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IN THE SUPREME COURT OF THE UNITED STATES

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DELBERT WILLIAMSON, ET AL., :

Petitioners :

v. : No. 08-1314

MAZDA MOTOR OF AMERICA, INC., :

ET AL. :

- - - - - x

Washington, D.C.

Wednesday, November 3, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

MARTIN N. BUCHANAN, ESQ., San Diego, California; on behalf of Petitioner.

WILLIAM M. JAY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioners.

GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-1314, Williamson v. Mazda. Mr. Buchanan.

ORAL ARGUMENT OF MARTIN N. BUCHANAN,
ON BEHALF OF THE PETITIONERS

MR. BUCHANAN: Mr. Chief Justice, and may it please the Court:

The issue here is whether a common law claim that Mazda should have equipped Mrs. Williamson's seating position with a lap/shoulder belt is impliedly preempted under the rationale of Geier v. American Honda. The claim is not preempted, because it is perfectly consistent with and would not frustrate the objectives of the operative 1989 version of Standard 208 governing Type 2 seatbelts in rear seats.

One point that is clear from this Court's express preemption holding in Geier is that Congress intended common law to play a complementary role in achieving the objectives of the Motor Vehicle Safety Act.

Based on the savings clause, the Court decided that Congress intended to preserve a significant role for State tort law to operate in compensating

1 accident victims and promoting greater safety in vehicle
2 design. And, on the issue of implied obstacle
3 preemption, the majority also agreed with the dissent
4 that State common law will not be preempted unless there
5 is clear evidence of a conflict with Federal objectives.

6 JUSTICE SCALIA: Why would -- why would the
7 Federal Government do that? I mean, trust juries to
8 supplement whatever -- whatever the Federal rules are,
9 but not permit State agencies who -- who studied the
10 matter with experts, to supplement what the Federal
11 rules are?

12 MR. BUCHANAN: Justice Scalia --

13 JUSTICE SCALIA: Why does that make any
14 sense, to just say, oh, you know, we -- we don't want
15 the State mucking around in this area, but of course
16 juries can do so? Why does that make any sense?

17 MR. BUCHANAN: Justice Scalia, I think the
18 Court answered the question in *Sprietsma* when it said
19 common law has an important role to play in providing
20 compensation to victims. And therefore the Court found
21 it rational in *Sprietsma* to make that distinction; and
22 ultimately it's a -- it's a judgment call for Congress
23 to make.

24 JUSTICE SCALIA: I don't -- I don't doubt
25 they made it. I'm just curious as to why it could

1 possibly have been?

2 MR. BUCHANAN: Well --

3 JUSTICE SCALIA: Unless I -- unless lawyers
4 bring suits before -- before juries, maybe.

5 MR. BUCHANAN: Well, Justice Scalia, I
6 believe common law has an important role to play, not
7 only in compensating victims but also in providing
8 manufacturers with an incentive to develop safer
9 vehicles, even safer than the Federal minimum standards.

10 CHIEF JUSTICE ROBERTS: I thought the reason
11 that the Solicitor General gives for not -- that NHTSA
12 did not immediately require the type 2 seatbelt is
13 because the costs would have been higher. Is that your
14 understanding?

15 MR. BUCHANAN: Mr. Chief Justice, for the
16 aisle seating position that we are talking about in this
17 case, the reason NHTSA decided not to mandate it
18 immediately was, A, a concern about obstructing the
19 aisleway with the shoulder belt; and B, a concern, yes,
20 about the cost of a possible alternative design.

21 CHIEF JUSTICE ROBERTS: How come allowing --
22 or why doesn't allowing the relief you seek under State
23 law impose those same costs, contrary to NHTSA's
24 objective in not making those mandatory?

25 MR. BUCHANAN: Well, Your Honor, any time

1 NHTSA creates a safety standard it necessarily takes
2 into account costs and benefits and the safety
3 attributes. So --

4 CHIEF JUSTICE ROBERTS: And a State tort
5 action does not?

6 MR. BUCHANAN: A State tort action does.
7 What I'm trying to -- the point I'm trying to make,
8 Mr. Chief Justice, is that if that were sufficient to
9 preempt, then any minimum standard that NHTSA creates
10 would therefore preempt State law and it would nullify
11 the savings clause.

12 CHIEF JUSTICE ROBERTS: I suppose -- I
13 understand the argument. I'm not sure it's right,
14 though, in the sense that NHTSA may decide not to make
15 particular standards mandatory for reasons other than
16 cost. It may decide it doesn't think the technology is
17 adequately developed. It may decide that it doesn't
18 think there are adequate, you know, mechanics prepared
19 or involved.

20 But here it's because of the cost, and the
21 relief you are seeking it seems to me directly imposes
22 the costs that NHTSA decided not to require.

23 MR. BUCHANAN: Well, NHTSA made a decision
24 as of 1989 that the technology -- it obviously had
25 concerns about the technology and costs. But any type

1 of -- of consideration of technology and costs is as of
2 that moment in time, and the agency specifically
3 encouraged manufacturers to install Type 2 lap/shoulder
4 belts in these types of seating positions. And our
5 lawsuit is perfectly consistent with the agency's
6 objective of encouraging lap/shoulder belts in these
7 seating positions. By 1993 --

8 CHIEF JUSTICE ROBERTS: Well, every -- there
9 is no objective that the government pursues regardless
10 of cost. I understand that their objective was to
11 encourage this, but it was clearly not to impose it,
12 because it thought at that time that the costs were too
13 great. So to simply say their objective was to get
14 these in ignores the other side of the cost/benefit
15 analysis.

16 MR. BUCHANAN: Well, I think what the agency
17 did with respect to these seating positions in 1989 is
18 it, A, it recognized that there were tremendous safety
19 benefits for Type 2 lap/shoulder belts. And yes, it
20 found enough countervailing considerations in terms of
21 cost and feasibility not to mandate that as part of the
22 Federal minimum standard. And so from the Federal
23 Government's perspective, for these seating positions,
24 the government was neutral as between Type 1 and Type 2
25 belts.

1 Either one of those belts would have
2 sufficed to satisfy the Federal agency's objectives.
3 And therefore a State law claim that eliminates
4 effectively one of those options does not in any way
5 frustrate the agency's objectives. The government has
6 explained in its brief that its objectives would have
7 been fully satisfied if all car manufacturers had
8 installed Type 2 lap/shoulder belts immediately.

9 JUSTICE SCALIA: Why is that different from
10 Geier? Didn't the automobile manufacturer in Geier --
11 wasn't -- weren't the manufacturers similarly left to
12 do, choose for themselves whether to have one type of
13 constraint or another?

14 MR. BUCHANAN: They were, Justice Scalia,
15 but the Court's decision in Geier did not turn on the
16 mere fact that the manufacturers had a choice, and Mazda
17 is not asserting that claim here either. The
18 determinative agency policy at issue in Geier was that
19 the agency deliberately sought a variety of different
20 passive restraint types. It was concerned about a
21 public backlash against airbags, and it wanted to
22 encourage the development of alternative passive
23 restraint systems.

24 JUSTICE KENNEDY: But you are saying that
25 once the government gives the manufacturer a choice,

1 then the jury -- the -- the tort system can second-guess
2 it; and that is not consistent with a likely government
3 intent to allow the manufacturers a choice based on the
4 technical advances to that date.

5 MR. BUCHANAN: Justice Kennedy, I don't
6 think that the government gave manufacturers a choice.
7 It gave them two different options for complying with a
8 minimum standard; but it didn't suggest that foreclosing
9 one of those options would in any way frustrate its
10 objectives. It didn't suggest that it thought State --
11 that there should be some --

12 JUSTICE KENNEDY: Well, suppose the
13 government says you have a choice and the State of Iowa
14 passes a law and says you don't have a choice. No
15 frustration of the governmental purpose there?

16 MR. BUCHANAN: It depends what the reason
17 for the choice is, Justice Kennedy.

18 JUSTICE KENNEDY: No, there's just -- just
19 the statutes as I have given them to you. That there --
20 is there preemption just on the face of the statute?

21 MR. BUCHANAN: Not if it's a -- not if it's
22 just simply creating a minimum standard. There is no
23 preemption.

24 JUSTICE GINSBURG: That's what the statute
25 calls for, minimum.

1 MR. BUCHANAN: Yes, that's --

2 JUSTICE GINSBURG: That the agency is to set
3 minimum standards. And then I take it that the Court in
4 Geier says it wasn't -- it wasn't a minimum standard,
5 because if a State deviated from it, it would detract;
6 it would be an obstacle to the realization of the
7 Federal standard.

8 But here the -- a minimum standard was
9 adopted, minimal standard, and I think the agency is
10 telling us just the opposite of what it said in Geier;
11 right?

12 MR. BUCHANAN: Exactly correct, Justice
13 Ginsberg. In Geier the agency was the entity putting
14 forward the theory of exemption, that this claim by
15 Geier that all Honda vehicles should have been equipped
16 with airbags, frustrated its intent to accomplish a
17 whole variety or mix of passive restraint devices.

18 It was a direct conflict with the agency's
19 objectives. Here, the agency is telling us the exact
20 opposite. It was not trying to further choice or
21 variety. It was not trying to maintain a diversity of
22 Type 1 and Type 2 seatbelts in rear seating positions.
23 Its objective was to obtain the greater safety benefits
24 of Type 2 seatbelts.

25 The agency found that Type 2 seatbelts were

1 more effective in preventing fatalities and serious
2 injuries, that they offered greater overall protection
3 for children, and, most fundamentally, that they
4 actually increased seatbelt usage in rear seating
5 positions.

6 Our common law theory seeks to obtain all
7 those exact same safety benefits for aisle seating
8 positions. And we know by 1993, when this vehicle was
9 manufactured, at least one major manufacturer, GM, was
10 in fact installing Type 2 lap/shoulder belts in aisle
11 seating positions. Our complaint alleges that it was
12 perfectly feasible for Mazda to do so in 1993 when it
13 manufactured this vehicle, and that it was unreasonable
14 not to do so, and that's the important --

15 JUSTICE KENNEDY: Of course, your theory is,
16 if I understand your case -- correct me if I am wrong --
17 if GM had installed Type 2, they could have been sued on
18 the theory that Type 1 was better and there would have
19 been no preemption.

20 MR. BUCHANAN: I think that would be a much
21 more difficult case, Justice Kennedy, but --

22 JUSTICE KENNEDY: But under the theory of
23 your case, that suit could go forward.

24 MR. BUCHANAN: That's correct.

25 Theoretically, that suit could move forward. But the

1 question that the Supremacy Clause asks is not whether
2 hypothetically, there might be future conflicting jury
3 verdicts. The question is: Does our claim here that we
4 are asserting under California State law conflict with
5 the Federal objectives? It does not. The agency has
6 told us it does not.

7 There is nothing in the contemporaneous
8 regulatory history of the Type 2 seatbelt rule that --

9 CHIEF JUSTICE ROBERTS: What if the rule
10 here had another provision that said you must have
11 Type 1? You can have Type 2 --

12 MR. BUCHANAN: Cannot?

13 CHIEF JUSTICE ROBERTS: You can have Type 2,
14 right? But we are not requiring Type 2, because we
15 think the costs on manufacturers would be too great. We
16 may require it in the future, but not now.

17 Is it the same? Is your position the same?

18 MR. BUCHANAN: My position would be the
19 same. There is no preemption there.

20 CHIEF JUSTICE ROBERTS: Well, doesn't the --
21 doesn't the increased costs that are imposed by the tort
22 liability conflict with NHTSA's determination in my
23 hypothetical that they're not requiring Type 2 because
24 of the cost?

25 MR. BUCHANAN: Your Honor, any time the

1 agency considers costs, it is at a particular moment in
2 time. It is not necessarily a determination that for
3 all the future, this should never be done and no State
4 law should ever mandate that it be done.

5 And that's -- what we have here is not only
6 a determination that there were cost issues, but an
7 affirmative encouragement to manufacturers to do what
8 our State --

9 JUSTICE KENNEDY: Well, then, if the
10 regulation comes out July 1, you say there is a
11 preemption until midnight July 1, but as of July 2 there
12 could be a suit?

13 MR. BUCHANAN: I think there was never
14 preemption under this regulation.

15 JUSTICE GINSBURG: I think what you are
16 saying -- the statute says "minimal standards" and the
17 agency says "no obstacle," and that's it, that if there
18 is a preemptive force to the -- to the safety standards,
19 that it is for the government to say that.

20 MR. BUCHANAN: Correct, Justice Ginsburg.
21 And not only does it say "minimum standards," it
22 explicitly says in the savings clause that mere
23 compliance with a motor vehicle safety standard shall
24 not exempt the manufacturer from common law liability.

25 CHIEF JUSTICE ROBERTS: Well, it said all

1 those thing in Geier, too, didn't it?

2 MR. BUCHANAN: It did. But again, the key
3 dispositive fact in Geier was the agency's desire to
4 achieve a variety of different passive restraint
5 devices, and a claim that the entire Honda fleet should
6 have had airbags would directly conflict with that.
7 That was the dispositive fact in this Court's decision
8 in Geier, and that is what is lacking here. And what we
9 have here is much more --

10 JUSTICE SCALIA: Your judgment here doesn't
11 apply to the entire Mazda fleet, supposedly, right?
12 Just to the car that caused harm to the plaintiff?

13 MR. BUCHANAN: No, that's not correct,
14 Justice Scalia. It's not a matter of whether it's the
15 entire fleet or not. It's a matter of whether the
16 common law claim conflicts with the Federal objective.
17 And in Geier, it conflicted, because the objective was
18 variety.

19 JUSTICE SCALIA: What about the next case?
20 Let's assume a similar case. Is that jury bound to come
21 out the same way as to whether there should have been a
22 shoulder constraint or not?

23 MR. BUCHANAN: No, Justice Scalia, and
24 that's something that the Court in Geier contemplated
25 and discussed. The Court in Geier acknowledged that --

1 JUSTICE SCALIA: Geier came out against you.
2 Why are you appealing to Geier?

3 MR. BUCHANAN: It came out -- I don't -- I
4 think Geier fully supports us, Justice Scalia. And
5 certainly on the express preemption issue, the Court
6 acknowledged the possibility that there could be
7 conflicting results, inconsistent jury verdicts, which
8 is always --

9 JUSTICE GINSBURG: Why are we looking to
10 Geier when you have a statute that says common law
11 remedies are safe? I mean, as long as it says that --
12 maybe it didn't make a whole lot of sense, but they did
13 it.

14 MR. BUCHANAN: I agree with you, Justice
15 Ginsburg. But I think Geier also says that. Geier
16 relies on the savings clause to say that there's a
17 significant role for common law actions to play. And
18 specifically with regard to the possibility of
19 inconsistent jury verdicts, the Court in Geier said the
20 possible -- the possibility of nonuniformity, the
21 Savings Clause reflects a congressional determination
22 that that's a small price to pay for a system where
23 juries create and enforce safety standards and
24 simultaneously provide compensation to victims. So I
25 think that's something the Court considered in Geier.

1 I would like to reserve the rest of my time
2 for rebuttal, please.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Jay.

5 ORAL ARGUMENT OF WILLIAM M. JAY,

6 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING THE PETITIONERS

8 MR. JAY: Mr. Chief Justice, and may it
9 please the Court:

10 Respondents chose to comply with the Federal
11 minimum safety standard by installing a Type 1 seatbelt,
12 but the savings clause makes clear that they are not
13 exempted from the consequences of that choice under
14 State common law when that choice results in injury.
15 They must show that, as Geier makes clear, that the
16 State law rule of decision would pose a conflict with an
17 articulable Federal policy. They haven't shown that
18 here.

19 I would like to go first to the question the
20 Chief Justice asked my friend Mr. Buchanan about cost-
21 benefit analysis and the Federal judgment that at the
22 time the imposition of a national uniform Federal
23 minimum standard of Type 2 seatbelts wasn't warranted at
24 these seating positions.

25 Simply saying that, and I -- simply saying

1 that is not enough to establish that the Federal agency
2 wished for the adoption of Type 2 seatbelts not to
3 happen. As Mr. Buchanan said, every Federal
4 rulemaker -- certainly every NHTSA safety standard
5 adoption must include --

6 CHIEF JUSTICE ROBERTS: No -- I agree with
7 you, it doesn't require. It doesn't support the
8 inference that they did not want Type 2 seatbelts to
9 happen, to be used.

10 It does, in my hypothetical view, support
11 the inference that it didn't want to mandate Type 2
12 seatbelts because it was worried, as you said in your
13 brief at page 9, about the cost. And yet its worries
14 about the cost, it seems to me, are overridden by the
15 position that State tort suits can go on for the absence
16 of Type 2 seatbelts.

17 MR. JAY: Well, of course the baseline is
18 that State tort suits can always go forward. And in
19 this case, the agency decided not to impose this
20 nationwide mandate because of the tradeoff between costs
21 and benefits.

22 The benefits were significant. Everyone
23 recognizes that. Everyone recognizes that Type 2
24 seatbelts were better for -- better or at least
25 equivalent for all categories of passengers, and I will

1 come back to that. But as far as the imposition of
2 costs go, NHTSA decided that it was not worth it at that
3 time for NHTSA to require that. That doesn't mean that
4 NHTSA wanted to adopt the policy of freeing
5 manufacturers of -- of any obligation to incur those
6 costs, let alone that it wanted -- for example, if NHTSA
7 had thought that it would harm safety for manufacturers
8 to spend that money on Type 2 seatbelts instead of
9 something else, it could have said that.

10 In Geier, for example, the reason that the
11 agency deliberately sought variety --

12 JUSTICE SOTOMAYOR: Well, it did say that
13 earlier, didn't it?

14 MR. JAY: I'm sorry, Justice Sotomayor?

15 JUSTICE SOTOMAYOR: Earlier, it said that
16 there was difficulties with -- pre-1989, '82 or '84,
17 that there were difficulties with Type 2 belts and
18 children's safety. So was this preempted in '82-'84 and
19 not preempted by '89?

20 MR. JAY: No, Justice Sotomayor. It was not
21 preempted at any time. What you're --

22 JUSTICE SOTOMAYOR: So what do you need for
23 the agency to say before Geier comes into effect? For
24 the lower courts, what's the minimum that lower courts
25 missed here in not -- in coming to the conclusion they

1 did in their application of Geier?

2 MR. JAY: The contrast between this case and
3 Geier is that this case, like Geier, involves options,
4 but it does not involve a Federal policy that the
5 manufacturer must remain free to choose among those
6 options as it sees fit. In Geier --

7 JUSTICE ALITO: Mr. Jay -- I'm sorry.

8 MR. JAY: I was going to say in Geier the
9 manufacturer -- the agency concluded that it would
10 disserve safety if automatic seatbelts and airbags were
11 not both on the market. There has been no such
12 determination here either in 1984 or at any other time.

13 JUSTICE ALITO: Isn't it true that for a
14 period of 10 years the lower courts uniformly held that
15 there wasn't any preemption here? And if that's the
16 case, why didn't the Federal Government come forward at
17 any point during that time and say that this is
18 preempted?

19 MR. JAY: Two responses, Justice Alito.
20 First, the question presented here about Type 1 versus
21 Type 2 seatbelts has only been by decided by a couple of
22 federal courts of appeals, no states courts at last
23 resort.

24 Second, on the more general question, why
25 doesn't NHTSA participate in these cases, NHTSA as a

1 matter of course does not usually participate in private
2 party litigation under State common law, even when that
3 litigation might touch on a State -- the interpretation
4 of a Federal safety standard. And when the courts asked
5 for NHTSA's views, NHTSA generally responds, as this
6 Court asks for the government's views in this case and
7 the government responded. And I think if the Court were
8 to look back to the first brief in a string of briefs
9 that the government has filed about these issues under
10 this act, the brief in Wood versus General Motors filed
11 in 1990, you could predict the position that the
12 government would take in this case from that brief. The
13 government said in that case that options don't preempt,
14 merely because they are options. In most cases there
15 will be no federal policy that presents a conflict.

16 That case presented the case of the passive
17 restraint phase-in and there it was the rare
18 circumstance, as the Court later held in Geier, where
19 there was frustration of the Federal policy, but that's
20 because the Federal policy was to encourage variety, not
21 just for its own sake, but because variety would serve
22 safety. The roads would be measurably less safe if
23 airbags were rushed into service.

24 By contrast, in this case NHTSA would have
25 been perfectly happy if every manufacturer had installed

1 Type 2 seatbelts the day after the 1989 rulemaking. So
2 there was no conflict.

3 As far as the child safety concern to which
4 Justice Sotomayor alluded, it is referred to in the 1984
5 denial of a request to impose the rule that later was
6 imposed in 1989. The agency said that it had concerns
7 about how particular child seats, which at the time were
8 anchored with a form of tether. And it said that it
9 thought the continued use of tethered car seats was
10 something that it chose to encourage rather than
11 anchoring them with Type 2 seats.

12 The agency did not speak at all to whether
13 Type 2 versus Type 1 was better for child safety and the
14 agency then answered that in the 1989 rulemaking. So
15 for adults Type 2 seatbelts are safer and they encourage
16 seatbelt use because they are more popular. For
17 infants, the agency specifically asked whether Type 2
18 seatbelts could be as efficacious as Type 1 seatbelts in
19 holding an infant car seat in place. It concluded that
20 they could. That's set out at page 25 of our brief.
21 And for toddlers, children who are too small to sit in a
22 Type 2 seatbelt without assistance, the agency
23 recommended booster seats. And if there was no booster
24 seat the agency recommended that they not use the
25 shoulder belt. Not that they detached the shoulder

1 belt. The agency indeed specifically rejected the idea
2 that the shoulder belt should be removed at page 47990
3 of the notice of proposed rulemaking.

4 JUSTICE ALITO: If the child were injured by
5 a Type 2 belt, would a suit based on that be preempted?

6 MR. JAY: If the child were injured by the
7 Type 2 belt and the suit would be on the theory that a
8 Type 1 belt should have been installed?

9 JUSTICE ALITO: Yes.

10 MR. JAY: At the time, no, that lawsuit
11 would not have been preempted. Mr. Buchanan said that
12 that would be harder case and I think he said that
13 because the agency was specifically encouraging Type 2
14 seatbelts, and in this case Respondents can't show
15 anything suggesting that the agency was encouraging Type
16 1 seatbelts. So it might be a harder case for that
17 reason, but at that time there were two ways of
18 complying with the Federal minimum standard and the
19 savings clause provides that simply complying with the
20 Federal standard does not preempt the operation of State
21 common law.

22 So we discussed the child safety, the
23 alleged child safety rationale. I want to say a word
24 about the idea that aisle seats were unsafe for the
25 installation of these seatbelts. As Mr. Buchanan

1 mentioned, the agency specifically encouraged the
2 installation of those seats where it was feasible. It
3 was found to be feasible in 1991 by General Motors,
4 which installed them. But another word about that,
5 because Respondents have suggested that the chief
6 counsel of NHTSA has said in 1994 in a letter something
7 favorable to their position, and that letter is
8 reproduced in the appendix to the Petitioner's reply
9 brief.

10 I urge the Court to look at the entire
11 letter and not the sentence that was excerpted several
12 times in Respondents' brief. Because what the agency
13 said was that, in response to someone who complained
14 that manufacturers were installing Type 2 seatbelts and
15 they said, the complainant said that makes these
16 minivans unsafe because people will be trapped in the
17 back seat. The agency said it disagreed, that people
18 could go under the safety belt, that they could detach
19 the safety belt, that the safety benefits of a Type 2
20 seatbelt outweighed any convenience concern about access
21 to or egress from the rear seat.

22 And I think that is perfectly consistent
23 with the policy NHTSA has taken all along. Type 2
24 seatbelts are safer, more effective and to be
25 encouraged. When NHTSA decided not to mandate that

1 based on its understanding at the time of who used
2 seatbelts, who used seatbelts in the rear center seats
3 and what the -- how many fatalities and injuries would
4 be prevented and whether the dollar cost would be
5 justified by -- by the dollar equivalent of injuries and
6 fatalities prevented, it wasn't making a preemptive
7 judgment that Type 2 seatbelts, therefore, should not be
8 installed. And for that reason there is no frustration
9 of anything that NHTSA had in mind in the 1989
10 rulemaking by allowing this tort suit to proceed as
11 saved by the Savings Clause.

12 JUSTICE ALITO: If we adopt your view, would
13 Geier apply to any other regulation?

14 MR. JAY: I don't think that Geier is good
15 for that day only. I do think, as we said in Geier and
16 the brief in Wood to which we alluded and so on, that
17 Geier is the exceptional circumstance. That was, of
18 course, an exceptionally difficult and unusual
19 rulemaking. The phase-in concern in Geier one can
20 easily envision being replicated in another safety
21 standard issue where the agency were to conclude that
22 it's going to impose a new requirement, but it does not
23 want it rushed into service in the entire fleet right
24 away and so it affirmatively discourages hurried
25 installation. But that's not the case here because the

1 agency actually encouraged earlier compliance.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Garre.

4 ORAL ARGUMENT OF GREGORY G. GARRE

5 ON BEHALF OF THE RESPONDENTS

6 MR. GARRE: Thank you, Mr. Chief Justice,

7 and may it please the Court:

8 In 1984 and again in 1989 the agency
9 specifically determined that the statutory safety and
10 practicability objectives would be best served by giving
11 manufacturers the flexibility to install a lap-only or
12 lap/shoulder seatbelt.

13 JUSTICE SOTOMAYOR: Can I ask you a
14 question? How is this case different from a situation
15 where the agency looks at a request for a minimum
16 standard, says: Require that a certain light be added
17 to the lights in a car. The agency comes back and says,
18 you know, there are so many designs of cars; in some
19 cars, particularly sedans, the light is an added safety
20 feature; in vans it may not be because of the size of
21 vans. And so we are not going to require it. We are
22 going to let manufacturers, depending on what design
23 their car has, to choose between the two, so that we're
24 not going to set a minimum standard for every one
25 because there are too many different designs.

1 Despite that ruling, the manufacturer says it costs
2 two pennies more to put this light in a sedan. I know
3 the agency has said it's safer, but I don't want to do
4 it. I don't have a van, I don't have any reason except
5 the two pennies that I don't want to do it. Is that
6 case preempted? Because you were just merely given the
7 option?

8 MR. GARRE: The typical case where a Federal
9 motor vehicle safety standard establishes only a
10 minimum, like the standard for braking performance or
11 roof structure is not going to be preempted. Geier says
12 that and we're not challenging that.

13 JUSTICE SOTOMAYOR: How is this different
14 from the hypothetical where the agency said there could
15 be an obstruction with the entry, but manufacturers who
16 can design it without the obstruction should really do
17 it. How is this, this case, different than the one
18 hypothetical?

19 MR. GARRE: This case is different because
20 the agency specifically recognized in 1984 and 1989 that
21 there were serious safety and practicability tradeoffs
22 between these two different design options and
23 specifically gave manufacturers the option of installing
24 one type of seatbelt or the other.

25 JUSTICE BREYER: Nothing in the agency that

1 I can find says that the agency really wanted a mix of
2 options. I mean, they said it's up to the manufacturer.
3 But in Geier which I think all of this could be just
4 avoided.

5 MR. GARRE: I think --

6 JUSTICE BREYER: And the agency would simply
7 say, do they want to have this to be a maximum or just
8 the minimum. It's so easy to say that, but I haven't
9 found agencies saying it. I don't know why.

10 MR. GARRE: We are not here --

11 JUSTICE BREYER: We are forced to deal with
12 the situation we have; and the situation we have in
13 Geier is filled with indications that they really wanted
14 a mix because of the unusual circumstances present
15 there.

16 MR. GARRE: What the agency --

17 JUSTICE BREYER: You have to point to
18 something here that shows that.

19 MR. GARRE: What the agency wanted here was
20 flexibility. It wanted flexibility because it
21 recognized that there were safety tradeoffs and that the
22 safety and practicability objectives were best served by
23 leaving --

24 JUSTICE SOTOMAYOR: But wait a minute. What
25 that -- what you are not answering is flexibility to

1 ensure that a manufacturer imposes or thinks about
2 safety and chooses the option that is safest.

3 MR. GARRE: And --

4 JUSTICE SOTOMAYOR: So what's the inducement
5 for a manufacturer to put the light into a sedan or to
6 put a seatbelt 2, when it can, without causing an added
7 safety risk? If it's preempted, there is no inducement.

8 MR. GARRE: The agency recognized here that
9 Type 1 seatbelts, the lap-only seatbelts, themselves
10 posed unique safety risks. It did so to children. If
11 you look at the 1984 rulemaking, the agency couldn't
12 have been more clear that we are not going to impose a
13 Type 2 mandate for rear seats, because that's going to
14 be harmful to children.

15 JUSTICE GINSBURG: Mr. Garre --

16 MR. GARRE: The agency preserved that very
17 status quo in 1989. Petitioners recognize that in note
18 1 of their brief.

19 JUSTICE GINSBURG: Mr. Garre, in -- in Geier
20 I think it was Justice Breyer who called attention to
21 the agency having informed the Court that if tort suits
22 were to go on, at -- in -- in contradiction to the
23 government's view that there should be both of these --
24 that the safety standards that were set there, it would
25 be disturbed. It would be impeded.

1 And the opinion said we assign weight to the
2 Department of Transportation there, to their view that a
3 tort suit there would stand as an obstacle to the
4 accomplishment of the Federal safety standards. And if
5 the Court gives weight to what the agency says in Geier,
6 shouldn't it equally give weight here when NHTSA is
7 telling us there is no conflict? It says its rule sets
8 out what the statute calls for, a minimum standard.

9 MR. GARRE: We don't think the Court should
10 defer to the agency's position. We don't think the
11 Court should adopt it. In Geier the Court found that
12 the regulatory record was clear enough that it didn't
13 have to rely on the agency position. So we think --

14 JUSTICE GINSBURG: But then the Court --
15 what was the Court doing in saying that? Was it -- just
16 wanted the agency to feel good?

17 MR. GARRE: Well, I think what it said, and
18 obviously Justice Breyer can correct me; he wrote the
19 opinion for the Court -- was that it thought the
20 regulatory record was clear enough, but it did
21 ultimately say that it did agree with the agency,
22 although it didn't make a difference to the Court's
23 opinion.

24 JUSTICE BREYER: It also said -- it did say
25 as a practical thing, not -- not some theoretical legal

1 thing. Who is most likely to know what 40,000 pages of
2 agency record actually mean and say? People in the
3 agency. And the second most likely is the SG's office,
4 because they will have to go tell them.

5 MR. GARRE: But if --

6 JUSTICE BREYER: So if the government
7 continuously says, this is what the agency means and the
8 agency is telling them, yes, this is what it means, the
9 chances are they will come to a better, correct
10 conclusion than I will with my law clerks --

11 MR. GARRE: And --

12 JUSTICE BREYER: -- because I have a lot to
13 do. All right.

14 (Laughter.)

15 MR. GARRE: Of course, from --

16 JUSTICE BREYER: That's the practical. I'm
17 sorry, but that is the practical idea that I think
18 underlies what was said in Geier.

19 MR. GARRE: And from the Wyeth case we know
20 that the Court isn't always going to agree with the
21 agency. Here I think what's different from Geier is
22 that you have no contemporaneous interpretation of the
23 agency. The agency is looking at a cold record going
24 back 20 years, and it's not taking into account
25 everything that's in the record.

1 JUSTICE BREYER: No, but it did -- we are
2 dealing with 1989 primarily.

3 MR. GARRE: That's right.

4 JUSTICE BREYER: And in 1989, I think -- we
5 are at least quoted on the other side -- what the agency
6 said was, well, we see these lap and shoulder belts are
7 actually more effective. Now, we are reluctant to
8 recommend them for the center seat or aisle seat because
9 people might get caught in the spools. On the other
10 hand, manufacturers may be able to work out that
11 problem. Therefore, we encourage the manufacturer to
12 try to figure out a way around it.

13 And the SG, looking at all that stuff, says,
14 you see, they didn't mind if manufacturers were put
15 under another legal obligation to do it, because they'd
16 have no objection to making the manufacturers do it,
17 they are just not certain yet.

18 MR. GARRE: And --

19 JUSTICE BREYER: Now that's -- that's how I
20 read what was said.

21 MR. GARRE: And I think that's what the SG
22 says and we think that -- that the SG is wrong.

23 We think the agency said in 1989 and it said
24 in 1984 it could not have been more clear that they did
25 not want to mandate the Type 2 belt, the very rule that

1 the Petitioners want to mandate through this State law
2 tort action. They didn't want to do it because they
3 were concerned about child safety, they were concerned
4 about aisle safety, they were concerned about
5 practicability.

6 JUSTICE SOTOMAYOR: But that's always the
7 case when the agency sets a minimum. By setting a
8 minimum, it's basically saying we don't want to mandate
9 more.

10 MR. GARRE: That's --

11 JUSTICE SOTOMAYOR: But -- but you are not
12 disagreeing that the statute by its term says that a
13 minimum doesn't preempt State common law.

14 MR. GARRE: The statute says that and from
15 Geier we know that that doesn't resolve the preemption
16 question.

17 JUSTICE SOTOMAYOR: So I'm still not sure
18 why creating an option is any different than the
19 minimum.

20 MR. GARRE: Where the option is designed to
21 protect flexibility that serves the statutory safety and
22 practicability objectives --

23 JUSTICE SOTOMAYOR: But the default is
24 always that the manufacturers have an option. A minimum
25 by definition gives manufacturers options.

1 MR. GARRE: It's not that. As a practical
2 matter, that kind of option, like the minimum for
3 Federal braking standards is fundamentally different
4 than the kind of option is Geier and the kind of option
5 here.

6 JUSTICE SOTOMAYOR: But you haven't
7 explained why.

8 MR. GARRE: The reason why is because --

9 JUSTICE SOTOMAYOR: If the minimum by its
10 own definition gives freedom to the manufacturer to
11 impose more if it chooses, or not, why does the option
12 to tell a manufacturer, pick what you think is safest,
13 why does that do more?

14 MR. GARRE: Because the agency determined
15 here that the flexibility was necessary to advance
16 Federal safety and practicability objectives, and that
17 that -- those objectives would be frustrated by a Type 2
18 mandate. And flexibility -- this Court has
19 recognized --

20 JUSTICE GINSBURG: But there is no such
21 statement. I mean there was a statement we don't want
22 to impose those costs, but we have the agency in
23 court -- we have the Solicitor General's office in court
24 telling us, the statute says minimum, the statute says
25 the common law isn't displaced, and we are telling the

1 Court that we think this is a situation where it is
2 minimum and so the common law isn't displaced.

3 Shouldn't we assume that the standard that
4 the agency set, that as the agency said is a minimum
5 standard unless the agency tells us that it should be
6 preemptive of tort suits?

7 MR. GARRE: Not when you have the kind of
8 unique standard here. Granted, this is going to be the
9 rare situation. But if you look at, for example, take
10 child safety. The agency couldn't have been clearer in
11 1984. Look at 49 Federal Register 15241, the final
12 rule, that it was not going to mandate Type 2 seatbelts
13 because they found that that would harm child safety.
14 The agency specifically carried forward that rule in
15 1989 for the rear inboard seats at issue in this case.

16 Note 1 of Petitioner's reply brief said that
17 the law is exactly the same in 1989 as to these seats as
18 in 1984. It -- hasn't been preempted in 1984,
19 notwithstanding what my friend said here from the
20 government today; and if it was preempted in 1984 it has
21 to be preempted in 1989.

22 The tradeoffs here, we have talked about the
23 lawsuit involving a -- a child who was -- who was
24 restrained by a shoulder belt and harmed as a -- as a
25 result of that belt, which is a concern that NHTSA has

1 recognized throughout its history.

2 Under their position, the manufacturer could
3 be sued for having a Type 2 belt by the child who was
4 harmed or by the person in the back row that had
5 difficulty getting out of the car in the event of an
6 accident, just as they could be sued under Petitioner's
7 theory for having a Type 1 belt. This -- the agency
8 recognized, this was a unique situation where there were
9 serious safety and practicability tradeoffs; they wanted
10 to give the -- the manufacturers the flexibility to make
11 this decision, and that flexibility served, the agency
12 concluded, the Federal safety and -- and practicability
13 objectives.

14 If you look at this Court's decision --

15 JUSTICE SOTOMAYOR: But I'm sorry, you still
16 haven't responded to me. Manufacturers are always at
17 risk for common law claims under this statute, because
18 this statute expressly says they are. Every design
19 choice a manufacturer makes under almost any situation
20 where the common law is in effect puts it at risk that a
21 jury will decide whether it did enough or not, under
22 cost/ benefit analysis and technology.

23 So I don't know why when the agency creates
24 a minimum by choice or not, it should be implicitly
25 preempted in -- from the application of State law.

1 MR. GARRE: Justice Sotomayor, there are
2 hundreds of Federal motor vehicle safety standards, and
3 I would agree with you for virtually all of them, except
4 you have the rare standards -- and they are rare, like
5 the one in Geier and like the one here -- where the
6 agency quite obviously is doing something much
7 different. It's expressly granting options and it's
8 making clear in the record that the reason it is doing
9 that is to serve Federal objectives that would be
10 frustrated by the imposition of a particular rule.

11 I think you have to look at this from the
12 standpoint of the manufacturers who are told that they
13 can manufacture this car with this design or that
14 design, and you can go look at the Federal Register and
15 see that the reason the agency is doing that is to
16 advance safety and practicability objectives.

17 CHIEF JUSTICE ROBERTS: How do you tell --
18 in response to Justice Sotomayor, how do you tell
19 whether the agency is giving options or simply setting a
20 minimum?

21 MR. GARRE: Well, first you would look --

22 CHIEF JUSTICE ROBERTS: Because a minimum,
23 of course, always gives you options.

24 MR. GARRE: In a very generalized sense.
25 But we know from Geier that that doesn't resolve the

1 preemption question, because the same could have been
2 said with respect to the rule in Geier.

3 First you look at the rule, and you are just
4 not going to find very many rules at all in the
5 Federal -- in the Code of Federal Regulations that
6 provide this kind of express option for equipment
7 design. And then second, you go look and you -- and you
8 see what the agency said about that in its final rules
9 and the commentary accompanying the final rules.

10 And here, if you look, not only would you
11 find that the agency granted this flexibility to serve
12 Federal safety and practicability objectives, you would
13 find that it specifically rejected the very rule that
14 Petitioners want to impose on State tort law, because it
15 concluded that that rule would be counterproductive from
16 the standpoint of safety and practicability. So there
17 couldn't be --

18 JUSTICE GINSBURG: Was that in 1989? I
19 thought there was some advance in the child seats
20 between the early '80s and '89.

21 MR. GARRE: There was some question about a
22 movement from tethered to non-tethered, but that only
23 created the compatibility issue that the agency
24 recognized in the 1989 rulemaking and 1984.

25 I mean, at the same time the agency is

1 telling manufacturers: Install your -- manufacture your
2 car seats so they can be installed with a
3 Type 1 lap-only belt, and it's telling parents:
4 Parents, put your children in the rear center seat
5 because that's going to be the safest seat, which, by
6 the way, is the seat that is going to have a lap-only
7 belt. And so it's clear --

8 JUSTICE GINSBURG: Was that in 1989?

9 MR. GARRE: That was true at the time of
10 1989, as well as --

11 JUSTICE SOTOMAYOR: But this wasn't the
12 center seat. This was an aisle seat.

13 MR. GARRE: It was -- as the plaintiffs
14 called it in their complaint, it was the middle seat in
15 the middle row. It was a center seat in every practical
16 sense. It just happened to be an aisle seat as well,
17 because there was a space on the --

18 JUSTICE SCALIA: I don't understand that,
19 and I looked for a diagram. It talked about the center
20 seat, aisle seat --

21 MR. GARRE: Unfortunately, the diagrams --

22 JUSTICE SCALIA: Do you know what the
23 terminology is?

24 MR. GARRE: It's not in the record, Justice
25 Scalia.

1 JUSTICE SCALIA: Where is it?

2 MR. GARRE: You have three rows in the car.
3 In the front row, you've got the driver's side and the
4 front row driver on the right-hand side. And then you
5 have the middle row of seat, and then have you a back
6 row.

7 The middle row seat had a seat on the side,
8 which was the outboard seat, a seat in the middle, which
9 is where the decedent in this case was sitting, and
10 then it had an aisle next to it. So it was a center
11 seat --

12 JUSTICE SCALIA: The aisle was not between
13 the two seats?

14 MR. GARRE: No, it was on the side of the
15 vehicle. So it was the center seat in every practical
16 sense, and therefore provided the same structural
17 concerns that NHTSA recognized.

18 JUSTICE BREYER: They wrote: "Of course, in
19 those cases where manufacturers are able to design and
20 install lap/shoulder belts at seating positions adjacent
21 to aisleways without interfering with the aisleway's
22 purpose of allowing access to more rearward seating
23 positions, NHTSA encourages the manufacturers to do so."

24 It doesn't sound like they are against a
25 tort suit that would require you to do so, because, in

1 principle at least, all of those things should be taken
2 into account.

3 MR. GARRE: If I could make three points in
4 response to that.

5 First, as the language you just read
6 indicates, it didn't require -- they didn't encourage at
7 all costs. They encouraged where this specific safety
8 concern could be addressed.

9 Second, there is a world of difference
10 between saying, we encourage manufacturers to do what's
11 appropriate when they can practically do so, and a world
12 in which a jury could have decided the day after --

13 JUSTICE BREYER: Those arguments are what I
14 think Justice Sotomayor was saying: It is a huge
15 problem for manufacturers. It's called tort suits in
16 different places and different juries and different
17 States. But that is beyond the scope of this case.

18 If the agency wants to displace those tort
19 suits often, all they have to do is say that the purpose
20 is something like you are saying and that they are
21 intended to be displaced.

22 MR. GARRE: We know from Geier that the
23 agency doesn't have to make a formal statement to
24 justify its intent.

25 JUSTICE BREYER: It doesn't have to. That's

1 why I am only making this comment, rather than in the
2 form of this question that maybe I don't understand why
3 they don't. It would make our job simpler.

4 MR. GARRE: I think the record -- we
5 certainly think the record here -- the agency really
6 couldn't have been clearer in saying: We don't want the
7 Type 2 mandate, the lap/shoulder mandate the Petitioners
8 are trying to impose here. It said it unambiguously --

9 JUSTICE GINSBURG: If the government doesn't
10 mean what it says the way you do -- we are being told
11 here that far from encouraging Type 1, all along, the
12 government says: Yes, Type 2 is a better seatbelt.

13 MR. GARRE: Well, that's just not true. And
14 with respect to the government, I don't think that the
15 regulatory record supports that generalized statement
16 that it was Type 2 at all -- at all costs. It was clear
17 that the agency recognized --

18 JUSTICE GINSBURG: No, they did say that the
19 reason that we are not making it mandatory is because of
20 some cost benefit analysis. We don't think we should
21 impose that as a minimum then.

22 MR. GARRE: And gave the very unique kind of
23 option here. The agency identified several costs with
24 imposing a Type 2 mandate here. It recognized the
25 unique safety concerns present when you are trying to

1 stretch a Type 2 belt across the aisle, which is going
2 to block access, which is a clear safety concern. It
3 identified the child safety concerns which were the
4 basis for this very same option in 1984 and which were
5 carried forward when the agency preserved the status quo
6 for the rear inboard seats at issue here. It recognized
7 other safety concerns, including obstructing the
8 rearward vision of drivers when you install the Type 2
9 belt in the center seat, because --

10 JUSTICE ALITO: By 1989, hadn't the agency
11 decided that the child safety concerns were no longer
12 applicable?

13 MR. GARRE: No, and the portion of the
14 notice of proposed rulemaking that's cited refers to the
15 no positive or negative effects. And that language, it
16 does not lead to the conclusion that the government and
17 Petitioner suggests, for a few reasons.

18 First, the agency was referring only to rear
19 outboard seats, not rear inboard seats, the kind of seat
20 at issue. And that's important because NHTSA was
21 telling parents: Put your children in the rear center
22 seat, the inboard seat, because that -- that seat also
23 was the seat that was most likely to have the lap belt,
24 which is how NHTSA was telling child seat manufacturers
25 to install their child seats, that you could install

1 them with a lap belt because it was more compatible with
2 that.

3 Second of all, that, the reference to the no
4 positive or negative, was a tentative assessment. If
5 you look in the Federal Register where that language
6 appears -- it's on 53 Federal Register 47988 to 47989 --
7 the agency said: This is a tentative assessment; we
8 want your comments on this. Comments came back and the
9 agency backed off from that and said, we have to examine
10 this more.

11 And secondly, that positive -- no positive
12 or negative statement -- could only apply when child --
13 when children were using the boosters which would help
14 with the Type 2 shoulder belt so the belt wasn't going
15 over the neck. But NHTSA knew at that time that very
16 few, less than 1 percent, of parents were actually
17 putting their kids in the booster seats. This was
18 20 years ago. This was at a time when many children
19 weren't in any car seats at all, no matter what NHTSA
20 was saying.

21 So they recognized that they were at real
22 risk here, that children -- children with a Type 2 belt,
23 just to be clear -- and NHTSA recognized this during the
24 1989 rulemaking -- that belt is going to pose an obvious
25 safety risk to children, because the shoulder belt that

1 is terrific for adults is going to take -- is going to
2 create unique chest loads on children. And if the
3 children is not on a booster, as virtually all were not,
4 the belt is going to appear too high on the head -- on
5 the neck or head, which is a safety problem.

6 JUSTICE SCALIA: Why didn't they prohibit
7 it, if they were so sure about that? They allowed it,
8 didn't they?

9 MR. GARRE: Well, because this -- this was
10 something, Justice Scalia, that the agency struggled
11 with for almost a decade until it ultimately adopted the
12 latch system, which resolved the compatibility issue of
13 the lap belt versus the lap/shoulder belt for installing
14 the child car seat. I mean, anyone who has tried to
15 install a child car seat with a Type 2 belt, the
16 lap/shoulder belt, knows how difficult it was. And the
17 agency went back and forth on this and ultimately went
18 in a completely different direction in 1999 and
19 installed the lap system.

20 And another thing that happened is over
21 time, booster seats became more accepted. More parents
22 were putting children in booster seats. And we solved
23 that safety concern as well. But 20 years ago, at the
24 time that this rule was adopted, the agency clearly
25 appreciated the child safety risk. Again, in 1984 --

1 JUSTICE SCALIA: Why shouldn't we allow the
2 juries to take account of those changes over time?

3 MR. GARRE: Because it would --

4 JUSTICE SCALIA: I mean, as you say, the
5 agency's rule only spoke of the situation at that time.

6 MR. GARRE: This was an area that NHTSA was
7 carefully monitoring. You had rulemakings in '84 and
8 '89 and it adopted a very unique approach to resolving
9 the safety issue, which was to expressly give
10 manufacturers this option to advance Federal safety and
11 practicability objectives. We haven't talked as much
12 about the practicability objectives, but that is one of
13 the statutory objectives of the act.

14 Congress couldn't have been more clear on
15 that and the agency in 1989 couldn't have been more
16 clear in the final notice, saying we are not going to
17 require manufacturers to install Type 2 belts in the
18 rear center and aisle seats because that's just too
19 costly. It's substantially expensive and the agency
20 well knew based on its history that imposing this sort
21 of overly costly safety measures that the Type 2 belt
22 would have been for these seats at that time could have
23 proved counterproductive with the agency's long-term
24 safety mission.

25 The agency said that in the rulemaking in

1 this case at 52 Federal Register 22819 where it said
2 that requiring these kind of overly costly measures
3 created a lost opportunity to improve safety through
4 other means.

5 This is something that Congress gave the
6 agency the expert judgment to make on these matters and
7 the practicability objectives, which was just as much a
8 statutory objective as a safety objective, would have
9 been directly frustrated if, as could have happened
10 under the Petitioners position in this case, on the very
11 day after the agency passed this rule in 1989 and said
12 we are not going to require rear inboard seats to have
13 Type 2 lap/shoulder belts. A jury in California hit my
14 client with a multimillion dollar punitive damages award
15 because they did not install a Type 2 belt in that seat.

16 That would have been directly contrary to
17 the Federal objectives. It would have undermined the
18 safety objectives that the agency recognized and it
19 would have undermined the practicability objectives that
20 the agency recognized, and then you have this world in
21 which manufacturers like my client could be hit with
22 multimillion dollar punitive damages award in one state
23 for installing the Type 2 belt where a child was injured
24 or someone was in the back seat and couldn't get out.

25 JUSTICE GINSBURG: I thought we were told

1 that there was one manufacturer, I think General Motors
2 was mentioned, that was doing this Type 2 belt
3 uniformly?

4 MR. GARRE: I think that was later in time.
5 It wasn't in 1989. Truthfully, if you look at late as
6 2004 when the agency adopted so-called Anton's law rule,
7 which eventually did mandate Type 2 belts in these kinds
8 of seats. Even then the agency recognized that there
9 were still technical feasibility concerns with
10 installing the Type 2 belts in these seats.

11 And just to be clear, the problem is, is
12 finding the anchor to install the shoulder belt in rear
13 center or aisle seats. You have got to anchor it
14 somewhere. If you put it in the side wall you are going
15 to have straps crossing across the aisle and obstructing
16 access. If you put it in the roof you are going to have
17 something --

18 JUSTICE SOTOMAYOR: But that is not the
19 issue here. The issue is whether it was feasible in
20 this car, not whether or not it was not feasible
21 elsewhere.

22 MR. GARRE: And the agency resolved
23 conclusively that it was not practical in 1989. Was it
24 theoretically possible? Eventually manufacturers --

25 JUSTICE SOTOMAYOR: That goes to my point of

1 the light in the sedan versus the van. It's letting the
2 manufacturers decide what's the best choice.

3 MR. GARRE: It gave them that flexibility,
4 the agency determined in the 1994 chief counsel letter
5 and we hope the Court does read it, makes it clear that
6 the agency concluded that in this situation, and it's a
7 rare situation, the manufacturer was in the best
8 position to decide what was most appropriate for its
9 vehicles. And, again, there is this flexibility
10 objective.

11 If you look at Fidelity Federal Savings &
12 Loan v. A. la Cuesta, the decision cited on page 19 of
13 our brief, you have this Court recognizing that a
14 Federal law that gave flexibility where you have a state
15 mandate that interferes with that flexibility, that is
16 an actual conflict. Ultimately under Geier, this Court
17 is looking for the existence of an actual conflict. We
18 think a rule that says manufacturers, you are free to
19 choose between this type of seatbelt and that type of
20 seatbelt, and the reason we are giving you that
21 flexibility is to advance federal safety and
22 practicability objectives.

23 We are not going to require you to put a
24 lap/shoulder belt in there because that would frustrate
25 those Federal objectives, the state law tort suit that

1 would mandate the very thing that the agency chose not
2 to, to advance federal objectives is preempted. If
3 there are no further questions?

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Buchanan, have you four minutes.

6 REBUTTAL ARGUMENT OF MARTIN N. BUCHANAN
7 ON BEHALF OF THE PETITIONERS

8 MR. BUCHANAN: First of all, I would like to
9 clear up the child safety issue and I know Mr. Jay has
10 addressed this to some extent, but let me be perfectly
11 clear, there is absolutely nothing in the '87 to '89
12 regulatory history that mentions anything about child
13 safety being a consideration in the agency's decision
14 not to mandate Type 2 shoulder belts for aisle and
15 center seating positions.

16 Specifically, Justice Ginsberg asked Mr.
17 Garre about whether there is anything about the rear
18 center seat being the safest place for children in that
19 regulatory history. There is no mention whatsoever in
20 that regulatory history about that issue, and the reason
21 for that is this: The reason the rear center seat was
22 considered safer for children had nothing to do with the
23 type of seatbelt that was installed in that seat.

24 It's considered safest for children because
25 it's farthest from the potential point of impact in a

1 side impact collision.

2 CHIEF JUSTICE ROBERTS: When you talk about
3 safety to children, are you also addressing the strap
4 going across the aisle or the strap interfering with
5 vision? I know that is not directly related to
6 children, but it affects what type of belt might be the
7 safest overall.

8 MR. BUCHANAN: You are right,
9 Mr. Chief Justice, that was not expressed in any way in
10 terms of a child safety concern. I would also, minor
11 correction, the interference with rear vision was a
12 comment that a commenter made in the regulatory history
13 and the agency never really expressed an opinion one way
14 or the other about whether that was a concern.

15 I think what's really important here is that
16 state tort law provides an incentive for manufacturers
17 to exercise their options reasonably. And whether that
18 option is to exceed a minimum standard that doesn't have
19 options, or to choose between two different options that
20 a minimum standard provides, state tort law ensures that
21 manufacturers act reasonably. Our contention --

22 CHIEF JUSTICE ROBERTS: But state tort law
23 doesn't, juries typically don't take into account the
24 fleet costs of avoiding liability, which as I understand
25 from the SG's brief in this case was the reason that

1 Type 2 was not mandated, because of the overall costs.
2 You have a jury with an injured plaintiff, they are not
3 likely to weigh heavily the fact that this would cost 3
4 extra cents per car fleet wide. I think that is the
5 sort of thing NHTSA considers.

6 MR. BUCHANAN: Mr. Chief Justice, under any
7 state's tort law, I think cost and feasibility would be
8 practical considerations for the jury under the jury
9 instructions given. Those are liability issues, cost
10 and feasibility in any tort system. And so that's a
11 liability issue down the road.

12 Here it's important to preserve state tort
13 law because Congress said state tort law shall be
14 preserved. And again, whether it's a choice between
15 options, Type 1 or Type 2, or whether it's potential
16 liability for not going beyond the minimum braking
17 standard, either way manufacturers should be held
18 accountable according to Congress in its enactment of
19 the statute for the design choices they make. There is
20 nothing different about a design standard option 1
21 versus option 2.

22 The final point I want to make before I sit
23 down is that I think in some respects this case with
24 regard to the question about whether Congress intended
25 for the agency to be the exclusive authority for

1 weighing these types of considerations, in some respects
2 Wyeth versus Levine is instructive here.

3 Because I think that was the same argument
4 that was made in Wyeth versus Levine, that a jury should
5 not be allowed to second-guess the FDA's labeling issues
6 and to allow the jury to do so would subvert the
7 exclusive authority of a Federal agency, and the Court
8 rejected that argument in Wyeth, and as the dissent
9 pointed out in Wyeth, that statute did not even have a
10 Savings Clause. And it did not define the labeling
11 standards as minimum standards.

12 Here we have a much more clear expression of
13 congressional intent. They intended these to be minimum
14 standards. They have a savings clause that says common
15 law liability shall be preserved. Obviously Congress
16 did not intend NHTSA to be the exclusive safety standard
17 cook. They deliberately preserved state court juries as
18 also providing for additional vehicle safety and for an
19 incentive to manufacture safer vehicles.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 12:03 p.m., the case in the
23 above-entitled matter was submitted.)

24
25

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