No. 19-35415

In the

United States Court of Appeals

for the

Ninth Circuit

LIGHTHOUSE RESOURCES INC., et al.,
Plaintiffs-Appellants,

BNSF RAILWAY COMPANY,
Intervenor-Plaintiff-Appellant,

– v. –

JAY ROBERT INSLEE, in his official capacity as Governor of the State of Washington, et al.,
Defendants-Appellees,

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,
Intervenor-Defendants-Appellees.

On appeal from the United States District Court for the Western District of Washington, Case No. 3:18-cv-05005, Hon. Robert J. Bryan

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BRIEF OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ASSOCIATION OF AMERICAN RAILROADS, CROW NATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MINING ASSOCIATION, AND NATIONAL TRIBAL ENERGY ASSOCIATION AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

No *amicus* signing this brief has a parent corporation, and no publicly held corporation owns 10% or more of any of any *amicus*'s stock.

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INTEREST OF THE *AMICI CURIAE*

The American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise virtually all refining and petrochemical manufacturing capacity in the United States. AFPM's members supply consumers domestically and internationally with a wide variety of products that are used daily in homes and business. Among its other missions, AFPM engages in legal advocacy on issues important to its members.

The Association of American Railroads (AAR) is an incorporated, nonprofit trade association comprised of freight and passenger railroads. AAR's freight members operate 83 percent of the line haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. Its passenger rail members operate intercity passenger trains and provide commuter rail services. Together, AAR's member railroads operate a rail system that spans North America and links to a globalized goods movement network.

The Crow, or Apsaalooke, Nation is a federally-recognized tribe in Montana with an enrolled membership of 14,000. With a 75% unemployment rate, the Crow Nation must generate revenue to provide jobs and services for tribal members. The Crow Nation has an abundance of natural resources ready to be developed, including 18 billion tons of exportable coal, which

represents ten percent of the United States' coal reserves, and three percent of the world's. The Crow Nation has a significant interest in developing and exporting its coal resources.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the nation, representing small and large manufacturers in every industrial sector in all 50 states. U.S. manufacturers employ more than 12 million men and women, contribute $2.25 trillion to the U.S. economy annually, have the largest economic impact of any sector of the American economy, and account for more than three-quarters of nationwide private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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

The National Tribal Energy Association is a national tribal organization that represents the top energy producing tribes. Together, these tribes

represent over 300,000 individual members who rely directly on the continued production of energy, as well as the uninterrupted flow of energy products to their customers. The Association's principal mission is assisting and advocating for the development and exportation of tribal energy resources. The Indian Commerce Clause (U.S. Const. art. I, sec. 8, cl. 3) provides strong constitutional support for the unimpeded exportation of tribal energy resources.

Amici—each of which is directly impacted by national policies regarding the mining, transportation, or use of coal—have a substantial interest in the proper resolution of this appeal. Defendants seek to block construction of the Millennium Bulk Terminal, because of their policy disagreement regarding the worldwide use of coal. In this way, defendants—State officials—seek to countermand foreign trade initiatives. Tolerance of such obstruction would hurt American workers, inhibit American economic growth, and violate the Constitution's command that the federal government serve as the sole representative of the United States in foreign trade and foreign affairs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants in this case—high-ranking policymakers for the State of Washington—have steadfastly refused to allow construction of a coal export facility at the Millennium Bulk Terminal near the Port of Longview. They have done so not to protect legitimate local interests, but because they oppose

the use of coal as an energy source throughout the world. Their avowed goal is to inhibit the exportation of American coal and to slow its consumption in global markets. In attempting to control American foreign policy in this way, Defendants have overstepped the constitutional limitations on their authority.

The Constitution allocates exclusive authority over international trade to the federal government. And it does so for good reason: International trade not only impacts the entire nation's economy, but it is a critical tool—both a carrot and stick—in the executive's dealings with foreign allies and adversaries alike. The common-sense corollary of the Constitution's allocation of exclusive authority to the federal government over foreign commerce is its denial of that authority to the states. States may not, therefore, disrupt uniform federal policy regarding foreign trade or impose burdens on foreign trade that outweigh local benefits.

Defendants' actions here violate both of those proscriptions. *First*, blocking construction of a major export facility would undermine the uniformity of federal trade policy, which is to encourage the export of coal—both for the benefit of American producers (who rely on exports for billions of dollars in job-creating income) and of the United States' allies in Asia (who rely on American exports as a critical source of energy). *Second*, defendants' actions fail the Commerce Clause's *Pike* balancing test because there is no

appreciable local benefit of their conduct. Rather, defendants are overtly promoting their own, preferred international environmental policy interests in preventing the use of coal for energy.

The district court effectively allowed defendants to continue with their obstructionist behavior. It held that a decision of Washington's Pollution Control Hearings Board denying the terminal a Clean Water Act permit would have preclusive effect here. The court held further that, as to any issues not precluded, a stay is warranted under the *Pullman* abstention doctrine, in favor of a state court appeal from that decision. This Court should reverse the lower court's orders for all of the reasons given in the appellants' opening brief: The issues being resolved in the state and federal forums are different, and the prerequisites for abstention—an "extra-ordinary" remedy—are not present here. *See* Opening Br. 19-36.

Amici file this brief to address the importance of the underlying merits. If undisturbed, the district court's decision will stand as an invitation for states to adopt their own foreign policy, in contradiction of constitutional safeguards. The result would be a damaging disruption to national and international trade policies of all sorts.

ARGUMENT

I. STATE AND LOCAL INTERFERENCE WITH FOREIGN TRADE UNDERMINES A UNIFORM FOREIGN POLICY AND IS HARMFUL TO THE NATIONAL ECONOMY

A. Trade plays an important role in America's foreign policy

International trade is the lifeblood of the American economy. As the world's largest exporter and importer of goods and services, with total exports of nearly $2.3 trillion in 2013 (*see* Office of U.S. Trade Representative, *Benefits of Trade*, perma.cc/4UP6-TUW7), the United States depends on trade relationships and trade facilities to help American goods find their way to buyers around the world and to bring critical resources and investment to the United States. As of 2013, America's exports supported nearly 5,600 jobs per $1 billion exported, including an estimated 25% of all American manufacturing jobs. *Id.* These benefits enrich Americans in every industry across the country.

1. The United States' abundant energy resources are critical to the country's export trade. Energy exports have accounted for a substantial part of U.S. economic growth in recent years, contributing significantly to the nation's annual real GDP growth from 2006 to 2013. *See* Craig S. Hakkio & Jun Nie, *Implications of Recent U.S. Energy Trends for Trade Forecasts*, Fed. Reserve Bank of Kan. City, 5 (2014), perma.cc/V3FC-24W8; U.S. Bureau of Econ. Analysis, *Gross Domestic Product: Percent Change from Preceding*

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

Against this background, the proposed coal export facility would be a substantial economic boon to Washington and to the rest of the country. These local and national economic benefits are why Congress has made it a national priority for more than two decades to increase exports of American-mined coal and directed the Commerce Department to prepare plans for encouraging these exports. *See* 42 U.S.C. § 13367(a).

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

The federal government has made energy exports a key foreign policy focus. These efforts have been particularly significant in the coal sector, where the Department of the Interior has moved to facilitate more leases of federal land for coal development (*see* U.S. Dep't of Interior, Concerning the Federal Coal Moratorium, Order No. 3348 (Mar. 29, 2017), perma.cc/HZW5-3RYU) with the express goal of "assist[ing] our allies with their energy needs." Press Release, U.S. Dep't of Interior, Secretary Zinke Takes Immediate Action to Advance American Energy Independence (Mar. 29, 2017), perma.cc/F5NH-PK6L.

These energy exports are critically needed in Asia, where our international allies including Japan and South Korea have strong demand for American energy. *See, e.g.*, Qinnan Zhou, *The U.S. Energy Pivot: A New Era for Energy Security in Asia?*, Woodrow Wilson Int'l Ctr. for Scholars (Mar. 26, 2015), perma.cc/5CXZ-LNKT. And in order to reach Asian markets, coal producers must have access to export facilities on the West Coast—which is why the federal government's current National Security Strategy states that it is critical for the United States to give "continued support of private sector development of coastal terminals" for energy exports. The White House, *National Security Strategy of the United States of America*, 23 (Dec. 2017), perma.cc/QLU5-WR4J.

3. The implications of permitting Washington to interfere with foreign trade in coal would reach far beyond the energy industry. Numerous other American industries rely on foreign trade, including agriculture, which has posted an annual trade surplus for over 50 years and contributed more than $138 billion to American exports in 2017 (*see* Office of U.S. Trade Representative, *2018 Fact Sheet: USTR Success Stories: Opening Markets for U.S. Agricultural Exports*, perma.cc/G8WF-U8DY); the manufacturing sector, which produced an astonishing $1.2 trillion in exports in 2016 (*see* Nat'l Ass'n of Mfrs., *United States Manufacturing Facts* 2 (revised Jan. 2018), perma.cc/-U8AV-NGVT); and the freight rail industry, which depends on international trade for 35% of annual rail revenue and 50,000 rail jobs worth $5.5 billion in annual wages and benefits (*see* Ass'n of Am. Railroads, *Freight Railroads & International Trade* 2 (Mar. 2017), perma.cc/V9DL-8X63). Each of these trade-reliant economic sectors makes critical contributions to the American economy and to relationships with America's trading partners. The United States has a strong interest in ensuring that exports in these sectors remain strong and uninhibited by local interference.

B. State and local interference impede the federal prerogative to establish and implement uniform foreign policy

It is not difficult to see how and why interference like Washington's undermines the federal government's plenary control over the nation's trade

policy. "Foreign commerce," as the Supreme Court has repeatedly recognized, "is pre-eminently a matter of national concern." *Japan Line, Ltd. v. L.A. Cty.*, 441 U.S. 434, 448 (1979). "In international relations and with respect to foreign intercourse and trade[,] the people of the United States act through a single government with unified and adequate national power." *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933).

The rationale for this approach is self-evident: The federal government representing the interests of citizens from every state, is best positioned to balance the interests of that nation's many different regions and to balance domestic goals with foreign policy objectives. The Constitution's design reflects this clear preference for federal policymaking in the realm of foreign trade and foreign affairs. Thus, while the Constitution grants Congress power to regulate both domestic and foreign commerce, "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater" of the two. *Japan Line*, 441 U.S. at 448 & n.12 (collecting authorities).

It would be impossible for the federal government to speak with a single voice on behalf of the nation in foreign affairs and international trade if individual states and their municipalities could adopt their own policies that contradict or otherwise interfere with federal policy. When states attempt to influence international affairs through their own regulatory efforts and by pursuing their own local agendas, they at best create legal uncertainty and

burdens for international partners. At worst, they harm the national economy and frustrate the federal government's efforts to implement its foreign policy altogether—just as Washington has sought to do here.

II. WASHINGTON'S ACTIONS VIOLATE THE FOREIGN COMMERCE CLAUSE

A. The Foreign Commerce Clause prohibits states from undermining uniformity in, or imposing disproportionate burdens on, foreign commerce

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

In its domestic-trade dormant Commerce Clause cases, "[t]he Supreme Court 'has adopted . . . a two-tiered approach to analyzing state economic regulation under the Commerce Clause.'" *Pharm. Research & Mfrs. of Am. v. Alameda*, 768 F.3d 1037, 1039-40 (9th Cir. 2014) (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986)).

First, when a state or local law discriminates against interstate commerce by treating in-state or in-country economic interests more favorably

than out-of-state or out-of-country economic interests, the law "is virtually *per se* invalid." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994). As this Court has put it, if a state entity "1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors in-state economic interests over out-of-state interests[,] . . . it violates the Commerce Clause per se." *NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993).

Second, when a state law "regulates evenhandedly" with only "incidental effects" on interstate or foreign commerce, the law is invalid under the Commerce Clause if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Or. Waste Sys.*, 511 U.S. at 99 (quotation marks omitted). In other words, if a facially neutral statute "has only indirect effects on interstate commerce," courts conduct a balancing test to determine if the burden on interstate commerce exceeds the local benefits. *S.D. Myers, Inc. v. City & Cty. of S.F.*, 253 F.3d 461, 466 (9th Cir. 2001).

Courts often rely on this general domestic-commerce framework to resolve dormant Commerce Clause cases involving international trade. *See, e.g.*, *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 81-82 (1992) (relying on interstate Commerce Clause decisions to inform the Court's foreign Commerce Clause analysis). At the same time, it is well understood

that the prohibitory power of the Commerce Clause is even stronger in the context of foreign commerce, with respect to which "a State's power is further constrained because of the special need for federal uniformity." *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) (quotation marks omitted). Thus, "the constitutional prohibition" against state and local regulation of foreign commerce is even "broader than the protection afforded to interstate commerce" because "matters of concern to the entire Nation are implicated." *Kraft Gen. Foods*, 505 U.S. at 79; *accord, e.g.*, *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 749 (5th Cir. 2006) ("[T]he scope of Congress's power to regulate foreign commerce, and accordingly the limit on the power of the states in that area, is greater.").

For these reasons, and in light of the importance of uniform federal regulation in the area of foreign affairs, "a more extensive constitutional inquiry is required" to decide a dormant Commerce Clause challenge involving foreign commerce. *Japan Line*, 441 U.S. at 446. As this Court previously has put it, "when state regulations affect foreign commerce, additional scrutiny is necessary to determine whether the regulations 'may impair uniformity in an area where federal uniformity is essential,' or may implicate 'matters of concern to the whole nation . . . such as the potential for international retaliation.'" *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1014 (9th Cir. 1994) (quoting *Japan Line*, 441 U.S. at 448, and *Kraft*

Gen. Foods, 505 U.S. at 79); *accord, e.g.*, Laurence H. Tribe, *American Constitutional Law* § 6-21, at 469 (2d ed. 1988) ("If state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce.").

According to this more demanding standard, a court must ask additionally whether a state or local law regulating foreign commerce threatens to "impair federal uniformity in an area where federal uniformity is essential." *Japan Line*, 441 U.S. at 448. Such laws "are invalid 'if they (1) create a substantial risk of conflicts with foreign governments; or (2) undermine the ability of the federal government to "speak with one voice" in regulating commercial affairs with foreign states.'" *Piazza's Seafood World*, 448 F.3d at 750 (quoting *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1022 (5th Cir. 1989)). That is so regardless of local benefit. *Kraft Gen. Foods*, 505 U.S. at 79.

B. Washington's conduct violates these principles

The burden on foreign commerce from Washington's attempts to block the construction of the Millennium Bulk Terminal outweighs any benefit to Washington. And even if that were not so, the resulting disruption of the uniform federal policy favoring American energy exports more than justifies finding a Foreign Commerce Clause violation here.

1. Washington's actions interfere with the uniformity of federal policy.

The question whether the United States should export coal or any other good or commodity—and in what amounts—is an issue that falls squarely within the purview of the federal government. *See Japan Line*, 441 U.S. at 448. The federal government has taken the initiative to set policy for the nation in this area by prioritizing energy exports in general, and coal exports in particular, as key to the economic prosperity and national security of both the United States and its Asian allies.

Washington's actions regarding the proposed Millennium Bulk Terminal threaten to undermine this uniform federal policy. Geography dictates that, in order to export coal to Asia from Wyoming and Utah (or, indeed, most anywhere in the United States), a coal producer must have access to export facilities on the West Coast, including in Washington. But Washington has sought to block any such exportation within its jurisdiction by preventing coal export facilities such as the Millennium Bulk Terminal from being constructed. If such conduct were permissible, western states and cities could coordinate to frustrate federal energy and trade policy by blocking *all* coal exports to Asia—in effect, overriding the exportation policy for the entire nation.[1]

[1] This is not a speculative concern. Washington—along with Oregon, California, British Columbia, and the cities of San Francisco, Oakland, Los

This kind of direct interference with an express federal policy violates *Japan Line*'s "one voice" requirement. State laws have been held to violate the Commerce Clause where they merely articulated a foreign policy that tangentially diverged from the federal government's. *See, e.g.*, *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 68 (1st Cir. 1999) (Massachusetts law restricting state's ability to transact with companies doing business in Burma prevented the federal government from speaking with one voice). If such laws are unconstitutional, *a fortiori* Washington's overt attempt to *block* a commodity's exportation is as well when the federal government has expressly *encouraged* its exportation.

2. Washington's actions impose burdens on foreign commerce that outweigh any local benefits.

Even under the more permissive *Pike* balancing test that applies to state actions under the domestic Commerce Clause analysis, Washington's attempt to block the construction of the Millennium Bulk Terminal is unconstitutional. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid*

Angeles, Seattle, Portland, and Vancouver—is a member of the Pacific Coast Collaborative, an organization that aims to "[d]ramatically reduce greenhouse gas emissions" through state and local policies. *See* Pac. Coast Collaborative, *About*, perma.cc/Y67Y-FAXQ. It would be straightforward for these jurisdictions to coordinate their policies in order to block coal exports. Indeed, plaintiffs allege that they have done just that. *See* ER 222 (alleging that Washington policymakers have "coordinated with officials in Oregon and California in a 'subnational' effort to prevent any new coal exports from the United States Pacific Coast to Asian markets").

Waste Mgmt. Auth., 550 U.S. 330, 346 (2007). Whatever benefit accrues to Washington from blocking these exports, it does not outweigh the considerable practical and economic burdens on the rest of the country or on the nation's delicate relationships with foreign powers.

Washington's refusal to permit construction of the Millennium Bulk Terminal is blocking as much as $17 *billion* per year in gross domestic product for the states where the coal that would be exported is produced—a massive detriment to these states and communities. *See* Berkman Report 15-17 (Dkt. 265). Moreover, the proposed terminal facility is vital to the continued vitality of America's energy industry, given that there currently is insufficient port capacity on the West Coast to allow export of sufficient volumes of coal to meet our Asian allies' demands. *See* Schwartz Report 14-15 (Dkt. 277) (noting that the Terminal is the "only viable project" for new facilities for exporting coal to Asia and is thus "essential to the continued survival of coal mining in the western U.S."). Yet Washington seeks to unilaterally block this development, imposing an enormous burden on foreign trade.[2] In this way, Washington is leveraging its control over port facilities to improperly set energy and trade policy for the nation. And this case would be

[2] Ironically, blocking development of the Millennium Bulk Terminal would almost surely produce *higher* overall greenhouse gas emissions, as coal exports would be transported to less convenient locations for export.

just the tip of the spear. A decision upholding Washington's actions would be a green light to restrict other exports as well.

Washington must establish overwhelming local benefits to overcome the enormous costs of this interference on the national economy and withstand a Commerce Clause challenge. It plainly cannot. Indeed, development of the export facility would *benefit* Washington economically, producing substantial new tax revenues for the state and creating a significant number of new jobs and infrastructure opportunities in Cowlitz County, where the facility would be located. ER 216. Defendants' willingness to forgo these benefits and block development of the terminal suggests that their true motivation is an ideological opposition to coal exports in general, not a desire to benefit Washington specifically.

To be sure, some of Defendants' actions rested on purported environmental concerns about the project. But these environmental concerns are by all appearances pretextual. Washington's original environmental review of the project identified, at most, potential environmental issues that could readily be mitigated. But the state's final denial of a permit for the facility under Section 401 of the Clean Water Act "distort[ed]" those conclusions into predictions of certain environmental harm. Placido Decl. ¶¶ 14-15 (Dkt. 275). That kind of shift is the hallmark of motivated reasoning. Washington's true intent is to regulate international trade in coal—an aim that cannot satisfy

the Commerce Clause inquiry, which looks only to the "putative *local* benefits" of a state policy. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970) (emphasis added).

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

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

for the coal export facility had little if anything to do with the water quality provisions of the Act, or indeed with water quality issues at all. Nor could it have. In fact, Defendants were concerned with entirely different, wholly out-of-state environmental impacts from transporting the coal before and after export. This use of the Section 401 process to pursue interests that have nothing to do with water quality demonstrates that Defendants were not pursuing any putative "local benefit" when they blocked development of the export facility.

The implications of allowing states to hijack Section 401 for purposes unrelated to water quality would be disruptive to numerous sectors of the economy. If Washington can prohibit the export of coal by way of Section 401 permitting, states across the country could similarly restrict domestic and foreign trade. After all, the mining industry is not the only industry that depends upon state certifications under Section 401 in order to do business. Recent years have seen an "immense expansion of federal regulation of land use" under the Clean Water Act, with the relevant agencies asserting federal jurisdiction over "virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality opinion). Section 401 state certifications have accordingly become

necessary for significant numbers of real estate, infrastructure, and agricultural projects. Indeed, in many states, Section 404 and 401 approvals are broadly required for any project that may involve "dredg[ing], fill[ing] or otherwise alter[ing] the bed or banks of any stream, lake, wetland, floodplain or floodway"—which describes the vast majority of agricultural projects. *See* U.S. Army Corps of Eng'rs, *Permit Requirements for the State of Illinois* 1, perma.cc/6T6W-E5YM. This kind of political gamesmanship is not what Congress contemplated when it granted states the authority to review proposed projects for water quality issues in Section 401.

It also bears emphasis that Defendants have treated the Millennium Bulk Terminal facility differently from other development projects proposed during the same period. Defendants have *never* used their authority to deny a permit or certification to a project prior to doing so with respect to the Millennium Bulk Terminal. Dkt. 262 at 13-14. And a state official involved in the review of the Terminal explains that "if Millennium proposed to ship anything other than coal, [the state] would have granted the Section 401 water quality certification" here, as well. Placido Decl. ¶ 13. This pattern makes clear that Defendants' true intent—and the actual effect of their conduct—is to unilaterally manipulate U.S. energy policy and foreign trade practices rather than to regulate Washington's environment. The Commerce

Clause cannot abide that kind of preferential treatment with respect to foreign trade.

III. ALLOWING WASHINGTON'S ACTIONS TO STAND WOULD GIVE A GREEN LIGHT TO STATE AND LOCAL INTERFERENCE WITH FOREIGN TRADE POLICY

The clear unconstitutionality of Washington's actions is reason enough to reverse the district court's stay order, which wrongly gave preclusive effect to the rulings of the state pollution control board, and allow this case to proceed. But reversal is also warranted for a second reason: A ruling in the state's favor would invite states and municipalities across the country to interfere with U.S. foreign relations.

In light of the polarization of the American electorate, and the tendency of Americans to live near others who share their political views (see *generally* Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (2008)), many state and local governments themselves have assumed polarized political characters. Whereas the bodies politic and state governments in California, Oregon, Maryland, and New Mexico are known to lean reliably in favor of progressive foreign and trade policy, for example, those in states like South Carolina, Texas, Montana, and Alaska are known to lean in the other direction. *See* Jeffrey M. Jones, *Red States Outnumber Blue for First Time in Gallup Tracking*, Gallup (Feb. 3, 2016), perma.cc/-EY5C-SYAZ; Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not*

Ideology: A Social Identity Perspective on Polarization, 76 Pub. Opinion Q. 405, 412-15 (2012); Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 Electoral Stud. 12 (2016). Large municipal governments are often strongly polarized as well. *See, e.g.*, Anthony Williams, *Stop One-Party Rule in Big Cities*, CityLab (Oct. 15, 2017), perma.cc/6749-ZTYL.

Many border states and coastal cities can, to some degree, control American export trade with our foreign allies, including Mexico and Canada and those in Asia and Europe. If the Court allowed Washington's obstructionist conduct in this case, it would encourage counties and cities to use their geographic leverage over international trade to obstruct any policies with which they disagree. This is an equal-opportunity problem—just as Republican administrations can expect obstruction from Democratic-leaning states and cities, Democratic administrations can expect obstruction from Republican-leaning states and cities.

The results would be deeply harmful to national foreign trade policy and a clear offense to the nation's federalist scheme. West Coast port cities that disagree with how certain livestock are raised could block development of port facilities or infrastructure leading to such facilities in order to obstruct exports of meat and other animal products. *Cf. Missouri v. California*, No. 22O148 (S. Ct. filed Dec. 7, 2017), *motion for leave denied*, 2019 WL 113057

(Jan. 7, 2019) (suit by Missouri challenging California's efforts to limit the sale of non-cage-free eggs within California). Conversely, South Carolina municipalities that disagree with immigration policies essential to the labor supply needed for much of American manufacturing could attempt to deny Clean Water Act or other permits for rail facilities needed to export goods manufactured with such labor. *Cf. United States v. California*, 921 F.3d 865 (9th Cir. 2019) (United States' suit against California concerning immigration policy). And because virtually all international trade is bilateral, states or cities likewise could attempt to obstruct the *im*portation of such goods from our foreign allies based on similar policy objections.

It was precisely to prevent such state and local meddling with foreign trade policy that the Framers of the Constitution allocated exclusive authority over international trade and foreign policy to the federal government. Washington's conduct in this case is inconsistent with that framework. In this case, it is coal; in the next case, it could be agriculture or manufactured goods. This Court should not tolerate Washington's efforts to undermine the federal government's policy with respect to international trade in coal resources, just as it should not tolerate similar conduct in related contexts.

CONCLUSION

The district court's order should be reversed.

November 6, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *amici curiae* certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 5,364 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

November 6, 2019 /s/ *Michael B. Kimberly*

CERTIFICATE OF SERVICE

I hereby certify that that on November 6, 2019, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

November 6, 2019 /s/ *Michael B. Kimberly*

No. 19-35415

In the
United States Court of Appeals
for the
Ninth Circuit

LIGHTHOUSE RESOURCES INC., et al.,
Plaintiffs-Appellants,

BNSF RAILWAY COMPANY,
Intervenor-Plaintiff-Appellant,

– v. –

JAY ROBERT INSLEE, in his official capacity
as Governor of the State of Washington, et al.,
Defendants-Appellees,

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,
Intervenor-Defendants-Appellees.

On appeal from the United States District Court for the Western District of Washington, Case No. 3:18-cv-05005, Hon. Robert J. Bryan

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MOTION OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ASSOCIATION OF AMERICAN RAILROADS, CROW NATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MINING ASSOCIATION, AND NATIONAL TRIBAL ENERGY ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

No *amicus* signing this brief has a parent corporation, and no publicly held corporation owns 10% or more of any of *amici*'s stock.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

Pursuant to Fed. R. App. P. 29(a)(3), the American Fuel & Petrochemical Manufacturers, Association of American Railroads, Crow Nation, National Association of Manufacturers, National Mining Association, and National Tribal Energy Association respectfully move for leave to file the attached brief as *amici curiae* supporting appellants. In support of this motion, proposed *amici* state as follows:

1. The American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise virtually all refining and petrochemical manufacturing capacity in the United States. AFPM's members supply consumers domestically and internationally with a wide variety of products that are used daily in homes and business. Among its other missions, AFPM engages in legal advocacy on issues important to its members.

The Association of American Railroads (AAR) is an incorporated, nonprofit trade association comprised of freight and passenger railroads. AAR's freight members operate 83 percent of the line haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. Its passenger rail members operate intercity passenger trains and provide commuter rail services. Together,

AAR's member railroads operate a rail system that spans North America and links to a globalized goods movement network.

The Crow, or Apsaalooke, Nation is a federally-recognized tribe in Montana with an enrolled membership of 14,000. With a 75% unemployment rate, the Crow Nation must generate revenue to provide jobs and services for tribal members. The Crow Nation has an abundance of natural resources ready to be developed, including 18 billion tons of exportable coal, which represents ten percent of the United States' coal reserves, and three percent of the world's. The Crow Nation has a significant interest in developing and exporting its coal resources.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the nation, representing small and large manufacturers in every industrial sector in all 50 states. U.S. manufacturers employ more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, have the largest economic impact of any sector of the American economy, and account for more than three-quarters of nationwide private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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

The National Tribal Energy Association is a national tribal organization that represents the top energy producing tribes. Together, these tribes represent over 300,000 individual members who rely directly on the continued production of energy, as well as the uninterrupted flow of energy products to their customers. The Association's principal mission is assisting and advocating for the development and exportation of tribal energy resources. The Indian Commerce Clause (U.S. Const. art. I, sec. 8, cl. 3) provides strong constitutional support for the unimpeded exportation of tribal energy resources.

Proposed *amici*—each of which is directly impacted by national policies regarding the mining, transportation, or use of coal—have a substantial interest in the proper resolution of this appeal. Defendants seek to block construction of the Millennium Bulk Terminal, because of their policy disagreement regarding the worldwide use of coal. In this way, defendants—State officials—seek to countermand foreign trade initiatives. Tolerance of

such obstruction would hurt American workers, inhibit American economic growth, and violate the Constitution's command that the federal government serve as the sole representative of the United States in foreign trade and foreign affairs.

2. Proposed *amici* respectfully submit that an *amicus* brief addressing the underlying Foreign Commerce Clause issue in this case will be helpful to the Court as it considers this appeal. The Court will be better able to assess the practical consequences of affirming the district court's order if it has a fuller understanding the underlying constitutional issue at stake. The constitutional issues are not directly addressed by the parties' briefs. Proposed *amici*'s brief addresses the merits of this issue succinctly and will thus give the Court helpful background without burdening the Court as it considers the issues raised on appeal.

3. Pursuant to Circuit Rule 29-3, proposed *amici* sought the consent of the parties to file their brief. Appellants have consented to the filing of the brief. Intervenor-Defendants-Appellees took no position on the filing of the brief. And by email dated November 5, 2019, counsel for Defendants-Appellees stated that they "will make a decision on whether to object to the filing after we have an opportunity to review [the brief]."

CONCLUSION

Proposed *amici*'s motion for leave to file an *amicus* brief in this case should be granted, and the attached brief should be deemed filed.

November 6, 2019

Respectfully submitted,

/s/ *Michael B. Kimberly*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *amici curiae* certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 829 words, including footnotes and excluding the parts of the motion exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

November 6, 2019 /s/ *Michael B. Kimberly*

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November 6, 2019 /s/ *Michael B. Kimberly*