

No. 06-10498

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

CHAD O'HARA, Individually and as Next Friend of H.O., a Minor; and
MICHELLE O'HARA, Individually and as Next Friend of H.O., a Minor,

Plaintiffs -Appellants,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court for
the Northern District of Texas, No. 3:05-DCV-1134-G

**BRIEF OF THE PRODUCT LIABILITY ADVISORY
COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF
DEFENDANT-APPELLANT 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.

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|-----------------|-----------------------|
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| Michelle O’Hara | |

| | |
|----------------------------|--------------------|
| General Motors Corporation | Defendant-Appellee |
|----------------------------|--------------------|

Amici Curiae

| | |
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*The Products Liability Advisory
Council, 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 THE PRODUCT LIABILITY ADVISORY
COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF
DEFENDANT-APPELLANT AND AFFIRMANCE**

INTEREST OF THE *AMICUS CURIAE*¹

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association with 128 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States, with emphasis on the law governing the liability of manufacturers of products. PLAC’s perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector, from automobiles to electronics to pharmaceutical products. Since 1983, PLAC has filed over 725 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC’s corporate members is attached as Appendix A.

This case, which concerns the scope of the preemption doctrine, raises issues

¹ 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. The parties have consented to the filing of this brief under Federal Rule of Appellate Procedure 29(a).

of considerable importance to PLAC and its members. Many of PLAC's members are governed by comprehensive federal safety regulations and statutes. Such uniform, national standards, mandated by Congress and developed by agencies with considerable expertise in the field, are vastly superior as a matter of both common sense and public policy to a system in which an agency's carefully designed standards may be supplanted or supplemented at will by trial courts or lay juries. PLAC's members, 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. Accordingly, PLAC and its members have a strong interest in the proper resolution of this challenge to the authority of a federal agency under a detailed federal regulatory scheme.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its brief, GM has fully rebutted plaintiffs' specific challenges to the district court's well-reasoned opinion (as well as those raised by Trial Lawyers for Public Justice ("TLPJ") in its *amicus* brief). In particular, GM has demonstrated that plaintiffs' assertion that their vehicle is defective as a matter of state law—on the ground that the front passenger windows were made from tempered glass rather than from glass-plastic or laminated glass—is preempted by FMVSS 205, 49 C.F.R. § 571.205, which expressly provides manufacturers with the choice among

tempered glass, glass-plastic glazing or laminated glass.² State-law liability on this claim would necessarily depend on Texas law precluding manufacturers from using one of the specific design options specified in the NHTSA standard, and thus is preempted under ordinary principles of conflict preemption. *See* GM Br. 16–30; *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

Given GM’s persuasive demonstration of the fallacies underlying plaintiffs’ specific arguments, we see no need to reinvent the wheel in this brief. *See* 5th Cir. R. 29.2. There are, however, several overarching themes to plaintiffs’ and TLPJ’s presentation of this case that, if accepted by this Court, could inappropriately narrow federal preemption doctrine in ways that would affect cases far removed from this one.

In particular, plaintiffs and their *amicus* rely heavily on a so-called “presumption against preemption” in arguing that plaintiffs’ claims are not preempted by FMVSS 205. *See* Pl. Br. 54–56; TLPJ Br. 8–10. But even if there is such a presumption, it has no bearing on this case, which involves an application of basic principles of *conflict* preemption rather than of an express preemption provision. *See* Part A, *infra*.

² GM has also explained why plaintiffs’ other claims—such as the claim that the windows in their vehicle do not, in fact, comply with FMVSS 205—fail. Because these alternative claims are fact-specific and of less broad significance, we do not address them in this brief.

Plaintiffs also deny that it would conflict with federal law for state law to preclude a manufacturer from exercising one of a limited set of options *specifically authorized* by federal law. *See* Pl. Br. 42–44; TLPJ Br. 10–13. This argument is based on an erroneous reading of *Geier*. Rather, as both case law and elementary logic demonstrate, the presence of a slate of specific options in a regulation is strong evidence that the regulation would preempt a state law precluding a manufacturer from choosing one option from among those authorized by federal law. *See* Part B, *infra*.

Finally, plaintiffs and TLPJ place great weight on the Supreme Court’s decision in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), which, they argue, is “controlling” and stands for the proposition that “a federal agency’s decision * * * not to adopt a regulation to require a piece of safety equipment [does] not give rise to implied conflict preemption of a state-law claim premised on a duty to use that equipment.” Pl. Br. 35; *see also* TLPJ Br. 15–20. *Sprietsma* stands for no such broad principle; rather, that case involved a fact-intensive inquiry into the regulatory history of one specific federal regulatory scheme. Furthermore, even if one were to extract that general principle from the case, it would have no bearing here. *Sprietsma* involved a circumstance in which there was no relevant federal regulation of recreational boat propeller guards at all. The Coast Guard declined to adopt such a regulation and the Court addressed the preemptive effect of that decision not

to regulate. That is completely different from the question of the scope of the preemptive effect of a long-standing federal regulation that *specifically authorizes* a limited set of options for the materials acceptable for side windows. The purported principle that the lack of regulation in a certain arena, even if intentional, does not preempt state law has no bearing on a situation in which an agency *has* regulated, and in particular has specified a limited set of authorized options. Finally, the fact that NHTSA considered *changing* FMVSS 205 to require advanced glazing materials, but chose not to do so, does not bring this case under the *Sprietsma* preemption analysis. *See* Part C, *infra*.

ARGUMENT

A. **There Is No Presumption Against Preemption In An Implied (Conflict) Preemption Case Such As This One.**

Both plaintiffs and TLPJ argue that this Court must address the preemption issue in this case through the lens of the so-called “presumption against preemption.” *See* Pl. Br. 54–56; TLPJ Br. 8–10. Whether or not such a presumption exists in express-preemption cases, it is simply not applicable in the conflict-preemption context.³

³ Although no “presumption against preemption” applies here, we note that in several recent Supreme Court cases, PLAC and other national business groups have filed *amicus* briefs criticizing the “presumption against preemption” on multiple grounds. *See, e.g.*, Br. of the Product Liability Advisory Council, Inc. and the Chamber of Commerce of the United States of America as *Amicus Curiae*, *United*

Notably, every case plaintiffs and TLPJ cites for the proposition that a “presumption against preemption” applies in this case addresses the analysis of express preemption provisions. But this Court has stated that, even though that presumption may apply to an express-preemption analysis, courts “do not begin with an assumption against *conflict* preemption.” *Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257, 1261–62 (5th Cir. 1992) (internal quotation marks and citations omitted; emphasis in original). As the Court explained in *Perry*, there is no presumption against conflict preemption because “[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,’ for ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’” *Id.* (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988), in turn quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

States v. Locke, Nos. 98-1701 & 98-1706, 529 U.S. 89 (2000), at 4–12, available at 1999 WL 966527; Br. of the Product Liability Advisory Council, Inc. as *Amicus Curiae*, *Norfolk S. Ry. v. Shanklin*, No. 99-312, 529 U.S. 344 (2000), at 3–12, available at 1999 WL 1211740; Br. of the Chamber of Commerce of the United States of America as *Amicus Curiae*, *Geier v. American Honda Motor Co.*, No. 98-1811, 529 U.S. 861 (2000), at 25–26, available at 1999 WL 1049891. Those briefs have demonstrated that the presumption is of relatively recent vintage, has been applied in an inconsistent fashion, suffers from a number of serious ambiguities, is fundamentally at odds with central principles of preemption law even in the express-preemption context, and, at most, may have validity only in very narrow circumstances.

That the presumption does not apply in the conflict-preemption context is uncontroversial. *See, e.g., Pharm. Research and Mfr's of Am. v. Meadows*, 304 F.3d 1197, 1206 (11th Cir. 2002) (“a state statute is generally not entitled to a presumption against implied conflict preemption”); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) (“When considering implied preemption, no presumption exists against preemption.”). In fact, in *Geier* the Supreme Court expressly rejected the application of any sort of “special burden” in determining whether a state law conflicts with federal law, *see* 529 U.S. at 874—over Justice Stevens’s dissent on this precise issue. *See id.* at 888 (Stevens, J., dissenting) (“I submit that the Court is quite wrong to characterize its rejection of the presumption against pre-emption, and its reliance on history and regulatory commentary rather than either statutory or regulatory text, as ‘ordinary experience-proved principles of conflict pre-emption.’”).

Nor has anything in the Supreme Court’s preemption case law since *Geier* called into question the well-established proposition that the “presumption against preemption” does not apply in the conflict-preemption context. For example, *Spriestma*—which was a conflict-preemption case—did not depend on a “presumption against preemption”; in fact, the Court in that case never even mentioned any such presumption. Instead, the *Sprietsma* Court relied on the Court’s conclu-

sion that there was no actual conflict between state and federal policy. *See* 537 U.S. at 65–66.

Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005), too, is off point. TLPJ is simply wrong when it relies on *Bates* to assert that “[t]he presumption against preemption is especially strong in cases involving so-called implied conflict preemption. *Cf. Bates*, 544 U.S. at 459 (Thomas, J., concurring in the judgment in part and dissenting in part) (noting the ‘Court’s increasing reluctance to expand federal statutes beyond their terms through doctrines of implied preemption’).” TLPJ Br. 9–10. Importantly, *Bates* was not an implied conflict preemption case; it concerned the scope of *express preemption* under Section 24(b) of FIFRA, 7 U.S.C. § 136v(b). *See* 544 U.S. at 442–43 (“we consider whether petitioners’ claims are pre-empted by § 136v(b)”) (footnote omitted). In fact, the *Bates* Court held that the express preemption provisions of Section 136v(b) would preempt some common law, or judge-made, claims. *See id.* at 443 (“The Court of Appeals * * * correctly h[e]ld that the term ‘requirements’ in § 136v(b) reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties.). The Court held merely that the specific claims articulated by the plaintiffs did not fall within the scope of Section 136v(b).⁴

⁴ *Bates* also emphasized the Court’s concern about displacing the states’ role

Furthermore, TLPJ mischaracterizes Justice Thomas’s dissent in *Bates*. First, Justice Thomas disclaimed any interest in whether there was any history of tort litigation against manufacturers: “The history of tort litigation against manufacturers is also irrelevant.” *Bates*, 544 U.S. at 457 (Thomas, J., dissenting). Second, Justice Thomas did not—as TLPJ implies—suggest that there is a stronger “presumption against preemption” when conflict preemption is at issue. To the contrary, Justice Thomas’s dissent noted in the sentence immediately following the one quoted by TLPJ that “[t]his reluctance [to expand federal statutes beyond their terms through doctrines of implied pre-emption] reflects that pre-emption analysis is not a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the *ordinary meanings* of state and federal law conflict.” *Id.* at 459 (internal quotation marks and citations omitted; emphasis added). Thus, Justice Thomas plainly agreed that there is no presumption against preemption in the conflict-preemption arena. Rather, Justice Thomas believed—as do we—that if the ordinary meaning of state and federal law conflict, then, under the Supremacy Clause, federal law must prevail.

where there has been a “long history of tort litigation” before Congress enacted a particular statute. *See* 544 U.S. at 449; Pl. Br. 54; TLPJ Br. 8. But that is not relevant here. Neither plaintiffs nor TLPJ cites any evidence of a “long history of tort litigation” involving the materials used for vehicle windows that predated NHTSA’s adoption of FMVSS 205, which—from the start—contained options.

B. The Presence Of Options In The Controlling Safety Standard Should Weigh Heavily In Favor Of This Court Finding Plaintiffs’ Claims To Be Preempted.

Plaintiffs—and more explicitly, TLPJ—argue that the fact that an agency provides that parties may comply with a regulation through one of a limited slate of options does not suggest that a state-law rule precluding the use of one of those options is preempted as a matter of federal law. *See* TLPJ Br. 10–13; Pl. Br. 42–44. According to TLPJ, “[t]he core teaching of *Geier* is that regulatory options, standing alone, do not possess *any* preemptive force.” TLPJ Br. 12 (emphasis added). As proof of this argument, TLPJ explains that “[i]f the mere existence of regulatory options were sufficient to preempt tort claims, then *Geier* would not have needed even to address the complex policy reasons underlying Standard 208.” *Id.*

This argument involves a fundamental misreading of *Geier*, which it is important that this Court not adopt. The existence of a limited slate of specific options in a regulatory scheme is strong—albeit not necessarily conclusive—evidence that a state-law rule precluding the exercise of one of those options would be preempted by federal law.

1. It is important to note that agencies do not often identify multiple specific options for complying with any given regulation. The usual course of federal regulation is to institute a broad performance standard that does not specify how the regulated entity must meet that standard or, alternatively, to mandate one spe-

cific method for complying with a regulation.⁵ In those rare instances in which an agency does specifically create a limited set of options among which a regulated entity may choose, the logical implication should normally be that the agency has both (a) rejected the idea of regulating via a traditional performance standard that does not constrain design, and (b) considered the acceptability of each of those options (among others), and determined that the regulated entity should be free to choose among the options allowed under the federal rule.⁶

A regulation mandating that an item be made of steel necessarily implies that state law cannot require that item to be made of aluminum. Similarly, a regulation mandating that that item be made of steel *or* aluminum—but not of tin, titanium, wood, plastic, or any other material—demonstrates that the agency has con-

⁵ See, e.g., STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 377 (4th ed. 1999) (describing performance standards, which specify results, and design standards, which require the use of a specific technology); Cass R. Sunstein, *Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 268 (1996) (calling it one of “the principal lessons of the last generation of experience with regulation” that the government should “use performance standards instead of design standards”).

⁶ There may, of course, be exceptions to this principle—and thus it is appropriate for a court to inquire into the specifics of any given regulation—but as a *general* matter the creation of a limited slate of specific options must be understood as suggesting that the federal government specifically intends for manufacturers to be allowed to choose freely among those options (but not others), and thus that states may not impose liability on a manufacturer for exercising one of the specified options.

sidered the matter and has decided that *both* steel and aluminum are acceptable, for one of any number of reasons,⁷ but that alternative materials are not acceptable. If that is the case—for whatever reason—then it is apparent that a state-law rule that the manufacturer cannot use steel would conflict with the federal regulator’s determination to the contrary, and would be preempted by federal law. There is no real difference between a regulation that specifies that the manufacturer must use material X and one that specifies that the manufacturer must use X or Y; each suggests a conscious decision on the part of the regulator to authorize certain options, but not others.

Thus, it is unsurprising that courts routinely find that, if a federal agency has specifically authorized a regulated entity to choose from among a specific array of options to comply with a regulation, states may not preclude the regulated entity from choosing one of those options. *See* GM Br. 18–19 & n.38.

For example, in the leading case of *Fidelity Financial Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), the Supreme Court addressed the situation where a regulation promulgated by the Federal Home Loan Bank Board

⁷ For example, the agency could have concluded that (a) each material has its own set of advantages and disadvantages, such that neither is superior to the other overall; (b) having a mix of options in the marketplace is important; or (c) the agency needs further data from the real world to decide which option to mandate in the future.

gave federal savings and loan associations the authority, “at [their] option,” to include or not to include a “due-on-sale” clause in mortgage agreements. *Id.* at 146–47 (quoting 12 C.F.R. § 545.8-3(f) (1982)). The Court held that this regulation preempted a state-law rule precluding the use of due-on-sale clauses, and stressed that “[t]he conflict does not evaporate because the Board’s regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts.” *Id.* at 155. The Court noted that “[t]he Board consciously has chosen not to mandate use of due-on-sale clauses because it desires to afford associations the flexibility to accommodate special situations and circumstances,” and held that a state law precluding such clauses would “deprive[] the lender of the flexibility’ given it by the Board.” *Id.* (internal quotation marks and citation omitted).

Another court put it even more bluntly: “If * * * federal regulations requiring a *choice* of safety features do not impliedly or expressly shield a manufacturer from liability for making the very choice mandated, then [that regulatory scheme] has little purpose or any reason for being.” *Gills v. Ford Motor Co.*, 829 F. Supp. 894, 899 (W.D. Ky. 1993) (emphasis in original). *See also, e.g., Griffith v. General Motors Corp.*, 303 F.3d 1276, 1280–81 (11th Cir. 2002); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir. 2000); *Taylor v. General Motors Corp.*, 875 F.2d 816, 827 (11th Cir. 1989) (“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”).⁸

Notably, neither plaintiffs nor TLPJ have identified even a single case in which the existence in a regulation of a limited slate of acceptable options was held *not* to preempt a state-law rule restricting that choice. *Cf.* TLPJ Br. 10–13 (discussing only *Geier*). This is unsurprising, because the general rule is that when a federal regulation specifies a limited array of specific options for compliance, states may not preclude the regulated entity from choosing among those options.

2. Nothing in *Geier* is to the contrary. The Supreme Court in *Geier* found the detailed set of regulatory options presented to manufacturers in FMVSS 208 for passive-restraint systems to preempt a state-law rule precluding the exercise of one of those options. It is true, as TLPJ notes, that the *Geier* Court addressed the lengthy regulatory history of FMVSS 208 prior to finding that regulation to preempt a state-law rule requiring manufacturers to use air bags. *See* 529

⁸ This Court, too, has assumed that the choice among specifically delineated regulatory options is generally protected against state-law interference. In *Perry*, the Court noted its “agreement with much of [the] reasoning” of courts that had held that FMVSS 208, 49 C.F.R. § 571.208, preempted state-law suits premised on the failure of a manufacturer to include an airbag in a vehicle (957 F.2d at 1265), stressing instead that even if a manufacturer cannot be liable for its choice among specified options, it could still be liable under state law if that lawsuit were premised not on the *choice* among the options but instead on how the manufacturer *implemented* one of the specified options. *See id.*

U.S. at 875–79; TLPJ Br. 11–12. But this is unsurprising because FMVSS 208 was promulgated under the Safety Act, which contains a savings clause. As a result of that savings clause, most regulations issued pursuant to the Safety Act “create[] only a floor, *i.e.*, a *minimum* safety standard.” *Geier*, 529 U.S. at 868 (emphasis added). The Court in *Geier*, therefore, appropriately analyzed the specific regulation at issue to confirm that it did not merely set a performance standard that the states were free to supplement. But as discussed above (at 11–12), the vast majority of instances in which an agency specifies a limited slate of options in a regulatory scheme—including *Geier*—will reflect a specific agency determination to provide manufacturers with the choice among *all* of those options, and thus will preempt a state-law rule precluding the manufacturer from choosing one of those options.

To be sure, one can imagine hypothetical situations in which a federal regulation might authorize a regulated entity to choose among a limited set of options, but in which it would not undermine that regulatory scheme for a state to preclude the manufacturer from choosing one of those options. This is why the *Geier* Court analyzed the specific regulatory history of FMVSS 208, why the *de la Cuesta* Court analyzed the specific regulatory history of the FHLBB regulation, and why the district court in this case analyzed the specific regulatory history of FMVSS 205. But this possibility in no way undermines our basic point, which is that the

general presumption must be that when an agency specifies that a regulated entity may comply with a regulation in one of a number of specific means, state law may not preclude the regulated entity from choosing one of the federally authorized means of compliance.

In any event, as GM has demonstrated in its brief (at 23–30), there can be no doubt that in this specific instance NHTSA intended to authorize manufacturers to use tempered glass, glass-plastic glazing, or laminated glass in side windows, and that each option has different advantages and disadvantages. That is all this Court should need to discern in order to hold that FMVSS 205 preempts a state-law rule requiring manufacturers to use laminated glass in side windows. *See Geier*, 529 U.S. at 881; *de la Cuesta*, 458 U.S. at 155.

C. *Sprietsma v. Mercury Marine* Is Irrelevant To This Case.

Plaintiffs and TLPJ place great weight on the Supreme Court’s decision in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), which, they argue, is “controlling” in this litigation (Pl. Br. 35), and which, they assert, stands for the proposition that “a federal agency’s decision * * * not to adopt a regulation to require a piece of safety equipment [does] not give rise to implied conflict preemption of a state-law claim premised on a duty to use that equipment.” *Id.*; *see also* TLPJ Br. 15–20. Plaintiffs misread *Sprietsma*, which does not support their position in this case.

1. Plaintiffs over-generalize the import of the *Sprietsma* decision, which was focused on the detailed regulatory history of a *specific* agency decision not to promulgate a *specific* regulation in a previously unregulated area. Nothing in *Sprietsma* suggests that an agency decision to forgo regulation could never have preemptive effect.

In fact, the *Sprietsma* Court relied heavily on the fact that the Coast Guard did not view its own decision not to issue a regulation in that case to be preemptive.⁹ In its brief in *Sprietsma* the government stressed not only that it did not believe there to be preemption in that specific case, but also that “in some circumstances a federal decision to forgo regulation in a given area *may* imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate.” Br. of the United States as *Amicus Curiae* in *Sprietsma v. Mercury Marine*, No. 01-706, 537 U.S. 51 (2002), at 16, *available at* 2002 WL 500643 (internal quotation marks and citations omitted; emphasis added).

⁹ See *Sprietsma*, 537 U.S. at 68 (finding “strong support” for finding of no preemption in the fact that “the Solicitor General, joined by counsel for the Coast Guard, has informed us that the agency does not view the 1990 refusal to regulate or any subsequent regulatory actions by the Coast Guard as having any preemptive effect”).

The *Sprietsma* Court accepted not only the government’s view that there was no preemption in that specific case but also its assertion that federal non-regulation can, in appropriate circumstances, be preemptive. As the Court explained:

[W]e have recognized that “a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much pre-emptive force as a decision *to regulate*.” *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983); *see also Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947) (state law is pre-empted “where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute”).

Sprietsma, 537 U.S. at 66 (emphasis in original).¹⁰ Thus, plaintiffs’ protestations notwithstanding, *Sprietsma* does not stand for a general rule that all decisions not to regulate are necessarily non-preemptive. The case instead demonstrates that the preemption inquiry in such instances must be undertaken based on the specific regulatory history at issue.

2. Plaintiffs’ argument that “a federal agency’s decision * * * not to adopt a regulation to require a piece of safety equipment [does] not give rise to im-

¹⁰ As the Second Circuit has explained, “[f]ederal regulation need not be heavy-handed in order to preempt state regulation.” *N.Y. State Comm’n on Cable Television v. F.C.C.*, 669 F.2d 58, 66 (2d Cir. 1982) (finding state regulation pre-empted despite the FCC’s “failure to impose its own regulations”).

plied conflict preemption” (Pl. Br. 35) is not only flawed; it is also irrelevant to this case. Here, NHTSA *has*, for almost 40 years, regulated the types of materials that may be used in side windows in vehicles. As GM explains in its brief, (at 6), NHTSA first promulgated FMVSS 205 in 1968; that Safety Standard has always specified the types of material that a manufacturer may and may not use in various window positions in automobiles—and authorizes manufacturers to use tempered glass, glass-plastic glazing, or laminated glass for side windows. Thus, even if *Sprietsma* were to stand for the proposition that an agency’s failure to regulate cannot be preemptive (or even is generally not preemptive), that rule would be inapplicable here. *See Frank v. Delta Airlines Inc.*, 314 F.3d 195, 199 n.6 (5th Cir. 2002) (distinguishing *Sprietsma* on the ground that the *Frank* case “involve[d] the preemptive effect of *adopted* FAA regulations as opposed to the preemptive effect of the Coast Guard’s decision *not* to regulate propeller guards in *Sprietsma*’) (emphasis added).

3. Plaintiffs nonetheless try to shoehorn this case into the *Sprietsma* mold on the ground that NHTSA considered *modifying* FMVSS 205 to require advanced glazing rather than tempered glass, but chose not to do so—which plaintiffs assert is equivalent to the Coast Guard’s decision not to regulate propeller guards. *See* Pl. Br. 35–36; TLPJ Br. 18. These are simply not parallel situations; the relevant inquiry in this case is not why the agency decided not to modify its regulation

but why it initially decided to provide manufacturers with limited options among window materials (and thereafter continued to provide manufacturers with such options). As we discussed above (at 11–12), the agency’s decision to provide manufacturers with this choice is persuasive evidence that a state-law rule precluding manufacturers from choosing one of these options is preempted by federal law. If anything, the agency’s lengthy reconsideration of its existing regulation, leading to its eventual determination *not* to change that regulation, is further proof that a state-law rule to the contrary would frustrate the purposes of federal law; nothing in *Sprietsma* suggests otherwise.

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.

Respectfully submitted,

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DECEMBER 7, 2006

**APPENDIX A: CORPORATE MEMBERS OF THE
PRODUCT LIABILITY ADVISORY COUNCIL AS OF 12/1/2006**

| | |
|--------------------------------------|--|
| 3M | Emerson Electric Co. |
| A.O. Smith Corporation | Engineered Controls International, Inc. |
| Altec Industries | Estee Lauder Companies |
| Altria Corporate Services, Inc. | Exxon Mobil Corporation |
| American Suzuki Motor Corporation | Ford Motor Company |
| Amgen Inc. | Freightliner LLC |
| Anheuser-Busch Companies | Genentech, Inc. |
| Appleton Papers, Inc. | General Electric Company |
| Arai Helmet, Ltd. | General Motors Corporation |
| Astec Industries | GlaxoSmithKline |
| BASF Corporation | The Goodyear Tire & Rubber Company |
| Bayer Corporation | Great Dane Limited Partnership |
| Bell Sports | Guidant Corporation |
| Beretta U.S.A Corp. | Harley-Davidson Motor Company |
| BIC Corporation | The Heil Company |
| Biro Manufacturing Company, Inc. | Honda North America, Inc. |
| Black & Decker (U.S.) Inc. | Hyundai Motor America |
| BMW of North America, LLC | ICON Health & Fitness, Inc. |
| Boeing Company | Illinois Tool Works, Inc. |
| Bombardier Recreational Products | International Truck and Engine Corporation |
| BP America Inc. | Isuzu Motors America, Inc. |
| Bridgestone Americas Holding, Inc. | Jarden Corporation |
| Briggs & Stratton Corporation | Johnson & Johnson |
| Brown-Forman Corporation | Johnson Controls, Inc. |
| CARQUEST Corporation | Joy Global Inc., Joy Mining Machinery |
| Caterpillar Inc. | Kawasaki Motors Corp., U.S.A. |
| Chevron Corporation | Kia Motors America, Inc. |
| Continental Tire North America, Inc. | Koch Industries |
| Cooper Tire and Rubber Company | Kolcraft Enterprises, Inc. |
| Coors Brewing Company | Komatsu America Corp. |
| Crown Equipment Corporation | Kraft Foods North America, Inc. |
| DaimlerChrysler Corporation | Lincoln Electric Company |
| The Dow Chemical Company | Magna International Inc. |
| E & J Gallo Winery | Masco Corporation |
| E.I. DuPont De Nemours and Company | Mazda (North America), Inc. |
| Eaton Corporation | Medtronic, Inc. |
| Eli Lilly and Company | |

Mercedes-Benz of North America, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pentair, Inc.
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
Tyson Foods, Inc.
UST (U.S. Tobacco)
Vermeer Manufacturing Company
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2006, 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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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 29(d) and 32(a)(7)(B)(i), and Fifth Circuit Rule 32.2, because—according to the word-count facility in Microsoft Word—the brief contains 4916 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P.32(a)(6) because the brief has been prepared using Microsoft Word 2002 in a proportionally spaced typeface in Times New Roman with 14 point typeface.

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