The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

LIGHTHOUSE RESOURCES INC.; LIGHTHOUSE PRODUCTS, LLC; LHR INFRASTRUCTURE, LLC; LHR COAL, LLC; and MILLENNIUM BULK TERMINALS-LONGVIEW, LLC, Plaintiffs, 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, Defendants.	NO. 3:18-cv-5005-RJB BRIEF OF THE NATIONAL MINING ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN FARM BUREAU FEDERATION, AND AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS AS *AMICI CURIAE* IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL DISMISSAL AND ABSTENTION NOTE ON MOTION CALENDAR: MAY 15, 2018

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INTEREST OF THE *AMICI CURIAE*

The National Mining Association (NMA) 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 (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. It is headquartered in the District of Columbia. Through its state and county Farm Bureau organizations, AFBF represents about 6 million member families in all 50 states and Puerto Rico.

The American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM's members supply consumers with a wide variety of products that are used daily in homes and businesses. They also rely on a secure, uninterrupted, and plentiful supply of raw materials to produce products that are consumed both here and abroad.

Amici have a significant interest in this case because Washington's actions to block construction of a new coal export facility at the Millennium Bulk Terminal threaten the United

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States' energy economy and will set a harmful precedent that encourages other states to interfere with national trade policy that they oppose, in violation of the Constitution's command that the federal government be the sole representative of the nation in trade and foreign affairs. Denial of relief would, moreover, open the floodgates to local obstruction of national foreign policy initiatives with which coastal states disagree.[1]

INTRODUCTION

Defendants in this case—local policymakers in the State of Washington—have steadfastly refused to allow construction of a coal export facility at the Millennium Bulk Terminal near the Port of Longview. They have done so not to protect legitimate local interests, but because they oppose the use of coal as an energy source throughout the world. There is nothing local about it. Their avowed goal is, in other words, to inhibit the exportation of American coal and to slow its consumption in global markets.

In attempting to control American foreign policy in this way, Defendants have overstepped the constitutional limitations on their authority. The Constitution allocates exclusive authority over international trade to the federal government alone. And it does so for good reason: International trade not only impacts the economy of the entire nation, but it is a critical tool—both a carrot and stick—in the executive's dealings with foreign allies and adversaries alike. The common-sense corollary of the Constitution's allocation of exclusive authority to the federal government over foreign commerce, moreover, is its denial of that authority to the states, which may not regulate in ways that either interfere with the uniformity of federal policy regarding foreign trade or impose burdens on foreign trade that outweigh local benefits.

Defendants' actions here violate both of those proscriptions. *First*, their attempts to block construction of a major export facility have undeniably undermined the uniformity of federal trade policy, which is to encourage the export of coal, both for the benefit of American producers

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

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(who rely on exports for billions of dollars in job-creating income) and of the United States' allies in Asia (who rely on American exports as a critical source of energy). *Second*, Defendants' actions fail the Commerce Clause's so-called *Pike* balancing test because there is no appreciable local benefit of their conduct. Rather, defendants are overtly promoting their own, preferred international-level environmental policy interests in preventing the use of coal for energy.

This Court should deny the pending motion and enjoin Defendants' attempts to obstruct the federal government's policy of encouraging energy exports. To do otherwise would be an invitation to states across the country to begin legislating their own foreign policy, in flat contradiction of the Framers' plans and Supreme Court's teachings and disrupting national and international trade policies of all sorts.

ARGUMENT

I. State Interference With Foreign Trade Undermines a Uniform Foreign Policy and Is Harmful to the National Economy.

A. Trade Plays an Important Role in America's Foreign Policy.

International trade is the lifeblood of the American economy. As the world's largest exporter and importer of goods and services (*see* Office of the U.S. Trade Rep., *Benefits of Trade*, perma.cc/4UP6-TUW7), the United States depends on trade relationships and trade facilities to help American goods find their ways to buyers around the world and to bring critical resources and investment to the United States. As of 2013, America's exports of goods supported nearly 5,600 jobs per $1 billion exported, including an estimated 25% of all manufacturing jobs. *Id*. These benefits enrich Americans in every industry across the country.

The United States' abundant energy resources are critical to the country's export trade. Energy exports have accounted for a "substantial part" of U.S. economic growth in recent years, contributing approximately 10% of the nation's annual real GDP growth from 2006 to 2013. *See* Craig S. Hakkio & Jun Nie, Fed. Reserve Bank of Kansas City, *Implications of Recent U.S. Energy Trends for Trade Forecasts* 5, perma.cc/V3FC-24W8; Bureau of Econ. Analysis, *Gross Domestic Product: Percent change from preceding period*, perma.cc/8WJR-MBYZ. American

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energy exports have been fueled in no small part by a growth in coal exports, which grew by 68% between 2016 and 2017 alone. *See* U.S. Energy Information Admin., *U.S. Coal Exports*, perma.cc/E4GA-KTKG. For every million short tons of U.S. coal exported, an estimated 1,320 jobs are created, and expenditures on downstream transportation services related to coal exports supported another 8,850 jobs at transportation companies in 2011. Ernst & Young, *U.S. Coal Exports: National and State Economic Contributions* at i-ii (May 2013), perma.cc/6VE6-AKPL.

It is no surprise, therefore, that the proposed coal export facility at the Millennium Bulk Terminal would be a substantial economic boon to several states and, indirectly, to the rest of the country. The increased coal exports made possible by the new facility would generate more than one hundred million dollars in tax revenue for Washington State and its localities (Compl. ¶ 73); millions of dollars in new revenue for Montana and Wyoming (*id.* ¶¶ 76-77); and support thousands of jobs in those states and around the country (*id.* ¶¶ 72, 75). Benefits such as these are the reason why Congress has made it a national priority for more than two decades to increase exports of American-mined coal and directed the Commerce Department to prepare plans for encouraging these exports. *See* 42 U.S.C. § 13367(a).

In addition to its economic benefits, America's international trade is also 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 United States can strengthen the community of democratic nations economically and foster ties of cooperation and respect between those nations and the United States.

The current administration has made energy exports a key foreign policy focus. The administration's 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 (*see Concerning the Federal Coal Moratorium*, Order No. 3348 (Mar. 29, 2017), perma.cc/HZW5-3RYU), with the express goal of "assist[ing] our allies with their energy needs." Press Release, U.S. Dep't of Interior, *Secretary Zinke Takes Immediate Action to*

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Advance American Energy Independence (Mar. 29, 2017), perma.cc/F5NH-PK6L *See also* Compl. ¶¶ 192-205. These energy exports are critically needed in Asia, where allies such as Japan and South Korea have strong demand for American energy. *See, e.g.*, Qinnan Zhou, *The U.S. Energy Pivot: A New Era for Energy Security in Asia?*, Woodrow Wilson Int't Center for Scholars New Security Beat (Mar. 26, 2015), perma.cc/5CXZ-LNKT. And in order to reach Asian markets, coal producers must have access to export facilities on the West Coast—which is why the administration's current National Security Strategy states that it is critical for the United States to give "continued support of private sector development of coastal terminals" for energy exports. Office of the President, *National Security Strategy of the United States of America* 23 (Dec. 2017), perma.cc/QLU5-WR4J.

Yet the implications of Defendants' conduct reach far beyond the energy industry. 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 (*see* Office of the U.S. Trade Rep., *2018 Fact Sheet: USTR Success Stories: Opening Markets for U.S. Agricultural Exports*, perma.cc/G8WF-U8DY); and the manufacturing sector, which produced $1.2 trillion in exports in 2016 (*see* Nat'l Ass'n of Mfrs., *United States Manufacturing Facts* 2, perma.cc/U8AV-NGVT). Each of these trade-reliant industries makes critical contributions to the American economy and to relationships with America's trading partners, and the United States has a strong interest in ensuring that exports in these sectors remain strong.

B. State Interference Impedes Federal Efforts to Establish and Implement Foreign Trade Policy.

Against this backdrop, it is not difficult to see how and why interference like Defendants' undermines the federal government's plenary control over the nation's trade policy.

"Foreign commerce," as the Supreme Court has repeatedly recognized, "is pre-eminently a matter of national concern." *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 448 (1979). "In international relations and with respect to foreign intercourse and trade, the people of the

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United States act through a single government with unified and adequate national power." *Bd. of Trustees v. United States*, 289 U.S. 48, 59 (1933). The rationale for this approach is self-evident: The federal government, which comprises members from every state and an executive elected by the nation as a whole, is best positioned to balance the interests of different states and regions and to balance domestic goals with foreign policy objectives. The Constitution's design reflects this clear preference for federal policymaking in the realm of foreign trade. And while it grants Congress power to regulate *both* domestic *and* foreign commerce, "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater" of the two. *Japan Line*, 441 U.S. at 448 & n.12 (collecting authorities).

Yet it would be impossible for the federal government to speak with one voice on behalf of the nation in foreign affairs and international trade if individual states could adopt their own policies that contradict or otherwise interfere with federal policy. When states attempt to influence international affairs through their own regulatory efforts and pursuing their own local agendas, they at best create legal uncertainty and burdens for international partners. At worst, they frustrate the federal government's efforts to implement its foreign policy altogether—just as the state of Washington has sought here to do.

II. Vigorous Enforcement of the Commerce Clause Is Essential to the Executive's Exclusive Foreign Policy Prerogatives.

To prevent states from interfering with federal trade policy, the Commerce Clause (which entrusts Congress with power to regulate foreign and interstate trade) has been held to preclude state regulation that discriminates against or burdens foreign commerce. Washington's actions, which run afoul of that prohibition, demonstrate the importance of vigorous enforcement of the Constitution's exclusive commitment of the foreign commerce power to the federal government.

A. The Foreign Commerce Clause Prohibits States From Impairing Federal Policy Uniformity in Foreign Commerce, or Imposing Burdens on Foreign Commerce That Outweigh Any Local Benefit.

The Supreme Court has "held on countless occasions that, even in the absence of specific action taken by the Federal Government to disapprove of state regulation implicating interstate

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or foreign commerce, state regulation that is contrary to the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States, may be invalid under the unexercised Commerce Clause." *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7-8 (1986).

In its domestic-trade dormant Commerce Clause cases, "[t]he Supreme Court 'has adopted . . . a two-tiered approach to analyzing state economic regulations under the Commerce Clause.'" *Pharm. Research & Mfrs. of Am. v. Cnty. of Alameda*, 7f68 F.3d 1037, 1039-40 (9th Cir. 2014) (quoting *Brown–Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986)). First, when a state law discriminates against interstate or foreign commerce by treating in-state or in-country economic interests better than out-of-state or out-of-country economic interests, the law "is virtually *per se* invalid." *Or. Waste Sys., Inc. v. Dep't of Envtl. 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 only if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* (quotations omitted).

Courts often rely on this general framework to resolve dormant Commerce Clause cases involving international trade as well. *See, e.g., Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 81-82 (1992) (relying on interstate Commerce Clause decisions). However, it is well understood that the prohibitory power of the Commerce Clause is especially strong in the context of foreign commerce, 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) (internal quotation marks omitted). Thus, "the constitutional prohibition" against state regulation of foreign commerce is even "broader than the protection afforded to interstate commerce" because "matters of concern to the entire Nation are implicated." *Kraft Gen. Foods*, 505 U.S. at 79; *accord, e.g., Piazza's Seafood World, LLC v. Odom*,

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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").

For these reasons, and in light of the importance of uniform federal regulation in the area of foreign affairs, "a more extensive constitutional inquiry is required" to decide a dormant Commerce Clause challenge involving foreign commerce. *Japan Line*, 441 U.S. at 446. As the Ninth Circuit has put it, "when state regulations affect foreign commerce, additional scrutiny is necessary to determine whether the regulations 'may impair uniformity in an area where federal uniformity is essential,' or may implicate 'matters of concern to the whole nation . . . such as the potential for international retaliation.'" *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1014 (9th Cir. 1994) (quoting *Japan Line*, 441 U.S. at 448, and *Kraft Gen. Foods*, 505 U.S. at 79). *Accord, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-21, at 469 (2d ed. 1988) ("If state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce.").

According to this more demanding standard, a court must ask additionally whether a state 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 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. That is so regardless of local benefit. *Kraft Gen. Foods*, 505 U.S. at 79.

B. Defendants' Conduct Violates These Principles.

The burden on foreign commerce from Washington's attempts to block development of the coal export facility at the Millennium Bulk Terminal far outweighs any benefit to the state. But the Court need not engage in any weighing of burdens and benefits because the resulting

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disruption of the uniform federal policy in favor of exporting American energy is an amply sufficient basis for finding a Foreign Commerce Clause violation here.

1. Defendants' Actions Interfere With the Uniformity of Federal Policy.

The question whether the United States should export coal—or any other good or commodity—and in what amounts, is one that squarely falls within the purview of the federal government. *Japan Line*, 441 U.S. at 448. As described above (at 3-5), 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 allies in Asia.

Washington's actions regarding the coal export facility at the Millennium Bulk Terminal threaten to undermine this uniform federal policy. Geography dictates that, in order to export coal to Asia from Montana and Wyoming (or, indeed, most anywhere in the United States), a coal producer must have access to export facilities on the West Coast, including in Washington. But Washington has sought to block development of any such facility in its jurisdiction—and worse, it has coordinated with other West Coast states to bring them along in this scheme, effectively closing the nation's west coast to the exportation of coal. *See* Compl. ¶¶ 100-16. If these efforts are successful, it will frustrate U.S. energy and trade policy by restricting the ability to export coal to Asia. If allowed to stand, Washington's conduct will effectively have set the coal exportation policy for the entire Nation.

This kind of direct interference with an express federal policy unquestionably 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.*, *Nat'l 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 unconstitu-

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tional, *a fortiori* Washington's overt attempt to undermine the federal government's export policy is as well.

2. Defendants' Actions Impose Burdens That Far Outweigh Any Local Benefits.

Even under the more permissive *Pike* balancing test that applies to state actions under the domestic Commerce Clause analysis, Washington's attempt to block development of Plaintiffs' coal export facility is unconstitutional. *See, e.g.*, *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007). Whatever benefit accrues to Washington from denying these benefits is slight, and the cost to the rest of the country is massive.

Washington's refusal to permit the development of the export facility at the Millennium Bulk Terminal is blocking as much as $2.5 *billion* per year in coal trade—an amount that could provide significant benefits to the American economy and put a sizable dent in America's trade deficits with Asian nations. Compl. ¶ 78. This commerce would also provide substantial benefits to the economies of the states where the coal is produced—supporting local jobs and services in these states and communities. *Id.* ¶¶ 75-77. There currently is insufficient port capacity on the West Coast to allow export of sufficient coal to meet our Asian allies' demands. The proposed terminal would add capacity and open a vastly larger volume of commerce. But Washington is unilaterally blocking this development, imposing an enormous burden on foreign trade. In this way, Defendants are leveraging Washington's position on the coast to set energy and trade policy for the entire nation.[2]

Defendants would have to establish overwhelming local benefits to overcome the enormous costs of this interference on the national economy and withstand Plaintiffs' Commerce Clause challenge—and they 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,

[2] This impact on coal and energy trade, moreover, is just the tip of the iceberg, as a decision upholding Washington's actions would permit it to restrict other exports as well.

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where the facility would be located. Compl. ¶¶ 72-74. Defendants' willingness to forgo these benefits and block development of the terminal lays bare their true motivation, which is an ideological opposition to coal exports in general, not a desire to benefit Washington specifically.

To be sure, some of Defendants' actions rested on purported environmental concerns about the project. But none of the environmental concerns raised had anything to do with *Washington*'s environment or natural resources; rather, they concerned the projected *global* effects of consuming the coal that would be exported through the Millennium Bulk Terminal facility. *See, e.g.*, Compl. ¶ 124. Those concerns cannot satisfy the Commerce Clause inquiry, which looks only to "the benefits of a state or local practice," not to a state's desire to regulate national or international matters. *See, e.g.*, *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008).

Defendants' rationale underlying the denial of a certification under Section 401 of the Clean Water Act (33 U.S.C. § 1341) exemplifies the lack of local interests at stake here and—if allowed to stand—would pave the way for all kinds of obstructive conduct in violation of the Commerce Clause. Through the Clean Water Act, Congress sought to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate [water] pollution" (33 U.S.C. § 1251(b)), and Section 401 was "[o]ne of the primary mechanisms" by which it set out to achieve that goal. *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991). Congress's intent in Section 401 was "to give the states veto power over the grant of federal permit authority for activities potentially *affecting a state's water quality*" (*United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989) (emphasis added)), preserving their role as the "prime bulwark in the effort to abate water pollution." *See United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir.1983).

Under Section 401, 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). Here, however, the denial of plaintiffs'

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application for certification for the coal export facility had nothing to do with the water quality provisions of the Act, or indeed with water quality issues at all. Nor could it have. The environmental impact statement for the project prepared pursuant to Washington's State Environmental Policy Act ("SEPA") found that there would *not* be any adverse effects on water quality from the facility. Compl. ¶ 164. Instead, the denial rested on out-of-state environmental impacts from transporting the coal before and after export. This use of the Section 401 process to pursue interests that have nothing to do with water quality demonstrates that Defendants were not pursuing any putative "local benefit" when they blocked development of the export facility.

Perhaps more importantly, the implications of allowing states to hijack Section 401 for purposes unrelated to water quality would be disruptive to numerous sectors of the economy. If Washington can prohibit the export of coal by way of Section 401 permitting, states all across the country could similarly restrict domestic and foreign trade. After all, 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." *See Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality opinion). Section 401 state 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 the vast majority of agricultural projects. *See* U.S. Army Corps of Eng'rs, *Permit Requirements for the State of Illinois* 1, perma.cc/6T6W-E5YM.

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This kind of political gamesmanship is not what Congress contemplated when it granted states the authority to review proposed projects for water quality issues in Section 401.[3]

It also bears emphasis that Defendants have treated the Millennium Bulk Terminal facility differently from other port development projects proposed during the same time period. Plaintiffs allege that Washington supported development of several other export facilities in the state and that the only salient difference between those facilities and the proposed coal export facility is that the latter involves coal and the others did not. Compl. ¶¶ 138-48. Defendants therefore cannot deny that their true intent—and the actual effect of their conduct—is to unilaterally 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. Dismissing the Case Would Give States a Green Light to Interfere With Foreign Trade Policy in Other Contexts.

As discussed above, there is more at stake here than just the export of coal to Asia, although that alone is a serious enough issue to warrant relief.

In light of the widespread polarization of the American electorate, many state governments themselves have assumed polarized political characters. Whereas the bodies politic and state governments in California, Oregon, Maryland, and New Mexico are known to lean strongly in favor of liberal foreign policy and trade policy, for example, those in states like South Carolina, Texas, Montana, and Alaska are known to lean strongly in the other direction. *See* Jeffrey M. Jones, Gallup, *Red States Outnumber Blue for First Time in Gallup Tracking* (Feb. 3, 2016), perma.cc/K35X-BBKE; Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not*

[3] Declining to invalidate Defendants' conduct here would have implications beyond offense to the dormant Commerce Clause. If a state with an ideological axe to grind can use a Section 401 certification to upend federal control over foreign affairs, so too can it use Section 401 certifications to interfere with *any* conduct by *any* industry it disapproves of. States whose officials disapprove of certain farming operations might use Section 401 to block construction of animal feedlots or other agricultural operations. Likewise, state officials who disapprove of infrastructure development or large-scale factories might deny Section 401 certification to new projects when they are proposed on lands subject to the Clean Water Act.

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Ideology: A Social Identity Perspective on Polarization, 76 Pub. Opinion Q. 405, 412-15 (2012); Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 Electoral Stud. 12 (2016).

Each of these states controls, to some degree, American export trade with our foreign allies, including Mexico and Canada and those in Asia and Europe. If the Court allows Defendants' obstructionist conduct in this case to stand, it will serve as an open invitation to states like these to use their geographic leverage over international trade to obstruct any administration with whose policies they disagree. This is not a one-way ratchet; just as Republican administrations can expect obstruction from Democratic-leaning states, Democratic administrations can expect obstruction from Republican-leaning states.

The results would be disastrous for American foreign trade policy and a clear offense to the nation's federalist scheme. California could deny port access and refuse to permit new port facilities for agricultural exports if it disagrees with the manner in which livestock are raised. *Cf. Missouri v. California*, No. 22-O-148 (S. Ct. filed Dec. 7, 2017) (Missouri has sued California, challenging California's efforts to limit the sale of non-cage-free eggs within California). Conversely, South Carolina could refuse port access or to permit new port facilities for handing exports of manufactured goods if it disagrees with liberal immigration policies that ensure sufficient labor supply needed to make those goods. *Cf. United States v. California*, No. 18-cv-490 (E.D. Cal. filed Mar. 6, 2018) (United States' suit against California concerning immigration policy). And because virtually all international trade is bilateral, these states likewise could attempt to obstruct the importation of such goods from our foreign allies based on other policy objections. Worse still, states like Texas, New Mexico, and Montana could attempt to override in practice the prevailing administration's uniform federal policies concerning free trade (or not) with Mexico and Canada.

It was precisely to prevent such intrastate meddling in foreign trade policy that the Framers of the Constitution saw fit to allocate exclusive authority over international trade and

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foreign policy to the federal government. Washington's conduct in this case is inconsistent with that constitutional framework. In this case, it is coal; in the next case, it could be agriculture or manufactured goods. This Court should not tolerate Defendants' efforts to assume for themselves the unilateral power to set aside the federal government's judgments with respect to international trade in coal resources, just as it should not tolerate similar conduct in related contexts.

CONCLUSION

The Court should deny Defendants' motion for partial dismissal and abstention.

DATED this 18th day of May, 2018.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 18th 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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