No. 94-1387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN
INDIVIDUALLY and as ADMINISTRATORS OF the
Estate of Natalie K. Calhoun, Deceased,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the General Maritime Law of the United States since this Court's decision in *Moragne v. States Marines Lines* provides for wrongful death and survival remedies in cases involving the death of recreational boaters on the navigable waters of the United States.

2. Whether, if *Moragne* did not provide wrongful death and survival remedies for recreational boaters, should such remedies be fashioned as part of the general maritime law to the exclusion of state law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution

Statutes

Regulations

Other Authorities

Conventions

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The Maritime Law Association of the United States ("MLA") respectfully files this brief *amicus curiae* in support of Petitioners Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd. and requests this Court to reverse the decision of the United States Court of Appeals for the Third Circuit (the "Court of Appeals"). Petitioners and Respondents have consented in writing to the filing of this brief by the MLA and the parties' written consents have been filed with the Clerk of this Court pursuant to Rule 37.3 of this Court.

NATURE OF THE MLA'S INTEREST

MLA has a strong interest in this case because it involves important issues of maritime law, and because the Court's decision may substantially affect the uniformity of maritime law. MLA is a nationwide bar association founded in 1899 and incorporated in 1993. Its membership of approximately 3,600 includes attorneys, judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association ("ABA") and is represented in ABA's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, stevedoring companies, passengers, marine insurance underwriters and brokers and all other maritime plaintiffs and defendants.

MLA's purposes are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation. . . .*

(Emphasis added).

The MLA has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act and the Federal Arbitration Act. 46 U.S.C. §§ 1300-1315; 9 U.S.C. §§ 1-16. The MLA also has cooperated with congressional committees in the formulation of other maritime legislation.[1]

On April 25, 1975, the MLA passed a resolution urging congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well."[2] A substantially identical resolution was adopted by the American Bar Association in 1976. The MLA reaffirmed this resolution in 1986.[3]

In furtherance of its uniformity of maritime law policy, MLA has filed a number of *amicus* briefs accepted by this Court[4] in important issues of maritime law where the

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[1] *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376 (1988); implementation of the 1972 Convention for Prevention Collisions at Sea, 28 U.S.T. 3459, 1050 U.N.T.S. 16, *amended* by T.I.A.S. No. 10672, 1143 U.N.T.S. 346, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 (7th rev'd ed. 1993) [BENEDICT] at p. 3-34.1; *See* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); Inland Navigation Rules Act of 1980, 33 U.S.C. §§ 2001-2073.

[2] MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

[3] MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

[4] *E.g.*, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, ___ U.S. ___, 115 S. Ct. 1043 (1995); *American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981 (1994); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

Court's decision would substantially affect the uniformity of maritime law. Such a situation exists in this case.

The maritime jurisdiction of federal courts is provided by the Constitution and is the cornerstone upon which uniformity of U.S. maritime law has been built. If maritime interests were governed by the laws of the fifty states, it would create an unworkable patchwork of laws that would defeat uniformity and inhibit the free flow and use of navigable waters.

SUMMARY OF ARGUMENT

The general maritime laws of the United States, and not the laws of the fifty states, must provide the remedies for wrongful death and survival involving recreational boaters on the navigable waters of the United States. This Court decided in *Moragne v. Marine Lines, Inc.*, 398 U.S. 375 (1970), that there is a wrongful death remedy in the general maritime law "for death caused by violation of maritime duties" *Id.* at 409. The fashioning of that remedy was most recently reaffirmed in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

This Court should declare that *Moragne* was not limited to its facts, longshoremen and seamen, but created a general maritime wrongful death remedy for all persons falling within maritime jurisdiction. Alternatively, a wrongful death and survival remedy for torts causing death to recreational boaters should be fashioned by the Court in keeping with the principle of uniformity. Uniformity is required in this area because the application of various and diverse state remedies would result in unjustifiable and hopeless conflicts in substantive law among the states and between the states and maritime law for similarly situated plaintiffs within the maritime jurisdiction of the United States.

ARGUMENT

THE GENERAL MARITIME LAW OF THE UNITED STATES AND NOT STATE LAW MUST PROVIDE THE REMEDY FOR WRONGFUL DEATH AND SURVIVAL ACTIONS INVOLVING RECREATIONAL BOATERS ON THE NAVIGABLE WATERS OF THE UNITED STATES.

I.

THE PRINCIPLE OF UNIFORMITY IN THE GENERAL MARITIME LAW OF THE UNITED STATES.

A. Constitutional Basis For Uniformity.

Article III, Section 2 of the U.S. Constitution grants judicial power to "all cases of admiralty and maritime jurisdiction." According to this Court, the Constitution establishes three different grants of power:

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the supreme Court" which were authorized by Art. I, § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," [citation omitted], and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution.

Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61 (1959).

Since the early days of this nation, the constitutional grant of admiralty and maritime jurisdiction to the federal courts has been broadly construed. Justice Story noted that the addition of the term "maritime" in the constitutional grant of power was purposeful, and the jurisdiction was broader than just the term "admiralty" as it existed under English law and called for the most liberal interpretation:

> [T]he Constitution not only confers admiralty jurisdiction, but the word "maritime" is super added, seemingly *ex industria* to remove every latent doubt. "Cases of maritime jurisdiction" must include all maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admiralty, *"causae civiles et maritime."* In this view there is a peculiar propriety in the incorporation of the term "maritime" into the Constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. [Citation omitted]. One party sought to limit it by locality, another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all "cases of maritime jurisdiction," or, what is precisely equivalent, of all maritime cases.
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> . . . [T]he language of the Constitution will therefore warrant the most liberal interpretation. . . .
>
> The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorized us to believe the national policy, as well as juridical logic, require the clause of the Constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction.

Delevio v. Boit, 7 F. Cas. 418, 442-43 (C.C.D. Mass. 1815).

The justification for granting federal judicial power over admiralty and maritime cases was, at the time of the public debate on the Constitution, found in the "laws of nations" and "public peace." As noted by Alexander Hamilton in *The Federalist No. 80*:

> . . . The most bigoted idolizers of state authority have not thus far shown a disposition to deny the national judiciary the COGNIZANCE of Maritime causes. These

> so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are by the present confederation submitted to federal jurisdiction.

The Federalist No. 80, at 538 (Alexander Hamilton), (F. Cooice ed., 1961).

This Court in *THE LOTTAWANNA*, clearly stated that the Article III provision intended to create ". . . a system of law coextensive with, and operating uniformly in, the whole country." 88 U.S. (21 Wall.) 558, 575 (1875), *cited in American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981, 987 (1994). The development and application of a substantive body of uniform laws in all situations in which there is admiralty jurisdiction, follows from the principal of uniformity. "With admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 255 (1972).

The importance of uniformity arises from the commonality of those factors and conditions which are found in the realm of the maritime. These include a common historical basis,[5] the perils associated with the seas and weather, the juridical personality of the vessel, the similarity of risks in the maritime venture, the federal statutory rules governing navigation on the territorial waters;[6] and governing vessel safety,[7] the special solicitude shown to maritime workers by

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[5] 1 *Benedict On Admiralty*, § 104 (1995).

[6] *See, e.g., Sea Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974); *Inland Navigational Rules Act of 1980*, 33 U.S.C. §§ 2001-2073.

[7] Federal Boat Safety Act, 46 U.S.C. § 4301 *et seq.*

both the courts[8] and Congress[9] and the particular characteristics associated with maritime commerce. Maritime substantive law was developed to respond to the special needs of the maritime world.

Therefore, the principle of uniformity does not exist solely in a vacuum as a self-serving concept without any basis in reality. The courts have implicitly recognized this reality in the situs and nexus requirements for maritime jurisdiction which are themselves factors and conditions which require maritime substantive rules. Those factors and conditions do not change from state to state or on some other venue related basis but are themselves uniform. Maritime law recognizes this and has developed a set of uniform laws to govern these situations.

B. The Process For Determining The Choice Of Law.

The attention to the principle of uniformity evidences the importance attached to it, and is a recognition of the fact that this principle deserves more than lip service as suggested by the Court of Appeals below. Petition at A-10. Highlighting the difficulty of adhering to the principle of uniformity does not diminish the vital importance of it to the maritime jurisprudence of this country.

It is true that it is not always easy to discern a bright line "separating permissible from impermissible state regulation in [this Court's] admiralty jurisprudence." *American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981, 987 (1994). However, what is apparent from this

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[8] *See, e.g., Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 577 (1974).

[9] *The Jones Act*, 46 U.S.C. app. § 688; *The Longshore and Harbor Workers' Compensation Act*, 33 U.S.C. §§ 901-950.

Court's jurisprudence on the principle of uniformity is the process by which this Court arrives at a determination of what law should apply. There are essentially four factors to the choice of law process one can discern from this Court's decisions.

First, with admiralty jurisdiction comes the application of substantive maritime law. *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986) (*citing Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 255 (1972)). There is a presumption of the application of maritime law when the jurisdictional inquiry has been satisfied. The reason for this is the same as the justification for uniformity: the locus and nexus of the occurrence requires the specialty of the maritime law for resolution. If substantive admiralty law is not applied, why bother with admiralty jurisdiction.

Second, the Courts look to applicable federal statutes or, "absent a relevant statute, the general maritime law, as developed by the judiciary. . . ." *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986) (*citing United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975) and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160-161 (1920)). *See generally Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 233 (1986). Federal statutory laws are given deference by the Court.[10] The contribution of congressional enactments to the maritime area is quite evident

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[10] ". . . [W]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978). "[We] defer to Congress' purpose in making a uniform provision for recovery for wrongful deaths on the high seas . . ." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 233 (1986).

in the many laws dealing with maritime issues.[11] Absent any legislative enactments, the controlling rules of admiralty as developed by the judiciary apply.

In the absence of statutory law or general maritime law, the Court fashions general maritime law from existing maritime law, federal maritime statutes and state sources. *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864-65 (1986) (recognizing products liability including strict liability); *Kermarec v. Compagnie Gen. Trans at Catiques*, 358 U.S. 625, 630 (1959) (fashioning a shipowner's duty of reasonable care); *Moragne v. Marine Lines, Inc.*, 398 U.S. 375 (1970) (creating a wrongful death remedy in general maritime law); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624-25 (1978); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).

The cases in which this Court has fashioned remedies may be generally divided into two categories: those where the court has developed a body of principles;[12] and those where the Court has felt a need to resolve anomalies or discrepancies in the law.[13] Obviously, again, the jurisdictional locus and nexus are a necessary and outcome determinative pretext for the fashioning of the law.

Finally, when reviewing state statutes which impact on maritime activities, this Court determines whether the state statutes "contravenes an applicable act of Congress"

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[11] 1 *Benedict on Admiralty*, § 109 (1995).

[12] *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864-65 (1986); *Kermarec v. Compagnie Gen. Trans at Catiques*, 358 U.S. 625, 630 (1959); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

[13] *Moragne v. Marine Lines, Inc.*, 398 U.S. 375 (1970); *Sea Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974).

or "works material prejudice to characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations". A state statute which does, must yield to a general maritime rule of law.

This fourth characteristic includes two scenarios. The first is a state statute which regulates a specific activity already regulated by existing maritime law. The second is the situation where there is an applicable state statute, but no specific general maritime rule of law or statute and the state statute arguably may still conflict with the unique characteristics of the general maritime law. It is in this latter area where this Court has had to determine the necessity of fashioning an appropriate general maritime remedy where none exists and in spite of the existence of a state remedy.

As stated by this Court[14] and by commentators,[15] it is difficult to ascertain when a maritime rule should be fashioned, or, stated differently, when an applicable state statute should be viewed as violative of the unique characteristic features of maritime law. Two points do surface, however, which are most important in this issue. First, the existence of admiralty jurisdiction creates the need to examine any state statute in the overall context of general maritime law. Second, a general maritime remedy must be fashioned when one does not exist, if there are characteristic features of maritime law which otherwise would be vio-

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[14] *American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981 (1994).

[15] *See* Gilmore & Black, *The Law of Admiralty*, pp. 463-68, (2d ed. 1975) where the authors suggest a "balancing test" best explains the Court's decisions on this point without providing any real guidance on the issue.

lated by the use of the state law. Indeed, both points arise from the principle of uniformity enunciated by this Court as a desired feature in the general maritime law.[16]

The appropriate and proper conclusion to be made is that the process for determining the choice of law is driven by the unique nature of maritime interests and that uniformity is the guiding principle. The substantive law may be fashioned from federal statutes, state statutes, common law or existing maritime law always guided by the principle of uniformity. And, even in the review of a state law which impacts maritime interests, it is always necessary to be mindful of the unique nature of maritime interests.

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[16] The Court of Appeals below developed a "displacement analysis" to determine the choice of law issue. The "displacement analysis" of the Court of Appeals is fundamentally flawed for three reasons. First, the Court equates the preemption analysis applicable to federal-state statute conflicts issues with the maritime choice of law rules when the latter rests on admiralty jurisdiction and the former relies on a federal-state statutory conflict. Second, the analysis fails to place proper emphasis on the importance of fashioning law in an area already occupied by maritime substantive law. Third, the analysis seems to suggest that because state law may be a source from which to fashion an appropriate maritime rule, state law could be used in and of itself without the step of inclusion into the general maritime law. "Thus, because it makes little practical difference as to whether the general maritime law has incorporated state law or whether state law provides a rule of decision of its own force, we simply refer to the problem as 'displacement of state law' ". Petition at A-10 (footnote omitted). It is difficult to imagine after the use of state law along with existing maritime law in *Moragne*, *East River* and *Miles* to fashion a *maritime* remedy how the Court of Appeals could have reached such a strange conclusion. The Court of Appeals' blurring of this important distinction also will lead to the "displacement" of *existing* substantive maritime law. *See* Discussion, *infra*, pp. 23-26.

II.

THIS COURT HAS DEVELOPED A BODY OF MARITIME TORT PRINCIPLES WHICH OCCUPY AND GOVERN ALL INJURIES AND DEATH ON NAVIGABLE WATERS.

A. This Court's Decision In Moragne v. States Marine Lines Created A General Maritime Remedy For Wrongful Death.

This Court's decision in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), was a landmark decision because it reversed the decision in *THE HARRISBURG*, 119 U.S. 199 (1886), and fashioned a wrongful death remedy for the general maritime law. *Moragne* is noteworthy for the principle of uniformity and the discussion in this case for several reasons.

First, this Court took notice of the special characteristics of maritime law. *Moragne*, 398 U.S. at 386-87. Second, the general development of state wrongful death remedies and federal wrongful death remedies was acknowledged as evidence of a policy favoring the creation of such a remedy. *Id.* at 390-93. Third, this Court further recognized that Congress "has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death . . . " *Id.* at 393. Fourth, Congress enacted Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768 and the Jones Act, 46 U.S.C. app. § 688, providing for wrongful death remedies and consequently evidencing congressional intent. Fifth, incongruities had developed between the decisional and the statutory law regarding wrongful death which could no longer be justified. *Moragne*, 398 U.S. at 395-96.

All of the above factors formed the basis for the repudiation of *THE HARRISBURG*, the affirmation of the principal of uniformity and the rejection of state remedies:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts.

Id. at 401.

The wrongful death remedy fashioned by this Court in *Moragne* was for the general maritime law and is not, as the Court of Appeals below has stated, limited to longshoreman. Petition at A-33-34. Legal scholars and almost all of the other circuits have concurred in this interpretation.[17]

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[17] *See Matter of S/S Ilelena*, 529 F.2d 744, 753 (5th Cir. 1976) ("because a persuasive rational for the enforcement of state wrongful death statutes in admiralty courts no longer exists after *Moragne*, we hold that the wrongful death remedy provided by that case precludes recognition in admiralty of state statutes."); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980) ("We hold that the need for uniformity in maritime wrongful death actions requires extension of *Moragne* to cover claims based on negligence, to the exclusion of state wrongful death statutes."); *Miles v. Apex Marine, Corp.*, 498 U.S. 19 (1990) (the uniform law of admiralty preempts state wrongful death statutes in territorial waters); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974) (recognizing a federal maritime survival action similar to *Moragne*); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1060 (1994) (state law claims dismissed in favor of federal maritime law); *Lyon v. Ranger III*, 858 F.2d 22 (1st Cir. 1988) (recovery consistent with standard *Moragne* wrongful death and survival action); *Green v. Vantage S.S. Corp.*, 466 F.2d 159 (4th Cir. 1972) (*Moragne* wrongful death action displaces state statutes); *Walker v. Braris*, 995 F.2d 77 (5th Cir. 1993) (damages limited to those recoverable under a *Moragne* death cause of action); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984) (under principles announced in *Moragne*, general maritime law includes a survival action permitting recovery of decedent's pre-death dam-

(continued...)

B. The Further Development Of Maritime Tort Law.

Moragne does not stand alone in the jurisprudence dealing with uniformity in maritime tort law. Other recent cases before and after evidence continuing activity in the area of substantive maritime tort law.

Kermarec v. Compagnie Gen. Transatlantique, 358 U.S. 625, 630 (1959) developed the shipowner's duty of exercising reasonable care, noting the development in the common law in fashioning a single standard of care. *Sea Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974), picked up where *Moragne* left off in the fashioning of a nonstatutory wrongful death remedy. In *Gaudet*, the majority and dissent again looked to the policy evidenced by state and federal law to argue for the proper parameters of the remedy.

In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), this Court read DOHSA to provide the elements of damages in a wrongful death on the high seas. While the decision has been read as an example of this Court failing to support uniformity, it is better interpreted to show the deference paid to specific federal maritime statutory schemes in determining maritime tort damages. Thus, while this Court fashioned the elements of damages for wrongful death on territorial waters in *Gaudet* by reference to statutory law and the uniformity policy of the maritime law, it would not upset the specific federal statutory scheme in the name of uniformity. Most importantly, this Court reaffirmed the

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[17] (...continued)
ages); *Spiller v. Thomas M. Lowe, Jr. & Assoc.*, 466 F.2d 903 (8th Cir. 1972) (general maritime wrongful death and survival actions exist after *Moragne*); Gilmore & Black, *The Law of Admiralty* pp. 369-70 (2d ed. 1975) (a treatise previously cited with approval by this Court in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 405, 410 (1975)); Schoenbaum, *Admiralty and Maritime Law*, pp. 240-41 (1987).

value of uniformity, but minimized the threat in the context of DOHSA laws. *Mobil Oil Corp.*, 436 U.S. at 624.

If there was any doubt as to how to interpret the inclusiveness of the wrongful death remedy in *Moragne*, then the decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), should have laid that doubt to rest. *Miles* confirmed that *Moragne's* general maritime cause of action for wrongful death applies to seamen which in essence confirmed that *Moragne* should not be so narrowly interpreted to apply only to longshoremen.

Miles also is noteworthy for two other reasons. First, it reconfirmed the willingness of this Court to fashion tort remedies consistent with existing maritime law. Second, this Court acknowledged (although it did not rule on) the federal and state statutory support for a right of survival and the decisions of various lower courts to use the Jones Act and the many state survival statutes to fashion a general maritime right of survival. *Miles*, 498 U.S. at 33-34.

The inescapable conclusion to be drawn from this line of cases is that this Court has totally occupied the maritime tort area and that it is willing to fashion tort remedies for the general maritime law consistent with the existing federal statutes in recognition of the principal of uniformity and has taken the lead in developing fair and flexible remedies. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). Thus, to the extent the Court of Appeals is correct in its narrow reading of *Moragne*, this Court should now extend the general maritime wrongful death remedy to the recreational boating area.[18]

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[18] This Court's activities in the maritime tort area between 1950 and 1970 have been characterized by Gilmore and Black as revolutionary. Gilmore & Black, *The Law of Admiralty* § 6-61, p. 468 (continued...)

C. The Application Of Maritime Jurisdiction To Recreational Boating And The Need For Uniformity.

An important and relevant development in this Court's maritime jurisprudence since *Moragne* has been the application of maritime jurisdiction to recreational boating. *See Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Sisson v. Ruby*, 497 U.S. 358 (1990). *See generally* Warren J. Marwedel, *Admiralty Jurisdiction and Recreational Craft Personal Injury Issues*, 68 TUL. L. REV. 423 (1994). Until *Calhoun*, the Court of Appeals also seemed to be in agreement with application of general maritime law to recreational boaters. *See Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991). Indeed, the existence of admiralty jurisdiction in this case is incontrovertible.

There is now a convergence of this Court's maritime jurisdictional decisions and its substantive maritime tort law. It is consistent with this Court's previous decisions that the substantive maritime law should follow maritime jurisdiction in cases involving torts arising from recreational vessels. This Court should clarify this issue and, to the extent necessary, fashion the appropriate wrongful death and survival remedies in the same manner used in *Moragne* and its successors.

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[18] (...continued)
(2d ed. 1975). "Not infrequently the personal injury cases seemed to present a problem of choice between a federal or maritime law rule and a state common law or statutory rule. . . . State law rules which were not inconsistent with the court's reformulation of the substantive law were allowed to continue to influence the results in litigation. The federal solution was reserved for cases in which results consistent with the reformulation of substantive law required the application of an old or the fashioning of a new rule of maritime law. . . ." *Id.* The case law since 1970 has only furthered this development.

As noted above, the reasons for fashioning tort remedies for the general maritime law center on the goal of uniformity. A general maritime tort remedy treats all similarly situated persons within admiralty jurisdiction in a uniform and predictable manner. It precludes forum shopping. It removes the anomalies created by the differences in remedies among the states. And, it promotes harmony with the federal statutory scheme applicable to recreational boating. Moreover, there is no compelling state or local interest which should override the development of appropriate remedies. *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-42 (1961).

III.

THE USE OF STATE WRONGFUL DEATH AND SURVIVAL REMEDIES WOULD RESULT IN IRRECONCILABLE AND UNJUST OUTCOMES FOR SIMILARLY SITUATED PERSONS.

A. Drowning In The Sea Of State Law.

The accident resulting in the death of Natalie K. Calhoun is not unlike many unfortunate accidents giving rise to maritime tort law suits in that such accidents share certain common elements: a navigable body of water, a vessel, allegations of negligence, strict liability or breach of warranty, risks normally associated with perils of the sea, and common navigation rules. The commonality of elements results in similarly situated plaintiffs and strongly suggests the desirability of equal treatment before the law. And yet, the Court of Appeals would have the myriad and diverse state laws govern the rights of those similarly situated plaintiffs. The Court of Appeals did not offer a rationale for such a conclusion and its opinion does not even attempt any review or analysis of any state laws to justify such an opinion and which would eliminate what appears on its face to be an unjust and inequitable result.

However, a proper analysis of state laws would demonstrate that the application of state wrongful death and survival action remedies would result in endless and impossible conflicts no less in number and no less unjust than those faced by this Court in *Moragne*. The conflicts would result both from the interstate differences in the law and the conflicts between state law and the general maritime law.

B. The Nature Of State Wrongful Death And Survival Remedies And The Likelihood Of Conflict.

Wrongful death and survival remedies are found in all states and were created by state legislatures to supplement the common law which precluded such remedies. In essence, the wrongful death remedy usually permits next of kin to maintain a cause of action for the death of a loved one and a survival remedy preserves the causes of action available to a decedent before he dies. Most important for this analysis is the fact that the remedies preserve whatever tort causes of action are available under the general laws of the state. Thus, a plaintiff may allege a right to bring a cause of action pursuant to a wrongful death statute, but must plead the elements of a recognized tort in order to state a valid cause of action.

It logically follows that a proper impact analysis of the application of state remedies to persons similarly situated in the maritime must include not only the remedies themselves, but also the substantive tort law which would be the basis of any cause of action authorized by the remedies. And it is in that state substantive tort law where the significant differences among the states may be found.

General maritime law provides that all actions involving personal injury must be commenced within three (3) years of the date of occurrence. 46 U.S.C. § 763a. The law pro-

vides that pure comparative fault be used to reduce a plaintiff's recovery by the percentage of the decedent's fault, but does not provide a complete bar to recovery for damages. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). Finally, the general maritime law does not limit the amount of damages that may be recovered for personal injury, including death.

In stark contrast to the above, differences in the wrongful death and survival act statutes of the numerous states having navigable waters with respect to the amounts of damages recoverable, statutes of limitations and comparative fault rules are significant. We only need to survey a handful of states bordering identical bodies of water to demonstrate these differences.

For example, in Indiana, bordering Lake Michigan, if the defendant in a wrongful death action is the decedent's employer, liability shall not exceed $10,000. Ind. Code § 22-3-9-6 (1991). Indiana does not otherwise limit the amount of damages recoverable in a wrongful death action. *Id.* § 34-1-1-2 (1983). In contrast, Wisconsin limits damages for loss of society and companionship to $150,000. Wis. Stat. Ann. § 895.04(4) (1995). Illinois limits non-economic damages to $500,000 and bars all recovery for hedonic damages. 740 ILCS 180/2 (1995); 735 ILCS 5/2-1115.1(a) (1995).

Indiana, Wisconsin and Illinois further limit recovery by reducing available damages by the percentage of fault attributable to the decedent.[19] However, if the decedent's fault is determined to be greater than that of the defendants, recovery is barred altogether.[20] In contrast, Michigan does not

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[19] Ind. Code § 34-4-33-3 (1995) and § 34-4-33-4 (1995); Wis. Stat. Ann. § 895.045 (1995); 740 ILCS 180/2 (1995).

[20] *Id.*

bar recovery regardless of the decedent's degree of fault, but only reduces damages by that percentage. Mich. Comp. Laws § 600.2949 (1986).

In terms of when an action may be maintained, Indiana and Illinois adhere to a two (2) year limitation period from the date of death.[21] In Wisconsin, an action must be brought within three (3) years. Wis. Stat. Ann. § 893.54 (1983). And in Michigan, the applicable limitations period depends on the underlying cause of action upon which recovery is sought. Mich. Comp. Laws. § 600.2922 (1986).

The laws governing the various states bordering navigable waters other than the Great Lakes also differ significantly. For example, Maine limits damages for loss of comfort, society and companionship, including damages for emotional distress, to $75,000. Me. Rev. Stat. Ann. tit. 18-A, § 2-804(b) (1981). It also limits punitive damages to $75,000. *Id.* In contrast, New York law specifically provides that the amount of damages recoverable due to injuries causing death shall not be subject to any statutory limitations. N.Y. Civ. Prac. L. & R. Art 1, § 16 (1939). Similarly, Connecticut does not significantly limit the damages recoverable. Conn. Gen. Stat. Ann. § 52-555 (1991).

All of these states, Maine, New York, and Connecticut, generally proscribe a two (2) year limitations period from the time of a death within which to bring an action.[22] However, Connecticut further restricts when an action may be commenced by refusing to recognize any actions for wrongful death commenced more than five years from the date of

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[21] Ind. Code § 34-1-1-2 (1983); 740 ILCS 180/2 (1995).

[22] Me. Rev. Stat. Ann. tit. 18-A, § 2-804(b) (1981); *Debrino v. Benaquista & Benaquista Realty, Inc.*, 522 N.Y.2d 980, 135 A.D.2d 1044 (3d Dpmnt. 1987); Conn. Gen. Stat. Ann. § 52-555 (1991).

the wrongful act or omission. Conn. Gen. Stat. Ann. § 52-555 (1991).

These states also differ in their application of a contributory negligence rule. The rule followed by Connecticut provides that recovery is completely barred if the plaintiff or decedent's fault is greater than the fault of all defendants. Conn. Gen. Stat. Ann. § 52-572h(b) (1991). In contrast, in Maine and New York, a decedent's fault serves only to reduce recovery by the degree of that fault.[23]

Other states also differ in their application of rules governing recovery in wrongful death actions. The maximum money damages recoverable for injury or death from the Texas state government or a municipality thereof is $250,000 per person and $500,000 for each single occurrence. Tex. Civ. Prac. & Rem. Code Ann. § 101.023 (1986). Maximum money damages recoverable against a unit of local government are $100,000 for each person and $300,000 for each single occurrence. *Id.* Louisiana limits damages in a death action against the state to $500,000. La. Rev. Stat. Ann. § 13:5106 (1991). An action for wrongful death under Texas law must be commenced within two (2) years from the date of death. Tx. Civ. Prac. & Rem. Code Ann. § 16.003 (1986). In Louisiana, an action must be commenced within one (1) year. La. Civ. Code Ann. art. 2315.2 (1995). In Texas, recovery for wrongful death due to negligence is completely barred if the decedent's fault was greater than that of all defendants. Tx. Civ. Prac. & Rem. Code Ann. § 33.001 (1995). In contrast, Louisiana only reduces the amount of recovery by the degree of the decedent's fault. La. Civ. Code Ann. art. 2323 (1995).

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[23] Code Me. R. 14 § 156; N.Y. Civ. Prac. L. & R. § 1411 (1976).

California, Oregon and Washington on the west coast also differ in the application of their wrongful death statutes. In California, an action must be brought within one (1) year of the death. Cal. Civ. Proc. § 340 (1982). Damages are limited to the loss/damages that the decedent sustained or incurred before death including any punitive or exemplary damages the decedent would have been entitled to had he/she lived, but do not include pain suffering or disfigurement. Cal. Civ. Proc. § 377.34 (1992). A decedent's contributory negligence does not bar recovery, but only reduces recovery by the degree of decedent's fault. Cal. Civ. Code § 1714 (1978).

In contrast, in Oregon, a wrongful death action must be commenced within three (3) years of the death. Or. Rev. Stat. § 30.020 (1991). In Washington, the action must be commenced within two (2) years. Wash. Rev. Code § 4.16.130 (1988). Neither Oregon nor Washington significantly limit damages available. Or. Rev. Stat. § 30.020 (1991); Wash. Rev. Code § 4.20.020 (1985). Oregon bars all recovery if a decedent's fault is greater than the fault of all defendants. Or. Rev. Stat. § 18.470 (1993). Washington, like California, only reduces recovery by the degree of the decedent's fault. Wash. Rev. Code § 4.22.005 (1981).

Finally, Puerto Rico, the locale of the subject incident, and Pennsylvania, the state in which Petitioners brought the instant action, also differ with respect to the laws of their wrongful death and survival acts. In Pennsylvania, damages where a governmental unit is liable cannot exceed $500,000 and are limited to past and future earning capacity, pain and suffering due to death, medical expenses, loss of consortium, loss of support and property losses. Pa. Cons. Stat. Ann. § 8553 (1982). Puerto Rico has a one (1) year limitations period from date of death within which to file an action. P.R. Laws Ann. tit. 31, § 5298 (1991). Pennsylvania has a two (2) year limitation period which is further re-

stricted by the requirement that the limitation period on the underlying personal injury action had not run before the decedent's death. Pa. Cons. Stat. Ann. § 8301 (1982). Puerto Rico requires that any recovery be reduced by the degree of fault attributable to the decedent. P.R. Laws Ann. tit. 31, § 5141 (1991).[24] The rule followed by Pennsylvania provides that recovery is completely barred if the plaintiff or decedent's fault is greater than the fault of all defendants. Pa. Cons. Stat. Ann. § 7102 (1982).

Obviously, it will be important in which state's territorial waters an accident occurs for even though two states share the same navigable waters, the available remedies may differ significantly. There is no principled or logical justification for allowing such a difference to exist when the occurrence leading to death occurs on a navigable water, is governed by the same federal rules as to navigation and boat safety and is subject to maritime jurisdiction. Similarly situated plaintiffs should not be treated differently.

C. State-Maritime Law Conflicts.

The Court of Appeals found no conflict between state wrongful death and survival remedies and general maritime law because there allegedly are no similar remedies for non-seamen. Even if that conclusion is correct based on a reading of *Moragne*, it is totally incorrect in the context of *all* maritime tort law. It is not only the difference among the state wrongful death and survival remedies that creates unjustified anomalies in the law of wrongful death. Using

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[24] If a decedent employee knew of the defect or negligence which caused his injury and failed to give notice within a reasonable time, his heirs are not entitled to any compensation as against the employer.

rongful death and survival remedy in a maritime
tes its own set of anomalies.

ne law recognizes a general theory of products lia-
negligence including strict liability. *See East River*
p. v. Transamerica Delaval Inc., 476 U.S. 858
laritime law also recognizes the doctrine of pure
ive fault. *See United States v. Reliable Transfer*
U.S. 397 (1975). The maritime statute of limita-
personal injury actions, including death, is three
U.S.C. § 763a. The problem develops, of course,
need to apply a substantive body of law consistent
principals of maritime law, after having adopted
rongful death and survival remedy. This Court has
y held that ". . . when admiralty adopts a state's
ction for wrongful death, it must enforce the right
egrated whole, with whatever conditions and lim-
he creating state has attached." *THE TUNGUS v.*
d, 358 U.S. 588, 592 (1959) (*citing THE HARRIS*-
9 U.S. 199 (1886)). But applying state substantive
ld result in many instances in the abrogation of
substantive law. Thus, rather than state law
enting" a void in the maritime law, state law
pplant maritime law which would otherwise apply,
contradiction to the supremacy of maritime law,
ormity. Indeed, the anomaly of the situation is
emonstrated by the instant case: had Natalie Cal-
y been injured as opposed to killed, there is no
at federal maritime law would apply to her claims.

rverse effects created by the use of state remedies
ena of maritime tort law can best be illustrated by
etical death due to a negligence scenario occurring
linois navigable waters of Lake Michigan arising

from an alleged breach of federal navigational rules.[25] Illinois has a two year statute of limitations for bringing a wrongful death claim, a cap on non-economic damages and a 51% contributory negligence rule. In contrast, general maritime law has a three year statute of limitations, no cap on damages and a pure comparative fault rule. Does the maritime pure comparative fault doctrine supersede the Illinois 51% rule? Does the Illinois limit on non-economic damages "cap" the recovery otherwise available under maritime law? If the action is filed within three years, but after two years from the date of the occurrence or death, is the action barred? *THE TUNGUS* decision would mandate the use of state law to the exclusion of existing and applicable maritime law even though the accident arose from a breach of the *federal* navigational rules.

The inequities in such an outcome can be further illustrated by another hypothetical. If Natalie Calhoun owned the vessel she was driving and was carrying a passenger who was injured but not killed, Natalie would have a state law remedy while her passenger would have maritime remedies against her and Yamaha. Or, if both Natalie and her passenger were passengers on someone else's vessel, their remedies would differ. In either case, Yamaha would find itself swamped in the differences between state and maritime law.[26]

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[25] Lake Michigan has been selected because it is the body of water on which Mr. Sisson's vessel, the M/V ULTORIAN, was found at the time of the fire. *Sisson v. Ruby*, 497 U.S. 358, n.4, (1990).

[26] The Court of Appeals below downplayed the significance of different recoveries based on a party's status. Petition at A-41. But the real problem is illustrated here, where the status of the parties is the same.

These illustrations demonstrate the fallacy in the preemption analysis of the Court of Appeals. It is important whether you adopt a state remedy or only use state remedies as sources of law from which to fashion a uniform maritime remedy. In the former case, you end up displacing maritime law while in the latter you fill a void in the general maritime law by fashioning a maritime remedy without the state law baggage.

D. The Need For A Judicial Pronouncement Of A Uniform Maritime Remedy.

Clearly, without a reversal of the Court of Appeals decision below, and a pronouncement of the application of *Moragne* (along with the creation of a maritime survival action) to recreational boating accidents, the "anomalies" rectified by *Moragne* and other decisions will overtake maritime tort law and destroy uniformity. This Court should define maritime tort law in this context as is appropriate and necessary, to the exclusion of state wrongful death and survival remedies, the application of which can only lead to troublesome results.

This Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), is a good example of the conflict and confusion created when the principal of uniformity is "displaced" by state law. *Wilburn* involved the destruction of a small houseboat for commercial use on an artificial inland lake and the insurer's refusal to pay a claim for the loss because of alleged breaches of "warranties." The issue before the Court was whether any breach of warranty, although unrelated to the loss, bars recovery under a maritime contract of insurance.

The maritime jurisdiction of the Court in *Wilburn* was acknowledged as the policy was a maritime contract. *Id.* at 313. The Court made two inquiries: "(1) Is there a judicially

established federal admiralty rule governing these warranties; (2) If not, should we fashion one?" *Id.* at 315. Finding that there was no maritime rule of warranties, that the law of insurance was historically governed by the states, that insurance disputes were generally handled in state courts, and that Congress left regulation to the states, the majority of the Court felt compelled to leave regulation with the States.

The *Wilburn* decision has been harshly criticized.[27] Insurance policies have been "as unquestionably an integral part of the admiralty and maritime jurisdiction as is any other subject matter."[28] By not fashioning a rule of law on this outcome determinative issue, the Court in essence precluded the future development of a maritime rule of law in this most fundamental area of maritime jurisprudence. While sharing all of the indices of maritime jurisdiction, historical underpinnings and commercial necessity, the interpretation of maritime policies of insurance are to be subject to the local state rules of law.

This same outcome is likely in the maritime tort law if this court affirms the decision of the Court of Appeals. It would be impossible to justify such an outcome in light of the "displacement" of existing substantive maritime law which would result.

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[27] *See* Gilmore & Black, *The Law of Admiralty*, § 2-8 (2d ed. 1975).

[28] *Id.* § 2-1, p. 53.

IV.

NOTHER WAY TO CIRCUMVENT ADMIRALTY 'TION FOR RECREATIONAL VESSELS.

ellate Court's decision in *Yamaha* is yet another f the undeniable confusion which presently char- maritime jurisdiction inquiries by the lower ıere little or none existed under the old "situs" after this Court decided *Sisson*, the lower courts to apply multi-factored jurisdictional tests as set *elly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert.* 6 U.S. 969 (1974) and *Edynak v. Atlantic Ship-* 562 F.2d 515 (3d Cir. 1977) or variations thereof.

ance, the third and fourth circuits, while acknowl- ey were bound by *Sisson*, continued to use the ors. *Sinclair v. Soniforn, Inc.*, 935 F.2d 599, 602 991); *Price v. Price*, 929 F.2d 131, 135 (4th Cir. istrict court in Maryland, following the multi-part ned a commercial "hit the tanker" test showing rts unnecessary focus on commerce. *Smith v.* 342 F. Supp. 1137 (D. Md. 1986).

urt has had to address admiralty tort jurisdiction- our times[29] since 1972. This case raises essential- ıe issue. Part of the reason may be philosophical, ralty jurisdiction and law should not apply in the al context, but we believe the real confusion has ıexus test first created in *Executive Jet*. While the exus decision in *Executive Jet* may have been re- aircraft, we submit it was not necessary if the d the original situs test and the obvious, unstated

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e Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 429 *emost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Sis-* , 497 U.S. 358 (1990); *Jerome B. Grubart, Inc. v. Great lge & Dock Co.*, ___ U.S. ___ 115 S. Ct. 1043 (1995).

rule, that a vessel be involved. Admiralty jurisdiction is constitutional, and may be augmented by Congress under the Commerce Clause. However, the constitution does not require commerce under Article III. Even if commerce is required, 20 million boats on the water represents a substantial commercial impact. What is the difference between vacationers on the Q.E. 2, or 100 people on a sightseeing boat on the Potomac River, or one person who rents and operates a wave runner on navigable water. All of these people are involved in recreational pursuits that directly impact on commerce.

This Court has struggled with the commercial/recreational argument for years resulting in extensive litigation over the issue of admiralty jurisdiction and what law applies. The doctrine of uniformity in admiralty law should provide the real focus. It is the use of navigable waterways that demands uniformity.

We urge the Court to reconsider the arguments made in *Sisson* and *Grubart* that the Court return to the situs test analysis. If you have a vessel on navigable waters, you have admiralty jurisdiction and admiralty law applies. If no admiralty rule exists, the Court should then fashion one. This will give uniformity and end the "paper chase" approach we presently have.

CONCLUSION

The MLA respectfully urges this Court to reaffirm the principal of uniformity in the area of maritime tort law by applying *Moragne* to the death actions of recreational boaters. Alternatively, this Court should fashion an appropriate general maritime wrongful death and survival remedy consistent with its maritime tort jurisprudence. The decision

of the Court of Appeals should therefore be reversed and the case remanded for further proceedings consistent with such a decision.

Respectfully submitted,

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