



Ship docked at the Port of Los Angeles

The U.S. Supreme Court today asked the Solicitor General for his views as to whether the Court should hear and decide a controversial case from California challenging the California Air Resources Board's authority to regulate ocean shipping. The specific CARB regulations at issue require marine vessels operating in state waters and ports to use cleaner marine fuels in ship engines, thereby reducing air pollution in California's coastal regions. The case is *Pacific Merchant Shipping Assn. v. Goldstene*, Supreme Court No. 10-1555.

Earlier this year, the [U.S. Court of Appeals for the Ninth Circuit](#) rejected industry claims that CARB's Vessel Fuel Rules, requiring ships to use low-emission marine fuels in diesel and diesel-electric engines, violate federal law. The Ninth Circuit instead concluded that CARB is properly exercising state police power to combat severe pollution and public health problems associated with air emissions from the adjacent Ports of Los Angeles and Long Beach. Those facilities collectively constitute the largest and busiest port in the United States, through which pass a full 40% of all national imports.

As the Ninth Circuit noted, ocean-going vessels have long been a leading source of air pollution in Southern California, due in large part to the marine shipping industry's widespread use of low-grade, highly polluting bunker fuel. California's South Coast Air Basin has been a chronic non-attainment area when it comes to federal air quality standards mandated under the Clean Air Act. CARB's Vessel Fuel Rules are intended to address the problem by requiring ocean vessels plying California waters to use cleaner fuels in lieu of bunker fuel; the Ninth Circuit characterized the CARB rules as "critical to ongoing efforts at compliance" with Clean Air Act mandates.

One particularly controversial aspect of the CARB Vessel Fuel Rules—and the specific target of the industry's litigation challenge—is a requirement that ocean vessels using California ports use cleaner marine fuels when operating within 24 nautical miles of the California

coastline. (By contrast, California only holds title to the ocean bed and waters out to the three-mile limit.) A marine shipping trade organization sued CARB in federal court, arguing that this feature of CARB's Vessel Fuel Rules violates Dormant Commerce Clause principles, and is preempted by both the U.S. Constitution and federal statutes. After the Ninth Circuit rejected those claims, the trade organization petitioned the U.S. Supreme Court for certiorari.

Today's Supreme Court order seeking the views of the United States as to whether the Court should grant certiorari is noteworthy for several reasons. First, it means that the justices are giving serious consideration to the petition. (By contrast, the Court summarily rejects most of the 3000+ cert petitions filed annually.) Second, the United States is no ordinary litigant. Its views regarding the particular constitutional issues presented by the petition are traditionally given far greater weight by the justices than are those of private parties, or even states. Finally, the U.S. Solicitor General—the federal government's legal representative before the Supreme Court—is no ordinary attorney when it comes to Supreme Court advocacy. The Court has a unique and extraordinarily close institutional relationship with the Solicitor General. (Supreme Court mavens routinely refer to the Office of the Solicitor General, an elite unit within the U.S. Department of Justice, as the “Tenth Justice.”) So the opinion the Solicitor expresses to the justices as to whether Pacific Marine Shipping Association's petition for certiorari should be granted will likely be very influential.

Does today's Court order guarantee that this case will actually find its way onto the Supreme Court's docket this Term? No. But the odds that the Court will ultimately grant certiorari have now been raised to something approaching 50-50. And if the Solicitor General winds up supporting the industry's petition, the chances of a cert grant will increase even further.