THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., et al, Plaintiffs, and BNSF RAILWAY COMPANY, Plaintiff-Intervenor, v. JAY INSLEE, et al., Defendants, and WASHINGTON ENVIRONMENTAL COUNCIL, et al., Defendant-Intervenors.	NO. 3:18-cv-05005-RJB PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S COMBINED BRIEF ON PRECLUSION AND *PULLMAN* ABSTENTION

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INTRODUCTION

This case raises critical constitutional issues concerning the power of Washington State to enforce a de facto ban on new coal exports under the guise of "even-handed" state environmental review. Just as Washington State could not ban interstate trucking or ban (or even tax) foreign shipping containers—both of which everyone acknowledges would violate the Commerce Clause—it also may not refuse to permit all new interstate and foreign commerce in coal. Yet this is exactly what the State has done, claiming it has impartially applied is environmental laws to disguise its true motives. Plaintiffs will prove this false. Plaintiffs will show the requirements imposed on the Millennium Bulk Terminal ("Terminal") are not imposed on similar projects and, if they were, those projects would never be permitted. Plaintiffs will further prove the Terminal was treated differently by the State *expressly because* it is intended to export coal. Put another way, Plaintiffs will prove that the State denied the required permits *for the purpose of blocking the export of coal*. This is unconstitutional.

After substantial discovery and motions practice, this case is finally scheduled to be tried next month. Plaintiffs are ready.

As set forth in this combined brief by Plaintiffs and Plaintiff-Intervenor, under well-settled law, neither preclusion nor *Pullman* abstention provides any basis to cancel, truncate, or delay the upcoming trial.[1] The factual and legal findings in the state proceedings are not entitled to preclusive effect. None of the state proceedings satisfies the requirements for collateral estoppel. Chief among those requirements is that the issues actually litigated and decided must be "identical" to those in this case. They are not even close to "identical," as amply shown by

[1] Plaintiffs and Plaintiff-Intervenor have therefore combined their two, ten-page allotments.

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the attached declarations from the attorneys in each of the state proceedings. The findings and rulings in the state proceedings concern only state-law specific determinations. None relates in any manner to the Commerce Clause.

This distinction is critical as a state's actions may well be perfectly valid under state law but nonetheless violate the U.S. Constitution. Defendants admit this. Decl. of D. Feinberg, Ex. 1 at 10, Mar. 26, 2019 Hearing Tr. (Defendants' counsel concedes that regardless of the outcome of the state proceedings, the State's actions "could still violate the Constitution."). This case alone will determine the Commerce Clause issues raised by Defendants' actions; none of the state proceedings will. Based on this fact, it is well-settled that the Court may not grant preclusive effect to any aspect of the state proceedings but, instead, must hear all the evidence for itself and render its own decision. *See, e.g., Matson Navigation Co., Inc. v. Hawaii Pub. Utilities Comm'n,* 742 F. Supp. 1468, 1480 (D. Haw. 1990) (state court proceedings challenging prohibitions on commerce did not collaterally estop a later federal Commerce Clause claim as the issues were not identical); *Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist.*, 31 F.3d 89, 101-02 (2nd Cir. 1994) (no preclusive effect of state proceedings can bar plaintiffs' dormant Commerce Clause claim). Moreover, the primary state decisions relied upon by Defendants, from the Pollution Control Hearings Board ("PCHB") and the Shoreline Hearings Board ("SHB"), cannot possibly bind this Court as neither body has legal authority to consider or decide federal constitutional questions. *See Hammer v. City of Bainbridge Island,* SHB No. 07-018, 2007 WL 3151704, at *4 (Wash. Shore. Hrg. Bd. Oct. 22, 2007) ("The [SHB] has recognized the limits on its authority to consider constitutional issues, and should decline to rule on contentions that a statute, regulation, or procedures violate constitutional provisions."); *Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Dep't of Ecology*, 51

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P.3d 744, 765 n.13 (Wash. 2002) ("Although the District has suggested constitutional infirmities in the section 401 certification, the Board has no jurisdiction over such issues, *see* RCW § 43.21.B.110."); *Lewis v. Dep't of Ecology*, PCHB No. 96-272, 1997 WL 241279, at *1 (Wash. Pol. Control Bd. Mar. 5, 1997) ("This defense raises constitutional issues of equal protection that are beyond the jurisdiction of the PCHB."). It is axiomatic that a state tribunal *without* authority to decide an issue cannot estop a federal court *with* such authority from doing so. *See U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 250 (9th Cir. 1992) ("we should decline to give res judicata effect to the state court judgment if we determine that the state court lacked jurisdiction to hear the action"); *Nichols v. Seattle Hous. Auth.*, 288 P.3d 403, 408 (Wash. Ct. App. 2012) (hearing examiner must act within the scope of his authority for a ruling to potentially carry preclusive effect).[2]

Abstention is also not appropriate as any delay—no matter how long—would never obviate the need to decide the constitutional claims now before this court. This is because, as noted above, state actions may be valid under Washington state law but may nonetheless violate the U.S. Constitution. This alone renders *Pullman* abstention inapplicable.

[2] In its Order Regarding Applicable Law, (Dkt. 309 at 2-3), the Court discussed the "fairness" factors outlined by the U.S. Supreme Court in *United States v. Utah Construction & Mining*, 384 U.S. 394, 422 (1966)—as reiterated in *Miller v. County of Santa Cruz*, 39 F. 3d 1030, 1032-1033 (9th Cir. 1994) and as amplified by the Washington Supreme Court in *Reninger v. Dept. of Corrections*, 134 Wash. 2d 437, 449 (1998). Importantly, these factors concern the threshold question of whether the factual and legal determinations of an administrative body **could potentially** be entitled to preclusive effect. However, even if all of the *Utah Construction* and *Reninger* factors are satisfied, the elements of collateral estoppel under Washington law—including the crucial requirement of "identical issues"—**must also** be satisfied. *Reninger*, 134 Wash. 2d at 449. Notably, unlike here as described more fully below, there was no genuine dispute about the identity of claims or issues in *Utah Construction*, *Miller*, or *Reninger*. 384 U.S. at 421; 39 F.3d at 1034; 134 Wash.2d at 449.

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BACKGROUND

I. The Four State Proceedings

Plaintiff Millennium Bulk Terminals-Longview, LLC ("Millennium") brought four state challenges to 1) the denial of its shoreline permits application; 2) the Department of Ecology's Section 401 water quality certification denial ("401 Denial"); 3) the Department of Natural Resource's sublease denial; and 4) Ecology's response to public records requests (collectively, the "state proceedings"). None of these challenges raises factual or legal issues identical to the issues in Lighthouse's Commerce Clause claims. None will resolve any of the Commerce Clause issues facing this Court.

A. Shoreline Hearing Board

On November 14, 2017, the Cowlitz County Hearing Examiner denied Millennium's shoreline permit applications under the Washington State Environmental Policy Act (SEPA), the Washington Shoreline Management Act (SMA), and the Cowlitz County Shoreline Master Plan (SMP). Decl. of T. Hobbs ¶¶ 8-9. All of the Hearing Examiner's determinations were exclusively based on state law (*i.e.*, SEPA, the SMA, and the SMP), and no constitutional issues were raised or considered. *Id.* Indeed, no constitutional issues could possibly have been addressed, as the Hearing Examiner has no jurisdiction to consider federal Commerce Clause claims. *See Dotson v. Pierce County Dep't of Planning & Land Servs.*, 2018 Wash. App. LEXIS 2795, at *27 (Dec. 11, 2018 Wash. Ct. App.) (county hearing examiner with authority to decide land use issues properly ruled it did not have the authority to rule on constitutional issues). Nor could any such constitutional claims concerning this permit have existed prior to the Hearing Examiner initially denying it.

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On appeal, the SHB affirmed the Hearing Examiner's SEPA finding under SEPA only. Decl. of T. Hobbs ¶ 11. The SHB did not reach the SMA and SMP issues. *Id.* No federal constitutional issues were raised or ruled upon. Indeed, it would have been impossible for any constitutional issues to have been considered or adjudicated, as the SHB may not hear those issues. Decl. of D. Feinberg, Ex. 3 at 5, SHB Prehearing Order ("[t]he following issues, which raise constitutional claims outside of the Board's jurisdiction, are included here to preserve them for any future appeal"); *see also Hammer*, SHB No. 07-018, 2007 WL 3151704, at *4 (the SHB "should decline to rule on contentions that a statute, regulation, or procedures violate constitutional provisions").

Millennium appealed the SHB decision to the Washington State Court of Appeals, Division II. Oral argument is not yet set in that proceeding and no findings of fact or conclusions of law have been rendered therein. Decl. of T. Hobbs ¶ 11. Neither the Governor's Office nor Ecology Director Bellon is a defendant in any of these proceedings. *Id.* at ¶ 12.

B. Pollution Control Hearings Board

Millennium appealed Ecology's 401 Denial to the PCHB, arguing violations of statutory environmental laws. Decl. of B. Ginsberg ¶ 5. On August 15, 2018, the PCHB granted Ecology's motion for summary judgment, which addressed two environmental laws. *Id.* at ¶ 10. The PCHB decided that Ecology's Clean Water Act ("CWA") section 401 Denial Order was valid under 1) the CWA, 33 U.S.C. §1341, and 2) SEPA, RCW § 43.21C.060. Dkt. 130-6 at 21, PCHB Summ. Judg. Order. No constitutional issues were raised or addressed. Decl. of B. Ginsberg ¶ 13.The PCHB addressed only the issues presented to it—none of which is identical to the issues required to be decided in resolving Lighthouse's Commerce Clause claims. Dkt. 130-6 at 4-5, PCHB Summ. Judg. Order.

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It is worth repeating that the PCHB expressly did not resolve or rule upon any of the constitutional issues, concluding it lacked jurisdiction to hear those claims. *See id.* at 4 ("[t]he following issues, which raise constitutional claims outside of the Board's jurisdiction, are included here to preserve them for any future appeal"). Moreover, even if it somehow could have and did reach those claims, which it did not, those claims are due process and equal protection claims. Decl. of B. Ginsberg ¶ 10, 13.[3] Millennium does not assert any Commerce Clause claims in this or any other state proceeding.

C. Challenge to Department of Natural Resources sublease denial

The Washington Department of Natural Resources ("DNR") denied Northwest Alloys, Inc.'s ("NWA") request to sublease aquatic lands to Millennium. Decl. of T. Hobbs ¶ 5. Millennium challenged this denial in Cowlitz County Superior Court, alleging that the denial violated the terms of the lease between NWA and DNR. *Id.* The Superior Court held that DNR's decision to deny consent to sublease was arbitrary and capricious under the terms of the lease but did not order DNR to consent to the sublease. *Id.* at ¶ 6. Both parties cross-appealed this decision. As the Superior Court explained, "[t]he extensive permitting process involved in [Plaintiffs'] proposed coal export terminal is not before the Court in this appeal. In this case, the Court is strictly concerned about rights under a lease between parties to that lease." *Id.*, Ex. A at ¶ 1. Neither Ecology nor the Governor's Office is a defendant in either the underlying Superior Court case or the appeal. *Id.* at ¶ 7.

[3] *See also infra* page 13 n.7 (noting that elements of these claims are different from what is required to establish a violation of the Commerce Clause).

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D. Public Records Request

Millennium sued the Ecology for violating the Washington State Public Records Act. Decl. of J. Vance at ¶ 5. Millennium's claim was limited to a single state law issue: whether Ecology illegally withheld and did not timely produce certain public records. *Id.* at ¶¶ 5, 10. The Superior Court held that Ecology had performed an adequate search and disclosed all requested documents. *Id.* at ¶ 6. The Court dismissed the complaint, and Millennium has appealed. *Id.* The Governor's Office is not a defendant in this litigation. *Id.* at ¶ 9.

ARGUMENT

II. None Of The State-Level Decisions Is Entitled To Any Preclusive Effect On Any Issues Before This Court.

Before a federal court can afford preclusive effect to a decision of a state court or administrative agency consistent with the Full Faith and Credit Act, 28 U.S.C. § 1738, the state's requirements for either collateral estoppel or res judicata must apply. *Matson*, 742 F. Supp. at 1479 (citing *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798 (1986)).

Neither collateral estoppel nor res judicata applies here. Collateral estoppel does not apply because the issues raised in Lighthouse's Commerce Clause claim are not "identical" to those actually litigated and decided at the state level. Res judicata is not applicable because the claims at the state-level are not the same claims in this case; there are no Commerce Clause claims at the state level. Finally, it is well established that neither the PCHB nor the SHB has the legal authority to decide federal constitutional questions, which eviscerates any possibility that res judicata or collateral estoppel could possibly apply with respect to those proceedings.[4]

[4] *See Hammer v. City of Bainbridge Island*, SHB No. 07-018, 2007 WL 3151704, at *4 (Oct. 22, 2007 Wash. Shore. Hrg. Bd.) ("The [SHB] has recognized the limits on its authority to consider constitutional issues, and should decline to rule on contentions that a statute, regulation, or procedures violate constitutional provisions."); *Pub. Util. Dist. No. 1 of Pend Oreille Cty v. Dep't of Ecology*, 146 Wash. 2d 778, 821 n.13 (2002) ("Although the District has suggested constitutional infirmities in the section 401 certification, the Board has no jurisdiction over such issues, *see* RCW § 43.21.B.110."); *Lewis v. Dep't of Ecology*, PCHB No. 96-272, 1997 WL 241279, at *1

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See Borneo, 971 F.2d at 250 ("we should decline to give res judicata effect to the state court judgment if we determine that the state court lacked jurisdiction to hear the action"); *Nichols*, 288 P.3d at 408 (hearing examiner must act within the scope of his authority for a ruling to potentially carry preclusive effect).

A. Collateral estoppel does not apply because the issues adjudicated before the state agencies are not identical to Lighthouse's Commerce Clause claims.

Collateral estoppel bars the re-litigation of issues that were "actually litigated and necessarily decided" in a previous proceeding. *Sprague v. Spokane Valley Fire Dept.*, 189 Wash. 2d 858, 899 (2018). Defendants, as the parties asserting preclusion, "bear[] the burden of demonstrating with clarity and certainty what was decided in the previous case." *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000). *See also Larsen v. Town of Corte Madera*, No. C 04-05212 SI, 2005 WL 1656888, at *6 (N.D. Cal. 2005) ("If there is doubt, collateral estoppel will not be applied.").

The Supreme Court of Washington imposes four requirements—all of which must be met—for collateral estoppel to apply: 1) identical issues; 2) a final judgment on the merits; 3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and 4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Sprague*, 189 Wash. 2d at 899. Importantly, the Court need go "no further than the first step" to hold that collateral estoppel is not appropriate where, as here, the issues are not "identical." *SDDS, Inc. v. State of S.D.*, 994 F. 2d 486, 492-93 (8th Cir. 1993).

(Mar. 5, 1997 Wash. Pol. Control Bd.) ("This defense raises constitutional issues of equal protection that are beyond the jurisdiction of the PCHB.").

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Courts have consistently held that the concept of "identical issues" requires that the issues litigated and decided in the state proceedings must be the very same "precise issues" raised in the present case.[5] *Id.* at 493. Mere similarities of facts or of certain evidence do not make collateral estoppel appropriate; rather, the precise issues determined must be identical for collateral estoppel to apply. *Sprague*, 189 Wash. 2d at 901. Further, preclusive effect to agency decisions may not be appropriate when "they are intertwined with[] important constitutional questions." *Sprague*, 189 Wash. 2d at 904. *See also Kennedy v. City of Seattle*, 617 P.2d 713, 715-16 (Wash. 1980) ("an important public question of law…should not be foreclosed by collateral estoppel").

Here, collateral estoppel does not apply because the issues adjudicated before the state agencies are not "identical to the issues" presented by Lighthouse in this lawsuit. *See Sprague*, 189 Wash. 2d at 901 (despite substantial overlap and similarities between the two cases, court found no preclusive effect where an employee alleged at the state-level that he was terminated for unconstitutional religious reasons but then raised a subsequent, related but different, constitutional free-speech claim). Surely, if, as in *Sprague*, two different yet related constitutional claims arising from the very same facts and circumstances are insufficient to trigger collateral estoppel, then the state rulings on issues of state law here, without any rulings on any constitutional issues at all, cannot possibly give rise to estoppel. There simply is no support for the proposition that rulings on issues of state law can somehow foreclose constitutional claims for which compliance with state law is not even relevant, much less

[5] Courts consider several factors when analyzing whether the two proceedings address identical issues as to render them "essentially the same dispute," including: whether there is substantial overlap in the evidence and argument; the "same rule of law" is involved in both proceedings; the pretrial preparation and discovery in the first proceeding cover the issues in the second proceeding; and the claims involved in the two proceedings are "closely related." *Valley Disposal, Inc. v. Cent. Vermont Solid Waste Management Dist.*, 31 F.3d 89, 100 (2d Cir. 1994). As shown below, none of these factors is satisfied here.

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dispositive. *Smith v. Bayer Corp.*, 564 U.S. 299, 309 (2011) (if the "two legal standards differ…then the federal court resolved an issue not before the state court"); *Standlee v. Smith*, 518 P.2d 721, 723 (Wash. 1974) (*en banc*) ("Even if the issue is identical and the facts remain constant, the adjudication in the first case does not estop the parties in the second, unless the matter raised in the second case involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment.") (internal quotations omitted). Indeed, even similar Commerce Clause claims brought in two different cases may not give rise to collateral estoppel in the second case. *Valley Disposal, Inc.*, 31 F.3d at 102 ("[W]e do not think the evidence introduced and the arguments made in the state court proceeding can be said to have adequately addressed Plaintiffs' present dormant Commerce Clause claim," where the state court had addressed the Commerce Clause issue but "relie[d] on facts that differ so materially" from the ones before the federal court.).

The decision in *Matson Navigation Co., Inc. v. Hawaii Pub. Utilities Comm'n* is on point. 742 F. Supp. at 1479. In *Matson*, an interstate common carrier that shipped freight among the Hawaiian Islands and to the mainland U.S. brought an action in federal court against the Hawaii Public Utilities Commission alleging that it was attempting to improperly regulate interstate commerce in violation of the dormant commerce clause. The defendant raised collateral estoppel based on a prior state-level action that addressed whether certain of plaintiff's cargo was considered interstate or intrastate under state law. *Id.* at 1479. The federal court refused to apply collateral estoppel (and res judicata) because the issues in the two proceedings were not identical, even though the dormant Commerce Clause was "relevant" to the state proceedings and the cases shared substantial overlap. *Id.* at 1479-80.

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Here, there is much less similarity between the state and federal matters than that found insufficient in *Matson*, which compels the same result be reached here. In this case, Lighthouse claims that the Defendants violated the dormant and foreign Commerce Clause. To resolve these claims, the following issues must be determined by this Court: (1) whether the Defendants intended to or in fact discriminated against foreign or interstate commerce; (2) whether the Defendants intended to or in fact burdened foreign or interstate commerce; (3) the extent of any such burdens or the countervailing actual or alleged benefits of the state's actions; and (4) whether the Defendants intruded into an area in which the United States, and not the states, are permitted to act under the U.S. Constitution. *See generally* Dkt. 262, Plaintiffs' Opp. to Defs. Mot. for Summ. Judg. None of these issues has been or will be determined in the state proceedings. Decl. of B. Ginsberg ¶ 16; Decl. of T. Hobbs ¶¶ 7, 13; Decl. of J. Vance ¶ 12.

In stark contrast, the issues actually litigated and decided in the state proceedings are limited to markedly different state-law considerations having little or nothing to do with the commerce clause claims and certainly do not meet the "identical" requirement necessary for collateral estoppel to apply. *Id.*; *see also* Decl. of D. Feinberg, Ex. 2, Table of Issues Actually Litigated and Decided in State Proceedings.

The issues in this litigation and in the prior state proceedings are plainly not "identical" or even anything close to that stringent standard. *Id.* Even if the Commerce Clause was relevant to the state proceedings—which it is not—Millennium has not raised any Commerce Clause issues in the state proceedings nor have those state bodies ruled on them. *See Matson Navigation Co.*, 742 F. Supp. at 1480 ("The court cannot determine that the [state commission] implicitly addressed the purely legal dormant commerce clause issue by determining that the subject goods were not interstate."). In the state proceedings, Millennium does not assert a violation

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of the foreign or interstate Commerce Clause under the United States Constitution nor does it assert that the Defendants burdened, hindered, or otherwise prevented or interfered with foreign or interstate commerce. Decl. of B. Ginsberg ¶¶ 7, 9; Decl. of T. Hobbs ¶¶ 7, 14; Decl. of J. Vance ¶¶ 11, 12. None of the state proceedings raises or addresses in any manner whether the Defendants intended to or in fact discriminated against or burdened foreign or interstate commerce. *Id.*

Because the Commerce Clause issues presented by Lighthouse "have yet to be evaluated in full by any adjudicatory body," *Sprague*, 189 Wash. 2d at 902, collateral estoppel is not appropriate.

B. Res judicata does not apply because no Commerce Clause claims have been asserted in any of the state proceedings.

Under Washington law, dismissal on res judicata grounds is only appropriate where the subsequent claim is ***identical*** to a prior claim in four respects: "(1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made." *Ensley v. Pitcher*, 152 Wash. App. 891, 902 (Wash. Ct. App. 2009) (emphasis added). The party asserting the defense of res judicata bears the burden of proof. *Id.* These requirements are not met here.[6]

Requirement two above—requiring the same causes of action—is not met. In this case, Lighthouse asserts violations of the dormant and foreign Commerce Clause, brought under 42 U.S.C. § 1983. By contrast, none of the state actions involves any claims under the Commerce Clause. Instead, almost all of the claims in the state proceedings are brought exclusively under

[6] In addition, the parties are not identical. The Governor's Office is not a defendant in any of the state court proceedings. And neither of the Defendants—the Defendant Inslee or Defendant Bellon—are parties to the litigation regarding the Department of Natural Resources sublease denial nor the Shoreline Hearings Board litigation. Thus, res judicata is not appropriate.

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state law. *See* Decl. of B. Ginsberg ¶¶ 6-7, 15; Decl. of T. Hobbs ¶¶ 6, 12; Decl. of J. Vance ¶ 10. There is one exception. As the Court alludes in its Order, Millennium's § 1983 action raised two federal constitutional claims. Dkt. 309 at 3. However, Millennium's claims are claims for substantive due process and equal protection violations—not Commerce Clause claims. Decl. of B. Ginsberg ¶ 10.[7] Absent identical claims (that is, the very same causes of action), res judicata does not apply. In addition, the § 1983 claims for substantive due process and equal protection have not been ruled on in any manner by the state court. Decl. of B. Ginsberg ¶ 13. Thus, there is no final judgment that could even potentially trigger res judicata.

C. The PCHB and SHB lack authority to decide constitutional questions.

Finally, collateral estoppel and res judicata cannot apply for another reason: neither the PCHB nor the SHB has the legal authority or ability to decide federal constitutional questions. *See, e.g.*, *Hammer*, SHB No. 07-018, 2007 WL 3151704, at *4; *Pub. Util. Dist. No. 1 of Pend Oreille Cty.*, 146 Wash. 2d at 821 n.13; *Lewis*, PCHB No. 96-272, 1997 WL 241279, at *1. In fact, here, the PCHB held that these constitutional issues were "outside the Board's jurisdiction." Decl. of B. Ginsberg, Ex. A at 4-5, PCHB Prehearing Order; Decl. of D. Feinberg, Ex. 3 at 5, SHB Prehearing Order. No constitutional claims could have been "properly before" either the PCHB or SHB. *See Miller v. Cty. of Santa Cruz*, 39 F.3d 1030, 1032-33 (9th Cir. 1994). Therefore, the decisions of the SHB and PCHB are not entitled to preclusive effect on the constitutional issues in this litigation. *Id.*

[7] Establishing a violation of due process or equal protection requires entirely different elements than those required to establish a violation of the commerce clause. Washington law is clear that claims brought under different constitutional provisions are not identical for preclusion purposes. *See, e.g., Sprague*, 189 Wash. 2d at 901 ("here we are concerned with free speech, not free exercise").

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III. *Pullman* Abstention's "Extraordinary" Remedy Is Inappropriate Here.

The court should not invoke the discretionary *Pullman* abstention doctrine to stay this case until the state proceedings are resolved. Doing so would serve no purpose except to delay the inevitable. This is because, regardless of the outcome in the state proceedings, this case cannot and will not be rendered moot.

Federal courts have a "virtually unflagging obligation" to exercise their jurisdiction, even in the face of "[p]arallel state-court proceedings." *Sprint Commc'ns Inc. v. Jacob*, 571 U.S. 69, 77 (2013). Abstention of any kind is appropriate only "in a few exceptional circumstances." *Myer v. Cty. of Orange*, No. 89-56238, 1991 WL 21350, at *1 (9th Cir. Feb. 21, 1991). Ninth Circuit courts are especially hesitant to abstain in section 1983 cases, like this one, because "[c]onflicting results, piecemeal litigation, and some duplication of judicial effort . . . is the unavoidable price of preserving access to the federal relief which section 1983 assures." *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979).

Pullman abstention represents an "extraordinary and narrow exception to the duty of a district court to adjudicate a controversy." *Courthouse News Service v. Planet*, 750 F. 3d 776, 783 (9th Cir. 2014). To invoke the *Pullman* doctrine, the Ninth Circuit imposes "three independently mandated requirements," all of which must be satisfied to invoke the doctrine: (1) a case must involve "a sensitive area of social policy" that federal courts should avoid unless there is no alternative; and (2) "constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy"; and (3) the potentially determinative state law issue's "proper resolution" is "uncertain." *Id.* at 783-84 (quoting *Porter v. Jones*, 319 F. 3d 483, 492 (9th Cir. 2003)). The absence of any one of these requirements precludes *Pullman* abstention. *Porter*, 319 F. 3d at 492. All three fail here.

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D. Only federal relief under the Commerce Clause, a claim not pending in any state court litigation, can terminate the controversy before this Court.

The state proceedings do not raise a Commerce Clause claim and, therefore, cannot "obviate the need for constitutional adjudication" of Lighthouse's federal claims, as the second *Pullman* factor requires. *See Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 938-40 (9th Cir. 2002). Defendants conceded as much. Decl. of D. Feinberg, Ex. 1, Mar. 26, 2019 Hearing Tr. at 10 ("[I]f the 401 denial is valid on its face under state law, it's actually completely valid, it could still violate the Constitution"). This is because it is well established that actions may be valid under state law but nonetheless violate the constitution.

Moreover, even if an individual state permit were set aside in one or more of the state court cases, that would not moot the instant case. From the start, this case was about more than a single permit denial. In its complaint, Lighthouse alleged that "the Defendants have unreasonably delayed and denied a *number of permits and approvals* for a port facility that would enable the export of coal to U.S. allies and trading partners in Asia." Dkt. 1 at ¶ 4 (emphasis added). The relief requested by Lighthouse and BNSF—who is only a party to the Shoreline Hearing Board proceeding—includes:

- A declaration that *any environmental reviews* of the proposed coal export facility at the Millennium Bulk Terminal … may not be used in a manner that violates the Commerce Clause to unreasonably deny or unreasonably condition a permit, including *unreasonably denying or unreasonably conditioning a permit* based on the effects of transporting coal to and from the Terminal by rail and vessel traffic in interstate or foreign commerce. Dkt. 1 § VII, ¶ D (emphasis added); see also Dkt. 22-1 ¶ 130.

- An order vacating any and all of the Defendants' decisions regarding the Millennium Bulk Terminal that violate the Commerce Clause. Dkt. 1 § VII, ¶ G (emphasis added); *see also* Dkt. 22-1 ¶ 132.

- An injunction ordering the Defendants, as the Commerce Clause requires, to continue processing in good faith *any and all current and future MBT Longview permit applications*. Dkt. 1 § VII, ¶ J (emphasis added); *see also* Dkt. 22-1 ¶ 135.

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This case must proceed regardless of the results in the state proceedings. This is because, even if Millennium ultimately won every state case, the Defendants already have pre-denied whichever permits come next and may simply deny the challenged permits again on new grounds, all of which would violate the Commerce Clause. *See* Dkt. 1-4; L. Randall Dep. 157:18-158:7 (Ecology discussed using state law to "deny other permits").

The state proceedings cannot provide the broader relief that this Court can offer applying *across* permits and approvals, including future permits and approvals. This is because, with one exception noted below, the state proceedings consider narrow state law issues specific to individual permits, which can never make Lighthouse whole. Only this broader federal case allows Lighthouse "to obtain all of the relief that [it is] seeking through this action." *See Park at Cross Creek LLC v. City of Malibu*, No. LA-CV-15-00033-JAK, 2015 WL 9698236, at *5 (C.D. Cal. April 10, 2015). Accordingly, the "delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court" counsel against abstention. *See Harris Cty. Commr's Court v. Moore*, 420 U.S. 77, 83 (1975).

In addition, this Court has properly refused to apply *Pullman* abstention where a plaintiff's "federal claims require proof of different elements than the state claims," ***even where "the federal and state claims arise from the same nucleus of operative facts***." *Hannum v. Wash. State Dep't of Licensing*, No. C06-5346RJB, 2006 U.S. Dist. LEXIS 51213, at *9-10 (W.D. Wash. July 26, 2006) (Bryan, J.) (emphasis added). Not only are these Commerce Clause claims completely unconnected to the state proceedings, but nearly *everything* about the federal and state claims differs: different plaintiffs (BNSF is only a party to the SHB proceeding and four of the five Lighthouse Plaintiffs here are not parties to any state proceedings), different

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defendants (the Governor's Office is not subject to any state proceeding), different relief (only this case presents broad relief across multiple permits and other state actions), and different claims (there are no Commerce Clause claims pending anywhere but here).

That Lighthouse's subsidiary brought substantive due process and equal protection (but not a Commerce Clause) claims in state court is immaterial to the question of whether *Pullman* abstention is appropriate. *Pullman* abstention is designed to allow courts the discretion to avoid litigation of constitutional issues where definite ruling on a *state law* issue would obviate the need for constitutional adjudication. *See Porter*, 319 F.3d at 492. It does not provide courts with the discretion to abstain from deciding a federal constitutional issue by allowing a state court to adjudicate a different federal constitutional issue. *Pullman* abstention does not allow courts the discretion to simply postpone deciding claims that will not and cannot be resolved in state court proceedings, such as Lighthouse's commerce clause claim in this case.

E. Lighthouse's as-applied challenge does not implicate sensitive social issues within the meaning of *Pullman*.

Pullman abstention is only appropriate if a case involves "sensitive area of social policy," such as facial challenges to entire regulatory schemes pertaining to zoning/land use planning or death penalty procedures. *See, e.g., Kollsman v. Los Angeles*, 737 F.2d 830, 836-37 (9th Cir. 1984) (*Pullman* abstention was appropriate in a case that required consideration of the interrelation of several California statutes involving land use planning); *Brown v. Vail*, 623 F. Supp. 2d 1241, 1244-45 (W.D. Wash. 2009) (Pullman abstention was appropriate for a challenge to the State of Washington's lethal injection protocol, which touched on a sensitive area of social policy); *see also K&S Devs. LLC v. City of SeaTac*, No. C-13-499-MJP, 2013 U.S. Dist. LEXIS 147574, at *7-*8 (W.D. Wash. Oct. 10, 2013) (describing Ninth Circuit precedent). Here there is no such broad, across-the-board challenge to all of the State's zoning

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or land use rules, to which the Plaintiffs have no general objection. The way Washington State has handled reviews and permitting of every facility other than the Terminal is not challenged. What is at issue in this case is the fact that the state used materially different policies and procedures for the Terminal than it used for any other permit application in its history and did so because this facility is intended to export coal.

As-applied challenges like this one "bear scant resemblance to [] politically delicate [challenges to] [jurisdiction]-wide regulations." *Id*; *see also Daniels Sharpsmart, Inc. v. Smith*, No. 1:17-CV-403-LJO-SAB, 2017 WL 2547051, at *6 (E.D. Cal. June 13, 2017) ("relatively straightforward Commerce Clause challenge" does not touch "a sensitive area of social policy"), *aff'd in part, rev'd in part sub nom. Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608 (9th Cir. 2018). While Lighthouse seeks broad relief, that relief is tailored to Terminal-specific state actions. Lighthouse does not seek to overturn SEPA, Section 401, or any other state law of general applicability. Nor does it seek to overturn Washington State's entire land use scheme but, instead, only the unconstitutional application of that scheme to the Terminal (in a manner it has never been applied to any other permit application or facility in the history of the state). None of this is grounds for abstention as abstention is not appropriate for particularized, plaintiff-specific claims. *Privitera v. Cal. Bd. of Med. Quality Assur*., 926 F.2d 890, 896 (9th Cir. 1991) ("constitutional claim[s] [that are] highly individualized" do not satisfy the first *Pullman* factor).

Other case specific factors also suggest abstention is inappropriate. First, the federal government "has definitively entered the fields" of environmental law and international trade at issue in this case. *See Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 940 (9th Cir. 2002) (first *Pullman* factor not met where federal government entered regulatory field through

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CERCLA, which, like the CWA, "envision[s] a partnership between various levels of government").

Second, this case, because it involves an export facility, presents an area of "particular *federal* concern" for which abstention is particularly inappropriate. *See Courthouse News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014). Amicus briefs from fourteen states underscore the national importance of the issues at stake here and their direct bearing on those States' ability to engage in foreign commerce. *See* Dkt. 78-2 (Amici Brief in Opp. to Defs. Mot. for Abstention by Wyoming, Kansas, Montana, Nebraska, South Dakota, and Utah); Dkt. 136 (Amici Brief of California, Maryland, New Jersey, New York, Oregon, and Massachusetts); Dkt. 237; Dkt. 286; *see also* Dkt. 264 (Decl. of J. Beggar) ("securing additional West Coast coal export capacity is critical to the future of the Wyoming and its coal industry").

Third, Lighthouse's invocation of the Constitution's Commerce Clause presents special reasons to avoid abstention. *See Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348, 350 (4th Cir. 2005) ("[t]he federal interest asserted under the commerce power lies at the core of the commercial values protected by that clause, namely the promotion of robust trade and enterprise among the several states."). When such "an overwhelming federal interest" is at stake, "no [individual] state interest, for abstention purposes, can be nearly as strong at the same time." *Id.*

F. There are no determinative state law issues that are "uncertain."

Nor is resolution of Millennium's state law claims "uncertain" within the meaning of *Pullman*'s third requirement. An outcome is not uncertain "just because it turns on the facts of the particular case." *Pearl Inv. Co. v. San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985). Instead, a federal court must be unable to predict with "any" confidence the way in which a

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state court would rule on an issue of "state law" that is relevant to the constitutional claims. *Id.* Here, there is no issue of state law which is germane to or which would resolve the constitutional claims, as the Commerce Clause claims are independent of whether the Defendant's actions did or did not comport with state law. Simply put, the issue of what is permitted by state law is not relevant to or dispositive in this case. In addition, since the Court initially denied the Defendants' abstention motions, two state administrative tribunals resolved the Defendants' *state law* claims in their favor.[8] For *Pullman* purposes, that means the Defendants' state law claims are *more* certain now than they were a year ago. And far from mooting Lighthouse's claims, those decisions affirming the Defendants' actions under state law only reinforce the need for this Court to reach the merits of the federal claims before it.

Pullman abstention was inappropriate when this case started and it is even more inappropriate now. Because discovery confirmed Lighthouse's theory of the case—and need for broad relief—and because this case neither presents sensitive state social issues nor posits unanswered state law questions, none of the *Pullman* elements are met. Abstention now only "impose[s] expense and [] delay" on an already long-delayed project. *Potrero Hills Landfill, Inc. v. Cty. of Solano*, 657 F.3d 876, 889 (9th Cir. 2011) (internal citations omitted). With discovery over and trial looming, abstention makes little sense. The Court should resolve Lighthouse's claims on the merits here and now.

Dated this 8th day of April, 2019.

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[8] Millennium disputes those decisions, which are on appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

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