No. 09-820

In The Supreme Court of the United States

MARY D. SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, and THE LUMMI NATION

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE BAY PLANNING COALITION AND THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

JOHN BRISCOE
Counsel of Record
DAVID M. IVESTER
PETER S. PROWS
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, 7th Floor
San Francisco, CA 94104
(415) 402-2700

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Is the boundary of coastal property, when federal common law supplies the rule of decision (as when the upland is federal property), the mean high water (MHW) line where it *would* fall if seawalls, fill and other works were assumed away, with the result that the tideland owner (usually, the State) owns some indefinite part of the upland?

Is the landward extent of "navigable waters" under the Rivers and Harbors Act of 1899 likewise the MHW line where it would fall if seawalls, fill and other structures were imagined away, with the result that federal permitting authority attaches to work in long-dry areas such as urban waterfronts, airports, and military installations?

Are structures such as seawalls, roadbeds and the like, which were lawful when built, now unlawful as "obstructions to navigation" because they lie waterward of a hypothetical inland MHW line that would exist if man's constructions were imagined to be removed?

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INTEREST OF THE AMICI CURIAE[1]

The Bay Planning Coalition is a not-for-profit California corporation formed in 1983 for the purpose of urging balanced government regulation of the waters and shoreline areas of San Francisco Bay and the California Delta. Its membership then and now comprises the Bay Area port authorities, many of the shoreline cities of the Bay and Delta, large and small private landowners from oil refineries to the operators of small-craft marinas, and engineering and consulting firms. Since its founding it has successfully argued, in courts or in the administrative arena, that various regulatory actions of state and federal agencies were bad policy, or unlawful. It has also argued for environmental regulation. When in 1995 the Governor of California proposed to abolish the San Francisco Bay Conservation and Development Commission, a regional planning agency, the Bay Planning Coalition initiated an alliance with environmental interest groups and led the successful effort to keep that agency in existence.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part. No person or entity, other than amici and their members, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties. Counsel for amici were not engaged to prepare this brief until February 1, 2010, and so could not secure the written consent of all parties within the ten days required by Rule 37.2(a). The written consents were promptly thereafter secured.

The California Building Industry Association is a statewide nonprofit trade association comprising approximately 3,700 member companies who employ more than 100,000 people. The Association's members are engaged in all facets of planning, entitling, financing, designing, constructing, selling, and maintaining new homes in California. The Association is the recognized "voice" of the residential-development industry in California.

Members of the Bay Planning Coalition and the California Building Industry Association will be adversely affected to a profound degree if the Ninth Circuit's decision stands. So too, as we show, will many federal agencies.

INTRODUCTION AND SUMMARY OF ARGUMENT

In issue in this case are the ownership and regulation of thousands of miles of improved shoreline and hundreds of square miles of dry land currently protected by shore-defense structures from inundation or erosion.

Urbanized lands on the coasts and in the coastal estuaries of the United States are far different today from what they were before urbanization. The waterfronts of New York, Philadelphia and San Francisco look not at all as they looked before development. The same is true in non-urban areas where military installations line the shoreline. To provide access

to the water, and at the same time protect against depredations of wave action, rising water levels, and subsidence (when reclaimed, coastal marshes subside), levees and seawalls have been built to provide a stable, protective shoreline. Often, to provide access to deeper water, authorities have encouraged the filling of waterfront areas, and the erection of seawalls as forward bulwarks against the sea. The result is that much of downtown San Francisco, like New York, is land over which tidewater once flowed and ebbed. *See, e.g., Knudson v. Kearney*, 152 P. 541 (Cal. 1915) overruled in part on grounds not relevant here, *City of Berkeley v. Superior Court*, 162 Cal. Rptr. 327 (Cal. 1980); *Appleby v. New York*, 271 U.S. 364 (1926).

When built in compliance with laws applicable at the time of the construction, if any laws were applicable, seawalls and levees – and the streets, buildings, naval facilities and airport runways behind them – have been excluded from the concept of "navigable waters of the United States." The result has been that no approval of the Corps of Engineers under Section 10 of the Rivers and Harbors Act of 1899 ("RHA"), 33 U.S.C. § 403, has been required to resurface an airport runway, to fill a sinkhole in a city street on the San Francisco waterfront, or to install new dockside buildings on a Navy base. It ought to go without saying that those streets, runways and buildings, and the seawalls protecting them, remain as lawful as when they were built.

The decision below will change all that, at a minimum in the States and Territories of the Ninth Circuit, if allowed to stand. The decision first holds that the shoreline property boundary under federal common law is the mean high water (MHW) line where it would fall if seawalls, levees and fill were removed, and tidewater freed to flow inland. (Such a rule may suit the Government in this, the very rare case in which it owns not the coastal uplands, but the tidelands. In the usual case the Government owns the lands on the coast, and the State owns the adjacent tidelands.) The decision goes on to hold that the landward reach of the Rivers and Harbors Act is the very same line – the MHW line as it *would exist*, if protective works did not. The decision additionally holds that structures existing in this new, extended reach of "navigable waters," even if lawful when built, are now obstructions to navigable waters, are hence unlawful, and are thus subject to federal criminal charges, and civil lawsuits for abatement and of course for monetary penalties. 33 U.S.C. § 403a.

The mischief of the Ninth Circuit's opinion is manifest. But like the question where the full extent of the new federal jurisdiction lies – where would the new MHW line fall if all man's improvements were stripped away? – the full extent of the mischief is uncertain. The burden of the Ninth Circuit's opinion will fall equally on federal property managers (commanders of Navy and Air Force facilities, coastal wildlife-refuge managers) as it will on city officials, seaport and airport managers, not to mention private

landowners. That is because federal agencies must obtain approval under the Rivers and Harbors Act for work in "navigable waters" like anyone else. 33 CFR § 322.3(c). Moreover, the agency charged with administering the Rivers and Harbors Act, the U.S. Army Corps of Engineers, which was not a party to this case, will be burdened (in the region comprising the Ninth Circuit anyway) with the responsibility to regulate "work" in vast dry areas formerly beyond its purview.

To the extent that sea level continues to rise as it has over the last century (*e.g.*, 2 Shalowitz, *Shore and Sea Boundaries* (1964) 262, n. 81) or rises even faster and further as predicted by some (*e.g.*, Intergovernmental Panel on Climate Change, Climate Change 2007: Synthesis Report, Summary for Policymakers (2007) 6-12), the mischief worked by the Ninth Circuit's opinion will only multiply as the tides reach ever more shore defense structures lawfully built on dry land. The tides may be held back by those structures as intended and designed, but the Ninth Circuit's "legal" MHW line will penetrate through and beyond them as if they were not there, with the result that they and the lands and improvements they protect may be claimed by the adjoining tideland owners and may be deemed unlawful obstructions to navigation under the RHA.

More to the point, the opinion is wrong, and conflicts with decisions of this Court and at least one other circuit. A writ of certiorari will enable this Court to declare the nationwide limit of navigable

waters, a limit applicable in all circuits, and calm the welter of confusion that the opinion below is stirring.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND AT LEAST ONE OTHER COURT OF APPEALS, AND IS ERRONEOUS

A. The Rule Announced by the Ninth Circuit – That Under Federal Common Law the Coastal Boundary of Property Is the Mean High Water Line Where It Would Lie If Seawalls and the Like Were Imagined Away – Conflicts With a 1982 Decision of This Court and Is Wrong

The Ninth Circuit in its opinion below took up the trespass claim first, and held that federal common law, not state law, supplied the elements of the federal tort of trespass. The Court then moved on to discuss the law of waterfront boundaries, presumably of the view that federal common law likewise supplied the rule of decision of this property-law question.[2]

[2] The Court below never squarely addressed the latter choice-of-law question, the property-boundary question, though at one point it cited *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) for a proposition, noting in its next breath that *Bonelli* was overruled in *Oregon ex rel. State Land Bd. v. Corvallis Sand*

(Continued on following page)

For reasons that are less than clear from the opinion below, the Ninth Circuit found as fact that, if the seawall in question were removed, the MHW line would encroach far inland of the seawall's position. (The seawall had been constructed landward of the MHW line, but erosion of the coastal land brought the MHW line to the face of the wall. The Court apparently presumed the erosive process of the waters of Georgia Strait would continue inland unabated; either that, or that the land behind the seawall had subsided.) The question then was whether the real MHW line or a hypothetical one was the property boundary. The Ninth Circuit could produce no law on point, and so felt free to develop a rule of federal common law on the question. It did so by first describing a common-law "vested right" of the tideland owner to additions to his tidelands if erosion of the shoreline occurred. *United States v. Milner*, 583 F.3d 1174, 1191 (9th Cir. Wash. 2009), Pet. App. 19-24. It summarized its brief analysis of this convoluted subject[3] in this terse paragraph:

& Gravel Co., 429 U.S. 363, 368-370 (1977). Pet. App. 22. The holding of *Bonelli* was that federal common law governed waterfront boundary cases between a state and private owner. *Corvallis*, decided three years later, overruled *Bonelli* and held state law governed.

[3] This Court's jurisprudence on the subject is considerable, as are the writings of scholars. *See, e.g.,* Angell, *A Treatise on the Right of Property in Tide Waters* (2d ed. 1847) 249-251; Hall, *A History of the Foreshore and the Law Relating Thereto* (3d [Stuart Moore] ed. 1888) 395, 785-789; Lemmon, *Public Rights in the Seashore* (1932) 20-27.

> By this logic, both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line. The relationship between the tideland and upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion. Indeed, the fairness rationale underlying courts' adoption of the rule of accretion assumes that uplands already are subject to erosion for which the owner otherwise has no remedy.

Pet. App. 22. To protect this right, the Court wrote, its new rule was necessary, adding that the result "quickly follows." Pet. App. 29.

But the Ninth Circuit's result does not follow, much less "quickly." In fact its new rule of federal common law, that an imaginary MHW line far landward of the actual MHW line is the property boundary, conflicts with this Court's decision in *Cal. ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278-285 (1982).

In that case, the property ownerships formed a mirror image of those in this case. This is the unusual case, with the Federal Government owning the tidelands (in trust for the Lummis) and other parties owning the uplands. *Cal. ex rel. State Lands Comm'n* presented the far more common case calling for

application of federal common law to the shoreline-boundary question: The Federal Government owned the upland (a Coast Guard station), and the State owned the tideland. Substantial "artificial" land formed along the shoreline of the federal installation, and California claimed to own that land. California's position was that the MHW line must be regarded as if the "artificial" land did not exist. California's position was in this respect precisely the position taken by the Government, and adopted by the Ninth Circuit, below.

But this Court in 1982 rejected California's assertion, and held that the Federal title extended to the actual MHW line, not some hypothetical one. *Id.* at 288. If the proper rule is that the actual MHW line is the boundary when artificial land forms on the shoreline, not some hypothetically generated line, with all the more reason that ought to be the rule when the erosion of a shoreline is arrested by a lawfully built protective structure.

B. At Least One Other Circuit Holds That the Reach of the Rivers and Harbors Act Extends Landward to the Actual Mean High Water Line, Not a Hypothetical One, Where Structures Constraining the Incursion of Waters Were Built Lawfully. The Ninth Circuit's Decision Is in Conflict

The Ninth Circuit next took up the question of the landward reach of the Rivers and Harbors Act of 1899. With no analytical difficulty the Court held that

the reach of the RHA extended to the same line as the new shoreline property boundary the Court had just announced – the MHW line as it would exist if shore-protection works such as seawalls, levees and fill were imagined away. The result of the Court's decision, as the Court itself observed, is that such works are now unlawful structures. Pet. App. 31.

The Ninth Circuit's decision conflicts with a decision of the Third Circuit. In *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. N.J. 1974), the Third Circuit considered whether a Section 10 permit was required for work on land that had once been marsh, but had been lawfully filled decades earlier. The Government there argued that a permit was required because the filled land had once been below the MHW line. The Government's argument was the one it, 35 years later, made to the Ninth Circuit in this case – that one must imagine the fill removed, and the MHW line that would result was the landward reach of "navigable waters" under the Rivers and Harbors Act. The Ninth Circuit accepted the argument.

The Third Circuit in *Stoeco Homes*, however, found in the argument nothing of merit. It observed that much of the eastern seaboard had been lawfully built on fill and that, if the Rivers and Harbors Act applied as the Government urged, it would "apply as well to thousands of acres of streets, homesites, factory sites and railyards." *Id.* at 608. The court held that the Rivers and Harbors Act did not apply to property that, but for fill that was lawful when built,

would lie below the MHW line. *Id.* at 611. The Corps could not now require a permit, the Court held, after having long acquiesced in the fill. *Id.* To hold otherwise would be to "cast doubt upon the property status of thousands of acres of former tidal marshes," and, in the Court's words, "present problems" under the Due Process and Takings Clauses of the Fifth Amendment. *Id.*

C. Under the Ninth Circuit Decision, Vast Reaches of Dry Land and Landside Facilities of the Seaports, Airports, and Army and Navy Installations Lying Behind Seawalls and Levees Will, Nonetheless, Lie Within "Navigable Waters" and Require Federal Approval Under the Rivers and Harbors Act – a Result Congress Could Not Have Intended

The Ninth Circuit, apparently piqued at the homeowners for not settling with the Lummis and Federal Government, Pet. App. 27-28, 44, added to the homeowners' injury by holding that the seawall, lawful when built, had become unlawful by the action of tide and time. Pet. App. 29. One may argue whether such a result is an appropriate punitive measure in this case. But the ramifications of such a decision went unheeded.

Seaports are conventionally built by diking off shallow lands out to deep water, and filling behind them, as along the East River, or the Houston Ship

Channel. Two principal purposes are served by this "reclamation" – water deep enough to accommodate ocean-going vessels is reached, and mudflats are reclaimed to serve as quays, docking facilities, and platforms for container cranes. (Today's largest container vessels draw as much as 50 feet of water.[4]) Commercial airports in coastal areas are largely built as well on diked-off land. That is the case with the San Francisco International Airport, the Oakland International Airport, and many others. Numerous military facilities were likewise built in this way. In San Francisco Bay alone, Mare Island Naval Shipyard, Treasure Island Naval Base, Hunters Point Naval Shipyard, and Alameda Naval Air Station, to name just a few military facilities, were built on land reclaimed by diking off the waters of the Bay. Nothing in the Ninth Circuit's opinion confines its holding (that structures built where waters would flow, were it not for shore-protective works, are unlawful) to the peculiar facts of the case. And so, presumably, the levees and seawalls of these seaports, airports and military installations, and the warehouses and hangars behind them, are now unlawful obstructions to navigation subject to actions to require their removal, for monetary penalties, or worse. 33 U.S.C. § 403a.

Many of these military installations have been converted to civilian uses. The former Hamilton

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[4] The *Emma Maersk* has a draft of 15.5 meters, for example. http://www.emma-maersk.info.

Air Force Base in northern San Francisco Bay, for example, is now the site of a new community that is home to thousands of residents. Under the Ninth Circuit's ruling, the homes of these people, and the streets and sidewalks and parks built for their use and enjoyment, are unlawful obstructions to navigation, because were the protective seawalls removed, all would be under water.

One would like to think the Ninth Circuit was oblivious to these ramifications of its opinion. But the Court had before it a map, prepared in 1959 by the Department of Commerce for the Corps of Engineers and published as part of a well-circulated study in 1959, that shows in bold colors the areas of San Francisco Bay reclaimed by diking and filling since 1850. [5] The map is the Government's own pictorial representation of the extent that San Francisco Bay had been diked off to create dry land by 1959. It shows the extensive diked-off lands that created the Oakland and San Francisco airports, Treasure Island, the Port of Oakland, and much more. It also shows that the Financial District of San Francisco is built on such land. The Bank of America Building just

[5] The map, entitled "Historical Development of Reclaimed Land 1850-1958," is Plate 19, Sheet 2 of 2, in *Future Development of the San Francisco Bay Area, 1960-2020*: Economic Aspects of Comprehensive Survey of San Francisco Bay and Tributaries, prepared for U.S. Army Engineer District, San Francisco, Corps of Engineers by U.S. Dept. of Commerce (1959). The map is Appendix 10 to the brief of the Bay Planning Coalition filed as amicus curiae in the court below.

misses lying within Corps jurisdiction under the Ninth Circuit's ruling. But the Transamerica Pyramid is built on reclaimed land, as are dozens of other skyscrapers, and all of San Francisco's Embarcadero Center. Like the seawall that protects them, they are presumably unlawful obstructions to navigation under Section 10, according to the Ninth Circuit. In this area ("area" being necessarily quite general, for tracing the line where tides would flow were the seawalls and other works removed will be tricky), new construction likewise would require a Section 10 permit, as would, presumably, routine maintenance such as pothole repair.

At bottom the Section 10 question must be: What did Congress intend? No Congress, not in 1899, not ever, could have intended such a result.

II. THE ISSUES ADDRESSED IN THE NINTH CIRCUIT DECISION ARE OF SUBSTANTIAL IMPORTANCE TO AMERICA'S PORT OPERATORS AND OTHER SHORESIDE PROPERTY OWNERS – INCLUDING FEDERAL AGENCIES, WHO LIKE OTHER WATERFRONT PROPERTY OWNERS MUST OBTAIN PERMITS FROM THE CORPS FOR WORK IN "NAVIGABLE WATERS"

The importance of the issues decided by the Ninth Circuit to many members of the California Building Industry Association and of the Bay Planning Coalition – an organization of cities, the ports of

San Francisco Bay, and other shoreside property owners – should require little elaboration. The seaport and airport operators now find that most if not all of their facilities, wet and dry, are in "navigable waters"; that work within them requires federal permits never required before, and that much if not all of the structures are now deemed unlawful. The Ninth Circuit was chillingly clear:

> [W]e have interpreted the RHA as making unlawful the failure to remove structures prohibited by § 10 [that is, those that exist where waters would flow were seawalls and the like removed], even if they were previously legal.

Pet. App. 31.

Maybe the Corps will develop and propose a new "master permit," applicable just to the States and Territories of the Ninth Circuit, one that would attempt to legalize existing structures. The proposal of such a master permit, though, would likely be delayed for years by litigation brought by anti-development organizations. The ultimate promulgation of such a remedy, even assuming the Corps had the political will to try it, is far from a certain thing.

What of the ability of affected shoreline property owners within the Ninth Circuit to develop their properties? Take properties on Sansome or Battery Streets in San Francisco's Financial District. That District was, before it was reclaimed (lawfully, we should note, though that is irrelevant under the

Ninth Circuit's opinion), a bay within San Francisco Bay known as Yerba Buena Cove. Such development will require either the approval of Congress or Corps permits under Section 10, according to the Ninth Circuit's opinion. But what of the owners' ability to borrow for the construction? What knowledgeable lender would lend beneath such a cloud?

What of the ability of seaport and airport authorities to modernize or expand their facilities? Major infrastructure projects at airports and seaports can cost billions of dollars. Aside from the presumed need to obtain federal permission for new marine terminals, hangars, runways and the like, there is the need to borrow money by issuing bonds. What apprehensions will the bond underwriters have for public projects in the shorelines of the Ninth Circuit?

Finally, what of the impact to the Federal Government? The commanders of coastside military bases (consider just the Navy installations in the harbors of Puget Sound, San Diego and San Pedro Bays, Guam and Hawaii) preside over tens of thousands of acres of dry lands that will now be regulated under Section 10 as "navigable waters of the United States," with all that that entails (the need for permits, the specter that much of the facilities are "unlawful").

Those are impacts to the federal agencies that will now be regulated under the Ninth Circuit's view of the reach of Section 10. But some federal agency must do the regulating, and that agency is the Corps

(except when Congress steps in, as under the first clause of Section 10). Is the Corps prepared to assume these vast new permitting – and enforcement – responsibilities in the Ninth Judicial Circuit? We do not know whether the federal attorneys below, who advanced the arguments embraced by the Ninth Circuit, conferred beforehand with the Assistant Secretary of the Army for Civil Works or the Chief of Engineers. But in light of the extraordinary reach of the decision below, it is hoped the Solicitor General will now.

CONCLUSION

The writ of certiorari should issue to the Ninth Circuit Court of Appeals.

Respectfully submitted,

JOHN BRISCOE
Counsel of Record
DAVID M. IVESTER
PETER S. PROWS
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, 7th Floor
San Francisco, CA 94104
(415) 402-2700

Counsel for Amici Curiae

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