Granted

No. 98-1811

IN THE

Supreme Court of the United States

Alexis Geier, *et al.*,

Petitioners,

v.

American Honda Motor Company, Inc., *et al.*,

Respondents.

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

BRIEF FOR PETITIONERS

Robert M.N. Palmer
The Law Offices of Robert M.N. Palmer, P.C.
205 Park Central East, Ste. 511
Springfield, MO 65801-5720
(417) 865-3234

James W. Taglieri
Cadeaux & Taglieri, P.C.
1100 Connecticut Avenue, NW, Suite 800
Washington, D.C. 20036
(202) 785-3373

Arthur H. Bryant
(Counsel of Record)
Leslie A. Brueckner
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Avenue, NW, Suite 800
Washington, D.C. 20036
(202) 797-8600

QUESTION PRESENTED

Whether an automobile manufacturer's compliance with a federal motor vehicle safety standard promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), preempts state common law claims that an automobile was defectively designed because it lacked an airbag where (1) the Safety Act expressly provides that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law"; and (2) the federal safety standard was a minimum performance standard that encouraged, but did not require, the installation of airbags in cars?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioners Alexis Geier, William Geier, and Claire Geier and respondents American Honda Motor Company, Inc., Honda of America Manufacturing, Inc., and Honda Motor Company, Ltd. (collectively, "Honda").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Legislative Materials:

Regulatory Materials:

Miscellaneous:

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 166 F.3d 1236. The order of the district court granting defendants' motion for summary judgment (Pet. App. 17-21) is not reported.

JURISDICTION

The court of appeals entered judgment on February 5, 1999. This Court granted the petition for a writ of *certiorari* on September 10, 1999. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY AND REGULATORY PROVISIONS

This case involves the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 ("Standard 208"). Relevant portions of the Safety Act and Standard 208 are in an appendix to this brief.[1]

STATEMENT OF THE CASE

A. Introduction. Congress passed the Safety Act in 1966 to reduce motor vehicle injuries and deaths. To achieve that goal, Congress authorized the federal government to issue minimum safety standards for motor vehicle performance. 15 U.S.C. §§ 1391(2), 1392(a). At the same time, Congress made clear that "[c]ompliance with any Federal motor vehicle safety standard does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). In keeping with this statutory directive, for 20 years after the Act's passage, the

[1] On July 5, 1994, Congress recodified the Safety Act "without substantive change." Pub. L. No. 103-272, 108 Stat. 745, 941. The relevant recodified provisions are also set forth in the appendix.

nation's appellate courts unanimously agreed that common law claims are not preempted by the Safety Act or by federal motor vehicle safety standards.[2]

Against this backdrop, in 1984, the National Highway Traffic Safety Administration ("NHTSA") amended the federal motor vehicle safety standard governing occupant restraint systems – Standard 208 – to include a performance requirement encouraging, but not requiring, the installation of airbags. Consistent with the Safety Act's dictate, NHTSA never suggested that compliance with Standard 208 would preempt any common law claims involving airbags. To the contrary, the agency found that "the most effective system is an airbag plus a lap belt and shoulder harness" (49 Fed. Reg. 28962, 28986 (1984)) and, in keeping with Congress' express preservation of common law claims, specifically noted that "potential liability for any deficient systems" would help spur auto manufacturers to install the best system. *Id.* at 29000.

This lawsuit harmonizes well with Congress' and NHTSA's actions. Petitioners allege that Honda should have

[2] *See Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Kippen v. Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976); *Fox v. Ford Motor Co.*, 575 F.2d 774, 778 (10th Cir. 1978); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1978), *cert. denied*, 450 U.S. 959 (1981); *Dorsey v. Honda Motor Co., Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1198 (Ala. 1985); *Volkswagen of America, Inc. v. Young*, 321 A.2d 737, 746 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 345 N.E.2d 683, 688 (Mass. 1976); *Arbet v. Gussarson*, 225 N.W.2d 431, 438 (Wis. 1976).

done more than the bare minimum required by Standard 208 and that Alexis Geier would not have been seriously injured if the 1987 Honda Accord she was driving contained the system NHTSA called the "most effective": an airbag plus a lap belt and shoulder harness. The lower court nonetheless held that, even if this allegation is true and Honda would be held liable at common law, Honda is immune from suit solely because it complied with Standard 208. This ruling violates the plain terms of the Safety Act, misconstrues Standard 208, and improperly interferes with both the power of the states in our federal system and the power of Congress to establish the law.

B. The Safety Act. Congress enacted the Safety Act in response to the deaths and injuries resulting from unsafe vehicles. *See* S. Rep. No. 89-1301, 89th Cong., 2d Sess., 1-2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2709-10; H.R. Rep. No. 89-1776, 89th Cong., 2d Sess. 10-11 (1966). The Act's sole stated purpose is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. *See also Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 55 (1983) ("Congress intended safety to be the pre-eminent factor under the Act.").

To this end, Congress empowered the Department of Transportation to prescribe "motor vehicle safety standards" that "shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms." 15 U.S.C. § 1392(a). The Act further defines "safety standards" as "*minimum* standard[s] for motor vehicle *performance* or motor vehicle equipment *performance*. . .." 15 U.S.C. § 1391(2) (emphases added). In issuing these minimum performance standards, the agency is directed to consider "relevant available motor vehicle safety data," whether the proposed standard "is reasonable, practicable and appropriate" for the particular type of motor vehicle, and the "extent to which such standards will contribute

to carrying out the purposes" of the Act. 15 U.S.C. § 1392(f)(1), (3), (4).

When it enacted the Safety Act, Congress was fully aware of the existence of state common law design defect lawsuits against manufacturers.[3] For that reason, Congress explicitly addressed what it did and did not intend to preempt in two separate sections of the Safety Act: the preemption provision and the savings clause. The former does not mention common law claims. Rather, it states in pertinent part:

> 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.

---

[3] *See, e.g., Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 1256-57 (1966) ("*House Hearings*") (testimony of Representative Charles P. Farnsley regarding design defect litigation involving the General Motors Corvair); *id.* at 1315 (statement of Daniel P. Moynihan regarding *Comstock v. General Motors Corp.*, 99 N.W. 2d 627 (Mich 1959)); *id.* at 1351 (statement of Mr. Maurice A. Gargell concerning Corvair design defect litigation); *Hearings on S. 3005 Before the Senate Committee on Commerce*, 89th Cong., 2d Sess. 252 (1966) (testimony of Dr. Seymour Charles noting pendency of 100 lawsuits challenging safety design of the Corvair). *See also generally* Kurt B. Chadwell, *Automobile Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141, 178 n.223 (1994).

15 U.S.C. § 1392(d).

The Safety Act's savings clause, in contrast, expressly refers to common law. It provides that "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

C. Standard 208. Standard 208 sets forth minimum performance requirements for the protection of vehicle occupants in crashes. *See* 49 C.F.R. § 571.208. The version of Standard 208 at issue here was promulgated in 1984, in response to this Court's decision in *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983). Under this rule, manufacturers were encouraged, but not required, to install airbags in their vehicles. (Current law, in contrast, requires airbags in all new vehicles. *See* 49 U.S.C. § 30127(b); 58 Fed. Reg. 46551 (1993)). Although this case involves the 1984 amendments to Standard 208, a brief review of the Standard's prior history is essential to understanding the purposes of the 1984 rule.

1. Regulatory History. As originally issued in 1967, Standard 208 simply required the installation of seatbelts in all automobiles. *See State Farm*, 463 U.S. at 34. However, "[i]t soon became apparent that the level of seatbelt use was too low to reduce traffic injuries to an acceptable level." *Id.* NHTSA therefore began considering "passive restraint systems" that do not require any independent action by the vehicle's occupant. *Id.* at 35. Two types of automatic protection emerged from the investigation: automatic seatbelts and airbags. *Id.* Ultimately, the agency's investigation showed that these passive restraints were substantially safer than manual alternatives, potentially saving approximately 12,000 deaths and 100,000 serious injuries annually. *Id.*

Based on these findings, in 1969, NHTSA proposed a rule that would have required the installation of passive restraints in automobiles. *See id.* After extensive rulemaking proceedings, during which the agency repeatedly amended the rule to require various sorts of passive restraints, *see id.* at 35-36, and the automobile industry waged "the regulatory equivalent of war against the airbag," *id.* at 49-50, NHTSA suspended the passive restraint requirement in 1976. *Id.* at 36. Although Transportation Secretary William Coleman concluded that airbags were safe and effective, he decided not to mandate passive restraints because he expected that there would be "widespread public resistance to the new systems." *Id.* at 37.

Secretary Coleman's successor, Brock Adams, reversed the decision and mandated the phasing in of passive restraints for model years 1982 to 1984. *Id.* The two principal systems that would satisfy the standard were airbags and automatic seat belts; the choice of which system to install was left to the manufacturers. *See id.* Seven months before the first deadline, however, new Transportation Secretary Drew Lewis delayed and then rescinded that order "due to changed circumstances and, in particular, the difficulties of the automobile industry." *Id.* at 38. Finding that most manufacturers would install detachable automatic seatbelts rather than the far-safer airbags, he ruled that the passive restraint requirement would defeat auto safety, because the automatic seatbelts would simply be detached. *Id.* at 38-39.

In 1983, this Court in *State Farm* held that the rescission of Standard 208 was arbitrary and capricious. *Id.* at 57. The Court was especially critical that, after deciding that detachable automatic seat belts would not work, NHTSA had not even considered requiring airbags as the only form of passive restraints. *Id.* at 48. This was clearly arbitrary, in the Court's view, because "the agency's original proposed Standard

contemplated the installation of inflatable restraints [*i.e.* airbags] in all cars." *Id.* at 46.[4] Since that time, the agency had reaffirmed "the life-saving potential of the airbag" as a highly effective form of passive restraint. *Id.* at 47-48. "Given the effectiveness ascribed to airbags by the agency," the Court wrote, "the mandate of the Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags." *Id.* at 48. Because "NHTSA's . . . analysis of airbags was nonexistent," *id.*, the Court vacated the agency's decision rescinding Standard 208 and remanded for further consideration. *Id.* at 57.

2. The 1984 Rule. In the aftermath of *State Farm*, Secretary of Transportation Elizabeth Dole reinstated the passive restraint requirement, with a phase-in period beginning September 1, 1986, and full implementation required by September 1, 1989. 49 Fed. Reg. 28962 (1984).[5] Under the new rule, auto manufacturers could satisfy the passive restraint requirement "by using automatic detachable or nondetachable

---

[4] The Court noted that, "[w]hile NHTSA's 1970 passive restraint requirement permitted compliance by means other than the airbag . . . , '[t]his rule was a de facto air bag mandate since no other technologies were available to comply with the standard.'" *Id.* at 46 n.11 (citation omitted).

[5] Under the phase-in schedule, "a minimum of 10 percent of all cars manufactured after September 1, 1986, must have automatic occupant crash protection. After September 1, 1987, the percentage is raised to 25 percent; after September 1, 1988, it is raised to 40 percent; and after September 1, 1989, all new cars must have automatic occupant crash protection." 49 Fed. Reg. 28999. The rule further provided that the requirement for passive restraints would be rescinded if, by the end of the phase-in period (April 1, 1989), mandatory seatbelt use laws ("MULs") were passed by enough states to cover two-thirds of the U.S. population. *Id.* at 28963. This never occurred, and the MUL provision was ultimately deleted. *See* 58 Fed. Reg. 46563 (1993).

belts, *airbags*, passive interiors, or other systems that will provide the necessary level of relief." *Id.* at 28996 (emphasis added). Thus, under this version of the rule (which applies to petitioners' vehicle in this case), manufacturers were permitted, but not required, to use airbags in their vehicles.[6]

Because this Court had found the prior Secretary's decision arbitrary and capricious for failing to consider an "airbags only" requirement, Secretary Dole went to some length to explain why the agency was not requiring "airbags only" – instead of automatic seat belts and other types of passive restraints – in all cars. First, comparing the two, she said that "[a]lthough airbags may provide greater safety benefits, when used with belts, and potentially larger injury premium reductions than automatic belts, they are unlikely to be as cost effective." *Id.* at 29001. Second, Secretary Dole expressed concern that, due to public unfamiliarity with the technology, a government-mandated "airbags only" rule "could lead to a backlash affecting the acceptability of airbags." *Id.* Third, Secretary Dole noted that several commenters "questioned the Department's authority to issue an "airbags only" standard, claiming that it would be a 'design' standard." *Id.* She said that, "[e]ven if the Department could legally issue a performance standard that could only be met by an airbag under present technology," doing so would create "a number of problems" and could "unnecessarily stifle innovation" in other types of passive systems, such as automatic belts and passive

[6] The agency noted that airbag technology had already been employed by various auto makers at various times. *See, e.g.*, 49 Fed. Reg. at 28965 (noting that, between "1973 and 1976, General Motors produced approximately 11,000 full-sized Chevrolets, Buicks, Oldsmobiles and Cadillacs equipped with airbags, . . . Ford installed airbags in 831 Mercurys, [and] a small number were installed in Volvos also.") NHTSA further noted that, since the early 1980s, Mercedes Benz had sold approximately 22,000 airbag-equipped cars worldwide. *Id.*

interiors. *Id.* For these and other reasons, the agency declined to mandate airbags in all vehicles. *See id.*

The agency made clear, however, that systems that included airbags were the preferred option. Secretary Dole repeatedly emphasized that the safest system was precisely the one that the petitioners seek to prove was an available, safer design in this case: "*the most effective system is an airbag plus a [manual] lap and shoulder belt.*" *Id.* at 28986 (emphasis added). *See also id.* at 28984. The Secretary also emphasized that this was not merely the agency's opinion; to the contrary, the auto manufacturers themselves acknowledged that "the combination of an airbag and manual lap and shoulder belts . . . [is] the most effective system of all." *Id.* at 28966.

In keeping with these observations, the new rule was designed to encourage the development and availability of airbags. As NHTSA explained, "[a]utomatic occupant protection systems that do not totally rely on belts, such as airbags or passive interiors, offer significant additional potential for preventing fatalities and injuries, at least in part because the American public is likely to find them less intrusive; *their development should be encouraged through appropriate incentives.*" 49 Fed. Reg. at 28963 (emphasis added).

The first such incentive was the use of a phase-in requirement that permitted manufacturers gradually to install passive restraints over a three-year period. Secretary Dole explained, *id.* at 29000 (emphasis added):

> If the Department had required full compliance by September 1, 1987, it is very likely all of the manufacturers would have had to comply though the use of automatic belts. Thus, *by*

> *phasing-in the requirement, the Department makes it easier for manufacturers to use other, perhaps better, systems such as airbags and passive interiors.*

The second incentive to "encourage the use of non-belt technologies during the phase-in period" (*id.* at 28997) was to give manufacturers "extra credit" toward their percentage requirement if they used "something other than an automatic belt to provide the automatic protection to the driver." *Id.* at 29001. Under the rule, "[f]or each car in which they do so [*i.e.*, install a non-belt passive restraint, such as an airbag], they will receive credits for an extra one-half automobile toward their percentage requirement." *Id.* at 29000. Although the credit could be earned by non-belt passive restraints other than airbags (such as "passive interiors," *see id.* at 28965), NHTSA "believe[d] that the primary system that would be used under this 'extra credit' alternative would be the airbag." *Id.* at 29000. This was desirable because "airbags should provide very significant safety benefits." *Id.* The agency added that, "[e]ven though fewer cars would be equipped with automatic protection if extra credit is given for airbag automobiles," the tradeoff was worth it because "airbags – when used with belts – are very effective." *Id.*

The final incentive identified by the agency to encourage the use of non-belt alternatives – such as airbags – was the threat of future liability imposed through the tort system. According to Secretary Dole, "[s]ome commentators on the rule suggested that [auto] manufacturers would use the cheapest system [automatic seatbelts] to comply with the automatic restraint requirement . . .." *Id.* at 29000. In response, she stated that "the Department does not agree with this contention. It believes that competition, *potential liability for any deficient systems*, and pride in one's product would prevent

this." *Id.* (emphasis added). Thus, the agency believed that "potential liability" could create an incentive for manufacturers to avoid the cheapest passive restraint systems in favor of safer alternatives – such as the one the agency identified as the safest alternative of all: "an airbag plus a lap and shoulder belt." 49 Fed. Reg. at 28986.

In keeping with this third incentive, the preamble to the 1984 rule contains no indication that the agency sought to preempt any common law tort claims involving airbags or any other type of occupant restraint. To the contrary, in addition to the remark noted above, Secretary Dole explicitly noted comments that the auto manufacturers could be sued by crash victims who were injured because their cars lacked airbags:

> Another potential source of manufacturer liability was raised by Stephen Teret, representing the National Association for Public Health Policy:
>
> "If a reasonable means of protection is being denied to the motoring public, the denial should lead to liability, even if the liability can be imposed on each and every car manufacturer. People whose crash injury would have been averted had the car been equipped with an air bag can sue the car manufacturer to recover the dollar value of the injury."

Id. at 28972. *See also id.* at 28971 (discussing various comments relating to potential product liability claims involving airbags under the 1984 rule). Thus, the agency was aware of the possibility of future damage actions involving airbags, yet it never suggested that such claims would conflict

with the 1984 version of Standard 208 – or that such claims would be preempted.

D. This Litigation. In 1992, Alexis Geier was driving a 1987 Honda Accord in the District of Columbia. J.A. 2. At the time the vehicle was manufactured, Standard 208 required Honda to install some form of passive restraint in at least 10 percent of its cars (*see* n.5, *supra*), and permitted Honda to install passive restraints (including airbags) in all of its cars. Honda elected not to install any passive restraint in the vehicle driven by Ms. Geier; rather, her car contained the type of system – a manual three-point lap belt and shoulder harness – that was still permitted by Standard 208 during the phase-in period, but would be legally barred thereafter.

At the time of the accident, Ms. Geier was wearing the lap belt and shoulder harness provided for the driver in the design of the car. Rounding a curve, the vehicle spun out of control and collided with a tree. The lap belt and shoulder harness did not adequately protect Ms. Geier, and she sustained multiple serious injuries. J.A. 2-5.

On January 12, 1995, Ms. Geier and her parents filed this lawsuit seeking damages against Honda under the common law of the District of Columbia on theories of negligence, breach of warranty, and strict product liability. J.A. 5-42. Petitioners allege that the 1987 Honda Accord was negligently and defectively designed because it lacked "an effective and safe passive restraint system, including, but not limited to airbags . . ." (J.A. 3-4), and that, if the car had contained a driver's-side airbag in addition to the manual lap belt and shoulder harness, Ms. Geier would not have been seriously injured in the crash.

Even though the design advocated by petitioners was fully consistent with Standard 208 (and was the safest option identified by NTHSA in the preamble to the rule), Honda moved for summary judgment on the ground that the Geiers' claims are preempted by the Safety Act and Standard 208. Pet. App. 17. The district court granted the motion and the court of appeals affirmed, holding that petitioners' claims were impliedly preempted because they conflict with the goals of Standard 208. Pet. App. 17-20.

The appeals court first acknowledged it would be "problematic" to find petitioners' claims expressly preempted in light of both the Act's "broadly worded savings clause" and the strong presumption against finding express preemption of common law claims when Congress' intent to preempt "is not clear from the statute's language." Pet. App. 10-11. Given the broad wording of the savings clause, the court reasoned, "it would be difficult to discern a 'clear and manifest purpose of Congress' to preempt a design defect claim based on the absence of an airbag." Pet. App. 11 (citations omitted).

The lower court ultimately decided that it need not resolve the express preemption question, however, since it instead found implied preemption of petitioners' claims. Pet. App. 12. The court first rejected petitioners' assertion that, under *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Safety Act's clear express preemption provisions preclude any inquiry into implied preemption. App. 14. The court went on to hold that petitioners' claims are "implicitly preempted" on the ground that they conflict with the regulatory framework established by Standard 208. App. 16. While conceding that the 1984 rule "does not mandate or forbid the use of airbags" (Pet. App. 14), the court held that imposition of common law liability for failure to install an airbag would frustrate the federal government's goals of "encouraging both public

acceptance of the airbag technology and experimentation with better passive restraint systems." Pet. App. 15. Thus, the court concluded, Ms. Geier had no right to seek compensation for her injuries at common law.

SUMMARY OF ARGUMENT

In determining whether a state cause of action is preempted by federal law, the Court's sole task is to ascertain the intent of Congress. This determination of Congressional intent is not made in a vacuum; rather, it is informed by a strong presumption against preemption that can be overcome only by a clear manifestation of congressional intent to the contrary.

Measured in this light, it is clear that Congress did not intend to preempt common law tort claims under the Safety Act. Indeed, the two provisions of the Safety Act that set forth Congress's intent with respect to preemption – the preemption provision (15 U.S.C. § 1392(d)) and the savings clause (15 U.S.C. § 1397(k)) – reveal that common law claims are expressly *preserved*, not preempted.

The language of the preemption provision shows that Congress only intended to preempt state *legislative* or *administrative* safety standards that are not identical to federal safety standards governing the same aspect of motor vehicle performance, and not to preempt common law tort actions. Thus, the Safety Act's express preemption provision does not even encompass common law tort claims.

Any doubt on this point would be dispelled by the savings clause, which states in sweeping and unambiguous terms that "compliance with any . . . safety standard . . . does not exempt any person from any liability under common law." Both the plain language of this "anti-preemption" provision and its legislative history leave no room for a conclusion that petitioners' claims are expressly preempted by the Safety Act.

Nor are petitioners' claims impliedly preempted by the Safety Act. This Court has made clear that, where Congress has spoken directly and clearly on the issue of preemption – as it did in the Safety Act – there can be no finding of implied preemption. Because the Safety Act contains both an express preemption provision and an express anti-preemption provision manifesting a congressional intent *not* to preempt, any inquiry into implied conflict preemption is precluded. Thus, all of Honda's arguments about the alleged conflict between petitioners' claims and Standard 208 are irrelevant.

Even assuming, however, that this Court could reach the issue of implied conflict preemption in this case, there is no preemption here since petitioners' claims do not conflict with the Safety Act or Standard 208. Implied conflict preemption applies only where it is impossible for a private party to comply with both state and federal requirements or where state law would frustrate the full purposes and objectives of Congress. Impossibility is not an issue in this case, since Standard 208 undisputably would have permitted installation of an airbag in Ms. Geier's 1987 Honda and, in any event, would allow Honda to pay damages to the Geiers.

Similarly, petitioners' claims do not frustrate any federal purpose. First, this lawsuit does not frustrate any Congressional purpose, since Congress made clear (in the Act's savings clause) that the preservation of common law claims would *aid* the accomplishment and execution of its full purposes. Congress recognized that federal regulations and common law liability can and should work together to create safer vehicles. Given Congress' expressed desire to preserve all common law claims, petitioners' claims would not frustrate the purpose of

the Safety Act. But a finding of implied preemption here would.

Petitioners' claims are also consistent with the goals underlying Standard 208. As Congress intended, NHTSA promulgated Standard 208 as a minimum performance standard and left the common law undisturbed. NHTSA noted, however, that the "most effective" system was "an airbag plus a lap belt and shoulder harness," 49 Fed. Reg. at 28986, and explicitly relied on several incentives to encourage the use of airbags – including the threat of "potential liability for any deficient system." *Id.* at 29000. Petitioners' attempt to hold Honda liable for failing to install an airbag (in addition to a manual lap belt and shoulder harness) in the 1987 Honda Accord is in perfect harmony with this approach.

Finally, contrary to the lower court's ruling, petitioners' claims do not frustrate the goals identified by NHTSA in its 1984 rule of "allowing consumers to adjust to the new [airbag] technology" and "permitting experimentation with designs for even safer systems." Pet. App. 15. Regarding the former, the agency declined to require airbags in all cars by administrative fiat partly because it feared a public backlash. No such backlash would result from common law liability in a no-airbag suit, however, both because a manufacturer would not likely change its conduct in response to a jury verdict and because, even if the manufacturer did, it would make every effort to *promote* public acceptability of airbags. This lawsuit is also in line with NHTSA's goal of promoting technological experimentation, since (as Secretary Dole recognized) the common law tort system actually encourages manufacturers to experiment with safer product designs. Because petitioners' claims are entirely consistent with – and actually advance – the goals underlying Standard 208, the lower court's finding of implied conflict preemption is in error.

ARGUMENT

This case is about federalism and the separation of powers. For decades, this Court has emphasized that federal preemption analysis is governed by two bedrock legal principles based on these Constitutional concerns.

First, as the Court recently reaffirmed in *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), a party seeking preemption of state law bears a heavy burden of overcoming the long-standing "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action." In all preemption cases, a court must start with an assumption "that the States' historic police powers cannot be superseded by a Federal Act unless that is Congress' clear and manifest purpose." *Id.* (citation omitted). These are not empty platitudes; they stem from and protect our Constitutional system of federalism. *See, e.g., Jones v. Rath Packing*, 430 U.S. 519, 525 (1977) (the presumption against preemption "provides assurance that 'the federal-state balance' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts.") (citation omitted).

This presumption is especially strong where, as in this case, preemption would displace the historic power of the states to protect the health and safety of their citizens. *See Medtronic*, 518 U.S. at 485. Moreover, where preemption of common law claims would leave injured individuals without any state or federal remedy, which is the result sought by Honda here, a court may find preemption only in the most compelling circumstances. *See English v. General Electric Corp.*, 496 U.S. 72, 87-90 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

Second, in determining whether a state cause of action is preempted by federal law, the Court's "sole task is to

ascertain the intent of Congress." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (plurality). This principle, too, is Constitutionally-based; it derives from and preserves the separation of powers, limiting the courts to their Constitutionally-assigned role. As long as Congress acts within the scope of its powers, the courts must stay true to Congress' intent. They are not free to use the doctrine of implied preemption (or anything else) to substitute their judgment for that of Congress.

I. Petitioners' Claims Are Not Expressly Preempted And, In Fact, Are Expressly Preserved.

The provisions of the Safety Act that set forth Congress' intent regarding preemption – the preemption provision (15 U.S.C. § 1392(d)) and the savings clause (15 U.S.C. § 1397(k)) – reveal that common law claims are *expressly preserved*, not preempted.

A. The Preemption Provision Does Not Encompass Common Law Claims.

The Safety Act's preemption provision states in pertinent part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d).

The most notable feature of this language is the absence of any reference at all to common law claims. Although the absence of an explicit reference to common law does not automatically preclude a finding of preemption, *see Cipollone*, 505 U.S. at 520-22, the absence of such a reference in Section 1392(d) *combined with* the express reference to "common law" in the Act's savings clause, 15 U.S.C. § 1397(k) (discussed in more detail below), defeats any notion that Congress intended the Safety Act's preemption provision to encompass common law claims. *E.g.*, *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (internal quotation marks omitted). *Accord Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).[7]

Even putting aside the absence of any reference to "common law" in the preemption provision, however, many other aspects of Section 1392(d) and the Safety Act demonstrate that Congress never intended to preempt tort suits against auto manufacturers.

First, the preemption provision only prohibits a State from establishing or continuing in effect a "safety standard" that

---

[7] The absence of any reference to common law claims in the Act's preemption provision would be telling even if the savings clause did not exist. Congress has repeatedly shown its ability to refer to "common law" when it intends to include it within the scope of a preemption clause. *Compare, e.g.*, Copyright Act of 1976, 17 U.S.C. § 301(a) (1977) (preempting rights "under the common law, rule, or public policy"); Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e) (1989) (preempting any "State constitution, statute, court decree, common law, rule or public policy").

conflicts with a "Federal motor vehicle safety standard" established under the Act. Although the term "safety standard," standing alone, may not be wholly self-defining, it does not stand alone in Section 1392(d): rather, Congress used the same term in the same provision *twice* to refer, in the first instance, to the type of federal law that is to be accorded preemptive effect – a "Federal motor vehicle safety standard" – and, in the other, to the type of state law that is subject to preemption – again, a "safety standard." "Safety standard," moreover, is the term used throughout the Act to refer to the *administrative* standards that the Secretary is authorized to adopt pursuant to the Act.[8] The use of the same term to refer to the state norms that may be displaced by a Federal "safety standard" is, under normal rules of statutory construction, indicative that the term is meant to have the same meaning. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (It is a "basic canon of statutory construction that identical terms within an Act bear the same meaning.") (citing cases); *Morrison-Knudsen Const. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983) ("[A] word is presumed to have the same meaning in all subsections of the same statute."). *See also Medtronic*, 518 U.S. at 489 (plurality opinion) (citing other uses of the term "requirements" throughout statute to demonstrate that Congress' focus is "enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries"). Thus, the only sensible reading of the Safety Act's preemption provision

[8] *See, e.g.*, 15 U.S.C. § 1392(e) ("[t]he Secretary may by order amend or revoke any [f]ederal motor vehicle safety standard . . ."); *id.* at § 1392(h) ("[t]he Secretary shall issue initial [f]ederal motor vehicle safety standards. . ."); *id.* at § 1392(i)(1)(A) ("the Secretary shall publish proposed [f]ederal motor vehicle safety standards . . ."); *id.* at § 1392(i)(1)(B) ("the Secretary shall promulgate [f]ederal motor vehicle safety standards . . .").

is that a "safety standard" promulgated under the Act will only preempt a state legislative or administrative "safety standard" that is not identical to the federal standard.[9]

Second, the fact that Section 1392(d) limits the preempted field to state and local safety standards "with respect to" motor vehicles further demonstrates that preemption under the Safety Act is limited to state positive law. The tort duties under which plaintiffs seek compensation are not duties "with respect to" motor vehicles, but rather are *general* state-law responsibilities concerning the conduct of persons who manufacture and sell *all kinds* of products. On the other hand, state positive-law requirements to which the preemption provision is directed are, in fact, standards "with respect to" motor vehicles. *See Medtronic*, 518 U.S. at 501-02 (rejecting preemption of common law claims on ground that "the general state common-law requirements in this suit were not specifically developed 'with respect to' medical devices. Accordingly, they are not the kinds of requirements that Congress and the [agency] feared would impede the ability of federal regulators to implement and enforce specific federal requirements.").

Third, the "safety standards" referred to in the Safety Act's preemption provision are "*minimum* standards" that concern an "aspect of *performance*." This was not an idle

[9] In this respect, the Safety Act is markedly different from the statute in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), which preempted any relevant "law, rule, regulation, order or standard," thus reaching virtually every method by which a State can impose legal obligations, and the 1969 statute in *Cipollone*, which used the sweeping term "requirement or prohibition . . . imposed under State law" to manifest Congress' intent to preempt all forms of State law. 505 U.S. at 521-22.

choice of words by Congress. As the Senate Report accompanying the Safety Act explained:

> Unlike the General Services Administration's procurement standards, which are primarily *design* specifications, both the interim standards and the new and revised standards are expected to be *performance* standards, specifying the required minimum safest performance of vehicles but not the manner in which the manufacturer is to achieve the specified performance. . . . The Secretary would thus be concerned with measurable *performance* of a braking system, but *not its design details*.

S. Rep. No. 89-1301, 89th Cong., 2d Sess. 6 (1966) (emphasis added). Common law claims, in contrast, do not set specific minimum performance standards; they focus – as motor vehicle safety standards do not – on the *manner* in which the manufacturer chose to achieve the specific performance. Indeed, this case focuses on whether Honda's *design* was negligent and/or defective.

Fourth, the preemption provision only applies to a safety standard "establish[ed]" or "continue[d] in effect" by a "State or political subdivision of a State." Construing an award of damages to a tort victim as "establishing" or "continuing in effect" an auto safety standard is at odds with the ordinary meaning of Congress' words. The duties relied on by tort claimants are general duties under the common law that have evolved over hundreds of years. Although a jury award of damages would represent confirmation of a pre-existing common law duty – for instance, the duty to act non-negligently – only an inept grammarian could construe an award of damages in a tort suit as "establishing" or "continuing in effect"

a safety standard or other regulation. On the other hand, it is common parlance to say that a previously "established" statute or regulation "continues in effect."

Fifth, it makes no sense to construe the term "State or political subdivision of a State" as encompassing a jury (or judge) in a tort case. Political subdivisions of states, such as counties and towns, often enact health and safety laws. For this reason, it was logical for Congress to include "political subdivisions" in the coverage of the Act's preemption provision, lest there be some ambiguity as to the breadth of the term "State." At the same time, no one would ordinarily describe an award of damages by a jury or judge as being issued by a "State or political subdivision of a State." And it is impossible to say that a jury or judge in an Article III *federal* court is in any sense a "State or political subdivision thereof."

Sixth, the Safety Act defines a "motor vehicle safety standard" as a "minimum standard for motor vehicle performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. § 1391(2). This definition plainly encompasses state statutory and administrative performance standards and, just as plainly, does not encompass either general common law duties or jury verdicts applying those duties in specific cases, neither of which "provide objective criteria" of the type set forth in administrative regulations.

Seventh, Section 1392(d) contains certain exceptions that further show that Congress did not intend to preempt common law claims. After describing its preemptive reach, the statute provides that (1) states may "enforce" safety standards that are "identical" to Federal safety standards; and (2) Federal, state, and local governments may, with respect to vehicles procured for their own use, establish safety requirements that

impose "a higher standard of performance" than that imposed by an otherwise applicable federal standard. App. 1. Once again, these provisions plainly relate to federal, state, and local standards concerning the actual performance of vehicles – not to common law claims, which have no conceivable relevance to state and local "enforcement" of "identical" safety standards.

Eighth, if the preemption provision did apply to common law claims, it would, by its terms, preempt virtually *all* common law claims involving aspects of motor vehicle performance governed by a federal safety standard, including those routinely allowed by the courts over the past 30 years. *See* n.2, *supra*. Federal motor vehicle safety standards are currently in effect as to almost all aspects of performance of motor vehicles and their equipment. If Honda is right, and the preemption provision encompasses all common law claims "which [are] not identical to [a] Federal standard" governing the same "aspect of performance," 15 U.S.C. § 1392(d), then NHTSA's rules preempt almost all common law claims, leaving design defect victims with no remedy.

This cannot be what Congress intended, especially since the Safety Act provides no form of compensation for victims of defectively designed automobiles. To use the words of *Medtronic*, "[Honda's] construction of [the statute] would therefore have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation . . . It is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct,' and it would take language much plainer than the text of [Section 1392(d)] to convince us that Congress intended that result." 518 U.S. at 487 (plurality)

(citation omitted). The same reasoning is applicable here. Section 1392(d) does not encompass common law claims.[10]

B. The Savings Clause Expressly Preserves Common Law Claims.

If any doubt remained as to the inapplicability of the Safety Act's express preemption provision to common law claims, it would be dispelled by the Safety Act's express *anti-preemption provision* – the savings clause – which unambiguously *preserves* all common law claims. It states in simple and straightforward terms: "Compliance with *any* Federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* common law liability." 15 U.S.C. § 1397(k) (emphasis added).

On its face, the savings provision is sweeping and unambiguous. "Compliance with any Federal . . . safety standard" is a phrase that does not admit of qualification. It cannot be read to mean only compliance with certain federal safety standards, or to except from its scope safety standards that deal with the particular question of design or performance at issue in a given common law action. Similarly, the phrase "does not exempt any person from any common law liability"

---

[10] The revised and recodified version of the preemption provision makes even clearer that Congress did not intend to preempt common law claims. It provides in pertinent part: "When a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter." 49 U.S.C. § 30103(b), App. 2. Although the revisions were intended to make no "substantive change," Congress' reference to safety standards being "prescribed" further evidences that Congress has always had legislative and administrative standards in mind.

does not on its face admit of qualification. "[A]ny common law liability" is all-inclusive. That phrase cannot fairly be read to mean that the Safety Act provides any basis for exempting any defendant from any common law liability.

In the lower court, Honda attempted to avoid the plain meaning of the savings clause by arguing that Section 1397(k) is not really addressed to federal preemption at all. Instead, Honda asserted that the savings clause was really designed to ensure that compliance with a minimum federal standard would not be a complete defense to liability under state law. This reading of the savings clause makes no sense, particularly in light of the interpretation of the Safety Act's preemption provision that Honda advanced below. According to Honda, Section 1392(d) expressly preempts all common law claims that relate to the same aspect of performance as a federal motor vehicle safety standard. If that is so, there would be no need for Congress to negate the affirmative state law defense of compliance with those claims, because they would already be extinguished by virtue of preemption.

Thus, under the reading advanced by Honda, the savings clause could only logically relate to claims that survive the preemption provision because they concern an aspect of motor vehicle performance that is *not* subject to a federal safety standard. But here Honda's argument breaks down completely, because there could be no affirmative defense of compliance with a federal standard that does not exist. In other words, under Honda's reading of the preemption provision, the savings clause could only apply in cases where it would necessarily have no legal effect. Honda would essentially render the section's plain language meaningless – an approach this Court has repeatedly disavowed. *See Freytag v. C.I.R*, 501 U.S. 868, 877 (1991) (our decisions "consistently have expressed a deep reluctance to interpret a statutory provision so as to render

superfluous other provisions in the same enactment.") (citations and internal quotation marks omitted).[11]

Honda also argued below that Section 1397(k) is merely a "general savings clause" and, as a rule, "general savings clauses" only reflect Congress' intent to preclude a finding of implied field preemption. This argument fails for three reasons. First, it blatantly conflicts with Honda's other argument about the meaning of Section 1397(k): *i.e.*, that the savings clause was designed to insure that mere compliance with a federal safety standard is not an absolute defense to liability at common law. Second, whatever the anti-preemptive effect of "general savings clauses" may be, 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. Assertions about "general savings clauses" simply do not apply to it. Third, the assertion that Section 1397(k) only negates implied field preemption cannot be squared with the language of the preemption provision, which by its terms applies only when there is a federal safety standard in place and a state safety standard regulates "the same aspect of performance" as the federal standard. 15 U.S.C. § 1392(d). Thus, the scope of the preemption provision is clearly limited to situations where state and federal regulations *address the same matter*. The

---

[11] Even putting aside these insurmountable flaws in Honda's reasoning, it would have made no sense for Congress to include a provision in the Safety Act negating the state law defense of compliance with federal safety standards. At the time the Safety Act was enacted (and still today), it was already the law in every state that compliance with a federal regulation is *not* an absolute defense in an action for negligent failure to do more. *See Restatement (Second) of Torts* § 288C (1964). *See also* Paul Deuffert, *The Role of Regulatory Compliance in Tort Actions*, 26 Harv. J. on Legis. 175 (1989). Since the law was already clear on this point at the time Congress enacted the Safety Act, Honda's interpretation would render the savings clause a nullity in more ways than one.

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 address, and affirmatively negate, the prospect of such broader field preemption.

C. The Safety Act's Legislative History Confirms That Congress Intended To Preserve Common Law Claims.

Normally, the plain and unequivocal language of the preemption provision and the savings clause would preclude further analysis. *See, e.g., TVA v. Hill*, 437 U.S. 153, 184 n.29 (1984). But, if one looks to the Safety Act's legislative history, it only confirms that Congress intended to preserve all common law claims.

1. The Senate Bill. The bill reported out of the Senate Commerce Committee and passed by the full Senate contained a preemption provision similar to the bill ultimately enacted into law. *See* 112 Cong. Rec. 14,257 (1966). But the Senate bill did *not* include a savings provision. Even so, the Senate Committee Report stated, with respect to the preemption provision of the bill, that:

> [T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law.

S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966). And Senator Magnuson, the sponsor of the Senate bill, stated on the floor of the Senate that:

> Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The *common law on product liability still remains as it was.*

112 Cong. Rec. 14,230 (1966) (emphasis added).

2. The House Bill. The original House bill contained a preemption provision similar to the preemption provision in the Senate bill, and, like the Senate bill, did not contain a savings clause. *See* H.R. 13228, 89th Cong., 2d Sess. (introduced on March 2, 1966). During hearings on that bill, however, Tom Triplett, an attorney from South Carolina, raised the following pointed concern regarding the possible effect of the House bill on the liability of manufacturers under state law:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> You may think that the manufacturer is afraid of Government regulation but the cry you are hearing may be "Brer Fox, please don't throw me in the briar patch." If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets Government standards," and an already compounded problem will be recompounded.

House Hearings at 1249.

In direct response to Mr. Triplett's testimony, the House Committee amended the original House bill by inserting a savings provision identical in all respects to the savings provision ultimately signed into law: "Compliance with *any* Federal motor vehicle safety standard issued under this title does not exempt *any* person from *any* common law liability." *See* 112 Cong. Rec. at 19,657 (1966) (emphasis added). This savings provision was explained in the House Committee Report as follows:

> It is intended and this subsection specifically establishes, that *compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability.*

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added).

During the floor debates on the reported House bill, Representative O'Neill proposed an amendment that would have strengthened the remedial provisions of the bill by adding criminal penalties for willful violations of the Act. In opposing this amendment, Representative Dingell, a member of the House Committee that had reported the bill, stated:

> We are told . . . that this legislation is not strong enough. A look at the bill, at what the committee has brought to the floor, disproves this. . . . *[W]e have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser.* This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer, and they can be exercised against the manufacturer.

112 Cong. Rec. 19,663 (1966) (emphasis added).

The amendment was defeated. *Id.* at 19,664. The reported bill then passed the full House with certain minor amendments not relevant here. *Id.* at 19,664-19,669.

3. The Senate-House Conference. A Senate-House Conference Committee was convened to reconcile the differences between the Senate and House bills. The Conference Committee adopted the savings provision of the House bill *in haec verba*, and also adopted the House version of the preemption provision with certain minor changes not relevant here.

The Conference Committee Report made no mention of the Senate's agreement to the savings provision included in the House bill. But the Senate conferees' understanding of the savings provision was clearly stated on the floor of the Senate by Senator Magnuson, the sponsor of the Senate bill, as well as by Senator Cotton, a conferee. Senator Magnuson stated:

> The Senate conferees accepted the House provision that *compliance with Federal standards does not exempt any person from common law liability.* This provision makes explicit, in the bill, a principle developed in the Senate report. This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with

> Federal standards. No court rules of evidence are intended to be altered by this provision.

112 Cong. Rec. 21,487 (1966) (emphasis added). And Senator Cotton explained:

> The Senate conferees also yielded on a provision, inserted by the House, declaring that compliance with any Federal standard does not exempt any person from common law liability. Nevertheless, it seems clear and was, I believe, the consensus of the conferees on both sides, that proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it.

Id. at 21,490.

* * *

In sum, the legislative history confirms that the Safety Act means what it says: Congress expressly preserved all common law claims. It is impossible to find in the preemption provision and the savings clause a "'clear' and 'manifest'" federal statutory purpose "[t]o displace traditional state [law] in such a manner." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (quotation omitted). To the contrary, Congress sought to achieve the Safety Act's purposes *both* by authorizing minimum federal performance standards *and* by preserving common law tort remedies for those injured in car accidents – and the incentive for design improvements that such remedies create.

This approach is hardly unusual. Congress has repeatedly preserved common law claims, despite their arguably regulatory effect, while preempting direct state

regulation. For example, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), this Court held:

> The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. *We believe Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not. Cf. Silkwood v. Kerr McGee Corp.*, 464 U.S. at 256 (Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was preempted).

Id. at 185-86 (footnote omitted; emphasis added). Similarly, in *Cipollone*, seven members of this Court agreed that, although a 1965 cigarette labeling act expressly preempted state regulatory law, it did not preempt state common law, noting that "there is no general, inherent conflict between [express] federal preemption of state [regulatory] warning requirements and the continued vitality of state common law [damages] actions." 505 U.S. at 518 (plurality); *id.* at 533-34 (Blackmun, J., concurring).[12]

---

[12] *See also, e.g., Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 211 (1996) (variations in state remedies have "long been deemed compatible with federal maritime interests," and the lack of a federal comprehensive tort recovery regime in the federal act suggests that state tort actions are not

This approach, moreover, makes good sense. As Honda well knows, and Congress certainly understood when it passed the Safety Act, regulatory agencies are notoriously subject to capture by those they are intended to regulate and, even in the best circumstances, move laboriously and cautiously. Given the purpose of the Safety Act (to promote auto *safety*), it was reasonable for Congress to preempt state legislative and administrative standards that are different than federal regulations, but continue to allow the common law tort system to play its traditional role of compensating injury victims, encouraging safer designs, and prompting the federal government to set higher performance standards. That is precisely the approach reflected in the Act, which expressly preserves all common law claims.

II. Petitioners' Claims Are Not Impliedly Preempted.

Bypassing Congress' *express* preservation of all common law claims, the lower court held that petitioners' claims are *impliedly* preempted because, in the court's view, they would frustrate certain policies underlying Standard 208. That ruling is wrong on two counts. First, the court should never have resorted to implied preemption analysis here. When Congress *expressly* and unequivocally states its intent to preserve all common law claims, the courts are prohibited from disregarding that clear statement and finding that Congress (or a regulatory agency) *implicitly* preempted some of them anyway. Second, even if it were permissible to resort to

---

preempted); *English v. General Electric Co.*, 496 U.S. 72, 85 (1990) (state minimum wage laws, child labor laws, and tort claims would not be preempted by federal law at nuclear power plants even though they may affect resource allocation decisions and may alter radiological safety policies).

implied preemption analysis here, petitioners' claims are not impliedly preempted because they are entirely consistent with the federal government's decision to permit, but not mandate, the installation of airbags in all automobiles.

A. The Question Of Implied Preemption Cannot Be Reached Because Congress Unambiguously Preserved All Common Law Claims.

This Court has made clear that, where Congress has spoken directly and clearly on the preemption issue at stake – as it did in the Safety Act – the courts cannot search for some implied Congressional intent that differs from what Congress said. In *Cipollone,* a seven-member majority stated:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.

505 U.S. at 517 (quotations deleted). This approach, the Court said "is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted." *Id.*

The lower court nevertheless conducted an implied preemption analysis here, holding that this Court's subsequent decision in *Freightliner Corp. v. Myrick,* 514 U.S. 280 (1995),

authorized its foray and "rejected" our "interpretation" of *Cipollone*. Pet. App. 13. In so doing, the lower court misread *Myrick* and *Cipollone* – and misunderstood our view of both.

In *Myrick*, this Court held that the Safety Act does not preempt a claim that a truck was defectively designed because it lacked anti-lock brakes. 514 U.S. at 286-87. Unlike in this case, there was no federal safety standard in effect in *Myrick*, so the language of the Act's preemption provision (15 U.S.C. §1392(d)), which applies only when a federal standard is "in effect," and the savings clause (15 U.S.C. §1397(k)), which applies only when there has been "compliance" with such a standard, were simply not applicable. Without deciding the effect or scope of those provisions, *see* 514 U.S. at 287 n.3, this Court held that the state common law claims at issue were neither expressly nor impliedly preempted because, at bottom, there was no federal law in place with which they could even arguably conflict. *Id.* at 286.

In the course of the decision, the Court took pains to reject a misinterpretation of *Cipollone* that had surfaced in the lower courts. The Court noted that some lower courts had read *Cipollone* to hold that "implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute." *Id.* at 287. "This argument," the Court said, "is without merit." *Id. Myrick* then re-emphasized what the Court had already said in *Cipollone* – the inclusion of an express preemption provision in a statute suggests, but does not automatically mean, that matters beyond the provision's reach are not impliedly preempted:

> The fact that an express definition of the pre-emptive reach of a statute "implies" – *i.e.* supports a reasonable inference – that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption . . . At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.

514 U.S. at 288-89.

This was the language that the lower court cited as demonstrating that resort to implied preemption here is proper and that our interpretation of *Cipollone* is wrong. Pet. App. 13. But we agree wholeheartedly with this language. Thus, if the Safety Act only contained its express preemption clause, that provision alone would not necessarily prohibit a finding of implied preemption. "At best, *Cipollone* supports an inference. . . ; it does not establish a rule." *Myrick*, 514 U.S. at 289.

The Safety Act, however, does not just contain an express preemption clause; it also contains an express and unequivocal anti-preemption clause. *And that fact makes all of the difference.* For when Congress has expressly said that the precise aspect of state law at issue is not preempted, the courts are not free to search farther. The courts' sole task is to ascertain the intent of Congress and, if Congress has spoken clearly (as it did in the Safety Act), the courts cannot *imply* something contrary to what Congress *expressly* said. That proposition is the core of this Court's holding in *Cipollone*: when Congress' express words provide "a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws. . .." 505 U.S. at 517. And that proposition was in no way disavowed in *Myrick*.

Cipollone, of course, did not involve statutes with express anti-preemption provisions, but that fact is of no moment; the principle is still applicable and sound. Moreover, the two cases cited in *Cipollone* for this principle *did* contain express anti-preemption provisions and, in both cases, this Court held that those provisions barred resort to implied preemption. Thus, in *Malone v. White Motor Corp.*, 435 U.S. 497, 504-05 (1978), this Court noted that implied conflict preemption may be found where "Congress does not clearly state in its legislation whether it intends to preempt state laws," but refused to consider implied conflict preemption because of the express anti-preemption provisions in the statutes at issue, saying that "the expression of congressional intent [not to preempt state law] should control the decision here." Similarly, in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987), the Court refused to undertake an implied preemption analysis because the express anti-preemption provisions made Congress' intent not to preempt clear. *Accord id.* at 295 (Scalia, J., concurring).

By disregarding the Safety Act's express anti-preemption provision and conducting an implied preemption inquiry, the lower court violated the teachings of these cases and embarked on a journey contrary to the two basic principles of preemption analysis emphasized most recently in *Medtronic* – and the constitutional values from which they flow. First, because of the value the Constitution places on federalism, preemption analysis begins with a strong presumption against preemption. In recognition of this value, in myriad cases in myriad areas, this Court has adopted and rigorously applied "clear statement rules" to legislation that might encroach on the

states' sovereign powers within our federalist system.[13] In so doing, this Court has emphasized that Congress' power to impose its will on the states under the Supremacy Clause "is an extraordinary power in a federalist system," *Gregory*, 501 U.S. at 460, and that, to avoid disrupting the "delicate balance" of federalism, *id.*, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" state law. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). In this case, however, Congress *has* made a clear statement – *of its intent not to preempt.* To allow consideration of implied preemption here would be to turn this entire approach on its head.

Second, because of the value our Constitution places on the separation of powers, the courts' sole task in preemption analysis is to ascertain Congress' intent. In recognition of this value, this Court has repeatedly made clear that Congress' plain words must be given their meaning – whether or not the courts agree with the result.[14] To permit a court to disregard an

---

[13] *See, e.g., Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*, 119 S. Ct. 2199, 2205 (1999) (Congressional abrogation of states' sovereign immunity requires "unmistakably clear" statutory language); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (Congress may not encroach on sovereign powers reserved to states by Tenth Amendment absent "plain statement" of intent to do so); *id.* at 2401 (citing cases). *See also U.S. v. Lopez*, 514 U.S. 549, 610 (1995) (Souter, J., dissenting) (discussing clear statement rules in various contexts). *Cf. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 119 S. Ct. 2219 (1999) (state cannot be deemed to have waived its sovereign immunity absent "clear" and "unequivocal" declaration of intent to do so).

[14] *See, e.g., Brogan v. United States*, 522 U.S. 398, 408 (1998) ("[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so. . ."); *Norfolk & Western Railway Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991) ("[i]f

express anti-preemption provision as clearly worded as Section 1397(k) would contradict this fundamental tenet – and make implied preemption an open invitation to judicial activism and the displacement of state law in violation of Congress' intent.

There is one additional reason here why resort to implied preemption would be improper. In this case, faced with the unequivocal language of the Safety Act's savings clause and the uniform appellate decisions rejecting federal preemption of common law design defect claims, *see* n.2 *supra*, the federal agency involved (NHTSA) did not purport to be exercising any power to preempt any such claims. Thus, despite the extensive rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1994), and despite the intense political battle that took place over the content of Standard 208, no one – no person, no State, and no Member of Congress – received any notice that any person's right to bring state common law claims might be preempted by the agency's revised standard. And, in the 48 pages of tiny print summarizing the comments and the agency's reasons for adopting the Rule, there is not a single word suggesting that anyone ever commented on – or that the agency even considered – that possibility. *See* 49 Fed. Reg. 28962-29010.

In other words, the type of implied preemption found by the lower court here is implied preemption of state common law by federal agency *silence* on the subject – in the face of an

---

the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress."); *Commissioner of Internal Revenue v. Asphalt Products Co., Inc.*, 482 U.S. 117, 121 (1987) ("Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.").

express statutory provision prohibiting such preemption. Surely, this will not do. To begin with, given Congress' express prohibition of preemption of common law claims, NHTSA simply lacked the power to preempt such claims, even if it wanted to. *See, e.g., Lyng v. Payne,* 476 U.S. 926, 937 (1986) ("an agency's power is no greater than that delegated to it by Congress"). *Cf. Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.") Even assuming, however, that NHTSA has the power to preempt common law, its failure to say a word on the subject is further reason to foreclose any inquiry into implied conflict preemption here. This Court has previously said that "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 714, 718 (1985). At a minimum, we should expect no less before a court may find that an agency preempted state common law claims under an authorizing statute expressly preserving those claims.

B. Even Assuming That Implied Preemption Can Be Reached Here, Petitioners' Claims Are Not Preempted Because They Do Not Conflict With Federal Law.

Even assuming, however, that implied preemption analysis is proper in this case, there is no preemption here. As *Myrick* explained, implied preemption only arises when there is an "actual conflict" between federal and state law – either

because it would be "impossible for a private party to comply" with both or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." 514 U.S. at 287 (citations omitted). "Impossibility" is not an issue in this case, because it is undisputed that Standard 208 would have permitted installation of an airbag in petitioners' vehicle and, in any event, would allow the payment of compensation to the Geiers. The question, then, is whether petitioners' claims somehow "stand as an obstacle" to federal purposes. The answer is no, since this lawsuit complements the goals of the Safety Act and Standard 208.

1. Petitioners' Claims Are Fully Consistent with the Safety Act.

First, there is no conflict between petitioners' claims and Congress' goals in passing the Safety Act, given that Congress made the policy judgment (as embodied in the Act's savings clause) that the preservation of all common law claims would *aid* the accomplishment and execution of its full purposes. If Congress' words mean anything, they show that Congress intended the common law tort system to exist alongside the new regulatory regime. This approach makes sense, as Congress has often relied on the combination of minimum federal regulations and common law liability to create safe and effective consumer products – while also giving victims the right to compensation for their injuries. *See supra* at 32-34. Given this fact, it can hardly be said that petitioners' claims would frustrate Congressional purposes; rather, it is a finding of preemption that would impermissibly frustrate the purposes and policies underlying the Safety Act.

The lower court nonetheless reasoned that allowing Honda to be held liable in this case would "interfere with the *method* by which Congress intended to meet its goal of

increasing automobile safety" – *i.e.*, "delegat[ing] authority to prescribe specific motor vehicle safety standards to the Secretary of Transportation. . . ." Pet. App. 14 (citations omitted; emphasis in original). Authorizing the Secretary of Transportation to prescribe motor vehicle safety standards, however, was only *one of the methods* by which Congress intended to meet its goal of increasing auto safety. *Another was preserving common law claims.* The lower court erred by finding that the former method impliedly eliminated the latter, when Congress expressly authorized both.

Honda made a similar error below, arguing that petitioners' claims would destroy the uniformity the Safety Act is supposedly meant to achieve. Uniform safety standards may be the goal of Section 1392(d), but preservation of common law claims is the goal of Section 1397(k). Congress did not intend either section to override the other. To the contrary, Congress adopted both sections – and preserved all common law claims – to achieve the sole stated purpose of the Safety Act: "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. As the New York Court of Appeals recently explained, "the uniformity argument is plainly insufficient in this case to supply the implied 'conflict' preemption 'kicker,' necessary to override the other express and controlling language of the Safety Act's preemption and savings clauses, and the legislative history." *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376, 384 (N.Y. 1998) (quotations and citations omitted).

2. Petitioners' Claims Are Fully Consistent with Standard 208.

Petitioners' claims are also fully consistent with the letter and spirit of Standard 208. When Secretary Dole promulgated Standard 208, she took the approach Congress

authorized under the Safety Act: she issued a performance standard allowing manufacturers to use the designs of their choice, but did not purport to preempt any common law claims. At the same time, she specifically found that "an airbag plus a lap and shoulder belt" was the "most effective system" (49 Fed. Reg. at 28986) and relied on three separate incentives to encourage manufacturers to utilize this system: the phase-in of the passive restraint requirement; the "extra credit" for the use of "non-belt" passive restraints (*i.e.*, airbags); and the threat of "potential liability for any deficient systems." *Id.* at 29000-01. Petitioners' attempt to hold Honda liable for failing to install an airbag (in addition to a manual lap belt and shoulder harness) in the 1987 Honda Accord is in total harmony with this approach.

The lower court nevertheless held petitioners' claims impliedly preempted on the theory that they would conflict with two goals underlying the Secretary's decision to make airbags "one of several options" available to comply with "the passive restraint requirements of Standard 208" – specifically, "allowing consumers to adjust to the new [airbag] technology" and "permitting experimentation with designs for even safer systems." Pet. App. 15 (citation omitted). This holding was erroneous for several reasons.

First, as a threshold matter, the court below failed to recognize a simple, yet dispositive, fact: *petitioners' vehicle was not subject to the passive restraint requirements of Standard 208.* As explained above, the 1984 version of Standard 208 applicable in this case contained a phase-in schedule that gave manufacturers three years to install some form of passive restraint in their vehicles. When Ms. Geier's 1987 Honda Accord was manufactured, Standard 208 required that "a minimum of 10 percent of all cars . . . must have automatic occupant crash protection." App. 8. Honda did manufacture 10 percent of its cars to meet that requirement

(with automatic seatbelts in some cars and airbags in others), but the 1987 Honda Accord was not one of those cars. Given that fact, a common law claim that *this* vehicle should have had an airbag (in addition to its manual lap belt and shoulder harness) – even if successful – could not create any conflict between state law and the federal passive restraint requirements.

Honda may nonetheless argue that petitioners' claims conflict with the federal government's decision to phase in the passive restraint requirement over a three-year period (rather than require 100% compliance all at once). Thus, for example, Honda might contend that the federal government chose a gradual phase-in in order to promote public acceptance of passive restraint technology, and that a tort verdict holding a manufacturer liable for failing to install an airbag would conflict with this goal. Any such argument would fail, however, for the simple reason that, as a factual matter, *no tort verdict could have prompted any auto maker to start installing airbags in its cars during the phase-in period.* NHTSA itself estimated that "installation of airbags in compact and larger cars would require 3 to 4 years lead-time." 49 Fed. Reg. at 28989. Consequently, even if Honda was held liable the day after the first 1987 Honda Accord was sold, the company could not change its behavior and install airbags in all of its cars until *after the conclusion of the phase-in period.* Moreover, since the crash that prompted this case did not take place until January 1992, when the phase-in period was over and Congress had already enacted legislation ordering NHTSA to require airbags in all new cars, 49 U.S.C. § 30127(b), petitioners' claims in this case could not possibly interfere with the government's decision to phase in passive restraints between 1986 and 1989. Thus, even assuming that tort verdicts have a powerful regulatory effect on manufacturers' conduct – a dubious proposition at best (*see infra* at 47-48) – under the facts of this case any claim of conflict is a chimera.

Second, the fact that the federal government made airbags one of several options that manufacturers could choose to comply with Standard 208 does not, in itself, pose any conflict with the Geiers' common law claim that Honda should have installed an airbag, in addition to a manual lap belt and shoulder harness, in the car in this case. Standard 208's options framework is simply a reflection of the Safety Act itself, which authorizes NHTSA to issue minimum *performance* standards (not mandate specific designs). *See* 15 U.S.C. § 1391(2).[15] In keeping with this statutory mandate, *all* federal standards promulgated pursuant to the Act permit design "options," some implicitly and others explicitly. Nothing in the Safety Act or its legislative history suggests that the preemptive effect of a federal standard turns on whether it implicitly or explicitly permits such choices.[16]

Moreover, to make preemption turn on whether the design option in question was explicitly mentioned in the federal standard would lead to bizarre and unjust results. If preemption took place only when the federal standard explicitly mentioned the design in question, then petitioners' claims *would not* be preempted if Standard 208 only required manual

[15] Indeed, Secretary Dole noted that "several commenters questioned the Department's authority to issue an airbag only standard, claiming it would be a 'design' standard," and repeatedly emphasized that she was issuing a "performance standard," extolling the advantages of that approach over issuing a federal mandate imposing even the best design. 49 Fed. Reg. at 29001. *See also id.* at 28996, 28997.

[16] Standard 208 is not unique in explicitly providing optional means of compliance. *See, e.g.*, Standard 125 (warning devices); Standard 202 (head restraints); Standard 217 (bus emergency exits and window retention and release). 49 C.F.R. §§ 571.101 *et seq.* (1998). Thus, if the "options" argument is right, then at least some common law claims would be barred in regard to each of these matters.

belts (and silently permitted airbags), but *would* be preempted because Standard 208 actually said that manufacturers could put in airbags, too. Under this approach, the Geiers would actually be *worse off* because NHTSA explicitly allowed Honda to use the design the Geiers say it should have used. That cannot be right. Moreover, from the manufacturers' standpoint, it is certainly "fairer" to hold Honda accountable for failing to use a design that was specifically mentioned (and called "the most effective system") by the federal government than it would be to hold Honda accountable for failing to use a design that was never mentioned by the federal government. But the "options" rationale leads to the opposite result.

Third, petitioners' claims do not conflict with Secretary Dole's goal of "allowing consumers to adjust to the new [airbag] technology." Pet. App. 15. To be clear, Secretary Dole did express concern that a federally-imposed "airbag only" rule "could lead to a backlash affecting the acceptability of airbags." 49 Fed. Reg. at 29001. This makes sense, given that the automobile industry had previously waged "the regulatory equivalent of war against the airbag," *State Farm*, 463 U.S. at 49-50, and no doubt would have made every effort to poison public opinion against a government-mandate requiring airbags in all cars. It was certainly reasonable for the agency to expect that a new regulation requiring airbags in every new vehicle across America would generate considerable corporate opposition and public controversy.

The same could not be said, however, of a judge or jury verdict holding a manufacturer liable for failing to install an airbag. To begin with, unlike a government mandate, such a common law verdict would not force a manufacturer to change its conduct in any way – let alone to install airbags in its entire fleet of vehicles. Rather, all the imposition of liability would require is that the manufacturer compensate its victim for his or

her injuries. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. at 185-86.[17] Even assuming, however, that a manufacturer decided to change its conduct and install airbags to avoid further liability, it would undoubtedly make every effort to *promote* the safety of the new systems, in order to sell more cars. This is precisely the opposite of what Secretary Dole feared the auto makers would do in response to a government-mandated airbag requirement – *i.e.*, launch another war against NHTSA by claiming that airbags are unsafe. Thus, unlike a government regulation requiring airbags in all cars, a jury finding that a manufacturer was negligent for failing to install an airbag would actually help educate the public about the benefits of the technology, thereby *promoting* public acceptability of airbags – which is exactly what the agency wanted in the first place.[18]

Fourth, for similar reasons, petitioners' claims do not conflict with NHTSA's interest in "permitting experimentation with designs for even safer systems." Pet. App. 15. While a federal "airbags only" mandate would *outlaw* such

[17] Indeed, the first "no-airbag" recovery took place in 1984, when Ford Motor Company paid $1.8 million to settle a claim that a Pinto was defectively designed because it lacked an airbag. *See Burgess v. Ford Motor Co.*, No. DV79-355 (Ala. Cir. Ct. 1984). Yet the auto makers continued to make cars without airbags for another decade, until Congress finally passed a law mandating airbags in all vehicles. *See* 49 U.S.C. § 30127(b).

[18] There are other reasons that common law claims would not conflict with NHTSA's goal of allowing consumers to adjust to airbag technology. To begin with, no manufacturer would decide to install airbags in response to common law claims unless it was convinced the public would accept them. In addition, any manufacturer that chose to install airbags in response to common law verdicts would have several years to promote their acceptance. *See* 49 Fed. Reg. at 28989 (estimating that "installation of airbags in compact and larger cars would require 3 to 4 years lead-time").

experimentation, the prosecution of common law claims would *encourage* such experimentation by spurring the manufacturers to avoid unduly dangerous designs and seek out especially safe ones. As Secretary Dole recognized, common law claims create an incentive for design innovation and the development of safer systems because the manufacturers understand that, if they do not utilize an available safer system, they could be held liable for the injuries that result. *See* 49 Fed. Reg. at 49000.

The argument that tort liability stifles innovation is also belied by the auto manufacturers' own arguments in the 1984 rulemaking. According to Secretary Dole, the auto industry persistently complained that "the presence of the government in the middle of the debate over passive restraints has distorted the activities of both automobile manufacturers and insurance companies." 49 Fed. Reg. at 29003. "If the marketplace had been allowed to work," the industry argued, "insurance incentives would have led to the voluntary adoption of one or more systems by the manufacturers." *Id.* Thus, in the manufacturers' opinion, an unregulated environment is the most fertile ground for growth and adoption of diverse technology. Any such environment, however, would necessarily *include the potential imposition of tort liability for defective designs*, since the Safety Act's preemption clause only applies where there is a "Federal motor vehicle safety standard in effect." 15 U.S.C. § 1392(d). Thus, absent government regulation, there would be no preemption of *any* form of state law. Clearly, then, the auto manufacturers understand that the common law can and does readily coexist with innovation and technological diversity.

In short, *all* of the safety goals that Secretary Dole feared would be endangered by an "airbag only" government design mandate are furthered by common law claims. Thus, it is not surprising that Standard 208 is devoid of any reference whatsoever to an administrative intent to preempt common law

claims. This silence speaks volumes, given that the agency was clearly aware of the potential for ongoing litigation involving airbags. Especially in light of the powerful presumption against preemption – a presumption designed to protect the states' historic right to provide compensation for their citizens through the tort system – it would be perverse to conclude that, without saying a word on the matter, NHTSA implicitly contravened Congress' explicit command and wiped out all common law claims involving airbags, leaving victims like Ms. Geier with no remedy at all for their injuries.

CONCLUSION

The lower court's decision finding preemption of petitioners' claims should be reversed.

Respectfully submitted,

Robert M.N. Palmer
The Law Offices of
Robert M.N. Palmer, P.C.
205 Park Central East
Suite 511
Springfield, MO 65801-5720
(417) 865-3234

James W. Taglieri
Cadeaux & Taglieri, P.C.
1100 Connecticut Avenue,
NW, Suite 800
Washington, D.C. 20036
(202) 785-3373

Arthur H. Bryant
(Counsel of Record)
Leslie A. Brueckner
Trial Lawyers for Public
Justice , P.C.
1717 Massachusetts Avenue,
NW, Suite 800
Washington, D.C. 20036
(202) 797-8600

Date: October 22, 1999

claims. This silence speaks volumes, given that the agency was clearly aware of the potential for ongoing litigation involving airbags. Especially in light of the powerful presumption against preemption – a presumption designed to protect the states' historic right to provide compensation for their citizens through the tort system – it would be perverse to conclude that, without saying a word on the matter, NHTSA implicitly contravened Congress' explicit command and wiped out all common law claims involving airbags, leaving victims like Ms. Geier with no remedy at all for their injuries.

CONCLUSION

The lower court's decision finding preemption of petitioners' claims should be reversed.

Respectfully submitted,

Robert M.N. Palmer
The Law Offices of
Robert M.N. Palmer, P.C.
205 Park Central East
Suite 511
Springfield, MO 65801-5720
(417) 865-3234

James W. Taglieri
Cadeaux & Taglieri, P.C.
1100 Connecticut Avenue,
NW, Suite 800
Washington, D.C. 20036
(202) 785-3373

Arthur H. Bryant
(Counsel of Record)
Leslie A. Brueckner
Trial Lawyers for Public
Justice , P.C.
1717 Massachusetts Avenue,
NW, Suite 800
Washington, D.C. 20036
(202) 797-8600

Date: October 22, 1999