The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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

and

BNSF RAILWAY COMPANY,
Plaintiff-Intervenor,

v.

JAY INSLEE, et al.,
Defendants,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,
Defendant-Intervenors.

NO. 3:18-cv-5005-RJB

BRIEF OF THE NATIONAL MINING ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN FARM BUREAU FEDERATION, AND AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS AS *AMICI CURIAE* IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF THE *AMICI CURIAE*

The National Mining Association (NMA) 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 and 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 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 about 6 million member families in all 50 states and Puerto Rico.

The 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 Washington's actions to block construction of a new coal export facility at the Millennium Bulk Terminal threaten the United States' energy economy and will set a harmful precedent that encourages other states to interfere with national trade policy that they oppose, in violation of the Constitution's command that the federal

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government be the sole representative of the nation in trade and foreign affairs. A judgment allowing these actions to stand would, moreover, open the floodgates to local obstruction of national foreign policy initiatives with which coastal states disagree.[1]

INTRODUCTION

Defendants in this case—local policymakers in the State of Washington—have used their permitting authority under the Clean Water Act to permanently block construction of a coal export facility at the Millennium Bulk Terminal near the Port of Longview. They have done so not to protect legitimate interests in local water quality, but because they oppose the use of coal as an energy source, "[no] matter where it's burned." Robisch Decl. Ex. 24. Their avowed goal is, in short, to inhibit the exportation of American coal and to slow its consumption in global markets.

The dispute between the parties centers in large part on the *Pike* balancing test, which asks whether "the burdens of the statute . . . so outweigh the putative benefits as to make the statute unreasonable or irrational." *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991). *See* Dkt. 211, at 11-19; Dkt. 227, at 14-17. *Pike* balancing is a fact-intensive inquiry. Although *amici* are confident that Plaintiffs would prevail under that test, this brief focuses on a more fundamental point: *Pike* balancing is inapplicable here. And the extreme facts of this case demonstrate why that is so.

The Constitution allocates exclusive authority over international trade to the federal government alone. And it does so for good reason: international trade not only impacts the economy 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 common-sense corollary of the Constitution's allocation of exclusive authority to the federal government over foreign commerce, moreover, is its denial of that authority to the states, which is categorically forbidden from regulating in ways that interfere with the uniformity of federal policy regarding foreign trade.

[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. This brief is submitted pursuant to the Court's Blanket Order on Amicus Curiae Briefs (Dkt. 103) and its previous grant of leave to file (Dkt. 110).

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Defendants' move to block construction of a major export facility has plainly undermined the uniformity of federal trade policy, which is to encourage the export of coal, both for the benefit of American producers (who rely on exports for billions of dollars in job-creating income) and of the United States' allies in Asia (who rely on American exports as a critical source of energy). Defendants' conduct is not authorized by the Clean Water Act, because they are not acting to further any interest in protecting local water quality. Rather, Defendants are promoting their own, preferred international-level environmental policy interests in preventing the use of coal for energy.

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

ARGUMENT

I. State 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 essential to the American economy. The United States is the world's largest exporter and importer of goods and services (*see* Office of the U.S. Trade Rep., *Benefits of Trade*, perma.cc/4UP6-TUW7), and it 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 manufacturing jobs. *Id*. These benefits enrich Americans in every industry across the country.

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 approximately 10% of the nation's annual real GDP growth from 2006 to 2013. *See* Craig S. Hakkio & Jun Nie, Fed. Reserve Bank of Kansas City, *Implications of Recent U.S. Energy*

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Trends for Trade Forecasts 5 (2014), perma.cc/V3FC-24W8; Bureau of Econ. Analysis, *Gross Domestic Product: Percent change from preceding period*, perma.cc/8WJR-MBYZ. American energy exports have been fueled by a growth in coal exports, which grew by 68% between 2016 and 2017 alone. *See* U.S. Energy Information Admin., *U.S. Coal Exports*, perma.cc/E4GA-KTKG.

The proposed coal export facility at the Millennium Bulk Terminal would be a substantial economic boon to several states and, indirectly, to the rest of the country. The increased coal exports made possible by the new facility would generate more than one hundred million dollars in tax revenue for Washington State and its localities and support thousands of jobs in Washington and elsewhere. *See* Berk, *Economic & Fiscal Impacts of Millennium Bulk Terminals Longview*, at 23-26 (April 12, 2012); *accord* Sprague Decl. ¶ 14; Berkman Decl. ¶ 30. Benefits such as these 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).

In addition to its economic benefits, America's international trade is also 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. *See* Tabor Decl. at 37, 77-78; Banks Decl. ¶¶ 9-13. Its efforts have been particularly significant in the coal sector, where the Department of the Interior has moved to facilitate more leases of federal land for coal development (*see* U.S. Dep't of Interior, *Concerning the Federal Coal Moratorium*, Order No. 3348 (Mar. 29, 2017), perma.cc/HZW5-3RYU), with the express goal of "assist[ing] our allies with their energy needs." Press Release, U.S. Dep't of Interior, (Mar. 29, 2017), perma.cc/F5NH-PK6L. These energy exports are essential in Asia, where allies such as 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*

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in Asia?, Woodrow Wilson Int'l Center for Scholars New Security Beat, Mar. 26, 2015, perma.cc/5CXZ-LNKT. And in order to reach Asian markets, coal producers must have access to export facilities on the West Coast—which is why the federal government's current National Security Strategy states that it is critical for the United States to give "continued support of private sector development of coastal terminals" for energy exports. Office of the President, *National Security Strategy of the United States of America* 23 (Dec. 2017), perma.cc/QLU5-WR4J.

The implications of Defendants' conduct reach well 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 the U.S. Trade Rep., *2018 Fact Sheet: USTR Success Stories: Opening Markets for U.S. Agricultural Exports*, perma.cc/G8WF-U8DY); and the manufacturing sector, which produced $1.2 trillion in exports in 2016 (*see* Nat'l Ass'n of Mfrs., *United States Manufacturing Facts* 2, perma.cc/U8AV-NGVT). Each of these trade-reliant industries makes critical contributions to the American economy and to relationships with America's trading partners, and the United States has a strong interest in ensuring that exports in these sectors remain strong.

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

"Foreign commerce," the Supreme Court has said, "is pre-eminently a matter of national concern." *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 448 (1979). The rationale for this approach is self-evident: The federal government, which comprises legislators from every state and an executive elected by the nation as a whole, 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, which grants Congress plenary power over foreign commerce, reflects this clear preference for federal policymaking in the realm of foreign trade.

It would be impossible for the federal government to speak with one voice on behalf of the nation in foreign affairs and international trade if individual states could adopt their own policies that contradict or otherwise interfere with federal policy. When states attempt to influence international

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affairs through their own regulatory efforts and pursuing their own local agendas, they at best create legal uncertainty and burdens for international partners. At worst, they frustrate the federal government's efforts to implement its foreign policy altogether—just as the state of Washington has sought here to do.

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

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

A. The Foreign Commerce Clause Prohibits States From Impairing Federal Policy Uniformity in 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 Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7-8 (1986).

In the domestic-trade dormant Commerce Clause context, when a state law discriminates against interstate or foreign commerce by treating in-state or in-country economic interests better than out-of-state or out-of-country economic interests, the law "is virtually *per se* invalid." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). When a state law "regulates evenhandedly" with only "incidental effects" on interstate or foreign commerce, however, the law is invalid only if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* (quotations omitted). This analysis is known as the *Pike* balancing test.

Courts often rely on this two-part framework to resolve dormant Commerce Clause cases

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involving international trade as well. *See, e.g.*, *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 81-82 (1992). But it is well understood that the prohibitory power of the Commerce Clause has special force in the context of foreign trade relations, 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).

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 international trade, as here. *Japan Line*, 441 U.S. at 446. Under this more demanding standard, a court must ask whether a state law regulating foreign commerce threatens to "impair federal uniformity in an area where federal uniformity is essential." *Id.* at 448. Such laws are categorically 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, LLC v. Odom*, 448 F.3d 744, 750 (5th Cir. 2006) (quotation marks omitted). That is so regardless of local benefit. *Kraft Gen. Foods*, 505 U.S. at 79. In other words, "[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 in the case of interstate commerce." *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 68 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

B. Defendants' Conduct Violates These Principles.

Under the framework properly stated, the question of *Pike* balancing never arises. That is because Defendants have unlawfully interfered with federal export policies, preventing the government from pursuing a single, uniform foreign policy with respect to coal exportation.

This interference is not "authorized" by the Clean Water Act; Congress never meant for states to use their limited permitting authority under the Act as a lever for implementing policy agendas unrelated to local water quality. The implications of upholding the challenged action here are alarming in their scope and impact.

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1. Defendants' 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 one that falls squarely within the purview of the federal government. *Japan Line*, 441 U.S. at 448. The federal government has taken the initiative to set policy in this area for the nation as a whole, prioritizing energy exports as key to the economic prosperity and security of both the United States and its allies in Asia.

Washington's decision to block the coal export facility at the Millennium Bulk Terminal, if allowed to stand, would undermine this uniform federal policy. Geography dictates that, in order to export coal to Asia from Montana and Wyoming (or, indeed, most anywhere in the United States), a coal producer must have access to export facilities on the West Coast, including in Washington. But Washington has proposed permanently to block development of any such facility at the most suitable site in its jurisdiction—and worse, it has coordinated with other West Coast states to bring them along in this scheme, risking the effective closure of the nation's west coast to the exportation of coal. If these efforts are successful, it will plainly frustrate US energy and trade policy by restricting the ability to export coal to Asia. If Washington's conduct is allowed to stand, a handful of states will effectively have set the coal exportation policy for the entire nation.

The Court thus need not engage in the *Pike* balancing analysis ordinarily applicable to claims concerning domestic conduct. Washington's conduct here is a direct interference with express federal policy concerning export trade with foreign allies, and it therefore unquestionably violates *Japan Line*'s "one voice" requirement. *See, e.g.*, *Nat'l Foreign Trade Council*, 181 F.3d at 67 ("Supreme Court decisions under the Foreign Commerce Clause have made it clear that state laws that are designed to limit trade with a specific foreign nation are precisely one type of law that the Foreign Commerce Clause is designed to prevent."). Indeed, that is Defendants' expressly-stated goal. *See* Robisch Decl. Ex. 24 (Defendant Inslee asserting that if "enormous amounts of Powder River Basin coal that are exported through our ports," it will hurt the global environment "[no] matter where it's burned").

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State laws have been held to violate the foreign Commerce Clause in far less obvious cases of local interference. In *National Foreign Trade Council*, for example, Massachusetts passed a law "restrict[ing] the ability of Massachusetts and its agencies and authorities to purchase goods or services from individuals or companies that engage in business with Burma." 181 F.3d at 45. In particular, it required the state's finance department "to maintain a 'restricted purchase list' of all firms engaged in business with Burma" and forbade the state from doing business with such companies. *Id.* at 45-46. The First Circuit struck down the law because it was "a direct attempt to regulate the flow of foreign commerce" and thus violated "the Commerce Clause 'one voice' test." *Id.* at 68. The Supreme Court affirmed, agreeing that the statute "compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments" and was therefore invalid. *Crosby*, 530 U.S. at 381.

If a law such as that is unconstitutional, *a fortiori* Washington's blatant attempt to stymie the federal government's export policy is as well. Undeniably, it is "a direct attempt to regulate the flow of foreign commerce" and thus inconsistent with "the Commerce Clause 'one voice' test." *Nat'l Foreign Trade Council*, 181 F.3d at 68.

Contrary to the State Defendants' claims (Dkt. 227 at 18), it is of no moment that the immediate impact of Defendants' decision is merely to impede construction of one particular coal facility or that Plaintiffs remain "free to [export coal] from other locations." A similar argument could have been made in defense of the Massachusetts law struck down in *Natsios*, which affected only Massachusetts's trade with Burma and left other states free to trade with that country. The size of the law's impact was beside the point, because the *Japan Line* principle holds that *any* local interference with the uniformity of national foreign-trade policy—however great or small the law's practical impact—is unconstitutional.

Defendant-Intervenors' assertion that federal policy does not invariably promote the export of coal (Dkt. 211 at 20-21) is likewise irrelevant. The federal government, as the entity empowered by the Foreign Commerce Clause to speak on behalf of the nation on matters concerning foreign

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trade, is entitled to decide what mix of policies best further the nation's goals. Thus, recognizing exceptions to broader policies in international trade is its prerogative—and its alone. Exercise of that prerogative does not in any sense condone a state's efforts to take matters into its own hands, by recognizing inconsistent exceptions of its own.

2. The Clean Water Act Does Not "Authorize" Defendants' Actions.

The State Defendants argue that they have not violated the foreign Commerce Clause because Congress "expressly authorized" their actions when it enacted the Clean Water Act. Dkt. 227 at 7. Although Congress may indeed authorize states to take actions that would otherwise violate the Commerce Clause, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). That is, the federal statute must make clear "that Congress affirmatively contemplate[d] otherwise invalid state legislation" and expressly intended to authorize it and, in effect, insulate it from the dormant Commerce Clause challenge. *Id.*

The Clean Water Act does not remotely meet that description. In the Clean Water Act, Congress sought to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate [water] pollution" (33 U.S.C. § 1251(b)), by giving states a limited "veto power over the grant of federal permit authority for activities potentially *affecting a state's water quality*" (*United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989) (emphasis added)). That language does not reflect any intent—much less a clear statement of intent—to exempt permitting decisions from Commerce Clause scrutiny. On the contrary, Congress expressly provided that the Act "shall not be construed as . . . limiting the authority or functions of any officer or agency of the United States under any other law or regulation." 33 U.S.C.A. § 1371(a). It is simply untenable to read the Clean Water Act as authorizing states to use their Section 401 permitting authority to implement trade-policy objections unrelated to water quality concerns.

Allowing states to hijack Section 401 for purposes unrelated to water quality would disrupt numerous sectors of the economy, in ways that Congress surely did not intend. If Washington can

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use Section 401 permitting to block construction of the bulk terminal at issue here because it is "adamantly opposed" to coal exportation as a policy matter (Rivers Decl. ¶ 5), states all across the country could similarly restrict domestic and foreign trade on the basis of their own local policy agendas. Section 401 state certifications are necessary for significant numbers of real estate, infrastructure, manufacturing, resource-extraction, and agricultural projects. This kind of political gamesmanship is not what Congress contemplated when it granted states the authority to review proposed projects for water quality issues in Section 401.

Against this background, especially close scrutiny of the Defendants' purported rationales for the permit denial in this case is warranted. Yet under any level of scrutiny, Defendants' arguments fall apart. The denial of Plaintiffs' application for certification for the coal export facility had nothing to do with water quality concerns. The State Defendants have effectively conceded as much; their list of the "environmental impacts" of the proposed terminal conspicuously lacks any mention of *water quality* impacts. Dkt. 227 at 15. This use of the Section 401 process to pursue interests that have nothing to do with water quality lays bare Defendants' true intent to interfere with national foreign trade policy rather than to regulate Washington's environment. Congress assuredly never meant to authorize such interference with foreign trade when it passed the Clean Water Act.

III. Upholding Washington's Actions Would Give States a Green Light to Interfere With Foreign Trade Policy in Other Contexts.

Ensuring a uniform national voice on matters of international trade is critical in the modern political environment. In light of the widespread polarization of the American electorate, many state governments have assumed polarized political characters. Whereas the state governments in California, Oregon, Maryland, and New Mexico are known to lean in favor of liberal 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, Gallup, *Red States Outnumber Blue for First Time in Gallup Tracking* (Feb. 3, 2016), bit.ly/2HpYnJn; 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 et al., *The Rise of Negative Partisanship and*

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the Nationalization of U.S. Elections in the 21st Century, 41 Electoral Stud. 12 (2016).

Each of these states controls, to some degree, American export and import trade with our foreign allies, including Mexico and Canada and those in Asia and Europe. If the Court allows Defendants' obstructionist conduct to stand, it will serve as an open invitation to states like these to use their geographic leverage over international trade to obstruct any administration with whose policies they disagree. This is an equal opportunity problem; just as Republican administrations can expect obstruction from Democratic-leaning states, Democratic administrations can expect obstruction from Republican-leaning states.

The results would be disastrous for American foreign trade policy and a clear offense to the nation's federalist scheme. California could deny port access and refuse to permit new port facilities for agricultural exports if it disagrees with the manner in which livestock are raised. *Cf. Missouri v. California*, No. 22-O-148 (S. Ct. filed Dec. 7, 2017) (Missouri has sued California, challenging California's efforts to limit the sale of non-cage-free eggs within California). South Carolina could refuse port access for handing exports of manufactured goods if it disagrees with liberal immigration policies that ensure sufficient labor supply needed to make those goods. *Cf. United States v. California*, No. 18-cv-490 (E.D. Cal. filed Mar. 6, 2018) (United States' suit against California concerning immigration policy). And because virtually all international trade is bilateral, these states likewise could attempt to obstruct the importation of such goods from our foreign allies.

It was precisely to prevent such intrastate meddling in foreign trade policy that the Framers saw fit to allocate exclusive authority over international trade and foreign policy to the federal government. Washington's conduct in this case is inconsistent with that constitutional framework. In this case, it is coal; in the next case, it could be agriculture or manufactured goods. This Court should not tolerate Defendants' efforts to assume for themselves the unilateral power to set aside the federal government's judgments with respect to international trade in coal resources.

CONCLUSION

The Court should deny Defendants' motion for summary judgment.

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DATED this 11th day of March, 2019.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 11th day of March, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel on record in the matter.

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