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

REPLY BRIEF FOR PETITIONERS

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When Congress designed the federal auto safety regulatory system, it provided "[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) (emphasis added). Yet Honda and its *amici* now insist that compliance with *this* Federal motor vehicle safety standard does exempt *this* defendant from *this* liability under common law. Before addressing their arguments in detail, we correct two misperceptions of our claims.

First, we do not claim that all cars manufactured in 1987 should have had airbags. Rather, we claim that the 1987 Honda Accord in this case was defectively designed because, as a result of the Accord's unique design characteristics (including, among other things, its shape, weight, and seating system), the manual lap belt and shoulder harness provided were insufficient to prevent Alexis Geier from suffering grievous injuries in a moderate-speed crash. J.A. 4-5. As far as we know, many other 1987 cars (including other cars manufactured by Honda) provided sufficient crash protection without an airbag. The car driven by Ms. Geier did not. That is why we contend it should have had an airbag.

Second, we do not challenge in any way, much less ask this Court (or a jury) to reconsider, the Secretary of Transportation's decision not to require airbags in all 1987 cars. We have no quarrel with the Secretary's regulatory decision to amend Standard 208 as she did. What we challenge here is the notion that, simply by making that decision, the Secretary exercised a different power – the power to preempt and immunize Honda from the Geiers' common law claims. For Congress did not give the Secretary that power, the Secretary did not purport to exercise it, and there is no conflict whatsoever between the Geiers' common law claims and the decision the Secretary actually made.

I. Petitioners' Claims Are Not Expressly Preempted.

Virtually all of the federal courts of appeals and state courts of last resort have held, and the United States agrees, that the Safety Act does not expressly preempt common law claims. *See* Petition at 9; U.S. Br. at 10-15. Honda's contrary arguments do not withstand scrutiny.

1. Honda's primary argument is that the Safety Act's express preemption provision, 15 U.S.C. § 1392(d), encompasses common law claims because it uses the term "safety standard," and "[t]his 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." Resp. Br. at 12. But "safety standard" is not a "broad term" that naturally encompasses the entire gamut of state laws; in fact, it is much narrower than the express preemption terms in the cases cited by Honda.[1] In any event, it would have been bizarre for Congress to use the same term – "safety standard" – to apply narrowly with respect to federal law and, at the same time, to encompass all state laws, including common law claims. Honda does not cite any authority for that topsy turvy proposition.[2]

[1] *Compare, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 674 (1993) ("law, rule, regulation, order, or standard"); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("requirement or prohibition"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) ("law, rule, regulation, standard, or other provision having the force and effect of law").

[2] In fact, none of the cases cited by Honda supports its broad reading of Section 1392(d). For example, unlike the 1969 cigarette labeling act in *Cipollone*, Section 1392(d) contains no reference to the entire body

Honda attempts to salvage its overbroad reading of the Act's express preemption clause by arguing that "the instances in which [S]ection 1392(d) preempts common-law claims are exceeding rare." Resp. Br. at 18. But how can that be so? As a glance at the Federal Register will confirm, NHTSA has promulgated detailed minimum standards governing almost every imaginable aspect of motor vehicle performance. *See* 49 C.F.R. Part 571. If the preemption clause encompasses common law claims, then nearly every lawsuit alleging that a manufacturer should have done something more than the minimum required by NHTSA would be preempted. Honda might love this outcome, but there is no indication that Congress intended the Safety Act to grant Honda and its *amici* such a free ride.

2. Honda's express preemption argument ultimately fails because the Act's savings clause, 15 U.S.C. § 1397(k), expressly preserves all common law claims. Honda attempts to nullify the savings clause by arguing that it has nothing to do with preemption; instead, it says, Section 1397(k) only "negates compliance with government standards as a federal-law affirmative defense to the merits of the claim." Resp. Br. at 21. But that is not what Section 1397(k) says and cannot be what it means. For, under that interpretation, Congress intended the

of "state law." *See* 505 U.S. at 515. Also, unlike the Safety Act, most of the statutes in the cases cited by Honda – including *Cipollone*, *CSX*, and *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) – contain no express savings provision referring to common law claims. In fact, in *Cipollone*, at 523 n.22, a plurality of the Court relied on the *absence* of a savings provision as evidence that the 1969 act preempted some damage claims. *Cipollone* also noted that the savings provision of the Comprehensive Smokeless Tobacco Health Education Act, 14 U.S.C. § 4406 – which says that "[n]othing in this Act shall relieve any person from liability at common law or under State statutory law to any other person" – broadly *preserves* damages claims. *Id.* at 518; *see also id.* at 537 n.2.

savings clause to negate a defense to a claim that Section 1392(d) had already *eliminated* through preemption. Judge Selya, in his dissent in *Wood v. General Motors Corp.*, 865 F.2d 395, 426, (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), articulated the central fallacy of this interpretation: "It would be a strange 'savings clause' indeed which could salvage an action on the merits in this fashion but be impuissant to stop preemption..."[3]

Honda insists that Section 1397(k) cannot apply to preemption because it does not start with the phrase "Nothing in this section shall be construed as preventing" or similar words. *See* Resp. Br. at 22. But nothing in this Court's precedents requires Congress to begin an anti-preemption clause with such words. Indeed, the notion that Congress must use some "magic words" to preclude a finding of preemption

[3] Congress also had no reason to negate an "absolute" state law compliance defense because, when the Safety Act was passed, it was *already* the law in every state that compliance with "an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions." *Restatement (Second) of Torts* § 288C (1965). Honda argues otherwise, quoting the 1965 Restatement as saying 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...'" Resp. Br. at 25 n.10 (quoting comment a). But Honda omits the remainder of the comment, which confirms that "if for any reason a reasonable man would take additional precautions, the provision does not preclude a finding that the actor should do so." Moreover, if (as Honda claims) Section 1397(k) expressly bars the use of compliance as a defense, then it would bar the States from deciding that compliance *could* be used as a defense – which Honda's *amici* now says at least one state has done. *See* Alliance of Automobile Manuf. Br. at 25 n.10.

contradicts both the presumption against preemption and common sense.[4]

In the end, Honda relies on the Safety Act's legislative history to buttress its "compliance defense" interpretation of Section 1397(k). Resp. Br. at 27. But that history devastates Honda's position. Section 1397(k) was added by the House of Representatives, and the House Report specifically provides that the clause "establishes[ ] that compliance with safety standards is not to be a defense *or otherwise to affect the rights* of parties under common law..." H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added). Of course, the most fundamental "right[ ] of parties under common law" is the right to sue in the first place. Thus, the House Report makes clear that the savings clause has precisely the meaning given it by petitioners: it expressly preserves common law claims.

[4] None of the cases cited by Honda supports its assertion that "magic words" are needed. Moreover, the cases are distinguishable on myriad grounds. For example, *Morales*, 504 U.S. at 385, held that a "general" savings clause that was a "relic" did not supercede a "specific" preemption provision added to the legislation much later. In contrast, Section 1397(k) is more "specific" than and was added *after* Section 1392(d). Similarly, the savings clause in *International Paper v. Ouellette*, 479 U.S. 481, 493 (1987), unlike Section 1397(k), was limited by the words "Nothing in this section" and did "not purport to preclude preemption of state law by other provisions of the Act." And the savings clause in the Interstate Commerce Act cases contained a proviso – "but the provisions of this act are in addition to such remedies" – which prompted the Court to find that its "manifest" and "evident[ ]" purpose was to preclude an inference from other provisions of the Act that the federal remedies provided were exclusive (allowing the States to exercise concurrent jurisdiction over claimed violations), but not to permit remedies inconsistent with the Act's substantive provisions. *Chicago & N.W. Tr. Co. v. Kalo Brick & Title Co.*, 450 U.S. 311, 328 (1981); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446-47 (1907).

II. Congress' Plain Words Preclude Any Inquiry Into Implied Conflict Preemption.

Given Congress' express preservation of common law claims, any resort to implied conflict preemption analysis is improper. As the Court said in *Cipollone*, 505 U.S. at 517, 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." The United States' and Honda's arguments to the contrary are meritless.

1. The United States argues that, because conflict preemption stems directly from operation of the Supremacy Clause, the Court should "assume" that Congress intended to preempt any state common law claims viewed as conflicting with a federal standard unless there is a "solid basis" for believing that Congress "intended fundamentally to alter traditional preemption analysis." U.S. Br. at 17. The government's concession that Congress *can* preserve common law claims that would otherwise conflict with federal law is important, but the United States' approach still has it backwards. First, preemption analysis starts with the assumption that state law is *not* preempted.[5] Second, federal

[5] As part of its argument, the United States improperly asserts (without citation to any authority) that the presumption against preemption does not apply to implied conflict preemption. *See* U.S. Br. at 18 n.13. *See also* GM Br. at 18-19. In fact, the presumption applies with full force to conflict preemption. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715, 720-21 (1985). *See also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring); *id.* at 115 (Souter, J., dissenting). This makes sense. If the presumption is to be employed when interpreting Congress' *express* language, a court should be even more cautious in *implying* Congress' intent to preempt state law from far less reliable indicators.

regulatory agencies only have the power to preempt state law that Congress gives them.[6] Thus, this Court should "assume" the opposite of what the United States proposes: absent a "solid basis" for finding that Congress intended to give NHTSA the power to preempt state common law claims, such claims are not preempted – even if a court might view them as conflicting with some standard adopted by NHTSA.[7]

2. Here, of course, there is no basis for believing that Congress gave NHTSA the power to preempt common law claims. To the contrary, Section 1397(k) is a *rock* "solid basis" for finding that Congress expressly denied NHTSA that power. *John Hancock*, 510 U.S. at 99. Indeed, "[i]t is difficult to imagine what language Congress could have used to make the point more clear." *Munroe v. Galati*, 938 P.2d 1114, 1118 (Ariz. 1997). The United States and Honda have only three contrary proposals to offer. First, the United States says that "[n]othing in the text of the clause suggests that common law liability is saved ... even if it conflicts with a federal safety standard." U.S. Br. at 18. But the text *does* suggest that; it says compliance "does not exempt *any* person from *any* liability under common law." "Any" means *any*. There was no reason

[6] The Supremacy Clause – which states that "the Constitution and the Laws of the United States . . . are the supreme Law of the Land," U.S. Const. Art. VI, Cl. 2 – does not alter that fact. *Congress* makes the "Laws of the United States." Federal regulatory agencies can only promulgate such "Laws" to the extent that Congress empowers them to do so.

[7] The United States, at 17-18, cites *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993), in support of its proposed assumption, but that case hardly turned the traditional approach to preemption on its head. To the contrary, it held that, in enacting ERISA, Congress did not intend to "alter traditional analysis" by making "state law, not federal law [,] preemptive." *Id.* at 99, 101.

for Congress to elaborate on that all-encompassing word. Second, the United States says that, because Section 1397(k) does not contain the word "preemption," it does not "address preemption at all." U.S. Br. at 18. The government, however, has previously taken the position that Section 1397(k) and similar clauses *do* address and *negate* preemption.[8] Moreover, this Court routinely interprets statutory provisions as preventing preemption even when they do not contain that word in their title or in text. *See, e.g., California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281-82 (1987); *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978). Third, Honda and the United States say that Congress should have included the text of Section 1397(k) in or immediately after Section 1392(d). Resp. Br. at 26; U.S. Br. at 18, 20. But Congress had no reason to do that, especially since (as the United States agrees) Section 1392(d) does not encompass common law claims.[9]

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[8] See *Freightliner Corp. v. Myrick*, No. 94-286 (October Term, 1994), Brief for United States as *Amicus Curiae* Supporting Respondents, at 14-18 (interpreting Safety Act); *Lewis v. Brunswick Corp.*, No. 97-288 (October Term 1997), Brief for United States as *Amicus Curiae* Supporting Petitioners, at 21-25 (interpreting nearly identical savings clause in Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(g), as "mak[ing] clear Congress' explicit intent to preserve tort liability.") In its *Freightliner* brief at 14-18, the United States argued at length that Section 1397(k) precludes a finding of express preemption under the Safety Act. The United States rejects Honda's express preemption argument here, *see* U.S. Br. at 11-15, but it now contends (as does Honda) that, because Section 1397(k) does not contain the word "preemption," the clause merely addresses compliance with federal standards as a defense, not preemption. *Id.* at 18-22. We have already rebutted that contention in I(2), above.

[9] Honda also defends its "you-can-always-get-to-implied-preemption" approach by stating that this Court routinely decides cases on implied conflict preemption grounds without bothering to address whether state law is expressly preempted. *See* Resp. Br. at 43-45. The cases cited by Honda, however, have no bearing here. For example, in *Boggs v. Boggs*, 520 U.S. 833 (1997), this Court proceeded directly to implied conflict

3. Finally, Honda and the United States insist that implied preemption cannot be barred here because it is "simply inconceivable" that Congress intended to preserve common law claims that could otherwise be viewed as conflicting with federal law. Resp. Br. at 20; *see also* U.S. Br. at 22-23. But, as this Court has recognized, Congress has done that before. For example, in *Cipollone*, 505 U.S. at 518-19, this Court held that all common law claims were left intact by a 1965 cigarette labeling act, including failure-to-warn and misrepresentation claims based on the cigarette warning labels dictated by federal law. And the Court held that, given Congress' clear words, any resort to implied preemption analysis would be improper. *Id.* at 517. If Congress intended this result in 1965, why is it "inconceivable" that Congress preserved all common law claims when it passed the Safety Act in 1966, one year later?

It may be "inconceivable" to Honda and the United States that Congress would preempt state statutory and regulatory standards that differ from federal standards, while leaving all common law claims in place, but there are many good reasons why Congress might adopt this approach. For example: (1) Congress might be urged by competing political factions to preempt state prescriptive standards and leave the common law intact and, for political reasons, decide to do what the competing factions urged; (2) Congress might want to address matters of regulation, but not compensation, because compensation has traditionally been addressed by the States; (3)

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preemption without considering whether the statute at issue – ERISA – expressly preempted state law because the Court had previously decided that ERISA's preemption and savings clauses do *not* manifest an intent by Congress to preserve state law that conflicts with federal purposes. *See, e.g., John Hancock*, 510 U.S. at 99. And in *Kalo Brick*, 450 U.S. at 311, the Court *did* construe the meaning of an express savings clause in the statute at issue, concluding that the clause did not salvage a state law that would interfere with federal occupation of the regulatory field. *Id.* at 330.

Congress might want to create a floor for the operation of the market (requiring a minimum level of safety) but otherwise leave the market (including the incentives created by state tort law) unfettered; (4) Congress might trust the States to ensure that common law accords sufficient weight to compliance with government standards as a defense; (5) Congress might understand that, even if a State decided a manufacturer could be held liable for doing something required by federal law (or failing to do something prohibited by federal law), that manufacturer could not be forced to violate federal law – it could only be forced to pay damages to the plaintiff; and (6) Congress might think that, in the unlikely event that this occurred, it might spur the manufacturer to urge, and the federal government to consider, amending the standard.

4. Under our Constitutional system, because Congress might have had these or other good reasons, the courts cannot ignore Congress' words and embark on an implied preemption inquiry. Wherever that inquiry took them, it would be a "fundamentally lawless path," Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988), § 6-26, at 483 n.8, and an enormous waste of judicial resources. *Cipollone* and the precedents it stemmed from show that path is forbidden. *See* Pet. Br. at 38-40. Because of the Constitutional values implicated here, many commentators have urged this Court to adopt in this context the clear statement rules it currently applies in the Tenth and Eleventh Amendment cases.[10] Under

[10] *See, e.g.*, Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 Boston U. L. Rev. 559, 627 (June 1997); John A. Chatowski, *Cipollone and the Clear Statement Rule: Doctrinal Anomaly or New Development in Federal Preemption*, 44 Syracuse L. Rev. 769 (1993); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Constitutional Law Quarterly 29 (1988); Tribe, *supra*, § 6-26, at 482 n.8.

those rules, even if the Safety Act did *not* include a savings clause, any resort to implied conflict preemption would be barred. This Court need not decide that issue here, however, because Congress did *not* speak ambiguously in the Safety Act; it clearly and unequivocally preserved common law claims. That being so, the courts may not seek out (much less purport to find) a supposed implied Congressional intent to preempt petitioners' claims against Honda.[11]

III. Even If Implied Preemption Could Be Considered, Petitioners' Claims Do Not Conflict With Federal Law.

In any event, petitioners' claims are not impliedly preempted because they do not conflict with Standard 208. The absence of a direct conflict is patent: the Geiers do not seek to hold Honda liable for doing something required by federal law

[11] In our opening brief at 40-41, we gave an additional reason why resort to implied preemption here would be improper: NHTSA's utter failure to suggest that Standard 208 might preempt any common law claims. The United States argues that the absence of any agency intent to preempt is immaterial because "conflict preemption arises not from a specific intent to preempt but from the direct operation of the Supremacy Clause . . .." U.S. Br. at 27. But this Court has previously relied on the absence of any express statement by an agency of its intent to preempt to counsel against a finding of conflict preemption. *Hillsborough*, 471 U.S. at 721 ("since the agency has not suggested that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal of ensuring sufficient plasma."). Not only is such "strong evidence" lacking here, but (as we show below) the agency gave every indication that it intended to *rely* on tort liability to promote its regulatory agenda. Under these circumstances, a finding of implied conflict preemption would undermine the entire notice-and-comment process and create the wrong incentive for other agencies considering promulgating regulations that might have some preemptive effect.

or for failing to do something prohibited by federal law. To the contrary, they seek to hold Honda liable for failing to do something that federal law both permitted *and encouraged*: the installation of what the manufacturers conceded and the federal government found was the "most effective system of all...the combination of an airbag and a manual lap and shoulder belt." 49 Fed. Reg. at 28966, 28986. Yet Honda and the United States contend that these claims conflict with federal law. We address the United States' arguments first.[12]

1. The most astonishing argument is advanced by the federal government, which insists – three separate times – that, Secretary Dole actually decided in 1984 that no-airbag claims would conflict with Standard 208. Thus, the United States demands respect for "the Secretary's reasonable conclusion that claims such as petitioners' would thwart the purpose behind Standard 208." U.S. Br. at 28. It says "the question is not whether tort liability in general stifles innovation but whether liability for failure to install airbags would have done so. The Secretary determined that it would." *Id.* at 29. And it implores the Court to "decline petitioners' invitation to second-guess that reasonable determination." *Id. But these assertions are false.*

[12] The United States contends that its position is entitled to "substantial weight," relying on *Medtronic*, 518 U.S. at 496. U.S. Br. at 26-27. *Medtronic* merely held that, in the absence of a clear congressional command as to preemption, a court may accord weight to an agency's formal regulatory pronouncements regarding preemption. *See id.* at 495-96. That is a far cry from this case, where Congress has spoken clearly on the issue of preemption, *compare id.* at 505, and NHTSA never gave any indication (let alone issued formal regulations) that Standard 208 would preempt common law tort claims. (Indeed, as we show below, it gave every indication to the contrary.) Under these circumstances, no deference is permitted or due. *See Bowen v. Georgetown University*, 488 U.S. 204, 212 (1988) (no deference due to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice).

The government provides no citation to the Secretary's supposed determinations because they do not exist. The Secretary never made them. This would be a far different case if she had.

2. In fact, the Secretary actually said she would *rely* on the threat of no-airbag liability to achieve her goals. *See* Pet. Br. at 10-12. Responding to complaints that "manufacturers would use the cheapest system to comply with [the] automatic restraint requirement," Secretary Dole said that "*potential liability for any deficient systems*" would help ensure that manufacturers did not use "the least expensive alternatives." 49 Fed. Reg. at 29000 (emphasis added). The United States argues that "[p]etitioners misunderstand the Secretary's statement, which meant that manufacturers could face tort liability if they installed defective passive restraints." U.S. Br. at 25. This assertion, however, is no more true than those exposed above. The Secretary was not talking about "defective" passive restraints. The context demonstrates that her references to "the cheapest system[s]" and "the least expensive alternatives" were to *automatic seatbelts* (which were far less expensive – albeit less effective – than airbags) and the "tort liability" she was referring to was no-airbag liability. *See, e.g.*, 49 Fed. Reg. at 28989 (chart comparing cost of airbags relative to automatic belts). Indeed, one key problem with airbags was their relatively high cost. *See id.* at 28969, 28974, 28975, 28991, 28992. Secretary Dole reasonably saw no-airbag claims as furthering her policy goals, since the manufacturers were not likely to avoid the cheapest systems absent sufficient economic incentive to do so.

There is, therefore, no indication in the regulatory record that the Secretary ever suggested, much less decided, that no-airbag claims would conflict with her policy goals or be preempted. To the contrary, the preamble proves that NHTSA

saw no conflict between such claims and Standard 208 (and did not think they would be preempted). Under the heading "Product Liability," NHTSA identified a "potential source of manufacturer liability" that it quoted from Stephen Teret of the National Association for Public Health Policy: "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." 49 Fed. Reg. at 28972. The government now says that "an agency does not endorse a comment merely by describing it," U.S. Br. at 26 n.22, which is true, but federal regulation (especially federal preemption of state law by regulation) is not a game of "Gotcha!" For the government to identify and quote this "potential source of manufacturer liability" in 1984 without suggesting or quoting a contrary view, but now assert preemption of that liability, is simply untenable. *See* n.11, *supra.*

3. Nevertheless, the United States now argues that the Geiers' common law claims are impliedly preempted because they conflict with Secretary Dole's 1984 policy of encouraging a variety of passive restraints. That argument, however, does not apply to the Geiers' claims and is flawed at the core.

a. The government's argument does not apply to the Geiers' claims because *the car in this case did not have any passive restraints*. Petitioners' lawsuit alleges that Honda should have installed airbags (in addition to manual restraints) in a car that had *no* passive restraints. If Honda did that, its actions would in no way decrease the variety of other passive restraints available. The government's argument may apply logically to common law claims that a manufacturer should have installed airbags (instead of another type of passive restraint) in a car that actually *had* some other type of passive restraint – because, if all manufacturers did that, their actions *would* decrease the variety of passive restraints available. But

it has no logical application to claims (like the Geiers') that a manufacturer should have installed airbags (in addition to manual restraints) in a car that had no passive restraints whatsoever. Thus, even if the government's argument is right, it does not apply to the claims in this case.[13]

b. The United States' argument, however, is not right. It is based on three false factual premises. The government contends that (a) "If, when the Secretary promulgated the rule in 1984,...manufacturers had known that they could later be held liable for failure to install airbags," then (b) that "would likely have led them to install airbags in all cars," and (c) that would have, "[a]t the very least, interfered with the method by which Standard 208 was designed to reach its goals." U.S. Br. at 25 (brackets deleted). But (a) as we have just shown above, the manufacturers *did* know in 1984 they could later be held liable for failure to install airbags (and had no reason to think otherwise); (b) they did *not* respond to the threat of liability by installing airbags in all cars; and (c) even if they had, they would have done so in response to the very method by which Standard 208 was designed to achieve its goals – *i.e.*, by responding to the risk of "potential liability for deficient systems." 49 Fed. Reg. at 29000.

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[13] The United States' argument also does not apply here because the government concedes that, even under its theory, "a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car because of other design features particular to that car...would not necessarily frustrate Standard 208's purposes." U.S. Br. at 26. But if this case is viewed (as the government erroneously views it) just like one saying a manufacturer should have installed airbags rather than another type of passive restraint, then this is exactly the type of case the government concedes is not preempted – for it turns on the design features particular to the 1987 Accord. *See supra* at 1.

c. In addition to ignoring the facts, the United States disregards the potential impact of other common law claims on the auto makers' conduct. Thus, the government assumes that, if no-airbag claims were permitted, manufacturers would have immediately installed airbags in all cars. But, since *all* common law claims were left in place, manufacturers could also have been held liable for not installing other forms of passive restraints (such as automatic seatbelts) in appropriate cases, as well as for injuries caused by airbags. Thus, if Honda is right, and airbags were not the safest passive restraints for all cars (*see* Resp. Br. at 31), the auto makers would not respond to tort incentives by installing airbags in all cars – indeed, it would have been folly for them to do so. The Secretary knew this and expected that, because of the high costs associated with airbags, most manufacturers would still choose to install manual or automatic belts. *See* 49 Fed. Reg. at 29000. That is why she built additional incentives into the rule – the phase-in period and the "extra credit" system – to further encourage the use of airbags. *See id.*

d. Moreover, the United States improperly treats diversity as the Secretary's ultimate goal in promulgating Standard 208. But the Secretary *encouraged* diversity; she did not *require it.* In fact, she encouraged diversity – and relied on tort liability – as a means to an end. The end was prompting the manufacturers to develop and install, and the public to accept, the safest and most cost-effective passive restraint system possible. If that system turned out to be airbags, any other single system, or a combination of devices and approaches, so be it. In other words, although the government says that an all-airbag (or, presumably, an "all-anything") result would conflict with the Secretary's goals, *see* U.S. Br. at 9, the Secretary never *prohibited* such a result, she just declined to *impose* it. (If Standard 208 had required that no more than X percent of cars have airbags, this would be a far different case.) The

Secretary's approach (unlike a government mandate requiring airbags) left the manufacturers free to develop and install whatever the best system was, and then (by relying on market forces, including tort exposure) encouraged them to develop and install even better systems in the future. Preempting common law claims based on the failure to install airbags (and/or other forms of passive restraints) would undercut that approach, elevate variety over safety, and eliminate the tort incentive for manufacturers to jettison dangerous designs and adopt safer ones. That is not what the Secretary had in mind.[14]

e. Finally, the government's theory would lead to perverse results. According to the United States, U.S. Br. at 29 n.27, crash victims like the Geiers cannot sue the auto makers for failing to install airbags and/or automatic seatbelts and/or any other forms of passive restraints in their cars – all because NHTSA adopted a regulatory amendment in 1984 designed to *encourage* the auto companies to install passive restraints generally and airbags specifically. Presumably, however, crash

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[14] There is accordingly no basis for the United States' suggestion that imposition of tort liability for no-airbag claims would undercut the Secretary's determination that "experience with a variety of passive restraints would best promote public acceptance [of airbags.]" U.S. Br. at 28. As explained above, the Secretary understood that tort liability would *not* discourage diversity. Moreover, if the threat of tort liability did prompt manufacturers to install airbags, the auto makers would make every effort to *promote* their acceptability – which is exactly what NHTSA wanted. *See* Pet. Br. at 48. The United States admits "[t]hat may be true," but contends that "speculation of [this] sort...cannot displace the Secretary's reasonable conclusion that claims such as petitioners' would thwart the purposes behind Standard 208." U.S. Br. at 28. But this brings the United States full circle, because the Secretary never *made* any determination that tort liability would undermine the public acceptability of airbags.

victims in vehicles or vehicle positions not covered by the 1984 amendment still can bring no-airbag claims. So, drivers and passengers in vehicles manufactured before 1984 still can sue; passengers in trucks, tractors, and multi-purpose vehicles such as jeeps still can sue (because those vehicles were excluded from the 1984 amendment, *see* 49 Fed. Reg. at 28996); and passengers in the front center and rear seats of cars still can sue (because those seating positions were also excluded from the 1984 amendment, *see id.*). The only people who cannot sue are the ones the government sought to "help." Neither Congress nor the Secretary intended such bizarre results, which would discourage all Americans from seeking federal regulatory action to enhance auto safety.

4. Honda's implied preemption arguments would also lead to incredible outcomes and stretch the doctrine far beyond Constitutionally-permissible bounds.

a. Honda's first argument – that the Geiers' claims are preempted because Secretary Dole decided not to require airbags in all cars – is a variation of the government's argument rebutted in ¶ 2.d. above and is deficient for the same reasons. Honda's argument, however, goes way beyond the government's. Honda says common law claims are impliedly preempted whenever "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." Resp. Br. at 34. But that test is met every time the Secretary issues a federal standard.

b. Honda's second argument – that the Geiers' claims are preempted because they would impede the flexibility the Secretary provided in Standard 208 – ignores the fact that the

Secretary authorized the manufacturers to exercise that flexibility *subject to potential tort liability*. As part of this argument, Honda emphasizes that Standard 208 gave it optional means for compliance, but we have already explained in our opening brief, at 46-47, why that fact does not matter – and the United States agrees. *See* U.S. Br. at 21 n.18 and accompanying text (noting other standards providing optional means of compliance). Honda may think that liability concerns should not affect its choice of design options, but Congress and Secretary Dole thought otherwise.[15]

c. Honda's third argument – that the Geiers' claims are preempted because they conflict with the federal goal of uniform standards – would preempt almost all common law claims and is negated by the express terms of the Safety Act itself. As we explained in our opening brief at 43, uniform safety standards may be the goal of Section 1392(d), but preservation of all common law claims is the goal of Section 1397(k). Congress adopted both sections. Its express preservation of common law claims must be respected.[16]

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[15] Honda's reliance, at 36, on *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), and *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), in support of its options argument is misplaced. *Barnett* did not involve common law claims. And in *Fidelity*, the Court noted that "it would have been difficult for Congress to [have given] the Board a broader mandate," the Board *expressly* stated its intent to preempt *all* state law, and the statute contained no savings clause preserving common law claims. *Id.* at 3026, 3028.

[16] Honda's closing argument, at 47, is that the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), affirmatively endorsed the decisions finding no-airbag claims impliedly preempted by Standard 208. But that statute takes no position on the preemption issue. Section 2508(d) of the Act says that neither the section nor the Act shall "be construed by any court as indicating an intention by Congress to affect, change, or modify in any way the liability,

CONCLUSION

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

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if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints." The Senate-House Conference Report says, "This section is not to be a 'sword' or a 'shield' in litigation or otherwise." H.R. Rep. No. 102-404, 102d Cong., 1st Sess., at 401 (1991).