

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FREIGHTLINER CORPORATION, ET AL., Petitioners
v. BEN MYRICK, ET UX., ET AL.

CASE NO: No. 94-286

PLACE: Washington, D.C.

DATE: Wednesday, February 22, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FREIGHTLINER CORPORATION, :

4 ET AL., :

5 Petitioners :

6 v. : No. 94-286

7 BEN MYRICK, ET UX., ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, February 22, 1995

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:10 a.m.

14 APPEARANCES:

15 CHARLES FRIED, ESQ., Cambridge, Massachusetts; on behalf
16 of the Petitioners.

17 MICHAEL H. GOTTESMAN, ESQ., Washington, D.C.; on behalf of
18 the Respondents.

19 PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the United States, as amicus curiae,
22 supporting the Respondents.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 94-286, Freightliner Corporation v. Ben
5 Myrick. Mr. Fried.

6 ORAL ARGUMENT OF CHARLES FRIED

7 ON BEHALF OF THE PETITIONERS

8 MR. FRIED: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 In these two consolidated cases, the Eleventh
11 Circuit overruled its own prior decision in Taylor v.
12 General Motors, an airbags case, to hold that conflict
13 preemption may not be implied under the Safety Act.
14 Thereby, it reversed grants of summary judgment in two
15 district courts below and allowed the plaintiffs, the
16 respondents here, to claim that under Georgia tort law it
17 may be claimed to be a design defect for manufacturers not
18 to incorporate antilock devices in their airbrake systems.

19 Though the First, Third, and Tenth Circuits,
20 like the Eleventh Circuit, had held previously that
21 conflict preemption may be implied under the Safety Act,
22 the Eleventh Circuit believed that this Court's decision
23 in Cipollone v. Liggett Group required a different rule
24 because there had been express attention to the subject of
25 preemption in the act, thereby virtually foreclosing any

1 further inquiry into implied or conflict preemption.

2 We believe that is wrong, and that express
3 preemption does not virtually foreclose inquiry into
4 implied preemption. We also believe that it is wrong to
5 say that section 39 -- 1397 saves inconsistent State law,
6 including tort law.

7 Before explaining why there is indeed an
8 incompatibility here between allowing a Georgia jury to
9 find a design defect and the Safety Act, I'd like to say
10 just one very brief word about why the Eleventh Circuit
11 rule is surely incorrect. If that rule were correct, then
12 it would compel Congress, every time it legislates, to add
13 a "we mean it" clause, a clause which says, and, of
14 course, we preempt all inconsistent and incompatible State
15 law. Such a boilerplate clause would add nothing to the
16 Supremacy Clause, nor would it subtract anything from the
17 burdens on this Court, the task of this Court, in
18 determining what State laws are and are not incompatible.

19 QUESTION: Mr. Fried, even if we accept your
20 position on that, we have here an express preemption
21 clause, as I understand it, and it preempts State
22 standards applicable to a particular aspect of performance
23 addressed by a Federal standard that is in effect, and as
24 I understand it, there is no Federal standard in effect
25 now on antilock brakes, and how can there be express

1 preemption? How do we even get that far?

2 MR. FRIED: Well, there --

3 QUESTION: There just isn't a Federal standard.

4 MR. FRIED: That is the contention principally
5 urged by the Solicitor General, and we believe that is
6 incorrect. The case which most compelling is brought to
7 mind was actually cited by respondents' amici ATLA.

8 That's the Ilsa Petroleum case, in which this
9 Court said that a preempted inference is not to be drawn
10 by inaction alone, to be sure, but from inaction joined
11 with action, and what I'd like to do is indicate to you
12 that there was in this case both action and inaction, and
13 that those two together in fact constitute a Federal
14 determination that it is dangerous -- not simply
15 unwarranted, but dangerous, or potentially dangerous, to
16 require the incorporation of antilock brakes in --
17 antilock devices in airbrake systems.

18 QUESTION: Mr. Fried --

19 QUESTION: Well, if the Federal Government had
20 never had any regulation in effect at all dealing with
21 antilock brakes, would there be any reason to think the
22 express preemption clause is invoked here?

23 MR. FRIED: There would not. That would not,
24 but that --

25 QUESTION: And you rely on the history of what

1 happened, I gather.

2 MR. FRIED: No. We rely on the history, but
3 also on the text of the present standard 121. It's the
4 Solicitor General who asks us to read 121 as if the
5 subject of antilock devices had not been addressed, but
6 that is simply wrong. The subject is addressed. It's
7 addressed in two places in the present standard. It is
8 addressed first --

9 QUESTION: Mr. Fried, why shouldn't we accept
10 the administrator's determination of what the status of
11 regulation is? If your reading is plausible, and their
12 reading is plausible, and they are telling us that the
13 expert administrator says, in effect, there is no Federal
14 standard, why don't we owe that position deference?

15 MR. FRIED: the administrator is owed deference
16 because of the administrator's expertise. The
17 administrator has expertise in safety matters. That
18 expertise led the administrator to conclude in 1978 and
19 before, that it is safe and required -- and appropriate to
20 require antilock devices.

21 That judgment was reversed. That judgment was
22 rejected by the courts, and certiorari was granted here.
23 I believe that at that point any deference due to the
24 administrator was exhausted. The administrator --

25 QUESTION: Mr. Fried, I just don't think that's

1 true, that we only accord deference to agency officials in
2 their areas of expertise. We certainly accord deference
3 to an agency officer as to the meaning of that agency's
4 regulation. Now, that's a preeminently lawyer's type
5 question, what the text of a regulation means. It has
6 nothing to do with being a -- you know, an expert about
7 technical safety matters. It's just what the meaning of
8 the regulation is.

9 MR. FRIED: Well --

10 QUESTION: We accord deference.

11 MR. FRIED: On that, let's turn to the meaning
12 of the regulation, because there is -- if there is
13 deference to be paid, I think that deference cannot carry
14 all the way to the conclusion which respondents and the
15 Solicitor General seek, because in this case there was a
16 federally mandated process, and the outcome of that
17 process was the removal, and that removal is textual.
18 It's not just a hole. It's not just like the air in the
19 souffle. It's there. It's on page -- I don't have the
20 page, but it's S3 of the regulation. It says --

21 QUESTION: Where do we find that?

22 MR. FRIED: In the lodging, Your Honor. It's
23 not -- it was subsequently lodged with the Court to --
24 it's referred to in the briefs, but the actual regulation
25 we lodged subsequently with the Court, on page 377 of that

1 lodging, but it simply says, and it is quoted in all the
2 briefs, that notwithstanding the provisions which in
3 effect, to use the Solicitor General's phrase, in effect
4 impose an antilock device requirement, notwithstanding it,
5 that requirement is removed. So that's there, in the
6 text.

7 Now, there is further addressing of anti --

8 QUESTION: I still don't quite understand,
9 Mr. Fried, just following up with -- you were interrupted
10 on -- you were going to quote something that was in
11 writing that was in place now, that preempts the State --

12 MR. FRIED: Yes, Your Honor.

13 QUESTION: Is that what you just referred to?

14 MR. FRIED: No. I'm going to refer to another
15 provision as well, which I'm frank to say we didn't focus
16 on until late in the game, but the respondents cite it on
17 page 9, footnote 8 of their briefs, and that is Standard
18 S5.5.1 on page 383 of the lodging.

19 Now, that standard --

20 QUESTION: That is footnote 8 on page 9 of the
21 respondent's brief?

22 MR. FRIED: That is correct. That is correct.
23 I hope I've got the -- yes, that's right. That refers to
24 S5.5.1, and what that standard says is that if you are
25 going to put antilock devices in your airbrake systems,

1 then they may not degrade the total performance of the
2 system.

3 QUESTION: I find this quite unsatisfactory,
4 Mr. Fried, that things that seem to be at the core of the
5 case were either lodged or are in the footnote in someone
6 else's brief.

7 MR. FRIED: I wish it had been otherwise,
8 Mr. Chief Justice.

9 QUESTION: Is it your position, Mr. Fried, that
10 if a truck had airbrakes on it, and there was an accident,
11 that the Federal standard could be used or argued to a
12 jury as evidence that it was unsafe?

13 MR. FRIED: It could be used if it violated
14 5.5.1 as set out by the respondents. That is to say, if
15 the device --

16 QUESTION: Well, suppose it didn't?

17 MR. FRIED: Oh, if it did not, then that, too,
18 would be preempted.

19 Just like Georgia cannot say it is a design
20 defect not to incorporate antilock devices, even though
21 the basis of the Federal determination was that it is
22 dangerous to have such a requirement, so Florida, let's
23 say, to give an example, could not say it is a design
24 defect for manufacturers to incorporate properly
25 functioning antilock devices which nevertheless, because

1 of driver error or maintenance problems, which are the two
2 things that plague these devices, has led to an accident.
3 Either way --

4 QUESTION: But it seems to me that indicates
5 there's an absence of a safety standard. The act requires
6 that there is preemption if there is a safety standard in
7 place, but this is an absence of a standard.

8 MR. FRIED: There is -- Standard 121,
9 altogether, is a comprehensive design and performance
10 standard. It is not just a performance standard. It has
11 many elements of design, and altogether it says what
12 constitutes minimally acceptable airbrake systems.

13 QUESTION: Well, it is with respect to airbrake
14 systems, but it's not comprehensive with respect to the
15 vehicles upon which an airbrake system may be installed.
16 There's nothing comprehensive -- it is expressly
17 noncomprehensive with respect to them, and it seems to me
18 that's the point that we have to focus on.

19 MR. FRIED: An antilock device becomes part of
20 an airbrake system. It is integral to the airbrake
21 system. It isn't --

22 QUESTION: Well, it may do so, but the only word
23 from the National Government with respect to them, by the
24 National Government's own text, does not apply to trucks
25 and trailers.

1 I will stipulate to the comprehensiveness of the
2 regulation with respect to those vehicles that it has
3 application to, but the point that seems to be dispositive
4 to me is, it doesn't apply to these vehicles, therefore
5 there can't be express preemption, and I would suppose, a
6 fortiori, there can't be implied preemption.

7 MR. FRIED: Oh, the difficulties that are being
8 raised apply as well to implied preemption, that is
9 correct, but what one has to do is consider what the
10 Federal Government has done and why it has done it.

11 QUESTION: No, but no matter how comprehensive
12 the regulation may be with respect to those vehicles that
13 it covers, it is neither comprehensive nor even, if you
14 will, in existence with respect to those vehicles that it
15 does not cover, so I'm missing your point here. I don't
16 see the relevance of arguing the comprehensiveness of what
17 it says when it applies to the question of whether it
18 applies to these trucks and trailers, which by its express
19 terms, it does not.

20 MR. FRIED: Well, it does apply to all trucks
21 and trailers, including those that incorporate antilock
22 devices, because those antilock devices cannot, if they're
23 functioning properly, bring -- the malfunctions in them,
24 rather than maintenance and driver mistakes, cannot bring
25 the performance of the rest of the system below the

1 prescribed minimum. So it addresses that.

2 QUESTION: But I'm focusing on the text of the
3 amendment. What was the text of the amendment?

4 MR. FRIED: Well, the provision I've been citing
5 to you is in the standard as it is now in operation, and
6 the amendment withdrew the requirement of having that
7 device in all airbrakes.

8 Now, it seems to me important to ask, why did it
9 withdraw that requirement, if the reason it was withdrawn
10 has to do with the safety concerns of the act, not a
11 concern for uniformity, not a concern simply that the
12 agency hadn't done it's knitting right, hadn't produced
13 the right evidence, but because the record compelled the
14 conclusion that this requirement, as a requirement, is
15 dangerous.

16 QUESTION: Mr. Fried, suppose one were to read
17 this as the agency's responding not to its own better
18 judgment, but to the compulsion of the Ninth Circuit?

19 Forgetting about the deference point that I
20 raised earlier, why isn't the most reasonable reading of
21 what happened here is that the agency is now in the
22 position of saying, well, we're not yet ready to
23 promulgate a final rule on this point because the Ninth
24 Circuit says we have to do a little more work?

25 Why isn't that the most reasonable reading, that

1 they have suspended their judgment. They have not made a
2 judgment that this is unsafe, or that there should be an
3 option, as they made in the case of the airbag/seatbelt
4 regulation?

5 MR. FRIED: Justice Ginsburg, you're quite
6 right, the agency did not in its heart of hearts,
7 expressed in its own news releases, accept the Ninth
8 Circuit's determination. They said, the administrator
9 said, we still think we're right, but the Ninth Circuit
10 said that this thing which you still think is right is not
11 just unwarranted, it is dangerous.

12 QUESTION: Well, let me get to Justice
13 Ginsburg's point in just a slightly different way.

14 Suppose the agency said, we do not -- we have
15 concluded, after looking at the Ninth Circuit opinion,
16 that we do not have sufficient information to rule on this
17 one way or the other. The matter -- the estopping
18 regulation is rescinded, the distance regulation is
19 rescinded for trucks, and we are going to study the matter
20 further.

21 Would that be preemptive of the Georgia rule?

22 MR. FRIED: It would be because the premise was
23 not -- and this is what I have to keep coming back to.
24 the premise of the Ninth Circuit's decision was not,
25 "Look, you don't have a sufficient basis for imposing this

1 requirement," rather, they went further. They say,
2 "Imposing this requirement is dangerous."

3 If they had said, imposing --

4 QUESTION: But it seems to me is what we're
5 interested in is what the agency has done, not what the
6 Ninth Circuit has said, and if the agency, in my
7 hypothetical, has said, "We wish to study the matter
8 further, we do not have information at this time
9 sufficient to make up our mind one way or the other," I
10 find it very difficult to see that that is a safety
11 standard that preempts the Georgia rule, and it seems to
12 me that that is very close to what we have and what
13 Justice Ginsburg was getting at in her question.

14 MR. FRIED: Again, that formulation assumes that
15 the decision forced on a reluctant agency was a decision
16 that what you've done here is simply not sufficiently
17 justified, rather than a decision which was at the heart
18 of the safety concerns -- that is to say, what you have
19 done here is dangerous, and the agency, of course, has had
20 the matter under continual review ever since.

21 Congress has urged it, in both 1988 and 1991, to
22 hurry up its review. In 1992, they issued a notice of
23 proposed rulemaking, but the agency record and the agency
24 materials which are cited in our brief over and over again
25 state that there are still grave problems about these

1 devices, and these problems are not the problems of cost.

2 QUESTION: But that's not a standard.

3 MR. FRIED: What is a standard is 121 as a
4 whole, and 121 as a whole tells you what are minimally
5 safe airbrake systems, and those minimally safe airbrake
6 systems do not, cannot be compelled to include antilock
7 devices because it is dangerous. That is our view of what
8 the standard is at this moment.

9 QUESTION: You're saying it's just as clear as
10 if it in so many words said, you may not use antilock
11 brakes.

12 MR. FRIED: Oh, no, they do say you may use
13 them.

14 QUESTION: Oh.

15 MR. FRIED: You may use them if, when properly
16 functioning, they don't degrade the rest of the system.
17 You may use them.

18 There are three kinds of problems that were
19 experienced with the antilock devices. One problem was
20 electrical failures. For instance, you'd pass a radar,
21 and the radar would cause this device, which is an
22 electrical device, to put on the antilock brake when you
23 don't want it, or perhaps to remove it.

24 The second kind of failure was maintenance
25 problems. The third was driver reactions, the same

1 problem which caused the administrator just recently to
2 withdraw notice of proposed rulemaking on automobile
3 antilock brakes. Now --

4 QUESTION: You're saying it's as though the
5 statute said, or the regulation, you may not use them if
6 they have this degrading consequence.

7 MR. FRIED: If they have this degrading
8 consequence --

9 QUESTION: -- you may not use them.

10 MR. FRIED: You -- I believe that --

11 QUESTION: That's what they in effect said.

12 MR. FRIED: Oh, well they -- it's not as if. It
13 says that in so many words.

14 QUESTION: But does it say they all have this
15 consequence?

16 MR. FRIED: No, they don't. They say, if they
17 do.

18 QUESTION: Well, what about the systems at issue
19 in this case? Do they have that consequence?

20 MR. FRIED: Well, there are no -- these trucks,
21 which were manufactured --

22 QUESTION: Oh, they don't have --

23 MR. FRIED: They don't have -- they do not have
24 the devices.

25 The point that I'm making --

1 QUESTION: If you could show that they would
2 automatically have the consequence, you wouldn't have to
3 reply upon this regulation anyway, because you would show
4 that it's not negligence to have them.

5 QUESTION: Yes.

6 QUESTION: If they all have that consequence, it
7 couldn't possibly be negligence, so --

8 MR. FRIED: Oh, we don't -- we could not say
9 that they do all have that consequence.

10 QUESTION: Well, if you can't say that, then you
11 cannot say that this regulation in effect prohibits the
12 use of antilock brakes.

13 MR. FRIED: I mentioned the three kinds of
14 difficulties, because 5.5.1 addresses only the first. The
15 maintenance problems and the driver response problems,
16 which are grave, and which the agency in its technical
17 reports continuously refers to, those persist, and when I
18 answered Justice --

19 QUESTION: Yes, but if you have the driver
20 response problem, wouldn't that apply to any system?

21 MR. FRIED: No. It's possible that one day
22 there will be a system design such that drivers will
23 respond properly.

24 QUESTION: Well, what if the plaintiffs alleged
25 in this case that such a system is now available, and you

1 were negligent not to use it? Why is that preempted?

2 MR. FRIED: That is preempted because the
3 judgment that those systems are now available is a
4 judgment which we believe is reserved to NHTSA, the
5 correct place to make --

6 QUESTION: What reserves that judgment to NHTSA?

7 MR. FRIED: 121 as a whole reserves that
8 judgment to NHTSA.

9 QUESTION: And in fact prohibits any use of
10 antilock devices until we say they're okay --

11 MR. FRIED: No.

12 QUESTION: -- is that what you're saying?

13 MR. FRIED: Leaves the option open, and forbids
14 either Georgia or Florida to impose design-defect
15 liability for having them or not having them. That it
16 retain -- in other words, you retain the option. The
17 manufacturers retain the option to put well functioning
18 devices on their trucks.

19 QUESTION: How about devices that do not
20 function well?

21 MR. FRIED: Those are --

22 QUESTION: Do they retain the option to use
23 those?

24 MR. FRIED: No, they are not. Those are
25 explicitly excluded, as respondents point out, by 5.5.1.

1 QUESTION: And it's clear that that excludes
2 only those identified in that --

3 MR. FRIED: Electrical failure. It says,
4 electrical failure, so maintenance problems, driver --
5 inappropriate driver response can't be called electrical
6 failure, that's correct, and so it's the actual
7 functioning of the thing, since it is indeed an electrical
8 device.

9 QUESTION: But Mr. Fried, you concede that if
10 all we ever had here was a notice of proposed rulemaking
11 of the part of 121 that the Ninth Circuit rejected, if all
12 we ever had was that, and the agency never made it a rule,
13 then there would be no argument about preemption, that the
14 States could have their tort law?

15 MR. FRIED: They would not, because there would
16 not have been any occasion for the Ninth Circuit to reach
17 a conclusion on the record as part of the mandated process
18 under the act that such a requirement is a dangerous
19 requirement with which --

20 QUESTION: So everything really hinges -- your
21 argument hinges on the respect that we owe to that Ninth
22 Circuit judgment?

23 MR. FRIED: I believe it hinges more on the
24 respect that the agency owed to that Ninth Circuit
25 judgment. The agency has to operate lawfully, and the

1 Ninth Circuit said it would be unlawful because it's
2 dangerous to require this, and the agency reluctantly, to
3 be sure, respected that judgment. It had no choice.

4 So I say yes, it is the agency to which we
5 point, a reluctant agency, but the agency nonetheless.

6 QUESTION: Well, but the agency just -- when you
7 say respected it, just did the act that it required, but
8 not for the reason that it stated, and it seems to me that
9 it's important to your case to establish not just that the
10 Ninth Circuit's judgment required the elimination of that
11 regulation, but also that it established the reason for
12 the elimination of the regulation, and that just doesn't
13 track. To find the reason for it, we simply look to the
14 Ninth Circuit judgment.

15 MR. FRIED: And that reason is that this
16 requirement --

17 QUESTION: And that is the reason --

18 MR. FRIED: -- is dangerous.

19 QUESTION: And that is the reason the agency
20 eliminated it? Nonsense. The agency eliminated it
21 because it had to.

22 MR. FRIED: But the agency is a law-abiding
23 agency, and therefore it must act pursuant to a judgment
24 of a court of law.

25 QUESTION: It doesn't have to say something is

1 true which it believes is false. You can comply with the
2 judgment of the court even while thinking the court is
3 wrong, can't you? I know a lot of people that lose here
4 that think that.

5 (Laughter.)

6 QUESTION: And they comply nonetheless.

7 MR. FRIED: Well, it is quite interesting on
8 this score that the agency consistently has been unable,
9 and in its technical reports, has been unable to show that
10 the Ninth Circuit was wrong.

11 If I may, I'd like to reserve the balance of my
12 time for rebuttal. Thank you.

13 QUESTION: Very well, Mr. Fried. Mr. Gottesman,
14 we'll hear from you.

15 ORAL ARGUMENT OF MICHAEL H. GOTTESMAN

16 ON BEHALF OF THE RESPONDENTS

17 MR. GOTTESMAN: Chief Justice, may it please the
18 Court:

19 It may be well to recall what this lawsuit in
20 Georgia alleges. It alleges that these two trucks, the
21 trucks that -- one truck that killed Mrs. Lindsey, the
22 other that maimed Mr. Myrick, these two trucks were not
23 designed as safely as they might have been, and it alleges
24 that by the time these two trucks were manufactured, which
25 was many, many years after the record that the Ninth

1 Circuit was reviewing, 7 years in the case of one truck
2 and 12 years in the case of the other, that at that time
3 there were available safe antilock brakes, and that those
4 brakes would have been safer than the brake system that
5 was chosen.

6 Now, at the core of this case, and I think it is
7 reflected by the discussion so far, is the question of
8 whether there is any Federal determination with which this
9 lawsuit, if it were won by the plaintiffs, would conflict,
10 and recall, the plaintiffs haven't won this lawsuit yet.
11 They are going to have to prove that in fact by 1982 or
12 1987 there were, in fact, safety devices that would have
13 made this truck safer with an antilock device.

14 So the preemption issue has to be considered on
15 the hypothesis that such evidence could be presented. If
16 it's not, the Georgia courts are obviously not going to
17 find for the plaintiffs, and so we focus on that question
18 first.

19 Now, the jumping off point is a proposition that
20 all the parties here, including the United States, agree
21 on, and I'll give you the petitioner's formulation of that
22 point, because I think it's one that we all agree on.
23 Conflict preemption could not exist, of course, where
24 there was no Federal determination on the specific
25 subject, so that's the petitioner's formulation of what's

1 involved here.

2 And so the question we have is whether there is
3 a Federal determination on the specific subject of whether
4 antilock brakes are unsafe in cars. Now, there once was a
5 specific judgment. Obviously, the initial regulation by
6 the agency said, you must have them, because we believe
7 they are safer. Plainly, if that regulation had remained
8 in effect, this lawsuit would not be preempted. It would
9 be entirely consistent with the Federal regulation.

10 QUESTION: Mr. Gottesman, strictly speaking,
11 that isn't the question that we granted certiorari on. We
12 granted certiorari on the question of whether, if there is
13 express preemption, there can also be implied preemption.
14 Is it your position that this is one of those anterior
15 questions that has to first be decided before we get to
16 that?

17 MR. GOTTESMAN: We do, Your Honor, for two
18 reasons. First of all, the question presented necessarily
19 subsumes that. It says, whether the act preempts State
20 common law standards that conflict with Federal standards.
21 Implicit is that in the point that they have to, as part
22 of that, demonstrate that there is a conflict.

23 In the brief in opposition at page 26, we
24 expressly pointed out to the Court that it is our
25 contention that there is no conflict, and the proposition

1 made on that point was made actually more broadly in the
2 brief in opposition. Beginning on page 21 is the caption,
3 "Respondent's Common Law Claims Do Not Conflict With the
4 Safety Act, Nor With Standard 121," and on page 26, the
5 precise point that we're making here is made.

6 That is, that the present status of the Federal
7 regulations is that they don't preclude antilock brakes,
8 but they impose no requirement one way or the other, that
9 in that context, there is no conflict if Georgia says
10 well, we encourage you, or at least we will award tort
11 damages against you, if you don't have them.

12 So the issue is properly preserved. It is a
13 ground that would sustain the decision below, and I think
14 really this point is also the point that goes to the
15 question of express preemption. I think the two are
16 really the same, and that is, whether there is, in fact, a
17 conflict between what the State is doing and what the
18 Federal regulations say. Is there a Federal regulation in
19 effect that would be -- would comprehend the point that
20 the Georgia courts are being asked to decide in this case?

21 And the regulation as it presently stands says
22 that as to the aspects of performance which are involved
23 here, the ability of a truck to stop within a certain
24 distance at a certain speed, and the ability to do so
25 without jackknifing or skidding, what is sometimes called

1 vehicle stability, as to those aspects, those were dealt
2 with in the original regulation, and each of the
3 provisions that dealt with those aspects of performance is
4 now declared not to be applicable to trucks and trailers,
5 so the present state of the regulatory record is that
6 there is no regulation that deals with those aspects of
7 performance of trucks, the ones which the Ninth Circuit
8 said effectively required antilock brakes.

9 Now, the petitioners say, well, but that gives
10 us an option. Well, of course it does. Whenever there's
11 no regulation in effect, they -- the Government has chosen
12 not to regulate something, they enjoy the options that all
13 citizens do, to do whatever is not regulated, but that
14 hardly constitutes a Federal interest that Congress would
15 have wanted to preempt, or that it did preempt on the face
16 of this statute.

17 Now, petitioner's argument ultimately depends on
18 its trying to infuse the statement, there is no regulation
19 applicable to trucks and trailers, with the Ninth
20 Circuit's reasons for requiring that they suspend their
21 earlier regulation.

22 Now, the first proposition, of course, is that
23 the Ninth Circuit doesn't have the power to preempt, only
24 the agency does, and the agency has said there's no
25 regulation in effect applicable to trucks and trailers,

1 but the second point is, this is an overreading in any
2 event of what the Ninth Circuit said.

3 The Ninth Circuit said that it was convinced
4 from the record that antilock brakes promised greater
5 safety in trucks, and it said to a large degree, these
6 devices were already perfected. It said, but there were
7 some trucks, a substantial number, for which it was a
8 potential hazard, and it said the reason this regulation,
9 which required all trucks to have safety devices, was --
10 had to be suspended is because it did not distinguish
11 between those on which it was safe and those that were
12 not.

13 You can't have a regulation, said the Ninth
14 Circuit, requiring that all trucks have antilock brakes if
15 some trucks would be potentially dangerous. There had not
16 actually been any injury with these, but there was the
17 "potential" because some manufacturers were saying, "We're
18 having problems."

19 And again, from petitioners' brief, they say,
20 uniform requirements on all trucks in all their variety of
21 configurations is what the Ninth Circuit condemned. You
22 can't have a uniform blanket requirement.

23 So the Ninth Circuit didn't say that antilocks
24 are unsafe on all trucks. It said, they're unsafe on some
25 trucks, and some trucks based on a record that was made in

1 1975, long before these trucks were manufactured.

2 Now, our lawsuit is not seeking a determination
3 that all trucks must have antilocks. Our lawsuit contends
4 that these two trucks would have been safer if they had
5 antilocks. We have to prove that.

6 What the Ninth Circuit said is not at all
7 inconsistent with our proving that. First of all, they
8 recognized even then that many trucks would be safe with
9 antilocks. Secondly, this is 7 and 12 years later, and as
10 everybody's briefs point out, there has been what is
11 called a second generation of antilock devices which are
12 safe.

13 There has been a huge increase in the actual
14 usage by manufacturers of antilock devices, even though
15 they're not required to do so by the present regulation,
16 and so nothing in the Ninth Circuit, even if you were to
17 read the Ninth Circuit opinion as though it, in heightened
18 verbal, appeared here as an explanation for the withdrawal
19 of the regulation.

20 That would suggest nothing that says the Ninth
21 Circuit has any disposition not to recognize this lawsuit,
22 or to find it inconsistent with the Federal interest, and,
23 of course, the interested agencies are here. The
24 interested agency, I should say, NHTSA, is here, telling
25 you that there is no impeding of any kind. There's no

1 express preemption, there's no implied preemption in this
2 case, because there is no Federal interest with which this
3 collides, and there is no regulation on this aspect of
4 performance. We withdrew it.

5 Now, petitioner says, but there's some other
6 provision that says, if you choose antilock brakes, then
7 you must have them conform electrically to what's
8 required, so they say, see, there is some regulation of
9 antilock brakes in this case.

10 But the preemption provision of this statute
11 doesn't say, if they regulate that item of equipment the
12 States can't act. The preemption provision says, if they
13 regulate an aspect of performance of an item of equipment,
14 the State can't act, and in this case, the item of
15 equipment is antilock brakes, and they have not regulated
16 the performance standards that are at issue here.

17 Now, we have not yet gotten to the question of
18 whether the savings clause would in any event sustain this
19 lawsuit even if there were some conflict, but we do want
20 to point out to the Court that the savings clause in this
21 case, by its terms, professed to save any common law
22 liability that manufacturers had. Compliance with this
23 act was not to remove any common law liability, and the
24 legislative history that accompanies that confirms what it
25 says. The legislative history said, now, we --

1 QUESTION: Well, so if there were a Federal
2 performance standard applicable here, is it your position
3 that the savings clause would still preserve this cause of
4 action?

5 MR. GOTTESMAN: Well, we have three -- yes. We
6 have -- well, if there were one applicable to this.

7 We have two points. First, this -- the tort
8 lawsuit is not a safety standard within the meaning of the
9 preemption clause. That's confirmed by the savings
10 clause. That is, with the benefit of the savings clause,
11 we know that's not what they meant by a safety standard, a
12 tort judgment.

13 But beyond that, we do have the savings clause
14 itself which was put in there, and this is not like the
15 Morales case, or the American Airlines case, where you
16 were dealing with a statute that had had a savings clause
17 way back when, when regulating airlines was the vogue, and
18 Congress said, not only are we going to regulate it, but
19 we want not to interfere with any State regulation of
20 airlines, but then 20 years later, Congress came along and
21 said, now we want to deregulate the airlines, and so we
22 want to make it quite clear, we are now going to preempt
23 State regulation, and those unhappy with that reached back
24 to that earlier savings clause, which was not focused
25 specifically on common law lawsuits. It said, all State

1 law is preserved.

2 QUESTION: So if the Federal Government said,
3 there may be no antilock braking system on a truck,
4 everyone would agree that the State cannot have a
5 regulation to the contrary, then?

6 MR. GOTTESMAN: Absolutely.

7 QUESTION: Could a jury find there would be
8 negligence for not having the antibrake system?

9 MR. GOTTESMAN: Well, after first saying that's
10 not this case, our strongest position would be yes. When
11 I say strongest, our most --

12 QUESTION: Most extreme --

13 MR. GOTTESMAN: -- advanced position, yes, and
14 it would be yes because that is what the plain language of
15 the statute says.

16 QUESTION: Well, that's what I wanted to focus
17 on. It says that common law liability will exist, but
18 that's different from saying that the State is free to set
19 the standard for what the negligence is.

20 MR. GOTTESMAN: Well, I think when you read the
21 language, the language says, compliance will not exempt
22 them from any common law liability, any common law
23 liability, and you read the legislative history of the
24 people who both wrote it and who were the conferees
25 adopting it. What they have said is, we do not mean this

1 to have any effect on tort liability.

2 QUESTION: But common law liability doesn't
3 necessarily include the formulation of the standard of
4 care.

5 MR. GOTTESMAN: Well, Your Honor, I think it
6 does --

7 QUESTION: This is the extreme that we're
8 talking about.

9 MR. GOTTESMAN: Well, it is the -- I don't --
10 that was the Chief Justice's characterization.

11 QUESTION: You're -- I think you're saying it
12 doesn't necessarily. Of course not, but the only reason
13 to have this provision is to cover that element of the
14 common law that does. I mean --

15 MR. GOTTESMAN: Is to have which provision, the
16 savings clause, or --

17 QUESTION: The common law liability provision.

18 MR. GOTTESMAN: Yes.

19 QUESTION: Of course, common law liability
20 includes a lot of things. It includes standards, it
21 includes --

22 MR. GOTTESMAN: Yes.

23 QUESTION: -- procedures, and all sorts of
24 things.

25 MR. GOTTESMAN: The standards of care are

1 apart --

2 QUESTION: But since we're dealing with a
3 statute that issues standards, this thing must be
4 addressing common law liability insofar as liability is
5 based on standards, otherwise it's meaningless.

6 MR. GOTTESMAN: Well, that's right.

7 QUESTION: It would be like saying, compliance
8 with the motor vehicle safety standard will not permit a
9 10-person jury. It would make no sense. It must be
10 addresses as standards, don't you think?

11 MR. GOTTESMAN: Well, it isn't --

12 QUESTION: So why is that an extreme position?

13 MR. GOTTESMAN: Well, as I say, that was not my
14 characterization. I said it was our strongest --

15 (Laughter.)

16 MR. GOTTESMAN: -- our most far-reaching
17 characterization of the statute, and I want to -- if you
18 could just automatically assume at the end of every third
19 sentence there is, this is not this case --

20 (Laughter.)

21 MR. GOTTESMAN: But the argument that is made by
22 petitioners is that Congress can't have meant that. That
23 would be absurd, to allow the States to compensate people
24 on the theory that they obeyed a requirement of a Federal
25 law, and there is, to be sure, an absurdity exception to

1 the plain language reading of the statute, but I want to
2 suggest that this is not absurd.

3 This Court has repeatedly written opinions in
4 which it has demonstrated an understanding that there is a
5 difference between an actual prohibition on conduct and
6 simply compensating people who are being hurt.

7 In Silkwood, all nine justices -- and there was
8 no savings clause there, but all nine justices said, we
9 start with the presumption that Congress doesn't mean to
10 take away common law compensation if it doesn't provide
11 any, and it's going to take heavy --

12 QUESTION: Yes, but let me -- can I just
13 interrupt? It seems to me there's a vast difference
14 between a regulation that sets a minimum standard on the
15 one hand, and one can say, well, that doesn't preempt
16 common law liability for imposing an even tough standard
17 on the one, but if you had an express prohibition in a
18 Federal statute or standard saying you can't use antilock
19 brakes --

20 MR. GOTTESMAN: Well --

21 QUESTION: -- do you think a State could --

22 MR. GOTTESMAN: No, of course they can't have an
23 express prohibition, but a tort action is not.

24 QUESTION: That's exactly what I thought Justice
25 Kennedy gave you.

1 MR. GOTTESMAN: Yes -- oh, well, I'm sorry. The
2 tort action is not an express prohibition.

3 QUESTION: No, no, no. No, the express
4 prohibition in the Federal statute saying you may not use
5 antilock brakes. Do you think you could -- Georgia could
6 impose liability saying you were negligent because you did
7 not violate the Federal statute?

8 MR. GOTTESMAN: I think that is what the plain
9 meaning of the statute says, and there is not an
10 inconsistency. Georgia obviously can't tell them we're
11 going to put you in jail.

12 QUESTION: Sure there's an inconsistency.
13 They're making a violation of -- they're making people --
14 requiring people to violate Federal law.

15 MR. GOTTESMAN: No, they're not. People can't
16 violate the Federal law. If they violate the Federal law,
17 their trucks will be removed from the road, they will be
18 hit with heavy civil penalties, and they'll have to recall
19 every truck. That's what the statute says. They can't
20 violate the Federal law. They must obey the Federal law.

21 QUESTION: But then --

22 MR. GOTTESMAN: But then they have to compensate
23 the people they hurt, that's all.

24 QUESTION: Well, but it's just -- in that case,
25 it would be the jury setting up a standard that is totally

1 in conflict with the Federal law. The Federal law says,
2 antilock -- you must have antilock brakes or you must not
3 have them, and the jury is saying something different.

4 MR. GOTTESMAN: Well, there would be a
5 disagreement about standards, but there would not be a
6 conflict in -- there would be no threat to the Federal
7 interest, which is what preemption is all about.

8 Nobody is going to violate an absolute command
9 of the Federal requirement. They're just going to have to
10 compensate, that's all. And so it's not absurd, and it's
11 indeed consistent with what this Court did both in
12 Silkwood and in Goodyear Atomic v. Miller. It recognized
13 the Congress may want to have exclusive regulation.
14 You've got to do it our way, but we don't mind if the
15 State compensates people.

16 QUESTION: But you're inserting, that's not this
17 case.

18 (Laughter.)

19 MR. GOTTESMAN: Yes, repeatedly, every third
20 sentence.

21 (Laughter.)

22 MR. GOTTESMAN: It is our position that
23 obviously that is not this case. There's no conflict at
24 all.

25 QUESTION: Wouldn't it be --

1 MR. GOTTESMAN: There's no express preemption.
2 There's no -- we don't need the savings clause in this
3 case.

4 QUESTION: But Mr. Gottesman, on the case that's
5 not this case, wouldn't it be a powerful, strong defense
6 on the part of the manufacturer to say, we had to have
7 this device under Federal compulsion?

8 MR. GOTTESMAN: Well, of course, no judge in any
9 State in this Union would let that case get to a jury.
10 Let's be clear about that. The test is whether the
11 manufacturer behaved reasonably.

12 That's the test under both causes of action in
13 Georgia. That's the test for design defects in every
14 State, and nobody -- I think there's probably not a
15 decided case in history that has held somebody to have
16 behaved unreasonably because they obeyed a Federal
17 statute.

18 QUESTION: I think I could find some.

19 MR. GOTTESMAN: Yes?

20 (Laughter.)

21 MR. GOTTESMAN: Well, I want to qualify what I
22 just said.

23 (Laughter.)

24 MR. GOTTESMAN: I hope not in Arizona, Your
25 Honor.

1 QUESTION: That's not this case.

2 (Laughter.)

3 MR. GOTTESMAN: That's not this case, Your
4 Honor.

5 Thank you.

6 QUESTION: Thank you, Mr. Gottesman.

7 Mr. Wolfson, we'll hear from you.

8 ORAL ARGUMENT OF PAUL R. Q. WOLFSON

9 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING THE RESPONDENTS

11 MR. WOLFSON: Mr. Chief Justice, and may it
12 please the Court:

13 On the implied preemption point, the Department
14 of Transportation, the NHTSA, perceives no conflict
15 between its own lack of regulation of antilock brakes, and
16 the Georgia tort law that is relied on by respondents, and
17 NHTSA does not construe its own Federal safety standards
18 either in this case or generally as conferring this
19 federally protected immunity from State tort judgments.

20 On the express preemption case, NHTSA believes
21 that, first, Congress did not intend the preemption clause
22 of the saving act -- of the Safety Act to reach tort
23 liability and, second, that even if tort suits are
24 covered, that Georgia law would not be preempted in this
25 case because the law would not relate to an aspect of

1 performance of the standard, covered by a standard that is
2 in effect.

3 Section 1397(k) makes clear that Congress did
4 not intend the Safety Act's preemption clause to reach
5 common law liability. Congress enacted that saving clause
6 specifically to preclude the argument that compliance with
7 Federal standards would provide a defense as a matter of
8 Federal law to State common law liability, but that is
9 essentially what the petitioners are asking for here,
10 albeit in the guise of preemption, and Congress did draw a
11 distinction between the State-imposed prescriptive
12 standards, which were preempted, and the State-imposed
13 tort liability, which was not.

14 That is the best explanation for the enactment
15 of the saving clause, and really, petitioners have offered
16 no alternative explanation for why Congress would have
17 enacted it, or any alternative interpretation of the
18 saving clause.

19 There is also what we conceive to be the
20 narrower ground for why Georgia tort law would not be
21 preempted in this case expressly, and that is, even the
22 preemption clause applies only when there's a Federal
23 standard in effect and when the State standard governs by
24 the same aspect of performance that is regulated by that
25 Federal standard.

1 NHTSA does not have, in effect, any safety
2 standard that either requires or prohibits the
3 installation of antilock brakes in trucks, and it also
4 does not have in effect any Federal standard that does the
5 same thing indirectly, as was originally conceived, such
6 as by regulating stopping distances or vehicle stability
7 requirements in trucks.

8 The petitioners' argument, which is essentially
9 that what NHTSA has left unregulated is a form of
10 regulation, is really quite inconsistent with the way that
11 NHTSA perceives its role under the Safety Act. NHTSA's
12 function under the Safety Act is to set minimum standards
13 of performance, and generally speaking the regulatory
14 scheme does not provide that anything that is not
15 regulated is regulated, that there is this federally
16 protected option to avoid further State regulation or
17 State liability.

18 In this particular case, in the area of antilock
19 brakes, this is simply an area that, as of now, NHTSA has
20 left unregulated, and until it does step in, the States
21 are free to fill that regulatory gap either by
22 prescriptive standards or by an enactment of State -- or
23 by the implementation of State tort liability, which is
24 what the respondents are asking for here.

25 QUESTION: Mr. Wolfson, I gather from what

1 you've said that you do take the -- or, the Government
2 does take the extreme position that there could be a
3 standard in effect, and nonetheless an individual could be
4 held liable at common law for not violating that standard,
5 for complying with the standard, is that right?

6 MR. WOLFSON: No, I don't think -- I think we
7 would take the position that that should be analyzed as a
8 matter of implied preemption. That is, if the Federal
9 Government had a standard that required a specific --

10 QUESTION: Right.

11 MR. WOLFSON: -- size headrest --

12 QUESTION: Right.

13 MR. WOLFSON: -- and the State standard of
14 care -- if the State sought to essentially premise
15 liability on compliance with a Federal mandate, that would
16 preemptive as a matter of implied conflict preemption.

17 QUESTION: I see. Then what do you think the
18 meaning of the exception for the common law is, for common
19 law liability?

20 MR. WOLFSON: The exception for the common law
21 reaches cases like this.

22 I might say, I think in --

23 QUESTION: They don't need that for cases like
24 this. You're saying there's no standard. I assume that
25 the exception applies only when there's a standard.

1 You're telling us there's no standard.

2 MR. WOLFSON: I think that the Congress put "the
3 saving act" because it thought that with -- the preemption
4 clause standing by itself might be ambiguous on the point,
5 and so the -- and so --

6 QUESTION: Might be ambiguous on the point of
7 whether what?

8 MR. WOLFSON: Tort -- whether common law
9 liability would be considered a standard and thus
10 preempted under 1392, so the saving clause --

11 QUESTION: But you say it is preempted. You say
12 it is preempted impliedly.

13 MR. WOLFSON: It -- a standard -- a State
14 standard -- a State standard when there is a Federal
15 standard in effect, a State prescriptive standard issued
16 by, say, the George Department of Motor Vehicles --

17 QUESTION: Is preempted.

18 MR. WOLFSON: Would be preempted. State tort
19 liability that might achieve similar effect indirectly is
20 not preempted.

21 QUESTION: So your answer is, you can, indeed,
22 be held liable in tort for refusing to violate a Federal
23 standard.

24 MR. WOLFSON: As a matter of implied preemption,
25 you cannot be held liable in tort if that liability is

1 premised on compliance with a Federal mandate.

2 QUESTION: So then you don't think this
3 provision has any effect.

4 MR. WOLFSON: It -- well, the provision says,
5 compliance with Federal standard, but if there's a -- will
6 not provide a defense to State tort liability, but I think
7 if there's a Federal standard that requires obedience to a
8 specific mandate, like a headrest of a specific size, it
9 isn't really --

10 QUESTION: There cannot be common law liability.

11 MR. WOLFSON: Right. It isn't really --

12 QUESTION: Then I really don't know what that
13 provision means. Maybe it means nothing.

14 MR. WOLFSON: Well, it --

15 QUESTION: Well, doesn't it apply in a case of
16 minimum standards?

17 MR. WOLFSON: Yes, exactly.

18 QUESTION: A State standard, common law standard
19 could be a little tougher. The antilock brake standard
20 might require stopping in 10 feet, and they might say,
21 well, you're negligent unless it could stop you in 5 feet.

22 MR. WOLFSON: NHTSA perceives no difficulty with
23 that situation.

24 QUESTION: And I suppose it would apply in the
25 case of an expressly provided option. You may have it or

1 not have it. An express option, as distinct from an
2 option by silence. I suppose it would apply then.

3 MR. WOLFSON: Only -- there would only be a
4 Federal conflict, a conflict with a Federal -- an implied
5 preemption situation if the reason why the option were
6 provided was, as in the airbag case, to preserve a
7 diversity of approaches because NHTSA believed the Safety
8 Act required that.

9 If NHTSA simply says, we're not regulating --
10 we're not requiring you to have this option, we think it
11 might be a good idea, but you go ahead and decide and
12 there are three ways you might accomplish something,
13 that's not really a conflict situation. It's an area that
14 NHTSA has left unregulated, and here, NHTSA has left open
15 to truck manufacturers in some sense the option to install
16 antilock brakes or not to. NHTSA --

17 QUESTION: This is slightly different from the
18 example you just gave, because here, your position, I take
19 it, is what the agency has done is the equivalent of
20 agency silence.

21 MR. WOLFSON: Yes. There is a regulatory gap
22 here.

23 QUESTION: You're expressly saying nothing, if
24 you will.

25 MR. WOLFSON: That's correct, and I might add, I

1 don't think that that silence takes on a different
2 character just because the standard was vacated in
3 response to the Ninth Circuit's decision in --

4 QUESTION: Suppose -- sorry. Suppose it were
5 just what they say it is, which I think it isn't, but
6 suppose it were, that the agency said, we've studied this
7 for 4 years. We're not going to tell you you can't have
8 the brakes. We think maybe you shouldn't. They're very
9 dangerous. We regulate every aspect of this problem but
10 that because we think they're so dangerous, and that's
11 what they say, and that's the rule.

12 Under those circumstances, could juries all over
13 the country say that these things, which NHTSA found very
14 dangerous and therefore left them out, say you have to
15 have them? As I say, I don't know that that is this case,
16 but I think they'd like to make it --

17 MR. WOLFSON: I don't think it is this case, but
18 I think even there the tort suit could go forward.

19 QUESTION: It could go forward. Then why has
20 Congress created an act that's supposed to have safety as
21 its objective if, in fact, the agency specifically defined
22 that this thing is very dangerous, nonetheless the
23 truckers all over the country would have to have them?

24 MR. WOLFSON: In that situation, if the evidence
25 on the rulemaking record was so compelling that NHTSA

1 could have only concluded that the device, the antilock
2 brake device, should be prohibited, then perhaps NHTSA
3 should have issued a standard that prohibited antilock
4 brakes, but --

5 QUESTION: Maybe Congress doesn't trust State
6 regulators. Maybe Congress thinks State regulators are
7 too much under the thumb of automobile manufacturers or
8 some other lobby group, and therefore is unwilling to have
9 its standards preempted by State regulators, but trusts
10 the courts, and thinks that perhaps if a State court as a
11 common law matter wants to set aside a standard, that's
12 another matter. That's a conceivable --

13 MR. WOLFSON: I think there are a number of --

14 QUESTION: -- attitude, isn't it?

15 MR. WOLFSON: I think there are a number of
16 reasonable explanations why Congress drew the distinction
17 between State prescriptive standards and common law
18 liability. Congress might have believed that preempting
19 common law liability would be a greater intrusion under
20 Federalism and State sovereignty because the common law
21 had been in operation for a long period of time.

22 QUESTION: Or that the manufacturers who lost
23 the battle at the Federal regulatory agency will simply go
24 out and fight it State-by-State before the State
25 regulators and get it reversed, and they didn't want that

1 to happen, but they're not worried about the common law
2 reversing it.

3 MR. WOLFSON: That's -- it's a plausible reason
4 for why Congress might have done it, but --

5 QUESTION: Thank you, Mr. Wolfson.

6 Mr. Fried, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF CHARLES FRIED

8 ON BEHALF OF THE PETITIONERS

9 MR. FRIED: Mr. Chief Justice, it is entirely
10 correct that we sort certiorari in this Court on the
11 Eleventh Circuit's rule about implied preemption and that
12 was the only matter as to which there was a conflict
13 between the circuits.

14 Now, the brief in opposition raises the "no
15 conflict" point -- that is to say, no conflict with the
16 Federal determination -- on page 26 simply by a casual --
17 or I -- drop the casual, simply by the statement that
18 since the Federal regulations did not forbid antilock
19 devices, there can be no conflict.

20 Of course, that's not our position. It was not
21 the position of the dissenting judge, it was not the
22 position of the court of appeals, which found there was a
23 conflict, or the district courts.

24 Nevertheless, this is not a case like the one
25 you handed down yesterday. This is not one governed by

1 your Rule 14.1, which deals with the cert position. It's
2 15.1 and, of course, the Court is entirely free to proceed
3 to the no-conflict point if it chooses.

4 Now, it's important to see that the courts, the
5 three courts below did decide this in terms of implied
6 preemption, and did indeed find a conflict.

7 The implied preemption perhaps has some more
8 force to it than the express preemption, because the
9 conflict is with what we insist is a total Federal
10 determination, and that is how this Court had looked at
11 the Ilsa Petroleum case although reaching a difference
12 conclusion, but by language, which supports us and the
13 Atlantic Richfield case, which we cite in our brief, as
14 well.

15 Finally, I should point out that it's not quite
16 accurate to say that NHTSA has said we're not ready yet,
17 not quite yet, but everybody has these. In these -- these
18 trucks were manufactured in '82 and '87. They only began
19 to be offered as -- antilock devices only began to be
20 offered as options after the later truck was manufactured,
21 and presumably because the manufacturers did not believe
22 they could comply until then with 5.5.1, and what's
23 important to see is that NHTSA has continuously, at the
24 highest levels, sought to impose this requirement and
25 continuously been compelled by its own technical people in

1 reports which we cite to you to say that the evidence
2 shows that the problems have not yet been solved.

3 If there are no further questions I thank the
4 Court.

5 QUESTION: I have just one question, Mr. Fried.
6 You cited a case in your first presentation, cited in one
7 of your opponents amicus briefs, and I didn't get the
8 citation.

9 MR. FRIED: Ilsa Petroleum. It's cited in the
10 ATLA brief. That's the case in which the Court spoke of
11 the preemptive smile cannot be there if there is no cat
12 left, but we say there's a cat.

13 Thank you, Your Honor.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fried.
15 The case is submitted.

16 (Whereupon, at 11:10 a.m., the case in the
17 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

FREIGHTLINER CORPORATION, ET AL., Petitioners v. BEN MYRICK, ET UX., ET AL.

CASE NO.:94-286

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

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