

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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**Nos. 18-2118**

PORTLAND PIPE LINE CORPORATION AND  
THE AMERICAN WATERWAYS OPERATORS,

Plaintiffs-Appellants

v.

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

Defendants – Appellees

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

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**BRIEF OF *AMICUS CURIAE* PORTLAND PILOTS, INC.,  
MAINE ENERGY MARKETERS ASSOCIATION,  
AND ASSOCIATED GENERAL CONTRACTORS OF MAINE  
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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**Corporate Disclosure Statement**

Portland Pilots, Inc., is not a publicly-held corporation, and it does not have a parent corporation. Maine Energy Marketers Association is not a publicly-held corporation, and it does not have a parent corporation. Associated General Contractors of Maine is not a publicly-held corporation, and it does not have a parent corporation.

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## IDENTITIES AND INTERESTS OF *AMICI CURIAE*<sup>1</sup>

### I. Portland Pilots, Inc.

Portland Pilots, Inc. (“PPI”), is a private, closely-held corporation, established in 1925, and located in Portland, Maine. PPI employs two maritime pilots who provide pilotage service, 24 hours a day, 365 days a year, for all foreign and larger domestic vessels traveling to and from Portland Harbor. The pilots serve to protect Portland Harbor by ensuring the safe passage of vessels into and out of the harbor, as well as the safety of crews, passengers, and cargo.

When foreign or large domestic vessels come into or leave Portland Harbor, a PPI pilot is on the ship’s bridge. Maritime pilots are experts in the difficult task of navigating large ships and their cargo through narrow waterways, often competing with heavy maritime traffic from smaller craft. Pilots have specialized knowledge about local conditions, and their job is to guide a ship safely into or out of port. *See, e.g., Hobart v. Drogan*, 35 U.S. 108, 123 (1836) (A pilot is “a person, taken on board at a particular place, for the purpose of conducting a ship through a river, road, or

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<sup>1</sup> This brief is submitted under Federal Rule of Appellate Procedure 29(a) with an accompanying Motion for Leave to File Amicus Brief. Undersigned counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any of the parties; no party or party’s counsel contributed money for the brief; and no one other than *amici* and their counsel have contributed money for this brief.

channel, or from or into a port. His duty [is to] navigate the ship over and through his pilotage limits, or, as it is commonly called, his pilotage ground.”).

Marine pilots were recognized by the first Congress of the United States as critical to the nation’s commerce. 1 Stat. 53, 54 (1789). In 1851, the United States Supreme Court affirmed that maritime pilots were essential to the safe operation of vessels: “[Pilotage laws] rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them....” *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. For Relief of Distressed Pilots, Their Widows and Children*, 53 U.S. 299 312, 315 (1851). More recently, the U.S. Supreme Court reiterated that maritime pilots are “indispensable cogs in the transportation system of every maritime economy” and that “[t]heir work prevents traffic congestion and accidents which would impair navigation in and to the ports,” and that pilotage directly affects “the safety of lives and cargo, the cost and time expended in port calls, and in some measure, the competitive attractiveness of particular ports.” *Kotch v. Board of River Port Pilot Com’rs for Port of New Orleans*, 330 U.S. 552, 558 (1947). This remains true today.

PPI provides navigational services to a range of vessels, including crude and petroleum product tankers, container and break bulk ships, cruise ships, and ferries

traveling to and from Portland Harbor. The importance of PPI to Maine's economy and the safety of its waters and coastal inhabitants cannot be overemphasized.

Maine ranks second among New England states for marine traffic volume, and Portland Harbor was the second largest oil port on the east coast of the United States prior to the Clear Skies Ordinance, which eliminated crude oil deliveries in the Port of Portland. PPI, as a vital member of the Harbor's transportation system, is uniquely situated to comment on the negative economic and safety impacts of the City of South Portland's Clear Skies Ordinance (Ordinance No. 1-14/15) adopted on July 21, 2014 (the "Ordinance"). Appellants' Add. 5-1.

## **II. Maine Energy Marketers Association**

Maine Energy Marketers Association ("MEMA") is a 300-member organization that includes providers of heating oil, propane, biofuels, pellets, electricity, and motor fuels. In addition, MEMA has more than 175 associate members who provide goods and services to Maine's petroleum dealers and their customers.

MEMA's membership also includes the owners and operators of 70% of Maine's 1,300 convenience stores, through which it sells more than 1 billion gallons of gasoline and diesel fuel. MEMA members sell more than 90% of all the propane sold in Maine each year, as well. MEMA members serve more than 415,000 Maine households and keep nearly 1 million Mainers warm through the winter months.



MEMA is uniquely situated to explain the impact that the Ordinance has had on its members as well as on the overall health and economic viability of Portland's working waterfront.

### **III. Associated General Contractors of Maine**

Since 1951, the Associated General Contractors of Maine ("AGC Maine") has been Maine's largest construction trade association representing general and specialty contractors, and construction-related firms across the state. AGC Maine's membership includes commercial building, heavy and highway, industrial, utility, and specialty contractors who work in the public and private construction markets.

Prior to the Ordinance, South Portland's waterfront was a critical source of work for many of AGC Maine's member companies, including site work and excavation, engineering, utility, welding and fabrication, vertical building, and specialty trades like electrical and mechanical. Much of the work performed by construction companies on the waterfront is directly aimed at improving safety and the environmental health of the Port.

AGC Maine's specialized knowledge and equipment is rapidly shifting out of state as work in South Portland has disappeared. The ability of these businesses to invest in its infrastructure, and hire and train qualified employees has suffered.

## **SUMMARY OF THE ARGUMENT**

Contrary to the stated purpose of the Ordinance, the Ordinance compromises the local economy and safety of operations within Portland Harbor and disrupts the well-being of the entire Port, the busiest commercial port on the coast of Maine. The Ordinance interferes with and harms local businesses that are dependent on the volume and size of vessels entering and leaving Portland Harbor. Although it is limited by its express terms to the loading of crude oil, the financial effects of the Ordinance are far-reaching. By prohibiting the loading of crude oil in Portland Harbor and curtailing the number of crude oil tankers requiring navigation, the Ordinance adversely affects PPI, and MEMA's and AGC Maine's members, which are an essential part of Maine's working waterfront, and compromises the environmental health and the safety of shipping in the Harbor. Furthermore, the Ordinance reduces the ability of other businesses dependent on a robust working waterfront to respond to changes in world markets.

While there remains modest domestic and foreign commerce in petroleum products, salt, and containerized goods in Portland Harbor (whereas paper, wood pulp, scrap metal, and coal have essentially disappeared), the transportation of crude oil has played a disproportionately large role in the economic viability of PPI and MEMA's and AGC Maine's members, and other businesses that are part of Maine's working waterfront.

Pursuant to state statute, the Board of Harbor Commissioners for the Port of Portland (the “Harbor Commission”) sets pilotage rates based on a vessel’s size, generally described as deadweight tonnage (DWT), which reflects each vessel’s carrying capacity. P. & S. L. 1981, § 5 (2) (as amended); 38 M.R.S. § 90(1)(B). Crude tankers are approximately 167,000 DWT – four times the carrying capacity of a typical product tanker and over six times the carrying capacity of the typical small container ship that calls upon the Port of Portland. Without the potential for importing oil from Canada by reversing the flow of oil in the pipeline operating between Montreal and South Portland (estimated to bring in 140,000 barrels of oil per day, equating to four to six crude tankers entering Portland Harbor each month), PPI faces significant hardship and a loss of its pilots’ unique knowledge base. Without this potential source of revenue, PPI will be significantly less able to hire and retain pilots necessary to ensure the safety of commerce in Maine’s busiest harbor. On top of that, PPI apprentice pilots will not have the opportunity to adequately train on such large, heavy ships while navigating the waters of the Port of Portland. Without a supply of future pilots qualified to navigate these types of vessels, the Harbor cannot respond nimbly to market conditions and receive such ships. The Ordinance threatens to permanently hinder future economic development, and, at the same time, curtail the highest levels of safety in and around the harbor.

MEMA members and other businesses, including AGC's member companies, will suffer as well. In 2013, Portland ranked 41st in volume of traffic among the 132 ports monitored by the Maritime Association. Without tanker traffic, Portland has dropped 40 spots to 81st, just below Red Dog, Arkansas. In the process, countless jobs are being lost, and the vitality of Portland Harbor is changing drastically. Once businesses and skilled tradesmen relocate in response to the economic downturn, reviving the Harbor's unique skillset, infrastructure, and overall safety network will become all the more difficult.

## **ARGUMENT**

### **I. THE ORDINANCE ADVERSELY IMPACTS THE LOCAL ECONOMY.**

Portland Harbor is a major commercial seaport. In 2013 more than 750 vessels entered the Harbor to load and unload cargo weighing tens of millions of tons. By 2018, Portland Harbor had fewer than 300 compulsory-pilotage vessel visits, with the brief anomaly of the ill-fated Yarmouth, Nova Scotia-Portland ferry service, which started service in 2016 and then discontinued operations at the end of 2018. The harbor is ice-free and exceptionally deep, which means that it can – and does – handle even the largest ocean-going vessels. This is the reason the Pipeline was originally built in 1941. Appellants' Add. at 3-6. Crude oil tankers deliver oil at the Pier 2 terminal, located in South Portland, where three pipelines owned and operated by the Portland Pipe Line Corporation ("PPLC") terminate. *Id.*

Since World War II, crude oil has been unloaded in Portland Harbor and transported through a dedicated pipeline system to refineries located in Quebec and Ontario. The original 12-inch pipeline from the terminal in South Portland was built to provide for safe transportation of crude oil to Quebec at a time when German U-boats patrolled the western Atlantic. From the start, Portland Pipe Line protected our national security, but also provided the Harbor with the opportunity to respond to changes in the commercial market and reinvent itself as an oil port. Appellants' Add. at 3-6. The original pipeline was abandoned in place in 1983 and is being used to protect two other pipelines owned by PPLC. *Id.* at 3-7. Both of the two existing pipelines are currently idle. *Id.*

**A. Historically, crude oil has been the lifeblood of Portland Harbor.**

By 2004, Portland had become the second busiest port by crude oil volume on the east coast, behind only Philadelphia, and 224 crude oil tankers entered Portland Harbor to unload crude oil at the Pier 2 terminal. That year, 160 million barrels of oil were unloaded and transported through the pipeline owned and operated by PPLC from South Portland to Montreal. At that time, PPI employed five full-time pilots and five other full-time employees. By 2014, 33 million barrels were unloaded and transported through Portland Pipeline – a 79% reduction – and by 2018 no crude oil was delivered to PPLC, a 100% reduction over 12 years.

This decline reflects a significant change in international oil markets. Prior to the recession in 2008, Canada imported a substantial amount of oil that was brought into Portland Harbor by crude oil tankers and unloaded at the Pier 2 terminal and then transported through the PPLC pipeline to Montreal. Canada's demand for foreign oil has steadily and dramatically declined. As a result, the number of crude oil tankers delivering crude oil to the Pier 2 terminal plummeted. In 2004, over 200 crude tankers entered the Port of Portland; in 2018 no crude oil tankers discharged in Portland Harbor. The impact of this decline threatens the economic viability of the Harbor and also compromises its safety.

The sustainability of PPI, AGC Maine's and MEMA's member organizations, as well as other businesses serving the Harbor, have been materially impacted by the dwindling Canadian demand for foreign oil. The Ordinance thwarts a critical opportunity to offset this decline by effectively prohibiting the importation of Canadian oil. By eliminating this option, the Ordinance threatens to make this downturn permanent.

Without pilots skilled in the navigation of large, deep-draft tankers in the Port, the Harbor's ability to receive large, heavy vessels (carrying any type of cargo) is seriously compromised. Pilots have specialized knowledge of a particular port, as well as hundreds of hours of training dedicated to maneuvering particular types of vessels into and out of the Port. For example, in Portland Harbor all pilots hold an

unlimited master's (captain's) license and must, *inter alia*, possess a federal license with a first-class pilot endorsement and have completed 250 training trips of compulsory-pilotage vessels (at least 25% of which must be made during hours of darkness); pass a written examination; and submit proof of certifications in radar, bridge management, and electronic chart instrumentation. 38 M.R.S. § 91; Maine Department of Transportation Rule 17-387. Pilots capable of, and experienced in, navigating large vessels through the pilotage ground of Portland Harbor are not easily replaced. In fact, only four such pilots are duly licensed (presently, there is one pilot apprentice), and a loss of even one of them is deeply felt – not just by the large tanker vessels, but by all maritime traffic through the port. If these large tank vessels disappear for very long, the specialized, local knowledge of these pilots will simply disappear.

**B. Tanker traffic through the Port of Portland has declined precipitously in recent years.**

Competition and consolidation have closed five of the six Montreal refineries that previously relied on foreign oil shipped through Portland Harbor. The last refinery in Montreal recently switched to receiving oil from western Canada through the pipeline owned by Enbridge, Inc., that operates between western Canada and Montreal. As a direct result of this change, only nine crude oil tankers entered Portland Harbor during 2016, six in 2017, and none called upon the Port in 2018. As demonstrated in the table below, the lower number of crude oil tankers entering and

departing from Portland correlates directly with the significant loss of DWT. For example, in 2014 the year the City adopted the Ordinance, PPI piloted 43 crude oil tankers, but in 2018, PPI did not pilot any crude oil tankers to PPLC. In this same period, DWT in Portland Harbor was cut by almost half. *See* Table 1; ECF Doc. # 139 at 13.

### Vessel Traffic and DWT in Portland 2004 – 2018

Table 1

Year	Crude Tankers	Product Tankers	Container Ships and Other Vessels	DWT
2004	226	221	141	36,315,254
2005	211	204	133	36,184,008
2006	186	211	127	33,034,397
2007	176	192	119	32,373,593
2008	168	214	81	31,840,861
2009	148	212	89	31,375,354
2010	136	201	78	30,088,520
2011	82	196	108	24,386,066
2012	74	192	102	22,175,470
2013	67	202	105	22,071,978
2014	43	179	290	20,342,442
2015	28	178	283	19,028,833
2016	11	142	231	13,820,572
2017	6	133	229	13,321,021
2018	0	130	258	13,077,058



The metric for determining PPI's revenue is the total DWT of vessels requiring its services. Hence, PPI's revenues for the 12-month period ending on July 31, 2016, were down 46% compared with the prior period ending on July 31, 2015, notwithstanding the increase in container and cruise ships entering Portland Harbor and the brief operation of the ferry service between Portland and Nova Scotia, which, as stated above, is not scheduled to resume in 2019. The dramatic loss has occurred despite a slight increase in container ship traffic, as container ships do not generate comparable revenues, due to their smaller size, and currently call upon Portland only once a week.

In response to the decline in crude oil tanker traffic, PPI has made significant cuts in its overhead, including a substantial reduction in its workforce. Its workforce now consists of two pilots (who work full time a portion of the year and part-time during the remainder of the year) and two part-time deckhands. This is compared to five full-time pilots and five other employees in 2004. Since the City enacted the Clear Skies Ordinance, PPI eliminated two deckhand positions for cost reasons, which presents challenges in ensuring the safe boarding and disembarking of its pilots. In addition, PPI has since closed its office that was located at Union Wharf, and the two pilots now conduct PPI business out of their homes. PPI's primary pilot boat was built in 1969 and, if the current trend continues, PPI will be forced to sell its newer (2007) pilot boat due to decreased revenue.

The long-term sustainability of PPI is dependent on the ability of PPLC to adjust to changing oil markets by reversing the flow of crude oil in the pipeline, thereby enabling the importation of oil from Canada, and increasing the number of crude oil tankers requiring its services. If the Ordinance is overturned Canadian crude oil can be loaded at the through-point of the Harbor in South Portland for distribution throughout New England and beyond.

By precluding the loading of crude oil in South Portland, the Ordinance jeopardizes PPI's ability to invest in training programs, pilot boats, dispatch services, rotation systems, and equipment and support systems needed for a modern, efficient, and safe pilotage operation in Portland Harbor. Without the skills and experience of a sufficient number of marine pilots and crew employed by PPI, the Ordinance undercuts the Harbor Commission's ability to provide the necessary number of qualified and licensed pilots for "safety and convenience of commerce" (Maine Department of Transportation Rule 17-387, § 17.1(a)(ii)) in Maine's busiest harbor.

Other businesses dependent on the transportation of oil products into and out of Portland Harbor, including tug boats, line handlers, marine fuel suppliers, ship agents, ship chandlers, cargo gaugers / inspectors, line handlers, oil containment boom support and ship expeditors,<sup>2</sup> have also been negatively affected.

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<sup>2</sup> A ship agent acts as the servant of the master and owners of the vessel, and is charged with overseeing and coordinating all aspects of the port call. A ship chandler supplies the crew's food and the ship's maintenance supplies. A boom and line handler

Prior to the Ordinance, South Portland's waterfront was a critical source of work for many of AGC Maine's member companies, including site work and excavation, engineering, utility, welding and fabrication, vertical building, and specialty trades like electrical and mechanical. Much of the work performed by construction companies on the waterfront is directly aimed at improving safety and the environmental health of the port.

Importantly, in addition to prohibiting all "bulk loading" of crude at the harbor in South Portland, the Ordinance also explicitly prohibits the installation, construction, reconstruction, modification, or alteration of new or existing facilities, structures, or equipment for the purpose of bulk loading of crude oil onto any marine tank vessels in the harbor in South Portland. For many of AGC Maine's companies that have relied on the steady flow of waterfront work, the Ordinance has forced them to seek work out of state in order to avoid having to layoff tenured employees or closing their doors.

A number of AGC Maine members with long-term contracts and century-old business relationships with companies located within the shoreline zone have been directly and negatively impacted by the City's decision to change the applicable zoning. The precedential effect this change will have goes beyond the direct impact

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helps to tie up and release the ship, and also assists in loading and unloading cargo. An expediter helps to facilitate the cargo transfer.

on these existing business relationships, raising the price of energy and extending to regional and national energy security concerns.<sup>3</sup>

## **II. SEVERELY REDUCED TANKER TRAFFIC THREATENS THE OVERALL SAFETY OF THE PORT.**

The overall safety of the Portland Harbor is threatened by the reduction in the number of crude oil tankers entering Portland Harbor. Local businesses that service the Port are dependent on the number and size of vessels entering Portland Harbor. These same businesses are responsible for the safe, efficient operation of the Port. Vessels carrying cargo that can be especially dangerous or damaging to the environment also put a premium on the skill and knowledge of today's harbor pilots. The Ordinance has made it less viable for these companies and PPI to service Portland Harbor and, without them, the overall safety of Portland Harbor will be compromised. The precedent set by this local ordinance directly impedes the State's goal of protecting the energy future and safety of our citizens.

The problem goes beyond the economic hardship imposed by the Ordinance. Apart from the profitability of operating in the Port, the loss of tanker traffic makes it disadvantageous for some companies to stay. The trial court recognized the likely loss of specialized safety equipment with the demise of the Pipeline (Appellants'

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<sup>3</sup> This is a very real possibility. The people of Maine may suffer higher priced heating and transportation fuels costs are spread between fewer vehicles and terminal operations are reduced.

Add. at 3-42. (“Portland Tugboat may permanently lose all of the business it previously received from assisting ships seeking to dock at PPLC’s Pier 2.”)). The same is true of the oil-spill response vessel *Marine Responder*, which the nonprofit company Marine Spill Response Corporation announced would be sold in the wake of the demise of Portland Pipe Line. *See* ECF # 139 at 16. As a result, all of these separate businesses are selling their equipment and losing the specialized, local knowledge of their employees, all of which contributes to the existing safety network of the Harbor.

**III. THE ORDINANCE DOES NOT FURTHER – RATHER, IT UNDERMINES – SOUTH PORTLAND’S PURPORTED GOAL OF IMPROVING PORT SAFETY.**

The Ordinance does not improve port safety. Instead, the Ordinance puts an economic strain on the local businesses charged with the safe and efficient operation of the port, and it inhibits their ability to do their job. Likewise, the Ordinance impedes large tanker traffic, which simply makes it uneconomical for some types of ships to continue to call on the Port. Without a firefighting tug or the capability to respond immediately to an oil spill, the overall safety of the port is unambiguously compromised. *See* Order and Judgment (ECF # 255); Appellants’ Add. at 3-42, 43. The Ordinance does not further its purported goal of protecting the health and safety of the port. It has the opposite effect.

The City of South Portland, in the Findings section of the Ordinance, paints the picture of a thriving waterfront with promising opportunities for increased growth, which is threatened by the menacing presence in the Harbor of tankers laden with crude oil. In actuality, the Port of Portland was a thriving center for maritime trade *because* tankers laden with oil and petroleum products came and went. The bustling waterfront that the City envisions is not possible unless Portland Harbor is a hub of activity. The Ordinance threatens the City of South Portland's community vision. The unloading of crude oil has taken place in Portland Harbor for over 70 years. It has been an integral part of waterfront growth, not its destruction.

The Ordinance, by comparison, threatens the economic health of South Portland's working waterfront. An Economic Impact Report commissioned by MEMA notes: The Port of Portland "has 35 businesses providing over 100 jobs in support activities for water transportation and freight transportation management. Total payroll for these businesses amounts to nearly \$6.0 million." *See* ECF # 139 at 21. On top of that, "many specialized welding and repair businesses, specialized construction businesses, fuel suppliers, engineering, insurance and legal jobs not formally classified as 'port-related' nevertheless depend on port activities for the major shares of their sales." *Id.* If these businesses are forced to shut-down, then the working waterfront that has thrived in Portland for nearly two centuries will cease to exist, and the traffic that remains – small container vessels, commuter ferries and

break-bulk cargo vessels – will not be enough to entice the Harbor’s current safety network (firefighting tugs, the Coast Guard, and the *Maine Responder*) to remain. This loss, more than tanker traffic, threatens the environmental safety of the Harbor.

### CONCLUSION

For all of the foregoing reasons, and for the additional reasons set forth in the Plaintiffs’-Appellants’ brief, the Ordinance violates both constitutional and statutory law, and is profoundly misguided as a matter of law. In addition, as explained herein, and contrary to the City of South Portland’s claim, the Ordinance does not make the Port of Portland a safer place. *Amici* PPI, MEMA, and AGC respectfully urge this Court to reverse the decision of the district court.

Dated at Portland, Maine, this 15<sup>th</sup> day of February, 2019.

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### **CERTIFICATE OF SERVICE**

I, Twain Braden, hereby certify that on February 15, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filings to all counsel of record.

/s/ Twain Braden  
Twain Braden, Esq.

### **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,789 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) 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 font size 14.

Dated: February 15, 2019.

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