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-Appellees

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

# BRIEF OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES, INTERNATIONAL LIQUID TERMINALS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL MINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the *Amici Curiae* state that they have no parent corporations and no publicly held company owns 10% or more of any *amicus*'s stock.

/s/ Joshua H. Runyan
Joshua H. Runyan

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*Amici Curiae* American Fuel & Petrochemical Manufacturers ("AFPM"), American Petroleum Institute ("API"), Association of Oil Pipe Lines ("AOPL"), International Liquid Terminals Association ("ILTA"), National Association of Manufacturers ("NAM"), and National Mining Association ("NMA") (collectively "Amici") hereby file this brief in support of Appellants Portland Pipe Line Corporation ("PPLC") and the American Waterways Operators ("AWO") (collectively, "Appellants").

## STATEMENT OF COUNSEL

This *Amici* Brief was authored by Steptoe & Johnson LLP ("Steptoe") on behalf of *Amici*. *Amici* are not parties to the case before this Court. Steptoe has received no funds from a party or a party's counsel intended to fund preparation or submission of this *Amici* Brief. While Steptoe has previously represented PPLC in other matters, Steptoe does not currently represent PPLC. Further, Steptoe did not and does not represent PPLC with respect to the proceedings in the District Court or this appeal. Finally, no person or entity other than Amici has contributed money to Steptoe intended to fund the preparation or submission of this *Amici* Brief. Steptoe is authorized by *Amici* to file this brief, and was likewise authorized by a similar group of Amici to file the Amici brief submitted in, and accepted by, the District Court.

## INTEREST OF AMICI

Appellees, through the City of South Portland's ("City") Clear Skies Ordinance ("Ordinance"), have stopped PPLC from proceeding with its plans to transport Canadian oil sands crude across the U.S. border to the South Portland Harbor for loading onto marine tank vessels for further delivery to domestic and foreign refinery destinations. The record developed in the District Court reflects that the City enacted the Ordinance in the face of local concerns over the extraction and transport of Canadian oil sands crude based on speculative fears about pipeline releases. But the the Ordinance has impacts far beyond the City – its effect is to stop the importation of Canadian oil sands crude into Maine via PPLC's existing pipeline infrastructure and consequently to prevent that crude from being further transported to refineries by water.

This result is contrary to the Federal Government's preemptive regulation of the transportation of that crude and its exclusive constitutional rights to control the flow of foreign commerce free of unwarranted local constraints, as well as the rights of the President to control foreign affairs through the issuance of the cross-border Presidential Permit issued to PPLC. If the City was concerned with air emissions, as it claims, the Ordinance would establish air emission standards or volume limitations for emitting sources, as is typical of air quality regulations. But the Ordinance is instead directly targeted at the importation of Canadian crude by

pipeline; it flatly prohibits the loading of crude oil onto vessels from PPLC's pipeline because that is what the City deemed was required to block PPLC's planned pipeline operations.

Amici are greatly concerned about the Ordinance at issue here as well as opening the door to other local pipeline safety and other local laws that contravene broader national interests in the movement of crude oil. They respectfully request that the District Court's decision be reversed, and the Ordinance declared unlawful.

## I. Amici Organizations

API is a national trade association that represents all aspects of America's oil and natural gas industry. API's more than 600 members, from large integrated companies to smaller independents, come from all segments of the industry. They are producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry. API is also the worldwide leading standards-making body for the oil and natural gas industry, including standards and recommended practices incorporated or referenced in numerous state and federal regulations. API represents the oil and natural gas industry to the public, Congress, the Executive Branch of the Federal Government, state governments, and to the media.

AOPL is a nonprofit national trade association that represents the interests of oil pipeline owners and operators before the United States Congress, regulatory

agencies, and the judiciary. AOPL's members operate pipelines that carry approximately 96% of the crude oil and petroleum products moved by pipeline in the United States, extending approximately 208,000 miles in total length. These pipelines safely, efficiently, and reliably deliver approximately 18 billion barrels of crude oil and petroleum product each year, consistent with safety regulations implemented by U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA"). AOPL strives to ensure that the public and all branches of government understand the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable, and most cost-effective method.

AFPM is a national trade association, whose members comprise virtually all U.S. refiners and petrochemical manufacturers that receive crude oil and other liquids products via the midstream sector, which includes pipelines, rail roads, vessels, tankers, and trucks. AFPM's member companies have an interest in ensuring that they will be able to receive crude oil supplies, including from Canada, necessary to meet U.S. energy consumption demand without interference by local governments with contrary interests.

NMA is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and

supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

ILTA is an advocate and key resource for the liquid terminal industry. ILTA works closely with Congress and the federal agencies responsible for overseeing the safe operation of liquid terminals in the United States, including the Department of Transportation and the U.S. Coast Guard ("USCG"). The liquid terminals and aboveground storage tank facilities (e.g., tank farms) operated by ILTA's members are imperative to the U.S. midstream industry in that they interconnect with and provide services to the various modes of liquid transportation, including ships, vesssels, tank trucks, rail cars and pipelines. ILTA's members operate more than 600 liquid terminals in the United States, many of which have a nexus with marine transportation that could be adversely impacted by actions limiting the transportation of crude oil and petroleum products.

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. NAM is the voice of the manufacturing

community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

## BACKGROUND

### I. US Energy Policy Requires the Free Flow of Petroleum Products On a National and International Pipeline System

The Federal Government's long-standing regulation of pipelines across the United States' international boundaries underscores the paramount national interest in the importation and exportation of crude oil. Ever since the late nineteenth century, a pipeline owner must obtain authorization from the President, acting pursuant to his inherent constitutional authority over foreign affairs, for any international border crossing. *United States v. La Compagnie Francaise des Cables Telegraphiques*, 77 F. 495, 496 (C.C.S.D.N.Y. 1896) (no one "has any right to establish a physical connection" between the U.S. and another country without the consent of the President); *see also Sierra Club, et al. v. Clinton, et al.*, 689 F. Supp. 2d 1147, 1163 (D. Minn. 2010) ("the President's authority to issue the border-crossing Permit comes by way of his constitutional authority over foreign affairs and authority as Commander in Chief is well recognized"). The President has since delegated the administration of his constitutional authority over cross-border pipelines to the U.S. Department of State ("State Department") pursuant to Executive Order No. 13,337, 69 Fed. Reg. 25,299 (April 30, 2004), amending Executive Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 20, 1968), governing the

issuance of Presidential Permits. By the authority vested under these Executive Orders, PPLC was issued a Presidential Permit by the State Department for the pipeline impacted by the Ordinance in 1999. That Permit authorizes the transport of crude oil between the United States and Canada. *See* Appellants' Brief, at 12.

Before issuing a Presidential Permit to PPLC authorizing the construction, operation, and maintenance of a crude oil pipeline at the U.S. border, the State Department made a determination on behalf of the President that the pipeline served the "national interest" of the United States. *See* Exec. Order No. 13,337, at Sec. 1(g). The State Department may conclude, for example, that a cross-border pipeline's operation will serve the national interest by enhancing access to secure and reliable supplies of North American crude oil; reducing the nation's reliance on imports from nations that are less stable or unfriendly to U.S. interests; ensuring refineries in the U.S. continue to get the type of oil needed to satisfy public demand for petroleum products; and generating millions of dollars of tax revenue for communities along the pipeline route that provide funding for schools, roads, and other community needs. *See, e.g.*, 74 Fed. Reg. 43,212 (Aug. 26, 2009).

This type of finding highlights the fundamental role that international crude oil pipelines play in satisfying American energy needs. The national importance that such pipelines play is further emphasized by the fact that the vast oil volumes they transport cannot be easily or feasibly replaced by other transportation modes;

it would, for example, take a line of tanker trucks, about 750 per day, loading up and moving out every two minutes, 24 hours a day, seven days a week, to move the volume of even a modest-sized pipeline.[1] The railroad-equivalent of that same modest-sized pipeline would be a train of seventy-five 2,000-barrel tank rail cars every day.[2] No tanker trucks or rail infrastructure exists to displace crude volumes transported by pipeline throughout North America.

Recognizing the great importance of pipelines and other infrastructure, the current Administration has declared that "it is the policy of the executive branch to streamline and expedite … approvals for all infrastructure projects, especially projects that are a high priority for the Nation, such as … repairing and upgrading critical … pipelines," among other infrastructure. Exec. Order No. 13,766 of January 24, 2017, 82 Fed. Reg. 8,657, 8,657 (Jan. 30, 2017), *Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects* (emphasis added). This is because "America needs increased infrastructure investment to strengthen our economy, enhance our competitiveness in world trade, create jobs and increase wages for our workers, and reduce the costs of goods and services for our families." Exec. Order No. 13,807, 82 Fed. Reg.

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[1] *See* PHMSA, General Pipeline FAQs, *available at* http://phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/?vgnextoid=a62924cc45ea4110VgnVCM1000009ed07898RCRD&vgnextchannel=daa52186536b8210VgnVCM1000001ecb7898RCRD&vgnextfmt=print (last updated: Jan. 23, 2013).

[2] *Id.*

40,463, 40,463 (Aug. 24, 2017) *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects* (infrastructure includes "pipelines"). The Obama Administration also recognized the importance of pipelines: "rising production is outpacing the capacity of pipelines to deliver the oil to refineries," and the only option is therefore for new pipelines to be constructed or for existing pipelines to be reconfigured to meet that demand and "enhance our Nation's energy security." *See* Memo. of March 22, 2012, Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects, 77 Fed. Reg. 18,891, 18,891 (Mar. 28, 2012) ("2012 Presidential Memorandum").

The "high priority" reconfiguration of existing pipeline infrastructure, like PPLC seeks to achieve with the use of its pipeline to transport crude oil southbound from Canada into Maine, is fundamental to meeting ever-growing national demand. Pipeline owners and operators are required to continually modify their facilities, practices, and operations in order to provide refiners and end-users with the volumes and types of petroleum products they desire from the sources that they demand. U.S. energy needs must dynamically respond to consumer trends, national energy policy changes, the discovery of new extraction sources, and commodity pricing. Thus, it is no surprise that PPLC seeks now to tailor its operations to meet growing demand for Canadian oil sands crude through

a reversal of its existing pipeline to transport that crude to the South Portland Harbor. The City, however, has effectively blockaded this project of national interest through the local Ordinance at issue here.

## II. The Flow of Crude Oil is Subject to Extensive Federal Regulation and Oversight

Consistent with the broad national interest in energy, the Federal Government has occupied the entire field of pipeline safety. The operation and maintenance of a crude oil pipeline is extensively regulated by PHMSA pursuant to the Pipeline Safety Act ("PSA"), 49 U.S.C. §§ 60101, *et seq*.

PHMSA's regulations govern all facets of pipeline operations, including design, specifications, operation, and maintenance so as to ensure safety. *See, e.g.*, 49 C.F.R. Part 195. PHMSA regulations, for example, dictate the design and specifications for all segments of a pipeline (49 C.F.R. § 195.200, *et seq*.) and the pressures at which such pipelines may be operated (49 C.F.R. § 195.406). Those regulations further establish the frequency within which operators must conduct internal and external investigations to identify potential integrity threats, including the timelines under which even *potential* threats must be inspected and repaired (49 C.F.R. § 195.452). PHMSA regulations further address possible releases, establishing the procedures under which an operator is to control a pipeline, including responding to alarms or triggers that may be indicative of a release (49 C.F.R. § 195.446); the placement of valves that may be remotely shut to minimize

a potential release (49 C.F.R. § 195.116); and requirements for alarms to notify a control room in the event of a potential release (49 C.F.R. § 195.446(e)). The PSA preempts any State or local government from implementing any such matters concerning pipeline safety. *See* 49 U.S.C. § 60104(c).

Further, to respond to, contain, and minimize a release to the environment (should one occur), the federal government has imposed extensive emergency response planning requirements under the Oil Pollution Act ("OPA"), also administered by PHMSA for onshore pipelines such as PPLC's. *See* 33 U.S.C. § 1321. In accordance with OPA, pipeline operators are required to prepare and implement comprehensive emergency response plan documents, which include extensive and detailed tactics and strategies to respond to a release from regulated facilities, including pipelines, storage tanks, and vessels. These robust plans are designed to: (i) ensure that a release of oil is quickly contained; (ii) direct initial clean-up efforts to mitigate adverse consequences to natural resources; and (iii) establish procedures for coordinating with state and federal agencies regarding a long-term response effort. *See* 49 C.F.R. Part 194.

Should any release of crude oil into waters of the United States result from a pipeline spill, the Clean Water Act ("CWA") establishes a liability framework under which the Federal Government may seek civil or criminal penalties and impose injunctive measures applicable at any facility from which a release has

occurred or is threatened. *See, e.g.*, 33 U.S.C. § 1321. The CWA, as amended by OPA, also sets forth requirements for owners and operators of facilities from which oil has been discharged to coordinate with the Federal Government to clean-up, remediate, and restore natural resources. Further, the CWA establishes the Oil Spill Liability Trust Fund, which provides local governments and the public with the ability to recover any damages or costs (including natural resource damages) that may be incurred as a result of an oil release. *See* 33 C.F.R. Part 136. Thus, any individual, community, or resource that may be harmed by an oil spill will be fully compensated by the Oil Spill Liability Trust Fund for any and all recoverable costs and damages, and those funds will ultimately be recovered by the Federal Government from the pipeline owner and/or operator.

In addition, the operation of tanks and terminals that may store crude oil or transfer crude oil from one transport mode to another are subject to the comprehensive regulatory oversight of the U.S. Environmental Protection Agency ("EPA") and USCG under laws that dictate the level of emissions permitted from these sources, as well as their design and safe operation. *See, e.g.*, 40 C.F.R. Part 112 (EPA regulations pertaining to requirements for the holding of crude oil in bulk storage tanks); 40 C.F.R. Parts 60-61, 63 (EPA regulations pertaining to emissions of volatile organic compounds and air pollutants, such as benzene, from new, reconstructed and modified oil and gas sources including bulk storage tanks).

Broad federal regulatory oversight over petroleum transport pipeline also extends to the actual physical transfer of products from one transport mode to another, such as from a pipeline to a vessel. *See, e.g.*, USCG regulations at 33 C.F.R. § 156.120 (setting forth requirements for conducting an oil transfer operation).

## ARGUMENT

The City's Ordinance is representative of efforts by anti-pipeline activists, and notably persons opposed to the transportation through the City of Canadian oil sands crude, to stop industry from constructing and/or utilizing existing pipeline infrastructure to meet growing energy demands. A concerted effort by groups throughout the country has arisen to oppose pipeline development for various reasons, often to address fears of pipeline spills or impede oil extraction.[3]

Here, the City's Ordinance effectively achieves the goal of stifling pipeline operations. The Ordinance blocks U.S. commerce and undermines strategic U.S. energy policy on the importation of Canadian crude oil. Thus, the question before

[3] Some of the litigation derives from concerns about potential releases of crude oil that could cause adverse impacts to sensitive resources. *See, e.g.*, *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Engineers*, 1:16-cv-01534 (D.D.C. 2017) (Native American tribes challenging the US Army Corps of Engineers' ("Corps") issuance of permits required for the Dakota Access Pipeline's ("DAPL") to cross a culturally-sensitive lake). Other litigation relates to concerns over the type of product being transported and national and global impacts relating to the extraction, transport, and refining of that oil. *See, e.g.*, *Indigenous Environmental Network et al. v. United States Department of State et al.*, 4:17-CV-00029 (D. Mont. 2018) (concerns over environmental impacts resulting from extracting and refining Canadian oil sands crude that is transported on the proposed Keystone XL pipeline).

this Court – whether a local government may enact an Ordinance that blocks an international pipeline project that is supported by federal policy and regulated by a federal agency to ensure its safety – has significant implications to PPLC, Amici, and the entire energy industry. As shown below, the Ordinance is preempted by federal law and cannot stand in the face of the U.S. Constitution.

## I. The Ordinance is a Safety Standard that is Preempted by the Pipeline Safety Act

While framed as an environmental law designed to protect clean air, the City's Ordinance was adopted following extensive local expressions of concern about pipeline safety. Because it stands as an obstacle to the goals of the PSA, it is preempted by the that federal statute.

The Ordinance is the result of the City's years-long effort to ban the transport of Canadian crude derived from Alberta's oil sands via pipeline into the South Portland Harbor due to speculative fears about adverse impacts if that particular type of crude were to be released into the environment. *See* Appellants' Brief, at 6-10. Initial attempts by the City sought to expressly prohibit the transport of oil sands crude through its borders; however, the City's Ordinance was re-crafted as a zoning regulation on air-emitting sources relating to pipeline off-loading operations. *Id*. The stifling effect of the Ordinance on pipeline operations, however, is no different.

The PSA is premised on the notion that the Federal Government, acting through PHMSA, is to have exclusive jurisdiction to impose pipeline safety standards pertaining to "transporting hazardous liquid" in interstate commerce, including pipeline "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance." 49 U.S.C. § 60102(a)(2) (directing the Secretary of Transportation to prescribe minimum safety standards for pipeline transportation); *see also id*. at § 60101(a)(22) ("transporting hazardous liquid" means the "movement of hazardous liquid by pipeline, or the storage of hazardous liquid incident to the movement of hazardous liquid by pipeline, in or affected interstate or foreign commerce").

Given PHMSA's extensive safety regulatory role, the PSA includes an express preemption provision: a state or local "authority may not adopt or continue in force safety standards" that concern "interstate pipeline transportation." *See* 49 U.S.C. § 60104(c). By including this express preemption provision in the PSA, Congress recognized that the pipeline industry cannot operate in a setting where local governments have the ability to unilaterally restrict the ability of pipelines to transport hazardous liquids, including crude oil, in foreign and interstate commerce. Moreover, the express preemption is sufficiently broad that it applies even if the pipeline transportation activity at issue were not subject to federal regulation. *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 359 (8th Cir. 1993).

Because the Ordinance seeks to regulate the safety of PPLC's pipeline, and does so by effectively prohibiting the use of that PHMSA-regulated pipeline to facilitate off-loading of that oil onto vessels, the Ordinance is a safety standard that is preempted by the PSA. *See, e.g.*, *Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, 08–CV–1724, 2008 WL 5000038 (N.D. Tex. Nov. 25, 2008), *aff'd* 608 F.3d 200 (5th Cir. 2010) (concluding that a fencing requirement under a zoning ordinance was preempted by the PSA because the requirement was intended to serve a safety purpose); *see also Kinley Corp.*, 999 F.2d at 358 ("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 . . . ."); Office of the Illinois Attorney General, Application of County Zoning Regulations to Interstate Crude Oil Pipelines, 1998 Op. Ill. Att'y. Gen. 008 (Ill.A.G.), 1998 WL 205427 (April 23, 1998) ("the application of local zoning regulations to interstate pipelines used to transport hazardous liquids, including crude petroleum, is preempted by Federal law."). The District Court's finding that the Ordinance is not a safety standard was simply wrong.

Further, the U.S. Supreme Court instructs that Congress's preemptive intent is also implied when a state or local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As shown above in Section Background(II), federal law extensively regulates pipeline safety and design, including off-loading operations, as well as responsibility for emissions and spill clean-up. However, this extensive federal regulation is effectively voided by the Ordinance's prohibition on any off-loading of oil onto vessels at the South Portland Harbor. The Ordinance undermines the overarching goals of the PSA and other federal laws – to regulate the safe transportation of crude oil from one point to another – and is therefore impliedly preempted.

## II. The Ordinance Violates the U.S. Constitution

The Ordinance is exactly the type of local legislation that the Commerce Clause and foreign affairs doctrine of the U.S. Constitution are intended to guard against – i.e., efforts by a local government to disrupt the stream of foreign commerce, in this case the transportation of crude oil to supply domestic and international energy demands in a pipeline that holds a Presidential Permit.

National policy and this Country's energy industry require a pipeline network that is capable of freely transporting, as the market dictates, petroleum products from various extraction sources without impediment at any point in North America's interconnected supply chain. The City's prohibition on the flow of crude oil southbound through its borders for off-loading onto vessels is thus flatly

at odds with the Commerce Clause and the foreign affairs doctrine of the U.S. Constitution.

### A. The Ordinance Unconstitutionally Prevents the Federal Government From Achieving Uniformity in the Regulation of Foreign Affairs and Commerce

By precluding the off-loading of crude oil from pipeline to vessel at the South Portland Harbor, and hence effectively stopping the importation of Canadian crude into the City, the City's Ordinance undermines the ability of the Federal Government to speak with one voice in the area of commerce with other nations, where the federal role is constitutionally paramount. *See, e.g.*, *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) (It is well understood that the prohibitory power of the Commerce Clause is especially strong in the context of foreign commerce, with respect to which "a State's power is further constrained because of the special need for federal uniformity.") (internal quotation marks omitted).

The Constitution allocates exclusive authority over international trade to the federal government alone – i.e., "[p]ower over external affairs," such as the transport of oil from a foreign nation to the U.S., "is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). The U.S. Supreme Court's seminal modern decision restricting state or local action that interferes with foreign commerce is *Japan Line, Ltd v.*

*County of Los Angeles*, 441 U.S. 434 (1979). There, the Court emphasized, "'[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.'" *Id*. at 448 (citation omitted). *Japan Line* requires a more extensive constitutional analysis when foreign, rather than domestic, commerce is involved, and in doing so the Constitution requires that courts examine the national interest rather than that of any individual state or locality. *See id*.

The City's de facto and discriminatory prohibition against the transportation of imported crude oil through its borders based on concerns about air emissions does not permissibly outweigh the nation's overarching interest in the free flow of energy resources across national boundaries. *Hines*, 312 U.S. at 63 ("Our system of government is such that the interest of the cities, counties and states … imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."). Here, the President, pursuant to his inherent constitutional authority over foreign affairs, and acting through the State Department pursuant to the Executive Orders discussed in Section Background(I) above, issued a Presidential Permit to PPLC after making a determination that the transport of crude oil between Canada and the U.S. serves the national interest. The Ordinance, however, as a practical matter serves to override the State Department's role and also usurp the Federal Government's exclusive

constitutional authority to determine that oil may enter the United States via PPLC's cross-border pipeline to implement national energy policies.

The City's Ordinance makes it impossible for the nation to speak with one voice with respect to oil imported from Canada via the PPLC pipeline. The U.S. Energy Information Administration ("EIA") recognizes that "Canada is the United States' largest partner for energy trade."[4] In fact, "Canada is by far the largest source of U.S. crude oil imports, providing 41% of total U.S. crude oil imports" mainly via cross-border pipelines like that at issue in this case.[5] The long-standing importance of U.S. trade with Canada is underscored by the North American Free Trade Agreement and the proposed US-Mexico-Canada Agreement, both of which further market access for US natural gas and oil products, and U.S. natural gas and oil investments in Canada.[6] Further, in recently announcing sanctions against the Venezuelan government, President Trump requested "Canada's willingness to open the spigots in Alberta" to allow for increased oil importation into the U.S. of the type of heavy oil produced in Canada to compensate for import shortfalls of

[4] Natalie Kempkey, *Canada is the United States' largest partner for energy trade*, U.S. Energy Information Administration (Dec. 29, 2017), https://www.eia.gov/todayinenergy/detail.php?id=34332.
[5] *Id*.
[6] *See* API Comments (Dec. 20, 2018), https://www.api.org/~/media/Files/News/Letters-Comments/2018/API-Submission-to-ITC-USMCA-Investigation-V1-20Dec2018.pdf.

similar oil from Venezuela.[7] Such increased crude imports from Canada could be achieved in part through PPLC's pipeline project, which would occur using existing infrastructure, requiring only the construction of discrete off-loading facilities at the South Portland Harbor – facilities that are banned by the Ordinance.

The Ordinance also interferes with national policy to promote crude oil exportation. Following the lifting of a long-term ban on oil exportation in 2015,[8] crude oil became "the largest U.S. petroleum export, with 1.8 million barrels per day (b/d) of exports in the first half of 2018."[9] This trend will continue – the EIA now projects that, for the first time since the 1950s, the United States will export more energy than it imports by 2020, as increases in crude oil, natural gas, and natural gas plant liquids production outpace growth in U.S. energy consumption.[10] It is a matter of national policy to "promote exports of our energy resources" and to "expand our export capacity through the continued support of private sector development" in order to allow for "increased market access and a greater

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[7] Dan K. Eberhart, *Oil markets should brace for a stalemate in Venezuela,* Washington Examiner (Feb. 1, 2019), https://www.washingtonexaminer.com/opinion/op-eds/oil-markets-should-brace-for-a-stalemate-in-venezuela.

[8] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, Division O, Title I, Section 101.

[9] Mason Hamilton, *Crude oil was the largest U.S. petroleum export in the first half of 2018*, U.S. Energy Information Administration (Sept. 24, 2018), https://www.eia.gov/todayinenergy/detail.php?id=37092.

[10] *See The United States is expected to export more energy than it imports by 2020*, U.S. Energy Information Administration (Jan. 29, 2019), https://www.eia.gov/todayinenergy/detail.php?id=38152.

competitive edge for U.S. industries."[11] PPLC's plans for off-loading crude from pipeline to vessel at the South Portland Harbor would further this national interest and open trading markets by allowing for the exportation of that crude oil via vessel to foreign refinery destinations. That, however, cannot happen as a result of the City's Ordinance.

This kind of direct and discriminatory interference with important federal policies unquestionably violates *Japan Line's* "one voice" requirement; if allowed to stand, the City's Ordinance will have restricted the movement of oil imported into the United States from Canada by PPLC, and thus the use and potential exportation of that oil within the larger setting of the nation's energy policy. *See also Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 79 (1992) ("the constitutional prohibition" against state regulation of foreign commerce is even "broader than the protection afforded to interstate commerce" because "matters of concern to the entire Nation are implicated").

If allowed to stand, the Ordinance would serve to unlawfully stifle Canadian crude commerce in Maine altogether, a proposition that the Supreme Court has disallowed in other contexts that are not as intensively regulated by the federal government as is pipeline safety. *See C&A Carbone, Inc. v. Town of Clarkstown*,

[11] Office of the President, *National Security Strategy of the United States of America* (Dec. 2017), https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf.

511 U.S. 383, 390 (1994); *see also City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (striking down New Jersey statute that prohibited the import of solid waste); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (striking down Oklahoma law that prohibited the export of natural minnows). Any local regulation, like the City's Ordinance, "that is contrary to the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole," should be struck down. *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7-8 (1986); *see also Foreign Trade Council v. Natsios*, 181 F.3d 38, 68 (1st Cir. 1999) (Massachusetts law restricting state's ability to transact with companies doing business in Burma was unconstitutional because it prevented the federal government from speaking with one voice).[12]

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[12] Nor does the lack of any in-state competitor to PPLC allow the Ordinance to stand in the face of the dormant Commerce Clause. In assessing whether the Ordinance discriminates against interstate commerce, the District Court held that there can be no discrimination where there is no benefit to intrastate companies. However, a finding of local favoritism is not an "essential element" for a violation of the dormant Commerce Clause. *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. at 79; *see also Natsios*, 181 F.3d at 67.

The District Court erred in distinguishing *Kraft* and *Natsios*, concluding that the statutes found to be unlawful in those cases "made facial distinctions based on the nationality of the commercial entity or the location of the commerce." Opinion, at 63. The City's Ordinance, however, is no different in that it discriminates against the nationality of a particular product (i.e., Canadian crude), and the location of its importation into the U.S. (i.e., through Maine to the South Portland Harbor). The Ordinance's ban makes a clear distinction between this activity and the *receipt* of oil from any other source and any other mode.

### B. The Ordinance, as Applied, Opens the Door to an Impermissible Patchwork of Local Restraints That Would Impede Commerce

Affirming the City's right to enforce an Ordinance targeted at the transportation of Canadian crude will open the door to any number of other local governments adopting similar anti-pipeline ordinances. Such a result epitomizes an unconstitutional "interfere[nce] with the natural function of the interstate market" for crude oil transportation from extraction sources in Canada to refinery destinations in furtherance of the nation's energy needs and national energy policy. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976). The interstate and foreign commerce crude oil pipeline transportation business on which so many of Amici's members depend will thus be open to the risk that local regulations will impose challenging barriers that cannot readily be overcome.

As the U.S. Supreme Court has recognized, "the practical effect of [the City's Ordinance] must be evaluated not only by considering the consequences [by] itself, but also by considering . . . what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). If every locality traversed by an existing or proposed pipeline project were empowered to enact similar ordinances to prevent the operation of that pipeline through its boundaries, pipeline commerce could come to a halt. Any decision by this Court to uphold the Ordinance would in fact serve as a signal to other local governments with pipelines and/or harbors within their borders that they are free to

use any available pretext, including the guise of air emissions as here, to enact legislation to similarly prohibit specific pipeline projects.

Accordingly, "[t]he Commerce Clause problem with the [Ordinance] appears in even starker relief when it is recalled that if [the City] may enact [a law to ban the transportation of Canadian crude oil], so may each of the border States and, indeed, so may every other State in the Nation." *Healy*, 491 U.S. at 339. Thus, "[a]ssuming, as we must, that all cities … enacted [ ] ordinances like the one at issue here, the interstate market in [crude oil transport] could be substantially diminished or impaired, if not crippled." *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1072 (8th Cir. 2000) (finding a city waste ordinance to be excessively burdensome due to the fact that other cities could enact similar ordinances that would adversely impact the interstate market in recyclable materials). The mere potential for the enactment of other regulations like the Ordinance therefore underscores the problems created if the Ordinance were permitted and warrants an unambiguous determination by this Court that the City's Ordinance is unconstitutional. *See also CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (finding in a preliminary injunction context that an ordinance limiting the rail and truck transportation of certain hazardous materials posed an unreasonable burden on interstate commerce, *particularly* given the possibility of similar laws being enacted by other jurisdictions).

Nor can the City's prohibition against foreign commerce be upheld as a lawful local regulation of air emissions or other environmental goals. The Ordinance does not spell out some permissible level of emissions or allowable sizes of emitting sources, as is seen under other clean air regulatory schemes. *See, e.g.*, 40 C.F.R. Part 50 (establishing national primary ambient air quality standards for pollutants). Whatever air quality or other benefits accrue to the City from banning the off-loading of crude oil from pipelines at the South Portland Harbor, if any, are neither defined nor reasonably quantified under the Ordinance's outright ban, which targets only very specific pipeline-related emissions and only emissions off-loading oil from pipeline to vessel. The Ordinance does not regulate emissions resulting from loading crude from a vessel into a pipeline in South Portland, underscoring that the real target is the oil sands crude that PPLC transports southbound from Canada, and not emissions at all.

No effort was made by the City to achieve its alleged goal of regulating air emissions through a less burdensome means, such as allowing crude off-loading activities from pipeline to vessel that do not result in any net increase in air emissions. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (assessing whether methods less burdensome to interstate or foreign commerce could have been chosen). Rather, the Ordinance's ban on pipeline to vessel transfers is complete and without exception, imposing a massive cost to Appellants and the

rest of the country in the form of the closure of an oil pipeline in which there is a significant federal and international interest, irrespective of whether purported air quality concerns could have been met in some less burdensome way.

In short, the burden on foreign commerce by the Ordinance far outweighs whatever amorphous benefits the City might cite, underscoring that what is really at issue is the ability of the nation to sustain pipeline operations in the face of local dissatisfaction or fears associated with the transportation of certain types of foreign crude oil. Federal goals embodied in uniform and preemptive pipeline and maritime safety regulation have also been sacrificed to a local Ordinance that effectively prohibits the transport of oil sands crude in the City. To the extent that local interests are allowed to override the interests protected by the U.S. Constitution and federal law, the risk that South Portland's actions will be repeated elsewhere is substantial and calls for a determination that the City's action cannot stand. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008) ("even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice"); *Pittson Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653, 662-3 (W.D.N.Y. 1981) (finding ordinance that restricted transportation facilities at a port to be discriminatory against interstate commerce).

## CONCLUSION

Amici's members' interests and the national interest are one in the same – provide safe, reliable modes to transport crude oil to meet U.S. energy and security demands. Amici's members cannot achieve that goal in the face of the Ordinance, or other measures like it, whereby a local government has assumed ultimate power to dictate, contrary to national policy, the ability of an international pipeline to import Canadian oil sands crude into Maine. For the foregoing reasons this Court should declare the Ordinance unlawful.

RESPECTFULLY SUBMITTED this 19th day of February 2019.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations set forth in Rule 29(a)(5) because it contains 6,473 words, as counted by Microsoft Word, excluding the items that may be excluded.

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**CERTIFICATE OF SERVICE**

I, Joshua H. Runyan, hereby certify that on February 19, 2019, I caused a true and correct copy of a copy of the foregoing document to be served on all parties of record via the CM/ECF system.

/s/ Joshua H. Runyan
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