Granted

No. 98-1706

In the Supreme Court of the United States

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Petitioner,
v.
GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,
Respondents.

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

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether federal statutes, regulations, and international treaty commitments of the United States that prescribe comprehensive standards for tank vessel operations, personnel qualifications, and manning expressly or impliedly preempt attempts by an agency of the State of Washington to enforce regulations that impose different standards and requirements governing the same subject matters aboard the same tank vessels.

2. Whether an individual state may deny entry to, or penalize for non-compliance with state safety and environmental protection regulations, a vessel that has been found by the vessel's nation of registry and the United States Government to be eligible to enter the United States under multilateral treaty commitments, federal law, and federal regulations governing safety and environmental protection.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Constitutional Provisions, Statutes, Rules, and Other Governmental Materials:

Other Materials:

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 States. WLF regularly appears in legal proceedings before federal and state courts to defend and promote free enterprise and individual rights. WLF has appeared before this Court in cases involving preemption, *see Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996); *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), and the foreign affairs powers of the United States, *see Perpich* v. *United States Dep't of Defense*, 496 U.S. 334 (1990). WLF submits this brief in support of Petitioner and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

STATEMENT

In the interest of judicial economy, WLF incorporates by reference the factual statement as it appears in the petition for writ of certiorari of the International Association of Independent Tanker Owners (Intertanko). Additionally, we wish to emphasize certain aspects of the record.

In response to the 1989 *Exxon Valdez* oil spill, *see* Wash. Br. Opp. at 1, the Washington Legislature enacted a statute codified at Chapter 88.46 of the Revised Code of Washington. The statute requires every oil tanker owner or operator whose vessel enters state waters to file "an oil spill prevention plan," WASH. REV. CODE § 88.46.040(1), *reprinted in* Pet. App. 346a, with the Washington Office of Marine Safety (OMS). Under the statute the OMS "shall only

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel made a monetary contribution to the preparation and submission of this brief.

approve a prevention plan if it provides the best achievable protection from damages caused by the discharge of oil into the waters of the state and if it determines that the plan meets the requirements of this section and rules adopted by the office." WASH. REV. CODE § 88.46.040(3), *reprinted in id.* at 347a–348a.

Pursuant to its statutory mandate, the OMS has issued several rules "establish[ing] standards for spill prevention plans." WASH. REV. CODE § 88.46.040(1), *reprinted in id.* at 346a. OMS rules cover a broad range of matters, including "watch practices, policies, and procedures," WASH. ADMIN. CODE § 317-21-200, *reprinted in id.* at 318a; the requirement that "[a]n oil spill prevention plan must describe a comprehensive training program that requires training beyond the training necessary to obtain a license or merchant marine document," WASH. ADMIN. CODE § 317-21-230, *reprinted in id.* at 330a; "policies, procedures, and practices for alcohol and drug testing," WASH. ADMIN. CODE § 317-21-235, *reprinted in id.* at 334a; the number of hours that crew members may work each day, *see* WASH. ADMIN. CODE § 317-21-245, *reprinted in id.* at 339a; the requirement that "[a]ll licensed deck officers and the vessel's designated person in charge . . . are proficient in English and speak a language understood and spoken by subordinate officers and unlicensed crew," WASH. ADMIN. CODE § 317-21-250, *reprinted in id.* at 340a; and the requirement to keep detailed training and work hour records, *see* WASH. ADMIN. CODE § 317-21-255, *reprinted in id.*

Intertanko brought an action for injunctive and declaratory relief against the State of Washington and State officials in the United States District Court for the Western District of Washington. It claimed that 16 of Washington's "best achievable protection" (BAP)

regulations, including those described above, were preempted by federal law and treaties ratified by the United States. *See id.* at 46a. On cross-motions for summary judgment the court ruled that neither express, conflict, *see id.* at 61a–65a, nor implied field preemption, *see id.* at 60a–61a n.10, invalidated the challenged regulations. The court also found that the regulations did not run afoul of the Interstate Commerce Clause, the foreign affairs power of the United States, or the provision of the Washington State Constitution, *see* WASH. CONST. art. XXIV, § 1, setting a three-mile limit on the State's "jurisdiction and dominion," *State* v. *Pollock*, 136 Wash. 25, 29 (1925). *See* Pet. App. 66a–73a. Intertanko appealed to the U.S. Court of Appeals for the Ninth Circuit, and the United States intervened "in general support of Intertanko's position." Pet. 13.

The Ninth Circuit affirmed in part and reversed in part, upholding the validity of the challenged regulations with one exception. On preemption grounds it struck down § 317-21-265(a) of the Washington Administrative Code, "[b]ecause the [global positioning system] and radar requirements are virtually identical to the navigational equipment required by the Washington Tanker Law." Pet. App. 31a. In every other respect, however, the court concluded that the challenged BAP regulations passed muster under the Supremacy Clause and the Interstate Commerce Clause and did not impermissibly intrude on the foreign affairs authority of the United States. *See id.* at 19a–29a, 32a–37a.

The court cited four reasons for rejecting Intertanko's preemption claim with respect to all the challenged BAP regulations except for § 317-21-265(a). First, it agreed with Washington that "Congress expressly indicated its intent not to preempt state law in the field of oil-spill prevention when it passed

§ 1018 of the Oil Pollution Act of 1990 . . . ." *Id.* at 14a. To reach this conclusion the court declined Intertanko's invitation to construe § 1018 as being "limited in its application to state laws concerning liability and penalties." *Id.* at 16a. The United States asserted that a network of federal laws governing oil tankers[2] preempts the challenged BAP regulations, even if § 1018 does not. *See id.* The court disagreed, preferring instead to identify § 1018 as decisive evidence of "Congress's overarching purposes and objectives . . . [i]n the field of tanker regulation, "demonstrat[ing] Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability, and compensation." Pet. App. at 21a–22a.

Second, the court relied on *Chevron U.S.A., Inc.* v. *Hammond*, 726 F.2d 483 (9th Cir. 1984). There the Ninth Circuit held that the Ports and Waterways Safety Act, which "subjects to federal rule the design and operating characteristics of oil tankers," *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 154 (1977), and the Port and Tanker Safety Act, which "requires the Secretary of Transportation to establish regulations addressing vessel management, drug and alcohol testing, seafarer training and qualifications, casualty reporting, seafarer discipline, manning, work hours, pilotage, and language requirements," Pet. App. 20a, "do[ ] not mandate international uniformity." *Chevron*, 726 F.2d at 493. Instead, the court below reasoned, because the statutes authorize the Coast Guard to set higher standards than those set by international agreement, Congress intended "that the international agreements set only minimum standards, that strict international uniformity was unnecessary,

[2] These include the Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 471; the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424; and the Tank Vessel Act of 1936, Pub. L. No. 74-765, 49 Stat. 1889.

and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction." *Id.* at 494.

Third, the court narrowly construed *Ray* to require preemption only when a state statute governs oil tanker "design and construction characteristics." *Ray*, 435 U.S. at 168. Based on this reading of *Ray*, the court rebuffed Intertanko's claim that "federal regulation of oil tankers . . . is so comprehensive as to preempt impliedly the field of tanker regulation." Pet. App. at 25a.

Fourth, the court refused to consider arguments by the United States that certain BAP regulations conflict with international agreements governing the right of innocent passage and transit in the Strait of San Juan de Fuca. *See id.* at 24a. The court explained its refusal by suggesting that since the United States raised these arguments "for the first time on appeal . . . the state defendants have not had the opportunity to develop the record," *id.* at 24a–25a, regarding the pertinent agreements.

Intertanko and the United States petitioned the court of appeals for rehearing and rehearing *en banc*, which the court denied. *See* Pet. App. at 76a. Both parties subsequently filed petitions for certiorari in this Court, which were granted and consolidated for argument. *See United States* v. *Locke, et al.*, 148 F.3d 1053 (9th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3152 (U.S. Sept. 14, 1999) (No. 98-1701); *International Association of Independent Tanker Owners* v. *Locke, et al.*, 148 F.3d 1053 (9th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3152 (U.S. Sept. 14, 1999) (No. 98-1706).

SUMMARY OF ARGUMENT

The State of Washington has attempted to regulate all oil tankers operating in its waters. Intertanko

claims that several of the State's regulations are preempted or are otherwise constitutionally invalid. Ordinarily this Court would evaluate Intertanko's preemption claim by starting with the presumption that Congress did not preempt Washington's regulations. We argue that that presumption is inapposite in this case.

The presumption against preemption should not be indulged when the state law at issue occupies an area traditionally reserved to the federal government. Constitutional history and text, as well as this Court's precedent, affirm that foreign commerce and foreign affairs have been long regarded as areas of special federal competence. America's experience under the Articles of Confederation illustrate the perils of letting any one State violate laws and treaties enacted on behalf of the entire Nation. Statements by those who wrote and ratified the Constitution, as well as the text of the Constitution itself, furnish ample evidence that the federal government was deliberately invested with sufficient power to bind the country in matters relating to foreign affairs and foreign commerce. This Court's decisions have followed a consistent path of affirming the federal government's paramount authority in these areas.

Washington's BAP regulations do not qualify for the presumption against preemption for three reasons. First, they attempt to govern in areas outside the domain traditionally allotted to state police powers. Second, they cover matters of national and international, rather than local, significance. Third, by attempting to supplant international standards, they expose the Nation to the risks of impeded commerce and international retaliation.

ARGUMENT

The Questions Presented ask, in essence, "[w]hether federal statutes, regulations, and international treaty commitments of the United States" preempt Washington's statutes and regulations purporting to govern oil tankers operating in state waters and "[w]hether an individual state may deny entry to, or penalize" vessels that comply with federal law and international safety and environmental standards but not with Washington law. "[F]airly included," SUP. CT. R. 14.1(a), is a further question. How much weight should the Court give the presumption against preemption when the challenged state laws fall into an area traditionally reserved to the federal government? We contend that the Court should give this presumption little if any weight in this case. Neither constitutional history and text nor this Court's precedent supports that presumption when, as here, state law occupies the fields of foreign commerce and foreign affairs.

THE PRESUMPTION AGAINST PREEMPTION SHOULD NOT BE INDULGED WHERE THE CHALLENGED STATE LAW OCCUPIES AN AREA TRADITIONALLY RESERVED TO THE FEDERAL GOVERNMENT

The doctrine of preemption has its constitutional roots in the Supremacy Clause:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution

> or laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI. The Court has long applied this clause by declining to enforce state laws that conflict with federal law. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). When seeking to determine whether a particular state law must give way to a federal provision, the Court has repeatedly taught that "[t]he purpose of Congress is the ultimate touchstone." *Retail Clerks Int'l Assoc.* v. *Schermerhorn*, 375 U.S. 96, 103 (1963).

> Congress' intent, of course, is primarily discerned from the language of the pre-emption statute and the "statutory framework" surrounding it . . . [and] the "structure and purpose of the statute as a whole" . . . as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Medtronic, Inc. v. *Lohr*, 116 S. Ct. 2240, 2250–51 (1996) (citations omitted).

Preemption may occur in three ways. First, Congress's intent to preempt state law may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, a state law is preempted if it poses an actual conflict with federal law. *See Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983). Third, a state law is preempted "if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone* v. *Liggett Group, Inc.*, 505

U.S. 504, 516 (1992) (quoting Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153 (1982)).

Coloring this analysis is the Court's oft-repeated "assumption that the historic police powers of the States were not to be superseded by . . . Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see, e.g.*, *Cipollone*, 505 U.S. at 516; *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). The Court has recently explained that its presumption that "Congress does not cavalierly pre-empt state-law causes of action," *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240, 2250 (1996), rests on the principle that "the States are independent sovereigns in our federal system." *Id.* Nevertheless, this presumption finds no support in history or precedent when the state law at issue occupies an area traditionally regarded as the province of the federal government. To better understand why this is so, it will be instructive to recall America's experience under the Articles of Confederation.

A. The Federal Government Was Originally Understood to Possesses an Especially Strong Claim to Authority in Foreign Affairs and Foreign Commerce

As this Court has acknowledged, "One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased." *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 283 (1976); *see also* American Dredging Co. v. Miller, 510 U.S. 443, 466 (1994) (Kennedy, J., dissenting) ("Comity with other

nations and among the States was a primary aim of the Constitution."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 99 (Carolina Academic Press 1987) (abridged ed., 1833) (*hereinafter* Story) ("[T]he want of any power in congress to regulate foreign or domestic commerce was deemed a leading defect in the confederation."). On a closely related point, one historian has observed that "the most serious doubts about the adequacy of the Articles of Confederation arose over the inability of Congress to frame and implement satisfactory foreign policies." JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 26 (1996). Those doubts began to arise soon after America signed the Peace of 1783 with Great Britain, when it faced three crises in foreign relations.

The peace treaty itself paradoxically led to the first crisis. It entitled American and British creditors to recover good faith debts "with no lawful impediment," *id.* at 27, and required Congress to get the states to allow British subjects and American loyalists to recover their confiscated property. *See id.* "Both articles placed Congress in the awkward position of guaranteeing what it lacked the constitutional authority to deliver: the compliance of state legislatures and courts with a national commitment made to a foreign power." *Id.* The British retaliated by keeping their forts in Oswego, Niagra, and Detroit, along the northwestern frontier, in violation of the peace treaty. *Id.*

By 1784, a second crisis erupted when Great Britain closed her home island and West Indies ports to American shipping. At the same time, British ships entered American ports at will. *See id.* "Lacking authority to regulate interstate or foreign commerce, Congress could neither devise nor impose

a uniform set of restrictions on British ships. And this *constitutional* debility in turn diminished the prospects for advancing American trading interests through the negotiation of a satisfactory commercial treaty with Britain . . . ." *Id.* at 26-27.

The third major foreign policy crisis arose when, in April 1784, Spain barred American ships from entering New Orleans and navigating the lower Mississippi River. *See id.* at 27. Because there was effectively no American navy to counter Spain's action, American frontiersmen were cut off from exporting their goods via the Gulf of Mexico. *See id.* This posed a grave threat to the safety of America's western territories. As events then stood, "[s]hould the weakness of the Union force western settlers to accommodate themselves to Spain, control of the regions lying between the Appalachian Mountains and the Mississippi would be lost to the United States." *Id.*

Such foreign policy crises, which predominantly centered on disputes over international shipping and navigation, eventually propelled Americans toward a stronger national government.

> [T]hese concerns of foreign policy dominated efforts to strengthen the confederation. Proposals for reform developed along two lines. One involved *clarifying* the authority that might be presumed already to lie in Congress by virtue of its general power to make treaties with foreign nations. Here the great challenge was to establish the principle that national obligations should prevail over the legislative acts of sovereign states. . . . The other avenue of reform centered on enhancing federal power in an area where experience indicated that the national interest required that Congress be given what it currently lacked: greater authority

> to regulate both foreign and interstate commerce.

Id. at 28. However, such reforms "foundered on the requirement of unanimous state ratification," *id.*, until 1787, when delegates gathered at Philadelphia "for the sole and express purpose of revising the Articles of Confederation." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 14 (Max Farrand ed., 1966) (Resolution of Congress, dated Feb. 21, 1787).

On May 29, 1787, Governor Edmund Randolph of Virginia stood in Independence Hall and introduced the Virginia Plan, the basis for the original Constitution. *See* 1 *id.* at 18-19. To persuade other convention delegates to abandon the Articles of Confederation in favor of a new form of government, Governor Randolph surveyed "the defects of the confederation." *Id.* at 18. He named only five, of which two are relevant here. First, Randolph noted that "the confederation produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by th[eir] own authority. . . . [T]hey could not cause infractions of treaties or of the law of nations, to be punished . . . . [P]articular states might by their conduct provoke war without controul." *Id.* at 19. Second, Randolph observed "that there were many advantages, which the U. S. might acquire, which were not attainable under the confederation—such as . . . counteraction of the commercial regulations of other nations." *Id.*

Three weeks later, on June 19th, James Madison addressed the convention in opposition to the Virginia Plan's great rival, the New Jersey Plan, which proposed a weaker, more state-centered form of government. *See id.* at 314-22. Madison's very first criticisms were directed at that New Jersey Plan's failure to vest authority over foreign affairs in a strong national government:

> Will it prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars? The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole. The existing confederacy does <not> sufficiently provide against this evil. The proposed amendment to it does not supply the omission. It leaves the will of the States as uncontrouled as ever.

Id. at 316.

Madison's criticism rested on the connection he discerned between treaties and wars. He perceived that when states are free to violate treaties, the consequence may be "the calamities of foreign wars," *id.*, which "no part of a nation [should] have it in its power to bring . . . on the whole." *Id.* In a nutshell, Madison's argument was that the Articles of Confederation allowed a single state to expose the entire nation to the risk of war by leaving them free to violate treaties and that the New Jersey Plan failed to create a national government strong enough to stop it. Given this and other weaknesses, the New Jersey Plan was rejected. *Id.* at 322.

Once the Constitution was written and proposed to the states, delegates to various state ratifying

conventions expressed similar concerns about the national government's power to bind the entire Nation to treaties. Madison himself, speaking before the Virginia convention, described the humiliating consequences of the Confederation's impotence on this point. "[F]oreign nations are unwilling to form any treaties with us; they are apprized that our general government cannot perform any of its engagements, but that they may be violated at pleasure by any of the states." James Madison, Speech in Virginia Ratifying Convention (June 6, 1788), *reprinted in* 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 135–136 (2d ed., 1836).

In South Carolina Charles Cotesworth Pinckney emphasized the sanctity of treaties and the consequences of the national government's inability to honor treaties under the Articles of Confederation.

> If treaties entered into by Congress are not to be held in the same sacred light in America, what foreign nation will have any confidence in us? Shall we not be stigmatized as a faithless, unworthy people, if each member of the Union may, with impunity, violate the engagements entered into by the federal government? Who will confide in us? Who will treat with us if our practice should be conformable to this doctrine? Have we not been deceiving all nations, by holding forth to the world, in the 9th Article of the old Confederation, that Congress may make treaties, if we, at the same time, entertain this improper tenet, that each state may violate them?

Speech of Charles Cotesworth Pinckney in the South Carolina Ratifying Convention, Jan. 17, 1788, *reprinted in* 4 *id.* at 278. Pinckney further pointed out that allowing any State to violate a treaty subjects the entire Nation to substantial risks. "[F]or we do not enter into treaties as separate states, but as united states; and all the members of the Union are answerable for the breach of a treaty by any one of them." *Id.* at 279.

In the Massachusetts Ratifying Convention, Thomas Dawes, Jr. underscored the weakness to which America was reduced by her incapacity to bind every State to international commercial agreements.

> We are independent of each other, but we are slaves to Europe. We have no uniformity in duties, imposts, excises, or prohibitions. Congress has no authority to withhold advantages from foreigners, in order to obtain advantages from them. By the 9th of the old articles, Congress may enter into treaties and alliances under certain provisoes; but Congress cannot pledge that a single state shall not render the whole treaty of commerce a nullity.

Speech of Thomas Dawes, Jr., in Massachusetts Ratifying Convention, Jan. 21 1788, *reprinted in* 2 *id.* at 58–59. Dawes concluded, "If we wish to encourage our own manufactures, to preserve our own commerce, to raise the value of our own lands, we must give Congress the powers in question." *Id.* at 59.

Justice Jackson aptly summarized the original understanding of the federal interest in regulating foreign commerce.

> The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of power over their internal affairs.

> No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished.

H. P. Hood & Sons v. *Du Mond* , 336 U.S. 525, 533–34 (1949). With the peace, prosperity, and international reputation of America at stake, those who wrote and ratified the Constitution formed a government with the power to bind the Nation in matters regarding foreign affairs and foreign commerce.

B. The Constitution Invests the Federal Government with Power to Bind the Nation in Matters of Foreign Affairs and Foreign Commerce

The words of the Constitution plainly confer on the federal government the power to implement foreign policy and regulate foreign commerce.

Article I gives Congress power over a breathtaking array of matters regarding foreign affairs. Section 8 contains the largest grant of powers. They include the power to "lay and collect Taxes, Duties, Imposts and Excises," U.S. CONST. art. I, § 8, cl. 1; to "provide for the common Defence," *Id.*; to "regulate Commerce with foreign Nations," *Id.* at art. I, § 8, cl. 3; to "establish an uniform Rule of Naturalization," *Id.* at art. I, § 8, cl. 4; to "regulate the Value . . . of foreign Coin," *Id.* at art. I, § 8, cl. 5; to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *Id.* at art. I, § 8, cl. 10; to "declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *Id.* at art. I, § 8, cl. 11; to "raise and support Armies," *Id.* at art. I, § 8, cl. 12; to "provide and maintain a Navy," *Id.* at art. I, § 8, cl. 13; to "make Rules for the Government and Regulation of the land and naval Forces," *Id.* at art. I, § 8, cl. 14; to "provide for calling forth the Militia to . . . repel Invasions," *Id.* at art. I, § 8, cl. 15; to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States," *Id.* at art. I, § 8, cl. 16; to "exercise [exclusive legislation] over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards," *Id.* at art. I, § 8, cl. 17.

Article II delegates equally impressive authority over foreign affairs to the President. "The President shall be Commander in Chief of the Army and navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ." *Id.* at art. II, § 2. "He shall have power, by and with the Advice and Consent of the senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls." *Id.* The President "shall receive Ambassadors and other public Ministers . . . and shall Commission all the Officers of the United States." *Id.* at art. II, § 3.

In addition to the delegations of power contained in Articles I and II, Article I, section 10 is instructive since it expressly prohibits states from sharing in certain powers granted to the federal government. "No State shall . . . grant Letters of Marque and Reprisal . . . ." *Id.* at art. I, § 10, cl. 1. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ." *Id.* at art. I, § 10, cl. 2. "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in

time of Peace, enter into any Agreement or Compact . . . with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.* at art. I, § 10, cl. 3.

This mass of powers delegated by Articles I and II, and further defined by the exclusions of Article I, § 10, supplies the Constitution's definition of "foreign affairs." Whether the powers to regulate foreign commerce and conduct foreign affairs were delegated exclusively to the federal government, or left to the concurrent jurisdiction of federal and state governments, is a question not immediately answered by the Constitution's express terms. For guidance we first turn to *The Federalist*, "usually regarded as indicative of the original understanding of the Constitution." *Printz* v. *United States*, 117 S. Ct. 2365, 2372 (1997).

Beginning in *Federalist* No. 41, James Madison explained "the sum or quantity of power which [the Constitution] vests in the Government, including the restraints imposed on the States." THE FEDERALIST NO. 41, at 268 (Jacob E. Cooke ed., 1961).[3] He classified delegations of federal power into six categories, only two of which need concern us here.

Madison then discussed the second category of federal powers, "which regulate the intercourse with foreign nations." THE FEDERALIST NO. 42, at 279. Under this heading, Madison included the power "to make treaties; to send and receive Ambassadors, other public Ministers and Consuls; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to regulate foreign commerce . . . ." *Id.* Once again, Madison considered these powers to lie within the exclusive province of the federal government. "This class of

[3] Subsequent citations to the *Federalist* are to the Jacob Cooke edition.

powers forms an obvious and essential branch of the fœderal administration. *If we are to be one nation in any respect, it clearly ought to be in respect to other nations.*" *Id.* (emphasis added). Granting the federal government sole authority to define "offences against the law of nations," *id.*, plainly improved on the Articles of Confederation, which, as Madison pointed out, "leave it in the power of any indiscreet member to embroil the confederacy with foreign nations." *Id.* at 280-81. As for the power to regulate foreign commerce, Madison deferred to Alexander Hamilton's discussion in *Federalist* 22. *See id.* at 281 & n.*.

There Hamilton explained why the power to regulate foreign commerce "strongly demands a Fœderal superintendence." THE FEDERALIST NO. 22, at 136. In justifying Congress' power to regulate foreign commerce, Hamilton naturally cited the risks to which the weakness of the Articles of Confederation had exposed America.

> No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, by which they conceded privileges of any importance to them, while they were apprised that the engagements on the part of the Union, might at any moment be violated by its members; and while they found from experience that they might enjoy every advantage they desired in our markets, without granting us any return, but such as their momentary convenience might suggest.

Id. Referring to efforts by several states to regulate commerce with Great Britain, Hamilton noted that "the want of concert, arising from the want of a general authority, and from clashing, and dissimilar views in the States has hitherto frustrated every

experiment of the kind; and will continue to do so as long as the same obstacles to an uniformity of measures continue to exist." *Id.* at 137.

Returning to Madison's analysis of federal power, he fixed the line running between state and federal power at the following point:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce . . . ."

THE FEDERALIST NO. 45, at 313. Madison evidently classified "war, peace, negociation, and foreign commerce" as "external objects," *id.*, which the Constitution delegated to the federal government.

Alongside the *Federalist*, perhaps "the most widely held 'original understanding' of the nature of the Constitution" was expressed by Justice Joseph Story in his *Commentaries*. *See* Ronald D. Rotunda & John E. Nowak, *Introduction*, Story at xxi. Echoing Madison's concerns that a single state might imperil the entire union if left free to dabble in foreign affairs, Story found, too, that the Constitution left no such authority for the states.

> The security (as has been justly observed) of the whole Union ought not to be suffered to depend upon the petulance or precipitation of a single state. The constitution has wisely both in peace and war, confided the whole subject to the general government. Uniformity is thus secured in all operations, which relate to foreign powers; and an immediate responsibility to the nation on the part of those, for whose conduct the nation is itself responsible.

Id. at 490.

With the harsh experience of foreign policy crises under the Articles of Confederation a comparatively recent memory, it is perhaps not surprising to find that Madison, Hamilton, and Story, and other Framers, whatever their other differences, agreed that the Constitution gave the federal government preeminent constitutional authority to conduct foreign affairs and regulate foreign commerce. Nor should it come as a surprise to learn that this Court has repeatedly affirmed the same constitutional interpretation in a line of decisions stretching back to the first half of the nineteenth century.

C. This Court's Decisions Repeatedly Emphasize that the Federal Government Has Paramount Authority to Conduct Foreign Affairs and Regulate Foreign Commerce

"That the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution, was pointed out by authors of The Federalist in 1787, and has since been given continuous recognition by this Court." *Hines* v. *Davidowitz*, 312 U.S. 52, 62 (1941). In *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540 (1840), the Court addressed whether a state may constitutionally extradite a fugitive from a foreign country. The Court could not reach the merits of that question, because the absence of Justice McKinley left it evenly divided. *See id.* at vii. Nonetheless, Justice Taney, in an opinion joined by Justice Story among others, declared his belief that the foreign affairs power resides exclusively in the federal government: "It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation . . . ." *Id.* at 575.

In this century the Court has reaffirmed this understanding. Justice Sutherland, in an opinion for the Court in *United States* v. *Belmont*, 301 U.S. 324 (1937), stated it in unmistakable terms. "Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government." *Id.* at 330.

In *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), the Court struck down a Pennsylvania statute governing alien registration. The Court explained:

> The Federal Government, representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. "For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.

Id. at 63 (quoting The Chinese Exclusion Case, 130 U.S. 581, 606 (1889)).

In *United States* v. *Pink*, 315 U.S. 203 (1942), the Court held that state and local policies which conflicted with the United States' recognition of Soviet Russia must yield to the federal government's supreme power in the conduct of foreign affairs. Again, the Court explained:

> If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power.

Id. at 232.

And in 1968, the Court struck down an Oregon statute that purported to establish conditions under which non-resident aliens could take property through probate, holding that the statute unconstitutionally intruded on the federal power over foreign affairs. *Zschernig* v. *Miller*, 389 U.S. 429 (1968). There the Court plainly stated that "state involvement in foreign affairs and international relations," *id.* at 436, was impermissible because they are "matters which the Constitution entrusts solely to the Federal Government." *Id.* The Court perceived, as the Framers did, "the dangers which are involved if each State . . . is permitted to establish its own foreign policy." *Id.* at 441.

During the Bicentennial, when so much attention was focused on the Nation's birth, this Court had occasion to recall the enduring reasons for granting the federal government authority to set uniform nationwide standards for foreign trade. In *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), the Court noted that the Import-Export Clause, U.S. CONST. art. I, § 10, cl. 2, answered the Framers' concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." 423 U.S. at 285. To describe Congress's power to regulate foreign commerce the Court has used such all-encompassing adjectives as "exclusive," "absolute," and "complete." *Buttfield* v. *Stranahan*, 192 U.S. 470, 493 (1904).

Thus constitutional history and text, as well as this Court's decisions, establish that the areas of foreign affairs and foreign commerce have been long reserved to the federal government. The same considerations also yield several reasons not to indulge the usual presumption against preemption in this case.

D. The Presumption Against Preemption Should Not Be Indulged In this Case, Because Washington's BAP Regulations Occupy Areas Traditionally Reserved to the Federal Government

At least as applied to state regulations governing flag vessels from foreign countries and to vessels engaged in international shipping, the presumption against preemption stands on an extraordinarily rickety foundation. To begin with, this Court has never applied that presumption when a preemption claim pits a state law against federal law and international agreements. *See* Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part I)*, 29 J. MAR. L. & COM. 335, 387 (1998). The reasons not to indulge that preemption for the first time in this case are clear.

First, consider how the presumption is usually expressed. The Court presumes that "historic police powers of the States were not to be superseded by . . . Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Regulations governing work hours, training, language, and drug testing for the crew and operations of oil tankers do not fall within the "*historic* police powers of the

States." *Id.* (emphasis added). States are relative newcomers to the field of maritime vessel safety regulation, having entered it to fill real or perceived lacunae in federal law. *See Kelly* v. *Washington*, 302 U.S. 1, 13 (1937) ("state law touches that which the federal laws and regulations have left untouched"). In contrast, the federal government has regulated foreign commerce and navigation from the beginning. "[A]s the very first order of business after organizing the House [of Representives], STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 65 (1993), James Madison proposed the adoption of an impost on imported goods. *See id.* And navigation laws figured among the business of Congress during its first session. *See, e.g.*, Act of Sept. 1, 1789, ch. 11, 1 Stat. 55, *amended by* Act of Dec. 31, 1792, ch. 1, 1 Stat. 287 (codified as amended at 46 U.S.C. § 11).

Second, a presumption against preemption is especially inappropriate here, because the BAP regulations at issue cover matters of national and international significance. "[T]he Court will generally uphold state legislation if the state was exercising its inherent police power over a subject matter that is 'maritime but local;' that is, over a matter that does not require a uniform national rule, but rather is better suited to multiple rules adapted to local necessities." Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part I)*, 29 J. MAR. L. & COM. 335, 379-80 (1998). On the other hand, a law "must of necessity be national in its character" when it affects "a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected." *Henderson* v. *Mayor of New York*, 92 U.S. 259, 273 (1876). The BAP regulations fall into the latter category.

This Court has made it clear that when a state law "affects international relations . . . [a]ny concurrent state power that may exist is restricted to its narrowest limits." *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941). Perhaps this is because the federal government possesses greater authority to regulate foreign commerce than commerce among the states.

> Although the Constitution, Art I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater. Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction.

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434, 448 (1979) (footnotes omitted).

In general terms, maritime vessel regulations stand on a foundation of international agreements.

> The modern legal regime governing merchant vessel safety and pollution prevention is now dominated by international agreements. Exercising its foreign affairs powers, the United States has entered into a multitude of international conventions, treaties, and agreements which together establish the terms of foreign merchant vessel access to United States ports and waters and the construction, design, equipment, manning, and operational rules and standards with which those vessels must comply as a condition of entry. In most cases the international conventions also establish the safety and pollution prevention standards with which United States flag vessels must comply under domestic law and as a condition of entry into the ports or waters of other nations.

Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. MAR. L. & COM. 565, 565 (1998); *see also* Story at 617 (suggesting that the law governing civil liability for maritime shipping "has, or may have, an intimate relation to the rights and duties of foreigners in navigation and maritime commerce. It may materially affect our intercourse with foreign states; and raise many questions of international law, not merely touching private claims, but national sovereignty and national reciprocity."); S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.A.A.N. at 1341 (citing this Nation's "long history of preemption on maritime safety matters . . . founded on the need for uniformity applicable to vessels moving in interstate commerce.").

Washington's BAP regulations are not relegated to matters of local concern. They apply in all state waters. *See* WASH. ADMIN. CODE § 317-21-020, *reprinted in* Pet. App. 308a; 1991 Wash. Laws ch. 200 § 101(3)(c). For that reason alone Washington must admit that the regulations "are not based on the 'peculiarities of local waters,' but rather on the state's judgment regarding acceptable risk levels for all state waters." Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III)*, 30 J. MAR. L. & COM. 85, 127 (1999) (footnote omitted).

Third, to indulge the presumption against preemption in this case would ignore the substantial risks to the Nation if individual states are allowed to disrupt the uniform regulatory scheme governing oil tankers. When it comes to foreign commerce, the Court has acknowledged "the special need for federal uniformity." *Wardair Canada, Inc.* v. *Florida Dep't of Revenue*, 447 U.S. 1, 8 (1986). That uniformity,

along with its handmaiden, international reciprocity, has been established by congressional statute. *See, e.g.*, the Tank Vessel Act, ch. 729, 49 Stat. 1889; Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424; Act to Prevent Pollution from Ships, Pub. L. No. 96-478, 94 Stat. 2297; Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471; Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484; 46 U.S.C. § 3303(a) ("A foreign country is considered to have inspection laws and standards similar to those of the United States when it is a party to an International Convention for Safety of Life at Sea to which the United States is currently a party"); 46 U.S. § 3711 ("The Secretary may accept any part of a certificate, endorsement, or document issued by the government of a foreign country under a treaty, convention, or other international agreement to which the United States is a party, as a basis for issuing a [U.S.] certificate of compliance.").

Allowing individual states to disrupt this uniform regulatory scheme carries the risk that "a conflicting patchwork of national standards . . . would impede the free-flow of commerce." Letter from Douglas J. Bennett, Jr. (Asst. Sec'y for Cong. Affairs) to Cong. John Murphy (Chair, House Merchant Marine & Fisheries Comm.) (Sept. 13, 1977), *reprinted in* 1978 U.S.C.A.A.N. 3270, 3315.

Even more ominously, allowing Washington to enforce the BAP regulations challenged here carries "the threat . . . of offending our foreign trading partners and leading them to retaliate against the Nation as a whole." *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159, 194 (1983); *see also Hines* v. *Davidowitz*, 312 U.S. 52, 64 (1941) ("Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may

arise from real or imagined wrong to another's subjects, inflicted, or permitted, by a government."). Unfortunately, the first half of that threat has materialized: Washington's regulations have sparked two diplomatic protests. The first, signed by 13 European countries and the Commission of the European Community, complained that "[d]iffering regimes in different parts of the US would create uncertainty and confusion." Note Verbale from the Royal Danish Embassy to the U.S. Department of State 1 (June 14, 1996) (File No. 60 USA.1/4). They called on the United States "to pursue a regulatory regime, on a national basis, which is consistent with agreed international standards." *Id.* Canada has filed a similar protest. Letter from the Embassy of Canada to the U.S. Department of State 1 (May 7, 1997) (Note No. 0389). Yet despite the dangers posed by provoking an open rupture with the country's major trading partners, "nothing in the legislative record of the 1991 Washington tanker laws at issue . . . indicates that the state considered the possible foreign relations implications of its statutes." Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III)*, 30 J. MAR. L. & COM. 85, 89 n. 737 (1999).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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