ORAL ARGUMENT REQUESTED
No. 25-6115

In the United States Court of Appeals for the Tenth Circuit

NICK SHAFFER and CHARLA SHAFFER, individually and as parents and next friends of Hope Shaffer, deceased,
Plaintiffs-Appellants,

v.

TOYOTA MOTOR CORPORATION, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Oklahoma
Case No. 5:22-CV-00151 (The Hon. David L. Russell)

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INTRODUCTION

Toyota does not deny that the record supports a finding that it designed an unreasonably dangerous seatback and was negligent in doing so. Nor does it deny that its defective seatback caused the death of a 15-year-old girl. Yet, as it did below, Toyota continues to maintain that it is entitled to summary judgment anyway. It contends that an Oklahoma statute categorically immunizes it from liability for its defective design because the design complied with a 1967 federal safety standard.

As we explained in our opening brief, however, Oklahoma's statute does not shield companies from liability whenever they comply with a federal safety standard. Rather, it contains two key exceptions: It confers no immunity if the federal standard is: (1) "inadequate to protect the public from unreasonable risks of injury"; or (2) if the company has "withheld … information … relevant to the federal government's or agency's determination of adequacy." Okla. Stat. tit. 76, § 57.2(B)(1), (2).[1]

Toyota tries to defend the district court's decision that no reasonable jury could find that the 1967 safety standard is inadequate or that it withheld relevant information. But it is wrong on both counts. As to the first: Toyota cannot overcome the fact that NHTSA itself has twice admitted that its 60-year-old standard is now "inadequate." No plausible interpretation of the Oklahoma statute confers immunity

[1] Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

where the agency that promulgated the standard has deemed it inadequate, and Toyota never offers one. It does not explain why the standard should be considered adequate as a matter of law despite the agency's statements to the country, or why Oklahoma's legislature would have wanted compliance with it to confer immunity.

Because it has no persuasive response, Toyota instead attempts to sidestep the merits altogether by claiming that the plaintiffs have forfeited their arguments. But the plaintiffs specifically challenged the standard's adequacy below, and the district court addressed it. Accepting Toyota's claim of forfeiture would require this Court to adopt an exceedingly exacting brand of waiver that would leave parties with little room to develop their arguments on appeal or respond to the reasoning set forth by the district court, and would instead punish litigants that do not effectively refile their district court briefing verbatim. This Court has never adopted that view of waiver.

As to the second exception: Toyota does not attempt to defend the district court's reasoning. Nor does it deny that it withheld information sought in connection with an inquiry into Congress's determination of the adequacy of the 1967 standard. Toyota instead offers only atextual, policy-based arguments about the reach of the statute—arguments better addressed in the first instance by the Oklahoma courts.

In the end, this appeal may be resolved without deciding any thorny questions of state law or policy. But to the extent that this Court believes that more interpretive work is needed, that would only favor certification to the Oklahoma Supreme Court.

ARGUMENT

I. Toyota does not come close to showing that every reasonable juror would find that the 1967 federal standard is adequate.

A. On inadequacy, Toyota's fundamental problem is that NHTSA itself has admitted that the 1967 standard is "inadequate." It first did so in 1998, when it admitted that the standard has been "[g]enerally … acknowledged" to "require[] inadequate seat strength to [e]nsure that the seat does not fail when a car is subject to a severe rear impact," and because "advances in technology ha[d] made possible significant improvement in the ability of the car seat to add appreciable crash victim occupant protection." App. Vol. 3 at 6. The agency viewed these as "valid criticisms" of the standard's adequacy. *Id.* It then acknowledged the standard's inadequacy once again in 2004, when the agency admitted that the standard did not represent its "informed decision" because there was not enough "research and data" to "allow an informed decision on a rulemaking action in this area" *at all*. App. Vol. 3 at 91. That is all that is needed for this Court to reverse. If even the agency has recognized that the almost 60-year-old standard is now inadequate, how could it be unreasonable for a jury to agree?

None of Toyota's three responses are persuasive.

First, Toyota denies that NHTSA admitted that the standard is inadequate, either in 1998 or 2004. It claims (at 28) that the 1998 admission is not an admission because the agency was just providing an "update on a research program" that it

launched to address "petitions [it] received … regarding seat back strength," and to aid "future considerations" of "upgrading" the standard. That's true as far as it goes; the agency was providing an update on its research program. But why should that matter? The reason that NHTSA had initiated the program was *because of* the "valid criticisms" of the standard, which was widely "acknowledged" to be "inadequate," and which had been made obsolete by "advances in technology." App. Vol. 3 at 6.

Nor does it matter that NHTSA said that the standard was inadequate to prevent failure only in "a severe rear impact," not in *any* rear impact. *Contra* Toyota Br. 28. The standard is obviously sufficient to prevent failure in some accidents. What the agency was concerned about—what caused it to research the question—was that the standard did not prevent failure in more serious (but still highly foreseeable) read-end crashes, and that it no longer had any real-world effect because of technological changes. NHTSA would not have called these "valid criticisms"—a phrase that Toyota ignores—if it believed that the standard was adequate. App. Vol. 3 at 6.

Toyota's treatment of what NHTSA did in 2004 is even less defensible. Citing nothing, Toyota asserts (at 29) that the agency terminated its rulemaking because it found that "the evidence had not shown a need to change the standard at all." That is not what NHTSA said. Here is what it said instead: (1) setting a seatback standard is a "complex" task that requires a "proper balance" of competing considerations;

(2) "[c]omprehensive information needed to determine that proper balance is not available"; (3) even so, the agency has "improved [its] understanding of how seat performance affects rear impact occupant protection" in the years since 1967, and that improved "understanding helped to guide the agency in formulating its proposal to upgrade"; (4) "although the agency has a better understanding of the issues associated with seat performance in rear impacts at various speeds, further studies are needed to allow NHTSA to develop a proposed upgrade" to the standard to "effectively balance seat back strength and interaction with other vehicle attributes"; (5) in particular, "it continues to be a challenge to assess the potential benefits of regulatory strategies for improving seat performance in higher speed rear impacts" because "there is considerably less data available" for how the seats perform at those speeds; (6) as a result, "additional research and data analyses are needed to allow an informed decision on a rulemaking action in this area." App. Vol. 3 at 91–93.

There is no way to read this and think that the 1967 standard reflects the kind of "cogent determination [of] the pertinent risks" that the Oklahoma legislature wanted manufacturers to be able "to rely on." *Contra* Toyota Br. 20 (quoting *Am. Honda Motor Co. v. Milburn*, 696 S.W.3d 612, 631 (Tex. 2024)). To the contrary, the agency expressly admitted that the 1967 standard is *not* an "informed decision," that it is *less* informed than the agency's subsequent decision to explore an upgrade, and that *no* adequate standard could be selected even in 2004 because the data was "not

available." App. Vol. 3 at 91–93. So yes, "[t]hat is about the strongest possible evidence of regulatory inadequacy that a plaintiff could produce." Opening Br. 26; *contra* Toyota Br. 29.

Second, faced with such a strong agency admission, Toyota tries to ratchet up the burden for establishing inadequacy. It argues that, under the majority opinion in *Milburn*, establishing inadequacy "necessarily" requires a "comprehensive review of the various factors and tradeoffs NHTSA considered in adopting [the] safety standard." Toyota Br. 25. But as the plaintiffs explained in their opening brief, that is not what *Milburn* holds. "Regulatory-process flaws are one way that a plaintiff may show inadequacy under *Milburn*, but so too are subsequent developments (which necessarily take place *after* the regulatory process has occurred)." Opening Br. 32. *Milburn* goes out of its way to say that "nothing in our opinion should be read to limit the grounds on which the presumption may be rebutted," 696 S.W.3d at 631 n.23, and that other facts may show inadequacy "*even in the absence of* evidence that the standard was inadequate based on the information available to NHTSA" at the relevant time. *Id.* at 631 (emphasis added). Toyota's reading of *Milburn* cannot be squared with this language, and Toyota does not bother trying to show otherwise.

Nor can Toyota's position be squared with the language of the Oklahoma statute. Section 57.2(B)(2) expressly focuses on whether the "federal safety standards" are "inadequate to protect the public from unreasonable risks of injury." Unlike a

neighboring provision, which refers to "standards or procedures," section 57.2(b)(2) says nothing about process. Okla. Stat. tit. 76, § 57.2(C)(1); *see* Opening Br. 33. It speaks only of standards. Thus, if the federal safety standard is inadequate, the presumption against liability is overcome—regardless of whether the *process* that led to it was *also* inadequate. On this textual point, too, Toyota makes no effort to respond.

Instead, it attacks an argument that the plaintiffs aren't making. The plaintiffs are not taking the position that, under *Milburn*, "it is appropriate to require evidence addressing the agency's reasons when a plaintiff asserts that the agency 'got it wrong' by adopting the standard, but the agency's reasons may be safely ignored when a plaintiff asserts that the agency 'got it wrong' by declining to adopt a new one." *Contra* Toyota Br. 25. To be clear, the plaintiffs are not asserting that NHTSA got it wrong by declining to adopt a new standard. Nor are they asking the Court to ignore the agency's reasons for declining to adopt a new standard. They are saying the opposite: that the agency's reasons may *not* be ignored, and that they prove inadequacy. And that is true irrespective of whether the agency should have picked a *new* standard.

So, if ever there were a case where a plaintiff could show inadequacy without having to show that the agency "got it wrong" when it adopted the standard, it would be this one. When an agency has admitted that a standard is insufficient to protect the public, there is no need to go back in time and ask whether the standard was also insufficient when it was adopted. In that scenario—this scenario—the contention is

not that the agency has gotten anything wrong. Rather, it is that the agency got it right when it told manufacturers, customers, other regulators, and the public at large that the 1967 standard was inadequate and had been outpaced by new technology. A jury could easily find that the presumption is rebutted in these circumstances, even without a comprehensive review of the factors that led to the agency's decision to set or not amend the standard.

Finally, because its position on the merits is so weak, Toyota attempts to avoid the merits by claiming that the plaintiffs have forfeited the argument. *See* Toyota Br. 27–28. They did not. The plaintiffs specifically argued below that the federal standard was inadequate even under *Milburn*, which permits plaintiffs to point to "subsequent developments" to "demonstrate that the standard was no longer adequate" when the product was manufactured. App. Vol. 2 at 146 (quoting *Milburn*, 696 S.W.3d at 631). The plaintiffs introduced evidence that NHTSA has since admitted that "the standards in FMVSS 207 were 'inadequate' to protect occupants in rear end crashes," and "that 'advances in technology have made possible significant improvement in the ability of the car seat to add appreciably crash victim occupant protection.'" App. Vol. 2 at 136. And the plaintiffs specifically cited the 1998 press release as the very first piece of evidence supporting inadequacy. *See* App. Vol. 2 at 145. The court then rejected that argument. App. Vol. 3 at 113. It did so for only one reason: because it read the *Milburn* majority opinion to require "evidence that

NHTSA erred in its weighing of considerations when deciding against amending FMVSS 207." *Id.* Because the plaintiffs had not produced such evidence, any admissions by the agency were irrelevant. *See* App. Vol. 3 at 114 ("Plaintiffs' failure to provide any evidence of NHTSA's regulatory process in either promulgating or failing to amend FMVSS 207 effectively precludes their rebuttal of the presumption under *Milburn*.").

This is nothing like the type of "vague, arguable references to a point in the district court proceedings" that will constitute forfeiture. *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721 (10th Cir. 1993). "To preserve an issue for appeal, a party must alert the district court to the issue and seek a ruling." *Century 21 Real Est. Corp. v. Meraj Int'l Inv. Corp.*, 315 F.3d 1271, 1278 (10th Cir. 2003). The plaintiffs did that here. Even if they did not cite the 2004 termination of rulemaking in addition to the 1998 press release, they preserved the issue. And they have every right to explain on appeal why the district court's reasoning is flawed. As the U.S. Supreme Court has explained, "[o]nce a … claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *see Scott v. Wingate Wilderness Therapy, LLC*, 792 F. App'x 590, 594 n.3 (10th Cir. 2019) (citing *Yee* regarding preservation).

In any event, the district court was fully apprised of the 2004 termination of rulemaking. Toyota cited it below, App. Vol. 3. at 84; it was in the record before the

court, App. Vol. 3 at 91–93; and it was addressed in (and in fact central to) the court's opinion, App. Vol. 3 at 112. The plaintiffs may therefore articulate on appeal why that document does not support Toyota's view and instead supports their own. Moreover, it is a two-page document that the district court had clearly read in full. So this case does not present the concern that can animate a finding of waiver—that the district court would have had to hunt through thousands of pages of documents to identify the key point. *Mitchell v. City of Moore*, 218 F.3d 1190, 1197–98 (10th Cir. 2000).

To agree with Toyota on waiver, then, this Court would have to take its waiver jurisprudence further than it has ever gone, allowing essentially no development of an argument on appeal, no matter the circumstances. *See Scott*, 792 F. App'x at 594 n.3 (holding argument preserved that was advanced in briefing below); *U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1147 (10th Cir. 2009) (holding issue preserved where the "parties argued, and the district court definitively ruled on, the precise objection raised on appeal"). The Court should decline to do so.

B. Nothing more is needed to reverse. But as the plaintiffs emphasized in their opening brief, there is ample additional evidence showing inadequacy if that were necessary. This includes (1) the sweeping technological changes since 1967; (2) the fact that modern seatbacks are now designed to be many times stronger than the federal standard; (3) the fact that Toyota itself concluded that the standard was too weak, designing its seatback to be two and a half times stronger than that standard—and

still, it was defective; (4) the fact that Congress enacted legislation premised on a view that the standard is inadequate; and (5) the expert report explaining how the standard has been "clearly established to be inadequate" since 1967. Opening Br. 24–28.

Toyota's primary response to this argument is to claim that most of these so-called "evidentiary theories" have not been preserved. Toyota Br. 1; *see also id.* at 1, 17, 21, 24, 27, 30, 32 (using the word "waiver," or a variant thereof, 13 times in its brief). But again, this response rests on an exceedingly strict view of waiver that this Court has not adopted, and that would make particularly little sense to adopt here.

Below, the plaintiffs pressed the same basic arguments that they do on appeal. They specifically pointed out that (1) Toyota's seat strengths go well beyond the defunct federal standard, App. Vol. 2 at 134–35, 146; (2) Toyota itself has admitted that the standard is insufficient to reduce harm, App. Vol 2. at 145; (3) the standard "does not take in to account any technologies advanced after 1967, including dynamic testing, and the weight or mass of an occupant," *id.*; and (4) the two sponsors of the congressional legislation recognized that the standard was "inadequate," *id.* These arguments mirror the plaintiffs' arguments on appeal. Although the plaintiffs have continued to develop these arguments on appeal, there is nothing prohibiting them from doing so where the district court had the opportunity to pass on them below. *See Yee*, 503 U.S. at 534; *Century 21*, 315 F.3d at 1278; *Scott*, 792 F. App'x at 594 n.3.

Beyond arguing waiver, Toyota relies primarily on its misreading of *Milburn*. It argues (at 24) that a jury may not "find that a safety standard is inadequate without evidence that addresses the 'various factors and tradeoffs' the agency considered when adopting (or declining to change) the rule." But again, that is not a correct reading of *Milburn*. And Toyota offers no reason to think that the Oklahoma Supreme Court would go further than the Texas Supreme Court on this point.

*   *   *

Taken together, there is more than enough evidence to allow a reasonable jury to find that the 1967 federal safety standard is inadequate under Oklahoma law. Because the district court held otherwise based on a misreading of *Milburn*, its grant of summary judgment to Toyota should be reversed for that reason alone.

II. On the second exception, Toyota does not defend the district court's reasoning or establish that it is entitled to summary judgment.

Because inadequacy furnishes an independent basis for reversal, this Court may dispose of this appeal without reaching the second issue (whether Toyota withheld information relevant to a determination by the federal government or the agency about the adequacy of the standard). Were the Court to reach the issue, however, it should reverse the district court's decision on this ground as well.

Toyota does not defend the district court's reasoning. It concedes that, when the statute refers to information "relevant to the federal government's or agency's

determination of adequacy," Okla. Stat. tit. 76, § 57.2(B)(2), it is referring to the federal government *or* the agency—not to the agency alone. *See* Toyota Br. 33. Toyota further concedes that the federal government "includes Congress." Toyota Br. 33–34. And Toyota does not deny that the information that it withheld here was sought in connection with a legislative inquiry into the adequacy of the 1967 federal safety standard—an inquiry that eventually culminated in federal legislation on the topic.

To receive summary judgment on this issue, then, Toyota must convince the Court of two things: (1) that the statute contains an unstated requirement that the information be withheld *from* the federal government or agency, and (2) that, in this context, the federal government includes Congress but not members of Congress.

Toyota does neither. As to the first, it makes no argument that the statutory text requires that the information be withheld from anyone in particular. Nor does it explain how this Court could read such a requirement into the text when it lacks the language found in a neighboring provision (which requires that the relevant information be "withheld *from* or misrepresented *to* the government or agency," Okla. Stat. tit. 76, § 57.2(C)(2) (emphases added)). Instead, Toyota's argument is based on "legislative intent" and a belief that interpreting the statute as written would not be a "sensible reading" of it. Toyota Br. 34. Oklahoma courts, however, look to "legislative intent" only "when statutory language is ambiguous or conflicting."

Stricklen v. Multiple Inj. Tr. Fund, 542 P.3d 858, 866 (Okla. 2024). "If the language in the statute is plain and unambiguous, the legislative intent is deemed to be expressed by the statutory language." *Id.* at 865–66. Here, the language is unambiguous; it omits the key phrase found in subsection (C)(2), and that choice must mean something.

What it doesn't mean, however, is that a manufacturer must respond to "*every* request for information regarding a regulated aspect of product design from *anyone* at *anytime*," even from "[g]adflies" or "plaintiffs' attorneys." *Contra* Toyota Br. 34. By its text, the statute requires that the information withheld be "relevant to the federal government's … determination of [the] adequacy of the [federal] standard[]." Okla. Stat. tit. 76, § 57.2(B)(2). It is hard to see how information requested by a gadfly or a plaintiffs' attorney could ever be sufficiently connected to such a determination. But a request from senators actively engaged in a legislative inquiry to determine whether congressional action to strengthen the standard is warranted? That's a different matter entirely. As the plaintiffs explained in their opening brief, the request here was made "in connection with a specific effort to determine whether the federal standard was adequate—an effort that culminated in legislation reflecting Congress's determination that the standard was *not* in fact adequate and that it should be updated." Opening Br. 35–36. The requirement of relevance demands no more.[2]

[2] Toyota basically concedes (at 33) this interpretation of the phrase "relevant to a determination," calling it "clear" that the provision covers information "withheld in connection with some effort by the 'federal government.'"

As to the second point: Even if the statute contained an additional, atextual requirement that the information be withheld from the federal government or the agency in particular, a reasonable jury could find that this requirement is satisfied here. Toyota concedes (at 34) that the "federal government" includes Congress. And as the plaintiffs have pointed out, "it would make particularly little sense to require that information be requested by and withheld from Congress as a whole, given that Congress as a whole rarely engages in information-gathering"—individual Senators or Committees do. Opening Br. 39. "To impose that requirement would thus nullify the statute's reference to 'federal government.'" *Id.* Toyota has no comeback.[3]

As a result, this Court may reverse on this alternative ground as well.

III. Toyota's resistance to certification is telling—and unpersuasive.

Finally, if there were any ambiguity in either statute that mattered to this appeal, this Court should certify the questions to the Oklahoma Supreme Court. In opposing certification, Toyota does not mention section 57.2(B)(2), even though it urges this Court to read into the statute an unstated requirement as a matter of public

[3] It is worth noting that Toyota's interpretation would also nullify the statute's reference to "agency" in a wide array of situations that the Oklahoma legislature would likely find surprising. If, for example, the manufacturer misrepresented or withheld information in response to the Consumer Products Safety Commission, or some other agency that shares information with NHTSA (or an NHTSA employee other than the agency head), that manufacturer would enjoy broad immunity from state tort law under Toyota's reading of the statute.

policy. If this Court were at all taken with that argument, it should at least certify the question; it should not rewrite the statute under the guise of judicial interpretation.

As for section 57.2(B)(1), this question is a poster child for certification. There is no Oklahoma authority interpreting this provision, judges in other jurisdictions have reached different conclusions about what it means (with *Milburn* alone yielding four opinions representing at least three different views), and it implicates important state policy interests. Opening Br. 40–43. Even Toyota has previously recognized that this question warrants discretionary review from a state supreme court. Opening Br. 42.

Nothing Toyota says now changes this. Toyota faults the plaintiffs for failing to seek certification in the district court. But there is no "categorical rule against certifying a question following an adverse decision," *Fowler v. State Farm Mut. Auto. Ins. Co.*, 759 F. App'x 160, 166 (4th Cir. 2019), and this Court should not create one now. Certification is always a discretionary call. And in this case, one of the reasons why the plaintiffs are seeking certification on appeal is that the district court misread *Milburn*, which did not become apparent until after the court issued its decision.

Toyota also tries to make something of the fact that the plaintiffs agree that the questions are not "determinative" of the litigation. Response to Motion to Certify at 7–8. But that's because the plaintiffs believe that they should prevail even under the interpretation adopted by the majority in *Milburn*. Hence, their request to certify is, as the title makes clear, conditional. If the Court finds it necessary to determine

the precise contours of the Oklahoma law to resolve the case, however, it should certify.

Nor is this an easy question of statutory interpretation. The statute does not define what it means for a safety standard to be inadequate, and the word does not itself offer "clear standards." *Contra* Toyota Br. 36. The various opinions from *Milburn* drive that point home. Perhaps the Oklahoma Supreme Court will agree with the majority opinion in that case. But it is its own sovereign, and it is entitled to make its own determination of how best to interpret its own law. So the question is very much "an open one." *Pino v. United States*, 507 F.3d 1233, 1237 (10th Cir. 2007). And in at least one judge's view, the question is "really" one "of policy and politics—which makes judicial application of this statute somewhat confounding." *Milburn*, 696 S.W.3d at 635 (Blacklock, J., concurring). Thus, while this Court can (and should) resolve the case without reaching the novel and difficult questions about Oklahoma law, if the Court believes that answering them is necessary to resolve the case, it should certify.

CONCLUSION

The district court's grant of summary judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,411 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font. This brief complies with all privacy requirements of Federal Rule of Appellate Procedure 25(a)(5) and 10th Circuit Rule 25.5. The digital submission of this brief has been scanned for viruses with the most recent version of a commercial virus scanning program, Nord VPN 2025, and according to the program is free of viruses.

April 27, 2026

<u>/s/ Deepak Gupta</u>
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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2026, I electronically filed the foregoing reply brief with the Clerk of the Court for the U.S. Court of Appeals for the Tenth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Deepak Gupta
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