

**IN THE
INDIANA COURT OF APPEALS**

Case No. 09A05-0708-CV-00425

JENEAN ROLAND and CARL J.)	Appeal from the
ROLAND, a minor, b/n/f JENEAN)	Cass Superior Court No. 1
ROLAND,)	
)	
Appellants,)	Trial Court Case
)	No. 09D01-0408-CT-00018
)	
v.)	
)	
)	
GENERAL MOTORS)	The Honorable Thomas C. Perrone,
CORPORATION, a foreign)	Judge
corporation,)	
)	
Appellee,)	
)	
and)	
)	
KRISTEN SHELTON and)	
GENASYS, L.C., a foreign limited)	
liability corporation,)	
)	
(Defendants below).)	

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AND
THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC.
AS AMICI CURIAE

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**BRIEF OF AMICI CURIAE
IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE**

INTEREST OF THE AMICI CURIAE

The Alliance of Automobile Manufacturers, Inc. (“Alliance”) is a nonprofit trade organization formed in 1999. Its mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. Defendant-Appellee General Motors Corporation is a member of the Alliance, along with BMW Group; Chrysler LLC; Ford Motor Company; Mazda North American Operations; Mercedes-Benz USA; Mitsubishi Motors North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc; and Volkswagen of America, Inc. The Alliance frequently participates as *amicus curiae* or as an intervenor in cases addressing Federal regulation of motor vehicles. In doing so, the Alliance presents the broad perspective of vehicle manufacturers.

The Association of International Automobile Manufacturers, Inc. (“AIAM”) is a nonprofit trade association that represents international motor vehicle manufacturers, certain original equipment suppliers, and other automotive-related trade associations. AIAM’s mission is to protect and promote the unique interests of international automakers and their suppliers in the United States. AIAM is dedicated to the promotion of free trade and to policies that enhance motor vehicle safety and the protection of the environment. The *members* of AIAM are Aston Martin Lagonda of North America, Inc.; Ferrari North America, Inc.; Maserati North America, Inc.; American Honda Motor Co., Inc.; Hyundai Motor America; Isuzu Motors America, Inc.; Kia Motors America, Inc.; Mitsubishi Motors North America, Inc.; Nissan North America, Inc.; Peugeot Motors of America, Inc.; Renault SA; Subaru of America, Inc.; American Suzuki Motor

Corporation; and Toyota Motor Sales, U.S.A., Inc. The *associate members* of AIAM are ADVICS North America, Inc.; Robert Bosch GmbH; Delphi Corporation; Denso International America, Inc.; and the Japan Automobile Manufacturers Association, Inc.

This case raises issues of considerable importance to the *amici* and their respective members. The regulations at issue here apply directly to the vehicles manufactured by the Alliance's members and many of AIAM's members. These regulations were developed by the National Highway Traffic Safety Administration ("NHTSA") to establish uniform, national standards, and they reflect NHTSA's expert balancing of a variety of considerations, including safety and public acceptance. As a matter of sound public policy, NHTSA's considered judgments on the options that vehicle manufacturers should have under these regulations should not be subject to second guessing by lay juries. The members of the Alliance and AIAM, and ultimately the consumers of their products, benefit greatly from known, uniform Federal standards, and, therefore, have an interest in the proper application of the preemption doctrine that assures the supremacy of these regulations.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its brief, General Motors Corporation ("GM") has fully rebutted the Rolands' specific challenges to the superior court's decision that the Rolands' claims are preempted by Federal Motor Vehicle Safety Standard ("FMVSS") 208 (49 C.F.R. § 571.208), which expressly afforded GM the option of equipping the rear center seating position of the subject 1998 Chevrolet Cavalier with a lap-only belt.

Amici submit this brief to assist the Court in understanding FMVSS 208, which, unlike many other FMVSSs, specifies particular equipment options as part of a comprehensive regulatory scheme for restraints in motor vehicles. In the instant case, the relevant provisions of FMVSS 208 afforded the manufacturer of 1998 motor vehicles the option of equipping the rear

center seating position with a lap-only or a lap/shoulder belt. In providing these options, NHTSA sought to advance specific public policy goals and concerns – especially with regard to the compatibility of seat belts with child restraints. These policies and goals would be frustrated by tort liability for exercising the option of equipping the rear center seat with a lap-only seat belt. In addition, the “Federalism” statements that the Rolands quote from various Federal Register preambles do not support the Rolands’ argument that their claims are not preempted. The Rolands have misconstrued these statements, misstated their significance, and misunderstood the Executive Orders pursuant to which the “Federalism” statements were made.

ARGUMENT

At least since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), “it has been settled that state law that conflicts with federal law is ‘without effect’” – that is, preempted. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citation omitted).

This case involves “obstacle” or “frustration of purpose” preemption. *See, e.g., United States v. Locke*, 529 U.S. 89, 109 (2000) (State law preempted “when the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’”) (citation omitted); *see also Griffith v. General Motors Corp.*, 303 F.3d 1276, 1279 (11th Cir. 2002). Because common law claims would be an obstacle to NHTSA’s policy of affording manufacturers specified equipment options in FMVSS 208, numerous cases have held that FMVSS 208 preempts common law claims. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (claim of defect based on lack of air bags held to be preempted by Safety Act and FMVSS 208); *Griffith, supra* (preemption of claim concerning lap-only belt in front center seating position); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377 (7th Cir. 2000) (preemption of claim concerning lap belt at bus driver’s seating position).

I. **NHTSA AFFORDED MANUFACTURERS OF 1998 MODEL YEAR PASSENGER VEHICLES THE OPTION OF PROVIDING LAP-ONLY SEAT BELTS FOR THE REAR CENTER SEATING POSITION FOR SPECIFIED POLICY REASONS**

A. **The Safety Act**

FMVSS 208 was promulgated by NHTSA pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 (“Safety Act”), Pub. L. 89-563, 80 Stat. 718 (codified at 49 U.S.C. § 30101, *et seq.*). The Safety Act was enacted “to reduce traffic accidents and deaths and injuries resulting from traffic accidents.” 49 U.S.C. § 30101.

Congress intended the FMVSSs to be “uniform national standards” (*Wood v. General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988)) and sought to achieve national uniformity by preempting State law. 49 U.S.C. § 30103(b). As the Senate Report on the Safety Act states, “State standards are preempted” to the extent “they differ from Federal standards” because “the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government.” S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2712, 2720.

The Safety Act, however, does not *expressly* preempt common law claims. A “saving clause” in the Safety Act provides that “[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.” 49 U.S.C. § 30103(e).

As the Supreme Court and numerous other courts have held, however, neither the express preemption clause nor the Safety Act’s “saving clause” precludes the *implied* preemption of State common law actions. *See, e.g., Geier*, 529 U.S. at 869-74; *Hurley*, 222 F.3d at 381.

B. **FMVSS 208**

FMVSS 208, *Occupant Crash Protection*, establishes performance standards and equipment requirements for the protection of automobile occupants in crashes. FMVSS 208,

which occupies close to 90 pages in the current Code of Federal Regulations, has been held not to set forth a “minimum standard,” but rather to provide “a comprehensive regulatory scheme.” *Griffith*, 303 F.3d at 1281.

The Department of Transportation first promulgated FMVSS 208 in 1967, when it imposed a requirement, effective January 1, 1968, for the installation of Type 1 (lap-only) or Type 2 (lap/shoulder) manual seat belts in new cars. 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967). Since then, as reflected in the Code of Federal Regulations, FMVSS 208 has been amended many times to account for advancements in seat belt technologies, the development and advancement of air bag technologies, and the increasing use of seat belts by the American public.

Two related amendments are pertinent here. One required lap/shoulder belts in rear outboard seating positions in most passenger cars, such as the vehicle at issue here, but continued the option of providing lap belts or lap/shoulder belts for non-outboard positions, including the center rear seating position. *See* 54 Fed. Reg. 25275 (June 14, 1989).¹ The other required lap/shoulder belts for rear outboard seating positions in other types of vehicles, including convertibles, light trucks, and multipurpose passenger vehicles. *See* 54 Fed. Reg. 46257, 46257, 46258 (Nov. 2, 1989). As further discussed below, the preamble to the latter rule discussed other pertinent issues, as well.

In promulgating, revising, and interpreting FMVSS 208, NHTSA and the courts have recognized the importance of public confidence in occupant restraint systems and the need to avoid adverse consequences. *Cf. Geier*, 529 U.S. at 875-77; *Motor Vehicle Mfrs. Ass’n v. State*

¹ For present purposes, the “outboard” seating positions may be defined as the ones near the side structure of the vehicle. In a sedan, the front outboard seating positions are the driver’s position and the passenger’s position nearest the passenger door. Some sedans have a non-outboard front seating position (the front center seat). Similarly, in most sedans, the rear outboard seating positions are the two closest to the side structure of the vehicle. The non-outboard rear seating position, if there is one, is in the middle.

Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34-37 (1983); 63 Fed. Reg. 49958, 49959-49964 (Sept. 18, 1998). Thus, for instance, in phasing in passive restraint systems, NHTSA gave effect to a “policy judgment that a gradual phasing in of passive restraint systems would be the best way in which to ‘lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance.’” *Griffith*, 303 F.3d at 1280 (quoting *Geier*, 529 U.S. at 875).²

Similarly, in FMVSS 208, NHTSA frequently has given manufacturers flexibility in choosing restraint options, because the resulting mix of restraint options may “maximize the likelihood that people would actually use the passenger restraint systems installed in their cars and trucks.” *Id.* at 1281; *see also Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1123 (3d Cir. 1990) (“Standard 208 was specifically designed to give automobile manufacturers a choice among several options when providing restraint systems for passengers.”).

In addition, throughout the course of its FMVSS 208 rulemakings, NHTSA has given serious consideration to the effects of various restraint systems on the safety of children. *See, e.g.*, 65 Fed. Reg. 30680, 30741-30742 (app. C) (May 12, 2000) (discussing NHTSA’s efforts to

² “Passive restraints” are those that “require no action by vehicle occupants.” 49 C.F.R. § 571.208 S4.1.1.1. Air bags are passive restraints, as are automatic seat belts, which move into position without any action by vehicle occupants. 49 C.F.R. § 571.208 S4.5.3. “Active restraints,” by contrast, require the vehicle occupants to do something, such as latch a manual seat belt. It bears noting that *Geier* cannot be distinguished from the present case on the ground that *Geier* addressed a passive restraint – an air bag – and this case addresses an active restraint – a manual seat belt. *See Griffith*, 303 F.3d at 1280 (“Although plaintiffs in [*Geier* and previous Eleventh Circuit cases] sought to require manufacturers to install passive restraints (air bags and fully automatic seat and lap belt systems), in none of them is the preemptive effect of FMVSS 208 analyzed as a function of a distinction between passive and manual restraint systems”); *Hernandez-Gomez v. Volkswagen of Am., Inc.*, 32 P.3d 424, 429 (Ariz. Ct. App. 2001) (*Geier* is properly read to support the proposition that, when a NHTSA decision “to leave options open to . . . manufacturers was made with specific policy objectives in mind,” a tort suit that “if successful, would under mine that policy objective” is preempted) (quoting *Hurley*, 222 F.3d at 382).

address the risk posed by air bags to out-of-position occupants, particularly children); 61 Fed. Reg. 60206 (Nov. 27, 1996) (mandating improved air bag labeling concerning risks to children posed by air bags); 60 Fed. Reg. 27233 (May 23, 1995) (permitting manual deactivation devices for front passenger air bag in vehicles in which rear-facing child seats can fit only in front seat); 59 Fed. Reg. 51158, 51159 (Oct. 7, 1994) (noting “air bag/infant restraint interaction problem” caused by the incompatibility of rear-facing infant car seats and passenger airbags); 49 Fed. Reg. 15241, 15242 (April 18, 1984) (denying petition for rulemaking to establish lap/shoulder belt requirement for outboard rear seating positions, in substantial part because the agency “does not agree with petitioners that booster seats used in conjunction with Type 2 belts are as effective as booster seats equipped with shoulder harnesses (which must be tethered to the vehicle)” and noting that lap/shoulder belts would create excessive chest loads on young children during crashes).

C. The Seat Belt Options for Rear Non-Outboard (Center) Seating Positions

With many of these concerns in mind, NHTSA expressly gave manufacturers the *option* of equipping non-outboard rear seats – the seating position at issue in this case – with *either* lap belts or lap/shoulder belts. *See* 49 C.F.R. § 571.208 S4.1.5.1 (passenger cars manufactured on or after September 1, 1996, must have a “Type 1 [lap-only] or Type 2 [lap/shoulder] seat belt assembly”).

NHTSA’s provision of this option reflects a deliberate policy choice. In fact, in the late 1980s, when NHTSA mandated lap/shoulder belts for rear *outboard* seating positions, NHTSA decided *not* to require those belts in rear non-outboard seating positions. *See* 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989); 53 Fed. Reg. 47982, 47984-47985 (Nov. 29, 1988). In deciding to maintain the existing options for either lap belts or lap/shoulder belts in rear non-outboard positions, NHTSA focused on a number of important policy concerns.

First, in the notice of proposed rulemaking concerning lap/shoulder belts in rear seating positions, NHTSA focused on “technical difficulties associated with a requirement to install lap/shoulder belts at all rear seating positions.” 53 Fed. Reg. at 47984-47985; *see also* 54 Fed. Reg. at 46258 (final rule) (reiterating conclusion that the lap/shoulder belt requirement should apply only to rear outboard seating positions).

Second, NHTSA also was concerned about the compatibility between child safety restraints and a requirement for lap/shoulder belts at all rear designated positions. As noted above, the consistency between restraint requirements and child safety has been a recurring theme in FMVSS 208 rulemakings. Thus, in denying the 1984 petition to require lap/shoulder belts at outboard rear seating positions (*see supra* at 7), NHTSA stated that:

[t]he installation of Type 2 belts in the rear outboard seating positions would make the installation of the conventional child safety seat much less convenient than with the current Type 1 belt. This would occur because the shoulder portion of a Type 2 belt would have to be placed behind the restraint, or otherwise moved out of the way, since most child restraints are designed to be used only with lap belts. This is an important consideration in view of the fact that 44 States and the District of Columbia have laws requiring the use of child safety seats. These State use laws make it desirable that compliance be accomplished as smoothly as possible.

49 Fed. Reg. at 15241-15242.

Even though NHTSA rethought this analysis in certain respects in the rulemaking to require the installation of lap/shoulder belts in rear outboard seats, the agency remained concerned about the compatibility between lap/shoulder belts and child restraints, noting that one child restraint manufacturer had urged the agency to “consider the compatibility between child restraints and vehicle safety belts thoroughly in this rulemaking.” 53 Fed. Reg. at 47988. NHTSA stated, “Additionally, the agency has heard reports that some current combinations of child restraints and rear safety belt systems may be incompatible. For example, some have said

that a rear set lap/shoulder belt may be too short to fit around a child safety seat.” *Id.*; *see also* 54 Fed. Reg. at 25276 (noting that some commenters had raised issues concerning “compatibility with child restraint systems”).³

In the decade following the rear outboard lap/shoulder belt rulemaking, NHTSA’s concerns about the compatibility between child restraints and seat belts increased with the increasing use of lap/shoulder belts. Thus, in 1993, NHTSA promulgated a regulation imposing a “lockability” requirement for lap/shoulder belts in outboard seating positions. *See* 58 Fed. Reg. 52922 (Oct. 13, 1993). As NHTSA explained in the 1991 supplemental notice of proposed rulemaking that resulted in the 1993 final rule, a requirement that “the lap belt portion of a lap/shoulder belt provide some means, other than an external device that required manual attachment or activation, to prevent any further webbing from spooling out of the retractor until the means was released or deactivated” is referred to as “the ‘lockability requirement.’” 56 Fed. Reg. 63914, 63915 (Dec. 6, 1991). “The lockability requirement evolved from the movement at low vehicle speeds of child safety seats held by safety belts that use an emergency locking retractor (ELR). This movement gave rise to questions and concerns on the part of the public about the safety and effectiveness of child seats when used with such belts.” *Id.*

Concerns about lockability arose because of conflicts between the need to increase the comfort and convenience of lap/shoulder belts for teenagers and adults and the need to assure

³ At the time of the rulemaking and for a number of years afterwards, most child restraints were compatible with lap belts, but could be used with lap/shoulder belts only with difficulty. *See* Comments of Mercedes-Benz of North America, Inc., docketed as NHTSA 87-08-NO1-021, at 1 (July 30, 1987) (“Due to the extremely low occupancy-rate of the rear-center seat by adults, plus *an improved suitability for fastening child restraint systems*, the rear-center seating positions are equipped with lap belts.”) (emphasis added); NHTSA, *Child Passenger Safety Resource Manual* 88 (March 1992) (stating that the “center rear seating position,” which almost always has a lap belt, “often has a belt that is tightened by hand and therefore usually poses fewer compatibility problems [for child restraints]”).

that these belts adequately and firmly secure child restraints. In order to meet the former need – increasing adult comfort and convenience – NHTSA had mandated that lap/shoulder belts at rear outboard positions be equipped with “emergency locking retractors” (“ELRs”) that lock the belt only in sudden stops or crashes, but otherwise allow some occupant movement. *See, e.g.*, 55 Fed. Reg. 30914, 30915 (July 30, 1990) (ELRs are required “as the retractor for the lap belt portion of the lap/shoulder belt system”). By generally permitting the restrained teenage or adult occupant some freedom of movement, ELRs enhance the occupants’ comfort and convenience, which in turn encourages restraint use.⁴

But this virtue of ELRs becomes a distinct drawback when ELR-equipped belts are used to secure child restraints. Because such belts permit some occupant movement, they also permit the *child restraint* to move around, which makes parents anxious and may pose safety risks for the secured children. *See* 56 Fed. Reg. at 63915. Although there are separate devices, such as locking clips, that can be affixed to the seat belts to prevent the movement associated with ELRs, at least as early as 1989, NHTSA was convinced that external devices were unsatisfactory and that the agency, therefore, should require that lap/shoulder belts be equipped with built-in locking mechanisms. *See* 54 Fed. Reg. at 46261.

Because of concerns about adequacy of notice and the objectivity of a lockability requirement, this requirement could not be implemented when the lap/shoulder belt requirement was promulgated in 1989. *See* 56 Fed. Reg. at 63915. Subsequently, NHTSA addressed these concerns and, in October 1993, NHTSA imposed a lockability requirement, mandating that seat

⁴ ELRs also are required for lap belts when those belts are permitted at *outboard* seating positions, but are not required for lap belts when those belts are used in non-outboard positions, such as in the center rear seat. *See* 49 C.F.R. § 571.208 S7.1.1.2(a); S7.1.1.1.3; 61 Fed. Reg. 30657, 30665 (June 17, 1996).

belts equipped with ELRs – which, as noted, are principally lap/shoulder belts – have a built-in locking mechanism to prevent movement of the child restraint. *See* 58 Fed. Reg. 52922.

The lockability regulation expressly “exclud[ed] belts which have no retractor . . . from the lockability requirements. These belts automatically provide lockability and therefore subjecting them to testing would be unnecessary.” 58 Fed. Reg. at 52925. This exclusion applies in practice to most lap belts in non-outboard seating positions: as noted above, these belts are not required to have ELRs, and they generally are equipped with manual adjusting devices, not retractors. Thus, lockability reflects another respect in which lap belts present fewer compatibility problems with child restraints than do lap/shoulder belts – a fact that NHTSA was aware of as far back as 1984, when, as noted above (*supra* at 7), it denied a petition to require lap/shoulder belts in rear outboard positions. *See* 49 Fed. Reg. at 15241-15242 (stating that “the installation of Type 2 belts in the rear outboard seating positions would make the installation of the conventional child safety seat much less convenient than with the current Type 1 belt”).

These developments amply support the conclusion that NHTSA made a deliberate policy choice to preserve the existing options for manufacturers to use *either* lap-only or lap/shoulder belts in rear non-outboard seating positions. Subsequent developments underscore the soundness of that choice, because they show that the promulgation of the lockability requirement did *not* resolve the compatibility problems between child restraints and lap/shoulder belts.

In early 1999, NHTSA noted:

Vehicle seats and seat belts have evolved over the years. At one time, the standard means of attaching a child restraint was the vehicle lap belt. Now all outboard seating positions are required to be equipped with lap/shoulder belts. . . . Because of the difficulty of designing vehicle seat belts to perform the dual function of restraining child restraint systems and of restraining the torsos of older individuals, the vehicle belts are not as effective as they could be for the purpose of restraining child restraints.

. . . . Efforts to make vehicle belt systems more effective for older children and adult passengers have also resulted in the belt systems becoming more complex and more difficult to use to attach child restraints correctly. Due to these complexities people often misuse child restraints in vehicles.

NHTSA Office of Regulatory Analysis Plans & Policy, *Final Economic Assessment: FMVSS No. 213, FMVSS No. 225: Child Restraint Systems, Child Restraint Anchorage Systems*, Docket No. 98-3390-27, at 4 (Feb. 1999); *see also* 62 Fed. Reg. 7858, 7859 (Feb. 20, 1997) (discussing belt/child restraint compatibility issue at length); 64 Fed. Reg. 10786, 10788, 10790 (Mar. 5, 1999) (similar).

Because of the difficulty in reconciling lap/shoulder belt safety, comfort, and convenience for adults with lap/shoulder belt-child restraint compatibility, NHTSA ultimately opted for a new method of anchoring child restraints that would not require a child restraint/seat belt interface. *See id.* at 10786; *see also* 68 Fed. Reg. 38208, 38209 (June 27, 2003) (discussing requirement for “Lower Anchors and Tethers for Children” or the “LATCH System.”).

Against this background, the agency’s decision *not* to require lap/shoulder belts in the rear center position, but rather to continue to give manufacturers the *option* of providing lap belts *or* lap/shoulder belts in rear non-outboard seats, makes eminent sense and manifests a clear policy choice. The decision fosters flexibility, reflects an assessment of the excessive costs that a lap/shoulder belt requirement would have imposed, addresses well-founded concerns – including safety concerns – about the technological problems that would be created by a lap/shoulder requirement for rear non-outboard seats, and demonstrates a prudent approach to the complex and continuing dilemma posed by the seat belt/child restraint compatibility problem.⁵

⁵ Pursuant to “Anton’s Law,” Pub. L. No. 107-318, 116 Stat. 2772 (Dec. 4, 2002), in 2004 NHTSA mandated lap/shoulder belts for all rear seating positions, except for side-facing seats. *See* 69 Fed. Reg. 70904 (Dec. 8, 2004). NHTSA’s 2004 rule does not detract from our argument about the policy reasons for affording the seat belt options at issue here, because by 2004, the

II. A BARE ALLEGATION THAT A MODEL YEAR 1998 PASSENGER VEHICLE IS DEFECTIVE IF IT LACKS A LAP/SHOULDER BELT IN THE REAR CENTER SEAT IS PREEMPTED

Because NHTSA specifically gave manufacturers the option of equipping their 1998 passenger vehicles with lap belts or lap/shoulder belts in rear non-outboard seating positions, the Rolands may not hinge their claims solely on the contention that the provision of lap-only belts in the rear center seating position renders a vehicle defective. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (claim for failure to equip vehicle with air bags held preempted); *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256, 260-61 (1985) (State law is preempted to the extent it eliminates “flexibility” contemplated by Federal law); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708-09 (1984) (State law cannot deprive regulated entities of “flexibility and discretion” deliberately conferred by Federal law); *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 155 (1982) (similar); *Griffith v. General Motors Corp.*, 303 F.3d 1276, 1281-82 (11th Cir. 2002); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir. 2000); *Hernandez-Gomez v. Volkswagen of America, Inc.*, 32 P.3d 424, 427-28 (Ariz. Ct. App. 2001).

Thus, in *Griffith*, the plaintiff alleged that the General Motors pickup truck in which she was injured was “defective because of the lap belt only design for the center occupant” – in *Griffith*, the front center seat occupant. The Eleventh Circuit found the claim to be preempted. 303 F.3d at 1278. The court noted that, in *Geier* and other cases, courts found suits to be

child seat/seat belt compatibility problems that we have described above had been largely eliminated by the LATCH system. Accordingly, the compatibility concerns that prompted NHTSA to retain the option to use lap-only belts in the rear center seating position of the Model Year 1998 vehicle involved in this case were largely, if not entirely, eliminated by the time that NHTSA promulgated the 2004 rule. When General Motors manufactured the vehicle at issue in this case, the applicable regulations afforded General Motors the option that it exercised, and they did so for the policy reasons that we have described.

preempted when those suits sought “to impose liability on a car or truck manufacturer for selecting a vehicle restraint system specifically authorized by FMVSS 208.” *Id.* at 1280. The Eleventh Circuit further noted that, unlike other Federal Motor Vehicle Safety Standards, “the rule-making history of FMVSS 208 makes clear that DOT saw it not merely as a minimum standard, but as a comprehensive regulatory scheme. DOT intended and expected FMVSS 208 to produce a mix of restraint devices, both passive and manual, in cars and trucks.” *Id.* at 1281 (citations omitted).⁶

The *Griffith* court concluded that “when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted.” *Id.* at 1282. Thus, because Griffith’s suit, if successful, “would foreclose an option specifically permitted by FMVSS 208,” her suit “conflicts with that federal law and is impliedly preempted.” *Id.*

The holding of *Griffith* is directly applicable here. In this case, the Rolands seek to predicate liability on the manufacturer’s selection of an option expressly provided by NHTSA in FMVSS 208, thereby effectively foreclosing that option. Thus, as in *Griffith*, the suit here is preempted.⁷

⁶ In discussing *Griffith* (Appellants’ Br. 59-61), the Rolands appear to have overlooked the Eleventh Circuit’s distinction between FMVSS 208 and other safety standards. Moreover, their assertion that *Griffith* was decided before *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), is irrelevant because *Sprietsma* – a failure to regulate case – does not affect the preemption analysis here. Equally meritless is their attempt to distinguish *Griffith* on the ground that it involved a front seat belt. The Rolands have not shown why that fact should make any difference to the preemption issue here.

⁷ See *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1125 (3d Cir. 1990) (stating that “‘a state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option’”) (quoting *Taylor v. General Motors Corp.*, 875 F.2d 816, 827 (11th Cir. 1989)).

Equally instructive in this regard is the Seventh Circuit's decision in *Hurley*. Hurley was a bus driver who alleged that the bus in which he was injured was defectively designed because it provided only a lap belt, rather than a knee bolster, air bag, steel cage, and three-point seat belt. 222 F.3d at 380. The Seventh Circuit found that his claim was preempted because his suit would "foreclose[] a manufacturer's choice between seat belts and airbags." *Id.* at 381. "We conclude that the Supreme Court's opinion in *Geier* governs Hurley's case and compels the conclusion that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suits that depends on foreclosing one or more those options is preempted." *Id.* at 383. *See also Hernandez-Gomez*, 32 P.3d at 427-28 (challenge to manufacturer's choice of an option permitted by FMVSS 208 held preempted).⁸

Thus, *Griffith*, *Hurley*, and *Hernandez-Gomez* amply support the preemption of the Rolands' center rear lap-only belt claims here. Because a lap-only belt was one of the equipment options expressly provided by FMVSS 208, a common law suit attacking the selection of that option is preempted. *See also James v. Mazda Motor Corp.*, 222 F.3d 1323 (11th Cir. 2000); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("Because Plaintiff sued Defendants for exercising an option explicitly permitted by Congress, a conflict exists between state and federal law if Plaintiff goes forward with this state law claim of defective design. Therefore, Plaintiff's suit against Defendants for their exercise of an option provided to Defendants by FMVSS 208 conflicts with federal law and, thus, is preempted.") (citations omitted); *Carrasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169, 177 (M.D. Pa. 2001).

⁸ The Rolands' attempt to distinguish *Hurley* (Appellants' Br. 58-59) is conclusory and ignores the policy rationales for the lap-only seat belt option that we have explained.

III. NHTSA’S “FEDERALISM” PREAMBLE STATEMENTS DO NOT SUPPORT THE ROLANDS’ PREEMPTION ARGUMENTS

Pointing to certain regulatory preambles in which NHTSA made statements about the “Federalism” implications of various seat belt rules, the Rolands suggest that these statements prove that the seat belt provisions of FMVSS 208 do not have preemptive effect. *See* Appellants’ Br. 28-29.⁹ Specifically, the Rolands discuss two 1989 rulemaking preambles, in which NHTSA stated that it did not believe that the rules would have significant “Federalism” implications, and one 2004 rulemaking, in which NHTSA stated that the final rule was not intended to preempt State tort civil actions. *Id.*

The statements about the “Federalism” implications of the 1989 and 2004 rules were issued pursuant to two Executive Orders. The 1989 statements were issued pursuant to Executive Order 12612. *See* 54 Fed. Reg. 26275, 25278 (June 14, 1989); 54 Fed. Reg. 46257, 46265-66 (Nov. 2, 1989). The 2004 statement was issued pursuant to Executive Order 13132, which was the successor to Executive Order 12612. *See* 69 Fed. Reg. 70304, 70912 (Dec. 8, 2004). The Rolands’ argument fundamentally misconstrues the preamble statements, as well as the purpose and effect of these Executive Orders.

With regard to the 1989 preambles, the Rolands assert that “[i]n essence, NHTSA was saying that the rule amendments were not *intended* to have federal preemptive effect.” Appellants’ Br. 29 (emphasis added). There is no basis for this assertion. The 1989 preambles do not refer to NHTSA’s *intent*. They merely state that “[t]his rule has also been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and NHTSA has determined that the rule does not have sufficient federalism implications to warrant the

⁹ A “preamble” is an introductory statement, typically printed in the Federal Register, that summarizes and explains a newly promulgated rule and discusses various regulatory issues and the comments that were filed by participants in the rulemaking process.

preparation of a Federalism Assessment.” 54 Fed. Reg. at 25278; *see also* 54 Fed. Reg. at 46265-66 (same, except for phrase “this rule,” rather than “the rule”). Thus, rather than expressing an *intent* with regard to preemption, the 1989 preamble statements merely state *predictions* about the likely impact of the rules on the full range of Federalism concerns set forth in Executive Order 12612, and indeed, that is all Executive Order 12612 required of the agency. *See* 52 Fed. Reg. 41685, 41687 (Oct. 30, 1987) (“As soon as an Executive department or agency *foresees* the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.”) (emphasis added). The mere fact that *in 1989* NHTSA did not predict that Federalism concerns in general, and preemption issues in particular, would later arise does not mean that NHTSA *intended* that, contrary to the Supremacy Clause of the United States Constitution, its policies should be trumped by conflicting policies embedded in State tort civil actions.

Moreover, there is no basis to infer an intent not to preempt conflicting State law from NHTSA’s silence about its intent. To the contrary, it should be assumed that NHTSA *would* intend the preemption of conflicting State laws and standards – including common law rules and standards. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 885 (2000) (“Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict.”).

The Rolands can find no support for their argument in the 2004 preamble, either. To the contrary, in the 2004 preamble, NHTSA stated that “[t]he final rule is not intended to preempt state tort civil actions, *except to the extent that the agency has specifically determined that detachable Type 2 belts meeting the requirements of this rule are permissible for vehicle seats*

specifically permitted to be equipped with detachable Type 2 belts.” 69 Fed. Reg. at 70912 (emphasis added). The option to equip certain seats with detachable Type 2 belts was the sole equipment option provided in the 2004 rule. Thus, in the 2004 preamble, NHTSA actually expressed its intent to preempt civil tort actions that challenge the exercise of an option expressly permitted by FMVSS 208 – that is, NHTSA expressed an intent to preempt the same kind of challenge that the Rolands are attempting here. Far from supporting the Rolands’ claim, NHTSA’s statement *endorses* the preemption of tort claims, such as the one at issue here, that seek to restrict or interfere with the exercise of a specifically permitted FMVSS 208 option.

More broadly, the Rolands’ argument ignores basic facts about the context of the preamble statements that they cite. As noted, these statements were made pursuant to Executive Orders 12612 and 13132. The principal purposes of these Orders were to encourage agencies to avoid unnecessary conflicts with State laws (especially, with State statutory and administrative law), to mandate consultations in order to avoid such conflicts, and to prepare Federalism Assessments and Federalism Summary Impact Statements in certain circumstances. *See* 64 Fed. Reg. 43255, 43257 (Aug. 10, 1999) (Executive Order 13132, at § 4(c), requiring that “[a]ny regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated”); *id.* (§ 4(d), stating that “[w]hen an agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict”); *id.* (§ 6(a), requiring agencies to establish consultation processes and to designate consulting officials); *id.* at 43258 (§ 6(c)(2), requiring consultation for preemption matters and preparation of a “federalism summary impact statement” that describes consultation process and

steps); 52 Fed. Reg. at 41687 (Executive Order 12612, at § 4(d), mandating consultation “with appropriate officials and organizations representing the States in an effort to avoid . . . a conflict” between State law and Federally-protected interests); *id.* at 41687-88 (§ 6(b)-(c), mandating Federalism Assessments).

The Executive Orders, therefore, did not require agencies to make binding statements of preemptive intent – especially with regard to conflicts between Federal regulations and State laws that might arise at some indeterminate point in the future. Rather, the Executive Orders merely required a *predictive*, largely factual assessment of the impact of Federal regulations upon State law, an attempt to minimize that impact, and transparency with regard to the impact that was *anticipated* when the regulation was promulgated. Nothing in the Executive Orders precluded the possibility that unanticipated conflicts with State law – especially State tort law – might emerge later and require the preemption of such State law.

Moreover, the Executive Orders focused principally (if not exclusively) on conflicts with State *statutory* and *administrative* law, not conflicts with common law tort actions. This is evident from the requirements for consultations with State officials. Executive Order 12612 (which, as noted above, governed the Federalism statements in the 1989 preambles) required consultation with “appropriate officials and organizations representing the States.” *Id.* at 41687 (§ 4(d)). That Order did not define who those officials should be, but Executive Order 13132 (which was the Executive Order governing the 2004 preamble) did define the “State and local officials” who were to be consulted. They are defined as “elected officials of State and local governments or their representative national organizations.” 64 Fed. Reg. at 43255 (§ 1(d)). Such officials almost certainly are responsible for the interpretation, implementation, and enforcement of State *statutory* and *administrative* law, not the *common law* of tort.

Judges are responsible for the interpretation, implementation, and enforcement of State common law, but, surely, the Executive Orders could not be construed as *sub silentio* creating a rubric for consulting *judges* about the preemption of state common law actions. Indeed, such consultations would be highly problematic because they would require judges, in effect, to render advisory opinions about the meaning and application of the common law in response to abstract and hypothetical questions. Such a process would be inconsistent with our traditions of judicial practice, and, indeed, would threaten the integrity of the adjudicative process. Thus, if such an extraordinary departure from traditional practice had been contemplated by the Executive Orders (in order to ascertain and avoid the potential preemption of *common law* claims), the Executive Orders would have said so *expressly*. That they did not is powerful evidence that the Executive Orders were not focused on concerns about preemption of civil tort actions, such as the one here, and, therefore, agency “Federalism” pronouncements in rulemaking preambles should not be construed to set binding limits on the preemption of conflicting common law standards.

Thus, the Rolands’ argument would not make sense even if they had construed NHTSA’s statements in the 1989 and 2004 preambles correctly, which, as we have shown, they did not.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted

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