No. 01-706

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether federal law preempts state common-law claims that a recreational motor boat engine was defectively designed because it lacked a propeller guard when: (1) the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311, 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)); and (2) the U.S. Coast Guard has not prescribed any regulations with respect to propeller guards.

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JURISDICTION

The decision of the Illinois Supreme Court was filed on August 16, 2001. This Court granted the petition for a writ of certiorari on January 22, 2002. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS

This case involves the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (the "Boat Safety Act" or "Act"). Relevant portions of the Act are in an appendix to this brief.

STATEMENT OF THE CASE

The question presented is whether state common-law claims that a boat engine was defectively designed because it lacked a propeller guard are preempted by the Boat Safety Act or by a decision of the U.S. Coast Guard not to try to develop a regulation that would have required propeller guards on recreational motor boats. The Illinois Supreme Court held that such claims are impliedly preempted, 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 *Lewis v. Brunswick Corp.*, No. 97-288 (October Term 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998), took the position that claims exactly like

petitioner's are not preempted by federal law.[1] The lower court's finding was clearly in error, as petitioner's claims are expressly preserved by the Boat Safety Act and do not in any way frustrate the goals of either Congress or the U.S. Coast Guard.

At the outset, we note that this case has enormous implications for the rights of the States to compensate tort victims through the common law. The agency "action" at issue here was a 1990 decision by the U.S. Coast Guard *not* to take any regulatory action involving propeller guards. That decision, which was set forth in a letter from a Coast Guard official to the Chairman of the Coast Guard's own Advisory Council, was never made the subject of any notice-and-comment rulemaking and never published in the *Federal Register*. Since that time, moreover, the agency has never taken the position that common-law claims are preempted in this area – and, in fact, the United States has taken the formal position (in *Lewis*) that such claims are *not* preempted. Finding preemption under these circumstances, where the States were given no notice of a possible restriction of their historic right to compensate victims through their tort systems – let alone an opportunity to comment on the propriety of such a restriction – would directly undermine the role of the States as separate

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[1] In *Lewis*, the United States argued that (1) common-law claims involving propeller guards are not expressly preempted because the Boat Safety Act's preemption clause, 46 U.S.C. § 4306, does not include common-law claims and its savings clause, 46 U.S.C. § 4311(g), expressly preserves them (U.S. Brief at 12-25); and (2) such claims are not impliedly preempted because, *inter alia*, the Coast Guard has never regulated propeller guards (although it retains the authority to do so) and never found such devices to be contrary to the interests of boat safety. *Id.* at 25-26. *Lewis* settled after oral argument, before any decision was rendered in the case.

sovereigns in our federal system. This Court should not tolerate such a result.

A. The Federal Statutory And Regulatory Framework.

1. The Boat Safety Act.

The Boat Safety Act of 1971 was enacted to authorize the creation of federal safety standards for recreational boats used on navigable waters of the United States. At the time of enactment, "[o]ver 40 million Americans [were] engage[d] in recreational boating each year in approximately 9,000,000 boats," with usage "increasing at the rate of about 4,000 per week . . ." S. Rep. No. 248, 92d Cong., 1st Sess. (1971) ("Senate Report"), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1334. This increase in recreational boating was accompanied by a marked increase in "accidents, deaths and injuries." *Id*. at 1334. Congress estimated that, "[i]n the last five years, nearly 7,000 Americans have died in boating mishaps." *Id.*

Congress recognized that the lack of adequate federal regulation contributed to the hazards of recreational boating. As of 1971, there were only "[t]wo laws . . . in existence that affect[ed] the noncommercial boat users on the navigable waters of the United States." H. R. Rep. No. 324, 92d Cong., 1st Sess. (1971) ("House Report"), at 1. These two laws – the Motor Boat Act of 1940, 54 Stat. 165, and the Federal Boating Act of 1958, 72 Stat. 1754 – imposed limited requirements principally relating to lighting, fire extinguishers, and boat numbering, and did not authorize the creation of federal construction or design standards. In 1971, Congress concluded that "[t]hese two acts do not meet current requirements of safe boating." House Report at 9. *See also* Senate Report at 1335

("the 1940 Act and the 1958 Act are not together adequate to meet today's needs").

To address the inadequacies in existing law, Congress decided, "for the first time," to enact a law that would address "the subject of safety for boats used principally for other than commercial use" – *i.e.*, recreational vessels. House Report at 2; Senate Report at 1333. The "major thrust" of the legislation was to grant the Coast Guard the authority to promulgate design and construction standards for recreational boats. House Report at 2. Congress observed that "[s]imilar authority" already existed with respect to aircraft and motor vehicles. *See id.* at 2; Senate Report at 1334. Congress further noted that, although "safety standards and requirements for certain categories of larger commercial vessels have existed for many years," Senate Report at 1334, recreational vessels had never before been a focus of federal law.

Against this backdrop, 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." *Id*. at 1333. The Act, which applies to "recreational vessel[s] . . . on waters subject to the jurisdiction of the United States . . . ," 46 U.S.C. § 4301(a), 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) (emphasis added). This rulemaking authority has been delegated to the Commandant of the United States Coast Guard. 49 C.F.R. § 1.46(n)(1). Although manufacturers are subject to civil and criminal penalties for the violation of Coast Guard safety standards, *see* 46 U.S.C. §

4311, the Act does not establish any mechanisms for compensating persons injured by unsafe boats.

Under the Act, the Coast Guard's authority to issue minimum safety standards is "permissive and not mandatory." Senate Report at 1338. *See* 46 U.S.C. § 4301(a)(1). Moreover, the Act sets out a number of limitations on the circumstances under which the Coast Guard may exercise its rulemaking authority. Among other things, the Act prohibits the Coast Guard from establishing regulations that would "compel substantial alteration" of existing "recreational vessel[s]" unless the Coast Guard makes a determination that the regulation is necessary to "avoid a substantial risk of personal injury to the public, that the [agency] considers appropriate in relation to the degree of hazard that the compliance will correct." 46 U.S.C. § 4302(c)(2).

In addition, before establishing any safety regulations, the Coast Guard is required to consult with the National Boating Safety Advisory Council (the "Advisory Council"). *See* 46 U.S.C. § 4302(c)(4). The Advisory Council does not include any federal officials; rather, it is comprised of seven State boating officials, seven industry representatives, and seven members from national recreational boating organizations and from the general public. *See* 46 U.S.C. § 13110. Congress further specified that Advisory Council members are not "officer[s] or employee[s] of the United States Government for any purpose." 46 U.S.C. § 13110(d).

Finally, before issuing any regulations under the Act, the Coast Guard must comply with the formal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553, which requires public notice and comment on a rule before it becomes effective. *See* Senate Report at 1340. Under this

scheme, any party adversely affected by a standard prescribed under the Boat Safety Act is entitled to seek judicial review of the standard in accordance with the Administrative Procedure Act. *Id*.

The Act also contains two provisions addressing the effect of Coast Guard regulations on state law. First, Congress included a 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, providing 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). 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.

a. The Subcommittee Investigation. In May 1988, at the request of the U.S. Coast Guard, the Advisory Council appointed a five-person subcommittee (the "Subcommittee") to "[a]ssess 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." J.A. 43. *See also* J.A. 12. The Subcommittee, which consisted of one Coast Guard representative, one state member, one industry representative, and two members of the public, was also charged with considering whether the Coast Guard should "move towards a federal requirement for some form of propeller guard" on recreational boats. J.A. 43.

In November 1989, the Subcommittee recommended that the Coast Guard "take no regulatory action to require propeller guards." *See* Report of the Propeller Guard Subcommittee of the National Boating Safety Advisory Council dated November 7, 1989 ("Subcommittee Report"), J.A. 12-71. According to the Subcommittee Report, propeller guards were already in use on certain vessels, including amusement park boats, rescue vessels used in other countries, and on landing boats used by the U.S. Marines and the U.S. Navy. J.A. 30-31. The Subcommittee Report said, however, that although propeller-guards were "feasible" for some boats, the devices could "affect boat operation adversely" and "create new hazards" under certain circumstances. J.A. 36-39. The Subcommittee Report further concluded that the majority of underwater-impact injuries were attributable to factors unrelated to unguarded boat propellers, such as contact with other parts of the boat. J.A. 39. The Subcommittee also found that there was no universal solution to the problem of unguarded boat propellers:

> Since there are hundreds of propulsion unit models now in existence, and thousands of hull designs, the possible hull/propulsion unit combinations are extremely high. No simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive costs.

J.A. 38. As a result, the Subcommittee Report concluded, "[a]lthough the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future." J.A. 40.

At the time it issued this recommendation, the Subcommittee was aware of on-going litigation involving injuries caused by unguarded boat propellers. The Subcommittee Report specifically noted that "[a] number of law suits have been filed by victims of alleged propeller strikes to recover damages from the operator of the striking vessel and also against the manufacturer of the propulsion unit and/or boat" (J.A. 17), and included a detailed discussion of the various "legal theories" and factual disputes involved in these cases. J.A. 17-20. In addition, the majority of the individuals that appeared before the Subcommittee during the course of its investigation had served as expert witnesses in propeller-guard litigation (the bulk of these witnesses had testified on behalf of boat industry defendants). J.A. 15-16. The Subcommittee Report, however, contains no mention of federal preemption or any suggestion that the Coast Guard should even consider preempting future lawsuits involving propeller guards.

On November 7, 1989, the Advisory Council accepted the Subcommittee Report and adopted its recommendation that no regulatory action be taken with respect to propeller guards. J.A. 72-79. However, in response to concerns expressed by a propeller-strike accident victim that "it is obvious that all related information is not in yet . . ." (J.A. 78), the Chairman "assured the Council and guests that this is not a dead issue. If new pertinent information becomes available, a subcommittee will be reconvened." J.A. 79.

b. The Coast Guard's Decision. The Coast Guard, in turn, adopted the Advisory Council's recommendation that it "take no regulatory action to require propeller guards." J.A. 80. Although the agency did not take any formal action in this regard, the Coast Guard's Chief of the Office of Navigation and Safety and Waterway Services – Rear Admiral Robert T. Nelson – wrote a letter to the Chairman of the Advisory Council setting forth the rationale underlying the agency's decision not to begin the formal regulatory process. J.A. 80-84 (the "Coast Guard Letter"). The Coast Guard Letter stated:

> 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.

J.A. 80. 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* or other information on the state of the art." J.A. 81 (emphasis added). He further stated that the Coast Guard intended to publish "a series of articles in our Boating Safety Circular . . . aimed at avoiding boat/propeller strike accidents. Topics could include, for example, . . . *available propeller guards* . . .." J.A. 83 (emphasis added).

At no point did the Coast Guard Letter – or anything else issued by the agency – indicate that it had concluded that propeller guards might be dangerous. None of the Subcommittee Report's statements about the dangers of propeller guards was reiterated or endorsed in the Coast Guard Letter. In addition, although the Subcommittee's investigation was prompted in part by numerous lawsuits filed by propeller-strike victims against boat engine manufacturers (J.A. 17), the Coast Guard Letter does not mention these lawsuits or indicate in any way that the agency intended to preempt common-law claims relating to propeller guards.

Neither the Subcommittee Report nor the Coast Guard Letter was ever published in the *Federal Register* or made the subject of any formal regulatory action. Thus, there was no attempt to conform to the rulemaking requirements of either the Boat Safety Act, *see* 46 U.S.C. § 4302, or the Administrative Procedure Act. *See* 5 U.S.C. § 553. To date, there is still no federal regulation with respect to propeller guards, and their use is neither mandated nor prohibited by federal law.

c. Subsequent Developments. The Coast Guard has, however, continued to investigate whether to require the use of propeller guards on recreational motor boats. In 1995, 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 or possible alternatives to propeller guards" on recreational houseboats and other "displacement-type (non-planing) vessels." *See* 60 Fed. Reg. 25,191 (1995), J.A. 85. 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. 13,123 (1996), J.A. 90. 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). J.A. 100.

Finally, in December 2001, the Coast Guard proposed a rule that would require owners of all "non-planing" rental vessels to install "either a propeller guard or a combination of three other propeller injury avoidance measures: A swim ladder interlock, an aft visibility device, and an emergency ignition cut-off switch." 66 Fed. Reg. 63,645 (2001), J.A. 141. In the preamble to the proposed rule, the Coast Guard stated that it intends to initiate "subsequent regulatory projects" to address an Advisory Council recommendation that the agency require manufacturers and importers of all new "planing" vessels 12 to 26 feet – such as the motor boat that killed petitioner's wife – and all new non-planing vessels 12 feet and longer "to install one of several factory installed propeller injury avoidance measures." J.A. 139-40.

B. The Proceedings Below

This case arose out of a boating accident in Tennessee in which the petitioner's wife, Jeanne Sprietsma, fell from a motor boat and was struck by the motor's propeller blades. J.A. 100-

102. As a result, she suffered serious injuries and later died. J.A. 102. The boat was equipped with an outboard motor that did not have a propeller guard. J.A. 101-102. The motor was designed, manufactured, and sold by respondent Mercury Marine, a division of Brunswick Corporation. J.A. 100-101.

Petitioner Rex Sprietsma is the administrator of the estate of his deceased wife. J.A. 102. He filed a wrongful death and survival action against Mercury Marine in the Circuit Court of Cook County, Illinois seeking to recover damages based on negligence and strict liability for his wife's pain and suffering, along with the financial losses suffered by him and his son. J.A. 100-122. The complaint alleged, among other things, that the boat engine was defectively designed because it was not equipped with a propeller guard. J.A. 102.

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 (Pet. App. 39) and the intermediate appellate court affirmed, finding that petitioner's claims are expressly preempted by the Boat Safety Act. Pet. App. 34.

On appeal, the Illinois Supreme Court rejected the appellate court's express preemption ruling, but held that petitioner's claims are impliedly preempted by federal law. Pet. 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. Pet. App. 5 Relying on *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 court declined to apply any presumption against preemption on the

theory that "federal concerns predominate in this case." Pet. 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 "[c]ompliance 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. Pet. App. 9-10. The court went on to hold, however, that petitioner's claims are impliedly preempted on the theory that a jury verdict finding Mercury Marine liable for not installing a propeller guard would "frustrate" federal purposes. Pet. App. 16. Despite its acknowledgment that the Coast Guard has never issued any regulations governing propeller guards, the court found that the agency's regulatory *inaction* amounted to an affirmative decision to preclude any common-law claims seeking to hold a manufacturer liable for failing to install propeller guards. *Id.*

SUMMARY OF ARGUMENT

This case is governed by the strong presumption against preemption that this Court has repeatedly applied in cases involving the States' historic right to protect the health and safety of their citizens and compensate victims through their tort systems. *See, e.g., Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). This Court's decision in *United States v. Locke,* 529 U.S. 89 (2000), which held that the presumption against preemption does not apply to state laws regulating the design features of ocean-going oil tankers used in national and international maritime commerce, does not suggest a different result. None of the federal interests at stake in *Locke* – particularly the federal government's long-standing interest in

regulating commercial vessels used in international trade – is implicated in this case, which involves the design features of a small recreational vessel that, until recently, were not even within the scope of any federal regulatory authority.

Even assuming, however, that *Locke* altered the traditional presumption against preemption applicable to common-law tort claims, petitioner's claims are not preempted. First, the Boat Safety Act does not expressly preempt *any* common-law claims. The plain language of the Act's preemption clause – 46 U.S.C. § 4306 – shows that Congress only expressly preempted state *legislative* or *administrative* safety standards in the boat safety area, and not common-law claims. Any doubt on this point would be dispelled by the Act's broadly-worded savings clause, which states in sweeping and unambiguous terms 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). Both the text of this "anti-preemption" provision and its legislative history leave no room for a conclusion that petitioner's claims are expressly preempted by the Safety Act. *See Geier v. American Honda Co.*, 529 U.S. 861, 868 (1999).

Nor is there any basis for the lower court's conclusion that petitioner's claims are impliedly preempted because they frustrate federal purposes. First, this lawsuit is entirely consistent with the goals of the Boat Safety Act, since Congress made clear (in the Act's savings clause) that the preservation of common-law claims would *aid* the accomplishment and execution of its full purposes. Congress recognized that federal regulations and common-law liability can and should work together to create safer recreational boats. Given Congress' expressed desire to preserve common-law claims, petitioner's lawsuit would not undermine the purposes of the Act. In fact,

because the Act limits the Coast Guard's authority to the promulgation of actual rules under 46 U.S.C. § 4302, affording preemptive effect to the agency's regulatory *in*action would actually *frustrate* Congress' purposes.

Petitioner's claims are not inconsistent with any of the Coast Guard's regulatory goals. First and foremost, because the agency has never promulgated any regulations governing propeller guards, there is no federal standard with which a state common-law action could possibly conflict. The Coast Guard remains free, moreover, to promulgate any regulations in this area in the future, if the appropriate justifications exist. Nothing about petitioner's lawsuit could possibly conflict with or undermine this grant of rulemaking authority.

This lawsuit also does not conflict with any specific agency determination regarding propeller guards. The Coast Guard has never given any indication of an intent to preempt common-law claims like petitioner's. Nor has the agency ever found that propeller guards are inconsistent with boat safety. To the contrary, in its unpublished letter setting forth the agency's decision not regulate propeller guards, the Coast Guard not only declined to mention the alleged hazards of propeller guards, but it affirmatively stated that propeller guards were "available" and could play a role in helping to prevent propeller-strike accidents – observations that are flatly inconsistent with any notion that the agency found propeller guards to be dangerous or intended to preempt common-law claims in this area.

This Court's teachings regarding the preemptive effect of regulatory inaction confirm that petitioner's claims must be permitted to go forward. Although the Court has sometimes found state law preempted in the absence of an applicable

federal standard, it has only done so when Congress had fully occupied the regulated field at issue (or made clear its intent that the field remain unregulated). Where, as here, federal law has *not* fully occupied the regulatory field, the Court has made clear that, absent some "extant action" from which a preemptive inference can be drawn, "preemption, if it is intended, must be explicitly stated." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum*, 485 U.S. 496, 503 (1988). This test cannot be met here, because the Coast Guard has never regulated propeller guards or said a word about preemption, and the Boat Safety Act explicitly preserves common-law claims. That being so, this case is governed by *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), where this Court held – in the context of a statute that, like the Boat Safety Act, expressly preserves common-law claims – that the absence of a federal safety standard precludes any finding of implied conflict preemption.

ARGUMENT

I. This Case Is Governed By A Strong Presumption Against Preemption.

To begin with, this case is governed by a strong presumption against preemption of state law. As this Court recently explained, where "Congress has 'legislated . . . 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 [federal law] unless that was the clear and manifest purposes of Congress." *Medtronic*, 518 U.S. at 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). This presumption is at its strongest when the question is, as here, whether Congress

intended to prohibit the States from protecting the health and safety of their citizens through the exercise of such traditional and core police powers as the provision of common-law tort remedies. *Id*. *See also Hawaiian Airlines, Inc., v. Norris*, 512 U.S. 246, 252 (1994); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone*, 505 U.S. at 516. In this connection, whether the federal statute provides "any substitute for the traditional court procedure for collecting damages for injuries caused by tortious conduct" – as the Boat Safety Act does not – is particularly significant. *United Constr. Workers v. Laburnum Corp.*, 347 U.S. 656, 663-64 (1954); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). In the absence of such a substitute, plaintiffs who could prove that their physical injuries resulted from the wrongful conduct of defendants under state law would be left wholly without any remedy – a result that should not readily be attributed to Congress.

Contrary to the lower court's holding, this Court's decision in *United States v. Locke*, 529 U.S. 89 (2000), which involved state regulation of the operation and design of ocean-going oil tankers used in international commerce, does not suggest a different result here with regard to the presumption against preemption. *Locke* 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 that "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id*. The Court also expressed concern that state regulations governing international ocean-going oil

tankers would undermine "the substantial foreign affairs interests of the Federal Government." *Id*. at 97.

Locke's holding has no bearing here for several reasons. First, in contrast to the long-standing statutory and regulatory scheme at issue in *Locke* governing commercial vessels, *see id*. at 108, the federal government's involvement in regulating noncommercial boat design is of relatively narrow scope and markedly recent vintage.[2] This fact alone renders inapposite *Locke*'s holding that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a *history of significant federal presence*." 529 U.S. at 108 (emphasis added).

Second, this case in no way implicates the foreign affairs concerns paramount in *Locke*. There, this Court emphasized that the "scheme of regulation" governing oil tankers "includes a significant and intricate complex of international treaties and maritime agreements bearing upon the licensing and operation of vessels." *Id.* at 102.[3] In that context, where the state laws at

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[2] As explained above, prior to the passage of the Boat Safety Act, Congress had never attempted to regulate the design aspects of noncommercial vessels. As of 1971, only two laws – the Motor Boat Act of 1940 and the Federal Boating Act of 1958 – "affect[ed] the noncommercial boat users on the navigable waters of the United States" (House Report at 1), and those laws were highly limited in scope, dealing principally with safety equipment and boat numbering. Congress recognized this fact, and sought to fill the void by passing, "for the first time," federal legislation that authorized the Coast Guard to regulate the design features of recreational boats. House Report at 2.

[3] As co-petitioner in the case, the United States emphasized that the state laws at issue "differ from the international . . . regulatory regime in numerous ways," and that enforcement of these laws "raises the distinct possibility that other nations that are parties to international conventions and

issue threatened directly to impinge on the United States' treaty obligations with foreign countries, it made perfect sense for *Locke* to reject any application of the presumption against preemption of state law. These international concerns, however, are not present here, because this case involves the design features of a small recreational vessel that will never be used in international commerce. *Locke* is inapplicable for this reason, as well.[4]

The lower court nonetheless jettisoned the presumption against preemption on the ground that "the claims in this case relate to federal maritime activity . . .." Pet. App. 6. In so holding, the lower court relied on *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674 (1982), which held that a collision between two pleasure boats on navigable waters had a sufficient nexus to traditional maritime activity to come within the admiralty jurisdiction of the federal courts. That the federal courts possess admiralty jurisdiction over some maritime torts involving recreational boats does not, however, strip the States of their interest in ensuring that the victims of

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agreements will regard the United States in violation of its obligations and thus take actions that will undermine international uniformity." *United States v. Locke*, Case Nos. 98-1701, 98-1706, Brief for the United States at 12, 45. These sentiments were joined by "the governments of 13 ocean-going nations[, who] expressed their concerns [about conflicting state regulations] through a diplomatic note directed to the United States." 529 U.S. at 97.

[4] *See Allen-Bradley Local No. 1111 v. Wisc. Empl't Relations Bd.*, 315 U.S. 740, 749 (1942) ("we were more ready to conclude that a federal act in a field that touched international relations superseded State regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and the use of streets and highways").

maritime torts be compensated for their injuries. In *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), for example, this Court held that the family of a young woman killed in a jet ski accident was entitled to seek damages for her wrongful death under state law. *Id*. at 202. Although the Court did not decide whether state law would ultimately supply the liability standard governing the wrongful death case, *see id.* at 216 n.14, *Yamaha* shows that, even in the maritime area, the states retain a powerful interest in compensating the victims of hazardous products – an interest that has always been central to this Court's decisions applying the presumption against preemption of state law. *See, e.g., Medtronic*, 518 U.S. at 485.

In addition, numerous prior decisions of this Court have made clear that, absent a direct conflict with federal law, States' "police powers" in the areas of health and safety 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). Thus, as this Court observed in *Yamaha*, "[f]ederal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters." 516 U.S. at 215 n.13. To this end, "States have . . . traditionally contributed to the provision of environmental and safety standards for maritime activities." *Id*. (collecting cases).

Against this backdrop, there is no justification for disregarding the presumption against preemption. Not only does the federal interest here pale in comparison to that at issue in *Locke*, but the States' interest in exercising their police powers to protect health and safety is a powerful one, even in the maritime context. In case after case, this Court has applied

the presumption against preemption to protect the State's exercise of its traditional police powers, notwithstanding an arguably strong countervailing federal interest in the subject matter at hand.[5] There is no reason to abandon this presumption here simply because this case involves the design features of a recreational boat engine that, until fairly recently, were not even within the regulatory jurisdiction of any federal agency.

II. Petitioner's Claims Are Not Expressly Preempted.

The lower court held that the Boat Safety Act's savings clause, which 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), precludes any finding of express preemption in this case. *See* Pet. App. 9. In so ruling, the lower court relied on *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868 (1999), which construed a similarly-worded savings clause in the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq*. (the "Motor Vehicle

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[5] *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404, 2414 (2001) (cigarettes); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (medical devices); *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993) (railroad crossings); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (cigarettes); *English v. General Electric Co.*, 496 U.S. 72, 79 (1990) (nuclear power); *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 714, 718 (1985) (blood plasma); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (food labeling); *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940) (highway safety); *H.P. Welch & Co. v. State of New Hampshire*, 306 U.S. 79, 85 (1939) (highway safety); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 610 (1926) (locomotive equipment).

Safety Act"), as precluding any express preemption of common-law claims.[6]

We agree that *Geier*'s holding regarding the savings clause in the Motor Vehicle Safety Act definitively resolves any question of express preemption in this case and effectively overrules the various pre-*Geier* decisions holding that the Boat Safety Act expressly preempts common-law claims like petitioner's.[7] This point is addressed *infra* at II(B). However, to ensure that this Court has the benefit of full briefing on the express preemption issue, we also address the text of the Act's express preemption clause – 46 U.S.C. § 4306 – here. As explained below, even without the savings clause, it is clear that Section 4306 does not encompass common-law claims.

As a threshold matter, we note that Section 4306 is susceptible of at least two interpretations regarding the Boat Safety Act's effect on state *positive law – i.e.*, legislation and regulations. The preemption clause provides that,

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[6] *See also 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) (holding that *Geier* precludes any finding of express preemption under the Boat Safety Act).

[7] *See Carstensen v. Brunswick Corp.*, 49 F.3d 430, 433 (8th Cir.), *cert. denied*, 516 U.S. 866 (1995); *Moss v. Outboard Marine Corp.*, 915 F. Supp. 183, 186 (E.D. Cal. 1996); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Mowery v. Mercury Marine*, 773 F. Supp. 1012, 1017 (N.D. Ohio 1991); *Farner v. Brunswick Corp.*, 239 Ill. App. 3d 885, 891-92 (Ill. 1992); *Ryan v. Brunswick Corp.*, 557 N.W.2d 541, 551 (Mich. 1997). Since *Geier*, no court has held that the Boat Safety Act expressly preempts common-law claims.

> [u]nless 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*.

Id. (emphasis added). One interpretation of this language is that, absent the grant of an exemption from the Coast Guard, the *only* action the States can take in the field of recreational boat safety is to pass laws or regulations that are "identical to" pre-existing federal regulations. Under this reading of Section 4306, state positive law may be preempted even where – as here – there is no federal regulation governing the design features at issue.

A second – and far more plausible – interpretation is that Section 4306 only limits what a State can do in the event the Coast Guard *has* prescribed a federal regulation (the State is limited to prescribing an "identical" regulation); it does not affect what a State can or cannot do where the Coast Guard has *not* promulgated a federal regulation. This interpretation is supported by the fact that the Congress merely gave the Coast Guard permissive authority to promulgate minimum safety standards for recreational boats. *See* 46 U.S.C. § 4302(a) ("[t]he Secretary *may* prescribe regulations . . . establishing minimum safety standards for recreational vessels and associated equipment . . .") (emphasis added). That the Coast Guard is not required to issue *any* standards under the Act is

inconsistent with the notion that Congress intended to preempt the entire field of state positive law in this area.[8]

Under this reading of Section 4306, the fact that the U.S. Coast Guard has not issued any regulations with respect to propeller guards definitively resolves the express preemption question in petitioner's favor. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (unanimous holding that common-law claims involving a manufacturer's failure to install antilock brakes in trucks are not expressly preempted by the Motor Vehicle Safety Act because "[t]here is no express federal standard addressing [antilock brakes] for trucks or trailers."). *Cf. Medtronic*, 518 U.S. at 494 (majority opinion); *id.* at 508 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 513 (O'Connor, J., concurring in part and dissenting in part) (unanimous holding that common-law claims alleging that heart pacemakers were defectively designed are not preempted by Medical Device Amendments of 1976 because the federal agency had not promulgated any standards governing the design of these devices).

This Court need not resolve this issue, however, because even if Section 4306 preempts state positive laws in the absence

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[8] *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 171-72 (1978) (because Title I of the Ports and Waterway Safety Act (the "PWSA") "merely authorizes and does not require the Secretary [of Transportation] to issue regulations" governing vessel traffic, it does not preempt the field of state positive law). *Cf. id.* at 168 (because Title II of the PWSA *obligates* the agency to promulgate rules regarding tanker design and operation, the statute "leaves no room for the states to impose different or stricter design requirements than those which Congress has enacted . . ."). *See also U.S. v. Locke*, 529 U.S. 89 (2000) (reaffirming *Ray*'s analysis of the preemptive scope of Titles I and II of the PWSA).

of a federal regulation, it does not expressly preempt common-law claims under any circumstances. This is made clear both by the text of Section 4306 and by the Act's savings clause, 46 U.S.C. § 4311(g), which expressly *preserves* common-law claims.

A. The Act's Preemption Provision Does Not Encompass Common-Law Claims.

The plain wording of Section 4306 shows that Congress did not expressly preempt common-law claims. To begin with, Section 4306 only preempts any "*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 (emphasis added). Perhaps the most notable feature of this provision is the absence of any reference to common-law claims. Congress has shown its ability to refer to "common law" when it intends to include it within the scope of a preemption clause.[9] Indeed, the reference to "common law" in the Act's savings clause, 46 U.S.C. § 4311(g) (*see infra* at II(B)), shows that Congress was cognizant of common law *in this very piece of legislation,* thereby defeating any notion that Congress intended the preemption provision to encompass common-law claims. *See, e.g.*, *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("[i]t is generally presumed that Congress acts intentionally and purposely when it includes particular

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[9] *See, e.g.*, Copyright Act of 1976, 17 U.S.C. § 301(a) (preempting rights "under the common law, rule, or public policy"); Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e) (preempting any "State constitution, statute, court decree, common law, rule or public policy").

language in one section of a statute but omits it in another") (internal quotation marks omitted).

Even the broadest reading of Section 4306 ultimately breaks down, however, in light of other aspects of the preemption provision which show that Congress did not preempt tort suits against boat manufacturers. *First*, the Act merely preempts state "law[s] or regulation[s]" that are not identical to federal requirements. Although "law," standing alone, is susceptible to a broad reading, "[l]anguage . . . cannot be interpreted apart from context." *Smith v. United States*, 508 U.S. 224, 229 (1993). Here, the term "law" does not stand in isolation, but rather as a counterpart to the word "regulation," which is a prescriptive requirement promulgated by an administrative rather than legislative body. Indeed, this Court in *Cipollone* repeatedly noted that the word "regulation" is a reference only to positive law and not to common-law duties or damages liability. *See* 505 U.S. at 504, 519, 523. Thus, if "a word is known by the company it keeps," *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citation omitted), and if this Court is to adhere to the oft-stated "assum[ption] 'that the legislative purpose is expressed by the ordinary meaning of the words used,'" *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)), the phrase "law or regulation" cannot plausibly be read to encompass the damages claims in Mr. Sprietsma's suit.[10]

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[10] The reference to "requirement" in the preemption clause does not suggest a different result. Although this Court in *Cipollone* found preemption of common-law claims by a statute that broadly preempted any "requirement or prohibition . . . imposed under state law," 505 U.S. at 520, Section 4306 is very different. First, unlike the 1969 Act at issue in *Cipollone,* Section 4306 does not preempt "requirements" at all; rather, it preempts a "law or regulation . . . *imposing* a requirement for associated equipment . . .." 46 U.S.C. § 4306 (emphasis added). Thus, the word

Second, the preemption provision only prohibits a State from imposing a nonidentical "law or regulation establishing . . . a performance or other *safety standard* or imposing a requirement for associated equipment . . .." 46 U.S.C. § 4306 (emphasis added). "Safety standard" is a term used at various places in the Act to refer to the *administrative* standards the Coast Guard is authorized to adopt pursuant to Section 4302. *See, e.g.*, *id*. at §§ 4302(a)(1), 4302(a)(2), 4304, 4311(f)(1), and 4311(f)(2). The use of the same term to refer to the state norms that may be displaced by a federal "safety standard" is, under normal rules of statutory construction, indicative that the term is meant to have the same meaning. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning") (citing cases); *Morrison-Knudsen Const. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983) ("a word is presumed to have the same meaning in all subsections of the same statute"). Thus, the only sensible reading of the Act's preemption provision is that a "safety standard" promulgated under the Act (or a requirement for equipment associated with such a standard) will only preempt state *legislative* or *administrative* "safety standards" – and not common-law claims.

"requirement" in the Boat Safety Act is merely used to describe the *type* of "law or regulation" that is preempted by federal law; it is not, as in *Cipollone*, intended to designate an entirely separate category of items that are subject to preemption. Second, unlike the 1969 Act in *Cipollone*, Section 4306 contains no broad reference to preempting the entire body of "state law" – a term that this Court held could be read to encompass common law claims. *See* 505 U.S. at 515. Third, unlike the Boat Safety Act, the 1969 Act in *Cipollone* did not contain any sort of savings provision at all, let alone one that expressly referred to common-law claims.

Third, the preemption provision only applies to a safety standard "establish[ed], continue[d] in effect, or enforce[d]" by a "State or a political subdivision of a State." Construing an award of damages to a tort victim as "establishing, continuing in effect, or enforcing" a boat safety standard is at odds with the ordinary meaning of Congress' words. The duties relied on by tort claimants are general duties under the common law that have evolved over hundreds of years. Although a jury award of damages would represent confirmation of a pre-existing common-law duty – for instance, the duty to act non-negligently – only an inept grammarian could construe an award of damages in a tort suit as "establishing, continuing in effect, or enforcing" a boat safety standard or other regulation. On the other hand, it is common parlance to say that a previously "established" statute or regulation "continues in effect" or is "enforced."

Fourth, it makes no sense to construe the term "State or a political subdivision of a State" as encompassing a jury (or judge) in a tort case. Political subdivisions of states, such as counties and towns, often enact health and safety laws. For this reason, it was logical for Congress to include "political subdivisions" in the coverage of Section 4306, lest there be some ambiguity as to the breadth of the term "State." At the same time, no one would ordinarily describe an award of damages by a jury or judge as being issued by a "State or political subdivision of a State." And it is impossible to say that a *federal* jury or judge in a diversity action in which a preemption defense is raised is in any sense a "State or political subdivision thereof." Thus, the Boat Safety Act's express preemption provision cannot reasonably be read to encompass common-law claims.

B. The Act's Savings Clause Expressly Preserves Common-Law Claims.

If any doubt remained as to the inapplicability of the Boat Safety Act's express preemption provision to common-law claims, it would be dispelled by the Act's *anti*-preemption provision – the savings clause – which expressly *preserves* all common-law claims. It states in simple terms: "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).

On its face, this language is sweeping and unambiguous. "Compliance with standards, regulations, or orders prescribed under this chapter" is a phrase that does not admit of qualification. It cannot be read to mean only compliance with certain federal safety standards, or to exempt from its scope safety standards that deal with the particular question of design or performance at issue in a given common-law action. Similarly, the phrase "does not relieve a person from liability at common law or under State law" does not on its face admit of qualification. "[L]iability at common law or under State law" is all-inclusive. That phrase cannot fairly be read to mean that the Boat Safety Act provides any basis for exempting any defendant from any common-law liability.

This conclusion is supported by *Geier*, 529 U.S. at 861, which considered a similarly worded preemption provision and savings clause in the Motor Vehicle Safety Act. Like the Boat Safety Act, the preemption provision of the Motor Vehicle Safety Act preempts states from establishing "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." 15 U.S.C. § 1392(d). And, like the nearly

identical provision in the Boat Safety Act, the savings clause in the Motor Vehicle Safety Act expressly provides that compliance with federal safety standards "does not exempt any person from any liability under common law." *See* 15 U.S.C. § 1397(c).

In interpreting these two provisions, *Geier* noted that, standing alone, the preemption provision of the Motor Vehicle Safety Act "arguably" might be read broadly to preempt common-law claims. 529 U.S. at 868. But, the Court went on to note, Congress gave no indication that it intended for the preemption provision in the Motor Vehicle Safety Act to be read this broadly. Instead, as in the Boat Safety Act, Congress included a savings clause, expressly communicating its intention to preserve common-law claims. In light of Congress' decision to include this clause, *Geier* found, "a broad reading" of the express preemption provision "cannot be correct." *Id*. at 868. Rather, the inclusion of "[t]he savings clause assumes that there are some significant number of common-law liability cases to save." *Id*. To give "actual meaning" to this clause, the Court found, it is necessary to read the express preemption provision to exclude common-law claims. *Id.* In light of the almost identical wording of the Boat Safety Act's savings clause, the same holding is warranted here.[11]

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[11] The Boat Safety Act's savings clause's reference to "State law" as well as "common law" does not render *Geier* inapplicable here. This reference merely indicates that some forms of damages liability in some states are imposed via statute rather than common law, and saves those claims as well. *See Cipollone*, 505 U.S. at 518, 537 n.2 (savings clause in the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4406, providing that "[n]othing in this Act shall relieve any person from liability at common law or under *State statutory law* to any other person," preserves damages claims from preemption).

This interpretation of Section 4311(g) is confirmed by the Boat Safety Act's legislative history, which demonstrates that Congress enacted the savings clause to clarify that the Act does not preempt common-law claims. The savings clause was added to the Act at the urging of Richard Schwartz, the Executive Director of the Boat Owners Association of the United States, who testified that:

> we would recommend a savings provision with respect to the consumers' private remedies, which is not touched on by the present Bill. *We would like to see it explicitly clarified that compliance with standards issued under the Act does not relieve the manufacturer from liability under State or common law in private law suits.* It should be made clear that this Act does not preempt state or common law.

Merchant Marine Subcommittee of the Senate Committee on Commerce, 92d Cong., 1st Sess., Hearing (March 22, 1971), 88 (emphasis added).

At the same hearing, the Commandant of the Coast Guard, in response to a Senator's question about the inclusion of an express savings clause, also stated that

> [w]e do not believe that compliance with promulgated standards under the Act has the effect of relieving a manufacturer from liability under the usual tort law concerning negligence or warranties. For many years the Coast Guard has required compliance with "standards" by inspected vessels. Courts have consistently held that a vessel owner's compliance with Coast Guard inspection requirements is not synonymous with "seaworthiness" under maritime

> law. Though the analogy is apparent *we would have no objection to an express provision to clarify that a manufacturer's compliance with promulgated standards does not by itself relieve him of any tort liability which otherwise could pertain.*

Id. at 66 (emphasis added).

Congress responded by adding the savings clause, and commented that the new provision

> is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. *The purpose of the section is to assure that in a product liability suit 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 value.

Senate Report, 1971 U.S.C.C.A.N. at 1352 (emphasis added).

Thus, at the time of the bill's drafting, Congress was presented with the very question at issue in this case: whether the Boat Safety Act should preempt common-law damages claims. Faced squarely with this issue, Congress did not enact or otherwise provide any "clear and manifest intent" to preempt such laws as is required to find preemption. *See Cipollone*, 505 U.S. at 516. Rather, its response (in the form of the savings clause) demonstrates that Congress intended to preserve common-law claims even in cases where a manufacturer could

demonstrate compliance with a minimum federal standard.

III. Petitioner's Claims Are Not Impliedly Preempted.

The lower court agreed that petitioner's claims are not expressly preempted by the Boat Safety Act. Pet. App. 9-10. It held, however, that petitioner's lawsuit is *impliedly* preempted by the Coast Guard's decision not to require propeller guards on recreational boats. Implied preemption only arises when there is an "actual conflict" between federal and state law – either because it would be "impossible for a private party to comply" with both or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Freightliner*, 514 U.S. at 287 (citations omitted). "Impossibility" is not an issue in this case, because it is undisputed that the Coast Guard has not regulated propeller guards and that nothing in federal law would prohibit respondent from installing propeller guards on its boat engines (or from paying compensation to petitioner). The question, then, is whether petitioner's claims somehow "stand as an obstacle" to federal purposes. The answer is no, since this lawsuit is not inconsistent with the goals of either Congress or the Coast Guard.

A. Petitioner's Claims Do Not Conflict With Any Congressional Purposes.

First, petitioner's claims do not in any way "stand as an obstacle" to Congress' purposes. To the contrary, petitioner's claims are entirely consistent with the overriding goal of the Boat Safety Act, which is to promote recreational boating *safety*. When passing the Act, Congress recognized that existing standards for boat safety were inadequate, and that

more needed to be done to protect the public from unsafe recreational boats. Common-law actions help to promote this goal by identifying safer products and raising public awareness of the hazards of unguarded propellers. Thus, lawsuits like petitioner's actually *further* Congress' prime interest in this piece of legislation.

Respondent argued below, however, that Congress' main goal in passing the Boat Safety Act was to achieve "uniformity" in boat safety regulation, and that permitting common-law claims would undermine this goal by subjecting boat manufacturers to conflicting standards of conduct. This was also the crux of the Eleventh Circuit's holding in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (1997), *cert. granted*, 522 U.S. 978, *cert. dismissed*, 523 U.S. 1113 (1998), which found that: (a) the Boat Safety Act preempts the entire field of recreational boat safety regulations; and thus (b) "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the [Boat Safety Act]." *Id*. at 1505.

These arguments do not withstand analysis. First, as explained *supra* at 23-24, there is no sound basis for concluding that Congress ever intended to preempt the entire field of state positive law with respect to the design and safety features of recreational boats. Rather, because the Boat Safety Act merely permits – rather than requires – the Coast Guard to issue minimum safety standards (*see* 46 U.S.C. § 4302(a)), the most logical reading of the Act is that Congress intended to leave the States free to act in areas where the federal government has not regulated. *See Ray*, 435 U.S. at 171-72. In such areas, the States are free to do as they choose, and there is no federal

interest in "uniformity" that could possibly trigger a finding of conflict preemption.[12]

Even assuming, however, that the Boat Safety Act *does* preempt the field of state positive law (and thus bars States from enacting any legislation or regulations except to the extent that they are "identical" to federal safety standards, *see* 46 U.S.C. § 4306), petitioner's lawsuit would still be consistent with federal purposes because Congress expressly *preserved* common-law claims. Once again, *Geier* is illustrative on this point. There, this Court observed that "the pre-emption provision [of the Motor Vehicle Safety Act] itself reflects a desire to subject the industry to a single, uniform set of federal safety standards." 529 U.S. at 871. At the same time, however, the statute's "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." *Id*. *Geier* held that, where such a savings clause exists, any finding of preemption is "disfavored" except in instances "where a jury imposed safety standard actually conflicts with a federal safety standard." *Id*.

By similar logic, Congress's interest in regulatory "uniformity" with regard to recreational boating safety cannot form the basis for a finding of implied preemption here. Even if Congress preempted the field of state positive law in this area, the Boat Safety Act's savings clause shows that Congress also intended to permit common-law claims to continue to play

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[12] Even in areas where the Coast Guard has regulated, moreover, the agency has the authority to grant broad exemptions from any federal safety standard provided that "recreational vessel safety will not be adversely affected . . .." 46 U.S.C. § 4305.

their traditional role of protecting and compensating tort victims. That being so, it can hardly be said that petitioner's claims would frustrate Congressional purposes; rather, it is a finding of preemption that would impermissibly frustrate the purposes and policies underlying the Boat Safety Act. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) ("[t]he case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'") (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)).

Affording preemptive effect to the Coast Guard's regulatory inaction would also undermine Congress' directive that the Coast Guard act in accordance with the rulemaking procedures of both 46 U.S.C. § 4302 and the Administrative Procedure Act ("APA"). *See* Senate Report at 1340. Congress gave the Coast Guard a limited grant of authority to "prescribe regulations" in the area of recreational boat safety. 46 U.S.C. § 4302. To exercise this authority, however, the Coast Guard must observe the notice-and-comment rulemaking requirements of the APA, which – among other things – "are designed to assure due deliberation." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996).[13] Congress further provided

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[13] Before promulgating a rule, moreover, the agency must consider a number of special factors, including "the need for and the extent to which the regulations will contribute to recreational vessel safety" and "relevant available recreational vessel safety standards" from a variety of sources. *Id*. § 4302(c)(1)-(2). The agency is also obligated formally to consult with its Advisory Council before taking any regulatory action. *Id*. § 4302(c)(4). Even if all these requirements have been observed, the agency is prohibited from "compel[ling] substantial alteration of a recreational vessel or item of associated equipment that is in existence . . . [unless such action is

that, if a party is adversely affected by a standard prescribed under the Boat Safety Act, the aggrieved person is entitled to seek judicial review of the standard under the APA. *See* Senate Report at 1340.

Thus, Congress gave the Coast Guard the power to flex its preemptive muscle, but obligated it to do so through the actual enactment of regulations in accordance with the well-defined standards and procedures of both Section 4302 and the APA. In the case of propeller guards, however, the agency chose not to undertake any of the actions required to exercise its regulatory authority. Instead, one agency official wrote a letter to the Chairman of the Advisory Council stating that the Coast Guard had decided to "take no regulatory action to require propeller guards." J.A. 80. That this decision was never exposed to public notice and comment or published in the *Federal Register* is reason enough to find that it lacks any substantive preemptive force. *See Chrysler v. Corp. v. Brown*, 441 U.S. 281, 313 (1979) (holding that substantive agency rule "cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in [the APA]"); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (same).

This Court has recognized that "[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by . . . agencies must be rooted in a grant of power by the Congress *and subject to limitations which that body imposes*." *Chrysler*, 441 U.S. at 302 (emphasis

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necessary] to avoid a substantial risk of personal injury to the public, that the [agency] considers appropriate in relation to the degree of hazard that the compliance will correct." *Id*. § 4302(c)(3).

added). In this case, Congress limited the Coast Guard's authority with respect to recreational boat design to the promulgation of *actual rules* under Section 4302. Thus, if the Coast Guard Letter had said that propeller guards should be *required* on all boats, but took no regulatory action to mandate that result, then Mercury Marine could not be prosecuted or fined by the agency for failing to install propeller guards. *See id.*; *Morton*, 415 U.S. at 236. Yet, if Mercury Marine has its way here, tort victims will be stripped of their right to seek compensation for their injuries even though the agency has not taken *any* formal action regarding propeller guards, let alone prescribed the sort of standard required by Section 4302. Affording preemptive effect to the agency's letter, then, would create a one-way rule that would work solely in respondent's favor – surely a result that Congress neither envisioned nor permitted. Thus, if anything, finding preemption here would actually *frustrate* Congressional purposes.

B. Petitioner's Claims Do Not Conflict With The Coast Guard's Purposes.

Petitioner's claims also do not conflict with the Coast Guard's purposes. We begin with the key point: *there is no federal regulation regarding propeller guards*. Respondent does not dispute that the Coast Guard has the authority, if it chooses, to require (or even ban) propeller guards. Yet the Coast Guard has taken no such action with regard to propeller guards; to the contrary, after studying the issue, the agency expressly declined to take *any* regulatory action in this area. Having done so, however, the Coast Guard remains free to promulgate a rule addressing propeller guards, if appropriate justifications exist. Thus, the agency is at liberty to take whatever actions it deems appropriate in this area – so long as those actions are consistent

with the rulemaking obligations imposed on it by Congress.[14]

Nor can it be said that petitioner's lawsuit would frustrate an implicit intent on the agency's part to preempt common-law claims involving propeller guards. As explained above, the Coast Guard's investigation into a possible propeller-guard requirement was prompted in part by the numerous lawsuits filed by propeller-strike victims. J.A. 17. In fact, a majority of the witnesses that appeared before the Subcommittee had served as expert witnesses in propeller-guard litigation, and several pages of the Subcommittee Report are exclusively devoted to this topic. J.A. 15-16. Yet, despite the centrality of propeller-guard litigation in the Subcommittee's investigation, neither the Subcommittee Report nor the Coast Guard Letter contains any hint that the agency intended to preempt common-law tort claims like petitioner's. Indeed, there is not a single word in the entire agency record that the Coast Guard ever even considered that possibility. Given this silence, and the absence of any federal regulation relating to propeller guards, it would be "perverse" to conclude that the Coast Guard, without saying so, implicitly wiped out all common-law claims, leaving individuals like Rex Sprietsma with no remedy at all. *Medtronic*, 518 U.S. at 487 (plurality); *see also Silkwood*, 464 U.S. at 251 ("[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

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[14] In fact, the agency has recently proposed a rule that, if enacted, would require owners of rental houseboats to install either a propeller guard or a combination of various other "propeller injury avoidance measures." J.A. 141.

Mercury Marine has nonetheless contended that preemption should be inferred here because petitioner's claims would conflict with the Coast Guard's alleged conclusion that propeller guards actually *decrease* boat safety. The Coast Guard, however, has never reached any such conclusion. In its unpublished letter, the agency merely stated that:

> 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.

J.A. 80. Thus, the agency's decision was based, *not* on a finding that propeller guards are dangerous, but rather on its concerns that (1) the existing data could not meet the "stringent" rulemaking standards of the Act (which require, *inter alia*, a finding that any rule compelling the substantial alteration of existing boats is necessary to avoid a "substantial risk of personal injury to the public . . . ," 46 U.S.C. § 4302(c)(3)); and (2) there was no technically feasible solution to the problem of unguarded boat propellers "in all modes of boat operation." J.A. 80. Neither of these conclusions would be undermined in the least by a jury verdict holding a manufacturer liable for failing to include a *particular* propeller guard on a *particular* boat engine.

In response, Mercury Marine has pointed to statements in the Subcommittee Report that some propeller guards might

cause injuries when used on some boats, and attempted to parlay this into a purported conclusion by the agency that propeller guards are inherently dangerous. This approach, however, is based on a fundamentally flawed premise: that the Subcommittee is the functional equivalent of the Coast Guard for purposes of agency decision-making. In reality, however, the five-member Subcommittee (which is itself merely a subset of the Advisory Council) possessed no regulatory authority and included four non-agency officials, including members of the public and an industry representative. Congress has made clear, moreover, that an Advisory Council member is not "an officer or employee of the United States Government for any purpose." 46 U.S.C. § 13110(d). That being so, there is no basis for asserting that the Subcommittee's conclusions are those of the Coast Guard.

As a factual matter, moreover, any such assertion is inconsistent with the Coast Guard's own actions. First, the Coast Guard Letter neither repeated nor endorsed any of the Subcommittee's statements regarding the purported dangers of propeller guards. This omission, standing alone, would be telling enough, but the Coast Guard Letter goes on to state that the agency intended to continue to gather information regarding the "*development and testing of new propeller guarding devices*" (J.A. 81) (emphasis added) and to publish "a series of articles . . . aimed at avoiding boat/propeller strike accidents. *Topics could include*, for example, . . . *available propeller guards* . . .." J.A. 83 (emphasis added). Thus, not only did the agency omit any mention of the alleged hazards of propeller guards, but it chose to emphasize that such devices could play a role in helping to avoid "propeller strike accidents" in the future. In the face of these statements, there is no basis for concluding that the agency found propeller guards to be contrary to the interests of boat safety – and thereby implicitly

preempted common-law tort claims like petitioner's. *See Kelly v. State of Washington*, 302 U.S. 1, 10 (1937) (even in the maritime context, state law may be superceded by federal action "only where the repugnance is so 'direct and positive' that the two [laws] 'cannot be reconciled or consistently stand together'") (citations omitted).

C. This Court's Teachings Confirm That Petitioner's Claims Are Not Impliedly Preempted.

The lower court nonetheless found that petitioner's claims are impliedly preempted on the theory that the Coast Guard's "decision to forego regulation in a given area [implies] an authoritative federal determination that the area is best left *un*regulated." Pet. App. 13 (quoting *Arkansas Electric Co-op. v. Arkansas Pub. Serv. Com'n*, 461 U.S. 375, 384 (1983)). This holding, however, misapplies this Court's teachings regarding the preemptive effect of regulatory inaction. It is true that, where the federal government has fully occupied a particular regulated field, this Court has occasionally found federal preemption in the absence of a specific federal standard governing the product or transaction at issue.[15] These holdings

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[15] *See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) (holding state positive law extending patent-like protection to boat manufacturing process that was unprotected by federal patent laws preempted because it "enters the field of regulation which the patent laws have reserved to Congress"); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 425 (1986) (holding state positive law imposing requirements on gas purchases preempted despite lack of federal regulation in this area because Congress "intended federal occupation of the regulated field"); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 613 (1926) (holding state positive law preempted because it purported to impose rule in regulatory field already occupied by federal statute, even though the agency "has not seen fit to exercise its authority to the full extent conferred"). In addition, *Arkansas Electric* itself ultimately

have no bearing here, however, because the Boat Safety Act does not preempt the field of state positive law with respect to recreational boat design (*see supra* at 23-24) and, even if it does, common-law claims are expressly *excluded* from any preempted field.

In addition, in *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum*, 485 U.S. 496 (1988), this Court cautioned that *Arkansas Electric* should not be interpreted to mean that "deliberate federal inaction could always imply preemption." *Id*. at 503. This proposition "cannot be," for "[t]here is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it." *Id*. Thus, the Court found, where there is no "extant" action that "can create an inference of preemption in an unregulated segment of an otherwise regulated field, *preemption, if it is intended, must be explicitly stated*." *Id*. (emphasis added). This test is plainly not met here, given that the agency has never taken any regulatory action with respect to propeller guards and has remained completely silent on the subject of preemption.

Contrary to the lower court's holding (*see* Pet. App. 13-15), *Ray v. Atlantic Richfield* Co., 435 U.S. 151 (1978), does not suggest a different result. *Ray* considered whether various aspects of a Washington state law governing oil tankers in Puget Sound (the "Tanker Law") violated the Ports and Waterways Safety Act of 1972 (the "PWSA") and various associated Coast Guard regulations. *Ray* held that specific design requirements imposed by the Tanker Law were preempted by Title II of the PWSA, which occupied the entire

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held that "nothing in the language, history, or policy of the Federal Power Act suggests . . . a conclusion" that a decision not to issue federal regulations should preempt state regulation. 461 U.S. at 384.

field of state law in this area. *Id.* at 168. This holding has no bearing in this case because the Boat Safety Act (unlike Title II) does not preempt the field of state positive law and, even if it did, this case involves *common-law* claims that, by virtue of the Act's savings clause, clearly do not fall within any field occupied by the Boat Safety Act.[16]

Geier's implied preemption holding is equally inapplicable to this case. In opposing review by this Court, Mercury Marine mischaracterized *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." Opposition Br. at 15 (citing *Geier*, 529 U.S. at 881; emphasis in original). Based on this mischaracterization of *Geier*, Mercury Marine claimed that the U.S. Coast Guard's decision "*not* to impose [a propeller guard] requirement" must be accorded similar preemptive effect. *Id*. (emphasis in original).

The main flaw in this analogy is that, unlike the decision at issue here (a decision by the federal government to take *no*

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[16] As the basis for its contrary conclusion, the lower court relied on *Ray*'s subsequent holding that Title I of the PWSA, which governs "vessel traffic services and systems," preempted a provision of the Tanker Law banning oil tankers in excess of 125,000 dead weight tons from entering Puget Sound. *Id.* at 174-78. *See* Pet. App. 14-15. Because Title I "merely authorizes and does not require" the Coast Guard to issue any regulations in this area (*id.* at 171), and thus – like the Boat Safety Act – does not preempt the field of state law, the question was whether the Secretary had taken sufficient action to preempt this aspect of the Tanker Law. *Ray* held that the State's size limitation was preempted because – unlike here – the Coast Guard had promulgated a vessel-traffic control system for Puget Sound that "contain[ed] only a narrow limitation on the operation of supertankers." *Id*. at 178. This holding only serves to underscore the absence of preemption here, given that Coast Guard has never regulated propeller guards in any respect.

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. 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.[17]

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.* Instead, following an internal investigation that never reached the rulemaking stage, the Coast Guard decided not to attempt to regulate these devices in any way, in part because there was no universally applicable technology appropriate for use on all boats. J.A. 80.

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[17] 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.

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

In this sense, this case is markedly similar to *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted in the absence of an applicable federal safety standard. In 1974, the agency had promulgated a rule – Standard 121 – that required that all truck manufacturers install antilock brakes. This requirement was invalidated by the Ninth Circuit in *Paccar, Inc. v. NHTSA*, 573 F.2d 632 (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. 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." *Freightliner*, 514 U.S. at 285.

In *Freightliner*, the truck manufacturers argued that federal law preempted common-law claims that their trucks were defective because they lacked antilock brakes. This Court disagreed, holding that there could be no express or implied preemption because there was no federal standard in place regarding antilock brakes in trucks. *See id*. at 289. In so holding, *Freightliner* 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] would be free from all state regulation." *Id*. at 286. *See also id*. at 289-90 (emphasizing that "Standard 121 currently has nothing to

say concerning [antilock brakes] one way or another, and [the agency] has not ordered truck manufacturers to refrain from using . . . [the] devices"). Similarly here, there is no regulation governing propeller guards and no basis for concluding that the agency intended to preempt common-law claims relating to those devices.

The lower court distinguished *Freightliner* on the ground that, "[i]n contrast to *Freightliner*, where the lack of federal regulation was not the result of an affirmative decision not to regulate, here, the Coast Guard did make an affirmative decision to refrain from promulgating a propeller guard requirement." Pet. App. 11-12. This, however, is a distinction without a difference. Here, as in *Freightliner,* the Coast Guard never ordered boat engine manufacturers to refrain from installing propeller guards – to the contrary, the Coast Guard Letter appears to encourage further testing and use of such devices. J.A. 81, 83. And there is no evidence that the Coast Guard decided that propeller guards "should be free from all state regulation." *Id*. at 286. Rather, as in *Freightliner*, 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 *Freightliner*, that decision was made by the Ninth Circuit and then memorialized in the amendment to Standard 121 eliminating the antilock brake 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. *Freightliner* makes clear that federal preemption does not exist under these circumstances.

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In sum, petitioner's claims are neither expressly nor impliedly preempted by federal law. Any contrary holding would not only unlawfully deprive petitioner and other victims of unguarded boat propellers of their day in court, but it would seriously encroach on "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999). This Court has emphasized that the federal government's power to impose its will on the States under the Supremacy Clause "is an extraordinary power in a federalist system," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" state law. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Surely an equivalent degree of certainty should be required when determining whether a federal *agency* intended to override state law.

The type of preemption found by the lower court here, however, is based on federal agency *inaction* with respect to a particular device and agency *silence* on the subject of preemption – in the face of an express statutory provision prohibiting such preemption. Under this radical approach, *any* federal decision not to regulate could be deemed to have preemptive force, regardless of the particular reason for federal inaction. Such a ruling could wipe out common-law tort remedies in myriad areas where the federal government has considered, but ultimately decided not to promulgate, a minimum federal safety standard governing a particular product.

Further, in a case where – as here – the federal government have not undertaken any formal rulemaking regarding the product at issue, the lower court's approach would result in the eradication of common-law claims without any meaningful

notice to the States or opportunity for them to comment on the propriety of such a restriction – a result wholly at odds with "the federal/state balance embodied in [this Court's] Supremacy Clause jurisprudence." *Hillsborough County v. Auto. Med. Labs*, 471 U.S. 707, 717 (1985). It is also at odds with the Executive Branch's own requirement that the States must be afforded the opportunity to participate in any rulemaking that involves the possible preemption of state law. *See* Exec. Order No. 12612, § 4(e), 3 C.F.R. § 252, 255 (1988); Exec. Order No. 13132, § 4(e), 64 Fed. Reg. 43,255, 43,257 (1999) (discussed in *Geier*, 529 U.S. at 909 n.24 (Stevens, J., dissenting)). In recognition of the role of the States as independent sovereigns within our federalist system, this Court should make clear that, at the least, the States must be given notice and an opportunity to be heard in the rulemaking process before they are stripped of their power to protect and compensate their citizens through the common law.

CONCLUSION

The lower court's decision finding preemption of petitioner's claims should be reversed.

Respectfully submitted,

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