Nos. 18-16105 & 18-16141

In the

United States Court of Appeals

for the

Ninth Circuit

OAKLAND BULK & OVERSIZED TERMINAL, LLC,
Plaintiff-Appellee,
– v. –
CITY OF OAKLAND,
Defendant-Appellant,
and
SIERRA CLUB; SAN FRANCISCO BAYKEEPER,
Intervenor-Defendants.

On appeal from a final judgment of the
United States District Court for the Northern District of California
Case No. 3:16-cv-07014, Hon. Vince Chhabria

BRIEF FOR THE NATIONAL MINING ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN FARM BUREAU FEDERATION, AND AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Amici are the National Mining Association, the National Association of Manufacturers, the American Farm Bureau Federation, and American Fuel & Petrochemical Manufacturers. Each is a nonprofit trade association. None has a parent corporation, and no publicly held corporation owns 10% or more of any of *amici*'s stock.

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INTEREST OF THE *AMICI CURIAE*[1]

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 Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. 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 American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 to protect, promote, and represent

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[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. All parties have consented to the filing of this brief.

the business, economic, social, and educational interests of American farmers and ranchers. It is headquartered in the District of Columbia. Through its state and county Farm Bureau organizations, AFBF represents nearly six million member families in all 50 states and Puerto Rico.

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

Amici have a significant interest in this case because upholding Oakland's attempt to block coal export operations at the Oakland Bulk & Oversized Terminal would encourage local obstruction of national foreign trade initiatives with which coastal municipalities disagree. Not only would this risk hurting American workers across the board, but it would violate the Constitution's command that the federal government be the sole representative of the nation in foreign trade and foreign affairs.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2013, the City of Oakland agreed to lease a site on San Francisco Bay to plaintiff-appellee Oakland Bulk & Oversized Terminal (OBOT) for development of a multi-commodity bulk goods terminal.

As is customary in such agreements, the development agreement between the City and OBOT provided that the terminal would be subject only to the regulations in force at the time of the agreement. But the agreement contains an exception: A regulation that postdates the development agreement may be applied to OBOT if the City determines that, on the basis of substantial evidence, a failure to apply the regulation would pose a "substantial danger" to the health or safety of people in Oakland. ER3.

In 2016, in response to political pressure, the City enacted a new regulation targeted specifically at OBOT, prohibiting it from handling or exporting coal. The public explanation for the ordinance and its particular application in this case is the protection of local public health and safety. But the evidence below shows beyond genuine dispute that the health-and-safety explanation is mere pretext. In fact, the rationale for the ordinance was the City's ideological objection to the exportation of American coal to global markets.

National foreign trade policy expressly favors exportation of American energy resources, including coal. In attempting to inhibit national foreign trade policy in this way, Oakland overstepped the limitations of the Foreign Commerce Clause. 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 economic well-being of the entire nation, but it is a critical tool—both a carrot and stick—in the

Executive's dealings with foreign allies and adversaries alike. The corollary of the Constitution's allocation of exclusive authority to the federal government over foreign commerce is the denial of that authority to state and local governments. Local authorities may not regulate in ways that either interfere with the uniformity of federal policy regarding foreign trade or impose burdens on foreign trade that outweigh local benefits.

Oakland's actions here violate both of those proscriptions. First, its attempt to block coal exports from a major export facility would undermine uniform federal trade policy, which is to encourage the exportation 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, Oakland's actions fail the Commerce Clause's so-called *Pike* balancing test because there is no appreciable local benefit to the ordinance, as the district court below correctly concluded.

The district court wisely avoided the constitutional dimensions of this case, appropriately recognizing that there are adequate non-constitutional grounds for resolving this case by focusing on the resolution applying the ordinance, rather than the ordinance itself. *See* D. Ct. Dkt. 219 (reserving constitutional claims until after resolution of the contract claim); *accord* ER39. We nevertheless lay out the Commerce Clause arguments for this Court's consideration because a reversal on the questions present-

ed in this appeal would unavoidably bring them to the fore. Appellant's brief makes this clear insofar as it asks for judgment only on the contract claim.

A reversal of the district court's carefully considered contract-interpretation holding would therefore force resolution of appellee's serious constitutional challenges. More fundamentally, it would stand as an invitation to state and local governments across the country to begin legislating their own foreign policy, in contradiction of the Framers' design and the Supreme Court's teachings, and to disrupt 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 (*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 ways to buyers around the world and to bring critical resources and investment to the United States. As of 2013, America's exports of goods 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, and 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.

In short, the proposed coal export facility at OBOT would be a substantial economic boon to Oakland and to the rest of the country. These local and national economic benefits are the reason 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, Secretary Zinke Takes Immediate Action to Advance American Energy Independence, U.S. Dep't of Interior (Mar. 29, 2017), perma.cc/F5NH-PK6L.

These energy exports are critically needed in Asia, where 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), per-

ma.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 Oakland's conduct necessarily 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), and 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).

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

Against this backdrop, it is not difficult to see how and why interference like Oakland'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, which comprises members from every state, is best positioned to balance the interests of different states and 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 while it 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).

Yet 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 Oakland has sought to do here.

II. THE COURT SHOULD INTERPRET THE DEVELOPMENT AGREEMENT TO AVOID THE SERIOUS CONSTITUTIONAL QUESTIONS POSED BY OAKLAND'S ORDINANCE

This Court's settled practice is to "avoid constitutional questions when an alternative basis for disposing of the case presents itself." *Lee v. Walters*, 433 F.3d 672, 677 (9th Cir. 2005) (quoting *United States v. Sandoval-Lopez,* 122 F.3d 797, 802 n.9 (9th Cir. 1997)); *see also, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."). The Court should adhere to that practice in this case by upholding the district court's well-supported conclusion that Oakland's resolution breaches its development agreement with OBOT. To hold otherwise would force serious constitutional questions under the Foreign

Commerce Clause, which precludes state and local regulation that discriminates against or burdens foreign commerce.

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 regulations under the Commerce Clause.'" *Pharm. Research & Mfrs. of Am. v. Cty. of 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 or foreign 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. Qual-*

ity 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). 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 na-

tional 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. That is so regardless of local benefit. *Kraft Gen. Foods*, 505 U.S. at 79.

B. Oakland's conduct violates these principles

The burden on foreign commerce from Oakland's attempts to block any handling or exports of coal at OBOT outweighs any benefit to Oakland. And even if that were not so, the resulting disruption of the uniform federal policy in favor of exporting American energy is an amply sufficient basis for finding a Foreign Commerce Clause violation here.[2]

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[2] The Commerce Clause extends to subdivisions of a state. *See, e.g.*, *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 361 (1992) ("[O]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.")

1. Oakland'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 allies in Asia.

Oakland's actions regarding the proposed coal export facility at OBOT 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 California. But Oakland has sought to block any such exportation within its jurisdiction by prohibiting any coal exports from the OBOT facility. If such regulation 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.[3]

[3] This is hardly speculative. Oakland—along with Washington, Oregon, California, British Columbia, and the cities of San Francisco, Los 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 Collabora-

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* Oakland's overt attempt to block the exportation of a commodity that the federal government wishes to be exported is as well.

2. Oakland'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, Oakland's attempt to block any coal exports from OBOT is unconstitutional. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007). Whatever benefit accrues to Oakland from blocking these

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tive, *About*, perma.cc/Y67Y-FAXQ. It would be straightforward for these jurisdictions to coordinate their policies in order to block coal exports. Indeed, a currently-pending lawsuit against the State of Washington alleges that they have done just that. See Compl. ¶ 100, *Lighthouse Res. Inc. v. Inslee*, No. 3:18-cv-5005 (W.D. Wash. Jan. 3, 2018) (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").

exports, it does not outweigh the considerable burdens on the rest of the country and our delicate relationships with foreign powers.

Oakland's ban on coal exports from OBOT would block a sizable volume of coal trade—trade that could provide significant benefits to the American economy and put a sizable dent in America's trade deficits with Asian nations. This commerce would also provide substantial benefits to the economies of the states where the coal is produced—supporting local jobs and services in these states and communities. There currently is insufficient port capacity on the West Coast to allow export of sufficient volumes of coal to meet our Asian allies' demands. The OBOT export facility would add much-needed capacity by opening a vastly larger volume of commerce. But Oakland's ordinance would unilaterally block this development, imposing an enormous burden on foreign trade.[4] In this way, Oakland is leveraging its control over port facilities to improperly set energy and trade policy for the nation. The impact on coal and energy trade would be, moreover, just the tip of the spear. A decision upholding Oakland's actions would be a green light to restrict other exports as well.

Oakland would have to establish overwhelming local benefits to overcome the enormous costs of this interference on the national economy

[4] Ironically, the resulting burdens on national and international trade would almost surely produce *higher* overall greenhouse gas emissions, as coal exports would be transported to further-off ports for export.

and withstand a Commerce Clause challenge. In light of the district court's findings of fact, it plainly cannot. The district court found, after a detailed canvass of the record under the deferential "substantial evidence" standard, that there was not adequate evidence to support a conclusion that the ordinance was necessary to prevent harm to the City or its residents. The court concluded that the existing estimates of particulate matter emissions from the facility were flawed in their assumptions and failed to consider numerous relevant facts. ER 13-30. In particular, the court noted, the estimates failed to account for the fact that the Bay Area Air Quality Management District could use its regulatory authority to mitigate any health or safety risks from the coal operations. ER 24-26.

As the district court concluded, the lack of evidence suggesting that the ordinance is necessary to preserve air quality in Oakland lays bare the true motivation for the ordinance: an ideological opposition to coal exports in general, based on concerns about projected global climate effects of consuming the coal that would be exported. *See* ER 35 ("The hostility toward coal operations in Oakland appears to stem largely from concern about global warming."). But those concerns are precisely the kind of national economic considerations that belong to the *federal* government. In any event, they cannot satisfy Oakland's burden under the Commerce Clause, which looks only to the local "benefits of a state or local practice," not to a

state's desire to regulate national or international matters. *See, e.g.*, *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008).

It also bears emphasis that Oakland's ordinance treats OBOT—a terminal facility that would not actually burn any coal—differently from a an iron foundry located elsewhere in the city and that burns coke on-site. The latter is exempted from the City's ordinance, so long as it complies with relevant permits. ER 26. The only explanation for Oakland's willingness to allow the foundry to continue operating—while at the same time barring the export of coal at OBOT—is that Oakland's chief aim is to regulate U.S. energy policy and foreign trade practices, rather than environmental conditions in the city. The Foreign Commerce Clause cannot abide that kind of local interference.

III. UPHOLDING OAKLAND'S INTERPRETATION OF THE DEVELOPMENT AGREEMENT WOULD GIVE A GREEN LIGHT TO STATE AND LOCAL INTERFERENCE WITH FOREIGN TRADE POLICY

The serious constitutional problems with the Oakland ordinance are reason enough to affirm the judgment below on non-constitutional grounds. But affirmance is also warranted for a second reason: A ruling in the City's favor would be an invitation to 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 policy 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 allows Oakland's obstructionist conduct in this case, it will serve as an open invitation to 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 the manner in which certain livestock are raised could refuse access to port facilities for 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 liberal immigration policies that are essential to the labor supply needed for much of American manufacturing could refuse port access for the exportation of goods manufactured with such labor. *Cf. United States v. California*, 314 F. Supp. 3d 1077 (E.D. Cal. 2018), *notice of appeal filed*, No. 18-16496 (9th Cir. 2018) (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 saw fit to allocate

exclusive authority over international trade and foreign policy to the federal government. Oakland'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 Oakland's efforts to assume for itself the unilateral power to set aside the federal government's judgments with respect to international trade in coal resources, just as it should not tolerate similar conduct in related contexts.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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February 15, 2019

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 4,954 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 Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: February 15, 2019 /s/ *Michael B. Kimberly*

CERTIFICATE OF SERVICE

I hereby certify that that on February 15, 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.

Dated: February 15, 2019 /s/ *Michael B. Kimberly*