HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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-05005-RJB STATES OF CALIFORNIA, MARYLAND, NEW JERSEY, NEW YORK and OREGON, and the COMMONWEALTH OF MASSACHUSETTS'S AMICUS BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COMMERCE CLAUSE ISSUES

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Amici, the States of California, Maryland, New Jersey, New York, and Oregon, and the Commonwealth of Massachusetts ("Amici States") respectfully submit this amicus curiae brief in support of the motions for summary judgment filed regarding Plaintiffs' Commerce Clause claims by Defendants Jay Inslee, in his official capacity as Governor of the State of Washington, and Maia Bellon, in her official capacity as Director of the Washington Department of Ecology (collectively, "Washington").[1]

I. INTRODUCTION

Plaintiffs Lighthouse Resources ("Lighthouse") and Burlington Northern Santa Fe Railroad ("BNSF") argue that the Commerce Clause prohibits Washington from denying permits for a large-scale industrial terminal ("Terminal") based on its environmental impacts, alleging that the State's decision interferes with Plaintiffs' efforts to increase profits by shipping coal to Asia. Plaintiffs' thus attempt to transform the dormant Commerce Clause into an all-purpose shield protecting a business's ability to operate precisely where and how it wants. Amici States urge the Court to reject this attempted intrusion on state and local police power to protect residents and local environments, as well as on the cooperative federalism model established by Congress in the Clean Water Act.

Indeed, the key element of a dormant Commerce Clause claim—that the challenged action confers an advantage for in-state interests over out-of-state competitors—is missing entirely from this case. *See Kentucky v. Davis*, 553 U.S. 328, 337–38 (2008). Absent such economic protectionism by Washington, Plaintiffs' claims simply boil down to an attack on a land use decision based on an assessment of local environmental impacts—an assessment Plaintiffs do not and cannot challenge here. But that local land use decision only prevents Lighthouse from developing a particular project in a particular place, and the ability to develop a project in a preferred location is not protected by the Commerce Clause. Further, Washington

[1] Amici States were previously granted leave to file as amicus curiae in this case on August 21, 2018. *See* Dkt. 134; *see also* Dkt. 103. Amici States' first brief supported Washington's successful motion for summary judgment on Plaintiffs' preemption claims. *See* Dkt. 136.

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has also not interfered with foreign commerce in an area requiring uniformity; in fact, it has not regulated foreign commerce at all. Plaintiffs' dormant Commerce Clause claims fail.

II. AMICI STATES' INTEREST

Pursuant to their historic police powers, Amici States and their political subdivisions enforce myriad state and local laws to protect the environment and the public health and safety of their residents. The power of state and local governments to regulate land use to prevent or minimize development projects' adverse impacts on the environment or public health and safety has been recognized for generations. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389-90 (1926); *Mugler v. Kansas*, 123 U.S. 623, 666 (1887). This well-established state and local authority applies to land use throughout the relevant jurisdiction and, thus, applies to lands that border navigable rivers or sit on coastlines, just as it does to lands that do not. The exercise of this state and local authority over land use can affect corporations' abilities to conduct business, including their abilities to use navigable waters, in the ways they prefer.

Whether or not the proposed project borders navigable waters, a State's exercise of its police power authority can lawfully affect a company's ability to get its product to certain domestic and global markets. For example, state and local authorities routinely make decisions regarding the possible expansion of highways, the siting and permitting of manufacturing and distribution facilities, the authorization of oil and gas development, and other activities that may affect how easily a product may be shipped from point A to point B, or whether it can be shipped at all. But those effects do not, by themselves, transform a State's exercise of its historic police power into an unconstitutional interference with interstate or foreign commerce. Amici States therefore have an interest in Plaintiffs' attempt to invoke the dormant Commerce Clause to invalidate a land use decision adopted to protect the local environment and the health and safety of local residents.

Amici States also regulate navigable waters as part of a system of cooperative federalism established pursuant to the federal Clean Water Act. 33 U.S.C. §§ 1251-1387. Section 401 of the Clean Water Act mandates that all entities requiring a federal permit for a

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discharge into navigable waters must also obtain a certification from the State that the proposed project will not violate water quality standards, including those established pursuant to state laws. 33 U.S.C. § 1341. State regulation of these navigable rivers and coastlines pursuant to express congressional authority necessarily may affect shipping operations and therefore both interstate and foreign commerce. Thus, Amici States have an interest in rebutting Plaintiffs' contentions regarding constitutional limitations on a State's congressionally-authorized authority to take these regulatory actions.

III. BACKGROUND[2]

Lighthouse is a coal company that, naturally, wants to sell more coal, including to markets overseas. Lighthouse currently exports coal to foreign markets through existing terminals, which are located in the United States along the East and West Coasts and in the Gulf of Mexico, and in both Mexico and Canada. Nonetheless, Lighthouse wants to construct and operate a new coal export terminal. It evaluated dozens of available sites on the West Coast and ultimately selected Longview, Washington, as its desired location, along the banks of the Columbia River.

Before it could begin building this large-scale industrial Terminal, Lighthouse was required to obtain a series of permits and authorizations from state and local authorities, including a state certification under Clean Water Act section 401. In reviewing Lighthouse's requests for the necessary permits and authorizations, Washington analyzed the Terminal's anticipated environmental impacts, as required by state law, and determined that the Terminal would create unavoidable and significant negative environment impacts on Washington's environment and the public health and safety of its residents. *See Lighthouse Resources Inc. v. Inslee*, No. 18-cv-5005, 2018 WL 6505372, at *1-2 (W.D. Wa. Dec. 11, 2018). On the basis of these serious threats to public health and the environment, Washington denied Lighthouse the necessary permits to operate the Terminal, including the section 401 certification.

[2] The Court is familiar with the facts of this case, and Amici States thus recite only those facts here that are most relevant to this brief.

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IV. ARGUMENT

The crux of Plaintiffs' dormant Commerce Clause claims is that the Clause guarantees them the right to build the Terminal wherever they want, regardless of Washington's conclusions about impacts on the public health and safety of its residents and the environment. That is not the law. The dormant Commerce Clause prohibits economic protectionism—something Plaintiffs have not, and cannot, allege. The Clause does not provide unfettered protection for Lighthouse to construct a Terminal wherever it would prefer, based on its assessment of the most lucrative location for its intended operations. Nor does the Clause override historic state and local police power authority to make land use decisions in the interest of protecting the environment and the health and safety of their residents.

A. Washington's actions do not discriminate against, or excessively burden, interstate commerce.

The dormant Commerce Clause "is driven by concern about economic protectionism"—specifically "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Davis*, 553 U.S. at 337–38 (internal quotations omitted). At the same time, dormant Commerce Clause jurisprudence recognizes that local autonomy is foundational to our system of federalism. *Id.* at 338. "Under the resulting protocol for dormant Commerce Clause analysis, [courts] ask whether a challenged law discriminates against interstate commerce." *Id*. Where discrimination is found, the law is "virtually *per se* invalid and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* (internal quotations omitted). "Absent discrimination for the forbidden purpose, however, the law will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 338-39 (internal quotations and citations omitted).[3]

[3] State actions that regulate extraterritorially may also run afoul of the dormant Commerce Clause. Plaintiffs make no allegation that Washington's denial of Lighthouse's permits regulates conduct occurring wholly out-of-state, and so Amici States do not address that issue here.

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While Plaintiffs characterize their challenges as claims of discrimination against, and excessive burdens on, interstate and foreign commerce, the facts Plaintiffs actually allege simply convey that, in their view, their own business plans were hindered by Washington's land use decision. Specifically, Lighthouse alleges that Washington has "discriminated against Lighthouse's and its subsidiaries' efforts to transport into Washington coal that is being mined in Montana, Wyoming, and other states." Lighthouse Compl. at ¶ 241; *see also id.* at ¶ 242. BNSF similarly alleges that Washington has "discriminated against BNSFs' efforts to transport coal into Washington" from other States. BNSF Compl. at ¶ 111; *see also id.* at ¶ 112. These are allegations of injuries to Plaintiffs' businesses, without any allegations even suggesting that other businesses, specifically in-state competitors, received competitive advantages over Plaintiffs. Such allegations, on their own, do not give rise to a viable dormant Commerce Clause claim.

i. The dormant Commerce Clause does not protect the preferences of individual businesses concerning how to sell their goods.

The dormant Commerce Clause "protects the interstate market, not particular interstate firms." *Exxon Corp. v. Maryland*, 437 U.S. 117, 127 (1978). Thus, without violating the dormant Commerce Clause, Maryland could prohibit petroleum refiners from operating retail gasoline stations in the State, even though the refiners clearly preferred to sell their product through a distribution chain they controlled. *See id.* at 119, 128. Similarly, Minnesota could constitutionally prohibit milk packaged in non-reusable plastic containers from being sold in the State, even though some milk producers preferred the very packaging Minnesota prohibited. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981). The crux of Plaintiffs' claims here—that they may not build an export terminal precisely where they would like to—simply is not a dormant Commerce Clause violation because such "harm" is not the concern of the Clause. *See also Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) ("[A] state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce. A critical

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requirement for proving a violation of the dormant Commerce Clause is that there must be a *substantial burden* on *interstate commerce*.") (internal citation omitted, emphasis in original).

ii. Washington's actions do not constitute economic protectionism and are not prohibited by the Commerce Clause.

Plaintiffs have also failed to allege, and cannot allege, the essential facts necessary to state a discrimination claim under the dormant Commerce Clause. Again, the Clause prohibits economic protectionism—"regulatory measures *designed to benefit in-state economic interests by burdening out-of-state competitors*." *Davis*, 553 U.S. at 337-38 (emphasis added). Accordingly, to establish a discrimination claim under the Commerce Clause, Plaintiffs must not merely demonstrate that Washington is "discriminating against" their individual business, but also that Washington is discriminating *in favor* of Plaintiffs' in-state competitors. Indeed, "in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference"—in other words, no discrimination. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). Plaintiffs have identified no in-state firms that are similarly situated—no in-state competitors that Washington's decision favors—and, thus, their claims fail. *See Exxon*, 437 U.S. at 125 ("disparate treatment [claim] ... meritless" in the absence of local competitors); *Tracy*, 519 U.S. at 298 ("Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities.").

In fact, Plaintiffs allege injury to an entire group of competitors—all potential investors in the development of coal export facilities in Washington—without any claim that in-state investors are favored relative to out-of-state investors. Lighthouse Compl. at ¶ 246; *see also* BNSF Compl. at ¶ 116. This allegation is implausible, of course, because the rejection of Lighthouse's specific plans for a specific location does not obviously injure anyone else. But even if Plaintiffs could prove this allegation were true, this alleged injury to *all* potential developers or operators of coal export facilities would not establish that Washington's actions were protectionist. *See Clover Leaf Creamery Co.*, 449 U.S. at 471-72 (no protectionism where

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prohibition applied to "all milk retailers … without regard to whether the milk, the containers, or the sellers are from outside the State"). Plaintiffs simply have no discrimination claim without any in-state competitor receiving an advantage, and Plaintiffs can point to no such competitor.

It is of no matter that Plaintiffs attempt to style their claim as one of discriminatory purpose. While discrimination under the dormant Commerce Clause can be found in a law's purpose, advantages for in-state competitors remain a necessary element of such discrimination. *Tracy*, 519 U.S. at 298. Thus, even if Plaintiffs could show that Washington was motivated by an opposition to coal (which, after extensive discovery, they cannot), their discrimination claims would still fail. Plaintiffs cannot satisfy the basic, threshold test for this claim.[4]

iii. Washington's actions impose no significant burden on interstate commerce and are not prohibited by the Commerce Clause.

Finally, Plaintiffs have not alleged, and cannot show, that Washington's land use decision regarding a single potential terminal site imposes an excessive burden on interstate commerce in violation of the *Pike* balancing test. Under that test, the challenged law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Davis*, 553 U.S. at 338 (internal quotations omitted, modification in original). Courts "need not examine the benefits of the challenged law[]," when it does "not impose a significant burden on interstate commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1155 (9th Cir. 2012). And "there is not a significant burden on interstate commerce merely because a non-discriminatory regulation precludes a preferred, more profitable method of operating [a business]." *Id.* at 1154; *see also United Haulers Ass'n., Inc. v. Oneida-Herkimer Solid Waste Management Auth.*, 550 U.S. 330, 346-47 (2007)

[4] Notably, Plaintiffs argue that Washington's denial of Lighthouse's permits will substantially harm the State financially, costing it an economic windfall of approximately $146 million in tax revenues, substantial infrastructure upgrades, and other major investments in Washington. Lighthouse Compl. at ¶ 73-4. Plaintiffs have not even attempted to explain how Washington's rejection of these economic benefits could constitute economic protectionism and therefore could violate the dormant Commerce Clause.

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(emphasizing the absence of "*any* disparate impact on out-of-state as opposed to in-state businesses").

Yet, that is precisely what Plaintiffs claim here—that Washington has violated the dormant Commerce Clause because Lighthouse cannot construct what it wants, where it wants. In fact, Lighthouse itself alleges that it identified 27 potential export terminal sites on the West Coast. Lighthouse Compl. at ¶ 53. It then alleges that it concluded the Millennium Bulk Terminal site in Longview, Washington "was the preferred site." *Id.* at ¶ 54. But it does not allege why it cannot pursue those other 26 sites or, even, why it *must* find a site on the West Coast. That it might cost more to develop elsewhere, whether on the West Coast or not, does not transform Washington's land use permit denial into a constitutional violation. The Commerce Clause neither protects Plaintiffs' preferred "methods of operation" nor protects against the fact that government action may increase the cost of doing business. *See Exxon*, 437 U.S. at 128. Indeed, this Court need not even consider the benefits here because Plaintiffs have failed to allege the significant burden on commerce that would trigger that inquiry. *Harris*, 682 F.3d at 1155. Plaintiffs' claim of excessive burden fails at the threshold stage.[5]

Plaintiffs' *Pike* claim is particularly implausible because, under section 401 of the Clean Water Act, Congress has expressly authorized States to regulate the quality of navigable waters within their own jurisdictions, subject to minimum federal standards, notwithstanding that a denial of certification under that authority might affect commerce more or less in the precise way Plaintiffs assert here. Accordingly, "Congress has struck the balance it deems appropriate, [and] the courts are no longer needed to prevent States from burdening commerce." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). That is, Congress has already determined that the benefits of a State preventing "significant unavoidable adverse impacts," as Washington

[5] If the court were to consider the putative local benefits, Plaintiffs' claims would still fail. As discussed above, Plaintiffs do not allege a significant burden on interstate commerce, whereas the local benefits of Washington's actions—including the protection of water quality—are substantial, well-documented, and not subject to dispute here. *See* Dkt. 227, 14-17.

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did here, outweigh the effects a section 401 certification denial might have on commerce. There simply is no *Pike* claim here.

B. Washington's actions do not implicate the foreign dormant Commerce Clause.

Plaintiffs alternatively contend that by not issuing permits for the Terminal, Washington has unconstitutionally interfered with a supposed uniform "federal policy" to export as much energy as possible all over the world. Previously, Washington and Intervenors have extensively articulated why such a uniform federal policy in favor of energy exports, particularly one overriding the need for environmental protection, does not in fact exist. *See* Dkt. 206 and 208. Below, Amici States emphasize two points. First, Washington's denial of Lighthouse's permits to construct the Terminal in Washington simply does not regulate foreign commerce. Second, Washington's denial of Lighthouse's permits in no way "impair[s] uniformity in an area where federal uniformity is essential," or prevents the federal government from speaking with "one voice when regulating commercial relations with foreign governments." *See Japan Line, Ltd. v. County of Los Angeles* 441 U.S. 434, 448 (1979) ("*Japan Line*").

i. Washington's denial of Lighthouse's Permit does not regulate foreign commerce.

Most fundamentally, Washington's decision not to issue permits for Lighthouse's Terminal in no way regulates commerce with foreign entities. Washington is neither prohibiting Lighthouse from selling coal in Asia nor forbidding foreign nations from purchasing Lighthouse's coal. Rather, Washington is merely prohibiting the construction of a specific proposed industrial facility at a particular site because the proposed facility will create significant local pollution. Washington is not manipulating foreign trade by placing a quota, tariff, or embargo on products for its own economic benefit. *See South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (Alaska law requiring wood be processed by in-state companies prior to export violated foreign dormant Commerce Clause). Washington is not subjecting a foreign or multinational entity to in-state taxes. *See Japan Line*, 441 U.S. at 444-55 (Los Angeles tax applied to foreign-owned shipping containers violated

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foreign dormant Commerce Clause). While Washington's land use decision may or may not impact Lighthouse's profitability, as virtually *all* land use decisions might impact a company's profitability, such an effect is not a constitutional violation.

Amici States are aware of no case in which a local land use decision was overturned due to its potential impact on the market for specific products in foreign commerce, and for good reason. Assume, for the sake of argument, that Plaintiffs are correct that Washington's decision not to permit the Terminal regulates foreign commerce and interferes with a unitary federal policy of "export[ing] American energy all over the world." Lighthouse Compl. ¶ 195; BNSF Compl. ¶ 89. Given the various forms of energy resources and the global nature of such markets, *any* state or local interference with a private company's ability to domestically produce or export an energy resource would violate the foreign dormant Commerce Clause. Under that assumption, for example, a decision by California not to authorize an oil refinery along its coastline could violate the foreign dormant Commerce Clause. So could a decision by Maine to zone an area for coastal preservation rather than energy export terminals. There is no reason that Plaintiffs' argument would stop at the water's edge. A decision by Utah not to authorize additional coal mines could similarly interfere with foreign commerce, as it could result in less coal being sold overseas. So could a decision by North Dakota not to permit additional oil and gas drilling. As these examples demonstrate, if Plaintiffs' sweeping theory were correct, the foreign dormant Commerce Clause would cast a long shadow over local land use decisions that for centuries have been recognized as part of historic state and local police power authority. Because Plaintiffs' novel legal theory would upend these historic state and local powers and enjoys no support in any existing caselaw, this Court should summarily reject it.

ii. <u>Land use decisions like the one Washington made here are inherently local and need not be uniform nationwide</u>.

The goal of the foreign dormant Commerce Clause is to prevent States from "impair[ing] uniformity in an area where federal uniformity is essential." *Japan Line*, 441 U.S. at 448. But deciding what to build and where to build it, as Washington has done here, is one of

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the most quintessential historic *local* government functions. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning law prohibiting industrial development upheld as valid police power function). It is not an area for which national uniformity is essential (or probably even possible given that these decisions are, by their very nature, specific to the proposed project and site at issue). In fact, the Clean Water Act manifests Congress's intent to maintain a system of cooperative federalism over the siting of facilities like Lighthouse's Terminal that impact navigable waters. While the Clean Water Act establishes national minimum controls for pollutant discharges into navigable waters, Congress expressly preserved the rights of States to impose their own more stringent controls, 33 U.S.C. § 1370, and authorized States to veto projects requiring federal permits by denying water quality certifications, 33 U.S.C. § 1341. By explicitly preserving state and local police power over land abutting navigable waters, subject to minimum federal benchmarks, Congress determined that national uniformity over such land use decisions is neither essential nor desired. Because Washington's land use decision does not impair uniformity in an area where uniformity is "essential," it does not violate the Commerce Clause.

V. CONCLUSION

Plaintiffs' Commerce Clause arguments boil down to their dissatisfaction with a traditional land use decision Washington made to protect its residents and natural resources, and their complaints that Washington's decision has made it harder for them expand their businesses. The dormant Commerce Clause, however, respects Washington's long-standing police power authority to make local land use decisions and does not provide Plaintiffs with a constitutional right to override that authority in order to build an export terminal in their preferred location. There is no Commerce Clause claim here.

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DATED: February 14, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this date I filed the foregoing document with the Clerk of the Court using the court's ECF filing system which will automatically serve the filing on registered ECF users.

DATED February 14, 2019, at Seattle, Washington.

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