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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Email	Important Preemption Information for Your Review - To: Lauren J. Vestewig - From: John P. Schmitz	1	03/15/2002	b6;
002	Report	Sprietsma v. Mercury Marine [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/08/2025 JLS]	1	N.D.	

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Rex R. Sprietsma v. Mercury Marine

FRC ID:
9693

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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VICKI LEWIS, ET VIR., ETC., Petitioners, v. BRUNSWICK CORPORATION, Respondent.

No. 97-288

1997 U.S. Briefs 288

October Term, 1997

January 28, 1998

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

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Attorneys for Amicus Curiae General Motors Corporation

QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety?

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INTEREST OF AMICUS CURIAE

General Motors Corporation ("General Motors") is the world's largest manufacturer of automobiles. n1

n1 Petitioners and respondent have consented to the filing of this brief, in letters on file in the Clerk's office. The undersigned counsel for General Motors Corporation alone have authored this brief, and no other person or entity has made a monetary contribution to its preparation or submission.

The National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718

(1966), 49 U.S.C. §§ 30101-30169 (1994) (the "Motor Vehicle Safety Act") is similar in certain respects to the Federal Boat Safety Act of 1971 ("the Boat Safety Act"), under review here. The Motor Vehicle Safety Act contains a preemption clause, which states that when a federal standard is in effect, no State may "establish, or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 49 U.S.C. § 30103(b)(1). Moreover, like the Boat Safety Act, the Motor Vehicle Safety Act states: "Compliance with any [federal standard] does not exempt a person from liability under common law." 49 U.S.C. § 30103(e).

For that reason, the resolution of certain issues under the Boat Safety Act is potentially relevant to issues that arise under the Motor Vehicle Safety Act. General Motors thus has an interest in the Court's disposition of this case.

INTRODUCTION

The Boat Safety Act, 46 U.S.C. §§ 4301-4311 (1994), contains two provisions relevant to the preemption issues presented in this case.

Section 4306, entitled "Federal preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.



Section 4311, entitled "Penalties and injunctions," provides in subsection (g):

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.



The preemption issues presented in this case require the Court to reach a sensible and harmonious construction of these two provisions. Amicus curiae General Motors respectfully submits that the positions taken by petitioners and the Solicitor General fail in this task. This brief is being submitted to respond to the points discussed not only in petitioners' brief, but also in the Solicitor General's brief.

SUMMARY OF ARGUMENT

1. The Boat Safety Act delegates implementing authority to regulate the design and performance of boats and associated equipment, which the Coast Guard exercised by adopting extensive and detailed regulations. As the Solicitor General notes, section 4306 of the statute expressly preempts the field of state laws and regulations imposing standards or requirements with respect to the design and performance of boats and associated equipment, with only three exceptions: the States may enforce laws that are identical to federal regulations; they may apply for authorization to enforce differing laws; and they may

regulate the carrying or use of marine safety articles to meet uniquely hazardous local conditions, unless this authority is specifically disapproved.

If none of these exceptions applies, the Boat Safety Act explicitly preempts state law governing boat design and performance -- regardless of whether a federal regulation governs that same aspect of boat design or performance. Here, the Coast Guard has not required propeller guards on outboard motors. The State of Georgia has not obtained authorization to require propeller guards and does not claim that they would address any uniquely hazardous local conditions. Therefore, petitioners' tort claim based on respondent's failure to install propeller guards is expressly preempted.

2. Petitioners and the Solicitor General counter that state common law damages actions enjoy a blanket immunity from this straightforward preemption analysis because state common law is not a state "law or regulation" and does not impose any legal "standard" or "requirement" within the meaning of this clause. That is wrong. The Court has rejected their argument at least thrice, by holding that broad terms in a preemption clause such as "standard[s]" and "requirement[s]" encompass state common law. See, e.g., Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring in part and concurring in judgment); id. at 2262 (O'Connor, J., concurring and dissenting in part); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); id. at 548-49 (Scalia, J., concurring and dissenting in part). Petitioners and the Solicitor General offer no justification for the Court to overrule this line of decisions, which forecloses their position.

Even putting aside this controlling precedent, the position taken by petitioners and the Solicitor General ignores the fact that state common law is an integral part of the corpus of state law, and it sets "standards" and "requirements" that govern private conduct quite as much as state positive law does. Their argument also rests on the bizarre assumption that Congress intended a single state jury -- an ad hoc collection of citizens assembled to hear one case -- to have more power to regulate private conduct in a manner different from the federal government than do their duly elected and appointed state officials. Finally, their suggested misreading of the statutory language, if accepted, would undermine the settled holding of cases as basic as Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

3. Petitioners and the Solicitor General further contend that the so-called "savings" clause in the Boat Safety Act negates its explicit preemption of common law tort suits. That, too, is incorrect. The preemption clause contains its own savings provisions, which operate to save state law from preemption where it is identical to federal law, where authority is granted to enforce differing state laws, and in limited circumstances to address uniquely hazardous local conditions. What petitioners and the Solicitor General call a "savings" clause -- section 4311 (g) -- is more appropriately viewed as an "anti-affirmative-defense" clause. It says nothing about the kinds of state laws that are preempted. Instead, it simply disclaims any federal immunity from liability at state law, which thus frees each State to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) will be recognized as an affirmative defense in an otherwise permissible state-law cause of action. The claim that this provision should be read instead as a broad "anti-preemption" clause is untenable and cannot be squared with the plain language of the statute.

In any event, the Court has repeatedly held that the general language of a so-called "savings" clause cannot negate the plain terms of an explicit preemption clause. See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385 (1992). More generally, the Court has routinely given these general clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. See, e.g., Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-52 (1987).

4. Moreover, petitioners' claims also fail under an implied-conflict preemption analysis. As the

Court has consistently held in several recent decisions, the mere existence of a clause directed at preemption in the Boat Safety Act does not eliminate the need for such analysis. See Medtronic, 116 S. Ct. at 2259 (plurality opinion) (implied-conflict preemption inquiry is proper); Freightliner Corp. v. Myrick, 514 U.S. 280, 287-88 (1995) (conducting such an inquiry); CSX, 507 U.S. at 673 n.12 (same). In addition, the so-called "savings" clause does not preclude implied-conflict preemption analysis, as the Court has long held. See, e.g., International Paper Co. v. Ouellette, 479 U.S. 481, 493-94 (1987); Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907). Unlike petitioners, the Solicitor General accepts this established approach, and there is no reason for the Court to strike out in a different direction in this case.

Here, accepting the Court of Appeals' view that the Coast Guard made a considered decision not to regulate propeller guards on recreational vessels, in furtherance of its mission to promote boat safety, the necessary result is that any such requirement imposed by state law is impliedly preempted. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978). Indeed, as a practical matter it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the federal agency's explicit determination that requiring them to be equipped with propeller guards would undermine the public safety.

ARGUMENT

I. THE BOAT SAFETY ACT PREEMPTS THE FIELD OF STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT.

The Solicitor General points out that the plain language of the Boat Safety Act, its legislative history, and its subsequent administrative history all support the view that the statute is intended to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to certain exceptions that are specified in the statute itself. Strangely, however, the Solicitor General does not draw the conclusion that the Boat Safety Act actually has this effect, for reasons that will be discussed in more detail in Sections II and III, infra.

As the Solicitor General explains, the text of the Boat Safety Act appears expressly to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to three exceptions that are set forth in the preemption clause itself. See U.S. Br. 14; 46 U.S.C. § 4306. First, Congress has authorized the States to enforce laws that are "identical" to regulations adopted by the Secretary. Second, the States may apply to the Secretary for authorization to enforce differing laws. Third, the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State, unless the Secretary specifically disapproves. See id.

If none of these exceptions applies, the Boat Safety Act, by its terms, preempts state law governing the design and performance of recreational vessels and their associated equipment -- regardless of whether a federal regulation governs that same aspect of boat design or performance. It thus differs from the Motor Vehicle Safety Act at issue in Freightliner Corp. v. Myrick, 514 U.S. 280, 287-88 (1995), which preempts state law only where a federal regulation concerning the same aspect of performance is in effect. Myrick is thus irrelevant to the express preemption issue raised in this case.

As the Solicitor General further notes, this reading of the broad preemption clause contained in the Act is confirmed by its legislative history. See U.S. Br. 14. The Senate Report on the proposed legislation stated that it was intended to have broad preemptive effect, explaining the preemption clause as follows:

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. . . . The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S. Rep. No. 92-248, at 20 (1971), reprinted in 1971 U.S.C.C.A.N. 1341. The Report emphasized that the "need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." Id. at 14 (emphasis added). While the language of the Act phrased the Secretary's obligation to issue regulations in permissive rather than mandatory terms, "the Committee expected that initial standards will be promulgated as soon as practicable." Id. at 17. "It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards, and the possibility for continuous review and updating of the standards, that the Committee opted for a system of administrative rather than statutory standards." Id.

The Solicitor General also explains that this construction of the preemption clause accords with the administrative history implementing the Boat Safety Act. See U.S. Br. 14-15. The day after the Act was signed into law, the Secretary issued a statement exempting all existing state "laws and regulations" from preemption under the express language of the new statute. 36 Fed. Reg. 15,764-65 (Aug. 11, 1971). The Secretary noted that he was acting under the authority conferred by Congress, which provided that the Secretary "may, if he considers that boat safety will not be adversely affected, issue exemptions from any provision of this Act or regulations and standards established thereunder, on terms and conditions as he considers appropriate." Id. (quoting 46 U.S.C. § 4305). Because "boating safety will not be adversely affected by continuing in effect those existing laws and regulations," the Secretary exempted each State from the operation of the express preemption clause, which "prohibit[s] any of those jurisdictions from continuing in effect or enforcing any provision of law or regulation that is not identical to a Federal regulation." 36 Fed. Reg. at 15,765. The exemption was to remain in effect "until expressly superseded, revoked, or otherwise terminated." Id.

About a year later, the Coast Guard exercised the authority delegated by the Secretary to issue voluminous regulations governing boat safety pursuant to 46 U.S.C. § 4302. See 37 Fed. Reg. 15,777-85 (Aug. 4, 1972). These regulations cover a broad spectrum of safety matters, such as design standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, requirements for safety equipment to be carried on boats, and measures to correct especially hazardous conditions. See, e.g., 33 C.F.R. Pts. 175, 177, 181, 183 (1997). Thereafter, the Coast Guard proposed to replace the previous blanket exemption from preemption with a more limited provision, noting that "the issuance of these regulations removes the necessity for an exemption to the prohibitions of [the Act's preemption clause] concerning performance or other safety standards for boats." See 38 Fed. Reg. 71 (Dec. 27, 1972). The blanket exemption from preemption for state laws concerning boat performance or safety standards was eventually eliminated. See 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

Both the legislative history and subsequent administrative history implementing the Boat Safety Act thus reinforce the plain language of the preemption clause. That provision operates to preempt all state laws that are not "identical" to federal regulations, unless they concern certain uniquely hazardous local conditions or unless the Secretary specifically

confers additional authority to act. n2

n2 Contrary to the assertions made by the Solicitor General, see U.S. Br. 14-15, nothing in the administrative history implementing the Act suggests that the exemptions to preemption granted first by the Secretary and later by the Coast Guard do not apply to state common law. Indeed, the Coast Guard explained its later, more limited, exemption by noting that it "will principally [but not solely] affect State statutes and regulations." 38 Fed. Reg. at 6914 (emphasis and bracketed material added). See also infra Sections II & III.

Here, the Court's application of the statute's preemption analysis is relatively uncomplicated. The Coast Guard has not required manufacturers to install propeller guards on outboard motors. The State of Georgia has not obtained authorization from the Secretary to require manufacturers to install propeller guards, and no claim has been made that they would address any uniquely hazardous local conditions. Petitioners' tort claim based on respondent's failure to install propeller guards thus is expressly preempted by the Boat Safety Act.

The Solicitor General tries to avoid this straightforward conclusion by arguing that: (1) the preemption clause contained in section 4306 of the Boat Safety Act does not encompass "standards" and "requirements" imposed by state common law; and (2) in any event, section 4311(g) of the Boat Safety Act should be read to override the preemption clause and to preserve all state common law. See U.S. Br. 13-25. These arguments are incorrect, as shown in Sections II and III, infra.

II. THE PREEMPTION CLAUSE APPLIES TO REQUIREMENTS IMPOSED BY STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE.

The preemption clause in the Boat Safety Act states that no State may "establish, continue in effect, or enforce a law or regulation" establishing a "performance or other safety standard" or imposing such a "requirement" for recreational vessels and their associated equipment, which is "not identical to" a regulation prescribed by the Coast Guard under the Act. 46 U.S.C. § 4306. Petitioners and the Solicitor General contend that this provision encompasses only "state legislative and administrative enactments," but not common law. Petrs. Br. 13; U.S. Br. 11-12. They thus argue that all common law damages actions -- regardless of whether they set requirements or standards that differ from a federal requirement that is directly applicable -- are immune from a claim-by-claim determination of whether they are preempted under the Act. This extreme position is wrong, for a number of reasons.

First, the Court has rejected this very argument in three cases, holding that the use of terms such as "law," "standard," and "requirement" in a preemption provision plainly covers standards and requirements set by common law damages actions. See Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring); id. at 2262 (O'Connor, J., concurring and dissenting in part); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); id. at 548-49 (Scalia, J., concurring and dissenting in part). The sound reasons for the Court's repeated holding on this interpretive point compel adherence to stare decisis as the Court addresses it once again in this case. n3

n3 The Solicitor General directly disagrees with the holdings of these cases, see U.S. Br. 17-18 & n.9, yet never offers any plausible basis for overruling them. For their part, petitioners essentially ignore the Court's holdings in Medtronic, CSX, and Cipollone when discussing this point. See Petrs. Br. 24-28.

In Cipollone, the Court was obliged to construe the express preemption provisions contained in two successive federal statutes -- the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), and the Public Health Cigarette Smoking Act of 1969, 84 Stat. 87. The Court determined that in the preemption clause in the 1965 Act, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required in the

advertising of [properly labeled] cigarettes.'" Cipollone, 505 U.S. at 518 (quoting section 5(b) of the 1965 Act). The Court noted that this language was consistent with "the continued vitality of state common law damage actions," and was "best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." Id. at 518-19.

The Court held, however, that Congress changed the situation dramatically by enacting the "much broader" preemption clause contained in the 1969 Act. 505 U.S. at 520. That provision introduced new constraints upon all manner of requirements, duties, and standards imposed under state law by stating that "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are labeled as required under federal law. 15 U.S.C. § 1334(b). Based on this language -- particularly the reference to "requirement[s] or prohibition[s] ... imposed under State law" -- the Court held that common law actions were within the coverage of the preemption clause in the 1969 Act. 505 U.S. at 520-24. n4

n4 The plurality opinion on this point actually speaks for the majority, for it is reinforced by the express agreement of Justices Scalia and Thomas. See 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part).

In Cipollone, therefore, the Court specifically rejected the linguistic argument urged by petitioners here in an attempt to limit the scope of terms such as "standard" and "requirement" to exclude the effects of damage actions brought under state common law. The Court explicitly found this argument to be "at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions." 505 U.S. at 521. In a key passage that squarely resolves this issue, the Court stated: "The phrase 'no requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." Id. Even though there was some evidence in the legislative history suggesting that Congress "was primarily concerned with positive enactments by States and localities," the Court was emphatic that "the language of the Act plainly reaches beyond such enactments." Id. (emphasis added). n5

n5 Justice Scalia's separate opinion, joined by Justice Thomas, expressly agreed that the broader language of the 1969 Act "plainly reaches beyond [positive] enactments," and "general tort-law duties" can impose requirements or prohibitions within the meaning of the 1969 Act. See 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part) (brackets in original).

The Court dispatched the same argument more briefly in the CSX case, where it considered the preemptive effect of the Federal Railroad Safety Act of 1970, 84 Stat. 971. The preemption clause contained in that statute provided that applicable federal regulations would preempt any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434. n6 In a single sentence, the Court treated the issue as settled, flatly stating that "legal duties imposed on railroads by the common law fall within the scope of these broad phrases." 507 U.S. at 664 (citing Cipollone plurality and concurrence). No member of the Court dissented from this proposition.

n6 The Railroad Safety Act's preemption clause provided that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement," but included an exception for "an additional or more stringent [state] law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard," when "not incompatible" with Federal law. 45 U.S.C. § 434; see 507 U.S. at 662 n.2.

In Medtronic, the Court addressed the Medical Device Amendments of 1976, 90 Stat. 539,

which contained a preemption clause barring any State from " establishing or continuing in effect" any "requirement" relating to the safety or effectiveness of a medical device that differed from any applicable Federal requirement. 21 U.S.C. § 360k(a). Plaintiffs argued that "common-law duties are never 'requirements'" within the meaning of the statute, and that the statute "therefore never pre-empts common-law actions." 116 S. Ct. at 2258 (Stevens, J., plurality opinion).

A majority of the Court directly rejected this argument. Justice Breyer, in a separate concurrence, stated that "one can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law." 116 S. Ct. at 2259 (Breyer, J., concurring). After setting forth the Court's holdings to the same effect in Cipollone and CSX, Justice Breyer observed that the same rationale "would seem applicable to the quite similar circumstances at issue here." Id. at 2259. He also agreed on this point with Justice O'Connor's separate opinion for four Justices, which held that state common law actions impose "requirements" because they "operate to require manufacturers to comply with common-law duties." Id. at 2262 (O'Connor, J., concurring and dissenting in part) (citing Cipollone). The other Justices found it unnecessary to address the issue,since none of plaintiffs' claims was preempted in any event. Id. at 2259 (Stevens, J., plurality opinion). The conclusion reached by the five Justices who addressed the question thus constitutes yet another holding that common law claims impose state law "requirements" within the meaning of such an explicit preemption clause. See generally Marks v. United States, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court"). n7

n7 In addition, the Court has frequently held that the term "standards" refers to state common law as well as state positive law. See, e.g., Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California products liability law); United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 400 (1965) (referring to "common law standards"); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-31 (1959) (referring to "standard of care" imposed by common law).

It bears mention that the Government's position in this case is flatly inconsistent with the position in Medtronic, where the Solicitor General stated: "We do not agree with respondents' broad submission that the act's preemption provision does not speak at all to common law tort claims. In our view, the word 'requirement' in section 521(a) of the act encompasses duties imposed by State common law, as well as duties imposed by State statutory or regulatory law." Transcript of Oral Argument, Medtronic (No. 95-754), at 45. There the Solicitor General added that "Cipollone and the use of the requirement there, and just the nature of State law ... would also encompass duties imposed by the ... law from whatever source." Id. at 46. The Government offers no explanation for this abrupt about-face from its position in Medtronic.

Second, even if petitioners' argument were not squarely foreclosed by these prior decisions, it is still plainly wrong because it ignores the ordinary interrelations between the substantive principles of the common law and statutory law in regulating the health, safety, and welfare of citizens in each state. Again, the Court discussed this point in Cipollone, and pointed out that "common law damages actions of the sort raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such actions do not impose 'requirements or prohibitions,'" for "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." 505 U.S. at 522; see also Medtronic, 116 S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) (state common law actions constitute "requirements" where they "operate to require manufacturers to comply with common-law duties").

In this regard, it simply does not matter whether the remedy used to enforce the substantive component of the state law is the payment of damages to private parties rather than the payment of fines to the government or some other enforcement mechanism. "Such regulation

can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 247 (1959). The Court recently reaffirmed this position. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1598 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

The intricate relationship between state common law and state statutory and administrative law in regulating private conduct, and the extent to which they are inherently interwoven, is widely understood and readily demonstrated. Earlier in this century, the courts typically led the way on health and safety issues by applying and developing common law principles to regulate the private sector. The requirements, obligations, and standards imposed in accordance with these principles, in turn, were eventually codified and at times modified by state legislatures when they took the initiative to address particular concerns. On occasion, legislatures have enacted regulatory statutes conferring administrative authority on government agencies to regulate private conduct directly, while still retaining the common law to fill the remaining gaps between these positive enactments. The further interaction of state legislation and state common law adjudication often is even more complex, as legislative or regulatory enactments may be used to supply the duty of care underlying private damage actions. See generally Melvin Eisenberg, The Nature of the Common Law, (1988); Guido Calabresi, A Common Law for the Age of Statutes (1982). n8

n8 The Solicitor General offers a strained construction of the statutory phrase "State or political subdivision" that would appear to read the courts entirely out of the framework of state governments. See U.S. Br. 18-19. This approach overlooks the fact that the statute in Medtronic contained the same phrase ("State or a political subdivision"), and a majority of the Court held that its preemption clause reached common law claims. In the same passage, the Solicitor General suggests that if state courts wished to apply state common law standards or requirements to the design or manufacture of recreational vessels and associated equipment, it would be absurd to expect state judges to apply for federal authorization to do so. Id. We agree that the suggestion is absurd; it also is irrelevant. As with the state legislatures, the state courts have authority to act only where state law is not preempted; any application for an exemption from preemption to the governing federal agency -- here, the Coast Guard -- would be made by state executive officials. Neither state legislators nor state judges would be expected to make this application.

At the state level, therefore, it is undeniable that the common law forms an integral part of the law's comprehensive regulation of private conduct. Taken in combination with statutory and regulatory enactments, the common law imposes a continual procession of legal "requirements," obligations, prohibitions, and "standards" that are designed to influence and regulate the actions of businesses and individual citizens. See, e.g., Medtronic, 116 S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) ("state common-law damages actions operate to require manufacturers to comply with common-law duties"). Any reading of these terms that would pose a putative distinction between common law and positive law in this respect would be fundamentally misguided. See id. at 2259 (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical.").

Third, the argument presented by petitioners and their amici rests on the odd assumption that Congress intended an ad hoc collection of state citizens assembled to hear one civil case -- a jury -- to have greater power to set standards that differ from Federal law than do sovereign state officials acting through the careful, deliberative processes established in the legislative and administrative spheres. Such a result would be a perverse undermining of the democratic process, and the Court should not assume that Congress intended "this anomalous result" unless it clearly so provided. See Medtronic, 116 S. Ct. at 2260 (Breyer, J., concurring). Certainly nothing in the language of the Boat Safety Act requires this upside-down worldview. Indeed, for the reasons stated above, section 4306 plainly contemplates

that state juries, just like state administrative and legislative officials, set "standard[s]" and "requirement[s]" that may therefore be preempted by federal regulatory action. Cf. New York Times v. Sullivan, 376 U.S. 254, 265 (1964) (the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Indeed, petitioners' argument on this point is so plainly wrong that, if accepted here, its logic would partially overrule Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The very same argument that petitioners and their amici put forward with respect to the text of section 4306 would apply equally well to the term "laws" in the Rules of Decision Act, 28 U.S.C. § 1652. The Rules of Decision Act requires a federal court to apply "the laws of the several states" as the rules of decisions in civil actions not arising under federal law. Applying the logic of petitioners' argument, because the Supremacy Clause refers also to "the Laws of the United States," U.S. Const. art. VI, cl. 2 (emphasis added), and because there is no general common law of the United States, then the phrase "the laws of the several states" should be limited to the positive law of the several states, thereby excluding state common law as the governing rules of decision in federal courts. Adoption of petitioners' argument thus would have the pernicious consequence of upsetting the entire interpretive basis for the longstanding and important Erie doctrine.

It is therefore not surprising that, in Cipollone, the Court rejected the parallel argument that the phrase "State law" included only state statutes and regulations, but not state common law. See 505 U.S. at 522-23; see also id. at 549 (Scalia, J., concurring and dissenting in part) (agreeing that the phrase "State law" used in the 1969 Act "embraces state common law"). The Court recognized that this argument was flatly irreconcilable with its longstanding construction of the same basic language in the Rules of Decision Act. See Erie, 304 U.S. at 77-78. Indeed, the Court indicated no desire to revisit the controversial battles fought over many decades that led up to the Court's historic decision in Erie to overrule the contrary interpretation of the Rules of Decision Act that had been adopted in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). Instead, the Court simply noted that "we have recognized the phrase 'state law' to include common law as well as statutes and regulations." Cipollone, 505 U.S. at 522. For all the same reasons, the efforts made by petitioners and the Solicitor General to limit the terms "requirement[s]" and "standard[s]" to state positive law must fail.

III. SECTION 4311(g) SIMPLY CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT LIMIT THE SCOPE OF THE PREEMPTION CLAUSE.

The Boat Safety Act contains what some have called a "savings" clause, which states that "compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Petitioners and the Solicitor General contend that this provision establishes that the common law is beyond the reach of the preemption clause. See Petrs. Br. 28-31; U.S. Br. 21-24. But that does not square with the relation between the preemption clause and this provision, with the text of this provision, or with the clear purpose of this provision, as explained by Congress.

Section 4311(g) does not serve the purpose of "saving" state law or state common law from preemption at all. Indeed, the preemption clause contains its own savings provisions, which are explicitly designed to specify when state law is preserved in the face of the broader general language of the preemption clause. Those provisions operate to save state law from preemption in three distinct circumstances.

First, the States may apply their own law where it is "identical to a regulation prescribed" under federal law. 46 U.S.C. § 4306. This provision is similar to one at issue in Medtronic, where the Court unanimously held that the preemption clause permitted state laws and state requirements to be enforced where they are identical to federal law. See 116 S. Ct. at 2255; id. at 2264 (O'Connor, J., concurring and dissenting in part).

Second, the States may apply to the Secretary for permission to apply their own law even where it differs from federal law. See 46 U.S.C. § 4306. This provision establishes an avenue for each State to seek approval, on a state-by-state basis, for exemption from the statutory prohibition on enforcing inconsistent state laws if a particular matter is thought to warrant an exemption.

Third, the States are explicitly permitted to apply their own law to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State," unless the Secretary specifically disapproves of their doing so. 46 U.S.C. § 4306. This one narrow area of explicit state authority is clearly circumscribed, thus reinforcing the otherwise restrictive impact of the broad preemption clause.

Moreover, section 4311(g) says nothing about the kinds of state laws that are preempted or saved from preemption. Rather, it simply disclaims any possibility that a manufacturer will be able to assert a federal immunity from liability at state law based on its mere compliance with the requirements imposed by federal law. This provision thus works in tandem with the preemption clause by ensuring that the boundaries of federal preemption are not improperly expanded by a broad "government standards" defense, which might be asserted to impede the enforcement of otherwise valid state law. Thus, it would be much more appropriate to refer to this provision as an "anti-affirmative-defense" clause, which operates to preserve state authority on how to treat the issue of a manufacturer's compliance with pertinent federal standards and requirements. For example, where state common law addresses "uniquely hazardous" local conditions, as expressly permitted by the statute, this clause would ensure that federal law is understood to place no limits on how state courts treat the issue of compliance with any federal requirements.

Section 4311(g) thus should not be misread as an "anti-preemption" clause. To the contrary, Congress declared in this provision that where a state-law cause of action is not preempted by federal law, it is impermissible for a party or a court to accomplish the same end by citing the party's compliance with all pertinent federal requirements as the basis for an affirmative defense or immunity asserted to defeat the same state-law cause of action. In this manner, Congress specified that unless state common law is actually preempted, it cannot be circumscribed by legal inferences that might otherwise be drawn about a party's conduct in exercising due care by complying with the federal regulatory scheme. See, e.g., Restatement (Third) of Torts: Products Liability § 4, cmt. e (proposed final draft Apr. 1, 1997) (explaining the "important distinction" between "the matter of federal preemption of state products liability law" and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness").

The Senate Report accompanying the Act confirms this interpretation. Congress intended, with respect to section 4311(g), that "mere compliance ... with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary use." S. Rep. No. 92-248, at 32 (1971), reprinted in 1971 U.S.C.C.A.N. 1352. The references to "not ... a complete defense" and "evidentiary value" further establish that this provision simply ensures that the States will have the flexibility to determine whether a party's compliance with pertinent federal requirements can serve as the basis for an affirmative defense or immunity asserted to defeat an otherwise permissible state-law cause of action. In practice, the States differ in their views of such an affirmative defense, and on the admissibility of evidence of compliance with federal standards on the issues of defectiveness and due care. n9

n9 Each State thus remains free to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) is a relevant factor or an affirmative defense under state law in adjudicating an otherwise permissible state-law cause of action. There are diverse views on this issue under state law. Some States recognize a

rebuttable presumption that a product which complies with federal standards is not defective. E.g., Mich. Comp. L. Ann. § 600.2946(4) (West 1997); Kan. Stat. Ann. § 60-3304(a) (1996). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive or presumptive evidence. E.g., Wagner v. Clark Equip. Co., 700 A.2d 38, 49-50 (Conn. 1997); Brooks v. Beech Aircraft Corp., 902 P.2d 54, 63 (N.M. 1995). A few States may hold that compliance conclusively negates any defect, see, e.g., Beatty v. Trailmaster Prods., 625 A.2d 1005, 1013-14 (Md. 1993), while others may treat compliance as irrelevant and inadmissible, see, e.g., Sheehan v. Cincinnati Shaper Co., 555 A.2d 1352, 1355 (Pa. Super. 1989).

The contrary reading of this provision proposed by petitioners would, in addition, flout Congress' intention that "the need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level" and that "manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. No. 92-248, at 14, 20 (emphases added).

The erroneous construction of section 4311(g) urged upon the Court by petitioners and the Solicitor General is further underscored by their failure to come to grips with the actual language of the clause, which states that "compliance with ... this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g) (emphasis added). Although they make much of the fact that Congress used the term "common law" in this provision, they completely ignore the fact that Congress also referred to all of "state law" in the same passage. If petitioners' reading of this provision were to be adopted, then it would become a complete "anti-preemption" clause, and all state law -- whether statutory, administrative, or judge-made -- would remain in effect as a basis for imposing liability, thus completely nullifying the plain import of the preemption clause. Thus, petitioners' strained attempt to find deeper meaning in the omission of the term "common law" from the preemption clause and its inclusion in the so-called "savings" clause, see Petrs. Br. 30, rests on a clear distortion of the statutory text.

In addition, as Justice Breyer explained in Medtronic, the position urged by petitioners and their amici "would have anomalous consequences." 116 S. Ct. at 2259 (Breyer, J., concurring). It would permit "the liability-creating premises of the plaintiffs' state law tort suit" to operate in direct conflict with federal law, whereas state agency regulations could not. Id. at 2261. Yet the practical "effects of the state agency regulation and the state tort suit are identical." Id. at 2259; see also supra Section II.

Finally, the Court's prior cases have consistently held that the general language of a so-called "savings" clause cannot negate the terms of an explicit preemption clause. The Court has frequently been faced with potentially competing preemption and general savings clauses, and has given the latter provisions limited effect in the context of the statutory scheme as a whole. For example, in Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), the Court held that a "general 'remedies' saving clause cannot be allowed to supersede the specific substantive preemption provision." Id. at 385. Indeed, the Solicitor General had urged this reading upon the Court:

> [The savings clause] is properly construed only to preserve those remedies not inconsistent with other provisions of the statute, including [the] express preemption provision. That is the interpretation that this Court has long placed on a comparable savings clause in the Interstate Commerce Act. Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121, 129-30 (1915).

Brief for the United States as Amicus Curiae Supporting Respondents, Morales (No. 90-1604), at 16.

More generally, the Court has routinely given so-called "savings" clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. See, e.g., American Airlines v. Wolens, 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding savings clause providing that statute does not "abridge or alter the remedies now existing at common law or by statute"); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-52 (1987) (savings clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy"). Indeed, just two days ago, the Court held again "'it is a commonplace of statutory construction that the specific'" language concerning such matters as preemption "'governs the general' terms of the saving clause." South Dakota v. Yankton Sioux Tribe, No. 96-1581, slip op. at 17 (U.S. Jan. 26, 1998) (quoting Morales, 504 U.S. at 384)). n10

n10 The Solicitor General's suggestion that the federal safety standards should be understood as mere "minimum" standards, see U.S. Br. 20-21, proves too much, for it would exempt all state law from the reach of the preemption clause. Indeed, the only limit that the Solicitor General appears to place on this approach is supposedly premised on the language of section 4311(g), though once again he fails to recognize that the phrase "at common law" is followed by the phrase "or under State law." See id. at 21; see also Ray v. Atlantic Richfield Co., 435 U.S. 151, 168 n.19 (1978) (rejecting argument that because statute referred to "minimum standards," it "requires recognition of state authority to impose higher standards").

Therefore, section 4311(g) of the Boat Safety Act cannot properly be read to nullify or abridge the explicit terms of the preemption clause.

IV. PETITIONERS' CLAIMS ALSO ARE SUBJECT TO IMPLIED-CONFLICT PREEMPTION ANALYSIS AND ARE IMPLIEDLY PREEMPTED.

Even if not expressly preempted, petitioners' claims would fail under an implied-conflict preemption analysis.

Petitioners briefly assert that the Court should not conduct any implied preemption analysis in this case because the Boat Safety Act contains a preemption clause. See Petrs. Br. 31-32. Notably, the Solicitor General appears to disagree with this assertion, for his brief devotes considerable space to the customary inquiry into implied-conflict preemption in an effort to explain its view that petitioners' claims are not impliedly preempted in this case. See U.S. Br. 25-30.

In fact, this Court's precedents have already established that the judicial inquiry into implied-conflict preemption, which is dictated by the Supremacy Clause, is proper when courts are applying the federal regulatory safety laws. At one time, a passage from the plurality opinion in Cipollone, see 505 U.S. at 517, had been misinterpreted so as to create confusion on this point. The Court seemed to settle the issue in CSX, when it conducted an implied-conflict preemption analysis even though the federal railway safety statutes included a preemption clause. See 507 U.S. at 673 n.12.

Nevertheless, some lower courts continued to dispute the issue. When the Court granted review in Myrick, therefore, the parties addressed it and the Court squarely resolved it:

> According to respondents and the Court of Appeals, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), held that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute. This argument is without merit.

514 U.S. at 287 (emphasis added). The Court specifically noted that it had in fact "engaged in a conflict pre-emption analysis" in Cipollone itself, id. at 289, and had done so again in CSX, notwithstanding the existence of a preemption clause in the statutes at issue in both of those cases, see id. After thus conclusively deciding the issue, the Court went on to conduct an implied-conflict preemption inquiry under the motor vehicle safety statutes, which include both a preemption clause and a clause addressing the effect of compliance with federal standards and requirements. See id. at 287-88.

Finally, in Medtronic, the posture of the case decided by the Court was such that it concerned only an issue of express preemption, without any briefing on the issue of implied preemption. See, e.g., 116 S. Ct. at 2251 (plurality opinion). Nonetheless, even the four Justices who gave the preemption clause its narrowest reading pointed out that in considering further questions about express preemption under that statute in the future, "the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis." Id. at 2259 (citing Myrick, 514 U.S. at 289). The statute at issue in Medtronic, once again, contained both a preemption clause and a clause addressing the effect of federal compliance.

The Court's repeated endorsements of implied-conflict preemption analysis in the context of federal safety statutes that contain a preemption clause, and often a general savings clause, defeats the argument that such analysis is foreclosed in this case. This approach also accords with the natural effect of the Supremacy Clause. Federal law is unequivocally stated to be "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and thus any state law which conflicts with federal law is "pre-empted by direct operation of the Supremacy Clause." Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union, 468 U.S. 491, 501 (1984). The mere inclusion of a preemption clause in a statute cannot uproot the necessary constitutional inquiry. n11

n11 Petitioners refer to a supposed "presumption against preemption." Petrs. Br. 24. Where state and federal law collide, the Supremacy Clause settles the matter and there is no place for presumptions, no matter how much the matter may traditionally be in the state domain: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." Free v. Bland, 369 U.S. 663, 666 (1962); see also Cipollone, 505 U.S. at 516 ("state law that conflicts with federal law is without effect"); id. at 544 (Scalia, J., concurring and dissenting in part) (same).

Moreover, the mere inclusion of a general savings clause in a federal statute cannot nullify the traditional judicial inquiry into implied-conflict preemption. n12 For almost a century, the Court has made clear that even when an Act has no preemption clause at all, a savings clause cannot be read to permit claims that actually conflict with the Act. The principle was first stated in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907). There, a federal act contained a broad savings clause that purported to save "the remedies now existing at common law or by statute." Id. at 446. In spite of that savings clause, the Court held that an existing but conflicting common law claim was preempted because a savings clause "cannot in reason be construed as continuing ... a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." Id.; see also International Paper Co. v. Ouellette, 479 U.S. 481, 485-505 (1987) (state common law claims were impliedly preempted because they conflicted with the method chosen by federal law to implement the statutory goals, despite broad savings clause); Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 328-31 (1981) (same). Whatever else may be the effect of section 4311(g), it most assuredly cannot, consistent with the Court's decisions, be interpreted to bar implied-conflict preemption.

n12 The Solicitor General also appears to accept this proposition, for he states that "under our reading of the savings clause," a common law claim would be preempted by a pertinent federal regulation if it "propounded a standard of conduct directly contrary to the federal rule." U.S. Br. 28.

For purposes of the merits of the inquiry into implied-conflict preemption in this case, amicus curiae General Motors accepts the position taken by the Court of Appeals, see Pet. App. A15-A21, and presented in more detail by respondents here -- that in the circumstances of this case the Coast Guard made a considered decision not to mandate propeller guards on recreational vessels, because it determined that to do so would disserve the core safety objectives of the Boat Safety Act. n13 On this record, the agency's decision "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978). n14

n13 The Solicitor General similarly frames the issue as whether the "Coast Guard's decision not to regulate propeller guards" results in implied preemption, U.S. Br. 25 (emphasis added), though his explanation of the underlying basis for the agency's decision is somewhat different.

n14 The Solicitor General's efforts to distinguish Ray, see U.S. Br. 28-29 & n.19, are unpersuasive. First,it cannot matter whether the federal agency is required to act or permitted to act; what matters is simply whether it is authorized to act. Second, the regulations imposed under the Boat Safety Act are quite comprehensive. See, e.g., 33 C.F.R. Pts. 175, 177, 181, 183.

As a practical matter, moreover, it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the governing federal agency's explicit determination that requiring them to be equipped with propeller guards would undermine the public safety. The conflicting signals of state and federal policy pose an obvious potential to whipsaw citizens who wish only to abide by the law and policies of their respective governments. There can be little doubt that if any manufacturer had ignored these safety concerns and installed propeller guards, these considerations would have featured prominently in any lawsuit arising from a blunt trauma injury or fatality of the sort described by the agency as the basis for its determination not to mandate propeller guards on recreational vessels.

In sum, the Coast Guard's decision not to require propeller guards because to do so would disserve the core safety objectives of the Boat Safety Act necessarily leads to the conclusion that such a standard or requirement imposed by state positive law or common law is impliedly preempted. See, e.g., Ray, 435 U.S. at 178.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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No. _____

IN THE

Supreme Court Of The United States

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division
of Brunswick Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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QUESTION PRESENTED

This case involves the same issue raised by *Lewis v. Brunswick Corp.*, No. 97-288 (October Term, 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether common law tort claims that a boat was defectively designed because it lacked a propeller guard are preempted by federal law. In *Lewis*, the United States submitted an *amicus curiae* brief stating the federal government's view that such claims are not preempted. *Lewis*, however, settled after oral argument, before any decision was rendered. This case presents the first meaningful opportunity for the Court to consider this preemption issue since *Lewis*. The question presented is:

Whether the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. 1993), preempts state common law claims that a recreational motor boat was defectively designed because it lacked a propeller guard when: (1) the Act expressly provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law" (46 U.S.C. § 4311(g)); (2) the U.S. Coast Guard has never adopted any standard or regulation with respect to propeller guards; and (3) the United States has taken the position that common law no-propeller-guard claims do not conflict with or otherwise frustrate any federal statutory or regulatory purpose?

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PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner Rex R. Sprietsma, Administrator of the Estate of Jeanne Sprietsma (as appellant) and respondent Mercury Marine, a Division of Brunswick Corporation (as appellee).

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OPINIONS BELOW

The opinion of the Illinois Supreme Court (App. 1-22) is reported at 197 Ill.2d 112 (2001). The opinion of the appellate court (App. 23-38) is reported at 729 N.E.2d 45 (2000). The unreported order of the trial court (App. 39) was entered on November 20, 1998.

JURISDICTION

The decision of the Illinois Supreme Court was filed on August 16, 2001. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The express "preemption clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4306 (1988), reads as follows:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

The express "savings clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(g) (1988), reads as follows:

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> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

The Coast Guard has not issued any regulations governing propeller guards on recreational vessels. The agency considered developing a regulation requiring propeller guards on all recreational boats, but it decided not to do so. The Coast Guard's decision not to take any regulatory action with respect to such devices was not the subject of any formal rulemaking.

STATEMENT OF THE CASE

This case presents the question of whether a state common law claim that a boat engine was defectively designed because it lacks a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. 1993) ("Boat Safety Act" or "Act"), and by a decision of the United States Coast Guard not to begin developing a regulation that would have required the use of propeller guards on all recreational motor boats. The Illinois Supreme Court held that such claims are impliedly preempted by federal law, even though the Coast Guard has never regulated propeller guards and even though the United States, in an *amicus curiae* brief filed with this Court in a case that was settled after oral argument, took the position that no-propeller-guard claims like petitioner's are not preempted by federal law. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288). In so doing, the lower court disregarded repeated teachings of this Court that the federal government's own view of the preemptive effect of agency regulations is entitled to "susbstantial weight." *E.g., Medtronic v. Lohr, Inc.*, 518 U.S.

470, 496 (1996) (majority opinion); *id.* at 505-07 (Breyer, J., concurring). The Illinois Supreme Court's decision, which is in direct conflict with the Texas Supreme Court's holding in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), is the subject of this petition.

A. The Federal Statutory and Regulatory Framework.

1. The Boat Safety Act.

The Boat Safety Act was enacted to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating – presently the Secretary of Transportation." S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333. The Act provides that the Secretary of Transportation "may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment . . .." 46 U.S.C. § 4302(a)(1). This rulemaking authority has been transferred to the Commandant of the United States Coast Guard. *See* App. 2. The National Boating Safety Advisory Council (the "Advisory Council") is charged with assisting the Coast Guard in evaluating the need for safety regulations. 46 U.S.C. § 4302(c)(4).

Under the Act, the Coast Guard's authority to issue minimum safety standards is permissive, not mandatory. *Id. See also* S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1338. In addition, the Coast Guard is prohibited from establishing regulations that would compel substantial alterations of existing boats unless compliance with

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those regulations would "avoid a substantial risk of personal injury to the public." 46 U.S.C. § 4302(c)(2). The Act sets forth the procedures that the Coast Guard must follow to prescribe such regulations, including the actual publishing of a proposed safety standard and the express provision of a future effective date after its initial publication. *See* 46 U.S.C. § 4302(b). Thus the Act

> requires certain actions by the [Coast Guard] in the development of safety standards . . . In addition to the specific procedural requirements outlined in the [Act], the [Coast Guard], in promulgating standards, is required to comply with the formal rulemaking procedures in the Administrative Procedure Act (5 U.S.C. 553).

S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1340. Under this scheme, any party adversely affected by a standard prescribed under the Act is entitled to seek judicial review of the standard in accordance with the Administrative Procedure Act. *Id.*

The Boat Safety Act also contains two provisions addressing the effect of Coast Guard regulations on state law. First, Congress included in the legislation an express preemption clause providing, in pertinent part, that:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated

> equipment . . . that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. Second, Congress included an anti-preemption provision, or savings clause, that expressly preserves all common law claims. It provides:

> [c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C. § 4311(g).

Together, the preemption provision and the savings clause govern the preemptive effect of federal regulations issued pursuant to the Boat Safety Act.

2. The Coast Guard's Decision Not to Regulate Propeller Guards.

In 1988, in response to increasing controversy over – and litigation with respect to – the dangers of unguarded boat propellers, the Coast Guard formed a subcommittee of the Advisory Council that included members of the boating industry and the general public (the "Subcommittee"). The Subcommittee was charged with investigating the feasibility of requiring guards to prevent underwater propeller accidents and opining whether "the Coast Guard should move toward a federal propeller guard requirement." App. 3. In November 1989, based in part on its conclusion that propeller guards "could create other safety concerns" (App. 3), the Subcommittee recommended that the "Coast Guard should take no regulatory action to require propeller guards." App. 3. This

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recommendation was then adopted by the Advisory Council and forwarded to the Coast Guard for its consideration. App. 3.

On February 1, 1990, the agency adopted the Advisory Council's recommendation that "the Coast Guard should take no regulatory action to require propeller guards." App. 3. In a letter setting forth the rationale underlying the agency's decision not to begin the formal regulatory process, Rear Admiral Robert T. Nelson explained the Coast Guard's position on propeller guards as follows:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

App. 40. Rear Admiral Nelson added, however, that the agency would "continue to collect and analyze accident data for changes and trends . . . [and] review and retain any information made available regarding development and testing of new propeller guarding devices . . ." App. 40-41.

At no point did Rear Admiral Nelson's letter – or anything else issued by the Coast Guard – indicate that the agency had concluded that propeller guards are dangerous. In addition, although the agency was well aware of ongoing lawsuits filed by a number of propeller-strike victims, *see* Report of the Propeller Guard Subcommittee of the National Boating Safety

Advisory Council, November 7, 1989, at 4, Rear Admiral Nelson's letter contains no indication that the agency ever intended to preempt common law claims relating to a manufacturer's failure to install propeller guards in its boats.

The Coast Guard's 1990 decision not to begin the process of developing a regulation to require propeller guards was not the product of any formal rulemaking proceeding and did not result in any regulatory action. Thus, there was no attempt to conform to the notice-and-comment rulemaking requirements of the Administrative Procedure Act. *See* 5 U.S.C. § 553 (1994). To date, there is still no federal regulation with respect to propeller guards, and their use is neither mandated nor prohibited by federal law.[1]

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[1] The Coast Guard has, however, continued to study various policy proposals to prevent propeller-related injuries. In 1995, for example, the Coast Guard issued an Advance Notice of Proposed Rulemaking ("ANPRM") requesting comment on "the public's present feelings about the use of propeller guards on these vessels," a request occasioned by a serious accident involving a houseboat. *See* 60 Fed. Reg. 25,191 (1995). In 1996, the Coast Guard issued another ANPRM "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 12,123 (1996). And, in 1997, the Coast Guard sought "comments on the effectiveness and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller." 62 Fed. Reg. 22,991 (1997). Because it received few responses to that request, the Coast Guard extended the period for comments. *See* 62 Fed. Reg. 44,507 (1997). To date, the rulemaking is still open, and the Coast Guard is still considering what action, if any, to take with regard to propeller guards. *See* 64 Fed. Reg. 21,566 (1999).

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B. The Proceedings Below

This case arose out of a boating accident in Tennessee state waters in which the petitioner's decedent, Jeanne Sprietsma, fell from a motor boat and was struck by the motor's propeller blades. App. 1. As a result, she suffered serious injuries and later died. App. 1. The boat was equipped with a 115-horsepower outboard motor that did not contain a propeller guard. The motor was designed, manufactured, and sold by respondent Mercury Marine, a division of Brunswick Corporation. App. 1, 23.

Petitioner Rex Sprietsma is the administrator of the estate of his deceased wife. App. 1. He filed a wrongful death action against Mercury Marine in the Circuit Court of Cook County, Illinois seeking to recover damages for his wife's pain and suffering, along with the financial losses suffered by him and his son. App. 1. The complaint alleged that the boat engine was defectively designed because it was not equipped with a propeller guard. App. 24.

Respondent moved to dismiss on the ground that Mr. Sprietsma's claims are preempted by the Boat Safety Act and by the Coast Guard's decision not to regulate propeller guards. The trial court granted the motion to dismiss, finding the claims to be preempted. App. 39. The appellate court affirmed, holding that the claims are expressly preempted by the Boat Safety Act. App. 34.

On appeal, the Illinois Supreme Court rejected the appellate court's express preemption ruling, but nonetheless held that petitioner's claims are impliedly preempted by federal law. App. 16. At the outset, the court held that the case is not subject to the strong presumption against federal preemption

that ordinarily applies to health and safety issues – "matters which have traditionally come within the jurisdiction of the state through its police powers." App. 5 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474 (1996)). Relying on this Court's recent decision in *United States v. Locke*, 529 U.S. 89 (2000), which held that the presumption against preemption does not apply to cases involving international maritime commerce, the Illinois Supreme Court declined to apply any presumption against preemption in this recreational boating case on the theory that, "[a]lthough Sprietsma's claims bear upon state and federal concerns, we believe the federal concerns predominate in this case." App. 6.

The lower court then considered the questions of express and implied preemption under the Boat Safety Act. Regarding the former, the court concluded that the Act's broadly-worded savings clause, which provides that "compliance with this chapter . . . does not relieve a person from liability at common law or under state law," precludes any finding of express preemption of common law claims. App. 9-10. The Illinois Supreme Court went on to hold, however, that petitioner's claims are impliedly preempted by federal law because a jury verdict finding Mercury Marine liable for not installing a propeller guard would "frustrate" federal purposes. App. 16. Despite its acknowledgment that the Coast Guard has never issued any regulations governing propeller guards (yet retains the authority to do so if it so chooses), the court found that the agency's regulatory *in*action amounted to an affirmative decision to preclude any common law claims seeking to hold a manufacturer liable for failing to install propeller guards. In the court's view, "[a] damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the [Boat Safety Act]." App. 16 (citations omitted).

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In so ruling, the lower court chose to disregard the United States' only articulated view on the matter: the anti-preemption position set forth in the Solicitor General's *amicus curiae* brief in *Lewis*, which argued that "[t]he Coast Guard's conclusion in 1990 that the available data did not justify the issuance of regulations concerning propeller guards *is not a basis for implied conflict preemption of petitioners' common law tort claims*." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 26, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288) (emphasis added). The *Lewis* brief emphasized that "[t]he Coast Guard has never formally determined that a requirement [of propeller guards] would be contrary to the interests of boat safety." *Id.* The United States further noted that,

> [i]f it had reached that conclusion, the Coast Guard may well have prohibited propeller guards. The Coast Guard stated only that the "available propeller guard accident data do not support imposition of a regulation requiring propeller guards."

Id. Given this fact, and the absence of any federal regulation governing propeller guards, the United States concluded that the petitioners' claims did not in any way conflict with the federal regulatory scheme. *Id.* at 25-30.

In the face of these arguments, the Illinois Supreme Court ultimately held that the United States' no-preemption position in *Lewis* was not persuasive because, among other things, "[t]he Solicitor General has not presented his argument concerning the *Lewis* case or the Sprietsma claim to this court." App. 18. This petition followed.

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Same Federal Preemption Issue that this Court Considered in *Lewis*, But Could Not Resolve Because *Lewis* Settled After Oral Argument.

This case presents the same issue of federal preemption that was before the Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether state common law tort claims that a boat was defectively designed because it lacked a propeller guard are preempted by federal law. In *Lewis*, the United States submitted an *amicus curiae* brief arguing that, because the Coast Guard never issued any regulations relating to propeller guards, common law no-propeller-guard claims do not conflict with or undermine any federal regulatory purpose. *Lewis* settled after oral argument, so no opinion was ever rendered in the case. The lower courts remain split on the issue, with one state supreme court (Texas) holding that no-propeller-guard claims are not preempted and a host of federal courts and the Illinois Supreme Court holding just the opposite (*see infra* at II).

The decision below is the first meaningful opportunity for this Court to review the propeller-guard issue in the wake of *Lewis*. The same question was presented in *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied sub nom. Lady v. Outboard Marine Corp.*, 121 S. Ct. 1402 (2001), but the respondent declared bankruptcy shortly after the petition was filed and the writ was denied. The Illinois Supreme Court's ruling in this case is the first decision on the propeller-guard question rendered by a state high court or federal court of appeals since the denial of review in *Lady*.

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Thus, this case presents the first opportunity since *Lewis* for this Court to resolve this important issue of federal law.[2]

II. There is a Direct Split of Authority as to Whether No-Propeller-Guard Claims are Preempted by the Boat Safety Act.

Review is also warranted because there is a direct split between the Supreme Court of Texas and the Illinois Supreme Court (along with three federal circuit courts) as to whether a common law claim that a manufacturer is liable for failing to equip its boats with propeller guards is preempted by the Boat Safety Act.

In *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), the Texas Supreme Court held that the Boat Safety Act neither expressly nor impliedly preempts no-propeller-guard claims. The court emphasized the strong presumption against federal preemption of state common law claims – a presumption that "particularly obtains when, as in this case, state regulation of health and safety matters is involved." *Id.* at 249 (citing *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985)). In light of this strong presumption against preemption, *Moore* rejected the boat manufacturer's claim that the reference to "law or regulation" in the Boat Safety Act's preemption provision encompasses – and expressly preempts – common law claims. 889 S.W.2d at 250.

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[2] In fact, in opposing review in *Lady*, the bankrupt defendant urged this Court to await review of the decision in *this* case, arguing that Mr. Sprietsma's claims against a non-bankrupt boat manufacturer would present a more suitable vehicle for review. *See* Respondent's Brief in Opposition at 24, *Lady v. Outboard Marine Corp.*, No. 00-1031.

The Texas Supreme Court also rejected the boat manufacturers' argument that the plaintiff's no-propeller-guard claims were impliedly preempted under the Act. *Id.* at 251. On this point, the defendants argued that "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's determination that guards should not be mandated." *Id.* The Texas Supreme Court disagreed, stating, first, that the Coast Guard's decision not to commence rulemaking did not "reflect an intention to foreclose state tort liability." *Id.*

As to the boat manufacturers' claim that preemption must be implied because permitting no-propeller-guard claims would undermine Congress' goal of creating uniform safety regulations, the Texas Supreme Court stated: "the [Act's] savings clause reflects that Congress was willing to tolerate some tension between the concept that uniform safety regulations should be established at the federal level and the concept that a state may nevertheless award tort damages for unsafe products." *Id.* at 252. This approach makes sense, in the Texas Supreme Court's view, because "the regulatory effect of damage awards is not equivalent to that of positive enactments: a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer – installing guards on future boats or taking no action and bearing the liability as a cost of doing business." *Id.* at 251 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988)). *Moore* concluded that, although "[w]e recognize the potential for conflict, [we] do not think it justifies a holding of preemption." *Id.* at 251-52.

The decision below is squarely in conflict with *Moore*. Although the two courts agree that there is no express

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preemption of common law claims under the Boat Safety Act (in light of the Act's savings clause), the Illinois Supreme Court split with *Moore* in holding that no-propeller-guard claims are impliedly preempted by the Coast Guard's regulatory inaction. To reach this conclusion, the lower court began by abandoning a core proposition of law embraced in *Moore*: that such claims are subject to a strong presumption against federal preemption. *See* App. 6. Having jettisoned the presumption against preemption, the lower court went on to conclude – again directly contrary to the holding in *Moore* – that "[a] damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the [Boat Safety Act]." App. 16. Such an outcome, the court held, "would present an obstacle to the accomplishment and execution of the purposes and objectives Congress sought in enacting the [Boat Safety Act]." App. 16.

Thus, the decision below is manifestly at odds with the Texas Supreme Court's decision in *Moore*. In addition, as the lower court recognized, this split is reflected in numerous other court decisions regarding the scope of preemption under the Boat Safety Act, including *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir.), *cert. denied*, 516 U.S. 866 (1995), *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. dismissed*, 523 U.S. 1113 (1998), and *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied sub nom. Lady v. Outboard Marine Corp.*, 121 S. Ct. 1402 (2001). *See* App.16 (collecting cases). Review is warranted here to finish the job started in *Lewis*: to resolve this split, prevent further confusion among the lower courts, and ensure that state

common law claims that Congress intended to preserve are not preempted.[3]

III. The Decision Below Conflicts with Relevant Decisions of this Court.

Review is also warranted because the lower court's ruling conflicts with decisions of this Court in at least three ways: first, it improperly affords preemptive effect to federal regulatory inaction; second, it improperly abandons the long-standing presumption against preemption; and, third, it fails to give any – let alone sufficient – weight to the federal government's own interpretation of the preemptive effect of the Coast Guard's decision not to regulate propeller guards.

A. The Lower Court Erroneously Afforded Preemptive Effect to the Federal Government's Regulatory Inaction.

To begin with, the Illinois Supreme Court's holding that the Coast Guard's decision *not* to commence rulemaking with respect to propeller guards has preemptive force directly conflicts with *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which made clear that the mere absence of federal regulation with respect to a particular product has no preemptive effect. In *Myrick*, this Court considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982), and by a federal motor vehicle

[3] Unless this split is resolved, the viability of no-propeller-guard claims in Texas will depend entirely on whether a case proceeds in state or federal court.

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safety regulation governing airbrake systems in buses, trucks, and trailers. 49 C.F.R. § 571.121 (S3) (1993) ("Standard 121").

As originally promulgated in 1974, Standard 121 required that all truck manufacturers install antilock brakes. This requirement was invalidated by the Ninth Circuit's decision in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 640 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), which held that, although the braking performance of some trucks was improved by antilock brakes, "critical problems began with mass production of vehicles designed to meet the Standard." *Id.* at 641. Due to the unforeseen manufacturing difficulties encountered during mass production of antilock systems, the Ninth Circuit ordered the federal regulatory agency to suspend the antilock requirements of Standard 121. *Id.* at 643. In response, the agency added language to the regulation stating that the antilock brake provisions invalidated by the *Paccar* ruling "are not applicable to trucks and trailers." 49 C.F.R. § 571.121(S3).

In *Myrick*, the truck manufacturers argued that Standard 121 preempted common law claims that their trucks were defective because they lacked antilock brakes. This Court disagreed, holding that there could be no express preemption because there was no federal standard in place regarding antilock brakes in trucks. *See* 514 U.S. at 286. In so holding, *Myrick* explicitly rejected the truck manufacturers' claim "that the absence of regulation itself constitutes regulation," especially where "there is no evidence that [the federal agency] decided that [the product] should be free from all state regulation . . .." *Id.* Regarding implied preemption, the Court ruled, first, that "it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with." *Id.* at 289. Frustration of federal objectives was also not an issue, in the Court's view, because

the federal regulation "currently has nothing to say concerning [antilock brake] devices one way or another, and [the federal agency] has not ordered truck manufacturers to refrain from using [such] devices. A finding of liability against petitioners would undermine no federal objectives or purposes with respect to [antilock brake] devices, since none exist." *Id.* at 289-90.

The decision below is squarely at odds with *Myrick*. In finding federal preemption of petitioner's no-propeller-guard claim, the Illinois Supreme Court embraced the very proposition that was rejected in *Myrick*: that an agency's decision not to regulate has the same preemptive force as a decision to regulate. This ruling has the perverse effect of transforming a federal decision *not* to commence rulemaking regarding propeller guards on motor boats into an affirmative decision to *ban* any common law claim seeking to require a manufacturer to pay damages for failing to include a specific propeller guard on a specific boat. Not only is this conclusion contrary to *Myrick*, but it flies in the face of numerous prior decisions of this Court holding that mere federal regulatory inaction, without more, does not imply an authoritative federal determination that the area is best left unregulated. *See, e.g., Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 496, 503-04 (1988) (federal inaction alone does not have preemptive effect); *Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (regulatory inaction only has preemptive force where Congress has made clear that its intention is "to fill a regulatory gap, not to perpetuate one.") (footnote omitted).

The lower court also ignored the fact that, as in *Myrick*, "there is no evidence that [the federal agency] decided that [the product at issue] should be free from all state regulation . . .." 514 U.S. at 286. As explained above, the Coast Guard's

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decision not to commence rulemaking regarding propeller guards stemmed from its "many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation." App. 40. Due to the lack of a "universally acceptable" solution, and the high statutory threshold of having to demonstrate that federal regulation would "avoid a substantial risk of personal injury to the public," 46 U.S.C. § 4302(c)(2), the Coast Guard declined to commence rulemaking to consider a nationwide standard for propeller guards. *Id.* The agency never stated, however, that there was *no* technology appropriate for use in *any* mode of boat operation; rather, the Coast Guard found that there was no technology appropriate for a national, *across-the-board* regulation applicable to *all* types of boats. App. 40. Contrary to the Illinois Supreme Court's apparent reasoning, this determination would be entirely consistent with a state's decision to allow some boat manufacturers to be held liable for failing to install a certain type of propeller guard on specific boats or on boats used for a particular purpose.

There is also no evidence that the Coast Guard intended to restrict the ability of victims of propeller accidents to seek compensation through the common law tort system. To the contrary, as *Moore* recognized, the Propeller Subcommittee report that was the basis for the Coast Guard's decision not to regulate propeller guards "mentions that manufacturers have been sued for not installing propeller guards, and recognizes that a federal requirement of propeller guards would establish a prima facie case of manufacturer liability in some states." 889 S.W.2d at 252. Despite this recognition of on-going litigation regarding propeller guards, the agency never suggested that it intended to preempt such actions in the future. *See* App. 40-41. "Thus even if the Coast Guard made a policy determination, carrying preemptive weight, that propeller

guards should not be regulated, its preemptive effect would not necessarily include common law." 889 S.W.2d at 252.

The absence of any preemptive intent on the part of the Coast Guard is dramatically underscored by the manner in which its decision was rendered. Under the Boat Safety Act, the Coast Guard is directed to "*prescribe regulations* . . . establishing minimum safety standards . . .." 46 U.S.C. § 4302(a)(1) (emphasis added). In keeping with this directive, Congress clearly intended that only properly promulgated regulations would exert preemptive force under the Act. In this case, however, there was no rulemaking proceeding of any sort, let alone a federal regulation proclaiming the Coast Guard's intention to ban state regulation of propeller guards. Instead, the agency's decision not to commence rulemaking was the product of internal deliberations by an advisory subcommitee (as opposed to the notice-and-comment rulemaking procedures mandated by the Administrative Procedure Act, *see* 5 U.S.C. § 553 (1994)), and was embodied in an informal letter to the Chairperson of the Advisory Council setting forth the agency's decision not to regulate propeller guards. App. 40-44. This is hardly the type of "clear and manifest" expression of preemptive purpose that must be evident before preemption may be found based on regulatory inaction. *Isla Petroleum*, 485 U.S. at 503.

At bottom, the Coast Guard's decision not to commence rulemaking with regard to propeller guards is markedly similar to the fate of antilock brake regulation described in *Myrick*. In both cases, the absence of regulation was due to a determination that the current state of technology did not warrant a universal regulatory solution to a safety problem. In *Myrick*, that decision was made by the Ninth Circuit and then memorialized in the amendment to Standard 121 eliminating the antilock brake

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requirement for trucks and trailers; in this case, the decision not to commence rulemaking was made by the agency in the first instance. But the result in both instances was the same: an absence of any federal regulation mandating *or* prohibiting the use of the technology in question. *Myrick* makes clear that federal preemption does not exist under these circumstances.

The Illinois Supreme Court's decision, moreover, has implications far beyond the narrow issue of preemption under the Boat Safety Act. If the decision below is permitted to stand, it could massively broaden the scope of federal preemption far beyond what Congress ever intended. Under the lower court's reasoning, *any* federal decision not to regulate could be deemed to have preemptive force, regardless of the reason for federal inaction and regardless of the extent to which Congress made clear its intent *not* to intrude on States' regulatory power and/or strip individuals of their common law remedies. Not only would this constitute a grievous blow against the traditional rights of victims to seek redress for injuries caused by dangerous products, but it would strip the States of their historic power to protect the health and welfare of their citizens. Review is warranted to prevent this deep encroachment on the rights of the States to protect their citizens and of citizens to use the common law to protect themselves – rights that neither Congress nor the Coast Guard ever expressed any intention to restrict.

B. The Lower Court Erroneously Disregarded the Presumption Against Preemption.

Review is also warranted to correct the lower court's decision to abandon any presumption against preemption of common law claims in all cases in the "maritime" context – even those involving a small recreational boat in state waters.

See App. 6. This approach does violence to the rights of the States to provide compensation for their citizens and flies in the face of long-standing decisions of this Court recognizing a strong presumption against federal preemption in health and safety matters. *See generally Medtronic*, 518 U.S. at 485.

The lower court's error stemmed in part from a misreading of this Court's recent decision in *Locke*, 529 U.S. 89 (2000), which involved state regulations of the operation and design of ocean-going oil tankers used in international commerce. *Locke* merely held that, in a case where "[t]he state laws in question bear upon national and international *maritime commerce*, . . . there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.* at 108 (emphasis added). A presumption against preemption is inappropriate in such cases, this Court reasoned, given Congress' longstanding authority "to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations." *Id.* at 98. The Court also expressed concern that regulations governing international ocean-going oil tankers implicated "the substantial foreign affairs interests of the Federal Government." *Id.* at 97.

These concerns have no bearing here. First, this case is entirely unrelated to "interstate navigation," as the accident that harmed petitioner occurred on Tennessee waters. Second, this case has nothing to do with "maritime commerce," international or otherwise, as the Boat Safety Act merely involves federal regulation of *recreational* vessels, such as the boat that struck petitioner's wife. *See* 46 U.S.C. § 4301. Finally, the United States' "foreign affairs interests" – so paramount in *Locke* that "the governments of 13 ocean-going nations expressed their concerns [about conflicting state regulations] through a

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diplomatic note" (429 U.S. at 97) – are clearly not implicated here. The United States has no greater interest in maintaining presumptively exclusive authority over safety features on small recreational boats than it has regulating medical devices, cigarettes, and myriad other products over which the federal government has authority and yet the presumption against preemption has been applied by this Court with full force. *See, e.g., Medtronic*, 518 U.S. at 485 (medical devices); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (cigarettes).

At the same time, *Locke* reaffirmed that the "beginning assumption" against preemption continues to apply in cases involving the "historic police powers of the States." 429 U.S. at 107 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Numerous prior decisions of this Court have made clear that such powers may be exercised concurrently with the federal government's jurisdiction over maritime matters, *see, e.g., Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Kelly v. State of Washington*, 302 U.S. 1 (1937), and that, absent express Congressional intent to preempt the entire field of state law, preemption only lies where the conflict between state and federal law is "so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly*, 302 U.S. at 10 (citations omitted). *See also Askew*, 411 U.S. at 341; *Huron*, 362 U.S. at 444. Nothing in *Locke* suggests that these cases are no longer good law, or that the presumption against preemption no longer applies in cases – such as this one – that involve the historic police powers of the states to compensate accident victims through the tort system. *See, e.g., Medtronic*, 518 U.S. at 488. Review is warranted to correct the Illinois Supreme Court's unwarranted holding to the contrary.

C. The Lower Court Erroneously Disregarded the United States' Own Interpretation of the Preemptive Effect of the Coast Guard's Regulatory Inaction.

Finally, review is warranted because the lower court improperly disregarded this Court's repeated teachings that the views of the federal government are entitled to deference when determining the preemptive effect of an agency's regulatory decisions. As this Court held in *Medtronic*, the United States' interpretation of the scope of preemption is entitled to "substantial weight." 518 U.S. at 496 (majority opinion); *id.* at 505-07 (Breyer, J., concurring). *See also Geier v. Honda*, 529 U.S. 861, 885 (1999) (federal government's interpretation of preemptive scope of agency regulations is entitled to "special weight"); *Hillsborough County*, 471 U.S. at 714-15 ("[t]he [federal government's] statement is dispositive on the question of implicit intent to pre-empt unless either the agency's position is inconsistent with clearly expressed congressional intent, . . . or subsequent developments reveal a change in that position") (citations omitted). Deference to the federal government's understanding of the Boat Safety Act is particularly appropriate where, as here, the United States is *ceding* authority to the states, not trying to claim power for itself. The concern behind the preemption doctrine – protection of federal interests from inconsistent state or local activity – is not implicated where the United States itself does not object to – and indeed welcomes – state participation. *See Hillsborough County*, 471 U.S. at 714-15.

The lower court paid lip service to these principles, but then substituted its judgment for that of the United States in holding that petitioner's common law claims are impliedly preempted by federal law. Such an approach was warranted, in the lower court's view, because the United States had not entered an

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appearance before it – even though the federal government's brief in *Lewis* was made part of the record in this proceeding. This reasoning simply makes no sense: an *amicus curiae* brief filed by the Solicitor General's office represents the United States' official position on an issue whether or not the United States has entered a formal appearance in a case.

The lower court also held that the *Lewis* brief is not entitled to deference because "arguments made in the *Lewis* brief have been rejected by the Supreme Court in *Geier*." App. 18. This argument is simply wrong. With reference to implied conflict preemption (which is the issue before this Court), the United States in *Lewis* argued that the absence of any federal regulation of propeller guards, coupled with the absence of any federal determination that a requirement of propeller guards would be contrary to boat safety, meant that a common law damage claim such as petitioner's "would not in any way conflict with the federal regulatory scheme." Brief for United States as *Amicus Curiae* Supporting Petitioners at 26, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288).

This argument is entirely consistent with, and not in any way undercut by, this Court's recent decision in *Geier*. Regarding implied conflict preemption, *Geier* held that a common law claim that an automobile was defective because it lacked an airbag conflicted with a complex federal regulation that was carefully designed to "bring about a mix of different [passive restraint] devices introduced gradually over time." *See* 529 U.S. at 874. On this latter point, this Court's holding was narrowly confined to the particular regulation at issue, and has no bearing on whether a no-propeller-guard claim like petitioner's would conflict with the U.S. Coast Guard's regulatory *in*action regarding propeller guards.

At the same time, in one key respect that went unmentioned by the lower court, *Geier* confirms that the Texas Supreme Court got it exactly right. In *Geier*, the United States had filed an *amicus curiae* brief arguing that no-airbag claims would conflict with federal regulatory purposes. This Court ultimately deferred to that position, holding that the United States' interpretation of the preemptive effect of agency action is entitled to "special weight." *Geier*, 529 U.S. at 875. Thus, if anything, *Geier* provides further reason to grant review and accord the United States' authoritative position on the preemptive effect of the Coast Guard's regulatory inaction the deference it deserves.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

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"Schmitz, John P." <JSchmitz@mayerbrownrowe.com>
03/15/2002 03:01:15 PM

Record Type: Record

To: Lauren J. Vestewig/OPD/EOP@EOP

cc:

Subject: Important Preemption Information for Your Review

Hello Lauren,

Can you please pass this message on to Mr. Lefkowitz, from John? Have a great weekend. - Vanessa

Jay:

Please give me a call about this if you have a chance, it's quite important -- as you can see from the attachment. I've already spoken to Tim Flanigan about it. <<Boat Safety-Preemption.pdf>>

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3/29 next Friday

Sprietsma v. *Mercury Marine*

Background. The plaintiff in this case claims that a boat motor manufactured by Mercury Marine was defectively designed because it lacked a "propeller guard." The Illinois Supreme Court held that such tort claims are preempted by the Coast Guard's considered policy decision, pursuant to the Federal Boat Safety Act (BSA), expressly rejecting a propeller guard requirement on the ground that it was technologically unsound, economically infeasible, and detrimental to boat safety. *All nine* federal courts to address the issue have reached the same conclusion.

The preemption issue presented in *Sprietsma* reached the Court five years ago in *Lewis* v. *Brunswick Corp.*, which settled before decision. The Clinton Administration filed an amicus brief there opposing preemption (reportedly contrary to the views of the Coast Guard, and at the urging of ATLA and TLPJ). Several intervening Supreme Court decisions make the position advocated by the prior Administration untenable, however, and the Illinois Supreme Court expressly stated that the "arguments made in the [government's] *Lewis* brief have been rejected by the Supreme Court." In particular, the views expressed in the *Lewis* brief are flatly inconsistent with *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), and *United States* v. *Locke*, 529 U.S. 89 (2000), decisions that strongly reaffirm the Court's "conflict preemption" doctrine, which holds that state tort law may not be permitted to interfere with federal regulatory objectives.

CG arguing against preemption

some formality from govt's decision not to regulate

What's at Stake. *Sprietsma* is unquestionably the most important preemption case before the Supreme Court, and a decision adopting the Clinton Administration's position in *Lewis* would be a serious impediment to tort reform. Two key principles are at stake: (1) that federal decisions *not* to regulate, where based on a considered analysis of the policy issues, are presumptively as entitled to preemptive effect as decisions *to* regulate; and (2) that federal preemption principles apply with no less force to state common law duties as to state statutes and regulations. Implied preemption is critical in cases such as this, where an expert federal agency has carefully reviewed the scientific data, heard the concerns of every interested constituency, and made a public policy determination that a particular device is contrary to public safety.

savings clause

field preemption

This case clearly illustrates the potential for abuse of the tort system and the relationship between implied preemption and rational tort liability. After extensive study, the Coast Guard determined that propeller guards are not only technologically and economically infeasible, but *detrimental to* boating safety. Its 50-page report explained that "[t]he boating public must not be misled into thinking there is a 'safe' [propeller guard]," and that propeller guards "create other safety concerns," such as "adversely affecting boat operations," "increasing the chance of blunt force contact to a person in the water," and "creating a new hazard in that an arm or leg could be caught between the guard and the propeller blades." The plaintiff here fully understands this, yet insists that a boat without a propeller guard is "unreasonably dangerous." He realizes that boat manufacturers cannot realistically install such devices, but seeks a holding that propeller guard claims are actionable so that boat manufacturers are exposed to liability in every highly emotional case in which someone has been injured in a propeller-related accident. The leaves manufacturers with a Hobson's choice: decline to install propeller guards, and be sued for failing to do so (as here), or install such devices, and be sued for manufacturing a motor that ignores the unanimous recommendation of industry experts, representatives of the boating public, and the governing regulatory authorities (as well as the holdings of numerous courts). In short, this case is an ideal vehicle for the Bush Administration to pursue rational tort reform. Bush Administration support of ATLA and TLPJ in this abusive case is, we believe, unthinkable.

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Supreme Court, U.S.
FILED
DEC 20 2001
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No. 01-706

In the Supreme Court of the United States

REX R. SPRIETSMA, ADMINISTRATOR OF THE ESTATE OF JEANNE SPRIETSMA, DECEASED, PETITIONER

v.

MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION, RESPONDENT.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Illinois Supreme Court correctly applied this Court's preemption precedents, including *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), and *United States v. Locke*, U.S. 89 (2000), in holding that the Federal Boat Safety Act preempts common law claims asserting that recreational boat motors must be equipped with "propeller guards," where the Coast Guard expressly rejected such a requirement after extensive administrative proceedings.

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RULES 29.6 AND 14.1 STATEMENT

Respondent is Mercury Marine, an unincorporated division of Brunswick Corporation. Brunswick Corporation has no parent company, and no publicly held company owns 10% or more of Brunswick's stock.

Petitioner is Rex R. Sprietsma, administrator of the estate of Jeanne Sprietsma, deceased.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Illinois Supreme Court (Pet. App. 1-22) is reported at 757 N.E.2d 75 (Ill. 2001). The opinion of the Illinois Appellate Court (Pet. App. 23-38) is reported at 729 N.E.2d 45 (Ill. App. 2000). The order of the Circuit Court of Cook County (Nov. 20, 1998) (Pet. App. 39) is unreported.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257. As explained below, however, there is a question about the Court's jurisdiction in this case. See *infra* pp. 29-30.

STATEMENT OF THE CASE

The petition rests almost entirely on the claim that this Court should resolve the question presented in *Lewis* v. *Brunswick Corp.*, No. 97-288, which was dismissed before a decision on the merits. 523 U.S. 1113 (1998). But the principal legal issues raised here were definitively resolved two Terms ago in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000)—which involved a law that petitioner has acknowledged is "nearly identical" to the law at issue here, and which the court below carefully applied in reaching its decision.

No post-*Geier* decision conflicts with the ruling below. The nine federal courts to address the issue (both before and after *Geier*) have unanimously held that "propeller guard" claims are preempted by the Boat Safety Act. The only contrary decision —a 1994 state court ruling—rests on reasoning that has been repudiated by several recent decisions of this Court, including *Geier* and *United States* v. *Locke*, 529 U.S. 89 (2000). Thus, the petition is nothing more than a quarrel with the application of settled law to this particular case. There is no genuine conflict among the lower courts, and it will be time enough to address the issue if and when a conflict arises.

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This Court's denial of certiorari only six months ago in *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001), a case presenting the same issue in a nearly identical petition submitted by the same counsel, confirms that this is not a certworthy case. There is no justification for a different disposition here.

A. The Federal Boat Safety Act

Congress enacted the Federal Boat Safety Act ("BSA"), 46 U.S.C. §§ 4301-4311, to "improve boating safety and to foster greater development, use, and enjoyment of all the waters of the United States." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214 (1971). Congress sought to achieve those goals by "authorizing the establishment of national construction and performance standards for boats and associated equipment." *Ibid.*

Prior to the BSA, the federal laws governing boat safety did "not meet current requirements of safe boating." H.R. Rep. No. 92-324, at 9 (1971) ("H.R. Rep."). The Motorboat Act of 1940 imposed limited safety requirements "such as life preservers [and] fire extinguishers." S. Rep. No. 92-248, at 13 (1971) ("S. Rep."). The Boating Act of 1958 was narrower—"primarily a boat numbering statute." H.R. Rep. at 9. Congress thus established a more comprehensive and "coordinated national boating safety program"—the BSA. S. Rep. at 1, 13.

The BSA has three principal components. First, it establishes "a standard numbering system for vessels" that is administered by the Coast Guard. Pub. L. No. 92-75, §§ 17-24, 85 Stat. at 220-222; *Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before a Subcomm. of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess. 57 (1970) ("H. Hearings") (statement of Rear Admiral Joseph J. McClelland, U.S. Coast Guard).[1]

[1] The statute vests implementing authority in the Secretary of Transportation, who has delegated his functions to the Coast Guard. 49 C.F.R. § 1.46(n)(1).

Second, "to encourage greater State participation and consistency in boating safety efforts, and particularly greater safety patrol and enforcement activities," the BSA establishes "State boating safety programs" under the auspices of the Coast Guard. Pub. L. No. 92-75, §§ 25-33, 85 Stat. at 222-226.

Third, and most important, the Act mandates comprehensive federal design standards for boats and associated equipment (including motors). The Act directs the Coast Guard to prescribe regulations (46 U.S.C. § 4302(a)):

> (1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard—
>
> (A) meeting the need for recreational vessel safety; and
>
> (B) being stated, insofar as practicable, in terms of performance * * *.

In considering whether to adopt a manufacturing standard, the Coast Guard must "consult with" the National Boating Safety Advisory Council ("NBSAC" or "Council"). 46 U.S.C. §§ 4302(c)(4), 13110. The Council's 21 members, all of whom are appointed by the Secretary of Transportation, must have expertise in recreational boating safety and must represent three different constituencies: (a) seven state officials responsible for state boat safety programs; (b) seven representatives of boat manufacturers; and (c) seven representatives of national boating organizations and the general public. *Id.* § 13110(a), (b)(1).

B. Preemption Under The Federal Boat Safety Act

The BSA grants the Coast Guard plenary authority to require that manufacturers comply with its "national construction and performance standards for boats and associated equipment." S. Rep. at 15. Because of their effect on interstate and maritime commerce, Congress was particularly concerned that any such manufacturing requirements be nationally uniform: "The need

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for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." *Id.* at 14. Accord H.R. Rep. at 29; see H. Hearings at 61 ("several States are developing requirements of their own in law[s] which are varied and it is quite important both for the convenience of the boatmen and for the manufacturer, too, to insure that these standards are uniform throughout the country") (statement of Rear Admiral McClelland). As Representative Monagan explained: "A proliferation of dissimilar standards would give the manufacturer * * * an impossible task. Federal preemption over any law or regulation which establishes boat or associated equipment safety standards is imperative now." *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 101 (1971) ("S. Hearing").

Congress also recognized that maritime safety traditionally has been an area where federal regulation predominates. As the Senate Report states: "federal preemption in the issuance of boat and equipment safety standards * * * conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20.

These considerations led Congress to draft the BSA's preemption clause in broad and inclusive terms:

> Unless permitted by the [Coast Guard] under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the [Coast Guard's] disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. The Act thus insures that boat manufacturers are not subject to "compliance with widely varying local requirements." S. Rep. at 20. By mandating that any state laws, regulations, or requirements be "identical" to some regulation issued by the Coast Guard, the preemption clause "preempts the field on boating standards or regulations." H.R. Rep. at 11.

C. The Federal Boat Safety Act's "Savings Provision"

Late in the course of Congress's consideration of the BSA, the Senate Commerce Committee added a "Savings Provision" to the bill. See S. Rep. at 31. "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter," this provision states, "does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).

The only recorded discussion of this provision in the House was a brief colloquy on the floor, in which Representative Grover described it as a "technical amendmen[t] put in on the Senate side in which we of the minority of the Committee on Merchant Marine and Fisheries have concurred." 117 Cong. Rec. 28036 (1971). The Senate's "technical" amendment "was concurred in" by the House, and the Act was adopted. *Ibid.*

D. The Coast Guard's Considered Determination That Propeller Guards Should Not Be Required

The Coast Guard has promulgated a host of federal boat and motor design standards. See 33 C.F.R. Chap. I, Subchap. S. In particular, it has adopted numerous "Equipment Requirements," including design standards for boat motors, flotation materials, electrical and fuel systems, personal flotation devices, distress signals, and ventilation systems. See *id.* Parts 175 (Subparts B-D), 183 (Subparts D-L). For example, the Coast Guard regulates the "safe powering" and "maximum horsepower capacity" of boats, the "placement" of outboard motors, and the "quick turn"

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capability of boats equipped with such motors. *Id.* § 183.53 (boats must be "capable of completing a 90° turn without the driver losing control of the boat or reducing the throttle setting" at "maximum throttle"). The Coast Guard also has authority to notify manufacturers of product defects, and manufacturers must certify that their products comply with all federal design standards. *Id.* §§ 179.11, 181.7, 181.15.

1. The Coast Guard's study of propeller guards

In 1988, the Coast Guard considered whether to require manufacturers to install propeller guards on their boat motors. As required by 46 U.S.C. § 4302(c)(4), the Coast Guard consulted with the NBSAC and directed it to:

- "Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water."
- "Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public."

NBSAC, *Report of the Propeller Guard Subcommittee* (Nov. 7, 1989) ("Report"), Appendix A (Ill. App. A29). The NBSAC in turn appointed a subcommittee to "review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers" and the "[f]easibility of some form of mechanical guard or other action to prevent such contact." *Id.* at A2.

2. The Subcommittee's makeup and methodology

The Subcommittee comprised representatives of every interested constituency—state boat safety officials, industry representatives, members of recreational boating groups, and members of the general public. Ill. App. A55. Throughout its

study, it invited oral and written participation from others by publishing notices of its proceedings in the Federal Register.[2]

Over an 18-month period, the Subcommittee heard from a wide range of interested parties—designers of propeller guards, accident victims and their attorneys, marine engineers, naval architects, academics, industry representatives, and medical doctors. It conducted a "comprehensive" review of the "documentation, materials and information" about propeller-related injuries, including videos, journal articles, patents, on-water test data, and statistics pertaining to the causes of boating accidents. It held public meetings across the country, and it conducted its own on-water tests, where members were given opportunity to drive boats both equipped and unequipped with propeller guards. Ill. App. A2-A5, A34-A39, A41-A43.

3. The Subcommittee's study of propeller guards

The Subcommittee carefully studied each of the "three basic configurations of 'propeller guards'": (1) ring-type guards, (2) screen- or cage-type guards, and (3) nozzle-type guards. Ill. App. A13-A14. Observing that a propeller guard requirement "would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them," it stated that "[f]easibility" was an "important questio[n] before the Subcommittee." *Id.* at A6.

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[2] See, *e.g.*, 53 Fed. Reg. 33210 (Aug. 30, 1988) (public notice of Propeller Guard Subcommittee meeting on Sept. 22-23, 1988, stating that the meeting "is open to the public" and inviting "oral" or "written statement[s]"); *id.* at 43070 (Oct. 25, 1988) (same for Subcommittee meeting on Nov. 14, 1988); *id.* at 43069 (same for NBSAC meeting on Nov. 15-16, 1988); 54 Fed. Reg. 15068 (Apr. 14, 1989) (same for Subcommittee meeting on May 13, 1989 to "[d]iscuss the pros and cons of Propeller Guards"); *id.* at 15066 (same for NBSAC meeting on May 11-12, 1989); *id.* at 42138 (Oct. 13, 1989) (same for Subcommittee meeting on Nov. 4, 1989); *ibid.* (same for NBSAC meeting on Nov. 6-7, 1989).

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Ring-type guards consist of a circular band surrounding the motor's propeller to prevent contact from the propeller's side. Ill. App. A15. However, the Subcommittee found that "the ring-type guard creates severe steering and trim effects which cause serious safety and control problems." *Id.* at A17. In on-water tests, for example, "the boat could not be brought out of a turn at high speed unless power was quickly reduced. In the hands of an inexperienced or negligent operator, a serious accident could result." *Ibid.* Moreover, ring-type guards create "a new hazard"—"an arm, leg, etc., may be caught by the bars or ring and held against the rotating propeller." *Id.* at A21-A22.

Cage- or mask-type guards consist of "a screen surrounding the propeller like a fan cage or catcher's mask, constructed of wire mesh, bars or wires." Ill. App. A14. The Subcommittee, however, found that such guards are only feasible for use on slow-moving "rescue boats" or "amusement park bumper boats, which operate at very slow speeds (approximately 2 miles an hour or less) where problems of drag, engine efficiency, structural integrity and boat handling are negligible," and where "a blow to a person in the water" has "minimal effects." "No evidence indicated that this solution had any validity for normal use of pleasure boats at normal planing speeds." *Id.* at A16.

Nozzle-type guards surround the propeller with "a tunnel or tube" and are designed "to increase its efficiency by producing greater power at low speeds, such as for tug boats and large ships." But "[n]o example of any nozzle device suitable for recreational boat use at normal operating speeds was brought to the attention of the Subcommittee." Ill. App. A14, A16.

4. The Subcommittee's conclusions

Based on the available data, the Subcommittee conducted a cost-benefit analysis of propeller guards, explaining that any "technologically feasible safety featur[e]" must "minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard, (b) materially

interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk." Ill. App. A21. The Subcommittee flatly rejected the "assert[ion] that propeller guard technology and/or availability meets the foregoing criteria." *Ibid.* Rather, it found "that propeller guards could create other safety concerns, including: (1) adversely affecting boat operations at speeds greater than 10 miles per hour; (2) increasing the chance of blunt force contact to a person in the water; and (3) creating a new hazard in that an arm or leg could be caught between the guard and the propeller blades." Pet. App. 3.

The Subcommittee thus concluded that "propeller guarding at best could have only a negligible impact on improving boating safety," and that "[o]perators of a 'guard-equipped' boat can be expected to have a false sense of security when approaching persons in the water at slow speeds, with a very real risk of impacting and/or entrapping a body appendage." Ill. App. A22, A24. As stated in the Report's conclusions:

> The development and use of devices such as "propeller guards" can * * * be counter-productive and can create new hazards of equal or greater consequence. * * * [T]here are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

Id. at A24-A25. The Subcommittee accordingly recommended that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards," but rather should focus on efforts such as "awareness campaigns" regarding "hazards associated with careless or negligent boat operation." *Id.* at A25. There were no "minority or dissenting statements." *Id.* at A2.

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5. The Coast Guard's adoption of the Subcommittee's Report and Recommendations

The 21-member NBSAC and the Coast Guard *unanimously* adopted all of the Subcommittee's recommendations. Ill. App. A74; *id.* at A274 ("All of the report's recommendations are accepted" and "will be implemented"). In conformity with the Council's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard expressly determined that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards.*" *Id.* at A25, A274 (emphasis added). In addition to the accident data, the Coast Guard cited "economic" and "feasib[ility]" concerns as grounds for rejecting a propeller guard requirement. *Ibid.*

The Coast Guard noted that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices." Ill. App. A274. However, despite several instances in which the Coast Guard has invited the public to submit information regarding the feasibility of fitting *other* types of boats with propeller guards (*e.g.*, houseboats), it has never altered its conclusions regarding high-speed recreational boats.[3] Nor has it issued any regulation requiring any boat to be equipped with such a guard or permitting the States to adopt such a requirement. To the contrary, in one recent notice of proposed rulemaking, it reiterated that "[u]nder

[3] In 1995, the Coast Guard issued a Notice and Request for Comments on "the public's present feelings about the use of propeller guards" on "houseboats." 60 Fed. Reg. 25191 (May 11, 1995). In 1996, it issued an Advance Notice of Proposed Rulemaking "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13123 (Mar. 26, 1996); see also 62 Fed. Reg. 22991 (Apr. 28, 1997) (soliciting comments on the effectiveness of specific devices that have been suggested for reducing the number of accidents involving propellers of rented boats). The Coast Guard has received "very general" comments in response to its 1995 notice. 65 Fed. Reg. 23144, 23148 (Apr. 24, 2000).

current Federal statutes (46 U.S.C. 4306), the States *do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction.*" 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996) (emphasis added). The Coast Guard has held this view since the Act's adoption. See 36 *id.* 15764 (Aug. 18, 1971); 38 *id.* 6914 (Mar. 14, 1973).

D. The Proceedings Below

The complaint alleges that on July 10, 1995, while boating in Tennessee, Jeanne Sprietsma "was caused to fall from the boat" in which she was riding as a passenger. Ill. App. A278. Ms. Sprietsma, a 41-year-old woman, allegedly was struck by the boat motor's propeller and sustained injuries resulting in death. The engine was a 115-horsepower outboard motor manufactured by Mercury Marine in 1988, equipped with a traditional propeller. *Id.* at A289-A290.

The accident occurred in the Mitchell Creek portion of Dale Hollow Lake, a major interstate body of water that spans the Kentucky-Tennessee border. Ill. App. A278. The lake was created by a federal dam built by the U.S. Army Corps of Engineers pursuant to the Flood Control Act of 1938 and the Rivers and Harbors Act of 1946. It covers some 935 square miles and has more than 600 miles of shoreline, as well as seven federal recreation areas, 14 commercial marinas, and dozens of lodges, motels, and campgrounds. See generally http://www.lrn.usace.army.mil/op/DAL/rec/ (visited Dec. 4, 2001).

Rex Sprietsma later filed this suit against Mercury Marine and Ebbtide Corporation, the boat's manufacturer. Asserting theories of strict liability and negligence, he alleged that the boat's motor was defectively designed because it lacked a "propeller guard" that would have prevented Ms. Sprietsma's death. Ill. App. A277-A285. He also alleged that the boat, a 1988 Ebbtide ski boat, was defective because it "[a]llowed for

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open bow seating to the very front edge of the bow," lacked "sufficient back support in the seating" or "any substantial form of rail or guard to obstruct a fall out of the boat," and failed to warn of these risks. *Id.* at A286.

Mercury Marine moved to dismiss the complaint, contending that the claims against it were preempted by the BSA. The Cook County Circuit Court granted the motion. Noting that the Coast Guard's "consideration of the propeller guard regulation or the lack thereof was substantial and within the guidelines set forth by [the BSA]," it held that the Coast Guard's decision not to require propeller guards impliedly preempted tort claims that would impose such a requirement. Ill. App. A292-A293, A295. The Appellate Court unanimously affirmed, observing that "every federal court to have considered the issue" has held that the BSA preempts propeller guard claims. Pet. App. 38.

In a detailed opinion that carefully canvassed governing Supreme Court precedents, the Illinois Supreme Court affirmed the lower courts' decisions. The court began by noting that the BSA, which applies to recreational boats operated "on waters subject to the jurisdiction of the United States" (46 U.S.C. § 4301(a)), is predicated on the "federal maritime jurisdiction." Pet. App. 5-6. Because propeller guard claims "bear upon an area historically regulated by the federal government," the court stated, "'an assumption of nonpre-emption is not triggered.'" *Ibid.* (quoting *Locke*, 529 U.S. at 108).

The court went on to hold that petitioner's claims were impliedly preempted under a long line of this Court's decisions, including *Geier*, *Locke*, and *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). Pet. App. 12-17. Quoting this Court's holding in numerous cases that "'a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate,'" the court concluded (Pet. App. 13, 15-16):

> [T]he Coast Guard's failure to promulgate a propeller guard requirement here equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA. The Coast Guard made an informed decision that no regulatory action should be taken to require propeller guards after studying the findings and recommendations of the Advisory Council and the Propeller Guard Subcommittee. A damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the FBSA.

The court was also persuaded by the reasoning of *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598, 615 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001), which held that "'where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's.'" Pet. App. 18-19.[4]

REASONS FOR DENYING THE PETITION

The petition satisfies none of this Court's criteria for a grant of certiorari. Its central theme is that this Court should take its "first meaningful opportunity" (Pet. 11) to address the question presented in *Lewis* v. *Brunswick Corp.*, No. 97-288, which settled before decision. But the issues raised in *Lewis* (and in this case) have been resolved by intervening decisions of this Court, including *Geier* and *Locke*. The court below carefully applied those precedents in concluding that the Coast Guard's considered decision regarding propeller guards has preemptive force, and nine other federal courts—including the only other post-*Geier* case—have unanimously reached the same result.

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[4] The court further held that petitioner had waived his various arguments concerning the date of manufacture of the motor in question and accordingly did not address them. Pet. App. 19.

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See *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001). Thus, the petition presents nothing more than a disagreement over the application of this Court's recent decisions to the facts of this particular case, which is not worthy of a grant of certiorari. See Rule 10. There will be other opportunities to review the issue should a conflict arise in the future.

Moreover, several other prudential considerations warrant a denial of certiorari. The decision below is of no practical importance because petitioner could not recover under Illinois law even if his tort claim were allowed to go forward. In addition, this case arose in state court and part of the proceeding—petitioner's claim against Ebbtide Corporation, the boat's manufacturer—is still pending. It thus appears that the decision below is not final as to all parties. Finally, the decision below is fully consistent with this Court's preemption rulings, with the federal interest in uniform design requirements for boats in interstate commerce, and with the public interest in boat safety. There is no ground for further review.

I. THE PETITION FAILS TO SATISFY ANY OF THE CRITERIA FOR A GRANT OF CERTIORARI.

A. This Court's Recent Decisions Have Resolved The Legal Issues Left Undecided In *Lewis* v. *Brunswick Corporation*.

Petitioner's principal argument for certiorari is the claim that "[t]his case involves the same issue raised by *Lewis* v. *Brunswick Corp.*, No. 97-288," which settled before a decision on the merits. Pet. i. Because this Court granted review in *Lewis*, the argument goes, it should grant review here as well.

Lewis presented two related questions: first, whether "it is constitutionally permissible to imply the federal pre-emption of state common law claims" when a statute contains both express preemption and savings clauses; and second, whether "torts of

omission [can be] impliedly preempted" under a statute that contains a savings clause. Pet. i in No. 97-288.

This Court answered both of these questions in *Geier*. As to whether implied preemption principles apply to laws containing both express preemption and savings clauses, *Geier* expressly held that such provisions "do[] *not* bar the ordinary working of conflict pre-emption principles." 529 U.S. at 869. And as to whether a "tort of omission" can be impliedly pre-empted in the face of a savings clause, *Geier* itself involved such a tort—a "failure to install" claim—yet the Court held that allowing a jury to require auto makers to install airbags would frustrate the purpose of a federal decision *not* to impose such a requirement. *Id.* at 881. That a case involves a "failure to install" claim does not alter this Court's analysis: the inquiry remains whether the claim "actually conflicts" with the federal regulatory scheme, either by making it "'impossible' for private parties to comply with both state and federal law," or by "frustrat[ing] the accomplishment of a federal objective." *Id.* at 873.

Petitioner attempts to discount *Geier* as "narrowly confined to the particular regulation at issue." Pet. 24. In the court below, however, he argued vehemently that the statutory provisions at issue in *Geier* and those at issue here were "nearly identical." Pet. 5 in Ill. No. 89492. Moreover, he sought review in the Illinois Supreme Court on the basis of this Court's pending decision in *Geier* (*id.* at 4-5, 17), and most of his merits brief below was devoted to arguments concerning *Geier*.

The court below faithfully applied *Geier* in holding that a jury verdict imposing a duty to install propeller guards would "present an obstacle to the accomplishment and execution of the purposes and objectives Congress sought in enacting the FBSA." Pet. App. 16. Petitioner's disagreement with the lower court's application of these "ordinary pre-emption principles, grounded in longstanding precedent" (*Geier*, 529 U.S. at 874), does not warrant a grant of certiorari.

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Any remaining issue presented in *Lewis* was disposed of in *Locke*, which addressed the preemptive effect of Coast Guard decisions concerning the design and construction of maritime vessels. Specifically, petitioner complains that the court below entered uncharted waters in holding that a federal decision not to regulate can have preemptive effect in the "absence of any federal regulation." Pet. 20. But *Locke* unanimously reaffirmed that there are "instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority," citing this Court's repeated holdings that "'where failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." 529 U.S. at 99, 110 (citations omitted). As the Court in *Locke* stated in reference to the Coast Guard: "The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Id.* at 111.

As with *Geier*, the court below carefully analyzed *Locke* in rendering its opinion. It explained that "'the relevant inquiry for * * * pre-emption'" is "'whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all'" and concluded that the Coast Guard's "informed decision that no regulatory action should be taken to require propeller guards" "equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA." Pet. App. 15-16 (quoting *Locke*, 529 U.S. at 110). Here again, petitioner dislikes this application of settled precedent, but there is no reason to review an application of principles that this Court laid down just two Terms ago—especially under a statutory scheme that petitioner concedes is "nearly identical" to that in *Geier*. If a conflict arises in the future, this Court can address the issue at that time.

B. The Lower Courts Are Not Divided Over The Issue Of BSA Preemption Of Propeller Guard Claims.

Petitioner next argues that review is necessary to resolve a "direct conflict" among the lower courts. Pet. 3. He concedes (at 11) that "a host" of courts have held that the BSA preempts propeller guard claims—indeed, the decision below accords with that of *every* federal court and several state courts to address the issue[5]—but asserts that the decision below conflicts with one 1994 state court decision, *Moore* v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994).

Contrary to petitioner's claim, there is no genuine conflict. To begin with, the court in *Moore*, like the lower court here, rejected the contention that the BSA expressly preempts propeller guard claims, 889 S.W.2d at 249-251, and petitioner himself notes that the decisions are in agreement on that score. Pet. 13-14.

As for implied preemption, the reasoning of *Moore* has been overtaken by that of *Geier* and this Court's other recent preemption rulings. *Moore* held that the presence of an express preemption clause precluded a finding of implied preemption. 889 S.W.2d at 251 n.10. But that view was decisively rejected in *Geier*, which found conflict preemption in the face of a similar provision. 529 U.S. at 869 (an express preemption provision "does *not* bar the ordinary working of conflict preemption principles"); see also *Freightliner Corp.* v. *Myrick*,

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[5] See *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000); *Lewis* v. *Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997); *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995); *Moss* v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *Outboard Marine Corp.*, No. J90-0011(L) slip. op. at 2 (S.D. Miss. Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Ryan* v. *Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. 1992).

514 U.S. 280, 287 (1995) (rejecting the Eleventh Circuit's view "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute").[6]

Similarly, the *Moore* court was of the view that the BSA's savings clause indicated Congress's intent to preserve even common law claims that were in "tension" with federal policy. 889 S.W.2d at 252. But *Geier* rejected the view that a savings clause may be interpreted "to 'save' all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act." 529 U.S. at 870.

Likewise, *Moore* reasoned that "damage awards" are "not equivalent to * * * positive enactments," since "a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer—installing guards on future boats or taking no action and bearing the liability as a cost of doing business." 889 S.W.2d at 251. *Geier*, by contrast, held that "rules of law that judges and juries create or apply" in tort suits may remove a manufacturing choice that federal regulators intended to preserve. 529 U.S. at 871.

Finally, *Moore* applied a presumption against preemption, reasoning that the lawsuit implicated the safety of boats "on [Texas's] waterways." 889 S.W.2d at 251. *Locke*, however, made clear that no such presumption applies to the regulation of "maritime commerce" (529 U.S. at 108); the accident here occurred on an interstate body of navigable water (see *supra* p.11); and Congress relied upon its "historic maritime jurisdiction" in enacting the BSA. S. Rep. at 17; see *id.* at 20 (citing "the long history of preemption in maritime safety matters" and "the need for uniformity applicable to vessels moving in

[6] Indeed, the *Moore* court cited the Eleventh Circuit's decision in *Myrick* for the proposition that the presence of an express preemption clause foreclosed any implied preemption analysis. See 889 S.W.2d at 251 n.10. As shown in the text, however, this Court expressly repudiated that aspect of the Eleventh Circuit's reasoning when the case came before it on certiorari.

interstate commerce"); see also *Geier*, 529 U.S. at 873 (declining to apply an "unusual, 'special burden' against pre-emption").

In sum, at every point in its reasoning, *Moore* adopted legal conclusions that have since been rejected by this Court's decisions. There is no reason to believe that the Texas Supreme Court would reach the same result today—especially when three justices dissented in *Moore* for reasons that this Court validated in *Geier* and *Locke*. See 889 S.W.2d at 252-257; *Worthy* v. *Collagen Corp.*, 967 S.W.2d 360, 367 (Tex. 1998) ("We are also bound to follow the decisions of the United States Supreme Court, the final authority on federal preemption issues"). Thus, *Moore* does not give rise to any conflict with the decision below.

Apart from the decision below, the only other post-*Geier* case to address BSA preemption of propeller guard claims is *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000). Applying *Geier* and *Locke*, the court there held that allowing such claims to proceed "would present an obstacle to and frustrate the flexible approach towards propeller guards adopted by the Coast Guard." *Id.* at 614.

Like the court below, the Fifth Circuit in *Lady* rejected the argument that claims implicating "maritime commerce" are entitled to a "presumption against preemption." 228 F.3d at 607. Like the court below, it rejected the view that the BSA "expressly preempts" propeller guard claims. *Id* at 611. Like the court below, it rejected the argument of the Solicitor General in *Lewis*. *Id.* at 615 n.23. And like the court below, it rejected the contention that propeller guard claims are not preempted "as long as the Coast Guard has not promulgated a regulation that conflicts with the common-law requirement." *Id.* at 611-612. "Rather," the court held, "where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation

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and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's." *Id.* at 615. *Lady* is thus on all fours with the decision below.

Without dissent, this Court denied the petition for certiorari in *Lady*—which was an *almost verbatim* copy of the petition filed here, raising identical arguments. 121 S. Ct. 1402 (2001). The petitioner's counsel there (also counsel here) argued that there was a conflict between the Fifth Circuit's decision and *Moore*, and that review was needed "to finish the job started in *Lewis*." Pet. 15 in No. 00-1031. OMC responded that *Geier* resolved the question presented in *Lewis*, and that the Solicitor General's arguments in *Lewis* and the reasoning of *Moore* have been rejected by recent decisions. The only development since *Lady* is the decision below. Thus, every post-*Geier* decision has held that the BSA impliedly preempts propeller guard claims.[7]

C. The Decision Below Is Fully Consistent With The Decisions Of This Court.

Faced with the absence of any genuine conflict among the lower courts, petitioner resorts to the assertion that the decision below conflicts with this Court's precedents. Pet. 15-25. He

[7] Petitioner tries to divert attention from the denial of certiorari in *Lady* by noting that OMC filed a Chapter 11 bankruptcy petition shortly after Lady sought certiorari. Pet. 11-12. In his reply brief in support of certiorari (at 7-9), however, Lady (represented by petitioner's counsel here) vigorously argued that "OMC's bankruptcy is not a reason to deny the writ," since he could obtain relief from the stay and potentially recover a substantial amount on remand if he prevailed. That assertion was plainly correct. The fact that OMC was in reorganization proceedings does not mean that Lady would have been unable to pursue his tort claim. Bankruptcy courts routinely lift the automatic stay to permit a determination of the validity of a claim in other litigation, particularly where necessary to avoid loss of the entire claim. See 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (15th ed. rev. 2001); *Foust* v. *Munson S.S. Lines*, 299 U.S. 77 (1936) (district court abused its discretion in staying wrongful death suit against company involved in reorganization proceeding). A bankruptcy court would undoubtedly lift the stay to permit briefing and argument of a case in which this Court granted certiorari.

makes three such claims—that the decision is inconsistent with *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); that it misapplied *Locke* in declining to apply a "presumption against preemption"; and that it failed to give sufficient weight to the Solicitor General's brief in *Lewis*. None of these arguments has merit.

Myrick involved a federal safety standard prescribing short stopping distances for semitrailers. The Ninth Circuit invalidated the standard on the ground that the National Highway Traffic Safety Administration ("NHTSA") had not considered the failure rate of anti-lock brake systems ("ABS"), which were needed to comply with the standard. 514 U.S. at 284-285. NHTSA thereafter amended the standard so that the distance and lock-up requirements no longer applied to semitrailers. *Id.* at 285.

The plaintiffs in *Myrick*, who were injured in accidents with trucks lacking ABS, claimed that "the absence of ABS was a negligent design that rendered the vehicles defective." 514 U.S. at 283. The defendants replied that the absence of any federal standard governing truck stopping distances evidenced an intent to leave the issue unregulated, thus impliedly preempting the plaintiffs' claims. This Court rejected that argument, however, explaining that "the lack of federal regulation *did not result from an affirmative decision of agency officials to refrain from regulating air brakes*." *Id.* at 286 (emphasis added).

In contrast to *Myrick*, this *is* a case where the absence of a federal regulation resulted from the agency's "affirmative decision to refrain" from regulating. As both the court below and the Fifth Circuit held: "'the lack of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate.'" Pet. App. 12 (quoting *Lady*, 228 F.3d at 612).

Moreover, the plaintiffs in *Myrick* merely sought to impose a state-law duty that was effectively identical to the short-lived

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federal regulation. NHTSA wanted to regulate truck stopping distances; it had specifically endorsed ABS; and it had imposed a rule that would have required trucks to install ABS, only to have a court declare it invalid. Here, by contrast, the Coast Guard affirmatively determined that propeller guards should *not* be required, and petitioner advocates a duty directly contrary to this judgment. Thus, *Myrick* is wholly inapposite—as the lower courts have consistently recognized. Pet. App. 11-12; *Lady*, 228 F.3d at 612; *Lewis*, 107 F.3d at 1503-1504.

Petitioner next argues that the court below, in not applying a presumption against preemption, "misrea[d] this Court's recent decision in *Locke*." Pet. 21. He claims that *Locke* is irrelevant because this case involves "*recreational* vessels" and "has nothing to do with maritime commerce," because the accident here took place in "state waters," and because *Locke* involved "international" issues and "ocean-going oil tankers." *Id.* at 20-21. These arguments are without foundation.

First, the fact that this case involves *recreational* boats does not mean it does not implicate *interstate commerce* and *federal waterways*. Pleasure boating is a multi-billion-dollar industry, manufacturers make pleasure boats for national markets, and such boats routinely cross state lines (as petitioner's boat did here). As Congress explained in adopting the Act at issue: federal preemption in this context "conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20; accord *id.* at 14 (citing "[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded"). Thus, Congress fully understood that manufacturing standards for recreational boats directly affect interstate commerce. See also *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 675 (1982) ("[a] collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce").

Nor did this case arise in "state waters." As explained above (at 11), the accident here occurred in the Dale Hollow chain of lakes—a navigable and interstate body of water that crosses the Tennessee-Kentucky border and that was created by federal authorities acting under federal legislation. The "jurisdictional applicability" of the BSA extends to every recreational vessel "within the historic federal maritime jurisdiction—the navigable waters of the United States, [and] certain internal waters which are in the exclusive or concurrent jurisdiction of the United States." S. Rep. at 17. In sum, petitioner cannot plausibly claim that this accident occurred on state waters that are not "subject to the jurisdiction of the United States." 46 U.S.C. § 4301(a).

It makes no difference that *Locke* involved "international" concerns and "ocean-going oil tankers." Congress understood the BSA to be as closely related to maritime commerce as the Act at issue in *Locke*; the BSA applies as fully to boats on land-locked lakes as to those "on the high seas" (§ 4301(a)); and the federal government's paramount authority over maritime commerce does not depend on its being foreign or international in scope. *Foremost*, 457 U.S. at 674-677. As the Fifth Circuit explained in *Lady*: "any distinction between recreational vessels and tankers is of little significance, as the national interest in vessels operating on navigable waters of the United States encompasses both." 228 F.3d at 607.[8]

Moreover, even if petitioner's arguments regarding *Myrick* and *Locke* were correct (and they are not), they would represent nothing more than a quarrel over the Illinois Supreme Court's application of this Court's recent decisions to the particular

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[8] It is well settled that "'[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Fed. Sav. & Loan* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)).

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facts of this case. Petitioner does not deny that a federal decision not to regulate can have preemptive force when it is based on an affirmative determination that the area is best left unregulated; he simply disagrees that this is such a case. Nor does he dispute that a "presumption against preemption" does not apply to regulation of maritime commerce; he simply disagrees that this case involves such commerce. These disagreements do not justify this Court's review. See Rule 10 ("misapplication of a properly stated rule of law" is an insufficient basis for certiorari).

Finally, petitioner says that the decision below disregarded precedent in not deferring to the Solicitor General's brief in *Lewis*, which argued that the BSA does not preempt propeller guard claims. Pet. 23-25. But as the court below explained:

> [A]rguments made in the *Lewis* brief have been rejected by the Supreme Court in *Geier*. For example, the Solicitor General in the *Lewis* brief argued that the existence of the savings clause (section 4311(g)) "makes clear Congress's explicit intent to preserve tort liability." But the *Geier* Court found implied preemption in the presence of the savings clause and rejected the argument that this clause "bar[red] the ordinary working of conflict pre-emption principles."

Pet. App. 18; see *Lady*, 228 F.3d at 615 & n.23 (the Solicitor General's views in *Lewis* were not "sufficient to overcome the reasons supporting the application of implied preemption").

This is but one of the Solicitor General's arguments in *Lewis* that was rejected in *Geier*. For example, the *Lewis* brief states (at 27) that "a common law claim would be permitted even if a regulation were in existence unless that claim propounded a standard of conduct directly contrary to the federal rule." But *Geier* explained that the "full purposes" of federal law could be frustrated even absent such a direct conflict. 529 U.S. at 873.

Similarly, the brief (at 22) made much of the fact that the BSA's preemption provision did not reference common law claims, stating that "[t]he regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions." But as *Geier* observed in analyzing a similar provision: "rules of law that judges and juries create or apply in [state tort] suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts." 529 U.S. at 871.

And the brief in *Lewis* argued (at 28) that "the absence of a federal regulation does not create a preemptive effect on state common law claims when the federal scheme is not intended to occupy the complete field of motorboat safety." But while the Court in *Geier* made no finding that the Act there "preempted the field," it readily concluded that the government's refusal to require airbags was a considered decision with preemptive force. See 529 U.S. at 874-883.

Furthermore, the Coast Guard did not sign the Solicitor General's brief in *Lewis*—in contrast to its practice in other preemption cases involving its jurisdiction. *E.g.*, U.S. Br. in *Locke* (No. 98-1701). And that brief acknowledged the Coast Guard's "longstanding interpretation" that the Act preempts state safety requirements "regardless of whether a federal standard is in existence." *Lewis* Br. 15-17. See 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996) ("the States do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction"); 36 *id.* 15764 (Aug. 18, 1971); 38 *id.* 6914 (Mar. 14, 1973). Thus, it is not the case that the views set forth in the *Lewis* brief are "the United States' only articulated view on the matter." Pet. 10. But in any event, those views have been rejected by subsequent decisions of this Court.

The holding below is consistent not only with *Myrick*, *Locke*, and *Geier*, but also with a long line of this Court's precedents.

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As the court below recognized (Pet. App. 13-15), it is well settled that a federal decision not to regulate has preemptive force where based on a considered study of the regulatory question. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-152 (1989); *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). As the Court stated in the leading case in this area—involving the Coast Guard's authority—the "relevant inquiry" is "whether the Secretary has either promulgated his own [requirement] * * * or has decided that no such requirement should be imposed at all." *Ray*, 435 U.S. at 171-172. Accord *Locke*, 529 U.S. at 104, 107 (reaffirming *Ray*'s "essential framework," "analytic structure," and "holding"). There is no reason to review the Illinois Supreme Court's ruling that this is such a case.

It is hard to imagine a more compelling case for application of the principle recognized in these decisions. Pursuant to statutorily prescribed procedures, the Coast Guard conducted a painstaking, 18-month study of propeller guards. Its decision not to require them reflected not indifference, but a thorough analysis of the regulatory issues and a conclusion that they were technologically infeasible, economically unjustified, and likely to *increase* safety hazards. Ill. App. A24. As in *Geier*, the Coast Guard focused on a single item of equipment and made a "policy judgment that safety would best be promoted" if that item is *not* required. 529 U.S. at 881. And as in *Geier*, to allow "different juries in different States [to] reach different decisions" "would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives" and override federal safety policies that were "deliberately imposed." *Id.* at 869, 871, 872. See also *id.* at 884 (rejecting the argument that "a formal agency statement of pre-emptive intent [i]s a prerequisite to concluding that a conflict

exists"); *Ray*, 435 U.S. at 178 (holding that the Coast Guard's "failure to promulgate a ban" on large oil tankers took on "the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute").

II. THIS CASE IS NOT A PROPER VEHICLE TO RESOLVE THE QUESTION PRESENTED.

Quite apart from the petition's failure to satisfy the criteria of Rule 10, review is also unwarranted for various prudential reasons. To begin with, a decision here would be of no practical importance because petitioner could not recover under Illinois tort law even if his claim were allowed to proceed. In Illinois, a party alleging a design defect must satisfy § 402A of the RESTATEMENT (SECOND) OF TORTS (1965), which imposes strict liability on makers of "unreasonably dangerous" products. See *Lamkin* v. *Towner*, 563 N.E.2d 449 (Ill. 1990). Time and again, Illinois courts have held that a product is not "unreasonably dangerous" if its risks "derive merely from those inherent properties * * * which are obvious to all who come in contact with [it]." *Hunt* v. *Blasius*, 384 N.E.2d 368, 372 (Ill. 1978).[9]

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[9] See *Miller* v. *Dvornik*, 501 N.E.2d 160, 164 (Ill. App. 1986) (holding that a motorcycle is not defective for lack of crash bars and stating that "[i]t is well settled that injuries are not compensable if they are caused by inherent propensities of a product which are obvious to all who come into contact with them"); *Scoby* v. *Vulcan-Hart Corp.*, 569 N.E.2d 1147, 1151 (Ill. App. 1991) (holding that a deep fat fryer is not defective for lack of a protective cover and stating that "[c]onsidering not only the obvious nature of any danger here but, also, the simple nature of the mechanism involved, * * * summary judgment for the defendant was clearly proper"); *Jarke* v. *Jackson Products*, 631 N.E.2d 233, 238 (Ill. App. 1994) (holding that a welding mask was not unreasonably dangerous for failure to include an ear guard and stating that "the only pertinent inquiry is whether the product is unreasonably dangerous in the state in which it is used"); *Todd* v. *Societe BIC, S.A.*, 21 F.3d 1402, 1407 (7th Cir. 1994) (en banc) (holding that a cigarette lighter was not unreasonably dangerous for lack of a child-restraint device; stating that "[i]njuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product").

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These holdings fully apply to a boat motor's propeller, the dangers of which are readily apparent to the ordinary consumer. Much as a chef must appreciate the dangers of a sharp knife, or a lumberjack the dangers of a saw's spinning chain, members of the boating public must appreciate the danger of an outboard motor's high-speed propeller blades—as numerous courts have held. *E.g.*, *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505, 1507 (11th Cir. 1990) (reversing a verdict finding that a propeller was defective for lack of a guard on the basis that "products whose inherent danger is patent and obvious, do not, as a matter of law, involve defects of a sort that a jury should resolve," and explaining that "the ordinary consumer clearly understands that a revolving propeller involves danger").[10]

[10] In addition to *Elliott*, see *Fitzpatrick* v. *Madonna*, 623 A.2d 322, 324-325 (Pa. Super. Ct. 1993) (reversing a jury verdict for the plaintiff because "[a] competent person knows that he or she must stay clear of the churning blades of an outboard motor in the same way as a person avoids airplane propellers, chain saw teeth, and lawn mower blades," and because "it cannot be said with any degree of certainty that the risk of injury will be reduced by a safety guard"); *Pree* v. *Brunswick Corp.*, 983 F.2d 863, 867-868 (8th Cir. 1993) (unguarded propellers "[are] not dangerous beyond the expectations of the ordinary consumer" and "do not, as a matter of law, involve defects of a sort that a jury should resolve"); *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993) (entering judgment for the manufacturer and citing the "absence of evidence that there was a feasible, safer alternative design for a propeller guard"); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579, 1583 (M.D. Ga. 1991) ("a pleasure boat's unguarded propellers are not dangerous beyond the expectations of the ordinary consumer"; "the consensus of experts that the industry's adaption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate"); *Beech* v. *Outboard Marine Corp.*, 584 So. 2d 447, 449-450 (Ala. 1991) (finding no "jury issue" because "a propeller guard that arguably creates other dangers is not a safer design"); *Veal* v. *Teleflex, Inc.*, 586 So. 2d 188, 191 (Ala. 1991) (holding that "the trial court should not have submitted the [defective design] charge to the jury" and rejecting the claim "that because there were several patents available for propeller guards, Mercury Marine was negligent or wanton in failing to utilize them on its boats").

In light of this overwhelming body of authority, there is no substantial ground to doubt that Illinois courts would reject petitioner's claim as a matter of substantive tort law. It would thus be a waste of private and judicial resources to debate the preemption issue in this context.

Moreover, it is questionable whether this Court has jurisdiction in this matter. Under 28 U.S.C. § 1257(a), the Court may review federal issues arising from "[f]inal judgments or decrees rendered by the highest court of a State." In order to satisfy the finality requirement, the judgment from which review is sought must be final as to all parties and issues. See *Flynt* v. *Ohio*, 451 U.S. 619, 620 (1981) (per curiam) ("the final-judgment rule has been interpreted 'to preclude reviewability where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State'"); *Collins* v. *Miller*, 252 U.S. 364, 370 (1920) (the judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action"); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948).

Petitioner, however, sued not only respondent, but Ebbtide Corporation, alleging that its boat was defectively designed because it lacked adequate handrails and failed to warn passengers of inadequate back support in the boat's seating. See *supra* p. 12. The Circuit Court granted respondent's motion to dismiss, and that decision was affirmed on appeal. Petitioner's claim against Ebbtide, however, is still pending.[11] A trial below may result in full relief (rendering the issue here moot), or it may raise other issues of federal law (*e.g.*, relating to punitive damages or other federal regulatory standards). In any event, the decision below did not resolve petitioner's claims against

[11] After the decision of the Illinois Supreme Court, the Circuit Court of Cook County reinstated petitioner's remaining claim against Ebbtide on its trial docket. See Order (Cook County Circuit Ct. No. 01L14400) (Dec. 4, 2001).

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all parties, and the federal question presented here is not conclusive of the remaining proceedings below.

Finally, it merits emphasis that the decision below is fully consistent with the public interest in safe boating. After careful study, the Coast Guard determined not only that propeller guards were infeasible for any recreational speedboat, but also that they would give boaters a false sense of security and increase the occurrence of serious accidents. Numerous courts have held that speedboats are not defective for lack of propeller guards, citing "the consensus of experts that the industry's adaption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate." *E.g.*, *Elliott*, 903 F.2d at 1509. Thus, the decision below accords with the public interest in ensuring that boats be as safe as possible.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

[12] At the present time, boating accidents involving propellers are very rare. As the Subcommittee found, the "risk of fatality" from recreational power-boating is small in comparison to that of other activities, including other types of boating: estimated fatalities per each million activity hours were "1.26 for inflatables, 0.62 for canoes/kayaks, and 0.59 for rowboats, in each case with no engine being involved, compared to a risk of 0.14 from all causes for open motorboats (*within which the risk of propeller strike itself is a very small fraction*)." Ill. App. A11 (emphasis added).

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No. 01-706

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division
of Brunswick Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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ARGUMENT

As explained in our petition for *certiorari*, this case presents the identical question that was before this Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir., *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether a state common-law claim that a boat engine was defectively designed because it lacks a propeller guard is preempted by a decision of the United States Coast Guard not to begin developing a regulation that would require the use of propeller guards on recreational motor boats. *Lewis* settled after oral argument, before any decision was rendered in the case. This is the first meaningful opportunity for this Court to revisit this important question of federal law in the wake of *Lewis*.

Mercury Marine's main theme in opposition is that review should not be granted because decisions of this Court since *Lewis* was argued – particularly *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), and *United States v. Locke*, 529 U.S. 89 (2000) – have "definitively resolved" the core questions presented in this case and discredited the conflicting decision of the Texas Supreme Court in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994). As we now explain, these arguments are meritless.

1. Neither *Geier* nor *Locke* Resolved the Federal Preemption Question Presented in *Lewis* and this Case.

A. *Geier*'s Implied Preemption Holding Has No Bearing Here.

Mercury Marine's principal claim is that *Geier* repudiated the Texas Supreme Court's decision in *Moore*,

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thereby effectively eradicating the split of authority that gave rise to the grant of *certiorari* in *Lewis*. In so arguing, Mercury Marine mischaracterizes *Geier* as holding that "allowing a jury to require auto makers to install airbags would frustrate the purpose of a federal decision *not* to install an airbag requirement." Opp. at 15 (citing *Geier*, 529 U.S. at 881; emphasis in original). Based on this mischaracterization of *Geier*, Mercury Marine claims that the U.S. Coast Guard's decision "*not* to impose [a propeller guard] requirement" must be accorded similar preemptive effect. *Id.*

The main flaw in this analogy is that, unlike the decision at issue here (a decision by the federal government to take *no* regulatory action at all), *Geier* involved a highly complex federal safety standard that did, in fact, regulate the use of airbags. In *Geier*, this Court confronted the 1984 version of a federal motor vehicle safety standard promulgated by the National Highway Traffic and Motor Vehicle Safety Administration ("NHTSA") – Standard 208 – that required auto manufacturers gradually to "phase-in" the use of passive restraint devices in passenger automobiles. Unlike the typical minimum safety standards promulgated by NHTSA, Standard 208 "deliberately sought variety . . . by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement." 529 U.S. at 878. The Court emphasized that NHTSA sought a "mix of devices" because of safety concerns associated with airbags. *Id.* at 878-79. *Geier* further stressed that, in NHTSA's view, a "mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with

airbags, and could facilitate the development of alternative, cheaper, and safer passive restraint systems." *Id.* at 879.

Against this backdrop, *Geier* held that a common-law damages action holding a manufacturer liable for its failure to install an airbag would conflict with NHTSA's goal of encouraging a mixture of passive restraint devices. *Id.* at 880. The Court wrote that "a rule of state tort law imposing [liability for failure to install airbags] . . . would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* In so ruling, *Geier* gave "special weight" to an *amicus curiae* brief filed by the United States, in which the agency strenuously argued that no-airbag claims would conflict with and substantially undermine NHTSA's regulatory goals. *See id.* at 886.

The facts here could not be farther from those in *Geier*. Unlike the complex set of regulatory obligations imposed by Standard 208, which affirmatively encouraged a mixture of passive restraint devices, *there is no federal regulation whatsoever governing propeller guards.* As previously explained, the only action taken by the Coast Guard with regard to these devices was to task a subcommittee of its Advisory Council (which included, among others, industry representatives and members of the public) with investigating whether the federal government should begin to develop a regulation requiring propeller guards on passenger boats. *See* Pet. at 5. The Coast Guard ultimately decided not to regulate these devices in any way, in part because there was no universally applicable technology appropriate for use on all boats. *Id.* at 6. To date, there is no federal safety standard governing (or even addressing) the use of propeller guards. Thus, unlike in *Geier*, there is no federal regulatory framework

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with which petitioner's common-law claims could possibly conflict.

This conclusion is underscored by the fact that, in *Lewis*, the United States filed an *amicus curiae* brief confirming that no-propeller-guard claims exactly like petitioner's do not in any way conflict with federal regulatory purposes. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, Lewis v. Brunswick Corp., 522 U.S. 978 (1997) (No. 97-288) ("*Lewis* Brief"). This position stands in stark contrast to the United States' *amicus curiae* brief in *Geier*, which vigorously asserted that no-airbag claims would frustrate and undermine the goals of Standard 208. *See* 529 U.S. at 880. And *Geier* itself confirms that the Solicitor General's views on the preemptive effect of an agency's regulatory decisions are entitled to some deference. *Id.* at 882, 886. *See also Medtronic v. Lohr, Inc.*, 518 U.S. 470, 496, 505-07 (1996) (majority and concurring opinions). Thus, if anything, *Geier* provides further reason to grant review and accord the United States' authoritative position the deference it deserves.[1]

[1] Mercury Marine attempts to avoid the United States' anti-preemption position in *Lewis* by arguing that the Solicitor General's reasoning, like that of the Texas Supreme Court in *Moore*, has been discredited by *Geier*. *See* Opp. at 24-25. This argument is meritless. First, the *Lewis* Brief's suggestion (at 21) that the Boat Safety Act's savings clause "makes clear Congress's explicit intent to preserve tort liability" is, contrary to respondent's claim, in no way contrary to *Geier* and ultimately irrelevant to the United States' rejection of preemption, which hinged on the fact that there is clearly no conflict between no-propeller-guard claims and the Coast Guard's regulatory purposes. *Id.* at 25-27. Second, the *Lewis* Brief's recognition (at 22) that the "regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions" is, in fact, supported by ample authority and is wholly consistent with *Geier*. (As explained *infra* at 7-8, *Geier* explicitly acknowledged, and did not purport to overrule, numerous prior decisions of this Court making precisely this point.) Third, the *Lewis* Brief's argument (at 28) that, absent a statute that affirmatively preempts the entire field of state action, regulatory inaction lacks preemptive effect, is fully consistent with *Geier*, given that *Geier* did not involve a "field preemption" statute and did not involve regulatory inaction. In short, *Geier* did not undermine the validity of any of the arguments set forth in the Lewis Brief, and Mercury Marine's arguments to the contrary are simply wrong.

B. *Locke*'s Preemption Holding is Equally Inapplicable to this Case.

Mercury Marine also argues that "any remaining issue presented in *Lewis* was disposed of in *Locke*," which stated that there are "instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority." Opp. at 16. *Locke*, however, did little more than reaffirm this Court's previous holding in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), that Title II of the Ports and Waterways Safety Act of 1972 ("PWSA") expressly preempts the entire field of state laws and regulations governing ocean-going oil tankers used in international commerce.[2] Within the context of a field preemption statute like the PWSA, it made sense for this Court to "reaffirm" that regulatory inaction may exert a preemptive effect on state law. This holding has virtually nothing to do with this case, however, given that the

[2] As the Supreme Court explained in *Ray* (and reiterated in *Locke*), Title II of the PWSA *requires* the Coast Guard to issue "such rules and regulations as may be necessary with respect to the design, construction, and operation of the covered vessels." *Ray*, 435 U.S. at 168; *Locke*, 529 U.S. at 110. *Ray* and *Locke* both reasoned that, given Title II's mandatory directive that the Coast Guard impose national regulations governing the general seaworthiness of tankers and their crews, "Congress has left no room for state regulation of these matters." *Locke*, 529 U.S. at 110.

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Boat Safety Act, unlike the PWSA, does *not* preempt the field of boat safety.

As explained by the United States in *Lewis*, the Boat Safety Act "is quite distinctive from the [PWSA]" insofar as it "does not require the [Coast Guard] to issue regulations, but rather merely permits [the agency] to do so." *Lewis* Brief at 29. *See also* 46 U.S.C. § 4302(a). As the United States concluded, this grant of permissive regulatory authority reveals that Congress never intended the Act to preempt the entire field of boat safety regulation, given that the Coast Guard has the option of doing *nothing* under the Act (and, in fact, has not issued any regulations governing propeller guards). Because the Boat Safety Act does not preempt the regulated field, *Locke*'s language regarding the preemptive effect of regulatory inaction has no bearing here: unlike the PWSA, the Boat Safety Act only preempts state positive law in areas where the Coast Guard has issued regulations governing the subject matter at issue – and it is undisputed that no such action has been taken with respect to propeller guards. Thus, Mercury Marine's suggestion that *Locke* resolves the preemption question presented here has no merit.[3]

---

[3] Assuming, however, that the Boat Safety Act (like Title II of the PWSA) preempts the field of state positive law even where the Coast Guard has taken no regulatory action, *Locke*'s holding would still have no bearing here given that common-law claims are expressly preserved by the Act's broadly worded savings clause. *See* 46 U.S.C. § 4311(g). In this respect, this case is very different from both *Ray* and *Locke*, which involved state regulations rather than common-law claims. As the United States explained in *Lewis*, "[t]hat distinction is equally important here, because the [Act] contains a savings clause, but the PWSA, at issue in *Ray*, did not." *Lewis* Brief at 29.

2. *Moore* is Still Good Law, and Directly Conflicts with the Decision Below.

Equally without merit is Mercury Marine's claim that "there is no genuine conflict" between the decision below and the Texas Supreme Court's decision in *Moore*. *See* Opp. at 17. Mercury Marine argues, first, that *Moore* is no longer good law because its holding that "the presence of an express preemption clause precluded a finding of implied preemption" was rejected by *Geier*. *Id.* *Moore*'s holding on this point is irrelevant, however, because the Texas Supreme Court went on to reach the same implied conflict preemption question presented here: whether "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's policy determination that guards should not be mandated." *Id.* at 251.

Mercury Marine is also wrong in claiming that *Moore*'s holding that "damage awards" are "not equivalent to . . positive enactments" conflicts with this Court's prior teachings and was definitively rejected by *Geier*. Opp. at 18. In reality, *Moore*'s holding on this point is squarely in accord with numerous prior decisions of this Court recognizing that "the effects of direct regulation . . . are significantly more intrusive than the incidental regulatory effects of [damage awards]." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) ("there is no general, inherent conflict between [express] federal pre-emption of state [regulatory] warning requirements and the continued vitality of state common law [damages] actions") (plurality); *id.* at 533-34 (Blackmun, J., concurring); *English v. General Electric Corp.*, 496 U.S. 72, 85 (1990) (common-law claims "neither direct nor substantial enough" to be within the preempted field"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S.

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238, 256 (1984) ("Congress intended . . . to tolerate whatever tension there was between [federal regulation and state common-law claims, and] [w]e can do no less.").

Notably, *all* of these cases were cited in *Geier*, which explicitly acknowledged this Court's oft-repeated teachings that the effects of "tort law may be somewhat different" than those of positive law for purposes of determining the extent of federal preemption. *See* 529 U.S. at 882. And *Geier*'s particular holding that the "rules of law that judges or juries create or apply in [tort] suits" may remove a choice that federal regulators intended to preserve has no bearing here, given that the Coast Guard has made crystal clear that it never intended even to address any aspect of manufacturers' decision making with respect to propeller guards. In short, *Moore* remains good law after *Geier*, and is squarely in conflict with the decision below.[4]

[4] Mercury Marine also claims that *Moore* was wrong because it applied a presumption against preemption that was subsequently rejected in *Locke*. *See* Opp. at 18. As explained in our petition, however, there are myriad reasons why *Locke*'s rejection of the presumption against preemption – a holding directed to state regulation of ocean-going oil tankers involved in international maritime commerce – should not apply to a case involving a small recreational vessel on local waters. *See* Pet. at 21-23. Even assuming that the Texas Supreme Court erred in this regard, however, its preemption ruling was still correct, given that the Coast Guard has never regulated propeller guards and the United States itself has taken the position that no-propeller-guard claims do not undermine or frustrate any federal policy.

3. This Case is a Proper Vehicle for Review.

Finally, there is no merit to Mercury Marine's argument that this case is not a proper vehicle for review on the grounds that (1) "petitioner could not recover under state tort law even if his claim were allowed to proceed"; and (2) this Court's jurisdiction is "questionable" due to the pendency of remaining claims against the boat's manufacturer. *See* Opp. at 29. Regarding the former, suffice it to say that the alleged weaknesses of petitioner's claims on the merits (which is a subject of hot dispute and belied by the fact that other injury victims in similar cases have obtained significant recoveries) is hardly a valid reason to decline review. Regarding the jurisdictional argument, the Illinois Supreme Court affirmed judgments dismissing petitioner's claims on the ground that they are preempted by federal law. Mercury Marine neither disputes that this is a final judgment between the parties to this appeal nor produces any authority for the argument that petitioner's claims against other defendants not party to this appeal render the Illinois Supreme Court's dismissal ruling unreviewable under 28 U.S.C. § 1257. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975), this Court recognized its jurisdiction to review a state court decision where "the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state-court proceedings." *See also Brady v. Maryland*, 373 U.S. 83 (1963) (reviewing federal question arising out of criminal conviction before sentencing because sentence would not moot issue). This well-recognized exception to any requirement of technical finality that Section 1257 otherwise might impose plainly applies here, especially given that Mercury Marine will not even be a party to the only remaining state court proceedings it identifies. Respondent's preemption

defense is thus guaranteed to survive these proceedings as a live issue in this case, and the case is properly presented for review.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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*529 U.S. 861, *; 120 S. Ct. 1913, **;*
*146 L. Ed. 2d 914, ***; 2000 U.S. LEXIS 3425*

ALEXIS GEIER, ET AL. v. AMERICAN HONDA MOTOR COMPANY, INC., ET AL.

No. 98-1811

SUPREME COURT OF THE UNITED STATES

529 U.S. 861; 120 S. Ct. 1913; 146 L. Ed. 2d 914; 2000 U.S. LEXIS 3425; 68 U.S.L.W. 4425; CCH Prod. Liab. Rep. P15,795; 2000 Cal. Daily Op. Service 5277; 2000 Daily Journal DAR 5277; 2000 Colo. J. C.A.R. 2826; 13 Fla. L. Weekly Fed. S 344

December 7, 1999, Argued
May 22, 2000, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DISPOSITION: 166 F.3d 1236, affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, petitioners appealed from the judgment of the appellate court, affirming the dismissal of their "no airbag" tort suit, finding that those claims conflicted with Federal Motor Vehicle Safety Standard 208, and that the National Traffic and Motor Vehicle Safety Act of 1966, former 15 U.S.C.S. § 1381 et seq., consequently pre-empted the suit.

OVERVIEW: Petitioner driver collided with a tree and was seriously injured. Petitioners, the driver and her parents, sued respondent car manufacturer, claiming that respondent had designed its car negligently and defectively because it lacked a driver's side airbag. The district court dismissed the suit, and the court of appeals affirmed. The court granted certiorari and affirmed the dismissal. The court found that the National Traffic and Motor Vehicle Safety Act of 1966, former 15 U.S.C.S. § 1381 et seq., express preemption provision did not preempt the common-law "no airbag" action because the language permitted a narrow reading that excluded common-law actions. However, the court found that petitioners' suit conflicted with Federal Motor Vehicle Safety Standard (FMVSS) 208. FMVSS 208 sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argued would have stood as an obstacle to the accomplishment of that objective, and the statute foresaw the application of ordinary principles of preemption in cases of actual conflict. Hence, petitioners' action was pre-empted.

OUTCOME: Judgment affirmed; petitioners' action was preempted, since the rule of state tort law for which they argued would have stood as an obstacle to the accomplishment of a Federal Motor Vehicle Safety Standard, which sought a developing mix of alternative passive restraint devices.

CORE TERMS: pre-emption, airbag, passive restraint, manufacturer, common-law, regulation, pre-empt, state law, safety standard, saving clause, pre-emptive, passive, seatbelt, belt, automatic, federal law, install, obstacle, pre-empted, saving, manual, Safety Act, occupant, duty, mix, motor vehicle, state tort, installation, promulgated, lawsuit

CORE CONCEPTS - ♦ Hide Concepts

Torts : Procedure : Preemption

A "no airbag" tort suit conflicts with the objectives of Federal Motor Vehicle Safety Standard 208, a standard authorized by the National Traffic and Motor Vehicle Safety Act of 1966, former 15 U.S.C.S. § 1381 et seq., and is therefore pre-empted by the Act.

Constitutional Law : Supremacy Clause

Transportation Law : Private Motor Vehicles : Maintenance & Safety

See former 15 U.S.C.S. § 1392(d).

Torts : Procedure : Preemption

Compliance with a federal safety standard does not exempt any person from any liability under common law, former 15 U.S.C.S. § 1397(k).

Torts : Procedure : Preemption

The savings clause in the Motor Vehicle Safety Act of 1966, former 15 U.S.C.S. § 1381 et seq., (like the express preemption provision) does not bar the ordinary working of conflict preemption principles.

Torts : Procedure : Preemption

The court has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.

Constitutional Law : Supremacy Clause

The saving clause in the Motor Vehicle Safety Act of 1966, former 15 U.S.C.S. § 1381 et seq., foresees -- it does not foreclose -- the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts.

Constitutional Law : Supremacy Clause

The court has not previously driven a legal wedge, only a terminological one, between conflicts that prevent or frustrate the accomplishment of a federal objective and conflicts that make it impossible for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are nullified by the Supremacy Clause of the United States Constitution.

Constitutional Law : Supremacy Clause

Torts : Procedure : Preemption

The court has refused to read general saving provisions to tolerate actual conflict both in cases involving impossibility, and in frustration-of-purpose cases.

Torts : Procedure : Preemption

When the rule of law for which petitioners contend would stand as an obstacle to the accomplishment and execution of the important means-related federal objectives, it is pre-empted.

Constitutional Law : Supremacy Clause

Conflict pre-emption turns on the identification of "actual conflict," and not on an express statement of pre-emptive intent.

Constitutional Law : Supremacy Clause

While pre-emption fundamentally is a question of congressional intent, the court traditionally distinguishes between express and implied pre-emptive intent, and treats conflict pre-emption as an instance of the latter. And though the court has looked for a specific statement of pre-emptive intent where it is claimed that the mere volume and complexity of agency regulations demonstrate an implicit intent to displace all state law in a particular area, so-called field pre-emption, the court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists.

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SYLLABUS: Pursuant to its authority under the National Traffic and Motor Vehicle Safety Act of 1966, the Department of Transportation promulgated Federal Motor Vehicle Safety Standard (FMVSS) 208, which required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints. Petitioner Alexis Geier was injured in an accident while driving a 1987 Honda Accord that did not have such restraints. She and her parents, also petitioners, sought damages under District of Columbia tort law, claiming, *inter alia,* that respondents (hereinafter American Honda) were negligent in not equipping the Accord with a driver's side airbag. Ruling that their claims were expressly pre-empted by the Act, the District Court granted American Honda summary judgment. In affirming, the Court of Appeals concluded that, because petitioners' state tort claims posed an obstacle to the accomplishment of the objectives of FMVSS 208, those claims conflicted with that standard and that, under ordinary pre-emption principles, the Act consequently pre-empted the lawsuit.

Held: Petitioners'"no airbag" lawsuit conflicts with the objectives of FMVSS 208 and is therefore pre-empted by the Act. Pp. 3-23.

(a) The Act's pre-emption provision, 15 U.S.C. § 1392(d), does not expressly pre-empt this lawsuit. The presence of a saving clause, which says that "compliance with" a federal safety standard "does not exempt any person from any liability under common law," § 1397(k), requires that the pre-emption provision be read narrowly to pre-empt only state statutes and regulations. The saving clause assumes that there are a significant number of common-law liability cases to save. And reading the express pre-emption provision to exclude common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate where, for example, federal law creates only a minimum safety standard. Pp. 3-5.

(b) However, the saving clause does *not* bar the ordinary working of conflict pre-emption principles. Nothing in that clause suggests an intent to save state tort actions that conflict with federal regulations. The words "compliance" and "does not exempt" sound as if they simply bar a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute, or a minimum, requirement. This interpretation does not conflict with the purpose of the saving provision, for it preserves actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. Moreover, this

Court has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law, a concern applicable here. The pre-emption provision and the saving provision, read together, reflect a neutral policy, not a specially favorable or unfavorable one, towards the application of ordinary conflict pre-emption. The pre-emption provision itself favors pre-emption of state tort suits, while the saving clause disfavors pre-emption at least some of the time. However, there is nothing in any natural reading of the two provisions that would favor one policy over the other where a jury-imposed safety standard actually conflicts with a federal safety standard. Pp. 5-11.

(c) This lawsuit actually conflicts with FMVSS 208 and the Act itself. DOT saw FMVSS 208 not as a minimum standard, but as a way to provide a manufacturer with a range of choices among different passive restraint systems that would be gradually introduced, thereby lowering costs, overcoming technical safety problems, encouraging technological development, and winning widespread consumer acceptance -- all of which would promote FMVSS 208's safety objectives. The standard's history helps explain why and how DOT sought these objectives. DOT began instituting passive restraint requirements in 1970, but it always permitted passive restraint options. Public resistance to an ignition interlock device that in effect forced occupants to buckle up their manual belts influenced DOT's subsequent initiatives. The 1984 version of FMVSS 208 reflected several significant considerations regarding the effectiveness of manual seatbelts and the likelihood that passengers would leave their manual seatbelts unbuckled, the advantages and disadvantages of passive restraints, and the public's resistance to the installation or use of then-available passive restraint devices. Most importantly, it deliberately sought variety, rejecting an "all airbag" standard because perceived or real safety concerns threatened a backlash more easily overcome with a mix of several different devices. A mix would also help develop data on comparative effectiveness, allow the industry time to overcome safety problems and high production costs associated with airbags, and facilitate the development of alternative, cheaper, and safer passive restraint systems, thereby building public confidence necessary to avoid an interlock-type fiasco. The 1984 standard also deliberately sought to gradually phase-in passive restraints, starting with a 10% requirement in 1987 vehicles. The requirement was also conditional and would stay in effect only if two-thirds of the States did not adopt mandatory buckle-up laws. A rule of state tort law imposing a duty to install airbags in cars such as petitioners' would have presented an obstacle to the variety and mix of devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed. It would also have made adoption of state mandatory seatbelt laws less likely. This Court's pre-emption cases assume compliance with the state law duty in question, and do not turn on such compliance-related considerations as whether a private party would ignore state legal obligations or how likely it is that state law actually would be enforced. Finally, some weight is placed upon DOT's interpretation of FMVSS 208's objectives and its conclusion that a tort suit such as this one would stand as an obstacle to the accomplishment and execution of those objectives. DOT is likely to have a thorough understanding of its own regulation and its objectives and is uniquely qualified to comprehend the likely impact of state requirements. Because there is no reason to suspect that the Solicitor General's representation of these views reflects anything other than the agency's fair and considered judgment on the matter, DOT's failure in promulgating FMVSS 208 to address pre-emption explicitly is not determinative. Nor do the agency's views, as presented here, lack coherence. Pp. 11-23.

166 F.3d 1236, affirmed.

COUNSEL: Arthur H. Bryant argued the cause for petitioners.

Lawrence G. Wallace argued the cause for the United States, as amicus curiae, by special leave of court.

Malcolm E. Wheeler argued the cause for respondents.

JUDGES: BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, THOMAS, and GINSBURG, JJ., joined.

OPINIONBY: BREYER

OPINION: [*864] [*921] [**1916]**

JUSTICE BREYER delivered the opinion of the Court.

[*HR1A]** [1A]
This case focuses on the 1984 version of a Federal Motor Vehicle Safety Standard promulgated by the Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. § 1381 *et seq.* (1988 ed.). The standard, FMVSS 208, required auto manufacturers to equip some but not all of their **[*865]** 1987 vehicles with passive restraints. We ask whether the Act pre-empts a state common-law tort action in which the plaintiff claims that the defendant auto manufacturer, who was in compliance with the standard, should nonetheless **[**1917]** have equipped a 1987 automobile with airbags. We conclude that the Act, taken together with FMVSS 208, pre-empts the lawsuit.

I

In 1992, petitioner Alexis Geier, driving a 1987 Honda Accord, collided with a tree and was seriously injured. The car was equipped with manual shoulder and lap belts which Geier had buckled up at the time. The car was not equipped with airbags or other passive restraint devices.

Geier and her parents, also petitioners, sued the car's manufacturer, American Honda Motor Company, Inc., and its affiliates (hereinafter American Honda), under District of Columbia tort law. They claimed, among other things, that American Honda had designed its car negligently and defectively because it lacked a driver's side airbag. App. 3. The District Court dismissed the lawsuit. The court noted that FMVSS 208 gave car manufacturers a choice as to whether to install airbags. And the court concluded that petitioners' lawsuit, because it sought to establish a different safety standard -- *i.e.,* an airbag requirement -- was expressly pre-empted by a provision of the Act which pre-empts "any safety standard" that is not identical to a federal safety standard applicable to the same aspect of performance, 15 U.S.C. § 1392(d) (1988 ed.); Civ. No. 95-CV-0064 (D. D.C., Dec. 9, 1997), App. 17. (We, like the courts below and the parties, refer to the pre-1994 version of the statute throughout the opinion; it has been recodified at 49 U.S.C. § 30101 *et seq.*). **[***922]**

The Court of Appeals agreed with the District Court's conclusion but on somewhat different reasoning. It had doubts, given the existence of the Act's "saving" clause, 15 U.S.C. § 1397 (k) (1988 ed.), that petitioners' lawsuit involved the potential **[*866]** creation of the kind of "safety standard" to which the Safety Act's express pre-emption provision refers. But it declined to resolve that question because it found that petitioners' state-law tort claims posed an obstacle to the accomplishment of FMVSS 208's objectives. For that reason, it found that those claims conflicted with FMVSS 208, and that, under ordinary pre-emption principles, the Act consequently pre-empted the lawsuit. The Court of Appeals thus affirmed the District Court's dismissal. 166 F.3d 1236, 1238-1243 (CADC 1999).

[*HR1B]** [1B]
Several state courts have held to the contrary, namely, that neither the Act's express pre-emption nor FMVSS 208 pre-empts a "no airbag" tort suit. See, *e.g.*, *Drattel* v. *Toyota Motor Corp.*, 92 N.Y.2d 35, 43-53, 699 N.E.2d 376, 379-386, 677 N.Y.S.2d 17 (1998); *Minton* v. *Honda of America Mfg., Inc.*, 80 Ohio St. 3d 62, 70-79, 684 N.E.2d 648, 655-661 (1997); *Munroe* v. *Galati*, 189 Ariz. 113, 115-119, 938 P.2d 1114, 1116-1120 (1997); *Wilson* v.

Pleasant, 660 N.E.2d 327, 330-339 (Ind. 1995); *Tebbetts* v. *Ford Motor Co.*, 140 N.H. 203, 206-207, 665 A.2d 345, 347-348 (1995). All of the Federal Circuit Courts that have considered the question, however, have found pre-emption. One rested its conclusion on the Act's express pre-emption provision. See, *e.g.*, *Harris* v. *Ford Motor Co.*, 110 F.3d 1410, 1413-1415 (CA9 1997). Others, such as the Court of Appeals below, have instead found pre-emption under ordinary pre-emption principles by virtue of the conflict such suits pose to FMVSS 208's objectives, and thus to the Act itself. See, *e.g.*, *Montag* v. *Honda Motor Co.*, 75 F.3d 1414, 1417 (CA10 1996); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116, 1121-1125 (CA3 1990); *Taylor* v. *General Motors Corp.*, 875 F.2d 816, 825-827 (CA11 1989); *Wood* v. *General Motors Corp.*, 865 F.2d 395, 412-414 (CA1 1988). We granted certiorari to resolve these differences. We now hold that this kind of "no airbag" lawsuit conflicts with the objectives of FMVSS 208, a standard authorized by the Act, and is therefore pre-empted by the Act. **[*867]**

[*HR1C]** [1C]
[*HR2A]** [2A]
[*HR3A]** [3A]
In reaching our conclusion, we consider three subsidiary questions. First, does the Act's express pre-emption provision **[**1918]** pre-empt this lawsuit? We think not. Second, do ordinary pre-emption principles nonetheless apply? We hold that they do. Third, does this lawsuit actually conflict with FMVSS 208, hence with the Act itself? We hold that it does.

II

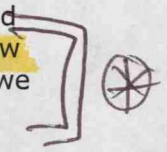
We first ask whether the Safety Act's express pre-emption provision pre-empts this tort action. The provision reads as follows:

"Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment [,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." **[***923]** 15 U.S.C. § 1392 (d) (1988 ed.).

American Honda points out that a majority of this Court has said that a somewhat similar statutory provision in a different federal statute -- a provision that uses the word "requirements" -- may well expressly pre-empt similar tort actions. See, *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 502-504, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996) (plurality opinion); 518 U.S. at 503-505 (BREYER, J., concurring in part and concurring in judgment); 518 U.S. at 509-512 (O'CONNOR, J., concurring in part and dissenting in part). Petitioners reply that this statute speaks of pre-empting a state-law "safety *standard*," not a "requirement," and that a tort action does not involve a safety *standard*. Hence, they conclude, the express pre-emption provision does not apply.

[*HR2B]** [2B]
We need not determine the precise significance of the use of the word "standard," rather than "requirement," however, for the Act contains another provision, which resolves the **[*868]** disagreement. That provision, a "saving" clause, says that "compliance with" a federal safety standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k) (1988 ed.). The saving clause assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate -- for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. See, *e.g.*, Brief for United States as *Amicus Curiae* 21 (explaining that common-law claim that a vehicle is defectively designed because it lacks antilock brakes would not be pre-empted by 49 CFR § 571.105 (1999), a safety standard establishing minimum requirements for brake

performance). Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions, for, as we have just mentioned, it is possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence the broad reading cannot be correct. The language of the pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the pre-emption clause must be so read. **[*869]** **[**1919]**



III

We have just said that the saving clause *at least* removes tort actions from the scope of the express pre-emption clause. Does it do more? In **[***924]** particular, does it foreclose or limit the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that "actually conflict" with the statute or federal standards promulgated thereunder? *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta,* 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). Petitioners concede, as they must in light of *Freightliner Corp.* v. *Myrick,* 514 U.S. 280, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995), that the pre-emption provision, by itself, does not foreclose (through negative implication) "any possibility of implied [conflict] pre-emption," *id.,* at 288 (discussing *Cipollone* v. *Liggett Group, Inc.,* 505 U.S. 504, 517-518, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992)). But they argue that the saving clause has that very effect.

[*HR3B]** [3B]
We recognize that, when this Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act. See *Freightliner, supra,* at 287, n. 3 (declining to address whether the saving clause prevents a manufacturer from "using a federal safety standard to immunize itself from state common-law liability"). We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.

[*HR2C]** [2C]
[*HR3C]** [3C]
Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations. The words "compliance" and "does not exempt," 15 U.S.C. § 1397(k) (1988 ed.), sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one. See Restatement (Third) of Torts: Products **[*870]** Liability § 4(b), Comment *e* (1997) (distinguishing between state-law compliance defense and a federal claim of pre-emption). It is difficult to understand why Congress would have insisted on a compliance-with-federal-regulation precondition to the provision's applicability had it wished the Act to "save" all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act. Nor does our interpretation conflict with the purpose of the saving provision, say by rendering it ineffectual. As we have previously explained, the saving provision still makes clear that the express pre-emption provision does not of its own force pre-empt common-law tort actions. And it thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. See *supra*, at 4-5.

[*HR4]** [4]
Moreover, this Court has repeatedly "declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States* v. *Locke*, 529 U.S. ,(2000) (slip op., at 14); see *American Telephone & Telegraph Co.* v. *Central Office Telephone,* **[***925]** *Inc.*, 524 U.S. 214, 227-228, 141 L. Ed. 2d 222, 118 S. Ct. 1956 (1998) *(AT&T)*; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446, 51 L. Ed. 553, 27 S. Ct. 350 (1907). We find this concern applicable in the present case. And we conclude that the saving clause foresees -- it does not foreclose -- the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts. We do not understand the dissent to disagree, for it acknowledges **[**1920]** that ordinary pre-emption principles apply, at least sometimes. *Post*, at 14-16 (opinion of STEVENS, J.).

[*HR5A]** [5A]
Neither do we believe that the pre-emption provision, the saving provision, or both together, create some kind of "special burden" beyond that inherent in ordinary pre-emption principles -- which "special burden" would specially disfavor pre-emption here. Cf. *post,* at 14. The two provisions, read together, reflect a neutral policy, not a specially **[*871]** favorable or unfavorable policy, towards the application of ordinary conflict pre-emption principles. On the one hand, the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create. See H. R. Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966) ("Basically, this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards"); S. Rep. No. 1301, 89th Cong., 2d Sess., 12 (1966). This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.

On the other hand, the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. That policy by itself disfavors pre-emption, at least some of the time. But we can find nothing in any natural reading of the two provisions that would favor one set of policies over the other where a jury-imposed safety standard actually conflicts with a federal safety standard.

[*HR6]** [6]
Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield retention requirements that federal law requires. **[*872]** See, *e.g.*, 49 CFR § 571.212 (1999). Insofar as petitioners' argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally **[***926]** mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect. To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to "'destroy itself.'" *AT&T, supra,* at 228 (quoting *Abilene Cotton,* 524 U.S. at 446). We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship. Cf. *post*, at 15, n. 16. But there is no reason to believe Congress has done so here.

[*HR5B]** [5B]
The dissent, as we have said, contends nonetheless that the express pre-emption and saving provisions here, taken together, create a "special burden," which a court must impose "on a party" who claims conflict pre-emption under those principles. *Post*, at 14. But nothing in the Safety Act's language refers to any "special burden." Nor can one find the basis for a "special burden" in this Court's precedents. **[**1921]** It is true that, in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995), the Court said, in the context of interpreting the Safety Act, that "[*a*]*t best*" there is an "inference that an express pre-emption clause forecloses implied pre-emption." *Id.*, at 289 (emphasis added). But the Court made this statement in the course of *rejecting* the more absolute argument that the presence of the express pre-emption provision entirely foreclosed the possibility of conflict pre-emption. *Id.*, at 288. The statement, headed with the qualifier "at best," and made in a case where, without any need for inferences or "special burdens," state law obviously would survive, see 514 U.S. at 289-290, simply preserves a legal possibility. This **[*873]** Court did not hold that the Safety Act *does* create a "special burden," or still less that such a burden necessarily arises from the limits of an express pre-emption provision. And considerations of language, purpose, and administrative workability, together with the principles underlying this Court's pre-emption doctrine discussed above, make clear that the express pre-emption provision imposes no unusual, "special burden" against pre-emption. For similar reasons, we do not see the basis for interpreting the saving clause to impose any such burden.

[*HR3D]** [3D]
[*HR5C]** [5C]
[*HR7A]** [7A]
[*HR8]** [8]
A "special burden" would also promise practical difficulty by further complicating well-established pre-emption principles that already are difficult to apply. The dissent does not contend that this "special burden" would apply in a case in which state law penalizes what federal law requires -- *i.e.*, a case of impossibility. See *post*, at 8, n. 6, 15-16, n. 16. But if it would not apply in such a case, then how, or when, would it apply? This Court, when describing conflict pre-emption, has spoken of pre-empting state law that "under the circumstances of the particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" -- whether that "obstacle" goes **[***927]** by the name of "conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; . . . interference," or the like. *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941); see *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). The Court has not previously driven a legal wedge -- only a terminological one -- between "conflicts" that prevent or frustrate the accomplishment of a federal objective and "conflicts" that make it "impossible" for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are "nullified" by the Supremacy Clause, *De la Cuesta*, 458 U.S. at 152-153; see *Locke*, 529 U.S., at (slip op., at 17); *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 110 S. Ct. 2270 (1990), and it has assumed that Congress would not want either kind of conflict. The Court **[*874]** has thus refused to read general "saving" provisions to tolerate actual conflict *both* in cases involving impossibility, see, *e.g.*, *AT&T*, 524 U.S. at 228, *and* in "frustration-of-purpose" cases, see, *e.g.*, *Locke*, *supra*, at (slip op., at 11-20); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-494, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987); see also *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328-331, 67 L. Ed. 2d 258, 101 S. Ct. 1124 (1981). We see no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case. That kind of analysis, moreover, would engender legal uncertainty with its inevitable systemwide costs (*e.g.*, conflicts, delay, and expense) as courts tried sensibly to distinguish among varieties of "conflict" (which often shade, one into the other) when applying this complicated rule to the many federal statutes that contain **[**1922]** some form of an express pre-emption provision, a saving provision, or as here, both. Nothing in the statute

suggests Congress wanted to complicate ordinary experience-proved principles of conflict pre-emption with an added, "special burden." Indeed, the dissent's willingness to impose a "special burden" here stems ultimately from its view that "frustration-of-purpose" conflict pre-emption is a freewheeling, "inadequately considered" doctrine that might well be "eliminated." *Post*, at 24, and n. 22. In a word, ordinary pre-emption principles, grounded in longstanding precedent, *Hines, supra,* at 67, apply. We would not further complicate the law with complex new doctrine.

IV

[*HR1D]** [1D]
The basic question, then, is whether a common-law "no airbag" action like the one before us actually conflicts with FMVSS 208. We hold that it does.

In petitioners' and the dissent's view, FMVSS 208 sets a minimum airbag standard. As far as FMVSS 208 is concerned, the more airbags, and the sooner, the better. But that was not the Secretary's view. DOT's **[*875]** comments, which accompanied the promulgation of FMVSS 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices **[***928]** would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance -- all of which would promote FMVSS 208's safety objectives. See generally 49 Fed. Reg. 28962 (1984).

A

The history of FMVSS 208 helps explain why and how DOT sought these objectives. See generally *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 34-38, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). In 1967, DOT, understanding that seatbelts would save many lives, required manufacturers to install manual seat belts in all automobiles. 32 Fed. Reg. 2408, 2415. It became apparent, however, that most occupants simply would not buckle up their belts. See 34 Fed. Reg. 11148 (1969). DOT then began to investigate the feasibility of requiring "passive restraints," such as airbags and automatic seatbelts. *Ibid.* In 1970, it amended FMVSS 208 to include some passive protection requirements, 35 Fed. Reg. 16927, while making clear that airbags were one of several "equally acceptable" devices and that it neither "'favored' nor expected the introduction of airbag systems." *Ibid.* In 1971, it added an express provision permitting compliance through the use of nondetachable passive belts, 36 Fed. Reg. 12858, 12859, and in 1972, it mandated full passive protection for all front seat occupants for vehicles manufactured after August 15, 1975, 37 Fed. Reg. 3911. Although the agency's focus was originally on airbags, 34 Fed. Reg. 11148 (1969) (notice of proposed rulemaking); *State Farm*, 463 U.S. at 35, n. 4; see also *id.*, at 46, n. 11 (noting view of commentators that, as of 1970, FMVSS **[*876]** 208 was "'a de facto airbag mandate'" because of the state of passive restraint technology), at no point did FMVSS 208 formally require the use of airbags. From the start, as in 1984, it permitted passive restraint options.

DOT gave manufacturers a further choice for new vehicles manufactured between 1972 and August 1975. Manufacturers could either install a passive restraint device such as automatic seatbelts or airbags or retain manual belts and add an "ignition interlock" device that in effect forced occupants to buckle up by preventing the ignition otherwise from turning on. 37 Fed. Reg. 3911 (1972). The interlock soon became popular with manufacturers. And in 1974, when the agency approved the use of detachable automatic seatbelts, it conditioned that approval by providing **[**1923]** that such systems must include an interlock system *and* a continuous warning buzzer to encourage reattachment of the belt. 39 Fed. Reg. 14593. But the interlock and buzzer devices were most unpopular with the public. And Congress, responding to public pressure, passed a law that forbade DOT from requiring, or permitting compliance by means of, such devices. Motor Vehicle and Schoolbus Safety Amendments of

1974, § 109, 88 Stat. 1482 (previously codified at 15 U.S.C. § 1410b(b) (1988 ed.)).

That experience influenced DOT's subsequent passive restraint initiatives. In 1976, DOT Secretary William **[***929]** Coleman, fearing continued public resistance, suspended the passive restraint requirements. He sought to win public acceptance for a variety of passive restraint devices through a demonstration project that would involve about half a million new automobiles. *State Farm, supra,* at 37. But his successor, Brock Adams, canceled the project, instead amending FMVSS 208 to require passive restraints, principally either airbags or passive seat belts. 42 Fed. Reg. 34289 (1977).

Andrew Lewis, a new DOT Secretary in a new administration, rescinded the Adams requirements, primarily because DOT learned that the industry planned to satisfy those **[*877]** requirements almost exclusively through the installation of detachable automatic seatbelts. 46 Fed. Reg. 53419-53420 (1981). This Court held the rescission unlawful. *State Farm, supra,* at 34, 46. And the stage was set for then-DOT Secretary, Elizabeth Dole, to amend FMVSS 208 once again, promulgating the version that is now before us. 49 Fed. Reg. 28962 (1984).

B

Read in light of this history, DOT's own contemporaneous explanation of FMVSS 208 makes clear that the 1984 version of FMVSS 208 reflected the following significant considerations. First, buckled up seatbelts are a vital ingredient of automobile safety. *Id.,* at 29003; *State Farm, supra,* at 52 ("We start with the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries"). Second, despite the enormous and unnecessary risks that a passenger runs by not buckling up manual lap and shoulder belts, more than 80% of front seat passengers would leave their manual seatbelts unbuckled. 49 Fed. Reg. 28983 (1984) (estimating that only 12.5% of front seat passengers buckled up manual belts). Third, airbags could make up for the dangers caused by unbuckled manual belts, but they could not make up for them entirely. *Id.,* at 28986 (concluding that, although an airbag plus a lap and shoulder belt was the most "effective" system, airbags alone were *less* effective than buckled up manual lap and shoulder belts).

Fourth, passive restraint systems had their own disadvantages, for example, the dangers associated with, intrusiveness of, and corresponding public dislike for, nondetachable automatic belts. *Id.,* at 28992-28993. Fifth, airbags brought with them their own special risks to safety, such as the risk of danger to out-of-position occupants (usually children) in small cars. *Id.,* at 28992, 29001; see also 65 Fed. Reg. 30680, 30681-30682 (2000) (finding 158 confirmed airbag-induced fatalities as of April 2000, and amending rule **[*878]** to add new requirements, test procedures, and injury criteria to ensure that "future air bags be designed to create less risk of serious airbag-induced injuries than current air bags, particularly for small women and young children"); U.S. Dept. of Transportation, National Highway Traffic Safety Administration, National Accident Sampling System Crashworthiness Data System 1991-1993, p. viii (Aug. 1995) (finding that airbags caused approximately 54,000 injuries between 1991 and 1993). **[**1924]** **[***930]**

Sixth, airbags were expected to be significantly more expensive than other passive restraint devices, raising the average cost of a vehicle price $ 320 for full frontal airbags over the cost of a car with manual lap and shoulder seatbelts (and potentially much more if production volumes were low). 49 Fed. Reg. 28990 (1984). And the agency worried that the high replacement cost -- estimated to be $ 800 -- could lead car owners to refuse to replace them after deployment. *Id.,* at 28990, 29000-29001; see also *id.,* at 28990 (estimating total investment costs for mandatory airbag requirement at $ 1.3 billion compared to $ 500 million for automatic seatbelts). Seventh, the public, for reasons of cost, fear, or physical intrusiveness, might resist installation or use of any of the then-available passive restraint devices, *id.,* at 28987-28989 -- a particular concern with respect to airbags, *id.,* at 29001

(noting that "airbags engendered the largest quantity of, and most vociferously worded, comments").

FMVSS 208 reflected these considerations in several ways. Most importantly, that standard deliberately sought variety -- a mix of several different passive restraint systems. It did so by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement. *Id.,* at 28996. And DOT explained why FMVSS 208 sought the mix of devices that it expected its performance standard to produce. *Id.* at **[*879]** 28997. DOT wrote that it had *rejected* a proposed FMVSS 208 "all airbag" standard because of safety concerns (perceived or real) associated with airbags, which concerns threatened a "backlash" more easily overcome "if airbags" were "not the only way of complying." *Id.,* at 29001. It added that a mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. *Id.,* at 29001-29002. And it would thereby build public confidence, *id.,* at 29001-29002, necessary to avoid another interlock-type fiasco.

The 1984 FMVSS 208 standard also deliberately sought a *gradual* phase-in of passive restraints. *Id.,* at 28999-29000. It required the manufacturers to equip only 10% of their car fleet manufactured after September 1, 1986, with passive restraints. *Id.,* at 28999. It then increased the percentage in three annual stages, up to 100% of the new car fleet for cars manufactured after September 1, 1989. *Ibid.* And it explained that the phased-in requirement would allow more time for manufacturers to develop airbags or other, better, safer passive restraint systems. It would help develop information about the comparative effectiveness of different systems, would lead to a mix in which airbags and other nonseatbelt passive restraint systems played a more prominent role than would otherwise result, and would promote public acceptance. *Id.,* at 29000-29001.

Of course, as the dissent points out, *post*, at 19-20, FMVSS 208 did not guarantee the mix by setting a ceiling for each different passive restraint **[***931]** device. In fact, it provided a form of extra credit for airbag installation (and other nonbelt passive restraint devices) under which each airbag-installed vehicle counted as 1.5 vehicles for purposes of meeting FMVSS 208's passive restraint requirement. 49 CFR § 571.208, S4.1.3.4(a)(1) (1999); 49 Fed. Reg. 29000 (1984). **[*880]** But why should DOT have bothered to impose an airbag ceiling when the practical threat to the mix it desired arose from the likelihood that manufacturers would install, not too many airbags too quickly, but too few or none at all? After all, only a few years earlier, Secretary Dole's predecessor had discovered that manufacturers intended to meet **[**1925]** the then-current passive restraint requirement almost entirely (more than 99%) through the installation of more affordable automatic belt systems. 46 Fed. Reg. 53421 (1981); *State Farm*, 463 U.S. at 38. The extra credit, as DOT explained, was designed to "encourage manufacturers to equip *at least some* of their cars with airbags." 49 Fed. Reg. 29001 (1984) (emphasis added) (responding to comment that failure to mandate airbags might mean the "end of . . . airbag technology"); see also *id.,* at 29000 (explaining that the extra credit for airbags "should promote the development of what may be better alternatives to automatic belts *than would otherwise be developed*" (emphasis added)). The credit provision *reinforces* the point that FMVSS 208 sought a gradually developing mix of passive restraint devices; it does not show the contrary.

Finally FMVSS 208's passive restraint requirement was conditional. DOT believed that ordinary manual lap and shoulder belts would produce about the same amount of safety as passive restraints, and at significantly lower costs -- *if only auto occupants would buckle up*. See *id.,* at 28997-28998. Thus, FMVSS 208 provided for rescission of its passive restraint requirement if, by September 1, 1989, two-thirds of the States had laws in place that, like those of many other nations, required auto occupants to buckle up (and which met other requirements specified in the standard). *Id.,* at 28963, 28993-28994, 28997-28999. The

Secretary wrote that "coverage of a large percentage of the American people by seatbelt laws that are enforced would largely negate the incremental increase in safety to be expected from an automatic protection requirement." *Id.,* at 28997. **[*881]** In the end, two-thirds of the States did not enact mandatory buckle-up laws, and the passive restraint requirement remained in effect.

In sum, as DOT now tells us through the Solicitor General, the 1984 version of FMVSS 208 "embodies the Secretary's 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." Brief for United States as *Amicus Curiae* 25; see 49 Fed. Reg. 28997 (1984). Petitioners' tort suit claims that the manufacturers of the 1987 Honda Accord "had a duty to design, manufacture, distribute and sell a motor vehicle with an effective and safe passive restraint system, including, but not limited to, airbags." App. 3 (Complaint, P 11).

In effect, petitioners' tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the **[***932]** 1987 Honda Accord. Such a state law -- *i.e.*, a rule of state tort law imposing such a duty -- by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. It would have required all manufacturers to have installed airbags in respect to the entire District-of-Columbia-related portion of their 1987 new car fleet, even though FMVSS 208 at that time required only that 10% of a manufacturer's nationwide fleet be equipped with any passive restraint device at all. It thereby also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed. In addition, it could have made less likely the adoption of a state mandatory buckle-up law. Because the rule of law for which petitioners contend would have stood "as an obstacle to the accomplishment and execution of " the important means-related federal objectives that we have just discussed, it is pre-empted. *Hines*, 312 U.S. at **[*882]** 67; see also *Ouellette*, 479 U.S. at 493; *De la Cuesta*, 458 U.S. at 156 (finding conflict and pre-emption where state law limited the availability of an option **[**1926]** that the federal agency considered essential to ensure its ultimate objectives).

Petitioners ask this Court to calculate the precise size of the "obstacle," with the aim of minimizing it, by considering the risk of tort liability and a successful tort action's incentive-related or timing-related compliance effects. See Brief for Petitioners 45-50. The dissent agrees. *Post*, at 17-20. But this Court's pre-emption cases do not ordinarily turn on such compliance-related considerations as whether a private party in practice would ignore state legal obligations -- paying, say, a fine instead -- or how likely it is that state law actually would be enforced. Rather, this Court's pre-emption cases ordinarily *assume* compliance with the state law duty in question. The Court has on occasion suggested that tort law may be somewhat different, and that related considerations -- for example, the ability to pay damages instead of modifying one's behavior -- may be relevant for pre-emption purposes. See *Goodyear Atomic Corp.* v. *Miller,* 486 U.S. 174, 185, 100 L. Ed. 2d 158, 108 S. Ct. 1704 (1988); *Cipollone*, 505 U.S. at 536-539 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part); see also *English,* 496 U.S. at 86; *Silkwood* v. *Kerr-McGee Corp.,* 464 U.S. 238, 256, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984). In other cases, the Court has found tort law to conflict with federal law without engaging in that kind of an analysis. See, *e.g., Ouellette,* 479 U.S. at 494-497; *Kalo Brick*, 450 U.S. at 324-332. We need not try to resolve these differences here, however, for the incentive or compliance considerations upon which the dissent relies cannot, by themselves, change the legal result. Some of those considerations rest on speculation, see, *e.g., post*, at 17 (predicting risk of "no airbag" liability and manufacturers' **[***933]** likely response to such liability); some rest in critical part upon the dissenters' own view of FMVSS 208's basic purposes -- a view **[*883]** which we reject, see, *e.g., post*, at 17-20 (suggesting that pre-existing risk of "no airbag" liability would have made FMVSS 208 unnecessary); and others, if we understand them

correctly, seem less than persuasive, see, *e.g.*, *post*, at 18 (suggesting that manufacturers could have complied with a mandatory state airbag duty by installing a *different* kind of passive restraint device). And in so concluding, we do not "put the burden" of proving pre-emption on petitioners. *Post*, at 23. We simply find unpersuasive their arguments attempting to undermine the Government's demonstration of actual conflict.

One final point: We place some weight upon DOT's interpretation of FMVSS 208's objectives and its conclusion, as set forth in the Government's brief, that a tort suit such as this one would "'stand as an obstacle to the accomplishment and execution'" of those objectives. Brief for United States as *Amicus Curiae* 25-26 (quoting *Hines*, 312 U.S. at 67). Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirements. *Medtronic*, 518 U.S. at 496; see *id.* at 506 (BREYER, J,. concurring in part and concurring in judgment). And DOT has explained FMVSS 208's objectives, and the interference that "no airbag" suits pose thereto, consistently over time. Brief for United States as *Amicus Curiae* in *Freightliner Corp.* v. *Myrick*, O. T. 1994, No. 94-286, pp. 28-29; Brief for United States as *Amicus Curiae* in *Wood* v. *General Motors Corp.*, O. T. 1989, No. 89-46, pp. 7, 11-16. In these circumstances, the agency's own views should make a difference. See *City of New York* v. *FCC*, 486 U.S. 57, 64, 100 L. Ed. 2d 48, 108 S. Ct. 1637 (1988); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714, 721, 85 L. Ed. 2d 714, **[**1927]** 105 S. Ct. 2371 (1985); *De la Cuesta, supra*, at 158; *Blum* v. *Bacon*, 457 U.S. 132, 141, 72 L. Ed. 2d 728, 102 S. Ct. 2355 (1982); *Kalo Brick, supra*, at 321. **[*884]**

We have no reason to suspect that the Solicitor General's representation of DOT's views reflects anything other than "the agency's fair and considered judgment on the matter." *Auer* v. *Robbins*, 519 U.S. 452, 461-462, 137 L. Ed. 2d 79, 117 S. Ct. 905 (1997); cf. *Hillsborough County, supra*, at 721 (expressing reluctance, in the absence of strong evidence, to find an actual conflict between state law and federal regulation where agency that promulgated the regulation had not, at the time the regulation was promulgated *or subsequently*, concluded that such a conflict existed). The failure of the Federal Register to address pre-emption explicitly is thus not determinative.

[*HR1E]** [1E]
[*HR7B]** [7B]
[*HR9]** [9]
The dissent would require a formal agency statement of **[***934]** pre-emptive intent as a prerequisite to concluding that a conflict exists. It relies on cases, or portions thereof, that did not involve conflict pre-emption. See *post*, at 25; *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 583, 94 L. Ed. 2d 577, 107 S. Ct. 1419 (1987); *Hillsborough, supra*, at 718. And conflict pre-emption is different in that it turns on the identification of "actual conflict," and not on an express statement of pre-emptive intent. *English*, 496 U.S. at 78-79; see *Hillsborough*, 471 U.S. at 720-721; *Jones*, 430 U.S. at 540-543. While "pre-emption fundamentally is a question of congressional intent," *English, supra*, at 78, this Court traditionally distinguishes between "express" and "implied" pre-emptive intent, and treats "conflict" pre-emption as an instance of the latter. See, *e.g.*, *Freightliner*, 514 U.S. at 287; *English*, 496 U.S. at 78-79; see also *Cipollone*, 505 U.S. at 545, 547-548 (SCALIA, J., concurring in judgment in part and dissenting in part). And though the Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere "volume and complexity" of agency regulations demonstrate an implicit intent to displace *all* state law in a particular area, *Hillsborough, supra*, at 717; see *post*, at 25, n. 23 -- so-called "field pre-emption" -- the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists. **[*885]** Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict. While we certainly accept the dissent's basic position that a court should not find pre-emption too readily in the absence of clear evidence of a conflict, *English, supra*,

at 90, for the reasons set out above we find such evidence here. To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended. The dissent, as we have said, apparently welcomes that result, at least where "frustration-of-purpose" pre-emption by agency regulation is at issue. *Post*, at 24, and n. 22. We do not.

Nor do we agree with the dissent that the agency's views, as presented here, lack coherence. *Post*, at 21-22. The dissent points, *ibid.*, to language in the Government's brief stating that

"a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car *because of other design features particular to that car* . . . would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23 (emphasis added).

And the dissent says that these words amount to a concession that there is no conflict in this very case. *Post*, at 21. But that is not what the words say. Rather, **[**1928]** as the italicized phrase emphasizes, **[***935]** they simply leave open the question whether FMVSS 208 would pre-empt a different kind of tort case -- one *not* at issue here. It is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption -- say, because it would affect so few cars that its rule of law would not create a legal "obstacle" to 208's mixed-fleet, gradual objective. But that is not what petitioners **[*886]** claimed. They have argued generally that, to be safe, a car must have an airbag. See App. 4.

[*HR1F]** [1F]
Regardless, the language of FMVSS 208 and the contemporaneous 1984 DOT explanation is clear enough -- even without giving DOT's own view special weight. FMVSS 208 sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argue would stand as an "obstacle" to the accomplishment of that objective. And the statute foresees the application of ordinary principles of pre-emption in cases of actual conflict. Hence, the tort action is pre-empted.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

DISSENTBY: STEVENS

DISSENT: JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE THOMAS, and JUSTICE GINSBURG join, dissenting.

Airbag technology has been available to automobile manufacturers for over 30 years. There is now general agreement on the proposition "that, to be safe, a car must have an airbag." *Ante*, at 23. Indeed, current federal law imposes that requirement on all automobile manufacturers. See 49 U.S.C. § 30127; 49 CFR § 571.208, S4.1.5.3 (1998). The question raised by petitioner's common-law tort action is whether that proposition was sufficiently obvious when Honda's 1987 Accord was manufactured to make the failure to install such a safety feature actionable under theories of negligence or defective design. The Court holds that an interim regulation motivated by the Secretary of Transportation's desire to foster gradual development of a variety of passive restraint devices deprives state courts of jurisdiction to answer that question. I respectfully dissent from that holding, and especially from the Court's unprecedented extension of the doctrine of pre-emption. As a preface to an explanation of my understanding of the statute and the regulation, these preliminary observations seem appropriate. **[*887]**

"This is a case about federalism," *Coleman* v. *Thompson*, 501 U.S. 722, 726, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991), that is, about respect for "the constitutional role of the States as sovereign entities." *Alden* v. *Maine*, 527 U.S. 706, 713, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999). It raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions. The rule the Court enforces today was not enacted by Congress and is not to be found in the text of any Executive Order or regulation. It has a unique origin: it is the product **[***936]** of the Court's interpretation of the final commentary accompanying an interim administrative regulation and the history of airbag regulation generally. Like many other judge-made rules, its contours are not precisely defined. I believe, however, that it is fair to state that if it had been expressly adopted by the Secretary of Transportation, it would have read as follows:

"No state court shall entertain a common-law tort action based on a claim that an automobile was negligently or defectively designed because it was not equipped with an airbag;

"Provided, however, that this rule shall not apply to cars manufactured before September 1, 1986, or after such time as **[**1929]** the Secretary may require the installation of airbags in all new cars; and

"Provided further, that this rule shall not preclude a claim by a driver who was not wearing her seatbelt that an automobile was negligently or defectively designed because it was not equipped with any passive restraint whatsoever, or a claim that an automobile with particular design features was negligently or defectively designed because it was equipped with one type of passive restraint instead of another."

Perhaps such a rule would be a wise component of a legislative reform of our tort system. I express no opinion about **[*888]** that possibility. It is, however, quite clear to me that Congress neither enacted any such rule itself nor authorized the Secretary of Transportation to do so. It is equally clear to me that the objectives that the Secretary intended to achieve through the adoption of Federal Motor Vehicle Safety Standard 208 would not be frustrated one whit by allowing state courts to determine whether in 1987 the life-saving advantages of airbags had become sufficiently obvious that their omission might constitute a design defect in some new cars. Finally, I submit that the Court is quite wrong to characterize its rejection of the presumption against pre-emption, and its reliance on history and regulatory commentary rather than either statutory or regulatory text, as "ordinary experience-proved principles of conflict pre-emption." *Ante*, at 11.

I

The question presented is whether either the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act or Act), 80 Stat. 718, 15 U.S.C. § 1381 *et seq.* (1988 ed.), n1 or the version of Standard 208 promulgated by the Secretary of Transportation in 1984, 49 CFR §§ 571.208, S4.1.3-S4.1.4 (1998), pre-empts common-law tort claims that an automobile manufactured in 1987 was negligently and defectively designed because it lacked "an effective and safe passive restraint system, including, but not limited to, airbags." App. 3. In *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 34-38, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983), we **[***937]** reviewed the first chapters of the "complex and convoluted history" of Standard 208. It was the "unacceptably high" rate of deaths and injuries caused by automobile accidents that led to the enactment of the Safety Act in 1966. *Id.*, at 33. The purpose of the Act, as stated by Congress, **[*889]** was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. The Act directed the Secretary of Transportation or his delegate to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." § 1392(a). The Act defines the term "safety standard" as a "minimum standard for motor vehicle performance, or motor vehicle equipment performance." § 1391(2).

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n1 In 1994, the Safety Act was recodified at 49 U.S.C. § 30101 *et seq*. Because the changes made to the Act as part of the recodification process were not intended to be substantive, throughout this opinion I shall refer to the pre-1994 version of the statute, as did the Court of Appeals.

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Standard 208 covers "occupant crash protection." Its purpose "is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements . . . [and] equipment requirements for active and passive restraint systems." 49 CFR § 571.208, S2 (1998). The first version of that standard, issued in 1967, simply required the installation of manual seatbelts in all automobiles. Two years later the Secretary formally proposed a revision that would require the installation of "passive occupant restraint systems," that is to say, devices that do not depend for their effectiveness on any action by the vehicle **[**1930]** occupant. The airbag is one such system. n2 The Secretary's proposal led to a series of amendments to Standard 208 that imposed various passive restraint requirements, culminating in a 1977 regulation that mandated such restraints in all cars by the model year 1984. The two commercially available restraints that could satisfy this mandate **[*890]** were airbags and automatic seatbelts; the regulation allowed each vehicle manufacturer to choose which restraint to install. In 1981, however, following a change of administration, the new Secretary first extended the deadline for compliance and then rescinded the passive restraint requirement altogether. In *Motor Vehicle Mfrs. Assn.*, we affirmed a decision by the Court of Appeals holding that this rescission was arbitrary. On remand, Secretary Elizabeth Dole promulgated the version of Standard 208 that is at issue in this case.

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n2 "The airbag is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces. The lifesaving potential of these devices was immediately recognized, and in 1977, after substantial on-the-road experience with both devices, it was estimated by [the National Highway Traffic Safety Administration (NHTSA)] that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually. 42 Fed. Reg. 34298." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 35, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

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The 1984 standard provided for a phase-in of passive restraint requirements beginning with the 1987 model year. In that year, vehicle manufacturers were required to equip a minimum of 10% of their new passenger cars with such restraints. While the 1987 Honda Accord driven by Ms. Geier was not so equipped, it is undisputed that Honda complied with the 10% minimum by installing passive restraints **[***938]** in certain other 1987 models. This minimum passive restraint requirement increased to 25% of 1988 models and 40% of 1989 models; the standard also mandated that "after September 1, 1989, all new cars must have automatic occupant crash protection." 49 Fed. Reg. 28999 (1984); see 49 CFR §§ 571.208, S4.1.3-S4.1.4 (1998). In response to a 1991 amendment to the Safety Act, the Secretary amended the standard to require that, beginning in the 1998 model year, all new cars have an airbag at both the driver's and right front passenger's positions. n3

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n3 See 49 U.S.C. § 30127; 49 CFR § 571.208, S4.1.5.3 (1998). Congress stated that it did not intend its amendment or the Secretary's consequent alteration of Standard 208 to affect the potential liability of vehicle manufacturers under applicable law related to vehicles with or without airbags. 49 U.S.C. § 30127(f)(2).

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Given that Secretary Dole promulgated the 1984 standard in response to our opinion invalidating her predecessor's rescission of the 1977 passive restraint requirement, she provided a full explanation for her decision not to require airbags **[*891]** in all cars and to phase in the new requirements. The initial 3-year delay was designed to give vehicle manufacturers adequate time for compliance. The decision to give manufacturers a choice between airbags and a different form of passive restraint, such as an automatic seatbelt, was motivated in part by safety concerns and in part by a desire not to retard the development of more effective systems. 49 Fed. Reg. 29000-29001 (1984). An important safety concern was the fear of a "public backlash" to an airbag mandate that consumers might not fully understand. The Secretary believed, however, that the use of airbags would avoid possible public objections to automatic seatbelts and that many of the public concerns regarding airbags were unfounded. *Id.,* at 28991.

Although the standard did not require airbags in all cars, it is clear that the Secretary did intend to encourage wider use of airbags. One of her basic conclusions was that "automatic occupant protection **[**1931]** systems that do not totally rely upon belts, such as airbags . . . , offer significant additional potential for preventing fatalities and injuries, at least in part because the American public is likely to find them less intrusive; their development and availability should be encouraged through appropriate incentives." *Id.,* at 28963; see also *id.,* at 28966, 28986 (noting conclusion of both Secretary and manufacturers that airbags used in conjunction with manual lap and shoulder belts would be "the most effective system of all" for preventing fatalities and injuries). The Secretary therefore included a phase-in period in order to encourage manufacturers to comply with the standard by installing airbags and other (perhaps more effective) nonbelt technologies that they might develop, rather than by installing less expensive automatic seatbelts. n4 As a further incentive **[*892]** for the use of such technologies, the standard provided that a vehicle equipped with an airbag or other nonbelt system would count as 1.5 vehicles for the purpose **[***939]** of determining compliance with the required 10, 25, or 40% minimum passive restraint requirement during the phase-in period. 49 CFR § 571.208, S4.1.3.4(a)(1) (1998). With one oblique exception, n5 there is no mention, either in the text of the final standard or in the accompanying comments, of the possibility that the risk of potential tort liability would provide an incentive for manufacturers to install airbags. Nor is there any other specific evidence of an intent to preclude common-law tort actions.

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n4 "If the Department had required full compliance by September 1, 1987, it is very likely all of the manufacturers would have had to comply through the use of automatic belts. Thus, by phasing-in the requirement, the Department makes it easier for manufacturers to use other, perhaps better, systems such as airbags and passive interiors." 49 Fed. Reg. 29000 (1984).

n5 In response to a comment that the manufacturers were likely to use the cheapest system to comply with the new standard, the Secretary stated that she believed "that competition, potential liability for any deficient systems[,] and pride in one's product would prevent this." *Ibid.*

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II

Before discussing the pre-emption issue, it is appropriate to note that there is a vast difference between a rejection of Honda's threshold arguments in favor of federal pre-emption and a conclusion that petitioners ultimately would prevail on their common-law tort claims. I express no opinion on the possible merit, or lack of merit, of those claims. I do observe, however, that even though good-faith compliance with the minimum requirements of Standard 208 would not provide Honda with a complete defense on the merits, n6 I assume **[*893]** that such compliance would be admissible evidence tending to negate charges of negligent and defective design. n7 In addition, **[**1932]** if Honda were ultimately found liable, such compliance would presumably weigh against an award of punitive damages. *Silkwood* v. *Kerr-McGee Corp.*, 485 F. Supp. 566, 583-584 (WD Okla. 1979) (concluding that substantial compliance with regulatory scheme did not bar award of punitive damages, but noting that "good faith belief in, and efforts to comply with, all government regulations would be evidence of conduct inconsistent with the mental state requisite for punitive damages" under state law). n8

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n6 *Wood* v. *General Motors Corp.*, 865 F.2d 395, 417 (CA1 1988) (collecting cases). The result would be different, of course, if petitioners had brought common-law tort claims challenging Honda's compliance with a mandatory minimum federal standard -- *e.g.*, claims that a 1999 Honda was negligently and defectively designed *because* it was equipped with airbags as required by the current version of Standard 208. Restatement (Third) of Torts: General Principles § 14(b), and Comment *g* (Discussion Draft, Apr. 5, 1999) ("If the actor's adoption [or rejection] of a precaution would require the actor to violate a statute, the actor cannot be found negligent for failing to adopt [or reject] that precaution"); cf. *ante*, at 8-9 (discussing problem of basing state tort liability upon compliance with mandatory federal regulatory requirement as question of pre-emption rather than of liability on the merits); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal [regulations and state tort law] is a physical impossibility . . . ").

n7 Restatement (Third) of Torts: Products Liability § 4(b), and Comment *e* (1997); *Contini* v. *Hyundai Motor Co.*, 840 F. Supp. 22, 23-24 (SDNY 1993). See also Restatement (Second) of Torts § 288C, and Comment *a* (1964) (negligence); *McNeil Pharmaceutical* v. *Hawkins*, 686 A.2d 567, 577-579 (D. C. 1996) (strict liability).

n8 The subsequent history of *Silkwood* does not cast doubt on this premise. See *Silkwood* v. *Kerr-McGee Corp.*, 667 F.2d 908, 921-923 (CA10 1981) (reversing on ground that federal law pre-empts award of punitive damages), rev'd and remanded, 464 U.S. 238 (1984), on remand, 769 F.2d 1451, 1457-1458 (CA10 1985).

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The parties have not called our attention to any appellate court opinions **[***940]** discussing the merits of similar no-airbag claims despite the fact that airbag technology was available for many years before the promulgation of the 1984 standard -- a standard that is not applicable to any automobiles manufactured before September 1, 1986. Given that an arguable basis for a pre-emption defense did not exist until that standard was promulgated, it is reasonable to infer that the manufacturers' assessment of their potential liability for compensatory and punitive damages on such claims -- even **[*894]** without any pre-emption defense -- did not provide them with a sufficient incentive to engage in widespread installation of airbags.

Turning to the subject of pre-emption, Honda contends that the Safety Act's pre-emption provision, 15 U.S.C. § 1392(d), expressly pre-empts petitioners' common-law no-airbag claims. It also argues that the claims are in any event impliedly pre-empted because the

imposition of liability in cases such as this would frustrate the purposes of Standard 208. I discuss these alternative arguments in turn.

III

When a state statute, administrative rule, or common-law cause of action conflicts with a federal statute, it is axiomatic that the state law is without effect. U.S. Const., Art. VI, cl. 2; *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992). On the other hand, it is equally clear that the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States. n9 Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws -- particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers -- are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996); *Gade* v. *National Solid Wastes Management Assn.*, 505 U.S. 88, 116-117, 120 L. Ed. 2d 73, 112 S. Ct. 2374 (1992) (SOUTER, J., dissenting) ("If the [federal] statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred").

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n9 Regrettably, the Court has not always honored the latter proposition as scrupulously as the former. See, *e.g.*, *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988).

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When a federal statute contains an express pre-emption provision, "the task of statutory construction must in the first instance focus on the plain wording of [that provision], which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664, 123 L. Ed. 2d 387, 113 S. Ct. 1732 (1993). The Safety Act contains both an express pre-emption provision, 15 U.S.C. § 1392(d), and a saving **[**1933]** clause that expressly preserves common-law claims, § 1397(k). The relevant part of the former provides:

"Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, **[***941]** no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." n10

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n10 This provision is now codified at 49 U.S.C. § 30103(b)(1). Because both federal and state opinions construing this provision have consistently referred to it as " § 1392(d)," I shall follow that practice. Section 1392(d) contains these additional sentences: "Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard."

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The latter states:

"Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." n11

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n11 This provision is now codified at 49 U.S.C. § 30103(e). See nn. 1 and 10, *supra*.

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Relying on § 1392(d) and legislative history discussing Congress' desire for uniform national safety standards, n12 Honda argues that petitioners' common-law no-airbag claims are expressly pre-empted because success on those claims would necessarily establish a state "safety standard" not identical to Standard 208. It is perfectly clear, however, that the term "safety standard" as used in these two sections refers to an objective rule prescribed by a legislature or an administrative agency and does not encompass case-specific decisions by judges and juries that resolve common-law claims. That term is used three times in these sections; presumably it is used consistently. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570, 131 L. Ed. 2d 1, 115 S. Ct. 1061 (1995). The two references to a federal safety standard are necessarily describing an objective administrative rule. 15 U.S.C. § 1392(a). When the pre-emption provision refers to a safety standard established by a "State or political subdivision of a State," therefore, it is most naturally read to convey a similar meaning. In addition, when the two sections are read together, they provide compelling evidence of an intent to distinguish between legislative and administrative rulemaking, on the one hand, and common-law liability, on the other. This distinction was certainly a rational one for Congress to draw in the Safety Act given that common-law liability -- unlike most legislative or administrative rulemaking -- necessarily performs an important remedial role in compensating accident victims. Cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251, 256, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984).

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n12 S. Rep. No. 1301, 89th Cong., 2d Sess., 2 (1966); H. R. Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966).

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It is true that in three recent cases we concluded that broadly phrased pre-emptive commands encompassed common-law claims. In *Cipollone* v. *Liggett Group, Inc.*, while we thought it clear that the pre-emption provision **[***942]** in the 1965 Federal Cigarette Labeling and Advertising Act applied only to "rulemaking bodies," 505 U.S. at 518, we concluded that the broad command in the subsequent 1969 **[*897]** amendment that "no requirement or prohibition . . . shall be imposed under State law" did include certain common-law claims. 505 U.S. at 548-549 (SCALIA, J., concurring in judgment in part and dissenting in part). n13 In *CSX* **[**1934]** *Transp., Inc.* v. *Easterwood*, where the pre-emption clause of the Federal Railroad Safety Act of 1970 expressly provided that federal railroad safety regulations would pre-empt any incompatible state "'law, rule, regulation, order, or standard relating to railroad safety,'" n14 we held that a federal regulation governing maximum train speed pre-empted a negligence claim that a speed under the federal maximum was excessive. And in *Medtronic, Inc.* v. *Lohr*, we recognized that the statutory reference to "any requirement" imposed by a State or its political subdivisions may include common-law duties. 518 U.S. at 502-503 (plurality opinion); 518 U.S. at 503-505 (BREYER, J., concurring in part and concurring in judgment); 518 U.S. at 509-512 (O'CONNOR, J., concurring in part and dissenting in part).

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n13 The full text of the 1969 provision read: "'No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.'" 505 U.S. at 515 (quoting Public Health Cigarette Smoking Act of 1969, 84 Stat. 88).

n14 507 U.S. at 664 (quoting § 205, 84 Stat. 972, as amended, 45 U.S.C. § 434 (1988 ed. and Supp. II)).

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The statutes construed in those cases differed from the Safety Act in two significant respects. First, the language in each of those pre-emption provisions was significantly broader than the text of § 1392(d). Unlike the broader language of those provisions, the ordinary meaning of the term "safety standard" includes positive enactments, but does not include judicial decisions in common-law tort cases.

Second, the statutes at issue in *Cipollone*, *CSX*, and *Medtronic* did not contain a saving clause expressly preserving common-law remedies. The saving clause in the Safety Act **[*898]** unambiguously expresses a decision by Congress that compliance with a federal safety standard does not exempt a manufacturer from *any* common-law liability. In light of this reference to common-law liability in the saving clause, Congress surely would have included a similar reference in § 1392(d) if it had intended to pre-empt such liability. *Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 338, 114 S. Ct. 1588, 128 L. Ed. 2d 302 (1994) (noting presumption that Congress acts intentionally when it includes particular language in one section of a statute but omits it in another).

The Court does not disagree with this interpretation of the term "safety standard" in § 1392 (d). Because the meaning of that term as used by Congress in this statute is clear, the text of § 1392(d) is itself sufficient to establish that the Safety Act does not expressly pre-empt common-law claims. In order to avoid the conclusion that the saving clause is superfluous, **[***943]** therefore, it must follow that it has a different purpose: to limit, or possibly to foreclose entirely, the possible pre-emptive effect of safety standards promulgated by the Secretary. The Court's approach to the case has the practical effect of reading the saving clause out of the statute altogether. n15

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n15 The Court surely cannot believe that Congress included that clause in the statute just to avoid the danger that we would otherwise fail to give the term "safety standard" its ordinary meaning.

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Given the cumulative force of the fact that § 1392(d) does not expressly pre-empt common-law claims and the fact that § 1397(k) was obviously intended to limit the pre-emptive effect of the Secretary's safety standards, it is quite wrong for the Court to assume that a possible implicit conflict with the purposes to be achieved by such a standard should have the same pre-emptive effect "'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Ante*, at 10. Properly construed, the Safety Act imposes a special burden on a party relying on an arguable implicit conflict **[**1935]** with a temporary regulatory policy -- **[*899]** rather than a conflict with congressional policy or with the text of any regulation -- to demonstrate that a common-law claim has been pre-empted.

IV

Even though the Safety Act does not expressly pre-empt common-law claims, Honda contends that Standard 208 -- of its own force -- implicitly pre-empts the claims in this case.

"We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 110 S. Ct. 2270 (1990), or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is 'impossible for a private party to comply with both state and federal requirements,' *id.*, at 79, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941)." *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995).

In addition, we have concluded that regulations "intended to pre-empt state law" that are promulgated by an agency acting non-arbitrarily and within its congressionally delegated authority may also have pre-emptive force. *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U.S. 141, 153-154, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). In this case, Honda relies on the last of the implied pre-emption principles stated in *Freightliner*, arguing that the imposition of common-law liability for failure to install an airbag would frustrate the purposes and objectives of Standard 208.

Both the text of the statute and the text of the standard provide persuasive reasons for rejecting this argument. The saving clause of the Safety Act arguably denies the Secretary the authority to promulgate standards that would **[*900]** pre-empt **[***944]** common-law remedies. n16 Moreover, the text of Standard 208 says nothing about pre-emption, and I am not persuaded that Honda has overcome our traditional presumption that it lacks any implicit pre-emptive effect.

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n16 The Court contends, in essence, that a saving clause cannot foreclose *implied* conflict pre-emption. *Ante*, at 11. The cases it cites to support that point, however, merely interpreted the language of the particular saving clauses at issue and concluded that those clauses did not foreclose implied pre-emption; they do not establish that a saving clause in a given statute cannot foreclose implied pre-emption based on frustration of that statute's purposes, or even (more importantly for our present purposes) that a saving clause in a given statute cannot deprive a *regulation* issued pursuant to that statute of any implicit pre-emptive effect. See *United States* v. *Locke*, 529 U.S. , (2000) (slip op., at 12-15); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987) ("Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action"); *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328, 331, 67 L. Ed. 2d 258, 101 S. Ct. 1124 (1981). As stated in the text, I believe the language of this particular saving clause unquestionably limits, and possibly forecloses entirely, the pre-emptive effect that safety standards promulgated by the Secretary have on common-law remedies. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986). Under that interpretation, there is by definition no frustration of federal purposes -- that is, no "tolerat[ion of] actual conflict," *ante*, at 11 -- when tort suits are allowed to go forward. Thus, because there is a textual basis for concluding that Congress intended to preserve the state law at issue, I think it entirely appropriate for the party favoring pre-emption to bear a special burden in attempting to show that valid federal purposes would be frustrated if that state law were not pre-empted.

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Honda argues, and the Court now agrees, that the risk of liability presented by common-law claims that vehicles without **[**1936]** airbags are negligently and defectively designed

would frustrate the policy decision that the Secretary made in promulgating Standard 208. This decision, in their view, was that safety -- including a desire to encourage "public acceptance of the airbag technology and experimentation with better passive restraint systems," n17 -- would best be promoted **[*901]** through gradual implementation of a passive restraint requirement making airbags only one of a variety of systems that a manufacturer could install in order to comply, rather than through a requirement mandating the use of one particular system in every vehicle. In its brief supporting Honda, the United States agreed with this submission. It argued that if the manufacturers had known in 1984 that they might later be held liable for failure to install airbags, that risk "would likely have led them to install airbags in all cars," thereby frustrating the Secretary's safety goals and interfering with the methods designed to achieve them. Brief for United States as *Amicus Curiae* 25.

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n17 166 F.3d 1236, 1243 (CADC 1999).

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There are at least three flaws in this argument that provide sufficient grounds for rejecting it. First, the entire argument is based on an unrealistic factual predicate. Whatever the risk of liability on a no-airbag claim may have been prior to the promulgation of the 1984 version of Standard 208, that risk did not lead any manufacturer to install airbags in even a substantial portion of its cars. If there had been a realistic likelihood that the risk of tort liability would have that consequence, there would have been no need for Standard 208. The promulgation of **[***945]** that standard certainly did not *increase* the pre-existing risk of liability. Even if the standard did not create a previously unavailable pre-emption defense, it likely *reduced* the manufacturers' risk of liability by enabling them to point to the regulation and their compliance therewith as evidence tending to negate charges of negligent and defective design. See Part II, *supra*. Given that the pre-1984 risk of liability did not lead to widespread airbag installation, this reduced risk of liability was hardly likely to compel manufacturers to install airbags in all cars -- or even to compel them to comply with Standard 208 during the phase-in period by installing airbags exclusively.

Second, even if the manufacturers' assessment of their risk of liability ultimately proved to be wrong, the purposes of Standard 208 would not be frustrated. In light of the inevitable **[*902]** time interval between the eventual filing of a tort action alleging that the failure to install an airbag is a design defect and the possible resolution of such a claim against a manufacturer, as well as the additional interval between such a resolution (if any) and manufacturers' "compliance with the state law duty in question," *ante*, at 19, by modifying their designs to avoid such liability in the future, it is obvious that the phase-in period would have ended long before its purposes could have been frustrated by the specter of tort liability. Thus, even without pre-emption, the public would have been given the time that the Secretary deemed necessary to gradually adjust to the increasing use of airbag technology and allay their unfounded concerns about it. Moreover, even if any no-airbag suits were ultimately resolved against manufacturers, the resulting incentive to modify their designs would have been quite different from a decision by the Secretary to mandate the use of airbags in every vehicle. For example, if the extra credit provided for the use of nonbelt passive restraint technologies during the phase-in period had (as the Secretary hoped) ultimately encouraged manufacturers to develop a nonbelt system more effective than the airbag, manufacturers held liable for failing to install passive restraints would have been free to respond by modifying their designs to include **[**1937]** such a system *instead of* an airbag. n18 It seems clear, therefore, that any **[*903]** **[***946]** potential tort liability would not frustrate the Secretary's desire to encourage both experimentation with better passive restraint systems and public acceptance of airbags.

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n18 The Court's failure to "understand [this point] correctly," *ante*, at 20, is directly attributable to its fundamental misconception of the nature of duties imposed by tort law. A general verdict of liability in a case seeking damages for negligent and defective design of a vehicle that (like Ms. Geier's) lacked any passive restraints does not amount to an immutable, mandatory "rule of state tort law imposing . . . a duty [to install an airbag]." *Ante*, at 18; see also *ante*, at 8 (referring to verdict in common-law tort suit as a "jury-imposed safety standard"). Rather, that verdict merely reflects the jury's judgment that the manufacturer of a vehicle without any passive restraint system breached its duty of due care by designing a product that was not reasonably safe because a reasonable alternative design -- "including, but not limited to, airbags," App. 3 -- could have reduced the foreseeable risks of harm posed by the product. See Restatement (Third) of Torts: Products Liability § 2(b), and Comment *d* (1997); *id.*, § 1, Comment *a* (noting that § 2(b) is rooted in concepts of both negligence and strict liability). Such a verdict obviously does not foreclose the possibility that more than one alternative design exists the use of which would render the vehicle reasonably safe and satisfy the manufacturer's duty of due care. Thus, the Court is quite wrong to suggest that, as a consequence of such a verdict, only the installation of airbags would enable manufacturers to avoid liability in the future.

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Third, despite its acknowledgement that the saving clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor," *ante*, at 7, the Court completely ignores the important fact that by definition all of the standards established under the Safety Act -- like the British regulations that governed the number and capacity of lifeboats aboard the *Titanic n19* -- impose minimum, rather than fixed or maximum, requirements. 15 U.S.C. § 1391(2); see *Norfolk Southern R. Co.* v. *Shanklin*, 529 U.S. , (2000) (BREYER, J., concurring) (slip op., at 1) ("federal *minimum* safety standards should not pre-empt a state tort action"); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 721, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985). The phase-in program authorized by Standard 208 thus set minimum percentage requirements for the installation of passive restraints, increasing in annual stages of 10, 25, 40, and 100%. Those requirements were not ceilings, and it is obvious that the Secretary favored a more rapid increase. The possibility that exposure to potential tort liability **[*904]** might accelerate the rate of increase would actually further the only goal explicitly mentioned in the standard itself: reducing the number of deaths and severity of injuries of vehicle occupants. Had gradualism been independently important as a method of achieving the Secretary's safety goals, presumably the Secretary would have put a ceiling as well as a floor on each annual increase in the required percentage of new passive restraint installations. For similar reasons, it is evident that variety was not a matter of independent importance to the Secretary. Although the standard allowed manufacturers to comply with the minimum percentage requirements by installing passive restraint systems other than airbags (such as automatic seatbelts), it encouraged them to install airbags and other nonbelt systems that might be developed in the future. The Secretary did not act to ensure the use of a variety of passive restraints by placing ceilings on the number of airbags that could be used in complying **[**1938]** with the minimum requirements. n20 Moreover, even if variety and gradualism had been independently important to the Secretary, there is nothing in the Standard, the accompanying commentary, or the history of airbag regulation to support the notion that the Secretary intended to advance those purposes at all costs, without regard to the detrimental consequences that pre-emption of tort liability could have for the achievement of her avowed purpose of reducing vehicular injuries. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. at 257.

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n19 Statutory Rules and Orders 1018-1021, 1033 (1908). See Nader & Page, Automobile-Design Liability and Compliance with Federal Standards, 64 Geo. Wash. L. Rev. 415, 459

(1996) (noting that the *Titanic* "complied with British governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage with boats capable of carrying only about [half] of the people on board"); W. Wade, The *Titanic*: End of a Dream 68 (1986).

n20 Of course, allowing a suit like petitioners' to proceed against a manufacturer that had installed no passive restraint system in a particular vehicle would not even arguably pose an "obstacle" to the auto manufacturers' freedom to choose among several different passive restraint device options. Cf. *ante*, at 16, 18-19.

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My disagreement with Honda and the Government runs deeper than these flaws, however. In its brief, the Government concedes that "[a] claim that a manufacturer should have chosen to install airbags rather than another type of **[*905]** passive restraint in a certain model of car because of other design features particular to that car . . . would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23. n21 Petitioners' claims here are quite similar to the claim described by the Government: their complaint **[***947]** discusses other design features particular to the 1987 Accord (such as the driver's seat) that allegedly rendered it unreasonably dangerous to operate without an airbag. App. 4-5. The only distinction is that in this case, the particular 1987 Accord driven by Ms. Geier included no passive restraint of any kind because Honda chose to comply with Standard 208's 10% minimum requirement by installing passive restraints in other 1987 models. I fail to see how this distinction makes a difference to the purposes of Standard 208, however. If anything, the type of claim favored by the Government -- *e.g.,* that a particular model of car should have contained an airbag instead of an automatic seatbelt -- would seem to trench even more severely upon the purposes that the Government and Honda contend were behind the promulgation of Standard 208: that having a variety of passive restraints, rather than only airbags, was necessary to promote safety. Thus, I conclude that the Government, on the Secretary's behalf, has failed to articulate a coherent view of the policies behind Standard 208 that would be frustrated by the petitioners' claims.

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n21 Compare *ante*, at 18-19 (disagreeing with Government's view by concluding that tort-law duty "requiring manufacturers of all similar cars to install airbags rather than other passive restraint systems . . . would [present] an obstacle to the variety and mix of devices that the federal regulation sought"), with *ante*, at 21, 23 (noting that "the agency's own views should make a difference," but contending that the above-quoted Government view is "*not* at issue here").

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V

For these reasons, it is evident that Honda has not crossed the high threshold established by our decisions regarding **[*906]** pre-emption of state laws that allegedly frustrate federal purposes: it has not demonstrated that allowing a common-law no-airbag claim to go forward would impose an obligation on manufacturers that directly and irreconcilably contradicts any primary objective that the Secretary set forth with clarity in Standard 208. *Gade* v. *National Solid Wastes Management Assn.,* 505 U.S. at 110 (KENNEDY, J., concurring in part and concurring in judgment); 505 U.S. at 111 ("A freewheeling judicial inquiry into whether [state law] is in tension with federal objectives would undercut the principle that it is Congress [and federal agencies,] rather than the courts[,] that pre-empt state law"). Furthermore, it is important to note that the text of Standard 208 (which the Court does not even bother **[**1939]** to quote in its opinion), unlike the regulation we reviewed in *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta,* 458 U.S. at 158, does not contain any expression of

an intent to displace state law. Given our repeated emphasis on the importance of the presumption against pre-emption, see, *e.g.*, *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. at 663-664; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947), this silence lends additional support to the conclusion that the continuation of whatever common-law liability may exist in a case like this poses no danger of frustrating any of the Secretary's primary purposes in promulgating Standard 208. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. at 721; *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. at 251 ("It is difficult to believe that [the Secretary] would, without comment, **[***948]** remove all means of judicial recourse for those injured by illegal conduct.").

The Court apparently views the question of pre-emption in this case as a close one. *Ante*, at 20-21 (relying on Secretary's interpretation of Standard 208's objectives to bolster its finding of pre-emption). Under "ordinary experience-proved principles of conflict pre-emption," *ante*, at 11, therefore, the presumption against pre-emption should control. Instead, the Court simply ignores the presumption, **[*907]** preferring instead to put the burden on petitioners to show that their tort claim would not frustrate the Secretary's purposes. *Ante*, at 19-20 (noting that petitioners' arguments "cannot, by themselves, change the legal result"). In view of the important principles upon which the presumption is founded, however, rejecting it in this manner is profoundly unwise.

Our presumption against pre-emption is rooted in the concept of federalism. It recognizes that when Congress legislates "in a field which the States have traditionally occupied . . . [,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. at 230; see *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). The signal virtues of this presumption are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that Congress speak clearly when exercising that power. In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985); see *United States* v. *Morrison*, 529 U.S. , (2000) (BREYER, J., dissenting) (slip op., at 6-9); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. , (2000) (STEVENS, J., dissenting) (slip op., at 2); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 292-293, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995) (THOMAS, J., dissenting); *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-464, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991). In addition, the presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes -- *i.e.*, that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution **[*908]** of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. at 67. n22

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n22 Recently, one commentator has argued that our doctrine of frustration-of-purposes (or "obstacle") pre-emption is not supported by the text or history of the Supremacy Clause, and has suggested that we attempt to bring a measure of rationality to our pre-emption jurisprudence by eliminating it. Nelson, Preemption, 86 Va. L. Rev. 225, 231-232 (2000) ("Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that the federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes"). Obviously, if we were to do so, there would be much less need for the presumption against pre-emption (which the commentator also criticizes). As matters now stand, however, the presumption reduces the risk that federal judges will draw too deeply on malleable and politically unaccountable sources such as regulatory history in

finding pre-emption based on frustration of purposes.

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While the presumption is important in assessing the pre-emptive reach of federal statutes, it becomes crucial when the pre-emptive effect of an administrative regulation is at issue. Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law. We have addressed the heightened federalism and nondelegation concerns that agency pre-emption raises by using the presumption to build a procedural bridge across the political accountability gap between States and administrative agencies. Thus, even in cases where implied regulatory pre-emption is at issue, we generally "expect an administrative regulation to declare any intention to pre-empt state law with some specificity." n23 *California Coastal* **[*909]** *Comm'n* v. *Granite Rock Co.,* 480 U.S. 572, 583, 94 L. Ed. 2d 577, 107 S. Ct. 1419 (1987); see *Hillsborough County* v. *Automated Medical Laboratories, Inc.,* 471 U.S. at 717-718 (noting that too easily implying pre-emption "would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence," and stating that "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive"); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta,* 458 U.S. at 154 (noting that pre-emption inquiry is initiated "when the administrator promulgates regulations intended to pre-empt state law"). This expectation, which is shared by the Executive Branch, n24 serves to ensure **[**1941]** that States will be able to have a dialog **[*910]** with agencies **[***950]** regarding pre-emption decisions *ex ante* through the normal notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553.

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n23 The Court brushes aside our specificity requirement on the ground that the cases in which we relied upon it were not cases of implied conflict pre-emption. *Ante*, at 21-22. The Court is quite correct that *Hillsborough* and *California Coastal* are cases in which field pre-emption, rather than conflict pre-emption, was at issue. This distinction, however, does not take the Court as far as it would like. Our cases firmly establish that conflict and field pre-emption are alike in that both are instances of implied pre-emption that by definition do "not [turn] on an express statement of pre-emptive intent." *Ibid.*; see, *e.g.*, *Freightliner Corp.* v. *Myrick,* 514 U.S. at 287 (quoted on page 15, *supra*); *English* v. *General Elec. Co.,* 496 U.S. 72, 79-80, 110 L. Ed. 2d 65, 110 S. Ct. 2270, and n. 5 (1990) (noting that field pre-emption rests on an inference of congressional intent to exclude state regulation and that it "may be understood as a species of conflict pre-emption"); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta,* 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). Given that our specificity requirement was adopted in cases involving implied pre-emption, the Court cannot persuasively claim that the requirement is incompatible with our implied pre-emption jurisprudence in the federal regulatory context.

n24 See Exec. Order No. 12612, § 4(e), 3 CFR 252, 255 (1988) ("When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings."); Exec. Order No. 13132, § 4(e), 64 Fed. Reg. 43255, 43257 (1999) (same); cf. *Medtronic, Inc.* v. *Lohr,* 518 U.S. 470, 496, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996) (discussing 21 CFR § 808.5 (1995), an FDA regulation allowing a State to request an advisory opinion regarding whether a particular state-law requirement is pre-empted, or exempt from pre-emption, under the Medical Device Amendments of 1976).

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When the presumption and its underpinnings are properly understood, it is plain that Honda has not overcome the presumption in this case. Neither Standard 208 nor its accompanying commentary includes the slightest specific indication of an intent to pre-empt common-law no-airbag suits. Indeed, the only mention of such suits in the commentary tends to suggest that they would not be pre-empted. See n. 5, *supra*. In the Court's view, however, "the failure of the Federal Register to address pre-emption explicitly is . . . not determinative," *ante*, at 21, because the Secretary's consistent litigating position since 1989, the history of airbag regulation, and the commentary accompanying the final version of Standard 208 reveal purposes and objectives of the Secretary that would be frustrated by no-airbag suits. Pre-empting on these three bases blatantly contradicts the presumption against pre-emption. When the 1984 version of Standard 208 was under consideration, the States obviously were not afforded any notice that purposes might someday be discerned in the history of airbag regulation that would support pre-emption. Nor does the Court claim that the notice of proposed rulemaking that led to Standard 208 provided the States with notice either that the final version of the standard might contain an express pre-emption provision or that the commentary accompanying it might contain a statement of purposes with arguable pre-emptive effect. Finally, the States plainly had no opportunity to comment upon either the commentary accompanying the final version of the standard or the Secretary's *ex post* litigating position that the standard had implicit pre-emptive effect.

Furthermore, the Court identifies no case in which we have upheld a regulatory claim of frustration-of-purposes implied conflict pre-emption based on nothing more than an *ex post* administrative litigating position and inferences from **[*911]** regulatory history and final commentary. The latter two sources are even more malleable than legislative history. Thus, when snippets from them are combined with the Court's broad conception of a doctrine of frustration-of-purposes pre-emption untempered by the presumption, a vast, undefined area of state law becomes vulnerable to pre-emption by any related federal law or regulation. In my view, however, "preemption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking." 1 L. Tribe, American Constitutional Law § 6-28, p. 1177 (3d ed. 2000).

As to the Secretary's litigating position, it is clear that "an interpretation contained in a [legal brief], not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking[,] . . . does not warrant *Chevron*-style deference." *Christensen* v. *Harris County*, 529 U.S. , (2000) (slip op., at 10). Moreover, our **[***951]** pre-emption precedents and the APA establish that even if the Secretary's litigating position were coherent, the lesser deference paid to it by the Court today would be inappropriate. Given the Secretary's contention that he has the authority to promulgate safety standards that pre-empt state law and the fact that he could promulgate a standard such as the one quoted *supra*, at 2, with relative ease, we should be quite reluctant to find pre-emption based only on the Secretary's informal effort to recast the 1984 version of Standard 208 into a pre-emptive mold. n25 See **[**1942]** *Hillsborough County* v. *Automated Medical* **[*912]** *Laboratories, Inc.*, 471 U.S. at 721; cf. *Medtronic, Inc.* v. *Lohr*, 518 U.S. at 512 (O'CONNOR, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference"); *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U.S. 735, 743-744, 135 L. Ed. 2d 25, 116 S. Ct. 1730 (1996). Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking -- whether contemporaneously with the promulgation of the allegedly pre-emptive regulation or at any later time that the need for pre-emption becomes apparent n26 -- respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context and the APA's requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation. 5 U.S.C. § 551(5); *Paralyzed Veterans of America* v. *D. C. Arena L. P.*, 326 U.S. App. D.C. 25, 117 F.3d 579, 586 (CADC 1997); *National Family Planning & Reproductive Health Assn.* v. *Sullivan*, 298 U.S. App. D.C. 288, 979 F.2d 227, 240 (CADC 1992).

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n25 The cases cited by the Court, *ante*, at 21, are not to the contrary. In *City of New York* v. *FCC*, 486 U.S. 57, 100 L. Ed. 2d 48, 108 S. Ct. 1637 (1988), for example, we were faced with FCC regulations that explicitly "reaffirmed the Commission's established policy of pre-empting local regulation of technical signal quality standards for cable television." *Id.*, at 62, 65. It was only in determining whether the issuance of such regulations was a proper exercise of the authority delegated to the agency by Congress that we afforded a measure of deference to the agency's interpretation of that authority, as *formally* expressed through its explicitly pre-emptive regulations. *Id.*, at 64; see also *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700-705, 81 L. Ed. 2d 580, 104 S. Ct. 2694 (1984) (regulation); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U.S. at 158-159 (regulation); *Blum* v. *Bacon*, 457 U.S. 132, 141-142, 72 L. Ed. 2d 728, 102 S. Ct. 2355 (1982) (Action Transmittal by Social Security Administration); *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. at 327 (order of Interstate Commerce Commission); *United States* v. *Shimer*, 367 U.S. 374, 377, 6 L. Ed. 2d 908, 81 S. Ct. 1554 (1961) (regulation). I express no opinion on whether any deference would be appropriate in any of these situations, but merely observe that such situations are not presented here.

n26 *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. at 721 (noting that agency "can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements" and to promulgate regulations pre-empting local law that imperils the goals of that program).

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Because neither the text of the statute nor the text of the regulation contains any indication of an intent to pre-empt **[*913]** petitioners' cause of action, and because I cannot agree **[***952]** with the Court's unprecedented use of inferences from regulatory history and commentary as a basis for implied pre-emption, I am convinced that Honda has not overcome the presumption against pre-emption in this case. I therefore respectfully dissent.

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*1998 U.S. TRANS LEXIS 21, **

◆ Go to Supreme Court Opinion ◆ Go to Supreme Court Brief(s)

VICKY LEWIS, ET UX., INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS AND AS ADMINISTRATORS OF THE ESTATE OF KATHRYN C. LEWIS, DECEASED Petitioners v. BRUNSWICK CORPORATION

No. 97-288

SUPREME COURT OF THE UNITED STATES

1998 U.S. TRANS LEXIS 21

March 2, 1998, Monday, Washington, D.C.

[*1] The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:35 a.m.

APPEARANCES:

DAVID E. HUDSON, ESQ., Augusta, Georgia; on behalf of the Petitioners.

DAVID C. FREDERICK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the petitioners.

KENNETH S. GELLER, ESQ., Washington, D.C.; on behalf of the Respondent.

OPINION: PROCEEDINGS

11:35 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 97-288, Vicky Lewis v. Brunswick Corporation.

Mr. Hudson, you may proceed whenever you're ready.

ORAL ARGUMENT OF DAVID E. HUDSON ON BEHALF OF THE PETITIONERS

MR. HUDSON: Thank you, Mr. Chief Justice, may it please the Court:

Plaintiffs' claims that Brunswick negligently failed to protect against propeller guard injuries in the circumstances of this case should not be preempted for three reasons. First of all, the claims we are bringing in this case do not conflict with any Federal regulation. Under Freightliner, there's no **preemption.**

Secondly, the text of the **preemption** clause, section 4306 of the act, does not, much less clearly and unambiguously, reach **[*2]** the body of State law of general application, common law damage claims. Our position there is consistent, we think, with all of the **preemption** cases of this Court.

Thirdly, in this case the reading that we submit for the **preemption** clause is confirmed by a

particular savings clause, where Congress specifically and without qualification provided that compliance with the **Boat Safety** Act regulation is no defense to common law claims.

In this **preemption** case, as in every case of statutory interpretation, surely the starting point is the text of the act itself. We submit in this case it is also the ending point. Starting with a statement of purpose in the policy declaration--

QUESTION: Mr. Hudson, we have a good amplifying system. I think we could hear you even if you didn't speak quite as loud.

MR. HUDSON: I will tone it down--

QUESTION: Okay.

MR. HUDSON: --Chief Justice.

Starting with the policy declaration in section 2 of the act, Congress spoke of reciprocity and comity, signal words that State law has a role to play. It spoke of developing and enforcing Federal and State laws, again signalling that State laws would have a role to play.

And then throughout the act Congress over and **[*3]** over again speaks of the enactment of positive regulations both by the Federal Government and by the State, never any reference to common law claims.

QUESTION: Well, but we've certainly held in Medtronic and in that Cipollone case that State common law actions can constitute requirements subject to **preemption.**

MR. HUDSON: Yes, Your Honor, there has a been a holding that the common law can lead to a requirement. I don't think that--

QUESTION: Can lead to? It is. I mean, they are requirements, and I don't see why we should necessarily create--treat this statute differently in that regard.

MR. HUDSON: Well, for a couple of reasons. The language used in this statute is different than the language used in both Cipollone and in Medtronic. In this statute, Congress says that there may not be a State law or regulation. In both Cipollone and Medtronic it was a requirement which arose under State law and this Court has, in a number of cases, not only in Cipollone but following that in Medtronic, English v. GE, Goodyear v. Miller, Silkwood, has explained that common law is a traditional State area.

If we were to obtain a judgment in this case, Brunswick would not be required to put a propeller **[*4]** guard on any of its boats in any State, or in any jurisdiction. It would have the discretion as a manufact--

QUESTION: Well, I--isn't the whole purpose of your punitive damage claim to require the manufacturer to change his behavior?

MR. HUDSON: Even then--

QUESTION: Isn't that what you're going to argue to the jury?

MR. HUDSON: Even then, Your Honor, it may not be necessary that they actually install a propeller guard. It may be enough that a warning be issued putting consumers on notice that if you are thrown or fall out of this boat there's a danger of this type of injury.

We assert in our complaint that they had this knowledge, and they had--

QUESTION: Well, I take it that the main thrust of your argument below is that the propeller guard should have been installed. You're going to change the behavior of the manufacturer. That's the whole justification, at least for your punitive damage award, punitive damage claim.

MR. HUDSON: To award compensation to the injured victim is the first purpose. The punitive damage claim is a heightened incentive to do the steps that are necessary to protect persons who use the boats. It would have that impact.

But as this Court acknowledged in Silkwood, **[*5]** punitive damage is a customary part of the State common law damage scheme and just because it's a punitive damage claim married with a claim for general damages does not create any heightened point of reference to preempt a State law claim.

QUESTION: On that very point, if--imagine that the Coast Guard here had said what it didn't say, but suppose it said we think that the guards on these propellers are actually a greater danger than an unguarded propeller because somebody can get hit on the head, and that's a bigger chance of harm than the other, so suppose because of that they'd said very clearly, we don't want guards.

Now, on your view of the statute a jury would be perfectly free to award punitive damages against the manufacturer because he did the very thing that the Coast Guard told him to do. Now, what sense would that make of the statute?

MR. HUDSON: Under that reading it wouldn't make sense, Justice Breyer, and I'd like to--

QUESTION: So how do you prevent--how do you read it your way, which is to say, it preserves common law claims, and yet avoid what you've just said is a ridiculous result?

MR. HUDSON: May I assume in your question that you are referring to the Coast Guard **[*6]** adopting a regulation saying thou shalt not have propeller guards, and then not as a matter of **preemption,** but I think as a matter of the Supremacy Clause and cases like American Airlines v. Wollands and the case that was cited from 1907. If the State attempts to do something it is in conflict with the regulation by Supremacy Clause analysis--

QUESTION: What happens to your savings clause here? You said that the savings clause preserves all common law remedies and so why hasn't Congress, on your view of it--I mean, what then does the savings clause mean? You started off pointing to that savings clause which refers to common law and State law--

MR. HUDSON: Well--

QUESTION: --and--yes. So you see my question.

MR. HUDSON: It's--I think you have to go one word further. Back in the savings clause it refers to liability under common law or State law, is what is preserved, and--

QUESTION: Well--

QUESTION: You mean, it reads punitive damages out?

MR. HUDSON: No. I think it is--that is a liability claim under State law, but you asked what is the purpose of the savings clause if you cannot bring a claim that is diametrically opposed to a Federal regulation, which is not our case.

I concede **[*7]** that if--

QUESTION: I'm trying to get your view on it. I thought your view was that the common law was simply preserved. Now I take it your view is that the common law is simply preserved in the absence of a specific determination by the Coast Guard. Is that your view? That's a different view.

MR. HUDSON: No, sir, I think that is our view, Your Honor.

QUESTION: So in other words your view is that the savings clause does nothing if the Coast Guard--it--the savings clause is necessary, I guess, in your view. It's just that this prempt--a straight rule of the Coast Guard preempts the tort remedy, but other than a straight rule it doesn't, is that the view?

MR. HUDSON: Well, it depends on whether or not there's a conflict, because if they say thou shalt not have a propeller guard, then our claim would be barred.

QUESTION: Suppose it simply--

QUESTION: Well, but you told me that State common law couldn't be a requirement and could never have any preemptive effect, so you can't have it both ways.

MR. HUDSON: Well--

QUESTION: Now, I take it you're backing off that position and you're saying, well, if it really is in direct conflict, then maybe common law rules can in fact be requirements **[*8]** or regulations under--

MR. HUDSON: Fortunately, that's not our case, but I do--

QUESTION: No, but even if--

MR. HUDSON: I do concede--

QUESTION: Even if we think that, that doesn't end the case for you because you have another theory here, right?

MR. HUDSON: Well, our theory is that there is no conflict.

QUESTION: No, but before you get to--I thought that your position was that the savings clause requires us to read the statute in such a way that the reference to regulations or standards does not necessarily encompass every common law rule. Do you go any further than that?

MR. HUDSON: No, we don't, Justice Souter.

QUESTION: Okay. Okay.

MR. HUDSON: That is statutory evidence, along with some pretty extensive legislative history, that all concerned thought that common law claims would survive even after the adoption of this act. It is additional authority for the proposition that what was preempted in section 4306 were positive enactments under a State legislative law on affirmative regulation.

QUESTION: And what do you do with the phrase, or under State law? I didn't understand your--

MR. HUDSON: Justice Scalia, you backed up in that statute.

QUESTION: You just say you have to read **[*9]** it with the word--

MR. HUDSON: Liability.

QUESTION: --liability. I don't--that doesn't make any sense to me. I don't--

MR. HUDSON: For example, Justice Scalia, in our case we are bringing a negligence--we have a negligence count. We have a wrongful death count. The wrongful death count is a statutory claim in Georgia. It's been in existence for over 100 years, so that is a liability claim--that's certainly not common law. I don't think wrongful death was recognized at the common law.

QUESTION: Well, you could call it a State law--it's positive State enactment rather than common law--couldn't you?

MR. HUDSON: The difference, I think, Chief Justice, is it is not a law aimed specifically at boating requirements. What Congress was addressing in 4306 was acts and regulations enacted by a State and particularly applied to **boat safety.** These are laws of general application, much as has been said you might have a zoning law or a general safety law. These are different from what Congress preempted in the section under question.

QUESTION: Of course, that reference to State law might be an indication that the only--that the general **preemption** clause should be read to mean that there is no **preemption [*10]** unless there is a positive enactment of Federal law. That might be one indication of--and that's not the way the Coast Guard read it right after the act, after the passage of act, but it could mean that too, couldn't it?

MR. HUDSON: I think that is the most logical reading, because when you read 4306 in conjunction with 4305, what you are permitted to obtain exemption from if you apply to the Coast Guard is from existing rules and regulations of the Coast Guard.

Furthermore, if you read the statute where it says at the conclusion, unless identical to a regulation comprised under section 4302, that's surplus. If what Congress intended to do was to say the only regulation we're going to have are positive enactments of the Coast Guard, then you don't need that language in the statue that says, unless identical to the regulations prescribed under this section.

QUESTION: Well, you could read it either way. I mean, there's an ambiguity there.

I suppose you could read it as saying, all State law goes unless the Coast Guard has adopted a regulation and State law is identical to that regulation, or you could read it as saying, all State law stays unless there is a Coast Guard regulation and **[*11]** in that case the only State law that stays is that which is identical. You could read it either way, I suppose, textually.

The reference to State law in the savings clause as distinct from common law might be an indication of which of those two possible readings you should take, i.e. that the State law is preserved in the absence of a positive enactment with conflict.

MR. HUDSON: To that I would respond, Justice Souter, that the former reading, why do you need State laws that simply parrot an existing Federal regulation that has been enacted by the Coast Guard.

QUESTION: Mm-hmm.

MR. HUDSON: The conduct is being regulated.

I would further say, if you have a statue that can be read both ways under the clear and

unambiguous standard that this Court cites in every one of its **preemption** cases, that in itself proves that at the very least this would be an ambiguous statute.

QUESTION: If that's what we mean.

QUESTION: You don't--we don't have to resolve that question, I take it, to decide in your favor, because the Government is taking the position, I assume, that the Coast Guard is right when the Coast Guard says, we're the only ones in the standard-setting business, so to reach your common **[*12]** law claim we don't have to decide--

MR. HUDSON: That is correct, because from the time of the enactment of the act and through the present time the Coast Guard has never taken the position that common law claims of general application of State laws are preempted.

QUESTION: May I ask you about the--whether the Georgia--the question of Georgia law of--to introduce to this jury the fact that the Coast Guard did not make a regulation requiring propeller guards would be relevant, wouldn't it?

MR. HUDSON: At least the underlying facts that caused the Coast Guard not to do anything, and the Coast Guard decided not to do anything because they couldn't come up with a common solution and it might expensive and the data was incomplete.

Now, the study committee said some other things, but the Coast Guard letter was general in that nature.

Yes, I think the underlying facts about whether propeller guards are safe or not safe do come into evidence.

QUESTION: And the fact that the Coast Guard that has set other standards didn't set this one.

MR. HUDSON: Yes, I think that could, because it will be a very limited application, even when it comes in, because the Coast Guard's action was very narrow in **[*13]** scope, the letter that adopted the position of the subcommittee that studied propeller guards.

QUESTION: Mr. Hudson--

QUESTION: Are you responding to Justice Ginsburg's question by saying what you think is desirable, or what you feel you know about the Georgia law of evidence?

MR. HUDSON: Well, I think I do know that much, Your Honor. In product liability cases in Georgia there's a recent supreme court decision we cite in our brief, and it allows all of these factors to come into evidence, whether they are other designs, whether they are Federal regulations, or Federal authorities. The whole mix goes into the jury's determination of whether or not this was too dangerous for use under this application.

QUESTION: Mr. Hudson, 4305 is discussed in all the briefs. I can't find it set forth anywhere. Is it set forth in any of your submissions?

It's very annoying to have a lot of discussion going on about a particular statutory provision and you look in the materials in front of you and it's just not there.

Is it in the red brief?

MR. HUDSON: Your Honor, I can't--we'll look in the blue brief. I think 4305 is the statute that allows the regulations to be established. Other than the fact that-- **[*14]**

QUESTION: It's the one that permits the State to apply--

MR. HUDSON: For an exemption.

QUESTION: For an exemption.

MR. HUDSON: Okay. That's right.

QUESTION: Right.

MR. HUDSON: It's--if we haven't set it forth, Your Honor, that's an oversight, but it simply says the Coast Guard can grant an exemption from an existing act or a regulation that the Coast Guard has adopted, not an exemption from the wiping-of-the-slate clean notion that Brunswick submits in this case.

QUESTION: Well, I'm still looking for it.

MR. HUDSON: I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Hudson.

Mr. Frederick, we'll hear from you.

ORAL ARGUMENT OF DAVID C. FREDERICK ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

MR. FREDERICK: Thank you, Mr. Chief Justice, and may it please the Court:

Justice Scalia, it's at page 2 of the red brief. Actually, sorry, page 1 of the red brief, 4305.

We agree with petitioners that common law claims are not expressly preempted or impliedly preempted by Coast Guard regulations that don't exist in this case. Congress had two very good reasons to differentiate between positive law enactments and common law remedies that might be **[*15]** available.

The first is that common law remedies give manufacturers a choice as to whether or not they would change their product design or to install some particular equipment. They could make a cost-benefit analysis of whether assuming the risk that their product might cause a danger and thereby incur liability is worth the cost of redesigning the equipment or putting on some type of propeller guard, and that--

QUESTION: What about punitives?

QUESTION: We've heard that argument before. We heard it in Cipollone. We hear it in every case where the issue is whether common law remedies are precluded, and we have not found it persuasive.

MR. FREDERICK: Well, Justice Scalia--

QUESTION: I mean, it's true, you can roll the dice if you like. I suppose you can say the same thing about an explicit regulatory prohibition and there's especially very little difference when you have punitive damages.

I mean, I could ignore a regulation, too, can't I, and say it's a cost of business. A cost of doing business is now and then I'll get picked up for violating the regulation. It's worth it. I can say that about a regulation just as well as about a common law liability.

MR. FREDERICK: Justice Scalia, **[*16]** I'm trying to set forth the reasons why in 1971, when Congress enacted this statute, it may have differentiated it. The second is that it legislated against a backdrop, the historical traditions of the country that if people were injured they would have the ability to bring a tort claim, and so the words that it used in setting out in sections 4302, 4306, and 4311(g) used words that suggest positive law enactments would be preempted in 4306 and that common law liability would be saved--

QUESTION: Is that true even if the Coast Guard has a particular rule? I mean, suppose the Coast Guard said, look, this is obviously a tough question whether you should have propeller guards or not. People are killed both ways, and if the--you don't want to make a mistake. So the Coast Guard says, we don't want it. We think more people are killed with the propeller guards than without.

Are you saying under those circumstances in your view a State is perfectly free to award $ 50, $ 60, $ 100 million in punitive damages for doing the very thing the Coast Guard said not to do?

MR. FREDERICK: No. We think implied conflict **preemption**--

QUESTION: Ah.

MR. FREDERICK: --principles would be applicable.

QUESTION: **[*17]** So in other words it's just the fact they don't have a particular reg here that this turns on, in your opinion.

MR. FREDERICK: Well, the savings clause should not be read to eviscerate the power that Congress gave the Coast Guard to promulgate affirmative regulations, so that if in exercising that power that Congress gave the Coast Guard the Coast Guard promulgates a regulation that prohibits propeller guards, it would be anomalous to read the savings clause to bring it into conflict with that.

QUESTION: So if they have a reg--suppose they do have a reg.

MR. FREDERICK: Yes.

QUESTION: In your view, should we look to see whether that reg, there's a direct conflict with the State law or common law State--you know, the tort judgment, whether it--the State tort judgment would defeat an object of the reg, or whether the state judgment would be in an area that the reg clearly intends to reserve to the Coast Guard--that's your view of it?

MR. FREDERICK: That's correct. All of the--

QUESTION: Okay. If that's your view of it, why doesn't that apply--and I think maybe that is a perfectly good view. Why doesn't that just as much apply to a State positive regulation as it would to a tort action? **[*18]**

MR. FREDERICK: Because in 4306 the words that Congress used, it started out by saying, unless permitted by the Secretary, and everything else follows. It uses terms that parallel the terms that were used in 4302 which allow the Secretary to prom--to establish a safety standard.

If you then look at 4306 you see the parallel reference to, a State shall not be allowed to do a law or regulation that establishes a standard or in 4302(a)(2) it says, or impose a requirement or require a--an associated equipment device.

You then look at 4306. After the or, it says, or impose a requirement for associated

equipment.

In our view, the language the Congress used in 4302 was to say, these are the things that the Secretary is authorized to issue regulations about, and then in 4306 it says, unless the Secretary permits, a State can't do those things which the Secretary is empowered to do in 4302, and--

QUESTION: The trouble I find with this analysis, that you rely just on implied **preemption** for common law, is that would be very peculiar in a statute which in 4306 insists that the State law be identical, that the State regulation, at least, be identical to the Federal law.

I mean, it's really saying, **[*19]** we don't want any State regulation unless it's the very same one.

MR. FREDERICK: Well, to the contrary, Justice Scalia.

If a regulation that a State promulgates is written in words that are going to be easily compared with a Federal standard it would be very easy to determine whether it was identical or not identical.

And the fact that Congress used the phrase, liability under common law in the savings provisions 4311(g), but did not use the phrase, common law to show that which was to be preempted in 4306 is further textual support for our view that those things which were to be preempted in 4306 were positive enactments of State law that would be done by State executive officers because, in fact, they will have to apply to the Secretary for the exemption from a **preemption,** and they are the ones who have to seek that authority in order to keep that in place, so it is true that--

QUESTION: Why would a State want to have a regulation that was identical with the Federal regulation?

MR. FREDERICK: Mr. Chief Justice, the history of it is that the Coast Guard recognized that it lacked the resources in order to enforce all of these provisions with the tens of millions of boats that were **[*20]** out there, so in fact when the Commandant of the Coast Guard testified he urged Congress to provide a scheme that would allow States to promulgate parallel--an identical regulation so that State enforcement officers could go and help with the enforcement of the safety standards.

QUESTION: The States couldn't help enforce the Coast Guard regulation?

MR. FREDERICK: It wasn't clear at the time whether in the absence of that explicit authority and provision that State officers would have the incentive or necessarily the power to do that, so when the Commandant of the Coast Guard testified before the Senate committee he made very clear that what the concern that the Coast Guard had was the positive enactments that would be conflicting with State law.

And he also made clear in response to a written question that was given to him in advance of his testimony so he had additional time to think about it that private remedies would be available to people if they were injured as a result of an unsafe device that was put on a boat.

So we think the legislative history, the structure and the text make very clear that what Congress was intending to do in 4306 was to deal with State positive law enactments.
[*21]

I would like to address, briefly address the respondent's theory of the savings clause, because in our view it doesn't really make that much sense. They have two theories.

The first is that the savings clause was intended to make clear that there was to be no affirmative defense. In our view, that is incorrect, because it was black letter law in 1971. It was in the Second Restatement of Torts in section 288(c), which was published by the American Law Institute in 1965.

The compliance with a legislative enactment or a regulation would not relieve someone of liability if a reasonable person acting under the same or similar circumstances would do otherwise.

So that theory for the savings clause really doesn't make much sense. There would have been no need for Congress to have added a specific savings provision.

The second theory that they have is that the savings clause was intended to save against breach of warranty or manufacturing defect claims. Well, that theory in our view doesn't make any sense because you can't read 4306 to preempt those things, so--

QUESTION: Do you think the American Law Institute always represents what is the view in almost all of the States? That hasn't been **[*22]** my experience.

MR. FREDERICK: Well, I think--

QUESTION: I mean, I think there would be real reason to put that in just in case a number of States were following it.

MR. FREDERICK: Justice Scalia, even if you were to say that what Congress was intending to do was to put the ALI's view right into law, the words that Congress used made very clear that general provisions of common law liability are to be preserved, because it didn't say liability under common law, especially breach of warranty or product defect claims. It didn't create the kind of textual limitation that the respondents would read into the savings clause.

So I think that if you look at the way that respondent's theory spells, you know, out what the savings clause was intended to do, there really wouldn't be that much of a reason to do it, and--

QUESTION: What do you do--

QUESTION: What do you do with--oh.

MR. FREDERICK: Thank you.

QUESTION: Thank you, Mr. Frederick.

When we return at 1:00, Mr. Geller, we'll hear from you.

(Whereupon, at 12:01 p.m., the Court recessed.)

AFTERNOON SESSION

1:00 p.m.

CHIEF JUSTICE REHNQUIST: Mr. Geller, we'll hear from you.

ORAL ARGUMENT OF KENNETH S. GELLER ON BEHALF OF THE RESPONDENT

MR. **[*23]** GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

We heard 25 minutes of argument this morning from the plaintiffs and the Solicitor General explaining why it's perfectly permissible for the State of Georgia through its common law to impose a requirement that boats be equipped with propeller guards, but if Georgia can do this, then presumably South Carolina could through its common law impose a requirement that boats not be equipped with propeller guards for the reasons that, as the Coast Guard found, they make boats less safe.

Now--

QUESTION: Well, excuse me. I didn't know that the Coast Guard had found that at all. The Solicitor General's brief sets out a portion of the Coast Guard's letter stating the reason that it was going to take no actions. This is on page 7 of the SG's brief. At least in the excerpt there the Coast Guard didn't make any such finding. Is there more material?

MR. GELLER: No, there's no--I should say the Coast Guard was relying, I believe, on unanimous recommendations from the--from its Subcommittee on Propeller Guards and from the National Boating Safety Advisory Council, each of whom had found that the use of propeller guards would demonstrably **[*24]** make boating less safe, and the Coast Guard--

QUESTION: Well, that's right, but the Coast Guard--

MR. GELLER: The Coast Guard--

QUESTION: --gave its reasons. I mean, it said there was a deficiency of accident data, the difficulty of coming up with a single model, and so on. It didn't, as I understand it, adopt any finding that in fact it would be more dangerous in some cases--

MR. GELLER: That's--

QUESTION: --so I don't think we can attribute that to the Coast Guard.

MR. GELLER: That's true, Justice Souter, although it did find--it did agree with the recommendations of the underlying committees that it shouldn't impose a prop guard requirement.

But my point is simply that the accident in this case occurred on a body of water that forms part of the border between South Carolina and Georgia, and the plaintiffs and the Solicitor General don't bother to explain how a manufacturer could possibly build a boat that could operate on that body of water and still comply with these divergent State law.

QUESTION: What if there had been no Federal statute at all? A boat manufacturer would still have a difficult time complying with both--

MR. GELLER: Yes.

QUESTION: --South Carolina and Georgia **[*25]** law were they different.

MR. GELLER: But it was the very purpose of this statute, Mr. Chief Justice, the very purpose of this statute to avoid that sort of a problem. In fact, the Senate report specifically says in this case it assures that manufacturers for the domestic trade will not--will not involve--will not have to worry about compliance with widely varying local requirements. That's our precise point. It was the purpose of this statute to avoid a situation--

QUESTION: Well, yes, but the Coast Guard did not, in fact, adopt a regulation on this specific device, and I don't know that South Carolina have a different rule. Does South Carolina have common law principles that say you must have a propeller guard?

MR. GELLER: No, it doesn't, and no, I think that would be preempted if it did as well. My point is simply to explain why there's a need for a national uniform rule here, which Congress recognized in passing this statute. It's so you have one single rule that manufacturers can follow throughout the United States.

QUESTION: Yes, but it clearly envisions that the Coast Guard might not take action with regard to the whole universe of possible actions it could take, and we have **[*26]** a situation here where it didn't take action.

MR. GELLER: But the language--

QUESTION: And that may leave open some room for application of State law.

MR. GELLER: I think that the language of the **preemption** provision, Justice O'Connor, specifically addresses the situation and provides, as the Solicitor General acknowledges, the Coast Guard has always interpreted the provision according to its plain--the Coast Guard has always interpreted the provision according to its plain language to preempt State law involving design and equipment requirements even in the absence of a Coast Guard regulation because of this congressional desire to have uniform national requirements.

In fact, this act was passed in 1971. The day after the act was passed--the day after--the Coast Guard issued a regulation under section 4305 exempting all existing State requirements from **preemption,** because--

QUESTION: Well, of course, that included, as I understand it, State regulatory requirements in the narrow sense, so that it did not necessarily imply that the Coast Guard thought that it was necessary to do that to preserve any State common law.

MR. GELLER: There was no--it simply exempted all existing State requirements. **[*27]** There was no specific discussion of statutes, regulations, common law. The point is--

QUESTION: Right, and that's--I mean, my only point is, I don't think you can infer from that that the Coast Guard ever took the position that a common law requirement was, in fact, preempted.

MR. GELLER: No. I'm taking from that the understanding, which has been in existence since the beginning of the statute, that even in the absence of a regulation section 4306 would provide for **preemption** from State law. That was the point that I think comes through clearly.

QUESTION: Mr. Geller, doesn't it--it's a little unrealistic to talk about a requirement imposed by State law anyway.

It's not as though--I mean, even within the State of South Carolina a manufacturer wouldn't know whether to put on or off the propeller guard, because one jury, the first jury may find it was negligent not to have it, and that--certainly that finding that it was negligent not to have a propeller guard does not prevent a subsequent South Carolina juror, jury from finding that it was negligent to have a propeller guard, isn't that right?

MR. GELLER: That's true. That's why it seems completely irrational for Congress to have prohibited **[*28]** State legislatures or State boating commissioners from entering this area, because it was concerned about the need for national uniform regulation, one rule that every manufacturer could follow throughout the United States, and to create an exception for common law rules, which is I think the point that Justice Breyer made last year in his separate opinion in Medtronic, but--

QUESTION: But isn't the argument for exception oddly enough supported by the advisory

committee's report here, and that is that the designs of boats vary so enormously that it would be difficult, if not impossible, to have a uniform rule in the sense of saying, all boats should have propeller guards, or all boats should have this kind of propeller guard.

The kind of multifarious context here suggests exactly what common law adjudication is intended to serve, and that is quite fact-specific adjudications when no uniform rule really could sensibly be written to cover it.

MR. GELLER: Two requirements, Justice--two responses, Justice Souter. The first is I think that misstates what the advisory committee, commission did here. It tested every type of propeller guard in existence, and it concluded that there was no **[*29]** feasible workable propeller guard that could be used on any type of motor boat, so I don't think it's fair to say that it simply said there wasn't one that could be used on every boat. It tested every single--

QUESTION: Well, I thought they--and you know this better than I do. I thought they said that in some cases the guard would in fact make it much more dangerous than it was.

MR. GELLER: Exactly.

QUESTION: But not in all cases.

MR. GELLER: In every case in which a motor boat was going more than 10 miles an hour. In other words, they didn't find any application in which it would be safe to require that a motor boat be equipped with a propeller guard.

But the second answer to your question, Justice Souter, frankly is that this is an argument that I think--and Justice Scalia said this this morning--the Court has heard many previous times when faced with statutes of this type and has never drawn an exception between statutory requirements and common law requirements.

QUESTION: But we have emphasized the language in the particular statutes.

MR. GELLER: Yes, and the language in this statute I think is indistinguishable, Justice Stevens, from--

QUESTION: Does it have the word requirement **[*30]** in it?

MR. GELLER: Yes. The list--this statute does. In fact, it might be useful to focus on the specific language at issue here, because I think it answers a lot of questions. The section--

QUESTION: Mr. Geller, as you do that--

MR. GELLER: Yes.

QUESTION: --can you tell me if there's another statute that uses the word, minimum safety standards, because I thought that gave some kind of a tone to it.

MR. GELLER: Yes. The statute, for example, that was at issue in Ray v. Atlantic-Richfield, which this Court considered 20 years ago, had that very language in there, and the Court said that didn't mean there was no **preemption.** It simply meant the manufacturers--

QUESTION: No, everyone agrees that there's a **preemption** pro tanto. That is, to the extent the Coast Guard has a standard, the State can't have a different one.

MR. GELLER: Yes.

QUESTION: But the word minimum suggests to me that there could be other things, that

every--

MR. GELLER: What the Court--

QUESTION: That those standards must be followed, but there could be additional standards.

MR. GELLER: That's not the argument--the Court rejected that very argument in Ray v. Atlantic-Richfield, Your Honor. They're minimum in the sense **[*31]** that manufacturers could add to that. They're not minimum in the sense that States could add to that. That would make--there would be no reason for **preemption** if they were--if that reading of minimum standards were correct. There would be no reason to have a **preemption** clause in there.

QUESTION: The reason could be that these standards are in place, but we're not saying that that's the universe, that there can't be liability apart from these standards.

Let me ask you something just as a matter of updating. As I understood the propeller guard, it wasn't dead, that there's still current consideration in the Coast Guard?

MR. GELLER: Yes. Yes, absolutely.

QUESTION: Where--what is the status of that now?

MR. GELLER: As recently as last August, Justice Ginsburg, the Coast Guard again asked for comments from people as to whether there would be a workable type of propeller guard that the Coast Guard could consider.

QUESTION: And that's just--

MR. GELLER: They haven't yet issued any regulation presumably because they haven't yet been satisfied that they can meet the standards of 4302, which is to say that the requirement that the propeller guard would actually advance the interest of **boat [*32] safety.**

QUESTION: All we know is that they asked again.

MR. GELLER: Yes.

QUESTION: And we don't know anything about the answers.

MR. GELLER: No. I don't believe anything has happened since August of 1997.

Let me just focus if I could the Court on the language of 4306. It's reprinted in a number of different places, including page 6 of the red brief, and it's helpful to focus on the language. This language, Justice Stevens, is I think identical in respect to the language that the Court had before it in Medtronic and in Cipollone.

Section 4306 has a broad requirement that--broad **preemptions** that the State may not establish or enforce a law imposing a requirement for associated equipment, which is--no one disputes that a propeller guard here is associated equipment, and the Court has held in Cipollone, in Easterwood, in Norfolk and Western Railway, in Medtronic, that the word requirement in those very similar statutes includes common law claims.

In fact, I don't know of any case in this Court that has ever construed the word requirement to include only positive law, and the Court on a number of occasions has rejected that very argument. The Court--

QUESTION: Well, you take--

QUESTION: **[*33]** A law or regulation establishing--

MR. GELLER: Law or--

QUESTION: A law or regulation establishing--

MR. GELLER: Yes. I think the--

QUESTION: --the requirement?

MR. GELLER: I think the language in Medtronic was very, very similar. The law here is the common law, which establishes a requirement for associated equipment.

QUESTION: Well, you take the position, Mr. Geller, that regardless of whether--what we think of the action or inaction of the Coast Guard on this propeller guard business that any common law requirement for a propeller guard by a State is preempted, no matter what the Coast Guard has done--

MR. GELLER: That's right.

QUESTION: --or hasn't done.

MR. GELLER: Because I think that section 43--section 4306 enacts a general **preemption** rule that says no State can impose a requirement for associated equipment. Now, there are--

QUESTION: So if the Coast Guard had never even studied the problem, nothing had been done--

MR. GELLER: Absolutely. For the purposes of--

QUESTION: --you take the position it's still preempted.

MR. GELLER: Yes, for purposes of our express **preemption.**

Now, here we have a very powerful implied **preemption** argument as well, which I'll get to in a minute, Justice **[*34]** O'Connor, because the Coast Guard did do a thorough study, but that's right, and this is, of course, the way the Coast Guard has interpreted this statute over the years.

QUESTION: What sense would that make? I mean, you bring me along a lot when you say, unless we read the word requirement to include tort action--

MR. GELLER: Yes.

QUESTION: --then you would have a Coast Guard explicit rule and a State could have a tort case that would force the opposite. That would make no sense. I accept that--

MR. GELLER: That would make no sense.

QUESTION: --at least for argument. But doesn't it also make no sense to say, if the Coast Guard doesn't do anything, does nothing whatsoever, that then you couldn't have any State tort law in the area?

MR. GELLER: You couldn't have any--

QUESTION: I mean, I can understand why Congress might have said, if the Coast Guard does

nothing at all, still the States aren't supposed to sit there and write rules out on a piece of paper, but I just can't understand why Congress would have said, if the Congress does nothing at all, all of State tort law goes up in smoke.

MR. GELLER: Not all of State tort--I think the breadth of this argument has been grossly overstated, **[*35]** Justice Breyer. The States have a large role to play under the **Boat Safety** Act, but in terms of boat safe use and operation, boater education, boat numbering, tort law can apply in case of manufacturing defects involving boats, and--

QUESTION: No, no, but why would Congress have wanted to--

MR. GELLER: Yes, and--

QUESTION: --say that no State tort law for the basic hornbook classic negligence--

MR. GELLER: Of design. Design.

QUESTION: --of design, any of that stuff when the Coast Guard does nothing.

MR. GELLER: Because, as Congress said--as Congress said, there has to be a uniform national rule for design requirements. You can't build a boat, one boat for South Carolina and another boat for Georgia, and that's precisely--

QUESTION: Well, I take it--I take it that an additional answer to Justice Breyer--maybe you don't want--is that this didn't prempt all State tort law automatically because the Coast Guard could and, in fact, did leave much of it in place, and in the States.

MR. GELLER: Absolutely. In fact, I want to turn--

QUESTION: Under 430--05.

MR. GELLER: 4305. 4305, Justice Kennedy. That's exactly right. I think if you look at section 4306, which I keep wanting to bring the **[*36]** Court back to because that's the issue in this case, is how to interpret that provision, there are a number of exceptions that Congress has written into the **preemption** provision.

There's a general **preemption** provision of State design requirements for the reasons I gave, that there has to be uniformity in design requirements. You can't have--you have to have a single national rule, which is precisely what the Senate report says. It assures that manufacturers will not have to worry about compliance with widely varying local requirements.

And then there are three exceptions to narrow it in section 4306. First of all, as Justice Kennedy said, the Coast Guard can draft an exemption to allow States to have a rule involving design of boats.

Second, even when the Coast Guard hasn't granted an exemption--

QUESTION: Are we talking about 4306 or 4305?

MR. GELLER: Yes, 4306. 4305 allows the Coast Guard to grant the exemption, but it's--4306 says that there's a general **preemption** of State requirements involving the design and equipment of boats, but the Coast Guard can grant an exemption to the States.

Secondly, the States can operate--their State law can operate to meet some uniquely hazardous **[*37]** local condition, and third, the States are allowed to enforce their law about the design of boats to the extent that it is identical to a regulation promulgated by the

Coast Guard, and the scheme of this is obvious.

The Coast Guard is supposed to promulgate the rules that tell manufacturers what they have to do in order to build a boat, a recreational boat in interstate commerce, and the States can enforce--if the State law is identical to it, the States can participate in the enforcement. So if a boat is built out of compliance with Federal design requirements, there can be a State law remedy, but the States can't add to the requirement.

So that they--so that here, for example, you know, you could have a State requirement that has--that it requires that boats be built with propeller guards. That would be a requirement only for one State. It would dictate the national rule and, if a State had a contrary rule, you couldn't sell a boat in interstate commerce, because one State could say you had to have one type of requirement, another State could say you have to have another.

The idea of this was to have a uniform national rule, and as--the Court actually confronted a case almost precisely **[*38]** like this 20 years ago, Ray v. Atlantic Richfield. That was a case in which Congress passed a statute that promulgated--that authorized the Coast Guard to promulgate design requirements for tankers, and the Coast Guard in fact did.

It promulgated a long list of design requirements for tankers, and then the State of Washington came in and passed a statute that said, if you want to operate in Puget Sound, you also have to follow the following three additional design requirements. You have to have double hulls, you have to have two radar, working radar, and this Court held that that statute was preempted. It was preempted actually in the absence of an express **preemption** provision.

But the reason the Court gave is--applies here like a glove. The Court said, enforcement of these State requirements would frustrate what seems to us to be the evident congressional intent to establish a uniform Federal regime controlling the design of oil tankers. This is 435 U.S. at page 151.

It's precisely the same thing here. In fact, here there's even more evidence that that's what Congress wanted to do, because there's an express **preemption** provision that says that that's what **[*39]** they're trying to do.

QUESTION: Well, but you also have the savings clause, 4311, and--

MR. GELLER: Yes. Let's talk about the savings clause.

QUESTION: --its reference to common law and State law cuts the other way, I--

MR. GELLER: I don't think a fair reading of the savings clause cuts the other way, Justice O'Connor, but let's look at that as well. This is on page 2 of the red brief.

What it literally says--what it literally says is that compliance with a Federal regulation or order does not relieve a person from liability at common law or under State law, and the legislative history uses almost the exact same language to describe what Congress was trying to do here.

What Congress was trying to do here, quite specifically, and it says it literally, is that in those areas where State law still has a role to play, areas that are not preempted, it is not a defense to that State law claim that you've complied with the Federal regulation.

That's precisely what this says, and that's all that this says. It says nothing about **preemption,** and if it were truly a savings clause intended to create a gaping hole in section 4306, you'd think it would have been put in section 4306.

QUESTION: What **[*40]** does it apply to? Give me a few examples.

MR. GELLER: One example might be, Justice Scalia, if a State had a design requirement that was not preempted because it was intended to deal with uniquely hazardous local conditions. That's not preempted under section 4306. Or the State may have a design--

QUESTION: Yes, but by the same token you don't need a savings clause.

MR. GELLER: You need a savings clause, Justice Souter, for fear that the--that it might be perceived under State law that it's a complete defense that you've complied with the Federal regulation.

QUESTION: Yes, but that would be a bizarre reading of the **preemption** clause.

QUESTION: I don't think you really need it for that. Do you have any other examples?

MR. GELLER: Yes. Well, I think actually, Justice Scalia, that's precisely what the legislative history again says this was trying to do, because when it discusses the savings clause, which I should say was added at the last minute--

QUESTION: You're talking to me?

(Laughter.)

MR. GELLER: I'm talking to the Court.

But it does explain what this--what 4311(g) is intended to do. It says, of course, in describing 4311(g) and the reason they put it in, of course, depending **[*41]** on the rules of evidence of the particular judicial forum, such compliance--in other words, compliance with Federal regulations--may or may not be admissible for its evidentiary value.

In other words, they couldn't possibly have been talking about Federal **preemption** here. They were talking about State rules, and contrary--

QUESTION: What would happen in a case that--let's assume that there is fairly clear **preemption.** The Coast Guard says, no propeller guards, and this boat has no propeller guards, and the accident happened. Could the plaintiff sue for failure to warn?

MR. GELLER: I think that that claim would--the failure to warn about the absence of propeller guards?

QUESTION: About the absence, yes.

MR. GELLER: I think--I think that would probably be preempted as well because of the effect it would have on manufacturers to build their boats to--in other words, the failure to warn would have to warn about some dangerous, perhaps defective condition that--

QUESTION: I looked at the complaint briefly. I didn't see a failure to warn--

MR. GELLER: There isn't a failure to warn claim in this case--

QUESTION: --allegation here.

MR. GELLER: --and it's an interesting question. I'm not sure **[*42]** that I know the right answer, but I think the argument would be that if you allowed failure to warn claims in that situation it would impose pressure on manufacturers to put on the device that would eliminate the need to make the warning, and that would be a--

QUESTION: Oh, no. It would just--it would make them warn. It would make them put labels on.

MR. GELLER: There are warning requirements in the act as well, Federal warning requirements, and it may be that those would preempt a State warning requirement, but that's not what we have here. This is a pure design requirement.

They're saying this boat is defective because it didn't have a propeller guard, and what I'm saying is that section 4306 addresses that question precisely and says that the--what equipment a boat operating in interstate commerce should have is a question reserved to the Coast Guard.

QUESTION: Well, Mr. Geller, it's--you say that a propeller is regarded as associated equipment for the board--

MR. GELLER: Yes.

QUESTION: --for the boat?

MR. GELLER: Yes.

QUESTION: It's not a part of the boat itself.

MR. GELLER: It's defined in Coast Guard regulations as associated equipment.

QUESTION: So there's a little bit different **[*43]** language about associated equipment than there is for the vessel itself, isn't there? One says, imposing a requirement for associated equipment, and for the boat it says, enforce a law or regulation establishing performance or other safety standard.

MR. GELLER: Right, and we are relying--this case involves the section of 4306 that talks about imposing a equipment for associated--

QUESTION: A requirement.

MR. GELLER: A requirement for associated equipment, that's right.

QUESTION: Mr. Geller, can I come back and ask you for another example of how the savings clause would apply State law, other than a State law that had been exempted under 4305?

MR. GELLER: There are many types--first of all, I'm not sure that Congress necessarily had in mind a specific situation. They were told--

QUESTION: I don't need many. Just give me a couple.

MR. GELLER: Yes. Any case in which State law has a role to play. There could be a tort claim that the boat was defectively manufactured because something was done in a particular way and the--

QUESTION: But--

MR. GELLER: --suggestion is that you shouldn't allow the **preemption** provision to be broadened beyond Congress' intent by allowing the defense to argue **[*44]** that mere compliance--mere compliance with the Federal regulations is a defense under State law.

QUESTION: But unless the defective manufacture claim dealt with the manufacture of the

propeller--

MR. GELLER: Yes. I mean, it could have. It could have. I mean, in other words--

QUESTION: It seems to me it would be preempted anyway. I just don't see any realistic situation in which the savings clause would apply, other than when there's been an exemption, which I don't find--

MR. GELLER: Well--

QUESTION: --terribly persuasive.

MR. GELLER: That's one example, but you have to remember, Justice Scalia, this was added at the last minute. This was not part of the original bill. It was stuck in at the Senate committee level at the last minute because someone suggested there might be a problem here, let's put this in, but--

QUESTION: Mr.--finish your answer. I'm sorry.

MR. GELLER: But the other key point--I mean, I think the Achille's heel of the plaintiffs' and any attempt to rely on section 4311(g) is that it doesn't distinguish at all between common law and State law.

I think the Court would have to commit an unnatural act with that language to draw a distinction between the common law and **[*45]** State law for purposes of **preemption,** and if--and if it saved all State law, which is the only logical reading of it, if it saves common law claims, if it saves State law claims there's no **preemption** at all. It eliminates completely section 4306.

QUESTION: I want to be sure--I thought you made an acknowledgement of a point I didn't think you would make. You suggested in answer to Justice Scalia that there could be a State law defective manufacture claim even if the Coast Guard had promulgated elaborate regulations about how boats had to be manufactured and the boat complied with every one of those regulations.

MR. GELLER: Yes. Yes.

QUESTION: There could still be a State law claim?

MR. GELLER: There could be a claim--there could well be a State law claim because we would not be within State 4306, that the boat was not manufactured according to its design requirements.

QUESTION: No, I'm assuming it complied with the--because it only talks about when they comply with all the Federal requirements. You think there still could be a--

MR. GELLER: Yes, but there aren't manufacturing requirements.

QUESTION: No, but I'm assuming they--of course, they could have a problem here, of course.

MR. **[*46]** GELLER: Yes. In other words, if, for example, the Coast Guard had a propeller--had a propeller guard requirement--

QUESTION: Right.

MR. GELLER: --and you complied fully with--you put the propeller guard on your boat, so you

satisfied the design requirements, but you didn't fasten it properly. It should have been fastened with four bolts and you only put two on, and it fell off in the water, there would be, I think, a plausible--

QUESTION: Even if--

MR. GELLER: --failure to manufacture--

QUESTION: Assuming that the Coast Guard regulation didn't tell you how many bolts to put on.

MR. GELLER: Right.

QUESTION: Is that right?

MR. GELLER: Right. But you see, the--Justice Stevens, the precise difference between that hypothetical--

QUESTION: It seems to me there's a bigger gap in this case than the one you--

MR. GELLER: A failure to manufacture claim only requires the manufacturer to comply with his own or the Coast Guard's design requirements. It doesn't add any design requirements.

The problem with allowing the States to impose design requirements--

QUESTION: But if that's true in regard to a minor matter like nuts and bolts, why isn't it true with regard to the total omission of any requirement **[*47]** for propeller guards?

MR. GELLER: Because how the boat is to be designed and what equipment the boat is to have on it is a question reserved to the Coast Guard or else you can't have a uniform national rule.

QUESTION: Well, but that's the same--true with the four bolts instead of two.

MR. GELLER: No. No, I don't think so, Your Honor, because there would be a uniform national rule. You have to build your boat consistent with the design requirements.

Now, if in a particular case you don't--

QUESTION: No, but the omission is, there's no requirement on the number of bolts. In this case, there's no requirement on propeller guards.

MR. GELLER: No, but in one case you're simply being asked to comply with your own design requirements. If your own design requirement says it should have four bolts, you have to have four bolts. If you only put two in, it's a manufacturing defect. That's a clear claim that can be brought under State law.

We have a completely different type of claim in this case. They're claiming it should have been designed differently.

QUESTION: The statute says performance standard. It doesn't talk about design.

MR. GELLER: Right.

QUESTION: So therefore, if the failure to have--it's **[*48]** the same question. If the failure to have a performance standard permits, in your view, a tort suit in respect to the defective manufacture, why doesn't the failure to have a propeller guard standard permit a tort suit in

respect to the failure to have the propeller guard? I think that's what Justice Stevens'--

MR. GELLER: I thought Justice Stevens was referring to a manufacturing defect, a failure to comply with your own design requirements or the Coast Guard's design requirements. There's a single set of design requirements. You have to comply with it, and if you don't, you're liable as a manufacturer for having a manufacturing defect.

That doesn't prevent you from manufacturing one type of boat throughout the United States. When you're dealing with a design requirement where each State can impose its own design requirement, it is impossible to build a single boat that operates throughout the United States, and that's precisely what the legislative history said Congress had in mind and wanted uniform national design and equipment requirements.

Manufacturing requirements are of a totally different order. You simply screwed up with one particular boat. It doesn't tell you anything **[*49]** at all about how you have to build the generality of your boats.

Now, I just want to turn for a minute to implied **preemption,** which provides a separate and totally independent basis for **preemption** here. The--even if the--even if 4306 didn't cover this situation, it's clear that it would--the State law claim here would be impliedly preempted, because it plainly frustrates what Congress and the Coast Guard were trying to do in this area.

I don't know of any piece of equipment that's been more thoroughly studied by the Coast Guard than prop guards, and the advisory committee and the Subcommittee on Prop Guards took 18 months, they looked at all the available data, they took a boat out onto Boston Harbor and operated it both with and without prop guards, they held hearings across the country--

QUESTION: Mr. Geller, do we give any credence to the fact that the Coast Guard itself doesn't think that this is contrary to what it's intending to do. In fact, it thinks it's consistent with the act.

MR. GELLER: Well, I don't know, Justice Ginsburg. That's the position of the Solicitor General. The Coast--I find it interesting, the Department of Transportation did not sign this brief, which is **[*50]** not typical of its practice. It's signed other briefs in this Court in cases like Myrick in recent years, so I don't know what the position of the Coast Guard is.

The Coast Guard has clearly held that even in the absence of a Federal regulation there is **preemption** of State law.

QUESTION: The Coast Guard isn't in charge of **preemption** anyway. The Coast Guard doesn't administer **preemption.** I mean, we give the Coast Guard deference on those matters that are within its bailiwick.

MR. GELLER: Yes. My point, Justice Scalia--

QUESTION: Whether the State is preempted or not is not within the Coast Guard's bailiwick.

MR. GELLER: All I'm saying, Justice Scalia, the answer to Justice Ginsburg's question is, I don't know of any pronouncement by the Coast Guard, ever, that has ever drawn a distinction between--

QUESTION: Well, maybe we should just leave the Coast Guard out of it.

MR. GELLER: Well, the fact of the matter is that the Coast Guard has never--

(Laughter.)

MR. GELLER: And I think it's an important point. The Coast Guard has never, ever drawn a distinction between State, regulatory, statutory, or common law requirements, ever, and I think it would be inconsistent for the Coast Guard to **[*51]** do that, given the fact that common law requirements can frustrate what they're trying to do, as this case shows every bit as much as a State statutory or regulatory--

QUESTION: And I suppose some inquiry into that subject is within their purview, because they can pronounce regulations exempting--

MR. GELLER: Right.

QUESTION: --certain State laws.

MR. GELLER: Right, and I don't know of any instance in which they have ever said, contrary, for example, to in Medtronic, where the FDA had a regulation that--

QUESTION: Thank you, Mr. Geller.

Mr. Hudson, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DAVID E. HUDSON ON BEHALF OF THE PETITIONERS

MR. HUDSON: In regard to the position of the Coast Guard, I think in footnote 2 of the blue brief the statement of the Commandant at the time the legislation was enacted is pretty compelling.

Without any qualification, without any cramp reading, the Commandant understood that the usual tort law concerning negligence and warranties would survive the enactment of this law. It's consistent with the statement quoted on page 6 of the blue brief by the executive director of the Boatowners Association, who suggested a need for a provision in the law **[*52]** to make it clear that common law claims would survive.

QUESTION: This is the statement of the Commandant before this legislation was on the books?

MR. HUDSON: Yes, during the Senate committee hearings in response to a question from the committee.

QUESTION: You consider that to be a position of the agency as to the meaning of the law?

MR. HUDSON: Further evidence of the agency's position I think, Justice Scalia, is found in those 1971 and 1973 Federal Register provisions that are cited in all of the briefs where the Coast Guard specifically left in place all laws enacted by the States prior to 1971.

It was talking about statutory enactments, even felt no need to even speak to the common law. If they're going to allow the State law enactments to stay in place, surely the common law survives as well and, in fact, I don't know that there's any recision of those 1971 exemptions from **preemption.**

The claims we're making here, the Georgia wrongful death statute is over 100 years old, the negligence standard has existed for as long as the State of Georgia has existed, so the common law has never been a focus of the Coast Guard restriction, or any need to exempt from **preemption** common law claims. **[*53]**

In regard to the case of Ray v. Atlantic Richfield, it does not fit this case. That was a situation

where the Coast Guard was directed--the statute said it shall issue the regulations governing the size of tankers and other activities on the coast. The Coast Guard in fact enacted regulations.

And if the State of Washington was able to put a limit on tanker sizes, contrary to what the Coast Guard had done, it would be the hypothetical Justice Breyer presented this morning. You would have a conflict, and under the Supremacy Clause, the State may not act contrary to any established regulation of the Coast Guard and in this case we don't have an established regulation.

Finally, I would submit--

QUESTION: You wouldn't necessarily have a conflict if they added something that the regulations didn't have, like a propeller guard. It wouldn't necessarily conflict any more than it does.

MR. HUDSON: I agree there would be no conflict, Justice Scalia. If we are able to prevail on a damage claim there would be no conflict.

It seems to me, Your Honors, that for Brunswick to prevail and for **preemption** to exist in this case five very high hurdles have to be overcome. They must overcome the presumption **[*54]** against the displacement of State law. They must overcome the requirement that **preemption** be manifest and clear purpose of Congress. They must overcome the lack of any statutory or legislative history showing an intent to restrict the common law. They must overcome the common understanding of the words used in section 4306.

Justice Stevens, in Cipollone you made a distinction between a **preemption** of requirements and in the Senate draft in the tobacco legislation they talked about a statute or regulation. That was changed to a requirement, and you pointed out one would be preempted and the other would not.

And finally, they would have to overcome the express mention of the common law in the savings provision in this case.

On the other hand, this is a **preemption** case, after all. The Federal agency with the authority to regulate agrees that common law claims should not be barred, or, indeed, there is no conflict between anything claimed in our lawsuit and any existing regulation of the Coast Guard and, if our claims are successful, we will only enhance the ultimate goal of the **Boat Safety** Act, which was to improve safety for people using boats.

Thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: **[*55]** Thank you, Mr. Hudson.

The case is submitted.

(Whereupon, at 1:34 p.m., the case in the above-entitled matter was submitted.)

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