No. 45791 - 1 - II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

CHERI ROLLINS,

Appellant,

vs.

BOMBARDIER RECREATIONAL PRODUCTS, a Canadian corporation,

Respondent.

APPELLANT'S OPENING BRIEF

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1. Identity Of Parties

Appellant is Cheri Rollins. Respondent is Bombardier Recreational Products, Inc., a Canadian corporation, (BRP)

2. Statement Of Case

This matter arises out of Cheri Rollins being blown-up by a jet ski manufactured by BRP. Gas vapors inside the jet ski (PWC)[1] exploded when Cheri started it and an electrical arc occurred, igniting gas vapor. If the vapors were not present, or not to the degree they were, there would have been no explosion. A powered ventilator (blower) would have evacuated the vapors, preventing the explosion. BRP does not equip PWCs with blowers. Cheri presented expert testimony that was a design flaw, easily remedied for little money.

BRP obtained summary judgment, after three tries, arguing State liability for a lack of powered ventilation is preempted by Federal law. Liability conflicts no Federal law: Federal law does not prohibit powered ventilation; it requires it. Twice the Trial Court correctly denied BRP's preemption motion. On the third try the Trial Court changed its mind. It erred.

What BRP argued created preemption was not a law but instead a mere letter from the United State Coast Guard (USCG) saying BRP need

[1] The industry and others generally refer to all forms of jet skis, wave runners, etc., as Personal Water Craft, or PWCs. Cheri will adopt that nomenclature herein.

not use powered ventilation. That letter ostensibly "exempted" BRP from Federal law (the FSBA) requiring powered ventilation.[2] However, the USCG never took steps necessary to make that letter, law. It was only ever a mere letter.

Preemption is only triggered when there is a conflict of law between the States and Federal government. Case law directly on point holds a letter is not law. Case law directly on point holds statements of policy and direction are not law. Neither are subject to the Constitutional, democratic process. Neither support preemption, eviscerating the right of the Fifty States to legislate for the protection of their citizens.

Preemption may arise in two ways: express or implied.

When express, Congress itself must explicitly state in the United States Code an intention to preempt the state action at issue.

When implied, there must be a finding that either: (1) State action conflicts with a Federal statute or Regulation, or (2) Federal law (an actual statute or Regulation) so completely occupies the field of endeavor to leave no room for State action. As an aside, even a direct, head to head conflict between State law and administrative Regulation does not give rise to "express" preemption. The US Supreme Court has determined that merely implies preemption.

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[2] Cheri did not allege violation of the Federal requirement of powered ventilation is evidence of liability. Her claim was of simple design negligence.

Regardless of the form of preemption pursued, case law is clear preemption arises only upon a conflict between State and Federal law. For that, case law is equally clear only a United States Code or Regulation published in the Code of Federal Regulations is "law." The party asserting preemption must ground its argument by citation to the statute(s) or Regulation(s) giving rise to the conflict. Reference to anything else will not do and should not even be entertained: nothing but a USC or CFR can be said to be Federal law.

The parties agree if preemption lays it arises from the Federal Boating Safety Act (FBSA) and any authority delegated by Congress to administer it; ultimately, the USCG was charged to do so.

The USC passed by Congress creating the FBSA adopts no requirements or prohibitions. It merely vested authority in the Secretary of the Department of Transportation to create Regulations, if any, on only specific topics, deferring to the regulatory process to determine what the Regulations should be. Congress's charge was not that any Regulation shall be adopted; it only indicated they "may" be adopted. That is an important distinction when evaluating implied preemption; it evidences an intention Federal action will not be so broad to occupy the entire field. US Supreme Court and Washington case law have specifically evaluated the FBSA and found it is not so broad as to occupy the entire field of boating

safety. A field preemption argument here is impossible.

Exercising its delegated authority, the USCG passed regulations requiring powered ventilation.

There is no Federal law conflicting with state liability for a lack of powered ventilation. State liability for not having it is consistent with FBSA Regulations requiring powered ventilation. State liability does not even conflict with BRP's letter. But, even if it did, preemption of States Rights cannot and does not arise out of a letter. A letter is not law. It cannot constitute preemption of the laws of all 50 states. To even assert such is an injury to States Rights and contrary to black letter authority on Federalism.

That BRP's letter is not law is alone enough. However, that the USCG did not intend that letter to have the force of preemptive law is illustrated by the fact that in 1999 it initiated the public process required to do so and it issued no Regulation to do it. If when poised to issue a law the USCG decided not to demonstrates this is not a close question.

3. Assignment Of Error

1. The Trial Court erred when it granted BRP's motion for summary judgment.

4. Issues Relating To Assignment Of Error

1. Whether the FBSA preempts state liability for a lack of powered ventilation;

2. Whether a letter written by a Federal employee, not adopted as a Regulation nor published in the CFR, constitutes law sufficient to give rise to preemption.

5. Facts

A. BRP's Jet Ski Exploded Because It Had No Powered Ventilation

On August 1, 2009 a jet ski own by Cheri's father exploded with Cheri on it. CP 534. The force of the explosion hurled Cheri upwards of 10 feet in the air. She landed on the adjacent wood dock. CP 53. Although she was not killed, her injuries were catastrophic. Id.

The explosion happened because liquid gas accumulated in the bottom of the jet ski that, in the hot summer, converted to gas vapor. CP 596. When Cheri engaged the ignition switch, an electrical arc occurred between the starter and engine block. Id. That arc ignited the gas vapors. Id. By design, BRP's PWC's engine compartment is an enclosed, sealed space. CP 601. No different than holding a lit fire cracker in the palm of your hand versus enclosing your hand around it, the compression the enclosed jet ski's engine compartment provided gave rise to the force of the explosion. CP 600, CP 163.

BRP does not equip any PWCs with powered ventilation. CP 598. It relies on a passive system using small vents at the front requiring the PWC to be in fairly significant forward movement to force air into the

vents, pressurize the interior, and expel vapors.[3] CP 535. However, that provides no ventilation when the PWC is sitting still as is always the case at start up or during idle such as when riders are switched, etc. CP 599.

To address ventilation when the PWC is not moving, BRP instructs that on ignition the user should lift the front cowling to evacuate vapors. CP 686. No instruction is given on what to do when the user has idled for a time despite the fact vapors are actually more likely to build up then (the fuel system is pressurized and pumping gas through any leak, and running there is an ever present ignition source). Regardless, merely lifting the front cowling is not sufficient. CP 601. Directly under the front cowling is a tool tray with an airtight seal. Lifting the cowling only vents the tool tray, not the engine compartment. BRP does not instruct users to lift and vent the tool tray; it only instructs to lift the cowling.[4]

Assuming the end-user understood the insufficiency of BRP's

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[3] The industry does this as well. Of course, established industry practice has long been understood to, at times, do nothing more than needlessly perpetuate hazard and death. For instance: the automobile industry long campaigned against seat belts, asbestos was long used as insulation, smoking on airplanes was not merely tolerated it was encouraged, iron workers used to walk beams hundreds of feet in the air with no safety lines. There are more examples. Presently, society would be shocked if those practices were introduced. There will also be a time when the sorry history of the PWC industry deciding to save five dollars on a blower will be looked at with no less disdain. It is only, respectfully, the blissful ignorance of the lay boating public that allows this practice to continue. Education, or one good Nightline story, would likely end the practice.

[4] There is no warning issue before this Court. However, the lack of warning is context when discussing BRP's failure to not design around this hazard: it neither warned nor designed it out of the product.

instruction and also lifted the tool tray exposing the engine compartment, that is still insufficient. CP 597. Gas vapors are much heavier than air. Merely lifting the tool tray, for any reasonable amount of time, will not vent gas vapors in the bottom of the hull. CP 601. Sitting there, the heavier gas vapors will sit in the bottom of the hull. CP 601, CP 604.

The only thing that evacuates gas vapor sitting in the bottom of the hull is to disrupt the air. CP 601-602. Only a powered ventilation system does that for a static (standing still) PWC. Id. Cheri's expert easily designed and installed a powered ventilation system, on an exemplar of this precise PWC, that did not affect its sea worthiness and which he opined if present and used would have prevented the explosion.[5] CP 602.

BRP may respond arguing there is no evidence Cheri would have used a blower if the PWC was so equipped. That is of no weight here: (1) it has nothing to do with whether summary judgment based on preemption was appropriate; (2) BRP never thought to ask if she would have used one, and (3) Cheri's expert opined that if user compliance is the concern, a blower could easily be wired so the PWC will not start until it runs a

[5] The detail of this explanation is for context and arguable of no import. BRP did not move for summary judgment on the merits of its design albeit it no doubt disputes Cheri's expert's opinion.

predetermined amount of time.[6]

B. BRP's USCG Letter Is Only A Letter

This Court must review BRP's USCG letter. It only says BRP is "exempt" from the FBSA requiring powered ventilation. CP 300-301.

However, there is material distinction between saying a party is not "required" to do something, versus saying they are "prohibited" from doing something. BRP's letter does not say it is prohibited from using powered ventilation nor is there any USCG regulation to that effect. Id. As the letter is written, BRP could use or not use powered ventilation. *See* Id. BRP had a choice and decided not to do so.

Nothing in the letter even hints at preemption. Id.

Nothing in the letter grants immunity from state tort liability. Id.

The letter was not adopted as a Regulation published in the CFR. CP 1896-1899. This is perhaps the only material fact on appeal. Albeit, it was not even published as a general statement in the Federal Registry.

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[6] If BRP would like to get into the minutia, one of its litigation responses is also that wiring a PWC to not start until the blower runs for a set period time creates a safety hazard because it could delay starting in an emergency situation where the user needs to move quickly. That also has an easy engineering fix. However, Cheri will not digress further here. BRP's liability defense arguments have nothing to do with this appeal. Albeit, they do illustrate the fallacies it relies on for not using blowers.

6. Authority

A. Preemption Basics

> [P]reemption will be found only in those situations where it is the clear and manifest purpose of Congress. Federal preemption of state law can occur in three circumstances: (1) express preemption where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied the entire field (field preemption); and (3) implied preemption where there is an actual conflict between federal and state law (conflict preemption).

Gracia v. Volvo Europa Truck, N.V., 112 F.3d 291, 294 (7th Cir. 1997) (internal citations omitted, parenthesis in original). See also Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 97-98 (1992):

> Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

(underline added) (internal citations omitted).

To determine express preemption is simple; it requires Congress by statute to expressly state an intention to preempt State action:

> The Supreme Court has made clear that Congress may indicate its intent to displace state law through express language. Where Congress enacts an express preemption provision, our task is to interpret the provision and identify the domain expressly pre-empted by that language.

Chase v. SLM Corp., 593 F.3d 936, 942 (9th Cir. 2010) (citations omitted).

Where there is express preemption there should never be a debate whether it was expressed; the language must be clear. Id. Instead, express preemption cases typically ask how broad the preemption is. Id. The Court must consider "the text of the provision, the surrounding statutory framework, and Congress's stated purposes in enacting the statute to determine the proper scope of an express preemption provision." Id.

The two means to find implied preemption, conflict and field preemption, are well settled.

Under conflict preemption, a conflict lays if compliance with State law requires an in-fact conflict with Federal law:

> ...conflict pre-emption, which occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.

U.S. v. Locke, 529 U.S. 89, 109 (2000).

Locke involved state law conflicting USCG regulations. Locke held "Coast Guard regulations are to be given pre-emptive effect over conflicting state laws." Id. at 110 (underline added). Locke explained for Regulation versus statutes to have preemptive effect, the Regulation must be issued within Congressional authority: "A federal agency acting within the scope of its congressionally delegated authority may preempt state

regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law." Id. (underline added). Scope of authority is important and explained in greater detail below regarding the FBSA and Administrative Procedures Act (APA).

Under field preemption, Federal Regulation must be so complete as to leave no room for state action:

> Field preemption, described as the pinnacle of federal preemption, is a preemption approach so pervasive that Congress must have intended to leave *no room* for the states to supplement it. Implicit preemption can be found where the scheme of federal regulation is so pervasive as to make reasonable the inference that there is no room for state action.

Aguayo v. U.S. Bank, 653 F.3d 912, 921 (2011) (italics in original, underline added) (internal citations omitted). Note the word Regulation.

Last but not least, preemption exists to ensure Federal law is supreme. Ignored by BRP, to even raise the issue requires identifying a conflict of Federal and State law. Nothing short of a conflict of law suffices:

> Although federal administrative law as well as Congressional enactments are the supreme law of the land, we must reiterate, lest the analysis become unmoored, that it is federal *law* which preempts contrary state law; nothing short of federal law can have that effect. The Supreme Court's longstanding interpretation of the Supremacy Clause, and indeed the Supremacy Clause itself, mandate this principle.

Fellner v. Tri-Union Seafoods, LLC, 539 F.3d 237, 243 (3rd Cir. 2008) (italics in original, underline added). (citing Cipollone v. Liggett Group, Inc., 505 US 504 (1992). BRP's argument its letter, even if titled an "exemption," gives rise to preemption is "unmoored" indeed. Id.

It is agreed if preemption is asserted by resort to "field" preemption, a party may not be able to point to any one Regulation creating the conflict; but, for that party it is worse: they must point to an entire "field" of Regulations. What is required is conflict with Regulation, e.g., law. Preemption does not arise out of mere activity.

B. Boating Safety, The FBSA, And Preemption

The parties agree the FBSA is at issue. Sprietsma v. Mercury Marine, 537 US 51 (2002) provides a thorough history of the FBSA. Its intention is to create "minimum safety standards for recreational vessels and associated equipment" to "improve boating safety." Id. at 57. (underline added). BRP errs ignoring the word "minimum."

The FBSA was not intended to provide a comprehensive list of actions so thoroughly regulating watercraft safety compliance with it demonstrates the reasonableness of any one design. Although there was a desire to have somewhat of a "national construction and performance" standard for minimum safety requirements, that "interest is not unyielding." Id. at 70.

> [T]he concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more prominent objective, emphasized by its title, of promoting boating safety.

Id. (underline added). In other words: "safety" before "uniformity." Id.

Congress empowered the Secretary of Transportation to pass Regulations implementing the FBSA. Id. 46 USC 4302 identifies the only issues the Secretary "may" but need not regulate; one is ventilation: "(a) The Secretary may prescribe regulations... (2) requiring the installation, carrying, or use of associated equipment (including fuel systems, ventilation systems, electrical systems...) on recreational vessels and classes of recreational vessels subject to this chapter, and prohibiting the installation, carrying, or use of associated equipment that does not conform with safety standards established under this section..." (underline added).

The Secretary of Transportation delegated its FBSA power to the USCG. Sprietsma, 537 US at 57 and 49, CFR 1.46(n)(1) (1997). That power was not delegated without reservation. The Secretary directed "[b]efore exercising that authority, the Coast Guard must consider certain factors, such as the extent to which the proposed regulation will contribute to boating safety, and must consult with a special National Boating Safety Advisory Council appointed" by the FBSA before acting Id. at 57-58.

That Regulation adds to, it cannot and does not supplant, the requirements of the APA, passed by Congress, for an agency to pass a Regulation having the force of law. See 5 USC 533.

It was agreed by Cheri the FBSA authorizes "exemptions" by 46 USC 4305: "If the Secretary considers that recreational vessel safety will not be adversely affected, the Secretary may issue an exemption from this chapter or a regulation prescribed under this chapter." Notably, none of the public vetting, required by the APA or the FBSA itself, is required to issue an exemption. The significance of that will be detailed below.

Congress has not passed a statute and the Secretary has not passed a Regulation indicating merely granting an exemption shall have the force of a Regulation to that effect. They could not.

Before any agency pronouncement may be considered a "Regulation" and thus law, its adoption shall comply with the Administrative Procedure Act (APA) requiring both notice and comment periods open to the public and ultimately publication in the CFR. 5 USC 533. This is made clear by Sprietsma specific to the FBSA. At length, the Court searched for a conflict of "Regulations" passed by the USCG under the FBSA, each time citing the CFR for it. For a Regulation to be a Regulation, it must be published in the CFR.

That is true of the USCG under the FBSA, because it is true of

every administrative agency in every instance of legislative power delegated to the administrative branch: for any agency to pass a Regulation it must comply with the Administrative Procedure Act. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537-538 (DC. Cir. 1986).

Brock, by Justice Scalia before ascending to the Supreme Court, is critical authority; nothing may be considered a Regulation short of agency adherence to the APA and publishing the Regulation in the CFR:

> *Failure* to publish in the Federal Register is indication that the statement in question was *not* meant to be a regulation, since the Administrative Procedure Act requires regulations to be so published. The converse, however, is not true: *Publication* in the Federal Register does *not* suggest that the matter published *was* meant to be a regulation, since the APA requires general statements of policy to be published as well. *See* 5 U.S.C. § 552(a)(1)(D). The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to contain only documents "having general applicability *and legal effect,*" 44 U.S.C. § 1510 (1982) (emphasis added), and which the governing regulations provide shall contain only "each Federal *regulation* of general applicability and current or future effect

Id. at 538-539 (internal citation omitted in part, all italics in original, underline added).

It is not inappropriate for agencies to make statements of intent regarding its civil enforcement of regulations; those are "statements issued by an agency to advise the public prospectively of the manner in which the

agency proposes to exercise a discretionary power," Id. at 537. However, such statements are not Regulations with the force of law:

> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent proceedings.... A properly adopted substantive rule establishes a standard of conduct which has the force of law....
>
> A general statement of policy, on the other hand, does not establish a binding norm.

Id. at 537.

Rejecting BRP's argument its letter exemption resulted from a thoughtful USCG process and therefore with more weight, the Supreme Court held even thoughtful administrative action, short of regulation, does not give rise to preemption:

> ...[A]lthough the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an "authoritative" message of a federal policy against propeller guards.

Sprietsma, 537 US at 66 (quotation in original).

Indeed, not only is BRP's letter not published in the CFR as required to be a Regulation, e.g., law, it is not even published in the Federal Register as required for mere statements of guidance. The APA requires that even "statements of general policy" "shall" be "publish(ed) in the Federal Register for the guidance of the public." 5 USC 552(a)(1).

To squarely address preemption, the FBSA passed by Congress mandates preemption only for "Regulations" passed by the Secretary (or his delegates) within the authority of the Act; from 46 USC 4306:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

(underline added). Again, note: "Regulation," e.g., law.

Sprietsma evaluated the FBSA's preemption clause's scope indicating it must be read with its Savings Clause to understand its meaning. Sprietsma, 537 US at 63.

Placing the two together, the Supreme Court held Congress only intended "to preempt (State) performance standards and equipment requirements imposed by statute or regulation" that are "not identical to a Regulation" but not preempt "liability at common law or under State law." Id. The Court explained there was no intention to preempt personal injury liability claims:

> [C]ompensation is the manifest object of the saving clause, which focuses not on state authority to regulate, but on

> preserving "liability at common law or under State law." In context, this phrase surely refers to private damages remedies.

Id. at 64. (underlined added). Sprietsma arose by the assertion of a tort. Id. at 54. But, the Savings Clause's preservation of liability under either common law or State law well includes statutory liability. The preemptive distinction is not whether state liability arises under a tort or statute; but instead, whether the potentially conflicting state law is a conflicting "performance standard or equipment requirement" which is preempted, or a "liability" for "private damage" which is not Id.

Thus, although it may be said the FBSA has an express preemption clause, its scope is narrowly limited to only State laws comprising "performance standards or credit requirements" conflicting Regulations passed under the Act, but not personal injury liability. Sprietsma, 537 US at 63.

Related, Congress intended no immunity by a manufacturer's compliance with the FBSA. Id. The Savings Clause expressly states "compliance with this chapter or standard, regulations or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 USC 4311(g).

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C. The FBSA Requires Powered Ventilation – BRP's Letter Exemption Does Not Prohibit Its Use

An actual FBSA Regulation, duly passed and published in the CFR, requires each compartment of a watercraft designed with "a permanently installed gasoline engine with a cranking motor must: (1) be open to the atmosphere, or (2) be ventilated by an exhaust blower system." 33 CFR 183.610. It is not disputed PWCs are watercraft with a "permanently installed gasoline engine" that is not "open to the atmosphere." State liability for not having a blower follows the FBSA - it does not conflict it. 46 USC 4306.

It does not matter what BRP's letter exemption says: letters are not law but only a conflict of law gives rise to preemption. But for the sake of argument, BRP's exemption letter does not prohibit BRP's use of blowers; it merely says BRP is not required to comply with the FBSA's requirement of them. The original letter, dated January 22, 1988 is for a predecessor model to the one in Cheri's explosion.[7] Nowhere in it is BRP "prohibited" from using powered ventilation. The letter only says:

> Pursuant to the authority contained in 46 USC 4305 and 49 CFR 1.45(n)(1)... an exemption from the requirements of subparts (lists the subparts, including those requiring powered ventilation) is hereby granted to the Bombardier Corporation...

[7] Exemptions from other FBSA provisions were granted in the same letter; for example: loading requirements and warning label requirements. Those are not relevant and are not addressed.

CP 1323.

BRP could, under its letter, use or not use powered ventilation as it saw fit.

When the model that exploded was originally introduced, BRP asked the 1998 exemption be updated to include it. The new exemption does nothing to add a prohibition of blowers; it merely updates the exemption to add newer models. CP 1326-1328.

D. Liability For A Lack Of Powered Ventilation Is Not Preempted

1. OVERVIEW

Below, BRP's tactic was to introduce irrelevant argument and issues to cloud a very simple question: is there a Federal Statute or Regulation that state liability for not having powered ventilation conflicts. Only then may there be preemption. If there is, it should be simple for BRP to cite either the USC or CFR for it. BRP cannot. BRP did not.

To obfuscate that, BRP relied on smoke and mirrors arguing the USCG really thought hard and consulted experts before writing the letter. It matters not how much thought the USCG put into writing its letter nor who it consulted before it did. Mere "careful consideration" by an Agency does "not convey an "authoritative" message of a "federal policy." Sprietsma, 537 US at 67. Only a Regulation does. Id.

Ultimately, BRP's argument for preemption relies and revolves around convincing the Court its USCG letter exemption has the force of law. That is flawed for a variety of independent reasons.

2. BRP'S EXEMPTION LETTER DOES NOT GIVE RISE TO EXPRESS PREEMPTION

Express preemption lays only when Congress expresses that intention clearly, and then only within that expression. Gade, 505 US at 98. However, that standard exists against the backdrop of a strong presumption against finding it met:

> There is a strong presumption against preemption and state laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.

Stevedoring Services of America, Inc. v. Eggert, 129 Wn.2d 17, 24 (1996). See also CSX Transportation v. Easterwood, 507 US 658 (1993):

> In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is the clear and manifest purpose of Congress.

Id. at 664. (internal citations omitted).

Here, this Court's task is simple: the US Supreme Court in Sprietsma already found the FBSA does not expressly preempt state law creating personal injury liability. Sprietsma held the only express preemption stated by Congress was regarding "performance standards and

equipment requirements imposed by statute or regulation." Sprietsma, 537 US at 63. Cheri relies on no such state standard or regulation. Instead, her claim is for generic product design defect.

Ultimately, Congress's expression in the FBSA stated no standards at all; it only identified a limited set of topics on which the Secretary may – or may not at its discretion – issue Regulations on. Congress only stated a preemptive intent on safety Regulations actually passed as Regulations. The only Federal Regulation on ventilation requires it. 33 CFR 183.610. State liability for not having something the only Federal law that exists says is required, does not conflict Federal law. State personal injury liability is "saved" by the Saving Clause. Sprietsma, 537 US at 64.

In the event BRP argues state liability for personal injury gives rise to an inconsistent standard and that is preempted by Congress's desire to have a national standard, Sprietsma directly addressed that finding it is an argument of implied preemption, Sprietsma, 537 US at 57, therefore it will be addressed below under implied preemption. Spoiler alert: the Court rejected the argument.

3. THERE IS NO IMPLIED PREEMPTION

As noted above, there are two forms of implied preemption: (1) conflict and (2) field. Gade, see also Gracia and Chace. Neither lay.

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i. There Is No Implied Conflict Preemption

Implied conflict preemption may arise in two ways: (1) "where compliance with both federal and state regulations is a physical impossibility" or (2) "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Gade, 505 U.S. at 97-98. Before addressing those, there are burdens and presumptions that apply to both. The Washington Supreme Court explained:

> There is a strong presumption against finding preemption in an ambiguous case, and the burden of proof is on the party claiming preemption.

Inlandboatsmen's Union of the Pacific v. Dept. of Transp., 119 Wn.2d 697, 702 (1992); see also Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 78 (1995).

a. COMPLIANCE WITH THE FBSA AND LIABILITY FOR A LACK OF POWERED VENTILATION PRESENTS NO "IMPOSSIBILITY"

Explicit in the first method of implied conflict preemption is an actual Federal "Regulation" making it "impossible" to comply with both State and Federal law. Id. Every case cited above holds that. BRP cited no Regulation. Instead, it argued liability for no powered ventilation conflicted with its letter and utilized a variety of adjectives to exaggerate

its weight, ranging from calling it an action to a finding. Even if those descriptors apply, none are a "Regulation."

Thus, to cut to the quick, cited at length above Fellner held in the context of implied conflict preemption only a conflict of law gives rise to preemption and for Agency action to constitute law only a Regulation will do. Fellner, 539 F.3d at 243 ("...it is federal *law* which preempts contrary state law; nothing short of federal law can have that effect." (italics in original)). See also Cipolloene, 505 US at 516 ("...it has been settled that state law that conflicts with federal law is without effect." (underline added)).

A letter is not a regulation. Brock. Brock is illustrative not for preemption (it does not address it) but on what constitutes a Regulation or Federal law in the first place. Brock explains nothing short of a Regulation that went through the process of the APA (proposal, public comment, hearing, findings, and publishing in the CFR) may be considered a Regulation and hence law. Brock, 796 F.2d at 539.

Brock's holding is the established rule.

In Wabash Valley Power Ass'n v. Rural Electrification Admin, 903 F.2d 445 (7th Cir. 1990) a Federal Agency by letter ordered a local electric company to raise its rates, arguing Congress gave it authority to do so. Id. at 450 ("By this letter, we notify you that the REA hereby

exercises jurisdiction over the rates charged by Wabash."). The REA was given that authority, but the CFR in effect said the States (localities) may set their own rates. Id. The agency said it changed its mind, as it may do under the CFR, and its letter evidenced that. The local authority refused and sued. Id.

Among other arguments, the Federal Agency argued state (local) rate authority was preempted by the Agency's exercise of its authority to determine rates. Id. The Court acknowledged the REA was conferred that authority by Congress and could exercise it, but it was simply the fact it had not properly done so. The law as it existed in the Regulations conferred that power to the states and the REA could cite no law in effect where it (the REA) changed its mind, returning that power to itself:

> Neither REA's letter to Wabash nor its brief in this court cites any provision of the statute allowing it to regulate the rates charged by its borrowers. Unless the REA has this authority, it is hard to see how it can preempt state law, given the holding of *Arkansas* that federal law does not occupy the field. REA needs a source of authority to set up a system making demands inconsistent with those of state law, so that under the Supremacy Clause the federal obligation would prevail.

Id. at 453. (field preemption will be discussed in the next section).

Wabash is nearly identical to the case at bar, ignoring the Savings

Clause for a moment.[8] As in Wabash, assuming for the sake of argument the USCG could preempt State law on this point, like the REA the USCG did not work the steps to do so. As the actual law exists, powered ventilation is required by the FBSA; the Regulation says that: all watercraft with enclosed engine compartments shall have powered ventilation. 33 CFR 183.610(2).

Like the REA in Wabash, the USCG could change its mind and amend the law to the effect PWCs need not have powered ventilation or could even prohibit them from using it. Arguably, as in Wabash, BRP might argue the USCG did change its mind and its letter exemption is the proof. However, as in Wabash, merely writing a letter constitutes no change of law giving rise to preemption over a conflict of law. Agencies cannot change the law, even one they may change, by issuing a letter:

> Its effort to preempt state regulation of Wabash's rates alone founders on a mundane obstacle: it neglected to use the procedures required by the APA.
>
> In order to preempt state authority, the REA (Rural Electrification Administration) must establish rules with the force of law. Regulations adopted after notice and comment rulemaking have this effect. Federal regulations have no less pre-emptive effect than federal statutes. Yet although ratemaking is a rule under the APA, the REA did not follow the procedures the APA prescribed for rulemaking. It sent Wabash a letter. There was no notice, no opportunity

[8] The Savings Clause is essentially a trump card: Congress did not intend to preempt personal liability claims. But, even ignoring that, and assuming personal injury liability could be preempted, BRP's letter falls short.

> for comment, no statement of basis, no administrative record, no publication in the Federal Register—none of the elements of rulemaking under the APA.

Id. at 453-454 (citations omitted, citing in part Brock, underline added).

The only material difference between Wabash and the case at bar (again, ignoring the FBSA's Savings Clause) is BRP's letter was written as an "exemption" and Wabash's letter was not. However, that is a difference that makes no difference. As explained by Brock, inter alia, agency statements regarding its administrative enforcement of Regulations do not constitute law unless they comply with the APA themselves, culminating in publication in the CFR making the statement a "Regulation" and thus law. Brock, 796 F.2d at 538. Although BRP's letter was ostensibly issued as an "exemption" as allowed by the CFR, the content of the letter is not a CFR; it is not law. At best, BRP proved an exception but not preemption.

Despite the esoteric path taken to get here, it is suggested the issue is that simple: the simple "mundane" fact is the USCG "neglected to use the procedures required by the APA" if it wanted to take PWCs out of the FBSA requirement of powered ventilation for that decision to constitute "law" with supremacy over state law to the contrary. Wabash. Although academic, even then that would not preempt state personal injury liability given Sprietsma's explanation only State regulations constituting safety

standards were intended to be preempted but not state liability. Perhaps if a Regulation was written broader than the exemption and prohibited powered ventilation as the FBSA also allowed Regulations "prohibiting" equipment, see 46 USC 4302 (a) (2), instead of merely making it not a requirement, that might have some weight.

The foregoing is sufficient. However as added moral support, that the USCG's failure to comply with the APA on this issue demonstrates it never intended to change the law is illustrated by the fact in 1999 it did start that process and adopted no Regulations. Specific to the function of granting exemptions, in 1999 the USCG commenced the APA process to create Regulations whereby PWC manufacturers such as BRP could obtain exemptions and also put on the table the fundamental issue of whether the FBSA should be amended specific to PWCs and powered ventilation; from the Federal Register:

> The Coast Guard seeks public comment to better respond to a petition for rulemaking submitted by the Personal Watercraft Industry Association (PWIA). The petition requests that the Coast Guard authorize a new method of complying with recreational boating safety laws as they relate to personal watercraft...

CP 1742.

The USCG issued no Regulation to change the law. The CFRs reveal none. BRP cited none.

This is not a matter of the USCG always having the power to issue a Regulation and create law PWCs need not have powered ventilation but failing to do so; although that would be enough. The USCG started the APA process to consider whether to do so and decided to not change the law. What more can be said on the fact there is no law nor even intention to have a law to the effect proposed by BRP.

On implied conflict preemption, BRP relied heavily on Gracia, arguing it supports preemption here. According to BRP, Gracia holds a Congressional or Administrative decision to not require a piece of equipment preempts state liability for the equipment's absence. BRP's argument relied on ignoring Gracia's facts.

In Gracia, the plaintiff was injured after being ejected from a large commercial vehicle. Gracia, 112 F.3d at 293. When the truck collided with another vehicle, the truck's windshield popped out and the plaintiff, a non-restrained passenger, was ejected out the front of the truck sustaining personal injury. Id.

Under the National Traffic and Motor Vehicle Safety Act, Congress directed the Secretary of Transportation to establish "federal motor vehicle safety standards" "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." Id. at 295. The Secretary delegated (as it did to the USCG under the FBSA) its authority to the

National Highway Transportation Safety Administration (NHTSA). Id.

To accomplish Congress's stated goal, NHTSA passed Regulations (actual Regulations, e.g., law) including one requiring windshields be affixed to withstand a certain amount of force, i.e., that they not pop out in an accident as happened in Gracia's case. Id. 295. That was codified as a Regulation, published in the CFRs. However, NHTSA also passed a Regulation, e.g., law, stating vehicles over a specified weight limit need not meet that standard. Id. That Regulation was codified as a Regulation, published in the CFRs. The commercial truck Gracia was a passenger in was such a vehicle. Id. Thus, within the same Regulatory scheme, there was a Regulation that windshields be affixed but also a Regulation saying that requirement did not apply to certain commercial trucks. Id.

Gracia held NHTSA's Regulation certain commercial vehicles need not have affixed windshields was law creating a preemptive effect:

> [H]ere there is a specific federal standard[9] addressing windshield retention for the truck at issue, in which the NHTSA determined that this type of vehicle should be exempt from the affixing requirement. The Supreme Court has held that a federal decision to forgo regulation in a

[9] The Court was clear it its use of the word "standard" was short hand: The Safety Act "is a statute, while the federal motor vehicle safety standards are regulations established by the NHTSA; however, they are consistently referred to as "safety standards" and, therefore, this term is used to refer to them throughout this opinion." Gracia, fn. 3. When Gracia references a "federal standard," it is referencing an actual Regulation, not a standard of conduct. This is important to bear in mind as one of BRP's tactics below was to dress-up its letter in a variety of costumes; one of which was to call it a "standard." It is what it is: a letter. Id.

> given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate.

Id. at 296 (internal citation omitted) (underlined added). Preemption rose and fell on the "federal decision to forgo regulation" that was itself stated in "a specific federal standard," e.g., a Regulation, constituting law. Id.

If BRP seizes on the word "exempt," that would take it out of its context. NHTSA did not issue a letter "exemption" the Supreme Court found gave rise to preemption; it passed a Regulation with the force of law that gave rise to preemption.

Gracia provides BRP no authority. BRP ignores Cheri never contended the USCG is without authority to pass a Regulation prohibiting the use of powered ventilation that could possibly preempt state liability for its absence. She only asserted that did not happen here. Such a limitation must be codified in a Regulation. It was in Gracia.

At best for BRP, if the FBSA said in a Regulation, powered ventilation is required for all watercraft except PWCs, perhaps BRP could cite Gracia and make the argument. Albeit, even then it would fail on its ultimate merit because as discussed above, unlike the NTMVSA in Gracia that was intended to establish the safety standards, the FBSA was only intended to establish "minimum" safety standards. A lack of preemption

of liability for not having equipment not explicitly required in what is explicitly only a "minimum" safety standard in the FBSA is consistent with preempting liability for not having equipment not required in what is explicitly the safety standard in the NTMVSA.

Not having a regulation requiring a particular piece of equipment cannot be viewed as a preemptive intention to not allow state liability for its absence is particularly compelled by the language of the FBSA because Congress did not merely authorize Regulations requiring certain equipment, it also provided authority to prohibit their use. ("The Secretary may prescribe regulations... requiring the installation... and prohibiting the installation... (of) equipment that does not conform with safety standards established under this section..."). 46 USC 4302 (a)(2). Congress intended that if the USCG determined a piece of equipment should not be used at all, a Regulation would be passed prohibiting it.

These interpretations fit precisely Congress's intention the FBSA was to establish "minimum safety standards for recreational vessels and associated equipment." Sprietsma, 505 US at 57.

A decision not to require a piece of equipment (whether a propeller guard as in Sprietsma or powered ventilation here) but not prohibit it is easily reconciled with the overall intention of Congress: the piece of equipment may not be required for "minimal" safety but its presence is not

unsafe either. Its presence is therefore not required by the FBSA, but is absence is also not compelled. It is left to the manufacturer to decide.

That also fits precisely with the actual language of BRP's letter. The letter does not prohibit BRP using powered ventilation. It merely said BRP need not do so. Its use was left to the discretion of BRP. To come full circle to Sprietsma, in this case, just as the USCG decided to not require the use of a propeller guard by passing Regulation, it also did not prohibit its use. State liability for not having it was not preempted as there was no federal law or intent that state liability impeded.

This also follows Williamson v. Mazda Motor of America, 131 US 1131 (2001) that in effect held when a Regulation allows a manufacturer a choice of action, state liability for the choice made is not preempted. Before discussing Williamson, it cannot be overstressed even addressing it gives too much weight to BRP's letter exemption. In Williamson what was involved was an actual Regulation, e.g, law, that gave manufacturers a choice of action. BRP's letter is not a regulation, it is not law. However, if even a choice of action codified as law does not give rise to preemption, a fortiori BRP's mere letter does not.

In Williamson, preemption was rejected. As with boats and the FBSA, Congress passed an Act authorizing the Department of Transportation to pass standards regarding vehicle safety. Id. at 1134.

One of the standards passed by DOT, codified at 49 CFR 571.208, required the use of lap belts for center riding, back seat passengers but left it to the manufacturers' discretion whether to use both lap and shoulder belts or only a lap belt. Id. at 1137. Williamson brought a state claim alleging fault for the manufacturer providing only a lap belt, and not shoulder belt, e.g., for the choice made as permitted by the CFR. Id. at 1134. The manufacturer argued state law creating liability premised on the lack of a shoulder belt, in essence an argument requiring a shoulder belt, was preempted by DOT's giving manufacturers a choice of whether to use one. The manufacturer argued that if liability could be founded on the decision not to use a shoulder belt, that would conflict the CFR giving manufacturers a choice whether to use one; in effect, nullifying the choice allowed by the CFR. Id.

Williamson noted the Act's preemption and savings clause evidenced an intention to preempt state safety standards but not state liability claims; as Sprietsma did. Id. Finding no express preemption of injury claims (as Sprietsma did), the Court explained imposing liability for the choice made was not preempted:

> [E]ven though the state tort suit may restrict the manufacturer's choice, it does not stand as an obstacle to the accomplishment of the full purposes and objectives of federal law.

Id. at 1139. (internal citations omitted).

Again ignoring BRP's letter fails the condition precedent of not being a law in the first place, as in Williamson its letter does not prohibit the safety item it is being sued over; BRP had the choice of using it or not. There is nothing in either the CFR or the letter indicating the choice to use power ventilation is itself an objective of federal law. Under its letter, BRP was at its discretion to implement powered ventilation.

Impeding a manufacturer's "choice" under the CFRs is an impediment to Federal law only when the choice is itself "a significant regulatory objective." Id. at 1137. Williamson contrasted its decision that being presented a choice under the CFR does not preempt liability for the choice made, with its decision in Geier v. American Honda Motor Corp., 529 US 861 (2000) where state liability for the manufacturer's choice of vehicle front passenger restraints was preempted by CFRs. In Geier, the Court addressed CFRs allowing a phasing in of requirements of first shoulder belts and then airbags but allowing manufacturers the choice of implementing them earlier than required. Geier found, as affirmed by Williamson, that because the CFRs themselves evidenced "the maintenance of manufacturer choice" was "a significant federal regulatory objective," state liability impeding that choice was preempted. Id. at 1136.

Nothing in this case, not in the CFR's or even BRP's letter, demonstrates BRP's "choice" to not use powered ventilation is itself "a significant federal regulatory objective." Id. Instead, the case at bar is like Williamson (well, in fact it is not because Williamson involved an actual Regulation constituting law as required to even raise the question of preemption whereas BRP's letter is not) where when confronted with the choice, there is no preemption of state liability for the choice made.

b. LIABILITY FOR NO POWERED VENTILATION IS NOT AN "OBSTACLE" TO THE FBSA

Sight cannot be lost this preemption concept, of an interference or obstacle to the purpose of the objective of the law still falls under, and is derivative of, the larger preemption concept of "conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility." Gade. Under this standard what must still be shown is an obstacle to law. That still requires the identification of a law that is frustrated or impeded. BRP's letter is not law.

Here again, BRP identified no law or Regulation liability for lack of powered ventilation interferes with or is an obstacle to its "purpose or intention." BRP points only to its letter. Its letter is not law nor Regulation. Liability for powered ventilation may be an "obstacle" to its letter, but it is an obstacle of "law" that is required.

Liability for a lack of powered ventilation does not "impede" the "purpose or intention" of the FBSA because the FBSA requires powered ventilation.

In anticipation of an argument liability for powered ventilation conflicts with Congress's interest to establish a national standard, that argument fails for four independent reasons.

First, and most easily, Sprietsma rejected that same argument based on the FBSA. Although Congress had an interest in some uniformity, that "interest is not unyielding." 537 US at 57. "[C]oncern with uniformity does not justify the displacement of state common-law remedies,"[10] particularly when "promoting boating safety." Id. Liability for powered ventilation is both consistent with the FBSA itself and promotes "boat safety," consistent with Congress's overriding interest. Liability in Cheri's case is the "overriding interest." Id.

Second, the FBSA requires powered ventilation. It cannot be said liability for not having it contributes to a lack of national standard. The national standard is powered ventilation. 33 CFR 183.610. Not having it is the inconsistency. To argue inconsistency is not an argument of inconsistency of standard or law, it is an argument of inconsistency with

[10] Elsewhere, Sprietsma was clear neither liability arising out of "common law" or any "state law" was preempted. BRP would err by seizing on the odd, random sentence that only used the phrase common law when discussing this concept.

its letter. But, Congress's intention was a consistency of Regulatory standards, e.g. law, not a letter. Preemption only arises upon a conflict of law. Fellner.

Third, as a matter of policy, to give force to preemption regarding an alleged lack of uniformity arising out of letters subverts the APA. It would create authority allowing an Agency to unilaterally abrogate all fifty States' Rights with none of the democratic vetting required by the APA. It stands preemption and Federalism on their head and does violence to Constitutional protection particularly when it is considered Congress under the APA restricts all agencies' ability to make law by requiring them to first comply with the APA and the Secretary in the FBSA added to that the requirement the USCG also comply with an additional process of vetting through the Boating Council before issuing a Regulation. 49 CFR 1.46(n)(1) and Sprietsma, 537 US at 58. Despite those stringent requirements before an agency may make law preempting States Rights, granting an exemption requires no process at all: The USCG in its sole discretion may grant one if one person unilaterally feels it is "reasonable." 46 USC 4305. Here, the question is not whether BRP's exemption as granted in fact is "reasonable."[11] It is whether it has the

[11] BRP will not doubt argue the USCG vetted the exemption. That is of no weight. Only compliance with the APA constitutes compliance with the APA and regardless of what the USCG did here, (1) it did not comply with the APA and (2) what is law

force of law to preempt fifty States' Rights. It does not. Indeed, for BRP to even assert such ignores the APA and FBSA.

At best it may be said the USCG exercised its discretion to say by way of exemption it would not pursue administrative enforcement of the FBSA's powered ventilation requirement against BRP. But, an exercise of discretion does not make it the law of the land as is required to give rise to preemption. *See* Brock. As explained in Locke, only administrative regulation issued within the scope of Congress's authority that may give rise to preemption. Locke, 529 U.S at 110: "A federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." But even if BRP could persuade this Court the USCG intended by its letter to preempt all 50 States' laws, that would be outside its delegated authority and insufficient to give rise to preemption. Again, BRP ignores the distinction between mere exemption from mere administrative enforcement and preemption.

Fourth, on the merits of a lack of consistency argument, the facts of Sprietsma demonstrate its lack of merit. Sprietsma involved a death

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for one is law for all. If the USCG's issuance of a letter is sufficient to give rise to preemption, that rule must apply to all agency letters. It is suggested for BRP to even raise the USCG's process short of APA compliance as being sufficient underscores the Constitutional peril at hand. The USCG knows of the APA; it complied with it in the passage of actual Regulations. To not comply here, but to urge enforcement of its mere letter as though it did, is to advocate exactly the Constitutional violation the APA is intended to protect against in the first place.

caused when a boat with an outboard motor ran over a woman in the water. Sprietsma, 537 US at 54. Plaintiff alleged the lack of a "propeller guard" was responsible for the death (decedent was struck by the propeller) and sued under a state tort theory alleging negligent design for lack of the propeller guard. Id.

As here, the manufacturer argued state tort liability was preempted by the FBSA. Id. The FBSA did not require propeller guards and the manufacturer argued liability that ostensibly would require them to avoid liability was preempted. Id. at 65.

The USCG considered a regulation requiring propeller guards but did not adopt it. Id. at 65. It issued no regulation requiring or prohibiting them; manufacturers were free to use or not use them. The Court held the USCG's consideration of requiring a safety feature but decision not to do so does not evidence an intention to preempt State liability for the feature's absence and created no overriding inconsistency.

Although a long quote, it is dispositive not only of BRP's argument regarding uniformity, but also relates back to the preceding section herein and rejects an assertion of a direct conflict by BRP's argument below that the USCG's decision to not issue a regulation must be viewed as a decision there should be no requirement at all:

We first consider, and reject, respondent's reliance on the

> Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats. It is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation. The decision in 1990 to accept the subcommittee's recommendation to "take no regulatory action," App. 80, left the law applicable to propeller guards exactly the same as it had been before the subcommittee began its investigation. Of course, if a state common-law claim directly conflicted with a federal regulation promulgated under the Act, or if it were impossible to comply with any such regulation without incurring liability under state common law, pre-emption would occur. This, however, is not such a case.
>
> Indeed, history teaches us that a Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards. That was the course the Coast Guard followed in 1971 immediately after the Act was passed, and again when it imposed its first regulations in 1972 and 1973. The Coast Guard has never taken the position that the litigation of state common-law claims relating to an area not yet subject to federal regulation would conflict with "the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 65-66.

ii. There Is No Field Conflict Preemption

The standard for field conflict preemption is adequately described above. It requires "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Gade.

The Supreme Court (and Circuits) have examined areas of the law

and determined whether agency regulation is so pervasive as to give rise to a field preemption argument and applies those interpretations in later cases. For instance, in English v. General Electric, 496 US 72 (1990) the Court after reviewing the history of nuclear power and its regulation concluded the Federal Government's control and regulation was so extensive it occupied its full field except any provisions explicitly ceded to the states. Id. at 82. That finding was applied in subsequent cases. See Conn. Coalition Against Millstone v. Conn. Sitting Council, 942 A.d2 345, 358 (2008). Similarly, when Wabash considered field preemption, it relied on cases already determining the Regulatory scheme at issue did not occupy the field and found it was bound by those earlier decisions. Prior lack of field determinations must be applied, particularly when the US Supreme Court conducted the analysis.

The US Supreme Court conducted a field analysis of the FBSA in Sprietsma and explicitly found the FBSA was neither originally intended nor implemented so broadly as to occupy the field of boating safety:

> We think it clear that the FBSA did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies.

Id. at 68.

Becker v. US Marine, 88 Wn.App. 103 (1997) also analyzed the FBSA and explained why it does not occupy the field:

> The Act itself states that the Coast Guard "may" prescribe regulations establishing "minimum" safety standards and requiring installation of safety equipment. The word "may" is permissive, not mandatory. The Act thus sensibly contemplates that the Coast Guard will not necessarily be able to identify, weigh, and regulate every risk involved in recreational boating. Under the Act, the Coast Guard has promulgated regulations in about 10 specific areas. There is no reason to believe these regulations comprehensively set forth every standard a boat must meet to be reasonably safe.

Id. at 106-107.

Although there have been amendments since 1997, a review of the FBSA reveals no meaningful enlargement to the "10 specific areas" reviewed in Becker. Congress has not added to the FBSA to allow any greater scope of regulation since Sprietsma or Becker. Despite those cases' findings, BRP persisted arguing the Federal government occupies the field, pointing to the same CFRs already considered and rejected by Sprietsma and Becker.

Nothing more need be said. When the Supreme Court has evaluated the FBSA and found neither it or the USCG have so occupied the field of regulation that no state law may exist, BRP may not argue to the contrary. The mere presence of regulations, not even a so-called detailed regulatory scheme as BRP asserted below without authority exists here, does not by itself imply preemption of state remedies. Keams v. Tempe Technical Institute, Inc., 39 F.3d 222, 226 (9th Cir. 1994).

Sprietsma also rejected the argument a goal of a uniformity of standards constitutes field preemption. This was discussed in great detail above. To the extent any alleged lack of uniformity may be identified, the goal of boating safety is the paramount consideration.

E. BRP Raised A Variety Of Non-Sequitors Worth No Weight

It is not Cheri's intention to anticipate all of BRP's responses by rebutting all of BRP's below. However, a few points bear mentioning.

First, late in its briefing BRP seized on the fact WAC 352-60-050 is in BRP's words, "identical to federal regulations contained in Section 183.610" of the FBSA regarding powered ventilation. Citing that, BRP argued "Washington... defers to the Coast Guard's Federal Scheme" (BRP sj 3, p. 6) implying state civil liability for a lack of blowers constitutes a conflict. BRP ignores the actual language.

Just like the CFRs, the WACs require powered ventilation in watercraft such as PWCs. See WAC 352-60-050. There is no conflict between the WAC requiring powered ventilation, 33 CFR 183.610 requiring powered ventilation, and tort liability for its absence..

BRP also cited RCW 79A.60.100 and quoted its subsection (2) stating as between state law and "federal law and regulations...federal laws and regulations shall control." CP id. It is ironic BRP so late in the

proceedings and on its third motion on the same issue, remained blind to the explicit language it is only a "federal law and regulation" that gives rise to inconsistency: only those things are law; letters are not law. Nothing in the WACs or RCWs indicates Washington expresses an intention to defer to unilaterally written letters.

Second, BRP cited a variety of authority below asserting it held preemption was found for mere agency action short of regulation. BRP's attributions were plainly incorrect.[12] One example, Chicago & NW Transp. Co. v. Kalo Brick & Title Co., 450 US 311 (1981) was cited by BRP asserting preemption was found in the absence of any statutory language. That was false. In short, in Chicago the plaintiff sued asserting state liability arising out of state statute over a railroad's decision to not maintain a specific line of tracks. Id. at 314-315. The railway provided notice of that intention, filed with the Interstate Commerce Commission which ultimately did not oppose the request. Id. at 313. The plaintiff, who failed to timely perfect its objection to that request, filed suit. Id.

The US Supreme Court found the civil claim was preempted. Below, BRP argued this proves preemption need not arise directly from a Statute or Regulation. That ignored the case's holding.

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[12] Cheri will not take this Court's time by dissecting all of BRP's citations; hopefully, Cheri's responses below will have make clear to BRP it should not attribute various case law as it did below and the matters will not be repeated here.

State liability was preempted because the Interstate Commerce Clause (the constitution, e.g., law) and Congress's statutory framework regarding railroad regulation to the ICC (e.g., Regulations), were characterized by the Supreme Court as "exclusive and plenary (in) nature," id. at 321, and "simply (left) no room" for State action to the contrary. Id. at 328. Thus, there was both conflict in fact and field preemption and clearly, where conflict was found to lay it arose out of actual Congressional Statute and administrative Regulation. Indeed, although preemption was discussed in detail in some respects the case has nothing to do with it. Ultimately, the court concluded because the plaintiff did not timely perfect its objection regarding the Rail line's closure with the Interstate Commerce Commission, what was really going on was an attempted end-run of a quasi-judicial process (the ICC's review) that had already run its course. Id. at 331-332.

Like its miscitation to Chicago, BRP employed the same tactic to its citation of Transway Corp. v. Hawaiian Exp. Serv., Inc., 679 F.2d 1328 (9th Cir. 1982) asserting it held preemptive power was given to an "exemption" that was not codified in either Statue or Regulation. But again, BRP ignored the facts of the case.

First, this is another Interstate Commerce case. Preemption exists because the US Supreme Court has found Interstate Commerce is uniquely

a Federal question that preempts state law.

Second, although the word "exemption" was uttered and had some relevance, it had little to nothing to do with preemption. The dispute in Transway was over who (the State or Federal government) had the power to regulate what constituted an interstate "terminal area." Id. at 1332. Because nothing Congress or the ICC had passed or Regulated ceded authority to control the subject of the dispute, the State was preempted from wading in. Id.

BRP also argued a lack of preemption would "render Bombardier (and all other manufacturers), and even (Cheri) and (her parents), in violation of both federal and state law." That is plainly hyperbole. **(A)** Even if true it sheds no light on the question of preemption: the issue here is preemption, not some form of attenuated manufacturing estoppel defense. **(B)** It is false on its face. State civil liability has little if nothing to do with "legality" under the FBSA. Liability under the Products Liability Act does not make BRP's conduct "illegal." It merely makes BRP liable for Cheri's injuries which, again, she has not relied on a violation of the FBSA's powered ventilation requirement to prove. Here, as in Williamson BRP had a choice to use powered ventilation and made it poorly. It may and should be liable for its poor choice no differently than in Williamson. **(C)** BRP's letter exemption is merely an Administrative

hall-pass. The USCG essentially told BRP it would not pursue Administrative action for the lack of a powered ventilation but did not declare, nor could it if the USCG wanted to, that the exemption provided total civil immunity. BRP throughout has failed to appreciate that proving-up a letter exemption only proves an exemption from civil enforcement. It does not prove preemption. **(D)** Finally, on its very best day if BRP could convince a court the USCG intended preemption by its letter exemption and intended civil immunity, at very best BRP might prove the USCG acted ultra vires – illegally – by trying to end run Congress's limitations on Administrative action stated in both the APA and the FBSA itself. As such, Congress has already stated an intention such action does not preempt State law by the FBSA's narrow preemption clause allowing preemption only for administrative action within the scope of conferred authority.

7. Conclusion

The length of this brief belies the simplicity of the issue. State liability for a lack of powered ventilation conflicts no Federal law. The only Federal law there is requires powered ventilation.

With no conflict of law, BRP asked the Trial Court to close its eyes to the fact its letter is not Federal law. It is still not understood why on the third bite of the apple the Trial Court acceded. It is suspected the Trial

Court placed weight where none should have even been considered: the declaration of a former USCG Officer arguing the USCG gave a lot of thought before issuing the letter.

As Brock, Sprietsma, inter alia, held, nothing short of a Regulation is law and only a conflict of law gives rise to preemption. It matters not what the USCG did before its letter, no different than Wabash an agency cannot change its mind and change law by writing a letter. For BRP to even assert such is frivolous; Cheri will not beat that drum here.

To the extent the USCG or BRP had the unexpressed, subjective intention the letter would preempt state law runs afoul of settled doctrines of Administrative limitation as express in Brock and the APA. It ignores both the FBSA's preemption clause preempting only state safety standards and the Savings Clause preserving state personal injury liability. It is, at best, an ultra vires intention that gives rise to no preemption. Locke.

At very best, BRP's letter provided a choice whether to use powered ventilation. The FBSA did not prohibit its use despite power to do so. Not even BRP's letter did not prohibit powered ventilation.

It is ironic BRP has ignored the USCG did not force its letter down its throat: BRP asked for it. For a manufacturer to assert the granting of its request for exemption from administrative enforcement constitutes law to displace all 50 States Rights is novel indeed.

Liability for BRP's choice is not preempted merely because BRP was given a choice. See Williamson. This is unlike Giere where DOT had an overriding interest in preserving choice; in the phasing in air bags "choice" was an overriding intention to encourage adoption before it was believed feasible – not to allow choice to not use them at all. BRP could have used ventilation. It 100 year old technology. It could and should use it now.

The FBSA was only ever intended to sketch out "minimum" safety requirements. Sprietsma. Personal injury liability has long been the ant pushing the boulder of safety up the hill of corporate indifference. Cheri does not ask this Court to reverse because it would be a nice result nor simply to make PWCs safe. If her claim is preempted, it is preempted. However, it no more lays to BRP to argue for preemption with assertions of well-intended consideration by the USCG: the only thing it may be heard to create preemption is a conflict of law. It is again challenged to identify it. Pointing to its letter fails.

DATED this 17th day of November, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused the foregoing document to be deposited for delivery via hand delivery to:

Thomas R. Merrick, WSBA #10945
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Dated this 17th day of November, 2014, at Seattle, Washington.

Dave Loeser