No. ______, Orig

In the Supreme Court of the United States

STATE OF MONTANA AND STATE OF WYOMING,
Plaintiffs,

v.

STATE OF WASHINGTON,
Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, BILL OF COMPLAINT, AND BRIEF IN SUPPORT

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No. ______, Orig

In the Supreme Court of the United States

STATE OF MONTANA AND STATE OF WYOMING,
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STATE OF WASHINGTON,
Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

The State of Montana and the State of Wyoming respectfully move this Court for leave to file the attached Bill of Complaint. The grounds for this Motion are set forth in the accompanying Brief.

Respectfully submitted,

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In the Supreme Court of the United States

STATE OF MONTANA AND STATE OF WYOMING,
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v.

STATE OF WASHINGTON,
Defendant.

BILL OF COMPLAINT

The States of Montana and Wyoming bring this action against the State of Washington, and for their cause of action assert as follows:

NATURE OF THE ACTION

1. This is a Commerce Clause challenge to Washington State's discriminatory denial of port access to ship Montana and Wyoming coal to foreign markets. This case implicates an important purpose of the Commerce Clause: prohibiting coastal states from blocking landlocked states from accessing ports based on the coastal states' economic protectionism, political machinations, and extraterritorial environmental objectives. When Washington denied "with prejudice" a Section 401 Water Quality permit for the Millennium Bulk Terminal in Cowlitz County, it did so to protect its own agricultural interests and because it objected, as a matter of political posturing, to the commodity that Wyoming and Montana sought to export: coal.

2. Washington State's discrimination severely impacts Montana and Wyoming. While domestic coal production has declined in recent years, foreign markets are booming. These markets desire the low-sulfur, cleaner-burning coal found in Montana's and Wyoming's Powder River Basin. Asian markets have a distinct need for Montana and Wyoming coal as they seek to expand their electric generating capacity to bring a higher quality of life to their populations and replace problematic nuclear facilities. State officials in Wyoming and Montana have made significant efforts to promote the States' coal resources in those Asian markets. But without port access, Wyoming and Montana are unable to export coal to these foreign markets.

3. Wyoming and Montana depend on taxes from coal production to fund critical state and local infrastructure and programs. Coal severance taxes and other coal revenue generate hundreds of millions of dollars annually in state revenue, and coal extraction produces thousands of high-paying jobs. Without the ability to maintain that revenue, the States would have difficulty funding governmental programs, like K through 12 education.

4. With every passing year the problem is exacerbated as Montana and Wyoming have fewer markets for their massive coal reserves. Ironically, without an opportunity to import low-sulfur, cleaner-burning coal from Montana and Wyoming, Asian markets turn to other sources of coal that do not burn as clean and that ultimately harm the environment.

5. Washington's efforts to block port access also impact federal energy and security policies. The United States has made it clear that exporting coal to Asia and other global markets is key to boosting the American economy and protecting our national security. The previous Administration also stressed the importance of coal exports, with President Obama calling the United States "the Saudi Arabia of coal." A key component of the National Security Strategy is to boost energy exports through coastal terminals like Millennium Bulk.

6. Washington, however, unilaterally blocked port access because of: (1) its Governor's and his appointees' discriminatory favoritism of Washington products over Montana and Wyoming coal; (2) the Governor's political opposition to coal; and (3) perceived extra-territorial environmental impacts of coal combustion in foreign markets. Discriminating against Montana and Wyoming coal for these reasons violates both the Dormant Commerce Clause and the Foreign Commerce Clause.

JURISDICTION

7. This Court has original and exclusive jurisdiction over this action under Article III, § 2, cl. 2 of the U.S. Constitution and 28 U.S.C. § 1251(a). "By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).

PARTIES

8. Plaintiffs the State of Montana and the State of Wyoming are sovereign States losing significant coal severance taxes because of Washington State's discriminatory conduct. Montana brings this original action through its Attorney General, Timothy C. Fox. Wyoming brings this original action through its Attorney General, Bridget Hill.

9. Defendant State of Washington is a sovereign State. Service on the Defendant the State of Washington is made in this action on the Governor and the Attorney General of Washington. Sup. Ct. R. 17, 29.

GENERAL ALLEGATIONS

MONTANA'S AND WYOMING'S COAL RESERVES AND BOOMING FOREIGN DEMAND

10. Montana and Wyoming have vast coal reserves. Wyoming has a reserve base of 58.1 billion tons and is the biggest producer in the country by far. Montana has the largest recoverable coal reserve in the country, measuring 118 billion tons, and is the sixth largest producer.

11. Both Wyoming and Montana depend heavily on coal severance taxes and other taxes and fees related to coal production to fund critical state and local infrastructure and programs.

12. Wyoming's coal production generates hundreds of millions of dollars each year in tax revenue. Since 2007, Wyoming has generated approximately $4.89 billion in severance and ad

valorem taxes from coal production. Over ninety percent of the coal Wyoming produces is shipped out of state.

13. Montana's coal severance tax generates over 80 million dollars each year. Over seventy-five percent of Montana coal is shipped out of state.

14. Domestic demand for coal is declining, and that decline will only increase as domestic coal-fired plants near the end of planned life cycles and are not being replaced with new facilities. The U.S. Energy Information Administration estimates that coal consumption in 2019 will reach a 40-year low and will continue to decline in 2020.[1]

15. As a result of reduced domestic demand, Montana and Wyoming have significant excess coal capacities. They are unable to transfer production to the export market, however, because as land-locked states they lack port capacity. Both States have concluded, after substantial research, that the future of the States' coal production largely depends on whether Asian markets are available through West Coast port access.

16. Asian coal markets are expanding and have a distinct need and economic desire for the low-sulfur Powder River Basin Coal in Montana and Wyoming.

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[1] U.S. Energy Information Administration, *Short-Term Energy Outlook* (December 10, 2019), https://perma.cc/BB47-8RKA; *see also* U.S. Energy Information Administration, *Almost all U.S. Coal Production Is Consumed for Electric Power* (June 10, 2019) (noting that domestic coal production exceeds consumption), https://perma.cc/PL6Z-3X5V.

Japan, Taiwan, South Korea, and China especially are expanding coal-fired power stations. Japan is the third largest coal-importing country in the world and its use of coal, particularly considering recent failures related to nuclear energy, is increasing. South Korea has limited domestic energy resources and is expected to become a large importer of U.S. coal, which is beneficial for both economic and national security reasons.

17. U.S. companies have already secured prospective export contracts with South Korea, but because of the limited ability to obtain U.S. coal, South Korea has looked elsewhere, including Russia, which has increased its coal exports to the country. These Asian countries need to supply their expanding power stations; if they are unable to get clean-burning coal from Wyoming and Montana, they will get high sulfur coal from other countries.

18. Japan is also dependent on imports for its energy, especially following the Fukushima nuclear power plant accident. Japan is installing clean coal plant technologies to meet environmental targets, and it plans "to develop about 45 additional coal power plants, adding more than 20 GW of capacity in the next decade."[2] In 2016, Wyoming entered a five-year Memorandum of Understanding (MOU) with the Japan Coal Energy Center. The MOU contemplates the parties' cooperation in the facilitation of coal exports and sales, which may include the development of new U.S. coal export and Japanese coal import terminals,

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[2] U.S. Energy Information Administration, *Japan: Overview* (February 2, 2017), https://perma.cc/B97V-UZTU.

public support to existing export facilities together with establishing sale contracts for Wyoming coal.

19. Japan, like other Asian countries, has identified Powder River Basin coal from Montana and Wyoming as being particularly desirable for the country's next generation of high efficiency, low emissions coal-fired power plants.

20. Wyoming and Montana have made significant efforts to expand coal exports to Asian markets. Both States' Governors have visited Asian countries to promote the States' coal. The States recognize that the ability to export to Asian markets is critical to their economic security, as well as production of high-paying jobs in the States.

21. Landlocked states like Montana and Wyoming depend on port access on the West Coast to get their most important commodities, like coal, to foreign markets. The only currently available port to ship Wyoming and Montana coal to foreign markets is in British Columbia, Canada. The facility is already at maximum capacity. Although proposals for port terminals have been investigated in Oregon and California, none of those proposals has materialized.

WASHINGTON'S DENIAL OF PORT ACCESS FOR WYOMING AND MONTANA COAL EXPORTS

22. Lighthouse Resources, which is a coal energy supply chain company that operates mines in Montana and Wyoming, proposed to convert a contaminated former aluminum smelter site in Cowlitz County, Washington on the lower Columbia River into a transloading facility called Millennium Bulk Terminal.

23. The U.S. Department of Transportation has designated the Columbia River as a Marine Highway for the transportation of commerce. Congress authorized an expenditure of over $180 million to deepen the river to accommodate increased export and import growth.

24. Washington recognizes that it "is a gateway state, connecting Asian trade to the U.S. economy," and that "[m]any states are [] dependant on the ports in Washington to import and export freight."[3] In addition to the significant federal investment in the Columbia River to facilitate United States exports, Washington boasts that "ports in Washington have several significant advantages, including natural deep-water harbors on the coasts, a West Coast location close to Asian markets, and strong connections to Freight Economic Corridors."[4]

25. Washington's geography allows it to use its ports for its own economic stability and competitiveness while denying those benefits to interior states like Montana and Wyoming. Washington is one of the most trade-dependent states in the Nation, with total imports and exports valued at $126.8 billion in 2016 alone.[5]

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[3] Washington State Department of Transportation, *2017 Washington State Marine Ports and Navigation Plan*, 1-2, https://perma.cc/6D7S-RC25.

[4] *Ibid.*

[5] *Id.* at 2.

26. Most of the coal that would be exported from the Millennium Bulk Terminal would be from the Powder River Basin in Montana and Wyoming. The Millennium Bulk Terminal would have the capacity to ship 44 million metric tons of coal per year, which would be transported from Montana and Wyoming by rail, and then exported to foreign markets.

27. The Millennium Bulk Terminal permitting process began in 2012 and included an application for water quality certification under Section 401 of the Clean Water Act (33 U.S.C. § 1341). The Clean Water Act seeks 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). As part of that process, the Washington Department of Ecology ("Ecology"), Cowlitz County, and the United States Army Corp of Engineers initially sought to undertake a joint Environmental Impact Statement ("EIS"). The Washington Department of Ecology, however, demanded that the EIS include within its study area an analysis of the impact and global greenhouse effect of emissions from the combustion of coal in foreign markets. *See* EIS, Section 1.3; 2.1.

28. When assessing permitting decisions and the environmental impacts of a proposal, Washington state law explicitly requires that agencies assess the end use of products exported from Washington ports. "In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impact only to those aspects within its jurisdiction, including local or state boundaries." WAC 197-11-060(4)(b); *see*

also RCW 43.21C.030(1)(f) (requiring agencies to "[r]ecognize the worldwide and long-range character of environmental problems.").

29. Pursuant to that authority, the Governor's Director of the Department of Ecology stated that a broader and more rigorous scope of review for an EIS involving a terminal to export coal is justified because of "the end use of [the] product" and that "there is no speculation as to the end use of the exported coal; it will be combusted for thermal power" and because it will "increase[e] America's total export of coal." App. 96-97. Because of Washington's insistence that the EIS have a broad scope of analysis and include extra-territorial impacts of coal combustion on greenhouse gas emissions, the Corp of Engineers decided that it could not participate in a joint EIS. App. 83.

30. Washington treated the Millennium Bulk Terminal very differently from other ports served by the same rail line. The State did not subject other projects at the Terminal to expanded environmental review like it did the Millennium Bulk Terminal. It is undisputed that the only reason that Washington imposed expanded and ultimately unfair environmental review and scrutiny was because the commodity that the Millennium Bulk Terminal will ship is coal. App. 53-55; App. 89-93.

31. For example, the Governor promised Washington-based Boeing that the scope of environmental review for one of its projects would be much different because it did not involve coal. The Governor's talking points for a meeting with Boeing stated "Let me be clear that the next generation of 777x

wings is a very different commodity than coal. Based on what we know about the 777x at this time, we would expect a much different SEPA approach would apply to a proposed 777x project." App. 63. Because "State law discourages greenhouse gas pollution and coal power," ports shipping coal to Asia and other international markets would be subject to heightened review. *Ibid.*

32. The State of Washington has made itself a gatekeeper for interstate and international commerce based on what it alone concludes are good environmental policies beyond its borders. The Governor confirmed that the degree of scrutiny for environmental reviews under the State Environmental Policy Act ("SEPA") was dependent on the end use of the commodity that would be shipped from Washington's terminals. If a product, in Washington's view, increased greenhouse gas emissions, it would not be permitted.

33. After four years of review, Washington and Cowlitz County published the EIS in April, 2017. The EIS identified nine potential environmental impacts that *could* result from construction and operation of the Millennium Bulk Terminal. App. 52. Cowlitz County, which was co-lead on the EIS, stressed that the EIS described only potential impacts and that they were capable of mitigation or elimination. *Ibid.* Cowlitz County concluded that the EIS described a fully permittable project. App. 55.

34. For purposes of the Section 401 water quality certification, the EIS concluded that "[t]here would be no unavoidable and significant adverse environmental impacts on water quality." EIS, Section 4.5.8. For all

but one potential impact, the EIS recognized that mitigation or infrastructure improvements would resolve any potential adverse impacts. Air quality was the only impact needing additional mitigation plans because it was a last-minute addition to the EIS and there had been insufficient opportunity to address mitigation. App. 56.

35. In response to the EIS and additional comments that needed to be reviewed, the Washington Department of Ecology planned to deny the Section 401 water quality certification "without prejudice," which was the Department's usual practice when still evaluating information before an impending certification deadline. App. 5. Following a denial without prejudice, an applicant may resubmit a water quality certification application, and the Department of Ecology could complete any review within the new timeframe. The Department of Ecology drafted a letter denying the Section 401 Certification "without prejudice." The draft letter was signed and was prepared to be sent by certified mail. App. 1.

36. Before the letter was sent, the Department sent a copy to the Governor's office. App. 78-79. In response, the Governor's office asked that the Department delay sending the letter. App. 80-81. The Governor's political appointee at the Department of Ecology then took over the process and drafted a new letter denying the Section 401 water quality certification "with prejudice" for a variety of reasons not addressed in the letter prepared by career professionals at the Department of Ecology. App. 7, 45. The new reasons for denying the permit included

impacts from train traffic, vehicle congestion, noise and vibration, rail safety, and air quality. These potential impacts, however, were addressed in the EIS as either capable of mitigation or elimination. App. 52.

37. The State denied the water quality certification based on the State Environmental Protection Act ("SEPA"), which is the state version of the National Environmental Policy Act ("NEPA"). Washington employed what the State calls "substantive SEPA authority" which grants broad discretion to deny a permit for a variety of reasons. RCW 43.21C.060. Upon information and belief, the denial of the permit for the Millennium Bulk Terminal was the first time in Washington's history that it had used substantive SEPA authority to deny a permit.

38. The co-lead of the EIS, Cowlitz County, charged the State with denying the water quality certification based on pretextual reasons that did not accurately reflect the EIS or the potential impacts and mitigation plans it identified, and that the application would have been approved if the Millennium Bulk Terminal sought to export anything but coal. App. 53.

39. In defending its denial of the Section 401 Water Quality Certification, it became clear that the State denied the permit in part to protect Washington's own agricultural interests. The State justified the denial because the "Millennium proposal would only ship coal, there would be no apples. No agricultural products from Washington would be handled at the site." App. 71. The State claimed that "increased coal trains from the Millennium proposal would compete with rail shipments of other goods, including

Washington's important agricultural products." *Ibid*; *see also* App. 71.

40. The State argued that the Millennium Terminal would not boost Washington's Agricultural exports, claiming that "[t]he opposite is probably true. The Millennium coal proposal could harm farmer's ability to get their commodities to market by increasing Washington's rail traffic on a line that would already be over capacity." App. 72.

41. When Governor Inslee was asked at a press conference whether he felt "any sympathy for Montana and Wyoming who are trying to get an important product, coal, to market," he said "no" because "apple[s] [are] healthy, eating coal smoke [] is not."[6]

42. Governor Inslee has repeatedly targeted prohibiting port access for Montana and Wyoming coal as a key campaign issue. In his first press conference, the Governor declared that "there are ramifications ultimately if we burn the enormous amounts of Powder River Basin coal that are exported through our ports." He said that the permitting decisions for those ports would be the largest decision for the state during his lifetime.[7]

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[6] Governor's Press Conference On Clean Power Plan, 29:48-30:23, https://perma.cc/HLF8-K4N6.

[7] Jessica Goad, *Governor Inslee Calls Coal Exports "The Largest Decision We Will Be Making as a State from a Carbon Pollution Standpoint,"* ThinkProgress (January 22, 2013), https://perma.cc/8GBE-QMVK.

43. The Governor's office also suggested that Washington could tolerate emissions from the aerospace industry because it "brings thousands of jobs with those emissions; coal export doesn't." App. 65.

44. Washington also denied the permit because of the Governor's bias against coal and his unjustified extraterritorial concerns that shipments of coal to overseas markets would increase greenhouse gas emissions. That fact is reflected in the State's insistence that the EIS include a study of global greenhouse gas emissions by Asian markets, as well as public statements made by State officials.

45. Without port access, the landlocked states of Wyoming and Montana are unable to access overseas markets for one of the States' most important commodities and one of the biggest drivers of their economies. As a result, Montana and Wyoming are suffering direct injury by losing tens of millions of dollars each year in taxes and fees from coal production and losing thousands of high paying jobs in the coal industry.

46. Meanwhile, Washington can export nearly 35 million bushel cartons of apples to more than 60 countries around the world, simply because it is a State with port access.[8] The effectiveness of the State's port access was made possible by significant federal investment in making the Columbia River suitable for large-scale export. Washington has blocked Montana and Wyoming from engaging a similar export market

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[8] *See* Washington Apple Commission, *Washington Export Marketing- Overview*, https://perma.cc/MT5A-MR3Y.

simply because the State wants to protect its own agricultural interests and because it has a political objection to the commodity that Wyoming and Montana seek to export: coal.

Count I- Violation of the Dormant Commerce Clause

47. Paragraphs 1 to 46 are incorporated by reference as if set forth fully here.

48. The Commerce Clause of the U.S. Constitution, Article I, § 8, prohibits States from engaging in discriminatory or protectionist actions against other States. The Commerce Clause also prohibits a State from regulating conduct outside its borders or placing an undue burden on interstate commerce.

49. Washington's denial of a Section 401 Water Quality certification was based on protecting the State's own agricultural interests, the political concerns and aspirations of its Governor, and because of extraterritorial and unfounded concerns that coal exports from Wyoming and Montana would increase greenhouse gas emissions in Asia.

50. Washington is seeking to regulate conduct—the export and combustion of coal in foreign markets—that is wholly outside its borders.

51. Washington denied the Section 401 Water Quality certification because of Washington officials' political opposition to the commodity sought to be exported from Montana and Wyoming: coal.

52. Washington has intentionally discriminated against the landlocked States of Montana and Wyoming and has effectively blocked port access for these States to get one of their most important commodities to market.

53. Washington's discriminatory action against Wyoming and Montana coal for political purposes and to protect its own economic interests is per se invalid.

54. Washington's discriminatory and protectionist actions are imposing a heavy burden on Montana and Wyoming, including the loss of significant coal severance and other taxes generated by coal production and sale.

55. Washington's protectionist actions discriminate against Wyoming and Montana and impose a heavy burden on interstate commerce.

56. The burdens on interstate commerce imposed by Washington's decision to block Wyoming and Montana's port access are excessive in relation to putative local benefits.

57. Wyoming and Montana therefore seek declaratory and injunctive relief holding that Washington's actions are invalid under the Commerce Clause.

Count II- Violation of the Foreign Commerce Clause

58. Paragraphs 1 to 57 are incorporated by reference as if set forth fully here.

59. The Foreign Commerce Clause of the U.S. Constitution, Article I, § 8, cl. 3, prohibits States from regulating foreign commerce, especially when it is at odds with the foreign policy of the United States Government.

60. Increasing U.S. energy exports, especially coal, is an important policy goal of the federal government. Exporting coal to Asia and other global markets is a key federal priority to boost the American economy and advance national security interests.

61. Realizing federal investment in coastal ports like Washington's by expanding American energy exports, including coal, is a key foreign policy goal of the United States.

62. Washington State's decision to deny port access for coal exports based on protecting its own agricultural interests and based on its extraterritorial concerns about greenhouse gas emissions infringes on the Federal Government's exclusive role to regulate foreign commerce.

63. Washington's actions have created a risk of conflict with foreign governments that rely on reliable export of Powder River Basin coal from Wyoming and Montana.

64. Washington's discriminatory actions have impeded Wyoming's and Montana's ability to engage in foreign commerce.

65. Wyoming and Montana therefore seek declaratory and injunctive relief holding that

Washington's actions are invalid under the Foreign Commerce Clause.

PRAYER FOR RELIEF

A. Declare that Washington's discrimination against Wyoming and Montana coal exports violates the Dormant Commerce Clause;

B. Preliminarily and permanently enjoin Washington from engaging in protectionist and discriminatory actions in its permitting decisions for the Millennium Bulk Terminal and from basing its permitting decisions on extraterritorial factors;

C. Preliminarily and permanently enjoin Washington from denying the Clean Water Act Section 401 Water Quality Certification on grounds unrelated to water quality;

D. Award costs and reasonable attorneys' fees to the Plaintiff States;

E. Grant such other relief as the Court deems just and proper.

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INTRODUCTION

Montana and Wyoming seek to invoke the Court's original jurisdiction to prevent Washington from discriminating against Montana's and Wyoming's ability to engage in interstate and foreign commerce by blocking port access to foreign markets. The Framers understood that landlocked States, which lack convenient ports for foreign commerce, were ripe for abuse by coastal States. Their solution was the Commerce Clause, which guaranteed that no individual State could dictate the terms of interstate or foreign trade. Today, however, Montana and Wyoming are suffering the harms that the Framers sought to prevent.

Montana and Wyoming have vast reserves of low-sulfur coal that generate hundreds of millions of dollars in critical state revenue each year. But the sharp decline in domestic coal consumption is having an enormous impact on both States, affecting state and local funding across the board. Foreign markets, however, have a specific need for Montana's and Wyoming's abundant low-sulfur coal. If only they can get it.

There are no West Coast terminals that can handle the export of Montana and Wyoming coal. Currently, the only viable option is a proposed terminal in Longview, Washington called Millennium Bulk. Based on political opposition to increased coal exports and economic self-interest, Washington officials denied a Section 401 Water Quality Certification for the Terminal, *with prejudice*, effectively killing the project. Washington's discriminatory closure of its ports to

Montana and Wyoming coal violates the Dormant Commerce Clause and the Foreign Commerce Clause, leaving Montana and Wyoming no option to get one of their most important commodities to foreign markets.

Washington's discriminatory actions amount to a de facto embargo on Montana and Wyoming coal. This Court provides the only forum in which Montana's and Wyoming's claims can be heard, and the States ask this Court to exercise its exclusive and original jurisdiction to remedy Washington's inequitable and unconstitutional actions.

STATEMENT

I. Montana's and Wyoming's Large Reserves of Low-Sulfur Coal Generate Critical State Revenue.

Wyoming and Montana have enormous coal reserves, much of which is in the Powder River Basin spanning both States. Wyoming has led the Nation in coal production since 1986 and has the second largest reserve base at 58.1 billion tons.[1] Wyoming exports approximately 91% of the coal it produces.[2] Montana has the largest coal reserve in the country, amounting to 118 billion tons, and is the sixth largest coal

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[1] U.S. Energy Information Administration, *FAQ about Coal,* https://perma.cc/G4V2-NEJ3.

[2] Wyoming State Geological Survey, *Coal Production & Mining,* (Third Quarter, 2019), https://perma.cc/TSX4-7WR2.

producer.[3] Seventy-five percent of Montana's production is shipped out of the State.[4]

This Court has previously recognized the vast quantity and unique quality of Montana and Wyoming coal. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 612 (1981) ("Buried beneath Montana are large deposits of low-sulfur coal"); *Wyoming v. Oklahoma*, 502 U.S. 437, 442 (1992) ("Wyoming is a major coal-producing State" that "has a significant excess mining capacity."). Because Powder River Basin coal has a low sulfur content, "less sulfur escapes and pollutes the air when Wyoming [and Montana] coal is burned." *Id.* at 455, n.7.

Revenues generated from coal production are vital to both Wyoming and Montana. While neither State sells coal directly to generating facilities, both States "impose a severance tax upon the privilege of severing or extracting coal from land within its boundaries." *Id.* at 442 (recognizing Wyoming's severance tax); *see also* Mont. Code Ann. §§ 15-35-101 to -122; Wyo. Stat. §§ 39-14-101 to -111. Coal production in Wyoming generates several hundred million dollars each year in taxes, royalties, and fees and is the second largest source of

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[3] *See* National Mining Association, *U.S. Reserves by State and Type-2016* (November 2017), https://perma.cc/2YJP-J3XE.

[4] Montana Environmental Quality Council, *Final Report to the 66th Montana Legislature, 15* (June 2018), https://perma.cc/P8EF-7X76.

tax revenue for state and local governments.[5] Coal production revenue in Montana is the State's second-highest source of natural resource tax revenue, totaling over $80 million per year.[6] Those receipts fund a broad range of important programs in both States, from education to infrastructure, and coal production provides thousands of high paying jobs.[7] The States also lease State lands for coal extraction, which is an important source of revenue for their school trusts. For example, in 2019, Montana generated $11.3 million for state schools from coal royalty revenue produced from leases on 14,692 acres of state land.[8]

II. Though Domestic Consumption of Montana and Wyoming Coal Has Declined, International Demand is Increasing.

Montana and Wyoming have suffered severe financial impacts from the sharp decline in domestic demand for coal. Coal production in Montana has declined "from about 45 million tons in 2008 to 32

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[5] Wyoming Mining Association, *Wyoming Coal-September 2018 Concise Guide, 4,* https://perma.cc/5BJP-ULWR.

[6] Montana Environmental Quality Council, *Montana Department of Revenue Biennial Report, July 1, 2016-June 30, 2018, p. 97,* https://perma.cc/KA2T-GLMJ.

[7] Montana Department of Revenue Biennial Report, at 105; Wyoming Mining Association, at 4.

[8] Montana Board of Land Commissioners Agenda, at 84; https://perma.cc/7GA3-9LKJ.

million tons in 2016."[9] Between 2016 and 2017, Wyoming saw a nearly $178 million dollar decrease in revenue generated from coal production, which was a 16.7 percent decrease from the previous year.[10] Most of this decline is due to weakening domestic markets for coal.[11]

The decline in domestic coal demand is expected to continue and will become more dramatic as coal-fired plants near the end of planned life cycles and are not replaced with new facilities.[12] It is expected that domestic coal consumption in 2019 will be the lowest it has been in forty years, and it will only continue to decline in 2020.[13]

Despite the decline in domestic demand, overseas markets are booming. Asian markets are expanding and have a distinct need and economic desire for the

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[9] Montana Department of Environmental Quality, Understanding Energy in Montana 2018, 74, https://perma.cc/5B83-XGZV.

[10] Wyoming Mining Association, *Wyoming Coal-September 2018 Concise Guide, 4.*

[11] *Ibid.*

[12] U.S. Energy Information Administration, *U.S. coal consumption in 2018 expected to be the lowest in 39 years* (December 4, 2018), https://perma.cc/C5VR-ZGMF.

[13] U.S. Energy Information Administration, *Short-Term Energy Outlook* (December 10, 2019), https://perma.cc/BB47-8RKA; *see also* U.S. Energy Information Administration, *Almost all U.S. Coal Production Is Consumed for Electric Power* (June 10, 2019) (noting that domestic coal production exceeds consumption), https://perma.cc/PL6Z-3X5V.

low-sulfur Powder River Basin coal in Montana and Wyoming.[14] Japan, Taiwan, South Korea, and China are expanding coal-fired power stations to increase their electric generating capacity to bring a higher quality of life to their populations.[15] Japan is particularly dependent on imports to supply the country's energy, especially following the Fukushima nuclear power plant accident. Japan is a signatory to the Paris Climate Agreement and has led the way in developing clean coal technology and research for carbon capture, but that technology requires low-sulfur coal.

Wyoming and Montana have engaged in major efforts to expand coal production to Asian markets. Governors of both States have visited Asian countries to promote their States' coal. In 2016, Wyoming entered a five-year agreement with the Japan Coal Energy Center.[16] The agreement contemplates the parties' cooperation in facilitating coal exports and sales, which may include the development of new U.S. coal export and Japanese coal import terminals and establishing sale contracts for Wyoming coal. The States are acutely aware that exporting to Asian

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[14] *See, e.g.*, Josh Galemore, *Japan Presents Opportunity for Powder River Basin Coal*, Casper Star Tribune (October 22, 2018), https://perma.cc/5665-RRPT.

[15] International Energy Agency, *Market Report Series-Coal 2018, Key Findings*, https://perma.cc/RXA2-3LSL.

[16] Wyoming Mining Association, *Wyoming Reaches Deal with Japan to Research Clean Coal*, (August 3, 2016), https://perma.cc/8X9U-MFXQ.

markets is vital to their economic security. But they cannot reach these markets without access to a coastal port.[17]

The harms caused by lack of port access are not theoretical. For example, private U.S. companies have successfully secured prospective export contracts with South Korea, but the lack of port access makes it impossible to supply the coal. As a result, South Korea has increasingly looked to other countries, specifically Russia, which has already increased its coal exports to Korea.[18] Foreign countries' reliance on imported coal means that, by necessity, they must either get clean-burning coal from Montana and Wyoming or high-sulfur coal from other countries.

III. The Present Controversy – Washington Blocks Montana and Wyoming from Exporting Coal.

To access foreign export markets for Wyoming and Montana coal, a private company proposed a loading facility called the Millennium Bulk Terminal in Cowlitz County, Washington. The proposal would convert a contaminated former aluminum smelter site into a

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[17] *See* Gabe Collins and Andrew Erickson, *Wyoming and Montana Could Become Major New Coal Suppliers to China and the Asian Market—If they Can Obtain Port Access*, China SignPost, (September 4, 2012) (noting that Montana and Wyoming are uniquely positioned to export coal to fill China's growing need for clean-burning coal), https://perma.cc/B559-EJ3L.

[18] *See* Press Release, *Mechel Signs Long-Term Coal Supply Contract with South Korea's STX Corporation*, (October 17, 2019), https://perma.cc/FL92-AVRH.

productive transloading facility that would provide the bridge between Montana's and Wyoming's Powder River Basin coal and the Asian markets hoping to import it. At full capacity, the Millennium Bulk Terminal would ship 44 million metric tons of coal per year, most coming from mines in the Powder River Basin in Montana and Wyoming.[19]

The State of Washington recognizes that it "is a gateway state, connecting Asian trade to the U.S. economy," and that "[m]any states are [] dependent on the ports in Washington to import and export freight."[20] Various portions of the Columbia River have been designated as "marine highways" by the Maritime Administration, an agency of the U.S. Department of Transportation.[21] This designation provides many benefits, including federal funding, a benefit Washington has often sought and obtained.[22] In addition to the federal investment that made its ports possible, Washington advertises that "ports in Washington have several significant advantages, including natural deep-water harbors on the coasts, a

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[19] Millennium Bulk Terminals-Longview, Final SEPA Environmental Impact Statement, 2-11, -23 (April 2017).

[20] Washington State Department of Transportation, *2017 Washington State Marine Ports and Navigation Plan*, 1-2, https://perma.cc/6D7S-RC25.

[21] Maritime Administration, *America's Marine Highway*, https://perma.cc/H7NC-37Z3.

[22] *See, e.g.*, Allison Frost, *Report Highlights Economic Benefits of Deeper Columbia*, Think Out Loud (July 6, 2015), https://perma.cc/9DXH-XWMW.

West Coast location close to Asian markets, and strong connections to Freight Economic Corridors."[23] Indeed, Washington relies heavily on those ports for its own economy. It is one of the most trade-dependent States in the Nation, with imports and exports valued at $126.8 billion in 2016 alone.[24]

The Millennium Bulk Terminal proposal was led by a coal energy supply chain company now called Lighthouse Resources. The permitting process for the facility began in February 2012. As part of this process, Lighthouse applied for what is known as a Section 401 Water Quality Certification, deriving from Section 401 of the Clean Water Act, 33 U.S.C. § 1341, which—in conjunction with Lighthouse's application for local permits—triggered an environmental review under the Washington State Environmental Policy Act (SEPA), Rev. Code Wash. 43.21C *et seq*. SEPA, in turn, required the Washington Department of Ecology and Cowlitz County to complete an Environmental Impact Statement ("EIS").

Washington state law explicitly requires that agencies assess the extraterritorial impact of products shipped from Washington ports when considering environmental impacts for permitting decisions. *See* WAC 197-11-060(4)(b) ("In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impact only to those

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[23] Washington State Department of Transportation, *2017 Washington State Marine Ports and Navigation Plan*, 1-2, https://perma.cc/6D7S-RC25.

[24] *Ibid.*

aspects within its jurisdiction, including local or state boundaries."); *see also* RCW 43.21C.030(1)(f) (requiring agencies to "[r]ecognize the worldwide and long-range character of environmental problems"). The State has justified a more rigorous scope of review for an EIS involving a terminal to export coal because "there is no speculation as to the end use of the exported coal; it will be combusted for thermal power" and because it will "increase[e] America's total export of coal." App. 92; *see also id.* at 89-93, 96-97.

Therefore, Washington insisted that the EIS assess the global impact, if any, of the Millennium Bulk Terminal, from mining coal in Montana and Wyoming, transporting and exporting it, through combustion in Asia.[25] Washington's insistence that the EIS expand its focus on coal's export to Asia and the global impact on greenhouse gas emissions caused the U.S. Army Corps of Engineers to reverse its decision to pursue a joint NEPA/SEPA EIS for the project. App. 83.

In 2017, after four years of review, the Washington Department of Ecology and Cowlitz County jointly published the EIS. The EIS identified nine potential environmental impacts that *could* result from construction and operation of the Terminal.[26] Co-lead on the EIS, the Cowlitz County Director of Building and Planning, stressed that these *potential* impacts

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[25] Millennium Bulk Terminals-Longview SEPA Environmental Impact Statement, SEPA Greenhouse Gas Emissions Technical Report, at 191-93, https://perma.cc/2HG5-APJA.

[26] EIS, Summary, § S.7, pp. S-41 to S-43, https://perma.cc/27DR-67UX.

could be mitigated or eliminated, and that the EIS described a fully permittable project. App. 52-55.

Importantly, the EIS concluded that "[t]here would be no unavoidable and significant adverse environmental impacts on water quality."[27] For all but one potential impact (air quality), the EIS recognized that mitigation or infrastructure improvements would resolve any potential problems. App. 52, 55. The air quality analysis was differentiated because it was a late addition to the EIS and Lighthouse had no opportunity to address mitigation. App. 56.

While the EIS concluded that water quality impacts were less than significant, the Washington Department of Ecology staff continued with its 401 Certification review to determine if Lighthouse's proposal complied with state water quality requirements. The Department of Ecology planned to follow its usual practice when water quality issues remain unresolved by the certification deadline, which was to deny the Certification "without prejudice." App. 1-5. Career staff prepared a draft letter to that effect, explaining the need for more time to review public comments and to further evaluate mitigation plans for water quality impacts. *Id.* The letter noted that denying the application "without prejudice would not in any way preclude Millennium from resubmitting a request for a [water quality certification] at a later date." *Id.* at 5. That letter was signed and ready to be mailed. Department of Ecology staff then emailed the prepared letter to the Governor's office for approval, advising

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[27] EIS, § 4.5.8; *see also* App. 60.

that the department intended to send the letter that day. App. 78.

At that point, political appointees commandeered the process. The draft letter was never sent. After staff met with Governor Inslee about the project (App. 80), Maia Bellon, the Governor's director of the Department of Ecology, drafted a new letter denying the Millennium Bulk Terminal proposal "*with prejudice*." App. 7. The denial with prejudice killed the project. The application could not be resubmitted, contrary to the Department's established practice, and the administrative review was prematurely terminated, though the Department was expecting additional information.

IV. Washington Denied the 401 Certification Because of Its Political Objection to Coal and Because of Its Own Economic Self-Interest.

Washington officials cited the potential environmental impacts identified in the EIS as reasons for denying the permit. App. 46-47. Those reasons included potential impacts from train traffic, vehicle congestion, noise and vibration, rail safety, and air quality. The denial was based on the Department's discretionary authority under SEPA. App. 46.

Dr. Elaine Placido, who was point on the project for the EIS co-lead, Cowlitz County, described those reasons as exaggerated and pretextual. App. 53. Her perspective was uniquely well-founded because, although she had worked on hundreds of environmental reviews with the Department of

Ecology, she had never seen another application treated so unfairly; Placido stated that she "witnessed Ecology treat Millennium more like an adversary than a permit applicant." App. 53-54, 60-61. (Para. 10, 12, 25, 26.) Based on her long and involved work on the EIS, the "project team openly agreed that each of the impacts *potentially* caused by the Terminal were avoidable and subject to reasonable mitigation." App. 52. (emphasis original). She and her staff believed that the Department of Ecology purposely "distorted" the findings to recast "multiple EIS potential impacts that 'could' occur as impacts that 'would' occur." App. 55-56. Her final assessment was blunt: "I believe that if Millennium proposed to ship anything other than coal, Ecology would have granted the Section 401 water quality certification." App. 55.

There is plenty of additional grist for the mill. Washington State officials, especially Governor Inslee, have consistently used port access for Montana and Wyoming coal as a wedge issue to advance personal political ambitions. Governor Inslee made opposition to coal exports a campaign priority starting with his first press conference as governor. He declared that "there are ramifications ultimately if we burn the enormous amounts of Powder River Basin coal that are exported through our ports," and he characterized the permitting decisions for those ports as the largest decision for the State during his lifetime.[28] In Governor

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[28] Jessica Goad, *Governor Inslee Calls Coal Exports "The Largest Decision We Will Be Making as a State from a Carbon Pollution Standpoint*," ThinkProgress (January 22, 2013), https://perma.cc/8GBE-QMVK.

Inslee's recent presidential campaign, his spokesperson boasted that the Governor led opposition to oil and coal export terminals for the Washington coast.[29] In fact, a centerpiece of his presidential campaign was to phase out all domestic coal energy generation within ten years.[30] And when Governor Inslee was asked if he felt "any sympathy for Montana and Wyoming who are trying to get an important product, coal, to market," he said "no" because "apple[s] [are] healthy, eating coal smoke [] is not."[31] Washington also actively worked to develop a strategy to subject coal export facilities to more rigorous environmental review than other projects. App. 67-69; *see also* App. 63 (Governor's talking points assuring Boeing that it would not be subject to the same environmental review as the coal port).

Governor Inslee is not alone. Coastal state political leaders have vigorously worked to prevent coal export from California and Oregon as well. For example, in Oakland, California, city officials prevented development of an export terminal and admitted that their opposition stemmed solely from the project's plan to export coal. One of the politicians responsible for blocking development of the terminal was unabashed:

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[29] Benjamin Storrow, *Is Inslee the climate choice? First he must pass something*, E&E News, (January 18, 2019), https://perma.cc/3ND6-M5SP.

[30] Jay Inslee for Governor, *Rejecting New Fossil Fuel Infrastructure*, https://perma.cc/68CV-AY9U.

[31] *See* Governor's Press Conference On Clean Power Plan, 29:48-30:23, https://perma.cc/HLF8-K4N6.

"As far as I can tell, nobody on the West Coast wants this coal."[32] The same official said that a cargo facility at the site would be fine, just not one that handles coal. *Ibid.* Even more recently the city council in Richmond, California passed an ordinance banning coal exports from a port located in the city after the mayor boasted that he would "like to get rid of coal worldwide."[33] And half a dozen other coal export proposals in California, Oregon, and Washington have collapsed in recent years because of similar political opposition that has successfully used permitting processes to kill the projects. *Ibid.*

In addition to the overt political motivation for the denial, Washington publicly admitted that it denied the Water Quality Certification to block competition with its own agricultural exports. One of the "Key messages" that Washington wanted to promote after denying the Millennium Bulk Terminal was that "Increased coal trains from the Millennium proposal would compete with rail shipments of other goods, including Washington's important agricultural products." App. 71. The Washington Department of Ecology defended the Section 401 Certification denial in part because the "Millennium proposal would only ship coal, there would be no apples. No agricultural products from Washington would be handled at the site." *Ibid.* The

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[32] Bill Lucia, *With West Coast States Blocking Coal Export Projects, Proponents Keep Pushing,* Route Fifty (November 19, 2019), https://perma.cc/MJ66-5BEA.

[33] Will Wade, *California City Bans Coal, Blocking Key Export Route to Asia,* Bloomberg News (January 14, 2020), https://perma.cc/7N8Z-MP24.

Department of Ecology argued that the Millennium Bulk Terminal would not boost Washington's agricultural exports, claiming that "[t]he opposite is probably true. The Millennium coal proposal could harm farmer's ability to get their commodities to market by increasing Washington's rail traffic on a line that would already be over capacity." App. 72-73 ("[c]oal and apples don't mix. Millennium's proposal would only ship coal. There is no 'apples to coal' comparison here"); App. 65 (Governor's policy director noting that the Washington-based aerospace industry brings jobs, while coal export does not).

Following the 401 Certification denial, Lighthouse Resources sued Governor Inslee in federal district court, based in part on the Commerce Clause. *Lighthouse Resources v. Inslee*, No. 3:18-cv-05005-RJB (W.D. Wash. January 3, 2018). Neither Montana nor Wyoming were parties.[34] After fifteen months of litigation and hundreds of docket entries, the federal district court abstained from deciding the Commerce Clause issues while litigation involving other issues proceeded in a Washington state court.[35] In short, Washington successfully killed the project based on politics and economic self-interest, knowing that it left Montana and Wyoming with no option to serve foreign markets and no judicial recourse. Washington's actions have had an enormous impact on interstate commerce,

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[34] The States joined an amicus brief in support of Lighthouse's Commerce Clause challenge.

[35] That abstention order is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit Court, docket no. 19-35415.

and especially on Montana and Wyoming, yet Washington has dodged any Commerce Clause challenge to its discriminatory actions in denying port access for coal exports.

ARGUMENT

This Court has original jurisdiction over cases and controversies between the States. U.S. Const. art. III, § 2, cl. 2. That jurisdiction has been exclusive since the First Congress adopted the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81 (1789), (codified at 28 U.S.C. § 1251(a)). "By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Original jurisdiction was meant to provide States with a means of peaceful resolution of problems such as "trade barriers, recriminations, [and] intense commercial rivalries [that] had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative." *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450 (1945) (citations and internal footnote omitted).

In deciding whether to grant leave to file a complaint in a dispute arising under the Court's original jurisdiction, the Court examines two factors: (1) "the interest of the complaining State, focusing on the seriousness and dignity of the claim"; and (2) "the availability of an alternative forum in which the issue tendered may be resolved." *Mississippi v. Louisiana,* 506 U.S. 73, 77 (1992) (citation and quotation marks

omitted). Here, both factors weigh in favor of the Court exercising its original jurisdiction.

"The model case for the invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Mississippi*, 506 U.S. at 77 (citations omitted). *Casus belli* is "[a]n act or circumstance that provokes or justifies war." *Black's Law Dictionary* 231 (8th ed. 2004). That is *precisely* the situation here. Frederic Bastiat is credited with saying: "When goods do not cross borders, soldiers will." This Court has also recognized that an embargo "may be, and often is, used as an instrument of war[.]" *Gibbons v. Ogden*, 22 U.S. 1, 192 (1824). Here, Washington has imposed a de facto embargo on Montana and Wyoming coal. Therefore, the *casus belli* that this Court looks for exists. Accordingly, this Court should exercise its exclusive and original jurisdiction to remedy this inequitable and unconstitutional embargo, which can be settled in no other forum.

I. The Seriousness and Dignity of Montana's and Wyoming's Claims Warrants Exercise of the Court's Original Jurisdiction.

The seriousness and dignity of Montana's and Wyoming's claims weigh heavily in favor of the Court's exercise of original jurisdiction. The State of Washington's restraint of Montana's and Wyoming's legitimate economic activity plainly implicates important sovereign interests that are essential to the proper functioning of the Union. "[T]he right to engage in interstate commerce is not the gift of a state," and it is not for coastal states to ordain for their landlocked

neighbors which of their industries may access the stream of commerce. *West v. Kansas Nat. Gas Co.*, 221 U.S. 229, 260 (1911). If one State had such power "embargo may be retaliated with embargo, and commerce will be halted at state lines." *Id.* at 255. This Court alone can ensure fair access to international waters for each of the several States.

In fact, the Court has previously entertained several cases among States involving Commerce Clause claims, especially in cases involving the transportation or taxation of natural resources. *See, e.g., Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (enjoining enforcement of a West Virginia law prohibiting transportation of natural gas to other states); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (invalidating Louisiana use tax on offshore gas processed within Louisiana but moving to other states); *Wyoming*, 502 U.S. 437 (invalidating an Oklahoma statute that required electric-generating plants to burn a mixture of coal containing at least ten percent Oklahoma-mined coal). This case similarly warrants the Court's review.

As with its original jurisdiction, the Court judiciously exercises its appellate jurisdiction, but in so doing, it has not hesitated to strike down State-erected barriers to the fundamental infrastructure of interstate and international commerce. *See, e.g., Pennsylvania*, 262 U.S. 553 (enjoining a state statute prohibiting the interstate transport of natural gas); *Gibbons*, 22 U.S. 1 (enjoining a state statute granting the exclusive right of navigation); *Bowman v. Railway Co.*, 125 U.S. 465 (1888) (holding invalid a state statute forbidding any

common carrier from transporting liquor into Iowa without first receiving a certificate that the recipient was authorized to sell liquor in the county). Interstate and international highways, railways, waterways, and seaports are the instrumentalities of commerce, and this Court should be particularly vigilant to ensure that the parochial political concerns of one State do not prevent their fair use.

Notably, this Court has exercised original jurisdiction in cases with lesser constitutional insult than Washington has inflicted on Montana and Wyoming. For example, the Court exercised original jurisdiction where one State merely *reduced* another State's ability to collect tax revenues, as opposed to the total blockage Washington caused here. *See Wyoming*, 502 U.S. at 451. When Oklahoma affected Wyoming's "ability to collect severance tax revenues, an action undertaken in its sovereign capacity," this Court described it as "beyond peradventure" that Wyoming raised "a claim of sufficient seriousness and dignity" to exercise original jurisdiction. *Ibid.* Because Oklahoma was causing Wyoming to lose severance tax from coal extraction, "Wyoming's challenge under the Commerce Clause precisely 'implicate[d] serious and important concerns of federalism fully in accord with the purposes and reach of our original jurisdiction.'" *Ibid.* (quoting *Maryland*, 451 U.S. at 744.

This case presents an even bolder attack on constitutional values because Washington has completely barred Montana's and Wyoming's access to an international shipping port. Washington's discrimination was carried out at the highest level –

Governor Inslee's office hijacked the permit process and forced a denial of Section 401 Certification. This action was a departure from customary practices and based on improper justifications. This Court should intervene to address not only the loss of Montana's and Wyoming's rights but the loss of millions of dollars each year in severance tax and other coal production revenue caused by Washington's political opposition to coal. Moreover, the future of both State's coal production, with the critical benefits it provides to the citizens of those States, is in substantial doubt without reliable access to foreign markets. *Wyoming*, 502 U.S. at 446 (recognizing that "loss of any market cannot be made up by sales elsewhere.").

Left unchecked, other coastal States will likely follow Washington's lead at the expense of their landlocked neighbors. Washington, Oregon, and California have already erected unreasonable barriers to coal exports. Without this Court's intervention, these States will be free to take additional discriminatory actions against Montana and Wyoming. While it is coal that is disfavored today, it will assuredly be another commodity tomorrow. After all, a century ago, this Court applied the Commerce Clause to prevent States from discriminating against imported liquor. *See Granholm v. Heald,* 544 U.S. 460, 476-486 (2005) (summarizing cases). Just as it did in those cases, the Court must intervene to stop States from interfering with interstate commerce by imposing their own political and moral judgments on their neighbors.

When examining "the seriousness and dignity of the claim," this Court must naturally look to the merits of

the arguments advanced by the movant States. *See Mississippi*, 506 U.S. at 77 (citation and quotation marks omitted). Montana and Wyoming present this Court with a serious controversy supported by arguments that easily clear the "dignity" bar. The arguments advanced by Montana and Wyoming show that this Court's exercise of original jurisdiction in this case is warranted, and Montana and Wyoming should be granted leave to file their Bill of Complaint.

A. Washington's Embargo of Montana and Wyoming Coal is *Per Se* Invalid Under the Dormant Commerce Clause.

The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Although the Clause does not expressly limit a States' ability to regulate commerce, this Court has interpreted the Clause to include a "dormant" limitation preventing States "from adopting protectionist measures." *Tennessee Wine and Spirits Retailers Assoc. v. Thomas,* 139 S. Ct. 2449, 2459 (2019). This case implicates the core reasons that the Dormant Commerce Clause exists: ensuring the free-flow of goods across State lines, preventing a single State from dictating the terms of interstate commerce based on its own political and extraterritorial interests, and preventing economic protectionism.

The Commerce Clause was the Framers' cure for the "economic Balkanization that had plagued relations among the Colonies" and was born from the premise that the federal government "alone has the gamut of powers necessary to control of the economy," and that

"the states are not separable economic units." *Oregon Waste Sys., Inc. v. Dept. of Environmental Quality of State of Oregon*, 511 U.S. 93, 98–99 (1994) (quotations and citations omitted).

Protecting landlocked States from the whims of States with port access was an especially important motivation for the Framers, who were concerned about "the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors." James Madison's Preface to Debates in the Convention of 1787, *reprinted in* Records of the Federal Convention of 1787 (M. Farrand ed. 1966); *see also* Letter from James Madison to Professor Davis, *reprinted in* The Founders' Constitution, Volume 2, Article 1, Section 8, Clause 3, Document 21 ("The condition of the inland States is of itself a sufficient proof that it could not be the intention of those who framed the Constitution to *substitute* for a power in Congress to impose a protective tariff, a power merely to permit the States individually to do it." (emphasis in original)). This principle is not unique to the United States. *See Right of Access of Land-Locked States to and from the Sea and Freedom of Transit*, United Nations Convention on the Law of the Sea, Part X, Articles 124-132; *id.* at Article 125 ("land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport").

The Commerce Clause and its implicit restrictions on the States were key reasons for the Constitution's adoption. The Court described that "[o]ne of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional

Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976). "By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, it strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542 (2015) (citations omitted). The Court long ago described that "when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." *Gibbons*, 22 U.S. at 199–200.

1. Washington's Obstruction of Port Access to Benefit Its Own Economic Interests at the Expense of Other States Violates The Dormant Commerce Clause.

Washington publicly stated that it denied the Section 401 Certification permit to protect its own agricultural interest. This is clearly unconstitutional.

The Dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interest by burdening out-of-state competitors." *Wyoming*, 502 U.S. at 454 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)); *see also Tennessee Wine & Spirits*

Retailers Ass'n, 139 S. Ct. 2449, 2460 (2019) ("[T]he proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law."). One of the clearest signs that a State has violated the Dormant Commerce Clause is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc.*, 511 U.S. at 99. This Court has "laid repeated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949). "[L]aws that discriminate against interstate commerce face 'a virtually per se rule of invalidity.'" *Granholm*, 544 U.S. at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

Washington's treatment of the Section 401 Certification is constitutionally offensive because it "directly regulates or discriminates against interstate commerce or . . . its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citations omitted). Washington publicly proclaimed the reasons it denied the Section 401 Certification and chief among these was protecting its own economic interests (*see*, *supra*, Statement, Section IV). Thus, this case presents "the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977) (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951)). Washington officials were clear that, in addition to politics, what motivated the

decision to deny the permit was that "[i]ncreased coal trains from the Millennium proposal would compete with rail shipments of other goods, including Washington's important agricultural products" and reminding people that the "Millennium proposal would only ship coal, there would be no [Washington] apples." App. 11.; *see also* App. 65 ("Aerospace brings thousands of jobs with those emissions; coal export doesn't.")

Washington's pursuit of self-interested economic protectionism runs afoul of the Commerce Clause and this Court's decisions interpreting the Clause. Washington's actions benefit its own economic interest while burdening the interests of Montana and Wyoming. This is a constitutional violation, and this Court should exercise original jurisdiction to resolve this dispute among States.

2. Washington's Obstruction of Port Access Based on Political Discrimination Violates the Dormant Commerce Clause.

While the Dormant Commerce Clause most often prohibits economic protectionism, it is equally concerned with the "practical effects" of state actions on interstate commerce. *Brown-Forman Distillers Corp.*, 476 U.S. at 583. "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power[.]'" *S. Pac. Co. v. Arizona*, 325 U.S. 761, 779-80 (1945) (citations omitted).

The Dormant Commerce Clause prohibits a coastal State from blocking port access for certain commodities or products simply because it does not like them or gains political capital by opposing them. Coastal State and local governments in California and Oregon have joined Washington in a vigorous and coordinated effort to kill West Coast port access for coal export. *Lucia, supra* note 41, *With West Coast States Blocking Coal Export Projects*. That newly-developed strategy to block coal exports from interior States is rooted in political opposition to the commodity that States like Montana and Wyoming are trying to get to market. *See, e.g., Cascadia Law Group PLLC, Reducing Impacts from Fossil Fuel Projects Report to the Whatcom County Council*, February 12, 2018 (proposing strategy to erect regulatory barriers to coal and other fossil fuel exports).

When Washington bars access to a port, it appoints itself a gatekeeper of the national economy. That conduct is improper because maintaining the free flow of national commerce is precisely what the Commerce Clause was designed to protect. Whether it is political motivation or a tariff based on economic protectionism, the result is the same. The "action of the State would 'neutralize the economic consequences of free trade among the states'" and fundamentally undermine the Commerce Clause's goal to unify commerce "upon the theory that the peoples of the several states must sink or swim together." *H.P. Hood & Sons*, 336 U.S. 525, 532-33 (1949) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). No State has "the power to retard, burden or constrict" the flow of commerce,

especially when it is based on raw political motive. *H.P. Hood & Sons*, 336 U.S. at 533.

Washington's *with prejudice* permit denial was motivated by political machinations, namely, Governor Inslee's political campaign to control global greenhouse gas emissions. The Governor's appointees commandeered the permitting process from career staff to ensure that the project would be denied "with prejudice." Washington treated the Millennium Bulk Terminal permitting process differently, and less favorably, than in-state projects from Washington companies, such as Boeing. The Governor appears to have assured Washington-based Boeing that Boeing's projects would not face the same degree of scrutiny as the Millennium Bulk Terminal proposal, stating: "Let me be clear that the next generation of 777x wings is a very different commodity than coal. Based on what we know about the 777x at this time, we would expect a much different SEPA approach would apply to a proposed 777x project." App. 63.

Washington killed the Millennium Bulk Terminal due to purported concern about greenhouse gas emissions outside Washington's borders. *Supra*, Statement, Section IV. Indeed, Washington law explicitly requires that agencies consider the product's end use and the impact that use has beyond the State's borders. WAC 197-11-060(4)(b); *see also* RCW 43.21C.030(1(f). Just as a State's economic protectionism is unconstitutional, the Commerce Clause prevents a State from interfering with interstate commerce based on extra-territorial concerns. *See C & A Carbone, Inc. v. Town of*

Clarkstown, N.Y., 511 U.S. 383, 393–94 (1994). For a State to deny a permit based on factors "it might deem harmful to the environment" is illegitimate and "would extend the [State's] police power beyond its jurisdictional bounds." *Id.* at 393 (citing *Baldwin*, 294 U.S. 511). A State cannot shut off interstate commerce because it has concerns about speculative impacts beyond its borders. *See Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989).[36]

The advancement of Governor Inslee's political ambitions was ultimately the nail in the coffin of the Section 401 process. Political ambition is not a constitutionally benign motive. Even if the motive could positively be attributed to Washington's desire to protect its own citizens, that motive would not save Washington's actions from infirmity under the Dormant Commerce Clause, because "[t]o give entrance to [the] excuse" of benefiting local interests "'would be to invite a speedy end of our national solidarity.'" *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 206 (1994) (quoting *Baldwin,* 294 U.S. at 522-523). Manipulating a State's environmental review process over energy producing resources, to serve political ends, falls squarely within that admonition.

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[36] Washington's assumption that the Terminal would increase greenhouse gas emissions was wrong. Research by Professor Dr. Frank Wolak, who directs Stanford's Program on Energy and Sustainable Development, reached the same conclusion. He concludes that opening a west coast port for coal exports to Asia would reduce greenhouse gas emissions. *See* Frank Wolak, *Assessing the Impact of the Diffusion of Shale Oil and Gas Technology on the Global Coal Market*, Stanford.edu (November 7, 2017), https://perma.cc/H25K-W7GG.

The fact that Washington's efforts to block coal export resulted from a permitting decision rather than State statute makes it even more constitutionally repugnant. This Court has already recognized that the Dormant Commerce Clause's protections are not limited to statutes or regulations and can be triggered by specific State actions like permit or license denials. *See H.P. Hood & Sons*, 336 U.S. at 526-28. That approach only makes sense. A permit or licensing denial based on political or economic discrimination is no less offensive to the Dormant Commerce Clause because it was at the direction of one political official. Indeed, it is worse because, as here, the action can be based on the motivations of a lone State actor, unchecked by the deliberative process of the State Legislature. That discriminatory motive could extend to any commodity that falls out of favor with a State's political regime, be it coal, non-organic produce, or ethanol-based fuels. The free-flow of interstate commerce cannot hang on whether an ambitious politician can score political points for opposing another State's product or commodity.

"Our system, fostered by the Commerce Clause, is that every farmer and every craftsman [and miner] shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them." *H. P. Hood & Sons*, 336 U.S. at 539. Washington's discriminatory embargo of Montana and Wyoming coal thus implicates the core purposes that underlie the Dormant Commerce Clause and constitutes a clear violation of the Constitutional

provision that enabled the Union.[37] This Court should grant leave to file the Bill of Complaint so that this dispute among the States can be resolved.

B. The Foreign Commerce Clause Requires Heightened Scrutiny When States Impact Foreign Trade in Contravention of U.S. Foreign Policy.

Washington's actions also offend the Foreign Commerce Clause. A close counterpart to the Dormant Commerce Clause, the Foreign Commerce Clause provides that Congress has the power to "regulate Commerce with foreign nations." U.S. Const. art I, § 8, cl. 3. This clause refers both to attempts to regulate the conduct of foreign companies and attempts to restrict the actions of American companies overseas. *Nat. Foreign Trade Council v. Natsios*, 181 F.3d 38, 79 (1st Cir. 1999) (citing *Cooley v. Bd. of Wardens*, 53 U.S. 299, 317 (1851)). The Court applies an analysis similar to its Interstate Commerce Clause jurisprudence, but with even more force.

This Court has recognized that "Foreign commerce is pre-eminently a matter of national concern" that requires the Nation to speak with "one voice." *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 448–49 (1979) (citations omitted). There is a special need for federal uniformity in issues involving foreign trade. *Id.* at 446, 453–54. As a result, "state restrictions burdening foreign commerce are subjected to a more

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[37] Montana and Wyoming also assert that Washington's embargo fails the balancing test articulated in *Pike v. Bruce Church, Inc*, 397 U.S. 137, 142 (1970).

rigorous and searching scrutiny." *South-Central Timber Development, Inc., v. Wunnicke*, 467 U.S. 82, 100 (1984); *see also Kraft Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 505 U.S. 71, 79 (1992) (recognizing that prohibition of state regulation of foreign commerce is "broader than the protection afforded to interstate commerce" because "matters of concern to the entire Nation are implicated"); Laurence H. Tribe, American Constitutional Law § 6-21, at 469 (2d ed. 1988) ("[i]f 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 the case of interstate commerce").

State action violates the Foreign Commerce Clause if it "*either* implicates foreign policy issues which must be left to the Federal government *or* violates a clear federal directive." *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (emphasis original). Washington's policy of denying permits to prevent the construction of a coal port does both.

The unambiguous foreign policy of the United States is to support coal export. The federal government has made its position clear: exporting coal to Asia and other global markets is key to boosting the American economy and protecting our national security, thus, the current Administration's policy is to "export American energy all over the world."[38] Advancing this foreign policy, President Trump issued

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[38] Remarks by President Trump at the Unleashing American Energy Event (June 29, 2017), https://perma.cc/HS43-Z9PK.

Executive Order 13783 in 2017, articulating that natural resource development is crucial to "ensuring the Nation's geopolitical security."[39] The U.S. Secretary of Energy subsequently requested a strategy to assess opportunities to advance U.S. coal exports to international markets.[40] The resulting report indicated that there was great opportunity to export coal, especially from the Powder River Basin, to foreign markets, which would improve the U.S. balance of trade, support key allies, and boost the U.S. economy.[41] The report recommended that developing West Coast terminal capacity was critical to the United States' strategy to expand coal exports, and noted that, on "the West Coast, the limited capacity of export terminals has greatly limited the ability to export western U.S. coals."[42]

A strong export market for coal is not only the current Administration's foreign policy. President Obama also recognized the importance of coal exports, especially to Asia, which peaked at over 125 million tons in 2012.[43] Recognizing the country's export

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[39] Executive Order 13783 (March 28, 2017).

[40] Letter from Rick Perry to Greg Workman, (January 7, 2018), https://perma.cc/P993-YA6U.

[41] *Advancing U.S. Coal Exports*, National Coal Council, 2-10 (October 22, 2018), https://perma.cc/MR7C-RJE7.

[42] *Id.* at 6, 10.

[43] U.S. Energy Information Administration, Annual Coal Report 2017, Table 36.

potential for coal, President Obama called the United States "the Saudi Arabia of coal."[44]

Part of the United States National Security Strategy is to help allies become more energy independent. Thus, a key component of the National Security Strategy is to boost energy exports through coastal terminals like Millennium Bulk Terminal:

> The United States will promote exports of our energy resources, technologies, and services, which helps our allies and partners diversify their energy sources and brings economic gains back home. We will expand our export capacity through the continued support of private sector development of coastal terminals allowing increased market access and greater competitive edge for U.S. Industries.[45]

Washington's unilateral decision to block Montana and Wyoming—the largest coal producers in the United States—from accessing those foreign markets, frustrates both landlocked States and Asian allies, prevents the United States from speaking with "one voice," and contravenes clear federal directive. This outcome alone is sufficient reason for this Court to grant leave to file the Bill of Complaint.

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[44] David Farenthold and Michael Shear, *As Obama Visits Coal Country, Many Are Wary of His Environmental Policies*, Washington Post (April 25, 2010).

[45] *Advancing U.S. Coal Exports An Assessment of Opportunities to Enhance U.S. Coal*, National Coal Council, https://perma.cc/L9CV-L5PA.

II. Montana and Wyoming Have No Alternative Forum.

Under the second jurisdictional factor, this Court examines whether there is another forum where "there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 93 (1972). Here, there is no other forum where these elements exist. Montana's and Wyoming's sovereign interests in being free from Washington's discrimination against their economic well-being are at stake here. Those interests can be litigated only in this Court, satisfying the second factor that the Court considers in determining whether to exercise its original jurisdiction. *See Mississippi*, 506 U.S. at 77.

Congress vested this Court with "original and *exclusive* jurisdiction of all controversies between two or more States." *Ibid.* (emphasis original) (quoting 28 U.S.C. § 1251(a)). Thus, while the private parties in the litigation in the Western District of Washington raised a Commerce Clause challenge to Washington's denial of the Section 401 Water Quality Certification, Congress' description of this Court's jurisdiction as exclusive for cases between States "necessarily denies jurisdiction of such cases to any other federal court," including the Washington district courts. *Id.* at 77–78. Furthermore, that litigation is not active so there is "no pending action" that raises the same issue or provides a forum to challenge Washington's actions under the Dormant Commerce Clause. *See Wyoming*, 502 U.S. at 452.

This Court previously found the exercise of original jurisdiction proper "without assurances, notably absent here, that a State's interest under the Constitution will find a forum for appropriate hearing and full relief." *Ibid.* Of note, this Court granted leave in *Wyoming* even though the private mining companies impacted by the law could have sued elsewhere because "[e]ven if such action were proceeding, however, Wyoming's interests would not be directly represented." *Ibid.*

The interests of Montana and Wyoming, specifically, cannot be directly represented anywhere but in this Court. There is no opportunity, much less assurance, that any other court will reach the Dormant Commerce Clause claims at issue in this case and it is certain that Wyoming and Montana will not receive *any* direct relief, let alone "full relief." Jurisdiction in this Court is even more critical in this case because of the important foreign policy interests of the United States at stake.

CONCLUSION

For the foregoing reasons, this Court should grant the Motion for Leave to File the Bill of Complaint.

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