# NO. 09-0048

## IN THE SUPREME COURT OF TEXAS

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Motor Coach Industries Mexico, S.A. de C.V.,
f/k/a Dina Autobuses, S.A. de C.V.

*Petitioner*

v.

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

*Respondents*

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

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**PETITION FOR REVIEW**

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## STATEMENT OF THE CASE

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| Nature of the case: | This appeal arises from a products liability suit brought by Respondents against Petitioner, a manufacturer of motorcoaches, and others for injuries arising from a motorcoach accident. Respondents alleged that the bus was defectively designed because it was not equipped with passenger seat belts or with laminated glass passenger windows. |
| Trial court and judge: | The 170th Judicial District Court of McLennan County, Texas, the Honorable Jim Meyer, presiding. |
| Disposition by trial court: | Following a jury trial, the trial court signed a final judgment awarding Respondents actual damages, prejudgment interest, and costs, totaling $17,008,153.22. The judgment also awarded post-judgment interest. |
| Appellants/court of appeals: | MCI Sales and Service, Inc. and Motor Coach Industries Mexico, S.A. de C.V. |
| Appellees/court of appeals: | James Hinton, Individually, and as Representative of the Estate of Dolores Hinton, Deceased; David Hinton, 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; Dwain Marshall, Individually; Bobbie Marshall, Individually; Sharon Marshall-Chapman, Individually; Patsy Beasley, Individually and as Executrix of the Estate of Wayne Beasley; Shirley Sommer, Individually; Mildred Myers, Individually; Mallory Miller, Individually; Barbara Miller, Individually; Peggy Armstrong, Individually; and Katherine Fulton, Individually and as Executrix of the Estate of Martha Louise McKee, Deceased. |

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|---|---|
| Court of appeals: | The Court of Appeals for the Tenth District of Texas sitting in Waco, Texas. |
| Participating justices: | Chief Justice Tom Gray and Justices Bill Vance and Felipe Reyna |
| Citation to opinion: | *MCI Sales & Service, Inc. v. Hinton*, No. 10-06-00256-CV, 2008 Tex. App. LEXIS 6951 (Tex. App.—Waco Sept. 10, 2008, pet. filed) |
| Appellate court disposition: | In a 2-1 opinion authored by Justice Vance, the court of appeals rejected the federal preemption claim, but reversed the trial court's judgment and remanded the case for a new trial based on the trial court's failure to submit all settling parties in the charge for the jury to determine their proportionate responsibility, as required by Chapter 33 of the Texas Civil Practice and Remedies Code. Chief Justice Gray dissented that he would render a take-nothing judgment because respondents' claims are preempted by the Federal Motor Vehicle Safety Standards. After the court of appeals issued its opinion, but before motions for rehearing were due, the court suspended the appeal because MCI Sales and Service, Inc. filed bankruptcy on September 15, 2008. On October 15, 2008, the court of appeals severed the MCI Sales and Service, Inc. appeal from the remainder of the appeal, and reinstated the appeal as to Motor Coach Industries Mexico, S.A. de C.V. Respondents filed a motion for rehearing in the reinstated appeal, which the court of appeals denied on December 9, 2008. |

## STATEMENT OF THE JURISDICTION

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

This Court also has jurisdiction under section 22.001(a)(6) because this appeal involves significant issues of preemption that have not been addressed by this Court, and are likely to recur. *See* TEX. GOV'T CODE § 22.001(a)(6). Petitioner, a motorcoach manufacturer, was sued by respondents for injuries they suffered as a result of a motorcoach crash on Interstate 35. Respondents allege that the motorcoach was unreasonably dangerous because it did not have passenger safety belts and laminated glass on the side windows. In both respects petitioner's motorcoach complied with the National Highway Traffic Safety Administration's (NHTSA) safety standards for occupant crash protection (Federal Motor Vehicle Safety Standard 208) and for window glazing (Federal Motor Vehicle Safety Standard 205). Petitioner claimed that respondents' claims were preempted, but two justices on the three-member panel held that they were not.

Respondents' claims as to both safety belts and window glazing have a very great potential to be raised in other lawsuits involving motorcoaches. Similar claims are being made around the state as to seatbelts and glazing in motorcoach buses, and as to glazing in private automobiles. Thus, if this Court chooses not to take this case, the opinion of

the court of appeals will be argued as the law of the state on these significant issues of first impression.

**ISSUES**

1. Pursuant to statutory authority, the National Highway Traffic Safety Administration promulgated detailed regulations specifying the equipment required on motorcoach buses. *See* 49 C.F.R. §§ 571.101 *et seq*. NHTSA specifically studied and rejected a proposal to require safety belts at all passenger positions on motorcoaches, finding that there was no safety need for seat belts. A jury in McLennan County, Texas, found otherwise and held Petitioner liable for manufacturing a bus that is in perfect compliance with all applicable federal regulations. Are the respondents' claims that the motorcoach bus was defective and unreasonably dangerous because it lacked passenger seat belts preempted under applicable doctrines of federal preemption?

2. The Court of Appeals held that Hinton's suit, which would result in a state tort rule of law imposing a duty on motorcoach manufacturers to install seat belts for passengers, did not conflict with or stand as an obstacle to the accomplishment of the objectives of (1) NHTSA's 1974 decision that there was no need for passenger seat belts, (2) NHTSA's refusal in 1974 to issue a standard requiring passenger seat belts, and (3) NHTSA's statements of preemptive intent contained in its chief counsel's 1992 letter to petitioner's affiliate. Was this error?

3. (Unbriefed Issue). In *Geier v. American Honda Motor Company*, the U.S. Supreme Court held that the preemption clause of the Motor Vehicle Safety Act when read with the savings clause contained in the Act reflects a neutral policy—not a specially

favorable or unfavorable policy—towards preemption. 529 U.S. 861, 870–873 (2000). The Court of Appeals applied a more onerous burden. It held that Petitioner did not meet "the difficult burden of overcoming the presumption against preemption." *MCI Sales & Service, Inc. v. Hinton*, No. 10-06-00256-CV, 2008 Tex. App. LEXIS 6951, at *15 (Tex. App.—Waco Sept. 10, 2008, pet. filed). Did the Court of Appeals err when it applied a heightened presumption contrary to *Geier*?

4. NHTSA also promulgated detailed Federal Motor Vehicle Safety Standards (FMVSS) authorizing two types of glazings for motorcoach side windows: tempered glass and laminated glass. *See* 49 C.F.R. § 571.205. Even after a 10-year study of the utility of advanced glazings to prevent ejections and a 5-year study of motorcoach passenger safety, NHTSA decided in 2001 not to change the glazings permitted in FMVSS 205. Both studies confirmed that window glazings are not the best means of preventing ejections. Regarding motorcoaches, NHTSA concluded that increasing motorcoach roof strength and installing seat belts would be more effective in preventing ejections than window glazings, and NHTSA expressed its intent to focus on these two methods to improve passenger safety. Respondents claimed that the motorcoach was defective and unreasonably dangerous because it lacked laminated glass on the side windows, which they say would have prevented ejections. The jury agreed. Are the respondents' claims and the jury's verdict contrary to NHTSA's decision to provide a choice of glazings in FMVSS 205, and does it frustrate a federal policy as expressed by NHTSA to focus on roof strength and seat belts because window glazings are not the effective way to prevent ejections? Are these claims preempted?

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Petitioner, Motor Coach Industries Mexico, S.A. de C.V., files this Petition for Review under Texas Rule of Appellate Procedure 53.2 and shows the following:

## PRELIMINARY STATEMENT

The basic issue in this case is whether the National Highway Traffic Safety Administration or juries throughout the country should decide what safety equipment should be on a motorcoach designed for interstate travel, which is the subject of extensive federal regulations. The trial and appellate courts in Waco, Texas determined that a jury in that city was not precluded by principles of federal preemption from deciding this issue. Hence, this petition.

## STATEMENT OF THE FACTS

### The Creation of NHTSA.

Congress enacted the National Traffic & Motor Vehicle Safety Act to reduce traffic accidents and deaths and injuries resulting from traffic accidents. *Motor Vehicle Mfr.'s Ass'n of the U. S. v. State Farm Mut. Ins. Co.,* 463 U.S. 29, 33 (1984); *see* 15 U.S.C. §§ 1381 *et seq.* (1976 ed. and Supp. V (current version at 49 U.S.C. §§ 30101 *et seq*. (1994))); Appendix 5b. Congress delegated the authority to promulgate safety standards under the Act to the Administrator of the National Highway Traffic Safety Administration. *Motor Vehicle Mfr.'s Ass'n*, 463 U.S. at 452; *see also* 49 C.F.R. § 1.50 (a) (1982); Appendix 5a. The Administrator was to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated

in objective terms." *Motor Vehicle Mfr.'s Ass'n*, 463 U.S. at 451; 15 U.S.C. § 1392(a) (1976 ed., Supp. V) (current version at 49 U.S.C. §§ 30101 *et seq.* (1994)); Appendix 5c.

**The 1973 Proposed Rule that Ultimately Was Withdrawn.**

In 1973, NHTSA issued a notice of proposed rule making (NPRM) entitled "Bus Passenger Seating and Crash Protection." 38 Fed. Reg. 4776 (proposed Feb. 22, 1973); Appendix 6a. NHTSA proposed that bus seats be made stronger, with higher seat backs and with more padding. *Id.* These would keep, or contain, the passenger within the seating area during a crash, and would protect the passenger. *Id.* NHTSA also proposed to equip each seat with a belt anchored to a seat. *Id.* NHTSA incorporated these proposals into a proposed new standard for all buses. *Id.*

**1974 NHTSA Comment Still in Effect Today.**

After a year of study, NHTSA withdrew this proposed standard. 39 Fed. Reg. 27585 (July 30, 1974); Appendix 6b. Instead, NHTSA concluded that the proposed containment standards should apply only to three types of buses that regularly carry children, and that seat belt requirements were not justified for intercity (motorcoach)[1] and transit buses. *Id.* NHTSA withdrew its proposed minimum seating standards for intercity and transit buses, refused to promulgate a standard requiring seat belts for motorcoaches, and denied the petition by the Center for Auto Safety to require seat belts in motorcoaches because there was safety reason to require belts.[2]

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[1] Intercity buses are motorcoaches. *See*, *e.g.*, 67 Fed. Reg. 14903 (Mar. 28, 2002); Appendix 6c.

[2] After this, NHTSA created separate standards for school buses (FMVSS 222) and motorcoaches and transit buses (FMVSS 208, the general standard for occupant crash protection) 39 Fed. Reg. 27586 (July 30, 1974); *see also* 49 C.F.R. § 571.222; 49 C.F.R. § 571.208. NHTSA required seat belts in motorcoaches—but only for the drivers. 49 C.F.R. § 571.208 at S4.4.1. Beginning in 1991, NHTSA distinguished between buses over 10,000

**NHTSA Explained the Preemptive Effect in a 1992 Letter.**

Since 1974, NHTSA has not retreated from its refusal to require motorcoaches to install seat belts on its cost/benefits analysis. In 1992, NHTSA explained the preemptive effect of its 1974 proposed rule and its withdrawal. Letter from Paul Jackson Rice, Chief Counsel for NHTSA to C.N. Littler, Coordinator, Regulatory Affairs, Motor Coach Industries (Aug. 19, 1992) DX 108, Appendix 7. Petitioner's affiliate (MCI) asked NHTSA if proposed legislation that required motorcoaches in New York State to be equipped with passenger seat belts for all seats was preempted.

The Chief Counsel for NHTSA explained that the legislation was preempted.

> Standard No. 208 requires compliance with either of two options for the driver's seating position, the installation of an automatic restraint or the installation of either a lap belt or lap/shoulder belt, and does not require any type of occupant protection system at any other seating position. **NHTSA expressly determined that there is not a safety need for safety belts or another type of occupant crash protection at these seating positions**. *See* 39 Fed. Reg. 27585 (July 30, 1974). With respect to these large buses, the New York bill would be preempted to the extent that it requires seat belts to be installed at seating positions other than the driver's seating position.

*Id.* (emphasis added).

The letter reflects NHTSA's own belief that the safety standard and its 1974 decision not to require seat belts in motorcoaches both preempted that issue. For, when the chief counsel ultimately stated that the proposed legislation was preempted, he based

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pounds (motorcoaches) and buses less than 10,000 pounds. 49 C.F.R. § 571.208 at S4.4.3. For buses less than 10,000 pounds, NHTSA required passenger seat belts. 49 C.F.R. § 571.208 at S4.4.3.2. Buses weighing over 10,000 pounds, like the one at issue here, are still not required to have passenger seat belts.

that not only on Standard 208, but also on NHTSA's conclusion in 1974 that "there is not a safety need for safety belts or another type of occupant crash protection" in passenger seating areas. *Id.*

**Recent Notices Regarding Motorcoach Safety.**

More recently, NHTSA has revisited motorcoach safety. In 2002 it requested comments and stated its intent to follow a two-tiered approach to improving motorcoach occupant protection. 67 Fed. Reg. 14903-04 (Mar. 28, 2002); Appendix 6c. The first tier would focus on preventing crashes and rollover devices. *Id.* at 14905.

The second tier would focus on minimizing injuries and fatalities from crashes and rollovers. One part of this focus would be to reduce ejections from motorcoaches. NHTSA listed 4 ways ejections could be minimized: 1) limiting the size of glazing materials and upgrading standards for window retention, 2) roof crush safety standards, 3) side curtain airbags, and 4) restraint systems. *Id.* But before seat belts were installed, NHTSA pointed out that it would need to investigate (1) changes in the structure of motorcoaches to ensure that seats and seat belts have adequate strength to withstand impacts, (2) modifications to seat reclining features, and (3) seat belt usage rates. *Id.*

In 2007, NHTSA issued a new paper presenting a "comprehensive review of motorcoach safety issues" entitled "NHTSA's Approach to Motorcoach Safety."[3] Memorandum from Roger A. Saul, Director, Office of Crashworthiness Standards to NHTSA Docket 2007–28793 (Aug. 6, 2007) (available at

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[3] Respondents submitted this paper to the Court of Appeals during the pendency of the appeal. The Court of Appeals judicially noticed it and referred to it in its opinion in footnote 5. *See MCI Sales & Service,* 2008 Tex. App. LEXIS at *19 n. 5.

http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Vehicle9020Safety/Articles/Associated%20Files/481217.pdf); Appendix 8. NHTSA noted what a safe mode of transportation motorcoaches have been, but acknowledged that accidents, though "relatively rare," can cause a significant number of fatal or serious injuries. *Id* at 2.

NHTSA prioritized its strategies using a cost benefit analysis. *Id*. at 11. The first priority was motorcoach roof strength. Roof strength plays an important role in ejections because the bus frame becomes deformed in rollovers, which causes windows to pop out. *Id*. at 11, 20. The second priority was seat belts. *Id*. at 12. Seat belts are the most direct method of retaining passengers within the seating compartment and could protect passengers in multiple types of crashes "including rollover." *Id*. at 12–13. NHTSA also noted that many crashes involve fairly high accelerations and roof "deformations" that glazing materials and windows cannot withstand. *Id*. at 12, 20. Seat belts could prevent ejections in these circumstances. *Id*.

As in 2002, NHTSA acknowledged that before seat belts could be installed, studies must be performed to assess the various physical forces at play in crashes and rollovers so that seat belts could withstand them. *Id*.

**Window Glazing.**

NHTSA also regulates windows in buses. Safety standard 205 identifies glazing materials that must be used on windows in motor vehicles. 49 C.F.R. § 571.205; Appendix 5e. The purpose of glazing materials is to "reduce injuries resulting from impact to glazing surfaces, ensure a necessary degree of transparency in windows for driver visibility, and minimize the possibility of occupants being thrown through the

vehicle windows in collisions." *Id.*

As the Court of Appeals stated in its opinion, FMVSS 205 recognizes two types of glass for use in motorcoaches: tempered glass and laminated glass. These two options have been a part of the safety standard since 1972. The Society of Automotive Engineers Glazing Materials Standards Committee asked NHTSA to upgrade its standard with 1983 and 1991 revisions, but NHTSA refused. In 1991 NHTSA began to study advanced side glazing as a way of reducing ejections from cars. In 2001 Congress ordered NHTSA to decide whether to issue a new regulation on advanced side glazing. After 10 years of study, NHTSA decided to keep the current glazing requirements for tempered glass and laminated glass. *See* National Highway Traffic Safety Administration, Final Report, Ejection Mitigation Using Advanced Glazing (Aug. 21, 2001); Appendix 9.[4]

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

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

materials to- developing more comprehensive performance–based test procedures. *Id*. at x–xi, 53–54.

NHTSA also considered how to reduce ejections from motorcoaches in a 2007 report on motorcoach safety. It concluded that two other solutions would reduce ejections more effectively than a change in glazing materials: roof strength and seat belts. *Id*. at 11. Glazing, though something to continue studying, was put on the back burner. *Id*. at 19–20.

**The Bus, the Accident, and Ensuing Suit.**

The bus in question was manufactured in 1995 and imported into the United States in 1996. It was fully compliant with all applicable regulations. On February 14, 2003, it was involved in an accident on Interstate 35 between Temple and Waco. The weather was bad; it was overcast. The road was wet and hilly. The driver of the bus, not realizing soon enough that the traffic in front of him on Interstate 35 was stopped, swerved, causing the motorcoach to cross the median and careen into an oncoming Suburban. The motorcoach tipped onto its side, slid, and came to rest on a grassy bank on the far side of the oncoming traffic. Some bus passengers were ejected; others, though not ejected, were injured. Five passengers died; fourteen were injured. Respondents sued Petitioner claiming, among other things, that the motorcoach was defectively designed because it lacked passenger seat belts and laminated glass in the side passenger windows.

## SUMMARY OF THE ARGUMENT

This appeal is about preemption. The Court of Appeals erroneously held, in two separate issues of first impression for Texas state courts, that neither NHTSA's deliberate

decision not to require passenger seat belts nor its decision to permit tempered glass in passenger windows preempted these product liability claims.

In deciding whether an area of law is preempted, courts search for expression by the relevant federal agency of an intent to preempt. NHTSA has expressed its intent to preempt seating safety in motorcoaches by its refusal in 1974 to require seat belts in motorcoaches because there was no safety need for them, by the issuance of Standard 208 which requires seat belts only for drivers, and by a 1992 letter in which its chief counsel claimed preemption by relying on both the safety standard and the 1974 refusal to require seat belts. In light of these expressions of an intent to preempt, the Court of Appeals erred when it held that Hinton's lawsuit was not impliedly preempted. In addition, the Court of Appeals erred when it held that the Hinton's lawsuit, which would require seat belts on motorcoaches, does not conflict with NHTSA's purposes in not requiring seat belts.

The Court found that Standard 205, the standard on window glazings, is a minimum standard that does not preempt a state rule requiring a higher standard. It relied solely on the Fifth Circuit Court of Appeals opinion in *O'Hara v. General Motors Corporation*, 508 F.3d 753 (5th Cir. 2007), which reached this same conclusion. The Fifth Circuit apparently did not have before it a Final Report NHTSA issued after a 10-year study on ejections from motor vehicles and advanced glazing. In that study, NHTSA concluded that, although some glazing materials were better at preventing ejections, they created new problems for belted passengers that the current tempered glass did not. NHTSA decided against requiring advanced glazing materials and to keep

the current glazing requirements. It would pursue other options such as side air bags to prevent ejections. Additionally, in a 5-year motorcoach study NHTSA concluded that glazing systems were not the answer to reduce ejections. But, increasing roof strength and installing seat belts would reduce ejections. The trial court erred by ignoring the extensive studies NHTSA conducted and by holding that respondents' suit would not frustrate a federal policy and that NHTSA's actions did not equal an intent to preempt. *See Geier*, 529 U.S. at 875–883; *Int'l Paper Co. v. Ouellette*, 471 U.S. 1481, 493–97 (1987).

## ARGUMENT

### I. NHTSA's actions in 1974 and 1992 reflect an intent to preempt.

The Court of Appeals concluded that respondents' lawsuit was not impliedly preempted because NHTSA has not reflected an intent through FMVSS 208 to preempt state tort lawsuits that would require seat belts for all motorcoach passengers. *MCI Sales & Service*, 2008 Tex. App. LEXIS 6951 at *18-19. In reaching this result, the court erred in several ways.

First, the court erred in deciding that NHTSA has not expressed any intent to preempt state regulation of passenger seat belts in motor coaches. Twice NHTSA has expressed its conclusion that passenger seat belts should not be required. This conclusion has as much preemptive force as would a decision to require seat belts. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66–7 (2002); *see also Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 67 (1947).

In 1974, NHTSA decided not to require seat belts in motorcoaches. NHTSA affirmatively concluded that passenger seat belts in motorcoaches were not justified because there was not a safety need for them. 39 Fed. Reg. at 27585 (July 30, 1974); Appendix 6b, at 1. After at least a year-long study NHTSA concluded, among other things, the following:

- the different vehicle structures, operating speeds, and conditions and accident modes of school buses, transit buses, and motorcoaches dictate different requirements for the different buses;
- seating requirements[5] for motorcoaches are not justified;
- no standard will issue imposing seating requirements in motorcoaches and transit buses because the current design is adequate;
- the petition of the Center for Automotive Safety to require seat belts will be denied because the current seating adequately protects passengers; and
- it will propose safety standards in the future *if it finds them desirable*.

*Id*. (emphasis added). On its own, this 1974 comment sufficiently reflects an authoritative determination not to regulate.[6] *Sprietsma*, 537 U.S. at 66–7; *see also Surles v. Greyhound Lines Inc.*, 2005 WL 1703153 (E.D. Tenn. July 20, 2003).

A 1992 letter to MCI, an affiliate of Petitioner, from NHTSA's Chief Counsel dispels any doubt about the agency's intent. The Chief Counsel explained that a New York bill requiring passenger seat belts would be preempted to the extent that it required seat belts in motorcoaches at positions other than the driver's position. Appendix 7.

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[5] Seating requirements have to do with height and ability to withstand forces from the front, rear, and sides, and with seat belt anchorage. *See* Appendix 6b at 27587 (S5.1).

[6] The U.S. Supreme Court does not require a specific formal agency statement identifying preemption. *Geier*, 529 U.S. at 884. In the Appendix at tabs 4 and 12 are the preemption clause of the U.S. Constitution and the Savings Clause of the Motor Safety Act.

Although only express preemption is implicated in a discussion of state legislation, the Chief Counsel appears to have relied on both express and implied preemption, for he explained that the legislation was different from the standard NHTSA issued, then he stated that "NHTSA expressly determined that there is not a safety need for safety belts . . . at [passenger seats]." *Id.* This last statement addresses implied preemption and comes directly from the NHTSA 1974 NPRM. If the Chief Counsel intended to rely only on express preemption, this last statement was completely unnecessary because the variance from the standard alone established express preemption. But instead of stopping there, he also reminded MCI of NHTSA's decision that there was not a safety need for belts.

The Court of Appeals also concluded that NHTSA had no intent to preempt passenger seat belts on this issue. But a host of cases—including *Sprietsma*—state that silence, or the failure of a federal regulatory agency to issue a regulation covering a specific issue, does not necessarily mean no preemptive intent. *Sprietsma*, 537 U.S. at 66–67; *see also Ouellette*, 479 U.S. at 493–496; *Bethlehem Steel*, 330 U.S. at 773–775. For example, in *Bethlehem Steel v. New York State Labor Relations Board*, foremen in New York filed petitions with the National Labor Relations Board—which the NLRB denied—requesting that they be allowed to unionize as a class. 330 U.S. at 769, 774–75. Later the foremen petitioned the New York Labor Relations Board, requesting that they be allowed to unionize.[7] The New York Board approved the request. *Id.* at 769–771. The U.S. Supreme Court held that the New York Board had no authority to act because the issue was preempted. Although the NLRB had not issued a regulation stating that

[7] New York's Labor Relations Board was authorized to act in areas the NLRB had not.

foremen were not a proper bargaining unit, the Court held that should not be interpreted as a statement that the NLRB had no authority over the issue. *Id.* The NLRB's failure to act "[took] on the character of a ruling that no such regulation is appropriate or approved." *Id*. at 774. The NLRB's refusal to act "was a determination and an exercise of discretion to determine that such units were not appropriate for bargaining purposes." *Id*. at 774–775.

That is the situation presented here. Clearly, NHTSA has the authority to regulate seat belts in motorcoaches; it has done so—requiring seat belts for drivers of motorcoaches. 49 C.F.R. § 571.208; Appendix 5d. And, at first it intended to require seat belts for passengers too, *see* 38 Fed. Reg. 4776 (Feb. 22, 1973), but, as discussed, concluded otherwise, finding no safety need for them. 39 Fed. Reg. 27585 (July 30, 1974); Appendix 6b. It reiterated this determination in the 1992 letter. Appendix 7.

Even with its recent motorcoach studies NHTSA was not focusing primarily on requiring seat belts for passengers. In 2002, NHTSA focused first on technology that could help avoid crashes altogether, and then on window glazings, roof strength, side air bags, and finally restraint systems. 67 Fed. Reg. at 14904–05 (Mar. 28, 2002); Appendix 6c. After further study, in 2007 NHTSA changed its priorities, deciding to place at a high priority increased roof strength and restraint systems. Appendix 8.

In summary, NHTSA has not issued a standard on passenger seat belts; it did not do so because there was no safety need. Recently, NHTSA has re-evaluated the need, but has not issued a standard, waiting for studies to indicate the necessary details of such a system. *Id*. The Court of Appeals erred in not finding preemption on this issue, for the

jury verdict is contrary to NHTSA's earlier expressions that no seat belts are needed and frustrates its more recent expressions that it will require restraint systems after it obtains sufficient data to determine the specifics of such a system.

## II. The Court of Appeals erred in holding that NHTSA's 10-year study on the role of advanced window glazings and NHTSA's decision not to change FMVSS 205 and to look to other ways of preventing ejections did not amount to an intent to preempt state regulation on window glazings.

The Court of Appeals also erred by not finding preemption of the window glazing issue. This issue is controlled by *Geier*. There, the Supreme Court reviewed a NHTSA safety standard—FMVSS 208—that required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints. *Geier*, 529 U.S. at 864–65. The regulatory agency chose to phase in passive restraints (such as nondetachable automatic belts and airbags) and not require them all at once. *Id*. This was a deliberate decision based on various concerns associated with each of the passive restraint systems and with the goal of getting as many people as possible to wear seat belts. *Id*. at 880–881. As in *Geier*, NHTSA's decision to give motorcoach manufacturers choices for side window glazings reflects a deliberately chosen federal policy, reached after weighing competing concerns.

In FMVSS 205, NHTSA chose to give motorcoach designers the choice between tempered glass and laminated glass, recognizing that the two do not perform in the same way. *See* 49 C.F.R. § 571.205. The ANSI/SAE Z26.1–1996, which sets out the requirements for glazing on windows, states the following: "One safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type. *Since accident conditions are not standardized, no one*

*safety glazing material can be shown to possess the maximum degree of safety under all conditions,* against all conceivable hazards." ANSVSAE Z26.1-1996 at 2.2 (emphasis added); Appendix 11.

Section 2.2's statement that some glazings are better for some hazards and others for other hazards was borne out by the 10-year NHTSA study on ejections and the role of advanced glazing systems in preventing ejections from cars. Appendix 9. It found that window glazings are not the best way to prevent ejections, and that the advanced glazings caused more problems for passengers who are not ejected. Tempered glass, while not as effective in preventing ejections, caused fewer neck injuries for passengers who were not ejected. At the end of that study, NHTSA weighed the various alternatives and chose to keep the current choice for window glazings and to look at other methods to prevent ejections.

NHTSA reached this same conclusion in a 2007 paper it issued on motorcoach safety. Appendix 8. It chose not to change the safety standard for window glazing, and to focus on factors other than glazing that would more effectively reduce ejections: increasing roof strength and studying the use of seat belts on motorcoaches. Again, NHTSA had to balance a number of considerations.

Both (1) the amount of research and study that went into NHTSA's conclusions on the relationship between glazings and ejections and (2) the deliberate choice to leave several options available to motorcoaches for side window glazing reflect NHTSA's intent to preempt and its intent to keep several options available to buses. *Geier*, 529

U.S. at 881–882.[8] Thus, the case is no different from *Geier,* in which NHTSA also chose—for various reasons—to give choices to the auto manufacturers. *Id.*

The Court of Appeals relied on *O'Hara v. General Motors Corp*. to conclude that NHTSA has not preempted state suits on window glazings. *Hinton*, 2008 Tex. App. LEXIS 6951, at *45; Appendix 3. However, in reaching its decision, the *O'Hara* court apparently looked only at the Final Rule (68 Fed. Reg. 43,971) NHTSA issued and at the Notice of Withdrawal (67 Fed. Reg. 41,365), noting that they were not very long and relied primarily on reasons other than safety for their conclusions not to change the window glazings standard. *O'Hara*, 508 F.3d at 761-762. It apparently did not look at the Final Report.[9] Appendix 8. That report was 55 pages; its conclusions were based primarily on safety considerations. *Id*. at ix-xi, 53-54. If one considers this report, this case is quite similar to *Geier*. 529 U.S. at 877-881; *see also Carden v. General Motors Corp*., 509 F. 3d. 227 (5th Cir. 2007).

Thus, for window glazings, Hinton's suit interferes with the methods NHTSA has chosen to protect passengers on motorcoaches. *Ouellette,* 479 U.S. at 493–94. It also interferes with a choice NHTSA deliberately intended to leave to motorcoach manufacturers, since both options perform differently—one may be better in some

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[8] This highlights one of the problems with the Court of Appeals' judgment. It allowed a jury verdict to stand even though the verdict was contrary to the conclusion NHTSA reached after its 10- and 5-year studies. It allows jurors, whose specific charge is to look only at a specific issue (whether MCI should have used a different material to prevent ejections), to override decisions made by NHTSA, which is charged with deciding the best way to achieve its safety goals by studying the whole picture.

[9] The *O'Hara* court found that NHTSA had not preempted the O'Hara's lawsuit in part because NHTSA's decision not to issue a new standard was based more on cost than on safety factors. *O'Hara*, 508 F.3d at 757. Yet the Final Report clearly states that NHTSA was concerned about the increase in neck injuries a new standard would cause. In addition, although the *O'Hara* court stated that these neck injuries were "minor," neither the Final Report nor the Notice of Withdrawal relied on by the *O'Hara* court described them as minor.

circumstances and not as good in others. *See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 154–56 (1982). Finally, it ignores the years of study NHTSA invested in these questions and the educated decisions it reached in light of these studies, replacing these with a jury's decision based on a narrowly focused look at the very broad and complex issue of ejections and passenger safety in motorcoaches.

## CONCLUSION AND PRAYER

The experts at NHTSA have studied hundreds of accidents since 1972 to decide whether seat belts and laminated side windows are necessary for the safety of passengers of motorcoaches. They answered "no." A McLennan County jury heard evidence about one accident. When asked if motorcoaches fully complying with federal standards are unreasonably dangerous, the jury answered "yes." The obvious contradiction calls for the proper application of preemption principles.

For all of the reasons stated above, Petitioner, Motor Coach Industries Mexico, S.A. de C.V., respectfully requests that this Court grant its Petition for Review, reverse the judgments of the trial court and the Court of Appeals, and render judgment that Respondents, Hinton, et al., take nothing because their claims are preempted. Petitioner also prays for any and all other relief to which it may be entitled.

Respectfully submitted,

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A true and correct copy of the foregoing instrument has been mailed to all counsel of record by U. S. Mail, certified mail, return receipt requested on the 25th day of February, 2009, as follows:

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**APPENDIX**

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|---|---|---|---|
| 1. | Charge of the Court | | |
| 2. | Final Judgment | | |
| 3. | Opinion and Judgment of the Tenth Court of Appeals | | |
| 4. | U.S. CONST. art. VI, clause 2 | | |
| 5. | a. | 49 C.F.R. § 1.50 | Delegation to Administrator |
| | b. | 49 U.S.C. § 30101 | Purpose and Scope |
| | c. | 49 U.S.C. § 30111 | Standards |
| | d. | 49 C.F.R. § 571.208 | Occupant Crash Protection |
| | e. | 49 C.F.R. § 571.205 | Glazing Materials |
| 6. | a. | 38 Fed. Reg. 4776 | 1973 Notice of Proposed Rule |
| | b. | 39 Fed. Reg. 27585 | 1974 Notice of Proposed Rule |
| | c. | 67 Fed. Reg. 14903 | 2002 Notice of Public Meeting |
| 7. | 1992 Letter to "NHTSA's Approach to Motorcoach Safety" | | |
| 8. | "NHTSA's Approach to Motorcoach Safety" | | |
| 9. | Ejection Mitigation Using Advanced Glazing: Final Report | | |
| 10. | 68 Fed. Reg. 43964 | | Proposed Final Rule |
| 11. | ANSI/SAE Z26.1-1996 | | American National Standard for Safety |
| 12. | 49 U.S.C. § 30103(e) | | Savings Clause of Motor Safety Act |