THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY

Court of Common Pleas

James C. Wilson, Circuit Court Judge

Case No. 06-CP-38-1071

MARY ROBYN PRIESTER, Individually and as natural mother/next of kin and personal representative of the Estate of James Lloyd Priester, ……. *Plaintiff-Appellant,*

v.

Preston Williams Cromer; Stage Light Management d/b/a Showgirls(z); Lloyd Brown, individually and d/b/a Showgirls(z); and Nikki D's, Inc., …….. *Defendants,*

of whom FORD MOTOR COMPANY, a Delaware corporation, is …… *Defendant-Respondent*

SUPPLEMENTAL BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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SUPPLEMENTAL BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND AFFIRMANCE

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 100 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 and elsewhere, 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 925 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 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

[1] Pursuant to Rule 213, SCACR, this brief is conditionally filed and accompanied by a motion for leave to file the brief.

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 regulatory scheme.

BACKGROUND

Applying the well-established preemption principles set forth in the U.S. Supreme Court's decision in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), this Court determined that Federal Motor Vehicle Safety Standard ("FMVSS") 205, 49 C.F.R. § 571.205—which expressly provides manufacturers with the choice between installing tempered glass or advanced glazing in side windows—preempts plaintiff's claim that her Ford F-150 pickup truck was defective because it used tempered glass. *Priester v. Cromer*, 388 S.C. 425, 430, 434, 697 S.E.2d 567, 570, 572 (2010).[2] As the Court explained:

> [T]he purpose of [FMVSS 205] is to provide an automobile manufacturer with a range of choices among different types of glazing materials, as opposed to providing a minimum standard. . . . To allow this suit to go forward would sanction a jury verdict finding [plaintiff's] pickup truck to be defectively designed solely because it selected the federally authorized choice of tempered glass.

388 S.C. at 433, 697 S.E.2d at 571.

Contrary to plaintiff's submission, the Court did not arrive at this conclusion based "solely" on the "mere fact" that FMVSS 205 provides manufacturers with a range of choices for regulatory compliance. Pl. Supp. Br. 2, 12-13. Rather, after carefully reviewing the regulatory record, this Court determined that the National Highway Traffic Safety Administration

[2] The term "advanced glazing" is sometimes used to refer to glass-plastic glazing, laminated glazing, or laminated glass. Advanced-glazing materials can withstand more force before shattering.

("NHTSA") was "extremely reluctant to pursue [an advanced-glazing] requirement that may increase injury risk for belted occupants to provide safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle." *Priester*, 388 S.C. at 430, 697 S.E. 2d at 570 (internal quotation marks omitted). The Court accordingly concluded that the state-law tort liability plaintiff sought—which would have the effect of requiring advanced glazing in all similarly situated vehicles—would "stand as an obstacle to achieving the purposes and objectives of Regulation 205." 388 S.C. at 433, 697 S.E. 2d at 571.

The U.S. Supreme Court vacated this Court's judgment and remanded the case for further consideration in light of *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011). On April 7, 2011, this Court directed the filing of supplemental briefs addressing the impact, if any, of the *Williamson* decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

As Ford's supplemental brief demonstrates, *Williamson* confirms that FMVSS 205 preempts plaintiff's state-law claim. Liability on that claim necessarily would depend on South Carolina law precluding manufacturers from using one of FMVSS 205's approved window-design options, and thus is preempted under ordinary principles of conflict preemption as applied in *Geier* and reaffirmed in *Williamson*.

Despite calls by the petitioners in *Williamson* and their *amici* to overrule *Geier*—or to go even further and abolish implied conflict preemption altogether—*Williamson* refused to jettison *Geier*. To the contrary, *Williamson* applied *Geier*'s legal framework "*directly to the case before*" it and confirmed that "'ordinary pre-emption principles, grounded in longstanding precedent,'" govern whether a state-law tort action is preempted because it "conflicts with the federal regulation." 131 S. Ct. at 1136 (quoting *Geier*, 529 U.S. at 874; emphasis added).

Likewise, the Court declined invitations to adopt a "clear statement" rule or to impose a special burden on the party urging preemption. Indeed, the opinion does not even mention a presumption against preemption. *Williamson* thus requires no change in the analytical *approach—i.e.*, *Geier*'s mode of analysis—that this Court has already faithfully applied in *Priester*. *See* Point I.A, *infra*.

Nor does *Williamson* require a change in the *result* that this Court reached in *Priester*. *Williamson* involved a fact-specific application of the *Geier* legal framework to one particular FMVSS and one particular state-law tort claim. The U.S. Supreme Court concluded that FMVSS 208, which governs passive-restraint devices, did not preempt a state-law claim seeking to impose liability upon manufacturers that installed a lap belt (as opposed to a lap-and-shoulder belt) in the rear inner-seat position. *See* 131 S. Ct. at 1133. That was because, in the Court's view, "providing manufacturers with this seatbelt choice is not a significant objective of the federal regulation," as evidenced by a detailed "examination of the regulation, including its history, the promulgating agency's contemporaneous explanation of its objectives, and the agency's current views of the regulation's pre-emptive effect." *Id.* at 1133, 1136.

This case involves a different FMVSS with a different regulatory record. Although the FMVSS at issue in *Williamson* did permit the option of installing either lap belts or lap-and-shoulder belts, the agency "did *not* fear additional safety risks arising from" lap-and-shoulder belts and, to the contrary, was "convinced that lap-and-shoulder belts would increase safety." 131 S. Ct. at 1138 (emphasis added). In fact, the reason that the agency did not "require lap-and-shoulder belts . . . was that it thought that this requirement would not be cost-effective." *Id.* at 1139. The U.S. Supreme Court was reluctant to infer "pre-emptive intent" from "the mere existence of such a cost-effectiveness judgment." *Id.* After all, lap-and-shoulder belts would make

everyone safer, and the only question was *at what price*. Given the unequivocal safety benefits that would accrue from requiring lap-and-shoulder belts, a state-court "judge or jury" generally should be free to "reach a different conclusion" than did the federal agency about how much that additional safety is worth. *Id.* The U.S. Supreme Court thus concluded that no significant regulatory objective was served by FMVSS 208's allowance of manufacturer choice.

Here, in contrast, as this Court explained in *Priester*, NHTSA was "'extremely reluctant'" to require advanced glazing because its installation might "'*increase* injury risk for belted occupants,'" even if advanced glazing provided some "'safety benefits primarily for unbelted occupants.'" 388 S.C. at 430, 697 S.E.2d at 570 (quoting Advanced Glazing Research Team, NHTSA, *Ejection Mitigation Using Advanced Glazing: Final Report*, at 54, Docket No. NHTSA-1996-1782-21 (Aug. 2001) ("NHTSA Final Report"); emphasis added). This safety tradeoff—plainly a significant regulatory objective, unlike the cost-effectiveness tradeoff in *Williamson*—was central to NHTSA's decision to preserve the option of using tempered glass on side windows. *See* 49 C.F.R. § 571.205 S2 ("The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces . . . ."). The Court should therefore adhere to its holding in *Priester*. *See* Point I.B, *infra*.

The Court should affirmatively reject any notion that *Williamson* spells the end of conflict preemption and reaffirm the continuing vitality of that doctrine. The heritage of conflict preemption traces back to the Supremacy Clause, and it is crucial to the sensible regulation of numerous industries. An unduly narrow understanding of conflict preemption would undermine the policy decisions underlying not only FMVSS 205 but the entire National Traffic and Motor Vehicle Safety Act ("Safety Act"). And it would potentially disrupt the careful balancing of

risks and benefits that federal administrative agencies undertake in scores of contexts as they regulate important and complex facets of the economy. *See* Point II, *infra*.

ARGUMENT

I. This Court's Conclusion That Plaintiff's Claim Is Preempted By FMVSS 205 Is Unaffected By *Williamson*.

As Ford's supplemental brief demonstrates, *Williamson* presents no basis for revisiting this Court's well-reasoned, unanimous opinion in *Priester* that plaintiff's claim conflicts with, and thus is preempted by, federal law. FMVSS 205 specifically preserves the option between tempered glass and laminated glazing, a choice that furthers a significant regulatory objective—namely, NHTSA's recognition of an "increase [in] risk of neck injury" on account of higher "neck shear loads and neck moments" when belted passengers impact advanced glazing materials. NHTSA Final Report, at 36, 54.

A. *Williamson* confirms that the *Geier* framework and conflict-preemption doctrine still control.

Plaintiff contends (at 19-20) that *Williamson* marked a sea change in conflict preemption and "[s]trictly [l]imited" *Geier*'s reach. But that simply is not so. *Williamson* broke no new legal ground and left unaltered the settled principles of conflict-preemption analysis that were applied by the U.S. Supreme Court in *Geier* and by this Court in *Priester*. If anything, *Williamson* is notable for what it did *not* do. It did not call into question the *Geier* legal framework or the applicability of "ordinary pre-emption principles." It did not mention or apply any presumption against preemption. And it did not read the Court's post-*Geier* implied-preemption decisions (such as *Wyeth v. Levine*, 129 S. Ct. 1187 (2009)) as altering the fundamental question that a court must answer in determining whether a state law is conflict-preempted by federal regulation: "whether, in fact, the state tort action conflicts with the federal regulation," such that the state-law claim "stands as an obstacle to the accomplishment and execution of the full purposes

and objectives" of federal law. *Williamson*, 131 S. Ct. at 1136 (internal quotation marks omitted).

Amici supporting the petitioners in *Williamson*—including plaintiff's counsel in this case, Public Justice—urged the Court to "reconsider" *Geier*'s reading of the Safety Act's saving clause and "rule that Congress expressly saved all common law claims despite the promulgation and compliance with any federal motor vehicle safety standard." Br. for Attorneys Information Exchange Group 22, 28, *Williamson*, No. 08-1314 (U.S.), *available at* 2010 WL 4162556; *see, e.g.*, Br. for Public Justice, P.C. 2, *Williamson*, No. 08-1314 (U.S.), *available at* 2010 WL 3167305 (arguing that the "time is more than ripe for this Court to reconsider the meaning of the savings clause" articulated in *Geier*); Br. for Illinois, et al. 25, *Williamson*, No. 08-1314 (U.S.), *available at* 2010 WL 3167303 (suggesting that *Geier* may be a "strong candidate for reexamination").

Some *amici* urged the Court to go even further. They asked it to radically alter its preemption jurisprudence by eliminating obstacle preemption (*i.e.*, preemption based on frustration of federal purposes and objectives) entirely and limiting conflict preemption to situations in which it is literally impossible to simultaneously comply with federal and state law. *See, e.g.*, Br. for American Association for Justice 9, 13, *Williamson*, No. 08-1314 (U.S.), *available at* 2010 WL 3167304 (arguing that conflict preemption should be limited to situations in which "it is logically impossible for the court to apply both federal and state law" and thus that "state tort remedies that do not actually render it impossible to apply federal law" should not be preempted); Br. for Public Justice, P.C. 36, *Williamson*, No. 08-1314 (U.S.), *available at* 2010 WL 3167305 ("[S]tate law should be displaced only where compliance with federal and state law would be an 'impossibility.'").

Williamson brushed aside these efforts to have the Court reconsider *Geier* and the applicability of ordinary conflict-preemption principles. Instead, the Court concluded that *Geier*'s "holdings appl[i]ed directly." 131 S. Ct. at 1136. In particular, the Court reaffirmed that, "[i]n light of *Geier*," the Safety Act's "saving clause does not foreclose or limit the operation of ordinary pre-emption principles, grounded in longstanding precedent." *Id.* at 1135-36 (internal quotation marks omitted). Under these "ordinary pre-emption principles," the Court said, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law is pre-empted." *Id.* at 1136 (internal quotation marks omitted); *cf. id.* at 1142 (Thomas, J., concurring in the judgment) (criticizing the majority's "purposes-and-objectives pre-emption analysis").

The petitioners in *Williamson* did not go so far as their *amici*, but they did ask the Court to apply *Geier* in a manner that would undermine its core holdings. They argued that conflict preemption should operate only when there is "an irreconcilable conflict" between federal regulation and state law sufficient to overcome what they asserted was a "strong presumption against preemption" of state tort law. Pet. Br. 21, 23, *Williamson*, No. 08-1314 (U.S.), *available at* 2010 WL 3017750; *see also* Reply Br. 4, *Williamson*, No. 08-1314 (U.S.), *available at* 2010 WL 4216266. But materially the same argument was advanced in *Geier* itself and rejected. As *Geier* made clear, the Safety Act does *not* impose any sort of "special burden" that would "specially disfavor pre-emption." 529 U.S. at 870. The Court held that the Safety Act "reflect[ed] a neutral policy, not a specially favorable or unfavorable policy, toward the application of ordinary con-

flict pre-emption principles." *Id.* at 870-71. Thus, "[i]n a word, ordinary pre-emption principles, grounded in longstanding precedent, apply." *Id.* at 874.[3]

Williamson, then, represents only a case-specific application of *Geier*, which itself applied long-established conflict-preemption principles. Notably, the Court did not place a thumb either on the side of the scale favoring preemption or on that *dis*favoring it. The decision made no mention of any sort of "presumption" or "assumption" against preemption, and it did not impose a "clear statement" rule, even though the petitioners and their *amici*, relying on *Wyeth*, had insisted that the Court's analysis must begin with the so-called "presumption against preemption." Pet. Br. 23, *Williamson*, No. 08-1314 (U.S.), *available at* 2010 WL 3017750; *see also* Br. for the United States 11, *Williamson*, No. 08-1314 (U.S.), *available at* 2010 WL 4150188 ("this Court generally proceeds on the 'assumption' that a state law poses no . . . obstacle to the accomplishment of a federal purpose"); Br. for Illinois, et al. 17-18, *Williamson*, No. 08-1314 (U.S.), *available at* 2010 WL 3167303 ("The 'obstacle' preemption doctrine . . . not only disregards a statute's plain language, but it also violates the general requirement that Congress make any intent to displace state law express.").

Instead, the Court waded into the particular regulatory history of FMVSS 208 and determined that, whereas in *Geier* "the regulation's history, the agency's contemporaneous explanation, and its consistently held interpretive views indicated that the regulation sought to maintain manufacturer choice in order to further significant regulatory objectives," those "same considerations indicate[d] the contrary" in *Williamson*. 131 S. Ct. at 1139. The state-law rule sought by

[3] It is clear that the majority in *Geier* did not view "ordinary pre-emption principles" as including any generally applicable presumption against preemption, as this was a point of contention between the majority and the dissent. *See Geier*, 529 U.S. at 906-07 (Stevens, J., dissenting) ("[T]he Court simply ignores the presumption [against preemption], preferring instead to put the burden on petitioners to show that their tort claim would not frustrate [federal] purposes.").

the petitioners there, which required manufacturers to install lap-and-shoulder belts in the rear inner-seat position, did not frustrate a significant federal regulatory objective of FMVSS 208, and so the Court found that it was not preempted. *See id.* at 1139-40.

B. The maintenance of manufacturer choice in glazing-material selection is a significant regulatory objective of FMVSS 205.

Because this Court's prior decision in *Priester* carefully applied the *Geier* framework to determine that plaintiff's claim is preempted by FMVSS 205, we could well end here. Although *Williamson* rejected the specific conflict-preemption argument put forth by the manufacturer, it changed nothing of substance in the *Geier* mode of analysis and in no way compelled the conclusion that preemption is inappropriate here. On the contrary, the indicia of regulatory purpose that pointed toward preemption in *Geier* and against preemption in *Williamson* support a finding of preemption here.

Plaintiff caricatures *Priester* as having been premised "solely" and "exclusively" on the fact that FMVSS 205 "gave manufacturers a choice of different window glazing technologies." Pl. Supp. Br. 12-13. That decision speaks for itself. Given the thoroughness with which this Court canvassed FMVSS 205's regulatory record, *see* 388 S.C. at 429-30, 697 S.E.2d at 569-70, as well as Ford's persuasive demonstration in its supplemental brief that plaintiff's arguments for revisiting *Priester* are baseless, we will only briefly explain why the maintenance of manufacturer choice in the selection of window materials was, in fact, in the service of a significant regulatory objective—namely, safety, and in particular the tradeoff between the increased risk of neck injuries to belted occupants and the decreased risk of ejection to unbelted occupants.

From its adoption, FMVSS 205 has given manufacturers the choice between installing tempered glass and laminated glazing in side windows. As in *Geier*—but unlike in *Williamson*—NHTSA's decision to retain that option rested in large part on safety grounds, a distinction

that is of crucial importance in the preemption analysis. *Compare Geier*, 529 U.S. at 877-78 (agency had concerns about the "special risks to safety" of airbags, "such as the risk of danger to out-of-position occupants (usually children) in small cars") *with Williamson*, 131 S. Ct. at 1138-39 (agency was convinced that rear seat lap-and-shoulder belts would uniformly have safety benefits). In *Williamson*, for example, the Court pointedly observed that the agency believed that lap-and-shoulder belts "would be even more effective" than lap belts in preventing injury and would not "diminish[] the safety" of any class of occupants. 131 S. Ct. at 1138. While FMVSS 208 ultimately did not require lap-and-shoulder belts, there was "little indication that [the agency] considered this matter a significant *safety* concern." *Id.* (emphasis added).

The regulatory record here tells a starkly different story, which this Court recounted in *Priester*. *See* 388 S.C. at 429-30, 697 S.E.2d at 569-70. Beginning in the late 1980s, NHTSA became concerned with the significant number of fatalities and serious injuries resulting from the ejection of occupants in rollover accidents. *See* Advance Notice of Proposed Rulemaking, *Side Impact Protection—Passenger Cars*, 53 Fed. Reg. 31,712 (Aug. 19, 1988). Several years later, NHTSA turned in earnest to studying whether FMVSS 205 should be modified to require manufacturers to install advanced glazing in side windows in order to reduce the risk of ejection. *See* Advance Notice of Proposed Rulemaking, *Rollover Prevention*, 57 Fed. Reg. 242 (Jan. 3, 1992); Rulemaking Plan, *Planning Document for Rollover Prevention and Injury Mitigation*, 57 Fed. Reg. 44,721 (Sept. 29, 1992). NHTSA analyzed at great length the potential benefits and risks of advanced glazing. *See* Advanced Glazing Research Team, NHTSA, *Ejection Mitigation Using Advanced Glazing—A Status Report*, at 1-1, 2-2, Docket No. NHTSA-1996-1782-21 (Nov. 1995) ("NHTSA 1995 Status Report") ("Computer simulations and component testing show that head injuries may increase with the use of some alternative side glazings. . . . [Q]uestions arose as to

whether this material would actually increase injuries."); John Winnicki, *Estimating the Injury Reducing Benefits of Ejection Mitigating Glazing*, Technical Report No. DOT-HS-808-369 (Feb. 1996); Advanced Glazing Research Team, NHTSA, *Ejection Mitigation Using Advanced Glazing: Status Report II*, at ix, Docket No. NHTSA-1996-1782-21 (Aug. 1999) ("Additional research should examine the likelihood of increased injuries to belted occupants . . . .").

NHTSA eventually decided not to require advanced glazing. It concluded that "advanced glazing increased the risk of neck and back injuries in rollover accidents" and "'increase[ed] injury risk for belted occupants.'" *See Priester*, 388 S.C. at 430, 697 S.E.2d at 570 (quoting NHTSA Final Report, at x, 54).

Contrary to plaintiff's submission (at 5, 22-25), safety was not merely an incidental concern in NHTSA's decision to preserve manufacturer choice between tempered glass and advanced glazing. Plaintiff conflates the "cost-effectiveness judgment" underlying the agency's decision not to require lap-and-shoulder belts in *Williamson* with the agency's nuanced reasoning here. Pl. Supp. Br. 23-24. In *Williamson*, NHTSA was "convinced" that "lap-and-shoulder belts would increase safety" and posed no significant countervailing safety concerns. 131 S. Ct. at 1138. Its "cost-effectiveness" judgment was that a requirement to install lap-and-shoulder belts in all seat positions nonetheless was too expensive in relation to its unequivocal safety benefits. *See id.* at 1139.[4] Here, in contrast, NHTSA was "extremely reluctant" to require advanced glaz-

[4] The U.S. Supreme Court reasoned in *Williamson* that the "mere existence of such a cost-effectiveness judgment" generally should not invest a federal motor-vehicle safety standard with preemptive effect, since most such regulations "embody some kind of cost-effectiveness judgment." 131 S. Ct. at 1139. To conclude otherwise, the Court explained, would transform all federal safety standards into *maximum* standards—*i.e.*, safe harbors for manufacturers in the face of potential tort liability—and thereby "eliminat[e] the possibility that the federal agency seeks only to set forth a *minimum* standard potentially supplemented through state tort law." *Id.* (emphasis added). The Court could not "reconcile this consequence with [the] statutory saving clause." *Id.*

ing because there were safety concerns on *both* sides of the equation: the "increase[d] injury risk for belted occupants" had to be considered alongside the "safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle." NHTSA Final Report, at x.

This safety tradeoff was one of the "primary reasons" that the agency terminated its proposed rulemaking to require advanced glazing and deliberately retained the option of using tempered glass in side windows. Withdrawal of Advance Notices of Proposed Rulemaking, *Motor Vehicle Safety Standards*, 67 Fed. Reg. 41,365, 41,367 (June 18, 2002); *see id.* ("advanced side glazing in some cases appears to increase the risk of neck injury"). As NHTSA later summed things up, it "closely studied advanced glazing as a potential ejection mitigation countermeasure but terminated an advance notice of proposed rulemaking on advanced glazing in 2002 . . . based on [its] observation that advanced glazing produced higher neck shear loads and neck moments than impacts into tempered side glazing." Final Rule, *Federal Motor Vehicle Safety Standards, Ejection Mitigation*, 76 Fed. Reg. 3212, 3222 (Jan. 19, 2011) (footnote omitted).[5]

Whatever safety benefits advanced glazing does provide accrue "primarily [to] *unbelted* occupants," such as plaintiff here, who gain the most from a decreased likelihood of ejection. NHTSA Final Report, at 54 (emphasis added). But advanced glazing does little for *belted* occupants, who must endure the increased risk of additional neck injuries resulting from impact with a surface that retains its integrity and does not give as easily. *See id.* at 43-46 (sensitivity analy-

[5] In describing the 2011 ejection-mitigation rulemaking, plaintiff tepidly acknowledges that NHTSA *still* "does not require advanced glazing." Pl. Supp. Br. 7. Plaintiff goes on to suggest that NHTSA's past safety concerns had nothing to do with its recent decision to continue retaining tempered glass as a window-material option. *Id.* at 8. But that is incorrect. NHTSA expressly stated that "knowledge and insights . . . gained from past research on ejection mitigation safety systems . . . underlie many of the decisions [it] made in forming this final rule," including its termination of the FMVSS 205 advanced-glazing-requirement proposed rulemaking. *See* Final Rule, *Federal Motor Vehicle Safety Standards, Ejection Mitigation*, 76 Fed. Reg. at 3222.

sis demonstrating that benefits of advanced glazing would decline dramatically with increased seatbelt use). And it is eminently rational for NHTSA to be concerned about increasing the safety risk to *belted* occupants, because the vast majority of vehicle occupants now wear their safety belts. *See* Timothy M. Pickrell & Tony Jianqiang Ye, *Occupant Restraint Use in 2009—Results From the National Occupant Protection Use Survey Controlled Intersection Study*, at 2, Report No. DOT-HS-811-414 (Nov. 2010) (noting that 84% of vehicle occupants in the United States wore their safety belts in 2009). Thus, although FMVSS 205's mandate retaining the choice of using tempered glass may have exacerbated some injuries, it undoubtedly mitigated many others: those to individuals who avoided death or paralysis because their side windows were made of tempered glass, which, following an accident, shattered harmlessly into small, granular pieces. *See* NHTSA 1995 Status Report, at 5-1 ("[T]empered glass . . . produce[s] little risk of causing a serious head or neck injury to an occupant from impact with the glass. Due to the fracture characteristics of tempered glass, there is also little risk of serious laceration.").

The regulatory tradeoff between the safety of belted occupants and that of unbelted occupants is one that Congress reposed in NHTSA. When, as here, the agency's decision to retain manufacturer choice reflects a balancing of *safety* objectives, the concern that the agency sought "only to set forth a *minimum* standard potentially supplemented through state tort law," *Williamson*, 131 S. Ct. at 1139, is a distant one. Whatever otherwise might be the appeal of the contention that advanced glazing could save lives "overall," Pl. Supp. Br. 25, therefore, that decision is not for plaintiff or a South Carolina jury to make. The state-law tort claim would not be second-guessing a mere "cost-effectiveness" judgment (as in *Williamson*), 131 S. Ct. at 1139, but rather NHTSA's considered determination that there is no single "right answer" to the question of what kind of glazing material is safer under all circumstances. NHTSA's rejection of an "all ad-

vanced-glazing" requirement is fully supported by the national policy of encouraging seatbelt use. *See Geier*, 529 U.S. at 857, 877 ("[B]uckled up seatbelts are a vital ingredient of automobile safety."); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) ("[T]he safety benefits of wearing seatbelts are not in doubt.").

Because plaintiff's claim is premised on the notion that Ford had a duty to install advanced glazing rather than tempered glass, the state-law tort rule she seeks necessarily "would . . . require[] manufacturers of all similar cars to install [advanced glazing] rather than other [window materials]." *See Geier*, 529 U.S. at 881. It therefore would eliminate the flexibility that NHTSA deliberately conferred on manufacturers when it withdrew, after years of study and research, the proposed rulemaking for an advanced-glazing requirement. NHTSA made the considered determination to retain that choice in significant part due to "safety . . . concerns," Withdrawal of Advance Notices of Proposed Rulemaking, *Motor Vehicle Safety Standards*, 67 Fed. Reg. at 41,367; Final Rule, *Federal Motor Vehicle Safety Standards, Ejection Mitigation*, 76 Fed. Reg. at 3222, which doubtless count as significant regulatory objectives under *Geier* and *Williamson*. A state-law rule precluding manufacturers from choosing an option that NHTSA has specifically preserved to further the significant regulatory objective of automobile safety would thus frustrate the purposes and objectives of federal law. Accordingly, this Court should adhere to its prior holding in *Priester* that plaintiff's claim is preempted.

II. Plaintiff's Broader Arguments Against Conflict Preemption Would, If Accepted, Compromise A Number Of Important Federal Regulatory Objectives.

Apart from the fallacies underlying plaintiff's specific arguments against preemption, there is a troubling theme to her presentation more generally. Plaintiff portrays conflict preemption as suspect, and thus something that should be viewed with a skeptical eye by the courts. *See, e.g.*, Pl. Supp. Br. 2 ("preemption is only justified in rare circumstances"), 19 (finding of

preemption in *Geier* was "highly unusual"), 20 (*Geier* was a "*sui generis* decision that must be strictly limited to its facts"), 27 (*Williamson* "narrowly confine[d]" *Geier* to its facts). As we have explained, the same arguments were advanced in *Williamson* and rejected by the U.S. Supreme Court. Despite invitations to narrow or do away with conflict-preemption doctrine, the Court recognized that "ordinary conflict pre-emption principles" are grounded in "longstanding precedent" and compel a finding of preemption when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law." *Williamson*, 131 S. Ct. at 1136 (internal quotation marks omitted).

And for good reason. Conflict preemption plays a vitally important role in our federal system and ensures that, when Congress or a federal agency acting pursuant to delegated authority establishes a uniform federal regulatory regime, that regime is not unduly frustrated by the operation of inconsistent state laws. Far from being an exceptional or anomalous result, preemption under such circumstances is a necessary consequence of the constitutional plan and the Supremacy Clause. "[S]ince [the Court's] decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819)[], it has been settled that state law that conflicts with federal law is without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted). Regardless of how "compelling" an interest a State may have in preservation of its law, "under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law"—even one "clearly within a State's acknowledged power, which interferes with or is contrary to federal law"—"must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (internal quotation marks omitted). Once a conflict has been identified as a matter of substantive law, the Supremacy Clause requires the "nullifi[cation]" of the contrary state law, *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985), no matter how

"clearly within [the] State's acknowledged power" the law is, *Felder v. Casey*, 487 U.S. 131, 138 (1988) (internal quotation marks omitted); *see also Geier*, 529 U.S. at 873. Indeed, at that point "[a] holding of federal exclusion of state law is inescapable." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

This case provides an apt illustration of the importance of conflict preemption in protecting the integrity of regulatory decisions made by expert federal administrative agencies and avoiding a patchwork of inconsistent state regulation. There was and is no "right" or "perfect" answer to the question whether tempered glass or advanced glazing is always safer and therefore should be installed on all side windows.[6] As this Court cogently explained:

> [I]t can be stated generally that tempered glass is safer for vehicle occupants wearing seatbelts, where the risk of ejection is reduced, because it provides less risk of additional injuries. Laminated glass is safer for unbelted passengers, where the risk of ejection is increased, because it is likely to keep a passenger inside the vehicle due to the "adhering" quality of the glass.

Priester, 388 S.C. at 430, 697 S.E.2d at 569. NHTSA's expert judgment was to specifically authorize *both* options for compliance with FMVSS 205. As we have explained, this was a deliberate policy decision, made in consideration of the full spectrum of occupant (*e.g.*, belted versus unbelted), vehicle, collision, and injury-mechanism (*e.g.*, window impact versus ejection) variables. *See* 49 C.F.R. § 571.205 S2 ("The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces . . . *and* to minimize the possibility of occupants being thrown through the vehicle . . . .") (emphasis added).

[6] For that reason, there is nothing to plaintiff's repeated insistence that tempered glass is merely a "minimum standard." *E.g.*, Pl. Supp. Br. 8, 17-19, 22. Under some scenarios, tempered glass performs better than advanced glazing; under others, advanced glazing performs better than tempered glass. For example, that advanced glazing might be "optimal" as to ejection mitigation, *id.* at 18, does not mean that it is "optimal" as to avoiding neck injuries.

Preemption of plaintiff's state-law tort claim gives effect to Congress's decision to commit the formulation of motor-vehicle safety standards to NHTSA. For a lay jury in a single case to second-guess the policy decisions made by federal experts in light of the circumstances of a single car accident would undermine Congress's broader goals in enacting the Safety Act. As the Safety Act's legislative history makes clear, Congress pursued a "uniformity of standards so that . . . industry will be guided by one set of criteria rather than by a multiplicity of diverse standards." S. Rep. No. 89-1301, at 12 (1966); *see also* H.R. Rep. No. 89-1776, at 17 (1966). The only alternative to uniform regulatory guidance would be, in President Johnson's words, "unthinkable—50 standards for 50 different States." 112 Cong. Rec. 14,253 (1966).

Worse still than *inconsistent* state-law standards is the specter of outright *contradictory* ones. Failing to conclude that plaintiff's claim was preempted would place manufacturers in an impossible quandary. Neither tempered glass nor advanced glazing provides optimal safety for all individuals in all accident scenarios. There are acknowledged safety tradeoffs for both options. Taking the broader perspective mandated by the Safety Act, which charges NHTSA with devising nationwide safety standards to "protect[] . . . against unreasonable risk of death or injury," 49 U.S.C. § 30102(a)(8), NHTSA made the judgment to maintain manufacturer choice between different kinds of side-window materials. If through the imposition of state-law tort liability, a jury in *this* case had the power to eliminate tempered glass as an option for side windows for all "manufacturers of all similar cars," *Geier*, 529 U.S. at 881, nothing would stop a jury in *another* case, on different facts (such as a belted occupant sustaining a neck fracture from impacting a window made of a glass-plastic laminate), from also eliminating advanced glazing as an option. In other words, although plaintiff argues that the use of *tempered glass* was defective, *advanced glazing* could just as easily be found defective by another jury. Such case-by-case

"regulation" by juries would "eviscerate the unitary federal regulation and leave manufacturers with no options for glazing materials in vehicle side windows." *Priester*, 388 S.C. at 432, 697 S.E.2d at 571 (quoting *Morgan v. Ford Motor Co.*, 680 S.E. 2d 77, 94 (W.Va. 2009)).

Juries, working through the case-by-case process of common-law adjudication, are ill-equipped to balance the potential public benefits of a regulatory choice against its potential to cause harm. The trier of fact in any given case will see only the costs of the choice in the context of a particular plaintiff, who might well have endured grievous injuries, and will never see the benefits reaped by other individuals not before the court—much less take account of the even more indirect, long-term effects of shaping the public's behavior. As the U.S. Supreme Court emphasized in a decision finding preemption in the medical-device area, "tort law[] applied by juries" produces distorted results because it fails to emulate the global cost-benefit analysis that an expert regulatory agency would employ. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008). While *Williamson* (like *Geier*) rejected the view that the mere fact that a FMVSS contains a choice *necessarily* means that the agency engaged in a careful balancing of risks and benefits, *see* 131 S. Ct. at 1139, Ford has demonstrated that *this case* is one in which NHTSA did undertake, over many years, precisely that balancing.

Preemption of plaintiff's state-law claim thus not only is compelled by the doctrine of conflict preemption, but also rests on sound considerations of public policy. A single jury, which understandably will feel sympathy for the plaintiff before it and dwell on the particular circumstances of that plaintiff's accident, should not be allowed—and under the Supremacy Clause *is* not allowed—to disrupt NHTSA's expert decisions made in the wider public interest.

CONCLUSION

For the foregoing reasons, as well as those stated in Ford's supplemental brief, the judgment of the circuit court should be affirmed.

Respectfully submitted,

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APPENDIX A: CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS OF 4/4/2011

3M
Altec Industries
Altria Client Services Inc.
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler Group LLC
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pella Corporation
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Segway Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Techtronic Industries North America, Inc.
Terex Corporation

TK Holdings Inc.
The Toro Company
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this ___th day of June, 2011, I served two copies of the foregoing brief, by overnight delivery on the parties herein, at the following addresses:

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