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6 The Honorable Robert J. Bryan

7 **UNITED STATES DISTRICT COURT**
8 **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 DEFENDANTS AND DEFENDANT-INTERVENORS' JOINT OPPOSITION TO PLAINTIFFS' RULE 54(b) MOTION

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TABLE OF CONTENTS

I. INTRODUCTION 1
II. BACKGROUND 1
A. The Court's Earlier Interlocutory Orders 1
B. The *Pullman* Stay 2
C. Plaintiffs' Rule 54(b) Motion and Appeal 3
III. ARGUMENT 3
A. The Court's *Pullman* Stay Is Not An Appealable Final Decision 4
B. Plaintiffs' Belated Rule 54(b) Requests Should Be Denied 6
1. Rule 54(b) Standards 6
2. Rule 54(b) certification would be inequitable and inefficient 7
a. Certification would facilitate inefficient, piecemeal appeals 7
b. The equities weigh against Rule 54(b) certification 9
IV. CONCLUSION 10

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TABLE OF AUTHORITIES

Cases

Badham v. U.S. Dist. Ct. for N. Dist. of Cal.,
721 F.2d 1170 (9th Cir. 1983) 5

Birkes v. Tillamook Cty.,
No. 3:09-CV-1084-AC, 2012 WL 2178964 (D. Or. June 13, 2012) 9, 10

Colo. R. Water Conservation Dist. v. United States,
424 U.S. 800 (1976) 4

Confederated Salish v. Simonich,
29 F.3d 1398 (9th Cir. 1994) 5

Corrosioneering, Inc. v. Thyssen Envtl. Sys., Inc.,
807 F.2d 1279 (6th Cir. 1986) 7

Curtiss–Wright Corp. v. Gen. Elec. Co.,
446 U.S. 1 (1980) 6

Gregorian v. Izvestia,
871 F.2d 1515 (9th Cir. 1989) 9

Idaho v. Coeur d'Alene Tribe,
521 U.S. 261 (1997) 1

In re Lindsay,
59 F.3d 942 (9th Cir. 1995) 6

Jack v. Borg-Warner Morse Tec, LLC,
No. C17-0537JLR, 2019 WL 130301 (W.D. Wash. Jan. 8, 2019) 8

Jewel v. NSA,
810 F.3d 622 (9th Cir. 2015) 6

King v. Newbold,
845 F.3d 866 (7th Cir. 2017) 10

Liberty Mut. Ins. Co. v. Wetzel,
424 U.S. 737 (1976) 6

Montes v. Rafalowski,
No. C-09-00976, 2012 WL 5392290 (N.D. Cal. Nov. 2, 2012) 9

Morrison-Knudsen Co., v. Archer,
655 F.2d 962 (9th Cir. 1981) 7, 8

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Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 3, 4, 5

New Mexico v. Trujillo,
813 F.3d 1308 (10th Cir. 2016) 5

Pakootas v. Teck Cominco Metals, Ltd.,
905 F.3d 565 (9th Cir. 2018) 6

Quackenbush v. Allstate Ins. Co.,
517 U.S. 706 (1996) 3

Stanley v. Chapell,
764 F.3d 990 (9th Cir. 2014) 5

Tsyn v. Wells Fargo Advisors, LLC,
No. 14-cv-023552-LB, 2016 WL 7635883 (N.D. Cal. June 27, 2016) 9

Wood v. GCC Bend, LLC,
422 F.3d 873 (9th Cir. 2005) 6, 7, 9

Rules

Fed. R. App. P. 4(a)(1)(A) 5

Fed. R. Civ. P. 54(b) .... passim

Statutes

28 U.S.C. § 1291 .... passim

28 U.S.C. § 1292(a)(1) 5

46 U.S.C. § 3703 1

46 U.S.C. § 70001 1

49 U.S.C. § 10501 1

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I. INTRODUCTION

More than five months after entry of two partial summary judgments, Plaintiffs Lighthouse *et al.* and Plaintiff-Intervenor BNSF (together, Plaintiffs) move this Court to certify those interlocutory orders as appealable final judgments under Rule 54(b) of the Federal Rules of Civil Procedure. The motion rests on the premise that the Court's *Pullman* stay is a "final and appealable" decision under 28 U.S.C. § 1291. Mot. at 2. That premise is false. The stay is interlocutory and unappealable. Although the ostensible purpose of Plaintiffs' "protective" motion is to "streamline the ensuing litigation" and consolidate appellate review, Mot. at 6 (quotation marks and citation omitted), Rule 54(b) certification here would do just the opposite. It would allow Plaintiffs to appeal partial summary judgment decisions from last fall, even if the Ninth Circuit dismisses the stay appeal as non-final and unappealable, as it should. Plaintiffs' manifest aim is to undermine the Court of Appeals' authority to determine its own jurisdiction and bypass the normal appellate process. The State Defendants and Defendant-Intervenors (together, Defendants) respectfully ask the Court to deny Plaintiffs' belated Rule 54(b) certification request.

II. BACKGROUND

A. The Court's Earlier Interlocutory Orders

The Court has issued two partial summary judgment orders relevant here. First, on October 23, 2018, the Court dismissed all claims against Defendant Hilary Franz because they were "predicated on decisions which implicate Washington's uniquely sovereign interest in its own submerged land" and thus barred by the Eleventh Amendment. Dkt. 270 at 13 (citing *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997)).

Second, on December 11, 2018, the Court entered a partial summary judgment order dismissing Plaintiffs' two statutory preemption claims under the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10501, and the Ports and Waterways Safety Act (PWSA), 46 U.S.C. §§ 3703, 70001. Dkt. 200. Plaintiffs failed to request an

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immediate Rule 54(b) certification of those decisions—now seven and five months old—electing instead to continue litigating their related claims.

B. The *Pullman* Stay

The Parties cross-moved for summary judgment on Plaintiffs' remaining constitutional claims. The Court entered summary judgment for Defendants on BNSF's Foreign Affairs Doctrine claim. Dkt. 308.[1] With respect to Plaintiffs' remaining claims under the dormant Commerce Clause, the Court invited supplemental briefing on the preclusive effect of state agency decisions and *Pullman* abstention. Plaintiffs opposed *Pullman* abstention because, they asserted, "any delay—no matter how long—would never obviate the need to decide the constitutional claims now before this court." Dkt. 314 at 8 of 28. Because the state proceedings do not involve Commerce Clause claims, Plaintiffs argued that a return to federal court was "inevitable." Dkt. 314 at 19 of 28 ("regardless of the outcome in the state proceedings, this case cannot and will not be rendered moot"); *id.* at 21 of 28 ("Not only are these Commerce Clause claims completely unconnected to the state proceedings, but nearly *everything* about the federal and state claims differs . . . ."); Dkt. 324 at 9 ("no matter which way the state proceedings are decided this Court would still have to rule on the same issues presently before it").

The Court abstained under *Pullman*, staying the case until the conclusion of state court proceedings. Dkt. 326.[2] The stay reflected not only "the principles of comity raised by *Pullman*," but also "considerations of judicial economy" and to "avoid inconsistent results." Dkt. 326 at 8.

[1] Plaintiffs do not seek to certify under Rule 54(b)—and have not appealed—the Court's Foreign Affairs summary judgment decision, apparently leaving that dispositive ruling for a later, separate appeal from a final judgment.

[2] The state court litigation challenging Ecology's Section 401 denial is proceeding, with cross-motions for summary judgment currently being briefed and hearing on those motions expected in July 2019. *Millennium Bulk Terminals-Longview, LLC v. Dep't of Ecol.*, No. 18-2-00994-08 (Cowlitz Cty. Super. Ct.).

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C. Plaintiffs' Rule 54(b) Motion and Appeal

Four weeks after the Court stayed this case, Plaintiffs moved the Court to certify its immunity and statutory preemption decisions as final judgments under Rule 54(b). Announcing that they would appeal the stay as of right under 28 U.S.C. § 1291, Plaintiffs argued that the Court's partial summary judgment decisions would be appealable under the doctrine of merger, regardless of whether it certified them under Rule 54(b). Mot. at 4–5. The next day, Plaintiffs filed a notice of appeal, designating the *Pullman* stay, the dismissal of Defendant Franz, and the statutory preemption decision as appealable orders. Dkt. 331.

III. ARGUMENT

Plaintiffs' Rule 54(b) request is premised entirely on their theory that the *Pullman* stay is an appealable final decision. That theory is both incorrect and irrelevant to their certification request. The stay is non-final because it does not "amount[] to a dismissal of the suit," and instead expressly anticipates a return to federal court once state proceedings conclude. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.* (*Moses H. Cone*), 460 U.S. 1, 10 (1983); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 713 (1996) (*Moses H. Cone* "concluded that the abstention-based stay order was appealable as a 'final decision' under § 1291 because it put the litigants 'effectively out of court,' and because its effect was 'precisely to surrender jurisdiction of a federal suit to a state court.'") (quotation marks and citations omitted) (quoting *Moses H. Cone*, 460 U.S. at 11 n.11).

The Ninth Circuit, however, will decide whether it has jurisdiction over Plaintiffs' stay appeal, and this Court should not grant Rule 54(b) certification on the erroneous presumption that the appeal is valid. Should the Ninth Circuit reject the stay appeal, a Rule 54(b) certification from this Court would facilitate exactly what the Rule is designed to prevent—inefficient, piecemeal appeals involving the same underlying factual predicates. It would also be inequitable because Plaintiffs delayed many months before seeking certification and because Defendants would be prejudiced by having to litigate on multiple fronts at once.

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1 **A. The Court's *Pullman* Stay Is Not An Appealable Final Decision**

2 In general, only a "final decision" of a district court is appealable as of right. 28 U.S.C. 3 § 1291. A stay is ordinarily not final because, by its very nature, it provides only a temporary 4 pause in the district court litigation. *Moses H. Cone*, 460 U.S. at 10 n.11. The Supreme Court 5 has recognized that a stay may be appealable under § 1291, however, where it "amounts to a 6 dismissal of the suit." *Id.* at 10. Plaintiffs' Rule 54(b) request hinges on their mistaken idea 7 that this Court's stay is an appealable final order under *Moses H. Cone*. That argument is not 8 only wrong but inapt to their motion.

9 First, the Court's *Pullman* stay is not an appealable final order because it does not 10 "amount[] to a dismissal." *Id.* In *Moses H. Cone*, the district court entered a stay under 11 *Colorado River* abstention in deference to parallel state litigation. 460 U.S. at 4; *see Colo. R.* 12 *Water Conservation Dist. v. United States*, 424 U.S. 800, 813–20 (1976). The state-court 13 litigation "involved the identical issue of arbitrability" of the parties' commercial dispute— 14 which was "the only substantive issue present in the federal suit." *Id.* at 10. The Court held 15 that the *Colorado River* stay was final for the purposes of § 1291 because it "meant that there 16 would be no further litigation in the federal forum." *Moses H. Cone*, 460 U.S. at 10. At the 17 same time, the Court recognized that a "stay pursuant to *Pullman* abstention is entered with the 18 expectation that the federal litigation will resume in the event that the plaintiff does not obtain 19 relief in state court on state-law grounds." *Id.*

20 So it is with this Court's *Pullman* stay, which expressly contemplates that, "if Plaintiffs 21 lose in the state courts, they would still have an opportunity to proceed with commerce clause 22 issues in federal court." Dkt. 326 at 6. Plaintiffs themselves have insisted that this federal case 23 "must proceed regardless of the results in the state proceedings." Dkt. 314 at 21 of 28; *see also* 24 *id.* at 19 of 28 ("regardless of the outcome in the state proceedings, this case cannot and will 25 not be rendered moot"). That sharply distinguishes this case from *Moses H. Cone*, in which 26 "the state court's judgment on the issue would [have] be[een] res judicata" and rendered the

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federal case moot. 460 U.S. at 10. The *Pullman* stay here does not "become[] final merely because it . . . allow[s] a state court to be the first to rule on a common issue." *Moses H. Cone*, 460 U.S. at 10 n.11; *see, e.g.*, *Stanley v. Chapell*, 764 F.3d 990 (9th Cir. 2014) (stay not appealable under § 1291 where it "merely has the practical effect of allowing a state court to be the first to rule on a common issue," even if it "will likely involve substantial delay") (quotation marks and citations omitted).[3]

Second, this Court has no reason to even reach whether its stay is an appealable decision, as that is a question the Court of Appeals must decide de novo. *See New Mexico v. Trujillo*, 813 F.3d 1308, 1317 (10th Cir. 2016). In Plaintiffs' view, if the Ninth Circuit were to rule that the stay is appealable, the Court's partial summary judgment decisions would merge with it on appeal. Mot. at 4. If the Ninth Circuit concludes (correctly) that the stay is interlocutory and unappealable, the earlier orders would clearly be unreviewable—both because they are non-final and because Plaintiffs failed to appeal them within the 30-day jurisdictional deadline. *See* FRAP 4(a)(1)(A); *Trujillo*, 813 F.3d at 1317 n.3. In other words, Plaintiffs base their entire Rule 54(b) motion on the stay's appealability, yet that is squarely a matter for the Court of Appeals. This Court should decline to address that unnecessary issue and instead apply the straightforward Rule 54(b) standards. As explained below, those standards compel denial of Plaintiffs' certification request.

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[3] Unlike this Court's stay, a *Pullman* stay would be appealable under § 1291 only if its "sole purpose and effect . . . is precisely to surrender jurisdiction of a federal suit to a state court." *Moses H. Cone*, 460 U.S. at 10 n.11; *see, e.g.*, *Confederated Salish v. Simonich*, 29 F.3d 1398, 1407 (9th Cir. 1994) ("We have jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1) to hear an *interlocutory* appeal of a district court's order granting a stay pursuant to the *Pullman* abstention doctrine.") (emphasis added); *Badham v. U.S. Dist. Ct. for N. Dist. of Cal.*, 721 F.2d 1170, 1171 (9th Cir. 1983) ("Under some circumstances, a *Pullman* abstention order may be deemed a final order subject to direct appeal under 28 U.S.C. § 1291.").

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B. Plaintiffs' Belated Rule 54(b) Requests Should Be Denied

1. Rule 54(b) Standards

A "partial summary judgment" order is "usually not an appealable final order" under § 1291 "because it does not dispose of all of the claims." *Jewel v. NSA*, 810 F.3d 622, 627 (9th Cir. 2015) (quotation marks and citation omitted). Rule 54(b) provides one exception, permitting the district court to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties," but "only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b).

The U.S. Supreme Court has set forth a two-part test under Rule 54(b). *Curtiss–Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7–10 (1980). First, the court must determine that the judgment is truly final—that is, "an ultimate disposition" either of an "individual claim entered in the course of a multiple claims action," *id*. at 7 (internal quotation marks omitted), or of "some but not all of the parties" in a multiple-party action, *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 n.3 (1976). Second, the court must determine whether there is any just reason for delay. *Curtiss–Wright*, 446 U.S. at 8. In this second step, "'a district court must take into account judicial administrative interests as well as the equities involved.'" *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 576 (9th Cir. 2018) (quoting *Curtiss–Wright*, 446 U.S. at 8). The Ninth Circuit embraces a "pragmatic approach focusing on severability and efficient judicial administration," and has "eschewed setting narrow guidelines for district courts to follow." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 880 (9th Cir. 2005). Whether to certify an eligible judgment as final "is left to the sound judicial discretion of the district court." *Curtiss–Wright*, 446 U.S. at 8.

Contrary to Plaintiffs' representations, Rule 54(b) requests are not "routine[ly]" granted. Mot. at 3; *see, e.g.*, *Curtiss–Wright Corp.*, 446 U.S. at 10–11 ("Plainly, sound judicial administration does not require that Rule 54(b) requests be granted routinely."); *In re Lindsay*, 59 F.3d 942, 951 (9th Cir. 1995) (cautioning against "routine 54(b) determinations");

Corrosioneering, Inc. v. Thyssen Envtl. Sys., Inc., 807 F.2d 1279, 1282 (6th Cir. 1986) ("Rule 54(b) is not to be used routinely, or as a courtesy or accommodation to counsel.") (citations omitted); *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981) (Kennedy, J.) ("Judgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.").

2. Rule 54(b) certification would be inequitable and inefficient

Although the Court's partial summary judgment orders meet the first step of the Rule 54(b) test (juridical finality), they fail the second step. Both judicial efficiency and the equities weigh against certification.

a. Certification would facilitate inefficient, piecemeal appeals

Plaintiffs' requested Rule 54(b) certification would substantially increase the likelihood of piecemeal appeals. If the Court of Appeals rightly concludes that the *Pullman* stay is non-final and unappealable, Rule 54(b) certifications would permit Plaintiffs to obtain immediate review of two interlocutory decisions. The only outcome—and the manifest purpose—of Rule 54(b) certification here would be to make successive appeals "essentially inevitable"—the exact opposite of the efficiency interests Rule 54(b) should promote. *Wood*, 422 F.3d at 882 (reversing Rule 54(b) certification that permitted seriatim appeals on "different theories" of liability "arising out of the same factual relationship" between the parties).

Certification would not only result in multiple appeals, but duplicative ones. The factual issues underlying the partial summary judgment orders overlap with those relevant to Plaintiffs' other claims, increasing the likelihood that the Court of Appeals would "have to revisit the same facts—spun only slightly differently—in a successive appeal." *Id.* The Court's preemption order contained four salient holdings: (1) neither Lighthouse nor BNSF met the redressability test of standing to pursue claims under the ICCTA or the PWSA;

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(2) Lighthouse was not a "rail carrier" as defined by the ICCTA; (3) BNSF was not regulated by the Department of Ecology's Section 401 denial and could not bring an ICCTA preemption claim; and (4) that the Section 401 denial did not implicate the PWSA. Those issues and arguments will recur when Plaintiffs' remaining dormant Commerce Clause claim is adjudicated. Indeed, the redressability prong of standing already arose in the Court's written questions to counsel before the dormant Commerce Clause oral argument. *See, e.g.*, Notice to Counsel, Dkt. 300. And in any appeal from the Court's preemption decision, the Plaintiffs will likely point to the same discovery, exhibits, and expert reports at issue in the dormant Commerce Clause claim. *Compare* Plaintiffs' Preemption Exhibits Dkt. 188-2 (Answers to Interrogatories by Ecology Director Bellon); Dkt. 188-3 (Expert Report of Dr. Berkman); Dkt. 191 (Expert Report of Dr. Huneke), *with* Plaintiffs' dormant Commerce Clause Exhibits Dkts. 262-45, 262-48, 262-59 (Answers to Interrogatories by Ecology Director Bellon); Dkt. 265 (Expert Report of Dr. Berkman); Dkt. 269 (Expert Report of Dr. Huneke). Such a "similarity of legal or factual issues will weigh heavily against entry of judgment" under Rule 54(b). *Morrison-Knudsen Co.*, 655 F.2d at 965.

Plaintiffs' observation that the statutory "preemption questions are distinct and severable" from other claims does not control the analysis. Mot. at 7. In a recent decision in this district, the court denied Rule 54(b) certification, noting that while its "summary judgment ruling centered on two discrete issues not directly implicated by their other claims," the ruling implicated legal issues, factual issues, and expert opinion that were also part of other claims. *Jack v. Borg-Warner Morse Tec, LLC*, No. C17-0537JLR, 2019 WL 130301, *2 (W.D. Wash. Jan. 8, 2019) (denying Rule 54(b) certification and noting "the substantial common ground between Plaintiffs' claims against Union Pacific and their claims against the remaining Defendants"). Here, Plaintiffs similarly frame their claims "in an artificially narrow fashion."

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Id.[4] The question is not whether the Court's preemption ruling implicates the dormant Commerce Clause, Mot. at 7, but whether the Plaintiffs rely on, and the appellate court will need to review, similar facts, exhibits, and experts for both claims. *See, e.g.*, *Wood*, 422 F.3d at 882 ("We cannot afford the luxury of reviewing the same set of facts in a routine case more than once without a seriously important reason"). Plaintiffs have shown no reason for early appellate review here, and Rule 54(b) certification would only ensure piecemeal appeals.

b. The equities weigh against Rule 54(b) certification

The equities oppose certification because Plaintiffs unreasonably delayed their Rule 54(b) request, which if granted would prejudice Defendants by forcing them to litigate this case simultaneously in multiple courts. *See generally Gregorian v. Izvestia*, 871 F.2d 1515, 1519 (9th Cir. 1989) (second step of Rule 54(b) analysis "focus[es] on traditional equitable principles such as prejudice and delay").

Plaintiffs waited more than five months after the Court's statutory preemption decision—and more than six months after the Court's immunity decision—to seek certification. Although the courts of this Circuit do not usually apply a strict deadline to Rule 54(b) motions, Plaintiffs' long delay tilts the equitable balance against them. *Compare Birkes v. Tillamook Cty.*, No. 3:09-CV-1084-AC, 2012 WL 2178964, at *3 (D. Or. June 13, 2012) ("While Rule 54(b) does not specify a fixed time within which a motion under the rule may be filed, the longer an aggrieved party waits after receiving notice of the court's ruling, the less likely it will be—in the typical case—that he can persuade the . . . court that there is, in the language of the rule, 'no just reason for delay.'"), *with King v. Newbold*, 845 F.3d 866, 868

[4] Several of the cases relied on by Plaintiffs undercut their own argument. The district court in *Tsyn v. Wells Fargo Advisors*, *LLC*, No. 14-cv-023552-LB, 2016 WL 7635883 (N.D. Cal. June 27, 2016) (cited in Mot. at 6), denied a Rule 54(b) motion because the claims "interrelate and overlap" and all claims in the amended complaint, as here, were based on common factual allegations. *Id.* at *3. In *Montes v. Rafalowski*, No. C-09-00976, 2012 WL 5392290 (N.D. Cal. Nov. 2, 2012) (cited in Mot. at 7–8), the district court denied a motion for entry of partial summary judgment because of the similarity of legal and factual issues.

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(7th Cir. 2017) ("[A]s a general rule it is an abuse of discretion for a district judge to grant a motion for a Rule 54(b) order when the motion is filed more than thirty days after the entry of the adjudication to which it relates.") (quotation marks and citation omitted). Plaintiffs elected not to seek certification of the earlier summary judgment decisions at the time the Court issued them. They filed their dilatory Rule 54(b) motion only in response to the *Pullman* stay for the sole purpose of circumventing the finality requirement of § 1291. Rewarding such strategic delay would be inequitable.

Finally, certifying the partial summary judgment orders as final would prejudice Defendants because it would almost certainly force them to litigate in multiple courts simultaneously and this case on appeal at least twice. By permitting immediate review of those earlier rulings, certification would create a "parallel appellate process" for certain claims while the state court proceedings continue—and likely after litigation in this Court resumes. *Birkes*, 2012 WL 2178964, at *3. And once this Court's stay is lifted, either Plaintiffs or Defendants would likely appeal the Court's ultimate dormant Commerce Clause ruling. In contrast, Plaintiffs would suffer no hardship from denial of Rule 54(b) certification to permit the normal process of appellate review to unfold.[5]

IV. CONCLUSION

For all the reasons stated above, Defendants respectfully request that the Court deny Plaintiffs' Rule 54(b) request.

[5] Although Plaintiffs unsuccessfully moved to continue the trial date and extend the deadlines of this case, Dkt. 156, it has proceeded expeditiously. Plaintiffs' claim of "*years*" of delay (Mot. at 8) is exaggerated, as they filed this case in 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 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 such filing to all counsel of record.

DATED this 20th day of May 2019.

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