No. 22O152

In the Supreme Court of the United States

STATE OF MONTANA & STATE OF WYOMING,
Plaintiffs,

v.

STATE OF WASHINGTON,
Defendant.

On Motion for Leave to File Bill of Complaint

BRIEF OF KENTUCKY, ALASKA, ARKANSAS, INDIANA, KANSAS, MISSISSIPPI, MISSOURI, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PLAINTIFFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*[1]

This case asks whether a state may restrict the interstate flow of a particular good through its borders. Today, that good is coal. Tomorrow, it will be something else. Regardless of the good at issue, the *amici* States have a profound interest in ensuring that the goods produced by their citizens make it to the markets that demand them.

To protect this interest, our Framers created a system of "interdependence" between and among the states on matters of interstate commerce. *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949). As such, the Constitution limits a state's ability to restrict the interstate flow of goods going through its borders. A state that disregards this limitation threatens not only the sovereignty of the *amici* States, but also the livelihood of many of their citizens.

This is particularly true where, as here, one state has used its unique access to a channel of commerce to create what amounts to a de facto embargo on the interstate shipment of a particular good. Each state has access to different channels of commerce. Some states have key ports. Others do not, but instead have important highways or an ideally located airport. In light of this geographic diversity, the *amici* States have an interest in ensuring that no state uses its access to a particular channel of commerce to restrict the interstate flow of goods from other states.

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[1] *Amici* States have notified counsel for all parties of their intention to file this brief. Sup. Ct. Rules 37.2(a), 37.4.

SUMMARY OF THE ARGUMENT

Trade disputes between the states led the Framers to include the Commerce Clause in the Constitution. As relevant here, prior to the adoption of the Constitution, coastal states with ports used this geographic advantage to restrict the free flow of goods involving their neighboring states. This is little different than Washington's refusal to allow coal from Montana and Wyoming to pass through its borders.[2]

As a doctrinal matter, this case implicates the core protections of the dormant Commerce Clause in two respects. First, there is direct evidence that Washington refused to allow a coal-shipment terminal to be built in part to protect in-state economic interests. Second, there is powerful evidence that Washington denied the certification request for a coal-shipment terminal in part to control out-of-state conduct. These dormant Commerce Clause claims warrant the Court's exercise of its original jurisdiction.

This matter also raises foundational questions about how the sovereignty of one state interacts with the sovereignty of others. Viewed from this perspective, Washington has essentially overridden the sovereign powers of Montana and Wyoming to decide for themselves how to utilize their vast coal reserves and how to fund certain critical government services. The potential for one state to make policy decisions for other states weighs heavily in favor of the Court hearing this matter. This concern is especially

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[2] For purposes of this brief, the *amici* States accept as true Montana and Wyoming's allegations about Washington's conduct.

pronounced here because of Washington's access to ports. Our Constitution envisions that states will use their geographic advantages to promote the free flow of goods, not to block access to willing markets.

ARGUMENT

This is a classic case for the exercise of the Court's original jurisdiction. This matter not only raises serious claims under the dormant Commerce Clause,[3] but it implicates the history that led to this constitutional protection and important sovereign interests that are essential to the proper functioning of our nation.

In deciding whether to hear a dispute between or among states, the Court considers "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim."[4] *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citation and internal quotation marks omitted). It is "beyond peradventure" that a Commerce Clause dispute in which one state "directly affects" another state "implicates serious and important concerns of federalism fully in accord with the purposes and reach of our original jurisdiction." *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992)

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[3] Montana and Wyoming also have alleged that Washington violated the Foreign Commerce Clause. Mot. 31–34. Although this brief does not focus on this claim, the *amici* States agree that the Court should decide all of the claims raised in this matter.

[4] The Court also considers the "availability of an alternative forum in which the issue tendered can be resolved." *Mississippi*, 506 U.S. at 77. This condition is met here. Mot. 35–36.

(quoting *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981)). This case readily meets this standard.

Washington has deliberately obstructed interstate commerce by refusing to permit the construction of a terminal—known as the Millennium Bulk terminal—that would ship Montana and Wyoming coal to foreign markets that demand it. Montana and Wyoming have presented compelling evidence that Washington burdened the shipment of coal for impermissible reasons. More specifically, Washington restricted the free flow of coal through its borders to favor local interests and to control out-of-state conduct.

I. Washington's conduct is contrary to the very reason the dormant Commerce Clause exists.

There is nothing new about states trying to erect barriers to interstate commerce. Indeed, the frequency of trade disputes between the states was one of the major shortcomings of the Articles of Confederation and served as the driving force for the inclusion of the Commerce Clause in the Constitution. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019). Although these Confederation-era trade disputes took many forms, some of them bear a striking resemblance to the current dispute among Montana, Wyoming, and Washington.

Prior to the adoption of the Constitution, some coastal states used their access to ports to restrict the free flow of goods involving neighboring states. More specifically, "[s]tates with major port cities, especially New York and Massachusetts, took advantage of their

superior position in international commerce and in regional markets to pass discriminatory duties against neighboring states' traffic at their ports." Brandon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce & the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. 37, 47 (2005–2006) (quoting Cathy Matson, *The Revolution, the Constitution, & the New Nation*, *in* 1 The Cambridge Economic History of the United States: The Colonial Era 380 (Stanley L. Engerman & Robert E. Gallman eds., 1996)). New York pressed its geographic advantage so far that its "tariff 'relieved the land and property of the state from heavy taxation.'" *Id.* at 61 (quoting E. Wilder Spalding, *New York in the Critical Period, 1783–1789*, at 153 (1932)).

This obviously created problems. "States with fewer geographic advantages resented the bite that port states took from commerce that had to pass through those ports before arriving in the hinterlands. This friction sometimes escalated, resulting in imposts and tariffs specifically targeting goods from a particular state." *Id.* at 48. The consequence: "According to many historians, this competition sometimes resulted in overt discrimination by one state against goods produced in or re-exported from a neighboring state." *Id.* (collecting authorities).

The Framers had escalating trade disputes like these in mind when they arrived at the constitutional convention. In fact, "removing state trade barriers was a principle reason for the adoption of the Constitution." *Thomas*, 139 S. Ct. at 2460. The "discussion [at the constitutional convention] of the power to regulate

interstate commerce was almost uniformly linked to the removal of state trade barriers, and when the Constitution was sent to the state conventions, fostering free trade among the States was prominently cited as a reason for ratification." *Id.* (internal citation omitted). To this end, Alexander Hamilton argued in The Federalist No. 7 that "state protectionism could lead to conflict among the States," while in The Federalist No. 11 he "touted the benefits of a free national market." *Id.* (citing The Federalist Nos. 7, 11, at 62–63, 88–89 (C. Rossiter ed., 1961)); *see also* Denning, 94 Ky. L.J. at 49–59 (discussing the writings of Alexander Hamilton, James Madison, and others about these issues).

Consistent with this history, the Court has long held that the dormant Commerce Clause guards against returning to our prior era of trade disputes and rivalries. *See Thomas*, 139 S. Ct. at 2459–60. Without such a protection, "we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising." *Id.* at 2460. More to the point, the dormant Commerce Clause reflects "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)).

The conduct at issue here cannot be described as anything other than "economic Balkanization." In denying the certification for the Millennium Bulk

terminal, Washington created what amounts to a de facto embargo against the shipment of Montana and Wyoming coal to markets that demand it. Mot. 7–17. This is not an instance of Washington using its police powers to regulate how coal can or cannot be used within its borders. *See Southern Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 767 (1945) ("[T]here is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."). Instead, Washington is purporting to use its police powers solely to restrict the transportation of coal that is destined *for somewhere other than Washington.*

Washington's conduct cannot be meaningfully distinguished from that of coastal states prior to the adoption of the Constitution. In both instances, coastal states pressed their geographic advantage to restrict their neighbors' free flow of goods. In fact, Washington's conduct is arguably more of an impediment to interstate commerce than the historical examples discussed above. Whereas coastal states in the Confederation era merely imposed "discriminatory duties against neighboring states' traffic at their ports," Denning, 94 Ky. L.J. at 47 (citation omitted), Washington's denial of the certification for the Millennium Bulk terminal has effectively prohibited the interstate shipment of Montana and Wyoming coal to willing markets. In sum, the history that led to the Commerce Clause is now in danger of repeating itself.

II. Washington's conduct raises serious concerns under the dormant Commerce Clause.

The dormant Commerce Clause applies here in two key respects: First, the Clause prohibits Washington from discriminating against out-of-state economic interests in favor of local ones. Second, the Clause limits Washington's ability to burden interstate commerce to control out-of-state conduct.

1. It is not often that a state admits—without qualification—that it burdened interstate commerce to protect local interests. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 354 (1977) (discussing the "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods" (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951)). By all indications, this is one of those cases.

The dormant Commerce Clause prevents "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality State of Or.*, 511 U.S. 93, 99 (1994). "If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Id.* State action that discriminates against interstate commerce can be sustained "only on a showing that [the restriction] is narrowly tailored to 'advanc[e] a legitimate local purpose.'" *Thomas*, 139 S. Ct. at 2461 (citation omitted).

Washington's with-prejudice denial of the certification for the Millennium Bulk terminal has all the indicia of impermissible local favoritism. Mot. 12–16. For example, in talking points, Washington criticized the certification request because it "would only ship coal, there would be no apples. No agricultural products from Washington would be handled at the site." App. 71. Washington also emphasized that "[i]ncreased coal trains from the Millennium proposal would compete with rail shipments of other goods, including Washington's important agricultural products." *Id.*

The unmistakable takeaway from these statements is that Washington denied the certification request for the Millennium Bulk terminal in part to protect Washington's agricultural products. This is the definition of "simple economic protectionism" that "overtly blocks the flow of interstate commerce at a State's borders." *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

2. The dormant Commerce Clause problems do not stop with Washington's overt discrimination against out-of-state interests. As Montana and Wyoming have explained, Washington also denied the certification for the Millennium Bulk terminal because Washington's political leaders simply dislike coal. Mot. 12–14. In so doing, Washington effectively prohibited coal that is headed somewhere other than Washington from getting there. At bottom, Washington acted to control out-of-state conduct: the production, taxation, and interstate shipment of Montana and Wyoming coal.

The ability to participate in interstate commerce "is not the gift of a state." *H.P. Hood & Sons*, 336 U.S. at 535; *see also Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332–34 (1964) (invalidating state regulation of alcohol passing through airport that would not be used until arrival at international destination); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 533–34, 538 (1938) (invalidating state restriction on shipments to a federal enclave within its borders). Instead, it is "*a common right*, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution." *Shafer v. Farmers' Grain Co. of Embden*, 268 U.S. 189, 199 (1925) (emphasis added). It follows that the right to participate in interstate commerce is not subject to a neighboring state's veto. *See H.P. Hood & Sons*, 336 U.S. at 539 (holding that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation"). Put more directly, a state cannot burden interstate commerce to control what other states may ship to willing markets. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337 (1989) ("[T]he Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.").

The Court's decision in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), underscores this point. There, a town passed an ordinance requiring solid waste to be processed at a single, privately owned plant within the town. *Id.* at 387. As relevant here, the ordinance burdened interstate commerce by "depriv[ing] out-of-state businesses of access to a local

market." *Id.* at 389. In finding a violation of the dormant Commerce Clause, the Court emphasized that the town could not restrict interstate commerce on the basis that it halted practices elsewhere that the town "might deem harmful to the environment." *Id.* at 393. To allow this, the Court concluded, "would extend the town's police power beyond its jurisdictional bounds." *Id.* Yet, that is exactly what Washington has done here. It has acted to control the right of Montana, Wyoming, and their citizens to participate in interstate commerce.

III. Washington's actions threaten every state's sovereignty.

Left unchecked, Washington's conduct will weaken the sovereignty of all states, especially those without ready access to a valuable channel of commerce. This provides further reason for the Court to exercise its original jurisdiction.

Our Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). More specifically, under the dormant Commerce Clause, "states are not separable economic units." *H.P. Hood & Sons*, 336 U.S. at 538. So, generally speaking, states are not to pull in different directions in moving interstate commerce, but instead are to work together in getting goods from Point A to Point B. This "advance[s] the solidarity and prosperity of this Nation." *Id.* at 535.

This system protects each state's sovereignty by limiting the power of one state to use its police powers to control conduct in another state. *See, e.g.*, *Healy*, 491 U.S. at 336. Without this protection, in-state political processes will be circumvented by other states. That is to say, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938).

This case demonstrates this problem all too well. Montana and Wyoming have vast coal reserves that historically have generated critical revenue for the states through coal-severance taxes that fund important government services. Mot. 3–4. However, these services are now at risk not because of a lack of demand for coal, but because of the actions of Washington's political leaders. Thus, issues that matter greatly to Montana, Wyoming, and their citizens—the ability to sell coal and the states' ability to collect taxes on it—are being decided not in statehouses in Helena and Cheyenne, but by another state. This threat to state sovereignty could not be any more direct, and it alone justifies the Court's invocation of its original jurisdiction. *See Wyoming*, 502 U.S. at 451 (exercising original jurisdiction where another state's conduct "directly affects Wyoming's ability to collect severance tax revenues").

This concern is especially acute here because of Washington's unique geography—namely, its access to

ports. Washington's actions are not far removed from the specter of coastal states controlling interstate commerce involving landlocked states. As Montana and Wyoming have explained, this concern is not limited to Washington. Other localities in Oregon and California also have taken steps in recent years to restrict the shipment of coal through their ports. Mot. 14–15; *see also Healy*, 491 U.S. at 336 (considering the effect "if not one, but many or every, State adopted similar legislation").

The notion that coastal states and localities can control interstate commerce from, and thus in many respects the economies of, landlocked states cannot be reconciled with the dormant Commerce Clause, as described above. Our nation is one in which each state has different geographical advantages and disadvantages in moving interstate commerce. Some states are proximate to a crucial port; others have highways that lead to a certain market; still others have an airport located in a key area. The dormant Commerce Clause serves as an equalizer for the states' geographical advantages and disadvantages.

The problems with a contrary rule are obvious. To begin with, such a rule would undermine the "certainty" of "free access" to willing markets that the dormant Commerce Clause provides. *See H.P. Hood & Sons*, 336 U.S at 539. Taken to its logical end, Washington's conduct will create an unpredictable economic regime for states and their citizens in which a good can get to an out-of-state market only if there is a politically viable route to that market. *See Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 678

(1981) (plurality opinion) (holding that a state's "parochial interests" do not suffice to shut its borders to interstate commerce). Moreover, political whims can and do change. A good that is politically disfavored today can be favored tomorrow, and vice versa.

More fundamentally, if Washington can block the interstate shipment of coal based upon local politics, what is to stop a state from preventing other politically unpopular goods from passing through it borders? It is not hard to imagine a state refusing to open its borders to the interstate shipment of any number of goods that are unpopular in certain circles. In short, Washington's conduct comes with no limiting principle to prevent other politically motivated embargoes.

CONCLUSION

This case calls into question the very ability of Montana and Wyoming to participate in interstate commerce. When that basic premise is questioned, the Court should decide the matter. The Court should grant Montana and Wyoming's motion for leave to file a bill of complaint.

Respectfully submitted,

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