No. 152, Original

In the Supreme Court of the United States

STATE OF MONTANA AND STATE OF WYOMING,
PLAINTIFFS

v.

STATE OF WASHINGTON

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the order of the Court inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the motion for leave to file a bill of complaint should be denied.

STATEMENT

A. Millennium's Application For Certification Under Clean Water Act Section 401

In 2012, Millennium Bulk Terminals–Longview, LLC (Millennium) proposed to build a new coal-export facility—to be known as the Millennium Bulk Terminal—in Cowlitz County, Washington. Compl. ¶¶ 22, 27. The proposed terminal would have been located on 190 acres of land that Millennium had leased along the Columbia River, and its purpose would have been to enable the export of U.S. coal to countries in Asia. See Compl. ¶ 26; 18-cv-5005 D. Ct. Doc. 130-1, at S1 (W.D. Wash. Aug. 16,

2018). As proposed, the terminal would have involved the construction of railway facilities for trains carrying coal from the Powder River Basin in Montana and Wyoming and from the Uinta Basin in Utah and Colorado; a stock-yard for storing the coal arriving on those trains; docks for ocean-going vessels bound for Asia; and facilities for loading coal onto those vessels. See 18-cv-5005 D. Ct. Doc. 130-1, at S1, S4; Mot. App. 10-11.

Before Millennium could begin to build its proposed terminal, it had to obtain numerous federal, state, and local permits. See 18-cv-5005 D. Ct. Doc. 130-1, at S43-S44. Those permitting requirements triggered an environmental-review process under the Washington State Environmental Policy Act (SEPA), Wash. Rev. Code §§ 43.21C.010 *et seq.* See 18-cv-5005 D. Ct. Doc. 130-1, at S2. In April 2017, that process culminated in a final environmental impact statement (FEIS) issued by the Washington Department of Ecology (Ecology) and Cowlitz County. *Id.* at S1-S45. The FEIS reflected a determination that, even if "proposed mitigation measures were implemented, they would reduce but not completely eliminate significant adverse environmental impacts resulting from construction and operation of" the proposed terminal in "nine environmental resource areas." *Id.* at S41. The FEIS stated, for example, that construction and operation of the proposed terminal would raise average daily noise levels, increase the risk of accidents involving trains and vessels, and reduce air quality along the railway lines. *Id.* at S42-S43. Millennium did not seek review of the FEIS. 18-cv-5005 D. Ct. Doc. 130-6, at 7 (W.D. Wash. Aug. 16, 2018).

As part of the permitting process, Millennium was also required to obtain various federal permits. See

18-cv-5005 D. Ct. Doc. 130-1, at S44. Because construction of the proposed terminal would involve the discharge of dredged material into the Columbia River, see *id.* at S1, Millennium was required to obtain permits from the U.S. Army Corps of Engineers (Corps) under Section 404 of the Clean Water Act, 33 U.S.C. 1344, and Sections 10 and 14 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, 408. Under Section 401 of the Clean Water Act, however, the Corps could not issue those permits unless Washington, as the State in which the discharge would originate, either (1) certified that the discharge would comply with applicable provisions of the Clean Water Act and appropriate requirements of state law, or (2) waived the certification requirement. See 33 U.S.C. 1341(a)(1) and (d).

In September 2017, Ecology denied with prejudice Millennium's application for certification under Section 401 of the Clean Water Act. Mot. App. 9-44. The denial rested on two grounds. *Id.* at 14-44. First, Ecology determined that the proposed terminal's "unavoidable and significant adverse impacts" in the "nine areas" identified in the FEIS "conflict[ed] with Ecology's SEPA policies." *Id.* at 14; see *id.* at 14-33. Second, Ecology determined that Millennium had failed to provide "reasonable assurance that the [terminal] as proposed will meet applicable water quality standards." *Id.* at 33; see *id.* at 33-43.

Millennium appealed Ecology's denial of Section 401 certification to the Washington Pollution Control Hearings Board (Board), which affirmed in August 2018. 18-cv-5005 D. Ct. Doc. 130-6, at 1-22. As an initial matter, the Board held that neither state law nor the Clean Water Act precluded Ecology from relying on "substantive SEPA" policies in denying certification. *Id.* at 10.

The Board then held that Ecology did not clearly err in "exercising its SEPA substantive authority to deny" Millennium's application for Section 401 certification, given that Ecology had relied on "factual findings in the FEIS" that Millennium had not challenged. *Id.* at 20. Having found the SEPA-based ground sufficient to sustain Ecology's decision, the Board declined to reach the issue of "whether there was reasonable assurance that the [proposed terminal] would meet water quality standards." *Id.* at 21.

B. Millennium's Suits In Federal And State Court

1. Millennium filed two suits challenging the denial of its application for Section 401 certification. First, in January 2018, Millennium—together with its parent company, Lighthouse Resources Inc. (Lighthouse)—brought suit against the Governor of Washington and the Director of Ecology in federal district court. 18-cv-5005 D. Ct. Doc. 1, at 1-53 (W.D. Wash. Jan. 3, 2018). Millennium alleged, among other things, that the denial with prejudice of its application for Section 401 certification had "the intent and effect of discriminating against and unduly burdening foreign and interstate commerce," in violation of the dormant Foreign and Interstate Commerce Clauses. *Id.* at 3; see *id.* at 45-48. Asserting that its Section 401 application had not been "treated like other requests of its kind," *id.* at 35, Millennium alleged that the "true reason" for the denial of certification was "the desire to prevent American coal export[s] to Asia," *id.* at 47. The district court granted Montana and Wyoming leave to participate as amici curiae in the case. See 18-cv-5005 D. Ct. Doc. 110, at 2 (W.D. Wash. May 18, 2018); 18-cv-5005 D. Ct. Doc. 78, at 1-2 (W.D. Wash. May 8, 2018).

Second, in September 2018, Millennium brought suit against Ecology and its Director in the Washington Superior Court for Cowlitz County. 18-cv-5005 D. Ct. Doc. 304-1, at 1-32 (W.D. Wash. Mar. 20, 2019). Millennium alleged, among other things, that the denial, with prejudice, of its application for Section 401 certification had been motivated by "animus towards coal," *id.* at 28, in violation of its "due process and equal protection rights" under the United States Constitution, *id.* at 31. Millennium asserted that such animus had led Ecology to do a series of things it had "never" done before: deny "a water quality certification 'with prejudice,'" "using SEPA," based on "non-water-quality effects found in an EIS." *Id.* at 29.

2. In April 2019, the federal district court invoked *Pullman* abstention, see *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), and stayed its proceedings pending the conclusion of Millennium's state-court suit. *Lighthouse Res. Inc.* v. *Inslee*, No. 18-cv-5005, 2019 WL 1572605, at *4 (W.D. Wash. Apr. 11, 2019). The district court explained that Millennium's Commerce Clause claims "'might be mooted or presented in a different posture by a state court determination of pertinent state law' (or facts)." *Ibid.* (citation omitted). Millennium appealed the district court's stay order to the Ninth Circuit. See 18-cv-5005 D. Ct. Doc. 329, at 2 (W.D. Wash. May 10, 2019).

Meanwhile, in November 2019, the Washington Superior Court issued an order declining to dismiss Millennium's due process and equal protection claims. Ruling at 3-4, *Millennium Bulk Terminals–Longview, LLC* v. *Washington State Dep't of Ecology*, No. 18-2-994-08 (Nov. 20, 2019). The defendants filed a motion for discretionary review in the Washington Court of Appeals,

contending that the lower court had erred in allowing Millennium's claims to proceed to trial. Mot. for Discretionary Review at 8, *Millennium Bulk Terminals–Longview, LLC* v. *Washington*, No. 54368-1-II (Wash. Ct. App. Dec. 24, 2019). The Washington Court of Appeals agreed to review the order. Order Granting Mot. to Modify at 1, *Millennium Bulk Terminals–Longview, LLC* v. *Washington*, No. 54368-1-II (July 29, 2020).

3. In December 2020, while the federal and state cases brought by Millennium were pending before the Ninth Circuit and the Washington Court of Appeals, Lighthouse and Millennium filed voluntary bankruptcy petitions under Chapter 11. See 19-35415 C.A. Doc. 88-3, Exs. 2-3 (9th Cir. Jan. 20, 2021). With the bankruptcy court's approval, *id.* Ex. 1, at 1-2, Millennium agreed to reject its lease of the land on which the proposed terminal would have been constructed. See *id.* Ex. 1, at 5 (agreeing to "reject the Ground Lease"). Millennium also agreed to relinquish its rights to improvements and other assets on that land. See *id.* Ex. 1, at 8 (agreeing to "relinquish all claims and rights to * * * all Land Improvements and such other assets described in Section 12 of the Ground Lease").[1]

In light of the bankruptcy petitions, the defendants in Millennium's federal-court suit challenging the denial of Section 401 certification moved to dismiss the pending appeal as moot. 19-35415 C.A. Doc. 88-1, at 1 (Jan. 20,

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[1] The bankruptcy court has since confirmed Lighthouse and Millennium's joint Chapter 11 bankruptcy plan. 20-13056 Bankr. Ct. Doc. 435, at 27 (Bankr. D. Del. Mar. 10, 2021); see 20-13056 Bankr. Ct. Doc. 492, at 1 (Bankr. D. Del. Apr. 7, 2021) (providing notice of the plan's April 7, 2021 effective date). The bankruptcy court has also entered a final decree closing Millennium's bankruptcy case. 20-13056 Bankr. Ct. Doc. 508, at 4 (Bankr. D. Del. Apr. 16, 2021).

2021). The Ninth Circuit granted the unopposed motion. 19-35415 C.A. Doc. 93, at 2 (Mar. 23, 2021). The parties then advised the district court that, given "Lighthouse's bankruptcy and subsequent divestment of its interest in the terminal property," the case as a whole was "moot." 18-cv-5005 D. Ct. Doc. 351, at 2 (W.D. Wash. Apr. 27, 2021). The district court dismissed the case with prejudice. 18-cv-5005 D. Ct. Doc. 352, at 1-2 (W.D. Wash. Apr. 27, 2021).

The defendants in Millennium's state-court suit challenging the denial of Section 401 certification similarly requested that the Washington Court of Appeals vacate the superior court's ruling "on grounds that Millennium has divested all of its interest in the project site, rendering its claims moot." Ruling Remanding Order at 2, *Millennium Bulk Terminals–Longview, LLC* v. *Washington*, No. 54368-1-II (Wash. Ct. App. Mar. 19, 2021). The Washington Court of Appeals "remanded for further proceedings dismissing Millennium's claims as moot." *Ibid.* On remand in the Washington Superior Court, the parties stipulated that, "in light of [Millennium's] bankruptcy filing and subsequent divestment of its interest in the property involved here, the present case is moot." Stipulated Mot. to Dismiss at 1-2, *Millennium Bulk Terminals–Longview, LLC* v. *Washington State Dep't of Ecology*, No. 18-2-994-08 (May 6, 2021) (Stipulated Mot. to Dismiss). Earlier this month, the superior court dismissed the case with prejudice. Agreed Order of Dismissal at 1, *Millennium Bulk Terminals–Longview, LLC* v. *Washington State Dep't of Ecology*, No. 18-2-994-08 (Wash. Super. Ct. May 10, 2021).

C. Montana And Wyoming's Complaint

About a year before Lighthouse and Millennium filed for bankruptcy, Montana and Wyoming filed in this

Court their motion for leave to file a bill of complaint against Washington. Like the complaint that Millennium had filed in the federal district court, Montana and Wyoming's complaint alleges that the denial with prejudice of Millennium's application for Section 401 certification had the intent and effect of discriminating against and unduly burdening foreign and interstate commerce, in violation of the dormant Foreign and Interstate Commerce Clauses. Compl. ¶¶ 47-65. Asserting that Washington treated the proposed terminal "very differently" from other projects, Compl. ¶ 30; see Compl. ¶¶ 31, 35, 37-38, the complaint alleges that Washington's actions in denying Section 401 certification were motivated by "political opposition" to coal and a desire to protect Washington's own economic interests. Compl. ¶ 51; see Compl. ¶¶ 49-50, 53.

The complaint alleges that, but for "Washington's discriminatory and protectionist actions," the Millennium Bulk Terminal could be built and would financially benefit Montana and Wyoming because Asian countries would buy more U.S. coal, most of that coal would be produced in Montana and Wyoming, and Montana and Wyoming would be able to collect "severance and other taxes" on the increased production and sale of coal. Compl. ¶ 54; see Compl. ¶¶ 10-21, 26. The complaint therefore asserts that Montana and Wyoming "are sovereign States losing significant coal severance taxes because of Washington State's discriminatory conduct." Compl. ¶ 8; see Compl. ¶ 54.

To redress that asserted injury, the complaint seeks "declaratory and injunctive relief holding that Washington's actions are invalid," Compl. ¶¶ 57, 65, and specifically seeks injunctions that would prevent Washington from "engaging in protectionist and discriminatory

actions in its permitting decisions for the Millennium Bulk Terminal" and from denying the Section 401 certification for Millennium's proposed terminal "on grounds unrelated to water quality," Compl. 19. If the Court were to grant that relief, Montana and Wyoming explain, then "the project can move through the permitting process like any other." Reply Br. 8. In other words, the relief sought in the complaint is directed at Washington's allegedly unconstitutional actions with respect to one particular project—the Millennium Bulk Terminal. See *ibid.* ("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."); *ibid.* ("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.").

DISCUSSION

Montana and Wyoming seek leave to file a bill of complaint challenging Washington's denial of Millennium's application for a certification under Section 401 of the Clean Water Act—a certification that would have been a prerequisite to building a new coal-export terminal on the Columbia River in Washington. Regardless of whether that denial was unlawful, however, Millennium will not be building its proposed terminal. After Montana and Wyoming sought leave to file their bill of complaint in this Court, Millennium filed for bankruptcy and divested itself of any interest in the property in question. Accordingly, this suit would not redress Montana and Wyoming's asserted injury from the denial of certification under Section 401. Because no Article III

case or controversy exists, the motion for leave to file a bill of complaint should be denied.

A. Disputes Between Two Or More States Must Satisfy Article III's Case-Or-Controversy Requirement To Fall Within This Court's Original Jurisdiction

Article III of the Constitution limits the federal "judicial Power" to the adjudication of "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1; see U.S. Const. Art. III, § 2, Cl. 2 (providing that "[i]n all Cases * * * in which a State shall be Party, the supreme Court shall have original Jurisdiction"). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006). Disputes "between two or more States" are no exception. U.S. Const. Art. III, § 2, Cl. 1. They, too, must present a proper case or controversy to fall within this Court's jurisdiction. See *ibid.* Accordingly, "[i]t has long been the rule that in order to engage this Court's original jurisdiction, a plaintiff State must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 663 (1976) (per curiam); see *Texas* v. *Florida*, 306 U.S. 398, 405 (1939) (explaining that the Court's "constitutional authority to hear the case and grant relief turn[ed] on the question whether the issue framed by the pleadings constitutes a justiciable 'case' or 'controversy' within the meaning of the Constitutional provision"). And, as with other cases under Article III, a State bringing an original-jurisdiction suit must establish that there is "ground for judicial redress." *Massachusetts* v. *Missouri*, 308 U.S. 1, 15 (1939).

Article III requires that the elements of a proper case or controversy exist at "all stages of litigation." *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021). "The doctrine of standing generally assesses whether [they] exist[] at the outset, while the doctrine of mootness considers whether [they] exist[] throughout the proceedings." *Ibid.* Thus, to demonstrate standing, a plaintiff must establish "injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler*, 547 U.S. at 342 (citation omitted). "And if in the course of litigation a court finds that it can no longer provide a plaintiff with any effectual relief, the case generally is moot." *Uzuegbunam*, 141 S. Ct. at 796; see *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) ("A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'") (citation omitted).

B. Montana And Wyoming's Dispute With Washington Does Not Satisfy Article III's Case-Or-Controversy Requirement

Whether viewed through the lens of standing or of mootness, Montana and Wyoming's dispute with Washington does not satisfy Article III's case-or-controversy requirement. The injury that Montana and Wyoming assert is a loss in revenues from "coal severance and other taxes." Compl. ¶ 54; see Br. in Support 1; Reply Br. 1-2. According to Montana and Wyoming, that injury is traceable to Washington's "discriminatory and protectionist actions" in denying Millennium's application for Section 401 certification. Compl. ¶ 54; see Compl. ¶¶ 49-51. And to redress that injury, Montana and Wyoming seek "declaratory and injunctive relief

holding [Washington's actions] invalid," Compl. ¶¶ 57, 65, and removing them as an obstacle that prevents Millennium from obtaining Section 401 certification for its proposed coal-export terminal, Compl. 19. The relief that Montana and Wyoming seek is thus limited to "[r]edressing" Washington's "denial of the Section 401 water quality certification" for "this project"—*i.e.*, the Millennium Bulk Terminal. Reply Br. 8; see *ibid.* (explaining that "Montana and Wyoming ask only that Washington evaluate the project without political bias and protectionist motivations").

After Montana and Wyoming filed their motion for leave to file a bill of complaint, however, Millennium and its parent company, Lighthouse, declared bankruptcy. See 19-35415 C.A. Doc. 88-3, Exs. 2-3. As part of that bankruptcy, Millennium "divest[ed]" itself of "its interest in the property involved here," which it had been leasing from the owner of the land. Stipulated Mot. to Dismiss 1-2; see 18-cv-5005 D. Ct. Doc. 130-1, at S1; 18-cv-5005 D. Ct. Doc. 351, at 2; p. 6, *supra.* Millennium has thus abandoned its proposal to build a coal-export terminal on that property. And having abandoned its proposal, Millennium no longer has any interest in the fate of its application for Section 401 certification for that project. Millennium has therefore agreed to dismissal on mootness grounds of its own suits, one of which had raised the same constitutional claims as Montana and Wyoming in challenging Washington's denial of that application. See Stipulated Mot. to Dismiss 1-2; 18-cv-5005 D. Ct. Doc. 351, at 2.

Given Millennium's "bankruptcy filing and subsequent divestment of its interest in the property involved here," Stipulated Mot. to Dismiss 1-2, Montana and Wyoming's suit similarly fails to present any Article III

case or controversy at this point. Even if this Court were to uphold Montana and Wyoming's constitutional challenge to Washington's previous denial of Section 401 certification and require Washington to reconsider Millennium's application, Millennium would still be bankrupt, would still lack any remaining interest in the property in question, and would still have abandoned its plans to build the proposed terminal. None of the relief that Montana and Wyoming seek would change the fact that there will be no Millennium Bulk Terminal—and thus no chain of causation running from an increase in coal exports to increased revenues for Montana and Wyoming from "coal severance and other taxes," Compl. ¶ 54.

Although this Court could grant Montana and Wyoming leave to file their bill of complaint, invite Washington to file a motion to dismiss, and address standing or mootness at that juncture, the Court routinely denies leave to file for lack of an Article III case or controversy. See, *e.g.*, *Texas* v. *Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (denying leave to file "for lack of standing under Article III"); *Federal Republic of Germany* v. *United States*, 526 U.S. 111, 112 (1999) (per curiam) (denying leave to file in part because "it [wa]s doubtful that Art. III, § 2, cl. 2," provided jurisdiction); *Pennsylvania* v. *New Jersey*, 426 U.S. at 664 (denying leave to file because "the defendant State" had not "inflicted any injury upon the plaintiff States"); *United States* v. *Nevada*, 412 U.S. 534, 540 (1973) (per curiam) (denying leave to file in part because "the possibility of a ripe controversy between the United States and California" was "too remote"); *Alabama* v. *United States*, 373 U.S. 545, 545 (1963) (per curiam) (denying leave to file because the "alleged adverse general effects" of the defendants'

actions "afford[ed] no basis for the granting of any relief"); *Massachusetts* v. *Missouri*, 308 U.S. at 17 (denying leave to file for lack of "a controversy in the constitutional sense"); see also *Texas* v. *California*, 141 S. Ct. 1469, 1470 n.1 (2021) (Alito, J., dissenting) (noting the Court's history of denying States leave to file "for lack of standing and on account of other justiciability defects"); cf. *New York* v. *Illinois*, 274 U.S. 488, 489-490 (1927) (striking portion of bill of complaint because the request for injunctive relief would not "rest on an actual or presently threatened interference with the rights of another").

Moreover, in deciding whether leave to file should be granted, the Court routinely considers the status of litigation in other forums for resolving the issue that a plaintiff State seeks to raise. See, *e.g.*, *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992) (explaining that the Court "explore[s] the availability of an alternative forum in which the issue tendered can be resolved" in determining whether the exercise of original jurisdiction is appropriate). As explained above, examination of other litigation involving the same proposed terminal shows that Millennium has filed for bankruptcy, that Millennium has divested itself of any interest in the property in question, and that Millennium's own suits challenging the denial of Section 401 certification—including the federal-court suit that raised the same constitutional challenge as Montana and Wyoming—have themselves been dismissed as moot. See pp. 6-7, 12, *supra*. Given those circumstances, the absence of a current Article III case or controversy is sufficiently plain to obviate the need for further proceedings. Accordingly, the Court

should deny leave to file the bill of complaint for lack of an Article III case or controversy.[2]

CONCLUSION

The motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

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[2] Mere speculation 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 would, of course, not be sufficient to establish an Article III case or controversy. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (observing that the Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient") (brackets, citation, and internal quotation marks omitted).