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A Tale of Two Portlands: How Port Cities Can Survive Dormant Commerce Clause Challenges to Fossil Fuel Shipping Restrictions

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A Tale of Two Portlands: How Port Cities Can Survive Dormant Commerce Clause Challenges to Fossil Fuel Shipping Restrictions

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Abstract

Five port cities—Portland, Oregon; South Portland, Maine; Oakland, California; Longview, Washington; and Salt Lake City, Utah—have something in common: they all restricted the handling of fossil fuels at their shipping terminals. Moreover, impacted industries have responded with nearly identical dormant Commerce Clause-based lawsuits against the first four of those localities. This Article examines how much latitude cities have under the dormant Commerce Clause to restrict the handling of fossil fuels at their ports, using as case studies two recent court decisions upholding the ordinances of Portland, Oregon and South Portland, Maine under the dormant Commerce Clause. In addition, because the shipment of Utah coal ties together the ports in Oakland, California, Salt Lake City, Utah, and Longview, Washington, this Article evaluates the constitutionality of Oakland's and Salt Lake City's fossil fuel handling ordinances, concluding that the dormant Commerce Clause provides ample room to restrict fossil fuels at these and other ports.

I. Introduction

On May 15, 2018, a federal district court in California handed down a ruling that had Utah's coal country cheering, while leaving communities elsewhere to question the extent of their own authority to protect their health from fossil fuel emissions.[1] The court struck down the City of Oakland's coal-handling ban down as-applied to the Oakland Bulk and Oversized Terminal.[2] This ruling in *Oakland Bulk and Oversized Terminal v. City of Oakland*[3] (hereinafter "*Oakland*") is now on appeal to the U.S.

1. *See* Brian Maffly, *In a Potential Boon to Rural Utah, Judge Overturns Oakland's Ban on Coal Shipment Through its Port*, SALT LAKE TRIB. (May 16, 2018), https://perma.cc/AP8A-AEAH.

2. Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 321 F. Supp. 3d 986, 988–89 (N.D. Cal. 2018), *appeal docketed*, No. 18-16141 (9th Cir. June 20, 2018).

3. 321 F. Supp. 3d 986 (N.D. Cal. 2018).

Court of Appeals for the Ninth Circuit.[4] If upheld, this ruling opens the door for five million tons of Utah coal to ship through Oakland each year,[5] with $53 million of Utah public funds supporting the Terminal's development.[6] Alternatively, if the Ninth Circuit overturns the district court's contractually based ruling,[7] the court may turn to the plaintiff's alternative claims that the City's actions violated the dormant Commerce Clause of the U.S. Constitution[8] and were preempted by federal statutes.[9] The outcome of that decision could have far-reaching implications for other Utah coal cases and for other port cities seeking to limit fossil fuels, as explained below.

On the same day as the release of the *Oakland* ruling favoring Utah coal, the State of Utah joined an amicus brief in *Lighthouse Resources v. Inslee*,[10] arguing that the State of Washington violated the dormant Commerce Clause when it denied a permit for a coal terminal expansion in Longview, Washington.[11] This lawsuit was brought by a Utah-based coal

4. *Id.*

5. *See Oakland Bulk & Oversized Terminal*, 321 F. Supp. 3d at 989–90; Brian Maffly, *Utah's Top Coal Producer is Fighting to Reverse a California City's Ban on Exporting Coal and Open New Markets for Local Mines*, SALT LAKE TRIB. (Jan. 8, 2018), https://perma.cc/GEA4-CKCA [hereinafter, *Utah's Top Coal Producer*] ("The investment guaranteed 5 million to 10 million tons of Utah coal would move through the California terminal every year.").

6. *See* Press Release, EARTHJUSTICE, *Utah Legislature Votes to Fund California Coal Export Terminal at Taxpayer Expense* (Mar. 11, 2016), https://perma.cc/ZS2Q-J7LW; *Utah's Top Coal Producer*, *supra* note 5.

7. *See Oakland Bulk & Oversized Terminal*, 321 F. Supp. 3d at 992. The district court's decision was based solely on the contract between the City of Oakland and OBOT. *Id.* The court deferred on addressing the constitutional and federal preemption claims raised by the plaintiffs, explaining that it would be "unnecessary to adjudicate those potentially more weighty questions if the case could be resolved on the breach of contract claim." *Id.*

8. The dormant Commerce Clause is the judicially created doctrine that recognizes an implied limitation on states' ability to limit interstate commerce, based on Congress's Constitutionally delegated power to regulate interstate commerce. *See* U.S. CONST. Art I., §8, cl. 3; *see also infra* Part III.

9. *Oakland Bulk & Oversized Terminal*, 321 F. Supp. 3d at 991. The federal statutes that Plaintiffs alleged were violated include the "Interstate Commerce Commission Termination Act, the Hazardous Materials Transportation Act, and the Shipping Act of 1984." *Id.*

10. Lighthouse Resources Inc. v. Inslee, No. 3:18-cv-05005 (W.D. Wash. filed Jan. 3, 2018).

11. State of Wyoming, Kansas, Montana, Nebraska, South Dakota and Utah's Motion for Leave to Participate as *Amicus Curiae*, Lighthouse Resources, Inc. v. Inlsee, No. 3:18-cv-05005 (W.D. Wash. motion and brief filed May 8, 2018); *see also* Phuong Le, *5 States Join Utah in Legal Fight over Washington State Coal-Export Terminal*, SALT LAKE TRIB. (May 12, 2018), https://perma.cc/43TY-9LH9.

company and is making its way through a federal district court in Washington.[12]

Following these developments, other courts have ruled on similar challenges to fossil fuel shipping-related restrictions in two more port cities: South Portland, Maine[13] and Portland, Oregon.[14] This time, however, the courts favored the cities in full[15] and in part,[16] respectively. An appeal of the U.S. District Court for the District of Maine's decision in the South Portland, Maine case is currently pending in the U.S. Court of Appeals for the First Circuit.[17]

Finally, and most recently, in December 2018, Salt Lake City, Utah adopted an ordinance that restricts the handling and storing of coal and prohibits extractive industries and refineries[18] in a new, to-be-developed "Utah Inland Port."[19] No legal challenges to Salt Lake City's ordinance have been reported (yet), but a challenge would be unsurprising given the years-long political battle over the Inland Port and the state of Utah's vigorous commitment to building it, despite protests by the local community, environmental groups, and the Mayor of Salt Lake.[20] This

12. The plaintiff, Lighthouse Resources, Inc., is headquartered in Salt Lake City, Utah. Complaint at ¶¶ 4, 16, Lighthouse Resources Inc. v. Inslee, No. 3:18-cv-05005 (W.D. Wash. filed Jan. 3, 2018).

13. Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264 (D. Me. 2018), *appeal docketed*, No. 18-02118 (1st Cir. Nov. 13, 2018).

14. Columbia Pac. Bldg. Trades Council v. City of Portland, 412 P.3d 258 (Or. Ct. App.), *cert. denied*, 434 P.3d 29 (Or. 2018).

15. *City of South Portland*, 332 F. Supp. 3d at 269 (holding South Portland's ordinance blocking crude oil exports did not violate dormant Commerce Clause); *see also* Portland Pipe Line Corp. v. City of South Portland, 288 F. Supp. 3d 322 (D. Me. 2017) (holding South Portland's ordinance was not preempted by state or federal laws).

16. *City of Portland*, 412 P.3d at 261 (holding Portland's ordinance did not violate dormant Commerce Clause but remanding with respect to certain factual findings).

17. *City of So. Portland*, No. 18-02118 (1st Cir. filed Nov. 13, 2018).

18. Salt Lake City, Utah, Ordinance No. 69-18 of 2018, An Ordinance Amending Various Sections of Title 21A of the *Salt Lake City Code* Pertaining to Regulation of Inland Port Uses (codified at SALT LAKE CITY, UTAH CODE, § 21A.34.150(E)(1)(b) (Sterling Codifiers through June 11, 2019)), https:// perma.cc/5LLG-SHPK; *id.* at § (B)(2)(f) (refinery and extractive industry prohibitions); *see also* Taylor Stevens, *Salt Lake City Council Passes Rules Aimed at Regulating the Inland Port, a Massive Development Planned for the West Side*, SALT LAKE TRIB. (Dec. 4, 2018), https://perma.cc/RTP5-4X3H.

19. The Utah Inland Port was created by the Utah Legislature in March 2018. Utah Inland Port Authority Act, S.B. 234 (Mar. 2018), as amended by Utah Inland Port Authority Amendments, H.B. 2001 (July 2018), Utah Code §§ 11-58-101–901 (2018).

20. *See* Taylor Stevens, *House Committee Approves Bill to Expand Inland Port over Opposition from Environmental Groups*, SALT LAKE TRIB. (Mar 5, 2019), https:// perma.cc/M8CZ-5SW6 (describing a Utah state bill to expand the inland port into rural communities); Brian Maffly, *Utah coal country's push for a West Coast deep-water port resurfaces as Senate panel advances funding plan*, SALT LAKE TRIB. (Mar. 11, 2019),

tension has already come to a head in the form of a lawsuit by Salt Lake City against the Port.[21] A lawsuit in the other direction would be in line with the Utah Inland Port's chaotic start and the aforementioned lawsuits in Oakland, Portland, and South Portland.

The fate of a potential challenge against Salt Lake City's ordinance may be heavily impacted by the appeals pending the First Circuit [22] and Ninth Circuit,[23] over South Portland's and Oakland's respective fossil fuel shipping bans. In addition, these lawsuits may have implications for the broader, nationwide trend of local and state efforts to limit fossil fuels and the accompanying trend of industry-led lawsuits challenging such regulations.[24] Cities, in particular, have been leading the charge to reduce fossil fuel-related emissions[25] in the face of growing climate change-related threats such as forest fires,[26] heat-related deaths,[27] and other extreme

https://perma.cc/Y7NU-K3JR (describing ongoing moves by Utah officials to allocate $53 million to the coal proposed terminal in Oakland, California).

21. Katie McKeller, *Salt Lake City Mayor Sues over 'Gross State Overreach' in Utah Inland Port Authority's Creation*, DESERET NEWS (Mar. 11, 2019), https://perma.cc/AZ2T-QQY2. Previously, Salt Lake City Mayor Biskupski had referenced potential Utah Constitutional challenges to the Port, and former Salt Lake City Mayor Ted Wilson alleged that the Utah Inland Port Authority violates the Utah Constitution's "Ripper Clause." *See* Ted Wilson, *Letter: Salt Lake Inland Port Will be Tied up in Court*, SALT LAKE TRIB. (July 23, 2018), https://perma.cc/RVM9-SSG2; *see also* Matthew Piper, *Some Think One Sentence in the Utah Constitution Might Undo the Inland Port Authority*, DESERET NEWS (July 30, 2018), https://perma.cc/RVM9-SSG2.

22. *City of South Portland, No. 18-02118* (1st Cir. filed Nov. 13, 2018).

23. *OBOT v. City of Oakland, No. 18-16141* (9th Cir. filed June 20, 2018).

24. *See generally* Benjamin L. McCready, Note, *Like it or Not, You're Fracked: Why State Preemption of Municipal Bans are Unjustified in the Fracking Context*, 9 DREXEL L. REV. ONLINE 61 (2016) (describing municipal regulation of oil and gas fracking and legal challenges to such regulation); Felix Mormann, *Constitutional Challenges and Regulatory Opportunities for State Climate Policy Innovation*, 41 HARV. ENVTL. L. REV. 189, 192 (describing constitutional claims against state renewable portfolio standards, feed-in tariffs, and other climate and energy policies).

25. *See, e.g.*, Salt Lake City, Joint Resolution of Salt Lake City Council and Mayor Establishing Renewable Energy and Carbon Emissions Reduction Goals for Salt Lake City (Nov. 1, 2016), https://perma.cc/C4N4-VSTX; CITY OF SAN DIEGO CLIMATE ACTION PLAN, CITY OF SAN DIEGO (Dec. 2015), https://perma.cc/9VUC-JK52 (San Diego's Climate Action Plan, which was adopted unanimously in December 2015, commits San Diego to 100% clean energy, achieving 50% of commutes via transit, walking, and biking, covering 35% of urban areas with tree canopy, and eliminating waste.); Chris Teale, *Cities Bullish on Need to Lead at US Conference of Mayors' Annual Meeting*, SMARTCITIES DIVE (June 11, 2018), https://perma.cc/U7TW-L9KT.

26. Matthew Brown, *Driven by Climate Change, Fire Reshapes U.S. West*, SALT LAKE TRIB. (Sept. 3, 2018), https://perma.cc/F4Z9-8GAJ.

27. Jonathan Watts, *We Have 12 years to Limit Climate Change Catastrophe, Warns UN*, THE GUARDIAN (Oct. 8, 2018), https://perma.cc/GY9Q-N33T.

weather events.[28] While states like Utah fail to meet federal air quality standards,[29] cities have been picking up the slack. Cities are acting to counterbalance the Trump administration's environmental rollbacks, which have included withdrawing the United States from the global Paris climate accord,[30] repealing the Clean Power Plan,[31] proposing to freeze greenhouse gas based fuel economy standards for cars,[32] and repealing or loosening emissions standards on certain truck components,[33] among other regressive actions. City-level environmental action has taken many forms in recent years, including shifting to renewable energy, making buildings more efficient, promoting alternative transportation,[34] and banning fracking.[35]

28. Fiona Harvey, *Why the Next Three Months are Crucial for the Future of the Planet*, THE GUARDIAN (Oct. 5, 2018), https://perma.cc/54H2-674R.

29. S*ee* Emma Penrod, *EPA Labels Utah Air-Quality Problems 'serious'*, SALT LAKE TRIB. (May 3, 2017), https://perma.cc/EHW7-5T33 (describing "serious" nonattainment for $PM_{2.5}$ and how several areas in Utah, including the Salt Lake metro area, are in "serious non-attainment" of National Ambient Air Quality Standards for fine particulate matter ($PM_{2.5}$) and "marginal non-attainment" for ozone); Emma Penrod, *Feds Give Utah Three Years to Bring Ozone Pollution Down to Acceptable Levels*, SALT LAKE TRIB. (May 1, 2018), https://perma.cc/VP2Q-J4MZ (reporting seven Utah counties, including Salt Lake, were in violation of national ozone standards); Emma Penrod, *Advocates Growing Impatient as Utah's New Plan for Cleaner Air Falls Behind Schedule*, SALT LAKE TRIB. (Aug. 25, 2017), https://perma.cc/7WSH-ZJDJ (describing Utah's history of missing deadlines, and that state officials notified the U.S. EPA that Utah would likely miss the December 2017 deadline for its $PM_{2.5}$ compliance plan); *Status of SIP Required Elements for Utah Designated Areas*, U.S. EPA, https://perma.cc/7E8C-FKDL (last visited Oct. 9, 2018) (showing 12/31/2017 *deadline* for compliance reports for $PM_{2.5}$ for Salt Lake City and Provo metro areas' "serious" nonattainment, but none had not been *submitted* as of Oct. 9, 2018).

30. Hiroko Tabuchi and Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. TIMES (June 1, 2017), https://perma.cc/33Q4-KP4G; Chris Teale, *Report: US Almost halfway to achieving Paris climate goals thanks to city, state action*, UTILITY DIVE (Sept. 14, 2018), https://perma.cc/K8CX-M7E6.

31. The "Clean Power Plan" was adopted under the Obama administration and required states to implement controls on greenhouse gas emissions from existing power plants. 80 Fed. Reg. 64662 (Oct. 23, 2015). The Trump administration repealed the Clean Power Plan in August 2018. 83 Fed. Reg. 44746 (Aug. 31, 2018).

32. The Safer Affordable Fuel Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42986 (proposed Aug. 24, 2018) (to be codified at: 49 C.F.R. pts 523, 531, 533, 536, and 537; and 40 C.F.R. pts 85-86); *see also* Coral Davenport and Hiroko Tabuchi, *E.P.A. Prepares to Roll Back Rules Requiring Cars to be Cleaner and More Efficient*, N.Y. TIMES (Mar. 29, 2018), https://perma.cc/86EF-53ZT.

33. Juliet Eilperin, *EPA plans to repeal emission standards for truck components*, WASH. POST (Oct. 23, 2017), https://perma.cc/Z7UQ-F9XS.

34. Jason Plautz, *Survey: 57% of Cities Plan Climate Action in Next Year*, UTILITY DIVE (Sept. 14, 2018), https://perma.cc/6KK4-SNBA.

35. *See generally* McCready, *supra* note 24 (reviewing cases litigating municipal regulation of oil and gas fracking).

Legal scholarship has examined the authority of state[36] and local[37] governments to adopt many kinds restrictions on fossil fuels. However, there is a gap in scholarship addressing the particular trend embodied in the *Oakland*, *South Portland*, *Portland*, *Lighthouse Resources*, and Salt Lake City cases: local restrictions on the handling and storage of coal and oil in ports, and the legal backlash these restrictions have incited. This Article fills that gap by examining this trend and its unique and emerging ties with Utah's coal industry.[38] Specifically, this Article observes that the fossil fuel industry has been serving ports with lawsuits that make the same three kinds of claims which are worthy of scholarly attention: (1) violation of the dormant Commerce Clause of the U.S. Constitution;[39] (2) preemption by federal laws governing trains, ports, and pipelines; and (3) state preemption of municipal authority.[40]

Moreover, this Article seeks to put the dormant Commerce Clause issues to rest, because local governments have a more important role than ever in ensuring all people to have healthy places to live, work, and play,[41] and because the same kinds of industry-led challenges keep recurring and may resurface in Salt Lake City. Specifically, this Article examines how much latitude cities have under the dormant Commerce Clause to prohibit

36. *See, e.g.*, Mormann, *supra* note 24, at 192 (describing Constitutional challenges to state renewable portfolio standards, feed-in tariffs, and other state climate and energy policies); Tessa Gellerson, *Extraterritoriality and the Electric Grid:* North Dakota v. Heydinger, *A Case Study for State Energy Regulation*, 41 HARV. ENVTL. L. REV 563, 569-70 (2017) (discussing an Eight Circuit decision striking down North Dakota's Renewable Portfolio Standard).

37. *See, e.g.*, McCready, *supra* note 24 (reviewing litigation over municipal regulation of oil and gas fracking); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1997, 1998–99 (June 2018) (criticizing new and extreme efforts by states to preempt local government laws); Thomas Linzey and Daniel E. Brannen Jr., *A Phoenix from the Ashes: Resurrecting A Constitutional Right of Local, Community Self-Government in the Name of Environmental Sustainability*, 8 ARIZ. J. ENVTL. L. & POL'Y 1, 8 (arguing "community self-governance" for environmental issues should be recognized as a fundamental right under the U.S. Constitution).

38. *See supra* notes 5-12 and accompanying text.

39. *See supra* note 8.

40. Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 321 F. Supp. 3d 986, 991 (N.D. Cal. 2018) *appeal docketed*, No. 18-16141 (9th Cir. June 20, 2018) (plaintiffs raised dormant Commerce Clause, federal preemption, and contractual claims); Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 270 (D. Me. 2018) (plaintiffs raised dormant Commerce Clause, and federal and state preemption claims), *appeal docketed*, No. 18-02118 (1st Cir. filed Nov. 13, 2018); Columbia Pac. Bldg. Trades Council v. City of Portland, 412 P.3d 258, 261 (Or. Ct. App. 2018) (plaintiffs raised dormant Commerce Clause and state statute claims), *cert. denied*, 434 P.3d 29 (Or. 2018); Complaint at ¶11, Lighthouse Resources Inc. v. Inslee, 3:18-cv-05005 (W.D. Wash. filed Jan. 3, 2018) (raising dormant Commerce Clause and federal preemption claims).

41. *See supra* notes 28-39 and accompanying text.

or restrict handling and storing coal and oil at ports, using the decisions in the Portland, Oregon[42] and South Portland, Maine[43] litigation as case studies and applying those lessons to the ordinances in Salt Lake City, Utah and Oakland, California. This Article focuses on the dormant Commerce Clause because it is comparable across jurisdictions and because it seems particularly prone to revival in cases involving Utah coal, given that Utah officials raised dormant Commerce Clause claims in the Longview, Washington case[44] and in a threatened suit over California's cap-and-trade program.[45]

This Article proceeds in Part II with background on the fossil fuel restrictions in five cities: South Portland, Maine; Portland, Oregon; Oakland, California; Longview, Washington; and Salt Lake City, Utah. Part III explores the parameters of the dormant Commerce Clause as established by the U.S. Supreme Court and U.S. Courts of Appeals and as applied by courts in the Portland and South Portland cases. Part IV analyzes how those parameters comfortably allow the ordinances adopted by Salt Lake City and Oakland. This Article concludes there is room under the dormant Commerce Clause for port cities to lawfully ban or restrict the storage and handling of fossil fuels.

II. Background on Port-City Fossil Fuel Restrictions

Multiple ports have imposed restrictions on storing and handling coal, crude oil, and fossil fuels. This Part provides an overview of those restrictions in South Portland, Maine, Portland, Oregon, Longview, Washington, Oakland, California, and Salt Lake City, Utah, as well as an overview of the legal challenges that have arisen in the first four of those localities.

A. South Portland, Maine's "Clear Skies Ordinance" on Crude Oil Exports

In July 2014, the City of South Portland, Maine, adopted its "Clear Skies Ordinance," which essentially bars the export of crude oil by ship

42. *City of Portland*, 412 P.3d 258.

43. *City of South Portland*, 332 F. Supp. 3d at 269.

44. *See supra* note 11 and accompanying text.

45. *See* Brian Maffly, *In a Potential Boon to Rural Utah, Judge Overturns Oakland's Ban on Coal Shipment Through its Port*, SALT LAKE TRIB. (May 16, 2018), https://perma.cc/AP8A-AEAH (reporting that "Utah has set aside $1.5 million to sue California over its cap-and-trade program"); Brian Maffly, *Are California Climate Policies Unfair to Utah?*, SALT LAKE TRIB. (Feb. 12, 2018), https://perma.cc/6ZXX-ZQTV (reporting that Utah Rep. Mike Noel asserted California's cap-and-trade system is "a clear violation of the U.S. Constitution's Commerce Clause" because it makes Utah coal-powered electricity more expensive in California).

from South Portland's waterfront.[46] Specifically, the Clear Skies Ordinance blocks the "bulk loading of crude oil onto marine tank vessels" (also referred to as "tankers").[47] The Ordinance also bars the "storing and handling of petroleum and/or petroleum products" and the "construction" or "modification" of "new or existing facilities, structures, and equipment . . . for the purpose of bulk loading of crude oil" onto tankers.[48] The City adopted this Ordinance after the Portland Pipe Line Corporation considered reversing the flow of a 70-year-old oil pipeline in order to export Canadian tar sands oil to international markets via South Portland.[49]

In February 2015, the Portland Pipeline Corporation and the American Waterways Operators filed a lawsuit against the City of South Portland, alleging the Clear Skies Ordinance violated the dormant Commerce Clause of the U.S. Constitution, as well as the Equal Protection and Due Process Clauses, and was preempted by the Pipeline Safety Act, the Ports and Waterways Safety Act, and two state laws.[50] In 2017, the U.S. District Court for the District of Maine ruled the Ordinance was not preempted by federal or state law.[51] In August 2018, the court in *Portland Pipe Line Corp. v. City of South Portland* (hereinafter "*South Portland*") upheld South Portland's Clear Skies Ordinance against the dormant Commerce Clause challenge.[52] An appeal of the district court's decision is now pending in the U.S. Court of Appeals for the First Circuit.[53]

46. *City of South Portland*, 332 F. Supp. 3d at 282–83.

47. *Id*.

48. *Id*.

49. *Id.* at 276–82.

50. *Id.* at 270. The state law claims were brought under Maine's Oil Discharge Prevention Law and South Portland's comprehensive plan. *See id.* The plaintiffs also alleged the Ordinance is preempted by the President's foreign affairs power and "the Constitution's embedded principle of federal maritime governance." *Id.*

51. Portland Pipe Line Corp. v. City of South Portland, 288 F. Supp. 3d 322 (D. Me. 2017) (holding that South Portland was entitled to Summary Judgement against the plaintiff's federal and state preemption claims).

52. *City of South Portland*, 332 F. Supp. 3d. at 298–316 (holding, after a bench trial, that South Portland's ordinance did not violate the dormant Commerce Clause; specifically, the ordinance did not have an impermissible extraterritorial reach, nor did it discriminate against interstate commerce on its face, in effect, or on purpose, nor did it impose an excessive burden on interstate commerce, nor did it impermissibly interfere with foreign relations); *see also* Sabrina Shankman, *South Portland's Tar Sands Ban Upheld in a 'David vs. Goliath' Pipeline Battle*, INSIDE CLIMATE NEWS (Aug. 28, 2018), https://perma.cc/BV9A-C5PE.

53. Portland Pipe Line Corp. v. City of South Portland, No. 18-02118 (1st Cir. filed Nov. 13, 2018).

B. Portland, Oregon's Cap on Large Fossil Fuel Terminals

In June 2016, the City of Portland, Oregon adopted a policy that prohibits the expansion or construction of "bulk fossil fuel terminals that store more than 2 million gallons of fossil fuel."[54] At the same time, the policy allowed exceptions for such large terminals in "places like airports . . . retail gas stations, and terminals built for distributors and wholesalers who receive and deliver fuel solely by trucks."[55]

Similar to the situation in South Portland, Maine, an industry group challenged the Portland, Oregon ordinance on multiple grounds, including alleged violations of the dormant Commerce Clause. And, similar again to the outcome of the *South Portland, Maine* case, the Oregon Court of Appeals in *Columbia Pac. Bldg. Trades Council v. City of Portland* (hereinafter "*Portland*") upheld Portland, Oregon's policy against the dormant Commerce Clause challenge in January 2018.[56] The Oregon Supreme Court declined to review this decision in July 2018.[57] However, unlike the *South Portland* decision that struck down *all* of the plaintiff's claims,[58] the Portland, Oregon decision concluded the ordinance here did not meet a state requirement that land use decisions be supported by an "adequate factual basis," because one of the city's factual findings (forecasting a decline in fossil fuel demand) did not fully combat countervailing evidence.[59] Therefore, although the court held the ordinance did not violate the dormant Commerce Clause, Portland must now provide additional facts to satisfy the state evidentiary standard before putting its ordinance into effect.[60]

54. Columbia Pac. Bldg. Trades Council v. City of Portland, 412 P.3d 258, 262 (Or. Ct. App.), *cert. denied*, 434 P.3d 29 (Or. 2018). By converse, the policy allowed terminals storing less than 2 million gallons of fossil fuels. *Id.*

55. *Id.*

56. *Id.* at 261; *see also* Steve Law, *Court Decision Means Portland Can Sharply Restrict Fossil Fuel Terminal Expansion*, PORTLAND TRIB. (July 31, 2018), https://perma.cc/C6NY-BGSN.

57. Columbia Pac. Bldg. Trades Council v. City of Portland, 434 P.3d 29 (Or. 2018) (decision published without opinion, denying petition for review of 412 P.3d 258 (Or. Ct. App. 2018)).

58. *See id.* at Part II. A.

59. Columbia Pac. Bldg. Trades Council v. City of Portland, 412 P.3d 258, 268–271 (Or. Ct. App.), *cert. denied*, 434 P.3d 29 (Or. 2018) (noting, however, that the court used a standard of review that was deferential to the Land Use Board of Appeal's decision).

60. *See* Sean Mahoney, *A Tale of Two Portlands*, CONSERVATION LAW FOUNDATION (Sept. 24, 2018), https://perma.cc/L6MG-JEYX.

C. Port of Longview, Washington Coal Terminal Permit Denials

On January 3, 2018, a coal mining company headquartered in Salt Lake City, Utah, filed suit against the state of Washington for denying permits for a port facility that would export coal to Asia.[61] The complaint alleges violation of the dormant Commerce Clause and preemption by the Interstate Commerce Commission Termination Act and the Ports and Waterways Safety Act.[62] The state of Utah joined an amicus brief supporting the plaintiff's dormant Commerce Clause claim on the same day the *Oakland* district court ruling was released.[63]

D. Oakland, California's Coal Handling Ban

Not every port city has fared as well in court as the two Portlands.[64] On May 15, 2018, the U.S. District Court for the Northern District of California invalidated the City of Oakland, California's application of a coal-handling ban to the Oakland Bulk and Oversized Terminal ("OBOT").[65] Four years earlier, a subsidiary of Utah's largest coal producer, Bowie Resource Partners, secured the contractual right to manage the Oakland Terminal and ship approximately five million tons of Utah coal through it each year.[66] Such a deal would be a boon to Utah's coal industry, which has declined over the last two decades.[67] In fact, annual production slipped to 13.9 million tons in 2016—the lowest reported amount since 1985.[68] Hoping to help secure this potential boost to Utah coal shipping, the Utah Legislature allocated $53 million in 2016 to help

61. Complaint at ¶¶ 4, 16, Lighthouse Resources Inc. v. Inslee, No. 3:18-cv-05005 (W.D. Wash. filed Jan. 3, 2018).

62. *Id.* at ¶11.

63. State of Wyoming, Kansas, Montana, Nebraska, South Dakota and Utah's Motion for Leave to Participate as *Amicus Curiae*, Lighthouse Resources, Inc. v. Inlsee, No. 3:18-cv-05005 (W.D. Wash., Motion and Brief Filed May 8, 2018); *see also* Le, *supra* note 11.

64. *See supra* Sections II.A and II.B.

65. Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 321 F. Supp. 3d 986, 988–89 (N.D. Cal. 2018), *appeal docketed*, OBOT v. City of Oakland, No. 18-16141 (9th Cir. filed June 20, 2018).

66. The City of Oakland contracted with OBOT in 2012-13 to develop a bulk goods shipping terminal. *Oakland Bulk and Oversized Terminal*, 321 F. Supp. 3d at 988–90. OBOT later contracted with Terminal Logistics Solutions to design and manage the terminal. *Id.* Terminal Logistics Solutions is a wholly owned by Bowie Resource Partners. *Id.* In September 2015, OBOT gave the City initial plans for the terminal, including plans to handle roughly 5 million metric tons of coal there each year. *Id.*; *see also Utah's Top Coal Producer*, *supra* note 5.

67. GOVERNOR'S OFFICE OF ENERGY DEVELOPMENT, ADVANCING UTAH COAL 9 (May 2017), https://perma.cc/8TCG-RZCB.

68. *Id.*

fund the Oakland Terminal's development.[69] However, before development of the Terminal got off the ground, public outcry over news of the Utah coal plan prompted the Oakland City Council to hold two public hearings and hire an outside consultant to analyze the project's health and safety impacts.[70] The City Council then approved an ordinance in 2016 which prohibited the storage and handling of coal at bulk goods facilities in Oakland.[71] The City also adopted a resolution applying the ban to OBOT[72] on the grounds that it was "necessary to prevent conditions substantially dangerous to the health and/or safety of . . . adjacent Neighbors."[73] OBOT quickly responded to Oakland's ordinance with a lawsuit claiming breach of contract, preemption by three federal laws regulating rail transportation, and violation of the Dormant Commerce Clause.[74]

Importantly, the district court's ruling in *Oakland* was decided solely on *contractual* grounds, as-applied, and *not dormant Commerce Clause* or other federal preemption claims.[75] The court found "the record before the City Council [did] not contain substantial evidence that OBOT's proposed operations would pose a substantial danger to the health or safety of people in Oakland," which the contract required before the City could apply new laws to the Terminal.[76] The court then held that "the resolution applying the coal ordinance to the OBOT facility is invalid."[77] Thus, the district court did not invalidate the entire coal ban ordinance; it only invalidated the *application* to OBOT, and only on *contractual* grounds, while expressly leaving Oakland "free . . . to pursue future regulation of the project" after

69. *Utah's Top Coal Producer*, *supra* note 5; *see also* Press Release, EARTHJUSTICE, *supra* note 6.

70. *Oakland Bulk & Oversized Terminal*, 321 F. Supp. at 990.

71. City of Oakland, California, Ordinance No. 13385 (July 19, 2016).

72. City of Oakland, California, Resolution No. 86234 (July 19, 2016).

73. *Oakland Bulk & Oversized Terminal*, 321 F. Supp. at 991.

74. *Id.* The complaint alleged Oakland's ordinance is preempted by the federal Interstate Commerce Commission Termination Act (ICCTA), the Hazardous Materials Act, and the Shipping Act of 1984. *Id.*

75. *See id.* at 992 (declining to address the constitutional and federal preemption claims by explaining it would be "unnecessary to adjudicate those potentially more weighty questions if the case could be resolved on the breach of contract claim").

76. *Id.* The health and safety finding by the City was necessary because the contract precluded the application of most new laws to OBOT, but reserved the City's right to apply new laws if it "determines based on *substantial evidence* and after a public hearing that failure to do so would place . . . adjacent neighbors . . . in a condition *substantially dangerous* to their health or safety." *Id.*

77. *Id.* at 1010.

developing "a record that more carefully and thoroughly la[ys] out the evidence."[78]

In other words, although the district court's contract-based decision is on appeal in the Ninth Circuit,[79] even if the City of Oakland loses that appeal, the City still has the ability to apply its ban to OBOT in the future, after developing additional evidence. Alternatively, if the Ninth Circuit overturns the district court's ruling on the contract issue, the case may get remanded to the district court to consider OBOT's alternative claim that the City's ban violates the dormant Commerce Clause of the U.S. Constitution. Part IV of this Article analyzes how a court might rule on OBOT's dormant Commerce Clause claim.

For now, however, Utah coal supporters should not feel emboldened by the district court's decision in *Oakland* because (as explained above) the court's holding was based on a fact-specific contract claim and, therefore, it has limited applicability elsewhere. Moreover, because the district court never reached the dormant Commerce Clause claim, this issue is still unresolved and provides no precedent for industries making dormant Commerce Clause claims elsewhere. However, one thing that is clear—and in industries' favor—from both the *Oakland* and *Portland*[80] decisions is that cities seeking to restrict fossil fuels will need to be more vigilant in providing evidentiary bases for their ordinances.

E. Salt Lake City, Utah "Inland Port" Zoning Restrictions

While the *Oakland*, *South Portland*, and Longview, Washington lawsuits were pending in federal district courts, and while the Oregon Supreme Court was considering *Portland*'s petition for review, the Utah Legislature passed a law in March 2018 that approves development of a "Utah Inland Port" in Salt Lake City and West Valley[81] with the objectives of "facilitat[ing] the transportation of goods," "coordinating trade-related opportunities to export Utah products nationally and internationally," "connect[ing] local businesses to potential foreign markets for exportation," and being a "hub for trade combining rail, trucking, air cargo, and other transportation."[82] This new state law required Salt Lake City to adopt an ordinance by December 31, 2018, to allow "port uses," and

78. *Id*. at 1009–1010.

79. OBOT v. City of Oakland, No. 18-16141 (9th Cir. filed June 20, 2018).

80. *See supra* notes 59, 76, and accompanying text.

81. *See* Utah Inland Port Authority Act, 2018 Utah Laws Ch. 179 (S.B. 234) (codified as amended at UTAH CODE ANN. §§ 11-58-101–901 (West, Westlaw through 2019 General Sess.)).

82. UTAH CODE ANN. § 11-58-203 (West, Westlaw through 2019 General Sess.).

expressly barred the city from prohibiting "natural resources"[83]—a move reportedly intended to avoid an Oakland-style coal ban.[84]

In compliance with the state's mandate, Salt Lake City unanimously adopted a zoning ordinance on December 4, 2018[85] that prohibits any "extractive industry" or "refinery [of] petroleum products" from the Inland Port Overlay District,[86] but allows natural resources, coal, and crude oil, with restrictions.[87] Specifically, any "natural resource and bulk material storage" facility larger than 500 square feet in area must be located at least 1,000 feet from a residential zone or state prison facility, and must be contained within walls higher than the pile of materials, using "fugitive dust control measures."[88] In addition, the "unloading, loading, transfer, or temporary storage of coal, coal byproducts, and crude oil," must be in "an enclosed building," or in a covered rail car, or in an open rail car where the material has been "sprayed with surfactant to reduce dust," and such activity must be at least 1,000 feet from "environmentally sensitive areas."[89] These standards contain an exception for "existing landfills" and for when storage is "necessary for public safety purposes, such as the storage of de-icing materials used on public streets."[90] As mentioned above, no challenges to Salt Lake's restrictions have surfaced yet,[91] but this Article hypothesizes how claims mirroring those in the two Portlands, Oakland, or Longview cases could arise and how dormant Commerce Clause claims could be resolved.

83. *Id.* at §§ 11-58-205(5), (6).

84. Taylor Anderson, *Just Days Before a Planned Special Session to Fix Utah's Controversial Inland Port Bill, Negotiations Broke Down Between Governor and Salt Lake Mayor*, SALT LAKE TRIB. (May 19, 2018), https://perma.cc/MKW8-4YC6 (quoting Utah House Speaker Greg Hughes discussing how "too much control over the port by Salt Lake City could . . . lead to political fighting over whether the region becomes an area for shipping coal. Such a fight recently played out in Oakland, Calif., which tried to ban the shipment of coal . . . .").

85. Salt Lake City, Utah, Ordinance No. 69-18 of 2018, An Ordinance Amending Various Sections of Title 21A of the *Salt Lake City Code* Pertaining to Regulation of Inland Port Uses (codified at SALT LAKE CITY, UTAH CODE, § 21A.34.150 (Sterling Codifiers through June 11, 2019)), https://perma.cc/5LLG-SHPK; *see also* Salt Lake City Council Meeting Video (Dec. 4, 2018), https://slc.primegov.com/portal/Meeting?compiledMeetingDocumentId=7599 (unanimous vote, no discussion, at 1:04-1:05); *see also* Stevens, *supra* note 18.

86. SALT LAKE CITY, UTAH, CODE § 21A.34.150 (B)(2)(f) (Sterling Codifiers through June 11, 2019).

87. *Id.* at § (E)(1)(a), (b).

88. *Id.* at § (E)(1)(b)).

89. *Id.* at § (E)(1)(b).

90. *Id.* at § (E)(1)(c), (d).

91. *See supra* Part I, at notes 20-21.

III. Dormant Commerce Clause Parameters for Fossil Fuel Handling Restrictions in Port Cities

The U.S. Supreme Court has long accepted that Congress's Constitutional power to "regulate Commerce with foreign nations and among the several states"[92] not only authorizes Congressional action, it also impliedly "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[93] This doctrine, known as the dormant Commerce Clause, seeks to protect what the Court has described as the Framers' intent to avoid states (and their political subdivisions, i.e., cities) from engaging in "economic Balkanization"[94] or "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[95]

However, the doctrine is tempered by the Court's recognition that the "Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy."[96] In other words, the dormant Commerce Clause is not an absolute bar on all state and local regulation touching interstate commerce. Rather, courts examine if a state or local law offends the Commerce Clause using a four-pronged test.[97] (A) First, a state or local law that "discriminates" against interstate commerce faces a "virtually *per se* rule of invalidity,"[98] but may survive if it "serves a legitimate local purpose" which "could not be served as well by available nondiscriminatory means."[99] (B) Conversely, if a law is nondiscriminatory or "regulates evenhandedly to effectuate a legitimate local public purpose, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[100] (C) Third, a law violates the dormant Commerce Clause if it has an impermissible "extraterritorial"

92. U.S. CONST. art. I, §8, cl. 3.

93. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 98 (1994); *see also* New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988) (stating that the Commerce Clause "limits the power of the States to discriminate against interstate commerce").

94. Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

95. *New Energy Co.*, 486 U.S. at 273.

96. Dep't of Revenue of Ky. V. Davis, 553 U.S. 328, 338 (2008).

97. This Article discusses all four potential prongs of the dormant Commerce Clause, including the dormant *foreign* commerce clause, because all four have the potential to be raised against local laws regulating the shipping and handling of fossil fuels at ports, as evidenced by Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 296 (D. Me. 2018).

98. *E.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

99. Maine v. Taylor, 477 U.S. 131, 138 (1986) (citations omitted).

100. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

reach.[101] (D) Finally, a state or local law violates the dormant Commerce Clause if it "interferes with the federal government's ability to speak with one voice when regulating commerce with foreign nations."[102] This Part assesses the parameters of each prong using relevant Supreme Court and Courts of Appeals decisions, and how those parameters were correctly applied in the Portland and South Portland cases.

A. Local Restrictions on Fossil Fuels are Not Inherently Discriminatory

This Section discusses a threshold question in the four-pronged dormant Commerce Clause analysis summarized immediately above. Namely, this Section details how courts determine whether a state or local law "discriminates" against interstate commerce and, further, how courts have answered this question when examining fossil fuel restrictions, including those in *Portland* and *South Portland*.

Whether a law "discriminates" against out-of-state commerce is a threshold question because U.S. Supreme Court precedent holds that if a state or local law does discriminate, then that law is unconstitutional unless the government proves it "serves a legitimate local purpose, and . . . this purpose could not be served as well by available nondiscriminatory means."[103] Discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[104] A law may be found discriminatory [1] "on its face or [2] in practical effect,"[105] or [3] if it has a "discriminatory *purpose*."[106]

101. Healy v. Beer Inst., 491 U.S. 324, 336 (1989). Courts and scholars have questioned whether the test of "extraterritoriality" should be considered a test in and of itself or whether it simply folds, or should fold, into the other two tiers. *See* Gellerson, *supra* note 36, at 569–70 (arguing that extraterritoriality should be folded into the *Pike* balancing test, particularly for state regulations of electric power). *Compare* Pharm. Research & Mfrs. of Am. v. Cty. of Alameda, 768 F.3d 1037, 1039 (9th Cir. 2014) (using a "two-tiered approach" to the dormant Commerce Clause, which did not include extraterritoriality), *with* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1171–72 (10th Cir. 2015) (analyzing a Colorado energy law under the extraterritoriality doctrine, while calling the doctrine the "most dormant" of dormant Commerce Clause tests); Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1101–04 (9th Cir. 2013) (finding that California's low carbon fuel standard did not regulate extraterritorially).

102. Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 296 (D. Me. 2018), *appeal docketed*, No. 18-02118 (1st Cir. Nov. 13, 2018).

103. *Taylor*, 477 U.S. at 138 (citations and internal quotations omitted).

104. *E.g.*, Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99 (1994).

105. *Taylor*, 477 U.S. at 138 (citations and internal quotations omitted).

106. Bacchus Imps. v. Dias, 468 U.S. 263, 270–71 (1984).

This Section examines the parameters of these three kinds of discrimination, specifically as applied to fossil fuel regulations. This Section also highlights how Portland's and South Portland's fossil fuel shipping ordinances were found by the courts to be nondiscriminatory under all three kinds of discrimination. Finally, this Section concludes that those rulings in *Portland* and *South Portland* were correct and in-line with the precedent of the U.S. Supreme Court and U.S. Courts of Appeals. Later, Section B will explore how courts have easily upheld fossil fuel regulations after finding them to be nondiscriminatory, but even a discriminatory fossil fuel regulation could be upheld.

1. Fossil fuel restrictions based on fuel type do not "facially discriminate"

A state or local law is facially "discriminatory" under dormant Commerce Clause jurisprudence if it treats products differently based on state boundaries alone.[107] On the flip-side, a local ordinance that "does not distinguish between out-of-state and instate interests" is not facially discriminatory.[108] However, even if a local law does make geographic distinctions, the U.S. Supreme Court explained in *Philadelphia v. New Jersey*[109] that such a law is only "discriminatory" when it is without "some reason, apart from their origin, to treat [foreign and local products] differently."[110] The U.S. Court of Appeals for the Ninth Circuit interpreted this to mean that a law is "not facially discriminatory simply because it affects in-state and out-of-state interests unequally."[111] Rather, the Ninth

107. *Or. Waste Sys.*, 511 U.S. at 99–100 (finding Oregon's surcharge on disposal of out-of-state waste "patently discriminates against interstate commerce," where the fee differential was based on geographic distinction alone, and the out-of-state waste was no more harmful or costly than waste generated within the state).

108. Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 300–08 (D. Me. 2018) (relying on Philadelphia v. New Jersey, 437 U.S. 617 (1978)), *appeal docketed*, No. 18-02118 (1st Cir. Nov. 13, 2018).

109. Philadelphia v. New Jersey, 437 U.S. 617 (1978).

110. *Id.* at 627 (holding that New Jersey's law was facially discriminatory because it barred out-of-state waste on the basis of geographic origin alone, and out-of-state waste posed no greater threat than in-state waste).

111. Rocky Mt. Farmers Union v. Corey, 730 F.3d 1070, 1089–91 (9th Cir. 2013). The Supreme Court previously stated the "justification for[] a law has no bearing on whether it is facially discriminatory," and a law is discriminatory if it makes any "geographic distinction." *Or. Waste Sys.*, 511 U.S. at 100. However, as the Ninth Circuit observed, the Supreme Court's holdings accompanying such statements were based on situations in which "no nondiscriminatory reason for the distinction was shown." *Rocky Mt. Farmers Union*, 730 F.3d at 1089 (citing *Or. Waste Sys.*, 511 U.S. at 101 n.5; Chem. Waste v. Hunt, 504 U.S. 334, 244 n.7 (1992)). Therefore, the Ninth Circuit extrapolated that a law with locational differences is nondiscriminatory if "location affects actual emissions" and "impose[s] higher costs." *Id.* at 1089–90. Some scholars argue the Ninth Circuit erred in

Circuit held in *Rocky Mountain Farmers Union v. Corey*[112] and *American Fuel & Petrochemical Manufacturers v. O'Keeffe*[113]—both of which the U.S. Supreme Court declined to review[114]—that a law with geographic distinctions is nondiscriminatory if there is "some reason, apart from their origin, to treat them differently."[115] Such reasons may include when out-of-state products impose greater harm, and the state simply "recover[s] the increased cost through a differential charge on [the] out-of-state" product,[116] so long as the difference is "calibrated to the actual risk imposed."[117]

In the context of fossil fuels, therefore, if "an out-of-state [fuel] actually cause[s] more . . . emissions for each unit produced . . . [the state] can base its regulatory treatment on these emissions."[118] Thus, a law that makes in-state sales of some kinds of fuels "less attractive" is nondiscriminatory so long as it "treats [fuels] by all producers the same way based on the real risks posed" and "measures real differences in the harmful effects" on the locality.[119]

Using the above principles, the Ninth Circuit held in *Rocky Mountain Farmers Union* that California's Low Carbon Fuel Standard was not "facially discriminatory" even though it used some locational factors to calculate the fuels' "Carbon Intensity" ratings, which made some out-of-state fuels "less attractive" (while making some more economical) to sell

finding California's Fuel Standard nondiscriminatory, but that the Fuel Standard could nonetheless have survived strict scrutiny. Hwi Harold Lee, *Dormant Commerce Clause Review: Why the Ninth Circuit in Corey Strayed from Precedent and What the Supreme Court Could have Done About It,* 40 B.C. ENVT. AFF. L. REV. E. SUPP. 54, 64–65 (2015).

112. *Rocky Mt. Farmers Union*, 730 F.3d at 1089–91.

113. Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903, 911–912 (9th Cir. 2018) (finding that Oregon's low carbon fuel standard was not facially discriminatory, based on the precedent of *Rocky Mt. Farmers Union*, 730 F.3d at 1090), *cert. denied*, 139 S. Ct. 2043 (2019).

114. Rocky Mt. Farmers Union v. Corey, 573 U.S. 946 (2014) (denying cert. over California's Low Carbon Fuel Standard); Corey v. Rocky Mt. Farmers Union, 573 U.S. 947 (2014) (same); Am. Fuel & Petrochemical Mfrs. Ass'n v. Corey, 134 S. Ct. 2875 (2014) (same); Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 139 S. Ct. 2043 (2019) (denying cert. over Oregon's fuel standard).

115. *Rocky Mt. Farmers Union*, 730 F.3d at 1089 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978)); *Am. Fuel & Petrochemical Mfrs.*, 903 F.3d at 911–912 (quoting *Philadelphia*, 437 U.S. at 626–27 (1978)).

116. *Rocky Mt. Farmers Union*, 730 F.3d at 1089 (citing Or. Waste Sys. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 101, n.5 (1994).

117. *Id.* (citing Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 344 (1992)).

118. *Id.* at 1090.

119. *Id.* at 1091–92.

in California.[120] The court reasoned that, even if out-of-state fuels had different carbon ratings than their California counterparts and thus differing costs of competing in the California market, such distinctions were based on the "nondiscriminatory reason" that they "actually cause more [greenhouse gas] emissions."[121] Following this precedent, the Ninth Circuit also upheld Oregon's fuel standard in *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, finding the law was not facially discriminatory because it distinguished between fuels based on "carbon intensity," not geographic origin.[122]

Similarly, the U.S. District Court for the District of Maine also found the City of South Portland, Maine's fossil fuel regulation to be nondiscriminatory on its face in *South Portland*.[123] However, the South Portland ordinance did not test the boundaries of the dormant Commerce Clause facial discrimination doctrine as far as the California and Oregon fuel laws discussed in the preceding paragraph. Although South Portland's ordinance effectively barred the export of crude oil by ship from the city's port and also barred facilities that would support such exports, South Portland's ordinance—unlike the California and Oregon fuel standards—made "no explicit mention of source, destination, or residency. Facially, it binds local entities to the same extent as entities based . . . outside the state."[124] Rather, South Portland's ordinance "applies with equal force to any entity seeking to load crude oil" in the regulated zones."[125] Therefore, when the District of Maine held in *South Portland* held that the city's ordinance was "not facially discriminatory,"[126] the court was well within the dormant Commerce Clause bounds pushed by other circuits, namely the Ninth Circuit.

120. *Id.* at 1083–1107. The rating system took into account a variety of factors from production through consumption of the fuels, including shipping-related emissions, efficiency of production, and the type of electricity used in production. "Credits" were given to fuels with low Carbon Intensity ratings, and "deficits" were given to high Carbon Intensity fuels. Although fuels with high Carbon Intensity ratings may still be sold in California by purchasing carbon "credits," the system makes it less economical for high-carbon fuels to participate. *Id.* at 1080. The Fuel Standard did not hurt all out-of-state fuels; rather, some Midwest ethanols had the highest Carbon Intensity values, while others had the lowest, and Brazilian ethanol had the lowest Carbon Intensity ratings. *Id*. at 1092–93.

121. *Id.* at 1089–90.

122. Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903, 911–912 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019).

123. *See* Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 300 (D. Me. 2018), *appeal docketed*, No. 18-02118 (1st Cir. Nov. 13, 2018).

124. *Id.*

125. *Id.*

126. *Id.*

In *Portland, Oregon*, facial discrimination was not even alleged, as the ordinance there simply prohibits any new large fossil fuel terminal in the city, regardless of the origins of the company or fuel.[127] Nonetheless, the Oregon court analyzed Portland's ordinance against the U.S. Supreme Court's reasoning in *Philadelphia v. New Jersey*[128]—a seminal facial discrimination case—and concluded the ordinance did not discriminate because it does not "bar fuel exports to or through Portland, but [rather] place[s] restrictions on the size of certain fuel terminals that may be used as export facilities."[129] Therefore, like the U.S. District Court for the District of Maine, the Oregon Court of Appeals here was well within dormant Commerce Clause facial discrimination holdings of other courts.

2. Fossil fuel restrictions do not have a "practical effect" of discrimination if there is no competition between substantially similar entities, nor if only local entities are harmed, nor if differentiation is based on harm caused by out-of-state products

As discussed above, a state or local law faces a presumption of unconstitutionality under the dormant Commerce Clause if it "discriminates" against out-of-state commerce on its face, in practical effect, or in its purpose.[130] This Subsection examines the parameters of the second type of discrimination—"practical effect"—and how courts have applied this test to fossil fuel regulations, including Portland's and South Portland's ordinances on oil storing and shipping.

Absent *facial* discrimination, a local law may still be considered discriminatory if it has the "practical effect" of excluding out-of-state products from being sold in-state[131] or "causes local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market."[132] In other words, in order to prevail, "the claimant must show both how local economic actors are favored by

127. Columbia Pac. Bldg. Trades Council v. City of Portland, 412 P.3d 258, 261–63 (Or. Ct. App.), *cert. denied*, 2018 Ore. LEXIS 588 (Or. July 26, 2018).

128. Philadelphia v. New Jersey, 437 U.S. 617, 624–29 (holding that New Jersey's law was facially discriminatory because it barred out-of-state waste on the basis of geographic origin alone, and out-of-state waste posed no greater threat than in-state waste).

129. *City of Portland*, 412 P.3d at 265.

130. *See* discussion *supra* at notes 103–106.

131. Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) (holding that a city ordinance, which prohibited the sale of milk unless it was bottled within five miles of the city square, "plainly discriminates against interstate commerce" because in "practical effect [it] excludes from distribution in Madison wholesome milk produced and pasteurized [out-of-state]," even though it also excluded milk from other distant in-state cities).

132. Exxon Corp. v. Governor of Md., 437 U.S. 117, 126 n.16 (1978).

the legislation, and how out-of-state actors are burdened."[133] An allegation of discrimination under the dormant Commerce Clause also requires a "comparison of substantially similar entities" and "actual or prospective competition between the supposedly favored and disfavored entities in a single market."[134] Thus, "[t]he fact that the burden of a state regulation falls on some interstate companies [or types of companies] does not, by itself, establish a claim of discrimination against interstate commerce."[135]

As referenced in the prior Subsection, the Ninth Circuit in *Rocky Mountain Farmers Union* examined the degree to which California's Low Carbon Fuel Standard impacted similar in-state and out-of-state crude oil producers. The court held that the Fuel Standard's crude oil provisions did not have a discriminatory "practical effect," even though it partially correlated oil production location with "carbon intensity" ratings, which influences the in-state price.[136] The court reasoned that the Fuel Standard both benefitted and burdened various in-state fuels, and both benefitted and burdened various out-of-state fuels.[137] The Ninth Circuit subsequently explained in *American Fuel & Petrochemical Manufacturers* that *Rocky Mountain Farmers Union* established that a fuel regulation "based on the real risks posed" is "not a dormant Commerce Clause violation" and, under that premise, held that Oregon's low carbon fuel standard did not discriminate in effect.[138]

State and local laws may go even further than the California and Oregon fuel standards described above and may outright exclude one kind

133. Eastern Ky. Res. v. Fiscal Court of Magoffin Cty., Ky., 127 F.3d 532, 543 (6th Cir. 1997).

134. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298–300 (1997).

135. *Exxon*, 437 U.S. at 126; *see also* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1171–73 (10th Cir. 2015) (finding Colorado's Renewable Portfolio Standard "does not discriminate against out-of-staters" even though it "effectively means some out-of-state coal producers . . . will lose business").

136. Rocky Mt. Farmers Union v. Corey, 730 F.3d 1070, 1099–1101 (9th Cir. 2013). However, the court remanded the issue of "whether the Fuel Standard's *ethanol* provisions discriminate in purpose or in practical effect." *Id.* at 1078 (emphasis added). On remand, the district court denied the Defendants' motion to dismiss the discriminatory effects claim, ruling that more information was needed on "how much ethanol the affected producers import to California," in order to "assess adequately the extent to which ethanol producers are benefited or burdened" by the Fuel Standard. Rocky Mt. Farmers Union v. Corey, 258 F. Supp. 3d 1134, 1162–63 (E.D. Cal. 2017). However, that order was also based on an allegation that California had changed its standards to artificially aid in-state fuels. Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903, 915 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019) (clarifying the basis for decision in *Rocky Mountain Farmers Union*).

137. *Rocky Mt. Farmers Union*, 730 F.3d at 1099–1101.

138. *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d at 914–915.

of group or product without being deemed discriminatory.[139] This was the situation in *Exxon Corp. v. Governor of Maryland*,[140] where the U.S. Supreme Court held that a state law blocking all petroleum producers and refiners from operating retail service stations in-state was not discriminatory, even though 95% of the businesses blocked by the law were out-of-state companies[141] and even though "at least three refiners w[ould] stop selling" gas in-state.[142] The Court reasoned that the law did not "distinguish between in-state and out-of-state companies in the retail market."[143] Rather, the law simply prohibited one particular kind of business, retail service stations operated by petroleum producers or refiners, which was allowable because the Commerce Clause does not "protect[] the particular structure or methods of operation" of the interstate market.[144]

Consistent with *Exxon*, the court in *Portland, Oregon* held that Portland's ordinance, which generally prohibits large "bulk fossil fuel terminals," did not have a discriminatory "practical effect" even though it allowed exceptions for fuel terminals in "airports . . . retail gas stations, and terminals built for distributors and wholesalers who receive and deliver fuel solely by trucks."[145] The court concluded the ordinance does not "disfavor out-of-state *exporters* when compared to '*substantially similar*' in-state exporters because there are no producers, refiners, or distributors in Portland or Oregon, much less ones that export fuel to national or international markets."[146] The court also rebuffed the plaintiff's assertion that the ordinance discriminates by "disfavor[ing] out-of-state *sellers* of fossil-fuels" while "favor[ing] local, in-state *purchasers* and *end users*" via "exceptions for facilities that serve local end *users* of fuel."[147] Out-of-state *exporters*, the court explained, are not "substantially similar entities" to in-

139. *See* Philadelphia v. New Jersey, 437 U.S. 617, 626–29 (1978) (explaining that New Jersey could legitimately pursue its goal of preventing the environmental harms caused by waste by "slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may be incidentally affected," but holding that New Jersey's law was facially discriminatory because it barred out-of-state waste on the basis of geographic origin alone, and the out-of-state waste posed no greater threat than waste generated in-state. The law was facially discriminatory because the state could not show "some reason, apart from origin, to treat them differently.").

140. 437 U.S. 117 (1978).

141. *Id.* at 138 (Blackmun, dissenting).

142. *Id.* at 127 (majority).

143. *Id.* at 126.

144. *Id.* at 127.

145. Columbia Pac. Bldg. Trades Council v. City of Portland, 412 P.3d 258, 262 (Or. Ct. App. 2018), *cert. denied*, 434 P.3d 29 (Or. 2018).

146. *Id.* at 265 (emphasis added) (citing *Exxon*, 437 U.S. at 125).

147. *Id.* at 264.

state end *users*, and thus no comparison could be made for a dormant Commerce Clause discrimination claim.[148]

Similarly, in *South Portland, Maine*, the court correctly held that the City's ordinance—which prohibits the loading of crude oil onto tankers and bars the construction of supporting facilities—was not "discriminatory in practical effect."[149] The court reasoned that there were "no direct [out-of-state] competitors to suffer a relative disadvantage" because there were no local producers or shippers who could benefit.[150] Further, the court continued, "the entities most directly harmed [a pipeline company and a tugboat company] by the practical effects of the Ordinance are in-state, local businesses."[151] The court rejected the plaintiff's argument that the ordinance had the "practical effect of completely blocking flows of crude oil from Canada."[152] Instead, the court found South Portland's ordinance did not impact several major sources of Canadian oil entering the city and, even if it did have an impact, such an argument "stretches the dormant Commerce Clause too far" and would be contrary to *Exxon.*[153] The court held that, "in a modern globalized economy," the fact that "commerce in a market originates in another state or country does not mean that otherwise evenhanded regulations or prohibitions on that market automatically have the 'practical effect' of discriminating against interstate or foreign commerce."[154]

In sum, the reasoning of the District of Maine in *South Portland* and the Oregon Court of Appeals in *Portland* is well-supported by U.S. Supreme Court precedent in *Exxon*. Therefore, *South Portland* and *Portland* were correct to conclude that the fossil fuel shipping and storing ordinances at issue did not discriminate in effect.

3. Fossil fuel restrictions do not have a discriminatory purpose when primarily based on environmental or health concerns

The third kind of dormant Commerce Clause "discrimination" examined by some courts—including the district court in *South Portland*—is "discriminatory purpose."[155] Courts often recite that strict scrutiny under

148. *Id*.

149. Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 300–01 (D. Me. 2018), *appeal docketed*, No. 18-02118 (1st Cir. Nov. 13, 2018).

150. *Id.*

151. *Id.* at 301.

152. *Id.* at 302.

153. *Id.* at 302–03.

154. *Id.*

155. *See id.* at 303–08.

the dormant Commerce Clause is triggered if a state or local law has a "discriminatory purpose."[156] However, courts rarely strike down a law based on "discriminatory purpose" alone.[157] This has led some courts, including the U.S. Court of Appeals for the First Circuit and the U.S. District Court for the District of Maine in *South Portland*, to "question whether a showing of discriminatory purpose alone will invariably suffice to support a finding of constitutional invalidity under the dormant Commerce Clause."[158] Some courts omit the "discriminatory purpose" test altogether, as the court in *Portland, Oregon* did.[159]

When courts do use the discriminatory purpose test, many have taken a restrained approach. For example, the U.S. Supreme Court in *Pike v. Bruce Church* held that a lower level of scrutiny applies where the "primary purpose" is nondiscriminatory, and the "effects on interstate commerce are only incidental."[160] Citing *Pike*, the First Circuit held that heightened scrutiny is not triggered if the "potential discriminatory purpose [is] lurking in the background, [and] that purpose [is], at most, incidental to the primary purposes."[161]

In the context of environmental laws reviewed by the Supreme Court, a purported environmental purpose will not save a law from being deemed "discriminatory" if the law burdens only out-of-state products that pose no greater environmental or health risk than in-state products.[162] On the other

156. *E.g.*, Bacchus Imps. v. Dias, 468 U.S. 263, 270–71 (1984).

157. Courts that have overturned state or local laws on the basis of the law's discrimination have not often done so without a finding of discriminatory *effect* or *facial* discrimination. *See id.* at 268–71 (holding that a Hawaiian law exempting locally produced beverages from an alcohol tax that applied to non-local beverages had the discriminatory "purpose" of "aid[ing] Hawaiin industry" and *also* "seems clearly to discriminate on its *face*" and had the "*effect*" of discrimination); *see also* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 351–52 (1977) (noting "some indications" of intentional discrimination but holding the North Carolina law was discriminatory based on its "discriminatory *impacts*" or "effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned . . . ."). Indeed, the Supreme Court noted that "the principal focus of inquiry must be the practical *operation* of the statute . . . judged chiefly in terms of [its] probable *effects*." Lewis v. Bt Inv. Managers, 447 U.S. 27, 37 (1980) (emphases added).

158. All. of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 36 n.3 (1st Cir. 2005); *City of South Portland*, 332 F. Supp. 3d at 303 (citing *All. of Auto. Mfrs.*, 430 F.3d at 36 n.3).

159. *See, e.g.*, *City of Portland*, 412 P.3d at 263 (explaining that the dormant Commerce Clause discrimination test is whether a law discriminates "on its face or in practical effect").

160. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

161. All. of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 39 (1st Cir. 2005).

162. *See* Maine v. Taylor, 477 U.S. 131, 149 (1986) (rejecting an argument that economic protectionism was evidenced by a government statement that Maine's money would be better "spent at home" on "home-grown bait"). For example, in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Court held that a New Jersey law, which had the

hand, where a law is designed to curtail fossil fuels that pose a greater environmental harm than other products, the Ninth Circuit has held that such laws do not have a discriminatory or "protectionist purpose;" rather, they are "genuinely proposed for environmental reasons," even if some of the law's supporters promote the law's *local* economic benefits.[163]

For example, the Ninth Circuit held in *Rocky Mt. Farmers Union* that the crude oil restrictions in California's Low Carbon Fuel Standard did not have a discriminatory purpose, even though they were designed to "promote the development of alternative fuels rather than to encourage . . . crude oil" and the restrictions partially correlated with location.[164] Moreover, the district court on remand also found the Fuel Standard's *ethanol* provisions did not have a "protectionist purpose," even though a state agency press release touted that "[p]roduction of fuels within the state will also keep consumer dollars local by reducing the need to make fuel purchases from beyond its borders."[165] The court found that, at most, the statement was an "economic defense of a [regulation] *genuinely proposed for environmental reasons*."[166] The Ninth Circuit reached the same conclusion when examining Oregon's low carbon fuel standard and statements by Oregon's governor touting the law's local economic benefits.[167] These holdings are consistent with the U.S. Supreme Court's decision in *Maine v. Taylor*, where the Court upheld Maine's ban on certain out-of-state fish and rejected an argument that economic protectionism was

purpose of protecting the state's environment, health and safety, was facially discriminatory, not because of the law's environmental purpose, but because it expressly barred only *out-of-state* waste, which posed no greater risk than in-state waste. The Court acknowledged that "slowing the flow of *all* waste" would be permissible under a long line of cases upholding quarantine laws that blocked "noxious" products at state borders. *Id*. at 627–29.

163. *See Rocky Mt. Farmers Union*, 730 F.3d 1070, 1100 n.13 (9th Cir. 2013) (holding that an "economic defense of a [regulation] genuinely proposed for environmental reasons" is not evidence of a "discriminatory purpose"); Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903, 912 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019) (holding that statements by state government officials promoting the local economic benefits of the law "do not plausibly relate to a discriminatory design and are easily understood, in context, as economic defense of a regulation genuinely proposed for environmental reasons"); *see also* Rocky Mt. Farmers Union v. Corey, 258 F. Supp. 3d 1134, 1156 (E.D. Cal. 2017) (dismissing the assertion that discriminatory purpose was evidenced by a government statement that an environmental law would help "keep consumer dollars local").

164. *Rocky Mt. Farmers Union*, 730 F.3d at 1085, 1099–1101.

165. *Rocky Mt. Farmers Union*, 258 F. Supp. 3d 1134, 1156.

166. *Id.* (emphasis added) (citing *Rocky Mt. Farmers Union*, 730 F.3d at 1100 n.13 (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n. 7 (1981))).

167. *Am. Fuel & Petrochemical Mfrs*., 903 F.3d at 912.

evidenced by a government statement saying Maine's money would be better "spent at home" on "home-grown bait."[168]

Similarly, the U.S. District Court for the District of Maine in *South Portland* correctly held that that the City's ordinance did not have a discriminatory effect, where the ordinance's "primary purpose" was nondiscriminatory, despite its design to block a specific kind of product (crude oil) that happened to come from out-of-state.[169] The court ruled as such despite some private supporters of the law encouraging "stop[ping] out-of-state big oil" or "Canadian oil," and one Councilmember proposing (but not receiving support) to include a distinction between American and Canadian oil.[170] Instead, the court found the "handful of anti-Canadian comments and references to out-of-state interests . . . falls short of establishing that the Ordinance's primary purpose was to disfavor out-of-state competitors or to favor in-state competitors" when viewed in context of the "voluminous record" demonstrating the City's focus on community's "health and safety," and "air quality, water quality, aesthetics, and redevelopment risks of crude oil loading in general."[171]

In sum, the result and reasoning in *South Portland* is consistent with the First Circuit, Ninth Circuit, and Supreme Court precedents discussed in the preceding paragraphs. Moreover, these decisions demonstrates that, to the extent that local laws must be subjected to a "discriminatory purpose" test under the dormant Commerce Clause doctrine, fossil fuel restrictions with genuine and *primary* environmental and health purposes are not discriminatory in purpose, even if some of the law's supporters tout purposes that could be considered discriminatory or protectionist. However, the decisions discussed in this Subsection have also demonstrated that the "discriminatory purpose" test may no longer be necessary and, therefore, the Oregon Court of Appeals was not out-of-line when it ignored this issue altogether.

B. Fossil Fuel Restrictions can Withstand the Pike Test and Strict Scrutiny

The preceding Section demonstrated how fossil fuel regulations can be found "non-discriminatory" under a dormant Commerce Clause analysis and how the courts in *Portland* and *South Portland* correctly found the

168. Maine v. Taylor, 477 U.S. 131, 149 (1986) (quoting *United States v. Taylor*, 752 F.2d 757, 760 (1st Cir. 1985)) (the Court in *Maine v. Taylor* found that Maine's law was *facially* discriminatory but did not find the law had a discriminatory *purpose*, and the Court ultimately upheld Maine's law under a strict scrutiny standard).

169. Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 303–04 (D. Me. 2018), *appeal docketed*, No. 18-2118 (1st Cir. filed Nov. 13, 2018).

170. *Id.*

171. *Id.* at 304.

fossil fuel handling and storing ordinances in those cases to be nondiscriminatory.[172] This Section discusses the next step in a court's dormant Commerce Clause analysis—determining what level of judicial scrutiny applies and whether the law at issue can withstand that scrutiny.

If a state or local law does not "discriminate" against out-of-state commerce, but rather "regulates even-handedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[173] Local and "[s]tate laws frequently survive this *Pike* scrutiny,"[174] including the fossil fuel restrictions in South Portland, Maine[175] and Portland, Oregon.[176] In contrast to the relatively light scrutiny placed on nondiscriminatory laws, there is a "virtually *per se* rule of invalidity"[177] for discriminatory laws. Even so, discriminatory laws may still survive if they "serve[] a legitimate local purpose" that "could not be served as well by available nondiscriminatory means," even if the risks are "imperfectly understood" and even if the proposed solution would not be a "complete success."[178]

Therefore, if a court rules consistently with the prior Section's premise that local restrictions on fossil fuel handling and storing should generally be deemed nondiscriminatory, those restrictions can typically survive the *Pike* test. However, even if a court found a local restriction on fossil fuel handling and storing to be discriminatory, this Section argues that the Supreme Court's precedent in *Maine v. Taylor* may nevertheless allow the local law's survival.[179]

In *Maine v. Taylor*, the U.S. Supreme Court held that a facially discriminatory law may survive strict scrutiny where the state seeks to "guard[] against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible."[180] In supporting its rare decision to uphold a facially discriminatory law—which

172. *See infra* Section III.A.

173. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

174. Dep't of Revenue v. Davis, 553 U.S. 328, 339 (2008) (citing *Pike*, 397 U.S. 137); *see also* Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903, 916 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019) (holding that Oregon's low carbon fuel standard survived the *Pike* test in "in light of the substantial state interest in mitigating the environmental effects of greenhouse gas emissions …").

175. *City of South Portland*, 332 F. Supp. 3d at 308.

176. Columbia Pac. Bldg. Trades Council v. City of Portland, 412 P.3d 258, 266 (Or. Ct. App.), *cert. denied*, 434 P.3d 29 (Or. 2018).

177. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

178. Maine v. Taylor, 477 U.S. 131, 138–51 (1986) (citations omitted).

179. For a similar argument made with respect to California's Low Carbon Fuel Standard, see Lee, *supra* note 111, at 65.

180. *Maine*, 477 U.S. at 148.

banned the importation of live baitfish from other states—the Court reasoned that Maine's desire to protect its fisheries from parasites and non-native species was a "legitimate interest."[181] Further, there was no non-discriminatory means to achieve this goal because "there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species."[182] The Court explained that the "commerce clause cannot be read as requiring [a state] to sit idly by and wait until potentially irreversible environmental damage has occurred . . . before it acts to avoid such consequences."[183] Therefore, *Maine v. Taylor* paved the way for courts to uphold local fossil fuel shipping and handling bans against dormant Commerce Clause challenges when those bans aim to combat "irreversible environmental damage," such as long-term human health effects and climate change, and there is no feasible or "satisfactory way" besides a ban to achieve that goal. For example, the overwhelming risk of climate change or the long-term human health risks of fine particulate matter—which governments, health organizations, courts, and the trucking industry alike concede is harmful at any level[184]—could be deemed the kind of irreversible environmental harm which nothing less than a ban would satisfactorily address.

Even though *Portland, Oregon* and *South Portland, Maine* were decided under the *Pike* balancing test, the courts arguably could have reached the same conclusions under a strict scrutiny standard, using the logic of *Maine v. Taylor*. For example, in *South Portland*, the court held that the City's ordinance prohibiting crude oil loading did "not impose burdens on foreign and interstate commerce that are clearly excessive in relation to the putative local benefits."[185] The court found that although the ordinance "creates meaningful burdens on interstate and foreign commerce,"[186] it also created "ample and weighty local benefits" by addressing "air emissions-related public health risks" for adjacent "sensitive locations, such as schools," as well as noise, odor, and other environmental risks from loading crude oil.[187] As evidence of the significant risks imposed by the project, the court was influenced by the fact that the American Lung Association gave the county a "C" air quality grade, even though the state's Department of Environmental Protection

181. *Id.* at 150.

182. *Id.* at 141.

183. *Id.* at 148.

184. *See infra* notes 273-274 and accompanying discussion.

185. Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 308 (D. Me. 2018), *appeal docketed*, No. 18-2118 (1st Cir. filed Nov. 13, 2018).

186. *Id.* at 309.

187. *Id.* at 310.

found the air quality to be acceptable.[188] In addition, because the court was persuaded by the unrebutted testimony that "there is no safe level of exposure to many of the air pollutants that would be emitted,"[189] less-restrictive means would not achieve the city's goal of protecting air quality. The court rebuffed the plaintiff's assertion that the ordinance's benefits were inflated because it does not address other sources of local pollution. Instead, the *South Portland* court said that "a legislature need not strike at all evils at the same time or in the same way, and [] a legislature may . . . adopt[] regulations that only partially ameliorate a perceived evil,"[190] echoing the *Maine v. Taylor* holding that a local law need not guarantee "complete success."[191]

Likewise, in *Portland, Oregon*, the court's ruling in the city's favor purportedly relied on *Pike* deference—finding the plaintiff had not proven that an absence of large fossil fuel terminals in the city would excessively burden interstate commerce.[192] And, like in *South Portland*, the *Portland* decision could also be upheld under the scrutiny of *Maine v. Taylor*. The court in *Portland, Oregon* recognized that the City's ordinance would provide "legitimate putative local benefits which include limiting the number of very large fossil fuel terminals in a moderate-to-high earthquake liquefaction zone," as well as "reduc[ing] the risk of potential explosions, accidents, and fire at large fossil fuel terminal," and "reduc[ing] the similar risk of catastrophic accident from the larger trains that transport fossil fuels to the terminals."[193] Opponents could maybe argue that seismic safety goals could be achieved through other technological means and therefore the ordinance should not survive strict scrutiny. However, it's unclear if such technology exists or would be less restrictive than Portland's simpler size-based restriction.

In sum, while the specific outcome will be fact-dependent, *Maine v. Taylor, Portland, and South Portland* demonstrate that there is room for bans on fossil fuel shipping, handling, and storing to survive a strict scrutiny dormant Commerce Clause test.

188. *Id.* at 312.

189. *Id.*

190. *Id.* (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)).

191. Maine v. Taylor, 477 U.S. 131, 151 (1986).

192. Columbia Pac. Bldg. Trades Council v. City of Portland, 412 P.3d 258, 267 (Or. Ct. App.), *cert. denied*, 434 P.3d 29 (Or. 2018).

193. *Id.* at 266.

C. Restrictions on Handling and Storing Fossil Fuels Do Not Regulate "Extraterritorially"

Some challengers to state and local fossil fuel restrictions—including the plaintiffs in *Portland* and *South Portland*—have argued that such laws violate the doctrine against extraterritoriality.[194] A law is *per se* invalid under the "extraterritoriality" doctrine if the law, "either by its express terms or by its inevitable effect,"[195] "control[s] commerce occurring wholly outside the boundaries of a State"[196] or "project[s] its legislation" into another state.[197] Because the Supreme Court has "rarely held that statutes violate the extraterritoriality doctrine,"[198] scholars have observed that the "contours of the doctrine" are not "fully articulated" and are "unsettled and poorly understood," leading to inconsistent interpretation among lower courts.[199] Therefore, the applicability of the extraterritoriality doctrine to port fossil fuel restrictions is best understood through a series of case examples.

The Tenth Circuit—in an opinion authored by now Supreme Court Justice Gorsuch—upheld Colorado's Renewable [Energy] Portfolio Standard[200] against a challenge under the extraterritoriality prong of the dormant Commerce Clause, despite the fact that the law "effectively means some out-of-state coal producers . . . will lose business."[201] The court in

194. *Id.* at 265; Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 292–92 (D. Me. 2018), *appeal docketed*, No. 18-2118 (1st Cir. filed Nov. 13, 2018).

195. Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003) (finding that a Maine statute that placed requirements on drug manufactures, but not on pharmacies, did not extraterritorially regulate when it did "not regulate the price of any out-of-state transaction . . . . Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price," nor did it tie "the price of its in-state products to out-of-state prices," nor could a manufacturer "avoid its rebate obligation by opening production facilities in Maine . . . .").

196. Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989) (striking down a Connecticut law that required in-state beer prices to be no higher than out-of-state prices, which had the *effect* of controlling prices outside of the state).

197. Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 521 (1935) (invalidating a New York law that extended its minimum milk prices beyond its borders by forbidding the in-state sale of milk that was purchased out-of-state below the minimum price). But, as explained above in note 101, courts sometimes treat extraterritoriality as branch under the strict scrutiny/discrimination branch, rather than its own branch.

198. Rocky Mt. Farmers Union v. Corey, 730 F.3d 1070, 1101 (9th Cir. 2013); *see also* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015) (calling the extraterritoriality doctrine the "most dormant" of dormant Commerce Clauses tests).

199. Gellerson, *supra* note 36, at 569, 580.

200. The Renewable Portfolio Standard "requires electricity generators to ensure that 20 percent of the electricity they sell to Colorado consumers comes from renewable sources." Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1170 (10th Cir. 2015).

201. *Id.* at 1171.

Energy & Env't Legal Inst. v. Epel held that the extraterritoriality doctrine only applies where "three essential characteristics" are present: "(1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses."[202] The court concluded that these elements were not met, because the Standard did not "blatantly" regulate price, nor did it "discriminate" against out-of-state consumers or producers, even though it could have "ripple effects, including price effects, both in-state and elsewhere," and "hurt" fossil fuel businesses.[203] The court reasoned that Colorado's law "does not discriminate"[204] because it would equally harm all fossil fuel producers and equally help all renewable energy producers, regardless of location.[205] The court also cautioned against "overinclusion" in applying the extraterritoriality doctrine, warning that "if any state regulation that 'control[s] . . . conduct' out of state is *per se* unconstitutional," the court would "have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels[.]"[206]

Similarly, the Ninth Circuit held that California's Low Carbon Fuel Standard was not an "extraterritorial regulation," because it only applied to fuels consumed in-state and was "properly based . . . on the harmful properties of fuel."[207] The court reasoned that "[t]he Commerce Clause does not protect [a business's] ability to make others pay for the hidden harms of their products merely because those products are shipped across state lines."[208] Moreover, even if California had the "goal of influencing the out-of-state choices of market participants," it was free to do so by "regulat[ing] commerce and contracts *within* [its] boundaries."[209] The court found that California's Fuel Standard did not impose mandates on "wholly out-of-state transactions."[210] Rather, the Fuel Standard allowed businesses "in any location [to] elect to respond to the incentives," without requiring businesses to "meet a particular carbon intensity standard" (they could purchase carbon credits to meet the standard), and without requiring any jurisdiction to "adopt a particular regulatory standard for its producers

202. *Id.* at 1173.

203. *Id.* at 1173–74.

204. *Id*. at 1173.

205. *Id*. at 1174.

206. *Id*. at 1175.

207. Rocky Mt. Farmers Union v. Corey, 730 F.3d 1070, 1101–04 (9th Cir. 2013).

208. *Id.* at 1106.

209. *Id.* at 1103 (emphasis added) (citing Pharm. Research & Mfrs. Of Am. v. Walsh, 538 U.S. 644, 679 (2003)).

210. *Rocky Mt. Farmers Union*, 730 F.3d at 1101.

to gain access to California."[211] Further, the Fuel Standard "makes no effort to ensure the price of [fuel] is lower in California than in other states."[212] On these same grounds, the Ninth Circuit also recently found Oregon's low carbon fuel standard did not regulate extraterritorially.[213]

In contrast, the Eighth Circuit upheld a district court ruling overturning a Minnesota law, which had essentially banned new coal generation in the state's electricity market.[214] The district court had found Minnesota's law was unconstitutional on the grounds that it was extraterritorial regulation.[215] However, only one out of three judges on the panel found the law violated the dormant Commerce Clause, while the other two found the law was preempted by federal statutes.[216] Further, one of the judges disagreed with the overly broad application of the extraterritoriality doctrine, explaining that there is a "distinction between [impermissible] wholly extraterritorial regulation and [permissible] regulations which apply to out of state companies entering into commerce within a state," and concluding that the law did not control conduct wholly outside of the state.[217] Therefore, the Eight Circuit's splintered decision should not be seen as a gateway to expansive use of the extraterritoriality doctrine against environmental laws.

Consistent with the Ninth and Tenth Circuit decisions described above, the court in *Portland, Oregon* concluded that Portland's ordinance limiting the size of fossil fuel terminals did "not regulate the conduct of out-of-state consumers in Oregon, nor do they regulate out-of-state consumers' conduct in their states."[218] Likewise, the *South Portland, Maine* court held that the City's ordinance "prohibit[ing] crude oil within the boundaries of certain districts in the City" was not an extraterritorial regulation because "[c]onduct is not controlled by the Ordinance if it occurs

211. *Id.*

212. *Id.* at 1103.

213. Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903, 916–917 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019).

214. North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016).

215. *Id.* at 913–914 (discussing North Dakota v. Heydinger, 15 F. Supp. 3d 891, 919 (D. Minn. 2014)); *see also* Gellerson, *supra* note 36, at 589–90 (describing North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016)).

216. *See North Dakota*, 825 F.3d at 913 (Loken, J.); *id.* at 924 (Murphy, J., concurring in part and concurring in judgment) (asserting the law is preempted by the Federal Power Act); *id.* 927 (Colloton, J., concurring in judgement) (asserting the state law conflicts with the Clean Air Act); *see also* Gellerson, *supra* note 36, at 590–593.

217. *North Dakota*, 825 F.3d at 925 (Murphy, J. concurring in part and concurring in judgement).

218. Columbia Pac. Bldg. Trades Council v. City of Portland, 412 P.3d 258, 266 (Or. Ct. App.), *cert. denied*, 434 P.3d 29 (Or. 2018) (the court did not expressly use the term "extraterritoriality").

outside . . . South Portland's Shipyard, Commercial, and Industrial districts."[219] Further, petroleum companies "would not be subject to inconsistent obligations if other localities passed similar statutes . . . . [T]here would simply be a smaller list of potential sites for loading crude oil."[220] Moreover, even though the likely "*effect* of [South Portland's] Ordinance is to *influence* . . . infrastructure outside the City" because it could hurt the plaintiff's ability to obtain financing for a pipeline, the court concluded "that does not mean the Ordinance regulates extraterritorially."[221] In reasoning reminiscent of Justice Gorsuch's warning against "overinclusion,"[222] the *South Portland* court cautioned against using extraterritorial *effect* to strike down laws, because if effect alone were enough, then "in the modern age of highly interconnected commerce, there would be virtually no room for local historic police powers."[223]

In sum, the bounds and applicability of the extraterritoriality doctrine are ill-defined. But to the extent that challengers to a port fossil fuel ban raise extraterritoriality concerns, *Portland* and *South Portland*, as well as the Ninth and Tenth Circuit cases discussed above, demonstrate that courts have room to conclude such bans do impermissibly regulate extraterritorially.

D. Dormant Foreign Commerce Clause

An additional dormant Commerce Clause issue in the context of port communities restricting fossil fuels is that of the dormant *foreign* Commerce Clause, or the "federal government's ability to speak with one voice when regulating commerce with foreign governments."[224] Plaintiffs

219. Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 297 (D. Me. 2018), *appeal docketed*, No. 18-2118 (1st Cir. filed Nov. 13, 2018).

220. *Id.*

221. *Id.*

222. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1175 (10th Cir. 2015) (warning that "if any state regulation that 'control[s] . . . conduct' out of state is *per se* unconstitutional, wouldn't we have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels?").

223. *City of South Portland*, 332 F. Supp. 3d at 297.

224. *Id.* at 314–15 (citing e.g., *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 449 (1979)).

raised this issue in *Oakland*[225] and the Longview, Washington case,[226] and the court addressed this issue in *South Portland, Maine*.[227]

In *South Portland*, the court concluded the city's ordinance did not "interfere with the government's ability to 'speak with one voice' when regulating foreign commerce or impair[] uniformity in an area where federal uniformity is essential."[228] Despite the fact that the ordinance barred mostly Canadian-oil, the ordinance did "not explicitly target any foreign countries."[229] Further, "[e]ven if enacted in many other jurisdictions, there will be no inconsistent burdens" or "perplexing disuniformity, it is simply unfavorable uniformity."[230] The court reasoned that "[a]ny local regulation or prohibition on a large and important industry will inevitably touch on federal commerce in a broad sense, given the realities of a modern globalized society," and the mere fact that an ordinance has "foreign resonances because it impacts a piece of cross-border infrastructure and a large industry" does not put it in conflict with the Commerce Clause.[231]

Therefore, just as *South Portland* demonstrated that local bans on fossil fuel handling, storing, and shipping can survive dormant Commerce Clause tests for discrimination and extraterritorially, it also demonstrated that such bans can survive dormant foreign Commerce Clause Challenges.

IV. Salt Lake City's and Oakland's Ordinances are Well within the Bounds of the Dormant Commerce Clause Jurisprudence

The previous Part of this Article demonstrated that local restrictions on fossil fuel handling at ports are not inherently discriminatory, do not inherently regulate extraterritoriality, do not impermissibly regulate foreign commerce, and could survive a stricter scrutiny test. Part IV now applies this precedent to the ordinances in Oakland, California and Salt Lake City,

225. Complaint at ¶¶10, 130, 132, 158, 166, *Oakland*, Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 321 F. Supp. 3d 986, 988–89 (N.D. Cal. 2018) (No. 3:16-vc-07014-MEJ), *appeal docketed*, OBOT v. City of Oakland, No. 18-16141 (9th Cir. filed June 20, 2018).

226. Complaint at ¶¶224-239, Lighthouse Resources Inc. v. Inslee, No. 3:18-cv-05005 (W.D. Wash. filed Jan. 3, 2018) (claiming relief under the dormant Foreign Commerce Clause, alleging the state discriminated against the plaintiff's "efforts to export coal to their Asian customers" and created "substantial risk of conflict with foreign governments").

227. *City of South Portland*, 332 F. Supp. 3d at 313–14.

228. *Id.* at 316.

229. *Id.* at 314.

230. *Id.* at 315.

231. *Id.* at 315–316.

Utah, and concludes that both fit comfortably within the bounds of the dormant Commerce Clause.

A. Oakland's and Salt Lake's Ordinances are Not Discriminatory on Their Face, In Effect, or In Purpose

This Section subjects Oakland's and Salt Lake City's ordinances to the three tests of dormant Commerce Clause discrimination discussed in Part III—discrimination on the face of the law, in-effect, and in purpose—and concludes these ordinance are nondiscriminatory under each test.

1. Oakland's and Salt Lake's ordinances are not "facially discriminatory"

Applying the principles of *Philadelphia v. New Jersey*,[232] *Portland, Oregon*,[233] and *South Portland, Maine*,[234] the ordinances in Oakland and Salt Lake do not facially discriminate. Salt Lake City's ordinance does not base its natural resources restrictions on geographic origin, but rather on the size of storage area, type of fuel, or type of industry or product.[235] This echoes—albeit in a much less-restrictive way—Portland, Oregon's ordinance barring fossil fuel facilities over a certain size.[236] Similarly, Oakland's ordinance does not prohibit coal from a specific locality, but rather prohibits coal *from any location* from being stored or handled "at bulk goods facilities in Oakland."[237] This mirrors South Portland, Maine's prohibition on crude oil loading in certain city zones.[238] Therefore, courts examining Oakland's and Salt Lake City's ordinances should follow the logic of the two Portland cases and find no facial discrimination, because the ordinances apply "with equal force to any entity seeking to load [coal or crude oil]" in the regulated zones and they "bind[] local entities to the

232. Philadelphia v. New Jersey, 437 U.S. 617, 624–29 (holding that New Jersey's law was facially discriminatory because it barred out-of-state waste on the basis of geographic origin alone, and out-of-state waste posed no greater threat than in-state waste).

233. Columbia Pac. Bldg. Trades Council v. City of Portland, 412 P.3d 258, 263 (Or. Ct. App.), *cert. denied*, 434 P.3d 29 (Or. 2018); *see also supra* Part III.A.1.

234. *City of South Portland*, 332 F. Supp. 3d 264; *see also supra* Part III.A.1.

235. SALT LAKE CITY, UTAH, CODE § 21A.34.150(E)(1) (Sterling Codifiers through June 11, 2019) (placing restrictions on "natural resource and bulk material storage in excess of five hundred (500) square feet in area"); *id.* at § (E)(1)(b) (placing more restrictions on the coal, coal byproducts, and crude oil); *id.* at § (B)(2)(f) (prohibiting any extractive industry, waste incinerator, hazardous waste storage or processor, refinery of petroleum products).

236. *City of Portland*, 412 P.3d at 263.

237. Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 321 F. Supp. 3d 986, 991 (N.D. Cal. 2018), *appeal docketed*, No. 18-16141 (9th Cir. June 20, 2018).

238. *City of South Portland*, 332 F. Supp. 3d at 282–84.

same extent as entities based . . . outside the state."[239] Further, even if the Oakland and Salt Lake ordinances did place more restrictions on fossil fuels coming from out-of-state, it is still possible for a court to apply the Ninth Circuit's standard and find no discrimination, so long as the out-of-state fuels impose greater harm on the city than locally produced fuels, and the additional restrictions are proportional to the harm.[240]

2. Oakland's and Salt Lake's ordinances arguably do not discriminate in effect, but more facts are needed

Applying the principles of *Exxon Corp. v. Governor of Maryland*,[241] *Portland, Oregon,* and *South Portland, Maine*, a court should find that Oakland's and Salt Lake's ordinances do not discriminate in practical effect. In *Oakland*, the plaintiff's complaint has the same two flaws as the complaints in *Portland* and *South Portland*: (1) a lack of competition between substantially similar in-state and out-of-state entities; and (2) alleged harm only to local entities.[242]

First, the Oakland ordinance does not discriminate between substantially similar in-state and out-of-state entities. The *Oakland* plaintiff claims that the City's ordinance discriminates against "out-of-state miners, shippers, customers, and carriers of coal . . . while protecting in-state interests by banning the transportation of coal . . . and simultaneously exempting from the ban certain local, non-commercial and on-site manufacturing operations within Oakland that handle, store, and/or consume coal."[243] Similar to the exemptions in Portland, Oregon's ordinance,[244] the local *consumers* exempted from the Oakland ban are not "substantially similar entities" to the out-of-state *miners*, *shippers*, or *carriers* allegedly harmed.[245]

239. *Id*. at 300.

240. Am. Fuel &Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903 (9th Cir. 2018), *cert. denied,* 139 S. Ct. 2043 (2019) (finding Oregon's fuel standard was not facially discriminatory); *see* Rocky Mt. Farmers Union v. Corey, 730 F.3d 1070, 1089 (9th Cir. 2013) (holding California's Fuel Standard was not facially discriminatory, where differential treatment of local and nonlocal fuel was based on carbon intensity).

241. Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978).

242. *See City of South Portland,* 332 F. Supp. 3d at 300–03; *see also City of Portland*, 412 P.3d at 262.

243. Complaint, Document 1 at ¶131, Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 321 F. Supp. 3d 986 (N.D. Cal. 2018), *appeal docketed*, No. 18-16141 (9th Cir. filed June 20, 2018) (No. 3:16-cv-07014-VC).

244. *See City of Portland*, 412 P.3d at 264 (holding that "sellers" and "users" of fossil fuels are not "substantially similar entities" for a dormant Commerce Clause comparison).

245. The facilities exempted in Oakland's ban include: "(i) Non-commercial facilities (e.g. educational facilities or residential property on which persons may Store or Handle small amounts of Coal or Coke for personal, scientific, recreational, or incidental

Second, Oakland's ordinance only allegedly harms local entities. The harm claimed in *Oakland* is the loss of money by the *defendant* (City of Oakland) and by the plaintiff, which is a California corporation.[246] Therefore, as the *South Portland* court concluded, "[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."[247] Further, the *Oakland* plaintiff's allegation of harm to out-of-state *customers*, as well as harm alleged to out-of-state producers, is undermined by the fact that "18 months after the Ordinance was enacted, the coal trains that ran through Oakland before then [to the neighboring Port of Richmond] have continued to do so."[248] Moreover, even if there was harm to out-of-state coal producers, the ordinance applies equally to coal from any location. As the court in *South Portland, Maine* noted, the fact that "commerce in a market originates in another state or country does not mean that otherwise evenhanded regulations or prohibitions on that market automatically have the 'practical effect' of discriminating against interstate or foreign commerce."[249] Therefore, like in *South Portland*, a court has ample room to find that Oakland's ordinance does not discriminate in-effect.

Similarly, for Salt Lake City's ordinance, challengers would have a difficult time overcoming the fact that the entities most likely to be directly economically harmed by the City's standards on coal, crude oil, and extractive industries[250] are *Utah-based* companies. In fact, the State of Utah's official objectives for the Utah Inland Port include fostering the "export [of] *Utah products*" and "connect[ing] *local businesses* to potential foreign markets for exportation."[251] Challengers could argue that the ordinance might disproportionately burden out-of-state *purchasers* as compared to in-state *purchasers*, because Utah products going through the Inland Port are likely intended for out-of-state markets—such as those in Oakland, California or Longview, Washington—whereas Utah products

use) and (ii) on-site manufacturing facilities where all of the Coal or Coke is consumed on-site at that facility's location and used on-site as an integral component in a production process . . . ." City of Oakland, Cal., Ordinance 13385, § 8.60.040(C) (July 20, 2016).

246. Complaint, Document 1 at ¶14, ¶122, Oakland Bulk & Oversized Terminal, LLC, 321 F. Supp. 3d 986 (No. 3:16-cv-07014-VC).

247. *City of South Portland*, 332 F. Supp. 3d at 301.

248. Intervenor-Defendant's Motion for Summary Judgement, Document 156 at 14:10-19, Oakland Bulk & Oversized Terminal, LLC, 321 F. Supp. 3d 986 (No. 3:16-cv-07014-VC) (citing the Declaration of OBOT's owner, Mr. Tagami).

249. *City of South Portland*, 332 F. Supp. 3d at 302.

250. SALT LAKE CITY, UTAH, CODE §§ 21A.34.150(E)(1)(b), B(2)(f) (Sterling Codifiers through June 11, 2019).

251. UTAH CODE ANN. § 11-58-203 (West, Westlaw through 2019 General Session) (emphases added).

going to in-state markets may be less likely to travel through the Inland Port and thus would not be impacted by the Ordinance. Challengers may also point to the Ordinance's exemption for "[t]he outdoor storage of bulk materials necessary for safety purposes, such as the storage of de-icing materials used on public streets"[252] as a benefit to purely local consumers.

However, it is uncertain if the specific kinds of in-state and out-of-state purchasers that a challenger to Salt Lake City's ordinance might discuss would be "substantially similar" for a dormant Commerce Clause comparison.[253] And, even if those purchasers were substantially similar, challengers would need to prove Salt Lake's ordinance caused Utah coal to become more expensive out-of-state. Given that Utah coal can simply circumvent the Inland Port to ship to out-of-state markets, which it currently does,[254] it is unclear if the City's restrictions would result in any differences between in-state and out-of-state prices of Utah coal and if a price differential would be anything other than a permissible "incidental" effect of an otherwise "evenhanded[]" law,[255] "based on the real risks posed."[256] Therefore, depending on the specific facts, a court may follow *South Portland's* conclusion that challenges to Salt Lake City's ordinance "stretch[] the dormant Commerce Clause too far."[257]

3. Oakland's and Salt Lake's ordinances are properly based on environmental health concerns and do not have a discriminatory purpose

A court should almost certainly find that Oakland's or Salt Lake City's ordinances do not have a discriminatory purpose, in light of the Supreme Court's decision in *Maine v. Taylor* and the Ninth Circuit rulings on California's and Oregon's low carbon fuel standards.[258] These decisions demonstrate that laws which are designed to curtail a harmful product do

252. SALT LAKE CITY, UTAH, CODE § 21A.34.150(E)(1)(c) (Sterling Codifiers through June 11, 2019).

253. *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 297-303 (1997) (holding that natural gas "bundled with [. . .] services and protections" and sold to local consumers by utilities did not compete with "unbundled" natural gas sold by independent marketers to high-volume industrial buyers).

254. ADVANCING UTAH COAL, *supra* note 68, at 9 ("14.6 percent of Utah's [coal] production went to other states and roughly 5 percent went to foreign countries" in 2015).

255. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

256. Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903, 914–17 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019) (holding Oregon's low carbon fuel standard did not discriminate in effect because different treatment between in-state and out-of-state fuels was based on carbon intensity, not geography).

257. Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 302 (D. Me. 2018), *appeal docketed*, No. 18-02118 (1st Cir. Nov. 13, 2018).

258. *See supra* Part III.A.3.

not have a discriminatory purpose if proposed for environmental reasons, even if some of the laws' supporters promote the *local* economic benefits, unless other clearly discriminatory factors are present.[259]

The express purpose of Oakland's ordinance is to "address the unique and peculiar health, safety, and/or other impacts of Coal" in a community that has "populations most vulnerable to health impacts from air pollutants."[260] These goals and concerns were echoed by community groups.[261] Likewise, the express purpose of Salt Lake City's ordinance is to "facilitate[] regional, national, and international trade," while also aiming to be a "model to the nation for sustainable development," "respect[] and maintain[] sensitivity to the natural environment," "help[] to achieve City and State goals for air and water quality," and "avoid, minimize, manage, and mitigate detrimental environmental impacts."[262] The public[263] and the local school district[264] have echoed environmental and health concerns over the Inland Port that Salt Lake's ordinance was

259. *See Am. Fuel & Petrochemical Mfrs.* 903 F.3d at 912 (statements by state officials promoting the local economic benefits of the law "do not plausibly relate to a discriminatory design and are easily understood, in context, as economic defense of a regulation genuinely proposed for environmental reasons."); Rocky Mt. Farmers Union v. Corey, 258 F. Supp. 3d 1134, 1156 (E.D. Cal. 2017) (dismissing assertion that discriminatory purpose was evidenced by government statement that the law would help "keep consumer dollars local"); Maine v. Taylor, 477 U.S. 131, 149 (1986) (rejecting an argument that economic protectionism was evidenced by a government statement saying Maine's money would be better "spent at home"); *see also* Rocky Mt. Farmers Union, 730 F.3d 1070, 1100 fn.13 (9th Cir. 2013) ("economic defense of a [regulation] genuinely proposed for environmental reasons" is not evidence of a "discriminatory purpose"); *cf.* Philadelphia v. New Jersey, 437 U.S. 617, 627–29 (1978) (wherein the Court held a New Jersey law, which had the *purpose* of protecting the state's environment, health, and safety, was *facially* discriminatory because it expressly barred only *out-of-state* waste, which posed no greater risks than in-state waste. The Court acknowledged that "slowing the flow of *all* waste" would be permissible under a line of cases upholding quarantine laws that blocked "noxious" products at state borders).

260. City of Oakland, Cal., Ordinance 13385, § 8.60.010, § 8.6.020(B) (July 20, 2016).

261. *Challenging Proposed Coal Export Terminal in Oakland, California*, EARTHJUSTICE, https://perma.cc/3QHX-D8DN ("transporting and storing coal on the Oakland waterfront poses serious short- and long-term impacts on community health and the local environment") (last visited Oct. 20, 2018).

262. SALT LAKE CITY, UTAH, CODE § 21A.34.150 (A) (Sterling Codifiers through June 10, 2019).

263. Taylor Stevens, *How Will the Inland Port, a Massive Project Near the Great Salt Lake, Affect Air Quality and the Ecosystem?*, SALT LAKE TRIB. (Oct. 21, 2018), https://perma.cc/AHL6-Q96Q (reporting that most public comments to the City Council and Port Board focused on environmental impacts).

264. *See, e.g.*, Glen Mills, *Salt Lake City School District raises concerns about Inland Port*, GOOD4UTAH (Sept. 11, 2018, 8:35 AM), https://perma.cc/X234-BWFC (describing traffic, noise pollution, and air quality concerns).

designed to regulate. The fact that Salt Lake's ordinance also aims to "minimize[] resource use" without regard for the geographic origin of those resources[265] does not indicate any kind of discrimination recognized by dormant Commerce Clause jurisprudence. Further, even though Salt Lake City's Mayor has been an outspoken critic of the state's takeover of the Port area, her criticism has not questioned the commercial or interstate trade purposes of the Port.[266]

Therefore, it would be easy for a court to recognize that the primary purposes of both Oakland's and Salt Lake City's restrictions are not geographical, but instead have to do with the impact caused by coal from any location on "the health and safety of [the] community," just as the court in *South Portland, Maine* did.[267] Moreover, like in *South Portland*,[268] a court would be well-reasoned to conclude that Salt Lake City's and Oakland's ordinance are free from any discriminatory purpose under the dormant Commerce Clause.

B. Oakland's and Salt Lakes Ordinances Could Withstand Strict Scrutiny

Even if Oakland's and Salt Lake City's health and safety-focused ordinances were found to be discriminatory, they could still survive. The U.S. Supreme Court has recognized that the dormant Commerce Clause:

> does not elevate free trade above all other values. As long as a [local law] does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.[269]

Courts would be well-reasoned to find that, under the precedent of *Maine v. Taylor*, the ordinances of Oakland and Salt Lake City "serve[] a legitimate local purpose" that "could not be served as well by available nondiscriminatory means" and thus should be upheld, even if the proposed

265. SALT LAKE CITY, UTAH, CODE § 21A.34.150(A) (Sterling Codifiers through June 10, 2019).

266. *See, e.g.*, Katie McKellar, *Salt Lake mayor calls for public's help to guide port zoning*, DESERET NEWS (Aug. 10, 2018), https://perma.cc/NEJ6-YA5N (quoting Mayor Biskupski as saying the city is "being forced" to meet an "arbitrary deadline," and it is "troubling" that the state-created port authority can overturn city zoning decisions).

267. Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 304 (D. Me. 2018), *appeal docketed*, No. 18-02118 (1st Cir. Nov. 13, 2018).

268. *Id.* at 303.

269. Maine v. Taylor, 477 U.S. 131 (1986); Portland Pipe Line Corp., 332 F. Supp. 3d at 151 (citations omitted).

solutions would not be a "complete success."[270] Similar to *Maine v. Taylor*, Oakland and Salt Lake City's ordinances legitimately "guard[] against imperfectly understood environmental risks"[271] that the air emissions from coal handling and storing would impose on nearby vulnerable communities.[272]

One of the health main concerns with ports and coal shipping is fine particulate matter, which the U.S. EPA, California EPA, World Health Organization, and federal courts have all concluded is harmful at any level.[273] Even the American Trucking Association asserted to the Supreme Court that "particulate matter . . . inflict[s] a continuum of adverse health effects at any airborne concentration greater than zero."[274] This is particularly concerning in Oakland, where an independent consultant for the City estimated that the proposed coal terminal would result in fine particulate matter levels over *twice* the daily and yearly "threshold[s] of significance" for air quality set by California and the local Air District.[275] The City of Oakland further determined that adding particulate matter would be significant because the area was "out of attainment" with relevant National Ambient Air Quality Standards.[276] Likewise, health advocates in Salt Lake City are concerned about the impacts of the Utah Inland Port[277] because, even without the Port, Salt Lake County is in "serious non-attainment" of National Ambient Air Quality Standards for fine particulate matter.[278] It would be clear, therefore, for a court to conclude that Salt Lake

270. *Maine*, 477 U.S. at 138–51 (holding discriminatory laws are allowable if they "serve[] a legitimate local purpose" that "could not be served as well by available nondiscriminatory means," even if risks are "imperfectly understood" and solution may not be "complete success").

271. *Id*. at 148.

272. *See* Brief of Amicus Curiae for State of California, Document 170-1 at 7, Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 321 F. Supp. 3d 986 (N.D. Cal. 2018), *appeal docketed*, No. 18-16141 (9th Cir. June 20, 2018) (No. 3:16-cv-07014-IV) (describing pollutants that coal handling creates, and vulnerable communities adjacent to the Oakland terminal); Mills, *supra* note 264 (describing air quality concerns for low-income schoolchildren near the Utah Inland Port in Salt Lake City); Stevens, *supra* note 263.

273. Motion for Summary Judgement by Defendant, Document 145 at 15, *Oakland Bulk & Oversized Terminal*, 321 F. Supp. 3d 986 (No. 3:16-vc-07014-IV).

274. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).

275. *Oakland Bulk & Oversized Terminal, LLC*, 321 F. Supp. 3d at 994–95.

276. *Id.* at 1004.

277. Stevens, *supra* note 263 (quoting an advocate: "we just don't have a whole lot of room to fully increase manufacturing and truck traffic that would potentially be generated from the inland port").

278. Emma Penrod, *EPA labels Utah Air-quality Problems 'Serious'*, SALT LAKE TRIB. (May 3, 2017), https://perma.cc/7PJK-LADB (Salt Lake County is also in "'marginal' non-attainment" for ozone); Emma Penrod, *Feds Give Utah Three Years to Bring Ozone*

City and Oakland's ordinances permissibly "serve[] a legitimate local purpose"[279] concerned with air quality and public health.

Salt Lake City and Oakland's ordinances also arguably "could not be served as well by available nondiscriminatory means."[280] For Oakland, the City likely lacks authority to enforce the less restrictive measures suggested by OBOT and the district court, such as using covers or chemical dust suppressants on rail cars carrying coal.[281] The Interstate Commerce Commission Termination Act may preempt directly regulating the rail carriers, as OBOT argued in its complaint.[282] Alternatively, the fact that the City likely would have limited recourse to enforce contracts between OBOT and its sub-lessees undermines OBOT's suggestion that Oakland should be satisfied with its promise to require its sub-lessees to use covers.[283]

Likewise, Salt Lake City's prohibition on extractive industries and refineries in the Inland Port[284] may not be achievable through lesser means like technical regulations, because such regulations could run into state preemption issues, whereas zoning regulations simply barring these harmful activities from particular locations would ordinarily be considered safe within the City's police powers.[285] In addition, the requirement in Salt Lake City's ordinance that coal and crude oil handling be done in an enclosed building, covered rail car, or open rail car if material has been "sprayed with surfactant to reduce dust"[286]—while otherwise allowing

Pollution Down to Acceptable Levels, SALT LAKE TRIB. (May 1, 2018), https://perma.cc/DLU7-K93K.

279. Maine v. Taylor, 477 U.S. 131, 138 (1986) (citations omitted).

280. *Id.*

281. Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 321 F. Supp. 3d 986, 995–98 (N.D. Cal. 2018), *appeal docketed*, No. 18-16141 (9th Cir. June 20, 2018).

282. Complaint, Document 1 at ¶137, *Oakland Bulk & Oversized Terminal*, 321 F. Supp. 3d 986 (No. 3:16-cv-07014-IV). Oakland's ordinance arguably does *not* cross the ICCTA because it does not regulate rail and regulates only storing and handling of coal at certain facilities in the city. City of Oakland, Ordinance 13385, § 8.60.010 (July 20, 2016).

283. *Oakland Bulk & Oversized Terminal*, 321 F. Supp. 3d at 996.

284. SALT LAKE CITY, UTAH, CODE § 21A.34.150 (B)(2)(f) (Sterling Codifiers through June 10, 2019).

285. *See generally* McCready, *supra* note 24 (providing an overview of cases where city regulation of oil and gas fracking was preempted by state technical regulations but where, in at least one case in New York, an outright ban prevailed over an express preemption statute of oil and gas regulation; further arguing that state preemption of outright *bans* on oil and gas drilling is not supported by the rationale that supports state preemption of *technical aspects of drilling*, which is based on the desire to avoid a patchwork of conflicting technical local regulations); *see also generally infra* note 298 (discussing the authority of Utah municipalities to regulated public health and safety under *State v. Hutchinson*).

286. SALT LAKE CITY, UTAH, CODE ch. 21A.34.150 IP, § (E)(1)(b) (2019).

those materials—are already strikingly minimal. Any less restrictive means would be meaningless or not "satisfactory," as the U.S. Supreme Court put it in *Maine v. Taylor*.[287]

Finally, even though Salt Lake City's and Oakland's ordinances do not address many other sources of pollution that threaten health and environment, courts recognize that local laws "need not strike at all evils."[288] "[I]mpediments to complete success . . . cannot be a ground for preventing a [local government] from using its best efforts to limit [an environmental] risk."[289] Therefore, courts would be well-reasoned if they were to allow Salt Lake City's and Oakland's ordinances to survive strict scrutiny under the dormant Commerce Clause.

C. Salt Lake's and Oakland's Ordinances Do Not Regulate Extraterritorially

Just as the court in *South Portland, Maine* saw "little difference between [South Portland's] Ordinance and other zoning prohibitions" and concluded the ordinance therefore did not violate the extraterritoriality doctrine,[290] a court should have no trouble following that same logic to uphold Salt Lake City's zoning ordinance. In fact, South Portland's total prohibition on crude oil loading in a city shipyard is far more intrusive than Salt Lake's ordinance, which allows coal and crude oil to be loaded and stored so long as it is done in an enclosed building, covered rail car, or open rail car sprayed with dust-controlling surfactants.[291] Therefore, it should be even easier for a court to uphold Salt Lake's ordinance against in extraterritoriality challenge. Likewise, courts should not find Oakland's coal ordinance to be an impermissible extraterritorial regulation, as it does not restrict the handling of coal outside of the city's "bulk material facilities."[292]

As in the Tenth Circuit's *Energy & Environmental Legal Institute. v. Epel* opinion authored by then-Judge Gorsuch, even if Salt Lake City's or Oaklands's restrictions have "ripple effects" on markets elsewhere, the ordinances do not "blatantly" regulate price, nor do they discriminate against out-of-state consumers or producers.[293] And, as in *South Portland,*

287. Maine v. Taylor, 477 U.S. 131, 141 (1986).

288. Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 312 (D. Me. 2018), *appeal docketed*, No. 18-02118 (1st Cir. filed Nov. 13, 2018) (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466).

289. *Maine*, 477 U.S. at 151 (citations omitted).

290. *City of South Portland*, 332 F. Supp. 3d at 297.

291. SALT LAKE CITY, UTAH, CODE § 21A.34.150 (E) (Sterling Codifiers through June 10, 2019).

292. City of Oakland, Cal., Ordinance 13385, § 8.60.040(B) (July 20, 2016).

293. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173–74 (10th Cir. 2015).

Maine, "conduct is not controlled by the Ordinance[s] if it occurs outside" the cities' ports.[294] Both Salt Lake City's and Oaklands's ordinances are well within the cities' "historic police powers" described in *South Portland*.[295] They are nothing more than "health and safety regulations," as then-Judge Gorsuch framed it, which are well within the bounds of the dormant Commerce Clause.[296] In fact, California's Attorney General agrees that Oakland may use its "police power to protect . . . vulnerable residents from dangerous pollution."[297] The Utah Supreme Court has also long recognized the general welfare power of Utah municipalities, and that it would be "a mockery of the concept of local self-government to require all counties to have the same ordinances as all others."[298] The fact that Oakland's and Salt Lake's ordinances regulate products which come from or go to other states does not change the fact that they only directly regulate activities within the cities.[299] Therefore, courts would be well-supported to conclude that neither Salt Lake City's nor Oakland's ordnance regulate extraterritorially.

D. Oakland and Salt Lake's Ordinance Do Not Infringe on Foreign Commerce

Just as in *South Portland, Maine*, Oakland's and Salt Lake's ordinances do not interfere with the "federal government's ability to speak with one voice when regulating commerce with foreign governments."[300] The *South Portland* court aptly reasoned that "[a]ny local regulation or prohibition on a large and important industry (fossil fuels) will inevitably

294. *City of South Portland*, 332 F. Supp. 3d at 297.

295. *Id.*

296. *Energy & Env't Legal Inst.*, 793 F.3d at 1174.

297. *See* Brief of Amicus Curiae for State of California, Document 170-1 at 7, Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 321 F. Supp. 3d 986 (N.D. Cal. 2018) (No. 3:16-vc-07014-IV).

298. State v. Hutchinson, 624 P.2d 1116, 1126 (Utah 1980) (holding that, because Utah statutorily granted the "general welfare power to local governments, those governments have independent authority apart from, and in addition to, specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power, i.e. providing for the public safety, health, morals, and welfare" (citing Salt Lake City v. Allred, 437 P.2d 434 (1968))); *see also* DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY STATE HANDBOOK 408–09 (2002) (describing how State v. Hutchinson established a "statutory home role" for Utah local governments).

299. *See* Rocky Mt. Farmers Union, 730 F.3d 1070, 1106 (9th Cir. 2013) ("[t]he Commerce Clause does not protect [a business's] ability to make others pay for the hidden harms of their products merely because those products are shipped across state lines").

300. Portland Pipe Line Corp. v. City of South Portland, 332 F. Supp. 3d 264, 313–14 (D. Me. 2018) (citing Japan Line, Ltd. v. Los Angeles Cty., 441 U.S. 434, 449 (1979)), *appeal docketed*, No. 18-02118 (1st Cir. filed Nov. 13, 2018).

touch on federal commerce in a broad sense, given the realities of a modern globalized society," and the mere fact that an ordinance has "'foreign resonances' because it impacts a piece of cross-border infrastructure and a large industry" does not put it in conflict with the Commerce Clause.[301] Likewise, the mere fact that the coal industry or other industries hope to ship their products to international markets via ports in Oakland and Salt Lake City does not mean those cities' ordinances violate the dormant Commerce Clause, where they neither target any foreign countries, nor force market participants to comply with inconsistent burdens.

V. Conclusion

Utah's coal industry got a temporary win with the *Oakland* district court decision, but municipalities have the power to win the larger fight over restrictions on fossil fuels at their ports. The recent decisions in *South Portland, Maine* and *Portland, Oregon* demonstrate that municipal bans on fossil fuel shipping and handling at ports can withstand dormant Commerce Clause challenges. Further, these two Portland decisions, alongside precedent from the U.S. Supreme Court,[302] the Tenth Circuit under Justice Gorsuch,[303] and the Ninth Circuit[304] suggest that Oakland's coal ban and Salt Lake City's restrictions on coal, oil, refineries, and extractive industries could and should withstand dormant Commerce Clause challenges. This conclusion is consistent with the Supreme Court's recognition that the Commerce Clause does not require communities "to sit idly by and wait until potentially irreversible environmental damage has occurred . . . before [they] act[] to avoid such consequences."[305] This is also consistent with scholarship calling for recognition of a legal right to "local self-determination"[306] or "community self-governance"[307] for environmental problems.

301. *City of South Portland*, 332 F. Supp. 3d at 315–16.

302. Maine v. Taylor, 477 U.S. 131, 148 (1986) (facially discriminatory law survived strict scrutiny where state sought to "guard [. . .] against imperfectly understood environmental risks" and there were no feasible, less restrictive means); *see* Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978) (upholding law prohibiting one industry from retail sales in-state).

303. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1170 (10th Cir. 2015) (upholding Colorado renewable energy law against dormant Commerce Clause challenge, even though "some out-of-state coal producers . . . will lose business").

304. Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019) (upholding Oregon's low carbon fuel standard); *see also* Rocky Mt. Farmers Union v. Corey, 730 F.3d 1070, 1101–04 (9th Cir. 2013) (largely upholding California's low carbon fuel standard).

305. *Maine*, 477 U.S. at 141.

306. Briffault, *supra* note 37.

307. Linzey and Brannen, *supra* note 37.

However, while cities such as Oakland and Salt Lake City have viable options to achieve their goals of avoiding harmful emissions from coal and oil handling in their ports without running afoul of the dormant Commerce Clause, it is also clear from *Oakland* and *Portland* that cities will need to be vigilant in their fact-finding to support their ordinances, as courts may apply a scrutinizing eye under administrative or contract law.[308] Cities will also need to take precautions to ensure their ordinances do not cross the line of other claims frequently raised, including state preemption of municipal authority and federal preemption by statutes regulating trains, ports, and pipelines.[309] If cities avoid these pitfalls, they will not be prohibited—by the dormant Commerce Clause or otherwise—from restricting fossil fuels at their ports.

308. *See supra* Part II, discussing how the *Oakland* court held the record lacked the contractually required "substantial evidence" of health and safety risks, and the *Portland* court held Portland's ordinance lacked an "adequate factual basis" because one of the city's factual findings did not adequately combat countervailing evidence.

309. *See supra* Part I, note 40 and accompanying text.

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