United States Court of Appeals

for the

First Circuit

Case No. 18-2118

PORTLAND PIPE LINE CORPORATION;
THE AMERICAN WATERWAYS OPERATORS,

Plaintiffs-Appellants,

– against –

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

Defendants-Appellees.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states as follows: The Chamber of Commerce of the United States of America has no parent company. No publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber has a strong interest in this important case. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country—including New England. It regularly represents the interests of its members by filing *amicus* briefs in cases, like this one, that involve issues of concern to the nation's business community.

The Chamber's members include producers, transporters, and users of crude oil, and they depend on stable, predictable, and nationally uniform regulations. Ordinances like the one the City enacted here threaten these interests and set a dangerous precedent that, if adopted elsewhere, would seriously disrupt interstate and international markets and create a patchwork of regulation that the Constitution and numerous statutes were designed to prevent. The Chamber's members also have a substantial interest in the maintenance of a coherent foreign trade policy, like the one in place with Canada for its energy resources, including oil sands. The City's Ordinance disrupts these interests and impedes this country's commerce with our neighbors and allies.

[1] The Chamber certifies that no counsel for a party authored this brief in whole or in part, and no one other than the Chamber, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION

The Chamber of Commerce of the United States of America ("Chamber") respectfully urges this Court to reverse the district court's decision. The Appellants challenge the legality of an Ordinance enacted by the City of South Portland that prohibits the bulk loading of crude oil onto tankers in the Portland Harbor. *See* D. Ct. ECF Doc. 1-1. The only conceivable effect of the Ordinance—and the obvious and indisputable reason it was enacted—is to prohibit the flow of oil from Canada to the United States through the Portland-Montreal Pipeline. By preventing oil from being loaded onto tankers once it arrives, the Ordinance *by design* eliminates the incentive to send it through the pipeline in the first place. The Chamber agrees with the Appellants that the Ordinance, among other deficiencies, violates the Commerce Clause and the Supremacy Clause. The Chamber submits this *amicus* brief to explain why the Ordinance is not only unconstitutional, but also threatens serious harm to business interests and the ability of the United States to promote vital international trade relationships.

ARGUMENT

The Ordinance before the Court constitutes a remarkably specific threat to international trade and the uniform regulation of oil transmission and export. As the Appellants explain, the Ordinance was passed by the City Council as part of a continuous effort by activists and City officials to prevent the international

shipment of oil-sands crude extracted in Canada by taking advantage of South Portland's location. *See* Appellants Brief at 6-10. After voters narrowly rejected a referendum expressly designed to interfere with international oil transportation—activity approved by the Department of State and regulated by federal pollution and safety laws—the City Council immediately began drafting this Ordinance to reach the same end. Throughout the drafting and enactment process, the record makes clear that the City Council's goal was to do whatever it took to stop the export of Canadian oil through the Portland-Montreal Pipeline. *See id.* The City Council ultimately did so by prohibiting the *loading* of oil *from* the Pipeline onto "marine tank vessel[s]" and the construction of any pipeline or shipping facilities associated with such bulk loading. *See* Ordinance §§ 27-786, 27-922(n), 27-930. Notably, the Ordinance does *not* prohibit the *unloading* of oil *into* the Pipeline. Nor does it purport to set emissions standards or otherwise neutrally regulate air quality. And nothing in the challenged provision involves facially neutral requirements such as setbacks, scenic impact standards, or other traditional zoning requirements. The specificity of the prohibition is thus, on its face, plainly designed to discriminate against the export of Canadian oil by controlling the direction and source of the oil in the Pipeline and through the Port of Portland.

Despite these infirmities, the district court upheld the law, granting the City summary judgment on many of the Appellants' challenges and rejecting the

remainder after a bench trial. This Court should reverse those decisions, for several reasons. Among other infirmities, the Ordinance violates the Commerce Clause, is preempted by federal law, and conflicts with U.S. foreign policy. First, the Ordinance violates the Commerce Clause because it was designed with the express purpose of impeding foreign commerce—*i.e.*, the transportation of oil-sands crude from Canada to Maine, for export beyond these shores. Second, the Ordinance is preempted—by function of the Supremacy Clause—because it attempts to regulate interstate pipeline safety, which is preempted by the Pipeline Safety Act. Indeed, the Framers designed the Commerce Clauses and the Supremacy Clause to function in tandem to prevent exactly the type of market balkanization effectuated by the Ordinance.

Third, the City's interference with foreign commerce and Congress's national standards is neither harmless nor incidental. The Ordinance will have serious, adverse consequences for businesses in the Portland Harbor, with ripple effects throughout the region. It also will unduly interfere with the trading relationship between the United States and Canada. Most importantly, permitting this law to stand would invite nationwide economic disaster by providing local interests with a road map to obstructing any U.S. trade, shipping, or energy policy with which they disagree. The Constitution was ratified in part to prevent states and their local subdivisions from engaging in precisely the type of extraterritorial

interference embodied by the Ordinance. The Court should reverse the judgment below.

I. The Ordinance Violates the Commerce Clause.

Article I of the Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations." U.S. Const. Art. I, § 8, cl. 3. The ability of the United States to speak with one voice on issues of foreign commerce was a driving force behind the adoption of the Constitution to replace the Articles of Confederation. *See* Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 Fordham L. Rev. 1955, 1962-65 (2015) (describing adoption of the Clause). As Alexander Hamilton noted, "The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy." *The Federalist No. 22*, at 137 (Jacob E. Cooke ed. 1961).

The positive grant of authority to Congress in the Foreign Commerce Clause includes a negative denial of authority to state and local governments. *See S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). Under the Foreign

Commerce Clause, state and local governments cannot enact laws that are "designed to limit trade with a specific foreign nation." *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 67 (1st Cir. 1999). A law that discriminates against foreign commerce is "virtually *per se* invalid." *Id.* (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). Courts "generally str[ike] down" such laws "without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). The Ordinance is such a law.[2]

First, the purpose and effect of the Ordinance are to discriminate against foreign commerce—namely, the transportation of oil-sands crude from Canada. And even if a law does not discriminate against foreign commerce on its face, it is invalid if it has a "discriminatory purpose" or a "discriminatory effect." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). The Ordinance unquestionably has a

[2] Some of the cases cited in this section interpret the Interstate Commerce Clause, not the Foreign Commerce Clause. But the distinction is immaterial because the principles governing the two clauses are "essentially the same." *Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41, 46 (1st Cir. 2005). If anything, the cases interpreting the Interstate Commerce Clause are too lenient because the Foreign Commerce Clause is wholly broader. "[S]tate restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny" because "[i]t is crucial to the efficient execution of the Nation's foreign policy that 'the Federal Government ... speak with one voice when regulating commercial relations with foreign governments.'" *S.-Cent. Timber Dev.*, 467 U.S. at 100 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)); *accord Kraft Gen. Foods, Inc. v. Iowa Dep't of Rev. & Fin.*, 505 U.S. 71, 79 (1992); *Japan Line, Ltd. v. L.A. Cty.*, 441 U.S. 434, 448 (1979).

discriminatory purpose; the history of the Ordinance and the comments of the City officials who enacted it demonstrate that its unmistakable purpose is to prevent the flow of oil-sands crude from Canada to Maine. *See, e.g.*, Appellant's Brief at 7-9; D. Ct. ECF Doc. 87 at 13 & n.17 (noting statements of majority of City Council members regarding their desire to inhibit the transportation of "the world's dirtiest oil," to stop the flow of "tar sands" from Canada, and even to protect the "indigenous people of Alberta"). The City's purported interest in air quality was therefore demonstrably pretextual. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

The Ordinance also has a discriminatory effect. By prohibiting the loading of oil onto tankers in the Portland Harbor (but not the unloading), the Ordinance ensures that no oil can be transported from Canada to Maine or exported through South Portland to international markets. The district court determined that the Ordinance's effect on interstate and foreign commerce was "meaningful." *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 309 (D. Me. 2018) ("[T]he Court agrees with PPLC that the Ordinance creates meaningful burdens on interstate and foreign commerce.") Canadian companies have no incentive to use the Portland-Montreal Pipeline if their oil cannot be moved once it arrives. And as the district court had earlier recognized, the Ordinance "stands as a barrier to the north-to-south operation" of the Portland-Montreal Pipeline, and "the history of the Ordinance … suggests that the City's motive in enacting the Ordinance was to do

just that." *Portland Pipe Line Corp. v. City of S. Portland*, 164 F. Supp. 3d 157, 175 (D. Me. 2016).

Second, the Ordinance also amounts to an impermissible "attempt[] to regulate conduct beyond [the City's] borders and beyond the borders of this country." *Nat'l Foreign Trade Council*, 181 F.3d at 69. By denying access to the Portland Harbor, the Ordinance attempts to discourage the extraction of oil-sands crude in Canada—a process that some environmentalists believe is harmful. The comments made by City officials when voting on the ordinance confirm this intent. *See* D. Ct. ECF Doc. 87 at 13 n.17. But the Foreign Commerce Clause prevents state and local governments from "impos[ing] economic sanctions on violators of its laws with the intent of changing ... lawful conduct in other States," because such efforts offend "principles of state sovereignty and comity." *Nat'l Foreign Trade Council*, 181 F.3d at 69 (second alteration in original) (quoting *BMW of N.A., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996)). It is no answer to say that the Ordinance will not *completely* discourage the extraction of oil-sands crude or that Canada can export oil-sands crude to other locations. If the City can effectively block Canadian oil from flowing through a pipeline, then so can other localities. *See id.* at 70. Accepting this argument would "read the Commerce Clause out of the Constitution." *Id.*

Third, the Ordinance "imped[es] the federal government's ability to 'speak with one voice' in foreign affairs.'" *Id.* at 68 (quoting *Japan Line*, 441 U.S. at 448-

49). "If state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree." *Id.* (quoting L. Tribe, *American Constitutional Law* § 6-21, at 469 (2d ed. 1988)). The Ordinance fails this test. It conflicts with U.S. treaty obligations with Canada to ensure open access to pipeline networks. *See infra* at 20-22. Moreover, the Canadian government has explained that the flow of oil-sands crude from Canada to the United States is "vital to the Canada-U.S. energy relationship." Gov't of Canada, *Oil Sands: A Strategic Resource for Canada, North America and the Global Market* 2 (2013), *available at* goo.gl/9MxR1e. Laws like the Ordinance that restrict market access to oil sands crudes may damage the "Canadian-US trade relations[hip]," which is "among the most important and mutually beneficial relationships in the world." IHS Cambridge Energy Research Associates, *The Role of the Canadian Oil Sands in US Oil Supply* 1 (2010), *available at* https://bit.ly/2X7aG2C. The Foreign Commerce Clause prohibits such "impair[ment] [of] federal uniformity in an area where federal uniformity is essential." *Japan Line*, 441 U.S. at 448.

On this point, the district court particularly erred in refusing to consider the national implications of its upholding of the Ordinance. The district court rejected the Appellants' concerns about the effect of other municipalities enacting similar prohibitions as "speculative." *Portland Pipe Line Corp.*, 332 F. Supp. 3d at 315. But considering the consequences if a local ordinance were replicated elsewhere is

specifically required when the local regulation implicates foreign affairs: "the effect of state and local laws should not be considered in isolation; rather, *courts must consider the combined effects of similar laws in numerous jurisdictions*." *National Foreign Trade Council*, 181 F.3d at 53 (citing *Zschernig v. Miller*, 389 U.S. 429, 433-34 (1968)) (emphasis added); *see also* Appellants' Br. 29-31.

Nor was the district court correct in arguing that the consequence of PPLC's argument "requires all coastal jurisdictions to allow crude oil loading at their shores." *Portland Pipe Line Corp.*, 332 F. Supp. 3d at 315. Nobody contends that the Commerce Clause requires local municipalities to take positive steps to build infrastructure or that it prohibits local zoning regulations or even *actual* environmental regulations. But the Commerce Clause plainly prohibits a targeted ban on the particular use of an existing facility *in order to prevent* the export of oil from Canada. The record establishes that was the aim of the Ordinance, and there is no dispute that was its effect.

II. The Ordinance Is Preempted by the Pipeline Safety Act.

The Supremacy Clause provides that "the Laws of the United States" are "the supreme Law of the Land," U.S. Const. Art. VI, cl. 2, which means "any state law … which interferes with or is contrary to federal law" is preempted. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)). Preemption can be express or implied. *Barnett Bank of*

Marion Cty., N.A. v. Nelson, 517 U.S. 25, 31 (1996). Express preemption occurs when "language in the federal statute … reveals an explicit congressional intent to pre-empt state law*." Id.* Implied preemption occurs when Congress occupies a field with "a regulatory scheme 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 530 (1st Cir. 2007) (quoting *Barnett Bank*, 517 U.S. at 31).

Here, the Ordinance is preempted by the Pipeline Safety Act.[3] This Act embodies Congress's attempt to deal with the precise subject matter of the Ordinance: the safe transmission of oil into, out of, and through pipelines. Congress has made express judgments that the economic importance of interstate and international oil transportation requires a unified, predictable set of federal standards. The Ordinance must give way to Congress's decision.

A. Federal Preemption—Through the Supremacy Clause—Functions in Tandem with the Commerce Clause To Remove Obstacles to National and Global Markets.

Allowing South Portland to second-guess the comprehensive pipeline regulatory schemes enacted by Congress would thwart the sound policies

[3] The Ordinance is not entitled to the presumption against preemption. The federal government, not the states, is traditionally responsible for regulating maritime commerce and interstate energy transportation. *See United States v. Locke*, 529 U.S. 89, 108 (2000); *Colo. Interstate Gas Co. v. Wright*, 707 F. Supp. 2d 1169, 1189 (D. Kan. 2010).

underlying both the Supremacy Clause and the Commerce Clauses. The Supremacy and Commerce Clauses were adopted, in part, to remove obstacles to national and international markets. Indeed, one of the chief purposes of the Constitution was to create a national government with the power to regulate interstate commerce in a uniform manner. As James Madison explained, "The defect of power in the [Articles of Confederation] to regulate the commerce between its several members [was] clearly pointed out by experience." *The Federalist No. 42*, at 283. Prior to enactment of the Constitution, the "multiplicity of laws in the several states" relating to commerce was one of the chief "evils" necessitating constitutional reform. James Madison, *Vices of the Political System of the United States* (1787), *available at* goo.gl/FMLe3. Hamilton noted that in the absence of a national government with authority to prescribe uniform commercial regulations, "[e]ach State, or separate confederacy, would pursue a system of commercial policy peculiar to itself [thereby creating] distinctions, preferences and exclusions, which would beget discontent." *The Federalist No. 7*, at 40. And accordingly, "The importance of the Union, in a commercial light, is one of those points, about which there is least room to entertain a difference of opinion, and which has, in fact, commanded the most general assent of men who have any acquaintance with the subject." *The Federalist No. 11*, at 65.

True union required that the national government have authority to pass uniform laws governing interstate and foreign commerce (the Commerce Clauses), and that those laws supersede contrary laws enacted under the authority of the states (the Supremacy Clause). As Hamilton explained, "The government of the Union must be empowered to pass *all* laws, and to make *all* regulations … in respect to commerce." *The Federalist No. 23*, at 149 (emphasis added). The Constitution's combination of the Commerce Clause and the Supremacy Clause created the framework for a truly national market, one that would substantially improve the new Nation's prosperity and, with that prosperity, its strength and standing in the world.

And that is why when George Washington, then the President of the Constitutional Convention, transmitted the Constitution to the Continental Congress, he was able to tout as one of three critical reasons for its adoption the fact that it vested the power of "regulating Commerce" in "the general government of the Union." *Letter from Federal Convention President George Washington to the President of Congress, Transmitting the Constitution* (Sept. 17, 1787), *available at* goo.gl/MK14fU. But in so doing, he expressly recognized that the price of that arrangement would be States ceding a substantial portion of their sovereignty to the national government: "It is obviously impracticable in the federal government of these States to secure all rights of independent sovereignty

to each and yet provide for the interest and safety of all— Individuals entering into society must give up a share of liberty to preserve the rest." *Id.* But for Washington—and as confirmed by the subsequent ratification votes in the several States—the benefits of uniform commercial regulations were well worth the necessary sacrifice of the States' "independent Sovereignty." It was a price worth paying for the benefits of an efficient, national market; one that would benefit businessmen, laborers, farmers, and consumers alike.

B. The Ordinance Is Expressly Preempted by the Pipeline Safety Act.

The Pipeline Safety Act of 1994 ("PSA"), 49 U.S.C. §§ 60101 *et seq.*, recodifies the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Liquids Pipeline Safety Act of 1979. *See Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 877 n.14 (9th Cir. 2006). Like its predecessors, the PSA leaves interstate pipeline facilities to "exclusive Federal regulation and enforcement." 49 C.F.R. § 195, App. A. The PSA contains the following express preemption provision: "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).

The Ordinance falls under this provision. By regulating the loading of crude oil onto tankers in the Portland Harbor, the Ordinance regulates "interstate pipeline facilities or interstate pipeline transportation." Those statutory terms are broad: they include any "equipment used or intended to be used in transporting

[oil]" and "the storage of [oil] incidental to the movement of [oil] by pipeline." *Id.* § 60101(a)(5), (a)(22)(A)(i); *see also S. Union Co. v. Lynch*, 321 F. Supp. 2d 328, 341 (D. R.I. 2004) (concluding that the PSA covers facilities and activities that are "downstream" from pipelines); *Exxon Corp. v. U.S. Sec'y of Transp.*, 978 F. Supp. 946, 950 (E.D. Wash. 1997) (noting that "Congress intended 49 U.S.C. § 60101[(a)](22)(A) to be read fairly broadly" and holding that storage tanks fell within the statutory definition). The PSA thus preempts state and local attempts to regulate the "facilities, structures, or equipment" that are necessary to facilitate the "bulk loading of crude oil" from the pipeline to marine tank vessels, Ordinance § 27- 786, as well as the loading itself.[4]

[4] Although 49 C.F.R. 195.1(b)(9)(ii) provides that promulgated federal safety regulations do "not apply to ... [t]ransportation of hazardous liquid ... [t]hrough facilities located on the grounds of a materials transportation terminal if the facilities are used exclusively to transfer hazardous liquid ... between a non-pipeline mode and a pipeline," this regulation does not purport to define or alter the statutory definitions in 49 U.S.C. § 60101(a) or the scope of the PSA's preemption provision. Moreover, "[t]he decision of the Department of Transportation to exempt certain pipelines from federal regulation does not necessarily mean that the state can step in and impose its own regulations. '[A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much pre-emptive force as a decision to regulate.'" *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 359 (8th Cir. 1993) (quoting *Ark. Elec. Coop. Corp. v. Ark. Public Service Comm'n*, 461 U.S. 375, 384 (1983)).

The Ordinance also unquestionably imposes a "safety standard[]," in violation of the PSA. 49 U.S.C. § 60104(c). The Ordinance is ostensibly aimed at safety. It emphasizes a desire to protect residents from the "harmful effects" of alleged discharges associated with the Pipeline. D. Ct. ECF Doc. 1-1 at 5. And the ordinance specifically targets (and bans) activities and structures associated with the loading of oil from the pipeline onto a marine tank vessel. It is not aimed at ensuring aesthetic harmony or imposing setback or frontage requirements. *Cf. Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, No. 08-CV-1724, 2008 WL 5000038, at *11 (N.D. Tex. Nov. 25, 2008) (invalidating requirement of a security fence around compressor stations as a "safety standard," but upholding other zoning provisions unrelated to safety), *aff'd*, 608 F.3d 200 (5th Cir. 2010). The fact that the Ordinance purports in part to target air quality is immaterial, as the PSA's safety standards are specifically aimed at "risks to life and property," including "the need for ... protecting the environment." 49 U.S.C. § 60102(a)(1), (b)(1)(B)(ii). Environmental standards *are* safety standards for purposes of the PSA.

Oddly, the district court concluded that the Ordinance was not a safety standard because "a prohibition is not a standard." *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 429 (D. Me. 2017). That is incorrect. The district court defined a standard as a "criterion for measuring acceptability, quality, or

accuracy." *Id.* (citing *Black's Law Dictionary* (10th ed. 2014)). And a prohibition sets at zero the bar for measuring the acceptability, quality, and accuracy of a given task—in this case the loading of oil. Thus, under the plain text of the definition, the Ordinance's ban constitutes a standard in violation of the PSA. The district court never explains why a prohibition cannot qualify as a standard; it treats the definition of standard noted above as *ipso facto* proving the point. *Id.* This is erroneous, and the district court's subsequent discussion of an inapposite motor vehicle efficiency standard provides no support for its position.

Moreover, preemption turns on the Ordinance's *actual* purpose and effect. *See Gade*, 505 U.S. at 105-06. In this case, the actual purpose and effect of the Ordinance are to shut down the Portland-Montreal Pipeline based on the City's mistaken belief that the flow of Canadian oil-sands crude is unsafe. Supporters of the Ordinance believe that oil-sands crude is prone to leaking and cannot be safely transported through pipelines. *See* Seth Koenig, *Portland Pipeline Dries Up, Reviving Talk of Oil Sands Service*, Bangor Daily News (Mar. 9, 2016), *available at* goo.gl/6Mtb09. Of course, such claims have been widely discredited. *See* U.S. Dep't of State, *Final Environmental Impact Statement for the Keystone XL Project*, at 3.13-38 (Aug. 26, 2011), *available at* goo.gl/Iq5Y0e (noting that "there is no evidence that the transportation of oil sands derived crude oil in Alberta has

resulted in a higher corrosion related failure rate than occurs in the transportation of the variable-sourced crude oils in the U.S. system"). But that is not the point: the PSA expressly requires the *federal government*, not the City, to make that safety call. *See 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 transmission facilities."); *accord Kinley Corp.*, 999 F.2d at 359.

III. The Ordinance Will Have Adverse Impacts on Local Business and the Country's Relationship with a Foreign Ally.

The harm caused by the Ordinance cannot be understated. By permitting a local city council to singlehandedly shut down a major international oil pipeline under obvious pretext, the district court has opened the door to the very "patchwork of state service-determining laws, rules, and regulations" that federal law aims to prevent. *Tobin v. Federal Exp. Corp.*, 775 F.3d 448, 455 (1st Cir. 2014) (quoting *Rowe v. N.H. Motor Transp. Ass'n,* 552 U.S. 364, 373 (2008)). And it has done so at enormous local and regional cost.

Most immediately, the Ordinance threatens the PPLC's enormous contributions to the local oil industry. As Appellants properly note, the PPLC is the backbone of the entire oil products shipping industry in Portland harbor. *See* Appellants' Br. 11-12. One economist has estimated that the oil terminal industry "serves as the anchor for the entire Port of Portland, accounting for 84% of the port's

cargo vessels and 94% of its total cargo." *The Economic Impact on South Portland and the Greater Portland Region of the "Waterfront Protection Ordinance" Proposed in the City of South Portland, Maine* at 2 (Sept. 23, 2013), *available at* goo.gl/TPKKNw [hereinafter *Economic Impact*].[5] The South Portland oil products storage and distribution system alone provides 85 jobs (including all 28 of PPLC's employees), spends nearly $38 million annually in the local economy, and maintains taxable assets of over $85 million. *Id.* at 2-4, Appellants' Br. at 11. If the Ordinance is permitted to continue, it may damage the Portland economy for a generation.

The indirect effects of the Ordinance will be substantial as well. The $38 million that the oil products wholesale and distribution industry spends each year in the region creates many other jobs and boosts consumer spending. *Economic Impact*, *supra*, at 5-7; *see also* Dick Ingalls, *"Clear Skies" Means Slow-Motion Dismantling of South Portland's Working Waterfront*, The Forecaster (Jul. 14, 2014), *available at* goo.gl/UxCDaW ("The terminals support untold numbers of other small businesses around the city, like barber shops, restaurants and grocery stores, tug boat operators, laborers, welders and pipefitters."). For each job lost in the oil products

[5] Although this analysis considered the impact of the somewhat broader proposed ordinance that the voters rejected (and which prompted the City's efforts to enact the slightly narrower challenged Ordinance), the report acknowledged PPLC's substantial share of the local industry, including its role as the industry's largest landowner in South Portland. *Economic Impact*, *supra* at 4.

wholesale and distribution industry, nearly three jobs are lost elsewhere. *See Economic Impact*, *supra*, at 6.

The Ordinance thus threatens hundreds, if not thousands, of jobs in Maine. *Id.* at 12. Consumers in Maine can also expect to see rising energy costs, as marine tankers are replaced by more expensive and less reliable ground transportation. *Id.* at 10-11. Indeed, the Maine Department of Economic and Community Development cited the Ordinance as the reason for its decision to revoke the City's "business-friendly" certification. *See* Darren Fishell, *South Portland Stripped of "Business Friendly" Designation*, Bangor Daily News (Apr. 17, 2015), *available at* goo.gl/Z9buZb.

As harmful as the Ordinance is to local interests, its damage spreads far beyond New England. The State Department's involvement in the approval process underscores the international trade issues at stake. Indeed, the governments of the United States and Canada have both "recognized the substantial benefits that would ensue from broadened crude oil transfers and exchanges between these two historic trading partners and allies," including "the increased availability of reliable energy sources, economic efficiencies, and material enhancements to the energy security of both countries." Pres. Findings on U.S.-Canadian Crude Oil Transfers, 50 Fed. Reg. 25,189, 25,189 (June 14, 1985). And a representative of Canada's government testified against the Ordinance, emphasizing the importance of the international

trade relationship. D. Ct. ECF Doc. 87 at 13-14. "The protests of America's trading partners are evidence of the great potential for disruption or embarrassment caused by" the Ordinance. *Nat'l Foreign Trade Council*, 181 F.3d at 54.

The Ordinance also directly conflicts with numerous longstanding and proposed U.S. treaty obligations. The 1977 United States-Canada Transit Pipelines Agreement, for example, provides that "[n]o public authority in the territory of either Party shall institute any measures . . . which would have the effect of, impeding, diverting, redirecting or interfering with in any way the transmission of hydrocarbons." Art. II, § 1, 28 U.S.T. 7449 (Jan. 28, 1977). The Ordinance violates the plain language of this treaty, making it unconstitutional under the Supremacy Clause. Moreover, the North American Free Trade Agreement ("NAFTA") requires the United States and Canada to minimize "prohibitions or restrictions on trade in energy and basic petrochemical goods." Art. 603; *see also* art. 601.

The recently negotiated successor to NAFTA, the United States-Mexico-Canada Agreement ("USMCA") preserves these obligations. The USMCA recognizes "the importance of enhancing the integration of North American energy markets based on market principles" and requires Canada and the United States "to support North American energy competitiveness, security, and independence [through] energy cooperation, including with respect to energy security and efficiency, standards, joint analysis, and the development of common approaches."

USMCA, Canada-U.S. Side Letter on Energy, Art. 3 (Nov. 30, 2018), *available at* https://bit.ly/2EhevuP. It also obligates Canada and the United States to ensure non-discriminatory access to pipeline networks. *Id.* at Art. 5. The Ordinance's direct targeting of Canadian oil imports thus contradicts existing and future commitments of the federal government.

The vitality of the U.S.-Canada trade relationship remains important to the economic success and national security of both nations. In a recently issued GAO report, U.S. government officials note the "extensive[] integrat[ion]" of the United States and Canadian energy sectors. *North American Energy Integration*, GAO 18-575 at 34 (Aug. 2018), *available at* https://bit.ly/2BKVP55. For the sake of both nations' economic and national security, "it is important not to disrupt" this integration. *Id.* That is why U.S. Presidents and Canadian Prime Ministers have repeatedly emphasized the importance of the free flow of energy between the two countries. *See, e.g., Joint Canada-United States Declarations on Trade and International Security* (Mar. 18, 1985), *available at* https://bit.ly/2SQaaXs; Elena Cherney, *Justin Trudeau Emphasizes Canada's Role as Energy Supplier to U.S.*, Wall St. J. (Mar. 9, 2017), *available at* https://on.wsj.com/2mtjjEc. Indeed, recent turmoil in Venezuela underscores the need for strong energy relationships with nearby partners like Canada. Venezuela is historically one of the top exporters of crude oil to the United States, and Gulf Coast refineries have historically been reliant

on such supplies. *See, e.g.*, Jordan Blum, *Gulf Cost Refiners Fear Loss of Venezuelan Oil*, Houston Chron. (Aug. 4, 2017), *available at* https://bit.ly/2SYaTGa. Increasing access to Canadian oil, for use in the United States or export from the United States, helps to ensure domestic energy stability. That stability is imperiled if local municipalities can enact pretextual ordinances that take direct aim at the import of foreign oil—which is precisely what has happened here.

In sum, the Ordinance purposely seeks to interfere with a vital commercial relationship between the United States and one of its closest allies. This is why the Framers of our Constitution were committed to protecting Congress's prerogative to regulate national commerce. Indeed, the Ordinance inflicts precisely the sort of harm that the Constitution sought to prohibit. The Constitution requires this Court to enjoin enforcement of the Ordinance.

CONCLUSION

For the foregoing reasons, the Chamber respectfully asks this Court to reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and 29(a)(4)(G), undersigned counsel certifies that this brief

(i) complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 5,511 words, including footnotes; and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February 2019, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the First Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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