OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ALEXIS GEIER, ET AL., Petitioners v. AMERICAN HONDA MOTOR COMPANY, INC., ET AL.

CASE NO: 98-1811 c.1

PLACE: Washington, D.C.

DATE: Tuesday, December 7, 1999

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

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ALEXIS GEIER, ET AL., :

Petitioners :

v. : No. 98-1811

AMERICAN HONDA MOTOR COMPANY, :

INC., ET AL. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, December 7, 1999

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

APPEARANCES:

ARTHUR H. BRYANT, ESQ., Washington, D.C.; on behalf of the Petitioners.

MALCOLM E. WHEELER, ESQ., Denver, Colorado; on behalf of the Respondents.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondents.

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P R O C E E D I N G S

(11:11 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 98-1811, Alexis Geier v. American Honda Motor Company.

Mr. Bryant.

ORAL ARGUMENT OF ARTHUR H. BRYANT

ON BEHALF OF THE PETITIONERS

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

The petitioners claim that the 1987 Honda Accord in this case was defectively designed under District of Columbia common law because it did not have an airbag in addition to a manual lap belt and shoulder harness.

There are two primary reasons why these common law claims are not preempted here.

First, Secretary Dole viewed these common law claims as furthering, rather than frustrating, the policies underlying standard 208.

Second, even if Secretary Dole had wanted to preempt these common law claims, Congress expressly denied her the power to do so.

Now, the reason I say that petitioners' claims were seen by Secretary Dole as furthering the policies under standard 208 is because she herself said that. In

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explaining the rationale for adopting the rule, she said that she would rely on, quote, the potential liability for deficient systems, end quote, to make sure that the manufacturers did not all put in the cheaper passive restraint, automatic seatbelts, and instead started putting in more of the more expensive passive restraint airbags. That is her statement.

In addition, under the section entitled Product Liability --

QUESTION: Where does -- where does that appear?

MR. BRYANT: That is in -- in our -- the blue brief at page 10. It is --

QUESTION: And it's -- it's taken from what?

MR. BRYANT: 49 Federal Register 29,000.

QUESTION: Which is the statement of basis and purpose for the rule?

MR. BRYANT: Yes. It is in the preamble to the rule under the heading -- under the heading Rationale for Adopting the Rule.

QUESTION: I -- I find the -- the statement you just quoted a -- a troubling one for the other side, I -- I agree. But I -- I still have difficulty in accepting it as -- as the -- with -- as having the significance for your side that you want because it seems to me that if, in making that statement, she in effect was alluding to the

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significance or the power of the common law to, in effect, adopt the very rule that she was declining to adopt -- i.e., you got to have the airbags -- then she was, in effect, saying I'm relying upon the common law to thwart the very judgment that I am making now. And that seems very odd. What -- what do you make of that?

MR. BRYANT: Well, I don't think she saw it that way at -- at all. I -- I think we have to start with the understanding that Secretary Dole found and all of the manufacturers admitted that the safest, best system was exactly the one that we seek to have installed in this case, an airbag plus a manual lap belt and shoulder harness.

She also was facing this Court's decision remanding the last rule that was issued as arbitrary and capricious because it didn't consider requiring airbags in all cars. Yet, she chose not to order airbags in all cars because she was concerned about cost considerations. She was concerned about manufacturer resistance, public acceptability, technological problems, and stifling innovation.

The reason she wanted tort liability to kick in, however, was because she knew -- and she said it clearly -- that if she simply required passive restraints generally, almost all the manufacturers would put in

automatic seatbelts. She did not seek tort liability because of the cost differences and these other factors I've mentioned.

QUESTION: That seems like a very great weight to put on a -- a single sentence in -- in a preamble, particularly when the Government takes the other position here.

MR. BRYANT: Well, I don't put the weight solely on that sentence.

QUESTION: Well, maybe you shouldn't put any weight on it. I mean, she does say that competition -- potential liability for any deficient systems. I mean, she may be saying, you know, I don't know any more about whether there's preemption than the Supreme Court does. We'll have to have a lawsuit.

(Laughter.)

QUESTION: There -- there is potential liability for deficient systems. That's exactly what we're arguing about today, isn't it?

MR. BRYANT: Well, that is what we're arguing about today.

But I think when the Government's argument is, as it is here, that the sole reason for preemption is a frustration of one of the Secretary's purposes and the Secretary herself refers to this as something she is

relying on as creating an incentive towards doing the installation of airbags, I think it is -- it carries great weight. I --

QUESTION: Well, what if we -- what if we get away from that statement and just look at the statutes? Do you want to address where we are then, disregarding that statement of Secretary Dole?

MR. BRYANT: Well, disregarding the statement, I still think, in terms of frustrating the policies underlying standard 208, there is no concern about frustrating the type of policies as Justice Souter was talking about. Because of the factual circumstances of the enormous cost differences and the other factors I've talked about, not only did the Secretary -- the Secretary, leaving common law liability in place, still thought the manufacturers were not likely to install airbags enough, and that's why she did two other things as further incentives to prompt them to put in airbags.

First of all --

QUESTION: Well, I wish you'd get back to my question, though, and stop speculating on what Secretary Dole was thinking and tell us what the statutes mean because I think that will be very strongly part of our necessary decision making in the case, and you can help us by focusing on what these two statutes read together mean

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because it's so unusual to have the subject dealt with in two separate sections rather than one. And in a circumstance where the natural reading of standard in section 1392(d) would include State common law standards of care, and yet, several sections down, we find section 1397(k). And what do we make of that --

MR. BRYANT: Well, I think --

QUESTION: -- and how do we deal with it?

MR. BRYANT: I think what we make of that is, as the United States itself has said, there is no express preemption whatsoever of common law claims by the statute. And the reason I was going to standard 208 is because I agree with the United States' position here. I do think that 1397(k) by its very terms -- and it was the second argument I was pointing to -- denies -- expressly denies Secretary Dole the power to preempt common law claims. It says, in plain and unequivocal terms, compliance with any Federal motor vehicle safety standard does not exempt any person from any liability under common law. And their basic central argument in this case is compliance with this Federal standard does exempt this person from this liability under common law. It cannot be squared with the language of the statute.

QUESTION: Well, suppose it said that you have to install seat bags and -- airbags and a State common law

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decision was that you're liable because you installed airbags. I mean, you know, airbags they think are dangerous.

MR. BRYANT: Well, what if there were a direct conflict?

QUESTION: Yes, yes, right.

MR. BRYANT: And I do -- it is important to point out, of course, there is no direct conflict here.

QUESTION: Yes, I understand that. But you're making --

MR. BRYANT: Yes.

QUESTION: -- an absolute argument, and I'm just saying I don't see how it could possibly be absolute.

MR. BRYANT: Well, I do think it is absolute, and let -- let me explain why.

First of all, I think the words clearly cover that example.

Second, I -- I believe it would be preempted, but it would not succeed. In any event, it could not prompt the defendant to violate Federal law.

The reason I say it would not succeed is because, first of all, at least no good lawyer would bring a case arguing that the defendant acted wrongfully by refusing the break Federal law. Second, in almost every State in the country I can imagine, a judge would not let

a claim like that get to a jury because no reasonable jury could find --

QUESTION: Well, you know, you could say -- I bet your opponent said exactly the same thing about this case. You know, I mean --

(Laughter.)

QUESTION: -- we hear that argument a lot. And I mean, obviously you could have a child who was killed when an airbag came out and somebody said that the whole system is no good and it was no good from day one and they gave in to political pressure. I'll spare you the details.

But I want to know your answer to my imagined case.

MR. BRYANT: Yes.

QUESTION: And in the imagined case is a jury does come in and the State does uphold it, and they are liable because they installed airbags. All right?

MR. BRYANT: Yes.

QUESTION: And now, in that case, would there be preemption?

MR. BRYANT: Yes, there would be preemption and it would be --

QUESTION: All right. Because -- because Congress intended it to be preempted.

MR. BRYANT: Because Congress intended there to be preemption and there would not be the kind of direct conflict, that is, an order requiring the defendant to break Federal law, that this Court has found preempted.

QUESTION: I -- I'm not sure I understand your -- your response. It seems to me that the problem is that -- that the preemptive -- strike that -- the non-preemptive effect that you attribute to the later statutory provision which preserves the common law is so broad that if we accept your argument, it means that even when the Federal standard says you shall install airbags, a State common law provision can say you shall not install airbags. And that common law would prevail over the Federal law --

MR. BRYANT: Well --

QUESTION: -- if we read that provision the way you want us to.

MR. BRYANT: I do believe that that is what it says. I also believe it is absolutely unnecessary for this Court to resolve that question here.

QUESTION: No, but it is to accept your argument because --

MR. BRYANT: No, I don't think --

QUESTION: -- that seems to me absurd.

MR. BRYANT: I don't -- I don't think it is

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necessary, and the reason is because this case is about frustration of purposes, not a direct conflict.

QUESTION: I understand, but to accept your categorical reading of that provision, if I see that that reading is going to lead to this absurd conclusion, I might look around for a different reading.

(Laughter.)

MR. BRYANT: I agree, but I would say two things. The only absurdity, to use your term, Justice Scalia, that you focused on is the absurdity of ordering someone to do something that Federal law prohibits. And there is no question that in this case what we are seeking to hold the defendant liable for is for failing to do something that Federal law both permitted and encouraged, but more importantly, the basic assumption of absurdity is not something that this Court has agreed with in the past.

In the Cipollone case, under the 1965 act, this Court held plaintiffs under common law could sue for failure to warn even though the warning label was mandated by the Federal Government. And this Court held that implied conflict preemption should not be looked at. And it also held that the '69 act did differently and it could understand Congress taking up both approaches.

QUESTION: That's -- that's not my hypothetical. I mean, Cipollone would have been my hypothetical if the

-- if the Federal Government said you shall not warn and the State held them liable for not warning.

MR. BRYANT: Well, as I understood your hypothetical, it was that the basis of liability was that the defendant should not have done something that Federal law required.

QUESTION: Required him to do.

MR. BRYANT: Yes, and that was that one of the theories of liability permitted under the '65 act in Cipollone, that it was a failure to warn because they did what Federal law required them to do, put on these warning labels, instead of something else. That was the '65 act --

QUESTION: No, but they -- they could have put on those warning labels and put on something else as well.

MR. BRYANT: Well, they could have done that, but they also -- one of --

QUESTION: -- necessary conflict. There was no necessary conflict. Well, anyway --

MR. BRYANT: Yes.

QUESTION: -- you -- you don't -- you offer me no -- no assistance. You -- you say that -- that if I accept your interpretation of what the common law provision means, I am indeed led to the conclusion that a State common law provision that requires you to do the

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opposite of -- of what the Federal statute requires is valid.

MR. BRYANT: Well, that -- that's not my position in two respects.

QUESTION: Well --

MR. BRYANT: First of all, I don't believe -- and I don't think Congress believed -- that the common law claim would actually require you to do anything other than pay money. And that is, there is no physical impossibility possible here. There is at most a tension between a requirement that you pay money and change your conduct.

QUESTION: Then you must -- you must think that auto manufacturers are irrational. If they have to pay money --

MR. BRYANT: Not at all.

QUESTION: -- they're going to change their behavior so that they don't have to pay any more money, and that's the point at which you get to the frustration.

QUESTION: Right.

MR. BRYANT: Well, if I may --

QUESTION: And you could say the same thing about a State criminal law. Hey, you don't have to violate the -- the Federal law. All you have to do is go to jail --

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(Laughter.)

QUESTION: -- for violating the Federal law. Right?

MR. BRYANT: First of all, I don't --

QUESTION: It's a free choice.

MR. BRYANT: First of all, I don't think they're rational. They make cost/benefit calculations. It is not correct to say that if they bear any cost, they change their -- their conduct. It depends on how much --

QUESTION: They can multiply. They can multiply, and they can envision future accidents.

MR. BRYANT: Yes.

QUESTION: And the price goes up. Don't you think that's their thought process?

MR. BRYANT: Well, I think it's part of their thought process. I think they also consider what would the cost be of injuries caused by airbags and of no automatic seatbelt injuries, and they do --

QUESTION: One --

MR. BRYANT: Excuse me.

QUESTION: One -- one hears defense of large verdicts for plaintiffs frequently as saying this will make the manufacturer take notice and keep it safe. There's certainly inconsistency between that and what you're saying I think.

MR. BRYANT: To be clear, Congress could reasonably preempt common law claims like the type we're talking about. Congress could leave some in place and some not in place, and Congress --

QUESTION: That doesn't answer my question at all what you're saying now.

MR. BRYANT: Yes. Common law claims can have a regulatory impact. The question is whether Congress intended to preempt the specific common law claims at issue.

QUESTION: The only thing I can get out of what you're saying is the answer would be let the manufacturer pay for all airbag related accidents, whatever the cause, whatever the inconsistency, and that will put cost pressure on the manufacturer to figure out the best system.

MR. BRYANT: No.

QUESTION: Now, that -- but that's -- I mean, that's in your favor. I'm not arguing against you there. I didn't think I was.

(Laughter.)

MR. BRYANT: I didn't take you as arguing against me.

QUESTION: Right. So -- so, but I mean, that -- that would try to reconcile these things, say it's just

a money judgment, they'll -- but that's a theory I've never seen Congress buy.

And -- and the reason I want you to focus on this is, for better or for worse, I did start question one, what about conflict?

MR. BRYANT: Yes.

QUESTION: Direct conflict I think we both now agree Congress preempts. Now, the answer to that has to be yes or no. I thought the answer is yes, preempt.

Then I get to question two, and question two is, why would interference in any significant way with the purpose of a regulation be treated differently? And if the answer to that question is it isn't, I get to question three, which is what is the purpose here.

All right? I expose my thinking on this so that you can tell me whether I'm -- you already said I'm wrong at step three, or you know, I haven't taken a view on that.

MR. BRYANT: Yes.

QUESTION: But as to step one and step two --

MR. BRYANT: Well, I think --

QUESTION: -- you say I'm right as to step one. What about step two?

MR. BRYANT: Well, as to step two -- as to step two, I think Congress' words plainly say that, when we're

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talking about frustration of policies of the Secretary, regardless of what the rule is as to conflict, there there is no preemption. And that was the point I was trying to make to Justice Scalia. That is, the Congress did not give the Secretary the power to say, in passing this standard, I have a bunch of policies and one of my policies will be frustrated by common law claims, and therefore I pick out these common law claims and preempt them. And I believe section 1397(k) has to be read fairly to include that kind of decision.

That's why I was saying I don't think this Court needs to answer question one. It's not presented here. But question two is, and I believe 1397(k) answers question two and it answers question two by saying, no, there is no preemption on this kind of an approach. If there can be preemption on this kind of approach, then it seems to me you are essentially reading 1397(k) out of the act, or at least limiting it so severely as to wonder why Congress put it in there.

The Secretary -- but I -- I do want to get back for a second to what the Secretary did here. It's relevant in my view both to section -- question two, somewhat, but particularly to question three. And that is, Justice Breyer, unlike the example that you gave in Medtronic where one of the beauties of giving it -- the

power to the agency is that they can -- the agency can lay out its reasons and predict what its purposes are and say what's preempted and not preempted, et cetera.

There is -- this Secretary not only made the comment that I started my conversation with, but also made no comment whatsoever anywhere suggesting in any place that she intended to eliminate a common law claim. Indeed, the entire structure of her approach was to not impose airbags on everyone, but rather to create -- to trust it to the market. And part of the market she was trusting was the tort liability system to internalize both the costs and the benefits of airbags versus automatic restraints of other types versus anything else that might come along in the future. I think it was an absolutely reasonable regulatory approach, but there is nothing to suggest whatsoever either that she considered preempting common law claims or suggested it.

So, what would happen here is we would be talking about not a situation where either the Congress or the Secretary expressly preempted common law claims, we'd be talking -- or where the Secretary even suggested a problem with common law claims --

QUESTION: We'd be talking about a situation in which the Secretary had done absolutely nothing. And I think what you're telling us is, at least so far as this

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point is concerned, that this combination of -- of regulations boils down, in effect, to inanition on the Secretary's part, just sort of throwing her hands up and saying, well, let the market figure it out.

MR. BRYANT: No, I don't think that's --

QUESTION: We -- we can't accept that.

MR. BRYANT: I don't accept that. I don't think that's a fair reading. I think when the Secretary acts, first of all, in the face of a savings clause like this one, and in the face of the presumption against preemption, and she starts there and then she says that she intends to rely on potential liability for deficient systems to help her achieve her goals of pushing people away from automatic seatbelts and towards airbags, then later on in her rationale she actually quotes and describes -- using her terms, she -- she calls it another potential source of liability for the manufacturers. She specifically refers to no airbag claims again. And then she says nothing whatsoever to suggest that she's eliminating common law claims, but several times says that her concern with leaving it to the market, without any additions from her, is that even with the tort liability, there will not be enough airbags installed and people will put in automatic seatbelts because they're so much cheaper. And so, she's not only using tort liability, but

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she's also phasing in the system over several years because she explains that will prompt more manufacturers to put in airbags.

And she gives them an extra credit for putting in cars with airbags; that is, she says, I would rather have 500 -- 50,000 cars on the road with airbags than 750,000 -- I'm sorry -- than 75,000 cars on the road with automatic seatbelts. She hasn't simply thrown up her hands and left it alone. She has put together a quite cohesive structure, which is I'm not going to impose this on high, but I am going to create an incentive system to prompt more airbags in cars and I'm going to leave it to the marketplace, including tort liability, to ultimately drive the manufacturers to the right decision, whatever that decision may be.

Now, the Federal Government's response to this -- and they concede there is no conflict here. Their sole response to this is that this frustrates the Secretary's desires to have a diversity of passive restraints. But I don't think that's -- that's wrong for five reasons.

First, that wasn't the Secretary's view. The Secretary viewed tort liability as enhancing diversity both generally and specifically, and I say specifically because given the cost considerations involved, she felt if there were not tort liability, there would not be as

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many airbags. And so, this would actually enhance the diversity.

Second, it ignores what happened. The entire theory the Government advances here is that if the manufacturers had had reason to believe they could have been held liable, then they all would have put in airbags. Well, they did have reason to believe they could have been held liable. In fact, they had no reason to believe in 1984 that they couldn't have been held liable. There was never, at that time, even a court case finding preemption. And the Secretary had said everything she said. And yet, what did they do? They did not put airbags in most cars.

Third, it assumes that tort liability leads to everybody putting in airbags. And I don't think it does as a logical matter because once you preserved all tort liability, the manufacturers are going to look at different cars and say, for these cars the cost and benefit calculation may be worth it; for these cars the cost and benefit calculation may not be worth it. They're going to look at all of the kinds of cases that we read about in the newspaper of people suing saying, the airbags shouldn't have been in my cars, and know that they feared that liability as well. And so, it does not in any way inevitably lead to airbags being put in cars, as it has not.

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QUESTION: How has the regulatory scheme changed since this accident occurred?

MR. BRYANT: Well, I think the single biggest change was that in 1991 Congress amended the act to require the Secretary to install airbags in all cars as of 19 -- all new cars as of 1998. And so, even if you're looking at it in sort of the practical effect from here forward, no one can seriously argue the practical effect, even if now all the manufacturers ran out and retrofitted their cars with airbags in response to this case, would be anti-safety.

QUESTION: And under the current regime, you would say that there still could be a State common law suit because the airbag had been installed and it damaged someone.

MR. BRYANT: I'm sorry. I didn't -- I did not understand the question.

QUESTION: I guess under the present regulatory scheme requiring the airbags, you would still argue that a State or the District of Columbia could in its common law find negligence by virtue of the installation of the airbag, by virtue of having it because it damaged someone --

MR. BRYANT: Well, as I --

QUESTION: -- when it deployed.

MR. BRYANT: As -- as I said -- I'm sorry. Are you talking about a theory of liability that the airbag shouldn't have been there at all as opposed to defective design of the airbag or something like that?

Yes. As I said, I do believe Congress preserved those. I also believe this Court does not have to resolve that at all to get there. And I also believe, in terms of the real world, it is a total red herring because people will not bring those suits. The courts and the States do not allow those suits. The practical reality is that's not something anybody needed to fear.

Now, one of the questions is, well, all right, even putting that aside, why would Congress do what it did and treat these differently? I think the basic answer is that Congress was interested in helping to protect potential victims of crashes, and it knew it couldn't prevent all of the -- prevent injury to all of those victims. And so, when you come to the common law, the question is whether you're going to hurt those people or help them. If it preempted some common law claims, then the people who were hurt at the end would actually have been hurt by Congress' actions as well.

That's the position they're saying our clients are in. They're saying that the Geiers, unlike people who were hurt in cars before 1984, and unlike people who were

hurt in crashes other than automobiles, trucks, mini-vans, et cetera --

QUESTION: Mr. Bryant, don't you recognize some tension between 1392(d) and 1397(k)?

MR. BRYANT: Yes, I do recognize the tension. I think the ultimate question here is whether Congress' approach as to that tension, leaving both in place, needs to be respected or not. I submit they do.

I'd like to save the rest of my time for rebuttal.

QUESTION: Very well, Mr. Bryant.

Mr. Wheeler, we'll hear from you.

ORAL ARGUMENT OF MALCOLM E. WHEELER

ON BEHALF OF THE RESPONDENTS

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

We now understand that petitioners' position is that what he calls true conflict preemption does exist despite 1397(k), but frustration preemption does not exist despite 1397(k). This Court has never in its history spread apart and split apart those two forms of conflict preemption. Every time the Court has articulated the doctrine of conflict preemption, it has done so by pairing impossibility and frustration.

QUESTION: No. His argument, as I understand

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it, is there in fact is no frustration here.

MR. WHEELER: That's -- I think it's his -- that was the third question I think that Justice Breyer asked, Justice Kennedy -- I'm sorry -- Justice Stevens.

The -- and there is frustration here. The -- what counsel tries to put the full weight of his argument on is the single sentence --

QUESTION: What is the frustration? Is it that if you do not preempt the common law cause of action, it will mean that there will be a total adoption of seatbelts -- I mean, of airbags?

MR. WHEELER: Not necessarily, Your Honor. What it means -- what would happen is that the manufacturers would be driven toward investing their efforts in airbags instead of in the diversity of restraint systems that the Secretary found to be necessary for national motor vehicle safety.

QUESTION: So that there would be more -- a greater proportion of airbags than the Secretary desired.

MR. WHEELER: Both a greater -- that's correct, Your Honor. Both a greater proportion and perhaps implemented at a pace that the Secretary thought might be dangerous to the public.

QUESTION: Well, the thing that puzzles me about that is that prior to the regulation going into effect,

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where there wasn't even arguable preemption, apparently the rate of installation of airbags was zero. So that the absence of preemption does not equate with total adoption or even rapid adoption of airbags --

MR. WHEELER: Well --

QUESTION: -- because we have a history of several years before 1984.

MR. WHEELER: Excuse me, Justice Stevens. The -- the premise is -- is somewhat flawed. In fact, as of 1984, Mercedes Benz had implemented airbags on an optional basis into its largest S class vehicles. In addition, Ford Motor Company had already entered into a contract with the United States Government, the Government Services Administration, to install airbags in 5,000 Tempo/Topaz vehicles. So, there was progress being made. The Secretary was very well aware of that, but was very concerned, as she expressed in great detail in her rulemaking, that to push it any faster than she was doing through the 10 percent requirement in 1987 risked killing people. It risked injuring people, and indeed we have seen subsequently that those concerns were very valid.

QUESTION: So, the frustration is that the rate might be larger than 10 percent. That's sort of a fixed ceiling in her view and it's frustration of the ceiling that -- that we're talking about.

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MR. WHEELER: Pushing manufacturers to go beyond that is what the frustration would be.

QUESTION: What was her purpose -- what was her purpose then in counting the airbag one and a half as against the seatbelt, only one?

MR. WHEELER: Because, Your Honor, again it's a very complex rulemaking, and what she was concerned about was that manufacturers, if she didn't do that, would be trying to put a larger number of passive seatbelts into a larger number of cars as opposed to airbags. By giving one and a half credits, she was enabling the manufacturers to focus some of their resources on airbag research and development for some cars, while at the same time moving forward to install a variety of other kinds of seatbelt systems into other cars, thereby providing the public with a diversity that she thought was necessary. And to -- to -- most importantly perhaps, to obtain the field data to answer the question which --

QUESTION: Well, it sounds like she was trying to promote putting in airbags to that extent by saying they're not all equal, I want to give a little shove.

MR. WHEELER: Some airbags. That's correct, Your Honor.

QUESTION: But one basic part of your case that I don't understand is a tort suit doesn't set a standard

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the way the Secretary does. You -- you -- that seems to be essential to your argument that -- that common law liability sets a standard, but common law liability zeroes in on one particular model by one particular manufacturer, and it doesn't set any across-the-board standard for anyone.

MR. WHEELER: Your Honor, the Court -- this Court has said many times that, in fact, common law liability does set standards, and it said that, for example, in Cipollone. It has said it -- really said it in Medtronic. The -- there is no question --

QUESTION: Well, then explain to me how a particular jury verdict with respect to one particular model would then control all models that by that manufacturer and, moreover, all models by every other manufacturer.

MR. WHEELER: Because, Your Honor, for example, let's take this very case. This plaintiff is seeking $20,500,000 for injuries to her face in an accident. If this manufacturer -- if Honda were to be held liable for $20,500,000, or perhaps some larger number, like the $4.1 billion verdict issued against General Motors in a case in one accident just earlier this summer, that manufacturer would have to be totally irrational not to take that into account in deciding what it ought to do and where it ought

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to devote its research resources and what it ought to put into its vehicles.

QUESTION: But I'm asking you to tell me why that liability is a standard. After all, a common law liability -- it's a jury verdict based on particular evidence. One jury could come out one way; another jury could come out another way. So, that sounds to me very far from what is a standard, and that's the simple question I'm asking you. It seems like a common law jury verdict is very far from a standard.

MR. WHEELER: Well, it's certainly different from a administrative standard and different from a legislative standard in that it is one case specific standard.

But again, Your Honor, I'm -- I'm not sure if you're asking under the language of this particular section 1392(d) or if you're asking as a general matter is there something odd about calling a common law standard a standard.

QUESTION: Well, I'm looking at two sections of the statute that seem to be in tension. Then I said, well, maybe they're not. Maybe common law liability means a tort suit applying general principles of common law, and maybe standard means something the legislature enacts or an administrative body sets for across the board.

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MR. WHEELER: Your Honor, I fully agree, by the way, that there in fact is no tension between section 1392(d) and 1397(k) but for a very different reason. And the reason is that 1397(k) begins with two words, compliance with, that defined the narrowness of its scope. It is not an anti-preemption provision. And -- and there has been no decision by this Court interpreting a provision like that that begins with the words, compliance with, as being an anti-preemption provision. Therefore, there's no tension literally --

QUESTION: Explain to me why it isn't. It says, compliance with the safety standard won't be a complete defense for common law actions.

MR. WHEELER: And that's because the assertion is not compliance with. The assertion here is preemption because of the conflict between the Secretary's purposes in -- in Federal motor vehicle safety standard 208 on the one hand and the common law standard that -- that the petitioners are asserting. We don't have to prove compliance.

Again, if -- if the Court goes back and looks at how the D.C. Circuit decided this case, how the district court decided this case, how it was defended, and how it was argued, the issue of whether there was compliance literally was not mentioned. It never came up.

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QUESTION: Of course, because if there's preemption, you don't have to worry about compliance.

MR. WHEELER: Right.

QUESTION: What that suggests is that the compliance provision makes no sense if we agree with you about the preemption provision.

MR. WHEELER: Not at all, Your Honor. As a matter of fact --

QUESTION: Well, tell me how the compliance provision would have operation if you read the preemption provisions as including preemption of -- of State common law.

MR. WHEELER: It would have operation and -- and we cited this case in our brief, Your Honor. In the Perry case, Perry v. Mercedes Benz, a Fifth Circuit case, 1992 -- it's one, by the way, of many but it happens to be a particularly illustrative one. There, there was an airbag in that Mercedes, and the plaintiff filed a claim against Mercedes Benz saying the airbag should have deployed at a different threshold level. We think that Mercedes set the threshold level too high. The airbag should have deployed earlier. That -- the compliance provision -- and Mercedes tried to defend on the ground that, well, we complied with Federal motor vehicle safety standard 208 by putting in an airbag. And the plaintiff said, but that's -- all it does

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is require an airbag. It doesn't say how it has to be designed.

QUESTION: But that's -- but that's just like saying we complied with the Federal standard by -- by having doors on the car. I mean, that -- that's surely not what the compliance provision means. It means compliance as to the very matter that the suit is about. If it doesn't mean that, it's -- it's meaningless.

MR. WHEELER: I beg to differ with Your Honor. The fact is if you look at the 13 cases cited in the petitioners' own brief at footnote 2 of their opening brief, 13 appellate courts had to address the question that manufacturers raised whether compliance with a Federal motor vehicle safety standard that did not address the specific type of defect that plaintiff was asserting nevertheless constituted an affirmative defense. And the appellate courts, including many Federal circuit courts, said the compliance provision prevents that.

QUESTION: Yes, it wouldn't take me a whole lot of time to -- to come to that conclusion by just saying, you know, the -- the provision at issue here is not whether the car should have doors. The provision here is -- is the airbag. And you'd come in and you'd say, well, I was in compliance with the door provision. That's not what we're talking about. And it's -- it's the same where

you say, you know, the -- the airbag was defective for some reason. You say, well, I was in compliance with the provision of having an airbag. Well, that's not what we're talking about.

MR. WHEELER: I agree, Your Honor. And that -- and that is exactly --

QUESTION: I think it converts -- it converts that into a meaningless provision.

MR. WHEELER: Well, but -- but again, the very fact we have 13 reported appellate decisions addressing that very question shows that it had meaning.

QUESTION: That plaintiffs make some -- some meaningless arguments I suppose.

MR. WHEELER: The defendants. It was defendants.

QUESTION: The defendants, yes.

QUESTION: I'm -- I'm confused on that point because I thought that you were saying that you could have a reg, say a door reg, and that some certain tort theories would interfere with the purpose and they would be preempted.

MR. WHEELER: That's correct.

QUESTION: But other tort theories might really not interfere with the purpose and they wouldn't be.

MR. WHEELER: Would not be preempted.

QUESTION: And then -- and then compliance in such a case would not, in fact, excuse the tort action that wasn't preempted.

MR. WHEELER: Not necessarily, Your Honor. That's the whole point.

QUESTION: That's your -- that's your point.

MR. WHEELER: That is my point.

QUESTION: Well, very well. If that's your point, why does this fall into the first category and what you've talked about is it would make the manufacturers produce more airbags? But that's what I'm not really certain about. It seemed to me that this was a passive restraint standard. And the whole point of manufacturers' choice there was that they could put in either airbags or spoolable belts or unlockable belts. And we, says the Secretary, will never tell you which.

But this theory isn't dependent on which of the three they put in, is it? I mean, isn't the case -- aren't the cases in front of us cases that rest upon their failure to put in passive restraints? Period. And if that's so, then how do they interfere with the purpose of the reg which was to encourage passive restraints but not to tell the manufacturers which of the three systems they ought to choose?

MR. WHEELER: No, Your Honor. The premise is -

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- is wrong. The case before the Court is a true no-airbag case.

QUESTION: In other words, they had -- they didn't have airbags, but they did have spoolable belts? Did they have spoolable belts or did they have unlockable belts?

MR. WHEELER: No, Your Honor. What they had was manual lap/shoulder belts.

QUESTION: Well, then they didn't have passive restraints.

MR. WHEELER: But that's not the petitioners' argument, and the reason it's not is because Ms. Geier was wearing her lap and shoulder belt. Therefore, the plaintiffs couldn't argue, well, there should have been a passive belt because she was belted. So, the plaintiffs -- the petition simply states there should have been an airbag in this vehicle. This is a true --

QUESTION: What is -- what is the response that you then make to their initial point about Secretary Dole having said we're going to rely upon the tort system to help enforce this?

MR. WHEELER: I have two responses to that, Your Honor.

First of all, that appears at 49 Federal Register, page 29,000, and petitioners, both in their

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brief and again in oral argument, have simply ignored the preceding paragraph where the Secretary made it quite clear what she was referring to. In the preceding paragraph, she says, the phase-in will permit the manufacturers to ensure that whatever system they use is effective, trouble-free, and reliable. And later on in the next paragraph, she refers to that manufacturers will be affected by product liability law not to put in deficient systems.

The Perry case that I've referred to already in the Fifth Circuit is exactly that situation. We've cited other cases in our brief that are exactly that situation. The Secretary wanted to use product liability law to ensure -- to help to ensure that if you put in an automatic belt system, it wouldn't be a defective system. If you put in an airbag system, it wouldn't be a deficient system. But she was not -- definitively not -- saying that she wanted to have just airbags.

And -- and my second response to that, Your Honor, is that from the very first moment that the Secretary was asked to speak to what it was that she intended in 1988, she said -- the Secretary said, we intend preemption. And that is a position that the Government has consistently taken for more than a decade. So, both -- that was -- the argument that the petitioners

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have made is a misreading of the Federal Register and it certainly misstates the position of the Government.

The -- I'd like to speak to the issue of 1397(k) again and -- and the differences between it and typical anti-preemption provisions.

In the typical anti-preemption provisions in this very statute, in section 1392(d), there are two anti-preemption provisions, and they use the language that Congress always uses when it intends to limit preemption. They begin with the language that says, nothing in this section shall prevent the States from or nothing in this statute shall prevent the States from. 1397(k) begins with, compliance with a standard shall not affect -- or not exempt, and that is language that this Court has never held to effect an anti-preemption result.

QUESTION: But it makes sense because it's tied into 1392(d) which talks about standards to have the 97 provision relate to standards.

MR. WHEELER: I agree. And again, I agree precisely because it ties into standard in the context of compliance with. And if the -- if you get to trial --

QUESTION: May I ask, just going back to the language, just -- I want to be sure I understand your point. Is it not true that you -- you are arguing today that compliance with the then existing regulation exempts

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your client from liability under common law?

MR. WHEELER: No, Your Honor, that's not what I'm arguing. The -- there is no need for me to get to the question of proving compliance at trial. As this Court has said multiple times, in preemption the Court looks first to determine what is the interpretation of the State law that's being asserted, what is the Federal statute, and then asks is there a conflict.

What gets proved at trial as to whether there's compliance is a separate question. It only comes up if the manufacturer asserts compliance as an affirmative defense. The legislative history of this provision, 1397(k), explicitly refers to the weight of evidence and it makes it clear that that's what the issue was. Indeed, in the D.C. Circuit -- in the D.C. Circuit, compliance is considered a rebuttable presumption.

QUESTION: So, are you saying that it's irrelevant that you were within the -- the -- that you were obeying the Federal regulations?

MR. WHEELER: It's unnecessary -- it's irrelevant in the sense that it's unnecessary to ask the question, Justice Kennedy. One only gets to that question if you --

QUESTION: But you cite -- but you cite the statute. You -- you cite the safety standard as -- as the

grounds for -- for being entitled to have the complaint dismissed.

MR. WHEELER: Because the -- the Federal regulation, Federal motor vehicle safety standard 208, is what conflicts with the asserted State cause of action. If the --

QUESTION: You argue that frustration itself -- if you get more than 10 percent -- preempts the cause of action, so you don't need an affirmative defense. That's why you don't need to rely on the --

MR. WHEELER: That's partly correct. That's right.

QUESTION: That's right. And -- and what you're saying is that compliance will not be a defense to the defendant's raising of an irrelevant provision.

MR. WHEELER: Or something that's on -- that's not quite on point, Your Honor, but --

QUESTION: If he raised a irrelevant provision, preemption would be a defense.

QUESTION: And you --

QUESTION: If he raises an irrelevant provision, compliance with that irrelevant provision is not a defense.

MR. WHEELER: Is not a defense.

QUESTION: And you would agree that if the

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Secretary's policy were fairly read as saying that 10 percent was to be a minimum rather than a maximum, there would be no frustration.

MR. WHEELER: No, not at all, Your Honor, because again, even if you read it as a minimum, which it quite clearly is, by the way -- the Secretary didn't say that manufacturers can't produce more than that --

QUESTION: But I thought you agreed earlier that the exposure to tort liability just -- will just increase somewhat the rate of adoption of airbags. It will go above the 10 percent. Does it have -- say it goes to 15 or 20 percent. Is that frustration?

MR. WHEELER: What is preempted is the forcing of the manufacturers to go to anything above 10 percent --

QUESTION: Well, they're not forced by the regulation, just forced by what the market forces that were in place before the regulation was adopted.

MR. WHEELER: They're forced by reality. That's exactly right. And it's -- again, what's very important is it's not just, especially in this case -- it's not just being forced to go above the 10 percent. It's being forced to put in a particular kind of passive restraint, namely airbags.

So, the Secretary's -- both of her purposes were

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being frustrated. They were -- this -- the petitioners want to force this manufacturer to put in a particular type of passive restraint and to force the manufacturer, which was above 10 percent, to go even further above 10 percent.

And if I may finish, may it please the Court, this Court has said, with respect to other statutory schemes involving broad regulatory authority given to an agency, that it would be absurd to assume that Congress intended that kind of chaos to reign. Well, that is exactly what we would have here. Both the House and the Senate, in enacting the statute, said -- they expressed concern about the chaos that would occur if all 50 States could regulate independently, and that is exactly what these types of tort actions would do.

Thank you.

QUESTION: Thank you, Mr. Wheeler.

Mr. Wallace, we'll hear from you.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

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

The last time -- we agree, I should start off, with the court of appeals that this is a case of implied

conflict preemption. The last time this statute was before the Court in Freightliner against Myrick, the Court engaged in an implied conflict preemption analysis and mentioned that there are two categories of implied conflict preemption: the impossibility to comply with both the State and Federal requirements or the classic kinds against Davidowitz, which has been referred to as the frustration category of implied conflict preemption. And that is the one that is relevant here.

We are talking only about the version of standard 208 that was in effect at the time this car was manufactured. It was an evolutionary version of standard 208 that was adopted after a lengthy rulemaking proceeding in which the Secretary recognized certain then-existing problems, one of which was great public resistance to airbags which, as we say in footnote 20, airbags engendered the largest quantity and most vociferously worded comments during the rulemaking.

There was a proposal before the Secretary to develop -- to adopt an all-airbag rule at that time, which she rejected in favor of a rule encouraging a variety of passive restraints in a proportion of the vehicles based on a conclusion that at that time diversity would best promote safety by promoting public acceptance of the passive restraints, by enabling the development of new and

improved technologies, and enabling the agency to acquire more data to take the next step in this evolutionary process --

QUESTION: Mr. Wallace?

MR. WALLACE: -- all of which were necessary.

QUESTION: Mr. Wallace, would you agree that she was building in some incentive to increase the number of airbags by counting them one and a half?

MR. WALLACE: We -- we describe that, and we think accurately, in context as a reasonable incentive to ensure that airbags would be in the mix of passive restraints since she did not impose a requirement.

One of the concerns was that seatbelts often were not buckled in those days, and if airbags were the restraint someone was relying on, they might actually be in greater danger because they'd be riding without their seatbelt buckled, and they'd be vulnerable to other kinds of accidents in which the airbag would not deploy. That was one of the advantages of the passive seatbelt restraint against the airbags.

These had to be analyzed at the time in terms of public acceptability and in light of the experience the Department had just had with resistance to the ignition interlock system that they had had to compel the public to buckle up and the congressional action that followed

repealing that because of public resistance. So, we're talking about a -- what were the implications of this version of the rule during a particular period.

Now, we have been very mindful in this series of filings addressing this subject which three Solicitors General have submitted and we've cited them to you. We've been very mindful that this statute is one that imposes only minimum standards that are adopted by the Secretary. That means that in the ordinary case the manufacturers are free to exceed the standard, and the implication would be that State law could not with a rival prescribe standards through administrative agencies but, through the tort suit system that is preserved, could hold the manufacturers to a higher standard.

But in -- in the version of 208 that was in effect at this time, allowing a suit based on a theory that it was a design defect not to have an airbag in a 1987 car, this is not just a question of what a jury will find on its own but what theory can be presented to the jury and what the jury can be instructed, that that would frustrate the Secretary's finding --

QUESTION: Mr. Wallace, can I ask you this question? I followed your brief all the way through the first 24 pages of the argument. You get to the point of frustration and you argued on page 25 that if you allow

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the potential tort liability to remain and not be preempted, it would likely have let all the companies to install airbags in all cars. That was your -- and it had not done that in the -- in the preceding period. So, that is really a straw man, is it not, because there really was no likelihood that that particular eventuality would come to pass?

MR. WALLACE: Well, we -- we're really -- we --

QUESTION: You did not argue that it would be a frustration of policy if they installed them in 20 percent instead of 10 percent.

MR. WALLACE: Well, the -- the percentage question really has to do with the transitional nature of the rule, which we understand not to be at issue in this case because the complaint here is not that there was no passive restraint in the car. The complaint is only that every car had to have a particular kind of passive restraint, every car, and that's an airbag.

QUESTION: But am I correct in saying that your -- the argument in your brief was the frustration would be that it would lead to 100 percent airbags?

MR. WALLACE: Well, we -- we tried --

QUESTION: And are you sticking to that argument?

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MR. WALLACE: Well, it -- it is -- it is a variety of the -- of the more basic point that it would undermine the policy determination at that time that there had to be a variety of occupant restraints available in the cars to go through this evolutionary period.

QUESTION: Mr. Wallace, the problem I have with your implied preemption argument is -- is simply that I don't -- I don't feel free to find an implication of preemption when I am -- when I am confronted flat in the face with a provision which says that compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from liability under common law. If that means what your opponent says it means, I don't think we're free to speculate about what implied preemption there must be.

MR. WALLACE: It is -- we're not saying that -- that other theories of common law liability would not be available. For example, a -- a theory that a particular airbag installation was defective or the airbag itself was defective --

QUESTION: But you wouldn't -- you wouldn't that provision to -- to preserve that. You would only need that provision to preserve a common law claim that's based upon the same thing that has been complied with.

MR. WALLACE: Even if that -- even if that

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airbag met the standard for an airbag was what I was about to say so that otherwise meeting the -- the standard for manufacturing or installing an airbag might be thought to be a defense.

QUESTION: If there was a standard for an airbag, if -- if it said the airbag has to be so many inches thick or whatnot --

MR. WALLACE: But we're -- we're talking about provisions --

QUESTION: -- if there wasn't any and all -- all it says is you have to have airbags, no one would have thought that -- that you needed this provision to be sure that -- that you could sue for a defective airbag.

MR. WALLACE: But -- but the Secretary's standards prescribe minimum standards for many kinds things. The brakes have to stop within a certain distance. It may be that even if you meet that standard, it could be a design defect if they didn't exceed that standard by a reasonably specified amount under State tort law. That kind of thing is saved by this clause.

We're not -- we're not talking about a -- an intent to preempt. We're talking here about a -- a kind of preemption that flows directly from the Supremacy Clause itself when there is a conflict between applying the State law in the way it's being applied and the achievement of

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the full purposes and objectives of the Federal law. And Federal law, as the Court said in City of New York --

QUESTION: Thank you, Mr. Wallace.

MR. WALLACE: -- regulations of the agency.

QUESTION: Your time has expired, Mr. Wallace.

Mr. Bryant, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF ARTHUR H. BRYANT

ON BEHALF OF THE PETITIONERS

MR. BRYANT: Thank you, Your Honor.

There might be frustration of purposes here if the Secretary had placed a ceiling on the number of cars with passive restraints generally or airbags specifically, discouraged manufacturers from installing passive restraints generally or airbags specifically, or suggested in any way that tort liability would conflict with her policies and that she intended to create some sort of liability-free zone. None of those are true.

The opposite is true. She placed no limit on the number of passive restraints. She placed no limit on the number of airbags, and she said she wanted to encourage both of them.

In addition, I think, Justice Breyer, the fact that you noted that this particular car had no passive restraints is critical. The argument about diversity of passive restraints and an airbag claim conflicting with

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that could theoretically apply if we were arguing it should have had an airbag instead of an automatic seatbelt. But when the car had no passive restraints at all, to say they should have put an airbag in it cannot, as a matter of pure, practical logic, in any way affect the diversity of what's put in cars that have automatic -- I'm sorry -- that have passive restraints in them. So, it doesn't get to the Government's theory at all.

And the response that Mr. Wheeler gave you about, well, she was wearing her seatbelt would make preemption turn on whether a person was wearing a seatbelt or not and actually make them worse off via preemption because they were wearing the seatbelt than they would be if they weren't wearing the seatbelt. And, of course, we're trying to encourage people to wear seatbelts.

I think the basic issue here is whether Congress or Secretary Dole ever intended the manufacturers to be free from liability for failing to install the precise system that the Secretary of Transportation found and the manufacturers admitted was the best and safest system, an airbag plus a manual lap belt and shoulder harness. We say section 1397(k) makes clear that Congress intended no such result and the Secretary's entire statement and structure of the standard makes clear she intended no such result.

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And the notion that somehow a finding that the manufacturers can't be held liable for failing to install what the Secretary herself said was the best system because that would somehow frustrate the Secretary's policies is, we submit, nonsensical on its face.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bryant.

The case is submitted.

(Whereupon, at 12:10 p.m., the case in the above-entitled matter was submitted.)

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CASE NO: 98-1811

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BY: Ilona M. May
(REPORTER)