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 Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In what can only be viewed as a desperate attempt to avoid an adverse ruling on the state-law preemption question presented in this case, Mercury Marine begins its brief with an entirely new argument that was never presented to the lower courts and never raised in its Opposition to the Petition for Certiorari: that this case is governed by federal admiralty law and that petitioner's claims are "statutorily displaced" by the Boat Safety Act. *See* Br. 7-28. Not only did Mercury Marine fail to raise this argument below and in its Opposition, but it affirmatively argued that petitioner's claims are governed by *Illinois state law*. As we explain in section III below, this new argument has been waived and, in any event, it lacks merit. This Court should not entertain respondent's attempt to evade resolution of a preemption question on which this Court has already *twice* granted review. *See Lewis v. Brunswick*, Case No. 97-288*, cert. dismissed*, 523 U.S. 1113 (1998) (case settled after oral argument before any decision was rendered).

At bottom, respondent's strategic decision to rely on a waived issue dramatically underscores the weakness of its arguments regarding the preemption question on which this Court granted review. As we explained in our opening brief, any question of express preemption in this case was effectively resolved by *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 868 (2000), which construed a savings clause similar to the one at issue here as expressly preserving common-law claims. *See* Pet. Br. 28-33. And any question of implied conflict preemption is laid to rest by the fact that the U.S. Coast Guard has not taken any regulatory action with respect to propeller guards – a conclusion that is supported by the United States' position, both here and in *Lewis*, that common-law no-propeller-guard claims do not conflict with any federal purposes. Respondent and its *amici* struggle mightily to salvage a preemption defense from the ashes of these developments, but their attempts fail at every juncture.

I. Petitioner's Claims Are Not Expressly Preempted.

A. Respondent's main theme regarding express preemption – and, indeed, throughout its entire brief – is that, because the Boat Safety Act expressly preempts the entire field of state positive law even in areas where the Coast Guard has not taken any regulatory action, Congress cannot possibly have intended to preserve common-law claims such as petitioner's. Any such approach, in respondent's view, would be both "absurd" and "incoherent." *See* Br. 41, 49.

Respondent's argument fails on two counts. First, the Act itself does not support Mercury Marine's field preemption theory, as it merely grants the Coast Guard *permissive* authority to promulgate minimum safety standards. *See* 46 U.S.C. § 4302.[1] Second, even if the Act preempts the field of state positive law, it is far from "absurd" for Congress to have chosen to preserve the rights of injury victims to sue at common law. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (common-law tort claims yielding jury verdict of over $10 million in compensatory and punitive damages permitted to stand despite Congress' occupation of entire field of nuclear safety). As this Court held in *Silkwood*, although there may be some "tension" between preemption of state positive law and preservation of common-law claims,

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[1] As previously explained (Pet. Br. 23-24), this fact alone distinguishes this case from the field-preemption holdings of both *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 (1978), and *United States v. Locke*, 529 U.S. 89, 111 (2000). Respondent nonetheless argues that *Ray* supports its field-preemption theory because it "expressly rejected the proposition that Congress's use of 'minimum standards' in an Act . . ." precludes a finding of field preemption. Br. 35. This observation is irrelevant, however, because *Ray*'s field-preemption holding turned on the fact that the statute at issue there – unlike the Boat Safety Act – imposed a *mandatory* duty on the Coast Guard to take regulatory action in the occupied field. *See* 435 U.S. at 168.

Congress' decision to adopt such an approach must be respected. *Id*.

B. The Boat Safety Act makes clear, moreover, that this is precisely the approach adopted by Congress with respect to recreational boats. The Act's express preemption clause contains no reference to common-law claims; instead, it merely preempts state "law[s] or regulation[s]" that are not identical to federal regulations. 46 U.S.C. § 4306. Mercury Marine's principal response is that Section 4306 also contains language – particularly the word "requirement" – that this Court has held encompasses common-law claims. Br. 30-32. This argument fails, however, because the Act 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 "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 v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and in *Medtronic v. Lohr*, 518 U.S. 470 (1996), intended to designate an entirely separate category that is subject to preemption.[2]

C. This interpretation of Section 4306 is confirmed by the Act's savings clause, which provides that "compliance with this chapter . . . *does not relieve a person from liability at common law or under State law*." 46 U.S.C. § 4311(g) (emphasis added). In *Geier,* 529 U.S. at 868, this Court construed a similar savings clause in the National Traffic and Motor

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[2] *Cipollone*'s holding is also inapposite for a number of reasons previously explained (*see* Pet. Br. 26 n.10), not the least of which is that the federal statute at issue in *Cipollone* did not include any savings clause, let alone one that expressly refers to common-law claims. The same is true of all the other cases cited by respondent in support of its express-preemption argument. *See* Br. 31-32.

Vehicle Safety Act (the "MVSA") as expressly preserving common-law claims. Since *Geier*, no court – including the court below – has held that the Boat Safety Act expressly preempts common-law claims. *See* Pet. Br. 21.

Respondent's main argument is that *Geier*'s express-preemption holding does not apply here because the Boat Safety Act's savings clause refers to "State law" as well as common law – a reference that, in Mercury Marine's view, would render Section 4306 a nullity if it were afforded the meaning given by petitioner. Br. 37. This argument, however, rests on a single, incongruous proposition: that because the Act's savings clause is *broader* than that at issue in *Geier*, it should be construed more narrowly. In addition, contrary to respondent's claim, the Act does not contain a reference to the entire body of state law. Rather, it speaks of the circumstances under which "a person" would be "relieve[d]" of "liability at common law or under State law," which clearly refers to forms of *damages liability*, whether pursuant to common law *or* statute (*e.g.*, state product liability statutes or wrongful death statutes).[3] Because the reference to "State law" in the savings clause merely refers to damages liability imposed via statute, state *positive-law* standards are still subject to preemption under Section 4306.[4]

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[3] *See Cipollone*, 505 U.S. at 518, 537 n.2 (referring to statutory language 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" as preserving damages claims from preemption).

[4] Respondent nonetheless argues (Br. 33) that, because the House Report accompanying the original legislation referenced an intent to "preempt the field of state law," Section 4311(g) cannot plausibly be read to save common-law claims. The savings clause, however, was added as an amendment to the bill *after* the House Report specifically to clarify that "in a product liability suit mere compliance with the minimum standards promulgated under the Act will not be a complete defense to liability." S. Rep., 1991 U.S.C.C.A.N. at 1352. *See generally* Pet. Br. 30-31. Thus,

In fact, it is *respondent's* interpretation of Section 4306 that would effectively "repeal" the savings clause. According to the Senate Report, the savings clause was intended to clarify that "in a product liability suit mere compliance with the minimum standards promulgated under the Act will not be a complete defense to liability." 1991 U.S.C.C.A.N. at 1352. Under Mercury Marine's "field preemption" reading of Section 4306, however, the states would retain almost no power to impose *any* liability on boat manufacturers, since all state law that is "not identical" to a preexisting federal standard would be wiped out by direct operation of Section 4306. In this scenario, there would be no need for manufacturers to assert regulatory compliance as an affirmative defense under state law, because any common-law claims relating to recreational boat design would already be extinguished by the Act's preemption clause. Thus, Mercury Marine's reading of the statute would render the savings clause largely meaningless – an approach this Court has disavowed. *See Geier*, 528 U.S. at 868.[5]

Respondent attempts to salvage its interpretation of Section 4311(g) by arguing that it preserves a "subset of state law and common law" that is not otherwise preempted by direct

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whatever the intent underlying the original House Bill, the subsequent enactment of Section 4311(g) shows that common-law claims were expressly *excluded* from any preempted field.

[5] Respondent also attempts to distinguish *Geier* on the ground that the Boat Safety Act's preemption clause "is far broader" than the one at issue in *Geier* because "preemption under the MVSA is triggered only by promulgation of a federal 'safety standard,'" while the Boat Safety Act's preemption clause applies (at least in the view of respondent) even when there is no federal safety standard in place. Br. 30. This, however, is a distinction without a difference. *Geier* interpreted the MVSA's preemption clause as not including common-law claims because any other approach would have rendered the MVSA's savings clause meaningless. *See* 429 U.S. at 868. The exact same approach is warranted here for the exact same reasons.

operation of Section 4306 – *i.e.,* claims concerning breach of contractual warranties, negligent boat operation, and defective manufacture and installation of marine products. Br. 39-40. This argument, however, finds no support in the text of the savings clause, which does not distinguish between any forms of liability. It is also contrary to the Act's legislative history, which shows that Congress enacted the savings clause to preserve victims' rights to bring "product liability suits," one primary form of which is design-defect claims. *See* S. Rep., 1991 U.S.C.C.A.N. at 1352.[6] Finally, respondent's argument fails to resurrect any meaningful role for the savings clause, because no reasonable defendant would attempt to rely on its compliance with federal standards governing boat *design* as an absolute defense in lawsuits – such as those alleging breach of warranties, negligent boat operation, or negligent installation of a properly designed product – that have little or nothing to do with the design features of the boat in question.[7]

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[6] Respondent's contention that Congress cannot have intended to preserve design-defect claims because such claims were "far from the usual tort law" (Br. 38) lacks merit. In truth, the Act was passed against the backdrop of existing common-law, which has historically had input on safe product designs, including in the boat safety area. In fact, during a Senate hearing on the Act, the Commandant of the U.S. Coast Guard testified that "[c]ourts have consistently held that a vessel owner's compliance with Coast Guard inspection requirements is not synonymous with 'seaworthiness' under maritime law." Pet. Br. 31 (quoting S. Rep. at 66). Thus, at the time the Act was passed, common law was deemed compatible with federal boat regulation, and this presence was recognized by Congress during the drafting of this legislation.

[7] Equally unconvincing is *amicus* Product Liability Advisory Council's argument (Br. 23-24) that Section 4311(g) plays a "meaningful role" in cases where the Coast Guard has issued an exemption from preemption with respect to one of its design or construction standards or where the State has regulated in order to meet "uniquely hazardous [local] conditions," as the Act permits. This argument fails because, in such cases, Section 4306 would not apply on its face, and thus there would be no need to "save" the claims from the scope of federal preemption. Nor would there

Mercury Marine also argues (Br. 41) that the savings clause cannot mean what it says because, if it did, State legislatures would be powerless to overturn a jury verdict holding a manufacturer liable for not installing propeller guards – an "absurd result," in respondent's view. However, a state law that eliminated a tort cause of action in the boat safety area would not have the effect of "establishing a recreational vessel . . . safety standard or imposing a requirement for associated equipment," and thus would not be preempted by Section 4306. Thus, contrary to respondent's claim, nothing in the Act would stop a State from passing a law that boat manufacturers cannot be held liable for failing to install a propeller guard. And even if it did, a statutory scheme that preempts state legislation while preserving the ability of juries to compensate injury victims is anything but "absurd," especially where the governing statute would otherwise leave victims without any remedy at all. *See 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").

II. Petitioner's Claims Are Not Impliedly Preempted.

A. Respondent's main theme with regard to implied preemption is that *all* common-law claims – not just those involving propeller guards – necessarily conflict with Congress's goal of achieving "uniformity" with respect to recreational boat design standards. Br. 42-43. This argument, however, is negated by the express terms of the Boat Safety Act itself. As explained above, uniform safety standards may be the goal of Section 4306, but preservation of common-law claims is the goal of Section 4311(g). Congress adopted both sections.

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be any need to rebut a regulatory compliance defense in such cases, because no defendant would logically argue that it is entirely exempt from liability by virtue of its compliance with *inapplicable* government regulations.

Its express preservation of common-law claims must be respected.[8]

Respondent nonetheless insists that common-law claims are preempted because they exert a "regulatory effect" identical to that of state positive law. Br. 44. The effects of common-law tort liability and direct state regulation, however, are far from identical. The principle purpose of a "law or regulation establishing a . . . safety standard or imposing a requirement for associated equipment" is to mandate *conduct*: a violator of a state regulatory requirement is subject to liability per se, to administrative remedies, or even to criminal penalties, and can often be forced to remove noncomplying products from the market. Imposition of tort liability, in contrast, does not force a manufacturer to do anything other than pay damages to its victims. Thus, as this Court has previously recognized, "[t]he effects of direct regulation . . . are significantly more intrusive than the incidental regulatory effects of such an award provision, [and] *Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.*" *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) (emphasis added).[9]

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[8] *See Geier*, 429 U.S. at 35 (the MVSA's "savings 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").

[9] *See also Silkwood*, 464 U.S. at 256 (tort awards not preempted even though "regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards"); *Cipollone*, 505 U.S. at 518 (noting that "there is no general, inherent conflict between [express] federal pre-emption of state [regulatory] warning requirements and the continued vitality of state common law [damages] actions." 505 U.S. at 518 (plurality); *id*. at 533-34 (Blackmun, J., concurring).

Despite this authority, respondent argues that Congress cannot have intended – and the Supremacy Clause does not permit – manufacturers to be subject to "widely varying local requirements" with regard to recreational boat design. Br. 43. But this is precisely the outcome that is permitted by numerous statutes, including (for example) the MVSA, which this Court has held does not preempt *any* forms of state law in areas where the federal government has not regulated. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 286, 289-90 (1995). Even when a federal safety standard is in effect, moreover, common-law claims are permitted to go forward so long as the federal standard is merely intended to create a regulatory floor. *See Geier*, 529 U.S. at 870. There is no logical basis for assuming (as does respondent) that choices Congress made with respect to motor vehicles, which are sold nationwide and are routinely used in interstate commerce, cannot possibly have made sense in the case of recreational boats.[10]

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[10] Uniformity aside, respondent also argues that petitioner's lawsuit would "contravene Congress's intent that design standards be imposed only after deliberation by expert administrators applying detailed statutory criteria." Br. 44. This argument, however, proves too much. Myriad other statutes authorize "expert administrators" to create minimum safety standards according to highly specific statutory criteria, *see, e.g.,* 15 U.S.C. § 1193 (Flammable Fabrics Act); 15 U.S.C. §§ 2506-08 (Consumer Product Safety Act); 42 U.S.C. § 5403 (National Manufactured Housing Construction and Safety Standards Act), yet courts have routinely held that minimum safety standards promulgated pursuant to such statutes do not preempt state common-law claims. *See, e.g., Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063 (9th Cir. 2000) (consumer products); *Choate v. Champion Home Builders Co.*, 222 F.3d 788 (10th Cir. 2000) (housing); *Gryc v. Dayton Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980) (flammable fabrics). *See also Geier*, 529 U.S. at 870. Nor is there any basis for respondent's claim (Br. 46-47) that permitting common-law design-defect claims would undermine Congress's prohibition of federal regulations that would "compel substantial alteration" of existing boats. As previously noted, holding a manufacturer liable for failing to install a propeller guards does not "compel" a manufacturer to do anything other than pay damages to the injury victim.

B. Nor is there any merit to respondent's claim that this lawsuit would conflict with or frustrate the Coast Guard's purposes. *See* Br. 47-50.[11] As previously explained, this argument fails for two reasons: (1) the Coast Guard has never promulgated any regulations with regard to propeller guards; and (2) the Coast Guard has never concluded that propeller guards are contrary to the interests of boat safety. Pet. Br. 38-41; U.S. Br. 15-30.

1. In response, Mercury Marine does not deny that the agency's rulemaking authority is limited to the promulgation of actual safety standards according to the formal rulemaking procedures of the Boat Safety Act. Nor does it deny that, as a matter of basic administrative law, informal agency decisions lack the force and effect of substantive law. *See* Pet. Br. 37; U.S. Br. 22-26. Rather, it argues that, because the Act preempts the field of state positive law even in cases where the Coast Guard has not regulated, no formal rulemaking is required impliedly to preempt common-law claims like petitioner's. Br. 48. But here again, respondent's argument improperly conflates the Act's effect on state positive law with its effect on common-law claims. As explained above, whether or not Congress preempted the field of state positive law, it expressly *excluded* common-law claims from any preempted field. That being so, common-law claims must be permitted to go forward unless they conflict with or undermine federal purposes. *Geier*, 429 U.S. at 875. And, because the Coast Guard chose not to follow the rulemaking procedures mandated by the Act, there is no valid expression of federal "purposes"

[11] Notably, respondent treats as an afterthought the implied-preemption theory on which the lower court decided this case, relegating this argument to the last three pages of its merits brief.

with which petitioner's claims could possibly conflict. *See* U.S. Br. 22-26.[12]

2. Moreover, contrary to Mercury Marine's contention, the Coast Guard did not conclude that propeller guards are dangerous. The Coast Guard Letter does not mention the supposed hazards of propeller guards; to the contrary, it appears affirmatively to encourage their continued testing and use. *See* Pet. Br. 39-41. Nor does the letter contain any indication of any intention on the part of the agency to preempt common-law claims regarding unguarded boat propellers.[13] And, since 1990 (when the letter was written), the agency has continued to study the possible use of propeller guards in recreational vessels to help prevent propeller-strike accidents. *See* Pet. Br. 11.[14]

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[12] In addition, as the United States observed, because the Boat Safety Act's savings clause makes clear that certain common-law claims can go forward even in areas where the federal government *has* regulated, finding preemption in this case "would thus give *greater* preemptive effect to the Coast Guard's decision *not* to regulate than would result from the agency's decision to promulgate a federal safety standard." U.S. Br. 20 (emphasis in original). Plainly, this would not do.

[13] Respondent cites *Geier*, 529 U.S. at 884-85, for the proposition that implied preemption does not require a formal statement of agency intent to preempt. Br. 48. However, *Geier*'s implied-preemption holding was based on a lengthy and complex federal regulation – Motor Vehicle Safety Standard 208 – that exhaustively addressed virtually every aspect of the subject matter at issue (passive restraint systems in passenger cars). *See* 529 U.S. at 875-82. (Even so, four dissenting Justices vigorously argued that the absence of any affirmative statement of an intent to preempt mandated a finding of no preemption. *See* 429 U.S. at 90 (Stevens, J., dissenting)). In this case, in contrast, there is no federal regulation at all governing propeller guards, rendering *Geier* inapplicable on this point.

[14] Respondent argues (Br. 12) that the Coast Guard's post-1990 efforts in this area are irrelevant because they concern non-planing vessels (*i.e.,* houseboats) rather than motor boats like the one that killed petitioner's wife. However, the Coast Guard's Advisory Committee recently recommended that the agency promulgate regulations requiring, among other

Mercury Marine's response (Br. 49) is that, because the Coast Guard Letter "closely tracked the [Advisory Committee's] findings," the Coast Guard necessarily must have endorsed all the factual conclusions of the Subcommittee Report. This argument, however, lacks any basis in fact. The *only* factual finding repeated in the Coast Guard Letter is the Subcommittee's observation that there is no "universally acceptable propeller guard available or technically feasible in all modes of boat operation." *See* J.A. 80. There is no mention of any of the Subcommittee's statements regarding the alleged dangers of propeller guards. Thus, as the United States explains, "nothing in the [Coast Guard L]etter expressly endorsed [the Subcommittee's] findings or incorporates them by reference." U.S. Br. 29. Against this backdrop, it is impossible to discern the type of "clear evidence of a conflict" that must form the basis of any implied preemption ruling. *Geier*, 529 U.S. at 885.

3. Because there is no factual basis for concluding that the Coast Guard intended to preempt claims like petitioner's, respondent relies on *Ray v. Atlantic Richfield Co.*, 435 U.S 151 (1978), for the proposition that the Coast Guard's affirmative decision not to require propeller guards exerts preemptive force. *See* Br. 48. *Ray*, however, has no bearing on this case, because the agency there had in fact issued comprehensive regulations regarding the subject matter at issue. *See* 435 U.S. at 178; *see also* Pet. Br. 43-44; U.S. Br. 20-22 (distinguishing *Ray*). Respondent's theory, moreover, paints with an overly broad brush, as it would accord preemptive effect to any agency

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things, that all new "planing" vessels 12-26 feet in length be required to install one of four possible "propeller injury avoidance measures," including "[p]ropeller guard[s] – any design." Minutes of 67th Meeting of the National Boating Safety Advisory Council (April 23-24, 2001), at 34. (These minutes are available at http://www.uscgboating.org/bul/bul_nbsac.asp.) The Coast Guard has not yet acted on this recommendation, although it has stated that it intends to address it in "subsequent regulatory projects." J.A. 140.

decision to study, but ultimately take no regulatory action with respect to, a particular safety device – even where, as here, the agency has never found the device to be dangerous and never given any indication of an intent to preempt state common-law claims. That cannot and should not be the law.

This conclusion is underscored by the fact that the federal government has *twice* taken the position, both here and in *Lewis*, that no-propeller-guard claims like petitioner's do not conflict with any federal purposes. This Court has recognized that the United States' position on the preemptive effect of agency actions is entitled to at least "some weight." *Geier*, 529 U.S. at 883; *see also id*. at 886 (United States' position in *amicus* brief that federal regulation preempts common-law claims accorded "special weight"). This approach is especially appropriate here because, not only has the United States' position remained "consistent[ ] over time," *Geier*, 529 U.S. at 883, but the Coast Guard is *ceding* authority to the States, not trying to claim power for itself. *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (adopting United States' position that breach-of-contract claims are not preempted by Airline Deregulation Act of 1978). Thus, this Court should accord the United States' position the "special weight" it deserves.

III. Respondent's Maritime-Law Argument Is Waived And Lacks Merit.

Finally, at the outset of its brief, respondent devotes nearly one-third of its entire argument to a new issue that was never raised below, was not mentioned in its Opposition to the Petition, and directly contradicts its position in the lower courts: that this case is within federal admiralty jurisdiction and that "federal maritime law cannot possibly be read to impose a federal duty to install propeller guards on motor boats." Br. 19. This argument has been waived and, in any event, lacks merit.

A. Before filing its merits brief in this case, respondent never once suggested that this case is governed by federal maritime law. In fact, it took the exact *opposite* position before the Illinois Supreme Court, arguing (for over 25 pages of its merits brief) that the Court did not need to reach the preemption question because Mr. Sprietsma's claims lack merit as a matter of *substantive Illinois tort law*.[15] Respondent took the same tack in its Opposition to the Petition for Certiorari, arguing that the preemption issue is not worthy of review because petitioner's claims would fail under *state law*. *See* Opp. 26-27. Despite this consistent litigating position, respondent has made a 180-degree turn and now urges this Court to find that, in fact, this case is subject to *admiralty* jurisdiction and that petitioner's *federal* common-law claims are "displaced" by the Boat Safety Act. Br. 17-28.

Respondent defends this dramatic about-face by arguing that, "[a]lthough this litigation was primarily conducted on the assumption that state law applied, . . . the parties briefed and argued all points necessary to [the] conclusion" that the case falls within federal maritime jurisdiction. Br. 17. This contention is simply false. In truth, *none* of the extensive arguments raised by respondent regarding application of maritime law was ever presented to the lower courts. In fact, respondent's only argument relating to maritime law was in *one paragraph* of its 75-page brief to the Illinois Supreme Court, where it simply argued that petitioner's claims are not entitled to the traditional presumption against preemption of *state law* because this accident occurred on water – an area where "there has been a history of significant federal presence." Br. 36. And respondent never even hinted – let alone actually argued – that petitioner's exclusive remedy lies in admiralty; to the contrary, Mercury Marine agreed that petitioner's claims arise

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[15] Copies of the relevant pleadings from the courts below have been lodged with the Clerk.

under substantive Illinois tort law, and it attempted to persuade the lower court to render a decision in its favor on the basis of the alleged weaknesses of petitioner's state-law claims. *Id*. at 49-75.[16]

Even if this Court were prepared to overlook respondent's failure, in clear violation of Rule 15.2 of this Court, to raise its brand-new issue in its brief in opposition, this Court does not address, in any but the most "exceptional cases," questions that a respondent raises here for the first time. *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987). That rule applies with "peculiar force" in "cases coming here from state courts." *McGoldrick v. Companie Generale Transatlantique*, 309 U.S. 430, 434 (1940). In this case, there is nothing "exceptional" about the issue respondent raises, given that (1) the lower court undisputably possessed subject matter jurisdiction over this lawsuit, *see Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986) (under "savings-to-suitors" clause, state courts are competent to adjudicate maritime cases); and (2) application of federal maritime law in an admiralty case "can be waived." *General Chemical Corp. v. De la Lastra*, 852 S.W.2d 916, 919

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[16] Respondent's contention (Br. 19 n.6) that the lower court actually decided "the maritime law question" raised here, and that the court's decision on this point "was a necessary predicate and subsidiary element of its decision" with regard to federal preemption, is also false. In reality, the lower court never found that this case is subject to admiralty jurisdiction; instead, it merely held that, because petitioner's claims "relate to federal maritime activity," this case is not subject to the traditional presumption against preemption. Pet. App. 6. It never held, moreover, that this case is governed by federal maritime law; to the contrary, it held that the *state-law* claims in this case are preempted by the Boat Safety Act. If the lower court had in fact concluded that this case is governed by federal maritime law, then it would not have needed to address the state-law preemption question *at all*. The cases cited by respondent to support review of its waived argument (Br. 19 n.6) have no bearing here, because they all involve situations where the new issue was deemed a "subsidiary question" fairly included in the question presented.

(1993).[17] In addition, respondent's argument that no-propeller-guard claims are governed by federal maritime law has never even been addressed in a single reported decision involving claims like petitioner's. *See* Pet. Br. 22 n.7; Resp. Br. 26. Thus there is no "exceptional" reason for this Court to tolerate respondent's thirteenth-hour attempt to derail this proceeding. *See Steagald v. United States*, 451 U.S. 204, 209 (1981) (a respondent should be barred from raising new issue "when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation").[18]

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[17] *See also* David W. Robertson, *Admiralty and Maritime Litigation in State Court*, 55 La. L. Rev. 685, 703 n.110 (1995) (noting that courts routinely "allow[] parties whose disputes [are] clearly maritime to choose to have the matter governed by state law").

[18] *See also TRW Inc. v. Alexander*, 122 S. Ct. 441, 451 (2001) (refusing to consider new issue raised by respondent for first time in its brief on the merits); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 171 (1999) ("[w]e would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate"); *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999); *Federal Trade Comm'n v. Grolier*, 462 U.S. 19, 23 n.6 (1983); *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 3.20 at 137 (7th ed. 1993).

Finally, we note that, because respondent never argued before the trial court or at the intermediate appellate level that maritime law governed petitioner's claims, any attempt by respondent to have raised its new argument before the Illinois Supreme Court almost certainly would have been rebuffed on state procedural grounds. *See People v. Franklin*, 504 N.E.2d 80, 83 (Ill. 1987) (an appellee is barred from raising a new argument that "is inconsistent with the position adopted below or [where] the party has acquiesced in contrary findings"). This would have constituted an independent and adequate state ground for decision depriving this Court of jurisdiction to consider that issue. *See Michigan v. Tyler*, 436 U.S. 499, 513

B. Respondent's new argument also fails on its merits. As a threshold matter, a party seeking to invoke admiralty jurisdiction over a tort claim must show that (a) the tort occurred on "navigable water"; and (b) that the incident "bears a substantial relationship to traditional maritime activity" *and* has "a potentially disruptive impact on maritime commerce." *Grubart, Inc. v. Great Lakes Dredge & Dock*, 513 U.S. 532, 534 (1995). The first part of this test is likely not met here because Dale Hollow Lake ("DHL") is a *recreational* lake that apparently does not support any maritime commerce.[19] As for the second part of the jurisdictional test, although "there is no requirement that the maritime activity be an exclusively commercial one," *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982), this Court has insisted that, at the least, an incident involving a pleasure boat must either implicate the "traditional concern that admiralty holds for navigation" (*id.* at 675) or have the potential to disrupt the commercial activities of *other* boats. *Sisson v. Ruby*, 497 U.S. 358 (1990). Neither situation is present here, given that there was no collision with another vessel, *compare Foremost*, 457 U.S. at 675; *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 202 (1996), and no possibility that this accident could disrupt the conduct of

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n.7 (1978). Respondent should not be permitted to bootstrap this Court's jurisdiction over its new issue by failing to raise it below altogether.

[19] Although there is no evidence in the record on this point (because respondent has never raised its admiralty argument until now), the Sixth Circuit has held that "[t]he only maritime traffic that occurs on [DHL] is in the form of *pleasure craft*." *Finneseth v. Carter*, 712 F.2d 1041, 1042 (6th Cir. 1983) (emphasis added). Although *Finneseth* went on to hold that DHL is subject to admiralty jurisdiction because it is "susceptible of being used [in the future] as a highway of commerce," *id*. at 1043, the Eighth Circuit has held that admiralty jurisdiction requires a *present* commercial use, not a hypothetical possibility of future commerce. *See Livingston v. United States*, 627 F.2d 165, 169 (8th Cir. 1980). Thus, there is substantial dispute even with respect to the threshold question of whether DHL is subject to admiralty jurisdiction *at all.*

maritime commerce on this purely *recreational* body of water. *Compare Sisson*, 497 U.S. at 363 (finding admiralty jurisdiction where fire on yacht docked at marina "could have spread to nearby commercial vessels or ma[d]e the marina inaccessible to such vessels"). Against this backdrop, it is not surprising that respondent never before even attempted to argue that petitioner's lawsuit was subject to federal admiralty jurisdiction.

Even if this case did fall within admiralty jurisdiction, it would not follow that petitioner's lawsuit is governed by federal maritime law. On this point, respondent simply equates the existence of admiralty jurisdiction with the application of substantive maritime law. *See* Br. 19-20. In reality, the question of what substantive law governs tort cases litigated in admiralty (which was specifically left open in *Yamaha*, 516 U.S. at 216 n.14) remains one of the thorniest and most debated areas in maritime jurisprudence.[20] In the wake of *Yamaha*, however, numerous commentators have persuasively argued that choice-of-law issues in admiralty should be resolved by weighing the relative interests of the state and the federal governments in applying their substantive law to the matter at issue.[21] In this case, which involves a "nonseafarer" and arises

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[20] *See, e.g.,* David W. Robertson, *The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 Tul. Mar. L. J. 81, 83, 90 (1996) (describing subject of federal-state choice of law in maritime cases as "diabolically difficult" and explaining that, since *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), this Court has issued 53 decisions in which state law and federal maritime law came into conflict, and "in 29 of those, state law triumphed over the competing claims of federal maritime law") (footnote omitted)).

[21] *See, e.g.,* Ernest A. Young, *Preemption at Sea*, 67 Geo. Wash. L. Rev. 273, 343-344 (1999) ("[t]here is no longer anything special about maritime commerce that demands a unique and largely judge-made body of uniform federal law"); Robert Force, *Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century*, 32 J. Mar. L. & Com. 517, 541

out of an accident on territorial (and, it appears, purely recreational) waters (*see* n.19, *supra*), the State of Illinois' interest in providing a tort remedy to petitioner outweighs any federal interest in the application of federal maritime law. *See* Brief *Amici Curiae* of the States of Missouri, *et al.,* 12-17. Thus, even if this case lies in admiralty as a *jurisdictional* matter (which it does not), *choice-of-law* principles in the post-*Yamaha* era dictate that petitioner's claims are governed by Illinois state tort law (as respondent has contended all along).[22]

Finally, even if this Court were to conclude that this case is governed by federal maritime law, any federal common-law claims that could be asserted by petitioner would not – as respondent contends – be "displaced" by the Boat Safety Act. *See* Br. 20-25. Not only has this argument never been adopted by any court, but it is directly contrary to the plain language of the Boat Safety Act, which expressly preserves common-law claims. *See* 46 U.S.C. § 4311(g). While it could be argued that this express preservation of victims' rights to sue only preserves claims brought under state common and statutory law, it would have made no sense for Congress simultaneously to have *extinguished* all claims asserted under federal common

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(2001).

[22] This conclusion also follows from *Yamaha* itself, which held that the "uniformity concerns" that informed other decisions to apply federal law in the maritime context were of much less significance in the context of a claim by a "nonseafarer" in state territorial waters. 516 U.S. at 215-16. *See also* David W. Robertson, *The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 Tul. Mar. L. J. 81, 101 (1996) (arguing that various aspects of *Yamaha* "unmistakably suggest[ ] that the United States Supreme Court may at some point announce that the governing liability standards in cases like *Yamaha* must come from state law").

law.[23] In any event, respondent's "statutory displacement" argument is nothing more than a rehash of its state-law preemption defense (*see* Br. 20-25), and it fails for all the same reasons – not the least of which is that Congress did not give the Coast Guard the authority to preempt (or to "displace") *any* common-law claims, state or federal, simply by writing a letter.

CONCLUSION

The lower court's decision finding preemption of petitioner's state common-law claims should be reversed.

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[23] None of the cases cited by respondent (Br. at 21-22) is to the contrary. In *Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981), this Court found statutory displacement of federal common-law nuisance claims where Congress had occupied the entire field through the establishment of a "comprehensive regulatory program" that governed "every point source discharge." Here, in contrast, Congress has merely granted the Coast Guard permissive authority to promulgate safety standards, and there is no federal regulation at all governing propeller guards. Moreover, unlike *Mobile Oil Co. v. Higgenbotham*, 436 U.S. 618 (1978), and *Dooley v. Korean Airlines Co., Ltd.*, 534 U.S. 116, 122 (1998), which held that certain damages permitted under general maritime law were displaced by a federal statute – the Death on the High Seas Act – that "[spoke] directly to the question" at issue by creating an alternative measure of damages, Congress has neither "spoken" of any intent to displace traditional maritime remedies in the area of recreational boating safety nor has it created any alternative means of recovery for victims of unsafe recreational boats. Thus, unlike in *Mobile Oil* and *Dooley*, finding "statutory displacement" under the circumstances presented here would leave victims like petitioner with *no* damages remedy at all.

Respectfully submitted,

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Date: June 26, 2002