

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: VICKY LEWIS, ET UX., INDIVIDUALLY, AS
PARENTS, AS NEXT FRIENDS AND AS
ADMINISTRATORS OF THE ESTATE OF KATHRYN C.
LEWIS, DECEASED Petitioners v. BRUNSWICK
CORPORATION

CASE NO: 97-288 c. 3
PLACE: Washington, D.C.
DATE: Monday, March 2, 1998
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Supreme Court U.S.

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VICKY LEWIS, ET UX., :
4 INDIVIDUALLY, AS PARENTS, AS :
5 NEXT FRIENDS AND AS :
6 ADMINISTRATORS OF THE ESTATE :
7 OF KATHRYN C. LEWIS, DECEASED :
8 Petitioners :
9 v. : No. 97-288
10 BRUNSWICK CORPORATION :

11 - - - - -X

12 Washington, D.C.

13 Monday, March 2, 1998

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States at
16 11:35 a.m.

17 APPEARANCES:

18 DAVID E. HUDSON, ESQ., Augusta, Georgia; on behalf of
19 the Petitioners.

20 DAVID C. FREDERICK, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curiae,
23 supporting the petitioners.

24 KENNETH S. GELLER, ESQ., Washington, D.C.; on behalf of
25 the Respondent.

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1 PROCEEDINGS

2 (11:35 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-288, Vicky Lewis v. Brunswick
5 Corporation.

6 Mr. Hudson, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF DAVID E. HUDSON

9 ON BEHALF OF THE PETITIONERS

10 MR. HUDSON: Thank you, Mr. Chief Justice, may
11 it please the Court:

12 Plaintiffs' claims that Brunswick negligently
13 failed to protect against propeller guard injuries in the
14 circumstances of this case should not be preempted for
15 three reasons. First of all, the claims we are bringing
16 in this case do not conflict with any Federal regulation.
17 Under Freightliner, there's no preemption.

18 Secondly, the text of the preemption clause,
19 section 4306 of the act, does not, much less clearly and
20 unambiguously, reach the body of State law of general
21 application, common law damage claims. Our position there
22 is consistent, we think, with all of the preemption cases
23 of this Court.

24 Thirdly, in this case the reading that we submit
25 for the preemption clause is confirmed by a particular

1 savings clause, where Congress specifically and without
2 qualification provided that compliance with the Boat
3 Safety Act regulation is no defense to common law claims.

4 In this preemption case, as in every case of
5 statutory interpretation, surely the starting point is the
6 text of the act itself. We submit in this case it is also
7 the ending point. Starting with a statement of purpose in
8 the policy declaration --

9 QUESTION: Mr. Hudson, we have a good amplifying
10 system. I think we could hear you even if you didn't
11 speak quite as loud.

12 MR. HUDSON: I will tone it down --

13 QUESTION: Okay.

14 MR. HUDSON: -- Chief Justice.

15 Starting with the policy declaration in section
16 2 of the act, Congress spoke of reciprocity and comity,
17 signal words that State law has a role to play. It spoke
18 of developing and enforcing Federal and State laws, again
19 signalling that State laws would have a role to play.

20 And then throughout the act Congress over and
21 over again speaks of the enactment of positive regulations
22 both by the Federal Government and by the State, never any
23 reference to common law claims.

24 QUESTION: Well, but we've certainly held in
25 Medtronic and in that Cipollone case that State common law

1 actions can constitute requirements subject to preemption.

2 MR. HUDSON: Yes, Your Honor, there has a been a
3 holding that the common law can lead to a requirement. I
4 don't think that --

5 QUESTION: Can lead to? It is. I mean, they
6 are requirements, and I don't see why we should
7 necessarily create -- treat this statute differently in
8 that regard.

9 MR. HUDSON: Well, for a couple of reasons. The
10 language used in this statute is different than the
11 language used in both Cipollone and in Medtronic. In this
12 statute, Congress says that there may not be a State law
13 or regulation. In both Cipollone and Medtronic it was a
14 requirement which arose under State law and this Court
15 has, in a number of cases, not only in Cipollone but
16 following that in Medtronic, English v. GE, Goodyear v.
17 Miller, Silkwood, has explained that common law is a
18 traditional State area.

19 If we were to obtain a judgment in this case,
20 Brunswick would not be required to put a propeller guard
21 on any of its boats in any State, or in any jurisdiction.
22 It would have the discretion as a manufact --

23 QUESTION: Well, I -- isn't the whole purpose of
24 your punitive damage claim to require the manufacturer to
25 change his behavior?

1 MR. HUDSON: Even then --

2 QUESTION: Isn't that what you're going to argue
3 to the jury?

4 MR. HUDSON: Even then, Your Honor, it may not
5 be necessary that they actually install a propeller guard.
6 It may be enough that a warning be issued putting
7 consumers on notice that if you are thrown or fall out of
8 this boat there's a danger of this type of injury.

9 We assert in our complaint that they had this
10 knowledge, and they had --

11 QUESTION: Well, I take it that the main thrust
12 of your argument below is that the propeller guard should
13 have been installed. You're going to change the behavior
14 of the manufacturer. That's the whole justification, at
15 least for your punitive damage award, punitive damage
16 claim.

17 MR. HUDSON: To award compensation to the
18 injured victim is the first purpose. The punitive damage
19 claim is a heightened incentive to do the steps that are
20 necessary to protect persons who use the boats. It would
21 have that impact.

22 But as this Court acknowledged in Silkwood,
23 punitive damage is a customary part of the State common
24 law damage scheme and just because it's a punitive damage
25 claim married with a claim for general damages does not

1 create any heightened point of reference to preempt a
2 State law claim.

3 QUESTION: On that very point, if -- imagine
4 that the Coast Guard here had said what it didn't say, but
5 suppose it said we think that the guards on these
6 propellers are actually a greater danger than an unguarded
7 propeller because somebody can get hit on the head, and
8 that's a bigger chance of harm than the other, so suppose
9 because of that they'd said very clearly, we don't want
10 guards.

11 Now, on your view of the statute a jury would be
12 perfectly free to award punitive damages against the
13 manufacturer because he did the very thing that the Coast
14 Guard told him to do. Now, what sense would that make of
15 the statute?

16 MR. HUDSON: Under that reading it wouldn't make
17 sense, Justice Breyer, and I'd like to --

18 QUESTION: So how do you prevent -- how do you
19 read it your way, which is to say, it preserves common law
20 claims, and yet avoid what you've just said is a
21 ridiculous result?

22 MR. HUDSON: May I assume in your question that
23 you are referring to the Coast Guard adopting a regulation
24 saying thou shalt not have propeller guards, and then not
25 as a matter of preemption, but I think as a matter of the

1 Supremacy Clause and cases like American Airlines v.
2 Wollands and the case that was cited from 1907. If the
3 State attempts to do something it is in conflict with the
4 regulation by Supremacy Clause analysis --

5 QUESTION: What happens to your savings clause
6 here? You said that the savings clause preserves all
7 common law remedies and so why hasn't Congress, on your
8 view of it -- I mean, what then does the savings clause
9 mean? You started off pointing to that savings clause
10 which refers to common law and State law --

11 MR. HUDSON: Well --

12 QUESTION: -- and -- yes. So you see my
13 question.

14 MR. HUDSON: It's -- I think you have to go one
15 word further. Back in the savings clause it refers to
16 liability under common law or State law, is what is
17 preserved, and --

18 QUESTION: Well --

19 QUESTION: You mean, it reads punitive damages
20 out?

21 MR. HUDSON: No. I think it is -- that is a
22 liability claim under State law, but you asked what is the
23 purpose of the savings clause if you cannot bring a claim
24 that is diametrically opposed to a Federal regulation,
25 which is not our case.

1 I concede that if --

2 QUESTION: I'm trying to get your view on it. I
3 thought your view was that the common law was simply
4 preserved. Now I take it your view is that the common law
5 is simply preserved in the absence of a specific
6 determination by the Coast Guard. Is that your view?
7 That's a different view.

8 MR. HUDSON: No, sir, I think that is our view,
9 Your Honor.

10 QUESTION: So in other words your view is that
11 the savings clause does nothing if the Coast Guard --
12 it -- the savings clause is necessary, I guess, in your
13 view. It's just that this preempt -- a straight rule of
14 the Coast Guard preempts the tort remedy, but other than a
15 straight rule it doesn't, is that the view?

16 MR. HUDSON: Well, it depends on whether or not
17 there's a conflict, because if they say thou shalt not
18 have a propeller guard, then our claim would be barred.

19 QUESTION: Suppose it simply --

20 QUESTION: Well, but you told me that State
21 common law couldn't be a requirement and could never have
22 any preemptive effect, so you can't have it both ways.

23 MR. HUDSON: Well --

24 QUESTION: Now, I take it you're backing off
25 that position and you're saying, well, if it really is in

1 direct conflict, then maybe common law rules can in fact
2 be requirements or regulations under --

3 MR. HUDSON: Fortunately, that's not our case,
4 but I do --

5 QUESTION: No, but even if --

6 MR. HUDSON: I do concede --

7 QUESTION: Even if we think that, that doesn't
8 end the case for you because you have another theory here,
9 right?

10 MR. HUDSON: Well, our theory is that there is
11 no conflict.

12 QUESTION: No, but before you get to -- I
13 thought that your position was that the savings clause
14 requires us to read the statute in such a way that the
15 reference to regulations or standards does not necessarily
16 encompass every common law rule. Do you go any further
17 than that?

18 MR. HUDSON: No, we don't, Justice Souter.

19 QUESTION: Okay. Okay.

20 MR. HUDSON: That is statutory evidence, along
21 with some pretty extensive legislative history, that all
22 concerned thought that common law claims would survive
23 even after the adoption of this act. It is additional
24 authority for the proposition that what was preempted in
25 section 4306 were positive enactments under a State

1 legislative law on affirmative regulation.

2 QUESTION: And what do you do with the phrase,
3 or under State law? I didn't understand your --

4 MR. HUDSON: Justice Scalia, you backed up in
5 that statute.

6 QUESTION: You just say you have to read it with
7 the word --

8 MR. HUDSON: Liability.

9 QUESTION: -- liability. I don't -- that
10 doesn't make any sense to me. I don't --

11 MR. HUDSON: For example, Justice Scalia, in our
12 case we are bringing a negligence -- we have a negligence
13 count. We have a wrongful death count. The wrongful
14 death count is a statutory claim in Georgia. It's been in
15 existence for over 100 years, so that is a liability
16 claim -- that's certainly not common law. I don't think
17 wrongful death was recognized at the common law.

18 QUESTION: Well, you could call it a State
19 law -- it's positive State enactment rather than common
20 law -- couldn't you?

21 MR. HUDSON: The difference, I think, Chief
22 Justice, is it is not a law aimed specifically at boating
23 requirements. What Congress was addressing in 4306 was
24 acts and regulations enacted by a State and particularly
25 applied to boat safety. These are laws of general

1 application, much as has been said you might have a zoning
2 law or a general safety law. These are different from
3 what Congress preempted in the section under question.

4 QUESTION: Of course, that reference to State
5 law might be an indication that the only -- that the
6 general preemption clause should be read to mean that
7 there is no preemption unless there is a positive
8 enactment of Federal law. That might be one indication
9 of -- and that's not the way the Coast Guard read it right
10 after the act, after the passage of act, but it could mean
11 that too, couldn't it?

12 MR. HUDSON: I think that is the most logical
13 reading, because when you read 4306 in conjunction with
14 4305, what you are permitted to obtain exemption from if
15 you apply to the Coast Guard is from existing rules and
16 regulations of the Coast Guard.

17 Furthermore, if you read the statute where it
18 says at the conclusion, unless identical to a regulation
19 comprised under section 4302, that's surplus. If what
20 Congress intended to do was to say the only regulation
21 we're going to have are positive enactments of the Coast
22 Guard, then you don't need that language in the statute
23 that says, unless identical to the regulations prescribed
24 under this section.

25 QUESTION: Well, you could read it either way.

1 I mean, there's an ambiguity there.

2 I suppose you could read it as saying, all State
3 law goes unless the Coast Guard has adopted a regulation
4 and State law is identical to that regulation, or you
5 could read it as saying, all State law stays unless there
6 is a Coast Guard regulation and in that case the only
7 State law that stays is that which is identical. You
8 could read it either way, I suppose, textually.

9 The reference to State law in the savings clause
10 as distinct from common law might be an indication of
11 which of those two possible readings you should take, i.e.
12 that the State law is preserved in the absence of a
13 positive enactment with conflict.

14 MR. HUDSON: To that I would respond, Justice
15 Souter, that the former reading, why do you need State
16 laws that simply parrot an existing Federal regulation
17 that has been enacted by the Coast Guard.

18 QUESTION: Mm-hmm.

19 MR. HUDSON: The conduct is being regulated.

20 I would further say, if you have a statute that
21 can be read both ways under the clear and unambiguous
22 standard that this Court cites in every one of its
23 preemption cases, that in itself proves that at the very
24 least this would be an ambiguous statute.

25 QUESTION: If that's what we mean.

1 QUESTION: You don't -- we don't have to resolve
2 that question, I take it, to decide in your favor, because
3 the Government is taking the position, I assume, that the
4 Coast Guard is right when the Coast Guard says, we're the
5 only ones in the standard-setting business, so to reach
6 your common law claim we don't have to decide --

7 MR. HUDSON: That is correct, because from the
8 time of the enactment of the act and through the present
9 time the Coast Guard has never taken the position that
10 common law claims of general application of State laws are
11 preempted.

12 QUESTION: May I ask you about the -- whether
13 the Georgia -- the question of Georgia law of -- to
14 introduce to this jury the fact that the Coast Guard did
15 not make a regulation requiring propeller guards would be
16 relevant, wouldn't it?

17 MR. HUDSON: At least the underlying facts that
18 caused the Coast Guard not to do anything, and the Coast
19 Guard to decide not to do anything because they couldn't
20 come up with a common solution and it might expensive and
21 the data was incomplete.

22 Now, the study committee said some other things,
23 but the Coast Guard letter was general in that nature.

24 Yes, I think the underlying facts about whether
25 propeller guards are safe or not safe do come into

1 evidence.

2 QUESTION: And the fact that the Coast Guard
3 that has set other standards didn't set this one.

4 MR. HUDSON: Yes, I think that could, because it
5 will be a very limited application, even when it comes in,
6 because the Coast Guard's action was very narrow in scope,
7 the letter that adopted the position of the subcommittee
8 that studied propeller guards.

9 QUESTION: Mr. Hudson --

10 QUESTION: Are you responding to Justice
11 Ginsburg's question by saying what you think is desirable,
12 or what you feel you know about the Georgia law of
13 evidence?

14 MR. HUDSON: Well, I think I do know that much,
15 Your Honor. In product liability cases in Georgia there's
16 a recent supreme court decision we cite in our brief, and
17 it allows all of these factors to come into evidence,
18 whether they are other designs, whether they are Federal
19 regulations, or Federal authorities. The whole mix goes
20 into the jury's determination of whether or not this was
21 too dangerous for use under this application.

22 QUESTION: Mr. Hudson, 4305 is discussed in all
23 the briefs. I can't find it set forth anywhere. Is it
24 set forth in any of your submissions?

25 It's very annoying to have a lot of discussion

1 going on about a particular statutory provision and you
2 look in the materials in front of you and it's just not
3 there.

4 Is it in the red brief?

5 MR. HUDSON: Your Honor, I can't -- we'll look
6 in the blue brief. I think 4305 is the statute that
7 allows the regulations to be established. Other than the
8 fact that --

9 QUESTION: It's the one that permits the State
10 to apply --

11 MR. HUDSON: For an exemption.

12 QUESTION: For an exemption.

13 MR. HUDSON: Okay. That's right.

14 QUESTION: Right.

15 MR. HUDSON: It's -- if we haven't set it forth,
16 Your Honor, that's an oversight, but it simply says the
17 Coast Guard can grant an exemption from an existing act or
18 a regulation that the Coast Guard has adopted, not an
19 exemption from the wiping-of-the-slate clean notion that
20 Brunswick submits in this case.

21 QUESTION: Well, I'm still looking for it.

22 MR. HUDSON: I'd like to reserve the balance of
23 my time.

24 QUESTION: Very well, Mr. Hudson.

25 Mr. Frederick, we'll hear from you.

1 ORAL ARGUMENT OF DAVID C. FREDERICK
2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONERS

4 MR. FREDERICK: Thank you, Mr. Chief Justice,
5 and may it please the Court:

6 Justice Scalia, it's at page 2 of the red brief.
7 Actually, sorry, page 1 of the red brief, 4305.

8 We agree with petitioners that common law claims
9 are not expressly preempted or impliedly preempted by
10 Coast Guard regulations that don't exist in this case.
11 Congress had two very good reasons to differentiate
12 between positive law enactments and common law remedies
13 that might be available.

14 The first is that common law remedies give
15 manufacturers a choice as to whether or not they would
16 change their product design or to install some particular
17 equipment. They could make a cost-benefit analysis of
18 whether assuming the risk that their product might cause a
19 danger and thereby incur liability is worth the cost of
20 redesigning the equipment or putting on some type of
21 propeller guard, and that --

22 QUESTION: What about punitives?

23 QUESTION: We've heard that argument before. We
24 heard it in Cipollone. We hear it in every case where the
25 issue is whether common law remedies are precluded, and we

1 have not found it persuasive.

2 MR. FREDERICK: Well, Justice Scalia --

3 QUESTION: I mean, it's true, you can roll the
4 dice if you like. I suppose you can say the same thing
5 about an explicit regulatory prohibition and there's
6 especially very little difference when you have punitive
7 damages.

8 I mean, I could ignore a regulation, too, can't
9 I, and say it's a cost of business. A cost of doing
10 business is now and then I'll get picked up for violating
11 the regulation. It's worth it. I can say that about a
12 regulation just as well as about a common law liability.

13 MR. FREDERICK: Justice Scalia, I'm trying to
14 set forth the reasons why in 1971, when Congress enacted
15 this statute, it may have differentiated it. The second
16 is that it legislated against a backdrop, the historical
17 traditions of the country that if people were injured they
18 would have the ability to bring a tort claim, and so the
19 words that it used in setting out in sections 4302, 4306,
20 and 4311(g) used words that suggest positive law
21 enactments would be preempted in 4306 and that common law
22 liability would be saved --

23 QUESTION: Is that true even if the Coast Guard
24 has a particular rule? I mean, suppose the Coast Guard
25 said, look, this is obviously a tough question whether you

1 should have propeller guards or not. People are killed
2 both ways, and if the -- you don't want to make a mistake.
3 So the Coast Guard says, we don't want it. We think more
4 people are killed with the propeller guards than without.

5 Are you saying under those circumstances in your
6 view a State is perfectly free to award \$50, \$60, \$100
7 million in punitive damages for doing the very thing the
8 Coast Guard said not to do?

9 MR. FREDERICK: No. We think implied conflict
10 preemption --

11 QUESTION: Ah.

12 MR. FREDERICK: -- principles would be
13 applicable.

14 QUESTION: So in other words it's just the fact
15 they don't have a particular reg here that this turns on,
16 in your opinion.

17 MR. FREDERICK: Well, the savings clause should
18 not be read to eviscerate the power that Congress gave the
19 Coast Guard to promulgate affirmative regulations, so that
20 if in exercising that power that Congress gave the Coast
21 Guard the Coast Guard promulgates a regulation that
22 prohibits propeller guards, it would be anomalous to read
23 the savings clause to bring it into conflict with that.

24 QUESTION: So if they have a reg -- suppose they
25 do have a reg.

1 MR. FREDERICK: Yes.

2 QUESTION: In your view, should we look to see
3 whether that reg, there's a direct conflict with the State
4 law or common law State -- you know, the tort judgment,
5 whether it -- the State tort judgment would defeat an
6 object of the reg, or whether the state judgment would be
7 in an area that the reg clearly intends to reserve to the
8 Coast Guard -- that's your view of it?

9 MR. FREDERICK: That's correct. All of the --

10 QUESTION: Okay. If that's your view of it, why
11 doesn't that apply -- and I think maybe that is a
12 perfectly good view. Why doesn't that just as much apply
13 to a State positive regulation as it would to a tort
14 action?

15 MR. FREDERICK: Because in 4306 the words that
16 Congress used, it started out by saying, unless permitted
17 by the Secretary, and everything else follows. It uses
18 terms that parallel the terms that were used in 4302 which
19 allow the Secretary to prom -- to establish a safety
20 standard.

21 If you then look at 4306 you see the parallel
22 reference to, a State shall not be allowed to do a law or
23 regulation that establishes a standard or in 4302(a)(2) it
24 says, or impose a requirement or require a -- an
25 associated equipment device.

1 You then look at 4306. After the or, it says,
2 or impose a requirement for associated equipment.

3 In our view, the language the Congress used in
4 4302 was to say, these are the things that the Secretary
5 is authorized to issue regulations about, and then in 4306
6 it says, unless the Secretary permits, a State can't do
7 those things which the Secretary is empowered to do in
8 4302, and --

9 QUESTION: The trouble I find with this
10 analysis, that you rely just on implied preemption for
11 common law, is that would be very peculiar in a statute
12 which in 4306 insists that the State law be identical,
13 that the State regulation, at least, be identical to the
14 Federal law.

15 I mean, it's really saying, we don't want any
16 State regulation unless it's the very same one.

17 MR. FREDERICK: Well, to the contrary, Justice
18 Scalia.

19 If a regulation that a State promulgates is
20 written in words that are going to be easily compared with
21 a Federal standard it would be very easy to determine
22 whether it was identical or not identical.

23 And the fact that Congress used the phrase,
24 liability under common law in the savings provisions
25 4311(g), but did not use the phrase, common law to show

1 that which was to be preempted in 4306 is further textual
2 support for our view that those things which were to be
3 preempted in 4306 were positive enactments of State law
4 that would be done by State executive officers because, in
5 fact, they will have to apply to the Secretary for the
6 exemption from a preemption, and they are the ones who
7 have to seek that authority in order to keep that in
8 place, so it is true that --

9 QUESTION: Why would a State want to have a
10 regulation that was identical with the Federal regulation?

11 MR. FREDERICK: Mr. Chief Justice, the history
12 of it is that the Coast Guard recognized that it lacked
13 the resources in order to enforce all of these provisions
14 with the tens of millions of boats that were out there, so
15 in fact when the Commandant of the Coast Guard testified
16 he urged Congress to provide a scheme that would allow
17 States to promulgate parallel -- an identical regulation
18 so that State enforcement officers could go and help with
19 the enforcement of the safety standards.

20 QUESTION: The States couldn't help enforce the
21 Coast Guard regulation?

22 MR. FREDERICK: It wasn't clear at the time
23 whether in the absence of that explicit authority and
24 provision that State officers would have the incentive or
25 necessarily the power to do that, so when the Commandant

1 of the Coast Guard testified before the Senate committee
2 he made very clear that what the concern that the Coast
3 Guard had was the positive enactments that would be
4 conflicting with State law.

5 And he also made clear in response to a written
6 question that was given to him in advance of his testimony
7 so he had additional time to think about it that private
8 remedies would be available to people if they were injured
9 as a result of an unsafe device that was put on a boat.

10 So we think the legislative history, the
11 structure and the text make very clear that what Congress
12 was intending to do in 4306 was to deal with State
13 positive law enactments.

14 I would like to address, briefly address the
15 respondent's theory of the savings clause, because in our
16 view it doesn't really make that much sense. They have
17 two theories.

18 The first is that the savings clause was
19 intended to make clear that there was to be no affirmative
20 defense. In our view, that is incorrect, because it was
21 black letter law in 1971. It was in the Second
22 Restatement of Torts in section 288(c), which was
23 published by the American Law Institute in 1965.

24 The compliance with a legislative enactment or a
25 regulation would not relieve someone of liability if a

1 reasonable person acting under the same or similar
2 circumstances would do otherwise.

3 So that theory for the savings clause really
4 doesn't make much sense. There would have been no need
5 for Congress to have added a specific savings provision.

6 The second theory that they have is that the
7 savings clause was intended to save against breach of
8 warranty or manufacturing defect claims. Well, that
9 theory in our view doesn't make any sense because you
10 can't read 4306 to preempt those things, so --

11 QUESTION: Do you think the American Law
12 Institute always represents what is the view in almost all
13 of the States? That hasn't been my experience.

14 MR. FREDERICK: Well, I think --

15 QUESTION: I mean, I think there would be real
16 reason to put that in just in case a number of States were
17 following it.

18 MR. FREDERICK: Justice Scalia, even if you were
19 to say that what Congress was intending to do was to put
20 the ALI's view right into law, the words that Congress
21 used made very clear that general provisions of common law
22 liability are to be preserved, because it didn't say
23 liability under common law, especially breach of warranty
24 or product defect claims. It didn't create the kind of
25 textual limitation that the respondents would read into

1 the savings clause.

2 So I think that if you look at the way that
3 respondent's theory spells, you know, out what the savings
4 clause was intended to do, there really wouldn't be that
5 much of a reason to do it, and --

6 QUESTION: What do you do --

7 QUESTION: What do you do with -- oh.

8 MR. FREDERICK: Thank you.

9 QUESTION: Thank you, Mr. Frederick.

10 When we return at 1:00, Mr. Geller, we'll hear
11 from you.

12 (Whereupon, at 12:01 p.m., the Court recessed.)

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1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: Mr. Geller, we'll hear
4 from you.

5 ORAL ARGUMENT OF KENNETH S. GELLER

6 ON BEHALF OF THE RESPONDENT

7 MR. GELLER: Thank you, Mr. Chief Justice, and
8 may it please the Court:

9 We heard 25 minutes of argument this morning
10 from the plaintiffs and the Solicitor General explaining
11 why it's perfectly permissible for the State of Georgia
12 through its common law to impose a requirement that boats
13 be equipped with propeller guards, but if Georgia can do
14 this, then presumably South Carolina could through its
15 common law impose a requirement that boats not be equipped
16 with propeller guards for the reasons that, as the Coast
17 Guard found, they make boats less safe.

18 Now --

19 QUESTION: Well, excuse me. I didn't know that
20 the Coast Guard had found that at all. The Solicitor
21 General's brief sets out a portion of the Coast Guard's
22 letter stating the reason that it was going to take no
23 actions. This is on page 7 of the SG's brief. At least
24 in the excerpt there the Coast Guard didn't make any such
25 finding. Is there more material?

1 MR. GELLER: No, there's no -- I should say the
2 Coast Guard was relying, I believe, on unanimous
3 recommendations from the -- from its Subcommittee on
4 Propeller Guards and from the National Boating Safety
5 Advisory Council, each of whom had found that the use of
6 propeller guards would demonstrably make boating less
7 safe, and the Coast Guard --

8 QUESTION: Well, that's right, but the Coast
9 Guard --

10 MR. GELLER: The Coast Guard --

11 QUESTION: -- gave its reasons. I mean, it said
12 there was a deficiency of accident data, the difficulty of
13 coming up with a single model, and so on. It didn't, as I
14 understand it, adopt any finding that in fact it would be
15 more dangerous in some cases --

16 MR. GELLER: That's --

17 QUESTION: -- so I don't think we can attribute
18 that to the Coast Guard.

19 MR. GELLER: That's true, Justice Souter,
20 although it did find -- it did agree with the
21 recommendations of the underlying committees that it
22 shouldn't impose a prop guard requirement.

23 But my point is simply that the accident in this
24 case occurred on a body of water that forms part of the
25 border between South Carolina and Georgia, and the

1 plaintiffs and the Solicitor General don't bother to
2 explain how a manufacturer could possibly build a boat
3 that could operate on that body of water and still comply
4 with these divergent State law.

5 QUESTION: What if there had been no Federal
6 statute at all? A boat manufacturer would still have a
7 difficult time complying with both --

8 MR. GELLER: Yes.

9 QUESTION: -- South Carolina and Georgia law
10 were they different.

11 MR. GELLER: But it was the very purpose of this
12 statute, Mr. Chief Justice, the very purpose of this
13 statute to avoid that sort of a problem. In fact, the
14 Senate report specifically says in this case it assures
15 that manufacturers for the domestic trade will not -- will
16 not involve -- will not have to worry about compliance
17 with widely varying local requirements. That's our
18 precise point. It was the purpose of this statute to
19 avoid a situation --

20 QUESTION: Well, yes, but the Coast Guard did
21 not, in fact, adopt a regulation on this specific device,
22 and I don't know that South Carolina has a different rule.
23 Does South Carolina have common law principles that say
24 you must have a propeller guard?

25 MR. GELLER: No, it doesn't, and no, I think

1 that would be preempted if it did as well. My point is
2 simply to explain why there's a need for a national
3 uniform rule here, which Congress recognized in passing
4 this statute. It's so you have one single rule that
5 manufacturers can follow throughout the United States.

6 QUESTION: Yes, but it clearly envisions that
7 the Coast Guard might not take action with regard to the
8 whole universe of possible actions it could take, and we
9 have a situation here where it didn't take action.

10 MR. GELLER: But the language --

11 QUESTION: And that may leave open some room for
12 application of State law.

13 MR. GELLER: I think that the language of the
14 preemption provision, Justice O'Connor, specifically
15 addresses the situation and provides, as the Solicitor
16 General acknowledges, the Coast Guard has always
17 interpreted the provision according to its plain -- the
18 Coast Guard has always interpreted the provision according
19 to its plain language to preempt State law involving
20 design and equipment requirements even in the absence of a
21 Coast Guard regulation because of this congressional
22 desire to have uniform national requirements.

23 In fact, this act was passed in 1971. The day
24 after the act was passed -- the day after -- the Coast
25 Guard issued a regulation under section 4305 exempting all

1 existing State requirements from preemption, because --

2 QUESTION: Well, of course, that included, as I
3 understand it, State regulatory requirements in the narrow
4 sense, so that it did not necessarily imply that the Coast
5 Guard thought that it was necessary to do that to preserve
6 any State common law.

7 MR. GELLER: There was no -- it simply exempted
8 all existing State requirements. There was no specific
9 discussion of statutes, regulations, common law. The
10 point is --

11 QUESTION: Right, and that's -- I mean, my only
12 point is, I don't think you can infer from that that the
13 Coast Guard ever took the position that a common law
14 requirement was, in fact, preempted.

15 MR. GELLER: No. I'm taking from that the
16 understanding, which has been in existence since the
17 beginning of the statute, that even in the absence of a
18 regulation section 4306 would provide for preemption of
19 State law. That was the point that I think comes through
20 clearly.

21 QUESTION: Mr. Geller, doesn't it -- it's a
22 little unrealistic to talk about a requirement imposed by
23 State law anyway.

24 It's not as though -- I mean, even within the
25 State of South Carolina a manufacturer wouldn't know

1 whether to put on or off the propeller guard, because one
2 jury, the first jury may find it was negligent not to have
3 it, and that -- certainly that finding that it was
4 negligent not to have a propeller guard does not prevent a
5 subsequent South Carolina juror, jury from finding that it
6 was negligent to have a propeller guard, isn't that right?

7 MR. GELLER: That's true. That's why it seems
8 completely irrational for Congress to have prohibited
9 State legislatures or State boating commissioners from
10 entering this area, because it was concerned about the
11 need for national uniform regulation, one rule that every
12 manufacturer could follow throughout the United States,
13 and to create an exception for common law rules, which is
14 I think the point that Justice Breyer made last year in
15 his separate opinion in Medtronic, but --

16 QUESTION: But isn't the argument for exception
17 oddly enough supported by the advisory committee's report
18 here, and that is that the designs of boats vary so
19 enormously that it would be difficult, if not impossible,
20 to have a uniform rule in the sense of saying, all boats
21 should have propeller guards, or all boats should have
22 this kind of propeller guard.

23 The kind of multifarious context here suggests
24 exactly what common law adjudication was intended to
25 serve, and that is quite fact-specific adjudications when

1 no uniform rule really could sensibly be written to cover
2 it.

3 MR. GELLER: Two requirements, Justice -- two
4 responses, Justice Souter. The first is I think that
5 misstates what the advisory committee, commission did
6 here. It tested every type of propeller guard in
7 existence, and it concluded that there was no feasible
8 workable propeller guard that could be used on any type of
9 motor boat, so I don't think it's fair to say that it
10 simply said there wasn't one that could be used on every
11 boat. It tested every single --

12 QUESTION: Well, I thought they -- and you know
13 this better than I do. I thought they said that in some
14 cases the guard would in fact make it much more dangerous
15 than it was.

16 MR. GELLER: Exactly.

17 QUESTION: But not in all cases.

18 MR. GELLER: In every case in which a motor boat
19 was going more than 10 miles an hour. In other words,
20 they didn't find any application in which it would be safe
21 to require that a motor boat be equipped with a propeller
22 guard.

23 But the second answer to your question, Justice
24 Souter, frankly is that this is an argument that I
25 think -- and Justice Scalia said this this morning -- the

1 Court has heard many previous times when faced with
2 statutes of this type and has never drawn an exception
3 between statutory requirements and common law
4 requirements.

5 QUESTION: But we have emphasized the language
6 in the particular statutes.

7 MR. GELLER: Yes, and the language in this
8 statute I think is indistinguishable, Justice Stevens,
9 from --

10 QUESTION: Does it have the word requirement in
11 it?

12 MR. GELLER: Yes. The list -- this statute
13 does. In fact, it might be useful to focus on the
14 specific language at issue here, because I think it
15 answers a lot of questions. The section --

16 QUESTION: Mr. Geller, as you do that --

17 MR. GELLER: Yes.

18 QUESTION: -- can you tell me if there's another
19 statute that uses the word, minimum safety standards,
20 because I thought that gave some kind of a tone to it.

21 MR. GELLER: Yes. The statute, for example,
22 that was at issue in Ray v. Atlantic-Richfield, which this
23 Court considered 20 years ago, had that very language in
24 there, and the Court said that didn't mean there was no
25 preemption. It simply meant the manufacturers --

1 QUESTION: No, everyone agrees that there's a
2 preemption pro tanto. That is, to the extent the Coast
3 Guard has a standard, the State can't have a different
4 one.

5 MR. GELLER: Yes.

6 QUESTION: But the word minimum suggests to me
7 that there could be other things, that every --

8 MR. GELLER: What the Court --

9 QUESTION: That those standards must be
10 followed, but there could be additional standards.

11 MR. GELLER: That's not the argument -- the
12 Court rejected that very argument in Ray v. Atlantic-
13 Richfield, Your Honor. They're minimum in the sense that
14 manufacturers could add to them. They're not minimum in
15 the sense that States could add to them. That would
16 make -- there would be no reason for preemption if they
17 were -- if that reading of minimum standards were correct.
18 There would be no reason to have a preemption clause in
19 there.

20 QUESTION: The reason could be that these
21 standards are in place, but we're not saying that that's
22 the universe, that there can't be liability apart from
23 these standards.

24 Let me ask you something just as a matter of
25 updating. As I understood the propeller guard, it wasn't

1 dead, that there's still current consideration in the
2 Coast Guard?

3 MR. GELLER: Yes. Yes, absolutely.

4 QUESTION: Where -- what is the status of that
5 now?

6 MR. GELLER: As recently as last August, Justice
7 Ginsburg, the Coast Guard again asked for comments from
8 people as to whether there would be a workable type of
9 propeller guard that the Coast Guard could consider.

10 QUESTION: And that's just --

11 MR. GELLER: They haven't yet issued any
12 regulation presumably because they haven't yet been
13 satisfied that they can meet the standards of 4302, which
14 is to say that the requirement that the propeller guard
15 would actually advance the interest of boat safety.

16 QUESTION: All we know is that they asked again.

17 MR. GELLER: Yes.

18 QUESTION: And we don't know anything about the
19 answers.

20 MR. GELLER: No. I don't believe anything has
21 happened since August of 1997.

22 Let me just focus if I could the Court on the
23 language of 4306. It's reprinted in a number of different
24 places, including page 6 of the red brief, and it's
25 helpful to focus on the language. This language, Justice

1 Stevens, is I think identical in respect to the language
2 that the Court had before it in Medtronic and in
3 Cipollone.

4 Section 4306 has a broad requirement that -- broad
5 preemptions that the State may not establish or enforce a
6 law imposing a requirement for associated equipment, which
7 is -- no one disputes that a propeller guard here is
8 associated equipment, and the Court has held in Cipollone,
9 in Easterwood, in Norfolk and Western Railway, in
10 Medtronic, that the word requirement in those very similar
11 statutes includes common law claims.

12 In fact, I don't know of any case in this Court
13 that has ever construed the word requirement to include
14 only positive law, and the Court on a number of occasions
15 has rejected that very argument. The Court --

16 QUESTION: Well, you take --

17 QUESTION: A law or regulation establishing --

18 MR. GELLER: Law or --

19 QUESTION: A law or regulation establishing --

20 MR. GELLER: Yes. I think the --

21 QUESTION: -- the requirement?

22 MR. GELLER: I think the language in Medtronic
23 was very, very similar. The law here is the common law,
24 which establishes a requirement for associated equipment.

25 QUESTION: Well, you take the position, Mr.

1 Geller, that regardless of whether -- what we think of the
2 action or inaction of the Coast Guard on this propeller
3 guard business that any common law requirement for a
4 propeller guard by a State is preempted, no matter what
5 the Coast Guard has done --

6 MR. GELLER: That's right.

7 QUESTION: -- or hasn't done.

8 MR. GELLER: Because I think that section 43 --
9 section 4306 enacts a general preemption rule that says no
10 State can impose a requirement for associated equipment.
11 Now, there are --

12 QUESTION: So if the Coast Guard had never even
13 studied the problem, nothing had been done --

14 MR. GELLER: Absolutely. For the purposes of --

15 QUESTION: -- you take the position it's still
16 preempted.

17 MR. GELLER: Yes, for purposes of our express
18 preemption.

19 Now, here we have a very powerful implied
20 preemption argument as well, which I'll get to in a
21 minute, Justice O'Connor, because the Coast Guard did do a
22 thorough study, but that's right, and this is, of course,
23 the way the Coast Guard has interpreted this statute over
24 the years.

25 QUESTION: What sense would that make? I mean,

1 you bring me along a lot when you say, unless we read the
2 word requirement to include tort action --

3 MR. GELLER: Yes.

4 QUESTION: -- then you would have a Coast Guard
5 explicit rule and a State could have a tort case that
6 would force the opposite. That would make no sense. I
7 accept that --

8 MR. GELLER: That would make no sense.

9 QUESTION: -- at least for argument. But
10 doesn't it also make no sense to say, if the Coast Guard
11 doesn't do anything, does nothing whatsoever, that then
12 you couldn't have any State tort law in the area?

13 MR. GELLER: You couldn't have any --

14 QUESTION: I mean, I can understand why Congress
15 might have said, if the Coast Guard does nothing at all,
16 still the States aren't supposed to sit there and write
17 rules out on a piece of paper, but I just can't understand
18 why Congress would have said, if the Coast Guard does
19 nothing at all, all of State tort law goes up in smoke.

20 MR. GELLER: Not all of State tort -- I think
21 the breadth of this argument has been grossly overstated,
22 Justice Breyer. The States have a large role to play
23 under the Boat Safety Act, but in terms of boat safe use
24 and operation, boater education, boat numbering, tort law
25 can apply in case of manufacturing defects involving

1 boats, and --

2 QUESTION: No, no, but why would Congress have
3 wanted to --

4 MR. GELLER: Yes, and --

5 QUESTION: -- say that no State tort law for the
6 basic hornbook classic negligence --

7 MR. GELLER: Of design. Design.

8 QUESTION: -- of design, any of that stuff when
9 the Coast Guard does nothing.

10 MR. GELLER: Because, as Congress said -- as
11 Congress said, there has to be a uniform national rule for
12 design requirements. You can't build a boat, one boat for
13 South Carolina and another boat for Georgia, and that's
14 precisely --

15 QUESTION: Well, I take it -- I take it that an
16 additional answer to Justice Breyer -- maybe you don't
17 want -- is that this didn't preempt all State tort law
18 automatically because the Coast Guard could and, in fact,
19 did leave much of it in place, and in the States.

20 MR. GELLER: Absolutely. In fact, I want to
21 turn --

22 QUESTION: Under 430 -- 05.

23 MR. GELLER: 4305. 4305, Justice Kennedy.
24 That's exactly right. I think if you look at section
25 4306, which I keep wanting to bring the Court back to

1 because that's the issue in this case, is how to interpret
2 that provision, there are a number of exceptions that
3 Congress has written into the preemption provision.

4 There's a general preemption provision of State
5 design requirements for the reasons I gave, that there has
6 to be uniformity in design requirements. You can't
7 have -- you have to have a single national rule, which is
8 precisely what the Senate report says. It assures that
9 manufacturers will not have to worry about compliance with
10 widely varying local requirements.

11 And then there are three exceptions to narrow it
12 in section 4306. First of all, as Justice Kennedy said,
13 the Coast Guard can draft an exemption to allow States to
14 have a rule involving design of boats.

15 Second, even when the Coast Guard hasn't granted
16 an exemption --

17 QUESTION: Are we talking about 4306 or 4305?

18 MR. GELLER: Yes, 4306. 4305 allows the Coast
19 Guard to grant the exemption, but it's -- 4306 says that
20 there's a general preemption of State requirements
21 involving the design and equipment of boats, but the Coast
22 Guard can grant an exemption to the States.

23 Secondly, the States can operate -- their State
24 law can operate to meet some uniquely hazardous local
25 condition, and third, the States are allowed to enforce

1 their law about the design of boats to the extent that it
2 is identical to a regulation promulgated by the Coast
3 Guard, and the scheme of this is obvious.

4 The Coast Guard is supposed to promulgate the
5 rules that tell manufacturers what they have to do in
6 order to build a boat, a recreational boat in interstate
7 commerce, and the States can enforce -- if the State law
8 is identical to it, the States can participate in the
9 enforcement. So if a boat is built out of compliance with
10 Federal design requirements, there can be a State law
11 remedy, but the States can't add to the requirement.

12 So that they -- so that here, for example, you
13 know, you could have a State requirement that has -- that
14 it requires that boats be built with propeller guards.
15 That would be a requirement only for one State. It would
16 dictate the national rule and, if a State had a contrary
17 rule, you couldn't sell a boat in interstate commerce,
18 because one State could say you had to have one type of
19 requirement, another State could say you have to have
20 another.

21 The idea of this was to have a uniform national
22 rule, and as -- the Court actually confronted a case
23 almost precisely like this 20 years ago, Ray v. Atlantic
24 Richfield. That was a case in which Congress passed a
25 statute that promulgated -- that authorized the Coast

1 Guard to promulgate design requirements for tankers, and
2 the Coast Guard in fact did.

3 It promulgated a long list of design
4 requirements for tankers, and then the State of Washington
5 came in and passed a statute that said, if you want to
6 operate in Puget Sound, you also have to follow the
7 following three additional design requirements. You have
8 to have double hulls, you have to have two radar, working
9 radar, and this Court held that that statute was
10 preempted. It was preempted actually in the absence of an
11 express preemption provision.

12 But the reason the Court gave is -- applies here
13 like a glove. The Court said, enforcement of these State
14 requirements would frustrate what seems to us to be the
15 evident congressional intent to establish a uniform
16 Federal regime controlling the design of oil tankers.
17 This is 435 U.S. at page 151.

18 It's precisely the same thing here. In fact,
19 here there's even more evidence that that's what Congress
20 wanted to do, because there's an express preemption
21 provision that says that that's what they're trying to do.

22 QUESTION: Well, but you also have the savings
23 clause, 4311, and --

24 MR. GELLER: Yes. Let's talk about the savings
25 clause.

1 QUESTION: -- its reference to common law and
2 State law cuts the other way, I --

3 MR. GELLER: I don't think a fair reading of the
4 savings clause cuts the other way, Justice O'Connor, but
5 let's look at that as well. This is on page 2 of the red
6 brief.

7 What it literally says -- what it literally says
8 is that compliance with a Federal regulation or order does
9 not relieve a person from liability at common law or under
10 State law, and the legislative history uses almost the
11 exact same language to describe what Congress was trying
12 to do here.

13 What Congress was trying to do here, quite
14 specifically, and it says it literally, is that in those
15 areas where State law still has a role to play, areas that
16 are not preempted, it is not a defense to that State law
17 claim that you've complied with the Federal regulation.

18 That's precisely what this says, and that's all
19 that this says. It says nothing about preemption, and if
20 it were truly a savings clause intended to create a gaping
21 hole in section 4306, you'd think it would have been put
22 in section 4306.

23 QUESTION: What does it apply to? Give me a few
24 examples.

25 MR. GELLER: One example might be, Justice

1 Scalia, if a State had a design requirement that was not
2 preempted because it was intended to deal with uniquely
3 hazardous local conditions. That's not preempted under
4 section 4306. Or the State may have a design --

5 QUESTION: Yes, but by the same token you don't
6 need a savings clause.

7 MR. GELLER: You need a savings clause, Justice
8 Souter, for fear that the -- that it might be perceived
9 under State law that it's a complete defense that you've
10 complied with the Federal regulation.

11 QUESTION: Yes, but that would be a bizarre
12 reading of the preemption clause.

13 QUESTION: I don't think you really need it for
14 that. Do you have any other examples?

15 MR. GELLER: Yes. Well, I think actually,
16 Justice Scalia, that's precisely what the legislative
17 history again says this was trying to do, because when it
18 discusses the savings clause, which I should say was added
19 at the last minute --

20 QUESTION: You're talking to me?

21 (Laughter.)

22 MR. GELLER: I'm talking to the Court.

23 But it does explain what this -- what 4311(g) is
24 intended to do. It says, of course, in describing 4311(g)
25 and the reason they put it in, of course, depending on the

1 rules of evidence of the particular judicial forum, such
2 compliance -- in other words, compliance with Federal
3 regulations -- may or may not be admissible for its
4 evidentiary value.

5 In other words, they couldn't possibly have been
6 talking about Federal preemption there. They were talking
7 about State rules, and contrary --

8 QUESTION: What would happen in a case that --
9 let's assume that there is fairly clear preemption. The
10 Coast Guard says, no propeller guards, and this boat has
11 no propeller guards, and the accident happened. Could the
12 plaintiff sue for failure to warn?

13 MR. GELLER: I think that that claim would --
14 the failure to warn about the absence of propeller guards?

15 QUESTION: About the absence, yes.

16 MR. GELLER: I think -- I think that would
17 probably be preempted as well because of the effect it
18 would have on manufacturers to build their boats to -- in
19 other words, the failure to warn would have to warn about
20 some dangerous, perhaps defective condition that --

21 QUESTION: I looked at the complaint briefly. I
22 didn't see a failure to warn --

23 MR. GELLER: There isn't a failure to warn claim
24 in this case --

25 QUESTION: -- allegation here.

1 MR. GELLER: -- and it's an interesting
2 question. I'm not sure that I know the right answer, but
3 I think the argument would be that if you allowed failure
4 to warn claims in that situation it would impose pressure
5 on manufacturers to put on the device that would eliminate
6 the need to make the warning, and that would be a --

7 QUESTION: Oh, no. It would just -- it would
8 make them warn. It would make them put labels on.

9 MR. GELLER: There are warning requirements in
10 the act as well, Federal warning requirements, and it may
11 be that those would preempt a State warning requirement,
12 but that's not what we have here. This is a pure design
13 requirement.

14 They're saying this boat is defective because it
15 didn't have a propeller guard, and what I'm saying is that
16 section 4306 addresses that question precisely and says
17 that the -- what equipment a boat operating in interstate
18 commerce should have is a question reserved to the Coast
19 Guard.

20 QUESTION: Well, Mr. Geller, it's -- you say
21 that a propeller is regarded as associated equipment for
22 the board --

23 MR. GELLER: Yes.

24 QUESTION: -- for the boat?

25 MR. GELLER: Yes.

1 QUESTION: It's not a part of the boat itself.

2 MR. GELLER: It's defined in Coast Guard
3 regulations as associated equipment.

4 QUESTION: So there's a little bit different
5 language about associated equipment than there is for the
6 vessel itself, isn't there? One says, imposing a
7 requirement for associated equipment, and for the boat it
8 says, enforce a law or regulation establishing performance
9 or other safety standard.

10 MR. GELLER: Right, and we are relying -- this
11 case involves the section of 4306 that talks about
12 imposing a equipment for associated --

13 QUESTION: A requirement.

14 MR. GELLER: A requirement for associated
15 equipment, that's right.

16 QUESTION: Mr. Geller, can I come back and ask
17 you for another example of how the savings clause would
18 apply State law, other than a State law that had been
19 exempted under 4305?

20 MR. GELLER: There are many types -- first of
21 all, I'm not sure that Congress necessarily had in mind a
22 specific situation. They were told --

23 QUESTION: I don't need many. Just give me a
24 couple.

25 MR. GELLER: Yes. Any case in which State law

1 has a role to play. There could be a tort claim that the
2 boat was defectively manufactured because something was
3 done in a particular way and the --

4 QUESTION: But --

5 MR. GELLER: -- suggestion is that you shouldn't
6 allow the preemption provision to be broadened beyond
7 Congress' intent by allowing the defense to argue that
8 mere compliance -- mere compliance with the Federal
9 regulations is a defense under State law.

10 QUESTION: But unless the defective manufacture
11 claim dealt with the manufacture of the propeller --

12 MR. GELLER: Yes. I mean, it could have. It
13 could have. I mean, in other words --

14 QUESTION: It seems to me it would be preempted
15 anyway. I just don't see any realistic situation in which
16 the savings clause would apply, other than when there's
17 been an exemption, which I don't find --

18 MR. GELLER: Well --

19 QUESTION: -- terribly persuasive.

20 MR. GELLER: That's one example, but you have to
21 remember, Justice Scalia, this was added at the last
22 minute. This was not part of the original bill. It was
23 stuck in at the Senate committee level at the last minute
24 because someone suggested there might be a problem here,
25 let's put this in, but --

1 QUESTION: Mr. -- finish your answer. I'm
2 sorry.

3 MR. GELLER: But the other key point -- I mean,
4 I think the Achille's heel of the plaintiffs' and any
5 attempt to rely on section 4311(g) is that it doesn't
6 distinguish at all between common law and State law.

7 I think the Court would have to commit an
8 unnatural act with that language to draw a distinction
9 between the common law and State law for purposes of
10 preemption, and if -- and if it saved all State law, which
11 is the only logical reading of it, if it saves common law
12 claims, if it saves State law claims there's no preemption
13 at all. It eliminates completely section 4306.

14 QUESTION: I want to be sure -- I thought you
15 made an acknowledgement of a point I didn't think you
16 would make. You suggested in answer to Justice Scalia
17 that there could be a State law defective manufacture
18 claim even if the Coast Guard had promulgated elaborate
19 regulations about how boats had to be manufactured and the
20 boat complied with every one of those regulations.

21 MR. GELLER: Yes. Yes.

22 QUESTION: There could still be a State law
23 claim?

24 MR. GELLER: There could be a claim -- there
25 could well be a State law claim because we would not be

1 within State 4306, that the boat was not manufactured
2 according to its design requirements.

3 QUESTION: No, I'm assuming it complied with
4 the -- because it only talks about when they comply with
5 all the Federal requirements. You think there still could
6 be a --

7 MR. GELLER: Yes, but there aren't manufacturing
8 requirements.

9 QUESTION: No, but I'm assuming they -- of
10 course, they could have a problem here, of course.

11 MR. GELLER: Yes. In other words, if, for
12 example, the Coast Guard had a propeller -- had a
13 propeller guard requirement --

14 QUESTION: Right.

15 MR. GELLER: -- and you complied fully with --
16 you put the propeller guard on your boat, so you satisfied
17 the design requirements, but you didn't fasten it
18 properly. It should have been fastened with four bolts
19 and you only put two on, and it fell off in the water,
20 there would be, I think, a plausible --

21 QUESTION: Even if --

22 MR. GELLER: -- failure to manufacture --

23 QUESTION: Assuming that the Coast Guard
24 regulation didn't tell you how many bolts to put on.

25 MR. GELLER: Right.

1 QUESTION: Is that right?

2 MR. GELLER: Right. But you see, the -- Justice
3 Stevens, the precise difference between that
4 hypothetical --

5 QUESTION: It seems to me there's a bigger gap
6 in this case than the one you --

7 MR. GELLER: A failure to manufacture claim
8 only requires the manufacturer to comply with his own or
9 the Coast Guard's design requirements. It doesn't add any
10 design requirements.

11 The problem with allowing the States to impose
12 design requirements --

13 QUESTION: But if that's true in regard to a
14 minor matter like nuts and bolts, why isn't it true with
15 regard to the total omission of any requirement for
16 propeller guards?

17 MR. GELLER: Because how the boat is to be
18 designed and what equipment the boat is to have on it is a
19 question reserved to the Coast Guard or else you can't
20 have a uniform national rule.

21 QUESTION: Well, but that's the same -- true
22 with the four bolts instead of two.

23 MR. GELLER: No. No, I don't think so, Your
24 Honor, because there would be a uniform national rule.
25 You have to build your boat consistent with the design

1 requirements.

2 Now, if in a particular case you don't --

3 QUESTION: No, but the omission is, there's no
4 requirement on the number of bolts. In this case, there's
5 no requirement on propeller guards.

6 MR. GELLER: No, but in one case you're simply
7 being asked to comply with your own design requirements.
8 If your own design requirement says it should have four
9 bolts, you have to have four bolts. If you only put two
10 in, it's a manufacturing defect. That's a clear claim
11 that can be brought under State law.

12 We have a completely different type of claim in
13 this case. They're claiming it should have been designed
14 differently.

15 QUESTION: The statute says performance
16 standard. It doesn't talk about design.

17 MR. GELLER: Right.

18 QUESTION: So therefore, if the failure to
19 have -- it's the same question. If the failure to have a
20 performance standard permits, in your view, a tort suit in
21 respect to the defective manufacture, why doesn't the
22 failure to have a propeller guard standard permit a tort
23 suit in respect to the failure to have the propeller
24 guard? I think that's what Justice Stevens' --

25 MR. GELLER: I thought Justice Stevens was

1 referring to a manufacturing defect, a failure to comply
2 with your own design requirements or the Coast Guard's
3 design requirements. There's a single set of design
4 requirements. You have to comply with it, and if you
5 don't, you're liable as a manufacturer for having a
6 manufacturing defect.

7 That doesn't prevent you from manufacturing one
8 type of boat throughout the United States. When you're
9 dealing with a design requirement where each State can
10 impose its own design requirement, it is impossible to
11 build a single boat that operates throughout the United
12 States, and that's precisely what the legislative history
13 said Congress had in mind and wanted uniform national
14 design and equipment requirements.

15 Manufacturing requirements are of a totally
16 different order. You simply screwed up with one
17 particular boat. It doesn't tell you anything at all
18 about how you have to build the generality of your boats.

19 Now, I just want to turn for a minute to implied
20 preemption, which provides a separate and totally
21 independent basis for preemption here. The -- even if
22 the -- even if 4306 didn't cover this situation, it's
23 clear that it would -- the State law claim here would be
24 impliedly preempted, because it plainly frustrates what
25 Congress and the Coast Guard were trying to do in this

1 area.

2 I don't know of any piece of equipment that's
3 been more thoroughly studied by the Coast Guard than prop
4 guards, and the advisory committee and the Subcommittee on
5 Prop Guards took 18 months, they looked at all the
6 available data, they took a boat out onto Boston Harbor
7 and operated it both with and without prop guards, they
8 held hearings across the country --

9 QUESTION: Mr. Geller, do we give any credence
10 to the fact that the Coast Guard itself doesn't think that
11 this is contrary to what it's intending to do. In fact,
12 it thinks it's consistent with the act.

13 MR. GELLER: Well, I don't know, Justice
14 Ginsburg. That's the position of the Solicitor General.
15 The Coast -- I find it interesting, the Department of
16 Transportation did not sign this brief, which is not
17 typical of its practice. It's signed other briefs in this
18 Court in cases like Myrick in recent years, so I don't
19 know what the position of the Coast Guard is.

20 The Coast Guard has clearly held that even in
21 the absence of a Federal regulation there is preemption of
22 State law.

23 QUESTION: The Coast Guard isn't in charge of
24 preemption anyway. The Coast Guard doesn't administer
25 preemption. I mean, we give the Coast Guard deference on

1 those matters that are within its bailiwick.

2 MR. GELLER: Yes. My point, Justice Scalia --

3 QUESTION: Whether the State is preempted or not
4 is not within the Coast Guard's bailiwick.

5 MR. GELLER: All I'm saying, Justice Scalia, the
6 answer to Justice Ginsburg's question is, I don't know of
7 any pronouncement by the Coast Guard, ever, that has ever
8 drawn a distinction between --

9 QUESTION: Well, maybe we should just leave the
10 Coast Guard out of it.

11 MR. GELLER: Well, the fact of the matter is
12 that the Coast Guard has never --

13 (Laughter.)

14 MR. GELLER: And I think it's an important
15 point. The Coast Guard has never, ever drawn a
16 distinction between State, regulatory, statutory, or
17 common law requirements, ever, and I think it would be
18 inconsistent for the Coast Guard to do that, given the
19 fact that common law requirements can frustrate what
20 they're trying to do, as this case shows every bit as much
21 as a State statutory or regulatory --

22 QUESTION: And I suppose some inquiry into that
23 subject is within their purview, because they can
24 pronounce regulations exempting --

25 MR. GELLER: Right.

1 QUESTION: -- certain State laws.

2 MR. GELLER: Right, and I don't know of any
3 instance in which they have ever said, contrary, for
4 example, to in Medtronic, where the FDA had a regulation
5 that --

6 QUESTION: Thank you, Mr. Geller.

7 Mr. Hudson, you have 4 minutes remaining.

8 REBUTTAL ARGUMENT OF DAVID E. HUDSON

9 ON BEHALF OF THE PETITIONERS

10 MR. HUDSON: In regard to the position of the
11 Coast Guard, I think in footnote 2 of the blue brief the
12 statement of the Commandant at the time the legislation
13 was enacted is pretty compelling.

14 Without any qualification, without any cramp
15 reading, the Commandant understood that the usual tort law
16 concerning negligence and warranties would survive the
17 enactment of this law. It's consistent with the statement
18 quoted on page 6 of the blue brief by the executive
19 director of the Boatowners Association, who suggested a
20 need for a provision in the law to make it clear that
21 common law claims would survive.

22 QUESTION: This is the statement of the
23 Commandant before this legislation was on the books?

24 MR. HUDSON: Yes, during the Senate committee
25 hearings in response to a question from the committee.

1 QUESTION: You consider that to be a position of
2 the agency as to the meaning of the law?

3 MR. HUDSON: Further evidence of the agency's
4 position I think, Justice Scalia, is found in those 1971
5 and 1973 Federal Register provisions that are cited in all
6 of the briefs where the Coast Guard specifically left in
7 place all laws enacted by the States prior to 1971.

8 It was talking about statutory enactments, even
9 felt no need to even speak to the common law. If they're
10 going to allow the State law enactments to stay in place,
11 surely the common law survives as well and, in fact, I
12 don't know that there's any rescission of those 1971
13 exemptions from preemption.

14 The claims we're making here, the Georgia
15 wrongful death statute is over 100 years old, the
16 negligence standard has existed for as long as the State
17 of Georgia has existed, so the common law has never been a
18 focus of the Coast Guard restriction, or any need to
19 exempt from preemption common law claims.

20 In regard to the case of Ray v. Atlantic
21 Richfield, it does not fit this case. That was a
22 situation where the Coast Guard was directed -- the
23 statute said it shall issue the regulations governing the
24 size of tankers and other activities on the coast. The
25 Coast Guard in fact enacted regulations.

1 And if the State of Washington was able to put a
2 limit on tanker sizes, contrary to what the Coast Guard
3 had done, it would be the hypothetical Justice Breyer
4 presented this morning. You would have a conflict, and
5 under the Supremacy Clause, the State may not act contrary
6 to any established regulation of the Coast Guard and in
7 this case we don't have an established regulation.

8 Finally, I would submit --

9 QUESTION: You wouldn't necessarily have a
10 conflict if they added something that the regulations
11 didn't have, like a propeller guard. It wouldn't
12 necessarily conflict any more than it does.

13 MR. HUDSON: I agree there would be no conflict,
14 Justice Scalia. If we are able to prevail on a damage
15 claim there would be no conflict.

16 It seems to me, Your Honors, that for Brunswick
17 to prevail and for preemption to exist in this case five
18 very high hurdles have to be overcome. They must overcome
19 the presumption against the displacement of State law.
20 They must overcome the requirement that preemption be
21 manifest and clear purpose of Congress. They must
22 overcome the lack of any statutory or legislative history
23 showing an intent to restrict the common law. They must
24 overcome the common understanding of the words used in
25 section 4306.

1 Justice Stevens, in Cipollone you made a
2 distinction between a preemption of requirements and in
3 the Senate draft in the tobacco legislation they talked
4 about a statute or regulation. That was changed to a
5 requirement, and you pointed out one would be preempted
6 and the other would not.

7 And finally, they would have to overcome the
8 express mention of the common law in the savings provision
9 in this case.

10 On the other hand, this is a preemption case,
11 after all. The Federal agency with the authority to
12 regulate agrees that common law claims should not be
13 barred, or, indeed, there is no conflict between anything
14 claimed in our lawsuit and any existing regulation of the
15 Coast Guard and, if our claims are successful, we will
16 only enhance the ultimate goal of the Boat Safety Act,
17 which was to improve safety for people using boats.

18 Thank you, Your Honors.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hudson.

20 The case is submitted.

21 (Whereupon, at 1:34 p.m., the case in the above-
22 entitled matter was submitted.)
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

VICKY LEWIS, ET UX., INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS AND AS ADMINISTRATORS OF THE ESTATE OF KATHRYN C. LEWIS, DECEASED

Petitioners v. BRUNSWICK CORPORATION

CASE NO: 97-288

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.