

No. 09-0048

IN THE SUPREME COURT OF TEXAS

MOTOR COACH INDUSTRIES MEXICO, S.A. de C.V.,

Petitioner,

v.

**JAMES HINTON, INDIVIDUALLY AND AS REPRESENTATIVE
OF THE ESTATE OF DOLORES HINTON, DECEASED, et al.,**

Respondents.

**On Petition for Review from the
Tenth Court of Appeals District, McLennan County, Texas
No. 10-06-00256-CV**

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¹ On July 17, 2009, the Court granted the parties' joint motion to consolidate No. 09-0540, *MCI Sales and Service, Inc. f/k/a Hausman Bus Sales, Inc. v. James Hinton, et al.*, with this case. As a result, both MCI entities are now petitioners/cross-respondents in this case.

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² Peggy Armstrong died on March 12, 2008, while the appeal was pending in the court of appeals. Respondents filed a Notice of Death Regarding Peggy Armstrong on April 1, 2008 in the court of appeals. Under TEX. R. APP. P. 7.1, the Court may proceed to adjudicate the appeal of her claim as if she were alive, and the Court's judgment will have the same effect as if rendered when she were still living.

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MCI included Dwain Marshall, Bobbie Marshall, Sharon Marshall Chapman, Mildred Myers, Mallory Miller, Barbara Miller, and Katherine Fulton, Individually and as Executrix of the Estate of Martha Louise McKee, Deceased, in the list of Respondents in their original Petition for Review. However, these individuals are not parties to this appeal. Their claims were severed into a separate case on May 24, 2006. (85 CR 20263).

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STATEMENT OF THE CASE

- Nature of the Case: This is a product liability case arising from a bus accident in which six people were killed and twenty-nine were injured. Motor Coach Industries Mexico, S.A. de C.V. and MCI Sales and Service, Inc. (collectively, "MCI") manufactured and sold the motorcoach involved in the accident. Hinton alleged that MCI's motorcoach was defectively designed because it was not equipped with passenger safety belts or laminated glass in the panoramic side windows. MCI denied these allegations and contended that the sole cause of Hinton's injuries was the negligence of the bus driver. MCI also contended that Hinton's claims were preempted by federal law.
- Trial court and judge: 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 actual damages, prejudgment interest and costs to Hinton. The amounts awarded ranged from a few thousand dollars to more than \$3 million.
- 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, Individually; Robert Kuryla, Individually; Karen Kuryla, Individually; Hattie Binns, Individually; Reta Haynes, Individually; Melinda Greger, Individually; Alan Horton, Individually; Elaine Horton, Individually; James L. Freeman, Individually and as Personal Representative of the Estate of Jo Catherine Freeman; James F. Freeman, Individually; Melanie Jo Brooks, Individually; Susan Akers Bills, Individually and as Executrix of the Estates of Robert Melvin Akers and Mildred Delois Akers, Deceased; Robert Melvin Akers, Jr., Individually; Patsy Beasley, Individually and as Executrix of the Estate of Wayne Beasley; Shirley Sommer, Individually; Peggy Armstrong, Individually; Ruth Powell, Individually; and Judy Benson, Individually.
- MCI listed Dwain Marshall, Bobbie Marshall, Sharon Marshall Chapman, Mildred Myers, Mallory Miller, Barbara Miller, and Katherine Fulton, Individually and as

Executrix of the Estate of Martha Louise McKee, Deceased, as appellees in their Petition for Review. However, these individuals were not parties to this proceeding in the court of appeals. Their claims were severed into a separate case on May 24, 2006. (85 CR 20263).

- Court of Appeals: The Court of Appeals for the Tenth District of Texas.
- Participating justices: Chief Justice Tom Gray and Justices Bill Vance and Felipe Reyna. Justice Vance authored the opinion. Chief Justice Gray dissented.
- Citation to opinion: *MCI Sales & Service, Inc. v. Hinton*, 272 S.W.3d 17 (Tex. App.—Waco 2008).
- Appellate court disposition: The court of appeals overruled MCI's preemption claim, overruled MCI's legal sufficiency challenges, and overruled MCI's claim that the bus driver's and the bus charter company's fault should have been submitted to the jury as "responsible third parties." But the court of appeals held that the trial court abused its discretion in not submitting the fault of the driver and the bus company as "settling persons" under the applicable version of Chapter 33 of the Texas Civil Practice & Remedies Code, and reversed and remanded the case. Because of this disposition, the court of appeals did not address four other issues presented by MCI.

After the decision by the court of appeals, several MCI entities, including Appellee MCI Sales and Service, Inc., filed bankruptcy on September 15, 2008. The court of appeals severed the appeal of the bankrupt MCI Sales and Service, Inc. and reinstated the appeal as to Motor Coach Industries Mexico, S.A. de C.V. Motor Coach Industries Mexico, S.A. de C.V. and Hinton each filed petitions for review.

MCI Sales and Service, Inc. filed a motion to reinstate the severed appeal on May 5, 2009, and the court of appeals reinstated the case on May 20, 2009. MCI Sales and Service, Inc. and Hinton each filed petitions for review in No. 09-0540. The parties simultaneously filed a joint motion to consolidate No. 09-0540 into this case, which was granted on July 17, 2009.

RESPONSE ISSUES PRESENTED

1. In *Wyeth v. Levine*, the United States Supreme Court reiterated that there is a presumption against preemption in cases involving implied conflict preemption, just as this Court previously held in *Great Dane v. Wells*, *Graber v. Fuqua*, and other cases. The United States Supreme Court did not reject this notion in *Geier v. American Honda Motor Co.*, but instead found that the Safety Act's "savings clause" did not impose a "special burden" beyond ordinary conflict preemption principles. Consequently, the court of appeals did not err when it stated that "MCI has not met the difficult burden of overcoming the presumption against preemption."

2. NHTSA promulgated a regulation under the Safety Act that permits manufacturers to use tempered or laminated glass in passenger windows. In *O'Hara v. General Motors Corp.*, the Fifth Circuit held that this regulation, FMVSS 205, is a "minimum standard" that does not preempt common law claims, just like the standard before this Court in *Great Dane*. Thus Hinton's claim that MCI should have used laminated glass on this bus, just as it does on every other bus it sells, does not conflict with FMVSS 205.

3. Over more than thirty years, NHTSA has promulgated a variety of regulations under the Safety Act. But it has left occupant protection for passengers in motorcoaches like MCI's bus completely unregulated. There are no standards regarding passenger seatbelts, passenger seating design, seat anchorages, interior padding or head rests. In the absence of any regulation regarding motorcoach passenger occupant

protection, Hinton's claim that MCI's bus should have been equipped with seatbelts does not conflict with any federal law or regulation.

4. NHTSA issued a memorandum in 2007 stating that it intends to adopt regulations *requiring* seatbelts on motorcoaches such as MCI's bus. This memorandum, though addressing the subject matter of Hinton's seatbelt claim, only reinforces that claim — it does not preempt it. Thus the court of appeals did not err.

With regard to this issue (listed as MCI's fifth issue in MCI's brief on the merits), MCI has changed the substance from the issue MCI presented in its petition.³ Because MCI did not raise or brief this issue in its Petition for Review, MCI has waived it.⁴

³ See TEX. R. APP. P. 55.2(f).

⁴ See TEX. R. APP. P. 53.2(f); *Ramos v. Richardson*, 338 S.W.3d 671, 673 (Tex. 2007).

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents/Cross-Petitioners James Hinton, Individually and as Representative of the Estate of Dolores Hinton, Deceased, *et al.*, ("Hinton")⁵ file this Respondents' Brief on the Merits in opposition to the Petition for Review filed by Petitioners/Cross-Respondents Motor Coach Industries Mexico, S.A. de C.V. and MCI Sales and Service, Inc. ("MCI").

STATEMENT OF FACTS

The court of appeals correctly described the facts of this case, the nature and history of the National Traffic & Motor Vehicle Safety Act ("Safety Act"), and correctly described the federal regulations at issue in this case and the relevant rulemaking history.⁶ Most recently, as MCI now concedes, NHTSA announced in 2007 that it intends to require passenger seatbelts on buses⁷ once it completes its research.⁸ In addition, bipartisan legislation has been introduced in the United States Congress that would mandate passenger seatbelts and laminated glass on all motorcoaches.⁹ Additional facts relevant to the issues before the Court are discussed below.

⁵ For ease of reference, the Respondents will collectively be referred to as "Hinton" in this brief. Although there are several respondents, the singular tense will be used unless the context requires otherwise.

⁶ *MCI Sales and Service, Inc. v. Hinton*, 272 S.W.3d 17 (Tex. App.—Waco 2008).

⁷ The bus at issue in this case is referred to as an "intercity motorcoach" in the regulations. Unless stated otherwise, the terms "bus" and "motorcoach" are used synonymously in this brief.

⁸ "NHTSA's Approach to Motorcoach Safety," Memorandum from Roger A. Saul, Director, Office of Crashworthiness Standards to NHTSA Docket 2007-28793 (Aug. 6, 2007), MCI Appendix 8, pp. 12-14.

⁹ S. 554, The Motorcoach Enhanced Safety Act of 2009, 111th Cong., 1st Sess. (2009).

I. The Accident

On February 14, 2003, thirty-four friends from the Memorial Baptist Church in Temple, Texas boarded a chartered bus to travel to Dallas, Texas for a gospel music concert.¹⁰ As they traveled north toward Waco, a steady drizzle became a driving rain.¹¹ Just south of Waco, the bus crested a hill to find that traffic on Interstate 35 had come to a virtual standstill because of an accident further north.¹² Several vehicles, including the bus, were forced to make emergency maneuvers to avoid the line of stopped traffic.¹³ The bus driver attempted to change lanes to gain more room to stop, but another vehicle cut him off and he was forced to steer into the median.¹⁴ The driver lost control of the bus in the median and it traveled across the median into the southbound lanes where it struck a vehicle, rotated counterclockwise and ultimately tipped over on its right side and slid to a rest.¹⁵ The National Transportation Safety Board ("NTSB") exhaustively investigated this incident and issued a Final Report on July 12, 2005.¹⁶ Notably, the NTSB excluded the bus driver's conduct as a factor causing or contributing to the accident.¹⁷

The bus was not equipped with seatbelts, so when the bus tipped over, the passengers were thrown from their seats toward the large panoramic windows on the

¹⁰ PX16, p. 3; 5 RR 98-99, 101.

¹¹ 5 RR 105.

¹² PX16, p. 3; 6 RR 72.

¹³ PX16, pp. 11-15; 6 RR 87-88.

¹⁴ PX16, p. 3; 6 RR 86-90.

¹⁵ PX16, p. 3; PX17, p. 4; 6 RR 96.

¹⁶ PX163.

¹⁷ PX163, pp. 31-32.

right side.¹⁸ Those windows were made of thin, non-laminated glass, and almost all of the windows on the right side shattered when the bus tipped over.¹⁹ This left large, gaping holes through which 13 passengers were ejected.²⁰ Hinton's glass expert, Herbert Yudenfriend, testified that the use of non-laminated glass in the side windows was inappropriate, in part because of the extremely large size of the windows.²¹ He opined that MCI should have instead used laminated glass in the passenger windows, as MCI did on all of its other buses.²²

Several ejected passengers were crushed to death under the bus as it slid to a stop.²³ Others were injured when they were thrown against the bus interior or into other passengers.²⁴ Passengers suffered injuries that included traumatically amputated limbs, broken bones, lacerations, closed head injuries, loss of vision, chest trauma and contusions of all kinds.²⁵

The injuries and deaths on this bus were not caused by the collision forces in the accident. Because of the size and weight of the bus, the impact forces alone were not severe enough to result in serious injury.²⁶ The bus itself, particularly the interior, was

¹⁸ 6 RR 105.

¹⁹ PX163, p. 5; 16 RR 35, 41.

²⁰ PX167, p. 5.

²¹ 16 RR 41-43.

²² *Id.* The bus in question was a model referred to as the Dina Viaggio. It was designed and manufactured in Mexico by Petitioner Motor Coach Industries Mexico, S.A. de C.V., then imported into the United States and sold by Petitioner MCI Sales and Service, Inc. (13 RR 149, 154-57).

²³ 7 RR 41-42.

²⁴ 14 RR 117.

²⁵ 14 RR 119-169.

²⁶ 14 RR 81-84.

remarkably undamaged, yet six people were killed and twenty-nine were injured when the bus tipped over.²⁷

The following pictures are part of Plaintiffs' Exhibit 6, which consisted of 632 photographs taken in connection with the Texas Department of Public Safety's investigation of the accident:



²⁷ 14 RR 71-72.



II. Trial court proceedings.

Hinton sued MCI on June 26, 2003, alleging MCI's bus was defectively designed because it lacked passenger seatbelts and laminated glass in the side windows.²⁸ MCI answered on August 4, 2003.²⁹

The state court commenced pretrial hearings on October 3, 2005, and the jury trial began October 6.³⁰ Hinton introduced hundreds of documents into evidence, and offered testimony from twenty-six fact witnesses and seventeen expert witnesses including representatives of MCI; experts in accident reconstruction, bus seat design, vehicle

²⁸ 1 CR 22.

²⁹ 1 CR 57.

³⁰ 2 RR 86; 5 RR 9.

restraint systems, biomechanics, occupant kinematics, glass and glass design, medicine, and other areas. The evidence showed that:

1. MCI uses an untested, non-standardized system of "compartmentalization" as the sole method of occupant protection in its motorcoaches.³¹
2. Rollover/tipover accidents present the greatest risk to motorcoach passengers for serious injury and death.³²
3. Even if designed properly, compartmentalization provides no effective occupant protection in rollover accidents.³³
4. Three-point seatbelts³⁴ provide better occupant protection than compartmentalization in rollovers and every other accident type.³⁵
5. Laminated glass provides better occupant protection than tempered glass because it can remain in a window frame even when broken.³⁶
6. MCI's standard practice, not followed with the subject bus, was to install laminated glass in the side windows.³⁷
7. A safer alternative design, as compared to the bus in question, was for the bus to have been equipped with three-point seatbelts and laminated side glass. Plaintiffs produced testimony and documentary evidence that showed that these suggested designs were readily available at the time of manufacture, and were both technologically and financially feasible.³⁸ In fact, MCI's Vice President of Engineering, Virgil Hoogestraat, admitted that installing passenger seatbelts was technologically and financially feasible.³⁹ Feasibility of laminated side glass was established by the fact that it had been MCI's standard practice for many years.⁴⁰

³¹ 8 RR 59; 8 RR 40; 9 RR 155-161; 6 RR 249-263.

³² 8 RR 86-89; 15 RR 35-39; 14 RR 95-96; PX173, p 46.

³³ 8 RR 61-63; 8 RR 59; 11 RR 77-80; 14 RR 106-07.

³⁴ A "three-point seatbelt" is one where the belt extends over the passenger's lap and shoulder, like those found in automobiles.

³⁵ 8 RR 65-68; 8 RR 77; 9 RR 88-89; 14 RR 102-03, 108.

³⁶ 16 RR 33, 78-79; 14 RR 177-183.

³⁷ 9 RR 180-182; 16 RR 35-36; 6 RR 238.

³⁸ 8 RR 101-02; 12 RR 85-86, 90-91; 18 RR 208-09.

³⁹ 7 RR 10-11.

⁴⁰ 9 RR 180-182.

8. Motorcoach buses in other countries have had three-point seatbelts since as early as 1994.⁴¹
9. The National Transportation Safety Board's investigation of this accident concluded that the lack of effective occupant restraint in this bus was a cause of the passengers' fatalities and serious injuries.⁴²
10. Every plaintiff who testified on the subject testified that it was his/her habit and custom to wear seatbelts and, had MCI installed seatbelts on the bus in question, they would have worn them at the time of the accident.⁴³
11. Expert testimony showed that if the passengers had been wearing seatbelts and the bus had laminated glass in the side windows, the passengers would not have been killed or suffered serious injury.⁴⁴

MCI contended that the "sole cause" of each of the Hinton plaintiffs' injuries and damages was the negligence of the driver, Cummings, and the bus operator, Central Texas Bus Lines, and offered documentary evidence and testimony in support. MCI also offered opinion testimony that installing seatbelts for the passengers would have done more harm than good, and would have actually increased the risk to each of the Hinton plaintiffs.

After almost four weeks of trial proceedings, the jury found that MCI's bus was defective because (1) it lacked passenger seatbelts and (2) it lacked laminated glass.⁴⁵ The jury also answered separate causation questions with respect to each defect and each plaintiff.⁴⁶ The jury found that the seatbelt defect proximately caused each of the Hinton plaintiffs' injuries and damages, and found that the glass defect proximately caused some

⁴¹ 19 RR 146-148; PX173, p. 82, 84, 89; 15 RR 43-44.

⁴² PX163, p 49.

⁴³ *See, e.g.*, 5 RR 162; 10 RR 298-99; 12 RR 169; 13 RR 72.

⁴⁴ 15 RR 61-62; 7 RR 227-231; 14 RR 113-169.

⁴⁵ 83 CR 19732.

⁴⁶ 83 CR 19734; 83 CR 19736.

of the Hinton plaintiffs' injuries and damages.⁴⁷ The jury awarded actual damages ranging from a few thousand dollars to more than \$3 million. The Hinton plaintiffs did not seek punitive damages.

SUMMARY OF THE ARGUMENT

In all preemption cases, there is a presumption that federal law does not preempt state common law claims. Federalism principles dictate that this presumption can only be overcome by a "clear and manifest" intent by Congress to preempt state law.

MCI contends that Hinton's claims are impliedly preempted by the Safety Act because Hinton's claims would frustrate the federal regulatory scheme with regard to laminated glass passenger windows and passenger seatbelts on motorcoaches. For Hinton's claims to be preempted, MCI must show that those claims actually conflict with a federal law or regulation.

The jury's verdict does not conflict with federal law. The federal regulation that governs the use of glass, FMVSS 205, is a "minimum safety standard" that does not preempt common law claims. As a result, Hinton's glass claim is not preempted.

There is no federal regulation that governs passenger occupant protection on motorcoaches like MCI's bus. There are no regulations regarding seat design, impact protection, seatbelts, or anything else. NHTSA has simply left this area unregulated since the Safety Act was enacted in 1966. Consequently, Hinton's seatbelt claim does not conflict with federal law and is therefore not preempted.

⁴⁷ *Id.*

ARGUMENT

I. The United States Supreme Court and this Court have recently reemphasized the presumption against preemption, and that implied preemption requires an *actual conflict* between state and federal law.

It is undisputed that the present case involves implied conflict preemption. MCI contends that Hinton's claims are preempted by federal motor vehicle safety standards regulations promulgated under the Safety Act. Before analyzing the specific preemption claims, an overview of preemption law and the fundamental principles that govern preemption analysis is helpful.

A. The presumption against preemption is rooted in federalism principles, which recognize the sovereignty of the states to regulate the safety of their citizens.

As this Court recently noted in *Graber v. Fuqua*, "[i]n all preemption cases, [the court's] analysis must begin with a presumption that Congress did not preempt state law."⁴⁸ *Graber* involved the question of whether federal bankruptcy law preempted a common law claim, but the presumption against preemption is rooted not in the specific law at issue, but in federalism concepts generally. This Court specifically discussed these concepts in *Great Dane Trailers, Inc. v. Wells*, which involved – just like this case – a claim of implied conflict preemption based on a FMVSS promulgated under the Safety Act:

The United States Supreme Court limits the preemption doctrine by presuming that Congress did not intend to displace state law. Historically, states have exercised primary authority in matters involving their citizens' public health and safety. Thus, this presumption is nowhere stronger than

⁴⁸ *Graber v. Fuqua*, 279 S.W.3d 608, 611 (Tex. 2009) (citing *Great Dane Trailers, Inc. v. Wells*, 52 S.W.3d 737, 743 (Tex. 2001)).

under circumstances in which the states are exercising that authority. Common-law actions based upon negligence and products liability involve the state's power to regulate health and safety matters. Accordingly, the party urging preemption has the difficult burden of overcoming the presumption against preemption.⁴⁹

MCI contends the presumption against preemption does not apply to implied conflict preemption cases and is contrary to *Geier*. But *Great Dane* was decided **after** *Geier*. In fact, this Court's opinion in *Great Dane* discusses *Geier* at length.⁵⁰ MCI states that the court of appeals relied on pre-*Geier* case law,⁵¹ but this is incorrect – the court of appeals simply relied upon *Great Dane*.⁵²

In addition, the United States Supreme Court specifically rejected MCI's argument in *Wyeth v. Levine*: "...[T]he dissent argues that the presumption against preemption should not apply to claims of implied conflict pre-emption at all, ...but this Court has long held to the contrary."⁵³ This presumption is premised on the federal government's "respect for the States as 'independent sovereigns in our federal system' [which] leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'"⁵⁴ In order to overcome this presumption, Congressional intent to preempt must be "clear and manifest."⁵⁵

⁴⁹ *Great Dane Trailers, Inc. v. Wells*, 52 S.W.3d 737, 743 (Tex. 2001) (internal citations omitted).

⁵⁰ *Id.* at 741, *et seq.*

⁵¹ MCI brief, p. 16.

⁵² *Hinton*, 272 S.W. 3d at 15.

⁵³ *Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct 1187, 1195 n. 3 (2009).

⁵⁴ *Id.*

⁵⁵ *Graber*, 279 S.W.3d at 612 (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 439 (2005); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 885 (2000) ("a court should not find pre-emption too readily in the absence of clear evidence of a conflict").

Both regulations at issue in this case were promulgated under the Safety Act. The Safety Act contains both an express preemption provision⁵⁶ and a common law "savings clause."⁵⁷ The savings clause reads: "Compliance with a motor vehicle safety standard prescribed pursuant to this chapter does not exempt a person from liability at common law."⁵⁸ The savings clause is significant, because it demonstrates Congress's awareness of state common law claims and its intent to permit some tension between the federal regulatory scheme and state common law.

The Supreme Court noted in *Geier* that the savings clause "reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. That policy itself disfavors pre-emption, at least some of the time."⁵⁹ That court later noted in *Wyeth* that "[t]he case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them."⁶⁰

⁵⁶ The express preemption clause applies only to state legislation or state regulations and is not relevant in this case.

⁵⁷ 49 U.S.C. § 30103(b), (e) (Appendix 10, MCI's Brief on the Merits).

⁵⁸ 49 U.S.C. § 30103(e).

⁵⁹ *Geier*, 529 U.S. at 871; *see also Great Dane*, 52 S.W.3d at 747-48.

⁶⁰ *Wyeth*, 129 S. Ct at 1200 (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)).

B. *Geier* did not alter the framework for analyzing implied conflict preemption claims or discard the presumption against preemption. It simply applied the long-standing preemption framework to a federal regulation that was unique both on its face and in its regulatory history.

The United States Supreme Court granted certiorari in *Geier* in order to resolve a conflict among various state and federal courts about the preemptive effect of the Safety Act.⁶¹ Some courts had held that the express preemption clause of the Safety Act preempts "any safety standard" (including common law claims) that is not identical to the "same aspect of performance" addressed by the particular FMVSS.⁶² Other courts had held that the Safety Act did not preempt "no airbag" suits like *Geier* at all.⁶³ The court of appeals in *Geier* rejected both of these approaches and analyzed the preemptive effect of the Safety Act using traditional conflict preemption analysis, like several other federal circuit courts had previously done.⁶⁴

The United States Supreme Court resolved these conflicts in *Geier*, specifically holding that the express preemption clause of the Safety Act does not preempt common law claims, and that preemption with respect to regulations under the Safety Act must be analyzed using traditional conflict preemption principles.⁶⁵

The Supreme Court analyzed how the express preemption clause and the savings clause should be construed in order to give effect to each:

⁶¹ *Geier*, 529 U.S. at 866.

⁶² *Id.* at 865-66.

⁶³ *Id.* at 866.

⁶⁴ *Id.* at 865-66.

⁶⁵ *Id.* at 866-67.

Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions [i.e. common law tort actions], for, as we have just mentioned, it is possible to read the pre-emption provision, standing alone, as applying to standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence, the broad reading cannot be correct. *The language of the [express] pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the [express] pre-emption clause must so be read.*⁶⁶

After concluding that the express preemption clause does not preempt common law tort claims, the Supreme Court went on to discuss whether the saving clause required a different sort of analysis than traditional conflict preemption principles:

We have just said that the saving clause *at least* removes tort actions from the scope of the express pre-emption clause. Does it do more? In particular, does it foreclose or limit the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that "actually conflict" with the statute or federal standards promulgated thereunder?

* * *

We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.⁶⁷

⁶⁶ *Id.* at 868 (emphasis added).

⁶⁷ *Id.* at 869 (emphasis in original).

The dissent argued that the saving clause imposed a "special burden" on a party claiming preemption, which the majority rejected. Instead, the majority held, neither the express pre-emption clause nor the savings clause had priority or supremacy over the other:

Neither do we believe that the preemption 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. The two provisions, read together, reflect a neutral policy, not a specially favorable or unfavorable policy, toward the application of *ordinary conflict preemption principles*.⁶⁸

MCI argues this language means that the presumption against preemption should not apply, but they are wrong. As discussed above, the presumption is rooted in federalism, not in the Safety Act or any other statute. The Supreme Court was not referring to the presumption against preemption when it discussed the "special burden"; it was discussing whether the saving clause mandated some analysis other than "ordinary conflict preemption principles."⁶⁹ The Supreme Court concluded its discussion by stating that, "In a word, ordinary pre-emption principles, grounded in longstanding precedent, apply. We would not further complicate the law with complex new doctrine."⁷⁰

Geier, then, holds that "ordinary conflict preemption principles" govern preemption analysis under the Safety Act. These principles dictate that (1) courts will "presum[e] that Congress did not intend to displace state law"⁷¹; and (2) preemption only

⁶⁸ *Id.* at 870-71 (internal citation omitted, emphasis added).

⁶⁹ *See and compare id.* at 869-74 (majority) with 898-99 (dissent).

⁷⁰ *Id.* at 874 (internal citation omitted).

⁷¹ *Great Dane*, 52 S.W. 3d at 743.

arises where there is an actual conflict between the common law claim and a federal *law* or *regulation*.⁷²

Utilizing these principles, *Geier* held that FMVSS 208 preempted the plaintiff's claim. The court noted the complex regulatory history behind the standard and the fact that the standard deliberately sought a gradual phase-in of passive restraints, and also deliberately sought to produce a variety of several different passive restraint systems.⁷³ The court found that "FMVSS 208 'embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car.'"⁷⁴ A common law claim that would require airbags in cars "would have presented an obstacle to the variety and mix of devices that the federal regulation sought."⁷⁵

The importance of *Geier* is its opinion and reasoning, not its outcome. The outcome was premised on a unique federal regulation. *Geier's* reasoning, however, is instructive. Many of the federal motor vehicle safety standards afford manufacturers with options. But it was not merely the options afforded by FMVSS 208 that gave rise to preemption; it was that, on its face, the regulation deliberately encouraged a *variety* of passive restraint systems. Because the plaintiff's claim would have interfered with the variety sought by the regulation itself, it was preempted.

⁷² *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3rd Cir. 2008) ("we must reiterate, lest the analysis become unmoored, that it is federal *law* which preempts contrary state law; nothing short of federal law can have that effect.") (emphasis in original).

⁷³ *Geier*, 529 U.S. at 875-881.

⁷⁴ *Id.* at 881.

⁷⁵ *Id.*

C. The United States Supreme Court's recent decision in *Wyeth v. Levine* not only reemphasized the presumption against preemption, but also that preemption only arises where there is an actual conflict between state and federal law.

Wyeth v. Levine is the Supreme Court's most recent decision involving implied conflict preemption, yet MCI hardly discusses the case at all. *Wyeth* reiterates how these dueling principles – federalism and state sovereignty versus supremacy of federal law – are applied in a conflict preemption case.

Levine was administered a prescription drug, Phenergan, by intravenous injection.⁷⁶ The drug entered Levine's artery and caused gangrene, which required Levine to have her right hand and forearm amputated.⁷⁷ Levine sued Wyeth, the drug manufacturer, contending that the manufacturer's warnings were inadequate with regard to intravenous injection of the drug.⁷⁸ Wyeth argued that the inadequate warning claim was preempted by federal law because (1) the Food and Drug Administration ("FDA") had specifically determined that Phenergan was safe and effective for intravenous injection and approved it for that use; and (2) the FDA had specifically approved the warning label accompanying the drug, which included specific warnings regarding intravenous injection.⁷⁹ Notably, the FDA instructed that the final label "must be identical" to the package insert approved by the FDA.⁸⁰

⁷⁶ 129 S. Ct at 1191.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1191-92.

⁷⁹ *Id.* at 1190-91, 1192.

⁸⁰ *Id.* at 1192.

Wyeth argued that it was impossible to comply with Levine's claims because they were prohibited from altering the drug's label, but the Supreme Court disagreed: "absent clear evidence that the FDA would not have approved a change to Phenergan's label, we will not conclude that it was impossible for Wyeth to comply with both federal and state [*i.e.* common law] requirements."⁸¹ Wyeth also argued "frustration of Congressional purpose" preemption, as MCI does in this case, contending that allowing lay juries to decide if stronger warnings were needed would interfere with "Congress's purpose to entrust an expert agency to make drug labeling decisions that strike a balance between competing objectives."⁸² The Supreme Court rejected this claim as well: "We find no merit in this argument, which relies on an untenable interpretation of congressional intent and an overbroad view of an agency's power to preempt state law."⁸³

Wyeth pointed to statements by the FDA in the preamble to a 2006 regulation that common law "failure to warn" claims such as Levine's would "threaten the FDA's statutorily prescribed role as the expert Federal agency responsible for evaluating and regulating drugs," and that "FDA approval of labeling...preempts conflicting or contrary State law."⁸⁴ However, Wyeth made the same mistake that MCI makes here. Wyeth, unable to point to any Congressional statement or any agency rule under Congressional

⁸¹ *Id.* at 1198.

⁸² *Id.* at 1199.

⁸³ *Id.*

⁸⁴ *Id.* at 1200.

authority, instead relied on agency proclamations, apparently presuming those can give rise to preemption.⁸⁵ The Supreme Court rejected this notion:

This Court has recognized that an agency regulation with the force of law can preempt conflicting state requirements. In such cases, the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of preemption. We are faced with no such regulation in this case, but rather with an agency's mere assertion that state law is an obstacle to achieving its statutory objectives.⁸⁶

Wyeth also argued (like MCI) that *Geier*'s disposition controlled the outcome of its case. But the Supreme Court showed why, as here, *Geier*'s result was not controlling: "In *Geier*, the [Department of Transportation] conducted a formal rulemaking and then adopted a plan to phase in a mix of passive restraint devices. . . . By contrast, we have no occasion in this case to consider the pre-emptive effect of a specific agency regulation bearing the force of law."⁸⁷

D. Even assuming the presumption against preemption does not apply, the court of appeals correctly held that Hinton's claims are not preempted because MCI has not shown the existence of an actual conflict with any federal law or regulation.

Moreover, even assuming the presumption against preemption does not apply to implied conflict preemption cases under the Safety Act, the court of appeals nevertheless correctly held that Hinton's claims are not preempted. The court of appeals correctly determined that FMVSS 205 is a minimum standard that does not preempt Hinton's laminated glass claim, and correctly held that neither FMVSS 208 nor any other federal

⁸⁵ *Id.*

⁸⁶ *Id.* at 1200-01.

⁸⁷ *Id.* at 1203.

law or regulation preempts Hinton's seatbelt claim.⁸⁸ The outcome was not based on whether the presumption applied; MCI simply failed to carry its burden of proving that Hinton's claims were preempted.

II. Hinton's laminated glass claim is not preempted because it does not conflict with FMVSS 205.

The jury found that the bus was defective because it should have been equipped with laminated glass in the side passenger windows, as MCI has done with most of its other buses for more than 35 years. MCI asserts that Hinton's laminated glass claim is preempted because it conflicts with FMVSS 205. Because FMVSS 205 is a "minimum standard," however, Hinton's claim is not preempted.

A. The Fifth Circuit correctly held in *O'Hara v. General Motors* that FMVSS 205 is a "minimum standard" that does not preempt state common law tort claims such as Hinton's.

MCI contends that the glass claim is "no different from the claims raised in *Geier*."⁸⁹ The Fifth Circuit rejected that very argument in *O'Hara v. General Motors Corp.*⁹⁰ The question before the Fifth Circuit in *O'Hara* was precisely the same as the one before this Court: "[W]hether FMVSS 205, which governs motor vehicle glazing [glass] safety, preempts a common law suit alleging that [a vehicle manufacturer's] use of

⁸⁸ The Fifth Circuit said in *O'Hara*, "[b]ecause we hold that FMVSS 205 is a minimum safety standard which does not preempt the O'Haras' suit regardless of any presumption against preemption, we do not reach this issue [*i.e.*, whether the presumption applied in that case]." *O'Hara*, 508 F.3d at 759 n. 4.

⁸⁹ MCI's Brief, p. 17.

⁹⁰ 508 F.3d 753, 758 (5th Cir. 2007).

a permitted glazing technology was unsafe."⁹¹ The Fifth Circuit⁹² noted that it was the first appellate court to decide the question.⁹³

The O'Haras' daughter was partially ejected in a low-speed, quarter rollover accident and was seriously injured.⁹⁴ O'Hara sued contending that the vehicle (an SUV) should have been equipped with laminated glass in the side windows in order to prevent or reduce the risk of ejection.⁹⁵ GM contended that FMVSS 205 and *Geier* preempted the O'Haras' claim.⁹⁶ It was undisputed that the glass used by GM in the vehicle was permitted by FMVSS 205 – just as it is undisputed in this case that the glass used by MCI was permitted by FMVSS 205. Nevertheless, the O'Haras contended – as Hinton does here – that the use of tempered glass rather than laminated glass made the vehicle defective and unreasonably dangerous.

The court analyzed the history of FMVSS 205, analyzed and distinguished the *Geier* decision, and held that "[b]ecause the text and commentary on FMVSS 205 show that it is best understood as a minimum safety standard, we hold that the O'Haras' common law negligence and strict liability claims are not preempted."⁹⁷

⁹¹ *Id.* at 757.

⁹² The panel that decided *O'Hara* consisted of Judges Jolly, Clement and Owen. Judge Clement authored the opinion.

⁹³ *Id.*

⁹⁴ *Id.* at 755.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 763.

MCI insists that this Court should simply ignore *O'Hara* and follow another decision by the Fifth Circuit instead, *Carden v. General Motors Corp.*⁹⁸ But MCI's reliance on *Carden* is misplaced. In *Carden*, the Fifth Circuit considered whether FMVSS 208 preempted the plaintiff's claim that an automobile manufacturer should have installed a three-point, lap-shoulder belt in the center rear seating position. It was undisputed that FMVSS 208 regulated occupant restraints in the center rear seat of passenger vehicles, as it does for all seating positions in passenger vehicles. Because the claim implicated FMVSS 208, the Fifth Circuit found *Geier* to be controlling and held that, under *Geier*, the plaintiff's claim was preempted because it conflicted with FMVSS 208.

MCI goes to great lengths to criticize *O'Hara* and argue that *Carden* was the better-reasoned opinion. However, MCI ignores a very critical distinction between the two cases: *O'Hara* was focused on FMVSS 205, and *Carden* was focused on FMVSS 208. In *Carden*, the court found that *Geier* (also an FMVSS 208 case) controlled its decision. In *O'Hara*, the court analyzed and rejected GM's contention that *Geier* controlled, explained why the case was different from *Geier*, and held because FMVSS 205 is a "minimum standard," it does not preempt state law claims such as Hinton's. This reasoning is completely consistent with *Great Dane*, where this Court, just like *O'Hara*,

⁹⁸ 509 F.3d 227 (5th Cir. 2007).

distinguished *Geier* and found that FMVSS 108 was a "minimum" standard that did not preempt common law claims.⁹⁹

Incredibly, MCI offers several speculative comments on what it thinks the Fifth Circuit must have ignored in formulating its decision in *O'Hara*. MCI criticizes the *O'Hara* court for not "mentioning" a 2001 NHTSA report in its opinion. Yet the court specifically considered NHTSA's 2002 Notice of Withdrawal, which contained a discussion of the 2001 report.¹⁰⁰ Moreover, GM discussed the 2001 report in its brief to the Fifth Circuit,¹⁰¹ as did *Amici Curiae* Alliance of Automobile Manufacturers and Association of International Automobile Manufacturers in their brief in support of GM.¹⁰² Considering that the defendant in *O'Hara* was the largest automobile manufacturer in the world, and that the case was significant enough to persuade national and international automobile manufacturing industry groups to intervene as *amicus curiae*, plus the fact that the Fifth Circuit was the first appellate court to decide the preemptive effect of FMVSS 205, it is highly unlikely that the *O'Hara* court overlooked any NHTSA reports.

Moreover, MCI urges this Court to disregard *O'Hara* because "*O'Hara* did not involve window glazings in motorcoaches."¹⁰³ But the Fifth Circuit's analysis in *O'Hara* was not limited to SUVs, the vehicle at issue in that case. The court analyzed the

⁹⁹ 52 S.W.3d at 749.

¹⁰⁰ 67 Fed. Reg. 41365, 41367 (June 18, 2002) (Appendix A, Hinton's Response to MCI's Petition for Review).

¹⁰¹ See Brief of Appellee General Motors Corporation, *O'Hara v. Gen. Motors Corp.*, 508 F.3d 753 (5th Cir. 2007) (No. 06-104-98), 2006 WL 5013180 at *9.

¹⁰² See Brief of Alliance of Automobile Manufacturers and Association of International Automobile Manufacturers as Amici Curiae Supporting Appellees, *O'Hara v. Gen. Motors Corp.*, 508 F.3d 753 (5th Cir. 2007) (No. 06-104-98), 2006 WL 5013181 at *18 n. 4.

¹⁰³ MCI Brief, p. 12.

structure and nature of FMVSS 205 generally, which the Fifth Circuit found to be a "minimum" standard, just as this Court held in *Great Dane* with regard to FMVSS 108. Whether applied to passenger vehicles, SUVs or motorcoaches, *O'Hara* found that FMVSS 205 is a "minimum" standard that does not preempt common law claims.

O'Hara dealt with the very same issue presented in this case, and considered the very same arguments MCI has raised. MCI simply does not like the outcome that *O'Hara* dictates – that Hinton's glass claim is not preempted. For the reasons discussed by the Fifth Circuit in *O'Hara*, FMVSS 205 is merely a "minimum safety standard" that does not preempt Hinton's common law claim – just like the standard at issue in *Great Dane* (FMVSS 108).

B. Even if *Geier* is relevant to the glass claim, *Geier* recognized that a claim based on a specific design choice may not be preempted.

As discussed above, *Geier* involved a specific safety standard with a very complex regulatory history. The Fifth Circuit considered, and rejected, the very same argument advanced by MCI – that FMVSS 205 is just like 208 and therefore *Geier's* outcome controls and mandates a finding of preemption: "Because we find that FMVSS 205 differs significantly from FMVSS 208 and does not establish a federal policy which would be frustrated by a state common law rule requiring advanced glazing in side windows, we hold that the O'Haras' suit is not preempted."¹⁰⁴

There is another aspect of the *Geier* decision that MCI has either completely overlooked or deliberately ignored. The plaintiff in *Geier* contended that *all* cars should

¹⁰⁴ *O'Hara*, 508 F.3d at 758.

be equipped with airbags, which is why his claim ran afoul of FMVSS 208, because that standard deliberately sought a variety of restraint systems. However, the court in *Geier* noted that there might be an exception to that rule, even under FMVSS 208:

It is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption – say, because it would affect so few cars that its rule of law would not create a legal "obstacle" to 208's mixed-fleet, gradual objective.¹⁰⁵

Thus, even if this Court were to extend *Geier* to cover FMVSS 205, Hinton's laminated glass claim would not be preempted. Hinton did not contend, and the jury did not find, that *all* vehicles, or even all buses, be equipped with laminated glass. It was the very large size of the passenger windows on MCI's bus that compelled the use of laminated glass. This is because in a tipover accident like the one here, tempered glass will very likely shatter and completely evacuate the window frame, leaving large openings through which passengers might be ejected. In fact, almost all of the glass from the passenger windows on the right side of the bus (the "down" side) was gone.¹⁰⁶ Hinton offered expert testimony on this issue.¹⁰⁷ MCI did not offer any evidence to refute it.

MCI's bus clearly presented a "special design-related circumstance."¹⁰⁸ The large, panoramic, tempered glass windows presented a special risk of ejection that could have

¹⁰⁵ *Geier*, 529 U.S. at 885. In fact, the court noted that this was the position of the United States, as stated in its amicus curiae brief filed in *Geier*: "a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car *because of other design features particular to that car* ... would not necessarily frustrate Standard 208's purposes." *Id.* (emphasis in original).

¹⁰⁶ See PX 2 (reproduced supra, at pp. 4-5).

¹⁰⁷ 16 RR 41-43.

¹⁰⁸ *Geier*, 529 U.S. at 885.

been mitigated by the use of laminated glass. The risk of ejection was particularly high because the bus lacked seatbelts or any other form of passenger restraint. The high number of ejections in this accident underscores the severity of the risk. It is for these reasons that the jury found that the lack of laminated glass caused the bus to be defective and unreasonably dangerous.

As a result, even if FMVSS 205 were not simply a "minimum standard" (contrary to the Fifth Circuit's holding in *O'Hara*), the jury's verdict does not conflict with FMVSS 205 because it was based on design features particular to MCI's bus. Unlike FMVSS 208, FMVSS 205 did not deliberately encourage manufacturers to use a variety of tempered and laminated glass – the standard simply left it up to the manufacturer to use whichever glass it thought was appropriate. Therefore, even using *Geier's* approach, a jury verdict finding that MCI's choice of tempered glass was inappropriate and unreasonably dangerous because of the specific circumstances of its use in this bus does not conflict with FMVSS 205.

C. The jury's verdict will not force MCI to redesign its product line. MCI already uses laminated glass in every other bus it sells. Only the model involved in this accident utilizes tempered glass.

MCI contends that the jury's verdict "would require [it] to focus its attention on changing the type of glazing it has in the passenger side windows of its buses...."¹⁰⁹ This statement is misleading at best. It was undisputed at trial that the bus at issue in this case, the Dina Viaggio, was the only bus model sold by MCI which utilized tempered glass in the passenger windows. This model bus was designed and manufactured in Mexico by

¹⁰⁹ MCI Brief on the Merits, p. 28.

Motor Coach Industries Mexico, S.A. de C.V. then imported into the United States and sold by MCI Sales and Service, Inc.¹¹⁰

Robert Capstick, the former Director of Engineering for MCI (and a senior technical advisor at the time of trial), testified that MCI always used laminated glass in its buses and that his engineering group was not even consulted about the use of tempered glass on the Dina Viaggio model bus.¹¹¹ Virgil Hoogestraat, MCI's Vice President of Engineering, was not aware of a single other bus manufactured and sold by MCI that did not use either laminated glass or plastic for the passenger windows.¹¹² Herbert Yudenfriend, one of Hinton's experts on the glass issue, testified that MCI used laminated glass in all of its other buses.¹¹³

Requiring MCI to address a design flaw on a single model in its product line hardly represents a threat to NHTSA's regulatory structure with regard to motor vehicle glass technology.

III. Hinton's seatbelt claim is not preempted because it does not conflict with any federal law or regulation. In fact, there are *no* federal regulations regarding motorcoach passenger seating or occupant protection.

As this Court and others have repeatedly stated, implied conflict preemption requires a showing of an *actual conflict* between a common law claim and a federal law or regulation.¹¹⁴

¹¹⁰ 13 RR 149, 154-57.

¹¹¹ 9 RR 147, 180-82.

¹¹² 6 RR 232, 238.

¹¹³ 16 RR 35-36.

¹¹⁴ *Great Dane*, 52 S.W.3d at 743 (citing *Myrick and Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994)).

MCI's primary contention, asserted throughout its brief, is that the jury's finding that MCI's bus needed seatbelts somehow creates a conflict with federal law because it frustrates NHTSA's selected plan or method for protecting motorcoach passengers. MCI claims that NHTSA "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."¹¹⁵

MCI uses a multitude of descriptive terms for this "particular method," including "different method" or "that method" or "a plan" or a "chosen method" or "a safety method in place" or a "preferred safety option."¹¹⁶ The one thing MCI cannot provide, much less describe, is the actual regulation that presents an *actual conflict* with Hinton's seatbelt claim.

This is because *there is no federal regulation regarding passenger occupant protection in motorcoaches*. In fact, passenger seating in large motorcoaches is essentially unregulated. MCI's contention that NHTSA "had a particular method by which it planned to provide safety on motorcoaches" is simply untrue. The FMVSS standards that govern occupant protection in vehicles do not apply to motorcoach passengers – only the driver. And though NHTSA has adopted a method of seating design to protect *school bus* passengers, NHTSA has never applied that method (or any other) to protect motorcoach passengers.

¹¹⁵ MCI Brief, p. 36.

¹¹⁶ MCI Brief, pp. 36, 44, 47, 49.

- A. NHTSA's decision not to issue a bus seatbelt regulation or require any other form of passenger occupant protection more than 30 years ago does not preempt Hinton's seatbelt claim. NHTSA has left motorcoach passenger seating and occupant protection virtually unregulated since the Safety Act was enacted in 1966. Just as in *Sprietsma* and *Myrick*, the decision not to regulate does not create a conflict between federal and state law.**

In 1973, NHTSA published notice of a proposed new safety standard that would require all buses to have improved passenger seats.¹¹⁷ The proposed seating standard included (1) performance requirements for seat strength; (2) standardized seat heights; (3) energy absorbing head impact zones; (4) energy absorbing knee impact zones; and (5) elimination of certain types of materials and design features.¹¹⁸

As originally proposed, the standard would apply to all types of buses: school buses, intercity motorcoaches (like MCI's bus), and transit buses (city commuter buses). The proposed standard also included an alternative approach employing seatbelts and modifying some aspects of the proposed seat design rules.¹¹⁹

In 1974, NHTSA substituted a new proposed standard on seat design, including very specific and technical specifications for *school bus* passenger seating.¹²⁰ Notably, the 1974 proposed standard applied *only* to school buses and expressly stated that it did not apply to intercity motorcoaches or transit buses. Since 1976, school bus manufacturers have been required to comply with a detailed standard, FMVSS 222,

¹¹⁷ 38 Fed. Reg. 4776 (Feb. 22, 1973) (MCI Appendix 6a).

¹¹⁸ *Id.* at 4777-79.

¹¹⁹ *Id.* at 4776-77.

¹²⁰ 39 Fed. Reg. 27585 (July 30, 1974) (MCI Appendix 6b). This standard was later codified as FMVSS Standard 222, "School bus passenger seating and crash protection," at 49 C.F.R. § 571.222.

which details specifications for a seating system known as "school bus compartmentalization."¹²¹

Unlike school buses, however, NHTSA has left motorcoach passenger seating completely unregulated. NHTSA explained in 1974 that it decided to leave motorcoach passenger seating unregulated based on cost/benefit considerations and seatbelt usage statistics available at that time:

The NHTSA has in fact determined that seating requirements for intercity and transit buses are not justified, based on benefit/cost studies of present seating performance in these buses. Injury statistics for intercity buses indicate that seating improvement would not reduce injuries substantially. Seat belt usage surveys in intercity buses also indicate that a very low percentage of passengers would utilize seat belts if they were provided.¹²²

In its brief, MCI mischaracterizes the 1974 school bus seating rule as a clear choice by NHTSA "to rely on seating design" to protect passengers in motorcoaches.¹²³ This is untrue. NHTSA chose to rely on seat design to protect *school bus* passengers; and manifested that decision by publishing specific regulatory requirements. However,

¹²¹ FMVSS 222, codified at 49 C.F.R. § 571.222. "Compartmentalization" is a passive form of passenger protection that relies on specified and engineered seating compartments to protect passengers in a crash.

¹²² 39 Fed. Reg. at 27585. Similarly, the Supreme Court noted in *Geier* that, despite the universal belief among experts dating back to 1967 that seat belts would save lives, as late as 1984 estimates showed that only 12.5% of front seat occupants in passenger vehicles utilized seat belts. *Geier*, 529 U.S. at 877. Since the advent of mandatory seat belt laws, the usage rates have increased dramatically. For example, according to NHTSA, usage rates in Texas exceeded 90% in 2008. See "Seat Belt Use in 2008 – Use Rates in the States and Territories," available at <http://www-nrd.nhtsa.dot.gov/Pubs/811106.PDF> (accessed on May 27, 2009).

¹²³ MCI Brief, p. 38.

NHTSA decided *not* to exercise its regulatory authority in the area of motorcoach passenger protection. NHTSA did not reject seatbelts for some "different method"¹²⁴ of passenger protection in motorcoaches.

MCI has attempted to create the illusion of a "choice" by NHTSA to rely on some other form of passenger protection so that it can argue that this case is like *Geier*. But MCI has based its entire "choice" argument on a phantom choice. To this date, NHTSA has never enacted any standard or regulation that creates any sort of method of protecting motorcoach passengers. The degree to which NHTSA has left motorcoach passenger protection unregulated is actually remarkable.¹²⁵

The various federal motor vehicle safety standards are codified at 49 C.F.R. § 571.100 *et seq.*¹²⁶ They regulate a wide variety of matters, including brake hoses, brake fluid, tires, driver controls, and numerous other things. In addition, there are a number of standards that address occupant protection. FMVSS 201, for example, addresses

¹²⁴ See MCI Brief, pp. 36, 44.

¹²⁵ Notably, another federal transportation agency, the National Transportation Safety Board, has been recommending seatbelts for motorcoach passengers since 1968 (11 RR 17-19, 33-35; PX173, pp. 96-98). In connection with its investigation of motorcoach accidents, the NTSB has consistently and repeatedly recommended passenger seatbelts (PX173, p. 43) ("From 1968 through 1973, the Safety Board issued 11 recommendations to the Federal Highway Administration (FHWA), the National Highway Traffic Safety Administration (NHTSA), or both, concerning restraints, including requiring that seatbelts be installed in buses."). The NTSB renewed its call for passenger seatbelts in 1999 in its Special Investigation Report on Bus Crashworthiness Issues (PX173, p. 68 (items 7-10), p. 70). The NTSB publishes a "Most Wanted Transportation Safety Improvements" list on its website (PX138). That list includes a section titled "Enhanced Protection for Bus Passengers" (*Id.*). Among the three specific recommendations is the following: "Devise new standards to protect motor coach passengers from being thrown out of their seats or ejected when a bus sustains a front, side, or rear impact or rolls over." (PX138).

¹²⁶ All of the FMVSS standards are codified at 49 C.F.R. § 571.xxx, where "xxx" represents the particular standard number. For example, FMVSS 205 is codified at 49 C.F.R. § 571.205. Consequently, Hinton will simply refer to the FMVSS number in the ensuing discussion.

"Occupant protection in interior impact," and imposes a variety of interior padding requirements to minimize injury when an occupant is involved in a collision.¹²⁷ However, it excludes buses weighing more than 4,536 kg, or 10,000 pounds.¹²⁸ FMVSS 202 regulates head restraints. It, too, excludes large buses.¹²⁹ FMVSS 207 regulates "Seating systems," and applies to all buses.¹³⁰ It "establishes requirements for seats, their attachment assemblies, and their installation to minimize the possibility of their failure by forces acting on them as a result of vehicle impact."¹³¹ However, it *specifically excludes* "passenger seat[s] on a bus."¹³² As a result, there are no requirements that govern bus *passenger* seat strength or whether or how those seats should even be attached to the floor of the bus.

FMVSS 208, the standard at issue in *Geier*, regulates "Occupant crash protection." It includes very detailed requirements regarding seatbelts and air bags (among other things) for all manner of vehicles. But in the section of the standard outlining requirements for buses, the requirements apply to the "driver only."¹³³ Section 4.4.3 of FMVSS 208 is the actual standard that applies to buses manufactured after September 1, 1991, which would include MCI's bus. It requires seatbelts for the passenger seats, but

¹²⁷ FMVSS 201.

¹²⁸ FMVSS 201 s2. A number of the safety standards use the 10,000 pound figure in defining applicability. It is undisputed that MCI's bus exceeded 10,000 pounds.

¹²⁹ FMVSS 202 s2.

¹³⁰ FMVSS 207 s2.

¹³¹ FMVSS 207 s1.

¹³² FMVSS 207 s4.2.

¹³³ FMVSS 208 s4.4.3.1, which references s4.4.2.1, s4.4.2.2 for large buses (relevant excerpt included at MCI's Appendix 5).

only for buses weighing *less* than 10,000 pounds. For large buses, like MCI's bus, the standard refers back to the requirements of sections 4.4.2.1 or 4.4.2.2, which apply only to the driver's seat.

FMVSS 214 regulates side impact protection, but it, too, excludes large buses.¹³⁴ Likewise, FMVSS 216 governs roof crush resistance, but it excludes buses weighing more than 2,722 kilograms (approximately 6,000 pounds).¹³⁵ In fact, the only federal motor vehicle safety standard that would apply to the seating in MCI's bus is FMVSS 302, "Flammability of interior materials."

In summary, NHTSA has not created any sort of regulatory framework that applies to motorcoach passenger seating. Essential issues such as interior padding, head restraints and seat anchorages are not specified or even required for motorcoach passengers. There simply is no federal regulation that applies to motorcoach occupant protection. As a result, Hinton's seatbelt claim is not preempted because the jury's verdict does not conflict with federal law.

B. MCI argued at trial that it used its own version of compartmentalization to protect passengers. But it was undisputed that MCI never even attempted to comply with the only federal regulation that addresses compartmentalization, FMVSS 222.

MCI implies throughout its brief that it utilizes a NHTSA-approved form of bus passenger protection. However, the only system of large bus passenger crash protection that NHTSA has ever enacted is the FMVSS 222 form of compartmentalization, which is

¹³⁴ FMVSS 214 s2.

¹³⁵ FMVSS 216 s3.

expressly limited to school buses.¹³⁶ MCI has never complied with, or even attempted to comply with, FMVSS 222.¹³⁷ Nor has MCI ever adopted any design or engineering criteria for its passenger seats, or conducted any testing to see whether its seating design afforded adequate passenger protection.

Hinton's seatbelt design expert, Dr. Anil Khadilkar, was involved in developing the school bus compartmentalization standard that ultimately became FMVSS 222 and has tested compartmentalization compliance in school buses for NHTSA.¹³⁸ He described school bus compartmentalization under FMVSS 222 as a "very structured engineering approach" with specific design and testing criteria.¹³⁹ When asked whether MCI's self-proclaimed form of compartmentalization was valid, he answered:

I have seen no evidence in terms of documentation, any testing, or even engineering explanation by anybody that they have anything comparable with compartmentalization as I described to you in 222, no.¹⁴⁰

MCI has never adopted a written policy setting forth the design criteria for what it contends is its own version of compartmentalization.¹⁴¹ Nor has MCI ever performed any testing to validate or evaluate whether its version of compartmentalization is effective.¹⁴²

This illustrates the fallacy in MCI's argument that it was following some "other method"

¹³⁶ FMVSS 222 s3.

¹³⁷ MCI's expert, General Curry, testified in his deposition and at trial that MCI's bus complied with FMVSS 222 and was therefore not defective. But on cross-examination admitted that he was wrong. (22 RR 55-58).

¹³⁸ 8 RR 22-23, 37-38.

¹³⁹ *Id.* at 39-44.

¹⁴⁰ *Id.* at 59.

¹⁴¹ 9 RR 156-60.

¹⁴² 9 RR 160. In fact, MCI's former Director of Engineering, Robert Capstick, could only point to "real life tests" involving a review of actual accidents and victims. (*Id.* at 161-62). Even then, he admitted that MCI performed no detailed investigation. (*Id.* at 162-67).

of passenger protection offered by NHTSA. The "other method" is essentially the freedom to do whatever the manufacturer chooses – even if it is very little or nothing.

For preemption purposes, of course, what MCI did or did not do is irrelevant. Hinton is simply responding to MCI's argument that it followed NHTSA's so-called "other method" for occupant protection.. The only relevant inquiry is what NHTSA did, or did not do, in terms of regulating motorcoach occupant protection.

C. NHTSA's inaction following the 1974 decision to leave bus passenger occupant protection unregulated does not preempt Hinton's claim. In fact, NHTSA has never opposed seatbelts in motorcoaches and has recently stated it intends to adopt a regulation requiring them in the future.

Following NHTSA's decision in 1974 not to regulate motorcoach occupant protection, NHTSA did not take any action to re-examine the issue until 2000. MCI asks this Court to give preemptive effect to this 30-plus year history of non-action by NHTSA. But MCI's argument "relies on an untenable interpretation of congressional intent and an overbroad view of an agency's power to preempt state law."¹⁴³

1. The 1977 Indiana University Study.¹⁴⁴

MCI devotes a substantial portion of its brief to a study published in 1977 by Indiana University and portrays that study as a reflection of NHTSA's "well-reasoned

¹⁴³ *Wyeth*, 129 S. Ct at 1199.

¹⁴⁴ Although it is not part of the record, MCI has asked the Court to take judicial notice of the 1977 study, which was included as Appendix 11 to MCI's Brief. MCI did not seek to introduce the study at trial, even though it had been published almost thirty years prior to the trial of this case. This is very different from the 2007 NHTSA report judicially noticed by the court of appeals, which was not released until shortly before this case was argued in the court of appeals. Hinton would submit that MCI's request that the Court take judicial notice of the 1977 study is inappropriate, but Hinton will discuss the study nevertheless.

decision that seatbelts should not be required for passengers."¹⁴⁵ This study, however, was not commissioned by NHTSA; it was commissioned by the Federal Highway Administration – a sister agency to NHTSA. As a result, it is a stretch to say the study is a reflection of NHTSA's policies or reasoning. Moreover, NHTSA did not take any action whatsoever as a result of the study. The study acknowledges that NHTSA had failed to regulate bus passenger protection despite repeated recommendations by another federal agency, the National Transportation Safety Board, to install passenger seatbelts on buses.¹⁴⁶ The purpose of the study was to essentially test the cost/benefit analysis used by NHTSA in 1974.¹⁴⁷ Not surprisingly, the study found that seatbelt usage rates were too low during the study period (1972-1976) to justify mandating seatbelts.¹⁴⁸ Nevertheless, the study confirmed that "[s]afety belt restraint systems can definitely produce a positive impact on death and injuries among intercity bus occupants."¹⁴⁹

Even under the most expanded concept of "congressional intent," the 1977 Indiana University study simply does not support MCI's position that federal law preempts Hinton's claim.

2. The 1992 letter from NHTSA's general counsel to MCI related to express preemption only, and may have been wrong.

In approximately 1992, one of MCI's affiliates wrote a letter to NHTSA inquiring about the effect of a proposed New York state statute that would require seatbelts on

¹⁴⁵ MCI Brief, p. 42.

¹⁴⁶ MCI Appendix 11, p. 2.

¹⁴⁷ *Id.*, p. 1.

¹⁴⁸ *Id.*, p. 3.

¹⁴⁹ *Id.*, p. 101.

motorcoaches.¹⁵⁰ NHTSA's counsel responded in a letter and stated that the Safety Act would preempt the proposed legislation. As the court of appeals noted,

NHTSA's chief counsel's conclusion in 1992 that the proposed New York statute requiring seatbelts in intercity buses appeared to be preempted by FMVSS 208 would implicate only the express preemption clause of the Safety Act. State legislation or regulation is expressly preempted unless it is identical to the federal standard.¹⁵¹

Further, as the Court will see, the comments in the letter that MCI relies upon merely repeat NHTSA's 1974 decision not to require seatbelts, which has never been considered to be an expression of *opposition* to seatbelts in motorcoaches. For these reasons, even if one assumes that statements by an agency's general counsel could potentially have preemptive effect (which they cannot¹⁵²), Hinton's common law claim does not conflict with them.

Moreover, as shown above, motorcoach passenger occupant protection has been completely unregulated since the Safety Act was enacted in 1966. With respect to a state statute that sought to mandate bus *passenger* seatbelts only, the Safety Act's express preemption clause would not apply. The Safety Act only prohibits standards "applicable to the same aspect of performance" that are not identical to a standard prescribed under the Act. As there is no standard that applies to motorcoach passenger occupant

¹⁵⁰ MCI petition, p. 3.

¹⁵¹ *Hinton*, 272 S.W.3d at 24; *see also Geier*, 529 U.S. at 868; *Wells*, 52 S.W.3d at 741; *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 7-8 (Tex. 1998).

¹⁵² *Fellner*, 539 F.3d at 243 ("we must reiterate, lest the analysis become unmoored, that it is federal *law* which preempts contrary state law; nothing short of federal law can have that effect.") (emphasis in original).

protection, a state law seeking to impose one could not run afoul of the express preemption clause.

3. NHTSA has never expressed opposition to seatbelts on motorcoaches. To the contrary, NHTSA has recently stated that it intends to adopt a regulation requiring them.

In 1989 (seven years before MCI's bus in this case was sold), MCI asked NHTSA to provide guidance on how to install seatbelts in one of its motorcoaches.¹⁵³ NHTSA declined to provide any specific guidance and stated that:

Federal law leaves the question of how any such anchorages should be designed entirely up to the judgment of the bus manufacturer. Please note, however, that the State of Nevada is free to specify certain design and performance criteria with which these anchorages must comply in its contract for these buses.¹⁵⁴

If NHTSA was opposed to the use of passenger seatbelts, it presumably would have said so. Instead, NHTSA directed either MCI or the State of Nevada (the purchaser) to design the seatbelt anchorages. In fact, NHTSA has never expressed opposition to the installation of passenger seatbelts in motorcoaches.¹⁵⁵ Dr. Carl Nash, who served as a senior executive of NHTSA for eighteen years, testified at trial that passenger seatbelts in motorcoaches are not prohibited or discouraged by the government.¹⁵⁶

¹⁵³ 28 CR 6519-20.

¹⁵⁴ *Id.*

¹⁵⁵ MCI has also cited the Court to a 1966 bill filed in the United States House of Representatives that would have required seatbelts on buses. Counsel for Hinton had to obtain a copy of the bill from a staff member at the House of Representatives, who had a difficult time even locating it. It appears that the bill never made it out of committee, just like thousands of bills introduced in Congress and the Texas Legislature each session. Thus, MCI's statement that "Congress chose not to require seat belts in motorcoaches" is a bit misleading, since neither house of Congress ever voted on the bill. This hardly indicates congressional opposition to seatbelts in buses.

¹⁵⁶ 11 RR 9-11, 69-70. MCI contends that this Court should disregard Nash's testimony because he was "not testifying at trial as a spokesman for NHTSA." MCI Brief, p. 48 n. 18. Yet MCI relies on the

As MCI discusses in its brief, NHTSA first began the process of considering whether to issue standards regulating motorcoach occupant protection in 2000. Following a preliminary study performed in cooperation with Transport Canada,¹⁵⁷ NHTSA announced its intention to require passenger seatbelts in motor coaches following additional testing. NHTSA is having to perform the basic research as part of the rulemaking process because the motorcoach manufacturers, like MCI, have failed to research the issue themselves. In 2000, in responding to the NTSB's repeated demand for standards to protect motorcoach passengers, NHTSA's acting Administrator stated:

The crashworthiness issues about motorcoaches the Safety Board raised deserve to be analyzed. Therefore, NHTSA will examine opportunities to share the cost of research with motorcoach manufacturers. The Safety Board's suggested time limitation of two years is not achievable given current resources. NHTSA asks that the Safety Board take under consideration that for many of the safety issues raised, appropriate industry standards are not in place on which to base regulations. Therefore, primary research needs to be performed prior to the issuance of any regulation.¹⁵⁸

In 2002, NHTSA held a public hearing to address motorcoach safety improvements.¹⁵⁹ NHTSA stated that it was beginning the process of determining "whether improvements in motorcoach passenger crash protection standards are warranted."¹⁶⁰ Passenger restraint systems were among the issues being discussed.¹⁶¹ NHTSA stated that it would be conducting research into motorcoach occupant safety in

testimony of its own expert, General Curry, also a former NHTSA executive. However, neither Nash nor Curry was testifying as a spokesman for NHTSA; Nash was simply testifying about the safety standards.

¹⁵⁷ Transport Canada is the Canadian counterpart to NHTSA.

¹⁵⁸ DX 40, p. 2.

¹⁵⁹ 67 Fed. Reg. 14903 (March 28, 2002), MCI Appendix 6c.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 14905, (6).

2004-2005, after which it would consider upgrading passenger crash protection.¹⁶² Restraint systems were included in the referenced issues to be explored.¹⁶³ NHTSA's evaluation of this issue has progressed, and NHTSA announced in 2007 that it intends to *require* passenger seatbelts in motorcoaches as soon as it has completed its research.¹⁶⁴

For MCI to prevail on its preemption claim, MCI must show that it was either (1) impossible for MCI to comply with both federal law and the common law standard imposed by the jury;¹⁶⁵ or (2) the common law standard "obstructs accomplishing and executing Congress' full purposes and objectives."¹⁶⁶ NHTSA has left the issue of motorcoach passenger crash protection unregulated for more than 30 years. NHTSA has not required seatbelts or any form of compartmentalization or seat design parameters for motorcoach passengers. NHTSA has simply left passenger protection decisions to the manufacturers' discretion. As the Supreme Court noted in *Wyeth*, "[A] tort case is unlikely to obstruct the regulatory process when the record shows that the [Agency] has paid very little attention to the issues raised by the parties at trial."¹⁶⁷ Hinton's claim is not preempted because it does not conflict with federal law.

D. Hinton's seatbelt claim is analogous to *Sprietsma* and *Myrick*, where there was no federal regulation that conflicted with the plaintiff's

¹⁶² PX170, p. 36.

¹⁶³ *Id.*

¹⁶⁴ See MCI Appendix 8, pp. 12-14; *Hinton*, 272 S.W.3d at 26 n. 5. In addition, as mentioned above, Texas Sen. Kay Bailey Hutchison and others have introduced legislation that would require motorcoaches like MCI's bus to be equipped with passenger seatbelts and laminated glass.

¹⁶⁵ MCI admitted at trial that it was not impossible for it to comply – it could have installed the belts and it was both technologically and financially feasible to do so. (28 CR 6472-73).

¹⁶⁶ *Great Dane*, 52 S.W.3d at 743.

¹⁶⁷ *Wyeth*, 129 S. Ct at 1203 n. 14.

claim, not *Geier*, *Carden* or *Bic Pen* where there was a specific federal regulation with which the plaintiff's claims conflicted.

MCI's brief sets forth a complicated analysis of various preemption decisions from this Court, the United States Supreme Court and the Fifth Circuit in an effort to fit this case within one of those decisions where preemption was found.¹⁶⁸ But the relevant analysis is really very simple. In *Geier*, *Carden*, and *Bic Pen*,¹⁶⁹ where preemption was found, there was an *actual federal regulation* with which the plaintiff's claims conflicted. By comparison, there was *no* federal regulation in *Sprietsma* or *Myrick*, and in both cases the United States Supreme Court found no preemption. Since there is no regulation under the Safety Act that applies to motorcoach passenger occupant protection, Hinton's seatbelt claim is not preempted.

As discussed in detail in Section II above, *Geier* involved the preemptive effect of FMVSS 208, which regulated air bags and passive occupant restraints in passenger vehicles. The Supreme Court found that a claim requiring air bags in all cars would conflict with the variety of passive occupant protections deliberately sought by FMVSS 208. *Carden*, too, was a FMVSS 208 case, which the Fifth Circuit found to be controlled by *Geier*.

In *Bic Pen*, the plaintiff claimed that a disposable lighter was defective because it did not have sufficient child-resistant properties.¹⁷⁰ This Court pointed out that disposable lighters are subject to the jurisdiction of the Consumer Product Safety

¹⁶⁸ MCI Brief, pp. 30-36; 44-48.

¹⁶⁹ *Bic Pen Corp. v. Carter*, 251 S.W.3d 500 (Tex. 2008).

¹⁷⁰ *Id.* at 506.

Commission, which had "adopted regulations requiring disposable lighters to be child-resistant and setting a protocol for testing a lighter's child resistance."¹⁷¹ The lighter at issue had to undergo testing to ensure that it complied with the child-resistance regulations and be certified as compliant with those regulations. It was undisputed that the lighter complied with the federal regulations.

The plaintiff's claim sought to impose a higher child-resistance standard than that adopted by the CPSC.¹⁷² This Court pointed out that the CPSC had considered imposing a higher child-resistance standard but rejected that approach because a higher standard might actually impede the overall purpose of protecting children: "The [CPSC] was concerned that if adults were unable or unwilling to use child-resistant lighters, they might switch to non-child-resistant lighters or matches, which could expose children to an even greater risk."¹⁷³ In noting this, the Court recognized that the CPSC's concern was reflected in the regulation itself, which imposed both a "floor" and a "ceiling," unlike any of the regulations at issue here. Consequently, this Court found that the plaintiff's claim that lighters should be more child-resistant impliedly conflicted with the CPSC regulations.¹⁷⁴

In each of these cases, there was a federal regulation with which the common law claim conflicted. MCI has not cited this Court to a single case implicating either the

¹⁷¹ *Id.* at 503.

¹⁷² *Id.* at 506.

¹⁷³ *Id.* at 507.

¹⁷⁴ *Id.* at 509.

Safety Act or any similar federal statute where a court found preemption in the absence of a federal statute or regulation.

But there are two decisions by the United States Supreme Court that are particularly enlightening considering the history of regulatory inaction regarding motorcoach passenger protection: *Sprietsma v. Mercury Marine*¹⁷⁵ and *Freightliner Corp. v. Myrick*.¹⁷⁶

In *Sprietsma*, the plaintiff's wife fell out of a boat and was struck by the boat's propeller and killed. The plaintiff alleged that the boat should have been equipped with a propeller guard. The manufacturer contended that the claim was preempted because the Coast Guard had specifically considered and rejected a regulation requiring propeller guards.¹⁷⁷ MCI contends that the Coast Guard's decision "was not driven by considerations of safety,"¹⁷⁸ but this is incorrect. Part of the Coast Guard's reasoning for rejecting the proposed regulation was that the guards would increase the risk of certain types of injuries.¹⁷⁹ The manufacturer argued (as MCI does in this case) that the Coast Guard's decision not to require propeller guards reflected a clear intent *not* to regulate, which was in conflict with the plaintiff's tort claims. The Supreme Court disagreed:

We first consider, and reject, respondent's reliance on the Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats.

¹⁷⁵ 537 U.S. 51 (2002).

¹⁷⁶ 514 U.S. 280 (1995).

¹⁷⁷ 537 U.S. at 61.

¹⁷⁸ MCI Brief, p. 34.

¹⁷⁹ 537 U.S. at 61. This is in stark contrast to NHTSA's decision in 1974 not to require seatbelts on motorcoaches. That decision was based solely on a cost/benefit analysis and statistics demonstrating very low seatbelt use rates, rather than any safety concern about seatbelts.

It is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States...from adopting such a regulation. ... The Coast Guard did not take the further step of deciding that, as a matter of policy, the States ... should not impose some version of propeller guard regulation, and it most definitely did not reject propeller guards as unsafe. ... Thus, although the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an "authoritative" message of federal policy against propeller guards.¹⁸⁰

The Supreme Court reached the same conclusion in *Myrick*. In *Myrick*, the plaintiffs alleged that tractor-trailers manufactured by the defendants were defective because they lacked an antilock braking system (ABS).¹⁸¹ As here, the regulation at issue in *Myrick*, FMVSS 121, did not include any requirement or prohibition regarding ABS brakes.¹⁸² The Supreme Court held that "the absence of a federal standard cannot implicitly extinguish state common law."¹⁸³ The court further stated,

In the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all. Further Standard 121 currently has nothing to say concerning ABS devices one way or the other, and NHTSA has not ordered truck manufacturers to refrain from using ABS devices. A finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS devices, since none exist.¹⁸⁴

The situation here is identical to *Myrick*: there is no applicable standard requiring or prohibiting seatbelts, so Hinton's common law claim does not conflict with federal law.

¹⁸⁰ *Id.* at 528; accord *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 252 (Tex. 1994) (holding that similar propeller guard claim not preempted).

¹⁸¹ 514 U.S. at 282.

¹⁸² *Id.* at 286.

¹⁸³ *Id.* at 282.

¹⁸⁴ *Id.* at 289-90.

The court of appeals correctly held that "the absence of federal regulation or the decision not to take regulatory action is not preemptive in this case."¹⁸⁵

In this regard, MCI's reliance on *Bethlehem Steel v. New York State Labor Relations Board* is misplaced. The *Bethlehem Steel* Court discussed a conflict between the federal National Labor Relations Act and a similar, but not identical, New York state statute. The state statute was declared invalid because the federal National Labor Relations Board had jurisdiction of the subject matter and had asserted control over that aspect of labor relations, yet had specifically refused to do the very act proposed by the state legislation – recognize "foremen's" bargaining units.¹⁸⁶ The Supreme Court acknowledged that federal inaction can be preemptive "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 under the policy of the statute."¹⁸⁷ This is very different from the regulatory scheme imposed by the Safety Act, which specifically describes its standards as "minimum standards" and contains a common law savings clause preserving common law claims that do not conflict with the Act.

International Paper Company v. Ouellette is similarly inapplicable. In *Ouellette*, the Supreme Court considered the preemptive effect of the Clean Water Act.¹⁸⁸ The court held that the CWA's comprehensive regulation of interstate water pollution preempted a

¹⁸⁵ *Hinton*, 272 S.W.3d at 25 (citing *Sprietsma*, 537 U.S. at 64-68, and *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-87 (1995) ("the absence of a federal standard cannot implicitly extinguish state common law")).

¹⁸⁶ *Bethlehem Steel v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774-75 (1947).

¹⁸⁷ *Id.* at 774.

¹⁸⁸ *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 483 (1987).

state common law claim by citizens of Vermont against a New York point source: "It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure."¹⁸⁹ Notably, however, the court also recognized that such a claim brought under New York law would *not* be preempted.¹⁹⁰ By comparison, "the Safety Act reflect[s] '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.'"¹⁹¹ In fact, the defendant in *Great Dane* also relied on *Ouellette* and made the same argument MCI makes here – that Welles' claim would "interfere with the methods that federal law has chosen to achieve [its] goals."¹⁹² This Court rejected that argument: "Standard 108 only impliedly preempts additional equipment that would have interfered with a trailer's ability to meet the standard's minimum, general conspicuity requirement. The Welles' claims do not create such an interference."¹⁹³ There are no federal regulations to interfere with in this case.

In *Geier*, *Carden* and *Bic Pen*, there were specific federal regulations that actually conflicted with the common law claim, so those claims were preempted. In *Myrick* and *Sprietsma*, there were no regulations, so those claims were not preempted. When a federal agency decides not to impose a particular safety requirement, that decision does

¹⁸⁹ *Id.* at 497.

¹⁹⁰ *Id.* at 497-98.

¹⁹¹ *Great Dane*, 52 S.W.3d at 747-48 (citing *Geier*, 529 U.S. at 871).

¹⁹² *Id.* at 746.

¹⁹³ *Id.* at 746-47.

not give rise to implied conflict preemption unless the decision conveys a clear and authoritative message of federal policy *against* a requirement. And here, NHTSA has never expressed opposition to installing passenger seatbelts on buses,. MCI has failed to overcome the presumption against preemption because it could not show a "clear and manifest" intent by Congress or NHTSA to preempt Hinton's claims that the motorcoach should have been equipped with passenger seatbelts.

E. NHTSA's 2007 report does not preempt Hinton's claim. It is not a law or regulation, and it simply underscores that Hinton's seatbelt claim does not conflict with federal law.

For the first time in this case, MCI now claims an additional "frustration of purpose" basis for its preemption claim. MCI argues that the jury's verdict would frustrate NHTSA's current course of action – to complete its research and testing and to issue a standard requiring passenger seatbelts in motorcoaches.¹⁹⁴

It is clear that NHTSA will require seatbelts on motorcoaches. MCI's supposed "chosen method" of no regulation will soon be replaced by a standard requiring precisely what the jury found was necessary – passenger seatbelts. Contrary to MCI's bold but unsupported claim that "[t]he experts at NHTSA have studied hundreds of accidents since 1972 to decide whether seatbelts ... are necessary for the safety of passengers of motorcoaches,"¹⁹⁵ the facts show that NHTSA first fully evaluated the issue beginning in

¹⁹⁴ MCI Brief, p. 50.

¹⁹⁵ *Id.*

2002 and decided that seatbelts *were* necessary. All that remains is the completion of testing and research necessary to develop the actual regulation.¹⁹⁶

MCI does not provide any actual explanation of how or why the jury's finding would frustrate or interfere with NHTSA's research or stated intent to require seatbelts. However, the implication is made that NHTSA would not want a manufacturer to test, develop, and design a safety advancement for its own product prior to the issuance of a government mandated standard. Yet NHTSA has never expressed such a policy, and the regulatory history of the Safety Act indicates that NHTSA, to the contrary, has historically relied on manufacturers to develop and implement the safety advances that ultimately lead to regulatory standards.

Moreover, the reason NHTSA is now required to perform this "primary research" is because, as NHTSA has explained, "appropriate industry standards are not in place on which to base regulations."¹⁹⁷ In other words, because MCI and other motorcoach manufacturers have made no efforts to test, develop or design passenger seatbelts, NHTSA had to start from scratch.

Vehicle and other product manufacturers have a responsibility to take the initiative in designing safe products. Dr. John Lennox, Plaintiff's expert, testified that responsible manufacturers take the lead in developing design solutions to known product hazards.¹⁹⁸ He described how companies like General Motors, Ford Motor Company and John Deere

¹⁹⁶ "NHTSA's Approach to Motorcoach Safety," pp. 12-14 (MCI Appendix 8).

¹⁹⁷ DX 40, p. 2.

¹⁹⁸ 15 RR 70-72.

have developed state of the art safety advances that were later used by the government to develop regulatory standards.¹⁹⁹ He described how General Motors spent five years and several million dollars working with his outside research institute to develop a safety solution that was not addressed by any government standard.²⁰⁰ MCI's own glass expert, Richard Morrison, testified that FMVSS 205 was actually just an adoption of a pre-existing, industry-developed standard (ANSI Z26.1).²⁰¹ The industry, not the government, initiated the safety improvement.

In *Great Dane*, the trailer manufacturer made another argument similar to MCI's in this case. The plaintiff argued that the subject trailer should have been equipped with additional reflective materials beyond those required under FMVSS 108.²⁰² The manufacturer argued that NHTSA had already decided to improve the standard and had, in fact, established a timetable to effectuate those improvements.²⁰³ Like MCI, the manufacturer contended that the common law claim would interfere with NHTSA's own efforts to improve trailer conspicuity.²⁰⁴ This Court rejected that argument:

[I]t is difficult to envision how a heightened common-law conspicuity requirement in 1986 would have conflicted with the Secretary's goal at that time to improve conspicuity markings and configurations.²⁰⁵

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 34.

²⁰¹ 21 RR 38-41.

²⁰² *Great Dane*, 52 S.W.3d at 740.

²⁰³ *Id.* at 744-45.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 745.

It is likewise difficult to envision how a jury's finding that MCI's bus needed passenger seatbelts somehow conflicts with NHTSA's own determination that all motorcoaches need seatbelts. The Safety Act is not intended to serve as a shield for manufacturers who fail to diligently pursue the design of safe products. As this Court stated in *Great Dane*, "[e]ncouraging manufacturers to act in a way that increases safety does not frustrate the primary purpose of the Safety Act."²⁰⁶

CONCLUSION AND PRAYER

For the reasons stated, the court of appeals correctly held that Hinton's claims are not preempted by federal law. Hinton's laminated glass claim does not conflict with FMVSS 205 because, as the Fifth Circuit found in *O'Hara*, that standard is merely a "minimum safety standard" that does not preempt common law claims. Hinton's seatbelt claim does not conflict with any federal law or regulation, since NHTSA has left motorcoach passenger protection unregulated for more than 30 years. Just as in *Myrick*, "the absence of a federal standard cannot implicitly extinguish state common law."²⁰⁷

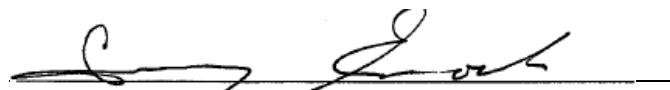
Respondents/Cross-Petitioners respectfully pray that the Court grant their Cross-Petition for Review, affirm the decision of the court of appeals regarding MCI's preemption issue, and reverse the court of appeals decision on Respondents/Cross-Petitioners' point and render judgment for Respondents/Cross-Petitioners against MCI in the amounts as assessed by the trial court. Respondents/Cross-Petitioners also pray for all other relief to which they may be entitled.

²⁰⁶ *Id.* at 748.

²⁰⁷ 514 U.S. at 282.

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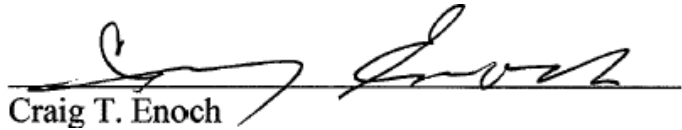
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 29 day of September, 2009, this document was served on all parties or their attorneys of record listed below by certified mail, return receipt requested, pursuant to the Texas Rules of Appellate Procedure.

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