

No. _____

**In The
Supreme Court of the United States**

—————◆—————
MARY ROBYN PRIESTER,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

—————◆—————
**On Petition For Writ Of Certiorari To
The Supreme Court Of South Carolina**

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §§ 30101 *et seq.*, or Federal Motor Vehicle Safety Standard 205, 49 C.F.R. 571.205, which incorporates by reference an industry standard that gives car manufacturers the option of installing either tempered glass or some form of “advanced glazing” in the side windows of passenger vehicles, preempt a state-law tort claim that a passenger truck was unreasonably dangerous because it utilized tempered glass in its side window.

PARTIES TO THE PROCEEDINGS

Petitioners are Mary Robyn Priester, Individually and as Natural Mother/Next of Kin, and Personal Representative of the Estate of James Lloyd Priester.

Respondent is Ford Motor Company.

Preston Williams Cromer remains a nominal party in the case.

Stage Light Management, d/b/a Showgirls(z); and Lloyd Brown, individually and doing business as Showgirls(z), and Nikki D's Inc. are no longer parties to this action due to either dismissal or settlement.

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OPINIONS BELOW

The opinion of the South Carolina Supreme Court (Pet. App. 1-13) is reported at 697 S.E.2d 567. The order of the trial court granting respondent Ford Motor Company's motion for summary judgment (Pet. App. 14-34) is not reported.¹



JURISDICTION

The lower court entered judgment on August 2, 2010, and a timely petition for rehearing was denied on September 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1257.



STATUTORY AND REGULATORY PROVISIONS INVOLVED

The National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §§ 30101 *et seq.*, provides in relevant part:

49 U.S.C. § 30103. Relationship to other laws.

(b) Preemption. (1) when a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a

¹ Citations to "Pet. App." are to the appendix to this Petition. Citations to "R." are to the record in the court below.

State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

* * *

(e) Common Law Liability. Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

Federal Motor Vehicle Safety Standard 205, 49 C.F.R. § 571.205 (1997), provides as follows:

S.1. Scope. This standard specifies requirements for glazing materials for use in motor vehicles and motor vehicle equipment.

S2. Purpose. The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions. . . .

As the lower court observed, Standard 205 does not itself specify which types of glazing materials may be used in motor vehicles. Pet. App. 5. Rather, Standard 205 simply incorporates by reference a

safety code developed by the American National Standards Institute. *Id.* Thus, the Standard provides:

S5.1.1.6. Multipurpose passenger vehicles. Except as otherwise specified provided by this standard, glazing for use in multipurpose passenger vehicles shall conform to the requirements for glazing for use in trucks as specified in [American National Standards] Z26.

Pet. App. 5-6. The relevant version of ANSI Z26 permits the use of either tempered glass or some form of advanced glazing (*e.g.*, laminated glass), on the side windows of passenger vehicles, so long as the glass meets certain testing requirements. Pet. App. 6.



INTRODUCTION

This case raises an issue of recurring importance that is closely related to a case that is currently pending before this Court: *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314 (U.S. argued Nov. 3, 2010). In this case, the lower court ruled that Standard 205, which gives car manufacturers the option of utilizing either tempered or laminated glass in the side windows of cars, preempts state-law tort claims. A similar issue is presented in *Williamson*: whether Federal Motor Vehicle Safety Standard 208, which gives car makers the option of installing either lap belts or lap-belt/shoulder

harnesses in the rear-center seats of cars (and the rear-aisle seats of minivans) preempts state-law tort claims. Because the Court's resolution of *Williamson* is likely to provide guidance to the courts below on the preemptive effect of regulations, like Standards 205 and 208, that give manufacturers different technological options for addressing a given safety issue, this petition should be held pending the Court's disposition of *Williamson*, and then the case vacated and remanded for further proceedings to the Supreme Court of South Carolina.

Alternatively, because this petition presents a question that is significant in its own right, this Court should grant the petition irrespective of its handling of *Williamson*. See Brief for the United States as *Amicus Curiae* in support of review, *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314 (U.S. Apr. 2010), at 20-22 (arguing that the split of authority regarding the preemptive effect of Standard 205 is an important issue that should be resolved by this Court).



STATEMENT OF THE CASE

Statutory and Regulatory Background:

1. The Safety Act.

Congress passed the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 49 U.S.C. §§ 30101 *et seq.*, to reduce motor vehicle

injuries and deaths. *See* S. Rep. No. 89-1301, 89th Cong., 2d Sess. 1-2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2709-10; H.R. Rep. No. 89-1776, 89th Cong., 2d Sess. 10-11 (1966). To this end, Congress empowered the National Highway Traffic Safety Administration (“NHTSA”) to prescribe minimum motor vehicle safety standards. 49 U.S.C. §§ 30101, 30104. The Safety Act provides that “[c]ompliance 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 *Geier v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000), this Court interpreted the savings clause as evidencing Congress’s intent to “preserve” common-law tort claims “that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor.” The Court went on to explain that only a common-law claim that “actually conflict[s]” with federal law will be preempted. *Id.* at 874.

2. Standard 205.

Standard 205, issued pursuant to the Safety Act, specifies minimum requirements for glazing materials in motor vehicles. 49 C.F.R. § 571.205 § 1. The stated purposes of Standard 205 include minimizing occupant ejections:

S2. Purpose. The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle

windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions.

49 C.F.R. § 571.205, § 2.

Notably, Standard 205 does not itself contain standards for the design, installation, or performance of motor vehicle windows. Instead, the regulation simply adopts and incorporates by reference the standards for automotive glass created by the American National Standards Institute (“ANSI”). 49 C.F.R. § 571.205, § 5.1; ANSI Z26.1-1980.

At the time NHTSA first promulgated Standard 205 (in 1966, when the first auto safety standards were promulgated), the agency did not specify any particular policy reason for adopting the ANSI materials standard. *See* 31 Fed. Reg. 15,219 (Dec. 3, 1966). The sole statement of purpose accompanying the rulemaking provided as follows:

S1. Purpose and Scope. This standard specifies requirements for glazing materials to reduce superficial and deep lacerations to the face, scalp, and neck, and to prevent occupants from being thrown through the vehicle windows in collisions.

S3.1 Materials. Glazing materials used in windshields, windows, and interior partitions shall conform to United States of America Standards Institute “American Standard Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land

Highways.” USA Standard Z26.1-1966, July 15, 1966.

Id.

Similarly, in 1984, when NHTSA amended Standard 205 to adopt the 1980 version of ANSI Z26.1 (which is the version relevant here), the agency’s adoption amendment merely stated:

This notice amends Standard No. 205, Glazing materials, to adopt by reference the 1980 version of American National Standard Z26, the safety code for glazing materials promulgated by the American National Standards Institute. Adoption of the most recent version of Z26 will permit the use of the latest technological developments in glazing.

49 Fed. Reg. 6732 (Feb. 23, 1984) (incorporating ANSI Z26.1-1977, as supplemented by Z26.1(a), July 3, 1980)).

Neither the original nor amended versions of ANSI Z26.1 contain any tests, standards, requirements, or guidelines for the design or performance of the actual window systems used in cars. Instead, ANSI Z26.1 has always simply listed various types of window materials (including tempered glass, laminated glass, and glass-plastic, R. 73) and specified various tests for determining whether a safety glazing material qualifies for acceptance under the code. R. 84-103. The ANSI tests, which relate to light, luminosity, humidity, boil, impact, fracture, and abrasion resistance, are performed only on 12" x 12"

or smaller flat specimens in the laboratory. *Id.* There are no ANSI tests for the design or performance of the actual full-size glass in motor vehicle windows, for the performance of the window systems in crashes, or for the prevention or minimization of occupant ejections.

The Foreward to the 1980 standard emphasized that it is merely “intended to provide minimum requirements” for window glazing, and that “[t]his standard does not itself state that safety glazings shall be used or to what extent they shall be used in glazing motor vehicles. Such requirements rest with either the legislative or administrative authority.” R. 72-73.

In 1988, NHTSA announced its proposal to amend Standard 205 to eliminate the option of using tempered glass in vehicle side windows and, instead, to require some form of advanced glazing, such as laminated glass, in all vehicle windows. *See* Advanced Notice of Proposed Rulemaking, Side Impact Protection – Passenger Cars, 53 Fed. Reg. 31,712 (Aug. 19, 1988). The purpose of this proposal was to minimize passenger ejections in the event of rollovers. *Id.*²

² Laminated glass reduces passenger ejections because it is likely to keep the passenger inside a vehicle due to the “adhering” quality of the glass. Pet. App. 6.

NHTSA proceeded to study the potential costs and benefits of its proposal. In 2001, NHTSA announced its conclusions that the use of advanced glazing in side windows “could save 537 to 1,305 lives annually,” and that, through use of advanced glazing, “an estimated 235 to 575 serious . . . injuries could be reduced annually.” R. 231 (NHTSA, Ejection Mitigation Using Advanced Glazing: Final Report, 2001, at vi). NHTSA further found that “[a]dvanced glazing systems have the potential to yield significant safety benefits by reducing partial and complete ejections through side windows, particularly in rollover crashes,” R. 234 (*id.* at ix), and that, “[i]n most side impact and rollover crashes, the tempered window glazing shatters. . . .” R. 267 (*id.* at 31).

Despite these conclusions, NHTSA ultimately decided to withdraw its proposal to require advanced glazing in all side windows. 67 Fed. Reg. 41,365 (June 18, 2002). The agency emphasized a concern that requiring advanced glazing in all cars “would require modifications to the design of all vehicles currently being produced to make their windows smaller, and the cost of such a design modification would be significant.” *Id.* at 41,367. Further, NHTSA noted that the well-established safety benefits of advanced glazing in side windows were not without drawbacks, including a slightly increased risk of minor neck injuries. *Id.* at 41,366-67. In light of these concerns, NHTSA stated that it would “not continue to examine a potential requirement for advanced side glazing.” *Id.*

The agency has continued, however, to permit advanced glazing as one of the regulatory options for side windows, and has continued to study advanced glazing alternatives as a means of mitigating passenger ejection through side windows. *See O'Hara v. General Motors Corp.*, 508 F.3d 753, 756 (5th Cir. 2007) (discussing history of Standard 205 and NHTSA's on-going study of the safety benefits of advanced glazing).³

3. This Litigation.

James Lloyd Priester was fatally crushed when he was ejected from the back of a 1997 Ford F-150 pickup truck manufactured by respondent Ford Motor Company, Inc. James' mother filed a South Carolina state-court lawsuit against Ford asserting strict products liability and negligence for the defective design of the vehicle's side windows. The complaint specifically alleged that Ford's use of tempered glass

³ *See also* NHTSA, Initiatives to Address the Mitigation of Vehicle Rollovers, June 2003 (discussing the agency's hope of "significantly reduc[ing] the potential for partial and complete ejection fatalities and injuries" through "window curtains and/or advanced glazing requirements"); NHTSA, Vehicle Safety Rulemaking Priorities and Supporting Research: 2003-2006 (discussing "promising technological innovations to prevent occupant ejections," including "improved glazing" of side windows); NHTSA, Vehicle Safety Rulemaking and Supporting Research Priorities: Calendar Years 2005-2009 (same).

in the truck's side windows was unreasonably dangerous and that some form of advanced glazing would have decreased the likelihood of passenger ejection.

Ford moved for summary judgment on the ground that Standard 205 preempted Ms. Priester's claims because a jury verdict in her favor would undermine the regulatory option, thereby conflicting with federal purposes. In so arguing, Ford relied heavily on *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), in which this Court held that a federal safety standard that gave car makers the option of installing either airbags or some other form of passive restraint in the front-driver seats of cars preempted state-law claims that a car was defective because it lacked an airbag.

After argument on Ford's summary judgment motion but before a decision was rendered, the United States Court of Appeals for the Fifth Circuit became the first appellate court to consider whether Standard 205 preempts tort claims seeking to hold a car manufacturer liable for failing to install laminated glass in side windows. *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007). After an exhaustive inquiry into the regulatory history of Standard 205, the court of appeals ruled that Standard 205 does not preempt such claims, holding that Standard 205's allowance of a range of window-glazing options "does not establish a federal policy which would be frustrated by a state common law rule requiring advanced glazing in side windows." *Id.* at 758.

After ordering supplemental briefing on *O'Hara*, the trial court rejected the Fifth Circuit's ruling, finding that "the *O'Hara* panel relied on the wrong data, did not consider important policy pronouncements of [NHTSA], and, as a result, reached the wrong conclusion regarding preemption." Pet. App. 23.

The Supreme Court of South Carolina affirmed. Pet. App. 1. The court observed that "[c]ourts across the country faced with this issue have struggled with the preemptive effect, if any, of [Standard] 205 and have reached opposite conclusions." Pet. App. 2. "Pending resolution from the United States Supreme Court," however, the court sided with those courts finding federal preemption of side-window claims, holding that "[t]o allow this suit to go forward would sanction a jury finding the Ford F-150 pickup truck to be defectively designed solely because it selected the federally authorized choice of tempered glass." Pet. App. 2, 12. According to the court, because "such a result would stand as an obstacle to achieving the purposes and objectives of [Standard] 205, the state tort action presents a conflict between federal law and state law." Pet. App. 12.

Petitioner moved for rehearing on various grounds, including that rehearing was warranted because this Court had recently granted review in *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314. The lower court denied the petition without comment on September 2, 2010. Pet. App. 40.



REASONS FOR GRANTING REVIEW

I. THIS CASE RAISES MANY OF THE SAME IMPORTANT ISSUES AS *WILLIAMSON V. MAZDA* REGARDING THE PREEMPTIVE EFFECT OF REGULATORY OPTIONS.

The most obvious reason review is warranted is because this case overlaps substantially with *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314, which is pending before this Court. Although *Williamson* involves a different federal regulatory option – Standard 208, which at the relevant time gave manufacturers the option of installing either lap belts or lap-belt/shoulder harnesses in the rear-center seats of cars and the rear-aisle seats of minivans – both cases present the same overarching federal question: whether the lower courts “gave too broad a reading to *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000),” by according preemptive effect to a federal safety standard that “manifests no affirmative intent to foster multiple options . . .” See Brief for the United States as *Amicus Curiae* in support of review, *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314 (U.S. Apr. 2010) (“U.S. *Cert.* Brief”) at 20-22.

There can be no serious dispute that this case is as worthy of review as *Williamson*. There, the United States argued that review was warranted in order to resolve the confusion generated by *Geier*, which held that the regulatory option embodied in Standard 208 preempted state-law claims that a car was defective because it lacked an airbag. Notably, the governments’ brief emphasized the split of authority with

regard to the regulation at issue in this case – Standard 205 – as a reason why review should be granted in *Williamson*. *See id.* at 20-21 (explaining that “lower courts have reached conflicting conclusions on how to apply *Geier* to [Standard] 205” and have “noted the need for further guidance from this Court”).

The United States emphasized that *Geier* has been broadly misread to mean that *any* options standard has preemptive effect, even where the standard “manifests no affirmative intent to foster multiple options. . . .” U.S. *Cert. Br.* at 9. This “methodological error,” the United States has explained, “is important: it mistakenly deprives the Safety Act’s savings clause of its proper effect; it transforms [a] . . . [safety standard] from a minimum standard into a definitive standard of care; and it does so contrary to the consistent position of the agency that promulgated the standards.” *Id.* at 8. These concerns, in the Government’s view, rendered the question presented in *Williamson* “sufficiently important and recurring to warrant this Court’s review.” *Id.*

All of these concerns apply with equal force here. Despite their differences, the safety standards involved in *Williamson* and in this case are identical in two crucial respects: (1) as in *Geier*, both give manufacturers the option of using more than one technology to address a particular safety issue; but (2) unlike *Geier*, neither this case nor *Williamson* involves a standard that “affirmatively encouraged the adoption of diverse forms of [technology]” or was

based on an “affirmative intent to foster multiple options.” U.S. *Cert. Br.* at 9. And, as in *Williamson*, the lower court’s misapprehension of the regulatory purposes underlying Standard 205 effectively “transform[ed]” Standard 205 “from a minimum level of care into a definitive level of care,” thereby “effectively depriving the Safety Act’s savings of its proper effect.” *Id.* at 8.

In light of this history, review is clearly warranted in this case. Because the decision to grant review in *Williamson* was based in part on the conflict in cases arising under Standard 205, it would be wrong to deny review in precisely such a case while *Williamson* is still pending, especially given the possibility that *Williamson* may not yield a majority decision.⁴ Instead, the Court should grant review here and hold this case pending the outcome in *Williamson*, thereby preserving the possibility of either a remand to the lower court or, to the extent appropriate, consideration of this case on the merits in the wake of *Williamson*.⁵

⁴ Associate Justice Kagan has recused herself from *Williamson* because she was Solicitor General when the United States filed its *cert.* brief in that case.

⁵ This is how this Court treated the petition for *certiorari* in *Colacicco v. Apotex, Inc.*, No. 08-437 (Oct. 2, 2008), which was filed when *Wyeth v. Levine*, 129 S.Ct. 1187 (2009), was still pending before this Court. Although *Colacicco* presented a different, albeit related, issue than *Wyeth* – the former involved federal preemption of failure-to-warn claims involving *generic* prescription drugs, whereas the latter involved federal preemption of such claims relating to *brand-name* drugs – this Court

(Continued on following page)

II. THERE IS A SPLIT OF AUTHORITY ON THE QUESTION PRESENTED, WHICH IS AN IMPORTANT ISSUE OF FEDERAL LAW IN ITS OWN RIGHT.

Williamson aside, review is warranted because the lower courts are deeply split and in need of guidance regarding the preemptive effect of Standard 205. U.S. *Cert. Br.* at 20-22. Indeed, as the lower court acknowledged, “[c]ourts across the country faced with this issue have struggled with the preemptive effect, if any, of [Standard] 205 and have reached opposite conclusions.” Pet. App. 1.

Thus, for example, in *Morgan v. Ford Motor Company*, 680 S.E.2d 77, 94-95 (W. Va. 2009), the Supreme Court of West Virginia held that Standard 205 preempts the same claims at issue in this case, yet described itself as being “stuck between a rock and a jurisprudential hard place.” The court went on to observe that, in its view, “*Geier* is flawed because it requires courts to . . . divine an agency’s interpretation from extraneous materials to determine the preemptive effect of a regulation . . . [But] *Geier* is, until altered or explicated by [this] Court, the guiding law of the land.” *Id.* The Tennessee Court of Appeals reached the same conclusion, similarly bemoaning what it understood to be the dictates of *Geier*. *See*

held the *Colacicco* petition pending the outcome of *Wyeth*, and then later vacated and remanded the petition for further consideration in light of its ruling in *Wyeth*. *Colacicco v. Apotex, Inc.*, 129 S.Ct. 1578 (2009).

Lake v. Memphis Landsmen, LLC, 2010 WL 891867, at *7 (Tenn. Ct. App. Mar. 15, 2010) (noting that, “[a]s was the *Morgan* court, this Court is ‘stuck between a rock and a jurisprudential hard place.’”) (citing *Morgan*).

Prior to these rulings, however, the United States Court of Appeals for the Fifth Circuit had issued its ruling in *O’Hara v. General Motors Co.*, 508 F.3d 753 (5th Cir. 2007), which rejected a claim that Standard 205 preempts claims concerning a car maker’s failure to install laminated glass in the side windows of a passenger vehicle. Based on an exhaustive analysis of the text and history of Standard 205, and the meaning and scope of *Geier* (which it found distinguishable), the Court of Appeals concluded that allowing a range of window-glazing options “does not establish a federal policy which would be frustrated by a state common law rule requiring advanced glazing in side windows.” *Id.* at 758.

Despite the Fifth Circuit’s thorough treatment of the issue, three state courts of last resort (*Morgan*, *Landsmen*, and the court below) disregarded *O’Hara* in favor of its own interpretation of *Geier* as applied to Standard 205.⁶ *O’Hara* was well reasoned and thorough, both with respect to its extensive recitation

⁶ There is also a split of authority on the question presented among numerous lower federal courts and state courts. *See generally Morgan*, 680 S.E.2d at 89 nn. 12 and 13 (collecting cases).

of the regulatory history of Standard 205 and its discussion of governing authority. Further percolation would be of little benefit, because the issue has been fully aired and the battle lines clearly drawn. The United States was correct when it identified this split as worthy of immediate review.

On a practical level, this case involves an even more significant real-world issue than *Williamson*. That case involves a type of passenger restraint – the two-point lap belt – that is no longer permitted by Standard 208. Yet in *Williamson*, the United States argued that the “issue remains significant” because “NHTSA estimates that in 2008, approximately 1,040,438 vehicles in the United States were equipped with some Type 1 seatbelts. . . .” U.S. *Cert. Br.* at 19. In this case, in contrast, the technology at issue – tempered glass in the side windows of passenger vehicles – is still permitted by NHTSA, and new cars with this technology are rolling off the assembly line every day. Thus the issue in this case dwarfs *Williamson* in terms of its real-world impact. Both car makers and the public have an undeniably powerful interest in knowing the extent to which car makers may be held liable for failing to install laminated glass in the side windows of cars.

III. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IS CONTRARY TO PRIOR RULINGS OF THIS COURT.

Finally, review is warranted because the lower court misapplied the two most relevant decisions of this Court: *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), and *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). Every court to find that Standard 205 preempts state-law claims, including the South Carolina Supreme Court in this case, has relied on this Court's ruling in *Geier* as the governing authority. (The same is true of the split of authority with regard to the claims at issue in *Williamson*.) These holdings all ignore that none of the policy considerations that *Geier* found dispositive with respect to NHTSA's passive-restraint standard was present in NHTSA's Standard 205 rulemakings.

In contrast to the hotly-debated technology at issue in *Geier* (the airbag), this case involves an uncontroversial device – laminated glass – that has never been the subject of any sort of public outcry, and that has in fact been permitted in side windows and *mandated* for front windshields by NHTSA for nearly four decades. *See* 32 Fed. Reg. 2408, 2414 (Feb. 3, 1967). Thus, unlike in *Geier*, there was no fear of a “public backlash” against particular technology that prompted NHTSA to give manufacturers an array of technological options. 529 U.S. at 891. Nor was there any “phase in” of any particular technology (*id.* at 879); any plan on NHTSA's part to “bring about a mix of different devices introduced gradually over

time” (*id.* at 875); any statement by NHTSA that it needed to “deliberately provide the manufacturer with a range of choices” (*id.* at 874); or any “policy judgment 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.

To the contrary, NHTSA’s adoption and incorporation by reference of the ANSI standards was unadorned by any statements *at all* regarding the preservation of regulatory options. *See O’Hara*, 508 F.3d at 761 (“There is no language in the Glazing Materials Final Rule commentary indicating that NHTSA intended to ‘preserve the option’ of using tempered glass in side windows, or that preserving this option would serve the safety goals of [Standard 205].”). The only fact that can be gleaned from NHTSA’s decision to adopt the ANSI standards is that NHTSA wanted cars to have, at a minimum, side windows made of an industry-approved material. *See id.* at 760 (holding that Standard 205 “is a materials standard that sets a safety ‘floor’ to ensure that the glazing materials used by manufacturers meet certain basic requirements.”). It is hard to imagine a scenario less like *Geier*, or one less worthy of triggering a finding of federal preemption.

In light of this background, it is not surprising that the Fifth Circuit, in *O’Hara*, held *Geier* to be inapplicable to Standard 205 cases, and found, instead, that cases like this one are governed by this Court’s unanimous decision in *Sprietsma*. *Id.* at 762.

In *Sprietsma*, this Court held that state-law claims seeking to hold a boat-engine manufacturer liable for failing to install a propeller guard on a passenger boat engine were not preempted by the U.S. Coast Guard's decision not to require propeller guards on all small motor boats. 537 U.S. at 65. In so holding, this Court noted that the Coast Guard's decision to not impose a universal propeller-guard requirement was based on cost/benefit considerations (in particular, concerns about the costs of requiring a propeller-guard retrofit on "millions" of existing boats), as well as the "lack of any 'universally acceptable model' propeller guard for 'all modes of boat operation.'" *Id.* at 67. The Court further noted that the Coast Guard continued to study propeller-guard technology and left open the possibility of imposing a universal requirement at some point in the future. *Id.* at 61-62.

The Coast Guard's decision not to require propeller guards on boat engines is strikingly similar to NHTSA's 2002 decision not to require advanced glazing in the side windows of cars. Just as in *Sprietsma*, NHTSA studied the possibility of requiring advanced glazing in side windows but concluded, based on a cost/benefit analysis, that it lacked sufficient data to justify the imposition of a universal advanced-glazing requirement. Just as in *Sprietsma*, NHTSA based this decision in part on concerns about the costs of modifying the design of all vehicles to accommodate advanced glazing technology. 67 Fed. Reg. at 41,367. Just as in *Sprietsma*, NHTSA has continued to study the possible benefits of advanced glazing in

order to determine how the technology can best be used to achieve the agency's overall safety goals. *See O'Hara*, 508 F.3d at 762. And just as in *Sprietsma*, NHTSA has repeatedly emphasized the potential safety benefits of advanced glazing, never banned it, and continues to permit its use.

For all these reasons, the Fifth Circuit was correct when it “[found] the parallels between NHTSA’s Withdrawal of Rulemaking and the Coast Guard’s statements in *Sprietsma* to be compelling.” *O'Hara*, 508 F.3d at 762. In this case, as in *Sprietsma*, there is no basis for concluding that the agency’s decision not to require a particular safety feature exerts preemptive force. The South Carolina Supreme Court’s conclusion to the contrary is but one example of the way in which myriad lower courts have misread this Court’s rulings in both *Geier* and *Sprietsma*. Review is warranted to instruct the lower courts as to the proper legal framework and to clarify the meaning and scope of this Court’s prior preemption holdings.



CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be held pending the Court’s decision in *Williamson*, after which the Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Williamson*. In

the alternative, the Court should grant the petition and schedule the case for briefing and hearing on the merits.

Respectfully submitted,

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