

No. G038845

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE**

DELBERT WILLIAMSON, et al.,

Plaintiffs-Appellants,

vs.

MAZDA MOTOR CORPORATION, et al.,

Defendants-Respondents.

APPEAL FROM THE ORANGE COUNTY SUPERIOR COURT
CASE NO. 04CC06494,
HONORABLE MICHAEL BRENNER

**APPLICATION OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS,
INC. FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE* IN
SUPPORT OF DEFENDANTS-RESPONDENTS AND BRIEF OF THE
ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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**APPLICATION OF THE ALLIANCE OF AUTOMOBILE
MANUFACTURERS, INC. FOR PERMISSION TO FILE *AMICUS
CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-RESPONDENTS**

To the Honorable David G. Sills, Presiding Justice:

Pursuant to Rule 8.200(c) of the Appellate Rules of the California Rules of Court, the Alliance of Automobile Manufacturers, Inc. (“Alliance”) respectfully applies for permission to file the attached *amicus curiae* brief in support of Defendants/Respondents. The 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/Respondent Mazda Motor of America, Inc., which does business as Mazda North American Operations, is a member of the Alliance, and Mazda North American Operations’ parent company is Defendant/Respondent Mazda Motor Corporation. The other Alliance members are BMW Group; Chrysler LLC; Ford Motor Company; General Motors Corporation; 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.

This case, which concerns the scope of the preemption doctrine, raises issues of considerable importance to the Alliance and its members. Plaintiffs/Appellants (hereinafter, “the Williamsons”) seek to impose liability upon Defendants/Respondents (hereinafter, “Mazda”) for exercising an option provided by a Federal regulation to which the Alliance members are subject. Specifically, the Williamsons allege that their 1993 Mazda MPV Minivan was defective because the vehicle’s rear center seats were equipped with lap-only seat belts, rather than lap/shoulder belts. The applicable Federal Motor Vehicle Safety Standard (“FMVSS”), FMVSS 208, that was in effect when the vehicle was manufactured, however, afforded manufacturers of model year 1993 passenger vehicles the option of equipping such vehicles with lap-only belts or lap/shoulder belts.

The regulation at issue here sets forth uniform, national standards that, pursuant to Congressional authorization, have been developed by the National Highway Traffic Safety Administration (“NHTSA”), a Federal agency with considerable expertise in the field. As a matter of common sense and sound public policy, the uniform and rational regulatory system developed by NHTSA is vastly superior to a system in which an agency’s carefully-designed standards may be supplanted or supplemented by ad hoc decisions of trial courts or lay juries. The members of the Alliance and,

ultimately, the consumers of their products, benefit greatly both from the certainty and efficiency that come with federal uniformity and from the security of knowing that lay juries will not second-guess the safety decisions of expert, deliberative bodies. Accordingly, the Alliance and its members have a strong interest in the proper resolution of this case, which, in effect, challenges the authority of a federal agency under a detailed federal regulatory scheme.

The Alliance seeks to assist the Court by explaining the policies that NHTSA sought to advance in affording manufacturers the option to equip their rear center seats with lap-only seat belts and to explain how the Williamsons' suit would frustrate these policies and, therefore, should be preempted.

CONCLUSION

For the foregoing reasons, the application for permission to file the attached *amicus curiae* brief should be granted and the brief filed.

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INTEREST OF THE *AMICUS 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/Respondent Mazda Motor of America, Inc., which does business as Mazda North American Operations, is a member of the Alliance, and Mazda North American Operations’ parent company is Defendant/Respondent Mazda Motor Corporation. The other Alliance members are BMW Group; Chrysler LLC; Ford Motor Company; General Motors Corporation; 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.

This case raises issues of considerable importance to the Alliance and its members, because it addresses the preemptive effect of regulations that apply directly to the vehicles manufactured by the Alliance’s members. Those regulations set forth uniform, national standards that, pursuant to Congressional authorization, have been developed by the National

Highway Traffic Safety Administration (“NHTSA”) – a Federal agency with considerable expertise in the field. The Alliance has an interest in the sound, uniform, and rational interpretation of those regulations and their preemptive effect. The Alliance and its members, and, ultimately, the consumers of Alliance members’ products benefit from the certainty and efficiency that comes with federal uniformity. The uniform and rational regulatory system developed by NHTSA is vastly superior to a system in which an agency’s carefully-designed standards may be supplanted or supplemented at will by trial courts or lay juries.

ARGUMENT

At least since *McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316, “it has been settled that state law that conflicts with federal law is ‘without effect’” – that is, preempted. (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 [quoting *Maryland v. Louisiana* (1981) 451 U.S. 725, 746].)

This case involves “obstacle” or “frustration of purpose” preemption. (*See, e.g., United States v. Locke*, (2000) 529 U.S. 89, 109 [State law preempted “when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”] [internal quotation marks omitted]; *Griffith v. General Motors Corp.* (11th Cir. 2002) 303 F.3d 1276, 1279.) Plaintiffs-appellants (hereinafter “the Williamsons”) seek to predicate their claims against

Defendants/Respondents (hereinafter “Mazda”) upon the fact that the rear center seating positions of their 1993 Mazda MPV Minivan were equipped with lap-only seat belts, instead of lap/shoulder belts. In equipping the vehicle’s rear center seats with lap-only belts, Mazda was exercising an option that NHTSA provided in the applicable Federal Motor Vehicle Safety Standard (“FMVSS”), FMVSS 208 (49 C.F.R. § 571.208). In providing this option, NHTSA sought to address significant policy concerns.

Because common law claims would be an obstacle to NHTSA’s policy of affording manufacturers the specific equipment options set forth in FMVSS 208, numerous cases have held that FMVSS 208 preempts common law claims. (*See, e.g., Geier v. Am. Honda Motor Co.* (2000) 529 U.S. 861 [claim of defect based on lack of air bags held to be preempted by Safety Act and FMVSS 208]; *Carden v. General Motors Corp.* (5th Cir. 2007) 509 F.3d 227, *pet. for cert. filed* [preemption of claims that vehicle was defective because it had a lap-only belt in the rear center position and the lap belt lacked a retractor]; *Griffith, supra* [preemption of claim concerning lap-only belt in front center seating position]; *Hurley v. Motor Coach Indus., Inc.*, (7th Cir. 2000) 222 F.3d 377 [preemption of claim concerning lap belt at bus driver’s seating position]; *Roland v. General Motors Corp.* (Ind. Ct. App. 2008) 881 N.E.2d 722 [preemption of claim

that vehicle was defective because it had a lap-only belt in the rear center position])). The court below reached the same conclusion.

The Williamsons, however, argue that their claims are not preempted. They contend that FMVSS 208 sets only minimum Federal safety standards and that FMVSS 208 affords manufacturers the option of equipping rear center seats with lap-only seat belts not in order to achieve certain safety objectives, but merely because of technical and cost issues. They appear to suggest that their claims could be preempted only if the provision of options in a Federal Motor Vehicle Safety Standard (“FMVSS”) always preempts state tort causes of action.

As we show below, the fundamental premises of the Williamsons’ argument are mistaken. The relevant provisions of FMVSS 208 are unlike most other NHTSA safety standards in that they establish more than just minimum safety standards. Even more important, NHTSA afforded manufacturers the option of equipping rear center seats with lap-only seat belts deliberately and with clear safety objectives in mind, and these policies would be frustrated by common law liability based solely on the exercise of one of those options. Thus, this case does not hinge on an argument that the mere provision of options in a safety standard is preemptive. FMVSS 208 is preemptive in this case because – contrary to the Williamsons’ assertions – NHTSA afforded design options to

manufacturers in order to achieve policy goals that would be undermined by the imposition of tort liability.

In making this showing we rely not just on the ample regulatory history of FMVSS 208 but also on a recent decision by the United States Court of Appeals for the Fifth Circuit – a decision handed down after the Williamsons filed their brief in this Court and subsequently followed by the Indiana Court of Appeals (*See Carden, supra; Roland, supra.*) In *Carden*, the Fifth Circuit rejected arguments virtually identical to the arguments made by the Williamsons here.

I. IN AFFORDING MANUFACTURERS OF 1993 MODEL YEAR PASSENGER VEHICLES THE OPTION OF PROVIDING LAP-ONLY SEAT BELTS IN REAR CENTER SEATING POSITIONS, NHTSA SOUGHT TO ADDRESS A NUMBER OF POLICY CONCERNS.

A. The Safety Act Was Designed To Produce Uniform National Motor Vehicle Safety Standards.

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; *see also Carden, supra*, 509 F.3d at 229-230.)

Congress intended the FMVSSs to be “uniform national standards” (*Wood v. General Motors Corp.* (1st Cir. 1988) 865 F.2d 395, 412) 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, supra*, 529 U.S. at 869-74; *Hurley, supra*, 222 F.3d at 381; *Roland, supra*, 881 N.E.2d at 726.)

B. FMVSS 208 Provides A Comprehensive Regulatory Scheme For Crash Protection.

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, supra*, 303 F.3d at 1281.) This crucial fact distinguishes FMVSS 208 from most other FMVSSs.

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); *see also Carden, supra*, 509 F.3d at 231.) 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. (*See, e.g., Carden, supra*, 509 F.3d at 231-232.)

Two related amendments are pertinent here. One required lap/shoulder belts in rear outboard seating positions in most passenger cars, 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

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 and minivans, 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.

for rear outboard seating positions in other types of vehicles, including convertibles, light trucks, and multipurpose passenger vehicles, such as MPV minivan at issue in this case. (*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 that regulation might cause. (*Cf. Geier, supra*, 529 U.S. at 875-77; *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.* (1983) 463 U.S. 29, 34-37; 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, supra*, 303 F.3d at 1280 [quoting *Geier, supra*, 529 U.S. at 875].)²

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, supra*, 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

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.” (*Griffith, supra*, 303 F.3d at 1281; *see also Pokorny v. Ford Motor Co.* (3d Cir. 1990) 902 F.2d 1116, 1123 [“Standard 208 was specifically designed to give automobile manufacturers a choice among several options when providing restraint systems for passengers.”].) But these are not the only policy reasons underlying FMVSS 208. Nor are they the only reasons that could support a finding of conflict preemption. (*See, e.g., Carden, supra*, 509 F.3d 231-232 [invoking policies relating to technical feasibility, costs, and child safety as grounds for a finding of conflict preemption].)

For example, as the Fifth Circuit noted in *Carden*, throughout the course of NHTSA’s FMVSS 208 rulemakings, including in the rulemakings

belt. *Geier* was not predicated upon a distinction between passive and active restraints. (*See Griffith, supra*, 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.* (Ariz. Ct. App. 2001) 32 P.3d 424, 429 [*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]; *Roland, supra*, 881 N.E.2d at 727 [citing cases and rejecting argument that *Geier* applies only to cases involving passive restraints].)

permitting lap-only belts in rear center seating positions, NHTSA has given serious consideration to the effects of various restraint systems on the safety of children. (*See Carden, supra*, 509 F.3d at 231 n.2 [“Moreover, FMVSS [208’s] extensive rule making history indicates that child safety concerns also played a part in the decision not to require lap/shoulder belts in rear seating positions.”]; *see also, e.g., Roland, supra*, 881 N.E.2d at 727; 65 Fed. Reg. 30680, 30741-30742 (app. C) (May 12, 2000) [discussing NHTSA’s efforts to 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. NHTSA Made A Deliberate Policy Decision To Provide Manufacturers With 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 positions at issue in this case – with *either* lap belts or lap/shoulder belts. (See Respondents’ Brief at 13 & n.5 [explaining regulatory options applicable to subject 1993 Mazda MPV].)

As the Fifth Circuit has held, NHTSA’s provision of this option reflects a deliberate policy choice. (See *Carden, supra*, 509 F.3d at 231 [“A review of the regulatory and rule making history of FMVSS 208 supports the conclusion that the NHTSA’s decision to allow car manufacturers the option to install either lap-only or lap/shoulder seat belts in the rear center seating position of passenger vehicles was deliberate, and the agency identified specific policy reasons for its decision.”].) 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 Carden, supra*, 509 F.3d at 231-232; 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 10), 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 seat 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

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]”].).

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 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.)

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).)

Because of concerns about the 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 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 10), 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, a conclusion—as noted above—that the Fifth Circuit has endorsed. (*See Carden, supra*, 509 F.3d at 231 [“A review of the regulatory and rule making history of FMVSS 208 supports the conclusion that the NHTSA’s decision to allow car manufacturers the option to install either lap-only or lap/shoulder seat belts in the rear center seat passenger vehicles was deliberate, and the agency identified specific policy reasons for its decision.”].)

Notably, much of the regulatory history that we have recited *post-dates* 1989, when, according to the Williamsons, “compatibility with child restraint systems was *no longer* a concern.” (Williamsons’ Reply Br. at 3.) In fact, as we have shown, NHTSA’s concerns about the compatibility of lap/shoulder belts and child restraints persisted well into the 1990s. As we show below, these concerns ultimately were allayed only when NHTSA adopted an entirely new approach to anchoring child restraints – the Lower Anchors and Tethers for Children (“LATCH”) system.

The Williamsons’ contrary argument focuses almost entirely on compatibility issues relating to older children, particularly older children in booster seats. (Reply Br. at 3-7.) Booster seats, however, are but one of many kinds of child restraints, and even as to boosters, NHTSA was

equivocal about lap/shoulder belt compatibility in the 1989 final rule, in part because the booster seats that work best with lap/shoulder belts – known as “belt-positioning boosters” – were not widely available at that time (or, for that matter, for years afterwards). (See 54 Fed. Reg. 25275, 25276 (June 14, 1989) [final rule, backing away from statements in the Notice of Proposed Rulemaking about the benefits of lap/shoulder belt usage with booster seats, noting that commenters had raised concerns about “compatibility with child restraint systems”]; see also 69 Fed. Reg. 16202, 16203 (Mar. 29, 2004) [stating that, in 1994, NHTSA revised the child restraint standard “to permit the manufacture of belt-positioning booster seats”]; 66 Fed. Reg. 49282, 49283 (Aug. 16, 2001) [noting that “belt positioning boosters have only entered the market within the last 5 to 6 years”]; 59 Fed. Reg. 37167, 37167 (July 21, 1994) [final rule amending child restraint regulations “to facilitate the manufacture of ‘belt-positioning’ child seats (i.e., booster seats designed to be used with the vehicle’s lap/shoulder belts”)].) As an another example, a 1992 NHTSA document cited above at 13 n.3 clearly shows that NHTSA remained concerned about compatibility issues well after 1989. (See 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]”]). Thus, the Williamsons’

characterization of NHTSA's 1989 conclusions about lap/shoulder belt-child restraint compatibility issues are inaccurate. There simply is no basis for the assertion that, by 1989, compatibility "was *no longer* a concern." (Reply Br. at 3).

Subsequent developments underscore both (i) the fact that NHTSA remained concerned about compatibility issues and (ii) the soundness of NHTSA's decision to preserve the option to equip rear center seats with lap-only belts. These subsequent developments reveal that the lockability requirement did *not* resolve the compatibility problems between child restraints and lap/shoulder belts.

Thus, 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. *See Carden, supra*, 509 F.3d at 231-32 [discussing regulatory history and concluding that technical, cost, and child safety considerations all played a part in NHTSA’s deliberations and demonstrate that NHTSA’s decision was deliberate and policy-driven]. NHTSA’s 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

II. A BARE ALLEGATION THAT A MODEL YEAR 1993 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 1993 passenger vehicles with lap-only belts or lap/shoulder belts in rear non-outboard seating positions, and did so deliberately for reasons of public policy, the Williamsons may not hinge their claims solely on the contention that the provision of lap-only belts in the rear center

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 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 1993 vehicle involved in this case were largely, if not entirely, eliminated by the time that NHTSA promulgated the 2004 rule. When Mazda manufactured the vehicle at issue in this case, the applicable regulations afforded it the option that it exercised, and they did so for the policy reasons that we have described. Moreover, as the Fifth Circuit explained in *Carden*, Anton’s Law has “no bearing” on a preemption analysis for a vehicle manufactured prior to that law’s enactment, because “we look to the version of FMVSS 208 in effect at the time” the vehicle at issue in the case was manufactured. (*Carden, supra*, 509 F.3d at 231 n1.)

seating position renders a vehicle defective. (*See, e.g., Geier, supra*, 529 U.S. at 865 [claim for failure to equip vehicle with air bags held preempted]; *Carden, supra*, 509 F.3d at 232 [“Because Carden’s and Wilson’s claim would foreclose a deliberate option left to manufacturers under Standard 208, namely the option of installing manual lap-only seat belts, Carden’s and Wilson’s seat belt claims are preempted.”]; *see also Lawrence County v. Lead-Deadwood School Dist. No. 40-1* (1985) 469 U.S. 256, 260-61 [State law is preempted to the extent it eliminates “flexibility” contemplated by Federal law]; *Capital Cities Cable, Inc. v. Crisp* (1984) 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* (1982) 458 U.S. 141, 155 [similar]; *Griffith, supra*, 303 F.3d at 1281-82; *Hurley, supra*, 222 F.3d at 382; *Hernandez-Gomez, supra*, 32 P.3d at 427-28.

In *Carden*, the plaintiffs’ claims were substantially identical to the Williamsons’ claims here. The Fifth Circuit carefully reviewed the regulatory history of the FMVSS 208 rear seat belt provisions, and concluded that claims that a vehicle was defective because it lacked a rear center lap/shoulder belt and the belt lacked retractors were preempted. (*Carden, supra*, 509 F.3d at 232.)

The Fifth Circuit found that NHTSA’s decision to afford vehicle manufacturers the option of equipping their vehicles’ rear center seats with

lap-only belts was “deliberate and [made] for “specific policy reasons.” (*Id.* at 232.) Indeed, the court embraced the regulatory history that we have provided here, concluding that NHTSA was concerned about “the technological problems associated with requiring the installation of lap/shoulder belts, and the resulting costs.” (*Id.*)

In addition, the court concluded that “child safety concerns also played a part in [NHTSA’s] decision not to require lap/shoulder belts in rear seating positions.” (*Id.* at 231 n.2.) As court explained:

Specifically, the NHTSA struggled to find balance between seat belt options in rear seating positions that could accommodate adult passengers and also properly restraint [sic] child safety seats. See, e.g., 49 Fed. Reg. 15241, 15241-15242 (Apr. 18, 1984) (“The installation of Type 2 belts in rear outboard seating positions would [make] the installation of conventional child safety seat much less convenient than with current Type 1 belt.”); 64 Fed. Reg. 10786, 10788 (Mar. 5, 1999) (discussing the difficulty of designing seat belts that both restrain older children, teenagers and adults and tightly secure child seats). The NHTSA has since promulgated standards that attempt to address those concerns with child safety by using devices other than seat belts. See 49 C.F.R. § 571.213.

(*Id.*) The holding in *Carden* is directly applicable here.

In an equally thorough opinion, the Indiana Court of Appeals in *Roland* reached the same conclusion regarding a virtually identical claim. See *Roland, supra*, 881 N.E.2d at 729.

Similarly, 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. (*Griffith*, *supra*, 303 F.3d at 1278.) The court noted that, in *Geier* and other cases, courts found suits to be 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 concluded 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. [Citation.] DOT intended and expected FMVSS 208 to produce a mix of restraint devices, both passive and manual, in cars and trucks.” (*Id.* at 1281.) 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.*).⁶

Also instructive in this regard is the Seventh Circuit’s decision in *Hurley*, *supra*. Hurley was a bus driver who alleged that the bus in which

⁶ (See also *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)].)

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. (*Hurley, supra*, 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 suit that depends on foreclosing one or more those options is preempted.” (*Id.* at 383; *see also Hernandez-Gomez, supra*, 32 P.3d at 427-28 [challenge to manufacturer’s choice of an option permitted by FMVSS 208 held preempted].)

Thus, *Carden, Roland, Griffith, Hurley, and Hernandez-Gomez* amply support the preemption of the Williamsons’ center rear lap-only belt claims here, as do numerous other decisions. (*See also James v. Mazda Motor Corp.* (11th Cir. 2000) 222 F.3d 1323; *Irving v. Mazda Motor Corp.* (11th Cir. 1998) 136 F.3d 764, 769; *Carrasquilla v. Mazda Motor Corp.* (M.D. Pa. 2001) 166 F. Supp. 2d 169, 177.)

III. NEITHER *SPRIETSMA* NOR A PRESUMPTION AGAINST PREEMPTION CAN SALVAGE THE WILLIAMSONS’ CLAIM.

Nor can the Williamsons salvage their claim by invoking the Supreme Court’s decision in *Sprietsma v. Mercury Marine* (2002) 537 U.S.

51. *Sprietsma* concerned the preemptive effect of a Coast Guard decision *not* to require propeller guards on motorboats or to regulate propeller guards at all. (537 U.S. at 54). When the Coast Guard was considering the matter, there was *no* regulation in place. (*Id.* at 60.) Based on the recommendation of an Advisory Council, the Coast Guard determined that a regulation was not warranted. (*Id.* at 60-61.) Here, by contrast, NHTSA *has* regulated rear seat restraints for more than three decades and, during the relevant period, affirmatively gave manufacturers the option to provide lap-only or lap/shoulder belts. In choosing (in 1989) *not* to alter this option, the agency made a determination, based in part on the safety policy considerations we have discussed, that the existing regulatory options should be left in place. There is no basis for treating a decision *not* to regulate at all as equivalent to a decision to *maintain* an existing regulatory option.

In *Carden*, *supra*, the Fifth Circuit rejected an argument similar to one the Williamsons make here. (*See Carden*, *supra*, 509 F.3d at 232.) The Williamsons argue that the Fifth Circuit in *Carden* (and the Indiana Court of Appeals in *Roland*) misconstrued *Sprietsma* (Reply Br. at 11-15). That is not so. For one thing, *Carden* and *Roland* both concluded that safety concerns, not just concerns about technological constraints and costs, were implicated in NHTSA's decision to provide a lap-only belt option in FMVSS 208. As we have shown, the Williamsons' argument that, by 1989,

NHTSA no longer had concerns about shoulder/lap belt-child restraint compatibility issues is simply wrong. In addition, contrary to the Williamsons' attempt to rewrite *Sprietsma* (see Reply Br. at 12-13), that case did, in fact, involve a refusal to regulate. That the Coast Guard had regulated in a number of *other* related areas does not mean that *Sprietsma* concerns something other than the preemptive effect of a failure to regulate. Here, by contrast, NHTSA *has* regulated. In addition, contrary to the Williamsons' argument (Reply Br. 14), the Fifth Circuit's treatment of *Sprietsma* in *Carden* is entirely consistent with its treatment of *Sprietsma* in *O'Hara v. General Motors Corp.* (5th Cir. 2007) 508 F.3d 753. In *O'Hara*, the court expressly distinguished FMVSS 208 from the safety standard at issue in *O'Hara* (FMVSS 205) (see *O'Hara*, 508 F.3d at 760) and the discussion of *Sprietsma* in *O'Hara* does not suggest that the *O'Hara* panel viewed *Sprietsma* differently than did the *O'Hara* panel.

Finally, the Williamsons' claim also cannot be saved by a "presumption against preemption." This is an implied conflict preemption case, and there is no place for a presumption against preemption in such a case. (See, e.g., *Irving, supra*, 136 F.3d at 769 ["When considering implied preemption, no presumption exists against preemption."]; *Perry v. Mercedes Benz of N. Am., Inc.* (5th Cir. 1992) 957 F.2d 1257, 1261 ["[W]e do not begin with an assumption against *conflict* preemption"].) Thus, in *Geier* – as the dissent there recognized – the Court rejected the application

of a presumption against implied conflict preemption. (*See Geier, supra*, 529 U.S. at 873-874 (majority opn.); *id.* at 888 (dis opn. of Stevens, J.)). Indeed, if anything, *Geier* supports a presumption *in favor of* preemption in cases, such as this one, in which State requirements so clearly conflict with Federal statutes or regulations. (*See Geier*, 529 U.S. at 873 [stating, with regard to obstacle and impossibility implied conflict preemption, that the Court “has assumed that Congress would not want either kind of conflict”]; *id.* at 885 [“Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict.”].)

Moreover, even with regard to claims of express preemption, the continued vitality of a presumption is in serious doubt in light of recent Supreme Court decisions such as *Riegel v. Medtronic, Inc.* (2008) 552 U.S. ___, 128 S. Ct. 999. There, in analyzing whether an express preemption provision in the Medical Devices Amendments of 1976 (21 U.S.C. § 360c *et seq.*) preempts State negligence and strict liability tort actions, neither the seven-Justice majority nor Justice Stevens, concurring, so much as mentioned the presumption, even though, in her dissent, Justice Ginsburg invoked it as the foundation for her position. (*See Riegel, supra*, 552 U.S. at ___, 128 S. Ct. at 1013-14, 1016 n.8, 1016 n.9 (dis. opn. of Ginsburg,

J.].)⁷ Thus, the Williamsons' claim cannot be saved by a presumption against preemption.

⁷ In this regard, it bears noting that, in her dissent, Justice Ginsburg did *not* invoke any presumption against preemption in discussing the possibility of conflict preemption under the Medical Devices Amendments. (*See Reigel, supra*, 552 U.S. at ___, 128 S. Ct. at 1019-20 (dis. opn. of Ginsburg, J.) [noting that an express preemption provision does not foreclose a claim of implied conflict preemption and that “[a]ccordingly, a medical device manufacturer may have a dispositive defense if it can identify an actual conflict between the plaintiff’s theory of the case and the FDA’s premarket approval of the device in question”].)

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief is proportionately spaced, has a typeface of 13 points, and contains 6,986 words, including footnotes and exclusive of tables and this certificate. In making this certification, I have relied on the word count facility in Microsoft Word.

MAYER BROWN LLP

Dated April 28, 2008

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CERTIFICATE OF SERVICE

I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On April 29, 2008, I served the foregoing document(s) described as:

**APPLICATION OF THE ALLIANCE OF AUTOMOBILE
MANUFACTURERS, INC. FOR PERMISSION TO FILE BRIEF AS
AMICUS CURIAE IN SUPPORT OF DEFENDANTS-
RESPONDENTS AND BRIEF OF THE ALLIANCE OF
AUTOMOBILE MANUFACTURERS, INC. AS AMICUS CURIAE IN
SUPPORT OF DEFENDANTS-RESPONDENTS**

- By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 29, 2008, at Palo Alto, California.

Kristine Neale