THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC.; LIGHTHOUSE PRODUCTS, LLC; LHR INFRASTRUCTURE, LLC; LHR COAL, LLC; and MILLENNIUM BULK TERMINALS-LONGVIEW, LLC, Plaintiff, v. JAY INSLEE, in his official capacity as Governor of the State of Washington; MAIA BELLON, in her official capacity as Director of the Washington Department of Ecology; and HILARY S. FRANZ, in her official capacity as Commissioner of Public Lands, Defendant.	No.: 3:18-cv-05005-RJB *AMICUS CURIAE* BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR ABSTENTION BY WYOMING, KANSAS, MONTANA, NEBRASKA, SOUTH DAKOTA AND UTAH NOTED ON THE MOTION CALENDAR: MAY 15, 2018

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INTRODUCTION

In 2016, the States of Wyoming and Montana generated tax revenues of just over $800 million from coal mining and coal-power generation. (*See* Aff. to Mot. for Amicus status). These revenues fund essential services to the citizens of the States, including water and highway infrastructure and education. (*Id.*). Coal is a critical source of income to the fiscal health of these two states and for the provision of basic services necessary for the health and well-being of their citizens. In addition to the specific interests of Wyoming and Montana, the additional amici states have a broad interest in ensuring that no single state can engage in a pattern of discrimination that results in control over any other state's ability to engage in a lawful activity involving interstate or foreign commerce. The Defendants' unconstitutional actions threaten these interests.

The Defendants have publicly expressed their personal antipathy to the use of coal as a fuel source. (*See, e.g.,* Compl. at ¶¶ 80-99). Defendant Governor Inslee is on record as opposing coal exports, particularly to Asia. (*Id.* at ¶ 86). The other named Defendants either share or have adopted Governor Inslee's anti-coal position. (*Id.* at ¶¶ 92-95 (Def. Bellon); 96-97 (Def. Franz)). With regard to the Millennium Bulk Terminal Port Facility, the Defendants have engaged in a pattern of discrimination to prevent Wyoming and Montana from engaging in interstate and foreign commerce. In doing so, the Defendants' have violated the Dormant Foreign and Domestic Commerce Clauses of the United States Constitution. The Defendants are interfering with the free trade of other states, something anathema to the founding principles of our nation. As Alexander Hamilton succinctly put it:

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

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The Federalist No. 22 (Alexander Hamilton).

The amici States offer this brief to assist the Court in its consideration of Defendants' argument that this Court should abstain from adjudicating the Commerce Clause claims in this suit. This Court should not abstain from considering these claims because abstention is not appropriate in dealing with Commerce Clause claims. Even if it was, the facts in this case do not satisfy the requirements under either the *Pullman* or *Colorado River* abstention doctrines. Accordingly, this Court should proceed to adjudicate the Commerce Clause claims.

BACKGROUND

I. The Millennium Bulk Terminal Coal Export Facility.

Since 2012, Lighthouse Resources, Inc., a vertically-integrated coal production, transportation, and export company, has sought to develop the Millennium Bulk Terminal Port Facility (Terminal Facility or Project) in Longview, Washington, on the Columbia River. (Compl. at ¶¶ 60-70). Lighthouse desires to transport coal it mines in Montana and Wyoming by rail to the Terminal Facility and then ship it to meet the growing demand for coal in Asia. (Compl. at ¶¶ 35-37; 45-50). The Project requires additional coal export capacity on the West Coast and, accordingly, Lighthouse has applied to obtain the necessary permits from the State of Washington to expand and develop the Terminal Facility to handle the additional coal. (Compl. at ¶¶ 51; 117; 149; 161; 173; 179).

The State of Washington has consistently denied Lighthouse's permit applications. (Compl. at ¶¶ 149-60; 161-72; 173-78; 179-83). There are currently actions related to these permit denials in state court and the Shorelines Hearing Board involving the denial by the Washington Department of Natural Resources of the transfer of a sublease for the site of the proposed Terminal Facility, the Washington Department of Ecology's denial of a Clean Water Act Section 401 certification on appeal to the Washington Pollution Control Hearings Board, and Cowlitz County's denial of a shoreline development and conditional use permit. (*See generally* Overton Decl. Exs. 4, 5, 8, and 10 attached to Def. Mot.).

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II. The Defendants' Opposition to the Millennium Bulk Terminal Port Facility.

The Defendants have a long-documented public opposition to fossil fuels, and coal in particular. (Compl. at ¶¶ 80-99; 107-10). Since the Defendants' accession to their current positions, Washington State agencies have denied *every* necessary permit for the Terminal Facility. (*Id.* at ¶¶ 121-24; 127-36; 149-59; 162-71; 176-78; 180-83). In response, Lighthouse has appealed the permit denials through the Washington state administrative and court systems. Lighthouse initiated this litigation in federal district court not to challenge the outcome of a specific permitting process, but to stop the Defendants' violation of the Dormant Foreign and Domestic Commerce Clause provisions of the United States Constitution under 42 U.S.C. § 1983. (*Id.* at ¶¶ 206-10). Specifically, Lighthouse alleges that the Defendants have discriminated against Lighthouse's project because it involves coal, thus preventing Wyoming and Montana from engaging in foreign and interstate commerce and depriving Lighthouse and its subsidiaries of an economic opportunity and prospective investment. (*Id.* at ¶¶ 225-39, 241-48).

The Defendants are not parties to any proceeding in a state court or administrative body where there is a Commerce Clause claim at issue. Further, the claim against the Defendants and the relief sought against them is distinct from that in the state-level proceedings. In the state proceedings, the issues are whether the state agencies lawfully denied various permits under various state laws. (Dkt. No. 21-1 at Ex. 4, 5, 8, 10, and 11). If the Facility prevails in the state proceedings, the remedy would be to grant the permit or to remand the matter to the permitting agency for an appropriate consideration of the permit application. By contrast, the claims in this Court rest on alleged violations of federal law and the remedy Lighthouse seeks is fundamentally different than that available in the state proceedings. Specifically, Lighthouse seeks: (1) an order reversing the Defendant's unconstitutional and illegal actions; (2) an injunction requiring the Defendants to apply the same standards to Lighthouse's permit

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applications that are applied to non-coal applications; (3) an injunction ordering that the Defendants not deny Clean Water Act Section 401 certification on a basis unrelated to the requirements of that Act; and (4) an injunction requiring the Defendants to continue to process all future and current permit applications made by Lighthouse. (*Id.* at Prayer for Relief, ¶¶ F-J).

III. Defendants' Motion for Abstention of the Commerce Clause Claims.

Defendants responded to the Complaint with a "Motion for Partial Dismissal Under Eleventh Amendment and FRCP 12(b)(6) and Motion for Abstention." The request for abstention derives from two doctrines established by the United States Supreme Court in the cases of *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), and is directed to Lighthouse's Commerce Clause claims. (Def. Mot. at 16-24). Because the Defendants do not meet the criteria for abstention, the States respectfully request that this Court deny the Motion for Abstention and adjudicate the Commerce Clause claims.

STANDARD OF REVIEW

Defendants bring their motion for abstention under Federal Rule of Civil Procedure 12(b)(6). (Def. Br. at 7). When considering an abstention request under Rule 12(b)(6), the court generally accepts as true the allegations in the complaint, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must "allege enough facts to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the [p]laintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

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Further, the Defendants' motion is a "facial" challenge to this Court's exercise of jurisdiction, not a "factual" one. "A factual challenge relies on affidavits or any other evidence properly before the court to contest the truth of the complaint's allegations." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 (9th Cir. 2014) (internal quotes and brackets omitted). The Defendants filed a Declaration from counsel identifying the concurrent state proceedings that included exhibits of related orders, notices of appeal, and other procedural filings. (Decl. of Lee Overton). The Defendants, however, do not contest the truth of any of the allegations in the Complaint. Accordingly, the factual allegations in the Complaint are true for purposes of this Court's resolution of the Defendants' motion.

ARGUMENT

Defendants assert that the parallel, state-level proceedings require this Court to abstain from ruling on Lighthouse's Commerce Clause claims. Initially, the Court should reject the Defendants' request for abstention because the Commerce Clause claims raise important federal questions that impact the economic interests of other states. Even if the abstention doctrines did apply, the Defendants have failed to establish that under the facts and circumstances of this case that either the *Pullman* or the *Colorado River* doctrine supports abstention.

I. The Commerce Clause claims are a matter of overwhelming federal interest making abstention inappropriate.

"The Commerce Clause of the United States Constitution, Article I, Section 8, prohibits states from discriminating against interstate commerce, and bars regulations that, although facially nondiscriminatory, unduly burden interstate commerce." *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Berch*, 773 F.3d 1037, 1048 (9th Cir. 2014). Abstention is not favored when sensitive federal constitutional claims are at stake. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 404 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989); *Harper v. Pub. Serv. Comm'n*, 396 F.3d 348, 355-56

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(4th Cir. 2005); *United States v. Morros*, 268 F.3d 695, 706-07 (9th Cir. 2001). The "commerce clause power itself justifies a narrower view of state interests in the abstention context." *Harper*, 396 F.3d at 357.

> The commerce power plays a role in abstention analysis quite different from many of the other provisions of the Constitution. *The dormant Commerce Clause demonstrates a difference of kind, not merely of degree. By its very nature, it implicates interstate interests. It protects all states by ensuring that no state erects the kind of barriers to trade and economic activity that threatened the survival of a fledging country* under the Articles of Confederation.
>
> Giving the power over commerce to Congress was easily seen as structurally creating an interstate interest … Our "national common market" does not allow states – even inadvertently – to impede commerce and sow disunity.
>
> When there is an overwhelming federal interest – an interest that is as much a core attribute of the national government as the list of important state interests are attributes of state sovereignty in or constitutional tradition – no state interest, for abstention purposes, can be nearly as strong at the same time[.]

Harper, 396 F.3d at 355-56 (emphasis added; internal ellipses omitted); *see also Life Partners, Inc. v. Morrison*, 484 F.3d 284, 300-01 (4th Cir. 2007) (determining that the district court did not abuse its discretion in declining to abstain on Commerce Clause claim); *Daniels Sharpsmart, Inc. v. Smith*, No. 1:17-cv-403-LJO-SAB, 2017 U.S. Dist. LEXIS 90840, at *11-20 (E.D. Cal. June 13, 2017) (finding that abstention on a Commerce Clause claim is generally inappropriate under any of the recognized abstention doctrines).

The Defendants' illegal actions have violated the United States Constitution and adversely impacted the economic and fiscal interests of states that seek to export commodities to foreign markets. The Defendants are trying to force on other states their policy preferences regarding the use of coal as a source of fuel, and thus, they are impeding the free flow of commerce. Today it is coal, tomorrow it could be natural gas or non-organic produce. The interests of interior states in developing foreign trade are now subject to the barriers erected by the policy whims of states that control access to international markets through their ports.

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This is *clearly* a matter of "overwhelming federal interest" that is crucial to the trade and economic activity of this nation, and there is no state interest, for purposes of abstention, that is comparable. Indeed, the Defendants cannot explain how a decision in any of the state proceedings would prevent them from continuing to engage in actions improper under the Commerce Clause.

Consequently, this Court should not engage in an assessment of the different factors of either the *Pullman* or the *Colorado River* doctrines, as abstention on a Commerce Claim is inappropriate under both in these circumstances. Instead, the Court should hear Lighthouse's claims under the Commerce Clause on the merits.

II. Abstention is not proper under the *Pullman* doctrine.

In *Pullman*, the United States Supreme Court counseled "abstention by federal courts in order to avoid decisions of federal constitutional questions when the case may be disposed of on questions of state law." Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be With Us – Get Over It!*, 36 Creighton L. Rev. 375, 388 (2003). "*Pullman* abstention 'is an extraordinary and narrow exception to the duty of a [d]istrict [c]ourt to adjudicate a controversy' that is properly before it." *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003) (quoting *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974)). A court should give a plaintiff's choice of a federal forum for hearing and adjudication of their federal constitutional claims "due respect" and "*Pullman* abstention should rarely be applied." *Porter*, 319 F.3d at 492 (citing *Zwickler v. Koota*, 389 U.S. 241, 248 (1967)).

Pullman abstention is appropriate only if three mandatory criteria are established: "(1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3)

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the proper resolution of the possible determinative issue of state law is uncertain." *Courthouse News Serv.*, 750 F.3d at 783-84 (quoting *Porter*, 319 F.3d at 492)).

None of these criteria are satisfied here. This case does not involve "a sensitive area of social policy" which has been defined to include "land use planning, landlord-tenant relationships, foreclosure policy, and death penalty procedures." *Daniels*, 2017 U.S. Dist. LEXIS 90840, at *15, n.11 (listing cases). The Defendants characterize this as a land use case. (Def. Mot. at 17). This is incorrect. This is actually a Commerce Clause claim under the United States Constitution. The premise of this case is that the Defendants used their official positions to interfere with the permitting **process**. There is no constitutional challenge to the validity of Washington's rules and laws governing the issuance of permits for projects like the Terminal Facility. The dispute does not touch on Washington's sovereign authority to regulate its lands, protect its environment, and the health and safety of its citizens. The dispute is that the Washington officials charged with enforcing those laws manipulated or simply ignored them in pursuit of their predetermined, personal agenda to block the export of coal through the State of Washington. Since a Commerce Clause challenge to the propriety of an administrative process is not "a sensitive area of social policy[,]" this alone makes *Pullman* abstention inappropriate in this case.

Moreover, Defendants fail to satisfy the second and third criteria. The second criterion asks whether a "constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy[.]" *Porter*, 319 F.3d at 492. The Defendants assume that the mere existence of related parallel claims in concurrent state proceedings is a sufficient basis for the federal court to abstain from addressing an important federal constitutional claim. (Def. Mot. at 18). In a series of conclusory statements, Defendants maintain that resolution of state law claims relating to the denied permits "would likely moot the constitutional challenges." (*Id*). The Commerce Clause claims derive from the Defendants' improper and extra-constitutional actions to block the transportation of coal across

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Washington's border for export into foreign commerce. Defendants do not address how resolution of the state law issues would resolve the federal constitutional claim or prevent the Defendants from continuing to advance their anti-coal agenda through impermissible actions in future proceedings. A definite resolution of the state law claims would not necessarily avoid a constitutional adjudication and, therefore, the second criterion does not support abstention.

The third criterion crystalizes the difficulty with the Defendants' request for abstention: "[T]he proper resolution of the possible determinative issue of state law is uncertain[.]" *Porter*, 319 F.3d at 492. "Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971). Defendant has not identified "an **unsettled** issue of state or local law that would be determinative of the federal claims." *Hancock v. City of Ridgefield*, No. C09-5580BHS, 2009 U.S. Dist. LEXIS 117948, at *6 (W.D. Wash. 2009) (emphasis added); (*See* Def. Mot. at 16-24 (no state or local law has been identified)); *see also Cingular Wireless, LLC v. Thurston Cty.*, 150 F. App'x 633, 635-36 (9th Cir. 2005) (finding that *Pullman* abstention is not appropriate absent "an unsettled area of state law"). Defendants do not identify any "unclear" or "unsettled" state law and, accordingly, they have not met the third criterion necessary for *Pullman* abstention.

III. Abstention is not proper under the *Colorado River* doctrine.

The Defendants also argue that this Court should abstain from determining the Commerce Clause claim under the Supreme Court's decision in *Colorado River*, but "[g]enerally, as between state and federal courts, the rule is that 'pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction[.]" *Colo. River*, 424 U.S. at 817 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). "Only in rare cases will 'the presence of a concurrent state proceeding' permit the district court to dismiss a concurrent federal suit 'for reasons of wise judicial administration.'"

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R.R. St. & Co. v. Transp. Ins. Co., 656 F.3d 966, 977-78 (9th Cir. 2011) (quoting *Colo. River*, 424 U.S. at 818)).

In *Colorado River*, the federal government brought a federal court action against various water users seeking a declaration of rights on the Colorado River and several tributaries. *Colorado River*, 424 U.S. at 805. Colorado had already established water districts to adjudicate water rights in state courts. *Id.* at 804. The federal district court dismissed the action in deference to the state court proceedings. *Id.* at 806. The Supreme Court affirmed, stressing, in particular, the "highly interdependent" relationship between the claims in the two courts and federal policy, embodied in law, of avoiding the piecemeal adjudication of water rights. *Id.* at 819-20; *see also R.R. St. & Co.*, 656 F.3d at 978.

Given the factual context of this case, the *Colorado River* abstention doctrine is not applicable because "*Colorado River* was a state law case that the Government sought to have federally adjudicated … [t]his case is the converse: a federal law case that the state seeks to have adjudicated in state court." *Morros*, 268 F.3d at 707. This case does not present a situation where "there is evidence of a strong federal policy that all claims should be tried in the state courts." *Morros*, 268 F.3d at 706-07. The federal adjudication of the Commerce Clause claims would not reach into an area of concern specific to the state; rather, it concerns an area of particular concern to the federal government: interstate commerce. Therefore, this is not a "rare" or "exceptional" case that calls for the federal court to abstain from adjudicating federal claims, and this Court should proceed to adjudicate the Commerce Clause claims. *See Daniels Sharpsmart*, 2017 U.S. Dist. LEXIS 90840, at *14-15 ("This case is premised on [a] claim, brought under a federal statute, that [d]efendants violated the Commerce Clause, a provision of the federal constitution. … Consequently, *Colorado River* abstention has no applicability here.") (citations and quotation marks omitted).

Considering the substance of the Defendants' motion also leads to the conclusion that abstention is not appropriate under the circumstances. To determine whether the federal case

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presents the "exceptional circumstances" justifying abstention under *Colorado River*, "the district court must carefully consider 'both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise.'" *R.R. St. & Co.*, 656 F.3d at 978 (quoting *Colo. River*, 424 U.S. at 818). The Ninth Circuit applies eight factors for assessing the appropriateness of a *Colorado River* stay or dismissal:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

R.R. St. & Co., 656 F.3d at 978-79. Defendants conclude that factors 3, 4, 6, 7, and 8 weight in favor abstention. But neither these five factors, nor the other three, weigh in favor of abstention.

The *Colorado River* court was primarily concerned with avoiding piecemeal litigation. *Morros*, 268 F.3d at 706-07 (quoting *Colo. River*, 424 U.S. at 819). "Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results … [t]he mere possibility of piecemeal litigation does not constitute an exceptional circumstance." *R.R. St. & Co.*, 656 F.3d at 979 (internal quotations and citations omitted).

> *Colorado River* does not say that every time it is possible for a state court to obviate the need for federal review by deciding factual issues in a particular way, the federal court should abstain. As the Supreme Court has observed, such a holding would "make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." Rather, *Colorado River* stands for the proposition that when Congress has passed a law expressing a preference for unified state adjudication, courts should respect that preference. As the Third Circuit astutely observed, "it is evident that the avoidance of piecemeal litigation factor is met, as it was in … *Colorado River* itself, only when there is evidence of a strong federal policy that all claims should be tried in the state courts.

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Morros, 268 F.3d at 706-07 (footnotes and internal quotation marks omitted). This case offers only the mere possibility of piecemeal litigation. There is no identified federal policy favoring the adjudication in the state courts of constitutional claims of state official misconduct in administrative permitting.[1] This factor strongly favors this Court exercising its jurisdiction to adjudicate these claims.

The fourth factor is the order in which jurisdiction was obtained. The Defendants admit the measure of the weight given to this factor does not depend on whether the state was the first to exercise jurisdiction. (Def. Mot. at 22). Indeed, "[t]he mere existence of a case on the state docket in no way causes a substantial waste of judicial resources nor imposes a burden on the defendant which would justify abstention." *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1370 (9th Cir. 1990). Further, abstention is particularly inappropriate when the federal proceeding, like this case, is brought under 42 U.S.C. § 1983. *See Daniels Sharpsmart*, 2017 U.S. Dist. LEXIS 90840, at *19-20; *see also Pue v. Sillas*, 632 F.2d 74, 77 n.4 (9th Cir. 1980).

Defendants acknowledge the progress of the state proceedings but do not offer any analysis of how that progress affects the federal litigation. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983) (stating that *Colorado River* abstention contemplates that "the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues … [i]f there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all"). A recitation of the progress of the state court proceedings tells us nothing about the adequacy of that vehicle to completely and promptly resolve those claims; nor does it address the consequences of this action being filed under 42 U.S.C. § 1983. Thus, this factor does not support abstention.

[1] For example, the Washington Shorelines Hearings Board's enabling statutes and administrative rules do not provide that body with jurisdiction to consider federal constitutional questions. See RCW 90.58 et seq., and WAC 461-8-315.

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Applying the sixth factor, courts are to ask whether the state court proceedings can adequately protect the rights of the federal litigants. Defendants interpret this to mean that so long as the state courts are competent to hear federal constitutional claims, then the factor weighs in favor of abstention. (Def. Mot. at 21). Defendants misinterpret the nature of the factor. The Ninth Circuit "has not applied this factor against the exercise of federal jurisdiction, only in favor of it." *Travelers*, 914 F.2d at 1370. "This factor, like choice of law, is more important when it weighs in favor of federal jurisdiction." *Id.* (quoting *Bethlehem Contracting Co. v. Lehrer/McGovern, Inc.*, 800 F.2d 325, 328 (2d Cir. 1986); *see also R.R. St. & Co.*, 656 F.3d at 981. This factor is of no value to the Defendants' argument because to the extent the courts consider the factor, it is **only** to determine whether it weighs in favor of federal jurisdiction, not against it. So, even if a party advocating abstention can show that the state tribunal can protect the rights of the federal plaintiff, this factor is merely eliminated from consideration; it lacks any weight. By asking this Court to weigh this factor in favor of abstention, Defendants err.

The seventh factor addresses concerns over forum shopping. Naturally, the Defendants argue that this factor weighs in favor abstention because Lighthouse, allegedly, did not focus "its efforts in the forum that it deems most favorable, [but] has flung its claims across as many forums as possible in the hopes of finding a single sympathetic one … [with] [t]he result [being] vexatious litigation in which [Lighthouse] seeks to litigate five lawsuits simultaneously." (Def. Mot. at 24).

"In the *Colorado River* context, this Circuit has held that forum shopping weighs in favor of a stay when the party opposing the stay seeks to avoid adverse rulings made by the state court or to gain a tactical advantage from the application of federal court rules." *Travelers*, 914 F.2d at 1371. Defendants do not identify any adverse state court ruling Lighthouse is seeking to avoid or how the federal court rules could give Lighthouse a tactical advantage in this litigation. Further, that there are on-going state lawsuits has more to do with the fractured

permitting process employed by the State of Washington than it does with any conscious choice by Lighthouse to seek out advantageous forums or to create vexatious litigation. Unless the Defendants are advocating that a party must give up certain due process rights to appeal adverse state rulings before filing an action in federal court, there is no evidence of forum shopping.

The final factor the Defendants contend weighs in favor of abstention is the eighth one in which this court should ask whether the state court proceedings will resolve all issues before it. Defendants argue that all they need show is that the state courts can adequately protect the rights of the litigants in the federal case for this factor to favor abstention. (Def. Mot. at 20-21). But this factor favors abstention when the parallel state court proceeding will "ensure comprehensive disposition of litigation … [o]therwise, a stay or dismissal will neither conserve judicial resources nor prevent duplicative litigation." *R.R. St. & Co.*, 656 F.3d at 982-83. Defendants' argument on this factor rests solely on the existence of parallel state proceedings. There is no analysis of whether the state court proceedings will "ensure [a] **comprehensive** disposition of [the] litigation." Accordingly, this factor is of little weight.

The ultimate "decision whether to dismiss a federal action because of parallel state-court litigation hinges on a careful balancing of the [relevant] factors … with the balance heavily weighted in favor of the exercise of jurisdiction." *R.R. St. & Co.*, 656 F.3d at 983 (quoting *Moses H. Cone*, 460 U.S. at 16). In this case, the balance weighs overwhelmingly in favor of this Court exercising jurisdiction.

I. CONCLUSION

The Defendants failed to meet their burden to show that the Commerce Clause claims set forth in Lighthouse's Complaint are of the rare and extraordinary type that would support abstention. Accordingly, *amicus curiae* the States of Wyoming, Kansas, Montana, Nebraska, South Dakota, and Utah respectfully request that this Court deny the Motion for Abstention and proceed to adjudicate the Commerce Clause claims.

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DATED: May 8, 2018

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 8th day of May, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel on record in the matter.

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