No. _____

In the
Supreme Court of the United States

PACIFIC MERCHANT SHIPPING ASSOCIATION,
Petitioner,

v.

JAMES GOLDSTENE, IN HIS OFFICIAL CAPACITY AS EXECUTIVE OFFICER OF THE CALIFORNIA AIR RESOURCES BOARD, NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., AND SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On July 1, 2009, the California Air Resources Board began enforcement of regulations that require foreign- and U.S.-flagged ocean-going vessels engaged in international and interstate commerce to use specified low-sulfur fuels whenever those ships are bound to or from California ports and within 24-miles of the California coastline. These Rules, adopted to reduce vessel emissions of diesel particulates and other air pollutants, apply, at an aggregate compliance cost estimated at $1,500,000,000, to a predominately foreign-flagged group of ships that call at California ports more than 10,000 times annually and carry more than 40% of the nation's containerized imports into California each year. The questions presented by this petition are:

1. Whether the Commerce Clause and the Supremacy Clause prohibit California's extraterritorial exercise of its police powers to require the use of specified low-sulfur fuels on foreign- and U.S.-flagged vessels engaged in foreign and interstate commerce while these ships are on the high seas.

2. Whether, by establishing the measure of California's seaward boundary at "three geographical miles distant from its coast line," the *Submerged Lands Act*, 43 U.S.C. §1312, preempts California's regulations that require foreign- and U.S.-flagged vessels engaged in international and interstate commerce to use specified low-sulfur fuels while those ships are navigating outside of the State's three-mile seaward territorial boundary so established.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceedings below are those set forth in the caption. Pursuant to Rule 29.6 of this Court, Petitioner Pacific Merchant Shipping Association states that it is a non-profit mutual benefit membership corporation organized under the laws of the State of California. Pacific Merchant Shipping Association ("PMSA") does not issue shares of ownership. Its members as of June 20, 2011, are listed in Appendix G hereto (App., 174a-175a). PMSA was the plaintiff in the district court and appellant in the Court of Appeals.

Respondent James Goldstene (sued in his official capacity as Executive Officer of the California Air Resources Board, a State of California agency) was a defendant in the district court and an appellee in the Court of Appeals. Respondents South Coast Air Quality Management District (a regional California governmental agency), the Natural Resources Defense Council, Inc., and the Coalition for Clean Air, Inc. intervened as defendants in the district court and were appellees in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Pacific Merchant Shipping Association ("PMSA"), respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in these proceedings on March 28, 2011.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, 1a-54a) is reported at 639 F.3d 1154 (9th Cir. 2011). The Amended Memorandum and Order of the District Court (Appendix B, 55a-75a) is unreported.

JURISDICTION

The Court of Appeals' judgment was entered on March 28, 2011, and no party sought rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause provides, in relevant part: "The Congress shall have Power...To regulate Commerce with foreign Nations, and among the several States...." U.S. Const. art. I, §8, cl. 3. The Supremacy Clause of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the

> judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The following are reproduced in full in the Appendix ("App.") hereto:

1. Appendix C: The relevant provisions of the *Act to Prevent Pollution from Ships,* as amended by the *Maritime Pollution Prevention Act of 2008*, 33 U.S.C. §§1903 and 1911, and Sections 4 and 6(a) of the *Submerged Lands Act*, 43 U.S.C. §§1312 and 1314(a) (App., 76a-82a);

2. Appendix D: Presidential Proclamation No. 5928 (Dec. 27, 1988), 54 Fed. Reg. 777 (Jan. 9, 1989), and Presidential Proclamation No. 7219 (Aug. 2, 1999), 64 Fed. Reg. 48701 (Sept. 8, 1999) (App., 83a-88a);

3. Appendix E: Section 2299.2 of Title 13 of the *California Code of Regulations* (Cal. Code Regs. tit. 13, §2299.2), and Section 93118.2 of Title 17 of the *California Code of Regulations*, (Cal. Code Regs. tit. 17, §93118.2) (App., 89a-160a);

4. Appendix F: Regulations 13 and 14 of Annex VI to the *International Convention for the Prevention of Pollution from Ships* ("MARPOL"), as revised October 10, 2008, by Resolution MEPC.176 (58) of the Maritime Environment Protection

Committee of the International Maritime Organization.[1] (App., 161a-170a).

STATEMENT OF THE CASE

Introduction

This case presents important constitutional questions left open by *United States v. Locke*, 529 U.S. 89 (2000), regarding whether a state can regulate the on-board operations of foreign- and U.S.-flagged ships engaged in international and interstate trade while those ships navigate the high seas outside the territorial waters of the state. By section 2299.2 of Title 13 and section 93118.2 of Title 17 of the *California Code of Regulations* (the "Rules"), the California Air Resources Board ("CARB") dictates what fuels these ships must use within twenty-four nautical miles from the state's coastline. This puts the reach of the Rules into the high seas, twenty-one miles seaward of the state's three-mile boundary as established by the *Submerged Lands Act*, 43 U.S. §1312 (App., 81a).

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[1] International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 34 U.S.T. 3407, 1313 U.N.T.S. 3 (entered into force Mar. 30, 1983), and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 17 I.L.M. 546, 1340 U.N.T.S. 61 (entered into force Oct. 2, 1983); International Maritime Organization – Marine Environment Protection Committee, Amendments to the Annex of the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution of from Ships, 1973, as Modified by the Protocol of 1978 Relation Thereto (Revised MARPOL Annex VI), MEPC 58/23/Add.1(17October2008): http://www5.imo.org/SharePoint/blastDataOnly.asp/data_id=24249/revisedannexviandnoxcodemepc5823-Add-1.pdf

In *Locke*, this Court noted that "a State's jurisdiction and authority are most in doubt" when it imposes regulations that "affect a vessel operator's out-of-state obligations and conduct." 529 U.S., at 116. Because the state regulations at issue in *Locke* directly governed vessel operations only within the waters of the State of Washington, however, the Court did not decide whether a state can regulate extraterritorial vessel operations. This case presents that question.

The Rules went into effect on July 1, 2009. They apply to a predominately foreign-flagged group of vessels that make an aggregate of more than 10,000 calls at California ports each year. The cargo these vessels carry to California accounts for more than 40% of this Nation's containerized import trade. U.S.-flagged ships that carry a significant volume of cargo in interstate trade between California and Hawaii and Guam are also subject to the Rules.

In order to comply with the Rules, the ships must purchase and load compliant fuels before sailing from distant foreign or out-of-state ports, store the fuels in segregated or mixed tanks during transit, adopt procedures to switch to the required fuels before arrival at the twenty-four mile mark, and maintain records of vessel activities regarding the switchover to and use of compliant fuels. Failure to comply with the Rules subjects the ships' owners and operators to significant fines and penalties for non-compliance. CARB estimates the compliance cost at $30,000 per port call at California and the aggregate cost to the ships' owners and operators at $275,000,000 to $362,000,000 per year and a cumulative $1,500,000,000 through 2014.

No state has previously sought to impose restrictions or requirements on the extraterritorial on-board operations of vessels engaged in foreign and interstate commerce on the high seas. Unguided by any directly applicable decision of this Court, the Ninth Circuit panel applied generally inapposite decisions from this Court and state and lower federal appellate courts, most of which have no bearing on state regulation of international or interstate vessels operating outside state waters. In doing so, the Court of Appeals employed the balancing test described by *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 441 (1960) (a challenge to a city prosecution under local ordinance for vessel smokestack emissions "during periods when the vessels were docked at the Port of Detroit"), to reject PMSA's Commerce Clause claim. It also applied a presumption against preemption to sustain the Rules against PMSA's statutory preemption challenge that was based on the *Submerged Lands Act's* three-mile measure of California's seaward boundary.

The Court of Appeals emphasized the important constitutional principles at stake and stated:

> This appeal presents the Court with a highly unusual and challenging set of circumstances. Given the circumstances, we do believe that the regulatory scheme at issue here pushes a state's legal authority to its very limits, although the state had clear justifications for doing so. More generally, we must take into account such fundamental considerations as, on the one hand, the supremacy of federal law, the various limitations on state regulations arising out of the dormant Commerce Clause and general

> maritime law preemption doctrines, and the federal government's unquestioned authority over this nation's relations with foreign countries, and, on the other hand, the sovereign police powers retained by California allowing the state to adopt a wide range of laws in order to protect the health, safety, and welfare of its own residents.

(App., 12a).

Having articulated these fundamental constitutional concerns, however, the Ninth Circuit's opinion ignored the principles outlined by *Locke*, *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Society for Relief of Distressed Pilots*, 53 U.S. (12 How.) 299 (1851), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). These cases establish that the federal authority to regulate vessels engaged in interstate and foreign commerce is exclusive where the subject matter of such regulation requires national uniformity.

Although *Cooley* and *Locke* hold that exclusive federal authority over maritime commerce can give way to state control in matters of local concern, the exercise of local authority over the at-sea conduct of vessels in foreign and interstate commerce has always been limited to regulation of conduct within the states' territorial jurisdiction. *United States v. Locke*, 529 U.S., at 112, and *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 179-80 (1978) (tug escort and other requirements for tankers within Washington State territorial waters); *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 327 (1973) (vessel liability for damage arising from "an oil spill in the State's territorial waters"); *Huron Portland Cement Co. v. Detroit*, 362

U.S., at 443 (local entities may impose "[e]venhanded local regulation to effectuate a legitimate local public interest"); *Cooley*, 53 U.S. (12 How.), at 319 (states can adopt regulations "applicable to the local peculiarities of the ports within their limits").

The Ninth Circuit's decision never addressed the fact that the present case – unlike *Huron Portland Cement* and the other cases in which this Court has upheld state regulation of interstate and international shipping *within* state waters – involves regulations that have their primary application on the high seas *outside* of state waters, with effects that extend to ports around the world where ships buy fuel. Instead, the Court of Appeals reached its result without confronting the relevant prior decisions of this Court that pose the threshold question of whether the federal government's authority under the Commerce Clause to regulate the operations of ships engaged in foreign and interstate commerce is exclusive when the ships are beyond the territorial waters of the states. By its decision below, the Court of Appeals has announced a novel rule that allows each separate state to regulate ship operations beyond the state's seaward territorial limits. That rule undermines this Court's jurisprudence that has established the line between permissible local regulation of ship operations for local purposes and impermissible state interference with the Nation's maritime commerce.

In addition to its Commerce Clause claim, PMSA challenged the Rules on grounds of statutory preemption based on the premise that the measure of state boundaries set by Section 4 of *the Submerged Lands Act* ("SLA"), 43 U.S.C. §1312, circumscribes the territorial dominion of the states for all purposes of the

Nation's domestic law and thereby impliedly precludes the direct exercise of jurisdiction by the states over vessels outside of those boundaries. *United States v. Louisiana,* 363 U.S. 1, 35 (1960) (state boundaries established by Congress are "fully effective as between Nation and State"); *People v. Weeren*, 26 Cal. 3d 654, 664-65 (Cal. 1980) (the SLA "established the state's 'boundaries' for *all* purposes, political and proprietary." (emphasis in original)). Congress adopted the SLA boundary provisions pursuant to its exclusive power to admit states to the Union under the Admissions Clause, Article IV, §3, cl. 1 of the Constitution (*United Sates v. Louisiana*, 363 U.S., at 34; App., 17a-18a, 25a-26a). This is an area of unique federal interest where there has been no "historical presence" of the states. *United States v. Locke*, 529 U.S., at 108 ("'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence").[2]

In reviewing Petitioner's statutory preemption challenge to the Rules, the Court of Appeals relied on the principles of preemption described in *Wyeth v. Levine*, 555 U.S. 555, ___, 129 S. Ct. 1187, 1195-96, n. 3 (2009). These apply the presumption against preemption where there has been an "historic presence of state law" in the field of regulation. The Court of Appeals concluded that since the Rules "ultimately implicate the prevention and control of air pollution"

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[2] Regulation of maritime commerce is also a "uniquely federal" field of legislative concern in which there is no presumption of preemption. *Chamber of Commerce v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968, 1983 (2011) (Roberts, Ch. J., plurality); *United States v. Locke,* 529 U.S., at 108.

and "[s]tates have long sought to protect their own residents from the undisputedly harmful effects of air pollution and other forms of environmental harms," the presumption should apply. (App., 22a). Invoking this presumption, the appellate court below determined, in part based on the SLA's statement of purpose and legislative history as a response to this Court's decision in *United States v. California*, 332 U.S. 19 (1947), that the Act does not reflect a congressional intent to preclude a state's extraterritorial regulation of maritime commerce.

Both questions presented by this petition concern whether a state can directly regulate the high seas operations of vessels engaged in international and interstate maritime commerce outside of the state's boundaries established by the *Submerged Lands Act*. Both merit review by this Court.

Statutory And Regulatory Background

CARB adopted the Rules on April 16, 2009, effective July 1, 2009. (App., 3a). The Rules apply to all "ocean-going vessels that are flagged in, registered in, entitled to fly the flag of, or otherwise operating under the authority of the United States ('U.S.-flagged') or any other country ('foreign-flagged')," (Cal. Code Regs. tit. 13, §2299.2(b)(2), Cal. Code Regs. tit. 17, §93118.2(b)(2)) (App., 90a-91a), subject to exceptions for, among other things, vessels in innocent passage. (Cal. Code Regs. tit. 13, §2299.2(c), Cal. Code Regs. tit. 17, §93118.2(c)) (App., 91a,127a).[3] "Ocean-going

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[3] Pursuant to California law, CARB adopted two identical versions of the Rules that now appear in two separate Titles of the

vessels" are defined by the Rules to mean all ships, other than "tugboats, towboats, or pushboats," that are 400 feet in length overall, 10,000 gross tons, or "propelled by a marine compression ignition with a per-cylinder displacement" equal to or greater than 30 liters. (Cal. Code Regs. tit. 13, §2299.2(d)(24), Cal. Code Regs. tit. 17, §93118.2(d)(24)) (App., 101a, 137a). Most of the foreign- and U.S.-flagged ships engaged in foreign and interstate commerce and calling at California ports fall within the Rules' definition of "ocean-going vessels."

Beginning July 1, 2009, the Rules have required the targeted vessels to use, subject to limited exceptions, "either marine gas oil (MGO), with a maximum of 1.5 percent sulfur by weight, or marine diesel oil (MDO), with a maximum of 0.5 percent sulfur by weight" in all of their engines while the vessels are operating within what the statute designates as "Regulated California Waters." (Cal. Code Regs. tit. 13, §2299.2(e)(1)(A).1 and (e)(1)(B).1, Cal. Code Regs. tit. 17, §93118.2(e)(1)(A).1 and (e)(1)(B).1) (App., 105a-107a,141a-142a). "Regulated California Waters" are defined by the Rules to include, with limited exceptions, "all waters within 24 nautical miles of the California baseline, starting at the California-Oregon border...and ending at the California-Mexico border at the Pacific Ocean, inclusive." (Cal. Code Regs. tit. 13, §2299.2(d)(30)(F-G), Cal. Code Regs. tit. 17, §93118.2(d)(30)(F-G)) (App., 103a-104a, 139a-140a). Beginning July 1, 2012, the Rules will limit the sulfur content in all fuels used on

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California Code of Regulations. PMSA has included the full texts of both in Appendix E (App., 89a-160a).

the targeted ships to 0.1% while they are operating within the designated "Regulated California Waters." (Cal. Code Regs. tit. 13, §2299.2(e)(1)(A).2 and (e)(1)(B).2, Cal. Code Regs. tit. 17, §93118.2(e)(1)(A).2 and (e)(1)(B).2) (App., 106a-107a, 142a-143a). They also impose recordkeeping, documentation, reporting, and monitoring requirements on "any person subject to this section," which includes any person or entity operating engines on vessels subject to the Rules. (Cal. Code Regs. tit., 13, §2299.2(e)(2), Cal. Code Regs. tit. 17, §93118.2(e)(2)) (App., 107a-108a, 143a-144a).

The Rules authorize, among other things, significant fines, penalties, and injunctive relief for non-compliance, and imprisonment to secure payment of any fines or penalties levied. (Cal. Code Regs. tit. 13, §2299.2(f), Cal. Code Regs. tit. 17, §93118.2(f)) (App., 110a-111a, 146a-147a); see also, Cal. Health & Safety Code §§39674-39675 and §§42400-42410. The purpose of the Rules is to require the use of low sulfur fuel on the ships "in order to reduce emissions of particulate matter (PM), diesel particulate matter, nitrogen oxides and sulfur oxides...within any of the waters subject to this regulation." (Cal. Code Regs. tit. 13, §2299.2(a), Cal. Code Regs. tit. 17, §93118.2(a)). (App., 89a, 125a).[4]

The Rules were adopted against the background of significant federal participation in an international effort to limit emissions from vessels engaged in international trade. In 2006, the Senate consented to the United States' participation as a signatory to Annex VI to the *International Convention for the*

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[4] The environmental effects of these emissions are described in detail by the Ninth Circuit's opinion. (App., 5a-8a, 41a-42a).

Prevention of Pollution from Ships, 1973, ("MARPOL Annex VI"). *Senate Executive Session, Daily Digest*, p. S3400 (Apr. 7, 2006). Regulation 13 of MARPOL Annex VI imposes standards on these vessels' engines for emissions of nitrogen oxides (App., 161a-165a), and Regulation 14 places a general limitation on fuel sulfur content that is currently 4.5%, will be 3.5% beginning January 1, 2012, and is reduced to 0.5% in 2020. (App., 170a). Regulation 14 also provides for the designation of Emission Control Areas in which lower sulfur content limits are imposed. (App., 171a-172a).

The *Maritime Pollution Prevention Act of 2008,* Pub. L. No. 110-280, 122 Stat. 2611, amended the *Act to Prevent Pollution from Ships*, 33 U.S.C. §§1901-1911, to authorize the Administrator of the U.S. Environmental Protection Agency ("EPA") to issue Engine International Air Pollution Prevention certificates for U.S. vessels in accordance with MARPOL Annex VI. (33 U.S.C. §1903(b)(1)) (App., 76a-77a). The 2008 Act also amended 33 U.S.C. §1903(b)(2) to give the EPA Administrator the authority to administer Regulations 12 through 19 of MARPOL Annex VI and amended §1903(c)(2) to require that the Administrator "shall" proscribe regulations implementing MARPOL Annex VI. (App., 77a).

On April 2, 2009, the United States and Canada jointly proposed the creation of an Emissions Control Area ("ECA") pursuant to Regulations 13 and 14 of MARPOL Annex VI for the coasts of both nations.[5] On

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[5] International Maritime Organization – Marine Environment Protection Committee, Proposal to Designate an Emission Control Area for Nitrogen Oxides, Sulphur Oxides and Particulate Matter

March 26, 2010, the joint proposal was adopted by the International Maritime Organization ("IMO"), the treaty's governing body. (App., 9a). This ECA will go into effect on August 1, 2012. (App., 9a). Until January 1, 2015, it will require essentially the same group of ships that are subject to the California Rules to use fuels with a maximum sulfur content of 1.0% whenever they are within 200 nautical miles of the coast of either the U.S. or Canada. (App., 9a, 171a). From January 1, 2015, the ECA will limit the sulfur content of the fuel to 0.1%. (App., 9a, 171a).

The California Rules will "remain in effect...until the Executive Officer [of CARB] issues written findings that federal requirements are in place that will achieve equivalent emissions reductions within the Regulated California Waters and are being enforced within the Regulated California Waters." (Cal. Code Regs. tit. 13, §2299.2(j)(1), Cal. Code Regs. tit. 17, §93118.2(j)(1)) (App., 125a, 159a). Thus, since the Rules impose stricter sulfur content limitations on the fuels used by the ships than do the federal and international rules until January 1, 2015, the California Rules will continue to govern vessel fuel use, side by side with the MARPOL Annex VI and ECA requirements, at least until that date. Furthermore, since nothing in the Rules compels the Executive Officer to make the findings necessary to end the California regime, there is no guarantee that the Rules will expire even after the federal and state requirements coincide.

Submitted by the United States and Canada, MEPC 59/6/5 (2 April 2009), http://www.epa.gov/otaq/regs/nonroad/marine/ci/mepc-59-eca-proposal.pdf

Congress enacted the *Submerged Lands Act*, 43 U.S.C. §§1301-1315, in 1953. (App., 14a). Section 4 of the SLA, 43 U.S.C. §1312, codified the measure of the states' seaward boundaries. (App., 81a). For California, the SLA established a seaward boundary at "a line three geographical miles distant from its coast line...." 43 U.S.C. §1312; *United States v. California*, 381 U.S. 139 (1965); *People v. Weeren,* 26 Cal. 3d, at 662. Under Section 6(a) of the SLA, 43 U.S.C. §1314, the federal government "retains all its navigational servitude and rights in and powers of regulation and control of" the "navigable waters" within the state's boundaries established by the SLA "for the constitutional purposes of commerce, navigation, national defense, and international affairs...." (App., 82a).

Proceedings In The District Court

On April 27, 2009, PMSA filed its complaint in the district court, seeking declaratory relief and an injunction against Respondent Goldstene's enforcement of the Rules beyond the state's three-mile seaward boundary. Its claim was based on the Commerce Clause, the Supremacy Clause, and statutory preemption by the boundary provisions of the *Submerged Lands Act*. Federal question jurisdiction existed in the district court pursuant to 28 U.S.C. §1331.

Petitioner PMSA's members include foreign and domestic vessel owners and operators that are commercial carriers of cargo and passengers in foreign and interstate trade. Its members' ships are subject to the Rules. Respondent Goldstene is the official at CARB charged with the authority to enforce the Rules. Respondents Natural Resources Defense Council, Inc.,

("NRDC"), Coalition for Clean Air, Inc. ("CCA"), and South Coast Air Quality Management District ("SCAQMD") are intervening parties with a membership interest (NRDC, CCA) or governmental interest (SCAQMD) in the reduction of emissions from the vessels.

On May 22, 2009, PMSA moved for summary judgment on its claim. No facts material to the motion were in dispute. The district court denied PMSA's motion for summary judgment by its Memorandum and Order of June 29, 2009, and, on August 28, 2009, filed an Amended Memorandum and Order to certify its ruling for interlocutory appeal pursuant to 28 U.S.C. §1292(b). (App., 74a).[6] The parties have agreed and the district court has ordered that proceedings in the district court be stayed pending appeal and disposition of this petition.

The Court Of Appeals' Commerce Clause Decision

The Court of Appeals granted PMSA's petition for interlocutory appeal of the Amended Memorandum and Order of the district court, and, by its opinion and judgment entered on March 28, 2011, affirmed the district court's denial of PMSA's summary judgment motion. It considered PMSA's Commerce Clause

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[6] The only difference between the two district court Memoranda and Orders is that the second one adds the language required to certify the case for interlocutory appeal. (App., 56a, n.1, 74a). Because it appealed only the second Order and the second Memorandum was otherwise identical to the first, PMSA has not included the initial Memorandum and Order of June 29, 2009, in the Appendix.

challenge to the Rules in Part III.B of its opinion. Its analysis of this issue mixed together a number of different Commerce Clause principles that have been variously outlined by this Court in cases of economic regulation, taxation, and health and safety legislation. Based thereon, it concluded that, because the state's need to limit emissions from the ships outweighs the cost burden of the regulations on the vessels, the extraterritorial regulation of the ships' fuel use does not run afoul of the Commerce Clause. (App., 44a-55a). The Court of Appeals first applied cases that have categorized state regulation of interstate commerce according to whether that regulation is "direct" or "incidental," citing *Or. Waste Sys. Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994), *UFO Chuting of Haw., Inc. v. Smith,* 508 F.3d 1189 (9th Cir. 2007), *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson,* 48 F.3d 391 (9th Cir. 1995), and *Barber v. Hawai'i*, 42 F.3d 1185 (9th Cir. 1994). (App., 44a-45a). It concluded that the Rules fall into the "incidental" category because their "central purpose...is to protect the well-being of the state's residents from the harmful effects of the fuel used by ocean-going vessels," and they do not discriminate against or overly burden the free flow of interstate and foreign commerce and navigation.[7] (App.,45a, 48a-49a).

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[7] *Locke* treated the state regulation of vessel at-sea conduct for environmental purposes at issue in that case as regulation of maritime commerce for purposes of its preemption analysis. 529 U.S., at 108. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.), at 72, held that regulation of the operation of vessels in navigation is regulation of commerce within the positive Commerce Clause powers of Congress. *Cooley*, 53 U.S. (12 How.), at 315 states: "That the power to regulate commerce includes the regulation of navigation, we consider settled." This includes "the power to prescribe rules

The Court of Appeals then addressed the interstate Commerce Clause prohibition on "state legislation regulating commerce that takes place wholly outside of the state's borders," citing the alcohol beverage pricing decisions in *Healy v. Beer Inst.,* 491 U.S. 324, 335-36 (1989), and *Brown–Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 579 (1986), and the financial transaction case of *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982). (App., 45a-46a). It distinguished these cases on the grounds that the Rules "continue to govern fuel use of ocean-going vessels traveling to and from California ports while they are within the state's own territorial waters," and, therefore, "do not apply to commercial activities occurring 'wholly outside' of the territorial limits of California." (App., 49a).

The Court of Appeals acknowledged "'the special need for federal uniformity'" in matters of foreign commerce, quoting *Wardair Canada Inc. v. Fla. Dep't of Revenue,* 477 U.S. 1, 8 (1986), and the need for the federal government "'to speak with one voice when regulating commercial relations with foreign governments,'" citing *Barclays Bank PLC v. Franchise Tax Bd. of Cal.,* 512 U.S. 298, 311 (1994), and *Japan Line, Ltd. v. Cnty. of L.A.,* 441 U.S. 434, 448 (1979). (App., 46a). Its opinion states:

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in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used." 53 U.S. (12 How.), at 316. By its Rules, CARB is regulating the instruments of maritime commerce directly. Its reasons for doing so do not change the fact that the ships' operations are the direct object of the Rules.

> We recognize the importance of uniformity as well as the unique role of the federal government in matters of foreign relations and international trade. In fact, the federal government, foreign countries, and international bodies have continued to take steps to control the critical problem of air pollution originating from ocean-going vessels, most significantly in the recently adopted ECA.

(App., 49a).

The Ninth Circuit's decision noted that *Chevron U.S.A. v. Hammond*, 726 F.2d 483, 492, n. 12 (9th Cir. 1984), *cert. den. sub nom., Chevron U.S.A..Inc., v. Sheffield*, 471 U.S. 1140 (1985), and *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1426 n.24 (9th Cir. 1990), *cert. den.* 504 U.S. 979 (1992), had previously observed that the authority to regulate the extraterritorial conduct of vessels engaged in foreign and interstate commerce should rest exclusively with the federal government. (App., 50a). It concluded, however, that:

> [T]he District Court reasonably noted that the language [in *Hammond* and *Aubry*] regarding the federal interest in uniformity "does not apply here...inasmuch as the United States has established a 24-mile contiguous zone for purposes of exercising territorial control" and "[t]he area at issue in this case falls within that twenty-four mile zone and does not extend to international deep waters falling outside that

> boundary."...(citing Presidential Proclamation No. 7219)....[8]

(App., 50a).

The Court of Appeals then applied a balancing test derived from *Huron Portland Cement v. City of Detroit* to affirm the district court's denial of PMSA's motion for summary judgment insofar as the motion was based on a Commerce Clause challenge to the Rules. (App., 52a). The Court of Appeals found that the "interests weighing in favor of striking down the Vessel Fuel Rules are rather attenuated in the present circumstances," citing the savings clause in 33 U.S.C. §1911 and the "sunset clause" in subsection (j) of the Rules. (App., 50a). It noted that "no federal (or international) environmental regime prohibits the state regulations at issue here," and referred to the Clean Air Act's State Implementation Plan requirements and allowance of "state in-use

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[8] Both Proclamation No. 7219 and No. 5928 expressly disclaim any intent to change the domestic law of the United States with respect to the states' territorial seas or jurisdiction of the states, and both left in place the existing three-mile limit on the territorial seas of the states for domestic purposes. (App., 84a, 87a-88a). See *In re: Air Crash off Long Island, N.Y., on July 17, 1996*, 209 F.3d 200, 215ff. (2d Cir. 2000) (Sotomayor, Cir. J, dissenting); *Restatement (Third) of the Foreign Relations Law of the United States*, §512, Reporter's Note 2 ("an assertion of a wider territorial sea by the United States...would not itself give rights in the additional zone to the adjacent States. Unless Congress determined otherwise, the zone between three and twelve miles would be under the exclusive authority of the Federal Government.").

requirements."[9] (App., 50a-51a). The court concluded its opinion with the following:

> In the end, we acknowledge the unusual characteristics and circumstances of the Vessel Fuel Rules. We are clearly dealing with an expansive and even possibly unprecedented state regulatory scheme. However, the severe environmental problems confronting California (especially Southern California) are themselves unusual and even unprecedented. Under the circumstances, we do not believe that the Commerce Clause or general maritime law should be used to bar a state from exercising its own police powers in order to combat these severe problems.

(App., 54a).

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[9] The federal laws referenced here do not extend the authority of the states beyond their territorial limits. Section 110 of the Clean Air Act, 42 U.S.C. §7410, requires states to "adopt and submit" a plan for enforcing federal ambient air standards "within such State." The "in-use" provisions of Section 209(d) of that Act, 42 U.S.C. §7543(d), allow only local regulation of engine use within the state, see *Allway Taxi, Inc. v. City of New York*, 340 F.Supp. 1120, 1124-25 (S.D.N.Y.), *aff'd,* 468 F.2d 624 (2d. Cir. 1972), and 33 U.S.C. §1911, by its terms, neither adds to nor detracts from existing state authority. (App., 80a). The reference to the absence of affirmative prohibitions on state extraterritorial authority by the Court of Appeals avoids the question of whether federal authority over vessel conduct on the high seas is exclusive, regardless of how or whether that authority is exercised. Compare *United States v. Locke,* 529 U.S., at 99 (*Cooley* "stated that there would be instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority").

In rejecting PMSA's Commerce Clause challenge to the Rules, the Court of Appeals did not consider the territorial limitations on state regulation of ships in navigation discussed in *Cooley* and *Locke* or address whether the restricted application of the ordinance at issue in *Huron Portland Cement* to conduct within the city limits of Detroit is a distinction that makes any difference to the outcome in this case. Instead, it invoked other state and lower federal court cases that consider extraterritorial exercise of authority by states but have nothing to do with the regulation of ships engaged in international and interstate commerce. (App., 53a). *See PMSA v. Aubry*, 918 F.2d, at 1426, n.24 (extraterritorial work of California employees not involved in "foreign, intercoastal, or coastwise voyages"); *State v. Stepansky*, 761 So.2d 1027 (Fla. 2000) (prosecution for rape on board a cruise ship); and *State v. Bundrant*, 546 P.2d 530 (Alaska 1976) (Alaskan regulation of extraterritorial scallop and crab harvest by American fishermen). The Court of Appeals acknowledged that "these various decisions may be distinguishable on a variety of grounds." (App., 54a). In fact, *Aubry* and *Bundrant* distinguished the state laws at issue in those cases from the extraterritorial application of state law to vessels engaged in international trade (*Aubry*, 918 F.2d, at 1426, n. 24) or to foreign citizens and vessels (*Bundrant*, 546 P.2d, at 547).

The Court Of Appeals' Statutory Preemption Decision

The Court of Appeals addressed the question of *Submerged Lands Act* preemption in Part III.A of its opinion. (App., 13a). It applied a presumption against preemption based on the "'historic presence of state

law' in the area of air pollution" and the environmental protection purposes of the regulations and rejected PMSA's contention that the SLA boundary provisions preempt state regulation of the conduct of vessels engaged in foreign and domestic commerce seaward of those boundaries. (App., 23a). The Court of Appeals determined that, although the statute sets the state's boundaries, "it does not really address the separate question of whether the states are totally precluded from regulating any conduct beyond their seaward boundaries...." (App., 38a). It concluded that, "at the very least, a state law regulating extraterritorial conduct in the high seas immediately adjacent to the state's territorial waters satisfying the well-established effects test should generally be sustained." (App., 38a). The Ninth Circuit relied on this Court's decision in *Strassheim v. Daily,* 221 U.S. 280, 285 (1911), a prosecution for a fraudulent "act done outside a jurisdiction, but intended to produce and producing detrimental effects within it," to sustain the Rules under that test. (App., 30a).

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Ignores the Line that This Court Has Identified Between Permissible Local Regulation of Shipping and Impermissible Interference With the Interstate and International Maritime Commerce of the United States

The Court of Appeals described CARB's Rules as "a rather expansive regulatory program applicable to one of the largest and most important trade routes in the world" and "an expansive and even possibly unprecedented state regulatory scheme" that "pushes

a state's legal authority to its very limits" and imposes "overall costs to the shipping industry" that "appear quite significant." (App., 12a, 43a, 54a). It upheld the Rules, however, on the grounds that the state "clearly has an especially powerful interest in controlling the harmful effects of air pollution resulting from the fuel used by ocean-going vessels while they are within 24 miles of the state's coast" that "far outweighs any countervailing federal interests." (App., 52a, footnote omitted).

The issue here, however, is not whether the state has an interest in regulating the vessels' operations outside of its territorial limits, but whether it has the authority to do so concurrent with the federal government's Commerce Clause power. PMSA does not contend and has never contended that emissions from the ships beyond the three-mile limit should not be regulated. (App., 39a-40a). The question is whether, under the Commerce Clause, the authority to impose such regulations rests exclusively with the national government.

By ratifying MARPOL Annex VI, making that treaty binding domestic law through amendments to the *Act to Prevent Pollution from Ships*, and joining with Canada through the IMO to regulate vessel fuels out to 200 nautical miles from the coasts of both countries, the United States has taken "political responsibility" for vessel air emissions in a way that demands uniformity. *United States v. Locke,* 529 U.S., at 117. Against this background, California's regulation of vessels in international commerce when they are outside state waters directly affects the Nation's international economic standing and its relations with foreign states and impinges on

Congress's ability to regulate such commerce "without embarrassment from intervention of the separate States and resulting difficulties with foreign nations...." *United States v. Locke*, 529 U.S., at 99 (2000). See also, *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S., at 448 ("federal uniformity is essential" in the regulation of foreign commerce); *Cooley*, 53 U.S. (12 How.), at 319 (the "power to regulate commerce...embraces a vast field...some imperatively demanding a single rule, operating equally on the commerce of the United States in every port...."); *Chevron U.S.A. v. Hammond*, 726 F.2d, at 492, n. 12: ("as to environmental regulation of deep ocean waters, the federal interest in uniformity is paramount...[and] in most cases needs to be exclusive because the only hope of achieving protection of the environment beyond our nation's jurisdiction is through international cooperation."); and *PMSA v. Aubry*, 918 F.2d, at 1426, n. 24 (concern for uniformity in *Hammond* arose because "the interest in uniformity in environmental regulation is greater where regulations cover activities on the high seas" and *Hammond* involved "regulation of *international* oil transport and *international* environmental protection efforts.") (emphasis in original).

From the beginning of the Republic, and as an essential element of its formation, the national government was given authority over international and interstate maritime commerce by the Commerce Clause, subject to a state's power to impose local regulations on vessels where those regulations do not compromise the principle of uniformity in the nation's dealings with such commerce. *Locke,* 529 U.S., at 99; *Cooley,* 53 U.S. (12 How.), at 316; *Gibbons v. Ogden*, 22 U.S (9 Wheat.), at 72; *The Federalist* Nos. 4, 6, 12, 42,

44. This Court early on interpreted the Commerce Clause to give Congress the power to regulate ships in navigation and to preclude the exercise of state control over navigation that is inconsistent with federal law. *Gibbons v. Ogden*, 22 U.S. (9 Wheat), at 82. Then, in *Cooley*, the Court held that the power to regulate commerce is not exclusive as to all commerce-related matters, but allows states and local entities to exercise their governmental powers to regulate matters touching on interstate or foreign commerce where the subject matter of the state law is "local and not national." 53 U.S. (12 How.), at 319. When the subjects of regulations "are in their nature national, or admit only of one uniform system, or plan of regulation," however, these "may justly be said to be of such a nature as to require exclusive legislation by Congress." *Ibid.* *Locke* made it clear that these principles of *Cooley* remain an important part of this Court's Commerce Clause jurisprudence. 529 U.S., at 99-100.

The "local" state regulation of vessel operations historically permitted under the principles of *Cooley* has been limited to regulation of ships operating within the state's waters. Even in those cases where the states have regulated the conduct of vessels within the state's territorial waters, a principal concern of this Court has been whether and to what degree the in-state regulation affects vessel operations outside of the state's jurisdiction. *Locke*, 529 U.S., at 112 (in-state tug escort and pilotage rules allowed because of their "[l]imited extraterritorial effect"). There are no decisions of this Court that extend state authority to direct regulation of vessel operations outside of the territorial waters of the state.

The linchpin of the unprecedented rule adopted by the Court of Appeals is the "well-established effects test" addressed in its discussion of PMSA's statutory preemption challenge to the Rules in Part III.A of its opinion. (App., 23a). The Commerce Clause principles of national uniformity, however, apply even when the states have an interest in or are affected by the extraterritorial conduct of the vessels. The issue is not whether that conduct has in-state effects but rather how the Constitution allocates the authority to regulate the vessel conduct giving rise to those effects as between the national and state governments. Constitutional principles of uniformity encompassed within the Commerce Clause require that the power to regulate the extraterritorial operations of ships engaged in maritime commerce remain exclusively with the national government even when the ships' extraterritorial conduct has some effect within a state.

In reaching its conclusion that the extraterritorial application of the Rules is a permissible exercise of state police powers, the Ninth Circuit's decision analyzed the constitutional issues raised by the extraterritorial scope of the Rules according to the same principles that this Court has applied to regulation of ships and commerce within the states. At every turn in its reasoning, the Court of Appeals perceived no difference between the constitutional analysis to be applied to regulation of vessels operating on the high seas and the analysis applied to vessel conduct within the state. Thus, the Court of Appeals never directly addressed the central Commerce Clause question presented by this case---whether the states have the power to impose on-board operating requirements on vessels engaged in foreign and interstate commerce while those vessels are

navigating the high seas. This petition asks this Court to decide that question.

II. The Question Of Statutory Preemption Is So Intertwined With The Commerce Clause Challenge To The Rules That The Two Questions Should Be Considered Together

The *Submerged Lands Act* draws the critical line for purposes of determining the limits of the States' territorial authority and establishes a bright line by which to measure the permissible territorial scope of the "local conditions and local needs" that can, in some circumstances, justify state regulation of vessels in international and national commerce. By asserting authority over ships engaged in interstate and international trade on the high seas outside of the state's boundaries, California is regulating in the areas of maritime commerce, the conduct of ships at sea outside of state boundaries, and the definition of state boundaries. These fields of legislation have not been "traditionally occupied" by the states and there has been "a history of significant federal presence" in all of them. *Locke*, 529 U.S., at 108; *United States v. Louisiana*, 363 U.S., at 33-35. Under these circumstances, the decision below raises important issues about whether the presumption against preemption should apply in deciding whether the SLA boundary provisions preclude the states' regulation of the vessels on the high seas.

Wyeth v. Levine, 555 U.S., at___, 129 S. Ct., at 1194-95, n. 3, described how, in the typical case, this Court makes an assumption of no preemption because the Court is reluctant to conclude that Congress would "cavalierly" legislate to preclude state regulation in a

field where states have traditionally and historically acted for the protection of their citizens. The Court of Appeals relied on this description of the doctrine to conclude that the presumption should apply since the Rules "ultimately implicate the prevention and control of air pollution" and "[s]tates have long sought to protect their own residents from the undisputedly harmful effects of air pollution and other forms of environmental harms." (App., 22a).

The preemption issue here, however, is a not an ordinary one. Again, the starting point is *Gibbons v. Ogden*, 22 U.S. (9 Wheat.), at 82 (state laws that "interfere with, or are contrary to the laws of congress made in pursuance of the constitution" are invalid under the Supremacy Clause). The boundary provisions of the SLA fall within the category of laws which, by their terms, imply congressional intent to preclude parallel state regulation because the laws "touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S 218, 230 (1947). In addition, "the goals 'sought to be obtained' and the 'obligations imposed' [by the SLA boundary provisions] reveal a purpose to preclude state authority." *Wis. Pub. Intervenor*, 501 U.S., at 604, quoting *Rice v. Santa Fe Elevator.*

The subject matter of the boundary provisions of the SLA – the seaward boundaries of the coastal states – is a field of "dominant," indeed exclusive, federal interest and authority. Distinct from the federal statutes considered in *Wyeth* and the other preemption cases on which the Court of Appeals relied, the

boundaries determined according to the terms of the SLA are significant not just to one area of substantive regulation but across the entire spectrum of extraterritorial conduct in the fields of "commerce, navigation, national defense, and international affairs," each of which is identified as an area of "paramount" federal interest by Section 6(a) of the SLA, 43 U.S.C. §1314(a). (App., 82a). These are fields in which there is an historically dominant federal interest and in which there has been no history of state legislation. Hence, the Court of Appeals on the one hand found the Rules to be "possibly unprecedented," but then, in contradiction, determined that they were within the historical exercise of state police powers.

In this case, the SLA marks the line by which to determine whether the Rules govern the extraterritorial operations of the ships for purposes of the Commerce Clause analysis. Whether the fact of that demarcation, in and of itself or in conjunction with Commerce Clause principles, preempts such extraterritorial regulation is not a question that fits neatly into the categories of preemption considered by the Court of Appeals. Rather, it presents the fundamental question of whether California's extension of its authority to "Regulated California Waters" outside of the state's boundaries as determined pursuant to federal law "interfere[s] with or [is] contrary to" that federal law.

The bar to CARB's authority to regulate ships beyond the state's seaward boundary derives from the Commerce Clause limitation on extraterritorial regulation of maritime commerce by the states, but it is the SLA that defines that boundary at three miles.

PMSA's SLA preemption claim is, therefore, dependent, in part, on the operation of the Commerce Clause territorial restrictions on state regulation, and the territorial measure of the Commerce Clause restriction on state law is, in turn, determined by reference to the SLA. In deciding whether California's extraterritorial regulation of vessels on the high seas is permissible, therefore, the question of whether the SLA preempts that exercise of authority beyond the state's boundaries should be considered together with the Commerce Clause question presented.

III. The Ninth Circuit's Approval of California's Extraterritorial Regulation Of The Operations Of Vessels Engaged In Foreign and Interstate Commerce Should Be Reviewed Now

By reaching out past its territorial seas to impose requirements on how foreign- and U.S.-flagged vessels operate, California has radically departed from any previous exercise of police powers by a state. The decision of the Ninth Circuit and the reasons given for it, if uncorrected by this Court, stand to provide states and local governments with broad, unprecedented authority to regulate the operations of vessels engaged in international and national commerce while those ships are on the high seas.

The unambiguous question of whether the states can exercise extra-territorial authority over the on-board operations of ships in foreign and international commerce is not an issue that requires further development in this or in any other case in the lower courts. This case presents the question starkly and plainly. On the one hand, the Rules directly impose

(and will continue to impose for at least three more years at a significant cost) standards of operational conduct on hundreds of ships that make thousands of voyages to California each year, carry a significant percentage of the goods imported into this country, play a central role in the nation's international and national trade and commerce, and are subject to parallel international and federal regulation of their fuel use. On the other hand, California has shown that vessel emissions have a significant effect on the state's environment and citizen health. The question of whether the federal government's authority to regulate the vessels' use of fuel on the high seas is exclusive or shared with the state under these circumstances is presented by this case as a matter of law on a clear record, and it is a question that is important enough to the Nation that it should be answered by this Court now and in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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