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. :

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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.

C O N T E N T S

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

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

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

MR. BUCHANAN: Justice Scalia --

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

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

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

possibly have been?

MR. BUCHANAN: Well --

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

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

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

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

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

MR. BUCHANAN: Well, Your Honor, any time

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BUCHANAN: Yes, that's --

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

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

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

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

The agency found that Type 2 seatbelts were

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

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

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

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

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

MR. BUCHANAN: That's correct. Theoretically, that suit could move forward. But the

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

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

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

MR. BUCHANAN: Cannot?

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

Is it the same? Is your position the same?

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

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

MR. BUCHANAN: Your Honor, any time the

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, it said all

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Jay.

ORAL ARGUMENT OF WILLIAM M. JAY,

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONERS

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

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

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

Simply saying that, and I -- simply saying

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

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

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

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

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

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

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

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

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

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

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

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

did in their application of Geier?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: Yes.

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

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

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

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

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

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

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

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

agency actually encouraged earlier compliance.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE RESPONDENTS

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

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

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

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

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

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

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

JUSTICE BREYER: Nothing in the agency that

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

MR. GARRE: I think --

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

MR. GARRE: We are not here --

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

MR. GARRE: What the agency --

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

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

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

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

MR. GARRE: And --

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

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

JUSTICE GINSBURG: Mr. Garre --

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

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

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

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

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

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

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

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

MR. GARRE: But if --

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

MR. GARRE: And --

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

(Laughter.)

MR. GARRE: Of course, from --

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

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

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

MR. GARRE: That's right.

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

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

MR. GARRE: And --

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

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

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

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

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

MR. GARRE: That's --

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

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

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

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

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

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

JUSTICE SOTOMAYOR: But you haven't explained why.

MR. GARRE: The reason why is because --

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

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

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

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

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

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

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

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

recognized throughout its history.

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

If you look at this Court's decision --

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

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

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

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

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

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

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

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

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

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

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

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

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

I mean, at the same time the agency is

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

JUSTICE GINSBURG: Was that in 1989?

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

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

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

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

MR. GARRE: Unfortunately, the diagrams --

JUSTICE SCALIA: Do you know what the terminology is?

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

JUSTICE SCALIA: Where is it?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GARRE: Because it would --

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

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

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

The agency said that in the rulemaking in

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

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

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

JUSTICE GINSBURG: I thought we were told

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

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

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

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

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

JUSTICE SOTOMAYOR: That goes to my point of

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Buchanan, have you four minutes.

REBUTTAL ARGUMENT OF MARTIN N. BUCHANAN

ON BEHALF OF THE PETITIONERS

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

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

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

side impact collision.

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

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

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

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

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

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

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

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

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

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

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

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

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