

# NO. 09-0048

## IN THE SUPREME COURT OF TEXAS

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

*Petitioners/Respondents*

v.

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

*Respondents/Petitioners*

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On Petition for Review from the Court of Appeals  
For the Tenth Judicial District of Texas

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### **MCI'S REPLY TO HINTON'S BRIEF ON THE MERITS**

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## Introduction

Respondents James Hinton, *et al.* (“Plaintiffs”) attempt to create many questions by their arguments. At its core, this appeal involves 1) a federal standard issued by the National Highway Traffic Safety Administration (NHTSA) specifying window glazing and 2) an affirmative decision by NHTSA to issue a standard requiring seat belts in motorcoaches only for motorcoach drivers and not for passengers. This Court must decide whether or not these decisions—made after NHTSA balanced their benefits and detriments—should stand as preemptive or should be second-guessed by a jury. Motor Coach Industries Mexico, S.A. de C.V. and MCI Sales and Service, Inc. (collectively “MCI”) contend these decisions acts are preemptive. The following are the key ingredients to resolving these issues.

First, the most recent United States Supreme Court case interpreting the Motor Vehicle Safety Act (Safety Act)—the Act that bestows on NHTSA the sole authority to issue standards governing motor vehicles—should stand as the primary guide for applying the Safety Act and for assessing the preemptive effect of NHTSA action regarding window glazing and seat belts. That case is *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000).

Second, Plaintiffs’ window glazing claim is preempted by the glazing standard, which allows manufacturers a choice between two glazings. This claim, which would foreclose one of the options NHTSA chose to give manufacturers, is preempted because it conflicts with the standard. *See Geier*, 529 U.S. at 881. Alternatively, the glazing claim would frustrate NHTSA policy as expressed in its comprehensive 2007 “Approach

to Motorcoach Safety.” In that document, NHTSA concluded after a number of years of study—contrary to the jury’s verdict—that glazing in motorcoaches cannot by itself prevent ejections.

Third, NHTSA’s decision not to require seat belts for passengers in motorcoaches and to require them only for motorcoach drivers reflects a judgment by the agency, after it conducted a cost-benefit analysis that seat belts would not improve the *overall* safety of motorcoaches over the safety already provided by the seating in motorcoaches.<sup>1</sup> Rejecting a request to *require* passenger seat belts in motorcoaches, NHTSA stated that it would reconsider its decision if it found such a standard *desirable*. This decision, announced in formal rule-making proceedings, is supported by a 1977 study on whether seat belts should be required in motorcoaches and is confirmed by the 1992 letter from NHTSA’s General Counsel to MCI and by the notices and letter issued by NHTSA beginning in 2000. MCI Brief, Appendices 7, 6c, 8; DX 40, Letter from Rosalyn G. Millman, Acting Administrator for NHTSA, to Jim Hall, Chairman of NTSB, p. 2 (March 3, 2000). NHTSA’s decision reflects the same type of decision-making and balancing NHTSA engages in when it issues a standard that is preemptive. This decision took on the character of a ruling that a standard requiring seat belts was not appropriate. It was not a decision to leave passenger seating safety unregulated.

This Court should respect these decisions made by NHTSA regarding motorcoach safety, decisions by which NHTSA weighed competing concerns; considered the

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<sup>1</sup> As recently as 2000, NHTSA stated that the average annual death toll on motorcoaches was five per year. In contrast, the average annual death toll for other passenger vehicles was approximately 32,000.

reasonableness, the practicality, and the appropriateness of the concerns and balanced them; and considered the extent to which its decisions furthered safety in motor vehicles. *See* 49 U.S.C.S. § 30111 (a), (b); 49 U.S.C.S. § 30101.

## **Argument**

### **I. *Geier* Controls this Court's Interpretation of the Safety Act.**

*Geier v. American Honda Motor Company* is the most recent and comprehensive construction of the Safety Act by any court. 529 U.S. 861 (2000). The first part of the case addresses the interplay of the Act's preemption and saving clauses and determines what preemption principles apply to a suit brought under the Safety Act. *Id.* at 867–74. Yet, in an effort to ensure that the presumption against preemption applies here, Plaintiffs all but ignore *Geier*, and urge this Court instead to look primarily to opinions that do not apply to the Safety Act. *See Wyeth v. Levine*, 555 U.S. \_\_\_, 129 S. Ct. 1187 (2009); *Graber v. Fuqua*, 279 S.W.3d 608 (Tex. 2009). Plaintiffs argue this so that it can urge this Court to apply the presumption. *See* Plaintiffs Brief, pp. 9–18. Plaintiffs so desire this Court to apply the presumption, that they interpret *Geier* as applying the presumption. This is exactly the opposite of what the dissent and academics say about *Geier*.

#### **A. *Geier* Did Not Apply the Presumption Against Preemption.**

As noted above, the first part of *Geier* discusses the interplay of the Safety Act's saving and preemption clauses. *Geier*, 529 U.S. at 867–74. It found that the interplay resulted in a neutral policy. Not once during its discussion did it mention the presumption against preemption, as the Supreme Court typically does when it applies the

presumption. *Id.*; see also *Wyeth v. Levine*, 129 S. Ct. at 1194–95; *Medtronic, Inc. v. Lohr*, 581 U.S. 470, 485 (1996); *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992); *Rice v. Santa Fe Elevator Corp.*, 311 U.S. 218, 230 (1947).<sup>2</sup>

Because of this, both the dissent and academics have OBSERVED that the Court did not apply the presumption. In his dissent in *Geier*, Justice Stevens complained because the court did not apply the presumption, saying that the court “reject[ed]. . .the presumption” and “ignore[d] the presumption.” *Geier*, 529 U.S. at 888, 906–07 (Stevens, J., dissenting). Academics have come to these same conclusions with one commentator saying, “the only way to make sense of [*Geier*] is to see it as putting a presumption in favor of preemption. See Erwin Chemerinsky, *Empowering States When it Matters: A Different Approach to Preemption*, 96 BROOK. L. REV. 1313, 1319 (2004) (emphasis added). Another commentator accused the Supreme Court of engaging in “judicial sleight of hand” and eradicating the presumption. See Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1, 2 (2002) (claiming the Court “abandon[ed] the . . . presumption”). Thus, both justices on the Supreme Court and commentators agree that the Court did not apply the presumption against preemption.

In spite of this evidence to the contrary, Plaintiffs claim that the Court applied the presumption because the Court held that ordinary preemption principles applied, in spite

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<sup>2</sup> Likewise, when the Supreme Court does not apply the presumption, it does not mention it. See *Riegel v. Medtronic, Inc.* 552 U.S. 312, 128 S. Ct. 999 (2008); *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978, 981–84 (2008); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 2–10 (2007); *Buckman Co. v. Plaintiff’s Legal Comm.*, 531 U.S. 341, 343 (2001).

of the tension between the Safety Act’s preemption and saving clauses. According to Plaintiffs, “ordinary preemption principles” include the presumption against preemption. *See* Plaintiffs Brief, pp. 14–15. However, the *Geier* opinion makes it clear that, by “ordinary preemption principles,” the Court was referring simply to implied conflict preemption. *Geier*, 529 U.S. at 870.

The reference to ordinary preemption principles arose when the Court discussed whether or not the saving clause removed tort actions from more than just the express preemption clause. *Id.* Then the Court said,

Does [the saving clause] do more? In particular, does it foreclose or limit the operation of *ordinary preemption principles* insofar as [they] 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? Petitioners concede, as they must in light of *Freightliner Corp. v. Myrick*, 514 U.S. 289 (1995), that the pre-emption provision, by itself, does not foreclose (through negative implication) “any possibility of *implied [conflict] preemption*”. . . . But they argue that the saving clause has that very effect.

*Geier*, 529 U.S. at 870. (emphasis added).

As the quote shows, the phrase “ordinary preemption principles” refers broadly to implied conflict preemption, not to the presumption against preemption.

**B. *Wyeth* and *Graber* do not Represent a Re-emphasis of the Presumption Against Preemption.**

Whether or not *Wyeth* and *Graber* re-emphasize the presumption is irrelevant here. As MCI has just shown, *Geier*, which construes the Safety Act, and is the most comprehensive analysis of the Safety Act, controls here. Neither *Wyeth* nor *Graber* involve the Safety Act. Moreover, *Wyeth* is completely irrelevant because it involved the

portion of an act that contained only a saving clause and no preemption clause. *Wyeth*, 129 S. Ct. at 1193–96. *Graber* never states whether or not the act it reviewed contained a saving or preemption clause. *Graber*, 279 S.W.3d at 610–17. Applying these cases instead of *Geier* would be like comparing apples to oranges.

In addition, MCI does not agree that these cases re-emphasize the presumption. In support of their claim, Plaintiffs point to nothing other than the mere application of the presumption. After *Wyeth* and *Graber* issued, both courts issued cases in which they did not apply the presumption. See *Cuomo v. The Clearing House Assoc., L.L.C.*, 129 S. Ct. 2710, 2720 (2009); *In re Collins*, 286 S.W.3d 911, 920 (Tex. 2009).

## **II. The Window Glazing Claim is Preempted.**

Applying ordinary preemption principles to the glazing claim, it is preempted. First, the verdict conflicts with the choice NHTSA deliberately gave motorcoach manufacturers because it forecloses one of the choices NHTSA wanted to give manufacturers. The wisdom of the choice is borne out by the 15-year study NHTSA conducted on the role of advanced glazing to prevent ejections and by NHTSA’s 6-year study on ejections in motorcoaches concluding in 2007. Second, the claim and the verdict conflict with NHTSA’s recently declared policy *not* to rely on glazing to prevent ejections, but instead to rely on increased roof strength and seat belts. This last point, Plaintiffs do not dispute.

### **A. To Refute Preemption, Plaintiffs Point Everywhere But the Obvious Place to Look.**

To refute preemption, Plaintiffs look everywhere but the obvious place. The

question is whether FMVSS 205 preempts the jury’s verdict that Plaintiffs would not have been ejected if the bus had been equipped with laminated, rather than tempered, glass. For guidance on evaluating whether a NHTSA standard is preemptive, the best place to go first is *Geier*. NHTSA derives its authority from the Safety Act. *Geier* is the most recent U.S. Supreme Court discussion of the Safety Act, and, in *Geier*, the Court engaged in its most comprehensive analysis of the Safety Act. *Geier*, 529 U.S. 861.

**1. *Geier* Emphasizes Weighing Factors and Striking a Balance.**

*Geier* is important to this case because, like the Plaintiffs here, the *Geier* plaintiffs claimed that FMVSS 208 was a minimum standard without preemptive effect. The Supreme Court had to resolve this issue. It did so by looking at the various forces at play in NHTSA’s decision and the reasons given for the decision. *Geier* emphasizes the plan NHTSA formulated based on the varying factors it weighed and the balance it struck. *Id.* at 1203. The Court listed seven “significant considerations” that affected NHTSA’s ultimate decision about what to require or not require in FMVSS 208. *Id.* at 877–78. Some of the considerations were positive, some negative. *Id.* By balancing these considerations, NHTSA reached a compromise—not a perfect rule, but the best option available—in FMVSS 208. *Id.* In its very recent decision, *Wyeth*, the Court described NHTSA’s actions in this way:

In *Geier*, the DOT conducted a formal rulemaking and then adopted a plan to phase in a mix of passive restraint devices. Examining the rule itself and the DOT’s contemporaneous record, which revealed factors the agency had weighed and the balance it had struck, we determined that state tort suits presented an obstacle to the federal scheme.

*Wyeth*, 129 S. Ct. at 1203. The *Geier* Court concluded that the plaintiffs could not sue to foreclose one of the options NHTSA purposefully adopted. *Geier*, 529 U.S. at 881.

To determine whether the standard was preemptive, and not a minimum standard, the *Geier* Court looked at the factors considered and weighed, the balance struck, and the decision to issue that specific standard in light of the competing factors.<sup>3</sup> According to *Wyeth*, another significant factor was that NHTSA engaged in formal rulemaking. *Wyeth*, 129 S. Ct. at 1203. In issuing FMVSS 205—the glazing standard—NHTSA engaged in these same acts.

## **2. For FMVSS 205, NHTSA Weighed Competing Factors and Engaged in Rulemaking.**

From the time FMVSS 205 was first issued, NHTSA made it clear that it gave a choice of two options for side window glazings because neither was perfect. *See* ANSI/SAE Z26.1—1996; MCI’s Brief on the Merits, p. 22, Appendix 9c. Neither tempered glass nor laminated glass performed optimally under all circumstances—tempered glass was superior to laminated glass under certain accident conditions, while laminated glass was superior under other conditions. *Id.* Because no one, including NHTSA, can know beforehand what type of accident a vehicle will have, NHTSA chose to keep both options available.

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<sup>3</sup> Plaintiffs claim that the *Geier* Court relied on the *variety* and number of options given in FMVSS 208. Plaintiffs Brief, p. 15. The Court did look at the variety, but a careful reading of the opinion shows that the Court relied on the fact that NHTSA, after weighing the various positive and negative factors, and after considering how best to achieve its goals of improving safety without making the cost too high and giving the public time to get used to both seat belts and air bags, struck a balance among the competing concerns. *Geier*, 529 U.S. at 877–80. To some, the balance struck was not safe enough. But as is clear in the opinion, NHTSA is responsible for making these decisions and creating a plan. *Id.*

Later statements NHTSA made, beginning in 1988 and ending in 2001,<sup>4</sup> show that this was a deliberate decision based on a compromise. *See* MCI Brief, pp. 21–25. Reducing ejections has been at the forefront of NHTSA’s goals from the outset but so has reducing injuries from impact with side windows. As FMVSS 205 states, the threefold goal of glazing has always been to 1) reduce injuries because of impact with the window, 2) ensure sufficient transparency, and 3) minimize ejections. 49 C.F.R. § 571.205 at S2. And from the inception of the rule, the three goals have been listed in that order.

In 1988, NHTSA began studying how to reduce ejections and whether new glazings could assist in reducing ejections. MCI Brief, p. 23; WILKE, et al., EJECTION MITIGATION USING ADVANCED GLAZING: FINAL REPORT at 1. In 1991, Congress mandated that NHTSA initiate rulemaking on rollover protection. *Id.* at 2.

In 2001, after ten years of study, NHTSA refused to change FMVSS 205 to require a more advanced side window glazing. MCI Brief, pp. 24–25; WILKE, at x. It did this for two reasons. First, advanced glazing produced more neck injuries in passengers who wore seat belts and were not ejected. MCI Brief, pp. 24–25; WILKE, at x. Second, other options, such as side air curtains, were more effective at preventing ejections than advanced glazings or tempered glass or laminated glass. MCI Brief, pp. 24–25; WILKE, at x, 7, 24–27, 47–50.

Thus, after 14 years of study, after pressure from Congress to require more

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<sup>4</sup> To discern preemptive intent, the Supreme Court regularly considers agency statements and activities during and after the issuance of the standard. *See, e.g., Wyeth*, 124 S. Ct. at 1197–1203; *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002).

advanced glazing techniques than tempered or laminated glass, and after weighing competing concerns of increased injuries resulting from hitting harder glass versus the ability of harder glass to better prevent ejections, NHTSA concluded that the current version of FMVSS 205 should not be changed. MCI Brief, pp. 24–25; WILKE, at x., 7, 24–27, 47–50.

NHTSA concluded that, as written, FMVSS 205 best served its threefold purpose. *Id.* It concluded that options other than window glazing are more effective at preventing ejections than any glazing. It concluded that these options should be pursued with that purpose in mind. WILKE, at x, 47–50. This certainly reflects the same balancing of competing interests that occurred in *Geier*. As a result, NHTSA should be given the same regard it was given in *Geier*.

In fact, just like the 1984 version of FMVSS 208 discussed in *Geier*, FMVSS 205 is a multi-purpose standard. Its sole—or even primary—purpose is not to prevent ejections; it has a threefold purpose.

Just as with the 1984 version of FMVSS 208, with FMVSS 205, NHTSA has had to juggle competing goals. The Final Report, summarizing the research NHTSA performed from 1988 to 2001, shows that NHTSA carefully considered other options available to improve ejection mitigation and rejected them because they disturbed the balance it had achieved between its first and third goals for FMVSS 205.

Just as with FMVSS 208, initially, NHTSA had specific reasons for providing the choice. Later, it had specific reasons for *not* changing that choice. This decision-making and balancing process merits *Geier* preemption status.

### **3. Contrary to Plaintiffs' Claims, Variety is Not the Deciding Factor in *Geier*.**

Plaintiffs claim that the *variety* of options given in FMVSS 208 drove the *Geier* Court to decide in favor of preemption. Plaintiffs Brief, p. 15. But as stated earlier, a careful reading reveals that the court was swayed because NHTSA weighed competing factors and crafted a standard that achieved a balance among the factors.

To rely on variety or a number of options as the primary indicator of preemption requires one to travel down a dangerous path. This would mean that only standards involving numerous safety options would preempt claims, while standards involving only a few options or no options would not preempt claims—regardless of preemptive intent.

Under Plaintiffs' argument the standard in *Bic Pen* arguably would not be preemptive because it involved a single performance requirement, not a complex mix of options. *Bic Pen Corp. v. Carter*, 251 S.W.3d 500, 506–09 (Tex. 2008). Yet, this Court held that the standard in *Bic Pen* preempted the plaintiff's claims and was not a minimum standard. *Id.* This Court reached that result for the same reasons the *Geier* Court found that the 1984 version of FMVSS 208 preempted *Geier*'s claim. *Id.*

Plaintiffs' glazing claim would require courts to ignore important considerations, such as considering and weighing competing interests. Instead, Plaintiffs' claim would require courts to attend to immaterial matters.

#### **B. *Great Dane* Does Not Control Here.**

Plaintiffs also argue that this Court's opinion in *Great Dane Trailers, Inc. v. Wells*, controls this case. 52 S.W.3d 737 (Tex. 2001). For two reasons, it does not control.

First, in reviewing a standard issued pursuant to the Safety Act, *Great Dane* held that “the party urging preemption has the difficult burden of overcoming the presumption against preemption.” *Id.* at 743. However, when the U.S. Supreme Court construed the Safety Act in *Geier*, it did not impose a difficult burden or discuss a difficult burden that Honda Motor had to overcome. *Geier*, 529 U.S. at 864–86. Not once did it mention the presumption against preemption. *Id.* In fact, the only time *Geier* mentioned any sort of burden at all, it stated that no burden existed. *Id.* at 869–71. Thus, *Great Dane* imposed a burden that *Geier* did not.

Second, the history surrounding the standard at issue in *Great Dane* is quite different from the history of the window glazing standard. *Great Dane* involved a claim that a trailer should have contained more conspicuity markings. *Great Dane*, 52 S.W.3d at 743. NHTSA was conducting studies on how to improve the conspicuousness of trailer markings before and after the trailer was manufactured. In 1987, the year after *Great Dane* manufactured its trailer, NHTSA concluded that it needed to engage in further study before amending the standard. Twelve years later, NHTSA did require more markings on trailers—consistent with Plaintiffs’ claims. This Court held that the standard did not preempt the claim, primarily because NHTSA was merely studying how to improve trailer conspicuity markings; if NHTSA preempted claims each time it studied safety, all claims would be preempted all of the time. *Id.* at 745.

This holding does not control here. For one thing, here, from the first, the

standard reflected a choice given because of competing interests.<sup>5</sup> In addition, here, when NHTSA ultimately concluded its study in 2001, unlike in *Great Dane*, NHTSA decided *not* to change the standard *because of the same competing concerns that created the standard*. 49 C.F.R. § 571.205; MCI Brief, Appendix 9b, p. 55. Unlike *Great Dane* NHTSA’s ultimate conclusion here was not consistent with Plaintiffs’ claim. Lastly, it appears that the standard in *Great Dane*, actually contemplated that it was a minimum because it “stated that, with some exceptions that do not apply, ‘each vehicle shall be equipped with *at least* the number of lamps, reflective devices, and associated equipment specified.’” *Great Dane*, 52 S.W.3d at 746 (emphasis in original). The standard here contains no similar language. 49 C.F.R. § 571.205; MCI Brief, Appendix 9a.

**C. Plaintiffs Did Not Allege a “Special Design” Claim.**

On page 24 of Plaintiffs’ Brief on the Merits, Plaintiffs claim—for the first time—that they alleged a “specific design claim” and that, therefore, *Geier* does not apply. *See* Plaintiffs Brief, p. 24. This is not correct.

*Geier* acknowledged that one type of claim *could* escape preemption if “some special design-related circumstances concerning a particular kind of car might require airbags, rather than automatic belts . . . .” *Geier*, 529 U.S. at 886. To allege a special design claim, one must allege a design defect particular to a specific vehicle that makes it

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<sup>5</sup> In *Daimler-Chrysler Corporation v. Inman*, 252 S.W.3d 299 (Tex. 2005) this Court recognized the validity of decisions NHTSA makes based on competing concerns and their preemptive effect. *Id.* at 301. (“In designing seat belt buckles, the risk of injury from accidental release of easy-to-unlatch buckles must be balanced against the risk of injury from non-use of hard-to-unlatch buckles. . . . [NHTSA] is charged with being sure that the balance is struck in the right place. . . . The decision is not one for a jury in one state or another to make for the rest of the nation.”)

different from all other vehicles in its class. *Id.*; see also *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 382–83 (7th Cir. 2000) (“[Hurley] has pointed to nothing about the design of this particular bus that makes it different from the average ‘bus with a gross vehicle weight rating of more than 10,000 pounds.’”); *Carrasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169 (M.D. Penn. 2001); *Alami v. Volkswagen of America, Inc.*, 70 N.Y.S. 2d 638 (N.Y. App. Div. 2004).

Not once in their Third Amended Petition did Plaintiffs allege a special design defect peculiar to the MCI bus that was different from the average motorcoach. See 5 CR 1117–18. Nor did Plaintiffs mention a special design defect before the Court of Appeals. See Appellee’s Brief, pp. x, 2, 9, 42.

Plaintiffs’ claims do not fall within the special design exception.

**D. Plaintiffs Do Not Dispute that Their Glazing Claim Conflicts with or Frustrates “NHTSA’s Approach to Motorcoach Safety.”**

Beginning in 2001, NHTSA began a study on motorcoach safety specifically to address a number of ejections that had occurred in recent years. Letter from Rosalyn G. Millman, Acting Administrator for NHTSA, to Jim Hall, Chairman of NTSB at 2 (March 3, 2000); DX 40. Starting with the acknowledgement that motorcoach travel has always been a safe mode of travel with an average of only five deaths a year, NHTSA nonetheless stated that recent severe crashes convinced it that it needed to reassess motorcoach safety. *Id.* Its 2002 Notice and Request for Comments shows that NHTSA expected that one of the primary tools to battle ejections would be improved window glazing. 67 Fed. Reg. 14903, 14905 (March 28, 2002); Appendix 6c.

However, by the time it issued its 2007 “Approach to Motorcoach Safety,” NHTSA’s crash studies had shown something quite different. NHTSA, NHTSA’S APPROACH TO MOTORCOACH SAFETY, NHTSA Docket 2007–28793; Appendix 8, pp. 9–10. In the fight to prevent ejections in catastrophic crashes, window glazing, in and of itself, played a very minor role. *Id.* at 11–14, 19–20. Increasing roof strength and installing seat belts would more effectively prevent ejections. *Id.* As the report noted, window glazings cannot withstand the forces at play when a bus turns on its side and slides along the ground, *id.*, especially when the roof and window frame of the bus buckle. *Id.* According to the report, the key to maintaining the integrity of a window during a catastrophic crash is increased roof strength so that the roof and the window encasements do not become deformed, causing the window to pop out. *Id.*

The jury’s verdict, which found that laminated glass would not have popped out and would have prevented Plaintiffs’ ejections, contradicts NHTSA’s conclusion in its report. 83 C.R. 19735–6. Moreover, its report is not like the study in *Great Dane*—a study with no end in sight. Here, NHTSA has placed a priority on issuing new requirements for roof strength and for seat belts, and has set deadlines for doing so.<sup>6</sup> NHTSA’S APPROACH TO MOTORCOACH SAFETY, pp. 12–14. This Court cannot allow the jury’s common law rule to frustrate NHTSA’s plan.

The jury’s verdict also frustrates NHTSA’s plan to improve motorcoach safety

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<sup>6</sup> NHTSA’s self-imposed deadlines were ambitious. Although the deadlines it set, which were in 2008, have passed, this does not diminish the authoritativeness of the conclusions or the preemptive effect of the statements.

because, at a time when NHTSA is attempting to produce new requirements on roof strength and seat belts—which NHTSA has concluded will be more effective than glazings in preventing ejections—the jury’s verdict will require motorcoaches who travel through Texas to install laminated windows in all motorcoaches. *See Geier*, 529 U.S. at 881.

**E. By Arguing that Their Glazing Claim Would Not Be a Significant Burden, Plaintiffs Are Asking This Court to Decide How Many Angels Can Dance on the Head of a Pin.**

Plaintiffs argue that the glazing claim does not frustrate any goals of NHTSA because the verdict will have only a very minor impact; the verdict will not require MCI to redesign its entire product line, but only the Dino Vaggio line. Plaintiffs Brief, pp. 25–26. Three problems undercut this argument. First, Plaintiffs have never raised it before. Second, the jury’s verdict applies to all motorcoaches manufactured, not just MCI’s. It applies to any motorcoach of any manufacturer. Third, and more importantly, this claim requires this Court to quantify the extent of the burden or obstacle. The United States Supreme Court has refused to do this. In *Geier*, the “[p]etitioners ask[ed] the Court to calculate the precise size of the ‘obstacle,’ with the intent of minimizing it. . . .” *Geier*, 529 U.S. at 882. The Court refused to engage in such speculation. *Id.*

In any event, any burden appears to be too much. In other cases, burdens that appeared relatively insignificant were considered unduly burdensome. In *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 9–10, 13–14 (2009), a state requirement that banks register with the state, pay fees, and submit to registration, inspection, and enforcement regimes by the state was held to be a significant burden. And in *Crosby v. National*

*Foreign Trade Council*, 530 U.S. 363, 366–77 (2000), the law of a single state imposing greater and different sanctions against Burma was held to frustrate the purposes of a Congressional Act and executive authority because the President of the United States had “less to offer and less economic and diplomatic leverage as a consequence.”

The Supremacy Clause is not phrased in terms of degrees. U.S. CONST. Art. VI, Cl. 2. Yet, Plaintiffs are asking this Court to attempt to quantify how much of a burden must exist before a claim is preempted. The United States Supreme Court has refused such requests. So should this Court.

### **III. The Seat Belt Claim is Preempted**

For years NHTSA has stated that motorcoaches are a safe mode of travel. 67 Fed. Reg. 14903. And they have been. In 2000, a NHTSA official stated that the average number of deaths in motorcoaches was five per year. Letter from Rosalyn G. Millman, *supra* at 14, p. 2. In 2002, for the 10-year period from 1990–1999, the average number of deaths was ten a year. 67 Fed. Reg. at 14903–04; MCI Brief, Appendix 6c. When NHTSA first considered whether to require seat belts in buses, it engaged in a cost-benefit analysis that considered a number of factors. 39 Fed. Reg. 27585 (July 30, 1974); MCI Brief, Appendix 6b. At that time, deaths on motorcoaches were low. NHTSA concluded that it did not want to require seat belts because the current seating protected the passengers. *Id.*

A 1977 study performed for the Federal Highway Administration confirmed NHTSA’s decision. It showed that if seat belts were added to motorcoaches, they could be a neutral, positive or a negative factor, depending on the type of accident. *See*

STANSIFER ET AL., INSTITUTE FOR RESEARCH IN PUBLIC SAFETY, ANALYSIS FOR NEED FOR PASSENGER SAFETY BELT REQUIREMENTS IN INTERCITY BUSES 10–18, 64–99 (Sept. 30, 1977); MCI Brief, Appendix 11. This Court must acknowledge the considerations weighed and balanced when NHTSA decided not to require seat belts in motorcoaches.

This Court also must consider the contemporaneous statements NHTSA issued concerning seatbelts. *See Sprietsma v. Mercury Marine, Inc.*, 537 U.S. 51, 64–67 (2002). When this Court does consider these statements, it should conclude that NHTSA’s decision not to require seat belts was an affirmative decision not to exercise its authority because it did not approve of a standard requiring seat belts in motorcoaches. Such a decision, coming in the midst of formal notice and rulemaking, is not merely a decision to leave passenger seating unregulated, it is a decision carrying preemptive weight.

**A. To Refute Preemption, Plaintiffs Ignore NHTSA’s Preemptive Actions in Deciding that a Seat Belt Standard was Not Appropriate.**

To argue against preemption, Plaintiffs rely on only two things: 1) no standard was in effect, which (according to Plaintiffs) meant that NHTSA left seat belts unregulated and 2) NHTSA has never been opposed to seat belts because it has allowed motorcoaches to install them. These arguments ignore the factors that courts have looked to in resolving preemption issues.

**1. Plaintiffs Ignore NHTSA’s Acts and Statements Made During Rulemaking.**

When a standard is not issued, the question to ask is this: Did the refusal to issue the standard take on the character of ruling that no such regulation was appropriate or approved? *Sprietsma*, 537 U.S. at 66. Logically the same acts that support a finding that

a standard is preemptive are relevant in deciding if a decision *not* to issue a standard is preemptive. The *Geier* Court discussed which factors it looked at in deciding preemption: 1) the competing considerations confronting NHTSA in its decision regarding what to require in FMVSS 208, 2) NHTSA's balancing of these factors and the compromise reached on the basis of the balancing, and 3) the plan NHTSA devised to accommodate the several safety opinions available to it. *Geier*, 529 U.S. at 877–78. These actions reflected preemptive intent. The *Wyeth* Court added fourth factor that reflected preemptive intent—NHTSA conducted formal rulemaking. *Wyeth*, 129 S. Ct. at 1203.

Three of these four preemption-indicating factors are present here. NHTSA conducted formal rule-making proceedings and initially proposed a standard requiring seat belts in all buses. *See id.* NHTSA spent a year studying the safety issues and conducted a cost-benefit analysis of whether seat belts should be required in motorcoaches for passengers by balancing the factors in favor of and against seat belts. *Id.* NHTSA considered the difference in the structures of motorcoaches and school buses, the difference in clientele, the difference in types of accidents, and the difference in routes. *Id.* NHTSA also considered accident and injury statistics for motorcoaches. *Id.* Finally, NHTSA engaged in further rulemaking proceedings in stating its decision that a standard requiring seat belts was not desirable. 39 Fed. Reg. 27585; MCI Brief, Appendix 6b.

The only *Geier* preemption-indicating factor not present here is the *Geier* plan to phase-in the safety options. This is not surprising, since NHTSA did not issue a standard

here. Thus, of the preemption indicating factors that could be present here, all three are present.

## **2. Plaintiffs Ignore NHTSA's Unusual Word Choice.**

In addition to the factors mentioned in *Geier* and *Wyeth*, one other factor is present. That factor is word choice. And Plaintiffs all but ignore it.

In the 1974 Notice of Public Rulemaking, NHTSA indicated that a standard requiring seat belts in motorcoaches was not appropriate. *Id.* What it actually said was this: “The NHTSA will, of course, propose standards in the future in this area if they are *found desirable*.” *Id.* Clearly, in 1974 NHTSA did not find a seatbelt *standard* desirable.

The word “desirable” is not the type of word an agency would use if the agency were merely ambivalent or noncommittal. The word “desirable” embodies a value judgment of good versus bad, of something having value versus something not having value. That this was a significant word choice is evident when one considers the other words available to NHTSA. The most obvious alternative choice is “necessary”—which certainly fits in with Plaintiffs’ argument that NHTSA merely left passenger seating requirements *unregulated* because seat belts were unnecessary. But NHTSA did not say that it would issue a standard in the future when it found seatbelts *necessary*. It said *desirable*.

The difference is significant. This Court cannot ignore NHTSA’s unusual choice of words and should consider it as another preemptive factor. The choice embodies a value judgment that NHTSA should not issue a *standard* requiring seat belts.

## **B. To Refute Preemption, Plaintiffs Dismiss Later Events and Rely on**

### **Flawed Logic.**

MCI has relied on other events and other statements by NHTSA to argue that NHTSA's 1974 decision preempts Plaintiffs' seat belt claim. Plaintiffs dismiss some as insignificant or irrelevant and uses flawed logic to dismiss others.

#### **1. The 1977 Study is Significant.**

First, Plaintiffs miss most of the point of the 1977 report prepared by Indiana University's Institute for Research in Public Safety. MCI Brief, Appendix 11. Plaintiffs agree that the study was performed to "test the cost/benefit analysis used by NHTSA in 1974." Plaintiffs Brief, p. 35. The study is significant for several other reasons. First, it confirms that NHTSA and NTSB disagreed on whether or not seatbelts should be required in buses. STANSIFER, *supra* p. 18, at 1. NHTSA, the regulating DOT<sup>7</sup> agency, thought seat belts should not be required; NTSB, the non-regulating DOT agency, argued that seat belts should be required. Second, it reveals that when NHTSA was considering the standard, ejections were not a significant problem for motorcoaches. *Id.* at 13. Third, it confirms that the seating design or arrangement then in use in motorcoaches was protecting passengers in crashes. *Id.* at 101. Fourth, it confirms that the effectiveness of seat belts depended on a variety of factors and that seat belts were not a positive, factor in all crashes. *Id.* at 10–18, 64–99.

In short, the report confirms that NHTSA was confronted with a choice to ensure

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<sup>7</sup> "DOT" is short for Department of Transportation, the umbrella governmental agency responsible for all aspects of transportation in the United States, including safety. Four DOT sub-agencies have some responsibility for highway safety. They include NHTSA, NTSB, and the Federal Highway Administration. The Federal Highway Administration commissioned the study.

passenger safety. It chose against requiring seat belts and in favor of the seating arrangement then used by motorcoaches, which it found was protecting passengers.

## **2. The 1992 Letter is Significant.**

Plaintiffs also attempt to dismiss the 1992 letter from NHTSA General Counsel to an MCI employee as insignificant. For the reasons discussed in MCI's Brief on the Merits, pp. 42–4, the letter is significant.

## **3. Plaintiffs Point to Immaterial Matters or Relies on Flawed Logic.**

Other facts Plaintiffs rely on to refute preemption are either immaterial or do not do what they argue.

**The 1989 Letter Does Not Help Plaintiffs.** Plaintiffs attempt to refute the 1992 NHTSA letter with a 1989 NHTSA letter regarding Nevada's desire to install seat belts in Nevada-owned buses used to transport Nevada state prisoners. Plaintiffs Brief, p. 37. NHTSA states in the letter that Nevada was free to specify a certain design for seat belt anchoring. *Id.* This statement does nothing to further Plaintiffs' position because the preemption clause of the Safety Act specifically states that it does not prevent any state from establishing a safety requirement for vehicles *procured for the State's own use* if the requirement imposes a higher standard than the applicable federal standard. *See* 15 U.S.C. 1392 (d). Nevada fell within this exception because it intended to install seat belts for the passengers on its own prison buses. 28 C.R. 6519–20.

**For the 1974 decision to be preemptive, NHTSA need not be opposed to the voluntary installation of seat belts by some manufacturers.** In an attempt to show that

NHTSA was not opposed to manufacturers installing seat belts in their motorcoaches, Plaintiffs point to another statement in the 1989 letter and to testimony in the record. Even assuming that NHTSA was not opposed if motorcoach manufacturers installed seatbelts in their buses, this does not necessarily refute a preemptive intent in 1974.

That NHTSA was opposed to *requiring* all motorcoaches to install seatbelts does not necessarily mean that it was completely opposed to any seat belts in motorcoaches. After all, NHTSA has required seat belts in other buses. 49 C.F.R. 571.208. The two positions are quite different. Under one, every motorcoach manufacturer must install specific seat belts in every motorcoach over 10,000 pounds. Under the other, some motorcoach manufacturers might choose to install seat belts of their choice.

This sort of approach by NHTSA is not completely unheard of. To an extent, the agency did this in *Geier*. It refused to *require* air bags or passive restraints in all cars, choosing instead to phase them in over some period of time. *Geier*, 529 U.S. at 874–77. At the same time, NHTSA gave manufacturers extra credit for installing more air bags and other passive restraints than required. *Id.* The *Geier* Court did not find these actions contrary to preemptive intent or even inquire if they were contrary to a preemptive intent.

This sort of approach also makes sense logically and practically. In 1974, when NHTSA looked at the issue, it decided that a standard requiring seat belts was not desirable. NHTSA concluded that the seating design currently in use was protecting passengers. The seating arrangement was a known quantity. Seat belts on motorcoaches were not a known quantity. The known quantity was effectively protecting passengers. Seat belts, the unknown quantity, had a neutral, positive, or negative impact depending

on the circumstances. STANSIFER, *supra* p. 18, at 10–18, 20–23, 64–99.<sup>8</sup>

Although seat belts were more effective at preventing ejections in rollovers, ejections were not a significant problem in 1974. *Id.* at 13. In addition, in less severe crashes involving less significant injuries, seat belts tended to have a positive, neutral, and negative impact. *Id.* at 10–18, 64–99. In light of these statistics, logically, it makes sense that NHTSA would not want to require an unknown. It also makes sense that NHTSA would not be opposed to manufacturers installing seat belts in their buses. In this manner, NHTSA could compile more statistics on the benefits and detriments of seat belts and ascertain if its initial decision was still valid. Additionally, in this manner, passengers might become more used to having seat belts in motorcoaches and be more likely to use them. In fact, this was one of NTSB's positions. *Id.* at 2.

In short, the fact that NHTSA may not have been opposed to manufacturers voluntarily installing seat belts does not refute the initial preemptive effect of its 1974 refusal to issue a standard requiring them.

**Plaintiffs complain that NHTSA is now having to conduct studies on seat belts, which they claim shows that NHTSA merely left seat belts unregulated.** Plaintiffs Brief, p. 38, 47. This claim also does not prove or disprove that NHTSA simply left seat belts unregulated and did not preempt the issue. In fact, Plaintiffs do not really attempt to explain why this proves that NHTSA has left seat belts unregulated or

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<sup>8</sup> In the Institute for Research in Public Safety study, the relative benefits of seat belts were evaluated based on judgment calls from experts in the field, not from statistics of motorcoach passengers wearing seat belts. STANSIFER, *supra* p. 18, at 10, 11–18, 64–99.

has any connection to the issue.

**Plaintiffs frequently state that “the absence of a federal standard cannot implicitly extinguish state common law.”** This statement is inaccurate on several levels. First, if Plaintiffs mean that NHTSA’s decision not to issue a standard regarding seat belts could not implicitly preempt Plaintiffs’ claims, that is wrong. In fact, the Supreme Court said just the opposite in *Sprietsma*. *Sprietsma*, 537 U.S. at 64. Second, if Plaintiffs are equating the situation here with the lack of a regulation in *Myrick* and *Sprietsma*, that also is wrong. In *Myrick* the Court stated that there was no standard because NHTSA *withdrew the standard*. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 284–287 (1995). Likewise, in *Sprietsma*, the Coast Guard did not refuse to issue a standard because it did not want to require propeller guards; it refused to issue a standard primarily because there did not appear to be a “universally acceptable propeller guard” for “all modes of boat operation.” *Sprietsma*, 537 U.S. at 67. In short, the Coast Guard did not study two forms of protection and affirmatively choose not to require one of them. *Id.*

**Plaintiffs’ claim that the detailed standards NHTSA has issued for motorcoach drivers and for smaller buses and school buses proves that NHTSA has simply left motorcoaches unregulated.** This also is not true. This fact actually confirms MCI’s position. Because of their size, motorcoaches often have an advantage in many crashes over these other buses. STANSIFER, *supra* p. 18, at 27. In part, that probably explains the difference in standards. Also, some of the smaller buses more often carry children and therefore need seat belts. 39 Fed. Reg. at 27585–6. In the early

years, ejections were low. STANSIFER, *supra* p. 18, at 15. The seating design was protecting passengers. 39 Fed. Reg. 27585. NHTSA considered them safe. *Id.* Seat belts added some degree of uncertainty. STANSIFER, *supra* p. 18, at 10–15, 20–23, 64–76. NHTSA did not want to require seat belts. Only recently, when ejections reached an unacceptable level to NHTSA, did NHTSA begin considering seat belts to address that issue. Letter from Rosalyn G. Millman, *supra* p. 14, at 2.

### **Conclusion**

In issuing FMVSS 205 and in deciding not to issue a standard requiring seat belts, NHTSA did the same things it did in *Geier* and other cases in which its standards were found preemptive. It considered various competing concerns. It conducted studies. It performed cost-benefit analyses. It struck a balance among the competing concerns. It conducted formal rule-making.

Here, in one case, it concluded that it must give a choice. In the other, it decided it did not approve of a standard requiring seat belts in all motorcoaches. These decisions are preemptive. They are the role of agencies, not juries.

This Court should reverse the court’s judgment and render a take nothing judgment for MCI.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The undersigned certifies that on the 16th day of October, 2009, this document was served on all parties or their attorneys of record listed below by certified mail, return receipt requested.

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