

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. FED-20-40

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.

Certified Question from the United States Court of Appeals for the First Circuit
Appeal No. 18-2118

**BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, PORTLAND PILOTS, INC., MAINE
ENERGY MARKETERS ASSOCIATION, ASSOCIATED GENERAL
CONTRACTORS OF MAINE, AND ASSOCIATION OF OIL PIPE LINES
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

Patrick Strawbridge, Bar No. 10024
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South, PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consvoymccarthy.com

Counsel for Amici Curiae

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | ii |
| INTEREST OF <i>AMICI</i> | 1 |
| ARGUMENT | 3 |
| I. The Ordinance circumvents the CCA and would create a patchwork approach to regulation that damages Maine’s economy. | 5 |
| A. The CCA provides for uniform state regulation of oil transfers over conflicting municipal ordinances. | 5 |
| B. The Ordinance conflicts with the text and frustrates the purpose of the CCA. | 8 |
| C. Allowing municipalities to unilaterally frustrate the CCA’s regulatory regime causes regulatory uncertainty and substantial economic harm to Maine’s economy. | 11 |
| CONCLUSION | 16 |
| CERTIFICATE OF SERVICE | 17 |

TABLE OF AUTHORITIES

Cases

| | |
|--|--------|
| <i>Bureau of Employee Relations v. Me. Labor Relations Bd.</i> , 611 A.2d 59, (Me. 1992)..... | 9 |
| <i>Gensheimer v. Town of Phippsburg</i> , 2005 ME 22, 868 A.2d 161 | 9 |
| <i>Midcoast Disposal, Inc. v. Town of Union</i> , 537 A.2d 1149, (Me. 1988)..... | 12 |
| <i>Portland Pipe Line Corp. v. City of South Portland</i> , 288 F. Supp. 3d 321 (D. Me. 2017) | 16, 17 |
| <i>Sanyer Envtl. Recovery Facilities, Inc. v. Town of Hampden</i> , 2000 ME 179, 760 A.2d 257..... | 10, 11 |
| <i>Schwanda v. Bonney</i> , 418 A.2d 163 (Me. 1980)..... | 12, 13 |
| <i>Ullis v. Town of Boothbay Harbor</i> , 459 A.2d 153 (Me. 1983)..... | 12 |

Statutes and Regulations

| | |
|-----------------------------------|------------|
| P.L. 2020, ch. 678..... | 6 |
| 30-A M.R.S. § 3001 | 11 |
| 38 M.R.S. § 541..... | 3, 4, 5, 8 |
| 38 M.R.S. § 544..... | 7 |
| 38 M.R.S. § 546..... | 6 |
| 38 M.R.S. § 552..... | 6 |
| 38 M.R.S. § 556..... | 3, 8, 11 |
| 06-096 C.M.R. ch. 600, § 13 | 7 |
| 06-096 C.M.R. ch. 685..... | 6 |

Other Authorities

| | |
|--|------|
| Ben S. Bernanke, <i>Irreversibility, Uncertainty, and Cyclical Investment</i> , 98 Q.J. ECON. 85 (1983) | 12 |
| L.D. 2214, Statement of Fact (114th Legis. 1990) | 10 |
| Legislative Research Committee, Report on Coastal Conveyance of Petroleum Products 104-24, Jan. 1970 | 5, 6 |
| Luboš Pástor & Pietro Veronesi, <i>Political Uncertainty and Risk Premia</i> , 110 J. FIN. ECON. 520 (2013) | 12 |
| P. & S.L. 1981, Ch. 98 | 14 |
| Planning Decisions, <i>The Economic Impact on South Portland and the Greater Portland Region of the “Waterfront Protection Ordinance” Proposed in the City of South Portland, Maine</i> (2013) | 14 |
| Robert Krol, <i>Economic Policy Uncertainty and Small Business Decisions</i> , 37 CATO J. 59, 59–60 (2017) | 12 |
| Scott R. Baker, Nicholas Bloom & Steven J. Davis, <i>Measuring Economic Policy Uncertainty</i> , 131 Q.J. ECON. 1593, 1633–1634 (2016) | 12 |
| Steven J. Davis, <i>Regulatory Complexity and Policy Uncertainty: Headwinds of Our Own Making</i> 15–17 (Becker Friedman Inst. for Research in Econ., Working Paper No. 2723980, Apr. 29, 2017) | 12 |
| Tom Bell, <i>Shifting markets may make Portland’s oil pipeline to Quebec redundant</i> , PORTLAND PRESS HERALD (Nov. 29, 2015) | 13 |

INTEREST OF *AMICI*

Amici represent various state and local interests negatively impacted by the City of South Portland's Clear Skies Ordinance (the "Ordinance").

The Chamber of Commerce of the United States of America ("Chamber") represents the interests of approximately 300,000 companies and professional organizations across the nation. The Chamber's membership includes businesses directly impacted by the City's Ordinance, whether by regional proximity or industry relation. The Chamber has an interest in protecting its members from bans on economic activity that are an impediment to vibrant and effective markets. Businesses and the communities they serve benefit from stable and predictable regulation, but the Ordinance produces the opposite. Unilateral municipal regulation in conflict of state law, like the Ordinance, will impose heavy economic burdens on many of the Chamber's members, extending far beyond the oil transportation industry. The Chamber supports the plain application of the Coastal Conveyance Act, which prohibits any one municipality from imposing contrary restrictions that could create an unadministrable patchwork of regulation to the detriment of a safe and efficient working waterfront.

Portland Pilots, Inc. ("PPI") provides piloting services in Portland Harbor. Marine pilotage is a crucial function at any seaport because local pilots possess the special knowledge needed to safely navigate vessels in and out of the port. So too here, the pilots employed by PPI ensure the safety of vessels entering and exiting Portland

Harbor. PPI offers piloting services for numerous vessel types, including oil tankers. The Ordinance has significantly disrupted ongoing marine traffic within Portland Harbor, to the detriment of PPI and others who depend on a historic and vibrant working waterfront in Maine.

Maine Energy Marketers Association (“MEMA”) represents more than 300 energy providers, which distribute heating oil, propane, biofuels, and motor fuels. MEMA members operate 70% of Maine’s convenience stores and sell over one billion gallons of gasoline and diesel fuel each year. In addition, over 90% of propane sold in the state is distributed through MEMA’s members. The Ordinance impacts the energy distribution market in which MEMA members participate, allowing it to provide a critical perspective on the Ordinance’s negative effects.

The Associated General Contractors of Maine (“AGC Maine”) is Maine’s largest construction trade association. AGC Maine is comprised of general contractors, specialty contractors, suppliers, and service providers all within the construction industry. The Ordinance has eliminated—and will continue to depress—construction projects in Portland Harbor and, as a result, AGC Maine’s members have suffered.

The Association of Oil Pipe Lines (“AOPL”) is a nonprofit national trade association that represents the interests of oil pipeline owners and operators before the judiciary, regulatory agencies, and legislative bodies. AOPL’s members operate pipelines that carry approximately 97% of the crude oil and petroleum products moved by pipeline in the United States, extending over 208,000 miles in total length. These

pipelines safely, efficiently, and reliably deliver approximately 21 billion barrels of crude oil and petroleum product each year. AOPL strives to ensure that the public and all branches of government understand the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable, and most cost-effective method. The Ordinance raises national energy policy concerns for oil pipelines, as it would effectively allow a local municipality to circumvent state law and thereby impermissibly bar safe, efficient pipeline transportation of needed crude oil supplies.

ARGUMENT

The Legislature enacted the Coastal Conveyance Act (“CCA”) to protect the health, welfare, and safety of Maine’s citizens while allowing for the safe loading and unloading of oil on Maine’s shores. By tasking the Department of Environmental Protection (“DEP”) to regulate the transportation and transfer of crude oil to and from the state’s coastline, the Legislature prioritized state oversight—not balkanized local regulation. In fact, by expressly preempting any local “ordinance” that conflicts with “this subchapter” *or* “any rule or order of the board or commissioner,” 38 M.R.S. § 556 (2019), the Legislature was unmistakably clear: the regulation of coastal oil transfers is a matter of *state* policy. Indeed, the Legislature recognized in its statement of Legislative purpose that it was “conferring upon the *department*”—not individual municipalities—“the power to deal with the hazards and threats of danger and damage posed by such transfers and related activities.” *Id.* § 541 (emphasis added). Here, by prohibiting the

loading of oil to ship from shore, the Ordinance conflicts with both a specific order of DEP and the comprehensive scheme set forth by the CCA. The Ordinance is therefore invalid.

This legislative judgment is not only binding law; it is also sound policy. The interstate energy market affects all Mainers—not just those who live near the ocean. The oil trade in particular provides the vast majority of Maine residents with heat in the winter.¹ It economically benefits thousands of employees and businesses on or near the working waterfront. Allowing local governments to entirely ban essential aspects of that trade (as South Portland attempted here), or allowing them to set stricter standards than DEP, would generate significant regulatory uncertainty, discourage individuals and companies from investing in the waterfront, and leave a critical sector of Maine’s statewide economy to the preferences of only some coastal residents. That is why the CCA gives primacy to state regulations as part of an overall statutory scheme designed to protect against the hazards of oil transportation while “taking into account multiple use accommodations necessary to provide the broadest possible promotion of public and private interests with the least possible conflicts in such diverse uses.” *Id.* The Ordinance frustrates that scheme, and therefore it must fall.

¹ See Energy Info. Admin., *Maine State Energy Profile*, <https://www.eia.gov/state/print.php?sid=ME> (last visited May 28, 2020) (“Nearly two-thirds of Maine households use fuel oil as their primary energy source for home heating, a larger share than in any other state.”).

I. The Ordinance circumvents the CCA and would create a patchwork approach to regulation that damages Maine’s economy.

A. The CCA provides for uniform state regulation of oil transfers over conflicting municipal ordinances.

In 1969, the Legislature passed the CCA to balance private and public uses of the Maine seacoast with “transferring and other handling of oil, petroleum products and their by-products and related activities.” 38 M.R.S. § 541. In doing so, the Legislature invoked the state’s police powers and proclaimed that the CCA’s purpose was to serve the state by “promoting its general welfare, preventing disease, promoting health and providing for the public safety.” *Id.* The Legislature also emphasized its desire to balance the competing needs of the coastal economy, recognizing the need to “tak[e] into account multiple use accommodations” in order “to provide the broadest possible promotion of public and private interests with the least possible conflicts in such diverse uses.” *Id.* Indeed, a legislative report recommending passage of the CCA specifically acknowledged the need to preserve “the economic benefits of the transporting of petroleum through [Maine’s] waters and ports without suffering damaging consequences.” Legislative Research Committee, Report on Coastal Conveyance of Petroleum Products 104-24, Jan. 1970 at 3, *available at* <http://lldc.mainelegislature.org/Open/Rpts/MaineSet/104-24.pdf>; *see also id.* at iv (noting the need “to protect [the] interests and the citizens of Maine from the hazards of transferring petroleum and its by-products without jeopardizing the many economic benefits accruing to the State from an expanding oil industry”).

The CCA thus established a comprehensive regime for overseeing the transportation and transfer of crude oil and petroleum products on the seacoast. *First*, the CCA establishes initial requirements for those who seek to transport and transfer crude oil and petroleum products by requiring all oil terminal facilities (including vessels) to be licensed by DEP prior to operation. *Id.* § 545. Licensees are then required to pay fees when transferring oil into the state. *Id.* § 551(4). The DEP collects these fees on a per-barrel basis. *Id.*; *see also* 06-096 C.M.R. ch. 685 (DEP rule describing “how to pay the oil transfer fees imposed by Maine law”). *Second*, the CCA grants DEP extensive regulatory powers. Section 546 provides a non-comprehensive list of matters under DEP’s regulatory purview, including operating and inspection requirements for oil terminal facilities, vessels, and pipelines; establishment of control districts; and, quite broadly, “procedures, methods, means and equipment to be used by persons subject to regulation.” 38 M.R.S. § 546. *Third*, the CCA tasks DEP with generating contingency plans, promulgating discharge reporting rules, and writing procedures for oil and pollutant clean-up. *See id.* § 546(4)(E). *Fourth*, the CCA imposes liability on licensees for unlawful discharges. *Id.* § 552(1)-(2). All told, the CCA requires state oversight of the transfer of oil between pipeline and vessel from start to finish. Every stage in the process is covered by the CCA’s breadth.²

² Just this year, the Legislature added to DEP’s responsibility under the CCA by expanding liability insurance and facility closure requirements. *See* P.L. 2020, ch. 678, §§ 5–6. The amendment takes effect on January 1, 2021. *Id.* § 7.

To carry out the CCA's mandates, the Legislature conferred duties and powers on DEP. *Id.* § 544. As discussed above, DEP administers the substantive provisions of the CCA by promulgating rules and regulations reaching every corner of the oil transportation, transfer, and storage business within twelve miles of the coast.

For example, to secure a license for a new oil terminal facility, applicants must comply with the comprehensive rules promulgated by DEP. *See* 06-096 C.M.R. ch. 600, § 13. The regulations mandate a plethora of granular requirements for aboveground storage tanks; pipes, valves, and pumps; secondary containment dikes; facility drainage systems; tank truck loading and unloading; fire prevention; physical security (fencing); and dock facilities. *See id.* § 7. These rules are not abstract; rather, they dictate construction standards down to the minutiae. For example, tanks must not be bolted or riveted, *id.* § 7(B)(2); dikes must have a minimum height of 24 inches, retain no less than 110% of the tank, and a permeability rate of 1×10^{-7} cm/sec, *id.* § 7(D)(1)-(3); fencing must be six feet high, *id.* § 7(H)(1); and certain areas must be lit at 50 lux, *id.* § 7(H)(2). As it pertains to license renewal, existing facilities are not off the hook; the regulations place standards on existing facility owners much like those for new facilities. *See id.* § 8.

In light of this extensive, state-administered scheme, the Maine Legislature foresaw that municipal ordinances might overlap with the CCA's objectives and purposes, and that this overlap could interfere with DEP's oversight of oil transfers. Therefore, the Legislature included a preemption provision which bars municipal

ordinances that “direct[ly] conflict with this subchapter”—that is, the CCA—“*or any rule or order*” of DEP “adopted under authority of this subchapter.” 38 M.R.S. § 556 (emphasis added). The Legislature’s choice of language here is purposely broad; by using the disjunctive term “or,” it plainly intended to override all municipal ordinances that conflict with the state’s centralized scheme for the regulation of coastal oil trade, whether or not they are reduced to a written rule or order by DEP.³ See *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 22, 868 A.2d 161 (“As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately.”) (quoting *Bureau of Employee Relations v. Me. Labor Relations Bd.*, 611 A.2d 59, 61 (Me. 1992)). In other words, having granted DEP sweeping regulatory authority over coastal oil transfers, the Legislature was clear that any local law in conflict with the purposes of the act—i.e., “deal[ing] with the hazards and threats of danger and damage posed by such transfers and related activities”—must fall. 38 M.R.S. § 541.

B. The Ordinance conflicts with the text and frustrates the purpose of the CCA.

By enacting the CCA, the Legislature recognized the importance of maintaining its seacoast while balancing the myriad public and private uses the waterfront has historically accommodated. The Legislature charged DEP with implementing this

³ Here, Portland Pipe Line’s right to load oil from the pipeline *was* reflected in a written order, *see* PPLC Br. 8-21. But even if that were not the case, South Portland’s attempt to bar entire aspects of the oil trade that the CCA comprehensively regulates is still preempted by §556.

delicate balance by approving licenses and promulgating rules covering every aspect of the oil transportation industry on the coast. In enforcing the CCA, the touchstone for DEP is the promotion of the public health, safety, and welfare of Maine's citizenry—including not only South Portland residents, but the State's population as a whole.

Allowing municipalities to chart their own path and to ignore DEP's orders or rules governing shore-to-ship oil transfer would frustrate the detailed regulatory scheme set forth in the CCA and arrogate authority over a crucial aspect of Maine's economy to a discrete group of coastal communities. Under South Portland's theory of the CCA, municipalities could—as South Portland has attempted here—seek to extinguish the very object CCA seeks to regulate: coastal oil transfers. The continuance of an oil transfer industry is the core assumption underlying the CCA. It makes little sense for the Legislature to task a state agency with comprehensive oversight of an industry, only to allow municipalities to render that oversight pointless. *See Sanyer Env'tl. Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, ¶ 32, 760 A.2d 257 (“It would make little sense for the Legislature to craft this process for [license] approval and include express provision for significant local participation, then after approval, allow the municipality to negate the proceedings and prohibit the expansion.”).

Subsequent legislative amendments confirm DEP's vital and primary role over the transfer of oil between ship and shore in Maine. In 1989, the Legislature amended various provisions relating to the structure of the DEP. Predominantly, the 1989 amendment clarified the division of authority between the board and the commissioner.

In its “Statement of Fact” accompanying the bill, the Legislature affirmed the importance of a single administrative body:

The subcommittee found that *the State is best served by having a strong, independent citizen board for environmental decision-making*. This bill establishes a framework to provide staff for the Board of Environmental Protection to develop an independent decision-making capacity.

L.D. 2214, Statement of Fact (114th Legis. 1990) (emphasis added).

The City’s Ordinance frustrates the goal of having a strong, independent board for environmental decisionmaking. Disguised as a zoning ordinance, the Clear Skies Ordinance, in reality, merely attempts to undercut the state’s comprehensive regulatory scheme. This court has previously struck down “zoning ordinances” which were fashioned to override a statewide licensing scheme administered by a state agency. *See, e.g., Sanyer Env’tl. Recovery Facilities*, 2000 ME 179, ¶ 33, 760 A.2d 257 (The “Zoning Ordinance which, as applied by the Town, absolutely bans the location and expansion of landfills within the Town, is preempted by the State solid waste management laws establishing a comprehensive regulatory scheme.”); *Midcoast Disposal, Inc. v. Town of Union*, 537 A.2d 1149, 1151 (Me. 1988) (holding land use ordinance prohibiting disposal of certain solid waste was preempted by the Solid Waste Management Act’s “comprehensive and exclusive regulatory scheme”); *Ullis v. Town of Boothbay Harbor*, 459 A.2d 153, 159 (Me. 1983) (“By enacting [a] comprehensive, statewide liquor licensing scheme . . . , the legislature by clear implication has denied to municipalities the right to legislate in the area of liquor sales.”); *Schwanda v. Bonney*, 418 A.2d 163, 167 (Me. 1980)

(“The [municipal] ordinance imposes licensing criteria beyond the statutory requirements and to that extent is invalid.”).

As PPLC rightly observes, the Ordinance here is not an attempt to impose a zoning requirement, but instead an outright ban on the transfer of oil from shore to ship. *See* PPLC Br. at 19-20. The regulatory scheme installed by the CCA simply leaves no room for South Portland’s attempt to prohibit large aspects of the oil-transfer industry. *See id.* at 21-27.

C. Allowing municipalities to unilaterally frustrate the CCA’s regulatory regime causes regulatory uncertainty and substantial economic harm to Maine’s economy.

The CCA’s preemption provision recognizes that a patchwork approach to regulation of Maine’s working waterfront is both inefficient and economically damaging. While Maine generally affords municipalities leeway to pass local ordinances under home rule, the Legislature reserves the right to expressly or impliedly preempt local ordinances. *See* 30-A M.R.S. § 3001(3) (2019) (affirming the Legislature’s intent to preempt any municipal ordinances that “would frustrate the purpose of any state law”); *see also Schwanda*, 418 A.2d at 165 (“Municipal corporations, as public bodies, may exercise only such powers as the Legislature has conferred upon them by law or which may have been granted to them directly by the Constitution.”).

Here, the Legislature foresaw the damage inherent in a patchwork approach to regulation and invoked its authority to preempt inconsistent municipal ordinances. *See* 38 M.R.S. § 556. This sensible determination reflects the economic realities posed by

unilateral municipal action, such as the Ordinance. A patchwork approach to regulation not only imposes economic burdens on regulated firms but also sends a damaging ripple effect throughout the economy. Maine has approximately 500 municipalities;⁴ dozens of them border the Atlantic Ocean. Allowing each of them to independently restrict any industry—much less one that is a critical component of state, national, and international trade, and which requires substantial upfront economic investment in infrastructure that by its nature cannot be relocated once built—is a recipe for chaos.

There is no doubt that regulatory uncertainty forces firms to reduce capital expenditures, quality, capacity, or a combination of the three.⁵ Often, this takes the form of employment reductions.⁶ Put simply, the inability to predict the regulatory environment *ex ante* poses substantial business risks.⁷ Firms must account for business

⁴ *Local*, <https://www.maine.gov/local/> (last visited May 28, 2020).

⁵ Steven J. Davis, *Regulatory Complexity and Policy Uncertainty: Headwinds of Our Own Making* 15–17 (Becker Friedman Inst. for Research in Econ., Working Paper No. 2723980, Apr. 29, 2017) (summarizing the “harmful effects of policy-related uncertainty”). *See also* Scott R. Baker, Nicholas Bloom & Steven J. Davis, *Measuring Economic Policy Uncertainty*, 131 Q.J. ECON. 1593, 1633–1634 (2016); Ben S. Bernanke, *Irreversibility, Uncertainty, and Cyclical Investment*, 98 Q.J. ECON. 85, 86 (1983) (“Postponing commitment will be desirable if improved information is more valuable to the investor than short-run return.”); Robert Krol, *Economic Policy Uncertainty and Small Business Decisions*, 37 CATO J. 59, 59–60 (2017) (“Lower investment and employment occur because uncertainty makes firms less sure about the returns associated with capital expenditures or hiring. Since there are nonrecoverable costs associated with a decision to invest in capital or hire and train workers, uncertainty makes it prudent to delay capital expenditures or hiring.”).

⁶ Krol, *supra* note 5, at 59.

⁷ *See* Luboš Pástor & Pietro Veronesi, *Political Uncertainty and Risk Premia*, 110 J. FIN. ECON. 520, 521–22 (2013).

risk by reducing their financial exposure, which means less expansion and hiring—as it relates to this case, fewer jobs in construction, maintenance, pilotage, and other service providers in the harbor.

The Ordinance exacerbates this problem by not only creating regulatory uncertainty but also preventing PPLC from adapting to a dynamic market. For years, oil tanker traffic served as the foundation for vessel traffic in Portland Harbor. At its peak in 2004, the harbor became the second-busiest oil port on the East Coast.⁸ At that time, the harbor served as an unloading point for crude oil that was ultimately imported into Canada. But changes in the international demand for oil (as well as the discovery of substantial North American oil fields) fundamentally altered the demand structure for crude oil. Importing oil from Canada is now the only economically viable method for PPLC’s pipeline to remain operational. Indeed, in 2018 not a single oil tanker used Portland Harbor; in 2004 that number was 226.

If PPLC is not able to reverse pipeline flow to adapt to the international market, this trend will become permanent. The federal district court recognized that an inability to load oil in South Portland will cost dozens of jobs at PPLC, its contractors, and tugboat operators. *Portland Pipe Line Corp. v. City of South Portland*, 288 F. Supp. 3d 321,

⁸ Tom Bell, *Shifting markets may make Portland’s oil pipeline to Quebec redundant*, PORTLAND PRESS HERALD (Nov. 29, 2015), <https://www.pressherald.com/2015/11/29/shifting-markets-may-make-portlands-oil-pipeline-to-quebec-redundant/#> (last visited June 9, 2020).

389 (D. Me. 2017).⁹ It would greatly diminish the value of PPLC’s real estate, which South Portland itself has assessed at more than \$44 million. *Id.* It would deprive the State and its municipalities of more than \$3 million in revenue, as well as future contributions to an oil spill recovery fund to which PPLC has previously provided \$70 million. *Id.* at 390.

The same effects are facing PPI, which serves the Harbor by supplying skilled pilots who can navigate large vessels safely. Without oil tanker traffic, PPI’s revenue base has collapsed. As such, PPI has been forced to reduce its workforce and may be forced to liquidate assets. Likewise, jobs related to port traffic, servicing vessels, and constructing or repairing structures on the waterfront have all been adversely impacted. Once these important jobs leave Portland Harbor, they will be difficult to replace. Indeed, the up-to-date, specialized knowledge required of a State-licensed pilot, *see* P. & S.L. 1981, Ch. 98, §§ 2 and 5 (2) (requiring all ships with nine feet or more of draft to have a licensed pilot in Casco Bay) (as amended), to navigate a deep-draft ship in Portland Harbor is ebbing as the Ordinance depresses ship traffic. When PPI’s principals are forced out of the business—due to retirement or for lack of income—that skill and knowledge base will be lost forever. Many other Harbor workers likewise

⁹ An economic impact report prepared in 2013, when a slightly broader ordinance was proposed in South Portland, estimated that South Portland’s oil products storage and distribution system alone provided 85 jobs and accounted for nearly \$38 million in annual spending in the local economy. Planning Decisions, *The Economic Impact on South Portland and the Greater Portland Region of the “Waterfront Protection Ordinance” Proposed in the City of South Portland, Maine* 2 (2013), goo.gl/TPKKNw.

possess specialized knowledge gleaned through years of experience with PPLC's pipeline.

The Ordinance's adverse economic effects extend beyond the Portland Harbor—numerous oil-related businesses are also harmed. Unable to adapt to demand shifts in the energy markets, PPLC will be unable to fulfill the oil transportation needs for downstream customers. Distributors, refiners, marketers, and end-users will be forced to bear the cost of this lapse in allocative efficiency.

The Ordinance also detrimentally impacts safety in Portland Harbor. By significantly reducing traffic at the Harbor, the Ordinance drives away experienced workers and has forced the re-deployment of specialized equipment, including tugs and an oil-spill response vessel.

The Ordinance's many negative effects underscore why preemption provisions like section 556 are so important. They provide certainty in the oil transportation industry, and ensure that regulated parties will invest in the infrastructure, employees, and supplies necessary to sustain their businesses. Nor is there any offsetting benefit from allowing municipalities to frustrate the Legislature's preference for a uniform, state-administered permitting process. The DEP already regulates the industry for safety and environmental protection, on top of the myriad federal regulations governing PPLC's operations. Additional municipal-level regulations—actually prohibitions—like those imposed by the Ordinance merely inflict economic burdens on regulated entities,

their business partners, employees, and the broader community. This is why section 556 should be enforced by its terms.

CONCLUSION

For these reasons, *amici* respectfully request that the Court answer the certified questions in the affirmative.

Patrick Strawbridge, Bar No. 10024
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South, PMB #706
Boston, Massachusetts 02109
(617) 227-0548
patrick@consovoymccarthy.com

Counsel for Amici Curiae

Dated: June 12, 2020

CERTIFICATE OF SERVICE

I, Patrick Strawbridge, hereby certify that two copies of a copy of this Brief of Amici Curiae were served upon counsel at the address set forth below by email and first class mail, postage-prepaid on June 12, 2020:

Sally J. Daggett, Esq.
Mark A. Bower, Esq.
JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, ME 04112
sdaggett@jbgh.com
mbower@jbgh.com

Jonathan M. Ettinger, Esq.
Jesse H. Alderman, Esq.
Euripides D. Dalmanieras, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210-2600
ettinger@foleyhoag.com
alderman@foleyhoag.com
edalmani@foleyhoag.com

John J. Aromando
Matthew D. Manahan
Nolan L. Reichl
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
jaromando@pierceatwood.com
mmanahan@pierceatwood.com
nreichl@pierceatwood.com

Dated: June 12, 2020

Patrick Strawbridge, Bar No. 10024