Granted

No. 98-1701 & 98-1706

IN THE
Supreme Court of the United States

UNITED STATES

v.

LOCKE, GOVERNOR OF WASHINGTON, *et al.*

AND

INTERNATIONAL ASSOCIATION OF
INDEPENDENT TANKER OWNERS
(INTERTANKO)

v.

LOCKE, GOVERNOR OF WASHINGTON, *et al.*

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

BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*

The National Association of Waterfront Employers ("NAWE") is a not for profit tax-exempt trade association organized under the laws of the District of Columbia.[1] NAWE's 35 member companies are private sector stevedores and marine terminal operators operating in over 100 ports in the United States on all three coasts, the Great Lakes, Alaska, Hawaii, and the Commonwealth of Puerto Rico. Signal Mutual Indemnity Association, Ltd. ("Signal") is the largest provider of indemnity insurance for the shore-based maritime industry.

The questions accepted for review present important questions of maritime law, with ramifications beyond the maritime industry directly impacted by the State of Washington's "Best Available Protection" regulations. Should the Circuit Court's preemption analysis stand, it will adversely affect the proper resolution of other maritime issues under a number of other federal statutes enacted pursuant to the maritime jurisdiction of the United States. Among the other federal maritime statutes *Amicus* NAWE members are subject to, include the Shipping Act of 1984, as amended, 46 U.S.C. App. § 1701 *et seq.*, the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.*, the waterfront safety and port facility security provisions of the Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1225 and 1226, and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* *Amicus* Signal insures many of the terminal/stevedoring opera-

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[1] Pursuant to Supreme Court Rule 37.3, letters of consent on behalf of all Petitioners and Respondents have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored the brief in whole or in part and no person or entity, other than the *Amici Curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

tions subject to one or more of these statutes for a large portion of the marine terminal/stevedoring industry.

The interests of *Amici* are not academic. Recently, one state port authority attempted to regulate stevedoring contracts through licensing despite the fact that stevedoring contracts fall within the federal admiralty jurisdiction. *Petition of South Carolina State Ports Authority for Declaratory Order,* 27 SRR 1137 (August 12, 1997). Under the laws of another state, private "bounty hunters" have noticed the maritime industry that its use of diesel engines for ship propulsion and for shore-side loading/unloading activities is unlawful under that state's laws. This state law is presently under court review. *Shell Oil Co. v. United States Department of Labor,* No. 97-1205 (D.C.D.C. May 28, 1997).

Amici submit that the maritime commerce provisions of the Constitution, and the statutes enacted pursuant to this authority, require a uniform and predictable federal regulatory standard, and not a standard that allows duplicitous and conflicting state maritime standards. Consequently, *Amici* have an interest in reversing the decision of the Circuit Court to the contrary.

STATEMENT OF THE CASE

At the time the Constitution was drafted, the states of the future United States were dependent on maritime commerce. Trade with other nations flowed almost exclusively over the navigable waters of the world. Even trade between the states flowed largely over our navigable waters, both inland and at sea. Not surprisingly, at the time the Constitution was drafted, the principal populations centers of the new nation were the port cities—Boston, New York City, Philadelphia, Baltimore, Charleston, etc.—that had grown around maritime commerce.

Our Founding Fathers were concerned, based on their firsthand experience under the Articles of Confederation, that the decisions of one state to regulate maritime commerce might affect the welfare of the other states:

> Advised, as they [the founding fathers] were by personal experience, of the difficulties which attended the separate exercise by the States of admiralty powers, before the confederation was formed, and afterwards from the restricted grant of judicial power in its articles, can it be supposed, in framing the constitution, when they were endeavoring to apply a remedy for those evils by getting the States to yield admiralty jurisdiction altogether to the United States, it was intended to circumscribe the larger jurisdiction existing in them to the limited cases, and those only then allowed in England to be cases of admiralty and maritime jurisdiction? * * * It is remarkable, too, that the words "all cases of admiralty and maritime jurisdiction," as they now are in the constitution, were in the first plan of government submitted to the convention, and that in all subsequent proceedings and reports they were never changed. There was but one opinion concerning the grant, and that was, the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately.

Waring v. Clarke, 46 (5 How.) U.S. 441, 456-457 (1847). Or as Chief Justice Marshall held: "The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it." *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 190 (1824). Or as Daniel Webster noted:

> In the history of the times, it was accordingly found, that the great topic, urged on all occasions, as showing the necessity of a new and different government,

was the state of trade and commerce. To benefit and improve these, was a great object in itself; and it became greater when it was regarded as the only means of enabling the country to pay the public debt, and to do justice to those who had most effectually labored for its independence. The leading state papers of the time are full of this topic. The New-Jersey resolutions complain, that the regulation of trade was in the power of the several States, within their separate jurisdiction, in such a degree as to involve many difficulties and embarrassments; and they express an earnest opinion, that the sole and exclusive power of regulating trade with foreign States, ought to be in Congress. Mr. Witherspoon's motion in Congress, in 1781, is of the same general character; and the report of a committee of that body, in 1785, is still more emphatic. It declares that Congress ought to possess the sole and exclusive power of regulating trade, as well with foreign nations, as between the States. The resolutions of Virginia, in January, 1786, which were the immediate cause of the convention, put forth this same great object. Indeed, it is the only object stated in those resolutions. There is not another idea in the whole document. The entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade. They found no means, but in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits, and its blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and, for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system. It would be easy to show, by reference to the discussions in the several State conventions, the prevalance of the same general topics; and if any

> one would look to the proceedings of several States, especially to those of Massachusetts and New-York, he would see, very plainly, by the recorded lists of votes, that wherever this commercial necessity was most strongly felt, there the proposed new constitution had most friends.

Gibbons, 22 U.S. at 11-13 (Webster's argument to Supreme Court).

The concern over the need for a strong central and uniform law governing maritime commerce was reflected and addressed throughout the Constitution. Many of the Constitution's clauses explicitly address the issue of maritime commerce. Other constitutional provisions implicitly address maritime commerce, for any other reading would fail to give those clauses their full force and effect. Examples are almost too numerous to list, but fall into four major categories:

First, the Constitution gave the national government the right to regulate maritime commerce. See U.S. Const. art. III, § 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .") (hereinafter the "Admiralty Clause"). U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States[.]") (hereinafter the "Foreign Commerce Clause" and "Domestic Commerce Clause" respectively, collectively the "Commerce Clause"). U.S. Const. art. I, § 8, cl. 10 ("The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations[.]") U.S. Const. art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and Rules concerning Captures on Land and Water[.]"). U.S. Const. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the fore-

going Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.") (hereinafter the "Necessary and Proper Clause").

Second, the Constitution placed restrictions on the national government's maritime commerce powers. *See* The Admiralty Clause. U.S. Const. art. I, § 9, cl. 5 ("No tax or Duty shall be laid on Articles exported from any State."). U.S. Const. art. I, § 9, cl. 6 ("No Preference shall be given by any regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obligated to enter, clear, or pay Duties in another.").

Third, the Constitution placed restrictions on the maritime commerce powers of the several states. *See* The Admiralty Clause. Foreign Commerce Clause. Domestic Commerce Clause. U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . ."). U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.")

Finally, the national maritime commerce law was made the supreme law of the land. U.S. Const. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). (These constitutional clauses will be referred to collectively in this brief as the

"maritime commerce clauses.") It is against this constitutional backdrop that the Court must judge the State of Washington's Best Achievable Protection ("BAP") regulations. Sections 317-21-010 *et seq.* of the Washington Administrative Code issued pursuant to Chapter 88.46 of the Laws of the State of Washington.

The concerns of the Founding Fathers are still with us today. The United States is still dependent—if anything, more dependent—on maritime commerce. Our principal population centers are still our port cities. We are now the world's leading maritime nation with more goods flowing to and from this country than anywhere else on earth. We share land borders with but two nations—Mexico and Canada—so our trade with the rest of the world flows primarily over the world's navigable waters. We have two states—Hawaii and Alaska—plus territories and the Commonwealth of Puerto Rico that have no land connection to the other states of the United States and therefore are dependent on maritime commerce for even their domestic commerce.

Waterborne cargo contributes more than $742 billion to the U.S. gross domestic product and creates employment for more than 13 million United States citizens. Waterborne cargo consists of more than 2 billion tons of domestic and international freight and 3.3 billion barrels of imported oil that is essential to the continued health of the economy. This cargo moves through more than 1,000 harbor channels and 25,000 miles of inland, intercoastal, and coastal waterways, more than 300 ports, with more than 3,700 terminals that handle passenger and cargo movement. In addition, our maritime system transports 134 million passengers by ferry; 5 million cruise ship passengers, and involves 110,000 commercial fishing and recreational fishing vessels. As impressive as these numbers are, waterborne commerce is expected to double in the next 20 years. U.S. Department of

Transportation, *An Assessment of the U.S. Marine Transportation System, A Report to Congress,* vii-viii (Sept. 1999).

The maritime system is literally the lifeblood of the United States economy. It has flourished because of national and international uniformity. As the Department of Transportation recently noted "Each component [of the U.S. Maritime Transportation System] is a complex system within itself and is closely linked with the other components." *Id.* at vii. The same 40 foot cargo container that moves along the highways and rail lines of the United States must move over the highways and rail lines of Europe, Asia, and the rest of the world. The equipment and procedures used in the United States to load and unload that container are necessarily the same as those used in Europe, Asia and the rest of the world. The ship that brings that container to a United States port, must also meet the requirements of the ports in Europe, Asia and the rest of the world. Uniformity, is the keystone to this entire system of maritime commerce.

The same uniformity is essential to the movement of oil. The oil tanker that calls on United States ports must necessarily meet the requirements of the ports in the Middle East, Europe, Asia and the rest of the world.

Not surprisingly, maritime law is now commonly based on international treaties such as those before the Court and laws implementing those treaties. With such an integrated and complicated maritime transportation system, the unilateral regulation of one nation—let alone 50 different states—has the potential to bring the system to a grinding halt. Just as was the case over 200 years ago, the decisions of one state to regulate maritime commerce has implications for the entire nation.

If anything, we are more dependent on a uniform maritime law than we were at the time the Constitution

was adopted. When our nation was founded, every state had a direct outlet to the sea connecting it to the rest of the world. Today, about half of our states have no direct outlet to the sea. Those states without an outlet to the sea are dependent on the other states with ports to get their goods onto the world market and to import the commodities they need to survive. Eighty percent of the goods that move through the Port of Norfolk are destined to or arriving from outside Virginia. Two-thirds of the goods that move through the Port of Los Angeles are destined to or arriving from outside California.

The oil that passes through the Washington State navigable waters is not necessarily destined to Washington State consumers. That oil may be destined to ports outside Washington State. Even if delivered to a Washington State port, the ultimate consumer is likely to be located outside Washington State. Any costs imposed by Washington State are borne in part by the citizens of the other northwest states who are the users of the oil. Any disruption in oil delivery because of Washington State regulations is suffered in part by the citizens of the other states who are dependent on that oil to heat their homes and run their businesses.

The Founding Fathers anticipated this problem because they had first hand experience with how the parochial interest of one locality could impact the well-being of the entire nation. They addressed it by removing the power to regulate maritime commerce from the states and placing it with the national government.

SUMMARY OF THE ARGUMENT

Any attempt to unify the 200 plus years of jurisprudence construing the maritime commerce clauses of the Constitution into a single set of consistent principles is analogous to putting a Rubik's cube in order. Every turn that unifies one side of the law seems to move another

side of the law out of order. *Amici* concede that it will take a legal mind greater than theirs to put the entire Rubik's cube of maritime commerce law into order. Nonetheless, *Amici* assert that several consistent principles come through that are relevant to decide the case currently before the Court.

First, the operation of an oil tanker on a navigable waterway is a maritime activity. Any regulation of how an oil tanker is operated on navigable waters, whether by a state or the national government, is a maritime regulation.

Second, when the federal courts review a maritime regulation, they do so pursuant to their grant of admiralty jurisdiction under the Admiralty Clause of the Constitution. The Admiralty Clause provides the jurisdictional basis regardless of whether the claim is couched in terms of tort or contract, and regardless of whethter a preemption claim is based on direct preemption by the Admiralty Clause or indirect preemption through federal legislation that was adopted pursuant to the Admiralty Clause and the Necessary and Proper Clause.

Third, with admiralty jurisdiction comes the automatic application of admiralty law. The application of admiralty law is mandated by the Constitution, not subject to the discretion of the litigants.

Fourth, the Constitution removed the right of states to exercise police powers over vessels operating on navigable waters. States are without the authority to arrest or detain ships on navigable waters. They have no authority to bar ships from their navigable waters. They have no right to negotiate with foreign nations over how ships will be operated in their navigable waters. When the Constitution is read together with the "saving to suitors" clause, 28 U.S.C. § 1333, it is clear that states' retained power over maritime commerce is limited to providing

"remedies" to injured parties, and even that right is subject to constitutional limitations.

When stripped down to the core issues, Washington State took the position below that the Constitution is silent on state regulation of maritime commerce. That absent an act of Congress prohibiting state regulation of maritime commerce, states are free to act. Washington State then pointed to section 1018 of the Oil Pollution Act of 1990 ("OPA 90"), 33 U.S.C. § 2718, as evidence that Congress did not intend to preempt state laws regulating oil tankers in maritime commerce.

Amici assert, that even if Washington State is correct in its reading of OPA 90, its BAP regulations are nonetheless preempted. If not preempted by federal statute, the BAP regulations fall outside the scope of the powers preserved to the states under the Constitution and therefore, are preempted by the Constitution.

ARGUMENT

I. THE OPERATION OF AN OIL TANKER ON NAVIGABLE WATERS IS A MARITIME ACTIVITY THAT FALLS WITHIN ADMIRALTY JURISDICTION.

Amici first assert the obvious—that the operation of an oil tanker on a navigable waterway is maritime commerce. Any regulation of that maritime commerce, whether by the national government or state governments falls within the admiralty jurisdiction of the federal courts.

While there does not appear to be a single precise statement as to what constitutes admiralty jurisdiction, it is now settled law that the constitutional delegation is broader than the admiralty jurisdiction of the English admiralty courts in the late 1700's:

> These decisions were part of a larger trend started in the 19th century of eschewing the restrictive prohibitions on admiralty jurisdiction that prevailed in

England. See e.g., *Waring v. Clarke*, 46 U.S. (5 How.) 441, 454-459 (1847) (holding that the constitutional grant of admiralty jurisdiction did not adopt the statutory and judicial rules limiting admiralty jurisdiction in England); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 456-457 (1852) (rejecting the English tide-water doctrine that "measure[d] the jurisdiction of the admiralty by the tide"); *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 26 (1870) (rejecting the English locality rule on maritime contracts "which concedes [admiralty] jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon").

Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603, 611 n.6 (1991).

One formulation of the grant of admiralty jurisdiction was that of Justice Story, while riding circuit:

> [T]he delegation of cognizance of all civil cases of admiralty and maritime jurisdiction to the courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea.

De Lovio v. Boit, 7 Fed. Cas. 418, 444 (C.C.D. Mass. 1815). The Supreme Court subsequently adopted similar formulations of the scope of admiralty jurisdiction:

> The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality. If the wrongs be committed on the high seas, or within the ebb and flow of the tide, it has never been disputed that they come within the jurisdiction of that court.

Philadelphia, W. & B.R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co., 64 (23 How.) U.S. 209, 215 (1859). *See also Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 207 (1996) (Essentially restating Justice Story's formulation of admiralty jurisdiction concerning torts). *Exxon*, 500 U.S. at 611 n6. (Essentially restating Justice Story's formulation of admiralty jurisdiction concerning contracts holding that "in determining whether a contract falls within admiralty, 'the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions." *quoting Dunham*, 78 U.S. at 26.). See also 46 App. U.S.C. § 740:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in *rem* or in *personam* according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water[.]

Admiralty Jurisdiction for torts now has two components: (1) location—i.e., on a navigable water, and (2) a connection with maritime activity. *Jerome B. Grubart, Inc. v. Great Lakes Dredging & Dock Co.*, 513 U.S. 527, 534 (1995). Under even the narrowest formulation of admiralty jurisdiction, an oil spill from an oil tanker operating on navigable water is a maritime tort that falls within the federal court's admiralty jurisdiction.

The BAP regulations are directed at preventing this maritime tort. The BAP regulations change how oil tankers must be operated on navigable waters—i.e., regulate the navigation of tankers—and falls within admiralty jurisdiction. If the point is not already settled, the federal

statutes at issue in this case were adopted pursuant to the Admiralty Clause and Necessary and Proper Clause.[2]

For the reasons stated above, this Court reviews the BAP regulations under its constitutional grant of admiralty jurisdiction.[3]

II. WITH ADMIRALTY JURISDICTION AUTOMATICALLY COMES ADMIRALTY LAW.

The jurisdictional analysis is critical to resolving this case because it dictates what substantive law must be applied. When a case falls within the admiralty jurisdiction of the federal courts as a factual matter, regardless of how the parties plead the case,[4] the courts must apply

[2] Each of the federal statutes in question in this case is codified within either Title 33 or Title 46 of the United States Code. Federal statutes enacted pursuant to the admiralty jurisdiction are found throughout these titles. As the House Committee on the Merchant Marine noted over 15 years ago, the various "maritime laws" codified within these two titles are a "confusing collection" of laws long in need of major revision. H.R. Rep. No. 338, 98th Congress, 1st Sess. (1983) p-113. Despite Congressional attempts since then to revise maritime law in an orderly fashion, much of it remains as confused as ever today.

[3] The admiralty jurisdiction of the federal courts provides an exception to the Eleventh Amendment that limits bringing claims in the federal courts against states without their consent. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (holding that admiralty claims are neither "suits in law or equity" as those terms are used in the Eleventh Amendment and thus are not precluded by the Eleventh Amendment.)

[4] While the Ninth Circuit did not address the admiralty law issues, it appears that the issues were presented below. INTERTANKO Brief at 9 ("INTERTANKO contends here that the challenged Washington BAP Regulations are fatally defective under each of four clauses of the Constitution of the United States (Supremacy, Foreign Affairs, Commerce **and Admiralty**)." (emphasis added)). *See also The International Association of Independent Tanker Owners (INTERTANKO) v. Locke*, 148 F.3d 1053, 1063 (9th Cir. 1998) (Noting that the United States also raised concerns about the right of "innocent passage," a maritime law right under international law).

admiralty law. *See Yamaha*, 516 U.S. at 206 (" 'With admiralty jurisdiction,' we have often said, 'comes the application of substantive admiralty law.' " *quoting East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986).).

As discussed in more detail below, the constitutional analysis to determine whether a state law is preempted under the Commerce Clause and the Admiralty Clause are fundamentally different. *Amici* respectively submit that it is the Court that must decide what substantive law to apply based on the subject matter of the litigation. The litigants simply cannot dictate whether a Commerce Clause or Admiralty Clause analysis is used by the Court.[5] When the subject matter is admiralty in nature, admiralty law provides the standard for review. *Chelentis v. Luckenback S.S. Co., Inc.*, 247 U.S. 372, 384 (1918). In *Chelentis*, the plaintiff filed a complaint in state court pursuant to state common law theories and disavowed all admiralty law claims and remedies. The defendant removed the case to federal court based on diversity jurisdiction, rather than admiralty jurisdiction. Nonetheless, both the Court of Appeals and the Supreme Court held that federal maritime law must be applied because of the maritime nature of the claim.

To further illustrate the point, the Ninth Circuit in this case relied on three Supreme Court decisions to provide the standard of review. *INTERTANKO*, 148 F.3d at 1059, *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1974). *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). *Retail Clerks International v.*

[5] *Amici* concede that a state law might have both maritime and non-maritime applications. If only the non-maritime applications were challenged, then the legal analysis could be limited to a Commerce Clause analysis. But that fact pattern is not the case currently before the Court. The application of the BAP regulations at issue in this case is a pure maritime commerce application.

Schermerhorn, 375 U.S. 96, 103 (1963). Each of these cases involves a Domestic Commerce Clause challenge to a state law. *Rice* involved the right of a state to regulate a grain storage warehouse. *Malone* involved the right of a state to regulate private pensions. *Retail Clerks International* involved the right of a state to require open shops in labor agreements.

None of these three cases had even the remotest connection to maritime commerce. Instead, they all involved federal laws that were enacted pursuant to the Domestic Commerce Clause. Could it seriously be argued that the parties to those cases could have forced the Supreme Court to apply admiralty law to those claims by simply briefing the claims under admiralty law, rather than Domestic Commerce Clause jurisprudence? The answer is obviously "NO." It is the courts, not the parties, that dictate what law must be applied. The courts make that decision based on the subject matter of the litigation. When the subject matter is maritime commerce, admiralty law must be applied.

Because the Washington State regulations fall within the admiralty jurisdiction of the federal courts, their validity must be viewed through the prism of the national maritime law. It is maritime jurisprudence that provides the standard of review for this martime case, not other jurisprudence. As discussed below, that standard of review under the Admiralty Clause is fundamentally different from the standard of review in non-admiralty cases. *See American Dredging Co. v. Miller*, 510 U.S. 443, 453 n.3 (1994) (noting that the preemption analysis under the Admiralty Clause and negative-Commerce Clause are fundamentally different.). *Amici* respectfully submit that the Court is simply without the constitutional authority to decide a case that falls within the Court's admiralty jurisdiction under other than admiralty law.

Amici believe two other doctrines support their position that the case before the Court must be analyzed under maritime law. First, it is settled law that the Federal courts must interpret federal and state statutes so as to maintain, rather than destroy their constitutionality. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992). *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.")

Second, in a related doctrine, Mr. Chief Justice Marshall admonished that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ." *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) *citing The Charming Betsey*, 6 U.S. (2 Cranch) 64, 118 (1804). *See also The Nereide*, 13 U.S. (9 Cranch) 388, 389 (1815). *MacLeod v. United States*, 229 U.S. 416, 434 (1913). *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918).

The case before the Court requires the Court to construe international treaties and federal laws. Should the Court construe those treaties and statutes in question under anything other than admiralty law, *Amici* believe that there is a significant risk that those statutes may be construed in such a manner as to be unconstitutional under admiralty law. Such an unconstitutional construction should be avoided if possible.

For the reasons stated above, *Amici* assert that the claims before the Court must be reviewed under the applicable maritime commerce clauses.

III. WASHINGTON STATE DOES NOT HAVE ANY RETAINED "POLICE POWERS" THAT ALLOW IT TO REGULATE MARITIME COMMERCE.

Amici submit that states simply have *no* retained "police powers" over matters that fall within admiralty jurisdiction. In making this assertion, *Amici* are using the phrase "police power" in the constitutional sense—i.e., a state power, preserved by the Tenth Amendment, allowing the individual states to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health and morals or the promotion of the public convenience and general prosperity. Paraphrasing *Black's Law Dictionary*, 1157 (Centennial Edition 1891-1991). Inherent in "police powers" is the right of prior restraint and the right to punish a citizen for conduct where no harm has yet occurred. It is these powers—the power of prior restraint and to punish before harm has occurred—that states are without in the area of maritime commerce.

A. The Admiralty Clause and the "Saving to Suitors" Clause Deny States the Police Power to Regulate Maritime Commerce.

Instead of having the power of prior restraint over maritime commerce, states have the limited power to provide "remedies" to "suitors"—a right that is fundamentally different than "police powers." It is settled law that the right to interpret and modify admiralty law is vested by the combination of the Constitution and federal statutes, exclusively in the federal government:[6]

> By the Constitution, the entire admiralty power of the country is lodged in the federal judiciary, and

[6] *Amici* submit that admiralty jurisdiction is vested exclusively in the federal courts by statute, but such jurisdiction could be vested in the states had Congress so chosen. On the other hand, the right to create or modify admiralty law is vested exclusively in the federal government by the Constitution.

> Congress intended by the ninth section to invest the District Courts with this power, as courts of original jurisdiction.

The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston, 47 U.S. (6 How.) 344, 390 (1848). It also is settled that there is concurrent jurisdiction between state common law courts and federal admiralty courts in some limited areas. This concurrent jurisdiction was incorporated into the Constitution and is reflected in part of one of the first acts of Congress, frequently referred to as the "saving to suitors" clause. The modern version of the "saving to suitors" clause reads as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all other remedies to which they are otherwise entitled. (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

28 U.S.C. § 1333. The first Congress that drafted the "saving to suitors" clause contained many of the delegates to the constitutional convention and state representatives who ratified the Constitution. As such, it has been presumed to reflect the founders' understanding of the lines between federal and state jurisdiction under the Constitution.

Neither the Constitution nor the "saving to suitors" clause preserves to the states police powers to regulate maritime commerce. Under the "saving to suitors" clause, "admiralty or maritime jurisdiction" is "exclusive"—i.e., the states' executives, legislatures and courts simply have no admiralty jurisdiction. Limited states' rights are preserved, but subject to three limitations. State laws can only provide "remedies," those remedies can only be pro-

vided to "suitors," and those "remedies" must be "remedies" that the "suitor" would have been "otherwise entitled" to under the common law.

On its face, the "saving to suitors" clause only preserves for the states a right to provide "remedies."

> The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law.

Chelentis, 257 U.S. at 384. A state may provide remedies "so long as it does not attempt to make changes in the 'substantive maritime law.' " *Madruga v. Superior Court of Cal., County of San Diego*, 346 U.S. 556, 561 (1954) *quoting Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924).

The Supreme Court has described what was left for the states under the "saving to suitors" clause as follows: "This leaves the concurrent power where it stood at common law. The clause has no application to seizures arising under the revenue laws, or laws of navigation, as those belong exclusively to the District Courts." *The New Jersey Steam Navigation Company*, 47 U.S. at 390.

Amici submit that state police powers, to the extent that phrase is used to encompass prior restraint of conduct, are simply not "remedies" as that term is used in the "saving to suitors" clause. Instead, remedies should be given its ordinary meaning—i.e., redress for an injury whether

from tort or breach of contract. Implicit in the term "remedies" is the concept that state laws may only act remedially, not proactively. The task of preventing maritime torts (i.e., regulating maritime commerce) was preserved by the Constitution and laws of the United States to the national government.

Amici further submit that a state enforcing a regulation is not a "suitor" as that term is used in the "saving to suitors" clause. Instead, the term "suitors" should be given its more natural meaning as the parties to civil litigation. That is not to say that a state cannot be a "suitor" when it has been injured by a maritime tort. It can. But such a case is a far cry from the role a state plays when exercising its police powers. In that capacity, the state is simply not a "suitor."

Finally, *Amici* submit that a state regulation of oil tankers is not a remedy that a state is "otherwise entitled" to under the common law. The BAP regulations have no relationship to the type of civil actions that could be entertained by common law courts at the time the Constitution was adopted.

For these reasons, *Amici* submit that the BAP regulations fall outside the scope of the "saving to suitors" clause, and thus, outside the scope of the powers retained by the states. Instead, state regulations covering how a commercial ship on navigable waters is operated would appear to be a type of navigation rule. As the Court long ago held, states simply have no retained power over such laws of navigation. *The New Jersey Steam Navigation Company*, 47 U.S. at 390.

B. Other Clauses of the Constitution Support the Position That States Have No Retained Police Power to Regulate Maritime Commerce.

Amici noted above, while the principal constitutional provision governing maritime commerce is the Admiralty

Clause, the Constitution contains other provisions that directly or indirectly implicate maritime commerce. *Amici* submit that these other constitutional provisions support their reading that the BAP regulations are outside the scope of Washington State's authority. This other provisions of the Constitution must be considered by the Court to help guide its interpretation because the construction of any single provision of the Constitution depends on a "fair construction of the whole instrument." *M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

As noted above, the BAP regulations are predicated on the assertion that states have the retained police power to regulate maritime commerce. That absent an act of Congress directly removing that state authority, the Constitution leaves the states free to regulate maritime commerce. Such an assertion is simply not consistent with the plain text of the Constitution.

Maritime commerce can be divided into four categories of vessels: ships of war, privately controlled commercial vessels; government controlled commercial vessels,[7] and pleasure craft. See 46 App. U.S.C. § 1701 *et seq*. The Constitution does not distinguish between these types of vessels.[8] Therefore, if Washington State has the retained police power to regulate some of these vessels, it has the retained policy power to regulate all of them. If Washington State can restrict privately held commercial vessels from its navigable waters, it can restrict foreign government controlled commercial vessels as well. If Washington State can arrest or fine the owners of privately held

[7] For example, today, the Chinese government is now one of the largest owner/operators of commercial vessels in the world. These Chinese government owned vessels routinely call on the ports of the United States.

[8] However, United States warships are treated differently under the Constitution because of the Supremacy Clause.

commercial vessels, it can arrest or fine the foreign governments that own government controlled commercial vessels. But, such an assertion is absurd on it face.

Take as an example, a theoretical incident where Washington State stops and inspects a foreign government controlled oil tanker bound from Canada to Alaska that was operating lawfully in the navigable waters of Washington State under all laws of the United States and applicable treaties. Washington State then arrests the ship or issues fines to the owners under Washington State law.

Such an action would implicate a number of constitutional provisions beyond the Admiralty Clause. First, such a state action would implicate the Commerce Clauses, both foreign and domestic. Since *Amici* presume that the parties will fully address this issue, no more need be said in this brief.

Second, such a dispute between Washington State and a foreign government would necessitate a diplomatic resolution. But on what authority does Washington State negotiate such a resolution with a foreign government? The Constitution bars such diplomatic efforts. U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . .") U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of the Congress . . . enter into any Agreement or Compacted with another State, or with a foreign Power[.]"). Only the national government can negotiate and enter into agreement with foreign governments over the operation of foreign vessels in United States waters. The implications of this Constitutional limitation is that the states cannot take actions against foreign vessels that would necessitate resolution through diplomatic agreement.

Third, the conduct of a state in stopping and searching a foreign flagged vessel is itself troublesome. The Constitution contains an express bar against states having

ships of war without the consent of the national government. U.S. Const. art. I, § 10, cl. 1 ("No State shall, without the Consent of the Congress . . . keep . . . Ships of War in time of Peace[.]") This provision must be viewed as it was at the time the Constitution was adopted. This provision did more than bar states from owning certain types of armaments. When viewed in its historical context, this constitutional provision effectively barred states from possessing the tools that would have been necessary to interfere with maritime commerce, even in the state's own waters. In the era of sailing ships, this constitutional bar precluded one state from interfering with the maritime commerce destined to another state perhaps more effectively than any other constitutional bar could have. Just as the First Amendment must now be applied to radio and television, this constitutional provision must be applied to modern techniques of projecting power on navigable waters.

Finally, to the extent Washington State claims to act pursuant to an act of Congress granting it the authority to interfere with maritime commerce, the constitutionality of that act of Congress is immediately called into question. Congress may not delegate to the states the right to interfere with maritime commerce under the Admiralty Clause. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). Congress also does not have the constitutional authority to authorize a state to detain vessels bound to or from another state. U.S. Const. art. I, § 9, cl. 6 ("[N]or shall Vessels bound to, or from, one State, be obligated to enter, clear, or pay Duties in another.") Thus, to the extent Washington State asks the Court to construe federal statutes as granting them the right to interfere with maritime commerce and force foreign vessels bound to or from other states to heave to and stand by for boarding, Washington State calls in to question the constitutionality of those federal statutes.

When these various provisions of the Constitution are read together, they provide a clear picture that the Founding Fathers intentionally limited the rights and ability of states to interfere with maritime commerce. At the time the Constitution was written, virtually every state had at least one port that shared a common bay or estuary with another state. As such, the maritime commerce of virtually every state was at the mercy of other states. The Port of Philadelphia was potentially threatened by the decisions of Delaware and New Jersey, the Port of Baltimore could be threatened by the decisions of Virginia, the Port of Newark could be threatened by New York, the Port of Savannah could be threatened by North Carolina, and so on and so on. The Founding Fathers were well aware of this problem. See Mr. Webster's argument to the Court, *Gibbons*, 22 U.S. at 11-14.

Washington State takes the position that the only remedy one state has to the potential catastrophic interference with maritime commerce from another state is to resort to the political process. Washington State's position is that absent an act of Congress, states are free to interfere with maritime commerce. Nothing could be further from the truth.

Instead of leaving maritime commerce to the whims of the political process, the Founding Fathers protected maritime commerce in the Constitution. While Supreme Court decisions limiting the rights of states to regulate maritime commerce may not always be politically popular, like many provisions of the Constitution and the Bill of Rights, the maritime commerce protections were included in the Constitution to avoid having these rights be subjected to the political winds of the day. Their purpose—to protect maritime commerce from the interference of the states—must still be given effect today.

IV. IF WASHINGTON STATE HAS RETAINED POLICE POWERS TO REGULATE MARITIME COMMERCE, THOSE REGULATIONS STILL MUST SURVIVE UNDER *JENSEN*.

Should the Court find that the BAP regulations fall within the scope of the "saving to suitors" clause, that is only the beginning, rather than the end, of the inquiry. Remedial state regulations that address maritime commerce still must survive constitutional scrutiny. For example, states' remedies that are *in rem* are *per se* unconstitutional. *Red Cross Line*, 264 U.S. at 124. *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1867). The Supreme Court has articulated the constitutional test for evaluating state remedies:

> And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917). The Court has consistently looked to this formulation when analyzing state laws that affect maritime commerce. *See Yamaha*, 516 U.S.. at 207. *American Dredging*, 510 U.S. at 447.

A. There Is No Presumption in Favor of the Validity of State Laws When Those State Laws Affect Maritime Commerce.

The first test of constittuionality articulated in *Jensen* is that a state law is unconstitutional if it "contravenes the essential purpose expressed by an act of Congress." *Jensen*, 244 U.S. at 216. This test is analogous to the traditional Domestic Commerce Clause/Supremacy Clause analysis with one important difference—there is no presumption that the state law is valid under an Admiralty Clause analysis.

Amici have been unable to identify any Admiralty Clause preemption case where the Court presumed the validity of the state law in question. For example, the Supreme Court has considered Admiralty Clause preemption in two recent cases. *Yamaha*, 516 U.S. at 119. *American Dredging Co.*, 510 U.S. at 443. In neither of these cases did the Court presume the validity of the state law.

Amici suspects that there will be extensive analysis by the parties in this case as to the question of whether the state BAP regulations contravene the essential purpose expressed by an act of Congress. Therefore, *Amici* will not attempt to duplicate that analysis here.

B. State Laws That Are Not Expressly Preempted by Federal Statute Are Still Preempted if They Interfere With the Uniformity of Maritime Law.

Even assuming *arguendo* that the BAP regulations are not inconsistent with an act of Congress, they still may be unconstitutional under the Admiralty Clause under the second and third branches of *Jensen*. *Amici* again note that the Admiralty Clause analysis is fundamentally different than the negative-Commerce Clause analysis. While the negative-Commerce Clause is concerned with harm to commerce and uses a balancing test, the Admiralty Clause is concerned with prejudice to, harmony with, and uniformity of the national maritime law. *American Dredging Co.*, 510 U.S. at 452 n.3. *Amici* submit that the Admiralty Clause test is significantly more difficult for a state to meet than is the negative-Commerce Clause.

Uniformity has always been at the center of the constitutional grant of maritime jurisdiction to the federal government. As the Supreme Court held long ago:

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. 558, 575 (1874).

> If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.

Jensen, 244 U.S. at 217.

> Thus, the "fundamental purpose" underlying the grant of federal admiralty jurisdiction is "[t]o preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government."

Knickerbocker, 253 U.S. at 160. Or as the Court more recently noted:

> The fundamental interest giving rise to maritime jurisdictions is "the protection of maritime commerce," and we have said that that interest cannot be fully vindicated unless "all operators of vessels on navigable waters are subject to uniform rules of conduct."

Sisson v. Ruby, 497 U.S. 358, 367 (1990) *quoting Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982).

No argument can be made that the BAP regulations are consistent with the constitutional prerequisite of uniformity. An oil tanker that complies with the laws of the United States and may lawfully enter the navigable waters of the other states may nonetheless be barred from entering the navigable waters surrounding Washington State. This position is the antithesis of uniformity and cannot withstand constitutional scrutiny.

It can be argued that the Supreme Court has already answered the question now before it. The State of New York took the same position 175 years ago that Washington State now takes. *Gibbons*, 22 U.S. 1. New York argued that it retained the right to control which commercial vessels entered its navigable waters and ports. The Supreme Court rejected New York's claims out of hand. *Amici* submit that there is no reason to reach a different conclusion today.

CONCLUSION

For all the reasons stated herein, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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