Nos. 98-1701, 98-1706

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA
Petitioner,

and

INTERNATIONAL ASSOCIATION OF INDEPENDENT
TANKER OWNERS (INTERTANKO),
Petitioner,

v.

GARY LOCKE, Governor of Washington, et al.,
Respondents,

BRIEF FOR STATE RESPONDENTS

Filed November 19, 1999

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STATEMENT

The environmental damage caused by oil spills from tankers can be catastrophic. In 1989, the *Exxon Valdez* tore open on rocks and dumped eleven million gallons of oil into Prince William Sound, Alaska. The damage to that state's citizens and environment lingers to this day. Although Washington has not suffered a similar catastrophe, its waters present navigation hazards in excess of Prince William Sound. JA at 124. Several near-disasters have been avoided by good fortune. JA at 65, 126-27.

The *Exxon Valdez* spill focused the attention of both Congress and the states on the risks posed by oil tankers. Congress responded by enacting the Oil Pollution Act of 1990, Pub. L. No. 101-380, August 18, 1990, 104 Stat. 484. The Oil Pollution Act (OPA 90) coordinates and enhances several aspects of the federal prevention, response, liability, and compensation regimes that deal with vessel-caused pollution. Washington responded to the *Exxon Valdez* disaster and other casualties by requiring tanker companies to file oil spill prevention plans and by conducting annual safety inspections to determine compliance with such plans. These requirements of Washington's oil spill prevention plans are the subject of this litigation.

A. Washington's Waters Are A Priceless Resource

Washington's waters contain some of the richest and most diverse eco-systems in the world. The outer coast consists of wave-exposed rocky headlands separated by stretches of sand and gravel beaches, plus two large estuaries, Grays Harbor and Willapa Bay. Puget Sound is a large internal sea with habitat ranging from muddy bays to open rocky shores. The Strait of Juan de Fuca is a transition zone between the wave-exposed coast and the quieter Puget Sound waters. Recreational use is extensive; there are over ninety parks located on or adjacent to Puget Sound, with an annual estimated visitation of over fifty-five million. JA at 180-90.

Washington's citizens live and work in the cities, towns, and rural areas around Puget Sound.

Shoreline vegetation covers 2,500 miles of Washington coast, providing a major link in the food chain. In addition to food, coastal habitat provides refuge from predators and a place for reproduction and raising off-spring. JA at 153-57. Washington waters support thousands of species of plants and animals. JA at 137-43. At least 125 species of birds spend some part of the year in Washington waters; sixty species winter here and fifteen species come in the summer to breed. JA at 162-71.

Washington is also home to five species of salmon and many other fish species, plus shrimp, clams, oysters, and scallops. Washington fisheries are important as both a commercial and a recreational resource. In 1993, the wholesale value of the commercial fishery was $354 million, sports anglers caught 475,632 salmon, and 1,252,177 pounds of clams were harvested. Fisheries also are significant to the economy and culture of treaty Indian tribes. JA at 174-78.

B. An Oil Spill Could Be Devastating To Washington's Citizens And Environment

Washington's waters are particularly vulnerable to damage from a spill. In Puget Sound, the water exchange is limited so that sediments in shallow areas would be heavily contaminated. JA at 193. Even on the rocky coast, damage could be extensive because it is home to long-lived, slow-growing species, such as mussels, that do not disperse well. JA at 142-43.

The effects of an oil spill in Washington waters will depend on a number of factors, such as the location of the spill, the number of gallons involved, and the type of oil. Heavy oil can kill invertebrates and plants outright. JA at 142. Birds, such as ducks, that live on the water are highly susceptible to

hypothermia after exposure to oil.[1] If fish and wildlife are not killed outright, their tissues likely are tainted by oil. Some species, such as clams, retain oil in their tissues for many months, destroying livelihoods and endangering human health. Animals will be constantly recontaminated by oil leaching out of the sediment. Fisheries will be shut down entirely after a spill. JA at 141-42. Washington's fisheries could suffer permanent damage through destruction of habitat and genetic damage. JA at 198. Recreational enjoyment and the lives of millions will be affected. JA at 141, 178, 181, 195, 201-02.

C. Navigation In Puget Sound Is Difficult

Most tanker traffic in Washington is through Puget Sound to refineries located both to the north and south.[2] JA at 120, 122-23. The Puget Sound area is extremely difficult to navigate. JA at 124. Tankers enter Puget Sound through the Strait of Juan de Fuca. Exhibit 34 is a chart of the Strait of Juan de Fuca and the northern part of Puget Sound.[3] The western end of the Strait has persistent fog, and it is heavily fished, causing congestion problems. JA at 123.

Tankers bound for the northern refineries must negotiate between Hein Bank and Smith Island where the waterway is narrow and congested. The tankers continue to the northeast and shoot the gap between Davidson Rock and Lawson Reef with dangerous obstacles on the edge of traffic lanes. At this point, the vessel turns north to enter Rosario Strait. As illustrated on Exhibit 34, Rosario Strait is too

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[1] Between 175,000 and 300,000 Common Murres were killed in the *Exxon Valdez* spill. The estimates of dead eagles from the *Exxon Valdez* spill range from 200 to over 900. Between 3,500 and 5,000 sea otters died as a result of the *Exxon Valdez* spill. JA at 194-97.

[2] Although there is some tanker traffic on the Columbia River, most oil is transported on the river by tank barge. JA at 120. This case challenges spill prevention plans for tankers.

[3] Exhibit 34 (Affidavit of Stanley J. Norman, JA at 88) has been lodged with the Court and served on the parties.

narrow for traffic lanes and one-way traffic for tankers is necessary. JA at 122.

Tankers bound for the two Anacortes refineries proceed up to the vicinity of Shannon Point, turn right, pass through the narrow Guemes Channel, and proceed to shallow Padilla Bay, where the refineries are located. The currents in the Guemes Channel are extremely strong, with frequent fog and a significant range of tides. Tankers bound for the Cherry Point and Ferndale refineries continue up Rosario Strait, past such obstacles as Peapod Rocks and Lummi Rocks. JA at 122-23.

Exhibit 33 is a chart of southern Puget Sound.[4] Tankers southbound for Tacoma transit broader waterways, but they are frequently more congested than the ones going north. There are also myriad obstructions close to the western side of the southbound traffic lane. JA at 124.

D. Washington's Rules Protect State Waters From Oil Spills

In 1991, the Washington Legislature acted to protect "some of the most unique and special marine environments in the United States". 1991 Wash. Laws ch. 200, § 101. The Legislature recognized that these marine environments were threatened by "billions of gallons of crude oil and refined petroleum products . . . transported by vessel on the navigable waters of the state [each year]". *Id.* The Legislature concluded that "prevention is the best method to protect the unique and special marine environments in this state". *Id.*

Under the 1991 law, all companies that operate tankers headed into Washington waters through the Strait of Juan de Fuca or the Columbia River are required to file oil spill prevention plans that meet certain requirements. Wash. Rev. Code § 88.46.040(1). These planning requirements provide "the best achievable protection [BAP] from damages caused by

[4] Exhibit 33 (Affidavit of Stanley J. Norman, JA at 88) has been lodged with the Court and served on the parties.

the discharge of oil into the waters of the state". Wash. Rev. Code § 88.46.040(3). The state conducts annual inspections of tankers docked in Puget Sound to ensure they comply with their company's oil spill prevention plan. Wash. Rev. Code § 88.46.030(1), (3). State inspectors must coordinate their inspections with the Coast Guard and any violations of Coast Guard or other federal regulations must be reported to the appropriate federal agency. Wash. Rev. Code §§ 88.46.030(4), .170(2). State inspections take place when the vessel is in port. Wash. Admin. Code §§ 317-31-210(3); 317-21-550(1).

It is unlawful to operate a tanker in Washington waters without an approved prevention plan. The 1991 law provides civil and criminal penalties against the owner or operator if there is a violation. Wash. Rev. Code §§ 88.46.080-.090.[5]

Washington developed its regulations with Coast Guard input, as well as extensive reliance on advisors with expertise. JA at 94-95. Washington's requirements focus on the human element of operations in Puget Sound rather than design and technology.[6] As stated by Coast Guard, sixty-five to eighty percent of marine casualties are caused by human error. JA at 133. The Coast Guard's maritime safety program spends eighty percent of its available resources addressing design and technical requirements. JA at 133.

[5] The law also provides that the state may deny entry into state waters to any covered vessel that does not have a spill prevention plan. Washington has neither the authority nor the ability to actually deny entry into state waters. The state enforcement power is limited to civil and criminal penalties.

[6] The state's only rule regarding technological equipment, Wash. Admin. Code § 317-21-265, was struck down by the Court of Appeals. *International Ass'n of Independent Tanker Owners v. Locke*, 148 F.3d 1053, 1066-67 (9th Cir. 1998); Intertanko App. at 29a-32a. State respondents do not seek review of this ruling.

1. Operations Required While In Or Near Washington Waters

A number of Washington's requirements are performed in or near Washington waters.[7] For example, Washington requires that the navigation watch in Washington waters consist of at least two licensed deck officers. Wash. Admin. Code § 317-21-200(1). (The Coast Guard imposes the same requirement for tankers. 33 C.F.R. § 164.13(c).) A tanker not equipped with automatic stand-by switching gear for standby generators must operate with stand-by generators running and immediately available to assume the electrical load while underway in state waters. Wash. Admin. Code § 317-21-210(1). Washington requires the position of a vessel to be recorded at fifteen minute intervals or less. Wash. Admin. Code § 317-21-205(1). (The Coast Guard requires the position of the vessel to be plotted on a chart of the area. 33 C.F.R. § 164.11(c).)

A few examples illustrate how these requirements are appropriate measures for spill prevention in Washington.

Navigation Watch During Restricted Visibility

A navigation watch has three primary functions: navigation, collision avoidance, and administration. When visibility is not restricted, two officers can perform this workload. During restricted visibility, a great deal more attention must be paid to navigation and collision avoidance. JA at 99. When a tanker is operating in restricted visibility, as determined by the vessel master or officer in charge, a Washington oil spill prevention plan requires three licensed deck officers, one of whom may be a pilot, on the navigation watch in pilotage waters. Wash. Admin. Code § 317-21-200(1)(a). A third deck officer will significantly decrease human-caused error during the long and stressful transit through the Strait of Juan de Fuca and Puget Sound. JA at 207.

[7] Examples include Wash. Admin. Code §§ 317-21-200(1), (3)-(6); -205(1)-(3); -210(1)-(4); -215(1)-(10); -225; -235(1); -245.

Fix Intervals

A tanker proceeding at its normal cruising speed will travel approximately four miles in fifteen minutes. JA at 105. The oil spill prevention plan requires the position of a tanker to be recorded at fifteen minute intervals or less. Wash. Admin. Code § 317-21-205(1). This addresses the particular risks of the narrow, twisting confines of the Strait of Juan de Fuca and Puget Sound, illustrated in Exhibits 33 and 34.

Anchor Watch

Washington has a history of problems with vessels dragging anchor. This is a major hazard for colliding with another vessel or running aground. JA at 102-03. Washington requires a licensed deck officer to maintain watch on the bridge while a tanker is anchored. The officer also is required to continually monitor the position of the vessel at anchor and plot its position at least once an hour. Wash. Admin. Code § 317-21-200(5).

Prearrival Tests And Inspections

Washington oil spill prevention plans require a series of tests and inspections that must be performed shortly before the vessel enters Washington waters. Wash. Admin. Code § 317-21-215. The prearrival inspection requirement protects against a frequent cause of problems—an undiscovered, but pre-existing, mechanical failure. JA at 208. A failure of critical navigation and engineering equipment subsystems could result in a grounding or collision and subsequent oil spill in the confines of Puget Sound. JA at 110.

2. Other Spill Prevention Requirements Directly Related To Protecting Washington Waters

A second category of spill prevention requirements protect Washington waters, but do not necessarily involve

operations performed exclusively in Washington waters.[8] Some mirror Coast Guard requirements, while others add on to existing Coast Guard requirements.

Training Policies

Washington requires that the oil spill prevention plan explain how the company has provided training to its crews and lists training criteria. Wash. Admin. Code § 317-21-230. Training is vital to oil spill prevention since sixty-five to eighty percent of all vessel accidents and casualties are caused by human error. JA at 111.

Drug And Alcohol Testing

Washington requires all companies to establish testing programs consistent with those required by the Coast Guard in 33 C.F.R. Part 95 and 46 C.F.R. Part 4, except 46 C.F.R. § 16.500 . The Washington standard goes further by requiring the company to include random alcohol tests, and by applying the requirement to foreign flag vessels. Wash. Admin. Code § 317-21-235. The purpose of the testing program is to prevent crew members from being intoxicated and unable to perform their duties. JA at 114-15.

Language

Washington requires licensed deck officers and the vessel's designated person in charge to communicate in English and a language understood and spoken by subordinate officers and unlicensed crew. Wash. Admin. Code § 317-21-250(1). English language communication is critical. For example, in the area west of Port Angeles before a pilot boards the vessel, deck watch officers with limited English have trouble communicating with the Coast Guard Vessel Traffic system, as well as other vessels, when they are required to talk to them to arrange safe passage in collision avoidance situations. JA at 123-24.

[8] Wash. Admin. Code §§ 317-21-200(2), -220, -230, -235(3), -250, -255, -260.

E. Congress Enacted The Oil Pollution Act To Prevent And Respond To Oil Spills From Tankers

Washington required oil spill prevention plans and compliance with BAP rules shortly after Congress enacted the Oil Pollution Act. Congress enacted the Oil Pollution Act based on expressions that spill prevention was critical. In the words of one Senate Report:

> "[A]ny oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. *Consequently, preventing oil spills is more important than containing and cleaning them up quickly.*" S. Rep. No. 101-94, 101st Cong., 1st Sess., pp. 2-3 (1990) (second italics ours), *reprinted in* 1990 U.S.C.C.A.N. 724.

The Oil Pollution Act imposed new federal requirements to prevent oil pollution from tankers. Prevention measures included review of drug and alcohol abuse in issuing licenses, certificates of registry, and merchant mariners documents;[9] random drug testing and suspension of licenses, certificates of registry, and merchant mariners documents for drug and alcohol abuse;[10] and a requirement that working hours on a tanker be no more than fifteen hours in any twenty-four-hour period and no more than thirty-six hours in any seventy-two-hour period.

In pursuit of the highest standards of prevention, Congress departed from international standards in several respects. Congress required tankers be constructed with double hulls by January 1, 2015.[11] This requirement applied to both United States and foreign flag tankers. Furthermore, the secretary of transportation (secretary) was required to adopt rules for single hull tankers operating in United States waters to

[9] OPA 90 § 4101; State App. at 51a-52a.

[10] OPA 90 § 4103; State App. at 54a-57a.

[11] OPA 90 § 4115(a); State App. at 72a-77a.

"provide as substantial protection to the environment as is economically and technologically feasible". OPA 90 § 4115(b); State App. at 77a-78a. Congress departed from norms advocated by international organizations.[12]

The Oil Pollution Act also required the secretary to adopt rules governing tanker operations with the auto-pilot engaged or with an unattended engine room.[13] Congress also required the secretary to designate waters on which tankers must have at least two licensed deck officers on the bridge.[14] Although these subjects might also fall within the jurisdiction of the flag state, the Coast Guard concluded that the rules should "apply to foreign flag tankers and U.S. tankers sailing on registry because these tankers pose a similar risk to the environment". 58 Fed. Reg. 27628 (1993).

In addition to its increased prevention measures, the Oil Pollution Act contained new provisions imposing federal liability for spills and damage to natural resources.[15] And it imposed new requirements for demonstrating financial responsibility.[16] These provisions also departed from the international regime for oil pollution liability and compensation.

In enacting the Oil Pollution Act, Congress considered the question of preemption and expressly indicated its intent to

[12] In its 1996 rulemaking for single hull tankers, the Coast Guard responded to comments that it was "undermining the international process; that competency and manning requirements fall under flag state jurisdiction; and the [rule] goes beyond international requirements in some cases". 61 Fed. Reg. 39771 (1996). The Coast Guard responded by stating: "Where international standards do not address certain operations, the Coast Guard has met the intent of Congress by issuing these rules to ensure that specific vessels reduce their accident risk." *Id.*

[13] OPA 90 § 4114(a); State App. at 70a.

[14] OPA 90 § 4116(b); State App. at 84a.

[15] OPA 90 §§ 1002-1006; State App. at 8a-25a.

[16] OPA 90 § 1016; State App. at 39a-42a.

save state authority from preemption. Section 1018(a)(1) expressly saved from preemption "the authority of any State" to impose "any additional liability or requirements with respect to" both "the discharge of oil" and "any removal activities in connection with such a discharge". Section 1018(a)(2) stated that Congress did not "affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law". Section 1018(c) stated that Congress had not affected the authority of "any State" to "impose additional . . . requirements . . . relating to the discharge, or substantial threat of a discharge, of oil".

SUMMARY OF ARGUMENT

The police powers of the states are not preempted except to the extent they conflict with federal law, or where Congress has made clear and manifest its intent to preempt. This strong presumption against preemption applies to preserve Washington's oil spill prevention laws. The presumption is not lessened because Washington's regulations apply to foreign commerce or maritime activities. Even treaties with foreign nations are carefully construed to save the sovereign powers of the states.

Congress did not expressly preempt state law. Petitioners, therefore, rely on the Ports and Waterways Safety Act of 1972 (PWSA) and amendments to that law to claim that Congress impliedly preempted state law in broad fields. This broad field preemption assertion fails because the boundaries of the fields are not carefully limited to fields where federal law leaves no room for state oil spill prevention laws. Petitioners have failed to show real, irreconcilable conflicts that imply Congressional intent to displace states from fields addressed by oil spill prevention plans.

In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court held that Title II of the PWSA preempted the field of tanker design and construction. The Court's holding and its reasoning does not extend to other subjects listed in Title II of the PWSA. The Court specifically distinguished manning and

operational requirements, such as a local pilot and a tug escort, from design and construction. Petitioners' argument draws an unwarranted inference of preemption by simply labeling state laws with subjects of rulemaking under Title II. This expansion of *Ray* is inconsistent with the decision and other preemption decisions of this Court.

By enacting § 1018 of the Oil Pollution Act, Congress demonstrated its understanding that, except for the field of design and construction adjudicated in *Ray*, other fields were not preempted. The language of that savings provision is broad and refers to any requirements imposed by states with respect to the discharge and potential discharge of oil. Congress would not enact a broad saving of state power in § 1018, if there were no state powers to be saved.

The treaties entered into by the United States do not conflict with Washington's law. The standards described by treaties are not self-executing and require the signature governments to adopt laws for implementation. Although the United States agrees to accept certificates issued by foreign flag states regarding certain matters, no conflict is presented with that system. Washington does not control ships to verify such certificates or act in conflict with federal actions. Washington directs its regulations to tanker companies and implements safety audits to determine whether owners and operators follow their oil spill prevention plans.

Nor are Washington's requirements in conflict with federal law. There is no claim of physical impossibility. Washington's law does not stand as an obstacle to achieving the objectives of Congress. From the PWSA to the Oil Pollution Act, the objective of Congress is to prevent oil spills and to allow states to further that objective. Washington law serves this core purpose and presents no conflicts with any federal statute or rule.

Congress has not, under Title I of the PWSA, preempted all state law that might address the same subject matter as a Coast Guard regulation. Under normal rules of

preemption, a state rule should not be preempted unless it presents physical conflicts or obstacles to a lawful Coast Guard rule. This may occur under Title I if the Coast Guard adopts safety standards that are specific to Puget Sound. Only then can there be a determination as to whether there is meaningful conflict between state and federal law.

ARGUMENT

A. There Is A Strong Presumption Against Preemption Of State Police Power

"In all pre-emption cases, and particularly in those in which Congress has 'legislated in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Both Intertanko and the federal government attempt to undermine this strong presumption.

1. Intertanko relies on the maritime context of the state oil spill prevention plan to argue that this Court should disregard or reorder the federalism relationship of the states and the federal government. Intertanko argues that regulation of ships in maritime commerce is a field in which state law is presumptively preempted, citing to a general need for uniformity. Intertanko Br. at 20. Assorted amici make the related argument that maritime law reflects a penumbra of federal interests and that there is no historic state interests. *E.g.*, Amicus Brief of Products Liability Council, et al., at 4. This Court has already rejected similar arguments. In *Askew v. American Waterways Operators*, 411 U.S. 325 (1973), this Court refused to

> "allow federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage – an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the

life of the ocean and the lives of the coastal people are greatly dependent." *Askew*, 411 U.S. at 328-29.

Askew, thus, affirmed that the states' historic police powers extend beyond liability and include setting requirements for preventing oil spills. State power was not preempted by complex federal regulations affecting maritime safety and the environment.[17]

For 150 years, this Court has consistently held that the states retain inherent sovereign powers to protect their citizens and their environment from risks presented by maritime activities, except to the extent that state law conflicts with federal law or when Congress has used its power to preempt state law from a subject. *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851) (Congress had not acted to preempt state power to require pilotage); *Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co. v. Board of Trustees of the Town of Catlettsburg*, 105 U.S. (15 Otto) 559, 562 (1882) (local authorities may regulate anchoring and wharfing); *Huse v. Glover*, 119 U.S. 543, 548 (1886) (fee on boats using locks); *Morgan's Louisiana & T.R. & S.S. Co. v. Board of Health of the State of Louisiana*, 118 U.S. 455, 465-66 (1886) (states have power to impose quarantine and inspection measures for ships arriving from international commerce).

[17] *Askew* explained that *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and its progeny "mark isolated instances" where state law was affected by a need for uniform federal maritime law. *Askew*, 411 U.S. at 388; *see also Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 118 (1962) ("we must candidly acknowledge that the decisions between 1917 and 1926 produced no reliable determinant of valid state law coverage"); *American Dredging Co. v. Miller*, 510 U.S. 443, 458-62 (1994) (Stevens, J., concurring, questioning viability of *Jensen*). Petitioner Intertanko, however, quotes *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924), the progeny of *Jensen*, to argue that maritime commerce requires uniformity in all regards, implying that there is no room for any state laws affecting tankers. Intertanko Br. at 20.

In *Kelly v. Washington*, 302 U.S. 1 (1937), the Court upheld state authority to inspect the hulls and machinery of motor vessels for general safety purposes in the face of "a maze of [federal] regulation". *Id.* at 4-5. The Court rejected the broad and undefined preemption of maritime matters urged here by Intertanko and amici:

> "There is no constitutional rule which compels Congress to occupy the whole field. . . . [T]he exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot "be reconciled or consistently stand together." *Kelly*, 302 U.S. at 10.

To be sure, *Kelly* recognized that Congressional action could preempt state law, but preemption was narrowly confined.

In *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), the Court held that states may regulate pollution from ships to protect their citizens and environment, in spite of a federal license for the boiler on the offending ship. *Id.* at 442. Congressional intent to preempt "is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State". *Id.* at 443 (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)). *Huron* also notes that Congress had recognized that air pollution caused peculiarly local harms, which further contradicted the ship owner's argument that Congress impliedly displaced state power to criminally cite a shipowner violating state air pollution laws. *Id.* at 446.

In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court struck down Washington requirements for tanker design and construction, while upholding state operational requirements, such as a local pilot on registered vessels and a tug escort for tankers in state waters. In reviewing the same police powers at issue here, the Court affirmed that the presumptions against preemption of state laws applied. *Ray*, 435 U.S. at 157 ("historic police powers of the States were not

to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress") (quoting *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947)).

2. The government seeks to connect the state's regulations to an area addressed in international treaties and conventions to seek a special preemption if state regulation "hinders" the Nation's conduct of its foreign affairs. U.S. Br. at 29, 47. The government's attempt to equate "preemption by treaty" to "interference with the federal government's exclusive authority to conduct the foreign affairs" (U.S. Br. at 29) ignores how these two subjects present different problems.

Washington does not contend that it can violate a lawful treaty entered into by the United States nor does it attack any treaty entered into by the United States. Petitioners, however, fail to identify treaty provisions that have been violated. As shown below at Part E (Argument), pages 30-34, Washington violates no self-executing treaty requirements. Cases such as *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), which involve state actions that violated an international agreement, have little relevance to this case.

Petitioners incorrectly invoke this Court's prior decisions concerning interference with "foreign affairs". These "foreign affairs" cases involve discriminatory treatment of aliens or foreign citizens. *See Hines v. Davidowitz*, 312 U.S. 52 (1941); *Zschernig v. Miller*, 389 U.S. 429 (1968). *Hines* struck down a Pennsylvania statute that required aliens to register because it imposed "distinct, unusual and extraordinary burdens and obligations upon aliens" (*Hines*, 312 U.S. at 65) in direct conflict with comprehensive federal registration laws (*id.* at 66-68) and in conflict with the constitutional choice that the power to regulate and register aliens is not concurrently shared with the states (*id.* at 68-69). *Zschernig* invalidated an Oregon law that provided that an estate would escheat to the state rather than go to an heir living in a communist country, again imposing a discriminatory burden based on foreign status

that was not "incidental or indirect". *Zschernig*, 389 U.S. at 434-35.

The government contends that *Hines* compels a conclusion that Washington's power to prevent oil spills operates in "the narrowest of limits". U.S. Br. at 29. This argument ignores how that description of state power in *Hines* was expressly based on the nature of Congress' exclusive power over naturalization and the direct connection between state discrimination and foreign relations. *See Hines*, 312 U.S. at 66, 68-69. State power should not fall within the "narrowest of limits" simply because foreign commerce is affected in a non-discriminatory manner. The government's expansive reading of *Hines* incorrectly creates a presumption against state power, without any showing of impact on foreign relations. *See also Pink*, 315 U.S. at 230 ("even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy").

B. Standards For Preemption Of State Oil Spill Prevention Laws

1. The central issue in this case is whether Congress has preempted state power to regulate oil tankers to prevent oil spills and, if so, how to define the scope and nature of that preemption. Preemption is fundamentally a question of Congressional intent. *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). Congressional intent to preempt state law can either be express or implied. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983).

2. Express preemption occurs when Congress expressly states its intent to preempt in the language of a statute. *Jones v. Rath Packing Co.*, 430 U.S. 519, 530 (1977) (Federal Meat Inspection Act expressly prohibited "marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under" the Act); *Shaw*, 463 U.S. at 91 (federal Employee Retirement Income Security Act (ERISA) preempts "any and all State laws insofar as they may

now or hereafter relate to any employee benefit plan covered" by ERISA).

3. The Court has recognized two types of implied preemption. The first is labeled implied field preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("state law is pre-empted if . . . federal law so thoroughly occupies a legislative field as to make reasonable the inference that congress left no room for the State to supplement it") (citation omitted) (internal quotation marks omitted). The second is conflict preemption. A "state law is pre-empted if that law actually conflicts with federal law". *Id.* A state law is in conflict with a federal law to the extent "it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress'". *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989) (citations omitted).[18]

4. The most difficult problem where there is a claim of field preemption is defining "the boundaries of the pre-empted field" (*English*, 496 U.S. at 82) where Congress has left no room for state law. In determining the existence and scope of field preemption, there are three principles often used by this Court that are relevant to determining Congressional intent in this case. First, no "intent to pre-empt may be inferred from the comprehensiveness of the" federal statutes or regula-tions at issue in a case. *Hillsborough Cy. v. Automated Medi-cal Lab., Inc.*, 471 U.S. 707, 716-17 (1985); *New York State Dep't of Social Serv. v. Dublino*, 413 U.S. 405, 415 (1973).

Second, the conflict between the state law and the field of federal law must be real, not speculative. "The existence of a hypothetical or potential conflict is insufficient to warrant the

[18] The Court has indicated that the labels used to describe conflict and field preemption are not "rigidly distinct". *See Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 104 n.2 (1992).

pre-emption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (state statute did not irreconcilably conflict with federal antitrust laws). Preemption does not arise because of a mere "tension" between the state law and the field claimed to be preempted. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (state law claims for compensatory and punitive damages undoubtedly affect the field of federal nuclear safety); *English*, 496 U.S. at 85-86, 90 (enjoining "seeking out conflicts between state and federal regulation where none clearly exists"). To determine if there is an irreconcilable conflict between state law and a field of federal law, the "key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted". *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 107 (1992); *see also id.* at 110 (Kennedy, J., concurring in part and concurring in the judgment) ("a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act").

Finally, an intent to preempt state law is not inferred when state law is coincidental to federal requirements, or when state law is enforcing a federal law. *California v. Zook*, 336 U.S. 725, 729-30 (1949) ("Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent."). When Congress has addressed the same subject matter as a state law, this coincidence "begs the only controversial question: whether Congress intended to make its jurisdiction exclusive". *Id.* at 731.

5. When these principles of implied preemption are applied to the instant case, the petitioners' overbroad assertions of field preemption must be rejected. Petitioners do not identify narrow fields where there is no room for state law. Rather, an examination of *Ray*, the Oil Pollution Act, and the Washington oil spill prevention plan law confirms that Congress has left room for the states to lower the risks of devastating oil spills.

C. Title II Of The Ports And Waterways Safety Act, As Interpreted By *Ray v. Atlantic Richfield Co.*, Does Not Establish Broad Field Preemption Of State Police Power

1. The federal government makes much of the fact that Congress has a long history of regulating maritime commerce. U.S. Br. at 18-24. The government points to this history to support its conclusion that Congress intended to preempt the requirements for Washington's oil spill prevention plans.

We draw the opposite conclusion. Congress has not acted to expressly preempt state police power as it relates to maritime commerce, and neither petitioner claims that Washington's requirements have been expressly preempted. Yet the history recited by the government demonstrates that states have, since the Constitution was ratified, applied their police power to maritime commerce. If Congress truly intends to preempt state regulation in this area, it has the power to state its intentions clearly and unambiguously.

2. Since Congress has not expressly preempted state law, petitioners argue that Title II of the Ports and Waterways Safety Act, as amended, impliedly establishes a broad field preemption of state police power in the area of vessel "design, construction, alteration, repair, maintenance, operations, equipping, personnel qualification, and manning". 46 U.S.C. § 3703(a). Intertanko claims that all of Washington's requirements fall within these broadly stated fields. Intertanko Br. at 23. The federal government argues that some requirements fall within similarly labeled fields but, except for providing a few examples, has not specifically identified which ones. U.S. Br. at 33-41. Petitioners pin their broad field preemption arguments to this Court's opinion in *Ray*.

Petitioners' interpretation of Title II is not well taken. In *Ray*, this Court was careful to define the boundaries of the field. The field preemption identified by this Court in *Ray* was narrow and dealt only with tanker design and construction. According to this Court: "Title II's principal concern is tanker

design and construction". *Ray*, 435 U.S. at 161. Having defined the field, the Court preempted only state design and construction requirements, because of the irreconcilable conflict with federal design and construction requirements. Contrary to petitioners' suggestion, the Court did not hold that all the subjects in Title II of the PWSA were similarly preempted.

3. The government argues that *Ray* applies to all the subjects in Title II and that the Court discussed tanker design and construction only "because those were the subjects of the claim before the Court". U.S. Br. at 26.[19] This argument is not correct. *Ray* also considered, and upheld, state requirements for a state pilot on registered vessels and for a tug escort. The Court was careful to distinguish these valid requirements from design and construction. In sustaining the pilotage requirement, the Court specifically noted the requirement for a state pilot was not a design requirement. The Court said:

> "Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned *does not mean that it is free to ignore otherwise valid state* or federal *rules or regulations that do not constitute design or construction specifications. Registered vessels*, for example, as we have already indicated, *must observe Washington's pilotage requirement*." *Ray*, 435 U.S. at 168-69 (emphasis added).

With regard to the tug escort requirement, the Court said:

> "*A tug-escort provision is not a design requirement*, such as is promulgated under Title II. *It is*

[19] The United States also argues that the field is preempted because Congress's goal was to create international uniformity. U.S. Br. at 26. This argument misreads the purpose of Congress. As reaffirmed by the Oil Pollution Act, the main goal of Congress has been to prevent oil spills, and Congress has put prevention ahead of international uniformity. *See* Statement, Part E *supra* p. 9-10.

> *more akin to an operating rule* arising from the peculiarities of local waters[.]" *Id.* at 171 (emphasis added).

Thus, in *Ray*, this Court carefully limited the field to tanker design and construction and found no Congressional intent to preempt other fields mentioned in Title II.

4. Where *Ray* was based on an actual irreconcilable conflict between state and federal design and construction standards, petitioners' field preemption argument amounts to little more than a labeling exercise. They attach a label, such as "manning", to Washington's requirements and then claim it falls into a preempted field because 46 U.S.C. § 3703(a) lists "manning" as an area for regulation. Under this theory, however, the tug escort requirement in *Ray* should have been preempted because it could be labeled an "operation", which is also listed in 46 U.S.C. § 3703(a).

No other decision of this Court turns field preemption into a labeling exercise. Field preemption can be described as a species of conflict preemption. *English*, 496 U.S. at 79 n.5; *Gade*, 505 U.S. at 104 n.2 (O'Connor, J.); *Gade*, 505 U.S. at 114 (Souter, J., dissenting). To have implied field preemption, the field must be carefully limited to a subject where Congress has left no room for state regulation. A state requirement must be examined to see if there is an irreconcilable conflict with a Congressional scheme. The Court followed this method of analysis in *Ray*. It concluded that the field of design and construction was preempted, essentially because a tanker can have but one blueprint for design and construction. The Court said:

> "This statutory pattern shows that Congress, *insofar as design characteristics are concerned*, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that *Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent*

> *state requirements.* In particular, as we see it, Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the *ground that its design characteristics constitute an undue hazard.*" *Ray*, 435 U.S. at 163-64 (emphasis added).

This reasoning does not apply generally to the broad categories of federal regulations that petitioners contend are field preempted. While it is clear a tanker can have only one blueprint, it is equally clear that operational requirements can change from port to port, and they must at all times respond to local risks and needs.

5. Petitioners also rely on minor textual signals, such as the directive that the secretary "shall" adopt rules. U.S. Br. at 26; Intertanko Br. at 21-22. No other case relies on the difference between "shall" and "may" to infer that Congress impliedly displaced state law from a field. That explanation in *Ray* should be limited to an observation about design and construction rules. Standing alone, a Congressional directive to make rules does not imply, in any way, that state laws are preempted. Similarly, petitioners' observation that the secretary is directed to consult with states before rulemaking also has no implications regarding preemption of state police powers. Congress in the same sentence directed consultation with non-governmental environmental organizations. 46 U.S.C. § 3703(c).

6. Petitioners' broad field preemption arguments depend on an extension of *Ray* beyond its logic and holding. Most importantly, the labels obtained from Title II of the PWSA do not demonstrate that Congress left no room for Washington's oil spill prevention measures. No irreconcilable conflict arises from allowing the states to require a written oil spill prevention plan and to audit owners and operators for

compliance with those prevention measures. This Court should reject petitioners' reliance on broad arguments of field preemption to eliminate sovereign powers of the states when there is no Congressional expression nor regulatory scheme that requires that type of broad preemption of state laws.

D. Congress Expressly Preserved State Police Powers In § 1018 Of The Oil Pollution Act of 1990

1. While Congress has not expressly preempted state law, it has expressly declared its intention not to preempt state law in § 1018 of the Oil Pollution Act. This is important for two reasons. First, since preemption is based on the intent of Congress, § 1018 directly states Congress' intent. Second, § 1018 impliedly contradicts petitioners' expansive reading of *Ray*.

2. Section 1018 of the Oil Pollution Act, provides, in part:

> "(a) PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT.—*Nothing in this Act* or the Act of March 3, 1851 shall—
>
> (1) *affect, or be construed or interpreted as preempting, the authority of any State* or political subdivision *thereof from imposing any additional liability or requirements with respect to*—
>
> (A) *the discharge of oil or other pollution by oil within such State*; or
>
> (B) any removal activities in connection with such a discharge; or
>
> (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.
>
> . . . .

> *(c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALTIES.—Nothing in this Act*, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), ***shall in any way affect, or be construed to affect, the authority of*** the United States or ***any State*** or political subdivision thereof—
>
> (1) *to impose* additional liability or *additional requirements*: or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
>
> *relating to the discharge, or substantial threat of a discharge, of oil.*" OPA 90 § 1018(a), (c) (emphasis added); 33 U.S.C.A. § 2718; State App. at 46a-47a.

3. The language of subsections 1018(a) and (c) is very broad. Section 1018(a) states that "[n]othing in this Act . . . shall (1) affect, or be construed or interpreted as preempting, the authority of any State . . . from imposing any additional . . . requirements with respect to (A) the discharge of oil or other pollution by oil within such state". Section 1018(c) states that "[n]othing in this Act . . . shall in any way affect, or be construed to affect, the authority of . . . any State . . . (1) to impose . . . additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil". On its face, this language confirms Congressional intent that the provisions of the Oil Pollution Act be pursued in a cooperative manner with the states without preemption of state laws.

The phrases "with respect to" and "relating to" are deliberately expansive, allowing states to determine which aspects of oil pollution they deem appropriate to regulate. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (law "relates to" an employee benefit plan if it has a connection with or reference to such a plan, even if it is not specifically designed to affect such plans, or the effect is only indirect);

Shaw, 463 U.S. at 96-97 ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."). Washington's spill prevention planning is among the most important requirements that a state might impose "with respect to" or "relating to" the discharge of oil.

4. Section 1018 supports the state's argument that no broad field preemption was ever intended by Congress in 1978 or since. By enacting the Oil Pollution Act and by enacting § 1018, Congress demonstrated its understanding that, except for the field of design and construction adjudicated in *Ray*, other fields were not occupied by federal law to the exclusion of state law. It would make no sense for Congress to express a broad savings of state powers from preemption in § 1018, if it had already preempted those state powers. Congress does not preempt state powers in such an ambiguous or duplicitous manner.

5. Both petitioners urge this Court to infer that the scope of § 1018 confirms that Congress intended to preempt state laws, because the Conference Report explained that: "The Conference substitute does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978)." U.S. Br. at 42; Intertanko Br. at 47. Petitioners take the Conference Report's statement about *Ray* out of context. The report describes a broadly worded savings clause that could be understood as affecting the holding in *Ray*. According to the Conference Report

> "[S]ubsection (a) of section 1018 of the substitute states explicitly that *nothing* in the substitute, or the Act of March 3, 1851 (the Limitation of Liability Act), *shall affect in any way the authority of a State* or local government *to impose additional liability or other requirements with respect to oil pollution or to the discharge of oil* within that State . . .
>
> . . . .

> Similarly, subsection (c) clarifies that nothing in the substitute, the Limitation of Liability Act, or in section 9509 of the Internal Revenue Code shall affect in any way the authority of the United States or *any State* or local government to impose *additional* liability or *requirements*, or to determine the amount of, any civil or criminal penalty for any violation of law." H.R. Conf. Rep. No. 101-653, 101st Cong., 2d Sess., pp. 121-22 (1990) (footnote omitted) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 799-800.

The reference to *Ray* in the Conference Report confirms only that the broad language of § 1018 does not undo the careful holding in *Ray* that the field of tanker design and construction is preempted. *Ray*, however, did not hold that all the subjects listed in the PWSA defined the field to be preempted. *See* Argument, Part C *supra* p.20-24.

6. Intertanko makes several arguments that § 1018 does not reflect intent to preserve state authority to impose additional requirements. First, Intertanko relies on Judge Graber's dissent to the denial of rehearing *en banc*. Intertanko Br. at 45. The Oil Pollution Act began as S 686 on the Senate side, and as HR 1465 on the House side. S 686, sponsored by Senator Mitchell of Maine, contained virtually the same expression of non-preemption that appears in § 1018. S 686 also contained a second savings clause, section 310.[20] Although the Conference Report was silent about section 310, Judge Graber reasoned that since the Conference Committee dropped section 310, it supports an inference that § 1018 addresses only state liability laws.

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[20] S 686, section 310, provided: "Nothing in this title shall be construed or interpreted as changing, diminishing, or preempting in any way the authority of a State, or any political subdivision thereof, to regulate oil tankers or to provide for oil spill liability or contingency response planning and activities in State waters." S 686, § 310, 101st Cong., 1st Sess. (Aug. 11, 1989).

The more logical inference, however, is that section 310 was eliminated because it was duplicative of section 106. Section 106 was a broad statement of intent not to preempt state law. The report from the Environment and Public Works Committee considering S 686 states:

> "Section 106 of the reported bill explicitly preserves the authority of *any State to impose its own requirements or standards with respect to discharges of oil within such State*. . . .
>
> . . . .
>
> Preemption has been discussed by the members of the Committee more than any other single issue. S. 686 does not embrace any preemption of State oil spill liability laws, State oil spill funds, or State fees, taxes, or penalties used to contribute to such funds. *The long-standing policy in environmental laws of not preempting State authority and recognizing the rights of States to determine for themselves the best way in which to protect their citizens, is clearly affirmed in S. 686.*" S. Rep. No. 101-94, 101st Cong., 1st Sess., pp. 17-18 (1989) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 739-740.

When the conference committee blended the provisions of S 686 and HR 1465 to create the Oil Pollution Act, it incorporated verbatim section 106(e) of S 686, by renumbering the subsection as § 1018(c). The Senate Report on S 686 had previously explained that it intended section 106(e) to confirm the absence of any significant intent to preempt:

> "This subsection reinforces the position *stated clearly elsewhere that no aspect of state oil spill programs is preempted*, including the authority to impose additional requirements or penalties." S. Rep. No. 101-94, 101st Cong., 1st Sess., p. 18 (1989) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 740.

In the final act, the broad sweep of section 106(e), meant that there was no need to repeat the same language that had been in section 310.

7. Intertanko argues next, again relying in part on Judge Graber, that § 1018 is limited to liability matters because the Oil Pollution Act repealed and adopted other provisions dealing with preemption. Intertanko Br. at 44-46. First, Intertanko points out that the Oil Pollution Act repealed liability fund provisions in the Trans-Alaska Pipeline Authorization Act, 46 U.S.C. § 1653(c)(9); the Outer Continental Shelf Lands Act, 43 U.S.C. § 1820(c); and the Deepwater Port Act, 33 U.S.C. § 1517(k)(1). Intertanko argues that this establishes that § 1018 is simply a substitute for those provisions. This conclusion does not follow. We agree that § 1018 does not preempt state laws on liability and that the Oil Pollution Act replaced other liability funds. The plain language of § 1018, however, cannot support a cramped interpretation that it only addresses liability.

Intertanko also points out that the express non-preemptive provision of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321(o)(2), was amended by the Oil Pollution Act to add the phrase "or with respect to any removal activities related to such discharge". OPA 90 § 4202(c). Intertanko argues this amendment would be unnecessary if § 1018 applied broadly. Section § 4202 amended parts of the FWPCA to set up a national response and planning system. The amendment to § 1321(o)(2) merely makes the FWPCA consistent with § 1018. Again, this fails to demonstrate that § 1018 is narrow or limited.[21]

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[21] Intertanko points to two other sections of the Oil Pollution Act that have non-preemptive language and argues that they would be unnecessary if § 1018 applies broadly. These sections are tailored to address fundamentally different issues. Section 5002, the Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990, sets up a local citizens' council (§ 5002(d)(1)) "to advise, monitor and make recommendations to oil terminal and tanker operators and governmental

E. Washington Laws Are Not Preempted By International Treaties

1. In its field preemption argument, the federal government relies on international treaties as a purpose of Congress. As a separate argument, however, the government makes the statement that treaties addressing tankers "independently" have preemptive force. U.S. Br. at 28. Intertanko cites to four conventions affecting shipping to argue that treaties fully occupy a "domain" to the exclusion of other lawmaking. Intertanko Br. at 30. Petitioners' reliance on these international treaties is not well taken.

2. The four treaties addressed by Intertanko and the government provide broad goals, which do not create self-executing rights. Article I(b) of the International Convention for the Safety of Life at Sea, 1974 (SOLAS) provides that the contracting governments "undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the present Convention full and complete effect". The Articles of Protocol of 1978, amending SOLAS, uses the same formulation – that the parties "undertake to give effect to the provisions". Protocal of 1978, Article I. On its face, the standards and provisions of SOLAS do not independently preempt state laws.

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officials" in Prince William Sound and Cook Inlet, Alaska. H.R. Conf. Rep. No. 101-380, 101st Cong., 2d Sess., p. 156 (1990), *reprinted in* 1990 U.S.C.C.A.N. 835. The savings clause in section 5002(n)(1) simply makes it clear that this unique entity "is not intended to affect the authority of the state of Alaska or the federal government with respect to the operation of oil tanker and terminal facilities". *Id.*. Title VIII, the Trans-Alaska Pipeline System Reform Act of 1990 (§ 8001), deals with issues pertaining to the Trans-Alaska Pipeline System. Section 8202 authorizes a civil penalty for discharges in transit from oil fields to the pipeline and during transportation through the pipeline or handling at the terminal facilities. Section 8202(e) provides that states are not preempted from imposing additional liability. Even if, under Intertanko's reading, § 1018 is limited to liability, it was not necessary to enact section 8202(c). Congress simply made section 8202 consistent with § 1018. It did not imply that § 1018 intends something different than its broad language.

Petitioners cite to the International Safety Management Code (ISM), adopted as Chapter IX of SOLAS, which addresses broad subjects such as "management" and "operation" of ships. The ISM illustrates the limited effect of the conventions. The ISM Code recites broad aspirations for management and operation of ships. *See* ISM Code 2.1 ("The Company *should* establish a safety and environmental-protection policy") (emphasis added). The ISM leaves extensive room for state spill prevention planning that ensures preparation for the needs and risks presented by that state's waters, acknowledging "ships operate under a wide range of different conditions" and the ISM provides only "general principles and objectives". ISM Code Preamble ¶ 4.

The International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978 (STCW) (as amended through 1995) takes the same form as SOLAS. Article I of that Convention provides that the STCW does not contain self-executing laws or standards, but that the parties must "undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary". The STCW provisions are written in terms of each country using its own laws to implement the minimum requirements. The same description applies to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL). *See* MARPOL Article I(1) ("Parties . . . undertake to give effect to the provisions of the present Convention").

3. International treaties may include specific provisions that are arguably mandatory or create rights that independently preempt Washington law. For example, Article X of the STCW provides that "[s]hips . . . are subject, while in the ports of a Party, to control by officers duly authorized by that Party to verify that all seafarers serving on board who are required to be certificated by the Convention are so certificated". This provision is not material to this case. Washington has disclaimed power to "control ships", and the record fails to

show that Washington has attempted to control ships to verify certificates in violation of Article X of the STCW. Wash. Admin. Code § 317-21-550(1). Washington directs its regulation at owners and operators to avoid conflict with the operative provisions of international law. Accordingly, this case does not present any situations where there is direct conflict between Washington law and a treaty right. *See also* Argument, Part G *infra* p. 37-48.[22]

4. In essence, petitioners are asking this Court to conclude that SOLAS and the ISM, the STCW, and MARPOL command each signatory nation to abandon federalist forms of government. The Note Verbale from Denmark, cited by the federal government, complains that a federalist form of government creates a *potential* for state laws that could be in conflict with federal laws. Intertanko App. at 354a. Neither the Note Verbal nor the amicus brief of the European Nations identifies any treaty provision that Washington State has violated.

These arguments indirectly confirm that international conventions such as SOLAS, the STCW, and MARPOL are made with the knowledge that the government has a federalist form of government. *See Wardair Canada, Inc. v. Florida Dep't of Rev.*, 477 U.S. 1, 12 (1986) (holding that agreement between two federalist nations is interpreted to reflect knowledge that the U.S. has both federal and state taxes); *Pink*, 315 U.S. at 230 (international treaties shall be construed to preserve state powers). As explained in *Wardair Canada*, the

[22] In footnotes, the government asks this Court to address whether Washington has violated a vessel management agreement with Canada or interfered with innocent passage. U.S. Br. at nn.22 & 23. Neither alleged conflict was presented to the district court. No record exists beyond the bare assertions in briefing that a conflict could exist. Moreover, each assertion seems focused on the mistaken assumption that Washington has some power or intent to control ships during passage. In the absence of an actual case or controversy and a ruling by the court of appeals, these issues are not properly before this Court or fairly subsumed in the question presented.

constitutional power of the federal government to speak with one voice on foreign affairs does not mean that it must "speak with any particular voice" and preempt state powers. *Wardair Canada*, 477 U.S. at 13.

5. The petitioners' related argument that these treaties reflect international uniformity in tanker design, construction, maintenance, and operation also falls far short of showing that Congress has left no room for Washington's oil spill prevention planning. The government describes how these international agreements cover limited matters and culminate in flag states issuing certificates that ships comply with minimal international standards. The certification process is not itself a uniform law, because "flags of convenience" maintain an open register allowing any vessel to be registered under the country's flag, even though it has no connection with the country. In many open registers, the flag state does not have the capability of supervising the safety of ships and, since a ship's registration can be transferred, shipowners can shop around for registers that have the lowest standards of enforcement at the lowest cost.[23] The limits on international uniformity were confirmed again in 1996 by the Organisation for Economic Co-operation and Development, which concluded that shipping is a free market that allows shipowners to determine vessel operating policy and avoid compliance with internationally agreed rules and regulations.[24]

6. Allowing Washington to apply an important environmental protection law to operations and actions of an oil tanker when it approaches and enters Washington does not impair a uniform international system. SOLAS, the STCW, and MARPOL do not substitute for the laws of the

[23] Lord Donaldson, London:HMSO, *Safer Ships, Cleaner Seas* ¶ 6.20 (May 1994); JA at 314-15.

[24] Directorate for Science, Technology and Industry Maritime Transport Committee, Organisation for Economic Co-operation and Development, Paris, *Non-Observance Of International Rules And Standards: Competitive Advantages* at 3 (January 1996).

implementing countries and do not address operational needs particular to the waters of the United States. Based on its actions in adopting the Oil Pollution Act and prior laws, it is inappropriate to impugn Congress with an intent that these international conventions are the solitary means of protecting each state's marine environment. Congress has never made international uniformity and convenience of the tanker industry a goal that displaces state power to enact laws tailored to preventing oil spills in state waters.

F. Title I Of The Ports and Waterways Safety Act Does Not Require Preemption Of State Police Powers

1. In addition to arguments that states are impliedly preempted on broad fields, petitioners argue that Washington law is preempted due to conflict. Conflict preemption exists when "it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' ". *English*, 496 U.S. at 79 (citation omitted) (quoting *Hines*, 312 U.S. at 67). Physical impossibility, however, has not been asserted as a basis for conflict preemption. JA at 87. Moreover, the rulings that rejected Intertanko's commerce clause arguments confirm that it is not impracticable to comply with plan requirements. Pet. App. at 32a-33a, 81a-85a. Indeed, many Intertanko members have complied. JA at 119. Petitioners, however, make two further arguments under the label of conflict preemption.[25]

2. Petitioners argue, again, that the full purposes and objectives of Congress include creating a singular set of convenient regulations for the tanker industry and that Washington's law presents an obstacle to this purpose. This argument is indistinguishable from petitioners' arguments that

[25] Note 22, above, addresses the third conflict argument, made by the federal government, claiming potential conflict with a United States/Canada vessel traffic agreement or with doctrines regarding innocent passage.

fields are impliedly preempted, addressed above. Furthermore, the Court of Appeals opinion on this case provides a persuasive explanation that Washington's law does not, on its face, present any obstacle to the full purposes of Congress. Congress has never endorsed simplistic devotion to international uniformity to the exclusion of state police powers tailored to oil spill prevention programs in local waters. Pet. App. at 17a-18a; *see* Argument, Part E *supra* p. 30-34.

3. The government points its conflict preemption argument at the individual requirements of the Washington law. The government does not focus on actual conflicts. Instead, it contends that Title I of the PWSA requires preemption of any state law if it addresses the same subject matter as a federal regulation. U.S. Br. at 27-28. This argument is based on 33 U.S.C. § 1225(b), which provides that: "Nothing contained in this section, with respect to structures, prohibits a state or political subdivision from prescribing higher safety equipment requirements or safety standards than those prescribed by Regulations hereunder." The government relies upon *Ray* to make this argument.

Ray invalidated Washington's prohibition on tankers of 125,000 DWT in port, because the Coast Guard had adopted a rule that permitted these so called supertankers on Puget Sound. *Ray*, 435 U.S. at 174-75.[26] The Court rejected the state's argument that Title I of the PWSA applied only to equipment. *Ray*, 435 U.S. at 174. The Court concluded that a size limit was a vessel safety standard and held the state could not impose higher safety standards for *vessels*. The legislative history of this provision establishes that Congress was concerned with vessel standards, not vessel operations. According to the House Report:.

> "The Coast Guard witness said that it was their intention that higher vessel equipment regulations and

[26] The Court also described this provision as an invalid design requirement. *Ray*, 435 U.S. at 175-76.

standards by States should apply to structures only and not to vessels. He agreed that the language of H.R. 17830 was not clear in this regard and that we should put some clarifying language in the section.

Your Committee adopted the suggested language since it will make clear the intent mentioned above." H.R. Report No. 92-563, 92d Cong., 1st Sess., p. 15 (1971).

While a Coast Guard vessel safety standard for Puget Sound will preempt a higher state vessel standard, this same reasoning does not extend to the state operational requirements at issue in this case.

This is confirmed by the holding in *Ray* with regard to tug escorts, which do not constitute a vessel safety standard. The Court upheld Washington's requirement for a tug escort, but it did not conclude that adoption of *any* Coast Guard rule on that subject would necessarily preempt the tug escort requirement. *Ray*, 435 U.S. at 172 ("It may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause."). At that time, the federal register notice on the subject of proposed tug assistance rules stated only that such rules were "to be developed". 41 Fed. Reg. 18770 (1976). The Court's own citation to this notice contradicts the interpretation that any federal rule will preempt an entire subject matter.

4. Moreover, for a rule to have preemptive effect, it must be a safety standard for Puget Sound. As this Court said in *Ray*, the "relevant [preemption] inquiry under Title I [of the PWSA] is . . . whether the Secretary has either promulgated his own . . . requirement *for Puget Sound* tanker navigation or has decided that no such requirement should be imposed at all". *Ray*, 435 U.S. at 171-72. If federal rules addressed the "peculiarities of local waters that call for special precautionary measures" (*id.* at 171), then a court could examine whether state law was in conflict with such rules. Thus, Washington's

supertanker prohibition was in direct conflict with a "*local* navigation rule" that determined "in what circumstances tanker size is to limit *navigation in Puget Sound*". *Id.* at 174-75 (emphasis added).

The federal government's Title I preemption claim is based on general Coast Guard Rules that are not specific to Puget Sound. For example, Washington requires tankers to record their position every fifteen minutes while in state waters. The government claims this requirement is preempted under Title I of the PWSA, because the Coast Guard decided not to adopt this requirement. U.S. Br. at 41 n.18. In fact, the Coast Guard never considered the application of this rule to Puget Sound. The proposed rule would have applied to "the navigable waters of the United States, except the Panama Canal and St. Lawrence Seaway". 41 Fed. Reg. 18766 (1976). The Coast Guard decided not to adopt the rule because it "would not be practicable in all navigable waters". 42 Fed. Reg. 5957 (1977). The Coast Guard has not concluded that the fixed interval requirement is not practicable in Puget Sound. In is an important safety measure given the difficulty of navigation.

5. Washington's interpretation of *Ray* is consistent with this Court's jurisprudence on conflict preemption. Allowing preemption when a general Coast Guard rule coincides with the subject matter of a state law creates a presumption *against* state police powers. It leads to preemption when there has been no analysis of whether the state requirement presents a significant obstacle to a federal purpose or a physical impossibility.

G. Washington's Requirements Do Not Conflict With United States Or International Requirements

The federal government seeks to show preemption both by a recitation of examples (U.S. Br. at 33-41) and by using a chart attached as an appendix that lists laws by broad category. In the examples, however, the government often applies its Title II field preemption argument, by attaching labels and citing to 46 U.S.C. § 3703. The government also cites

33 U.S.C. § 1223, to apply its contention that any regulation under Title I of the PWSA carries automatic preemption. Both of these arguments wrongly use broad or mechanical preemption concepts. The above arguments have already addressed the error of such preemption analysis.

The government's examples allow Washington to demonstrate that there is no conflict between state and federal requirements, or with international standards. Part 2 in this section shows there is no conflict presented by Washington's requirements for conduct in or near Washington waters. Part 3 reviews the Washington requirements that are reasonable spill prevention measures mirroring the federal law or international standards. Part 4 reviews the Washington requirements that are slightly different, but present no meaningful conflict.

1. The Laws Listed In The Government's Chart Are Often Unrelated And Do Not Show Conflict

As a threshold matter, the government's chart creates a misimpression. The government characterizes the chart as "a comprehensive comparison of the state BAP rules to the federal and international standards". U.S. Br. at 34 n.14. The apparent implication is that this opaque list of laws and standards implies that there is no room for state prevention plans, or that conflict must be in the air. Comprehensiveness and complexity are hallmarks of regulatory laws and do not, standing alone, justify an inference of preemption. *E.g.*, *Hillsborough Cy.*, 471 U.S. at 716-17.

As shown by the following examples, the chart should not be used to infer that conflict is in the air. Many of the laws listed by the chart have little bearing on Washington's spill prevention plans and show no hint of conflict.

Example 1 **– Security Rounds – Wash. Admin. Code § 317-21-200(4)**

A spill prevention plan requires the company to describe how its master will designate places on the vessel to

be periodically examined for safety and spill hazards such as defective machinery, hull integrity, or crew activities. Security rounds occur while under power, anchored, or docked in Washington waters. JA at 101. The government's chart lists the following federal laws and international treaties: 46 C.F.R. §§ 35.05-15, 15.1109; 33 C.F.R. §§ 155.810, 164.13(b); STCW A-VIII/2 (part 4-3, 4-4), (51.4)(anchored); U.S. Br. at 4a.

The four regulations have little or no relevance to security rounds and certainly show no conflict:

- 46 C.F.R. § 15-1109 provides that "[e]ach master of a vessel that operates beyond the Boundary Line shall ensure observance of the principles concerning watchkeeping set out in STCW Regulation VIII/2 and section A-VIII/2 of the STCW Code."
- 46 C.F.R. § 35.05-15(a) provides that "[a]t least one member of the crew of a manned tank vessel shall be on board at all times except when the vessel is gas free or is moored at a dock or terminal at which watchman service is provided."
- 33 C.F.R. § 155.810 provides that "[t]he vessel operator of each tank vessel that contains more oil than the normal clingage and unpumpable bilge or sump residues in any cargo tank shall maintain surveillance of that vessel by using a person who is responsible for the security of the vessel and for keeping unauthorized persons off the vessel."
- 33 C.F.R. § 164.13(b) provides that "[e]ach tanker must have an engineering watch capable of monitoring the propulsion system, communicating with the bridge and implementing manual control measures immediately when necessary. The watch must be physically present in the machinery spaces or in the main control space and must consist of at least a licensed engineer."

The international standards on the list include unrelated issues. The arguably relevant sections are not inconsistent with Washington's requirements, although not specific to Puget Sound. STCW A-VIII/2 (51.4) provides: "While at anchor, the officer in charge of the navigational watch shall . . . ensure that inspection rounds of the ship are made periodically." STCW A-VIII (part 4) deals with principles of watchkeeping while in port. Part 4-3 governs performing the deck watch. These principles include making "rounds to inspect the ship at appropriate intervals". STCW A-VIII (part 4-3) (102.1). Part 4-4 governs performing the engineering watch, which is unrelated.

Example 2* – Standby Generator – *Wash. Admin. Code § 317-21-210(1)

A spill prevention plan requires tankers *without* automatic switching gear for stand-by generators to turn on their stand-by generators to be available to assume the electrical load while underway in Washington waters. The government's chart lists the following federal laws and international treaties: 46 U.S.C. § 3703; 33 C.F.R. § 164.25(a)(3); 46 C.F.R. §§ Part 112, n.b, 112.25-3, 25-5, 25-10; SOLAS ch. II-1, Reg. 44; U.S. Br. at 7a.

First, the standby generator aspect of a Washington spill prevention plan illustrates the illogic of the government's field preemption argument that the labels in 46 U.S.C. § 3703(a) ("design, construction, alteration, repair, maintenance, operations, equipping, personnel qualification, and manning") can be used to infer Congressional intent to preempt. Turning on a standby generator addresses the danger of losing power in confined waters. It is an operational necessity peculiar to Washington and analogous to local pilotage. It is not design and construction.

Furthermore, no conflict is shown by the regulations or unrelated international standards:

- 33 C.F.R. § 164.25(a) provides that equipment be tested no more than twelve hours before entering the waters of the United States or getting underway, including a "[s]tandby or emergency generator, for as long as necessary to show proper functioning, including steady state temperature and pressure readings." *Id.* at (a)(3).
- 46 C.F.R. §§ Part 112, 112.25-3, 25-5, 25-10 deals with the normal source for emergency loads. It is an equipment requirement. 46 C.F.R. § 112.25-3(a) ("The normal source for emergency loads must be the ship's service generating plant."). 46 C.F.R. § 112.25-5 provides for a transfer to a "final emergency power source".
- SOLAS ch. II-1, Reg. 44 sets out technical specification for starting emergency generating sets and does not address whether a standby generator should be ready in the narrow confines of Puget Sound. SOLAS ch. II-1, Reg. 4(1) ("Emergency generating sets shall be capable of being readily started in their cold condition at a temperature of [zero degrees Celsius].").

Example 3 - STCW Requirements For Crew Certification

The government's chart asserts that Washington's operational requirements for local waters[27] somehow implicate crew certification requirements of the STCW, listing STCW A-II/1, A-II/2, A-II/3, and A-II/4. As an example, Wash. Admin. Code § 317-21-205(3) requires the master to have a schedule for comparing the steering gyrocompass with the magnetic compass, because of the risk of accident from an erroneous compass heading. JA at 106. The government's chart lists STCW A-II/2 (p. 43). U.S. Br. at 6a.

[27] Wash. Admin. Code §§ 317-21-200(1)(b), -205(2), (3), -215(1), -220(1)-(3). U.S. Br. at 2a, 5a-6a, 8a-9a.

Chapter II of the STCW Code establishes standards of seafarer certification. STCW A-II/2 identifies "[m]andatory minimum requirements for certification of masters and chief mates on ships of 500 gross tonnage or more." A candidate must demonstrate competence in certain areas, including how to "[d]etermine and allow for compass errors." STCW A-II/2 (page 43).

The certification of a master and chief mate for using compasses is not implicated by a spill prevention plan with a schedule for checking compasses in Puget Sound. This is like comparing the certified competence of a master to run the ship, with the state's requirement that a ship use a local pilot in Puget Sound. Sections A-II/1, A-II/3, and A-II/4 of the STCW set out other mandatory minimum requirements for certification that simply ensure competence, allowing these persons to be able to comply with particular needs for operating in Washington waters.

2. Some Washington Operational Requirements Prescribe Conduct Directly Necessitated By Local Conditions

A number of Washington's spill prevention requirements focus on conduct that should occur in or near Washington waters. No conflict is presented by these requirements.

Operating In Restricted Visibility – Wash. Admin. Code § 317-21-200(1)(a)

Washington requires three licensed deck officers, one of whom may be a pilot, on the bridge during restricted visibility. Washington requires this sensible step to avoid a collision or grounding in the narrow and congested waters of the Strait of Juan de Fuca and Puget Sound. JA at 99. In addition to its field preemption theory, the government argues that this requirement is preempted because of a Coast Guard rule requiring a minimum of two officers or because of a conflict with rest requirements of federal law.

The general Coast Guard requirement of two licensed officers on the bridge presents no conflict, nor is there conflict with the international goal of ensuring that watch officers obtain at least ten hours of rest in a twenty-four-hour period. The alleged conflict is based on the four-hour travel time between buoy J and pilotage waters when the third deck officer must come from the ship's crew. U.S. Br. at 37-38. Nothing in the record supports the speculation that additional crew would have to be flown to Washington. Ten hours of rest allows a deck officer to work fourteen hours a day, if needed. Thus, even after serving two four-hour watches, a deck officer could still work an additional six hours, which could include the four hours between buoy J and pilotage waters. In any event, the STCW provides an exception for overriding operational conditions, such as restricted visability. STCW A-VIII/1.3 ("The requirements for rest periods laid down in paragraphs 1 and 2 need not be maintained in the case of an emergency or drill or *in other overriding operational conditions*.") (emphasis added). This can include restricted visability.

Prearrival Tests And Inspections – Wash. Admin. Code § 317-21-215

A Washington plan requires tankers to make certain tests and inspections twelve hours or less before entering state waters. The government claims this requirement is preempted by Title II of the PWSA, because they label it an equipment requirement. U.S. Br. at 40. It is not an equipment requirement. It is an operational requirement, directly related to safe entrance into Washington. JA at 110. Except for its field preemption theory, the federal government shows no inconsistency with federal and international standards. Conflict preemption is not applicable.

Advance Notice Of Entry – Wash. Admin. Code. § 317-21-540

Washington requires tankers to give advance notice of entry into state waters. The government argues that this requirement is preempted under Title I of the PWSA,

because the Coast Guard has a rule on advance notice of entry. U.S. Br. at 38-9. Washington accepts the same notice of entry that the Coast Guard requires. In fact, the state and the Coast Guard share this information under a Memorandum of Agreement they entered into in 1995. JA at 266-70. No conflict is presented by providing notice to a state in coordination with an identical federal requirement. *Zook*, 336 U.S. at 729-30.

3. Spill Prevention Requirements That Mirror Federal And International Requirements

Some of Washington's safety requirements for prevention plans affect Washington waters but are not performed exclusively in Washington. Many of these requirements, however, are the same as federal and international standards and create no conflicts.

Emergency Procedures – Wash. Admin. Code § 317-21-220

A Washington plan requires the master of the vessel to post "station bills" for the crew stating crew assignments for various emergencies, such as fire or oil spills. The master must also establish written procedures for emergencies, such as collision, loss of propulsion, and loss of steering. The government argues that this operational requirement is a proficiency requirement and that there is a need for uniformity in an emergency. U.S. Br. at 40. The government misunderstands the requirement. It requires the company to post procedures and have written policies. JA at 110-11. It is consistent with federal and international standards. ISM Code 8.1-8.2 (8.1 – "The company should establish procedures to identify, describe and respond to potential emergency shipboard situations." 8.2 – "The company should establish programmes for drills and exercises to prepare for emergency actions."). Any company that complies with the ISM Code should have a plan that meets Washington's requirement.

Personnel Policies-Training – Wash. Admin. Code § 317-21-230

A Washington plan requires a tanker company to explain how it will provide training for its crew. The government argues that this requirement imposes a personnel qualification on the certificated seafarers or requires training beyond that necessary to get a license or certification. U.S. Br. at 35. The government misunderstands this requirement. Washington requires the company to explain how it will provide necessary training. Washington does not evaluate crew licenses or certificates.

The petitions speculate without basis that a tanker would have to fly a special crew to Washington. The training that the company describes need only be consistent with federal and international requirements. The ISM Code requires companies to "establish and maintain procedures for identifying any training which may be required" and to "ensure that such training is provided for all personnel concerned". ISM Code 6.5. It is analogous[28] to the training required under the STCW. *See* STCW A-II/2 (minimum standard of competence for masters and chief mates on ships of 500 gross tonnage or more); A-III/2 (minimum standard of competence for chief engineer officers and second engineer officers on ships powered by main propulsion machinery of 3,000 kW propulsion power or more); A-II/1 (minimum standard of competence for officers in charge of a navigational watch on ships of 500 gross tonnage or more); A-III/1 (minimum standard of competence for officers in charge of an engineering watch in a manned engine-room or designated duty engineers

[28] When Wash. Admin. Code § 317-21-230 was adopted in 1995, the state did require a company to provide training beyond that necessary to obtain a seafarer license. However, that is no longer true. When the ISM Code, authorized by SOLAS Chapter. IX, went into effect in 1998 and the 1995 Amendment to the STCW was implemented by the federal government, the Washington requirements and the international requirements converged.

in a periodically unmanned engine-room); A-VI/1 (mandatory minimum requirements for familiarization and basic safety training and instruction for all seafarers); A-VIII/2, Part III (Watchkeeping at sea). Washington simply intends that each company confirm its training in a plan that Washington can use to ensure compliance.

Language – Wash. Admin. Code § 317-21-250

A Washington plan requires all licensed deck officers and the vessel's "designated person in charge", 33 C.F.R. § 155.700, to communicate in English and a language understood by subordinate officers and unlicensed crew. The government argues that Washington's "requires all licensed deck officers to speak the language of the entire unlicensed crew". U.S. Br. at 36. There is nothing in the record to support this claim. The government misunderstands the Washington requirement. With regard to English, needed for external communication, Washington's requirement is the same as STCW Table A-II/1 (English language) (page 34). JA at 132. With regard to the crew, Washington requires "a language understood and spoken by subordinate officers and the unlicensed crew". Wash. Admin. Code § 317-21-250. The government cites no difference in federal law or international standards.

Management – Wash. Admin. Code § 317-21-260

A Washington plan requires a company to describe active management practices, policies, and safety procedures. The government argues that this is preempted under Title II, because they label it a personnel qualification. U.S. Br at 36-37. It is not a personnel qualification. It is a requirement directed to *the company* operating the vessel. It is consistent with the ISM Code: "A document of compliance should be issued for every Company complying with the requirements of the ISM Code by the Administration[.]" ISM Code 13.2. Washington accepts ISM certification obtained by companies. Once again, Washington requires no different conduct than required by federal law or international standards.

4. Washington Requirements That Differ From Federal Requirements Cause No Conflict

Some of Washington's requirements for prevention plans differ from the federal requirements. Even with regard to these requirements, the federal government has not demonstrated any meaningful conflict.

Event Reporting – Wash. Admin. Code § 317-21-130

Under a Washington plan, the owner or operator shall report events, such as collisions, for each vessel covered by the plan. This requirement is slightly different than the federal requirement. Washington requires reports of a near-miss and a report of corrective action. This area also is subject to the Memorandum of Agreement between Washington and the Coast Guard, in which the parties agree to share information about events such as collisions. JA at 270. The mere existence of an analogous federal requirement does not explain why the Washington requirement creates an irreconcilable conflict.

Illicit Drug And Alcohol Testing – Wash. Admin. Code § 317-21-235

A Washington plan requires the company to have minimal drug and alcohol testing and prohibits consumption in Washington. The most important difference with the Coast Guard's drug and alcohol rule is that Washington applies its requirement to companies with foreign flagged tankers while the federal requirements apply only to United States flagged vessels. The only reason advanced by the government to support a claim of conflict is that foreign governments have informed the federal government that their laws might not allow the drug and alcohol testing required by Washington. U.S. Br. at 34. The foreign governments with this concern are misinformed. The record in this case establishes that Washington waives the testing requirement if compliance would conflict with other laws governing the crew on a vessel coming to Washington. JA at 256. The government does not explain why including foreign flag vessels in this Washington

requirement is an obstacle to achieving the purpose of Congress. For example, the government does not appear to claim that safety will be enhanced by not testing foreign flag crews.[29]

H. Express Statements Of Preemption By The Coast Guard, Standing Alone, Do Not Preempt Aspects Of Washington's Oil Spill Prevention Planning

Intertanko and the federal government contended that the Coast Guard's bare declarations of an intent to preempt amounts to "express preemption". Intertanko Br. at 33; U.S. Br. at 44. As this Court emphasized in *City of New York v. Federal Communications Commission*, 486 U.S. 57, 63 (1988), Congressional intent to preempt state law may arise through an agency "acting within the scope of its congressionally delegated authority", but in such cases

> "the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. *The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may* determine that its authority is exclusive[.]" *Id.* at 64 (emphasis added).

[29] The federal government suggests that Washington's testing might violate the Fourth Amendment to the Constitution and that federal tests are limited to crew in "safety-sensitive positions". U.S. Br. at 34 The federal drug testing applies broadly to crew members, including those who occupy "a position, or perform the duties and functions of a position, required by the vessel's Certificate of Inspection" or who perform "duties and functions of patrolmen or watchmen required by this chapter". 46 C.F.R. § 16.230(a)(1), (2).

The opinion emphasizes that the determination of whether an agency may preempt state and local regulation follows from the rule that

> "'an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.' *Louisiana Public Service Comm'n*, 476 U.S., at 374". *Id.* at 66.

The Court of Appeals properly concluded that Intertanko and the government had not shown preemption based solely on simple declarations by the Coast Guard. As noted in *City of New York*, an agency's choice to preempt state law is not valid if "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned". *Id.* at 64 (quoting *United States v. Shimer*, 367 U.S. 374 (1961)). Here, the savings clauses of the Oil Pollution Act and the lack of Congressional intent to preempt Washington from the fields associated with oil spill prevention planning and inspections showed that the Coast Guard needed to do more than simply declare a zone of preemption. In light of these Congressional intentions, the Coast Guard needed to demonstrate that its preemption reflected a precisely described zone of actual conflicts or an area of exclusivity that corresponded with Congress' intent to broadly include state powers to protect state waters from oil spills.

The inability of the Coast Guard to simply declare zones of federal preemption does not limit its ability to fulfill its statutory obligations. The Court of Appeals opinion casts no doubt on the ability of the Coast Guard to displace a state law that actually conflicts with a Coast Guard rule. Washington has never denied that preemption must follow

from a proper showing of conflict or frustration of purpose with a lawfully enacted Coast Guard rule.

CONCLUSION

The judgement of the Court of Appeals should be affirmed.

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