Nos. 98-1701 & 98-1706

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

-and-

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES,

Respondents.

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

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

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BRIEF OF *AMICUS CURIAE* MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONERS[1]

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits this brief as *amicus curiae* in support of the Petitioners, the United States of America and the International Association of Independent Tanker Owners.[2]

INTEREST OF AMICUS CURIAE

The MLA is a national bar association founded in 1899, with a membership of about 3,600 attorneys, law professors and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests, including shipowners, charterers, cargo interests, port authorities, seaman, longshoremen, passengers, underwriters, and other maritime claimants and defendants.

The objectives of the MLA, as stated in its Articles of Association, are:

> to advance reforms in the Maritime Law of the United States, to facilitate justice in its

1. This Brief was authored by James Patrick Cooney of Royston, Rayzor, Vickery & Williams L.L.P., David J. Bederman, Professor of Law, Emory University Law School and Howard M. McCormack, of Healy & Baillie, L.L.P., President of the Maritime Law Association of the United States. No person or entity other than the Maritime Law Association made a monetary contribution to the preparation or submission of the Brief.

2. The MLA has received and filed concurrently with the filing of this Brief the written consents of Governor Gary Locke and the other state respondents the Natural Resources Defense Council, Washington Environmental Council and Ocean Advocates in both Nos. 98-1701 and 98-1706, the International Association of Independent Tanker Owners, the Petitioner in No. 98-1706 and the United States, Petitioner in No. 98-1701.

> administration, to promote uniformity in its enactment and enforcement, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide-range of legislation dealing with maritime matters during its 100 years of existence, including the Carriage of Goods by Sea Act,[3] the Federal Arbitration Act,[4] and the Foreign Sovereign Immunities Act.[5] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[6]

The MLA assists in maritime projects undertaken by agencies of the United Nations, and works closely with the International Maritime Organization (IMO) in the formulation of uniform international maritime standards. The President of the MLA (or his delegate) serves as a member and legal advisor to the U.S. delegation to the IMO Legal Committee.

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3. 46 U.S.C. §§ 1300-1315.

4. 9 U.S.C. §§ 1 *et seq.*

5. 28 U.S.C. §§ 1330, 1602-1611.

6. *E.g.*, Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376; Convention of the International Regulations to Prevent Collisions at Sea, 28 U.S.T. 3459, *as amended*, T.I.A.S. 10672; United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

. The MLA is one of some 57 national maritime law associations constituting the Comité Maritime International,[7] seeking international uniformity in maritime laws through international conventions.

In 1975, prompted by the need for both national and international uniformity in maritime law, the MLA passed a resolution asserting that the MLA "considers it of the utmost importance and in the public interest that maritime law be uniform to the maximum extent possible throughout the United States." In 1986, the MLA by resolution reaffirmed its "support of the importance of maintaining national uniformity in maritime law" and approved "action, subject to the By-Laws, to express such support, including filing amicus briefs and supporting proposed legislation or other action which favors uniformity in maritime law, and opposing proposed legislation or other action which impairs uniformity in maritime law."

In furtherance of its policy with regard to uniformity, the MLA has appeared before this Court as *amicus curiae* on numerous occasions to argue in favor of uniformity in the substance and application of the Maritime Law of the United States.[8]

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7. Its members include the following countries: Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, Finland, France, Germany, Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, D.P. R. Korea, Malaysia, Malta, Mauritanie, Mexico, Morocco, Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Russia, Venezuela and Yugoslavia.

8. *E.g.*, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Offshore Logistics, Inc.*

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SUMMARY OF ARGUMENT

The regulation of maritime commerce must be uniform and consistent on a national basis. This principle of Uniformity finds its basis in our Constitution and has been recognized since the beginning of the Republic.

In recent years, the United States has joined in international efforts through the International Maritime Organization to develop, implement and enforce a mandatory international legal regime designed to promote vessel safety and to prevent marine pollution. It has become a signatory to numerous international conventions establishing a comprehensive body of standards applicable to ocean going vessels. These international standards have been incorporated in statutes and regulations and are enforced by the U.S. Coast Guard. The statutes and regulations at issue in this case attempt to regulate the same vessel operations that are the object of the international and federal regulatory efforts.

The Washington statute and regulations are in conflict with international conventions and federal statutes and regulations. The court below failed to apply the necessary rule-by-rule conflict preemption test and erroneously failed to hold that the state statutes and regulations must fail under conflict preemption.

The international conventions dealing with vessel operations are so comprehensive as to occupy the entire field. The conventions are largely self-executing, but even if they are found not to be self-executing, the federal statutes and

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v. Tallentire, 477 U.S. 207 (1986); *Chick Kam Choo v. Exxon Corporation*, 486 U.S. 140 (1989); *Sisson v. Ruby*, 497 U.S. 358 (1990); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1996); *Exxon Co., U.S.A. v Sofec, Inc.*, 516 U.S. 1091 (1996); *Bouchard Transp. Co., Inc. v. United States*, __ U.S. __, 119 S. Ct. 1095 (Mem.) (1999).

regulations which seek to implement the standards contained in the conventions preempt the field. The court below should have held that the state statutes and regulations also fail under field preemption and that the Doctrine of Uniformity is applicable to the admiralty and maritime laws of the United States.

ARGUMENT

I. Washington's tanker regulations directly conflict with U.S. treaty obligations.

A. The United States has consistently sought to implement the International Maritime Organization's standards for vessel operations and safety.

From the earliest days of our nation, courts, legislatures and scholars have recognized that the regulation of waterborne commerce between the States and with foreign counties demands a uniform national approach and that it is an area to be dealt with primarily at the federal level.[9] More recently, the United States has joined in international efforts through the IMO to develop, implement and enforce an effective mandatory international legal regime designed to promote merchant vessel safety and prevent marine pollution by vessels.[10] It has become party to numerous international conventions and other agreements establishing comprehensive rules and standards for

9. *See, e.g.*, The Federalist, Nos. 11, 13, 15, 24 (Hamilton), 64 (Jay) and 80 (Hamilton); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1923).

10. *See* Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. Mar.L.& Com. 565 (1998) (Allen II). The International Maritime Organization is a specialized international agency of the United Nations established by convention in 1948. *See* IMO Website at http://www.imo.org.

merchant vessels, which have been incorporated into our domestic laws.[11]

The 1982 United Nations Convention on the Law of the Sea ("LOS Convention") is the framework for a mandatory international legal regime for the promotion of vessel safety and the prevention of marine pollution.[12] The LOS Convention places primary responsibility for regulating vessel safety and pollution prevention on the vessel's flag state and requires the flag state to meet international standards with regards to: (1) the construction, equipment and seaworthiness of ships; (2) the manning of vessels and the training and working conditions of their crews; and (3) the maintenance of signals and the prevention of collisions.[13] As a general matter, vessels certified as complying with applicable international standards must be allowed access to the territorial waters and ports of other nations (referred to either as "coastal" or "port" states). Port states have a duty to detain vessels determined upon inspection to be in violation of applicable international standards.[14]

The international standards that are enforced under the LOS Convention include the 1974 Convention for the Safety of Life at Sea and its 1978 Protocol ("SOLAS");[15] the 1973

11. *See, e.g.*, 46 U.S.C. §§ 3710(a) and 3711(a).

12. Entered into force Nov. 16, 1994, U.N. Doc. A/Conf.62/122, *preprinted in* 21 I.L.M. 1261 (1982), and in 6B Benedict on Admiralty, Doc. No. 10-6 (7th rev. ed. 1997). The LOS Convention was submitted to the Senate on October 7, 1994, and is pending ratification. S. Treaty Doc. 103-39, 103d Cong. (1994).

13. *See* Allen II, *supra* note 10 at 566-567.

14. *See* Allen II, *supra* note 10 at 569-575.

15. International Convention for the Safety of Life at Sea, London, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700; Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, 1974, 32 (Cont'd)

Convention for the Prevention of Pollution from Ships and its 1978 Protocol ("MARPOL");[16] the 1978 Convention of Standards of Training, Certification and Watchkeeping for Seafarers ("STCW");[17] the 1972 COLREGS Convention;[18] the 1969 Convention on Load Lines;[19] and the International Convention Concerning Minimum Standards in Merchant Ships ("ILO Convention 147").[20]

SOLAS specifies minimum international standards for construction, equipment, stability, machinery and electrical equipment, lifesaving appliances and fire detection and extinguishing equipment. Chapter V of the Convention establishes operational requirements and provides for mandatory ship reporting systems. The SOLAS amendments of 1994 require the implementation of the International Safety Management Code ("ISM Code"), which established an international standard for the safe management and operation of ships.[21] SOLAS provides for enhanced port state control,

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U.S.T. 5577, T.I.A.S. 10009 (a 1988 Protocol, S. Treaty Doc. No. 2, 102d Cong., at 83 (1191), is not yet in force).

16. International Convention for the Prevention of Pollution from Ships, T.I.A.S. No. 10561; 1978 Tanker Safety and Pollution Prevention Protocol (MARPOL), *reprinted in* 17 I.L.M. 546 (1978), entered into force Oct. 2, 1983.

17. Entered into force, Apr. 28, 1984; 1995 Amendments entered into force Feb. 1, 1997.

18. T.I.A.S. No. 8587, *reprinted in* 12 I.L.M. 734 (1973), entered into force July 15, 1977.

19. International Convention on Tonnage Measurement, T.I.A.S. No. 6331, entered into force July 18, 1982.

20. Convention Concerning Minimum Standards in Merchant Ships, *reprinted in* 15 I.L.M. 1288 (1976), entered into force Nov. 23, 1981.

21. The 1994 Amendments made the Code mandatory beginning July 1, 1998 for most vessels, including tankers.

including authority for the port state authorities to assess vessel crew performance in executing operational requirements.[22] In the United States, the Coast Guard has been assigned the responsibility of enforcing SOLAS requirements as the designated port state authority.[23] MARPOL establishes international standards for vessel design, construction and equipment standards which are enforced by the port state authority.[24] The STCW establishes international standards of the training, certification and watchkeeping for seafarers. While manning standards are established by SOLAS,[25] the Convention requires an adequate knowledge of the English language to obtain certification,[26] establishes in-port and underway watchkeeping requirements[27] and fixes minimum crew rest periods.[28]

SOLAS, MARPOL, the ISM Code and STCW have been implemented for United States flag vessels by various provisions of Titles 33 and 46 of the U.S. Code and regulations issued by the U.S. Coast Guard. Enforcement of convention standards are accomplished with respect to foreign vessels calling in U.S. ports through the United States Port State Control Initiative.[29]

The statute and regulations of the State of Washington at issue here[30] attempt to impose standards regarding vessel safety

22. SOLAS ch. XI, re. R; IMO Res A.787(19).

23. *See* Allen II, *supra*, note 10 at 582.

24. *See* Allen II, *supra*, note 10 at 583-585.

25. SOLAS ch. V, reg. 13; *see also* IMO Res. A.481(XII) (1981).

26. STCW Convention art. II, reg. 2.

27. STCW Annex, ch. VIII and STCW Code § A-VIII.

28. *Id.* STCW Code § A-VIII/1; *see* Allen II, *supra*, note 13, at 586.

29. 59 Fed. Reg. 36,826 (1994). *See generally*, Allen II, *supra*, note 10, at 588-594.

30. Oil and Hazardous Substances Spill Prevention and Response Act, 1991 Wash. Laws ch. 200 Wash. Rev. Code ch. 88.46.010 *et seq.*; Wash. Admin. Code §§ 317-21-010 *et seq.*

and the prevention of pollution that differ from the standards set out in the IMO conventions or in federal statutes and regulations. The Ninth Circuit held that the state statute and regulations are not preempted by either federal law or by international convention.[31] If this decision is allowed to stand, the ability of the federal government, and the U.S. Coast Guard in particular, to effectively regulate the operation of tankers and other vessels calling on the ports of this nation will be significantly eroded. The way will be open for the States and their political subdivisions[32] to effectively displace the federal government in its role as the principal regulator of our maritime commerce.

The possible displacement of the federal government as the principal regulator of maritime commerce is made all the more troublesome when considered in the context of the IMO Conventions already in place and the continued growth of international law dealing with safety at sea and the prevention of vessel pollution. If, indeed, statutory efforts of a state to regulate the operation of tankers and other ocean going vessels cannot be preempted by treaty or by federal statute and regulation, the stage will be set for the fragmentation of vessel regulation in the United States and the collapse of the current approach to vessel safety through a mandatory international

31. *Int'l Assoc. of Indep. Tanker Owners v. Locke*, 148 F.3d 1053 (9th Cir. 1998), *reh. denied*, 159 F.3d 1220 (9th Cir. 1998) (hereafter: "*Intertanko*").

32. § 1018 of OPA90, upon which the Ninth Circuit's preemption analysis is based, preserves the authority of States and *their political subdivisions* to impose requirements with respect to the discharge of oil. 33 U.S.C. § 2718b. Arguably, the decision for which review is being sought allows not only the states, but state port authorities, municipalities and other political subdivisions to regulate vessel operations concurrently with the federal government. Likewise, OPA90 applies to virtually any ocean-going vessel that uses petroleum based fuel, so that state regulation could apply to vessels other than tankers.

legal regime. Efforts to provide uniform rules and regulations consistent with the various international conventions regarding safety at sea and the prevention of pollution to which the United States is a signatory will be frustrated. Any sense of uniformity in the area of maritime regulation will be lost and a patch work of local standards will come into existence, creating "precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent."[33]

It is this threat to the uniformity of the maritime law of the United States that constrains the MLA to appear before this Court as *amicus curiae* to urge that the decision of the Court of Appeals in this case be reversed. The very nature of maritime commerce demands that its regulation be uniform and consistent both on a national and international basis. To encourage and facilitate ocean borne commerce, to provide for the safe operation of vessels coming to our shores and to meet our international treaty obligations, uniform and consistent national standards are necessary. For these reasons, the primary responsibility for the regulation of vessel operation and safety must be left, as a practical matter, to the federal government. The state statute at issue here encroaches and overlaps into an area that must remain nationally uniform and to that extent should be preempted by federal law and regulations under the Supremacy Clause of the U.S. Constitution.[34]

33. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 286 (1977).

34. The Constitutional basis of the preemptive federal role in the regulation of maritime commerce is clear. Article I, Section 8, Clause 3 (The Commerce Clause) states: "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states. Article I, Section 8, Clause 18 (The Necessary and Proper Clause) states that "The Congress shall have power * * * To make all laws which shall be necessary and proper for the carrying into Execution the foregoing Powers * * *. 'Article III, Section 2, Clause 3 (The Admiralty Clause) states:' The judicial power shall extend * * * To all cases of

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B. Washington's tanker regulations directly conflict with the federal statutory and regulatory scheme implementing IMO standards for tanker operations and safety.

At issue in this case is a statute of the State of Washington directed to the protection of state waters from oil pollution by oil tankers and regulations issued pursuant to that statute dealing with, *inter alia*, event reporting, operating procedures and watchkeeping practices, navigational practices, engineering practices, crew training, crew work hours, language requirements, and record keeping. The same areas are dealt with by Oil Pollution Act of 1990,[35] the Ports and Waterways Safety Act ("PWSA"),[36] a comprehensive body of regulations issued by the United States Coast Guard pursuant to these statutes,[37] and a number of international treaties and conventions dealing with maritime safety and the environment.[38]

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admiralty and maritime jurisdiction." It is now firmly recognized that these provisions empower Congress to make maritime law. *See Panama, supra*, note 9. *Cf. Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990), noting that "Maritime tort law is now dominated by federal statute . . ." Article VI, Section 2, (The Supremacy Clause) makes federal maritime law binding on the states: "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 Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

35. Pub. L. No. 101-380, 104 Stat. 484 (1990), as amended.

36. Pub. L. No. 92-340, 86 Stat. 424 (1972).

37. *E.g.*, 58 Fed. Reg. 27,268 (1993) (regulating watch keeping practices); 60 Fed Reg. 24,767, 24,771 (1995) (regulating steering gear); 58 Fed. Reg. 68,274, 68,277 (1993) (regulating drug testing)

38. *See, infra*, pp. 7-8.

The PWSA contains two titles. Title I is codified at Sections 1221-1227 of Title 33 U.S.C. and authorizes the establishment of vessel traffic control systems, the restriction of the operations of tankers not having specified capabilities and the negotiation of international treaties on vessel safety. Title II is codified in Title 46 of the U.S. Code and requires the Secretary of Transportation to adopt uniform federal regulations for the design, construction, equipment, and operation of tank vessels,[39] and delegates the Secretary's obligations to issue regulations to the U.S. Coast Guard.[40] The PWSA was supplemented in 1978 by the Port and Tanker Safety Act ("PTSA"),[41] which requires the Secretary of Transportation to establish regulations dealing with vessel management, drug and alcohol testing, seafarer training and qualifications, casualty reporting, seafarer discipline, manning, work hours, pilotage, and language proficiency requirements. Finally, OPA90 directly imposes several requirements including a provision for random drug and alcohol testing,[42] limited working hours for tanker crews,[43] and a requirement that tankers be equipped with double hulls.[44]

The Ninth Circuit held below that the Washington statute and regulations are not preempted by OPA90, PWSA, PTSA, or by any relevant international treaty or convention. In holding that the state statute was not preempted by OPA90, the Court relied on § 1018 of OPA90[45], which provides that "nothing in this Act . . . shall affect, or be construed or interpreted as preempting, the authority of any State or political subdivision

39. 46 U.S.C. § 3703.

40. 46 U.S.C. § 2104.

41. 46 U.S.C. §§ 9101, 9102.

42. 46 U.S.C. § 7702.

43. 46 U.S.C. § 8104(n).

44. 46 U.S.C. § 3703a.

45. 33 U.S.C. § 2718(a).

thereof from imposing any additional liability, or requirements with respect to . . . the discharge of oil or the pollution by oil within such State," or that "the authority of the United States or any State or political subdivision thereof . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge of oil." The court assumed without discussion that the state regulations dealing with vessel operations constituted "oil spill prevention requirements" and that such regulations were "with respect to" or "related to" the discharge of oil and thus could not be preempted by anything contained in OPA90.

In concluding that neither the PWSA nor the PTSA preempted the Washington statute and regulations, the Ninth Circuit held:

> In the field of tanker regulation, the overarching purposes of Congress are best revealed by OPA90. As the most recent federal statute in the field, OPA90 reflects "the full purposes and objectives of Congress." (Citing *Hines vs. Davidowitz*, 312 U.S. 52, 67 (1941)), better than the PWSA, the PTSA or the Tank Vessel Act, all of which OPA 90 was designed to complement.[46]

The Court went on to hold:

> Section 1018 of OPA 90 sheds considerable light upon the purposes and objective of Congress in effectuating a federal scheme of tanker regulation. That provision demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability and compensation.[47]

Under the reasoning utilized by the court below, the regulation of vessel operations by the State of Washington is

46. *Intertanko*, *supra*, 148 F.3d at 1062.

47. *Id.* at 1062.

principally directed to the prevention of oil spills, which is "in respect to" the discharge of oil and, as such, the state regulation of vessel operation cannot be preempted under § 1018 of OPA90. OPA90 is presumed by the Court to be the definite expression of Congressional purpose and objective in the area of vessel regulation, so that the saving effect of § 1018 is extended to all federal statutes dealing with vessel regulation.

The Ninth Circuit also held that the Washington statute and regulations are not preempted by several conflicting international treaties, including SOLAS, MARPOL, the LOS Convention International Convention for the Safety of Life at Sea, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, the Multilateral International Regulations for Preventing Collisions at Sea, and the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region[48] relying on its decision in *Chevron U.S.A., Inc. v. Hammond*,[49] which held:

> [T]he PWSA/PTSA does not mandate strict international uniformity. Although the legislative history of the PWSA/PTSA refers to congressional intent to abide by international agreements regarding the regulation of tankers, the statutes nonetheless give the Coast Guard specific authority to establish stricter requirements than those set by international agreements. *This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.*[50]

48. Dec. 19, 1979, *United States-Canada*, 32 U.S.T. 377, T.I.A.S. No. 9706.

49. 726 F.2d 483 (9th Cir. 1984), *cert. denied sub nom., Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985).

50. *Id.* at 493-94 (emphasis in original).

The key component of the preemption analysis utilized below is the broad construction placed on § 1018 of OPA 90 rather than the analysis employed by this Court in *Ray v. Atlantic Richfield Co.*[51] and ostensibly relied on by the court below. The construction placed on § 1018 would seem to protect from preemption any state vessel regulation that might contribute in the broadest sense to the prevention of vessel pollution. This construction cannot be sustained. First, there is no authority either in the legislative history or the case law to support the broad construction placed on § 1018. The language of § 1018 is substantially identical to the saving clauses in the Clean Water Act,[52] the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[53] the Trans-Alaska Pipeline Authorization Act (TAPAA),[54] and the Deepwater Port Act.[55] The language has never been construed to provide protection from preemption beyond the areas of state imposed liability for pollution and response and removal activities.[56] A consideration of the legislative history of OPA90 also creates serious doubt that there was ever any Congressional intent to extend the effect of § 1018 to pollution prevention regulation or even to the various legislative initiatives that were ultimately consolidated into OPA90.[57]

51. 435 U.S. 151 (1978).

52. 33 U.S.C. § 1321(o)(2).

53. 42 U.S.C. § 9614(a).

54. 43 U.S.C. § 1656(e)(1).

55. 33 U.S.C. § 1517(k).

56. *See, e.g., Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir 1979); Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III)*, 30 J. Mar.L.& Com. 85, 124 (1999). (Allen III)

57. *See generally, Intertanko*, 159 F.3d 1220 (9th Cir. 1998) (Graber, CJ, dissenting).

For the Ninth Circuit's preemption analysis to work, it must be accepted that the primary purpose behind the regulation of vessel operations is oil spill prevention. Oil spill prevention, however, is only a subset of the many purposes to which the regulation of vessel operations is directed. For instance, regulations directed to the prevention of vessel collision may be seen as directed to the prevention of oil spills since collisions may result in oil spills. Such regulations, however, are more realistically seen as regulations directed to the prevention of vessel collision, as well as the several consequences that may result from a collision including loss of life, personal injury, damage to property, as well as damage to the environment. In the real world, the prevention of oil spills or environmental damage is only one, and perhaps not the primary, purpose behind the regulation of vessel operations. It would seem that the need to protect human life and safety must be recognized as primary. Viewed in this way, the federal regulation of vessel operations is not directed exclusively to the prevention of oil spills and transcends the limited purposes and objectives the Court below implicitly assigned to it. Finally, there is nothing to suggest that § 1018 of OPA90 was intended to relieve the states of the preemptive effect of international treaties dealing with marine safety or pollution prevention.[58]

C. The decision below fails to conduct the necessary rule-by-rule conflict preemption test required by this Court in *Ray*.

Instead of treating each of the federal statutes that deal with vessel safety separately to determine their preemptive effect on conflicting state regulation, the court below assumed without analysis or authority that OPA90 reflected "the full purpose and objectives of Congress" better than prior legislation since it was the most recent federal statute in

58. Allen III, *supra*, note 56 at 132.

the field.[59] By doing so, the court reaffirmed the underlying assumption implicit in its overall preemption analysis that the primary purpose of vessel regulation is the prevention of pollution. Going one step further, the court applied its expansive construction of § 1018 to the entire field of tanker regulation and concluded that § 1018 was a key to the determination of the principal purposes and objectives of Congress in effectuating a federal scheme of tanker regulation which demonstrated "Congress's willingness to permit state efforts in the areas of oil-spill prevention."[60] This approach is logically unsupportable. It totally disregards the strategy that has been followed by the federal government in participating in a mandatory international vessel regulation regime that is implemented domestically through statute and Coast Guard regulation. The purposes and objectives of the PWSA and the PTSA must be considered apart from the purpose and objective of Congress in enacting OPA90 or even the Congressional purpose and objective in enacting the portions of OPA90 dealing with pollution prevention. There is every indication that in affirmatively directing the Secretary of Transportation and the Coast Guard to issue definitive regulations regarding vessel safety and spill prevention in the PWSA and the PTSA, as well as in Title IV of OPA90, it was not the purpose or objective of Congress to permit the states to enter the field of vessel regulation. To the contrary, the clear implication is that Congress intended for there to be a uniform national approach to vessel regulation consistent with the international treaties and conventions dealing with the various aspects of vessel operation, safety, and pollution prevention to which the United States is a party. The Ninth Circuit's failure to focus on the totality of the regulatory approach of the United States to vessel safety and pollution prevention is fatal to its

59. *Intertanko*, *supra*, 148 F.3d at 1062, *citing Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

60. *Intertanko*, *supra*, 148 F.3d at 1062.

conflict preemption analysis. A proper analysis can lead to no other conclusion but that the comprehensive approach to the regulation of vessel operations taken by the federal government in this area requires the preemption of conflicting state statutes and regulations.

II. The adherence of the United States to IMO standards constitutes a field preemption of Washington's tanker regulations.

A. Broad adherence to international regulatory schemes, even non-self-executing treaty obligations, can give rise to a field preemption where state regulations affect maritime commerce.

The United States is a party to numerous conventions dealing with vessel safety matters, including SOLAS, MARPOL, the ISM Code and STCW, that expressly prohibit the parties to the conventions from imposing standards stricter than those imposed by the conventions on foreign flag vessels calling in domestic ports.[61] These conventions seek to mandate compliance with specific standards regarding the vessel design, construction, maintenance, manning, personnel training, and management of vessels imposed by the vessel's flag state (nation), in exchange for assurance by the port state (nation) that compliance with the mandatory international standards will be sufficient for vessels to gain entry to the waters of the port state.[62] If this international vessel regulatory regime is to function in our federal system, international conventions entered into by the United States must be accorded preemptive effect over state regulatory efforts seeking to impose standards in excess

61. *See, e.g.*, SOLAS, Part II, note 420, art. VI(d), which provides: "All matters which are not expressly provided for in the present Convention remain subject to the legislation of the Contracting Governments."

62. *See generally*, Allen II, *supra*, note 10.

of convention requirements, no matter how desirable or benign the state regulations may appear.

The court below gave no consideration to how the purposes and objectives of the relevant international conventions affect the ability of the states to impose vessel regulations. Instead, the court relied on its decision in *Chevron U.S.A., Inc. v. Hammond*[63] to hold that treaties can create only minimum standards and that strict uniformity is not required by international treaties. Having already concluded that all of the relevant congressional purposes and objectives of tanker regulation were embodied in OPA90, and that nothing in OPA 90 would be frustrated by the Washington regulations, the court found it unnecessary to consider any legislative or foreign policy objectives that Congress and the President may have sought to obtain through the various conventions and treaties to which the United States is a party that impact the regulation of vessel safety. In doing so, the court cut short the conflict preemption analysis which it was required to carry out to determine whether the Washington law and regulation stands as an obstacle to the accomplishment and execution of the "full purposes and objective of Congress."[64] Had the proper analysis been carried out, there can be little doubt that the court would have found the Washington statute and regulations preempted by the various international conventions that impact the field of vessel regulation.[65]

63. *Supra*, note 49.

64. *See California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989); *Hines v. Davidowitz*, *supra*, note 59.

65. As noted by one commentator, "[n]othing in OPA90 or its legislative history and no authority cited by the court in Intertanko II, demonstrates a congressional intent to relieve the states of the preemptive effect of the IMO-sponsored marine safety or pollution prevention conventions." Allen, III at 132. Indeed, if it was not Congress' understanding that the states were generally preempted by

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It is asserted that the treaty provisions relied upon by Petitioners are not self-executing and, therefore, cannot be regarded as having field preemptive effect. It is submitted, however, that the IMO Conventions at issue are substantively self-executing, but, even if they are not, the conclusion that they nonetheless exert preemption of contrary state regulations is not altered. For example, even in the absence of an implementing federal statute, the courts have treated the SOLAS requirements as self-executing or have applied them as a component of the general maritime law.[66]

More generally, international conventions which purport to restrict the actions of a signatory are self-executing. In *Commonwealth v. Hawes*[67], a 1878 Kentucky Supreme Court decision cited by this Court as a "very able" statement of the law in *United States v. Rauscher*,[68] it was observed that:

(Cont'd)
federal statutes regulating maritime affairs, it would not have been necessary to reserve to the states a role in the liability and response aspects of marine pollution. For other commentaries on the general area, *see*, Robert H. Nicholas, Jr. *Federal and State Preemption Regarding Vessel Construction and Operation*, 73 Tulane Law Review 1 (1999); Charles L. Coleman, III, *Federal Preemption of State "BAP Laws; Repelling State Boarders in the Interest of Uniformity*, 9 U.S. F. Mar. L.J. 305 (1997).

66. *See Complaint of Damodar Bulk Carriers, Ltd.*, 903 F.2d 675 (9th Cir. 1990) (holding that "[t]his circuit recognizes SOLAS as having the status of law enforceable in American courts.") (*citing Alkmeon Naviera, S.A. v. M/V Marina L*, 633 F.2d 789, 793 (9th Cir. 1980)); *See United States v. Ultramar Shipping Co.*, 685 F. Supp. 887 (S.D.N.Y. 1987), *aff'd mem.*, 854 F.2d 1315, 1988 AMC 2408 (2d Cir. 1988) (holding that "[t]he SOLAS Conventions 'represent a uniform set of internationally recognized navigational rules and thus they have the status of general maritime law.' ").

67. 76 Ky. 697 (1878).

68. 119 U.S. 407, 427-28 (1886).

> When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."[69]

Even assuming that the relevant IMO Conventions are non-self-executing such international agreements are still entitled to field preemptive effect. Whether an international convention is self-executing may bear on the question of conflict preemption absent enabling legislation. However, if the treaty has been implemented by an Act of Congress, such action may well give rise to a specific clash with state legislative action. Field preemption operates more subtly. As has already been noted here, the question is whether Congress has pervasively sought to legislate in a particular field, giving rise to a clear implication that state regulation is simply unacceptable. In these circumstances, the ratification of STCW, MARPOL 73/78, the COLREGS, and SOLAS by the United States, in addition to consistent efforts by Congress to give sanction to international efforts to regulate vessel operations, clearly manifest a Congressional intent to field preempt state regulations regarding such operations.

69. *Id.* at 702-03. *See also United States v. Decker*, 600 F.2d 733 (9th Cir.), *cert. denied*, 444 U.S. 855 (1979); *Watson v. United States*, 592 F. Supp. 701 (W.D. Wash. 1983); Restatement of Foreign Relations Law of the United States § 111, rptr's note 5 (1987)

B. Washington's BAPS for tankers cannot be harmonized with international standards.

At the heart of this matter is the heightened awareness of and concern for the environment resulting from several significant and well-publicized oil spills involving vessel casualties, the most notable being the Exxon Valdez spill in 1989 which lead to the passage of the *OPA90* and the Washington statute here at issue. The policy determination made by Congress to allow the states and their political subdivisions a role in the area of maritime environmental regulation raises the question of how to reconcile the interests of the several States to protect their environments with the need for uniform and consistent regulation of maritime commerce. There is no question that the States have the inherent right under their police power to prohibit the discharge of pollutants into the environment within their boundaries, to establish standards regarding the response and abatement of such a discharge, and to impose civil and criminal liabilities to deter such harm to the environment. Implicit in this right to prohibit pollution is the interest of the states in the implementation of laws and regulations aimed at the prevention of pollution within their borders. In the maritime context, however, the environmental interests of the States must be balanced against the federal responsibility to provide for the uniform and consistent regulation of maritime commerce.

In this case, the effort of the State of Washington to protect its state waters and shores from oil pollution brings it into direct conflict with the efforts of the federal government to address essentially the same concerns on a national and international level. Washington has issued broad and comprehensive regulations establishing standards in the areas of incident reporting, watch keeping and lookout practices, bridge resource management, navigational practices, engineering practices, testing of engineering, navigational and propulsion systems,

emergency procedures, record keeping, personnel training, drug and alcohol testing, personnel job performance evaluation, work hours, language proficiency, and management practices. All of these regulations are for the stated purpose of preventing pollution. The decision below has upheld the right of Washington to regulate these areas of vessel activity notwithstanding the fact that these areas are dealt with comprehensively by federal statute and regulations and international convention. Vessels that call in ports of the State of Washington must comply not only with the standards and requirements imposed by federal regulation, but also the additional and more stringent standards and requirements of the State of Washington.[70]

If the decision below is allowed to stand, the legal framework on which we regulate our maritime commerce will become fragmented, uncertain, and unnecessarily contentious.[71] Any effort to maintain this dual state-federal regulation of vessel operations is both constitutionally impermissible and highly impracticable. If there is an area where field preemption should be upheld, it is in the area of merchant vessel regulation.

III. Federal Preemption in the Field of Maritime Commerce may be More Readily Established Than in Other Areas of Federal Legislative Authority.

As this Court noted in *Ray v. Atlantic Richfield Co.*[72], preemption may be express, implied from the context of an Act

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70. Unfortunately, the problem is not restricted to vessel actually calling on ports within the State of Washington, since the Washington statute would apply to vessels required to pass through state waters en route to ports in Canada, implicating our treaty obligations with Canada and the right of innocent passage generally.

71. As noted the Petition of the United States of America for Writ of Certiorari in No. 98-1701 at 26, several nations have formally protested the Washington state regulations.

72. 435 U.S. 151 (1978).

of Congress, or be required in the case of an actual conflict in legislative direction. It is true that this Court has allowed state regulation of certain offshore activities in the face of Congressional silence.[73] However, where state regulation ostensibly impacts the modalities of maritime commerce, the typical presumptions against federal preemption as noted by this Court in *Cipollone v. Liggett Group, Inc.*[74] arguably do not apply.

The Court in *Ray* certainly contemplated the particular problems posed by state regulation in the field of maritime commerce when it observed that

> Under the relevant cases, one of the legitimate inquiries is whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating the various aspects of oil-tanker operations and design with which the Tanker Law is concerned. As the Court noted in *Rice, supra*, 331 U.S. at 230:
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> > [The congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.[75]

73. *See Skiriotes v. Florida*, 313 U.S. 69 (1941) (sponge diving); *Alaska v. Arctic Maid*, 366 U.S. 1991 (1961) (taxation); *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973) (pollution regulation).

74. 505 U.S. 504, 515-16 (1992).

75. 435 U.S. at 157 (citations omitted).

It has always been the understanding of this Court that regulation of maritime commerce — especially in the actual operation of oceangoing vessels involved in international trade — was a matter in "which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[76]

Although it is not the MLA's intent to resurrect the Commerce Clause challenges to the Washington BAPs, disposed of below (and not renewed here), this Court's related jurisprudence as to the nature of federal maritime lawmaking competence, certainly has an impact on the relevant standard to be applied in field preemption cases involving maritime regulation. The MLA believes that these precedents strongly counsel in favor of a holding of federal field preemption of all state regulations that purport to affect the operations of coastwise or international commerce by sea.

Although this point seems self-evident, it may be helpful to discuss the *locus classicus* of the rule of federal supremacy in the admiralty field. Prior to this Court's 1917 decision in *Southern Pacific Co. v. Jensen*,[77] there was no doubt that an Act of Congress could preempt contrary state statutes and state decisional law in the admiralty field. What was more uncertain was whether state maritime legislation was somehow restrained even before affirmative Congressional action. In short, the question was whether the jurisdiction-granting Admiralty Clause of Article III of the Constitution had the same dormant aspect as the Commerce Clause in Article I. *The LOTTAWANNA*,[78] and *Workman v. Mayor, City of New York*,[79] certainly implied such with their emphasis on distinguishing

76. *Id.*

77. 244 U.S. 205 (1917).

78. 88 U.S. (21 Wall.) 558 (1874).

79. 179 U.S. 552 (1890).

local sorts of legislation. It remained for *Jensen* to confirm the doctrine in the most express manner possible.

"Considering our former opinions," Justice McReynolds began,

> it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which should prevail throughout the country. [citations omitted] And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. [citing *The LOTTAWANNA* and *Workman*][80]

The Court frankly acknowledged that ". . . it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation."[81] While states *could* constitutionally impose liens on resident vessels, fix pilotage fees, and give the right to recover in death actions,

> no such [state] 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 or interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which same law was

80. 244 U.S. at 215.

81. *Id.* at 216.

> incorporated by our national laws by the Constitution itself.[82]

This is the essence of *Jensen*'s uniformity doctrine and the dormant admiralty clause. The Court's holding obviously recognized the possibility of express preemption by Congress, but the concern was plainly focused on preventing states from legislating at variance with "the proper harmony and uniformity of that law in its international or interstate relations."

Jensen has never been repudiated and it retains vitality today, particularly in the core areas of admiralty, of which the regulation of oceangoing vessel operations must be considered one. In this Court's latest enunciation of the subject, in *American Dredging Co. v. Miller*,[83] it made clear the central purposes of federal supremacy in the maritime field. The Court's opinion unequivocally affirmed the continued vitality of *Jensen*, even while noting that "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our jurisprudence."[84]

Washington asserts that the enactment of its own BAPs for tanker operations, does not offend uniformity. This cannot be true. As already noted above, any attempt to impose particular operational standards on tanker activities in state waters, inevitably produces a patchwork quilt of regulation. Even if such BAPs do not require "hardware" changes in a ship's construction, design and equipment ("CDE" standards), they may none too subtly affect manning and training requirements for a vessel. Washington's "English-only" and watchkeeping rules may, for example, require costly and logistically-difficult

82. *Id.* at 216.

83. 510 U.S. 443 (1994).

84. *Id.* (comparing *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) with *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)).

crew transfers in order to ensure compliance. If Canada reciprocates, and a vessel's next port-of-call is Vancouver, will that vessel than have to be crewed by individuals fluent in both French and English? Similarly, Washington's training requirements might require that all watch standing officers be trained by organizations certified by the State of Washington.

Although the Washington BAPs that the court below validated appear innocuous and a legitimate exercise of a state's police power, they nonetheless impose substantial burdens on international maritime commerce. Given the nature of a long-standing and well-conceived international approach to regulation of tanker safety, Congress's manifest approval of such an international scheme, and the background principles of federal supremacy in this core area of maritime lawmaking, this Court should hold that state regulations for operations of tankers engaged in international commerce are field preempted.

CONCLUSION

The decision of the United States Court of Appeals in this case should be reversed and the statutes and regulations of the State of Washington held to be preempted under the Supremacy Clause of the U.S. Constitution. Under the Constitution, the admiralty and maritime laws of the United States, including laws dealing with the operation of vessels, their manning, the training of their crews, and the like, are to be nationally uniform. On a practical level, the regulation of vessel operations by the individual states is inconsistent with the mandatory regulatory regime in which this nation participates and will cause a level of fragmentation that will frustrate any national or international effort to regulate vessel operations.

Respectfully submitted,

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