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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

The Court has asked the parties to address the following question

What impact, if any, does the United States Supreme Court's decision in *Williamson v Mazda Motor of America, Inc*, 562 U S ___, 131 S Ct 1131, ___ L E 2d ___ (2011), have on the Court's prior decision in this case?

INTRODUCTION

The answer to the question framed by this Court's supplemental briefing order is that, to the extent that the Supreme Court's decision in *Williamson v Mazda Motor of America Inc*, 131 S Ct 1131 (2011), has any impact on the Court's prior decision in this case, *Williamson* only confirms that the result this Court reached was correct

This Court previously held that Priester's state-law tort claims against Ford were preempted by Federal Motor Vehicle Safety Standard ("FMVSS") 205 *Priester v Cromer*, 388 S C 425, 697 S E 2d 567 (2010) In reaching that conclusion, this Court faithfully applied the framework established by *Geier v American Honda Motor Co*, 529 U S 861 (2000), for determining when a FMVSS preempts state-law tort claims, and carefully examined the regulatory history of FMVSS 205 and statements by the National Highway Traffic Safety Administration ("NHTSA") concerning the objectives of that rule In doing so, the Court recognized that NHTSA deliberately provided manufacturers with "a range of choices among different types of glazing materials" to advance significant federal objectives—including promoting the safety of belted occupants—and that allowing this suit to go forward "would stand as an obstacle to achieving the purposes and objectives of [FMVSS] 205" 388 S C at 433, 697 S E 2d at 571 In particular, the Court recognized that NHTSA has concluded that tempered glass "is safer for vehicle occupants wearing seat belts, where the risk of ejection is reduced, because it provides less risk of additional injuries" 388 S C at 430, 697 S E 2d at 569

In *Williamson*, the Supreme Court held that a different FMVSS governing the design of seat belts rather than glass types for windows—FMVSS 208—did not preempt a state-law tort suit Because the Court's decision in *Williamson* involved a different

regulation, the decision necessarily has no bearing on this Court's interpretation of the important federal objectives of FMVSS 205 Indeed, *Williamson* nowhere mentions FMVSS 205 or its regulatory objectives Moreover, *Williamson* reaffirms that *Geier* governs the analysis of whether FMVSS 205 preempts Priester's tort suit As such, *Williamson* confirms that this Court—which analyzed the preemptive effect of FMVSS 205 under *Geier*—applied the correct legal analysis in reaching its prior decision And because the regulatory factors on which the Court relied in *Williamson* to find no preemption under FMVSS 208 are absent from the regulatory record at issue here concerning FMVSS 205, *Williamson* provides no basis to disturb this Court's result

Priester says that the "most important lesson of *Williamson* is that regulatory options, standing alone, do not exert *any* preemptive force," and claims that this principle "removes any basis for this Court's prior ruling in the case" Supp Br 12-13 [1] That argument is a straw man This Court did not base its prior decision on the premise that FMVSS 205 is preemptive merely because it provides an option—standing alone Rather, consistent with the Supreme Court's teaching in *Geier*, the Court looked to the regulatory objectives of FMVSS 205—including safety—and concluded that this action is preempted because it "would stand as an obstacle to achieving the purposes and objectives of [FMVSS] 205" 388 S C at 433, 697 S E 2d at 571 *Williamson* only confirms the correctness of that reasoning and at the same time, provides no reason to second-guess this Court's reading of the "purposes and objectives of [FMVSS] 205"

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[1] "Supp Br" refers to the Supplemental Brief of Appellant filed in this case on May 15, 2011 "Ford Br" refers to the Final Brief of Respondent filed in this case on July 16, 2009 "Pl Br" refers to the Final Brief of Appellant filed in this case on September 14, 2009 "R" refers to the Record on Appeal filed in this case on June 23, 2009

That should end the analysis of the impact of *Williamson* on this case In her supplemental brief, however, Priester has gone beyond *Williamson* and the narrow question framed by this Court's supplemental briefing order Instead, Priester has taken the Supreme Court's request to reconsider this case in light of *Williamson*, and now seeks essentially to relitigate the entire case She attempts to recast the regulatory objectives of FMVSS 205 (an issue that was not before the Supreme Court in *Williamson*) and renews many of the same FMVSS 205-specific arguments that this Court previously rejected (which were of course not presented in *Williamson* either) Moreover, when it comes to *Williamson* itself, Priester now effectively asks this Court to do what the Supreme Court itself *declined* to do in *Williamson* to dismantle *Geier* by reading it in such a narrow and case-specific way that there can never be preemption except on the *precise* facts presented in *Geier* In doing so, Priester mischaracterizes *Williamson* and fails to account for the fact that this Court simply lacks the authority to do what the Supreme Court itself refused to do in *Williamson*—strip *Geier* of any continuing force

Finally, Priester bases her position in large part on pure speculation about what the United States would say *if* it filed an amicus brief in this case That speculation provides an even less persuasive reason for reconsidering this Court's prior decision than the amicus brief that the government *did* file in *Williamson* This Court properly declined to change its decision in light of the government's brief in *Williamson* (presumably because the brief was addressed to a different regulation) And there is no basis for this Court to revisit its prior decision on the basis of Priester's result-oriented speculation about what the Solicitor General might say if the government filed a brief in this case

Moreover, nothing the government could say would alter the fact that allowing Priester's action to proceed would frustrate the important federal objectives of FMVSS 205

In short, neither *Williamson* nor any of the extra-*Williamson* arguments made by Priester in her supplemental brief provides any basis for reaching a different result today

STATEMENT OF THE CASE

Because Priester's brief goes beyond the limited question presented by this Court's supplemental briefing order and seeks essentially to re-litigate the entire regulatory history of FMVSS 205, *see* Supp Br 3-9, we begin by reviewing the regulatory history and important federal objectives of FMVSS 205

A FMVSS 205 And Its Regulatory Objectives

1 Under the National Traffic and Motor Vehicle Safety Act of 1966, 49 U S C §§ 30101 *et seq* ("Safety Act"), Congress directed the Secretary of Transportation to establish federal motor vehicle safety standards ("FMVSSs") that "shall be practicable, [and] meet the need for motor vehicle safety " 49 U S C § 30111(a) The Secretary has delegated the authority to promulgate such FMVSSs to NHTSA 49 C F R § 1 50(a)

NHTSA promulgated the regulation at issue in this case—FMVSS 205—pursuant to that delegation of authority FMVSS 205 specifies the requirements for glazing materials in vehicles 49 C F R § 571 205 S1 (1997) (R p 61) [2] The stated "purpose" of FMVSS 205 is safety—specifically, "to reduce injuries resulting from impact to

[2] All references to FMVSS 205 are to the 1997 version of the rule (the year the vehicle at issue was manufactured) *See* Summary Judgment Order at 4 (R p 4) (applying 1997 version) As relevant here, FMVSS 205 was amended in 1984 to adopt the 1980 version of American National Standard Z26 1, *see* ANS Z26 1-1977 as supplemented by ANS Z26 1a-1980 (R pp 69-108) *See* 49 Fed Reg 6732 (Feb 23, 1984) FMVSS 205 refers to that standard as "ANS Z26," 49 C F R § 571 205 S5 1 1 (R p 61), and all references to ANS Z26 are to that version unless otherwise noted The 1996 version of ANS Z26 was not adopted until 2003 *See* 68 Fed Reg 43,964 (July 25, 2003)

glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions " *Id* § 571 205 S2 (R p 61) FMVSS 205 deliberately provides manufacturers with the option to install side windows made either with tempered glass or so-called "advanced glazing" materials—a term used for laminated glass and certain glass-plastic materials—if the glass meets certain requirements *Id* § 571 205 S5 1 1 (R pp 61-62)

FMVSS 205 states that manufacturers "shall conform" to the safety code developed by the American National Standards Institute and explicitly incorporates Standard Z26—"ANS Z26 " 49 C F R § 571 205 S5 1 1 (R p 61), *see id* § 571 205 S5 1 1 6 (R p 63) ("Except as otherwise specifically provided by this standard, glazing for use in multipurpose passenger vehicles shall conform to the requirements for glazing for use in trucks as specified in ANS Z26 ") ANS Z26, in turn, provides manufacturers with the option of installing tempered glass or advanced glazing in side windows

ANS Z26 specifies performance tests—such as impact and visibility—that glazing materials must pass in order to be used in specified locations in motor vehicles It specifically lists both tempered and laminated glass as approved materials The key difference between them is how they respond to impact Laminated glass consists of two or more sheets of glass held together by an intervening layer or layers of plastic material," and it "will crack and break under sufficient impact, but the pieces of glass tend to adhere to the plastic and not to fly, if a hole is produced, the edges are likely to be less jagged than would be the case with ordinary glass " ANS Z26 Foreword (R p 73) Tempered glass on the other hand, "consists of a single sheet of specially treated plate,

sheet, or float glass," and "[w]hen broken at any point, the entire piece immediately breaks into innumerable small pieces, which may be described as granular, usually with no large jagged edges " *Id* *See also Priester*, 388 S C at 429-30, 697 S E 2d at 569

Because of these characteristics, each glazing material "possesses its own distinctive safety characteristics ' ANS Z26 Foreword (R p 73) The text of ANS Z26 explains further why it allows multiple types of glazing "One safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type Since accident conditions are not standardized, no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards " ANS Z26 § 2 2 (R p 79)

2 From 1988 to 2001, NHTSA evaluated whether to require manufacturers to use advanced glazing on side windows, primarily to protect against the ejection of unbelted occupants in crashes In 1988, NHTSA issued two Advance Notices of Proposed Rulemaking ("ANPRMs") announcing that it was considering proposed requirements including glazing requirements, to reduce the risk of ejections in crashes where side vehicle protection was a factor *See* 53 Fed Reg 31,712, 31,714 (Aug 19, 1988), 53 Fed Reg 31,716, 31,718 (Aug 19, 1988) In response, NHTSA received numerous comments, including those questioning "whether [ejection mitigation glazing] would actually increase injuries to belted occupants due to head injury, neck loading, and lacerations " *See* 67 Fed Reg 41,365, 41,366 (June 18, 2002) (summarizing comments on 1988 ANPRMs), *see also* Paul Atelsk et al , NHTSA, Ejection Mitigation Using Advanced Glazing A Status Report at 2-2 (Nov 1995) ("1995 Report") (R p 405) (discussing comments in response to 1988 ANPRMs and stating "[n]ot only was it not

clear that ejection mitigating plastic would reduce injuries and fatalities, but questions arose as to whether this material would actually increase injuries")

In 1991, Congress mandated that the Secretary of Transportation commence rulemaking on protecting vehicle occupants from rollover accidents National Highway Traffic Safety Administration Authorization Act of 1991, Pub L No 102-240, § 2503, 105 Stat 1914, 2083 (1991) To satisfy that mandate, NHTSA issued an ANPRM seeking data to assist the agency in determining the feasibility of developing standards to reduce the frequency of rollovers and the number and severity of injuries resulting from rollovers 57 Fed Reg 242, 243 (Jan 3, 1992) One potential countermeasure, among many, on which NHTSA sought comment was "improved glazing" *Id* at 250 NHTSA then issued a planning document, 57 Fed Reg 44,721 (Sept 29, 1992), which listed the possibility of advanced glazing on side windows The agency again received comments questioning whether advanced glazing on side windows would cause additional contact injuries *See* 67 Fed Reg at 41,366 (summarizing 1992 comments)

NHTSA continued to study advanced glazing as a potential ejection mitigation measure Safety concerns based on the potential for advanced glazing to increase neck injuries to occupants *wearing seat belts* (who are not typically ejected) were prominent throughout NHTSA's studies NHTSA's 1995 Report concluded "Since ejection mitigating glazings will generally allow for greater contact time between the head and glazing than conventional side windows, there is a potential for an increased risk of serious neck injury from such contact" 1995 Report at 5-3 (R p 432), *see also id* at 7-1 (R p 455) NHTSA's 1999 Report likewise found that despite "wide variability" in the neck measurements from impacts into glazings, "impacts with tempered glass resulted in

lower neck shear loads and moments than those with advanced glazings In each case, tempered glass impacts produced the lowest neck injury measurements " 65 Fed Reg 44,710, 44,711 (July 19, 2000) (describing Donald Willke et al, NHTSA, Ejection Mitigation Using Advanced Glazing Status Report II (Aug 1999) ("1999 Report")), *see also* 1999 Report at viii, 29, *available at* http //ntl bts gov/lib/ 17000/17300/17348/PB2001101002 pdf

When NHTSA concluded its studies in 2001, the agency's safety concerns for belted passengers prevailed In the House of Representatives' Conference Report on H R 4475, the Department of Transportation and Related Agencies Appropriation Act of 2001, Congress observed that NHTSA had been studying advanced glazing as an ejection prevention measure since 1991 and directed NHTSA to issue a final report on advanced glazing for side windows *See* H R Rep No 106-940, at 117 (2000) (Conf Rep) NHTSA issued that report in August 2001 *See* Donald Willke et al , NHTSA, Ejection Mitigation Using Advanced Glazing Final Report (Aug 2001) ("Final Report") (R pp 226-91) In that report, NHTSA confirmed its prior research that "impacts into currently-used tempered side glazing resulted in lower neck stresses and lower neck bending around the neck junction and torso, due to impacts into advanced glazing " Final Report at x (R p 235) "In other words," NHTSA concluded, "advanced side glazing appears to increase the risk of neck injury " *Id see also id* at 36 (R p 272), 54 (R p 290)

In light of these findings, NHTSA definitively rejected the possibility of requiring advanced glazing in lieu of tempered glass Such a requirement also would have gone against NHTSA's core objective of increasing seat belt use *See Geier*, 529 U S at 875, 877 Thus, NHTSA's 2001 Final Report stated "The agency is *extremely reluctant* to

pursue a requirement that may increase injury risk for belted occupants to provide enhanced safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle " Final Report at x (R p 235) (emphasis added), *see also id* at 54 (R p 290) According to NHTSA, the safety of passengers wearing seat belts was a "*critical* factor " *Id* at 53-54 (R pp 289-90) (emphasis added) ("Since the benefits of ejection mitigation occur primarily for unbelted occupants, a critical factor in this research program was to investigate any possible injury risk, particularly for belted occupants ")

As a result of these safety concerns, NHTSA determined "it is more appropriate to devote its research and rulemaking efforts to projects other than ejection mitigation through advanced glazing Thus, the agency will not continue to examine a potential requirement for advanced side glazing " *Id* at x (R p 235), *see also id* at 54 (R p 290) Instead, "with the advent of other ejection mitigation systems, particularly side airbag curtains, the agency will continue to explore the feasibility of ejection mitigation,' but will shift its focus ' from advanced glazing to development of more comprehensive, performance-based test procedures " *Id* at xi (R p 236), *see also id* at 54 (R p 290) Side curtain airbags, for example, offered the potential of preventing ejections while protecting belted passengers from the impact with laminated glass Such technology, however, was not feasible when the vehicle in this case was manufactured (1997)

Less than a year after it issued its 2001 Final Report, NHTSA formally terminated its pending rulemaking on the issue of advanced glazing 67 Fed Reg at 41,367 In its termination notice, NHTSA cited "[t]wo primary reasons" for withdrawing the ANPRMs (1) "the advent of other ejection mitigation systems, such as side air curtains and the need to develop performance standards for them," and (2) "the fact that advanced side glazing

in some cases appears to increase the risk of neck injury" *Id* NHTSA cited cost concerns as an additional, but not primary, reason as well *Id*

3 In January 2011, NHTSA adopted a new regulation—FMVSS 226—to establish ejection mitigation standards "to reduce the partial and complete ejection of vehicle occupants through side windows in crashes" Federal Motor Vehicle Safety Standards, Ejection Mitigation, Phase-In Reporting Requirements, Incorporation by Reference, Final Rule, 76 Fed Reg 3212, 3212 (Jan 19, 2011) ("2011 Final Rule') Like NHTSA's prior efforts to encourage manufacturers to approach the risk of ejection through a *mix* of measures, the 2011 Final Rule established a "performance-oriented" standard "to provide substantial flexibility to vehicle manufacturers in developing or enhancing ejection mitigation countermeasures" *Id* at 3219 The rule states that NHTSA "anticipates that manufacturers will meet the standard by modifying existing side impact air bag curtains, and *possibly* supplementing them with advanced glazing" *Id* at 3212 (emphasis added) Significantly, however, the rule prohibits manufacturers from using "movable glazing *alone* to meet the requirements of the standard" *Id* at 3219 (emphasis added)[3] As NHTSA did for front airbags during the 1980s, the rule also adopts a four-year phase-in period, which does not begin until 2013 *Id* at 3297

B Factual Background And Procedural History

1 Priester filed this products liability suit under state law based on a car accident that occurred in the early morning on August 17, 2002 Priester's son, James

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[3] The 2011 Final Rule states "No vehicle shall use movable glazing as the sole means of meeting [the ejection mitigation performance requirements]") 76 Fed Reg at 3297 (S4 2 1 1), *see id* at 3219 ("NHTSA determined after considering real-world field data on advanced glazing that movable advanced glazing alone would not be a satisfactory ejection mitigation countermeasure for side window openings")

Lloyd Priester, was riding without a seat belt in the rear seat of a 1997 Ford F-150 pickup truck As was true of all pickup trucks on the roads at that time, the vehicle had tempered glass in the side windows (which were movable) The driver and Priester, both under 21 years of age, were intoxicated at the time The driver was speeding and lost control of the vehicle as he rounded a bend in the road near St George, South Carolina The pickup truck went off the road into a ravine and rolled several times Priester was ejected from the vehicle and died at the scene Summary Judgment Order at 1-2 (R pp 1–2)

2 Priester filed suit in the Court of Common Pleas, alleging that Ford's use of "inappropriate glazing materials which would [not] retain occupants inside the vehicle, and which would not shatter on impact" breached the warranty and rendered the pickup truck defective and unreasonably dangerous Complaint ¶¶ 22-27 (R pp 20-21) Priester's sole claim was that Ford used the wrong type of glazing in the rear side, movable window through which Priester was ejected Priester argued that Ford was required "to install laminated glass" (*i e* advanced glazing) rather than tempered glass in the vehicle's side windows Supp Br 1, 9 Priester did not allege, and has never alleged that the tempered glass Ford used failed to meet the specifications in FMVSS 205 Nor has Priester alleged that Ford should have used other mitigation measures such as side impact airbags (which Priester acknowledges were not feasible for the vehicle at issue, *id* at 8 n 3) Rather, Priester seeks to impose on Ford by tort-law an "advanced glazing alone" requirement for movable side windows that is directly at odds with the regulatory objectives of FMVSS 205—and, indeed, is now expressly *prohibited* by NHTSA's 2011 Final Rule on ejection mitigation measures 76 Fed Reg at 3219

Ford moved for summary judgment on the ground that FMVSS 205 preempts Priester's tort claims The Court of Common Pleas for the County of Orangeburg granted the motion, relying on *Geier* The court reasoned that, as in *Geier*, NHTSA's "decision to provide design options to automobile manufacturers was made with *specific policy objectives* in mind Indeed the *safety and regulatory policy* concerns motivating NHTSA to retain the tempered glass option under FMVSS 205 are no less clear and compelling than the justifications for NHTSA's passive restraint options under FMVSS 208 recognize[d] in *Geier*" Summary Judgment Order at 6 (R p 6) (emphasis added)

> The court correctly described NHTSA s decision as based on safety concerns
>
> NHTSA concluded from the available evidence that removal of the tempered glass option could "increase injury risk for belted occupants" and was, therefore, a poor trade for providing a potential benefit for ' unbelted occupants As such, NHTSA preserved the tempered glass option because it might benefit individuals who use the safety equipment NHTSA requires i e , occupants who choose to use their seat belts Since the decision to allow manufacturers to use tempered glass was made with policy reasons in mind, it is an authoritative message of federal policy and is preemptive of state law to the contrary

Id at 15 (R p 15) (citations omitted)

3 This Court affirmed 388 S C 425, 697 S E 2d 567 The Court faithfully looked to and applied *Geier* as controlling precedent As this Court correctly explained, *Geier* held that FMVSS 208 preempted a state law products liability claim that eliminated one of the options permitted by the standard because the "Department of Transportation deliberately provided the manufacturer with a range of choices among different passive restraint devices to be gradually introduced" *Id* at 431, 697 S E 2d at 570 And, as this Court recognized, the reason for that deliberate policy was to "'promote [Regulation] 208 s safety objectives '" *Id* (quoting *Geier*, 529 U S at 875)

The Court then found that the same two key features of the regulation in *Geier* were present as to FMVSS 205 First, the Court found that the "purpose of [FMVSS 205] is to provide an automobile manufacturer with a range of choices among different types of glazing materials" *Id* at 433, 697 S E 2d at 571 And second, it correctly recognized that NHTSA purposefully preserved the option of using tempered glass for safety reasons This Court explained that tempered glass "is safer for vehicle occupants wearing seat belts, where the risk of ejection is reduced, because it provides less risk of additional injuries' *Id* at 429-30, 697 S E 2d at 569 The Court also recognized that NHTSA declined to require advanced glazing because ten years of studying the potential use of advanced glazing in side windows had led the agency to conclude that "advanced glazing increased the risk of neck and back injuries in rollover accidents" *Id* at 430, 697 S E 2d at 569 Accordingly, this Court recognized, "NHTSA was 'extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle,' and thus, 'the agency will not continue to examine potential regulatory requirement for advanced side glazing'' *Id* at 430, 697 S E 2d at 570 (citation omitted)

In concluding that FMVSS 205 preempted Priester's tort claim, this Court also pointed to *Morgan v Ford Motor Co*, 680 S E 2d 77 (W Va 2009), and *Lake v Memphis Landsmen L L C*, No W2009-00526-COA-R3-CV, 2010 Tenn App LEXIS 200 (Mar 15, 2010)[4] 388 S C at 432-33, 697 S E 2d at 571 Both the *Morgan* and *Lake* courts found that, under *Geier*, FMVSS 205 preempted tort liability for the use of

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[4] The *Lake* case was later remanded for reconsideration in light of *Williamson See Lake v Memphis Landsmen L L C*, No W2009-00526-SC-R11-CV, 2011 Tenn LEXIS 312 (Mar 24, 2011) It remains pending on remand

tempered glass because NHTSA's decision to give manufacturers an option between tempered and laminated glass furthered NHTSA's safety objectives The West Virginia Supreme Court in *Morgan* held that the issue was "controlled by *Geier*, because the NHTSA made a public policy decision to not mandate advanced glazing in side windows because of safety concerns" tied to advanced glazing 680 S E 2d at 94 [5]

Likewise, the Court of Appeals of Tennessee in *Lake* found that "there is a federal policy that allows the option to use tempered glass in side windows " 2010 Tenn App LEXIS 200, at *24 NHTSA "left the options for glass open so that manufacturers could choose the safety features that best accomplished both purposes" of FMVSS 205, to "prevent both ejection and injuries resulting from impact " *Id* NHTSA's decision was based in significant part on "a safety decision, as studies showed an increased risk of neck injury upon impact with the advanced glazing " *Id* at *24-25 Because NHTSA deliberately gave manufacturers the option to choose for safety reasons, the *Lake* court held that a state tort rule requiring laminated glass in side windows would "serve as 'an obstacle to the accomplishment and execution of' a federal policy " *Id* at *26 (quoting *Geier*, 529 U S at 881) This Court agreed, holding that imposing tort liability for using tempered glass in side windows "would stand as an obstacle to achieving the purposes and objectives of Regulation 205 " 388 S C at 433, 697 S E 2d at 571

4 Priester petitioned for certiorari While that petition was pending, the United States Supreme Court decided *Williamson v Mazda*, 131 S Ct 1131 (2011) In *Williamson* the Court held that FMVSS 208, 49 C F R § 571 208 (1993)—which gives

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[5] Priester contends that *Morgan* found preemption "based on the mere existence of an options standard " Supp Br 14 But Priester ignores *Morgan*'s ultimate conclusion, as quoted above, that NHTSA provided both options for safety reasons 680 S E 2d at 94

manufacturers the option of installing either a lap-and-shoulder seat belt or lap-only seat belt in certain rear seating positions of vehicles—did not preempt a state tort law claim seeking to hold manufacturers liable for installing one type of seat belt instead of the other option 131 S Ct at 1134 In so holding, the Court reaffirmed that *Geier* establishes the legal framework for analyzing preemption claims under the Safety Act, and held—based on its assessment of the regulatory history of FMVSS 208—that allowing Priester's action to proceed in *Williamson* would "not 'stan[d] as an obstacle to the accomplishment of the full purposes and objectives' of federal law" 131 S Ct at 1139-40 (alterations in original) (quoting *Hines v Davidowitz*, 312 U S 52, 67 (1941))

On February 28, 2011, the Supreme Court granted the petition for certiorari in this case, vacated this Court's judgment, and remanded the case "for further consideration in light of *Williamson*" *Priester v Ford Motor Co*, 131 S Ct 1570 (2011) Shortly thereafter, this Court issued an order directing the parties to address "what impact, if any, *Williamson* may have on this case" Order at 1 (Apr 7, 2011)

SUMMARY OF ARGUMENT

To the extent that it has any impact on this case, the Supreme Court's decision in *Williamson* only underscores the correctness of this Court's prior decision holding that Priester's state-law tort action is preempted by FMVSS 205

I This Court's prior decision is based on a faithful application of *Geier* to the regulatory record and objectives underlying FMVSS 205 *Williamson* only strengthens that decision because, in *Williamson*, the Supreme Court reaffirmed that *Geier* controls the preemption analysis under the Safety Act Priester argues that the "most important lesson of *Williamson* is that regulatory options, standing alone, do not

exert *any* preemptive force." Supp. Br. 12. But this Court did not base its prior decision on the premise that "options alone" are preemptive. Rather, the Court held that Priester's tort suit is preempted because allowing it to proceed would frustrate the important federal objectives of FMVSS 205, including safety. That is the analysis compelled by *Geier*—and *Williamson* only cements that conclusion. This Court should reject Priester's attempt to recast *Geier* and strip it of any continuing significance by deeming it "*sui generis*" and "strictly limited to its facts." Supp. Br. 20. The Supreme Court declined similar efforts in *Williamson* to effectively overrule *Geier*, and Priester's argument is simply an effort to have *this Court* dismantle *Geier*. But only the Supreme Court can overrule its decisions, and in *Williamson* the Supreme Court reaffirmed—rather than debased—*Geier*.

II. *Williamson* provides no basis for reconsidering this Court's interpretation of FMVSS 205 and its regulatory objectives because that decision involved a different FMVSS (FMVSS 208) with a different regulatory history. But the factors that the Supreme Court emphasized in *Williamson* all point to a conclusion of preemption on the different regulatory record here. First, the *Williamson* Court found that the Department of Transportation ("DOT") did not grant manufacturers the seat belt option at issue to advance any significant safety objective and emphasized that DOT had actually "encouraged manufacturers" to install lap-and-shoulder belts. By contrast, as this Court correctly concluded in its prior decision, safety was a paramount objective for the option granted by FMVSS 205. And far from *encouraging* manufacturers to install laminated glass in side windows, NHTSA stated that it was "extremely reluctant" to do so because of its significant safety concerns about laminated glass. Second, the *Williamson* Court concluded that the seat belt option was not designed to promote technological

development or a mix of devices By contrast, as was true for the option at issue in *Geier*, a key purpose of the option at issue here was to foster the development of new and more comprehensive ejection mitigation systems such as those including side impact airbags And third, the *Williamson* Court concluded that the seat belt option was ultimately driven by cost-benefit considerations By contrast, safety, not costs, was a "critical factor" in adopting and maintaining the option at issue here

III Neither Priester's speculation about what the Solicitor General *might* say if the United States filed a brief in this case nor the 2011 ejection-mitigation rule provides any reason for reversing this Court's prior decision either In the prior appeal, this Court properly declined to change its decision in light of the Solicitor General's brief in *Williamson*, and there is even less reason to revisit that decision based on Priester's result-oriented speculation about what the government might say *if* it filed a brief in this case Moreover, the government's brief in *Williamson* emphasized the same regulatory factors that the Supreme Court did in its decision in *Williamson* But as explained, those factors are absent from the regulatory record at issue in this case The 2011 Final Rule does not help Priester either Indeed, to the extent it is relevant at all here, that rule only bolsters the case for preemption of Priester's tort claims because it would *prohibit* the advanced glazing-only requirement for movable glass that Priester now seeks to impose through state tort law and adopts a graduated phase-in period for ejection-mitigation systems that is entirely inconsistent with Priester's attempt *immediately* and retroactively to impose an advanced glazing-only requirement through state tort law

Accordingly, the Court should adhere to its prior decision holding that Priester's state-law tort action is preempted by FMVSS 205 Neither *Williamson* nor any other factor cited by Priester provides any reason for this Court to reverse course here

ARGUMENT

At the outset, it is important to recognize that the Supreme Court's GVR order in this case "d[oes] not amount to a final determination on the merits" *Henry v City of Rock Hill*, 376 U S 776, 777 (1964), *accord Tyler v Cain*, 533 U S 656, 666 n 6 (2001) (citing *Henry*, 376 U S at 777)) A GVR order is "neither an outright reversal nor an invitation to reverse" *Gonzalez v Justices of the Mun Court*, 420 F 3d 5, 7 (1st Cir 2005), *see United States v Norman*, 427 F 3d 537, 538 n 1 (8th Cir 2005) ("The GVR is not the equivalent of a reversal on the merits ") Indeed, a GVR order does not even "suggest" that a lower court's decision is erroneous *See Communities For Equity v Michigan High Sch Athletic Ass n*, 459 F 3d 676, 680 (6th Cir 2006) ("[A] GVR does not indicate, nor even suggest, that the lower court's decision was erroneous"), *Hughes Aircraft Co v United States*, 140 F 3d 1470, 1473 (Fed Cir 1998) ("Vacatur and remand by the Supreme Court, however, does not create an implication that the lower court should change its prior determination"), Eugene Gressman et al , *Supreme Court Practice* 349 (9th ed 2007) ("[T]he Court does not treat the summary reconsideration order as the functional equivalent of a summary reversal order ")

Instead, a GVR order simply provides an opportunity for the lower court to reconsider its decision in light of an intervening precedent that *might* have a bearing on the case In other words, the order asks the lower court "merely to reconsider the entire case in light of the intervening precedent—which may or may not compel a different

result" *Supreme Court Practice* 349 Frequently, a lower court looks at its prior decision in light of the intervening Supreme Court precedent and then reaffirms its decision, just as this Court has done before *See McQueen v South Carolina Coastal Council*, 354 S C 142, 151, 580 S E 2d 116, 120 (2003), *cf State v Jefferies*, 316 S C 13, 446 S E 2d 427 (1994) (reinstating original conviction that was GVR'd to the Court of Appeals) As explained below, after considering *Williamson*, this Court should reaffirm its prior decision in this case because, to the extent that *Williamson* has any impact on this case, it simply confirms that this Court's prior decision was right

I *WILLIAMSON* REAFFIRMED THE LEGAL FRAMEWORK THAT THIS COURT APPLIED IN REACHING ITS PRIOR DECISION

A *Williamson* Squarely Reaffirmed *Geier*

This Court previously decided this case based on a proper application of the preemption analysis established by the Supreme Court in *Geier* In *Williamson*, many briefs—including the amicus brief filed by Priester's own attorneys here, Public Justice—urged the Supreme Court to reconsider its decision in *Geier* *See e g* , No 08-1314, Br of Public Justice, P C as *Amicus Curiae* in Support of Petitioners 1-2 (Aug 6, 2010), No 08-1314, Br of the Attorneys Information Exchange Group as *Amicus Curiae* in Support of Petitioners 22-25 (Aug 5, 2010), *cf* No 08-1314, Br for the States of Illinois *et al* as *Amici Curiae* in Support of Petitioners 25 (Aug 6, 2010) And in his opinion concurring in the judgment in *Williamson*, Justice Thomas reiterated his view that *Geier* was erroneously decided 131 S Ct at 1141-43 In *Williamson* however, the Supreme Court refused to overturn *Geier*—either directly or indirectly Instead, without a single critical word for *Geier*, the Court squarely reaffirmed the legal principles outlined in *Geier* and

resolved *Williamson* by applying those principles to its interpretation of the regulatory history and objectives of the FMVSS at issue

Williamson expressly reaffirmed the three cornerstones of *Geier* First, the Court reaffirmed *Geier*'s holding that the Safety Act, 15 U S C § 1381, did not expressly preempt the state tort suit 131 S Ct at 1136 Second, it reaffirmed *Geier*'s holding that the Safety Act's savings clause did not foreclose or limit the operation of "ordinary conflict pre-emption principles" *Id* at 1135-36 And third, the Court reaffirmed that, under ordinary conflict preemption principles, a conflict exists and the state law is preempted when it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the federal law *Id* at 1136 (citation omitted) The Court explained that, in *Geier*, the Court had found that the state tort suit presented an obstacle to the accomplishment of "the maintenance of manufacturer choice," which was a "significant federal regulatory objective" *Id* And because *Geier* was the governing precedent, the Court reasoned, "[w]e must decide whether the same is true here" *Id*[6]

Ultimately, the Court concluded that the application of the *Geier* principles to the different regulatory record before it in *Williamson* called for a different result Based on the Court's understanding of the regulatory record and objectives underlying FMVSS

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[6] In reaffirming *Geier*, the Supreme Court also necessarily confirmed that the fact that FMVSSs are generally defined as "minimum" standards does not automatically mean that such standards lack preemptive force The *Geier* majority rejected this argument (which had been made by the plaintiff and dissent in *Geier*) and instead held that, while most FMVSS requirements may establish only a floor, some grant manufacturers options that are protected by preemptive federal law *Geier* 529 U S at 874-75 *Geier* therefore establishes that a FMVSS can serve as more than just a minimum standard in order to achieve policy objectives of the Safety Act and thereby have preemptive effect Priester's repeated reference to FMVSS 205 as a "minimum standard" therefore does not answer whether that standard has preemptive effect under the *Geier* analysis

208's seat belt standard, the Court concluded that providing manufacturers a choice to install lap-only seat belts in the rear seats at issue did not further any significant federal regulatory objective *See id* at 1137-40, *infra* at 29-34 But far from recasting or overturning *Geier* the Court in *Williamson* simply applied *Geier* to the distinct regulatory record before it and reached a different conclusion—based on that record

B Priester's Efforts To Recast And Reinvent *Williamson* Are Unavailing

Instead of recognizing that *Williamson* solidified the reasoning of this Court's prior decision, Priester contends that *Williamson* changed the law in two ways that should affect this Court's analysis Priester is wrong on both counts

1 What Priester Calls The "Most Important Lesson Of *Williamson*" Is Inapplicable Here

Priester contends that the "most important lesson of *Williamson* is that regulatory options, standing alone, do not exert *any* preemptive force" Supp Br 12 But the "options alone" argument is a straw man Neither the manufacturer in *Williamson* nor Ford here argued that the existence of a regulatory option *alone* is sufficient to preempt a state tort action *See* No 08-1314, Br for Resp 2-3 (Sept 21, 2010) (explaining that the plaintiff "repeatedly mischaracterize[s] respondents position as arguing that 'mere compliance with an option is sufficient to preempt state common law'" and that respondents' position was in fact based on the premise that the option at issue was designed to achieve important regulatory objectives (citation omitted) (alteration in original)) More important, *this Court* did not rely on the mere existence of a regulatory option to find preemption in its prior decision Instead, the Court correctly understood and applied *Geier*—as reaffirmed in *Williamson* Thus, for example, this Court explained that FMVSS 208 preempted the tort suit in *Geier* because the

Department of Transportation ("DOT") "*deliberately* provided the manufacturer with a range of choices" to promote the regulation's "'safety objectives '" 388 S C at 431, 697 S E 2d at 570 (quoting *Geier*, 529 U S at 875) (emphasis added) And the Court correctly found the same to be true here NHTSA had the same affirmative intent—"the *purpose* of this regulation is to provide an automobile manufacturer with a range of choices," *id* at 433, 697 S E 2d at 571 (emphasis added)—and NHTSA was motivated by safety concerns, *id* at 430, 432, 697 S E 2d at 569-70, 571

Nor did Ford base its case for preemption on any "options alone" theory in the prior appeal Ford's arguments to this Court in favor of preemption likewise were consistent with *Geier* as reaffirmed in *Williamson* Ford contended that "*not only* does federal law permit the use of tempered glass in side windows, but it does so deliberately and 'with specific policy objectives in mind'"—namely, achieving the appropriate balance between the two "primary safety objectives" of FMVSS 205 Ford Br 15 (emphasis added) (citation omitted) The trial court's decision, which this Court affirmed, likewise applied *Geier* as reaffirmed in *Williamson* and reached the same conclusion as this Court on the regulatory record of FMVSS 205, holding that NHTSA's decision to grant manufacturers an option to use different glass types in FMVSS 205 "was made with specific policy objectives in mind" and, in particular, was motivated by "safety and regulatory policy concerns " Summary Judgment Order 6 (R p 6)

Priester blatantly mischaracterizes this Court's prior decision when she states that this Court "relied *exclusively* on the fact that Standard 205 gave manufacturers a choice of different window glazing technologies " Supp Br 12 (emphasis added), *see also id* at 13 This Court's discussion of NHTSA's safety reasons for not requiring advanced

glazing in side windows and its reliance on *Lake* and *Morgan*—both of which specifically relied on the safety purpose behind FMVSS 205 in finding preemption—underscore that the Court properly focused on the regulatory objectives served by the regulation's provision of options That is precisely the approach called for by *Geier* and that the Supreme Court reaffirmed in *Williamson* The key point in this case is not that FMVSS 205 gives manufacturers an option—it is that the rule does so to achieve important federal objectives, including safety This Court correctly held as much, and nothing in *Williamson*—which involved a different regulation and different regulatory history—provides any basis to second-guess this Court's reading of FMVSS 205

2 *Williamson* Did Not Overrule *Geier* Sub Silentio

Priester also contends that *Williamson* changed the law by stripping *Geier* of any continuing significance Thus, for example, Priester claims that "*Williamson* was emphatic in its teaching that *Geier* was a *sui generis* decision that must be strictly limited to its facts," and Priester repeatedly refers to the facts of *Geier* as "highly unusual" Supp Br 19, 20, *see also id* at 11 ("[T]he Court made clear that *Geier* should be limited to its (highly unique) facts") But the words "*sui generis*" "strictly limited to its facts," and 'highly unusual' are Priester's, not the Supreme Court's That language simply does not appear in *Williamson* And far from confining *Geier* to its precise facts, much less holding that *Geier* "must be strictly limited to its facts" (Supp Br 19), the Supreme Court has recognized that *Geier* has precedential force *beyond* its precise facts and, indeed, even outside the Safety Act context—including in a decision issued after the Court issued its decision in *Williamson* *See e g AT&T Mobility LLC v Concepcion* 131 S Ct 1740, 1748 (2011), *Wyeth v Levine*, 129 S Ct 1187, 1203 (2009)

Priester similarly asserts that *Williamson* found that the provision of options is a significant regulatory objective 'only" when all three of the factors that were present in *Geier* are present Supp Br 11, 15 But once again, Priester is putting words in the Supreme Court's mouth Indeed, Priester simply mischaracterizes *Williamson* by adding the word "only" before *Williamson*'s description of the facts involved in *Geier* Priester states "[T]he Court held [in *Williamson*] 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* '" Supp Br 11 (quoting *Williamson*, 131 S Ct at 1139) (first emphasis added) Later, Priester similarly argues that "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* '" Supp Br 15 (quoting *Williamson*, 131 S Ct at 1136) (first emphasis added)

Both of the quoted statements from *Williamson* simply describe the regulatory backdrop involved in *Geier* But neither statement—nor any other statement in *Williamson*—directed that preemption is appropriate "only" when all three factors are present And *Geier* does not say that either The Court's decision in *Williamson* cannot possibly support such a broad inference because the Court found that *none* of the three factors favored preemption in *Williamson* After describing that all three factors in *Geier* favored preemption, the Court stated "Here, these same considerations indicate the contrary " 131 S Ct at 1139 Accordingly, the Court had no occasion or need to address

what would result if only one or two of the factors favored preemption And it is of course not the case that a court is barred from finding that a FMVSS is preemptive unless the agency actually intervenes and files a brief saying so As *Geier* makes clear, the preemption analysis is based on a review of the regulatory record and objectives of the underlying rule But the analysis is not as idiosyncratic as Priester suggests

In effect, Priester is trying to get *this Court* to do what the *Supreme Court* pointedly declined to do in *Williamson* (despite the briefs asking the Court to do so and a concurring opinion by Justice Thomas arguing that *Geier* should be overruled, *see supra* at 19)—to dismantle *Geier* by gutting it of any continuing significance But only the United States Supreme Court can overrule one of its decisions *See e g , Agostini v Felton*, 521 U S 203 (1997) ("[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions " (quoting *Rodriguez de Quijas v Shearson/American Express Inc* , 490 U S 477, 484 (1989)) And the Supreme Court has made clear that the same rule applies when it comes to attempts to negate a Supreme Court precedent by narrowing it to the point where it lacks any practical significance *See Tenet v Doe*, 544 U S 1, 8-11 (2005) (explaining that there is "no basis" for the Court of Appeals' view that the "*Totten* bar has been reduced to an example of the state secrets privilege" and citing *Rodriguez de Quijas*)

3 *Williamson* Does Not In Any Way Validate *O'Hara*

In a variation of Priester's theme that *Williamson* effectively overruled *Geier* by purportedly limiting *Geier* to its "highly unusual" facts, Priester argues that "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) " Supp Br 27 But the Supreme Court did not even mention *O Hara* in its decision in *Williamson* Priester argues that *O Hara* is

consistent with *Williamson* because the Fifth Circuit did not "rely[] on the mere existence of regulatory options" to find preemption *Id* But Priester's strained effort to elevate the significance of *O Hara* based on *Williamson* is unavailing

To begin with, as discussed, this Court did not base its prior decision on any rule that "the mere existence of regulatory options" alone is preemptive *Id* And Priester's effort to paint this Court's prior decision in such terms is disingenuous Likewise, this Court's refusal to follow *O Hara* was based not on the fact that FMVSS 205 contains an option It was based on this Court's interpretation of the regulatory record and objectives underlying FMVSS 205 and conclusion that allowing Priester's state tort action to proceed would frustrate those important federal objectives, including safety *See supra* at 12-14 In *O Hara*, the Fifth Circuit concluded that safety concerns were *not* a significant factor underlying the agency's decision not to require advanced glazing *See* 508 F 3d at 761-62 But as this Court emphasized in its prior decision, the regulatory record refutes that conclusion Indeed, NHTSA has had serious concerns about the increased risk of serious injuries posed by advanced glazing for belted passengers, as confirmed in NHTSA's Final Report 388 S C at 430, 697 S E 2d at 570 As Ford pointed out in its brief (Ford Br 21, 28), *O Hara* completely ignored those safety concerns *Williamson* provides no basis for this Court to revisit, much less overturn, that finding, because *Williamson* did not discuss the regulatory history or objectives of FMVSS 205

Priester's continued reliance on *O Hara* is misplaced in another important respect The Fifth Circuit based its decision in *O Hara* largely on its reading of *Sprietsma v Mercury Marine*, 537 U S 51 (2002) *See O Hara*, 508 F 3d at 762 (finding purported "parallels" with "*Sprietsma* to be compelling") Indeed, Priester herself has

noted *O Hara*'s reliance on *Sprietsma*, and continues to rely on *Sprietsma* Supp Br 28-29 But, as Ford has already explained, *O Hara*'s reliance on *Sprietsma* is entirely misplaced Ford Br 25-27 *Sprietsma* dealt with the different situation in which the federal agency had decided not to regulate *at all* in the pertinent area (propeller guards) By contrast, here, as in *Geier*, the agency's refusal to impose the regulatory requirement that Priester seeks to impose through state tort law arose in the context of a comprehensive federal program that already regulated the equipment at issue Moreover, despite the *Williamson* plaintiff's extensive reliance on *Sprietsma see* No 08-1314, Br for Pet 23, 25, 33, 43, 44 (July 30, 2010), No 08-1314, Reply Br for Pet 5, 6, 19 (Oct 20, 2010), the Supreme Court's decision in *Williamson* does not even mention, much less rely on (or analogize the *Williamson* case to) *Sprietsma* In that respect, *Williamson* if anything only reinforces this Court's prior decision not to follow *O Hara*

Priester's rel ance on the Texas Supreme Court's decision in *MCI Sales & Service Inc v Hinton*, 329 S W 3d 475 (Tex 2010), is similarly misplaced *See* Supp Br 29 This Court previously recognized the appellate court decision in *Hinton* "[f]inding no preemption" 388 S C at 431 n 6, 697 S E 2d at 570 n 6 (quoting parenthetical) The Texas Supreme Court's affirmance of that decision does not change anything Moreover, the Texas Supreme Court simply pointed to *O Hara* But as discussed, this Court properly concluded that *O Hara*'s analysis of FMVSS 205 was unsupported by the regulatory record The fact that the Supreme Court denied certiorari in *Hinton* in no way alters the relevance of that decision No 10-1148, 2011 WL 972764 (May 23, 2011) "[T]he denial of a writ of certiorari imports no expression of opinion

upon the merits of the case, as the bar has been told many times " *Missouri v Jenkins*, 515 U S 70, 85 (1995) (internal quotation marks and citation omitted) [7]

II *WILLIAMSON* HAS NO BEARING ON THIS COURT'S INTERPRETATION OF FMVSS 205'S REGULATORY OBJECTIVES

In her supplemental brief, Priester goes far beyond the scope of the Supreme Court's remand and this Court's supplemental briefing order—which are focused on the impact, if any, of the Supreme Court's decision in *Williamson*—and essentially attempts to relitigate this Court's prior interpretation of the regulatory history and objectives of FMVSS 205 That effort should be rejected Because *Williamson* involved a different safety standard (FMVSS 208) than the one at issue here (FMVSS 205), and because FMVSS 205 and FMVSS 208 have different regulatory histories and different contemporaneous explanations by the agency, the Supreme Court's order remanding this case for further consideration in light of *Williamson* necessarily provides no basis for this Court to revisit its interpretation of FMVSS 205 and its objectives In any event, the Supreme Court s discussion in *Williamson* of the regulatory record underlying FMVSS 208 only reinforces this Court's prior decision holding that FMVSS 205 preempts Priester's state tort action, because each of the regulatory factors on which the Supreme

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[7] In any event, there are obvious non-merits-based reasons why the Supreme Court may have decided to deny certiorari in *Hinton* For example, the Texas Supreme Court's analysis of the preemptive effect of FMVSS 205 in *Hinton* was dictum As the Texas Supreme Court explained, its conclusion that another claim—based on the type of seat belt used—was not preempted by FMVSS 208 was itself "sufficient to uphold the jury's verdict ' *Hinton*, 329 S W 3d at 495 n 19 In addition, the Texas Supreme Court's decision in *Hinton* was interlocutory—ultimately the court remanded for further proceedings And in that respect, the Supreme Court may have believed that the state supreme court's decision was not final, and therefore not properly subject to review under 28 U S C § 1257(a) *See Jefferson v City of Tarrant*, 522 U S 75, 77-78 (1997)

Court focused in *Williamson* supports the conclusion that NHTSA affirmatively intended to provide options in FMVSS 205 to further significant regulatory objectives [8]

1 Significantly, the *Williamson* Court concluded that DOT did *not* grant manufacturers the option to install lap-only belts in the rear seats at issue in order to promote safety Instead, the Court concluded that DOT was "convinced that *lap-and-shoulder* belts would increase safety" as seat belt use continued to increase, and that the agency's prior safety concerns about lap-and-shoulder belt compatibility with child car seats had been alleviated 131 S Ct at 1138 (emphasis added) Moreover, while the Court recognized that DOT had also thought that the use of lap-and-shoulder belts in rear aisle seats could interfere with safety by blocking the aisle during entry and exit, the Court found that there was "little indication that DOT considered this matter a significant safety concern " *Id* And the Court emphasized that, instead of touting safety concerns about the use of lap-and-shoulder belts, the agency actually "encouraged manufacturers" to install lap-and-shoulder belts in the seating position at issue where feasible *Id* (citing 54 Fed Reg 46,257, 46,258 (Nov 2, 1989)) The United States repeatedly stressed that DOT had "encouraged" manufacturers to do so in its amicus brief in support of the *Williamson* plaintiffs No 08-1314, Br for the United States as *Amicus Curiae* in Support of Petitioners 17, 20, 21, 28 (Aug 6, 2010)

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[8] Priester also repeats her contention that FMVSS 205 does not preempt the tort suit because it simply incorporates an ANSI standard *See* Pl Br 7, 12-13, Supp Br 21 As Ford has explained (Ford Br 23 n 9), that argument is entirely without merit Indeed, FMVSS 205 expressly incorporates the ANSI standard, which included the option to use tempered or laminated glass There is no reason an agency may not incorporate such a standard by reference This Court properly rejected this argument 388 S C at 433, 697 S E 2d at 571 And the Supreme Court's decision in *Williamson* provides no basis whatsoever for reconsidering that argument or related arguments here

In stark contrast, the regulatory history and agency explanation in this case show that safety *was* a significant federal objective of the options provided by FMVSS 205 Indeed, whereas NHTSA had expressly "encouraged manufacturers" to install the safety equipment at issue in *Williamson* (lap-and-shoulder belts), 131 S Ct at 1138, the agency in this case stated that it was "*extremely reluctant*" to require the equipment that Priester seeks (laminated side windows) because doing so would "increase injury risk for belted occupants " Final Report at 54 (R p 90) (emphasis added) This case, in other words, is the polar opposite of *Williamson* when it comes to the safety objective

The regulatory purpose of FMVSS 205 and history of the rule underscores this conclusion The express purposes of FMVSS 205 include "to reduce injuries resulting from impact to glazing surfaces' and "to minimize the possibility of occupants being thrown through the vehicle windows in collisions " 49 C F R § 571 205 S2 (R p 61) ANS Z26—the standard that FMVSS 205 expressly incorporates by reference—explains that "[o]ne safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type," and so "no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards " ANS Z26 § 2 2 (R p 79)

As discussed, NHTSA expressed safety concerns throughout its studies of advanced glazing The concerns were first raised in response to NHTSA's 1988 ANPRMs At that time, "[n]ot only was it not clear that [advanced glazing] would reduce injuries and fatalities, but questions arose as to whether this material would actually increase injuries " 1995 Report at 2-2 (R p 405) (describing comments to 1988 ANPRM) Those safety concerns continued throughout the 1990s, *see* 67 Fed Reg at

41,366, and only grew as NHTSA continued its research NHTSA's 1995 Report stated that "[s]ince ejection mitigating glazings will generally allow for greater contact time between the head and glazing than conventional side windows, there is a potential for an increased risk of serious neck injury from such contact " 1995 Report at 5-3 (R p 432) By 1999, NHTSA concluded that it was clear that "impacts with tempered glass resulted in lower neck shear loads and moments than those with advanced glazings" and "[i]n each case, tempered glass impacts produced the lowest neck injury measurements " 65 Fed Reg at 44,711 (describing 1999 Report), *see also* 1999 Report at viii

Finally, when NHTSA concluded its studies in 2001, it confirmed that "advanced side glazing appears to increase the risk of neck injury" because "impacts into currently-used tempered side glazing resulted in lower neck shear loads and lower neck moments than impacts into advanced glazing " Final Report at 54 (R p 290), *see also id* at x (R p 235) Because of the "critical factor" of safety to belted passengers, the agency was "*extremely reluctant* to pursue a requirement that may increase injury risk for belted occupants to provide enhanced safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle " Final Report at 53-54 (R pp 289-90) (emphasis added) One of the "[t]wo primary reasons" for not requiring advanced glazing in side windows was "the fact that advanced side glazing in some cases appears to increase the risk of neck injury " 67 Fed Reg at 41,367

Moreover, providing the option of tempered glazing also furthered the agency's longstanding core safety goal encouraging seat belt use *See Geier*, 529 U S at 875, 877 ("[B]uckled up seatbelts are a vital ingredient of automobile safety "), *Williamson*, 131 S Ct at 1136-37 That safety objective is unquestionably "significant " And it makes

perfect sense for the agency to focus on the safety of *belted* passengers, since the vast majority of vehicle occupants wear seat belts and increasing the risk of injury to *belted* occupants versus unbelted occupants could have compromised the most important safety objective in the history of NHTSA—getting occupants to 'buckle up'"[9]

2 *Williamson* also concluded that DOT did not preserve seat belt options in FMVSS 208 to further technological advancement According to the Court, in providing manufacturers with options under FMVSS 208, DOT "had no interest in assuring a mix of devices," and it did not "seek to use its regulation to spur the development of alternative kinds of rear aisle or middle seat safety devices" 131 S Ct at 1138 Here too, the opposite is true for FMVSS 205 When NHTSA declined to require advanced glazing, it specifically cited the "advent of other ejection mitigation systems, such as side air curtains," and determined that it was "more appropriate" to focus on the development

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[9] Priester suggests that this safety objective was not significant because "NHTSA continues [1] to require advanced glazing in the front windshields of all automobiles, [2] to permit it in side windows, and [3] has recently adopted a new rule that actively encourages the use of advanced glazing in all side windows" Supp Br 26 But as to [1], there are non-ejection mitigation reasons for requiring laminated glass in windshields (like protecting against rocks or other objects that may hit a windshield) and NHTSA has long required front impact air bags, which, among other things, address the increased safety risks posed by advanced glazing in windshields from an ejection perspective NHTSA also has long recognized that "head impacts to side glazings generally occur to the side of the head" and "a blow to the side of a head will generally produce a more severe injury than would that same blow to the front of the head" 1995 Report at 5-2 (R p 431) As to [2], *Geier* itself teaches that the fact that the agency permits a particular type of equipment that poses increased safety risks does not mean that federal safety objectives will not be thwarted by state law tort suits categorically requiring that type of equipment And as to [3], the new rule to which Priester refers does not "actively encourage[] the use of advanced glazing in all side windows", it encourages the use of *side* impact airbags (which, among other things, would address the increase safety risks posed by advanced glazing) and "*possibly* supplementing them with advanced glazing" 76 Fed Reg at 3212 (emphasis added) More to the point, that rule actually *prohibits* the use of advanced glazing alone in movable side windows *Id* at 3219

of such systems 67 Fed Reg at 41,367, *see* 76 Fed Reg at 3219 (explaining that NHTSA 'redirected research and rulemaking efforts from advanced glazing to developing performance-based test procedures") Imposing a laminated glass requirement—like the requirement that Priester seeks to impose here through state tort law—would have impeded that important objective Thus, just as in *Geier*, 529 U S at 879, the agency's rejection of an advanced glazing requirement was based on a desire to foster the study and development of potentially more promising safety technology—technology that (unlike advanced glazing alone) would not create a greater risk of injury to *belted* occupants to provide asserted benefits to unbelted occupants [10]

3 In *Williamson* the Court ultimately concluded that, instead of being motivated by safety concerns or the desire to foster technological development, the "more important" reason the agency did not require lap-and-shoulder belts in rear inner seats was "that it thought that this requirement would not be cost-effective " 131 S Ct at 1139 The Court then held that, although "an agency could base a decision to pre-empt on its cost-effectiveness judgment, we are satisfied that the rulemaking record at issue [in *Williamson*] discloses no such pre-emptive intent " *Id* By contrast, while NHTSA also cited cost considerations in giving manufacturers the option of how to comply with

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[10] As noted, ultimately that policy led to DOT's adoption of the 2011 Final Rule, which establishes a "performance-oriented" standard "to provide substantial flexibility to vehicle manufacturers in developing or enhancing ejection mitigation countermeasures" and prohibits manufacturers from using "glazing *alone* to meet the requirements of the standard " 76 Fed Reg at 3219 (emphasis added), *see also* Final Report at xi (R p 236) ("NHTSA wants to focus its efforts on establishing the necessary safety performance that must be achieved, and allow vehicle manufacturers to *choose any technology* that achieves the necessary performance " (emphasis added)), *see also id* at 54 (R p 290) (same) Priester's suit would directly frustrate that objective by immediately imposing a "glazing alone" requirement under state tort law

FMVSS 205, it is clear that safety considerations were a "critical factor" in the agency's decision to adopt the option at issue *See supra* at 9 *Williamson*'s discussion of cost considerations therefore has no bearing on the regulation at issue here

III PRIESTER'S SPECULATION ABOUT THE POSITION OF THE GOVERNMENT AND RELIANCE ON FMVSS 226 ARE MISPLACED

Veering significantly from the impact, if any, of *Williamson* on the Court's prior decision in this case, Priester also relies heavily on speculation about the position that the Solicitor General would take in this case *if* the federal government were to file a brief, and on NHTSA's promulgation of the 2011 Final Rule on ejection mitigation measures Neither argument provides any basis for reversing the Court's prior decision in this case

A The Solicitor General Has Not Taken A Position In This Case And Its Prior Positions Are Consistent With This Court's Decision

Priester surmises that "*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 " Supp Br 15, *see also id* at 17 (it is "difficult to imagine" the United States taking a different position with regard to FMVSS 205 than it did in *Williamson*) But Priester's speculation about what the government might say is just that—speculation Furthermore, because the Solicitor General has not filed a brief *in this case*, this case is in the same position as it was when Priester brought the government's *Williamson* brief to the Court's attention during the prior appeal *See* Pl Motion to Invite the United States to Submit a Brief as *Amicus Curiae* (May 25, 2010), Order (June 10, 2010), Petition for Rehearing at 2-3 (Aug 15 2010), Order (Sept 2, 2010) The Court properly declined to attach any significance to the government's brief in *Williamson* then (presumably because the case involves a different regulation), and there is no reason to attach any weight to Priester's speculation about what the government might say in a brief it has not even filed

In any event, the government's brief in *Williamson* emphasized the same regulatory factors focused on by the Supreme Court in its decision—namely, the asserted absence of a significant safety objective or an effort to encourage technological development, and the conclusion that the agency's overriding objective was cost-effectiveness As discussed, however, those factors are absent here In *Williamson* the Court pointed to the Solicitor General's observation that giving manufacturers multiple options would not preempt a tort suit eliminating one option where "'the Secretary did not determine that the availability of options was necessary to promote safety '" 131 S Ct at 1139 (citation omitted) But whereas the Court concluded that "[t]his last statement describes [*Williamson*]," *id*, the opposite conclusion follows here Here, as discussed, safety was a "critical factor" and a "primary reason[]" for providing the option at issue under FMVSS 205 *See supra* at 9-10 None of the factors that the *Williamson* Court emphasized about the 1989 version of FMVSS 208 are present in this case

Moreover, as the Supreme Court has made clear, although courts may consider the agency's views on the preemptive effect of regulations, courts are to conduct their "*own* pre-emption analysis" and are not bound by the government's position on whether or not a regulation is preemptive *Wyeth* 129 S Ct at 1203 (emphasis added) As the Supreme Court concluded was true in *Geier*, the regulatory history here "is clear enough" that the government's view is beside the point *Geier*, 529 U S at 886 And any attempt by the government to argue that FMVSS 205 was *not* preemptive would be contradicted by the regulatory record and not entitled to weight *Cf Wyeth*, 129 S Ct at 1203 That is all the more reason why Priester's unsupported speculation about what the government *might* say provides no reason for the Court to reach a different result now

B To The Extent It Is Relevant, The 2011 Adoption Of FMVSS 226 Only Bolsters This Court's Prior Decision

Priester contends that "[a]ny 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" Supp Br 17, *see id* at 18 In other words, Priester asks this Court to change its decision based on NHTSA's 2011 adoption of a different rule—FMVSS 226 *See* 76 Fed Reg 3212 That argument fails

The Supreme Court vacated and remanded for further consideration in light of *Williamson*, not for further consideration in light of rulemakings that post-dated this Court's original decision Federal courts have recognized the "general rule" that "when the Supreme Court remands in a civil case, the court of appeals should confine its ensuing inquiry to matters coming within the specified scope of the remand" *Kotler v American Tobacco Co* , 981 F 2d 7, 13 (1st Cir 1992) (citing cases from the Second, Fourth, and Ninth Circuits) Here, the scope of the remand is clear to reconsider the Court's prior decision in light of *Williamson*—not anything else Moreover, by its own terms, the 2011 Final Rule does not apply to any vehicle until 2013—some 16 years after the vehicle involved in this case was manufactured *See* 76 Fed Reg at 3297

But in any event, to the extent that the 2011 Final Rule is relevant to the proceedings here, the rule only bolsters this Court's conclusion that FMVSS 205 preempts Priester's state law tort claims The only part of the 2011 rule that addresses the relevant time period here supports a finding of preemption The Final Rule explains "In the 1990s, NHTSA closely studied advanced glazing as a potential ejection mitigation countermeasure but terminated an advance notice of proposed rulemaking on advanced glazing in 2002 (67 FR 41365, June 18, 2002) The termination was based on our

observation that advanced glazing produced higher neck shear loads and neck moments than impacts into tempered side glazing." 76 Fed Reg at 3222 (footnotes omitted) In other words, the 2011 Final Rule reaffirms this Court's conclusion based on the *relevant* regulatory history and objectives of FMVSS 205 that allowing state tort suits like Priester's to go forward would thwart the agency's safety objective

The 2011 Final Rule also underscores the agency's objective during the relevant period to promote technological development by ensuring that manufacturers were free to choose from a range of options—and not simply required to use advanced glazing *See* 76 Fed Reg at 3219, 3222 (explaining that NHTSA sought to direct the focus of rulemaking and research *away from* advanced glazing to other ejection mitigation systems, including those using side impact airbags) The new FMVSS 226 establishes a "performance-oriented" standard "to provide substantial flexibility to vehicle manufacturers in developing or enhancing ejection mitigation countermeasures." *Id* at 3219 The rule states that NHTSA "anticipates that manufacturers will meet the standard by modifying existing side impact air bag curtains, and *possibly* supplementing them with advanced glazing." *Id* at 3212 (emphasis added) But far from backing the requirement that Priester seeks to impose here, the rule *prohibits* manufacturers from using "glazing alone to meet the requirements of the standard" in movable side windows *Id* at 3219

This action is predicated on Priester's claim that manufacturers were required by state law to use advanced glazing (*i e* laminated glass) *alone* to address the risk of ejection in movable side windows like those in the pickup truck involved in this case *See supra* at 12 As discussed, the agency refused to mandate an advanced glazing requirement during the relevant time period because it concluded that such a requirement

would *increase* the risk of injury to belted occupants During the relevant time period, the agency also specifically cited the "advent of other ejection mitigation systems, such as side air curtains," and determined that it was "more appropriate" to focus on the development of such other systems 67 Fed Reg at 41,367 Thus, in addition to safety concerns, the agency's rejection of an advanced-glazing requirement was based on a desire to foster the study and development of potentially more promising ejection mitigation systems Mandating advanced glazing in side windows—the rule that Priester seeks to impose through state tort law —would have thwarted the development of such comprehensive ejection mitigation systems Moreover, the 2011 Final Rule itself *prohibits* manufacturers from adopting the advanced-glazing-only approach that Priester seeks to impose through state tort law for movable side windows [11]

It is also significant that the 2011 Final Rule adopts a phase-in period for ejection-mitigation systems, which does not even begin until 2013 76 Fed Reg at 3297 That phase-in period is directly analogous to the phase-in period that the agency adopted in the air-bag rule at issue in *Geier* *See* 529 U S at 879 (emphasizing that NHTSA "deliberately sought a *gradual* phase-in of passive restraints") As in *Geier*, the existence of a phase-in period for ejection mitigation systems is inconsistent with the conclusion that the agency would have wanted a regime in which state tort suits could *immediately*

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[11] Advanced glazing may work well with side air bags precisely because the latter technology mitigates the particular hazard that the agency has long recognized is posed by advanced glazing—the risk of impact between a person's body and a vehicle's side windows Moreover, side air bags alleviate the risk posed to *belted* occupants So by allowing the technology to progress the agency promoted a solution that would not detract from its longstanding objective to encourage seat belt use The advanced glazing only rule that Priester seeks to impose would frustrate that impact objective by effectively creating *greater* injury risks for belted occupants *See supra* at 30-32

impose an advanced glazing requirement on manufacturers And that is doubly true here, where the requirement that Priester seeks to impose through state law is actually prohibited by the rule adopting the phase-in period 76 Fed Reg at 3219

Priester relies on a statement in the 2011 rule that "'NHTSA does not intend *this rule* [*i e* FMVSS 226] to preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by today's rule '" Supp Br 18 (quoting 76 Fed Reg at 3295 (emphasis altered)) But that statement does not help Priester when it comes to the question presented here—the preemptive effect of FMVSS 205 Indeed, the preemption statement in FMVSS 226 simply underscores that such a statement is conspicuously *absent* from the rule at issue here—FMVSS 205 Moreover, Priester's proposed standard is not a "higher standard" because it would raise safety concerns (*e g* , neck injuries for belted passengers) long identified by NHTA And whatever the regulation means by a "higher standard," it cannot mean that it would allow state law suits imposing a requirement that is actually prohibited by FMVSS 226—like the glazing-alone requirement that Priester seeks to impose through this action

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In *Williamson*, the Supreme Court reaffirmed that, as the Court held in *Geier* a state law tort suit that would stand as an obstacle to the accomplishment of significant federal objectives under the Safety Act is preempted 131 S Ct at 1136 Priester's tort suit here is predicated on her claim that Ford was negligent in using tempered glass rather than laminated glass in the side window of the pickup involved in this case Supp Br 9, *see id* at 1 If her suit were successful, it would immediately impose a retroactive advanced glazing-only requirement As this Court previously concluded, that

requirement would frustrate the significant federal objective of safety because it would increase the risk of injury to belted occupants Moreover, the imposition of such a requirement also would frustrate the significant federal objective of encouraging seat belt use because it would subordinate the interests of belted occupants (who face a greater risk of injury when laminated glass is used) to those of unbelted occupants And it would frustrate the significant federal objective of promoting the advent of safer and more comprehensive ejection mitigation systems including those employing side impact airbags, which could address the added risk of injury to belted occupants created by laminated glass, as well as the agency's decision that any requirement for such systems should be *phased-in* over time rather than immediately imposed

Neither *Williamson* nor any of the other considerations raised by Priester in her supplemental brief provides any reason for this Court to reverse its previous decision in this case holding that Priester's state tort action is preempted by FMVSS 205 and thereby unleash state tort claims retroactively imposing such a requirement

CONCLUSION

For the foregoing reasons, this Court should adhere to its prior decision holding that Priester's state-law tort claims are preempted by FMVSS 205

Respectfully submitted,

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