No. 18-2118

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PORTLAND PIPE LINE CORPORATION;
THE AMERICAN WATERWAYS OPERATORS,

Plaintiffs-Appellants,

v.

CITY OF SOUTH PORTLAND; MATTHEW LECONTE, in his official capacity as Code Enforcement Director of South Portland

Defendants-Appellees.

On Appeal from Judgment of the
United States District Court for the District of Maine

BRIEF OF *AMICI CURIAE* CONSERVATION LAW FOUNDATION, NATURAL RESOURCES COUNCIL OF MAINE, AND PROTECT SOUTH PORTLAND IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE (filed with assent)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* Conservation Law Foundation, Natural Resources Council of Maine, and Protect South Portland state that they have no parent corporations and no publicly held company owns 10% or more of any *Amicus's* stock.

AUTHORITY TO FILE

All parties to this case have consented to the filing of this *amicus curiae* brief.

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STATEMENT OF INTEREST

This *amicus* brief is filed on behalf of Conservation Law Foundation, Natural Resources Council of Maine, and Protect South Portland.[1]

Conservation Law Foundation ("CLF") is a non-profit, member-supported public interest environmental advocacy organization with offices in Maine, Massachusetts, Vermont, New Hampshire, and Rhode Island. CLF's mission is to help solve the environmental problems that threaten the people, natural resources, and communities of New England. CLF members live and work in South Portland. CLF participated in the public process by which the Clear Skies Ordinance was developed and enacted and has participated as *amicus* in the district court.

Natural Resources Council of Maine is a non-profit, membership organization protecting, restoring, and conserving Maine's environment. With more than 20,000 supporters statewide and beyond and approximately 1500 supporters in South Portland, the Natural Resources Council of Maine has worked state-wide to protect the health of Maine's rivers, lakes, streams, and coastal waters; promote sustainable communities through initiatives that reduce toxics

[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than *Amici*, their members or their counsel contributed money that was intended to fund the preparation or submission of this brief.

pollution and waste; and decrease air and climate-changing pollution through energy efficiency and renewable sources.

Protect South Portland is a 501(c)(3) non-profit, grassroots, citizen organization founded in early 2013. Protect South Portland's mission is to promote actions and practices that serve to protect the environment and health and welfare of South Portland, Maine. Protect South Portland has been a driving force behind the ordinance challenged in this case.

Conservation Law Foundation, Natural Resources Council of Maine, and Protect South Portland have each been involved in on-the-ground advocacy and legal efforts to protect the environment and public health and safety of the southern Maine region. Each of these groups has particularly focused, in recent years, on the passage and implementation of the challenged South Portland Clear Skies Ordinance, and they have amassed a depth of knowledge about the local impacts and concerns that prompted the enactment of the challenged Ordinance.

INTRODUCTION

South Portland, Maine is a small city with a proud maritime history, a working waterfront, and an engaged citizenry. For many decades, the City was defined by industrial activities along its waterfront. Today, the City seeks to ensure those businesses continue to thrive, while also balancing other needs of the community, such as a visionary waterfront redevelopment plan to promote

economic development while protecting the environment and public health. The City's efforts to balance these competing objectives were tested when appellant Portland Pipe Line Corp. ("PPLC") proposed a new project to bulk load crude oil onto marine tankers within the City's limits.

Contrary to the distorted picture PPLC paints in its opening brief, the project immediately raised a number of significant concerns to community members, local elected officials, and *Amici*. PPLC's infrastructure for the bulk loading of crude oil in the harbor required substantial construction, would degrade air quality beyond levels acceptable to the City, and would interfere with the City's long-term planning goals and scenic waterfront. PPLC proposed to build new infrastructure, including a pump station and electrical switchyard, extensively modify the existing pier to accommodate different kinds of vessels, and construct two 70 foot high vapor combustion units ("VCUs") – smokestack-like facilities needed to treat the significant quantities of polluted air displaced from tankers during the loading process. J.13.[2] However, the VCUs cannot scrub all pollutants from the displaced vapors, and the project would still degrade South Portland's air quality with hazardous air pollutants. SJ.103.

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[2] The district court's trial decision is cited as "J." followed by the internal page number; the district court's summary judgment decision is cited as "SJ."

PPLC's project would also fill 23 crude oil storage tanks, four of which sit on the waterfront and 19 of which sit approximately three miles from the pier, in the immediate vicinity of a city park, residential neighborhoods, schools, day care centers, athletic facilities, and churches. SJ.9-10, 14-15. Toxic pollution emissions from the increased use of these tanks would add to the degradation of the City's air quality.[3] Faced with this transformational project, the City looked hard at its legal authority to protect public health and safety and vetted its options through vigorous public debate. The City ultimately enacted a narrow ban on the bulk loading of crude oil and related infrastructure (the "Ordinance").

Relying on a startlingly disingenuous recounting of the facts and various muddled legal frameworks, PPLC and American Waterways Operators (collectively "Appellants") seek to craft a narrative of a grand, unlawful scheme to circumvent the U.S. Constitution and federal law. But as the district court found,

[3] A recent proposed consent decree between the U.S. Environmental Protection Agency and the owner/operator of several of these oil storage tanks in South Portland settled claims concerning harmful emissions from those tanks and the health risks posed to nearby residents from these emissions. *See* "Proposed Settlement Resolves Clean Air Act Claims Between EPA and South Portland, Maine Facility," March 25, 2019, https://www.epa.gov/newsreleases/proposed-settlement-resolves-clean-air-act-claims-between-epa-and-south-portland-maine (last accessed April 12, 2019)*; see also* Bouchard, Kelley, "EPA lawsuit over South Portland oil tanks raises neighborhood fears," Portland Press Herald, April 7, 2019, https://www.pressherald.com/2019/04/07/epa-lawsuit-over-south-portland-oil-tanks-raises-neighborhood-fears/ (last accessed April 12, 2019).

Appellants' claims are factually and legally wrong. As to the facts, the district court found ample justification for the bulk loading ban to protect local air quality, environmental quality, and other values, flatly rejecting Appellants' manufactured narrative and claimed "oil above all" national policy. As to the law, the district court correctly rejected all claims. *Amici* urge the Court to affirm the district court's decision in all respects.

ARGUMENT

I. THE MAINE OIL DISCHARGE PREVENTION LAW DOES NOT PREEMPT THE CHALLENGED ORDINANCE.

The City possesses "home rule" authority over all matters that are local or municipal in character, subject only to express or implied limitations from the Maine Legislature. Here, the City exercised this fundamental authority to protect its current and future citizens from PPLC's crude oil loading project. The district court's recognition that the City's exercise of its home rule authority in enacting the Ordinance is not preempted by the Maine Oil Discharge Prevention Law should be affirmed.

A. The Ordinance Falls Squarely within the City's Home Rule Authority.

As a small city in coastal Maine, South Portland seeks to ensure that its existing marine businesses and industry continue to thrive, while balancing the other needs of the community, including the economic redevelopment of its

waterfront and the protection of its environment and the health of its citizens. SJ.119-23. PPLC's plans to load crude oil onto marine tank vessels on the City's waterfront threatened this balance. SJ.16-42. To protect these interests, the City passed an ordinance that prohibits bulk loading of crude oil on the waterfront. SJ.89-90.

The Ordinance is a valid exercise of the "home rule" authority granted to municipalities by the Maine Constitution, Me. Const. art. VIII, pt. 2, § 1, and expressly conferred upon municipalities by the Maine Legislature. 30-A M.R.S. § 3001; SJ.223. This statute is liberally construed and creates a rebuttable presumption that local ordinances are a valid exercise of a municipality's home rule authority. 30-A M.R.S. § 3001(1)-(2); *Dubois Livestock, Inc. v. Town of Arundel*, 103 A.2d 556, 561 (Me. 2014).

The Ordinance falls squarely within the City's home rule authority because, among other things, it promotes economic redevelopment of the City's waterfront, and it protects human health. SJ.105, 122. PPLC's plans to load crude oil within the City would directly impact these legitimate interests. For instance, PPLC's plan would fill 23 oil storage tanks, four on the waterfront and 19 that are surrounded by residential neighborhoods, schools, day-care centers, athletic

facilities, and churches. SJ.9-10, 14-15. The plan would also require a new building and two 70-foot tall oil VCUs. SJ.24-25.[4]

These new facilities and operations would be harmful to City's residents, in particular its most vulnerable residents—children and the elderly. Loading operations would further degrade the City's air quality with volatile organic compounds, sulfur dioxide, nitrous oxides and hazardous air pollutants. These pollutants increase residents' risks of cancer, hospital admissions, and emergency room visits for asthma and upper airway inflammation, and cause adverse respiratory outcomes. J.34-38, SJ.102-05. Further, because the emission sources are next to schools, neighborhoods, and parks, health impacts would be most acutely felt by children, low-income, and elderly residents. J. 35, SJ.105.

PPLC's project would also thwart the City's goal of transforming its Shipyard "S" zoning district into a robust waterfront center for office complexes, commercial uses, traditional marine uses, residential development, integrated light industrial projects, and tourism. SJ.122-23. As the district court noted, the Ordinance is no different from the numerous other ordinances in Maine coastal communities that restrict or prohibit on-shore oil facilities for environmental, health or aesthetic reasons. SJ.205.

[4] PPLC's 2012–2013 revised reversal plan proposed different designs and combinations of new facilities within the City. SJ.34-35.

B. <u>The District Court Correctly Held that State Law Does Not Preempt the Ordinance.</u>

A local ordinance enacted under home rule authority is presumptively valid, and will only be invalidated if the Legislature intended to occupy the particular field of regulation or the local ordinance would frustrate the purpose of a state law. 30-A M.R.S. § 3001(3); *Cent. Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189, 1194 (Me. 1990) (discussing "express preemption" and "implicit preemption" and inquiring whether state law was "intended to occupy the field" and whether the local law would "frustrate the purposes" of the state law).

Here, the district court correctly held that the Ordinance is not preempted by the Maine Oil Discharge Prevention Law, 38 M.R.S. §§ 541 *et seq.* While that statute bans oil discharges into waters, *id.* § 543, requires licenses for transfer facilities, *id.* § 545, imposes strict liability for accidents, *id.* § 552, and empowers the Department of Environmental Protection ("DEP") to "adopt rules and regulations" relating to the operation of facilities and vessels, SJ.224, it also contains a broad savings clause that limits its preemptive effect on municipal ordinances or laws to those that are in "direct conflict" with its provisions. *Id.* § 556; SJ.225.

Despite PPLC's assertions, DEP's renewal of PPLC's transfer license is not an order nor is the Ordinance in conflict, directly or indirectly, with it. Nothing in

the license renewal or the relevant statutory and regulatory framework suggests that it was anything but a license. The word "order" only appears in the heading of the license renewal. Further, DEP issued the license renewal under 38 M.R.S. § 545 ("Operation without license prohibited") and 06-096 C.M.R., Chapter 600 ("Oil Discharge Prevention and Pollution Control Regulations"). Section 545 addresses the issuance and renewal of licenses and makes no mention of "orders." Similarly, Chapter 600 of the regulations addresses, among other things, licensing of oil terminal facilities, and makes no mention of "orders." *See, e.g.,* Chapter 600, § 13(A). The district court correctly held that, "the Legislature did not intend the 'licenses' specifically described throughout the statute to be 'orders' preempting further local restriction." SJ.226.

II. THE PIPELINE SAFETY ACT DOES NOT PREEMPT THE CHALLENGED ORDINANCE.

Appellants' Pipeline Safety Act preemption claim mischaracterizes the law of federal preemption. By focusing on issues of legislative intent—a framework that this Circuit rejects—Appellants expand the scope of the Pipeline Safety Act's express preemption clause well beyond Congress's unequivocal intent.[5]

[5] PPLC notably did not appeal its other federal preemption claims rejected by the district court, including maritime and Ports and Waterways Safety Act preemption. *See* SJ.190, 207.

A. **<u>The Ordinance Is Well Outside the Scope of Pipeline Safety Act Preemption, which is Limited to "Safety Standards."</u>**

Congressional intent is the "ultimate touchstone" of preemption analysis, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), and when Congress expressly defines the preemptive reach of a statute, it "implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggettt Group, Inc.*, 505 U.S. 504, 517 (1992); *Wash. Gas Light v. Prince George's Cty. Council*, 711 F.3d 412, 422 (4th Cir. 2013) (holding it unlikely that zoning plans impliedly preempted when they are beyond the scope of the Pipeline Safety Act's express preemption clause). The case for implied preemption, moreover, is "particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them." *Wyeth*, 555 U.S. at 575; *see also Wash. Gas Light*, 711 F.3d at 422 (extending the presumption against preemption to the Pipeline Safety Act). When an implied preemption challenge involves zoning power, the Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 230.

Appellants disregard these longstanding principles. Recognizing that the Ordinance does not resemble, interfere, or conflict with any federal pipeline safety

standards, Appellants try to redefine the scope of preemption by inventing an overly broad "field" of pipeline safety to fit within the doctrine of implied preemption. Brief of Appellants ("App.Br."), 27; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (describing implied field preemption). Similarly, Appellants invent an unexpressed Congressional objective to fit its preemption claims within the doctrine of implied obstacle preemption. App.Br.27; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (obstacle preemption). But these "square peg" arguments do not fit.

B. The Ordinance Is Not a "Safety Standard" Within the Meaning of the Pipeline Safety Act.

The Pipeline Safety Act only preempts state and local efforts to adopt and enforce "safety standards." 49 U.S.C. § 60104(c). At most, the Ordinance regulates the siting or location of a pipeline facility because it describes where bulk loading crude oil may not occur. This is not a safety standard under the Pipeline Safety Act. *Id.* § 60104(e); *Wash. Gas*, 711 F.3d at 422 (holding that siting and location of pipeline facilities is not a "safety standard."). As the district court held, "states and localities retain their ability to prohibit pipelines altogether in certain locations." SJ.172 (citing *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960)). *See also* H.R. Rep. No. 102-247, at 13-14 (1991)

(crude oil pipelines "are subject to the routing and environmental assessment requirements of the individual states they traverse").

As the district court held, the Ordinance does not "regulate the operations of those [pipeline] facilities within the meaning of the statute." J.73 & n.6; SJ.170. The district court explained that the Pipeline Safety Act regulates how a pipeline facility must be operated—requisite pressurization standards and anti-corrosion materials, for example—but not whether or where a pipeline facility must be located. *See* SJ.170 (federal automobile fuel economy standards on cars preempt state or local law but do not preempt a municipality's ability to regulate where roads or parking lots can be located, or whether to allow cars at all). The Fourth Circuit rejected a similar challenge, noting that "[l]ogically, the power to impose a zoning requirement includes the power to *preclude* any proposed usage of the zoned area that cannot comply with such requirement." *Washington Gas Light,* 711 F.3d at 421 (holding that zoning ordinances prohibiting siting of liquid natural gas tanks were land use regulations, not safety standards preempted by the Pipeline Safety Act) (emphasis added). *See also Texas Midstream Gas Servs., LLC v. City of Grand Prairie,* 608 F.3d 200 (5th Cir. 2010) (rejecting Pipeline Safety Act preemption of a city code regulating siting of a natural gas compressor because location was not a safety standard). The Ordinance, a land use regulation, falls within the area Congress intended to leave to local governments.

C. <u>This Court Should Reject Appellants' Attempt to Divine a Preempted Purpose from the Ordinance's Legislative History.</u>

Given its weak argument on express preemption, Appellants attempt to shift the Court's focus to the City's motivation behind the Ordinance. But it is "particularly pointless" to look to the legislature's motives where its retained authority is "sufficient to permit" the City to act as it did. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983). Moreover, this Court has held that a preemption analysis is limited to the effect of the challenged statute, not the legislative body's underlying motivation. *EEOC v. Massachusetts*, 987 F.2d 64, 70 n.3 (1st Cir. 1993). *See also Associated Indus. of Massachusetts v. Snow*, 898 F.2d 274, 279 (1st Cir. 1990) (rejecting the litigant's call to "divine the Massachusetts Legislature's intent"). This Court has consistently declined requests to shift preemption analysis "away from the state law's effect and towards the state's purpose for enacting the law." *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 78 (1st Cir. 2006).

Even if the Court were to reverse this longstanding precedent (which it should not do), it would be left with the district court's findings that flatly reject Appellants' "pretext" narrative. The district court found several "sincere" and "legitimate" concerns unrelated to pipeline safety giving rise to the Ordinance. J.83. While these findings were made in the context of the district court's dormant

commerce clause analysis, they equally support the City's numerous non-safety reasons for passing the ordinance. These include increased emissions-related public health risks from the VCUs, increased emissions-related public health risks from renewed utilization of the tank farm, increased odors from the tank farm, aesthetic and noise impacts that harm recreation, and reduced likelihood of redevelopment in the City. *Id.* Appellants would have this Court strike an ordinance that is supported by a host of concerns unrelated to pipeline safety standards, that does not regulate the pipeline at all, and that is an otherwise lawful exercise of police powers. This kind of strict scrutiny is ordinarily limited to equal protection claims and claims involving fundamental individual rights. When these issues are not implicated, the state and local legislation "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel v. Indiana*, 452 U.S. 314, 331–32 (1981).

III. THE CHALLENGED ORDINANCE DOES NOT VIOLATE DORMANT ASPECTS OF THE COMMERCE CLAUSE.

Appellants' commerce clause arguments misstate the governing law, conflate separate doctrines, and muddle well-established analytical frameworks. Using the same disingenuous recounting of facts as in their preemption argument, they seek to craft a narrative of a grand, unlawful scheme to circumvent the U.S. Constitution. As the district court found, however, Appellants' narrative is

factually and legally deficient. As to the facts, the Court found compelling justification for the bulk loading ban to protect local air quality, environmental quality, and other community values. J.83. Appellants' alternative narrative—that the Ordinance's environmental benefits were pretextual—was rejected after a trial. As to the law, it is well established that the commerce clause does not interfere with the ability of local governments to protect the safety and welfare of the community, even if there are incidental impacts on commerce. Appellants' arguments constitute a bold end-run on local police powers that, if accepted, would give polluting and dangerous industries unfettered license to operate with little local regulation at all—simply by claiming that such regulation has an adverse effect on commerce. This Court should reject that invitation.

The Constitutional grant of authority to Congress to regulate commerce exists "to avoid the tendencies toward economic Balkanization" that had plagued the colonies and early states. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). That goal is balanced against another key constitutional goal—the preservation of "federalism favoring a degree of local autonomy." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). A local ordinance can violate the dormant commerce clause if it a) "discriminates" against interstate or foreign commerce, *see Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978); or b) burdens interstate commerce in a "clearly excessive" manner in relation to its

benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The foreign commerce clause entails additional scrutiny to ensure that local action does not interfere with the ability of the federal government to speak with "one voice" on matters of international trade. *Japan Line v. County of Los Angeles*, 441 U.S. 434 (1979). The Ordinance easily passes under all of these tests.

A. The Ordinance Does Not "Discriminate" Against Foreign Commerce.

The goal of the commerce clause is to prevent "discrimination" against interstate or foreign commerce. Discrimination in this context does not mean "impact," or even "harm." Rather, discrimination "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). "Under the dormant Commerce Clause, if a state law has either the purpose or effect of significantly favoring in-state commercial interests over out-of-state interests, the law will routinely be invalidated unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005). Discrimination against out-of-state interests that is motivated by a desire to protect in-state economic interests is subject to strict scrutiny. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (contrasting "economic isolation and protectionism" from "incidental

burdens on interstate commerce [that] may be unavailable when a State legislates to safeguard the health and safety of its people.").

Importantly, the doctrine serves to protect interstate and foreign markets—not individual companies. *Colon Health Ctr. of Am. v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013) ("in conducting the discrimination inquiry, a court should focus on discrimination against interstate commerce—not merely discrimination against the specific parties before it"). In *Exxon Corp*., the Supreme Court explicitly rejected a discrimination claim involving a state that only affected out-of-state companies. 437 U.S. at 127. Because the statute did nothing to advantage in-state parties, there could be no "discrimination" for commerce clause purposes, despite the harm to out-of-state businesses. *Id.* This precedent "explicitly rejected the notion that any regulation that affects particular companies engaged in interstate commerce necessarily represents an impermissible burden upon it." *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391, 397 (9th Cir. 1995).

Finally, even where "discrimination" against commerce exists, and strict scrutiny applied, a local ordinance will be upheld where it is justified by a legitimate purpose that cannot otherwise be achieved. In *Maine v. Taylor*, 477 U.S. 131 (1986), the Supreme Court upheld a Maine statute banning the importation of certain baitfish from out of state. Even though the statute advantaged in-state baitfish producers at the expense of out-of-state ones, the

statute was upheld because the evidence showed a legitimate purpose behind the statute—specifically, protection of the environment and fisheries from potential parasites—and no alternative means to achieve it. *Id.* at 151 (state "retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources").

Appellants' claim of "discrimination" against commerce falls apart at the outset, as it rests on the false premise that the Ordinance "preclude[s] international pipelines from transporting oil." That's simply not what it does. The Ordinance precludes a particular activity—bulk loading of crude oil onto tankers—that the City found to be particularly problematic in the proposed location. As the district court found, there is good reason to treat loading and unloading of marine vessels in the harbor differently: loading expels significant quantities of "air laden with hydrocarbons" and unloading does not. J.34, 73. The Ordinance does not otherwise influence the use or movement of oil in or through the City. Such incidental impacts on commerce do not constitute unlawful discrimination against commerce itself. *See, e.g., Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 401 (3rd Cir. 1987) (finding a statute banning coal loading does not discriminate because it "does not prohibit the export, import, or transshipment of coal").

At the same time, there is also no local or national economic interest that South Portland was trying to benefit. "Conceptually, of course, any notion of

discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). "In the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." *Id.* at 300. Indeed, as the district court found, almost all of the economic burden of the Ordinance fell on local businesses. J.86.

Appellants ultimately argue that South Portland "discriminated" against tar sands—a uniquely toxic and dangerous form of crude oil. But it does not violate the commerce clause to restrict or ban a particular product, as long as doing so is for the purpose of protecting the health, safety, and environment of the local community rather than the desire to protect in-state competitors. The Ordinance was not tethered in any way to where the product was coming from, or where it was going. Even if individuals expressed hostility to "tar sands" when supporting the Ordinance, such hostility has nothing to do with where tar sands are produced or where they are used. Bans based on product harm are lawful under the Commerce Clause. *Maine v. Taylor*, 477 U.S. 131 (banning out of state baitfish); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (ban on plastic milk containers); *Pacific NW Venison Prod. v. Smitch*, 20 F.3d 1008 (9th Cir. 1994) (ban on importation of foreign wildlife). In short, a local community cannot

"discriminate" against a product; a violation of the commerce clause only occurs when it discriminates against out-of-state or foreign economic interests, for the purpose of protecting local competitors. There was no such discrimination here.

B. **The Ordinance Rationally Regulates To Achieve Legitimate State Objectives.**

Barring discrimination, all that is left is the extremely deferential, "rational basis" review under *Pike*. "For a facially neutral statute to violate the commerce clause, the burdens of the statute must 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). This judicial deference to local judgments is at its greatest in areas of safety, health, and environmental protection. *Clover Leaf Creamery Co.*, 449 U.S. at 473.

In practice, the use of *Pike* balancing to strike down state and local actions is exceedingly rare. Truly nondiscriminatory local actions run afoul of *Pike* where they impose significant harm on commerce but provide literally no benefits at all. In *Raymond Motor Trans. v. Rice*, 434 U.S. 439 (1978), Supreme Court struck down a Wisconsin regulation prohibiting 65-foot long "double" trucks on its highway, when the state completely declined to submit any evidence whatsoever in support of it. *Id*. at 444 ("The State, for its part, virtually defaulted in its defense of the regulations as a safety measure."). With zero safety benefits, and no dispute

that it imposed significant costs, the truck ban could not pass the low threshold of *Pike*. The outcome would have been different had the state been able to "legitimately assert" some safety justification for the rule. "[I]f safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Id*. at 449 (Blackmun, J., concurring).

There have been many *Pike* challenges to local ordinances that prohibit transloading infrastructure, especially for fossil fuels, and they have all failed. The *Norfolk Southern* court rejected a *Pike* challenge to a coal loading ban, because it burdened all commerce equally. 822 F.2d at 402. An ordinance prohibiting loading and unloading of crushed rock was found not to have even an "incidental burden" on commerce in *Wood Marine Services v. City of Harahan*, 858 F.2d 1061, 1064 (5th Cir. 1988).

The Ordinance easily passes *Pike's* "rational basis" review. The only burden that Appellants can establish is a burden to their company—not to the oil market as a whole. Overheated rhetoric about "staggering" impacts cannot mask the fact that the *Pike* analysis "protects the interstate market, not particular firms." *Exxon Corp*., 437 U.S. at 127-28. Crude oil can still move in, around, and through the City. While the Ordinance may frustrate Appellants' business plan to reverse the pipeline flow, they failed to show as a factual matter any legally relevant

burden on commerce as a whole. J.86. This failing is fatal to their *Pike* challenge. *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154 (9th Cir. 2012) ("There is not a significant burden on interstate commerce merely because a non-discriminatory regulation precludes a preferred, more profitable method of operating in a retail market.").

As to the benefits side of the equation, Appellants fare even worse. The district court made factual findings that the Ordinance would have numerous benefits for the health and safety of the community. SJ.105. For example, the Court considered testimony that vessel loading would increase hospital admissions and emergency room visits due to asthma and would increase City residents risk of "developing cancer and other serious human health risks." J.35 ("There is no safe human exposure level to benzene."). The district court also found that the City had adopted a new development vision for its waterfront that expanded a more diverse set of uses and amenities. J.39. These are precisely the sorts of local police power determinations where judicial deference to local authority is at its greatest. *Clover Leaf Creamery*, 449 U.S. at 473.

Appellants assert the Ordinance falls short because the goals the City hoped to achieve could have been achieved without completely banning bulk loading of crude oil. But this Court should not scrutinize this purely legislative balancing function in a *Pike* review. While courts inquire whether a local government's

goals could be achieved in a different way when examining a discriminatory ordinance under "strict scrutiny" review, there is no basis to do so under the *Pike* "rational basis" test. The Ninth Circuit explicitly rejected the notion that Courts should examine alternatives to the challenged laws. *Nat'l Assoc. of Optometrists*, 682 F.3d at 1156–57 (finding that "it is not the role of the courts to determine the best legislative solution to a problem."). Because the Ordinance rationally advanced the goals of the City to safeguard the health and safety of its community, it must be upheld.

C. The Ordinance Does Not Interfere with the Federal Government's Ability to Speak with "One Voice."

Appellants' foreign Commerce Clause arguments fare no better.[6] In *Japan Line v. County of Los Angeles*, 441 U.S. 434 (1979), the Supreme Court found a state tax on foreign-registered shipping vessels could "impair federal uniformity in an area where federal uniformity is essential" and could prevent the Federal government from "speaking with one voice when regulating commercial relations

[6] On April 10, 2019, President Trump signed two executive orders that address fossil fuel energy development and transportation generally. *See* Executive Order on the Issuance of Permits with Respect to Facilities and Land Transportation Crossings at the International Boundaries of the United States, https://tinyurl.com/y6aps8pb (last accessed April 12, 2019); *see also* Executive Order on Promoting Energy Infrastructure and Economic Growth, https://tinyurl.com/yxfbfeo2 (last accessed April 12, 2019). Neither impact the arguments raised in this appeal.

with foreign governments." *Id*. at 448, 451. Invalidation under this "one voice" standard is extraordinarily rare. Courts have only invalidated state laws under the foreign commerce clause where they contained facial, "patent" discrimination against foreign commerce, for instance, a state trading ban with a specific country. *Natsios v. Nat'l Foreign Trade Council*, 181 F.3d 38, 46 (1st Cir. 1999). Efforts to protect local public health and environmental values easily pass muster under this standard, even where they allegedly have an impact on foreign commerce. *Pacific NW Venison Prod. v. Smitch*, 20 F.3d 1008 (9th Cir. 1994) (upholding ban on imported wildlife because such trade is "not a matter in which national uniformity is important").

Again, Appellants' entire case rests on the false factual premise that the Ordinance regulates pipelines. It does not. The Ordinance regulates what happens to the oil when it comes out of the pipeline into the community, SJ.170-71. The Ordinance is agnostic as to where the oil is coming from and where it is going to; it simply seeks to reduce the public health and environmental impacts of loading it within the City's boundaries. J.64; SJ.194 (regulation applies to American oil as well as Canadian). The government's ability to speak with "one voice" on international oil trade is unimpeded by one local ordinance seeking to protect local air quality, public health, and environmental values.

Appellants' last tactic is to invent a new commerce clause standard under which a Court is supposed to imagine what would happen if every jurisdiction everywhere enacted similar legislation. No such standard exists. Indeed, using this type of imaginative stretch, every local ordinance, repeated across the county, would have an outsize impact on commerce. The U.S. Constitution protects varied approaches to local control under the doctrine of federalism. And of course, if there ever came a time when the aggregate effect of local regulation impeded national objectives, the U.S. Congress could exercise its constitutional authority to regulate the activity.

If the Court accepted Appellants' position, no local government would be able to protect the health and safety of its community wherever doing so interfered with domestic or international trade. Under Appellants' theory, the City would not be able to legislate to stop an oil tank farm from being constructed on a historic cemetery, or a beloved city park, or a low-income housing project. Commerce clause jurisprudence has long recognized the ability of state and local communities to chart their own destinies and protect local community values. The only question here is whether the dormant aspect of the commerce clause prohibits the City from protecting local values despite an incidental impact on commerce. It does not, and the Court should waste little time on this argument.

IV. THE ORDINANCE DOES NOT VIOLATE THE FOREIGN AFFAIRS DOCTRINE.

Appellants have little to say about the law governing the foreign affairs doctrine. Small wonder, as it is a narrow and “rarely invoked” doctrine reserved for state actions that clearly collide with unambiguous and long-standing federal policies. *Deutsch v. Turner Corp.*, 324 F.3d 692, 710 (9th Cir. 2003); *Gerling Glob. Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 752 (9th Cir. 2001) (noting that the Supreme Court had not applied foreign affairs doctrine in over 30 years). Cases analyzing the foreign affairs doctrine use the same structure as more common federal preemption claims. Courts look for conflict preemption or field preemption. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012). “Conflict preemption occurs when a state acts under its traditional power, but the state law conflicts with a federal action such as a treaty, federal statute, or executive branch policy.” *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013); *see generally Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003). Under field preemption, even in the absence of any express federal treaty, statute, or policy, a state law may be preempted if the law “intrudes on the field of foreign affairs without addressing a traditional state responsibility.” *Movsesian*, 670 F.3d at 1072.

Appellants do not make any argument that the Ordinance is preempted by federal foreign policy or treaties because they cannot make any such argument. Federal policy has long been to balance energy production and trade with local control and environmental and public health protection. Instead, Appellants pivot to a series of wild mischaracterizations of the facts. For example, Appellants bemoan an Ordinance that prohibits oil export and stops importing oil from Canada. App.Br.17, 34. The district court explicitly rejected this factual narrative. The Ordinance says nothing about importing or exporting oil; it says nothing about Canada; and it does not regulate the flow of oil in the pipeline. The district court found that the Ordinance was motivated by an intent to protect public health and local environmental values. J.69. Appellants give this Court no reason to disturb these careful and well-documented factual findings.

V. AFFIRMING THE DISTRICT COURT'S DECISION FURTHERS THE CITY'S STRONG POLICY INTEREST IN OPEN AND PUBLIC DEBATE.

Appellants' argument weighs heavily on statements of individual legislators and members of the public who participated in the legislative process that express opposition to crude oil derived from tar sands and concern about climate change. If this is the test—that trial courts and courts of appeal must scour the public record for signs of allegedly improper motivations—then the Court would markedly chill public participation and public debate. The Supreme Court has noted there is a

"profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Though written in the context of the First Amendment, that principle is meaningful here.

As seen in the record below, state and even local legislators understand that their authority is often limited by the U.S. Constitution, federal, and state law. But they still desire to exercise their authority to protect the health and safety of their residents and further community goals. Legislators will be strongly discouraged from fulfilling their duties if their otherwise lawful actions in furtherance of these goals are found unconstitutional based on isolated statements made during a public airing. Ironically, those issues that demand more careful vetting to address legal complexities will render the final decision more vulnerable to "improper motivation" challenges. But as the district court found, there is "nothing nefarious about crafting an ordinance capable of surviving judicial scrutiny." J.73, n.6.

These issues are particularly important to *Amici*, who frequently participate in public debate over matters affecting human health and the environment, including state and local legislation. If *Amici* cannot openly express their concerns without fear of well-healed opponents repurposing those statements to poison otherwise lawful legislation, they may well choose not to participate. *Amici* should

not need to consult an attorney before raising concerns to legislative bodies for fear of harming important legislative initiatives.

Open and public debate is a tenet of the American democratic system, which Appellants effectively seek to stifle. At this moment in our nation's history, this Court should not weaken the ability of state and local governments to address serious issues facing them nor deter citizens from participating in the process of meeting those challenges.

CONCLUSION

For the reasons stated above and in the City of South Portland's Answering Brief, *Amici* respectfully ask the Court to affirm the opinion of the district court.

Respectfully submitted,

CONSERVATION LAW FOUNDATION, NATURAL RESOURCES COUNCIL OF MAINE, and PROTECT SOUTH PORTLAND,

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DATED: April 12, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Rule 29(a)(5) as it contains 6,473 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

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