IN THE CIRCUIT COURT IN AND FOR THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY FLORIDA

CASE NO: 03-015647 CA 08

NADINE BRAILSFORD a/k/a NADINE HARRISON, individually, and as Parent and Guardian of CORY BRAILSFORD, a minor,

Plaintiffs,

vs.

NISSAN MOTOR COMPANY, LTD. a Japanese corporation; NISSAN MOTOR CORPORATION IN USA, n/k/a NISSAN NORTH AMERICA, INC., a California corporation; NISSAN RESEARCH & DEVELOPMENT, INC., n/k/a NISSAN TECHNICAL CENTER NORTH AMERICA, INC., a Michigan corporation; CORAL SPRINGS NISSAN, INC. a Florida corporation and FLORIDA POWER & LIGHT COMPANY, a Florida corporation,

Defendants.
_____/

PLAINTIFFS' BRIEF IN OPPOSITION TO NISSAN DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON PRE-EMPTION

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STATEMENT OF ISSUES

1. Whether an injury victim's state common-law claim that a passenger car was defectively designed because it lacked a three-point lap/shoulder belt in the rear-center seat are preempted by a minimum federal motor vehicle safety standard that allowed car manufacturers to equip rear-center car seats with *either* two-point lap belts *or* three-point lap/shoulder belts. *See* Part I below.

2. Whether an injury victim's state common-law claim that a passenger car was defectively designed because the two-point lap-belt in the rear-center seat used a manual adjusting device instead of a retractor are preempted by a minimum federal motor vehicle safety standard that allowed car manufacturers to equip the rear-center seats of their cars with lap belts that included *either* manual adjusting devices *or* retractors. *See* Part II below.

STATEMENT OF THE FACTS

A. Introduction.

The principal question is this case is whether a car maker can avoid liability for its failure to install what it knew to be the safest form of seat-belt technology – three-point lap/shoulder belts – in the rear-center seats of its cars simply because it complied with a federal regulation that gave car makers the option of installing either two-point lap belts or three-point lap/shoulder belts in that seating position. Defendants Nissan Motor Company, Ltd., *et al*. ("Nissan"), have urged this Court to follow the decision in *Griffith v. General Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002), which found implied conflict preemption of the plaintiff's claim that General Motors was negligent for failing to provide a shoulder belt along with a lap belt in the front-center seat of a pickup truck.

At the outset, it is important to note that this Court is not bound to follow the Eleventh Circuit's lead in *Griffith*. It is beyond dispute that state courts possess the authority to render binding judicial decisions that rest on their own interpretations of federal law. *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). *See also Magouirk v. Phillips*, 144 F.3d 348, 361 (5th Cir. 1998) (Supremacy Clause does not require Illinois courts to follow Seventh Circuit precedent interpreting the Fifth Amendment). In keeping with these principles, numerous state courts of last resort have declined to follow the federal preemption rulings of federal Courts of Appeals in their geographic region, instead issuing *directly contrary* rulings.[1] Thus, this Court is free to reach its own conclusions regarding the preemption question raised in this case.

Not only is *Griffith* not binding on this Court, but it has been stripped of any persuasive authority it ever possessed by the U.S. Supreme Court's decision in *Sprietsma v. Mercury Marine Corp.*, 537 U.S. 51 (2002). Nissan's main argument in this case is that plaintiffs' claims would conflict with the federal government's 1989 decision not to require lap/shoulder belts in

[1] *E.g., compare Mitchell v. Collagen Corp*., 126 F.3d 902, 912-15 (7th Cir. 1997) (holding that federal "premarket approval" process for medical device preempts common-law claims against device manufacturer), *with Weiland v. Telectronics Pacing Systems, Inc.*, 721 N.E.2d 1149, 1154 (Ill. 1999) (holding opposite and noting contrary decision in *Mitchell*); *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1416 (9th Cir. 1997) (holding that Federal National Traffic and Motor Vehicle Safety Act expressly preempts common-law no-airbag claims against car manufacturer), *with Munroe v. Galati*, 938 P.2d 1114, 1118 (Ariz. 1997) (holding opposite and noting contrary decision in *Harris*); *Martin v. Telectronics Pacing Sys., Inc.*, 105 F.3d 1090, 1099 (6th Cir. 1997) (holding that federal "Investigational Device" classification of medical device preempts common-law claims against device manufacturer), *with Niehoff v. Surgidev Corp.*, 950 S.W.2d 816, 823, 830 (Ky. 1997) (holding opposite and noting, in dissent, contrary decision in *Martin*); *Wood v. General Motors Corp.*, 865 F.2d 395, 414 (1st Cir. 1988) (holding that Federal National Traffic and Motor Vehicle Safety Act impliedly preempts common-law no-airbag claims against car manufacturer), *with Ford Motor Co. v. Tebbetts*, 665 A.2d 345, 348 (N.H. 1995) (holding opposite and noting contrary decision in *Wood*); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986) (holding that Federal Cigarette Labeling and Advertising Act impliedly preempts common-law personal injury claims against tobacco company), *with Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1230, 1245-47 (N.J. 1990) (holding opposite and noting contrary decision in *Cipollone*).

rear-center seats in cars. *Sprietsma* made clear, however, that an agency's decision not to require a particular safety feature based on economic considerations and the lack of a "universal" technical solution suitable for use on all vehicles does not exert any preemptive force. In the wake of *Sprietsma*, the decision in *Griffith* is not even arguably good law. And, without *Griffith*, Nissan is left without any legal support for the preemption arguments it has asserted in this case.[2]

B. <u>This Litigation</u>.

This case arose out of an accident involving a 1998 Nissan Sentra. On the morning of October 19, 2000, Nadine Brailsford, fully seat belted, was driving her four-year-old son Cory Brailsford to preschool. Complaint ¶ 12. Cory, also fully seat belted, was riding in the rear-center seat at the time of the accident, which was equipped with only a two-point lap belt. *Id*. All other seats in the car were equipped with three-point lap/shoulder belts. *Id*. Cory suffered grave injuries, including quadriplegia. His mother was injured in the crash, as well. *Id*. However, because she was wearing a three-point lap/shoulder belt, Ms. Brailsford received only minor orthopaedic injuries and – unlike her son – did not sustain any enhanced injuries.

On September 8, 2003, Nadine Brailsford filed suit against Nissan on her own behalf and in her capacity as Cory's guardian, seeking damages for their personal injuries. The complaint alleges, *inter alia*, that the car was defectively designed because the rear-center seat should have been equipped with a three-point lap/shoulder belt, instead of just a two-point lap belt. *See id*. ¶ 16(A). The complaint also alleges that the car was defectively designed because the rear-center-

[2] Notably, Nissan does not even mention *Sprietsma* in its brief. Instead, it argues that a ruling in its favor is compelled by *Griffith*, without even acknowledging the Supreme Court's subsequent ruling.

seat lap belt used a manual belt tightening device rather than a "spool retractor" (which ensures that the seat belt webbing is snug to the user's body). *Id*. at ¶ 16(B).[3]

On or about March 21, 2004, Nissan moved for partial summary judgment pursuant to Florida Rule of Civil Procedure 1.510 on the ground that the Brailsfords' no-lap/shoulder-belt and no-retractor claims are preempted by federal law. In particular, Nissan argues that the plaintiffs' no-lap/shoulder-belt claim is preempted because it would conflict with a provision of Federal Motor Vehicle Safety Standard 208 (48 C.F.R. § 571.208 S4.1.5.1(a)(2)) that gave car makers the option of installing either two-point lap belts or three-point lap/shoulder belts in the rear-center seats of passenger cars.[4] Nissan further argues that plaintiffs' no-retractor claim is preempted because it would conflict with another aspect of Standard 208 (48 C.F.R. § 571.208 S7.1.1.2(a)) that gave car makers the option of installing either retractors or manual adjusting devices in the rear-center seats of cars.[5]

C. <u>Federal Statutory and Regulatory Framework</u>.

This case involves the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 ("Standard 208").

1. The Safety Act. Congress passed the Safety Act in 1966 to reduce motor vehicle injuries and deaths. *See* S. Rep. No. 89-1301, 89th Cong., 2d Sess., 1-2 (1966), *reprinted in* 1966

[3] The complaint includes several other claims that are not the subject of Nissan's motion for summary judgment. *See* Complaint ¶¶ 16 (C) (alleging failure to include structural seat ramp); 16(D) (alleging failure to use reasonable care in the design and manufacturer of the car's interior surfaces); 16(E) (alleging failure to warn of limitations of rear-center-seat restraint system); 16(F) (alleging failure to recall cars based on defectively designed rear-center-seat restraint system).

[4] This argument is addressed *infra* at Part I.

[5] This argument is addressed *infra* at Part II.

U.S.C.C.A.N. 2709, 2709-10; H.R. Rep. No. 89-1776, 89th Cong., 2d Sess. 10-11 (1966). To this end, Congress empowered the National Highway Traffic Safety Administration ("NHTSA")to prescribe "motor vehicle safety standards" that "shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms." 15 U.S.C. § 1392(a). The Act further defines "safety standards" as "*minimum* standard[s] for motor vehicle performance or motor vehicle equipment performance. . .." 15 U.S.C. § 1391(2) (emphasis added).

In issuing minimum performance standards under the Safety Act, the agency is directed to consider "relevant available motor vehicle safety data," whether the proposed standard "is reasonable, practicable and appropriate" for the particular type of motor vehicle, and the "extent to which such standards will contribute to carrying out the purposes" of the Act. 15 U.S.C. § 1392(f)(1), (3), (4).

The Safety Act also includes a "savings clause" that provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). In *Geier v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000), the U.S. Supreme Court construed this clause as evidencing Congress' intent to "preserve" common-law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor."

2. The Rear-Center-Seat Option of Standard 208. The seat belt system installed in the Nissan Sentra was governed by Federal Motor Vehicle Safety Standard 208, which sets forth minimum standards for passenger restraint systems in motor vehicles. At the time this Nissan was manufactured, Standard 208 permitted manufacturers to install *either* two-point lap belts (a "Type 1" system) *or* three-point lap/shoulder belts (a "Type 2" system) in the rear-center seats of their cars. *See* 49 C.F.R. § 571.208 S.4.1.4.2 (1990). Because Nissan's federal

preemption defense hinges on this version of Standard 208, it is important to understand its evolution in some detail.

a. The 1968 Rule. The relevant version of Standard 208 first took effect in 1968, when NHTSA passed its initial set of motor vehicle safety standards. *See* 32 Fed. Reg. 2408 (February 3, 1967). At that time, Standard 208 required the installation of lap/shoulder belts at the drivers' and right-front passengers' seating positions, and *either* lap belts *or* lap/shoulder belts at every other designated seating position (*i.e.*, in the center-front seat and in all rear seats). *Id*. at 2415; *see also* 53 Fed. Reg. 47982 (November 29, 1988) (discussing history of Standard 208). In the preamble accompanying the final rule, NHTSA charactered this rule as a "minimum safety standard" within the meaning of the Safety Act. 32 Fed. Reg. at 2408. The regulatory preamble contained no further explanation or statement of policy with respect to the agency's decision to give car makers the option of installing either lap belts or lap/shoulder belts in rear seating positions. *See id*.

b. The 1986 National Transportation Safety Board Recommendation. In 1986, the National Transportation Safety Board (the "NTSB") issued a Safety Recommendation with respect to lap/shoulder belts. *See* Exhibit A. [6] Among other things, the NTSB concluded that "[l]ap/shoulder belts provide superior crash protection to that of lap belts alone, and present a significantly lesser risk of induced injury . . .." *See id*. at 4. The NTSB further observed that "such systems appear to work effectively even for children, and they can be used with child safety seats and booster seats." *Id*. The NTSB ultimately recommended that, "[g]iven the known deficiencies of lap-only belt systems and the superior crash protection offered by belt

[6] The NTSB is an independent federal agency with the statutory responsibility to, *inter alia*, "propose corrective action to make the transportation of individuals as safe and free from risk of injury as possible, including action to minimize personal injuries that occur in transportation accidents." 49 U.S.C. § 1116(a)(2).

systems that incorporate an upper torso restraint, the Safety Board believes that government and industry should take a number of steps to reduce reliance on lap belts and increase the availability of lap/shoulder belt systems." *Id*. at 5. With respect to industry, the NTSB recommended that "early action . . . be taken to provide aftermarket retrofit assemblies to convert lap/only belts to lap/shoulder belts." *Id*. The NTSB further found that such "retrofit assemblies" may be technically feasible "at every seating location," including rear-center seats. *Id*. at 6. With respect to new cars, the NTSB recommended that all rear seats – including rear-center seats – be equipped with lap/shoulder belts. *Id*.

c. The 1989 Amendments. In 1987, NHTSA issued an Advance Notice of Proposed Rulemaking requesting comments on the need for rulemaking to require lap/shoulder belts in all rear seats. *See* 52 Fed. Reg. 22818 (June 15, 1987). In response to this request, Nissan submitted comments saying that, in its view, no rulemaking was necessary because it and many other manufacturers were already starting voluntarily to install lap/shoulder harnesses in rear outboard positions. *See* Exhibit B. Nissan further opined that NHTSA should not require lap/shoulder belts in rear-center seats because of that seating position's relatively low occupancy rate. *Id*. Nissan admitted, however, that "[t]he cost of installing lap/shoulder belts for center rear seating positions is not significantly higher than costs for outboard positions." *Id*. at 2. Nissan went on to estimate that it would only cost "about $25 per vehicle" for it to install lap/shoulder belts in the rear-center seats of its sedan models. *Id*.

In 1988, NHTSA formally proposed to amend Standard 208 to require lap/shoulder belts in all rear outboard seating positions of passenger cars. *See* 53 Fed. Reg. 47982 (November 29, 1988). In its Notice of Proposed Rulemaking, the agency stated that it had decided not to propose a rear-center-seat requirement based on manufacturers' complaints that the costs of

installing lap/shoulder belts in rear-center seats might exceed the anticipated safety benefits. *See id*. at 47984.[7] At no point did the agency state that lap/shoulder belts would be unsafe in rear-center seats, or that it affirmatively sought to give car makers the unfettered choice between installing lap belts or lap/shoulder belts in that seating position. To the contrary, it emphasized that "[r]ear seat lap/shoulder belts are estimated to be more effective than rear seat lap belts in reducing fatalities and moderate-to-severe injuries." *Id*. at 47982.

In 1989, the agency published a final rule requiring lap/shoulder belts in all rear-outboard seats, but retaining the regulatory option with respect to rear-center seats. *See* 54 Fed. Reg. 25275 (June 14, 1989). The regulatory preamble once again emphasized that "NHTSA believes that lap/shoulder belts would be more effective than lap-only belts in rear seating positions." *Id*.

d. NHTSA's June 1999 Study. In June 1999, NHTSA published a study on the relative safety advantages of lap belts and lap/shoulder belts in the rear seats of cars. *See* DOT HS 808 945, "Effectiveness of Lap/Shoulder Belts in the Back Outboard Seating Positions," June 1999.[8] Among other things, the study compared the fatality risk for lap/shoulder belted occupants to the risk for lap-belted occupants. NHTSA's principal conclusion was that "[t]he change from lap to lap/shoulder belts [in rear outboard seats] *has significantly enhanced occupant protection, especially in frontal crashes."* Exhibit C at 1 (emphasis added). NHTSA added that:

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[7] Specifically, the agency cited manufacturers' concerns that: (1) it would "cost more to install lap/shoulder belts in the rear-center seating position . . . [than] at both rear outboard seating positions in cars"; (2) installation of lap/shoulder belts at the rear-center position would pose more "technical difficulties" than at the outboard positions in "vehicles other than passenger cars sedans"; and (3) because the rear-center seat "is the least-used seating position in cars," the cost of requiring lap/shoulder belts in all rear-center seats might exceed the relatively small safety benefits. 53 Fed. Reg. 47982, 47984 (November 29, 1988).

[8] An abstract of the study, which is also available on NHTSA's website, is attached as Exhibit C.

> In all crashes, lap/shoulder belts are 15 percent more effective than lap belts alone. In frontal crashes, lap/shoulder belts are 15 percent more effective than lap belts alone. In frontal crashes, lap/shoulder belts are 25 percent more effective than lap belts alone. . . . Lap/shoulder belts reduce the risk of both head and abdominal injuries in potentially fatal front crashes relative to lap belts only: head injuries by 47 percent and abdominal injuries by 52 percent.

Id.

In addition to finding that lap/shoulder belts provide "significantly enhanced protection" for all occupants, NHTSA placed particular emphasis on the safety benefits of lap/shoulder belts for children, stating that "[c]hildren ages 5 to 14 appear to derive the greatest incremental benefit from using back seat lap/shoulder belts rather than just a lap/belt. The incremental effectiveness of lap/shoulder belts is 26 percent for children." *Id*. at 3.

e. Anton's Law and the 2003 Proposed Amendments. In December 2002, President Bush signed into law a bill known as "Anton's Law," which provides for the improvement of child safety devices when installed in motor vehicles. *See* Pub. Law No. 107-318. *See also* 68 Fed. Reg. 46546 (August 2, 2003) (discussing Anton's Law). One of the provisions of Anton's Law concerns the installation of lap/shoulder belts in rear-center seating positions. Specifically, Section 5(a) of the law directs NHTSA to amend Standard 208 to require lap/shoulder belts in rear-center seats by no later than December 2004.

In August 2003, pursuant to this statutory directive, NHTSA published a proposal to require lap/shoulder belts in all rear-center seats. 68 Fed. Reg. 46546 (August 2, 2003). At the time, NHTSA stated that Anton's Law is "fully consistent with the agency's preexisting plan to initiate rulemaking" to require lap/shoulder belts in rear-center seats. *Id*. at 46547. In its notice of proposed rulemaking, NHTSA once again emphasized the special safety benefits of lap/shoulder belts for children, stating that "one of the primary reasons for today's proposal is the increased protection that children between the ages of four and eight gain by having a

lap/shoulder belt made available in rear center seating positions. When these lap/shoulder belts are installed in the rear center seating position, there will be an additional, and potentially safer, seating position available for a child in a belt-positioning booster seats." *Id*. at 46548. The agency further emphasized that requiring lap/shoulder belts in rear-center seats would not just benefit children: "[i]t would also benefit older occupants." *Id*. On this point, the agency cited the conclusions of its 1999 study, which found that requiring lap/shoulder belts in all rear seats would provide significant safety benefits for both adults and children. *See id*.

3. The Retractor/Manual-Adjusting-Device Option of Standard 208. Standard 208 also contains a provision that governs the design of lap-belt-only systems used in the rear-center seats of cars. Specifically, 48 C.F.R. § 571.208 S7.1.1.2(a) gives car makers the option of equipping center seats with seat belts that use *either* manual adjusting devices or retractors. In 1971, NHTSA had proposed a rule that would have required retractors at all seating positions in cars. *See* 36 Fed. Reg. 4600 (March 10, 1971) (discussing proposed rule). It ultimately decided not to require retractors for center seats, however, noting that "[s]everal comments stated that the installation of retractors at [center] seating positions would require extensive redesign of bench-type seats. In the light of the low occupancy rate for the center seats, the difficulties in meeting the requirement, and the short leadtime available, the requirement for center-position retractors has been omitted." *Id*. at 4601.

D. <u>The 1998 Nissan Sentra</u>.

Nissan has held a patent on lap/shoulder belts for rear-center car seats since September 30, 1975. *See* Exhibit D. In addition, as explained above, in its 1987 rulemaking comments to NHTSA, Nissan admitted that it would only cost "about $25" to install lap/shoulder belts in the rear-center seats of its Sedan cars. *See* Exhibit B at 2. Despite the low cost of this technology,

the car at issue in this case – a 1998 Nissan Sentra – was equipped with lap/shoulder belts at every seating position *except* the rear-center seat, which merely included a two-point lap belt.[9]

SUMMARY OF ARGUMENT

The sole question in this case is whether the Brailsfords' claims are "impliedly" preempted by federal law because, to use the words of *Geier*, they "actually conflict" with some federal purpose. Because there is a strong presumption against federal preemption of common-law tort claims, implied conflict preemption may only be found where there is a clear and direct conflict with federal law. No such conflict exists in this case, because the Brailsfords' claims are, in fact, entirely consistent with both the letter and spirit of Standard 208.

With regard to the plaintiffs' no-lap/shoulder-belt claim, at the time the Nissan Sedan was manufactured, Standard 208 required Nissan, at a minimum, to install lap belts in the rear-center seats of all cars. It also permitted, but did not require, car manufacturers to install lap/shoulder harnesses in that seating position. In this case, the Brailsfords merely seek to hold Nissan liable for failing to do more than the minimum required by federal law – *i.e.*, for failing to install a shoulder harness in addition to the minimum safety feature (a lap belt) required by Standard 208. It is precisely this type of lawsuit that, under *Geier*, is expressly *preserved* by the Safety Act's savings clause *unless* there is some special reason to conclude that the agency's purposes would be directly undermined by imposition of common-law liability.

Contrary to Nissan's contentions, no such special reason exists in this case. As a threshold matter, it is clear that the mere existence of a regulatory "option" is insufficient to

[9] In contrast, by 1998 at least 12 other major car dealers were installing lap/shoulder belts as standard equipment in rear-center seats of their sedan-style cars. *See* Exhibit E. In addition, by 1998, Nissan *itself* was installing this technology in sedan cars substantially similar to the Nissan Sentra that it sold in other countries – such as Japan and the United Kingdom. *See* Exhibit F.

support a finding of implied conflict preemption. This is the lesson of *Geier* itself (which relied on a highly unusual regulatory history as the basis for its preemption holding, *not* on the fact that the regulation created various options) and of the United States' own consistent litigating position that mere regulatory options do not, in and of themselves, exert *any* preemptive force.

Nor is there any other basis for concluding that this lawsuit would undermine some special federal policy with respect to rear-center seats. First, it is important to understand that this case is entirely different from *Geier*, which involved a version of Standard 208 that required car manufacturers to install either airbags or some other form of *passive* restraint in the front seats of passenger cars. The accompanying regulatory preamble made clear that the reason the federal government gave car makers the choice of installing various types of *passive* restraints was to ensure that car manufacturers installed a mix of *different* devices in the front seats of cars, in part to avoid a massive "public backlash" against airbags. Given this fear of airbags, the agency had the specific goal of ensuring that some cars include forms of passive restraints *other than* airbags. *Geier* held that, in light of this unique goal, a jury verdict holding a manufacturer liable for its failure to install an airbag would undermine federal policy by pushing car makers to install airbags in all their cars.

This reasoning has no application here. In contrast to the hotly-debated airbag, the type of safety device at issue in this case – the lap/shoulder belt – has always been required equipment in the front seats of passenger cars (and, since 1989, has been required equipment in rear outboard seating positions, as well). Given this history, there is no basis for concluding (as does Nissan) that NHTSA affirmatively sought to induce manufacturers to build some number of cars that did *not* include lap/shoulder harnesses in the rear-center seats. And the regulatory history of

the options standard at issue in this case does not contain a *single reference* to the type of "technological diversity" goals at issue in *Geier*.

Nor is there any merit to Nissan's contention that the federal government's *1989* decision not to require lap/shoulder belts in rear-center seats would be undermined by this lawsuit. This decision was not based on any conclusion that lap/shoulder harnesses would be unsafe or undesirable in that seating position – to the contrary, the agency repeated stated that lap/shoulder belts were the safest form of seat belt technology, and it affirmatively *required* lap/shoulderbelts in all rear outboard positions. Instead, the agency's decision not to require lap/shoulder belts in rear-center seats merely reflected its concerns about the technical difficulties of requiring lap/shoulder belts in all cars and the economic burden such a universal rule would impose on car makers. The U.S. Supreme Court has recently made it clear that these sorts of concerns cannot form the basis of a finding of implied conflict preemption. *See Sprietsma v. Mercury Marine Corp.*, 537 U.S. 51 (2002).

Nissan's claim that this lawsuit would conflict with the agency's alleged concerns about incompatibilities between lap/shoulder belts and child seats is equally baseless. Not only does this argument lack any support in the 1989 rulemaking record, but it is definitively rebutted by the fact that, since 1989, NHTSA has *required* lap/shoulder belts in all front and rear outboard positions (and, of course, permitted their use in center seats). It defies logic to contend that NHTSA affirmatively required the use of technology that it had concluded was incompatible with child safety. In addition, Nissan's argument ignores the fact that, time and again, the agency has emphasized the special safety benefits of lap/shoulder belts for children, and has recently proposed a rule to require lap/shoulder belts in *all* rear-center seats, citing child safety concerns. At bottom, then, all of Nissan's child-safety arguments are just a smokescreen to hide

the fact that the agency has never articulated any concerns that would be undermined in the least by the common-law claims at issue here.

Nissan's attack on plaintiffs' claim that the car was defectively designed because the rear-center seat's lap belt had a manual adjusting device rather than a retractor is equally meritless. Nissan argues that this claim is preempted because NHTSA affirmatively decided not to require car makers to use retractors on rear-center lap belts, and instead gave car makers the option of installing either retractors or manual adjusting devices. The regulatory history of this option, however, shows that NHTSA's decision was based solely on its concern that, due to the technical difficulties of installing retractors in the rear-center seats of certain cars and the low occupancy rate of that seating position, there was insufficient justification for an across-the-board retractor requirement for all rear-center seats. Once again, the teaching of *Sprietsma* is that this type of rationale cannot form the basis for a finding of implied conflict preemption.

Nissan's claim that the agency's retractor/manual-adjusting-device option was based on child safety concerns is just as fanciful as its other arguments. In reality, the agency has never found that retractors are unsafe for children and, in fact, it has *required the use of retractors in all rear-outboard lap-belts since at least 1971.* Once again, Nissan has failed to acknowledge a key fact that lays its entire preemption defense to rest.

ARGUMENT

THE BRAILFORDS' CLAIMS ARE NOT PREEMPTED BECAUSE THEY DO NOT CONFLICT WITH STANDARD 208.

As the United States Supreme Court has instructed, a party arguing for preemption of state law bears a heavy burden of overcoming the long-standing "presum[ption] that Congress does not cavalierly preempt state-law causes of action." *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). *See also Hernandez v. Coopervision, Inc.*, 661 So.2d 33, 34-35 (Fla. Dist. Ct. App.

1995) ("there is a long-standing presumption against federal preemption of the exercise of the power of the states. Thus, the party claiming preemption bears the burden of proof and must establish that Congress had clearly and unmistakably manifested its intent to supercede state law"); *Louisville and Nashville R. Co. v. Hickman*, 445 So.2d 1023, 1027 (Fla. Dist. Ct. App. Dist. 1983) ("[p]reemption will not be presumed, and even where it is clear that preemption applies, state law is invalid only to the extent that it is preempted"). This burden is especially heavy where, as here, preemption would displace the historic power of the states to protect the health and safety of their citizens. *Medtronic*, 518 U.S. at 485. Moreover, where preemption of common-law claims would leave injured individuals without *any* state or federal remedy, which is the result sought by Nissan here, a court may find preemption only in the most compelling circumstances. *See English v. General Electric Corp.*, 496 U.S. 72, 87-90 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

The only question in this case is whether the plaintiffs' claims are impliedly preempted because they conflict with Standard 208.[10] Implied conflict preemption only arises when there is an "actual conflict" between federal and state law, either because it would be "impossible for a private party to comply" with both or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). "Impossibility" is not an issue in this case, because it is undisputed that Standard 208 gave Nissan the option of installing a lap/shoulder belt in the rear-center seat of plaintiffs' car, and that it also gave Nissan the option of installing retractor-style lap belts in rear-center seats. The sole question, then, is whether plaintiffs' claims somehow "stand as an

[10] *Geier* held that common-law claims are never expressly preempted by the Safety Act in light of the Act's broadly worded "savings clause." *See* 529 U.S. at 868. In keeping with *Geier*, Nissan's sole argument is that the Brailsfords' claims are impliedly preempted because they conflict with the purposes underlying Standard 208.

obstacle" to federal purposes. The answer is no, since this lawsuit does not conflict with either of the regulatory options at issue here.

I. Plaintiffs' No-Lap/Shoulder-Belt Claim is Not Preempted.

A. *Geier* Makes Clear That Minimum Safety Standards, Standing Alone, Do Not Preempt Common-Law Claims.

We start with the most basic proposition of law established by the U.S Supreme Court in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), which is that minimum safety standards promulgated under the Safety Act do not, in and of themselves, preempt common-law claims seeking to hold a manufacturer liable for failing to do more than the minimum required by federal law.

In *Geier*, the Supreme Court considered whether common-law claims that a car was defectively designed because it lacked an airbag were preempted by either the Safety Act or by a version of Standard 208 that, *inter alia*, permitted various design options for passive restraints in the front seats of cars. The Court held, first, that the Act's broadly worded savings clause, which provides that "[c]ompliance with" a federal safety standard "does not exempt any person from liability under common law," precludes any finding of express preemption of common-law claims under the Safety Act. *Id*. at 868 (quoting 15 U.S.C. § 1397(k)). This language, the Court held, was specifically intended to "leav[e] adequate room for state tort law to operate – for example, where federal law creates only a floor, *i.e.*, a *minimum safety standard.*" *Id*. at 868 (emphasis added). Thus, under *Geier*, if a federal safety standard constitutes a floor or minimum standard, conflict preemption will ordinarily not apply because the Safety Act's savings clause

"preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." 529 U.S. at 871.[7]

This language applies here in spades. The version of Standard 208 at issue in this case required that, at a minimum, Nissan install a two-point lap belt in the rear-center seats of all passenger cars. In this action, the Brailsfords seek to hold Nissan liable for failing to do more than the minimum required by federal law – *i.e.,* for failing to install a shoulder harness *in addition to* the required lap belt in the rear-center seat of the Nissan Sedan. Thus, to use the language of *Geier*, this lawsuit merely "seek[s] to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* As such, the lawsuit is expressly "preserved" from preemption by the Safety Act *unless* there is some special regulatory goal that would be undermined by the plaintiffs' claims. *Id*. at 875.[8]

B. The Mere Existence Of Regulatory Options Does Not Preempt Common-Law Claims.

Nor is the mere existence of regulatory options, standing alone, sufficient to preempt common-law tort claims. *Geier* itself makes this clear. In concluding that the particular

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[7] In the wake of *Geier*, numerous courts have held that mere minimum safety standards issued under the Safety Act and a variety of other federal statutes are not, in and of themselves, sufficient to trigger a finding of implied conflict preemption. *See Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063, 1070 (9th Cir. 2000) (no preemption of common-law tort claims against a glass shower door manufacturer where the federal law merely created a minimum safety standard "above which state common law requirements were permitted to impose further duties"); *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 795 (10th Cir. 2000) (no preemption of common-law tort claims involving defective smoke detector where governing federal safety standard merely constituted "a minimum rather than a maximum standard"); *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398, 401 (8th Cir. 2000) (common-law tort claims involving defective lighting on tractor trailer not premepted where the federal regulation merely established a "minimum federal safety standard"); *Kent v. DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208 (N.D. Cal. 2002) (common-law tort claims against vehicle manufacturer based on alleged transmission design defect not preempted by federal minimum safety standard).

[8] As explained *infra* at I(C), no such policy goal is at issue in this case.

common-law claims at issue were preempted, *Geier* relied on an exhaustive analysis of the agency's stated *reasons* for adopting the particular options framework at issue, *not* on the mere fact that Standard 208 gave manufacturers a choice of various passive restraint options. *See* 529 U.S. at 875-83. If the mere existence of regulatory options were sufficient to preempt tort claims, then *Geier* would not have needed even to address the complex policy reasons underlying the 1984 version of Standard 208; it would have been sufficient to point out that the car maker in that case (Honda) had chosen to install one of several permitted regulatory options, and that the chosen option did not require an airbag. *Geier*, however, never purported to rely on such an observation, making clear that regulatory options, standing alone, do not exert any preemption force under the Safety Act.

Geier's holding and approach is in accordance with the consistent position of the United States that regulatory options do *not*, in and of themselves, exert preemptive effect. In *Geier*, the Supreme Court gave "special weight" to the position that NHTSA had taken "consistently over time" in a series of *amicus* briefs filed with the Court in three different cases – *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); and *Geier*. *See* 529 U.S. at 883, 885. *See* Exhibits G, H, and I. In those very briefs, NHTSA specifically rejected the broad "options" argument advanced by Nissan here and adopted by the court below.

Thus, in an *amicus curiae* brief filed by the United States in opposition to the grant of *certiorari* in *Wood*, which presented the same question that the Court ultimately answered in *Geier*, the federal government stated:

> *Respondent argues that FMVSS 208 preempts state tort claims because that standard has always allowed manufacturers to use various types of occupant restraints. We disagree with this reasoning.* Nothing in the Safety Act or FMVSS 208 confers on car makers a "right" to comply with the federal standards

> without tort liability, and [the Safety Act's savings clause] proves that Congress did not grant any such immunity. *That state tort law may compel an auto maker as a practical matter to choose one of the options authorized by federal law also does not necessarily establish an actual conflict between federal and state law*. Federal standards are "minimum standard[s]," 15 U.S.C. 1391 (2), permitting manufacturers to use any design that satisfies federal requirements. If any design "permitted" in this sense could not be the subject of a common-law design defect claim, manufacturers would obtain by implication what Congress expressly denied them in [the Safety Act's savings clause]: immunity from common law liability by complying with minimum federal standards. That result would be contrary to Congress's statutory design, which was to supplant direct state regulation of vehicle design, but to leave the common law intact absent an actual conflict with federal standards. *Thus, the mere fact that manufacturers may comply with federal law by installing one of several types of occupant restraint systems does not mean, standing alone, that a state law tort action seeking to impose liability for failing to install airbags is preempted*.

Exhibit G at 14-15 (citations and footnote deleted; emphasis added).[9]

Similarly, in the Brief of the United States as *Amicus Curiae* in *Freightliner*, the federal government noted that, "[a]lthough the majority of courts to have considered the question have concluded that 'no-airbag' suits are preempted, they have done so on a broader theory of implied preemption *with which the United States does not agree*, *i.e.*, that the existence of 'options' to comply with Standard 208 in itself precludes state-court judgments based on the failure to install one particular option." Exhibit H at 28-29 n.15 (emphasis added).

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[9] The United States' brief in *Wood* went on to clarify that

> what distinguishes this issue [*i.e.,* the question of whether a no-airbag claim would be preempted] is that the Secretary determined not simply to allow either automatic belts or airbags, but that an all airbag rule would *disserve* the *safety* purposes of the Act. She therefore affirmatively sought to encourage manufacturers to use a *variety* of protection systems in their fleets. It is *that* policy of affirmatively encouraging diversity that would be disrupted by tort liability, which therefore would be preempted.

Id. at 15 (emphasis in original; footnote omitted).

Finally, in the Brief of the United States as *Amicus Curiae* in *Geier*, the federal government argued that "state tort law does not conflict with a federal 'minimum standard' . . . . merely because state law imposes a more stringent requirement." Exhibit I at 21. Based on this argument, the United States went on to state:

> *We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose.* We disagree, however, with the contention that the Secretary provided options because she had no statutory authorization to do otherwise. The Secretary could have imposed performance requirements that effectively required an airbag design. As we explain at pages 23-26, *infra*, the Secretary chose not to do so in order to encourage the provision of a variety of passive restraints, because she determined that would best promote safety. Petitioners' claims are preempted because they would frustrate that policy judgment.

Id. at 21 n.18 (citations deleted; emphasis added). It was precisely this reasoning – *i.e.*, that common-law no-airbag claims are preempted because they would "frustrate" NHTSA's special policy goals, *not* because Standard 208 created regulatory options – that the Supreme Court adopted in *Geier*. *See* 529 U.S. at 883.

In short, the federal government itself has long been of the view that the mere existence of regulatory options is insufficient to preempt common-law claims. This view, moreover, is entitled to deference from this Court. *See Geier*, 529 U.S. at 883, 886 (federal government's position on the preemptive effect of Standard 208 is entitled to "special weight"). *See also Sprietsma v. Mercury Marine Corp.*, 537 U.S. 51, 68 (2002) (deferring to United States' view that decision by the United States Coast Guard not to require propeller guards on motor boat engines does not preempt common-law no-propeller-guard claims).

Thus, implied conflict preemption may be found only where there is some powerful reason to conclude – as the Supreme Court did in *Geier* – that imposition of tort liability would frustrate the agency's stated purposes. As we now explain, no such reason exists in this case.

C. Unlike In *Geier*, There Are No Policy Reasons Underlying The Applicable Version Of Standard 208 That Would Justify A Finding Of Federal Preemption In This Case.

1. The Options Standard At Issue In *Geier* Bears No Resemblance To The Options Standard At Issue Here.

As a threshold matter, it is important to be clear that none of the agency purposes at issue in *Geier* is even arguably present in this case. Perhaps the most striking difference between this case and *Geier* is that, unlike the 1984 version of Standard 208 in *Geier*, the version of Standard 208 at issue here was not accompanied by *any* statement of regulatory purpose. Neither the proposed rule nor the final rule issued in 1968 said a word with respect to the reasons underlying the agency's decision to permit either two-point lap belts or three-point lap/shoulder belts in the rear-center seats of passenger cars. *See* 31 Fed. Reg. 15212 (December 6, 1966); 32 Fed. Reg. 2408 (February 3, 1967). Instead, the agency simply characterized the rule as a "minimum safety standard" within the meaning of the Safety Act (*id.* at 2408) – precisely the type of standard that *Geier* concluded would *not* exert preemptive effect absent some special accompanying statement of regulatory policy that would be undermined by the imposition of common-law liability. 529 U.S. at 870.[10]

Even putting aside the absence of any policy statement accompanying the 1968 rule, none of the policy reasons at issue in *Geier* could possibly be undermined by the common-law claims asserted in this case. To understand why, it is essential to recognize that *Geier* involved a claim that a car maker was negligent for failing to install an *airbag* – a device that had undergone a

[10] The passive-restraint rule at issue in *Geier,* in contrast, was the product of lengthy administrative proceedings (including over 60 rulemaking notices, *see Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 35 (1983)), was the subject of an intense battle between automakers and the federal government, *see id*. at 34-41; *Geier*, 529 U.S. at 875-77, and was accompanied by a lengthy preamble (covering over 50 pages of text in the *Federal Register*) setting forth numerous policy reasons that the Court concluded would be directly undermined if the plaintiff's no-airbag claims were permitted to proceed. *See generally id*. at 877-82.

complex and highly controversial regulatory history and was the subject of intense public debate. *Geier* emphasized that, in issuing the 1984 version of Standard 208 (which gave car makers the choice of installing either airbags or various other types of passive restraints), the federal government had expressed grave concerns about auto manufacturers installing airbags in too many cars too quickly.[11] The Court noted, moreover, that the agency had affirmatively *rejected* a rule that would have required airbags in all passenger vehicles "because of safety concerns (perceived or real) associated with airbags, which concerns threatened a 'backlash' more easily overcome 'if airbags' were 'not the only way of complying.'" *Id*. at 879 (quoting 49 Fed. Reg. 28990, 29001 (1984)).

In light of these concerns about airbags, *Geier* concluded that NHTSA's decision to give manufacturers a choice of different passive restraint options was based on the agency's desire to foster a "mix of [passive restraint] devices" in cars. *Geier* noted that, in the agency's view, achieving a technological "mix" of devices was not only essential to avoid a "public backlash" against airbags, but also would "help develop data on comparative effectiveness, would allow the agency time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of *alternative, cheaper, and safer passive restraint systems*." *Id.* at 879 (emphasis added).

Geier further emphasized that the 1984 version of Standard 208 "also deliberately sought a *gradual* phase-in of passive restraints" (*id.* at 879 (emphasis in original)) by permitting manufacturers to install passive restraints in increasing percentages of their new cars over a

[11] Specifically, the agency had stated that "airbags brought with them their own special risks to safety, such as the risk of danger to out-of-position occupants (usually children) in small cars"; that airbags would be "significantly more expensive than other passive restraint devices" (and that "the high replacement cost – estimated to be $800 – could lead car owners to refuse to replace them after deployment"); and that "the public, for reasons of cost, fear, or physical intrusiveness might resist installation or use" of airbags. 529 U.S. at 877-78.

three-year period. This gradual phase-in, the Supreme Court noted, further reflected and reinforced the agency's goal of "allow[ing] more time for manufacturers to develop airbags or other, better, safer passive restraint systems." *Id*.

Against this backdrop, *Geier* concluded that, because the federal government had made it clear that it wanted to encourage a *diverse array* of passive restraint technology, a jury verdict holding a manufacturer liable for not installing airbags would undermine federal purposes by: (a) pushing car makers to install airbags in all their cars (thereby undercutting the "technological diversity" goal of Standard 208) and (b) pushing car makers to do so quickly (thereby undercutting the gradual-phase-in goal of Standard 208). *See id.* at 881.

None of these policy considerations is present here. This case has nothing to do with airbags (or any other form of passive restraint, for that matter); instead, it involves an uncontroversial device – the three-point lap/shoulder belt – that has never raised the types of safety concerns associated with airbags, never been the subject of any sort of public outcry (unlike with airbags) and, in fact, has been *mandated* for other seats by NHTSA since 1967, when the agency promulgated its very first safety standards under the Act. 32 Fed. Reg. 2408 (February 3, 1967). Given this history, it cannot be said that NHTSA affirmatively sought to promote a "mix of devices" when it gave car makers the option of installing either lap belts or lap/shoulder belts in the rear seating positions of their cars.[12]

[12] The absence of any such affirmative agenda on NHTSA's part is reinforced by the fact that, in contrast to the 1984 rule at issue in *Geier*, NHTSA enacted the 1968 options standard without any phase-in period at all. This meant that car makers were less likely to experiment with a range of different technologies, and more likely simply to choose the option that best fit their existing capabilities. (In keeping with this framework, most auto makers in fact chose simply to install two-point lap belts in the back seats of their cars. *See* 54 Fed. Reg. 25275 (June 14, 1989) (noting that, "[u]ntil recently, most manufacturers chose to comply with [the 1968 options standard] by installing lap-only safety belts at rear designated seating positions").

Nor is there any basis for concluding that any of the agency's safety goals would be undermined if, as a result of lawsuits like this one, more auto makers choose to install lap/shoulder belts in the rear-center seats of their cars. Such a conclusion might be warranted if NHTSA had affirmatively stated that it sought to avoid a "public backlash" against lap/shoulder belts, or that it wanted to give car makers more time gradually to develop better lap/shoulder belt technology, or even that it wanted to develop data on the comparative effectiveness of various belting systems. But, unlike in 1984, when NHTSA said all of these things with respect to the passive-restraint rule at issue in *Geier*, the agency said *nothing* at the time it promulgated the options standard at issue here.

Against this backdrop, there is no basis for a finding of implied conflict preemption in this case. Unlike the very different rule at issue in *Geier*, the *only* fact that can be gleaned from the 1968 options standard is that NHTSA wanted cars to have, at a minimum, either lap belts or lap/shoulder belts in their rear seating positions. Thus, there is no evidence to support a conclusion that this lawsuit would undermine the agency's purposes in any respect. *Compare Geier*, 529 U.S. at 881.

2. The Agency's 1989 Decision Not To Require Lap/Shoulder Belts In Rear-Center Seats Does Not Support Nissan's Implied Conflict Preemption Argument.

Nissan does not even attempt to claim that NHTSA's original 1968 regulatory option is sufficient to support a finding of implied conflict preemption. Instead, Nissan argues that this lawsuit is impliedly preempted because it would frustrate the federal government's *1989* decision not to require lap/shoulder belts in the rear-center seats of cars. This argument, however, does not withstand scrutiny.

As explained above, in 1988, NHTSA issued a notice of proposed amendments to Standard 208 to require manufacturers to install lap/shoulder belts in all rear *outboard* seating positions in passenger cars (*i.e.*, the window seats). 53 Fed. Reg. 47982 (November 29, 1988). At the time, the agency noted industry comments that the rear-center seating position is the least-used seating position in cars; that a lap/shoulder belt in that seating position would have low cost effectiveness; and that installation of lap/shoulder belts at the rear-center position would pose more "technical difficulties" than at the outboard positions in "vehicles other than passenger cars sedans." *Id.* at 47984. Based on these concerns, NHTSA decided not to propose requiring lap/shoulder belts in rear-center seats, stating that:

> Whether or not those difficulties could be overcome, there would be small safety benefits and substantially greater costs if rear seating positions that are not outboard seating positions were required to have lap/shoulder belts. Therefore, this proposal addresses only rear outboard seating positions.

Id. at 47984-85. The agency went on to issue final amendments that required lap/shoulder harnesses in all rear-outboard seating positions, but retained the regulatory option with respect to rear-center seats. 54 Fed. Reg. 25275 (June 14, 1989).

Contrary to Nissan's claim, this rulemaking history is insufficient to support any finding of implied conflict preemption. Most fundamentally, Nissan ignores the fact that, unlike in

Geier, the 1989 rulemaking is devoid of any statement on NHTSA's part that it intended to promote a diverse array of seat belt technology. Nor was there any finding by the agency that lap/shoulder belts would be undesirable or unsafe in rear-center seats; to the contrary, the agency broadly recognized that lap/shoulder belts "*would be even more effective than lap-only belts in rear seating positions*." 54 Fed. Reg. at 25275 (emphasis added). Instead, the agency simply found that, given the lower occupancy rate in this position, and the technical difficulties of installing lap/shoulder belts in the rear-center seats of some (but not all) cars, the costs of requiring all car makers to install lap/shoulder harnesses in all cars "might" exceed the safety benefits. 53 Fed. Reg. at 47984. It almost goes without saying that this finding would not be undermined in the least by a jury verdict holding a *single* car maker liable for failing to install a lap/shoulder belt in the rear-center seat of a *single* vehicle. *See generally* Declaration of Allan J. Kam at ¶¶ 14-20, Exhibit J hereto ("Kam Declaration").[13]

This conclusion is compelled by *Sprietsma v. Mercury Marine Corp.*, 537 U.S. 51 (2002), which held that an agency's decision not to require a particular safety feature based on its view that the costs of a universal requirement might exceed the safety benefits exerts zero preemptive effect. *Sprietsma* considered whether the U.S. Coast Guard's decision not to mandate the installation of propeller guards on all recreational motor boat engines impliedly preempted common-law claims that a boat manufacturer was negligent for failing to install a propeller guard on a particular boat engine. The Court held that the mere decision not to regulate does not exert any preemptive force; instead, the question is whether the common-law claims would undermine the agency's stated *reasons* for declining to regulate. *Id*. at 65.

[13] Allan Kam is a former attorney in NHTSA's Office of the Chief Counsel. In his declaration, he explains that the rear-center-seat option was not based on any of the policy objectives at issue in *Geier* and that none of the agency's regulatory goals would be undermined by this lawsuit.

Sprietsma went on to hold that, because the Coast Guard never found that propeller guards are unsafe, but instead merely found that it lacked available data to justify a uniform federal rule requiring propeller guards on all boats – in part because there was no "universally acceptable" propeller guard model suitable for use on all boats and in part because of the high cost of "retrofitting millions of boats" (*see id.* at 66-67) – the common-law claims would not undermine any federal regulatory purposes and must be permitted to proceed.

A similar conclusion is warranted here. As in *Sprietsma*, the federal government has never made any sort of determination that lap/shoulder belts would be unsafe in rear-center seats. To the contrary, NHTSA merely stated that available data did not justify imposition of a *universal* lap/shoulder belt requirement for all seats in all cars.[14] As in *Sprietsma*, the agency emphasized the lack of a single universal design that would be suitable for all the rear-center seats of all vehicle models. *See* 53 Fed. Reg. 47982, 47984 (November 29, 1988) (noting that a rear-center seat lap/shoulder belt requirement would pose "technical difficulties" in "vehicles other than passenger sedans"). And, as in *Sprietsma*, the agency emphasized that the economic burdens of a universal lap/shoulder belt requirement might exceed the potential safety benefits. *See id*. at 47984 (noting that, due to the relatively low occupancy of rear-center seats, the costs of a lap/shoulder belt requirement "might" exceed the benefits). Based on these concerns, NHTSA decided not to require all car makers in America to install lap/shoulder belts in rear-center seats. The agency never gave any indication, however, that lap/shoulder belts would be unsafe (or even undesirable) in that seating position; to the contrary, *it continued to include this device as one of*

[14] As explained above, the agency has since concluded that lap/shoulder belts are far *safer* than lap belts in rear-center seats, and has proposed a new rule requiring lap/shoulder belts in *all* rear seating positions. *See* 68 Fed. Reg. 46546 (August 2, 2003).

the permitted options for rear-center seats in all passenger cars. *Sprietsma* makes clear that there can be no finding of implied conflict preemption under these circumstances.

Nissan may contend that this case is different from *Sprietsma* because NHTSA's decision not to require lap/shoulder belts in rear-center seats left intact a *preexisting* regulatory option, whereas the Coast Guard's decision not to require propeller guards on boat engines meant that there was no federal regulation at all. This is a distinction without a difference, however, because, for all the reasons explained above, the preexisting regulatory option was unsupported by any reasons that would be undermined by lawsuits like this one (and Nissan does not contend otherwise). Because the option that was left undisturbed by the agency's 1989 decision not to require lap/shoulder belts in rear-center seats cannot, in and of itself, support a finding of conflict preemption, the fact that it remained in place after 1989 is legally irrelevant.

Notably, Nissan does not even mention *Sprietsma* in its opening brief. Instead, it relies on a number of car makers' comments (cited by the agency in its rulemaking notices) stating that there might be technical difficulties in installing lap/shoulder belts in the rear-center seats of some cars – particularly, in hatch-backs and station wagons. *See* Nissan Br. at 12 and Exhibit A. These comments, of course, do not necessarily reflect the views of the agency. Even if they did, moreover, they do not even come close to supporting a finding of implied conflict preemption. All they mean is that, in the view of some car makers, lap/shoulder belts might be difficult to install in *some* vehicles (and not even the type of vehicle at issue here). Given this potential difficulty (and the relatively low occupancy rate of rear-center seats), it may have made sense for the agency to decline to impose a universal lap/shoulder belt requirement for the rear-center seats of *all* vehicles.

This case, however, does not seek to hold all car makers liable for not installing lap/shoulder belts in the rear-center seats of *all* vehicles. Instead, it merely seeks to hold *one* car maker liable for not installing this technology in one particular kind of vehicle (a Nissan sedan car). Imposition of a jury verdict against Nissan in this case will not amount to a finding that all car makers were negligent; it will only mean that Nissan was negligent for not installing lap/shoulder belts in this particular vehicle. This is just like *Sprietsma*, where – in the face of an agency's decision not to impose an across-the-board propeller guard requirement due to the lack of a universally acceptable guard model – the plaintiffs sought to hold *one* boat engine manufacturer liable for not installing a propeller guard on *one* particular boat. The teaching of *Sprietsma* is that a tort remedy in such a case cannot in any way be said to frustrate or undermine federal regulatory purposes. *See* 537 U.S. at 67 (noting that "[t]he Coast Guard's apparent focus was on the lack of any 'universally acceptable' propeller guard for 'all modes of boat operation.' But nothing in its official explanation would be inconsistent with a tort verdict premised on a jury's finding that some type of propeller guard should have been installed on this particular kind of boat equipped with a particular type of motor").

3. The Agency's Alleged Concerns About The Compatibility Of Lap/Shoulder Belts And Child Restraints Does Not Support Nissan's Implied Conflict Preemption Argument.

Perhaps recognizing that the agency's conclusions about the lack of an economic justification for a universal lap/shoulder belt requirement cannot support a finding of implied conflict preemption, Nissan attempts to divine an additional "policy basis" on which to hinge its preemption argument. Thus, Nissan contends at great length (Nissan Br. at 13-20) that another reason why NHTSA decided to retain the regulatory option for rear-center seats is because of concerns about alleged "incompatibilities" between lap/shoulder belts and child seats. Nissan

argues that, since at least 1989, the agency has been concerned that lap-belt-only systems are actually *safer* for children in many respects, especially insofar as they provide a more reliable anchor for child seats. It is this concern, claims Nissan, that would be undermined by the common-law claims at issue here.

The problem with this argument is that it is fundamentally at odds with the regulatory history of Standard 208. First and foremost, the explanatory materials accompanying NHTSA's 1988 decision not to propose a rule requiring lap/shoulder harnesses in rear-center seats are devoid of any reference to child safety concerns. *See* 53 Fed. Reg. 47982, 47984 (November 29, 1988). In deciding to retain the regulatory option for that seating position, NHTSA's sole stated reasons for not requiring lap/shoulder belts in rear-center seats were the technical difficulties of requiring this system in all cars and the economic burden such a universal rule would impose on car makers. *Id*. Thus Nissan's entire discussion of the agency's supposed "child safety" rationale is a red herring, because *this concern was never mentioned by the agency at the time it took the regulatory action that Nissan claims exerts preemptive effect.* In effect, Nissan is asking this Court to pretend that NHTSA's decision to retain the rear-center-seat option was based on concerns that the agency never expressed, and then to base a finding of implied conflict preemption on those unexpressed concerns. Plainly, this will not do.

Nissan attempts to salvage its approach by citing various snippets of regulatory history that, on examination, do not support its position. First, Nissan quotes material from the agency's *1984* decision not to require lap/shoulder belts in *any* rear seating positions. *See* Nissan Br. at 14 (quoting 49 Fed. Reg. 15241 (April 18, 1984)). At the time, the agency had in fact expressed a concern that lap/shoulder belts might be less compatible with some child restraints than lap belts. For this and other reasons (including a concern that lap/shoulder belts might not substantially

increase safety for adults due to low belt usage in the rear seats of cars), NHTSA decided to deny a petition to require lap/shoulder belts in rear outboard seating positions, and instead decided to retain the regulatory option for all rear seats in passenger cars. Pointing to this decision, Nissan argues that the agency has an ongoing concern about possible incompatibilities between lap/shoulder belts and child seats, and that this concern would be undermined by lawsuits like this one.

Within five years of that decision, however, and almost a decade before the Nissan Sentra at issue in this case was manufactured, the agency *changed its mind* and decided to *mandate* lap/shoulder belts in the rear outboard seating positions of all passenger cars. *See* 54 Fed. Reg. 46257 (November 2, 1989); 54 Fed. Reg. 25275 (June 14, 1989). In its notice of proposed rulemaking, moreover, NHTSA emphasized that lap/shoulder belts provide better protection than lap belts for children in booster seats. *See* 53 Fed. Reg. 47982, 47984 (November 29, 1988) ("[f]inally, lap/shoulder belts in the rear seat would provide better protection for children restrained in booster seats. . . . The presence of lap/shoulder belts in rear seating positions would help booster seats installed in rear seat to provide even more effective protection for child occupants, by allowing booster seats to use the shoulder belt to provide additional upper torso restraint.") *Thus, by the time the car in this case was manufactured, the agency had decided to mandate lap/shoulder belts for all rear-outboard positions in cars, and it did so in part because of its view that lap/shoulder belts possess certain safety advantages for children not offered by two-point lap belts.*

Nissan's brief is silent on this point. Indeed, Nissan never even acknowledges the agency's views on the child safety benefits of requiring lap/shoulder belts in rear seats. Instead, as the basis for its implied conflict preemption argument, Nissan suggests that, because the

agency decided to stop short of mandating lap/shoulder belts for rear-*center* seats, it must have been concerned about the incompatibilities between lap/shoulder belts and child seats.

This argument fails for several obvious reasons. First, it illogically attributes to NHTSA the view that a belting system that is entirely appropriate for use with child seats in rear *outboard* positions (where such seats are often situated) is somehow unsafe or undesirable for children when installed in rear-center seats. Second, if Nissan were correct, and the agency had in fact concluded that lap/shoulder belts were incompatible with child seats, then NHTSA presumably would have decided to *eliminate* the regulatory option for that seating position and mandate two-point lap belts. NHTSA, of course, did no such thing. Third, and perhaps most importantly, the agency never said anything about child safety when it decided not to mandate lap/shoulder belts in rear-center seats. This alone is reason enough to reject Nissan's entire preemption defense outright.[15]

Nissan may counter by conceding, as it must, that NHTSA never viewed lap/shoulder belts as unsafe for children, and arguing instead that NHTSA's real goal in preserving the rear-center seat option was simply to make it more likely that the public would have a choice of restraints – including restraints (like lap belts) that would be more compatible with a range of different child restraints. Any such argument might make sense if NHTSA had, in fact, *mandated* lap belts for rear-center seats, insofar as such a rule would have ensured that the rear

[15] The only contemporaneous "support" that Nissan offers for its claim that the agency's 1989 decision not to require lap/shoulder belts in the rear-center seats of cars was animated by child safety concerns consists of the isolated comment of one car manufacturer, not the views of the agency itself. *See* Nissan Br. at 14 n.11 (citing comments of Mercedes Benz). Nissan also cites to language in the preamble to NHTSA's final 1989 rule stating that some commentors had raised concerns about "compatibility [of lap/shoulder belts] and child restraint systems." *Id*. at 14 (citing 54 Fed. Reg. at 25276). It is hard to imagine how this language helps Nissan, given that the agency ultimately decided to *disregard* these concerns and, instead, to mandate lap/shoulder belts for rear outboard positions (and, of course, to retain the regulatory option for rear-center seats).

of every car had both lap/shoulder belts (in the outboard positions) and one lap belt (in the center). But the agency never did any such thing. Instead, it permitted *either* lap belts or lap/shoulder belts in the rear-center seats of cars. This option meant that a car maker could choose to install lap/shoulder belts in *all* rear seats – and, in fact, as of 1998, a number of car makers were doing just that. *See* Exhibit E. If NHTSA had been concerned about the "compatibility" between lap/shoulder belts and child seats, and affirmatively sought to encourage diverse belting systems in the rear seats of cars, then why would it have given car makers the option of installing lap/shoulder belts in *all* rear seats? There is no answer to this question, and Nissan does not attempt to offer one.

Nissan's reliance on post-1989 regulatory material to support its claim that, in NHTSA's view, lap/shoulder belts are less safe for children than lap-belts (*see* Nissan Br. at 15-20) is even less convincing. On this point, Nissan cites two separate rulemakings – one in 1993 and one in 1999 – that it claims reveal an ongoing concern on NHTSA's part about the incompatibility of lap/shoulder belts and child restraints.[16] Nissan's arguments make no sense, however, because they ignore the fact that, despite these alleged concerns about compatibility, *NHTSA never even considered eliminating the 1989 regulatory option for rear-center seats – and, in fact, it continues to mandate the use of three-point systems for all rear outboard positions*.[17]

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[16] In the 1993 rulemaking, NHTSA required all lap belts, including the lap belt portion of lap/shoulder belts, to include a built-in locking mechanism to prevent movement of child seats. *See* 58 Fed. Reg. 52922 (October 12, 1993). In the 1999 rulemaking, the agency decided to eliminate its 1993 lockability requirement (which had proven insufficiently effective as a means of securing child seats) and instead require that all cars "be equipped with a means independent of vehicle safety belts" for securing child seats. 62 Fed. Reg. 7858 (February 20, 1997) (proposed rule); 64 Fed. Reg. 10786 (March 5, 1999).

[17] Nissan also cites NHTSA's 1992 "Child Passenger Safety Resource Manual" to support its claim that the agency had on-going concerns relating to lap/shoulder belts and child safety. *See* Nissan Br. at 14-15 n.11 and Exhibit C thereto). The document actually shows that, in NHTSA's view, lap/shoulder belts are fully compatible with child seats. *See* Manual at 87

To be sure, the 1993 rulemaking did constitute an effort on NHTSA's part to improve compatibility between child restraints and the type of belting technology that is utilized in three-point lap/shoulder belts (and typically is not used in two-point systems). But, contrary to Nissan's arguments, this effort does not mean that the agency preferred lap belts over lap/shoulder belts. If the agency had such a preference, then NHTSA presumably would have eliminated the option altogether (and most certainly would not have mandated lap/shoulder belts in rear outboard seats). Rather, it simply means that the agency recognized a need to resolve certain incompatibility problems between lap/shoulder belts (which have numerous recognized safety benefits, both for adults and children, not offered by two-point systems, *see* 53 Fed. Reg. 47982, 47984 (November 29, 1988)) and child seats. The mere fact that an agency decides to take action to make one of two permitted regulatory options even safer does not somehow render that option less desirable than the other – nor can it possibly be seen as the sort of clear evidence of a conflict needed to form the basis for a finding of implied conflict preemption. *Geier*, 529 U.S. at 885.[18]

(noting that "[m]ost child safety seats are designed to meet FMVSS 213 when secured in the vehicle by the lap belt alone *although they can be used with lap/shoulder belts as well*) (emphasis added). More importantly, the Manual reveals that, in NHTSA's view, lap/shoulder belts *are actually safer for all children over the age of four. See id*. at 92 (stating that, "[g]enerally, the order of preference of restraint options for children over four years . . . is: 1) Lap/shoulder belt that fits properly; 2) Belt-positioning booster seat; 3) Small shield booster seat; 4) Lap belt alone that fits properly").

[18] In any event, NHTSA itself has repeatedly stated that lap/shoulder belts possess certain important safety advantages for children who have outgrown child seats. For example, in its 1999 study on the "Effectiveness of Lap/Shoulder Belts in the Back Outboard Seating Positions," NHTSA specifically concluded that "*[c]hildren ages 5 to 14 appear to derive the greatest incremental benefit from using back seat lap/shoulder belts rather than just a lap/belt*." Exhibit C at 3 (emphasis added). The agency echoed this finding in its recent proposal to amend Standard 208 to require lap/shoulder belts in rear-center seats. *See* 68 Fed. Reg. 46546 (August 6, 2003). In the preamble to the proposed new rule, NHTSA repeatedly emphasized the potential safety benefits *to children* of requiring lap/shoulder belts in this seating position. *See id*. at 46548 (stating that lap/shoulder belt requirement would enhance safety because "children are

At bottom, all of Nissan's arguments about child safety are nothing more than smoke and mirrors designed to disguise the fact that this lawsuit is entirely consistent with the options framework embodied in Standard 208. Given that the agency continued to permit and require the use of three-point lap/shoulder belts throughout the 1990s (and, indeed, to this day), Nissan's attempt to manufacture a conflict out of alleged child safety concerns should be rejected.

D. The Cases Cited By Nissan Have No Bearing Here.

In addition to its erroneous reliance on *Geier*, Nissan cites on a number of cases that do not support its position. Nissan principally relies on *Griffith v. General Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002), which found implied conflict preemption of the plaintiff's claim that General Motors was negligent for failing to provide a shoulder belt along with a lap belt in the front-center seat of a car. *See* Nissan Br. at 24-26. *Griffith,* however, is flawed at its core and should not be given any consideration by this Court.[19]

First and foremost, *Griffith* was decided before the U.S. Supreme Court decided *Sprietsma*, 537 U.S. at 51. As explained above, *Sprietsma* makes clear that an agency's decision not to require a particular safety feature based on its view that the costs of a universal regulatory requirement might exceed the safety benefits does not preempt common-law claims seeking to hold a manufacturer liable for not installing that safety feature in a particular vehicle. In light of *Sprietsma,* the decision in *Griffith* is clearly wrong.

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increasingly riding in the back seat in response to educational campaigns designed to educate parents and other caregivers about the risk to children from riding in the front seat); *id*. at 46548 (stating that "one of the primary reasons for today's proposal is the increased protection that children between the ages of four and eight gain by having a lap/shoulder belt made available in rear center seating positions").

[19] As explained in the introduction to this brief, *Griffith* is not binding on this Court.

Second, *Sprietsma* aside, *Griffith* lacks any persuasive authority because it rests on an erroneous factual assumption that renders the entire decision invalid: that the federal government's "technological diversity" goal applied to *both* manual seat belts and passive restraints. It its decision, the Third Circuit asserted that "DOT intended and expected FMVSS 208 to produce a mix of restraint devices, *both passive and manual*, in cars and trucks." 303 F.3d at 1281 (emphasis added). As support for this proposition, *Griffith* relies exclusively on the U.S. Supreme Court's decision in *Geier*. *See id*. (citing *Geier*, 529 U.S. at 879). However, as explained above, *Geier* merely discussed the federal government's technological diversity goal with reference to *passive* restraints, and the Supreme Court never suggested that NHTSA had similar goals with respect to manual restraints in the rear seats of vehicles. This is not surprising, given that Nissan itself has failed to unearth any regulatory materials that even hint – let alone demonstrate – that NHTSA ever intended to promote a diverse array of manual restraints in the rear-center seats of passenger cars. This core factual error strips *Griffith* of any even arguable validity.

Third, *Griffith* is distinguishable on its facts. *Griffith* involved claims that a pickup truck was defectively designed because its *front* center seat lacked a lap/shoulder belt. 303 F.3d at 1278. This is an entirely different issue than this case, which involves the *rear* center seat of a passenger car. The 1989 rulemaking that is the centerpiece of Nissan's preemption argument here was not at issue in *Griffith,* because that rulemaking did not address the front seats of cars. Thus *Griffith* involved a different type of claim; a different options standard; and an entirely

different regulatory history than this lawsuit – all reason enough to reject any reliance on the decision outright.[20]

Hurley v. Motor Coach Inds., 222 F.3d 377 (7th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001) (*see* Nissan Br. at 26), is also inapposite. There, a bus driver sued a bus manufacturer for failing to do more than install a two-point lap belt in his seat, which was the minimum safety feature required by federal law. (The governing version of Standard 208 gave the manufacturer the option of installing either a full "passive" system or installing *either* a lap belt or a lap/shoulder belt.) With respect to the claim that the seat should have had a lap/shoulder belt, the Seventh Circuit focused on the fact that NHTSA had expressed concern that *heavy vehicle operators – e.g.*, bus drivers – have a particularly "strong aversion" to using seatbelts of any kind. *See id*. at 382. Based on this evidence of seatbelt "aversion" among heavy vehicle operators, *Hurley* concluded that NHTSA's decision to permit installation of the less-restrictive two-point lap belt (as opposed to the more confining three-point lap/shoulder belt) was specifically designed to "promot[e] safety by encouraging drivers to use the safety equipment that manufacturers install." *Id.* *Hurley* ultimately held that, "as in *Geier*, the decision to leave options open to bus manufacturers *was made with specific policy objectives in mind.* Hurley's suit, if successful, would undermine that policy objective and is therefore preempted." *Id*. (emphasis added).

No such "specific policy objections" could possibly be implicated by this lawsuit. *Hurley*'s reasoning would only apply here if NHTSA's decision to give *car makers* the choice of installing lap belts instead of lap/shoulder belts in rear seats was based on a desire to avoid

[20] In addition, it appears that the Eleventh Circuit was never ever apprised of the fact that the United States government itself has consistently disavowed the "options-always-preempt" argument that formed the basis for the decision in *Griffith*.

aggravating the public's "aversion" to seatbelts. But the history of Standard 208 as it applies to *cars* – and not buses – itself disproves any such conclusion. As previously explained, Standard 208 has *always* required three-point lap/shoulder belts in the front driver's and passenger seats of cars. It is therefore apparent that, in NHTSA's view, a three-point system has always been the safest form of manual restraint in *cars*, where the risk of driver "aversion" to seatbelts has not been an issue. Given that there was no evidence of driver "aversion" to seatbelts that influenced NHTSA's rulemaking with respect to the front seats of cars, it would make no sense to assume that any such concern animated the agency's decision to create a regulatory option with respect to the rear seats of cars. Instead, the rear-seat option can best be understood as reflecting the agency's view (as set forth in the regulatory preamble) that, because rear seats are generally safer and less frequently occupied than front seats, there was no reason to mandate three-point lap/shoulder belts for all rear-center seats.[21] Thus, none of the policy objectives at issue in *Hurley* has any application to this lawsuit.

Nissan also cites two cases – *Carasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169 (M.D. Pa. 2001), and *Hernandez-Gomez v. Volkswagen of American, Inc.*, 32 P.3d 424 (Ariz. App. Div. 2001) – that have no bearing here because, like *Geier*, they involved claims that a car maker was negligent for choosing one of the particular forms of *passive* restraints permitted by

[21] NHTSA's 1989 decision to require lap/shoulder belts for rear outboard seating positions further confirms that *Hurley* has no application here. If NHTSA had been concerned that public "aversion" to seat belts would reduce usage in these seating positions, then it presumably would have maintained the pre-1989 option of either lap belts or lap/shoulder belts for rear seats. Yet NHTSA mentioned no such concern in its 1989 rulemaking, which ultimately produced a lap/shoulder belt requirement for all rear outboard seating positions. And, as previously explained, the desire to omit rear-*center* seats from the rule was based *not* on a desire to promote safety (as was the case with the heavy-vehicle rule at issue in *Hurley*), but rather on concerns that the benefits of such a requirement might not exceed the costs given the relatively low occupancy rate of rear-center seats. *See* 53 Fed. Reg. at 47984.

Standard 208.[22] As in *Geier*, these claims arguably would have interfered with the federal government's goal of encouraging a mixture of different *passive* restraint technologies in passenger cars. This concern is not present in cases, like this one, that involve the installation of *manual* restraints in the rear seats of passenger cars, which were specifically exempted from the passive-restraint requirements at issue in *Geier*.[23]

* * *

In sum, there is no basis for this Court to find implied conflict preemption of plaintiffs' no-lap/shoulder-belt claim. The core teaching of *Geier* is that conflict preemption only exists where the common-law claims would directly undermine federal purposes. Try as it might, Nissan has failed to identify even a single federal purpose that would be undermined or frustrated by a jury verdict holding it liable in this case. Especially in light of the strong presumption against preemption, Nissan's preemption defense must fail.

II. Plaintiffs' No-Retractor Claim Is Not Preempted.

[22] In *Carrasquilla*, the car at issue was equipped with one of the passive-restraint options that was specifically permitted by the version of Standard 208 at issue in *Geier*: an automatic lap/shoulder harness and a manual lap belt. The plaintiff contended that this system was defectively designed because, *inter alia*, it should have included an "integrated automatic lap belt." *Id*. at 174. Relying on *Geier*, the Court held that the claim was preempted because it "was a direct challenge to the passive restraint system available to . . . defendants under Standard 208" and thus "is no different from petitioners' claim in *Geier*." *Id.* at 176. Similarly, in *Hernandez-Gomez*, the car at issue was equipped with a passive restraint option that was specifically permitted by Standard 208: a automatic shoulder belt that did not include a manual lap belt. The plaintiff contended that the system was defectively designed because it did not have a lap belt. The Arizona Court of Appeals disagreed, holding that, under *Geier*, the plaintiff's claims would interfere with the federal government's goal of giving car manufacturers a choice of *passive restraint options.*

[23] Nissan's reliance on *James v. Mazda Motor Corp.*, 222 F.3d 1223 (11th Cir. 2000), and *Irving v. Mazda Motor Corp.,* 136 F.3d 764, 769 (11th Cir. 1998) (*see* Nissan Br. at 28), is misplaced for the same reason; each case involves claims that a car maker was negligent for choosing one of the *passive* restraint options permitted by Standard 208 (an automatic shoulder harness and an automatic lap belt).

Almost as an afterthought, Nissan also contends that federal law preempts the Brailsfords' claim that the car was defectively designed because the rear-center-seat lap belt used a manual belt tightening device rather than a retractor. *See* Nissan Br. at 20-23. Nissan argues that this claim is preempted because it would conflict with a provision of Standard 208 that gives car makers the option of providing either retractors[24] or manual adjusting devices at rear-center seating positions.

It is not necessary to tarry long on this point, because most of the arguments set forth above with respect to plaintiffs' no-lap/shoulder-belt claim apply with full force to this argument as well. As explained above, the mere existence of federal regulatory options does not, in and of itself, provide any basis for a finding of implied conflict preemption. Instead, implied conflict preemption may be found only where the plaintiffs' claims would directly undermine some particularized federal purpose. Nissan has failed to identify any such purpose.

Nissan first points to NHTSA's 1971 decision not to require the use of retractors at all seating positions as evidence of a deliberate policy choice that would be undermined by lawsuits like this one. *See* Nissan Br. at 21. The most striking aspect of this decision is that it is based on almost identical reasons as the agency's 1989 decision not to require lap/shoulder belts in rear-center seats – and it is not preemptive for all the same reasons. In deciding not to require retractors in rear-center seats, NHTSA simply stated that

> [s]everal comments [on the agency's proposal to require retractors in all seats] stated that the installation of retractors at inboard positions would require extensive redesign of bench-type seats. In the light of the low occupancy rate for the center seats, the difficulties in meeting the requirement, and the short leadtime available, the requirement for center-position retractors has been omitted.

[24] There are two types of retractors: automatic locking retractors ("ALRs") and emergency locking retractors ("ELRs"). ELRs locks the belt in sudden stops and crashes, but otherwise allow some occupant movement. ALRs, as the name suggests, lock automatically after they are buckled.

36 Fed. Reg. 4600, 4601 (March 10, 1971). As in 1989, none of these reasons amount to a finding that retractors should not be installed in any cars; rather, they simply mean that, in NHTSA' s view, due to the technical difficulties of installing retractors in certain cars and the low occupancy rate of rear-center seats, there was insufficient justification for an *across-the-board* retractor requirement for all rear-seats.[25] For all the reasons explained above, this type of rationale cannot form the basis for a finding of implied conflict preemption. *See Sprietsma*, 537 U.S. at 66-67. *See also* Kam Declaration at ¶¶ 14, 16, 21.

Nissan's only other argument is that this claim is preempted because the agency has identified some compatibility problems between certain retractor style belts – in particular, emergency locking retractors ("ELRs") – and child seats. *See* Nissan Br. at 22-23. This argument makes no sense, given that Standard 208 expressly permits the use of retractor-style belts in rear-center seats. Why would NHTSA have permitted the use of retractors if, as Nissan contends, they pose safety risks for children? Nissan, not surprisingly, does not even attempt to answer this question.

Nissan's argument also ignores the fact that, since at least 1971, NHTSA's regulations have actually *required* the use of retractors for all outboard seating positions. *See* 36 Fed. Reg. 4600, 4601 (March 10, 1971) (describing new rule as requiring that "[l]ap belts furnished under the second or third options must have emergency-locking or automatic-locking retractors at all outboard positions, front and rear). If, as Nissan claims, retractors are incompatible with child seats (which they are not), then why would they agency have actually *mandated* their use with

[25] Nissan, of course, is free to defend itself at trial on the ground that unique characteristics of the Nissan Sentra rendered it technically infeasible to install a retractor in the rear-center seat. But NHTSA's recognition that technical difficulties might exist with respect to *some* vehicles cannot serve as a basis for a preemption defense that immunizes *all* car makers from liability.

respect to the most oft-used seating positions in cars? Once again, Nissan has no answer to this question.

The bottom line is that there is not a single basis for finding implied conflict preemption of plaintiffs' no-retractor claim. The agency's regulatory option does not reflect any of the policy concerns at issue in *Geier* (*i.e.*, the desire to promote technological diversity); nor does it reflect a view on NHTSA's part that retractors are somehow harmful to safety. To the contrary, the options standard merely reflects the agency's decision that there was insufficient justification to require retractors in all seats – and we know from *Sprietsma* that such a rationale is patently insufficient to preempt *any* common-law claims.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and hold that the plaintiffs' claims are not preempted by federal law and must be permitted to proceed.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U. S. Mail, hand delivery and/or Federal Express, this ____ day of June, 2004 to Terrence Russell, Esq., Ruden, McCloskey, 200 East Broward Blvd., 15th Floor, Fort Lauderdale, FL 33301; Leslie A. Brueckner, Esq., 1717 Massachusetts Avenue, NW, Suite 800, Washington, DC 20036; Charles Vernikoff, Esq., 6345 Collins Avenue, Suite 100, Miami Beach, FL 33141; Erika Z. Jones, Esq., 1909 K Street, NW, Washington, DC 20006; Robert E. Boan, Esq., P. O. Box 029100, Miami, FL 33102-9100; Robert J. Rudock, Esq., Christopher J.M. Collings, Esq., Brickell Bayview Centre, Suite 3000, 80 SW 8th Street, Miami, FL 33130.

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