

**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-01-0408-CV

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

Pima County Superior
Court Case No.
CV 274471

**RESPONSE OF DEFENDANTS/APPELLANTS VOLKSWAGEN
OF AMERICA, INC., *ET AL.* TO AMICUS BRIEF FILED BY
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.**

Kenneth S. Geller
David M. Gossett
MAYER, BROWN, ROWE & MAW
1909 K Street, NW
Washington, DC 20006
tel (202) 263-3000
fax (202) 263-3300

William T. Burghart
PESHKIN KOTALIK & BURGART
3030 North Central Avenue
Suite 1106
Phoenix, Arizona 85012-2718
tel (602) 248-7770
fax (602) 248-0777

Counsel for Defendants/Appellants

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Pursuant to Arizona Rule of Civil Appellate Procedure 16(b), Defendants/Appellants Volkswagen of America, Inc., *et al.*, hereby file this supplemental brief to respond to the amicus brief submitted by the Trial Lawyers for Public Justice (“TLPJ”).

INTRODUCTION

As we demonstrated in our response in opposition and in our supplemental brief, the decision of the Court of Appeals is manifestly correct. Under *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), plaintiff’s claims are preempted by Federal Motor Vehicle Safety Standard (“FMVSS”) 208 and the National Traffic and Motor Vehicle Safety Act (“Safety Act”), 49 U.S.C. § 30101 *et seq.* At all relevant times, the National Highway Traffic Safety Administration (“NHTSA”) specifically sought to have manufacturers develop a variety of passive safety systems in order to comply with the “occupant crash protection” rules contained in FMVSS 208. A state law tort claim premised on a challenge to a manufacturer’s authorized choice under FMVSS 208 would frustrate NHTSA’s goals of technological diversity and a careful phase-in of new systems. Thus, *every* court to address the question since *Geier* has held that litigation over a manufacturer’s method of compliance with FMVSS 208 – such as the present case – is preempted. Nothing in TLPJ’s brief supports reaching a different conclusion here.

ARGUMENT

Largely reiterating arguments made by the plaintiff, TLPJ articulates three reasons why, despite *Geier*, the claim in this case is not preempted. None of these arguments has any merit. TLPJ was counsel to the losing side in *Geier*, and it is now engaged in a blatant attempt to narrow that decision beyond recognition.

Throughout its brief, TLPJ has gone to great lengths to obfuscate what version of FMVSS 208 governs here. Before addressing TLPJ's arguments, we first clarify this history. As we explained in our supplemental brief (at 5-6), the version of FMVSS 208 that applied to plaintiff's 1981 model-year vehicle was issued on July 5, 1977. See Final Rule, 42 Fed. Reg. 34,289 (July 5, 1977) (Appendix 2 to the petition for review). That rule afforded manufacturers discretion to choose among the three options contained in S4.1.2 through the 1981 model year, but began to mandate First Option restraints for certain vehicles manufactured after September 1, 1981 – approximately a year after plaintiff's vehicle was manufactured. Thus, when this vehicle was built, VW was permitted to choose among the three options, but expected that within one year all of its large cars would be required to comply with the First Option, and within three years all of its cars would be required to comply with the First Option.¹

¹ NHTSA delayed and then rescinded the phase-in of First Option systems in 1981 (after this vehicle was manufactured). See Final Rule, 46 Fed. Reg. 21,172 (Apr. 9, 1981); Final Rule, 46 Fed. Reg. 53,419 (Oct. 29, 1981); VW Supp. Br. at

As *Geier* held – and as we explained in our supplemental brief (at 4-5, 9) – in the 1970s and 1980s FMVSS 208 was a unique safety standard. Rather than merely setting a performance standard, or even simply providing manufacturers a menu of options from which they could choose, NHTSA specifically desired that manufacturers use a *variety* of methods to comply with FMVSS 208. See, e.g., Department of Transportation, *The Secretary’s Decision Concerning Motor Vehicle Occupant Crash Protection*, at 2, 4, 6 (Dec. 6, 1976); 42 Fed. Reg. at 34,295. Thus, the *Geier* Court held that a state law requirement that all vehicles contain airbags would restrict the mix of occupant restraint systems on the road and would frustrate the essential purposes of FMVSS 208. See 529 U.S. at 878-879.

Plaintiff’s claim is *identical in all relevant respects* to the claim in *Geier*. Nonetheless, TLPJ argues that *Geier* does not govern because Ms. Hernandez-Gomez was in a rollover accident. But, as we explain in Part A, *infra*, the Supreme Court’s holding in *Geier* is not dependent upon the type of accident that may have occurred in any particular case. Indeed, any rule of preemption that would turn on the specific details of an accident would be both irrational and unworkable. TLPJ

6. The Supreme Court found that rescission to be inadequately explained (see *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983)), whereupon NHTSA reissued FMVSS 208 and again phased in a requirement that manufacturers provide First Option systems. See Final Rule, 49 Fed. Reg. 28,962 (July 17, 1984). That (1984) version of FMVSS applied to the vehicle in *Geier*.

also argues that *Geier* is inapplicable because plaintiff claims that VW should have installed a manual lap belt in her car rather than an airbag. But FMVSS 208 S4.5.3 specifically authorized manufacturers *not* to include manual lap belts if a safety-restraint system could nonetheless meet the performance requirements of one of the three options. (S4.5.3 thus expands the variety of options in the marketplace during the phase-in period, and plays a significant role in NHTSA’s goal of creating variety.) See Part B, *infra*. Finally, TLPJ asserts that plaintiff is not seeking to hold VW accountable for choosing an option allowed by federal law. But that is exactly what this litigation would do, and the logic of *Geier* applies directly to this case. See Part C, *infra*.

A. Rollover Claims Are Preempted Under *Geier*.

As we showed in our supplemental brief (at 16-17), the rationale of this Court’s decision in *Hernandez-Gomez v. Leonardo* (“*Hernandez-Gomez II*”), 185 Ariz. 509, 518-519, 917 P.2d 238, 247-248 (1996), is completely foreclosed by *Geier*; the specific details of plaintiff’s accident cannot affect the question whether her claim is preempted by FMVSS 208. FMVSS 208 relates to “occupant crash protection” without limitation, and “specif[ies] equipment requirements for active and passive restraint systems” without limitation as to the type of collision. See FMVSS 208 S2. Thus, the Seventh Circuit recently explained that “[t]he ability to withstand [specific types of accidents] is one aspect 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.” *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir. 2000), cert. denied, 531 U.S. 1148 (2001).

TLPJ disputes this, arguing that one must look at the requirements and purpose of what it calls “the portion of [FMVSS] 208 that VW complied with” (TLPJ Br. at 9) – the Second Option – which TLPJ inaccurately asserts was “applicable” only to frontal collisions (*ibid.* (quoting *Hernandez-Gomez II*, 185 Ariz. at 517, 917 P.2d at 246)). See also Pl. Supp. Br. at 2. But the point is that VW chose to install a Second Option system, which required that the vehicle provide specified levels of protection in frontal collisions but did not require that the vehicle comply with the rollover test requirement of FMVSS 208 S5.3. A decision for the plaintiff here would mean that *all* systems would have to comply with that rollover test requirement – and that the Second Option could not be used.

Thus, as in *Geier*, allowing this claim to proceed would frustrate NHTSA’s desire to provide manufacturers with choices under FMVSS 208, and in particular the choice between three authorized options – including a passive restraint system that did mandate rollover protection (the First Option) and a passive restraint system that did not (the Second Option). What method of restraint would provide the optimal level of occupant crash protection is both complex and uncertain.

Because of this lack of clarity, NHTSA repeatedly has reconsidered what occupant safety restraints to mandate under FMVSS 208. Between 1977 and 1981, and again between 1984 and 1990, NHTSA's approach was to afford manufacturers several options – so as to develop data and introduce passive restraints slowly – but to phase in the requirement that manufacturers meet the First Option. Under both the version of the Standard applicable to plaintiff's car and the version that governed in *Geier*, rollover testing was addressed through the phased-in requirement of mandatory compliance with the First Option.²

It is also incorrect to argue (as TLPJ does at 11-12) that manual lap belts should be required because they would necessarily provide increased rollover protection. TLPJ forgets that in the 1970s and 1980s very few people wore manual seat belts even if they were provided. See, e.g., NHTSA, *Automobile Occupant Crash Protection: Progress Report No. 3*, at 4 (July 1980) (“In 1979 only about 11 percent of all car drivers used the available belts.”). Therefore, NHTSA was actively seeking *fully passive* safety solutions – such as the one installed in this car – that did not require manual belts. For example, early versions of FMVSS 208 provided that vehicles had to meet the First Option, including the rollover test,

² Under the 1980 version of FMVSS 208 applicable here, all vehicles from the 1984 model year would have been required to meet the S5.3 rollover test or include manual lap belts (see 1980 FMVSS 208 S4.1.3), and large vehicles would have been required to undergo such testing starting in the 1982 model year (see *id.* S4.1.2). But *no* vehicles from the *1981 model year* were required to satisfy the First Option.

without relying on manual belts. See Occupant Crash Protection in Passenger Cars, Multipurpose Vehicles, Trucks and Buses, 36 Fed. Reg. 4600, 4601 (Mar. 10, 1971).³ Similarly, NHTSA enacted FMVSS 216, with which plaintiff has never alleged this vehicle did not comply, to specify “roof crush” standards as “an alternative to conformity with the rollover test of Standard 208.” See 36 Fed. Reg. 23,299, 23,299 (Dec. 8, 1971). Given NHTSA’s conclusion that “the rate of fatalities in Rabbits equipped with passive belts is less than one-third of the rate for Rabbits of the same years of manufacture equipped with active lap/shoulder belt systems” (Final Rule, 42 Fed. Reg. 61,466, 61,467 (Dec. 5, 1977)), the agency’s choice *not* to require manual belts in vehicles such as this one was completely justified.

Finally, the rollover test procedure of FMVSS 208, applicable to First Option restraints, has no relevance to this lawsuit or the facts and circumstances of an accident similar to the plaintiff’s in this case. The rollover crash test mandated by FMVSS 208 S5.3 requires only that a test dummy be *contained* within the vehicle. See *id.* S6.1. But *plaintiff was not ejected from her car*; she therefore has no cause to object to the failure of this vehicle to undergo this test. Moreover, there is no evidence whatsoever that this vehicle, simply because it contained a

³ The provision *allowing* the use of manual belts (S4.1.2.1(c)) to meet the First Option was added later, when it became clear that this goal might be too ambitious. See Occupant Crash Protection, 39 Fed. Reg. 10,271, 10,271 (Mar. 19, 1974).

restraint system certified under the Second Option, would not have met the containment standard of S6.1. In fact, the Insurance Institute for Highway Safety concluded that, because of their size and design, “Volkswagen Rabbits equipped with the automatic two-point belt system [in use here] * * * provide occupant protection from ejection in fatal crashes that is, at least, comparable to that of cars equipped with conventional manual three-point belt systems.” See J. Esterlitz, *A Comparison of Rates of Fatal Ejection from Manual and Automatic Belt Cars*, at 1 (June 1987). Therefore, any rationale seeking to carve out an exception to *Geier* preemption based on the test procedure applicable to First Option cars but not Second Option cars would have no applicability in this case.

In sum, NHTSA plainly considered rollover testing while developing FMVSS 208, because it included it in the First Option. The agency, however, decided not to apply this standard to the Second Option. This conscious agency choice to include a rollover test procedure in one option but not in another is part of the complex decision-making about FMVSS 208 that results in preemption.⁴

⁴ See, e.g., *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983) (“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*”) (emphasis supplied); *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 296-297 (7th Cir. 1997) (“the existence of * * * exclusionary language [detailing “which type of vehicles were excluded from complying with the windshield retention requirements”] in [FMVSS 212] mandates that we interpret it as representing a conscious decision by the NHTSA.”) (emphasis omitted).

Any suggestion in *Hernandez-Gomez II* that FMVSS 208 merely imposed “minimum” occupant restraint standards, which the states were free to supplement in the case of rollover accidents (see 185 Ariz. at 518, 917 F.2d at 247), was rejected by the Supreme Court in *Geier*. See 529 U.S. at 874-875, 878-879.

B. That This Is A No-Lap-Belt Case, Rather Than A No-Airbag Case, Does Not Justify A Refusal to Follow *Geier*.

TLPJ’s contention that *Geier* does not mandate preemption here because “this is a ‘no-lap-belt’ case, not a ‘no-airbag’ case” (TLPJ Br. at 10) is frivolous. As we have previously explained, lower courts have applied *Geier*’s analysis to seat-belt cases, see *Carrasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169 (M.D. Pa. 2001), and many courts had found such claims to be preempted even before *Geier*. See VW Supp. Br. at 11 n.5. Such holdings make perfect sense; the reasons given for finding preemption in *Geier* had little to do with airbags and everything to do with not frustrating NHTSA’s goal of ensuring that a *variety* of safety restraint systems be developed, tested, and introduced. TLPJ has no good arguments to the contrary.

TLPJ asserts that NHTSA was concerned with the too-rapid introduction of airbags, but that the agency has never been concerned with the too-rapid introduction of manual lap belts. See TLPJ Br. at 10-11. This argument ignores the language of FMVSS 208. Both the 1980 and the 1984 versions of FMVSS 208 mandated that manufacturers phase in First Option passive restraints, *not*

airbags per se. Just as requiring passive belts in 1981 or 1987 would undermine the phase-ins, so too would requiring a manual lap belt in addition to the passive belt system included in this car.

TLPJ's argument also ignores the history of seat belt usage and of FMVSS 208. Because historically very few people *used* manual seat belts (see page 6, *supra*), NHTSA sought to encourage passive restraint systems. Thus, the original version of the First Option in FMVSS 208 *required* that vehicles certified under the First Option *not* rely on manual seat belts to meet its performance requirements. See 36 Fed. Reg. at 4601. Furthermore, as we explained in our supplemental brief (at 5-6, 9), NHTSA was concerned with developing a *variety* of passive restraint systems – ones with or without manual lap belts, as well as ones with or without airbags. The VW system, which under S4.5.3 used a completely passive system to comply with the Second Option, was plainly authorized by FMVSS 208 (see VW Supp. Br. at 7; Passive Belt Release Mechanism, 39 Fed. Reg. 3834, 3834 (Jan. 30, 1974)), and was repeatedly lauded by NHTSA as an important step forward in the development of passive restraints despite – or perhaps because of – its lack of a manual lap belt. See VW Supp. Br. at 4 n.2.⁵

TLPJ's second point is equally unconvincing. It asserts that NHTSA specifically authorized VW to install the system plaintiff advocates – the existing

⁵ In fact, NHTSA specifically contracted with VW to manufacture more vehicles using this system. See 42 Fed. Reg. at 34,291-34,292.

passive-restraint system plus a manual lap belt. TLPJ thus claims that “when confronted with the propriety of the choice advocated by plaintiff here, the agency made clear that the use of seat belts did not in any way undermine or frustrate any federal purposes” (TLPJ Br. at 12). See also Pl. Supp. Br. at 7-8. The conclusion does not follow from the premise. First, while it is true that VW *could* have installed a system similar to the one it used but that also included a manual lap belt, the fact that this alternative system would have been one among the mix of authorized systems in no way negates the fact that the system actually installed also was part of that mix – and that a decision *precluding* VW from using this system thus would frustrate NHTSA’s purpose of creating broad variety. In fact, TLPJ’s argument would read S4.5.3 – which authorized fully passive systems such as the VW system – out of FMVSS 208.⁶

Second, nothing in the correspondence to which TLPJ refers supports the proposition that *a state rule requiring the installation of manual lap belts with the*

⁶ The related assertion in the plaintiff’s supplemental brief (at 7-8) that “[o]n June 14, 1976, DOT stated that the Second Option required ‘a passive restraint system providing protection in frontal crashes combined with lap seat belts providing protection in lateral and roll-over crashes.’ 41 Fed. Reg. 24070 (June 14, 1976 (emphasis added),” is misleading at best. While lap belts can be used to comply with the requirements of the Second Option, S4.5.3 specifically authorized compliance with the Second Option without a lap belt. The restraint system here fully complied with the Second Option, and in fact Secretary Coleman discussed and praised by name the then-newly-introduced passive belt system in the Volkswagen Rabbit in the very Notice from which plaintiff quotes. See Proposed Rulemaking and Public Hearing, 41 Fed. Reg. 24,070, 24,070 n.3, 24,072 (June 14, 1976).

VW system would not frustrate NHTSA's goals. Rather, the fact that a similar system with the addition of a manual lap belt would *also* be acceptable under FMVSS 208 is simply further evidence that NHTSA desired manufacturers to create a variety of systems during the phase-in period of FMVSS 208. More relevant than these letters, therefore, are regulatory pronouncements from NHTSA that specifically approved of the use of the VW system. See 39 Fed. Reg. at 3834 ("option two exists * * * to accommodate the introduction of passive restraint systems like Volkswagen's"); VW Supp. Br. at 4 n.2 (collecting accolades from Secretaries of Transportation about the VW system); *O'Bryan v. Volkswagen of Am., Inc.*, 838 F. Supp. 319, 322 (W.D. Ky. 1992). VW's system was one of the first that met the requirements of FMVSS 208 *without* requiring any action on the part of the front-seat passengers. Adding a manual lap belt to the VW system, while acceptable under FMVSS 208, would have undermined the very reason the system was significant and was greeted by NHTSA with such praise: At a time when few people wore active seat belts, any method of protection that did not require action on the part of vehicle occupants was considered to be of great importance. See page 6, *supra*.

TLPJ's final point (at TLPJ Br. 13, 14 n.1; see also *id.* at 2) — that the phase-in of mandatory First Option systems contained in the 1980 version of FMVSS 208 is not relevant to this case because that Standard did not require any

particular option for the 1981 model year — is simply absurd. The phase-in entailed *affording manufacturers full discretion* among the three options through the 1981 model year, and then mandated that large vehicles comply with the First Option in the 1982 model year, that large and mid-size vehicles comply with the First Option in the 1983 model year, and that all vehicles comply with the First Option in the 1984 model year and thereafter. The pre-1982 discretion to choose which option to install was an integral part of the phase-in of First Option systems. The public policy in favor of promoting choice among systems was evident as early as 1976, long before this vehicle was built. See VW Supp. Br. at 4-5 (discussing diversity-of-systems rationale for Secretary Coleman’s 1976 demonstration program). That public policy formed the basis for the 1977 Final Rule that was applicable to this car (see *id.* at 5) and was still fully in force in 1980 when this vehicle was built.⁷

Thus, TLPJ’s reading of NHTSA’s phase-in – ignoring it entirely during the 1977-1981 period – makes no sense. Under TLPJ’s theory, a state could require that all vehicles comply with the First Option between 1977 and 1981 (by including airbags, by affording increased rollover protection, by including manual lap belts, or any combination thereof), even though the state would no longer be able to enforce such compliance in 1982 or 1983. But such a rule would

⁷ The temporary rescission of that policy *after* this vehicle was built is completely irrelevant.

fundamentally undermine NHTSA's goals that a variety of passive restraint systems be developed during 1977-1981 and that such systems be introduced slowly. NHTSA desired this phase-in to increase public acceptance of passive-restraint systems and to allow the agency to develop data on their reliability and performance. A state mandate that manufacturers use specific restraint systems in 1980 or 1981 would frustrate these goals, which is the exact reason given by the *Geier* Court for its decision that claims challenging choices under FMVSS 208 are preempted.

C. Plaintiff's Claim Would Entail Holding VW Accountable For Selecting An Option Authorized By FMVSS 208, And Is Preempted Under *Geier*.

TLPJ's final argument is a scattershot attack against the application of *Geier* to plaintiff's claim. First, it asserts (at 14-15) that because plaintiff is not arguing "that VW should have installed manual lap belts *instead of* the passive restraint system it chose to install" but instead "that VW should have installed manual lap belts *in addition to* the passive restraint system it chose to install," her claims are not preempted. This argument is plainly wrong; in *Geier*, the plaintiffs similarly argued that Honda should have installed air bags *in addition to* the systems it chose to install – a Third Option manual seat belt system.⁸ More generally, the VW system *plus* manual lap belts would be a different system from the VW system as

⁸ See 529 U.S. at 865 (vehicle "was equipped with manual shoulder and lap belts * * *. The car was not equipped with airbags or other passive restraint devices").

installed; while both might satisfy FMVSS 208, a state law rule precluding a manufacturer from choosing one of those systems (the VW system as installed) would frustrate NHTSA's goal of having a broad set of possible systems be implemented. In short, plaintiff's claim would preclude *any* system that complied with the Second Option (FMVSS S4.1.2.2) under S4.5.3 (which authorized fully passive systems without the use of manual lap belts) – a clear interference with NHTSA's goals in FMVSS 208.

TLPJ's second argument (at 15-16) is that *Geier* does not hold automobile manufacturers immune whenever a federal regulation provides them with options, but instead only when the government has made it clear that it “wanted to encourage a *diverse array* of passive restraint technology, and to *phase-in* the use of passive restraints gradually over time” (*id.* at 15) (emphasis supplied). This is an accurate statement of the law – and completely consistent with the one made in our supplemental brief (at 9). As TLPJ stresses, *Geier* found that a claim based on failure to include airbags was preempted because it would “undercut[] the ‘technological diversity’ goal of Standard 208 [and] * * * undercut[] the gradual-phase-in goal of Standard 208.” TLPJ Br. at 15. But it is precisely these same diversity and phase-in goals that justify finding preemption here. See VW Supp. Br. at 8-9, 11.

We have never asserted that the mere *presence* of options suffices to require

preemption. Rather, as the Supreme Court explained in *Geier*, the options in FMVSS 208 existed so that manufacturers would create a diverse array of systems, to obtain experience with various systems and to allow for the gradual phase in of successful passive systems. FMVSS 208 thus differs from other Safety Standards – but the versions applicable in 1980 and in 1987 do not differ in any significant way from each other.⁹ Furthermore, as we explained above (at page 11), NHTSA specifically approved of the VW restraint system and identified it as an important part of the mix under FMVSS 208.

Thus, TLPJ’s third and final point – that the federal government has rejected the broad options-always-preempt argument – is a straw man. Beyond that, the government’s briefs in fact strongly support our position. The government’s amicus brief in *Wood v. General Motors Corp.*, 865 F.2d 394 (1st Cir. 1988) (quoted in TLPJ’s brief at 16-17) explains why FMVSS 208 *does* preempt claims such as plaintiff’s claim here, even if the mere presence of options under *other* safety standards would not require preemption. The very next paragraph of that brief, after the two paragraphs quoted by TLPJ, explains:

What distinguishes this issue from most is that the Secretary determined not simply to allow either automatic belts or airbags, but that an all airbag rule

⁹ As plaintiff acknowledged in her Supplemental Brief in the Court of Appeals (at 12), “the substandards * * * in the 1984 version of FMVSS 208 to which the Arizona Supreme Court cited in Hernandez-Gomez II are identical to the same substandards in the 1980 version of FMVSS 208.”

would disserve the safety purposes of the Act. She therefore affirmatively sought to encourage manufacturers to use a variety of protection systems in their fleet. *It is that policy of affirmatively encouraging diversity that would be disrupted by tort liability, which therefore would be preempted.*

Brief of the United States as *Amicus Curiae* in *Wood*, at 15 (emphasis added). Similarly, the *amicus* brief in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) (quoted in TLPJ Br. at 17) explains (at 28) that, while the government did not agree that the mere presence of options in a regulatory scheme would suffice to require preemption of state tort actions, *FMVSS 208 is different* because “the Secretary [of Transportation] concluded that, because of a history of substantial consumer resistance to automatic, or passive, occupant restraint systems, passenger safety would be best served by a diversity of such restraint systems.” Finally, as we showed in our supplemental brief (at 15 n.7), in its brief in *Geier* the federal government again argued for preemption under FMVSS 208, because FMVSS 208 “encourag[ed] manufacturers to offer a variety of passive restraints.” *Geier* *amicus* brief, at 23. A finding of liability here would frustrate the encouragement of such variety, and thus plaintiff’s claim is preempted.

* * * * *

In sum, none of TLPJ’s arguments supports reversing the decision of the Court of Appeals. NHTSA’s goal of having manufacturers comply with FMVSS 208 through a range of methods in 1980 was identical to its goal in 1987. Thus, a

state law tort claim premised on precluding manufacturers from implementing an authorized occupant restraint system would frustrate NHTSA's goals and, under *Geier*, must be preempted.

CONCLUSION

For the foregoing reasons and those in our earlier briefs, this Court should affirm the decision of the court of appeals.

Respectfully Submitted.

Kenneth S. Geller
David M. Gossett
MAYER, BROWN, ROWE & MAW
1909 K Street, NW
Washington, DC 20006
tel (202) 263-3000
fax (202) 263-3300

William T. Burghart
PESHKIN KOTALIK & BURGHART
3030 North Central Avenue
Suite 1106
Phoenix, Arizona 85012-2718
tel (602) 248-7770
fax (602) 248-0777

Counsel for Defendants/Appellants
May 20, 2002

ORIGINAL AND SIX COPIES
hand delivered this 20th day of
May, 2002, to:

Noel K. Dessaint, Clerk of Court
Supreme Court of Arizona
1501 W. Washington
Phoenix, AZ 85007

COPY of the foregoing faxed and mailed this
20th day of May, 2002, to:

Dale Haralson, Esq.
HARALSON, MILLER, PITT, & McANALLY, P.L.C.

One South Church Avenue
Suite 900
Tucson, AZ 85701-1620
Attorneys for Appellee

Larry E. Coben, Esq.
COBEN & ASSOCIATES
8710 East Vista Bonita Drive
Scottsdale, AZ 85255
Attorneys for Amici Attorney's Information Exchange Group et al.

Richard P. Traulsen, Esq.
BEGAM, LEWIS, MARKS & WOLFE, P.A.
111 West Monroe Street, Suite 1400
Phoenix, AZ 85003-1787

Leslie A. Brueckner, Esq.
TRIAL LAWYERS FOR PUBLIC JUSTICE
1717 Massachusetts Avenue, NW, Suite 800
Washington, D.C. 20036

Arthur H. Bryant, Esq.
TRIAL LAWYERS FOR PUBLIC JUSTICE
One Kaiser Plaza, Suite 275
Oakland, CA 94612
Attorneys for Amicus Trial Lawyers For Public Justice

Paul G. Cereghini, Esq.
BOWMAN & BROOKE, LLP
Phoenix Plaza
2929 North Central Avenue
Suite 1700
Phoenix, AZ 85012-2761

Leslie G. Landau, Esq.
McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
Attorneys for Amici Hyundai Motor Company and Hyundai Motor America
