Granted

No. 98-811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ALEXIS GEIER, ET AL.,

Petitioners,

v.

AMERICAN HONDA MOTOR CO., INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent injured plaintiffs in civil actions. State law has traditionally

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

afforded a remedy in tort by which those victims may seek fair compensation from wrongdoers.

Increasingly, those who may be defendants in state tort actions seek refuge in the doctrine of federal preemption. In too many instances, immunity from state law is urged by those whose objective is immunity from any accountability, where Congress has not provided an alternative means for legal redress. ATLA views the decision below as leading to an unwarranted denial of Americans' fundamental right to legal recourse for injury.

SUMMARY OF THE ARGUMENT

1. The decision of the lower court that the compliance with Motor Vehicle Standard 208 immunizes automakers from product liability based on failure to install airbags is based on a fundamental misunderstanding of the operation of product liability lawsuits. A verdict in a product liability action is not the functional equivalent of a state regulation requiring airbags in cars.

A verdict for plaintiff in such common law cases requires only that the defendant compensate the plaintiff for injuries. Verdicts are not accompanied by any order or requirement that the defendant modify its product. Nor does a plaintiff's verdict force the defendant to choose between changing the product's design or facing massive liability. Each jury assesses the reasonableness of a car's design under the individual circumstances existing when the automobile was manufactured. A plaintiff's verdict does not relieve any subsequent plaintiff from the burden of proving each element of the tort action.

2. This Court should establish a guidepost for courts facing the decision whether federal safety regulations preempt tort actions traditionally available under state law. Unless an express preemption provision clearly and unambiguously indicates Congress' intent to preempt common law remedies,

courts should presume that Congress intended that these remedies to coexist with federal regulations.

Such a presumption a conforms to the traditional and historical view that liability and regulation are complementary means of promoting safety and that regulations serve as a floor, not a ceiling. Although product liability exerts an influence on the decisions of manufacturers, this market-based incentive is not the type of direct exercise of state authority that would conflict with federal regulation.

In addition, requiring Congress to speak plainly when it intends to eliminate state common law remedies allows states to protect their interests through congressional representation and would safeguard the fundamental right of Americans to access to legal recourse for wrongful injury.

3. The lower court erred in finding that the express preemption of state "standards" applies to product liability actions. The plain language of the statute characterizes federal standards as "minimum." Plaintiff's causes of action alleging negligent design, strict liability and breach of warranty focus on whether the automaker acted unreasonably under the circumstances existing at the time. Such a cause of action does not establish objective criteria for the performance of the car. Finally, the savings clause does not conflict with the preemption provision, but makes clear Congress' intent to preserve product liability actions such as plaintiff's.

4. The lower court erred in holding that product liability remedies stand as an obstacle to federal purposes and objectives. Courts should rarely engage in "object" preemption in areas traditionally committed to state, rather than national authority.

Potential product liability, far from frustrating the purposes and objectives of Standard 208, was relied on by NHTSA to spur adoption of airbags.

ARGUMENT

I. THE DECISION THAT PLAINTIFF'S COMMON LAW CAUSES OF ACTION WERE PREEMPTED BY THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT WAS BASED ON AN ERRONEOUS VIEW OF PRODUCT LIABILITY LAW.

The lawmakers who drafted, debated and ultimately enacted the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.*, ["Safety Act"] surely are entitled to scratch their heads. Highly publicized hearings cast a spotlight on the "soaring rate of death and debilitation on the Nation's highways." S. Rep. No. 1301, 89th Cong., 2d Sess. 1 (1966). They included a memorable appearance by consumer advocate Ralph Nader, whose recent book, "Unsafe At Any Speed" castigated the auto industry for neglecting the problem of the "second collision" and crashworthiness. Without a dissenting vote, Congress authorized the Secretary of Transportation to establish federal motor vehicle safety standards. Congress' sole stated purpose was to " reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. §1381.

To avoid subjecting automakers to a multiplicity of requirements, Congress included a preemption provision which was narrowly limited to state safety standards:

> **Supremacy of federal 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 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).

Although it had already defined federal safety standards as "a *minimum* standard for motor vehicle performance," 15 U.S.C. §1391(2)(emphasis added), Congress added a savings clause that removes any doubt that automakers would continue to be subject to liability suits:

> **Continuation of common law liability**
> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. §1397(k).

Lawmakers might well be perplexed, therefore, by the decision by the lower court in this case that Honda's compliance with Safety Standard 208 does indeed exempt it from common law liability. Lawmakers might agree with Arizona Chief Justice Feldman that it "is difficult to imagine just what language Congress could have used to make the point more clear." *Munroe v. Galati*, 189 Ariz. 113, 938 P.2d 1114, 1119 (1997).

This case is the latest in a string of similar federal circuit court decisions. Each found the preemption of state "safety standards" to be irreconcilable with the preservation of common law liability. *See Wood v. General Motors Corp.*, 865 F.2d 395, 402 (1st Cir. 1988); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Taylor v General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1415 (9th Cir. 1997).

ATLA suggests that the fault lies not in Congress, but with those courts. A common element in these decisions is a fundamental error that is encapsulated by the bare assertion by the court below: "On its face, moreover, the term 'standard' in § 1392(d) could apply to the *requirements imposed by common law tort verdicts*." Pet. at App. 9.

(emphasis added). In the court's view, a tort verdict would operate to require an automaker to install airbags in its cars, the functional equivalent to a state statute or regulation. Pet. at App. 8. *See also Wood*, at 408 (verdict would be equivalent to a state statute requiring all vehicles registered in the state to have passive restraints); *Taylor*, at 824 n.16 ("the effect would be similar to that produced by a state regulation requiring automobiles to be equipped with airbags"); *Kitts*, at 789 (allowing a common law action "would be tantamount to establishing a conflicting safety standard").

On the contrary, ATLA submits, the only requirement imposed by a product liability judgment is the obligation to compensate the plaintiff for the injury caused. This Court has suggested that it would "be rare indeed for a court hearing a common- law cause of action to issue a decree that has 'the effect of establishing a substantive requirement for a specific device.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 503 (1996). Indeed, common law causes of action by definition do not provide such injunctive relief, *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1249 (N.J. 1990). ATLA has been unable to locate an instance in which a common law product liability damage verdict was accompanied by an order that defendant alter its product. For example, in *National Women's Health Network v. A.H. Robins Co.*, 545 F. Supp. 1177, 1181 (D. Mass. 1982), the court held that there was no basis under state product liability law to order defendant to recall its allegedly defective IUD in addition to awarding damages, adding: "No court has ever ordered a notification and recall campaign on the basis of state law."

Should a court attempt to issue an injunction requiring the installation of airbags, such an action would clearly be preempted. But a verdict and judgment in a common law action for damages does not require the defendant to do anything with respect to the product. The manufacturer remains as free as before to decide whether to modify its product or to leave the design unchanged. The

latter option leaves open the possibility that another consumer might be similarly injured and bring a successful damage suit. However, that is precisely the position the manufacturer occupied prior to the first lawsuit. No discernible requirement has been imposed under state law. Ralph Nader and Joseph A. Page, *Automobile-Design Liability And Compliance With Federal Standards* 64 Geo. Wash. L. Rev. 415, 437-39 (1996). *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1540-41 (D.C. Cir. 1984).

It is equally erroneous that "[a] successful no-airbag claim would mean that an automobile without an airbag was defectively designed." Pet. at App. 14, leaving the automaker with the choice of either installing airbags in its cars or facing massive liability claims. A jury verdict for plaintiff in this case may boost the confidence of plaintiffs with similar claims, but it does not relieve any subsequent plaintiff of the burden of proving each element of their causes of action. The first verdict does not confer any legal advantage on subsequent claimants so as to result in a flood of verdicts. Indeed, most manufacturers report that they did not change their product design in response to product liability litigation, though a majority undertook some measures to improve safety.[2]

Moreover, each plaintiff asserting liability based on the absence of airbags must establish the unreasonableness of the particular car's design in view of the circumstances existing at the time it was marketed. A successful claim in this case would mean only that the jury found the design of plaintiff's car was unreasonably dangerous in view of the

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[2] Risk managers of Fortune 1000 corporations with actual product liability experience reported that as a result (1) over 35% had improved their product warnings and/or instructions; (2) over 30% had improved the safety of their designs and (3) 65% had established formal safety objectives. E. Patrick McGuire, The Impact of Product Liability 18 (Conference Bd. 1988), summarized in W. Page Keeton et al. , Products Liability and Safety--Cases and Materials 1033-34 (2d ed. 1989).

foreseeable risk of harm, the gravity of the harm, and the feasibility and cost of a safer alternative design under the state of the art existing in 1987. Whether other cars lacking airbags were also defectively designed would depend on their relevant circumstances. For example, NHTSA determined in 1984 that in certain model cars airbags could readily be installed by the 1987 model year. Others faced difficult technological obstacles and design problems that would take up to five years to overcome. 49 Fed. Reg. 28970 (1984). A jury decision that makers of cars in the former group should compensate plaintiffs for injuries that would have been prevented by an airbag does not mean that the latter group of cars was defective for lack of a safety device that was not yet feasible.

The facts in this case illustrate that defective design is a case-by-case determination. According to the complaint, plaintiff was severely injured despite wearing her seatbelt because the seat itself broke away from its moorings due to inadequate design. If supported by the evidence, the jury could determine that in view of this particular tendency, Honda's reliance on belts alone for occupant protection was unreasonable. Such a verdict cannot be said to mean that any automobile lacking airbags is defectively designed.

This misunderstanding of the operation of product liability causes of action --that verdicts impose objective design standards that are equivalent to federal safety standards -- distorts the preemption analysis of the lower court and other federal courts. The courts recite the presumption against preemption, but they read the statutory language through preemption-colored glasses.

Significantly, a number of state supreme courts, which are most directly involved in the development and application of state product liability law, have held that causes of action are not preempted by Standard 208. *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376 (N.Y. 1998); *Munroe v. Galati*, 189 Ariz. 113, 938 P.2d 1114 (1997); *Minton v.*

Honda of America Mfg., Inc., 684 N.E.2d 648 (Ohio 1997); *Tebbetts v. Ford Motor Co.*, 140 N.H. 203, 665 A.2d 345 (1995), cert. denied, 516 U.S. 1072 (1996); *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995).

Parts III and IV of this brief argue that plaintiff's cause of action was neither expressly nor impliedly preempted. However, ATLA urges this Court to provide additional guidance to courts faced with preemption claims that would eliminate the tort remedies for wrongful injury. Specifically, this Court should instruct that courts may not deprive injured victims of such common law actions in the absence of a clear and unambiguous statement that Congress intends such a result. Such a "plain statement" rule most closely effectuates the intent of Congress and furthers the constitutional design that underlies the preemption doctrine.

II. COURTS MUST NOT DEPRIVE TORT VICTIMS OF LEGAL REDRESS UNLESS CONGRESS CLEARLY AND UNAMBIGUOUSLY INTENDED TO PREEMPT COMMON LAW REMEDIES.

In recent years, this Court has twice addressed the relationship between federal safety regulation of consumer products and common law tort remedies traditionally available to people injured by unsafe products. In both instances, the Court addressed the issue of whether the scope of express preemption encompassed not only state positive law, but also common law damage suits. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and *Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996), the Court set out guideposts for courts faced with the growing number of cases involving federal preemption: The purpose of Congress "is the ultimate touchstone" in every pre-emption case. *Medtronic*, at 485; *Cipollone*, at 516. Secondly, the court must examine the plain text of the preemption provision and examine each of the plaintiff's causes of action. *Cipollone,* at 523-24; *see Medtronic,* at 492-502. Finally, the scope of express preemption is to be narrowly construed consistent with the

strong presumption against preemption. *Cipollone,* at 518; *Medtronic,* at 485;

In ATLA's view, the lower court ignored these basic precepts. The court's examination of the express preemption provision at issue, 15 U.S.C. § 1392(d), is very brief. Pet. at App. 8-9. The court did not inquire whether Congress intended the term "standard" to include common law actions, nor did it undertake a close examination of either the statutory language or of plaintiff's causes of action. Its reliance on *Cipollone* and *Medtronic* ignored the example set by this Court that each statute be addressed on its own terms and that the construction of preemption provisions cannot be transplanted from one statute another. *See Cipollone*, at 522-23; *Medtronic* at 489. The lower court's conclusion -- "Common law liability in this specific context, therefore, can reasonably be viewed as constituting a 'standard' that might conflict with Standard 208," Pet. at App. 9 -- is based on little more than the court's own ipse dixit.

This view that common law liability is necessarily at odds with federal safety regulation stands in dramatic contrast to the longstanding and widely accepted view that tort liability complements governmental regulation in promoting safety. Congress is capable of using unambiguous language to preempt common law liability. In the absence of plain statutory language to that effect, courts should presume that Congress intends that common law remedies coexist with federal safety regulation.

A. Courts Should Presume Congress Intends Common Law Remedies to Coexist With Federal Safety Regulation.

1. Tort Liability Complements Federal Regulation in Achieving Safety.

As the Twentieth Century has unfolded, efforts to protect consumers from unsafe products have taken a two-pronged approach. One means is to ensure that the

marketplace itself provides incentives for manufacturers to make their products safe. However, where private decision making by producers has been deemed insufficient, government has stepped in to impose safety upon them.

Marketplace forces include the legal requirements developed by the common law. The free market necessarily exists within a legal environment. The law of contracts, property and tort provide the basis for ordering their relations based on enforceable rights and obligations. In the absence of this legal matrix, companies and individuals could no more conduct business than eighteen people could accomplish a game of baseball in the weightless vacuum of outer space.[3]

Product liability, an amalgam of tort and contract, is the result of efforts by state common law courts to accommodate the law to a modern marketplace in which consumers seldom dealt directly with product makers and America's fledgling industries no longer required protection, beginning with the landmark decision by Justice Brandeis in *MacPherson v. Buick Motor Co.,* 111 N.E. 1050 (N.Y. 1916), and more fully developed in *Henningsen v. Bloomfield Motors, Inc.,* 161 A.2d 69 (N.J. 1960), and *Greenman v. Yuba Power Products,* 377 P.2d 897 (Cal. 1963). Its most prominent formulation is set forth in Restatement (Second) of Torts §402A (1965). Although its purpose is to afford legal redress for death and injury, this product liability also plays a role, albeit an indirect one, in providing a disincentive to marketing unreasonably dangerous products in the first place. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products,* 44 Miss. L.J. 825, 826 (1973).

In his classic exposition, Dean Calabresi contrasts this indirect influence exerted on the market by tort law, which he calls "general deterrence" with governmental regulatory

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[3] On the importance of baseball to America's common law tradition, see Paul Finkelman, *Baseball and the Rule of Law,* 46 Cleveland St. L. Rev. 239 (1998).

mandates, or "specific deterrence. Guido Calabresi, THE COSTS OF ACCIDENTS 68-129 (1970). Manufacturers of defective, unreasonably dangerous products who are shielded from liability, are thereby able to externalize the cost of injuries caused by their products. Those products are therefore priced artificially low. *Id.* at 70. The costs of accidents are borne by the injured consumer, by first-party insurance, and by taxpayers through various government programs. But these entities are not in position to eliminate the risk. Nonliability is, in effect, a subsidy to the makers of unsafe products, giving them an economic advantage over manufacturers who have invested in safety. *Id.*

Product liability allocates to manufacturers the cost of harm caused by an unreasonably dangerous product, so that the purchase price reflects its true social cost. Market forces then lead the manufacturer -- who is in the best position to do so -- to determine the most cost-efficient means of minimizing those costs. *See also* Restatement (Second) of Torts §402A, comment c (1965); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1119-20 (1960); Richard C. Ausness, *Compensation For Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 46 Wayne L. Rev. 1085, 1140 (1990)("efficient allocation of resources is more likely if product prices reflect their actual social costs"). To the extent that prevention of injury is cheaper than the compensation of the injured, there is an incentive for manufacturers to make their products safer. Wade, *supra,* at 826.

Federal safety regulations also promote the safety of products entering the marketplace. But they do so in a much different manner. Administrative regulations are prospective; liability assesses past conduct. Regulations take the form of objective criteria applicable to a class of products. A liability verdict assesses whether a manufacturer breached a duty of care under the circumstances of a particular case. Regulatory penalties and injunctions are designed to enforce compliance

with safety standards. The amount of a liability verdict is designed to compensate for wrongful death and injury.

Federal safety regulation and state tort liability have coexisted for decades. It is a widely accepted principle of tort law that "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence when a reasonable person would take additional precautions." Restatement (Second) of Torts §288(C)(1965). Prosser at 203-04.

Courts have harmonized product liability with federal regulatory standards by viewing the latter as "a floor, not a ceiling." *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542-43 (D.C. Cir. 1984) ("federal legislation has traditionally occupied a limited role as the floor of safe conduct); *Rucker v. Norfolk & Western R.R.*, 396 N.E.2d 534, 537 (Ill. 1979); *Stevens v. Parke, Davis & Co.*, 507 P.2d 653, 661 (Cal. 1973); *Raymond v. Riegel Textile Corp,* 484 F.2d 1025 (1st Cir. 1973); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981); *see generally*, Clarence Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 Tex. L. Rev. 143, 157-66 (1949).

In sum, liability and regulation have generally been recognized as complementary means to promote safety. *See* American Law Institute, Reporters' Study: Enterprise Responsibility For Personal Injury vol I, 47-49 (1991); Teresa M. Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 12 J. Prod. Liab. 305 (1989); Steven Shavell, *Liability for Harm Versus Regulation of Safety,* 13 J. Legal Studies 357 (1984). Congress may be assumed to be familiar with these common law principles of ordinary tort litigation. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989).

This view has specifically included the Safety Act. In the landmark decision involving automobile crashworthiness, *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir.

1968), the court stated: "It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability."

This Court has recognized that Congress may intend that common law remedies coexist with federal safety regulation. For example, the Court determined in *Silkwood v. Kerr-McGee Corp.*,:

> Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards.

464 U.S. 238, 258 (1984). Justice Blackmun, dissenting on other issues, agreed with the majority on this point:

> Whatever compensation standard a State imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. . . . Compensatory damages therefore *complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme.*

Id. at 264 (Blackmun, J., dissenting)(emphasis added).

In such cases, ATLA suggests, courts should adopt the presumption that "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." *Id* at 255.

2. The Indirect Incentive for Safety Created by Potential Common Law Liability Does Not Conflict With the Exercise of Federal Safety Regulation.

The core of the preemption doctrine is the exercise of federal power. The exercise of state authority through administrative or legislative regulation may present a direct conflict with federal regulation. Common law liability

operates only indirectly, by enhancing market incentives for safety, and does not constitute the type of direct exercise of state authority that preemption addresses. As this Court explained:

> The effects of *direct* regulation on the operation of federal projects are significantly more intrusive than the *incidental* regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that *incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988)(emphasis added). Shortly thereafter, the Court reaffirmed the importance of this distinction:

> We recognize that a claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistleblowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.

English v. General Electric Co., 496 U.S. 72, 85 (1990).

Highly persuasive is this Court's decision in *New York Conference of Blue Cross v. Travelers Ins.*, 514 U.S. 645 (1995). The Court held that a state surcharge on hospital bills covered by commercial insurers are not preempted by 29 U.S.C. §144(a), which preempts state law that "relate to any employee benefit plan." The charges made nonprofit insurance "more attractive (or less unattractive) as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans."

Nevertheless, "laws with only an indirect economic effect on the relative costs of various health insurance packages" are not preempted. *Id.* at 659.

B. Courts Should Presume that Congress Does Not Intend to Abolish Common Law Remedies In A Field that Is Within the Responsibility of the States.

Providing legal recourse for those injured by dangerous products has been the province of the states.

> Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law *or a part of the law of torts*. And no clause in the Constitution purports to declare such a power upon the federal courts.

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938)(Emphasis added).

The states have a strong interest in developing and preserving avenues for legal redress for victims of wrongful injury. *See Medtronic,* at 487-89. Although Congress wields the power to supersede state law, due regard for federalism requires courts to "start with the assumption that the historic police powers of the states were not to be superseded by [a] federal act unless that was the clear and manifest purpose of Congress." *Medtronic* at 485; *See also Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963)(preemption of state law must be based on an "unambiguous congressional mandate to that effect").

This strong presumption against preemption of state tort law is simply an application of the broader "plain statement" doctrine which Justice O'Connor described in *Gregory v. Ashcroft*, 501 U.S. 452 (1991):

> "[I]f Congress intends to alter the usual constitutional balance between States and the Federal government, it must make its intention to do so unmistakably clear in the language of the statute."

Id. at 464. *See also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

Requiring Congress to speak plainly if it intends to cut off traditional state tort remedies does no violence to the principle that courts be guided by the intent of Congress. To the contrary, it provides an essential safeguard against judicial suppression of state law that was not intended by federal lawmakers. In addition, this plain statement requirement assures the states the opportunity to defend their sovereign authority. This Court in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), held that the integrity and sovereignty of the states is safeguarded primarily by their representation in Congress.

> By declining to infer preemption in the face of congressional ambiguity, the Court is . . . furthering the spirit of *Garcia* by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . .
>
> Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch 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.

Gregory v. Ashcroft, 501 U.S. at 464.

C. Courts Should Presume Congress Does Not Intend Preemption Which Would Deprive Wrongfully Injured Persons Without a Remedy.

In one of this Court's earliest pronouncements, Chief Justice Marshall stated that

> the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the

> laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). This right of access to justice is so fundamental that this Court has located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes,* 115 U.S. 512, 521 (1885).

In view of the importance of this right, this Court has stated "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) quoted in *Medtronic,* at 487. As Justice Blackmun added, "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter be left to the States." *Id.* at 464 U.S. at 264 n.7 (1984)(Blackmun, J., dissenting). *See also United Construction Workers v. Laburnum Const. Co.,* 347 U.S. 656, 663-64 (1954).

Indeed, there is at least a substantial question whether due process limits the authority of the federal government to abolish common law remedies without providing a reasonable alternative means for redress of injury. This was left as an open question in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 86-88, 91-93 (1978). There the Court suggested that the elimination of the common law right to a tort remedy in the Price-Anderson Act might violate due process but for the "panoply of remedies and guarantees" provided by Congress. *Id.* at 86-88 and 91-93.

The lower court's decision in this case, despite the absence of a clear statement that Congress intended to do so, has "the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the

judgment of Congress, needed more stringent regulation." *Medtronic*, at 487.

III. THE MOTOR VEHICLE ACT DOES NOT EXPRESSLY PREEMPT PRODUCT LIABILITY CAUSES OF ACTION

The lower court determined that 15 U.S.C. 1392(d) could be viewed as expressly preempting product liability remedies. Pet. at App. 9. Finding this conclusion irreconcilable with the savings clause, however, the court undertook an implied preemption analysis. Pet. at App. 12. ATLA submits that the proper construction of the preemption provision clearly does not include plaintiff's common law causes of action, even in the absence of the savings clause

This Court has spelled out the process for determining whether an express preemption provision includes common law causes of action.

> we must fairly but-in light of the strong presumption against pre-emption-narrowly construe the precise language of [the preemption provision] and we must look to each of petitioner's common law claims to determine whether it is in fact pre-empted. The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a ["safety standard"] giving that clause a fair but narrow reading.

Cippolone, 505 U.S. at 523-24.

A. The Text Of The Statute Indicates Congressional Intent To Preempt State Positive Law, But Not Common Law Remedies.

As was true in Medtronic, "if Congress intended to preclude all common-law causes of action, it chose a singularly odd word with which to do it." cite Although the lower court suggests that the term "standard" could include "requirements imposed by common law tort verdicts," Pet. at App. 9, such a reading demands that a jury be viewed as a

"State or political subdivision of a State." Though it is true that a jury award is "only enforceable under state law" by entry of judgment by a court, it is not "imposed by the state." *Cipollone,* at 505 U.S. at 526 n.24.

The fact that Congress used the exact phrase "safety standard" to refer to both the federal motor vehicle standard and the preempted area of state law strongly indicates that Congress intended to supersede only state administrative regulations similar in nature to the federal standards. *Compare, Medtronic,* 518 U.S. at 489.

Most importantly, the lower court ignored the definition of "safety standard" that Congress itself provided in the statute: Congress defined the term 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).

By characterizing federal standards as "minimum" the statute clearly permits standards to coexist with tort liability with federal standards performing their traditional role as a floor, not a ceiling. Indeed, an early and persuasive reading of this language is that Congress wished to avoid centralizing the function of promoting safe automobile design in a single agency that would be the target of the considerable power of the automotive industry. Rather, Congress may have intended potential liability "to spur the industry toward greater safety innovation, rather than permitting the manufacturers to discharge their obligations to the public by mere compliance with the administrative norms." Ralph Nader and Joseph A. Page, *Automobile Design and the Judicial Process,* 55 Calif. L. Rev. 645, 677 (1967).

Even if some uncertainty remains whether Congress intended § 1392(d) to immunize automakers from common law liability the legislative history demonstrates that Congress' purpose was to preempt positive law only.

Prior to passage of the Act, various states had attempted to impose legislative or administrative safety regulations on automobiles, though without notable success. Brenner, *Legal Requirements for the Equipment and Design of Private Motor Vehicles: State Action and National Problems*, 23 Geo. Wash. L. Rev. 429 (1955). Several state officials involved in those efforts testified before Congress. *See* Traffic Safety: Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess. pt. 1, at 413 (1966) (testimony of Iowa Attorney General Lawrence F. Scalise); Traffic Safety: Hearings on S. 3005 Before the Senate Comm. on Commerce, 89th Cong., 2d Sess. 511 (1966) (testimony of New York State Senator Edward Speno). Congress included the express preemption provision to avoid a situation in which automakers might be subjected to a multiplicity of such state regulations.

The Senate version of the bill, which contained a preemption provision but no savings clause, was not intended to affect product liability lawsuits. Indeed, the Senate Report draws the distinction between preempted safety standards and standards of care, which were deemed to be outside the scope of express preemption. "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." S. Rep. No. 1301, 89th Cong. 2d Sess. at 14 (1966)

The House bill contained the preemption provision that was ultimately enacted. Prophetically, an attorney testifying before the House Committee urged lawmakers to guard against the situation where "in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of 'Our product meets Government standards.'" Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess. 1249 (1966)(statement of Tom Triplett). The

Committee Chair responded "we do not intend to put that umbrella up, I assure you." *Id.* at 1258. Rep. Mackay re-emphasized that the intent of the legislation was that compliance with federal safety standards "does not preclude building a car with higher standards of safety, nor does it relieve makers of any legal liability whatsoever in terms of their obligations to the consumer. *Id.* at 1260.

It was in response to such concerns, and perhaps in an abundance of caution, that the House Committee added the savings clause, which ultimately was enacted as 15 U.S.C. § 1397(k). This history refutes the lower court's conclusion that this clause is in conflict with the preemption provision. The savings clause the congressional intent that was already expressed in § 1392(d) that common law remedies would continue to be available to injured plaintiffs. This is not an instance where legislative history yields mixed signals. "Indeed, nowhere in the Safety Act's history have we uncovered even the slightest hint that the preemption clause was intended to foreclose any state common-law duties enforced by damage actions." *Minton v. Honda of America Mfg., Inc.*, 684 N.E.2d 648, (Ohio 1997)

B. Plaintiff's Common Law Causes Of Action Do Not Fall Within Congress' Definition Of Safety Standard.

The statutory definition also limits preempted safety standards to standards "for motor vehicle performance" which provide "objective criteria." The court below did not examine plaintiff's causes of action to determine "whether the legal duty that is the predicate of the common law damages action constitutes" a safety standard within the meaning of § 1392(d). ATLA suggests that, to the extent that plaintiff's causes of action can be said to establish a standard, they represent a standard of care expected of product manufacturers, not a standard of performance for the product. Moreover, liability is determined by juries weighing the circumstances in each individual case, not by applying

objective criteria. They do not, therefore, meet the statutory definition of "safety standard."

Plaintiff's complaint asserts liability under three causes of action under the common law of the District of Columbia: negligent design, strict liability, and breach of implied warranty . The negligence cause of action requires a defendant to pay for injury caused by failure to exercise reasonable care, including providing reasonable protections to occupants in the event of foreseeable crashes.

Strict liability for design defects differs only slightly from negligence. Unlike liability for manufacturing defects, which focuses solely on the product, strict liability for design defects looks at the design choices made by the defendant. Under strict liability "the reasonableness of the manufacturer's act of placing the product as designed on the market is determined by the risk-utility analysis." *Warner Fruehauf Trailer Company, Inc. v. Boston,* 654 A.2d 1272, 1276 (1995). Plaintiffs "must 'show the risks, costs and benefits of the product in question and alternative designs,' and 'that the magnitude of the danger from the product outweighed the costs of avoiding the danger.'" *Artis v. Corona Corp.*, 703 A.2d 1214, 1216-17 (D.C. 1997) (citations omitted).. This risk-utility analysis is essentially a negligence standard. See |James A. Henderson, Jr. and Aaron D. Twerski, *Achieving Consensus on Defective Product Design,* 83 Cornell L. Rev. 867, 901 & 919 (1998).

The only substantive difference between negligence and strict liability for design defects is that contributory negligence is unavailable as a defense to strict liability. |*East Penn Mfg. Co. v. Pineda,* 578 A.2d 1113, 1118-19 (D.C. 1990). Factors include "the likelihood that it will cause injury, and the probable seriousness of the injury," the "availability of commercially feasible design alternatives," and "the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or

making it too expensive to maintain its utility," *Warner*, 654 A.2d at 1277.

The cause of action based on warranty is essentially the same as the strict liability cause of action under D.C. law. *Cottom v. McGuire Funeral Services, Inc.*, 262 A.2d 807, 808-09 (D.C. 1970) (adopting implied warranty without privity; any difference between warranty and strict liability is purely conceptual); *Bowler v.Stewart-Warner Corp.*, 563 A.2d 344 (D.C. 1989)(warranty and strict liability are one and the same).

In sum, plaintiff's common law causes of action ask the jury whether Honda breached a standard of care, not whether the car met some criterion of performance. A jury verdict for plaintiff would reflect its determination that Honda's decision to market the car without airbags was unreasonable in view of the magnitude and gravity of the risks to occupants and the feasibility and practicability of using a safer alternative design under the state of the art existing in 1987.

Manifestly, such a verdict establishes no objective criteria for automobiles. Moreover, "the risk-utility analysis must be applied in a flexible manner that is necessarily case specific." *Warner*, 654 A.2d at 1277. Certainly the factors considered by the jury will vary from case to case, and results may vary. For example, a jury may be more likely to find the decision to forego airbags unreasonable in smaller cars or, as in this case, cars where the seat may break free, making belts less protective. On the other hand, the design might not be unreasonable in older cars, made airbag technology was less developed. As this Court has long recognized:

> There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable . . . What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence.

Grand Trunk Railway Co. of Canada v. Ives, 144 U.S. 408, 417 (1892). Tort liability establishes no objective criteria.

At most, liability verdicts signal automakers of potential liability for failure to exercise a high degree of care for the protection of occupants in the event of motor vehicle collisions. They do not establish an objective criteria for vehicle performance and therefore do not constitute safety standards within the preempted scope of § 1392(d).

Finally, the savings clause set forth in § 1397 is not in conflict with the express preemption provision. As Arizona Justice Chief Feldman recently stated, "the two clauses work together to forbid states from enacting conflicting regulatory standards but allow common-law tort actions." *Hernandez-Gomez v. Leonardo*, 917 P.2d 238, 241 (Ariz. 1996).

The Court in *Cipollone* cited the Comprehensive Smokeless Tobacco Health Education Act of 1986, where Congress expressly pre-empted State law but provided a savings clause similar to § 1397, as an example of congressional intent to preempt only positive law while preserving state law damages actions. *Cipollone*, 505 U.S. at 518.

The savings clause "potently and pointedly negates any lingering notion of express preemption of State common-law claims. It is hard to imagine how Congress could have been plainer in its intended meaning." *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376, 382 (N.Y. 1998)

IV. PRODUCT LIABILITY CAUSE OF ACTION DOES NOT STAND AS AN OBSTACLE TO THE PURPOSES AND OBJECTIVES OF CONGRESS.

A. Where Congress' Express Preemption Does Not Clearly Encompass State Tort Remedies, Courts Should Not Undertake "Obstacle" Preemption.

The lower court stated that it could not reconcile the preemption provision with the savings clause. The court

therefore abandoned the effort to ascertain the intent of congress and engaged in implied preemption analysis. The Court in *Myrick* acknowledged that courts may find "implied conflict pre-emption where . . . 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)." 514 U.S. at 288-89. ATLA suggests, however, that "obstacle" preemption is not appropriate to deny tort remedies traditionally available under state law.

The Court in *Myrick* stated that the existence of an express preemption provision "supports a reasonable inference-that Congress did not intend to pre-empt other matters," though it does not entirely foreclose any possibility of implied pre-emption. *Id.* Of course courts should consider evidence that Congress intended to occupy the field or that it is physically impossible to comply with federal and state regulations, despite more narrowly drafted express preemption language.

However, judicial preemption on the ground that state law as an "obstacle" to the accomplishment of federal purposes stands as an invitation to judicial policymaking. In this case, for example, even accepting that the question of express preemption of tort liability was too close to call, there is a substantial chance the court preempted a broad area of state law that Congress intended not to preempt. ATLA suggests that a perceived inconsistency in Congress' preemption sections is an exceedingly weak basis for such drastic action. If the court is truly in equipoise concerning Congress' intent, the presumption against preemption counsels preservation of state law.

Permitting courts to find "obstacle" preemption might be deemed appropriate where preemption would be consistent with uniquely national interests at stake in the statute. Indeed, the Court first articulated the language of "obstacle" preemption in the course of preempting an Alien

Registration Act adopted by Pennsylvania. on the basis of field preemption. Justice Black emphasized that the rule was designed to preserve areas of peculiarly national authority from state encroachment.

> [T]his legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.

Hines, 312 U.S. at 67-68. (Emphasis added).

This distinction was underscored in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), which involved local regulation of blood plasma. Justice Marshall, for the Court, noted :

> [I]n the seminal case of *Hines v. Davidowitz*, [312 U.S. 52 (1941)], the Court inferred an intent to preempt from the dominance of the federal interest in foreign affairs because 'the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution,' . . . and the regulation of that field is intimately blended and intertwined with responsibilities of national government. Needless to say, those factors are absent here. Rather, as we have stated, the regulation of health and safety matters is primarily and historically, a matter of local concern.

Id. at 719.[4]

ATLA suggests that where preemption would supersede traditional state tort remedies and where Congress has expressly addressed the scope of preemption in language that does not clearly encompass those remedies, due regard

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[4] Compare *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), involving the impact of the Federal Clean Water Act on a state suit alleging pollution of a resort lake by a paper mill. The subject matter, interstate water pollution, was an area of national interest. Moreover, the Court emphasize that its holding "does not leave respondents without a remedy." *Id.* at 497.

for federalism counsels against eliminating tort actions on the basis of obstacle preemption. To hold otherwise, "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which it dislikes." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

> When the statute contains its own preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads it, is pursuing a fundamentally lawless path.

Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §6-25, at 483 n.8 (2d ed. 1988).

B. Product Liability Based on Failure to Equip Cars With Airbags Advances the Purposes and Objectives of Congress.

Even if the lower court were correct in undertaking an implied preemption analysis, it is clear that plaintiff's lawsuit does not "frustrate 'the accomplishment and execution of the full purposes and objectives of Congress.'" Myrick, quoting Hines, supra, at 67. Indeed, ATLA submits, common law actions such as plaintiff's serve to advance those goals.

The court below looked to portions of NHTSA's 1984 notice of final rulemaking with respect to Standard 208 and its accompanying statement. 49 FR 28962ff (1984). ATLA suggests that this document provides a compelling demonstration that NHTSA fully anticipated that product liability actions would not only remain available, but would further the objective of promoting wider use of airbags.

NHTSA reaffirmed its view that airbags represent the safest, though the most expensive, means of protecting occupants during collisions. 49 Fed. Reg. 28963. Responding to Congress' prohibition against a rule requiring airbags in all cars, NHTSA drafted Standard 208 to permit manufacturers

to choose between belts and bags for occupant protection. However, Congress clearly did not prohibit the use of incentives to encourage automakers to exceed the minimum requirements of the rule. Indeed, NHTSA offered its own incentive, crediting each automobile equipped with airbags as a car-and-a-half toward the manufacturer's compliance quota. 49 Fed. Reg. 29000. The additional incentive of avoiding common law liability clearly advances the agency's objective.

Responding to comments suggesting that automakers would overwhelmingly choose belts as the cheapest option, NHTSA stated that "competition, potential liability for any deficient systems and pride in one's product would prevent this." 49 Fed. Reg. 29000. Although pride in one's product is not to be disparaged, the agency was clearly relying on potential liability to induce manufacturers to choose airbags.

NHTSA also addressed concerns of carmakers that choosing airbags could increase their product liability exposure if they malfunctioned. In addition to providing evidence that choosing airbags would not increase product liability insurance premiums, NHSTA also suggested that choosing not to use airbags could itself be a source of product liability, quoting a comment by a representative of the National Association for Public Health Policy: "If a reasonable means of protection is being denied to the motoring public, that denial should lead to liability . . . People whose crash injury would have been averted had the car been equipped with an airbag can sue the car manufacturer to recover the dollar value of that injury." 49 Fed. Reg. 28972.

The lower court essentially held that the accomplishment of Congress' purpose of reducing injuries and deaths required NHTSA to work alone. ATLA submits that removing the threat of liability may itself frustrate the purpose of the Safety Act. For decades the industry "waged the regulatory equivalent of war against the airbag" *Motor*

Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 49 (1983). Reliance on regulation alone would further "encourage manufacturers to lobby for weaker regulations rather than developing safer products." Frank J. Vandall, *Undermining Torts' Policies: Products Liability Legislation,* 30 Am. U. L. Rev. 673, 687 (1981)

A cautionary example can be drawn from the sinking of the Titanic, "which complied with British governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage with boats capable of carrying only about one-third of the people on board." Nader and Page, supra, 64 Geo. Wash. L. Rev. at 459; *see* John Dudman, THE SINKING OF THE TITANIC 2, 30 (1988)

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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