NO. 92733-2

SUPREME COURT
OF THE STATE OF WASHINGTON

CHERI ROLLINS, an individual,

Petitioner,

v.

BOMBARDIER RECREATIONAL PRODUCTS INC.,
a foreign corporation,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Cheri Rollins's Petition for Review is simply a rehashing of her arguments before the Court of Appeals. Although she makes passing reference to the RAP 13.4(b) standards, she fails even to attempt to demonstrate how the Court of Appeals decision implicates those standards to support review. Nowhere in her Petition does Petitioner actually show a conflict between the Court of Appeals decision in this matter and another decision by this Court or the Court of Appeals. Petitioner also does not raise any issue of substantial public interest. Instead, Petitioner spends the entirety of her Petition arguing why she should have won on the merits. Such an approach does not meet the standards for review under RAP 13.4(b).

The Court of Appeals decision in this matter is a straightforward application of federal preemption within the context of the Federal Boat Safety Act of 1971, following Congress's intent as manifested through that statute. As rightly recognized below, Congress, through the FBSA, explicitly empowered the Coast Guard to promulgate both statutory and non-statutory regulations, standards and requirements with the force of law for boats and personal watercraft (PWC) and their associated equipment, including ventilation systems. 46 U.S.C. § 4302 and Official Notes. Congress also expressly empowered the Coast Guard to issue official statutory exemptions from any such statutory and non-statutory regulations, standards and requirements. 46 U.S.C. § 4305. Finally, Congress expressly bestowed upon the Coast Guard broad, flexible

discretion to carry out its regulatory duties under the FBSA. 46 U.S.C. § 4302 and Official Notes: "In lieu of establishing specific statutory safety requirements, subsection (a) provides flexible regulatory authority to establish uniform standards for the design...of the boats themselves and all associated equipment." (Emphasis added.)

There is nothing remarkable about the Court of Appeals's recognition of these unambiguous FBSA provisions or the Court's application of the provisions to the facts of this case. The Court's application simply recognizes and follows the express language of the FBSA and the preemptive regulatory authority it bestows on the Coast Guard relative to the official Exemptions.

In short, the Court of Appeals decision in this matter creates no conflict of law, and does not address an issue of substantial public interest. Rather, the decision recognizes the limited nature of statutory Exemptions under the FBSA and is thus unique and limited to Congress's intent as set forth in this specific Congressional Act, limited to boats and PWCs. Additionally, the Exemption is limited to five areas of PWC design, of which powered ventilation is only one part.[1] Because the Petition does not satisfy the specific requirements for review under RAP 13.4(b), review should be denied.

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[1] The other areas are Display of Capacity Information under Subpart B of 33 C.F.R. Part 183; Safe Loading Standard in Subpart C of Part 183; Flotation Standard in Subpart F of Part 183; and Fuel System requirements under Subpart J of Part 183.

II. ISSUE PRESENTED FOR REVIEW

Whether the U.S. Coast Guard's longstanding official Exemption relating to powered ventilation for all PWCs issued under 46 U.S.C. § 4305, pursuant to the Coast Guard's flexible regulatory authority granted by Congress under 46 U.S.C. § 4302 to establish both statutory and non-statutory requirements for the establishment of uniform safety standards for the design of boats and PWCs, which constitutes the federal standard for PWC ventilation design, preempts a state law claim seeking to impose a powered ventilation requirement for PWCs that is not identical to the federal standard.

III. STATEMENT OF THE CASE

Petitioner offers a woefully truncated, argumentative and inaccurate description of the facts below.[2] This case arises out of an explosion on August 1, 2009, involving a 1999 Sea-Doo XP LTD personal

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[2] The Petition should contain "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument[.]" RAP 10.3(a)(5); 13.4(e). As she did below, Petitioner litters her Petition with inaccurate and argumentative allegations. For instance, on page 8, Petitioner summarily asserts that "[a] blower would have prevented the explosion and made all PWCs and the boating public that much safer." To support this "fact" Petitioner cites to her paid expert's declaration in opposition to BRP's motion for summary judgment below. In footnote 4, Petitioner concedes that the entirety of the alleged "facts" contained therein are not before the Court and thus are not relevant. Petitioner did the same thing below. Equating lack of electrically powered ventilation—intended for conventional boats, not PWCs—to car seat belts and exploding Pintos is without basis. More importantly, these so-called "facts" are not part of the record before this Court. To the extent Petitioner presents the argumentative testimony of her expert regarding the installation of an alleged "dollar or two" blower as "factual," this information is as specious as it is irrelevant. The shortcomings of Petitioner's expert's work, however, are likewise not part of the record and not relevant to this appeal. Simply stated, there was nothing before the trial court establishing a blower would make the Sea-Doo more safe, especially given the neglect and lack of maintenance performed on the PWC. Had this case proceeded to trial, BRP would have established that placing a blower on this and all PWCs presents a myriad of greater safety issues and problems—as has been recognized by relevant federal agencies. CP 1747 (outlining problems presented by powered ventilation under "Ventilation" heading). The reasons for the Coast Guard's standard of no powered ventilation for PWCs are many, but they are irrelevant and not part of the record on appeal. For Petitioner to again acknowledge the irrelevancy of the liability issues, yet still argumentatively refer to them, is improper.

watercraft (PWC) on which Petitioner was sitting. The PWC was manufactured by Respondent Bombardier Recreational Products Inc. (BRP). In August 2011, Petitioner filed suit solely against former defendants Dennis and Lynette Long ("the Longs") — her parents — claiming their negligence in failing to properly maintain the subject Sea-Doo was the sole cause of the explosion. CP 2571-72.[3] In April 2012, the Longs moved to amend their Answer to implead BRP. CP 2575-79. The trial court granted the motion, and the Longs subsequently filed their Third Party Complaint ("TPC") against BRP, also in April 2012. CP 44-49.

The Longs' third-party claims against BRP alleged violations of Washington's Product Liability Act ("WPLA"), Washington's Consumer Protection Act ("CPA"), and for statutory contribution. *See id.* Petitioner then amended her complaint to assert the same WPLA design-defect claim directly against BRP. *See* CP 54-57. Petitioner acknowledged the only reason she asserted a WPLA claim against BRP was to eliminate the "empty chair" created by the Longs' impleading BRP. CP 2588-90.

The parties agree that the Petitioner's underlying design defect claim under the WPLA, RCW 7.70 *et seq.*, alleged that BRP (like every

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[3] The Longs failed to have the Sea-Doo undergo seasonal and annual safety inspections as recommended, encouraged, and directed by BRP. CP 2278-2281. From approximately 2005 onward, instead of taking the Sea-Doo to a maintenance facility, the Longs attempted their own "maintenance" on the PWC. *Id.* The Longs, however, did not conduct (nor did they have the expertise or tools to conduct) many of the manufacturer directives, such as fuel system pressurization checks or inspection of the starter connections, which Petitioner's own experts found were in utter disrepair and caused the explosion. *Id.*; CP 2140-2152.

other PWC manufacturer) did not include a powered "blower" device to vent any accumulated fuel vapors before starting the engine.

Since 1988, the Coast Guard has repeatedly granted BRP and all other PWC manufacturers an official Exemption from, among other things, the provisions of Section 183.610 of Subpart K of Part 183 of Title 33, Code of Federal Regulations ("C.F.R."), relating to powered ventilation systems for conventional boats.[4] CP 229-232. The Coast Guard first exempted BRP from these requirements on January 22, 1988. CP 670-71; CP 677-680. The 1988 Grant of Exemption, entitled "CGB 88-001," provides: "[a]ll information presented in the [BRP exemption] petition has been carefully considered by the Coast Guard." CP 678 (emphasis added). As to Section 183.610, the Grant of Exemption provides:

> The present ventilation regulations in Subpart K of Part 183 were intended to apply to conventional types of boats powered by inboard or sterndrive engines or equipped with generators. These engines may emit gasoline fuel vapors. The ventilation regulations are intended to remove such vapors; however, the fuel system on the "Sea-Doo" boat is not designed in the same way as a fuel system on a conventional inboard or sterndrive. The fuel system is sealed to prevent leakage when the boat is oriented in any position. As a result, compliance with the requirements of Section 183.610 is unnecessary to achieve an acceptable level of safety.

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[4] That section (33 C.F.R. §183.610) requires that boats with inboard engines (i.e., not open to the atmosphere) have a powered ventilation system:

> (a) Each compartment in a boat that has 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.

CP 679 (emphasis added). The Coast Guard concluded:

> In consideration of the foregoing, I find that to grant this exemption would not adversely affect boating safety. Therefore, pursuant to the authority contained in 46 U.S.C. 4305 and 49 C.F.R. 1.46(n)(1), which authority has been delegated to me by the Commandant, an exemption from the requirements of...Section 183.610 of Subpart K of Part 183 of Title 33, Code of Federal Regulations is hereby granted to the Bombardier..."

Id. (emphasis added). Subsequent amendments to the 1988 Grant of Exemption continued the Exemption, including Amendment CGG 88-001-9 relating to the subject 1999 Sea-Doo, issued on December 1, 1998. CP 670, CP 673-675.

Because of the Coast Guard's Grant of Exemption (CGB 88-001) and Amendment (CGG 88-001-9), the subject Sea-Doo was statutorily exempt from the requirements relating to powered ventilation systems set forth in Section 183.610. CP 232. This Exemption has remained in force for all personal watercraft manufactured by any manufacturer for sale in the United States, including BRP personal watercraft, since 1988 and has never been revoked by the Coast Guard. *Id.*

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Petitioner Has Not Met the Standards for Review Under RAP 13.4(b).

As noted, Petitioner has simply reargued the merits of her case below. The essence of her Petition for Review is that the Court of Appeals "got it wrong." RAP 13.4(b) is clear that "A petition for review will be accepted by the Washington Supreme Court only:"

> (1) If the decision of the Court of Appeals is in conflict with a decision of the [Washington] Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the [Washington] Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the [Washington] Supreme Court.

(emphasis added). Petitioner summarily invokes standards (1), (2) and (4), but does not explain why these rules support review.

1. The Court of Appeals Decision is Not in Conflict With Any of This Court's Precedents; Review is Unwarranted Under RAP 13.4(b)(1)

Petitioner misstates the standard under RAP 13.4(b)(1), asserting that the Court of Appeals decision is in conflict with a decision of both the State and U.S. Supreme Court. First, conflict with a U.S. Supreme Court decision is not a basis for review under RAP 13.4(b)(1). Second, Petitioner does not identify any decision from this Court with which the Court of Appeals decision conflicts. This alone is grounds for denial of review under RAP 13.4(b)(1).

Moreover, the Supreme Court decisions discussed by Petitioner—*Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) and *Sprietsma v. Mercury Marine*, 537 U.S. 51, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002)—are inapposite and distinguishable—they are not in conflict.

a. Wyeth is Inapposite and Does Not Conflict With the Court of Appeals Decision.

Petitioner failed to even cite *Wyeth* in her Appellate Opening Brief, raising it for the first time in her Reply brief. *Wyeth* involved an entirely different Congressional intent manifested through an entirely different statute and regulatory scheme—the Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*—for an entirely different administrative agency—the FDA—in an entirely different and unrelated context—prescription drugs. The "purpose of Congress" is "the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Grp. Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). Congressional intent begins and ends with the relevant Congressional Act at issue. In *Wyeth*, the preemption determination turned on application of the FDCA to the unique facts of that case. Here, preemption was determined based on the FBSA as applied to the facts below.

The *Wyeth* Court's analysis of the FDCA and of the FDA's preemptive power under that statute as applied to prescription drugs is not relevant to the Court of Appeals's application of the FBSA and the regulatory authority granted to the Coast Guard through the FBSA pertaining to PWC design and the official Exemption relative to powered ventilation. The Court of Appeals rightly ignored *Wyeth* in its decision, just as this Court should.

Wyeth and this case present different preemption universes as they derive from different Congressional Acts. The FDCA in *Wyeth*, unlike the

FBSA, did not even contain an express preemption provision for prescription drugs. *See* 555 U.S. at 574. Nor did *Wyeth* involve statutory Exemptions emanating directly from the operative Act, as in this case with the FBSA. Likewise, nowhere in *Wyeth* is there any express delegation by Congress through the FDCA to the FDA of a flexible regulatory authority empowering the agency to create both statutory and non-statutory regulations, standards and requirements with the force of law, as exists in the FBSA.

These critical differences, as well as the entirely different factual contexts between *Wyeth* and the Court of Appeals decision, render *Wyeth* of little significance to the Court of Appeals's analysis of the FBSA in this case. But more importantly, these differences highlight the lack of any conflict between the two decisions that would support review.

In her discussion of *Wyeth*, Petitioner takes strong issue with the Court of Appeals's citations to *Fellner v. Tri-Union Seafoods*, LLC, 539 F.3d 237 (3rd Cir. 2008) and *Colacicco v. Apotex, Inc.*, 521 F.3d 253 (3rd Cir. 2008), *vacated and remanded*, 556 U.S. 1101 (2009). As noted by the Court of Appeals, *Fellner*, in discussing what constituted federal law that could preempt contrary state law, specifically acknowledged that "federal agency action taken pursuant to statutorily granted authority short of formal, notice and comment rulemaking may also have preemptive effect over state law." 539 F.3d at 244 (citing *Colacicco*, 521 F.3d at 271 ("Although preemption is commonly thought of in terms of statutes and regulations, a federal agency's action taken pursuant to statutorily granted

authority may also have preemptive effect over state law.")) (Emphasis added.) Petitioner erroneously asserts that both *Fellner* and *Colacicco* were reversed by *Wyeth* on the exact legal propositions noted above and on essentially the identical procedural setting of this case. Petition for Review at 12.

Fellner remains good law for every proposition contained in its opinion, including that federal agency action pursuant to statutorily granted authority short of formal, notice and comment rulemaking carries preemptive power. Petitioner cites nothing to indicate *Fellner* was reversed, and the decision continues to be cited by other courts without qualification. Moreover, while the U.S. Supreme Court vacated the judgment in *Colacicco* in light of *Wyeth*, the grounds for vacation were not specified. The Supreme Court simply remanded the case to the Third Circuit "for further consideration in light of *Wyeth v. Levine*...." *Colacicco v. Apotex, Inc.*, 556 U.S. 1101 (2009). The instruction to apply the *Wyeth* analysis says nothing about the vitality of the *Fellner* court's reference to a portion of its earlier decision in *Colacicco.* Although the *Colacicco* judgment was vacated, there was nothing in the *Wyeth* opinion which reversed any relevant proposition in *Colacicco*—the instructions were simply to reconsider the case in light of *Wyeth*. Regardless, *Fellner*, and its specific citation to *Colacicco*, remains good law. Had *Colacicco*

been reversed on the specific grounds that Petitioner claims, cases that continue to apply *Fellner* would likely have limited its application.[5]

Consistent with *Fellner*, and as recognized by the Court of Appeals, the Coast Guard's federal agency action (*i.e.*, the official Exemption) undertaken pursuant to statutorily granted authority (46 U.S.C. § 4305) constitutes the federal standard for PWC design and has preemptive effect over Petitioner's state law claim. Petitioner's blind insistence that only positive laws, passed through the rulemaking process, can have preemptive effect ignores not only *Fellner* and similar holdings cited below, but also Congress's explicit intent in granting the Coast Guard flexible regulatory power to establish both statutory and non-statutory

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[5] As for the substance of *Wyeth*, Petitioner's reliance is misplaced. In *Wyeth*, the warnings on the defendant manufacturer's drug were deemed sufficient by the FDA when it approved the manufacturer's new drug application in 1955 and when it later approved changes in the drug's labeling. 555 U.S. at 558. The issue before the Supreme Court was whether the FDA's drug labeling judgments "preempt[ed] state law product liability claims premised on the theory that different labeling judgments were necessary to make drugs reasonably safe for use." *Id.* at 563. Rejecting Wyeth's preemption arguments, the Supreme Court held it was not impossible for Wyeth to comply with both federal and state labeling requirements because an FDA regulation existed that allowed Wyeth to unilaterally strengthen its warning without FDA approval; and the state suit did not conflict with Congress' objectives because it had never even enacted an express preemption provision for prescription drugs in the FDCA' s 70-year history. *Id.* at 563-74. The Court held this, coupled with its awareness of the longstanding prevalence of state tort litigation, evidenced that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness. *Id.* at 575

Here, however, as recognized by the Court of Appeals, it would be impossible for BRP to comply with both the Coast Guard's federal standard of no powered ventilation for PWCs and Petitioner's attempted state standard to require powered ventilation for PWCs. Additionally, Petitioner's state claim directly conflicted with the Coast Guard's federal "no powered ventilation" safety standard for PWCs promulgated under the FBSA, and thus undermines "the accomplishment and execution of the full purposes and objectives of Congress" because it would subject manufacturers to varying standards across the fifty states.

standards with the force of law relative to boat and PWC design to ensure uniform safety design standards among the States. 46 U.S.C. § 4302 and Official Notes. Such flexibility is essential to administrative agency function. *See SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).[6]

b. Sprietsma is Both Legally and Factually Distinguishable and Creates No Conflict With the Court of Appeals Decision.

As she did below, Petitioner continues to misconstrue *Sprietsma*, which addressed implied preemption under the FBSA. In *Sprietsma*, an

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[6] In *Chenery*, the U.S. Supreme Court upheld the authority of the Securities and Exchange Commission (SEC) to formulate a new rule or standard of conduct governing issues before it, even though the agency could have promulgated such a rule through a rule-making proceeding. 332 U.S. at 197-201. In discussing the flexibility essential to administrative agency function, the court held:

> Any rigid requirement that [general rules must be promulgated to have the force of law] would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. *Id.* at 202.
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> ***
>
> In other words, problems may arise in each case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. *Id.* at 203

This rationale aptly applies here and highlights Congress's wisdom and foresight in granting the Coast Guard flexible legal authority relative to boat and PWC design: the Coast Guard acknowledged that when the powered ventilation regulations were promulgated, it did not consider vessels such as PWCs that had a tendency to capsize and would ingest water into blower intakes. CP 1747. Nor did the regulations specify blower capacities appropriate for the minimal net compartment volumes of PWCs. *Id.*

individual died after being struck by a boat propeller. 537 U.S. at 54. The decedent's husband filed suit on state law theories, alleging that the motor should have been protected by a propeller guard. *Id.* at 55. Notably, the Coast Guard had previously decided, after testing and consultation, not to take any regulatory action whatsoever concerning the use of propeller guards. *Id.* at 61. The Court noted this decision "[did] not convey an 'authoritative' message of federal policy..." *Id.* at 67.

While the Court held that the Coast Guard's decision to forego regulation of propeller guards on boats did not impliedly preempt state common law claims, its decision was based solely on the Coast Guard's calculated decision not to regulate at all. *Id.* at 65. Dispositive to the *Sprietsma* court was that plaintiff's state common law claims related "to an area not yet subject to federal regulation;" thus, there was no conflict. *Id.* at 65-66.

In contrast, here the Court of Appeals found preemption because the Coast Guard has extensively regulated the area of ventilation for boats and PWCs and has, since 1988, granted the statutorily authorized Exemption to BRP (and all other PWC manufactures) from the powered ventilation regulations pursuant to its flexible regulatory authority. This has set the federal design standard for PWCs—that they must be designed without powered ventilation. Given the Coast Guard's active regulation in the ventilation area, the States are not allowed to regulate differently in this particular design area.

In light of the significant differences between the Coast Guard's lack of any regulation for propeller guards in *Sprietsma* and the longstanding extensive regulation of ventilation systems in this case, there is no conflict between *Sprietsma* and the Court of Appeals decision. The decisions are entirely consistent.

2. The Court of Appeals Decision is Not in Conflict with Another Decision of the Court of Appeals; Review is Unwarranted Under RAP 13.4(b)(2)

Though Petitioner maintains the Court of Appeals decision is in conflict with another decision of the Court of Appeals, she does not identify the conflicting decision, nor demonstrate any conflict with, or misapplication of, another decision by the Court of Appeals.

The only Washington Court of Appeals decision discussed in the Petition is *Becker v. U.S. Marine Co*, 88 Wn. App. 103, 943 P.2d 700 (1997). In portions of three short paragraphs Petitioner points out that *Becker* was decided in 1997 prior both to *Wyeth* and *Sprietsma,* and is thus secondary to those cases. Petition at 17-18. She maintains that the Court of Appeals "stretches *Becker* beyond its actual holding and conflicts with its own opinion," but never explains the "stretch" or the "conflict."

For the same reasons discussed with respect to *Sprietsma* above, *Becker* does not conflict in any way with the Court of Appeals decision—they are entirely consistent. Indeed, the analyses for *Becker* and *Sprietsma* and nearly identical.

Becker involved state law product liability claims against a boat manufacturer for, among other things, its failure to design the bow seating area with safety devices such as handrails to prevent passengers from being thrown out of the boat. 88 Wn. App. at 104-05. As in *Sprietsma*, the Coast Guard had never promulgated (or even considered promulgating) any regulations related to handrails or bow seat design. *Id.* at 110. The *Becker* court considered whether the Coast Guard had made an "explicit decision to either adopt a particular standard or to leave the feature or structure unregulated." *Id.* The Court decided plaintiff's tort claim was not preempted "[b]ecause the Coast Guard [had] not formally considered, evaluated and rejected regulation of bow seating design, including handrails...." *Id.* at 112.

In *Becker* (like *Sprietsma*), because the Coast Guard had never regulated (or even considered regulating) the area of bow seat design, this State was permitted to weigh in on this design area. In contrast here, given the Coast Guard's longstanding regulation of ventilation for boats and PWCs, states cannot regulate differently in this design area without creating a conflict between the federal and state standards. To hold otherwise would create an obstacle to the accomplishment and execution of Congress' objectives of establishing uniformity in manufacturing regulations and avoiding unworkable and unidentical special requirements

of the individual states. 88 Wn. App. at 108. (discussing one of FBSA's purposes is to provide uniformity in boating safety).[7]

Like *Spriestma*, *Becker* does not conflict with the Court of Appeals decision here. Rather, the opinions are entirely consistent and represent a correct application of the law based on the different facts and circumstances at issue in the respective cases.

3. The Court of Appeals' Preemption Analysis Under the Federal Boat Safety Act (FBSA) Does Not Involve an Issue of Substantial Public Importance; Review is Unwarranted under RAP 13.4(b)(4).

Petitioner summarily concludes that Division One's decision involves an issue of substantial public importance that should be determined by this Court. Petition at 9. Other than this statement, however, she does identify any issues that constitute substantial public importance.[8] Instead, Petitioner spends the entirety of her Petition rearguing the underlying merits of her case.

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[7] As she did below, Petitioner maintains that *Sprietsma* rejects the argument that a PWC powered ventilation requirement conflicts with Congress' interest to establish uniform national standards. Petition for Review at 3. Petitioner's quotation of *Sprietsma*, 537 U.S. at 70, however, conspicuously omits the qualifying first sentence of the quote: "Absent a contrary decision by the Coast Guard, the concern with uniformity does not justify the displacement of state common-law remedies..." Petition for Review at 3 (emphasis added to show language Petitioner omitted.) Through the Coast Guard's extensive regulation of ventilation systems for boats and PWCs (through the Exemption), unlike with propeller guards and bow seat design that had never been regulated, the Coast Guard has issued a contrary safety decision such that the concern for uniformity for watercraft ventilation displaces conflicting state and common-law remedies.

[8] Petitioner argues that the preemption determination raises an issue of States' rights. Petition for Review at 1, 9-10. Congress addressed this concern by reference to the Commerce Clause when it decided there was "[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level" and that "preemption of

The Court of Appeals' decision is a straightforward application of federal preemption within the context of the specific provisions of the Federal Boat Safety Act of 1971 and Congress' intent as manifested through that statute. There is nothing remarkable about the Court of Appeal's recognition of the unambiguous provisions of the FBSA or of the Court's application of the provisions to the facts of this case. The Court of Appeal's application simply recognizes and follows the express language of the FBSA and the regulatory authority it bestows on the Coast Guard with respect to the official Exemption.

The Court of Appeals decision creates no conflict of law and it recognizes the limited issue of statutory Exemptions under the FBSA. The decision is thus unique and limited to Congress's intent as set forth in this specific Congressional Act relative to boats and PWCs. Additionally, the Exemption is limited to only five areas associated with PWCs: display of capacity information, safe loading standard, flotation standard, fuel system requirements and powered ventilation. This limited issue does not implicate a substantial public interest. As such, review is not warranted.

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conflicting state law is necessary to "assure[] that manufacture for the domestic trade will not involve compliance with widely varying local requirements." *Rollins v. Bombardier Recreational Products, Inc.*, __ Wn. App. __, __ P.3d __, 2015 WL 9274912 (2015), at *6, quoting S. Rep. No. 92-248 (1971), reprinted in 1971 U.S.C.C.A.N. 1333, 1335, 1341. *See Becker*, 88 Wn. App. at 108. Petitioner offers no authority for limiting the power of Congress to preempt state law in the FBSA.

V. CONCLUSION

Petitioner cannot meet the RAP 13.4(b) requirements for review. As such, the Petition for Review should be denied.

DATED this 19th day of February, 2016.

MERRICK, HOFSTEDT & LINDSEY, P.S.

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DECLARATION OF SERVICE

On said day below, I e-mailed and hand delivered a true and accurate copy of the Answer to Petition for Review in Supreme Court Cause No. 92733-2 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: February 19, 2016, at Seattle, Washington.

Jill Martin, Legal Assistant
Merrick, Hofstedt & Lindsey, P.S.

OFFICE RECEPTIONIST, CLERK

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Subject: Supreme Court No. 92733-2 - Cheri Rollins v. Bombardier Recreational Products, Inc.

Good Afternoon:

Attached please find the Answer to Petition for Review in Supreme Court Cause No. 92733-2 for today's filing. Thank you.

Sincerely,

MERRICK | HOFSTEDT | LINDSEY

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