

## The Risks of Federal Preemption of State Autonomous Vehicle Regulations

**Overview of risks:** The National Highway Traffic Safety Administration (NHTSA) is unlikely to preempt state regulation in the areas of testing, permitting, licensing, test-driver training, and conditions for the operation of specific types of autonomous vehicles (AVs). It has stated in its 2013 Preliminary Statement of Policy Concerning Automated Vehicles (hereinafter Statement) that states are competent in regulating these areas. However, the Statement implied NHTSA's intention to create broad safety regulations and standards for new AVs and automating equipment, and it put states on not-so-subtle notice that the NHTSA will likely preempt them in this area. There are, however, elements of safety regulation where the NHTSA will seek to work with states – specifically, inspection regimes to monitor after-market modifications that turn traditional cars into AVs. Lastly, the NHTSA has the power to preempt state tort law *only* where it conflicts with a significant regulatory objective. Moreover, the current Administration appears unwilling to preempt state tort law even where such conflicts exist.

**Overview of recommendations:** To minimize the risk of federal preemption of provisions in its draft legislation, the ULC should focus on regulating:

- Testing, test permitting, test-driver licensing, and training programs for test drivers.
- Insurance requirements for manufacturers conducting testing and for the future operators/buyers of AVs.
- AV licensing or “endorsement” regimes for the future operators/buyers of AVs.
- Broad operational requirements for commercially available AVs relating less to safety and more to informing/enabling operators and ensuring compliance with state traffic laws.

### The NHTSA's mandate and scope of authority:

- The NHTSA's purpose and policy is to “reduce traffic accidents and deaths and injuries resulting from traffic accidents.”<sup>1</sup> To achieve this purpose, it has the authority to “prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce.”<sup>2</sup>
- Motor vehicle safety is defined as the “performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.”<sup>3</sup>
- “The agency does not regulate the actions of vehicle owners, the operation of motor vehicles on public roads or the maintenance and repair of vehicles-in-use.”<sup>4</sup>

### Unlikely NHTSA will preempt state regulations surrounding TESTING of autonomous vehicles:

- States can take the lead in regulating testing without much risk of preemption. One of the purposes of NHTSA's Statement was to “recommend[] principles that States may wish to apply as part of their considerations for driverless vehicle operation, especially with respect to testing and licensing.”<sup>5</sup>

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<sup>1</sup> 49 U.S.C.A. § 30101 (West).

<sup>2</sup> *Id.* § 30101(1).

<sup>3</sup> 49 U.S.C.A. § 30102(a)(8) (West) (emphasis added).

<sup>4</sup> Stephen P. Wood et. al., *The Potential Regulatory Challenges of Increasingly Autonomous Motor Vehicles*, 52 SANTA CLARA L. REV. 1423, 1435 (2012).

<sup>5</sup> Statement at 2, [http://www.nhtsa.gov/staticfiles/rulemaking/pdf/Automated\\_Vehicles\\_Policy.pdf](http://www.nhtsa.gov/staticfiles/rulemaking/pdf/Automated_Vehicles_Policy.pdf), (May 30, 2013).



- The NHTSA “believe[s] that states are well suited to address issues such as licensing, driver training, and conditions for operation related to specific types of vehicles . . . [but it] does not recommend at this time that states permit operation of self-driving vehicles for purposes other than testing.”<sup>6</sup>

**Unlikely NHTSA will preempt ADMINISTRATIVE REGULATIONS like licensing, permitting, driver training:**

- The NHTSA appears to have no interest in regulating administrative issues such as “licensing, driving training, and conditions for operation related to specific types of vehicles.”<sup>7</sup> States can, therefore, expect to fully control the permitting for test cars and drivers and the requirements for test-driver training programs.
- At this time, the NHTSA does not believe that AVs have reached the necessary level of sophistication to be “authorized for . . . general driving purposes.”<sup>8</sup> But when AVs have reached that stage, states can expect to exert considerable control in the areas of longer-term licensing or “endorsement” for consumer drivers, similar to the current scope of state highway-safety programs.<sup>9</sup>

**NHTSA is highly likely to preempt most, but not all, SAFETY STANDARD regulations related to AVs:**

- “NHTSA has considerable concerns . . . about detailed state regulation on safety of self-driving vehicles, and does not recommend at this time that states permit operation of self-driving vehicles for purposes other than testing.”<sup>10</sup>
- Safety standards appear to be what the National Traffic and Motor Vehicle Safety Act intended the NHTSA to regulate.<sup>11</sup> A large portion of the Statement is devoted to the NHTSA’s “Research Plan for Automated Vehicles.”<sup>12</sup> The Human Factors Research program has already yielded results,<sup>13</sup> and as funds permit, the NHTSA hopes to complete the first phase of research in three to four years.<sup>14</sup> Upon completion, if the NHTSA determines that “the vehicle or item of equipment falls under [its] authority[,] . . . that there is a safety need, and that the standard will meet that need,”<sup>15</sup> it is likely to promulgate regulations preempting state safety standards.
- NHTSA has the authority to regulate two different areas of safety standards:
  - Safety standards for new vehicles & equipment.
    - Broad statutory definitions give the NHTSA correspondingly broad authority “to issue safety standards that apply . . . to vehicles that were originally manufactured with autonomous capabilities” and to establish standards for “the individual pieces of equipment that . . . enable [AVs] to drive autonomously.”<sup>16</sup>

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<sup>6</sup> *Id.* at 10.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 14.

<sup>9</sup> See generally 23 U.S.C.A. § 402 (West).

<sup>10</sup> Statement, *supra* note 5, at 10.

<sup>11</sup> *Id.* (“NHTSA’s authority, expertise, and mandate is to establish uniform, national standards needed for vehicle safety.”).

<sup>12</sup> *Id.* at 5-9.

<sup>13</sup> See generally NHTSA, *Human Factors for Connected Vehicles: Effective Warning Interface Research Findings*, <http://www.nhtsa.gov/DOT/NHTSA/NVS/Crash%20Avoidance/Technical%20Publications/2014/812068-HumanFactorsConnectedVehicles.pdf>, (Sept. 29, 2014).

<sup>14</sup> Statement, *supra* note 5, at 7-8.

<sup>15</sup> Wood, *supra* note 4, at 1435.

<sup>16</sup> *Id.* at 1439-40.



- “[T]he transition from mechanical to electromechanical systems has had no significant effect on the extent of NHTSA’s authority over motor vehicle performance” because the statutory definitions cover all motor vehicle equipment regardless of the type of technology used.<sup>17</sup>
- Safety standards for after-market technologies and modifications to used vehicles.
  - The NHTSA’s “jurisdiction over after-market equipment is significant in regard to autonomous driving technologies because providers of advanced crash avoidance and autonomous driving technologies might wish to market these technologies for installation on used vehicles.”<sup>18</sup>
  - But NHTSA’s authority diminishes after the first sale where it must work with the states to conduct “periodic inspections to ensure that certain basic safety equipment on vehicles remains intact and functional after vehicles cease to be new.”<sup>19</sup>
  - Given that NHTSA has authority to establish standards applicable to after-market equipment, but has only limited means to regulate modifications made by car owners, it is conceivable that NHTSA will need to work in a type of shared-power regime with states to regulate “after-market modifications.”
- “Until such time as NHTSA has developed vehicle safety standards pertinent to self-driving technologies,”<sup>20</sup> the Agency suggested *basic principles* for things like “safe, simple, and timely” transition from self-driving mode to driver control that states can use to ensure safe operation of AVs.

**The NHTSA may preempt STATE COMMON LAW TORT LIABILITY only if it conflicts with a “significant regulatory objective.” Moreover, the current administration appears unwilling to preempt here.**

- The statutory language is vague regarding NHTSA’s power to preempt state common law:
  - On one hand, the preemption provision of the Safety Act expressly asserts federal authority by stating that “[w]hen a motor vehicle safety standard is in effect under this chapter, a State . . . may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.”<sup>21</sup>
  - On the other, the statute also provides a clause bolstering state tort common law: “Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.”<sup>22</sup>
  - For years, this ambiguous and seemingly self-contradictory setup left courts and the NHTSA struggling to grapple with the exact scope of the intended preemptive power.<sup>23</sup>

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<sup>17</sup> *Id.* at 1441.

<sup>18</sup> *Id.* at 1443.

<sup>19</sup> *Id.* at 1436; see also, U.S. Gov’t Accounting Office, GAO-11-603, *Auto Safety: NHTSA Has Options to Improve the Safety Defect Recall Process*, <http://www.gao.gov/assets/320/319698.pdf>, at 28-30 (June 2011).

<sup>20</sup> *Id.* at 13.

<sup>21</sup> 49 U.S.C.A. § 30103(b)(1) (West) (emphasis added).

<sup>22</sup> *Id.* § 30103(e).

<sup>23</sup> See, e.g., Catherine Sharkey, *Product Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 454 (April 2008) (indicating that Congress failed to address the preemption question through its vague statutory language which left the Supreme Court with inconsistent decisions) [hereinafter Sharkey: *Institutional Approach*].

- Supreme Court precedent indicates that preemption will be found only in the narrow context where the state tort action actually interferes with the achievement of a “significant regulatory objective.”
  - There are two Supreme Court cases that directly outline the NHTSA’s preemption power: *Geier*<sup>24</sup> and *Williamson*.<sup>25</sup>
    - In *Geier*, the defendant challenged a state design defect claim on the ground that such claim was preempted by the provision of Safety Act and Federal Motor Vehicle Safety Standards 208 (FMVSS 208).<sup>26</sup> The Court first concluded that the saving clause removes the state tort action from the scope of express preemption.<sup>27</sup> However, the Court held that the principle of implied conflict preemption still applied despite the saving clause.<sup>28</sup> Ultimately, the Court concluded that the state tort claim conflicted with the regulatory intention to provide manufacturers with options of different choices and was, therefore, preempted.<sup>29</sup>
    - In *Williamson*, the Supreme Court clarified the *Geier* decision by holding that state tort claims do not give rise to conflict preemption when the claim would foreclose a design option permitted under the FMVSS, unless giving the manufacturer a choice is a “significant regulatory objective.”<sup>30</sup> Furthermore, *Williamson* provided a framework that lower courts should utilize to determine whether the “significant regulatory objective” standard is met. Specifically, the court should review (1) the regulation, (2) its history, (3) the agency’s view of the regulation’s objective at the time it was promulgated, and (4) the agency’s current view on the regulation’s preemptive effect.<sup>31</sup>
  - The current Administration appears to be unwilling to preempt state tort law.
    - The *Williamson* case demonstrated that the Court will accord significant deference to NHTSA’s determination of a regulation’s objective in evaluating its preemptive effect.<sup>32</sup> Some commentators went further to argue that an agency’s position on preemption is nearly determinative in the Court’s final decisions.<sup>33</sup> Therefore, it is worth examining the different Administrations’ positions on preemption.
    - After *Geier*, the Bush Administration took a pro-preemption stance and conducted an aggressive preemption campaign to eliminate state common law tort liability.<sup>34</sup> After

<sup>24</sup> *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

<sup>25</sup> *Williamson v. Mazda Motor of Am., Inc.*, 131 S.Ct. 1131 (2011).

<sup>26</sup> *Geier*, 529 U.S. at 865.

<sup>27</sup> *Id.* at 867-68.

<sup>28</sup> *Id.* at 869-70.

<sup>29</sup> *Id.* at 886.

<sup>30</sup> *Williamson*, 131 S.Ct. at 1139-40.

<sup>31</sup> *Id.* at 1136.

<sup>32</sup> *Id.*

<sup>33</sup> See, e.g., Sharkey, *Institutional Approach*, *supra* note 23, at 477; Kelly Savage Day, *Preemption of State-Law Tort Claims: Change of Heart in Federal Agencies*, The WLF Legal Pulse, available at <http://wlflegalpulse.com/2010/10/26/preemption-of-state-law-tort-claims-change-of-heart-in-federal-agencies> (last visited Nov. 4, 2014).

<sup>34</sup> See, e.g., Thomas McGarity, *Curbing Abuse of Corporate Power: The Perils of Preemption*, 44-Sep Trial 20 (2008); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012) [hereinafter Sharkey, *Agency*]; David C. Vladeck, *The Emerging Threat of Regulatory Preemption*, American Constitution Society for Law and Policy, available at <https://www.acslaw.org/files/Vladeck%20Issue%20Brief.pdf> (last visited Nov. 4, 2014); Catherine M.



taking office, President Obama issued a Presidential Memorandum in 2009, in which he condemned the previous Administration's preemption practice and called on all federal agencies to review relevant regulations and decisions within the last ten years.<sup>35</sup>

- In response to the Presidential Memorandum, NHTSA drastically shifted away from its previous pro-preemption position in a series of rulemakings.<sup>36</sup> More notably, in August 2010 the solicitor general, on behalf of NHTSA, submitted an amicus brief to the U.S. Supreme Court in *Williamson*, arguing against preemption.<sup>37</sup> In the brief, the solicitor general outlined a sharply circumscribed view of the implied preemption under *Geier*, whereby NHTSA safety standards should generally be read as minimum standards unless the regulatory history demonstrates the agency's contrary affirmative policy.<sup>38</sup>
- In sum, the Obama Administration has brought a substantial shift in NHTSA policy away from federal preemption of state tort law, and this is likely to hold in the next couple of years for any state tort law related to autonomous vehicles.<sup>39</sup> But, the NHTSA has indicated that the ongoing first phase of its research is unlikely to be completed until 2017.<sup>40</sup> Therefore, NHTSA's ultimate determination on preemption of state tort laws related to AVs may depend on the policy of future Administrations.

### **Recommendations to the ULC on drafting legislation that will avoid substantial federal preemption:**

To avoid spending time and resources on regulations that the NHTSA is likely to preempt, states and the ULC *could* focus on regulating the following areas:

- **AV testing and test permitting:**

- Designate the vehicle conditions that must be satisfied in order for manufacturers to obtain a test permit (such as the existence of a driver's seat, steering wheel, and pedals and that a driver must be able to reassume control).
- Specify the necessary conditions for a test driver to obtain a permit (a clean driving record and completion of the manufacturer's training program).
- Define the training program for test drivers that a manufacturer must satisfy (including requirements that an expert teach the training and that the trainee receive practical defensive-driving training).

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Sharkey, *The Politics of Preemption: NHTSA, State Tort Law & Automobile Safety*, Torts Prof Blog, available at <http://lawprofessors.typepad.com/tortspref/2010/10/guest-blogger-cathy-sharkey-on-the-politics-of-preemption-nhtsa-state-tort-law-automobile-safety.html> (last visited Nov. 4, 2014) [hereinafter Sharkey, *Politics*].

<sup>35</sup> Preemption: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693, 24,693-94 (May 20, 2009) [hereafter 2009 Preemption Memorandum], available at <http://www.gpo.gov/fdsys/pkg/FR-2009-05-22/pdf/E9-12250.pdf#page=1> (last visited Nov. 4, 2014).

<sup>36</sup> See, e.g., Federal Motor Vehicle Safety Standards; Rearview Mirrors, 74 Fed. Reg. 9478 (proposed Mar. 4, 2009) (to be codified at 49 C.F.R. pt. 571) (replacing the previous rulemaking's preemption language with boilerplate language that stated that preemption of state law is merely a "possibility"); Federal Motor Vehicle Safety Standards, Child Restraint Systems; Hybrid III 10-Year-Old Child Test Dummy, 75 Fed. Reg. 71,648, 71,661 (proposed Nov. 24, 2010) (to be codified at 49 C.F.R. pt. 571); Federal Motor Vehicle Safety Standards; Electric-Powered Vehicles; Electrolyte Spillage and Electrical Shock Protection, 75 Fed. Reg. 33,515, 33,524 (June 14, 2010) (to be codified at 49 C.F.R. pt. 571) (stating that AAI's discerning of preemptive intent in the boilerplate language fundamentally misunderstood the NHTSA's intent).

<sup>37</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 10-31, *Williamson*, slip op. (No. 08-1314).

<sup>38</sup> *Id.* at 9.

<sup>39</sup> See, e.g., Day, *supra* note 33; Sharkey, *Politics*, *supra* note 34; Sharkey, *Agency*, *supra* note 34.

<sup>40</sup> Statement, *supra* note 5, at 8.



- Identify the preconditions for obtaining a permit for testing on public roads (e.g., that controlled tests be completed before applying for a permit for tests on public roads).
- **Insurance requirements:**
  - For testing (California and Nevada require that manufacturers who want to test AVs obtain \$5 million in insurance or a bond).
  - For the eventual consumer operation of AVs.
- **“Endorsement” regimes for AV operators on their existing driver’s licenses:**
  - Allow ordinary drivers to obtain “endorsements” for operation of AVs on public roads.
  - This could be as simple as a supplementary certification on one’s existing driver’s license.
- **Broad operational requirements for commercially-available vehicles of the future:**
  - The vehicle should be equipped with a means to easily engage/disengage AV technology (e.g., a button to engage AV technology and mechanisms to allow drivers to simply reassume control over the steering wheel in order to disengage the AV technology).
  - There should be a visual indicator telling the driver when AV technology is active.
  - Include a broad provision that requires the AV comply with state laws and federal safety standards before it can be driven.