THE STATE OF SOUTH CAROLINA
IN THE Supreme COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James C Williams, Circuit Court Judge

Case No 06–CP-38-1071

Mary Robyn Priester, Individually and as Natural Mother/Next of Kin and Personal Representative of the Estate of James Lloyd Priester, Appellant,

v

Preston Williams Cromer, Stage Light Management d/b/a Showgirls(z), and Lloyd Brown, individually and d/b/a Showgirls(z), Nikki D's, Inc , and Ford Motor Company, Inc , Defendants,

of whom Ford Motor Company, Inc , is the Respondent

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QUESTION PRESENTED

Does the U S Supreme Court's recent ruling in *Williamson v Mazda* lead to the conclusion that this action is not preempted?

INTRODUCTION

The Court has requested supplemental briefing on the impact of *Williamson v Mazda Motor Company of America, Inc* , 131 S Ct 1130 (2011), on its decision finding appellant's lawsuit preempted on the ground that it would undermine the purposes of Federal Motor Vehicle Safety Standard 205 *Priester v Cromer,* 388 S C 425, 433, 697 S E 2d 567, 571 (2010) Appellant respectfully submits that *Williamson* mandates reversal of this Court's prior ruling in this case Based on *Williamson*, the Court should reject Ford's contention that this lawsuit is preempted and remand to the trial court for proceedings on the merits of appellant's claims

The question in this case is whether Standard 205, which gives vehicle manufacturers the choice of installing either tempered or laminated glass in the side windows of passenger cars, preempts state-law tort claims seeking to hold a manufacturer liable for failing to install laminated glass in the side windows of a 1997 Ford F-150 pickup truck On August 2, 2010, this Court found the appellant's claims preempted on the ground that they would "stand as an obstacle to achieving the purposes and objectives of [Standard] 205 " *Priester,* 388 S C at 433, 697 S E 2d at 571 In particular, the Court held that "the purpose of [Standard 205] is to provide an automobile manufacturer with a range of choices among different types of glazing materials, as opposed to providing a minimum standard," and that permitting this lawsuit to proceed would interfere with that regulatory choice *Id*

In the wake of that ruling, however, the U S Supreme Court decided *Williamson v Mazda Motor Company of America, Inc* , 131 S Ct 1130 (2011), which held that the

mere fact that a regulation gives manufacturers a "range of choices" does not exert any preemptive force In *Williamson*, the Court specifically ruled that Federal Motor Vehicle Safety Standard 208, which gave car makers the option of installing either lap belts or lap-belt/shoulder harnesses in the rear-center seats of cars and in the rear-aisle seats of minivans did not preempt state-law claims that a manufacturer should be held liable for failing to install a lap-belt/shoulder harness in the rear-aisle seat of a minivan *Williamson* made clear that preemption is only justified in rare circumstances, such as in *Geier v American Honda Motor Co* , 529 U S 861 (2000), which held that a carefully crafted regulatory scheme to introduce airbags gradually over time, while encouraging other types of passive restraints, would have been undermined by lawsuits insisting that airbags be included in all vehicles immediately The *Williamson* Court refused to extend *Geier* to another provision in the very same regulation that simply provided a choice to manufacturers, and instead reaffirmed that non-preemption is the rule except in the rare case where giving car makers an unfettered choice among different kinds of safety devices "[is] a *significant regulatory objective* " 131 S Ct at 1138 (emphasis added)

Here, although this case involves a different regulation, the outcome must be the same Standard 205 simply establishes multiple glazing materials that car makers may use for side windows It identifies no "significant regulatory objective" of encouraging use of a variety of materials, it does not create the unique options scheme promulgated in the airbag regulation, and it lacks the complex regulatory history at issue in *Geier* Instead, Standard 205, like the regulation at issue in *Williamson*, is nothing more than a minimum federal safety standard, establishing a safety "floor," but permitting

manufacturers to improve the safety of their vehicles by installing additional protections As such, Standard 205 does not preempt a state tort claim, like the one advanced by the appellant here, that seeks to hold a car manufacturer liable for failing to do more than the minimum required by the regulation

This Court has directed the parties to address *Williamson*'s impact on the preemption analysis in this case A full discussion of *Williamson* is set forth below Because the preemption analysis hinges on understanding the federal purposes underlying Standard 205, however, this brief begins by describing that regulation in some detail Against that backdrop, the brief then contends that *Williamson* mandates reversal of this Court's prior ruling in this case

STATEMENT OF FACTS

A The Statute

Congress passed the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act") to reduce motor vehicle injuries and deaths, 49 U S C §§ 30101 *et seq* The Act empowers the National Highway Traffic Safety Administration ("NHTSA") to prescribe minimum motor vehicle safety standards *Id* §§ 30101, 30104 In *Geier*, the Supreme Court held that the Safety Act's savings clause expressly "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor " 529 U S at 870

B Standard 205

Since 1966, when NHTSA's first rules were adopted, Standard 205 has merely specified minimum requirements for glazing materials in motor vehicles 49 C F R §

571 205 [R 61] Unlike NHTSA's other regulations, Standard 205 does not itself contain any design or performance standards, instead, NHTSA simply incorporates by reference the standards for automotive glass created by an outside group, the American National Standards Institute ("ANSI") *Id* (These standards are commonly referred to as 'ANSI Z26 1')

ANSI Z26 1 does not contain any tests, standards, requirements, or guidelines for the design or performance of the actual window systems used in cars Instead, ANSI Z26 1 simply lists various types of window materials, including tempered glass and laminated glass, and specifies various tests for determining whether a glazing material qualifies for acceptance under the code [1] [R 69–108] ANSI Z26 1 does not purport to set any definitive requirements for window materials in automobiles In fact, the Forward to ANSI Z26 1 warns that the standard is merely "intended to provide *minimum* requirements" for window glazing [R 73 (emphasis added)] It goes on to state that "[t]his standard does not itself state that safety glazings shall be used or to what extent they shall be used in glazing motor vehicles " *Id*

C NHTSA's Investigation of Advanced Glazing

This case involves a 1997 Ford F-150 pickup truck During the time this truck was designed and manufactured, NHTSA was actively considering amending Standard

[1] As this Court previously observed, "[l]aminated glass differs from tempered glass in that laminated glass consists of two or more sheets of glass held together by an intervening layer or layers of plastic material Laminated glass will crack and break under sufficient impact, but the pieces of glass tend to adhere to the plastic Conversely, tempered glass consists of a single sheet of specially treated glass, and when broken the entire piece immediately shatters into innumerable small, granular pieces " *Priester*, 388 S C at 430–31, 697 S E 2d at 570–71 For purposes of this brief, we will use the term "advanced glazing" to refer to laminated glass

205 to *require* advanced glazing in side windows in order to reduce the risks of passenger ejection through the side windows in rollovers [R 234] By 2001, however, after 10 years of study, NHTSA had yet to make a final decision Congress stepped in and directed the agency to issue a final report on the issue [R 235]

In response, NHTSA issued its final report, *Ejection Mitigation Using Advanced Glazing*, which stated that it would not continue to examine a potential requirement for advanced glazing [R 226–91] In that report, NHTSA emphasized the safety benefits of advanced glazing, concluding that the use of this technology could save between 537 and 1305 lives and prevent an estimated 235 to 575 serious injuries each year [R 231] The Report further concluded that "[a]dvanced glazing systems have the potential to yield significant safety benefits by reducing partial and complete ejections through side windows, particularly in rollover crashes" [R 234]

With regard to the potential risks of advanced glazing, the agency identified *no* conclusive hazards, noting that the "*neck measurements from impacts into the glazings were not repeatable*" [R 233 (emphasis added)] Although NHTSA's "high[ly] variab[le]" and "limited" data suggested that "impacts into standard tempered glass resulted in lower neck shear loads and neck moments than those into the advanced glazing," the agency concluded that *"[n]o assessment of actual neck injury levels due to shear loads or moments was made since no accepted lateral neck injury criteria exist"* [R 272 (emphasis added)]

Despite its belief that advanced glazing promised "significant safety benefits," NHTSA ultimately decided not to pursue an advanced glazing requirement [R 286–

87] Central to the agency's decision was the recent emergence of side-airbag technology *Id* At car makers' urging, NHTSA had conducted crash tests on prototype side-airbag systems, which "established the feasibility of using side inflatable devices to prevent ejections through front side windows " [R 286] The agency concluded that, despite the "significant safety benefits" of advanced glazing, "these safety benefits are not unique to advanced glazing systems, other safety countermeasures can also prevent ejections " [R 234] NHTSA ultimately determined that "[a]dvanced glazing systems should be evaluated as one component of comprehensive ejection prevention and mitigation strategies that include inflatable head protection and/or rollover protection systems " [R 233–34]

D NHTSA's 2002 Decision Not to Amend Standard 205

Based on these findings, in 2002 NHTSA formally announced its decision not to amend Standard 205 to require advanced glazing in all side windows 67 Fed Reg 41365 (June 18, 2002) In its Notice of Withdrawal, NHTSA articulated the following reasons for this decision

> Two primary reasons for this conclusion are the advent of other ejection mitigation systems, such as side air [bag] curtains and the need to develop performance standards for them, and the fact that advanced side glazing in some cases appears to increase the risk of neck injury In addition, advanced side glazing would require modifications to, or the addition of, window frames on the side of vehicles and result in smaller side windows Advanced side glazing would require modifications to the design of all vehicles currently being produced to make their windows smaller, and the cost of such a design modification would be significant

Id at 41367

"Given these concerns," the agency stated, "it would be more appropriate to devote its research and rulemaking efforts with respect to ejection mitigation to projects other than advanced glazing The focus will shift from advanced glazing to the development of more comprehensive, performance-based test procedures " *Id*

This decision left the existing version of Standard 205 intact, with no specific form of glazing mandated

E NHTSA's 2011 Ejection Mitigation Rulemaking

In January 2011, NHTSA's ejection mitigation research finally bore fruit in the form of a new regulation – Federal Motor Vehicle Safety Standard 226 – designed to minimize passenger ejections in rollovers 76 Fed Reg 3212 (January 19, 2011) The purpose of the new rule, like Standard 205 itself, is "to reduce the partial complete ejection of vehicle occupants through side windows in crashes, particularly rollover crashes " *Id* at 3213 [2]

Unlike Standard 205, Standard 226 establishes a performance standard that requires manufacturers to pass a specified crash test, but does not mandate any particular form of technology *Id* Although the new test does not require advanced glazing, the agency stressed that "optimal test results resulted from use of both ejection mitigation window curtains [i e , side airbags] *and advanced glazing* " *Id* at 3223 (emphasis added) Thus, NHTSA expects that manufacturers will meet the standard by "modifying existing side impact air [bag] curtains" while "*possibly supplementing them with advanced glazing* " *Id* (emphasis added) And NHTSA

[2] Because Standard 226 was promulgated in January 2011, this Court did not have the benefit of this rulemaking at the time of the initial briefing in this case

'[e]ncourage[d] manufacturers to enhance ejection mitigation curtains *with advanced glazing* " in order to achieve the best safety results *Id* (emphasis added), *see also id* at 3219 (emphasizing "the beneficial effect advanced glazing can have and permitting the use of [advanced] glazing to achieve the performance criteria specified in the standard")

As part of investigation of this new regulation, NHTSA again considered the possibility of requiring advanced glazing to meet the requirements of the standard *Id* at 3219 The agency ultimately decided not to do so based solely on the facts that "31% of front seat ejections are through windows that were partially or fully rolled down and it is not unusual for advanced glazing to be heavily damaged and rendered ineffective in a rollover crash " *Id* at 3219 "According," NHTSA concluded, advanced glazing should be employed "in conjunction with the deployable safety system that will mitigate ejection through the stages of a rollover event, such as an ejection mitigation side curtain airbag " *Id* at 3219 Notably, in deciding not to require advanced glazing alone, NHTSA did not mention *any* potential risk of "neck injuries", to the contrary, the agency "recogniz[ed] the beneficial effect advanced glazing can have," but decided that "movable glazing alone" would be *less* effective than a system that combined advanced glazing and side curtain airbags *Id* [3]

At the end of Standard 226's preamble, NHTSA affirmatively states 'that this rule, like many NHTSA rules, prescribes only a *minimum* safety standard As such, *NHTSA*

[3] At the time the vehicle in this case was manufactured, side airbags were not yet commercially available, and thus advanced glazing was the exclusive method available to vehicle manufacturers to reduce the risk of passenger ejection during crashes

does not intend this rule to preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by today's rule" *Id* at 3295 (emphases added) Thus, in NHTSA's view – a view that was made known only four months ago, after the U S Supreme Court decided *Williamson* – a lawsuit like this one seeking to hold a manufacturer liable for failing to install advanced glazing in the side windows of a passenger vehicle would *not* be preempted by federal law

F This Litigation

This lawsuit arose out of a fatal accident involving a 1997 Ford F-150 pickup truck Appellant's son, James Lloyd Priester, who was in the rear seat of the truck at the time of the crash, was ejected from the rear window and died at the scene His mother filed a products liability case against Ford, alleging, among other things, that Ford breached its warranty by utilizing tempered glass in the side windows of the F-150 pickup truck, rather than installing appropriate glazing materials, such as laminated glass, that would not shatter on impact and would therefore retain occupants inside the vehicle during a crash *Priester*, 388 S C at 428, 697 S E 2d at 568

Ford sought summary judgment on preemption grounds, arguing that this lawsuit would conflict with Standard 205 *Id* This Court agreed, holding that "a jury verdict finding the Ford F-150 pickup truck to be defectively designed solely because it selected the federally authorized choice of tempered glass would stand as an obstacle to achieving the purposes and objectives of [Standard] 205" *Id* at 433, 697 S E 2d at 571 In so ruling, this Court likened this case to *Geier v American Honda Motor Co*, 529 U S 861 (2000), which found preemption of state-law tort claims alleging a car was

defective because it lacked an airbag on the ground that such claims would undermine a regulation that "deliberately sought variety — a mix of several different passive restraint systems" — in order to foster development of "alternative, cheaper, and safer passive restraint systems " *Id* at 1913 Citing cases that relied on *Geier* in finding federal preemption under Standard 205, this Court found this lawsuit preempted

The Court made clear that its decision was by no means an easy one, noting that "courts across the country are struggling over [Standard] 205 and whether it preempts conflicting state law actions " *Priester*, 388 S C at 433, 697 S E 2d at 571 The Court observed that the only federal appellate court to reach this issue — the United States Court of Appeals for the Fifth Circuit — had rejected a finding of preemption in a case like this one, holding that Standard 205 "is best understood as a minimum safety standard " 388 S C at 432, 697 S E 2d at 570–71 (quoting *O'Hara v General Motors*, 508 F 3d 753 (5th Cir 2007)) The West Virginia Supreme Court, on the other hand, had reached the opposite conclusion, finding federal preemption based on the fact that "a design defect claim would foreclose choosing one of [the] options" permitted by Standard 205 *Id* at 432 (quoting *Morgan v Ford Motor Co* , 224 W Va 62, 680 S E 2d 77 (2009))

The Court stated that, "in the absence of a determination from the United States Supreme Court on this matter, we must render our best judgment as to whether [Standard] 205 provides a manufacturer with options and, therefore, preempts Appellant's suit, or merely provides a safety floor and allows Appellant's suit to go forward " *Priester,* 388 S C at 433, 697 S E 2d at 571 The Court ultimately found

preemption on the ground that Standard 205 gives car makers a choice between installing tempered or laminated glass in the side windows of their vehicles, and that this lawsuit would interfere with that choice *Id*

Appellant sought review from the U S Supreme Court, arguing that the petition should be held pending the disposition of *Williamson,* and then the judgment vacated and the case remanded for further proceedings *Priester v Ford Motor Co* , Petition for a Writ of Certiorari, No 10-668 (Nov 22, 2010)

On February 23, 2011, the U S Supreme Court issued its ruling in *Williamson*, holding that a federal regulation that gave vehicle manufacturers the choice of installing either lap belts or lap-belt/shoulder harnesses in the rear-center seats of cars and rear-aisle seats of minivans does not preempt state tort claims alleging that a minivan was defectively designed because it lacked a lap-belt/shoulder harness in the rear-aisle seat 131 S Ct 1130 (2011) In so ruling, the Court definitively rejected the argument that, under *Geier*, a regulatory option always exerts preemptive force *Id* at 1137 To the contrary, the Court made clear that *Geier* should be limited to its (highly unique) facts, and held that a regulatory option exerts preemptive force only where, as in *Geier,* "the regulation's history, the agency's contemporaneous explanation, *and* its consistently held interpretive views indicated that the regulation sought to maintain manufacturer choice in order to further *significant regulatory objectives* " *Id* at 1139 (emphases added)

The Court went on to hold that no such objective existed with regard to the rear seatbelt options of Standard 208, which merely reflected the agency's cost-benefit

determination that it made sense to give manufacturers a choice of different seat belting technologies *Id* at 1138–39 The Court explained that "even though [a] state tort suit may restrict a manufacturer's choice, it does not 'stan[d] as an obstacle to the accomplishment of the full purposes and objectives' of federal law '" *Id* at 1139–40

On the heels of this decision, the U S Supreme Court vacated this Court s prior decision in this case and remanded for further proceedings in light of *Williamson Priester v Ford Motor Co* , No 10-668 (Feb 28, 2011)

ARGUMENT

WILLIAMSON MANDATES A FINDING OF NO PREEMPTION IN THIS CASE

A *Williamson* Made Clear that Mere Regulatory Options Do Not Preempt State Tort Claims

The first — and perhaps most important — lesson of *Williamson* is that regulatory options, standing alone, do not exert *any* preemptive force This ruling effectively reverses this Court's prior ruling in this case, which relied exclusively on the fact that Standard 205 gave manufacturers a choice of different window glazing technologies *See Priester*, 388 S C at 433–34, 697 S E 2d at 571–72 The Court was not, to be sure, alone in this approach as Justice Sotomayor noted in her concurring opinion in *Williamson*, a number of courts have interpreted *Geier* to mean that "anytime an agency gives manufacturers a choice between two or more options, a tort suit that imposes liability on the basis of one of the options is an obstacle to the achievement of a federal regulatory objective and may be preempted " 131 S Ct at 1140

Williamson decided, however, that the mere fact that a lawsuit "may restrict [a] manufacturer's choice" does not in any way stand as an obstacle to the accomplishment of the federal purposes under the Safety Act To the contrary, the Court held that a regulatory option only preempts state-law tort claims in cases where the record clearly shows that "choice is a significant regulatory objective" *Id* at 1138 Any other approach, the Court held, would "treat all [options] standards as if they were *maximum* standards, eliminating the possibility that the federal agency seeks only to set forth a *minimum* standard potentially supplemented through state tort law" *Id* at 1139 (emphases in original) "We cannot reconcile this consequence," the *Williamson* Court explained, with a "statutory savings clause that foresees the likelihood of a continued meaningful role for state tort law" *Id* at 1139 [4]

This conclusion that regulatory options, standing alone, do not preempt state tort claims removes the basis for this Court's prior ruling in this case In finding that Standard 205 preempts state-law torts claims, this Court looked *solely* to the fact that this lawsuit would interfere with the purpose of Standard 205, "which is to provide an automobile manufacturer with a range of choices among different types of glazing materials, as opposed to providing a minimum standard" 388 S C at 433, 697 S E 2d at 571 In so ruling, moreover, the Court relied on a decision of a sister court — the

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[4] *See also id* at 1140 ("[T]he mere fact that an agency regulation allows manufacturers a choice between options is insufficient to justify implied preemption, courts should only find pre-emption where evidence exists that an agency has a regulatory objective — *e g*, obtaining a mix of passive restraint mechanisms, as in *Geier* — whose achievement depends on manufacturers having a choice between options [A] link between a regulatory objective and the need for manufacturer choice to achieve that objective is the linchpin of implied preemption where there is a savings clause" 131 S Ct at 1140 (Sotomayor, J , concurring) (internal quotations omitted)

Supreme Court of West Virginia — that had *also* found preemption based on the mere existence of an options standard *Morgan v Ford Motor Co*, 224 W Va 62, 680 S E 2d 77 (2009) There, despite its observations that "Ford has presented us with little agency history to support a policy indicating that [Standard] 205 was intended to preempt state common-law claims " and that "*we have no agency explanations identifying a clear federal objective that would be corrupted by allowing the plaintiff to proceed*," (*id* at 94) (emphasis added), the *Morgan* court felt "compelled" to find the lawsuit preempted based on the fact that "[Standard] 205 permits the manufacturer to make a choice between available safety options for side-window glass, a design defect claim would foreclose choosing one of those options " *Id* at 94 [5]

This ruling — and a host of others like it (*see id* at 89 n 12 (citing other cases reaching similar conclusions)) — is no longer good law in light of *Williamson* s holding that a regulatory option only possesses preemptive force where manufacturer choice is shown to be a "significant regulatory objective " 131 S Ct at 1138 Indeed, in light of its inability to identify "a clear federal objective that would be corrupted by allowing the plaintiff to proceed," 680 S E 2d at 94, *Morgan* itself confirms that the history of Standard 205 reveals no such thing In light of this ruling, this Court's reliance on

[5] Despite its pro-preemption ruling, *Morgan* further observed that "[w]e find no language in [Standard] 205 that would indicate clear expression of congressional intent to preempt common-law suits regarding glazing in motor vehicles " 680 S E 2d at 94 To the contrary, the *Morgan* court observed, the rule commentary actually contains "agency language" suggesting that Standard 205 "would 'not have any substantial direct effects on the States,' *including 'preempt[ing] State law*[ ]'" *Id* at 86 (quoting 68 Fed Reg 43964, 43971 (July 23, 2003)) (emphasis added)

Morgan — and its resulting conclusion that Standard 205 exerts preemptive force — was misplaced, as *Williamson* now shows [6]

B *Williamson* Also Indicates that the United States Would Not Support a Finding of Preemption Under Standard 205

Williamson also suggests that, if called on to do so, the United States would not support a finding of preemption in cases like this one This is important because, in *Williamson*, the U S Supreme Court held that preemption may only be found where three distinct factors *all* support a finding of preemption a regulation's "history, [NHTSA's] contemporaneous explanation of its objectives, *and the agency's current views of the regulation's preemptive effect*" 131 S Ct at 1136 (emphasis added) The italicized phrase is a reference to the view of the United States, set forth in *amici* briefs to the Court in *Williamson*, regarding the preemptive effect of its own regulations *Id* at 1137 This view is particularly entitled to weight in case where, as in *Williamson*, the agency is disavowing any preemptive intent *Id* [7]

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[6] This ruling also effectively nullified literally dozens of other cases where courts have found preemption based solely on the existence of a regulatory option — many of which were cited by Ford in its prior brief to this Court *See, e g , Carden v Gen Motors Corp* , 509 F 3d 227, 230–31 (5th Cir 2007) (" *Geier* compels the conclusion that a state tort suit that would foreclose a safety option intentionally left to vehicle manufacturers by Federal Motor Vehicle Safety Standards is preempted "), *Griffith v Gen Motors Corp* , 303 F 3d 1276, 1282 (11th Cir 2002) ("[U]nder *Geier*, when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted "), *Hurley v Motor Coach Indus , Inc* , 222 F 3d 377, 383 (7th Cir 2000) ("[W]hen a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted ")

[7] Although the U S Supreme Court has noted that an agency's view that a state law *is* preempted is not dispositive in implied-preemption cases, *Wyeth v Levine*, 129 S Ct 1187, 1201 (2009), the Court has given considerable weight to a federal agency's representation that state law does *not* interfere with the policies or objectives of the

In *Williamson*, the United States distinguished *Geier* on its facts and vigorously asserted that the existence of regulatory options does not erect a barrier to state tort claims [8] In an *amicus* brief filed in support of the petition for *certiorari,* the United States observed that "[m]anufacturers always have the 'option' of exceeding a minimum safety standard when NHTSA has decided not to mandate a more stringent alternative because of considerations of cost or feasibility — as NHTSA did in this case and, indeed, often does in considering regulatory alternatives But if such an 'option' alone were enough to trigger federal preemption under *Geier*, the Safety Act's savings clause would be greatly undermined *Geier* does not mandate that result, because it determined that under the Safety Act common-law tort actions may proceed unless they conflict with a federal regulation, and here, there is no conflict " *Williamson v Mazda*, Brief for the United States as *Amicus Curiae* in Support of Petition for Certiorari, No 08–1314 (April 2010), at 15 *See also id* at 16 (explaining that the United States has consistently maintained to the Supreme Court that a federal regulation "permitting a manufacturer to choose among different options consistent with a minimum standard does not alone preempt state common-law tort claims seeking to impose liability for selecting one option instead of another ")

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federal statute and regulations the agency administers *See, e g , Altria Group, Inc v Good*, 129 S Ct 538, 549 (2008), *Sprietsma v Mercury Marine*, 537 U S 51, 67–68 (2002) That is particularly so where the agency has spoken with a consistent voice for a lengthy period of time *Wyeth,* 129 S Ct at 1201

[8] In *Geier*, in contrast, the United States argued that the plaintiff's "no-airbag" claims would undermine federal purposes, and thus should be preempted *See Geier*, 529 U S 861, 883(2000)

The United States echoed this conclusion in its subsequent brief on the merits in *Williamson*, explaining that "[m]erely establishing that [a] state common-law standard is higher than [a] federal minimum standard is not enough to establish a conflict Rather, a conflict results only when the Safety Act (or regulations implementing the Safety Act) does not just set out options for compliance, but also provides that the regulated parties must remain free to choose among those options" *Williamson v Mazda,* Brief for the United States as *Amicus Curiae* Supporting Petitioners, No 08-1314 (August 2010), at 8

In light of these observations, and the deference to which they are entitled, it is difficult to imagine the United States taking a contrary position with regard to Standard 205, which – as discussed in more detail below -- is devoid of any indication that the regulated parties must remain "free to choose among [the permitted] options" *Williamson*, Brief for the United States as *Amicus Curiae* Supporting Petitioners, at 8 Under *Williamson*, this fact also militates against any finding that this lawsuit conflicts with federal regulatory purposes

Any remaining doubt as to the United States' likely position in this case would be dispelled by NHTSA's recent ejection-mitigation rulemaking, which was finalized just four months ago *See* 76 Fed Reg 3212 (January 19, 2011) (Notice of Final Rulemaking) As noted above, Standard 226 -- which was the culmination of NHTSA's investigation into a possible amendment to Standard 205 – is a performance-based test that does not mandate any particular form of technology In the preamble accompanying the final rule, however, NHTSA stated that the *best* ejection mitigation

system would consist of modified side airbag curtains ***and*** *advanced glazing* *Id* at 3223 And, although Standard 226 does not require advanced glazing, NHTSA repeatedly emphasized the benefits of advanced glazing throughout its 2011 rulemaking, stated that the "optimal" system would utilize both side airbags and advanced glazing, and actively encouraged car makers to install both *Id* at 3219, 3223 In light of these statements, NHTSA would almost certainly take the position that a lawsuit advocating the use of advanced glazing would *further*, rather than undermine, federal safety purposes

But even more telling is the agency's statement at the end of its preamble regarding the preemptive effect of its new rule *Id* at 3295 There, NHTSA stated that a lawsuit seeking to hold a manufacturer liable for failing to do more than the minimum required by the regulation would *not* preempt state-law tort claims *Id* ("[T]his rule, like many NHTSA rules, prescribes only a *minimum* safety standard As such, *NHTSA does not intend this rule to preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by today's rule"* *Id* at 3295 (emphases added)

This is exactly such a case In advocating the use of advanced glazing, this lawsuit seeks "effectively [to] impose a higher standard on motor vehicle manufacturers than that imposed by" federal law *Id* The above italicized language makes clear that, in the agency's view such a lawsuit would not conflict with the purposes underlying Standard 226 and, therefore, would not exert any preemptive effect And if NHTSA believes that a lawsuit advocating advanced glazing would not be preempted by

Standard 226, then it could not reasonably take the position that an identical case *would* be preempted by Standard 205, which shares the same regulatory purpose of minimizing the risk of passenger ejection in the event of the crash [9] Rather, it would almost certainly argue that this lawsuit, which advocates a technology that the agency actively encourages, and that is permitted by both Standards 205 and 226, actively furthers federal purposes Under *Williamson*, this, too, strongly militates against any finding of preemption here 131 S Ct at 1137 (deferring to NHTSA's view that its regulation does not preempt tort claims)

C *Williamson* Also Strictly Limited the Reach of *Geier* and Clarified its Inapplicability to Standard 205

Williamson also swept away any notion that *Geier v American Honda Motor Co*, 529 U S 861 (2000), should be given broad application in other cases involving regulatory options As previously noted, *Geier* has been interpreted by several state appellate courts as mandating a finding of preemption in any case involving a federal regulatory option *See, e g , Morgan v Ford Motor Co*, 680 S E 2d 77, 94 (W Va 2009) *Williamson* finally put a stop to that trend by explaining that *Geier* involved a highly unusual options standard that was based on NHTSA's affirmative desire to promote a diverse mixture of passive restraints in the front seats of cars As explained below, no such regulatory objective is even arguably present in this case, to the contrary, the only fact to be gleaned from Standard 205's sparse history is that NHTSA

[9] The purpose of Standard 205 "is to reduce injuries resulting from impact to glazing surfaces and to minimize the possibility of occupants being thrown through the vehicle windows in collisions " [R 233] The purpose of Standard 226 is "to reduce the partial and complete ejection of vehicle occupants through side windows in crashes, particularly rollover crashes " 76 Fed Reg at 3213

wanted cars to have, at a minimum, side windows made of an industry–approved material

1 *Williamson* Limited *Geier* to Its Facts

Williamson was emphatic in its teaching that *Geier* was a *sui generis* decision that must be strictly limited to its facts The *Williamson* Court explained that the long and convoluted history of the passive-restraint options standard at issue in *Geier* showed that "[NHTSA] had long thought it important to leave manufacturers with a choice [of different passive restraint technologies] " *Id* at 1136 The Court further observed that NHTSA's "contemporaneous explanation of its 1984 regulation made clear that manufacturer choice was an important means for achieving its basic objectives " *Id* at 1137 Of crucial importance was the fact that the regulation at issue in *Geier* involved a highly unusual "phase-in," which initially required manufacturers to equip only 10% of their new fleets with passive restraints and then slowly to increase the percentages over time *Williamson* explained that NHTSA "intended its phasing period partly to give manufacturers time to improve airbag technology and to develop 'other, better' passive restraint systems " *Id* at 1137 (quoting *Geier*, 529 U S at 879)

This unusual phase-in requirement, the *Williamson* Court further explained, was the product of NHTSA's concern about the controversial nature of airbags, which were a relatively new safety technology In particular, NHTSA "worried that requiring airbags in most or all vehicles would cause a public backlash" due to the public's fear of airbags *Id* at 1137 NHTSA was also worried that, given the cost of airbags, "vehicle owners may not replace them when necessary, leaving occupants without passive protection "

Id To address these concerns, NHTSA "deliberately sought variety — a mix of several different passive restraint systems " *Id* (quoting *Geier*, 529 U S at 878) *Williamson* explained that it was this "significant regulatory objective" that formed the basis of the preemption holding in *Geier*, *not* the fact that Standard 208 gave carmakers a choice between airbags and other passive restraints *Id* at 1137

2 Standard 205's Incorporation of the ANSI Materials Standard Confirms *Geier*'s Inapplicability to this Case

No such "significant regulatory objective" of preserving manufacturer choice is even arguably present in this case In contrast to the airbag standard at issue in *Geier*, Standard 205's text and accompanying rule commentary are devoid of a single statement on NHTSA's part that it intended to promote a diverse array of side-window technology *Instead, Standard 205 is nothing more than a codification of the ANSI materials standard* And the ANSI materials standard is merely the list of materials approved by an outside, non-governmental entity [R 69]

NHTSA s mere act of incorporating the ANSI standard into Standard 205 cannot be said to reveal a "significant regulatory objective" of ensuring manufacturer choice *Williamson*, 131 S Ct at 1138 Certainly, NHTSA never stated anything to that effect And, notably, the ANSI standard *itself* affirmatively disclaims any particular purpose or policy, stating that "[t]his standard does not itself state that safety glazing shall be used or to what extent they shall be used in glazing motor vehicles Such requirements rest with either the legislative or administrative authority " [R 72]

The ANSI standard states, moreover, that it is merely intended to provide "*minimum requirements*" for safety glazing materials [R 73], which is exactly the type of

requirement that, under *Geier*, does not exert *any* preemptive effect Although *Geier* found preemption under the unique circumstances of that case, the U S Supreme Court emphasized that mere minimum standards that are "intended to provide a floor" do not exert any preemptive effect 529 U S at 870 (holding that the Safety Act's savings clause expressly "*preserves* those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor ") (emphasis added) If anything, then, NHTSA's act of adopting a set of self-described "minimum" standards has the effect of expressly *preserving* lawsuits, like this one, that "seek to establish greater safety than the minimum safety" achieved by Standard 205, which was merely "intended to provide a floor " *Id*

Against this backdrop, the only conclusion that can be drawn from Standard 205 itself is that NHTSA wanted cars to have, at a minimum, side windows made of an industry-approved material It is hard to imagine a scenario less like *Geier* — or one less worthy of triggering a finding of federal preemption

3 NHTSA's 2002 Decision Not to Amend Standard 205 Does Not Exert Preemptive Force

Williamson also confirms the absence of any conflict between this lawsuit and NHTSA's 2002 decision not to require advanced glazing in the side windows of passenger cars There, as here, the agency had affirmatively decided, based on a "cost-effectiveness" judgment, not to require the identical technology — a lap-belt/shoulder harness — that was being advocated by the plaintiff 113 S Ct at 1139 And there, as here, this decision left a preexisting regulatory option intact In

Williamson, Mazda argued that NHTSA's decision not to require lap-belt/shoulder harnesses would be directly undermined by allowing a jury to find Mazda liable for failing to install a lap-belt/shoulder harness in the rear of a minivan *Williamson* squarely rejected this conclusion, holding that a court may not "infer from the mere existence of such a judgment that the federal agency intends to bar States from imposing stricter standards " *Id* Thus the mere fact that NHTSA considered, but ultimately decided not to require, advanced glazing in all side windows cannot be said to possess the power to preempt

Nor could it be said that NHTSA's stated *reasons* for declining to require advanced glazing show evidence of an agency goal that would be undermined by this lawsuit To the contrary, NHTSA's decision not to require laminated glass was based on a "cost-effectiveness judgment" that, under *Williamson*, does not exert any preemptive effect On the "effectiveness" side of the equation, NHTSA found that there was no need to pursue advanced glazing in light of "the advent of other ejection mitigation systems, such as side air curtains [airbags], and the need to develop performance standards for them Notice of Withdrawal, 67 Fed Reg at 41367 NHTSA also noted that "advanced glazing in *some* cases *appears* to increase the risk of neck injury " *Id* at 41367 (emphasis added) On the "cost" side of the equation, NHTSA concluded that "advanced side glazing would require modifications to window frames on the side of vehicles," potentially resulting in "significant[ly]" higher costs to manufacturers 67 Fed Reg at 41367 On balance, NHTSA concluded that its "focus would shift from advanced glazing to the development of more comprehensive,

performance-based test procedures " *Id* Under *Williamson*, this type of cost-benefit analysis lacks any preemptive effect 113 S Ct at 1139 ("the fact that [NHTSA] made a negative judgment about cost-effectiveness cannot by itself show that [NHTSA] sought to forbid common-law tort suits in which a judge or jury might reach a different conclusion ")

As in *Williamson*, moreover, there is nothing in this "cost-effectiveness judgment" to suggest that preservation of manufacturer choice was a "significant regulatory objective" on NHTSA's part *Williamson*, 131 S Ct at 1138 NHTSA never stated, as it did in *Geier*, that its decision was based on a desire to foster a diverse array of options with regard to the various glazing materials in side windows This is not surprising, given that NHTSA's stated goal was to move *away* from advanced glazing and *towards* side airbags as a primary ejection mitigation strategy Because this goal would not be furthered by giving manufacturers a choice among different window glazing materials, there is no reason to believe that the preservation of manufacturer choice was one of NHTSA's 'objectives when it decided not to amend Standard 205 — let alone a "significant" enough one to warrant a finding of federal preemption here

NHTSA's statement that advanced glazing "appears" to increase the risk of neck injuries in "some" cases (67 Fed Reg at 41367) does not mandate a different result Ford previously made much of this statement, arguing that it illustrates a conflict between this lawsuit and NHTSA's safety goals In so arguing, however, Ford ignored the findings of the 2001 Final Report on which this statement was based, which reveal that NHTSA actually believe that advanced glazing would dramatically *increase* safety

and that the agency's decision not to require advanced glazing was principally due to the emergence of a potentially even more effective technology (the side curtain airbag), *not* due to concerns about the overall safety of advanced glazing

Thus, NHTSA's *overall* conclusion in it 2001 Final Report was that "[a]dvanced glazing systems have the potential to yield *significant safety benefits* by reducing partial and complete ejections through side windows, particularly in rollover crashes " [R 231 (emphasis added)] NHTSA further concluded that "[a]dvanced glazing systems could save 537 to 1305 lives annually In addition, an estimated 235 to 575 serious injuries could be reduced annually " *Id* All told, NHTSA concluded that advanced glazing could prevent almost 2,000 deaths and injuries *every year* *Id* In light of these statements, it is impossible to conclude that NHTSA viewed advanced glazing as contrary to public safety

To be sure, NHTSA also determined — based on preliminary testing it described as "limited" and "significant[ly] variab[le]" [R 233–72] — that advanced glazing "*may* increase the [neck] injury risk for *belted* occupants " [R 235 (emphasis added)] In the very same sentence, however, NHTSA stated that advanced glazing *would* "provide *enhanced* safety benefits for unbelted occupants, by preventing their ejection from the vehicle " [R 235 (emphasis added)] This conclusion is entirely consistent with NHTSA's *overall* conclusion that advanced glazing would yield "significant safety benefits" for occupants overall, potentially saving over 1,000 lives and preventing hundreds of serious injuries each year [R 231]

The fact that NHTSA ultimately decided not to require advanced glazing does not mean that the agency abandoned its conclusions regarding the positive safety benefits of advanced glazing To the contrary, NHTSA made clear, in both the 2001 Final Report and the 2002 Notice of Withdrawal, that the overriding force behind its decision not to pursue an advanced-glazing requirement was the emergence of the side curtain air bag, which seemed to offer even better ejection mitigation than advanced glazing, without the high costs 63 Fed Reg 41366-67 Although the agency ultimately decided not to impose a universal advanced-glazing requirement in light of the emergence of side airbags, its overall conclusion that advanced glazing would "yield significant safety benefits" [R 231] — a statement that NHTSA never abandoned or retracted — shows that such a requirement would have been fully consistent with its mission to promote public safety

The ultimate proof of the pudding is the fact that NHTSA ultimately decided to leave Standard 205 intact, giving car makers the option to continue to install advanced glazing in side windows Surely if NHTSA had determined that advanced glazing would be undesirable or unsafe in all passenger side windows, it would have banned the technology But the agency did no such thing, instead, it preserved the preexisting standard, thereby continuing to give car makers the option of utilizing advanced glazing in their side windows To this day, NHTSA continues to require advanced glazing in the front windshields of all automobiles, to permit it in side windows, and, as discussed above, has recently adopted a new rule that actively encourages the use of advanced glazing in all side windows 76 Fed Reg 3212 (January 19, 2011)

In this way, the regulatory scheme in this case is virtually identical to the one in *Williamson*, which required lap-belt/shoulder harnesses in most seating positions, permitted them in rear-inner seats, and encouraged manufacturers to use them because they were safer 131 S Ct at 1137–38 The fact that Standard 205 continues to permit advanced glazing in side windows is proof positive of the agency's views on the safety of the technology — and disposes of any argument of implied conflict preemption here

D *Williamson* Confirmed the Validity of Cases Holding that Standard 205 Does Not Have Any Preemptive Effect

Finally, by narrowly confining *Geier* to its facts, *Williamson* confirmed the validity of *O'Hara v General Motors Co* , 508 F 3d 753 (5th Cir 2007), which is the only federal Court of Appeals decision regarding the preemptive effect of Standard 205 *O'Hara* held that, "[o]n its face, [Standard] 205 is a material standard that sets a safety 'floor' to ensure that the glazing materials used by manufacturers meet certain basic requirements " *Id* at 760 This Court discussed *O'Hara* in its prior ruling in this case, but ultimately decided to follow the West Virginia Supreme Court's ruling in *Morgan*, *supra* — which has since been discredited by *Williamson*

O'Hara, on the other hand, followed the exact same approach mandated by *Williamson* Rather than relying on the mere existence of regulatory options, the *O'Hara* court closely examined the text and history of Standard 205 to conclude that there are no agency purposes that would be undermined by allowing lawsuits like this one to proceed *See id* at 761 (holding that "[t]here is no language in the [rule] commentary indicating that NHTSA intended to 'preserve the option' of using tempered glass in side

windows, or that preserving this option would serve the safety goals of [Standard] 205 ")

This ruling, notably, was based on a narrow reading of *Geier* that was, at the time, the minority view, but has proven correct in light of *Williamson* In particular, *O'Hara* recognized that, whereas "[Standard] 205's text and history are straightforward," the regulation at issue in *Geier* "include[d] detailed implementation timelines, an elaborate phase-in period, and a requirement that manufacturers conduct tests involving full vehicles and different-sized crash test dummies " 508 F 3d at 760 *O'Hara* concluded that "[a]ll of these factors are conspicuously absent from [Standard] 205 " *Id* at 760 The *O'Hara* court further observed that, whereas Standard 205 merely incorporated the ANSI standards by reference without substantial commentary, the NHTSA Final Rule commentary at issue in *Geier* was "47 pages long and [laid] out in detail the agency's concerns regarding public acceptance of airbag technology " *Id* at 761 All of these factors, the *O'Hara* court concluded, rendered *Geier* inapplicable to cases involving Standard 205

The O'Hara court also rejected the argument that NHTSA's 2002 decision not to require advanced glazing possessed any preemptive force, stating that "NHTSA's 2002 Notice of Withdrawal focused on the need to develop experimental standards for new rollover accident technologies It did not reject advanced glazing as unsafe (indeed, [Standard] 205 continued to require advanced glazing in vehicle windshields) Like the Coast Guard [in *Sprietsma v Mercury Marine*, 537 U S 61 (2002)], the NHTSA Notice of Withdrawal cited cost concerns and minor safety issues to justify the agency's

change in course And also like the Coast Guard, NHTSA has continued to study advanced glazing as part of its rollover protection program " *Id* at 762-63 *O'Hara* ultimately held that 'NHTSA's Notice of Withdrawal 'does not convey an authoritative message of a federal policy against' advanced glazing in side windows '" *Id* at 763

The Texas Supreme Court recently reached the same conclusion in *MCI Sales and Service Inc v Hinton*, 329 S W 3d 475 (Tex 2010), which was similarly based on the narrow reading of *Geier* later endorsed in *Williamson* *Id* at 496–97 The *MCI* court, notably, had been presented with the United States' *amicus* briefs in *Williamson*, which the Court quoted at length in its ruling [10] *See, e g , id* at 497 n 21, 499 With the benefit of those briefs, and after a lengthy examination of the text and history of Standard 205, the Texas Supreme Court concluded that "[n]othing in the text of [Standard] 205 indicates that it is anything other than a minimum materials standard In the absence of the standard, manufacturers could use any material allowed by state law, the standard simply limits the range of available choices " *Id* at 495

In reaching that decision, the court rejected the defendant's contention "that NHTSA made a *Geier*-like policy decision to encourage a range of glazing choices," observing that "[Standard] 205 gives manufacturers a choice of materials and recognizes that no one type is superior in all circumstances " *Id* at 497 The *MCI* court went on to state that Standard 205 "merely narrows the range of manufacturers' choice of glazing materials from potentially unlimited to a short list We find nothing in the

[10] The South Carolina Supreme Court did not have the benefit of those briefs in its earlier consideration of this case It also did not have the benefit of the Texas Supreme Court's decision in *MCI*, which was the first court to apply the United States' views in *Williamson* to a lawsuit involving Standard 205

standard's text, history, or NHTSA's comments to indicate that [Standard] 205 is anything other than a minimum standard As a minimum standard, [Standard] 205 does not preempt the jury finding that MCI should have used laminated glass in the motor coach's windows " *Id* [11]

These courts' conclusions that Standard 205 is simply a "minimum" safety standard is highly significant in light of *Geier*'s holding that the Safety Act expressly preserves lawsuits seeking to hold manufacturers liable for failing to do more than the minimum prescribed by a federal regulation that sets a safety "floor " 529 U S at 871 This principle applies in spades to Standard 205, which merely obligates manufacturers to, at a minimum, use one of the materials specified in the industry standard Under both *Geier* and *Williamson*, such a standard does not possess any power to preempt

[11] The Texas Supreme Court also rejected the argument that NHTSA's 2002 decision not to require advanced glazing – allegedly based on a risk of neck injuries – exerted any preemptive force, adopting the reasoning set forth in *O'Hara* *Id* at 497 (noting that "NHTSA did not state a positive desire to preserve the use of tempered glass in windows by forbidding contrary state regulation Rather, NHTSA declined to continue rulemaking regarding advanced glazing materials after completing a ten-year study of the subject because other safety measures, such as side air curtains, also helped to mitigate ejections and NHTSA needed to devote its resources to developing standards for them ") (citations omitted)

CONCLUSION

For all the foregoing reasons, this Court should reverse its prior ruling and find that appellant's claims are not preempted by federal law

Respectfully submitted

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May 15, 2011

THE STATE OF SOUTH CAROLINA
IN THE Supreme COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James C Williams, Circuit Court Judge
Case No 06–CP-38-1071

Mary Robyn Priester, Individually and as Natural Mother/Next of Kin and Personal Representative of the Estate of James Lloyd Priester, **Appellant,**

v

Preston Williams Cromer, Stage Light Management d/b/a Showgirls(z), and Lloyd Brown, individually and d/b/a Showgirls(z), Nikki D's, Inc , and Ford Motor Company, Inc , **Defendants,**

***of whom* Ford Motor Company, Inc , is the** **Respondent**

CERTIFICATE OF SERVICE

I certify that I caused to be served a copy of appellant's supplemental brief upon respondent by first class mail, postage prepaid, addressed to its attorneys at their address of record, namely

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