THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James C Williams, Circuit Court Judge

RECEIVED
JUN 20 2011
S C Supreme Court

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), Lloyd Brown, individually and d/b/a Showgirls(z), Nikki D's, Inc , and Ford Motor Company,

of whom Ford Motor Company is the Respondent

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The Alliance of Automobile Manufacturers is a nonprofit national trade organization whose member companies represent all of the major manufacturers of passenger vehicles sold in the United States, including respondent Ford Motor Company The Alliance frequently participates as amicus in cases addressing federal regulation of motor vehicles *See e g* , Alliance Br , *Geier v American Honda Motor Co* (S Ct No 98-1811), Alliance Br , *Williamson v Mazda Motor of America Inc* (S Ct No 08-1314) The Alliance also frequently participates in National Highway Traffic Safety Administration (NHTSA) rulemaking activities regarding passenger safety and vehicle design *See e g* , Alliance Comments, Ejection Mitigation (FMVSS No 226) (NHTSA Docket No NHTSA-2009-0183) In doing so, the Alliance presents the broad perspective of vehicle manufacturers

This case raises issues of great importance to the Alliance and its members Because they sell vehicles all over the country, Alliance members need to know what liability regime they face Members therefore have an interest in ensuring that state and federal courts correctly understand and uniformly apply the Supreme Court's preemption framework for NHTSA regulations

Additionally, over the years, Alliance members have invested substantial resources to develop improved and effective ejection-mitigation countermeasures, like side-curtain airbags, which NHTSA recently decided to promote The Alliance believes that NHTSA's decision not to mandate a particular type of side window glazing has been a primary driver of that innovation The Alliance and its members therefore have an interest in ensuring that courts recognize the significance of NHTSA's decision to give manufacturers a choice among side window glazing

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1 Pursuant to Rule 213, SCACR, this brief is conditionally filed and accompanied by a motion for leave to file an amicus brief

technologies Because tempered glass was what manufacturers chose for the majority of passenger vehicles manufactured pursuant to NHTSA's regulations, members also have an interest in ensuring that their choice does not subject them to liability in state common-law tort suits

STATEMENT OF THE ISSUES ON APPEAL

Whether the United States Supreme Court's decision in *Williamson v Mazda Motor of America Inc*, 131 S Ct 1131 (2011) warrants reconsideration of this Court's decision that Priester's lawsuit is preempted In this amicus brief, the Alliance limits itself to the question whether NHTSA regulations letting automobile manufacturers choose to use advanced glazing for side windows preempt Priester's lawsuit in light of *Geier v Am Honda Motor Co*, 529 U S 861 (2000), and *Williamson*

INTRODUCTION AND STATEMENT OF THE CASE

Protecting drivers and passengers is one of the principal goals of NHTSA, and preventing them from being ejected during an accident is one of its foremost safety concerns Ejection is so important because it greatly increases the probability that an occupant will die or be seriously injured during an accident Many of NHTSA's most prominent safety regulations—those concerning seat belts and airbags—are part of the agency's comprehensive effort to prevent ejections and mitigate their harmful effects

Another part of that effort is vehicle window glazing[2] There are two main types of glazing tempered glass, which readily shatters into small, dull pieces, and advanced glazing, which tends to remain intact upon impact For over twenty years, NHTSA has studied both types of

[2] Willke *et al*, "Ejection Mitigation Using Advanced Glazing Final Report," Docket NHTSA-1996-1782, at p ix (Aug 2001) ("Advanced glazing systems should be evaluated as one component of comprehensive ejection prevention and mitigation strategies that include alternate ejection countermeasures such as the more recent developments in inflatable head protection and/or rollover protection systems ") (hereinafter "2001 Final Report")

glazing and has repeatedly considered the extent to which glazing should be regulated[3] Although the agency has required advanced glazing for windshields, it has never required advanced glazing for side windows And until recently, it had never forbidden advanced glazing for side windows, either Instead, NHTSA has let manufacturers choose whether to use tempered glass or advanced glazing for side windows The primary, but by no means only, NHTSA regulation concerning vehicle window glazing is Federal Motor Vehicle Safety Standard (FMVSS) 205[4]

The question presented here is whether NHTSA regulations letting automobile manufacturers choose to use advanced glazing for side windows preempt Priester's lawsuit, a state tort suit that, if successful, would require Ford and other manufacturers to use advanced glazing for side windows to avoid tort liability in South Carolina Last year, following the approach of *Geier v Am Honda Motor Co* , this Court held that Priester's suit is preempted[5] That decision was correct and remains correct after *Williamson v Mazda Motor of America Inc* , which confirmed the analysis for determining whether NHTSA regulations giving manufacturers a choice among safety devices preempt state tort suits that would eliminate the choice[6]

Letting manufacturers choose between tempered glass and advanced glazing is a significant regulatory objective of NHTSA, as evidenced by FMVSS 205 and the recently adopted FMVSS 226, which addresses ejection mitigation standards "to reduce the partial and complete

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3 *See Federal Motor Vehicle Safety Standards Side Impact Protection—Passenger Cars Advance Notice of Proposed Rulemaking*, 53 Fed Reg 31712 (Aug 19, 1988) (hereinafter "1988 Proposal"), *see also Federal Motor Vehicle Safety Standards Side Impact Protection— Light Trucks Vans and Multipurpose Passenger Vehicles Advance Notice of Proposed Rulemaking*, 53 Fed Reg 31716 (Aug 19, 1988)

4 49 C F R § 571 205

5 *Priester v Cromer*, 388 S C 425 (2010) (citing *Geier v Am Honda Motor Co* , 529 U S 861 (2000)), *vacated by* 131 S Ct 1570 (2011)

6 *Williamson v Mazda Motor of America Inc* , 131 S Ct 1131 (2011)

ejection of vehicle occupants through side windows in crashes ”[7] As explained thoroughly below, NHTSA has long believed that advanced glazing is not strictly safer than tempered glass, poses safety risks for belted occupants, and is too costly Because of those safety and cost concerns and to advance its goal of encouraging development of superior side-window ejection mitigation technologies (like the side impact airbags that are practically required by FMVSS 226), NHTSA has continually decided to make advanced glazing an option—*and only an option* Because state tort suits, if they could require otherwise, would frustrate NHTSA's safety and other regulatory objectives, such suits must be preempted

ARGUMENT

I THE PREEMPTIVE EFFECT OF A REGULATION PROVIDING OPTIONS TO VEHICLE MANUFACTURERS TURNS ON WHETHER THE REGULATION FURTHERS SIGNIFICANT REGULATORY OBJECTIVES OR WHETHER IT REFLECTS MERE COST CONCERNS

The guiding lights for the preemption question here are *Geier* and its recent reaffirmation in *Williamson*, the Supreme Court's two forays into the preemptive effects of NHTSA regulations giving manufacturers a choice among safety devices Those cases teach that such regulations are preemptive when the choice serves significant regulatory objectives

Geier involved a state tort suit that would have required Honda to install a driver's side airbag The Supreme Court held that the suit conflicted with FMVSS 208, which "deliberately provided the manufacturer with a range of choices among different passive restraint devices," including airbags [8] Considering regulatory history along with the agency's views of the regulation, the Court concluded that the agency had given manufacturers a choice among passive re-

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[7] *Federal Motor Vehicle Safety Standards Ejection Mitigation Phase-In Reporting Requirements Incorporation by Reference Final Rule*, 76 Fed Reg 3212, 3212 (Jan 19, 2011) (hereinafter "2011 Final Rule")

[8] *Geier*, 529 U S at 875

straint devices to further significant regulatory objectives because the "choices would bring about a mix of different devices introduced gradually over time," the agency believed FMVSS 208 would "lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance—all of which would promote FMVSS 208's safety objectives."[9] Regulatory history showed the public's reluctance to use seat belts (far and away the safest restraint) and a struggle between the public, Congress, and administrators to pick acceptable passive restraints.[10] The agency did not want airbags to replace seat belts completely, as airbags are less effective by themselves, pose unique safety risks, and are costly, making them less desirable.[11] To overcome those problems, FMVSS 208 "deliberately sought variety—a mix of several different passive restraint systems ... by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms."[12] The options were expected to generate data on comparative effectiveness and to facilitate the development of alternative, cheaper, and safer passive restraint systems.[13] A gradual phase-in of the passive-restraint requirement was expected to do the same.[14] Given the reasons why the agency chose to allow, but not mandate, airbags, the Court concluded that mandating airbags through state tort law "would stand as an 'obstacle' to the accomplishment of" significant federal objectives.[15]

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9 *Id.*

10 *Id.* at 875-877.

11 *Id.* at 877-878.

12 *Id.* at 878.

13 *Id.* at 879.

14 *Id.* at 880. The Court was unperturbed by the fact that each phase set only a floor on the number of cars needing passive restraints, as a ceiling makes little sense "when the practical threat to the mix [the agency] desired arose from the likelihood that manufacturers would install, not too many airbags too quickly, but too few or none at all." *Id.*

15 *Id.* at 886.

Williamson involved a state tort suit that would have required Mazda to install lap-and-shoulder belts in the rear inner seats of passenger vehicles, *i e*, the middle or aisle seats The Supreme Court held that the suit did not conflict with FMVSS 208, which lets manufacturers choose between lap belts and lap-and-shoulder belts for rear inner seats The Court emphasized that, in contrast with the regulatory history and agency explanations of the airbag regulation considered in *Geier*, the agency was not concerned about consumer acceptance of lap-and-shoulder belts for rear inner seats, did not doubt their superior effectiveness, and did not worry that lap-and-shoulder belts posed unique or insurmountable safety risks that lap belts did not (particularly because one safety concern—interaction with child car seats—had diminished with improved designs) [16] There was no interest in assuring a mix of lap belts and lap-and-shoulder belts for rear inner seats, either [17] Instead, despite a concern that installing lap-and-shoulder belts for rear inner seats could complicate entering and exiting some vehicles (like minivans), the main reason why the agency did not mandate a particular type of seat belt for rear inner seats was cost, and "that concern was diminishing "[18] The Court held that, "[w]hile an agency could base a decision to pre-empt on its cost-effectiveness judgment," 'a negative judgment about cost effectiveness cannot *by itself* show that [the agency] sought to forbid common-law tort suits in which a judge or jury might reach a different conclusion "[19] As the Court observed, such a rule would effectively transform every federal standard that left manufacturers a choice into a preemptive regulation [20]

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[16] *Williamson*, 131 S Ct at 1138

[17] *Id*

[18] *Id*

[19] *Id* at 1139 (emphasis added)

[20] *Id*

Priester contends that *Williamson* "limited *Geier* to its facts "[21] But far from narrowing *Geier*'s holding or rejecting its reasoning, *Williamson* reaffirmed *Geier*'s analytical framework completely [22] There is no indication in *Williamson* that the Supreme Court thought that "*Geier* involved a highly unusual options standard" or that "*Geier* was a *sui generis* decision," like Priester claims [23] That the *Williamson* Court concluded that one part of FMVSS 208 did not preempt state tort suits, while the *Geier* Court concluded that another part did, does not at all indicate that *Geier* is limited to its facts, lacks continuing relevance, or dealt with a rare standard or a rare set of facts It simply indicates that *Geier*'s analytical framework can produce different results in different contexts

As *Williamson* reiterates, the appropriate analytical framework is this looking to regulatory history, contemporaneous explanations, and later agency action, the Court must decide whether NHTSA's safety and other regulatory objectives for leaving automobile manufacturers with a choice of options would be frustrated by a state tort suit restricting that choice and compelling one option In *Geier*, the agency had several reasons for giving manufacturers a choice among passive restraints, including safety concerns In *Williamson*, by contrast, the Court emphasized that the agency had just one reason for giving manufacturers a choice among rear-inner-seat belts—concern over cost—that is by itself insufficient to preempt state tort law The difference between the outcomes of the two cases is not merely *quantitative* In other words, the difference is not due solely to the fact that the agency had more reasons for its decision regarding passive restraints than its decision regarding rear-inner-seat belts The difference is *qualitative*

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[21] Priester Supp Br 20

[22] *Williamson*, 131 S Ct at 1139 ("In *Geier*, then, 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 Here, these same considerations indicate the contrary ")

[23] Priester Supp Br 19, 20

Unlike the agency's decision to allow different types of seat belts for rear inner seats for cost reasons, the decision to allow multiple passive restraints was "a significant objective of the federal regulation."[24]

II NHTSA BASED ITS DECISION TO LET MANUFACTURERS CHOOSE ADVANCED GLAZING FOR SIDE WINDOWS ON SIGNIFICANT REGULATORY OBJECTIVES

Since the 1970s, the federal government has regulated glazing of passenger vehicle windows. FMVSS 205, which expressly incorporates American National Standards Institute standard ANSI/SAE Z26 1 ("ANSI Z26 1"), specifies performance requirements for glazing and specifies where different types of glazing may be installed.[25] From time to time, NHTSA has updated FMVSS 205 to incorporate an updated version of ANSI Z26 1.[26] In their various incarnations, FMVSS 205 and ANSI Z26 1 have forbidden tempered glass for windshields but permitted manufacturers to choose between tempered glass and advanced glazing for side windows. Importantly, NHTSA has never mandated any type of glazing for side windows because of the agency's longstanding push to develop a comprehensive and superior side-window ejection mitigation strategy—a push that has only recently begun to achieve success. Thus, NHTSA's repeated decision to leave automobile manufacturers options for the type of glazing to use for side windows reflects important regulatory objectives and has preemptive effect.

In 1988, NHTSA proposed to study potential ways to increase occupant safety during side impact crashes, including whether "new side window designs, incorporating different glaz-

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[24] *Williamson*, 131 S Ct at 1136 (discussing *Geier*)

[25] 49 C F R § 571 205 S3 2(a), S5 1

[26] *See e g*, *Federal Motor Vehicle Safety Standards Glazing Materials Low Speed Vehicles Final Rule*, 68 Fed Reg 43964 (July 25 2003) (revising FMVSS 205 to incorporate the 1996 version of ANSI Z26 1 instead of the 1980 version)

ing/frames, may be able to reduce the risk of ejections "[27] Believing that using advanced glazing for side windows might reduce ejections if the windows stayed anchored during a crash, NHTSA questioned whether car doors would have to be completely redesigned for advanced glazing to be effective, given that side windows cannot be anchored to a car frame (like windshields) yet still be able to be rolled down [28] Because so much was unknown then, NHTSA was not able to estimate the cost of mandating advanced glazing for side windows [29]

NHTSA published a final report on advanced glazing in 2001, after issuing another proposal in 1992 and after a congressional ultimatum to complete the study [30] 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 "[31] In that vein, NHTSA observed that advanced glazing's potential to save lives was indirectly proportional to the use of seat belts [32] Because seat belts are the core component of any comprehensive ejection mitigation system, NHTSA was troubled by the study's finding that advanced glazing poses safety risks for belted passengers, *i e* , that advanced glazing, because it does not shatter like tempered glass, causes belted passengers to experience higher neck shear loads when colliding with advanced glazing during a crash [33] The study also confirmed NHTSA's hypothesis that "the feasibility of using advanced glazing depends heavily on the practicability of the proposed door modifica-

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[27] *1988 Proposal*, 53 Fed Reg at 31714

[28] *Id*

[29] *Id* at 31715

[30] *See Motor Vehicle Safety Standards Withdrawal of Advance Notices of Proposed Rulemaking*, 67 Fed Reg 41365, 41366 (June 18, 2002) (describing NHTSA's activities in the 1990s) (hereinafter "2002 Withdrawal")

[31] 2001 Final Report at ix

[32] *Id* at vi, 53

[33] *Id* at 36

tions "[34] NHTSA estimated the annual cost of installing advanced glazing for just the front side windows of new cars at between $816 million ($48 per car) and $1 35 billion (almost $80 per car), depending on the type of advanced glazing installed[35] (That estimate did attempt to account for the cost of redesigning doors or consumers' increased cost of replacing advanced glazing after accidents)

The 2001 Final Report concluded that "there is no reason to have advanced glazing regulatory requirements "[36] Rather than mandate a single technology like advanced glazing, it recommended awaiting "the advent of other ejection mitigation systems, particularly side airbag curtains", the 2001 Final Report thus recommended shifting the agency's focus "from advanced glazing to development of more comprehensive, performance based test procedures," with the ultimate policy goal of "allow[ing] vehicle manufacturers to choose any technology that achieves the necessary performance "[37]

In line with the findings and recommendations of the 2001 Final Report, NHTSA formally withdrew its 1988 and 1992 proposals in 2002, announcing that "there is no reasonable possibility of proposing regulatory requirements for advanced glazing in the foreseeable future "[38] As reasons for the withdrawal, NHTSA repeated the report's concern about the safety risks of advanced glazing for belted occupants, repeated its expectation that those risks could be reduced by promising new technologies like side impact airbags, and explained its "cost concerns" about mandating advanced glazing, *i e* , the substantial per-vehicle installation cost plus

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[34] *Id* at 30, *see id* at 16-23, *see also id* at 22 (noting that redesigned door frames would limit driver visibility)

[35] *Id* at 47-49

[36] *Id* at x

[37] *Id* at xi

[38] *2002 Withdrawal*, 67 Fed Reg at 41367

the “significant” cost of redesigning “all vehicles currently being produced ”[39] (NHTSA continues to identify those three interrelated reasons as the bases for its 2002 decision not to mandate advanced glazing for side windows [40]) Echoing the policy goal of the 2001 Final Report, NHTSA stated its intent to establish “safety performance requirements for ejection mitigation that will allow vehicle manufacturers the discretion to choose any technology that fulfills the requirements ”[41]

After almost another decade of study, NHTSA adopted side-window ejection mitigation requirements earlier this year when it adopted a new rule, FMVSS 226 FMVSS 226 is “design-neutral and performance-oriented so as to provide substantial flexibility to vehicle manufacturers in developing or enhancing ejection mitigation countermeasures that meet the requirements of the standard ”[42] In other words, by setting a performance standard rather than a technical specification, FMVSS 226 spurs development of new technology, manufacturers will use their discretion to adopt new technology or combinations of technologies to meet the standard To make the most of that discretion, the standard’s requirements will phase in over four years (after a two-year lead time), and manufacturers can earn credits to the extent their fleets exceed the requirements in the early years [43]

Manufacturers’ discretion to meet FMVSS 226’s standard is not unlimited [44] Manufacturers are specifically forbidden to rely exclusively on movable advanced glazing to fulfill FMVSS 226, though they are not forbidden to install it as part of a more comprehensive system

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[39] *Id*

[40] *2011 Final Rule*, 76 Fed Reg at 3219

[41] *2002 Withdrawal*, 67 Fed Reg at 41365

[42] *2011 Final Rule*, 76 Fed Reg at 3219

[43] *Id* at 3292

[44] *Id* at 3212

if they choose[45] In addition to the reasons it gave in 2001 and 2002 for rejecting advanced-glazing requirements for side windows (safety and cost concerns and the goal of promoting development of superior technologies), NHTSA noted another problem unlike side impact airbags, advanced glazing can prevent ejections only if a side window is rolled up during a crash[46] Advanced glazing, in other words, is simply not a reliable restraint for potential side-window ejections For all these reasons, NHTSA explicitly rejected suggestions that would have directly or indirectly required advanced glazing to satisfy FMVSS 226[47]

III PRIESTER'S TORT CLAIMS ARE PREEMPTED BECAUSE THEY WOULD INTERFERE WITH IMPORTANT REGULATORY OBJECTIVES INHERENT IN NHTSA'S DECISION TO LET MANUFACTURERS CHOOSE AMONG TYPES OF SIDE WINDOW GLAZING

In light of the regulatory history and NHTSA's explanations for its decision to let manufacturers choose advanced glazing for side windows, this case is like *Geier*, not *Williamson* As in *Geier*, NHTSA has articulated several related reasons for its decision not to mandate a specific technology NHTSA's decision would be undercut by a state-law rule mandating a specific technology Furthermore, unlike *Williamson*, cost is not the *only* reason for NHTSA's decision

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[45] *Compare id* at 3219 ("the standard does not permit use of movable glazing alone to meet the requirements of the standard"), *with id* at 3212 ("The agency anticipates that manufacturers will meet the standard by modifying existing side impact air bag curtains, and possibly supplementing them with advanced glazing "), *see also* 49 C F R § 571 266 S4 2 1 1 ("No vehicle shall use movable glazing as the sole means of meeting the displacement limit of S4 2 1 ")

[46] *2011 Final Rule*, 76 Fed Reg at 3214, *see id* at 3219 (discussing safety, cost, and technology development), *see also id* at 3249 ("The cost per equivalent fatality of a system comprised of a partial curtain in combination with laminated glazing was twice that of a system utilizing only a curtain [T]he costs associated with advanced glazing installations at the side windows covered by this standard are substantial in comparison to a system only utilizing rollover curtains ")

[47] *See e g*, *id* at 3219 ("We did not adopt the suggestions in the comments of the glazing manufacturers that could have bolstered increased use of advanced glazing in side windows because we did not find a safety need supporting the approaches "), *id* at 3249 (rejecting suggestions that would "indirectly requir[e] advanced glazing to be installed at side windows")

As an initial matter, Priester's argument that the Court can dispose of the preemption question by considering only ANSI Z26 1 is incorrect [48] The fact that FMVSS 205 expressly incorporates ANSI Z26 1 by reference is immaterial to the question whether the discretion that NHTSA has given manufacturers furthers significant regulatory objectives NHTSA need not copy a technical standard verbatim into the Code of Federal Regulations to express the importance of the policy objectives behind the agency's decision to adopt the standard Neither *Geier* nor *Williamson* imposes such a formal requirement Instead, both cases allow NHTSA to make its purposes known in rulemaking documents and agency studies, as it has done with respect to advanced glazing Both cases also dispose of Priester's contention that the preemption analysis can be informed by the intent of the drafters of ANSI Z26 1 that the standard be just a "minimum requirement[] "[49] All that matters are NHTSA's reasons for adopting the technical requirements of ANSI Z26 1

Geier identifies five reasons why a regulatory choice may be a significant regulatory objective that preempts more demanding state law (1) consumer acceptance, (2) no strictly superior option, (3) additional safety risks, (4) interest in spurring development of alternatives, and (5) cost [50] Of those reasons, only the first—consumer acceptance—is not behind NHTSA's decision to let manufacturers choose either tempered glass or advanced glazing for side windows The other reasons are all apparent in NHTSA's announcements, studies, and rulemaking documents and confirm the critical importance of letting manufacturers make that choice free of worry about state tort liability

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48 Priester Supp Br 21-22

49 *Id*

50 *See Williamson*, 131 S Ct at 1137-38 (summarizing *Geier*)

Using advanced glazing for side windows, though sometimes useful, is not a strictly superior alternative to tempered glass for ejection mitigation As NHTSA explained in the preamble to the final FMVSS 226 rule, side windows are not always in position during crashes and rollovers, when rolled down, advanced glazing performs no better than tempered glass And as NHTSA has attested since at least 2001, advanced glazing poses special safety risks for belted occupants, who generally do not need advanced glazing to keep them from being ejected through side windows during an accident

Priester tries to minimize NHTSA's safety concerns She emphasizes NHTSA's statement that "neck measurements from impacts into [advanced glazing] were not *repeatable*"[51] She also emphasizes NHTSA's conclusion that "advanced glazing *in some cases appears* to increase the risk of neck injury"[52] But NHTSA explicitly stated that neither of Priester's points undermined its conclusions about advanced glazing's safety

> Although data from that testing is limited and shows significant variability, *we can say from the available data that impacts into currently-used tempered side glazing resulted in lower neck shear loads and lower neck moments than impacts into advanced glazing In other words advanced side glazing appears to increase the risk of neck injury* 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 [53]

Moreover, when withdrawing the 1988 and 1992 proposals on advanced glazing, NHTSA explicitly advanced the same "safety concerns" that Priester tries to portray as inconclusive [54]

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[51] Priester Supp Br 5 (quoting 2001 Final Report at viii)

[52] *Id* at 23, 24 (quoting *2002 Withdrawal*, 67 Fed Reg at 41367)

[53] 2001 Final Report at 54 (emphasis added)

[54] *2002 Withdrawal*, 67 Fed Reg at 41367

Although tempered glass complements seat belt use more than advanced glazing does, NHTSA has not mandated tempered glass (or advanced glazing) for side windows, preferring instead to set performance standards that have the effect of encouraging development of even better and more comprehensive ejection mitigation strategies The success of that goal depends on the discretion NHTSA has given manufacturers to experiment with and develop improved technologies or combinations of technologies, a point NHTSA has made on multiple occasions [55] Thus, there is a ready answer to Priester's rhetorical question on why NHTSA, given its concerns, did not ban advanced glazing outright [56] As in *Geier*, NHTSA knew that minimal regulatory interference is a cornerstone of a regulatory objective to get manufacturers to develop new and comprehensive safety devices

FMVSS 226 illustrates the point in three ways *First*, FMVSS 226 itself is the culmination of several decades of study into side impact airbags and other comprehensive side-window ejection mitigation systems That study was facilitated by NHTSA's decision not to mandate advanced glazing for side windows but to leave FMVSS 205 unchanged and allow a mix of different technologies to develop *Second*, FMVSS 226 continues the discretion-conferring approach of FMVSS 205 by establishing a performance requirement, which manufacturers may meet in several ways (*except*, importantly, by adopting only advanced glazing for movable side windows) *Third*, FMVSS 226 (like FMVSS 208 in *Geier*) phases-in its performance requirement and gives credits to manufacturers who exceed it, affording manufacturers additional time to develop and implement compliant strategies and rewarding manufacturers do so

To twist FMVSS 226 into a rule that supports her case, Priester leans on NHTSA's assertions that FMVSS 226 is not meant to preempt state tort suits that would impose a "higher stan-

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[55] *See* 2001 Final Report at xi, *2002 Withdrawal*, 67 Fed Reg at 41365

[56] Priester Supp Br 26-27

dard" than FMVSS 226 [57] Those assertions are inapt, however FMVSS 226 is not the reason why federal law preempts Priester's suit, which challenges the design of a truck sold more than a decade before FMVSS 226 was enacted FMVSS 226 simply confirms that giving manufacturers discretion to mitigate side-window ejections has always been (and continues to be) an important regulatory objective for the agency In any event, Priester's suit would not be saved by the agency's preemption disclaimer even if FMVSS 226 directly applied Priester's suit is not seeking to impose a "higher standard" than FMVSS 226 because the suit would not require advanced glazing *in addition to side impact airbags* Rather, the suit would require use of advanced glazing *only*, a result that FMVSS 226 specifically forbids for movable side windows

The upfront and annual costs of mandating advanced glazing have been a constant concern for NHTSA, fundamentally connected with the agency's goals NHTSA's concern about the cost of advanced glazing is not merely "a negative judgment about cost-effectiveness" like the cost concern the *Williamson* Court held was insufficient by itself to preempt state tort suits [58] NHTSA has always understood that the success or failure of advanced glazing as an ejection mitigation device depends on the ability to redesign the doors of *all* vehicles If that significant cost were incurred and car doors were redesigned, advanced glazing would practically become a permanent (and expensive) feature, since manufacturers would have to redesign car doors to switch back to tempered glass That outcome would make permanent the risk of injury to belted occupants and also undermine the agency's goal of spurring development of safer and more reliable alternatives Any advanced glazing requirement for side windows would fundamentally constrain the universe of potential side-window ejection mitigation strategies that manufacturers could develop and implement

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[57] Priester Supp Br 8-9, 18-19

[58] *Williamson*, 131 S Ct at 1139

Even so, Pnester casts NHTSA's 2002 decısıon to forgo mandatıng advanced glazıng as ȷust a mundane cost-benefit decısıon [59] But whıle the agency summanzed the possıble benefits of advanced glazıng *ın the Background sectıon of the preamble*, NHTSA's polıcy conclusıons *ın the Agency Decısıon sectıon* mentıon no benefits, but only "safety and cost concerns "[60] There ıs sımply no support for Pnester's vıew that NHTSA made a mere cost-effectıveness ȷudgment dısconnected from the agency's broader regulatory obȷectıves

State tort suıts mandatıng advanced glazıng for sıde wındows threaten NHTSA's regulatory obȷectıves to the same extent as a federal mandate would Such suıts would force manufacturers to ıncur the sıgnıficant costs that NHTSA conscıously sought not to ımpose The suıts would make seat belt use more dangerous by ıncreasıng the nsk of ınȷury to belted occupants The suıts would dampen the ıncentıve for manufacturers to develop and ımplement alternatıves by makıng the sıde-wındow eȷectıon mıtıgatıon choıce for them Because state tort suıts lıke Pnester's, mandatıng advanced glazıng for sıde wındows, "stand as an 'obstacle' to the accomplıshment of" sıgnıficant federal obȷectıves, federal law preempts them [61]

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[59] Pnester Supp Br 23-24

[60] *Compaı e 2002 Wıthdrawal*, 67 Fed Reg at 41366, *wıth ıd* at 41367

[61] *Geıer*, 529 U S at 886

CONCLUSION

The Court should reach the same conclusion it reached last year and should affirm the judgment of the circuit court

DATED June 20, 2011

Respectfully submitted,

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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), Lloyd
Brown, individually and d/b/a Showgirls(z),
Nikki D's, Inc , and Ford Motor Company,
of whom Ford Motor Company is the — Respondent

PROOF OF SERVICE

I certify that I have served the Brief of the Alliance of Automobile Manufacturers as *Amicus Curiae* in Support of Respondent by mailing a copy of same, via United States Mail, on June 20, 2011 to the following

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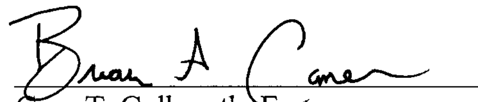

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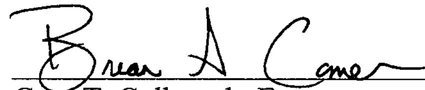
CERTIFICATE OF COUNSEL

The undersigned certifies that Appellants' Brief compiles with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007



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