Nos. 98-1701 and 98-1706

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether regulations adopted by the State of Washington governing staffing and operation of ocean-going oil tankers engaged in coastal and international commerce are pre-empted to the extent that they conflict with international obligations of the United States and Coast Guard regulations for such tankers promulgated pursuant to federal statutes and international conventions and agreements, and interfere with the accomplishment of federal objectives concerning tanker safety.

PARTIES TO THE PROCEEDING

The petitioner in this proceeding is the United States of America, which intervened in the case below. The case was originally brought by the International Association of Independent Tanker Owners (Intertanko) against various Washington State officials responsible for the promulgation and enforcement of the Washington regulations at issue here. Those officials are: Gary Locke, Governor of the State of Washington; Christine O. Gregoire, Attorney General of the State of Washington; Barbara J. Herman, Administrator of the State of Washington, Office of Marine Safety, was succeeded by Tom Fitzsimmons, Director, Washington State Department of Ecology, when the Office of Marine Safety was merged into the Department of Ecology; David MacEachern, Prosecutor of Whatcom County; K. Carl Long, Prosecutor of Skagit County; James H. Krider, Prosecutor of Snohomish County; and Norman Maleng, Prosecutor of King County. The Natural Resources Defense Council, Washington Environmental Council, and Ocean Advocates intervened in the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 148 F.3d 1053. The court's order denying rehearing (Pet. App. 36a-54a) is reported at 159 F.3d 1220. The opinion of the district court (Pet. App. 55a-89a) is reported at 947 F. Supp. 1484.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1998. A petition for rehearing was denied on November 24, 1998. On February 12, 1999, Justice O'Connor extended the time in which to file a petition for a writ of certiorari to and including March 24, 1999, and, on March 15, 1999, further extended the time in which to file to and including April 23, 1999. The petition was filed on April 23, 1999, and granted on September 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the United States Constitution, Ports and Waterways Safety Act of 1972, Port and Tanker Safety Act of 1978, Oil Pollution Act of 1990, Coast Guard regulations, and Washington state regulations are set forth in the Petition Appendix, at 90a-117a. A compendium of pertinent statutes, treaties, and regulations has been lodged with the Clerk of this Court and served on the parties.

STATEMENT

This case concerns the validity of a regulatory scheme adopted by the State of Washington that seeks to govern the design, equipping, staffing, personnel qualifications, and operation of oil tankers engaged in interstate and international commerce. The Washington regulations, which apply to all ships (including foreign-flag vessels) that transport oil through United States territorial waters within the State of Washington, differ in numerous respects from the comprehensive national and international standards developed for the same purpose. Those standards exist in international conventions formally ratified by the United States, other agreements with foreign nations, various Acts of Congress, and implementing regulations promulgated by the Secretary of Transportation through the Coast Guard. The federal framework of tanker regulation was previously considered by this Court in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), although the particulars of that framework have been modified and strengthened in a number of respects during the intervening 21 years.

1. a. The United States, through the Coast Guard and other federal agencies (such as the Departments of State and Defense, the Environmental Protection Agency, and the National Oceanic and Atmospheric Administration), is a leader in the development of international standards establishing

uniform requirements for oil tankers, as well as other vessels. Those standards serve to promote vessel safety, protect the marine environment, and facilitate international maritime commerce. See S. Treaty Doc. No. 39, 103d Cong., 2d Sess., at III (1994) ("The United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea."). The international regime, embodied in numerous agreements ratified by the United States, depends upon the principle of reciprocity: all parties are assured of a ship's compliance with international standards through the certification of the ship by the government of its own flag nation, and that certification is then respected by the other parties, including the United States, to permit vessels with certificates to enter the ports of parties and thus to allow for the uninterrupted flow of international maritime traffic.[1]

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[1] See International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), July 7, 1978, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996) (entered into force Apr. 28, 1984), as amended by the Seafarers' Training, Certification and Watchkeeping (STCW) Code, July 7, 1995, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996), which is implemented domestically by the Coast Guard pursuant to 46 U.S.C. 2101 *et seq.*; International Convention for the Safety of Life at Sea (SOLAS Convention), Nov. 1, 1974, 32 U.S.T. 47 (entered into force May 25, 1980), as amended, and the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, Feb. 17, 1978, 32 U.S.T. 5577, as amended through July 1, 1997, Int'l Maritime Org., Doc. Sales No. IMO-110E (1997), which is implemented by the Coast Guard pursuant to Executive Order No. 12,234, 3 C.F.R. 277 (1981); International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), Nov. 4, 1993, Res. A.741(18), Int'l Maritime Org., Doc. Sales No. IMO-186E (1994); see also Resolutions of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, May 24, 1994, Int'l Maritime Org., Doc. Sales No. IMO-110E (1997) (entered into force July 1, 1998) (making ISM Code

Over the years, Congress has enacted a series of statutes that provide for the establishment of federal standards in a wide range of subjects affecting shipping in waters subject to United States jurisdiction. Although those statutes adopt standards to govern maritime commerce among the States, they also furnish a means to implement the United States' treaty obligations, codify in domestic law the international system of tanker regulation, and confirm the United States' leadership in developing international rules for tanker safety. See, *e.g.*, H.R. Rep. No. 1384, 95th Cong., 2d Sess. Pt. 1, at 6-9 (1978). Many of the statutory provisions in turn direct the Secretary of Transportation (who has delegated that authority to the Coast Guard, 49 C.F.R. 1.46(b) and (c)), to establish the applicable standards.

The pertinent statutory provisions are codified in two different Titles of the United States Code. Title 46 of the Code establishes a comprehensive regulatory framework for ships

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mandatory), and Guidelines on Implementation of the International Safety Management Code by Administrators, Nov. 23, 1995, Res. A.788(19), Int'l Maritime Org., Doc. Sales No. IMO-117E (1995) (to assist in uniform implementation by administrators), acceded to by the United States in 1995, and implemented by the Coast Guard pursuant to 46 U.S.C. 3201-3205 (Supp. II 1996); International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997), as amended by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978 (MARPOL 73/78), Int'l Maritime Org., Doc. Sales No. IMO-520E (1997), implemented by the Coast Guard pursuant to 33 U.S.C. 1901-1915 (1994 & Supp. III 1997); Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (CVTMS Agreement), Dec. 19, 1979, U.S.-Can., 32 U.S.T. 377 (entered into force Dec. 19, 1979); United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, U.N. Div. for Ocean Affairs & Law of the Sea Office of Legal Affairs, U.N. Sales No. E.97.v.10 (1997), which has not yet been ratified by the United States, but which, pursuant to the President's Ocean Policy Statement, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983), is recognized by the United States to reflect customary international law to which the United States adheres.

in the navigable waters of the United States, addressing such subjects as "Inspection and Regulation of Vessels" (Pt. B, 46 U.S.C. 3101 *et seq.*), "Marine Casualties" (Pt. D, 46 U.S.C. 6101 *et seq.*), "Merchant Seamen Licenses, Certificates, and Documents" (Pt. E, 46 U.S.C. 7101 *et seq.*), and "Manning of Vessels" (Pt. F, 46 U.S.C. 8101 *et seq.*).[2] Chapter 37 of Title 46 contains a recodification of Title II of the Ports and Waterways Safety Act of 1972 (PWSA), Pub. L. No. 92-340, 86 Stat. 427,[3] as amended by the Port and Tanker Safety Act of 1978 (PTSA), Pub. L. No. 95-474, § 5, 92 Stat. 1480, and subsequent Acts of Congress. Section 3703(a) of Title 46 provides that "[t]he Secretary shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tank vessels "that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." See generally 46 U.S.C. 3703(a)(1)-(7). In developing those standards, the Secretary must consult with and consider the views of, *inter alia*, interested federal agencies, "officials of State and local governments," and "representatives of environmental groups." 46 U.S.C. 3703(c). A tank vessel of the United States must have a certificate of inspection issued by the Secretary endorsed to indicate that the vessel complies with the regulations issued under Chapter 37. See 46 U.S.C. 3710(a). Consistent with the role those regulations play in implementing the international regime, however, Congress has provided that, with respect to foreign-flag tank vessels, the Secretary may accept a certificate

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[2] The prior Title 46 was reorganized and enacted into positive law in 1983 by Public Law No. 98-89, § 1, 97 Stat. 500.

[3] Title II of the Ports and Waterways Safety Act of 1972 was in turn a revision of the Tank Vessel Act of 1936, ch. 729, 49 Stat. 1889, which was the first comprehensive federal law specifically regulating tank vessels. See pp. 25-26, *infra*.

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 certificate of compliance with federal standards. 46 U.S.C. 3711(a).

The other set of statutory provisions primarily relevant to this case is in Title 33 of the United States Code (entitled "Navigation and Navigable Waters"), in its Chapter 25, 33 U.S.C. 1221 *et seq.* (entitled "Ports and Waterways Safety Program"). That Chapter contains Title I of the PWSA, 86 Stat. 424, as amended by the PTSA, § 2, 92 Stat. 1471, and subsequent Acts of Congress. Section 1223 of Title 33 provides that the Secretary (1) "may construct, operate, maintain, improve, or expand vessel traffic services"; (2) "shall require" appropriate vessels to comply with any such service; (3) "may require vessels to install and utilize" navigation and other equipment that is "necessary to comply with a vessel traffic service"; (4) "may control vessel traffic in areas subject to the jurisdiction of the United States which the Secretary determines to be hazardous," by specifying times of entry or departure, establishing vessel traffic routing schemes, establishing vessel size, speed, draft limitations and operating conditions, and restricting operations to vessels having certain operating capabilities; and (5) "may require the receipt of prearrival messages from any vessel" in sufficient time to permit advance traffic planning prior to port entry. 33 U.S.C. 1223(a)(1)-(5) (1994 & Supp. 1997).

Unlike 46 U.S.C. 3703(a), under which the Secretary "must issue" all regulations on the specified subjects under Title II of the PWSA that he deems necessary to ensure tank vessel safety and protect the marine environment, *Ray*, 435 U.S. at 165, Section 1223 of Title 33 "merely authorizes and does not require" the Secretary to issue regulations under Title I of the PWSA to govern traffic at local ports and related matters, *id.* at 171. In deciding whether to issue

regulations and what form they should take, the Secretary must "take into account all relevant factors concerning navigation and vessel safety and protection of the marine environment." 33 U.S.C. 1224(a). The procedures the Secretary must follow in issuing regulations are similar to those under 46 U.S.C. 3703 discussed above. See 33 U.S.C. 1231(b). The Secretary is authorized to bar from operation on the navigable waters or in any port of the United States any vessel that fails to comply with regulations under those provisions, under Chapter 37 of Title 46, "or under any other applicable law or treaty." 33 U.S.C. 1228(a)(2).

b. Because the United States is a "flag state" (meaning that it is responsible for developing standards and regulations for ships flying the U.S. flag), a "port state" (meaning that U.S. ports receive cargo, and oil in particular, arriving on foreign-flag vessels), and a "coastal state" (meaning that foreign flag vessels navigate through U.S. coastal waters without entering its ports), the United States has a substantial interest in ensuring that all vessels that transit its waters, particularly foreign-flag vessels, comply with comprehensive safety and environmental protection standards.

For example, the International Convention for the Safety of Life at Sea (SOLAS), to which the United States became a party on November 1, 1974, 32 U.S.T. 47, sets standards to promote safe operations of vessels at sea. The SOLAS Convention establishes that every ship, when in a port of another signatory nation, is "subject to control by officers duly authorized by [the port nation] Government in so far as this control is directed towards verifying that the certificates issued under [the Convention] are valid." Annex, Ch. I, Pt. B, Reg. 19(a), Int'l Maritime Org., Doc. Sales No. IMO-110E (1997). But the SOLAS Convention, like other conventions at issue in this case (see note 5, *infra*), requires port nations to accept valid certificates (issued by the flag nation government) unless there are clear grounds for believing that the

condition of the ship or its equipment does not correspond substantially with the conditions for which the certificate was issued. *Id.* Reg. 19(b). If control is improperly exercised and a ship is unduly detained or delayed, the port nation government is responsible for compensation for any loss or damage suffered by the ship. *Id.* Reg. 19(f). Chapter I of the SOLAS Convention provides that foreign ships are subject to control only by officers duly authorized by the national government that is the signatory to the Convention. Pursuant to Executive Order No. 12,234 (see 3 C.F.R. 277 (1981)), which implements the SOLAS Convention, and the Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, § 602, 110 Stat. 3927, Coast Guard personnel are the duly authorized officers who may subject foreign vessels to control in United States ports under that Convention. See also 33 U.S.C. 1903(a), 1904 (1994 & Supp. III 1997) (same for MARPOL); 46 U.S.C. 3205 (Supp. III 1997) (ISM Code), 8304 (same for STCW through Officers' Competency Certificates Convention). Officials of Washington and other States are not. By June 1999, 139 nations, representing more than 98% of the world's shipping, had become parties to SOLAS. See IMO Treaty Ratification Tabulation table at <http://www.imo.org/imo/convent/summary.htm>.

The United States also has ratified the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) and all four of the MARPOL Annexes currently in force, and has implemented their provisions through, *inter alia*, the statutory provisions discussed above (see pp. 5-7, *supra*) and regulations issued under them.[4] More than 90 countries, representing more than three-quarters of world shipping, are parties to the four MARPOL

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[4] The Senate gave its advice and consent to the ratification of MARPOL on July 2, 1980, 126 Cong. Rec. 18,486-18,492, and it was implemented on October 21, 1980, by Pub. L. No. 96-478, 94 Stat. 2297.

annexes that are in force. See IMO Treaty Ratification Tabulation table, *supra*. The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), which promotes the safety of life at sea and the protection of the marine environment by establishing common rules for the training, certification, and watchkeeping for seafarers, is in force for 133 nations representing more than 98% of world shipping. *Ibid.* The United States became a party to the STCW Convention in 1991 (137 Cong. Rec. S5731 (daily ed. May 14, 1991); U.S. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1999*, at 417 (1999)), and has accepted the 1995 amendments to that Convention (*Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions as at 31 December 1998*, Int'l Maritime Org., Doc. Sales No. J/7031, at 287-288; 62 Fed. Reg. 34,506 (1997)).[5] International agreements and the federal statutory and regulatory framework with which they are integrated thus provide for a broad range of standards governing vessels, including design, equipment, construction, manning, personnel qualification, safety management, and operations.

c. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court addressed whether Washington State regulations applicable to tankers were preempted by various provisions

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[5] The requirements of certification and reciprocity also apply in the context of rules established pursuant to other international agreements. See STCW Convention, Arts. VI (certificates), X (control); MARPOL 73/78, Arts. 5-7; *id.* Annex I, Ch. 1, Regs. 5 (issue of certificates), 7 (form of certificate), 8A (port state control on operational requirements); SOLAS Convention, Annex, Ch. I, Pt. B; *id.* Ch. IX, Regs. 4 (certification), 6 (verification and control); *id.* Ch. XI, Reg. 4 (port state control on operational requirements).

of federal law, specifically including Title II of the PWSA and regulations issued under Title I of that Act, both of which are applicable in this case as well. In holding that the State's attempts to regulate the design and construction of oil tankers were preempted, the Court concluded that, in Title II of the PWSA, 46 U.S.C. 391a (Supp. V 1975) (now codified as amended at 46 U.S.C. 3701 *et seq.*), Congress "has entrusted to the Secretary [of Transportation] the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States," and thereby "intended uniform standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements." 435 U.S. at 163. The Court further noted that "Congress expressed a preference for international action and expressly anticipated that foreign vessels would or could be considered sufficiently safe for certification by the Secretary if they satisfied the requirements arrived at by treaty or convention." *Id.* at 168.

With respect to operations in local waters, however, the Court concluded that Washington's regulations were not automatically preempted by Title I of the PWSA, 33 U.S.C. 1221-1227 (Supp. V 1975), in the absence of regulations issued under that Title addressing the same subject matter. 435 U.S. at 171. The Court emphasized, however, that if the Coast Guard adopts regulatory requirements governing a particular subject (or concludes that no such requirements should be adopted at all), the state rules would be preempted. *Id.* at 171-172; see *id.* at 173-178 (invalidating Washington statute excluding from Puget Sound all tankers in excess of 125,000 deadweight tons because it differed from a Coast Guard rule). The Court explained that, under Title I of the PWSA, Congress desired that a federal official with an overview of all possible ramifications would promulgate

regulations after "balancing all of the competing interests." *Id.* at 177.

d. After the *Exxon Valdez* oil spill in Alaska in 1989, Congress enacted the Oil Pollution Act of 1990 (OPA), Pub. L. No. 101-380, 104 Stat. 484. Title I of OPA sets federal standards for liability and compensation for the discharge of oil into navigable waters of the United States. 104 Stat. 486-508. Subtitle A of Title IV of OPA—which concerns oil-spill prevention—addresses certain discrete issues relating to tanker personnel qualifications, manning, operations, design, and construction, and it does so in part by strengthening (or directing the exercise of) certain powers the Secretary already had under prior law. See 104 Stat. 509-523. With one exception, Subtitle A of OPA is consistent with international standards. See n.19, *infra.*

e. In 1994, pursuant to Washington Revised Code Chapter 88.46, Washington adopted a set of new regulatory requirements, which it called "Best Achievable Protection" (BAP) Regulations. See Wash. Admin. Code §§ 317-21-020 *et seq.* (1996). Those rules were designed to impose more stringent safety requirements on tankers, and thereby prevent oil spills. In pertinent part, the state rules require installation of specified navigational and emergency towing equipment; impose reporting requirements for certain vessel casualties regardless of whether they occur in Washington waters; mandate particular language-proficiency requirements and personnel qualifications for vessel officers and crews; establish maximum crew work hours; set drug-testing policies; and impose position- monitoring requirements. See Pet. App. 57a-60a (describing the provisions). Washington's regulations differ from the international and federal regulatory regime in numerous ways. See pp. 33-41, *infra.* Failure to comply with the Washington BAP rules subjects a violator to statutory penalties and a prohibition on

entry to port. Wash. Rev. Code §§ 88.46.070, 88.46.080, 88.46.090 (1996).

2. The International Association of Independent Tanker Owners (Intertanko) brought this suit for declaratory and injunctive relief against Washington state and local officials responsible for enforcing the BAP regulations. The district court granted Washington's motion for summary judgment and denied Intertanko's motion. Pet. App. 55a-89a. The district court recognized that "[a]lthough protection of the marine environment has historically been within the reach of the police powers of the state, shipping has traditionally been governed by federal law." *Id.* at 61a. The court also had "no doubt that the areas addressed by the Washington oil spill prevention rules, which generally cover tanker operations, personnel, management, technology, and information reporting, are also comprehensively regulated by federal statutes, regulations and treaty obligations." *Id.* at 69a. The court nevertheless sustained all of the Washington regulations.

The court relied principally on Section 1018(a) and (c) of OPA, which provides that "[n]othing in this Act" shall affect or preempt the authority of a State to impose "any additional liability or requirements with respect to * * * the discharge of oil or other pollution by oil within such State" or "additional liability or additional requirements * * * relating to the discharge, or substantial threat of a discharge, of oil." 33 U.S.C. 2718(a) and (c). The court concluded that, since Title IV of OPA contains some provisions addressing tanker operations, personnel management, technology, and information reporting, the effect of Section 1018 is that there is no preemption of any state laws that are inconsistent with

the federal regulatory regime, even though that regime rests on Acts of Congress other than OPA. Pet. App. 69a.[6]

3. The United States intervened after Intertanko appealed the district court's decision to the Ninth Circuit. The Ninth Circuit affirmed in part and reversed in part. Pet. App. 1a-35a. The court held that several Washington regulations requiring tank vessels to have certain navigation and towing equipment are preempted, *id.* at 26a-29a, but that state regulations imposing requirements with respect to staffing, personnel training, qualifications, and operation of tank vessels are not preempted, even where they depart from standards in international agreements and Coast Guard regulations, *id.* at 7a-25a.

Like the district court, the court of appeals relied primarily on Section 1018 of OPA. The court of appeals recognized that OPA is not the only federal statute that regulates tanker vessels, noting that the PWSA, the PTSA, and the Tank Vessel Act of 1936 do so as well. Pet. App. 11a. And the court of appeals rejected Washington's contention that Section 1018 of OPA, which provides that "this Act" shall not have preemptive effect, also applies to those other federal statutes. The court found that interpretation inconsistent with the "plain language" of Section 1018. *Ibid.* The court nevertheless held that the Washington regulations governing staffing, personnel training and qualifications, and operation of tank vessels are not preempted by Coast Guard regulations issued under those other federal statutes. *Id.* at 13a-19a. The court reasoned that OPA, "[a]s the most recent federal statute in the field, * * * reflects the full purposes and objectives of Congress better than [the other statutes

[6] The district court also rejected Intertanko's contention that the Washington regulatory program violates the Commerce Clause and the foreign affairs powers of the United States Government. Pet. App. 81a-86a. The court of appeals likewise rejected those contentions. *Id.* at 32a-35a.

governing tankers], all of which [OPA] was designed to complement." *Id.* at 16a (internal quotation marks, citation, and emphasis omitted).

The court of appeals also rejected petitioners' contention that the challenged state rules are invalid because they conflict with various international agreements governing tankers. The court found that Congress had not embraced strict international uniformity because the relevant treaties set only minimum standards, and each signatory nation can impose higher standards. Pet. App. 17a-18a. Finally, the court of appeals concluded that Coast Guard tanker regulations do not preempt Washington's BAP rules even where the Coast Guard has expressed an intent to preempt such rules. *Id.* at 29a-32a. The court held that "Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law." *Id.* at 31a. The court again relied on Section 1018 of OPA, reasoning that in view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own in OPA, it was "implausible" to conclude that Congress intended to delegate power to the Coast Guard to do so. *Id.* at 31a-32a.

4. The court denied petitions for rehearing filed by the United States and by Intertanko. Pet. App. 36a-37a. Judge Graber dissented. *Id.* at 37a-54a. In her view, the court's reliance on Section 1018 of the OPA was misplaced, because that Section is limited to liability and compensation for oil spills, and does not apply to preventive measures. *Id.* at 51a.

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[7] The Ninth Circuit did not reach two other bases raised by the United States for challenging the Washington regulations: their interference with innocent passage rights, and their conflict with a bilateral agreement between the United States and Canada concerning traffic in the Strait of Juan de Fuca. The court of appeals stated that those arguments had been raised for the first time on appeal, and the court declined to exercise its discretion to address them. Pet. App. 19a-20a; see notes 22 and 23, *infra*.

Judge Graber also concluded that the court had erred in holding that Congress must specifically have intended to give the Coast Guard power to preempt state regulatory schemes. *Id.* at 52a-54a.

SUMMARY OF ARGUMENT

Since ratification of the Constitution, the National Government has had paramount authority to regulate navigation of vessels in interstate and international commerce. The First Congress began the process of creating vessel rules, which has resulted in an ongoing, comprehensive network of federal standards governing the design and construction, alteration, repair, equipping, operation, personnel qualification, and manning of vessels, as well as the traffic rules they must follow when in United States waters. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court held that the Ports and Waterways Safety Act of 1972 (PWSA) may preempt state rules in two ways: state regulations that fall within the subjects of Title II of the PWSA are ousted by field preemption principles; and state regulations governing subjects addressed by Coast Guard standards promulgated under Title I of the PWSA (or subjects for which the Coast Guard has decided that there should be no standard at all) are preempted under conflict preemption principles. Since *Ray*, Congress has enacted the Port and Tanker Safety Act of 1978, which carries forward the preemptive scope of federal statutory law in a range of subjects pertaining to vessels, and the United States has become a party to numerous international codes and conventions that provide for detailed regulation of vessels. In this case, examples of Washington BAP rules that are preempted under either field or conflict preemption principles include state rules imposing standards for drug and alcohol testing, crew training, management policies and practices, operational procedures for restricted visibility, advance notice of entry, event reporting of marine

casualties, emergency procedures, and pre-arrival operating procedures.

Under a proper analysis, a court would examine the State's regime on a regulation-by-regulation basis to determine whether the rule (1) encroached on a field occupied by federal law, or (2) conflicted with an existing federal standard duly adopted pursuant to an Act of Congress, international agreement, or federal regulation. The Ninth Circuit did not conduct such an analysis, instead upholding all of the state rules still at issue in this litigation on the erroneous theory that Section 1018 of the Oil Pollution Act of 1990 was intended to divest the Coast Guard of its authority, confirmed in *Ray*, to promulgate preemptive regulations under *other* federal statutes. The court's reasoning, however, is inconsistent with the plain language of Section 1018 and the preemptive reach of federal law recognized in *Ray*. The Ninth Circuit's decision also undermines important principles of reciprocity in the many international agreements concerning vessels to which the United States is a party.

ARGUMENT

CERTAIN OF THE WASHINGTON STATE RULES REGULATING TANKERS ENGAGED IN INTERNATIONAL AND INTERSTATE TRADE ARE PREEMPTED BY INTERNATIONAL AGREEMENTS, FEDERAL STATUTES, AND FEDERAL REGULATIONS

Under this Court's settled preemption jurisprudence, state law is preempted "in three circumstances":

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. * * * Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy

> exclusively. * * * Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where 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 v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (citation omitted); see also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978).

This case raises the issue whether a complex regime of federal rules—embodied in international treaties and agreements, federal statutes, and federal regulations— preempts rules promulgated by the State of Washington concerning the international and interstate tanker industry. In *Ray*, the Court held that aspects of that regime preempt certain fields of tanker regulations, and it addressed the design and construction rules for such vessels involved in that case. 435 U.S. at 161-168. Other aspects of the federal regime, the Court held, preempt state law only if the Coast Guard has issued a regulation addressing the same subject or decided that no standard should be established at all. *Id.* at 171-172. In this case, the Ninth Circuit held that all but one of the challenged Washington rules are categorically *not* preempted—even where the subject matter is one that is subject to the same sort of uniform national regulation under Title II of the PWSA as were tanker design and construction in *Ray*, or where there is a Coast Guard regulation under Title I of the PWSA addressing the same subject. That ruling cannot be reconciled with the long history of paramount federal regulation of maritime commerce; with the comprehensive framework of federal treaties, statutes, and regulations that now govern that commerce; and with this Court's decision in *Ray*.

A. The National Government Historically Has Exercised The Preeminent And Preemptive Role In Regulating International And Interstate Shipping

1 The Framers of the Constitution recognized the need for the National Government to exercise paramount authority in regulating international and interstate navigation. Writing in Federalist No. 64, John Jay observed that "[t]here are few who will not admit that the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued; and that both our treaties and our laws should correspond with and be made to promote it." *The Federalist Papers* 392 (Clinton Rossiter ed., 1961). That statement reflected the disastrous experience under the Articles of Confederation, in which States could cause demonstrable harm to the country by individually abrogating treaties. Thus, as James Madison argued to the Constitutional Convention in favor of a strong national authority to conduct foreign relations:

> The tendency of the States to these violations [of treaties] has been manifested in sundry instances. The files of Cong[ress] contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This can not 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.

J. Madison, *Notes of Debates in the Federal Convention of 1787*, at 142 (Ohio Univ. Press ed. 1966). In Federalist No. 44, Madison similarly noted the danger of States being permitted to act independently on matters that interfere with the foreign relations of the Nation, "and hence the Union be

discredited and embroiled by the indiscretion of a single member." *The Federalist Papers*, *supra*, at 282. Accordingly, "[t]he restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils." *Id.* at 283. Those concerns were no less present if States had the power to exercise "arbitrary and vexatious powers" over interstate navigation, a result Alexander Hamilton described as "intolerable in a free country." Federalist No. 12, *id.* at 94.

2. Beginning with the First Congress in 1789, Congress has enacted legislation to set federal vessel standards. The first such law established a scheme of federal registration, with the holder of a vessel certificate being "entitled to the benefits granted by any law of the United States, to ships or vessels of the descriptions aforesaid." Act of Sept. 1, 1789, ch. 11, § 1, 1 Stat. 55. Soon thereafter, Congress imposed more stringent conditions on the requirements a vessel must meet to obtain a federal license. See Act of Dec. 31, 1792, ch. 1, 1 Stat. 287; Act of Feb. 18, 1793, ch. 8, 1 Stat. 305. The advent of steamships brought an extension of the federal licensing requirement for such vessels, Act of Mar. 12, 1812, ch. 40, 2 Stat. 694; Act of Mar. 3, 1825, ch. 99, 4 Stat. 129, as well as increasing concerns for the safety of passengers and crew members, which Congress perceived required further federal regulation, see Act of July 7, 1838, ch. 191, 5 Stat. 304. The 1838 Act authorized federal inspectors to assess the seaworthiness of the hull and the workability of the boiler and other machinery on steam vessels, and to confer a license only on those vessels that met the requisite standards. §§ 4, 5, 5 Stat. 305; see also Act of June 28, 1838, ch. 147, 5 Stat. 252.

In 1843, Congress imposed further equipment standards on federally-licensed steamboats by requiring that inspectors be assured that the vessel contained appropriate steer-

ing mechanisms. Act of Mar. 3, 1843, ch. 94, 5 Stat. 626. Six years later, Congress imposed operational rules for vessels navigating the "northern and western lakes." Act of Mar. 3, 1849, ch. 105, § 5, 9 Stat. 382. In 1852, Congress mandated additional requirements for safety equipment and special licenses for carrying dangerous articles. Act of Aug. 30, 1852, ch. 106, 10 Stat. 61. Congress also required that the master and engineer be specially licensed by a federal inspector, who would attest that the person "possess[ed] the requisite skill, and is trustworthy and faithful" to assure safe operation of the vessel. § 9, 10 Stat. 67.

In 1871, Congress enacted a significant overhaul of the regulatory regime governing steam-powered vessels, adding provisions for watchmen, other safety equipment, vessel design standards, inspection and testing of equipment, and licensing of captains, chief mates, engineers, and pilots. Act of Feb. 28, 1871, ch. 100, 16 Stat. 440. That Act further provided that the Department of the Treasury, which had supervisory authority over federal vessel inspectors, "shall * * * establish such rules and regulations as may be necessary" to provide adequate and current information about which persons, vessels, ship-builders, and equipment had satisfied the requisites of the statute, and such "rules and regulations to be observed by all steam-vessels in passing each other as they shall from time to time deem necessary for saf[e]ty." §§ 28, 29, 16 Stat. 449-450. Thus, by the time Congress enacted the Revised Statutes in 1873-1874, thereby placing in one central place the various laws pertaining to vessels, federal law contained extensive requirements for vessel and crew licensing, inspection, and certification of design, construction, and equipment. See Rev. Stat., Tit. 52 (1875). Those statutory requirements also included a broader mandate to the Treasury Department to "establish all necessary regulations required to carry out in the most effective manner the provisions of this Title, and such regu-

lations, when approved by the Secretary of the Treasury, shall have the force of law." Rev. Stat. § 4405 (1875).[8]

3. From an early date, this Court recognized the primacy of those federal laws over competing state standards. See, *e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, the Court held that a New York law purporting to confer an exclusive right to operate steamboats in New York waters was invalid to the extent that it precluded the holder of a federal license obtained under the 1793 statute from engaging in the commerce he was entitled to pursue under the federal statute. *Id.* at 212. The Court emphasized that, because those vessels were licensed under a federal statute, they had full authority to carry on their trade as conferred by Congress. *Id.* at 213 ("The grant of the privilege is an idle, empty form, conveying nothing, unless it convey[s] the right to which the privilege is attached, and in the exercise of which its whole value consists.").

In the decades after *Gibbons*, this Court found other state vessel requirements to be preempted by federal statutes governing vessel licensing, equipment standards, and operations. Thus, in *Sinnot* v. *Davenport*, 63 U.S. (22 How.) 227 (1859), the Court invalidated a state statute requiring the names of passengers to be recorded, holding that the federal license granted to the steamer contained "the only guards and restraints, which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade[.] * * * In every such case, the act of Congress or

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[8] As maritime commerce continued to increase, Congress imposed additional requirements, both for the design of vessels and how they must operate in United States navigable waters. See Act of June 7, 1897, ch. 4, 30 Stat. 96 (adopting rules to prevent collisions in certain harbors, rivers, and inland waters); Act of Feb. 17, 1898, ch. 26, 30 Stat. 248; Act of Mar. 23, 1898, ch. 86, 30 Stat. 340 (extending licensing requirements to second and third mates who have watch duties); Act of May 28, 1908, ch. 212, 35 Stat. 424 (miscellaneous amendments).

treaty is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Id.* at 241-243. See also *Foster* v. *Davenport*, 63 U.S. (22 How.) 244 (1859) (invalidating state lightering requirement). Using a similar rationale, this Court held that attempts by a State to require its own vessel license were also preempted by federal licensing statutes.[9]

In the absence of a federal statute on the subject, however, the Court upheld state exercises of police power over certain localized maritime matters against challenges brought under the Supremacy Clause. See, *e.g.*, *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 315 (1852) (1789 statute, now codified at 46 U.S.C. 8501 and 8503, found to permit States to impose requirement of local pilot in state waters); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 581 (1875) (upholding state maritime lien law "until Congress interposes, and thereby excludes further State legislation"); *Kelly* v. *Washington ex rel. Foss Co.*, 302 U.S. 1, 4 (1937) (no extant federal regulation of motor tugs).

Thus, by the time Congress enacted the Tank Vessel Act in 1936, 49 Stat. 1889, which ushered in a complex twentieth-century national and international regulatory regime specifically addressing oil tankers, the preemptive scope of federal law was clear: a federal license authorizing vessel operations

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[9] See *Moran* v. *New Orleans*, 112 U.S. 69, 75 (1884) (holding that a state law authorizing a city license fee "thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States"); *Harman* v. *Chicago*, 147 U.S. 396, 406-407 (1893) ("The requirement that every steam tug, barge or tow-boat towing vessels or craft for hire in the Chicago River or its branches shall have a license from the city of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city."); *White's Bank* v. *Smith*, 74 U.S. (7 Wall.) 646 (1869) (holding that state ship mortgage law was invalid under Supremacy Clause as in conflict with federal vessel statutes).

could not be interfered with, added to, or subtracted from, by state law, and federal laws and regulations governing vessels and their operations ousted competing state laws. Indeed, the Tank Vessel Act of 1936 was specifically intended to establish "a reasonable and *uniform* set of rules and regulations concerning ship construction, equipping, operation, and manning sufficient to ensure that vessels carrying the type of cargo deemed dangerous would meet all safety requirements plus such additional safeguards necessary to protect against the additional hazards created by the cargo and its handling." H.R. Rep. No. 2962, 74th Cong., 2d Sess. 2 (1936) (emphasis added) (quoted in part in *Ray*, 435 U.S. at 166). To that end, "[i]n order to secure effective provision against the hazards of life and property" created by tank vessels, the Tank Vessel Act authorized the promulgation of such additional federal rules and regulations as may be necessary with respect to such matters as the "design and construction, alteration, or repair of such vessels," "the operation of such vessels," and "the requirements of the manning of such vessels and the duties and qualifications of the officers and crews thereof." 49 Stat. 1889 (adding Rev. Stat. § 4417a(2), later codified at 46 U.S.C. 391a(2)).

B. Interstate And International Tanker Operations Are Subject To A Complex Regulatory Regime Of Preemptive Acts of Congress, International Agreements, And Federal Regulations

Against the foregoing historical background Congress enacted the Ports and Waterways Safety Act of 1972 (PWSA), 86 Stat. 424, and this Court decided *Ray* six years later. The Court in *Ray* construed Titles I and II of the PWSA to establish a set of principles for federal preemption of state rules with respect to a range of international vessel management requirements, undertaking a detailed, section-by-section analysis of each state provision to determine whether the particular state rule was preempted by a federal statute

or regulation addressing the same subject matter.[10] The question of preemption under the PWSA thus turns on an assessment of its distinctive titles.

1. *Under* Ray *v.* Atlantic Richfield Co., *Title II Of The Ports and Waterways Safety Act, And Coast Guard Regulations Issued Pursuant To Title I Of That Act, Preempt State Laws Governing Tank Vessels*

a. Title II of the PWSA revised and reenacted the Tank Vessel Act of 1936 and conferred on the Secretary of Transportation, through the Coast Guard, rulemaking authority virtually identical to that in the 1936 Act. See 46 U.S.C. 391a(2) (Supp. V 1975). That Title governs issues generally concerned with the vessel itself—its "design, construction, alteration, maintenance, operation, equipping, personnel qualification, and manning." 46 U.S.C. 3703(a). Under Title II, the Secretary "must issue" regulations addressing those subjects, *Ray*, 435 U.S. at 161, to the extent deemed "necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 46 U.S.C. 3703(a). Through such a comprehensive regulatory scheme, the Secretary, through the Coast Guard, can fashion a uniform national system of tanker regulation, not only to enhance navigation, safety, and environmental protection, but also to facilitate the free flow of interstate and foreign commerce, one of the central functions of the National Government under the Constitution. See pp. 18-19, *supra*; *Ray*, 435 U.S. at 165-

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[10] Specifically, *Ray* held that federal law preempted state vessel regulations that required a tanker enrolled strictly in coastal trade to have a local pilot aboard, 435 U.S. at 158; imposed requirements on the design and construction of tankers in addition to the federal standards required under Title II of the PWSA to obtain certificates of compliance issued by the Secretary of Transportation, *id.* at 160-163; and imposed operating rules that differed from regulations issued by the Secretary under Title I of the PWSA, *id.* at 171-178.

166. A uniform set of rules for the United States also enables this Nation to "speak with one voice" on those subjects in the international community, with a view toward encouraging nations generally to adopt a regime that fully promotes the interests in safety, navigation, and environmental protection throughout the world. *Id.* at 166. Under such a system, as a vessel moves from State to State and between the United States and foreign ports, there can be assurance that a single set of standards will attach to both the physical aspects of the vessel itself and the duties and qualifications of its officers and crew. For those reasons, Title II essentially provides for preemption of the field in the areas to which it is addressed.

That conclusion is confirmed by the disposition of the preemption issue in the portion of the Court's opinion in *Ray* discussing Title II of the PWSA. The plaintiff there challenged laws adopted by the State of Washington that prescribed construction and design standards. See 435 U.S. at 160. The Court found those state laws to be preempted, holding that "Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements," and that "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." *Id.* at 163-164. The Court noted that the Tank Vessel Act of 1936 was intended to effect "a reasonable and uniform set of rules" on that subject, *id.* at 166 (quoting H.R. Rep. No. 2962, *supra*, at 2), and that the amendments to that Act made by Title II of the PWSA indicated that "Congress anticipated the enforcement of federal standards that would pre-empt state

efforts to mandate different or higher design requirements," *ibid.*

Although the *Ray* opinion addresses the preemption issue under Title II of the PWSA in terms of tanker design and construction, it did so only because those were the subjects of the claim before the Court. The Court's reasoning extends to all subjects addressed by Title II, including vessel operations, personnel qualifications, and manning. That is evident from the text of 46 U.S.C. 3703(a), which furnishes no basis for distinguishing among the various aspects of tanker regulation on that score; the background of Title II in the Tank Vessel Act of 1936 and its emphasis on uniformity in areas beyond tanker design and construction; the mandatory nature of the Secretary's duty to issue regulations; the practical need for there to be a single set of rules on board the vessel as it moves from State to State and Nation to Nation; and the congressional purpose of promoting uniform international standards where appropriate, which cannot realistically be advanced if ships are not subject to uniform rules even within the United States. Thus, as we explain below (see pp. 33-41, *infra*), the BAP rules adopted by Washington State that address tank vessel staffing, personnel qualifications, operations, and other matters governed by Title II of the PWSA are necessarily preempted.

b. By contrast, Title I of the PWSA governs issues generally involved with "traffic control at local ports," 435 U.S. at 161, a subject that does not necessarily call for uniform national standards. And Title I confers on the Secretary permissive, not mandatory, authority to promulgate regulations, *id.* at 171, governing such matters of local traffic control as the times for vessel movement, size and speed limitations, conditions for local operations, and pre-arrival notification, *id.* at 169-170. See 33 U.S.C. 1223, 1224; pp. 6-7, *supra*. The *Ray* Court held that with respect to operating rules of the type routinely thought of as "arising from the peculiari-

ties of local waters that call for special precautionary measures" (*id.* at 171), "[t]he relevant [preemption] inquiry under Title I [of the PWSA] with respect to the State's power to impose [operating rules] 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." *Id.* at 171-172. In those circumstances, the state rule must give way. *Id.* at 172; see also *id.* at 173-178. Otherwise, Title I does not preempt state rules governing local vessel traffic. See *id.* at 171-173.

In reaching that conclusion, the Court relied in part on a provision of Title I of the PWSA, which states that nothing in that Title I is to "prevent a State or political subdivision thereof from prescribing *for structures only* higher safety equipment requirements or safety standards than those which may be prescribed pursuant to [Title I]." 33 U.S.C. 1222(b) (Supp. V 1975) (emphasis added). See 435 U.S. at 170, 171, 174. The Court reasoned that the authorization to impose higher safety standards "for structures only"—*i.e.*, for structures along the shore that might affect vessel traffic—"impliedly forbids higher state standards for vessels." *Id.* at 174. The Court found this implication to be "strongly supported by the legislative history of the PWSA": "The House Report explains that the original wording of the bill did 'not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field' and says that § 1222(b) was amended to provide 'a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated.'" *Ibid.* (quoting H.R. Rep. No. 563, 92d Cong., 1st Sess. 15 (1971)). See also 33 U.S.C. 1226(b) (current version of former Section 1222(b)). Accordingly, as we explain below (see pp. 33-41, *infra*), the BAP rules adopted by the State of Washington that address subject matters covered by Title I of the PWSA

are preempted if there is a Coast Guard regulation under Title I on the same subject.

c. On October 17, 1978, just seven months after this Court decided *Ray*, Congress enacted the PTSA, which revised and reenacted both Title I and Title II of the PWSA. See § 2, 92 Stat. 1471-1479 (Title I); § 5, 1480-1492 (Title II). Congress made no change of substance in the provisions of Title I and Title II that authorized the issuance of regulations, and upon which the Court relied in *Ray* to establish the framework for determining whether state laws regulating tank vessels are preempted. That subsequent enactment thus strongly supports adherence to the analytical framework of *Ray* in determining whether Washington's BAP rules are preempted. See *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 349-351 (1998); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

2. *International Treaties And Maritime Agreements Also Have Preemptive Force*

In addition to identifying the preemptive scope of the PWSA, the Court in *Ray* also noted that in passing that Act, "Congress expressed a preference for international action and expressly anticipated that foreign vessels would or could be considered sufficiently safe for certification by the Secretary if they satisfied the requirements arrived at by treaty or convention." 435 U.S. at 167-168. Thus, to the extent an international agreement creates a standard that is embodied in Coast Guard regulations or is formally recognized by the Coast Guard as applicable, that standard will also preempt a contrary state law.

Since *Ray* was decided, the United States has also become party to numerous international agreements regulating tankers that independently have preemptive power over state laws. An international treaty can have just as much preemptive force as a federal statute. See U.S. Const. Art. VI. This Court has recognized that, "[u]nder principles of

international law, the word ['treaty'] ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force." *Weinberger* v. *Rossi*, 456 U.S. 25, 29 & n.5 (1982) (citing Restatement of Foreign Relations, Pt. III, introd. note at 74 (Tent. Draft No. 1, 1980)). Under international law, an international treaty or agreement is binding on all political subdivisions of the ratifying nation, and a party would not be excused from compliance because of the actions of a political subdivision.[11]

Because international agreements reflect the intentions of nation-states, this Court has emphasized that any concurrent power held by States in fields that are the subject of international agreements is "restricted to the narrowest of limits." *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941). Thus, where the United States has exercised the authority of the Nation, a State "cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities." *Kolovrat* v. *Oregon*, 366 U.S. 187, 198 (1961). Accordingly, whether viewed through the lens of preemption by treaty or interference with the federal government's exclusive authority to conduct the foreign affairs of the United States, this Court has repeatedly struck down state laws that conflict with duly promulgated federal law touching on matters of international concern. See, *e.g.*, *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *United States* v. *Pink*, 315 U.S. 203, 232 (1942); *United States* v. *Belmont*, 301 U.S. 324, 327 (1937).

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[11] See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 27, 29, 1155 U.N.T.S. 331, 8 I.L.M. 679. Although the United States has not ratified the Vienna Convention, it is generally considered to be consistent with current treaty law and practice as recognized in the United States. See Restatement (Third) of the Law of Foreign Relations of the United States, Pt. III, introd. note at 144-145.

Those considerations have particular force in this case, because Congress has long recognized the importance of international rules in promoting safety and environmental protection in vessel operations. For example, although the Tank Vessel Act of 1936 contained a provision requiring vessels to carry a certificate of inspection evidencing compliance with the terms of the Act, it specifically provided that "the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States." 49 Stat. 1890. Congress included similar language in the PWSA, see § 201, 86 Stat. 429, 46 U.S.C. 391a(5) (Supp. V 1975), as amended by the PTSA, see § 5, 92 Stat. 1486-1487, 46 U.S.C. 3711.

As a result, under current law, a foreign vessel's compliance with international standards will satisfy domestic requirements for entering United States ports or waters. See, *e.g.*, 46 U.S.C. 3303 (Supp. III 1997) ("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 Government is currently a party."); 46 U.S.C. 3711(a) ("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."). The certification requirements imposed by international conventions and codes such as the STCW Convention, MARPOL, ISM Code, and SOLAS require extensive enforcement efforts by the Coast Guard. See note 5, *supra*; 33 C.F.R. 151.01 (MARPOL), 96.100 (ISM Code); 46 C.F.R. 10.101(a)(2), 12.01-1(a)(2), 15.101 (STCW), 199.01(b) (SOLAS). With regard to SOLAS, for example, Congress has specifically provided that a SOLAS certificate shall be

respected by the United States, see 46 U.S.C. 3303 (Supp. III 1997), and by executive order the President has directed the Coast Guard to enforce SOLAS, see Exec. Order No. 12,234, 3 C.F.R. 277 (1981). The various provisions of SOLAS, MARPOL, STCW, and the ISM Code must be taken into account, in conjunction with Coast Guard regulations that implement those agreements, to assess whether individual state rules are preempted.[12]

As the Court emphasized in *Ray*, "[t]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." 435 U.S. at 165. Congress no more intended to permit States to frustrate that federal purpose here, where the relevant certifications concern training, manning, and related policies, than it did in *Ray*, in which the Court specifically addressed design and construction standards. See *United States* v. *Belmont*, 301 U.S. at 331 ("In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.").

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[12] Congress has provided by statute that the ISM Code be enforced through applicable regulations, see 46 U.S.C. 3203(b) (Supp. III 1997). Similarly, the STCW Convention and its 1995 amendments have been implemented under United States law, see 137 Cong. Rec. S5731 (daily ed. May 14, 1991); 62 Fed. Reg. 34,506 (1997); 46 U.S.C. 3201 *et seq.*; as has MARPOL, see *Treaties in Force*, *supra*, at 407; *Status of Multilateral Conventions*, *supra*, at 280, 286; 126 Cong. Rec. 18,486-18,492 (1980). The STCW Convention is supplemented by an Annex and a Code that are integral parts of the Convention. See STCW Convention Art. I(1).

3. *Coast Guard Regulations Preempt Contrary State Rules*

This Court has "held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes." *Hillsborough County* v. *Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985). See also *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153-154 (1982); *California* v. *Zook*, 336 U.S. 725, 735-737 (1949). And, indeed, although "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law," *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 154, there is ample evidence from the PTSA and its predecessors that Congress intended the Coast Guard's rules to have primacy over conflicting state rules with respect to manning, training, and the other areas involved in this case, not merely with respect to construction and design.

First, "personnel qualification" and "manning" are specifically included in the list of subjects over which Title II of the PWSA has preempted the field. See 46 U.S.C. 3703(a). The PTSA further provides that the Secretary "shall issue regulations and procedures for the verification of manning, training, qualification, and watchkeeping standards promulgated by the certificating state of any foreign vessel which operates on or enters the navigable waters of the United States, and transfers oil or hazardous materials in any port or place under the jurisdiction of the United States." § 5, 92 Stat. 1488 (codified at 46 U.S.C. 9101(a)). The PTSA also confers authority on the Secretary to "modify any regulation or standard prescribed under this section to conform to the provisions of an international treaty, convention, agreement, or an amendment thereto, which is ratified by the United States," § 5, 92 Stat. 1489 (codified using slightly different language and merged into 46 U.S.C. 3703(a)), and to "withhold or revoke" clearance from the United States by any vessel that does not meet applicable standards, § 5, 92 Stat.

1489 (codified at 33 U.S.C. 1232(f) (Supp. III 1997)). Those provisions give ample authority to the Coast Guard to promulgate preemptive regulations implementing international agreements.

Second, Congress has long provided that, in promulgating regulations, the Coast Guard shall take into consideration the views of the States and port and harbor authorities. See 33 U.S.C. 1231(b)(2); 46 U.S.C. 3703(c)(2). Those provisions plainly do not contemplate that—after the Secretary has considered the States' views, taken international standards and other relevant factors into account, and elected to adopt uniform national standards on a particular subject—the States are then free to adopt divergent laws on the very same subject.

C. Certain Of The Washington Best Achievable Protection (BAP) Rules Are Preempted By Federal Law

The court of appeals found *none* of the state rules regarding staffing and operations preempted, without regard to whether they differed from federal regulations that were promulgated by the Coast Guard pursuant to statutory and international treaty authorities.[13] The result is to leave in place a number of Washington regulations that are inconsistent with federal law and specific international standards. Of the 15 BAP rules challenged in petitioner Intertanko's complaint, the vast majority should have been (but were not) held preempted by the court of appeals. The following examples are drawn for illustrative purposes, and are not intended to compose an exhaustive list of the Washington regulations that raise such concerns:

– *Drug and Alcohol Testing and Reporting*: The Washington regulations require extensive drug and alcohol testing

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[13] The only regulation held preempted by the court below concerned requirements for installation of particular equipment. See Pet. App. 26a-29a, 35a.

of all crew members on tankers, including foreign-flag vessels. Wash. Admin. Code § 317-21-235 (1999). Those regulations further mandate that the results of a positive drug test be reported to Washington within 72 hours of the confirmed test result. The state requirements appear to apply to a drug test conducted anywhere in the world for a vessel that weeks or months in the future might arrive in Washington waters. Washington's requirement of random testing of all crew members on all of the vessels operated by a carrier throughout the world creates a different rule from the Coast Guard's standards, which require post-accident and reasonable-cause testing requirements for foreign-flag vessels. See 46 C.F.R. 4.05-12; *id.*, Subpt. 4.06; *id.* Pt. 16; 33 C.F.R. 95.035.[14] Moreover, numerous foreign governments, including the Government of Canada, have informed the Coast Guard that their laws might not allow the testing of individuals in accordance with the Washington state requirements. See 59 Fed. Reg. 65,500-65,501 (1994); 57 Fed. Reg. 31,274 (1992); 56 Fed. Reg. 18,982 (1991); 53 Fed. Reg. 47,070-47,071 (1988). Indeed, even under United States law, the random testing of individuals is limited to those individuals aboard vessels who occupy safety-sensitive positions that are specifically identified in the regulations. 46 C.F.R. 16.230; see also 56 Fed. Reg. 31,030 (1991) (noting concerns based on

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[14] A comprehensive comparison of the state BAP rules to the federal and international standards is set forth in App., *infra*, at 1a-17a. Although the international regime generally authorizes the flag nation to determine that vessels are manned appropriately, crews are qualified, and vessels are seaworthy, the STCW Convention provides guidelines for the prevention of drug and alcohol abuse by recommending that administering parties develop national legislation prescribing a maximum 0.08% blood alcohol level during watchkeeping as a minimum safety standard on ships and prohibiting the consumption of alcohol within four hours of serving as a member of a watch. See STCW Code, § B-VIII/2, Pt. 5.

Fourth Amendment protections against unreasonable searches and seizures).

– *Crew Training Policies*: The Washington regulations require "training beyond the training necessary to obtain a license or merchant marine document." Wash. Admin. Code § 317-21-230 (1999). That provision constitutes a "personnel qualification" within the field preemptive ambit of 46 U.S.C. 3703(a). It also imposes requirements in addition to those of the STCW Convention, which provides that a certification by a flag state will be afforded respect through reciprocity in the United States. See STCW Convention, Arts. VI, X. The Coast Guard has promulgated extensive regulations on the licensing and qualifications of maritime personnel. See 46 C.F.R. Pts. 10, 12, 13, 15; see also 33 C.F.R. 155.1055, 157.152, 157.154. To meet the State's requirements, a crew would have to be flown in advance to Washington for training or otherwise extra-territorially meet acceptable state standards, before serving on a voyage to Washington waters. That requirement would often be impractical given the commercial realities of international shipping, in which vessels are frequently re-routed in mid-voyage to new destinations for the pickup or delivery of cargo. The practical effect of the Washington intrusion into international training requirements is that, unless the additional state training requirements have been met, foreign and U.S. flag vessels alike are precluded from entering Washington waters.[15]

– *Language Proficiency Requirements*: The Washington BAP rules require that "[a]ll licensed deck officers and the vessel's designated person in charge under 33 CFR sec.

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[15] Notwithstanding the State's contention that we are "simply wrong" (Br. in Opp. 27) in noting that the training requirements imposed by the State exceed national and international standards, the BAP rule details specific additional requirements that must be included in "a comprehensive training program approved by the [O]ffice [of Marine Safety]." Wash. Admin. Code § 317-21-230(1) (1999).

155.700 are proficient in English and speak a language understood and spoken by subordinate officers and unlicensed crew." Wash. Admin. Code § 317-21-250(1) (1999). That provision is a "personnel qualification" within the preemptive field of 46 U.S.C. 3703(a). See also 33 U.S.C. 1228(a)(7) (requiring vessel, while underway in U.S. waters, to have at least one licensed deck officer on the bridge capable of clearly understanding English). In addition, the international requirements that the United States has agreed to observe, by contrast, require an officer in charge of the navigation watch to be able to "perform the officer's duties * * * with a multilingual crew." See STCW Code, Tab. A-II/1, Col. 2, *English language*. The STCW standard requires licensed deck officers to be able to communicate with those who are part of the navigation watch, and only on those matters relevant to watch-keeping duties. The Washington regulations, on the other hand, require *all* licensed deck officers to speak the languages of the entire unlicensed crew, a requirement that imposes substantial additional burdens on ship owners and operators. The STCW standards must be met to achieve certification, see STCW Code, §§ A-II/1, A-III/1, A-V/1, and the Coast Guard has the authority to accept an STCW certificate of compliance. See 46 U.S.C. 3303, 8702(b) (designated percentage of crew that must understand an order "spoken by the officers" before a vessel may be allowed to operate in United States waters), 9101, 9102 (1994 & Supp. III 1997); 33 C.F.R. 155.710(c)(4), 161.12(b), 161.18(c); 46 C.F.R. 13.201(g), 15.730.

– *Management Policies and Practices*: The Washington regulations contain a series of requisites concerning management practices for a vessel, including personnel training and the types of elements that must be contained in an approved management program. Wash. Admin. Code § 317-21-260(1) to (3) (1999). That requirement constitutes an impermissible personnel qualification within the scope of the field

preempted by 46 U.S.C. 3703(a). The state rule also directly conflicts with 46 U.S.C. 3203(a) (Supp. III 1997), which provides that "[t]he Secretary shall prescribe regulations which establish a safety management system for responsible persons and vessels to which this chapter applies." Section 3203(b) further provides that "[r]egulations prescribed under this section shall be consistent with the International Safety Management Code with respect to vessels engaged on a foreign voyage." See also 46 U.S.C. 9102(a)(5). The federal regulations, which set forth in detail the requisite management practices that must be followed by vessel operators, enforce the ISM Code. See 33 C.F.R. Pt. 96; ISM Code, §§ 1.4, 2, 6.2, 7, 10. See also 46 C.F.R. 12.02-17(e), 13.125, 15.1107.[16]

– *Operating Procedures; Restricted Visibility*: The Washington BAP rules require three licensed deck officers on watch during times of restricted visibility, one of whom may be a state-licensed pilot when the vessel is in pilotage waters. Wash. Admin. Code § 317-21-200(1)(a) (1999). That requirement constitutes a "manning" requirement within the field of subjects covered by 46 U.S.C. 3703(a), which *Ray* has held preempts state rules, as well as a standard authorized by 33 U.S.C. 1223 (1994 & Supp. III 1997), which would be subject to the type of Title I analysis utilized in *Ray*. The state rule also diverges from the Coast Guard requirement of two licensed deck officers. See 33 C.F.R. 164.13(c) (regulation implementing OPA § 4116(b), codified at 46 U.S.C. 8502(h)); 58 Fed. Reg. 27,632 (1993) (expressing intent to preempt state rules). Because crews are staffed to meet international standards, the Washington rules also necessarily interfere with the accomplishment of another international

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[16] For similar reasons, we view the BAP rule concerning personnel evaluations also to be preempted by the Coast Guard regulations and applicable ISM standards. See Wash. Admin. Code § 317-21-240 (1999).

standard: ensuring that watch officers obtain at least ten hours of rest in any 24-hour period, which must be provided in "no more than two periods, one of which shall be at least 6 hours in length." STCW Code, § A-VIII/1. To comply with both the state personnel watch requirements and the international crew-rest standards, therefore, any vessel destined for Washington waters (or in transit through those waters) must increase its crew complement or fly additional personnel to the vessel prior to entering Washington waters, in order to comply both with the state personnel watch requirements and the international crew rest standards. The State has asserted that the conflict is of minimal practical consequence because the BAP rule applies only to "the 60 miles between buoy J and Port Angeles where pilotage waters begin." Br. in Opp. 26. Given the State's own estimate of the speed at which vessels normally travel (see *id.* at 4), a vessel would ordinarily take four hours to travel that distance, and those hours necessarily would encroach into the mandated rest period.[17]

– *Advance Notice of Entry*: The state rules contain a series of requirements for advance notice to be given to state officials prior to the entry of a vessel into state waters. See Wash. Admin. Code § 317-21-540 (1999). Those requirements are preempted using the type of analysis this Court used in *Ray* for permissive regulations promulgated under then-Title I of the PWSA. See *Ray*, 435 U.S. at 169-170. The Secretary "may control vessel traffic in areas subject to the jurisdiction of the United States which the Secretary determines

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[17] In addition to its authority to implement the STCW Convention, the Coast Guard has legal authority to promulgate its navigation watch and lookout regulations pursuant to Section 5 of the PTSA, 46 U.S.C. 3703, which, among other statutory provisions, requires the Coast Guard to develop manning requirements for vessels. See also 33 U.S.C. 2005 (requiring lookout by sight); 46 U.S.C. 8101(a)(3), 8104(n), 9101 (evaluation of foreign vessel compliance with manning requirements).

to be hazardous, or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by * * * specifying times of entry, movement, or departure." 33 U.S.C. 1223(a)(4); see also 33 U.S.C. 1223(a)(5). Under *Ray*, if the Coast Guard had not issued regulations, the State's rule would not be preempted. See 435 U.S. at 172. The Coast Guard *has* issued regulations governing advance notice of entry, however, thereby preempting the State's effort to regulate that facet of vessel operations. See 33 C.F.R. 156.215; *id.* Pt. 160, Subpt. C; see also UNCLOS, Art. 25(2).

– *Event Reporting of Marine Casualties*: The Washington rules require a vessel owner or operator to provide "an event summary of the past five years for each vessel covered by an oil spill prevention plan," with detailed information for each casualty, collision, allision, or near-miss, regardless of where in the world the event occurs. Wash. Admin. Code § 317-21-130 (1999). The rule also imposes an obligation on the owner or operator to send a report within 30 days of the event, even if the vessel operator has no contemporaneous expectation that its vessel will travel to Washington. That state rule is preempted by 46 U.S.C. 6101, which imposes on the Secretary the obligation of prescribing regulations for the reporting of marine casualties. See also 46 U.S.C. 6301 *et seq.* Section 5 of the PTSA also provides that "[t]he Secretary shall establish a marine safety information system" which, among other data, shall include "the history of marine casualties and serious repair problems of the vessel." 46 U.S.C. 3717(a)(4). Pursuant to those statutory authorities, the Coast Guard has promulgated regulations for marine casualty event reporting. See 33 C.F.R. 151.15, 151.26(b)(3), 153.203, 155.1035(b), 164.61; *id.*, Pt. 173, Subpt. C; 46 C.F.R. 4.05-1 to 4.05-10, 35.15-1. Various international agreements also contain requirements for event reporting. See

MARPOL 73/78, Art. 8; *id.* Protocol I; IMO Res. A.851(20); SOLAS Convention, Annex, Ch. V, Reg. 8-1.

– *Emergency Procedures*: The state rules require proficiency in a range of subjects during an emergency. See Wash. Admin. Code § 317-21-220 (1999). Those requirements are preempted by national and international standards, see 33 C.F.R. Tab. 96.250(h), 151.26(b)(4), 155.1035; 46 C.F.R. Pt. 35, Subpt. 35.10; *id.* 199.80; STCW Code, Tab. A-II/2 (qualification requirement for master of vessel), and are personnel qualifications preempted under 46 U.S.C. 3703(a). The need for uniformity is particularly apt in emergency response operations, to avoid confusion by a vessel's crew over differentiations in rules between the international/ national regime on the one hand and variant state rules on the other.

Operating Procedures—Pre-Arrival: The BAP rules impose a wide range of pre-arrival tests of such equipment as navigation instruments, generators, steering systems, engines, and other mechanical systems. See Wash. Admin. Code § 317-21-215 (1999). All of those requirements impose standards to test the performance of equipment, a subject within the preemptive field of 46 U.S.C. 3703. See *Ray*, 435 U.S. at 163-164. The Coast Guard has promulgated regulations addressing the equipment standards the State seeks to impose. See 33 C.F.R. 164.25, 164.35, 164.53; 46 C.F.R. 35.20-10; *id.*, Pt. 61, Subpt. 61.20. Those federal regulations are consistent with international standards requiring uniformity. See SOLAS Convention, Annex, Ch. II-1, Regs. 44, 46(2), 49; *id.* Ch. V, Reg. 19-2.

Under the proper analysis, therefore, the vast majority of the Washington BAP rules are preempted as coming within the field of preemptive subjects embraced within 46 U.S.C. 3703 recognized in *Ray* or as conflicting with treaty obliga-

tions and Coast Guard regulations recognized and promulgated by federal statutes.[18]

D. The Court Of Appeals' Analysis Upholding The State Rules Is Flawed

There can be no doubt that the Washington regulations discussed above are preempted under the analysis mandated by this Court's decision in *Ray*, as applied to the post-*Ray* statutory scheme created by Congress and the international regime accepted by the United States. The court of appeals did not disagree. The court believed, however, that, following the enactment of OPA in 1990, the Coast Guard no longer has the authority to issue regulations that would preempt state regulations addressing the same subject matter. That conclusion is deeply flawed.

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[18] In the court of appeals, we expressed the view that Sections 317-21-205 and 317-21-210 of the Washington BAP rules "raise no serious preemption issues." U.S. C.A. Br. 54. Upon further consideration, we have concluded that the view expressed in that brief may not be correct. Section 317-21-205 requires a vessel in state waters to record its position every 15 minutes. In 1976, however, the Coast Guard considered a similar requirement, see 41 Fed. Reg. 18,767-18,769, and concluded that such a rule could not be justified, see 42 Fed. Reg. 5957 (1977). See 33 C.F.R. 164.11(c)-(e); 46 C.F.R. 15.1109; STCW Code, § A-VIII/2, Pt. 3-1(24-28). See also *Ray*, 435 U.S. at 171-172 (federal decision not to issue regulation has preemptive effect if Secretary "has decided that no such requirement should be imposed at all"). Section 317-21-210 requires that certain standby generators will be on and running while the vessel is in state waters, the assumption apparently being that the main electrical system is not sufficiently reliable. That requirement raises a preemption question involving the interplay between equipment operability and rules pertaining to local traffic. Coast Guard regulations generally govern equipment standards, but do not address the precise question of standby generators being turned on in particular circumstances. Section 317-21-210 nevertheless could be thought to encroach on the regulatory field concerning vessel equipment, see 33 C.F.R. 164.11-164.25; 46 C.F.R. Pts. 111, 112. The validity of those two rules, as well as others that we have not specifically discussed in this brief, may be considered by the courts below on remand.

1. Contrary to the court of appeals' view, nothing in OPA affects *Ray*'s holding that the Coast Guard has authority to issue regulations that preempt state rules on the same subject. It would be surprising indeed for Congress to have deprived the Coast Guard of that power to adopt uniform national standards, since, as the district court acknowledged, "shipping has traditionally been governed by federal law." Pet. App. 61a. And, in fact, the Conference Report on OPA specifically states that OPA "does *not* disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 122 (1990) (emphasis added); see also H.R. Conf. Rep. No. 854, 104th Cong., 2d Sess. 135 (1996) (report on Coast Guard Authorization Act of 1996, citing *Ray* for proposition that Secretary has authority to promulgate regulations to promote federal vessel uniformity).

Significantly, moreover, OPA did not amend the provisions of the PWSA—which were relied upon by the Court in *Ray*, 435 U.S. at 161, 170, were expanded after *Ray* in the PTSA, and are now codified at 33 U.S.C. 1231 and 46 U.S.C. 3703—that authorize and direct the Secretary to issue regulations governing design, construction, alteration, repair, maintenance, operation, equipment, personnel qualification, and staffing of tanker vessels. Those statutory provisions identify a role for the States in the process of developing governing standards: they require the Secretary to consult with and "consider[] the views" of "officials of State and local governments." 33 U.S.C. 1231(b)(2); 46 U.S.C. 3703(c)(2). But this Court has already construed the language in 46 U.S.C. 3703 to afford field preemption of state rules. See *Ray*, 435 U.S. at 163-165.

In addition, Title IV of OPA makes plain that Congress intended to reinforce, not undermine, the established regime of international uniformity and reciprocity on such issues as staffing, training, and operation. Thus, Congress specifically

directed the Secretary of Transportation to evaluate the "manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation" to tankers, in order to determine whether they are "at least equivalent to United States law or international standards accepted by the United States"; and Congress provided that the Secretary may prohibit entry into the United States of vessels with documentation issued by countries that do not maintain and enforce such standards. OPA § 4106(a), 104 Stat. 513 (codified at 46 U.S.C. 9101(a)). That directive to the Secretary of Transportation refutes the Ninth Circuit's conclusion that Congress, in enacting OPA, subordinated the need for international uniformity and reciprocity to the divergent policy preferences of the States. Cf. Pet. App. 16a.[19]

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[19] One exception to the principle of reciprocity is a requirement that certain foreign-flag tankers must be double-hulled to enter United States waters. See 46 U.S.C. 3702(a), 3703a (1994 & Supp. III 1997). The Ninth Circuit attributed great importance to Congress's decision to promulgate that requirement in OPA notwithstanding the absence of an international rule, concluding that Congress's actions indicate that "strict international uniformity with respect to the regulation of tankers is not mandated by federal law and that international agreements set only minimum standards." Pet. App. 18a (internal quotation marks and brackets omitted). The court of appeals missed the significance of the fact that Congress itself enacted the double-hulling requirement and that it did so by *amending* the governing federal statutory framework. That specific and carefully drawn exception reinforces the conclusion that, with respect to the other subjects on which Congress has *not* acted, the authority of the Coast Guard to issue regulations that conform to international standards and preempt state rules that fail to do so was not affected by OPA. Nothing in that focused amendment supports the court of appeals' holding that *States* may ignore the international regime with impunity. That holding is fundamentally at odds with the law of preemption, and it threatens the ability of the United States to speak with one voice and to comply with its international obligations because it permits state regulatory requirements that are inconsistent with each other, as well as with the federal and international system. Indeed in 1990, there existed no international requirement for a double hull on tankers, and thus Congress

2. In holding that the Coast Guard no longer has the power recognized in *Ray* to issue regulations having preemptive effect, the court of appeals relied almost exclusively on Section 1018 of OPA. See Pet. App. 16a. But as the court recognized elsewhere in its opinion, see *id.* at 12a, Section 1018 addresses only the preemptive effect of "*this* Act"—*i.e.*, of OPA itself—not the preemptive effect of *other* federal statutes, such as the PWSA, at issue in *Ray*, and the post-*Ray* enactment of the PTSA. *Ibid.* The court of appeals' holding thus boils down to the notion that, even though Section 1018 neither applies to other federal statutes such as the PTSA nor alters the Secretary's rulemaking authority under it, Section 1018 nevertheless has a sort of penumbral effect that divests the Coast Guard of the power it previously had to issue preempting regulations under those other federal statutes. Simply to state the proposition is to refute it. Under the Constitution, Congress could divest the Coast Guard of that power under prior law only by enacting a new law that repealed that prior authority. See *INS* v. *Chadha*, 462 U.S. 919, 955 (1983). Congress did not do that in OPA.

Properly understood, Section 1018 expresses an intent for OPA not to displace whatever police powers States otherwise might have *independent* of OPA. Thus, whether state tanker laws are preempted turns on the vast body of federal treaty, statutory, and regulatory provisions governing tanker operations. As we have demonstrated, every federal rule that preempts a Washington BAP regulation derives from a source of law independent of OPA: the PWSA, PTSA,

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in OPA presaged subsequent international action. In 1993, MARPOL was amended to include a double hull requirement, which is similar to but not identical to the requirement under United States law. See MARPOL Annex I, Regs. 13F, 13G.

SOLAS, STCW, MARPOL, ISM Code, and Coast Guard regulations issued pursuant to those authorities.[20]

3. The court of appeals' erroneous reliance on Section 1018 of OPA also underlies its further (and equally erroneous) holding that Coast Guard regulations that are otherwise valid require additional legislative authority to have preemptive effect. See Pet. App. 29a-31a. That decision is incorrect in at least two important respects. First, 33 U.S.C. 1231 and 46 U.S.C. 3703 confer broad authority on the Coast Guard, after "considering the views" of the State and balancing competing considerations, to prescribe regulations for the design, construction, operation, equipping, personnel qualification, and staffing of tank vessels. Those provisions, which are unaffected by OPA, furnish ample authority for Coast Guard regulations that preempt conflicting state rules.

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[20] Although the parties and courts below extensively addressed the effect of OPA Section 1018 on the preemptive scope of other provisions of OPA itself—*e.g.*, whether Section 1018 applies only to Title I and not to Title IV-A, or whether its references to "requirements" "relating to discharges" would cover the sorts of vessel and personnel standards prescribed by the Coast Guard regulations that govern here—the Court need not decide those interpretive issues concerning Section 1018 to resolve this case. That is so because, as we have said in the text, all of the Coast Guard regulations are supported by authority outside of OPA. We note, however, that the application of Section 1018 to sections in Title IV of OPA is not clear, as the double hull requirement illustrates. Section 4115(a) of OPA establishes a requirement that certain tanker vessels be equipped with a double hull. 104 Stat. 517; 46 U.S.C. 3703a(a). It would be a bizarre reading of Section 1018 to permit a State to flout that congressional judgment by requiring a vessel to contain a *triple* hull before it could legally enter state waters. Thus, notwithstanding the Section 1018 savings provisions, other sections of OPA may nonetheless have implied preemptive effect. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (Congress did not intend to "undermine this carefully drawn statute through a general saving clause"); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 329-331 (1981) (general savings clause should not be construed to produce direct conflict with directive in federal statute).

Moreover, as this Court held in *Ray*, the Secretary already had authority under those provisions of the PWSA to issue regulations that preempt state regulatory efforts. Congress was not required to confer that authority all over again in OPA.

Second, and more fundamentally, Congress need not specifically confer preemptive authority on a federal agency for that agency's rules to have preemptive effect. In *City of New York* v. *FCC*, 486 U.S. 57 (1988), for example, this Court explained that "a narrow focus on Congress' intent to supersede state law is misdirected, for a pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Id.* at 64 (internal quotation marks and brackets omitted). In identifying "the correct focus" of a regulatory preemption inquiry, the Court left no doubt that "statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *Ibid.*; accord *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982) ("A pre-emptive regulation's force does not depend on express congressional authorization to displace state law.").[21]

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[21] In some instances the Coast Guard has expressly stated that its regulations do *not* preempt state rules. See, *e.g.*, 61 Fed. Reg. 1080-1081 (1996) (vessel oil spill response plan regulations); *id.* at 7917. In other cases, it has left no doubt that its regulations are intended to preclude state regulations touching the same subject. 63 Fed. Reg. 71,770 (1998); 62 Fed. Reg. 67,506 (1997); 58 Fed. Reg. 27,632 (1993). Even in the absence of an express statement by the Coast Guard, however, state rules are preempted where Congress has intended Coast Guard regulations to occupy the field, or where the Coast Guard has issued rules on a particular subject.

E. The Decision Below Hinders The United States' Ability To Promote Environmentally Sound Practices In The International Rulemaking Regime

The competing legal regime erected by Washington poses substantial and immediate diplomatic concerns for the United States in several critical respects. First, the existence of state regulations that conflict with international standards raises the distinct possibility that other nations that are parties to international conventions and agreements will regard the United States as in violation of its obligations and thus take actions that will undermine international uniformity. The United States Department of State has received a diplomatic note from 13 nations (Belgium, Denmark, Finland, France, Germany, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden) and the Commission of the European Community expressing concerns that "[d]iffering regimes in different parts of the US would create uncertainty and confusion. * * * The Governments therefore urge the US to pursue a regulatory regime, on a national basis, which is consistent with agreed international standards." Note Verbale from the Royal Danish Embassy to the U.S. Department of State 1 (June 14, 1996) (File No. 60 USA.1/4). On May 7, 1997, the Government of Canada submitted a similar diplomatic protest. Letter from the Embassy of Canada to the U.S. Department of State 1 (Note No. 0389). Those countries represent major maritime trading nations, significant allies of the United States, and leaders in establishing international vessel standards. A decision by other nations that the United States is in noncompliance with an international treaty obligation could lead to the abrogation of the agreement, a decision not to afford reciprocity to United States tankers in foreign ports, and consider-

able uncertainty in the legal regime governing international vessel management.[22]

Second, the conflicting Washington regulations undermine the credibility of the United States in negotiating international agreements that promote safe use of tankers around the world. The culmination of such negotiations has had, and will continue to have, significant desirable consequences for shipping and environmental safety in United States coastal waters and those of our trading partners. For that kind of diplomatic bargaining to result in agreements that other nations will enforce, however, the United States negotiators must be assured that they can represent the *entire* United States, and not be undermined by the actions of individual States that depart from the international regime. Because of the international nature of the shipping industry, the establishment of vessel standards for safety and environmental protection is generally most effective when carried out on an internationally cooperative level rather than by individual nations or political subdivisions of those nations acting on

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[22] A specific example of the principle of reciprocity that is undermined by the Washington BAP rules is the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (CVTMS Agreement), Dec. 19, 1979, U.S.-Can., 32 U.S.T. 377, which provides that a foreign vessel transiting United States waters en route to a Canadian port need not comply with United States laws if it complies with comparable Canadian laws and regulations. Congress specifically authorized the President to enter into such agreements. See 33 U.S.C. 1230(b)(1). The Washington BAP regulations recognize no reciprocity with Canadian rules for such transiting vessels, and such rules raise the specter that Washington will deny entry into United States waters of vessels that comply with the CVTMS Agreement, even those bound only for Canadian ports. The court of appeals erred in declining to consider that issue, see Pet. App. 19a, even though it elsewhere noted that Intertanko had raised concerns about the effect of the state BAP rules on the CVTMS Agreement, see *id.* at 17a. See also U.S. C.A. Br. 13, 39-40.

their own. See, *e.g.*, S. Treaty Doc. No. 39, 103d Cong., 2d Sess., at III (1994).[23]

If the Ninth Circuit decision were affirmed, every coastal State in the United States could adopt and enforce its own requirements, notwithstanding their inconsistency with the regulations of other States and the international community (as reflected in federal statutes and regulations). The consequences of state-by-state variations in tanker regulations could be highly problematic. Different States could impose different watch manning requirements, and tankers would have to comply with different sets of regulations (in addition to the federal scheme) when traveling in United States coastal waters, even if those requirements are mutually conflicting and even if the vessel is not even bound for a United States port. The multiplicity of overlapping regulatory requirements would further frustrate the substantial international interest in uniform vessel standards in such interna-

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[23] Particularly as they relate to manning, the BAP rules also raise a serious question of their consistency with the international law accepted by the United States regarding the right of innocent passage, which is critical to the free passage of U.S. military and civilian flag vessels at various places around the world. The right of innocent passage provides that a coastal nation's laws and regulations may not be applied to the design, construction, manning, or equipment of foreign vessels transiting in innocent passage through another nation's territorial sea unless they are giving effect to generally accepted international rules or standards, and that coastal nations may not impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage. See, *e.g.*, Convention on the Territorial Sea and the Contiguous Zone, Geneva, Apr. 29, 1958, 15 U.S.T. 1606, art. 15(1); UNCLOS, § 3, arts. 17, 21(2), 24(1)(a), 25(2); 33 U.S.C. 1230; 33 C.F.R. Pts. 160, 164. The court below erred in declining to consider that issue. See U.S. C.A. Br. 40-41. Although the right of innocent passage does not alter a coastal nation's right to impose regulations as a condition of port entry, such conditions must be consistent with that country's other international legal obligations.

tional conventions and codes as SOLAS, STCW, MARPOL, and the ISM Code.

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Many of the state BAP rules discussed above (see pp. 33-41, *supra*) operate in fields that have been preserved by Congress for exclusive federal regulation, while others are preempted by Coast Guard regulations or international agreements to which the United States is a party. The judgment of the court of appeals should be reversed to the extent the Court holds those particular BAP rules preempted. In other respects, the judgment of the court of appeals should be vacated and the case remanded to allow the courts below to assess the validity of the remaining regulations under the proper preemption analysis, as set forth in this brief.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-130 EVENT REPORTING	Information Reports	33 U.S.C. §1321(b)(5) 33 U.S.C. §1906 46 U.S.C. §3717 (PTSA §16) 46 U.S.C. §§6101-6102 33 CFR Table 96.250(i)(2)-(3) 33 CFR §§151.15, 151.26(b)(3) 33 CFR §153.203 33 CFR §155.1035(b) 33 CFR §161.12(c) 33 CFR §164.61 33 CFR Part 173, Subpart C 46 CFR §§4.05-1-4.05-10 46 CFR §35.15-1	MARPOL 73/78 Article 8 MARPOL 73/78 Protocol I IMO Resolution A.648(16) SOLAS Chap. V, Regulation 8-1 IMO Resolution A.851(20)
317-21-200 WATCH PRACTICES			
(1)	Manning	46 U.S.C. §3703 46 U.S.C. §8101(a)(3) 46 U.S.C. § 8502(h) 46 U.S.C. §§9101, 9102 33 CFR §164.13(c), (d) 46 CFR §15.1109	SOLAS Chapter 5, Regulation 13(a) STCW Regulation VIII/2 (2.1) STCW Code A-VIII/2 (9, 15, 16-17, 45)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(1)(a)	Manning	46 U.S.C. §3703 46 U.S.C. §8101(a)(3) 46 U.S.C. §8104(n) (OPA 90 §4114(b)) 46 U.S.C. §§9101, 9102 33 CFR §164.13(c), (d) 46 CFR §15.1109	SOLAS Chapter V, Regulation 13(a) STCW Regulation VIII/2-(2.1) STCW Code A-VIII/2 (16-17)
(1)(b)	Manning	46 U.S.C. §3703 46 U.S.C. §8101(a)(3) 46 U.S.C. §8104(n) 46 U.S.C. §§9101, 9102 33 U.S.C. §2005 46 CFR §10.903(c) 46 CFR §35.20-20 46 CFR §15.850 46 CFR §15.1109	COLREGS Rule 5 STCW Regulation II-4 STCW Code Table A-II/1 (pg 30) STCW Code Table A-II/3 (pg 61) STCW Code Table A-II/4 (pg. 68) STCW Code A-VIII/2 (13-15, 45.2)
(1)(c)	Navigation Operations	46 U.S.C. §3703 46 CFR §§113.30-5(g), 113.30-25	None
(1)(d)	Information Collection	No specific requirement. Similar to 46 CFR Subpart 35.07	None

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(2)(Preamble)	Operational Procedures	33 CFR §157.415 46 CFR §10.205(o) (after 2/1/2002)	STCW Code B-VIII/2 (4-5) (guidelines only)
(2)(a), (c)-(f)	Operational Procedures	46 CFR §10.205(o) (after 2/1/2002) 46 CFR §10.901(c) 46 CFR §10.903(c) 46 CFR §15.1109	STCW Code Table A-II/1 (pg 30) STCW Code Table A-II/2 (pg 44) STCW Code A-VIII/2 STCW Code B-VIII/2 (4-5) (guidelines only)
(2)(b), (3)	Operational Procedures	33 CFR §164.11(k) 33 CFR §168.60 46 CFR §15.1109	STCW Code A-VIII/2 (49, 50)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
2(g)	Operational Procedures	33 CFR §§161.18, 161.19-161.23 33 CFR §165.100(d)(3) (63 FR 71764 (Dec 30, 1998)) (NY, NE only)(towboats only). National rulemaking in progress (towboats only). *See* 62 FR 52063 (Oct. 6, 1997)) Reg project to be complete mid-2000 46 CFR §10.903(c) 46 CFR §15.1109	STCW Code Table A-II/1 (pg 27) STCW Code Table A-II/2 (pg 41) STCW Code Table A-II/3 (pg 58) STCW Code A-VIII/2 Part 2
(4)	Manning/ Operational Procedures	46 CFR §35.05-15 33 CFR §155.810 33 CFR 164.13(b)(underway) 46 CFR §15.1109	STCW Code A-VIII/2 (51.4) (anchored) STCW Code A-VIII/2 (102-103) (in port)
(5)	Manning	33 CFR §164.19 46 CFR §15.1109	STCW Regulation VIII/2.4 STCW Code A-VIII/2 (51)
(6)	Manning	33 CFR §164.13(b) 46 CFR §15.825(b) 46 CFR §15.1109	STCW Regulation VIII/2.3 STCW Code A-VIII/2 (54-55)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-205 OPERATING PROCEDURES -NAVIGATION			
(1)	Navigation Procedures	33 CFR §164.11(c) - (e) *See also* 42 FR 5957 (Jan. 31, 1977) 46 CFR §15.1109	STCW Code A-VIII/2 (24-28)
(2)	Navigation Procedures	33 CFR §§161.18, 161.19-161.23 33 CFR §165.100(d)(3)) (63 FR 71764 (Dec 30, 1998)) (NY, NE only)(towboats only). National rulemaking in progress (towboats only). See 62 FR 52063 (Oct. 6, 1997)) Reg project complete mid-2000 46 CFR §10.903(c) 46 CFR §15.1109	STCW Code Table A-II/1 (pg 27) STCW Code Table A-II/2 (pg 41) STCW Code Table A-II/3 (pg 58) STCW Code A-VIII/2 Part 2

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(3)	Navigation Procedures	33 U.S.C. §1223(a)(4)(D) 33 CFR §164.11(i) 46 CFR §10.903(c) 46 CFR §15.1109	STCW Code Table A-II/2 (pg 43) STCW Code A-VIII/2 (21.5.2, 34.2)
(4)	Navigation Procedures	None	None
(5) **RESERVED**	Navigation Procedures	OPA 90 § 4116(c) 33 U.S.C. § 1223 33 CFR § 168.40 Potential additional rule-making being studied. See P.L. 104-58, Title IV; 63 FR 64937 (Nov. 24, 1998)	None
(6) **RESERVED**	Operational Procedures	None. Potential rulemaking being studied. *See* P.L. 104-58, Title IV; 63 FR 64937 (Nov. 24, 1998)	None

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-210 OPERATING PROCEDURES ENGINEER-ING			
(1)	Equipment Operation Procedures	46 U.S.C. §3703 33 CFR §164.25(a)(3) 46 CFR Part 112, *n.b.* §§112.25-3, 25-5, 25-10	SOLAS Chapter II-1, Regulation 44
(2)	Manning / Operational Procedures	No similar reg. 33 CFR §§164.11(t), 164.13(b) and 46 CFR Subpart 58.25 combine to create similar regime.	Analogous to SOLAS Chapter V, Regulation 19-1
(3)	Equipment Operation Procedures	46 U.S.C. §3703 No specific regulations.	None
(4)	Equipment Operation Procedures	46 U.S.C. §3703 Somewhat analogous to 46 CFR §§ 35.25-10 and 58.01-10	None

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-215 OPERATING PROCEDURES -PREARRIVAL		Entire regulation, generally: 33 U.S.C. §1223 46 U.S.C. § 3703	
(1)	Navigation Equipment	33 CFR §§164.35 and 164.53 combine to create similar regime. 46 CFR §10.903(c)	STCW Code Table A-II/1 (pp. 27-28) STCW Code Table A-II/3 (pp. 58-59)
(2)	Equipment Operation	33 CFR §164.25(a)(3) 46 CFR §110.30-5	SOLAS Chapter II-1, Regulation 44
(3)	Equipment Operation	33 CFR §164.25(a)(1) 46 CFR §35.20-10 46 CFR §61.20-1	SOLAS Chapter V, Regulation 19-2
(4)	Equipment Operation	33 CFR §164.25(a)(5) 46 CFR §61.20-3	SOLAS Chapter II-1, Regulations 46(2), 49
(5), (6)	Equipment Operation	46 CFR §61.20-3(a)	SOLAS Chapter II-1, Regulation 46
(7)	Equipment Operation	46 CFR §61.20-3(a)	None
(8)	Equipment Operation	46 U.S.C. §3703 Somewhat analogous regs at 46 CFR §§ 35.25-10 and 58.01-10	None

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(9), (10)	Equipment Operation	46 CFR §61.20-3(a)	SOLAS Chapter II-1, Regulation 46
317-21-220 EMERGENCY PROCEDURES			
(1)	Manning	46 CFR §199.80 (b)	STCW Code Table A-II/2 (pg 54) STCW Code A-VIII/1 (5) SOLAS Chapter III, Regulations 8, 37
(2), (3)	Watchstanding Procedures	33 CFR Table 96.250(h) 33 CFR §151.26(b)(4) 33 CFR §155.1035 46 CFR Subpart 35.10 46 CFR §199.80 (b)(3)	SOLAS Chapter III, Regulations 8, 35, 37 STCW Code A-I/14 (2.1.2) STCW Code Table A-II/1 (pp. 36-37) STCW Code Table A-II/2 (pg 54) SOLAS Chapter III, Regulation 8 MARPOL Annex I, Regulation 26(2)(c)
317-21-225 EVENT RECORDS	Records	33 CFR §164.61 46 CFR §4.05-15 46 CFR §35.15-1	SOLAS Chapter. I, Regulation 21 SOLAS Chapter V, Regulation 20 (pending change will require voyage data recorders)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-230 TRAINING	Personnel Certification	Entire regulation, generally: 46 U.S.C. §3703 46 USC §7101 46 U.S.C. §8703 46 USC §§9101, 9102 46 CFR Parts 10, 12, 15	STCW, generally
PREAMBLE	Personnel Certification	46 USC §7101 46 CFR §10.101 46 CFR §15.1103 46 CFR §35.05-1	STCW Convention Article III
(1)	Personnel Certification	46 U.S.C. §7101(e) – (i), 46 U.S.C. §§8101, 8301(a) and 46 CFR §15.401 combine to create similar regime.	STCW Code I/14 (1.1)
(2)	Personnel Certification	33 CFR Table 96.250(f)(5) 46 CFR § 15.405 46 CFR §15.1105	SOLAS Chapter III, Regulation 19.4 ISM Code §6.3 STCW Regulation I/14.4 STCW Regulation VI/1 STCW Code A-I/14 STCW Code A-V/1 STCW Code A-VI/1 STCW Code B-I/14 (guidelines only)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
3(a)	Personnel Certification	33 CFR §155.1055 46 CFR Part 10 Subparts D, E & I 46 CFR Part 13	STCW Code A-II/2 STCW Code A-III/2 STCW Code A-III/3 STCW Code A-V/1
3(b)	Personnel Certification	46 CFR Part 10 Subparts D & I 46 CFR Part 13	STCW Code A-II/1 STCW Code A-II/3 STCW Code A-V/1
3(c)	Personnel Certification	33 CFR §155.1055 33 CFR §§157.152, 154 46 CFR Part 10 Subparts E & I 46 CFR Part 13 46 CFR §39.10-11	STCW Code A-III/1 STCW Code A-V/1
3(d)	Personnel Certification	46 USC §7301 46 USC §8701 46 CFR Parts 12, 13	STCW Code A-II/4 STCW Code A-III/4 STCW Code A-V/1
(4)	Personnel Certification	46 USC §7106 46 U.S.C. §9102(a)(6) 46 CFR §10.209 46 CFR §15.1105(c)(2)	STCW Regulation I/11(3-4) STCW Code A-I/11 STCW Code A-VI/1 (2.2)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(5)	Personnel Certification	33 CFR §155.230((b)(2)(iv) (towboats only)(See 63 FR 71764 (Dec. 30, 1998)) 33 CFR §155.1060 46 CFR §35.10-1 46 CFR §199.180	SOLAS Chapter III, Regulation 19.3 SOLAS Chapter V, Regulation 19.2(d)
317-21-235 DRUG & ALCOHOL USE	Personnel Certification	Generally: 33 CFR Part 95 46 CFR Part 16 49 CFR Part 40	STCW Code B-VIII/2 (34-36) (guidelines only)
(1)	Personnel Certification	46 U.S.C. § 8101(i) 33 CFR §95.045 46 CFR §16.101 46 CFR §35.05-25	No specific regulations
(2)	State Pilots	None	None
(3)(a)	Personnel Certification	46 U.S.C. §7101(i) 46 U.S.C. §7302(e) 46 CFR §16.210	No specific regulations
(3)(b)	Casualty Investigations	46 U.S.C. §2303a 46 CFR Subpart 4.06 46 CFR §16.240	No specific regulations

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(3)(c)	Personnel Certification	33 CFR §95.035 46 CFR §16.250	No specific regulations
(3)(d)	Personnel Certification	46 CFR §16.230	No specific regulations
(4)	Drug Testing	46 CFR Part 16, Subpart C 49 CFR §40.31	No specific regulations
(5)	Drug Testing	46 CFR §16.260 (record retention) 46 CFR §16.500	No specific regulations
(6)	Drug Testing	46 CFR §16.201(c) (U.S. personnel only)	No specific regulations
(7)	Drug Testing	46 CFR §16.105	No specific regulations
(8)	Drug Testing	46 CFR §16.230(e), (f)	No specific regulations
317-21-240 PERSONNEL EVALUATION	Personnel Certification		
(1)	Personnel Certification	46 U.S.C. §8101(i) 46 CFR §§35.05-20, 25	STCW Regulation VIII/1.2
(2)	Personnel Certification	None	None. Somewhat analogous to STCW Regulation I/14 (1.3)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-245 **WORK HOURS**	Manning	46 U.S.C. §3703 46 U.S.C. §8104(a), (d) 46 U.S.C. §8104(n) (OPA 90 §4114(b)) 46 CFR §§15.705 – 710; 15.1111	STCW Code A-VIII/1 (1 – 3) STCW Code B-VIII/1 (guidelines only)
317-21-250 **LANGUAGE**			
(1)	Personnel Certification	46 U.S.C. §3703 46 U.S.C. §8702(b) 46 U.S.C. §§9101, 9102 33 CFR §155.710(c)(4) 33 CFR §§161.12(b), 161.18(c) 46 CFR §13.201(g) 46 CFR §§15.730	SOLAS Chapter III, Regulation 35 SOLAS Chapter V, Regulation 13(c) (currently passenger vessels only; pending change will apply reg to all vessels) STCW Table A-II/1 (pg 34) STCW Table A-II/4 (pg 68) STCW Table A-III/1 (pg 75)
(2)	Operating Procedures	33 CFR Table 96.250(f)(8) 33 CFR §155.740(b) 33 CFR §155.1030(b)	SOLAS Chapter III, Regulation 35 SOLAS Chapter V, Regulation 13(c) (currently passenger vessels only, pending change will apply reg to all vessels) STCW Code A-I/14 (2.2)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-255 RECORD KEEPING			
(1)	Personnel Certification	46 USC §§ 9101 - 9102 46 CFR §10.304(e-h) 46 CFR §12.03-1(a)(8, 12) 46 CFR §15.1107(b)	STCW Regulation. I/14 (1.3) STCW Code B-II/1 (4.3, 5.4.3) (guidelines only)
(2)	Manning	46 CFR §15.1111(g)	Analogous to STCW Code A-VIII/1 (5) STCW Code B-VIII/1 (4) (guidelines only)
317-21-260 MANAGE-MENT			
(1) Management Oversight	Management procedures, policies, and practices	46 U.S.C. 3203 (Supp. III 1997) 33 C.F.R. §§ 96.210 - 230	ISM Code §§1.4, 7, 9, 10 SOLAS Chapter I, Regulation 11(a)
	Personnel Certification	46 U.S.C. 3203 (Supp. III 1997) 33 C.F.R. §§ 96.210 -230. 46 CFR §15.1107(b)	ISM Code §1.4 STCW, generally

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
	Personnel Certification	46 U.S.C. §9102(a)(5) 46 CFR §15.1107(a) 46 CFR §10.205(d) 46 CFR §12.02-17(e) 46 CFR §13.125	ISM Code §6.2 STCW Regulation I-9 analogous STCW Regulation I/14
	Management	None.	None.
	Management	46 U.S.C. 3203 (Supp. III 1997) 33 CFR §§ 96.210 - 230.	ISM Code §1.4
(2)	Management	Analogous to: 46 U.S.C. § 3203(a) (Supp. III 1997) 33 CFR §§96.220 – 230.	Analogous to ISM Code, generally
(3)	Management	46 U.S.C. § 3203(a)(1) (Supp. III 1997) 33 CFR Table 96.250(a)	ISM Code §§1.4.1, 2
(4)	Management	None. However, companies unlikely to be ISM certified by USCG without a vessel visit program in place.	None

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(5)	Maintenance	46 U.S.C. §3313(a) 46 U.S.C. §9102(a)(8) 33 CFR Table 96.250(j)	SOLAS Chapter I, Regulation 11(a) SOLAS Chapter III, Regulation 36
317-21-265 TECHNOLOGY			
(1)(a)	Navigation Equipment	33 U.S.C. §1223(a)(3) 46 U.S.C. 3703-3708 33 C.F.R. §164.41	SOLAS Chapter V, Regulation 12 (pending change)
(b)	Navigation Equipment	33 U.S.C. §1223(a)(3) 46 U.S.C. 3703-3708 33 C.F.R. §164.35 33 C.F.R. §164.37(a) 33 C.F.R. §164.38	SOLAS Chapter V, Regulation 12(h)-(j)
(2)(a)-(c), (3)	Operation of Equipment	33 U.S.C. §1223(a)(3) 33 C.F.R. §§155.230 (as revised at 63 FR 71754, 71763 (Dec 30 1998) 33 CFR §155.235	SOLAS Chapter 2-1, Regulation 3-4)
317-21-540 ADVANCE NOTICE OF ENTRY	Navigation Operations	33 USC §1223(a)(5) 33 CFR §156.215 33 CFR §§160.201 - 215	UNCLOS Article 25(2)