No. 22O152, Orig

In the Supreme Court of the United States

STATE OF MONTANA AND STATE OF WYOMING,
Plaintiffs,

v.

STATE OF WASHINGTON,
Defendant.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Montana Solicitor General
OFFICE OF THE MONTANA ATTORNEY GENERAL
215 N. Sanders St.
Helena, MT 59601

DALE SCHOWENGERDT
Counsel of Record
MARK STERMITZ
NEIL G. WESTESEN
JEFF J. OVEN
CROWLEY FLECK PLLP
900 N. Last Chance Gulch
Suite 200
Helena, MT 59624
(406) 449-4165
dschowengerdt@crowleyfleck.com

BRIDGET HILL
Wyoming Attorney General
JAY JERDE
Special Assistant Attorney General
JAMES KASTE
Deputy Attorney General
OFFICE OF THE WYOMING ATTORNEY GENERAL
2320 Capitol Avenue
Cheyenne, WY 82002

TIMOTHY STUBSON
CROWLEY FLECK PLLP
111 W. 2nd Street
Suite 220
Casper, WY 82601

Counsel for Plaintiffs

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The United States does not dispute that when the motion for leave was filed, the Bill of Complaint pleaded a live controversy between sovereigns of the sort that only this Court can resolve. Rather, it recommends denying the States access to their exclusive forum for a single reason: it asserts that this case is moot because Washington successfully bankrupted one terminal developer. But Washington has not changed its behavior, and the plaintiff States are still injured by it. The case is not moot.

The States' interests are broader than the fate of one developer. Montana and Wyoming are challenging Washington's longstanding discrimination against two landlocked States' sovereign interests in getting one of their most important commodities to market. Montana and Wyoming still have an abundance of low-sulfur, cleaner burning coal, and foreign markets want it. The terminal in Longview remains an ideal site to export that coal to Asian and other foreign markets. And Montana and Wyoming still have no other export option, besides an already over-burdened Canadian port.

Washington's hostility to coal exports also remains unchanged. This is not a case where a party voluntarily ends an unconstitutional policy to avoid review. Washington has changed nothing and will continue to block Powder River Basin coal exports based on coal's end use in foreign markets and to protect Washington's own agricultural interests. Bill of Compl. ¶¶ 27–32, 39.

If anything, the case for original jurisdiction is now stronger. No other forum can address Washington's unconstitutional policy. Litigation by the terminal

developer in Washington courts was Washington's primary objection to the Bill of Complaint. BIO 11–16. That litigation is dead because Washington's long game successfully wore out the terminal developer and its investors. Tr. of First Day Hearing 17, *In re Lighthouse Resources*, No. 20-13056 (Bkrtcy Ct. Del. Dec. 4, 2020).

Washington will continue to block port development and dissuade bidders from taking up this otherwise lucrative project. Evidenced by its successful eight-year crusade to kill the terminal project, Washington's policy-driven interpretation of its laws and regulations is not going to change on its own. Without relief from this Court—the only forum with the power to grant it—Wyoming and Montana likely will never see their abundant coal reserves to foreign markets.

I. Montana and Wyoming Seek Protection of their Sovereign Interests, Threatened by Washington's Ongoing Policies and Practices, Not Authorization of a Specific Project.

The issue that Wyoming and Montana seek leave to litigate is whether Washington's blockade of Powder River Basin coal exports infringes upon Wyoming's and Montana's sovereign interests under the Commerce Clause. Bill of Compl. ¶¶ 1–6, 47–65. The issue is not and never was, as the United States represents, solely whether Washington must grant a specific terminal developer a permit. That alone would not have been a basis to invoke the Court's original jurisdiction. Because the United States is wrong about what is at issue, it is also wrong about whether that issue remains live.

Washington's discriminatory policies and practices have not abated; they have succeeded, at least to date. A state statute and regulation demanding that agencies consider extraterritorial effects during the permitting process are still on the books. WAC 197-11-060(4)(b); RCW 43.21C.030(2)(f). Washington's executive branch interprets these provisions as requiring a broader and more rigorous assessment of projects involving coal than other commodities. Bill of Compl. ¶ 29. And the discrimination against coal runs all the way to the top, as evidenced by Governor Inslee's repeated admissions that Washington does not apply the same analysis when coal is at issue. Bill of Compl. ¶¶ 31, 41–42. That the terminal developer ultimately went bankrupt because of Washington's obstruction is no surprise—it was the intended outcome.

The relief Montana and Wyoming seek is not "limited to" allowing development and operation of the terminal by Millennium. U.S. Br. 12. The United States focuses on a fragment of one paragraph within the prayer for relief, through which the States ask the Court for an injunction addressing Washington's "protectionist and discriminatory actions in its permitting decisions for the Millennium Bulk Terminal." Bill of Compl. 19. This narrow reading of the Complaint cannot stand for two reasons.

First, Montana and Wyoming seek broader relief than the United States suggests. The States request: (1) a "[d]eclar[ation] that Washington's discrimination against Wyoming and Montana coal exports violates the Dormant Commerce Clause"; (2) a preliminary and

permanent injunction preventing Washington "from basing its permitting decisions on extraterritorial factors"; and (3) a preliminary and permanent injunction barring Washington from denying "Clean Water Act Section 401 Water Quality Certification on grounds unrelated to water quality." Bill of Compl. 19. The requested injunctive relief targets Washington's unlawful basis for these decisions and certifications generally, not a single decision.

Second, Montana and Wyoming ask the Court to enjoin Washington from continuing to obstruct development of the terminal, regardless of who the developer is. Though the name of the terminal may change, the terminal remains an ideal site for Powder Basin coal export. Bill of Compl. ¶¶ 23–25. The plan for the Millennium Bulk Terminal is a thoughtful one. The terminal has capacity for three ports, existing improvements, leases for the dry and aquatic land, and connection to railways. Tr. of First Day Hearing 15–16, *In re Lighthouse Resources*. It is further developed than any other viable site on the entire West Coast. Bill of Compl. ¶ 21. And coal export promises financial returns. Bill of Compl. ¶¶ 10–20. The only significant obstacle to another developer making the terminal a reality is Washington's illegal discrimination against Powder River Basin coal. If the Court orders the relief Wyoming and Montana seek, that obstacle will be removed.

Montana and Wyoming have direct and substantial interests in challenging Washington's selective isolationism, no matter that a single developer is no longer involved. It is "beyond peradventure" that a

state's conduct "directly affect[ing] [another state's] ability to collect . . . tax revenues" presents "a claim of sufficient seriousness and dignity." *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992) (internal quotation marks omitted). Thus, the Court has long recognized the significance of a state's sovereign interest in collecting tax revenue from a keystone state product. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 341, 345 (1977) (Washington had a "personal stake" to challenge North Carolina's discrimination against apple producers because it reduced Washington's tax revenues). Even more to the point, the Court has also adjudicated disputes between states when one state's actions threatened future, albeit uncertain, natural resource development. *See Nebraska v. Wyoming*, 515 U.S. 1, 11–13 (1995) (permitting Nebraska to seek an injunction against Wyoming for "proposed" water projects).

No terminal developer will share Montana's and Wyoming's concern with "removing state trade barriers," "a principal reason for the adoption of the Constitution." *Tennessee Wine and Spirits Retailers Assoc. v. Thomas*, 139 S. Ct. 2449, 2460 (2019). The interests Wyoming and Montana seek to vindicate are immediately traceable to a rule "essential to the foundations of the Union"—"in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Oregon Waste Systems, Inc. v. Department of Env. Quality of Ore.*, 511 U.S. 93, 99 (1994)).

Only Montana and Wyoming can vindicate these sovereign interests, and they can do so only in this Court. *Nebraska*, 515 U.S. at 13.

II. The Bankruptcy Arising from Washington's Discriminatory Policies and Procedures Sharpens the Controversy.

The government's belated brief, filed shortly after the terminal developer's bankruptcy, reads as if this case arose on certiorari, rather than in the Court's original jurisdiction, and as if the petitioner were the now-bankrupt terminal developer. But the United States' brief falls far short of the "demanding standard" that would be required to establish mootness in an ordinary case. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019).

"[A] case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Service Employees*, 567 U.S. 298, 307 (2012)). The assertions in the government's amicus brief do not establish "impossib[ility]," particularly at this late hour and when the parties are unable to develop the relevant facts in any other forum. *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203–04 (1968) (The argument "that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary" "is a matter for [a] trial judge."). Factually, the United States says nothing more than that a single developer is now bankrupt. Even if Wyoming and Montana complained only of Washington's refusal to permit further development of

a specific terminal (and they do not), this Court cannot fairly assess mootness without consideration of the likely future of the overall *project* in light of the bankruptcy, a fact-intensive inquiry whose outcome the United States has no basis for so confidently predicting. *See Federal Republic of Germany v. United States*, 526 U.S. 111, 112–14 (1999) (Breyer, J., dissenting) ("study and appropriate consultation" are necessary to decide "arguable" jurisdictional issues).

If anything, that the developer is now bankrupt is one more fact to be weighed in determining the important legal issue raised in this matter—whether Washington's policies and practices violate the Commerce Clause to Wyoming's and Montana's detriment. The bankruptcy only sharpens the controversy because it is directly traceable to Washington's improper discrimination against coal: "[A]fter eight years of trying to get the [Terminal] permitted," "the lenders and financers . . . are no longer willing to continue to finance [the developer]." Tr. of First Day Hearing 17, *In re Lighthouse Resources*.

Market forces have long favored development of a coal export facility in Washington. Bill of Compl. ¶ 10–21. Montana and Wyoming will collect taxes and fees related to coal production if the Court grants the relief sought and orders Washington to end its discriminatory policy of assessing coal-related port development more rigorously than other large-scale projects. This circumstance is enough to sustain the States' claim. *Chafin*, 568 U.S. at 172. At the very least, the issue should not be decided against Wyoming

and Montana before they have an opportunity to develop the necessary facts.

Washington has not reversed course on its discriminatory policies and practices. Washington got exactly what it wanted. Why would it change now? Under the voluntary cessation rule, when the defendant is responsible for the alleged mooting event, "[t]he 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the [defendant]." *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203). "[T]he standard . . . is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Ibid.* (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203). Such is certainly not the case here.

Because Washington's discrimination against coal remains unchecked, this is not "a run of the mill voluntary cessation case," but the principles underlying the voluntary cessation rule are no less applicable. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). It would be a "strange doctrine" indeed that would allow Washington to benefit by evading review because it successfully pursued the challenged course of conduct. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) (citation and quotation marks omitted) (vacating lower court judgment against defendant when plaintiff was singularly responsible for alleged mooting event).

Even if this case were moot, it would fall "within the established exception to mootness for disputes capable of repetition yet evading review." *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). It would contravene basic justiciability principles to reward Washington for its successful implementation of unconstitutional policies.

Montana and Wyoming did not have the opportunity to fully litigate their claims before Washington killed the terminal project, and nothing points to the possibility of a different outcome in the future. *Ibid.* "It would be entirely unreasonable to expect that [Montana and Wyoming] could have obtained complete judicial review of [their] claims" before the permit denial and resulting litigation forced the developer's bankruptcy. *Id.* at 463 (alterations, quotation marks, and citation omitted.) And, if anything keeps the same fact pattern from recurring, it will be that every interested developer knows it will be subject to the same fate as the first. When "it is reasonable to expect that the [defendant] will refuse to apply" the law as understood by the plaintiff, and the plaintiff asks the Court to adopt its interpretation of the law to guide future transactions between the plaintiff and defendant, Article III is satisfied. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016).

In a passing comment, the United States asserts that Montana and Wyoming cannot "speculat[e] that another entity might seek to propose a similar project and that it too could eventually be subjected to a similar Section 401 denial by Washington." U.S. Br. 15

n.2. As a preliminary matter, Montana and Wyoming do not "speculate" about future injury. The States challenge Washington's current policies and practices, which immediately affect the development of a viable coal export facility. In any event, the United States' argument goes nowhere. The United States does not dispute that Montana and Wyoming had standing at the time the suit was filed (and if it thought that the case *never was* justiciable, it surely would have said so in a brief arguing that the case is *not now* justiciable). Thus, the inquiry is not whether "threatened injury [is] certainly impending," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013), but whether any "possible remedy" is available, *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992). *See also Friends of the Earth*, 528 U.S. at 190 ("[T]here are circumstances in which the prospect that defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."); *see generally Honig v. Doe*, 484 U.S. 305, 329–333 (1988) (Rehnquist, C.J., concurring) (untangling origins of mootness doctrine from separate Article III considerations).

* * *

A final word on what the United States does not say, despite having plenty of words to spare in its brief. It does not contest that Montana and Wyoming alleged injury-in-fact when the case was filed. It does not assert that the controversy can be resolved in any other forum. And it does not contest that the States have raised an important issue that goes directly to their sovereign interests.

Only this Court can decide whether Washington's policy to blockade Powder River Basin coal exports violates the Commerce Clause. The Court should exercise its original jurisdiction and allow Montana and Wyoming to vindicate their sovereign interests. The Court should not dismiss the States' complaint simply because Washington's discriminatory policies successfully bankrupted the most recent developer.

CONCLUSION

For the foregoing reasons, this Court should grant leave to file the complaint.

Respectfully submitted,

BRIDGET HILL
Wyoming Attorney General
JAY JERDE
Special Assistant
Attorney General
JAMES KASTE
Deputy Attorney General
OFFICE OF THE WYOMING
ATTORNEY GENERAL
2320 Capitol Avenue
Cheyenne, WY 82002

TIMOTHY STUBSON
CROWLEY FLECK PLLP
111 W. 2nd Street
Suite 220
Casper, WY 82601

AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Montana Solicitor General
OFFICE OF THE MONTANA
ATTORNEY GENERAL
215 N. Sanders St.
Helena, MT 59601

DALE SCHOWENGERDT
Counsel of Record
MARK STERMITZ
NEIL G. WESTESEN
JEFF J. OVEN
CROWLEY FLECK PLLP
900 N. Last Chance Gulch
Suite 200
Helena, MT 59624
(406) 449-4165
dschowengerdt@crowleyfleck.com

Counsel for Plaintiffs

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