No. 10-1555

In the Supreme Court of the United States

PACIFIC MERCHANT SHIPPING ASSOCIATION, PETITIONER

v.

JAMES GOLDSTENE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The California Air Resources Board promulgated a regulation governing the sulfur content of fuel used by ocean-going vessels traveling within 24 nautical miles of the State's coast and bound to or from a California port. The questions presented are:

1. Whether California's vessel fuel regulation is preempted by the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which establishes state title to and ownership of seabed and subsoil natural resources within three miles of the state coastline.

2. Whether California's vessel fuel regulation is preempted by the Commerce Clause.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

In an effort to reduce air pollution affecting the State of California, the California Air Resources Board (CARB) adopted a regulation requiring ocean-going vessels bound to or from a California port to use cleaner fuels when operating within 24 nautical miles of California's coast. Petitioner challenged California's vessel fuel rule as preempted by the Submerged Lands Act (SLA), 43 U.S.C. 1301 *et seq.*, and the Commerce Clause, insofar as it regulates conduct more than three miles seaward of California's coast. The district court denied peti-

tioner's motion for summary judgment, and certified the preemption issues for interlocutory appeal. Pet. App. 55a-75a. The court of appeals accepted the appeal and affirmed the denial of summary judgment. *Id.* at 1a-54a.

1. a. California's South Coast Air Basin, which includes the Ports of Los Angeles and Long Beach, has long exceeded federal limits for particulate matter air pollution under the Clean Air Act, 42 U.S.C. 7401 *et seq*. See 42 U.S.C. 7407(d); 70 Fed. Reg. 955-956 (Jan. 5, 2005). Ocean-going vessels have been "a leading source of air pollution in California." Pet. App. 6a. They are a significant source of sulfur oxides emissions, which are, in turn, a precursor to particulate matter pollution. *Id.* at 6a-7a. The emissions result in large part from vessel operators' use of low-grade bunker fuel, which is composed primarily of thick, tar-like residual oil that remains at the end of the petroleum refining process. *Id*. at 6a. Ship bunker fuel contains an average of nearly 25,000 parts per million (ppm) of sulfur; in contrast, truck diesel fuel contains 15 ppm of sulfur. *Ibid*.

b. In April 2009, CARB transmitted its vessel fuel regulation to the California Secretary of State for filing, and the regulations became effective in July 2009. Pet. App. 3a, 57a. The vessel fuel rule applies to U.S.- and foreign-flagged tankers, container ships, bulk carriers, and other large vessels operating within 24 nautical miles of California's coast and bound to or from a California port. Cal. Code Regs. tit. 13, § 2299.2(b)(1)-(2), 2299.2(d)(23), and (e) (2012).[1] Vessels are exempt from

[1] The zone regulated by California's vessel fuel rule encompasses both the United States' "territorial sea," which extends from 0 to 12 nautical miles seaward of the coastal baseline, see Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988), as well as portions of the United States' "exclusive economic zone" (EEZ), which extends from 12 to 200

the rule if they are merely traversing that zone without calling at a California port. *Id.* § 2299.2(c)(1).

California's vessel fuel rule provides for a series of increasingly stringent limitations on the sulfur content of fuel. As of July 2009, the rule requires vessel operators to use either marine gas oil (MGO) with a maximum of 1.5% sulfur or marine diesel oil (MDO) with a maximum of 0.5% sulfur by weight. Cal. Code Regs. tit. 13, § 2299.2(e)(1)(A)(1) and (1)(B)(1) (2012). On August 1, 2012, the sulfur limit for MGO changes to a maximum of 1.0% sulfur, while the limit for MDO remains unchanged at a maximum of 0.5% sulfur. *Id.* § 2299(e)(1)(A)(2) and (1)(B)(2). Finally, on January 1, 2014, the sulfur limit

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miles, see Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). As a matter of international law, the sovereignty of every coastal nation extends to its territorial sea, including the air space over the territorial sea as well as its bed and subsoil, and is exercised subject to applicable rules of international law, including certain passage rights of foreign vessels. See Proclamation No. 5928, 54 Fed. Reg. 777 (1988); see also United Nations Convention on the Law of the Sea (LOS Convention), Dec. 10, 1982, arts. 2, 17, 1833 U.N.T.S. 397. Within the EEZ, the United States exercises sovereign rights for purposes of "exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superadjacent waters." Proclamation No. 5030, 48 Fed. Reg. 10,605; see also LOS Convention art. 56.

Although the decisions below (Pet. App. 51a; *id.* at 67a n.4) refer to the 12-mile marginal belt of sea beyond the territorial sea (*i.e.*, between 12 and 24 miles of the coastal baseline) known as the "contiguous zone," the nature of the United States' authority in that zone is not relevant to the analysis in this case. See Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999) (the United States' authority in the contiguous zone encompasses "the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea, and to punish infringement of the above laws and regulations committed within its territory or territorial sea").

for both MGO and MDO changes to a maximum of 0.1% sulfur. *Id.* § 2299.2(e)(1)(A)(3) and (1)(B)(3).[2]

c. California adopted its vessel fuel rule against the backdrop of treaty-based regulation of air pollution from ships. In 2008, the United States ratified Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL), Nov. 2, 1973, 1340 U.N.T.S. 184, as modified by Protocol of 1978, Feb. 17, 1978, 1340 U.N.T.S. 61, which contains globally applicable limits for the sulfur content of fuel used by ships, as well as permitting imposition of more stringent, geographically based limits for the sulfur content of fuel used by ships operating within designated Emissions Control Areas (ECAs). See Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, Sept. 26, 1997, S. Treaty Doc. No. 108-7.

In 2009, the United States and Canada jointly proposed to designate waters up to 200 miles seaward of the North American coast as an ECA, which would establish fuel sulfur limits more stringent than the globally applicable limits under Annex VI.[3] The Parties to MARPOL Annex VI, acting through the International Maritime Organization (IMO), adopted the North American ECA

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[2] In October 2011, CARB amended the vessel fuel rule to delay the effective date of the 0.1% sulfur requirement by two years, from January 1, 2012, to January 1, 2014. See Final Regulation Order at 7-8, *available at* http://www.arb.ca.gov/regact/2011/ogv11/ogvfro13.pdf (effective Oct. 27, 2011).

[3] The North American ECA includes waters adjacent to the Pacific, Atlantic, and Gulf coasts and the eight main Hawaiian Islands. United States Environmental Protection Agency, *Designation of North American Emissions Control Area to Reduce Emissions from Ships* (Mar. 2010), *available at* http://www.epa.gov/otaq/regs/nonroad/marine/ci/420f10015.pdf.

designation in March 2010. Marine Env't Protection Comm., IMO, Res. MEPC.190(60) (adopted Mar. 26, 2010).

The United States implemented Annex VI's requirements through amendments to the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. 1901-1915 (2006 & Supp. V 2011). Maritime Pollution Prevention Act of 2008, Pub. L. No. 110-280, 122 Stat. 2611; see 40 C.F.R. Pt. 1043. Under MARPOL Annex VI, as implemented by APPS, a 1.0% fuel sulfur standard will apply to both U.S.- and foreign-flagged vessels operating within the U.S. exclusive economic zone (generally defined as the zone between 12 and 200 miles from U.S. shores), as well as the area between 0 and 12 miles from U.S. shores, beginning on August 1, 2012. See 40 C.F.R. 1043.60(b) Tbl. 2; Pet. App. 9a; see also Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983) (establishing exclusive economic zone). Beginning on January 1, 2015, the same 0.1% sulfur limit applicable under California's vessel fuel rule will apply to U.S.- and foreign-flagged vessels traveling within the North American ECA, including the area within 200 miles of California's coast. See 40 C.F.R. 1043.60(b) Tbl. 2; Pet. App. 9a.

California's vessel fuel rule contains a sunset provision under which the rule will "cease to apply" upon the written finding by the Executive Officer of CARB that these or other federal requirements will achieve equivalent emissions reductions. Cal. Code Regs. tit. 13, § 2299.2(j)(1) (2012).

d. Respondents CARB and South Coast Air Quality Management District (South Coast AQMD) are charged with bringing California's South Coast Air Basin into compliance with federal Clean Air Act standards for particulate matter pollution by 2015. Pet. App. 8a n.1.

Under Clean Air Act requirements, the South Coast Air Basin must achieve federal air quality standards for particulate matter, including the precursor pollutant sulfur dioxide, by 2015. See 42 U.S.C. 7502(a)(2)(A) (requiring that nonattainment areas achieve national air quality standards no later than five years from the date of nonattainment designation and giving EPA authority to extend the deadline by no more than five additional years); 76 Fed. Reg. 69,928 (Nov. 9, 2011) (extending deadline to April 5, 2015). Because compliance is based on calendar annual averages, all pollution reduction measures needed to meet the federal particulate matter standards must be in place in 2014. See 42 U.S.C. 7502(c)(1); 40 C.F.R. 51.1007(b). Failure to comply with Clean Air Act nonattainment requirements may result in restrictions on federal transportation funding. 42 U.S.C. 7509.

Respondent South Coast AQMD has submitted to the U.S. Environmental Protection Agency (EPA) a state implementation plan (SIP) that relies on predicted pollution reductions from California's vessel fuel rule to demonstrate achievement of federal particulate matter standards for the South Coast Air Basin. See 42 U.S.C. 7410 (requiring submission of SIPs meeting certain criteria); 76 Fed. Reg. 69,928 (Nov. 9, 2011) (final rule approving South Coast SIP for particulate matter pollution). EPA approved the SIP. *Ibid.*; see 42 U.S.C. 7410(k); see 42 U.S.C. 7413(b) (final EPA approval of state regulations and their incorporation into a SIP makes them federally enforceable). EPA has also signed an approval of the vessel fuel rule, see Prepublication Final Rule (Nov. 9, 2011), *available at* http://www.regulations.gov (Doc. ID EPA-R09-OAR-2011-0544-0046). The final rule approving the vessel fuel rule has not, however, been published or become effective.

2. Petitioner Pacific Merchant Shipping Association, whose members own and operate U.S.- and foreign-flagged vessels, brought an action in federal district court challenging California's authority to regulate the fuel used by vessels traveling in the zone between 3 and 24 miles of the State's coast. Pet. App. 9a-10a. Petitioner asserted that California's vessel fuel rule is invalid under the SLA, the Commerce Clause, and the Supremacy Clause, insofar as it regulates conduct more than three miles seaward of California's coast. *Ibid.*

Petitioner moved for summary judgment. The district court denied the motion. Pet. App. 55a-75a. The court concluded that the SLA, which established state title to the ocean seabed up to three miles offshore, 43 U.S.C. 1312, does not "overrid[e] all state regulation beyond three miles from a state's coastline," Pet. App. 65a. The court also held that there are genuine issues of material fact regarding the impact of California's vessel fuel rule on maritime commerce relative to its health benefits for California's residents. *Id*. at 71a-73a. The court certified its ruling for interlocutory appeal. *Id.* at 74a.

3. The court of appeals accepted the appeal and affirmed the denial of summary judgment, Pet. App. 1a-54a, though noting that "the regulatory scheme at issue here pushes a state's legal authority to its very limits," *id.* at 12a.

As an initial matter, the court of appeals rejected petitioner's argument that the SLA categorically precludes California from regulating conduct beyond three miles from California's coast. Pet. App. 13a-43a. The court applied a presumption against preemption in light of the "historic presence of state law in the area of air pollution." *Id.* at 23a (internal quotation marks omitted).

"Especially in light of this applicable presumption," the court concluded that petitioner's SLA preemption argument "reads too much into the SLA itself and what Congress itself intended to achieve" through that statute. *Ibid*. The court explained that the Congress that enacted the SLA "was primarily concerned with the distinct question of who owned the 'submerged lands' and their valuable natural resources," and that "[e]ven if the statute does set out state territorial boundaries, it does not really address the separate question of whether the states are totally precluded from regulating any conduct beyond their seaward boundaries." *Id.* at 37a-38a.

The court of appeals concluded that, notwithstanding the SLA, "California may enact reasonable regulations to monitor and control extraterritorial conduct substantially affecting its territory." Pet. App. 29a. The court of appeals determined, however, that "there are genuine issues of material fact with respect to both the effects of the fuel use governed by California's regulations on the health and well-being of the state's residents as well as the actual impact of these regulations on maritime and foreign commerce." *Id*. at 24a.

The court of appeals also rejected petitioner's argument that California's vessel fuel rule conflicts with the Commerce Clause. Pet. App. 44a-54a. The court concluded that the state vessel fuel rule does not directly regulate interstate or foreign commerce, *id.* at 48a-49a, and that, "at this juncture" of the litigation, *id.* at 53a, petitioner had not shown that the resulting burdens on navigation and commerce outweigh the State's interest in controlling the "highly damaging and even life-threatening" effects of air pollution resulting from the fuel used by ocean-going vessels within 24 miles of California's coast, *id.* at 51a-52a.

DISCUSSION

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. In the government's view, however, further review of the court of appeals' interlocutory decision is not warranted at this time. Petitioner's argument that the Submerged Lands Act establishes a bright-line, three-mile limit on a State's authority to regulate maritime conduct lacks merit. And because the district court only denied petitioner's motion for summary judgment and there accordingly will be further proceedings in the district court, the court's interlocutory decision does not present a suitable opportunity for this Court to consider broader questions about the permissible reach of state regulatory authority in matters bearing on maritime commerce. Moreover, petitioner did not raise, and the court below accordingly did not consider, the effect of other relevant federal statutes on the validity of California's vessel fuel rule. Finally, the specific questions presented in this case are of limited practical impact, because California's vessel fuel rule is largely consonant with federal requirements under Annex VI and APPS, and should be overtaken by those requirements by January 2015. The petition for a writ of certiorari accordingly should be denied.

A. The Submerged Lands Act Question Does Not Warrant This Court's Review

Petitioner contends (Pet. 27-30) that the SLA, which "establishes States' title to submerged lands beneath a

3-mile belt of the territorial sea," *United States* v. *Alaska*, 521 U.S. 1, 6 (1997); see 43 U.S.C. 1311, 1312, preempts any state regulation of maritime commerce more than three miles offshore. The court of appeals correctly rejected that argument. Pet. App. 13a-43a. Although the court's opinion accorded insufficient weight to the federal government's primary responsibility for matters bearing on maritime commerce, the court correctly concluded that the SLA does not address the issues presented in this case.

1. As this Court has recognized, the federal interest in maritime commerce "has been manifest since the beginning of our Republic and is now well established." *United States* v. *Locke*, 529 U.S. 89, 99 (2000). "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," and such federal regulation dates to the First Congress in 1789. *Ibid.* Unlike fields historically occupied by the States, in matters bearing on maritime commerce "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.* at 108.

Although the court of appeals acknowledged these principles, it noted that this Court later held that a long history of federal regulation in a field need not eliminate the presumption that Congress has not displaced state law, since the presumption against preemption "accounts for the historic presence of state law but does not rely on the absence of federal regulation." Pet. App. 22a (quoting *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009)). In this context, the court's reliance on *Wyeth* was misplaced. Unlike the regulation of potentially harmful

products within the State, which has historically been an area of state concern, see *Wyeth*, 555 U.S. at 565 n.3; see also *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 475 (1996), the regulation of maritime commerce has primarily been a matter of federal concern, see *Locke*, 529 U.S. at 108. If a state law—including an environmental protection law, see Pet. App. 22a-23a—operates to regulate the conduct of maritime commerce, then a court must determine whether the law can stand without reliance on any "artificial presumption" against preemption. *Locke*, 529 U.S. at 108.

2. No reliance on any such presumption is necessary, however, to determine that the SLA does not preempt California's vessel fuel rule.

Congress enacted the SLA following a period of disputes between coastal States and the federal government "over their respective rights to exploit the oil and other natural resources of offshore submerged lands." *United States* v. *Louisiana*, 363 U.S. 1, 5-6 (1960). In a series of cases, this Court concluded that the federal government, rather than the States, had "full dominion over the resources of the soil" seaward of the low-water mark. *United States* v. *California*, 332 U.S. 19, 39-40 (1947); see also *United States* v. *Louisiana*, 339 U.S. 699, 704 (1950); *United States* v. *Texas*, 339 U.S. 707, 720 (1950). The SLA was enacted to overturn the result in those cases by "establish[ing] the titles of the States to lands beneath navigable waters within State boundaries" and "confirm[ing] the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries." Ch. 65, 67 Stat. 29 (1953).

The SLA's allocation of title to submerged lands does not, however, address state authority to regulate naviga-

tion or other activities occurring on the surface of the waters overlying the submerged lands. Before the SLA was enacted, this Court made clear that a State may regulate some maritime activities beyond the low-water mark boundary established in *United States* v. *California*, *supra*. See *Toomer* v. *Witsell*, 334 U.S. 385, 393-394 (1948) (rejecting argument that State lacked authority to regulate shrimp fishing beyond the low-water mark). Nothing in the SLA speaks to States' ability to regulate activities beyond their territorial limits, just as nothing in the SLA disturbs the federal government's authority to regulate navigation and maritime commerce within the statutory three-mile belt. See 43 U.S.C. 1314(a); *United States* v. *Rands*, 389 U.S. 121, 127 (1967) ("The [SLA] left congressional power over commerce and the dominant navigational servitude of the United States precisely where it found them."). The court below thus correctly concluded that the SLA does not implicitly preempt all state regulation of activities more than three miles offshore.

3. The decision below is consistent with the decisions of other courts of appeals, which have similarly rejected the argument that the SLA's delineation of boundaries for purposes of determining the ownership of natural resources implicitly preempts all state regulation of surface activities beyond the statutory three-mile belt. See *Gillis* v. *Louisiana*, 294 F.3d 755, 761 (5th Cir. 2002) ("Section 1312, which is part of the Submerged Lands Act, addresses only who retains title to submerged lands both within and beyond the three-mile line, with particular reference to ownership and exploration of natural resources in the seabed and subsoil. It does not address the regulation of pilotage on the waters above."); *Warner* v. *Dunlap*, 532 F.2d 767, 768, 772 (1st Cir. 1976)

(rejecting argument that SLA forbids state pilotage regulations more than three miles offshore, and explaining that "[t]he issue of a state's territorial limits is distinct from that of its right to control navigation") (internal citations omitted). Further review of the SLA issue is accordingly unwarranted.

B. The General Maritime Commerce Preemption Question Does Not Warrant This Court's Review

The Submerged Lands Act aside, petitioner contends (Pet. 22-27) that the Commerce Clause categorically forbids States from regulating vessels outside state territorial limits. Rejecting that argument, the court of appeals concluded that the scope of state authority to regulate matters bearing on maritime commerce requires an analysis of the burden that state regulation imposes on maritime commerce and navigation and the benefits of regulation to the health and welfare of the State's citizens. See Pet. App. 24a, 52a-53a; see also, *e.g.*, *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 98-99 (1994); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The court determined that there were genuine issues of material fact on these issues and accordingly denied petitioner's motion for summary judgment. That disposition does not warrant review at this time.

1. Petitioner does not contend that the court of appeals' disposition of its Commerce Clause argument conflicts with the decision of any other court of appeals, and it does not. Neither does the decision below conflict with any decision of this Court.

While the federal government has long had paramount authority in the area of maritime commerce, this Court's cases have acknowledged that States have a de-

gree of residual power to address matters of local concern by regulating some aspects of vessel conduct. The Court has, for example, noted the "important role for States and localities in the regulation of the Nation's waterways and ports." *Locke*, 529 U.S. at 109. And it has affirmed the States' authority to enact "reasonable, nondiscriminatory conservation and environmental protection measures," unless otherwise precluded from doing so by federal law. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 164 (1978) (quoting *Douglas* v. *Seacoast Prods.*, 431 U.S. 265, 277 (1977)); see *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 443, 446 (1960) (upholding smoke abatement ordinance as applied to ships docked in city port against Commerce Clause challenge, in the absence of any conflict with then-existing federal laws governing vessel inspection and licensing).

The Court has also indicated that there will be "instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority." *Locke*, 529 U.S. at 99 (citing *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1852)). But contrary to petitioner's suggestion (Pet. 6-7), this Court has not held, for purposes of the Commerce Clause, that a State's territorial boundaries mark a bright line between permissible state regulation and impermissible encroachment on maritime commerce.

In *Ray*, for example, this Court considered the validity of a state law that imposed requirements on radar equipment, oil compartment design, shaft horsepower, local certification of pilots, and use of a tug boat escort for tankers approaching Puget Sound. The Court concluded that the regulations governing vessel design and pilot licensing were displaced by Title II of the Ports

and Waterways Safety Act of 1972 (PWSA), as amended, 33 U.S.C. 1221 *et seq.*, 46 U.S.C. 3701 *et seq.*, which provides for the promulgation of comprehensive federal standards "of design, construction, alteration, repair, maintenance, and operation" of covered vessels. *Ray*, 435 U.S. at 158-168. The Court concluded that the state-law tug-escort requirement, on the other hand, was permissible because it was neither a design requirement preempted by Title II of the PWSA nor in conflict with Title I of the PWSA, which permits, but does not require, the Coast Guard to establish and operate "'vessel traffic services and systems' for ports subject to congested traffic." *Id.* at 168-173 (quoting 33 U.S.C. 1221).

Similarly, in *Locke*, this Court considered a set of Washington regulations governing equipping, staffing, and operation of oil tankers. The Court concluded that provisions of state law imposing crew-member English-language proficiency requirements and navigation watch rules were preempted by Title II of the PWSA. 529 U.S. at 112-114. In addition, the Court held that mandatory reporting of on-board accidents, regardless of the vessel's location at the time of the accident, was preempted by other provisions of federal law governing vessels' reporting obligations. *Id.* at 115-116 (citing 46 U.S.C. 6101 and 46 U.S.C. 3717(a)(4) (1994)). The Court remanded for consideration of whether other provisions of the state law were preempted by Title I of the PWSA, Title II of the PWSA, or any other source of federal or international law. *Id.* at 116.

To the extent the Court in *Ray* and *Locke* considered the "extraterritorial effect" of challenged regulations, it did so as a statutory matter, to determine whether the challenged regulation fell within the scope of Title I or Title II of the PWSA. See *Locke*, 529 U.S. at 112. In

neither case did the Court consider whether a State is constitutionally barred from implementing any regulation that applies extraterritorially even in the absence of countervailing federal law.

Unlike the plaintiffs in *Ray* and *Locke*, petitioner in this case has not argued that California's vessel fuel rule is preempted by the PWSA insofar as the rule may affect vessels' design, construction, alteration, repair, maintenance, operations, equipment, personnel qualification, or manning, either for vessels located within local ports and waterways or beyond them. The court of appeals therefore did not address that issue. And with respect to the issue it did consider, the court of appeals' rejection of petitioner's argument that the Commerce Clause precludes all state regulation of maritime activity beyond the State's territorial limits does not conflict with any decision of this Court.

2. Nonetheless, as the court of appeals itself recognized, see Pet. App. 12a, 54a, California's vessel fuel rule raises other difficult and important questions about the permissible scope of state regulation of matters affecting maritime commerce. At this juncture, however, this case does not present a suitable opportunity to explore those questions.

As an initial matter, the Court's consideration of the issues would be constrained by the narrow scope of the issues raised and decided below. Although 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," Reply Br. 1, petitioner did not raise, and the court below therefore did not consider, any questions concerning the effect of the PWSA, which provides for the promulgation of fed-

eral standards for the operation of covered vessels "that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 46 U.S.C. 3703(a).

Similarly, while the petition briefly raises questions about whether California's rule can be squared with the United States' international commitments or undermines the United States' ability to speak with one voice in matters of foreign affairs, Pet. 23-24 (citing, *inter alia*, *Locke*, 529 U.S. at 99), petitioner's argument below largely focused on the fact that California's vessel fuel rule imposes a sulfur limit different from the MARPOL standard between 2012 (now 2014, see n.2, *supra*) and 2015. Pet. C.A. Br. 44-46. Petitioner acknowledged (*id.* at 46 n.7), however, that APPS contains an express savings clause authorizing the imposition of standards more stringent than MARPOL. See 33 U.S.C. 1911 (2006 & Supp. V 2011); cf. H.R. Conf. Rep. No. 54, 110th Cong., 1st Sess., at 7 (2007) (noting that proposed amendments accompanying implementation of Annex VI "clarif[y] that authorities, requirements, and remedies" of APPS "do not amend or repeal any authorities * * * under any other provision of law, including the Clean Air Act of 1990 and the rights of States under that Act"). The court of appeals accordingly cited the savings clause in response to the concerns petitioner had raised, without otherwise addressing the impact of MARPOL or other international obligations on the questions presented in this case. See Pet. App. 50a-51a.

Nor, finally, has petitioner challenged California's authority to enforce the vessel fuel rule within three miles of the coast—thereby narrowing the issues before the court below to the question whether there is a con-

stitutionally significant difference between a state regulation that operates 3 miles offshore and one that operates 24 miles offshore. The practical consequences of the decision below are also correspondingly diminished because, under petitioner's current position, the vessel fuel rule would remain applicable to all ships calling at California ports. The only effect of petitioner's argument, if accepted by this Court, would be to limit the portion of the voyage by such a ship during which the vessel fuel rule applied.

Because these issues were not pressed or passed on below, they are not before the Court at this time. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). To grant review at this juncture therefore would thus prevent the Court from considering important dimensions of the underlying controversy in this case.

Moreover, the court of appeals rejected petitioner's Commerce Clause argument "at this juncture," and affirmed the denial of summary judgment. Pet. App. 52a-53a. Further proceedings in the district court, including any further development of the record as regarding the burden of the vessel fuel rule relative to the health benefits to California, may bear on the Commerce Clause questions petitioner raises. At this interlocutory stage of the proceedings, this Court's intervention to address those issues would be premature.[4]

3. Although this case touches on important matters of maritime commerce and foreign affairs, as the record

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[4] There similarly is no occasion in this case to address the effect of EPA's approval of the South Coast AQMD's SIP or of any published, effective EPA approval of the vessel fuel rule for purposes of the Clean Air Act (see p. 6, *supra*), which the court of appeals did not address.

currently stands, the practical consequences of the court of appeals' interlocutory ruling appear limited.

As noted above, see pp. 4-6, *supra*, California's vessel fuel rule applies in parallel with federal vessel fuel standards implemented under MARPOL Annex VI. Although there are at present certain differences between the applicable standards, the federal standard should overtake California's standard by January 2015. We assume that the State at that time will not second-guess the efficacy of the federal standard expressly adopted through MARPOL and implemented through APPS.

In the interim, because Annex VI "does not, as a matter of international law, prohibit Parties from imposing more stringent measures as a condition of entry into their ports," Letter of Submittal from Secretary of State Powell to President Bush, *in* S. Treaty Doc. No. 108-7, at VIII (internal citations omitted), and APPS's savings clause contemplates the adoption of such measures, 33 U.S.C. 1911 (2006 & Supp. V 2011); see p. 17, *supra*, it does not appear at present that the divergence between California and federal standards will pose a substantial risk of interference with the federal government's international commitments under MARPOL.

While California's vessel fuel rule could raise significant concerns under international law if it were interpreted to exceed a coastal nation's limited jurisdiction over passing ships or to otherwise impair navigational rights and freedoms under the law of the sea in areas beyond internal waters and ports, no party disputes that California's vessel fuel rule exempts any vessel that is merely traversing the zone covered by the vessel fuel rule without entering California internal waters or calling at a California port. Cal. Code. Regs. tit. 13, § 2299.2(c)(1) (2012); see also Pet. App. 4a ("In general,

the Vessel Fuel Rules only cover vessels calling at a California port, and they accordingly contain an express exemption for vessels simply traveling through the region"); *id.* at 71a ("It is uncontroverted that the Vessel Fuel Rules at issue herein are limited to vessels visiting California ports.").

Finally, on its face, California's vessel fuel rule appears to have been designed to minimize interference with applicable Coast Guard regulations. See Cal. Code Regs. tit. 13, § 2299.2(b)(3) (2012) ("Nothing in this section shall be construed to amend, repeal, modify, or change in any way any applicable U.S. Coast Guard requirements."). Whether California has in practice avoided such interference is a question that would require further record development. The rule also appears to require CARB to exempt vessel owners who demonstrate that equipment modifications—rather than the mere use of a different type of fuel—would be necessary in order to comply with the rule. See *id.* § 2299.2(g); *id* § 2299.2(d)(10) (defining "essential modifications" as "the addition of new equipment, or the replacement of existing components with modified components, that can be demonstrated to be necessary to comply with this regulation").

At present, therefore, it does not appear that review of the court of appeals' interlocutory decision in this case is warranted at this time to address any effect California's vessel fuel rule might have in the remaining period before it is overtaken by federal requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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