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

SUPPLEMENTAL 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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I. INTRODUCTION

This case presents important questions of federal law that should and can be answered now on the record before this Court. The Solicitor General's amicus curiae brief concedes the importance of the Commerce Clause question presented by the petition:

> "The California vessel fuel regulation at issue in this case raises important and difficult questions about the scope of a State's power to regulate seagoing vessels for the protection of the health, safety, and welfare of its residents, in the face of the national government's paramount authority to regulate maritime commerce." SG Br. 9.
>
> "…petitioner raises substantial questions about California's authority to 'directly regulat[e] the operation of vessels engaged in international and national commerce while the ships are beyond a state's territorial waters'…." SG Br. 16, quoting Reply Br. 1.
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> "…this case touches on important matters of maritime commerce and foreign affairs…." SG Br. 18.

The Solicitor General does not argue that the court of appeals decision or its reasoning on the Commerce Clause question was correct or that the substantive arguments advanced by respondents on that question should prevail. Instead, he asserts that the petition should be denied because the "narrow scope of the issues raised and decided below" does not allow "a suitable opportunity" for consideration of "other

difficult and important questions about the permissible scope of state regulation of matters affecting on maritime commerce" (SG Br. 16), and because the Submerged Lands Act ("SLA") statutory preemption question was rightly decided. SG Br. 9.

There are no broader questions that would prevent review of the Commerce Clause question. That issue is important enough that it should be reviewed by this Court now and in this case. The SLA preemption question is related to the Commerce Clause question in such a way that the two cannot be readily separated, and they should be reviewed together at the same time. The petition should be granted.

II. THE UNITED STATES' AMICUS CURIAE BRIEF PROVIDES NO VALID REASON TO DENY REVIEW OF THE COMMERCE CLAUSE QUESTION

The Solicitor General asserts five specific arguments for denial of review of the Commerce Clause question:

1. Petitioner did not raise and the court of appeals did not consider "any questions concerning the effect of" either Title I (33 U.S.C. §1221 *et seq*.) or Title II (46 U.S.C. §3701 *et seq*.) of the Ports and Waterways Safety Act ("PWSA"). SG Br. 16-17.

2. The impact of MARPOL Annex VI (Pet. App. 161a-173a) and the "savings clause" of the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. §1911, (Pet. App. 80a) should be

addressed in more detail below before this Court considers the case. SG Br. 9, 17.

3. Because PMSA has not challenged the California Air Resources Board ("CARB") rule's application within the state's three-mile territorial limit, deciding this case will not answer all possible questions regarding state power to regulate vessels in interstate and international commerce. SG Br. 17-18.

4. Because the decision below was on review of a denial of summary judgment, the case is a poor vehicle for review of the questions presented. SG Br. 9, 18.

5. The federal and international scheme "should overtake" the state rule in 2015, and the questions presented by the petition are, therefore, "of limited practical effect." SG Br. 9, 19.

These arguments present no valid reason to deny review.

1. The Solicitor General implies, but does not directly state, that the Court should deny review because the PWSA may provide alternative statutory grounds for preemption of the CARB rules, thereby avoiding the Commerce Clause issue in the same way that PWSA preemption of Washington's tanker vessel safety and design requirements avoided the treaty and Commerce Clause questions present in *United States v. Locke,* 529 U.S. 89, at 101, 104, 106-107 (2000). SG Br. 16-17. The PWSA, however, has no bearing on the subject matter or validity of the CARB rule.

The power of the federal executive to implement the United States' MARPOL Annex VI obligations and to specify the sulfur content of vessel fuel is governed by APPS, 33 U.S.C. §1901, *et seq*., (Pet. App. 76a-79a), not PWSA. SG Br. 5; 75 F.R. 22896, 22900 (April 30, 2010); 40 C.F.R. §1043.60. APPS delegates authority to implement and enforce MARPOL Annex VI, including the fuel sulfur content provisions of Regulation 14 (Pet. App. 170a-173a), to the Administrator of the Environmental Protection Agency ("EPA") and to the Secretary of the department in which the Coast Guard resides. 33 U.S.C. §1903(b)(2), §1903(c) (Pet. App. 76a-79a) and §1907(f)(2); see also, 33 U.S.C. §1901(a)(1) and (11) (definitions of "Administrator" and "Secretary").[1] It was not until after the APPS amendments implementing MARPOL Annex VI became law and the United States "became a party to MARPOL Annex VI by depositing its instrument of ratification with the IMO on October 8, 2008," 75 F.R. 22896, 22900, that the EPA was authorized to issue the federal vessel fuel use regulations. *Id.* It did so on April 30, 2010. *Id*. ("This final rule [40 C.F.R. §1043.60, *et seq*.] contains regulations codifying the Annex VI requirements and regulations to implement several aspects of the Annex VI engine and fuel regulations, which we [EPA] are finalizing under that APPS authority").[2] 33 U.S.C.

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[1] Pursuant to 33 U.S.C. §1903(c)(2), the Administrator must "prescribe any necessary or desired regulations to carry out the provisions of regulations 12, 13, 14…, of Annex VI to the Convention [i.e., MARPOL, Annex VI]." Pet. App. 77a.

[2] The Solicitor General makes clear that neither the Clean Air Act nor the Presidential Proclamation establishing the "contiguous zone," are grounds for sustaining the CARB rule. SG Br. 2, n.1,

§1903(c)(3) (Pet. App. 77a) requires the Secretary and the Administrator to "consult with each other" when "prescribing any regulations under this section." The Solicitor General does not suggest that this was not done or that the Coast Guard did not concur in the low sulfur fuel regulations issued by the EPA.

PWSA, on the other hand, delegates authority to administer its provisions to the United States Coast Guard alone. 33 U.S.C. §1223(a), 46 U.S.C. §3703(a). Neither Title I of PWSA, 33 U.S.C. §1223(a) (discretionary authority to issue regulations regarding vessel traffic), nor Title II, 46 U.S.C. §3703(a)(mandating general seaworthiness and safety rules for "tank vessel[s]," 46 U.S.C. §3702(a)), gives the Coast Guard authority to impose low sulfur fuel requirements on vessels to prevent air pollution. The Solicitor General does not argue that PWSA does so or suggest that the Coast Guard has or could issue any such regulations pursuant to the PWSA. See *United States v. Locke*, 529 U.S., at 101, 108.

It is no accident that the Solicitor General's brief stops short of saying that the PWSA preempts (or could preempt) the CARB rule, because the Solicitor General must know that the suggestion he advances would not stand scrutiny if it were expanded into an explicit argument. The PWSA simply does not extend to the subject of fuel sulfur content for air pollution control, and there was no reason, therefore, to raise or consider a PWSA argument below. There is no reason to deny review based on the PWSA.

6, 18, n.4; compare Pet. App. 51a, 52a, n. 8; Resp. Br. 5, 14, n.8, 18-20.

2. The point of the government's argument regarding the impact of MARPOL Annex VI and the APPS savings clause is unclear. The Solicitor General does not suggest that the treaty or the statute preempts the state rule. The district court (Pet. App. 71a, n.6) ruled that the APPS savings clause precluded preemption of the state's regulation by APPS or MARPOL Annex VI, and the court of appeals endorsed this holding. Pet. App. 50a-51a. The Solicitor General does not contend that conclusion was in error or explain what more the United States would have the lower courts do with this issue.

The PMSA agrees that neither the treaty nor APPS preempts the CARB rules. Reply Br., 5-6. The significance of the treaty and APPS in this case is that, like the Nation's participation in the Customs Convention On Containers considered in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 452-53 (1979), the United States' participation in MARPOL Annex VI reflects the strong interest of the Nation in speaking with "one voice" in matters of international regulation of the instrumentalities of international maritime commerce. See also, *United States v. Locke*, 529 U.S., at 103; *Chevron U.S.A. v. Hammond*, 726 F.2d 483, 492, n. 12 (9th Cir. 1984), *cert. den., sub nom. Chevron U.S.A. v. Sheffield*, 471 U.S. 1140 (1985). The "one voice" argument was presented, considered, and rejected below, and it is encompassed within the first Question Presented. Pet. C.A. Br. 44-46; Pet. C.A. Repl. Br. 22-26; Pet., 23-24. Pet. App. 71a, n. 6, Pet. App. 46a, 50a-51a. There is no reason to require the further lower court consideration of the treaty or statute that the government seems to urge. Whatever the Solicitor General's point is here, it provides no reason to forego review.

3. The fact that petitioner limits its challenge to application of the CARB rule outside the three-mile state territorial limit makes this a *better* case for review. This Court has made it clear that, in some circumstances, there can be certain state regulation of vessels in interstate and international commerce while those vessels are *in local waters*. *United States v. Locke, supra*; *Ray v. Atlantic Richfield Company,* 435 U.S. 151 (1978); *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440 (1960); *Kelly v. State of Washington,* 302 U.S. 1 (1937); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). The Court has not previously been called upon to address what powers, if any, the individual states have to regulate maritime commerce *outside* of their territorial limits. This Court should review this important constitutional issue precisely because PMSA has focused its request for review on the question that this Court has not yet had an opportunity to decide. PMSA's straightforward presentation of the question of state extraterritorial authority over primary vessel conduct eliminates the more difficult balancing considerations present in cases involving local waters and makes the case a cleaner vehicle for answering the pressing question of whether states can grant themselves regulatory reach beyond their seaward borders to regulate the primary conduct of foreign and U.S-flagged vessels engaged in maritime commerce.

4. The Solicitor General's tepid suggestion that there may be use in further factual development in the district court (SG Br. 18) has no merit. It was because the denial of Petitioners' summary judgment motion and the reasons for that denial conclusively foreclosed any possibility that PMSA might prevail at trial that the district court certified and the court of appeals

accepted the order of denial for interlocutory appeal pursuant to 28 U.S.C. §1292(b).

The effect of the state's rules on the extraterritorial conduct of the ships (fuel purchase, switching, and use, and recording of these) is set forth in the regulation itself. Pet. App. 106a-110a. Respondents conceded and the courts below considered the financial burden imposed on the ships by the California fuel rules. Pet. App. 5a-6a, 42a-43a, 68a-69a. PMSA does not dispute that vessel emissions are a substantial public health issue. Pet. App. 40a-42a, 52a. Although the Solicitor General makes general reference to the potential development of facts to allow further consideration of the burden/benefit balance in this case, he does not identify what additional facts might be relevant or how further proceedings might change the outcome of the case. *Compare* Pet. App. 52a-53a with SG Br. 18. This case presents legal, not factual issues, and no additional facts are needed to decide it.

5. The Solicitor General argues that the Court should not decide this case because the federal regulations "should overtake" the state rule in 2015. SG Br. 9, 19.[3] The converse of this is that the rule will continue in force and overlap with federal regulations for at least two and one-half more years. During this time, the rule will apply to vessels that make an aggregate of more than 10,000 calls at California ports annually. According to the EPA, CARB boards about

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[3] The suggestion that further factual inquiry below will produce a better case for review is somewhat disingenuous given the "limited practical effect" argument. By the time the lower courts have considered the case on remand, Respondents will no doubt then contend the case is of no practical effect or moot.

25 ships per month to check for compliance. 76 F.R. 40652, 40659 (July 11, 2011). PMSA does not know the full extent of CARB's enforcement of the Rules, but CARB estimates that about 5% of the ships inspected have been found non-compliant. 76 F.R. 40659. CARB has posted on its website at least twenty-six instances of its enforcement of the rules by imposition of fines or penalties on foreign ship operators since October 2010.[4]

Given the rule's continuing application and substantial effect, its potential future sunset is no reason to deny review of the important question presented by PMSA's petition. Moreover, the sunset clause is conditional on findings by CARB's Executive Officer, and there is no guarantee that the conditions precedent to the sunset will be met beginning in 2015. Pet. 13.

The "practical effect" argument also ignores the precedential effect of the Ninth Circuit's decision. Absent review by this Court, the court of appeals decision will establish the definitive rule for the Ninth Circuit coastal states of Alaska, Hawaii, Washington, Oregon, and California for years to come. It will allow these states (and all other coastal states in jurisdictions that follow the Ninth Circuit decision) to extend unilaterally their direct regulation of the primary conduct of ships in waters far from those states whenever those ships are en route to call at ports in those states. The court of appeals limits this authority only by an "effects test," which the Solicitor General does not defend. Particularly now, when

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[4] http://www.arb.ca.gov/enf/casesett/casesett.htm

regulation of sources of carbon emissions is at the forefront of proposed environmental restrictions to curtail global climate change, the principles adopted by the court of appeals decision open the door to piecemeal extraterritorial regulation of the primary conduct of vessels by each of the individual states whenever the federal government has not adopted measures that expressly preempt state action. The rule established by the court of appeals is contrary to the uniformity principles inherent in the Commerce Clause, but if this is going to be the rule, it should be one that this Court has considered and adopted. The flawed Ninth Circuit decision in this case should be reviewed by this Court.

III. THE SUBMERGED LANDS ACT QUESTION SHOULD BE REVIEWED WITH THE COMMERCE CLAUSE QUESTION

The petition (9, 27-30) and reply brief (2-3, 8-10) explain why the second Question Presented should be reviewed by this Court. The Solicitor General agrees that the court of appeals erroneously applied the presumption against preemption. SG Br. 10-11. This case presents an opportunity for the Court to clarify the preemption principles in maritime-related cases discussed in *United States v. Locke*, 529 U.S., at 111-112, 116, in this case of importance to the Nation and the international maritime community. The Solicitor General's description of the Act's purpose (SG Br. 11) also ignores the fact that the boundary provisions of 43 U.S.C. §1312 (Pet. App. 81a) are separate and apart from SLA's land grant provisions and this Court's previous determination that these provisions are "fully effective" to settle all questions regarding the states' territorial boundaries. *United States v. Louisiana*, 363

U.S. 1, 35 (1960). California's extension of its regulatory boundary to "California Regulated Waters" (Pet. App. 103a-104a) beyond the boundary set by the SLA is contrary to that purpose.

IV. THE IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW PRESENTED HERE SHOULD BE REVIEWED AND DECIDED NOW

Whether states can reach out 24 miles onto the high seas to dictate fuel requirements for vessels in international and interstate commerce is an important constitutional question of first impression that only this Court can definitively answer. It is only because the individual states have not until now extended their authority to regulate vessel conduct beyond their boundaries that the Court has not been presented an opportunity to clarify whether, and if so to what extent, states may exercise extraterritorial jurisdiction over maritime commerce. This case provides that opportunity.

The Solicitor General agrees that the petition's first question presents a substantial and important constitutional issue of first impression. The Solicitor General does not argue that the court of appeals decision was correct or its reasoning sound on this question. The "vehicle" arguments advanced by the Solicitor General's brief have no merit. The court of appeals decision erroneously concluded that the state's rules permissibly regulate the extraterritorial primary shipboard conduct of vessels engaged in foreign and interstate commerce, and this decision, if not reviewed, will endure for years. The validity of this decision is presented for review on a clean record as a matter of

law. The issue of whether the states' extraterritorial regulation of the primary conduct of ships is contrary to the Commerce Clause should be decided by this Court now. Because the SLA preemption issue is so related to that important constitutional question, review of that question should likewise be granted.

CONCLUSION

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

Respectfully submitted,

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