

**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

**SUPPLEMENTAL BRIEF FOR DEFENDANTS/APPELLANTS
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INTRODUCTION¹

Since the late 1960s, the federal government has regulated the safety-restraint systems that automobile manufacturers include in passenger vehicles. This lawsuit involves a challenge to the particular system that Volkswagen installed in its 1981-model-year Volkswagen Rabbits. Plaintiff does not deny that the system complied fully with federal law, and, in particular, was specifically authorized as one of the three safety-restraint options afforded in the applicable (1980) version of Federal Motor Vehicle Safety Standard (“FMVSS”) 208. Nonetheless, plaintiff argues that Volkswagen should have provided a different system, which she posits might have prevented her injuries. However, as the United States Supreme Court held in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), common law tort claims that challenge an automobile manufacturer’s choice among the three safety-restraint options in FMVSS 208 are impliedly preempted by federal law.

FMVSS 208 embodies the decision of the National Highway Traffic Safety Administration (“NHTSA”) that “safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car.” *Id.* at 881 (citing Brief for United States as *Amicus Curiae* 25)

¹ For the convenience of the Court, this supplemental brief supersedes Volkswagen’s Opposition to the Petition for Review, and includes Volkswagen’s argument on the merits of the preemption question (including those parts that were originally in the Opposition).

(emphasis in original). As the Supreme Court explained in *Geier*, where, as with FMVSS 208, the federal government has “deliberately sought variety,” no state requirement, including one imposed through common law tort litigation, may limit a manufacturer’s choice. *Id.* at 878. But that is *precisely* what plaintiff’s lawsuit seeks to do. While *Geier* involved the 1984 version of FMVSS 208, it is in all relevant respects identical to the 1980 version of FMVSS 208 that applied to plaintiff’s car – and the federal policy of deliberately affording manufacturers a choice among the three options included in both iterations of FMVSS 208 did not change between the versions. *Geier* is thus controlling in this case, and, as the court of appeals held, plaintiff’s claim is preempted by federal law. The decision of the court of appeals must be affirmed.

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 “practica-

ble” in their operation. *Id.* at 1392(a), 1392(f)(3). 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. 3911, 3912 (Feb. 24, 1972) – “First Option,” a “complete passive protection system” (see Notice, 36 Fed. Reg. 4600, 4604 (Mar. 10, 1972)); “Second Option,” a “head-on passive protection system” (see 37 Fed. Reg. at 3912), 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.²

After extensive consideration, Secretary Coleman decided to institute “a

² 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 41 Fed. Reg. at 24,070 n.3, 24,072. In fact, a long line of Secretaries of Transportation lauded the use of the passive belt system included in Volkswagen Rabbits beginning in the mid-1970s, which was installed in plaintiff’s vehicle. See *ibid.* (Secretary Coleman); 42 Fed. Reg. 34,289, 34,295 (July 5, 1977) (Secretary Adams); 49 Fed. Reg. 28,962, 28,999 (July 17, 1984) (Secretary Dole).

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).

Seven months later, incoming Secretary of Transportation Adams 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 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.*). This 1977 Final Rule, requiring that cars manufactured before August 31, 1981 meet one of the three Options, applied to Ms. Hernandez-Gomez's 1981 Volkswagen Rabbit. See *id.* at 34,297 (requiring that cars manufactured before August 31, 1981, "shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3").³

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 Mfrs. 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 relevant to this case, a verbatim reproduction of the version applicable between 1977 and 1981.* Insofar as the issues in this case are concerned, the sole substantive change between the 1980 version and the 1984 version of FMVSS 208 is that while the earlier regula-

³ In this final rule NHTSA also explained that Volkswagen had agreed to take part in Secretary Coleman's demonstration program using the passive-belt system in its VW Rabbit, and that NHTSA "anticipates that the manufacturers which were parties to the earlier demonstration program agreements will continue their current preparations for voluntary production of passive restraints" despite NHTSA's cancellation of that program. 42 Fed. Reg. at 34,295.

tion 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 later version 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).

C. Plaintiff's Accident And Lawsuit.

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. 3834, 3834 (Jan. 30, 1974) (“option two exists * * * to accommodate the introduction of passive restraint systems like Volkswagen’s.”).

Ms. Hernandez-Gomez sued, arguing that Volkswagen should have installed a manual lap belt – an active restraint – in the vehicle, even though the restraint system installed in her vehicle fully complied with the – fully passive – Second Option of FMVSS 208, which did not require such a belt. A jury agreed, and awarded Ms. Hernandez-Gomez \$3.1 million. Volkswagen appealed; before the court of appeals rendered its decision, the United States Supreme Court decided

Geier. Based on *Geier*, the court of appeals found the lawsuit to be preempted, and vacated the judgment.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD PLAINTIFF’S LAW-SUIT TO BE PREEMPTED BY FMVSS 208.

The Supremacy Clause preempts any state law that conflicts with federal law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Once it is determined that the particular state law at issue is preempted by federal law, that state law is “without effect.” *Ibid.* (citing *M’Culloch v. Maryland*, 17 U.S. (4. Wheat.) 315, 427 (1819)). State common law tort actions, not only state regulations or statutes, can be preempted by federal law. *Geier*, 529 U.S. at 871, 881. While there are several forms of preemption, at issue here is so-called “conflict” preemption, which occurs when it is impossible for a party to comply with both state and federal law, or where state law “prevent[s] or frustrate[s] the accomplishment of a federal objective.” *Id.* at 873-874. Because plaintiff’s lawsuit would frustrate the accomplishment of a federal objective – authorizing manufacturers to choose among a range of safety-restraint options – that lawsuit is preempted.

A. Under *Geier*, Lawsuits Challenging A Manufacturer’s Choice Among The Three Options In FMVSS 208 Are Preempted.

In *Geier*, the Supreme Court held that a plaintiff cannot premise liability on an automobile manufacturer’s choice among the safety-restraint options in FMVSS 208, because such claims are impliedly preempted by FMVSS 208 and the Safety

Act. 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 Court refused to allow the litigation to proceed. Allowing common-law tort litigation to require air bags – in other words, mandating compliance with the First Option using specific 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).⁴ 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.

⁴ *See also id.* at 879 (NHTSA was worried about “backlash” from a mandatory rule; wanted to “develop data” on comparative effectiveness; hoped that allowing various options would “overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems.” Finally, the agency hoped the gradual phase-in allowing a variety of systems “would * ** build public confidence, necessary to avoid another interlock-type fiasco.”) (citation omitted).

Every court since *Geier* to consider the issue has found that the reasoning of *Geier* applies to *all* litigation challenging a manufacturer’s choice among authorized safety-restraint systems under FMVSS 208, rather than only to the choice whether to include air bags:

- The court in *Carrasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169 (M.D. Pa. 2001), found a claim based on a manufacturer’s choice not to include an automatic lap belt in a system that used an automatic shoulder belt and a manual lap belt to be preempted under *Geier*. “[N]o matter how plaintiffs characterize their claim, they are attacking one of the specifically permitted passive restraint options under FMVSS 208.” *Id.* at 176 (alterations omitted). Therefore, the court held, the claim “‘present[ed] an obstacle’ to the accomplishment and execution of the purposes and objectives of the Safety Act and FMVSS 208, namely the objective of providing manufacturers with flexibility in choosing a restraint system,” and was preempted. *Id.* at 177 (citing *Geier*, 529 U.S. at 881-882; *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998)).
- The Seventh Circuit, in *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 381 (7th Cir. 2000), cert. denied, 531 U.S. 1148 (2001), held that a lawsuit premised on arguing that a bus should have included a three-point seat belt, an air bag, and structural support – rather than merely the two-point seat belt option authorized under FMVSS 208 and chosen by the manufacturer – was preempted. “*Geier* confirms * * * that a state lawsuit that forecloses an option left open by FMVSS 208 is * * * preempted.” *Id.* at 382.
- The Eleventh Circuit, in *James v. Mazda Motor Corp.*, 222 F.3d 1323, 1325-1327 (11th Cir. 2000), cert. denied, 532 U.S. 921 (2001), likewise found litigation challenging the manufacturer’s choice among options under FMVSS 208, specifically the choice not to include an automatic lap belt or air bag, to be preempted. “[A] suit against [a defendant] for [its] exercise of an option provided to [it] by FMVSS 208 conflicts with federal law and, thus, is impliedly preempted.” *Id.* at 1325 (quoting *Irving*, 136 F.3d at 769).
- The court below found Ms. Hernandez-Gomez’s claim that Volks-

wagen should have installed a manual lap belt, rather than comply with Option Two (which did not require such) to be preempted.⁵

Thus, the uniform weight of precedent supports the proposition that claims challenging a manufacturer's choice among the safety-restraint options under FMVSS 208 are preempted. It is important to note that this is a narrow rule of preemption; it applies *only* to limited facts involving regulatory *options*, such as those provided in FMVSS 208, and does not automatically apply even to other Safety Standards. Unlike FMVSS 208 – through which NHTSA specifically desired to allow manufacturers a range of choices – most Safety Standards set only legal minima 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); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737 (Tex. 2001) (same).⁶ Likewise, *Geier* does not bar litigation addressing the *design* of a chosen system (for example, the structure of knee bolsters or a seat belt) rather than the *choice* of a system authorized under FMVSS 208. See, *e.g.*, *Carrasquilla*, 166 F.

⁵ Most precedent pre-dating *Geier* also finds such claims preempted. See, *e.g.*, *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996); *Gentry v. Volkswagen of Am., Inc.*, 521 S.E.2d 13, 17 (Ga. Ct. App. 1999) (“to the extent that the [plaintiffs] allege as a design defect a failure to include a lap belt, that claim is preempted by federal law”). Several courts since *Geier* have also found such claims to be preempted in unpublished opinions.

⁶ Thus, plaintiff's assertion (at Pet. 11; see also Amicus Br. 3, 7-8, 10) that the “effect 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.

Supp. 2d at 178 (allowing litigation to proceed under theory that knee bolster and seat were defectively designed, but not based on lack of automatic lap belt); *Chevere v. Hyundai Motor Co.*, 729 N.Y.S.2d 272, 274 (N.Y. Sup. Ct. 2001) (allowing litigation to proceed under theory that “the design of the safety-belt-restraint installed was defective,” but not based on failure to include air bag). But plaintiff’s claim here was based solely on a challenge to Volkswagen’s choice of one authorized system under FMVSS 208. Thus, under *Geier*, this litigation is preempted by the Safety Act and FMVSS 208.

B. Plaintiff’s Attempts To Distinguish This Case From *Geier* Are Entirely Unpersuasive.

1. *The 1980 version of FMVSS 208 is indistinguishable from the 1984 version of FMVSS 208.*

Most of plaintiff’s effort to distinguish this case from *Geier* involves arguing that the 1980 version of FMVSS 208 is materially different from 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 her *amici* can withstand examination.

As discussed above (at pages 6-7), the relevant text of the two versions of FMVSS 208 includes no material differences relevant to this litigation. The policies underlying the 1980 version of FMVSS 208 also were identical to those underlying the 1984 version of FMVSS 208. In each version, NHTSA specifically wanted to allow manufacturers the discretion to create a mix of occupant crash pro-

tection systems, by providing a series of options among which manufacturers could choose. Compare pages 4-6, *supra* (citing regulatory history of 1980 version) with page 9, *supra* (citing *Geier*'s discussion of history of 1984 version). The reasons for providing manufacturers this choice in both versions included (1) to initiate public exposure to passive restraint systems slowly; (2) to create an incentive for manufacturers to create a diversity of options; (3) to encourage technological development; and (4) to allow comparison between these options as to cost, effectiveness, and public acceptability. Thus, while it is true 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), this is equally true of the 1980 version, which 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 4, *supra*), and "to obtain experience with" several systems and "to obtain feedback on [their] performance and reliability" (42 Fed. Reg. at 34,295; pages 5-6, *supra*).

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 4-5, *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.

Thus, there is no basis for distinguishing the 1980 version of FMVSS 208 from the 1984 version at issue in *Geier*, and the Supreme Court's decision in *Geier* finding a state common law tort action challenging a manufacturer's choice under the 1984 version to be preempted is plainly controlling in litigation under the 1980 version. As numerous courts have found, the earlier version of FMVSS 208 applicable here preempts state law tort claims, just as the 1984 version of FMVSS 208 does. See, *e.g.*, *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1123 (3d Cir. 1990) (claim based on 1981 vehicle impliedly preempted by FMVSS 208 and the Safety Act); *Taylor v. General Motors Corp.*, 875 F.2d 816, 827 (11th Cir. 1989) (claims based on 1980 and 1977 vehicles impliedly preempted by FMVSS 208 and the Safety Act); *Wood v. General Motors Corp.*, 865 F.2d 395, 408 (1st Cir. 1988) (claim based on 1976 vehicle impliedly preempted by FMVSS 208 and the Safety

Act).⁷

2. ***Both the 1980 version and the 1984 version of FMVSS 208 set performance criteria, which does not preclude preemption here.***

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 the 1980 version *and the 1984 version* 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. Derivatively, litigation in which it is relevant whether a specific *design* in fact *meets* the performance standards applicable to the manufacturer’s chosen option might not be preempted. See page 11, *su-*

⁷ The amicus brief in *Wood*, cited by plaintiff (at Pet. 10) 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. (emphasis in original). 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.”

pra. However, NHTSA’s longstanding decision to allow manufacturers to comply with FMVSS 208 § 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).⁸ Plaintiff’s case is based on just such a challenge. Thus, because the claim in *Geier* was preempted, the claim in this case must be preempted, as well.

3. *It is irrelevant that plaintiff was injured in a rollover accident.*

Plaintiff and her *amici* argue that Ms. Hernandez-Gomez can avoid preemption because she asserts liability arising from a rollover accident, rather than a frontal collision. This distinction also fails, for much 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 aspect of the general topic of crashworthiness that

⁸ As the First Circuit explained in *Wood*, FMVSS 208 is thus different from other safety standards in that it “has elements of a design standard.” 865 F.2d at 417. Furthermore, it had such elements in both the 1980 and 1984 versions.

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.”⁹ Plaintiff’s theory would punish VW under state law for having selected a Second Option restraint system, as it was entitled to do by federal law, and was in fact lauded for doing by repeated Secretaries of Transportation. See note 2, *supra*. *Geier* clearly holds that liability based on such a theory is preempted.¹⁰ Were Ms. Hernandez-Gomez’s claim not to be preempted, just as in *Geier* it would frustrate NHTSA’s goal of promoting a variety and mix of passive devices, because it would prevent a manufacturer from choosing the Second Option device installed in Ms. Hernandez-Gomez’s vehicle.

C. This Court’s Precedent Addressing The Preemptive Scope Of FMVSS 208 Is Superseded By *Geier*.

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.

⁹ 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.

¹⁰ 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.

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.”

Thus, as the court of appeals held, “a subsequent decision by the United States Supreme Court governing” preemption under the Safety Act and FMVSS 208 has been issued (Op. ¶ 8), and this Court’s conclusions in *Hernandez-Gomez II* “do not survive *Geier*” (*id.* at ¶ 16). Like the court of appeals, this Court must acknowledge the intervening decision of the United States Supreme Court in *Geier*, which demonstrates that plaintiff’s claims are preempted.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court of appeals.

Respectfully Submitted.

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