No. 22O152, Orig.

In the Supreme Court of the United States

MONTANA AND WYOMING,

Plaintiffs,

v.

WASHINGTON,

Defendant.

On Motion for Leave to File a Bill of Complaint in an Original Action

BRIEF OF THE NATIONAL MINING ASSOCIATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

MICHAEL B. KIMBERLY
Counsel of Record
MATTHEW A. WARING
McDermott Will & Emery LLP
500 North Capitol St. NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Statutes and other authorities

Statutes and other authorities—continued

Statutes and other authorities—continued

INTRODUCTION AND INTEREST OF THE *AMICI CURIAE**

This case presents a question of fundamental importance to our federalist form of government: May coastal States use their special influence over maritime export facilities to impede foreign trade in products and resources that they disapprove? If the exclusive constitutional commitment of national foreign-trade policy to the federal government means anything, the answer to that question must be *no*.

Montana's and Wyoming's bill of complaint is a case study in why. Invoking their authority under the federal Clean Water Act, high-ranking officials in Washington State have refused to permit construction of a coal export facility at the Millennium Bulk Terminal near the Port of Longview. The new terminal is essential to the exportation of low-sulfur coal resources from Montana and Wyoming to America's international trading partners in Asia. The federal government has expressly prioritized coal exports as a core feature of our national foreign-trade policy in East Asia, where our international allies, including Japan and South Korea, have a strong need.

By all appearances, Washington has denied CWA certification for construction of the terminal, not to protect waters of the United States or to pursue any other legitimate local interests, but because state officials disagree with the federal government's foreign trade policy. That is, they oppose the use of coal as an energy resource throughout the world—and their avowed goal is to inhibit the sale of Montana and Wyoming coal in global markets.

---

* No counsel for a party authored this brief in whole or in part, and no party other than *amici* or their counsel made a monetary contribution to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

Washington's interference with American foreign-trade policy is manifestly unlawful. The Constitution allocates exclusive authority over international trade to the federal government. And it does so for good reason: International trade and foreign policy are inherently matters of *national* concern. Washington, Montana, and Wyoming all relinquished elements of their sovereignty to the Union in exchange for (in part) the promise of a single federal policy concerning foreign trade, free from local obstruction by States with different political views and economic interests. Washington's actions here are denying Montana and Wyoming the benefit of that bargain.

And there is more at stake here than just the disagreement between the coastal Pacific Northwest States and the inland Rocky Mountain States over coal resources. If coastal States are free to interfere with national foreign-trade policy, port cities that disagree with how certain livestock are raised could block development of infrastructure needed to export animal products produced by mid-West States. Other coastal States that disagree with immigration policies essential to the labor supply needed for American manufacturing could attempt to block infrastructure needed to export goods manufactured with such labor. This kind of local interference with foreign trade policy is anathema to our federalist scheme.

Only this Court can correct the problem. Although private parties with a direct economic interest in the terminal have attempted to pursue these matters in lower state and federal courts, those forums have proven inadequate: The state court is jurisdictionally incapable of resolving the underlying constitutional issues because of a limitation in Washington's permit appeal procedures. At the same time, the federal district court has refused (under *Pullman* abstention) to hear the controversy. And, in any event, litigation by private parties is inadequate to vindicate the sovereignty of the States. It was in precisely such circum-

stances that the Framers intended this Court's exclusive original jurisdiction to operate: Montana and Wyoming seek to protect their sovereign interests, and they have no other forum for doing so.

For their parts, *amici* have a strong interest in seeing this Court grant the motion to resolve this dispute.

The **National Mining Association** is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

The **National Association of Manufacturers** is the largest manufacturing association in the Nation, representing small and large manufacturers in every industrial sector in all 50 States. U.S. manufacturers employ more than 12 million men and women, contribute $2.25 trillion to the U.S. economy annually, have the largest economic impact of any sector of the American economy, and account for more than three-quarters of nationwide private-sector research and development.

Amici have a substantial interest in the proper resolution of this dispute. Washington seeks to block construction of the Millennium Bulk Terminal because state officials disagree with the use of coal worldwide. In this way, Washington seeks to countermand national foreign trade initiatives. Tolerance of such obstruction would hurt American workers, inhibit American economic growth, and violate the Constitution's command that the federal government serve as the sole representative of the United States in foreign trade and foreign affairs.

ARGUMENT

When deciding whether to exercise its original jurisdiction to hear a dispute between States, the Court looks to (1) "the nature of the interest of the complaining State[s], focusing on the seriousness and dignity of the claim," and (2) "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992) (internal quotation marks and citation omitted). Both considerations tip strongly in favor of granting the motion for leave to file a bill of complaint here: Washington has defied the strictures of the Federal Commerce Clause by blocking construction of a port terminal needed to export low-sulfur coal from Montana and Wyoming to foreign markets, and an original proceeding in this Court is the only avenue for addressing the constitutional violation.

I. THE BILL OF COMPLAINT RAISES MATTERS OF PARAMOUNT IMPORTANCE

It is vitally important that Montana and Wyoming be able to challenge, before this Court, the unconstitutional conduct alleged in the bill of complaint. At stake here are fundamental questions about the balance of constitutional power among the States and between the States and the federal government on matters of international trade and foreign policy. This is the appropriate forum—the *only* forum—for resolution of such disputes.

A. International trade plays a central role in American foreign policy

1. International trade is the lifeblood of the American economy. As the world's largest exporter and importer of goods and services, with total exports of nearly $2.35 trillion in 2017,[1] the United States depends on international

[1] See Office of U.S. Trade Representative, *Benefits of Trade*, perma.cc/FHF3-25ZH.

trade relationships to help American goods find their way to buyers around the world and to bring critical resources and investment to the United States. As of 2013, America's exports supported nearly 5,600 jobs per $1 billion exported, including an estimated 25% of all American manufacturing jobs.[2] These benefits enrich Americans in every industry and every region across the country.

The United States' abundant energy resources are a critical element of the country's export trade. Energy exports have accounted for a substantial part of U.S. economic growth in recent years, contributing significantly to the nation's annual real GDP growth.[3] American energy exports have been fueled in no small part by coal exports, which grew by 68% between 2016 and 2017 alone.[4] For every million tons of coal exported, an estimated 1,320 jobs are created; expenditures on downstream transportation services related to coal exports supported another 8,850 jobs in 2011.[5]

Against this background, the proposed coal export facility at the Millennium Bulk Terminal would be a substantial economic boon—to Montana, to Wyoming, to *Washington*, and to the entire country. These local and national economic benefits are why Congress and the Executive have made it a national priority for more than two dec-

---

[2] *Ibid.*

[3] See Craig S. Hakkio & Jun Nie, *Implications of Recent U.S. Energy Trends for Trade Forecasts*, Fed. Reserve Bank of Kan. City, 5 (2014), perma.cc/V3FC-24W8; U.S. Bureau of Econ. Analysis, *Gross Domestic Product: Percent Change from Preceding Period*, perma.cc/8WJR-MBYZ (click "View/Download File").

[4] See U.S. Energy Info. Admin., *U.S. Coal Exports*, perma.cc/E4GA-KTKG.

[5] See Ernst & Young, *U.S. Coal Exports: National and State Economic Contributions*, i-ii (May 2013), perma.cc/6VE6-AKPL.

ades to increase exports of American-mined coal and directed the Commerce Department to encourage these exports. See 42 U.S.C. § 13367(a).

2. In addition to its domestic economic benefits, America's international trade in coal is an essential foreign policy tool for the United States to advance its interests around the world. By providing economic assistance to our allies, while denying it to our adversaries, the U.S. can strengthen the community of democratic nations and foster ties of cooperation and respect between those nations and the United States.

To that end, the federal government has made energy exports a key foreign policy focus. These efforts have been particularly significant in the coal sector, where the Department of the Interior has moved to facilitate more leases of federal land for coal development[6] with the express goal of "assist[ing] our allies with their energy needs."[7]

These energy exports are critically needed in Asia, where our international allies (including Japan and South Korea) have strong demand for American energy.[8] And in order to reach Asian markets, coal producers must have access to export facilities on the West Coast—which is why the federal government's current National Security Strategy states that it is critical for the United States to give "continued support of private sector development of coastal

---

[6] See U.S. Dep't of Interior, Concerning the Federal Coal Moratorium, Order No. 3348 (Mar. 29, 2017), perma.cc/HZW5-3RYU.

[7] See Press Release, U.S. Dep't of Interior, Secretary Zinke Takes Immediate Action to Advance American Energy Independence (Mar. 29, 2017), perma.cc/F5NH-PK6L.

[8] See, *e.g.*, Qinnan Zhou, *The U.S. Energy Pivot: A New Era for Energy Security in Asia?*, Woodrow Wilson Int'l Ctr. for Scholars (Mar. 26, 2015), perma.cc/5CXZ-LNKT.

terminals" for energy exports.[9]

3. Numerous other American industries rely on foreign trade, including agriculture, which has posted an annual trade surplus for over 50 years and contributed more than $138 billion to American exports in 2017;[10] the manufacturing sector, which produced an astonishing $1.2 trillion in exports in 2016;[11] and the freight rail industry, which depends on international trade for 35% of annual rail revenue and 50,000 rail jobs worth $5.5 billion in annual wages and benefits.[12] Each of these trade-reliant economic sectors makes critical contributions to the American economy and to relationships with America's trading partners. The United States—as distinct from any one State acting alone—has a strong interest in ensuring that exports in these sectors remain strong and uninhibited by local interference.

B. Local interference impedes the federal prerogative to establish and implement a uniform foreign policy

It is not difficult to see how and why interference like Washington's undermines uniform federal control over the Nation's trade policy and represents an offense to Montana's and Wyoming's sovereign interests.

"The States, in ratifying the Constitution," surrendered control over interstate and foreign commerce—and

---

[9] The White House, National Security Strategy of the United States of America 23 (Dec. 2017), perma.cc/QLU5-WR4J.

[10] See Office of U.S. Trade Representative, *2018 Fact Sheet: USTR Success Stories: Opening Markets for U.S. Agricultural Exports*, perma.cc/G8WF-U8DY.

[11] See National Ass'n of Mfrs., *United States Manufacturing Facts* 2 (revised Jan. 2018), perma.cc/U8AV-NGVT.

[12] See Association of Am. Railroads, *Freight Railroads & International Trade* 2 (Mar. 2017), perma.cc/V9DL-8X63.

submitted themselves to this Court's jurisdiction—to ensure "the peace of the Union." *Franchise Tax Bd. of California* v. *Hyatt*, 139 S. Ct. 1485, 1495 (2019). The Constitution thus "allocates to Congress the power to regulate Commerce among the several States." *New York* v. *United States*, 505 U.S. 144, 157 (1992) (quotation marks omitted and alteration incorporated). "As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power." *Id.* at 158.

So far as international trade is concerned, faithful adherence to this allocation of authority is essential not only to peace among the States, but also to the uniform management of the Nation's foreign affairs. "Foreign commerce," as this Court has repeatedly recognized, "is preeminently a matter of national concern." *Japan Line, Ltd.* v. *L.A. County*, 441 U.S. 434, 448 (1979). "In international relations and with respect to foreign intercourse and trade[,] the people of the United States act through a single government with unified and adequate national power." *Board of Trustees of Univ. of Ill.* v. *United States*, 289 U.S. 48, 59 (1933). There is thus "no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the concern for uniformity in this country's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413 (2003).

The rationale for this approach is self-evident. The federal government, representing the interests of citizens from every State, is best positioned to balance the Nation's different regional interests and to balance domestic goals with foreign policy objectives. Again, this expectation was essential to the bargain struck by the States in banding to-

gether to form a single Union. *Franchise Tax Bd.*, 139 S. Ct. at 1495. The Constitution's design thus reflects a clear preference for federal policymaking in the realm of foreign trade and foreign affairs. See *Japan Line*, 441 U.S. at 448 & n.12 (collecting authorities).

It would be impossible for the federal government to speak with a single voice on behalf of the Nation in foreign affairs and international trade if individual States and their municipalities could pursue their own preferred policies even when they contradict federal policy. When States attempt to influence international affairs through their own regulatory efforts and by pursuing their own local agendas, they at best create uncertainty and burdens for international partners. At worst, they harm the national economy and frustrate the federal government's efforts to implement a uniform foreign policy altogether—just as Washington has sought to do here.

C. Allowing Washington's actions to stand would encourage local interference with foreign trade policy

The practical consequences of allowing Washington's conduct to stand would be highly problematic. Indeed, denying the motion to file a bill of complaint would invite States and municipalities across the country to interfere with U.S. foreign relations.

1. In light of the polarization of the American electorate and the tendency of Americans to live near others who share their political views,[13] many state and local governments have assumed polarized political characters.[14]

---

[13] See generally Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (2008).

[14] See, *e.g.*, Jeffrey M. Jones, *Red States Outnumber Blue for First Time in Gallup Tracking*, Gallup (Feb. 3, 2016), perma.cc/EY5C-SYAZ.

Large municipal governments are often strongly politically polarized as well.[15]

Many border States and coastal cities can, to some degree, control American export trade with our foreign allies, including Mexico and Canada and those in Asia and Europe. If Washington's obstructionist conduct in this case is not curbed, other counties and cities will be encouraged to use their geographic leverage over international trade to obstruct policies with which they disagree. This is an equal-opportunity problem—just as Republican Administrations can expect obstruction from Democratic-leaning States and cities, Democratic Administrations can expect obstruction from Republican-leaning States and cities.

The results would be deeply harmful to national foreign trade policy and a clear offense to the Nation's federalist scheme. West Coast port cities that disagree with how livestock are raised in Nebraska, Kansas, or Texas could block development of infrastructure leading to port facilities to obstruct exports of meat and other animal products. Conversely, South Carolina municipalities that disagree with immigration policies essential to the labor supply needed for much of American manufacturing could attempt to deny Clean Water Act or other permits for rail facilities needed to export goods manufactured with such labor. And because virtually all international trade is bilateral, States or cities likewise could attempt to obstruct the *im*portation of such goods from our foreign allies based on similar policy objections.

2. The implications of allowing States to use Section 401 of the Clean Water Act for purposes unrelated to water quality would be particularly disruptive to numerous sectors of the economy.

---

[15] See, *e.g.*, Anthony Williams, *Stop One-Party Rule in Big Cities*, CityLab (Oct. 15, 2017), perma.cc/6749-ZTYL.

Under Section 401 of the Act, an applicant for a Section 404 discharge permit must obtain a certification from the State that the proposed discharge will comply with the applicable water quality standards under the Act. 33 U.S.C. § 1341(a). If Washington can prohibit the export of low-sulfur American coal by way of Section 401 certification, States across the country could similarly restrict domestic and foreign trade. The mining industry is not the only industry that depends upon state certifications under Section 401 in order to do business.

Recent years have seen an "immense expansion of federal regulation of land use" under the Clean Water Act, with the relevant agencies asserting federal jurisdiction over "virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Rapanos* v. *United States*, 547 U.S. 715, 722 (2006) (plurality opinion). Section 401 certifications have accordingly become necessary for significant numbers of real estate, infrastructure, and agricultural projects. Indeed, in many States, Section 404 and 401 approvals are broadly required for any project that may involve "dredg[ing], fill[ing] or otherwise alter[ing] the bed or banks of any stream, lake, wetland, floodplain or floodway"—which describes countless ordinary agricultural projects. See U.S. Army Corps of Eng'rs, *Permit Requirements for the State of Illinois* 1, perma.cc/6T6W-E5YM.

The Framers allocated exclusive authority over foreign affairs to the federal government to prevent local meddling in national foreign trade policy. Washington's efforts to undermine the federal government's policy with respect to foreign trade in coal thus present urgent and serious questions that warrant a hearing in this Court.

II. WASHINGTON'S ACTIONS VIOLATE THE FOREIGN COMMERCE CLAUSE

Washington's actions here violate the interstate and foreign Commerce Clauses. Washington's disruption of uniform federal policy favoring American energy exports justifies finding a Foreign Commerce Clause violation all on its own. Even if that were not so, the burden on foreign commerce from Washington's attempts to block the construction of the Millennium Bulk Terminal outweighs any benefit to Washington. No matter what test applies, its conduct is manifestly unconstitutional.

A. Washington's conduct violates the *per se* test applicable to Foreign Commerce Clause violations

1. This Court has "held on countless occasions" that "state regulation * * * may be invalid under the unexercised Commerce Clause." *Wardair Can., Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1, 7-8 (1986). The "negative" operation of the Commerce Clause has special force in the context of international trade, with respect to which "a State's power is further constrained because of the special need for federal uniformity." *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) (quotation marks and citation omitted). Thus, "the constitutional prohibition" against state and local regulation of foreign commerce is even "broader than the protection afforded to [domestic] interstate commerce" because "matters of concern to the entire Nation are implicated." *Kraft Gen. Foods, Inc.* v. *Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 79 (1992); accord, *e.g.*, *Piazza's Seafood World, LLC* v. *Odom*, 448 F.3d 744, 749 (5th Cir. 2006) ("[T]he scope of Congress's power to regulate foreign commerce, and accordingly the limit on the power of the states in that area, is greater."). Accord, *e.g.*, *Japan Line*, 441 U.S. at 446 (calling for an especially exacting and "extensive constitutional inquiry" to decide challenges involving foreign commerce).

Under this demanding standard, a court must ask whether a state or local law regulating foreign commerce threatens to "impair federal uniformity in an area where federal uniformity is essential." *Japan Line*, 441 U.S. at 448. Such laws are *per se* "invalid 'if they (1) create a substantial risk of conflicts with foreign governments; or (2) undermine the ability of the federal government to "speak with one voice" in regulating commercial affairs with foreign states.'" *Piazza's Seafood World*, 448 F.3d at 750 (quoting *New Orleans S.S. Ass'n* v. *Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1022 (5th Cir. 1989)). That is so regardless of local benefit. *Kraft Gen. Foods, Inc.*, 505 U.S. at 79.

2. As we have shown, the question whether the United States should export coal or any other good or commodity—and in what amounts—is an issue that falls squarely within the purview of the federal government. See *Japan Line*, 441 U.S. at 448. The federal government has taken the initiative to set policy for the Nation in this area by prioritizing energy exports in general, and coal exports in particular, as key to the economic prosperity and national security of both the United States and its Asian allies.

Washington's block of the Millennium Bulk Terminal undermines this uniform federal policy. Geography dictates that, in order to export coal to Asia from Montana and Wyoming (or most anywhere in the United States), coal producers must have access to export facilities on the West Coast, including in Washington. But Washington has obstructed any such exportation within its jurisdiction by preventing coal export facilities such as the Millennium Bulk Terminal from being constructed.

If such conduct were permissible, western States and cities could coordinate to frustrate federal energy and trade policy by blocking *all* coal exports to Asia—in effect, overriding the exportation policy for the entire Nation.

This concern is not speculative. Washington—together with Oregon, California, British Columbia, and the cities of San Francisco, Oakland, Los Angeles, Seattle, Portland, and Vancouver—is a member of the Pacific Coast Collaborative, which aims to "[d]ramatically reduce greenhouse gas emissions" through state and local policies. See Pacific Coast Collaborative, *About*, perma.cc/Y67Y-FAXQ. It is no great leap to imagine these jurisdictions coordinating their policies to block coal exports altogether.

This kind of direct interference with an express federal policy violates *Japan Line*'s "one voice" requirement. State laws have been held to violate the Commerce Clause where they merely articulated a foreign policy that tangentially diverged from the federal government's. See, *e.g.*, *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 68 (1st Cir. 1999) (Massachusetts law restricting state's ability to transact with companies doing business in Burma prevented the federal government from speaking with one voice). If such laws are unconstitutional, *a fortiori* Washington's overt attempt to block coal exports is as well.

B. Washington's conduct also flunks the *Pike* balancing test

Given that Washington's conduct interferes with foreign trade, this Court can and should invalidate Washington's attempt to block the construction of the Millennium Bulk Terminal without consulting the more permissive *Pike* balancing test that applies to state actions under the domestic Commerce Clause analysis. See *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007). But Washington's actions violate the *Pike* test as well. Whatever benefit accrues to Washington from blocking these exports, it does not outweigh the considerable practical and economic burdens on the rest of the country or on the Nation's delicate relationships with foreign powers.

1. In its domestic-trade dormant Commerce Clause cases, this Court "has adopted * * * a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S. 573, 578-579 (1986). First, when a state or local law discriminates against interstate commerce by treating in-state or in-country economic interests more favorably than out-of-state or out-of-country economic interests, the law "is virtually *per se* invalid." *Oregon Waste Sys., Inc.* v. *Dep't of Envt'l Quality*, 511 U.S. 93, 99 (1994). Second, when a state law "regulates evenhandedly" with only "incidental effects" on interstate or foreign commerce, the law is invalid under the Commerce Clause if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Ibid.* (quotation marks omitted). In the latter context, courts conduct a balancing test to determine if the burden on interstate commerce exceeds the local benefits.

Courts, including this one, sometimes rely on this general balancing framework to resolve dormant Commerce Clause cases involving international trade. See, *e.g.*, *Kraft Gen. Foods, Inc.*, 505 U.S. at 81-82 (relying on interstate Commerce Clause decisions to inform the Court's foreign Commerce Clause analysis).

2. Washington's conduct here fails the more forgiving *Pike* balancing test, as well. Its refusal to permit construction of the Millennium Bulk Terminal is blocking as much as $17 *billion* per year in gross domestic product for the States where the coal is produced—a massive detriment to these states and communities.[16] Moreover, the proposed terminal facility is vital to the health of America's energy industry, given that there currently is insufficient port ca-

[16] See Berkman Report at 15-17, *Lighthouse Resources Inc.* v. *Inslee*, No. 3:18-cv-05005 (W.D. Wash. Mar. 8, 2019), ECF No. 265

pacity on the West Coast to allow export of sufficient volumes of coal to meet our Asian allies' demands.[17] Yet Washington seeks to block this development unilaterally, burdening foreign trade tremendously.[18]

Washington would have to establish overwhelming local benefits to overcome the costs of this interference. It plainly cannot. Indeed, development of the export facility would *benefit* Washington economically, producing substantial new tax revenues for the State and creating a significant number of new jobs and infrastructure opportunities in Cowlitz County, where the facility would be located. The State's willingness to forgo these benefits and block development of the terminal suggests that its true motivation is an ideological opposition to coal exports in general, not a desire to benefit Washington specifically. See, *e.g.*, Motion App. 55-56; Bill of Compl. ¶¶ 38, 44.

To be sure, some of Washington's actions have rested on purported environmental concerns about the project. But these environmental concerns are by all appearances pretextual. Washington's original environmental review of the project identified environmental issues that could have been readily mitigated. Bill of Compl. ¶ 34. The State's final denial of a permit for the facility under Section 401 of the Clean Water Act "distort[ed]" those conclusions into predictions of certain environmental harm. Motion App. 55.

---

[17] See Schwartz Report at 14-15, *Lighthouse* (W.D. Wash. Mar. 8, 2019), ECF No. 277 (noting that the Terminal is the "only viable project" for new facilities for exporting coal to Asia and is thus "essential to the continued survival of coal mining in the western U.S.").

[18] Ironically, blocking development of the Millennium Bulk Terminal would almost surely result in higher overall greenhouse gas emissions, for two reasons: *First*, our Asian allies would consume higher-sulfur coal from Russia, and, *second*, any coal ultimately exported from Montana and Wyoming would have to be transported over longer distances to less convenient port locations.

That kind of shift is the hallmark of motivated reasoning. Washington's true intent is to regulate international trade in coal—an aim that cannot satisfy the Commerce Clause inquiry, which looks to the "putative *local* benefits" of a state policy. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (emphasis added).

Washington's use of its control over permitting under Section 401 of the Clean Water Act exemplifies the lack of local interests at stake here. The denial of certification for the coal export facility had nothing to do with the water quality provisions of the Act, nor indeed with water quality issues at all. Washington policymakers were concerned with entirely different, wholly out-of-state environmental impacts from transporting and burning coal. This use of the Section 401 process to pursue interests that have nothing to do with water quality is proof positive that Washington was not pursuing any "local benefit" when it blocked development of the export facility.

It also bears mention that Washington has treated the Millennium Bulk Terminal facility differently from other development projects proposed during the same period. *E.g.*, Bill of Compl. ¶¶ 30, 37. As a state official involved in the review of the Terminal explained, "if Millennium proposed to ship anything other than coal, [the state] would have granted the Section 401 water quality certification." Motion App. 55. This pattern makes clear that Washington's true intent—and the actual effect of its conduct—is to manipulate U.S. energy policy and foreign trade practices rather than to regulate Washington's environment. The Commerce Clause cannot abide that kind of preferential treatment with respect to foreign trade.

III. MONTANA AND WYOMING ARE UNABLE TO OBTAIN RELIEF IN ANY OTHER FORUM

The second part of the jurisdictional inquiry—whether there is "another forum where there is jurisdiction over the

named parties, where the issues tendered may be litigated, and where appropriate relief may be had" (*Illinois* v. *City of Milwaukee, Wis.*, 406 U.S. 91, 93 (1972))—likewise indicates that the Court should exercise its original jurisdiction here. Absent a grant of review, Montana and Wyoming will not be able to obtain appropriate relief on their claims in any other forum.

As an initial matter, it is clear that the plaintiff States themselves cannot sue Washington in any forum other than this Court. Washington has sovereign immunity from suit in its own courts (see *Alden* v. *Maine*, 527 U.S. 706 (1999)), and *amici* are unaware of any waiver of immunity that would apply to this suit. Nor could Montana and Wyoming sue in a lower federal court. This Court has "*exclusive* jurisdiction" over all controversies between States—a grant that "necessarily denies jurisdiction of such cases to any other federal court." *Mississippi* v. *Louisiana*, 506 U.S. 73, 77-78 (1992) (quoting 28 U.S.C. § 1251(a)).

Because Montana and Wyoming cannot assert their constitutional claims in proceedings other than these before this Court, the only theoretical alternative for obtaining relief on the States' claims is a suit in federal court by the private parties involved in developing the Millennium Bulk terminal. But there are a host of reasons that such litigation is not an adequate alternative.

For starters, this Court has recognized that a State's "[sovereign] interests [are not] directly represented" in suits by private parties. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 452 (1992). That makes sense, because private parties are motivated by private interests and may push for a decision on alternative grounds or for settlement.

Setting that aside, two private suits have in fact been attempted—both to no avail. First is the state court proceeding growing out of the certification and permitting process itself. When the State denied the application for a

water quality certificate, the terminal developer appealed to the state Pollution Control Hearings Board. See *Lighthouse Resources Inc.* v. *Inslee*, 2019 WL 1436846, at *2 (W.D. Wash. Apr. 1, 2019). When the Board affirmed the denial of certification, the developer "appealed the Pollution Control Hearings Board's decision to the Cowlitz County Superior Court, where it is now pending." *Ibid.*

The state-court proceeding is not an adequate substitute for a hearing on Montana and Wyoming's Commerce Clause claims before this Court, for at least two reasons. First, the state permitting authorities lacked jurisdiction to consider a Commerce Clause challenge to their conduct, and thus so too does the Superior Court. See *Lighthouse Res. Inc.* v. *Inslee*, 2019 WL 1572605, at *1 (W.D. Wash. Apr. 11, 2019) (the Commerce Clause claim could not be "decided in the State Pollution Control Hearings Board proceeding"). No matter how that case proceeds, the state courts will not have an opportunity to pass upon the very serious constitutional claims asserted here.

In addition, the administrative appeal is being pressed in the state courts of Washington itself, where judges are elected annually and juries are sensitive to local politics. It would blink reality to say that Montana and Wyoming could rely, for vindication of their sovereign interests, on the Washington state courts' consideration of a federal constitutional dispute being pressed by private, politically unpopular, out-of-state litigants. As the Framers recognized, a federal forum is critical for the protection of sovereign out-of-state interests.

It is no answer to point to private-party litigation in federal district court as an alternative. In the second suit, private parties sued Washington officials in the U.S. District Court for the Western District of Washington, asserting (among other things) a violation of the Commerce Clause. See *Lighthouse Resources Inc.* v. *Inslee*, No. 3:18-

cv-5005 (W.D. Wash. Jan. 3, 2018), ECF No. 1. Notwithstanding that the Commerce Clause claim cannot be adjudicated in the state court proceedings, however, the district judge in that case stayed the litigation under the *Pullman* abstention doctrine. See *Lighthouse*, 2019 WL 1572605, at *3-*4 (citing *R.R. Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941)). Thus even supposing that federal district court litigation brought by private parties could in theory vindicate Montana's and Wyoming's sovereign interests (and that is highly doubtful—see *Wyoming*, 502 U.S. at 452), it plainly could not do so here.

Montana and Wyoming "bring[] suit as * * * sovereign[s] seeking [a] declaration from this Court that [Washington's conduct] is unconstitutional." *Wyoming*, 502 U.S. at 452. It was to deal with precisely this kind of dispute that the Framers assigned exclusive jurisdiction to this Court. Review is therefore necessary to prevent Washington's interference with foreign trade policy and its "discriminat[ion] against [and] burden [upon] the interstate flow of articles of commerce." *Oregon Waste Sys.*, 511 U.S. at 98-99.

CONCLUSION

Montana and Wyoming's motion for leave to file a bill of complaint should be granted.

Respectfully submitted.

MICHAEL B. KIMBERLY
Counsel of Record
MATTHEW A. WARING
McDermott Will & Emery LLP
500 North Capitol St. NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Amici Curiae

March 2020