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

BRIEF OF *AMICI CURIAE* WORLD SHIPPING COUNCIL, CHAMBER OF SHIPPING OF AMERICA, CRUISE LINES INTERNATIONAL ASSOCIATION, INC., INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS, and the INTERNATIONAL CHAMBER OF SHIPPING IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The World Shipping Council, the Chamber of Shipping of America, the Cruise Lines International Association, Inc., the International Association of Independent Tanker Owners, and the International Chamber of Shipping respectfully file this brief as *amici curiae* in support of Petitioner Pacific Merchant Steamship Association (PMSA).

The World Shipping Council (WSC) is a U.S.-based membership trade association with 28 members that provide international liner shipping services to and from the United States and between other nations around the world. Liner shipping is that sector of the ocean transportation industry that operates vessels on regularly scheduled routes, as opposed to "tramp" shipping, in which vessel itineraries are dictated by the spot demands of particular customers.

WSC's members are domiciled in 17 different countries, with agencies and offices in virtually all of the nations that they serve. Taken together, WSC's

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[1] In accordance with the Court's Rule 37.6, *amici* and their counsel certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* and their members made any monetary contribution to the preparation or submission of this brief. *Amici* note that there is some overlap in the membership of the *amici* organizations and petitioner PMSA. Thirteen of WSC's twenty-eight members (or their affiliates) are PMSA members. Two of CSA's thirty-four members (or their affiliates) are PMSA members. Two of CLIA's twenty-six members (or their affiliates) are PMSA members. In compliance with Rule 37.2(a), counsel for *amici* provided the parties more than ten days advance notice of the filing of this brief. All parties have provided written consent to the filing of this brief.

members handle over ninety percent of the United States' ocean-borne containerized cargo. WSC holds consultative status at the International Maritime Organization (IMO), the United Nations agency with responsibility for the safety of life at sea and the protection of the marine environment.

The Chamber of Shipping of America (CSA) represents 34 U.S.-based companies that own, operate or charter oceangoing tankers, container ships, and other merchant vessels engaged in both domestic and international trades. CSA also represents other entities that maintain a commercial interest in the operation of such oceangoing vessels.

The Cruise Lines International Association, Inc. (CLIA) represents 26 member cruise lines that operate approximately 175 passenger vessels under a wide variety of international flags, including that of the United States. Member lines operate small vessels on coastal riverine itineraries as well as large vessels on international and worldwide itineraries. The vessels of CLIA's members range from approximately 50 passengers and a like number of crew up to 6,400 passengers and 2,200 crew. CLIA holds consultative status at the IMO.

The International Association of Independent Tanker Owners (INTERTANKO) is an organization established in 1970 to represent the interests of independent tanker owners and operators whose tankers are engaged in the international transport of oil and chemicals. INTERTANKO represents 250 members in 40 countries whose combined fleet comprises about 3,350 vessels. INTERTANKO holds consultative status at the IMO.

The International Chamber of Shipping (ICS) is an international trade association for merchant ship operators. ICS membership comprises national shipowners' associations representing over 75% of the world's merchant fleet. ICS represents the collective views of the international shipping industry from different nations, sectors, and trades. ICS is unique in that it represents the global interests of all the different sectors of the industry: bulk carrier operators, tanker operators, passenger ship operators, and container liner operators, including shipowners and third party ship managers. A major focus of ICS activity is the IMO, where it holds consultative status.

The shipping *amici* file this brief in support of Petitioner in order to provide perspective to the Court about the global importance and practical effect on international commerce of the issues presented by the petition.

SUMMARY OF REASONS

The petition seeks review of a California regulation that limits the sulfur content of fuels burned by oceangoing vessels while those vessels are in navigation up to 24 miles beyond California's coastal baseline. No state has ever asserted jurisdiction onto the high seas to the extent that California has done so here.

Beginning with *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. For Relief of Distressed Pilots*, 53 U.S. 299 (1852), and continuing through *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), and *United States v. Locke*, 529 U.S. 89 (2000), this Court has addressed the question of when state regulation of

international and interstate shipping *within state waters* is permissible. This case presents the next geographic step in that line of inquiry; that is, whether and to what extent a state may regulate international navigation *on the high seas*.

Although this case may be decided solely on the Commerce Clause ground that California has asserted jurisdiction in a field and in a geographic area that is the exclusive domain of the federal government, California's vessel fuel rules are also invalid because they address the same issue as an international treaty to which the United States is a party and which the Congress has implemented through domestic legislation. Annex VI to the International Convention for the Prevention of Pollution from Ships (MARPOL) sets international sulfur limits for marine fuels, but imposes those limits on a different schedule than the California rules. See Pet. App. 161a-173a.

At a constitutional level, California's rules undermine the ability of the United States to "speak with one voice" in conducting its international affairs. At a practical level, the state rules threaten the timely implementation of the Annex VI requirements by complicating the transition of global fuel refinery production to the new international standards.

Finally, the Ninth Circuit upheld the broad geographic reach of California's rules on the ground that vessel activities on the high seas have an effect within California's boundaries. That rationale has no logical limit, and it provides states with unbounded authority to regulate vessels at sea. It is imperative that this Court define the permissible territorial limits of state power over ships in international navigation.

REASONS FOR GRANTING THE PETITION

This case is of exceptional national importance because it raises the question of whether a state may regulate vessels engaged in international commerce while those vessels are on the high seas. To date, the Court has addressed the question only by negative implication. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), and again in *United States v. Locke*, 529 U.S. 89 (2000), the Court addressed questions about the extent to which a state could impose environmental regulations on vessels within state waters in light of federal legislation covering the same subject. The issue here is even more fundamental than the issues addressed in those two prior cases.

California does not claim that its vessel fuel requirements address unique local conditions or that they are limited to local waters. Instead, California has regulated vessels on the high seas out to 24 miles on the ground that the air emissions from those vessels have an effect within California. This Court has always emphasized the local nature of state action in the cases in which it has allowed state regulation of international and interstate navigation, but it has not had occasion to address directly the question of whether a state may reach beyond its territorial waters to regulate vessels on the high seas. This case presents that question, and the Court should answer it.

a. The Commerce Clause Requires That Federal Jurisdiction Over Vessels on the High Seas be Exclusive.

There is arguably no question more fundamental to freedom of navigation for the vessels that carry this nation's international trade than that of whether individual states may impose operating requirements on those vessels when they are outside of state territorial waters.

One hundred and thirty years ago, this Court observed that "[n]avigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of 'external concern,' affecting the nation as a nation in its external affairs. It must, therefore, be subject to the national government." *Lord v. Steamship Co.*, 102 U.S. 541, 544 (1881) (quotation in original). The Ninth Circuit, in the decision for which the petition seeks review, observed that its own case law holds that: "Of course, as to environmental regulation of deep ocean waters, the federal interest in uniformity is paramount. Such regulation 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." Pet. App. at 50a, quoting *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 492 n.12 (9th Cir. 1984). The decision below neither followed nor distinguished *Hammond*, and the principle of *Hammond* is as valid and consistent with this Court's precedent today as when it was decided.

This Court said in *Locke* that:

> The *Court in Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. For Relief of Distressed Pilots*, 53 U.S. 299, 12 How. 299, 13 L.Ed. 996 (1852), stated that there would be instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority, although in the case before it the Court found the challenged state regulations were permitted in light of local needs and conditions.

Locke, 529 U.S. at 99. The *Locke* Court also observed that "[t]he authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution." *Id*.

This case is one in which state regulation is preempted by the Commerce Clause, U.S. Const. art. 1, §8, cl. 3, even in the absence of federal legislation. It is difficult to imagine an instance in which the federal interest could be more undermined than the one – presented by this case – in which a state reaches its hand onto the high seas to regulate the activity of vessels in international commerce while they are outside of state waters.

b. The Executive Has Signed, the Senate Has Given Its Advice and Consent to Ratification, the United States Has Ratified, and the Congress Has Implemented a Treaty Addressing the Precise Issue Covered by the California Rules.

Although this case presents an appropriate opportunity to define an outer boundary for state regulation of maritime commerce based solely on the constitutional principle that regulation of vessels on the high seas is the exclusive domain of the federal government, there is another equally compelling reason to hear the case. With respect to the precise issue covered by the California rules, the federal government and the international community have in fact acted – and acted decisively – to regulate vessel fuel sulfur content through a comprehensive treaty.

The International Maritime Organization (IMO) adopted Annex VI to the International Convention for the Prevention of Pollution from Ships (MARPOL Annex VI) in 1997. Annex VI, which includes regulations for vessel fuel sulfur content, entered into force in 2005. The United States became a party to Annex VI in 2008 and joined an international effort to strengthen the sulfur standards in Annex VI. Amendments containing stricter sulfur standards were adopted by the IMO and became effective internationally on July 1, 2010. See Pet. App. 161a-173a. There are presently 65 parties to MARPOL Annex VI, which represent 89.82% of the world's shipping by gross tonnage.

Congress implemented Annex VI in the United States through amendments to the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901-1915.

The international regulations adopted under Annex VI set a baseline sulfur content limit on marine fuels that applies globally. Those regulations also prescribe the schedule under which the increasingly stringent limits phase in. Pet. App. 170a. Annex VI provides a mechanism for applying even stricter limits in specified areas through the adoption of Emission Control Areas (ECAs), as it did with the similar predecessor SOx Emission Control Areas (SECAs). SECAs under Annex VI came into effect for the Baltic Sea in 2006 and for the North Sea in 2007. See Pet. App. 171a. The stricter sulfur limits applicable through the amended treaty apply equally to all Emission Control Areas, including the Baltic and North Seas.

In 2009 the United States and Canada proposed an ECA covering waters adjacent to the east and west coasts of both countries, as well as the Gulf coast of the United States and the waters around Hawaii. Adopted by the IMO in 2010, that ECA places stricter sulfur limits on vessels operating within 200 miles of most of the continental United States and Canada, and it provides a schedule for the phase-in of the applicable sulfur limits. See Petition at 11-13; Pet. App. 8a-9a. That ECA thus covers the entire offshore area to which the California rules apply, plus hundreds of thousands of additional square miles of ocean. As noted above, these international requirements are made effective as U.S. domestic law through the Act to Prevent Pollution from Ships, as amended, 33 U.S.C. §§ 1901-1915 (APPS).

This comprehensive federal and international regime covering precisely the same topic as the California regulations leaves no room for state action, especially state action that imposes sulfur limits on a different schedule than Annex VI. As this Court said in *Locke*:

> On this point, Justice Holmes' later observation is relevant: "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604, 59 L. Ed. 1137, 35 S. Ct. 715 (1915).

Locke, 529 U.S. at 93.

c. The Need for Uniformity and the Practical Effects of the California Regulations in Light of MARPOL Annex VI and Its Domestic Implementing Legislation.

Amici represent vessel operators whose ships operate predominately in international waters and that carry goods and passengers all over the globe. Air emissions and water discharges from those ships have environmental effects worldwide, and those emissions and discharges are regulated, to one degree or another, throughout the world. The requirements of those regulations can take many forms, from the installation of treatment technologies, to best management practices, to design and manufacturing standards for hulls and engines, to the use of a certain type of fuel (this case).

Vessels must comply with the regulations applicable in the waters of each country whose ports they call, as well as international regulations applicable on the high seas. It is not feasible to build vessels with multiple treatment systems for a single discharge or constantly to change operating procedures to comply with different requirements as vessels move from country to country or state to state. Instead, if a regulatory system is to work, the requirements in each jurisdiction must be the same.

The need for uniformity is especially strong in the case of fuel requirements, because vessel operators that call in California ports must purchase fuel in foreign ports before they arrive in California. Although global fuel markets have so far provided sufficient California-compliant fuel to meet demand, the fact that California is directly prescribing behavior literally halfway around the world represents the greatest possible extraterritorial reach. In so doing, "it affects a vessel operator's out-of-state obligations and conduct, where a State's jurisdiction and authority are most in doubt." *Locke*, 529 U.S. at 93. It is important that the Court define the limits of that doubtful authority, if indeed such authority exists at all.

The fact that California's rules govern vessel operator behavior many thousands of miles away from that state most closely tracks this Court's earlier concerns about state regulation of international vessels. See *Locke*, 529 U.S. at 113 ("This requirement will dictate how a tanker operator staffs the vessel even from the outset of the voyage, when the vessel may be thousands of miles from Puget Sound."). But there is a related problem with the California scheme that is equally troublesome. That problem lies not

with the burden on any one vessel, but rather with the burden that potentially numerous individual fuel requirements can have on the global marine fuel markets, and therefore on the success of MARPOL Annex VI.

The parties to Annex VI have expressed a concern that the fuel markets may fail to produce adequate supplies of the cleaner fuels to meet global demand. The concern was significant enough when Annex VI was amended in 2008 that the parties included an explicit provision requiring that a fuel availability review be conducted by 2018. If that review finds that adequate compliant fuels are not available, then the 2020 compliance date for global baseline sulfur content can be pushed back to 2025. See Pet. App. 172a-173a.

Actions like California's, especially if other jurisdictions copy them, have a potential to undermine the timely implementation of Annex VI. It is one thing for the global oil refining industry to retool its production to meet a uniform new sulfur limit for vessel fuels on a uniform implementation schedule. It is quite another thing if that transition is burdened by multiple standards that come into effect at different times. Depending on the number and differences of such multiple standards, their existence could affect the ability of the marine fuel industry to supply enough fuel to meet the global Annex VI standards.

The potential for sub-national jurisdictions to undermine international agreements is particularly acute with respect to the United States. Because it has the world's largest economy, and because it retains a central role in international diplomacy, if the United States cannot "speak with one voice" in its relations

with other countries, see *Ray*, 435 U.S. at 166, then its ability to lead and work with other nations is diminished. In *Japan Line, Ltd. v. Cnty. of L.A.*, this Court said:

> Finally, in discussing the Import-Export Clause, this Court, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285, 96 S. Ct. 535, 540, 46 L.Ed.2d 495 (1976), spoke of the Framers' overriding concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations" under the Commerce Clause.

441 U.S. 434, 448 (1979) (footnote omitted).

In short, if the word of the federal government in a ratified international treaty is not the final word from the United States, then it becomes less likely that the international community will work with the United States to address global environmental issues that require global solutions. In that case, the burden on vessels in international trade, as serious as it is, pales in comparison to the inability of the world's nations to address the environmental effects of that trade. The Ninth Circuit mentioned this concern, Pet. App. 12a, 50a, but gave it absolutely no weight. The undermining of the U.S. Government's ability to regulate commerce with other nations is the most important aspect of this case, and it warrants review by this Court.

It is no answer that Annex VI and the North America ECA have garnered international support *in spite of* California's actions. Fundamental questions of whether the federal government has exclusive authority to regulate international vessels operating on the high seas cannot be relegated to some after-the-fact analysis of whether overlapping state actions measurably impeded the diplomatic efforts of the Nation. In addition to the fact that such an analysis is impossible to do, the U.S. Government and the governments of other nations need to know up front whether and to what extent the word of the federal government is the last word from the United States. In the context of international regulation of vessel emissions, the Court's review of this case would go a long way toward answering that question.

d. The Ninth Circuit's Decision Sets No Outer Boundary on State Regulation of Vessels on the High Seas.

The final reason why the petition should be granted is that there is no logical limit to the power claimed by California. California's rationale for extending the reach of its regulations onto the high seas – and a central reason the Ninth Circuit upheld that reach – was that the emissions from vessels on the high seas were blown into California and had deleterious effects there. The factual assumption underlying that theory was accepted as true by the parties and the courts below. The issue, however, is not whether there is a harm to be addressed, but who has the authority to address it. See, e.g. *Locke*, 529 U.S. at 94 ("The issue is not adequate regulation but political responsibility. . . .").

Under California's and the Ninth Circuit's theory, a state could assert regulatory jurisdiction as far onto the high seas as it could show that the activity so regulated had an effect within the state. That is no limit at all. Under the Ninth Circuit's theory, the very fact that the North America ECA is premised on effects from emissions released 200 miles from shore would provide a factual basis for a state – if the Constitution were found to permit it – to reach out that far. If that theory were applied to an emission such as carbon dioxide, the most ubiquitous "greenhouse gas," then a state's reach would literally be global, because greenhouse gas emissions have the same effect worldwide regardless of where they are released.

In short, the Ninth Circuit has enunciated a test that places no geographic limit on the reach of a state's regulatory power. That is a radical proposition, and it warrants this Court's attention.

CONCLUSION

As a matter of constitutional structure, the California vessel fuel rules fall within that category of subjects under the Commerce Clause that are off limits for state regulation, regardless of whether the federal government has acted. Here, in addition, the federal government *has* acted, signing and ratifying a comprehensive international treaty and implementing that treaty through domestic law. If the challenged rules are allowed to stand, then the benefit of the uniformity that is the product of long and difficult negotiations at the IMO will be lost. That is, by itself, of substantial importance to the nation's international trade and the vessel operators that carry that trade.

What is even more important is that allowing California's rules to stand would mean that the nation with the world's largest economy could not make good on its international agreements designed to facilitate the free and environmentally responsible passage of vessels around the world. That would mean that there may be fewer such agreements in the future, to the detriment of many of the world's inhabitants, including those whom the California rules are designed to protect.

The Court should grant the petition and reverse.

Respectfully submitted,

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APPENDIX

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APPENDIX 1

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