No. 10-1555

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Petitioner Pacific Merchant Shipping Association ("PMSA") seeks issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in order that this Court may review the decision in *Pacific Merchant Shipping Ass'n v. Goldstene*, 639 F.2d 1154 (9th Cir. 2011). Pet. App. 1a-38a. The decision affects most or all of the ships making 10,000 calls at California ports each year. It has opened the door for any one or all of this Nation's coastal states to regulate the extraterritorial operations of all vessels calling at their ports. It represents a fundamental change in the law of the United States that will negatively affect the national and international commerce of this Nation for years to come. It requires review by this Court.

PMSA has argued that, under the principles of *Cooley v. Bd. of Wardens of Port of Phila. ex rel. Soc'y for Relief of Distressed Pilots*, 53 U.S. (12 How.) 299 (1852), as restated by *United States v. Locke,* 529 U.S. 89, 99 (2000), the Commerce Clause precludes states from directly regulating the operation of vessels engaged in international and national commerce while the ships are beyond a state's territorial waters. The decision below and Respondents' Opposition Brief ignore *Cooley* completely. Nor did the Court of Appeals address, and Respondents' Opposition glosses over, *Locke*'s discussion of *Cooley's* limitations on state regulation of vessels. The Ninth Circuit's decision threatens the fundamental Commerce Clause principles established by *Cooley* and restated by *Locke*, but provides no analysis of those important principles or any reasons why they do not apply here.

The Commerce Clause question presented by this case is whether the CARB Rules, which govern the conduct of foreign and U.S.-flagged ships while they are navigating on more than 14,000 square miles of high seas outside of California's territorial waters, fall within the permissible "local" regulatory powers of the State described by *Locke*, *Cooley*, and the cases discussed in numbered paragraph 2, at pp. 3-4, *infra*. No decision of this Court answers this important question.

It is undisputed that ships carrying a significant portion of this Nation's cargo to and from California will remain subject to the CARB Rules, at great cost, until 2015. The decision below creates the potential for California and other coastal states to expand their regulation of extraterritorial vessel conduct. This decision's consequences and the importance of the constitutional issues it presents warrant issuance of the writ that Petitioner requests. The Brief In Opposition fails to demonstrate otherwise.

1. As PMSA and Respondents agree, *Locke* and *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978) confirm that state regulation of maritime commerce is permissible when called for by "local needs and conditions." (Respondents' Br., at 22) Respondents assert that the discussion of territorial limitations on State authority in *Locke* has no significance to the issues in this case because *Locke* was decided under a statute other than the Submerged Lands Act ("SLA") at issue in this case. PMSA has never suggested that *Locke* controls here. Rather, *Locke's* restatement of the *Cooley* principle that "there would be instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority," and *Locke's*

reference to territorial limitations on state regulation of pilotage raise but do not decide the questions presented here. 529 U.S., at 99, 112. The questions significant to this case that *Locke* thus left open are whether, in the absence of federal authority, the Commerce Clause, the SLA's boundary provisions, or both, place territorial limits on state regulation of maritime commerce. This case presents these issues directly.

2. The decisions Respondents cite confirm that the questions presented in this case have surfaced but have not been decided in cases previously before this Court. For example, in *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 421 (1976), the Court did not need to decide the territorial scope of state power over maritime activities because a federal statute precluded enforcement of the state's right-to-work laws. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960), stated that one of the "basic limitations upon local legislative power" is that the regulation must be "local." It provided examples of "local" laws that may be applied to ships, including "local pilotage laws...local quarantine laws...local safety inspections... or local regulation of wharves and docks...," (*id.*, at 447), but because the regulation at issue applied only within the City of Detroit, the Court did not need to give full content to the definition of the term "local." Similarly, in *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 338 (1973), the state's regulation of "sea-to-shore pollution" was limited to oil spills within the state's waters, and this Court listed the categories of "local" regulation recognized by *Huron Portland Cement* in support of its decision that the law was constitutional. *Kelly v. State of Washington*, 302 U.S. 1, 9-10 (1937), upheld a statute

that provided for in-state tug safety inspections and emphasized that, in the absence of congressional intervention, the states are allowed the "exercise of power appropriate to their territorial jurisdiction...to deal with local exigencies...." It did not decide whether states are constitutionally limited to in-state regulation. *See also, Wilmington Transport Co. v. Railroad Commission of Calif.*, 236 U.S. 151 (1915) (regulation of carriage between two California ports); *Skiriotes v. State of Florida,* 313 U.S. 69, 75-76 (1941) (state can regulate conduct within its territorial waters and "govern the conduct of its citizens upon the high seas"); *The Hamilton*, 207 U.S. 398 (1907) (Delaware wrongful death statute applied to claims against Delaware owners of two Delaware ships involved in a collision).

3. Respondents also rely on the pilotage cases of *Wilson v. McNamee*, 102 U.S. (12 Otto) 572 (1880), *Gillis v. Louisiana*, 294 F.3d 755 (5th Cir. 2002), and *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976). (Respondents' Br., at 8-9) These decisions are subject to *Locke's* statement that the "limited extraterritorial effect" of pilotage laws explains why the states' regulation of pilotage has historically been allowed, and each of these cases relied on the express federal statutory adoption of state pilotage laws in effect since 1789. *Wilson v. McNamee*, 102 U.S. (12 Otto), at 574; *Gillis v. Louisiana*, 294 F.3d, at 761; *Warner v. Dunlap*, 532 F.2d at 772; 46 U.S.C. §8501 (formerly 46 U.S.C. §211). *See also, U.S. v. Locke*, 529 U.S., at 112; *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.), at 310; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 207-208 (1824). The pilotage cases, therefore, provide no support for the extraterritorial regulation of fuel used on vessels where there is no historical record of such

regulation and Congress has not given the states any authority to impose such regulations.

4. Respondents, relying on the *Restatement (Third) of Foreign Relations Law of the United States,* §§402, 403, and *Strassheim v. Daily*, 221 U.S. 280 (1911), contend that the only territorial limitations on the authority of the individual states to regulate the conduct of vessels on the high seas in transit to or from California is the "effects" test. (Respondents' Br., at 7) The case here, however, concerns the allocation of authority between the state and federal governments as a matter of U.S. domestic law, not international law, and *Strassheim* has nothing to do with SLA preemption or whether the federal government has exclusive domain over maritime commerce outside three miles from the coast.

5. Respondents advance a new argument, based on new legislative and opinion materials that were not submitted to or considered by the courts below, that the Clean Air Act ("CAA") and Act to Prevent Pollution from Ships ("APPS") do not preempt CARB's Rules. (Respondents' Br., at 12ff.) There is no contention in this case that the CAA or APPS preempt the Rules. Based on the referenced materials, however, Respondents extend their argument to imply that because these statutes are silent on the issue, states have implicit authority to regulate fuel use on ships navigating seaward of the states' SLA boundaries. Nothing in APPS, the CAA, or the materials presented supports this conclusion.

The APPS savings clause ("...neither amend nor repeal...Nothing in this chapter shall") (Pet. App., at 80a) and Section 209(d) of the Clean Air Act, 42 U.S.C. §7543(d) ("Nothing in this part shall preclude...") are

stated in the negative. As the legislative history reflects, the APPS savings clause was intended to preserve whatever authority the states already have, not to give them more authority. Similarly, §209(d) was, by its terms, intended to clarify and limit the preemption set forth in §§209(a) and (e) of the CAA, 42 U.S.C. §7543(a) and (e). Respondents concede that §211 of the CAA, 42 U.S.C. §7545, is entirely silent on state regulation of fuel for non-road engines. (Respondents' Br., at 16) None of these statutes expressly or by implication affirmatively give the states any extraterritorial authority.

Respondents do not identify any provisions of Sections 107 or 110 of the CAA that give states extraterritorial authority. In 1970, Public Law 91-604, §4(a), codified Section 110(a)(1) of the CAA, 42 U.S.C.§7410, requiring states to submit a plan to "implement and maintain [national ambient air quality] standards *within its boundaries*." [emphasis added] *Train v. Natural Resources Defense Council*, 421 U.S. 60, 66 (1975). The precise language of the section required "...a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State." Respondents do not submit any legislative history of the 1970 Act, much less any that would support a conclusion that the 91st Congress intended by this language to give the states extraterritorial authority over vessels. The 1977 and 1990 Amendments left the provisions of Section 110(a)(1) intact, and the critical territorial provisions of the statute remain today as they were in 1970. This language appears to limit a state's authority to sources within the state, not to give

states authority to implement or enforce any element of the state plan extraterritorially.

Under the "clear statement" rule, moreover, the silence of Congress on the question of extraterritoriality establishes that the statutes do not give states extraterritorial authority. *Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119 (2005); *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244 (1991). The rule avoids intrusion on "sensitive domains in a way that Congress is unlikely to have intended had it considered the matter." *Spector v. Norwegian Cruise Line*, 545 U.S., at 139 (plurality opinion). In these cases, congressional silence is the equivalent of an express "statutory qualification" that, among the examples given, the statute has no extraterritorial application. *Ibid.* Application of the doctrine here is particularly apt where the statutes purportedly give authority to the states rather than assert federal authority directly. It is highly unlikely, if not inconceivable, that Congress would, without saying so explicitly, give states the authority to regulate the extraterritorial conduct of vessels. If Congress had wanted to give the states authority to regulate vessels' extraterritorial use of fuel, it could have said so. It did not.

The materials Respondents now offer do not reflect any congressional intent to provide the states with extraterritorial powers. The 1977 Office of Legal Counsel memorandum is not legislative history so it has no relevance to what Congress intended. Since §110 of the CAA was adopted by Congress in 1970, the 1977 legislative debate and memoranda are not relevant to the question of congressional intent with respect to the 1970 legislation. The 1990

Congressional Record excerpts make no reference to the extraterritorial regulation of vessels other than in an amendment applying to vessels serving Outer Continental Shelf facilities. 136 Cong. Rec. 36117; *see* 42 U.S.C. §7627(4)(C) (limiting extraterritorial sources conditionally subject to state authority to defined "OCS sources," not including vessels generally). Contrary to Respondents' assertion, there is nothing in this new material that establishes congressional intent to give states authority to regulate extraterritorial use of fuel by ships engaged in foreign and interstate commerce.

6. Respondents' contention that the extraterritorial reach of CARB's Rules does not implicate principles of uniformity because the Rules also apply within the State (Respondents' Br., at 10) misapprehends the questions presented here. The argument fails to address *Cooley v. Bd. of Wardens* or the territorial limitations on the exercise of state police power that derive from the Commerce Clause as reiterated in the cases since *Cooley*. Where Congress has not acted, "it is the responsibility of the judiciary to determine whether action taken by state or local authorities unduly threatens the values the Commerce Clause was intended to serve." *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7 (1986). This Court has noted that " 'a central concern of the Framers' " was " 'the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.' " *Id.*, at 7, quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1976). This was " 'an immediate reason for calling the Constitutional Convention.' " *Wardair*, 477 U.S., at 7, quoting *Hughes v. Oklahoma*. The Court has "acknowledged the self-

executing nature of the Commerce Clause and held...state regulation that is contrary to the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States, may be invalid under the unexercised Commerce Clause." *Wardair* 477 U.S., at 7-8, citing *H.P. Hood Sons, Inc. v. Dumond*, 336 U.S. 525 (1949), and *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945). A "special need for federal uniformity..." in the "unique context of foreign commerce" arises, moreover, because the concern "...is not with an actual conflict between state and federal law, but rather with the policy of uniformity, embodied in the Commerce Clause, which presumptively prevails when the Federal Government has remained silent." *Wardair*, 477 U.S., at 8.

It is the Commerce Clause itself, therefore, that requires uniformity, subject to the exception for "local" regulation. State regulation of the operation of vessels as instrumentalities of interstate and international trade acutely implicates this principle of uniformity because it directly involves the very means by which this Nation carries out its trade with other nations and between the states. This case presents the fundamental constitutional question of whether the "local" exception to Commerce Clause uniformity limits the states' authority to ship conduct within the state's seaward boundaries or allows a state to extend its direct exercise of jurisdiction over ships to the high seas. The fact that local in-state regulation may be permissible within the confines of Commerce Clause doctrine provides no answer to this question and for Respondents to suggest otherwise ignores the fundamental underpinnings of the Commerce Clause.

In any event, to the extent that Congress has acted, the SLA limits the territorial jurisdiction of the states.

7. The national and international importance of this case is underscored by the EPA's July 11, 2011, proposed approval of California's State Implementation Plan ("SIP"). (Respondents' Br., at 14, n. 8) The proposed approval relies solely on the decision below to conclude that there is no legal impediment to extraterritorial regulation of vessels by CARB. 76 Fed. Reg. 40652, 40658. If the Court of Appeals decision remains unexamined by this Court, this same rationale likely will be applied to approve, through the SIP process or otherwise, varying extraterritorial regulations by the diverse coastal states where extraterritorial control of vessel emissions is adopted by these states.[1]

8. Respondents suggest that the case is not ripe for review because Petitioners "should be afforded a chance to make any possible showing to counter what

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[1] Vessel contribution to state nonattainment of compliance with national ambient air quality standards is not unique to California, and the potential for continued reliance by the EPA on the Court of Appeals decision to approve extraterritorial regulation of ships is not mere speculation. As the EPA noted when it announced the designation of the North American ECA in 2010: "Many of our nation's most serious ozone and PM 2.5 nonattainment areas are affected by emissions from ships. Currently more than 30 major U.S. ports along our Atlantic, Gulf of Mexico, and Pacific coasts are located in nonattainment areas for ozone and/or PM 2.5." [footnote omitted]. EPA Regulatory Announcement EPA-420-5-10-015, "Designation of North America Emission Control Area to Reduce Emissions from Ships" (EPA ECA Factsheet), p. 3, dated March 2010, available at: http://www.epa.gov/otaq/regs/nonroad/marine/ci/420f10015.pdf.

the current record" shows about the impact of vessel emissions on California or the effect of the Rules on interstate and international commerce (Respondents' Br., at 9), but no further facts need be developed to resolve the constitutional questions presented by this Petition. Respondents do not contest that the CARB Rules directly regulate the onboard operations of the ships or that to comply with the Rules, the ships must, at an aggregate cost of more than $300,000,000 per year, switch fuels in transit before arrival at the twenty-four mile mark and keep separate records of the pertinent events for the State of California. As Respondents have made clear in their Brief (at pp. 1-3) and as the Court noted below (Pet. App., at 40a), the PMSA does not, on this appeal, dispute the environmental consequences of the vessel emissions. There are no material facts in dispute that are relevant to the issues presented by the Petition, and the decision below can and should be reviewed as a matter of law on the present record.

CONCLUSION

A writ of certiorari should issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,
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