No. 98-1811

IN THE SUPREME COURT OF THE UNITED STATES

ALEXIS GEIER, et al.,
Petitioner

v.

AMERICAN HONDA MOTOR COMPANY, INC.,
Respondent

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Filed November 19, 1999

QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1988), and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (1987), preempt a state common-law tort claim that an automobile manufactured in 1987 was defectively designed because it did not contain an air-bag.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector, and geographic region of the country. The Chamber has filed numerous *amicus* briefs in this Court on the subject of federal preemption. *See, e.g., United States v. Locke*, Nos. 98-1701 and 98-1706 (*amicus* brief filed Oct. 22, 1999); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Wisconsin Dep't of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986).

STATEMENT

1. The National Traffic and Motor Vehicle Safety Act of 1966, as amended, 15 U.S.C. §§ 1381 *et seq.* (1988) (the "Act"),[2] requires the Secretary of Transportation to promulgate federal motor vehicle safety standards. The Act includes a preemption provision that precludes states from establishing or continuing in effect

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[1] Pursuant to this Court's Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for both petitioners and respondents have consented to the filing of this amicus brief in letters that have been lodged with the clerk.

[2] The Act was amended and recodified without substantive change in 1994. Pub. L. No. 103-272, 108 Stat. 745. The court below and the parties have continued to refer to the earlier version of the Act, so for sake of clarity amicus will adhere to that same practice.

"any safety standard" that is not "identical to" an existing federal motor vehicle safety standard applicable to the same aspect of motor vehicle performance. 15 U.S.C. § 1392(d).

Pursuant to the Act, the Secretary has set forth uniform federal standards for motor vehicle occupant crash protection in Federal Motor Vehicle Safety Standard 208. *See* 49 C.F.R. § 571.208. The version of Standard 208 at issue in this case was promulgated by the Secretary in 1984. During the time period relevant to this case, Standard 208 authorized motor vehicle manufacturers to achieve the requisite level of motor vehicle safety without providing airbags in every motor vehicle. 49 C.F.R. § 571.208.S4.1.3.1. Instead, Standard 208 directed manufacturers to install a passive restraint system of some type in 10 percent of cars manufactured in the relevant model year, and gave manufacturers the right to select a variety of passive restraint systems—including but not limited to airbags—in order to satisfy this requirement. *Id.* The Secretary expressly refused to require manufacturers to include airbags in all cars, noting a number of safety, economic, technological, and practical goals that would be frustrated by imposition of such a requirement at that time. 49 Fed. Reg. 28,962, 29,000-02 (1984).

2. Alexis Geier was injured when she lost control of the 1987 Honda Accord she was driving and crashed into a tree. She and her parents, petitioners herein, brought suit against respondents claiming that the Honda Accord was defective because it did not contain an airbag.

The United States District Court for the District of Columbia granted respondents' motion for summary judgment and dismissed petitioners' complaint. The court ruled that petitioners' theory of liability was expressly preempted by the Act's preemption provision, 15 U.S.C. § 1392(d), and by Standard 208. *See Geier v.*

American Honda Motor Co., 166 F.3d 1236, 1238 (D.C. Cir. 1999).

The United States Court of Appeals for the District of Columbia Circuit affirmed. The court noted that "[t]he language of § 1392(d) is fairly sweeping" and that "[o]n its face, . . . the term 'standard' in § 1392(d) could apply to the requirements imposed by common law tort verdicts." 166 F.3d at 1240. The court declined to decide whether petitioners' claim was expressly preempted, however, noting that the Act contains a so-called "savings clause" providing that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k); *see* 166 F.3d at 1241.

Instead, the court of appeals joined several of its sister circuits in concluding that petitioners' cause of action was impliedly preempted because "a verdict in her favor would stand as an obstacle to the federal government's chosen method of achieving the Act's safety objectives." *Id.* As the court explained, "[a] successful no-airbag claim would mean that an automobile without an airbag was defectively designed. Congress, however, delegated authority to prescribe specific motor vehicle safety standards to the Secretary of Transportation, who in turn explicitly rejected requiring airbags in all cars on the ground that a more flexible approach would better serve public safety." *Id.* at 1242 (citation omitted). Thus, the court concluded, "allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department's policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." *Id.* at 1243. Accordingly, petitioners' claim was implicitly preempted. *Id.*

SUMMARY OF ARGUMENT

I. The Act preempts "any" state-imposed "safety standard" that is not "identical to" an existing federal motor vehicle safety standard relating to the same aspect of motor vehicle performance. 15 U.S.C. § 1392(d). Petitioners err in contending that this provision is inapplicable to standards imposed through common-law adjudication.

In the first place, this Court has repeatedly recognized that state common-law suits impose legal rules and standards that have the same regulatory effect as legislative or administrative pronouncements. Thus, this Court has concluded that common-law suits fall within the scope of preemptive provisions that refer to "requirements," "laws," "standards," and the like. The same conclusion is equally appropriate here.

In addition, common sense and experience confirm that state-law tort suits result in the imposition of safety standards on industry. Applying modern tort-law doctrines, state courts and juries have repeatedly imposed liability for products' failures to meet specific safety-related criteria. As even a limited sampling of the case law demonstrates, there are countless cases in which state courts have imposed or authorized findings of liability based on a product's inability to satisfy particular performance standards or design criteria imposed by the common law. The simple truth is that state courts and juries are adopting and enforcing an ever-widening array of performance and design standards through the mechanism of common-law adjudication, and thus it is readily apparent that state-law tort suits like this one lead to the establishment of "safety standard[s]." Petitioners' suit plainly seeks to establish a "safety standard" that is not identical to the standard set forth in Standard 208, and it is therefore expressly preempted by § 1392(d).

II. Petitioners' suit is also impliedly preempted because, as the court of appeals correctly held, permitting

tort plaintiffs to subject manufacturers to liability for failing to install airbags would frustrate the regulatory goals that the Secretary of Transportation sought to achieve in promulgating Standard 208. Petitioners contend that implied preemption analysis is unavailable in this case because the Act contains an express preemption provision and a so-called "savings clause," but petitioners' argument is without merit, for two reasons.

First, this Court's precedents make clear that implied conflict preemption analysis is entirely appropriate in these circumstances. Petitioners rely on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), but that case announces no prohibition against resort to implied preemption analysis under statutes containing express preemption clauses, and numerous precedents of this Court preclude adoption of any such rule. Equally flawed is petitioners' reliance on § 1397(k), the so-called "savings clause." This Court has consistently held that even the existence of a true savings clause does not obviate the need for implied conflict preemption analysis, because such clauses "'cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.'" *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

Second, persuasive considerations of public policy compel rejection of the arguments advanced by petitioners and their amici, which would largely eviscerate the doctrine of implied preemption as it has been recognized and applied by this Court. Petitioners and their amici offer no justification for so dramatic a departure from the current understanding of federal-state relations. If anything, recent trends in state tort law demonstrate an *enhanced* need for vigorous enforcement of implied preemption principles in order to shield our national economy from the increasing burdens placed upon it by un-

constrained, arbitrary, inconsistent, and excessive tort verdicts and liability rules. The same considerations that impelled the Framers of our Constitution to grant Congress the power to regulate interstate commerce and preempt burdensome state economic regulations now compel redoubled vigilance in judicial enforcement of implied preemption doctrine, which is necessary to ensure that the states do not impose undue burdens on interstate commerce through their common-law tort systems, particularly in instances where, as here, Congress or the responsible federal agency has already spoken by adopting a uniform national standard.

ARGUMENT

I. PETITIONER'S SUIT IS EXPRESSLY PREEMPTED BECAUSE IT SEEKS TO IMPOSE A "STANDARD" DIFFERENT FROM THAT IMPOSED BY FEDERAL LAW

The National Traffic and Motor Vehicle Safety Act of 1966 requires the Secretary of Transportation to establish "appropriate Federal motor vehicle safety standards" for "motor vehicle performance . . . which [are] practicable, which meet[] the need for motor vehicle safety and which provide[] objective criteria." 15 U.S.C. §§ 1391(2), 1392(a). The Act expressly mandates federal preemption of any state-law "safety standard" that is not identical to an existing Federal standard applicable to the same aspect of performance:

> 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. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.

15 U.S.C. § 1392(d).

Petitioner contends (Pet. Br. 18-25) that this express preemption provision does not apply to common law rules that have the effect of regulating motor vehicle safety, but is instead limited to legislative or administrative pronouncements. As demonstrated below, however, this argument is without merit. Both precedent and practical experience demonstrate convincingly that common-law adjudication imposes "safety standard[s]" to the same extent as other forms of state regulation.

A. Precedent Demonstrates That State Court Adjudication Establishes "Standards"

This Court has repeatedly recognized that state common-law suits are appropriately subjected to the same preemption analysis as state statutes or administrative regulations under express preemption provisions analogous to § 1392(d), because common-law adjudication results in the imposition of legal rules and standards that have the same regulatory impact as legislative or administrative pronouncements. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), for example, five Justices of this Court concluded that common-law suits are subject to preemption analysis under a federal statute preempting "any requirement" imposed by a "State or political subdivision" that is "different from, or in addition to," any requirement imposed by the federal regulatory scheme. 21 U.S.C. § 360k(a); *see* 518 U.S. at 504 ("One can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law.") (Breyer, J., concurring in part and concurring in the judgment); *id.* at 509 ("state common-law damages actions do impose 'requirements' and are therefore preempted where such requirements would differ from

those imposed by the [federal regulatory scheme]") (O'Connor, J., concurring in part and dissenting in part).

Similarly, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), six Justices concluded that a statute preempting certain "requirement[s] or prohibition[s] . . . imposed under State law" was fully applicable to common-law actions. *Id.* at 520-23 (opinion of Stevens, J.); *id.* at 548-49 (Scalia, J., concurring in the judgment in part and dissenting in part). The plurality explained that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Id.* at 521 (opinion of Stevens, J.). Indeed, as the plurality noted, "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, and indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Id.* (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). *Accord, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("Legal duties imposed . . . by the common law fall within the scope of" statute preempting any state "law, rule, regulation, order, or *standard* relating to railroad safety") (emphasis added); *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991) (statutory provision preempting "'the antitrust laws and all other law, including State and municipal law,'" did "not admit of [any] distinction . . . between positive enactments and common-law rules of liability").

These cases confirm that § 1392(d) must be construed in accordance with its plain language to encompass safety standards imposed by state tort law. Like the terms "requirement," "prohibition," "law," and "standard" at issue in the foregoing cases, the phrase "any safety standard" as used in § 1392(d) is broad and all-

encompassing, and plainly extends to standards imposed by common-law adjudication as well as those imposed by legislatures or administrative agencies.

B. Common Sense And Experience Confirm That State Court Adjudication Establishes "Standards" That Industry Must Satisfy Or Face Potentially Crushing Liability

Common sense and recent experience confirm that common-law adjudication results in the imposition of safety standards and that federal preemption of such standards is therefore mandated by § 1392(d). Under the rubric of risk-utility analysis or "unreasonable dangerousness" tests, state courts and juries have repeatedly demonstrated their power to impose liability on manufacturers and sellers based upon a product's failure to satisfy specific safety-related criteria. Manufacturers and sellers have been found liable for a wide variety of such product "defects."

State courts and juries frequently impose strict liability on the basis of particular performance standards imposed retroactively by operation of the common law. For example, the Texas courts upheld a jury verdict finding an aircraft manufacturer liable for the deaths of two individuals caused when their seats broke loose during a plane crash. *See Duncan v. Cessna Aircraft Co.*, 632 S.W.2d 375 (Tex. App. 1982), *rev'd in part on other grounds by Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984), and *Smithson v. Cessna Aircraft Co.*, 665 S.W.2d 439 (Tex. 1984). This holding was premised on a determination that the seat legs should have been designed to withstand 25 G's, but were only one-fifth that strong. 632 S.W.2d at 382-83. Equally specific performance standards have been im-

posed in countless other cases by virtue of state tort law.[3]

Similarly, state courts frequently impose liability on manufacturers for failure to satisfy specific design criteria purportedly necessary to achieve the requisite level of safety demanded by state tort law. In *Dallas v. F.M. Oxford Inc.*, 552 A.2d 1109 (Pa. Super. Ct. 1989), for example, a Pennsylvania state appellate court upheld a jury verdict imposing liability on an elevator manufacturer for injuries caused by an elevator door. The liability determination rested on the proposition that elevator doors must have photoelectric cells, rather than simply rubber "safety edges," to make them retract when an object comes between the doors. *Id.* at 1110, 1113. Similarly, in *Hopper v. Crown*, 646 So. 2d 933 (La. Ct. App. 1994), a Louisiana state appellate court upheld a jury verdict against a forklift manufacturer. The company's forklift design was declared defective because the partially enclosed driver's compartment had no door in the back to keep a standing driver from being ejected during a collision. *Id.* at 946. Numerous other courts have imposed or upheld equally specific safety-related

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3 *See, e.g., Joe Sartain Ford, Inc. v. American Indem. Co.*, 399 So. 2d 281 (Ala. 1981) (a truck's oil line should be made of metal rather than neoprene), *overruled in part on other grounds by Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671 (Ala. 1989); *Selmo v. Baratono*, 184 N.W.2d 367 (Mich. Ct. App. 1970) (a car's bumper brackets should be suitable for use in towing the car); *Hancock v. Paccar, Inc.*, 283 N.W.2d 25 (Neb. 1979) (a truck's bumper should be strong enough not to bend back and obstruct a wheel upon severe impact); *Dura-Stilts Co. v. Zachry*, 697 S.W.2d 658 (Tex. App. 1985, writ ref'd n.r.e.) (the aluminum alloy used to make stilts should be strong enough to support a foreseeable weight).

design requirements in a wide array of product liability cases.[4]

The simple truth is that state court judges and juries have been adopting and enforcing an ever-widening array of performance and design standards applicable to countless products. Thus, there is no merit to petitioners' contention that state-law tort actions like this case do not lead to the imposition of "safety standards" on industry.

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4 *See, e.g., Widson v. International Harvester Co.*, 200 Cal. Rptr. 136 (Ct. App. 1984) (an earth mover should have an audible device to warn that it is backing-up); *Camacho v. Honda Motor Co.*, 741 P.2d 1240 (Colo. 1987) (en banc) (a motorcycle should have leg-protection devices); *Nicolodi v. Harley-Davidson Motor Co.*, 370 So. 2d 68 (Fla. Dist. Ct. App. 1979) (same); *Cox v. R.O. Corp.*, 470 So. 2d 790 (Fla. Dist. Ct. App. 1985) (a truckbed-mounted crane should have an audible device to warn that its outriggers are about to deploy); *Watson v. Navistar Int'l Transp. Corp.*, 827 P.2d 656, 675-76 (Idaho 1992) (a four-inch gap in a combine's auger cover should be made smaller or guarded); *Simpson v. General Motors Corp.*, 483 N.E.2d 1 (Ill. 1985) (an earth scraper should have a roll bar); *Morales v. American Honda Motor Co.*, 151 F.3d 500, 507 (6th Cir. 1998) (a children's motorcycle should have a safety flag) (applying Kansas law); *Davis v. Commercial Union Ins. Co.*, 892 F.2d 378 (5th Cir. 1990) (a lint-cleaning machine should have interlock device to shut off its rollers when guard is removed) (applying Louisiana law); *Grover v. Grover*, 972 S.W.2d 568 (Mo. Ct. App. 1998) (automobile ramps should have barriers to prevent a vehicle from easily rolling off); *Miller v. Varity Corp.*, 922 S.W.2d 821 (Mo. Ct. App. 1996) (a tractor should have a rollover protection system); *Doty v. Navistar Int'l Transp. Corp.*, 639 N.Y.S.2d 592 (N.Y. App. Div. 1996) (a combine auger should be covered by a guard or have tapered edges and non-protruding screws); *Morgen Indus., Inc. v. Vaughan*, 471 S.E.2d 489, 492 (Va. 1996) (a conveyor belt should have wheel guards at the nip points).

Petitioners' amici protest that a single tort plaintiff's success in court does not translate into a standard because "it does not relieve any subsequent plaintiff of the burden of proving each element of their causes of action." Br. Amicus Curiae of Ass'n of Trial Lawyers of America at 7. But that argument simply ignores reality. In the first place, principles of stare decisis and respect for precedent generally mean that one appellate court's decision upholding liability based on a particular purported defect or flaw potentially will be followed in future cases. Moreover, one success—or even potential success—by plaintiffs' lawyers inevitably spawns a host of copycat suits seeking to cash in on the same winning theme, forcing industry to respond to an onslaught of litigation at great cost. *See* Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 442 (1999).

The argument that one plaintiff's success does not translate into a "standard" is further refuted by the fact that, in the wake of this Court's adoption of the doctrine of non-mutual offensive collateral estoppel (*see Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)), nearly 30 states, including the District of Columbia, have adopted some version of that doctrine. *See* 47 AM. JUR. 2D *Judgments* § 647 (1995); *see also* E.H. Schopler, Annotation, *Comment Note: Mutuality of Estoppel As Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment*, 31 A.L.R.3D 1044 §§ 4(c) and 5 (Supp. 1999). As a consequence, individual state tort suits may create the potential for the establishment of de facto regulatory standards that in some circumstances may be binding on the defendant in future cases as well. Moreover, once a single court or jury has deemed a product defective for failing to satisfy a particular design or performance requirement, future plaintiffs will typically rely on that finding as a basis for seeking punitive damages from the manufacturer, on the theory that the prior jury award placed the manufacturer

on "notice" of the "defect." Thus, defendants faced with new court-imposed standards may have little choice but to comply with those standards in order to minimize the burden of still further litigation, punitive damages, and the like.

C. Petitioners' Suit Seeks To Establish A "Standard" That Is Different From Standard 208

For all these reasons, therefore, there is no merit to petitioners' argument that their lawsuit does not seek to impose "any safety standard" within the meaning of § 1392(d). By means of this state-law tort suit, petitioners plainly seek to obtain a judicially binding determination that respondents were obligated to incorporate an airbag into the 1987 Honda Accord. That desired determination is every bit as much a "safety standard" as would be the identical requirement imposed by a state legislature or regulatory agency, and nothing in § 1392(d) differentiates between these different sources of safety standards.

Consequently, petitioners' attempt to avoid express preemption reduces to their argument that the so-called "savings clause" set forth in § 1397(k) requires rejection of the plain language of § 1392(d) in order to immunize all common-law liability rules from express preemption. As Justice Breyer cogently observed when confronted with a similar argument in *Medtronic*, however, "[t]o distinguish between [state agency regulation and state tort-law regulation] for preemption purposes would grant greater power . . . to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." 518 U.S. at 504 (Breyer, J., concurring in part and concurring in the judgment). In the absence of compelling evidence that Congress expressly considered and intended to achieve such an improbable result, there is no justification for construing the Act in this fashion. *See id.* ("Where Congress likely did not fo-

cus specifically upon the matter, . . . I would not take it to have intended this anomalous result.").

As has been ably demonstrated by respondents, § 1397(k) plainly was not intended to achieve the "anomalous result" urged by petitioners. Instead, § 1397(k) (which does not even address the issue of preemption) was intended to ensure that a motor vehicle manufacturer's compliance with federal requirements would not automatically be deemed to establish the affirmative defense of compliance with applicable safety regulations. Thus, contrary to the arguments advanced by petitioners and their amici, § 1397(k) does not trump the plain language of § 1392(d), and petitioners' cause of action is expressly preempted.

II. THE DOCTRINE OF IMPLIED PREEMPTION BARS PETITIONERS' SUIT

Under this Court's precedents, implied conflict preemption will be found "where it is 'impossible for a private party to comply with both state and federal requirements,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citations omitted). As the court below correctly recognized, petitioners' attempt to subject respondent to liability for failing to install airbags in its 1987 Honda Accords would frustrate the regulatory goals sought to be achieved by the Secretary of Transportation in promulgating Standard 208 pursuant to the authority delegated by Congress. *See* 166 F.3d at 1242-43. Accordingly, petitioners' suit is impliedly preempted.

Petitioners contend, however, that the court of appeals "should never have resorted to implied preemption analysis here," because such analysis is allegedly inappropriate when Congress has adverted to the issue of preemption in the statute. Pet. Br. 34-41. As demonstrated below, this Court's precedents compel rejection

of petitioners' contention. Moreover, powerful considerations of public policy confirm the need for implied preemption analysis when, as here, Congress or a federal agency has acted to adopt a uniform federal standard.

A. This Court's Precedents Make Clear That Implied Preemption Analysis Is Appropriate Under Statutes Containing An Express Preemption Provision

In support of their assertion that implied preemption analysis is inappropriate here, petitioners rely primarily on *Cipollone*. In that case, the Court noted that there is no need to infer preemptive intent from a statute's substantive provisions when the statute also contains an express preemption provision that "provides a 'reliable indicium of congressional intent with respect to state authority.'" 505 U.S. at 517. That observation is inapposite here, however, and provides no justification for petitioners' attempt to rewrite preemption law to eviscerate the doctrine of implied conflict preemption.

Contrary to petitioners' apparent belief, *Cipollone* did not purport to preclude implied preemption in instances where the relevant federal statute contains an express preemption clause. Indeed, as the court of appeals recognized (166 F.3d at 1241-42), that reading of *Cipollone* was squarely rejected in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which held that the argument that implied preemption analysis is unavailable "is without merit." *Id.* at 287. In fact, as the Court in *Freightliner* pointed out (*id.* at 288-89), *Cipollone* itself conducted implied preemption analysis despite the presence of an express preemptive provision (505 U.S. at 518), so *Cipollone* obviously cannot support the weight that petitioners place on it. In short, *Cipollone* does not "obviate the need for analysis of an individual statute's pre-emptive effects," including consideration of implied preemption. *Freightliner*, 514 U.S. at 289 (citing *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673 n.12 (1993)).

Numerous other cases are to the same effect. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), for example, the Court first considered the express preemption provision contained in the Employee Retirement Income Security Act of 1974 (*id.* at 138-42), and then went on to conduct an implied conflict preemption analysis as well (*id.* at 142-45), concluding that "the requirements of conflict pre-emption are satisfied in this case." *Id.* at 145. *Accord, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 540-41, 543 (1977) (Court's determination that state law was not expressly preempted "does not . . . resolve this case, for we still must determine whether the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'") (citation omitted); *see also Medtronic*, 518 U.S. at 503 ("the issue [of express preemption] may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis") (opinion of Stevens, J.); *CSX Transp.*, 507 U.S. at 673 n.12.

Equally flawed is petitioners' suggestion that the Act's so-called "savings clause" (§ 1397(k)) somehow displaces traditional preemption doctrine and precludes resort to principles of implied conflict preemption. This Court has repeatedly applied conflict preemption analysis despite the presence of even a true savings clause, reasoning that such clauses "'cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)); *see, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987).

Indeed, this Court has already held that implied preemption analysis is appropriate in circumstances essen-

tially identical to those that, in petitioners' view, are present here. In *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), the relevant federal statute contained an express preemption provision, but also contained a savings clause that the Court found was directly applicable to the state law at issue. *Id.* at 99. Despite the existence of this facially applicable savings clause, the Court had no difficulty concluding that implied preemption analysis was appropriate; the savings clause provided "no solid basis for believing that Congress . . . intended fundamentally to alter traditional preemption analysis." *Id.* Accordingly, the Court concluded that where a challenged state law "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,'" implied conflict preemption occurs *even if* that state law also falls within the protective ambit of a general savings clause. *Id.* (citation omitted). The same reasoning leads inexorably to the conclusion that implied preemption analysis is appropriate in this case as well, even assuming *arguendo* that Congress intended § 1397(k) to be a savings clause and that it extends to petitioners' claims.

B. The Evisceration Of Implied Preemption Analysis Sought By Petitioners And Their Amici Would Work A Dramatic And Disastrous Shift In The Balance Of State And Federal Power

Not content with petitioners' baseless attempt to pretermit implied preemption analysis in this case, petitioners' amici level an even more sweeping (but equally baseless) attack on the doctrine of implied preemption. They argue that "the scope of implied conflict preemption in products liability cases should be narrowly circumscribed" and "tightly constrained." Br. Amicus Curiae of Robert B. Leflar, *et al.* ("Leflar Br."), at 6, 14. Indeed, these amici assert that implied preemption is altogether inappropriate unless Congress or a federal regulatory agency has expressly dictated that a particular

federal standard "*and no other*" should govern the product at issue. *Id.* at 14 (citation omitted; emphasis added). Adoption of this view, of course, would effectively eliminate implied preemption analysis altogether, because an *express* statement of federal exclusivity would be required before preemption could occur.

Nothing in law or policy supports this proposed drastic restriction of the scope of federal preemption. This Court's well-established preemption case law makes clear that state law is displaced where "Congress intended federal law to occupy a field exclusively," where "it is 'impossible for a private party to comply with both state and federal requirements,'" or where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner*, 514 U.S. at 287. Petitioners and their amici offer no justifications for departing from this well-established line of precedent, nor could they.

If anything, recent developments and trends in state tort law reveal an *enhanced* need for vigorous enforcement of implied preemption principles and related constitutional mandates in order to shield our national economy from the increasing burdens placed upon it by unconstrained, arbitrary, inconsistent, and excessive tort verdicts and ever-expanding liability rules. Indeed, an examination of the rationale for the existence of Congress's power to preempt state economic regulation reveals that it is precisely these types of state-law excesses that justify and require the exercise of preemptive power by Congress and enforcement of that power by the federal courts.

Congress's power to regulate our national economy and preempt undesirable or inconsistent state regulations rests, of course, on the Commerce Clause (in conjunction with the Supremacy Clause). U.S. CONST. art. I, § 8, cl. 3; *id.* art. VI, cl. 2. The historical record clearly reveals that the Commerce Clause was adopted precisely in order to avoid the deleterious effects of excessive, inconsistent, and discriminatory state regulation of interstate commerce in a manner contrary to the interests of the Nation as a whole.

The Articles of Confederation did not confer power over interstate commerce upon the federal government and, as James Madison explained, this "want of a general power over Commerce led to an exercise of this power separately, by the States, w[hi]ch not only proved abortive, but engendered rival, conflicting and angry regulations." 3 RECORDS OF THE FEDERAL CONVENTION, at 547-48 (Max Farrand ed., 1911). The adoption of the Commerce Clause thus "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma,* 441 U.S. 322, 325-26 (1979).

In drafting the Commerce Clause, therefore, a central goal of the Framers was to deny States "[t]he opportunities . . . of rendering others tributary to them, by commercial regulations," THE FEDERALIST NO. 7, at 30 (Alexander Hamilton) (Bantam ed. 1982). What the Framers hoped to create was "an unrestrained intercourse between the States themselves [that would] advance the trade of each, by an interchange of their respective productions," and to ensure that "Commercial enterprise [would] have much greater scope" than it had under the Articles of Confederation. THE FEDERALIST NO. 11, at 53 (Alexander Hamilton).

The dramatic transformation of state tort law and practice over the past several decades has given rise to many of the same problems and concerns that originally impelled the Framers to grant control over interstate commerce to the federal government. Tort verdicts readily transmogrify from compensation for individual plaintiffs into edicts that restructure national markets and

industries. The general economic interests of the Nation are increasingly being sacrificed on the altar of the parochial interests of particular states, as declared by local state judges and lay juries.

When dealing with products that move in a national market, individual states simply cannot, as a federalist ideal would suggest, serve as laboratories conducting "economic experiments without risk to the rest of the country," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). To the contrary, the rest of the Nation actually bears the risks of such experiments by individual states. When a state's tort system imposes extra costs by means of stricter liability, often accompanied by draconian awards of punitive damages, manufacturers are forced to spread those costs to the other states in which their products are sold. *See* Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, *in* NEW DIRECTIONS IN LIABILITY LAW 90, 92 (Walter Olson ed., 1988). As a result, the effects of even a small minority of states' unduly strict liability standards come to be felt by consumers in all states. They must either pay higher prices or lose the option to buy products that have been withdrawn from the market because potential liability costs or litigation expenses are simply too high.

Thus, given the realities of today's national product markets, the Nation as a whole is increasingly being held hostage to errors made by individual states—or individual juries—in the direction of over-deterrence. Regulation through common-law tort verdicts and court decisions is a particularly problematic mechanism for such over-deterrence, because common-law decisionmaking is notoriously ill-suited to the establishment of nationwide standards that strike the proper balance among the multitude of societal interests at stake in a particular regulatory setting. Common-law adjudication is designed to take account only of the facts of individual cases and is narrowly circumscribed by the nature of the

adversary process, the rules of evidence, and other traditional constraints on judicial decisionmaking. In the minds of local lay jurors and state-court judges, moreover, there is often little contest between sympathy for a local plaintiff and feelings about a wealthy, out-of-state corporate defendant, especially when a skilled plaintiff's attorney tugs on their heartstrings. *See, e.g.*, Richard Neely, THE PRODUCT LIABILITY MESS 10-11 (1988). The inevitable result is over-deterrence as local judges and juries advance parochial local interests at the expense of the Nation's interest in a strong national economy.

When juries do render pro-plaintiff verdicts, moreover, the repercussions are often vastly amplified by the current trends in tort law. This Court scarcely needs to be informed of the increasing use of massive class actions or of the skyrocketing rises in punitive-damages awards. These factors alone catapult state tort systems out of the world of mere compensation in individual cases; even aberrational verdicts can now have crushing effects on manufacturers. In addition, with the liberalization of rules governing personal jurisdiction, venue, *forum non conveniens*, and conflict-of-laws doctrines, plaintiffs can often gain access to those state courts that have the most favorable substantive law. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981) ("Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous."); *see also* Gita F. Rothschild, *Forum Shopping*, 24 LITIGATION 40, 40 (Spr. 1998) ("[T]he expansion of personal jurisdiction in *International Shoe Co. v. Washington*, together with the nationwide business activities of many large enterprises, have increased plaintiffs' forum options and made forum shopping a common practice.") (citation omitted).

Inordinate costs are levied on businesses not only by the imposition of excessive liability in a few states, but also by the proliferation of varying standards in all of the states. Multiple jury verdicts, delivered in multiple jurisdictions, based on disparate standards that take account of different factors, combine with other state and local legislation and regulation to make it difficult to ascertain what the applicable standards are, much less to comply with them all simultaneously. Such unpredictability and inconsistency can stultify economic prosperity as much as the welter of local tariffs the Framers sought to eradicate in 1787.

Given all of these factors, it is not surprising that products are often withdrawn from the market and manufacturers driven into bankruptcy by a tower of lawsuits later seen to be without true foundation—most recently and dramatically in the case of breast implants. *See, e.g.*, David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457 (1999) (reviewing MARCIA ANGELL, SCIENCE ON TRIAL (1996)); Marc M. Arkin, *Products Liability and the Threat to Contraception*, Manhattan Institute Civil Justice Memo No. 36 (Feb. 1999) <http://www.manhattan-institute.org/html/cjm_36.htm> (describing lawsuits that led to withdrawal of Copper-7 IUD from market).

Less apparent, but equally real, are the costs imposed on society by the loss of potentially beneficial products that are never developed, or never released to market, because of concerns about potential liability. *See, e.g.*, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Some manufacturers of prescription drugs . . . have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.") (citations omitted);

Wayne C. Koff, *The next steps toward a global AIDS vaccine*, SCIENCE, Nov. 25, 1994, at 1335 (risk of tort liability is a "significant economic disincentive[]" that has helped lead "some manufacturers to eliminate or scale back AIDS vaccine development").

Every state of the Union suffers these adverse consequences of the current tort system, even if only a relative handful of states is to blame for the over-regulation and over-deterrence resulting from out-of-control tort verdicts and lawsuit abuse. Manufacturers and other businesses releasing their products or services into the stream of commerce have no choice but to tailor their productive activities to take account of the most excessive and burdensome version of state tort-law regulatory schemes. Thus, non-preemption should not be blithely equated with true federalism. In a national market, the common-law tort system itself shows scant respect for the autonomy of those states that choose to adopt more reasonable standards of tort liability in a vain attempt to avoid the disadvantages of over-deterrence. Where each state is already beholden to the whims and vagaries of judges and juries in other states, federal preemption does not shatter a perfect picture of states' rights.

Given these realities of our modern national economy and tort system, it is more important than ever that the federal courts vigorously police the boundaries between federal and state authority to regulate economic activity, because only if the courts are diligent in striking down excessive local regulation will this Nation's citizens continue to enjoy the fruits of a truly national economy that the Framers sought to obtain more than two centuries ago. Rather than weakening the doctrine of implied preemption out of manufactured concerns for "federalism," as petitioners and their amici would have it, the federal courts should instead redouble their vigilance in this area. Implied preemption is absolutely essential whenever state courts and local juries take steps to impinge upon the province of federal regulatory re-

gimes that enhance the efficiency and productivity of the national economy by providing consistent nationwide standards and implicitly displacing the hodgepodge of often-inconsistent local regulations and standards.

When federal regulators have made a considered determination about what specifications a product in interstate commerce must meet (after evaluating the costs and benefits to be borne by the Nation as a whole), it becomes especially likely that any stricter requirement imposed by an isolated state court or jury will not only spawn confusion but also be inconsistent with the needs and broader interests of the national economy. Although petitioners' amici argue that federal regulators are less able to impose appropriate safety regulations than are state court judges and juries (*e.g*, Leflar Br. 12-13), that contention is flatly inconsistent with the reality that federal agencies like the Department of Transportation are well suited to weigh competing interests and adopt appropriate and uniform national standards to govern particular aspects of the national economy. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983) (Congress adopted the Act and granted the Secretary authority to establish motor vehicle safety standards because "considerable expertise" is required to determine appropriate standards; "[b]efore changes in automobile design could be mandated, the effectiveness of these changes had to be studied, their costs examined, and public acceptance considered").

Indeed, federal agencies typically enjoy the benefits of specialized expertise and utilize procedures designed to ensure that they consider the views of all affected groups. As a consequence, uniform national standards adopted by federal agencies offer considerable advantages over the alternative mechanism urged by petitioners, namely, the continued imposition of arbitrary, unpredictable, inconsistent, and excessively strict *post hoc* standards selected on the basis of limited information by

state courts and juries. Far from adopting a stance of heightened judicial skepticism towards the doctrine of implied preemption, therefore, this Court should instead take this opportunity to reemphasize the need for, and the propriety of, strict judicial enforcement of uniform national standards in instances where, as here, those standards have been established by the federal agency charged by Congress with responsibility for promulgating uniform standards.

Petitioners and their amici make much of what they characterize as the "presumption" against preemption, but in reality there is no conflict between that "presumption" and the analysis set forth above. While this Court has traditionally approached every preemption case with an appropriate sense of respect for the authority of state governments within their spheres of responsibility, it is equally important to avoid frustrating Congress's purposes—and the overarching goals of the Commerce Clause—by eviscerating the benefits of uniform national standards that have been authorized by federal legislation and adopted by responsible federal agencies.

Properly understood, in fact, there is no meaningful "presumption" against implied preemption of state-law requirements that are inconsistent with uniform federal standards imposed pursuant to a comprehensive federal regulatory scheme. To be sure, this Court has stated that when Congress has "legislated . . . in a field which the States have traditionally occupied," the Court will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), *quoted in Medtronic*, 518 U.S. at 485. But that background assumption has no force in an implied preemption case, because there can be no room for doubt that Congress intended to preempt inconsistent or conflicting state laws; indeed, the Supremacy Clause renders

all such laws null and void. U.S. CONST. art. VI, cl. 2. Accordingly, "[w]here, as here, the issue is one of an asserted substantive conflict with a federal enactment, then '[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail.'" *Brown v. Hotel & Rest. Empls. & Bartenders Int'l Union Local 54*, 468 U.S. 491, 503 (1984) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)); *accord, e.g., Felder v. Casey*, 487 U.S. 131, 138 (1988).

The "presumption" against preemption is doubly inappropriate in cases like this one that involve the clash between uniform federal standards and state tort suits because, as noted above, the modern tort system has been transformed into a full-fledged regulatory scheme that allows individual states (or, more precisely, state judges and juries) to exert power and influence far beyond their borders, undermining or eliminating the ability of other states to choose different, and less excessive, regulatory schemes. Thus, the argument that federal preemption of liberal state-law liability standards somehow threatens state sovereignty and requires a "presumption" against preemption has absolutely no force; state "sovereignty" is already undermined by the excessive regulatory schemes imposed by some states on the Nation at large, and the actions of Congress and federal agencies in promulgating uniform and balanced standards serve only to bring the federal system back into balance, as envisioned by the Framers when they granted Congress the commerce power more than two centuries ago.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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