

**IN THE SUPREME COURT
STATE OF ARIZONA**

AMPARO HERNANDEZ-GOMEZ,

Plaintiff/Appellee,

v.

VOLKSWAGEN OF AMERICA, INC. *et al.*,

Defendants/Appellants.

Supreme Court Case No.
T-01-0002-CV

Court of Appeals Case No.
2 CA-CV 98-0188

Pima County Superior
Court Case No.
CV 274471

RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

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INTRODUCTION

The petition for review raises a question of exceedingly limited significance – the preemptive effect of a regulation applicable only to automobiles manufactured *more than 20 years ago* – and is based on entirely unpersuasive attempts to distinguish that 1980 regulation from the almost-identical 1984 regulation at issue in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). *Geier* held that common law tort claims that challenge an automobile manufacturer’s choice among the three safety-restraint options afforded in the 1984 version of Federal Motor Vehicle Safety Standard (“FMVSS”) 208 are impliedly preempted by federal law. Those three options exist *in identical terms* in the 1980 version of FMVSS 208, and the court of appeals was therefore plainly correct in finding that *Geier* is controlling and that plaintiff’s claims are preempted. No factor listed in Appellate Rule 23(c)(3) warrants this Court’s review of that decision.

STATEMENT

A. The history of the 1980 version of FMVSS 208. Congress enacted the National Traffic and Motor Vehicle Safety Act (“Safety Act”), 15 U.S.C. § 1381 *et seq.*, in 1966, to protect the public against the “unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and against [the] unreasonable risk of death or injury to persons in the event accidents do occur.” 15 U.S.C. § 1391(1). It sought to accomplish this goal by authorizing the Secretary of Transportation to prescribe safety standards of nationwide applicability. Congress declared that such standards must “meet the need for motor vehicle safety” and be “reasonable” and “practicable” in their operation. *Id.* at 1392(a), 1392(f)(3). The National Highway Traffic Safety Administration (“NHTSA”) has promulgated numerous standards on motor vehicle performance and design under the Safety Act, including FMVSS 208.

FMVSS 208 provides for “[o]ccupant crash protection.” In its initial (1967) incarnation, it required manual seat belts in all automobiles. See *Geier*, 529 U.S. at 875. Because occupants refused to wear these seat belts, in 1970 NHTSA began to consider “passive restraints” that did not require any intervention by the occupant, such as air bags and automatic seatbelts. See *ibid.* Thus, commencing with the 1973 model year, NHTSA afforded manufacturers a choice among three options to comply with FMVSS 208. See Notice, 37 Fed. Reg. 3,911, 3,912 (Feb. 24, 1972) – “First Option,” a “complete passive protection system” (see Notice, 36 Fed. Reg. 4,600, 4,604 (Mar. 10, 1972)); “Second Option,” a “head-on passive protection system” (see 37 Fed. Reg. at 3,912), or “Third Option,” a “lap and shoulder belt protection system with ignition interlock and belt warning” (*ibid.*). Most automobile manufacturers chose the Third Option. However, this ignition interlock system – which prevented an automobile from being started if the driver was not wearing a seatbelt – proved to be such a “fiasco” (*Geier*, 529 U.S. at 879) that Congress forbade NHTSA from requiring such systems. See *id.* at 876 (citing 88 Stat. 1482). The Third Option was thereafter rewritten without the ignition interlock. See Final Rule, 39 Fed. Reg. 38,380 (Oct. 31, 1974).

In 1976, Secretary of Transportation Coleman issued a Notice of Proposed Rulemaking to consider the future of mandatory passive-restraint systems. See 41 Fed. Reg. 24,070 (June 14, 1976). He pointed out that NHTSA “anticipated that passive restraints might eventually become required equipment” (*id.* at 24,070) for two reasons: first, because such systems “would perform more effectively in preventing injuries than would seat belts, and second, because seat belts are not used consistently, passive restraints, which require no action by the occupant, would ensure more widespread crash protection.” *Ibid.* On the other hand, he acknowledged that “[q]uestions of effectiveness, cost, and suspected hazards, as well as the philosophical problems of restricting individuals’ freedom of choice with regard to

how much they pay for safety protection” (*ibid.*), “difficult” questions “of assessing and comparing the safety benefits and costs of alternative occupant restraint systems” (*ibid.*), the “exist[ence of] only limited field experience with passive restraint systems” (*id.* at 24,073), and the lack of knowledge about “how the general public would react to passive belts” and air bags (*id.* at 24,074) all cautioned against decisive action.¹

After extensive consideration, Secretary Coleman decided to institute “a large-scale demonstration program to exhibit the effectiveness of passive restraints” (Department of Transportation, *The Secretary’s Decision Concerning Motor Vehicle Occupant Crash Protection*, at 6 (Dec. 6, 1976) (the “Coleman Decision”)), rather than mandate that manufacturers choose one specific option for their vehicles. He made this decision because of “the public’s unfamiliarity with, and suspicion of, passive restraints” (*id.* at 2), “effectiveness, reliability, cost, [and] governmental interference” objections to mandatory passive-restraint systems (*id.* at 4), and worries about “public acceptance of passive restraints” (*id.* at 52), as well as “to encourage further advances in * * * promising [passive restraint] technology” (*id.* at 25).

The incoming Carter Administration rescinded the Coleman Decision and decided instead to institute a “phase-in” of mandatory (First Option) passive restraint requirements, with passive-restraint systems initially mandated for certain vehicles in the 1982 model year and for all vehicles in the 1984 model year. See Final Rule, 42 Fed. Reg. 34,289 (July 5, 1977). The decision to create a phase-in, rather than requiring that manufacturers institute passive systems immediately, was made because of concerns about “reliability problems” of individual systems (*id.* at

¹ Secretary Coleman specifically discussed and praised the then-newly-introduced passive belt system in the Volkswagen Rabbit, which was one of the first passive systems available on the general market. See *id.* at 24,070 n.3; 24,072.

34,294); because of “doubt that a large proportion of [consumers] would find passive belts acceptable” (*id.* at 34,295); and “to obtain experience with these systems in the hands of a more limited segment of the public, and to obtain feedback on the performance and reliability of the systems” (*ibid.*). It is this 1977 Final Rule, requiring that cars manufactured before August 31, 1981 meet one of the three Options, that, unchanged, governed Ms. Hernandez-Gomez’s 1981 Volkswagen Rabbit. See *id.* at 34,297.

B. The 1984 version of FMVSS 208 at issue in *Geier*. Because plaintiff attempts to distinguish the 1980 version of FMVSS 208 from the 1984 version at issue in *Geier*, we briefly describe the post-1980 history of the Safety Standard. After Ms. Hernandez-Gomez’s automobile was manufactured, NHTSA delayed, and then rescinded, the phase-in of mandatory First Option passive restraints. See *Motor Vehicle Mfr’s Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 38 (1983). The Supreme Court found that rescission to be inadequately explained (*id.* at 34) and remanded to the agency for further consideration. That reconsideration led to the 1984 version of the regulation at issue in *Geier*. *The 1984 regulation at issue in Geier is, in all material respects, a verbatim reproduction of the version applicable between 1977 and 1981.*²

C. The *Geier* decision. Plaintiffs in *Geier* challenged Honda’s choice to provide a Third Option manual belt system, rather than also including air bags to satisfy the First Option; the Supreme Court held that such claims were impliedly preempted by FMVSS 208 and the Safety Act. Allowing common-law tort litigation to require air bags – in other words, mandating compliance with the First Option using spe-

² The sole substantive change between the two versions is that while the earlier regulation envisioned the phase-in of mandatory First Option passive systems commencing in the 1982 model year (see 1980 FMVSS 208 S4.1.2, S4.1.3), the 1984 regulation envisioned the phase-in of mandatory First Option passive systems commencing in the 1987 model year (see 1984 FMVSS 208 S4.1.3, S4.1.4).

cific technology – would undermine the goals of FMVSS 208, because, as the Court explained, FMVSS 208 “*deliberately provided the manufacturer with a range of choices among different passive restraint devices*. Those choices would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote FMVSS 208’s safety objectives” 529 U.S. at 875 (emphasis added); *id.* at 879. Any state law rule limiting a manufacturer’s choice among these options “would have presented an obstacle to the variety and mix of devices that the federal regulation sought” and “also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed.” *Id.* at 881. The Court therefore found that all such claims were preempted.

D. Plaintiff’s Accident. Amparo Hernandez-Gomez “sustained severe injuries when the 1981 Volkswagen Rabbit in which she was riding * * * veered off the road, flipped over, and landed on its roof.” Op. ¶ 1. The vehicle’s “[o]ccupant crash protection” system consisted of an automatic shoulder belt, a specially designed anti-submarining seat, and an energy-absorbing knee bolster (see *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 298, 884 P.2d 183, 184 (1994) (*Hernandez-Gomez I*). It is undisputed that the system installed in the vehicle complied fully with the Second Option of the 1980 FMVSS 208. See 39 Fed. Reg. 3,834, 3,834 (Jan. 30, 1974) (“option two exists * * * to accommodate the introduction of passive restraint systems like Volkswagen’s.”).

ARGUMENT

There is no reason for this Court to grant the petition for review. Plaintiff claims that the decision of the court of appeals “is of statewide importance” (Pet. 11) and that the decision “erroneously decided an important issue of law” (Pet. 4). *Cf.* Appellate Rule 23(c)(3). Neither assertion has any basis in fact.

I. THIS CASE HAS NO STATEWIDE IMPORTANCE³

A. The *Geier* Court defined the scope of preemption under the Safety Act, which the Arizona courts must apply.

After the U.S. Supreme Court’s definitive decision in *Geier*, no “important” questions about Safety Act preemption involving FMVSS 208 remain to be decided by this Court. It is well established that “[t]he United States Supreme Court is the ultimate authority interpreting the United States Constitution” (e.g., *State v. Bateman*, 113 Ariz. 107, 110, 547 P.2d 6, 9 (1976)), and that preemption is a matter of constitutional scope (*Hernandez Gomez I*, 180 Ariz. at 300, 884 P.2d at 186 (“The Supremacy Clause allows Congress to make laws that supersede state law.”)). Thus, following *Geier*, the courts of this State must consider that decision binding law.

While the U.S. Supreme Court in *Geier* did not directly determine the preemptive effect of the 1980 version of FMVSS 208 at issue here, the decision nonetheless laid out the principles that control this and any future question of preemption under the Safety Act in any litigation. Thus, the Supreme Court held that:

- The Safety Act does not expressly preempt state common law actions. See 529 U.S. at 867-868.
- The Safety Act includes no presumption against implied preemption. *Id.* at 870.
- State common law tort actions, not only state regulations or statutes, can be preempted where they conflict with or frustrate the purposes of Safety Act requirements. *Id.* at 871, 881.
- No “formal agency statement of pre-emptive intent [i]s a prerequisite to concluding that a conflict exists” sufficient to require preemption of a state tort claim. *Id.* at 884.
- Where NHTSA has “deliberately sought variety,” no state requirement may limit a manufacturer’s choice among the options FMVSS 208 has

³ We note that this Court rejected three separate petitions for transfer under Appellate Rule 19 while this case was pending in the court of appeals.

provided. *Id.* at 878. (The Court further held that the 1984 version of FMVSS 208 embodies just such a decision. *Id.* at 881.)

Given these holdings, it seems obvious that there are no broad questions remaining for this Court to decide about FMVSS 208 preemption. The decision below applies only to FMVSS 208, and is not generalizable even to other Safety Standards.⁴ While individual cases may arise that raise specific issues on which the applicability of *Geier* might be debatable, *cf. Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 381 (7th Cir. 2000), cert. denied, 531 U.S. 1148 (2001) (*Geier* applies to buses, not just cars); *Moser v. Ford Motor Co.*, 2001 WL 1387600, at *4 (4th Cir. Nov. 8, 2001) (table) (*Geier* preempts claims based on choice of restraint system, but not based on theory that specific system was defectively designed), such issues are not the type of “important issues of law” that this Court’s rules en- vision should lead to review. The application of these principles to this case is largely a mechanical question – and as we show in Section II, is one that the court of appeals performed correctly.

B. Few vehicles still exist that are covered by the 1980 version of FMVSS 208 at issue in this litigation.

The court of appeals’ decision is based on its determination that the 1980 ver- sion of FMVSS 208 is not materially different from the 1984 version of FMVSS 208 at issue in *Geier* (Op. ¶¶ 13-15), and thus that *Geier* controls. While that deci- sion resolved this appeal, it has no significance to almost any other current or fu-

⁴ Unlike FMVSS 208 – through which NHTSA specifically desired to allow manufacturers a range of choices – most Safety Standards set only regulatory crite- ria that states are free to supplement through tort liability. See, *e.g.*, *Leipart v. Guardian Indus., Inc.*, 234 F.3d 1063 (9th Cir. 2000) (FMVSS 108 not preemptive). Thus, plaintiff’s assertion (at 11; see also Amicus Br. 3, 7-8, 10) that the “ef- fect of the decision [below] is to immunize manufacturers from liability when tort victims are injured by defects tangentially touching on federal motor vehicle safety options selected by manufacturers” is simply hyperbole.

ture litigation. The regulation at issue in this case applies only to vehicles manufactured *more than 20 years ago*, before August 31, 1981. See 1980 FMVSS 208 S5.1.2. So too would any decision from this Court were it to grant review. But very few such vehicles remain in service,⁵ and little would be gained by this Court's review of a decision that likely will affect only this individual case.

C. Even were this Court to find plaintiff's claims not to be preempted, either this Court or the court of appeals would need to address VW's five remaining grounds for reversal before plaintiff would be entitled to any relief.

The decision below is also of limited importance because, as plaintiff acknowledges (see Pet. 2), VW raised five issues in addition to federal preemption in its appeal. Even if this Court were to reverse the court of appeals' preemption decision, it is entirely possible that plaintiff still would not be entitled to any recovery. Either this Court or the court of appeals would be obligated under Appellate Rule 23(i)(3) to consider each of these five other issues. Thus, even if the question presented by the petition for review were to have broad implications about the scope of Safety Act preemption (but see Section I.A, *supra*), and even if there were a significant number of other cases where an interpretation of the preemptive effect of the 1980 version of FMVSS 208 might be relevant (but see Section I.B, *supra*), judicial economy suggests that this case would still be an inappropriate vehicle for this Court to use to address the matter.

II. THE DECISION BELOW IS UNQUESTIONABLY CORRECT

While plaintiff and the *amici* make several scattershot arguments in an attempt to show that the lower court erred, at base all of these assertions are (as they must necessarily be) that the 1980 version of FMVSS 208 is materially different from

⁵ According to NHTSA's current model, only 7.9% of 20-year-old automobiles remain in service, and fewer still that were manufactured before then. See NHTSA, Updated Vehicle Survivability & Travel Mileage Schedules, at 7 (Nov. 1995).

the 1984 version of FMVSS 208 at issue in *Geier*. But neither the text of, nor the underlying policies behind, the two versions differs in any significant way, and none of the specific examples provided by plaintiff or the *amici* can withstand examination.⁶

It is manifest that the policies underlying the 1980 version of FMVSS 208 were *identical* to those underlying the 1984 version of FMVSS 208. Compare pages 3-4 with page 5, *supra*. In each version, NHTSA wanted to initiate public exposure to passive restraint systems slowly, desired that manufacturers create a diversity of options to encourage technological development and to allow comparison between these options as to cost, effectiveness, and public acceptability, and decided to phase in mandatory passive restraints. Based on this identity of mission – in each case critically dependent on allowing manufacturers the discretion to create a mix of occupant crash protection systems – the Supreme Court’s decision in *Geier* finding preempted a state common law tort action challenging a manufacturer’s choice under the 1984 version is plainly controlling over litigation under the

⁶ Underlying plaintiff’s arguments is a basic fallacy – that the court of appeals’ decision “totally undermines previous opinions of [this] Court” (Amicus Motion, at 2), namely, *Munroe v. Galati*, 189 Ariz. 113, 118, 938 P.2d 1114, 1119 (1997), and *Hernandez-Gomez v. Volkswagen (Hernandez-Gomez II)*, 185 Ariz. 509, 917 P.2d 238 (1996). This proposition is based on a fundamental misconception about the validity of those decisions after *Geier*. *Munroe* was specifically mentioned in *Geier* as a decision misinterpreting the preemptive effect of FMVSS 208 (see 529 U.S. at 866), and thus retains no precedential value. While *Hernandez-Gomez II* was not mentioned by name in *Geier*, it formed the basis for the overruled *Munroe* decision, and furthermore was explicitly based (1) on a “rebuttable presumption” against implied preemption under the Safety Act (185 Ariz. at 512, 917 P.2d at 241) that the *Geier* Court found not to exist (529 U.S. at 870) and (2) on the belief that FMVSS 208 merely “sets out minimum safety standards” (185 Ariz. at 518, 917 P.2d at 247), rather than, as the *Geier* Court held (at 875), “deliberately provid[ing] the manufacturer with a range of choices among different passive restraint devices.”

1980 version.⁷ The distinctions proposed by plaintiff and the *amici* have no merit.

1. Plaintiff (at Pet. 5) and the *amici* (at *Amicus* Br. 3-5) attempt to distinguish the two versions by stressing that the 1984 version “required a gradual phase-in of mandatory passive frontal crash protection under S4.1.2.1 starting in the 1987 model year” (Pet. 5), to allow NHTSA to develop better information about safety, to allow manufacturers to develop better passive-restraint systems, and to allow growth in public acceptance. See 529 U.S. at 879. What plaintiff and the *amici* fail to mention is that the 1980 version of FMVSS 208 *also* mandated a phase-in of systems to deal with the same questions of reliability, performance data collection, and possible public backlash. See pages 3-4, *supra*. The *Geier* Court’s explanation that “[b]ecause the rule of law for which petitioners contend would have stood ‘as an obstacle to the accomplishment and execution of’ [these] important means-related federal objectives * * *, it [was] pre-empted,” *id.* at 881 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), applies equally to this case.

2. That the 1984 version of FMVSS 208 “reflected [NHTSA’s] policy decision to seek ‘a mix of several different passive restraint systems,’” Pet. 5 (quoting *Geier*, 529 U.S. at 878), is also no basis for distinguishing the two versions. The 1980 version was also specifically based on the need for a variety of systems, to allow NHTSA to “assess[] and compar[e] the safety benefits and costs of alternative occupant restraint systems” (41 Fed. Reg. at 24,070; page 3, *supra*), and “to obtain experience with” several systems and “to obtain feedback on [their] per-

⁷ The amicus brief in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cited by plaintiff (at 10) therefore supports the decision of the court of appeals here; it explains (at 15) that the 1984 version of FMVSS 208 was preemptive because NHTSA “affirmatively sought to encourage manufacturers to use a variety of protection systems” and that state law tort liability would disrupt this effort. The government’s amicus brief in *Geier* also supports preemption; it argues (at 23) for implied preemption because the 1984 FMVSS 208 “encourage[ed] manufacturers to offer a variety of passive restraints.”

formance and reliability” (42 Fed. Reg. at 34,295; page 4, *supra*).

3. Both plaintiff and the *amici* attempt to distinguish this case from *Geier* by asserting that the 1980 version of FMVSS 208 mandated only performance criteria, not design criteria. See Pet. 9; *Amicus* Br. 9. But both versions of FMVSS 208 set “performance” standards, see 1980 FMVSS 208 S1; 1984 FMVSS 208 S1, and thus this does not differentiate the two – or this case from *Geier*. Furthermore, this argument misunderstands what is meant by a “performance” standard. FMVSS 208 has never specified the *exact design* a manufacturer must use to meet any sub-part of the Standard. Thus, for example, two manufacturers may choose to meet the Second Option differently, so long as both meet the underlying performance requirements of that option. However, NHTSA’s longstanding decision to allow manufacturers to comply with Standard 4.1.2 *either* by complying with the “First Option” *or* with the “Second Option” *or* with the “Third Option” is different. It does not matter *how* the manufacturer chooses to meet the option it chooses – hence FMVSS 208 is a performance standard – but plaintiff cannot challenge *which* option the manufacturer chooses to adopt. See *King v. Ford Motor Co.*, 209 F.3d 886, 890, 892 (6th Cir.), cert denied, 531 U.S. 960 (2000). However, plaintiff’s case is based on just such a challenge. Finally, as the First Circuit explained in *Wood*, FMVSS 208 is different from other safety standards in that it “has elements of a design standard.” 865 F.2d at 417.

4. Plaintiff’s (and *amici*’s) final argument – that they can avoid preemption because they assert liability arising from a rollover accident, rather than a frontal collision – fails for the same reasons that the performance-versus-design distinction fails: liability under this theory also is indisputably based on a challenge to *which option* VW chose under FMVSS 208, because the requirement for rollover protection is intentionally contained only in the First Option standard. See *Hurley*, 222 F.3d at 382 (“The ability to withstand [specific types of accidents] is one as-

pect of the general topic of crashworthiness that FMVSS 208 addresses. Otherwise, the option [to choose any listed option] that * * * *Geier* * * * preserve[s] for manufacturers would be eviscerated by the particulars of the crash in question.”⁸ Plaintiff’s theory would punish VW under state law for having selected a Second Option restraint system, as it was entitled and encouraged to do by federal law. *Geier* clearly holds that liability based on such a theory is preempted.⁹ Thus, the Fourth Circuit recently held preempted claims arising out of a rollover accident. See *Moser*, 2001 WL 1387600, at *1. The court explained that “[b]oth *Geier*’s and *Moser*’s claims would frustrate the Department of Transportation’s goal of promoting a variety and mix of passive devices.” *Id.* at *3. So too would Hernandez-Gomez’s claims, which, like *Moser*’s, arise from a rollover accident.

* * * * *

In sum, the decision below is plainly correct; plaintiff’s attempts to distinguish this case from *Geier* are wholly insubstantial. The 1980 and 1984 regulations were in relevant part identical, and *Geier* held the rationale for the choice afforded manufacturers in both to be preemptive. Furthermore, the petition for review addresses an issue of minimal importance.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

⁸ The assertion (*see* Pet. 9) that the First Option (S4.1.2.1) is irrelevant because no manufacturer chose that option is unsupported by any authority, has no basis in the record, and is in any event absurd. It was one option afforded manufacturers.

⁹ Plaintiff cites (at Pet. 8) 1974 NHTSA letters authorizing VW to incorporate manual lap belts into its vehicles, but these are entirely beside the point. A state rule *requiring* VW to do so would undermine NHTSA’s desire to have a variety of systems implemented, and in particular to have completely-passive systems developed. Under plaintiff’s logic, because Honda *could* have chosen voluntarily to add an air bag to the vehicle at issue in *Geier*, state law could have *required* it to do so.

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