Granted

NOS. 98-1701 and 98-1706

In the Supreme Court of the United States
OCTOBER TERM, 1999

UNITED STATES OF AMERICA,
PETITIONER

v.

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

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

BRIEF OF THE PACIFIC MERCHANT SHIPPING ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF OF THE PACIFIC MERCHANT SHIPPING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

I. SUMMARY OF ARGUMENT[1]

The decision of the United States Court of Appeals for the Ninth Circuit in this case—holding that regulations of the State of Washington relating to vessel manning, personnel qualifications and operations are not preempted by federal law—is squarely in conflict with this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 55 (1978). While the federal and state governments share control over some matters relating to pollution prevention, control, and enforcement, as well as pilotage in local waters, the federal government has assumed and expressed exclusive control over vessel design, construction, operation, repair, maintenance, equipping, personnel qualifications, manning (including the duties and training of personnel) and general navigation. State

[1] This brief was authored in whole by counsel for Amicus Curiae, and no party other than *Amicus Curiae* made a monetary contribution to its preparation or submission.

and local governments are not free to conclude that a vessel and its personnel—approved by the federal government to navigate in waters of the United States—must meet higher standards to navigate in waters within state boundaries.

II. INTEREST OF AMICUS CURIAE

The Pacific Merchant Shipping Association ("PMSA") is a trade association that represents foreign and domestic shipowners and operators as well as their agents and other maritime entities on the West Coast of the United States. Its predecessor organization was established in 1919. PMSA's members own, operate, manage or represent United States and foreign flag tankers, dry bulk vessels, vehicle carriers, ferry and passenger vessels, tugs and barges, container ships and general cargo vessels. PMSA represents 75% to 80% of the total vessel tonnage calling at San Francisco Bay and Los Angeles area ports. A substantial portion of that tonnage also transits Washington waters enroute to or from California ports.

By an overwhelming margin, most of the exports from and imports into the United States move by water. In significant part, those goods are moved to and from ports located on the West Coast. More than 220 million tons of dry cargo, valued in excess of $660 billion, moved through Ports in Washington, Oregon and California in 1998, an increase of about 20% since 1993.

In 1998, more than 2,900 ships arrived at and departed from San Francisco Bay ports. Of these, 660 were tanker vessels. In the same year, more than 3,100 ships called at Los Angeles area ports. Of these, more than 700 were tanker vessels. Approximately 1,830 ships, at least 290 of which were tanker vessels, called at ports in Puget Sound in the State of Washington, and approximately 1,879 ships, at least 138 of which were tanker vessels, called at Portland, Oregon. The majority of these vessels called at both foreign and United States ports during the same voyage. These statistics are representative of past years and 1999 to date (except for tanker calls, which have temporarily increased in 1999 due to California refinery shutdowns and delays).

Frequently ships, both liner and tramp,[2] that call at ports on the West Coast of the United States call at more than one port during the voyage. Often these ports are in different states, as is the case with a significant number of liner trade vessels that call at multiple West Coast states on the same voyage. For example, as shown on Addendum I, in an approximate 30 day period around October, 1999, 111 liner container vessels (of up to 91,560 gross tons with capacity up to 6,000 twenty-foot intermodal containers), scheduled to call at Washington ports or navigating its waters, were also scheduled to call at one or more other West Coast states on the same voyage. This is representative of usual monthly calls. From January to September 30 of this year, 2,604 tankers arrived at and departed from ports of the San Francisco Bay Area, Long Beach and Los Angeles. Of those, 600 tankers arrived from ports of other states and 571 tankers departed those California ports for ports of other states. 276 of those tankers' voyages were to or from Washington waters.[3]

The West Coast destination port of PMSA member tramp tanker vessels or tramp cargo vessels is also often changed, mid-voyage, from a port in one state to a port in another state. This occurs for a variety of reasons. For example, while a vessel is enroute, its cargo may be sold to a buyer or buyers who designate a new discharge port or ports, or delivery time demands may change, or congestion may develop at the original destination as a result of too many vessels at port or conditions ashore at the ocean terminals. There are numerous other contingencies in the world of international trade that can result in a change of ports during a vessel's ocean transit.

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[2] Tramp vessels do not have regular scheduled ports of call (as do liner vessels) and trade according to cargo demand and availability.

[3] The liner container calls were published in the September 30, 1999 edition of the Journal of Commerce Shipcards. The West Coast 1998 dry cargo statistics were provided by the Pacific Maritime Association records. The other vessel statistics were provided by the Marine Exchange in San Francisco and Los Angeles.

The twenty-seven PMSA members who operate foreign flag vessels maintain uniform and fleetwide training, record keeping, reporting, licensing and certification standards for their masters, officers, crew and vessels in accordance with each member's flag state regulations and standards set in applicable treaties, conventions and international agreements under which the vessels are issued certificates indicating compliance. These include ongoing vessel drills, training, and periodic continuing education on developments in vessel technology, operations and management. These certificates are accepted by the United States Coast Guard as compliance with United States regulations, thus allowing the vessels to call at United States ports. Such standards are, in main, set forth in the treaties, conventions, international agreements and United States statutes discussed at pages 11 to 17 herein. These standards and the Coast Guard regulations prescribed under United States statutes present uniform, although stringent, standards and rules which are easily understood, thus facilitating ease of administration and compliance by the PMSA members.

In addition to comprising the majority of merchant shipping tonnage calling at West Coast ports, a significant number of PMSA ship operator members operate vessels on the East and Gulf Coasts of the United States. Approximately 8 of its 35 members own or operate tankers. PMSA submits this *amicus curiae* brief with written consent of all parties, submitted herewith, in accordance with Supreme Court Rule 37(3)(a).

III. ARGUMENT

A. Introduction

In its decision below, the United States Court of Appeals for the Ninth Circuit held that Washington State statutes and regulations relating to the operation of oil tankers are not preempted by federal law under the Supremacy Clause of the United States Constitution and do not otherwise violate the Constitution. In so holding, the court decided an important

question of federal law in a way that conflicts with decisions of this Court, most notably, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

Prior to the passage of the Oil Pollution Act of 1990 ("OPA 90"), the federal, state and local governments shared control over some matters relating to pollution control as well as to liability and compensation for pollution in state waters. They also shared control over pilotage where knowledge of local waters is important. As shown below, however, the federal government has consistently asserted exclusive control over matters relating to vessel design, construction, alteration, repair, maintenance, operation, personnel qualification, equipping and manning (including the training, duties and watch keeping of personnel and marine casualty reporting).

Statutes enacted by Congress and treaties adopted by the United States after *Ray* have expanded the scope of mandatory federal regulation, thus broadening the field preempted under the principles of *Ray*. Nothing in OPA 90 repeals the existing Congressional directives that require the Secretary of Transportation ("Secretary") and Coast Guard to promulgate regulations with preemptive effect with respect to vessel design, construction, manning, personnel qualifications, on-board operations and navigation. Nor do the OPA 90 § 1018 preemption clauses purport to apply to these already preempted fields of regulation. The Washington regulations, if not invalidated, will lead other coastal states throughout the nation to adopt similar regulations and will result in extreme confusion, complexity and expense for shipowners in areas of concern where Congress has made clear that it intended to adopt one uniform set of rules to govern all vessels calling at any port in the United States. For all of these reasons, the Ninth Circuit holding should be reversed.

1. Overview of Ninth Circuit Holding

Following the *Exxon Valdez* oil spill in Alaskan waters in 1989, Congress passed OPA 90. The legislation resulted from a combination of several bills into one comprehensive act with

nine titles. Title I of the Act, which addresses liability and compensation for oil spills, contains two provisions that address federal preemption of state law. One provides that "[n]othing in this Act . . . shall . . . affect, or be construed or interpreted as preempting, the authority of any State . . . from imposing any additional liability or requirements with respect to . . . the discharge of oil or other pollution by oil within such State . . ." *See*, § 1018(a) of OPA 90, codified at 33 U.S.C. § 2718(a). The other provides that "[n]othing in this Act . . . shall in any way affect, or be construed to affect, the authority of . . . any State . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil." *See*, § 1018(c) of OPA 90, codified as 33 U.S.C. § 2718(c).

When Congress passed OPA 90, vessel design, construction, manning, personnel qualification, operation and navigation were already the subject of federal law relating to tanker safety and operation. Existing law included the Ports and Waterways Safety Act of 1972 ("PWSA"), codified as amended at 46 U.S.C. § 3701, *et seq.*, and the Port and Tanker Safety Act of 1978 ("PTSA"), codified at 33 U.S.C. § 1221, *et seq.* The PWSA concerned control of tanker traffic and tanker design, construction and operation. The PTSA concerned tanker management, personnel matters, casualty reporting and pilotage.

The State of Washington also enacted legislation relating to oil tankers and other vessels following the *Exxon Valdez* incident. The State established an Office of Marine Safety, which was empowered to promulgate regulations to protect state waters from oil pollution. The state regulations obligate owners and operators to: 1) Report events such as collisions, allisions and near misses of tankers; 2) employ specific watch and lookout practices and manning; 3) record positions every fifteen minutes, prepare comprehensive voyage plans and make frequent compass readings; 4) adhere to specified engineering and monitoring practices; 5) test and inspect engineering, navigation and propulsion systems before entering or

getting underway in state waters; 6) post written crew assignments and procedures relating to shipboard emergencies; 7) retain certain plotting records and the voyage plan in an event in state waters such as a collision, allision or near miss; 8) establish a comprehensive training program for personnel; 9) test and report regarding alcohol and drug use; 10) monitor personnel for fitness for duty; 11) limit hours personnel are allowed to work; 12) require proficiency of officers in English and other languages; 13) maintain training records for crew members of vessels; 14) implement management practices that demonstrate active monitoring of vessel operations and related matters; 15) equip vessels with global positioning, radar systems and emergency towing systems; and 16) provide notification of proposed entry of a vessel into state waters and of hazardous conditions. These regulations apply not only to vessels calling at Washington ports but also to vessels transiting Washington waters enroute to and from Canada or elsewhere.

The Washington State regulations can be generally described as concerning vessel operations, personnel qualifications and manning, including the duties and training of personnel. This is the same subject matter for which the Coast Guard has adopted a comprehensive regulatory scheme as directed by federal statutes. See, Appendix K to Intertanko's Petition for Writ of *Certiorari*, No. 98-1706, pages 349a to 353a. Thus, the Washington regulations present an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under existing federal law and regulations, when analyzed under *Ray*.

The Ninth Circuit, however, concluded that the OPA 90 "reflects the 'full purposes and objectives of Congress' . . ." better than preexisting legislation on the subject of oil pollution. *The International Association of Independent Tanker Owners (Intertanko) v. Locke*, 148 F.3d 1053, 1062 (9th Cir. 1998). The court held that the Washington regulations are not preempted by federal law because of the two preemption provisions in Title I of OPA 90. The court found that these provisions confirm the absence of Congressional intent in OPA 90 to preempt

the authority of any state to impose additional preventative requirements concerning vessels with respect to the pollution of the environment or the substantial threat of pollution by oil. *Id.* In doing so, the Court held that Coast Guard regulations did not preempt the Washington regulations. 148 F.3d at 1067-68.

2. Overview of Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978)

The Ninth Circuit's holding conflicts with the decision of this Court in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). There this Court considered whether federal law preempted then-existing Washington State regulations applicable to tankers. The Court considered the Washington regulations primarily against the PWSA. The PWSA contains two titles that overlap somewhat and are designed both to insure vessel safety and to protect navigable waters, water resources and shore areas from tanker cargo spillage. The focus of Title I is traffic control at local ports. *See, Ray*, 435 U.S. at 161, n. 9. The focus of Title II is tanker design and construction. *Id.*

Ray noted that Title II declares that the protection of life, property, and the marine environment from harm requires the promulgation of "comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation." 435 U.S. at 161. The Court also noted that Title II directs that "the Secretary *shall* establish such rules and regulations as necessary with respect to the design, construction, and operation of vessels as well as to a variety of related matters". *Id.* (quoting 46 U.S.C. § 391a(3) (emphasis added)).

The Court concluded that insofar as the design characteristics were at issue, and considering the statutes allowing the Secretary to approve foreign vessels with certificates issued under international standards as compliant with the Secretary's regulations, Congress had entrusted the Secretary of Transportation and the Coast Guard with the duty of determining which oil tankers are sufficiently safe to be allowed to transit the navigable waters of the United States. The Court also concluded that Congress intended "uniform national standards

that would foreclose the imposition of different or more stringent state requirements", 435 U.S. at 161-163, and that "state law in this area would frustrate the congressional desire of achieving uniform international standards". 435 U.S. at 167-68.

The Court reached a different conclusion as to Title I of the PWSA. The Court noted that "Title I . . . merely authorizes and does not require the Secretary to issue regulations to implement the provisions of the Title". 435 U.S. at 171. The Court observed that the Secretary had neither promulgated regulations relating to vessel traffic control issues nor determined that such regulations were unnecessary. As a result, the Court upheld the Washington State regulations that related to the subject of vessel traffic control in local waters. The Court further noted, however, that the Secretary may indeed issue regulations that would preempt the authority of the states even in the area of traffic control, but until that occurs, state regulations need not give way under the Supremacy Clause. 435 U.S. at 172.

The import of the decision in *Ray* is that, to determine whether a state law is preempted by federal law, a federal court must examine each provision of the state regulation as well as the applicable federal law to determine whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress or conflicts with a valid federal statute.

B. The Ninth Circuit Erred In Concluding That The Washington Regulations Are Not Subject to Field Preemption Under Ray

The Ninth Circuit's conclusion that "[b]ecause the Washington State regulations did not qualify as design and construction requirements, they are not automatically subject to field preemption under *Ray*", 148 F.3d at 1066, is inconsistent with the *Ray* analysis. *Ray* found that 46 U.S.C. § 391a(3) mandated that the Secretary "shall establish" such rules and regulations as may be necessary with respect to the design, construction and operation of the covered vessels, including the inspection of vessels and issuance of certificates of inspection evidencing

an International Convention for Safety of Life at Sea to which the United States is a party. 46 U.S.C. § 3303.

Thus, by the 1983 amendments to the PWSA, Congress expanded the field of mandatory subjects of regulation to add personnel qualification and manning of vessels including the duties and training of officers and crews to the subjects of vessel design, construction, alteration, repair, maintenance and operation. In doing so, and while leaving in place the foreign vessels provisions discussed in *Ray*, Congress expanded the field of preemption accordingly.

When other statutes enacted since *Ray* are considered, the expanded field of preemption is even more focused under the *Ray* analysis. Since *Ray*,[5] Congress has required, *inter alia*, the Secretary of Transportation to: evaluate manning, training, qualification and watch keeping standards of foreign nations and ban from United States waters the vessels of countries with standards below those of the United States[6]; prescribe regulations for reporting of marine casualties[7] and a uniform state marine casualty reporting system for vessels[8]; establish and implement a safety management system to ensure accident reporting procedures consistent with international standards[9]; enforce minimum professional qualifications for vessel masters and officers consistent with treaty[10]; bar from U.S. waters vessels which, under U.S. or foreign law or treaty, may threaten the marine environment or safety[11]; approve regulated vessel equipment and material, with discretion to rely on approval by

[5] More generally, the Washington Statutes also interfere with the Secretary's mandatory administration of the general superintendence over the merchant marine of the United States and its personnel, 46 U.S.C. § 2103, which includes, for example, certificating vessels of the United States carrying oil or bulk hazardous material as cargo, as a condition to operating, 46 U.S.C. § 3710; licensing and testing (including drug testing) of masters, mates, engineers, operators, and radio officers, 46 U.S.C. §§ 1701, 7701-7705, and merchant mariners, 46 U.S.C. §§ 7302, 7315, 7701-7705; certificating or endorsing tankermen, 46 U.S.C. § 3717; determining the complement of licensed individuals and crews considered to be necessary for the safe operation of a vessel, 46 U.S.C. §§ 8101, 8301, 8304; watches on vessels, 46 U.S.C. § 8104; and the manning and language capability of the crew of a vessel, 46 U.S.C. §§ 8701(b), 8702(b). The Secretary hasissued extensive regulations under these statutes.

[6] The Secretary shall periodically evaluate the manning, training, qualification and watch keeping standards of a foreign country that issues documentation for any vessel subject to 46 U.S.C. §§ 3701-3719, to determine if that country's standard for licensing and certification of seamen are at least equivalent to United States law or international standards acceptable by the United States, 46 U.S.C. § 9101(a). The legislative history notes that such standards "may be considered to include the Convention on Standards for the Training, Certification and Watch Keeping for Seafarers" (H.R. Conf. Rep. No. 643, 101st Cong., 2nd Sess., at 132 (1990). The vessels of any country failing such evaluation are prohibited from entering the United States, 46 U.S.C. § 9101(a)(3). Foreign tank vessels must have the Secretary's prescribed number of certified tankermen, where the crewmember in charge must understand English in order to transfer oil or hazardous material in United States ports. 46 U.S.C. § 9101(b).

[7] The Secretary shall prescribe regulations for "marine casualties to be reported and the manner of reporting." 46 U.S.C. §§ 6101, 6101(b).

[8] 46 U.S.C. § 6102; 46 U.S.C. § 6103 prescribes penalties for vessel failure to company with 46 U.S.C. §§ 6101 and 6102.

[9] The Secretary shall establish an uniform state marine casualty reporting system for vessels and implement a safety management system for vessels to insure safe and accident reporting procedures consistent with the International Safety Management Code, 46 U.S.C. §§ 3203, 3204, with provisions to deny clearance under 46 U.S.C. § 91 of any non-complying vessel. 46 U.S.C. § 3205.

[10] The Secretary must enforce the minimum requirement of professional capacity for masters and officers on board merchant vessels operating on the high seas, under the Officers Competency Certificates Convention, 1936, with authority to detain both a United States vessel and a foreign vessel for non-compliance until cured. 46 U.S.C. § 8304.

[11] The Secretary shall bar any vessel that has a history of accidents, pollution or repairs from the United States waters which, in the Secretary's determination may be unsafe or threaten the marine environment, fails to comply with United States or foreign law or treaty, or is manned by an officer licensed by a state whose standards are below the United Statesor international standards. 33 U.S.C. § 1228.

foreign governments per treaty standards[12]; and, transmit regulations promulgated under 33 U.S.C. §§ 1221, et seq., to appropriate foreign bodies for consideration as international standards.[13]

International agreements and treaties to which the United States is a party—which are the "law of the land"[14]—illustrate this point even further. These agreements include the following: the U.S.-Canada VTS agreement, 32 U.S.T. 377[15]; the International Convention for the Safety of Life at Sea, 1974 and

[12] The Secretary must approve regulated equipment and material before used on any vessel and may treat an approval of equipment or materials by a foreign government as approval by the Secretary if the design standards and testing procedures used by that government meet the requirements of International Convention for the Safety of Life at Sea, 1974 if such approval will secure the safety of individuals and property on board vessels subject to inspection and if the foreign government grants reciprocity. 46 U.S.C. § 3306(b)(1)(2)(A),(B),(C).

[13] The Secretary shall transmit to appropriate international bodies or forums, any regulations issued under 33 U.S.C. § 1221, et seq. for consideration as international standards. 33 U.S.C. § 1230.

[14] *See, e.g., United States v. Pink*, 315 U.S. 203, 230-31, 62 S.Ct. 554, 565-66, 86 L.Ed. 796 (1942) (treaties and international agreements are "law of the land" under Supremacy Clause); *In re Damodar Bulk Carriers, Ltd.*, 903 F.2d 675, 687 (9th Cir. 1990) (recognizing SOLAS as "law of the land").

[15] This agreement was entered into with Canada under 33 U.S.C. § 1230, which "authorize[s] and encourage[s]" the President to arrive at agreements with neighboring nations to establish vessel standards and vessel traffic service and authorized the Secretary to waive the application of any United States law or regulation concerning the design, construction, operation, equipment, personnel qualifications and manning standards for vessels operating in waters of the United States if the vessel is not enroute to or from a United States port or place and if the neighboring nation accords equivalent waivers for vessels enroute to or from a United States port. 33 U.S.C. § 1230(c)(2).

its Protocol of 1978 ("SOLAS"), 32 U.S.T. 47[16]; the International Convention for the Prevention of Pollution from Ships, 1973, and its 1978 Protocol ("MARPOL"); and the International Convention on Standards of Training, Certification and Watch Keeping for Seafarers, 1978, and the 1995 Amendments thereto ("STCW")[17].

[16] The purpose of SOLAS is to establish uniform international standards for the safety of life and property at sea and the protection of the marine environment. SOLAS governs, among other things, safety of navigation, carriage of dangerous goods, management for the safe operation of ships and special matters to enhance maritime safety. (Chs. IV, V, VII, IX, and XI.) SOLAS requires the Government of the State "whose flag the ship is entitled to fly" to conduct a system of inspections and surveys, and the issuance of certificates carried on board the vessel showing that the vessel complies with SOLAS (SOLAS Annex, Ch. I, Rg. 2, and Regs. 6-18).

The extent to which the authorities of one Government can control the ship of another Government under SOLAS is specified in Regulation 19(a) of Chapter I of the Annex:

> Every ship when in a port of another Contracting Government is subject to control by officers duly authorized by such Government insofar as this control is directed towards verifying that the . . . [SOLAS certificates] . . . are valid.

The SOLAS certificate of a foreign flag vessel "shall be accepted" unless there are "clear grounds" for "believing that the condition of the ship or its equipment does not correspond substantially with the particulars of any of the [SOLAS] certificates", or the SOLAS certificate has expired or is no longer valid. Under such circumstances, the vessel may be detained and the next port of call and the flag State must be notified. Regulation 19(c), (d), and (e).

The Secretary passed Federal Regulations codified at Volumes 33 and 46 of the Code of Federal Regulations pursuant to 46 U.S.C. § 2103, to authorize the United States Coast Guard to enforce SOLAS.

[17] The purpose of STCW, like SOLAS, is to establish uniform international standards for the safety of life and property at sea and the protection of the marine environment. The STCW governs vessel operations, personnel, and training matters, and also provides for the issuance of certificates by the flag State with respect to the standards for fitness, training, and qualifications of vessel personnel.

As in SOLAS, the STCW provides for authorities of one Government to control the ship of another Government: Ships, except those excluded . . .

SOLAS and the STWC are of significant import in that they provide the rules and regulations under which foreign vessels certificates are issued. These are the same certificates that the Secretary may accept as a basis for issuing a certificate of compliance to allow a vessel to enter United States waters and transfer oil or other hazardous materials at a United States port and also in lieu of the inspection of the vessel for marine safety and environmental compliance under United States regulations.

The Congressional mandate to the Secretary to regulate vessel operations, personnel qualifications and manning of vessels, including the duties, qualifications and training of the officers and crew, coupled with the statutes concerning foreign vessels and treaties, indicates "a class of regulations which Congress alone can provide" due to the need for uniformity. *Kelly v. Washington*, 302 U.S. 1, 14-15, 58 S.Ct. 87, 82 L.Ed. 3, (1937). This class of regulations could "not properly be left to the diverse action of the States. The State of Washington might prescribe standards and rules of one sort, Oregon another, California another and so on. . . ." *Id.*

Under *Ray's* rationale, the federal statutory pattern set forth above on subject matter embraced by the Washington regulations indicates that Congress expressed preference for international action on those subjects. Congress anticipated that foreign vessels and their personnel could be sufficiently safe to call at United States ports and waters if they satisfied the requirements established by treaty or convention. In doing so, Congress left no room for States to impose different or stricter requirements. Simply put, "[a] state law in this area . . .

[from the application of STCW]. . . . are subject, while in the ports of a Party to control by officers duly authorized by the Party to verify that all seafarers serving on board or required to be certificated by the Convention are so certificated or hold an appropriate dispensation. Such Certificate shall be accepted unless there are clear grounds for believing that the Certificate has been fraudulently obtained or that the holder of a Certificate is not the person to whom that Certificate was originallyissued. (STCW Conference, Article X)

would frustrate the congressional desire of achieving uniform, international standards and thus is at odds with "the object sought to be obtained [by Congress] . . . and the character of obligations imposed [by Congress]. . . ." *Ray*, 435 U.S. at 167-68.

C. *OPA 90 Does Not Repeal The Authority Of The Secretary And Coast Guard To Promulgate Regulations That Have Preemptive Effect*

In enacting OPA 90, Congress did not explicitly repeal the authority that had been conferred upon the Secretary of Transportation and the Coast Guard under the PWSA and other federal statutes. That is significant for, having once given a federal agency the authority to promulgate regulations in a field, Congress must abide by that delegation of authority until it is altered or revoked. *Cf. Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 955, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). The House Conference Committee confirmed in its analysis of the pending legislation that was to become OPA 90 that § 1018 "does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978)." *See*, H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess., at 121-22 (1990). Accordingly, nothing in OPA 90 can be construed to demonstrate that Congress intended to repeal Coast Guard regulations that were in effect at the time Congress passed OPA 90, or to prevent the Coast Guard from adopting regulations post-OPA that preempt state law.

In empowering a federal agency to act, Congress need not specifically authorize the agency to pass regulations that preempt state law for that agency to have the power to do so. *See, City of New York v. Federal Communications Commission*, 486 U.S. 57, 64, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988). The Coast Guard regulations that have been promulgated pursuant to the mandatory Congressional direction of the PWSA and later enactments were intended to preempt state regulation relating to

the on board operation of vessels. See Appendix H to Intertanko's Petition for a Writ of *Certiorari*, No. 98-1706, pages 269a-289a and Appendix K, pages 349a-353a.

D. The OPA 90 § 1018 Preemption Clauses Apply Only To The Liability And Compensation Provisions Of Title I

The requirements of § 1018(a) and (c) of OPA 90 require no different conclusion. As explained in the dissent of Judge Graber from the Ninth Circuit denial of petition for rehearing and suggestion for rehearing *en banc*, 159 F.3d 1220 (9th Cir. 1998), § 1018(a) and (c) are limited to Title I of OPA 90 and its liability and compensation provisions. The Section 1018 preemption clauses can be read broadly to include prevention measures in Title IV or read narrowly to apply only to the liability and compensation provisions of Title I. Standing alone, the wording of the provisions is ambiguous. Judge Graber noted that contextual clues in OPA 90 suggest that the narrow reading was actually intended. That is because § 1018 is placed in Title I, which addresses only liability and compensation for oil spills that actually occur, whereas Title IV, Title V, and Title VIII have their own preemption clauses. If the clauses in Title I were comprehensive, the preemption clauses of the other Titles would be superfluous. Courts generally avoid construing statutes in a way that would make substantial provisions superfluous. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996).

Having found the language of the statute to be ambiguous, Judge Graber analyzed the legislative history of OPA 90 at 159 F.3d at 1221-1223. She concluded that the history suggests that Congress intended for the preemption clauses of § 1018 to apply only to Title I and its liability and compensation provisions and not to apply to OPA 90's oil spill prevention

provisions (Title IV).[18] 159 F.3d at 1221-1223. Judge Graber's dissentis well-reasonedand in keeping with the statutory pattern strongly supporting preemption of the Washington regulations. Judge Graber relied on *National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*, 924 F.Supp. 1436, 1448 (E.D. Va. 1996), aff'd, 122 F.3d 1062 (4th Cir. 1997) (Table) cert. denied, 140 L.Ed. 2nd 467, 118 S.Ct. 1301 (1998), inter alia, in her analysis. The plaintiff in *NSCSA* argued that OPA's "saving clause" preserved its right to seek contribution from a co-defendant under both OPA and state law. In rejecting that argument, the district court, after analyzing the legislative history, held, "[t]he purpose behind the savings clause is to allow the states to impose liability upon oil polluters above the liability imposed through OPA. Congress wanted to give the states the power to force polluters to clean up oil spills completely and to compensate the victim of oil spills, even if their liability for these remediation expenses is limited under OPA".[19] As advanced by Judge Graber and *NSCSA*, the preemption clauses of § 1018 of OPA 90 should be narrowly read to apply only to the compensation and liability provisions of Title I, a result consistent with the federal statutory pattern and directives requiring preemption of the Washington regulations.

E. The Washington State Regulations Invite Other States To Issue Regulations With Attendant Complexities, Confusion And Potential Increased Risk To Safety And The Marine Environment

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[18] Judge Graber's summary of the history of the pending Senate and House bills and the blending of those bills into the final OPA 90 legislation by the Congress Conference Committee points out that the committee's "deletion of the only preemption clause that applied specifically to oil spill prevention and its reliance instead on two provisions that never applied to prevention provisions, together suggest that Congress did not intend its final version of Section 1018 to apply to OPA 90's oil spill prevention provisions (Title IV)." 159 F.3d at 1225.

[19] Judge Graber's disagreement with the Ninth Circuit's holding on the preemptive effect of Coast Guard regulations as inconsistent with Ninth Circuit and Supreme Court precedent is also well-stated.

As shown above, the Ninth Circuit's decision in this case is clearly inconsistent with the conclusion of the *Ray* Court that the federal judgment of whether a vessel is safe to navigate in waters of the United States prevails over a contrary state judgment. *See*, 435 U.S. at 165. The issue is one of extreme importance to the members represented by PMSA. Under the Ninth Circuit's ruling, other coastal states of the circuit, notably California, Oregon, Hawaii and Alaska, are free to adopt their own, different requirements relating to any aspect of OPA 90. Moreover, in addition to regulating tanker vessels, the State of Washington is now empowered to enforce its regulations that relate to the screening of dry cargo and passenger vessels that transit its waters to determine whether they present a substantial risk of harm to public health and safety of the environment. *See*, Wash. Rev. Code § 88.46.050. Other states could well follow suit.

Vessel operators otherwise complying with Coast Guard standards and International Treaties and Agreements will incur extraordinary additional expense and time to comply with the more stringent Washington standards—if compliance is even possible. Compliance would require vessel operators to, among other things, transport to their vessels additional multi-lingual officers and crews trained to Washington standards for transit through Washington waters, or to maintain such vessel staffing at all times; to constantly prepare, maintain and submit the Washington-required records—different in format and content from the Coast Guard requirements, thus imposing duplicate record keeping and reporting burdens on operators—for vessel worldwide operations; and to perform worldwide random alcohol and drug testing of all personnel on all vessels operated by concerned carriers and to report the results to Washington State. These rules are far more burdensome than, and conflict with, Coast Guard and international standards.

The problem would certainly be compounded should other states—such as Oregon, California, Hawaii, and Alaska—enact their own detailed regulations on the same subject matter.

Other port states of the United States and their politicai subdivisions could well follow suit. Operators of vessels transiting the waters of these states on the same voyage would be faced with an overwhelming managerial burden, in addition to heavy expense, if forced to keep track of, reconcile and comply with multiple and conflicting state and federal/international standards for crew training, multilingual capability, watch keeping, recording and reporting, navigation, engineering and other vessel operations. This potential burden is highlighted when one considers that there are currently about 10,000 vessel calls a year, collectively, at the major West Coast ports, 70% to 80% of which are foreign flag vessels. This means that about 27 vessels arrive and 27 vessels depart those ports each day, 20% to 30% of which are transiting to or from other ports in the Ninth Circuit.

Moreover, state regulation of this subject matter will frustrate the expertise of the Secretary of Transportation and the Coast Guard to prescribe national and uniform regulations for the concerned subject matter as directed by 46 U.S.C. § 3703(a). To impair the Secretary's ability to act is particularly unnecessary in this instance because Congress has directed the Secretary to consult with and consider the views of interested state governments and other parties described in 46 U.S.C. § 3703(c) and 33 U.S.C. § 1231. Thus, the interests of the various states and their political subdivisions will not be ignored and, indeed, can be incorporated into uniform national standards consistent with international standards.

State regulation of the same subject matter clearly interferes with the Congressional objective of uniform federal and international standards upon which the international maritime community can rely. Moreover, the Ninth Circuit's ruling leaves open the door for a conflicting multi-state and federal/international regulatory quagmire affecting not only tank vessels, but dry cargo and passenger vessels as well, all of which are within the ambit of Washington regulation.

The PMSA members, who are particularly at risk because of their operations in the waters of the states comprising the

Ninth Circuit, submit that uniform national and international maritime standards are necessary for safe and efficient vessel operations for the international maritime community, a public policy well entrenched in federal statutes and regulations and this Court's precedent.

IV. CONCLUSION

The Pacific Merchant Shipping Association respectfully urges the Court to grant the relief requested by petitioners to establish a national, uniform rule of maritime law that is consistent with federal statutes, regulations, international standards and the precedent of this Court.

Respectfully submitted,

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