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 the United States District Court
for the District of Maine

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Page

INTEREST OF THE UNITED STATES 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

ARGUMENT 13

I. The Ordinance Is Not Preempted by the Pipeline Safety Act 13

II. The Ordinance Is Not Preempted by the Federal Government's Foreign Affairs Powers 24

III. The Ordinance Does Not Violate the Commerce Clause 27

CONCLUSION 32

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page(s)**

Altria Grp., Inc. v. Good,
555 U.S. 70 (2008) 13

American Ins. Ass'n v. Garamendi,
539 U.S. 396 (2003) 24, 25, 27

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1997) 30

City of Arlington v. FCC,
569 U.S. 290 (2013) 15

Geier v. American Honda Motor Co.,
529 U.S. 861 (2000) 13, 18

General Motors Corp. v. Tracy,
519 U.S. 278 (1997) 28

Hess v. Port Auth. Trans-Hudson Corp.,
513 U.S. 30 (1994) 27

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 30

Oregon Waste Sys., Inc. v. Department of Envt'l Quality of Or.,
511 U.S. 93 (1994) 27

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 29, 30

Portland Pipe Line Corp. v. City of S. Portland,
240 A.3d 364 (Me. 2020) 12

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.,
550 U.S. 330 (2007) 29, 30

Statutes:

Pipeline Safety Act of 1979:
49 U.S.C. § 60101, *et seq.* 1
49 U.S.C. § 60101(a)(5) 2, 16
49 U.S.C. § 60101(a)(18) 2, 16
49 U.S.C. § 60101(a)(19) 3, 14, 20, 21
49 U.S.C. § 60101(a)(22)(A)(i) 2, 14, 16, 21
49 U.S.C. § 60102(a)(1) 2
49 U.S.C. § 60102(a)(2) 2, 13, 14, 19, 20
49 U.S.C. § 60102(b)-(f) 2
49 U.S.C. § 60102(b)(1)(B)(i) 2
49 U.S.C. § 60104(c) 2, 14, 18, 19
49 U.S.C. § 60104(e) 10

Ports and Waterways Safety Act:
46 U.S.C. § 70001, *et seq.* 4
46 U.S.C. § 70011(a)(1) 17
46 U.S.C. § 70011(a)(2) 4
46 U.S.C. § 70011(b)(1) 4, 17
46 U.S.C. § 70011(b)(3) 4, 17

42 U.S.C. § 1983 9

49 U.S.C. § 108(f) 3

Regulations:

33 C.F.R. § 154.105 .....4, 5, 17

33 C.F.R. pt. 154, subpt. C 5, 17

33 C.F.R. pt. 154, subpt. D 5, 17

33 C.F.R. pt. 156, subpt. A 17
33 C.F.R. § 156.100 5
33 C.F.R. § 156.120 5

49 C.F.R. pt. 195 3
49 C.F.R. § 195.1(a) 3, 18

49 C.F.R. § 195.1(b)(9) 3
49 C.F.R. § 195.1(b)(9)(ii) 15, 16, 18

Other Authorities:

Incidental, *Black's Law Dictionary* (11th ed. 2019) 21

Incidental, *Oxford English Dictionary* (June 2021 update).....21

INTEREST OF THE UNITED STATES

The United States files this brief in response to the Court's order of February 12, 2021, inviting the views of the United States on the federal issues raised by this appeal.

STATEMENT OF THE ISSUES

The City of South Portland, Maine enacted an ordinance prohibiting the storage and handling of crude oil that would be imported via pipeline from Canada and loaded onto marine vessels for subsequent transportation, and prohibiting construction to enable such loading. This brief will address three issues pertinent to the Court's resolution of this appeal:

1. Whether the ordinance is preempted by the Pipeline Safety Act;

2. Whether the ordinance is preempted by the federal government's constitutional foreign affairs powers; and

3. Whether the ordinance violates the Commerce Clause of the U.S. Constitution.

STATEMENT OF THE CASE

1. a. Congress enacted the Pipeline Safety Act of 1979, 49 U.S.C. § 60101, *et seq.*, "to provide adequate protection against risks to life and property posed" by the transportation by pipeline of gas and hazardous

liquids. *Id.* § 60102(a)(1); *see id.* § 60102(b)(1)(B)(i). To that end, Congress charged the Department of Transportation with "prescrib[ing] minimum safety standards for pipeline transportation and for pipeline facilities." *Id.* § 60102(a)(2). The statute identifies criteria the agency must consider in promulgating safety standards. *Id.* § 60102(b)-(f). And it expressly preempts state law governing the same subject. *Id.* § 60104(c) ("A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.").

The Pipeline Safety Act's definitional section is important to understanding the statute's scope. The term "'pipeline facility' means a gas pipeline facility and a hazardous liquid pipeline facility." 49 U.S.C. § 60101(a)(18). The term "'hazardous liquid pipeline facility' includes a pipeline, a right of way, a facility, a building, or equipment used or intended to be used in transporting hazardous liquid." *Id.* § 60101(a)(5). The statute defines "'transporting hazardous liquid,'" in relevant part, as "the movement of hazardous liquid by pipeline, or the storage of hazardous liquid incidental to the movement of hazardous liquid by pipeline, in or affecting interstate or foreign commerce." *Id.* § 60101(a)(22)(A)(i). More generally, it defines

"'pipeline transportation'" as "transporting gas and transporting hazardous liquid." *Id.* § 60101(a)(19).

The Pipeline and Hazardous Materials Safety Administration (PHMSA), a Department of Transportation agency, is charged with implementing and enforcing the Pipeline Safety Act. *See* 49 U.S.C. § 108(f). Its regulations provide the agency's interpretation of the statute's scope. *See* 49 C.F.R. pt. 195. Under the regulations, the agency's safety standards generally "appl[y] to pipeline facilities and the transportation of hazardous liquids … associated with those facilities in or affecting interstate or foreign commerce." *Id.* § 195.1(a). But the regulations explicitly exclude from coverage "[t]ransportation of hazardous liquid … [t]hrough facilities located on the grounds of a materials transportation terminal if the facilities are used exclusively to transfer hazardous liquid … between non-pipeline modes of transportation or between a non-pipeline mode and a pipeline." *Id.* § 195.1(b)(9).

b. Marine vessels are a non-pipeline mode of transportation. The United States Coast Guard, a branch of the United States Armed Forces located within the Department of Homeland Security, has the responsibility for regulating the safe loading and unloading of marine vessels. The Ports

and Waterways Safety Act, 46 U.S.C. § 70001, *et seq.*, directs the Coast Guard to "take such action as is necessary" to "protect the navigable waters and the resources therein from harm resulting from vessel or structure damage, destruction, or loss." *Id.* § 70011(a)(2). In particular, Congress authorized the Coast Guard to "establish[] procedures, measures, and standards for the handling, loading, unloading, storage, stowage, and movement on a structure (including the emergency removal, control, and disposition) of explosives or other dangerous articles and substances, including oil or hazardous material," and to "establish[] water or waterfront safety zones, or other measures, for limited, controlled, or conditional access and activity when necessary for the protection of any vessel, structure, waters, or shore area." *Id.* § 70011(b)(1), (3).

Under that authority, the Coast Guard promulgated regulations prescribing safety requirements for the equipment and operations within a "[m]arine transfer area," which the regulations define as "that part of a waterfront facility handling oil or hazardous materials in bulk between the vessel, or where the vessel moors" and inland containment or storage tanks. 33 C.F.R. § 154.105. The regulations "include[]" in the marine transfer area "the entire pier or wharf to which a vessel transferring oil or hazardous

materials is moored." *Id.*; *see id.* (defining "facility" as including an "onshore … facility" including but not limited to "structure, equipment, and appurtenances thereto, used or capable of being used to transfer oil or hazardous materials to or from a vessel or public vessel").

In 33 C.F.R. Part 154, the Coast Guard issued regulations to ensure that facilities in a marine transfer area capable of transferring oil or hazardous material in bulk are designed, built, and operated in a manner that promotes safe operations and prevents the discharge of oil or hazardous material. *See, e.g.*, 33 C.F.R. pt. 154, subpts. C (Equipment Requirements), D (Facility Operations). Part 156 Subpart A establishes requirements governing the "transfer of oil or hazardous material on the navigable waters or contiguous zone of the United States to, from, or within each vessel with a capacity of 250 barrels or more." *Id.* § 156.100; *see, e.g.*, *id.* § 156.120 (providing requirements for transfer between an onshore facility and a vessel).

2. The Portland Pipe Line Corporation, a company incorporated in Maine (Add. 3-6), operates a 24-inch pipeline and an 18-inch pipeline between South Portland, Maine, and Montréal, Québec, Canada (Add. 3-7).[1]

[1] "Add." refers to the Addendum in the opening brief.

Historically, the company used the pipelines to transport crude oil north, from Maine to Canada. Add. 3-7-8. Portland Pipe Line received the oil from vessels at Pier 2, a pier the company operates in the South Portland Harbor. Add. 3-7. It then transported the oil by pipeline to storage tanks in South Portland for subsequent transportation to Montréal. Add. 3-7-8. Some of those tanks are located next to Pier 2 (the Waterfront Tanks); the majority are located approximately 3 miles inland (the Main Tank Farm). *Id.*

In 2007-2008, Portland Pipe Line determined that production of crude oil from Alberta's "tar sands" fields was likely to lead to declining demand in Montréal for imported oil. Add. 3-10. The company took steps to reverse the flow of oil in its 18-inch pipeline to import crude oil south from Montréal to South Portland, where the oil would be loaded onto vessels at Pier 2 for delivery elsewhere. *Id.* Portland Pipe Line obtained approval from the South Portland zoning agency for new construction at the inland Main Tank Farm and modifications to Pier 2, including the installation of 70-foot-tall facilities to capture petroleum vapors that would be emitted from the air displaced when vessels' holds are filled with crude oil. Add. 3-13; *see* J.A. 963-85 (2009 application). Although Portland Pipe Line "invested substantial money and effort" in the flow-reversal project, the company halted its plans

in response to the 2008 financial crisis. Add. 3-10, 3-11. The company again attempted to resume the project in 2011, without success. Add. 3-15-17. The city's zoning approval expired in 2012. Add. 3-14.

In 2013, advocates opposing the flow-reversal project proposed an ordinance that would have limited the use of facilities in the harbor to unload petroleum from ships, prohibited the expansion of existing petroleum facilities, and prohibited the construction of new or expanded harbor piers. Add. 3-19. The city council rejected the ordinance. Add. 3-23. Most council members expressed sympathy with the organizers' "concerns about the air quality, water quality, aesthetics, odors, climate change, and property value impacts of crude oil derived from tar sands," but they believed the ordinance could have unintended consequences for local businesses. *Id.* The ordinance was made the subject of a referendum, which South Portland residents narrowly rejected. *Id.* The city council subsequently established a Draft Ordinance Committee to recommend an ordinance addressing concerns about the effects of transporting unrefined petroleum to South Portland and loading it into marine tank vessels. Add. 3-24.

After receiving the committee's recommendation, the city council enacted the Clear Sky Ordinance (Ordinance) at issue in this case. Add. 3-26;

see Add. 5-1-14 (Ordinance). The Ordinance "makes the 'storing and handling of petroleum and/or petroleum products' for the 'bulk loading of crude oil onto any marine tank vessel' a prohibited use in the Commercial 'C' and Shipyard 'S' zoning districts in the City." Add. 3-26 (quoting Ordinance); *see* Add. 5-9-10 (Ordinance, §§ 27-780(f) & 27-922(n)). The Ordinance also provides that "'there shall be no installation, construction, reconstruction, modification, or alteration of new or existing facilities, structures, or equipment, including but not limited to those with the potential to emit air pollutants, for the purpose of bulk loading of crude oil onto any marine tank vessel'" in the Commercial or Shipyard zoning districts. Add. 3-26-27 (quoting Ordinance); *see* Add. 5-9, 5-10 (Ordinance, §§ 27-786 & 27-930). "Among the Ordinance's stated purposes are to 'encourage the most appropriate use of land throughout the municipality;' 'to protect citizens and visitors from harmful effects caused by air pollutants;' 'to promote a wholesome home environment;' and 'to conserve natural resources.'" Add. 3-28 (quoting Ordinance).

Portland Pipe Line's Main Tank Farm is zoned Commercial. Add. 3-9. Pier 2 and the Waterfront Tanks are located in the Shipyard district. *Id.*

The Clear Sky Ordinance therefore prevents Portland Pipe Line from undertaking the flow-reversal project it previously contemplated.

3. a. Portland Pipe Line and American Waterways Operators (a trade organization that advocates for the interest of vessel owners and operators) sued, alleging that the Clear Sky Ordinance is preempted by state law, the Pipeline Safety Act and the Ports and Waterways Safety Act, and the Constitution's commitment of foreign affairs and maritime law to the federal government. Add. 4-2. Plaintiffs further alleged that the Ordinance exceeds the city's authority under the Commerce Clause and violates their due process and equal protection rights. *Id.* They also brought claims under 42 U.S.C. § 1983 and state law. *Id.*

The district court granted the city summary judgment on all claims other than the Commerce Clause claims, Add. 4-1, then, following a bench trail, granted judgment to the city on those claims. Add. 3-1.

The district court held that the Pipeline Safety Act does not preempt the Ordinance because the statute "prevents states and municipalities from imposing 'safety standards' for interstate pipeline facilities or interstate pipeline safety," but the Ordinance's "prohibition against loading crude oil at the Harbor [does not] constitute[] a safety standard." Add. 4-167-78. The

consideration the court found to be "perhaps most important[]" is the fact that Congress "explicitly limited" the statute's preemption provision by leaving to the states the authority "to prescribe the location or routing of a pipeline facility." Add. 4-172 (quoting 49 U.S.C. § 60104(e)). The court observed that "[u]nder their police power, states and localities retain their ability to prohibit pipelines altogether in certain locations." *Id.* The Ordinance is a "lesser restriction," the court concluded, because it only limits "what companies can do with the crude oil after it comes out of one end of the pipeline." *Id.* For similar reasons, the court held that the Ports and Waterways Safety Act did not preempt the Ordinance. Add. 4-178-90.

The district court held that the Ordinance is not preempted by the federal government's foreign affairs powers because it does not target any foreign country (Add 4-194); because the Ordinance does not conflict with any federal foreign affairs policy (Add. 4-195-99); and because restricting land uses through facially neutral zoning ordinances is a historically recognized state police power (Add. 4-200).

The district court subsequently ruled that the Ordinance does not violate the Commerce Clause because it does not regulate extraterritorially, discriminate against interstate or foreign commerce, excessively burden

interstate or foreign commerce, or interfere with the federal government's ability to speak with one voice in regulating foreign commerce. Add. 3-54-91.

With respect to extraterritoriality, the court held that any out-of-state effect of the Ordinance is indirect, and the Ordinance's land-use restrictions do not have the potential to subject regulated parties to inconsistent obligations. Add. 3-55-57.

Next, the district court held that the Ordinance does not discriminate against interstate or foreign commerce on its face, in its effect, or by its purpose. Add. 3-59. The Ordinance applies equally to in-state and out-of-state interests. Add. 3-60-61. Nor does it disadvantage out-of-state interests in its effect; Portland Pipe Line, which is most affected by the Ordinance, is a local, Maine business. Add. 3-61-66.

Turning to the relative burdens and benefits, the district court recognized that without the Ordinance, there is a "substantial likelihood" that Portland Pipe Line would complete the flow-reversal project. Add. 3-78. Consequently, the Ordinance "creates meaningful burdens on interstate and foreign commerce." *Id.* But the court also found that the Ordinance "creates ample and weighty local benefits," including reduced public health risks, reduced environmental risks, preservation of recreational areas, and

increased opportunity for redevelopment. Add. 3-79-80; *see* Add. 3-79-85 (detailing evidence). The court concluded that plaintiffs had "not shown that the burdens on interstate or foreign commerce are excessive in relation to the asserted local benefits." Add. 3-86.

Finally, the district court held that the Ordinance does not interfere with the federal government's ability to speak with one voice on matters involving foreign commerce, largely for the same reasons the court held that the Ordinance is not preempted by the federal government's foreign affairs powers. Add. 3-86-91.

b. Portland Pipe Line appealed, seeking this Court's review of the district court's holding that the Ordinance is not preempted by state law, the federal Pipeline Safety Act and the federal government's foreign affairs powers, and the district court's ruling that the Ordinance does not violate the Commerce Clause. Opening Br. 2. After briefing and oral argument, this Court certified the state-law preemption question to the Supreme Judicial Court of Maine, which held that state law does not preempt the city's Ordinance. *See Portland Pipe Line Corp. v. City of S. Portland*, 240 A.3d 364 (Me. 2020). This Court subsequently invited the United States to provide its views on "whether the ordinance is preempted by the Pipeline Safety Act,

violates the Commerce Clause, or interferes with federal foreign affairs powers." Order, Attach. 1 (Feb. 12, 2021) (citation omitted).

ARGUMENT

I. The Ordinance Is Not Preempted by the Pipeline Safety Act

Where "federal law contains an express pre-emption clause," whether a state law is preempted requires consideration of "the substance and scope of Congress' displacement of state law." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). If a state law does not come within the scope of a federal statute's express preemption provision, the state law will still be preempted if it actually conflicts with federal law. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 867 (2000). As we explain below, the Pipeline Safety Act does not expressly preempt the Ordinance. And because it is possible for private parties to comply with both the Ordinance and PHMSA regulations, and because the Ordinance does not stand as an obstacle to those regulations, the Ordinance does not conflict with federal law.

A. 1. The Pipeline Safety Act gives PHMSA the authority to "prescribe minimum safety standards for pipeline transportation and for pipeline facilities." 49 U.S.C. § 60102(a)(2). The statute preempts any state law that is a "safety standard[] for interstate pipeline facilities or interstate

pipeline transportation." *Id.* § 60104(c). But Pier 2 does not involve "interstate pipeline transportation" and is not an "interstate pipeline facility" within the statute's meaning, as interpreted by PHMSA and explained below. Accordingly, the Ordinance's restrictions applicable to that facility do not come within the scope of the preemption provision.

The statute directs PHMSA to regulate "pipeline transportation." 49 U.S.C. § 60102(a)(2). It defines "'pipeline transportation'" as "transporting gas and transporting hazardous liquid," *id.* § 60101(a)(19), and it defines "'transporting hazardous liquid,'" in relevant part, as "the movement of hazardous liquid by pipeline, or the storage of hazardous liquid incidental to the movement of hazardous liquid by pipeline, in or affecting interstate or foreign commerce," *id.* § 60101(a)(22)(A)(i).

Those definitions do not unambiguously specify when the transportation of hazardous liquid by pipeline ends and the transportation of hazardous liquid by non-pipeline means begins. PHMSA, the agency charged by Congress with implementing the Pipeline Safety Act, has interpreted the statute by notice-and-comment regulation not to include the "[t]ransportation of hazardous liquid … [t]hrough facilities located on the grounds of a materials transportation terminal if the facilities are used

exclusively to transfer hazardous liquid … between non-pipeline modes of transportation or between a non-pipeline mode and a pipeline." 49 C.F.R. § 195.1(b)(9)(ii). Thus, for purposes of the statute, PHMSA understands "pipeline transportation" to end just before the hazardous liquid enters a materials transportation terminal exclusively used to transfer the liquid to a non-pipeline mode of transportation. If the pipeline ends at a marine transfer area, at that point, the Coast Guard takes over regulatory authority pursuant to the Ports and Waterways Safety Act. PHMSA's interpretation of the statute that it administers is reasonable and entitled to judicial deference. *See City of Arlington v. FCC*, 569 U.S. 290, 296-97 (2013) (holding that courts must defer "to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction)").

Under its historic practice, Portland Pipe Line used Pier 2 exclusively to unload petroleum from vessels and move it to inland storage tanks for transportation to Canada. Add. 3-7. And under the flow-reversal project, Portland Pipe Line would transport petroleum by pipeline from Canada to its South Portland storage tanks and would use Pier 2 exclusively for transferring the oil onto marine vessels. Add. 3-10. All transportation of

petroleum on Pier 2 therefore occurs or would occur in facilities "used exclusively to transfer hazardous liquid … between a non-pipeline mode and a pipeline." 49 C.F.R. § 195.1(b)(9)(ii). Accordingly, the movement of petroleum that occurs in the Pier 2 facilities is not "pipeline transportation" within the Pipeline Safety Act's meaning, as PHMSA construes the statute.

In addition, Pier 2 is not a "pipeline facility" as PHMSA interprets that term. "'[P]ipeline facility'" includes "a hazardous liquid pipeline facility." 49 U.S.C. § 60101(a)(18). The term "'hazardous liquid pipeline facility' includes a pipeline, a right of way, a facility, a building, or equipment used or intended to be used in transporting hazardous liquid." *Id.* § 60101(a)(5). The statute defines "'transporting hazardous liquid,'" in relevant part, as "the movement of hazardous liquid by pipeline, or the storage of hazardous liquid incidental to the movement of hazardous liquid by pipeline, in or affecting interstate or foreign commerce." *Id.* § 60101(a)(22)(A)(i). But PHMSA has interpreted its regulatory authority under the Pipeline Safety Act not to extend to the movement of hazardous liquid through facilities used exclusively to transfer hazardous liquid between pipeline and non-pipeline modes of transportation. 49 C.F.R. § 195.1(b)(9)(ii). For that reason, loading petroleum from Pier 2 onto marine vessels (or unloading it) is not "transporting hazardous liquid"

within the statute's meaning. Accordingly, Pier 2 is not a "pipeline facility" covered by the Pipeline Safety Act.

PHMSA's understanding of the limits of its regulatory authority under the Pipeline Safety Act makes particular sense in light of Congress's direction to the Coast Guard (rather than PHMSA) to "establish[] procedures, measures, and standards for the handling, loading, unloading, storage, stowage, and movement" of "dangerous articles and substances, including oil" at shore areas next to navigable waters of the United States. 46 U.S.C. § 70011(a)(1), (b)(1); *see also id.* § 70011(b)(3) (authorizing the Coast Guard to regulate "activity when necessary for the protection of any vessel, structure, waters, or shore area"). As detailed above, *see supra* pp. 3-5, the Coast Guard has promulgated regulations governing "marine transfer area[s]," which include "the entire pier or wharf to which a vessel transferring oil or hazardous materials is moored." 33 C.F.R. § 154.105. Those regulations prescribe requirements for the safe design, building, and operation of oil transfer facilities, *see id.* pt. 154, subpts. C, D, and the safe transfer of oil between onshore facilities and vessels, *id.* pt. 156, subpt. A. Thus, it is the Coast Guard, not PHMSA, that regulates oil transfer operations on Pier 2.

In short, the Pipeline Safety Act does not expressly preempt the Ordinances, because its preemption provision applies only to safety standards for "interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). Pier 2 is not an interstate pipeline facility and its operations do not constitute interstate pipeline transportation.

2. A state law that does not come within a federal statute's preemption provision is nevertheless preempted if it conflicts with federal regulations promulgated by the agency with responsibility to implement the statutory scheme. Such a conflict typically arises either when it is impossible to comply with both state and federal law or where the state law stands as an obstacle to the accomplishment of the federal regulations' objectives. *See Geier*, 529 U.S. at 873-74. Because PHMSA's regulations explicitly exclude Pier 2 from coverage, 49 C.F.R. § 195.1(b)(9)(ii), it is possible to comply both with the regulations, which have no application to Pier 2, and the Ordinance's restrictions on that site. In addition, PHMSA's regulatory objective is to provide safety standards for "pipeline facilities and the transportation of hazardous liquids or carbon dioxide associated with those facilities in or affecting interstate or foreign commerce." *Id.* § 195.1(a). The Ordinance's restrictions on Pier 2 do not interfere with that objective because, as just

explained, Pier 2 is not a "pipeline facility," and its operations do not involve the "transportation of hazardous liquids" within the statute's or regulations' meaning.

B. 1. The Ordinance prohibits the "'handling of petroleum and/or petroleum products' for the 'bulk loading of crude oil onto any marine tank vessel'" on Pier 2. Add. 3-26 (quoting Ordinance); *see* Add. 5-9-10 (Ordinance, §§ 27-780(f) & 27-922(n)). The Ordinance also prohibits modifications of Pier 2 to enable the loading of petroleum onto vessels. Add. 3-26-27; Add. 5-9, 5-10 (Ordinance, §§ 27-786 & 27-930). The legal determination that the Ordinance is not preempted as it applies to Pier 2 therefore effectively resolves the statutory preemption question before the Court.

Because the Pipeline Safety Act does not apply to the Ordinance's restrictions on Pier 2, there is no need for the Court to consider the district court's analysis and determination that the Ordinance is not a "safety standard[]" within the meaning of the preemption provision and the provision authorizing PHMSA to prescribe "minimum safety standards." *See* 49 U.S.C. §§ 60102(a)(2), 60104(c). Determining whether a state law constitutes a "safety standard" for purposes of the Pipeline Safety Act is a complex

question that must take account of all relevant facts and circumstances. The United States respectfully urges this Court not to address that complex issue in this case, because its resolution is not necessary to decide this appeal.

2. Furthermore, because Portland Pipe Line cannot load oil onto vessels without making some modification to Pier 2, there is no need to consider whether the Ordinance restrictions that apply to the Main Tank Farm and the Waterfront Tanks are preempted. If the Court does address the Ordinance's restrictions on those other two facilities, however, it should hold that those restrictions also are not preempted in the specific circumstances of this case.

As an initial matter, unlike Pier 2, PHMSA's statutory authority and the statute's express preemption provision do extend to the Main Tank Farm and the Waterfront Tanks. *See* 49 U.S.C. § 60102(a)(2) (directing the prescription of "minimum safety standards for pipeline transportation and for pipeline facilities"). As noted above, the statute defines "'pipeline transportation'" as "transporting gas and transporting hazardous liquid." *Id.* § 60101(a)(19). And it further defines "'transporting hazardous liquid,'" in relevant part, as "the movement of hazardous liquid by pipeline, or the storage of hazardous liquid incidental to the movement of hazardous liquid

by pipeline, in or affecting interstate or foreign commerce." *Id.* § 60101(a)(22)(A)(i).

The storage of petroleum at the Main Tank Farm and the Waterfront Tanks is at the very least "*incidental* to the movement of hazardous liquid by pipeline" in interstate or foreign commerce. 49 U.S.C. § 60101(a)(22)(A)(i) (emphasis added). Something is "incidental" if it "[o]ccurr[s] or [is] liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part." *Incidental*, *Oxford English Dictionary* (June 2021 update); *see id.* (noting examples of that meaning dating to 1644); *see also Incidental*, *Black's Law Dictionary* (11th ed. 2019) ("Subordinate to something of greater importance; having a minor role …."). Under their historic use, the tanks were used to store petroleum before it was transported by pipeline to Canada. *See, e.g.*, Add. 3-8, 4-10. And under Portland Pipe Line's flow-reversal project, the tanks would be used to store petroleum that had been transported by pipeline from Canada. *See, e.g.*, Add. 3-34, 4-103. Storage of petroleum at the Main Tank Farm and the Waterfront Tanks thus constitutes "'transporting hazardous liquid'" and thus "'pipeline transportation'" within the statute's meaning. 49 U.S.C. § 60101(a)(19), (22)(A)(i).

Nevertheless, the Ordinance's restrictions on the Main Tank Farm and the Waterfront Tanks are not preempted by the Pipeline Safety Act in the circumstances here. The Ordinance does not prohibit all storage of petroleum at the Main Tank Farm and the Waterfront Tanks in connection with the movement or incidental storage of hazardous liquid by pipeline, but only the "'storing and handling of petroleum and/or petroleum products' for the 'bulk loading of crude oil onto any marine tank vessel'" in the zoning districts in which the Main Tank Farm and the Waterfront Tanks are located. Add. 3-26 (quoting Ordinance); *see* Add. 5-9-10 (Ordinance, §§ 27-780(f) & 27-922(n)). The Ordinance's restrictions on storage thus apply only insofar as those activities would permit loading petroleum onto vessels at Pier 2, which—as discussed above—is an activity that does not come within the Pipeline Safety Act's scope and is not regulated by PHMSA. Similarly, the Ordinance prohibits construction or modification of facilities at the Main Tank Farm and the Waterfront Tanks only if such work is "for the purpose of bulk loading of crude oil onto any marine tank vessel" (Add. 5-9, 5-10 (Ordinance, §§ 27-786 & 27-930))—again, activity that is outside the scope of the statute and PHMSA's regulations.

The Ordinance does not restrict any other modifications to the Main Tank Farm or Waterfront Tanks, nor does it prohibit storing petroleum except for the eventual loading onto marine vessels. Thus, Portland Pipe Line is free to continue its historic use of those facilities (as well as Pier 2) to transport petroleum to Canada. The Ordinance also would not restrict the company's ability to make modifications to the Main Tank Farm and Waterfront Tanks and to store petroleum there for any flow-reversal project that does not involve loading the petroleum onto marine vessels—for example, one using trucks or trains for further transportation.

In sum, because the only restricted activity at the Main Tank Farm and Waterfront Tanks is activity that would enable loading vessels with oil at Pier 2, and because loading vessels with oil at Pier 2 falls outside the Pipeline Safety Act's scope and PHMSA's regulations, the Ordinance's restrictions on the Main Tank Farm and Waterfront Tanks are also not preempted.[2]

[2] This case does not involve allegations that the Ordinance's stated purpose for regulating the Waterfront Tanks and Main Tank Farm—to prevent the loading of oil at Pier 2—is a sham. Such allegations would, if made in a different case, potentially be relevant to whether the state law at issue constitutes a "safety standard."

II. The Ordinance Is Not Preempted by the Federal Government's Foreign Affairs Powers

In *American Insurance Ass'n v. Garamendi*, the Supreme Court observed that a state law might be preempted by the federal government's foreign affairs powers if the law, regardless of its content, intrudes on a foreign relations matter that is entirely entrusted to the federal government (field preemption) or if the law significantly interferes with the federal government's foreign policy (conflict preemption). 539 U.S. 396, 418-20 (2003). In considering whether a state law is preempted on conflict grounds, courts must consider whether there is an actual conflict between the law and the federal government's foreign policy. *Id.* at 420. And courts must further "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." *Id.*

Although they do not distinguish between the two types of preemption, plaintiffs argue that the Ordinance conflicts with federal foreign policy. Opening Br. 32-44. Based on the United States' national security interest in oil imports and exports and the United States' diplomatic relations with Canada, plaintiffs contend that the Ordinance interferes with the President's ability "to speak for the Nation with one voice" and so is preempted by the

federal government's foreign affairs powers. Opening Br. 32 (quoting *Garamendi*, 539 U.S. at 420).

That argument is inconsistent with the presidential permit authorizing Portland Pipe Line to use the pipeline to transport oil across the border. The 1999 presidential permit authorizing the cross-border use of the 18-inch pipeline expressly contemplates that the pipeline will be subject to state regulation. The permit provides:

> Article 3. The construction, connection, operation, and maintenance of the United States facilities shall be subject to inspection and approval by the representatives of any Federal or State agency concerned. The permittee shall allow duly authorized officers and employees of such agencies free and unrestricted access to said facilities in the performance of their official duties.
>
> Article 4. Permittee shall comply with all applicable Federal and State laws and regulations regarding the construction, operation, and maintenance of the United States facilities and with all applicable industrial codes. The permittee shall obtain requisite permits from Canadian authorities, as well as the relevant state and local governmental entities and relevant federal agencies.

Resp. Br. Add. 1-2. The permit states that "the United States facilities of the pipeline" includes the entirety of the "18-inch pipeline which runs between South Portland, Maine and the international boundary at a point near North Troy, Vermont." Resp. Br. Add. 1-1. Because the permit, by its terms, anticipates that "State laws and regulations" will govern the "construction,

operation, and maintenance" of the 18-inch pipeline and that the pipeline will be subject "to inspection and approval" by "State agenc[ies]," federal foreign policy contemplates that a State may prohibit a proposed use of the pipeline because it fails to comply with valid and applicable State law or regulations.[3]

Plaintiffs contend that these provisions in the presidential permit are not conclusive because state regulation could nevertheless seriously interfere with the federal government's foreign policy. Reply Br. 16. While that could be the case in some circumstances, the United States does not believe that the Ordinance has that effect. As the district court concluded, the Ordinance "is a law of 'general applicability' within the traditional realm of state and local police power—local land use restrictions for onshore port facilities." Add. 4-200. The Ordinance does not expressly target Canadian oil, but instead restricts the use of land for unloading oil onto vessels, regardless of the oil's source. Moreover, "regulation of land use [is] a function traditionally

[3] Portland Pipe Line has considered using the 24-inch pipeline instead of the 18-inch pipeline in its flow-reversal project. Add. 3-15. The 1965 presidential permit governing the 24-inch pipeline similarly made the "construction, operation, maintenance and connection" of the pipeline subject to state agency inspection and approval. Compl. Ex. B (Art. 1). However, that permit only applies to the facility in the vicinity of the international border. *Id.* (preamble). But there is no basis to think that the federal government has a foreign policy interest in permitting State regulation of the 18-inch pipeline in South Portland but not the 24-inch pipeline.

performed by local governments." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). In light of South Portland's interest in the exercise of its traditional police powers, plaintiffs' speculation about the effect the Ordinance may have on the United States' diplomatic relations with Canada and their reliance on the federal government's general interest in international commerce in oil fails to "demonstrate[] a sufficiently clear conflict to require finding preemption here."[4] *Garamendi*, 539 U.S. at 420.

III. The Ordinance Does Not Violate the Commerce Clause

A. A state law that discriminates against foreign commerce violates the Commerce Clause. *Oregon Waste Sys., Inc. v. Department of Envt'l Quality of Or.*, 511 U.S. 93, 99 (1994) ("[D]ifferential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter … is virtually *per se* invalid.").

Plaintiffs argue that the Ordinance is discriminatory in purpose and effect. Opening Br. 48-50; Reply Br. 23. But Portland Pipe Line "is the only

[4] To the extent the city's purpose in enacting the ordinance is relevant, even in the absence of any significant practical conflict with foreign policy, the district court found after a bench trial that the city council adopted the ordinance primarily to address local health, environmental, and development concerns. *See* Add. 3-79-80. Plaintiffs do not challenge the district court's factual findings on appeal.

pipeline company in South Portland and the only company seeking to load crude oil onto tank vessels in the city of South Portland." Add. 3-61. "[I]n 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." *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997); *see id.* at 298 ("Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." (footnote omitted)). For that reason, eliminating the Ordinance "would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Id.* at 299.

Plaintiffs' discrimination argument fails for an additional, fundamental reason: Portland Pipe Line is a Maine corporation, and "[t]he Ordinance cannot be said to favor in-state commercial interests at the expense of out-of-state competitors when the entities most directly harmed by the practical effects of the Ordinance are in-state, local businesses." Add. 3-62. Moreover, the Ordinance's restrictions do not turn on the domestic or foreign character

of the oil. They apply equally to oil transported wholly within the United States, or even wholly within Maine. *See* Add. 3-60-61.

B. Plaintiffs also argue that the Ordinance fails the balancing test used to evaluate Commerce Clause challenges to state laws that are not discriminatory. Opening Br. 47-53 (discussing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)); Reply Br. 23-24 (same). Under the *Pike* balancing test, a state law that is "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental" will be upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (alteration in original; quotation marks omitted; discussing *Pike*).

But plaintiffs' *Pike* argument is not significantly different from their argument that the Ordinance is discriminatory. They contend that that the Ordinance is not directed at local concerns because it prevents the import but not the export of oil. Opening Br. 49. They claim that, were other cities to enact such ordinances, the effect on foreign commerce would be "staggering." Opening Br. 51; *see id.* at 29-30. And plaintiffs argue that the Ordinance is impermissible because the city could have enacted a more

targeted ordinance that focuses on health and environmental concerns instead of completely banning the loading of oil onto vessels. Opening Br. 51-53.

The *Pike* test does not demand that a State undertake the least restrictive means to further its legislative aims. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 582-83 n.16 (1997) (describing *Pike* test as "deferential"). The question is whether the means chosen impose a "clearly excessive" burden on interstate or foreign commerce in relation to the local benefits produced. *United Haulers*, 550 U.S. at 346 (quotation marks omitted). The availability of less restrictive means is a consideration relevant to that balancing test. *See Pike*, 397 U.S. at 142. But it is not dispositive where the means the State chose do not impose a clearly excessive burden on interstate or foreign commerce. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (upholding state statute under *Pike* without considering the availability of less-restrictive means because statute imposed no clearly excessive burden on interstate commerce).

The district court's factual findings provide ample basis for concluding that the Ordinance satisfies the *Pike* test. Based on its review of the record,

the court found that there was "copious conflicting evidence and scientific uncertainty regarding the magnitude of the air quality benefits and the existence of the benefits from water contamination risk reduction," and unrebutted evidence that the Ordinance would have "aesthetic and redevelopment benefits." Add. 3-85; *see* Add. 3-79-83 (discussing evidence). Considering the cumulative evidence, the court declined to "second-guess" the city's evaluation of the Ordinance's health and safety benefits (Add. 3-85), and it found that "[t]he City had real interests in reducing the visual, auditory, and olfactory externalities of heavy industrial activities within its borders and encouraging recreational and lower-impact development on the waterfront" (Add. 3-83).

On the other side of the scale, the court also found that the Ordinance would "create[] meaningful burdens on interstate and foreign commerce" because the flow-reversal project would likely proceed in its absence, and Portland Pipe Line's inability to proceed will lead to "significant" "[f]inancial losses to shareholders and workers in the relevant industries." Add. 3-78. But "[t]he predominant impacts on jobs and commercial revenues will fall on local Maine companies and their resident employees." Add. 3-86.

Balancing the benefits and burdens, the court reasonably concluded that plaintiffs had failed to "show[] that the burdens on interstate or foreign commerce are excessive in relation to the asserted local benefits." Add. 3-86. That court thus correctly concluded that the Ordinance does not violate the Commerce Clause.

CONCLUSION

For the foregoing reasons, the Court should resolve this appeal in accordance with the principles discussed above.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,423 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in CenturyExpd BT 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, which constitutes service under this Court's rules.

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