No. 98-1811

IN THE SUPREME COURT OF THE UNITED STATES

ALEXIS GEIER, et al.,
Petitioner

v.

AMERICAN HONDA MOTOR COMPANY, INC.,
Respondent

BRIEF FOR RESPONDENTS

Filed November 19, 1999

QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act of 1966 and Federal Motor Vehicle Safety Standard 208 preempt, either expressly or impliedly by conflict, a common-law tort claim that an automobile manufactured in the 1987 model year was defectively designed because it was equipped with seat belts and without airbags.

RULE 29.6 STATEMENT

Pursuant to S. Ct. Rule 29.6, Respondents American Honda Motor Co., Inc. and Honda of America Mfg., Inc. refer to and incorporate by reference the list of their non-wholly owned subsidiaries submitted with their Respondents' Brief in Opposition to Petition for Writ of Certiorari (at ii-iv) in this case.

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

BRIEF FOR RESPONDENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves several provisions of the National Traffic and Motor Vehicle Safety Act of 1966 ("the Safety Act"), 15 U.S.C. §§ 1381 *et seq.*, recodified "without substantive change" at 49 U.S.C. §§ 30101 *et seq.* Relevant sections, as they appear in each version, are set out in the appendix to this brief. Like the court of appeals and Petitioners, we generally refer to and cite the pre-recodification version of each section.

STATEMENT

A. The Safety Act

In 1966, Congress enacted the Safety Act, requiring the Secretary of Transportation to establish federal motor ve-

hicle safety standards ("FMVSS's") that "meet the need for motor vehicle safety." 15 U.S.C. § 1392(a). Each FMVSS must "protect[] against unreasonable risk of death or injury." 15 U.S.C. § 1391(1).

To ensure that the Secretary's determination that an FMVSS should govern a particular aspect of motor vehicle performance would not be undermined by a hodgepodge of state standards based on different judgments about how best to prevent unreasonable risks with respect to that particular aspect of performance, Congress provided that no State "shall have *any* authority either to establish, or continue in effect, . . . *any* safety standard" that addresses the same aspect and is not "identical to" the FMVSS. 15 U.S.C. § 1392(d) (emphasis added). Explaining the need for this preemption provision, the House Report stated:

> [T]his preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966). Similarly, the Senate Report stated:

> The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.

S. Rep. No. 1301, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720.

The same section also contains two limiting saving clauses, or anti-preemption provisions. One provides that "[n]othing in this section shall be construed as preventing any State from enforcing any safety standard which is

identical to" an FMVSS. 15 U.S.C. § 1392(d). The other provides that "[n]othing in this section shall be construed to prevent" any governmental entity from imposing higher standards of performance for vehicles purchased for its own use. *Ibid.*

Elsewhere in the Act, Congress included a section addressing the effect to be given to proof of compliance with an FMVSS in common-law actions. It states, "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). The legislative history of this section, consistent with the "compliance with" language itself, discusses the admissibility and weight of evidence of compliance with FMVSS's, not preemption. *See* pp. 27-28, *infra.*

B. Federal Motor Vehicle Safety Standard 208

In 1967 the Secretary promulgated FMVSS 208, requiring the installation of seat belts in automobiles sold in this country. 32 Fed. Reg. 2408, 2415 (1967). In 1969, because many occupants chose not to use their seat belts, the Secretary began to consider amending FMVSS 208 to require "passive" occupant-restraint systems—systems that restrain occupants automatically in crashes. 34 Fed. Reg. 11148 (1969). The systems considered included automatic seat belts, "deployable nets," airbags, and "energy-absorbing materials." 35 Fed. Reg. 7187 (1970). During the course of the ensuing 15 years, the Secretary conducted more than 2,000 crash tests and sled tests of vehicles equipped with airbags and other passive restraints, held numerous public hearings, published dozens of Notices of Proposed Rulemaking, considered thousands of pages of data and other material submitted by airbag manufacturers, seat-belt manufacturers, researchers in aca-

demia, vehicle manufacturers, consumers, insurance organizations, physicians, and others, and amended FMVSS 208 several times. *See, e.g., Pacific Legal Found. v. DOT*, 593 F.2d 1338, 1344 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979); 42 Fed. Reg. 5071 (1977); 46 Fed. Reg. 53419 (1981).

In 1983 this Court held that the Secretary's rescission of the most recent passive-restraint requirement had not been adequately explained, and remanded for reconsideration. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). On remand, Secretary Elizabeth Dole conducted a "thorough review of the issue of automobile occupant protection, including the long regulatory history [and] extensive studies, analyses, and data on the subject," 49 Fed. Reg. 28962 (1984), and promulgated the version of FMVSS 208 that was in effect when the 1987 Honda Accord was manufactured and sold.

In amending FMVSS 208, Secretary Dole explicitly considered and rejected an airbag requirement. *Id.* at 29000-02. Instead, she required vehicle manufacturers to phase in passive restraints beginning with at least 10 percent of their 1987 model-year ("MY") vehicles and reaching 100 percent with their 1990 MY vehicles. *Id.* at 28963. She explicitly authorized manufacturers to install manual lap-shoulder seat belts, and encouraged them to provide a variety of belt and non-belt occupant-restraint systems, throughout the phase-in period. *Id.* at 28997, 29000-02, 29008-10.

The Secretary also identified the several federal safety policies and purposes that underlay her decision. First, the then-available field data regarding the effectiveness of airbags relative to the effectiveness of seat belts not only were inadequate, but showed that airbags had provided *no* increased safety over seat belts as used. *Id.* at 28985.

Accordingly, rejection of an airbag requirement was necessary because "[w]idespread use of both [airbag systems and belt systems] is the only way to develop definitive data" as to their relative effectiveness. *Id.* at 29000, 29001. Rejection of an airbag requirement also was necessary to avoid impeding safety by "stifl[ing] innovation in occupant-protection systems" and "killing or seriously retarding the development of more effective . . . occupant protection systems." *Id.* at 29001.

The Secretary further noted that airbags continued to present unique safety dangers. She stated that the "lack of experience" regarding out-of-position occupants in some circumstances, "as well as the lack of experience for some companies in any form of airbag development, make the Department reluctant to mandate across-the-board airbags." *Id.* at 29001. She cautioned that "the Department can not state for certain that airbags will never cause injury or death to a child." *Id.* at 28992. She expressed concern that airbags might indirectly cause injuries and deaths because they might not be replaced after they deployed, which would leave occupants unprotected in subsequent collisions. *Id.* at 29001. And she expressed concern that, just as many consumers had disconnected the ignition interlocks that required seat belts to be buckled in order to start 1974 MY vehicles, consumers fearful about airbag dangers would disconnect their airbags and leave themselves unprotected. *Id.* at 29001.

Still further, the determination that airbags should not be required in 1987 was vital to the Secretary's goal of achieving increased safety as quickly as possible by giving the States an incentive to enact laws requiring vehicle occupants to use their seat belts. *Id.* at 28985-86, 28991, 29001, 29003. The Secretary emphasized that "[e]ffectively enforced seatbelt use laws . . . will provide the

greatest safety benefits most quickly of any of the alternatives. . . ." *Id.* at 28962.

C. This Case

On January 12, 1992, Alexis Geier drove a 1987 Honda Accord off the road and into a tree. J.A. 2. She and her parents sued Honda, seeking $10,500,000 in compensatory damages and $10,000,000 in punitive damages, *e.g.*, J.A. 5-10, and alleging that injuries she had incurred in the crash had resulted from, among other things, the "absence of airbags." *E.g.*, J.A. 24.

After Petitioners dismissed all but their "no-airbag" claims, the district court, following the Ninth Circuit's decision in *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997), held those claims expressly preempted and granted Honda's summary judgment motion. Pet. App. 17-20. The court of appeals affirmed. Pet. App. 1-16.

The court of appeals identified several reasons why the Secretary had determined that an airbag requirement would disserve federal safety policies and purposes. It also noted "the success of the Secretary's decision on how to implement the Act" with respect to the airbag issue. Pet. App. 15. The court then concluded that it "need not resolve whether Geier's claim is expressly preempted" because, as four other courts of appeals had held in no-airbag cases,[1] such claims "stand as an obstacle to

[1] *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 519 U.S. 814 (1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert denied*, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990).

the federal government's chosen method of achieving the Act's safety objectives." Accordingly, the court held Petitioners' claims impliedly preempted by that conflict. Pet. App. 12.

SUMMARY OF ARGUMENT

The Safety Act and FMVSS 208 preempt Petitioners' no-airbag claims. The common-law standard asserted by Petitioners threatens massive, repeated tort liability for having installed seat belts, and not airbags, in 1987 MY vehicles. In promulgating FMVSS 208, however, the Secretary determined that requiring airbags in 1987 MY vehicles would conflict with explicitly identified federal motor vehicle safety policies and purposes. To promote those policies and purposes, she expressly considered and rejected an airbag requirement, and authorized the installation of *either* seat belts *or* airbags in automobiles made in that year and for several years thereafter. As the court of appeals below held, and as the Secretary has long maintained, Petitioners' no-airbag claims conflict with FMVSS 208 and the Safety Act and are for that reason impliedly preempted.

In addition, although the court of appeals found it unnecessary to decide the issue, the Safety Act's preemption provision, 15 U.S.C. § 1392(d), expressly preempts Petitioners' no-airbag claims. It provides that no State shall have "any" authority to establish "any" safety standard different from an on-point FMVSS. FMVSS 208 was and is on-point, and Petitioners' no-airbag claims differ markedly from it by asserting a common-law standard requiring the installation of airbags in 1987 MY vehicles.

Section 1397(k) of the Safety Act does not prevent the narrow preemption, both express and implied, that governs here. Rather, the text, structure, and legislative history of the Act show that section 1397(k) does not

address this type of preemption at all, but instead has the quite different purpose of protecting common-law actions from a federally-created merits defense of compliance with safety regulations. Petitioners' argument to the contrary literally ignores the words "Compliance with" with which section 1397(k) begins.

Petitioners' contention that section 1397(k) precludes preemption of *any* common-law standard, no matter how violent the conflict between the common-law standard and an on-point FMVSS, also conflicts sharply with a series of decisions by this Court spanning the 20th Century. Those decisions hold that even broad anti-preemption provisions—those providing that "nothing" in the federal statute "shall in any way abridge or alter" either common-law *or* statutory remedies under state law—must be construed to prevent only field preemption, not preemption of common-law standards that conflict with federal regulations. Since the language of section 1397(k) is considerably narrower than the language of those provisions, it cannot properly be construed to limit preemption more broadly.

Petitioners' argument also attributes to Congress an intent so remarkable that it is without precedent in this Court's decisions. Under Petitioners' view, even when a federal standard *requires* manufacturers to install specific equipment, any plaintiff may bring a common-law claim against a manufacturer for having installed that very item of equipment. Yet if the same plaintiff were to sue the same manufacturer, but under a state safety statute, for having installed the same item of equipment, the claim would be preempted. It would be extraordinary to conclude that Congress intended a system both so inconsistent and so harmful to expressly articulated federal safety policies.

ARGUMENT

I. PETITIONERS' NO-AIRBAG CLAIMS ARE EXPRESSLY PREEMPTED [2]

State law is expressly preempted when "Congress' command is explicitly stated in the statute's language." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990). When an express preemption provision exists, a determination of its scope "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Id.* at 57. Here, the Safety Act contains an express preemption provision, and its language plainly encompasses Petitioners' no-airbag claims.

A. Section 1392(d) Preempts a Common-Law Standard Where, as Here, the Common-Law Standard Addresses the Same Aspect of Performance as a Federal Motor Vehicle Safety Standard, but Is Not Identical to It

When the Secretary of Transportation has determined that an FMVSS should govern a particular aspect of motor vehicle performance, the Safety Act expressly preempts "any" state safety standard that differs from the FMVSS and applies to the same aspect of performance. The first sentence of 15 U.S.C. § 1392(d) provides:

> 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 appli-

[2] Although the court of appeals held their claims impliedly preempted and did not rule on express preemption, Petitioners first address express preemption under section 1392(d), then section 1397(k), and finally implied preemption. So do we.

cable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. (Emphasis added.)

When Honda manufactured and sold the 1987 Accord, the Secretary had established an FMVSS governing the precise aspect of vehicle performance—restraining occupants either by seat belts or by airbags in crashes—with respect to which Petitioners seek to establish a common-law standard. FMVSS 208 not only authorized, but explicitly encouraged, manufacturers to offer consumers a variety of occupant-restraint systems—including manual seat belts, automatic seat belts, airbags, and passive interiors—in 1987 MY vehicles. Petitioners seek to enforce a markedly different standard, one that would subject manufacturers to repeated, massive liability for having produced 1987 MY vehicles without airbags. Because that standard differs from the on-point FMVSS, Petitioners' claims are expressly preempted.

1. *The Plain Language of Section 1392(d), as Well as Recent Decisions by This Court, Makes Clear That This Provision Encompasses Common-Law* Standards

Congress made clear that section 1392(d) was to encompass all categories of state safety standards by declaring that no State "shall have *any* authority either to establish, or to continue in effect, . . . *any* safety standard" not identical to an on-point FMVSS.[3] (Emphasis added.) That language encompasses common-law standards because States establish common-law standards through their courts, just as they establish legislative and administrative standards through their legislatures and administrative

[3] While asking the Court to give full scope to the word "any" as used in section 1397(k), *e.g.*, Pet. Br. at 25-26, Petitioners ignore the same word's repeated use in the preemption provision.

agencies. *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (quoting California Supreme Court's description of product-liability actions as ensuring compliance "with the state's safety standards"); *International Paper Co v. Ouellette*, 479 U.S. 481, 493, 495 (1987) (common-law claim preempted because it would allow "affected States . . . to impose separate discharge standards"); *id.* at 496 (common-law actions preempted because they would subject defendants "to a variety of common-law rules established by the different States. . . . These nuisance standards often are 'vague' and 'indeterminate.' "); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (framing preemption question as "whether the imposition of a state standard in a damages action" under common law "would frustrate the objectives of the federal law"); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) ("common law standards"); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("stricter negligence standards of common law"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring in part and concurring in the judgment) (state tort suits can "set state standards").

Petitioners argue that section 1392(d) should be interpreted to apply only to legislative and administrative standards because it does not explicitly say "common-law standards." Pet. Br. at 19. But it does not explicitly say "administrative standards" or "legislative standards," either. There is no basis to assume that Congress intended the usually encompassing word "standard" to mean only two of the common subcategories, but not the third.

Section 1392(d) identifies the Secretary's *preemptive* administrative standards by the statutorily-defined term "motor vehicle safety standards." 15 U.S.C. § 1391(2).

In contrast, section 1392(d) identifies the type of state law *subject to preemption* by the broader term "any safety standard." Thus, by declaring that when the Secretary has established an on-point "motor vehicle safety standard," the States may not establish "any safety standard" that differs from it, Congress showed that "safety standard" means more than administrative standards. *Cf. Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) ("principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ").[4]

This Court's decisions indicate that when Congress has prescribed the scope of preemption with a single broad term, rather than a catalogue of categories commonly subsumed by that term, the term should be construed to encompass those categories, including common-law claims. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521, 523 (1992) ("'[n]o requirement or prohibi-

[4] Petitioners argue that "safety standard" in section 1392(d) means only "administrative standards" because "Congress used the same term in the same provision" to identify both "the type of federal law that is to be accorded preemptive effect" and "the type of state law that is subject to preemption." Pet. Br. at 20. That argument ignores the statute's careful distinction, discussed in text above, between the Secretary's *preempting* "motor vehicle safety standards" and state "safety standards" *subject to preemption*. It also contradicts Petitioners' earlier argument that "safety standard" includes *both* administrative *and* legislative standards. Pet. Br. at 14, 21, 23.

Petitioners repeat the mistake in contending that Congress used the term "safety standard" "throughout the Act to refer to the administrative standards" promulgated by the Secretary, Pet. Br. at 20 n.8. Actually, each provision they cite uses the narrow, defined term "motor vehicle safety standard" to refer to the Secretary's administrative standards. 15 U.S.C. §§ 1392(e), 1392(h), 1392(i)(1)(A), 1392(i)(1)(B)). The Solicitor General offers a similar misinterpretation. *See* Br. for the United States at 12-13 (citing 15 U.S.C. § 1392(a)).

tion' . . . easily encompass[es] obligations that take the form of common law rules"); *Medtronic*, 518 U.S. at 509-11 (opinion concurring in part and dissenting in part) ("requirements" encompasses common-law tort claims); *id.* at 503-04 (concurring opinion) (same); *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) ("all other law" encompasses "common-law rules of liability").

Had it intended "standards" to have something less than this ordinary meaning and to refer only to statutes and regulations, Congress could have explicitly limited the scope of section 1392(d) to "statutes and regulations."[5] It did not do so, and its choice of the broader term dictates that the term be given its usual, broader scope. As stated in *Cipollone*, 505 U.S. at 523:

> [W]hile the version of the 1969 Act passed by the Senate pre-empted 'any State *statute or regulation* with respect to advertising or promotion' . . . , the Conference Committee replaced this language with 'State *law* with respect to . . . advertising or promotion.' In such a situation, § 5(b)'s pre-emption of 'State law' cannot fairly be limited to positive enactments. (Emphasis in original).

This conclusion is further confirmed by what the Court in *Cipollone* referred to as "the familiar principle of *expressio unius est exclusio alterius*." *Id.* at 517. When the Secretary has established an FMVSS governing a particular aspect of vehicle performance, the first sentence of section 1392(d) prohibits the States from establishing "any safety standard applicable to the same aspect of performance" unless the state standard is "identical to the

[5] When Congress meant "regulations" in the Act, it said "regulations." *E.g.*, 15 U.S.C. §§ 1392(g), 1398(a).

Federal standard." Two saving clauses in the same section specify the only exceptions. One allows States to enforce state standards "identical to" applicable FMVSS's. The other allows governments to establish, for vehicles procured for their own use, standards "higher than" applicable FMVSS's.

These two saving clauses in the preemption provision show that Congress well knew how to carve out exceptions in that provision. Because no other exception appears there, the principle of *expressio unius est exclusio alterius* establishes that there is none.

Thus, the text of section 1392(d) shows that it applies equally to legislative, administrative, and common-law standards. Just as a state statute or regulation requiring manufacturers to install airbags in 1987 MY vehicles would be preempted by FMVSS 208, so are Petitioners' no-airbag claims.

2. *Petitioners' Attempts to Avoid This Result Do Not Withstand Scrutiny*

Petitioners try to avoid this result by advancing a miscellany of arguments. Pet. Br. at 20-24. None withstands scrutiny.

For example, Petitioners argue that section 1392(d) cannot preempt common-law standards because it preempts standards "*with respect to* any motor vehicle," and common-law standards are general, rather than applying specifically "with respect to" motor vehicles. Pet. Br. at 21. That argument contradicts this Court's decisions in *Cipollone* and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

The preemption provision in *Cipollone* prohibited the States from imposing any requirement or prohibition "*with respect to* the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (Emphasis added.) The Court held preempted all common-law failure-to-warn claims based on allegations that the defendants' advertising or promotions should have included warnings in addition to those required by federal law. 505 U.S. at 514, 524. *Cipollone* thus makes clear that a preemption provision's use of "with respect to" readily encompasses general common-law standards that, when specifically applied, impose liability for conduct governed by an on-point federal regulation.

Similarly, the plaintiff in *Morales* "advance[d] the notion that only state laws specifically addressed to the airline industry are pre-empted, whereas the [federal statute] imposes no constraints on laws of general applicability." 504 U.S. at 386. The Court rejected the argument as "creating an utterly irrational loophole" and stated, "[T]here is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute. . . . " *Id.* Accordingly, here, as in *Cipollone* and *Morales*, "pre-emption of 'state law' cannot fairly be limited to positive enactments." *Cipollone*, 505 U.S. at 523.

Petitioners also argue that section 1392(d) cannot encompass common-law standards because the safety standards referred to in section 1392(d) "concern an 'aspect of performance'," whereas a common-law standard focuses on the design of the vehicle's equipment. Pet. Br. at 21-22. This fails to recognize that the Secretary can, and often does, establish performance standards by imposing equipment requirements and leaving numerous choices of equipment design to the manufacturers. *E.g.*, 49 C.F.R. §§ 571.103,S4.1 (1998) (requiring windshield defrosting

and defogging systems); 571.202,S4.3 (1998) (requiring head restraints). In fact, the very FMVSS in issue here states that it "specifies performance requirements" and does so "*by specifying equipment requirements* for active and passive restraint systems." 49 C.F.R. §§ 571.208,S1-S2 (emphasis added).

Petitioners further err in suggesting that the Act's reference to FMVSS's as "minimum standards," 15 U.S.C. § 1391(2), means that FMVSS's are *substantively* minimal. See Pet. Br. at 3, 21-22. As the Secretary has explained, "The word 'minimum' in the statutory definition of motor vehicle safety standards . . . does not refer to the substantive content of the standards but rather to their legal status—that the product covered must not fall short of them." 41 Fed. Reg. 2391, 2392 (1976). The Secretary hardly could have ruled otherwise. The Safety Act requires every FMVSS to "meet the need for motor vehicle safety" and "protect[] against unreasonable risk of death or injury." 15 U.S.C. §§ 1391(1), (2). *Cf. Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978) (phrase "minimum standards" does not permit States to impose standards stricter than federal standards); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 674 (1993) (train speed limits established by federal agency "must be read as not only establishing a ceiling, but also precluding additional state regulation [by a common-law negligence action]").

Petitioners next argue that "only an inept grammarian" would say that States "establish" or "continue in effect" standards in common-law actions, Pet. Br. at 22, and that "it makes no sense" to construe "State or political subdivision of a State" to include state courts that apply common-law standards. Pet. Br. at 23. These assertions ignore this Court's holdings with respect to almost identical language.

The preemption provision in *Easterwood* stated, "A *State may adopt or continue in force* an additional or more stringent law, rule, regulation, order, or standard . . . when not incompatible with any Federal law . . . ." 507 U.S. at 662 n.2 (emphasis added). The Court stated, "Legal duties imposed on railroads by the common law fall within the scope of these broad phrases," *id.* at 664, and held preempted a claim that the defendant had breached its common-law duty to operate its trains at safe speeds, *id.* at 673-75.

Likewise, in *Medtronic* the preemption provision stated, "[N]o State or political subdivision of a State" may "establish or continue in effect . . . any requirement" differing from an on-point federal requirement. 518 U.S. at 481. The Court concluded that this language, too, encompassed state-law tort suits. *See Ouellette,* 479 U.S. at 493, 495; *Cipollone,* 505 U.S. at 522; *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 325-26 (1981). In the same manner, section 1392 (d) precludes the States from establishing, or continuing in effect, common-law standards that differ from an on-point FMVSS.

Finally, Petitioners argue that the language of the saving clauses in section 1392(d) is inconsistent with an interpretation of the initial, preemptive sentence of section 1392(d) that encompasses common-law claims. Pet. Br. at 23-24. It is not. The saving clause in section 1392(d) allowing enforcement of common-law standards "identical to" federal standards was needed to, and does, enable States to continue to apply the common-law rule that violations of government safety standards constitute negligence *per se*. *See* Restatement (Second) of Torts § 288B(1) (1965). In any event, there is nothing inconsistent in having the preemptive sentence apply to statu-

tory, regulatory, and common-law standards, and having one or more saving clauses apply to specified subsets of those standards.

3. *Section 1392(d) Preempts Very Few Common-Law Claims*

Petitioners contend that if section 1392(d) applies to *any* common-law claim, it must "preempt almost all common law claims, leaving design defect victims with no remedy." Pet. Br. at 24. In fact, however, the instances in which section 1392(d) preempts common-law claims are exceedingly rare. No common-law claim is preempted unless the Secretary has established an FMVSS governing the *specific* aspect of performance attacked by the plaintiff. If an FMVSS requires certain equipment, but does not establish design requirements, plaintiffs can, and in large numbers do, allege that their injuries were caused by defects in the particular designs used by the manufacturers.

Thus, for example, although FMVSS 208 now requires airbags, it leaves the choice of design to the manufacturers. It does not establish the threshold collision speed that must cause the airbags to deploy, so plaintiffs are free to claim that the deployment threshold of a particular vehicle was too high or too low. *See Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992). It does not establish standards for gas temperatures or fabric materials, so plaintiffs are free to assert that a particular system was defectively designed in a manner that caused facial burns. *See Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23 (1st Cir. 1998). In sum, plaintiffs can assert any common-law standard that a state legislature could establish as a statutory standard for a private cause of action without differing from an

on-point FMVSS and thereby being preempted by section 1392(d).[6]

As a result, the design claims *not* preempted by section 1392(d) encompass almost all design-defect claims asserted by plaintiffs. Plaintiffs almost never claim that a vehicle is defective because it includes equipment required by an FMVSS or because it does not include equipment that an FMVSS explicitly says should not be required. *See Wood v. General Motors Corp.*, 865 F.2d 395, 402 n.9 (1st Cir. 1988) (conflict between common-law claims and FMVSS's, such as that requiring implied preemption of no-airbag claims, is a "rare event indeed"), *cert. denied*, 494 U.S. 1065 (1990). Accordingly, the preemptive effect of section 1392(d) on common-law claims is extremely narrow.

Most importantly, however, Petitioners beg the fundamental preemption question when they assert that preemption of a common-law claim should never be allowed because preemption "leav[es] design defect victims with no remedy." Pet. Br. at 24. As this Court has emphasized:

> Every pre-emption case involves a conflict between a claim of right under federal law and a claim of right under state law. A finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed.

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 584 (1981). Put differently, the question is not whether remedies should be provided for injuries caused by an unreasonably dangerous aspect of a vehicle. The fundamental

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[6] There is also no preemption of any claim that a defect resulted from a mistake, such as the omission of a fastener or weld, made during the manufacture of any item of equipment, since no FMVSS establishes any standard for any manufacturing process.

question is, Who should decide what is unreasonably dangerous? Congress delegated to the Secretary the power to determine when federal safety policies require an FMVSS to govern a particular vehicle aspect in order to "meet the need for motor vehicle safety" and "protect[] against unreasonable risk of death or injury." 15 U.S.C §§ 1391(1), (2). When the Secretary has established an on-point FMVSS for that purpose, federal policies and purposes require that her determination prevail over the view of an individual State that differs.

B. Section 1397(k) Does Not Narrow the Preemptive Scope of Section 1392(d)

Petitioners attempt to avoid express preemption by calling section 1397(k) of the Safety Act an "anti-preemption provision" and arguing that it precludes *any* form of preemption of *any* common-law claim. Pet. Br. at 14-15, 25-26, 37-39, 41. Under their theory, even when an FMVSS *requires* manufacturers to install specific equipment, plaintiffs can sue manufacturers for having done exactly that. At the same time, Petitioners concede that an otherwise identical claim asserted by the same plaintiffs under a state statute would be preempted. *See* Pet. Br. at 14, 21, 23.

The Safety Act cannot reasonably be interpreted to allow such bizarre and inconsistent results. It is simply inconceivable that Congress meant to "save" tort claims based on a common-law standard when those claims (i) would be preempted if based on a state statute and (ii) would penalize manufacturers under state law for having obeyed mandatory federal requirements.

To give section 1397(k) this strange meaning, Petitioners ignore the actual language of section 1397(k), the legislative history of section 1397(k), and the true

"anti-preemption" clauses in section 1392(d). All of these show that section 1397(k) does not address the scope of preemption mandated by section 1392(d) at all, much less entirely preclude preemption of common-law claims.

1. *The Text of Section 1397(k) Addresses the Defense of Compliance with Federal Standards, Not Section 1392(d) Preemption*

The statutory text shows that section 1397(k) does not address the scope of preemption under section 1392(d). Indeed, as the Solicitor General notes, "[T]he language of the clause does not directly address preemption at all." Br. for the United States at 18. Instead, it states: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." This is not the language Congress typically employs to restrict the scope of preemption; rather, this language refers to and negates compliance with government standards as a federal-law affirmative defense to the merits of a claim.[7]

The "compliance with" language differs dramatically from the encompassing saving-clause language Congress used both in section 1392(d) of the Safety Act and in

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[7] The titles of sections 1392(d) and 1397(k) further show that it is the former, not the latter, that addresses preemption. *See I.N.S. v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("title of a statute or section can aid in resolving an ambiguity in the legislation's text"). Section 1392(d) is entitled "Supremacy of federal standards." In contrast, the title of section 1397(k) mentions neither federal supremacy nor preemption; rather, its title is "Continuation of common law liability." Likewise, when Congress recodified the Safety Act in 1994, it relocated section 1392(d) at 49 U.S.C. § 30103(b), entitled "Preemption," but relocated section 1397(k) at 49 U.S.C. § 30103(e), entitled "Common law liability."

numerous other statutes when it intended to limit the scope of preemption. Section 1392(d) incorporates two saving clauses limiting the scope of its preemptive first sentence. Each begins with clear, unambiguous, and traditional anti-preemption saving language:

> *Nothing in this section shall be construed as preventing any State* from enforcing any safety standard which is identical to a Federal safety standard. *Nothing in this section shall be construed to prevent . . . the government of any State . . .* from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard. (Emphasis added.)

The saving clause in virtually every other preemption-limiting case decided by this Court has used similar anti-preemption language, not the narrow "compliance with" language of section 1397(k).[8]

The stark difference between the narrow "compliance with" language of section 1397(k) and the broad saving language used in section 1392(d) and other preemption-

[8] *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) (29 U.S.C. § 1144(b)(2)(A)); *Morales*, 504 U.S. 374 (49 U.S.C. § 1506); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (42 U.S.C. §§ 2000e-7, 2000h-4); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978) (29 U.S.C. § 309(b)); *Tallentire*, 477 U.S. 207 (46 U.S.C. § 767); *Gade v. National Solid Wastes Mgt. Ass'n*, 505 U.S. 88 (1992) (29 U.S.C. §§ 653(b)(4), 667(a)); *Ouellette*, 479 U.S. 481 (33 U.S.C. §§ 1365(a), 1370); *California v. F.E.R.C.*, 495 U.S. 490 (1990) (16 U.S.C. § 821); *Kalo Brick*, 450 U.S. 311 (49 U.S.C. § 22); *Mansell v. Mansell*, 490 U.S. 581 (1989) (10 U.S.C. § 1408(e)(6)); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424 (1963) (47 U.S.C. § 414).

limiting statutes cannot properly be ignored. *See Tallentire*, 477 U.S. at 222. It is a difference between a constitutional doctrine and a merits defense.

When a defendant asserts that a plaintiff's claim is preempted, whether by the Safety Act or by any other federal law, courts do not ask whether the defendant complied with the federal law; rather, courts employ "essentially a two-step process" of (1) examining the state standard asserted by the plaintiff and (2) determining whether enforcement of that standard is expressly preempted by, or would conflict with, an applicable federal law. *Kalo Brick*, 450 U.S. at 317. *Accord Cipollone*, 505 U.S. at 523-24. This analysis requires no factual determination of whether the defendant complied with federal law. Here, for example, the court of appeals never considered whether the particular seat-belt system in the 1987 Accord complied with the FMVSS's governing seat-belt equipment and performance. *See* Pet. App. at 1-16.

If, however, the preemption analysis leads to a conclusion of no preemption, and *if* the case proceeds to trial, *then* the general common-law rule is that the defendant may seek to prove compliance with the federal law and argue that the jury should consider the compliance as evidence of the reasonableness of the defendant's conduct. The Restatement (Third) of Torts: Products Liability § 4(b), comment *e* (1998), succinctly explains the difference:

> An important distinction must be drawn between the subject addressed in Subsection (b) and the matter of federal preemption of state products liability law. Subsection (b) addresses the question of whether and to what extent, as a matter of state law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness.

> When a court concludes that a defendant is not liable by reason of having complied with a safety design or warnings statute or regulation, it is deciding that the product in question is not defective as a matter of the law of that state. . . . In contrast, in federal preemption, the court decides as a matter of federal law that the relevant federal statute or regulation reflects, expressly or impliedly, the intent of Congress to displace state law, including state tort law, with the federal statute or regulation.

See Wood, 865 F.2d at 417-18 (holding no-airbag claim impliedly preempted, and explaining that "preemption of a state product liability suit . . . is distinct from a defense on the merits").[9]

Thus, section 1397(k) makes clear that Congress did not intend to make compliance a merits defense as a matter of federal law, but instead intended to allow States to choose whether to give compliance its traditionally limited role as an item of evidence that juries may consider in determining the reasonableness of defendants' designs. Without section 1397(k), courts may have concluded

[9] Petitioners' most serious confusion of the issues appears in their assertion that "for 20 years after the Act's passage, the nation's appellate courts unanimously agreed that common law claims are not preempted by the Safety Act or by federal motor vehicle safety standards." Pet. Br. at 1-2 & n.2 (citing 13 cases). In truth, the cases they cite do not stand for that proposition at all; rather, all but one of them focus solely on whether evidence of compliance is admissible and provides an affirmative defense. *See, e.g., Schwartz v. American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983). None addresses express preemption or conflict preemption. The only one that addresses preemption at all is *Arbet v. Gussarson*, 66 Wis. 2d 551, 562, 225 N.W.2d 431, 438 (1975), which rejects only the sweeping argument that the Safety Act "preempt[s] the field of automobile safety regulation thus rendering state courts powerless to act in this area."

that Congress intended to federalize the recognized exception to that general rule by making proof of compliance with FMVSS requirements, even those only indirectly related to the precise design claims in issue, a complete affirmative defense on the merits.[10] Without section 1397(k), for example, courts might have held, contrary to *Perry, supra*, that by installing airbags in its 1999 MY cars, as required by FMVSS 208, a manufacturer became exempt from common-law claims alleging defects in the airbag design, even though FMVSS 208 does not establish airbag design requirements.

The clarification of congressional intent regarding the weight to be given to compliance evidence was especially important for diversity actions in federal courts. Before the enactment of the Federal Rules of Evidence in 1975, "[t]he situation especially was chaotic in the field of evidence, because the applicable rules and the weight given to state doctrine varied from circuit to circuit, from law to equity, and from one branch of the law of evidence to another." 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2401 (2d ed. 1998). Section 1397(k) made it clear that, in common-law product liability cases brought in federal courts, the courts

[10] Petitioners erroneously assert that, "[a]t 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." Pet. Br. at 27 n.11. In fact, however, in 1966 it was clear that under some circumstances "the minimum standard prescribed by the legislation or regulation may be accepted . . . by the court as a matter of law, as sufficient for the occasion . . . ." Restatement (Second) of Torts § 288C, comment *a* (1965); William L. Prosser, Law of Torts § 35, at p. 205 (3d ed. 1964) (same). In addition, since then, several States have adopted, for product-liability cases, various exceptions to the general rule that Petitioners present as an absolute rule. *See* Br. of the Alliance of Automobile Manufacturers and the Asssociation of International Automobile Manufactures, Inc. at 24 n.11.

were to accord compliance evidence the weight given to it by applicable state law.[11]

2. *The Safety Act's Structure Confirms That Section 1397(k) Does Not Address Section 1392(d) Preemption*

The Safety Act's structure further shows that section 1397(k) was not intended to be a sweeping exception to section 1392(d). *Cf. Easterwood*, 507 U.S. at 664 ("Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue."). In *Easterwood* the Court indicated the importance of the locations of saving language and preemptive language relative to each other in a federal statute. The Court observed that the federal statute there "displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses" within the very same provision. 507 U.S. at 665. Here, in contrast, the Safety Act's preemption clause is neither prefaced nor succeeded in the same section by any saving clause for common-law actions. The "compliance with" clause does not appear until five full sections after the preemption provision.

In addition, as shown above, section 1392(d) does contain two "express saving clauses" immediately following the express preemption clause. *See* pp. 13-14, 22, *supra*. If Congress had intended section 1397(k) to constitute a third, and the most sweeping, limitation on preemption, Congress surely would have included it in its logical place, adjacent to the two saving clauses in the section labeled "Supremacy of federal standards."

[11] This, as well as the text at pp. 18-20, 23-25, *supra*, explains why the Solicitor General is mistaken in suggesting that section 1397(k) would be rendered superfluous if section 1392(d) were to apply to any common-law claim. *See* Br. of the United States at 14.

3. *The Safety Act's Legislative History Further Confirms That Section 1397(k) Does Not Address Section 1392(d) Preemption*

The treatment of section 1397(k) in the House report, Conference report, and floor debates further confirms that it does not address section 1392(d) preemption.[12] The House and Conference reports both contain sections entitled "Preemption." *See* H.R. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2731, 2732-33; H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966). Neither of them mentions section 1397(k); rather, they discuss only section 1392(d). The House report discusses section 1397(k) elsewhere, under the heading "Prohibited Acts and Exemptions." The Conference report does not mention it.

Senator Magnuson's description of section 1397(k) to the Senate after the House-Senate conference also shows that the section does not address section 1392(d) preemption. He 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 or evidence are intended to be altered by this provision.

112 Cong. Rec. 21,487 (1966). The "principle developed in the Senate report" was that FMVSS's "*need not* be interpreted as restricting State common law standards of

[12] Because section 1397(k) was added to the Senate bill after the House and Senate conference, the Senate report does not discuss it.

care," and "[c]ompliance 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), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added).

Thus, by adding section 1397(k), Congress intended to clarify that the Safety Act would not create a federal-law compliance defense and so would not "necessarily" shield a common-law defendant. If, as Petitioners contend, Congress intended section 1397(k) *always* to prevent *any* limit on *any* common-law claim, the words "not necessarily" and "need not" would be inconsistent with that purpose. If, on the other hand, section 1397(k) means what it says, it addresses only compliance as a merits defense and leaves preemption to section 1392(d) and ordinary conflict-preemption principles. That makes the legislative history sensible and consistent.

The snippets of legislative history Petitioners cite do not support a different conclusion. As the Solicitor General has noted, Petitioners fail to recognize that, just like section 1397(k) itself, the legislative history they cite does not address preemption at all, but instead discusses whether evidence of compliance with federal standards will be a complete defense or will be only evidence that juries may consider. *See* Br. for the United States at 19-20 & nn. 15-16.

II. PETITIONERS' NO-AIRBAG CLAIMS ARE IMPLIEDLY PREEMPTED BECAUSE THEY CONFLICT WITH THE SAFETY ACT AND FMVSS 208

The Supremacy Clause impliedly preempts state laws that would impede "the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). As the court of appeals held, and as the

Secretary has long maintained, no-airbag claims like Petitioners' do conflict with the purposes and objectives of the Safety Act and FMVSS 208, and they are impliedly preempted by that conflict.

A. Petitioners' No-Airbag Claims Interfere with the Purposes and Policies of the Safety Act and FMVSS 208

Petitioners contend that their claims for $20,500,000, based on a contention that the common law requires 1987 Honda Accords to have airbags, do not conflict with the purposes and policies of the Safety Act and FMVSS 208 "since this lawsuit complements the goals of the Safety Act and Standard 208." Pet. Br. at 42. The Department of Transportation, interpreting its own regulation, disagrees.[13] *See* Br. for the United States at 15-29. Likewise, every United States Court of Appeals that has considered the question disagrees. *See* p. 6 n. 1, *supra*. Moreover, even if Petitioners' no-airbag claims were consistent with the Secretary's safety goals, this Court has rejected the notion that consistency of substantive goals suffices to preclude preemption:

> In determining whether [state common law] "stands as an obstacle" to the full implementation of the [federal law], it is not enough to say that the ultimate goal of both federal and state law is [the same]. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal.

Ouellette, 479 U.S. at 494. *See Perez v. Campbell*, 402 U.S. 637, 650-52 (1971) (whether conflict exists between

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[13] As the Solicitor General has explained, Petitioners and their *amici* have misconstrued the Secretary's statements by suggesting that she intended potential tort liability to be an incentive for manufacturers to install airbags. *See* Br. for the United States at 25-26 n. 22.

state and federal laws depends not on state law's purpose, but on state law's effect on federal regulatory plan).

1. *Petitioners' No-Airbag Claims Conflict with the Secretary's Determination That Requiring Airbags in 1987 MY Vehicles Would Disserve Federal Safety Purposes*

The Secretary's decision that airbags should not be required in 1987 MY vehicles rested on a careful balancing of safety considerations and a finding that, for several reasons, requiring airbags in those vehicles might *reduce* public safety. As recognized by the court of appeals below:

> [T]he United States ultimately concluded that a no-airbag claim was preempted in *Wood* because the Department of Transportation specifically determined that "an all airbag rule would disserve the safety purposes of the Act" and that this policy "would be disrupted by tort liability, which therefore would be preempted."

Pet. App. 16 (quoting Brief of the United States as Amicus Curiae, on Petition for a Writ of Certiorari at 7, *Wood v. General Motors Corp.*, 494 U.S. 1065 (1990)).

The Secretary identified several safety concerns. First, the only real-world data (as opposed to test data) regarding the effectiveness of airbags relative to the effectiveness of seat belts were too sparse to permit scientifically sound conclusions; and what data there were showed that airbags then available provided *no* increased safety over seat belts as used:

> Based on field experience through December 31, 1983, . . . the computed airbag and manual belt effectiveness (as used in equivalent cars) for fatalities is now the same. This means that airbags would not save any more lives than the belt systems as used in those cars.

49 Fed. Reg. 28962, 28985 (1984). Rejection of an airbag requirement was necessary to implement federal safety goals because "[w]idespread use of both [airbag systems and belt systems] is the only way to develop definitive data" as to their relative effectiveness. *Id.* at 29000, 29001. It also addressed the Secretary's concern that requiring airbags would impede safety by "stifl[ing] innovation in occupant-protection systems":

> [B]y restricting the manufacturers [to airbags], the Department runs the risk of killing or seriously retarding the development of more effective, efficient occupant protection systems.

Id. at 29001.

Second, the Secretary recognized that airbags continued to present unique safety dangers. She stated that the "lack of experience" regarding out-of-position occupants in some circumstances, "as well as the lack of experience for some companies in any form of airbag development, make the Department reluctant to mandate across-the-board airbags." *Id.* at 29001. She also cautioned that "the Department can not state for certain that airbags will never cause injury or death to a child." *Id.* at 28992. She expressed concern that airbags might indirectly cause injuries and deaths because "the high cost of replacing an airbag may lead to its not being replaced after deployment. The result would be no protection for the front seat occupants of such an automobile." *Id.* at 29001. And she identified risks that existed because

> [s]ome people have serious fears or concerns about airbags. If airbags were required in all cars, these fears, albeit unfounded, could lead to a backlash

> affecting the acceptability of airbags. This could lead to their being disarmed, or perhaps, to a repeat of the interlock reaction.

Id. at 29001.

Still further, the determination that airbags should not be required in 1987 was a crucial part of the Secretary's goal of achieving increased safety as quickly as possible by giving the States an incentive to do what they had refused to do for many years: enact laws requiring vehicle occupants to use their seat belts. This was because seat belts, unlike airbags, provided protection in side and rear crashes, rollovers, multiple impacts, and low-speed crashes. *Id.* at 28985-86, 28991, 29001. The Secretary stated:

> [A] substantial increase as a result of the widespread enactment of [mandatory-use laws] would provide increased safety benefits much more quickly and at a much lower cost . . . . The data . . . demonstrate the dramatic reductions in deaths and injuries that widespread usage of the manual belt systems would achieve.

Id. at 29003. *See id.* at 28997 (increased belt use "is the quickest, least expensive way by far to significantly reduce fatalities and injuries"). To induce the enactment of mandatory-use laws, the Secretary provided in FMVSS 208 that the passive-restraint requirement would be eliminated if two-thirds or more of the American population were covered by laws meeting specified criteria by April 1, 1989. *Id.* at 28963.[14]

Three years later, denying a petition for reconsideration of related rulemaking, the Secretary stated:

[14] The Secretary's plan worked: "Indeed, it would appear that the passage of [mandatory-use laws] has in fact come about in *response* to the Secretary's rule." *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 487 n.25 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) (emphasis in original).

> The Insurance Institute for Highway Safety (IIHS) perhaps summed this issue up most clearly in its comment on the proposal, when it said: . . . "Each individual model with an air bag system requires a separate engineering development and crash testing program. *It wouldn't be responsible to pace the phase-in of air bags ahead of these constraints.*"

52 Fed. Reg. 42440, 42442 (1987) (emphasis added). The Secretary also noted that, even after the start of the 1987 model year, a major airbag supplier had stated that passenger-side airbags "may require a very energetic inflator which has the potential of injuring an out-of-position occupant. . . . To our knowledge, this technology has not been fully developed at this time . . . ." *Id.* The Secretary declared that any contention that passenger-side airbag technology was adequate "was based on false technical premises and faulty engineering judgment . . . ." *Id.* at 42443.

Thus, whereas Petitioners seek to establish a common-law standard that narrowly focuses on persons who want to claim that they would not have been injured had their 1987 MY vehicles included airbags, the Secretary, charged with promulgating nationwide standards that "protect[] against unreasonable risk of death or injury," forged a safety standard that carefully balanced the competing public interests of those persons and persons who might have been injured or killed had airbags been prematurely required. The Secretary determined that protection against unreasonable risk dictated that airbags not be required in 1987 MY vehicles.

As this Court made clear in *Kalo Brick*, this type of "reasonableness" balancing is a type of decision-making for which conflict preemption is particularly appropriate. There, after noting that the Interstate Commerce Act em-

powered the Interstate Commerce Commission "to pass on the reasonableness of a carrier's temporary suspension of its service," 450 U.S. at 319, the Court stated that, in making such a decision,

> the Commission must balance "the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other." Once the Commission has struck that balance, its conclusion is entitled to considerable deference. "The weight to be given [to each] is a matter which the experience of the Commission qualifies it to decide. And, under the statute, it is not a matter for judicial redecision." . . . The judgment as to what constitutes reasonableness belongs exclusively to the Commission. . . . A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress. . . .

450 U.S. at 321, 325-26 (citations omitted). *See City of New York v. F.C.C.*, 486 U.S. 57, 64 (1988). The same is true here, where the Secretary has determined, with respect to a particular aspect of vehicle performance, how best to protect the public from "unreasonable risk of injury or death" and has promulgated a federal standard that seeks to implement that determination in a specific manner.

Subsequent events have proved the importance and wisdom of the balance struck by the Secretary and her decsion not to force airbags to be rushed into production. In 1995 the Secretary reported that from 1991 to 1993, even with the phase-in time that FMVSS 208 had provided to address the risks, "approximately 54,000 injuries to occupants resulted from contacting an airbag." U.S. Dept. of Transp., National Accident Sampling System

Crashworthiness Data System 1991-1993, DOT HS 808 298, at viii (Aug. 1995). That number could well have been considerably greater had the Secretary prematurely rushed an airbag requirement into effect, or had common-law no-airbag claims been permitted to go forward despite the Secretary's determination.

Similar importance attaches to the Secretary's finding in her 1984 rulemaking that the airbags previously installed in production vehicles had provided *no* increased safety over seat belts as used. *See* pp. 30-31, *supra*. A 1977 study had estimated that passive restraints could prevent approximately 12,000 deaths annually, *State Farm*, 463 U.S. at 35. By 1980, better data had reduced that estimate to 9,000 lives saved annually. *Id.* at 38. Most importantly, in 1998, after tens of millions of airbag-equipped vehicles had been on the roads for several years, it turned out that the total number of lives saved by airbags between 1986 and 1998 was less than 3,200. 63 Fed. Reg. 49958, 49962 (1998).

Thus, events following the Secretary's 1984 decision that airbags should not be required in 1987 MY vehicles show that her judgment regarding both the uncertainty surrounding airbag risks and the uncertainty surrounding airbag benefits was correct and vitally important to federal safety policies.

2. *Petitioners' No-Airbag Claims Would Impede the Flexibility the Secretary Found Necessary to Implement Federal Safety Policies*

The common-law standard advocated by Petitioners also would permit each State to use the threat of repeated, massive compensatory and punitive damages awards to punish manufacturers for not installing airbags in 1987 MY vehicles. It would thereby undermine the flexibility

that the Secretary determined was necessary to "provide sufficient latitude for industry to develop the most effective [occupant-restraint] system." 49 Fed. Reg. at 28997.

This Court repeatedly has held that, when federal law implements federal policies by explicitly affording regulated entities a choice of specified options, the States cannot constitutionally limit them. *See, e.g., Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996); *de la Cuesta,* 458 U.S. at 155. Here, in like fashion, Petitioners' claims would frustrate the flexibility expressly provided by FMVSS 208. The Secretary provided this flexibility to foster technological innovation and field experience that would make a variety of passive restraint systems—belt systems, airbags, and "passive interiors"—safer and more acceptable to the public. 49 Fed. Reg. at 28962-63. The element of choice in the federal program, therefore, was not an expression of neutral indifference, but a purposeful element designed to address serious doubts about the safety and public acceptability of prematurely requiring the installation of airbags. *See Pokorny,* 902 F.2d at 1124 ("flexibility and choice is an essential element of the regulatory framework established in Standard 208"); Br. for the United States at 23-28.

Petitioners argue that the common-law standard they advocate would not impair that flexibility because it would not force manufacturers to change their conduct, but instead would only require manufacturers to compensate plaintiffs for their injuries. Pet. Br. at 47-48. Many times, however, this Court has found that common-law damages do tend to force actions that conflict with federal policies. *See Kalo Brick,* 450 U.S. at 325-26; *Ouellette,* 479 U.S. at 813.[15]

[15] Indeed, only three months after the Secretary published the version of FMVSS 208 in issue here, a group of plaintiffs' lawyers announced their goal of using no-airbag lawsuits to "force" vehicle manufacturers to install airbags on a more accelerated basis than the Secretary had determined would promote federal safety policies:

> [R]ecently, a small group of trial lawyers from around the nation has quietly developed a new strategy that they hope will move the airbag question out of the regulatory agencies and into the courts . . . . "We are trying to use economic pressure to force them to offer airbags," said [their spokesperson]."

Tamar Lewin, *The Air Bag Goes to Court,* N.Y. Times, Oct. 29, 1984, at 1 (Business Section).

Moreover, Petitioners' suggestion that the imposition of liability would require only compensation is at odds with their own complaint in this case, which seeks $10,500,000 in compensatory damages and $10,000,000 more in punitive damages. *E.g.,* J.A. 6-10. As the First Circuit recognized more than a decade ago in holding a no-airbag claim preempted:

> [I]t seems obvious that a damages award will have a pronounced effect on the manufacturer's future conduct. The same theory of recovery could be pursued by every front seat occupant injured in [a collision]. It is well known that injuries to front seat occupants are frequent; well over 20 lawsuits have been filed on the theory of absence of air bags in the last two years. . . . In these circumstances, General Motors' choice to avoid modification of its design "seems akin to the free choice of coming up for air after being underwater."

Wood, 865 F.2d at 410-11 (citation omitted).

Petitioners further miss the mark by arguing that the threat of such pronounced effects need not concern the Court in this case because the Secretary estimated in July 1984 that manufacturers would need at least three to four years to install airbags in all cars. Given the Secretary's determination that manufacturers could not install airbags in all cars until after the phase-in period ended on

September 1, 1989, Petitioners' argument must be that the Secretary believed it would not impair her carefully-structured program to allow thousands of plaintiffs to recover multiple millions of dollars in compensatory and punitive damages because manufacturers did not do something that they literally could not have done.

Petitioners ignore that the Secretary has long expressed a view different from theirs. *See* Br. of United States at 26-28. They also ignore that, in promulgating FMVSS's, the Secretary determines what is "reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment." 15 U.S.C. § 1392 (f)(3). *Accord* 15 U.S.C. §§ 1391(1), 1391(2), 1392(a). Having established a detailed schedule designed to phase in airbags in a reasonable, practicable, and appropriate manner, the Secretary cannot sensibly be deemed to have been indifferent to the adverse effects that the unbounded liability sought by Petitioners would wreak.

Petitioners try to circumvent that problem by arguing that, because the crash in this particular case occurred in 1992, after the phase-in period, their claims "could not possibly interfere with the government's decision to phase in passive restraints between 1986 and 1989." Pet. Br. at 45. That is a strange view of preemption. It argues that even if state law is for several years preempted by a federal law intended to induce manufacturers to produce a certain mixture of product features, and even if manufacturers during all those years produce products that promote federal policies in the exact manner intended and encouraged by the federal government, the preemption dissolves at the end of that period, thereby subjecting the manufacturers to liability as long as the once-protected products remain in use. Petitioners cite no authority for that view.

It makes no sense. Had preemption been so limited in 1984, the Secretary's policies would have been adversely affected during the phase-in period itself. Manufacturers could not have chosen to research, develop, and offer the variety of restraint systems that the Secretary had determined was *necessary* to promote federal safety policies; rather, they would have had to focus narrowly and solely on airbags. Because that conflict with federal policy is exactly what the preemption doctrine seeks to avoid, the fortuity that this crash occurred in 1992, rather than 1987, does not dissolve the conflict between federal law and Petitioners' no-airbag claims.

3. *Petitioners' No-Airbag Claims Conflict with the Federal Goal of Uniformity of Standards Where the Secretary Has Promulgated an On-Point FMVSS*

Both Houses of Congress emphasized that an important purpose of the Safety Act was to establish uniform national safety standards governing the design of motor vehicles used in all 50 States. The Senate stated:

> The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.

S. Rep. No. 1301, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. Similarly, the House stated:

> Basically, this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966). In hearings on the Act, legislators and the Secretary of Commerce repeatedly stressed the importance of national uniformity.[16]

If the States could impose common-law standards differing not only from an on-point FMVSS, but among each other, as well, neither the public nor industry would be guided by one set of criteria; rather, as consumers drove from one State to another, they and the manufacturers of their vehicles would be subjected to the very "multiplicity of diverse standards" that Congress sought to avoid. As this Court stated in holding common-law tort claims impliedly preempted in *Kalo Brick*, 450 U.S. at 326: "A system under which each State could, through its courts, impose . . . its own requirements could hardly be more at odds with the uniformity contemplated by Congress . . . ." *See Ouellette*, 479 U.S. at 496. That conflict is no less severe when the claims seek damages for personal injuries. *See Tallentire*, 477 U.S. at 230 ("incongruous is the idea that a Congress seeking uniformity in maritime law would intend to allow widely divergent state law wrongful death statutes to be applied on the high seas").

Although recognizing that uniformity was one of the purposes of the Safety Act, Petitioners nevertheless argue

[16] *See*, Traffic Safety Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess., pt. 1, at 146 (1966) (Secretary of Commerce John T. Connor) ("We don't think that the objectives . . . can be accomplished on a piecemeal basis or by leaving the authority untouched that is now vested in the States and municipalities."); *id.* at 606-07 (Hon. William D. Hathaway) (uniform national standards necessary because multiple and inconsistent state standards would "creat[e] chaos"); 112 Cong. Rec. 14,253 (1966) (Sen. Magnuson) ("The [Act] will . . . establish a program of strict national standards for automobiles. . . . the only alternative is unthinkable—50 standards for 50 different states. I believe this would be chaotic.")

that no common-law claim can be preempted, because any preemption would restrict some plaintiffs' ability to sue vehicle manufacturers. Pet. Br. at 42-43. But Petitioners point to nothing indicating that Congress intended to resolve the occasional tension between plaintiffs' ability to sue manufacturers and the need for national uniformity in a manner that utterly destroys that uniformity. The narrow preemptive scope we have described achieves the resolution Congress intended.

Congress sought uniformity only as to the precise aspects of performance for which the Secretary determines that an FMVSS should be established. As we have shown (*see* pp. 18-19, *supra*), lawsuits in which plaintiffs seek to establish a common-law standard that directly conflicts with an on-point FMVSS are exceedingly rare. Therefore, judicial recognition that such claims are preempted promotes the national uniformity intended by Congress *and* leaves plaintiffs free to pursue all nonconflicting common-law claims.

Petitioners' interpretation, however, does nothing at all to promote uniformity in the instances in which Congress determined it was needed—namely, where the Secretary has established FMVSS's. Instead, they say, individual courts throughout the land should be free to establish conflicting common-law standards, even standards that impose liability for doing exactly what an on-point FMVSS requires. As the Solicitor General observes, that would "lead the Act 'to destroy itself.'" Br. for the United States at 22-23 (*quoting American Tel. & Tel. Co. v. Central Office Tel.*, 524 U.S. 214, 228 (1998)). The Act cannot reasonably be construed to do so.

In sum, as this Court has recognized, "improving [motor vehicle] safety does not admit to easy solution," "call[s] for considerable expertise," and requires that "the

effectiveness of [design changes] be studied, their costs examined, and public acceptance considered." *State Farm*, 463 U.S. 29, 33 (1983). After a comprehensive regulatory review, the Secretary exercised that expertise and concluded that requiring airbags in 1987 MY vehicles would disserve federal safety goals. Petitioners' attempt to impose just such a requirement as a common-law standard conflicts with that determination substantively *and* interferes with the regulatory methods chosen by the federal government to achieve the Safety Act's stated goals. The Supremacy Clause prohibits that result.

B. Sections 1392(d) and 1397(k) Do Not Preclude This Court from Conducting a Conflict-Preemption Analysis

Petitioners contend that courts, including this Court, are prohibited from conducting any conflict-preemption analysis of any common-law claim because section 1397(k) is an "unequivocal anti-preemption clause" that preserves "all common law claims," regardless of whether those claims completely undermine the purposes and policies of on-point federal motor vehicle safety standards. Pet. Br. at 34-35, 37. That is wrong for two reasons.

First, as shown above in detail needing no further discussion here, section 1397(k) does not address the scope of preemption under section 1392(d); rather, section 1397(k) addresses the legal effect of a manufacturer's "compliance with" a federal standard. *See* pp. 21-26, *supra*. For the same reasons, section 1397(k) does not address the preemptive effect of a direct conflict between a federal safety standard and the imposition of liability under state tort law.[17]

[17] In *Ouellette* this Court noted that the Senate Report discussing one of the two saving clauses there in issue stated, "Compliance with requirements under this Act would not be a defense to a common law action for . . . damages." 479 U.S. at 493 n.13. That language is almost identical to the language of section 1397(k) and its legislative history relied on by Petitioners here. Despite that language, the Court in *Ouellette* held that the two saving clauses did not preclude conflict preemption of certain common-law nuisance claims. The same result should obtain here.

Second, as we now show, a long line of decisions by this Court holds that even sweeping saving clauses that explicitly preserve common-law *and* statutory claims from preemption cannot properly be construed to prevent conflict preemption. Petitioners have identified no reason why the narrower language of section 1397(k) should occasion the overturning of that inveterate principle.

Petitioners concede that in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995), the Court rejected as "without merit" the argument that the existence of an express preemption provision precludes a finding of conflict preemption. They contend, however, that conflict preemption cannot exist where the federal statute in question contains both an express preemption provision and an express anti-preemption provision. *See* Pet. Br. at 34, 37. That contention ignores not only the conflict-preemption analysis that the Court conducted in *Myrick* itself, but two cases, *Kalo Brick* and *Boggs v. Boggs*, 520 U.S. 833 (1997), in which the Court found conflict preemption in just such situations. That contention also is at odds with the many cases in which this Court has found conflict preemption despite saving clauses that, unlike section 1397(k), used broad, unequivocal anti-preemption language.

In *Boggs* the Court was called upon to consider whether ERISA preempted a state law allowing a particular type of testamentary transfer. ERISA contained both an express preemption provision, 29 U.S.C. § 1144(a), and an express anti-preemption provision broadly mandating that

ERISA "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). Nevertheless, the Court bypassed both provisions, proceeded directly to a conflict-preemption analysis, and held the state law impliedly preempted, stating:

> We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the [express preemption provision] provides further and additional support for the pre-emption claim.
>
> . . . .
>
> In the face of this direct clash between state law and the provisions and objectives of ERISA, the state law cannot stand. Conventional conflict preemption principles require pre-emption "where compliance with both federal law and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

520 U.S. at 841, 844 (citation omitted).

In *Kalo Brick* the Court was called upon to consider whether certain common-law tort actions were preempted by a ruling by a federal agency acting pursuant to a statute that contained both an express preemption provision and a broad anti-preemption provision. *See* 450 U.S. at 328, 329 n.16. Again forgoing express-preemption analysis, the Court held the common-law actions impliedly preempted because they conflicted with federal purposes and policies. *Id.* at 325-27.

These cases show not only that conflict-preemption analysis can properly be conducted in statutes with both

an express preemption provision and an express anti-preemption provision, but also that, when the conflict is clear, conflict-preemption analysis can proceed without close analysis of those provisions. *See also Medtronic,* 518 U.S. at 503 (express preemption "may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis").

Moreover, the Court many times has held conflict preemption not precluded even by provisions that, unlike section 1397(k), (i) used broad, traditional anti-preemption language, rather than narrow "compliance with" language, (ii) broadly and explicitly preserved both common law and statutory law of the States, and (iii) appeared in federal statutes that did not expressly provide for any preemption at all. *See, e.g., Ouellette,* 479 U.S. at 492-94; *T.I.M.E., Inc. v. United States,* 359 U.S. 464, 473-74 (1959); *Pennsylvania R.R. v. Puritan Coal Mining Co.,* 237 U.S. 121, 129-30 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 446-47 (1907). It would make no sense to reach a different conclusion based on the limited language of section 1397(k). *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 99 (1993) (ERISA's preemption provision and saving clause provide "no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis"; therefore, State law is preempted "where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."). As the Court explained in *Kalo Brick,* 450 U.S. at 328 (quoting *Puritan Coal,* 237 U.S. at 130), such saving clauses should be construed to have been included only because, without them,

> "it might have been claimed that, Congress having entered the field, the whole subject of liability . . . had been withdrawn from the jurisdiction of the state

> courts," so [the saving clause] was added to make plain that the Act "was not intended to deprive the state courts of their general and concurrent jurisdiction."

See Abilene Cotton, 204 U.S. at 446 (even broad anti-preemption clauses "cannot in reason be construed as continuing . . . a common law right" inconsistent with underlying federal aims).[18]

Finally, Petitioners recast their argument by asserting that, "given Congress' express prohibition of preemption of common law claims, NHTSA simply lacked the power to preempt such claims, even if it wanted to." Pet. Br. at 41. But this begs the question, which is whether Congress in fact intended section 1397(k) to preclude all forms of preemption, including conflict preemption.

It is undisputed that Congress broadly delegated to the Secretary the power to promulgate FMVSS's that she determined would "meet the need for motor vehicle safety" and "protect[] against unreasonable risk of death or injury". 15 U.S.C. §§ 1391(1), (2). Given this broad dele-

[18] Petitioners and all but one of their *amici* make no effort to address these cases. The one brief that makes an attempt, *see* Brief of the National Conference of State Legislatures, *et al.* ("NCSL") at 7-9, fails utterly. NCSL first observes that section 1397(k) refers only to common law and that the anti-preemption provisions in *Kalo Brick*, *Puritan Coal*, *Abilene Cotton Oil*, and other decisions of the Court swept more broadly by preserving *both* common law *and* state statutory law. NCSL then concludes from this that although the broader anti-preemption provisions in those cases did not preclude conflict preemption of common-law claims, section 1397(k) should be interpreted to do so. *Id.* at 8-9.

This is illogic of the first order. It argues that because section 1397(k) is *narrower* than the anti-preemption provisions in the cited cases, it should be given *broader* anti-preemptive effect. The opposite is true: Since section 1397(k) is narrower than the other provisions, any anti-preemptive effect it may have should be at least as limited as that of the other provisions.

gation, it is inconceivable that Congress intended to grant the Secretary power to preempt state statutes and regulations that conflict with the FMVSS's and in her judgment would undermine motor vehicle safety, but intended to withhold the power to preempt common-law standards that equally undermine her safety determinations. *See Kalo Brick*, 450 U.S. at 326-27. In conflict-preemption analysis, "a court's concern is necessarily with 'the nature of the activities which the States have sought to regulate,' " rather than with whether the States have chosen to regulate through their courts, their legislatures, or their administrative agencies. *Id.* at 317-18 (citation omitted). There is simply no "convincing reason why Congress would want to encourage states to impose an inconsistent safety standard of this nature by lawsuits but not by regulations." *Wood*, 865 F.2d at 412.

In 1991, Congress and the Secretary provided further evidence that the Safety Act cannot properly be read to preclude preemption of no-airbag claims. When Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991) ("ISTEA"), it mandated that airbags be required in all passenger cars built after August 31, 1997. Before Congress enacted ISTEA, however, the Secretary, through the Administrator of the National Highway Traffic Safety Administration, informed it that "most courts that have considered the matter have ruled that [no-airbag claims] are preempted by the . . . Safety Act and/or the safety standards issued by NHTSA." Letter to Congress from NHTSA Administrator Jerry Curry, November 7, 1991; H.R. Rep. No. 404, 102nd Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783 The Administrator cited three decisions by courts of appeals—*Pokorny*, *Wood*, and *Kitts*—that had held such claims preempted, and warned that if "federal law were revised to require

air bags in all cars, it is possible that some courts would conclude that these claims are no longer preempted." *Id.*

To avoid that result, Congress added this language:

> Nothing in this section or in the amendments made under this section to FMVSS 208 shall be construed by any person or court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Pub. L. No. 102-240 § 2508(d), 105 Stat. 1914, 2086. The Conference report expressly noted the Administrator's letter and stated that the conferees "do not want . . . to change the law on liability as it existed prior to enactment." H.R. Rep. No. 404, 102nd Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783. By thus expressly refusing to alter the preemption of no-airbag claims that it knew had been established in *Pokorny, Wood,* and *Kitts,* Congress indicated its acceptance of those decisions. *Cf. Haig v. Agee,* 453 U.S. 280, 300 (1981) ("congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy"); *Bob Jones Univ. v. United States,* 461 U.S. 574, 599-602 (1983).

In sum, an interpretation of the Safety Act that permits conflict preemption is consistent with the statutory titles, text, structure, and legislative history, and with the decisions of this Court. Petitioners' interpretation is not. Because the common-law standard Petitioners seek to enforce conflicts with the Safety Act and FMVSS 208, the court of appeals correctly held that their no-airbag claims are impliedly preempted.

CONCLUSION

The judgment of the court of appeals should be affirmed because Petitioners' no-airbag claims are expressly and impliedly preempted by the Safety Act and FMVSS 208.

Respectfully submitted,

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