No. _____ 081314

In The
Supreme Court of the United States

DELBERT WILLIAMSON, et al.,

Petitioners,

vs.

MAZDA MOTOR OF AMERICA, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where Congress has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), does a federal minimum safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts in certain seating positions impliedly preempt a state common-law claim alleging that the manufacturer should have installed a lap/shoulder belt in one of those seating positions?

2. Under this Court's recent ruling in *Wyeth v. Levine*, ___ S. Ct. ___, 2009 WL 529172 (2009), does a federal motor vehicle safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts impliedly preempt a state tort suit alleging that the manufacturer should have warned consumers of the known dangers of a lap-only seatbelt installed in one of its vehicles?

PARTIES

Thanh Williamson, the decedent, was killed in a head-on collision when her body "jackknifed" around a lap-only seatbelt installed in one of the seats of her family's 1993 Mazda MPV Minivan. There was no lap/shoulder seatbelt installed in her seating position. The other occupants of the vehicle were seated in positions equipped with lap/shoulder seatbelts and survived the crash.

Petitioners Delbert and Alexa Williamson are the decedent's surviving husband and daughter. Petitioner Estate of Thanh Williamson is the estate of the decedent. Respondents Mazda Motor Corporation and Mazda Motor Corporation of America, Inc. dba Mazda North American Operations (collectively "Mazda") manufactured the Mazda MPV Minivan at issue here.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	8
I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER COMMON-LAW CLAIMS FOR FAILURE TO INSTALL LAP/SHOULDER SEATBELTS ARE IMPLIEDLY PREEMPTED BY FMVSS 208 AND TO RESOLVE CONFLICTS IN THE LOWER COURTS OVER THE MEANING OF *GEIER* AND *SPRIETSMA*	8
A. Introduction	8
B. *Geier* Was Based on the Unique Regulatory History of the 1984 Regulations on Passive Restraints in Front Seating Positions	8
C. Many State and Federal Courts Have Misconstrued *Geier* and Applied an Overly Broad Interpretation of Its Implied Preemption Holding	13

TABLE OF CONTENTS – Continued

Page

D. Many State and Federal Courts Have Misconstrued *Sprietsma* and Applied an Overly Narrow Interpretation of Its Implied Preemption Holding 18

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER COMMON-LAW CLAIMS FOR FAILURE TO WARN ABOUT THE DANGERS OF LAP-ONLY SEATBELTS ARE IMPLIEDLY PREEMPTED BY FMVSS 208 23

CONCLUSION 26

APPENDIX

Opinion of the California Court of Appeal, Fourth Appellate District, Division Three (filed October 22, 2008) ..... App. 1

Order Modifying Opinion and Denying Rehearing of the California Court of Appeal, Fourth Appellate District, Division Three (filed November 18, 2008) ..... App. 28

Order of the Supreme Court of California Denying Petition for Review (filed February 11, 2009) ..... App. 31

TABLE OF AUTHORITIES

Page

CASES

Altria Group, Inc. v. Good, 129 S. Ct. 538 (2008) 20

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) 25

California v. ARC America Corp., 490 U.S. 93 (1989) 13

Carden v. General Motors Corp., 509 F.3d 227 (5th Cir. 2007) 8, 21

Chevere v. Hyundai Motor Co., 774 N.Y.S.2d 6, 4 A.D.3d 226 (N.Y. App. Div. 2004) 17

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 23

Geier v. American Honda Company, Inc., 529 U.S. 861 (2000) ..... *passim*

Griffith v. General Motors Corp., 303 F.3d 1276 (11th Cir. 2002) 8

Heinricher v. Volvo Car Corp., 61 Mass. App. Ct. 313, 809 N.E.2d 1094 (Mass. App. Ct. 2004) 8

Hurley v. Motor Coach Industries, Inc., 222 F.3d 377 (7th Cir. 2000) 8

Irving v. Mazda Motor Corp., 136 F.3d 764 (11th Cir. 1998) 23

Knipe v. SmithKline Beecham, 583 F. Supp. 2d 553 (E.D. Pa. 2008) 21

TABLE OF AUTHORITIES – Continued

Page

MCI Sales and Service, Inc. v. Hinton, 272 S.W.3d 17 (Tex. App. 2008) 21

O'Hara v. General Motors Corp., 508 F.3d 753 (5th Cir. 2007) 17, 21

Roland v. General Motors Corp., 881 N.E.2d 722 (Ind. App. 2008) 9, 20, 23

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) ..... *passim*

Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, 41 Cal. 4th 929 (2007) 21

Williamson v. Mazda Motor of America, Inc., 167 Cal. App. 4th 905, 84 Cal. Rptr. 3d 545 (Cal. Ct. App. 2008) 1, 7, 20

Wyeth v. Levine, ___ S. Ct. ___, 2009 WL 528172 (2009) 22, 24, 25

UNITED STATES CONSTITUTION

U.S. Const. Art. 6, cl. 2 1

STATUTES

28 U.S.C. § 1257(a) 1

49 U.S.C. § 30102(a)(9) 2, 9, 14, 25

49 U.S.C. § 30103(b)(1) 10

49 U.S.C. § 30103(e) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

49 C.F.R. 571.3 3

32 Fed. Reg. 2408 (Feb. 3, 1967) 2, 3, 14

49 Fed. Reg. 28962 (July 17, 1984) 10

53 Fed. Reg. 47982 (Nov. 29, 1988) 4

54 Fed. Reg. 25275 (June 14, 1989) 3, 13, 19

54 Fed. Reg. 46257 (Nov. 2, 1989) 3, 4, 13, 19, 22

69 Fed. Reg. 70904 (Dec. 8, 2004) 5

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OPINIONS BELOW

The published opinion of the California Court of Appeal, Fourth Appellate District, Division Three is reported at *Williamson v. Mazda Motor of America, Inc.*, 167 Cal. App. 4th 905, 84 Cal. Rptr. 3d 545 (Cal. Ct. App. 2008). The California Supreme Court's order denying discretionary review is unreported, No. S168717. App. 31.

JURISDICTION

The California Court of Appeal's decision was issued on October 22, 2008. App. 1. The California Supreme Court denied discretionary review on February 11, 2009. App. 31. This Court has jurisdiction to review the federal preemption issues decided by the California Court of Appeal under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This petition raises a federal preemption issue under the Supremacy Clause of the United States Constitution. The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

Laws of any State to the Contrary notwithstanding." U.S. Const. Art. 6, cl. 2.

The California Court of Appeal ruled that petitioners' lawsuit was preempted by Federal Motor Vehicle Safety Standard ("FMVSS") 208. The National Traffic and Motor Vehicle Safety Act ("Safety Act") defines a "motor vehicle safety standard" as "a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. § 30102(a)(9). The savings clause of the Safety Act provides: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

In 1967, the National Highway Traffic Safety Administration ("NHTSA") adopted the first set of federal motor vehicle standards pursuant to the Safety Act. 32 Fed. Reg. 2408 (Feb. 3, 1967). In the preamble, NHTSA made "findings . . . with respect to all standards." *Id.* at 2408. These included the following: "Each standard is a minimum standard for motor vehicle or equipment performance which is practicable and meets the need for motor vehicle safety. . . ." *Id.*

As originally enacted in 1967, FMVSS 208 allowed manufacturers to install either lap-only (Type 1) or lap/shoulder (Type 2) seatbelts in all rear seating positions of passenger vehicles. The relevant portion of the 1967 regulation stated: "Except as provided in S3.1.1 and S3.1.2, a Type 1 or Type 2 seat belt assembly that conforms to Motor Vehicle Safety

Standard No. 209 shall be installed in each passenger car seat position." *Id.* at 2415.

In 1989, NHTSA adopted two new regulations amending FMVSS 208 and mandating that passenger vehicles "shall be equipped with an integral Type 2 [lap/shoulder] seat belt assembly at every forward-facing rear outboard designated seating position." 54 Fed. Reg. 46257, 46266 (Nov. 2, 1989); 54 Fed. Reg. 25275, 25278 (June 14, 1989). The regulations defined a "rear outboard designated seating position" to mean "any 'outboard designated seating position' (as that term is defined at 49 CFR 571.3) that is rearward of the front seat(s), except any designated seating position adjacent to a walkway located between the seat and the side of the vehicle, which walkway is designed to allow access to more rearward seating positions." 54 Fed. Reg. 46257, 46266 (Nov. 2, 1989).

NHTSA specifically concluded that lap/shoulder belts are safer and more effective than lap-only belts in rear seating positions. 54 Fed. Reg. 46257, 46257-46258 (Nov. 2, 1989); 54 Fed. Reg. 25275, 25275-25276 (June 14, 1989). On the issue of compatibility with car seats, NHTSA stated: "[T]he agency believes that this proposal would offer benefits for children riding in some types of booster seats, would have no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts, and would offer older children the same incremental safety protection that would be

afforded adult rear seat occupants." 53 Fed. Reg. 47982, 47988-47989 (Nov. 29, 1988).

When it adopted the 1989 regulations, NHTSA decided not to require lap/shoulder belts for rear-center seating positions solely because it found "that there are more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder benefits at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989); *see also* 53 Fed. Reg. 47982, 47984 (Nov. 29, 1988).

NHTSA also decided not to mandate lap/shoulder belts for the aisle seats of multi-passenger vehicles, such as Thanh's seat in the Mazda MPV Minivan. The basis for this decision was a concern "that locating the anchorage for the upper end of the shoulder belt on the aisle side of the vehicle would stretch the shoulder belt across the aisleway and cause entry and exit problems for occupants of seating positions to the rear of the aisleway seating position." 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989). However, NHTSA stated: "Of course, in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways without interfering with the aisleway's purpose of allowing access to more rearward seating positions, NHTSA encourages the manufacturers to do so." *Id.* at 46258.

The 1989 regulations were in effect when the Williamsons' 1993 Mazda MPV Minivan was manufactured. In December 2002, President George W. Bush signed into law "Anton's Law," which required NHTSA to issue a new rule mandating installation of lap/shoulder belts in *all* rear seating positions of passenger vehicles. Pub.L. 107-318, § 5, 116 Stat. 2772 (Dec. 4, 2002) (quoted in Historical and Statutory Notes following 49 U.S.C.A. § 30127). NHTSA issued a new rule requiring lap/shoulder belts in all rear seating positions in December 2004. 69 Fed. Reg. 70904 (Dec. 8, 2004). In doing so, NHTSA confirmed that FMVSS 208 was "not intended to preempt state tort civil actions" except in one narrowly defined area not relevant here. *Id.* at 70912.

STATEMENT OF THE CASE

On August 14, 2002, Delbert Williamson and his wife, Thanh Williamson, were traveling with their daughter Alexa in their 1993 Mazda MPV Minivan. They were driving north on Route 89 in Kane County, Utah. Delbert was the driver, Thanh was seated in the right-hand aisle seat of the middle row, and their daughter was seated immediately to her left directly behind the driver's seat. Delbert and Alexa were both

wearing lap/shoulder seatbelts. Thanh was wearing a lap-only seatbelt. AA 283, 285; ARB at 8, n.1.[1]

A motor home towing a Jeep Wrangler was traveling in the opposite direction on Route 89. Suddenly, the Jeep Wrangler became detached from the motor home. The Jeep Wrangler crossed into oncoming traffic and struck the Williamsons' van. AA 283, 285.

Thanh was killed when the forces of the collision caused her body to "jackknife" around her lap-only seatbelt, resulting in severe abdominal injuries and internal bleeding. Delbert and Alexa suffered non-fatal injuries. AA 283, 285.

Thanh's survivors and her estate filed suit in California state court, asserting state tort claims including products liability and negligence. The Third Amended Complaint alleged in relevant part: (i) Thanh's seat should have been equipped with a lap/shoulder belt to restrain her upper torso in a frontal collision; and (ii) Mazda failed to adequately warn plaintiffs of the known hazards, risks, and dangers of the lap-only seatbelt installed in Thanh's seating position. AA 289-295.

In a motion for judgment on the pleadings and a subsequent demurrer, Mazda asserted that these

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[1] All citations to "AA" refer to the Appellants' Appendix filed in the California Court of Appeal. "ARB" refers to the Appellants' Reply Brief filed in the California Court of Appeal.

state law claims were preempted by FMVSS 208 under the Supremacy Clause of the United States Constitution. AA 55-66, 324-336. Mazda argued that the claims were preempted because they were in conflict "with the choice that federal law gave to manufacturers to choose which type of safety belt they would install in those center seats." AA 56. The trial court ultimately sustained Mazda's demurrer without leave to amend as to all of plaintiffs' claims arising out of the death of Thanh Williamson. AA 543-544.

In a published opinion, the California Court of Appeal affirmed the judgment. *Williamson v. Mazda Motor of America, Inc.*, 167 Cal. App. 4th 905, 84 Cal. Rptr. 3d 545 (Cal. Ct. App. 2008). Applying the doctrine of implied obstacle preemption under *Geier* and the Supremacy Clause, App. 6-24, the California Court of Appeal ruled that "FMVSS 208 preempts common law actions alleging a manufacturer chose the wrong seatbelt option. . . ." App. 24. The court ruled that the failure to warn theory of liability was "also barred by federal preemption." App. 26.

Plaintiffs filed a Petition for Review in the California Supreme Court solely on the federal preemption issue. The California Supreme Court denied discretionary review on February 11, 2009. App. 31.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER COMMON-LAW CLAIMS FOR FAILURE TO INSTALL LAP/SHOULDER SEATBELTS ARE IMPLIEDLY PREEMPTED BY FMVSS 208 AND TO RESOLVE CONFLICTS IN THE LOWER COURTS OVER THE MEANING OF *GEIER* AND *SPRIETSMA*

A. Introduction

The California Court of Appeal followed a growing body of federal and state case law that has broadly construed this Court's 5-4 preemption decision in *Geier v. American Honda Company, Inc.*, 529 U.S. 861 (2000) and narrowly construed its unanimous "no preemption" decision in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). As construed by these lower courts, *Geier* purportedly holds "that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted." *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377, 383 (7th Cir. 2000). *Accord Carden v. General Motors Corp.*, 509 F.3d 227, 230-31 (5th Cir. 2007); *Griffith v. General Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002); *Heinricher v. Volvo Car Corp.*, 61 Mass. App. Ct. 313, 318-19, 809 N.E.2d 1094 (Mass. App. Ct. 2004). Based on this understanding of *Geier*, these courts have ruled that a tort suit challenging a manufacturer's

use of one of the seatbelt options allowed by FMVSS 208 is preempted by federal law.

These courts have also concluded that *Sprietsma*'s holding – that a federal agency's decision not to mandate a particular safety device has no preemptive effect unless it reflects an authoritative federal policy against the device – applies only when there is a "complete absence of regulatory action." *Carden*, 509 F.3d at 232; *Roland v. General Motors Corp.*, 881 N.E.2d 722, 728-29 (Ind. App. 2008).

These interpretations of *Geier* and *Sprietsma* are wrong and they conflict with the decisions of other appellate courts. Certiorari should be granted to resolve these conflicts and to preserve the cooperative federalist scheme contemplated by Congress when it enacted the Safety Act. Congress expressly allowed state tort law to continue to operate in conjunction with the federal "minimum" standards to achieve greater vehicle safety. 49 U.S.C. §§ 30102(a)(9), 30103(e). By preempting state tort suits that seek to impose higher common-law standards, these cases frustrate the intent of Congress and undermine its fundamental goal of achieving vehicle safety.

B. *Geier* Was Based on the Unique Regulatory History of the 1984 Regulations on Passive Restraints in Front Seating Positions

In *Geier*, the plaintiff filed a state tort claim alleging that her vehicle was defective because the

front driver's seat was not equipped with an airbag. The issue was whether the 1984 version of FMVSS 208 relating to "passive restraints" in front seating positions preempted a state common-law tort action alleging that the defendant manufacturer should have equipped its vehicle with front airbags.[2]

Geier first held that the express preemption clause of the Safety Act, 49 U.S.C. § 30103(b)(1), did *not* preclude state tort liability. Based on the Act's savings clause, 49 U.S.C. § 30103(e), the Court concluded that Congress intended to "leav[e] adequate room for state tort law to operate – for example, where federal law creates only a floor, *i.e.,* a minimum safety standard." *Geier*, 529 U.S. at 868. The Court therefore found that the Safety Act "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870.

The Court next considered whether the savings clause foreclosed "the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as preempting state laws (including

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[2] The passive restraints regulation at issue in *Geier* did not apply to rear seating positions. 49 Fed. Reg. 28962 (July 17, 1984). "Passive restraints" are "devices that do not depend for their effectiveness on any action by the vehicle occupant," such as "airbags and automatic seatbelts." *Geier*, 529 U.S. at 889-90 (Stevens, J., dissenting). Manual seatbelts are not passive restraints, as they must be fastened manually. *Id.* at 880 (distinguishing between "ordinary manual lap and shoulder seat belts" and "passive restraints").

common-law rules) that 'actually conflict' with the statute or federal standards promulgated thereunder." *Geier*, 529 U.S. at 869. On this issue, the Court ruled that the savings clause "does *not* bar the ordinary working of conflict pre-emption principles." *Ibid.*

Finally, the Court considered whether Geier's state tort claim actually conflicted with the 1984 version of FMVSS 208 relating to passive restraints in front seating positions. *Geier*, 529 U.S. at 874-87. Although *Geier* held "that a court should not find pre-emption too readily in the absence of clear evidence of a conflict," *id.* at 885, the majority opinion concluded that Geier's suit would stand as an obstacle to the objectives of the passive restraint regulations contained in the 1984 version of FMVSS 208. Based on the regulatory history, the Court found that the 1984 regulations were intended to achieve a gradually developing mix of alternative passive restraint devices for front seating positions. *Id.* at 877-81, 886.

The Court concluded that Geier's tort claim conflicted with these regulatory objectives. First, the Court found Geier's theory that state common law imposed a duty to install airbags – as opposed to any other type of passive restraints – "presented an obstacle to the variety and mix of devices that the federal regulation sought." *Geier*, 529 U.S. at 881. Second, the Court noted that Geier's vehicle was manufactured during the initial phase-in period when the 1984 regulation "required only that 10% of a manufacturer's nationwide fleet be equipped with *any*

passive restraint device at all." *Ibid.* Thus, Geier's claim that *all* vehicles manufactured during this period should have been equipped with airbags "would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Ibid.*

From the very first sentence of its opinion, the majority in *Geier* repeatedly emphasized that its ruling was based solely on the *1984* version of FMVSS 208 governing passive restraints in front seating positions. *Geier*, 529 U.S. at 864 ("This case focuses on the 1984 version" of FMVSS 208 regarding "passive restraints"); *id.* at 874-75 (citing 1984 Department of Transportation ("DOT") comments in Federal Register "which accompanied the promulgation of FMVSS 208"); *id* at 877 (referring to "the version [of FMVSS 208] that is now before us"); *id.* at 877 (referring to "DOT's own contemporaneous explanation of . . . the 1984 version of FMVSS 208"); *id.* at 879 (referring to "[t]he 1984 FMVSS 208 standard" on "passive restraints"); *id.* at 881 (summarizing the purpose of "the 1984 version of FMVSS 208"); *id.* at 886 (referring to "the contemporaneous 1984 DOT explanation" of its passive restraints regulation).

Geier is inapplicable here. This case does not involve the unique regulatory history of the 1984 version of FMVSS 208 relating to passive restraint devices in front seating positions. Instead, it involves the *1989* version of FMVSS 208 relating to *manual* seatbelts in *rear* seating positions. Unlike the 1984 airbag regulations, nothing in the regulatory history

of the 1989 regulations suggests that NHTSA intended to achieve a gradual phase-in of a variety of different types of seatbelts in rear seating positions. On the contrary, the agency recognized that lap/shoulder seatbelts were inherently safer and its regulations were intended to achieve "the *earliest possible implementation* of a requirement for rear-seat lap/shoulder belts." 54 Fed. Reg. 25275, 25276 (June 14, 1989) (italics added); *see also id.* at 25277; 54 Fed. Reg. 46257, 46258, 46265 (Nov. 2, 1989).

For these reasons, a state tort suit alleging that all rear seating positions should have been equipped with lap/shoulder belts in 1993 would not stand as an obstacle to the federal seatbelt regulations promulgated in 1989. "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989).

C. Many State and Federal Courts Have Misconstrued *Geier* and Applied an Overly Broad Interpretation of Its Implied Preemption Holding

As noted, many state and federal courts have interpreted *Geier* to preempt state common-law suits whenever they would foreclose one of several equipment options authorized by a federal motor vehicle safety standard. This overbroad interpretation is not supported by anything in this Court's opinion. The

majority did not base its holding on the mere existence of regulatory options; it relied on evidence that the agency had adopted an authoritative federal policy designed to give vehicle manufacturers a variety of passive restraint choices and achieve a mix of different types of passive restraints in front seating positions. In fact, *Geier* cited earlier Supreme Court authority which it characterized as holding that a state common-law tort theory is preempted only where it "limit[s] the availability of an option *that the federal agency considered essential to ensure its ultimate objectives*." *Geier*, 529 U.S. at 882 (emphasis added & citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982)). Under *Geier*, if the federal agency does *not* consider the availability of a particular option to be essential to its objectives, a common-law theory foreclosing that option does not stand as an obstacle to the agency's goals and is not preempted.

The broad "options always preempt" interpretation of *Geier* is directly contrary to the statutory scheme enacted by Congress. Even when a motor vehicle safety standard provides different options for compliance, it is still by definition only a "minimum standard." 49 U.S.C. § 30102(a)(9). Indeed, when NHTSA first enacted FMVSS 208 and gave manufacturers the option of installing either lap-only or lap/shoulder belts in rear seating positions, the agency confirmed that "all standards" were only "minimum standard[s]." 32 Fed. Reg. 2408, 2408 (Feb. 3, 1967). The agency has never retreated from

this position. Further, the savings clause of the Safety Act provides: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). By holding that federal law preempts a state tort suit whenever it would foreclose an option permitted by a minimum safety standard, these cases threaten to convert the federal safety floor created by Congress into a national liability ceiling.

These cases are also contrary to the consistently stated views of the agency itself. In *Geier*, the Court relied on amicus briefs submitted by the United States on behalf of the DOT in three different Supreme Court cases. In each of those amicus briefs, the DOT consistently stated its position that "no airbag" lawsuits would conflict with its specific objectives in promulgating the *1984 version* of FMVSS 208 governing passive restraints. *Geier*, 529 U.S. at 883 (quoting Briefs for the United States as Amicus Curiae in *Geier*, No. 98-1911, *Freightliner Corp. v. Myrick*, No. 94-286, and *Wood v. General Motors Corp.*, No. 89-46). *Geier* concluded that the agency's position as to the preemptive effect of its own regulations was entitled to "special weight." *Id.* at 886.

In those very same amicus briefs, however, the DOT specifically rejected the broad theory of implied preemption embraced by the California Court of Appeal's decision. In *Wood*, for example, the federal government's amicus brief stated:

> Respondent argues that FMVSS 208 preempts state tort claims because that standard has always allowed manufacturers to use various types of occupant restraints. [Citations.] We disagree with this reasoning. . . . That state tort law may compel an auto maker as a practical matter to choose one of the options authorized by federal law also does not necessarily establish an actual conflict between federal and state law.

AA 414-415.

Similarly, in *Freightliner*, the amicus brief filed by the United States stated: "Although the majority of courts to have considered the question have concluded that 'no-airbag' suits are preempted, they have done so on a broader theory of implied preemption with which the United States does not agree, i.e., that the existence of 'options' to comply with Standard 208 in itself precludes state-court judgments based on the failure to install one particular option." AA 457-458, n.16.

And in *Geier* itself, the amicus brief for the United States argued: "[S]tate tort law does not conflict with a federal 'minimum standard' . . . merely because state law imposes a more stringent requirement. . . . We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose." AA 488 & n.18.

As *Geier* establishes, the DOT's consistently stated views as to the preemptive effect of its own

regulations are entitled to "special weight." *Geier*, 529 U.S. at 886. Because NHTSA has clearly indicated that it does not intend its own regulatory options to preempt all state tort claims that effectively foreclose one of those options, the broad "options always preempt" theory of implied preemption adopted by some lower courts should not be allowed to stand uncorrected.

Other federal and state courts have correctly recognized that "*Geier* does not automatically exempt automobile manufacturers from liability whenever a federal regulation provides them with options as to the type of restraint system to be employed." *Chevere v. Hyundai Motor Co.*, 774 N.Y.S.2d 6, 4 A.D.3d 226, 227 (N.Y. App. Div. 2004); *see also O'Hara v. General Motors Corp.*, 508 F.3d 753, 762-63 (5th Cir. 2007) (holding that NHTSA's decision to give manufacturers an option between laminated or tempered glass for side windows in FMVSS 205 did not preempt tort claim for failure to install laminated glass).

Certiorari should be granted on this issue because the line of cases followed by the California Court of Appeal threatens to undermine the valuable role Congress intended state tort law to play in providing incentives for manufacturers to develop safer vehicles than the federal minimum standards. If allowed to stand, these cases would immunize manufacturers from tort liability whenever they install one of the equipment options permitted by the federal minimum safety standards. That cannot be what Congress had in mind when it stated that compliance

with a motor vehicle safety standard "does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

D. Many State and Federal Courts Have Misconstrued *Sprietsma* and Applied an Overly Narrow Interpretation of Its Implied Preemption Holding

Two years after *Geier*, this Court decided *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). In a unanimous decision, the Court distinguished *Geier* in ruling that the Coast Guard's "intentional and carefully considered" decision not to mandate boat propeller guards did not preempt a state tort action based on the defendant's failure to install a propeller guard. *Id.* at 67. The Coast Guard's decision was based primarily on "available data" regarding the costs, technical feasibility, and relative safety benefits of mandating a universally acceptable propeller guard for all modes of boat operation. *Id.* at 61-62, 66-67. However, the Coast Guard did not make any "policy" judgment that states "should not impose some version of propeller guard regulation, and it most definitely did not reject propeller guards as unsafe." *Id.* at 67. Because the Coast Guard's cost-benefit analysis did "not convey an 'authoritative message' of a federal policy against propeller guards," this Court found that the plaintiff's tort claim was not preempted. *Id.* at 67-68.

Just as the Coast Guard in *Sprietsma* "did not reject propeller guards as unsafe," *Sprietsma*, 537 U.S. at 67, NHTSA has never rejected lap/shoulder belts as unsafe for non-outboard rear seating positions. On the contrary, the agency recognized in 1989 that lap/shoulder belts are safer and more effective in rear seating positions. 54 Fed. Reg. 46257, 46257-46258 (Nov. 2, 1989); 54 Fed. Reg. 25275, 25275-25276 (June 14, 1989). In 1989, NHTSA decided not to mandate lap/shoulder belts for non-outboard seats primarily because it believed that this still posed "more technical difficulties" and there were "small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989).[3]

This cost-benefit analysis is indistinguishable from the Coast Guard's reasoning for its decision not to mandate propeller guards in *Sprietsma*. It does "not reflect an 'authoritative' message of a federal policy against" lap/shoulder belts in non-outboard seating positions. *Sprietsma*, 537 U.S. at 67. Just as

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[3] For the type of aisle seat occupied by Thanh Williamson, NHTSA even "encourage[d]" manufacturers to install lap/shoulder belts if they could do so without obstructing the aisle. 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989). By 1993, when the Williamsons' vehicle was manufactured, there *were* technologically and economically feasible ways of anchoring the lap/shoulder belt directly to the seat without obstructing the aisle. Petitioners are not claiming that Mazda had a duty to install a lap/shoulder belt that would have obstructed the aisle.

the Coast Guard "left the law applicable to propeller guards exactly the same as it had been before," *id.* at 65, NHTSA left the law applicable to these seating positions exactly the same as it had been for over 20 years. Under *Sprietsma*, the agency's 1989 decision not to mandate lap/shoulder belts for these seating positions has no preemptive effect.

In refusing to apply *Sprietsma*, the California Court of Appeal followed a recent line of cases holding that *Sprietsma* is strictly limited to situations involving a "complete absence of regulatory action." App. 20 (citing *Carden v. General Motors Corp.*, 509 F.3d 227, 232 (5th Cir. 2007); *Roland v. General Motors Corp.*, 881 N.E.2d 722, 728-29 (Ind. App. 2008)). However, nothing in *Sprietsma* suggests that its holding is so limited. *Sprietsma* itself cannot fairly be characterized as a case involving complete absence of regulatory action. As this Court noted, the Coast Guard had in fact "promulgated a host of detailed regulations" on boat safety and performance, including "the use of specified equipment" and "precise standards governing the design and manufacture of boats themselves and of associated equipment, such as electrical and fuel systems, ventilation, and 'start-in-gear protection' devices." *Sprietsma*, *supra*, 537 U.S. at 60. Thus, *Sprietsma* was a case involving an agency's deliberate and carefully considered decision not to mandate *one particular type* of safety device.

This Court and others have applied *Sprietsma* in circumstances that did not involve a complete absence of regulatory action. *See, e.g.*, *Altria Group, Inc.*

v. Good, 129 S. Ct. 538, 550-51 (2008) (holding that state law claims against tobacco manufacturers for misrepresenting that cigarettes were "light" and had "lowered tar and nicotine" were not preempted by Federal Trade Commission's failure to require correction of misleading statements); *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553, 591-93 (E.D. Pa. 2008) (holding that Federal Drug Administration's decision not to mandate additional pediatric warning for drug did not convey an "authoritative message of federal policy" sufficient to preempt a state law failure to warn claim); *MCI Sales and Service, Inc. v. Hinton*, 272 S.W.3d 17, 23-28 (Tex. App. 2008) (holding that FMVSS 208 and NHTSA's decision not to mandate passenger seatbelts on motor coach buses did not constitute clear expression of federal policy sufficient to preempt common-law claim of duty to install passenger seatbelts on motor coach buses); *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations*, 41 Cal. 4th 929, 945-50 (2007) (holding that United States Fish and Wildlife's extensive regulatory history regarding kangaroo species did "not establish any 'authoritative' policy against state regulation").

Most notably, in a case decided just two weeks before the Fifth Circuit's decision in *Carden*, a different panel of the Fifth Circuit applied and followed *Sprietsma* even though NHTSA had promulgated a specific safety regulation on the exact subject at issue. In *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007), the Fifth Circuit ruled that a

common-law claim alleging that a vehicle should have been equipped with laminated glass windows was not preempted by federal law. Notably, there was a federal regulation in place (FMVSS 205) that specifically gave manufacturers the option of using either laminated or tempered glass for side windows. Even so, the Fifth Circuit found that NHTSA's decision not to mandate laminated glass was based on "cost concerns and minor safety issues" of a type that did "'not convey an authoritative message of a federal policy against'" laminated glass under the holding of *Sprietsma*. *Id.* at 762-63 (quoting *Sprietsma*, 537 U.S. at 67). These are exactly the same types of reasons NHTSA cited when it decided not to mandate lap/shoulder belts for non-outboard seating positions in 1989. 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989).

Certiorari should be granted to resolve this conflict between the lower appellate courts. There is no conceivable reason to confine *Sprietsma* solely to cases involving a complete absence of regulatory action. Whenever a federal agency decides not to impose a particular safety requirement, its decision should have preemptive effect only if it conveys an authoritative message of federal policy against the requirement. Otherwise, state tort suits will be preempted in the absence of any genuine conflict with federal law.

As this Court has recently confirmed, the presumption against preemption fully applies to implied conflict preemption. *Wyeth v. Levine*, ___ S. Ct. ___, 2009 WL 529172, at *5 n.3 (2009). Ordinarily, "the

absence of a federal standard cannot implicitly extinguish state common law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 282 (1995) (holding that absence of federal safety standard on anti-lock brakes did not impliedly preempt state common-law duty to install anti-lock braking system). Especially in cases where Congress has stated an intention to allow state common law to operate in conjunction with federal law, state tort law should never be displaced by a federal agency's decision not to impose a particular safety standard unless there is "clear evidence of a conflict" between state and federal policies. *Geier*, 529 U.S. at 88.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER COMMON-LAW CLAIMS FOR FAILURE TO WARN ABOUT THE DANGERS OF LAP-ONLY SEATBELTS ARE IMPLIEDLY PREEMPTED BY FMVSS 208

The same line of cases discussed above also held that FMVSS 208 preempts a state tort claim alleging that a vehicle manufacturer had a duty to warn about the known risks of one of the seatbelt options authorized by the federal standard. The California Court of Appeal followed these cases in ruling that petitioners' failure to warn theory of liability was "also barred by federal preemption." App. 26 (citing *Carden* 509 F.3d at 233; *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769-70 (11th Cir. 1998); *Roland*, 881 N.E.2d at 729-30). However, these holdings simply cannot be reconciled

with this Court's recent ruling in *Wyeth v. Levine*, ___ S. Ct. ___, 2009 WL 529172 (2009). Certiorari should be granted on this issue because the lower courts have decided an important question of federal preemption inconsistently with this Court's decision in *Wyeth*.

In *Wyeth*, the federal Food and Drug Administration ("FDA") approved as safe and effective the injectable form of a drug called Phenergan and also approved Wyeth's labeling of the drug. However, the FDA did not mandate additional warnings regarding known risks of the "IV-push" method of administration, whereby the drug is injected directly into a patient's vein. The plaintiff suffered injury from an IV-push injection of Phenergan and sued the manufacturer on a failure to warn theory under state law. *Wyeth*, 2009 WL 529172, at *2-3.

This Court held that the plaintiff's failure to warn theory was not preempted by federal law. First, the Court found that it was possible for Wyeth to comply with a state-law duty to modify Phenergan's labeling without violating the federal labeling requirements. *Wyeth*, 2009 WL 529172, at *7-9. Second, the Court held that imposing a state-law duty to provide a stronger warning would not obstruct the purposes and objectives of the federal drug labeling regulations. *Id.* at *10-13. The Court concluded that Congress intended the Food, Drug, and Cosmetic Act to operate in conjunction with state law to provide broad consumer protection. *Id.* at *10. The Court noted:

> As Justice O'Connor explained in her opinion for a unanimous Court: "The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them."

Id. (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)).

Under the holding of *Wyeth*, the mere fact that a federal agency has approved a product as safe and effective does not automatically preempt a state-law claim for failure to warn of the product's known risks. In *Wyeth*, this Court expressly ruled that the plaintiff's failure to warn claim was not preempted by the FDA's approval of the drug and its labeling. Similarly, petitioners' failure to warn claim is not preempted by NHTSA's approval of lap-only seatbelts as the minimum federal safety standard for some vehicle seating positions. As in *Wyeth*, Congress has clearly expressed its intention to allow state common law to operate in conjunction with federal "minimum" standards to achieve greater vehicle safety. 49 U.S.C. §§ 30102(a)(9), 30103(e). Requiring vehicle manufacturers to warn consumers about the known risks of lap-only seatbelts is no more of an obstacle to federal law than requiring drug manufacturers to provide stronger warnings about the known risks of a drug approved by the FDA.

Certiorari should be granted on this issue because it is an important question of federal preemption that has been wrongly decided by the lower federal and state courts. To ensure that state tort law continues to play its proper role in achieving greater vehicle safety than just the federal minimum standards, this Court should intervene to correct these erroneous decisions.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this petition for writ of certiorari should be granted.

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