

NO. 09-0048

IN THE SUPREME COURT OF TEXAS

MCI Sales and Service, Inc., f/k/a Hausman Bus Sales, Inc. and Motor Coach Industries
Mexico, S.A. de C.V., f/k/a Dina Autobuses, S.A. de C.V.

Petitioners/Respondents

v.

James Hinton, Individually and as Representative
of the Estate of Dolores Hinton, Deceased, *et al.*

Respondents/Petitioners

On Appeal from the Court of Appeals
For the Tenth Judicial District of Texas

**BRIEF ON THE MERITS OF PETITIONERS MCI SALES AND SERVICE INC.,
F/K/A HAUSMAN BUS SALES, INC. AND MOTOR COACH INDUSTRIES
MEXICO, S.A. DE C.V. F/K/A DINA AUTOBUSES, S.A. DE CV.**

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STATEMENT OF THE CASE

- Nature of the case: This appeal arises from a products liability suit brought by Respondents against Petitioners, a seller and manufacturer of motorcoaches, and others for injuries arising from a motorcoach accident. Respondents alleged that the bus was defectively designed because it was not equipped with passenger seat belts or with laminated glass passenger windows.
- Trial court and judge: The 170th Judicial District Court of McLennan County, Texas, the Honorable Jim Meyer, presiding.
- Disposition by trial court: Following a jury trial, the trial court signed a final judgment awarding Respondents actual damages, prejudgment interest, and costs, totaling \$17,008,153.22. The judgment also awarded post-judgment interest.
- Appellants/court of appeals: MCI Sales and Service, Inc. and Motor Coach Industries Mexico, S.A. de C.V.
- Appellees/court of appeals: James Hinton, Individually and as Representative of the Estate of Dolores Hinton, Deceased; David Hinton; Robert Kuryla; Karen Kuryla; Hattie Binns; Reta Haynes; Melinda Greger; Alan Horton; Elaine Horton; Ruth Powell; Judy Benson; James L. Freeman, Individually and as Personal Representative of the Estate of Jo Catherine Freeman; James F. Freeman; Melanie Jo Brooks; Susan Akers Bills, Individually and as Executrix of the Estates of Robert Melvin Akers and Mildred Delois Akers, Deceased; Robert Melvin Akers, Jr.; Patsy Beasley, Individually and as Executrix of the Estate of Wayne Beasley; Shirley Sommer; and Peggy Armstrong.
- Court of appeals: The Court of Appeals for the Tenth District of Texas sitting in Waco, Texas.
- Participating justices: Chief Justice Tom Gray and Justices Bill Vance and Felipe Reyna
- Citation to opinion: *MCI Sales & Service, Inc. v. Hinton*, 272 S.W.2d 17 (Tex. App.—Waco 2008, pet. filed)

Appellate court disposition: In a 2-1 majority opinion authored by Justice Vance, the court of appeals rejected the federal preemption claim, but reversed the trial court's judgment and remanded the case for a new trial based on the trial court's failure to submit all settling parties in the charge for the jury to determine their proportionate responsibility, as required by Chapter 33 of the Texas Civil Practice and Remedies Code. Chief Justice Gray dissented that he would render a take-nothing judgment because Respondents' claims are preempted by the Federal Motor Vehicle Safety Standards. After the court of appeals issued its opinion, but before motions for rehearing were due, the court suspended the appeal because MCI Sales and Service, Inc. filed bankruptcy on September 15, 2008. On October 15, 2008, the court of appeals severed the MCI Sales and Service, Inc. appeal from the remainder of the appeal, and reinstated the appeal as to Motor Coach Industries Mexico, S.A. de C.V. Respondents filed a motion for rehearing in the reinstated appeal, which the court of appeals denied on December 9, 2008.

STATEMENT OF THE JURISDICTION

This Court has jurisdiction under Texas Government Code section 22.001(a)(1) because the justices on the Court of Appeals disagree on a question of law material to the decision, namely whether Respondents' state tort claims are preempted. *See* TEX. GOV'T CODE § 22.001(a)(1).

This Court also has jurisdiction under section 22.001(a)(6) because this appeal involves significant issues of preemption that have not been addressed by this Court, and are likely to recur. *See* TEX. GOV'T CODE § 22.001(a)(6). Petitioners, a motorcoach manufacturer and seller, were sued by Respondents for injuries they suffered as a result of a motorcoach crash on Interstate 35. Respondents allege that the motorcoach was unreasonably dangerous because it did not have passenger safety belts and laminated glass on the side windows. Yet, in both respects Petitioners' motorcoach complied with the National Highway Traffic Safety Administration's (NHTSA) safety standards for occupant crash protection (Federal Motor Vehicle Safety Standard 208) and for window glazing (Federal Motor Vehicle Safety Standard 205). Petitioners claimed that Respondents' claims were preempted, but two justices on the three-member panel held that they were not. In reaching that result, the two justices misapplied and misinterpreted two decisions of the U.S. Supreme Court: *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) and *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

Respondents' claims as to both safety belts and window glazing have a very great potential to be raised in other lawsuits involving motorcoaches. Similar claims are being made around the state as to seatbelts and glazing in motorcoach buses, and as to glazing

in private automobiles. Thus, if this Court chooses not to take this case, the opinion of the court of appeals will be argued as the law of the state on these significant issues of first impression.

ISSUES

1. In *Geier v. American Honda Motor Company*, the U.S. Supreme Court held that the preemption and saving clauses of the Motor Vehicle Safety Act when read together reflect a neutral policy—not a specially favorable or unfavorable policy—towards preemption. 529 U.S. 861, 870–73 (2000). The Court of Appeals applied a more onerous burden. It held that Petitioners did not meet “the difficult burden of overcoming the presumption against preemption.” *MCI Sales & Service, Inc. v. Hinton*, 272 S.W.3d 17, 22, 25 (Tex. App.—Waco 2008, pet. filed). Did the Court of Appeals err when it applied a heightened presumption contrary to *Geier*?

2. Pursuant to statutory authority, the National Highway Traffic Safety Administration (“NHTSA”) promulgated a detailed Federal Motor Vehicle Safety Standard authorizing two types of glazings for motorcoach side passenger windows: tempered glass and laminated glass. See 49 C.F.R. § 571.205. The official comments regarding this standard state that “[o]ne 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 safety glazing material can be shown to possess the maximum degree of safety under all conditions against all conceivable hazards.” ANSI/SAE Z26.1–1996 at 2.2; Appendix 9c. The jury’s verdict established a common-law rule that for all situations laminated glass is a better, safer

design for passenger windows. Is this contrary to NHTSA's stated purpose of leaving two options available to manufacturers and contrary to *Geier*?

3. Even after more than 10 years of studying whether advanced glazings would effectively prevent ejections in cars, and a 5-year study of motorcoach safety, NHTSA has decided not to change the glazings specified in FMVSS 205. Both studies confirmed that window glazings are not the best means of preventing ejections. Does the jury's common-law rule, which would require motorcoaches to switch to laminated glass for side windows, frustrate or interfere with a federal agency policy to leave the glazings option available to motorcoaches and to focus instead on other means to prevent ejections?

4. NHTSA promulgated detailed regulations specifying the equipment required on motorcoaches. *See* 49 C.F.R. §§ 571.101 *et seq.* NHTSA specifically studied and rejected a proposal to require safety belts at all passenger positions on motorcoaches, deciding that it would rely on the seating design and not seat belts for passenger safety. It stated that it would require seat belts when it found they were desirable. But, a jury in McLennan County, Texas, found that specific seat belts were desirable and made a common-law rule that buses travelling in Texas must have seat belts. Are the claims underlying this common-law rule preempted?

5. Does the jury's common-law rule imposing a duty on motorcoach manufacturers to install a specific type of seat belt for passengers stand as an obstacle to the accomplishment of the objectives of NHTSA's recent studies on motorcoach safety, including its "Approach to Motorcoach Safety," in which NHTSA concluded that it could

not yet require seat belts in motorcoaches because the fundamental data was not available to enable NHTSA to require a specific seat belt design but set deadlines by which it would specify seat belt requirements? Is the jury's common-law rule also contrary to "NHTSA's Approach to Motorcoach Safety"?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners MCI Sales and Service, Inc. and Motor Coach Industries Mexico, S.A. de C.V. (collectively “MCI”), file this Petition for Review under Texas Rule of Appellate Procedure 53.2 and show the following:

INTRODUCTION

For years, the National Highway Traffic Safety Administration (“NHTSA”) has had a standard for window glazings and a policy regarding seat belts in motorcoaches. In 2005, a Waco jury essentially issued its own standards for glazings and seatbelts in motorcoaches throughout Texas and the United States.

For glazings in motorcoach passenger side windows, NHTSA deliberately left a choice of two glazings because neither was superior in all conditions, although each was superior to the other in certain conditions. After significant car and motorcoach studies on glazings, NHTSA has deliberately chosen to continue with these two choices, concluding for motorcoaches that window glazings alone do not prevent ejections.

As for seat belts, in 1974 NHTSA chose to rely on seat design—and not seat belts—as the safety option of choice and, as a result, refused to order seat belts in motorcoaches because motorcoaches were safe without them. The validity of this choice was confirmed by a 1977 study and the position was reiterated in 1992. NHTSA continued in this belief until 2002 or later, long after this bus was manufactured, when NHTSA concluded that ejections had become a significant problem in motorcoaches and new studies suggested that seat belts might be necessary to prevent ejections. NHTSA is

in the process of developing requirements for seat belts and has set an aggressive schedule to issue requirements for seat belts.

The McLennan County jury developed its own “standards”: one, laminated windows must be installed in side windows because they prevent ejections, and two, a specifically designed seat belt must be installed in all motorcoaches.

The question for this Court is this: Do the jury’s two rules conflict with or frustrate the standard NHTSA issued or the policies NHTSA has announced? The question answers itself: “yes.”

STATEMENT OF FACTS

NHTSA is Created to Regulate the Safety of Motor Vehicles.

Congress enacted the National Traffic and Motor Vehicle Safety Act (“Safety Act”) to reduce traffic accidents and deaths and injuries resulting from traffic accidents. *Motor Vehicle Mfrs. Ass’n of the U. S. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 33 (1984); *see* 15 U.S.C. §§ 1381 *et seq.* (1976 ed. and Supp. V) (current version at 49 U.S.C. §§ 30101 *et seq.* (1994)); Appendix 4a. Congress delegated the authority to promulgate safety standards under the Safety Act to the Administrator of the NHTSA. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 34 n.3; *see also* 49 C.F.R. § 1.50(a); Appendix 4b. The Administrator is charged with issuing motor vehicle safety standards that “shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 33 (quoting 15 U.S.C. § 1392(a) (1976 ed., Supp. V) (current version at 49 U.S.C. § 30111(a) (1994))); Appendix 4c.

Congress Considers Seat Belts.

In 1966, Congress considered whether to require seat belts for passengers in buses via a proposed bill. H.R. 13493, 89th Cong. 2nd Sess. (1966). The bill did not pass and the requirement was not added to the Safety Act. *See generally* 49 U.S.C. §§ 30101 *et seq.*

NHTSA Considers Seat Belts.

In 1971, NHTSA issued Federal Motor Vehicle Safety Standard 208, entitled “Occupant Crash Protection,” in which it required safety belts on motorcoaches *for the drivers only*. 49 C.F.R. § 571.208 at S4.4.1.

In 1973, NHTSA issued a Notice of Proposed Rule Making (“NPRM”) entitled “Bus Passenger Seating and Crash Protection.” 38 Fed. Reg. 4776 (Feb. 22, 1973) (to be codified at 49 C.F.R. pt. 571); Appendix 6a. NHTSA proposed that bus seats be made stronger, with higher seat backs and with more padding. *Id.* These proposed modifications would keep, or contain, the passenger within the seating area during a crash, and would protect the passenger. *Id.* Alternatively, in response to “suggestions from some quarters that seatbelts ought to be installed in buses,” NHTSA proposed that each seat be equipped with a belt anchored to a seat. *Id.* NHTSA incorporated these proposals into a proposed standard for all buses. *Id.*

In 1974, after a year of study, NHTSA withdrew this proposed standard for motorcoaches. 39 Fed. Reg. 27585 (July 30, 1974); Appendix 6b. NHTSA concluded that the current seating system of motorcoaches protected passengers and that seat belt use was too low to warrant installing them. *Id.* NHTSA withdrew its proposed minimum

seating standards for intercity and transit buses¹ and refused to promulgate a standard requiring seat belts for motorcoaches because there was no safety reason to require belts.² It said it would propose standards for seat belts “in the future . . . *if they are found desirable.*” *Id.* (Emphasis added.)

NHTSA Expresses Intent to Preempt Regarding Seat Belts.

Since 1974, NHTSA has not retreated from its refusal to require that motorcoaches be equipped with seat belts. In 1992, NHTSA explained the preemptive effect of its 1974 proposed rule and its withdrawal. *See* Letter from Paul Jackson Rice, Chief Counsel for NHTSA to C.N. Littler, Coordinator, Regulatory Affairs, Motor Coach Industries (Aug. 19, 1992); DX 108; Appendix 7. An MCI affiliate asked NHTSA if proposed legislation in New York State was preempted because it required passenger seat belts in all motorcoach seats. NHTSA responded, explaining that the state legislation was preempted because

NHTSA expressly determined that there is not a safety need for safety belts or another type of occupant crash protection at these seating positions. See 39 Fed. Reg. 27585 (July 30, 1974). With respect to these large buses, the New York bill would be preempted to the extent that it requires seat belts to be installed at seating positions other than the driver’s seating position.

¹ Motorcoaches are intercity buses. *See, e.g.*, 67 Fed. Reg. 14903 (Mar. 28, 2002); Appendix 6c.

² After this, NHTSA created separate standards for school buses (FMVSS 222) and motorcoaches and transit buses (FMVSS 208, the general standard for occupant crash protection). 39 Fed. Reg. 27586 (July 30, 1974); *see also* 49 C.F.R. §§ 571.222, 571.208. NHTSA eventually required seat belts in motorcoaches—but only for the drivers. 49 C.F.R. § 571.208 at S4.4.1. Beginning in 1991, NHTSA distinguished between buses weighing over 10,000 pounds (motorcoaches) and buses weighing less than 10,000 pounds. *Id.* at S4.4.3. For buses weighing less than 10,000 pounds, NHTSA required passenger seat belts. *Id.* at S4.4.3.2. Buses weighing over 10,000 pounds, like the one at issue here, are not required to have passenger seat belts. *Id.* at S4.4.3.1.

Id. (Emphasis added).

NHTSA Begins to Formulate a New Policy for Motorcoach Safety.

In 2002, seven years after the bus here was manufactured, NHTSA requested comments on motorcoach safety. It began with crash statistics, noting that “[h]istorically, motorcoaches (intercity buses) have been a relatively safe mode of transportation with about 10 fatalities per year” 67 Fed. Reg. 14903 (Mar. 28, 2002); Appendix 6c. But it also noted that in severe crashes, passengers may not have been provided with sufficient protection against ejection. *Id.* at 14903–04. Based on the data it had gathered, NHTSA stated its intent to prevent crashes and rollovers and to minimize injuries and fatalities. *Id.* at 14904–05. In order to minimize injuries, NHTSA proposed four potential regulations, with seat belts listed last of the four: (1) limiting the size of glazing materials and upgrading standards for window retention, (2) introducing roof crush safety standards, (3) requiring installation of side curtain airbags, and (4) requiring installation of seat belts. *Id.* NHTSA pointed out that before approving a requirement that seat belts be installed, it would need to investigate (1) what changes in the structure of motorcoaches would be necessary to ensure that seats and seat belts have adequate strength to withstand impacts, (2) modifications necessary for seat reclining features, (3) seat belt usage rates, and (4) appropriate sizes for seat belts. *Id.*

NHTSA Considers Window Glazing.

In 2003, NHTSA began a joint study with its Canadian counterpart, Transport Canada. NHTSA, NHTSA’S APPROACH TO MOTORCOACH SAFETY, NHTSA Docket 2007–28793, 9 (Aug. 6, 2007), *available at* <http://www.nhtsa.doc.gov./staticfiles/>

DOT/NHTSA/Vehicle%20Safety/Articles/Associated%20files/481287.pdf; Appendix 8. That study focused on “improving glazing and structural integrity on motorcoaches to prevent ejections.” *Id.* The study apparently did not consider the role of seat belts in preventing ejections. *See generally id.* Finally, in 2007, NHTSA issued a document entitled “NHTSA’s Approach to Motorcoach Safety,”³ stating the following: “The goal of this paper is to present a comprehensive review of motorcoach safety issues and the course of action [NHTSA] will pursue to most expeditiously address them.” *Id.* at 1. NHTSA again noted what a safe mode of transportation motorcoaches have been but acknowledged that accidents, though “relatively rare,” can cause a significant number of fatal or serious injuries in a single event. *Id.* at 2.

NHTSA looked at three ways to improve safety: prevention, mitigation, and evacuation. *Id.* As with its 1973 comment, NHTSA prioritized its strategies using a cost-benefit analysis. *Id.* at 11.

The first priority under mitigation was motorcoach roof strength. *Id.* Roof strength plays an important role in ejections because the bus frame becomes deformed in rollovers, which causes windows to pop out. *Id.* at 11, 20. Its second priority was seat belts because they are the most direct method of retaining passengers within the seating compartment and could protect passengers in multiple types of crashes “including rollover.” *Id.* at 12–13. NHTSA expressly noted that many crashes involve fairly high accelerations and roof “deformations” that glazing materials and windows cannot

³ Respondents submitted this paper to the Court of Appeals during the pendency of the appeal. The Court of Appeals judicially noticed it and referred to it in its opinion. *See MCI Sales & Service*, 272 S.W.3d at n.5.

withstand. *Id.* at 12, 20. Because glazing materials alone cannot withstand the forces exerted on the windows when a bus rolls over or slides, NHTSA concluded it must rely primarily on roof strength and seat belts—not window glazing—to protect passengers. *Id.* at 20.

NHTSA Gives Motorcoach Manufacturers a Choice Between Two Window Glazings.

NHTSA also regulates windows in buses and prescribes specific glazing materials that must be used on windows in motor vehicles. 49 C.F.R. § 571.205; Appendix 9a. The purpose of glazing materials is to “reduce injuries resulting from impact to glazing surfaces, ensure a necessary degree of transparency in windows for driver visibility, and minimize the possibility of occupants being thrown through the vehicle windows in collisions.” *Id.*

As the court of appeals recognized in its opinion, FMVSS 205 recognizes two types of glass for use in motorcoaches: tempered glass and laminated glass. These two options have been a part of the safety standard since 1972. In 1991, NHTSA began to study advanced side glazing as a way of reducing ejections from cars after Congress ordered NHTSA to decide whether to issue new regulations on advanced side glazing. WILKE ET AL., EJECTION MITIGATION USING ADVANCED GLAZING: FINAL REPORT ix–x, 2 (Aug. 21, 2001); Appendix 9b⁴.

In 2001, after 10 years of study, NHTSA announced in its Final Report that it would keep the current glazing requirements for tempered glass and laminated glass. *Id.*

⁴ This study was performed on cars and light trucks, but the standard applies to cars, light trucks, motorcoaches and other vehicles.

at 55. In that Final Report, NHTSA concluded that (1) there are limits to what can be accomplished with glazing materials, (2) ejection mitigation primarily benefits people who are not wearing seat belts, (3) advanced glazing materials—as opposed to tempered glass currently approved for use in side windows—will cause more injuries for passengers wearing their seat belts, and (4) other options such as side air bags are more effective in preventing ejections. *Id.* at x–xi, 53–54. NHTSA was reluctant to provide enhanced safety benefits for unbelted occupants at the expense of belted occupants. *Id.* at 54. It refused to issue a new standard changing the glazing materials, and stated that it would shift its focus from advanced glazing materials to developing more comprehensive performance-based test procedures. *Id.* at x–xi, 53–54.

In a 2007 report on motorcoach safety, NHTSA reported results from its study on ejections from motorcoaches. It concluded that two other solutions would reduce ejections more effectively than a change in glazing materials: roof strength and seat belts. NHTSA’S APPROACH TO MOTORCOACH SAFETY, *supra* page 5, at 11; Appendix 8. NHTSA stated that it had shifted its focus away from glazing materials because even advanced glazing materials cannot withstand the forces imposed on windows in rollovers and slides. *Id.* at 12, 20.

Regarding glazing and window retention, NHTSA explained that preliminary work had been done under a joint program with its Canadian counterpart, Transport Canada. They estimated the forces applied to the window structure of a motorcoach during rollover events and developed a test procedure for evaluating advanced glazing

materials and bonding techniques in preventing ejections. *Id.* at 19. Nevertheless, NHTSA concluded that,

review of motorcoach crashes has shown that many sustain significant structural deformation in the window frame area, thus compromising the capability of the window to prevent an occupant ejection. The roof strength strategy included in Section II of this report would likely provide improved structural integrity for the window glazing, *and the agency believes that pursuing the seat belt and roof strength approaches has greater potential for providing improved motorcoach occupant protection than continuing only the glazing/window retention strategy.*

Id. at 20 (emphasis added). After both of these studies, NHTSA continues to allow either tempered glass or laminated glass in motorcoaches.

The Bus, the Accident, and the Ensuing Suit.

The bus in question was manufactured in 1995, imported into the United States in 1996, and sold to Central Texas Bus Lines, which owned and operated the motorcoach on the day of the accident. (20 RR 59).

On February 14, 2003, it was involved in an accident on Interstate 35 between Temple and Waco. (5 CR 1111; 5 RR 98–99, 133; 9 RR 109–10). The weather was bad; it was overcast. The road was wet and hilly. (5 RR 135; 9 RR 109–10; PX 17 at pp. 3, 5–6, 20). The treads on the bus’s rear tires were quite thin. (6 RR 200–03; PX 17 at 39). The driver of the bus, not realizing soon enough that the traffic in front of him on Interstate 35 was stopped, swerved, causing the motorcoach to cross the median and careen into an oncoming Suburban. (5 RR 171–73; 13 RR 80–86; PX 16 at p. 8; PX 17 at pp. 3, 6, 35). The motorcoach tipped onto its side, slid, and came to rest on a grassy

bank on the far side of the oncoming traffic. *Id.* Some bus passengers were ejected; others, though not ejected, were injured. (7 RR 89; 9 RR 114, 116; 14 RR 119–22, 123–25, 127, 142–43, 146–47, 156–57, 169, 218–19, 220, 259). Five passengers died; fourteen were injured. (14 RR 114–15, 151–54). Respondents sued Petitioners⁵ claiming, among other things, that the motorcoach was defectively designed because it lacked passenger seat belts and laminated glass in the side passenger windows. (5 CR 1117 – 18).

The jury found that the motorcoach was defectively designed because it lacked passenger seat belts of a specific design and lacked laminated glass in the side passenger windows. (23 RR 54–56; 83 CR 19733–36). The trial court entered a judgment against MCI totaling \$17,008,153.22. (85 CR 20, 265).

SUMMARY OF THE ARGUMENT

This appeal is about preemption. In two separate issues of first impression for Texas state courts, the Court of Appeals erroneously held that neither NHTSA’s deliberate and long-standing decisions to rely on seating design for passenger safety and not to rely on passenger seat belts, nor its decision to permit a choice between laminated glass and tempered glass in side passenger windows, preempted Respondents’ common-law claims.

In deciding whether an area of law is preempted, courts search for expression by the relevant federal agency of an intent to preempt. NHTSA has expressed its intent to

⁵ The plaintiffs filed suits in different counties and in different McLennan County District Courts. (2 CR 232–412). The cases were consolidated into one action in McLennan County. (1 CR 210).

preempt seating safety in motorcoaches by several actions pre-suit and several actions post-suit. This expression began in 1973, with its stated preference for seat design as the safety method it wanted to use in motorcoaches, and in 1974 with its specific refusal to require seat belts in motorcoaches, stating that it would require them *when they became desirable*. This expression was followed in 1992 with a letter in which NHTSA's chief counsel determined that a proposed New York law was preempted by relying on both the safety standard *and* the 1974 refusal to require seat belts. Ten years later—seven years after this motorcoach was manufactured—NHTSA announced a “Public Meeting on Motorcoach Safety Improvements.” Finally in 2007, after five years of study, and after deciding to specifically address ejections, NHTSA began seriously looking at seat belts as a useful tool in preventing ejections. In spite of these expressions of an intent to preempt, the McLennan County jury relieved NHTSA of its responsibilities and found that seat belts should be required. The Court of Appeals erred when it held that this jury finding was not impliedly preempted.

In addition, in light of specific agency statements that no data exists on the various forces a seat belt would have to withstand to be effective, thereby preventing it from choosing a specific design of seat belt, the court of appeals erred when it held that the Respondents' lawsuit, which would require specific seat belts on motorcoaches, did not interfere with NHTSA's stated policy of developing requirements for seat belts and seat belt anchorages.

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) does not control and is distinguishable. A number of factors—none of which are present here—weighed on its

decision, including a formal statement by the Coast Guard that it did not view its actions as preemptive in nature.

The Court of Appeals further erred in concluding that Standard 205, the standard on window glazings, is a minimum standard that does not preempt a state rule requiring a higher standard. It relied solely on the Fifth Circuit Court of Appeals opinion in *O'Hara v. General Motors Corporation*, 508 F.3d 753 (5th Cir. 2007), which reached this conclusion concerning cars, not motorcoaches.

O'Hara does not control. First, *O'Hara* did not involve window glazings in motorcoaches. Second, the *O'Hara* panel ignored relevant reports showing the reasons NHTSA chose not to issue a new standard on glazing and ignored valid reasons NHTSA gave for not issuing a new standard.

Additionally, in a five-year *motorcoach* study, NHTSA concluded that glazing systems were not the answer to reduce ejections in motorcoaches. Rather, increasing roof strength and installing seat belts would reduce ejections. The trial court erred by ignoring the extensive studies that NHTSA had conducted and by holding that Respondents' suit would not frustrate a federal policy. See *Geier*, 529 U.S. at 875–883; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493–97 (1987).

ARGUMENT

I. THE LAW ON FEDERAL PREEMPTION OF STATE LAW.

“The United States Constitution provides that the laws of the United States are ‘the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ U.S. CONST. ART. VI, cl. 2. As a result, when state law

conflicts with federal law, the state law is preempted and has no effect. *Maryland v. Louisiana*, 451 U.S. 725, 741 (1981); *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 426 (Tex. 2005). Traditionally, the U.S. Supreme Court has identified two major types of preemption: (1) express preemption, in which a federal law expressly preempts a state or local law, and (2) implied preemption, in which a court discerns an intent by Congress or a federal agency to preempt. See, e.g., *Gade v. Nat'l Solid Waste Mgt. Ass'n*, 505 U.S. 88, 98 (1991). Two frequently articulated types of implied preemption are field and conflict preemption. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). Conflict preemption generally includes both preemption based on impossibility, when it is impossible to comply with both a federal and state law, and obstacle preemption, when a state law impedes the achievement of a federal objective. Compare *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142–43 (1963) (“[P]reemption is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility.”) with *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881–86 (2000) (concluding that a state tort law was preempted because it “would stand as an ‘obstacle’ to the accomplishment of” federal regulation by the NHTSA).

MCI relies on implied obstacle preemption. For obstacle preemption, the Court does not require “a specific, formal agency statement identifying conflict to conclude that such a conflict in fact exists.” *Geier*, 529 U.S. at 884. “Indeed one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict.” *Id.* at 885. Although the Court requires “clear evidence of conflict,” it does not “insist on a

specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking.” *Id.*

II. THE WACO COURT OF APPEALS APPLIED A HEIGHTENED PRESUMPTION AGAINST PREEMPTION TO MCI’S PREEMPTION CLAIM, CONTRAVENING THE HOLDING OF THE U.S. SUPREME COURT IN *GEIER V. AMERICAN HONDA MOTOR COMPANY*.

The Court of Appeals began and ended its preemption discussion by citing to a “presumption against preemption,” noting that “the party urging preemption has the *difficult burden of overcoming the presumption against preemption.*” *MCI Sales & Serv., Inc. v. Hinton*, 272 S.W.3d 17, 22, 25 (Tex. App.—Waco 2008, pet. filed) (quoting *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001)) (emphasis added). But as explained below, the court erred when it placed this extra burden on MCI to overcome a presumption against preemption. This extra burden is contrary to the U.S. Supreme Court decision in *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000), the controlling opinion on this issue.

In *Geier*, the U.S. Supreme Court interpreted the Motor Vehicle Safety Act of 1966—the same act at issue in this case—and considered the precise issue addressed by the Waco Court of Appeals: preemption. *Id.* Over the strenuous objections of the dissent, the U.S. Supreme Court concluded that the presumption against preemption was neutralized under the Act because of the interplay between the Act’s preemption and saving clauses. *Id.* at 870–71.

Neither do we believe that the pre-emption provision, the saving provision, or both together, create some kind of “special burden” beyond that inherent in ordinary pre-emption principles—which “special burden” would specially

disfavor pre-emption here.

Id. at 870. The Court then discussed the preemption provision of the Act, noting that it reflected Congress’s intent to have a “single, uniform set of standards”:

The two provisions, read together, reflect a neutral policy, not a specially favorable or unfavorable policy, towards the application of ordinary conflict pre-emption principles. On the one hand, the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create.

Id. at 871; *see* 49 U.S.C.S. § 30103(b) (Safety Act’s preemption provision); Appendix 10.

But the Court did not stop there, recognizing that the Safety Act’s saving clause displays a congressional decision to accept some non-uniformity. It had this to say about the saving clause:

On the other hand, the saving 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. That policy itself disfavors pre-emption, at least some of the time.

Id. *See* 49 U.S.C.S. § 30103(e) (Safety Act’s saving clause); Appendix 10. The court concluded its discussion by noting,

we can find nothing in any natural reading of the two provisions that would favor one set of policies over the other where a jury-imposed safety standard actually conflicts with a federal safety standard.

Id.

Under *Geier*, then, when a court applies the Act to determine if a lawsuit is pre-

empted, it should not impose an extra burden on the defendant arguing against preemption or presume against preemption. *Geier*, 529 U.S. at 870–71. Instead, the court should not specially favor or disfavor preemption. *Id.* As the *Geier* majority said, “[t]he two provisions, read together, reflect a neutral policy, not a specially favorable or unfavorable policy” *Id.* In short, the presumption against preemption does not come into play. *Id.*

Ignoring these pronouncements, the Waco Court of Appeals instead relied on pre-*Geier* case law to impose a “difficult burden” on MCI to “overcom[e] the presumption against preemption.” *MCI Sales & Serv., Inc.*, 272 S.W.3d at 25. This is reversible error.

III. THE GLAZING CLAIM IS PREEMPTED.

Respondents sued MCI alleging defective design because the motorcoach did not have laminated side windows. (5 CR 1117–18). The charge defined a “design defect” as

A condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use. For a design defect to exist there must have been a safer alternative design.

(83 CR 19733–36).

“Safer alternative design” was defined as “a product design other than the one actually used that in reasonable probability:

- (1) would have prevented or significantly reduced the risk of injury in question without substantially impairing the product’s utility; and
- (2) was economically and technically feasible at the time the product left the control of MCI by the application of existing or reasonably achievable scientific knowledge.”

(83 CR 19733–36).

The jury’s finding of a design defect amounts to a requirement that, in Texas, laminated glass must be used in motorcoach side windows. *Bates v. Dow Agrosciences*, 544 U.S. 431, 443–44 (2005). This finding is preempted in two ways. First, the claim is no different from the claims raised in *Geier v. Honda Motor Company*, 529 U.S. 861 (2000), and, for the reasons discussed in *Geier*, Respondents’ claim is preempted because NHTSA deliberately chose to give motorcoaches two options for side windows—laminated glass and tempered glass. 49 C.F.R. 571, 205; Appendix 9a. Second, the claim frustrates NHTSA policy as expressed in the pertinent regulation and as amplified in recent NHTSA motorcoach studies in which NHTSA has concluded that glazings alone cannot prevent ejections. NHTSA, NHTSA’S APPROACH TO MOTORCOACH SAFETY, *supra* page 5, at 20; Appendix 8. Rather than rely on glazings to prevent ejections, NHTSA has prioritized its focus on increasing roof strength and installing seat belts. *Id.* at 20.

A. A CHOICE DELIBERATELY GIVEN BY A FEDERAL AGENCY MAY NOT BE RESTRICTED BY THE STATE.

As pointed out earlier, Respondents sued MCI claiming that MCI’s motorcoach was defective because it did not have laminated glass in the side passenger windows. 83 CR 19735–36. The Geiers sued Honda claiming that Honda should have had a driver side air bag. *Geier*, 529 U.S. at 865.

The relevant Federal Motor Vehicle Safety Standard (“FMVSS”) on window glazing—Standard 205—states in effect that a motorcoach shall install laminated glass in the front window and *either* laminated glass or tempered glass in the side passenger

windows. In *Geier* the relevant FMVSS—Standard 208—provided for a phase-in of passive restraints (which included airbags). *Geier*, 529 U.S. at 877–79. The Court concluded that the Geiers’ suit—in which the Geiers alleged that Honda had a duty to design its car with airbags—would stand as an obstacle to the purpose NHTSA wanted to achieve by a gradual phase-in of passive restraints. *Id.* at 886. To reach this conclusion, the *Geier* court looked to NHTSA statements contemporaneous with the rule and to statements the agency and the United States government made in their brief before the court. *Id.* at 881–83.

1. In *Geier*, the Court Found that NHTSA Deliberately Chose to Give Manufacturers a Choice of Safety Options.

The Geiers claimed that FMVSS 208 merely set a minimum airbag standard. *Id.* at 875. However, the Court found that the agency did not view the standard as a minimum. Rather, for a variety of reasons, the Department of Transportation (DOT) or NHTSA deliberately chose to provide manufacturers with a range of choices that “would bring about a mix of different [passive restraint] devices introduced gradually over time” *Id.* By doing this, DOT would “lower costs, overcome technical safety problems, encourage technological development, and win wide-spread consumer acceptance—all of which would promote FMVSS 208’s safety objectives.” *Id.*

Thus, the *Geier* holding could be summarized in this way: Because DOT deliberately chose to give manufacturers a choice in the devices they used, and had a sound reason for doing so, the Geiers could not foreclose one of those options via a state tort suit alleging that the manufacturer’s car was negligently designed because the

manufacturer chose to use one of the options and not another. *Id.* at 881.

2. The Fifth Circuit Holds in *Carden* that a Deliberate Choice Based on Safety Reasons Invokes *Geier*.

Many courts have applied the concepts stated in *Geier*. Most have involved tort suits based on options NHTSA chose to give under FMVSS 208 in other settings. For example, the Fifth Circuit addressed the issue of options in *Carden v. General Motors*, 509 F.3d 227 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2911 (2008). *Carden* involved FMVSS 208 and options it provided for rear-center seats in cars. *Id.* at 229. The Cardens' daughter died from injuries she sustained in an impact while wearing a lap-only rear-center seat belt. *Id.* When the *Carden* car was manufactured, FMVSS 208 required that manufacturers install either a lap-only seat belt or a lap/shoulder belt. *Id.* at 230. *Carden* claimed that FMVSS 208 set a minimum standard that would not preclude a tort claim arguing for a device that gave a higher degree of safety. *Id.*

A Fifth Circuit panel composed of Chief Judge Jones and Judges DeMoss and Stewart disagreed. It held that

Geier . . . compels the conclusion that a state tort suit that would foreclose a safety option intentionally left to vehicle manufacturers by Federal Motor Vehicle Safety Standards is preempted.

Id. at 230–31.

When the Cardens argued that their claims were different because their claims were consistent with NHTSA's policy objectives and because NHTSA had never enunciated any specific regulatory policy for allowing manufacturers to install either lap belts or lap/shoulder belts, the court again disagreed. *Id.* at 231. It recited how NHTSA's

policy regarding seat belts in rear seating had evolved from allowing either lap-only or lap/shoulder belts in all seating positions to lap/shoulder belts in all positions except the rear-center seat, where the choice remained. *Id.* NHTSA commentary explained that it decided to leave the choice for the rear-center seat because “there [were] more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder belts at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task” *Id.* Per the court, “[b]ased on this language, it is clear that the agency’s decision was deliberate and based on managing technological constraints and cost efficiency.” *Id.* at 231–32.

3. Other Courts Agree with the Fifth Circuit.

A number of courts have ruled as the *Carden* court did based on options given by FMVSS 208. *See Griffith v. Gen. Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002), *cert. denied*, 538 U.S. 1023 (2003) (“[U]nder *Geier*, when an [FMVSS] leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted.”); *Hurley v. Motor Coach Indus.*, 222 F.3d 377, 383 (7th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001) (reasoning that when an FMVSS leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted); *Carasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169 (M.D. Penn. 2001) (plaintiffs were impermissibly attacking the specifically permitted restraint options under FMVSS 208); *Williamson v. Mazda Motor Co. of Am., Inc.*, 167 Cal. App. 4th 905, 914–915 (Cal. Ct.

App. 2008, pet. filed) (same); *Roland v. Gen. Motors Corp.*, 881 N.E.2d 722, 727 (Ind. Ct. App. 2008) (concluding that defective design suit challenging a lap-only seat belt in center rear seat was preempted); *Osman v. Ford Motor Co.*, 883 N.E.2d 1011, 1017 (Ind. Ct. App. 2005), *cert. denied*, 547 U.S. 1192 (2006) (same); *Heinricher v. Volvo Car Corp.*, 809 N.E.2d 1094, 1097–98 (Mass. App. Ct. 2004) (same); *Hernandez-Gomez v. Volkswagen of Am., Inc.*, 32 P.3d 424, 428–29 (Ariz. Ct. App. 2001) *cert. denied*, 537 U.S. 1046 (2002) (same).

B. FOR FMVSS 205, NHTSA ALSO DELIBERATELY CHOSE TO GIVE MANUFACTURERS A CHOICE OF SAFETY OPTIONS.

For FMVSS 205, NHTSA again has chosen to give motorcoach manufacturers a choice of safety options. This choice was deliberate, well-reasoned, and incorporated into the standard. In addition, if any doubt remained as to whether the standard set a minimum, official pronouncements by NHTSA in light of studies it performed confirm that the choice was deliberate and that it was not a minimum standard.

1. The FMVSS 205 Choice of Safety Options is Like *Geier*.

As in *Geier*, NHTSA had very specific reasons for giving motorcoach manufacturers a choice of safety options: these were the two best options available. For window glazings, NHTSA has relied on testing and recommendations of the Society of Automotive Engineers. FMVSS 205 refers to the ANSI/SAE Z26.1–1996, also titled “American National Standard for Safety Glazing Materials for Glazing Motor Vehicles and Motor Vehicle Equipment Operating on Land Highways.” Appendix 9c. This standard prescribed laminated glass in windshields to protect drivers from rocks and rock

fragments. 21 RR 34; ANSI/SAE Z26.1–1996 §3.3; Appendix 9c. It required buses to use either laminated glass or tempered glass for passenger side windows. Tempered glass was included as an option for its ability to withstand abuse. 21 RR 34; ANSI/SAE Z26.1–1996 §3.2; Appendix 9c.

NHTSA has stated that the purpose of glazing materials is threefold: (1) to reduce injuries resulting from impact to glazing surfaces, (2) to ensure a necessary degree of transparency in windows for driver visibility, and (3) to minimize the possibility of occupants being thrown through the vehicle window in collisions. 49 C.F.R. § 571.205 at S2. It appears that these purposes were the reason NHTSA chose to give a choice between tempered glass and laminated glass. As noted above, each performs differently under different crash situations.⁶ In fact, the standard states this:

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 safety glazing material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards.

ANSI/SAE Z26.1–1996 § 2.2; Appendix 9c.

It is apparent from this language that no perfect choice was available that would allow NHTSA to pick one material over the other. This is confirmed by two studies

⁶ “Laminated glass” means two or more pieces of sheet, plate, or float glass bonded together by an intervening layer of plastics material. ANSI/SAE Z26.1–1996. Laminated glass will crack or break under sufficient impact, but the pieces tend to adhere to the plastic. If a hole is produced, the edges are likely to be less jagged than ordinary (annealed) glass. *O’Hara v. Gen. Motors Corp.*, No. 3:05–CV–134–G ECF, 2006 U.S. Dist. LEXIS 23064 *4 n. 3 (N.D. Tex. April 25, 2006), *aff’d in part and rev’d in part*, *O’Hara v. Gen. Motors Corp.*, 508 F.3d 753 (5th Cir. 2007). When tempered glass is broken at any point, the entire piece breaks into small pieces that have relatively dull edges in comparison to broken pieces of ordinary (annealed) glass.

NHTSA initiated.

2. Studies Between 1988 and 2001 Confirm that NHTSA's Choice Was For Safety Reasons and that it was not a Minimum Standard.

In 1988, NHTSA began considering proposing requirements intended to reduce side ejections. WILKE ET AL., *supra* page 7, at 1. It issued two Advanced Notices of Proposed Rule Making, announcing NHTSA's intent to study and propose requirements. *Id.* At that point, NHTSA believed that new side window designs incorporating different "glazing/frames, [might] be able to reduce the risk of ejections." *Id.* But, from the outset concerns were voiced, claiming that the safety benefits were not quantified, questioning what effect ejection-mitigation glazing would have on overall occupant injuries and fatalities, and questioning whether this material would actually increase injuries in belted occupants. *Id.* at 2.

In 1991 Congress mandated that NHTSA initiate rulemaking on rollover protection; the mandate was contained in the National Highway Traffic Safety Administration Authorization Act of 1991. WILKE ET AL., *supra* page 7, at 2.

In its 55-page "Ejection Mitigation Using Advanced Glazing: Final Report," NHTSA reviewed its twelve-year study of advanced glazings as a means of preventing ejections. *Id.* at 1–9. One of the advanced glazings tested was laminated glazing, "similar to conventional windshields in which a plastic film is laminated between two glass layers." *Id.* at 18.

The testing began in 1991, with interim reports in 1995 and 1999. *Id.* at 3–5. After 1999, NHTSA concluded it needed to further evaluate how advanced glazing

systems could cause neck injury. *Id.* at 5. In 2001, ten years after NHTSA began its study, Congress directed NHTSA to complete and issue a final report. *Id.* at ix–x. In response to this directive, NHTSA issued its “Final Report” in which it stated that it would not issue an advanced glazing regulatory requirement.⁷ *Id.*

In explaining the results of the study and its decision not to issue a new regulation on advanced glazing, NHTSA first noted the lower rate of neck injuries associated with tempered glass than with any other glazings:

Despite wide variability, impacts into advanced glazings resulted in higher neck shear loads and neck moments than those into tempered glass. Impacts into standard tempered glass resulted in axial loads that were comparable to those in advanced glazings. In each case, the lowest neck injury measurements were obtained from tempered glass impacts.

Id. at viii.

At the conclusion of the Report’s introduction, NHTSA declined to issue a new regulation requiring that motorcoaches include advanced glazings, explaining that “advanced side glazing appears to increase the risk of neck injury . . . [and 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.” *Id.* at x. NHTSA concluded that it was “more appropriate to devote its research and rulemaking efforts to projects other than ejection mitigation through advanced glazing” and that it would “continue to examine a potential requirement for advanced side glazing.” *Id.* The agency stated that it would

⁷ A timeline of pertinent events is included in the Appendix at Tab 12.

explore ejection mitigation through other means, such as side airbag curtains and that it would shift its focus “from advanced glazing to development of more comprehensive, performance-based test procedures.” *Id.* at xi.

Thus, together, the commentary to FMVSS 205 and the history of NHTSA’s studies confirm that NHTSA’s decision to allow a choice between tempered glass and laminated glass was deliberate and was based on a variety of sound reasons, including safety.⁸ Although different from the reasons NHTSA expressed for phasing-in passive restraint systems in *Geier*, its reasons reflect a choice among the best available alternatives—not a minimum standard. *See Carden*, 509 F.3d 230–32.

A Texas tort law requiring a manufacturer to use only one of the choices deliberately endorsed by NHTSA is an obstacle to the accomplishment of the full purposes and objectives of Congress, and is a contrary rule of law. For these reasons it is preempted. *See Geier*, 529 U.S. at 875–83; *Carden*, 509 F.3d at 230–32.

C. THIS COURT SHOULD NOT FOLLOW O’HARA.

In *O’Hara v. General Motors Corp.*, a panel of the Fifth Circuit ruled that FMVSS 205 was a minimum safety standard that did not preempt a tort claim. The court expressed concern that NHTSA had not articulated a policy reason for its glazing requirement. 508 F.3d 753, 762–63 (5th Cir. 2007).

The *O’Hara* panel did not consider in its legal discussion the comment contained

⁸ In this Final Report on the mitigation of ejections study, NHTSA did consider more than just safety. It considered the effectiveness of glazings in preventing ejections and the costs of glazings. WILKE ET AL., *supra* page 7, at 24–27, 47–50.

in the ANSI/SAE Z26.1 § 2.2, which is incorporated into the Standard and explains that no material is best because all available materials work better in some situations but not in all. *O’Hara*, 508 F.3d at 758–61; *see* 49 C.F.R. § 571.205; ANSI/SAE Z 26.1–1996; Appendix 9c. The *O’Hara* panel did not mention the 55-page “Ejection Mitigation Using Advanced Glazing: Final Report” NHTSA issued explaining its studies and the reason it decided not to change the glazing rule. *O’Hara*, 508 F.3d at 758–62; *see* WILKE, *supra* page 7; Appendix 9b. Ironically, the items the court did not consider answer the court’s concerns that NHTSA did not have a stated policy on glazing and explain precisely why NHTSA chose to leave FMVSS 205 unchanged. They are discussed *supra*.

Also, unlike its sister panel in *Carden*, the *O’Hara* panel ignored what appear to be valid concerns on NHTSA’s part. The panel was dismissive of the three reasons NHTSA gave in its Notice of Withdrawal for not issuing a new advanced glazings standard and discounted them as non-preemptive. *Id.* at 761–62. Those reasons were the following: (1) other ejection mitigation systems that performed better needed standards developed, (2) advanced glazing “in some cases appears to increase the risk of neck injury,” and (3) significant window modifications would be required and would significantly increase costs. *Id.*

In contrast, when *Carden* considered the two reasons NHTSA gave for not requiring rear-center lap/shoulder belts—(1) technical difficulties associated with them and (2) they “would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task”—the *Carden* court found the decision “deliberate and based on managing technological constraints and

cost efficiency.” *Id.* at 231–32. Both goals were valid.

In *O’Hara* NHTSA pointed to cost, developing performance standards for other ejection mitigation systems that are more effective, and increased risk of injury. These reasons appear equally as valid as those listed in *Carden*.⁹ For that matter, these three reasons for NHTSA’s decision not to require advanced glazing do not appear less valid than the seven considerations listed in *Geier*. *Geier*, 529 U.S. at 877–78. When summed-up, the reasons listed in *Geier* had five bases: customer non-use, customer dislike, increased cost, disadvantages of the proposed restraint such as dangers accompanying restraint, and inability of the proposed restraint to fully protect unbuckled passengers.¹⁰ In short, the *O’Hara* panel dismissed as invalid reasons that appear to be very similar to reasons approved as valid in *Geier*, *Carden*, and other cases.

D. THE GLAZING CLAIM FRUSTRATES FEDERAL POLICY AS EXPRESSED IN “NHTSA’S APPROACH TO MOTORCOACH SAFETY.”

As stated earlier, the jury found that the bus was defectively designed because it had tempered glass on the side windows rather than laminated glass. More specifically, the jury found that laminated windows were a better design and would have prevented passengers from being ejected or would have significantly reduced the chance of passengers from being ejected.

This finding is directly contrary to NHTSA’s recent conclusions in its 2007

⁹ The *O’Hara* court seemed impressed with the panoply of reasons NHTSA phased in the safety options in *Geier*, noting the disparity between *Geier* and the case before it. But, in *Carden*, a host of reasons was not given. The court listed only two or three reasons.

¹⁰ These five reasons also sound very similar to the reasons NHTSA gave in its “Approach to Motorcoach Safety.” NHTSA’S APPROACH TO MOTORCOACH SAFETY, *supra* page 6, at 11–14, 19–21; Appendix 8.

“Approach to Motorcoach Safety.” NHTSA’s APPROACH TO MOTORCOACH SAFETY, *supra* page 5, at 11–14, 19–20; Appendix 8. There, NHTSA concluded that glazings alone will not prevent ejections. *Id.* Instead, NHTSA concluded that it would focus its efforts on increasing roof strength and ascertaining performance requirements for seat belts and seat anchorages because these—not a specific type of glazing—would be the most effective means of preventing ejections. *Id.* As a result, in 2007 NHTSA focused its attention on establishing roof crush and seatbelt performance standards on an expeditious basis. *Id.* at 11, 14.

While NHTSA was conducting its testing on the role of glazings to effectively prevent ejections, and only two years before NHTSA issued its “Approach to Motorcoach Safety” in which it concluded that glazings alone are insufficient to prevent ejections, the jury, based on its own study, concluded that a particular type of glazing would have prevented the ejections in this case. 83 CR 19735–36. In short, the jury not only usurped NHTSA’s role, but it also reached a different conclusion from NHTSA.

The jury’s rule of law, which would require MCI to focus its attention on changing the type of glazing it has in the passenger side windows of its buses, interferes with NHTSA’s goal of focusing industry attention on seat belts and roof strength, and its own goals of setting requirements for both in the near future. *See Geier*, 529 U.S. at 886; *Preston v. Ferrer*, 128 S. Ct. 978, 983, 985–87 (2008) (state act that delayed arbitration was in contravention of Congress’s intent to move parties out of court as quickly and easily as possible); *Ouellette*, 471 U.S. at 494 (state law is preempted if it interferes with the methods by which the federal statute was designed to reach its goal); *Perez v.*

Campbell, 402 U.S. 637, 643–54 (1971) (state act providing leverage for collection of damages from negligent drivers interfered with purposes of the Bankruptcy Act) As a result, the jury’s finding is preempted.

IV. THE SEAT BELT CLAIM IS PREEMPTED.

As discussed in the Statement of Facts, the jury also found that the MCI motorcoach was defective because it was not equipped with specifically designed seat belts. 83 CR 19733–34. Unlike the glazing claim for which NHTSA issued a Standard, here, after initially proposing to require seat belts, NHTSA refused to issue a Standard requiring seat belts to be installed at all passenger positions. 39 Fed. Reg. 27585; Appendix 6b. In light of this state of the record, the question for this Court is whether this refusal to enact a standard has a preemptive effect. *Sprietsma*, 537 U.S. at 66. Unquestionably, a refusal to act can have a preemptive effect. *Id.* at 64, 66 (“[R]espondent claims that [the plaintiff’s] claims are preempted . . . by the Coast Guard’s decision not to regulate. [This is a] viable pre-emption theor[y]. . . .”) *See also*, *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983); *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774 (1947). As the Supreme Court said, state law is preempted “where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is *appropriate or approved*. . . .” *Sprietsma*, 537 U.S. at 66 (citing *Ark. Elec. Coop.*, 461 U.S. at 384 and *Bethlehem Steel Co.*, 330 U.S. at 774).

Regardless of whether a court is reviewing a standard an agency did issue, or one it did not, the “purpose of Congress is the ultimate touchstone in every preemption case.”

Wyeth v. Levine, 129 S. Ct. 1187, 1194 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). In the case of a standard *not* issued, the question is, did the agency, by refusing to issue the standard, intend to say that the standard was not appropriate or approved? See *Sprietsma*, 537 U.S. at 66. In ascertaining intent on this issue, the Court can and should look to normal preemption opinions. A number of cases provide guidance on reasons or actions that reflect a preemptive intent.

A. GEIER, CARDEN, AND BIC PEN ILLUSTRATE AGENCY ACTIONS THAT REFLECT A PREEMPTIVE INTENT.

In *Geier*, in *Carden*, and in *Bic Pen*, the relevant regulatory agencies chose not to require a safety device the plaintiffs thought should have been required. See *Geier*, 529 U.S. at 865–67; *Carden*, 509 F.3d at 229; *Bic Pen Corp. v. Carter*, 251 S.W.3d 500, 502–04 (Tex. 2008). In each case, the manufacturer’s decision not to install the safety device the plaintiff argued for did not subject the manufacturer to suit because the regulatory agency’s decision not to require installation of the safety device reflected a well-reasoned choice that excluded the safety option for “significant considerations.” See *Geier*, 529 U.S. at 877–81; *Carden*, 509 F.3d at 231–32; *Bic Pen*, 251 S.W.3d at 506–09. These cases show that historically, federal agencies always have relied on cost-benefit analyses, which incorporate safety considerations, and on other factors, in making their regulatory choices.

In *Geier*, the Supreme Court listed seven “significant considerations” that went into NHTSA’s decision not to require all cars to have air bags, but to phase them in over a several-year period. *Geier*, 529 U.S. at 877–78. These included: (1) buckled seat belts

are vital ingredients of car safety; (2) more than 80% of front seat passengers leave their manual belts unbuckled; (3) air bags could partly make up for unbuckled manual belts; (4) passive restraints have their own disadvantages such as intrusiveness and dangers associated with them; (5) airbags have dangers associated with them; (6) airbags are significantly more expensive than passive restraint devices; and (7) the public, because of cost, fear, or intrusiveness, might resist installation or use of then-available passive restraint devices. *Id.* Because NHTSA had a scheme or plan to achieve its safety goals and valid reasons supporting that plan, an attempt by a state to require something different and to foreclose the options was preempted. *Id.* at 886; *see also Wyeth*, 129 S. Ct. at 1203. (“In *Geier*, the DOT conducted a formal rulemaking and then adopted a plan to phase in a mix of passive restraint devices.”)

Carden also involved a decision by NHTSA. The Agency had to decide whether it should require lap/shoulder belts for the rear-center seats in cars and the center seat in trucks. *Carden*, 509 F.3d at 229–30. When the *Carden*’s car was manufactured, NHTSA did not require lap/shoulder belts for the rear-center seats. *Id.* At the point the *Carden*’s car was manufactured, NHTSA concluded that technical difficulties existed with requiring lap/shoulder belts in the rear-center seat and that lap/shoulder belts would yield only minor safety benefits with substantially greater costs, given the lower use rate and difficult engineering task. *Id.* at 231. As the *Carden* court explained, the “agency’s decision was deliberate and was based on managing technological constraints and cost efficiency.” *Id.* at 231–32. The court found these reasons sufficient to express an intent to preempt.

In *Bic Pen*, a family sued the Bic Pen Corporation because of damages a six-year-old girl sustained when her five-year-old brother set her dress on fire with a Bic Pen lighter. *Bic Pen*, 251 S.W.3d at 502. The parents of the child alleged that Bic Pen negligently designed the lighter because it did not prevent their son from activating the lighter. *Id.*

The Consumer Product Safety Commission regulated lighters when Bic manufactured the lighter. *Id.* at 503. The Commission wanted to make lighters child resistant and concluded that the best way of regulating lighters would be by requiring that they perform up to a certain level. *Id.* at 507. After considering both higher and lower standards, the Commission decided against imposing a performance level greater than 85% because “the higher performance level [was] not commercially or technically feasible for many firms,” “would have substantial adverse effects on manufacturing and competition, and would increase costs disproportionate to benefits.” *Id.* According to the Commission, the eighty-five percent test struck a reasonable balance between improved safety for a substantial majority of young children and the potential for adverse competition effects and manufacturing disruption. *Id.*

Thus, in setting a performance level that was lower than the Carters advocated for, the Commission took into account cost, negative impact on competition, and increase in costs in connection with the benefits. According to this Court, the Commission balanced important factors through which it achieved its safety goals. *Id.* It represented a federal scheme that the Carters’ negligent design claim would upset.

Thus, in each of these cases the regulatory agency considered the positive and

negative aspects of the options before it, and, after balancing these considerations—which included safety considerations—chose a specific way of achieving its goals. In each case, the reviewing court found preemption.

B. SPRIETSMA AND FREIGHTLINER ILLUSTRATE AGENCY ACTIONS THAT DO NOT REFLECT PREEMPTIVE INTENT.

Both *Sprietsma* and *Freightliner* involve situations in which a federal agency had not issued a standard. In each case, the U.S. Supreme Court considered the reasons the federal agency did not issue a standard and found that the reasons failed to reflect a scheme or policy or an intent to preempt.

Sprietsma involved a decision by the United States Coast Guard, the federal agency charged with administering the Federal Boat Safety Act of 1971, not to issue a regulation requiring propeller guards. *Sprietsma*, 537 U.S. at 54, 57, 61–62. *Sprietsma* died from injuries she suffered after being hit by the propeller on her boat.

In considering the issue, the U.S. Supreme Court recognized that “a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much preemptive force as a decision *to regulate*.” *Id.* at 66. But this was not such a case, the court held. *Id.* The entire reason the Coast Guard gave for not issuing a regulation was the following:

The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guard on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible

in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

Id. According to the Court, this statement revealed only a judgment that the available data did not meet the Boating Act's stringent guidelines for federal regulation. *Id.* The decision was not driven by considerations of safety. *Id.*¹¹

Freightliner also provides examples of reasons that will not support a preemptive intent when no regulation is in effect. *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995). In *Freightliner*, the plaintiffs alleged that a tractor-trailer manufactured by Freightliner contained a design defect because the tractor-trailer did not contain an antilock braking system (ABS). *Freightliner*, 541 U.S. at 282. Freightliner claimed that the plaintiffs' suit was impliedly preempted because it conflicted with federal law. *Id.* Freightliner relied on FMVSS 121 by which NHTSA initially required tractor-trailers to have ABS devices capable of stopping within certain distances. *Id.* at 284. However, the standard was suspended by the Court of Appeals for the Ninth Circuit, which held that the standard was "neither reasonable nor practicable at the time it was put in effect." *Id.* at 285. The court found that NHTSA had failed to consider the higher failure rate of ABS devices. *Id.* The court held that the Standard would remain suspended until NHTSA had

¹¹ The decision also was driven by several other factors. The Coast Guard's statement did not reflect a decision not to allow states to impose some version of propeller guard regulation, and, in fact a Coast Guard subcommittee recommended education campaigns and articles issued by the Coast Guard describing "available propeller guards." *Sprietsma*, 537 U.S. at 67. Finally, the Coast Guard informed the court that it did not consider its actions as having any preemptive effect. *Id.* at 68. In addition, historically, the Coast Guard had publicly stated that states could regulate where the Coast Guard had not. *Id.* at 59–60, 65–66. As the court said, "history teaches us that a Coast Guard decision not to regulate a particular aspect of boating, safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards." *Id.* at 65–66.

compiled enough evidence to show that ABS devices would not create the possibility of greater danger. *Id.*

After the Ninth Circuit's decision, NHTSA amended the Standard so that it did not apply to trucks and trailers. *Id.*¹² By the time of the U.S. Supreme Court opinion almost twenty years later, NHTSA still had not taken final action to reinstate a safety standard governing the stopping distance of trucks and trailers. *Id.* at 285–86. The Court held that the claims were not preempted because the standard had been withdrawn under court order and never reinstated. *Id.* at 289–90.

Thus, *Sprietsma* and *Freightliner* are examples of cases in which the U.S. Supreme Court did not find preemption. If one compares *Sprietsma* and *Freightliner* to *Geier*, *Carden*, and *Bic Pen*, it is clear why the courts found preemption in one group of cases and not in the other. First, *Geier*, *Carden*, and *Bic Pen* furthered a regulatory agency's policy choice by their decisions. Neither *Sprietsma* nor *Freightliner* did this. In *Sprietsma*, the decision not to issue a standard did not further a policy goal and was not a policy statement on propeller safety or an indicator of the Coast Guard's plan to protect against propeller injuries. Instead, it was merely a non-action. In *Freightliner*, NHTSA had withdrawn its Standard requiring ABS devices and had done nothing in the intervening years to reinstate the standard. *Freightliner*, 514 U.S. at 285–86, 289–90. Neither a policy statement nor a safety plan could be discerned from this action. As in,

¹² NHTSA left the unamended Standard 121 in the Code of Federal Regulations so that “affected sections [could] most easily be reinstated” and so that manufacturers would know what NHTSA “still considers to be reasonable standard for minimum acceptable performance.” *Freightliner*, 514 U.S. 285.

Sprietsma, it was a mere non-action. However, NHTSA’s action regarding seat belts is not a mere failure to act.

C. NHTSA DID NOT WANT TO REQUIRE SEAT BELTS AND CHOSE TO RELY ON SEAT DESIGN.

NHTSA’s actions are quite different from those in *Sprietsma* and *Freightliner*. NHTSA first conducted formal rulemaking and had a safety plan in place when it refused to require seat belts for passengers on motorcoaches. And, it had a particular method by which it planned to provide safety on motorcoaches. *See Geier*, 529 U.S. at 886; *Ouellette*, 479 U.S. at 494. When one looks at the relevant agency reports, studies, and data, it is clear that NHTSA decided that a standard requiring seat belts was not appropriate and, therefore, it did not approve a standard requiring seat belts for all passengers. Instead, it chose a different method to ensure safety. NHTSA made this choice while the National Transportation Safety Board (“NTSB”), a non-regulatory agency, and others argued for seat belts.

By that choice, by its expression of its choice, and by later statements regarding the choice, NHTSA has shown that the common-law rule adopted by the jury was not appropriate or approved—or desirable—and was not the method NHTSA chose to provide safety to passengers.

1. In 1966 Congress Refused to Enact a Bill to Require Seat Belts in Motorcoaches.

From the beginning, seat belts were not required in motorcoaches. In 1966, when Congress enacted the Motor Vehicle Safety Act, Congress considered whether to require seat belts in motorcoaches. In fact, a bill was introduced to require seat belts in

motorcoaches used in interstate commerce. H.R. 13493, 89th Cong. 2nd Sess. (1966) (A proposed “bill that would require that motor buses be equipped with seat belts.”). Congress chose not to incorporate that bill into the Safety Act. *Id.* So, when the Safety Act was first enacted, Congress chose not to require seat belts in motorcoaches.

2. In 1973–1974 NHTSA Chose to Go with a Safety Option Other Than Seat Belts.

In 1973, NHTSA issued an NPRM for Motor Vehicle Safety Standards related to “Bus Passenger Seating & Crush Protection.” 38 Fed. Reg. 4776 (Feb. 22, 1973); Appendix 6a. In the opening paragraph of the Notice, NHTSA reflected its intent to protect passengers by changing the interior seating:

The purpose of this notice is to propose a new motor vehicle safety standard to require buses to have passenger seats that are stronger, higher, and less hostile on impact than present seats. The goal is to reduce injuries to bus passengers by providing seats that protect passengers rather than contribute to their injuries.

Investigation of bus accidents have pointed to the seat as being a significant factor in . . . caus[ing] . . . injury. The seats fail the passengers in three principal respects: By being too weak, too low, and too hostile.

Several serious accidents in recent years have been characterized by the progressive failure of seats under the weight of occupants being thrown forward by the force of the impact.

Id. It is clear from the notice that seat re-design was the focus, not seat belts, although NHTSA did propose an “alternative” option for safety employing seat belts. *Id.*

In response to suggestions *from some quarters* that seatbelts ought to be installed in buses, the NHTSA also proposes an alternative restraint system employing seatbelts. Under the belt restraint option, each passenger position on a seat would

be equipped with a lap belt anchored to the seat. To overcome the tendency of passengers not to wear belts, each belt would be equipped with a warning system that would signal both the passenger and the driver if the passenger fails to buckle the belt after sitting down.

Id. (Emphasis added). Obviously, some commenters thought seat belts should be installed and, as a bow to them, NHTSA was willing to study seat belts as a secondary, alternative restraint system. *Id.*

But after a year of study, NHTSA decided against seat belts—even as an alternative. School Bus Passenger Crash Protection, 39 Fed. Reg. 27585 (July 30, 1974) (to be codified at 49 C.F.R. pt. 571); Appendix 6b. It denied the petition of the Center for Auto Safety to require seat belts in motorcoaches, and it also concluded that the current seating performance did not justify new requirements. *Id.* In connection with both of these, it noted that studies of accident statistics showed that changes to seating would not significantly reduce injuries, and that seat belt usage rates were “very low.” *Id.* Finally, as a conclusion to its seat-belt discussion, NHTSA stated that it would propose a standard for seat belts “in the future . . . if they are found desirable.” *Id.*

By this notice NHTSA chose a distinct path for motorcoach safety, evident in its 1973 notice. In part because of very low usage rates for seat belts, it chose to rely on seating design.¹³ *Id.* The extent of its preference for seating design becomes clear when one looks at a 1977 study completed by the Institute for Research in Public Safety for the

¹³ Even though NHTSA chose not to require seat belts for all passengers on motorcoaches, in 1972 it did require either a lap belt or a personal protection system for drivers of motorcoaches. 49 C.F.R. 571.208, § 4.4.1.

Department of Transportation.¹⁴

3. A 1977 Study Prepared for DOT Confirms the Reasons Behind NHTSA's Focus.

As noted by NHTSA in its 1973 NPRM, it considered using seat belts as an alternative or secondary restraint system because of “suggestions from some quarters that seat belts ought to be installed on buses.” *Bus Passenger Seating and Crash Protection*, 38 Fed. Reg. 4776 (Feb. 22, 1973) (49 C.F.R. pt. 571); Appendix 6a. A 1977 study commissioned by DOT illuminates the extent of the dispute about seat belts and the reasons the low usage rate of seat belts played a role in NHTSA's decision to rely on seating design rather than seat belts. *See STANSIFER ET AL., INSTITUTE FOR RESEARCH IN PUBLIC SAFETY, ANALYSIS FOR NEED FOR PASSENGER SAFETY BELT REQUIREMENTS IN INTERCITY BUSES* (Sept. 30, 1977) (Study commissioned by and prepared for the U.S. Department of Transportation.)¹⁵; Appendix 11. The study found that passenger seat belts on motorcoaches were not recommended. *Id.*

Apparently, the “quarters” that advocated seat belt requirements did not go away after the 1974 NPRM and NHTSA's decision not to require seat belts. As a result, in 1977, DOT contracted with the Institute for Research in Public Safety at the Indiana University School of Public and Environmental Affairs to investigate available

¹⁴ In determining if an agency intended a preemptive effect, courts can look to later regulatory activities and inquiries by an agency to shed light on the question. *Sprietsma*, 537 U.S. at 67.

¹⁵ MCI requests that this Court take judicial notice of this Report prepared at the request of the Federal Highway Administration, a part of the Department of Transportation. It is available through the National Technical Information Service (NTIS), part of the U.S. Department of Commerce, and has been available to the public since its publication. The report is divided into two volumes with NTIS. Volume I, the narrative part of the report, is number PB80135387; Volume II, the appendices, is number PB80135395. The full report is included in the Appendix at Tab 11.

information pertinent to safety belts in intercity buses and to recommend requirements for safety belts if they were indicated. *Id.* at 1.

The Report first addressed the reason the Institute was hired to perform the study. A fair reading of the Report indicates that NHTSA and NTSB were at odds on the best way to protect passengers and DOT decided to procure the help of an objective third-party researcher to resolve the dispute. *Id.* at 1–2. NHTSA concentrated principally on “passive forms of occupant protection” while NTSB favored seat belts. *Id.* at 1–2.

The Institute’s charge was to (1) determine “the expected benefit in terms of injury and fatality reduction from the use of safety belts by bus passengers if . . . belts are made available,” and (2) “assess the likely costs borne by the industry under several scenarios of belt installation.” *Id.* The Institute team studied all available information pertinent to belts and motorcoaches with the goal of being able to recommend if NHTSA should issue a seat belt requirement, and if so, what the requirement would state. *Id.*

Several significant points move to the forefront when the Report is considered. First, in the five-year period for which accidents were studied, ejections were not a significant problem. *Id.* at 13.

Second, the Report explained the significance and necessity of cost-benefit studies when an agency is considering issuing a new standard:

The evaluation of any new government requirement or regulation should involve the simultaneous consideration of the estimated costs and benefits. The application of formal cost benefit analysis in the evaluation of proposed highway safety measures is well established.

Id. at 18. It also explained what factors are considered in a cost-benefit analysis. *Id.* at

18–19.

Third, a number of factors impact the effectiveness of seat belts, and the impact of seat belts is not always positive. Depending on the severity of the accident and the injury, the type of accident, and the cause of injury, the impact of a seat belt could be neutral, positive, or negative. *Id.* at 10–18, 64–99. In minor to moderate injuries, which comprise a significant percentage of injuries, seat belts generally would have had a neutral impact. *Id.* When the bus was struck from the side and the injury was caused because the passenger struck the side wall, belts would be of no benefit. *Id.* at 11.¹⁶

Fourth, use of seat belts was very low. The Report concluded that voluntary passenger use of belts would not exceed 17.6% and that the average use rate would be approximately 10.9%. *Id.* at 61–63, 100.

Fifth, the Report had these three primary recommendations: (1) seat belt requirements for motorcoaches were not recommended, (2) the present seat requirements were working very well, but the energy-absorbing design of seats should be optimized, and (3) all motorcoaches should have an energy-absorbing barrier at the front of the coach that also acts as a restraining barrier. *Id.* at 101.

In short, as this Report prepared for DOT shows, NHTSA chose a particular method it wanted to rely on for motorcoach safety. That method was not seat belts. The very low usage rate—on average 11%—made seat belts less attractive because it made

¹⁶ In another study by the NTSB in 1988, that agency concluded that “lap belts would not have lessened the injury outcome for passengers who sustained minor to moderate injuries” and that “lap belts would not have lessened the injury severity for the serious to fatally injured passengers who were seated in areas which were intruded during impact.” NTSB, HIGHWAY SPECIAL INVESTIGATION REPORT: BUS CRASH WORTHINESS ISSUES 95 (Sept. 21, 1999); PX 173.

them less effective. Also, seat belts would require great cost on the part of motorcoaches. In fact, according to the Report, if lap belts were installed in all passenger seats in new buses only, it would require expenditures of \$3–4 million annually for the first five years. *Id.* at 98. Assuming an 80% use rate, costs would continue to exceed the benefits for 18 years. *Id.* at 82–100. In addition, fatality rates were very low.

NHTSA’s decision, made in the face of extreme pressure from NTSB to require seat belts, shows, like *Geier* and *Carden*, a deliberate, well-reasoned decision that seat belts should not be required for passengers.

D. LATER REGULATORY EXPRESSIONS BY NHTSA CONFIRM THAT NHTSA CHOSE TO RELY ON SEAT DESIGN RATHER THAN ON SEAT BELTS.

Over the years since 1974 and the 1977 Report, NHTSA has had other occasions to revisit its 1974 decision not to use seat belts as the safety method for motorcoaches.¹⁷

1992. In 1992, NHTSA’s Chief Counsel responded to an inquiry about proposed New York State legislation requiring seat belts in all buses. Letter from Paul Jackson Rice, Chief Counsel for NHTSA to C.N. Littler, Coordinator, Regulatory Affairs, Motor Coach Industries (Aug. 19, 1992); DX 108; Appendix 7. Rice, NHTSA’s chief counsel, first pointed out that a safety standard relating to occupant crash protection on buses was in effect for buses over and under 10,000 pounds. *Id.* at 1. For buses over 10,000 pounds, the standard required one of two options: a complete passenger protection system or a belt system *for the driver only*. *Id.* at 2 (citing 49 C.F.R. § 571.208 at S4.4.2.1, S4.4.2.2). He pointed out that if the law required belts at positions other than the

¹⁷ A timeline of pertinent events is included in the Appendix at Tab 12.

driver's, it would be preempted. *Id.* He then added to this that “NHTSA expressly determined that there is not a safety need for safety belts or another type of occupant crash protection at these seating positions.” *Id.*

Rice's explanation that NHTSA concluded that “there is not a safety need for safety belts” was unnecessary because the law was expressly preempted by the standard. This is yet another indicator of NHTSA's mindset, conveyed by one with authority to speak on NHTSA's behalf.

2000. In 2000, NHTSA responded to an NTSB recommendation for NHTSA to study seat belts for passengers in motorcoaches and to consider the role glazing might play in preventing ejections. Letter from Rosalyn G. Millman, Acting Administrator for NHTSA, to Jim Hall, Chairman of NTSB (March 3, 2000); DX 40. NHTSA's Acting Director stated that on average, motorcoach crashes kill about five people per year. But, “[i]n light of the recent rash of crashes involving motorcoaches, NHTSA is considering whether seat belts would be beneficial....” *Id.* at 2. NHTSA organized a committee of NHTSA and industry members to study the feasibility and safety of seat belts in motorcoaches. It also announced it would study the role of glazings in preventing ejections in motorcoaches. *Id.*

2002. In 2002, NHTSA issued a notice of public meeting and request for comments, announcing that it, and its Canadian counterpart, Transport Canada, would study motorcoach safety. Public Meeting on Motorcoach Safety Improvements, 67 Fed. Reg. 14903 (Mar. 28, 2002) (to be codified at 49 C.F.R. pt. 571); Appendix 6c. Glazings were at the forefront of its efforts to reduce ejections. *Id.* at 14905. Restraint systems

were listed fourth of the four options to improve motorcoach safety; in addition, NHTSA stated that issues must be answered regarding seat performance and the ability of seat belts to effectively restrain passengers. *Id.*

2003. In 2003 NHTSA and Transport Canada began a joint study on the ability of window glazings and structural integrity to prevent ejections. NHTSA, NHTSA’S APPROACH TO MOTORCOACH SAFETY, *supra* page 6, at 9–10; Appendix 8. The study, concluded in 2006, does not consider the role of seat belts in preventing ejections. *Id.*

2007. Not until it issued a 2007 Report did NHTSA finally express an opinion that seatbelts should be considered as a safety option for motorcoaches in preventing ejections. *Id.* at 12–14, 21; Appendix 8. Ironically, while NHTSA was investigating the potential role of seat belts in preventing ejections—ultimately concluding that it would need to conduct testing to have the fundamental data necessary to produce requirements for seat belts—the jury concluded that it had enough information to require seat belts. 85 CR 20277–80. Thus, the experts did not have enough data, but the jury did.

E. WITH THIS REGULATORY HISTORY, CASE LAW SUPPORTS PREEMPTION.

This history, read with NHTSA’s statements in 1973 and 1974, shows that NHTSA conducted formal rulemaking, chose a particular course of action and a particular safety method from the beginning, and, except for a time in 1973 when it apparently was pushed to offer seat belts as a secondary safety option, chose to use only its original method. Its reasons for choosing that method over seat belts were based on comparing the relative performance of the two options, costs, the very low use of seatbelts, the low number of fatalities, and the mixed impact seat belts would have on

reducing injuries and fatalities. As noted earlier, seat belts did not perform better than the seating design already in motorcoaches in cases of minor to moderate injuries, and would not always have a positive impact for serious injuries. HIGHWAY SPECIAL INVESTIGATION REPORT: BUS CRASH WORTHINESS ISSUES, *supra* note 16, at 95; PX 173. These decisions reflect a policy and an intent to preempt.

1. This Case is More Like *Geier*, *Carden* and *Bic Pen* Because It Involves An Agency Policy.

The regulatory history on seat belts makes this case more like *Geier*, *Carden* and *Bic Pen* than *Sprietsma* and *Freightliner*. In *Geier* and *Carden*, because of competing concerns of costs, safety, technical capabilities and public use, the regulatory agencies decided not to require a safety device. In *Geier*, NHTSA phased in a choice of safety devices because of these competing concerns. *Geier*, 529 U.S. at 875–81. In *Carden* NHTSA offered a choice between two options because of these competing concerns. *Carden*, 509 F.3d at 231–32. In *Bic Pen* the Commission chose a slightly lower rate of protection because of similar competing concerns. *Bic Pen*, 251 S.W.3d at 507.

Here, we see the same sort of competing concerns that factored into NHTSA’s decisions in *Geier* and *Carden* and the Commission’s decision in *Bic Pen*. Confronted with a very low use rate of seat belts and a performance record not significantly different from the performance record of the seating design then available in buses, NHTSA chose to go with a method that did not depend on passenger choice to be effective, that was effective in many situations, and did not have the significant costs associated with seat belts. After balancing competing concerns, it chose a specific way of achieving its goals.

Thus, when NHTSA initially refused to add a seat belt requirement for passengers, it did so after considering the same factors it considered in *Geier* and *Carden*, concluding that it should not require seat belts for passengers and instead, should rely on seating. This is quite different from *Sprietsma*, where the Coast Guard thought propeller guards would be useful but chose not to issue a standard because it did not have enough data. The *Sprietsma* decision did not further a safety plan or whittle the preferred safety methods from two to one; it did nothing. Here, NHTSA did not leave motorcoaches unprotected like the Coast Guard did, and did not fail to issue a standard because of lack of data. Here, by refusing to require seat belts for passengers, NHTSA expressed its desire to rely on a different safety method, and it did so *because* of the data—data indicating that seat belts would not significantly alter injury statistics, were extremely expensive, and were rarely used by passengers, making them even less effective.

In addition, unlike *Sprietsma*, where no standard existed on propeller guards, and *Freightliner*, where the standard on ABS devices had been ordered withdrawn because of inadequate data and had never been reinstated, here a standard on seat belts for motorcoaches did exist. Enacted in 1972, it required seat belts for drivers only. 49 C.F.R. § 571.208 at S4.4.1. This was consistent with NHTSA’s policy at the time to approach passenger crash protection “from the seating standpoint ([a] combination of effective energy-absorbing material on all rigid surfaces, higher seat backs, and strengthening of seat surfaces and anchorages).” HIGHWAY SPECIAL INVESTIGATION REPORT: BUS CRASH WORTHINESS ISSUES, *supra* note 16, at 92 (quoting a 1971 NHTSA letter); PX 173.

This was not a non-decision like *Sprietsma*. This was a policy decision, a choice between two methods. The policy was to rely on seating rather than on seat belts. That it was a policy decision rather than no decision is confirmed by NHTSA's later comments and by comments from the Institute for Research in Public Safety and NTSB, all of which have been discussed *supra*. This is confirmed in the record by testimony of General Curry, former Administrator of NHTSA, who testified that "NHTSA looked very carefully at seatbelts. They had the option of going with seatbelts and made a deliberate decision not to go. And they have revisited that decision probably every year since then." 22 RR 44; PX 164.

Only recently, and more than twelve years after MCI manufactured and sold the motorcoach at issue, did NHTSA turn to seat belts as a potential, additional safety option and it did so to combat a specific safety problem: ejections. Not until NHTSA concluded that ejections had become a significant problem in motorcoach accidents and its studies indicated that window glazings alone would not prevent ejections, did NHTSA decide that it *might* need to add seat belts as a safety option. 67 Fed. Reg. at 14904-05; Appendix 6c.

In short, to say that NHTSA did not have a safety method in place that was specifically chosen over seat belts would be wrong. And to say that NHTSA's reasons for choosing that preferred safety option were inadequate also would be wrong. The U.S. Supreme Court has held that a "state law . . . is preempted if it interferes with the methods by which the federal statute was designed to reach [its] goal." *Ouellette*, 479 U.S. at 494 (1987). The jury's common-law rule interferes with the method NHTSA has

chosen to provide motorcoach safety. As a result, it is preempted.

2. The Testimony of Carl Nash is Irrelevant.

In addition to the reasons already discussed, the court of appeals relied on another reason to reach its result. It referred to testimony by Carl Nash, a former senior executive with NHTSA, who testified that NHTSA did not prohibit or even discourage passenger seat belts.¹⁸ *MCI Sales & Serv., Inc.*, 272 S.W.3d at 24. This fact, even if true, is irrelevant to the question of whether NHTSA had a safety plan, a preferred method of achieving that plan, and supportable reasons for following this plan. For NHTSA's safety choice to be a policy and a preemptive statement that seat belts should not be *required* by a state, NHTSA need not have been completely against seat belts in any motorcoach. Clearly NHTSA is not against seat belts per se because it requires them for passengers in some buses. NHTSA need simply have made a choice to go in a specific direction based on competing considerations and have chosen a method other than seat belts to accomplish its goal.

For example, in *Geier*, for a variety of reasons, NHTSA chose not to require air bags or passive restraints in all cars, but rather to phase them in over a four to five year period. *Geier*, 529 U.S. at 874–77. The court did not ask whether NHTSA would have discouraged *manufacturers* from installing air bags at a faster rate than the standard

¹⁸ To begin with, MCI questions whether this testimony can be considered in determining preemption. Nash was not testifying at trial as a spokesperson for NHTSA, nor would he have been able to speak regarding preemption on behalf of NHTSA even when he was with NHTSA. To determine preemption, courts have looked to statements issued by a regulatory agency, statements by an agency's administrator or statements by one clearly authorized to speak on behalf of the agency, such as a general counsel. *Wyeth*, 129 S. Ct. at 1200–1203; *Sprietsma*, 537 U.S. at 67–68; *Geier*, 529 U.S. at 883.

required, and nothing in this chosen option leads one to believe that NHTSA would have discouraged or prohibited *manufacturers* from installing more air bags or passive restraints than required by the standard. *Id.*

Rather, the question in *Geier* was whether the agency had a plan and whether the jury finding required something different from the Standard. That is the question that is relevant here as well. That NHTSA may not have discouraged manufacturers from installing seat belts does not prove that NHTSA had no set policy or prove that a state rule *requiring* seat belts would not be preempted. The important question is, did the jury's common-law rule interfere with or present an obstacle to NHTSA's chosen method of providing motorcoach safety. The answer is that it did; the jury's common-law rule requires motorcoaches to use a method that NHTSA—for a variety of well-founded reasons—specifically rejected. The jury found seat belts desirable when NHTSA had not.

F. THE SEAT BELT CLAIM CONFLICTS AND INTERFERES WITH FEDERAL POLICY AS EXPRESSED IN “NHTSA’S APPROACH TO MOTORCOACH SAFETY.”

As discussed in detail *supra*, in 2007 NHTSA issued a 21-page report in which it outlined its new focus for motorcoach safety. NHTSA’S APPROACH TO MOTORCOACH SAFETY, *supra* page 5. It prioritized the methods it would use to improve motorcoach safety and it set a rather expeditious schedule for setting requirements for these methods. *Id.* at 5–9. One of these goals was to minimize ejections. *Id.* at 11. To achieve this goal, NHTSA explained that it intended to rely on improved roof strength and seat belts. *Id.*

But, as of 2007, NHTSA could not issue requirements for seat belts because the

fundamental data necessary to formulate requirement was not available. *Id.* at 12, 13–14. NHTSA stated its intent to perform the studies to accumulate the necessary data and to do so very expeditiously so that it could specify requirements for seat belts within a short period of time. *Id.* (It initially set its deadline for 2008, but to date it has not announced requirements.)

The jury’s conclusion—in 2005—that it had enough data to conclude what type of seat belt the motorcoach should have had conflicts and interferes with NHTSA’s conclusion that the fundamental data necessary to formulate requirements for seat belts was not available, that it would perform studies to obtain the data, and that it would issue requirements in the near future. *Id.* 11–14; (12 RR 48–57; 14 RR 174–77; 23 RR 54–56); *see Geier*, 529 U.S. at 877–86; *Campbell*, 402 U.S. at 643–54.

CONCLUSION AND PRAYER

The experts at NHTSA have studied hundreds of accidents since 1972 to decide whether seat belts and laminated side windows are necessary for the safety of passengers of motorcoaches. They answered “no.” A McLennan County jury heard evidence about one accident and was asked if motorcoaches must contain seat belts and laminated side windows. The jury answered “yes.” The obvious contradiction calls for the proper application of preemption principles.

For all of the reasons stated above, Petitioners respectfully request that this Court grant their Petition for Review, reverse the judgments of the trial court and the court of appeals, and render judgment that Respondents take nothing because their claims are

preempted. Petitioners also pray for any and all other relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing instrument has been mailed to all counsel of record by U. S. Mail, certified mail, return receipt requested on the _____ day of _____, 2009, as follows:

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