

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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 ABSTENSION

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Table of Authorities ii

Interest of the *Amici Curiae* 1

Introduction 2

Argument 3

 I. State Interference With Foreign Trade Undermines a Uniform Foreign Policy and Is Harmful to the National Economy 3

 A. Trade Plays an Important Role in America’s Foreign Policy. 3

 B. State Interference Impedes Federal Efforts to Establish and Implement Foreign Trade Policy. 5

 II. Vigorous Enforcement of the Commerce Clause Is Essential to the Executive’s Exclusive Foreign Policy Prerogatives. 6

 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. 6

 B. Defendants’ Conduct Violates These Principles. 8

 1. Defendants’ Actions Interfere With the Uniformity of Federal Policy. 9

 2. Defendants’ Actions Impose Burdens That Far Outweigh Any Local Benefits. 10

 III. Dismissing the Case Would Give States a Green Light to Interfere With Foreign Trade Policy in Other Contexts. 13

Conclusion 15

TABLE OF AUTHORITIES

Cases

Barclays Bank PLC v. Franchise Tax Bd. of Cal.,
512 U.S. 298 (1994).....7

Bd. of Trustees v. United States,
289 U.S. 48 (1933).....6

Brown–Forman Distillers Corp. v. N.Y. State Liquor Auth.,
476 U.S. 573 (1986).....7

Dep’t of Revenue of Ky. v. Davis,
553 U.S. 328 (2008).....11

Japan Line, Ltd. v. Los Angeles Cty.,
441 U.S. 434 (1979).....6, 8, 9

Keating v. FERC,
927 F.2d 616 (D.C. Cir. 1991).....11

Kraft Gen. Foods Inc. v. Iowa Dep’t of Revenue & Fin.,
505 U.S. 71 (1992).....7, 8

Nat’l Foreign Trade Council v. Natsios,
181 F.3d 38 (1st Cir. 1999).....10

Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality,
511 U.S. 93 (1994).....7

Pac. Nw. Venison Producers v. Smitch,
20 F.3d 1008 (9th Cir. 1994)8

Pharm. Research & Mfrs. of Am. v. Cty. of Alameda,
768 F.3d 1037 (9th Cir. 2014)7

Piazza’s Seafood World, LLC v. Odom,
448 F.3d 744 (5th Cir. 2006)8

Rapanos v. United States,
547 U.S. 715 (2006) (plurality opinion)12

United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.,
550 U.S. 330 (2007).....10

1	<i>United States v. Marathon Dev. Corp.</i> ,	
	867 F.2d 96 (1st Cir. 1989).....	11
2	<i>United States v. Puerto Rico</i> ,	
3	721 F.2d 832 (1st Cir.1983).....	11
4	<i>Wardair Canada, Inc. v. Fla. Dep’t of Revenue</i> ,	
5	477 U.S. 1 (1986).....	7
6	Statutes, Rules and Regulations	
7	33 U.S.C. § 1251(b).....	11
8	33 U.S.C. § 1341.....	11
9	33 U.S.C. § 1341(a).....	12
10	42 U.S.C. § 13367(a).....	4
11	Other Authorities	
12	Alan I. Abramowitz & Steven Webster, <i>The Rise of Negative Partisanship and the</i>	
13	<i>Nationalization of U.S. Elections in the 21st Century</i> , 41 Electoral Stud. 12	
14	(2016).....	14
15	Bureau of Econ. Analysis, <i>Gross Domestic Product: Percent change from</i>	
16	<i>preceding period</i> , perma.cc/8WJR-MBYZ.....	4
17	<i>Concerning the Federal Coal Moratorium</i> , Order No. 3348 (Mar. 29, 2017),	
18	perma.cc/HZW5-3RYU.....	4
19	Craig S. Hakkio & Jun Nie, Fed. Reserve Bank of Kansas City, <i>Implications of</i>	
20	<i>Recent U.S. Energy Trends for Trade Forecasts 5</i> , perma.cc/V3FC-24W8.....	3
21	Ernst & Young, <i>U.S. Coal Exports: National and State Economic Contributions</i>	
22	(May 2013), perma.cc/6VE6-AKPL.....	4
23	Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, <i>Affect, Not Ideology: A Social</i>	
24	<i>Identity Perspective on Polarization</i> , 76 Pub. Opinion Q. 405 (2012).....	14
25	Jeffrey M. Jones, Gallup, <i>Red States Outnumber Blue for First Time in Gallup</i>	
26	<i>Tracking</i> (Feb. 3, 2016), perma.cc/K35X-BBKE.....	14
	Nat’l Ass’n of Mfrs., <i>United States Manufacturing Facts 2</i> , perma.cc/U8AV-	
	NGVT).....	5
	Office of the President, <i>National Security Strategy of the United States of America</i>	
	23 (Dec. 2017), perma.cc/QLU5-WR4J.....	5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Office of the U.S. Trade Rep., *2018 Fact Sheet: USTR Success Stories: Opening Markets for U.S. Agricultural Exports*, perma.cc/G8WF-U8DY5

Office of the U.S. Trade Rep., *Benefits of Trade*, perma.cc/_4UP6-TUW7)3

Press Release, U.S. Dep’t of Interior, Secretary Zinke Takes Immediate Action to Advance American Energy Independence (Mar. 29, 2017), perma.cc/F5NH-PK6L5

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-21 (2d ed. 1988).....8

U.S. Army Corps of Eng’rs, *Permit Requirements for the State of Illinois 1*, perma.cc/6T6W-E5YM13

U.S. Energy Information Admin., *U.S. Coal Exports*, perma.cc/E4GA-KTKG4

Qinnan Zhou, *The U.S. Energy Pivot: A New Era for Energy Security in Asia?*, Woodrow Wilson Int’l Center for Scholars New Security Beat, Mar. 26, 2015, perma.cc/5CXZ-LNKT5

1 **INTEREST OF THE *AMICI CURIAE***

2 The National Mining Association (NMA) is a national trade association whose members
3 produce most of America’s coal, metals, and industrial and agricultural minerals. Its membership
4 also includes manufacturers of mining and mineral processing machinery and supplies,
5 transporters, financial and engineering firms, and other businesses involved in the nation’s
6 mining industries.

7 The National Association of Manufacturers (NAM) is the largest manufacturing associ-
8 ation in the United States, representing small and large manufacturers in every industrial sector
9 and in all 50 states. Manufacturing employs more than 12 million men and women, contributes
10 \$2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector
11 and accounts for more than three-quarters of all private-sector research and development in the
12 nation. The NAM is the voice of the manufacturing community and the leading advocate for a
13 policy agenda that helps manufacturers compete in the global economy and create jobs across the
14 United States.

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

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

25 *Amici* have a significant interest in this case because Washington’s actions to block con-
26 struction of a new coal export facility at the Millennium Bulk Terminal threaten the United

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

6 INTRODUCTION

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

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

22 Defendants' actions here violate both of those proscriptions. *First*, their attempts to block
23 construction of a major export facility have undeniably undermined the uniformity of federal
24 trade policy, which is to encourage the export of coal, both for the benefit of American producers
25

26 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.

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

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

11 ARGUMENT

12 I. State Interference With Foreign Trade Undermines a Uniform Foreign Policy and 13 Is Harmful to the National Economy.

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

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

22 The United States’ abundant energy resources are critical to the country’s export trade.
23 Energy exports have accounted for a “substantial part” of U.S. economic growth in recent years,
24 contributing approximately 10% of the nation’s annual real GDP growth from 2006 to 2013. *See*
25 Craig S. Hakkio & Jun Nie, Fed. Reserve Bank of Kansas City, *Implications of Recent U.S.*
26 *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

1 energy exports have been fueled in no small part by a growth in coal exports, which grew by
2 68% between 2016 and 2017 alone. *See* U.S. Energy Information Admin., *U.S. Coal Exports*,
3 perma.cc/E4GA-KTKG. For every million short tons of U.S. coal exported, an estimated 1,320
4 jobs are created, and expenditures on downstream transportation services related to coal exports
5 supported another 8,850 jobs at transportation companies in 2011. Ernst & Young, *U.S. Coal*
6 *Exports: National and State Economic Contributions* at i-ii (May 2013), perma.cc/6VE6-AKPL.

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

16 In addition to its economic benefits, America’s international trade is also an essential
17 foreign policy tool for the United States to advance its interests around the world. By providing
18 economic assistance to our allies, while denying it to our adversaries, the United States can
19 strengthen the community of democratic nations economically and foster ties of cooperation and
20 respect between those nations and the United States.

21 The current administration has made energy exports a key foreign policy focus. The
22 administration’s efforts have been particularly significant in the coal sector, where the
23 Department of the Interior has moved to facilitate more leases of federal land for coal
24 development (*see Concerning the Federal Coal Moratorium*, Order No. 3348 (Mar. 29, 2017),
25 perma.cc/HZW5-3RYU), with the express goal of “assist[ing] our allies with their energy
26 needs.” Press Release, U.S. Dep’t of Interior, Secretary Zinke Takes Immediate Action to

1 Advance American Energy Independence (Mar. 29, 2017), perma.cc/F5NH-PK6L See also
2 Compl. ¶¶ 192-205. These energy exports are critically needed in Asia, where allies such as
3 Japan and South Korea have strong demand for American energy. See, e.g., Qinnan Zhou, *The*
4 *U.S. Energy Pivot: A New Era for Energy Security in Asia?*, Woodrow Wilson Int’l Center for
5 Scholars New Security Beat, Mar. 26, 2015, perma.cc/5CXZ-LNKT. And in order to reach Asian
6 markets, coal producers must have access to export facilities on the West Coast—which is why
7 the administration’s current National Security Strategy states that it is critical for the United
8 States to give “continued support of private sector development of coastal terminals” for energy
9 exports. Office of the President, *National Security Strategy of the United States of America* 23
10 (Dec. 2017), perma.cc/QLU5-WR4J.

11 Yet the implications of Defendants’ conduct reach far beyond the energy industry.
12 Numerous other American industries rely on foreign trade—including agriculture, which has
13 posted an annual trade surplus for over 50 years and contributed more than \$138 billion to
14 American exports in 2017 (see Office of the U.S. Trade Rep., *2018 Fact Sheet: USTR Success*
15 *Stories: Opening Markets for U.S. Agricultural Exports*, perma.cc/G8WF-U8DY); and the
16 manufacturing sector, which produced \$1.2 trillion in exports in 2016 (see Nat’l Ass’n of Mfrs.,
17 *United States Manufacturing Facts 2*, perma.cc/U8AV-NGVT). Each of these trade-reliant
18 industries makes critical contributions to the American economy and to relationships with
19 America’s trading partners, and the United States has a strong interest in ensuring that exports in
20 these sectors remain strong.

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

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

25 “Foreign commerce,” as the Supreme Court has repeatedly recognized, “is pre-eminently
26 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

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

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

17 **II. Vigorous Enforcement of the Commerce Clause Is Essential to the Executive’s**
18 **Exclusive Foreign Policy Prerogatives.**

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

24 **A. The Foreign Commerce Clause Prohibits States From Impairing Federal**
25 **Policy Uniformity in Foreign Commerce, or Imposing Burdens on Foreign**
26 **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

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

5 In its domestic-trade dormant Commerce Clause cases, “[t]he Supreme Court ‘has
6 adopted . . . a two-tiered approach to analyzing state economic regulations under the Commerce
7 Clause.’” *Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1039-40 (9th Cir.
8 2014) (quoting *Brown–Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79
9 (1986)). First, when a state law discriminates against interstate or foreign commerce by treating
10 in-state or in-country economic interests better than out-of-state or out-of-country economic
11 interests, the law “is virtually *per se* invalid.” *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511
12 U.S. 93, 99 (1994). Second, when a state law “regulates evenhandedly” with only “incidental
13 effects” on interstate or foreign commerce, the law is invalid only if “the burden imposed on
14 such commerce is clearly excessive in relation to the putative local benefits.” *Id.* (quotations
15 omitted).

16 Courts often rely on this general framework to resolve dormant Commerce Clause cases
17 involving international trade as well. *See, e.g., Kraft Gen. Foods, Inc. v. Iowa Dep’t of Revenue*
18 *& Fin.*, 505 U.S. 71, 81-82 (1992) (relying on interstate Commerce Clause decisions). However,
19 it is well understood that the prohibitory power of the Commerce Clause is especially strong in
20 the context of foreign commerce, with respect to which “a State’s power is further constrained
21 because of the special need for federal uniformity.” *Barclays Bank PLC v. Franchise Tax Bd. of*
22 *Cal.*, 512 U.S. 298, 311 (1994) (internal quotation marks omitted). Thus, “the constitutional
23 prohibition” against state regulation of foreign commerce is even “broader than the protection
24 afforded to interstate commerce” because “matters of concern to the entire Nation are imp-
25 licated.” *Kraft Gen. Foods*, 505 U.S. at 79; *accord, e.g., Piazza’s Seafood World, LLC v. Odom*,

1 448 F.3d 744, 749 (5th Cir. 2006) (“[T]he scope of Congress’s power to regulate foreign com-
2 merce, and accordingly the limit on the power of the states in that area, is greater”).

3 For these reasons, and in light of the importance of uniform federal regulation in the area
4 of foreign affairs, “a more extensive constitutional inquiry is required” to decide a dormant
5 Commerce Clause challenge involving foreign commerce. *Japan Line*, 441 U.S. at 446. As the
6 Ninth Circuit has put it, “when state regulations affect foreign commerce, additional scrutiny is
7 necessary to determine whether the regulations ‘may impair uniformity in an area where federal
8 uniformity is essential,’ or may implicate ‘matters of concern to the whole nation . . . such as the
9 potential for international retaliation.’” *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008,
10 1014 (9th Cir. 1994) (quoting *Japan Line*, 441 U.S. at 448, and *Kraft Gen. Foods*, 505 U.S. at
11 79). *Accord*, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-21, at 469 (2d ed.
12 1988) (“If state action touching foreign commerce is to be allowed, it must be shown not to
13 affect national concerns to any significant degree, a far more difficult task than in the case of
14 interstate commerce.”).

15 According to this more demanding standard, a court must ask additionally whether a state
16 law regulating foreign commerce threatens to “impair federal uniformity in an area where federal
17 uniformity is essential.” *Japan Line*, 441 U.S. at 448. Such laws “are invalid ‘if they (1) create a
18 substantial risk of conflicts with foreign governments; or (2) undermine the ability of the federal
19 government to speak with one voice in regulating commercial affairs with foreign states.’”
20 *Piazza’s Seafood World*, 448 F.3d at 750. That is so regardless of local benefit. *Kraft Gen.*
21 *Foods*, 505 U.S. at 79.

22 **B. Defendants’ Conduct Violates These Principles.**

23 The burden on foreign commerce from Washington’s attempts to block development of
24 the coal export facility at the Millennium Bulk Terminal far outweighs any benefit to the state.
25 But the Court need not engage in any weighing of burdens and benefits because the resulting
26

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

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

4 The question whether the United States should export coal—or any other good or
5 commodity—and in what amounts, is one that squarely falls within the purview of the federal
6 government. *Japan Line*, 441 U.S. at 448. As described above (at 3-5), the federal government
7 has taken the initiative to set policy for the nation in this area, by prioritizing energy exports in
8 general, and coal exports in particular, as key to the economic prosperity and national security of
9 both the United States and its allies in Asia.

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

20 This kind of direct interference with an express federal policy unquestionably violates
21 *Japan Line's* "one voice" requirement. State laws have been held to violate the Commerce
22 Clause where they merely articulated a foreign policy that tangentially diverged from the federal
23 government's. *See, e.g., Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 68 (1st Cir. 1999)
24 (Massachusetts law restricting state's ability to transact with companies doing business in Burma
25 prevented the federal government from speaking with one voice). If such laws are unconstitu-
26

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

3 **2. Defendants’ Actions Impose Burdens That Far Outweigh Any Local**
4 **Benefits.**

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

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

21 Defendants would have to establish overwhelming local benefits to overcome the
22 enormous costs of this interference on the national economy and withstand Plaintiffs’ Commerce
23 Clause challenge—and they plainly cannot. Indeed, development of the export facility would
24 *benefit* Washington economically, producing substantial new tax revenues for the state and
25 creating a significant number of new jobs and infrastructure opportunities in Cowlitz County,

26 _____
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.

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

4 To be sure, some of Defendants’ actions rested on purported environmental concerns
5 about the project. But none of the environmental concerns raised had anything to do with
6 *Washington’s* environment or natural resources; rather, they concerned the projected *global*
7 effects of consuming the coal that would be exported through the Millennium Bulk Terminal
8 facility. *See, e.g.*, Compl. ¶ 124. Those concerns cannot satisfy the Commerce Clause inquiry,
9 which looks only to “the benefits of a state or local practice,” not to a state’s desire to regulate
10 national or international matters. *See, e.g., Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 353
11 (2008).

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

24 Under Section 401, an applicant for a Section 404 discharge permit must obtain a
25 certification from the State that the proposed discharge will comply with the applicable water
26 quality standards under the Act. 33 U.S.C. § 1341(a). Here, however, the denial of plaintiffs’

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

9 Perhaps more importantly, the implications of allowing states to hijack Section 401 for
10 purposes unrelated to water quality would be disruptive to numerous sectors of the economy. If
11 Washington can prohibit the export of coal by way of Section 401 permitting, states all across
12 the country could similarly restrict domestic and foreign trade. After all, the mining industry is
13 not the only industry that depends upon state certifications under Section 401 in order to do
14 business. Recent years have seen an “immense expansion of federal regulation of land use”
15 under the Clean Water Act, with the relevant agencies asserting federal jurisdiction over
16 “virtually any parcel of land containing a channel or conduit—whether man-made or natural,
17 broad or narrow, permanent or ephemeral—through which rainwater or drainage may
18 occasionally or intermittently flow.” *See Rapanos v. United States*, 547 U.S. 715, 722 (2006)
19 (plurality opinion). Section 401 state certifications have accordingly become necessary for
20 significant numbers of real estate, infrastructure, and agricultural projects. Indeed, in many
21 states, Section 404 and 401 approvals are broadly required for any project that may involve
22 “dredg[ing], fill[ing] or otherwise alter[ing] the bed or banks of any stream, lake, wetland,
23 floodplain or floodway”—which describes the vast majority of agricultural projects. *See U.S.*
24 *Army Corps of Eng’rs, Permit Requirements for the State of Illinois* 1, perma.cc/6T6W-E5YM.

1 This kind of political gamesmanship is not what Congress contemplated when it granted states
2 the authority to review proposed projects for water quality issues in Section 401.³

3 It also bears emphasis that Defendants have treated the Millennium Bulk Terminal
4 facility differently from other port development projects proposed during the same time period.
5 Plaintiffs allege that Washington supported development of several other export facilities in the
6 state and that the only salient difference between those facilities and the proposed coal export
7 facility is that the latter involves coal and the others did not. Compl. ¶¶ 138-48. Defendants
8 therefore cannot deny that their true intent—and the actual effect of their conduct—is to
9 unilaterally manipulate U.S. energy policy and foreign trade practices rather than to regulate
10 Washington’s environment. The Commerce Clause cannot abide that kind of preferential treat-
11 ment with respect to foreign trade.

12 **III. Dismissing the Case Would Give States a Green Light to Interfere With Foreign**
13 **Trade Policy in Other Contexts.**

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

16 In light of the widespread polarization of the American electorate, many state
17 governments themselves have assumed polarized political characters. Whereas the bodies politic
18 and state governments in California, Oregon, Maryland, and New Mexico are known to lean
19 strongly in favor of liberal foreign policy and trade policy, for example, those in states like South
20 Carolina, Texas, Montana, and Alaska are known to lean strongly in the other direction. *See*
21 Jeffrey M. Jones, Gallup, *Red States Outnumber Blue for First Time in Gallup Tracking* (Feb. 3,
22 2016), perma.cc/K35X-BBKE; Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not*

23 ³ Declining to invalidate Defendants’ conduct here would have implications beyond offense to
24 the dormant Commerce Clause. If a state with an ideological axe to grind can use a Section 401
25 certification to upend federal control over foreign affairs, so too can it use Section 401
26 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.

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

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

11 The results would be disastrous for American foreign trade policy and a clear offense to
12 the nation's federalist scheme. California could deny port access and refuse to permit new port
13 facilities for agricultural exports if it disagrees with the manner in which livestock are raised. *Cf.*
14 *Missouri v. California*, No. 22-O-148 (S. Ct. filed Dec. 7, 2017) (Missouri has sued California,
15 challenging California's efforts to limit the sale of non-cage-free eggs within California).
16 Conversely, South Carolina could refuse port access or to permit new port facilities for handling
17 exports of manufactured goods if it disagrees with liberal immigration policies that ensure
18 sufficient labor supply needed to make those goods. *Cf. United States v. California*, No. 18-cv-
19 490 (E.D. Cal. filed Mar. 6, 2018) (United States' suit against California concerning immigration
20 policy). And because virtually all international trade is bilateral, these states likewise could
21 attempt to obstruct the importation of such goods from our foreign allies based on other policy
22 objections. Worse still, states like Texas, New Mexico, and Montana could attempt to override in
23 practice the prevailing administration's uniform federal policies concerning free trade (or not)
24 with Mexico and Canada.

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

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

6 **CONCLUSION**

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

8 DATED this 3rd day of May, 2018.

9 BYRNES KELLER CROMWELL LLP

10 By /s/ Bradley S. Keller

Bradley S. Keller, WSBA #10665

11 By /s/ Keith D. Petrak

Keith D. Petrak, WSBA #19159

Byrnes Keller Cromwell LLP

1000 Second Avenue, 38th Floor

Seattle, WA 98104

Telephone: (206) 622-2000

Facsimile: (206) 622-2522

Email: bkeller@byrneskeller.com

kpetrak@byrneskeller.com

17 MAYER BROWN LLP

Michael Kimberly (*pro hac vice* admission
pending)

1999 K Street, N.W.

Washington, District of Columbia 20006-1101

Telephone: (202) 263-3000

Facsimile: (202) 263-3300

Email: mkimberly@mayerbrown.com

21 -and-

22 Timothy Bishop (*pro hac vice* admission
pending)

71 S. Wacker Drive

Chicago, Illinois 60606

Telephone: (312) 701-7829

Facsimile: (312) 706-8607

Email: tbishop@mayerbrown.com

*Attorneys for Amici Curiae American Farm
Bureau Federation, American Fuel &
Petrochemical Manufacturers, National
Association of Manufacturers, and National
Mining Association*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 3rd 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.

/s/ Bradley S. Keller

Byrnes Keller Cromwell LLP
1000 Second Avenue, 38th Floor
Seattle, WA 98104
Telephone: (206) 622-2000
Facsimile: (206) 622-2522
bkeller@byrneskeller.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26