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June 10, 2010

Via Hand Delivery

Hon. Blake Hawthorne
Clerk, Supreme Court of Texas
201 W. 14th, Room 104
Austin, TX 78701

Re: No. 2009-0048; *Motor Coach Industries Mexico, S.A. de C.V., et al. v. James Hinton, Individually and as Representative of the Estate of Dolores Hinton, Deceased, et al.*; In the Supreme Court of Texas

Dear Mr. Hawthorne:

Respondents/Cross Petitioners James Hinton, et al. ("Hinton") respectfully submit this letter to apprise the Court of recent developments germane to the federal preemption issue pending before the Court in this case. Copies are provided for distribution to the justices.

On May 24, 2010, the United States Supreme Court granted the Petition for Writ of Certiorari in No. 08-1314, *Williamson v. Mazda Motor of America, Inc.* See 2010 WL 2025141. The primary question presented in *Williamson* is whether Federal Motor Vehicle Safety Standard ("FMVSS") 208 preempts a product liability claim based on the manufacturer's installation of a lap-only belt in the rear center seat of a passenger vehicle. It was undisputed that FMVSS 208 allowed the manufacturer to install either a "Type 1" (lap-only belt) or "Type 2" (lap/shoulder belt) in the rear, center seat position. The plaintiffs alleged, however, that the vehicle was defective because it was equipped with a lap belt rather than a three-point belt. The California state courts upheld the trial court's dismissal of the plaintiffs' claims under *Geier*, holding the claim was preempted, and the plaintiffs petitioned the Supreme Court.

While considering the plaintiffs' petition, the Supreme Court invited the Solicitor General "to file a brief in [the] case expressing the views of the United States." See Supreme Court docket, Case No. 08-1314, entry dated October 5, 2009. Solicitor General Elena Kagan filed the *Brief for the United States as Amicus Curiae* in the *Williamson* case on April 23, 2010. Joining the brief were the General Counsel, Assistant

General Counsel for Litigation, and Deputy Assistant General Counsel for Litigation for the Department of Transportation; and the Chief Counsel, Assistant Chief Counsel, and a Senior Trial Attorney for the National Highway Traffic Safety Administration. A copy of the brief is attached. Hinton respectfully requests the Court take judicial notice of the brief and the proceedings in *Williamson*. The brief is available at 2010 WL 1653014.

The United States supported the plaintiffs' petition requesting review of the California court's decision on preemption.¹ The United States asserts:

The decision below is at odds with the regulatory history of FMVSS 208 and the government's longstanding position on the preemption of state common-law tort suits by Federal Motor Vehicle Safety Standards that set only minimum standards. In reaching its conclusion, the decision below gave too broad a reading to [the Supreme Court's] decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Several other lower courts, both federal and state, have similarly misinterpreted *Geier*, and that recurring error has led to conflicts regarding the preemptive effect of other aspects of the FMVSS (although there is not yet a square disagreement over the precise factual scenario presented here, i.e., a decision not to install a Type 2 seatbelt [in a rear, center seat]). The lower courts' methodological error is important: it effectively deprives the Safety Act's savings clause of its proper effect; it transforms the FMVSS from a minimum standard into a definitive standard of care; and it does so contrary to the consistent position of the agency that promulgated the standards, as repeatedly expressed in the government's briefs to this Court beginning in 1990.

Brief of the United States, p. 8. The United States argues further:

The state appellate court characterized FMVSS 208 as giving manufacturers the "option" of installing either Type 1 or Type 2 seatbelts at any position for which a Type 2 seatbelt was not expressly required. Pet. App. 16 (citation omitted). As a result, the court held that state tort law is preempted under *Geier* when the state law imposes liability for choosing the less protective option. The state court's reading of *Geier* is incorrect. A Federal Motor Vehicle Safety Standard is a "minimum standard." 49

¹ The plaintiffs also asked the Supreme Court to review a dismissal of their "failure to warn" claims. The United States argued that the Supreme Court lacked jurisdiction to review that issue since it was predicated on a state-law issue independent of the federal issue. The Supreme Court limited their certiorari grant to the plaintiffs' preemption issue.

U.S.C. 30102(a)(9). Accordingly, a state common-law duty of care that effectively sets a higher minimum does not create a conflict with federal law, in the absence of specific features of a particular FMVSS that go beyond establishing a minimum standard. *Geier* held the local negligence-law duty of care preempted because the FMVSS at issue there did more than set a minimum standard. Rather, that FMVSS affirmatively encouraged the adoption of diverse forms of passive restraints, and state tort law could not be permitted to counter that encouragement by requiring that all manufacturers select the same form of passive restraint (airbags). Where, as in this case, a FMVSS manifests no affirmative intent to foster multiple options, there is no conflict of the sort that was presented in *Geier* – and hence no preemption.

* * *

Manufacturers always have the "option" of exceeding a minimum safety standard when NHTSA has decided not to mandate a more stringent alternative because of considerations of cost or feasibility—as NHTSA did in this case and, indeed, often does in considering regulatory alternatives. But if such an "option" alone were enough to trigger federal preemption under *Geier*, the Safety Act's savings clause would be greatly undermined. *Geier* does not mandate that result, because it determined that under the Safety Act, common-law tort actions may proceed unless they conflict with a FMVSS, and here, there is no conflict.

Id., p. 9, 15.

Indeed, the United States cites numerous decisions involving the preemptive effect of the Safety Act, including the court of appeals' decision in this case as well as other cases that the parties have cited in their briefs. *Id.*, p. 20.

While the opinions expressed by the Solicitor General and the chief counsels of the Department of Transportation and NHTSA do not control the preemption analysis in this case,² the United States' amicus brief in *Williamson* clearly shows that the United States, the Department of Transportation, and most importantly NHTSA, all disagree

² See *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3rd Cir. 2008, *cert. denied* ___ U.S. ___, 129 S. Ct. 1987 (2009)) ("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); discussed at pp. 15, 36 of Respondent Hinton's Brief on the Merits.

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with MCI's position – that FMVSS 208's "non-regulation" of passenger seatbelts in motorcoaches preempts Hinton's claim. Rather, Hinton's claims are not preempted by the Safety Act because they do not conflict with federal law.

Respectfully submitted,

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