In the

Supreme Court of the United States

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DIXY LEE RAY, Governor of the State of Washington, et al.,

Appellants,

--vs--

ATLANTIC RICHFIELD COMPANY AND SEATRAIN LINES, INCORPORATED,

Appellees.

No. 76-930

Washington, D. C.
October 31, 1977

Pages 1 thru 47

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v.	:	No. 76-930
ATLANTIC RICHFIELD COMPANY AND SEATRAIN LINES, INCORPORATED, Appellees.	:	

Washington, D. C.,

Monday, October 31, 1977.

The above-entitled matter came on for argument at 11:06 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

SLADE GORTON, ESQ., Attorney General of the State of Washington, Temple of Justice, Olympia, Washington 98504; on behalf of the Appellants.

APPEARANCES [Continued]:

RICHARD E. SHERWOOD, ESQ., O'Melveny & Myers, Perkins, Coie, Stone, Olsen & Williams, 611 West Sixth Street, Los Angeles, California 90017; on behalf of the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-930, Ray against Atlantic Richfield.

Mr. Attorney General, I think you may proceed when you're ready.

ORAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GORTON: Mr. Chief Justice, and may it please the Court:

The question before you is whether Washington's non-discriminatory exercise of its police power to protect a unique environment is preempted by the Ports and Waterways Safety Act of 1972, or some other federal doctrine.

In 1972, the Congress passed the PWSA. The object of that Act is the safety of vessels and the protection of our environment. Title I addresses operational safety in ports, waterways, and other congested waters. It authorizes, but it does not require, the Coast Guard to establish vessel traffic systems and to mandate safety devices and standards for use in connection with those systems.

As the Solicitor General says, it's like providing for safer highways and for traffic controls for automobiles.

Title II directs the Coast Guard -- and in this case it directs it -- to set minimum design and construction standards for tankers, and it is thus, in the Solicitor General's words,

like providing for safer automobiles.

In the five years since 1972, the Coast Guard has set up, pursuant to Title I, a skeletal vessel traffic system on Puget Sound. In the Coast Guard's own words, its major components are, and I quote, "a traffic separation scheme and a vessel-moving reporting system", which of course applies only to larger vessels.

When vessels get here, they have this system in the direction of Seattle and Tacoma, which is off of the chart, below; if they are going to ARCO's Cherry Point refinery, they pass through all of these islands on this system, and here, to that Cherry Point refinery. [indicating on chart]

The system also includes a limited radar which does not cover Rosario Strait through the islands. That's about all --

QUESTION: Well, you're not talking about radar on the vessel?

MR. GORTON: I'm talking about the Coast Guard's radar, to see where the vessels all are. That's about all. It's a wild exaggeration to call this a comprehensive and all-encompassing pattern of regulation.

Because of the urgent need for more stringent local controls, caused by the unique nature of Puget Sound, the 1975 Washington State Legislature adopted this Chapter 125, the law here under challenge. That statute, based on a well-

founded fear of disaster comparable to that of the TORREY CANYON, limited the maximum risk from the most disastrous possible oil spill by prohibiting tankers of more than 125,000 tons from Puget Sound entirely.

The line drawn by the Legislature being roughly like that (indicating on chart).

The Legislature sought to minimize the risks of any oil spill in Puget Sound by requiring the tug escort for tankers between 40 and 125 thousand tons, unless they are designed in such a manner as to render a tug escort unnecessary.

These requirements are based on the confined nature of Puget Sound, the lack of maneuverability of large tankers, and the near impossibility of the clean-up of a major oil spill in an area including 196 islands in San Juan County alone.

QUESTION: Mr. Attorney General, how did they happen to land on that 125,000 deadweight ton figure?

Did they pick it out of the air, or was there some reason for it?

MR. GORTON: There was considerable discussion in the legislative debate over the appropriate largest tanker which could appropriately -- which should be permitted to go through the Sound. A 225,000-ton tanker, for example, probably couldn't get through Rosario Straits at all, loaded, because it would draw too much water.

But I believe that they simply debated over the

proposition that at a given size, a major spill, a spill which lost all of the oil on board, would just -- it would totally ruin the entire area. That the State would lack any reasonable clean-up facilities to take care of such a spill. They hoped that between 40 and 125 thousand tons, even with a major one, the disaster would not be an irretrievable one.

QUESTION: You're not arguing, then, that the State might be able to exclude, say, tankers of 50,000 tons? They landed on that figure --

MR. GORTON: I think the question before you would be much different and much more difficult for me under those circumstances, Your Honor. Very few 125,000-ton tankers ever entered Puget Sound before this.

We are concerned with the fact that there are six refineries on Puget Sound. They must be supplied, they must be supplied with more by tanker now, because of the fact that the Canadians have cut off the pipeline to Cherry Point. The two years that we've enforced this law, all of those refineries on Puget Sound have in fact been supplied by tankers of less than 125,000 tons, to the full extent of their needs.

QUESTION: Are all the refineries up there in the Cherry Point area?

MR. GORTON: Two refineries are here (indicating on chart), two refineries are here, and two refineries are in Tacoma, which is off the chart to the south.

QUESTION: How many of those refineries can handle 125,000-ton ships?

MR. GORTON: One. ARCO's.

Now, there's another point. Even the Solicitor General fails clearly in his brief to distinguish between Puget Sound and all of the other waters and coastlines of the State of Washington, to which this law does not apply, because the Legislature was making a careful value judgment, leaving open to the larger tankers, should there be a major tanker port in the future, the Strait of Juan De Fuca and the Pacific Ocean coastline of the State.

In the more than two years since the passage of 125, as I said, those six refineries have gotten all the petroleum products they needed, operating totally consistently with the State law, which has been in force all that time.

QUESTION: Is there a legislative definition or an accepted definition of the line between the Strait of Juan De Fuca and Puget Sound?

MR. GORTON: The Legislature defines the line, which I've drawn here, from a particular light to another particular light.

Now, in 1972, right after the PWSA, the Congress also passed the Coastal Zone Management Act, which authorizes Coastal States to define, and I'm quoting from that Act, "permissible land and water uses within the Coastal Zone."

Transportation and navigation are among the uses expressly recognized by the CZMA as proper subjects of the State management program.

Upon approval by the Secretary of Commerce, the State plan becomes national policy, and other federal agencies are required to conduct their activities in a manner consistent with the State plan. The Washington State plan explicitly includes Chapter 125 as a "means by which the State proposes to exert control" over oil transportation.

In June of last year the plan was expressly approved by the Secretary of Commerce.

Finally, earlier this month -- this month, since all briefs except our reply brief was filed -- Congress approved S. 1522, which bars any increase in crude oil handling capacity at any facility in the State east of Port Angeles.

That's right here (indicating on chart). Except for local consumption.

ARCO's proposal to utilize a pipeline to the Midwest for Alaskan oil has thus been effectively prohibited. S. 1522, like Chapter 125, treats Puget Sound as unique, and recognizes the threat of pollution posed by tanker traffic in the Sound.

Now, the State's law will be avoided, of course, if Congress has expressly preempted it, or if it conflicts with some federal statute. The beginning point of your inquiry into

that question is explained in Jones v. Rath Packing, in the following words: We start with the assumption that the historic police powers of the State are not to be superseded by the federal Act, unless that was the clear and manifest purpose of Congress. But when Congress has unmistakably ordained that its enactments alone are to regulate a part of commerce, State laws regulating that aspect of commerce must fall.

We start with the obvious proposition that the Congress did not expressly preempt all forms of State control over tanker operation by the passage of the Ports and Waterways Safety Act. The only reference in the PWSA arguably indicating an intention by Congress to preempt State authority is found is Section 102(b), which contains no express preemption at all, but only a negative inference, and I quote that section:

"Nothing contained in Title I prevents a State from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this Act."

ARCO claims that the plain meaning of that language preempts any State rule affecting tanker operations, ipso facto. Not so.

Let's examine the inevitable result of the ARCO -- of ARCO's argument.

First, it would destroy a State managed vessel traffic

system even though the Coast Guard never set up its own system in replacement.

But Section 102(e) of the Act requires the Coast Guard to consider existing systems in determining the need for, or the substance of, the Coast Guard's own regulation, from which it's obvious that local systems are valid, at least until the Coast Guard supersedes them.

Next, ARCO's assertion flies in the face of the plain language of Section 102(b) itself, which limits the State only to the extent that standards or equipment have been prescribed, in the words of Section 102(b), by the Coast Guard.

The Coast Guard has not adopted general access limitations or tug escort provisions on Puget Sound.

QUESTION: Then why did Congress say "vessels only" in that language -- or "structures only."

MR. GORTON: Why did it say "structures only"? From the legislative history of that Act, it was speaking of equipment and standards which go on vessels, their radar system, their crew-manning requirements, vessel equipment and safety standards; these are what go on the vessel.

The paragraphs in the congressional, in the Report on it, indicate that that kind of limitation.

QUESTION: So it meant that the State could not preempt -- could not act in that area?

MR. GORTON: In that area, yes. We can't say what

brand of radar or radio the vessels carry.

Moreover, as the Solicitor General says, the legislative history of Section 102(b) shows that it deals only with these safety equipment standards and not with external, such as tug escorts, or access limitations.

Finally, ARCO's position, if we look at that section very carefully, would not allow the State even to enforce its shoreline zoning requirements as to loading docks, for example, on strictly environmental grounds, because such regulations would not be the safety requirements to which ARCO believes the savings clause in Section 102(b) is very strictly limited.

The true meaning of Section 102(b) is clear. When the Coast Guard establishes a vessel traffic system on a waterway, a State may not establish a conflicting system or require the use of different radio frequencies, for example. When the Coast Guard prescribes a given type of radar, the State may not prescribe a different type. Thus we, on this subject, are in accord with both the district court and the Solicitor General. The PWSA does not expressly preempt Chapter 125.

But in your preemption analysis in Jones vs. Rath Packing, you go into a further test, and I'll quote that. "Our task is to determine whether, under the circumstances of this particular case, the State's law stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress. This inquiry requires us to consider the relationship between State and federal laws as they are interpreted and applied, not merely as they are written."

The purposes of the Ports and Waterways Safety Act, as they are stated in Section 101 are: safety and the protection of -- the prevention of environmental harm resulting from vessel damage or destruction.

The purposes of the State Act are identical. Not only does it not frustrate the purposes of Congress, it facilitates and enhances them. The means which the State Act uses to achieve those purposes are also consistent with the PWSA. There is no conflict or friction between the Coast Guard vessel traffic system, as it operates in practice on Puget Sound, and the State requirements as they are actually carried out.

For more than two years those systems have worked in total harmony. In fact, the Commandant of the Coast Guard recently testified to Congress, pointing out that State tug escort requirements are but one example of appropriate complementary State regulation.

I should like you to note that the State's claim here is an extremely modest one. We recognize that Congress can preempt Chapter 125 whenever it wishes to do so. We assert only that it has not done so yet.

We acknowledge that the Coast Guard, by adopting a

valid regulation conflicting with the State statute can supersede either or both of the operative requirements of Chapter 125.

QUESTION: Which are what? Which are you talking about?

MR. GORTON: Which would be the access limit and the tug escort requirement.

QUESTION: And you are suggesting that until it does, your banning the larger tankers is valid?

MR. GORTON: Is perfectly -- well, when the Coast Guard passes a regulation which conflicts with that ban, then we're out. We understand that. We don't even --

QUESTION: What about a licensed United States-flag tanker?

MR. GORTON: Under the general enrollment Act. We do not feel that a license or a registration, either to a U.S.-flag or a foreign-flag tanker, is in any way conflicting. Going all the way back to Gibbons vs. Ogden and all the way forward to your latest case in this connection --

QUESTION: So you think the United States is just wrong with respect to license of a United States-flag ship?

MR. GORTON: Your cases have consistently held that even a license to a U.S.-flag vessel does not prevent the State from enforcing an even-handed conservation or environmental regulation. Even-handed. That is to say, applicable to every

one.

We're only claiming, even here, that the incomplete and fragmentary Coast Guard rules and traffic system on Puget Sound has not yet superseded our State rules.

ARCO goes on, of course, to argue preemption beyond Section 102 on more general and less precise grounds: the need for uniform national standards; the nature of the subject matter; the dominance of the federal interest.

In this field, ARCO elevates its preemption argument to the Constitution, independently of the PWSA, claiming that the field of Chapter 125 is one which the State constitutionally cannot regulate, even if Congress has not occupied it.

Note well how broad and expansive this claim is. If it's accepted, the State could not protect its environment, as Washington has, even if Congress had not acted at all, or perhaps even if Congress had expressly attempted to delegate that authority to the States. The very pilotage laws of 1789, which were approved in Cooley v. Board of Wardens, would be unconstitutional under that argument. As they dealt with vessel operations exactly as our tug escort requirements do, which ARCO claims require uniform national standards.

In this argument, ARCO equates the design and construction of oil tankers with their movement in local waters. But whatever one may say about design and construction, local movement is inherently and inevitably a local concern. For

almost two centuries, this Court has allowed the enforcement of local regulations on matters of local concern, as long as they don't positively conflict with federal law.

As Gilmore and Black have put it, the States have enacted, and I quote, "massive legislation dealing with shipping matters". Such legislation which has been approved by this Court includes quarantine regulations, docking, local speed controls, vessel inspection, and conservation legislation designed to protect the environment.

Title I of the Ports and Waterways Safety Act itself recognizes the existence and validity of such legislation, and is careful to speak of possible preemption only on the basis of the actual effect of Coast Guard regulations.

Finally, the Coastal Zone Management Act invites State plans which deal with navigation matters and allows the Secretary of Transportation to transmute them into federal policy. No resort to a demand for so-called uniformity, standing in the air, can withstand this specific congressional recognition of local concern.

The test of preemption as it applies to regulations such as Washington's is not a vague appeal to the need for national uniformity, but actual conflict.

Now, to the extent that this case is governed by the Ports and Waterways Safety Act, this entire controversy revolves around Title I of that Act and not Title II. It is

in treating the access limitation as a design control that both ARCO and the Solicitor General err.

Conceptually, design precedes even construction in the life of a tanker. Washington State does not require any design features.

Were the Coast Guard to establish an access limitation based on size in Puget Sound, like or conflicting with our own, for safety or environmental reasons, it would act under Title I of the PWSA, not the design standards of Title II. This misconception, together with one other, leads the Solicitor General to view the State's access limitation less favorably than he does the tug escort requirement.

That second misconception is that the proposition that large tankers cause a greater risk of oil spills than smaller ones is unreasonable, thus causing our access limitation to fall.

Now, the parties stipulated -- this case was tried on a stipulation -- to the existence of expert support for the proposition that large tankers were less safe, disputed though it may be, and its reasonableness was never in issue between the parties.

But, as I've already said, it bears emphasis, the Legislature had an additional rationale which is not even subject to dispute: supertankers clearly cause a risk of greater spills, and the State wishes to place a reasonable

ceiling on the most serious oil spill disaster to which Puget Sound may be subjected. That is a rational concern, and justifies the State's regulation, unless and until it conflicts with another established or authorized by Congress.

Your line of cases, to which Mr. Justice Blackmun adverted in his question, on the enrollment and registration statutes clearly permit an even-handed State regulation for environmental purposes, way back to the cases first coming after Gibbons vs. Ogden, Manchester vs. Massachusetts is one of those.

Interestingly enough, your most recent case in the field of preemption deals with exactly that question. And Mr. Justice Marshall, speaking for the Court, wrote in Douglas vs. Seacoast Products, less than six months ago: "States may impose even upon federal licensees reasonable, non-discriminatory conservation and environmental protection measures otherwise within their police power."

That is all we have done in the State of Washington, and we should not only be tolerated in that attempt to protect our environment, we should be encouraged.

QUESTION: You concede that the pilotage requirement is invalid as to certain types of ships?

MR. GORTON: Yes. It is because it conflicts with federal law. And that has not been an issue in this case.

I'll reserve, if I may, the balance --

QUESTION: Has the Coast Guard put some size limitations for some areas in Puget Sound?

MR. GORTON: No, Mr. Justice White, the Coast Guard has not addressed this subject. The Coast Guard, first, has delegated of course to each of its commanders the reasons they -- the ability to write rules. Under those rules, of course, the Puget Sound VTS is created.

There is one --

QUESTION: Well, what about the -- is there some local rule then about --

MR. GORTON: ARCO claims that the Coast Guard has entered this field because of a local rule --

QUESTION: Yes.

MR. GORTON: -- in this case a local rule which says that the vessels, the VTC will coordinate vessel movements to avoid hazardous meetings or crossing situations. Masters and pilots are encouraged -- and this is all they say -- to adjust the speed of their vessels so as to limit movement of large vessels through Rosario Strait to one direction at a time.

QUESTION: Well, was there --

MR. GORTON: It is found in the pretrial order, it is agreed that there is an informal, that isn't even written, Coast Guard rule that two 70,000-ton tankers won't pass one another going in either direction in Puget Sound -- in Rosario

Strait.

But that, of course, is not remotely inconsistent with our greater concern. And that, of course, applies not only to tankers but to every other kind of shipping.

I will reserve the balance of my time, if I may, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Attorney General.

Mr. Sherwood.

ORAL ARGUMENT OF RICHARD E. SHERWOOD, ESQ.,

ON BEHALF OF THE APPELLEES

MR. SHERWOOD: Mr. Chief Justice, may it please the Court:

In Florida Lime and Avocado Growers v. Paul, Mr. Justice Brennan stated for the Court that the maturity of avocados seems to be an inherently unlikely candidate for exclusive federal regulation.

By contrast, we would submit that the subject matter in this case, regulation of the construction, design and navigation of seagoing oil tankers, the lifeline of this country's energy fuel economy, bringing oil as they do from abroad and now from Alaska, is an obvious candidate for exclusive regulation by the federal government; and one which, under the Ports and Waterways Safety Act of 1972, as well as other legislation, has been preempted to the exclusion of State

regulations, such as the Washington tanker law.

In striking the delicate balance between energy needs and environmental protection, a balance which involves the foreign relations of the United States, 50 percent of our oil comes from abroad, 95 percent of tankers are foreign registry, a balance also which involves the competing interest of the coastal and the inland States, only the federal government has the sensitivity and the tools.

If Mr. Gorton is right, and the tanker law is just a simple exercise of the police power -- and I would note in that connection the view in Southern Pacific v. Arizona that one cannot always hide behind the convenient apologetics of the police power -- then other States can adopt different size limits, different design requirements, different tugboat penalties.

Alaska has already done so, encouraging large tankers, mandating different design characteristics, and 15 States, amicus curiae, are waiting eagerly in the wings.

In this context, I turn to the specific features of the Washington tanker law, each of which is preempted by federal law and by Coast Guard action pursuant to federal law.

First, the size limitations. We believe that it is clear from the Ports and Waterways Safety Act that a size limit is bad, both as a traffic regulation under Title I of the Ports and Waterways Safety Act and as a design requirement under

Title II.

101(3) of Title I gives the Coast Guard the power to set size and speed limits.

In the Senate Report leading up to the Act, at pages 32 and 33, there is a specific statement rejecting the idea of general size limitations on tankers, and a statement of preference for specificity for flexible regulation by the Coast Guard.

The Coast Guard has established a vessel traffic system for Puget Sound, and, despite Mr. Gorton's view, I would suggest that pages 141 through 198 of the Appendix, which spell out that vessel traffic system, indicate its comprehensiveness, including specific reporting requirements in Rosario Strait --

QUESTION: Mr. Sherwood, would you still say that there was preemption or that there was a conflict if the Coast Guard had not announced this traffic control plan for Puget Sound?

MR. SHERWOOD: As to the size limit, I would certainly think so, because the Coast Guard, as well as the Maritime Administration, --

QUESTION: You would just say the existence of the power to control the size was enough?

MR. SHERWOOD: Yes, I would, Your Honor.

QUESTION: Now, under what case would that be enough?

MR. SHERWOOD: Well, our view would be that under both cases such as Lockheed or Northern States --

QUESTION: You think just the -- you just have to spell out some intention from the comprehensiveness of the federal law that they didn't intend State interference?

MR. SHERWOOD: Yes. That where you have a statute which comprehensively regulates the field, and delegates the power to balance factors, the assignment of the right to set a size limit, we believe, must be related to an exclusion on the part of any State of the power to set a size limit. Otherwise --

QUESTION: You'd have a tougher case without the local traffic plan?

MR. SHERWOOD: I think we'd have a different case. I suspect it would be tougher. But the local traffic plan contemplates also that there be limits on the size of vessels going in both directions in Rosario Strait, and the Coast Guard retains both the power to ban vessels from Puget Sound or from any other waterway of the United States when there is a determination that such a ban is appropriate.

So, in our view, the size limit is precluded both by Title I, giving the Coast Guard the power to set size limits, and by Title II, giving the Coast Guard the power to set design requirements. Because the Coast Guard, in mandating design requirements, has not drawn any limit on the size of the vessel.

The Maritime Administration, in administering the subsidy program, has not drawn any size limitation on the size of vessels which will be functioning in the commerce of the United States, and there has been no effort to restrict either the building of vessels in U.S. shipyards or the building of vessels in other countries, in terms of their ability to come into the United States.

QUESTION: Yet there are some ports in the United States that a 150,000-ton tanker just can't get into, even though a State were to prohibit them, aren't there?

MR. SHERWOOD: Oh, indeed, Justice Rehnquist. There are very few ports where a tanker larger than 125,000 deadweight tons can presently go. The three logical port areas are all in the western United States, and the State of Washington, by its legislation, would cut off one of those.

QUESTION: Well, when you talk about the failure of the Maritime Administration to limit the deadweight of ships, that doesn't necessarily mean that they contemplated that the largest ship that they would permit would necessarily get in to any port in the United States?

MR. SHERWOOD: No, I think they were thinking in terms of two possibilities: one, existing ports; and the other, the construction of new ports, which may take place at some time in the future, including deepwater ports; none of which has yet been built.

But certainly the commitment of hundreds of millions of dollars in money, without the establishment of a size limitation, is evidence that if there is to be a size limitation, it ought to be federally imposed.

QUESTION: As I understand, your argument is that you can build a tanker any size you want and the State is powerless to keep it out? As of today.

MR. SHERWOOD: Yes, Mr. Justice Marshall. The State is powerless to keep it out, and the State --

QUESTION: Even though it will wreak havoc -- even though there's no question that the bottom will be ripped out.

MR. SHERWOOD: Well, I think there is no evidence that the bottoms of any of these vessels will or have been ripped out.

QUESTION: This is my hypothetical.

MR. SHERWOOD: Well, in that circumstance, the Coast Guard has an affirmative obligation to prevent the vessel from entering Puget Sound or any other port.

QUESTION: And if the Coast Guard does not act, the State is powerless?

MR. SHERWOOD: It would be my position that it would be the obligation then of the State --

QUESTION: Could the State pass a law and say: We will not allow any tankers in Puget Sound in which there is a

record of them having a bottom ripped out some place else?

MR. SHERWOOD: No, I would think again that would be beyond the power of the State, because the scheme of regulation --

QUESTION: So the State just lets them come in and rip the bottoms out.

MR. SHERWOOD: No, I don't think the State needs let any vessel come in its waters, because the State has the right both to go to the federal authorities as well as to seek the kind of political redress which was sought in the case of the Marine Mammal Protection Act at the federal level.

QUESTION: And until that's done, the State cannot act.

MR. SHERWOOD: That would be our position, yes, sir.

We believe that the area of regulation is one which requires that if there be size limits to be set, then the Coast Guard in consultation, as it is mandated to consult with the States and with local authorities, is the only proper organ to make those determinations; because otherwise you would have each State setting foreign policy, each State making determinations -- and, parenthetically, there is nothing whatever in the record which would support the conclusion of Mr. Gorton that there is a safety differential in a vessel larger than 125,000 deadweight tons.

QUESTION: And in this case they did. The Coast Guard

and the State did get together on Rosario.

MR. SHERWOOD: No, the State had no role in Rosario.

QUESTION: None at all?

MR. SHERWOOD: No. Indeed, to the best of my knowledge, there was no pre-existing vessel traffic system imposed by the State of Washington. That the first such system came into effect when the Coast Guard, acting under the Ports and Waterways Safety Act, adopted that system, and the Washington State legislation was two or three years later.

QUESTION: I see.

QUESTION: Do you say that under the federal Act the Coast Guard could set deadweight limits on tankers?

MR. SHERWOOD: Oh, it clearly could, Mr. Justice Rehnquist.

QUESTION: And would it have to set the same limits for every port in the United States, or could it vary from Commandant from Commandant?

MR. SHERWOOD: Well, it's my understanding that rules could be laid down which would be flexible depending on particular ports, and indeed, the section from the Senate legislative report that I read to you contemplates that there be no across-the-board size limitation, that it be imposed specific area by specific area, or depending upon other conditions, weather, for example, such as the limitations now in Rosario.

QUESTION: So you would have a great deal of diversity of regulation under the federal system, as you understand it?

MR. SHERWOOD: Yes. It's my understanding that the federal system contemplates that there be diversity of regulation, but that it be diversity of federal regulation.

QUESTION: Well, at the present time, I suppose the regulations for vessels docking at Alexandria are quite different from those in New York or New Orleans or Mobile.

MR. SHERWOOD: Oh, I'm certain that they are.

QUESTION: Under federal regulations.

MR. SHERWOOD: Yes.

QUESTION: I understood Attorney General Gorton's argument to be simply that, from the State's point of view, a disaster or a spill from a 150,000-ton tanker is a much greater disaster than a 50,000; and you don't need any evidence for that, do you?

MR. SHERWOOD: Well, I would suggest that you would need some evidence, because it's a question of whether the entire vessel was destroyed. The bulk of spills that have taken place have involved far less than the entirety of the vessel's oil. And, indeed, one has a pattern of dockside spills or very small spills, which is the norm, and the bulk of the vessels, I would suggest, are of varying sizes but there are relatively few catastrophes in which the entire vessel was

destroyed.

QUESTION: But until the Coast Guard put in new regulations and limitations about bulkheads, the contrary was true, was it not, that the larger tankers spilled a great deal more oil than the smaller ones?

MR. SHERWOOD: Well, I don't believe so, Chief Justice Burger. It is my impression that one must go well outside the record on this, but the Office of Technology Assessment of the federal government has issued a report on the subject, and it's my impression that there is no evidence that large tankers create a danger of greater spills than does a proliferation of smaller vessels, particularly in a confined waterway.

QUESTION: Well, are you addressing that to the present state of affairs, or the earliest spills, four or five years ago?

MR. SHERWOOD: I believe both. I believe both.

The TORREY CANYON, for example, was a human error in broad daylight, and it's not something, I think, that would have been prevented by any form of design requirement which could have been imposed upon the vessel.

QUESTION: Well, if it had been four times as big, it would have been an even worse disaster, I suppose.

MR. SHERWOOD: I think that's right, Mr. Justice White.

QUESTION: Well, I thought that was about all the Attorney General was arguing, that the larger tankers were potentially greater risks in these narrow straits and shallow waters. I didn't think he was representing that there was any specific evidence on that, but was arguing from the --

MR. SHERWOOD: Well, all that we have in the record on this is a stipulation between the parties that there's a good-faith dispute as to whether more smaller tankers creates a greater danger than fewer larger tankers.

QUESTION: Well, you would concede that smaller tankers will -- I take it you would concede, smaller tankers expose the State's waters or these waters in Puget Sound to less hazard than 150,000-ton tankers.

MR. SHERWOOD: No, I would not, because in order to bring the same amount of petroleum in you're going to require a larger number of smaller vessels, so that if you had seven 20,000-ton vessels, that would be the equivalent of one 140,000-ton vessel, and --

QUESTION: But, Mr. Sherwood, won't you agree that a large tanker is less maneuverable than a small tanker?

MR. SHERWOOD: It is less maneuverable under certain circumstances, Mr. Justice Marshall.

QUESTION: Is less maneuverable, period.

MR. SHERWOOD: No, I think that's a function of the equipment.

QUESTION: Well, would you agree that in Puget Sound, in Rosario Straits, a huge tanker is less maneuverable than a small tanker?

MR. SHERWOOD: No, I would not. My view on that would be that while it might require a longer time to stop, because of the size of the vessel, --

QUESTION: And to turn around.

MR. SHERWOOD: -- but it would depend on the characteristics of the particular vessel as to whether you had danger of lack of maneuverability, and, indeed, the Coast Guard, in imposing vessel equipment requirements, has not attempted to differentiate between vessels larger than 125,000 deadweight tons. The basic rules that have been adopted under Title II of the Ports and Waterways Safety Act have dealt with vessels larger than 20,000 deadweight tons or larger than, in some instances, 1500 deadweight tons.

Moreover, neither Rosario Strait nor Puget Sound is a finding of a shallow place.

QUESTION: Isn't it true that the average maritime collision case, that you find that the larger ship is less maneuverable?

MR. SHERWOOD: No, I think that's a --

QUESTION: I give you Griffin on Collisions. Isn't that what Griffin said?

MR. SHERWOOD: I'm not familiar with Griffin on

Collisions, but my view on that, Mr. Justice Marshall, is that it's a function of the age and the equipment of the vessel.

QUESTION: I think what you say is that you have a large ship with a perfect steering mechanism and a small ship with a beat-up one, that they're equal. But I'm considering that they both are equally well, efficiently equipped, and staffed, and sober.

MR. SHERWOOD: Well, if they had identical characteristics, I would suppose that a smaller vessel would be somewhat more maneuverable; but in an area that is as broad as Rosario Strait, more than a nautical mile wide, and as deep as Puget Sound, and if you look at Exhibit B to the Appendix you'll find that Puget Sound in most places is deep enough to accommodate any vessel afloat.

QUESTION: Well, why is it they have a single file in Rosario?

MR. SHERWOOD: Because the Coast Guard has concluded that as to the large vessels it is the safer way to go.

QUESTION: Well, Mr. Sherwood, what interest of the United States or of -- what interest couldn't be, federal interest couldn't be protected here by the Coast Guard if it wanted to protect it, or by the Secretary, if they wanted really to preclude State regulations? It would be easy to preclude any of these State regulations, wouldn't it?

MR. SHERWOOD: Yes. And it is our position that the

Coast Guard has precluded them.

QUESTION: I know, but if there's any argument about it, the Coast Guard could make it unmistakably clear, couldn't it?

MR. SHERWOOD: I just don't think, Mr. Justice White, that the Coast Guard is going to function in a fashion in which it is making determinations that it is barring a particular law. I think, rather, that the way in which it has acted under the Ports and Waterways Safety Act has been to adopt affirmative requirements.

For example, there are four design features in the Washington tanker law, which Mr. Gorton did not advert to, requiring that there be double bottoms, twin screws, extra propulsive mechanisms, and twin radars.

QUESTION: Well, you're not -- you're still not addressing yourself to my question. My question is: If it wanted to, it could make it specific.

MR. SHERWOOD: Well, in theory, the Coast Guard could say: We prohibit you from doing this.

But in practice there is no evidence that the Coast Guard --

QUESTION: Couldn't it say the following requirements will be observed and no others may be imposed? I suppose they could say that.

MR. SHERWOOD: Yes, they could say that. But under

the statute there is no reason why they should say it, when you've got, on the one side, the 102(b) language which says that the States are limited.

QUESTION: Well, there is a reason if the federal authorities think that a State should be disentitled to impose any stricter requirements than the federal rules. And there are many areas where States are permitted to impose stricter requirements.

Why shouldn't Washington impose stricter requirements here?

MR. SHERWOOD: Well, the Coast Guard has taken the position, as its chief counsel indicated at the time that the law was passed, that it was preempted by the Ports and Waterways Safety Act. And therefore, --

QUESTION: Well, I don't know that we're bound by the chief counsel of the Coast Guard.

MR. SHERWOOD: Well, I'm confident that you're not, because you're interpreting a statute of general application with a legislative history, and --

QUESTION: I suppose that if the Coast Guard -- that if it were decided that the law in its present form, including the Coast Guard regulations, do not preempt or do not foreclose or preclude this system of regulation by the State of Washington, that the State -- the Coast Guard, if it wanted to, could do something about it.

MR. SHERWOOD: Yes, but the question is: What must the Coast Guard do?

Take, for example, tugboats. The Coast Guard has issued a notice of intended rule-making for the general requirement of minimum standards for tugboats. It has given the captain of the port the responsibility to require tugboats, whenever it wishes, under both Title I and Title II, it has actually imposed the requirement in the margins not left open for it by the Washington authorities. In Alaska it has imposed a narrower requirement than the State requirement in Alaska waters, and that is presently being contested on the same basis; that if the federal authorities do not exercise the full scope of their power under the Ports and Waterways Safety Act, it creates an intolerable situation for both vessel design and vessel movement if each State is in a position to adopt its own regulations on the point.

QUESTION: That's almost a constitutional argument there, though, isn't it? Because you have a grant of authority by Congress to federal administrative authorities, like the Coast Guard. They choose to not exercise it. And then you say it just creates an intolerable burden because they have used their discretion given them by Congress not to do something.

MR. SHERWOOD: Well, I would suggest, Justice Rehnquist, that you would otherwise create a situation in which each time the Coast Guard considers and rejects something, twin

screws for example, that a State would then be in a position where it could add on the requirement, so long as it was something that the Coast Guard had not said was prohibited for States to do.

QUESTION: Well, then, you -- that would be a stronger case, though, if the Coast Guard had considered it and rejected it, to have the State then go ahead and add it on, wouldn't it?

MR. SHERWOOD: Well, the Coast Guard has here considered and rejected each of the design features of the Washington law.

QUESTION: But, as I understand the design features, that requirement can be completely avoided by taking a tugboat.

MR. SHERWOOD: It can at this time in Washington, with the imposition of a penalty, in the magnitude of some hundreds of thousands of dollars per year.

QUESTION: But, you mean if the vessel employs a tugboat it has to pay a penalty, too?

MR. SHERWOOD: Well, there is good-faith dispute as to the efficacy of tugboats in doing anything, because they are not attached to the vessel. They trail along behind it. They are different from the federal requirement, and thus, our view is that that is a penalty, as the Solicitor General very candidly stated in discussing the subject.

And if Washington can do it here, each other coastal

jurisdiction can impose its own variant. It can impose its own design requirements. It can impose its own alternatives as to how you get around the design requirements. And you have, again, a situation in which the purpose of the federal statute and the Tank Vessel Act before the Ports and Waterways Safety Act, to promote uniform and comprehensive regulation, is completely undermined.

QUESTION: But you did figure if --

QUESTION: Mr. -- go ahead.

QUESTION: -- if the Coast Guard is charged with administering this Act, and it thought that purpose were being undermined,as Justice White has suggested, it could prohibit it tomorrow; and it hasn't.

MR. SHERWOOD: Well, the Coast Guard, we submit, has acted in the only legible way that it can in dealing with the alternative regulations. It has made known its position of protest both in Washington and in Alaska. It has gone about the regulation of the size and the design and the movement of vessels, and has done so in a fashion which is inconsistent with competing State regulations, even if the States are seeking to help out.

QUESTION: Well, what if -- if this Court suggested that whatever it has done isn't enough, I suppose the Coast Guard would then know that it isn't enough. And would you say that the Coast Guard had the power under any of these statutes

that are involved to foreclose State regulations -- State design requirements, for example?

MR. SHERWOOD: I would believe that it clearly would. And it is our position that it, in fact, has exercised it.

QUESTION: Well, I understand that.

And I thought that you were urging also that the federal statute contemplated perhaps non-uniform regulations in many respects, and they --

MR. SHERWOOD: Yes, I believe it does.

QUESTION: Well, but you just said it contemplated uniform --

MR. SHERWOOD: Well, when I say "uniform" I mean uniform by one body being the umpire; that is, the point of a federal system is that there are political disputes that have to be --

QUESTION: I know, but there would be -- I thought you indicated the Coast Guard might put on different requirements at different ports.

MR. SHERWOOD: As indeed it has. It has different vessel traffic systems in the various ports which it regulates.

QUESTION: So the fact that a company might have to satisfy some requirement in Puget Sound and something different in San Diego or in New York is nothing so horrendous, is it?

MR. SHERWOOD: It's a question of how many political entities a company must deal with, and the company would then

be placed at the tender mercies of 50 different State Legislatures rather than --

QUESTION: Well, you don't have 50 different States with ports, do you?

How many are there?

MR. SHERWOOD: Well, actually, there are a number of inland States that have taken a position in both directions in this case, including those that are on the Great Lakes and those that are on rivers, as to their right to regulate -- and obviously it wouldn't be 50, Mr. Chief Justice.

QUESTION: I take it your point that if -- let us assume there are 20 different ports that take tankers of 50,000 or over, that at least there's one coordinating central authority that's recognizing the reasons for a different set of standard in Mobile Bay and Puget Sound; at least it isn't -- the right hand knows what the left hand is doing then.

MR. SHERWOOD: Precisely. And our view also would be that the Coast Guard can preempt under the Ports and Waterways Safety Act only if the Ports and Waterways Safety Act itself is regarded as preemptive. That is, it's very difficult, as a logical proposition, to understand how, if the statute doesn't do any preempting, it can be read as giving an abstract power of preemption. And at the same time, of course, the Coast Guard has done, in what we would submit is the only logical way,

the non-imposition of size limits, except selectively, the non-imposition of design requirements as contemplated by Washington, but the imposition of plenty of other design requirements. And the development of tug escort systems in areas where it thinks appropriate and under specific circumstances.

I would also note that there is, of course, a commerce issue, which is an equally significant one, because, under Kelly, there's no reason to think that this is unseaworthiness in the commonly accepted sense, and that there's a burden under such cases as Southern Pacific v. Arizona, Bibb, and Napier, that there is an impact on foreign policy because you have, as set forth at considerable length in our brief, the problem of negotiating with other countries about what the size limits are going to be, what the design requirements are going to be.

QUESTION: What about Cooley v. Board of Wardens? That involved the requirements you take on a pilot, didn't it?

MR. SHERWOOD: Yes, and the only historic exception, Mr. Justice Rehnquist, and the only one that I am able to find, aside from the limited regulation of docksides, is that pilotage since 1789 has been regarded as something where you can have a local pilot for vessels that are coming from abroad.

But I would submit that that is the full teaching of Cooley, and that the other cases in the field indicate, as does the new statutory scheme, that there should be exclusive

federal regulations.

QUESTION: Mr. Sherwood, in many areas the States, affected States dealing with a problem like this, get together with the federal government and work things out. Does this record show, or is it a matter of public notice, that there has or has not been such coordination between federal and State authorities?

MR. SHERWOOD: Well, the record shows one letter from Governor Evans to the President --

QUESTION: Well, I was speaking more generally. States generally, with the federal government, rather than just Washington.

MR. SHERWOOD: Oh, indeed, Mr. Chief Justice Burger. The statute contemplates that there be consultation, and each time the Coast Guard adopts a regulation, either under Title I or Title II, there is an opportunity, indeed mandated, for comment by State and local authorities; and there's been a wide pattern of comment by State and local authorities.

I would suggest, however, that the record is absolutely blank as to the State of Washington ever asking that the design requirements or the size limitations be imposed federally.

MR. CHIEF JUSTICE BURGER: Your time has expired.

We will resume at one o'clock with the Attorney General.

[Whereupon, at 12:00 noon, the Court recessed to 1:00 p.m.]

AFTERNOON SESSION

[1:02 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Sherwood, Justice Blackmun has a question for you before we proceed with the Attorney General.

QUESTION: I wanted to ask, Mr. Sherwood, whether -- am I correct, is it agreed that the district court is to be reversed with respect to the presumption ruling concerning registered vessels? As distinguished from enrolled vessels.

MR. SHERWOOD: Well, it's our understanding, Mr. Justice Blackmun, that if the Court affirms the striking down of the entire pilotage provision, that there was a pre-existing provision of Washington law which did require pilots, State pilots on all vessels which were registered, and thus, if the Court struck down that provision in its entirety from the tanker law, there would be, in place, a Washington requirement of pilots on the vessels that come from abroad.

And therefore I think it becomes a matter essentially irrelevant as to which way the Court goes on that point.

Because if it struck down the entire pilotage provision, there's the pre-existing Washington law; if it struck down only that portion pertaining to enrolled vessels, that also would be an appropriate disposition.

QUESTION: And secondly, and this is perhaps of no relevance, do any or all of ARCO's [illegible] tankers carry foreign

flags?

MR. SHERWOOD: Yes.

QUESTION: Is that in the record?

MR. SHERWOOD: Yes.

QUESTION: All of them?

MR. SHERWOOD: No. No, the majority of the vessels owned by the company, from the record, are U.S.-flag, but the bulk of the vessels that have brought foreign crude into Puget Sound for Atlantic Richfield were foreign-flag. That is, the 15 vessels that were larger than 125,000 deadweight tons were all vessels not owned by Atlantic Richfield, but rather were chartered by it and were foreign-flag vessels.

And I think you can see from the record, Mr. Justice Blackmun, the list of all of the vessels that have come in, and they run a patchwork of foreign-flag and U.S.-flag, some of them owned by the company, some not.

QUESTION: May I assume they possess federal licenses from the U.S.?

MR. SHERWOOD: Yes. All of the Atlantic Richfield vessels have the relevant federal licenses and permits under the Tank Vessel Act and certification under the other federal statutes, and, similarly, all the vessels that are foreign-flag have the appropriate arrangements for reciprocal treatment under our laws.

QUESTION: That's all I have.

QUESTION: Mr. Sherwood, may I ask you one question that I didn't have a chance to ask before lunch?

Does the record tell us anything about the safety advantages, if any, of having the tug escorts that you describe as a penalty for not having the design requirements under 125,000 tons?

MR. SHERWOOD: The record does not, I believe, Justice Stevens, tell us anything other than the existence of the good-faith dispute, although there are portions of the record, the Environmental Impact Statement for example of the Coast Guard in adopting its design requirements, which allude to tug escorts as a possible approach toward vessel safety in some limited circumstances; and there's also in the record the instances where the Coast Guard, on a quite pinpointed basis -- a good deal different from the way the State of Washington has done it -- has required tug escorts both in Puget Sound for LPG tankers and also in Alaska.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sherwood.

Mr. Attorney General.

REBUTTAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GORTON: In its Report which accompanied the passage of the Ports and Waterways Safety Act, the Senate stated, and I quote: "In terms of maneuverability the propulsion

units on 250,000-ton tankers are the equivalent to a one-third horsepower motor on a 40-foot boat."

This is something of which the Legislature of the State of Washington was conscious when it passed this law. The depth of Rosario Strait, or the controlling depth of Rosario Strait is 60 feet, and a 120,000-ton tanker has a draft of 52 feet loaded. By the time we get to 190,000 dead-weight tons, it becomes 61 feet.

The State Legislature wished at least that small margin of safety.

And finally, the smaller --

QUESTION: Is your emphasis there also on the maneuverability of such a large craft?

MR. GORTON: Of course it is. And that is from the Senate Report. They are obviously less maneuverable than the smaller craft.

It takes, for example, even at the 120,000-ton size, two and one-half miles to stop a tanker at 16 knots. By the time the tanker is 190,000-ton, it takes three and a half miles to stop.

QUESTION: Do those tankers ever go 16 knots in that area?

MR. GORTON: I doubt it. They can't, among other things, Mr. Chief Justice, because they are required to have tug escorts, and the tug escorts could not keep up with them

at 16 knots. That is, effectively we slow them down by the tug escort requirement.

QUESTION: Well, of course, on those figures as a limit, in a strong wind on Rosario Strait a canoe is smaller than a 20,000 deadweight ton vessel and yet it will be a lot less maneuverable.

MR. GORTON: Yes, it would be.

QUESTION: I've been in them.

MR. GORTON: That is correct, Your Honor. That might be less than the one-third horsepower on a 40-foot boat.

But the canoe, while it might put you in danger, would not put the environment in danger.

QUESTION: It isn't a straight line of comparison, right down --

MR. GORTON: No, it is not an absolute straight line comparison.

Mr. Sherwood referred to 16 States which are waiting in the wings to pass highly inconsistent legislation from that of the State of Washington. The simple answer to that question, under the PWSA, is that the minute one of those States passes a statute which creates a true rather than a fictional conflict with those of the State of Washington, in trade which involves the two, the Coast Guard will have the immediate power to step in and resolve it, overriding either our regulation or that of the other State, or both. But that situation simply hasn't

taken place yet, and may well never take place.

QUESTION: Are we to take that as meaning that the Coast Guard can step in today and take care of all of Mr. Sherwood's problems?

MR. GORTON: Precisely, Mr. Chief Justice. If the Coast Guard wishes to do so.

But the Coast Guard -- remember, neither the district court nor this Court has permitted an injunction during the course of this litigation to prohibit our State from enforcing the law. It has been in force since it went into effect in 1975. The Coast Guard has been obviously totally aware of it. The Coast Guard has obviously, by its lack of action, taken it as being consistent with its own regulation.

The Commandant of the Coast Guard, in testifying before the Congress quite recently, spoke of the tug escort requirement as being just one form of complementary State regulation. So we built up a totally fictional conflict here.

Finally, Mr. Justice Rehnquist asked Mr. Sherwood whether or not there was some penalty in connection with the tug escort requirements for not meeting the design desires of the State of Washington. And I don't believe he got an answer to that.

There is, of course, Mr. Justice Rehnquist, no such penalty. It is simply a quaint characterization by ARCO of the tug escort requirements, which are a valid and important

environmental protection measure.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:10 o'clock, p.m., the case in the above-entitled matter was submitted.]

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