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

# REPLY BRIEF OF APPELLANTS

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## Introduction

The City, supported by amici, argues that the Ordinance passes Constitutional muster because it is an ordinary siting, zoning or air regulation, with only incidental and evenhanded impact on foreign commerce.

But the Ordinance is ***not*** a siting or zoning regulation. It does not dictate where or under what circumstances a pipeline can be built. Instead, it targets an existing pipeline, regulating its operations to ensure that it does not flow from Canada into the United States. And the Ordinance is ***not*** an air emissions regulation, as it sets no air emissions standards—only rules intended to prevent the operation of the pipelines from north to south.

The City is free to enact generally applicable air or land use regulations with only incidental impact on cross-border pipeline operations or maritime and foreign commerce. What it cannot do is enact rules that target such operations and commerce; regulate pipeline operations and shut pipelines down; and, if replicated throughout the country, preclude the import of crude oil from Canada and ban the loading of all crude oil onto ships.

## I. The Ordinance is preempted under the PSA.

### A. An ordinance that regulates the direction of the flow of a pipeline is not a pipeline routing determination but rather regulates pipeline operations.

Consistent with the overarching "siting" defense asserted by the City and its supporting amici, the City argues that 49 U.S.C. § 60104(e), providing that the PSA "does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility," saves the Ordinance from preemption. (Brief of Appellees, or City Brief ("C-Br.") 18.[1])

A concise PHMSA-funded explanation of the siting frameworks for various types of energy infrastructure, noting, *inter alia*, the responsibility of the U.S. Department of State in siting cross-border pipelines, is found at http://pstrust.org/wp-content/uploads/2013/10/PST-Govt-Guide-Pipelines-2014-web.pdf. The Court need not explore this topic, however, because the Ordinance is unrelated to any prescription by the Secretary as to the siting or routing of a pipeline facility. The pipelines have been where originally sited in 1941, running through two countries and three states, in accordance with Presidential orders. (Final Principal Brief of Appellants, or "A-Br." 4.)

[1] Because the City's final principal brief is due after the due date for the instant reply, Appellants must cite to its initially filed brief.

The Ordinance regulates the ***operations*** of an existing pipeline, effectively and purposefully preventing a north-to-south flow. Even the City's fourteen supporting State amici concede that the PSA governs such flow regulation. (Amici Brief of Massachusetts, *et al.*, or "S-Br." 8: PSA standards concern "how oil flows through that [pipeline] infrastructure").)

Nor is the Ordinance even a neutral zoning regulation that provides that new infrastructure cannot be located within certain zoning districts. Because the City's goal was to stop the reversal of the pipelines' flow, the Ordinance prohibits the use of any equipment to load a ship (*i.e.*, to unload the pipelines), regardless of the dimension of such infrastructure, or when it was first installed. (A-Br. 11.)[2]

The City argues that a local regulation relates to siting, not operations, when it causes a complete pipeline shutdown, because a shutdown is a "prohibition," not a "standard." Under its view, local authorities are free under the PSA to shut down existing pipelines, perhaps because a shutdown can be viewed as a functional

[2] The City refers to "smokestacks." (C-Br. 5.) There would be no smokestacks should the flow of the pipelines be reversed. In any event, the substance of the Ordinance does not regulate *e.g.*, the height of smokestacks, VCUs or any other infrastructure. A similar allusion to "highly polluting activity" (S-Br. 15), ignores that no reversal can occur without meeting all applicable air emission standards. The City chose, intentionally, to enact no such standards of its own, given its goal to (a) stop the reversal, no matter what; and (b) affect no local businesses. (*See* A-Br. 52, n. 19.)

equivalent of wiping a pipeline off the map. It cites no legal authority for this proposition. (*See* C-Br. 18-19, 24.)

As noted previously (A-Br. 25-26), this argument is incorrect not only legally – a prohibition ***is*** a standard – but factually, because the Ordinance only regulates one direction of the pipelines' flow, so it is a standard even under the City's own erroneous definition. Neither the City nor any of its amici have responded, except, perhaps, to the extent the City asserts allowing continued southerly flow recognizes "grandfathering" principles. (C-Br. 16.)

This simply proves Appellants' point. What is being "grandfathered" here is the pipelines' northerly flow, which is just another way of saying that what is being prohibited is the flow of oil from Canada into the United States. The City's Brief even uses the word "operations." (*Id*.).

In sum, the Ordinance regulates the manner and direction in which the pipeline can flow, falling squarely into the preempted field.

### B. The decisions in *Texas Midstream* and *Washington Gas* support preemption.

The City argues that the decisions in *Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 211 (5th Cir. 2010), and *Washington Gas Light Co. v. Prince George's Cnty. Council*, 711 F.3d 412 (4th Cir. 2013), support its position. To the contrary, under the reasoning applied in both decisions, the Ordinance is preempted.

In *Texas Midstream*, a pipeline challenged a local requirement that compressor stations must be surrounded by a security fence and set back 300 feet from the road. The district court concluded that, given its safety purpose, the fence requirement was preempted, but upheld the setback; the Fifth Circuit affirmed. 608 F.3d at 211. In *Washington Gas*, the plaintiff wanted to add a new storage tank to its natural gas substation in its preferred location. The defendant denied the request based on a zoning plan that prohibited all industrial usage around a metro center aimed at maximizing transit-oriented development. 711 F.3d at 415.

In both cases, the Court of Appeals concluded that any safety purpose or effect of the upheld local regulation was incidental, and observed that the challenged zoning did not prevent the projects from proceeding, but only increased their costs. 711 F.3d at 422; 608 F.3d at 211. The Fourth Circuit underscored that that "the PSA expressly preempts the field of pipeline safety," 711 F.3d at 420-21, and the Fifth Circuit expressly probed beyond the face of the challenged local regulation, looking at city council records, to find that the motivation of the setback was not safety-driven. *Texas Midstream*, 608 F.3d at 211, citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (2010).

Applying the reasoning used in these two decisions, the Ordinance is preempted because:

- the trial court here found, and the record is replete with admissions that the City was concerned with pipeline safety;[3]
- The Ordinance does not merely add costs, but restricts pipeline flow and effectively shuts them down;
- The Ordinance is not evenhanded, with only incidental impact, but targets the pipelines and its operations.

In sum, unlike the regulations upheld by the Fourth and Fifth Circuits, the intent and effect of the Ordinance is to regulate in which direction oil may flow within pipelines, and, as a practical matter, it shuts down the pipelines, based on safety concerns.

### C. Effect is often dispositive, but the purpose of local regulation can also be relevant under the PSA.

The City admits that the Ordinance was at least partially driven by safety concerns (ECF 254 at 9), and appears to concede that the word "safety" for PSA preemption purposes includes environmental concerns. The language of the PSA is

[3] *E.g.*, The City enacted the Ordinance "in part out of concerns about the ***safety*** of handling tar sands crude oil at the Harbor ... in terms of environmental and public health risk from ***spills***" (Add. 3-73, n.6); the City deemed "tar sands to be a ***dangerous*** article … and intended to alleviate the ***risks from transporting*** [it]" (Add. 3-73); a primary purpose of the Ordinance was "protection of the environment from ***spills***" (Add. 4-49); and concerns such as air emissions and aesthetics were genuine, but overemphasized to downplay the City's "***spill-related***" concerns (*see* Add. 3-80) (emphasis supplied).

broad, preempting the entire field of regulation as to "risk to life or property posed by pipeline transportation and pipeline facilities." 49 U.S.C. § 60102(a)(1).[4]

Instead, the City, consistent with the trial court's legal ruling, argues that the fact the City enacted the Ordinance based at least in part on safety concerns is irrelevant. (C-Br. 21.)

As a threshold matter, the Court need not reach this legal issue, because the Ordinance is preempted based solely on its effect on pipeline operations and PHMSA's ability to set practicable safety standards. Even if the Ordinance were wholly unprecipitated by any safety concern – contrary to the fact finding and City admissions here – a local flow regime regulation falls squarely into the PSA's preempted field.

But the City is also wrong. When federal legislation field preempts a specific category of regulation such as "safety" standards, what is deemed "safety" can involve examining local purpose. *See ANR Pipeline Co. v. Iowa State Commerce Comm'n,* 828 F.2d 465, 471 (8th Cir. 1987) (striking down Iowa law as preempted under PSA predecessor, noting enactment of state law was for "safety reasons");

[4] While the trial court did not specify the location of the City's concerns about "spills" and "leaks," they, per force and as the legislative record reflects, relate to pipeline transportation and the pipelines themselves, with expressions of fear as to the age of the lines. (*E.g.*, Joint Appendix ("App.") 131-132, ¶¶ 50-58.) The trial court expressly recognized that the "environmental and safety concerns" motivating the Ordinance "overlap[ped]" with the safety field preempted under the PSA. (Add. 3-80, n.8.)

*see generally Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136, 145 (2d Cir. 2006) (Sotomayor, J.) (describing purpose analysis under the "safety" exception in 49 U.S.C. § 14501).

Whatever abstract difficulties might sometimes be involved in discerning local purpose, here, the purpose of this Ordinance has been found as a matter of fact, after trial. The City's objective was to regulate pipeline operations: to stop the reversal of the direction of the flow of the pipeline. The City's motivations in doing so, as found by the trial court, are replete with safety concerns, both narrowly and broadly construed. (*Supra* notes 3 & 4.)

The City argues that the trial court characterized its safety-related purpose was only "secondary." (C-Br. 22.) To the extent any ranking exercise could be legally informative, the word "secondary" is never used by the trial court in its findings. To the contrary, the court called non-safety concerns "overstated" so as to underplay "spill-related concerns." (Add. 3-80, 3-83.) And the City itself admitted that safety was one of its "primary" concerns. (Add. 1-46, 1-49.) Because the PSA preempts the entire field of safety standards, moreover, the legal test is whether "the matter on which the [locality] asserts the right to act is **in any way** regulated by the Federal Act." *Pacific Gas & Electric v. State Energy Commission*, 461 U.S. 190, 212-13 (1983) (emphasis added; citation omitted).

Finally, the implications of the City's defense underscore its discord with the federal statute. Under its view, any town anywhere along the route of an existing cross-border pipeline can shut down its operations because it believes oil pipelines are unsafe, and survive preemption. The PSA, which makes pipeline safety an exclusively federal concern, precludes this result.

### D. It is immaterial whether the Ordinance expressly references a piece of pipeline equipment.

The City argues that the Ordinance is not preempted because it does not regulate "pipeline facilities" themselves. (C-Br. 23; *see* S-Br. 10.) This argument is misdirected for at least two reasons.

First, whatever equipment the Ordinance names, what it actually ***does*** is restrict the flow of oil through the entire 200+ miles of PPLC's pipelines. The Ordinance is designed to and does plug one end of the lines. That the Ordinance refrains from expressly referencing any part of the lines is of no legal moment, as preemption "turns on 'the ***target*** at which [local] law ***aims.***" *Hughes v. Talen Energy Marketing, LLC,* 136 S. Ct. 1288, 1298 (2016) (citation omitted; emphasis in original). Many decisions have recognized that the ultimate effect of the regulation is what matters. *See, e.g.*, *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) (striking down Maine law referencing shippers as preempted by federal law referencing carriers, based on the indirect impact of the Maine law on carriers), citing *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541

U.S. 246, 255 (2004); *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 436 (1st Cir. 2016) (preemption can occur when state law's effect is only indirect); *Overka v. American Airlines, Inc.*, 790 F.3d 36, 40-41 (1st Cir. 2015) (court examines the logical effect of local regulation).

Second and relatedly, 49 U.S.C. § 60104(c) preempts local regulation of "interstate pipeline facilities or interstate pipeline ***transportation***" (emphasis supplied). 49 U.S.C. § 60101(5), (7), (11), (19), and (22) define interstate pipeline facilities and transportation broadly, excepting only movement through gathering lines, onshore production, refining or manufacturing facilities, or storage or in-plant piping systems associated with onshore production, refining, or manufacturing facilities.[5]

**E. The Ordinance is conflict preempted because it frustrates the PSA's goals.**

Even if the Ordinance were saved from express preemption, it would nevertheless be preempted under the doctrine of conflict preemption because it

[5] The States' assertion in a footnote that the City can impose safety standards of on-shore structures stricter than those contained in the PSA, based on a provision in the Ports and Waterways Safety Act ("PWSA") (S-Br. 9, n.7), is not only improper because amici cannot introduce new arguments, as they concede (*see id.* at 7, n.5), and is also waived as undeveloped, but is inapposite for the reasons given above – the Ordinance stops transportation throughout the pipelines. In any event, as this Court reminded the Commonwealth in *U.S. v. Massachusetts*, 493 F.3d 1, n.21 (2007), this provision related to its impact on a specific section of Title 33. The provision was also repealed in 2018. Pub. L. 115-282, 132 Stat. 4264.

interferes with the PSA's purpose of ensuring the enactment and application of uniform safety standards for cross-border and interstate pipelines.

In response, the City makes two arguments. First, it suggests that because the PSA includes an express preemption provision, there can be no implied preemption. (C-Br. 25.) This is incorrect. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

Second, it argues that there is no authority to support that this is the purpose of the PSA. (C-Br. 26.) This argument is equally bereft of merit.

The purpose of the PSA is to establish and apply national, practicable safety standards so that commerce can occur across many jurisdictions. *See* 49 U.S.C. §§ 60102(a)(1), 60102(b)(1); 49 U.S.C. Part 195 App. A (the PSA "provides for a national hazardous liquid pipeline safety program with nationally uniform minimal standards"). Hence, courts have universally recognized "the PSA's policy of providing national uniformity in the establishment and enforcement of hazardous liquid pipeline safety regulations." *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006); *see also Williams Pipe Line Co. v. City of Mounds View*, 651 F. Supp. 551, 569 (D. Minn. 1987) (noting "the clear Congressional goal of a national standard for hazardous liquid pipeline safety").

The City does not even mention these precedents, let alone explain why they are wrong. And once the uniformity purpose of the PSA is accepted, the Ordinance

plainly cannot survive: again, under the City's (and its amici's) view, any single town can shut down an interstate or cross-border pipeline, completely or in one direction, based on its own safety analysis or otherwise. That result cannot be reconciled with the PSA's purpose of ensuring national uniformity in pipeline regulation.

This conflict, moreover, is not merely theoretical. The question is whether a local law has only a remote adverse effect on the federal purpose animating the preempting statute, or whether that effect is direct and substantial. *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 86 (1st Cir. 1997). Here, as PPLC and AWO argued—without response by the City or any of its amici—PHMSA has concluded that transportation of diluted bitumen is safe so long as its regulations are followed; yet the trial court found that the City may supersede that federal agency's decision-making. (A-Br. 23-24.) The City's prohibition of the flow of oil from Canada, based on a fundamental disagreement with the federal government about the safety of its transportation through a pipeline, is a direct assault on federal decision-making under the PSA and is thus preempted. *See Algonquin Gas Transmission LLC v. Weymouth, Massachusetts*, 919 F.3d 54, 64-65 (1st Cir. 2019) (striking down local regulation under obstacle preemption grounds due to conflict between FERC's NGA review conclusions and local review).

In sum, the Ordinance's safety-driven, targeted effect and goal of stopping flow reversal, and its practical effect of shutting down the pipelines' operations entirely, both violates the PSA's express preemption provision and frustrates the core purpose of the federal statute.

## II. The Ordinance violates the Commerce Clause and foreign affairs doctrine.[6]

### A. The aggregate impact of local regulation is not only *a*, but *the* critical element of analysis.

The City and its amici vigorously argue that the national consequences of local regulation like the Ordinance are irrelevant.[7] (C-Br. 27; S-Br. 27; Brief of Conservation Law Foundation *et al*. ("CLF-Br.") 25.)

To the contrary, the legal analysis of local regulation ***must*** consider national impacts should that regulation proliferate, because the relevant constitutional question is whether the ***type*** of law at issue is prohibited.

A single New England port town will not shut down the entire nation's energy commerce, no matter what its ordinance provides. But the only way to

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[6] The States assert Appellants waived their foreign affairs claim. (S-Br. 16, n.11.) But the claim is discussed at length starting at A-Br. 29. As previously noted, *id*. n.12, the tests for a foreign affairs and a "One Voice" Commerce Clause claim overlap.

[7] "Like the Ordinance" does not mean evenhanded local regulation incidentally affecting pipelines or shipping. It means regulation targeting and shutting down the operation of existing cross-border pipelines or flatly prohibiting any loading of crude oil onto ships.

judge whether the ***category*** of regulation at issue violates the Constitution is to suppose that every port town does what the City has done here. There is no other way to engage in this analysis. As one court explained:

> Failing to adopt an aggregate analysis would render possible the situation in which numerous localities enacted such laws. Analyzed individually, the burden of each specific law would be very small. Taken together, however, these twigs would become a dam, crippling the interstate flow of commerce.

*Randy's Sanitation, Inc. v. Wright Cty.*, 65 F. Supp. 2d 1017, 1027 (D. Minn. 1999).[8]

The reason why the City and its amici resist the necessary aggregate impact analysis so strongly is self-evident. If every port city decided to enact a version of this Ordinance, it would devastate the national's energy commerce.[9]

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[8] Within the City's discussion is a reference to price controls, asserting that PPLC and AWO waived an "extraterritorial" claim. (C-Br. 28-29.) Appellants are not arguing that the Ordinance has ***only*** extraterritorial impact. The Ordinance affects activity both within and outside the City's borders. That said, it is an irrefutable, relevant fact that the Ordinance has a huge impact outside its borders, both in the aggregate and specifically, on an interstate and international level, given the Ordinance's targeted impact on instrumentalities of commerce themselves.

[9] The City argues that "interstate commerce in crude oil exportation has not been harmed" from "a vast number of local zoning prohibitions," and as support, cites AWO testimony at trial regarding surging business from waterborne transport. (C-Br. 30-31.) This argument reflects multiple misapprehensions on the City's part. First, the Ordinance is not like other zoning; it flatly bans all maritime export of crude oil. Second, the test is what ***will*** happen should all other port towns enact similar ordinances. AWO's testimony on this, the relevant point, was clear: if the Ordinance proliferates "[i]t would be devastating to their operations." (ECF 241 at 73:11-15.)

Existing cross-border pipelines cannot simply move. To operate, PPLC cannot transport crude oil 200 miles through its pipelines, then somehow in the last few miles circumvent South Portland. This Ordinance does not affect whether a compressor station is installed in one particular spot versus another; it shuts down the entire line from Montreal and prevents any crude oil from being exported out of the Port of Portland, a rare deep water port able to handle large oil tankers, and precipitating the construction of PPLC's pier, designed to handle such vessels. (App. 1302:25-1303:6.)

Viewed in the aggregate, this shutdown of commerce in oil replicates across the country. The "twigs" not only plug international and interstate pipelines, but, given the Ordinance's express language, it is uncontested that the Ordinance's effect blocks waterborne transportation as effectively as a literal damming of busy ports down the eastern and western seaboard, through the Gulf and up the Mississippi, shuttering maritime commerce, interstate and foreign, import or export. (App. 1136:13-20, 1139:5-13, 1140:17-1142:12, 1235:3-1240:8.)

### B. The Ordinance fails the One Voice test.

#### 1. The argument that treaties and Presidential Permits contemplate some local regulation begs the question before the Court.

The City notes, correctly, that Presidential Permits and U.S.-Canada agreements refer to compliance with "all applicable" law and the need to obtain

"relevant state and local" permits. (C-Br. 31, 38.) From this, the City argues that the Ordinance presents no interference with foreign policy or national interests.

This argument is circular. ***Constitutional*** local regulation is contemplated. For example, just as ordinary local ordinances or siting decisions are not preempted under the PSA, they likewise would not interfere with the federal government's foreign policy. But for the reasons already explained, the Ordinance is neither of these. And nothing in any treaty, agreement, Presidential permitting decision, or other federal document, statement, or policy – discussed at length at A-Br. 33-47 – approves or remotely suggests approval of local regulation that, contrary to the Commerce Clause or federal identification of foreign policy and national security interests, shuts down existing cross-border pipelines, blocks foreign oil import, and bans oil export by ship.

**2. The Ordinance is not a generally applicable local regulation with only incidental impact on federal interests.**

Adhering to its "Sanibel Defense," the City notes that land use and health are deemed traditional topics of local regulation, often allowing for "generally applicable" ordinances. (C-Br. 34-35.) This observation is true, but inapposite.

Generally applicable regulation would, *e.g.*, set height restrictions or air emission levels. The Ordinance does neither. This lack of a means-ends nexus – the absence of a tie between invocation of traditional local interests and evenhanded substance – was deliberate, because the City targeted reversal and did

not want the Ordinance to have generally applicable local impact. (*See* A-Br. 52, n.19.)

The Ordinance's non-incidental, profound impact on foreign commerce is not alleviated by omission of the word "Canada" in its text. It is a geographic fact that the pipelines run from Montreal to the City. The Ordinance, effectively and by design, prohibits flow in one direction through the pipelines and not the other. It expressly prohibits maritime export of oil, blocking oil from Canada an outlet by sea. That the Ordinance restricts loading of only crude, and not refined, oil only underscores its targeted nature, preventing the transportation of oil from Canada while assuring local, domestic oil needs are met.

The City's continued insistence that someone could ship crude oil by rail neglects to account for the trial court's rejection of that course as economically infeasible and inconsistent with the environmental objectives allegedly animating the Ordinance. (*See* Add. 3-78-79.) Similar City musings as to oil from the Hibernian oil field off Newfoundland travelling by ship down to South Portland, only to be shipped back up to Canada, similarly ignore reality. Canada, awash in oil, seeks outlets for ***export*** – precipitating the need to reverse the pipelines in the first place. The possibility that oil from the western United States might be mixed with Canadian oil as it travels west to east across Canada ignores the

geographically incontestable fact that the Ordinance is designed to stop, and does stop, the export of oil transported from Canada through the Harbor.

Under the One Voice test, it does not matter that the Ordinance was not enacted because the City hates all Canadians, or does not seek to promote economic protectionism. The test is violated when a local regulation exceeds "a threshold level of involvement in and impact on foreign affairs" or "compromises the President's very capacity to speak for the Nation with one voice," and when, as here, affects on foreign commerce, does so in an area requiring uniformity. (A-Br. 32-33.) Applying this test, the Ordinance violates the Constitution due to, among other things, (1) its one-sided nature, stopping import from, but not export to, Canada; (2) the need for uniformity when addressing instrumentalities of cross-border commerce; and (3) the foreign policy and national security implications of local regulations that restrict import of foreign and export of domestic oil.

The import-export of oil is a matter of strategic national security.[10] Local laws that allow export to Canada, but not import from Canada, disrupt U.S.-Canadian relations specifically. The ban of all ship loading undermines federal

[10] Appellants previously noted the specific conflict between the Ordinance and the federal lifting of the embargo on oil export. Crude oil is exported by ship. To ban loading is to ban export, in contravention of this federal policy. (A-Br. 34.) The City offers no response. The States argue there is no conflict because federal policy does not authorize or compel "all" imports and exports. (S-Br. 20.) If enacted elsewhere, **no** crude oil could be loaded, and, therefore, transported, on a ship, eliminating exports, and crippling interstate, as well as foreign, commerce in oil.

policy regarding foreign trade in oil generally. And cross-border pipelines running through multiple states and countries demand uniform regulation.

**3. The Ordinance violates maritime commerce principles.**

Appellants have noted the Ordinance's interference with federal oversight over maritime commerce, resulting in the Balkanization that led to our founders' adoption of a Constitution instead of Articles of Confederation. (A-Br. 44.) In response, the City argues that "the loading of crude oil is not a 'federally licensed maritime activity.'" (C-Br. 43.)

This is incorrect. A federal license "entitles a vessel to employment in unrestricted coast wise trade." 46 C.F.R. § 67.19(a). Loading cargo is an integral part of maritime trade. *See Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90, 92 (1937) ("Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination.").[11]

More broadly, again, evenhanded local regulation based on traditional local concerns, with only incidental impact on foreign commerce and designed with an

[11] The City's citation of *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987) and *Wood Marine Service v. City of Harahan*, 858 F.2d 1061 (5th Cir. 1988) is perplexing, in that neither discusses the right to engage in coastwise trade. They are of minimal relevance to any Commerce Clause/foreign affairs doctrine analysis, as neither involves foreign trade, and both involve regulations with only incidental, not targeted, impact on interstate commerce; indeed **no** burden was found in *Wood Marine*, 858 F.2d at 1065.

effective means-ends nexus, might survive scrutiny under maritime jurisprudence. But a flat ban on any loading of crude oil onto ships, shutting down maritime trade, does not. Contrary to the argument of the City amici's professors and municipal lawyers association, this is not ordinary land use mapping. The Ordinance bans all loading of crude oil on ships anywhere in the City. If enacted elsewhere, the Ordinance would ban cargo loading on all waters, effecting a national ban on maritime transportation.

**4. The Ordinance eliminates needed uniformity.**

As noted above, one important factor in applying the One Voice test is whether the local regulation intrudes into an area where uniformity, and, therefore, federal control, is warranted.

In response, the City characterizes the need for uniformity as "weak" here because the Ordinance regulates the conduct of ships docked in a harbor, instead of at sea. (C-Br. 44.) In this making argument, the City is apparently, and correctly, conceding movement of cargo by sea to be a subject of strong federal interest. As noted, above, that movement – an act of maritime commerce – begins with the loading process.

This City's argument also ignores the targeted impact of the Ordinance on pipelines, again a finding of fact by the trial court. Pipelines are instrumentalities of interstate commerce, requiring uniform regulation as a general matter. (*See*

A-Br. 40, n.17.) When such an instrumentality crosses a national boundary, and that instrumentality carries oil, foreign policy and commerce interests are reflected in requirements such as the need for Presidential permitting, and the analyses articulated in those permitting determinations. Only one federal voice can govern whether to allow cross-border pipelines to operate, and to decide questions such as in which direction they will flow or the product or volumes of oil they should carry.[12]

Federal authorities cannot speak with one voice on oil import-export relations with foreign nations if individual towns can shut down cross-border pipelines altogether or stop the reversal of existing pipelines, or can flatly shutter maritime export. Two recent Executive Orders, issued on April 10, 2019, further illustrate this point.

Executive Order 13867 on the Issuance of Permits with Respect to Facilities and Land Transportation Crossing at the International Boundaries of the United States, consistent with all the Presidential permitting analyses discussed in PPLC and AWO's principal brief: (1) notes the President's authority over cross-border projects; (2) expresses the need to avoid "undermining the efforts of the United

[12] Thus, the "Alberta Clipper" needed an amended Presidential permit to increase its delivery volume (A-Br. 41), and the Department of State instructed PPLC to contact it before consummation of reversal for its "review and consideration." (App. 127, ¶ 22A and Exhibit 6B cited therein.)

States to foster goodwill and mutually productive economic exchanges with its neighboring countries"; and (3) expresses a federal policy of "promot[ing] cross-border infrastructure." 84 Fed. Reg. 15496.

The Ordinance undermines each of these interests – federal authority, effort, and policy.

Executive Order 13838 on Promoting Energy Infrastructure and Economic Growth, notes the economic opportunities from U.S. oil production, and the need for infrastructure to transport these resources in domestic and international commerce. 84 Fed. Reg. 15495.

The Ordinance shuts down such existing infrastructure, and eliminates ships as mechanisms of transport in domestic and international commerce.

It is apparent from enactment of the Ordinance and the participation of the City's amici that some states and municipalities dislike oil. If so, they can stop using oil. They can address local concerns in an evenhanded way, with incidental impact on modalities of foreign commerce. But the Constitution does not permit flat municipal prohibitions on cross-border transportation in foreign and interstate commerce, with far-reaching effect outside local borders, eliminating the federal government's ability to achieve what it deems appropriate policy in the national interest.

### C. The Ordinance fails the *Pike* test.

The City's arguments that the Ordinance survives *Pike* are likewise misdirected, for three reasons.

*First*, the City makes the surprising claim that PPLC and AWO have not argued that the Ordinance "discriminates." Dividing the *Pike* test into (i) discrimination, you win, or (ii) no discrimination, you lose, it argues that Appellants lose. (C-Br. 29, 49.)

PPLC and AWO actually noted that the *Pike* test is generally one of degree, and because the Ordinance is not evenhanded, and its impact on pipeline commerce and shipping is not incidental, the Ordinance should fall on the stricter scrutiny side of the spectrum. (A-Br. 48.) The States properly equate "non-discrimination" with "incidental" impact. (S-Br. 26-27.) Discrimination means when regulation is not evenhanded, and has targeted, not incidental effect – as here. The Ordinance discriminates in both purpose and effect.

*Second*, in balancing of the burden on foreign or interstate commerce against putative local benefits, the City has erroneously rejected aggregate impact as a valid measure of burden. When this massive burden is taken into account, the scale again tips to invalidation.[13]

[13] The City claims that PPLC and AWO have not argued that a substantial burden on commerce is imposed by the Ordinance in the absence of weighing aggregate (footnote continued)

*Third*, examining the local benefit side of the ledger, and setting aside the catastrophic burdens when aggregate impact is considered, nowhere has the City contested, nor can it contest, that the Ordinance bans loading irrespective of any emissions or any new infrastructure. No doubt clean air and aesthetics can be local benefits, but not in the abstract. A municipality cannot claim even putative local benefits if there is no nexus between the substance of its ordinance and those claimed benefits.[14]

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(continued footnote)
impact. Setting aside that this is not the proper test, Appellants previously noted the trial court found the burden on commerce "meaningful," and described that meaningful impact on not just the pipelines, but its general ripple effect on pilots and associated marine businesses, as well as tax bases on all the towns along the pipelines' route by rendering the pipelines useless. (*See* A-Br. 5-6, 12.) That time will be needed for PPLC to ramp up business does not mean the Ordinance's burden on foreign commerce is "de minimis." (*See* C-Br. 52.) PPLC has survived and thrived for 75 years by responding to market conditions. The Ordinance stops it from doing so. That five refineries have closed in Montreal – an assertion the City makes with a cite to an amici brief that does not so state (*see id*. at 52, n.13) – if true, would only support PPLC's conclusion that reversal is needed to bring oil south instead of north, in order to tap into the booming export market in Alberta crude.

[14] The States' argument that no nexus is required (S-Br. 27) is incorrect. (*See* A-Br. 47-48, 51.)

## III. The Ordinance violates the Coastal Conveyance Act.

The City characterizes this claim as an "afterthought" (C-Br. 55), apparently because it can be made concisely. To respond to its arguments and that of its amici:

*First*, the States claim that the CCA's preemption clause applies only to "local actions that aim to prevent or address oil spills." (S-Br. 13.) The Ordinance was enacted to prevent spills. This is a factual finding of the trial court. In any event, the "in furtherance of the intent of" language in the CCA is a limitation on what laws are valid under 38 M.R.S. § 556, not a limitation on what laws are invalid if in conflict with an order of DEP. That is, to be valid under 38 M.R.S. § 556, an ordinance regulating oil discharge prevention must first be in furtherance of the intent of the CCA; if it contradicts the CCA's intent, there is no presumption of validity.

*Second*, the City and States argue that PPLC's license (ECF 89-5) is not an "order," because there is a distinction between "license[s]" authorizing oil-terminal facilities' operation and "order[s]" relating to clean-up and vessel detention. It is correct that there is a distinction in the statute, in that licenses are ***a sub-set type of order***. 38 M.R.S. § 556 applies to the broader class of all orders, not only licenses, which is why that word is used. A license is a type of order, which is why the

PPLC license itself says, at the top, that it is an order of the DEP. Conversely, a clean-up order is not a license, but it does not follow that a license is not an order.[15]

*Third*, the City and States argue that the Ordinance does not conflict with PPLC's license. The license provides that PPLC may load; the Ordinance provides it may not. That is a conflict.

*Finally*, as pervades the briefs of the City and all its amici, the States argue, erroneously, that preemption here would mean that no municipality in Maine could regulate the location of any oil facility. To the contrary, the CCA only preempts what a DEP license expressly allows.

The CCA alone invalidates the Ordinance.

## CONCLUSION

The Court should declare the Ordinance unconstitutional, enjoin its enforcement, and remand the matter to the district court for a calculation of Appellants' reasonable attorneys' fees under 42 U.S.C. § 1988.

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[15] That licenses are a type of order is reflected in various other sections of the CCA. *E.g.*, 38 M.R.S. § 550(1), which provides that if there is a spill, the person responsible is not liable for penalties if the person reports and cleans up in accordance with DEP rules and "orders." If orders did not include licenses, then the licensee would not have to report or clean up the spill if such reporting and clean up were required by the license. *See also* 38 M.R.S. § 552-A (ability to detain vessels based on administration of "orders" of the DEP; if "order" did not include license, vessels could not be detained if they violated only a license); 38 M.R.S. § 557 (providing for no stay of DEP rules or "orders"; if licenses did not include orders, they would be stayed, which would contravene the purpose of the statute).

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**CERTIFICATE OF COMPLIANCE WITH RULE 32**

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as it contains 6,234 words, excluding the parts of the brief exempted by Fed. R. App. 32(f).

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## CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2019, I electronically filed the foregoing Reply Brief of Appellants with the Clerk of Court using the CM/ECF system which will send notification to all counsel of record.

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