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

AMICUS CURIAE BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONER

PATRICK J. BONNER
FREEHILL, HOGAN & MAHAR LLP
80 Pine Street
New York, NY 10005-1759
(212) 425-1900

President
THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

JEFFREY S. MOLLER
Counsel of Record
BLANK ROME LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6998
(215) 569-5792
moller@blankrome.com

Counsel for Amicus Curiae The Maritime Law Association of the United States

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The Maritime Law Association of the United States (hereinafter, the "MLA") respectfully submits the following *amicus curiae* brief in support of the petition of Pacific Merchant Shipping Association ("PMSA") for a writ of certiorari.[1]

INTEREST OF *AMICUS CURIAE*

The MLA is a voluntary, nation-wide bar association founded in 1899, with a membership of approximately 3,000 attorneys, judges, law professors, and other distinguished members of the maritime community. Its attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests – shipowners, charterers, cargo owners, port authorities, terminal operators, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.[2] This

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authorized this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Pursuant to this Court's Rule 37.2(a), *amicus curiae* states that petitioner and all respondents received timely notice of the intent to file this brief and each has given written consent to the filing of this brief. Copies of all written consents have been submitted along with this brief to the Clerk.

[2] The MLA has submitted numerous *amicus curiae* briefs in cases of interest. The MLA has also sponsored a wide range of maritime legislation and revisions thereto in its 108 years of existence, including the Carriage of Goods by Sea Act, 46 U.S.C.

(Continued on following page)

Court has described the MLA as "an organization of experts in admiralty law" and "an expert body of maritime lawyers. . . ."[3]

The purposes of the MLA[4] are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the *Comité Maritime International* and as an affiliated organization of the

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§§ 1300-1315; the maritime portions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16; the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603-1611; the Maritime Lien Acts of 1910 and 1920 and their 1988 amendments, *see* 46 U.S.C. §§ 31341-31343; the Act permitting appeals from interlocutory admiralty decrees, 28 U.S.C. § 1292(a)(3); the Public Vessels Act, 46 App. U.S.C. §§ 781-790; the Extension of Admiralty Jurisdiction Act, 46 App. U.S.C. § 740; and the Inland Rules Act, 33 U.S.C. §§ 2001-2038. *See also Merchants Bank of Mobile v. Dredge GENERAL G.L. GILLESPIE,* 663 F.2d 1338, 1350, n. 17 (5th Cir. 1991) (MLA "regularly participates in national and international proceedings concerning maritime treaties and conventions").

[3] *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 223-24 (1986).

[4] Admiralty courts have recognized the MLA's general interests and concerns, including the "growing risk that fundamental principles of maritime law are presently being inadvertently eroded." *Merchants Bank*, 663 F.2d at 1349, n. 17.

> American Bar Association, and to act with other associations to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

It is the MLA's policy to involve itself as *amicus curiae* only when important issues of maritime law or practice are implicated and only when the effect of the Court's decision on maritime commerce or admiralty law may be substantial.[5] The MLA believes that uniformity in the maritime law, both national and international, is of great importance and has submitted *amicus curiae* briefs in cases, such as this, where the uniformity of maritime law is imperiled.[6]

For the foregoing reasons alone, the MLA's nationwide membership of attorneys, judges, law professors and members of the maritime community desires that the Supreme Court issue a writ of certiorari to the Ninth Circuit Court of Appeals in this case.

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[5] *E.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *United States v. Locke*, 529 U.S. 89 (2000); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1995); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Sisson v. Ruby*, 487 U.S. 358 (1990); *Offshore Logistics*, *Inc. v. Tallentire,* 477 U.S. 207 (1986); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

[6] *Shipping Corporation of India, Ltd. v. Jaldhi Overseas Pte Ltd.*, 130 S. Ct. 1896 (2010); *Exxon Shipping Co. v. Baker,* 554 U.S. 471 (2008); *Albany Insurance Co. v. Anh Thi Kiev,* Supreme Court No. 90-1985 (1991); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988).

SUMMARY OF ARGUMENT OF *AMICUS CURIAE*

There are compelling reasons to grant PMSA's petition for a writ of certiorari. The California Air Resources Board has issued an unprecedented set of regulations (the "CARB Rules")[7] which invade the customary province of federal maritime law and reach out beyond the well-established seaward limit of state authority. The decision of the Ninth Circuit Court of Appeals allowing enforcement of those regulations involves critical issues with respect to the rights of states to regulate the participants in maritime commerce and is in seeming conflict with relevant decisions of this Court.[8] There has never been a case in which the Supreme Court has allowed a state to regulate maritime activities out at sea beyond the traditional 3 mile limit. The Ninth Circuit's decision, in combination with recent decisions of two state Supreme Courts, has established a deviant trend which may only be stopped by a decision of this Court. The Ninth Circuit's own language fairly invites review of its decision, admitting that *PMSA v. Goldstene* presents "a highly unusual and challenging set of circumstances" pertaining to a regulatory scheme which "pushes a state's legal authority to its very limits" and involves "such fundamental considerations as . . . the supremacy of federal law [and] the various limitations on state regulations arising out of

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[7] Cal. Code Regs. tit. 13 § 2299.2; tit. 17 § 93118.2.

[8] *See* Sup. Ct. Rule 10(c).

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. . . ." *PMSA v. James Goldstene,* 639 F.3d 1154, 1162 (9th Cir. 2011).

The previous decisions of this Court have made clear that the "dormant" Commerce Clause[9] permits state regulation of maritime commerce only when the subject matter and geographical reach of the regulations have been local in nature, such as the requirement to employ state-licensed pilots who have unique knowledge of navigational hazards in inland waters. There has never been a decision of this Court which approves the enforcement of a state regulation governing conduct upon waters seaward of the well-established traditional 3 mile territorial limit. The Court of Appeals decision allowing enforcement of the CARB Rules seems therefore to be in direct conflict with decisions of this Court which define the boundaries of state regulatory authority in matters of commerce and maritime law.

As petitioner PMSA strenuously argues, the federal Submerged Lands Act, 43 U.S.C. § 1312 (the "SLA"), would seem to specifically prevent the reach of the CARB Rules beyond 3 miles as a matter of direct preemption under the U.S. Constitution's Supremacy Clause.[10] Even if the SLA is deemed not to

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[9] U.S. Const., art. I, § 8, cl. 3.

[10] U.S. Const., art. VI, cl. 2.

specifically govern with respect to regulation of activities upon the sea surface, the 3 mile jurisdictional boundary is set out as a matter of either international or the general maritime law, giving rise to field preemption. The important question as to whether or not the CARB Rules are preempted under the Supremacy Clause of the U.S. Constitution[11] ought to be taken up by this Court.

Maritime law is uniquely federal and national in scope.[12] As the Court has long recognized, substantive uniformity of the maritime law is essential. Allowing regulations issued by a state to have effect beyond its traditional recognized boundaries serves to disrupt that uniform system, inviting other states to issue conflicting and overlapping rules. This complicates the compliance problems facing operators of foreign ships and presents the potential for conflict in foreign relations. Given the unique Constitutional grant of federal judicial power over matters maritime,[13] the Supreme Court has special authority and responsibility to correct a situation where, as here, a Circuit Court of Appeals has allowed the maritime law to sail upon the wrong course.

[11] U.S. Const., art. VI, cl. 2.

[12] *THE LOTTAWANNA*, 88 U.S. (21 Wall.) 558, 575 (1874).

[13] U.S. Const., art. II, § 2, cl. 3.

ARGUMENT OF *AMICUS CURIAE*

I. THIS CASE PRESENTS IMPORTANT QUESTIONS WITH RESPECT TO THE U.S. CONSTITUTION'S COMMERCE AND SUPREMACY CLAUSES.

In the case of *Southern Pacific Railway v. Jensen*,[14] this Court prohibited the application of a state workman's compensation law to longshoremen working upon the navigable waters of the U.S. In doing so, the Court stated that it was "well established" that

> state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. . . . [N]o such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purpose for which such law was incorporated into our national laws by the Constitution itself.

244 U.S. 205, 216. In the *Jensen* decision, Mr. Justice McReynolds quoted and emphasized the language used by the Court in the case of *THE LOTTAWANNA*:

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[14] 244 U.S. 205 (1917).

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law extensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

244 U.S. 205, 215 (quoting *THE LOTTAWANNA*, 88 U.S. (21 Wall.) 558, 575 (1874)).

These words written in the 19th and early 20th Centuries express a fundamental principle which this Court has recognized as having continued vitality in the 21st. In the case of *United States v. Locke*,[15] the Court considered the efficacy of a statute enacted by the State of Washington which purported to regulate the operation of tank vessels in and upon the territorial waters of that state. Even though the federal Oil Pollution Act of 1990 contained a grant of Congressional permission for states to issue additional regulations with respect to oil pollution prevention,[16] the *Locke* Court struck down the supplementary state regulations. In the Court's decision, Justice Kennedy

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[15] 529 U.S. 89 (2000).

[16] Oil Pollution Act of 1990, 33 U.S.C. § 2718.

saw fit to refer to the legislative history of the Constitution itself:

> The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established. The 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, e.g., The Federalist Nos. 44, 12, 64.

529 U.S. 89, 99.

The Court has had repeat occasion to police the attempts made by various states to issue regulations effecting maritime commerce. A body of law has emerged which, given evolving circumstances, emerging problems and occasional disasters, has had to be reemphasized or modified from time to time. Now the Ninth Circuit's decision in *PMSA v. Goldstene* has presented another such occasion. The unique circumstance in this case is the attempt by the California Air Resources Board to reach beyond the customary territorial sea boundary to impose requirements on vessels with respect to the type of fuel to use in their engines.

The Court of Appeals justified its decision in part upon the ground that air pollution is a regulatory

area in which the states have long been involved. While it is true that the federal Clean Air Act[17] fully involves the states in making air quality attainment decisions, there ought to be no doubt that the CARB Rules are maritime in character, being a direct imposition upon the operations of sea-going ships. The record below is replete with facts regarding the thousands of vessels to be affected annually by the CARB Rules, the consequent hundreds of millions of dollars in expense, the complications associated with purchasing, storing and shifting of marine fuels, the details of marine engineering requirements, and the like. Indeed, the regulatory subject at issue – the type of fuel to be used in marine engines – has been specifically covered by an international treaty entitled International Convention for the Prevention of Pollution from Ships ("Marpol"). The subject and affected activities/entities being unequivocally maritime in character, the question is whether or not given their purported reach, the CARB Rules can be considered to be truly "local" as required by the corpus of existing Supreme Court precedent.

The Ninth Circuit Court of Appeals and the defendants below were unable to locate a single case decided by this Court permitting a state to prescribe or proscribe activities aboard vessels located outside of the traditional 3 mile territorial limit. That is largely because, up to now, coastal states have

[17] Clean Air Act, 42 U.S.C. §§ 7401, *et seq.*

understood the law and did not attempt to regulate activities beyond that line. The only case in which the Court has allowed a state to regulate beyond the 3 mile limit, *Skiriotes v. Florida*, 313 U.S. 69 (1941), involved the criminal prosecution of one of the state's own citizens. In cases allowing states to regulate on maritime subjects, the Court has always emphasized that the waters or property subjected to state regulation have been located well within the state's traditional borders. *See, e.g., Askew v. American Waterways Operators*, 411 U.S. 325 (1973) (allowing Florida state water pollution rate law to govern cases involving pollution of water within territorial limits); *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1852) (allowing states to issue regulations pertaining to the need for employment of pilots with knowledge of local waterway hazards); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (allowing city ordinance restricting air emissions to be enforced on vessels lying at waterfront terminals within city limits).

The decision of the Ninth Circuit Court of Appeals below seems to be in direct conflict with the Court's previous decisions with respect to the proper definition of the limits of state authority. The Court of Appeals cited its own prior decision in *PMSA v. Aubry*, 918 F.2d 1409 (9th Cir. 1990), cert. denied, 504 U.S. 979 (1992), and several decisions from state Supreme Courts which were arguably decided in a manner which conflict with this Court's decisions also. Among the latter were the Florida Supreme

Court's decision in *State v. Stepansky*, 761 So. 2d 1027 (Fla. 2000) (allowing conviction under a state statute of a non-Florida resident for a crime occurring aboard a cruise ship on the high seas); *State v. Jack*, 125 P.3d 311 (Alaska 2005) (Alaska possesses "extra-territorial criminal jurisdiction" over a sexual assault committed onboard an Alaskan State Ferry in Canadian waters); and *State v. Bundrant*, 546 P.2d 530 (Alaska 1976) (in absence of federal law, Alaska's crabbing regulations may be applied to American fishermen operating outside of the State's own territorial waters). In light of these decisions, enough controversy now exists that a need has arisen for this Court to express its own opinion and set the law back upon its proper course.

II. THE NINTH CIRCUIT'S APPROVAL OF CALIFORNIA'S EXTRATERRITORIAL REGULATION OF VESSEL OPERATIONS DISRUPTS THE UNIFORMITY OF MARITIME LAW.

Tough cases can sometimes result in bad law. In this case, the Ninth Circuit was faced with a difficult set of facts. The severity of the air pollution problem in California, particularly in the South Coast Air Basin, is well known. The substantial number of seagoing ships visiting the ports of California annually (and traversing the coastal waters enroute), many of which utilize minimally-refined ("bunker") petroleum fuels, may well be making a significant contribution to the problem. As such, those "mobile source" ships

were an inviting target for the California Air Resources Board, which bears the immense burden of bringing California into compliance with its responsibilities under the federal Clean Air Act. Those ships are predominately owned, controlled and crewed by foreign companies and foreign citizens, of course, meaning that it is less of a political challenge to impose costly regulations upon them. Under these circumstances, neither the District Court nor the Ninth Circuit was inclined to deny CARB the opportunity to make a positive impact upon California's air quality problem. In allowing the CARB Rules to be enforced, however, the Ninth Circuit has made law which is unprecedented, in conflict with prior decisions of this Court, and contrary to the long understood tenets of the maritime law.

As the Petitioner has explained in full,[18] the federal government has not been silent or inactive with respect to the question of air pollution from ships. The United States is a signatory to Marpol. The U.S. Congress has adopted Marpol as the positive law of the United States and directed that the Marpol Annex VI regulations, which pertain to the composition of vessel fuels, be adopted and enforced by relevant agencies of the United States government. An agreement is now in place with the government of Canada as to the definition of the Environmental

[18] Petition for Writ of Certiorari of Pacific Merchant Shipping Association, pp. 11-13.

Coverage Areas ("ECA") along the coasts of both the Atlantic and Pacific Oceans. The regulations to be enforced by the EPA (in conjunction with the U.S. Coast Guard) beginning in August 2012 specifically employ sulfur content restrictions such as those in the CARB Rules.

As a function of federal regulations, the sulfur content of fuels used by vessels within 200 nautical miles of the United States will therefore be restricted to 1.0% beginning in August 2012. This restriction is likely to have a substantial impact because the sulfur content of traditional marine bunker fuel, 24,000 ppm or 2.5%, is 250% greater than will be allowable. As of January 1, 2015, a sulfur limit of 0.1%, that is now imposed by the CARB Rules, will be required by the federal scheme.

One might ask: what harm will result if the Ninth Circuit's decision is allowed to stand? From the perspective of the MLA and its members, the answers are these: great damage will have been done to the uniformity of the maritime law if the Ninth Circuit's decision is left undisturbed; and little incremental harm will be done to the quality of the air in California if the Court grants the pending petition and eventually reverses that decision.

By the time this Court has read the briefs, heard the arguments and issued a decision in this case, only a short time will remain before the start date of the federal regulations. It is by no means assured, however, that the state of California will concede that the

CARB Rules will be preempted as of August 2012. A denial of certiorari will send a message to California that it is permissible for a state to regulate in an area traditionally left to exclusive federal control. The federal regulations which come into force in August 2012 will permit 1.0% sulfur content for the following 30 months, through January 2015, which is ten times the amount of sulfur permitted by the CARB Rules currently. A debate will rage, confusion will reign, and litigation will undoubtedly ensue with regard to the need for ships to switch from one fuel to another when passing from the 200 nautical mile ring into the 24 mile belt around California's coast. Millions of dollars in fuel expense and many more dollars in potential civil penalties and legal fees will remain at stake. This Court is likely to be facing the same exact issue two years from now.

Moreover, if the Court decides to leave the Ninth Circuit's decision undisturbed, that decision might remain on the books for years, serving as a faulty aid to legal navigation. Much mischief may result. There would be myriad opportunities for state legislatures to issue laws in the maritime sphere having extraterritorial effect if they felt that such laws would pass Constitutional muster. One can imagine state statutes requiring the offshore use of bio-fuels, for example, or prohibiting the offshore operation of vessels at inefficient speeds. States may think it appropriate to exercise dominion over the construction at sea of wind farms or other yet-to-be imagined sea surface structures potentially affecting navigation such as

ocean-current-driven energy generators. And there would be nothing stopping other coastal states from enacting vessel fuel rules of extraterritorial effect with requirements differing from the CARB Rules. This would present the potential situation in which a vessel cruising the U.S. coast 20 miles out to sea would have to shift from one fuel to another three times as it proceeded south from the waters off of Washington, through the waters off of Oregon to the waters off of California. The pending petition affords the Court a ripe opportunity to avoid such future problems. The MLA suggests that it would be wise for the Court to take action now so as to avoid these anticipated problems.

III. THIS COURT SHOULD CONSIDER FOR ITSELF THE IMPORTANT QUESTIONS ANSWERED BY THE NINTH CIRCUIT.

Petitioner PMSA presents a question with respect to the effect of the federal Submerged Lands Act upon the definition of the boundary of the jurisdiction of the states at sea. In enacting that statute, Congress itself recognized that the so-called "three mile" territorial limit has its firmest foundation in the law of the sea and the general maritime law. Article II of the U.S. Constitution directly grants jurisdiction over the admiralty and maritime law to the federal judiciary. The authority of the U.S. Congress to modify or change the maritime law no longer seems to be questionable, but if an enactment of Congress does not exist which covers a specific maritime law question,

the matter remains for the federal judiciary to discern and decide. The specific subject matter covered by the Submerged Lands Act may not include activity above the water's surface. If not, as is urged by the defendants below and was determined by the Ninth Circuit Court of Appeals, the question remains one for determination pursuant to the general maritime law, of which this Court is the ultimate arbiter.

The Supreme Court has a unique authority and responsibility to resolve admiralty disputes. The Constitution singles out maritime law as a matter of national importance[19] that is uniquely within the federal judiciary's purview.[20] Therefore, state legislatures, admiralty tribunals below, and the nation-wide admiralty bar look to this Court for guidance, especially on such fundamental matters as the limits of regulatory authority.

CONCLUSION

The Ninth Circuit's decision in this case has allowed the enforcement of state-issued regulations directly affecting maritime commerce in a geographic area which lies well beyond the limits set by both traditional law and Congress, where uniform federal law ought to exclusively reign. Those regulations

[19] U.S. Const., art. II, § 2, cl. 3; *THE LOTTAWANNA*, 88 U.S. at 558, 575.

[20] U.S. Const., art. II, § 2, cl. 3.

are, or soon will be, in direct conflict with an existing national/international regulatory scheme. The decision of the Court of Appeals ought not stand without the full consideration of the U.S. Supreme Court.

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Respectfully submitted,

JEFFREY S. MOLLER
Counsel of Record
BLANK ROME LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6998
(215) 569-5792

Counsel for Amicus Curiae
The Maritime Law
Association of the
United States