No. 98-1701

# In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

*v.*

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether regulations adopted by the State of Washington governing staffing and operation of ocean-going oil tankers engaged in coastal and international commerce are preempted to the extent that they conflict with international obligations of the United States and Coast Guard regulations for such tankers promulgated pursuant to federal statutes and international conventions and agreements.

**PARTIES TO THE PROCEEDING**

The petitioner in this proceeding is the United States of America, which intervened in the case below. The case was originally brought by the International Association of Independent Tanker Owners (Intertanko) against various Washington State officials responsible for the promulgation and enforcement of the Washington regulations at issue here. Those officials are: Gary Locke, Governor of the State of Washington; Christine O. Gregoire, Attorney General of the State of Washington; Barbara J. Herman, Administrator of the State of Washington, Office of Marine Safety; David MacEachern, Prosecutor of Whatcom County; K. Carl Long, Prosecutor of Skagit County; James H. Krider, Prosecutor of Snohomish County; and Norman Maleng, Prosecutor of King County. The Natural Resources Defense Council, Washington Environmental Council, and Ocean Advocates intervened in the district court.

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## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. 1a-35a)[1] is reported at 148 F.3d 1053. The court's order denying rehearing (App. 36a-54a) is reported at 159 F.3d 1220. The opinion of the district court (App. 55a-89a) is reported at 947 F. Supp. 1484.

### JURISDICTION

The judgment of the court of appeals was entered on June 18, 1998. A petition for rehearing was denied on November 24, 1998. App. 37a. On February 12, 1999, Justice O'Connor granted an extension of time in which to file a petition for a writ of certiorari to and including March 24, 1999, and on March 15, 1999, further ex-

[1] "App." refers to the separately bound appendix to the petition for a writ of certiorari.

tended the time in which to file to and including April 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the United States Constitution, Ports and Waterways Safety Act of 1972, Oil Pollution Act of 1990, Coast Guard regulations, and Washington State regulations are set forth in the appendix, at 90a-117a.

## STATEMENT

This case concerns the validity of a regulatory scheme adopted by the State of Washington that seeks to govern the equipment, design, staffing, and operation of oil tankers engaged in interstate and foreign commerce. The Washington regulations, which apply to all ships (including foreign-flag vessels) that transport oil through territorial waters, differ from the comprehensive national and international standards developed for the same purpose. Those standards have been codified in international conventions formally ratified by the United States, other agreements with foreign nations, various Acts of Congress, and implementing regulations promulgated by the Secretary of Transportation through the Coast Guard.

1. a. The United States, through the Coast Guard and other federal agencies (such as the Departments of State and Defense, the Environmental Protection Agency, and the National Oceanic and Atmospheric Administration), is a leader in the development of consensual international standards establishing uniform requirements for oil tankers, as well as other vessels. See S. Treaty Doc. No. 39, 103d Cong., 2d Sess. at III (1994) ("The United States has basic and enduring

national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea."). The international regime, embodied in numerous conventions ratified by the United States, depends upon the principle of reciprocity: all signatory nations are assured of a ship's compliance with international standards through the certification of the ship by the government of its own flag nation, and that certification is then respected by the other signatory nations, including the United States.[2]

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[2] See International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), July 7, 1978, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996) (entered into force April 28, 1984), as amended by the Seafarers' Training, Certification and Watchkeeping (STCW) Code, July 7, 1995, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996), which is implemented domestically by the Coast Guard pursuant to Subtitle II, 46 U.S.C. 2101 *et seq.*; International Convention for the Safety of Life at Sea (SOLAS Convention), Nov. 1, 1974, 32 U.S.T. 47 (entered into force May 25, 1980), as amended, and the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, Feb. 17, 1978, 32 U.S.T. 5577, as amended through July 1, 1997, Int'l Maritime Org., Doc. Sales No. IMO-110E (1997), which is implemented by the Coast Guard pursuant to Executive Order No. 12,234, 3 C.F.R. 277 (1981); International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), Nov. 4, 1993, Res. A.741(18), Int'l Maritime Org., Doc. Sales No. IMO-186E (1994); see also Resolutions of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, May 24, 1994, Int'l Maritime Org., Doc. Sales No. IMO-110E (1997) (entered into force July 1, 1998) (making ISM Code mandatory), and Guidelines on Implementation of the International Safety Management Code by Administrators, Nov. 23, 1995, Res. A.788 (19), Int'l Maritime Org., Doc. Sales No. IMO-117E (1995) (to assist in uniform implementation by administrators), ratified by the United States in 1995, and implemented by

Congress has enacted numerous federal statutes that furnish a means to implement the United States' treaty obligations, codify in domestic law the international system of tanker regulation, and confirm the United States' leadership in developing international rules for tanker safety. See, *e.g.*, H.R. Rep. No. 1384, 95th Cong., 2d Sess. Pt. 1, at 6-9 (1978).[3] Many of the statutory provisions in turn direct the Secretary of Transportation (who has delegated that authority to the Coast Guard, 49 C.F.R. 1.46 (b) and (c)) to establish the applicable standards.

Of particular relevance here, in a statutory provision drawn from Title II of the Ports and Waterways Safety

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the Coast Guard pursuant to 46 U.S.C. 3201-3205 (Supp. II 1996); International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), Nov. 2, 1973, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997), as amended by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997), implemented by the Coast Guard pursuant to 33 U.S.C. 1901-1915 (1994 & Supp. III 1997); Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (CVTMS Agreement), Dec. 19, 1979, U.S.-Can., 32 U.S.T. 377 (entered into force Dec. 19, 1979); United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, U.N. Div. for Ocean Affairs & Law of the Sea Office of Legal Affairs, U.N. Sales No. E.97.v.10 (1997), which has not yet been ratified by the United States, but which, pursuant to the President's Ocean Policy Statement, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983), is recognized by the United States to reflect customary international law to which the United States adheres.

[3] Those statutes include the Tank Vessel Act, ch. 729, 49 Stat. 1889; Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424; Act to Prevent Pollution from Ships, Pub. L. No. 96-478, 94 Stat. 2297; Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471; and Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484. (Those Acts, as amended, are codified in various parts of Titles 33 and 46 of the United States Code.).

Act of 1972 (PWSA), Congress has broadly directed the Secretary to "prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tank vessels "that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 46 U.S.C. 3703(a). In developing those standards, the Secretary must consult with and consider the views of interested federal agencies, "officials of State and local governments," "representatives of port and harbor authorities and associations," "representatives of environmental groups," and "other interested parties knowledgeable or experienced in dealing with problems involving vessel safety, port and waterways safety, and protection of the marine environment." 46 U.S.C. 3703(c). A tank vessel of the United States must have a certificate of inspection issued by the Secretary endorsed to indicate that the vessel complies with federal regulations. 46 U.S.C. 3710(a). Consistent with the role those regulations play in implementing the international regime, however, Congress has provided that with respect to foreign flag tank vessels, the Secretary may accept a certificate issued by the government of a foreign country under a treaty, convention, or other international agreement to which the United States is a party, as a basis for issuing a certificate of compliance with federal standards. 46 U.S.C. 3711(a). See also 33 U.S.C. 1221-1236 (complementary provisions under Title I of the PWSA).[4]

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[4] See 33 U.S.C. 1228 (vessel may not operate in United States waters unless it meets applicable licensing standards); 33 U.S.C. 1231 (rulemaking procedures providing for consultation similar to that under 46 U.S.C. 3703(c)); 60 Fed. Reg. 24,767 (1995) ("The Coast Guard is modifying its regulations on navigational safety and

Because the United States is both a "flag state" (meaning that it is responsible for developing standards and regulations for ships flying the U.S. flag) and a "port state" (meaning that U.S. ports receive cargo, and oil in particular, arriving on foreign-flag vessels), the United States has a substantial interest in ensuring that all vessels that transit its waters, particularly foreign-flag vessels, comply with comprehensive safety and environmental protection standards. The International Convention for the Safety of Life at Sea (SOLAS Convention), Nov. 1, 1974, 32 U.S.T. 47, establishes that every ship, when in a port of another signatory nation, is "subject to control by officers duly authorized by [the port nation] Government in so far as this control is directed towards verifying that the certificates issued under [the Convention] are valid." Annex, Ch. I, Pt. B, Reg. 19(a), Int'l Maritime Org., Doc. Sales No. IMO-110E (1997). But the SOLAS Convention, like other conventions at issue in this case, requires port nations to accept valid certificates (issued by the flag nation government) unless there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the conditions for which the certificate was issued. *Id.* at 19(b).[5] If control is exercised and a ship is unduly

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marine engineering to harmonize them with the International Convention for the Safety of Life at Sea.").

[5] The requirements of certification and reciprocity also apply in the context of rules established pursuant to other international agreements. See STCW Convention, Arts. VI (certificates), X (control); MARPOL 73/78, Arts. 5-7; *id.* at Annex I, Ch. I, Regs. 5 (issue of certificates), 7 (form of certificate), 8A (port state control on operational requirements); SOLAS Convention, Annex, Ch. IX, Regs. 4 (certification), 6 (verification and control), Int'l Maritime Org., Doc. Sales No. IMO-110E (1997); *id.* Ch. XI, Reg. 4 (port state control on operational requirements).

detained or delayed, the port nation government is responsible for compensation for any loss or damage suffered by the ship. *Id.* at 19(f). Chapter I of the SOLAS Convention provides that foreign ships are subject to control only by officers duly authorized by the national government that is the signatory to the Convention. Pursuant to Executive Order No. 12,234 (see 3 C.F.R. 277 (1981)), which implements the SOLAS Convention, and the Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, § 602, 110 Stat. 3927, Coast Guard employees are duly authorized officers who may subject foreign vessels to control in U.S. ports under that Convention. Officials of Washington and other States are not.

b. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court addressed whether Washington State regulations applicable to tankers were preempted by various provisions of federal law, specifically including regulations issued under one of the Acts of Congress—the Ports and Waterways Safety Act of 1972 (PWSA)—that is at issue in this case. In holding that the State's attempts to regulate the design of oil tankers were preempted, the Court concluded that, in Title II of the PWSA, 46 U.S.C. 391a (Supp. V 1975) (now codified as amended at 46 U.S.C. 3701 *et seq.*), Congress "has entrusted to the Secretary [of Transportation] the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States." 435 U.S. at 163. The Court noted that "Congress expressed a preference for international action and expressly anticipated that foreign vessels would or could be considered sufficiently safe for certification by the Secretary if they satisfied the requirements arrived at by treaty or convention." *Id.* at 168. With respect to personnel, staffing, and operational requirements, the Court concluded that Washington's

regulations were not automatically preempted by Title I of the PWSA, 33 U.S.C. 1221-1227 (Supp. V 1975) (now codified as amended at 33 U.S.C. 1221-1231), in the absence of federal regulations addressing the same subject matter. 435 U.S. at 171. But the Court emphasized that if the Coast Guard adopts regulatory requirements governing a particular subject (or concludes that no such requirements should be adopted at all), a State's inconsistent rules are ousted by operation of the Supremacy Clause. *Id.* at 171-172; see *id.* at 173-178 (invalidating Washington statute excluding from Puget Sound all tankers in excess of 125,000 deadweight tons because it differed from a Coast Guard rule).

c. After the *Exxon Valdez* oil spill in Alaska in 1989, Congress enacted the Oil Pollution Act of 1990 (OPA), Pub. L. No. 101-380, 104 Stat. 484. Title I of OPA sets federal standards for liability and damages for the discharge of oil into navigable waters of the United States. 104 Stat. 486-506. Subtitle A of Title IV—which concerns oil-spill prevention—addresses certain discrete issues relating to tanker personnel qualifications, manning, operations, design, and construction, and it does so in part by strengthening (or directing the exercise of) certain powers the Secretary already had under prior law. 104 Stat. 509-523. In that Subtitle, Congress required a design and construction standard that differed from international ones in only one respect, by mandating double hulls for certain types of tank vessels that operate in U.S. waters regardless of their flags (46 U.S.C. 3703a(a)), with an exception for vessels transiting through the territorial waters of the United States in innocent passage (46 U.S.C. 3702(e)). See OPA § 4115, 104 Stat. 517.[6] In all other respects,

[6] Similarly, in Title I, Congress required certain vessels to obtain Certificates of Financial Responsibility that provide more

Subtitle A is consistent with international standards. See, *e.g.*, OPA § 4106(a) and (b), 104 Stat. 513-514 (directing the Secretary to "evaluate the manning, training, qualification, and watchkeeping standards of a foreign country that issues documents" for covered tankers to ensure that they "are at least equivalent to United States law or international standards accepted by the United States").

d. In 1994, Washington adopted new regulatory requirements, which it called "Best Available Protection" (BAP) Regulations. Those rules were designed to impose more stringent safety requirements on tankers, and thereby prevent oil spills. In pertinent part, those rules require installation of specified navigational and emergency towing equipment; impose reporting requirements for certain vessel casualties regardless of whether they occur in Washington waters; mandate particular language-proficiency requirements and personnel qualifications for vessel officers and crews; establish maximum crew work hours; set drug-testing policies; and impose position-monitoring requirements. See App. 57a-60a (describing the provisions). Washington's regulations concerning personnel, management, and operation of vessels depart from the federal and international regulatory regime in numerous ways. See, *e.g.*, pages 17-20, *infra*.

2. The International Association of Independent Tanker Owners (Intertanko) brought this suit for declaratory and injunctive relief against Washington state and local officials responsible for enforcing the BAP regulations. The district court granted Washing-

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expansive coverage and higher limits than are required under the international regime. OPA §§ 1004(a)(1) and (d), 1016, 104 Stat. 492, 493, 502 (codified at 33 U.S.C. 2704(a)(1) and (d), 2716 (1994 & Supp. III 1997)).

ton's motion for summary judgment and denied Intertanko's motion. App. 55a-89a. The district court recognized that "[a]lthough protection of the marine environment has historically been within the reach of the police powers of the state, shipping has traditionally been governed by federal law." App. 61a. The court also had "no doubt that the areas addressed by the Washington oil spill prevention rules, which generally cover tanker operations, personnel, management, technology, and information reporting, are also comprehensively regulated by federal statutes, regulations and treaty obligations." App. 69a. The court nevertheless sustained all of the Washington regulations.

The court relied principally on Section 1018 of OPA, which provides that "[n]othing in this Act" shall affect or preempt the authority of a State to impose "any additional liability or requirements with respect to * * * the discharge of oil or other pollution by oil within such State," or "additional liability or additional requirements * * * relating to the discharge, or substantial threat of a discharge, of oil." 33 U.S.C. 2718(a) and (c). The court concluded that, since Title IV of OPA contains some provisions addressing tanker operations, personnel management, technology, and information reporting, the effect of Section 1018 is that there is no preemption of state laws that are inconsistent with the federal regulatory regime, even though that regime rests on Acts of Congress other than OPA. App. 69a. The court also found the inconsistency between the Washington rules and the international regime of maritime regulation implemented by federal law to be immaterial, since Congress had departed from the international regime in OPA by mandating a requirement of a double hull on oil tankers—a step that, the court opined, "demonstrates that Congress was not

overly concerned with maintaining uniformity with such standards." App. 66a.

The court also engaged in a separate "implied preemption" analysis, and determined that although Congress has occupied the field of regulating oil tanker design and construction, it has not done so in other areas in which a State might exercise its police powers to protect the environment. App. 69a-76a. Although the district court recognized that in *Ray* this Court had held that Coast Guard regulations issued under the PWSA preempt state laws in those other areas of tanker regulation as well, App. 70a-72a, the court concluded that Section 1018 of OPA required a different result here, notwithstanding the Coast Guard's expression of intent to preempt state laws, App. 76a-77a.[7]

3. The United States intervened after Intertanko appealed the district court's decision to the Ninth Circuit. The Ninth Circuit affirmed in part and reversed in part. App. 1a-35a. The court held that several Washington regulations requiring tank vessels to have certain navigation and towing equipment are preempted, App. 26a-29a, and that state regulations imposing requirements with respect to staffing, personnel training, qualifications, and operation of tank vessels are not preempted, even where they depart from standards set in international agreements and Coast Guard regulations, App. 7a- 25a.

Like the district court, the court of appeals relied primarily on Section 1018 of OPA. The court of appeals

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[7] The district court also rejected Intertanko's contention that the Washington regulatory program violates the Commerce Clause and the foreign affairs powers of the United States Government. App. 81a-86a. The court of appeals likewise rejected those contentions, App. 32a-35a, and they are not involved in this petition.

recognized that OPA is not the only federal statute that regulates tanker vessels, noting that the PWSA, the Port and Tanker Safety Act of 1978, and the Tank Vessel Act of 1936 do so as well. App. 11a. The court of appeals rejected Washington's contention that Section 1018 of OPA, which provides that "this Act" shall not have preemptive effect, also applies to those other federal statutes. The court found that interpretation inconsistent with the "plain meaning" of Section 1018. *Ibid.* The court nevertheless held that the Washington regulations governing staffing, personnel training and qualifications, and operation of tank vessels are not preempted by Coast Guard regulations issued under those other federal statutes. App. 13a-19a. The court reasoned that OPA, "[a]s the most recent federal statute in the field, * * * reflects the full purposes and objectives of Congress, better than [the other statutes governing tankers], all of which [OPA] was designed to complement." App. 16a (internal quotation marks, citation, and emphasis omitted). In the court's view, Section 1018 of OPA "demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability, and compensation." *Ibid.*

Next, the court of appeals rejected the contention that the challenged state rules are invalid because they conflict with various international agreements governing tankers. The court found that Congress had not embraced strict international uniformity because the relevant treaties set only minimum standards, and each signatory nation can impose higher standards. App. 17a-18a. The court similarly did not find the federal regulation of tankers to be so comprehensive as to preempt the field of tanker regulation. Rather, it read this Court's decision in *Ray* to require field preemption only of state rules governing tanker design, construction, and equipment, but not of rules pertaining to

tanker operations, personnel policies, and other staffing requirements. App. 21a-25a.

Finally, the court of appeals concluded that Coast Guard tanker regulations do not preempt Washington's BAP rules even where the Coast Guard has expressed an intent to preempt such rules. App. 29a-32a. The court recited the Court's conclusion in *Ray* that the relevant inquiry under the federal statutes providing for regulation of oil tankers is whether the Secretary has either promulgated his own regulations on the particular subject or decided that no such requirement should be imposed at all. App. 29a. But the court then proceeded to hold that, under those same statutes, "Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law." App. 31a. The court again relied on Section 1018 of OPA, reasoning that in view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own, it was "implausible" to conclude that Congress intended to delegate power to the Coast Guard to do so.[8]

4. The court denied petitions for rehearing filed by the United States and by Intertanko. App. 36a. Judge Graber dissented. App. 36a-54a. In her view, the court's reliance on Section 1018 of OPA was misplaced, because that section is limited to liability and compensation for oil spills, and does not apply to preventive measures. App. 51a. Judge Graber also concluded that the court had erred in holding that Congress must spe-

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[8] The Ninth Circuit did not reach two other bases raised by the United States for challenging the Washington regulations: their interference with the right of innocent passage, and their conflict with a bilateral agreement between the United States and Canada concerning traffic in the Strait of Juan de Fuca. See notes 15 and 14, *infra*. The court of appeals determined that those arguments had been raised for the first time on appeal, and the court declined to address them. App. 19a.

cifically have intended to give the Coast Guard power to preempt state regulatory schemes. App. 52a-54a.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case conflicts with a holding of this Court in an area of international commerce critical to the Nation's economy. As this Court made clear in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Supremacy Clause requires a finding of preemption when a state rule diverges from or federal standards regarding the design, equipping, staffing, operation, or construction of tank vessels. The court below therefore erred in holding categorically that Washington's rules governing staffing and operation of tank vessels are not preempted, rather than engaging in the type of provision-by-provision analysis mandated by *Ray*. The result of the Ninth Circuit's decision is to leave in place a set of state rules that differ in numerous ways from international standards and Coast Guard regulations governing the same subject matter.

The Ninth Circuit's decision gravely impairs the Coast Guard's longstanding authority to establish uniform national rules for vessels in interstate and foreign commerce and the United States' ability to conform to the international vessel-management regime. That regime rests on the principle of reciprocity, under which the flag nation certifies the compliance of its vessels with international rules, and that certification is then accepted by other participating nations. The Ninth Circuit's decision also substantially undermines the ability of the United States to speak with one voice in international negotiations to promote tanker safety and environmental protection. Review by this Court therefore is warranted.

1. The Ninth Circuit's decision squarely conflicts with this Court's decision in *Ray* and incorrectly ap-

plies the principles of federal preemption to the Washington State regulations governing oil tankers in foreign trade.

a. More than 20 years ago, this Court held in *Ray* that the Supremacy Clause of the Constitution barred the State of Washington from imposing certain regulatory requirements and restrictions on oil tankers in Puget Sound that differed from standards imposed by federal law. *Ray* construed Titles I and II of the Ports and Waterways Safety Act of 1972 (PWSA) to establish a set of principles for federal preemption of state rules with respect to a range of international vessel-management requirements. Although the Court in *Ray* recognized the legitimate police powers of States to issue certain rules to protect coastlines from oil spills, the Court emphasized that such rules must give way when a federal or international vessel requirement has been established. 435 U.S. at 172. The Court explained that Congress acted to "make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field," *id.* at 174 (quoting H.R. Rep. No. 563, 92d Cong., 1st Sess. 15 (1971)), and vested authority in the Coast Guard to ensure "consistency of regulation and thoroughness of consideration" of the wide variety of interests to be affected, *id.* at 176. "[I]t was anticipated that there would be a single decisionmaker, rather than a different one in each State." *Id.* at 177.

Applying that analytical framework, the Court in *Ray* undertook a detailed, section-by-section analysis of each state provision at issue to determine whether a national standard existed in a federal statute or regulation addressing the same subject matter. In doing so, the Court held that federal law preempted state vessel regulations that required a tanker enrolled strictly in coastal trade to have a local pilot aboard, 435 U.S. at 158; imposed requirements on the design and con-

struction of tankers in addition to the minimum federal standards required to obtain certificates of compliance issued by the Secretary of Transportation, *id.* at 160-163; and imposed operating rules that differed from rules adopted by the Secretary concerning the passage of ships in excess of a particular tonnage, *id.* at 173-178. The Court did uphold a Washington state rule requiring a tug escort for certain tankers, but it did so only because the issue of tug escorts had not been addressed by federal regulations. The Court specifically noted that "[i]t may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause." *Id.* at 172.

b. As with the state regulations found to be pre-empted in *Ray*, the State of Washington has once again sought to impose rules that differ in substantial respects from federal standards promulgated pursuant to federal statutes and international treaties.[9] Rather than engage in the type of provision-by-provision analysis required by *Ray*, however, the court of appeals held categorically that state rules pertaining to the staffing and operation of tankers are *not* preempted by Coast Guard regulations, without regard to whether the state rules conflict with the federal regulations.[10] App. 16a, 25a. That holding is flatly inconsistent with *Ray*. There the Court held that "[t]he relevant inquiry under Title I [of the PWSA] with respect to the State's power

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[9] Indeed, long before *Ray*, in the 1930s Washington's attempts to impose vessel management rules that differed from national standards were struck down by this Court in *Kelly* v. *Washington ex rel. Foss Co.*, 302 U.S. 1 (1937).

[10] The only regulations held preempted by the court below concerned requirements for installation of particular equipment on tank vessels. See App. 35a.

to impose [operating rules] is * * * whether the Secretary has either promulgated his own * * * requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all." 435 U.S. at 171-172.

The result of the Ninth Circuit's decision is to leave in place a number of Washington regulations that are inconsistent with federal law and specific international standards. The following examples are drawn for illustrative purposes, and are not intended to compose an exhaustive list of the Washington regulations that create such conflicts:

– *Operating Procedures; Restricted Visibility*: The Washington BAP rules require three licensed deck officers on watch during times of restricted visibility, one of whom may be a state-licensed pilot when the vessel is in pilotage waters. Wash. Admin. Code § 317-21-200(1)(a) (1998). That requirement diverges from the Coast Guard requirement of two licensed deck officers. See 33 C.F.R. 164.13(c) (regulation implementing the STCW Convention). Because crews are staffed to meet international standards, the Washington rules also necessarily interfere with the accomplishment of another international standard: ensuring that watch officers obtain at least ten hours of rest in any 24-hour period, which must be provided in "no more than two periods, one of which shall be at least 6 hours in length." STCW Code, § A-VIII/1. To comply with both the state personnel watch requirements and the international crew-rest standards, therefore, any vessel destined for Washington waters (or in transit through those waters) must increase its crew complement or fly additional personnel to the vessel prior to entering Washington waters.

– *Drug and Alcohol Testing and Reporting*: The Washington regulations require extensive drug and alcohol testing of all crew members on tankers, including foreign flag vessels. Wash. Admin. Code § 317-21-235 (1998). Those regulations further require that the results of a positive drug test be reported to Washington within 72 hours of the confirmed test result. Those state requirements appear to apply to a drug test conducted anywhere in the world for a vessel that might arrive in Washington waters weeks or months later. Washington's requirement of random testing of all crew members on all of the vessels operated by a carrier throughout the world creates a rule different from the Coast Guard's standards, which establish post-accident and reasonable-cause testing rules for foreign flag vessels. See 46 C.F.R. 4.05-12; 46 C.F.R. Subpt. 4.06; 46 C.F.R. 16.240; 33 C.F.R. 95.035.[11] Moreover, numerous foreign governments, including the Government of Canada, have informed the Coast Guard that their laws might not allow the testing of individuals in accordance with the Washington requirements. See 59 Fed. Reg. 65,500-65,501 (1994); 57 Fed. Reg. 31,274 (1992); 56 Fed. Reg. 18,982 (1991); 53 Fed. Reg. 47,070-47,071 (1988). Indeed, even under United States law, the random testing of individuals is limited to those individuals aboard vessels who

[11] Although the international regime generally authorizes the flag nation to determine that vessels are manned appropriately, crews are qualified, and vessels are seaworthy, the STCW Convention provides guidelines for the prevention of drug and alcohol abuse by prescribing a maximum 0.08% blood alcohol level during watchkeeping as a minimum safety standard on ships and prohibiting the consumption of alcohol within four hours prior to serving as a member of a watch. See STCW Code, § B, Ch. VIII, Pt. 5.

occupy positions of safety that are specifically identified in the regulations. 46 C.F.R. 16.230; see also 56 Fed. Reg. 31,030 (1991) (noting concerns based on Fourth Amendment protections against unreasonable searches and seizures).

– *Crew Training Policies*: The Washington regulations require "training beyond the training necessary to obtain a license or merchant marine document." Wash. Admin. Code § 317-21-230 (1998). That provision exceeds the requirements of the STCW Convention, pursuant to which a certificate by a flag state will be afforded respect through reciprocity in the United States. See STCW Convention, Arts. VI, X; 46 C.F.R. Pt. 12. To meet the State's requirements, a crew would have to be flown in advance to Washington for training before serving on a voyage to Washington waters, a requirement that would often be impractical given the commercial realities of international shipping, in which vessels are frequently re-routed in mid-voyage to new destinations for the pickup or delivery of cargo. The practical effect of the Washington intrusion into international training requirements is that unless the additional state training requirements have been met, foreign and U.S. flag vessels alike may not enter Washington waters.

– *Language Proficiency Requirements*: The Washington BAP rules require that "[a]ll licensed deck officers and the vessel's designated person in charge under 33 CFR sec. 155.700 are proficient in English and speak a language understood and spoken by subordinate officers and unlicensed crew." Wash. Admin. Code § 317-21-250(1) (1998). The international requirements that the United

> States has agreed to observe, by contrast, require an officer in charge of the navigation watch to be able to "perform the officer's duties * * * with a multilingual crew." See STCW Code, Tab. A-II/1, Col. 2, *English language*. The STCW standard requires licensed deck officers to be able to communicate with those who are part of the navigation watch, and only on those matters relevant to watchkeeping duties. The Washington regulations, on the other hand, require *all* licensed deck officers to speak the languages of the entire unlicensed crew, a requirement that imposes substantial additional costs and burdens on ship owners and operators.

c. There can be no doubt that the Washington regulations just discussed are preempted under the analysis mandated by this Court's decision in *Ray*. The court of appeals believed, however, that, since the enactment of OPA in 1990, the Coast Guard no longer has the authority to issue regulations that preempt state rules addressing the same subject matter. That conclusion is deeply flawed.

Contrary to the court of appeals' view, nothing in OPA affects *Ray's* holding that the Coast Guard has authority to issue regulations that preempt state rules on the same subject. It would be surprising indeed for Congress to have deprived the Coast Guard of that power to adopt uniform national standards, since, as the district court acknowledged, "shipping has traditionally been governed by federal law." App. 61a. And, in fact, the Conference Report on OPA expressly states that OPA "does *not* disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Company*, 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 122 (1990) (emphasis added).

Significantly, moreover, OPA did not amend the provisions of the PWSA—which were relied upon by the Court in *Ray*, 435 U.S. at 161, 170, and are now codified at 33 U.S.C. 1231 and 46 U.S.C. 3703—that authorize and direct the Secretary to issue regulations governing the design, construction, alteration, repair, maintenance, operation, equipment, personnel qualification, and staffing of tanker vessels. Those statutory provisions identify a role for the States in the process of developing such standards: they require the Secretary to consult with and "consider[] the views" of "officials of State and local governments." 33 U.S.C. 1231(b)(2); 46 U.S.C. 3703(c)(2). Those provisions plainly do not contemplate that—after the Secretary has consulted with the States, considered their views, taken international standards into account, struck a balance among competing considerations, and adopted uniform federal standards—the States are then free to adopt divergent laws on the very same subjects.

In addition, Title IV of OPA makes plain that Congress intended to reinforce, not undermine, the established regime of international uniformity and reciprocity on such issues as staffing, training, and operation. Thus, Congress specifically directed the Secretary of Transportation to evaluate the "manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation" to tankers, in order to determine whether they are "at least equivalent to United States law or international standards accepted by the United States"; and Congress provided that the Secretary may prohibit entry into the United States of vessels with documentation issued by countries that do not maintain and enforce such standards. OPA § 4106(a), 104 Stat. 513 (codified at 46 U.S.C. 9101(a)). That directive to the Secretary of Transportation refutes the Ninth Circuit's conclusion that Congress, in

enacting OPA, subordinated the need for international uniformity and reciprocity to the divergent policy preferences of the States. Cf. App. 16a.

In holding that the Coast Guard no longer has the power recognized in *Ray* to issue regulations having preemptive effect, the court of appeals relied almost exclusively on Section 1018 of OPA. See App. 16a. But as the court recognized elsewhere in its opinion, see App. 12a, Section 1018 addresses only the preemptive effect of "this Act"—*i.e.*, of OPA itself—not the preemptive effect of *other* federal statutes, such as the PWSA, at issue in *Ray*. The court of appeals' holding thus boils down to the notion that even though Section 1018 of OPA neither applies to other federal statutes such as the PWSA nor alters the Secretary's rulemaking authority under them, it nevertheless has a sort of penumbral effect that divests the Coast Guard of the power it previously had to issue preempting regulations under those other federal statutes. Simply to state that proposition is to refute it. Under the Constitution, Congress could divest the Coast Guard of that power under prior law only by enacting a new law that repealed that prior authority. See *INS* v. *Chadha*, 462 U.S. 919, 955 (1983). Congress did not do that in OPA.

Properly understood, then, Section 1018 expresses an intent for OPA not to displace whatever police powers States otherwise might have had prior to OPA. Thus, whether state tanker laws are preempted turns on the vast body of federal treaty, statutory, and regulatory provisions governing tanker operations, as well as the international regime on which those provisions of United States law are based.

d. The court of appeals' erroneous reliance on Section 1018 of OPA also underlies its further (and equally erroneous) holding that Coast Guard regulations that are otherwise valid require additional legislative au-

thority to have preemptive effect. See App. 29a-31a. That decision is erroneous in at least two important respects. First, 33 U.S.C. 1231 and 46 U.S.C. 3703 confer broad authority on the Coast Guard, after "considering the views" of the State and balancing competing considerations, to prescribe regulations for the design, construction, operation, equipping, personnel qualification, and staffing of tank vessels. Those provisions, which are unaffected by OPA, furnish ample authority for Coast Guard regulations that preempt conflicting state rules. Moreover, as this Court held in *Ray*, the Secretary already had authority under those provisions of the PWSA to issue regulations that preempt state regulatory efforts. Congress was not required to confer that authority all over again in OPA.

Second, and more fundamentally, Congress need not specifically confer preemptive authority on a federal agency for that agency's rules to have preemptive effect. In *City of New York* v. *FCC*, 486 U.S. 57 (1988), for example, this Court explained that "a narrow focus on Congress' intent to supersede state law is misdirected, for a pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Id.* at 64 (internal quotation marks and brackets omitted). In identifying "the correct focus" of a regulatory preemption inquiry, the Court left no doubt that "statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *Ibid.*; accord *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 154 (1982) ("A pre-emptive regulation's force does not depend on express congressional authorization to displace state law.").[12]

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[12] Although in some instances the Coast Guard has expressly stated that its regulations do *not* preempt state rules, it generally

e. Had the court of appeals conducted the proper preemption inquiry, it would have analyzed (or remanded to the district court to analyze) whether each of the state rules at issue conflicts with federal regulations or international treaty obligations, or otherwise hinders the effectuation of federal objectives in establishing uniform rules for tankers engaged in coastal and international trade. If factual questions arose about whether the state rules are inconsistent with federally-imposed standards or otherwise interfere with the federal goal of international reciprocity, the proper course would have been to develop a record on those issues.

2. Review is warranted in this case because the Ninth Circuit's decision gravely impairs the Coast Guard's longstanding authority to adopt uniform national rules affecting interstate and foreign shipping and the United States' ability to comply with its international obligations.

a. The United States has long had a strong interest in developing a uniform system of international obligations to regulate tankers. Those obligations, which are negotiated by various federal agencies and implemented through international commitments and regulations promulgated by the Coast Guard, seek to establish safety standards in such areas as tanker design, construction, equipment, staffing, and operations. The concept of reciprocity is critical to maintaining enforcement of uniform international standards. Through recognition and enforcement of standards mutually

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has been quite clear about the preemptive effect of its regulations. See, *e.g.*, 61 Fed. Reg. 1080-1081 (1996) (vessel oil spill response plan regulations); *id.* at 7917. In other cases, it has left no doubt that its regulations are intended to preclude state regulations concerning the same subject. 63 Fed. Reg. 71,770 (1998).

agreed-upon in the international community, Congress and the Coast Guard have specifically provided that the United States will accept flag-state certification of compliance with requirements concerning such matters as seafarer qualifications and training, in exchange for the recognition of certification by the United States that a vessel complies with those international standards. See page 3 and note 2, *supra*. Compare *Boos* v. *Barry*, 485 U.S. 312, 323-324 (1988) (discussing the importance of reciprocity in international relations).[13] This Court in *Ray* upheld the preemptive effect of that regime on inconsistent state rules. As the Court emphasized, Congress did not intend to permit a situation in which "a vessel * * * holding a Secre-

[13] The one statutory exception to the principle of international uniformity and reciprocity in this setting is the requirement that certain foreign-flag tankers must be double-hulled to enter United States waters. See 46 U.S.C. 3702(a), 3703a (1994 & Supp. II 1996). The Ninth Circuit attributed great importance to Congress's deviation from the international standard in enacting that requirement in OPA, concluding that Congress's actions indicate that "strict international uniformity with respect to the regulation of tankers is not mandated by federal law and that international agreements set only minimum standards." App. 18a (internal quotation marks and brackets omitted). The court of appeals missed the significance of the fact that Congress itself enacted the double-hull requirement and that it did so by *amending* the governing federal statutory framework to mandate that departure. That specific and carefully-drawn exception reinforces the conclusion that the authority of the Coast Guard to issue uniform regulations that conform to international standards (and thereby preempt conflicting state rules) was not affected by OPA in any other respect. A fortiori, nothing in that focused amendment supports the court of appeals' holding that *States* may ignore both the international regime and the Coast Guard's regulations. That holding is fundamentally at odds with the law of preemption, and it threatens the ability of the United States to speak with one voice and to comply with its international obligations.

tary's permit, or its equivalent, [a permit from its flag nation,] to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States." 435 U.S. at 164. "The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Id.* at 165. Congress no more intended to permit States to frustrate that federal purpose here, where the relevant certifications concern training and staffing policies, than it did in *Ray*.

b. The competing legal regime erected by Washington poses substantial and immediate diplomatic concerns for the United States in several critical respects. First, the existence of state regulations that conflict with international standards raises the distinct possibility that other nations that are signatories to international conventions and agreements will regard the United States as in violation of its obligations and commitments and thus take actions in response that will further undermine international uniformity. In that regard, the Department of State received a diplomatic note specifically addressing the Washington State BAP regulations from 13 nations (Belgium, Denmark, Finland, France, Germany, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden) and the Commission of the European Community expressing concerns that "[d]iffering regimes in different parts of the US would create uncertainty and confusion. * * * The Governments therefore urge the US to pursue a regulatory regime, on a national basis, which is consistent with agreed international standards." Note Verbale from the Royal Danish Embassy to the U.S. Department of State 1 (June 14, 1996) (File No. 60 USA.1/4). On May 7, 1997, the Government of Canada submitted a similar diplomatic protest. Letter from the

Embassy of Canada to the U.S. Department of State 1 (Note No. 0389).

Since those countries represent major maritime trading nations, significant allies of the United States, and leaders in establishing international vessel standards, their diplomatic protest is entitled to significant respect by this Court in considering this petition for a writ of certiorari. Indeed, a decision by other nations that the United States is in noncompliance with an international treaty obligation could lead to the abrogation of the agreement, a decision not to afford reciprocity to United States vessels in foreign ports, and considerable uncertainty in the legal regime governing international vessel management.[14]

Moreover, the conflicting Washington regulations undermine the credibility of the United States in negotiating international agreements that promote safe use of tankers around the world. The culmination of such negotiations has had, and will continue to have, significant desirable consequences for shipping and environmental protection in the coastal waters of the United States and its trading partners. For that kind of diplo-

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[14] A specific example of the principle of reciprocity that is undermined by the Washington BAP rules is the CVTMS Agreement, which provides that a foreign vessel transiting United States waters en route to a Canadian port need not comply with United States laws if it complies with comparable Canadian laws and regulations. Congress specifically authorized the President to enter into such an agreement. See 33 U.S.C. 1230(b)(1). The Washington BAP regulations recognize no reciprocity with Canadian rules for such transiting vessels, and such rules raise the specter that Washington will deny entry into United States waters of vessels that comply with the CVTMS Agreement. The court of appeals declined to consider that issue, see App. 19a, even though it elsewhere noted that Intertanko had raised concerns in the district court about the effect of the state BAP rules on the CVTMS Agreement, see App. 17a.

matic bargaining to result in agreements that other nations will enforce, however, the United States negotiators must be assured that they can represent the *entire* United States, and not be undermined by the actions of individual States that depart from the international regime and the United States' implementation of it. Because of the international nature of the shipping industry, the establishment of vessel standards for safety and environmental protection is generally most effective when carried out on an internationally cooperative level rather than by individual nations or political subdivisions of those nations acting on their own. See, *e.g.*, S. Treaty Doc. No. 39, *supra*, at III.[15]

c. In view of the immediate consequences caused by the Ninth Circuit's decision sustaining rules adopted by Washington that conflict with international and federal rules—and the Ninth Circuit's clear error under *Ray* in doing so—the Court should grant review now, rather than waiting for decisions of other States or courts to create further disuniformity in the international vessel-management system. Indeed, in past cases this Court has recognized the appropriateness of exercising its certiorari jurisdiction to resolve important questions affecting foreign relations before conflicting decisions in

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[15] The United States, for example, has led efforts to insure that foreign vessels transiting in innocent passage through a nation's territorial sea need only comply with international rules–as opposed to a coastal nation's unique regulations that might properly be applied if the vessel were to enter that nation's ports. By purporting to apply to all vessels in transit through its waters, see Wash. Admin. Code § 317-21-020(1) (1998), the BAP rules violate the international customary law principle protecting the right of innocent passage. See Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, Arts. 14 & 15, 15 U.S.T. 1606, 1610; UNCLOS, Arts. 21(2) & 24(1); 33 U.S.C. 1230; 33 C.F.R. Pts. 160, 164.

the courts of appeals have emerged. For example, the Court has granted certiorari to consider "[i]mportant questions concerning the effect of treaty and statute upon the privilege of aliens to acquire citizenship." *Moser* v. *United States*, 341 U.S. 41, 42 (1951). Similarly, certiorari was appropriate where a case "involve[d] important rights asserted in reliance upon federal treaty obligations." *Kolovrat* v. *Oregon*, 366 U.S. 187, 191 (1961). See also *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 407 (1964) ("We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area."); *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 196 (1970) (certiorari granted to consider whether a federal statute preempted state law governing picketing against foreign-flag vessels in U.S. ports); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (certiorari granted to review whether the Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over a foreign state in the United States).

If the Ninth Circuit decision is permitted to stand, every coastal State within the United States could feel empowered to adopt and enforce its own requirements, notwithstanding their inconsistency with the regulations of other States, the United States, and international treaties. Just in the Ninth Circuit alone, the consequences of state-by-state variations in tanker regulations could be highly problematic. The multiplicity of overlapping regulatory requirements within the United States would further frustrate the substantial national and international interests in uniform standards. The Court therefore should grant review to halt the unraveling of those uniform

standards that has been sanctioned by the Ninth Circuit in this case.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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