No. 01-706

In the Supreme Court of the United States

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

v.

MERCURY MARINE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner's state common-law tort action, based on respondent's failure to install a propeller guard on a motorboat, is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. 4301 *et seq.*, or by the decision of the Secretary of Transportation in 1990 to take no regulatory action to require the installation of propeller guards on recreational boats.

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INTEREST OF THE UNITED STATES

The Federal Boat Safety Act of 1971, 46 U.S.C. 4301 *et seq.*, authorizes the Secretary of Transportation to promulgate appropriate federal safety standards for recreational boats. 46 U.S.C. 4302(a). This case concerns the preemptive effect of the Secretary's decision in 1990 not to require the installation of propeller guards on engine propellers. In *Lewis* v. *Brunswick Corp.*, cert. granted, 522 U.S. 978 (1997) (No. 97-288), which presented the same preemption question, the United States filed a brief amicus curiae taking the position that the Secretary's 1990 decision did not preempt a private tort suit based on a manufacturer's failure to install a propeller guard. The writ of certiorari in *Lewis* was dismissed after oral argument pursuant to settlement. See 523 U.S. 1113 (1998).

STATEMENT

1. a. For most of the last century, Congress sought to promote the safe use of motorboats through various statutory requirements. In 1910, Congress required motorboats

of specified sizes to carry lights and safety equipment. See Act of June 9, 1910, ch. 268, 36 Stat. 462. The purpose of that law was to "prevent[ ] collisions of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States." H.R. Rep. No. 1162, 61st Cong., 2d Sess. 1 (1910). In 1940, Congress acted to expand the definition of "motorboat," to provide for local inspectors to ensure compliance with equipment and design requirements, and to impose penalties on persons who operated motorboats in a reckless or negligent manner. Act of Apr. 25, 1940, ch. 155, 54 Stat. 163; see S. Rep. No. 676, 76th Cong., 1st Sess. (1939). In 1958, Congress declared it "to be the policy of Congress to encourage uniformity of boating laws, rules, and regulations as among the several States and the Federal Government to the fullest extent practicable, subject to reasonable exceptions arising out of local conditions." Federal Boating Act of 1958, Pub. L. No. 85-911, § 9, 72 Stat. 1757.

By the early 1970s, approximately 40 million Americans were engaging in recreational boating activities each year in approximately nine million boats. S. Rep. No. 248, 92d Cong., 1st Sess. 6 (1971). That widespread participation came at a cost, as nearly 7000 persons lost their lives in boating accidents during the years 1966-1970. *Id.* at 7. In response to those developments, Congress enacted the Federal Boat Safety Act of 1971 (FBSA), Pub. L. No. 92-75, 85 Stat. 213 (46 U.S.C. 4301 *et seq.*). The Act was intended "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating—presently the Secretary of Transportation." S. Rep. No. 248, *supra*, at 6.

The FBSA authorizes the Secretary of Transportation to prescribe regulations establishing "minimum safety standards" for recreational boats. 46 U.S.C. 4302. In promul-

gating regulations, the Act requires the Secretary to consider "the extent to which the regulations will contribute to recreational vessel safety." 46 U.S.C. 4302(c)(1). The Secretary may not establish regulations compelling substantial alterations of existing boats and associated equipment unless compliance would "avoid a substantial risk of personal injury to the public." 46 U.S.C. 4302(c)(3). Before promulgating a regulation, the Secretary must consult with the National Boating Safety Advisory Council (Advisory Council), 46 U.S.C. 4302(c)(4), and must comply with the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553. See S. Rep. No. 248, *supra*, at 19. The Advisory Council must consist of 21 members, equally divided among representatives of "State officials responsible for State boating safety programs," "recreational vessel manufacturers and associated equipment manufacturers," and "national recreational boating organizations and * * * the general public." 46 U.S.C. 13110(b)(1)(A)-(C). The Secretary has delegated to the Coast Guard his rulemaking authority under the FBSA. See 49 C.F.R. 1.46(n)(1).[1]

b. Two provisions of the FBSA speak to the question whether, and under what circumstances, the Coast Guard's regulatory actions under the FBSA will preempt the appli-

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[1] The Coast Guard has promulgated numerous regulations regarding boat safety, specifying equipment to be carried on boats, and mandating design standards for minimum safety requirements. Those regulations address a range of different topics, including vessel numbering and accident reporting, 33 C.F.R. Pts. 173, 174; requirements for safety equipment to be carried on boats, such as personal flotation and visual distress signal devices, *id.* Pt. 175; measures to correct especially hazardous conditions, *id.* Pt. 177; defect notification requirements, *id.* Pt. 179; requirements for manufacturers concerning certifications of compliance, identification of boats, and instructions for personal flotation devices, *id.* Pt. 181; requirements regarding safe boat capacity and flotation devices, and standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, *id.* Pt. 183; and vessel identification requirements, *id.* Pt. 187.

cation of state law. Section 4306 of Title 46, entitled "Federal preemption," provides:

> Unless permitted by the Secretary * * *, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment * * * that is not identical to a regulation prescribed [by the Coast Guard] under section 4302 of this title.

46 U.S.C. 4306; see S. Rep. No. 248, *supra*, at 14 ("The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level."). The Act also contains a saving clause, which states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. 4311(g); see S. Rep. No. 248, *supra*, at 32 ("The purpose of [Section 4311(g)] is 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.").

c. This case presents the question whether the Coast Guard's decision in 1990 *not* to promulgate a regulation requiring manufacturers to install propeller guards on recreational motorboats preempts a state common-law suit premised on the theory that the manufacturer's failure to install such a guard rendered the vessel unreasonably dangerous. In 1988, the Coast Guard requested the Advisory Council to examine the feasibility and safety advantages and disadvantages of requiring propeller guards on recreational boats. See J.A. 12. The Council appointed a Propeller Guard Subcommittee for that purpose. *Ibid.* After an extensive review of scientific data and testimony, the Subcommittee

determined that the incidence of injuries or fatalities caused by persons coming into contact with propellers was relatively small. See J.A. 24, 39. The Subcommittee also found that propeller guards adversely affect the operation of boats at certain speeds and that such devices could create additional and more severe hazards. J.A. 36-37. The Subcommittee further concluded:

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

J.A. 38. The Subcommittee made six recommendations to address the issue of propeller strike injuries, including a recommendation that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." J.A. 40. The Advisory Council accepted the report and adopted its recommendations. J.A. 72-79.

The Coast Guard reviewed the Advisory Council's report and accepted its recommendation that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards," as well as recommendations made by the Advisory Council with respect to other boat safety issues. Pet. App. 40. That decision on behalf of the Coast Guard was communicated to the Advisory Council's Chairman by letter dated February 1, 1990, from Rear Admiral Robert T. Nelson, the Coast Guard Chief of the Office of Navigation Safety and Waterway Services, the office within the Coast Guard having responsibility for recreational boat safety. *Id.* at 40-44. That letter explained (*id.* at 40-41):

> The regulatory process is very structured and stringent regarding justification. Available propeller guard acci-

> dent data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.
>
> The Coast Guard will continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

The Coast Guard has continued to study various proposals to lessen the incidence of propeller-related injuries. In 1995, the Coast Guard issued an Advance Notice of Proposed Rulemaking (ANPRM) requesting comment on "the public's present feelings about the use of propeller guards or possible alternatives to propeller guards." 60 Fed. Reg. 25,191. In 1996, the Coast Guard issued an ANPRM "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13,123. In 1997, the Coast Guard sought "comments on the effectiveness of specific devices and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller." 62 Fed. Reg. 22,991. The Coast Guard subsequently extended the period for comments. See *id.* at 44,507.

Following an April 2001 meeting of an Advisory Council subcommittee, the Council recommended that the Coast Guard develop four specific regulations that would: (1) "[r]equire owners of all propeller driven vessels 12 feet in length and longer with propellers aft of the transom to dis-

play propeller warning labels and to employ an emergency cut-off switch, where installed"; (2) "[r]equire manufacturers and importers of new planing vessels 12 feet to 26 feet in length with propellers aft of the transom to select and install one of several factory installed propeller injury avoidance methods"; (3) "[r]equire manufacturers and importers of new non-planing vessels 12 feet in length and longer with propellers aft of the transom to select and install one of several factory installed propeller injury avoidance methods"; and (4) "[r]equire owners of all non-planing rental boats with propellers aft of the transom to install either a jet propulsion system or a propeller guard or all of several propeller injury avoidance measures." 66 Fed. Reg. 63,647 (2001).

On December 10, 2001, the Coast Guard published a Notice of Proposed Rulemaking (NPRM) (66 Fed. Reg. at 63,645-63,650) that "focus[ed] on implementing the fourth [Advisory Council] recommendation." *Id.* at 63,647. The proposed rule, if ultimately adopted, would require owners of non-planing houseboats for rent to "equip their vessels with either a propeller guard, or a combination of three propeller injury avoidance measures: A swim ladder interlock, an aft visibility device, and an emergency ignition cut-off switch." *Ibid.* Owners of non-planing houseboats not for rent would be required to "equip their vessels with either a propeller guard, or [with both] * * * a swim ladder interlock and an aft visibility device." *Ibid.* The December 10 NPRM did not address the Advisory Council's recommendations concerning planing vessels (such as the motorboat involved in this case). The NPRM did state, however, that the Coast Guard would address those recommendations "in subsequent regulatory projects." *Id.* at 63,647.

2. Petitioner Rex Sprietsma sued respondent Mercury Marine in state court to recover damages for the death of his wife, who fell from a motorboat and was struck by a Mercury Marine engine propeller. Petitioner's complaint alleged that

the Mercury Marine motor was defective because it lacked a propeller guard. See J.A. 104, 107, 109-110. The Illinois trial court granted respondent's motion to dismiss, finding that petitioner's claims are impliedly preempted under the FBSA. See Pet. App. 24, 39. The state appellate court affirmed, holding that 46 U.S.C. 4306 expressly preempts petitioner's common-law suit. Pet. App. 23-38.

3. The Supreme Court of Illinois affirmed. Pet. App. 1-22.

a. The court rejected respondent's contention that petitioner's common-law cause of action is expressly preempted by 46 U.S.C. 4306. Pet. App. 7-9. Relying on this Court's intervening decision in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), the court held that the inclusion of the saving clause in 46 U.S.C. 4311(g) "prohibits a broad reading of the express preemption provision." Pet. App. 9.

b. The Illinois Supreme Court held, however, that petitioner's common-law suit is impliedly preempted because it conflicts with the Coast Guard's decision not to impose a propeller guard requirement. Pet. App. 10-20. The court observed that in some instances, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." *Id.* at 13 (quoting *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)). Relying on this Court's decisions in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), and *United States* v. *Locke*, 529 U.S. 89 (2000), the court characterized "the relevant inquiry for * * * pre-emption as whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all." Pet. App. 15 (quoting *Locke*, 529 U.S. at 110). The court concluded that petitioner's claims are preempted because "[t]he Coast Guard made an informed de-

cision that no regulatory action should be taken to require propeller guards after studying the findings and recommendations of the Advisory Council and the Propeller Guard Subcommittee." *Id.* at 15-16.

c. Chief Justice Harrison dissented, Pet. App. 20-22, relying on the FBSA's saving clause, 46 U.S.C. 4311(g), which provides that compliance with the Act or standards promulgated thereunder "does not relieve a person from liability at common law or under State law." Chief Justice Harrison would have held that, under the "plain and ordinary meaning" of that provision, "[respondent's] compliance with the standard adopted by the Coast Guard, which was not to require propeller guards, clearly does not bar the common law tort claims asserted against it by [petitioner] in this case." Pet. App. 22.

SUMMARY OF ARGUMENT

A. The Federal Boat Safety Act does not expressly preempt petitioner's common-law claims. The Act categorically preempts state prescriptive laws and regulations establishing recreational vessel performance and safety standards unless they are authorized by the Secretary or are identical to an existing federal standard. The FBSA contains a saving clause, however, that expressly preserves the availability of common-law actions. The saving clause makes clear that petitioner's suit is not foreclosed either by the Act's express preemption provision or by principles of field preemption.

B. Petitioner's suit also is not foreclosed by implied conflict preemption principles. The fact that the Coast Guard focused upon the issue and made a considered decision not to take regulatory action to require propeller guards in 1990 does not, in and of itself, give rise to an inference that state law is preempted.

Respondent contends that imposition of common-law damages liability in this case would be inconsistent with the Coast Guard's *reasons* for declining to adopt a propeller

guard requirement. That argument lacks merit. The 1990 Coast Guard letter did not purport to interpret or explain any preexisting agency action having the force of law and did not itself possess the formal characteristics of an agency action with binding legal effect. In addition, imposition of common-law tort liability based on a manufacturer's failure to install propeller guards would not be incompatible with any decision or policy judgment set forth in that letter. Respondent's argument on this point presumes that, in adopting the bottom-line recommendation of the Advisory Council, the Coast Guard necessarily or presumptively endorsed all the subsidiary findings contained in the Propeller Guard Subcommittee's report. No principle of law justifies that conclusion.

ARGUMENT

PETITIONER'S CLAIMS ARE NOT PREEMPTED BY EITHER THE FEDERAL BOAT SAFETY ACT OR THE COAST GUARD'S DECISION IN 1990 NOT TO PROMULGATE A REGULATION REQUIRING PROPELLER GUARDS

Under this Court's settled preemption jurisprudence, state law is preempted "in three circumstances." *English* v. *General Elec. Co.*, 496 U.S. 72, 78 (1990). "First, Congress can define explicitly the extent to which its enactments pre-empt state law." *Ibid.* "Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79. "Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements * * * or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

Ibid. (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The Illinois Supreme Court correctly held that petitioner's claims are not expressly preempted by the FBSA. The court erred, however, in holding that those claims are impliedly preempted by the Coast Guard's decision in 1990 not to promulgate a regulation requiring propeller guards.

A. The FBSA Does Not Expressly Preempt Petitioner's Common-Law Claims, And The Federal Government Has Not Occupied The Field Of Motorboat Safety Regulation To The Exclusion Of State Tort Actions

1. The FBSA's preemption provision, 43 U.S.C. 4306, states as follows:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment * * * that is not identical to a regulation prescribed under section 4302 of this title.

Section 4302 states in pertinent part that "[t]he Secretary may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment." 46 U.S.C. 4302(a)(1). The Coast Guard's longstanding position is that, unless and until the agency has promulgated a safety standard dealing with a particular matter, a state law or regulation establishing a safety standard addressing that same matter is preempted, since in the absence of a federally-promulgated standard, such state laws and regulations cannot be "identical to a regulation prescribed under section 4302 of" Title 46. 46 U.S.C. 4306; see Gov't Br. at 14-15, 16 n.8, *Lewis*, *supra* (No. 97-288). Under that interpretation, which comports with the plain language of the Act's preemption provision, the Coast Guard's

failure to promulgate a propeller guard requirement categorically precludes the States from adopting such a requirement by statute or regulation. That is so, moreover, regardless of the Coast Guard's rationale for declining to impose any federal propeller-guard standard.

2. In the instant case, the Illinois appellate court found petitioner's common-law claims to be expressly preempted by Section 4306. Pet. App. 33-34. As the Supreme Court of Illinois correctly recognized (*id.* at 9), however, that reading of Section 4306 is inconsistent with this Court's intervening decision in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000). The Court in *Geier* concluded that the express preemption provision of the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA), 15 U.S.C. 1392(d) (1988)—a provision similar to that contained in the FBSA, compare *Geier*, 529 U.S. at 867, with 46 U.S.C. 4306—did not preempt a state common-law cause of action. The Court in *Geier* relied on the NTMVSA's "saving clause," which stated that "'[c]ompliance with' a federal safety standard 'does not exempt any person from any liability under common law.'" *Geier*, 529 U.S. at 868 (quoting 15 U.S.C. 1397(k) (1988)). The Court explained (*ibid.*):

> The saving clause assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate—for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. * * * The language of the pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the pre-emption clause must be so read.

The same analysis applies here. The FBSA contains a saving clause providing that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. 4311(g).[2] Section 4311(g) "assumes that there are some significant number of common-law liability cases to save." *Geier*, 529 U.S. at 868. In light of the saving clause, a "broad reading" of Section 4306 as encompassing common-law tort actions "cannot be correct." *Ibid.* Based on this Court's decision in *Geier*, the Illinois Supreme Court correctly held that the FBSA does not expressly preempt petitioner's common-law claims. Pet. App. 9.[3]

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[2] The NTMVSA saving clause at issue in *Geier* provided that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. 1397(k) (1988). The principal difference between that provision and the FBSA saving clause is that 46 U.S.C. 4311(g) states that compliance with federal standards "does not relieve a person from liability at common law *or under State law*" (emphasis added). Read in context, Section 4311(g)'s reference to "liability * * * under State law" is best understood to refer to state statutes (*e.g.*, wrongful death statutes) that authorize private suits for money damages, but not as a reference to state prescriptive laws and regulations, which are addressed directly in Section 4306. Cf. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (characterizing saving clause of the Comprehensive Smokeless Tobacco Health Education Act of 1986, which provides that "[n]othing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person," 15 U.S.C. 4406(c), as "preserv[ing] state-law damages actions").

[3] The FBSA's saving clause reinforces the most natural reading of the preemption provision itself. By its terms, Section 4306 preempts the States from establishing or enforcing "a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment." 46 U.S.C. 4306. Those terms are best understood to refer to a standard prescribed in advance by legislative or administrative authorities. That is particularly so in light of the fact that the FBSA also uses the term "standards" to describe the "regulations" issued by the Secretary, which are pre-

3. The FBSA's saving clause, construed in light of *Geier*, also means that petitioner's common-law damages claims are not foreclosed by principles of "field pre-emption." *English*, 496 U.S. at 79. The subject of recreational boating safety is not "a field that Congress intended the Federal Government to occupy exclusively." *Ibid.* To the contrary, while the States are largely precluded by Section 4306 from addressing that subject through positive laws and regulations, Section 4311(g) expressly contemplates the prospect of state common-law actions.

Indeed, even when the Coast Guard has focused its attention on a particular matter, has undertaken notice-and-comment rulemaking, and has promulgated a federal safety standard, Section 4311(g) means that a defendant's compliance with that standard will not necessarily preclude the possibility of a damages award in a common-law action. The Court in *Geier* observed that its interpretation of the NTMVSA's preemption and saving clauses would "leav[e] adequate room for state tort law to operate" by permitting common-law actions to go forward in those circumstances "where federal law creates only a floor, *i.e.*, a minimum safety standard." 529 U.S. at 868; see *ibid.* (rejecting a "broad reading" of the NTMVSA's preemption clause as "pre-empt[ing] all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard"); *id.* at 870 (saving clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor"); *id.* at 871 ("the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while

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scriptive in nature and do not encompass common-law or other damages liability. See 46 U.S.C. 4302.

simultaneously providing necessary compensation to victims").

The FBSA's saving clause similarly means that a defendant may be held liable under state tort law notwithstanding its "[c]ompliance with [the Act] or standards, regulations, or orders prescribed under" the Act. 46 U.S.C. 4311(g). The saving clause thus reflects Congress's intent that a state common-law rule should be subject to a less restrictive rule of preemption than applies to a state "law or regulation establishing a recreational vessel or associated equipment performance or other safety standard," which is categorically preempted unless it is either (a) expressly authorized by the Coast Guard, or (b) "identical" to an existing federal standard. 46 U.S.C. 4306; see pp. 11-12, *supra*.

B. The Coast Guard's Decision In 1990 Not To Require Propeller Guards Does Not Impliedly Preempt State Tort Claims Based On The Theory That The Manufacturer Should Have Installed A Propeller Guard

As the Court recognized in *Geier*, imposition of tort liability, like the application of state positive law, will in some circumstances hinder the achievement of federal objectives. See 529 U.S. at 881-883. The Court in *Geier* made clear that, notwithstanding the existence of the FBSA's saving clause, state common-law rules are preempted insofar as they "'actually conflict' with the statute or federal standards promulgated thereunder." *Id.* at 869; see *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) ("neither an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict pre-emption principles'") (quoting *Geier*, 529 U.S. at 869). Under ordinary conflict preemption principles, "implied conflict pre-emption" occurs "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress.'" *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).[4]

As the Illinois Supreme Court recognized, in some circumstances "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." Pet. App. 13 (quoting *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)); see *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) ("where failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation.") (ellipsis and internal quotation marks omitted). Respondent argues, and the state court held, that this is such a case—that imposition of common-law liability for failure to install propeller guards is contrary to federal policy as reflected in the Coast Guard's decision in 1990 to take no regulatory action to require propeller guards and is therefore preempted. However, while the Coast Guard has unquestioned authority under the FBSA to take action that would impliedly preempt common-law liability for failure to install a propeller guard, the agency has not done so to date.

1. The Illinois Supreme Court concluded that:

> the Coast Guard's failure to promulgate a propeller guard requirement here equates to a ruling that no such

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[4] Implied conflict preemption also occurs "where it is 'impossible for a private party to comply with both state and federal requirements.'" *Freightliner*, 514 U.S. at 287 (quoting *English*, 496 U.S. at 79). Because the Coast Guard has not promulgated any standard concerning propeller guards, however, it clearly would be possible for respondent to comply both with federal law and with any rule of liability that the Illinois courts might ultimately pronounce.

> regulation is appropriate pursuant to the policy of the FBSA. The Coast Guard made an informed decision that no regulatory action should be taken to require propeller guards after studying the findings and recommendations of the Advisory Council and the Propeller Guard Subcommittee. A damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the FBSA.

Pet. App. 15-16. The state court thus appears to have assumed that a federal agency's considered decision *not* to regulate a particular subject matter necessarily or at least presumptively implies that the matter should not be subject to regulation at either the state or federal level. See *ibid.* (Illinois Supreme Court states that common-law damages award in this setting "would effectively require boat manufacturers to install propeller guards, in direct contravention to the Coast Guard's policy against mandating such a device in favor of affording manufacture[r]s flexibility in the matter") (quoting *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598, 607 (5th Cir. 2000), cert. denied, 532 U.S. 941 (2001)).

That analysis is misconceived, particularly in light of the FBSA's saving clause. Even where a federal agency has focused its attention on a particular subject matter within its jurisdiction, it may have various reasons for concluding that federal regulation is inappropriate. The agency may believe that the available evidence is too inconclusive to warrant the imposition of a prescriptive standard under the criteria set forth in the relevant federal statute. It may conclude that a particular problem resists a nationwide solution and is better addressed at the state level. Or it may find that variations within the relevant subject matter are such that a workable prescriptive rule of general applicability cannot feasibly be adopted. In none of those circumstances would imposition of state common-law liability on a case-by-case basis subvert any federal policy reflected in the agency's decision to forgo

regulation. Indeed, the existence of potential common-law damages liability under state law may complement the agency's decision by creating an incentive for responsible parties in the private sector to address the problem through private research and innovation, in addition to affording compensation to individual injured parties in appropriate circumstances.

In *some* cases, an agency may conclude that a particular matter is better left unregulated and free of any legal consequences at both the federal and state levels. Where such an intent can reliably be ascertained, state laws may be preempted. See *Fidelity Fed. Sav. & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 155 (1982) (federal regulation authorizing though not requiring federal savings and loans to utilize and enforce due-on-sale clauses was intended to protect the lender's "flexibility" and therefore preempted state laws forbidding enforcement of such clauses); cf. *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608, 614-615 (1986) (under the National Labor Relations Act, "certain areas intentionally have been left to be controlled by the free play of economic forces," and "States are therefore prohibited from imposing additional restrictions on economic weapons of self-help") (internal quotation marks omitted). But the mere fact that the agency has made a considered decision to forgo *federal* regulation does not, in and of itself, give rise to an inference that all *state* law on the subject—including state tort law—is meant to be preempted.[5]

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[5] The report of the Advisory Council's Propeller Guard Subcommittee noted that "[a] number of law suits have been filed by victims of alleged propeller strikes to recover damages from the operator of the striking vessel and also against the manufacturer of the propulsion unit and/or boat." J.A. 17; see J.A. 15-16 (explaining that several persons who testified before the Subcommittee had participated in such lawsuits as witnesses or attorneys); J.A. 17-20 (describing claims and defenses in the litigation). Yet while the Subcommittee recommended against adoption of a federal propeller guard requirement, it did not recommend that the

Nothing in *Geier* is to the contrary. The Court in *Geier* considered the preemptive effect, not of an agency's failure to regulate, but of an existing federal safety standard that addressed in some detail the subject of motor vehicle passive restraint devices. See 529 U.S. at 878-879. In holding that the plaintiffs' common-law claims were preempted, moreover, the Court stressed that the agency in promulgating the federal standard had "deliberately sought variety—a mix of several different passive restraint systems," *id.* at 878, for safety-related reasons, and had "deliberately provided the manufacturer with a range of choices among different passive restraint devices," *id.* at 875. The Court found that the plaintiffs' lawsuit, which sought to impose a duty on manufacturers to install airbags rather than alternative passive restraint systems, "would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. The Court's resolution of the preemption issue thus turned on the agency's affirmative intent, embodied in a formal safety standard, that a mix of passive restraint devices be made available by manufacturers, and on the obstacle to the achievement of that purpose that would be created by a common-law rule requiring the installation of a single such device (airbags).

Geier does not suggest that common-law suits will be preempted whenever the federal agency has focused its attention upon the particular aspect of motor vehicle (or recreational vessel) performance that forms the basis of the plaintiff's claim. To the contrary, the Court in *Geier* recognized that a federal "minimum safety standard"— which obviously reflects the agency's considered decision regarding

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Coast Guard take any action to preempt state common law, nor did it give any indication that it believed private damages actions like those it discussed would be preempted if the Coast Guard accepted its recommendation to take no regulatory action to impose a federal propeller guard requirement. See J.A. 39-41.

the appropriate level of federal regulation—will not categorically preempt "nonidentical state standards established in tort actions covering the same aspect of performance." 529 U.S. at 868; see p. 14-15, *supra*. The *Geier* Court based its preemption holding not on a per se rule, but on a careful analysis of the pertinent safety standard and the extent to which common-law liability would frustrate the purposes embodied in that standard. The Illinois Supreme Court's analysis—which appears to hold petitioner's damages claims to be preempted solely on the ground that "[t]he Coast Guard [had] made an informed decision that no regulatory action should be taken to require propeller guards," Pet. App. 16—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. Nothing in *Geier*, or in any other decision of this Court, supports that approach to preemption.

In holding that petitioner's claims were impliedly preempted, the Illinois Supreme Court relied in part on this Court's decision in *Ray*. In *Ray*, the Court found that the State of Washington's oil tanker design requirements were preempted by the federal Ports and Waterways Safety Act of 1972 (PWSA) because the State's design requirements "would at least frustrate * * * the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers." Pet. App. 14 (quoting *Ray*, 435 U.S. at 165). As this Court explained in *Locke*, however, that statement addressed the portion of the PWSA governed by field-preemption rules, which apply when "Congress has left no room for state regulation of [the subject] matters." *Locke*, 529 U.S. at 111. The PWSA *required* the Secretary to issue "such rules and regulations as may be necessary with respect to the design, construction, and operation of the covered vessels." 435 U.S. at 161. The Court relied in part on the existence of that mandatory duty, see *id.* at 165

(noting that "the Secretary must issue all design and construction regulations that he deems necessary for [vessel safety and environmental protection]"), in discerning an "evident congressional intention to establish a uniform federal regime controlling the design of oil tankers," *ibid.* The FBSA, by contrast, does not require the Secretary to issue regulations but simply permits him to do so, and it does not address design features of covered vessels in the comprehensive manner addressed in the PWSA. Compare 46 U.S.C. 4302 (Secretary "may prescribe regulations establishing minimum safety standards" and "requiring the installation, carrying, or use of associated equipment"), with 46 U.S.C. 3703(a) (Secretary "shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels") (recodification of former 46 U.S.C. 391a(3)).[6]

Most significantly, *Ray* involved preemption of state prescriptive rules rather than of common-law damages claims,

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[6] This Court in *Ray* also found preempted Washington State's law banning tankers in excess of 125,000 DWT (dead weight tons) from Puget Sound. *Ray*, 435 U.S. at 178; see Pet. App. 14-15. But the Secretary of Transportation, through the Coast Guard, had promulgated the "Puget Sound Vessel Traffic System containing general rules, communication rules, vessel movement reporting requirements, a traffic separation scheme, special rules for ship movement in Rosario Strait, descriptions and geographic coordinates of the separation zones and traffic lanes, and a specification for precautionary areas and reporting points." *Id.* at 170. A local Coast Guard rule prohibited the passage of more than one 70,000 DWT vessel in Rosario Strait in either direction at a given time, and in bad weather, the restriction was reduced to 40,000 DWT. *Id.* at 171. Here, however, the Coast Guard has not issued comprehensive regulations governing motorboat safety generally or the use of propeller guards in particular. The Coast Guard's failure to promulgate a regulation requiring or prohibiting the use of propeller guards on motorboats therefore does not "take[] on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray*, 435 U.S. at 178 (internal quotation marks omitted).

and it did not involve the application of a saving clause. Under the FBSA, by contrast, compliance with federal safety standards does not by itself preclude the imposition of liability under state common law, even where liability is premised on the particular aspect of vessel performance that the federal standard addresses. "[T]he saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims." *Geier*, 529 U.S. at 871 (discussing NTMVSA saving clause). *Ray* is therefore of little assistance in resolving the preemption question presented here.

2. As explained above, the fact that the Coast Guard made a considered decision not to promulgate a federal propeller guard requirement is not, in and of itself, a sufficient basis for finding petitioner's state common-law claims to be preempted. Respondent contends, however, that the Coast Guard's *reasons* for declining to adopt such a requirement reflect an agency policy judgment that would be subverted by imposition of state common-law liability based on a manufacturer's failure to install a propeller guard on a recreational vessel. Respondent asserts that the Coast Guard's "decision not to require [propeller guards] reflected not indifference, but a thorough analysis of the regulatory issues and a conclusion that [propeller guards] were technologically infeasible, economically unjustified, and likely to *increase* safety hazards." Br. in Opp. 26. The 1990 Coast Guard letter cannot bear the weight respondent attaches to it. In neither form nor content does that letter "take[] on the character" of a formal "ruling" by the Coast Guard that preempts state tort law. *Ray*, 435 U.S. at 178.

a. The Supremacy Clause provides that "[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * *, shall be the supreme Law

of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. As the text of the Clause makes clear, preemption of state law may be accomplished only by valid federal *law*. See, *e.g.*, *English*, 496 U.S. at 79 ("state law is pre-empted to the extent that it actually conflicts with federal law"). "There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action." *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

Federal agency action having the force of law may pre-empt inconsistent state requirements, just as a federal statute may. See, *e.g.*, *De La Cuesta*, 458 U.S. at 153 ("Federal regulations have no less pre-emptive effect than federal statutes."); *Ray*, 435 U.S. at 171, 173-178 (local Coast Guard rule adopted by district commander or port captain pursuant to delegated authority); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 962-967 (1986) (federally prescribed rate); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 327 (1981) (adjudicatory order). State law may also be preempted by a federal agency's "inaction joined with action." *Isla Petroleum*, 485 U.S. at 503; see, *e.g.*, *Ray*, 435 U.S. at 174-175, 178. But at least as a general matter, state law is not preempted by a mere expression of an opinion or statement of policy by a federal agency, untethered to any agency action that has legal effect in its own right.

The 1990 Coast Guard letter on which respondent relies does not have the characteristics of agency action having independent legal effect. First, the letter does not purport to represent an interpretation by the Coast Guard of some

other, preexisting agency action having the force of law, to which preemptive effect might now be given in light of an interpretation in the Coast Guard's letter. For example, although the Coast Guard has promulgated federal safety standards dealing with a number of aspects of recreational vessel performance (see note 1, *supra*), the 1990 letter does not purport to be an explication of that existing regulatory framework as leaving no room for a propeller guard requirement. The letter therefore does not describe a "comprehensive federal scheme [that] intentionally leaves a portion of the regulated field without controls." *Isla Petroleum*, 485 U.S. at 503.

Any preemptive effect in this case therefore would have to come from the Coast Guard's 1990 letter standing alone. That letter, however, was not issued in the form of a rule or regulation promulgated pursuant to the procedures—*i.e.*, notice-and-comment rulemaking—that the Coast Guard is legally obligated to employ when it exercises its authority under the Act to promulgate a safety standard "meeting the need for recreational vessel safety." See 46 U.S.C. 4302(a)(1)(A); 5 U.S.C. 553; S. Rep. No. 248, *supra*, at 19. The letter likewise was not a formal public pronouncement issued at the conclusion of a notice-and-comment rulemaking proceeding (and on the basis of the record and comments in that proceeding) stating that no federal safety standard requiring propeller guards would be adopted and that a propeller guard requirement of any sort would undermine boating safety. Compare *Freightliner*, 514 U.S. at 286-287. Rather, the letter followed consultation only with the Advisory Council and simply stated the agency's determination not to institute any such rulemaking proceedings at all. Nor did the letter take the form of a decision issued at the conclusion of some other type of agency proceeding, such as a formal or informal adjudication.

Furthermore, the letter was not published in the *Federal Register* or in any other generally available reference source. Indeed, it was not formally announced in any manner or affirmatively made available even to the parties—*e.g.*, States, manufacturers, and members of the boating public—who might be interested in the subject of propeller guards, including any possible preemptive effect that the agency's approach to the propeller guard problem might be claimed to have. The letter was instead addressed solely to the Chairman of the Advisory Council.[7] Consistent with the context in which it was written, the letter did not set forth any extensive independent evaluation of data or comments of the sort that might be expected if the agency was rendering a decision that was to have independent legal effect on States and private parties—beyond the mere expression of an intent not to institute a rulemaking proceeding to impose a federal propeller guard requirement.

Because the Coast Guard's 1990 letter had none of the foregoing indicia of an agency determination that has (or was intended to have) the force of law in its own right, there is no

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[7] The FBSA does provide that, in prescribing regulations establishing safety standards, the Coast Guard shall "consult" with the Advisory Council about the various considerations that must be taken into account in deciding whether to establish such a standard. 46 U.S.C. 4302(c)(4). At least in the present circumstances, however, the Coast Guard's consultation with the Advisory Council about whether to institute a rulemaking proceeding, without some further action by the Coast Guard itself beyond the 1990 letter to the Chairman of the Council accepting the recommendation not to do so, does not constitute the sort of agency action to which preemptive effect should be attributed. Nor does the fact that notices of the Advisory Council's meetings were published in the *Federal Register* (see J.A. 1-11; Br. in Opp. 6-7 & n.2) affect that conclusion. As the notices themselves recite, they were published in accordance with the provisions of the Federal Advisory Committee Act that apply to such committees generally. See 5 U.S.C. App. § 10; *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 446-447 (1989).

occasion in this case to decide what degree of formality or type of procedure would be necessary in any given context for a particular agency action to have preemptive effect. That is especially so because, as explained below, the stated rationale in the Coast Guard's 1990 letter does not in any event support a finding of preemption.

b. Even if the 1990 letter were regarded as the Coast Guard's official explanation for an agency decision having the force of law, the imposition of common-law tort liability based on a manufacturer's failure to install propeller guards would not be in conflict with any policy judgment set forth in the letter. Contrary to respondent's contention, the letter did not state or imply that the Coast Guard had found propeller guards to be "technologically infeasible, economically unjustified, and likely to *increase* safety hazards." Br. in Opp. 26. Nor did the letter state (for example) that the Coast Guard had rejected a propeller guard requirement because it had determined that manufacturers must be afforded the unfettered discretion to offer a mix of propeller-related options or that informed consumers must be afforded an opportunity to choose between vessels that are and those that are not equipped with such mechanisms—a policy judgment that could indeed be subverted by imposition of common-law liability for failure to install a guard. Cf. *Geier*, 529 U.S. at 881 (common-law claim based on manufacturer's failure to install airbags held preempted where imposition of tort liability "would have presented an obstacle to the variety and mix of devices that the federal regulation sought").

Rather, the principal justification offered in the 1990 letter for the Coast Guard's decision to take no regulatory action to require propeller guards at that time was that "[t]he regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." Pet. App. 40. Those sentences simply

announced the agency's conclusion, given the evidence available *at that time*, that affirmative imposition of a federal propeller guard requirement could not be justified under the relevant statutory criteria. Particularly in light of the FBSA's saving clause, such a determination is not, standing alone, a sufficient basis for finding state common-law actions to be preempted. See pp. 17-20, *supra*. A decision not to regulate at the federal level is consistent with either (1) a determination that there is no justification for a uniform federal solution, but States may impose damages liability as they see fit; or (2) a determination that there should be no federal regulation *or* state common-law damages liability. In light of the Act's saving clause, the 1990 letter is simply too thin a reed to support the latter conclusion.

The 1990 letter also noted "the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation," and it observed that "the question of retrofitting millions of boats would certainly be a major economic consideration." Pet. App. 40. Imposition of common-law tort liability is not inconsistent with either of those reasons for the Coast Guard's decision to take no regulatory action at that time to require propeller guards. Resolution of private tort suits involving particular models of boats or engines does not require the identification of "a universally acceptable propeller guard." Cf. p. 7, *supra* (discussing proposed rule to require measures to guard against propeller strikes specifically on houseboats). And while the potential for tort liability may create economic incentives for particular forms of (productive or unproductive) behavior, the possibility of a damages award in an individual case involving a particular type of boat or engine is not reasonably equated with a legal requirement that "millions of boats" be retrofitted.

Finally, the 1990 letter stated that "[t]he Coast Guard will continue to collect and analyze accident data for changes and

trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art." Pet. App. 40-41. The letter thus expressly contemplated continuing federal scrutiny of the propeller guard issue in light of additional information, including information regarding the development of new safety devices. That fact further undermines any inference that the Coast Guard's determination not to institute rulemaking proceedings in 1990 was intended to resolve definitively the question whether propeller guards improve recreational vessel safety and should be required, allowed, or prohibited on boats covered by the Act.[8]

In the end, respondent's characterization of the basis for the Coast Guard's 1990 decision is not actually grounded in the text of the letter itself. Rather, respondent presumes that, in adopting the bottom-line recommendation of the Advisory Council, the Coast Guard endorsed all the subsidiary

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[8] The Coast Guard has continued since 1990 to study various proposals regarding propeller guards and alternative means of reducing the number of propeller strike deaths and injuries. See pp. 6-7, *supra*. The Coast Guard's requests for public comment on those issues are fully consistent with its conclusion in 1990 that the data at that time did not warrant imposition of a federal propeller guard requirement. Contrary to respondent's contention (Br. in Opp. 10-11), the agency's statement in the course of one such notice that, "[u]nder current Federal statutes (46 U.S.C. 4306), the States do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction," 61 Fed. Reg. 13,125 (1996), is not a basis for finding implied preemption. As the citation to 46 U.S.C. 4306 makes clear, the Coast Guard's statement referred to the FBSA's categorical preemption of state positive laws and regulations. Section 4306, when read in light of the saving clause, does not encompass common-law tort claims. See pp. 12-13, *supra*.

findings contained in the Propeller Guard Subcommittee's report, even though nothing in the letter expressly endorses those findings or incorporates them by reference. That conclusion would not be justified even if the underlying report had been prepared by subordinate officials within the agency itself. Cf. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). But it is particularly inappropriate for a court to conclude that the Coast Guard, in deciding to "take no regulatory action to require propeller guards" (Pet. App. 40), necessarily or presumptively endorsed the reasoning of a body located *outside* the government. Although the Secretary is required to consult with the Advisory Council before prescribing regulations under the FBSA, see 46 U.S.C. 4302(c)(4), and its members undoubtedly possess relevant expertise, the Act makes clear that it is not to be regarded as a federal entity. See 46 U.S.C. 13110(d) (payment to members for service on the Council "does not make a member of the Council an officer or employee of the United States Government for any purpose"). In light of the Coast Guard's duty to exercise independent judgment in considering the Advisory Council's recommendations, the Council's findings cannot properly be attributed to the Coast Guard absent express agency endorsement.

A communication such as the 1990 Coast Guard letter, although relatively informal in character, would typically be subject to careful review within the agency, in order to ensure that it explains (to the extent the agency believes appropriate) the basis for the decision the agency has actually made, without prematurely committing the agency to a position on ancillary questions that it has not yet definitively resolved. The preemption analysis that respondent proposes, under which an agency may be taken to have endorsed *sub silentio* the findings of an advisory body located outside the government, would substantially complicate the process by which federal agencies formulate and communicate their po-

licy determinations, especially in response to recommendations made by outside persons or bodies. A focus on the agency's *stated rationale* for its decision, by contrast, adequately protects against encroachment by state authorities while preventing "inadvertent" preemption of state law. Cf. *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985) ("because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, [the Court] can expect that they will make their intentions clear if they intend for their regulations to be exclusive"). In light of the stated rationale for the Coast Guard's decision not to impose a federal propeller guard requirement in 1990, there is no basis for concluding that imposition of tort liability in the present circumstances would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English*, 496 U.S. at 79.

CONCLUSION

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

Respectfully submitted.

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