January 4, 2009

Docket Management Facility
U.S. Department of Transportation
1220 New Jersey Avenue, S.E.
West Building, Ground Floor
Room W-12-140
Washington, D.C. 20590

Re: 2010-2015 Strategic Planning (Docket No. NHTSA-2009-0171)

Dear Sir or Madam:

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA), hereby submits comments in response to the National Highway Traffic Safety Administration's (NHTSA) notice regarding strategic planning on emerging or potential traffic safety problems. *See* 74 Fed. Reg. 213.

AAJ, with members in the United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights, strengthen the civil justice system, promote injury prevention, and foster the disclosure of information critical to public health and safety. AAJ requests that NHTSA reevaluate its position regarding conflict preemption. When promulgating regulations, NHTSA has repeatedly relied on *Geier v. American Honda Motor Co*[1] as authority to suggest that state tort law claims may be preempted.[2] AAJ believes that NHTSA's reading of *Geier* is overbroad. The Supreme Court's holding in *Geier* is extremely narrow and does not support NHTSA's expansive application. Moreover, NHTSA's repeated assertion that state tort law claims are preempted by its regulations has had a detrimental effect on public safety.

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[1] *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

[2] *See* 70 Fed. Reg. 49223 (2005); *See* 70 Fed. Reg. 36094 (2005); *See* 70 Fed. Reg. 53753 (2005); *See* Fed. Reg. 65509 (2007); *See* 73 Fed. Reg. 57260 (2007); *See* 73 Fed. Reg. 5484 (2008); *See* 73. Fed. Reg. 3910 (2008); *See* 73 Fed. Reg. 54020 (2008); *See* 73 Fed. Reg. 57297 (2008); *See* 73 Fed. Reg. 52939 (2008); *See* Fed. Reg. 3901 (2008); *See* Fed. Reg. 72326 (2008).

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I. NHTSA Is Not Authorized to Preempt State Tort Law Claims When Promulgating Safety Rules

NHTSA has repeatedly asserted that their vehicle safety standards may preempt state tort law pursuant to the Supreme Court's decision in *Geier*.[3] NHTSA's application of the law has been inaccurate and should be reevaluated.

A. *Geier* Does Not Apply to All Federal Motor Vehicle Safety Rules

Geier is an unusual, fact-driven case which cannot be used to establish preemption of state tort law for all NHTSA motor vehicle safety rules. The courts have found that the existence of a Federal Motor Vehicle Safety Standard on a specific topic, does not automatically preempt related common law tort claims against automobile manufacturers.[4] Rather than preempting state tort law claims, the standards contain a limited conflict-preemption provision that confirms that the federal standard's mandatory minimum safety requirement may not be compromised.[5] Courts have also noted that "as *Geier's* interpretation of the savings clause makes clear, a uniform minimum safety standard is not normally intended to preempt more stringent common law requirements."[6] Further, the *Geier* Court stated, "We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort

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[3] In fact, as a result of President Obama's preemption memorandum, NHTSA should reevaluate all regulations issued in the last ten years that purport to preempt state law in order to determine whether any preemption is legally justified. Memorandum for Heads of Executive Departments and Agencies: Preemption, 74. Fed. Reg. 24693 (May 20, 2009).

[4] The Fifth Circuit in *O'Hara v. General Motors*, found that FMVSS 205, which sets requirements for the glass used in automobile windows, simply creates a minimum safety standard and is not inherently tied to any policy that would be frustrated by common law claims for defective design, manufacture, or marketing. *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007). In addition, the Eighth Circuit in *Harris v. Great Dane Trailers, Inc.* found that Federal Motor Vehicle Safety Standard FMVSS 108, which sets forth vehicle lighting standards, did not preempt state tort law claims against automobile manufacturers for failing to mark vehicles with sufficient reflectors to ensure nighttime visibility. *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398 (8th Cir. 2000). Similarly, the district court in *Dancer v. Dorsey Trailer, Inc.,* also concluded that FMVSS 108 did not preempt common law suits for defective vehicle design. *Dancer v. Dorsey Trailer, Inc.*, 1992 U.S. Dist. WL 76981 (D. Pa. 1992).

[5] *Harris*, 234 F. 3d at 402.

[6] *Id*; *Dancer v. Dorsey Trailer, Inc.* 1992 U.S. Dist. WL 76981 (D. Pa. 1992).

actions, in such circumstances."[7] As such, NHTSA cannot use *Geier* as a blanket rationale to preempt state tort law for all motor vehicle safety rules.

B. Federal Law Has Maintained a Presumption Against Preemption

The *Geier* case respresents a narrow and singular exception to the long-standing presumption that state tort law is not preempted by federal regulations. Since *Geier*, the Supreme Court has been hesitant to find the existence of conflict preemption. Most recently, the Court in *Wyeth v. Levine* found that state tort law claims were not preempted by Federal Drug Administration labeling regulations. The Court stated, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[8] Additionally, the Court noted that while it may be appropriate to give deference to the Agency's views of the proper construction of its regulations, the Court should not defer to an Agency's view on the preemptive effect of its regulations.[9] For this reason, NHTSA should not be opining on preemption at all.

Also, the Supreme Court in *Bates v. Agrosciences LLC* stressed the requirement that a court reviewing a preemption claim must begin its analysis with the "basic presumption against preemption."[10] The Supreme Court also has held that the finding of conflict preemption requires the existence of a legal conflict.[11] Therefore, it would be inappropriate to rely on *Geier* for conflict preemption without the existence of a direct conflict on the record.

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[7] *Geier*, 529 U.S. at 863.

[8] *Wyeth v. Levine*, 129 S.Ct. 1187,1190 (2009) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)).

[9] *Id.*

[10] *Bates v. Agrosciences LLC,* 544 U.S.C. 431, 449 (2005). *See id.* At 455 (stating that the Supreme Court is becoming increasing[ly] reluctan[t] to expand federal statutes beyond their terms through doctrines of implied preemption."). This reluctance reflects that preemption analysis is not "'a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,' but an inquiry into whether the ordinary meanings of state and federal law conflict." *Id.* at 459 (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n.*, 505 U.S. 88,111 (1992)).

[11] *See, e.g., Medtronic v. Lohr,* 518 U.S. 470, 511 (1996).

Given the narrow *Geier* holding, the Supreme Court's decision in *Sprietsma v. Mercury Marine*[12] is a more appropriate case to determine whether a rule preempts state tort law. *Sprietsma* interprets a savings clause which is similar to the savings clause included in the National Traffic and Motor Vehicle Safety Act (NTMVSA).[13] In *Sprietsma* the court found that it is "perfectly rational" to preempt state standards but not common law claims, which "perform an important remedial role in compensating victims."[14] The Court stated that "compensation is the manifest object of the saving clause, which focuses not on state authority to regulate, but on preserving 'liability at common law or under State law'" and that, "in context, this phrase surely refers to private damages remedies."[15] This same principle should hold true for regulations promulgated pursuant to the NTMVSA.

C. Neither the President Nor Congress Approves of NHTSA's Attempts to Preempt State Tort Law

On May 20, 2009, President Obama issued a policy memorandum that stated that preemption should only be used when there is a sufficient legal basis to do so.[16] In addition, the memorandum the noted that agencies should not attempt to preempt state law through regulatory preambles except where preemption provisions are also included in the codified regulation.[17] Thus, NHTSA should refrain from using any further preemption language in regulatory preambles unless President Obama's conditions are met.

Furthermore, during past rulemakings, Congress also disapproved of NHTSA's attempts to preempt state tort law claims. At a Senate hearing in 2008 on Passenger Roof Strength, both Democratic and Republican Senators objected to the Agency's policy of including language regarding the preemption of state tort law in the preambles to proposed and final safety standards. Senator Tom Coburn (R-OK) and Senator Mark Pryor (D-AR) both questioned whether preemption of state tort law claims was the in the public interest, with Senator Coburn stating preemption "would be a major setback to

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[12] 537 U.S. 51 (2002).

[13] 49 U.S.C. § 301 *et. seq.* This occupant protection standard was promulgated based on Safety Standard 2008, included in this Act.

[14] 537 U.S. at 64.

[15] *Id.* (quoting 46 U.S.C. § 4311(g)).

[16] Memorandum for Heads of Executive Departments and Agencies: Preemption, 74. Fed. Reg. 24693 (May 20, 2009).

[17] *Id.*

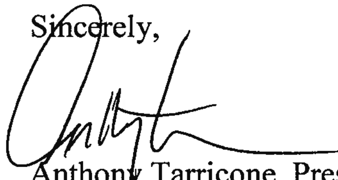
vehicle safety."[18] In addition, both the House and the Senate sent written requests to NHTSA, objecting to the use of preemption language in rulemakings. The Senate letter stated that the preemption language "would constitute an unprecedented incursion upon the constitutional rights of consumers, who will remain uncompensated for the needless deaths and injuries that occur due to the foreseeable negligence of manufacturers."[19]

D. Preemption of State Law Tort Claims is Detrimental to Public Safety

Lastly, preemption of state tort law claims related to vehicle safety standards is a significant detriment to the general public. It is a considerable abridgement of individual constitutional rights and results in a reduction in safety of vehicles. Additionally, when state tort laws are preempted, countless individuals are unable to pursue compensation for deaths and injuries caused by automakers' defective design and manufacturing. Moreover, vehicle automakers are left with little incentive to address these design and manufacturing defects. As a result, NHTSA should reevaluate its position on preemption of state tort law in future rulemakings.

AAJ appreciates this opportunity to submit comments in response to the Agency's request for comments for regarding strategic planning. If you have any questions or comments, please contact Sarah Rooney, AAJ's Regulatory Counsel at (202) 944-2805.

Sincerely,



Anthony Tarricone, President
American Association for Justice

[18] *Oversight Hearing on Passenger Vehicle Roof Strength: Hearings Before the Subcomm. On Consumer Affairs, Insurance, and Automotive Safety of the S. Comm. On Commerce, 110th Cong. (2008).*

[19] Letters from Sens. Mark Pryor, Tom Coburn, and Daniel Inouye to Secretary Mary Peters Re: Federal Motor Vehicle Safety Standard (FMVSS) No. 216 (June 19, 2008).