No. 98-1811

IN THE SUPREME COURT OF THE UNITED STATES

ALEXIS GEIER, et al.,
Petitioner

v.

AMERICAN HONDA MOTOR COMPANY, INC.,
Respondent

BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION SUPPORTING RESPONDENT

Filed November 19, 1999

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INTEREST OF AMICUS CURIAE

There are over 100 million vehicles without airbags on U.S. roads, and petitioners' "no airbag" claim would condemn them as defective. Amicus Curiae General Motors Corporation ("GM")[1] is the world's largest automobile manufacturer, and has the most cars on U.S. roads; accordingly, GM has a unique and significant interest in a correct decision in this case. Also, GM was a pioneer in airbag technology, and participated in the rulemaking process for Federal Motor Vehicle Safety Standard 208 (FMVSS 208), the occupant restraint standard, from the beginning. GM has played a central role in the development of the case law on the issue here; it was a party in the first three circuit court decisions to address the "airbag" preemption issue.[2] Thus GM has significant experience and knowledge regarding the applicable law and relevant regulatory history. It submits this brief in support of respondents.

SUMMARY OF ARGUMENT

FMVSS 208 granted manufacturers options to install in 1987 cars different restraint systems, including different passive restraint systems and manual seat belts. Transportation Secretary Dole specifically "declined to mandate airbag restraint systems in all vehicles," as petitioners put it (P. Br. at 9), because she judged that mandating airbags or any other single passive restraint system "runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems," 49 Fed. Reg. 28962,

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[1] Under Rule 37.3(a), the parties have consented to the filing of this *amicus curiae* brief. Letters evidencing that consent are on file in the Clerk's office. This brief has been written only by counsel for GM, and GM alone has provided the funds for its preparation and submission.

[2] *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990).

29001 (1984). That judgment was not novel. Options and the flexibility that went with them had been at the heart of FMVSS 208, indeed essential to its regulatory scheme, from its beginning.

Petitioners' no airbag claim, if allowed, would impose on manufacturers a state-law duty to install airbags in all cars, or impose tort damages on them if they did not. Accordingly, it would in effect take away the manufacturer's option to install manual seat belts or other passive restraints, not airbags, in cars, and punish the manufacturers, after the fact, for doing exactly what federal law authorized, and encouraged, them to do. Therefore, the overwhelming body of lower court authority held that petitioners' claim, if allowed, would "frustrate the regulatory scheme," "undermine the flexibility" essential to it, and "flatly" conflict with it; so, DOT, NHTSA and the Solicitor General explain, it would "disserve safety" and so must be preempted.

Petitioners' response proposes to abandon, or disregard, 100 years of settled Supreme Court preemption law. Thus they posit that a presumption against preemption saves their claim. But presumptions have no place here; state law that conflicts with federal law is, in this Court's words, "preempted by direct operation of the Supremacy Clause," "without effect," and "void." Petitioners also posit that, contrary to all other rules, state common-law rules that stand as an obstacle to federal law are not preempted; but this Court has repeatedly held that they are. Still, petitioners posit that their common-law claim is saved because it would serve safety. But NHTSA found that it would disserve safety. And even if it served safety, this Court holds a "state law is also preempted if it interferes with the methods by which Congress intended to meet" its goal.

Petitioners go on to propose new rules, and quarrel with the regulations they seek to undermine. Thus they propose that the common law does not regulate, but this Court has repeatedly held that it does. They propose that common-law duties are, in some metaphysical sense, general, but this Court

has repeatedly held that, general or not, they impose "requirements and prohibitions," and petitioners' proposed airbag requirement conflicts with federal law. Petitioners propose that FMVSS set performance, not design, standards, and so cannot conflict with common-law design standards. But Congress and this Court have required FMVSS 208 to speak to designs; it does; and petitioners' common-law design standard conflicts with it.

Petitioners propose, last, that the National Traffic and Motor Vehicle Safety Act's supposed savings clause saves their claim from preemption. It does not. First, it speaks to a defendant's "compliance" with federal law. Compliance, a merits defense, has nothing to do with preemption, and vice versa: Federal law preempts or not, by operation of federal law, regardless of compliance, and a private party by unilateral private noncompliance cannot un-preempt. Therefore, the "savings clause" has nothing to do with preemption on its face, and the legislative history, petitioners' own explication of "axiomatic" common-law principles, and the early Safety Act case law all demonstrate that the clause means exactly what it says.

Second, even if directed at preemption, the "savings clause" at most serves this traditional function: to make clear Congress' intent not to "occupy the field," and thus to save all claims that do not conflict with federal law, but not those that do. Again, the first 20 years of Safety Act case law gave it just that function.

Third, a general savings clause in no event saves a claim that actually conflicts with the Act that contains the clause. An unbroken chain of authority, 1907-1998, so holds, and necessarily so. The Supremacy Clause preempts conflicting state law. This Court has never assumed that Congress would be so cavalier as to discard the Supremacy Clause, and so accord conflicting state laws a free pass to undermine Congress' laws, all through a general savings clause that does not address whatever future conflict came to be in issue, and in the nature of things could not.

A state common-law claim that actually conflicts with an FMVSS is, in the First Circuit's words, a "rare event, indeed." This, as the overwhelming weight of lower court authority holds, is that rare event. Therefore petitioners' claim is preempted.

ARGUMENT

Petitioners' claim, if allowed, would conflict with FMVSS 208 and the Safety Act, and so is preempted. Petitioners[3] seek to avoid that truth by ignoring FMVSS 208's purpose, disregarding settled conflict preemption principles, inventing new ones, and, finally, according this Act's so-called savings clause an effect no savings clause has ever been accorded by this Court before.

We address FMVSS 208's history and purpose first (Part A); how plaintiffs' claim would conflict with FMVSS 208 and undermine its purpose, and so is preempted by it, next (Part B); and, last, how the so-called savings clause does not and could not save that undermining claim (Part C).[4]

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[3] We refer to the Brief for Petitioners as "P. Brief"; to the Brief of the United States as Amicus Curiae Supporting Affirmance as "U.S. Br."; and to the briefs of the amici supporting petitioners by amici's names as follows: Attorneys Information Exchange Group brief ("AIEG Br."); Association Of Trial Lawyers Of America brief ("ATLA Br."); National Conference Of State Legislatures, Counsel Of State Governments, National Association Of Counties, National League Of Cities, International City/County Management Association And U.S. Conference Of Mayors brief ("NCSL Br."); States Of Missouri, Arizona, California, Colorado, Connecticut, Delaware, Iowa, Kansas, Montana, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont and Washington brief ("Mo. Br."); Robert B. Leflar, Robert S. Adler, Michael Green, And Joseph A. Page Br. ("Leflar Br.").

[4] The D.C. Circuit found implied preemption, and GM focuses on why that was correct. Honda and other amici address express preemption, and petitioners' errors as to it.

A. FMVSS 208's Options And The Safety Purposes Behind Them.

Options and the flexibility that went with them have been at the heart of FMVSS 208, indeed, essential to its regulatory scheme, from its beginning. This is the regulation's history.

1. The Pre-1984 Option-Based Standards.

Before 1972 FMVSS 208 accorded manufacturers the option to install manual seat belts or various passive restraints in cars. 32 Fed. Reg. 2415 (1967). "[T]he safety benefits of wearing seatbelts are not in doubt. . . . " *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). However, manual belts are "active restraints," because the occupant must act to use them, and many people did not use them. So in 1972 the Department of Transportation ("DOT") amended FMVSS 208 to require installation of airbags or automatic belts – both passive restraints – in cars built after August 15, 1975. DOT also required "vehicles built between August 1973 and August 1975 . . . to carry either passive restraints or [manual] lap and shoulder belts coupled with an 'ignition interlock' that would prevent starting the vehicle if the belts were not connected." *Id.* at 35.

The ignition interlock rule caused a public outcry, and in 1974 Congress outlawed the "ignition interlock" standard, mandated that manufacturers retain the option to install manual belt systems, and prohibited DOT from requiring airbags or any other nonbelt restraint system unless, among other things, such a standard had been submitted first to both houses of Congress and not disapproved by them. 15 U.S.C. § 1410b(b), (c). *See* H.R. Rep. No. 93-1452 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6084, 6108; 120 Cong. Rec. 27816, 27822 (1974).[5]

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[5] Even if the legislative veto aspect of § 1410b fails (*see INS v. Chadha*, 462 U.S. 919 (1983)), Congress' intent to mandate options, including the manual belt option, is clear.

Accordingly, DOT deleted the ignition interlock requirement, 39 Fed. Reg. 38380 (1974), and amended FMVSS 208 to grant manufacturers the same options it provided before the ignition interlock episode. Thereafter, FMVSS 208 granted those same options, and rejected a mandatory passive restraint rule, in every model year from 1976-1987. For very good reasons:

In 1976, Secretary Coleman, after lengthy study, determined not to mandate passive restraints. 41 Fed. Reg. 24070 (1976); 41 Fed. Reg. 36494 (1976); *see also* 42 Fed. Reg. 5071 (1977). He reasoned that: (1) A policy "unacceptable" to the public would contravene the "goal of safety," and "every sampling of public opinion" showed most Americans opposed mandatory passive restraints. Secretary's Decision Concerning Vehicle Occupant Crash Protection, D.O.T., at 6, 11, 32, 52-57 (Dec. 6, 1976). (2) More data was needed before mandating passive restraints or any one of them. *Id.* at 9, 12, 27, 34, 57. (3) Increased manual belt use would make passive restraints unnecessary; airbags gave no greater protection than seat belts, when used. *Id.* at 7, 13, 29, 33. The Secretary concluded the "cause of safety would not be served" by mandating airbags or any passive restraints "at the present time." *Id.* at 27, 30-31, 34, 36; *see also* 41 Fed. Reg. at 24070-71.

In 1977, Secretary Adams required some form of passive restraints to be phased into cars beginning in model year 1982, but continued all FMVSS 208's options until then. He also granted manufacturers the option to choose which passive system to install before and after 1982, and so rejected an airbag-only standard at all times. *See* 42 Fed. Reg. 34289, 34290-96 (1977), 61468 (1977); 46 Fed. Reg. 53419, 53420 (1981); *see also Pacific Legal Found. v. Department of Transp.*, 593 F.2d 1338, 1348 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).[6]

[6] That prospective mandatory passive restraint regulation was submitted to Congress and not disapproved by it. But Congress declined DOT funding "to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system)." Department of Transportation and Related Agencies Appropriation Act, Pub. L. No. 95-335, § 317, 92 Stat. 450 (1978); Department of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-131, § 317(a), 93 Stat. 1039 (1979).

In 1981, Secretary Lewis delayed Adams' passive restraint phase-in for one year, 46 Fed. Reg. 12033, 12034 (1981); 46 Fed. Reg. 21172, 21174-75 (1981), and then rescinded it, noting, among other things, that increased manual belt use would effect an "immediate impact . . . many times greater" than mandatory passive restraints. 46 Fed. Reg. at 53419-25. He concluded manufacturers should "continue to have the current option." *Id.* at 53419.

Upon review, this Court held that Secretary Lewis had not sufficiently set forth his reasons for rescinding the passive restraint requirement, or for not requiring airbags, and remanded for consideration of those things. *State Farm*, 463 U.S. at 52-57.

2. DOT's 1984 Judgment That Diversity, Not A Mandatory Airbag Rule, Best Served Safety.

On remand, Secretary Dole undertook a comprehensive review of all restraint systems, and propounded the rule at issue here. It was challenged and upheld. *See State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 489 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987). The rule called for a measured introduction of passive restraints (no one kind was required), beginning with 10% of cars built in model year 1987 (the year at issue here), and ending with 100% of 1990 model year cars. 49 Fed. Reg. at 28999-29000.

Petitioners and their amici repeatedly claim that an airbag system was DOT's preferred choice. *See* P. Br. at 2, 8, 10-11; AIEG Br. at 15; Leflar Br. at 3-4. It was not. In fact, DOT found mandatory manual belt use laws ("MULs") "would more than match the safety benefits of [a passive

restraint] rule," and "will result in a more substantial reduction in deaths and injuries more quickly and at a lower cost than any other practical alternative." 49 Fed. Reg. at 28998.[7] Secretary Dole summed it up: seat belts if used are "the quickest, least expensive way by far to reduce fatalities and injuries," and "will provide the greatest benefits most quickly." 49 Fed. Reg. at 28962, 28997. Thus FMVSS 208 provided that the passive restraint phase-in was to be canceled if by 1987 states with two-thirds of the population enacted MULs, and to cease after it began if enough states enacted MULs between 1987 and 1989. *Id.* at 28963. Enough complying MULs were not enacted, so the phase-in was completed.

Airbags also were not DOT's preferred choice among passive restraints. Rather, the Secretary determined not to mandate any particular form of passive restraint at any time, before or after phase in. She found "disadvantages to each of the automatic restraint systems," (*id.* at 28998), and found that "public acceptability" of mandatory passive restraints – essential to their use and so their safety benefit – would be enhanced by authorizing manufacturers to install different restraint systems, so the public could choose among them. *Id.* at 28997, 29001. The Secretary found a "number of reasons" not to mandate airbags in particular, *id.* at 29000, including these: (1) "An airbag alone is less effective" than three-point belts when used, *id.* at 28986; (2) airbags are costly, especially to replace, *id.* at 29001; (3) airbags may not protect out-

[7] Thus the proposition that NHTSA wanted airbags in all cars because that was "the safest option" is simply false. Indeed, the Secretary noted that "estimating the effectiveness of [airbags] is very difficult," and "that airbags could range from being 46 percent more effective than the manual belts as used in the same cars to 70 percent less effective." 49 Fed. Reg. at 28985. The Secretary judged that "an airbag alone is less effective than a manual lap and shoulder belt or automatic belt, when those systems are used" (*id.* at 28986), airbags provide no protection in side and rear collisions, may injure out-of-position occupants, and provide only a marginal increase in safety over belts even when used with belts. *Id.* at 28984-85.

of-place occupants and, in fact, might cause injuries, especially to children (unfortunately proved true), *id.* at 28992, 29001; (4) the public feared airbags and may not accept them, *id.* at 29001; (5) more data as to their effectiveness needed to be collected, *id.*; and (6) more time was needed to develop the technology. *Id.* at 28992, 28996. Secretary Dole concluded that mandating airbags or any other passive restraint "runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." *Id.* at 29001.[8] In particular, "an airbag only decision would unnecessarily stifle innovation in occupant protection systems," and would take away the "latitude" necessary for industry to develop them. *Id.* at 28997.

In sum, from the beginning to the passive restraint phase-in, FMVSS granted – and Congress mandated – the option to install manual seat belts, or the manufacturers' choice of passive restraints, in cars. From the beginning, through the phase-in and indeed up until the 1997 model year, FMVSS 208 granted manufacturers the option as to what passive restraint to install in cars, and specifically rejected a rule mandating airbags or any other single passive system.[9]

3. NHTSA's Statements About FMVSS 208 Preemption And Congress' 1991 Action.

In 1990, the Solicitor General, joined by NHTSA and DOT, opposed certiorari in *Wood v. General Motors*, the first

[8] Petitioners attribute to NHTSA a comment by personal injury lawyer Steven Teret. *See, e.g.*, Pet. Br. at 10. But NHTSA made clear it was summarizing, not endorsing, comments: "Because of the large number of public comments, we have provided a representative sample of the comments made and the commenters who made them." 49 Fed. Reg. at 28966. NHTSA has never welcomed "no airbag" claims as incentives; to the contrary, it has made clear for 10 years that they are preempted. *See* pp. 9-10, below.

[9] Far from being the product of "political winds" (Leflar Br. at 13), options were judged essential by 6 straight administrations (Democratic and Republican).

circuit court to address (and find) "no airbag" claim preemption. Their brief said it would "*disserve* the *safety* purposes of the Act" to allow "no airbag" claims. Brief for the United States as Amicus Curiae, *Wood v. General Motors Corp.*, No. 89-46 (filed Mar. 1990), at 15 (emphasis original).

In 1994, in *Freightliner v. Myrick*, NHTSA and DOT contrasted brake standard cases, where the Agency believed there was no preemption, with "no airbag" cases, where the Agency was clear there was. Brief for the United States as Amicus Curiae, *Freightliner Corp. v. Myrick*, No. 94-286 (filed Dec. 1994) at 28-29 & n.16. The Agency explained that "common-law tort actions that imposed liability for failure to install airbags" would "frustrate[ ] the Secretary's policy judgment," and would have "an adverse effect on safety." *Id.* at 28.

Petitioners' amici advise that Congress would be puzzled that the circuit court here ruled as it did. In fact, Congress would be puzzled if it had not. In 1991 Congress was considering the law that eventually required NHTSA to mandate airbags. NHTSA apprised Congress then that "most courts that have considered the matter have ruled that ["no airbag" claims] are preempted by the [Safety Act] and/or the safety standards issued by NHTSA." Letter to Congress from NHTSA Administrator Jerry Curry, November 7, 1991; H.R. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1783. NHTSA cautioned Congress that the proposed law could call those preemption rulings into question. In response, Congress specifically provided that the new law was not to "be construed by any . . . court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints." Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086.

B. "No Airbag" Claims Undermine FMVSS 208 And Are Therefore Preempted.

The D.C. Circuit, joining five federal circuits, scores of district courts, and 12 state appellate courts, correctly held that "no airbag" claims directly undermine, and so conflict with, the Safety Act, FMVSS 208 and the purposes behind them.

1. The Conflict.

FMVSS 208 "was specifically designed to give automobile manufacturers a choice among several options when providing restraint systems." *Pokorny v. Ford Motor Co.*, 902 F.2d at 1116, 1123 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990). That flexibility – "latitude" – and those options are "essential" to FMVSS 208 and to advance its safety goal. *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 785 (3d Cir. 1992). Indeed, taking those options away, and in particular mandating a single passive restraint choice like airbags, would risk "killing or seriously retarding" development of the best systems. 49 Fed. Reg. at 29001.

Petitioners' no airbag claim, if allowed, would require manufacturers to install airbags in all cars, or impose tort damages on them if they did not. Accordingly, that claim would in effect take the manufacturers' option to install seat belts, not airbags, away. It would also punish a manufacturer, after the fact, for doing what FMVSS 208, in the interests of safety, authorized. Consequently, that standard would, in the Solicitor General's words, "disserve safety" (p. 10, above), and so defeat Congress' and DOT's full and most basic objectives. For a "state common law rule that would, in effect, remove the element of choice authorized in [FMVSS 208] would frustrate the federal regulatory scheme." *Taylor*, 875 F.2d at 827; *Pokorny*, 902 F.2d at 1125 (same); *Buzzard*, 966 F.2d at 783 (no airbag claims would "undermine the flexibility that Congress and the DOT intended to give to manufacturers in deciding whether to include air bags, automatic or manual seat belts in their design.").

Therefore, plaintiff's "no airbag" claim "flatly," *Wood*, 865 F.2d at 401, and impermissibly, conflicts with FMVSS 208. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982) (state action that punishes option granted by federal regulation preempted). For a "state common law rule cannot take away the flexibility provided by a federal regulation," "cannot prohibit the exercise of a federally granted option," and cannot impose damages for doing "what a federal act or regulation 'authorized [one] to do.' " *Taylor*, 875 F.2d at 827 (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981), and holding *de la Cuesta* "demonstrates the rule" and "governs this case"; also citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981)).

2. Petitioners' Efforts To Avoid The Conflict.

Petitioners try to avoid that flat conflict in various ways, none sound.

a. The Contention That Common Law Does Not Regulate.

Petitioners say the common law compensates plaintiffs, but leaves defendants free to act as they will; defendants can just keep on doing what they were found liable for, and keep paying for doing it, petitioners advise. Thus, the argument concludes, the common-law duty petitioners' claim would impose does not regulate and so cannot conflict with FMVSS 208. P. Br. at 47-48; AIEG Br. at 20; ATLA Br. at 15.

That argument disregards *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and the forty years of authority following it: "[State] regulation can be as effectively exerted through an award of damages as through some form of preemptive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* at 247. *Accord Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality) (quoting and following *Garmon*); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504-05, 509-10 (1996) (quoting and following *Cipollone*; opinions of five Justices); *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 675 (1993).

Petitioners' argument also disregards reality. As petitioners' brief euphemistically puts it, "the threat of future liability imposed through the tort system" is intended as an "incentive" to install airbags. P. Br. at 10. Indeed, petitioners seek $20 million in compensatory and punitive damages, quite an "incentive" by itself. And petitioners' amici confess that the "state law determination of whether a motor vehicle is defectively designed has an objective very similar to NHTSA's goal." Leflar Br. at 17; *see also* AIEG Br. at 4-5; ATLA Br. at 11. Likewise, petitioners' counsel confessed in 1984 that the purpose of "no airbag" claims was to "persuade the auto companies . . . to install airbags in all cars," exactly what NHTSA judged ought not occur. Trial Lawyers for Public Justice 1984 Annual Report.[10]

Nevertheless, petitioners' amici continue, regulations are "prospective in nature," and meant to prevent "socially harmful activities." (NCSL Br. at 14) The point is elusive. Perhaps the idea is that tort claims compensate for injuries, regardless whether the conduct causing them is "socially harmful" or not, or, indeed, as Missouri puts it, "legal or illegal." (Mo. Br.

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[10] Petitioners point to *English v. General Electric Co.*, 496 U.S. 72, 85 (1990), *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Each noted that damage awards regulated less directly than "direct regulatory authority" does. (*E.g.*, *Goodyear*, 486 U.S. at 186) But none changes *Garmon* or its progeny, much less suggests that common-law standards that conflict with federal standards are not preempted. Nor would they, for neither conflict preemption nor a conflicting common-law standard was in issue in any of them: *Goodyear* merely held that the authority granted a state by Congress to administer workers' compensation claims on federal land included authority to award supplemental sums for injuries resulting from violation of state safety laws; *English* and *Silkwood* were field preemption cases; and *Silkwood* made clear that "state standards" imposed "in a damages action" would be preempted where they "frustrate[d] the objectives of the federal law." *Id.* at 256.

at 3) But of course that is wrong, as petitioners' amici say elsewhere; tort law compensates for "wrongful injury" (ATLA Br. at 9), "unreasonably dangerous products" (*id.* 12), and "socially unreasonable conduct." Leflar Br. 7, 17.

But this excursion is ultimately off point. The issue is whether petitioners' common-law standard undermines the federal standard. It does. Therefore, it is preempted, whatever its purpose. *Ouellette*, 479 U.S. at 494 (state law sharing federal law's "ultimate goal" is preempted if it "interferes with the methods" Congress chose to achieve the goal).

In sum, petitioners' contention that common-law damage claims do not regulate is wrong as a matter of settled law, and, indeed, common sense: If administrative standards whose violation is punishable by thousand dollar fines regulate, multimillion dollar tort judgments do, and especially here. For every frontal crash is a potential no-airbag claim; "[i]n these circumstance," were "no airbag" claims allowed, manufacturer "choice to avoid modification of its design [to include airbags] 'seems akin to the free choice of coming up for air after being under water.' " *Wood*, 865 F.2d at 411 (citation omitted). From the beginning, the overwhelming body of no airbag authority so found. *See, e.g., Baird v. General Motors Corp.*, 654 F. Supp. 28, 32 (N.D. Ohio 1986) (manufacturer would have "but one realistic choice").[11]

b. The Contention That Common-Law Duties Are "General" And So Cannot Conflict.

Two of petitioners' amici argue that common-law duties are "general norms." *See* Mo. Br. at 11; AIEG Br. at 14. A third argues, contrarily, that "statutes and administrative regulations are necessarily abstract and general," but common-law liability is "particular." (NCSL Br. at 12) Whoever is right, the issue is beside the point.

Common-law damages actions "are premised on the existence of a legal duty." *Cipollone*, 505 U.S. at 522 (plurality). Indeed, the common law's "essence" is to "enforce duties that are either affirmative *requirements* or negative *prohibitions*." *Id.* (emphasis in original). The question in this conflict preemption case is not whether this common-law duty is in some metaphysical sense general or specific, but whether the standard it sets and the requirement it imposes undermine – and so conflict with – federal regulations. *See Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 105 (1992) (look to "effects"). This proposed common-law duty would undermine this regulatory structure. Pp. 11-12, above. Therefore, this claim based upon that duty is preempted, and rightly so; "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general [damages] statute," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992), or by general common law. *Medtronic*, 518 U.S. at 504 (Breyer, J., concurring), 518 U.S. at 509 (O'Connor, J., opinion for four Justices, concurring and dissenting); *Easterwood*, 507 U.S. at 664, 675.

c. The Contention That Common-Law Rules Cannot Conflict With Performance Standards.

Petitioners say federal standards set performance, not design, standards (*see, e.g.*, P. Br. at 46; NCSL Br. at 25), and that common-law actions do not establish "objective criteria." ATLA Br. at 3.

These propositions may, generally, be true, but are not here. Section 1410b, unique in the Safety Act, speaks to manual seat belts and passive restraints, both designs, and mandates NHTSA to grant options to install them. P. 5, above. FMVSS 208 in turn undertakes, among other things, to "specify[ ] equipment requirements for active and passive restraint

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[11] In fact, punitive damages – sought routinely, and here – are expressly intended to "punish[ ]" defendant's conduct and "deter[ ]" its repetition. *BMW of North Amer., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

systems," *see* 49 C.F.R. § 571.208, S2, speaks to particular restraint systems and their design, and so, rare among NHTSA regulations, has "elements of a design standard." *Wood*, 865 F.2d at 417; *see also Gills v. Ford Motor Co.*, 829 F. Supp. 894, 897 (W.D. Ky. 1993) (FMVSS 208 has "unique characteristics"); *Welsh v. Century Prods., Inc.*, 745 F. Supp. 313, 321 (D. Md. 1990) (FMVSS 208 is "unusual regulation"). *See* AIEG Br. at 5 (the cases treat " 'no air bag claims' as a unique issue").[12] Pp. 8-9, above. FMVSS 208 also expressly grants options – also unusual – to choose among those design elements.[13]

Petitioners' common-law claim is likewise, by ATLA's measure, a rarity, for it specifies a very "objective criterion": a car without airbags is defective. Moreover, "airbag suits are of the broadest general applicability – potentially affecting every vehicle on the road – and thus are most similar to a state regulation." *Wood*, 865 F.2d at 418.

Thus the performance/design inquiry undermines petitioners' general thesis. For as the first 20 years of Safety Act cases show (pp. 25, 27, below), a "direct conflict between a

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[12] Petitioners' amici apparently suggest NHTSA cannot regulate design. *See, e.g.*, NCSL Br. at 25. That is certainly wrong. FMVSSs are to "meet the need" for safety, 15 U.S.C. § 1392, and so protect the "public against unreasonable risk of accidents occurring because of the *design*, construction, or performance of a motor vehicle." *Id.*, § 1391(1)c(2) (emphasis added). In fact, this Court remanded the 1977 version of FMVSS 208 so the Secretary could consider whether to mandate airbags – a design (*State Farm*, 463 U.S. at 57) – and Congress ordered NHTSA to permit seat belts (§ 1410(b)), and later to mandate airbags – both designs.

[13] Petitioners say other regulations grant options. P. Br. at 46. Whether or not that is so, FMVSS 208 is unique. Congress specifically endorsed its options in § 1410b; Congress has not endorsed options for any other federal standard. FMVSS 208 granted options for safety reasons over many years; no other standard shares that history. Moreover, it makes no difference whether other standards provide options. If the same considerations and analysis applicable to FMVSS 208 apply to those other standards, they do. If they do not, they do not. They do apply to FMVSS 208.

common-law design standard and a Safety Act performance standard" is a "rare event indeed." *Wood*, 865 F.2d at 402 n.9. This, however, is that rare event.

d. The Contention That Claims Preempted In 1987 Are Un-Preempted in 1999.

Petitioners note that Congress enacted legislation in 1991 requiring airbags in all cars beginning in 1997. P. Br. at 45. Therefore, petitioners say, an award rendered in 1992 requiring airbags in all cars would not frustrate FMVSS 208's policy determination not to require airbags in all cars, and instead provide options, in 1984-91. Consequently, petitioners posit, while a state standard requiring airbags in all cars may have been preempted from 1984-91, it was retroactively un-preempted by 1992. This car was built in 1987, but this crash occurred in 1992. Therefore, petitioners conclude, Honda had a retroactively un-preempted state-law duty in 1992 to install an airbag in this car in 1987, although, since any state standard imposing such a duty was preempted in 1987, Honda could not have had any such duty then.

Petitioners cite no authority to support that, if we may say so, outlandish theory, and we know of none. How could there be? The State could not punish the manufacturer in 1987 for not installing airbags in 1987. Punishing the manufacturer five years after the fact for not discharging a duty it didn't have five years before and couldn't discharge five years later just makes the punishment immoral as well as illegal. In any case, the 1991 legislation petitioners argue changed the law expressly did not, much less retroactively. Congress specified that its 1991 legislation prospectively requiring airbags "shall" not be construed to affect the preexisting preemption law in any way. Pp. 10-11, above.

In sum, petitioners' proposed state common-law rule requiring airbags would "disserve safety" and undermine the regulatory scheme, and so conflict with federal law.

3. The Supremacy Clause Preempts "By Direct Operation" This Conflicting State Law.

"Conventional conflict pre-emption principles require pre-emption where compliance with both federal and state regulations [1] is a physical impossibility, . . . *or* [2] where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (internal quotation marks and citation omitted) (emphasis added). Where either is found, preemption is "require[d]." *Id.* at 844. Here, there is an actual conflict, so preemption is required.

Petitioners and their amici try to avoid that time-honored rule by presumption and abandonment. Neither works.

a. Avoidance By Presumption.

Petitioners and their amici repeatedly invoke the so-called presumption against preemption. This Court has certainly recited there is such a presumption, and has used it in unclear cases to reject express or field preemption arguments. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664-65, 668 (1993) (express); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (express); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-152 (1963) (field). Thus, ATLA notes that "the scope of express preemption is to be narrowly construed consistent with the strong presumption against preemption." ATLA Br. at 10.

Where state law actually conflicts with federal law, however, the case is clear, and there is no room for presumptions. State law that conflicts with federal law "is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees and Bartenders Int'l Union*, 468 U.S. 491, 501 (1984); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 594 (1987) ("traditional pre-emption analysis . . . requires an actual conflict between state and federal law, *or* a congressional expression of intent to pre-empt") (emphasis added). *See also Cipollone*, 505 U.S. at 516 (state law that conflicts with federal law "is 'without effect.' ") (citation omitted); *Ouellette*, 479 U.S. at 491 (state law

"invalid to the extent that it 'actually conflicts with . . . a federal statute' "); *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981) ("a state statute is void to the extent it conflicts with a federal statute"); *Kalo*, 450 U.S. at 317 ("a court *must* find local law pre-empted by federal regulation *whenever* the challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (citation and quotation marks omitted); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978) ("a state statute is void to the extent that it actually conflicts with a valid federal statute"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141, 146-47 (1963) (only after determining no conflict exists does court "turn to the question whether Congress has nevertheless ordained that the state regulation shall yield").

Petitioners protest that tort law is important to the states. But " '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. at 666). That rule is nearly as old as the republic. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824). *Accord Gade v. National Solid Waste Mgt. Ass'n*, 505 U.S. 88, 108 (1992) ("under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield") (internal quotation marks omitted); *DeCanas v. Bica*, 424 U.S. 351, 357 (1976): ("[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation.").

Petitioners cannot avoid conflict preemption by presumption.

b. Avoidance by Abandonment.

Next, petitioners propose that the settled law be abandoned, or disregarded, in these ways:

i. The Proposal That "Impossibility" Be The Only Test.

Petitioners and their amici propose that " 'obstacle' pre-emption is not appropriate to deny tort remedies traditionally available under state law"; only impossibility is. ATLA Br. at 26; Mo. Br. at 19-20; AIEG Br. at 11.

But the Court has repeatedly held that the obstacle pre-emption test applies to state common law as to any other. *See, e.g., Medtronic*, 518 U.S. at 496; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995); *Ouellette*, 479 U.S. at 493-94; *Silkwood*, 464 U.S. at 248; *Kalo*, 450 U.S. at 317; *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446-47 (1907). If anything, the test applies *a fortiori* to common law:

> The effects of the state agency regulation and the state tort suit are identical. To distinguish between [them] for pre-emption purposes would grant greater power to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.

Medtronic, 518 U.S. at 504 (Breyer, J., concurring).[14]

ii. The Proposal That A Benign State Purpose Eliminates Conflict.

Petitioners argue that their proposed state common-law duty to install airbags would serve safety. But NHTSA and DOT disagree: They concluded that mandating airbags or any other passive restraint would "disserve safety." In any case, "it is not enough to say that the ultimate goal of both federal and state law is [the same]. A state law also is pre-empted if it interferes with the methods by which Congress intended to meet [its goal]." *Ouellette*, 479 U.S. at 494; p. 14, above.

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[14] Indeed, petitioners' amici disprove petitioners' remove-one-test theory. They concede that an injunction requiring airbags, although based on common-law, "would clearly be preempted." ATLA Br. at 6. That injunction, however, would not make it impossible to comply with both federal and state law, but, like petitioners' damage claim, would necessarily be preempted under the (supposedly removed) obstacle test.

iii. The Proposal That NHTSA Cannot Preempt, Or Can Only Preempt Expressly.

Petitioners and their amici argue that NHTSA had no power to preempt, or at the least, that a preempting agency standard must state on its face the agency's intent to preempt. Of course, then the standard would expressly, not impliedly, preempt. There is no rule that federal regulations cannot impliedly preempt. To the contrary. An agency exercising its delegated authority has the same preemptive power as Congress. *City of New York v. Federal Communications Comm'n*, 486 U.S. 57, 63-64 (1988). Moreover, the preemptive "force" of an agency's regulations "does not depend on express congressional authorization to displace state law." *Id.* at 64 (quoting *de la Cuesta*, 458 U.S. at 154). That force comes from the Supremacy Clause. *Id.*; *Lincoln Sav. & Loan Ass'n v. Federal Home Bank Bd.*, 856 F.2d 1558, 1560 (D.C. Cir. 1988) (agency "regulations will preempt inconsistent state [law] by the simple operation of the Supremacy Clause.").

Petitioners complain that NHTSA gave no notice that FMVSS 208 might preempt conflicting state law. P. Br. at 40. But the Supremacy Clause gives notice that federal law preempts conflicting state law. *See, e.g., United States v. Shimer*, 367 U.S. 374, 381-82 (1961) (no express agency intent to preempt; preemption found).

iv. The Proposal That Preemption Cannot Take Away A Remedy.

Petitioners and their amici complain that preemption of "no airbag" claims would leave them "without a remedy for injuries caused by the automaker's unreasonable behavior," NCSL Br. at 12-13. But a manufacturer who does what federal law authorizes and encourages does not behave unreasonably. Thus, petitioners are not complaining that they have no remedy; they are complaining that as a matter of federal policy there is no wrong. Nor does *Silkwood* help; there was no conflict between federal and state law there.

Petitioners in fact had a remedy,[15] but it would not be unique if they were left without one. Every time a conflicting state-law claim is preempted, plaintiff necessarily is left without the remedy the preempted law provided. That is what preemption means. *See, e.g., Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959); *Ouellette*, 479 U.S. at 497 (Clean Water Act preempts non-source-state common-law remedies and all common-law remedies where source state provides none); *Garmon*, 359 U.S. at 246-47 (National Labor Relations Act preempts damage claim even when NLRB declines jurisdiction over the matter).

In sum, petitioners' claim conflicts with federal law and is preempted by direct operation of the Supremacy Clause.

C. The Meaning Of Section 1397(k).

Petitioners argue that § 1397(k), the supposed "savings clause," "saves *all* common law claims," including claims – like theirs – that conflict with federal law. P. Br. 34, 39 (emphasis added). That is an extreme contention. In all of U.S. history this Court has never held that any savings clause – even one clearly directed at preemption – preserves claims that actually conflict with the statute that contains the clause. To the contrary, this Court has held exactly the opposite for almost a century. Pp. 28-30, below.[16] Congress could not have intended to give states unlimited power to adopt common-law

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[15] Federal law expressly does not preempt state-law claims implementing the federal standards, 15 U.S.C. § 1392(d), and does not impliedly preempt non-conflicting claims. As ATLA points out, plaintiffs had a claim they could have made; "according to the complaint, . . . the seat itself broke away from its moorings due to inadequate design." ATLA Br. at 8. Plaintiffs cannot invoke a claim federal law prohibits because they waived a claim that federal law allows.

[16] Indeed, the thesis unwinds on itself. For as petitioners' amici admit, § 1397(k) could not save a state claim where it would be impossible to comply with both federal law and the common-law standard the claim seeks to enforce. AIEG Br. at 11; Leflar Br. at 14. Thus they agree that § 1397(k) really does not and cannot bar implied preemption.

rules that directly conflict with the Safety Act, the regulations under it, and the safety purposes those regulations serve – and so invite the chaos the Act was meant to avoid.

Section 1397(k) really has nothing to do with preemption, Part 1, below; at most serves to negate federal occupation of the field, Part 2, below; and certainly does not save claims that actually conflict with the Act that contains the clause, Part 3, below.

1. Section 1397(k), Fairly Read, Has Nothing To Do With Preemption.

Section 1397(k) provides that "compliance" with federal standards "does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). Compliance has nothing to do with preemption, and vice versa: Federal law preempts or not, by operation of federal law, regardless of compliance, and non-compliance cannot by private unilateral action un-preempt. *See AT&T v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) ("It is the Communications Act that renders the promises of preferences unenforceable"; thus private action in a tariff "cannot be construed to do what the parties have no power to do" under the Act).

Compliance with standards is a defense or not to a tort claim, as the substantive tort law provides. Petitioners' amici prove the point. "It is a widely accepted principle of tort law," they say – not preemption 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.' " ATLA Br. at 13; *see* Mo. Br. at 16, n.5 ("For a hundred years courts have considered axiomatic the principle that, against possible liability in tort, a defendant's compliance with governmental statutes and regulations is admissible only as evidence of the defendant's exercise of due care," not a complete defense.). As ATLA says, when Congress enacted the Safety Act, "Congress may be assumed to be familiar with these common-law principles of ordinary tort litigation." ATLA Br. at 13.

Thus § 1397(k)'s plain language (and structure, *see* Brief of Respondent American Honda Motor Co.; Brief of Amicus Curiae Product Liability Advisory Council), axiomatic tort law principles, and Congress' knowledge of them show the way to Congress' intent: to preserve state substantive state tort rules regarding the effect of compliance with federal standards as a defense on the merits to state tort claims, "not to preserve common law claims when they conflict with NHTSA standards." *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 298 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 697 (1998).

The legislative history is in accord. Petitioners and their amici cite no legislative statement that even suggests Congress intended by § 1397(k) to save conflicting state claims. And in fact, the history does not "specifically address[ ] the status of conflicting design standards established through the mechanism of common law [design] suits. . . . " *Wood*, 865 F.2d at 406. *See Pokorny*, 902 F.2d at 1123-25; *Taylor*, 875 F.2d at 826-27.

To the contrary, the legislative history – like the clause's express terms – does not speak to preemption at all, but simply opposes federalizing substantive tort principles. For example, the history recites that "[n]o *rules of evidence* are intended to be altered by this provision," and that "proof of compliance with Federal standards may be offered in any proceeding for such *relevance and weight* as courts and juries may give it." 112 Cong. Rec. 21487, 21490 (1966) (emphasis added). Preemption is not a matter of "rules of evidence" or "relevance and weight"; a tort-law compliance defense is. *See* Leflar Br. at 6 ("the comment of Congress assumed the continued existence of state tort law, including the traditional doctrine that compliance with government safety standards constitutes *nonconclusive* evidence of due care.").[17]

[17] Mr. Triplett (a personal injury lawyer, not a legislator), whose testimony petitioners and their amici embrace (*see, e.g.*, P. Br. at 29, AIEG Br. at 12-14; ATLA Br. at 22), is also in accord. *See* Brief of Respondent. Petitioners also quote Congressman Dingell's statement that the Safety Act "preserved every single common-law remedy." P. Br. at 30-31. But in

But, petitioners complain, that "it would have made no sense for Congress to . . . negat[e] the state law defense of compliance with federal safety standards [because] . . . it was already the law in every state that compliance with a federal regulation is *not* an absolute defense. . . . " P. Br. at 27, n.11. Petitioners' amici prove that false: "Some jurisdictions go further and mandate that compliance with such standards is a conclusive defense to tort liability; establishes a rebuttable presumption of non-negligence; or bars punitive damages." St. Br. at 16 (footnotes omitted); Leflar Br. at 20-21. Anyway the argument misses the point: Congress wanted to make clear that the states' rules on the compliance defense – whatever they were, uniform or not – were unaffected.

Petitioners' early Safety Act cases also are in accord. Petitioners say those cases speak to preemption and find none, but they do not; "the issue of implied preemption was never argued or addressed" in them. *Wood*, 865 F.2d at 417. Rather, those cases give § 1397(k) exactly the tort-law significance its language, structure and history counsel: to negate a federal compliance "defense on the merits," a "distinct" and "entirely different" issue from preemption. *Id.* at 417. *See Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *Schwartz v. American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Fox v. Ford Motor Co.*, 575 F.2d 774, 784-85 (10th Cir. 1978); *Knippen v. Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976); *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1198 (Ala. 1985), *overruled on other grounds*, 554 So.2d 927 (Ala. 1989); *Volkswagen of America, Inc. v. Young*, 321 A.2d 737, 746 (Md. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 345 N.E.2d 683, 688 (Mass. 1976).[18]

context, "Dingell's remarks refer to state tort suits which enforce federal standards, not to suits which would create different standards." *Wood*, 865 F.2d at 407 n.14.

[18] Those cases also answer petitioners' protest that "there could be no affirmative defense of compliance with a federal standard that" is not on

In sum, § 1397(k) preserves state-law rules regarding compliance as a defense. It does not speak to preemption, much less save conflicting state common-law claims from preemption.

2. Even If Directed At Preemption, Section 1397(k) Simply Negates Field Preemption.

"Savings clauses" directed at preemption traditionally serve a special function: to make clear Congress' intent not to "occupy the field," and thus to save all claims that do not conflict with federal law, but not those that do. *Ouellette*, 479 U.S. at 492 ("the saving clause negates the inference that Congress 'left no room' for state causes of action"); *Kalo*, 450 U.S. at 328 (savings clause included because without it, "it might have been claimed that, Congress having entered the field, the whole subject . . . had been withdrawn from the jurisdiction of the state courts") (quotation marks omitted); *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915) (savings clause included "to preserve all existing rights which were not inconsistent with those created by the statute"). If directed at preemption at all, § 1397(k) serves that function.

Thus the legislative history shows that Congress did not intend to shield manufacturers from "broad" liability, and that compliance with federal standards would "not *necessarily* shield any person from product liability at common law." *See* P. Br. at 29 (citing and quoting 112 Cong. Rec. 14230 (1966) and S. Rep. No. 89-1301 at 12 (1966)); AIEG Br. at 12. Those statements, if addressed to preemption at all, comport with Congress' usual intent in enacting general savings clauses: to make clear that an Act does not occupy the field – does not "necessarily" preempt "broad" common-law liability. They do

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point, so § 1397(k) could not apply in that setting. Pet. Br., p. 26. But in all those cases, there was no on-point federal standard, and the courts found that § 1397(k) applied. Also, there being no on-point standard, there was no conflict; that is why preemption was not in issue.

not speak to conflicting state claims at all, much less reflect some extraordinary intent to preserve them.

The "traditional purpose" reading is likewise supported by petitioners' other Safety Act cases. They found that § 1397(k) made clear that the automotive safety standards field was not occupied. *Buccery v. General Motors Corp.*, 60 Cal. App. 3d 533, 540-41 (1976); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Arbet v. Gussarson*, 225 N.W.2d 431, 438 (Wis. 1975); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1980); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 654, 656 (5th Cir. 1981), *as modified*, 670 F.2d 21, 673 F.2d 911 (1982); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983). The Third Circuit had no difficulty harmonizing its decision in *Dawson* (giving the savings clause that reading) with its decision in *Pokorny*, 902 F.2d at 1121 (finding "no airbag" claims conflicting and so preempted). Indeed, petitioners' amici, citing those cases, note that before the "no airbag" litigation, "not one appellate court . . . had ever entertained the notion that Congress chose to preempt common law liability in the *field* of motor vehicle product design." AIEG Br. at 4 (emphasis added).

But, petitioners continue, the "preemption provision cannot be read to give rise to any broader 'field' preemption of matters not regulated by the federal agency. Accordingly, there would be no reason for the savings clause to . . . affirmatively negate . . . broader field preemption." P. Br. at 28. Petitioners mistake the law. Field preemption turns on the Act's subject matter, purpose, and pervasiveness, not just a provision's words. *See Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 612-13 (1926). Petitioners also prove too much. If the preemption clause clearly excludes from preemption matters not covered by it, and, as petitioners argue, clearly excludes common-law claims, then § 1397(k) is redundant if it is read to address preemption *at all*.

In any case, it certainly does not save state claims that actually conflict with federal law. We turn to that.

3. Even If Directed At Preemption, Section 1397(k) Does Not Save Conflicting Claims.

This Court has never read a general savings clause to preserve claims that actually conflict with the Act that contains the clause. To the contrary, even when an Act has no preemption clause, a general savings clause cannot save state law that conflicts with the Act. *Abilene*, 204 U.S. at 446, lays down the principle. There, a general savings clause purported to save "the remedies now existing at common law or by statute." Nonetheless, this Court held an existing but conflicting common-law claim preempted, because a savings clause "cannot in reason be construed as continuing . . . a common law right . . . absolutely inconsistent with the provisions of the act." *AT&T*, 524 U.S. at 227-28 (savings clause "preserved only those rights that are not inconsistent with the statutory filed-tariff requirements," citing *Abilene*); *Morales*, 504 U.S. at 384-85 (clause saved "the remedies now existing at common law or statute"; a "general 'remedies' savings clause cannot be allowed to supersede the specific substantive pre-emption provisions," and "we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause") (citation and quotation marks omitted); *Ouellette*, 479 U.S. at 493-94, 505 (savings clause provided "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law"; Senate Report said "[c]ompliance with . . . Act would not be a defense to a common law action for . . . damages"; conflicting common-law claims preempted because Congress could not have "intended to undermine . . . [the Act] through a general savings clause"); *Kalo*, 450 U.S. at 328 (clause providing nothing in Act "shall in any way abridge or alter the remedies existing at common law or by statute" did not save conflicting common-law damage claim); *see also John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99 (1993) (saved state law "generally is not displaced," but is " 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' ").

The rule also makes good practical sense. Congress cannot foresee all the ways that state law might some day conflict with Congress' purposes. *Accord*, AIEG Br. at 18. Nothing permits one to assume that Congress would be so rash or cavalier as to discard the Supremacy Clause, and so accord conflicting state laws carte blanche to undermine Congress' legislation, all through a general savings clause that does not and cannot take into account whatever future conflicts may come to be. In fact, the law assumes the opposite. Congress' "purpose" to preempt is "evidenced," among other ways, by the mere fact that "state policy may produce a result inconsistent with the objective of the federal statute." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

But, petitioners argue, "Section 1397(k) is not a 'general savings clause.' It specifically addresses and preserves from federal preemption one aspect of state law: common law liability." P. Br. at 27. That, with respect, is a word game. A general savings clause is "general" because it generally saves claims in some field – say common law, or insurance law – but does not speak to specific laws within the field that may conflict with federal law some day; Congress will not be understood to have saved a specific conflicting law that it did not address. Thus in *John Hancock*, the saved field was very narrow: "any law . . . which regulates insurance, banking, or securities." Nevertheless, the Court held that conflicting state laws within the field were not saved. 510 U.S. at 99. *See also Morales*, 504 U.S. at 384-85 (applying *Abilene* principle to ERISA savings clause).

Indeed, petitioners' specific/general dichotomy reduces to absurdity. The notion is that the broader the savings clause, the less it saves, and the narrower the clause, the more it saves. Why would that be?

The *Abilene* principle has been the law throughout this century, and Congress is presumed to know about it and legislate in light of it. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988); *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979). Reading this clause in light of that principle, and assuming the clause is directed at

preemption, it saves all claims that do not conflict with the Safety Act and the regulations under it, but not those that do. Accordingly, § 1397(k) would save all claims that do not conflict with an FMVSS: claims based on manufacturing defects; claims based on state standards concerning aspects of performance not covered by federal standards; and claims based on state standards concerning aspects of performance that are covered by federal standards, but do not conflict with those federal standards. That is most claims.

But claims that actually conflict with federal law, though rare, are not saved. This is that rare claim. It is preempted.

CONCLUSION

The Court should affirm the decision of the District of Columbia Circuit.

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Respectfully submitted,

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