Appeal No. 18-2118

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PORTLAND PIPE LINE CORPORATION;
THE AMERICAN WATERWAYS OPERATORS,

Plaintiffs-Appellants

v.

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

Defendants-Appellants

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

BRIEF OF APPELLANTS

John J. Aromando, Bar No. 34926
Matthew D. Manahan, Bar No. 74501
Catherine R. Connors, Bar No. 7451
Nolan L. Reichl, Bar No. 1148010
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
Tel: 207-791-1100

Attorneys for Appellants
Portland Pipe Line Corporation and
The American Waterways Operators

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rule 26.1, Plaintiff Portland Pipe Line Corporation ("PPLC") discloses that it is a wholly-owned subsidiary of Montreal Pipe Line Limited, which is a privately held Canadian corporation. Plaintiff The American Waterways Operators ("AWO") discloses that there are no persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations (including parent or affiliated corporations, clearly identified as such), or any similar entities, which own 10% or more of it.

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JURISDICTIONAL STATEMENT

Plaintiffs PPLC and AWO challenge on federal constitutional and federal and state preemption grounds an ordinance ("the Ordinance") enacted by the Defendant City of South Portland (the "City") that prohibits the loading of crude oil onto ships, thus precluding PPLC importing oil from Canada through its pipelines and exporting that oil through the Port of Portland. (Add. 3-71, 5-1.[1])

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. (*See* ECF 1 at 4.) The district court issued its amended final judgment on October 10, 2018. (Add. 1-1.) Plaintiffs timely filed their notice of appeal on November 7, 2018. (ECF 266.) This Court has jurisdiction under 28 U.S.C. § 1291.

[1] Plaintiff-Appellants cite to documents, including trial transcripts, appearing on the district court's docket as "ECF [entry#] at [page#]" and to documents found in its Addendum as "Add. [page#]." In each instance where Plaintiff-Appellants cites to an ECF entry, reference is made to the page number assigned by the district court's ECF system. Cites to documents offered or admitted into evidence at trial are to the exhibit numbers (*e.g.*, "J1," "P1," or "D1") used on the trial exhibit list appearing at ECF 246.

STATEMENT OF THE ISSUES

1. Does the Pipeline Safety Act, 49 U.S.C. §§ 60101 *et seq.*, preempt the Ordinance because it intrudes into the expressly preempted field of pipeline safety standards or because it stands as an obstacle to enactment of uniform practicable standards governing the operation of cross-border pipelines?

2. Does the Commerce Clause of the U.S. Constitution and the foreign affairs powers committed to the federal government invalidate the Ordinance because it:

   - interferes in foreign affairs in more than an incidental way or inhibits the federal government's ability to speak with one voice on a subject matter in which uniformity is needed; or
   - imposes a disparate or excessive burden on interstate and international commerce despite alternatives that are less burdensome and more likely to achieve the Ordinance's purported benefits?

3. Does the Maine Coastal Conveyance Act, 38 M.R.S. § 556, preempt the Ordinance because its prohibition on loading crude oil onto ships conflicts with an order of the Maine Department of Environmental Protection permitting PPLC to load crude oil onto ships?

STATEMENT OF THE CASE

The overarching issue in this appeal is whether one town at one end of federally-permitted international pipelines can block the importation of Canadian oil through those pipelines and out the harbor where the town is located. The operative facts either were found by the district court after trial or are otherwise undisputed:

- the Ordinance was enacted to prevent PPLC from reversing the direction of the flow of its cross-border pipelines (Add. 3-71);
- the Ordinance in fact succeeded in stopping the flow of oil from Canada and has shuttered the pipelines (Add. 3-28, 3-71, 3-78, 3-91);
- the City took this action "in part out of concerns about the safety of handling tar sands crude oil at the Harbor ... in terms of environmental and public health risk from spills" (Add. 3-73, n.6); and
- if enacted elsewhere, U.S. ports would close to interstate and international trade in crude oil. (*See infra* at 12-13.)

Faced with the shutdown of its business, PPLC—joined by AWO, whose members employ tens of thousands of workers who would be devastated by the loss of port traffic—brought suit to challenge the Ordinance, contending, *inter alia*, that it is preempted by the Pipeline Safety Act ("PSA") and is invalid under the Commerce Clause and the doctrine of foreign affairs preemption.

The background necessary to resolving PPLC's appeal is set forth below.

I. FACTUAL BACKGROUND

A. PPLC's pipelines, running between Montreal and the South Portland Harbor, were built and have been operated pursuant to presidential determinations of national interest.

The Port of Portland's natural characteristics, including deep water and ice free conditions all year, has spurred the development not only of maritime commerce generally but also a pipeline system that has long served as a major international transportation conduit for crude oil.[2]

This pipeline system—the Portland-Montreal Pipe Line ("PMPL")—consists of three separate pipelines, built in 1941, 1950, and 1965, running from a southern terminus at the harbor in South Portland, Maine ("the Harbor"), through New Hampshire and Vermont, to the U.S. border with Canada, and on to a northern terminus in Montreal East, Quebec. (Add. 3-6-3-7; ECF 89, ¶¶ 1-6; P73, ¶¶ 3-4.)[3] As required for all cross-border pipelines, each was declared to be in the national interest by the President, who "has the sole authority to allow oil pipeline border crossings under his inherent constitutional authority to conduct foreign affairs." *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1081

[2] P73, ¶ 9. *See also* ECF 248 at 177:25-178:6.

[3] PPLC operates the United States portion of PMPL, while PPLC's parent company, Montreal Pipeline Limited ("MPLL"), operates the Canadian portion. (Add. 3-7; ECF 241 at 101:19-25.)

(D.S.D. 2009). All three lines run largely underground along the same rights of way between the Harbor and Montreal East. (Add. 3-7; ECF 89, ¶ 5; P73, ¶ 4.)

The Harbor has proven an ideal location to site the southern terminus of PMPL, as it can accommodate large tanker vessels with dimensions of up to 52 feet of draft and 170,000 deadweight tons of cargo. (Add. 3-8; ECF 89, ¶ 13; P73, ¶ 9.) Accordingly, PMPL has transported significant amounts of crude oil over the decades. At its peak, PPLC received 41 tankers each month and pumped more than 500,000 barrels of oil each day. (ECF 241 at 108:12, 142:15; *see also* ECF 89, ¶ 15.)

PPLC's successful operations for more than 75 years has greatly benefited the economy in and around the Harbor. For example, the frequent landings by oil tanker vessels created demand for Portland Tugboat LLC, a member of AWO, to provide "ship assist" services, whereby it guides tanker vessels into their docking locations. (Add. 3-42; Add. 4-110-4-111; ECF 89, ¶ 161; ECF 89-45, ¶ 6; ECF 241 at 42:4-11.) In 2008, half of Portland Tugboat's business consisted of ship assist services for oil tankers traveling to and from PPLC's pier. (ECF 241 at 42:4-11.) Overall, each tanker vessel landing at the pier generates upwards of $93,000 in fees and related revenues for tugboats, pilots, and the local economy. (ECF 241 at 116:25-117:13.) At its peak, PPLC's operations in the Harbor thus generated more than $45 million per year for the Harbor's economy.

B. The City enacted the Ordinance to stop reversal of the pipelines and the import of "tar sands" from Canada.

Over the years, PPLC has responded to market conditions in various ways, including reversing the direction of pipeline flow. In 1986 and 1987, it leased a line to an entity that obtained federal approval to reverse the direction of the line's flow to transport natural gas south from Quebec to Maine. (Add. 3-7; ECF 89, ¶¶ 17-21; P73, ¶ 10.) In 1999, PPLC resumed operation of that line after receiving federal approval to change the direction and return to transporting oil. (P73, ¶ 11; ECF 89, ¶¶ 17-21; ECF 89-3.) PMPL has been oriented for the northbound shipping of crude oil since that date. (ECF 89, ¶ 20; P73, ¶ 11.)

In recent years, the boom in Alberta oil production and the anticipated decline in demand to ship oil northbound into Quebec required another reversal. (Add. 3-10; ECF 89, ¶¶ 24, 26-27; P73, ¶¶ 12-16.)[4] As the district court put it, PPLC was oriented to "ship[ ] coals to Newcastle" and needed to adapt once again or face extinction as a going concern. (ECF 185 at 11.)

As the district court expressly found, however, the City enacted the Ordinance in order to stop that reversal—and the Ordinance has successfully achieved that result. (Add. 3-28, 3-71.)

[4] Diluted bitumen, also known as oil sands and as "tar" sands by its detractors, is a type of crude oil produced in Western Canada. (Add. 3-10; P73, ¶ 12; ECF 89, ¶ 25.)

1. The Ordinance was enacted based on concerns about the safety of Canadian "tar" sands.

Activists targeting PPLC's flow reversal project obtained sufficient signatures to place the legislation, then titled the "Waterfront Protection Ordinance," on the November 2013 ballot. (Add. 3-19; ECF 89, ¶ 46; P8-P9.) Like the final version, this iteration would have stopped PPLC's flow reversal project by prohibiting the use of its facilities to load ships, rather than unload them, as flow reversal would require. (P8.) Over the ensuing campaign, proponents argued the Ordinance would address safety issues posed by PPLC's reversal, such as spill risk, voicing an objection to perceived dangers in the transportation of Canadian diluted bitumen. (P102; P103; P104; ECF 89, ¶¶ 50-62; ECF 251-1 at 7:2-13:21, 15:12-28:9, 33:1-61:19.) In brief, Ordinance supporters sought "to prevent tar sands from being pumped from Canada to South Portland." (ECF 89, ¶ 54.)

South Portland voters rejected the Ordinance on November 5, 2013, by a margin of 51% to 49%. (Add. 3-23; P30 at 1; ECF 89, ¶ 63.)

The next day, however, the South Portland City Council met to discuss enacting a moratorium on the importation of oil sands that PPLC's reversal project aimed to accomplish. (Add. 3-23; P14; ECF 89, ¶ 65.) The City Council adopted the moratorium, with councilors opining that the previous referendum failed only because its text could have been read to have an impact broader than merely

stopping PPLC's reversal project, affecting other local oil-related businesses as well. (Add. 3-24; ECF 89, ¶ 76; J8; P15; ECF 89-10, ¶¶ 13-14.)

At the same time it adopted the moratorium, the City created a Draft Ordinance Committee ("DOC") to recommend amendments to the City code that would "address development proposals involving oil sands/tar sands products." (Add. 3-24; ECF 89, ¶ 79; ECF 89-10, ¶¶ 10, 17-18; P28.) Although PPLC asked for one of its representatives to serve on the committee (P7), the City constituted the DOC with individuals with extensive ties to environmental interest groups, one of whom expressly voiced his opposition to PPLC's flow reversal project during the application process. (ECF 89, ¶¶ 81, 84; P17-19; P28). Shortly after selecting DOC's members, the Council met with them in open session to state plainly DOC's charge: "to come up with language that will keep unrefined tar sands ... [o]ut of the City of South Portland." (P115; ECF 251-1 at 131:4-6; ECF 89, ¶ 85.)

Recognizing that the City's effort to regulate the use of a federally-permitted international oil pipeline implicated the Pipeline Safety Act and the "Interstate Commerce Act," South Portland Mayor Gerard Jalbert pointed to an ordinance he stated had been enacted in Sanibel, Florida. As described by Mayor Jalbert, Sanibel wanted to block fast food restaurants but realized it could not simply "outlaw hamburgers." So Sanibel outlawed drive-through windows instead, knowing that fast food restaurants could not survive economically without them,

thus using indirect, pretextual means to obtain an otherwise unobtainable goal. (Add. 4-54; P115; ECF 251-1 at 135:7-136:7; ECF 89, ¶ 92.) City councilors, DOC committee members, and the public thereafter repeatedly referred to their drafting approach as "the Sanibel Defense." (P115; P117; P125; P128; P136; P147; P153; ECF 251-1 at 135:11, 136:18, 138:21, 140:18, 162:18, 167:22-23, 169:6, 205:4, 272:19, 299:11; ECF 89, ¶¶ 85, 87, 90-91, 102, 105-106.)

After study by its attorney member, DOC decided upon citing air quality and land use as its method of "Sanibelizing" the Ordinance's ban from legal challenge, because DOC thought these subjects could be presented as proper subjects of local concern. (P142; ECF 89, ¶¶ 101-103, 105-106, and 109; ECF 251-1 at 240:15-244:3.) The City's charge remained constant: "to keep tar sands out of South Portland." (P129; ECF 251-1 at 177:10; ECF 89, ¶ 100.) The question before DOC was not whether to keep the Canadian oil out, but how to do so in a manner most likely to surmount constitutional scrutiny. (*See, e.g.*, P136; ECF 251-1 at 205:17-209:18 (discussing language attempting to avoid triggering preemption concerns under PSA).)

In July 2014, the DOC presented its final draft to the City Council. (Add. 3-26; ECF 89, ¶¶ 116-121; D200.) When asked why the Ordinance did not refer to Canadian oil specifically, the DOC responded that to do so expressly would have been unwise "for a number of other legal reasons" but that "as a

practical matter" the Ordinance banned "the Canadian product." (P155; ECF 251-1 at 313:8-314:2; ECF 89, ¶ 129.) The Council adopted the Ordinance by a 6-1 vote. (Add. 3-26; J6; P159; ECF 251-1 at 369:11-13; ECF 89, ¶ 131.)

2. The Ordinance prohibits loading crude oil onto ships as the easiest and most effective manner of stopping the transportation of oil from Canada without imposing an explicit ban or affecting local businesses.

Adhering to its "Sanibel Defense," the City named its legislation the "Clear Skies Ordinance" and appended to it a multi-page preamble concerning air quality. (Add. 5-1.) The City's own legal counsel noted such a preamble was not a normal part of a municipal ordinance. (P25; ECF 89, ¶ 110.) The attorney serving on the DOC explained it was included "in the event that there's a legal challenge to the ordinance," stating, "let's put as much belt and suspenders on here as we can." (ECF 89, ¶¶ 114, 116.)

Notably, despite this unusual preamble, the Ordinance does not actually regulate air emissions. Nor does it enact a zoning plan. Rather, the Ordinance flatly prohibits the "bulk loading of crude oil onto any marine tank vessel" and the use of any infrastructure to support that activity, irrespective of any air emissions or whether any new infrastructure is needed to achieve that loading. (Add. 5-11.)

This approach, as opposed to actual air or land use regulation, was employed by the City for four reasons: (1) fear that PPLC might be able to meet any air or land use regulation; (2) fear that the regulation might unintentionally affect

oil-related activity other than the import of Canadian oil; (3) DOC's lack of expertise to set actual regulatory standards; and (4) fear of running afoul of federal law or constitutional prohibitions if the City imposed an explicit ban on transporting Canadian oil through the pipelines. (*See, e.g.*, P120; P125; P128-P129; P131; P138; P136; ECF 251-1 at 147:16-148:18, 164:10-23, 170:11-15, 178:12-179:8, 189:21-190:11, 196:14-17, 205:17-209:18, and 221:-230:8.)

C. The Ordinance's ship loading prohibition shuts down PMPL and the Harbor to the transportation of crude oil and, if enacted elsewhere, would close U.S. ports to both domestic and foreign commerce in crude oil.

1. The Ordinance shuts down PMPL and the Harbor to transportation in crude oil.

The Ordinance achieved its desired effect: PPLC cannot reverse the flow of the pipelines and thus cannot import oil from Montreal for further transportation out of the Harbor. As one City Councilor summed up, "I guess that would take care of tar sands because if you can't load it, why have it shipped here?" (P158; ECF 251-1 at 346:4-5; ECF 89 at PSMF, ¶ 126.)

Because there is no market for transportation of oil into Canada, the result is that no oil flows through the pipelines in either direction. (Add. 3-28; ECF 89, ¶¶ 138-144; P73, ¶ 35.) PPLC's extinction means the loss of jobs for its 28 employees, plus a significant reduction in property tax revenues for all the states and municipalities along PMPL's route. Taxation authorities along PMPL value

its infrastructure at over $120 million, $44.7 million of which lies within City boundaries. (Add. 3-41; ECF 89, ¶¶ 147-148.) Because PPLC is the only actor in South Portland capable of handling crude oil, the Ordinance destroys all crude oil commerce at the Harbor, export or import. (P73, ¶ 19; ECF 89, ¶¶ 28-29.) The $93,000 per landing in economic benefit arising from tanker landings has been eliminated.

2. The national impact of the Ordinance would be catastrophic.

According to the federal government, pipelines are "essential" to the national economy and "safest means to move crude oil products." (P54 at 3.) If enacted elsewhere, the Ordinance not only would devastate this national pipeline network, but would stop maritime commerce at all U.S. ports handling crude oil. The evidence at trial regarding this impact was not only undisputed, but came primarily from the City's own expert. (*See, e.g.*, ECF 248 at 78:8-84:13.)

U.S. ports see literally hundreds of millions of gallons of petroleum loaded on water-going vessels each year, with such loading taking place on the Pacific, Atlantic, and Gulf coasts as well as on inland waterways. (ECF 241 at 68:17-70-12.) AWO's membership, which comprises some 80% of all U.S. flagged tug and towing vessels, moves approximately 280 million tons of petroleum products each year—all of which is loaded onto a vessel in a U.S. port. (ECF 241 at 60:13-61:18, 68:17-70-12.)

In recent years, following the federal government's lifting of the United States oil export ban, U.S. crude oil exports to foreign countries have increased exponentially, from approximately 48 million barrels per year as recently as 2013 to more than 400 million barrels per year in 2017, with the vast majority of this increase shipped abroad after being loaded onto tanker vessels in U.S. ports. (P69; ECF 248 at 80:9-22.) The City's expert described U.S. crude oil exports as "literally booming," but explained that this boom would end if legislation like the Ordinance proliferated across the small number of ports where shippers load oil for transport to foreign buyers. (ECF 247 at 203:22-204:5; ECF 248 at 77:9-82:1.)

II. PROCEDURAL HISTORY

PPLC and AWO filed suit against the City in 2015. (ECF 1.) The complaint advanced several theories, four of which relate to the instant appeal: preemption under the Pipeline Safety Act ("PSA"); preemption under the foreign affairs doctrine; violation of Commerce Clause; and state law preemption. (*Id*.)

In 2017, the district court granted summary judgment to the City on all counts except the Commerce Clause claim and a concomitant civil rights claim, and after a 2018 bench trial on the Commerce Clause claim, the court entered final judgment in the City's favor. It did so despite finding, as a matter of fact and after a full review of the Ordinance's comprehensive legislative history, that the

Ordinance was enacted to stop the pipeline reversal, and that the direct effect of the Ordinance was to prevent reversal and caused the shutdown of PMPL.

Regarding purpose, the court expressly found that the City sought to prevent import of Canadian oil based "in part out of concerns about the safety of handling tar sands crude oil at the Harbor (in terms of environmental and public health risk from spills)." (Add. 3-73, n.6.) Consistent with "the Sanibel Defense," the court found that the drafters of the Ordinance had crafted its language to reference topics typically deemed matters of local control and therefore more likely to provide cover in the event of a legal challenge. (*See* Add. 3-80 ("There is evidence that the City overemphasized or played up its air quality motives and sought to downplay the spill-related concerns.") and 3-83 (concluding motives such as aesthetics, air quality and redevelopment existed, albeit were "overstated").)

As to the Ordinance's effect, the district court found that the burden on commerce from preventing the pipelines' reversal and causing the shutdown of PMPL was "meaningful," without further quantification. (Add. 3-78, 3-86.) The district court also acknowledged that if other municipalities enacted similar ordinances, the number of ports at which crude oil could be loaded onto ships would shrink (Add. 3-56), but characterized this impact as "speculative." (Add. 3-89).

Despite these factual findings, and the undisputed end to pipeline and maritime commerce in oil caused by local prohibition of loading oil onto ships, the district court affirmed its previous PSA ruling and concluded that the Ordinance did not intrude into the United States's foreign policy authority or otherwise violate the Commerce Clause. (Add. 3)

This appeal followed.

SUMMARY OF ARGUMENT

I. *PSA preemption.*

A. The PSA grants the Department of Transportation ("DOT") exclusive jurisdiction to regulate pipeline safety, and expressly precludes municipalities from "adopt[ing] or continu[ing] in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). The Ordinance is just such an interstate pipeline safety standard. As the district court concluded, it was adopted to preclude PPLC from importing Canadian crude oil at least in part because of the City's concerns about the pipelines' safety, such as spills and leaks. And the Ordinance had the intended effect: it prevents PPLC operating its pipelines from north to south based on those concerns. There is no practical distinction between the Ordinance and a rule that simply outlaws use of the pipelines to transport Canadian diluted bitumen because the local regulator deems that transportation unsafe. The PSA, however, vests setting pipeline safety standards exclusively in DOT, not states or municipalities, and DOT has expressly concluded its current regulations set the appropriate safety standard for this transportation.

B. Even if the PSA did not expressly preempt the Ordinance, it does so impliedly because the Ordinance stands as an obstacle to Congress's goal, reflected in the PSA, of ensuring one nationwide, uniform, and exclusive federal scheme of

pipeline safety regulation, consisting of "adequate" and "practicable" standards allowing this vital conduit, deemed the safest by federal authorities, to operate.

II. *The foreign affairs doctrine and Commerce Clause*

A. Under the foreign Commerce Clause and foreign affairs doctrine, state and local governments cannot regulate foreign trade or important areas of foreign policy where uniformity is essential, because such regulations would prevent the federal government from speaking with "one voice" on matters of foreign policy. The Ordinance violates these constitutional mandates because it interferes with two crucial aspects of U.S. foreign policy. First, because the Ordinance's purpose and effect is to stop cross-border pipelines from importing oil from Canada, it interferes with the United States's ability to determine whether and under what circumstances the nation should import foreign oil, an area of foreign policy crucial to the nation's economy and national security that plainly requires the federal government to speak with "one voice." Second, the Ordinance explicitly prevents the maritime export of crude oil, similarly interfering with the United States's ability to determine when and under what circumstances maritime export in crude oil benefits the nation.

B. The Ordinance independently violates the Commerce Clause, foreign and domestic, under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The burden imposed on commerce by a ship loading prohibition on oil is staggering. If

enacted by other local governments, as this Court must assume it will be when assessing the Ordinance's impact, such local control would preclude the import of oil by pipeline and explicitly preclude its export by ship. On the other hand, the Ordinance's claimed local benefits are not only speculative but disconnected from its substance. The City claims that the Ordinance provides benefits of air quality and aesthetics, but the Ordinance regulates neither; it shuts down transportation of oil by ship, irrespective of any impact on air or aesthetics. The lack of any meaningful local benefit from the substance of the Ordinance, combined with the tremendous burden imposed on foreign and interstate commerce and the ease with which the purported benefits could be promoted through less burdensome and evenhanded air and land use regulation, requires invalidation under *Pike*.

III. *State Preemption*

The Ordinance violates the Maine Coastal Conveyance Act because it prohibits loading crude oil onto ships in direct conflict with an order of the Maine Department of Environmental Protection permitting PPLC to load crude oil onto ships.

STANDARD OF REVIEW

Whether the Ordinance is preempted is a legal question reviewed *de novo*. *O'Donnell v. Boggs*, 611 F.3d 50, 53 (1st Cir. 2010). Whether the Ordinance violates the Commerce Clause or the foreign affairs doctrine is likewise a legal question reviewed *de novo*. *See, Portland Pilots, Inc. v. NOVA STAR M/V*, 875 F.3d 38, 43 (1st Cir. 2017) ("As this appeal arises following a bench trial, we review the district court's factual determinations for clear error and its legal conclusions de novo.") (internal quotations and brackets omitted).[5]

ARGUMENT

I. The Pipeline Safety Act both expressly and impliedly preempts the Ordinance because the Ordinance intrudes into the field of pipeline safety standards and stands as an obstacle to federal goals.

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, federal law can preempt local regulation expressly or by implication, as when the local regulation

[5] The trial court granted summary judgment on the PSA claim, so this Court normally would take the facts in the light most favorable to PPLC and AWO, drawing all reasonable inferences in their favor from the summary judgment record. *See Tobin v. Federal Exp. Corp.*, 775 F.3d 448, 450 (1st Cir. 2014). After the trial on the Commerce Clause claim, however, the district court appeared to revisit its PSA ruling. (*See* Add. 3-73, n.6.) Thus, this Court should review the trial record rather than the summary judgment record in its review of the PSA preemption issue. *See Mandel v. Boston Phoenix, Inc.*, 456 F.3d 198, 205-06 (1st Cir. 2006); *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 557 (1st Cir. 2003). Ultimately, this issue is academic: the Ordinance is preempted, whether deferring to the district court's factual findings after trial or examining the summary judgment record in the light most favorable to Appellants.

"stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1288 (2016) (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)). Here, the Ordinance is preempted under both tests.

A. The Ordinance is expressly preempted.

1. The PSA expressly preempts local regulations designed to affect or affecting the field of cross-border pipeline safety standards.

Congress enacted the PSA to "provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities." 49 U.S.C. § 60102(a)(1) (emphasis supplied). Congress gave effect to that purpose in two basic ways.

First, it delegated to the Department of Transportation ("DOT") plenary authority to prescribe standards as to "all aspects of any pipeline transportation in or affecting interstate commerce." *Exxon Corp. v. U.S. Sec'y of Transp.*, 978 F.Supp. 946, 950 (E.D. Wash. 1997) (citing S. Rep. 96-182, *reprinted in* 1979 U.S.C.C.A.N. 1971, 1988). *See also* 49 U.S.C. §§ 60101 *et seq.*; 49 C.F.R. Part 195.[6] These standards include those "designed to meet the need for … protecting

[6] Federal regulations, as well as statutes, can preempt state and local laws and ordinances. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 151, 153 (1982).

the environment." 49 U.S.C. § 60102(b)(1)(3)(ii) (section entitled "Practicability and Safety Needs Standards").[7]

Second, Congress ensured uniformity in pipeline safety regulation by preventing states and municipalities from intruding into the field delegated to DOT. Congress accomplished that goal through an express preemption provision, which provides that a "State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). Courts have unequivocally ruled that this provision preempts the entire field of interstate pipeline safety and operations, *i.e.*, the field regulated under the PSA by DOT.[8] As the word "adequate" in section 60102(a)(1)

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[7] Congress amended the PSA in 1992 to include a "new emphasis on environmental protection." *See* H.R. Rep. No. 102-247, *reprinted in* 1992 U.S.C.C.A.N. 2642, 2643. The PSA also grants the Secretary of the DOT enforcement authority in the event of threats to "life, property or the environment" or if the facilities "would be constructed or operated, or a component of the facility is or would be constructed or operated, with equipment, material, or a technique that the Secretary decided is hazardous to life, property or the environment." *See* 49 U.S.C. § 60112(a)(2).

[8] *See, e.g., Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 878 (9th Cir. 2006) ("Federal preemption of the regulation of interstate pipeline safety . . . is manifest in the language of the PSA provision entitled 'Preemption.'"); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 358 (8th Cir. 1993) ("Congress has expressly stated its intent to preempt the states from regulating in the area of safety in connection with interstate hazardous liquid pipelines. For this reason, the state cannot regulate in this area . . . ."); *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465, 470 (8th Cir. 1987) ("Congress intended to preclude states from regulating in any manner whatsoever with respect to the safety of interstate

(footnote continued)

reflects, this goal includes establishing and applying workable standards that enable cross-border pipelines to operate. *See* 49 U.S.C. § 60102(b)(1) ("[a] standard prescribed under [subsection (a)] shall be – (A) practicable") (brackets added).

2. The Ordinance intrudes into the PSA's preempted field.

There can be no dispute the City designed the Ordinance to prevent the reversal of PMPL and shut it down altogether based on safety concerns about the transportation of diluted bitumen, including a fear of pipeline spills or leaks. (*See*

(continued footnote)
transmission facilities" and left "nothing to the states in terms of substantive safety regulation of interstate pipelines . . . ."); *Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49, 52 (D.R.I. 2013) ("Congress clearly has manifested an intent to occupy the field and has preempted local zoning ordinances and building codes to the extent that they purport to regulate matters addressed by federal law."); *N. Border Pipeline Co. v. Jackson Cty.*, 512 F.Supp. 1261, 1264 (D. Minn. 1981) ("entire field" preempted); *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 319 F.Supp. 1138, 1141 (E.D. La. 1970), *aff'd*, 445 F.2d 301 (5th Cir. 1971) (PSA "completely preempted" the field of interstate pipeline safety, thereby rendering invalid all local regulation "whether its standards . . . are greater, lesser or identical with" those of the PSA); *People ex rel. Sneddon v. Torch Energy Servs., Inc.*, 102 Cal. App. 4th 181, 187 (Cal. Ct. App. 2002) ("The language of the PSA clearly expresses the intent of Congress to fully occupy the field of oil and gas operations and interstate pipeline safety so that any state law that touches upon the area, even consistent state law, is preempted."); *S. Cal. Gas Co. v. Occupational Safety & Health Appeals Bd.*, 58 Cal. App. 4th 200, 209 (Cal. Ct. App. 1997) ("We find that it was the clear and manifest purpose of Congress to occupy the field … in the broadest sense possible") (internal quotations omitted). *See also* 49 C.F.R. Part 195, App. A ("The [Act] leaves to exclusive Federal regulation and enforcement the 'interstate pipeline facilities,' those used for the pipeline transportation of hazardous liquids in interstate or foreign commerce.").

Add. 3-73, n.6.) Indeed, the City conceded that a primary purpose of the Ordinance was "protection of the environment from spills." (ECF 254 at 9.)

The district court concluded that the Ordinance's purpose did not matter for preemption analysis. That is incorrect. Courts routinely review whether local regulation is intended to regulate within the preempted field. *See Texas MidStream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 211 (5th Cir. 2010) (motivation is germane to PSA preemption analysis) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990) (state law's purpose was relevant in determining whether the law was preempted in the field of nuclear safety)).

In any event, the Ordinance's purpose is ultimately immaterial because the City achieved its desired result: the Ordinance stops PPLC's reversal project, regulating what product flows through the pipeline, in which direction, and in doing so, shuts down pipeline operations entirely. Under the PSA, however, DOT, not the town at the end of a pipeline, prescribes what hazardous liquid may flow through an interstate pipeline and how that flow is directed, applying adequate, practicable, and uniform regulations. *See, e.g.*, 49 C.F.R. Part 195, Subparts B-H; 49 C.F.R. §§ 195.64, 195.452, and 195.258-262.

Notably, in 2011, Congress required the Secretary of Transportation to complete a comprehensive review of DOT hazardous liquid pipeline facility regulations to determine whether they sufficiently regulate pipeline facilities used

for the transportation of diluted bitumen. *See* Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, 125 Stat. 1905. DOT complied, undertaking a study of its regulations, including flow regime, to ensure the safety of the transportation of this specific product. *See* Mark A. Barteau et al., Transp. Research Bd., Special Rep. No. 311, *Effects of Diluted Bitumen on Crude Oil Transmission Pipelines* (2014).[9] The resulting study, drafted by an expert committee of the National Research Council, concludes that diluted bitumen is no more likely than other crude oils to be accidentally released from a pipeline or impose physical damage outside the range of other crude oil shipments. *See id*. at 2-3. Accordingly, in a 2015 proposed rule addressing the safety of hazardous liquid pipelines, DOT noted the results of the study and concluded no special regulation of diluted bitumen was necessary. *See* 80 Fed. Reg. 61,610, 61,620 (Oct. 13, 2015). The following year, Congress reinforced its commitment of pipeline safety authority to DOT, strengthening the power of DOT—not local authorities—to shut down pipelines based on safety concerns. *See* Protecting Our Infrastructure of Pipelines Enhancing Safety Act of 2016 ("PIPES Act"), Pub. L. No. 114-193, § 16, 130 Stat. 525 (codified at 49 U.S.C. § 60117(o)).

[9] The full version of the report can be found at https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/Report%20to%20Congress%20on%20the%20Study%20of%20Diluted%20Bitumen%20-%20August%202014.pdf (last visited Feb. 10, 2019).

While acknowledging the DOT study, the district court concluded that the City could supersede DOT's conclusions based on its own, local decision-making, because the City deemed "tar sands to be a dangerous article … and intended to alleviate the risks from transporting [it.]" (Add. 3-73.) This is precisely what the preemption provision in the PSA was intended to prevent, and the district court's sanction of that approach cannot stand.

The trial court's other articulated bases for upholding the Ordinance equally misapprehend the PSA's preemptive scope.

The district court concluded the PSA preempts only "standards," whereas the Ordinance is in effect a "prohibition" and, according to the district court, therefore not a standard. (Add. 4-170.) But the federal statute draws no such distinction, and DOT routinely enacts "prohibitions" under its standard-setting authority. *E.g.*, 49 C.F.R. § 195.406 (prohibiting operators from maintaining pipes at particular pressures) and § 195.112 (prohibiting operators from installing pipes made of certain materials). The 2016 PIPES Act empowers DOT to impose "emergency restrictions, prohibitions, and safety measures" on the operation of oil pipelines where necessary to avert an imminent hazard. *See* 49 U.S.C. § 60117(o)(1).

An ordinance that sets the amount of oil that may be transported through a pipeline at zero barrels per day is no different than an ordinance that sets a limit of

100 barrels per day, and no authority suggests the PSA would treat the two differently. In any event, even under the district court's reasoning, the Ordinance operates as a standard rather than a total prohibition because, although it precludes oil from flowing from Canada to Maine, it does not prohibit flow in the other direction; market forces prevent operating the pipeline south to north.

The district court also equated the Ordinance to a local siting regulation, with only incidental impact on the pipelines. (*See* Add. 4-172-4-174.) But the Ordinance regulates the operation of an existing pipeline, not the site at which a new pipeline may or may not be located. Nor is the Ordinance's effect on the pipeline in any way incidental. The district court itself concluded that the *whole point* of the Ordinance was to prevent the transportation of oil from Canada through the pipeline. The Ordinance is not a generally applicable zoning rule that has a secondary effect on a pipeline. It is a regulation targeted at PMPL, with, as found by the trial court, the intended and actual effect of preventing the reversal of the direction of the flow of oil through its pipelines.

To conclude that a municipal rule like this one directed at governing flow regime is "incidental" and thus not preempted would undermine the animating purpose of the PSA's preemption clause, which is to ensure that DOT—and *only* DOT—makes decisions regarding when and under what circumstances interstate oil pipelines can be operated safely. *See CSX Transp., Inc. v. Healey*, 861 F.3d

276, 284 (1st Cir. 2017) (looking to the context and purpose of federal regulatory scheme to determine scope of a preemption provision), citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996). Federal uniformity in pipeline safety regulation is crucial because interstate pipelines by nature run through numerous jurisdictions. If each one of those jurisdictions were "entitled to demand compliance with their own safety standards, the clear Congressional goal of a national standard for hazardous liquid pipeline safety would be thwarted." *Williams Pipe Line Co. v. City of Mounds View*, 651 F.Supp. 551, 569 (D. Minn. 1987).

B. The PSA impliedly preempts the Ordinance because it stands as an obstacle to the PSA's goal of national uniformity in cross-border pipeline regulation.

"[E]ven if there were no express preemption, it is obvious that many individual state agencies promulgating regulations according to their own notions of 'safety' and 'practicability' would frustrate the purpose of the Standards Committee and Congress' intent to establish uniform standards." *N. Border Pipeline*, 512 F. Supp. at 1264-65.

Under the Ordinance, the City arrogates to itself the power to dictate whether and in which direction oil may flow through a 200-mile pipeline running through three states and across an international border from a foreign, sovereign nation. Allowing such an exercise of local authority would wholly undermine the

national uniformity the PSA was meant to provide and, if enacted by other towns across the country, would make transportation of any particular hydrocarbon through a pipeline dependent not on DOT's judgment but the varied views of hundreds or thousands of city councils across the nation. The most fundamental aspect of PSA regulation—setting practicable standards that adequately protect against the risk to life and property in order to maintain the safest mode of oil transportation—is superseded by a local decision that federal standards are inadequate, shutting down that transportation.

The district court's contrary conclusion misunderstands the implied preemption doctrine in general and PSA's the goal in particular. The district court stated that it is possible to comply with both the PSA and the Ordinance and with the PSA's safety goal by simply ceasing pipeline operations. (Add. 4-170-4-171.) This is true—the pipelines can cease to exist, in which case there is no possibility of a spill—but inapposite. The relevant legal question is not whether it is possible for PPLC to comply with both the PSA and the Ordinance by shutting down, but whether the Ordinance stands as an obstacle to the PSA's purpose of establishing regulatory "adequate" and "practicable" uniformity in the area of pipeline safety regulation. Had Congress wanted DOT pipeline safety regulation to act as a mere regulatory floor, it would not have enacted an express preemption provision banning states and localities from the field of pipeline safety, and it would not have

charged DOT with enacting "practicable" regulations. The PSA's express preemption provision controls for the reasons explained earlier, but even if it did not, the Ordinance still would undermine the PSA's goal of federal uniformity, an independent basis for the Ordinance's invalidation.

II. The Ordinance violates the Commerce Clause and foreign affairs doctrine, weighing the aggregate impact were local regulation like the Ordinance to proliferate.

The district court conclusively found that the purpose of the Ordinance was to stop the reversal of, and its effect was to shut down, an international pipeline. Accordingly "a more extensive constitutional inquiry" is required than when only domestic interests are implicated. *Japan Line, Ltd. v. City of Los Angeles*, 441 U.S. 434, 446, 448-49 (1979); s*ee also South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 65, 68-69 (1st Cir. 1999).

Critically, while only one municipality enacted this Ordinance and it affects only PMPL, courts considering the impact of a local regulation must examine the aggregate impact on commerce and foreign relations were similar regulations enacted elsewhere. *See Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1991) (Commerce Clause); *Pharm. Research and Mfrs. of Am. v. Concannon*, 249 F.3d 66, 81 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003) (Commerce Clause); *Natsios*, 181 F.3d at 52-53 (foreign affairs). The issue is not whether other such local

regulation exists or is likely to be enacted, but rather the impact were the regulation to proliferate.[10] Thus, while the district court believed it was "speculative" that regulations like the Ordinance would be enacted elsewhere, it missed the relevant legal point—the analysis must consider aggregate impact, based on the assumption that the relevant local regulation would be enacted by localities nationwide.[11]

Finally, courts must also consider not only a regulation's potential aggregate impact, but the nature of that impact, *i.e.*, whether it is incidental, or targeted. *See American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) (a local regulation must fall where there exists a "likelihood that state legislation will

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[10] *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337 (1989) (striking down a state law based on the practical effect of the law "in conjunction with" other similar laws "that have been *or might be* enacted throughout the country") (emphasis supplied); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) ("Today ... New Jersey claims the right to close its borders .... Tomorrow, cities in New Jersey *may* find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States *might* then claim the right to close their borders. The Commerce Clause will protect New Jersey *in the future*, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce ….") (emphasis supplied); *see also U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1069 (8th Cir. 2003); *Diamond Waste v. Monroe Cty.*, 939 F.2d 941, 944-45 (11th Cir. 1991); *Randy's Sanitation, Inc. v. Wright Cty.*, 65 F. Supp. 2d 1017, 1027 (D. Minn. 1999).

[11] It would also be incorrect to assume that enactment elsewhere is unlikely. A City Councilor believed that Albany, New York and Mobile, Alabama selectmen were working on similar ordinances. (P155; ECF 251-1 at 312:2-3.) Ordinance supporters intended the Ordinance be used as a template for local action across the country. (P111; P158; P159; ECF 251-1 at 118:8-14, 332:14-17, 335:6-12, 356:4-12, 358:1-3.)

produce something more than an incidental effect" on foreign affairs); *Pike*, 397 U.S. at 142 (local regulation is more likely to withstand Commerce Clause challenge when it is "evenhanded" and its effects on cross-border commerce only "incidental"); *Natsios*, 181 F.3d at 52 (state law violates the foreign affairs doctrine when it has more than the "incidental or indirect" effect on foreign relations).

Applying these principles, the Ordinance's interference with the federal government's ability to speak with one voice on issues affecting foreign relations – when and with whom the U.S. trades in oil and who may engage in coastwise trade; the Ordinance's non-incidental targeting of commerce itself and its devastating impact on that commerce, both foreign and domestic; and the disconnect between the substance of the Ordinance and any evenhanded effort to achieve its purported benefits, all point to one, inexorable conclusion: under either the foreign affairs doctrine or the Commerce Clause, foreign or domestic, the Ordinance cannot stand.

A. The Ordinance violates the "One Voice" test.[12]

1. Local regulation may not exceed a threshold level of impact on foreign affairs or impede the President from speaking with one voice in an area where uniformity is essential.

Article II, Sections 2 and 3 of the Constitution provides broad and exclusive power to the President and federal authorities over foreign affairs. Under these provisions, there is "a threshold level of involvement in and impact on foreign affairs" that local authorities "may not exceed." *Natsios*, 181 F.3d at 52 (citing *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968)). A state law offends these federal foreign affairs powers when it "compromises the President's very capacity to speak for the Nation with one voice." *Garamendi*, 539 U.S. at 420.

The foreign Commerce Clause echoes this restriction when commerce is implicated and uniformity is needed. *See Natsios*, 181 F.3d at 68 ("Independent of any claim" based on foreign affairs preemption, Supreme Court decisions "make clear that a state law can violate the dormant Foreign Commerce Clause by impeding the federal government's ability to 'speak with one voice' in foreign affairs, because such state action harms 'federal uniformity in an area where

[12] The district court granted summary judgment on the foreign affairs claim and ruled on the Commerce Clause claim after trial. While the legal analysis under these constitutional provisions is not identical, these claims are so entwined it is difficult to separate them for review on appeal. In any event, whether considering the summary judgment or the trial record, the relevant evidence regarding both claims is largely undisputed.

federal uniformity is essential.'") (quotation omitted). In striking down a state statute, the Supreme Court has observed that if the statute creates "an asymmetry" in the way two nations treat each other, "foreign nations disadvantaged by the [law] may retaliate against American-owned instrumentalities present in their jurisdiction … so that the Nation as a whole would suffer." *Japan Line*, 441 U.S. 434 at 450.

2. The Ordinance violates the "One Voice" test because it directly intrudes, in a non-incidental way, into areas of foreign affairs where uniformity is essential.

The Ordinance's impact on foreign interests is asymmetrical and non-incidental. It targets the flow of oil *from* Canada, while allowing flow *to* Canada, and prohibits export, not import, of crude oil from the Harbor. The aggregate impact of the ship loading ban on commerce is also, as noted *supra*, staggering, shutting down ports to trade in crude oil throughout the nation. Given that trade in oil, through cross-border pipelines, and maritime commerce have all long been subjects of the exercise of federal authority over foreign relations and require uniformity of treatment, the Ordinance cannot stand.

a. Oil import and export is a matter of national strategic interest, and the Ordinance directly conflicts with federal law in this area.

Due to the criticality of oil to national security, how much oil comes into and goes out of the United States and from where have long been a major aspect of our foreign policy. *See* Council on Foreign Relations, *Timeline: Oil Dependence and*

U.S. Foreign Policy 1850-2017, https://www.cfr.org/timeline/oil-dependence-and-us-foreign-policy (last visited Feb. 10, 2019).[13]

A recent example demonstrates the conflict between the Ordinance and the federal government's policy decisions concerning the international oil trade. In 2015, Congress lifted the long-standing ban on the foreign export of domestic crude oil. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, Division O, Title I, Section 101. According to the City's own expert, this foreign policy decision has led to the U.S. exporting fast-growing amounts of U.S. crude oil to nations around the world. (ECF 248 at 73:2-81:2; P69.)

The Ordinance, however, flatly prohibits oil export, conflicting with the considered federal decision to lift the export ban. (*See* ECF 248 at 81:12-82:5 (City's expert admitting this foreign commerce of oil would be blocked by such local ordinances).) Under the Ordinance, local, not federal authorities decide if and when oil can be exported, contrary to federal law.

[13] *See also* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, Division O, Title I, Section 101 (lifting previous export ban of domestic oil, subject to Presidential assessments); Energy Policy and Conservation Act of 1975, Pub L. No. 94-163, 89 Stat. 871, Title I, Part B (establishing Strategic Petroleum Reserve); 19 U.S.C. § 1862 ("Safeguarding national security"; providing steps that may be taken regarding imports if the President determines they are needed for national security purposes, historically applied with respect only to oil).

b. The Ordinance interferes with U.S. decision-making in the area of oil trade and pipeline transit with Canada, vital to U.S.-Canadian relations.

Within the overarching federal foreign policy governing trade in oil, Canada, a stable non-OPEC member, plays and has long played a crucial role, as reflected and adjusted by treaties, agreements and individual Presidential decisions.

First, the importance to Canada's economy of exporting its oil cannot be overstated. (*See, e.g.*, P59 at 5-17, 25, 28 (listing statistics); P64-P65 (showing how Canadian crude is being transported for export largely through U.S. pipelines).)[14] By 2015, Canada's net export revenues from crude oil and bitumen had reached $70 billion. (P63.) As a Canadian representative appearing before the City Council stated: "Obviously, the ordinance and the moratorium target a project of a major Canadian interest, which explains why I'm here." (P106; ECF 251-1 at 76:4-5.)

Second, the importance of Canadian oil to the United States and the interdependence of U.S-Canadian energy markets are equally profound. (P55 at 3.) Canada is the United States' largest trading partner and its greatest supplier of foreign energy. Dep't of State, *Fact Sheet: U.S. Relations With Canada* (Feb. 1,

[14] None of the evidence admitted at trial on this issue was disputed, and the district court entered no contrary findings.

2018), https://www.state.gov/r/pa/ei/bgn/2089.htm.[15] The Ordinance not only interferes with Canadian interests in an asymmetrical manner, inviting retaliation, but intrudes in and conflicts with foreign policy maintaining the U.S.'s own interests in this area.

To date, and for many years, federal foreign policy has been to encourage trade in oil and other energy resources with Canada, and to facilitate cross-border transportation in such resources. For instance, the North American Free Trade Agreement provides that the United States shall regulate cross-border trade to ensure consistent and nondiscriminatory regulation with respect to "energy and basic petrochemical goods." North American Free Trade Agreement ("NAFTA"), Art. 603(1), 32 I.L.M. 289, 1993 WL 720485 (1993). The United States likewise "recognize[d] that it is desirable to strengthen the important role that trade in energy and basic petrochemical goods play in the free trade area and to enhance this role through sustained and gradual liberalization." *Id.*, Art. 601(2).

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[15] As of 2016-17, 99% of Canada's production of crude oil is exported to the United States, constituting 43% of total U.S. crude oil imports and 20% of U.S. refinery crude oil intake. (P59 at 31.) As of 2015, Canada was the U.S.'s top foreign oil supplier, providing four out of every ten barrels of oil imported, of the total 7.4 million barrels per day. As the U.S. has noted, the oil produced in Canada "is well-matched to processing capacity in the United States, where many refineries have the equipment needed to process such oil," and with few alternative outlets for export, Canada is "expected to continue to provide a large share of U.S. oil imports for the foreseeable future." (P57.) U.S. refineries have invested in reconfiguring their facilities specifically to process Canadian oil. (P66.)

Reaffirming those goals, the United States recently agreed to replace NAFTA with the U.S.-Mexico-Canada Agreement, available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between ("USMCA"),[16] which, if ratified by the U.S. Senate, would continue to promote cross-border trade in oil between the two nations. *See, e.g.*, USMCA, CA-U.S. Side Letter on Energy, Art. 3 ("recogniz[ing] the importance of enhancing the integration of North American energy markets based on market principles, including open trade and investment among the Parties, to support North American energy competitiveness, security, and independence").

This policy is longstanding. The 1977 Transit Pipelines Agreement between the United States and Canada provides that "[n]o public authority in the territory of either Party" will impede or interfere "in any way" with hydrocarbon transportation. Agreement Between the Government of the United States of America and the Government of Canada Concerning Transit Pipelines, Art. II, 28 U.S.T. 7449, 1977 WL 181731 (1977). The President and the Canadian Prime Minister subsequently agreed to strengthen Canada-U.S. energy trade "by reducing restrictions, particularly those on petroleum imports and exports, and by maintaining and extending open access to each other's energy markets, including

[16] The Court can find the full text of the USMCA at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (last visited Feb. 10, 2019).

oil[.]" Joint Canada-United States Declarations on Trade and International Security, 1 Pub. Papers 307 (Mar. 18, 1985). President Reagan further made findings confirming "the objective of liberalizing energy trade, including crude oil, between the United States and Canada." Pres. Findings on U.S.-Canadian Crude Oil Transfers, 50 Fed. Reg. 25,189 (June 14, 1985). "Both Governments recognized the substantial benefits that would ensue from broadened crude oil transfers and exchanges between these two historic trading partners and allies. These benefits would include the increased availability of reliable energy sources, economic efficiencies, and material enhancements to the energy security of both countries." *Id*.

A recent GAO report discusses the importance of an integrated North American energy relationship, with U.S. government officials noting that the U.S. energy sector is extensively integrated with its neighbors, the system is working well, and "it is important not to disrupt the advances that have already been made." U.S. Gov't Accountability Office, Rep. No. GAO-18-575, North American Energy Integration at 34-35 (Aug. 2, 2018), https://www.gao.gov/products/GAO-18-575.

Local decision-making to cut off cross-border transit in oil from Canada directly undermines this national policy. Indeed, if every municipality decided to preclude international oil pipelines from transporting oil, there would be no way for the United States to give effect to its longstanding foreign policy.

The district court believed this argument proves too much, because in that court's view, an ordinance that shuts down any industry—the district court's example was a ban on fireworks—the aggregate effect would necessarily be to cut off trade in that industry. (Add. 3-90.) But the international oil trade is not just any industry—it is, for the reasons just described, not only strategically crucial to the United States' foreign policy, but is itself the subject of significant trade agreements. Further, the Ordinance does not evenhandedly ban a product's use within the City's borders. Rather, it asymmetrically prevents the transportation of oil coming from Canada, not one drop of which comes to rest within those borders for City consumption. The Ordinance purposefully blocks a stream of cross-border commerce by plugging an international conduit of trade that starts in Montreal and proceeds by ship through the Port of Portland. A local decision not to consume a product might not have international implications, but such asymmetrical interference with a cross-border conduit of trade certainly does, and the Ordinance unduly interferes with the federal government's constitutional power to conduct foreign affairs.

c. The need for federal uniformity in cross-border pipeline and maritime transportation is particularly acute.

As noted above, the Ordinance poses particular problems because it regulates not only international commerce, but the instrumentalities of that commerce in the form of cross-border pipelines and shipping. Even when only the

domestic Commerce Clause is implicated, state or local legislation regulating cross-border modes of transportation is often deemed constitutionally infirm due to the need for uniformity to avoid the obstruction of the free flow of commerce.[17] The Ordinance not only intrudes into two such modes of commerce, cross-border pipelines and shipping, but does so in a way that impinges on foreign relations decision-making.

i. Presidential pipeline permitting

Presidential permitting decisions graphically reflect how decision-making in this area involves foreign policy considerations.

As reflected by President Roosevelt's 1941 executive order establishing the first PMPL pipeline to aid Canada in time of war (Presidential Proclamation, No. 2517, 6 Fed. Reg. 5081 (Oct. 7, 1941)), cross-border conduits for the transportation of crude oil long have been the subject of Presidential control, based on his foreign

[17] *See, e.g.*, *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (striking down state law forbidding 65-foot double-trailer trucks within its borders); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (striking down similar law in another state); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (striking down state law regulating shape of truck mud flaps); *S. Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945) (striking down state law limiting number of cars on trains and holding that "ever since *Gibbons v. Ogden* … the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority"). *See also* ECF 241 at 64:23-65:13 (AWO representative testifying to the need for uniformity in maritime commerce regulation to maintain its membership's competitive position).

affair powers. *See Sisseton-Wahpeton*, 659 F. Supp. 2d at 1081 ("[T]he President has the sole authority to allow oil pipeline border crossings under his inherent constitutional authority to conduct foreign affairs."); *see also* Exec. Order No. 11,423, 1968 WL 99009 (1968). Recent permitting decisions demonstrate just how closely presidential pipeline permitting is tied up with important foreign policy objectives.

In 2009, for example, the Department of State ("DOS") issued a presidential permit to build the "Alberta Clipper" pipeline from the oil sands region of Alberta, Canada across the international border in North Dakota to U.S. oil markets. *See* 74 Fed. Reg. 43212, 2009 WL 260049 (Aug. 26, 2009). DOS amended this permit in 2017 to allow for an increase in the volume of oil transported from Canada, emphasizing the national interest in increasing U.S. energy security and the importance of Canadian energy resources. The 2017 permitting decision notes that "crude oil supplies in western Canada represent the largest and closest foreign supply source to domestic refineries," and that the permit would "advance the priorities President Trump has articulated regarding U.S. energy," referencing a joint statement by the President and the Canadian Prime Minister providing that "U.S.-Canada energy and environmental cooperation are inextricably linked, and we commit to further improving our ties in those areas." The permitting decision further notes: "Issuance of this permit will send a positive signal about the future

reliability and availability of United States' energy imports from Canada and the trade relationship generally, which will advance U.S. energy, economic, and foreign policy goals." Department of State Record of Decision and National Interest Determination ("ROD"), Enbridge Energy, Limited Partnership, Application for Presidential Permit, Line 67, §§ 6.0, 7.0, https://www.state.gov/documents/organization/275069.pdf (last visited Feb. 10. 2019).

Conversely, after weighing foreign policy interests, the Obama Administration denied a presidential permit for the Keystone XL pipeline. ROD, TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, https://2012-keystonepipeline-xl.state.gov/documents/organization/249450.pdf (last visited Feb. 10, 2019). In making this determination, the Secretary of State acknowledged "the importance of sourcing foreign oil from our neighbors like Canada and Mexico." *Id*. at 29 (internal quotations omitted). Ultimately, however, the Obama Administration concluded that other factors outweighed this energy security factor, and that, while Canada had asserted that a denial would "have a negative impact on" U.S. relations with Canada, the impact on these relations was insufficient to outweigh other factors. *Id*. at 30.

The Trump Administration then re-assessed national interests and foreign policy factors, and issued a permit for Keystone XL. ROD, TransCanada Keystone

Pipeline, L.P. Application for Presidential Permit, Keystone XL Pipeline, https://keystonepipeline-xl.state.gov/documents/organization/269323.pdf (last visited Feb. 10, 2019). The decision states that "[g]lobal energy security is a vital part of U.S. national security" and that crude oil "is vital to the U.S. economy," and also notes Canada's role as the largest and fastest-growing source of U.S. crude oil imports, providing a stable and secure source of energy supply physically close to the U.S. market. *Id*. at 27-28. The decision emphasizes that Canadian oil sands projects in particular provide greater geological certainty of future supply levels, and notes that without transboundary pipeline infrastructure, Canada might redirect this source of reliable supply to Asian markets. *Id*. at 28. Emphasizing the importance of the U.S.-Canadian relationship, DOS found "that it is in the United States' interest to strengthen the role Canada plays as a secure conduit for crude oil to reach the U.S. market[.]" *Id*. at 29.

In sum, whether and how cross-border pipelines transport oil to and from Canada is a sensitive foreign policy decision to be weighed by the President. Applying the factors noted in *Natsios* and *Garamendi*, and as found by the district court, the design and effect of the Ordinance is to block PMPL's importation of oil from Canada. If followed elsewhere, local authorities, not the President, would be in charge of deciding whether to allow this importation. Foreign policy for decades has sought to facilitate cross-border trade in hydrocarbons with Canada, a

stable, non-OPEC nation, and presidents have taken carefully calibrated approaches in weighing national security and foreign policy interests when making decisions regarding cross-border pipelines with Canada. The Ordinance disrupts and conflicts with this calibrated approach, wholly ignoring the foreign policy considerations carefully weighed by the President consistent with strategic national interests.

ii. Maritime commerce and federal licensing

The Ordinance expressly bans the loading of crude oil onto ships, and thus prohibits ships that otherwise would transport crude oil from engaging in coastwise and international trade. Such regulation of maritime commerce strikes at the heart of why the Founders enacted the Commerce Clause, and, indeed, the Constitution as a whole—to stop the Balkanization of interstate trade, and maritime commerce in particular.

In *Japan Line*, involving shipping containers, the Court expressly cited shipping in identifying when uniformity is required in the foreign commerce arena:

> the Court consistently has distinguished oceangoing traffic ... ; these cases reflect an awareness that the taxation of foreign commerce may necessitate a uniform national rule. Indeed, in *Pullman's Palace*, the Court wrote that the "'vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature.'" 141 U.S., at 24 … quoting *Railroad Co. v. Maryland*, 21 Wall. 456, 470, (1875).

441 U.S. at 450 (citation omitted).

The Supreme Court long has held that a state law is preempted when it purports to ban federally licensed maritime activity, and it has been a fundamental principle of federal law throughout the history of our nation that "no State may completely exclude federally licensed commerce" upon its waterways. *Douglas v Seacoast Prods., Inc.*, 431 U.S. 265, 283 (1977) (striking down Virginia statute prohibiting federally licensed vessels from fishing in Chesapeake Bay) (citations omitted). *See also Young v. Coloma-Agaran*, 340 F.3d 1053, 1057 (9th Cir. 2003) (striking down state regulation prohibiting licensed tour boat operators from operating in a particular bay; "[w]e conclude that the ban, in conjunction with the relevant federal shipping laws, violates the Supremacy Clause. Simply stated, the ban completely excludes the plaintiffs from conducting their federally-licensed tour boat businesses in Hanalei Bay."); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 348 (4th Cir. 2001) (striking down state statutory provisions excluding federally licensed barges from transporting any type or amount of municipal solid waste on rivers in Virginia; "[p]recedent is clear, however, that a state statute that completely excludes federally licensed commerce upon such state's waterways is unconstitutional."), citing *Douglas*, 431 U.S. at 283.

The Ordinance constitutes such an impermissible ban. It prohibits federally licensed marine vessels from loading cargo, a component of coastwise trade. Title 46, Chapter 121 of the U.S. Code provides for the licensing of domestic vessels

engaged in coastwise trade and precludes state and local governmental authorities from banning such trade. Federal law also provides for federal licensing of foreign-flagged vessels engaged in trade in oil and oil products, and precludes state and local governmental authorities from banning such trade. *See* 46 U.S.C. § 9101; 46 C.F.R. Part. 154, Subpart E. The holding of a federal license "entitles a vessel to employment in unrestricted coastwise trade." 46 C.F.R. § 67.19(a). As the court in *Young*, *supra*, noted:

> As early as 1824 in *Gibbons v. Ogden* [22 U.S. (9 Wheat.) 1 (1824)], a coasting license has been held to unequivocally grant the authority to carry on the coasting trade. *Id*. at 212. The sweeping nature of the coasting license is premised on the idea that the right to engage in interstate commerce derives from natural law and the Constitution confers absolute control of its regulation to congress. *Id.* at 211; *cf*. 58 Fed. Reg. 60256-01, 60258 (Nov. 15, 1993) (to be codified at 46 C.F.R. pts. 1 & 67) ("[T]he long-held policy of the Coast Guard [is] that the right to engage in the restricted trades is an entitlement that appertains to the vessel and arises as a matter of law upon meeting the requisite conditions.").

340 F.3d at 1056. *See also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 164 (1978) ("Congress did not anticipate that a vessel … holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States."); *Sperry v. Florida*, 373 U.S. 379, 385 (1963) ("No State law can hinder or obstruct the free use of a license granted under an act of Congress.").

In sum, cross-border oil trade and maritime commerce are core subjects of federal control. By prohibiting the flow of oil through the pipeline from Canada and shutting down the Harbor to oil export, the Ordinance impermissibly intrudes into areas requiring uniformity and a careful approach calibrated by federal foreign policy authorities. Based solely on the preemptive force of federal foreign affairs powers and the foreign Commerce Clause, the Court should declare the Ordinance unconstitutional.

B. The Ordinance fails the *Pike* test applicable under the domestic and foreign Commerce Clause.

An additional test for violation of the Commerce Clause applies whether foreign or interstate commerce is at stake. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under this test, courts examine three elements: (1) whether the local regulation regulates "evenhandedly" with only an "incidental" impact on interstate commerce; (2) the severity of the burden imposed by the local regulation on interstate commerce; and (3) the nexus or lack thereof between the putative local benefits of the local regulation and the means employed in the regulation to achieve them, focusing on whether methods less burdensome to commerce could have been chosen. *See id*. at 142.

While discrimination almost inevitably will result in invalidation of the local regulation, beyond that, the "question becomes one of degree." *Id*. (internal citation omitted). *See also Wyoming*, 502 U.S. at 455 n.12 ("There is no 'clear

line' separating close cases on which scrutiny should apply.") (citation omitted). The inquiry "should be undertaken by 'eschew[ing] formalism for a sensitive, case-by-case analysis of purpose and effects." *Walgreen Co. v. Rulian*, 405 F.3d 50, 55 (1st Cir. 2005) (citing *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)).

The Ordinance fails this test.

1. The Ordinance is not evenhanded, with a targeted, not incidental impact on foreign commerce.

Discrimination can run afoul of the Commerce Clause in either purpose or effect. *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 9, n.7 (1st Cir. 2010). Typically, the type of discrimination alleged takes the form of economic protectionism, protecting local interests against outside competition. When foreign commerce is involved, however, economic protectionism is not necessary to find discrimination. *Natsios*, 181 F.3d at 67.

As noted, the Ordinance is asymmetrical, preventing oil from Canada coming into the United States, but not prohibiting oil flowing from the United States into Canada. The City carefully crafted the Ordinance to avoid adverse impact on oil-related local businesses, motivated by antipathy toward a particular type of oil produced in Canada. While not falling into the type of economic protectionism routinely condemned under the Commerce Clause, given the lack of evenhandedness and the Ordinance's targeted, non-incidental goal of impacting

foreign commerce, this first factor should be weighed against a finding of constitutionality.

The perspective animating enactment of the Ordinance was a parochial conclusion that no benefit befell local interests from the transportation of oil through the pipeline and Harbor—there was nothing in this commerce for the City; instead, the benefits remitted solely to Canadian interests and "big oil." (P104; P110; ECF 251-1 at 29:9-23, 36:20, 41:2, 48:13, and 94:2.) As one speaker summed up when urging enactment of the Ordinance: "[T]his is just a reminder that tar sands, which is really the thing in question here, isn't even American. It's Canadian oil." (P104; P113; P157; P158; ECF 251-1 at 59:5, 61:15, 125:3-5, 320:14-16, 333:15-17.) This is exactly the mindset the Commerce Clause was enacted to restrain. The Ordinance represents the same type of hoarding of a local asset—here, a harbor—condemned in myriad precedent. *E.g.*, *C&A Carbone Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1983); *City of Philadelphia v New Jersey*, 437 U.S. 617, 623 (1978); *Sporhase v. Nebraska ex. rel Douglas*, 458 U.S. 941, 957-60 (1982). Whether a municipality stops cross-border commerce in order to provide an affirmative advantage to a local interest, or does so because it sees no local advantage, such parochial obstruction violates the anti-Balkanization principle animating the Commerce Clause. The advantages and disadvantages of

commerce *via* pipelines and waterways stretching across multiple borders require weighing the interest of the nation as a whole.

The decision in *Pittson Warehouse Corp. v. City of Rochester*, 528 F.Supp. 653 (W.D.N.Y. 1981), illustrates this point. There, the City of Rochester enacted regulations restricting commercial shipping operations in its harbor area. The court found the regulations *per se* invalid under the Commerce Clause because they halted commercial shipping at the local port, amounting to economic isolation: "the ordinance maintains the port's inactive status and places an impermissible barrier around the borders of the City, barring trade with Canada and inhibiting interstate commerce." *Id*. at 662 (citation omitted). Noting that the transportation of cargo by water is impossible unless the cargo can be put on board, the court found the enactments a clear example of impermissible legislation that overtly blocks the flow of interstate commerce at the locality's borders. *Id*. at 660.

2. The Ordinance's burden on interstate and foreign commerce is staggering.

The severity of the burden on foreign commerce imposed by the Ordinance at the Harbor has been noted. Its mechanism for doing so, a ship loading ban, also makes the conclusion as to its disastrous aggregate impact inescapable.

3. There is no nexus between the purported local benefits of the Ordinance and the means used to achieve those benefits.

If a local regulation is deemed discriminatory, then the burden is on government to demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. *C&A Carbone, Inc.*, 511 U.S. at 392. Beyond that, "the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142; *see also Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 847-48 (1st Cir. 1998) (citing *Pike*). Here, because the benefit side of the Ordinance as written is nonexistent, the particular rigor with which the Court scrutinizes this third factor is immaterial.

The City claims the benefits of the Ordinance are air quality and aesthetics.[18] The district court, while not entering any factual findings quantifying these local benefits, concluded that they would be genuine. (Add. 3-80.)[19] But speculation as

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[18] The benefit of pipeline spill prevention cannot be considered given its preempted nature. *See Rollins Envtl. Servs. (FS), Inc. v. St. James Parish*, 775 F.2d 627, 635 (5th Cir. 1985) (because local regulation banning claimant's activity was preempted, its objective was illegitimate and in any event an unreasonably burdensome and restrictive means of obtaining an illegitimate end and it thus violated the Commerce Clause).

[19] In order to reverse the pipeline, PPLC would have to meet all state and federal air emissions regulations. (ECF 247 at 61:2-21, 123:7-17; ECF 249 at 123:12-124:6.) Hence, any quantification of benefit would require identification of the amount of emissions incrementally allowed by state and federal regulation to be generated by the reversal, if any, and the size and required location of the

(footnote continued)

to the amount of putative local benefit the City could obtain from an ordinance preventing air emissions or the installation of scrubbing equipment cannot sustain the Ordinance. While the Ordinance's preamble references air and aesthetics, its substantive text neither regulates air emissions nor depends on any change in infrastructure appearance. Loading of crude oil onto ships is prohibited *even in the absence of any air emission or the addition of any new infrastructure whatsoever*. There is a total disconnect between the putative benefits cited by the City and the substance of the Ordinance.

If the City had wanted to protect its air, it could have issued air emission regulations. Similarly, if it had wanted to address aesthetics or re-zone its land uses, it could have done so focusing on new structures, in an evenhanded manner. But because the goal was to stop oil sands crude from flowing through the pipelines and out the Harbor, the drafters consciously avoided such regulation.

(continued footnote)
equipment that would be needed to meet those regulations. But this identification cannot be made given, among numerous factors, the rapid evolution of best available technology over time (the licensing process for the reversal will take a substantial period); the multiplicity of options for where any equipment might be located; and the fluidity of the anticipated amount and type of oil that would flow through the pipeline. (ECF 247 at 41:9-55:121.) The most one can say with any certainty is that loading unchecked by pollution control mechanisms emits more air particulates than unloading; when originally conceived, PPLC contemplated using two units to meet then-existing air regulations; and as of the date of trial, a future flow reversal project likely would require only one unit. (ECF 247 at 33:4-15, 37:15-38:2, 41:9-42:19, 49:22-50:15.)

Indeed, the legislative record reflects that the City enacted an ordinance prohibiting loading onto ships instead of air or zoning regulations based on concern that PPLC might be able to achieve reversal without any increase in emissions or new infrastructure. (*See supra* at 10-11.)

The prohibition of any activity—indeed, driving a single car—can avoid an air emission or affect the aesthetic appearance of a location. That does not mean a town can ban traffic from Canada. A local regulation might diminish interstate commerce without running afoul of the Constitution if it does so in an evenhanded way, without massive adverse impact on that commerce, and the means employed to advance its purported legitimate local benefits cannot be easily addressed by different means less burdensome on commerce. The Ordinance not only fails applying each one of these factors, but its impact on foreign and maritime commerce, directed at instrumentalities of that commerce, in an area replete with foreign relation sensitivities, underscores that it cannot stand.

III. The Coastal Conveyance Act preempts the Ordinance.

Maine's Oil Discharge Prevention Law, also referred to as the Coastal Conveyance Act ("CCA"), expressly preempts ordinances that are "in direct conflict with this subchapter or any rule or order of the board or commissioner adopted under authority of this subchapter." 38 M.R.S. § 556. A "rule or order of the board or commissioner" includes any license issued by the Maine Department

of Environmental Protection ("DEP"). (ECF 89, ¶¶ 22, 24, and Exhibits 4 and 5 cited therein (licenses issued via "Department Order" appearing at ECF 89-5 and 89-6).).

The DEP issued a license for PPLC that explicitly approves the "loading" as well as unloading of crude oil onto tankers. (*See* ECF 89, ¶ 22; ECF 89-5 at 3 ("oil would be … loaded on vessels at the South Portland pier"); ECF 89-6 at 2 ("PPLC's existing license … allows PPLC to receive oil from Montreal … prior to being loaded onto vessels.").) The Ordinance directly conflicts with this agency approval, and thus is preempted by the CCA.

Again, the district court's articulated reason for rejecting this claim undercuts its ruling finding no preemption. The district court acknowledged that PPLC's license "might well be an 'order'' in a "technical sense," but stated, without citation, that for preemption purposes the Maine Legislature must not have intended what it stated in the language of its statute. (Add. 4-224-4-226.)

The CCA is not ambiguous. Under its plain language, a license is an order, and the order preempts local regulation. Under Maine law, unambiguous statutes are interpreted to mean what they say. *See Maine Today Media, Inc. v. State*, 2013 ME 100, ¶ 6, 82 A.3d 104 ("If the language [of a statute] is unambiguous, we interpret the provisions according to their unambiguous meaning unless the result

is illogical or absurd.") (brackets added; internal quotations omitted). The Ordinance is preempted.

CONCLUSION

For the reasons given above, this Court should declare the Ordinance unconstitutional and illegal, enjoin its enforcement, and remand the matter to the district court for a calculation of Plaintiffs' reasonable attorney's fees under the Civil Rights Act, 42 U.S.C. § 1988.

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/s/ Catherine R. Connors
John J. Aromando, Bar No. 34926
jaromando@pierceatwood.com
Matthew D. Manahan, Bar No. 74501
mmanahan@pierceatwood.com
Catherine R. Connors, Bar No. 7451
cconnors@pierceatwood.com
Nolan L. Reichl, Bar No. 1148010
nreichl@pierceatwood.com
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
Tel: 207-791-1100
Fax: 207-791-1350

Attorneys for Plaintiffs
Portland Pipe Line Corporation and
The American Waterways Operators

CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as it contains 12,830 words, excluding the parts of the brief exempted by Fed. R. App. 32(f).

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DATED: February 12, 2019

/s/ Catherine R. Connors
Catherine R. Connors, Bar No. 7451
cconnors@pierceatwood.com
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
Tel: 207-791-1100
Fax: 207-791-1350

Attorney for Plaintiffs
Portland Pipe Line Corporation and
The American Waterways Operators

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2019, I electronically filed the foregoing Brief of Appellants with the Clerk of Court using the CM/ECF system which will send notification to all counsel of record.

Dated: February 12, 2019

/s/ Catherine R. Connors

Catherine R. Connors, Bar No. 7451
cconnors@pierceatwood.com
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
Tel: 207-791-1100