

1                               IN THE SUPREME COURT OF THE UNITED STATES

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3   REX R. SPRIETSMA,                               :

4   ADMINISTRATOR OF THE ESTATE OF :

5   JEANNE SPRIETSMA, DECEASED,                               :

6                               Petitioner                               :

7               v.                               :   No. 01-706

8   MERCURY MARINE.                               :

9   - - - - - X

10   Washington, D. C.

11   Tuesday, October 15, 2002

12                       The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10:44 a.m.

15 APPEARANCES:

16 LESLIE A. BRUECKNER, ESQ., Washington, D. C.; on behalf of

17 the Petitioner.

18 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D. C.; on

20 behalf of the United States, as amicus curiae,

21 supporting the Petitioner.

22 STEPHEN M. SHAPIRO, ESQ., Chicago, Illinois; on behalf of

23 the Respondent.

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1 P R O C E E D I N G S

2 (10:44 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 01-706, Rex Sprietsma v. Mercury Marine.

5 Ms. Brueckner.

6 ORAL ARGUMENT OF LESLIE A. BRUECKNER

7 ON BEHALF OF THE PETITIONER

8 MS. BRUECKNER: Mr. Chief Justice, and may it  
9 please the Court:

10 The question presented in this case is whether  
11 State common law tort claims that a boat engine was  
12 defective because it lacked a propeller guard are  
13 preempted either by the Boat Safety Act of 1971 or by an  
14 unpublished Coast Guard letter stating that the agency had  
15 decided not to take any regulatory action with respect to  
16 propeller guards.

17 There is no express preemption here because the  
18 Boat Safety Act includes a savings clause that expressly  
19 preserves the availability of common law claims. And in  
20 light of this clause, this case boils down to the question  
21 of whether our claims are impliedly preempted because they  
22 conflict with some valid expression of Federal law. And  
23 the answer to this question is no for two distinct  
24 reasons.

25 First, as the United States has argued, the

1 Coast Guard letter itself lacks the force of law  
2 regardless of its content.

3 And second, even if the Coast Guard could  
4 preempt State law in this fashion, there's no preemption  
5 here because our claims are entirely consistent with the  
6 Coast Guard's stated reasons for not taking any regulatory  
7 action with respect to propeller guards.

8 QUESTION: What would happen if there were no  
9 savings clause in this case?

10 MS. BRUECKNER: If there were no savings clause,  
11 our position is that there would still be no express  
12 preemption because section 4306 of the Boat Safety Act, by  
13 its terms, in our view does not encompass common law  
14 claims. But the savings clause --

15 QUESTION: Well, except that -- that this clause  
16 is different, say, than the one we had in Geier. The  
17 Geier clause -- savings clause begins -- or preemption  
18 clause begins with the assumption that there is a  
19 regulation. This begins the other way. It says the State  
20 may not have any regulation unless it's consistent with an  
21 existing Federal regulation.

22 MS. BRUECKNER: That's true, Your Honor, but  
23 here, as in Geier, reading this preemption clause as  
24 encompassing common law claims would render the savings  
25 clause of this statute superfluous, and that is exactly

1 the result that this Court rejected in Geier.

2 QUESTION: Well, suppose a State said there can  
3 be a common law action in the courts of this State for the  
4 violation of any safety regulation which this legislature  
5 proposes, and we hereby direct that there be a propeller  
6 -- a guard on every propeller. Would that statute be  
7 valid under -- under 4306?

8 MS. BRUECKNER: In our view that statute would  
9 be valid because we read 4306 as not even preempting State  
10 positive law, that is, laws and regulations, unless  
11 there's an actual Coast Guard standard. But this Court  
12 need not resolve that --

13 QUESTION: But -- but 4306 doesn't require a  
14 Coast Guard standard. It -- it says that there's a  
15 disability on the State legislature unless there is a  
16 Coast Guard standard and that State statute is parallel to  
17 it.

18 MS. BRUECKNER: Section 4306 in our view can be  
19 read -- read two different ways. One, our reading of the  
20 statute is that it only kicks in where the Coast Guard has  
21 regulated. The United States disagrees on this point and  
22 reads 4306 as expressly preempting all forms of State  
23 positive law, that is, laws and regulations, even where  
24 the Coast Guard hasn't regulated.

25 But the United States and we agree that however

1 you read 4306 with respect to State positive law, common  
2 law claims are preserved, and the reason is that 4311(g)  
3 would be stripped of any meaning if 4306 is read as  
4 encompassing common law claims.

5 QUESTION: Not -- not when -- I mean, that's why  
6 I think yours is the better view, actually. But I mean,  
7 on your view you needn't drive a wedge between the common  
8 law and positive law because there's meaning for both.

9 MS. BRUECKNER: Absolutely, Your Honor.

10 QUESTION: And I've never -- I guess it's a  
11 better question for the Government. I don't see why you'd  
12 want to drive a wedge between those two.

13 QUESTION: Well, let's -- let's take the  
14 Government's position which is that the State could not  
15 pass a statute on a -- requiring a propeller -- a  
16 propeller guard. If -- if that's true, if we accepted  
17 that, why is it that a jury should be able to require the  
18 same thing?

19 MS. BRUECKNER: Because that is what Congress  
20 made clear in section 4311(g) that juries should be able  
21 to do. Jury --

22 QUESTION: Ms. Brueckner, here's -- here's my  
23 problem with 4311(g). You can -- it not only is a savings  
24 clause for common law, it's also a savings clause for  
25 State law. It says it does not relieve a person from

1 liability at common law or under State law. Now, I -- I  
2 do not know how an intelligent Congress could have --  
3 could have written such a thing. But that's what it says:  
4 at common law or under State law.

5 Now, you can't read the savings clause portion  
6 that says under State law to mean all State law because  
7 then the savings clause would totally cancel the  
8 preemption clause. Right?

9 MS. BRUECKNER: I agree, Justice Scalia.

10 QUESTION: So you -- you have to limit State law  
11 to mean, well, not all State law. And why -- why would it  
12 not be natural to read common law also not to include all  
13 common law, for example, not including any common law that  
14 specifically imposes liability for failure to have certain  
15 propeller standards?

16 MS. BRUECKNER: First, Your Honor, the fact that  
17 this savings clause is slightly broader than that at issue  
18 in Geier, because of the reference to State law, is not a  
19 reason to construe it narrowly.

20 Second, the reference to State law can easily be  
21 understood as a reference to, as the statute itself says,  
22 liability imposed under State law, which we read to mean a  
23 reference to State damages statutes such as wrongful death  
24 and survival. And this case is a perfect illustration of  
25 that.

1                   QUESTION: Well, that really is a bit of a  
2 stretch, isn't it, to say you're talking -- when you say  
3 State law, you're only talking about wrongfully tendered  
4 an act and that sort of thing?

5                   MS. BRUECKNER: I don't think so, Your Honor,  
6 because section 4311(g)'s language is -- is quite clear  
7 and it is set forth at the blue brief at page 6.

8                   QUESTION: Well, to say it's quite clear -- it  
9 does not relieve a person from liability at common law or  
10 under State law. Whatever we may come up with as the  
11 meaning of that or you may suggest, I don't think you  
12 could say it's clear.

13                  MS. BRUECKNER: I disagree, Your Honor, because  
14 the reference to liability at common law or under State  
15 law to my mind suggests a reference to liability under  
16 State law, and liability under State law in this context  
17 is liability by which the measure of damages is a State  
18 statute, such as the wrongful death statute or the  
19 survival statute here that this complaint arises under.

20                  QUESTION: I guess you have a different meaning  
21 of clear than I do.

22                  MS. BRUECKNER: That -- that may be, Your Honor.

23                  I would note, however, that in -- in Cipollone  
24 this Court noted that language exactly like this, a  
25 savings clause that specifically preserved liability at



1 common law or -- or under State law in the Comprehensive  
2 Smokeless Tobacco Act, preserved common law claims. This  
3 is the same language. And again --

4 QUESTION: Why do you need that? I mean, I'm --  
5 I'm interested. I might -- why do you need that if, in  
6 fact, your interpretation of the preemption clause is  
7 correct? There are some regs of the Coast Guard that do  
8 preempt positive common -- common law and positive law,  
9 and some that don't. And so the savings clause simply  
10 makes clear that those that don't, don't. It gives  
11 meaning to it.

12 MS. BRUECKNER: You're absolutely right, Your  
13 Honor.

14 QUESTION: So you don't need this damages thing,  
15 do you?

16 MS. BRUECKNER: No, we don't, Your Honor.

17 QUESTION: Well, no, but the savings clause says  
18 even those that do, don't.

19 (Laughter.)

20 QUESTION: I mean, isn't that the --

21 QUESTION: No, it doesn't necessarily have to --  
22 the -- the -- I'm certain it's not clear to the contrary,  
23 but it's at least arguably to the contrary.

24 MS. BRUECKNER: Even without the savings clause,  
25 we read section 4306 on its face as not encompassing

1 common law claims, and the main reason why, putting aside  
2 the savings clause, is that the language of 4306 tracks  
3 the language of section 4302 of the statute, which is the  
4 affirmative delegation of rulemaking authority of the  
5 Coast Guard. It's on the first page of the appendix to  
6 the blue brief.

7 And 4302 authorizes the Coast Guard to do two  
8 things: promulgate minimum safety standards and require  
9 associated equipment. And this is exactly the same  
10 language that's in 4306.

11 QUESTION: Well, this is the kind of thing that  
12 the Coast Guard could require, isn't it? Propeller guard?

13 MS. BRUECKNER: Absolutely, Your Honor, under  
14 4302 --

15 QUESTION: And in Arkansas Electric, I think we  
16 held that a Federal decision to forego regulation in a  
17 given area may imply an authoritative Federal  
18 determination that the area is best left unregulated and  
19 would have as much preemptive force as a decision to  
20 regulate.

21 Is that the situation here? Certainly the Coast  
22 Guard looked at it and decided not to regulate. Should we  
23 apply Arkansas Electric and say that's binding?

24 MS. BRUECKNER: No, Your Honor, and here is why.  
25 This case really presents the question, putting aside the

1 express preemption issue which we believe is resolved by  
2 Geier, of under what circumstances does an agency's  
3 affirmative decision not to regulate pack a preemptive  
4 punch such as -- so as to wipe out common law claims. And  
5 there are -- there are two preconditions that must be met,  
6 neither of which is present here.

7 First, the agency's decision not to regulate  
8 must take the form that itself possesses the force of law,  
9 and that is lacking here for reasons I'll explain in a  
10 moment.

11 Second, the agency --

12 QUESTION: That was the holding of Arkansas  
13 Electric; it doesn't have to take the form

14 MS. BRUECKNER: Actually the holding of Arkansas  
15 Electric was that there was no preemption at all in that  
16 case, but perhaps Your Honor is --

17 QUESTION: Yes, but the -- the passage I read to  
18 you indicates that a decision not to regulate can, in  
19 fact, be -- have preemptive effect.

20 MS. BRUECKNER: Yes, Your Honor, but a pure  
21 decision not to regulate or a pure agency inaction has  
22 only been held to exert preemptive effect in the context  
23 of statutes that preempt the field where there's total  
24 Federal occupation of the field.

25 Here, however you read 4306 with respect to

1 State laws and regulations, common law claims we believe  
2 are excluded from the regulated field. Therefore, there  
3 has to be a conflict. And for affirmative -- an  
4 affirmative agency decision not to regulate to preempt  
5 State law under a conflict preemption analysis, there both  
6 has to be an agency action that possesses the force of law  
7 and there has to be an actual conflict between the  
8 agency's underlying reasons for not regulating and the  
9 common law claims. And both of these criteria are absent  
10 here.

11 First, as the United States has argued -- and we  
12 agree -- this unpublished letter -- Coast Guard letter  
13 itself lacks the force of law. It's important to remember  
14 here that not only is there no agency regulation, but  
15 there was never any rulemaking. There was never any  
16 publication of a notice that the Coast Guard was even  
17 considering --

18 QUESTION: Let -- let me ask you this question.  
19 Let's assume a -- a hypothetical case in which the engine  
20 manufacturer is sued and is -- and is found liable by the  
21 jury for having a propeller guard which makes the boat  
22 difficult to turn so the boat hits the dock. It -- it  
23 can't turn fast enough to avoid the dock. We have that  
24 case and it's consolidated with yours. So we have one  
25 case where they're liable for having the guard and another

1 case where they're liable for not having the -- the guard.  
2 Would you argue the case the same way and would we have to  
3 affirm both cases?

4 MS. BRUECKNER: Yes, Your Honor, and -- and Your  
5 Honor's hypothetical actually illustrates my point.  
6 There's no question that a boat manufacturer could not be  
7 held liable for installing -- could not be held -- a -- a  
8 claim alleging that a boat manufacturer was negligent per  
9 se for installing a propeller guard couldn't be based on  
10 an existing Coast Guard regulation because the letter  
11 lacks the force of law with respect to boat manufacturers.  
12 There's no agency action here that could form the basis  
13 for any common law claim one way or the other.

14 QUESTION: But -- but if the manufacturer is  
15 subject to conflicting jury verdicts, as you indicate -- I  
16 suppose we could change the hypothetical so we have two  
17 States, one which requires it, the other of which -- and  
18 -- and you would say those weren't preempted, either.

19 MS. BRUECKNER: That's correct, Your Honor. And  
20 -- and this is --

21 QUESTION: That seems to me to -- to give very  
22 little effect to the wording of the clause which says that  
23 a State cannot have a standard unless it's parallel to a  
24 Federal statute.

25 MS. BRUECKNER: But it does give meaning to the

1 language of section 4311(g) which says that even where a  
2 Coast Guard has promulgated a minimum safety standard,  
3 common law liability is preserved except to the extent  
4 that there's an actual conflict.

5 QUESTION: But you could -- you could read that,  
6 couldn't you -- you -- you argue that to accept your -- to  
7 respondent's view would mean the savings clause has no  
8 work to do, but the savings clause could still be for  
9 cases of negligent -- negligent operation, for cases in --  
10 of negligent -- negligence in manufacturing a piece of  
11 equipment. So there -- there would be -- on any reading  
12 of this, there would be something saved. So -- so you --  
13 I think you have to modify your argument. The savings  
14 clause would be nullified.

15 MS. BRUECKNER: I respectfully disagree, Justice  
16 Ginsburg, and -- and here's why. The respondent here does  
17 contend that the savings clause applies to breach of  
18 warranty and negligent manufacturing claims. And that  
19 argument fails, first of all, because such claims are not  
20 encompassed within 4306 on its face, and therefore there  
21 wouldn't have been any need for Congress to save those  
22 claims.

23 Secondly, this Court construed a similar savings  
24 clause in Geier as expressing Congress's intent that mere  
25 compliance with minimum safety standards would not be an

1 absolute defense to liability in a product liability  
2 action. And compliance with a Coast Guard regulation  
3 establishing a minimum safety standard could never be an  
4 absolute defense in a case involving negligent manufacture  
5 or a breach of warranty, for example. So, the  
6 respondent's theory leaves really no meaningful role for  
7 the savings clause to play.

8           And I would emphasize that these arguments were  
9 all asked and answered in Geier, and the Court held that a  
10 similarly worded savings clause, albeit without the  
11 reference to State law, has to mean that common law claims  
12 are not expressly preempted.

13           Now, that doesn't mean that our claims must  
14 necessarily be permitted to go forward if they conflict  
15 with Federal law, but there's clearly no conflict here  
16 again for two reasons.

17           First, the Coast Guard letter lacks the force of  
18 law. And on that point, before turning to the reasons why  
19 our claims are actually consistent with the Coast Guard's  
20 stated reasons for declining to regulate, I would further  
21 note that not only is there no regulation, no rulemaking  
22 here, but the Coast Guard letter was never even published  
23 in the Federal Register. It was never made available to  
24 the public in any formal way whatsoever. And it doesn't  
25 even purport to set forth a definitive agency position on

1 the subject of propeller guards. What the letter says is  
2 that the agency is going to continue to consider the  
3 matter and gather further data. And so, this letter  
4 itself lacks the force of law.

5 The second reason, of course, is that even if  
6 the Coast Guard could preempt simply by writing a letter,  
7 our claims are not inconsistent with the Coast Guard's  
8 stated reasons for declining to regulate. The Coast Guard  
9 was focusing on the lack of a universally acceptable  
10 propeller guard solution, the costs of a retrofit, and  
11 such other matters, and there's no inconsistency between  
12 our claims --

13 QUESTION: What if the Coast Guard's reason had  
14 been we think putting the coast -- putting a propeller  
15 guard on would make the -- the vessel even more dangerous?

16 MS. BRUECKNER: There would still be no  
17 preemption here because the Coast Guard letter lacks the  
18 power to preempt.

19 QUESTION: Would that satisfy the second  
20 condition of -- of your two-prong test?

21 MS. BRUECKNER: It would, Your Honor, but our  
22 position is that there still has to be a regulation and  
23 there's no regulation here.

24 QUESTION: Well, I understand. I'm just asking  
25 you about the second part of your test.



1 MS. BRUECKNER: It would satisfy the second part  
2 of the test.

3 Finally, I'd like to reserve the remainder of my  
4 time for rebuttal, if I may, but I --

5 QUESTION: Very well, Ms. Brueckner.

6 Mr. Stewart.

7 ORAL ARGUMENT OF MALCOLM L. STEWART

8 ON BEHALF OF THE UNITED STATES,

9 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

10 MR. STEWART: Mr. Chief Justice, and may it  
11 please the Court:

12 The Coast Guard is the Federal agency charged  
13 with administration of the Boat Safety Act and with the  
14 promulgation of safety standards.

15 And to understand the Coast Guard's traditional  
16 view of these issues and the backdrop against which  
17 Congress legislated, it may be helpful to look to what the  
18 Coast Guard said at the time the Boat Safety Act was  
19 proposed. And if you'll look to page 31 of the blue  
20 brief, this is the answer provided by the Commandant of  
21 the Coast Guard when he was asked, in written form,  
22 whether it was his view that compliance with Federal  
23 safety standards would furnish a complete defense to  
24 liability under common law or State law. And he was  
25 further asked, if there wouldn't be a complete defense,

1     should that be made explicit in the act.

2                     And the Commandant said: we do not believe that  
3     compliance with promulgated standards under the act has  
4     the effect of relieving a manufacturer from liability  
5     under the usual tort law concerning negligence or  
6     warranties. For many --

7                     QUESTION: Go ahead.

8                     MR. STEWART: For many years the Coast Guard has  
9     required compliance with standards by inspected vessels.  
10    Courts have consistently held that a vessel owner's  
11    compliance with Coast Guard inspection requirements is not  
12    synonymous with seaworthiness under maritime law. Though  
13    the analogy is apparent, we would have no objection to an  
14    express provision to clarify that a manufacturer's  
15    compliance with promulgated standards does not by itself  
16    relieve him of any tort liability which otherwise could  
17    pertain.

18                    And I think the --

19                    QUESTION: Is he -- is the Commandant a lawyer?

20                    MR. STEWART: I'm not sure whether the  
21    Commandant was a lawyer, but the -- the questions were  
22    submitted to him in written form. He was given time to  
23    consult with his advisors and prepare his answers.

24                    QUESTION: But the Commandant's lawyer or the  
25    Commandant might well admit that if, as Justice Ginsburg

1 pointed out, there's defective design, if -- if the  
2 propeller falls apart and -- that then there's liability.

3 MR. STEWART: I think -- I think what --

4 QUESTION: So that -- this -- this thing that  
5 you quote us just brings us right back to where we began.

6 MR. STEWART: Well, I think a couple of things  
7 are noteworthy about the way that the Commandant  
8 responded.

9 First, when he gave -- first, he made clear that  
10 the Coast Guard was familiar and was comfortable with the  
11 idea that even when it had inspected a vessel and had --  
12 the -- the vessel had passed the Coast Guard's own  
13 regulatory standards, nevertheless there was a -- the  
14 possibility of damages liability based on unseaworthiness.

15 QUESTION: Would --

16 QUESTION: What do we care whether the Coast  
17 Guard was happy? I mean, this isn't even plumbing the  
18 mind of Congress. It's plumbing the mind of the Coast  
19 Guard. What do we care?

20 MR. STEWART: Well, I think part of the argument  
21 on the other side has been that whatever the text of the  
22 statute might say, the Court should strain to hold common  
23 law claims --

24 QUESTION: Well, maybe. That may -- but what I  
25 don't see here is whether he's aware of the fact which is

1 -- and I'm aware of it and you are -- that whatever  
2 standard the Coast Guard has -- let's say you have to have  
3 a 1-inch wire, and what my -- they mean by that is you  
4 don't have to a 2-inch wire. Okay? Absolutely clear.  
5 And there is no point in telling the State of Idaho you  
6 can't pass a law for a 2-inch wire when any jury in the  
7 State of Idaho can come in with a judgment that does  
8 precisely the same thing as that rule. I mean, maybe this  
9 Coast Guard Commandant doesn't care about whether it can  
10 preempt at all, but it doesn't seem to me logical to take  
11 the position you can't have a regulation but you can have  
12 a tort judgment that is identical.

13 MR. STEWART: Well, first of all, the tort  
14 judgment is not identical because it fulfills an important  
15 purpose that the prescriptive standard doesn't, namely  
16 compensating people who have actually been injured by  
17 reason of defects.

18 QUESTION: You could say we don't care if, in  
19 fact, the rules that we're about to promulgate are totally  
20 ignored by the States, as long as the purpose is to  
21 compensate someone.

22 MR. STEWART: Well, as this Court made clear in  
23 Geier, the effect of holding that State common law suits  
24 are not categorically preempted is not that the Federal  
25 judgments can be ignored; that is, there's still a role

1 for principles of conflict preemption. The Court in Geier  
2 said the point of the savings clause would be eviscerated  
3 if common law claims were -- that were not identical to  
4 Federal standards were categorically preempted.  
5 Nevertheless, particular common law claims can conflict  
6 with the -- the text or purposes of particular  
7 regulations.

8 QUESTION: The Commandant didn't seem to  
9 understand that. In -- in your endorsement of the  
10 Commandant's statement, I thought you were disagreeing  
11 with -- with counsel for the petitioners here who -- who  
12 did say that there could be conflict preemption of common  
13 law claims, anyway. The Commandant doesn't even seem to  
14 recognize that.

15 MR. STEWART: I think what he is saying is we  
16 have always understood that compliance with our regulatory  
17 requirements will not furnish a categorical defense to  
18 suits at common law and we would understand the same --

19 QUESTION: Well -- well, maybe it ought to be  
20 interpreted, to try to make sense of this scheme, as  
21 certainly covering the situation where the State by its  
22 common law doctrine tries to make a requirement that the  
23 Coast Guard has -- and the Federal Government has flatly  
24 contradicted by regulation. That may not be this case,  
25 but if the Coast Guard were to pass a regulation saying no

1 propeller guards should be put on boats because we think  
2 it is more dangerous, if they have them, now we should  
3 interpret the savings clause as not allowing a cause of  
4 action on that same ground.

5 MR. STEWART: That's exactly right and that's  
6 precisely the analysis that the Court went through in  
7 Geier and it's the analysis we urge the --

8 QUESTION: But -- but under your -- your  
9 rationale, you say, oh, but there's a duty to compensate,  
10 and that's different. Why doesn't that same argument  
11 apply so that you tell Justice O'Connor, oh, yes, the jury  
12 can -- can go full speed ahead?

13 MR. STEWART: I mean, I think the Court has  
14 often pointed out in various contexts that even where it  
15 can be said that a primary goal of Congress was X, we  
16 shouldn't assume that Congress intended to pursue that  
17 goal at all costs. The point is simply that Congress drew  
18 a somewhat different balance with respect to common law  
19 actions than it did with -- with respect to prescriptive  
20 rules.

21 And I think part of the reason for that was that  
22 Congress was establishing a mechanism by which the Coast  
23 Guard could itself promulgate prescriptive safety  
24 standards. In ousting State law, it was replacing State  
25 law with something else. But the Boat Safety Act doesn't

1 contain any mechanism by which an injured person can seek  
2 compensation for his injuries, and therefore it was  
3 natural for Congress to determine that subject to conflict  
4 preemption principles, the remedial mechanisms that had  
5 previously been available should continue to be available.  
6 And I think --

7 QUESTION: Well, maybe -- maybe it doesn't do  
8 that much. I mean, maybe the savings clause allows causes  
9 of action for breach of warranty, for negligent operation  
10 of the boat, and things like that.

11 MR. STEWART: I -- well, the -- the same could  
12 have been said of the savings clause in Geier, but the  
13 Court, nevertheless, concluded that common law actions  
14 were not categorically preempted. And I think the reason,  
15 as Ms. Brueckner said, was that no one could have supposed  
16 that common law claims going to an entirely different  
17 aspect of the manufacturer's conduct than the design,  
18 design feature that was at issue in -- in the Coast  
19 Guard's regulatory --

20 QUESTION: I -- I don't see how you -- you talk  
21 about straining. All -- there is some -- number of  
22 statutes. They all read a little differently, but there  
23 isn't really that much substantive difference between  
24 them. And although the Court has disagreed, I've tended  
25 to take the view, treat statutes and common law alike, and

1 probably they're not preempted either unless the agency  
2 comes in and makes it pretty clear that they are. Now,  
3 that's pretty easy for people to follow. If they want to  
4 argue pro and con preemption, they go to the agency.

5 MR. STEWART: I think that may --

6 QUESTION: So wouldn't I reach that same  
7 position here?

8 MR. STEWART: That -- that might be a legitimate  
9 rule to follow in the absence of statutory language  
10 expressly addressing the subject, but here we have one  
11 provision that says a State may not establish a law  
12 requirement of setting forth a safety standard or  
13 requirement for associated equipment unless it is  
14 identical to a Federal safety standard.

15 And then in the savings clause it says -- and  
16 this is at page App. 6 of the blue brief -- compliance  
17 with this chapter or standards, regulations, or orders  
18 prescribed under this chapter does not relieve a person  
19 from liability at common law under State law. So whatever  
20 that means, it has to mean there will be some  
21 circumstances under which the manufacturer complies with  
22 all applicable Federal rules and yet is nevertheless held  
23 liable under the common law. And --

24 QUESTION: Very simple. In those situations  
25 where you -- as you just heard, the ones that the



1 petitioner just argued for.

2 QUESTION: Design defect.

3 MR. STEWART: But -- but if -- if the same rule  
4 of preemption were applied to common law suits as to  
5 prescriptive regulations, namely that the State couldn't  
6 do anything that was not identical to Federal law, it  
7 could never be the case that a manufacturer who complied  
8 with Federal law could, nevertheless, be held liable at  
9 common law. The -- the preemption clause and the savings  
10 clause, read together, compel the conclusion that Congress  
11 at least intended a different rule of preemption to apply.

12 QUESTION: That's -- that's not -- that's not  
13 true. The Coast Guard doesn't say how the -- the  
14 propeller should be manufactured, out of a -- an eighth of  
15 an inch or -- or of a tenth of an inch blade. And if the  
16 smaller blade falls apart, you can sue the manufacturer.

17 MR. STEWART: But I -- I don't think anyone  
18 would have contended that such a suit would be preempted  
19 by the preemption clause even in the absence of the  
20 savings clause.

21 And again, this is exactly the same situation  
22 that was before the Court in Geier. Had -- had that  
23 argument been a sound one, the Court would presumably have  
24 construed the -- the Motor Vehicle Safety Act savings  
25 clause that was at issue there --

1           QUESTION: Geier didn't have the same clause,  
2 and I -- I think it's a big difference when it says under  
3 common law or State law --

4           MR. STEWART: But it does refer --

5           QUESTION: -- because you -- you have to  
6 distinguish State -- not just State common law, but State  
7 statutes. You have to draw some line that is going to  
8 exclude State statutes as well as the common law.

9           MR. STEWART: Well, it does refer to -- may I  
10 finish?

11          QUESTION: Yes.

12          MR. STEWART: It refers to liability under -- at  
13 common law or under State law, and therefore State law is  
14 most naturally taken to be a reference to laws that  
15 accomplish purposes similar to those of the common law.

16          QUESTION: Thank you, Mr. Stewart.

17          Mr. Shapiro, we'll hear from you.

18                   ORAL ARGUMENT OF STEPHEN M SHAPIRO

19                   ON BEHALF OF THE RESPONDENT

20          MR. SHAPIRO: Thank you, Mr. Chief Justice, and  
21 may it please the Court:

22           I think a word of history here explains some of  
23 the mystery surrounding the statutory language. For over  
24 90 years, Congress has specified the safety equipment that  
25 has to be installed on motorboats, and it was in 1937 that

1 this Court ruled in Kelly v. Washington that the States  
2 may not impose their own requirements for safety equipment  
3 on boats that travel in interstate waters. And that was  
4 the background of this legislation.

5 This act preempts State law creating any  
6 requirement for boat equipment that is not identical with  
7 the prescribed Coast Guard regulation. And this serves a  
8 critical fail-safe purpose. Risky devices like propeller  
9 guards may not be imposed on the public under State law  
10 unless and until they're approved by the expert regulatory  
11 agency under the criteria that Congress has laid down.

12 Now, this preemption provision has three  
13 exceptions which are written right into the provision, but  
14 none of those exceptions fits this case. So my friends  
15 have to make the argument that this general savings  
16 clause, which says nothing about preemption, is another  
17 implicit exception, but that's inconsistent --

18 QUESTION: Unless there's just no Federal  
19 regulation at all on this.

20 MR. SHAPIRO: And -- and --

21 QUESTION: Maybe the Federal Government has not  
22 -- acting through the Coast Guard, has made no  
23 requirement, no decision at all.

24 MR. SHAPIRO: And the -- the wisdom of this  
25 statute is that until the Coast Guard makes a decision

1 about a device like propeller guards, they may not be  
2 imposed on the public.

3 Think of what happens under Justice Kennedy's  
4 example. If Illinois commands installation of these  
5 devices and backs up that judgment with millions of  
6 dollars in damages, people in 49 other States are exposed  
7 to the risks and burdens of propeller guards.

8 QUESTION: Well, not necessarily. I mean, you  
9 say if Illinois imposes it, I mean, this is one reason, it  
10 seems to me, that you can take the statute at -- at its  
11 word. The common law never imposes a requirement. This  
12 jury found that a propeller -- that failure to have a  
13 propeller guard was negligence. Another jury in another  
14 case in the same State may find that the failure to have a  
15 propeller guard was not negligence. There's no State  
16 requirement being imposed.

17 MR. SHAPIRO: Well, we agree with the statement  
18 in Garmon that the Court, for preemption purposes, should  
19 assume compliance and then ask what are the implications.  
20 The implications are that Illinois could coerce the  
21 installation of these devices. Another State may  
22 disagree.

23 QUESTION: On the basis of one jury verdict?

24 MR. SHAPIRO: Or one or --

25 QUESTION: It's like in tort actions in general.

1 I don't see how you get from one jury verdict, that that  
2 becomes the positive law of the State, that you must have  
3 a propeller guard.

4 MR. SHAPIRO: Well, after the first jury  
5 verdict, then the -- in come the claims for punitive  
6 damages in the next case, and there is a powerful coercive  
7 effect from damage actions. This Court has said so.

8 QUESTION: Mr. Shapiro, isn't it true that there  
9 all -- aren't there -- isn't it true there are all sorts  
10 of cases in which different designs of boats may have a --  
11 be more dangerous than other designs, depending on whether  
12 they have a propeller guard?

13 I notice that one of the allegations in the  
14 prayer for relief in the complaint was they provided an  
15 unreasonably dangerous design in utilizing an unprotected  
16 propeller. That -- as I read that, that wouldn't  
17 necessarily mean every boat needed a -- a propeller guard,  
18 but rather some particularly dangerous designs might need  
19 one.

20 MR. SHAPIRO: Well, what's --

21 QUESTION: So that you get some preemption and  
22 some not.

23 MR. SHAPIRO: The -- what the safety council  
24 found, the Coast Guard's committee of 21 experts, was that  
25 for all boats that travel more than 10 miles an hour,

1 these are infeasible devices. And the reason is you have  
2 to match the propeller guard with the particular engine  
3 and the particular hull combination. There are thousands  
4 and thousands of hulls out there.

5 QUESTION: But the -- the Coast Guard itself  
6 didn't find anything. It said we're not making the  
7 standard now. As counsel for petitioner pointed out,  
8 there is no formal action. There's just non-action by the  
9 Coast Guard.

10 MR. SHAPIRO: Well, the -- the Coast Guard said  
11 that the available accident data compiled by the 21  
12 experts did not support a propeller guard requirement  
13 under the --

14 QUESTION: But they were still watching it.  
15 They didn't make a -- a determination that propeller  
16 guards are dangerous, therefore should not be used. They  
17 said we're still keeping this under advisement.

18 MR. SHAPIRO: And in April of 2001, they looked  
19 at this again, and the Coast Guard representative on the  
20 safety council said we realize we cannot mandate  
21 installation of propeller guards. They're not feasible,  
22 and the propeller guard subcommittee said again, these  
23 will increase blunt trauma injuries.

24 QUESTION: This is something that's published,  
25 that's -- that's a formal kind of action?

1                   MR. SHAPIRO: Yes. Yes, Your Honor. It's -- I  
2 believe it's footnote 14 in plaintiff's reply brief. They  
3 -- they cite to the web site for these council minutes.

4                   QUESTION: No, but did they -- did they go  
5 through any, in effect, administrative procedure kind of  
6 formal action?

7                   MR. SHAPIRO: Well, but under this statute, that  
8 isn't necessary, Your Honor. It -- they -- they did  
9 have --

10                  QUESTION: Well, it may be -- it may not be  
11 necessary in the sense that they are under an obligation  
12 to do it, but if they don't do something like that, I -- I  
13 don't know that their -- their announcement has any  
14 particular status that's relevant here.

15                  MR. SHAPIRO: Well, because of the wording of  
16 this statute, which is so different from Geier -- it's the  
17 exact opposite of Geier -- under this statute, unless  
18 there's an identical Coast Guard regulation in place,  
19 State law is preempted.

20                  QUESTION: I don't see how it is so different  
21 from Geier. I mean, you read it as saying if there's no  
22 regulation at all, no requirements, then the State  
23 couldn't have any tort law?

24                  MR. SHAPIRO: Well, as to equipment, associated  
25 equipment, for boats, unless there's a Coast Guard

1 regulation in place, the States can't mandate that  
2 equipment.

3 QUESTION: All right. Then you would say, for  
4 example -- not just that, but in your view if you had,  
5 like a propeller that shot torpedoes, I mean, something  
6 that was absolutely absurd, you -- the State would not be  
7 able to have a tort judgment based on that even though the  
8 Coast Guard has never had the chance to look into it?

9 MR. SHAPIRO: Well --

10 QUESTION: Now, I mean, I grant you that's a  
11 possible reading.

12 But I think perhaps a better reading of it would  
13 be that you can't have a -- a rule or a regulation or a  
14 tort judgment or any other requirement of law different  
15 from a Coast Guard requirement when there is a  
16 requirement.

17 MR. SHAPIRO: Your Honor --

18 QUESTION: But not when there isn't.

19 MR. SHAPIRO: Your Honor, we -- we think that  
20 overlooks the history that I began with because under this  
21 Court's decisions, the States could not impose  
22 requirements for equipment or -- or construction, design  
23 or structure for boats moving in interstate waters. That  
24 was Kelly v. Washington, a unanimous opinion by Chief  
25 Justice Hughes.



1                   QUESTION: But, Mr. Shapiro, in -- in this very  
2 setting, the Coast Guard said, when this Boat Safety Act  
3 was new, States, until we get around to doing this, your  
4 law controls. So there must have been some scope for  
5 State law regulating equipment that was there for the  
6 Coast Guard to say, it will take us time to get our  
7 regulations. In the meantime, State law applies. So  
8 there must have been some law to apply in the States.

9                   MR. SHAPIRO: Oh, yes, there -- there are three  
10 exceptions to the preemption provision. They're explicit  
11 exceptions, and we don't have to go looking to the savings  
12 clause for a fourth, implied exception.

13                   There -- there is an exception if the Coast  
14 Guard grants an exemption under APA procedures. They  
15 didn't do that here.

16                   There's another exemption for local hazardous  
17 conditions, but that exception doesn't fit here either.

18                   QUESTION: But I'm talking about in the interim  
19 It's from -- what was it -- '71 to '73?

20                   MR. SHAPIRO: Yes, Your Honor.

21                   QUESTION: The rules that applied were State  
22 rules because the Coast Guard said, States, your law  
23 controls while we haven't got any yet.

24                   MR. SHAPIRO: That's the key point, Your Honor.  
25 That was done by formal exemption, and that shows that

1 this statute has the exceptions built right into  
2 preemption provision.

3 QUESTION: But it shows that there must have  
4 been State law. You -- you -- I thought you were saying  
5 it's been forever or for a very long time that only  
6 Federal law sets the standards.

7 MR. SHAPIRO: Yes.

8 QUESTION: The Coast Guard must have thought  
9 there were standards in existence that could be applied.

10 MR. SHAPIRO: What -- what was happening,  
11 according to the legislative history, is the States were  
12 beginning to require battery covers, anchors, lines, and  
13 other pieces of associated equipment, including warning  
14 decals on the boats, and Congress says, this has to stop.  
15 There's nothing wrong with these requirements, but we  
16 can't have 50 sets of them. So this field is being  
17 preempted for associated equipment requirements until the  
18 Coast Guard adopts a regulation or the Coast Guard gives  
19 an exemption, which it did in 1971.

20 And I think the structure is very important.  
21 This is so different from Geier. There was not a  
22 structure like this with three exceptions written right  
23 into the statute, and to treat the savings clause, which  
24 doesn't say a word about preemption and which the  
25 legislative history says is simply a matter of State law

1 defenses, as a fourth, implied exception to preemption  
2 truly does violence to the structure of this law.

3 QUESTION: Well, what do you --

4 QUESTION: How do you treat the savings clause?  
5 What -- what do you think it means?

6 MR. SHAPIRO: It does not address preemption at  
7 all. It addresses an affirmative defense that it -- that  
8 could be available under State law. That's the defense of  
9 compliance with Coast Guard regulations or orders or any  
10 provision of this entire statute.

11 Now, section 288C of the Restatement of Torts --  
12 this is an echo of section 288C which was published just a  
13 few years before Congress passed the savings provision.  
14 It doesn't deal with preemption at all. It deals with --  
15 with compliance.

16 QUESTION: Right. To make this clear, would you  
17 identify the kinds of cases that you envision at State law  
18 that this clause, in effect, says you may not defend  
19 conclusively by claiming compliance with a Coast Guard  
20 reg? What kinds of cases?

21 MR. SHAPIRO: It has a huge scope of operation,  
22 unlike Geier. To start with the Coast Guard's example,  
23 the ordinary negligence case, negligent operation was very  
24 important to Congress because most of these propeller  
25 accidents occur because of negligent operation or reckless

1 operation of the boat. That's what the Coast Guard says  
2 on its web site today. And so the defendant couldn't  
3 defend by saying, gee, my boat complies with all the Coast  
4 Guard regulations --

5 QUESTION: Okay. No, no, I understand your  
6 point. But you've got negligent operation and what --  
7 what else do you have in mind?

8 MR. SHAPIRO: The -- the next thing the Coast  
9 Guard referred to is express warranty. The defendant  
10 couldn't say simply because I've complied with this long  
11 list of Coast Guard requirements, I don't have to honor my  
12 contractual promises or --

13 QUESTION: Okay. How about negligent  
14 manufacture?

15 MR. SHAPIRO: Negligent installation is  
16 certainly covered, and defective manufacture is also  
17 protected by the savings clause. That's when a particular  
18 unit comes off the assembly line and it's defective.  
19 Those were the original tort cases --

20 QUESTION: I -- I suppose there would be some  
21 close cases. Suppose there's two ways to make a  
22 propeller. One is to have it slightly canted with a  
23 teflon cover and -- and a gear mechanism that makes it  
24 stop the minute it hits a hard object. The other is the  
25 cheaper way, to make it terribly sharp and no -- no

1 ability to stop. Could the injured party sue the  
2 manufacturer of the second kind, the -- the cheap,  
3 dangerous kind of propeller?

4 MR. SHAPIRO: It is possible and for this  
5 reason. The language of the statute for associated  
6 equipment only preempts requirements for associated  
7 equipment. And that could be construed to mean simply  
8 requirements to install propeller guards, which you've not  
9 installed.

10 Now, if you took a different interpretation of  
11 requirements for, it might encompass that case, but this  
12 Court could give a narrow construction to requirements  
13 for.

14 And this case is the paradigm case because  
15 manufacturers have decided not to use this kind of safety  
16 equipment because they know it's a hazard. It's a known  
17 hazard. Several courts have disapproved these devices.  
18 21 safety experts of the Coast Guard have pointed out the  
19 dangers this creates. So manufacturers have consciously  
20 --

21 QUESTION: Mr. Shapiro, I'm not sure you  
22 answered my question before. Again, supposing 90 percent  
23 of the boats really don't need a propeller guard, using  
24 the reasoning of the committee that decided not to  
25 recommend. But there are 10 percent that are some exotic

1 design that's particularly dangerous and they really are  
2 dangerous unless they have a -- a propeller guard on them  
3 Could you say that -- that 10 percent has to be treated  
4 like the 90 percent?

5 MR. SHAPIRO: Well, because the manufacturer  
6 doesn't know --

7 QUESTION: Well, it's the design. I'm just  
8 talking about a particular design --

9 MR. SHAPIRO: Yes.

10 QUESTION: -- that seems to be particularly  
11 hazardous if you had the propeller too close to the person  
12 operating the boat or something like that.

13 MR. SHAPIRO: Well, the reason that's preempted  
14 and that that is a requirement for associated equipment,  
15 even in the case that you give, is because the  
16 manufacturer has no idea what hull is going to be put  
17 together with this motor. The motor can move from hull to  
18 hull to hull.

19 And what the Coast Guard found -- the -- the  
20 committee found in its report was that you have to have an  
21 exact hydrodynamic fit between the particular engine and  
22 the particular hull and the particular propeller guard.  
23 So if juries, say, impose propeller guards on -- on  
24 designs we think are dangerous --

25 QUESTION: Yes, but what if the manufacturer of

1 the propeller is on notice that it's being -- was being  
2 purchased for a particularly dangerous design, as I've  
3 described? It seems to me sometimes the -- the company  
4 could know what kind of boats it's going on.

5 MR. SHAPIRO: Well, we -- we rely on the logic  
6 of this committee report which says that -- that for all  
7 planing boats that go 10 miles an hour or faster, these  
8 devices are counterproductive because they interfere with  
9 steering. They double the amount of fuel that's consumed.  
10 They increase air and water pollution and they create  
11 serious hazards of blunt trauma injury.

12 So what the -- the committee found was that  
13 these devices for any category of planing boat -- and here  
14 we have a boat that goes 50 miles an hour. We've got an  
15 18-foot ski boat with a 115 horsepower engine.

16 QUESTION: But you could -- it seems to me as a  
17 matter of defense to tort liability, you could put all  
18 that evidence in, and say in this particular case, our  
19 design was sensible for the very reasons you just  
20 described. Therefore, we're not negligent.

21 MR. SHAPIRO: Well, that's true in many of these  
22 preemption cases, but all it takes is an errant jury  
23 verdict or two or three to coerce a decision by the  
24 manufacturer to install devices that are very hazardous to  
25 the public.

1                   QUESTION: Then all you'd have to do is go to  
2 the Coast Guard and say, look what's happened, and then  
3 they'd be explicit, if you're right. And the other side  
4 there would have a chance to argue to the Coast Guard that  
5 you're not right.

6                   MR. SHAPIRO: Justice Breyer, that's cold  
7 comfort. They would hand us this brief that they've just  
8 submitted saying that it's up to the jury to decide  
9 whatever the jury wants.

10                  QUESTION: Well, fine. If that's the policy of  
11 the Coast Guard, then I don't see why you should rely upon  
12 them for preemption.

13                  MR. SHAPIRO: Well, because Congress had a  
14 different vision. Congress was going with the rule of  
15 Kelly, Kelly against Washington.

16                  QUESTION: Well, why did Congress then say  
17 minimum standards? It didn't say the Coast Guard  
18 standards are necessarily adequate. It just said, Coast  
19 Guard, set minimum standards.

20                  MR. SHAPIRO: Well, the legislative history is  
21 very explicit on that. The boating associations and the  
22 manufacturers associations had all kinds of very elaborate  
23 standards of their own, and everybody said during these  
24 hearings that is to be encouraged. We want them to do  
25 more of that. The statute shouldn't stop that.



1 But there was no suggestion that the States could  
2 intervene and impose their own standards and their own  
3 requirements. And in fact, in the Ray decision, this  
4 Court said minimum standards under another similar statute  
5 do not mean -- do not mean that the States can embroider  
6 on and supplement those -- those standards.

7 And after all, the preemption provision here  
8 doesn't say anything about minimum standards or maximum  
9 standards. It says all requirements for boat safety  
10 equipment are preempted unless there is an identical Coast  
11 Guard regulation in place. This is the rule of Kelly  
12 against Washington which --

13 QUESTION: Mr. Shapiro, do you cite Kelly  
14 against Washington in your brief?

15 MR. SHAPIRO: We did not. Plaintiffs cited it  
16 in their brief. It's 302 U.S. And I'll give the Court  
17 the cite. I think it's critically important. 302 U.S. at  
18 14 through 15.

19 QUESTION: It's critically important, but you  
20 didn't even cite it.

21 MR. SHAPIRO: Well, it's quoted in the cases  
22 that we do cite. It's quoted in the Ray decision. It's a  
23 -- it's an early precursor of Ray and in Locke. I was  
24 explaining it as -- as the background of Congress's  
25 legislation here.

1                   And I'd like to suggest to the Court that it  
2 makes a huge difference here that this is a case that  
3 arises in the maritime context. At a minimum, the  
4 maritime context means there is no presumption against  
5 preemption, as the court below held. And because Congress  
6 wanted to achieve uniformity --

7                   QUESTION: Well, I mean, that may be true if  
8 you're talking about commercial boating, but it's not true  
9 of recreational boating.

10                  MR. SHAPIRO: Oh, yes, it is. We believe it is,  
11 Your Honor, because this Court --

12                  QUESTION: Little motorboats?

13                  MR. SHAPIRO: Absolutely.

14                  QUESTION: 5-foot skiffs and little put-puts?

15                  MR. SHAPIRO: Since the '40s and the '50s, this  
16 Court, and later in *Foremost* and in *Sisson*, this Court has  
17 held that recreational boats fall squarely within the  
18 maritime jurisdiction.

19                  QUESTION: Even in New Hampshire?

20                  (Laughter.)

21                  MR. SHAPIRO: I -- there may be some carve-out  
22 for New Hampshire in this statute.

23                  (Laughter.)

24                  MR. SHAPIRO: And I've tried to figure out the  
25 reasons for that carve-out, and I've never -- I've never

1 understood those.

2 But this is maritime context, and this lake --  
3 the U.S. Court of Appeals for the Sixth Circuit has held  
4 that is -- it's a navigable interstate body of water.

5 QUESTION: Yes, because it -- it happens to lie  
6 on the border between two States, but not every landlocked  
7 lake is subject to -- to Coast Guard maritime  
8 jurisdiction.

9 MR. SHAPIRO: Oh, absolutely not. It has to be  
10 an interstate body of water.

11 But since the 1850s, this Court has held that  
12 interstate waterways are subject to the maritime  
13 jurisdiction.

14 And this waterway, by the way, was constructed  
15 by the U.S. Army Corps of Engineers. It's surrounded with  
16 marinas that rent pleasure boats, and this is big  
17 business, the pleasure boating business, on Dale Hollow  
18 Lake.

19 And because this is a maritime context, that  
20 says a lot about the savings clause, because this Court  
21 has held that in maritime cases, savings clauses should be  
22 interpreted narrowly to avoid obstructing the carefully  
23 constructed preemption provision in the statute and to  
24 avoid making an end run around the Coast Guard's expert  
25 supervision, which is what Congress wanted.

1                   And we go further and say that because the court  
2 below was right in characterizing this as an admiralty  
3 case, any conflict between Illinois law and Federal law is  
4 just imaginary. That's because Federal common law follows  
5 Federal maritime jurisdiction, and there can't be --

6                   QUESTION: But you didn't argue that. I mean,  
7 in Illinois -- all through the Illinois State courts, the  
8 assumption was that the -- the law to be applied, if you  
9 could have a common law, would be Illinois common law, not  
10 some Federal maritime common law.

11                  MR. SHAPIRO: Well, the Illinois Supreme Court  
12 agreed with us on this point. They have two pages in  
13 their opinion --

14                  QUESTION: They -- all they said is that the --  
15 the preemptive force is different. They did not say that  
16 Illinois common law was displaced. That is, if there is  
17 State law to -- if there is law other than the Coast Guard  
18 regulations to apply, it was Illinois State law all -- all  
19 along. And as far as I know, it wasn't until this Court  
20 that you raised the question, never mind State law, the  
21 Federal maritime law would control in any event.

22                  MR. SHAPIRO: Well, we think this is an included  
23 question. It was certainly addressed by the court below.  
24 The court below cited this Court's Jensen decision, which  
25 is the leading maritime preemption decision. And it was

1 using maritime analysis to support the preemption holding  
2 that the court ultimately made. Now, this was step number  
3 one in our preemption argument below, but we're entitled  
4 to elaborate it in this Court and cite additional cases.

5 QUESTION: Well, why was the argument that  
6 Illinois law is preempted, why was that at issue at all  
7 if, as you say, there is no State law in this area? It's  
8 all Federal.

9 MR. SHAPIRO: Well, we -- we proceeded to argue  
10 in the alternative that under express preemption and under  
11 a conflict preemption that -- that State law was  
12 preempted. But with a two-page discussion in this opinion  
13 on maritime, I think it is an addressed and included  
14 question. And if the Court doesn't consider --

15 QUESTION: Did you -- in your -- in the briefing  
16 of this case in the State court, did you make the argument  
17 Federal law covers the waterfront? There is no State law  
18 to apply?.

19 MR. SHAPIRO: We made the first part of the  
20 argument. We said Federal law covers the waterfront  
21 because Congress conceived of this as a maritime question  
22 and was preempting State law broadly, exerting its  
23 traditional, under Kelly against Washington, the usual  
24 Federal Government role over equipment installed on  
25 motorboats. And we said that this is an enclave of

1 Federal law. And we cited this Court's Yamaha decision  
2 and we cited the Foremost decision. We cited admiralty  
3 cases and we said it was an admiralty case.

4 QUESTION: But Yamaha said that this is an open  
5 question, and it didn't resolve it.

6 MR. SHAPIRO: Right, but our -- my point is that  
7 we were citing this Court's admiralty decisions. And then  
8 the Illinois Supreme Court went further and cited a host  
9 of additional admiralty decisions. Now, when you have  
10 that kind of discussion in a State court opinion of a  
11 Federal law issue, this Court, I believe, can reach that  
12 as an included question and it's an intertwined question.

13 And let me suggest it is the easiest way to  
14 resolve and the narrowest way to resolve this case because  
15 it is propeller guard-specific. It makes no aggressive  
16 law regarding tort claims on -- on the land, and --

17 QUESTION: But, Mr. Shapiro, the Solicitor  
18 General disagrees with you on this point.

19 MR. SHAPIRO: The Solicitor General hasn't  
20 briefed this point, the maritime law point.

21 QUESTION: I -- I thought his brief said he  
22 thought they're wrong on the presumption going the other  
23 way. I'm pretty sure that's in his brief.

24 MR. SHAPIRO: Well, I don't think --

25 QUESTION: Are you suggesting that if this

1 action had been in Lake Geneva, Wisconsin, instead of  
2 where it was, you'd have a different result or you might  
3 have a different result?

4 MR. SHAPIRO: I think you'd have the same  
5 result, but you would have fewer reasons for reaching that  
6 same result.

7 QUESTION: The argument you're making now would  
8 not apply.

9 MR. SHAPIRO: It would not apply. It would  
10 apply to -- to Lake Michigan but not to Lake Geneva.

11 Now, I'd like -- like to return to Justice  
12 Kennedy's comment about the conflicting judgments among  
13 State courts. If -- if Illinois were to mandate propeller  
14 guards and back up the judgment with millions of dollars  
15 in damages, that would impose these devices on all the  
16 people in the United States, and at everybody's estimate,  
17 these are risky devices with serious problems. And in the  
18 next case in another State, we would be sued for  
19 installing these devices.

20 The Walt Disney World was sued. They put a  
21 little propeller guard on a bumper boat and they were sued  
22 when a kid's arm got caught in the propeller guard. So  
23 sure as can be, if -- if one State mandates them, the next  
24 State is going to penalize them.

25 And the legislatures of the State -- this is the

1   worst and most shocking aspect of this theory.   The  
2   legislatures of the States could not protect their  
3   citizens against --

4               QUESTION:   I don't see that, Mr. Shapiro.   I  
5   don't know why the Illinois State legislature couldn't say  
6   that our State law is the Coast Guard's standards and  
7   nothing else.   A State legislature could see that this  
8   kind of result of a jury never happens again.   The State  
9   would be free to say precisely that whatever the Coast  
10   Guard includes is the law, and what they haven't included,  
11   it can't be required.   The State legislature could enact  
12   such a law.   I don't see why it couldn't.

13              MR. SHAPIRO:   What it -- what it could not enact  
14   is a law that says no boats coming into the State of  
15   Illinois or California may be equipped with propeller  
16   guards.   Why?   Because that's not identical with the Coast  
17   Guard regulation.

18              And yet, the juries in various States could be  
19   imposing these devices.   People could be losing their  
20   lives and boats --

21              QUESTION:   Why couldn't a State legislature say,  
22   satisfaction of the minimum standards prescribed by the  
23   Coast Guard excludes any other liability for design  
24   defects?

25              MR. SHAPIRO:   Well --



1                   QUESTION: Why couldn't the State legislature  
2 say that?

3                   MR. SHAPIRO: I think that that may well be a  
4 safety standard in disguise, but it -- the State could not  
5 do the thing that it really had to do which was to  
6 prohibit boats using propeller guards. If -- if juries in  
7 various parts of the United States put pressure on  
8 manufacturers to put propeller guards on their boats, the  
9 legislature needs the power to say no, this can't come  
10 into the -- can't come into the State. But that is  
11 clearly preempted under the SG's interpretation of the  
12 statute.

13                  And I think that is a true disservice to  
14 federalism, to have these kinds of conflicting judgments,  
15 and it shows the wisdom of Congress's architecture in this  
16 statute, that the States may not impose requirements for  
17 propeller guards unless and until the Coast Guard vets  
18 these proposals, finds that they're safe, finds that they  
19 satisfy Federal criteria of feasibility and safety, and  
20 adopts the rule and a regulation.

21                  It's like FDA legislation, protect the public  
22 against common law claims of this sort that could have  
23 such serious adverse effects on the public.

24                  QUESTION: Well, you -- you say that -- that in  
25 the situation you -- where you have the conflicting jury

1 verdicts, which I agree is a problem, you go to the Coast  
2 Guard and tell them that, and they just say, oh, that's  
3 too bad. We don't care. They might not say that, of  
4 course. But -- but if they did say that, that's why  
5 Congress insisted that you have this identical  
6 requirement. That's your view.

7 MR. SHAPIRO: Yes.

8 QUESTION: But suppose they do just refuse to  
9 have any requirement. I mean, that's equally absurd to  
10 me. On the one hand, you point to one absurdity one way,  
11 but it seems equally absurd to have no law in the area  
12 where the Coast Guard just refuses to act.

13 MR. SHAPIRO: The -- there's a good reason for  
14 refusing to act in this instance, and that is, these  
15 devices are very hazardous. You can't turn the boat  
16 safely. There's a danger of blunt trauma injury that is  
17 worse than the propeller slices. A surgeon can slice up  
18 propeller slices occasionally, but the blunt trauma injury  
19 from a propeller guard is lethal if it hits you in the  
20 chest or in the head.

21 And it -- it -- the steering is interfered with.  
22 You have to double the horsepower of these engines once  
23 you put a big bird cage around or a big circle around the  
24 propeller guard. There -- there are thousands of pounds  
25 per square inch of pressure exerted on these propeller

1 guards, and they create a serious navigation hazard.

2           And it -- it isn't just the committee that in  
3 1990 concluded that these were dangerous. These were 30  
4 experts on safety appointed by the Secretary of  
5 Transportation that assigned all these dangers and  
6 feasibility problems.

7           And this is exactly, by the way, what seven  
8 courts have held who've looked on -- at propeller guards  
9 on the merits. They've held that these devices are not  
10 feasible and that they're dangerous. There's not a single  
11 court in the United States that has said that these have  
12 to be installed.

13           And so, this is the problem, the real world  
14 problem, of having individual juries listen to those who  
15 lost before the administrative forum on propeller guards.  
16 Okay, we're going to start all over again in the court  
17 system, and now we're going to get juries to start  
18 commanding installation of propeller guards. There's a  
19 real world hazard, a danger for the public, and Congress  
20 has wisely drafted this statute to protect us and our  
21 children against that risk.

22           Now, these devices clearly raise policy concerns  
23 of nationwide significance and that's why the Coast Guard  
24 had to consider these issues in proceedings around the  
25 country that lasted for 18 months. Many sectors of

1 society are affected by these devices, and Congress just  
2 did not intend that individual juries were going to make  
3 these decisions for the whole country. This would be  
4 extraterritorial regulation with a vengeance, just what  
5 this Court said in *Locke* should not be done under State  
6 law.

7           Now, my friend also has argued in the brief that  
8 safety is the goal of the Boat Safety Act, and that  
9 uniformity is just a secondary concern. But Congress did  
10 pursue its safety agenda through a particular method, and  
11 that was uniform standards for marine equipment. Congress  
12 wanted the whole Nation to benefit from safe and efficient  
13 standards, and it wanted the whole Nation to be protected  
14 against standards and requirements that represent risky  
15 experiments. And that's just what propeller guards are.  
16 And that's why the Coast Guard said in 1991 that these  
17 standards have to meet stringent Federal criteria before  
18 they're imposed.

19           And that does bring us back to congressional  
20 intent because when Congress passed this preemption  
21 provision, the States were starting to adopt requirements  
22 for battery covers and for warning placards on boats and  
23 for lines and anchors. And Congress said, that's fine,  
24 but we can't have 50 sets of these requirements. We've  
25 got to be uniform set of these requirements. And it is

1 untenable to conclude that although the harbor master at  
2 Belmont Harbor cannot compel the installation of propeller  
3 guards, the Circuit Court of Cook County is perfectly free  
4 to do that with a big threat of damages. Both of these  
5 are exercises of Illinois law and they're both preempted.

6 We accordingly urge this Court to affirm the  
7 decision of the Illinois Supreme Court.

8 QUESTION: Thank you, Mr. Shapiro.

9 MS. Brueckner, you have 3 minutes remaining.

10 REBUTTAL ARGUMENT OF LESLIE A. BRUECKNER

11 ON BEHALF OF THE PETITIONER

12 MS. BRUECKNER: Your Honor, the -- the maritime  
13 argument was waived. The reason the United States never  
14 briefed it is that respondents didn't even raise it in  
15 their opposition brief to this Court. It was never raised  
16 until they filed their brief on the merits. This is not  
17 the time or place to decide the issue raised by  
18 respondent, particularly the Yamaha question that was  
19 specifically left reserved in Justice Ginsburg's opinion.

20 On the savings clause, their whole argument is  
21 that the savings clause must be read simply to preserve  
22 breach of warranty and negligent installation claims. Not  
23 only is this not supported by the language of the clause,  
24 which is itself broad, but the legislative history of the  
25 Boat Safety Act in the Senate report -- let's forget about

1 the Commandant for the time being. The Senate report  
2 states -- and I'm quoting from the blue brief at 32 --  
3 that the purpose of this section to assure that in a  
4 product liability suit mere compliance with the minimum  
5 standards promulgated under the act will not be a complete  
6 defense to liability. This demonstrates that Congress had  
7 in mind product liability actions just like this one.

8           Respondent also claims that these boats are --  
9 are terribly -- that propeller guards are terribly  
10 hazardous and the Coast Guard has found this. Well, first  
11 of all, the Coast Guard letter doesn't say anything about  
12 the hazards of propeller guards.

13           And contrary to Mr. Shapiro's contention, in  
14 April 2001, the Coast Guard's advisory committee issued --  
15 stated in its minutes a recommendation that the Coast  
16 Guard actually require propeller guards as one of four  
17 permitted options on boats exactly like this one. This is  
18 -- the cite is on page 11, footnote 14 of the yellow  
19 brief. So not only did the Coast Guard not find in 1990  
20 that propeller guards are hazardous, but it's considering  
21 requiring them on boats just like this one.

22           On the conflicting judgments point, Mr. Shapiro  
23 raises the specter of conflicting jury verdicts in these  
24 cases and Congress cannot possibly have intended that  
25 result. That's exactly the result that Congress permitted

1 in the context of motor vehicles where, absent a Federal  
2 safety standard, the States are -- juries are permitted to  
3 impose whatever liability they choose. And even where  
4 there's a minimum standard, under Geier, jury verdicts may  
5 be permitted to go forward.

6 But if -- and indeed there are conflicting jury  
7 verdicts that arise, the Coast Guard can step into the  
8 breach, and as Justice Ginsburg suggested, State  
9 legislatures could pass a rule saying that no liability  
10 could be imposed in cases like this one.

11 I would also point out on this conflicting jury  
12 verdict problem that we are not seeking punitive damages  
13 in this case. Punitive damages are not available in  
14 Illinois in a wrongful death action.

15 Finally, I would note that the absence of a  
16 regulation is itself reason to find no preemption here.  
17 This statute, as we read it, provides that common law  
18 claims may be permitted to go forward unless there's a  
19 conflict. Here there's no regulation. There's no formal  
20 statement of agency purposes. There's no articulated  
21 reasons that our claim could possibly conflict with.

22 And finally, at the end of the day, we have a  
23 victim here who would be left without any compensation  
24 whatsoever if this Court holds that common law claims are  
25 preempted. We would urge this Court to permit our claims

1 to proceed.

2 Thank you.

3 CHIEF JUSTICE REHNQUIST: Thank you, Ms.  
4 Brueckner.

5 The case is submitted.

6 (Whereupon, at 11:44 a.m., the case in the  
7 above-entitled matter was submitted.)

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