

THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC.;
LIGHTHOUSE PRODUCTS, LLC; LHR
INFRASTRUCTURE, LLC; LHR COAL,
LLC; and MILLENNIUM BULK
TERMINALS-LONGVIEW, LLC,

Plaintiff,

v.

JAY INSLEE, in his official capacity as
Governor of the State of Washington; MAIA
BELLON, in her official capacity as Director
of the Washington Department of Ecology;
and HILARY S. FRANZ, in her official
capacity as Commissioner of Public Lands,

Defendant.

No.: 3:18-cv-05005-RJB

AMICUS CURIAE BRIEF IN OPPOSITION
TO DEFENDANTS' MOTION FOR
ABSTENTION BY WYOMING, KANSAS,
MONTANA, NEBRASKA, SOUTH
DAKOTA AND UTAH

NOTED ON THE MOTION CALENDAR:
MAY 15, 2018

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26

INTRODUCTION

1
2 In 2016, the States of Wyoming and Montana generated tax revenues of just over \$800
3 million from coal mining and coal-power generation. (*See* Aff. to Mot. for Amicus status).
4 These revenues fund essential services to the citizens of the States, including water and
5 highway infrastructure and education. (*Id.*). Coal is a critical source of income to the fiscal
6 health of these two states and for the provision of basic services necessary for the health and
7 well-being of their citizens. In addition to the specific interests of Wyoming and Montana, the
8 additional amici states have a broad interest in ensuring that no single state can engage in a
9 pattern of discrimination that results in control over any other state's ability to engage in a
10 lawful activity involving interstate or foreign commerce. The Defendants' unconstitutional
11 actions threaten these interests.

12 The Defendants have publicly expressed their personal antipathy to the use of coal as a
13 fuel source. (*See, e.g.*, Compl. at ¶¶ 80-99). Defendant Governor Inslee is on record as
14 opposing coal exports, particularly to Asia. (*Id.* at ¶ 86). The other named Defendants either
15 share or have adopted Governor Inslee's anti-coal position. (*Id.* at ¶¶ 92-95 (Def. Bellon); 96-
16 97 (Def. Franz)). With regard to the Millennium Bulk Terminal Port Facility, the Defendants
17 have engaged in a pattern of discrimination to prevent Wyoming and Montana from engaging
18 in interstate and foreign commerce. In doing so, the Defendants' have violated the Dormant
19 Foreign and Domestic Commerce Clauses of the United States Constitution. The Defendants
20 are interfering with the free trade of other states, something anathema to the founding
21 principles of our nation. As Alexander Hamilton succinctly put it:

22 The interfering and unneighborly regulations of some States, contrary to the true
23 spirit of the Union, have, in different instances, given just cause of umbrage and
24 complaint to others, and it is to be feared that examples of this nature, if not
25 restrained by a national control, would be multiplied and extended till they
26 became not less serious sources of animosity and discord than injurious
impediments to the intercourse between the different parts of the Confederacy.

1 *The Federalist* No. 22 (Alexander Hamilton).

2 The amici States offer this brief to assist the Court in its consideration of Defendants'
3 argument that this Court should abstain from adjudicating the Commerce Clause claims in this
4 suit. This Court should not abstain from considering these claims because abstention is not
5 appropriate in dealing with Commerce Clause claims. Even if it was, the facts in this case do
6 not satisfy the requirements under either the *Pullman* or *Colorado River* abstention doctrines.
7 Accordingly, this Court should proceed to adjudicate the Commerce Clause claims.

8 BACKGROUND

9 **I. The Millennium Bulk Terminal Coal Export Facility.**

10 Since 2012, Lighthouse Resources, Inc., a vertically-integrated coal production,
11 transportation, and export company, has sought to develop the Millennium Bulk Terminal Port
12 Facility (Terminal Facility or Project) in Longview, Washington, on the Columbia River.
13 (Compl. at ¶¶ 60-70). Lighthouse desires to transport coal it mines in Montana and Wyoming
14 by rail to the Terminal Facility and then ship it to meet the growing demand for coal in Asia.
15 (Compl. at ¶¶ 35-37; 45-50). The Project requires additional coal export capacity on the West
16 Coast and, accordingly, Lighthouse has applied to obtain the necessary permits from the State
17 of Washington to expand and develop the Terminal Facility to handle the additional coal.
18 (Compl. at ¶¶ 51; 117; 149; 161; 173; 179).

19 The State of Washington has consistently denied Lighthouse's permit applications.
20 (Compl. at ¶¶ 149-60; 161-72; 173-78; 179-83). There are currently actions related to these
21 permit denials in state court and the Shorelines Hearing Board involving the denial by the
22 Washington Department of Natural Resources of the transfer of a sublease for the site of the
23 proposed Terminal Facility, the Washington Department of Ecology's denial of a Clean Water
24 Act Section 401 certification on appeal to the Washington Pollution Control Hearings Board,
25 and Cowlitz County's denial of a shoreline development and conditional use permit. (*See*
26 *generally* Overton Decl. Exs. 4, 5, 8, and 10 attached to Def. Mot.).

1 **II. The Defendants' Opposition to the Millennium Bulk Terminal Port Facility.**

2 The Defendants have a long-documented public opposition to fossil fuels, and coal in
 3 particular. (Compl. at ¶¶ 80-99; 107-10). Since the Defendants' accession to their current
 4 positions, Washington State agencies have denied *every* necessary permit for the Terminal
 5 Facility. (*Id.* at ¶¶ 121-24; 127-36; 149-59; 162-71; 176-78; 180-83). In response, Lighthouse
 6 has appealed the permit denials through the Washington state administrative and court systems.
 7 Lighthouse initiated this litigation in federal district court not to challenge the outcome of a
 8 specific permitting process, but to stop the Defendants' violation of the Dormant Foreign and
 9 Domestic Commerce Clause provisions of the United States Constitution under 42 U.S.C. §
 10 1983. (*Id.* at ¶¶ 206-10). Specifically, Lighthouse alleges that the Defendants have
 11 discriminated against Lighthouse's project because it involves coal, thus preventing Wyoming
 12 and Montana from engaging in foreign and interstate commerce and depriving Lighthouse and
 13 its subsidiaries of an economic opportunity and prospective investment. (*Id.* at ¶¶ 225-39, 241-
 14 48).

15 The Defendants are not parties to any proceeding in a state court or administrative body
 16 where there is a Commerce Clause claim at issue. Further, the claim against the Defendants
 17 and the relief sought against them is distinct from that in the state-level proceedings. In the
 18 state proceedings, the issues are whether the state agencies lawfully denied various permits
 19 under various state laws. (Dkt. No. 21-1 at Ex. 4, 5, 8, 10, and 11). If the Facility prevails in
 20 the state proceedings, the remedy would be to grant the permit or to remand the matter to the
 21 permitting agency for an appropriate consideration of the permit application. By contrast, the
 22 claims in this Court rest on alleged violations of federal law and the remedy Lighthouse seeks
 23 is fundamentally different than that available in the state proceedings. Specifically, Lighthouse
 24 seeks: (1) an order reversing the Defendant's unconstitutional and illegal actions; (2) an
 25 injunction requiring the Defendants to apply the same standards to Lighthouse's permit
 26

1 applications that are applied to non-coal applications; (3) an injunction ordering that the
 2 Defendants not deny Clean Water Act Section 401 certification on a basis unrelated to the
 3 requirements of that Act; and (4) an injunction requiring the Defendants to continue to process
 4 all future and current permit applications made by Lighthouse. (*Id.* at Prayer for Relief, ¶¶ F-
 5 J).

6 **III. Defendants' Motion for Abstention of the Commerce Clause Claims.**

7 Defendants responded to the Complaint with a “Motion for Partial Dismissal Under
 8 Eleventh Amendment and FRCP 12(b)(6) and Motion for Abstention.” The request for
 9 abstention derives from two doctrines established by the United States Supreme Court in the
 10 cases of *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941), and
 11 *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), and
 12 is directed to Lighthouse’s Commerce Clause claims. (Def. Mot. at 16-24). Because the
 13 Defendants do not meet the criteria for abstention, the States respectfully request that this Court
 14 deny the Motion for Abstention and adjudicate the Commerce Clause claims.

15 **STANDARD OF REVIEW**

16 Defendants bring their motion for abstention under Federal Rule of Civil Procedure
 17 12(b)(6). (Def. Br. at 7). When considering an abstention request under Rule 12(b)(6), the court
 18 generally accepts as true the allegations in the complaint, construes the pleading in the light
 19 most favorable to the party opposing the motion, and resolves all doubts in the pleader’s favor.
 20 *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). To survive a Rule 12(b)(6)
 21 motion to dismiss, the plaintiff must “allege enough facts to state a claim to relief that is
 22 plausible on its face.” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A
 23 claim has facial plausibility when the [p]laintiff pleads factual content that allows the court to
 24 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
 25 *v. Iqbal*, 556 U.S. 662, 678 (2009).
 26

1 Further, the Defendants’ motion is a “facial” challenge to this Court’s exercise of
2 jurisdiction, not a “factual” one. “A factual challenge relies on affidavits or any other evidence
3 properly before the court to contest the truth of the complaint’s allegations.” *Courthouse News*
4 *Serv. v. Planet*, 750 F.3d 776, 780 (9th Cir. 2014) (internal quotes and brackets omitted). The
5 Defendants filed a Declaration from counsel identifying the concurrent state proceedings that
6 included exhibits of related orders, notices of appeal, and other procedural filings. (Decl. of
7 Lee Overton). The Defendants, however, do not contest the truth of any of the allegations in
8 the Complaint. Accordingly, the factual allegations in the Complaint are true for purposes of
9 this Court’s resolution of the Defendants’ motion.

10 ARGUMENT

11 Defendants assert that the parallel, state-level proceedings require this Court to abstain
12 from ruling on Lighthouse’s Commerce Clause claims. Initially, the Court should reject the
13 Defendants’ request for abstention because the Commerce Clause claims raise important
14 federal questions that impact the economic interests of other states. Even if the abstention
15 doctrines did apply, the Defendants have failed to establish that under the facts and
16 circumstances of this case that either the *Pullman* or the *Colorado River* doctrine supports
17 abstention.

18 **I. The Commerce Clause claims are a matter of overwhelming federal interest** 19 **making abstention inappropriate.**

20 “The Commerce Clause of the United States Constitution, Article I, Section 8, prohibits
21 states from discriminating against interstate commerce, and bars regulations that, although
22 facially nondiscriminatory, unduly burden interstate commerce.” *Nat’l Ass’n for the*
23 *Advancement of Multijurisdiction Practice v. Berch*, 773 F.3d 1037, 1048 (9th Cir. 2014).
24 Abstention is not favored when sensitive federal constitutional claims are at stake. *See, e.g.,*
25 *Procunier v. Martinez*, 416 U.S. 396, 404 (1974), *overruled on other grounds by Thornburgh*
26 *v. Abbott*, 490 U.S. 401, 413-14 (1989); *Harper v. Pub. Serv. Comm’n*, 396 F.3d 348, 355-56

1 (4th Cir. 2005); *United States v. Morros*, 268 F.3d 695, 706-07 (9th Cir. 2001). The “commerce
 2 clause power itself justifies a narrower view of state interests in the abstention context.”
 3 *Harper*, 396 F.3d at 357.

4 The commerce power plays a role in abstention analysis quite different from
 5 many of the other provisions of the Constitution. *The dormant Commerce*
 6 *Clause demonstrates a difference of kind, not merely of degree. By its very*
 7 *nature, it implicates interstate interests. It protects all states by ensuring that no*
state erects the kind of barriers to trade and economic activity that threatened
the survival of a fledging country under the Articles of Confederation.

8 Giving the power over commerce to Congress was easily seen as structurally
 9 creating an interstate interest ... Our “national common market” does not allow
 states – even inadvertently – to impede commerce and sow disunity.

10 When there is an overwhelming federal interest – an interest that is as much a
 11 core attribute of the national government as the list of important state interests
 12 are attributes of state sovereignty in or constitutional tradition – no state interest,
 for abstention purposes, can be nearly as strong at the same time[.]

13 *Harper*, 396 F.3d at 355-56 (emphasis added; internal ellipses omitted); *see also Life Partners,*
 14 *Inc. v. Morrison*, 484 F.3d 284, 300-01 (4th Cir. 2007) (determining that the district court did
 15 not abuse its discretion in declining to abstain on Commerce Clause claim); *Daniels*
 16 *Sharpsmart, Inc. v. Smith*, No. 1:17-cv-403-LJO-SAB, 2017 U.S. Dist. LEXIS 90840, at *11-
 17 20 (E.D. Cal. June 13, 2017) (finding that abstention on a Commerce Clause claim is generally
 18 inappropriate under any of the recognized abstention doctrines).

19 The Defendants’ illegal actions have violated the United States Constitution and
 20 adversely impacted the economic and fiscal interests of states that seek to export commodities
 21 to foreign markets. The Defendants are trying to force on other states their policy preferences
 22 regarding the use of coal as a source of fuel, and thus, they are impeding the free flow of
 23 commerce. Today it is coal, tomorrow it could be natural gas or non-organic produce. The
 24 interests of interior states in developing foreign trade are now subject to the barriers erected
 25 by the policy whims of states that control access to international markets through their ports.
 26

1 This is *clearly* a matter of “overwhelming federal interest” that is crucial to the trade and
2 economic activity of this nation, and there is no state interest, for purposes of abstention, that
3 is comparable. Indeed, the Defendants cannot explain how a decision in any of the state
4 proceedings would prevent them from continuing to engage in actions improper under the
5 Commerce Clause.

6 Consequently, this Court should not engage in an assessment of the different factors of
7 either the *Pullman* or the *Colorado River* doctrines, as abstention on a Commerce Claim is
8 inappropriate under both in these circumstances. Instead, the Court should hear Lighthouse’s
9 claims under the Commerce Clause on the merits.

10 **II. Abstention is not proper under the *Pullman* doctrine.**

11 In *Pullman*, the United States Supreme Court counseled “abstention by federal courts
12 in order to avoid decisions of federal constitutional questions when the case may be disposed
13 of on questions of state law.” Leonard Birdsong, *Comity and Our Federalism in the Twenty-*
14 *First Century: The Abstention Doctrines Will Always Be With Us – Get Over It!*, 36 Creighton
15 L. Rev. 375, 388 (2003). “*Pullman* abstention ‘is an extraordinary and narrow exception to the
16 duty of a [d]istrict [c]ourt to adjudicate a controversy’ that is properly before it.” *Porter v.*
17 *Jones*, 319 F.3d 483, 492 (9th Cir. 2003) (quoting *Canton v. Spokane Sch. Dist. No. 81*, 498
18 F.2d 840, 845 (9th Cir. 1974)). A court should give a plaintiff’s choice of a federal forum for
19 hearing and adjudication of their federal constitutional claims “due respect” and “*Pullman*
20 abstention should rarely be applied.” *Porter*, 319 F.3d at 492 (citing *Zwickler v. Koota*, 389
21 U.S. 241, 248 (1967)).

22 *Pullman* abstention is appropriate only if three mandatory criteria are established: “(1)
23 the case touches on a sensitive area of social policy upon which the federal courts ought not
24 enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly
25 can be avoided if a definite ruling on the state issue would terminate the controversy, and (3)
26

1 the proper resolution of the possible determinative issue of state law is uncertain.” *Courthouse*
2 *News Serv.*, 750 F.3d at 783-84 (quoting *Porter*, 319 F.3d at 492)).

3 None of these criteria are satisfied here. This case does not involve “a sensitive area of
4 social policy” which has been defined to include “land use planning, landlord-tenant
5 relationships, foreclosure policy, and death penalty procedures.” *Daniels*, 2017 U.S. Dist.
6 LEXIS 90840, at *15, n.11 (listing cases). The Defendants characterize this as a land use case.
7 (Def. Mot. at 17). This is incorrect. This is actually a Commerce Clause claim under the United
8 States Constitution. The premise of this case is that the Defendants used their official positions
9 to interfere with the permitting **process**. There is no constitutional challenge to the validity of
10 Washington’s rules and laws governing the issuance of permits for projects like the Terminal
11 Facility. The dispute does not touch on Washington’s sovereign authority to regulate its lands,
12 protect its environment, and the health and safety of its citizens. The dispute is that the
13 Washington officials charged with enforcing those laws manipulated or simply ignored them
14 in pursuit of their predetermined, personal agenda to block the export of coal through the State
15 of Washington. Since a Commerce Clause challenge to the propriety of an administrative
16 process is not “a sensitive area of social policy[,]” this alone makes *Pullman* abstention
17 inappropriate in this case.

18 Moreover, Defendants fail to satisfy the second and third criteria. The second criterion
19 asks whether a “constitutional adjudication plainly can be avoided if a definite ruling on the
20 state issue would terminate the controversy[.]” *Porter*, 319 F.3d at 492. The Defendants
21 assume that the mere existence of related parallel claims in concurrent state proceedings is a
22 sufficient basis for the federal court to abstain from addressing an important federal
23 constitutional claim. (Def. Mot. at 18). In a series of conclusory statements, Defendants
24 maintain that resolution of state law claims relating to the denied permits “would likely moot
25 the constitutional challenges.” (*Id.*). The Commerce Clause claims derive from the Defendants’
26 improper and extra-constitutional actions to block the transportation of coal across

1 Washington's border for export into foreign commerce. Defendants do not address how
2 resolution of the state law issues would resolve the federal constitutional claim or prevent the
3 Defendants from continuing to advance their anti-coal agenda through impermissible actions
4 in future proceedings. A definite resolution of the state law claims would not necessarily avoid
5 a constitutional adjudication and, therefore, the second criterion does not support abstention.

6 The third criterion crystalizes the difficulty with the Defendants' request for abstention:
7 "[T]he proper resolution of the possible determinative issue of state law is uncertain[.]" *Porter*,
8 319 F.3d at 492. "Where there is no ambiguity in the state statute, the federal court should not
9 abstain but should proceed to decide the federal constitutional claim." *Wisconsin v.*
10 *Constantineau*, 400 U.S. 433, 439 (1971). Defendant has not identified "an **unsettled** issue of
11 state or local law that would be determinative of the federal claims." *Hancock v. City of*
12 *Ridgefield*, No. C09-5580BHS, 2009 U.S. Dist. LEXIS 117948, at *6 (W.D. Wash. 2009)
13 (emphasis added); (See Def. Mot. at 16-24 (no state or local law has been identified)); *see also*
14 *Cingular Wireless, LLC v. Thurston Cty.*, 150 F. App'x 633, 635-36 (9th Cir. 2005) (finding
15 that *Pullman* abstention is not appropriate absent "an unsettled area of state law"). Defendants
16 do not identify any "unclear" or "unsettled" state law and, accordingly, they have not met the
17 third criterion necessary for *Pullman* abstention.

18 **III. Abstention is not proper under the Colorado River doctrine.**

19 The Defendants also argue that this Court should abstain from determining the
20 Commerce Clause claim under the Supreme Court's decision in *Colorado River*, but
21 "[g]enerally, as between state and federal courts, the rule is that 'pendency of an action in the
22 state court is no bar to proceedings concerning the same matter in the Federal court having
23 jurisdiction[.]'" *Colo. River*, 424 U.S. at 817 (quoting *McClellan v. Carland*, 217 U.S. 268, 282
24 (1910)). "Only in rare cases will 'the presence of a concurrent state proceeding' permit the
25 district court to dismiss a concurrent federal suit 'for reasons of wise judicial administration.'"
26

1 *R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 977-78 (9th Cir. 2011) (quoting *Colo. River*,
2 424 U.S. at 818)).

3 In *Colorado River*, the federal government brought a federal court action against
4 various water users seeking a declaration of rights on the Colorado River and several
5 tributaries. *Colorado River*, 424 U.S. at 805. Colorado had already established water districts
6 to adjudicate water rights in state courts. *Id.* at 804. The federal district court dismissed the
7 action in deference to the state court proceedings. *Id.* at 806. The Supreme Court affirmed,
8 stressing, in particular, the “highly interdependent” relationship between the claims in the two
9 courts and federal policy, embodied in law, of avoiding the piecemeal adjudication of water
10 rights. *Id.* at 819-20; *see also R.R. St. & Co.*, 656 F.3d at 978.

11 Given the factual context of this case, the *Colorado River* abstention doctrine is not
12 applicable because “*Colorado River* was a state law case that the Government sought to have
13 federally adjudicated ... [t]his case is the converse: a federal law case that the state seeks to
14 have adjudicated in state court.” *Morros*, 268 F.3d at 707. This case does not present a situation
15 where “there is evidence of a strong federal policy that all claims should be tried in the state
16 courts.” *Morros*, 268 F.3d at 706-07. The federal adjudication of the Commerce Clause claims
17 would not reach into an area of concern specific to the state; rather, it concerns an area of
18 particular concern to the federal government: interstate commerce. Therefore, this is not a
19 “rare” or “exceptional” case that calls for the federal court to abstain from adjudicating federal
20 claims, and this Court should proceed to adjudicate the Commerce Clause claims. *See Daniels*
21 *Sharpsmart*, 2017 U.S. Dist. LEXIS 90840, at *14-15 (“This case is premised on [a] claim,
22 brought under a federal statute, that [d]efendants violated the Commerce Clause, a provision
23 of the federal constitution. ... Consequently, *Colorado River* abstention has no applicability
24 here.”) (citations and quotation marks omitted).

25 Considering the substance of the Defendants’ motion also leads to the conclusion that
26 abstention is not appropriate under the circumstances. To determine whether the federal case

1 presents the “exceptional circumstances” justifying abstention under *Colorado River*, “the
2 district court must carefully consider ‘both the obligation to exercise jurisdiction and the
3 combination of factors counseling against that exercise.’” *R.R. St. & Co.*, 656 F.3d at 978
4 (quoting *Colo. River*, 424 U.S. at 818). The Ninth Circuit applies eight factors for assessing
5 the appropriateness of a *Colorado River* stay or dismissal:

6 (1) which court first assumed jurisdiction over any property at stake; (2) the
7 inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation;
8 (4) the order in which the forums obtained jurisdiction; (5) whether federal law
9 or state law provides the rule of decision on the merits; (6) whether the state
10 court proceedings can adequately protect the rights of the federal litigants; (7)
11 the desire to avoid forum shopping; and (8) whether the state court proceedings
12 will resolve all issues before the federal court.

11 *R.R. St. & Co.*, 656 F.3d at 978-79. Defendants conclude that factors 3, 4, 6, 7, and 8 weight
12 in favor abstention. But neither these five factors, nor the other three, weigh in favor of
13 abstention.

14 The *Colorado River* court was primarily concerned with avoiding piecemeal litigation.
15 *Morros*, 268 F.3d at 706-07 (quoting *Colo. River*, 424 U.S. at 819). “Piecemeal litigation
16 occurs when different tribunals consider the same issue, thereby duplicating efforts and
17 possibly reaching different results ... [t]he mere possibility of piecemeal litigation does not
18 constitute an exceptional circumstance.” *R.R. St. & Co.*, 656 F.3d at 979 (internal quotations
19 and citations omitted).

20 *Colorado River* does not say that every time it is possible for a state court to
21 obviate the need for federal review by deciding factual issues in a particular
22 way, the federal court should abstain. As the Supreme Court has observed, such
23 a holding would “make a mockery of the rule that only exceptional
24 circumstances justify a federal court’s refusal to decide a case in deference to
25 the States.” Rather, *Colorado River* stands for the proposition that when
26 Congress has passed a law expressing a preference for unified state adjudication,
courts should respect that preference. As the Third Circuit astutely observed, “it
is evident that the avoidance of piecemeal litigation factor is met, as it was in ...
Colorado River itself, only when there is evidence of a strong federal policy that
all claims should be tried in the state courts.

1 *Morros*, 268 F.3d at 706-07 (footnotes and internal quotation marks omitted). This case offers
2 only the mere possibility of piecemeal litigation. There is no identified federal policy favoring
3 the adjudication in the state courts of constitutional claims of state official misconduct in
4 administrative permitting.¹ This factor strongly favors this Court exercising its jurisdiction to
5 adjudicate these claims.

6 The fourth factor is the order in which jurisdiction was obtained. The Defendants admit
7 the measure of the weight given to this factor does not depend on whether the state was the
8 first to exercise jurisdiction. (Def. Mot. at 22). Indeed, “[t]he mere existence of a case on the
9 state docket in no way causes a substantial waste of judicial resources nor imposes a burden
10 on the defendant which would justify abstention.” *Travelers Indem. Co. v. Madonna*, 914 F.2d
11 1364, 1370 (9th Cir. 1990). Further, abstention is particularly inappropriate when the federal
12 proceeding, like this case, is brought under 42 U.S.C. § 1983. *See Daniels Sharpmart*, 2017
13 U.S. Dist. LEXIS 90840, at *19-20; *see also Pue v. Sillas*, 632 F.2d 74, 77 n.4 (9th Cir. 1980).

14 Defendants acknowledge the progress of the state proceedings but do not offer any
15 analysis of how that progress affects the federal litigation. *See Moses H. Cone Mem’l Hosp. v.*
16 *Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983) (stating that *Colorado River* abstention
17 contemplates that “the parallel state-court litigation will be an adequate vehicle for the
18 complete and prompt resolution of the issues ... [i]f there is any substantial doubt as to this, it
19 would be a serious abuse of discretion to grant the stay or dismissal at all”). A recitation of the
20 progress of the state court proceedings tells us nothing about the adequacy of that vehicle to
21 completely and promptly resolve those claims; nor does it address the consequences of this
22 action being filed under 42 U.S.C. § 1983. Thus, this factor does not support abstention.

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25 ¹ For example, the Washington Shorelines Hearings Board’s enabling statutes and administrative rules
26 do not provide that body with jurisdiction to consider federal constitutional questions. See RCW 90.58
et seq., and WAC 461-8-315.

1 Applying the sixth factor, courts are to ask whether the state court proceedings can
2 adequately protect the rights of the federal litigants. Defendants interpret this to mean that so
3 long as the state courts are competent to hear federal constitutional claims, then the factor
4 weighs in favor of abstention. (Def. Mot. at 21). Defendants misinterpret the nature of the
5 factor. The Ninth Circuit “has not applied this factor against the exercise of federal jurisdiction,
6 only in favor of it.” *Travelers*, 914 F.2d at 1370. “This factor, like choice of law, is more
7 important when it weighs in favor of federal jurisdiction.” *Id.* (quoting *Bethlehem Contracting*
8 *Co. v. Lehrer/McGovern, Inc.*, 800 F.2d 325, 328 (2d Cir. 1986); *see also R.R. St. & Co.*, 656
9 F.3d at 981. This factor is of no value to the Defendants’ argument because to the extent the
10 courts consider the factor, it is **only** to determine whether it weighs in favor of federal
11 jurisdiction, not against it. So, even if a party advocating abstention can show that the state
12 tribunal can protect the rights of the federal plaintiff, this factor is merely eliminated from
13 consideration; it lacks any weight. By asking this Court to weigh this factor in favor of
14 abstention, Defendants err.

15 The seventh factor addresses concerns over forum shopping. Naturally, the Defendants
16 argue that this factor weighs in favor abstention because Lighthouse, allegedly, did not focus
17 “its efforts in the forum that it deems most favorable, [but] has flung its claims across as many
18 forums as possible in the hopes of finding a single sympathetic one ... [with] [t]he result
19 [being] vexatious litigation in which [Lighthouse] seeks to litigate five lawsuits
20 simultaneously.” (Def. Mot. at 24).

21 “In the *Colorado River* context, this Circuit has held that forum shopping weighs in
22 favor of a stay when the party opposing the stay seeks to avoid adverse rulings made by the
23 state court or to gain a tactical advantage from the application of federal court rules.” *Travelers*,
24 914 F.2d at 1371. Defendants do not identify any adverse state court ruling Lighthouse is
25 seeking to avoid or how the federal court rules could give Lighthouse a tactical advantage in
26 this litigation. Further, that there are on-going state lawsuits has more to do with the fractured

1 permitting process employed by the State of Washington than it does with any conscious
2 choice by Lighthouse to seek out advantageous forums or to create vexatious litigation. Unless
3 the Defendants are advocating that a party must give up certain due process rights to appeal
4 adverse state rulings before filing an action in federal court, there is no evidence of forum
5 shopping.

6 The final factor the Defendants contend weighs in favor of abstention is the eighth one
7 in which this court should ask whether the state court proceedings will resolve all issues before
8 it. Defendants argue that all they need show is that the state courts can adequately protect the
9 rights of the litigants in the federal case for this factor to favor abstention. (Def. Mot. at 20-
10 21). But this factor favors abstention when the parallel state court proceeding will “ensure
11 comprehensive disposition of litigation ... [o]therwise, a stay or dismissal will neither conserve
12 judicial resources nor prevent duplicative litigation.” *R.R. St. & Co.*, 656 F.3d at 982-83.
13 Defendants’ argument on this factor rests solely on the existence of parallel state proceedings.
14 There is no analysis of whether the state court proceedings will “ensure [a] **comprehensive**
15 disposition of [the] litigation.” Accordingly, this factor is of little weight.

16 The ultimate “decision whether to dismiss a federal action because of parallel state-
17 court litigation hinges on a careful balancing of the [relevant] factors ... with the balance
18 heavily weighted in favor of the exercise of jurisdiction.” *R.R. St. & Co.*, 656 F.3d at 983
19 (quoting *Moses H. Cone*, 460 U.S. at 16). In this case, the balance weighs overwhelmingly in
20 favor of this Court exercising jurisdiction.

21 **I. CONCLUSION**

22 The Defendants failed to meet their burden to show that the Commerce Clause claims
23 set forth in Lighthouse’s Complaint are of the rare and extraordinary type that would support
24 abstention. Accordingly, *amicus curiae* the States of Wyoming, Kansas, Montana, Nebraska,
25 South Dakota, and Utah respectfully request that this Court deny the Motion for Abstention
26 and proceed to adjudicate the Commerce Clause claims.

1 DATED: May 8, 2018

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 8th day of May, 2018, 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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