

No. 06-11182

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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LISA ANN CARDEN, Individually and for and on behalf of those entitled to recover for  
the wrongful death of Alexa Lee Wilson, RONALD LEE WILSON, II, Individually and as  
Heir to Alexa Lee Wilson,  
*Plaintiffs -Appellants,*

v.

GENERAL MOTORS CORPORATION,  
*Defendant-Appellee.*

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On Appeal from the United States District Court for  
the Northern District of Texas (Fort Worth Division), No. 4:05-CV-00549-A

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**BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.,  
AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE  
MANUFACTURERS, INC., AS *AMICI CURIAE* IN SUPPORT OF  
DEFENDANT-APPELLEE AND AFFIRMANCE**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

**Parties**

Lisa Ann Carden	Plaintiff
Ronald Lee Wilson, II	Plaintiff
General Motors Corporation	Defendant

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Alliance of Automobile Manufacturers, Inc.

*Amicus Curiae*

*The Alliance of Automobile Manufacturers, Inc. does not have a parent corporation, nor does any publicly-held corporation own 10% or more of its stock.*

Association of International Automobile Manufacturers, Inc.

*Amicus Curiae*

*The Association of International Automobile Manufacturers, Inc., does not have a parent corporation, nor does any publicly-held corporation own 10% or more of its stock.*

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**BRIEF OF *AMICI CURIAE***  
**IN SUPPORT OF DEFENDANT-APPELLANT AND AFFIRMANCE**

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**INTEREST OF THE *AMICI CURIAE*<sup>1</sup>**

The Alliance of Automobile Manufacturers, Inc. (“Alliance”) is a nonprofit trade organization formed in 1999. Its mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. Defendant-Appellee General Motors Corporation is a member of the Alliance, along with BMW Group; DaimlerChrysler Corporation; Ford Motor Company; Mazda North American Operations; Mitsubishi Motors North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc; and Volkswagen of America, Inc. The Alliance frequently participates as *amicus curiae* or as an intervenor in cases addressing federal regulation of motor vehicles. In doing so, the Alliance presents the broad perspective of vehicle manufacturers.

The Association of International Automobile Manufacturers, Inc. (“AIAM”) represents international motor vehicle manufacturers, original equipment suppliers, and other automotive-related trade associations. AIAM’s mission is to protect and

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<sup>1</sup> Pursuant to Fifth Circuit Rule 29.1 and Federal Rule of Appellate Procedure 29(b), this brief is accompanied by a motion for leave to file the brief. Plaintiffs have not consented to the filing of this brief.

promote the unique interests of international automakers and their suppliers in the United States. AIAM is dedicated to the promotion of free trade and to policies that enhance motor vehicle safety and the protection of the environment. The members of AIAM are Aston Martin Lagonda of North America, Inc.; Ferrari North America, Inc.; Maserati North America, Inc.; American Honda Motor Co., Inc.; Hyundai Motor America; Isuzu Motors America, Inc.; Kia Motors America, Inc.; Mitsubishi Motors North America, Inc.; Nissan North America, Inc.; Peugeot Motors of America, Inc.; Renault SA; Subaru of America, Inc.; American Suzuki Motor Corporation; and Toyota Motor Sales, U.S.A., Inc. The Affiliates of AIAM are ADVICS North America, Inc.; Robert Bosch GmbH; Delphi Corporation; Denso International America, Inc.; and the Japan Automobile Manufacturers Association, Inc.

This case, which concerns the scope of the preemption doctrine, raises issues of considerable importance to the Alliance, AIAM, and their respective members. The regulations at issue here apply directly to the vehicles manufactured by the Alliance's members and many of AIAM's members, and those regulations set forth uniform, national standards that, pursuant to Congressional authorization, have been developed by the National Highway Traffic Safety Administration ("NHTSA") – a Federal agency with considerable expertise in the field. As a matter of common sense and sound public policy, the uniform and rational

regulatory system developed by NHTSA is vastly superior to a system in which an agency's carefully-designed standards may be supplanted or supplemented at will by trial courts or lay juries. The members of the Alliance and AIAM, and ultimately the consumers of their products, benefit greatly both from the certainty and efficiency that comes with federal uniformity and from the security of knowing that lay juries will not second-guess the safety decisions of expert, deliberative bodies.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

In its brief, General Motors Corporation ("GM") has fully rebutted plaintiffs' specific challenges to the district court's decision that plaintiffs' claims are preempted by Federal Motor Vehicle Safety Standard ("FMVSS") 208 (49 C.F.R. § 571.208), which expressly afforded GM the option of equipping the rear center seating position of the subject 1999 Pontiac Grand Am with a lap-only belt.

Rather than repeat GM's arguments – *see* 5th Cir. R. 29.2 – *amici* will explain that, notwithstanding plaintiffs' assertions, FMVSS 208 has been held to be a fairly unique NHTSA standard, in that for substantive policy reasons it specifies particular equipment options as part of a comprehensive regulatory scheme for restraints in motor vehicles. *Amici* also will show that, during the 1980's and 1990's, NHTSA had specific public policy goals and concerns – especially with regard to the compatibility of seat belts with child restraints – in

affording manufacturers the option under FMVSS 208 of equipping their passenger vehicles' rear center seating positions with lap-only seat belts. Thus, even if plaintiffs were correct in arguing that the mere presence of options for compliance in a typical FMVSS is not sufficient for preempting lawsuits challenging the exercise of a choice with regard to those options, FMVSS 208 and the rear center seat belt options provided by FMVSS 208 preempt plaintiffs' claims.

### **ARGUMENT**

At least since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), “it has been settled that state law that conflicts with federal law is ‘without effect’” (*Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)) – that is, preempted. “Pre-emption may be either express or implied . . . .” *FMC Corp. v. Holliday*, 498 US. 52, 56-57 (1990) (citations and internal quotation marks omitted). This case turns on implied preemption.

At a minimum, state law may be impliedly preempted “when compliance with both state and federal law is impossible” or “when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *United States v. Locke*, 529 U.S. 89, 109 (2000) (internal quotation marks and citation omitted). *Accord Griffith v. General Motors Corp.*, 303 F.3d 1276, 1279 (11th Cir. 2002), *cert. denied*, 538 U.S. 1023 (2003).

Numerous cases have held that the Federal regulation at issue in this case – FMVSS 208 – preempts common law claims. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (claim of defect based on lack of air bags held to be preempted by Safety Act and FMVSS 208); *Griffith, supra* (FMVSS 208 preempts claim that vehicle was defective because it had only a lap belt in front center seating position); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377 (7th Cir. 2000) (FMVSS 208 preempts claim concerning lap belt at bus driver’s seating position), *cert. denied*, 531 U.S. 1148, *and reh’g denied*, 532 U.S. 990 (2001).

**I. NHTSA HAD SPECIFIC POLICY GOALS AND CONCERNS IN AFFORDING MANUFACTURERS OF 1999 MODEL YEAR PASSENGER VEHICLES THE OPTION OF PROVIDING LAP-ONLY SEAT BELTS FOR THE REAR CENTER SEATING POSITION**

**A. The Safety Act**

FMVSS 208 was promulgated by NHTSA pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 (“Safety Act”), Pub. L. 89-563, 80 Stat. 718 (codified at 49 U.S.C. § 30101, *et seq.*), which, in turn, was enacted “to reduce traffic accidents and deaths and injuries resulting from traffic accidents.” 49 U.S.C. § 30101.

The Act directs the Secretary of Transportation to issue FMVSSs that “shall be practicable, meet the need for motor vehicle safety, and be stated in objective

terms.” 49 U.S.C. § 30111(a).<sup>2</sup> Congress intended the FMVSSs to be “uniform national standards” (*Wood v. General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988)) and sought to achieve national uniformity by preempting state law. 49 U.S.C. § 30103(b). As the Senate Report on the Safety Act states, “State standards are preempted” to the extent “they differ from Federal standards” because “the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal government.” S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2712, 2720.

The Safety Act, however, does not **expressly** preempt common law claims. A “savings clause” in the Safety Act provides that “[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.” 49 U.S.C. § 30103(e).

As the Supreme Court and numerous other courts have held, however, neither the express preemption clause nor the “savings clause” in the Safety Act precludes the **implied** preemption of state common law actions. *See, e.g., Geier*, 529 U.S. at 869-874; *Hurley*, 222 F.3d at 381

## **B. FMVSS 208**

FMVSS 208, *Occupant Crash Protection*, sets forth performance standards and equipment requirements for the protection of automobile occupants in crashes.

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<sup>2</sup> The authority to promulgate FMVSSs, and to enforce them, was delegated to NHTSA. *See* 49 C.F.R. § 501.2(a)(1).

FMVSS 208, which occupies close to 90 pages in the current Code of Federal Regulations, has been held not to set forth a “minimum standard,” but rather to provide “a comprehensive regulatory scheme.” *Griffith*, 303 F.3d at 1281.

FMVSS 208’s stated purpose “is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, **and by specifying equipment requirements for active and passive restraint systems.**” 49 C.F.R. § 571.208 S2 (emphasis added).<sup>3</sup>

The Department of Transportation first promulgated FMVSS 208 in 1967, when it imposed a requirement, effective January 1, 1968, for the installation of manual seat belts in all new cars. 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967). Since then, FMVSS 208 has been amended many times to account for advancements in seat belt technologies, the development and advancement of air bag technologies, and the increasing use of seat belts by the American public.

Among these amendments are ones that:

- require manufacturers to provide either air bags or automatic seat belts for front outboard seat occupants

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<sup>3</sup> “Passive restraints” are those that “require no action by vehicle occupants.” 49 C.F.R. § 571.208 S4.1.1.1. Air bags are passive restraints, as are automatic seat belts, which move into position without any action by vehicle occupants. 49 C.F.R. § 571.208 S4.5.3. “Active restraints,” by contrast, require the vehicle occupants to do something, such as latch a manual seat belt.

(*see* 65 Fed. Reg. 30680, app. B, 30740-30741 (May 12, 2000) (discussing final rule issued in 1984));<sup>4</sup>

- give manufacturers the option of providing lap belts or lap/shoulder belts in rear seating positions (*see* 54 Fed. Reg. 25275, 25275 (June 14, 1989) (noting that manufacturers were “permitted to choose between installing a Type 1 (lap-only) or Type 2 (lap/shoulder) safety belt system” at rear designated seating systems));
- require lap/shoulder belts in rear outboard positions but continue to give manufacturers the option of providing lap belts or lap/shoulder belts for non-outboard positions, including in the center rear seating position at issue in this case (*see* 54 Fed. Reg. at 25275);
- require air bags (and rescind the automatic seat belt option) (*see* 65 Fed. Reg. at 30741; 58 Fed. Reg. 46551, 46553 (Sept. 2, 1993));
- permit a manual deactivation device for the front passenger air bag in vehicles in which rear-facing child seats can fit only in the front seat (*see* 60 Fed. Reg. 27233 (May 23, 1995));
- require improved labeling to enhance awareness of the dangers posed by passenger air bags to children (*see* 61 Fed. Reg. 60206 (Nov. 27, 1996));
- permit manufacturers to offer “depowered” air bags (*see* 65 Fed. Reg. at 30741; 62 Fed. Reg. 12960 (March 19, 1997)); and

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<sup>4</sup> For present purposes, the “outboard” seating positions may be defined as the ones near the side structure of the vehicle. In a sedan, the front outboard seating positions are the driver’s position and the passenger’s position nearest the passenger door. Some sedans have a non-outboard front seating position (the front center seat). Similarly, in most sedans, the rear outboard seating positions are the two closest to the side structure of the vehicle. The non-outboard rear seating position, if there is one, is in the middle.

- require manufacturers to provide “advanced air bags” (see 65 Fed. Reg. 30680, *passim*).

The foregoing list of FMVSS 208 developments provides just a sampling of the evolution of the regulations. Particularly important for this matter are the developments in the second and third bullets, which served to maintain rear-seat belt-option flexibility for manufacturers of model year 1999 vehicles.

In promulgating, revising, and refining the requirements of FMVSS 208, NHTSA, Congress, and the courts have recognized the importance of public confidence in occupant restraint systems and the need to avoid adverse consequences. *Cf. Geier*, 529 U.S. at 875-877; *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34-37 (1983); 63 Fed. Reg. 49958, 49959-49964 (Sept. 18, 1998). Thus, for instance, in phasing in passive restraint systems, NHTSA gave effect to a “policy judgment that a gradual phasing in of passive restraint systems would be the best way to ‘lower costs, overcome technological safety problems, encourage technological development, and win widespread consumer acceptance.’” *Griffith*, 303 F.3d at 1280 (quoting *Geier*, 529 U.S. at 875).<sup>5</sup>

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<sup>5</sup> It bears noting, especially in light of some of plaintiffs’ arguments, that *Geier* is not just a case about the preemptive force of passive restraint regulations. Such a circumscribed reading of *Geier* has been decisively rejected. *See Griffith*, 303 F.3d at 1280 (“Although plaintiffs in [*Geier* and previous Eleventh Circuit cases] sought to require manufacturers to install passive restraints (air bags and fully automatic seat belt and lap belt systems) in none of them is the preemptive effect of FMVSS

In addition, throughout the course of its FMVSS 208 rulemakings, NHTSA has given serious consideration to the effects of various restraint systems on the safety of children. *See, e.g.*, 65 Fed. Reg. 30680, app. C, 30741-30742 (May 12, 2000) (discussing NHTSA’s efforts to address the risk posed by air bags to out-of-position occupants, particularly children); 61 Fed. Reg. 60206 (Nov. 27, 1996) (mandating improved air bag labeling concerning risks to children posed by air bags); 60 Fed. Reg. 27233 (May 23, 1995) (permitting manual deactivation devices for front passenger air bag in vehicles in which rear-facing child seats can fit only in front seat); 59 Fed. Reg. 51158, 51159 (Oct. 7, 1994) (noting “air bag/infant restraint interaction problem” caused by the incompatibility of rear-facing infant car seats and passenger airbags); 49 Fed. Reg. 15241, 15242 (April 18, 1984) (denying petition for rulemaking to establish lap/shoulder belt requirement for outboard rear seating positions, in substantial part because the agency “does not agree with petitioners that booster seats used in conjunction with Type 2 belts are as effective as booster seats equipped with shoulder harnesses (which must be

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208 analyzed as a function of a distinction between passive and manual restraint systems”); *Hernandez-Gomez v. Volkswagen of Am., Inc.*, 32 P.3d 424, 429 (Ariz. Ct. App. 2001) (*Geier* is properly read to support the proposition that, when a NHTSA decision “to leave options open to . . . manufacturers was made with specific policy objectives in mind,” a tort suit that “if successful, would undermine that policy objective” is preempted) (quoting *Hurley*, 222 F.3d at 382).

tethered to the vehicle)” and noting that lap/shoulder belts would create excessive chest loads on young children during crashes).

In FMVSS 208, NHTSA has frequently given manufacturers flexibility in choosing restraint options, because the resulting mix of restraint options may “maximize the likelihood that people would actually use the passenger restraint systems installed in their cars and trucks.” *Griffith*, 303 F.3d at 1281; *see also Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1123 (3d Cir. 1990) (“Standard 208 was specifically designed to give automobile manufacturers a choice among several options when providing restraint systems for passengers.”).<sup>6</sup>

**C. The Seat Belt Options for Rear Non-Outboard (Center) Seating Positions**

With many of these concerns in mind, NHTSA expressly gave manufacturers the **option** of equipping non-outboard rear seats – the seating position at issue in this case – with lap belts or lap/shoulder belts. *See* 49 C.F.R. § 571.208 S4.1.5.1 (passenger cars manufactured on or after September 1, 1996, must have a “Type 1 [lap-only] or Type 2 [lap/shoulder] seat belt assembly”).

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<sup>6</sup> As the Third Circuit has explained:

That such flexibility and choice is an essential element of the regulatory framework established in Standard 208 has repeatedly been made clear in the regulatory history of this particular safety standard.

*Pokorny*, 902 F.2d at 1124.

NHTSA's decision to provide this option reflects a deliberate policy choice. In fact, in the late 1980s, when it mandated lap/shoulder belts for rear **outboard** seating positions, NHTSA decided **not** to require those belts in rear non-outboard seating positions. *See* 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989); 53 Fed. Reg. 47982, 47984-47985 (Nov. 29, 1988). In deciding to maintain the existing options for either lap belts or lap/shoulder belts in rear non-outboard positions, NHTSA focused on a number of important policy concerns.

**First**, in the notice of proposed rulemaking concerning lap/shoulder belts in rear seating positions, NHTSA stated,

The agency has tentatively concluded that it should limit the proposed requirement for lap/shoulder belts in rear seats to outboard seating positions *only*. The agency agrees with those commenters that asserted that there would be more technical difficulties associated with a requirement to install lap/shoulder belts at all rear seating positions, than with a requirement to install lap/shoulder belts only at rear outboard seating positions. Whether or not those difficulties could be overcome, there would be small safety benefits and substantially greater costs if rear seating positions that are not outboard seating positions were required to have lap/shoulder belts. Therefore, this proposal addresses only rear outboard seating positions.

53 Fed. Reg. at 47984-47985. In the preamble to the November 1989 final rule on lap/shoulder belts in rear seating positions, NHTSA reiterated its conclusion that the lap/shoulder belt requirement should apply only to rear outboard seating positions, noting that:

[s]ome commenters suggested that technologies and designs are available to provide lap/shoulder belts at rear center seating positions, and that NHTSA should further examine this issue. The agency explained in the NPRM that there are more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder belts at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task. Accordingly, this rulemaking excluded further consideration of a requirement for center rear seating positions. None of the commenters presented any new data that would cause the agency to change its tentative conclusion on this subject that was announced in the NPRM.

54 Fed. Reg. at 46258.

**Second**, NHTSA also was concerned about the compatibility between child safety restraints and a requirement for lap/shoulder belts at all rear designated positions. As noted above, the consistency between restraint requirements and child safety has been a recurring theme in FMVSS 208 rulemakings. Thus, in denying the 1984 petition to require lap/shoulder belts at outboard rear seating positions (*see supra* at 10), NHTSA stated that:

[t]he installation of Type 2 belts in the rear outboard seating positions would make the installation of the conventional child safety seat much less convenient than with the current Type 1 belt. This would occur because the shoulder portion of a Type 2 belt would have to be placed behind the restraint, or otherwise moved out of the way, since most child restraints are designed to be used only with lap belts. This is an important consideration in view of the fact that 44 States and the District of

Columbia have laws requiring the use of child safety seats. These State use laws make it desirable that compliance be accomplished as smoothly as possible.

49 Fed. Reg. at 15241-15242.

Even though NHTSA rethought this analysis in certain respects in the rulemaking to require the installation of lap/shoulder belts in rear outboard seats, the agency remained concerned about the compatibility between lap/shoulder belts and child restraints, noting that one child restraint manufacturer had urged the agency to “consider the compatibility between child restraints and vehicle safety belts thoroughly in this rulemaking.” 53 Fed. Reg. at 47988. NHTSA stated, “Additionally, the agency has heard reports that some current combinations of child restraints and rear safety belt systems may be incompatible. For example, some have said that a rear set lap/shoulder belt may be too short to fit around a child safety seat.” *Id.*; *see also* 54 Fed. Reg. at 25276 (noting that some commenters had raised issues concerning “compatibility with child restraint systems”).<sup>7</sup>

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<sup>7</sup> At the time of the rulemaking and for a number of years afterwards, most child restraints were compatible with lap belts, but could be used with lap/shoulder belts only with difficulty. *See* Comments of Mercedes-Benz of North America, Inc., docketed as NHTSA 87-08-NO1-021, at 1 (July 30, 1987) (“Due to the extremely low occupancy-rate of the rear-center seat by adults, plus **an improved suitability for fastening child restraint systems**, the rear-center seating positions are equipped with lap belts.”) (emphasis added); NHTSA, *Child Passenger Safety Resource Manual* 88 (March 1992) (stating that the “center rear seating position,” which almost always has a lap belt, “often has a

In the decade following the rear outboard lap/shoulder belt rulemaking, NHTSA's concerns about the compatibility between child restraints and seat belts increased with the increasing use of lap/shoulder belts. Thus, in 1993, NHTSA promulgated a regulation relating to the "lockability" of lap/shoulder belts in outboard seating positions. *See* 58 Fed. Reg. 52922 (Oct. 13, 1993). "Lockability" refers to how the belt restrains – locks in – the passenger, preventing movement. Lockability issues arose because of conflicts between the need to increase the comfort and convenience of lap/shoulder belts for teenagers and adults and the need to assure that these belts adequately and firmly secure child restraints. In order to meet the former need – increasing adult comfort and convenience – NHTSA had mandated that lap/shoulder belts at rear outboard positions be equipped with "emergency locking retractors" ("ELRs") that lock the belt only in sudden stops or crashes, but otherwise allow some occupant movement. *See, e.g.*, 55 Fed. Reg. 30914, 30915 (July 30, 1990) (ELRs are required "as the retractor for the lap belt portion of the lap/shoulder belt system"); Interpretation Letter from John Womack, Acting Chief Counsel, NHTSA, to Ralph Harpster (September 15, 1994) ("Standard No. 208 also requires the lap belt portion of the Type 2 seat belt assembly installed at any forward-facing rear outboard seating position to have an

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belt that is tightened by hand and therefore poses fewer compatibility problems [for child restraints]").

emergency locking retractor.”). By generally permitting the restrained teenage or adult occupant some freedom of movement, ELRs enhance the occupants’ comfort and convenience, which in turn encourages restraint use.<sup>8</sup>

But this virtue of ELRs becomes a distinct drawback when ELR-equipped belts are used to secure child restraints. Because such belts permit some occupant movement, they also permit the **child restraint** to move around, which makes parents anxious and may pose safety risks for the secured children. Although there are separate devices, such as locking clips, that can be affixed to the seat belts to prevent the movement associated with ELRs, NHTSA was convinced by commenters who argued that external devices were unsatisfactory and that the agency, therefore, should require that lap/shoulder belts be equipped with built-in locking mechanisms. *See* 54 Fed. Reg. at 46261 (discussing comments advocating a requirement that “the belt system in the vehicle be capable of tightly securing a child seat, without resort to any additional hardware like locking clips”).

Because of technical issues, this lockability requirement could not be mandated at the same time the lap/shoulder belt requirement was promulgated. In

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<sup>8</sup> ELRs also are required for lap belts when those belts are permitted at **outboard** seating positions, but are not required for lap belts when those belts are used in non-outboard positions, such as in the center rear seat. *See* 49 C.F.R. § 571.208 S7.1.1.2(a); S7.1.1.1.3; 61 Fed. Reg. 30657, 30665 (June 17, 1996) (notice on international regulatory harmonization, stating that FMVSS No. 208 permits lap belts to be equipped with ELRs, automatic locking retractors, or manual adjustment devices).

October 1993, however, NHTSA imposed a lockability requirement, mandating that seat belts equipped with ELRs – which, as noted, are principally lap/shoulder belts – have a built-in locking mechanism to prevent movement of the child restraint. *See* 58 Fed. Reg. 52922 (Oct. 13, 1993).

The lockability regulation expressly “exclud[ed] belts which have no retractor . . . from the lockability requirements. These belts automatically provide lockability and therefore subjecting them to testing would be unnecessary.” 58 Fed. Reg. at 52925. *See also* 49 C.F.R. § 571.208 S7.1.1.5(c) (lockability test procedure does not apply to “seat belt assemblies that have no retractor or are equipped with an automatic locking retractor”). This exclusion applies in practice to most lap belts in non-outboard seating positions: as noted above, these belts are not required to have ELRs, and they generally are equipped with manual adjusting devices, not retractors. Thus, the lockability issue reflects another respect in which lap belts present fewer compatibility problems with child restraints than do lap/shoulder belts – a fact that NHTSA was aware of as far back as 1984, when, as noted above (*supra* at 10, 13-14), it denied a petition to require lap/shoulder belts in rear outboard positions. *See* 49 Fed. Reg. at 15241-15242 (stating that “the installation of Type 2 belts in the rear outboard positions would make the installation of the conventional child safety seat much less convenient than with the current Type 1 belt”).

These developments amply support the conclusion that NHTSA made a deliberate policy choice to preserve the existing options for manufacturers to use **either** lap-only or lap/shoulder belts in rear non-outboard seating positions. Subsequent developments underscore the soundness of that choice, because they show that the promulgation of the lockability requirement did **not** resolve the compatibility problems between child restraints and lap/shoulder belts.

Thus in 1997, NHTSA again confronted the compatibility problem:

Child restraint effectiveness is reduced by limitations imposed by vehicle belt design, and by belt anchorage locations. Child seats are generally designed to attach to a vehicle by means of the vehicle's lap belt system. While child seats provide high levels of safety when correctly attached to a standard vehicle seat assembly with only a lap belt, in most vehicles different types of seat belt systems exist in addition to or in lieu of a lap belt. . . . Some of these belt systems, such as those equipped with a locking retractor, are able to hold a child seat without use of attachment accessories, but a parent must correctly manipulate the system, such as by pulling the belt completely out of the retractor and feeding excess slack back into it after buckling in the child seat. Some belt systems can be used to secure a child seat only when used with an accessory item . . . such as a locking clip or supplemental strap.

62 Fed. Reg. 7858, 7859 (Feb. 20, 1997). The agency went on to explain:

Child restraint effectiveness is also reduced by incorrect securing of children and child restraints due to the complexities of adapting vehicle belts to those purposes and due to failure to follow instructions. To properly install child restraints, devices such as lockable retractors, locking clips, and supplemental belts must be

used in many cases. Unfortunately, it appears that many people installing a child seat are either unfamiliar with the use of these devices (which generally are not used or needed except in conjunction with a child restraint), not able to understand or unwilling to read instructions concerning their proper use, or unable to surmise from their design how to use them correctly. People generally are frustrated about the difficulty in installing child seats correctly in vehicle seats. Recent user trials conducted in the U.S. and Canada found that virtually all the people surveyed in the studies expressed high levels of dissatisfaction with conventional means of attaching child restraints in vehicles.

*Id.* (footnotes omitted).

In early 1999, NHTSA further noted:

Vehicle seats and seat belts have evolved over the years. At one time, the standard means of attaching a child restraint was the vehicle lap belt. Now all outboard seating positions are required to be equipped with lap/shoulder belts. . . . Because of the difficulty of designing vehicle seat belts to perform the dual function of restraining child restraint systems and of restraining the torsos of older individuals, the vehicle belts are not as effective as they could be for the purpose of restraining child restraints.

. . . . Efforts to make vehicle belt systems more effective for older children and adult passengers have also resulted in the belt systems becoming more complex and more difficult to use to attach child restraints effectively. Due to these complexities people often misuse child restraints in vehicles.

NHTSA Office of Regulatory Analysis Plans & Policy, *Final Economic Assessment: FMVSS No. 213, FMVSS No. 225: Child Restraints Systems, Child*

*Anchorage Systems*, Docket No. 98-3390-27, at 6 of 45 (Feb. 1999). This

observation was not isolated. Shortly thereafter, the agency noted that:

[t]he primary purpose of seat belts has always been to protect older children, teenagers and adults from serious injury in vehicle crashes. A secondary purpose of seat belts has been to install child restraints in vehicles.

Attempting to design seat belts to achieve the first purpose (restraining older children, teenagers and adults) has sometimes led to design choices that may have made it more difficult for the belts to achieve the second purpose (tightly securing a child restraint). One design change is the replacement of simple lap belts with integrated lap/shoulder belts in the back seats of vehicles. Another change is the positioning of some seat belt anchorages several inches forward of the seat back to better position the lap belt low on the pelvis of these occupants. While these and other design changes have increased the ability of vehicle belt systems to restrain occupants, they have made it harder for motorists to use belts on some vehicles for installing child restraints.

64 Fed. Reg. 10786, 10788 (Mar. 5, 1999).

NHTSA explained that:

[o]ver the years, vehicle seats and belt systems evolved to better restrain the upper and lower torsos of older children, teenagers and adults. . . . The need to design vehicle seat belts to perform the dual functions of restraining child restraint systems and of restraining the torsos of older children, teenagers and adults limits the extent to which vehicle belts can be designed to promote the effectiveness of child restraints.

*Id.* at 10790. The agency went on to point out that:

[e]fforts to make vehicle belt systems more effective for teenagers and adults have also resulted in the belt

systems becoming more complex. Lap/shoulder belts have replaced lap belts. On older vehicles, these belts need to be used with an accessory item, such as a locking clip, for use with child restraints. . . . Since September 1, 1995, lap belts on new passenger vehicles are lockable without a locking clip, but the belt must be maneuvered in a special manner not always understood by consumers to engage the locking feature.

*Id.*

As more vehicles were being equipped with lap/shoulder belts in outboard seating positions, these compatibility problems resulted in a high rate of incorrect usage of child restraints: “A four-state study done for NHTSA in 1996 examined people who use child restraints and found that approximately 80 percent of the persons made at least one significant error in using the systems. Observed misuse due to a locking clip being incorrectly used or not used when necessary was 72 percent. Misuse due to the vehicle seat belt being incorrectly used with a child seat (unbuckled, disconnected, misrouted, or untightened) or used with a child too small to fit the belts was 17 percent.” *Id.* (citation omitted).

Because of the difficulty in reconciling lap/shoulder belt safety, comfort, and convenience for adults with lap/shoulder belt-child restraint compatibility, NHTSA ultimately opted for a new method of anchoring child restraints that would not require a child restraint/seat belt interface. Thus, in the March 5, 1999 Federal Register notice quoted above, NHTSA promulgated a rule requiring a new anchorage system for attaching child restraints to vehicles. *See id.* at 10786 (final

rule). This anchorage system is known as “Lower Anchors and Tethers for Children” or the “LATCH System.” *See* 68 Fed. Reg. 38208, 38209 (June 27, 2003).

Against this background, the agency’s decision not to require lap/shoulder belts in the rear center position, but rather to continue to give manufacturers the **option** of providing lap belts **or** lap/shoulder belts in rear non-outboard seats, makes eminent sense and manifests a clear policy choice. The decision fosters flexibility, incorporates an appropriate assessment of the excessive costs that a lap/shoulder belt requirement would have imposed, reflects well-founded concerns – including safety concerns – about the technological problems that would be created by a lap/shoulder requirement for rear non-outboard seats, and demonstrates a prudent approach to the complex and continuing dilemma posed by the seat belt/child restraint compatibility problem.

**II. A BARE ALLEGATION THAT A MODEL YEAR 1999 PASSENGER VEHICLE IS DEFECTIVE IF IT LACKS A LAP/SHOULDER BELT IN THE REAR CENTER SEAT IS PREEMPTED**

Because NHTSA specifically gave manufacturers the option of equipping their 1999 passenger vehicles with lap belts or lap/shoulder belts in rear non-outboard seating positions, plaintiffs may not hinge their claims solely on the contention that the provision of lap-only belts in the rear center seating position renders a vehicle defective. *See, e.g., Geier v. American Honda Motor Co.*, 529

U.S. 861 (2000) (claim for failure to equip vehicle with air bags held preempted); *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256, 260-261 (1985) (state law is preempted to the extent it eliminates “flexibility” contemplated by Federal law); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708-709 (1984) (state law cannot deprive regulated entities of “flexibility and discretion” deliberately conferred by Federal law); *Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 155 (1982) (similar); *Griffith v. General Motors Corp.*, 303 F.3d 1276, 1281-1282 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 1953 (2003); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir. 2000), *cert. denied*, 531 U.S. 1148, *and reh’g denied*, 532 U.S. 990 (2001); *Hernandez-Gomez v. Volkswagen of America, Inc.*, 32 P.3d 424, 427-428 (Ariz. Ct. App. 2001), *cert. denied*, 537 U.S. 1046 (2002).

Thus, in *Griffith*, the plaintiff alleged that the General Motors pickup truck in which she was injured was “defective because of the lap belt only design for the center occupant” – in this case, the front center seat occupant. The Eleventh Circuit found the claim to be preempted. 303 F.3d at 1278.

The court noted that there was no dispute that FMVSS 208 “does not mandate any particular type of restraint, but rather requires manufacturers to choose from several specific options in installing a restraint system in their passenger cars and trucks.” *Id.* at 1279. Just as General Motors here had the

option of equipping the rear center seat with a lap belt or a lap/shoulder belt, General Motors in *Griffith* was “free to install . . . either a lap belt for pelvic restraint or a shoulder/lap belt combination system.” *Id.* The court noted that, in *Geier* and other cases, courts found suits to be preempted when those suits sought “to impose liability on a car or truck manufacturer for selecting a vehicle restraint system specifically authorized by FMVSS 208.” *Id.* at 1280.

The Eleventh Circuit further noted that, unlike other Federal Motor Vehicle Safety Standards, “the rule-making history of FMVSS 208 makes clear that DOT saw it not merely as a minimum standard, but as a comprehensive regulatory scheme. DOT intended and expected FMVSS 208 to produce a mix of restraint devices, both passive and manual, in cars and trucks.” *Id.* at 1281 (citations omitted).

The plaintiffs in *Geier* and *Griffith*, however, “would have eliminated this ‘mix.’” *Griffith*, 303 F.3d at 1281. The *Griffith* court concluded that “when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted.” *Id.* at 1282. Thus, because Griffith’s suit, if successful, “would foreclose an option specifically permitted by FMVSS 208,” her suit “conflicts with that federal law and is impliedly preempted.” *Id.*

The holding of *Griffith* is directly applicable here. In this case, plaintiffs' suit also would predicate liability on the manufacturer's selection of an option expressly provided by NHTSA in FMVSS 208, thereby effectively foreclosing that option. Thus, as in *Griffith*, the suit here is preempted.<sup>9</sup>

Equally instructive in this regard is the Seventh Circuit's decision in *Hurley*. Hurley was a bus driver who alleged that the bus in which he was injured was defectively designed because it provided only a lap belt, rather than a knee bolster, air bag, steel cage, and three-point seat belt. 222 F.3d at 380. The Seventh Circuit found that his claim was preempted because his suit would "foreclose[] a manufacturer's choice between seat belts and airbags." *Id.* at 381. "We conclude that the Supreme Court's opinion in *Geier* governs Hurley's case and compels the conclusion that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suits that depends on foreclosing one or more those options is preempted." *Id.* at 383.

Similarly, in *Hernandez-Gomez*, the plaintiff alleged that the 1981 Volkswagen Rabbit in which she was injured in a rollover accident was defective because its restraint system consisted only of an automatic shoulder belt, and did

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<sup>9</sup> See *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1125 (3d Cir. 1990) (stating that "a state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option") (quoting *Taylor v. General Motors Corp.*, 875 F.2d 816, 827 (11th Cir. 1989)).

not include a manual lap belt. Because the vehicle's restraint system was a specifically permitted option under FMVSS 208, the court held that Hernandez-Gomez's suit was preempted:

[t]he applicable version of FMVSS 208 gave Volkswagen three options for equipping its 1981 Rabbit with a safety restraint system. . . . Plaintiff maintains, however, that the 1981 Rabbit was negligently or defectively designed because it did not have a passenger lap belt. But this would impose a duty on Volkswagen to include that belt in all such vehicles to avoid tort liability. Accordingly, as in *Geier*, plaintiff's common-law tort claim presents "an obstacle to the variety and mix of devices that [FMVSS 208] sought," and is implicitly preempted.

*Hernandez-Gomez*, 32 P.3d. at 427-428 (citation omitted; quoting *Geier*, 529 U.S. at 881; alteration in original).

Thus, *Griffith*, *Hurley*, and *Hernandez-Gomez* amply support the preemption of plaintiffs' center rear lap-only belt claims here. Because a lap-only belt was one of the equipment options expressly provided by FMVSS 208, a common law suit attacking the selection of that option is preempted. *See also James v. Mazda Motor Corp.*, 222 F.3d 1323 (11th Cir. 2000) (claim against manufacturer for equipping car with an automatic shoulder belt and manual lap belt – an option allowed by FMVSS 208 – held preempted), *cert. denied*, 532 U.S. 921 (2001); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir.) ("Because Plaintiff sued Defendants for exercising an option explicitly permitted by Congress, a

conflict exists between state and federal law if Plaintiff goes forward with this state law claim of defective design. Therefore, Plaintiff’s suit against Defendants for their exercise of an option provided to Defendants by FMVSS 208 conflicts with federal law and, thus, is preempted.”) (citations omitted), *cert. denied*, 525 U.S. 1018 (1998); *Carrasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169, 177 (M.D. Pa. 2001) (plaintiffs’ claim “which . . . the court construes as a direct attack against defendants for [their] exercise of an option under FMVSS 208 – ‘presents an obstacle’ to the accomplishment and execution of the purposes and objectives of the Safety Act and FMVSS 208, namely the objective of providing manufacturers with flexibility in choosing a restraint system,” and, “[t]herefore, plaintiffs’ action is preempted”).

## CONCLUSION

For the foregoing reasons, as well as those elaborated upon in GM's brief, this Court should affirm the order of the district court.

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APRIL 13, 2007

## CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April 2007, I served two bound copies of the foregoing brief, as well as one copy of that brief in PDF format on a 3.5” floppy diskette, by overnight delivery on the parties herein, at the following addresses:

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Dated: April 13, 2007