

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

PERMIAN HIGHWAY PIPELINE, LLC §  
AND KINDER MORGAN TEXAS §  
PIPELINE, LLC, §

*Plaintiffs,* §

v. §

Civil Action No. 1:19-CV-00734

CITY OF KYLE, TEXAS, §

*Defendant.* §

**PLAINTIFFS PERMIAN HIGHWAY PIPELINE, LLC AND KINDER MORGAN  
TEXAS PIPELINE, LLC’S VERIFIED ORIGINAL COMPLAINT  
FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

Plaintiffs Permian Highway Pipeline, LLC (“PHP”) and Kinder Morgan Texas Pipeline, LLC (“KMTP,” and collectively, “Plaintiffs”) file this Original Complaint for Declaratory Judgment and Injunctive Relief against the City of Kyle, Texas (“Defendant”), and allege as follows:

**I. NATURE OF THE ACTION**

1. This action arises out of Defendant’s second attempt to impermissibly interfere with the construction and operation of the Permian Highway Pipeline (the “Pipeline”). Defendant first sued Plaintiffs, the Railroad Commission of Texas (the “Railroad Commission”), and several Railroad Commission officials in a state district court in Travis County, seeking a declaration that the Texas regulatory scheme governing gas utilities is unconstitutional and requesting an injunction specifically enjoining the construction of the Pipeline. After losing in that court, Defendant passed an ordinance<sup>1</sup> (the “Ordinance”) that impermissibly imposes upon

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<sup>1</sup> A true and correct copy of Defendant’s Ordinance is attached as Exhibit A.

Plaintiffs a host of safety requirements related to the construction and operation of the Pipeline and subjects Plaintiffs to criminal penalties if they fail to comply.

2. The Ordinance cannot stand. Plaintiffs seek a declaration that the Ordinance is unconstitutional and preempted by both federal and Texas law, and a preliminary and permanent injunction prohibiting Defendant from implementing and enforcing the Ordinance.<sup>2</sup>

## II. PARTIES

3. Plaintiff Permian Highway Pipeline, LLC is a Delaware limited liability company that maintains its principal place of business at 1001 Louisiana Street, Suite 1000, Houston, Texas 77002. PHP is the owner and economic operator of the Pipeline.

4. Plaintiff Kinder Morgan Texas Pipeline, LLC is a Delaware limited liability company that maintains its principal place of business at 1001 Louisiana Street, Suite 1000, Houston, Texas 77002. KMTP is the operator of the Pipeline.

5. Defendant City of Kyle, Texas is a municipal corporation chartered as a home-rule city pursuant to Article 11 of the Texas Constitution. Defendant is located in Hays County and may be served by delivering a copy of the summons and complaint to its mayor, clerk, secretary, or treasurer at City Hall, 100 W. Center Street, Kyle, Texas 78640.

## III. JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this is a civil action “arising under the . . . laws . . . of the United States” and Plaintiffs are

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<sup>2</sup> Pursuant to section 37.006(b) of the Texas Civil Practice and Remedies Code, the Attorney General of Texas is being served with a copy of this Complaint. TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(b) (“In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.”).

seeking declaratory and injunctive relief based on a federal statute—i.e., the Pipeline Safety Act, 49 U.S.C. §§ 60101 *et seq.* This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to determine all questions and claims arising under Texas law.

7. Venue is proper in the Western District pursuant to 28 U.S.C. § 1391(c) because Defendant is subject to personal jurisdiction in this district and all or a substantial part of the events giving rise to the claim occurred in this district.

#### **IV. FACTS AND APPLICABLE LAW**

##### **A. Texas needs the Pipeline.**

8. The Permian Basin is the most active and productive oil and gas field in the United States. It currently supplies a large amount of the oil and gas for the entire United States. Production in the Permian Basin has reached historic levels, and experts project it will increase for many years to come.

9. There is currently, and will continue to be for the foreseeable future, a shortage of oil and natural gas pipeline capacity out of the Permian Basin. In the Permian Basin, most natural gas is produced in conjunction with, and from the same wells as, the production of oil. In that productive area, approximately 400 million cubic feet of gas is stranded every day. That gas is produced along with the oil. Some of the gas is burned off (flared) for lack of pipeline capacity, emitting carbon dioxide and methane into the atmosphere. Some of it is never produced in the first place, which prevents the associated oil from being produced at all. In either event, the lack of pipeline capacity harms the Texas economy and keeps the nation more dependent upon foreign energy sources.

10. The Pipeline, which is expected to be in service by late 2020, will help solve the takeaway capacity problem in the Permian Basin and boost the Texas economy. The Pipeline is a forty-two-inch buried natural gas pipeline designed to transport up to 2.1 billion cubic feet per

day of natural gas through approximately 430 miles of pipeline from the Waha Hub in Reeves County, Texas to the Katy Hub near Houston. Upon completion, the Pipeline will cross sixteen Texas counties,<sup>3</sup> providing an outlet for the Permian Basin’s increased natural gas production, facilitating associated oil production, and reducing flaring. At the Katy Hub, and at various points along its route, the Pipeline will connect to other new and existing pipeline systems serving the Texas Gulf Coast markets and elsewhere.

**B. The Pipeline is regulated extensively by federal and Texas law.**

11. The Pipeline is subject to a myriad of federal and Texas laws and related regulations that apply to, among other issues, underground oil and gas activities as well as the safety of pipeline construction and operations. Those laws and regulations expressly preempt local laws and regulations that purport to do the same, especially those directed at the safety of pipeline construction and operations.

**1. The Pipeline Safety Act regulates pipeline safety and expressly preempts local law that purports to regulate pipeline safety.**

12. The Pipeline Safety Act, 49 U.S.C. §§ 60101 *et seq.* (the “PSA”), was enacted in 1994 to “provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation.” 49 U.S.C. § 60102(a)(1). The PSA was the combination and recodification of two then-existing pipeline safety statutes without substantive changes—i.e., the Natural Gas Pipeline Safety Act of 1968 (“NGPSA”) and the Hazardous Liquid Pipeline Safety Act of 1979 (“HLPASA”).

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<sup>3</sup> Attached as Exhibit B is a map of the Pipeline’s route.

13. The PSA requires the Secretary of Transportation (the “Secretary”) to prescribe minimum safety standards for pipeline transportation that apply to owners and operators of pipelines and may apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipelines. *Id.* § 60102(a)(2).

14. The applicable PSA regulations include, but are not limited to, those regulations found at 49 C.F.R. Parts 190, 191, and 192. These regulations are titled “Pipeline Safety Programs and Rulemaking Procedures” (Part 190), “Transportation of Natural and Other Gas by Pipeline; Annual Reports, Incident Reports, and Safety–Related Condition Reports” (Part 191), and “Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards” (Part 192).

15. The PSA creates a broad federal regulatory umbrella that allows the Secretary to prescribe safety standards for virtually every aspect touching on the pipeline transportation of natural gas within the United States. The breadth and depth of the PSA itself demonstrates the intent of Congress to preempt the field with respect to safety of any pipeline or pipeline facility affecting interstate commerce.

16. In addition to occupying the field, the PSA also *expressly* preempts municipal regulation of pipeline safety in Texas. The federal preemption applies to both interstate and intrastate pipelines.

The PSA contains an express preemption provision that prohibits state authorities from adopting or enforcing safety standards for interstate pipeline facilities or interstate pipeline transportation. It also prohibits state authorities from adopting or enforcing safety standards for intrastate pipeline facilities and intrastate pipeline transportation unless the state authority is either certified by [the Secretary] or has an agreement with [the Secretary].

*Tex. Midstream Gas Servs., L.L.C. v. City of Grand Prairie*, No. CIV.A.3:08CV1724-D, 2008 WL 5000038, at \*5 (N.D. Tex. Nov. 25, 2008) (citing 49 U.S.C. §§ 60104(c), 60106(a)), *aff'd sub nom.*, 608 F.3d 200 (5th Cir. 2010). Courts have long held that the PSA “preempts the entire domain of pipeline safety.” *Id.* at 8; *see also Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 358 (8th Cir. 1993) (recognizing that, under HLPSA, “Congress has expressly stated its intent to preempt the states from regulating in the area of safety.”); *Nat. Gas Pipeline Co. of America v. R.R. Comm’n of Texas*, 679 F.2d 51, 53–54 (5th Cir. 1982) (same proposition under NGPSA).

17. The Texas Legislature has delegated to the Railroad Commission the authority to seek certification under the PSA to regulate intrastate pipeline safety in Texas. TEX. UTIL. CODE ANN. § 121.201(a)(6)–(8). That delegation is *exclusive*. *Id.* § 121.201(b)(2). The Railroad Commission has sought and obtained such certification. U.S. Dept. of Transportation, Pipeline and Hazardous Materials Safety Administration, *Guidelines for States Participating in the Pipeline Safety Program*, Appendix F (State Program Certification/Agreement Status) (Revised January 2019) (hereinafter, the “Guidelines”).

18. Texas law grants the Railroad Commission the power to regulate pipeline safety to the fullest degree possible in accordance with the PSA. TEX. UTIL. CODE ANN. § 121.201(b)(1), (2). As the certified state authority, the Railroad Commission has adopted safety regulations that mirror and build upon the PSA’s regulations. *See* 16 TEX. ADMIN. CODE § 8.1(b) (adopting by reference federal minimum safety standards). For example, all pipelines “operating wholly or partially within” Texas must “have on file with the [Railroad Commission] an approved organization report (Form P-5) and financial security as required by Texas Natural Resources Code[.]” *Id.* § 8.51(a). The Railroad Commission also has promulgated specific requirements for

natural gas pipelines, including “Written Procedure for Handling Natural Gas Leak Complaints” and a “Mandatory Removal and Replacement Program.” *Id.* §§ 8.201, *et seq.*, 8.205, 8.208.

19. In contrast, municipalities like Defendant are *expressly* prohibited by the PSA from adopting or enforcing any ordinance that establishes a safety standard or practice relating to pipeline transportation. Defendant is not authorized to seek certification under the PSA, *see Tex. Midstream I*, 2008 WL 5000038, at \*5 n.5 (recognizing Texas law “prohibits municipalities from regulating the safety of pipeline facilities”) (citing TEX. UTIL. CODE ANN. § 121.202(a)), and Defendant is in fact *not* so certified. Guidelines, Appendix F. Moreover, while the Texas Legislature has exercised its right under the PSA to delegate the State’s pipeline safety regulation to the Railroad Commission, it has also exercised its rights under the PSA to expressly preempt such regulation by local authorities. TEX. UTIL. CODE ANN. § 121.202(a) (“A municipality or a county may not adopt or enforce an ordinance that establishes a safety standard or practice applicable to a facility that is regulated under this subchapter, another state law, or a federal law.”).

**2. Texas law significantly curtails the ability of local governments to regulate oil and gas activities, and expressly preempts local laws that do not meet stringent standards.**

20. The Texas Legislature can preempt local regulation. “While home-rule cities have all power not denied by the Constitution or state law, and thus need not look to the Legislature for grants of authority, the Legislature can limit or withdraw that power by general law. Deciding whether uniform statewide regulation or nonregulation is preferable to a patchwork of local regulations is the Legislature’s prerogative. The question is not whether the Legislature *can* preempt a local regulation . . . but whether it *has*.” *City of Laredo v. Laredo Merchants Ass’n*, 550 S.W.3d 586, 592–93 (Tex. 2018) (emphasis in original).

21. The Texas Constitution mandates that no city ordinance “shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.” TEX. CONST. ART. XI, § 5(a). “Therefore, a home-rule city’s ordinance is unenforceable to the extent that it is inconsistent with the state statute preempting that particular subject matter.” *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016). The “critical inquiry in determining whether an ordinance is preempted is whether the Legislature expressed its preemptive intent through clear and unmistakable language.” *Id.* at 8.

22. In the Texas Utilities Code, the Texas Legislature provided that the Railroad Commission shall “establish fair and equitable rules for the full control and supervision of the pipelines subject to this chapter and all of their holdings pertaining to the gas business in all of their relations to the public, as the railroad commission determines to be proper.” TEX. UTIL. CODE ANN. § 121.151(2).

23. Furthermore, the Texas Legislature provided that the Railroad Commission shall “prescribe and enforce rules for the government and control of pipelines subject to this chapter in respect to their pipelines and producing, receiving, transporting, and distributing facilities.” *Id.* § 121.151(4).

24. Additionally, the Texas Legislature provided that the Railroad Commission “prescribe or adopt safety standards for the transportation of gas and for gas pipeline facilities,” and “by rule take any other requisite action in accordance with [the PSA] and its subsequent amendments or a succeeding law.” *Id.* § 121.201(a)(1), (7).

25. This power “applies to the transportation of gas and gas pipeline facilities in this state to the maximum degree permissible under [the PSA]” and “is granted to provide exclusive state control over safety standards and practices applicable to the transportation of gas



and gas pipeline facilities within the borders of this state to the maximum degree permissible under that law.” *Id.* § 121.201(b)(1), (2). In other words, anything not reserved by federal law to federal regulatory authorities is reserved by Texas law to the Railroad Commission.

26. The Texas Legislature also prescribed that the Railroad Commission “shall adopt rules regarding: (1) public education and awareness relating to gas pipeline facilities; and (2) community liaison for responding to an emergency relating to a gas pipeline facility.” *Id.* § 121.2015(1), (2).

27. To add further clarity, the Texas Legislature provided that cities and counties do not have the power to regulate the safety of gas utilities and gas pipeline facilities: “A municipality or a county may not adopt or enforce an ordinance that establishes a safety standard or practice applicable to a facility that is regulated under [the PSA].” *Id.* § 121.202 (a).

28. These provisions of the Texas Utilities Code preempting municipal regulation of gas pipeline safety have been established for decades. More recently, the Texas Legislature passed yet another statute, codified in the Texas Natural Resources Code, unmistakably conferring upon the State “exclusive jurisdiction” over “oil and gas operations,” which includes the “transportation of oil and gas.”

**(b) An oil and gas operation is subject to the exclusive jurisdiction of this state.** Except as provided by Subsection (c), a municipality or other political subdivision may not enact or enforce an ordinance or other measure, or an amendment or revision of an ordinance or other measure, that bans, limits, or otherwise regulates an oil and gas operation within the boundaries or extraterritorial jurisdiction of the municipality or political subdivision.

**(c) The authority of a municipality or other political subdivision to regulate an oil and gas operation is expressly preempted,** except that a municipality may enact, amend, or enforce an ordinance or other measure that:

**(1) regulates only aboveground activity** related to an oil and gas operation **that** occurs at or above the surface of the ground, including a regulation governing fire and emergency response, traffic, lights, or noise, or imposing notice or reasonable setback requirements;

- (2) is commercially reasonable;
- (3) does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator; and
- (4) **is not otherwise preempted by state or federal law.**

TEX. NAT. RES. CODE ANN. § 81.0523(a)(2), (b), (c) (emphases added).

29. Plaintiffs are each a “gas utility” as defined in section 121.001 of the Texas Utilities Code, and are therefore subject to the applicable provisions in the Texas Utilities Code. Plaintiffs also own or operate the Pipeline and are therefore subject to Railroad Commission jurisdiction under the Texas Natural Resources Code. *See* TEX. NAT. RES. CODE ANN. § 81.051(a)(3), (b).

30. Thus, the Ordinance, which purports to regulate the safety of pipeline construction, operations, and other activities, is preempted and violates the Texas Constitution, Texas Utilities Code, and Texas Natural Resources Code, in addition to violating federal law, including the U.S. Constitution and the PSA.

**3. Defendant’s own Code of Ordinances recognizes the supremacy of federal and state laws.**

31. Defendant’s Code of Ordinances (the “Code”) acknowledges the subordinate role of Defendant’s ordinances to federal and Texas law.

32. Section 4.03, for example, provides Defendant’s council “shall have the power to ordain, alter, amend or repeal and enforce ordinances, resolutions, rules, orders, and regulations, for any public purpose, that are not in conflict with this charter, or federal or state law.” Kyle, Texas, Code § 4.03.

33. Moreover, one of the enumerated powers and duties of Defendant’s council is the power and duty “[t]o govern the affairs of the city in conformance with this charter and the state and federal constitutions and laws[.]” *Id.* § 4.03(r). For the avoidance of doubt, the Code

separately provides: “No ordinance or other action of the council may be inconsistent with this charter or in conflict with any applicable state or federal law.” *Id.* § 4.06(a).

34. Despite these recognitions, Defendant passed the Ordinance that runs rough-shod over federal and Texas law, ignores the regulatory schemes that have been in place for decades, and imposes criminal penalties for alleged violations.

**C. Facing inevitable preemption at every turn, Defendant sets out to halt the construction of the Pipeline in court and then on its own.**

35. Defendant first attacked the constitutionality of the Texas regulatory scheme for intrastate natural gas pipelines in state district court in Travis County and sought an injunction enjoining the construction of the Pipeline.

36. On April 22, 2019, Defendant and others sued Plaintiffs, the Railroad Commission, and several Railroad Commission officials in a state district court in Travis County, seeking a declaration that the Texas regulatory scheme governing gas utilities is unconstitutional and requesting an injunction specifically enjoining the construction of the Pipeline. The case was assigned to the Honorable Lora J. Livingston, Cause No. D-1-GN-19-002161, and Judge Livingston held an evidentiary hearing on May 28 and 29, 2019. On June 25, 2019, Judge Livingston issued a letter ruling.<sup>4</sup> On July 5, 2019, Judge Livingston entered a Final Judgment that dismissed the Railroad Commission with prejudice for lack of jurisdiction, rendered judgment for PHP and KMTP, and denied the request for a temporary injunction as moot.<sup>5</sup>

37. During the litigation in Travis County, Defendant was working on the Ordinance to impermissibly interfere with the Pipeline if its lawsuit was unsuccessful. At a special

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<sup>4</sup> A true and correct copy of Judge Livingston’s letter ruling is attached as Exhibit C.

<sup>5</sup> A true and correct copy of Judge Livingston’s Final Judgment is attached as Exhibit D.

meeting on May 14, 2019, Defendant’s City Council passed the Ordinance on first reading.<sup>6</sup> At a regular meeting on July 2, 2019, after losing in the Travis County state district court, Defendant’s City Council gave final approval to the Ordinance on second reading.<sup>7</sup> Notably, the Ordinance declares that its purpose is “risk reduction” and subjects the Pipeline to multiple safety regulations—applicable to the construction and operation of the Pipeline—that are preempted by federal and Texas law.

**D. The Ordinance is unconstitutional and almost entirely preempted.**

38. The Ordinance is unconstitutional to the extent that it is preempted by, or otherwise in conflict with, federal and Texas law.

39. The PSA, Texas Utilities Code, and Texas Natural Resources Code preempt all of the sections of the Ordinance that purport to regulate pipeline safety, including, but not limited to, the following sections of the Ordinance: 8-250(2), (3), (5), (6), (8), (10)–(13); 8-253(1)–(6), (8); 8-255(1)–(2); 8-256(1)–(6); 8-258(2); 8-259; 8-260(1)–(2); and 8-261.

40. The Texas Natural Resources Code further preempts all of the sections of the Ordinance that purport to regulate oil and gas operations belowground. *See* TEX. NAT. RES. CODE ANN. § 81.0523(b), (c)(1). Sections 8-250(6) and 8-253(4) of the Ordinance, for example, generally require a minimum depth belowground of 10 feet for pipelines, and in public rights-of-way impose an even more onerous depth requirement of no less than 13 feet.

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<sup>6</sup> True and correct copies of excerpts of the agendas for the May 14 and July 2 meetings of Defendant’s City Council are attached as Exhibits E and F, respectively. Complete copies of the agendas are available on Defendant’s website. *See* <https://www.cityofkyle.com/council/agenda-packets>. Exhibit F shows the Ordinance passed first reading by a 4-0 vote.

<sup>7</sup> The Ordinance passed second reading by a 7-0 vote. *See* <https://kyle.novusagenda.com/agendapublic/VODPreview.aspx?meetingVideoID=6b8502c7-7198-4b18-8efd-a0214228b290&index=17179> (last visited July 22, 2019).

41. The Texas Natural Resources Code and Texas Utilities Code also preempt the financial requirements in Section 8-260 and the enforcement provisions in Section 8-261.<sup>8</sup> Federal and Texas law already regulate both of these areas. *See, e.g.*, TEX. NAT. RES. CODE ANN. § 91.109 (Financial Security for Persons Involved in Activities Other Than Operation of Wells); TEX. UTIL. CODE ANN. §§ 15.021, *et seq.* (enforcement process and penalties applicable to all utilities), §§ 121.301, *et seq.* (enforcement remedies applicable to gas utilities), §§ 121.401, *et seq.* (appeal process applicable to gas utilities).

## V. CAUSES OF ACTION

### A. Count 1 – Declaratory Judgment (Federal and State Preemption)

42. Plaintiffs incorporate the preceding paragraphs.

43. An actual, justiciable controversy exists between Plaintiffs and Defendant concerning the legal validity of Defendant’s Ordinance and the extent to which it is preempted by federal and Texas law. The fact that Plaintiffs face the threat of irreparable harm from enforcement of local regulations preempted by federal and Texas law satisfies the “actual controversy” requirement. Moreover, as set forth above, there is a substantial controversy between the parties having adverse legal interests, which is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

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<sup>8</sup> Section 253-9 of Defendant’s Ordinance sets forth various fees for pipelines. For any charges levied on pipelines by local governments, the Gas Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 101.001, *et seq.*, provides in relevant part: “The railroad commission has exclusive appellate jurisdiction to review an order or ordinance of a municipality exercising exclusive original jurisdiction as provided by this subtitle.” TEX. UTIL. CODE ANN. § 102.001(b). Plaintiffs hereby object to the fees in Section 253-9 and reserve their rights to challenge those fees at the Railroad Commission.

44. Based on the foregoing, a declaratory judgment is both necessary and proper to set forth and determine the extent to which Defendant's Ordinance is preempted by federal and Texas law. Pursuant to 28 U.S.C. § 2201, Plaintiffs therefore request a declaratory judgment that:

- (i) Defendant's Ordinance is preempted by federal and Texas law to the extent it regulates the safety of pipeline construction and operations;
- (ii) Defendant's Ordinance is preempted by Texas law to the extent it regulates belowground oil and gas activities; and
- (iii) Defendant's Ordinance is preempted by federal and Texas law to the extent it imposes financial security requirements and enforcement provisions.

45. Pursuant to Federal Rule of Civil Procedure 57, Plaintiffs request a "speedy hearing of [this] declaratory-judgment action." FED. R. CIV. P. 57.

**B. Count 2 – Declaratory Judgment (Violations of Commerce Clause)**

46. Plaintiffs incorporate the preceding paragraphs.

47. An actual, justiciable controversy exists between Plaintiffs and Defendant concerning whether Defendant's Ordinance violates the Commerce Clause of the United States Constitution. U.S. CONST. ART. I, § 8. The Commerce Clause bars states and their subdivisions from unjustifiably discriminating against or burdening the flow of goods, including natural gas. Here, the Ordinance invades the province of the federal government by attempting to regulate pipelines despite an extensive federal regulatory scheme reserving such authority over both interstate and intrastate pipelines to federal regulators and properly designated state regulators (in this case the Railroad Commission). The Pipeline will run through 16 counties and numerous municipalities. Each county and municipality cannot pass its own pipeline construction, operation, and safety regulations, thereby subjecting the Pipeline and other pipelines to a patchwork of local regulations throughout the state that will unduly impede and disrupt interstate commerce. For these reasons, Defendant's Ordinance cannot withstand federal constitutional scrutiny.

48. Based on the foregoing, a declaratory judgment is both necessary and proper to set forth and determine the extent to which Defendant's Ordinance violates the Commerce Clause. Pursuant to 28 U.S.C. § 2201, Plaintiffs therefore request a declaratory judgment that:

- (i) Defendant's Ordinance is unconstitutional and violates the Commerce Clause to the extent it regulates the safety of pipeline construction and operations; and
- (ii) Defendant's Ordinance is unconstitutional and violates the Commerce Clause to the extent it imposes financial security requirements and enforcement provisions.

49. Pursuant to Federal Rule of Civil Procedure 57, Plaintiffs request a "speedy hearing of [this] declaratory-judgment action." FED. R. CIV. P. 57.

**C. Count 3 – Declaratory Judgment (Violations of Texas Constitution)**

50. Plaintiffs incorporate the preceding paragraphs.

51. An actual, justiciable controversy exists between Plaintiffs and Defendant concerning the extent to which Defendant's Ordinance violates the Texas Constitution. The Texas Constitution mandates that no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. ART. XI, § 5(a). As set forth above, Defendant's Ordinance violates the Texas Constitution and laws of Texas in multiple ways.

52. Based on the foregoing, a declaratory judgment is both necessary and proper to set forth and determine the extent to which Defendant's Ordinance violates the Texas Constitution. Pursuant to 28 U.S.C. § 2201, Plaintiffs therefore request a declaratory judgment that:

- (i) Defendant's Ordinance is unconstitutional and violates Texas law to the extent it regulates the safety of pipeline construction and operations;

- (ii) Defendant's Ordinance is unconstitutional and violates Texas law to the extent it regulates belowground oil and gas activities; and
- (iii) Defendant's Ordinance is unconstitutional and violates Texas law to the extent it imposes financial security requirements and enforcement provisions.

53. Pursuant to Federal Rule of Civil Procedure 57, Plaintiffs request a "speedy hearing of [this] declaratory-judgment action." FED. R. CIV. P. 57.

**D. Count 4 – Preliminary and Permanent Injunctive Relief**

54. Plaintiffs incorporate the preceding paragraphs.

55. Plaintiffs request that the Court issue a preliminary and permanent injunction prohibiting implementation and enforcement of Defendant's Ordinance. Such relief is available under 28 U.S.C. § 2202 in order to effectuate the Court's declaratory relief, and such relief is also permitted under 42 U.S.C. § 1983.

56. For the reasons set forth above, Plaintiffs have established a likelihood of success on the merits of their claims. Because the Ordinance is expressly preempted by federal and Texas law, Plaintiffs need not satisfy the remaining requirements for injunctive relief and are therefore entitled to a preliminary injunction until a final judgment is entered.

57. Alternatively, although not required to do so, Plaintiffs can satisfy the remaining requirements for injunctive relief if necessary.

58. Plaintiffs will likely suffer imminent and irreparable injury if Defendant is not restrained from implementing and enforcing the Ordinance while this litigation is pending. Without a preliminary injunction, Plaintiffs face criminal liability and daily fines for alleged violations of the Ordinance. There is no adequate remedy at law because Plaintiffs will either have to capitulate to the unconstitutional and preempted regulations or be criminally prosecuted and



fined until the Court determines the extent to which the Ordinance is unconstitutional, preempted, or both.

59. The harms faced by Plaintiffs outweigh any harm that would be sustained by Defendant if the preliminary injunction were granted. Temporarily postponing the effect of the Ordinance poses no risk to Defendant. The only thing Defendant will have lost is the opportunity to prosecute and assess charges for violations of the Ordinance. Moreover, there is no countervailing injury to Defendant because it is already obligated under the U.S. Constitution and Texas Constitution not to regulate in preempted areas.

60. Issuance of a preliminary injunction would not adversely affect the public interest. To the contrary, a preliminary injunction will serve the public interest. As noted above, there is a pipeline capacity crisis in Texas and any delay in constructing the Pipeline will result in the waste of natural resources, pollution, and other adverse consequences for energy consumers in Texas, throughout the United States, and elsewhere.

61. For all these reasons, and those set forth in Plaintiffs' Application for Preliminary Injunction, which is being filed contemporaneously with this Complaint, Plaintiffs request that the Court set their application for hearing and issue a preliminary injunction maintaining the *status quo* until a final judgment is entered.

#### **VI. ATTORNEYS' FEES**

62. Plaintiffs incorporate the preceding paragraphs.

63. Defendant's Ordinance deprives Plaintiffs of their rights under the Constitution and laws of the United States, and Defendant's conduct is thus actionable under 42 U.S.C. § 1983, for which attorneys' fees may be awarded pursuant to 42 U.S.C. § 1988.

64. Plaintiffs seek an award of their reasonable and necessary attorneys' fees in this action for the deprivation of their constitutional rights.

**VII. RIGHT TO AMEND**

65. Plaintiffs reserve the right to amend this Complaint.

**VIII. PRAYER FOR RELIEF**

For the foregoing reasons, Plaintiffs request that Defendant be cited to appear and answer, and that the Court, after hearing this matter:

- a. Enter a Preliminary Injunction and Permanent Injunction prohibiting the City of Kyle, Texas, and its officers, agents, servants, employees, representatives, and attorneys, and all others in active concert with them, from implementing and enforcing the Ordinance;
- b. Enter a judgment declaring:
  - i. Defendant's Ordinance is preempted by federal and Texas law to the extent it regulates the safety of pipeline construction and operations;
  - ii. Defendant's Ordinance is preempted by Texas law to the extent it regulates belowground oil and gas activities;
  - iii. Defendant's Ordinance is preempted by federal and Texas law to the extent it imposes financial security requirements and enforcement provisions;
  - iv. Defendant's Ordinance is unconstitutional and violates the Commerce Clause to the extent it regulates the safety of pipeline construction and operations;
  - v. Defendant's Ordinance is unconstitutional and violates the Commerce Clause to the extent it imposes financial security requirements and enforcement provisions;
  - vi. Defendant's Ordinance is unconstitutional and violates Texas law to the extent it regulates the safety of pipeline construction and operations;
  - vii. Defendant's Ordinance is unconstitutional and violates Texas law to the extent it regulates belowground oil and gas activities; and
  - viii. Defendant's Ordinance is unconstitutional and violates Texas law to the extent it imposes financial security requirements and enforcement provisions;
- c. Award Plaintiffs pre-judgment and post-judgment interest at the maximum rate allowed by law;

- d. Award Plaintiffs their costs of court;
- e. Award Plaintiffs their reasonable and necessary attorneys' fees; and
- f. Award Plaintiffs all other relief, in law and in equity, to which they may be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS  
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 AND KINDER MORGAN TEXAS  
 PIPELINE, LLC

*\*pro hac vice* motion being filed herewith



UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

PERMIAN HIGHWAY PIPELINE, LLC  
AND KINDER MORGAN TEXAS  
PIPELINE, LLC,

*Plaintiffs,*

v.

CITY OF KYLE, TEXAS,

*Defendant.*

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Civil Action No. \_\_\_\_\_

**AFFIDAVIT OF BILL KROGER**

**STATE OF TEXAS**

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**COUNTY OF HARRIS**

Before me, the undersigned notary, on this day personally appeared Bill Kroger, the affiant, a person whose identity is known to me. After I administered an oath, the affiant testified as follows:

1. My name is Bill Kroger. I am over twenty-one years old, of sound mind, and am competent to make this affidavit. I have personal knowledge of the facts stated herein, and I affirm that they are true and correct.

2. I am a partner at the law firm Baker Botts L.L.P. and counsel for Plaintiffs Permian Highway Pipeline, LLC and Kinder Morgan Texas Pipeline, LLC (collectively, “Plaintiffs”) in the above-captioned action and also counsel for Plaintiffs in Cause No. D-1-GN-19-002161; *Sansom, et al., v. Texas Railroad Commission, et al.*; in the 261st Judicial District of Travis County, Texas (the “Travis County Action”). I have been licensed to practice law in the State of Texas since 1989.

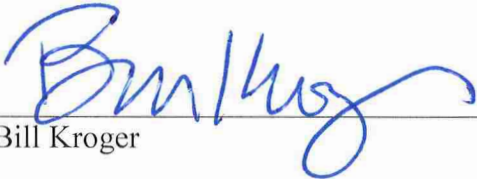
3. **Exhibit A** is a true and correct copy of the Ordinance of the City of Kyle, Texas, as attached to the agenda for the July 2, 2019 meeting of the Kyle City Council and available on Kyle's website.

4. **Exhibit C** is a true and correct copy of the letter ruling issued on June 25, 2019 by the Honorable Lora J. Livingston in the Travis County Action.

5. **Exhibit D** is a true and correct copy of the Final Judgment entered on July 5, 2019 by the Honorable Lora J. Livingston in the Travis County Action.

6. **Exhibit E** is a true and correct copy of an excerpt of the agenda for the May 14, 2019 meeting of the Kyle City Council.

7. **Exhibit F** is a true and correct copy of an excerpt of the agenda for the July 2, 2019 meeting of the Kyle City Council.

  
Bill Kroger

SWORN TO and SUBSCRIBED before me by Bill Kroger on July 22, 2019.

  
Notary Public

