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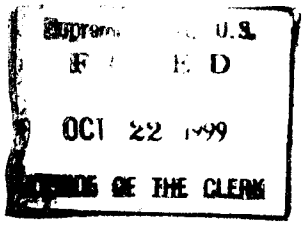

No. 98-1701
No. 98-1706

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), *ET AL.*,
Petitioners,

v.

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

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN WATERWAYS OPERATORS IN SUPPORT OF PETITIONERS

ELDON V.C. GREENBERG
Counsel of Record
GARVEY SCHUBERT & BARER
1000 Potomac St., NW, 5th Fl.
Washington, DC 20007
202.965.7880

BARBARA L. HOLLAND
Associate Counsel
GARVEY SCHUBERT & BARER
1191 Second Avenue, 18th Fl.
Seattle, WA 98101
206.464.3939

Attorneys for Amicus Curiae The American Waterways Operators

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This brief is filed by the American Waterways Operators (AWO) as *amicus curiae* in support of the position of Petitioners International Association of Independent Tanker Owners (Intertanko) and the United States of America (United States).[1] AWO submits this brief with the written consent of all parties, which accompany this brief. *See* Sup. Ct. R. 37(3)(a).

I. INTERESTS OF *AMICUS CURIAE* AMERICAN WATERWAYS OPERATORS

The AWO is the national association representing the inland and coastal tugboat, towboat and barge industry in the United States. AWO's 375 member companies include bulk commodities and oil transporters, ship docking and harbor services operators, fueling, bunkering, and lightering services operators and shipyards. For over fifty-five years, AWO has worked to promote a better understanding of the unique nature of the domestic waterborne transportation industry and its safe and environmentally sound contribution to the U.S. economy.

A. The AWO represents a vital and responsible segment of the U.S. transportation industry.

The U.S. barge and towing industry is a diverse and vital segment of America's interstate transportation system. Barges and towing vessels make nearly one million voyages annually from over 2,000 bulk cargo docks and terminals along America's inland and coastal waterways. The industry employs more than 33,000 people aboard 5,200 tugs and towboats and more than 30,000 barges, including tank barges which transport oil. The barge and towing industry contributes more than $5 billion a year to the nation's economy. With operations along our nation's 25,194 miles of inland and coastal waterways, including the Atlantic, Pacific, and Gulf coasts, the tugboat, towboat and barge industry is diverse in terms of geographic areas served, the types of vessels operated,

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[1] Counsel for *amicus curiae* AWO authored this brief in its entirety. No person or entity other than AWO provided monetary support for the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

the range of cargoes carried, and the skills necessary to perform its many tasks.

Tug and barge transportation provides America's shippers with a highly cost-efficient and reliable means of moving the raw materials that fuel the nation's economy. Indeed, barges move fifteen percent of our nation's freight for less than two percent of the nation's total freight bill. The economic efficiency of barge transportation is matched by its energy efficiency. In fact, barging is America's most energy efficient mode of surface transportation. One gallon of fuel will move a ton of cargo more than 500 miles by tug and barge.

The U.S. tug and barge industry is committed to providing its customers with transportation services that are not only efficient, reliable, and cost-effective, but as safe and environmentally sound as possible. In recent years, the industry has worked closely with the U.S. Coast Guard to upgrade regulatory standards in such key areas as towing vessel operator qualifications and navigation equipment on towing vessels. That commitment is also demonstrated by industry-driven safety initiatives like the AWO "Responsible Carrier Program," a code of safe practices for tug and barge companies, and the "Coast Guard-AWO Safety Partnership," which brings the barge and towing industry together with government to solve marine safety and environmental protection problems.

B. The U.S. tug and barge industry is subject to a pervasive scheme of federal regulation and is therefore deeply concerned over this threat to national uniformity.

As commercial vessels operating under U.S. flag, AWO-member tugboats, towboats and barges are subject to a vast array of federal statutes and regulations that govern the construction, design, equipment and manning (CDEM) of the vessels, as well as operator license qualifications, training and watchkeeping. *See, e.g.*, 46 U.S.C. ch. 37 (tank barge CDEM requirements); 46 C.F.R. pts. 25-26 (uninspected vessel equipment and operations

requirements); 46 C.F.R. pts. 30-40 (tank vessel operations requirements); 33 C.F.R. pts. 155-156 (tank barge oil transfer requirements); 46 U.S.C. ch. 41 (towing vessel safety equipment requirements); 46 U.S.C. § 8104 (towing vessel watches); 46 U.S.C. § 8904 and 46 C.F.R. § 15.610 (towing vessel manning standards); 33 C.F.R. § 164.72 (towing vessel navigation equipment requirements). The Coast Guard's detailed rules for crew drug and alcohol testing apply to tugboat and towboat crews. *See* 46 C.F.R. § 4.06 and pt. 15. Federal regulations also prescribe rules governing methods for towing barges. *See* 33 C.F.R. pt. 163. Standards for tankermen responsible for oil transfers to and from tank barges are set by federal law. *See* 46 U.S.C. §§ 7317 and 8703; 46 C.F.R. pt. 13. It is also significant that tugs towing tank barges in coastal waters beyond the U.S. boundary line are subject to the standards prescribed by the International Convention on Standards for Training, Certification and Watchkeeping for Seafarers (STCW Convention). *See* 46 C.F.R. § 15.1101. The STCW standards incorporated by reference into Title 46 of the C.F.R. prescribe requirements for crew training and set limits on crew watch and rest periods. *See* 46 C.F.R. §§ 15.1109 and 15.1111.

Even after it enacted the Oil Pollution Act of 1990 (OPA 90),[2] upon which the Ninth Circuit relied so heavily in upholding the Washington tanker regulations, Congress continued to add to the federal scheme of regulation for the tug and barge industry. Title IX of the Coast Guard Authorization Act of 1996 (titled "Towing Vessel Safety")[3] and Section 311 of the Coast Guard Authorization Act of 1998 (titled "Petroleum Transportation")[4] both target the tug and tank barge industry for additional regulation. The 1998 Act specifically addresses tug and tank barge operations in the waters of the north Atlantic states. In none of the sections cited in the 1996 and 1998 Acts did Congress insert a "savings" clause

[2] Pub. L. No. 101-380, 104 Stat. 484 (1990).

[3] Pub. L. No. 104-324, tit. IX, 110 Stat. 3901 (1996), codified at 46 U.S.C. §§ 3719 and 4102(f).

[4] Pub. L. No. 105-384, § 311, 112 Stat. 3411 (1998).

authorizing state regulatory authority over the tug and barge subjects addressed by the federal act.

It can fairly be said that the activities of the U.S. tank barge industry may occur "only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 634 (1973) (quoting from *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944)) (finding an implied intent to preempt state law under such circumstances); *see also Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 614 (1991) (suggesting that such a regime implies field preemption). The prospects of a new array of overlapping state and local requirements under the Ninth Circuit's holding are of great concern to AWO and its members.

C. The Ninth Circuit's ruling fundamentally alters the maritime regulatory regime in the United States.

The Ninth Circuit's ruling under review will have consequences that extend far beyond the State of Washington or the parties to this particular case. To see how the decision will affect the tug and barge industry in particular, it is important to understand that the federal definition of a "tank vessel" includes the tank *barges* owned and operated by many of AWO's members. *See* 46 U.S.C. § 2101(39). State laws that prescribe standards that are different from or otherwise overlap with the federal regime for tank barges and the tugs that tow them will destroy the uniformity so vital to AWO's members in their interstate transportation function.

It is no overstatement to say that the decision to uphold "overlapping" state regulations applicable to vessels engaged in interstate commerce has the potential to fundamentally alter the entire regulatory regime for the tug and barge industry in the United States. The Ninth Circuit ruling, if allowed to stand, might be used to determine the validity of a parallel set of Washington state Best Achievable Protection ("BAP") regulations for tank barges and the tugs that tow them. *See infra* para. IV.E.3. The

Ninth Circuit's narrow reading of this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), might also be employed to validate laws enacted by the State of Rhode Island that call for the phase-out of single-hull tank vessels in state waters well before the time prescribed by Congress in OPA 90. *See infra* para. IV.E.1.

II. QUESTIONS PRESENTED FOR REVIEW OF CONCERN TO *AMICUS CURIAE* AMERICAN WATERWAYS OPERATORS

The questions presented in Intertanko's petition No. 98-1706 and the United States' petition No. 98-1701 of principal concern to the AWO are:

> Whether federal statutes, regulations and international treaty commitments of the United States that prescribe comprehensive standards for tank vessel operations, personnel qualifications, and manning expressly or impliedly preempt attempts by an agency of the state of Washington to enforce regulations that impose different standards and requirements governing the same subject matters aboard the same tank vessels.
>
> Whether regulations adopted by the State of Washington governing staffing[5] and operation of ocean-going oil tankers engaged in coastal and international commerce are preempted to the extent that they conflict with international obligations of the United States and Coast Guard regulations for such tankers promulgated pursuant to federal statutes and international conventions and agreements.

[5] The term more commonly used, particularly in international law and in federal statutes and regulations, is "manning." *See, e.g.*, 46 U.S.C. ch. 81.

With respect to the second question, AWO and its members are particularly concerned about the preemptive effect of Coast Guard regulations applicable to oil tankers and tank barges engaged in coastal and inland interstate commerce and the role those regulations play in promoting uniformity.

III. SUMMARY OF ARGUMENT

The Ninth Circuit's decision reveals an elemental misunderstanding of this Court's holding in *Ray* regarding field preemption of the subjects covered by Title II of the Ports and Waterways Safety Act (PWSA) and implied preemption by regulations prescribed under authority of Title I of the PWSA. The circuit court grouped such disparate subjects as mariner qualifications, licensing, training, watchstanding practices and English language competency, along with drug and alcohol testing and navigation practices, and labeled them *operating* requirements in the same sense that the Court in *Ray* used that term when it upheld the state's escort tug requirements. In doing so, the Ninth Circuit overlooked the fact that the Court in *Ray* was referring to operating requirements adapted to the "peculiarities" of "local waters." In effect, the Ninth Circuit decision reflects an erroneous belief that under the PWSA, as construed by this Court in *Ray*, the State of Washington may determine that *all* of the coastal and inland waters of the state may be deemed to fall within the "local peculiarities" exception to uniform national rules under the PWSA. At the same time, the court's decision ignores the preemptive effect of regulations promulgated under authority of Title I of the PWSA.

In addition, the circuit court's conclusion that OPA 90 Section 1018 somehow stripped the Coast Guard of its longstanding authority under the PWSA and other statutes to prescribe regulations that preempt state or local law is inconsistent with this Court's decisions on agency preemption. The court's construction of Section 1018 of OPA 90 as a source of new authority for the states to embark on a regulatory program for tank vessel safety and vessel-source pollution prevention is contrary to the text and structure of OPA 90, the Act's legislative history and prior cases

construing virtually identical language in other federal pollution statutes. Finally, the circuit court erred in concluding that only Congress' oil spill prevention purpose in OPA 90 was relevant to the court's conflict preemption analysis, enabling the court to ignore other important congressional and agency purposes that would have been inconsistent with the court's decision. By selectively including and excluding congressional and agency purposes and objectives, the circuit court's decision violates the basic teachings of this Court that congressional intent is the ultimate touchstone of any preemption analysis.

IV. ARGUMENT

A. The Ninth Circuit decision reflects an elemental misunderstanding of the holding and reasoning of *Ray* on the preemptive effect of the PWSA.

The Ninth Circuit acknowledged the continued vitality of this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), and the pivotal role of that decision in resolving the instant case. Given the OPA 90 Conference Committee statement that nothing in OPA 90 was intended to disturb this Court's decision in *Ray*, the circuit court could hardly conclude otherwise. *See* H.R. Conf. Rep. No. 101-653, at 122 (1990). However, the circuit court misapplied this Court's holding and reasoning in *Ray*, particularly *Ray*'s painstaking approach to classifying vessel *operating* requirements, and the Court's conclusion on the preemptive effect of Coast Guard regulations promulgated under Title I of the PWSA.

1. Limits on state regulation of federally licensed or inspected vessels.

The Court's decision in *Ray* followed a line of cases stretching back to 1824, in which the Court carefully defined the limits of state regulatory authority over vessels holding federal licenses or certificates of inspection that authorize the vessel to engage in a particular commercial trade on the navigable waters of the United States. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (striking down, on preemption grounds, New York ban on

steamships). The evolution of what the Court has labeled the "negative implications" of its decision in *Gibbons* was examined by the Court in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 277 and 279 (1977). When the only federal laws raised in a preemption challenge are the federal documentation and licensing statutes, the Court has held that mere possession of a federal license to engage in a commercial trade or activity does not immunize the vessel from all state and local regulation. *See, e.g.*, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444-45 (1960) (upholding municipal smoke abatement ordinance). On the contrary, the Court has held that the states may enforce against such vessels reasonable, nondiscriminatory conservation and environmental regulations "otherwise within their police power." *Douglas*, 431 U.S. at 277.

The courts' Article VI preemption analysis does not, however, end with examination of federal documentation laws in cases where other federal laws, including treaties, federal statutes and regulations, are implicated. For example, even in *Huron* the Court declined to reach the question whether the city's vessel *inspection* ordinance was preempted by federal inspection laws, after determining there was no evidence that the city had attempted to enforce its inspection ordinance. *Huron*, 362 U.S. at 442 n.1.

This Court's decision in *Ray* set forth a "no-overlap" rule, which qualifies the states' authority to impose conservation and environmental regulations otherwise within their police powers. The Court has long treated *interstitial* state laws intended to fill gaps in the federal maritime regulatory scheme quite differently from state laws that *overlap* the federal scheme, prescribing state-specific regulations that are stricter than or otherwise different from federal standards. In both *Kelly v. State of Washington*, 302 U.S. 1 (1937), and *Huron*, the Court upheld the challenged state or local regulation only after finding that the local laws were interstitial. *See, Kelly*, 302 U.S. at 8; *Huron*, 352 U.S. at 445. After examining these cases and others, the Court in *Ray* articulated the "no-overlap" rule. *Ray*, 435 U.S. at 164-65. The

Court recognized that such overlapping state laws reflected an impermissible substitution of judgment. *Id.* at 165.

2. *Ray v. Atlantic Richfield Co.* and the new Ports and Waterways Safety Act.

In *Ray*, the Court addressed the preemptive effect of a number of familiar federal statutes and regulations. The Court applied preemption and non-preemption clauses in federal pilotage laws to Washington's pilotage requirements, upholding state pilotage requirements for vessels engaged in the foreign trade and invalidating those applicable to vessels in the coastwise trade (i.e., between two U.S. ports). *Id.* at 159-60. The Court also rejected the state's argument that either the Clean Water Act or the Coastal Zone Management Act provided authority for states to regulate oil tankers. *Id.* at 178 n.28.

Most of the Court's analysis in *Ray*, however, focused on the PWSA,[6] the centerpiece of the federal vessel safety and pollution prevention regime.[7] Throughout the opinion in *Ray*, the Court distinguished between Congress' intent as to the preemptive effect of Title I and Title II of the PWSA. The Court's conclusions regarding the preemptive reach of the PWSA can be summarized as follows:

(1) The "statutory structure" of Title II of the PWSA reveals that Congress intended that Title II would fully occupy the field of tank vessel construction and design requirements. *Ray*, 435 U.S. at 162-63. Although Title II also addresses other tanker regulatory subjects, including tank vessel operation, equipping, personnel qualification and manning (including duties, qualifications and training of the officers and crews), at the time of the *Ray* decision, Washington did not purport to regulate those other

[6] Pub. L. No. 92-340, 86 Stat. 424 (1972).

[7] The Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471 (1978) (PTSA), had not been enacted at the time of the Court's decision.

subjects, so the question of preemption of those subjects was not before the Court.[8]

(2) In contrast to Title II of the Act, which *requires* the Secretary of Transportation (Secretary) to promulgate tanker regulations, Title I provides the Secretary with *discretion* to promulgate regulations, and therefore does not evince an intent that federal law would occupy the field for subjects falling within that Title. When, however, the Secretary exercised the authority conferred by Title I, the Court reasoned (in *dictum*) that the Secretary's regulations, together with the preemptive effect of 33 U.S.C. § 1222(b)[9] (discussed below), would preempt state laws on the same subject. *Id.* at 171-72.

(3) By saving, in Title I of the PWSA, state authority to prescribe "higher equipment or safety standards" only as to *structures* (33 U.S.C. § 1222(b), now at § 1225(b)), Congress impliedly preempted the states from imposing on *vessels* higher equipment or safety standards than those prescribed by the Secretary under his or her Title I authority. *See Ray*, 435 U.S. at 171, 174.

3. The Ninth Circuit's decision erroneously validated overlapping state tanker regulations.

The Ninth Circuit upheld, against a broad-based preemption challenge, overlapping Washington state regulations applicable to vessel operations and crew member qualifications, training, watchstanding, English language competency and drug and alcohol

[8] The "statutory structure" of Title II that informed the Court's decision in *Ray* extends to each of the subjects for which the Secretary of Transportation was directed by Congress to prescribe regulations. *See* 46 U.S.C. § 3703(a).

[9] At the time of the Court's decision in *Ray*, the state law saving clause for structures was codified in 33 U.S.C. § 1222(b). It was subsequently re-codified in 33 U.S.C. § 1225(b).

testing, despite the established "no overlap" rule articulated by this Court in *Huron* and *Ray*. The circuit court's decision is premised on two errors in its application of *Ray*. First, the court's decision fails to recognize that many of the overlapping Washington tanker regulations address subjects within the field preempted by Title II of the PWSA. The circuit court's error was compounded by its misunderstanding of this Court's distinction in *Ray* regarding vessel operating requirements adapted to the "peculiarities" of particular local waters, and those for which Congress intended uniform national rules. Second, the court failed to recognize that under *Ray*'s reasoning, once the Coast Guard promulgates rules under its Title I authority, the states are preempted from prescribing higher safety or equipment standards for vessels.

The Ninth Circuit's decision to classify subjects as diverse as mariner licensing, training, watchstanding, drug and alcohol testing and English language competency as operational requirements — as that label was employed by the Court in *Ray* — reveals a fundamental misunderstanding of both the PWSA and the Court's decision in *Ray*. Both Title I and Title II of the PWSA address vessel operations. *See* 46 U.S.C. § 3703 and 33 U.S.C. § 1223. The Court in *Ray* was careful to distinguish the two provisions. The Ninth Circuit in *Intertanko* was not. Title II of the PWSA requires the Secretary to promulgate regulations prescribing tank vessel CDEM standards, crew qualification standards, and ballasting and operating requirements. *See* 46 U.S.C. § 3703(a). Under the Court's decision in *Ray*, Title II fully occupies the field of tanker design and construction. *Ray*, 435 U.S. at 163-64. The Court's decision was based on the structure of Title II and the importance of the fact that Congress had required the Secretary to issue regulations to implement that title. *Id.* It follows from the Court's reasoning that the other subjects in Title II for which the Secretary was required to promulgate regulations, including tank vessel operations, occupy the field as well.

As the Court in *Ray* recognized, the operating requirements envisioned by Congress in Title I are rules and procedures addressed to the peculiarities of local waters, such as the narrow

and relatively shallow waters of Rosario Strait in upper Puget Sound. *See* 435 U.S. at 174-75 and n.26. The Court's analysis of whether the state's ban on tankers of more than 125,000 deadweight tons in *Ray* fell within the Title II (field preemption) or Title I (preempted only after the Secretary has promulgated rules) rule turned on whether the state rule represented a contrary state judgment on safety and environmental protection or was instead a response to a unique and localized condition. The Court explained that:

> [i]f Washington's exclusion of large tankers from Puget Sound is in reality based on water depth in Puget Sound or on other local peculiarities, the Tanker Law in this respect would appear to be within the scope of Title I, in which event also state and local law would represent contrary judgments, and the state limitation would have to give way.

Id. at 175 (*dictum*). When the distinction was pointed out to the Ninth Circuit in *Intertanko*, the panel's response was that "the BAP Regulations are designed for the same 'local waters,' namely Puget Sound, as was the Washington Tanker Law contested in *Ray*." *See Intertanko v. Locke*, 148 F.3d 1053, 1065 (9th Cir. 1998). On the contrary, the Court's discussion in *Ray* focused on the waters of a particular strait, where Washington sought to limit the passage of large tankers. The BAP regulations, by contrast, apply to vessels throughout state waters[10], including coastal waters out to three miles, and therefore constitute the kind of substitution of judgment on safety and environmental protection the Court in *Ray* analyzed under Title II of the Act. *Cf. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 213 (1983) (reasoning that "a state judgment that nuclear power is not safe enough to be further developed would conflict directly

[10] *See* Wash. Rev. Code § 88.46.080 (prohibiting tank vessels from operating in state waters unless they have an approved prevention plan that complies with the BAP Regulations). State waters are defined in Article XXIV, Section 1 of the Washington State Constitution.

with the countervailing judgment of the NRC") (*dictum*). Moreover, the court simply ignored the fact that, even if the Washington regulations were a response to unique, local conditions, stricter state safety or equipment standards would be preempted by the Coast Guard's regulations under Title I of the Act.

B. The Ninth Circuit's construction of OPA 90 Section 1018 is inconsistent with the structure and legislative history of the Act and with prior cases construing virtually identical saving clauses.

Notwithstanding this Court's earlier decisions against overlapping state laws, the Court of Appeals upheld Washington State regulations that overlap federal treaties, statutes and regulations. The circuit court's decision relies almost entirely on its interpretation of Congress' intent in Section 1018 of OPA 90. As Judge Graber details in her dissent from the Ninth Circuit's refusal to grant a rehearing *en banc*, the panel's construction of Section 1018 is flawed. *See Intertanko v. Locke*, 159 F.3d 1220, 1221-25 (9th Cir. 1999) (Graber, J., dissenting from suggestion for *rehearing en banc*).

Congress has long provided for concurrent state authority to prescribe laws imposing liability and compensation requirements and to assess additional penalties for discharges of oil or hazardous substances in state waters.[11] This Court upheld state laws

[11] *See* Clean Water Act, 33 U.S.C. § 1321(o)(2) (CWA) (providing that "[n]othing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State"); Comprehensive Response, Compensation and Liability Act, 42 U.S.C. § 9614(a) (CERCLA) (providing that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State"); Deepwater Port Act of 1972, 33 U.S.C. § 1517(k) (DWPA) (providing that "[t]his section shall not be interpreted to preempt the field of liability or to preclude any State from imposing additional requirements or liability for any discharge of oil from a deepwater port or a vessel within any safety zone").

prescribing liability for oil pollution removal costs and damages in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). The Court's decision rested primarily on the state law saving clause in the Water Quality Improvement Act of 1970, 84 Stat. 91 (1970) (WQIA) (a predecessor to the CWA), which was similar in nearly all respect to Section 1018 of OPA 90.[12] Nothing in the *Askew* decision, however, supports a conclusion that Congress intends, when it preserves the authority of states to impose a *requirement or liability with respect to the discharge of oil*, to grant new authority to the states to regulate merchant vessel safety and vessel-source pollution prevention. In fact, the Court in *Askew* left open the question whether the WQIA saving clause would validate state laws prescribing spill *equipment* requirements. *Askew*, 411 U.S. at 336-37 (reasoning that "[r]esolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations . . . should await a concrete dispute . . .").

The touchstone in all preemption analyses is the purpose or intent of Congress. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Against the 150 year long backdrop of Supreme Court decisions stretching from *Gibbons* to *Huron* and *Ray*, Congress enacted OPA 90. Congress clearly contemplated that *some* state competency over water pollution subjects would be preserved. The question presented to the Court by this appeal is whether Congress intended, by the saving clause in Section 1018, to amend the existing tanker regulatory regime, and to permit the states to regulate subjects previously within the exclusive domain of federal law. Plainly, it did not. Congress selected a familiar and narrowly drawn saving clause that saved state authority only over pollution liability and compensation issues.

How did Congress make known its intent regarding the role of state law under OPA 90? First, by the text: Congress crafted a

[12] Section 1161(o) of the WQIA, as quoted by the Court, provided that "[n]othing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within the state." *See Askew*, 411 U.S. at 329.

state law saving clause that incorporated language virtually identical to the language it had earlier used in the WQIA (analyzed in *Askew*), CERCLA and the DWPA.[13] Second, through the structure: it placed that saving clause in Title I of OPA 90, which addresses "liability and compensation." Third, by contemporaneous statements in the most persuasive source of legislative intent: the Conferees made clear in the Conference Report — Congress' final statement on the meaning and intent of OPA 90 — that nothing in OPA 90 was intended to disturb this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). *See* H.R. Conf. Rep. No. 101-653, at 122 (1990).

C. The Court's conclusion that OPA 90 Section 1018 strips the Coast Guard of its delegated authority to prescribe preemptive regulations is contrary to the text and legislative history of OPA 90 and this Court's decisions.

The Ninth Circuit decision would strip the Coast Guard of the authority Congress conferred on the agency to preempt state regulation of a subject matter, whether that authority derives from OPA 90 or another act or treaty. *See Intertanko*, 148 F.3d at 1067-68. The court's ruling is inconsistent with this Court's decisions on the preemptive effect of agency regulations and on the deference to be accorded to an agency's reasonable construction of an ambiguous statute.[14] Moreover, the decision is inconsistent with this Court's conclusions regarding field preemption under Title II of the PWSA and the preemptive effect of Coast Guard regulations promulgated under Title I of the PWSA. Because Title II of the PWSA completely occupies the field for the subjects listed, the preemptive effect of Coast Guard regulations under Title II is irrelevant; preemption follows directly from the PWSA itself. The Court in *Ray* also recognized that Coast Guard regulations

[13] *See supra* note 11 (quoting saving clauses from CWA, CERCLA and DWPA).

[14] *See United States v. Shimer*, 367 U.S. 374 (1961); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *Hillsborough County, Florida v. Automated Medical Labs*, 471 U.S. 707 (1985); *City of New York v. FCC*, 486 U.S. 57 (1988); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

promulgated under authority of Title I, or a decision that no regulatory action was appropriate, would preempt state laws on that subject. *Ray*, 435 U.S. at 174-75 (*dictum*). The Ninth Circuit decision also ignores the fact that Congress has itself acknowledged the "long history of preemption in maritime safety matters" founded on "the need for uniformity applicable to vessels moving in interstate commerce."[15]

D. The circuit court's "single-purpose" approach to conflict preemption analysis erroneously omits other vital congressional and agency purposes and objectives.

The Ninth Circuit concluded that:

> In the field of tanker regulation, the overarching purposes of Congress are best revealed by OPA 90. As the most recent federal statute in the field, OPA 90 reveals "the *full* purposes and objectives of Congress" ... better than the PWSA, the PTSA, or the Tank Vessel Act, all of which OPA 90 was designed to complement.

Intertanko, 148 F.3d at 1062 (citations omitted). The Ninth Circuit's decision to focus on only one act (OPA 90) — indeed, on only one purpose (prevention) in that single act — as the "best" source of congressional intent in its conflict preemption analysis will result in the exclusion of a number of purposes and objectives underlying OPA 90 and other statutes, treaties and regulations. Although the approach may simplify the court's task, it fails to satisfy the court's obligation under an Article VI review to give effect to the supremacy of federal law, in accordance with Congress' intent. The following examples highlight congressional or agency purposes and objectives that likely will be omitted under the Ninth Circuit's approach.

[15] Sen. Rep. No. 92-248, at 20-21 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1341.

In Section 4115 of OPA 90, Congress prescribed a twenty-five year phase-out period for single-hull tanker vessels. *See* 46 U.S.C. § 3703a (codifying OPA 90 Section 4115). If Congress had in mind the single "prevention" purpose attributed to it by the Ninth Circuit, and an intent that the goal be pursued equally by the states without concern for federal preemption, Congress would likely not have taken the approach evident in Section 4115. On the contrary, the legislative history of OPA 90 reveals that Congress had in mind a number of purposes, in addition to its spill prevention goal, when it prepared the elaborate phase-out schedule. Those other purposes included the needs and capabilities of the transporters themselves, as well as the shipyards that will be called upon to build the new double-hull tankers and tank barges. *See*, H.R. Conf. Rep. No. 101-653, at 93-94 (1990) (describing Congress' concerns in enacting OPA 90 for the need to balance the goal of prompt environmental protection against other considerations).

A federal purpose to bring uniformity to the mariner professional licensing and training standards is also evident in the Coast Guard's regulations implementing recent amendments to the International Convention on the Standards for Training, Certification and Watchkeeping for Seafarers (1978, as amended in 1995). *See* 62 Fed. Reg. 34,506 (1997) (concluding in its rulemaking that one of the purposes of the 1995 amendments was to prescribe "clear, uniform standards of competence" for mariners). There is no evidence the Ninth Circuit considered the federal goal of uniformity when it upheld state laws prescribing more stringent mariner licensing, training and English competency standards.

The Coast Guard is undertaking a revision of the federal regulations applicable to U.S. flag vessels with the purpose of "harmonizing" these regulations with international standards. *See* 61 Fed. Reg. 58,804 (1996); 62 Fed. Reg. 1622, 1624 (1997). AWO's members support the Coast Guard's purpose and objective of "leveling the playing field" for U.S. flag vessel operators, to enable them to compete on fair terms with foreign vessels. At the

same time, AWO's members recognize that any harmony between federal and international standards will be meaningless if state and local governments are free to frustrate the federal objectives by prescribing their own laws on the same subject.

AWO's members are also deeply concerned over the protest by the Government of Canada to Washington's decision to prescribe laws applicable to vessels on international voyages to Canadian ports in the province of British Columbia, that must necessarily transit through Washington State waters in northern Puget Sound. Canada's protest declares that the action directly violates an international agreement between the two nations.[16] Many of the vessels operated by AWO's members transit the Canadian waters of the Inside Passage between Washington State and Alaska. If the state's violations of the international agreement resulted in a loss of reciprocity benefits for U.S. flag vessels operating in Canadian waters, AWO's members might be forced to either comply with additional Canadian requirements or travel the exposed ocean route between Washington and Alaska. This result would cause severe financial consequences for members of the barge and towing industry.

E. The Ninth Circuit's decision poses additional grave consequences for AWO's members.

Beyond the AWO concerns raised above, the consequences of the Ninth Circuit's decision to AWO's members are best demonstrated by three examples.

1. The Ninth Circuit rule might be used to validate tank vessel design requirements otherwise preempted under *Ray*.

Because the federal requirements respecting the phase-out of single-hull tank vessels appear in OPA 90 (Section 4115 of Title IV), under the Ninth Circuit's reasoning, the saving clause in Title I of OPA 90 (Section 1018) could be construed to validate stricter

[16] Cooperative Vessel Traffic Management System for the Juan de Fuca Region, Dec. 19, 1979 (U.S.-Canada), T.I.A.S. 9706, 32 U.S.T. 377.

state laws on that same subject. Moreover, because spill *prevention* is the only relevant purpose the Ninth Circuit's rule would consider in a conflict preemption analysis under OPA 90, Congress' purposes in delaying implementation, to provide the industry with adequate time to meet the new double-hull requirement, would be ignored. The question presented is not merely academic for AWO's members. The State of Rhode Island has enacted laws banning single-hull tankers beginning in 2001 — up to fourteen years earlier than the date Congress selected in OPA 90.[17] As a tank vessel design and construction rule, the Rhode Island standard encroaches upon the field exclusively occupied by Title II of the PWSA under this Court's decision in *Ray*. Even though nothing in OPA 90 or its legislative history indicates that Congress intended that Section 1018 would alter the Court's finding of Title II field preemption, the Ninth Circuit's decision might be interpreted to hold otherwise.

Rhode Island's decision to accelerate regulatory implementation dates over those established by federal law raises important questions that are likely to recur regarding the federal purposes in prescribing a future implementation date to provide industry with adequate time to comply with the new standards. Although some have argued that the state's accelerated compliance date "complements" the federal safety or pollution prevention goal, such reasoning focuses on only one objective, while ignoring the objectives that persuaded Congress to establish a longer implementation schedule. The effect of Rhode Island's accelerated phase-out schedule on AWO's members who transport oil in the northeastern United States could be devastating, forcing the retirement of tank barges more than a decade before the federal deadline.

[17] *Compare* R.I. Gen. Laws § 46-12.6-10 ("Effective Jan. 1, 2001, no tank vessel shall transport oil or hazardous material over the waters of this state in any conditions unless the tank vessel (i) has a double hull or (ii) is accompanied by an escort towing vessel. . . .") *with* 46 U.S.C. § 3703a (phasing out single-hull tank vessels over period ending 2015). The Rhode Island escort tug rule likely also overlaps with 46 U.S.C. § 3719 (interim measures for single hull tank barges).

2. The Ninth Circuit's decision fails to account for preemption by subsequent legislation.

In the almost decade-long period since OPA 90 was enacted, Congress has continued to legislate new requirements for the tug and barge industry. Both the Coast Guard Authorization Act of 1996[18] and the Coast Guard Authorization Act of 1998[19] contain sections requiring the Coast Guard to promulgate regulations applicable to tugs and tank barges. In sections of the 1996 Act, now codified in 46 U.S.C. §§ 3719 and 4102(f), Congress prescribed a specific regime for addressing the risk of oil spills from single-hull tank barges. The Act requires the Secretary, in consultation with the Towing Safety Advisory Committee, to prescribe regulations for single-hull tank barges and the tugs towing them that operate in ocean or coastal waters. Coast Guard Authorization Act of 1996, § 901(a). The Secretary's proposed regulations were published in 62 Fed. Reg. 52,057 (1997). In the proposed regulations, the Coast Guard has indicated that state regulations on the subjects addressed by the federal regulations (including some of the Rhode Island requirements) would likely be preempted by the forthcoming federal regulations. *See* 62 Fed. Reg. at 52,066. Under the Ninth Circuit's rule, however, the Coast Guard regulations — even though based on a statute enacted after OPA 90 that contains no state law saving clause — may not preempt state regulations. Moreover, contrary to established rules of statutory construction, the circuit court apparently would give no deference to the agency's construction of the statutes involved. *See Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984). The result for AWO's members would be to destroy any hope of the uniformity so vital to interstate transportation.

[18] *See supra* note 3.

[19] *See supra* note 4.

3. Many of the Washington BAP standards applicable to tank barges might be validated by the Ninth Circuit rule even though preempted under *Ray*.

The rule adopted by this Court in the *Intertanko* challenge to the Washington tank ship regulations will likely provide the legal basis for determining the validity of Washington's BAP regulations for tank barges. *See* Wash. Admin. Code ch. 317-21, pt. 4. Indeed, the questions presented by this review do not distinguish between the regulations applicable to tank ships and those that apply specifically to tank barges. An examination of several selected Washington regulations applicable specifically to tank barges and the tugs that tow them reveals the extent of the state's ambition and the overlap between the state scheme and the federal regime.[20]

Federal law requires tugs over five net tons and tank barges to be documented and carry appropriate federal endorsements for the trade in which they are engaged. *See* 46 U.S.C. §§ 12102, 12106(b) and 12110. Tank barges are also subject to federal inspection. *See* 46 U.S.C. § 3710. Accordingly, such tugs and barges fall within the Court's decisions in *Gibbons*, *Douglas*, *Huron* and *Ray*. As summarized by the Court in *Ray*, those cases establish a "no overlap" rule. *Ray*, 435 U.S. at 164. It seems clear that the Washington "technology" requirements applicable to tank barges in Wash. Admin. Code § 317-21-345 constitute construction, design or equipment requirements and are therefore preempted under the PWSA Title II field preemption conclusion in *Ray*. Additionally, those technology regulations overlap with, and are preempted by, federal regulations in 33 C.F.R. § 164.72.

Washington's tank barge standards also require, *inter alia*, that tugs towing tank barges comply with state-specific watch procedures and a state-imposed minimum watch complement,

[20] The Washington State ambition is clear in Wash. Rev. Code § 88.46.150, which invites recommendations for the state to "adopt standards for tow [boat] equipment and its maintenance, operation and inspection."

Wash. Admin Code § 317-21-300, and manning requirements, *id.* § 317-21-315. The latter regulation requires that tugs towing tank barges that operate in coastal waters carry three licensed operators or tow-vessel operators, *id.* § 317-21-315(b)(2), even though federal law prescribes a system requiring two licensed operators and minimum rest periods. *See* 46 U.S.C. § 8104; 46 C.F.R. §§ 15.610 and 15.710. Under the rubric of "operating procedures," Wash. Admin Code § 317-21-305 purports to prescribe when and how tugs and their tows may cross coastal bars *en route* to or from inland waters and ports. Wash. Admin Code § 317-21-310 prescribes specific manning standards for tugs towing tank barges, even though such standards plainly overlap with federal statutes. *See* 46 U.S.C. §§ 8904 and 9102. Finally, Wash. Admin Code § 317-21-310 prescribes state-specific training requirements for tug operators that overlap with federal standards under 46 C.F.R. pt. 15.

Under *Ray*, the Washington tank barge BAP standards would not be valid to the extent they fall within the subject matter exclusively occupied by Title II of the PWSA/PTSA or the subject of the Coast Guard's regulation under Title I, or if they overlap with existing federal statutes or regulations. Under the Ninth Circuit's simplified classification scheme, however, the tank barge rules would likely be deemed *operating* rules, and therefore would be valid under that court's understanding of *Ray*. The only congressional purpose the circuit court would accredit in determining whether the Washington regulations frustrate the accomplishment of the full purposes and objectives of Congress would be the prevention purpose in OPA 90. Accordingly, any balancing of the costs and benefits or risks and utility of safety measures represented in the existing federal rules would likely be ignored. Such an approach could seriously threaten the ability of AWO's members to provide an economical interstate transportation option in the years to come.

V. CONCLUSION

The Ninth Circuit's decision permits an overlapping patchwork of federal, state and local laws that will destroy

uniformity for interstate carriers. The circuit court's decision fails to respect the supremacy of federal law prescribed by Article VI of the Constitution, as applied by this Court in *Ray v. Atlantic Richfield Co.* If it stands, the decision will have an immediate and pervasive effect on the tugboat, towboat and barge industry in the United States. The industry's ability to provide the nation with a cost-efficient and energy-efficient alternative to its interstate transportation needs will be seriously undermined by the ruling. Accordingly, AWO urges this Court to reverse the Ninth Circuit and to remand the case for a decision consistent with the holding and reasoning of the Court's decision in *Ray v. Atlantic Richfield Co.* and with Congress' true purposes in OPA 90 and the other statutes, treaties and regulations that form the Law of the Land with respect to maritime regulation.

Respectfully submitted,

ELDON V.C. GREENBERG
Counsel of Record
GARVEY SCHUBERT & BARER
1000 Potomac St., NW, 5th Fl.
Washington, DC 20007
202.965.7880

BARBARA L. HOLLAND
Associate Counsel
GARVEY SCHUBERT & BARER
1191 Second Avenue, 18th Fl.
Seattle, WA 98101
206.464.3939

Attorneys for Amicus Curiae the American Waterways Operators

October 20, 1999