No. 01-706

In the Supreme Court of the United States

REX R. SPRIETSMA, ADMINISTRATOR OF THE ESTATE OF JEAN SPRIETSMA,

Petitioner,

v.

MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION,

Respondent.

On Writ of Certiorari to the Illinois Supreme Court

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, VA 20191
(703) 264-5300

ALAN UNTEREINER*
Robbins, Russell, Englert Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("PLAC"), is a non-profit corporation with 123 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the state and federal appellate courts, including in many of this Court's cases involving issues of federal preemption. See, *e.g.*, *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). In addition, PLAC filed an *amicus* brief in this case in the Illinois Supreme Court. Because many of PLAC's members manufacture products that are subject to preemptive federal requirements, they have a vital interest in the development of the law of preemption and the proper resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether federal law preempts a state-law tort claim that outboard motors lacking propeller guards are defective. "Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure or purpose." *FMC Corp.* v. *Holliday*, 498 U.S.

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[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk. No counsel for a party wrote this brief in whole or in part, and no person or entity, other than PLAC or its members or counsel, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

52, 56-57 (1990) (internal quotation marks omitted). Because Congress included an express preemption clause in the Boat Safety Act of 1971 ("BSA" or "Act"), 46 U.S.C. § 4306, congressional intent to supersede state and local authority in the area of recreational boat safety is undeniable. The only dispute is over the *extent* of preemption.

As we explain below, the broad language of the BSA's preemption clause easily resolves the disagreement in respondent's favor. Petitioner's propeller guard claim seeks to impose a "requirement" or "standard" under state "law" on the "associated equipment" of a "recreational vessel" (46 U.S.C. § 4306): the requirement that outboard motors include propeller guards. As the Coast Guard recognizes, this *very same requirement* in a state statute would be "categorically" preempted by the BSA – preempted even if the Coast Guard never took *any* action concerning a federal propeller guard requirement (much less the outright rejection of such a requirement that actually occurred). U.S. Br. 9, 19; J.A. 97. The so-called "savings" clause, 46 U.S.C. § 4311(g), does not limit express preemption under Section 4306. Rather, the purpose of Section 4311(g) is to exempt all "liability at common law or under State law" that survives preemption under Section 4306 from the specified *affirmative defense* of compliance with Coast Guard standards, requirements, or orders. Nothing in *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000), requires a different result.

Petitioner's claim is also impliedly preempted. In the absence of express preemption, the Supremacy Clause ensures that "state law that conflicts with federal law is 'without effect.'" *Cipollone* v. *Liggett Group*, 505 U.S. 504, 516 (1992) (quoting *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981)). State law conflicts with federal law if it becomes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Petitioner's claim that state law requires propeller guards – a device that the Coast Guard refused to require on the strength of a detailed administrative record showing that propel-

ler guards had unacceptable safety risks – frustrates the fundamental purposes of the BSA.

Before addressing these issues of express and implied preemption, we rebut the notion – propounded by petitioner and his *amici* – that federal preemption of state law involving nationally distributed products is unusual, disfavored, or contrary to principles of federalism.[2]

ARGUMENT

I. CONGRESS OFTEN REMOVES OBSTACLES TO A UNIFIED NATIONAL MARKETPLACE BY PREEMPTING DIVERGENT STATE AND LOCAL LAWS CONCERNING NATIONALLY DISTRIBUTED PRODUCTS

From the briefs submitted by petitioner and his *amici*, one might think that this case implicates "critical safeguard[s] of federalism" (States' *Amicus* Br. 2) and "has enormous implications" (Pet. Br. 2) for state authority over matters of health, safety, and welfare. In fact, federal preemption of state and local law is well-accepted, routine, and exceedingly common. Congress has repeatedly exercised its broad power over interstate commerce to preempt state and local authority – especially in the areas of state and local efforts to regulate nationally distributed products or the instrumentalities of interstate commerce.

Federal preemption of state law is a necessary incident of the Supremacy Clause. U.S. Const. art. VI, cl. 2. By "direct

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[2] Respondent has argued extensively (and the lower court determined) that this is an admiralty case governed by maritime law. If this Court were to agree with that submission, it would not be necessary to reach any issue of preemption here. PLAC agrees with respondent that federal maritime law could not be construed to require imposition of propeller guards by juries in fifty States when Congress has enacted a statute calling for expert and uniform administrative resolution of such issues, and the Coast Guard has refused to require propeller guards based on a determination that they do not satisfy the standards set forth in the BSA.

operation of the Supremacy Clause," States are precluded from taking any actions inconsistent with federal law. *Brown* v. *Hotel and Restaurant Employees & Bartenders Int'l Union Local 54,* 468 U.S. 491, 501 (1984). Moreover, congressional power over a subject under the Commerce Clause allows *complete preemption* of state authority. See *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Commerce Clause power includes authority to preempt multifarious or conflicting state and local requirements that Congress finds detrimental to the national economy or otherwise undesirable. It also includes the authority to decide that particular aspects of interstate commerce should remain *unregulated* by federal, state, or local law. See *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n,* 461 U.S. 375, 384 (1983).

A wide array of federal statutes expressly preempt state and local law.[3] Many of these statutes involve products that are distributed nationally. Congress's desire for greater uniformity in requirements applicable to nationally distributed products is

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[3] These include the Federal Election Campaign Act, 2 U.S.C. § 453; the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136v; the Packers and Stockyard Act, *id.* § 228c; the Agricultural Marketing Act, *id.* § 1626h; the Food Security Act, *id.* § 4817; the Plant Protection Act, *id.* § 7756; the Flammable Fabrics Act, 15 U.S.C. § 1203(a); the Federal Hazardous Substances Act, *id.* § 1261 note; the Child Safety Protection Act, *id.* § 1278 note; the Federal Cigarette Labeling and Advertising Act, *id.* § 1334; the Fair Packaging and Labeling Act, *id.* § 1461; the Poison Prevention Packaging Act, *id.* § 1476(a); the Consumer Product Safety Act, *id.* § 2075(a); the Magnuson-Moss Warranty Act, *id.* § 2311(c); the Nutritional Education and Labeling Act, 21 U.S.C. § 343-1; the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k(a); the Poultry Products Inspection Act, *id.* § 467e; the Federal Meat Inspection Act, *id.* § 678; the Egg Products Inspection Act, *id.* § 1052; the Occupational Safety and Health Act, 29 U.S.C. § 667; the Employee Retirement Income Security Act, *id.* § 1144(a); and, of course, the Boat Safety Act, 46 U.S.C. § 4306. See also note 4, *infra*.

understandable. For example, in enacting the many express preemption clauses that supersede state requirements relating to product labeling, Congress has determined that particular products should have uniform national warnings. Without a guarantee of uniformity, manufacturers serving the national market could be required to use different warnings in every State – creating precisely the sort of inefficiencies and conflicts against which the Commerce Clause was directed. Without uniformity enforced through federal preemption, inconsistent state warning requirements could preclude sale of the same product nationwide. Even without a direct conflict, manufacturers would have to continuously update and change labeling in response to regulators – and juries – in fifty States.

But the practical difficulties that attend multifarious product *labeling* requirements pale in comparison to the mischief that divergent design requirements would cause – particularly design requirements applicable to permanent aspects of a product that can be used to travel among different States (such as the design of a boat hull). Thus Congress has frequently chosen to supersede state requirements targeting the channels or *instrumentalities* of interstate commerce (or things that regularly and foreseeably move in interstate commerce). See *United States* v. *Lopez*, 514 U.S. 549, 558 (1995). Examples include preemptive federal statutes applicable to automobiles, trucks, airplanes, and of course boats.[4] In *Southern Ry.* v. *Railroad Comm'n*, 236 U.S. 439 (1915), this Court held that Congress preempted the *entire field* of freight car safety equipment intended for the protection of employees. Preemptive statutes governing railroads include

[4] In addition to the BSA and the Ports and Waterways Safety Act (see *United States* v. *Locke*, 529 U.S. 89, 110-12 (2000)), these include the Hazardous Materials Transportation Uniform Safety Act, 49 U.S.C. § 5125; the Federal Aviation Administration Authorization Act, *id*. § 14501(c); the National Traffic and Motor Vehicle Safety Act, *id*. § 30103(b)(1); the Surface Transportation Assistance Act, *id.* § 31114(a); the General Aviation Revitalization Act, *id.* § 40101 note; and the Airline Deregulation Act, *id.* § 41713(b).

the Federal Railroad Safety Act, 49 U.S.C. § 20103(a), and the Safety Appliance Acts, 49 U.S.C. §§ 20301-20306.

This case fits comfortably within *both* of these established areas of federal preemption. Recreational boats (and boating equipment) are consumer products sold and distributed in a nationwide market. At the same time, boats are mobile and frequently travel between States or along a state border. The mobility of recreational boats presents the same sort of intractable difficulties with divergent state and local design requirements that railroads once experienced with railroad cars. A manufacturer such as respondent that sells an outboard motor in Rhode Island cannot prevent the equipment from eventually being used in Florida, Michigan, California, or even Hawaii.

Nor is this all. Federal superintendence and preemption are particularly appropriate here because, as respondent has shown, the accident in this case occurred on a navigable interstate waterway. Petitioner's claim is accordingly governed by *federal* maritime law. In passing the Boat Safety Act, Congress explained that "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. No. 92-248, 92d Cong., 1st Sess. 20 (1971) ("Senate Report").[5] For maritime reasons as well, the existence of preemptive federal safety requirements under the BSA should surprise no one.

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[5] Analogously, the Federal Aviation Act provides that the "United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a); see also *Northwest Airlines* v. *State of Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) (noting that Commerce Clause "lift[s] the navigable waters of the United States out of local controls and into the domain of federal control" and that "[a]ir as an element in which to navigate" is also "inevitably federalized").

In recent years, this Court has repeatedly addressed whether Congress's express preemption of state "requirements," "standards," and "laws" includes common-law requirements and standards, particularly those of state tort law. On every occasion, the Association of Trial Lawyers of America ("ATLA") has urged this Court to distinguish between common-law and statutory duties – despite the obvious anomalies that distinction would create given the codification of common-law tort doctrines in many States. Not surprisingly, ATLA (and petitioner) recycle those arguments here. See ATLA *Amicus* Br. 2-3, 17 (suggesting that "product liability law" does not impose "state requirements"); Pet. Br. 25-28.

Majorities of this Court have repeatedly rejected these arguments as contrary to English usage and common sense.[6] The Court has long recognized that "[state] 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* v. *Garmon*, 359 U.S. 236, 247 (1959). The idea that massive common-law liability for a design defect does not "require" any future action by a product manufacturer ignores practical realities. A manufacturer that ignored a multimillion-dollar verdict in a design defect case would risk not only similar verdicts but also *punitive* damages in the future.

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[6] See *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 511 (1996) (concurrence and dissent) ("ordinary meaning" of provision preempting state "requirements" "*clearly* pre-empts any state common-law action") (emphasis added); *id.* at 504 (Breyer, J., concurring) (recognizing "anomalous consequences" of "grant[ing] greater power * * * to a single state jury than to state officials acting through state administrative and legislative lawmaking functions"); *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) (preemption of any state "law, rule, regulation, order, or standard" includes "[l]egal duties imposed on railroads by the common law"); *Cipollone*, 505 U.S. at 521 (plurality); *id*. at 548-49.

Finally, the broader issue raised by such arguments is not federalism but separation of powers. See generally Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2087-88, 2090-92 (2000). Federalism does not – and cannot – justify refusal to enforce a policy decision made by the Congress to bring greater order, efficiency, and rationality to an important area of maritime and interstate commerce by preempting divergent state and local requirements imposed on boat manufacturers. Nor does federalism authorize judicial second-guessing of Congress's judgment that certain boating safety issues are better resolved by an expert federal agency than haphazardly by lay juries in fifty States. And, of course, federalism provides no basis for declining to give effect to the Supremacy Clause by tolerating state and local laws that conflict with federal law or frustrate Congress's purposes.

II. THE BOAT SAFETY ACT EXPRESSLY PREEMPTS PETITIONER'S CLAIM

Congress enacted the Boat Safety Act of 1971, codified in part as amended at 46 U.S.C. §§ 4301-11, in order to "improve boating safety and to foster greater use, development, and enjoyment of all waters of the United States." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214. To further those objectives, Congress vested broad regulatory authority in the Secretary of Transportation (since delegated to the Coast Guard) "authorizing the establishment of *national* construction and performance standards for boats and associated equipment." *Ibid.* (emphasis added); see 49 C.F.R § 1.46(n)(1). See also 46 U.S.C. § 4302. Congress also declared a national policy in favor of "encourag[ing] greater and continuing *uniformity* of boating laws and regulations as among the several States and the Federal Government." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214 (emphasis added). The concerns that prompted Congress to provide for "national construction and performance standards for boats and associated equipment" (Senate Report at 15), are readily apparent from the legislative history – and no different

from the reasons that spurred Congress to enact many other preemption provisions targeting nationally distributed products.

A. Section 4306 Generally Preempts The Field Of Recreational Boating Safety and Performance Standards And Equipment Requirements

1. To achieve the goal of national uniformity in boat and equipment safety standards, Congress included the following provision – entitled "Federal preemption" – in the BSA:

> Unless permitted * * * 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*.

46 U.S.C. § 4306 (emphasis added). Section 4305, in turn, provides that "[i]f the Secretary considers that recreational vessel safety will not be adversely affected, the Secretary may issue an exemption from this chapter or a regulation prescribed under this chapter." *Id.* § 4305.

As the statutory text makes plain, Congress intended to bring about broad federal preemption of state and local laws in the field of performance and safety standards for boats and associated equipment. Under Section 4306, States are generally precluded from "establish[ing]," or "continu[ing] in effect," or even "enforc[ing]," any "law or regulation" that establishes a boat performance or safety standard or imposes a "requirement" on "associated equipment" – unless the state law is "identical" to a regulation that has been "prescribed" by the Coast Guard "under section 4302." Thus, until the Coast Guard has acted by issuing a national design or construction requirement, the States

are generally ousted from the entire field of design and construction standards. Accord U.S. Br. 11.

Section 4306, however, contains two carefully drawn exceptions to this broad preemptive command. First, it permits the Coast Guard to grant an exemption from preemption pursuant to Section 4305 if the agency makes a determination that "recreational vessel safety will not be adversely affected." 46 U.S.C. § 4305.[7] Second, Section 4306 includes an exception – applicable "in the absence of the [Coast Guard's] disapproval" – for state and local laws that "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State." *Id*. § 4306. The Coast Guard's "right of disapproval" is intended "to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity." Senate Report at 20. Notably, both of these exceptions remain under the ultimate control of the Coast Guard, the expert federal agency charged with formulating uniform national design and construction requirements.

Once the Coast Guard has acted by establishing national design requirements, the States remain free to enact or to enforce requirements that mirror the federal requirements. As the Senate Report accompanying the BSA noted, "the very magnitude of the boating safety problem * * * suggests that an effective program of education, enforcement, and assistance must actively involve the States." Senate Report at 13. In addition to carving out a role for the States in enforcement and education, the Act also "does not preempt state law or regulation directed

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[7] The Coast Guard has indicated that exemptions must be consistent not only with public safety but also with the needs of interstate commerce and interstate boating traffic (and with all of the purposes underlying the BSA). 44 Fed. Reg. 21109-21110 (1979). And "no exemption will be granted for any requirement that would compel substantial alteration" of an existing boat or item of boating equipment unless the applicant demonstrates "a substantial risk of personal injury to the boating public." *Id.* at 21110.

at safe boat *operation and use*, which was felt to be appropriately within the purview of state or local concern." *Id.* at 20.[8]

Petitioner's claim falls squarely within the domain of state law expressly preempted by Section 4306. Petitioner's complaint alleges that respondent's outboard motor was defective for lack of a propeller guard. J.A. 100-110. The statute expressly reaches not only all "performance or other safety standard[s]" imposed under any state or local "law or regulation" on recreational vessels, but also any "requirement" imposed on "equipment" that is "associated" with a "recreational vessel." 46 U.S.C. § 4306. No one disputes that a propeller guard falls within this language. As the Coast Guard has itself recognized, Section 4306 operates to "categorically preclude[] the States from adopting" a "propeller guard requirement" through any "statute or regulation." U.S. Br. 12; see J.A. 97.

Moreover, petitioner is seeking, through this lawsuit, to impose a performance and safety standard – as well as a requirement – on respondent and its product: the requirement that the outboard motor include a propeller guard. The rule of state law requiring propeller guards that petitioner seeks to "establish, continue in effect, or enforce" is also plainly "not identical to" any Coast Guard regulation. Nor is there any suggestion here that the propeller guard petitioner alleges should have been provided was needed to "meet uniquely hazardous conditions

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[8] Congress's recognition of these areas of state authority further refutes the submission of the state *amici* (Br. 2) that preemption here would upset "the appropriate balance of authority between the States and the federal government." Not only did Congress expressly *recognize* the role of the States in such areas as education and enforcement, it also *provided for* state input into the process of formulating uniform federal design standards. Under the BSA, the Coast Guard must "consult with" the National Boating Safety Advisory Council ("NBSAC"), 46 U.S.C. § 4302(c)(4), a group of experts and other persons interested in boat safety. Fully one-third of the 21 members of the NBSAC must be state officials responsible for state boat safety programs. See *id.* § 13110(b)(1).

or circumstances within the State." Accordingly, there should be no serious dispute that the broad language of Section 4306, standing alone, easily encompasses petitioner's claim.

2. With the government's support, petitioner nevertheless contends that Section 4306 should not be interpreted as expressly preempting his propeller guard claim. Except for petitioner's reliance on the so-called "savings" clause of the BSA (46 U.S.C. § 4311(g)) and on the *Geier* decision, which we discuss in detail below, these arguments are all readily dispatched.

First, petitioner (but not the government) maintains that the broad language of Section 4306 should be narrowly interpreted because of the "strong presumption against preemption" that applies to cases involving "common-law tort remedies." Pet. Br. 16; see also *id.* at 16-21. But such a presumption is inapposite to this case. As the Illinois Supreme Court correctly noted (Pet. App. 5a-6a), the Boat Safety Act implicates the "historic federal maritime jurisdiction." Senate Report at 17; see also *id.* at 20 (discussing the "long history of preemption in maritime safety matters"). In the area of "maritime commerce," there simply is "no beginning assumption that concurrent regulation by the State is a valid exercise of police powers." *United States* v. *Locke*, 529 U.S. 89, 108 (2000); see also *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) (no presumption against preemption of state tort claims when regulated subject is "inherently federal in character").[9]

Second, petitioner argues that Section 4306 does not operate to preempt state law unless and until "the Coast Guard *has* prescribed a federal regulation." Pet. Br. 23. This argument

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[9] Because no "presumption against preemption" applies here, this case presents no occasion to reexamine whether that "presumption" – which is of recent vintage, has been inconsistently applied, and is at odds with other doctrines of preemption law – ought to be abandoned, as PLAC has urged in recent cases. See No. 99-312 PLAC Br., *Norfolk S. Ry.* v. *Shanklin*, at 3-12; Nos. 98-1701 & -1706 PLAC Br., *United States* v. *Locke*, at 4-12.

ignores the text of Section 4306, which provides "categorically" (U.S. Br. 9) that "a State *may not* establish, continue in effect, or enforce a law or regulation" in the field of recreational vessel and equipment design "that is not identical to *a regulation prescribed under section 4302 of this title*" (46 U.S.C. § 4306 (emphasis added)). It also ignores the Coast Guard's "long-standing" view that "in the absence of a federally-promulgated standard, * * * state laws and regulations cannot be 'identical to a regulation prescribed under section 4302 of' Title 46." U.S. Br. 11.[10]

Equally mistaken is petitioner's contention that his reading is "more plausible" because "Congress merely gave the Coast Guard permissive authority" to issue federal standards and requirements. Pet. Br. 23. Congress intended the Coast Guard to prescribe all necessary boat standards. See, *e.g.*, Senate Report at 17 ("While the language of Section 5 is permissive and not mandatory, the Committee expects that initial standards will be promulgated as soon as practicable."). Moreover, there is no good reason – and certainly none apparent from the text of the statute itself – to believe that Congress intended to make its goal of uniformity contingent upon the Coast Guard's specific issuance of formal regulations.

Petitioner is wrong to say (Br. 24) that *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), or *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), lends any support to this reading. The preemption provisions in those cases were worded differently. The

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[10] For precisely that reason, the Secretary of Transportation took action immediately after the BSA was passed to grant exemptions under 46 U.S.C. § 4305 temporarily — until the Coast Guard adopted federal boat construction and performance standards and equipment requirements — for all state boat safety laws, regulations, and requirements "in effect on the effective date of the Federal Boat Safety Act of 1971." 36 Fed. Reg. 15764, 15765 (1971); see also 38 Fed. Reg. 6914 (1973) (rescinding that general exemption of state laws). Under petitioner's view, these regulatory actions by the federal government were wholly unnecessary.

National Traffic and Motor Vehicle Safety Act (MVSA) preemption clause at issue in *Myrick* preempts state standards only when "'a Federal motor vehicle safety standard * * * is in effect.'" *Geier*, 529 U.S. at 867 (quoting 15 U.S.C. § 1392(d) (1988 ed.)). As the Solicitor General explained in *Lewis* v. *Brunswick*, this Court in *Myrick* "based its decision" on "th[is] introductory clause * * *, which required, as a prerequisite for preemption, that a federal regulation be 'in effect' for the same aspect of performance." No. 97-288 U.S. Br. 16 n.8. But the BSA's "introductory clause is not written in a comparably limiting manner." *Ibid.* Instead, Section 4306 mandates preemption according to its terms "[u]nless" the Coast Guard grants an exemption. 46 U.S.C. § 4306. The preemption clause at issue in *Medtronic* is also phrased differently. See 21 U.S.C. § 360k(a)(1) (preempting state requirements that are "different from, or in addition to" federal requirements that are "applicable under this chapter to the device"). And in contrast to the BSA's preemption clause, Section 360k(a) has long been interpreted by the administering agency as having preemptive effect only where a federal requirement is already in place. 21 C.F.R. § 808.1(d); 43 Fed. Reg. 18661, 18662 (1978).

Third, petitioner argues (Br. 25) that Section 4306's reference to any state or local "law or regulation" that imposes a safety or performance "standard" – as well as to any "requirement" imposed on "associated equipment" – does not include "common law claims." The government appears to agree. U.S. Br. 13 n.3 (suggesting that the "most natural reading" of this language would limit its applicability to "a standard prescribed in advance by legislative or administrative authorities").[11] The

[11] According to the government, its narrow interpretation of Section 4306 finds support in "the fact that the FBSA also uses the term 'standards' to describe the 'regulations' issued by the Secretary, which are prescriptive in nature and do not encompass common-law or other damages liability." U.S. Br. 13-14 n.3. That same argument was made, and necessarily rejected, in *Medtronic* – a result urged by the Solicitor General. See Nos. 95-754 & 95-886 U.S. Br. 16-17.

argument that common law is different, however, is squarely foreclosed by this Court's decisions. See note 6, *supra*.

Fourth, petitioner argues (Br. 27-28) that common-law requirements are not "establish[ed], continue[d] in effect, or "enforce[d]" by a "State or political subdivision of a State." 46 U.S.C. § 4306. An identical argument was rejected in *Medtronic*, which involved a preemption clause that applies to any "State or political subdivision of a State" and preempts any effort to "establish or continue in effect" state requirements. See also *Easterwood*, 507 U.S. at 664 (common-law claims covered by preemption provision referring to "laws" that States may "adopt or continue in force"). The phrase "State or political subdivision of a State" plainly includes all organs of state government, including the judicial branch. See *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (jury is a "quintessential governmental body"); *Ex Parte Virginia*, 100 U.S. 339, 347 (1880) ("A State acts by its legislative, its executive, or its judicial authorities.").

B. Petitioner's Reliance On The "Savings" Clause And On *Geier* Is Misplaced

In contending that there is no express preemption in this case, both petitioner and the United States rely principally on 46 U.S.C. § 4311(g), which provides:

> 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.

According to petitioner, this provision – which he describes as an "*anti*-preemption" clause (Br. 28) – categorically "saves" from preemption under Section 4306 "all common-law claims" and indeed all "forms of damages liability" under state law. *Id.* at 28, 30 & n.11.

In the alternative, petitioner (now joined by the United States) argues that, even if Section 4311(g) does not "save" petitioner's claim from express preemption, it nevertheless sheds light on the proper interpretation of Section 4306. See

Pet. Br. 22, 29-30; U.S. Br. 12-13. This is necessarily an *alternative* argument because, if Section 4306 does not reach common-law claims in the first place, it would not be possible for Section 4311(g) to "save" such claims from express preemption. In advancing this second argument, petitioner and the United States rely substantially on *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000). As we explain below, neither argument based on Section 4311(g) and *Geier* has any merit.

1. Section 4311(g) "Saves" Nothing From Preemption Under Section 4306

American tort law has long recognized the "important distinction" between: (1) regulatory compliance as an affirmative defense to common-law and other tort liability, and (2) federal preemption of state law. RESTATEMENT OF THE LAW (THIRD): PRODUCTS LIABILITY § 4, cmt. e (1998) ("RESTATEMENT (THIRD)"). As the American Law Institute has explained (*ibid.*):

> When a court concludes that a defendant is not liable by reason of having complied with safety design or warnings statutes or regulation, it is deciding [as a matter of state law] that the product in question is *not defective as a matter of the law of that state.* * * * In contrast, in federal preemption, the court decides as a matter of federal law that the relevant federal statute or regulation reflects, expressly or impliedly, the intent of Congress to *displace state law*, including state tort law, with a federal statute or regulation. * * * [A] determination that there is preemption *nullifies otherwise operational state law*.

See also RESTATEMENT (SECOND) OF TORTS § 288C (1965). The compliance-with-government-standards defense is a close cousin of the tort-law doctrine under which *noncompliance* with a relevant safety standard is sometimes regarded as negligence *per se.* See RESTATEMENT (THIRD) § 4, cmt. d.

In *Geier*, the majority acknowledged this important distinction between preemption and the compliance defense in examining the meaning of a "savings" provision in the MVSA (15

U.S.C. § 1397(k) (1988 ed.)). Significantly, the Court in *Geier* did *not* hold that the MVSA's "savings" clause operated by its own force to "save" common-law claims from preemption under the MVSA's express preemption clause (*id*. § 1392(d)). Instead, the Court relied on the "savings" clause only indirectly, as a reason why the preemption clause of that statute must be interpreted to exclude "standards" imposed through common-law actions. See *Geier*, 529 U.S. at 867-68. "Without the savings clause," the Court explained, "it is possible to read the preemption provision, standing alone, as applying to standards imposed in common-law tort actions." *Ibid.* But if that reading were accepted, "few, if any, state tort actions would remain for the savings clause to save." *Ibid*. To preserve some meaningful function for the "savings" clause, the Court interpreted the MVSA's preemption clause narrowly as excluding "standards" imposed though common-law actions.

The Court in *Geier* went on, moreover, to squarely *reject* the argument that the "savings" clause operated to "save" common-law claims from any form of *implied* preemption. 529 U.S. at 869-74. In so doing, the Court acknowledged that the language of the MVSA "savings" clause did not appear to be aimed at saving state-law tort actions *from preemption*. Invoking the RESTATEMENT (THIRD) and the well-established distinction "between state-law compliance defense and a federal claim of pre-emption," the Court explained:

> The words "[c]ompliance" 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.

Geier, 529 U.S. at 869-70 (emphasis added). "It is difficult to understand," the Court reasoned, "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 * * *." *Id*. at 870. Nor could such a precondition be reconciled with an intent on Congress's part to "save" from implied preemption conflicting state standards imposed by the common law.

Even more than the "savings" clause at issue in *Geier*, Section 4311(g) is couched in language that "sound[s] as if [it] simply bar[s] a special kind of defense, namely, a defense that compliance with a federal standard automatically" excuses "a defendant from state law." *Geier*, 529 U.S. at 869. Not only does Section 4311(g) similarly refer to "compliance" with federal standards, but it provides that such compliance will not "*relieve* a person from liability at common law or State law" – language that suggests an intent merely to preclude the avoidance of liability through an affirmative defense.

The legislative history of the BSA confirms that Section 4311(g) relates to the compliance defense and not at all to federal preemption. As the Senate Report explained, Section 4311(g)'s "purpose * * * [wa]s to assure that in a product liability suit *mere compliance* by a manufacturer with the minimum standards promulgated under the Act will not be a *complete defense* to liability." Senate Report at 32 (emphasis added).[12] See also *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong. 1st Sess. 66 (1971) ("Senate Hearing") (statement of Admiral Chester R. Bender) ("we would have no objection to * * * clarify[ing] that a manufacturer's compliance with promulgated standards does not by itself relieve him of any tort *liability which otherwise could pertain*") (emphasis added). During the House debate, one Member aptly described Section

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[12] Tellingly, the Senate Report goes on to state that "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 at 32. If Section 4311(g) were addressed to federal preemption, there would have been no reason for Congress to be concerned with the admissibility of a manufacturer's compliance.

4311(g) as a "technical amendmen[t]." 117 Cong. Rec. 28036 (1971) (statement of Rep. Grover).

At least four other features of Section 4311(g) and the BSA confirm that the "savings" clause was not designed to limit the scope of federal preemption under Section 4306 at all. *First*, Section 4311(g) is *not limited* to preemptive federal design and construction standards issued by the Coast Guard pursuant to 46 U.S.C. § 4302. Instead, it broadly covers "compliance" with "this chapter" [Chapter 43, 46 U.S.C. §§ 4301-4311] as well as with any "standards, regulations, or orders prescribed under this chapter." *Id*. § 4311(g).[13] Insofar as Section 4311(g) applies to federal "regulations" or "orders" that are *not preemptive* in nature (or even to Chapter 43 in its entirety), its function *cannot be* to spare state requirements from preemption under Section 4306.[14] Thus, *at least in part*, Section 4311(g) must concern the affirmative defense of compliance with federal requirements.

Second, Congress included *in Section 4306 itself* a specific exception to preemption for state and local requirements con-

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[13] The reference to "this chapter" makes sense in light of another provision of the BSA authorizing the Coast Guard to "require or permit the display of seals * * * certifying or evidencing compliance with Federal safety regulations and standards for boats and associated equipment." Pub. L. No. 92-75, § 7, 85 Stat. 213, 216 (1971) (codified as amended at 46 U.S.C. § 4302(a)(3)). Congress may well have anticipated that an *operator* of a recreational boat accused of negligence in a boating accident might invoke compliance with all Coast Guard standards as an affirmative defense to a claim that the operator should have been carrying additional safety equipment on board. See also *Creppel* v. *Geco-Prakla, Inc.*, 1994 WL 50241 (E.D. La. Feb. 11, 1994) (rejecting absolute compliance defense asserted by oil company in maritime trespass action).

[14] The BSA included a provision (entitled "general regulations") that authorized the Coast Guard to issue regulations "necessary or appropriate to carry out the purposes of this Act." Pub. L. No. 92-75, § 39, 85 Stat. 213, 228 (1971). That provision is now codified at 46 U.S.C. § 13109(c).

cerning "the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State."

Third and relatedly, Congress's placement of Section 4311(g) – Section 40 of the original BSA – at the very end of the Act, far removed from the express preemption provision (Section 10 of the Act), further indicates that the "savings" clause was directed at the entire Act rather than at a single provision placed much earlier. Compare 46 U.S.C. § 4305 (exemption provision placed immediately before Section 4306).

Fourth, Section 4311(g) provides that compliance with federal requirements "does not relieve a person from liability at common law *or under State law*." 46 U.S.C. § 4311(g) (emphasis added). If petitioner were correct that this language spares state requirements from preemption, it would operate to spare not just state "common law" but *all* "State law." That, in turn, would have the effect of eviscerating the BSA's express preemption clause (hardly the "technical amendment" of the House debate). In numerous other cases, this Court has refused to interpret a general "savings" clause in a manner that would cause a federal statute to "destroy itself." *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).[15]

Seeking to avoid this difficulty, petitioner and the United States advance a novel interpretation of the "savings" clause. They maintain that Section 4311(g)'s broad reference to "liability at common law *or under State law*" covers only "state statutes * * * that authorize *private* suits for *money damages*, but not * * * state prescriptive laws and regulations." U.S. Br. 13 n.2 (emphasis added); Pet. Br. 30 & n.11 (same). Congress, however, included no such words of limitation in Section 4311(g). The Congress that drafted the BSA knew how to create

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[15] See also *American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-91 (1992); *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915).

an exemption for damages liability – and did so in another provision of the BSA. See Pub. L. No. 92-75, § 16, 85 Stat. 220 (creating federal "good samaritan" duty on the part of operator of a vessel involved in a collision or accident to render certain assistance to other "persons affected"; and providing that any person who complies with this duty "shall not be held liable *for any civil damages* as a result of the rendering of [such] assistance") (emphasis added); see also 46 U.S.C. § 2303(c) (current codification of § 16: individual who renders such assistance "is not liable for damages").

Petitioner's reading would also lead to perverse consequences. Under petitioner's view, Section 4311(g) would "save" from express preemption under Section 4306 a state propeller guard requirement imposed though a tort lawsuit that resulted in a multimillion-dollar exaction of punitive damages, while at the same time nullifying and superseding a local ordinance requiring propeller guards but imposing only a modest sanction for violations. Why would Congress have wished to create such a curious form of express preemption?

For all of the foregoing reasons, this Court should conclude that Section 4311(g) has *nothing to do with preemption* and instead relates exclusively to the compliance-with-government-standards defense. Finally it should be added that Congress knows full well how to draft a true "anti-preemption" provision. It has done so many times.[16] Congress is also fully capable of drafting exceptions to statutory commands of express preemp-

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[16] See, *e.g.*, 7 U.S.C. § 2910(a) ("Nothing in this chapter may be construed to preempt or supersede any other program relating to beef promotion organized and operated under the laws of the United States or any State."); *id.* § 4512(a) ("Nothing in this chapter may be construed to preempt or supersede * * *"); *id.* § 6109 (same); *id.* § 6812(c) (same); *id.* § 7811(c) (same); 10 U.S.C. § 2694(d); 15 U.S.C. § 77s(c)(3)(C); *id.* § 2649(a); *id.* § 3905(d); *id.* § 6410; 16 U.S.C. § 831c-3(d); 18 U.S.C. § 922(q)(4); 20 U.S.C. § 6737(c); 42 U.S.C. § 247–4a(f); *id.* § 280g-1(d); *id.* § 604a(k); *id.* § 12113(d)(3).

tion. That is precisely what Congress did, for example, in enacting the provision at issue in *City of Columbus* v. *Ours Garage and Wrecker Service*, No. 01-419 (pending): a provision that excepts the "safety regulatory authority of a State" (49 U.S.C. § 14501(c)(2)(A)) from the scope of an express preemption provision covering all state laws relating to the "price, route, or service of any motor carrier" (*id.* § 14501(c)(1)). In fact, as noted above, *Section 4306 itself* falls into this category, because it includes a specific exception for certain state and local requirements. See also 7 U.S.C. § 6309(a); *id.* § 7756(b); 15 U.S.C. § 1203(b); *id.* § 1476(b); *id.* § 6715. Section 4311(g) bears no resemblance to either a traditional anti-preemption provision or a specific exception to preemption.

2. Section 4311(g) Provides No Basis For Interpreting Section 4306 Narrowly

Petitioner and the United States next argue that here, as in *Geier*, the "savings" clause requires this Court to read the BSA's express clause narrowly as excluding requirements imposed by state common law. That argument is incorrect.

As noted above, this Court's decision in *Geier* to interpret the express preemption provision of the MVSA as excluding common-law standards rested on the need to preserve some meaningful role for the "savings" clause involved in that case. There is no comparable risk, however, that the BSA's savings clause will be rendered meaningless. Unlike the MVSA's savings clause, the BSA's savings clause is *not* limited to "compliance" with preemptive standards and requirements issued by the federal agency.[17] As explained above, it also broadly covers

[17] The MVSA's "savings" clause is limited to "[c]ompliance" with "Federal motor vehicle safety standard[s] issued under this subchapter." 15 U.S.C. § 1397(k) (1988 ed.). Moreover, the MVSA's express preemption provision (unlike the BSA's) is triggered only once there is "'a Federal motor vehicle safety standard * * * in effect.'" *Geier*, 529 U.S. at 867 (quoting 15 U.S.C. § 1392(d) (1988 ed.)). In those circumstances, the Court was faced with the question

compliance with "this chapter" [Chapter 43, 46 U.S.C. §§ 4301-4311] as well as with any "standards, regulations, or orders prescribed under this chapter." *Id*. § 4311(g). Thus, in all manner of proceedings that do *not* involve boat and equipment design and construction requirements, the savings clause precludes defendants from relying on compliance with federal standards as a defense to liability. See note 13, *supra*.

In other settings as well, Section 4311(g) would continue to play a meaningful role. *First*, it would foreclose the complete defense of compliance in any case where the Coast Guard has issued an exemption from preemption with respect to one of its design or construction standards. This is not a mere hypothetical possibility. As explained above, the Coast Guard issued a *blanket* exemption from preemption for the first two years following the BSA's enactment. During that entire period of time, the "savings" clause played a meaningful role in all cases involving design and construction standards that had been imposed by federal law. Nor is this an isolated occurrence. See, *e.g.*, 33 C.F.R. § 175.5 (exempting from preemption certain state-law requirements relating to the wearing or carriage of personal flotation devices).

Second, the "savings" clause in Section 4311(g) retains meaning in cases that fall within Section 4306's exception for state regulation of "the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State." 46 U.S.C. § 4306. Under that exception, for example, state law could impose negligence liability on the operator of a boat who complied fully with federal requirements relating

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of what role the MVSA "savings" clause would retain if common-law standards were covered by the express preemption clause. Because the MVSA's preemption clause preempts all nonidentical state standards, the operation of the "savings" clause would have been limited (under the manufacturer's reading of the statute) to cases in which plaintiffs were seeking to impose a standard under state law that was identical to the federal standard.

to the carrying and use of visual distress signals (see 33 C.F.R. §§ 175.110, 175.130), where local conditions (such as the prevalence of thick fog) necessitated the carrying of more powerful flares and other visual distress devices. In such a case, Section 4311(g) would also serve a meaningful role.

The essential rationale for the Court's narrow construction of the MVSA's preemption clause in *Geier* is accordingly absent from this case. What is more, the language of Section 4306 is broader than that of the MVSA's preemption clause, which referred solely to state "standards." In contrast, Section 4306 refers more expansively to any state or local "law or regulation" that imposes a safety or performance "standard" – as well as to any "requirement" imposed by state law on "associated equipment." In *Geier*, the Court observed that it was "possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions," but concluded that it "need not determine the precise significance of the use of the word 'standard[.]'" 529 U.S. at 868. In this case, the language of Section 4306 admits of no ambiguity, especially in light of this Court's decisions in *Medtronic*, *Easterwood*, and *Cipollone*. See note 6, *supra*.

III. PETITIONER'S CLAIM IS ALSO IMPLIEDLY PREEMPTED

Regardless of the scope of Sections 4306, petitioner's propeller guard claim is impliedly preempted. Congress gave the Coast Guard plenary authority over the issuance of uniform national boat design and construction standards and equipment requirements. After a thorough investigation, the Coast Guard decided that there should be no propeller guard requirement for recreational boats. That determination, moreover, was based on an underlying report that had concluded, at least in part, that the use of propeller guards would create serious safety hazards for recreational boaters and swimmers alike. It would frustrate the purposes of this comprehensive federal scheme to allow state lay juries, on an ad hoc basis, to second-guess the expert federal agency and impose just such a requirement.

A. The Safety Risks Of Propeller Guards Identified By The Propeller Guard Subcommittee Are Serious

In the late 1980s, the Coast Guard considered requiring manufacturers to install propeller guards on their boat engines. Among other things, the agency asked an advisory body, the NBSAC (see note 8, *supra*), to "[r]eview the available data on the prevention of propeller-strike accidents" and "[a]ssess the arguments for and against some form of mechanical guard to protect against propeller strikes." J.A. 43. The Coast Guard also asked the NBSAC to evaluate several different "propeller guard designs" and determine whether there should be "a federal requirement for some form of propeller guard." *Id.* at 43-44. This charge was fully consistent with the standards Congress has directed the Coast Guard to apply in determining what safety standards and requirements to impose. See 46 U.S.C. § 4302(c)(1), (2), (4) (requiring Coast Guard to consult with NBSAC and to consider various factors and data).

In response, the NBSAC established a Propeller Guard Subcommittee to evaluate the issue after gathering information from a wide array of private and public sources. J.A. 12. The Subcommittee conducted an exhaustive review spanning 18 months, including an investigation of the causes and overall risk of injury or death as a consequence of propeller strikes. Evidence produced to the Subcommittee indicated that "boating fatalities" involving people who are struck by either the "boat or propeller" amounted to approximately 49 deaths each year. *Id*. at 61-62. But because "the propeller itself is the sole factor in only a minority of impacts" (*id.* at 72), the number of fatal accidents attributable to propeller strikes is much lower. "On an absolute basis this is one third to one half the number of fatalities associated with being struck by lightning." *Id.* at 62.

The Subcommittee also determined that other factors play a role in the small number of accidents each year involving propeller strikes. In particular, "[o]perator inexperience, incompetence, negligence, and alcoholic intake are significant contributing factors in reported 'propeller strikes[.]'" J.A. 25.

Passengers may be ejected from a boat (and then struck by a propeller) if they are "improperly seated," or as a result of a collision, or during sudden deceleration, "sharp turns," or "wave or wake bounces." *Ibid*. In addition, the 20% of all propeller strikes that occur at idling or slow speeds (below 10 m.p.h.) involve people who are operating boats "in the vicinity of swimmers" or are "in the process of picking up a fallen water skier," and include situations where the operator "inadvertently put[s] an engine in gear when swimmers are using a boarding ladder or platform." *Ibid.*

The Subcommittee also investigated the biomechanical aspects of underwater impacts and the mechanical and hydrodynamic effects of various propeller guard designs on safe boat operation. The Subcommittee made the following findings with respect to the physics of underwater impacts:

> The density of water is approximately 830 times that of air. The density of the human body is approximately the same as water. Therefore, it follows that a human body immersed in water cannot move independently of the water around it. The result of an object striking a human body in water is that the body absorbs most of the energy of the striking object. * * * The resistance force on body movement in water at 1 mile per hour is the same as a force of 29 mph in the air. It was repeatedly stated that a skull impact at 10 mph or more in water would be generally fatal. A glancing head blow twisting the neck could result in a sheared neck at such speeds * * * .

J.A. 32-33. Both "mask" and "ring-type" guards, the Subcommittee explained, significantly increase the "underwater profile" of a boat, "thereby increasing the chances of [underwater] contact." *Id.* at 36. In like manner, the "Kort nozzle, or tunnel" form of guard "substitute[s] impact for propeller cut hazard." *Id.* at 37. Because propeller guards "increase significantly the potential impact area," they "present the additional hazard of blunt trauma injuries, which are often more severe" than the "cutting wounds" caused by a propeller impact. *Id*. at 34.

The hydrodynamic effects of "mask" and "ring-type" guards were also substantial, the Subcommittee concluded, with additional negative consequences for boating safety. At speeds above 10 m.p.h. (when most propeller strikes occur), "both types of guards – especially the ring – affect boat operation adversely." J.A. 37. Indeed, ring-type guards "create[] severe steering and trim effects" which, in turn, "cause serious safety and control problems" that can result in a "serious accident." *Id.* at 31. The Subcommittee noted that, in addition to these steering and handling problems, ring guards create "a new hazard" of arms and legs being "caught by the bars or ring and held against the rotating propeller." *Id.* at 36. The Subcommittee also concluded that use of propeller guards would cause some operators to develop a "false sense of security when approaching persons in the water at slow speeds, with the very real risk of impacting and/or entrapping a body appendage." *Ibid.*

In addition to outlining these safety concerns, the Subcommittee examined issues of feasibility and cost. Mask and ring-type guards, the Subcommittee concluded, are feasible only at "idling and very low speeds." J.A. 36. Fine mesh guards are "not feasible above 2-3 mph, which rules them out for recreational boating." *Ibid*. Similarly, the Kort nozzle has a "rapid loss of efficiency above 10 mph" and thus is "not operationally feasible at normal pleasure boat speeds." *Id*. at 37. All propeller guard designs, moreover, result in increased drag, loss of speed, and dramatically reduced power and fuel efficiency. *Id*. at 31-32, 37. Finally, a propeller guard "must not only fit the motor but be designed for hydrodynamic compatibility with the hull on which the motor is used." *Id*. at 38. "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" and "[n]o simple universal design" exists that could be used. *Ibid*. And the cost of retrofitting millions of existing boats would be "prohibitive." *Ibid.*

On the basis of this extensive factfinding, and its determination that the "use of devices such as 'propeller guards'

can * * * be counter-productive and can create new hazards of equal or greater consequence," the Subcommittee unanimously concluded that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." J.A. 39-40, 74-75. Subsequently, the full NBSAC considered the Subcommittee's report and unanimously adopted all of the Subcommittee's findings and recommendations. *Id.* at 78.

After considering these voluminous materials, the Coast Guard decided to accept all of the recommendations of the NBSAC and the Subcommittee report. J.A. 80. With respect to the NBSAC's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard concluded that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards*." *Ibid.* (emphasis added).

B. Allowing Petitioner's Claim Would Frustrate The Boat Safety Act's Purposes And Place Manufacturers In An Impossible Position

Petitioner's effort to impose a propeller guard requirement through a tort lawsuit is squarely at odds with several features of the BSA, including (1) Congress's goal of uniformity in design and construction standards and equipment requirements; (2) the statutory directive that equipment requirements be formulated only by an expert agency applying specified procedures and standards; and (3) the ban on substantial alterations of existing boats. See Resp. Br. 41-47. Beyond that, however, petitioner's claim is also exceedingly difficult to reconcile with the Coast Guard's "considered decision" (U.S. Br. 9) – based as it was on a detailed report that demonstrated that propeller guards *were unsafe* – not to require propeller guards.

The contrary arguments of petitioner (and the government) largely rest on several misconceptions. First, petitioner ignores the fact that the BSA categorically preempts state and local design and construction standards and equipment requirements whether or not the Coast Guard has issued a regulation. Second, petitioner relies on a basic misapprehension of the meaning and

function of the BSA's "savings" clause. See pages 15-24, *supra*. As this Court made clear in *Geier*, however, provisions like Section 4311(g) "do *not* bar the ordinary working of conflict pre-emption principles." 529 U.S. at 869.

Once these misconceptions are set to one side, petitioner and the government are left with the argument that there is no implied preemption here because the Coast Guard did not specifically endorse or formally adopt the Subcommittee's conclusions regarding the serious safety hazards associated with propeller guards or otherwise issue a formal regulation. Here again, this argument overlooks a central feature of the BSA: it generally ousts the States from regulating in the field of design and construction safety standards and equipment requirements *even if the Coast Guard has not taken any formal action*. But what is most striking about the Solicitor General's brief is his complete failure to address *whether the Coast Guard in fact relied on safety concerns in making its decision*. The Solicitor General treats the issue as if it were purely hypothetical, bereft of real world context or consequences. Thus, he advances a variety of arguments based on a parsing of the Coast Guard's letter and argues that only a focus on the Coast Guard's "stated rationale" will adequately protect against "inadvertent" preemption of state law (even though the Coast Guard's rejection of a propeller guard was hardly "inadvertent"). U.S. Br. 23-30.

The issue, however, *does* have significant real-world implications. The Subcommittee's report firmly establishes that propeller guards give rise to serious safety hazards. Not surprisingly, courts that have examined the report and the available safety data have reached the same conclusion regarding the safety and feasibility of propeller guards. For example, in *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505, 1509 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991), the court took note of evidence that "guards themselves can become a danger as they move through the water." Based on undisputed evidence, the court concluded (*ibid.* (emphasis added)):

> [C]urrent industry standards, and the federal regulations, simply reflect the consensus of experts that the industry's adoption of propeller guards at this point *would not only be infeasible, but unwise, unsafe and unfortunate*.

Other courts are in agreement.[18]

Based on these authorities and the record and report developed by Subcommittee, no rational manufacturer would install propeller guards on outboard motors. Yet if this lawsuit is permitted to proceed, and it results in a jury determination of liability against respondent, respondent would face great peril – including the prospect of punitive damages in later cases – unless it installed propeller guards in the future. When it did so, however, respondent would open itself up to new lawsuits by people who have suffered the blunt traumas caused by being struck by the larger area of the propeller guard, or been injured because a propeller guard caused a boat to spin out of control, or been hit by an idling boat whose operator was lulled into a false sense of security by the presence of the guard. In all of these future cases, plaintiffs can be expected to rely heavily on the Subcommittee's data and report. Thus, the government's position in this case puts manufacturers of outboard motors in an impossible position. And it severely disserves the fundamental objective of enhancing boat safety which underlies the BSA.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

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[18] See *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993) ("the record shows * * * the absence of evidence that there was a feasible, safer alternative design for a propeller guard"); *Pree* v. *Brunswick Corp.*, 983 F.2d 863, 867 (8th Cir.) ("[e]xperts for both sides * * * testified regarding the potential difficulties that propeller guards might engender"), cert. denied, 510 U.S. 815 (1993); *Fitzpatrick* v. *Madonna*, 623 A.2d 322, 325-26 (Pa. Super. 1993); *Beech* v. *Outboard Marine Corp.*, 584 So.2d 447, 450 (Ala. 1991).

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, VA 20191
(703) 264-5300

ALAN UNTEREINER*
Robbins, Russell, Englert Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

MAY 2002

* *Counsel of Record*

Counsel for Amicus Curiae

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
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Johnson Controls, Inc.
Joy Global Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Holdings, Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.

Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors R & D of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
Otis Elevator Company
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Philip Morris Companies Inc.
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Raytheon Aircraft Company
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Sears, Roebuck and Co.
Shell Oil Company
Siemens Corporation
Smith & Nephew, Inc.
Snap-on Incorporated
Sofamor Danek, Medtronic Inc.
Solutia Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Sunbeam Corporation
Synthes (U.S.A.)
Textron Inc.
The Boeing Company
The Dow Chemical Company
The Goodyear Tire & Rubber Company
The Heil Company

The Procter & Gamble Company
The Raymond Corporation
The Sherwin-Williams Company
The Toro Company
Thomas Built Buses, Inc.
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Whirlpool Corporation
Wilbur-Ellis Company
Wyeth
Yamaha Motor Corporation, U.S.A.
Zimmer, Inc.