No. 18-2118

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 A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

BRIEF OF MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, MAINE, MARYLAND, MINNESOTA, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTRODUCTION

Amici Massachusetts, California, Connecticut, Delaware, Maine, Maryland, Minnesota, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, and the District of Columbia (Amici States) submit this brief in support of the City of South Portland (City) and to oppose Portland Pipe Line Corporation's (PPLC) sweeping Supremacy and dormant Commerce Clause claims against a local ordinance firmly rooted in state and local governments' police power. PPLC's proposed oil-pipeline-reversal project would impose a new use on the City's waterfront (bulk loading of crude oil onto vessels), require construction of two seventy-foot combustion stacks, *see* PPLC Br. Addendum (Add-#-#) 5-3, 5-5 to 5-6, and cause "significant" emissions of hazardous air pollutants near schools, a community center, and residential areas where the City's most vulnerable residents routinely would be exposed. Add-3-34 to 3-38. Concerned about those impacts, the City passed the Clear Skies Ordinance (Ordinance) to prohibit "a new[, non-traditional] land use that would … significantly impact[] future development of the City's waterfront, air quality, scenic ocean views, and [the City's] land-use planning vision." Add-5-3; *accord* Add-5-5, 5-6.

Amici States have a strong interest in ensuring that the Supremacy and dormant Commerce Clauses are not misconstrued to improperly constrain state and local governments' authority to address local threats to public health, welfare, and

the environment through laws like the Ordinance. Amici States urge the Court to reject PPLC's attempt to erode settled law for the following reasons. First, neither the federal Pipeline Safety Act (PSA), 49 U.S.C. §§ 60101-60301, nor the Maine Oil Discharge Prevention and Pollution Control law (Maine Oil Law), Me. Rev. Stat. tit. 38, §§ 541-560 (2019), preempts the Ordinance. PPLC's urged factual inquiry into the City's legislative motivation is inconsistent with the PSA's express preemption provision and settled preemption principles. Second, the Ordinance constitutes a permissible exercise of police-power authority that does not violate the dormant Commerce Clause. Congress and the Executive have preserved state and local governments' longstanding police-power authority over oil-pipeline siting and vessel-loading activities, and the Ordinance's air-quality and land-use planning benefits far outweigh any incidental burden on interstate or foreign commerce in oil. This Court should affirm the District Court's judgments.

INTERESTS OF AMICI

State and local governments are "vested with the responsibility of protecting the health, safety, and welfare of [their] citizens," *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007), and discharge that responsibility through the police powers reserved to them by the Tenth Amendment, *Hamilton v. Ky. Distilleries & Warehouse*, 251 U.S. 146, 156 (1919). "Regulation of land use … is a quintessential state and local power," *Rapanos v. United States*,

547 U.S. 715, 738 (2006), and regulation of air pollution, too, "clearly falls within the exercise of even the most traditional concept of … the police power," *Huron Portland Cement v. Detroit*, 362 U.S. 440, 442 (1960).

Amici States are deeply concerned that, as the District Court warned, PPLC's far-ranging preemption and dormant Commerce Clause arguments could swallow "many perfectly ordinary health and welfare regulations." *See* Add-3-66. For example, "[s]ince all foreign commerce, like all interstate commerce, has a local source or destination, virtually every state program affects the flow of foreign [and interstate] commerce to some extent." Brannon P. Denning, *Bitker on Regulation of Interstate and Foreign Commerce* § 10.03, at 10-7 (2d ed. 2013); Add-3-56. The Supreme Court has been careful to ensure "that not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States," *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976), even where the law effects a ban, *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986). As the following examples illustrate, Amici States and their political subdivisions enforce countless laws critical to protecting local public health, welfare, and the environment, including laws governing energy-infrastructure siting and coastal planning, that are consistent with—and not preempted by—existing federal laws and may incidentally impact interstate and foreign commerce without violating the dormant Commerce Clause.

In the energy arena, for example, the Massachusetts Energy Facilities Siting Board may approve—or deny—energy facilities based on state agencies' environmental and other concerns, even where those projects would implicate pipeline infrastructure or serve interstate markets. *See, e.g.*, Mass. Gen. Laws ch. 164, § 69H. As another example, in 2016, with a $3.2 billion interstate natural gas pipeline proposal then pending before the Federal Energy Regulatory Commission (FERC), the Massachusetts Supreme Judicial Court held that Massachusetts law did not authorize the proposed financing scheme, effectively defeating the proposal.[1] More recently, in 2018, a New Hampshire agency denied an application to construct a cross-border electricity transmission line—which, like PPLC's proposed pipeline, had received federal approval—that would have brought hydroelectric power from Canada to New England.[2] Outside of New England, Delaware has long prohibited both onshore and offshore coal and oil bulk-loading—a law that has survived a dormant Commerce Clause challenge.[3] And, on the West Coast, Washington denied

[1] *ENGIE Gas & LNG LLC v. Department of Pub. Utils.*, 475 Mass. 191, 56 N.E.3d 740 (2016); Jon Chesto, *Utilities Withdraw Plan for $3 Billion Natural Gas Pipeline Expansion*, Boston Globe, June 29, 2017.

[2] Decision and Order Denying Application for Certificate of Site and Facility, *In re Northern Pass Transmission, LLC*, No. 2015-06 (Mar. 30, 2018), https://tinyurl.com/y32q65of, *appeal pending*, N.H. S.Ct. No. 2018-0486; 82 Fed. Reg. 55,595, 55,595-99 (Nov. 22, 2017).

[3] *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 398-07 (3d Cir. 1987).

a water quality certification to construct a new facility for exporting coal to foreign markets.[4]

Year in and year out, states also decide whether to approve other projects that implicate interstate and foreign commerce under environmental protection laws like the Massachusetts Waterways, Wetlands Protection, and Clean Waters Acts, Mass. Gen. Laws, ch. 91, §§ 1-64; ch. 131, § 40; ch. 21, §§ 26-53. Under the Waterways Act, for example, the denial of a license to construct or expand a marine terminal could, like the Ordinance, impact the geographic location from which products are shipped to other state and foreign markets without abridging the Supremacy or dormant Commerce Clauses. Mass. Gen. Laws ch. 91, §§ 1-2, 14-18. And States also may approve or deny applications to site solid or hazardous waste facilities without infringing either Clause. *See* Mass. Gen. Laws ch. 21D, §§ 1-19 (Hazardous Waste Facility Siting); ch. 111, §§ 150A-150A1/2 (Solid Waste Facility Siting); *see also TBI, Inc. v. Board of Health of N. Andover*, 431 Mass. 9, 11, 725 N.E.2d 188 (2000) (affirming denial of application to site recycling and solid waste transfer facility based on air impacts); *cf. City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).

[4] *Lighthouse Resources, Inc. v. Inslee*, No. 3:18-cv-05005-RJB, 2019 WL 1436846 (W.D. Wash. Apr. 1, 2019) (denying foreign affairs preemption claim).

These actions, and others like them, are manifestations of a core function of state and local governments—deciding how best to control pollution and use land within their jurisdictions for the benefit and protection of their residents and natural resources. PPLC's unsupported arguments, if adopted, would invite unwarranted challenges to Amici States' long-recognized police-power authority and routine actions regularly taken to protect public health, welfare, and the environment. This Court should decline PPLC's invitation.

ARGUMENT

I. Neither Federal nor State Law Preempts the Ordinance.

PPLC's preemption claims are meritless because they misstate the scope of the PSA and the focus of the PSA preemption inquiry and ignore the Maine Oil Law's plain text.

A. The Pipeline Safety Act Does Not Preempt Local Air-Quality and Land-Use Regulation.

"[B]oth the Federal Government and the States wield sovereign powers." *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). While valid federal statutes are, of course, the "supreme Law of the Land," U.S. Const. art. VI, cl. 2, "respect for the states as 'independent sovereigns in our federal system' leads [courts] to assume that 'Congress does not cavalierly pre-empt state [] law.'" *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (citation omitted). Courts thus "begin [the preemption] analysis 'with the assumption that the historic police powers of the

States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,'" an assumption that carries "particular force when[, as here,] Congress has legislated in a field traditionally occupied by the States." *Altria Grp. v. Good*, 555 U.S. 70, 77 (2008) (citation omitted).[5] That "clear and manifest purpose" must be evident in the statute's "text and structure." *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993) (citation omitted). Here, it is not, and PPLC's attempt to scrutinize the City's motivation for the Ordinance is doctrinally misguided and meritless.

1. The Ordinance Does Not Regulate Pipeline Safety.

The PSA neither expressly nor impliedly preempts the City's Ordinance, as the District Court correctly held. Add-4-172-74. The *Pipeline Safety* Act, as its name suggests, regulates only pipeline safety, requiring the U.S. Department of Transportation (DOT) to adopt "*safety* standards for *pipeline* transportation and … facilities." 49 U.S.C. § 60102(a)(2) (emphases added). In contrast to other statutes

[5] Until now, Chamber Br. 11 n.3, no one has argued that the presumption against preemption does not apply to PPLC's *PSA* preemption claim. *United States v. Slade*, 980 F.2d 27, 30 (1st Cir. 1992). "An amicus," however, "'cannot introduce a new argument into a case.'" *Sindi v. El-Moslimany*, 896 F.3d 1, 31 n.12 (1st Cir. 2018) (citation omitted). The Chamber's argument is also wrong, because the Ordinance is a local air-pollution and zoning restriction that does not regulate maritime commerce. *See Pacific Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1167 (9th Cir. 2011) (applying presumption to evaluate state regulation of marine-vessel fuel because it concerned air pollution, not maritime commerce).

that expressly preempt some aspects of states' traditional siting authority,[6] the PSA expressly disclaims DOT's authority "to prescribe the location or routing of a pipeline facility," thus reserving to state and local governments their longstanding authority to pass pollution-control and land-use laws that may affect the routing and location of such facilities. *Id.* § 60104(e). The PSA's preemptive reach was thus purposefully limited to state or local "*safety* standards for interstate *pipeline* facilities or … transportation." *Id.* § 60104(c) (emphases added); *see infra* Prt.II.A.1. (discussing state primacy in oil-pipeline siting). The Ordinance here is neither a "safety standard" nor a restriction on any covered "pipeline facilities."

First, the Ordinance is a valid restriction on the location of oil transfer facilities, not a preempted "safety standard[]." *Id.* § 60104(c). PSA safety standards concern how pipeline facilities are constructed and maintained and how oil flows through that infrastructure, *see* 49 C.F.R. pt. 195, not traditional local zoning measures, as the statute expressly precludes DOT from "prescrib[ing] the location or routing of a pipeline facility," 49 U.S.C. § 60104(e). A House Committee Report indeed confirms that interstate oil pipelines "are subject to the routing and

[6] *E.g.*, 15 U.S.C. § 717b(e)(1) (granting FERC "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal"); 49 U.S.C. § 10501 (granting Surface Transportation Board exclusive authority over siting of railroad facilities); *cf.* 47 U.S.C. § 332(c)(7)(B) (prescribing limits on state and local authority to regulate wireless facility location).

environmental assessment requirements of the individual states they traverse." H.R. Rep. No. 102-247, pt.1, at 13-14 (1991).

The Ordinance is a zoning measure that adds to the City zoning code's list of harmful, prohibited uses (like manufacturing of ammonia and explosives) a new use—loading of crude oil onto ships—and bars construction of new infrastructure to facilitate that use that would increase hazardous air pollution near sensitive populations and thwart locally preferred development. Add-5-3 to 5-5. Thus, even if the Ordinance regulated PSA-covered pipeline facilities (it does not, as next discussed), it would be the type of "location or routing" restriction that courts have deemed reserved to the States. *Washington Gas Light Co. v. Prince George's Cnty.*, 711 F.3d 412, 420-22 (4th Cir. 2013) (upholding zoning restriction against PSA-preemption challenge); *Texas MidStream Gas Servs. v. City of Grand Prairie*, 608 F.3d 200, 211-12 (5th Cir. 2010) (same).[7]

Second, the Ordinance does not even regulate PSA-covered "pipeline facilities"; it regulates only exempted beyond-the-pipeline infrastructure. DOT has

[7] While the Court need not reach the issue, safety-based zoning restrictions are thus also lawful under the PSA. And even were the Ordinance a safety standard, the Ports and Waterways Safety Act (PWSA), 33 U.S.C. §§ 1221-31, expressly preserves state and local authority to "prescrib[e] higher safety equipment requirements or safety standards than those" established by the Coast Guard for shoreside structures—a point PPLC has conceded by waiving its PWSA preemption claim on appeal. *Id.* § 1225(b); *see also* H.R. Rep. No. 95-1384, pt.1, at 14-15 (1978) ("A specific recognition is given, with respect to … structures, that States … may prescribe higher safety standards … than those prescribed by the [Coast Guard].").

exempted from PSA-regulation infrastructure used to transport oil "between a *non-pipeline* mode [of transportation] and a pipeline" at materials transportation terminals. 49 C.F.R. § 195.1(b)(9)(ii) (emphasis added). Contrary to Amicus Chamber of Commerce's claim that the regulation has no impact on the PSA-preemption analysis, Br. 15 n.4, DOT specified that the regulation indeed "identifies the scope of hazardous liquid pipelines to which [PSA safety standards] apply" by "includ[ing] a list of particular types of pipelines that are exempted from" them. 73 Fed. Reg. 31,634, 31,640 (June 3, 2008). The facilities implicated by the Ordinance—like PPLC's pier and combustion stacks—would be used to transfer crude oil to "a non-pipeline mode [of transportation]"—vessels—at PPLC's marine terminal. 49 C.F.R. § 195.1(b)(9)(ii); *see* Add-5-7 to 5-12. As such, PPLC's preemption claim fails for the additional reason that, even if any of that beyond-the-pipeline infrastructure otherwise qualified as a "pipeline facility," it is nonetheless exempt from the PSA.

Finally, while the absence of express preemption does not necessarily preclude an implied preemption claim, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000), in this case the PSA's narrowly defined scope and purpose do compel that conclusion. As the Fourth Circuit explained in rejecting a similar challenge to local zoning plans, "[b]ecause the County Zoning Plans are not [PSA-covered] safety standards," they also "do not stand as an obstacle to the

accomplishment of" the PSA's purpose "to create federal minimum safety standards on … pipeline facilities." *Washington*, 711 F.3d at 422. Here, too, the Ordinance—which, again, imposes no "safety standards" on any "pipeline facilities"—is not an obstacle to the PSA's goal of ensuring uniform safety standards. As a valid local "location or routing" restriction on beyond-the-pipeline infrastructure, it falls outside the PSA's scope.[8]

2. The Ordinance's Actual Effects, Not Local Legislators' Subjective Motivations, Drive the PSA-Preemption Analysis.

PPLC and its Amici nonetheless urge this Court to examine the subjective intent of individual city councilors and even members of the public—as reported in the press—to divine an alleged covert, dominant pipeline-safety motive behind the Ordinance. PPLC Br. 22-23; AFPM Br. 17. Their argument misconstrues the PSA's text and general preemption principles by relying on local legislators' purported subjective intent rather than the Ordinance's actual effects.

First, unlike in some other contexts, the PSA itself does not make the motivation behind a state or local law relevant in the preemption inquiry. Again, Congress narrowly defined PSA-preempted standards solely by the subject matter

[8] Perhaps recognizing the PSA's limited scope, Amici AFPM invoke a collection of distinct federal statutes to suggest a vague field preemption claim. Br. 11-13, 17. Congress's preemptive intent, however, must be identified in the "text and structure of the statute at issue," *CSX Transp.*, 507 U.S. at 664, and the PSA's text forecloses any such claim here.

the PSA regulates—pipeline safety. *See* 49 U.S.C. § 60104(c). Thus, "[r]ather than attempt[ing] to divine [the local legislature's] intent in enacting its … legislation, [this Court] look[s] instead to the effect of the regulatory scheme"—here, whether the Ordinance regulates pipeline safety (it does not). *Associated Indus. of Massachusetts v. Snow*, 898 F.2d 274, 279 (1st Cir. 1990); *see also Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 76-77 (1st Cir. 1997).

Second, even if Congress had made a state or local law's purpose relevant, this Court need not and should not look beyond the face of the Ordinance, which states its main aims. *See* Add-5-6. PPLC's attempt to countermand that unambiguously expressed intent by cherry picking comments from individual legislators and the public threatens "a serious intrusion into state sovereignty." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996). It also creates the real possibility that "one State's statute could survive pre-emption … while another State's identical law would not, merely because its authors had different aspirations," *Shady Grove Orthopedic Assocs. v. Allstate Ins.*, 559 U.S. 393, 404 (2010)—or even just because of variation in the evidence available from different legislative bodies.[9] Relatedly, factual "inquiry into legislative motive is often an unsatisfactory venture" because different concerns may and often do motivate different lawmakers. *Pacific Gas &*

[9] Massachusetts, for example, "does not publish an official record of the hearings, debates, drafts and redrafts which constitute the legislative history of a statute." *Snow*, 898 F.2d at 279 n.5.

Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 216 (1983). Because PPLC's urged inquiry invites unwarranted challenges to facially valid state and local laws—like the Ordinance—based solely on the differing availability and wisdom of individual legislators' public statements, it is wholly misplaced.

B. The Maine Oil Law Does Not Preempt the Ordinance.

PPLC briefly attempts to commandeer the Maine Oil Law to preempt the Ordinance. But that state statute, too, *preserves* local police-power authority and thus neither expressly nor implicitly preempts the City's action. As the District Court explained, Add-4-223 to 4-224, the law expressly reserves Maine's robust home rule authority: it may not "be construed to deny any municipality, by ordinance or by law, from exercising police powers under any general or special Act," 38 M.R.S. § 556. PPLC nevertheless invokes the statute's narrow preemption provision, claiming that the Ordinance is "in direct conflict with" an "order of the board or commissioner" and thus preempted. Br. 53-55 (quoting Me. Rev. Stat. tit. 38, § 556). The claim fails for at least three reasons.

First, § 556's "direct conflict" preemption clause applies only to "ordinances and bylaws in furtherance of [the Maine Oil Law's]" intent—local actions that aim to prevent or address oil spills. *See* Me. Rev. Stat. tit. 38, § 541 (oil-spill-prevention and clean-up purpose). Local police-power regulations regarding other aspects of

oil transfers, including the air pollution and land use restricted by the Ordinance, are beyond the clause's narrow scope. Add-5-2 to 5-6.

Second, PPLC's Maine Oil Law Renewal License is not an "order" that can preempt the Ordinance under the law's circumscribed preemption clause. *See* ECF 89-5. From its inception, the statute has distinguished between "license[s]" authorizing oil-terminal facilities' operation, Me. Rev. Stat. tit. 38, § 545, and mandatory "order[s]" such as clean-up and vessel detention orders, *see id.* §§ 547, 548, 550, 552-A, 557; *see* 1969 Me. Laws 83-86, 90 (reflecting distinction between "license[s]" and "order[s]").[10] Contrary to PPLC's unsupported claim, Br. 53-54, the statute's preemption clause refers only to "order[s]," not "licenses." Me. Rev. Stat. tit. 38, § 556. And PPLC's license is, as its "Renewal License" caption confirms, a license authorizing operation of a marine terminal facility, not an "order" contemplated by the Maine Oil Law. ECF 89-5 at 1.

Finally, the Ordinance does not "direct[ly] conflict" with the Renewal License. Me. Rev. Stat. tit. 38, § 556. PPLC's Renewal License conditionally authorizes, but does not mandate, operation of PPLC's oil-terminal facility. The Ordinance does not mandate activity prohibited by it. Add-5-7 to 5-13. PPLC's

[10] The Law's implementing regulations likewise refer to oil-terminal facility licenses only as "license[s]," 600 Me. Code R. §§ 2(o) & (y), 13, and the Maine administrative regulations applicable to facility licensing decisions define "[l]license" to encompass a host of agency decisions, without reference to orders, 2 Me. Code R. § 1(L).

argument, if accepted, would preclude virtually any local regulation of such facilities and thus read § 556's savings clause out of the statute altogether, contrary to established rules of statutory construction. *See Kimball v. Land Use Regulation Comm'n*, 2000 ME 20, 745 A.2d 387, 394 (2000).

II. The Ordinance Is a Constitutionally Permissible Exercise of State and Local Police Powers that Does Not Abridge the Dormant Foreign and Domestic Commerce Clauses.

PPLC next presents several extreme and doctrinally unfounded theories under the dormant Foreign and Domestic Commerce Clauses that, if accepted, could expose myriad longstanding state and local regulatory programs to constitutional challenges. Those theories are undoubtedly driven by the fact that PPLC is itself a *Maine* corporation, challenging a *Maine* local zoning law, and therefore cannot show that the Ordinance discriminates against out-of-state or foreign companies or directly controls activity beyond Maine's borders. Add-3-54 to 3-76. Indeed, PPLC can point to nothing indicating that the Ordinance—a land use regulation of a highly polluting activity—is premised on the type of "economic protectionism," *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328, 337 (2008), or self-serving foreign trade manipulation, *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984), that the dormant Commerce Clause seeks to prevent. The District Court appropriately rejected PPLC's attempt to overcome these barriers by creating new law, and this Court should too.

A. The Ordinance Does Not Violate the Dormant Foreign Commerce Clause's One-Voice Standard.

The Commerce Clause authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. Where foreign commerce is implicated, the Clause's Foreign aspect prevents state and local governments from enacting laws that "prevent[] the Federal Government from 'speaking with one voice' in international trade," *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 193 (1983) (citation omitted). The "one-voice" standard focuses on whether the state or local law "impair[s] federal uniformity in an area where federal uniformity is essential." *Barclays Bank v. Franchise Tax Bd. of California*, 512 U.S. 298, 320 (1994) (quotation marks omitted).

The Supreme Court has emphasized the judiciary's institutional limits in assessing the need for national uniformity in international trade, cautioning that where "a state [law] merely has foreign resonances … , [courts] cannot infer, '[a]bsent some *explicit* directive from Congress, … that treatment of [the] foreign [subject] at the federal level mandates identical treatment by the States," *Container*, 463 U.S. at 194 (emphasis added); *see Barclays*, 512 U.S. 327-28.[11] Thus, while the

[11] PPLC does not develop and thus has waived its foreign affairs preemption claim. Br. 32 n.12. Even so, the claim would fail, because, as the analysis *infra* makes clear, "there is [no] evidence of a clear conflict between" the Ordinance and any "consistent" federal policy. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003).

Supreme Court has at times engaged in an arguably broader inquiry into whether state or local law "implicates foreign policy issues which must be left to the Federal Government," *Container*, 463 U.S. at 194, recently it has focused on "*specific* indications of congressional intent to bar the [challenged] state [or local] action," *Barclays*, 512 U.S. at 324 (emphasis added); *see Wardair Canada, Inc. v. Florida Dep't of Rev.*, 477 U.S. 1, 9 (1986).

Here, rather than barring State or local land-use or pollution-control police-power actions that may affect oil-pipeline siting or bulk-oil loading, both legislative and executive federal actions have purposefully "yield[ed] the floor" in this arena to state and local governments. *Barclays*, 512 U.S. at 329.

1. Congressional Actions Preserve State and Local Police-Power Regulation.

The Foreign Commerce Clause "grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Barclays*, 512 U.S. at 329 (citation omitted). In this context, "Congress may more passively indicate that certain state practices do *not* 'impair federal uniformity in an area where federal uniformity is essential.'" *Id.* at 323 (quoting *Japan Line Ltd. v. L.A. Cty.*, 441 U.S. 434, 448 (1979)). That is, Congress "need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce." *Id.* In this case, the "proffered evidence … demonstrate[s] that the Federal Government intended to *permit* the States [and their subdivisions] to" regulate on

topics that implicate the cross-border transportation of oil, including pipeline location and pollutant emissions from bulk oil loading. *Id.* at 322.

Congress has left oil pipeline siting to state and local governments. "[I]nterstate liquid pipelines … are not subject to FERC jurisdiction, but rather are subject to the routing and environmental assessment requirements of the individual states they traverse." H.R. Rep. No. 102-247, at 13-14; *see* 49 U.S.C. § 60104(e). Indeed, "the state-by-state patchwork of authority regarding siting … for oil pipelines highlights the federalism balance Congress has set in this area and puts it in stark contrast with the congressional decision to federalize the same process for interstate natural gas pipelines." Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 Iowa L. Rev. 947, 984 (2015). As FERC, the federal agency that makes natural gas pipeline siting decisions, explains: "FERC has no jurisdiction over construction … of … oil pipelines … or storage facilities." FERC: Oil–Environment, https://www.ferc.gov/industries/oil.asp.[12] And DOT, under the PSA, regulates only pipeline safety, not whether and where pipelines are built or beyond-the-pipeline infrastructure like the combustion stacks here needed to load oil from an oil pipeline

[12] *Accord* Alexandra Klass & Jim Rossi, *Reconstituting the Federalism Battle in Energy Transportation*, 41 Harv. Envtl. L. Rev. 423, 435 (2017).

to a non-pipeline transportation mode—matters within state and local governments' local land-use and pollution-control authority.

Congress also has allowed state and local governments to impose stricter regulations on vessel bulk-oil loading. In the Clean Air Act, for example, Congress preserved state and local government authority to regulate more strictly pollutant emissions from vessel-loading operations, like those governed by the Ordinance. 42 U.S.C. § 7511b(f)(1)(A); *see* Add-4-196. And while Congress has implemented Annex VI of the International Convention for the Prevention of Pollution from Ships, which concerns air pollution from vessel operation and loading activities, *see* Add-4-196, Congress made clear that doing so would "supplement," not "amend" or "repeal any other authorities," 33 U.S.C. § 1911; *see Pacific Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1180 (9th Cir. 2011).[13] Similarly, as the District Court recognized, in the Ports and Waterways Safety Act "Congress expressly" preserved state and local "power to enact … restrictions" like the Ordinance, Add-4-189—again, "a quintessential example[] of the use of historic police powers." Add-4-189.

[13] PPLC's excursion into maritime law in its dormant Foreign Commerce Clause argument is similarly misplaced. Br. 44-47. Federal maritime law does not create a constitutional right for vessels (foreign or otherwise) to load and transport any cargo from any port they deem profitable. State and local governments retain a "wide scope" of authority to regulate maritime commerce, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 338 (1973); federal maritime law does not "swallow most of the police power of the States," *id.* at 328.

PPLC grasps at straws searching for any Congressional indication that foreign policy mandates uniformity thereby precluding state and local governments from regulating where cross-border oil-pipelines are located or whether they must open their waterfronts to bulk-oil loading whenever a company wishes. PPLC highlights Congress' decision to lift its 1973 "ban on the foreign export of *domestic* crude oil" in 2015. Br. 34 (emphasis added); Consolidated Appropriations Act, Pub. L. No. 114-113, 129 Stat. 2242, 2987 (2015). Regardless of whether the oil in PPLC's pipeline originates from domestic or foreign sources, however, lifting that specific domestic-oil export ban does not reflect a Congressional policy to affirmatively authorize—much less compel—*all* imports and exports without regard to state and local pipeline siting or bulk-oil loading laws. Absent an "explicit directive from Congress," *Container*, 463 U.S. at 194, that "the national interest is [not] best served by ... [continued] state [and local] autonomy" in this area, *Barclays*, 512 U.S. at 331, this Court must accept Congress's choice not to displace state and local governments' exercise of their traditional land-use planning and environmental protection authority.

2. Executive Actions Also Preserve State and Local Authority.

The federal Executive's actions, to the extent relevant, also show that the federal government "*permit[s]* the States [and their subdivisions] to" exercise their traditional land-use and pollution-control powers even if they limit or prevent oil-

pipeline siting or bulk-oil loading within their borders. *See id.* at 322. PPLC and its Amici cite a string of sources to claim cross-border pipelines "require uniformity of treatment," PPLC Br. 33, but none establishes a consistent national policy to displace local police powers. Indeed, neither the sheer number of federal statements that touch on commerce in oil, *see Wardair*, 477 U.S. at 10, nor whether "this area involves foreign policy considerations," PPLC Br. 40, matters. Instead, what matters is that the federal government has assumed a decidedly deferential policy toward both U.S. and Canadian state and local police-power regulation that may incidentally affect cross-border oil pipelines.

PPLC may be correct that "the President has the sole authority to allow oil pipeline border crossings," Br. 41, but the President's exercise of that authority, through his designee the Secretary of State, reflects mutual respect for the application of both U.S. and Canadian state and local laws that may incidentally affect federally approved oil-pipeline border crossing projects. Indeed, the Presidential Permit for PPLC's pipeline, just like permits for other cross-border oil pipelines, *e.g.*, 82 Fed. Reg. 53,553, 53,554 art.3 (Nov. 16, 2017); 82 Fed. Reg. 16,467, 16,468 art.3 (Apr. 4, 2017), specifically requires PPLC to "comply with all applicable Federal and State laws and regulations regarding the construction, operation, and maintenance of the United States facilities." Add-4-199. As the District Court correctly explained, that permit reflects "an additional requirement …

for pipelines, not an intent to displace state and local authority over their ports and oil transfer facilities." Add-4-199. Notably, the same is true in Canada. In this case, for example, PPLC failed to secure local zoning and building permits for a pump station in Canada that are needed to facilitate the pipeline-reversal project as originally proposed. Add-4-30; Add-3-88. It cannot, therefore, be said that the United States has an explicit federal trade policy to facilitate cross-border oil transport with Canada without regard to compliance with state and local police-power regulations. To the contrary, Presidential cross-border oil permits reinforce state and local governments' traditional authority over local land use and pollution control.[14]

PPLC and its Amici point to other materials that may indicate an aspiration to promote "energy trade, including crude oil, between the United States and Canada," PPLC Br. 38 (citing 50 Fed. Reg. 25,189 (June 14, 1985)), but none announces a policy to preclude compliance with state and local laws. Instead, they make clear that energy policy does not trump environmental protection. *See, e.g.*, National

[14] That fact also refutes PPLC's inflated claim that the Ordinance creates an asymmetry "in the way" the United States and Canada treat each other (allowing oil to flow to but not from Canada). Br. 33. And, in any case, the purported asymmetry is not the type of asymmetry that the Court has considered in its dormant Foreign Commerce Clause cases, which focus on the imposition of inconsistent obligations on foreign commerce rather than the precise path commerce flows between nations. *See Japan Line*, 441 U.S. at 451 (California tax on foreign shipping containers "result[ed] in multiple taxation of the instrumentalities of foreign commerce").

Security Strategy of the United States of America 22 (Dec. 2017), https://tinyurl.com/y33mu9zs; *cf. Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633-34 (1981) (rejecting argument that federal statutory goal to "encourage the greater use of coal" "demonstrate[d] a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal"). Nor is the President's authority regarding national energy policy as all-encompassing as PPLC and its Amici suggest. *E.g.*, *League of Conservation Voters v. Trump*, No. 17-cv-00101-SLG, 2019 WL 1431217, at *2 n.20, *13 (D. Alaska Mar. 29, 2019) (invalidating Executive Order seeking to release certain withdrawn lands for oil exploration and drilling as unauthorized exercise of Congressional power).

Together, (i) Congress's longstanding acceptance of state and local government police-power authority over oil-pipeline siting and bulk-oil loading operations and (ii) the Executive's express preservation of that authority demonstrate that both branches "contemplated that state oversight of [those activities] would have some effect on interstate [and foreign] commerce." *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 524 (1989). Indeed, "the *law* as it presently stands" preserves such authority, *cf. Wardair*, 477 U.S. at 10, and there would be "little point" to reserving that authority "if the inevitable repercussions of States [or local governments]' exercise of this power in the arena of interstate [or foreign] commerce meant [they] could not constitutionally enforce" laws like the Ordinance.

Northwest, 489 U.S. at 524. In combination, "all of the [these] considerations" show "that the foreign policy of the United States—whose nuances … are much more the province of the Executive Branch and Congress than of this Court—is not seriously threatened by" the Ordinance. *Container*, 463 U.S. at 196.

B. PPLC Improperly Attempts to Remake *Pike*'s Deferential Standard.

Also misguided is PPLC's claim that the Ordinance violates the Supreme Court's *Pike* standard. Br. 47; *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Ordinance easily survives the *Pike* analysis, and this Court should reject PPLC's attempt to distort *Pike*'s deferential approach into one of strict scrutiny.

Where, as here, national uniformity is not required, courts evaluate "the burden on foreign commerce in the same manner that [they] analyze the burden on interstate commerce." *Pacific Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1013 (9th Cir. 1994); *see Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41, 46 (1st Cir. 2005). And where, as also here, a law neither regulates extraterritorially nor discriminates on its face or in effect, Add-3-54 to 3-76; City Br. 28, 35-37, courts apply the deferential *Pike* balancing test. *See Pharmaceutical Research & Mfrs. of America v. Concannon*, 249 F.3d 66, 80 (1st Cir. 2001) (citation omitted), *aff'd sub nom. Pharmaceutical Research & Mfrs. of America v. Walsh*, 538 U.S. 644 (2003).

PPLC purports, but fails, to apply the *Pike* standard. Br. 47. Under *Pike*, this Court asks whether the challenged law imposes burdens on interstate commerce that

"clearly exceed[] the local benefits," *Pharmaceutical Care Mgmt. v. Rowe*, 429 F.3d 294, 312 (1st Cir. 2005), and considers only "(1) the nature of the putative local benefits advanced by the statute; (2) the burden the statute places on interstate commerce; and (3) whether the burden is 'clearly excessive' as compared to the putative local benefits," *Pharmaceutical*, 249 F.3d at 83-84. Indeed, "[i]t matters not whether th[o]se benefits actually come into being at the end of the day." *Rowe*, 429 F.3d. at 314. State and local laws "frequently survive this *Pike* scrutiny." *Davis*, 553 U.S. at 339; *see also Philip Morris, Inc. v. Reilly*, 267 F.3d 45, 66 (1st Cir. 2001) (noting *Pike*'s "low level of scrutiny").

The Ordinance's local benefits far outweigh any incidental burden on interstate or foreign commerce. The District Court rightly found that the "Ordinance creates ample and weighty local benefits," Add-3-79 to 3-80, including air quality and "unrebutted" aesthetic and redevelopment benefits, Add-3-85. Even PPLC concedes, as it must, that those benefits are "genuine." Br. 51-52. Because the Ordinance's police-power "justifications are not illusory," this Court may "not second-guess the legislative judgment about their importance in comparison with related burdens on interstate commerce." *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 670 (1981) (quotation marks omitted); *see CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987).

By contrast, despite its claim of a "staggering" burden, Br. 50, PPLC cites only purported impacts of the Ordinance on its in-state business, not interstate or foreign commerce. Br. 11-12; *see also* Chamber Br. 18-20 (same). "[T]he fact that a law may have 'devastating economic consequences' on a particular interstate firm is not sufficient to rise to a Commerce Clause burden." *Pharmaceutical*, 249 F.3d at 84 (citation omitted). Instead, "the [Commerce] Clause protects the interstate market, not particular interstate"—and certainly not *in-state*—"firms, from prohibitive or burdensome regulations." *Id.* (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978)). PPLC cites no evidence suggesting the Ordinance will impose any material burden on interstate or foreign commerce in oil as opposed to economic impact on its business and certain local businesses that support it. Nor can it. *See, e.g.*, City Br. 51-53. In fact, the federal government found that denying the cross-border Presidential permit for the much larger proposed Keystone pipeline would *not* materially impact the Canadian oil market. *See Indigenous Envtl. Network v. U.S. Department of State*, 347 F. Supp. 3d 561, 575-76 (D. Mont. 2018).

PPLC distorts the *Pike* standard in at least four respects in an effort to overcome those decisive defects. First, under *Pike*, courts do not decide whether a non-discriminatory law has "only an 'incidental' impact on interstate commerce," Br. 47; a nondiscriminatory law's effects are *per se* "incidental," *Davis*, 553 U.S. at

338; *see Oneida-Herkimer*, 550 U.S. at 338.[15] Second, under *Pike*, courts do not analyze whether "less burdensome" methods "could" achieve the local law's benefits, Br. 51; less burdensome methods are evaluated only to determine whether a "*discriminatory* law … will survive" strict scrutiny, *compare Davis*, 553 U.S. at 338 (citation omitted & emphasis added), *and National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1157 (9th Cir. 2012), *with Pharmaceutical*, 249 F.3d at 83-84. Third, under *Pike*, courts simply do not assess whether a "nexus" exists between the challenged law and its benefits. Br. 47; *compare South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091-92 (2018), *with Pharmaceutical*, 249 F.3d at 83-84. Fourth, under *Pike*, courts also do not engage in an aggregate-impacts analysis to decide whether a law's burdens clearly exceed its benefits. Br. 50; *see* City Br. 27-32. This Court should reject PPLC's attempt to rewrite the established "protocol," *Davis*, 553 U.S. at 338, to subject a plainly nondiscriminatory law like the Ordinance to strict or additional scrutiny not required by this Court, *Oneida-Herkimer*, 550 U.S. at 347 (rejecting similar "invitation[] to rigorously scrutinize … legislation passed under the auspices of the police power").

[15] *National Foreign Trade Council v Natsios*, also cited by PPLC, Br. 48, is inapposite, because applies where, unlike here, "discrimination is *patent*." 181 F.3d 38, 67 (1st Cir. 1999) (citation omitted & emphasis added), *aff'd in part by Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

CONCLUSION

For these reasons, this Court should affirm the District Court's judgments.

Dated: April 12, 2019

Respectfully submitted,

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I hereby certify that:

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Dated: April 12, 2019
Boston, Mass.

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I hereby certify that I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on April 12, 2019, and that parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

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