No. 22O152, Orig

In the Supreme Court of the United States

STATE OF MONTANA AND STATE OF WYOMING,
Plaintiffs,

v.

STATE OF WASHINGTON,
Defendant.

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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ARGUMENT

I. Only This Court Can Redress the Harm to Montana's and Wyoming's Sovereign Interests.

1. Washington wrongly asserts Montana and Wyoming have suffered no real harm because this case is simply a challenge to "the denial of a private company's permit application to build a privately owned project." BIO 12-14. This Court has rejected similar arguments and Washington knows better. Washington itself sought and received this Court's protection after North Carolina discriminated against companies distributing Washington apples in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). In *Hunt*, North Carolina argued Washington lacked a "personal stake" in the litigation because it was "not itself engaged in the production and sale of Washington apples or their shipment into North Carolina." *Id.* at 341. Washington reprises North Carolina's losing argument here, claiming this case is a "private grievance" that does not impact the States' sovereignty. BIO 12-14. The Court easily dismissed that argument in *Hunt*, as it should here, holding Washington had standing because North Carolina's discrimination against private apple producers and distributors reduced the tax assessments Washington received. *Id.* at 345. Like North Carolina's discrimination against Washington's apples, Washington's discrimination against Montana and Wyoming coal is costing the States millions in severance tax and revenue, a well-established direct

injury severely impacting Montana and Wyoming. Br. in Supp. 2-4.

In addition to *Hunt*, Washington ignores *Wyoming v. Oklahoma*, which relied on *Hunt* to hold that Wyoming had standing to challenge Oklahoma's discrimination against Wyoming coal because Oklahoma's conduct diminished the coal severance tax Wyoming received. 502 U.S. 437, 450 (1992). The Court found it "beyond peradventure that Wyoming has raised a claim of sufficient 'seriousness and dignity'" because Oklahoma's discrimination against private companies "directly affects Wyoming's ability to collect severance tax revenues." *Id.* at 451. That is the precise interest Montana and Wyoming raise here.

Washington's claim that Montana and Wyoming are not harmed because there is no booming international coal market is simply wrong. As Montana and Wyoming have alleged, they have developed Asian trading partners ready, willing, and able to buy Powder River Basin coal, if only they can get it. Bill of Compl. ¶18. Moreover, it strains credulity to suggest the port developer is spending millions to develop a port to serve no customers. Despite Washington's hostility, developers have undertaken such efforts because the international coal market lacks the low-sulfur coal the Powder River Basin can provide. *See* Schwartz Report at 14-15, Lighthouse, No. 3:18-cv-05005 (W.D. Wash. Mar. 8, 2019, Doc. No. 277) (expert report affirming international demand for Powder River Basin coal and noting the Millennium Bulk Terminal is

"essential to the continued survival of coal mining in the western U.S.").

Nor is it a legitimate answer to the Commerce Clause violation to say the States can simply export their coal from another port in another country. BIO 17-18. The Commerce Clause protects interstate commerce, not intra-country commerce. Forcing the States to route their products through Washington and travel hundreds of miles to a Canadian port does nothing to absolve Washington's discrimination against landlocked sister States. Even if it could, the Canadian port lacks sufficient capacity. Bill of Compl. ¶21; Brief in Supp., 33. As Montana and Wyoming demonstrated, Washington's Columbia River is uniquely suited—in part because of significant federal investment—to transport goods to Asian markets. Bill of Compl. ¶¶23-25; Brief in Supp 8-9. Washington cannot delegate to a foreign country its constitutional duty to treat *this* project fairly.

Washington also unpersuasively attempts to confine this Court's original jurisdiction to disputes over "finite resources" like water or boundaries. BIO 14. That view runs counter to this Court's long history of resolving Commerce Clause disputes, especially those involving interstate transport of natural resources (Br. in Supp. 19), and Congress's decision to vest exclusive jurisdiction in this Court for disputes between States. Without this forum, States would surely return to the "trade barriers, recriminations, [and] intense commercial rivalries [that] had plagued the colonies," or worse. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450 (1945); *see also* Br. in Supp. 17-18.

Moreover, port access is just as much a "finite resource" as water because some States (like Washington) have it, while other States (like Montana and Wyoming) do not; litigation over port access for landlocked States is worthy of this Court's resolution. BIO 14. This is especially true given that port access for landlocked States was one of the Framers' motivating purposes for the Commerce Clause and a vital component of workable interstate commerce. Brief in Support, 22-24; *see also* Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 Cal. L. Rev. 1203, 1207 (1986) (*"*Madison was most concerned that states having ports through which foreign commerce flowed were taxing imports and exports to enrich their treasuries, at the expense of the people of other states in which the goods originated or for which they were destined.") (citing The Federalist No. 42, at 274 (E.M. Earle ed. 1937)). As Washington notes, "Controversies concerning…the manner and use of the waters of interstate lakes and rivers" provide "the paradigm subject matter for original jurisdiction cases." BIO 14. This is exactly such a case.

2. That private companies have sued (without recourse) in Washington courts is irrelevant. No other forum is considering a Commerce Clause challenge to Washington's discrimination. Because State permitting authorities lacked jurisdiction to consider such claims, they are not at issue in the state litigation. *Lighthouse Res. Inc. v. Insleee*, 2019 WL 1572605, at * 1 (W.D. Wash. Apr. 11, 2019). The terminal developer brought a Commerce Clause action in the Western District of Washington, but the court stayed the litigation under *Pullman* abstention.

Id. at *3-4. Even assuming private litigation could vindicate the States' sovereign interests, it is doubtful a court will ever hear those private party claims.

Moreover, a suit among private parties advancing private interests is not the same as a dispute among independent sovereigns. Even if lower courts can decide Commerce Clause claims in general, this Court has held an alternative forum exists only if the States are parties to the cases. Washington selectively quotes *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) to suggest the Court should decline jurisdiction because "there is another forum 'where the issues tendered may be litigated, and where appropriate relief may be had." BIO 15. But Washington omits an important qualifier: The Court may defer jurisdiction when a claim "involves the availability of another forum *where there is jurisdiction over the named parties*, where the issues tendered may be litigated." *Illinois*, 406 U.S. at 93 (emphasis added). That omission distinguishes most of the cases Washington cites because they involved a State against a private party, not another State, so the Court's jurisdiction was not exclusive. *See Wyoming v. Oklahoma*, 502 U.S. at 452 (distinguishing cases because the States were not parties.); s*ee* BIO 14-15 *citing Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496-98 (1971) (State claim against private company); *Washington v. General Motors Corp.*, 406 U.S. 109,114-115 (1972) (same); *Louisiana v. Mississippi*, 488 U.S. 990 (1988) (declining jurisdiction because Louisiana was a party in litigation raising the same issue against private parties); *Illinois v. Michigan*,

409 U.S. 36 (1972) (Illinois sought original jurisdiction rather than a writ of certiorari when it was a party to an action by private parties in Michigan). The Court's exclusive jurisdiction for suits among States leaves Montana and Wyoming with no other forum to litigate their Commerce Clause claims.

Even if Washington courts were willing to decide the Commerce Clause claims and the States could be parties to the litigation, Washington's view that Washington courts should decide the issue remains flawed. One of the primary principles underlying this Court's original jurisdiction is "the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own." *Ohio*, 401 U.S. at 500; *see also* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443, 477 (1989) (original jurisdiction meant to avoid potential bias in forcing State to "resort to the territory of its opponent.").

Nor is this merely a suit to redress private interests of state citizens, as Washington claims. *See* BIO 15-16, n.3. The cases on which Washington relies depend on injury to citizens rather than the direct injury to coal severance taxes Wyoming and Montana raise. *Wyoming v. Oklahoma*, 502 U.S. at 451; *Pennsylvania v. New Jersey*, 426 U.S. 660, 664-665 (1976) (declining jurisdiction over privileges and immunities and equal protection claims because "both Clauses protect people, not States"); *Arizona v.*

New Mexico, 425 U.S. 794, 797 (1976) (declining jurisdiction where Arizona suffered no direct harm and it was represented by one of its political subdivisions in state court litigation); *cf Maryland v. Louisiana*, 451 U.S. 725, 742-44 (1981) (exercising original jurisdiction in case with similar facts to *Arizona v. New Mexico* because state alleged direct injury and was not a party in state court litigation).

3. Washington's claim that Montana's and Wyoming's injuries are not redressable because Washington has denied other permits in addition to the Section 401 water quality certification fails because the Section 401 water quality certification was denied "with prejudice," while the other permits were not. The terminal developer can resubmit the other permit applications, even assuming those denials become final. The developer, however, cannot resubmit the Section 401 water quality certification because Washington irrevocably denied it and then decreed that it would be futile to resubmit. App. 7-8, 47.

Moreover, unlike the Section 401 Water Certification, the terminal developer has other options to pursue additional permits, as the Washington Court of Appeals recognized. *See e.g., Millennium Bulk Terminals-Longview, LLC v. State*, No. 52215-2, 2020 WL 1651475, at *4-5 (Wash. Ct. App. March 17, 2020) ("Millennium's permit application does not rely on it being the sublessee of the aquatic lands."). Regardless, the Department of Ecology made it clear that the other permits hinged on the State's unconstitutional denial of the Section 401 Certification. *See e.g.,* App. 47 ("Ecology staff will

not be spending time on permit preparation related to Millennium's additional applications for the coal export terminal."). Redressing Washington's unconstitutional denial of the Section 401 water quality certification will redress Montana's and Wyoming's injury and will ensure this project is given the same fair consideration Washington gives to non-coal based terminal proposals.[1]

Montana and Wyoming ask only that Washington evaluate the project without political bias and protectionist motivations, exactly as career staff was prepared to do before the Governor's office intervened. If this Court so orders, the project can move through the permitting process like any other.

II. Washington's Commerce Clause Arguments Ignore the Facts and this Court's Precedent.

A. Washington Denied the Permit for Unconstitutional Reasons.

Washington answers evidence showing it denied the permit to protect its agricultural interests by claiming that the emails and talking points were only meant to "correct[] misstatements" about the

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[1] Federal permitting continues to move forward, despite Washington's roadblocks. *See* Director of Department of Ecology to U.S. Army Corps of Engineers, September 10, 2018, at https://perma.cc/Y8HQ-GV6N.

project. BIO 27-28. But the "correction" Washington refers to is the admission that port competition from Montana and Wyoming coal would "harm farmers' ability to get their commodities to market . . . including Washington's important agricultural products." App. 71-73. The Governor's senior policy advisor was equally unambiguous about why the Governor favored in-state aerospace projects: "Aerospace brings thousands of jobs with those emissions; coal export doesn't." App. 65. Washington cannot simply whitewash the Governor's offensive statements. *See also* Bill. of Compl. ¶41 (stating he has no sympathy for Montana and Wyoming trying to get an important commodity to market because "apple[s] [are] healthy, eating coal smoke [] is not"); *id.* ¶¶42-43. Washington's attempt to gloss over Montana's and Wyoming's evidence of overt economic protectionism and political discrimination is unavailing, and the evidence renders the permit denial unconstitutional on its face. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Washington officials conceded that political discrimination against coal was driven by extra-territorial concerns about greenhouse gas emissions from combustion of coal in Asia. Washington does not deny that fact, nor could it, because the Director of Ecology was explicit in defending the decision. She recognized Washington law requires consideration of extraterritorial greenhouse gas emissions as part of its review. App. 91-93, 95. Washington's law violates the Commerce Clause. *See C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393-94 (1994) (violation of the Commerce Clause to "extend the [State's] police power beyond its jurisdictional

bounds."). Those admissions make this a more straightforward Commerce Clause case than most.

Washington's fallback argument that the Commerce Clause only precludes discrimination within the same industry fares no better. *See* BIO 28. Unconstitutional discrimination is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Department of Environ. Qual.*, 511 U.S. 93, 99 (1994). The purpose of the Commerce Clause is to prohibit a State from impeding the interstate movement of goods to protect its own interests. *Ibid*. Washington's argument that it can engage in protectionism if it does not discriminate against the exact same industry finds no support in any of this Court's precedent.

Like all States, Washington can legitimately scrutinize permit applications, and Montana and Wyoming do not argue otherwise. What Washington cannot do is deny permits because of political opposition to another State's natural resource or to protect its own agricultural industry. Although Washington cites a parade of purported adverse consequences, including dredging the riverbed and increasing rail and vessel traffic, Washington readily accepts similar consequences for projects that benefit its own agriculture or other favored in-State industries. Pet. 14, 28; App. 53. The EIS co-lead, who had an insider's view of the decision-making and who has been involved in countless similar projects, affirmed what the unambiguous evidence shows: because the subject was coal, Washington purposely skewed the EIS findings and the project's mitigation

plans to justify the State's predetermined decision to deny the permit. *See, e.g.,* App. 52-55. Few cases present such a blatant Commerce Clause violation.

Washington's claim that the permit applicant "has never proposed reasonable mitigation measures" for the potential impacts identified in the EIS (BIO 23) is simply not accurate. Dr. Placido affirmed that the permit applicant was "responsive, timely, and engaged" in the process, but the State "wholly exclude[ed]" it from mitigation discussions and then "ignored or discounted mitigation that . . . would very likely mitigate or eliminate the impacts identified in the 401 Denial." App. 52, 60-61.

B. Section 401 Does Not Authorize Washington to Discriminate.

Washington suggests its Section 401 denial is immune from constitutional scrutiny because Congress authorized States to conduct the review under the Clean Water Act (33 U.S.C. § 1341). BIO, 20-21. While Congress may authorize conduct the Commerce Clause would otherwise prohibit, "congressional intent must be unmistakably clear." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). Washington has a high burden to show that Congress "affirmatively contemplate[d]" and authorized state action that would otherwise be invalid under the Commerce Clause. *Id*. at 90.

Other than citing Section 401, Washington makes little effort to demonstrate that Congress authorized discriminatory water quality certifications. In fact, "Section 401 authorizes states

to impose *only conditions that relate to water quality*." *American Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 107 (2d Cir. 1997) (quotation omitted and emphasis added). The EIS could not have been more explicit that "[t]here would be no unavoidable and significant adverse environmental impacts on water quality." EIS, § 4.5.8; App. 60. That finding raises the question whether Washington had authority to deny the permit under Section 401 at all. *See Power Auth. v. Williams*, 457 N.E.2d 726, 730 (N.Y. 1983) ("Congress did not empower the States to reconsider matters, unrelated to their water quality standards."). Washington cannot deny a Section 401 water quality certification for a bevy of reasons unrelated to water quality, as it did here, and then try to immunize its wrongful conduct from Commerce Clause review by claiming Congress "affirmatively contemplate[d]" and approved it.

III. Washington's Discriminatory Permit Denial Violates the Foreign Commerce Clause.

Washington repackages many of the same arguments in response to the States' foreign Commerce Clause claim, including that Section 401 authorizes discrimination and that Montana and Wyoming are still able to ship some coal through a Canadian port. BIO 34-35. Washington's defenses are no more persuasive in this context, especially given the Foreign Commerce Clause's "more rigorous and searching scrutiny." *See South-Central Timber Dev., Inc.*, 467 U.S. at 100. As discussed above, Congress authorized states to evaluate "water quality" in

Section 401 certifications, not the myriad other considerations Washington tries to pack into its evaluation of the Millennium Bulk Terminal. Moreover, Washington's claim that Montana's and Wyoming's limited access to foreign ports fixes the problem is even more unacceptable in defense of a Foreign Commerce Clause claim, which protects the power to regulate "commerce *with* foreign nations," not *through* foreign nations. U.S. Const. art I, § 8, cl. 3.

Washington's attempt to block international coal exports based on its unilateral judgment that those exports will impact global greenhouse admissions is unconstitutional if it "either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983). The federal government's clear directive is that international coal export is an important component of both the national economy and national security. Br. in Supp. 32-34. If there were any doubt, the fact that the Corps of Engineers has resumed the federal permitting process for this project despite Washington's denial of the water quality certification answers the question. *See*, *supra*, n.1.

CONCLUSION

For the foregoing reasons, this Court should grant the States' Motion.

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