

THE STATE OF SOUTH CAROLINA
IN THE Supreme COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

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James C Williams, Circuit Court Judge

Case No 06-CP-38-1071

S.C Supreme Court

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

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

As a threshold matter, the tide has already started to turn against preemption in cases involving the preemptive effect of Standard 205. On May 23, 2011, the U.S. Supreme Court denied review in *MCI Sales and Service v. Hinton*, ___ S.Ct. ___, 2011 WL 972764 (U.S. Tex.). *MCI* was the first case to consider the impact on Standard 205 cases of the views expressed by the United States in the briefing of *Williamson v. Mazda*, 131 S.Ct. 1130 (2011). See 329 S.W.3d 475 (Tex. 2010).¹ In finding that Standard 205 does not preempt state tort claims, the Texas Supreme Court looked to the United States *amicus* brief in *Williamson*, which clarified that a regulatory option, standing alone, has no preemptive effect. *Id.* at 499. “We agree,” the *MCI* court stated “[a]ttributing preemptive intent to every deliberative agency decision runs afoul of Congress’s choice to define safety standards as minimum standards and its clear decision to allow juries a place in developing common-law rules that exceed the federally defined floor.” *Id.*²

Although the denial of *certiorari* does not have precedential effect, the U.S. Supreme Court’s decision to deny review in *MCI* is revealing in light of its decision in *this* case to vacate and remand for further proceedings in light of *Williamson*. One can infer that the Supreme Court views *Williamson* as supportive of the Texas Supreme Court’s conclusion that Standard 205 does not preempt state tort claims.³

¹ Although *MCI* was decided before the U.S. Supreme Court decided *Williamson*, the Texas Supreme Court had the benefit of the United States’ views on the preemptive effect of Standard 205, as set forth in its *amicus* brief in support of *certiorari* in *Williamson*, 329 S.W.3d 475, 499 (Tex. 2010).

² An Arizona federal court recently agreed that, under *Williamson*, Standard 205 does not preempt state tort claims. *Bernal v. Daewoo*, Case 2:09-cv-01502-DGC (D. Ariz. June 2, 2011), set forth at <http://www.publicjustice.net/Repository/Files/BernalDistrictCourtOrder2Jun2011.pdf>. To undersigned counsel’s knowledge, this is the only other *post-Williamson* decision involving Standard 205.

³ Ford attempts to downplay the significance of the denial of review in *MCI* on the (continued)

Ford struggles to lead this Court to the opposite result, but its efforts are unavailing. Ford's efforts to avoid the obvious implications of *Williamson* to this case fail both as a matter of fact and as a matter of law.⁴

I

This lawsuit is not contrary to NHTSA's public safety goals

Ford concedes, as it must in light of *Williamson*, that the mere fact that Standard 205 gives car makers the option of installing either tempered glass or some form of advanced glazing (e.g., laminated glass) does not exert preemptive force. Ford also concedes — again, as it must in light of *Williamson* — that NHTSA's decision not to require advanced glazing in all cars does not in and of itself possess the power to preempt. Stripped of these arguments, Ford's case rests on the proposition that this lawsuit would undermine NHTSA's specific reasons for not requiring advanced glazing in all passenger vehicles — in particular, the concern that advanced glazing could increase the risk of neck injuries “in some cases.” 67 Fed. Reg. 41365 (June 18, 2002). This argument fails for a host of reasons.

A NHTSA viewed advanced glazing as offering “substantial safety benefits” to the traveling public

The most notable flaw in Ford's argument is that it ignores NHTSA's overall conclusion with regard to the safety benefits of advanced glazing, which is set forth in the

³(continued)

ground that there are “obvious non-merits-based reasons why the Supreme Court may have decided to deny certiorari in *[MCI]*” Ford Br. at 28 n.7. None of these “obvious” reasons was mentioned in the opposition to the petition, however, rather, the sole ground for opposing review was that “the Texas Supreme Court properly applied the correct rule of law and reached the correct decision.” Brief in Opposition to *Certiorari*, 2011 WL 1540424 (U.S.) at *4.

⁴ Ford charges that appellant is improperly “relitigating” this appeal. Ford Br. at 3-4. Appellant's supplemental brief solely addressed the impact of *Williamson* on this case, as this Court directed. A regulatory history was provided because *Williamson's* relevance can only be determined with reference to the particular purposes and policies underlying Standard 205.

agency's 2001 Final Report, *Ejection Mitigation Using Advanced Glazing* (Aug 2001)⁵ [R 226-91] There, NHTSA stated that advanced glazing has the potential to “yield *substantial safety benefits* by reducing partial and complete ejections through side windows, particularly in rollover crashes ” [R 234 (emphasis added)] Indeed, NHTSA found that advanced glazing could prevent over 1,000 deaths and serious injuries every year [R 231] Although Ford discusses the Final Report at some length (Ford Br at 7–8), it never addresses (much less attempts to refute) this core finding, and its silence on this point speaks volumes Ford simply cannot deny that, overall, NHTSA viewed advanced glazing as being “substantially” safer than tempered glass in the side windows of cars

In light of NHTSA's finding that advanced glazing could yield ‘substantial safety benefits,’ why did NHTSA decide not to require advanced glazing in all passenger vehicles? The 2001 Final Report reveals that NHTSA's principal reason for not requiring advanced glazing was the emergence of a new technology — the side airbag — that offered potentially superior ejection mitigation At the urging of various auto makers, NHTSA conducted a series of “full–scale rollover tests using prototype inflatable devices ” [R 286] “These full scale tests ” NHTSA concluded, established the feasibility of using side inflatable devices to prevent ejections through front side windows ” [R 286] Based on this finding, NHTSA stated that “it would be more appropriate to devote its research and rulemaking efforts to projects other than ejection mitigation through advanced glazing [R 290]

But even then NHTSA did not reject advanced glazing as a source of ejection mitigation Instead, the agency wrote that it intended to develop ‘a more comprehensive, performance–based test procedure [that would] allow vehicle manufacturers to choose *any technology* that achieves the necessary minimum performance ” [R 236 (emphasis

⁵ This report is crucial to the analysis, because it formed the basis for NHTSA's 2002 decision not to require advanced glazing See 67 Fed Reg 41365 (June 18, 2002) Ford does not contend otherwise

added)] The reference to “any technology” is important, because it shows that NHTSA was not ruling out the potential use of advanced glazing in the future as a means of satisfying a performance-based standard. Indeed, NHTSA’s recently issued Standard 226 affirmatively encourages car makers to utilize both side airbags *and* advanced glazing to prevent passenger ejection in rollovers. See Priester Br. at 7–9, 76 Fed. Reg. 3212 (January 19, 2011) ⁶

In short, NHTSA never rejected the use of advanced glazing for ejection mitigation; it simply decided not to *require* it in light of the emergence of a new technology — the side airbag — that might prove even more effective. There is nothing about this decision that would be undermined by this lawsuit, which advocates the use of a technology that, according to NHTSA itself, offers “substantial safety benefits.” [R. 235.]

B NHTSA’s references to a risk of neck injuries from advanced glazing does not provide a basis for finding federal preemption

Ford’s main response is that NHTSA’s *principal* reason for not requiring advanced glazing was the possible risk of neck injuries, and thus this lawsuit would undermine NHTSA’s safety goals. This argument is disproved by the actual findings of the 2001 Final Report.

First, the 2001 Final Report shows that NHTSA’s concerns about a risk of neck injuries from advanced glazing did not alter its overall conclusions about the technology’s

⁶ The *amicus* brief of the Alliance of Automobile Manufacturers (“AAM Br.”) confirms that NHTSA did not affirmatively reject advanced glazing for ejection mitigation, and that the driving force behind its 2002 decision not to require advanced glazing was a long-standing desire “to develop a comprehensive and superior side-window ejection mitigation strategy.” AAM Br. at 8. See also *id.* at 9 (“the 2001 Final Report reiterated the agency’s policy view that advanced glazing ‘should be evaluated as one component of comprehensive ejection prevention and mitigation strategies,’”), *id.* at 10 (“[r]ather than mandate a single technology like advanced glazing, [NHTSA] recommended awaiting the advent of other ejection mitigation systems, particularly side airbag curtains,” with the ultimate policy goal of ‘allow[ing] vehicle manufacturers to choose any technology that achieves the necessary performance.’) (quoting the 2001 Final Report at x, xi).

safety benefits. What the agency actually found was that advanced glazing “*may increase the [neck] injury risk for belted occupants*” [R 235 (emphasis added)]. In the very same sentence, however, NHTSA observed that advanced glazing would “*provide enhanced safety benefits for unbelted occupants, by preventing their ejection from the vehicle*” [R 235 (emphasis added)]. Thus NHTSA’s “neck–injury” reference merely related to belted passengers, and the agency’s *overall* conclusion was that advanced glazing would prevent thousands of serious injuries and deaths every year and provide “substantial safety benefits” to the traveling public [R 235].

Second, the 2001 Final Report reveals that the potential risk of neck injuries was, in NHTSA’s view, speculative. NHTSA described its testing data as “limited” and showing “significant variability” [R 272–290]. “The repeatability of neck loads and moments,” NHTSA added, “was generally poor” [R 272]. Given this “high variability and limited data,” NHTSA concluded that “[g]enerally, impacts into standard glass resulted in lower neck shear loads and neck moments than those into advanced glazing” [R 272]. NHTSA stopped short of assessing “actual neck injury levels” due to the lack of any accepted lateral neck injury criteria [R 272].

In short, NHTSA never concluded that advanced glazing would actually *cause* neck injuries, instead, it merely found that the technology *might* increase the *risk* of neck injuries in some cases. The limited nature of the agency’s findings on this point confirms that NHTSA viewed this risk as an additional reason to investigate the possible use of side airbags for ejection mitigation, *not* as a stand–alone reason to reject an advanced–glazing requirement.

Third, the 2001 Final Report shows that NHTSA was also concerned about a potential risk of neck injuries from *side airbags*. Thus, NHTSA stated that its “full–scale tests [of side airbags] *also showed that there was some potential for neck injury to non–ejected passengers*” [R 286 (emphasis added)]. Despite this risk, NHTSA decided to explore the use of side airbags for ejection mitigation. In light of this decision, it is

impossible to conclude that the risk of neck injuries from advanced glazing was the driving force behind the agency's decision not to promulgate an advanced-glazing requirement

Fourth and most simply, Ford's argument that NHTSA viewed advanced glazing as unsafe is belied by the agency's 2002 decision not to eliminate the advanced-glazing option. Surely, if NHTSA found advanced glazing to be unsafe, it would have banned the technology. Instead, NHTSA chose to leave Standard 205 intact which gave (and continues to give) car makers the option of installing advanced glazing. This alone is proof positive of the agency's views on the safety of the technology.⁷

C Ford's argument that this lawsuit would undermine NHTSA's "core policy" of increasing seat belt use cannot withstand scrutiny

Ford tries to bolster its safety argument by arguing that because advanced glazing helps reduce ejection of *unbelted* passengers, such a rule "would have gone against NHTSA's core objective of increasing seat belt use." Ford Br. at 8 (citing *Geier v American Honda Motor Co.*, 529 U.S. 861-875 (2000)). The record is devoid of any evidence, however, that NHTSA's decision not to require advanced glazing was based on a concern that the technology would decrease seat belt use. Ford's only citation is to the Supreme Court's decision in *Geier*, which has nothing to do with Standard 205 and merely states that "buckled up seatbelts are a vital ingredient of automobile safety." 529 U.S. at 877. Ford does not cite to anything written by NHTSA on this point because the agency never mentioned such a "core objective" with regard to its decision not to require advanced glazing.

⁷ The Auto Manufacturers argue that "there is a ready answer to Priester's rhetorical question on why NHTSA, given its concerns, did not ban advanced glazing outright — *i.e.*, that NHTSA "knew that minimal regulatory interference is a cornerstone of regulatory objective to get manufacturers to develop new and comprehensive safety devices." AAM Br. at 15. With respect, this is no answer. If NHTSA wanted to give auto manufacturers the leeway to continue to explore the possible use of advanced glazing in conjunction with *other* ejection mitigation technology (like the side airbag), it could simply have banned the *exclusive* use of advanced glazing, but continued to permit its potential use as part of an overall ejection mitigation system.

Ford's argument also makes no sense as a factual matter. According to Ford, NHTSA was concerned that advanced glazing would reduce the incentive to utilize manual seatbelts. For this to be true, a passenger would have to (a) be aware that the car was equipped with advanced glazing (indistinguishable to the eye from tempered glass), (b) understand that advanced glazing would reduce the possibility of ejection in the event of a crash, and (c) choose to forego the well-known protections offered by seat belts in *all* crash conditions in exchange for the more limited benefits offered by advanced glazing (ejection mitigation) in the event of a *particular type* of crash (the rollover). For all these reasons, it is simply illogical for Ford to contend that an advanced-glazing requirement would have reduced the incentive to buckle up. In any event, Ford's argument on this point is unsupported by the record and, for this reason alone, should be disregarded.

D Standard 226 helps Priester, not Ford

Ford also attempts to shore up its safety argument by pointing to the recently promulgated Standard 226, which urges car makers to utilize a combination of side airbags and advanced glazing to prevent passenger ejection. 76 Fed. Reg. 3212 (January 19, 2011). Ford makes much of the fact that Standard 226 does not permit car makers to *exclusively* use advanced glazing in the side windows of cars, arguing that this establishes that the technology is unsafe. Ford Br. at 38–39.

This argument, too, is contrary to the facts. NHTSA's decision to prohibit the exclusive use of advanced glazing had nothing to do with a risk of neck injuries, rather, it was based on the observation 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." 76 Fed. Reg. at 3219. See also AAM Br. at 14 (explaining that the reason Standard 226 does not permit the exclusive use of advanced glazing is because "side windows are not always in position during crashes and rollovers.") Because advanced glazing only works when the windows are rolled up, NHTSA mandated that the technology must 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 (emphasis added) This does not amount to a determination that advanced glazing is unsafe, to the contrary, it simply means that a system that employs both airbags and advanced glazing is *safer* — which explains why the preamble to Standard 226 urges car makers to utilize both 76 Fed Reg 3205, 3223 (noting that optimal test results “resulted from use of both ejection mitigation window curtains [*i.e.*, side airbags] *and advanced glazing*’) (emphasis added) *Id* at 3222 (encouraging the use of advanced glazing as a supplement to side airbags)

Ford’s argument that this lawsuit would conflict with NHTSA’s safety goals is also derailed by NHTSA’s statement in the preamble to Standard 226 “that this 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 (emphasis added)

This statement strongly suggests that, if asked, NHTSA would take the same position with respect to the preemptive effect of Standard 205. Standard 226 requires, at a minimum, the use of side airbags, but also — like Standard 205 — gives car makers the option of utilizing advanced glazing as well. Suppose that a car maker were simply to do the minimum required by Standard 226 by installing side airbags without adding advanced glazing. NHTSA’s statement means that, in the agency’s view, a lawsuit seeking to hold that car maker liable for failing to use advanced glazing would not conflict with the purposes underlying Standard 226. Thus, the Standard would have no preemptive effect. It would make no sense for NHTSA to conclude that such a lawsuit *would not* be preempted by Standard 226 but *would* be preempted by Standard 205, given that both rules address ejection mitigation in car crashes.

Ford’s principal response is that “the preemption statement in [Standard] 226 simply underscores that such a statement is conspicuously *absent* from the rule at issue here —

[Standard] 205 ” Ford Br at 39 (emphasis in original) At the time Standard 205 was adopted, however, federal agencies were not obligated to opine on the preemptive effect of their regulations (Notably, for example, there was no such statement in the rule at issue in *Geier* See 529 U S at 884) In 1999, however, the President ordered federal agencies to analyze the “federalism implications” of their regulations Executive Order 13132 (August 4, 1999) ⁸ The preamble to Standard 226 was undoubtedly issued in response to that directive, and thus has no bearing on whether NHTSA has a different view with regard to the preemptive effect of Standard 205

Ford’s second argument is that NHTSA cannot have meant “to allow state law suits imposing a requirement that is actually prohibited by [Standard 226] — like the glazing-alone requirement that Priester seeks to impose through this action ’ Ford Br at 39 This argument ignores the fact that the car at issue in this case was manufactured in 1997, when side airbags did not exist As discussed above, the reason Standard 226 prohibits the *exclusive* use of advanced glazing is because side airbags are a more reliable form of ejection mitigation That prohibition has no application to vehicles that were manufactured prior to development of the side airbag

To be clear this lawsuit does not contend that vehicles manufactured *today* should be equipped exclusively with advanced glazing Appellant only contends that the vehicle at issue in this case, which was manufactured before side airbags were available (and long before Standard 226 was conceived), should have been equipped with advanced glazing Ford’s attempt to manufacture a conflict between this lawsuit and Standard 226 thus fails as a matter of fact

⁸ See <http://www.thisnation.com/library/eo-federalism.html>

II

Ford's remaining arguments lack merit

In addition to arguing that this lawsuit would undermine NHTSA's safety goals, Ford offers a host of legal arguments that are equally unpersuasive. Ford's overall contention is that appellant has read *Geier* too narrowly and *Williamson* too broadly. In reality, it is Ford that is guilty of an overly broad reading of *Geier* and an excessively narrow reading of *Williamson*. And, contrary to Ford's claim, *Williamson* provides strong support for the conclusion that this lawsuit does not undermine any federal purposes.

A Appellant is not seeking to "dismantle" *Geier*

To begin with, appellant is not seeking 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* [*v. American Honda Motor Co.*, 529 U.S. 861 (2000)]" Ford Br. at 3. This argument mischaracterizes appellant's position. In *Geier*, the regulation at issue had a complex history and reflected a policy decision by NHTSA to deliberately encourage a variety of passive restraints, including airbags. Because of this regulatory history and NHTSA's deliberate decision to promote a mix of different passive restraint options in motor vehicles, the Court held that a common-law claim predicated on the failure of the manufacturer to pick a specific type of passive restraint — an airbag — was preempted. 529 U.S. at 870–77.

Contrary to Ford's argument, appellant is not advocating a position that would strip *Geier* of any meaning outside the specific context of that case. Appellant agrees, for example, that *Geier* continues to apply with full force to any case where granting manufacturers a choice was a "significant regulatory objective." There are many such cases that remain good law after *Geier*, and appellant does not contend otherwise.⁹ Appellant's position is simply that *Geier* has no application *here* because, for all the reasons

⁹ See, e.g., *MCI*, 329 S.W.2d at 497 n.20 (citing cases)

previously explained (and *infra* at (D)), NHTSA's decision to give manufacturers a choice of glazing technologies was not a 'significant regulatory objective' underlying Standard 205¹⁰

B Williamson's holding that mere regulatory options do not exert preemptive force is directly relevant to this case

Ford also argues that *Williamson* is inapplicable because [n]either the manufacturer in *Williamson* nor Ford here argued that the existence of a regulatory option *alone* is sufficient to preempt a state tort action " Ford Br at 21 (emphasis in original) This argument ignores the fact that many courts — including this one — have read *Geier* to mean that "any time 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 pre-empted " See *Williamson* 113 S Ct at 1140 (Sotomayor, J , concurring)¹¹

The West Virginia Supreme Court's holding in *Morgan v Ford Motor Co*, 680 S E 2d 77 (W Va 2009) is a particularly striking example of this reasoning There the Court repeatedly emphasized the absence of any indication that NHTSA intended for Standard 205 to preempt state tort claims, observing that (1) "we have no agency explanations identifying a clear federal objective that would be corrupted by allowing the plaintiff to proceed" (*id* at 94), (2) [w]e find no language in [Standard] 205 that would indicate a clear expression of congressional intent to preempt common-law suits regarding glazing in motor vehicles" (*id*) and (3) the 'agency language' in the rule commentary suggests that Standard 205 "would 'not have any substantial direct effects on the States,'

¹⁰ The Product Liability Council's suggestion that appellant seeks to "abolish conflict preemption altogether" is a straw man PLAC *Amicus* Br at 5 Appellant has never argued that *Williamson* "spells the end of conflict preemption," and thus there is no need for this Court to "reaffirm the continuing vitality of that doctrine " *Id*

¹¹ Ford wrongly accuses appellant of "blatantly mischaracterizing" this Court's prior decision in this case Ford Br at 23 Although the decision describes various aspects of Standard 205's regulatory history the actual *holding* appears to rely exclusively on the fact that this lawsuit would disrupt the options framework of Standard 205 See 388 S C 425, 433 (2010)

including preempt[ing] State law[.]” *Id* at 86 (quoting 68 Fed Reg 43964, 43971 (July 23, 2003)) (emphasis added)

Despite the obvious absence of any federal objective that would be undermined by the plaintiffs’ lawsuit, the *Morgan* court felt compelled to find preemption 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

Cases like *Morgan* illustrate the importance of *Williamson*’s holding that mere regulatory options do not preempt state law On this ground alone, *Williamson* is highly relevant here

C *Williamson* Is not distinguishable on safety grounds

Ford also attempts to distinguish *Williamson* on the ground that NHTSA was “convinced that lap–and–shoulder belts would increase safety,” whereas NHTSA had expressed “extreme reluctan[ce]” to require laminated glass in all side windows ” Ford Br at 29–30 This argument cannot be reconciled with NHTSA’s repeated statements that advanced glazing offers substantial safety benefits ” See, e g , R 231, 234 As explained above, NHTSA never said that those “substantial benefits were outweighed by the possible risk of neck injuries to belted passengers, rather, it merely cited that concern as one factor counseling in favor of its decision to move towards a performance requirement that could be met by using *any* form of technology, *including advanced glazing*

In light of that overall conclusion, this case is actually on all fours with *Williamson* with regard to public safety In each case, the agency decided not to require a particular technology *despite* its conclusion that the technology would, overall, “increase safety ” Ford’s attempt to distinguish *Williamson* on safety grounds therefore lacks any merit

D Williamson is not distinguishable on the ground that Standard 205 was designed to promote a “mix of devices”

Ford’s also argues that *Williamson* has no bearing here because, whereas “the *Williamson* Court concluded that the seatbelt option was not designed to promote a mix of devices, 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 airbags*” Ford Br at 16–17 (emphasis added) See also Ford Br at 30, 32–34

What Ford forgets is that Standard 205 merely governs *window materials*, and it does not purport to limit the use of additional ejection mitigation technology (such as airbags) Thus, a jury verdict holding a manufacturer liable for failing to select a particular *window* option would not preclude the development “of new and more comprehensive ejection mitigation systems such as those including side airbags” Ford Br at 16–17

The options standard at issue in *Geier* was very different There, the regulation gave car makers the choice of installing *either* airbags *or* some other form of passive restraint What the Supreme Court held was that a jury verdict holding a manufacturer liable for installing an *airbag* would dissuade manufacturers from developing one of the *other* types of passive restraint permitted by the same standard, thereby undermining NHTSA’s goal of fostering a diverse mix of passive restraints See *Geier*, 529 U S at 881 (holding that “petitioners tort action would have required manufacturers of all similar cars to install airbags rather than the other passive restraint systems [permitted by Standard 208] such as automatic belts or passive interiors It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought”)

Ford’s argument would only make sense if Standard 205 itself gave car makers the choice of installing *either* advanced glazing *or* airbags — *and not both* If that were true, and if NHTSA had expressed a goal of fostering the development of both technologies in order to “develop data on comparative effectiveness,” *Geier*, 529 U S at 879, then a jury verdict holding a manufacturer liable for not installing advanced glazing might undermine the

agency's purposes by making it less likely that car makers would develop "a mix of devices" *Id* at 879. But the argument makes no sense with regard to a safety standard that merely governs window materials, because a jury verdict holding a car maker liable for not installing advanced glazing would not in any way hinder a manufacturer's ability to install side airbags (or any other ejection mitigation technology, for that matter).

In other words, because advanced glazing and airbags are not mutually exclusive — and, as Standard 226 demonstrates, actually work best in combination — there is no way a lawsuit like this one could interfere with the development of a mix of devices. Ford's attempt to analogize this case to *Geier* and to distinguish *Williamson* on "technological-diversity" grounds therefore fails.¹²

E *Williamson* confirmed the validity of cases holding that Standard 205 does not have any preemptive effect

As explained in our opening brief (at 27–28), *Williamson* confirmed the validity of *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007), and *MCI Sales and Service v. Hinton*, 329 S.W.3d 475 (Tex. 2010), which rejected the argument that Standard 205's options framework exerts preemptive effect.

Ford attempts to undermine the Fifth Circuit's conclusion in *O'Hara* on the ground that it "completely ignored" NHTSA's safety concerns and therefore reached the wrong result. Ford Br. at 25–26. Ford also complains that the Fifth Circuit's reliance on *Spretnsma v. Mercury Marine*, 537 U.S. 51 (2002), is "entirely misplaced." Ford Br. at 27. Both arguments are incorrect.

¹² The Auto Manufacturers make a related argument in their *amicus* brief — *i.e.*, that advanced-glazing suits "would dampen the *incentive* for manufacturers to develop and implement alternatives by making the side-window ejection mitigation choice for them." AAM Br. at 17 (emphasis added). This argument is belied by the history of the automotive industry, which has always sought to make cars better, faster, and stronger, not merely to meet minimum government safety standards. As Ford itself has repeatedly observed, "safety sells," http://media.ford.com/article_print.cfm?article_id=31666, and the contention that an advanced-glazing requirement would eliminate any incentive to develop additional, complementary safety measures is self-serving, at best.

First, *O'Hara* did not “ignore” NHTSA’s safety concerns with regard to advanced glazing. The Fifth Circuit recited the history of Standard 205 in considerable detail, 508 F.3d at 759–64, including NHTSA’s concerns regarding the risk of neck injuries from advanced glazing. *Id.* at 757, 761–62. Based on this extensive history, the *O'Hara* court concluded — correctly — that “NHTSA’s 2002 Notice of Withdrawal focused on the need to develop experimental standards for new rollover accident technologies” — *i.e.*, side airbags — and that the agency “did not reject advanced glazing as unsafe.” *Id.* at 762. This conclusion is exactly in keeping with the actual findings of the 2001 Final Report on which the agency’s decision was based.

Ford is also wrong in attacking *O'Hara*’s reliance on *Spnestsma v Mercury Manne*, 537 U.S. 51 (2002), which rejected federal preemption of claims that a boat engine was defective because it lacked a propeller guard. *Spnestsma* is directly relevant to this case, because it made clear that a federal agency’s decision not to require a particular safety device does not, standing alone, exert any preemptive force — a holding that has since been reaffirmed by *Williamson*.

The particular *facts* of *Spnestsma* are instructive as well, because they show that a potential risk of injury from a particular safety feature does not automatically translate into federal preemption. There, after 18 months of study, a Coast Guard subcommittee found that feasible propeller guards might prevent penetrating injuries *but increase the potential for blunt trauma caused by collision with the guard*.” *Id.* at 61 (emphasis added). The subcommittee further determined that “it would be prohibitively expensive to retrofit all existing boats with propeller guards because no universal design suitable for all boats and motors in existence had been proved feasible.” *Id.* Based on these findings, the Coast Guard decided not to issue a regulation requiring propeller guards. *Id.* On this record, the U.S. Supreme Court held that there was no basis for finding a conflict between the plaintiffs’ claims and federal regulatory purposes. *Id.* at 70.

The same conclusion is warranted here. Just like the Coast Guard in *Spnestsma*,

NHTSA decided to study the possibility of requiring a particular type of equipment (advanced glazing in side windows) in order to address a safety concern (passenger ejection in rollover crashes) Just as in *Spnetsma*, there was some indication that the technology would help save lives *but also might increase the risk of certain injuries* And just as in *Spnetsma*, the agency concluded, based on safety data and cost concerns, that it would not promulgate a requirement but would continue to study the possible benefits of advanced glazing in order to determine how the technology can best be used to achieve the agency's overall goals The Supreme Court's conclusion that none of these reasons exerts preemptive force applies squarely to this case, and thus the *O'Hara* court's reliance on *Spnetsma* cannot be faulted

Ford's attack on the Texas Supreme Court's decision in *MCI Sales and Service, Inc.*, 329 S W 3d 475 (Tex 2010), is similarly baseless Ford says that "the Texas Supreme Court simply pointed to *O'Hara*" (Ford Br at 27), but nothing could be further from the truth The decision contains a thorough analysis of every aspect of Standard 205 and analyzes NHTSA's purposes in exhaustive detail, ultimately concluding that the agency "did not state a positive desire to preserve the use of tempered glass in windows by forbidding contrary state regulation " 329 S W 3d at 497 If anything *MCI* is even more detailed and meticulous than *O'Hara*, and Ford's argument to the contrary is mysterious In light of the Texas Supreme Court's thorough analysis, it is not surprising that the U S Supreme Court declined the manufacturer s invitation to grant review

III

Ford's bid for immunity ignores the core principles governing federal preemption

Finally, and more generally, Ford s broad interpretation of *Geier* and narrow interpretation of *Williamson* reflects an improper doctrinal approach to federal preemption To read Ford's brief, one would assume that preemption is the rule, rather than the exception But the opposite is the case It is important to remember that the *only* time that

the U S Supreme Court has found preemption in a motor vehicle safety case was in *Geier Williamson*, meanwhile, rejected preemption in an options case involving the *exact same regulation* at issue in *Geier* —Standard 208 — and it did so *unanimously* — something that rarely happens with this sharply divided Court (*Geier*, in contrast, was a closely divided 5-4 decision)

By speaking with one voice, the *Williamson* Court powerfully reaffirmed that preemption may only be found where there is direct evidence of a conflict between federal purposes and a state tort claim. The reason for this both simple and important. Federal preemption involves core principles of federalism that lie at the heart of our constitutional framework. The framers understood that, in our federalist system, states' rights must be respected absent a direct conflict with federal law. The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of our lives. The framers recognized, moreover, that the States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy. Thus, any acts of the national government — whether legislative, executive or judicial in nature — that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the framers.

Faithful to this principle undoubtedly animated the Supreme Court's unanimous decision in *Williamson* to respect states' rights to compensate their citizens via the court system. *Williamson* also reaffirmed the importance of judicial restraint and faithfulness to the legislative enactments of Congress. When Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966, it could have chosen to wipe out all state tort claims. But it did no such thing. Instead, Congress enacted a savings clause stating that "[c]ompliance with" a federal safety standard "does not exempt any person from *any liability under common law*." 15 U.S.C. § 1397(k) (emphasis added)

Williamson reaffirmed that, "[e]specially in light of the 'statutory savings clause that

foresees the likelihood of a continued meaningful role for state tort law,” preemption may *only* be found in rare cases, such as *Geier*, where the car maker “carried [its] burden of establishing that [NHTSA] ‘deliberately sought variety’ to achieve greater safety ” 131 S Ct at 1140 (Sotomayor, J , concurring) (quoting *Geier*, 529 U S at 878) Finding preemption in cases where, as here, the car maker has *not* demonstrated that NHTSA “deliberately sought variety” when it adopted the regulation at issue would strip the savings clause of any meaning — a result that *Williamson* forbids and the Constitution cannot tolerate ¹³

At bottom Ford is asking this court to engage in an act of judicial activism Try as it might, Ford has failed to point to any clear evidence of preemptive intent on NHTSA's part Instead, the car maker is asking this Court to divine preemptive intent based on snippets of regulatory history that do not support its argument If Congress's words mean anything they mean that a court may only find preemption where there is an “actual conflict between state law and federal purposes This is simply not such a case

¹³ The Product Liability Advisory Council argues that this case would “undermine Congress’s broader goals” by disrupting the “uniformity” of safety standards in the auto industry PLAC Br at 18 This exact argument was affirmatively rejected by *Geier* itself, which held that “the savings clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create but also enforce safety standards, while simultaneously providing necessary compensation to victims ” *Geier*, 529 U S at 870 Based on this observation, *Geier* held that the Safety Act does not expressly preempt state tort claims and that preemption only lies where there is a direct conflict between state tort claims and federal regulatory purposes

CONCLUSION

The appellant again urges the Court to reverse its prior ruling and to find that appellant's claims are not preempted by federal law

Respectfully submitted,

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by 
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July 11, 2011

THE STATE OF SOUTH CAROLINA
IN THE Supreme COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

RECEIVED

JUL 11 2011

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

SC Supreme Court

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

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