

No. 13-15855

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

CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF TRANSPORTATION ET AL.,
Defendant-Appellee,

Appeal From The United States District Court For The
Northern District of California
In Case No. 3:12-cv-00711-RS, Judge Richard Seeborg

**BRIEF OF *AMICUS CURIAE* PIPELINE SAFETY TRUST IN SUPPORT
OF PLAINTIFF-APPELLANT CITY AND COUNTY OF SAN FRANCISCO
AND IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW**

GLENN K. VANZURA (SBN 238057)
LEE A. LINDERMAN (SBN 280743)
IRELL & MANELLA LLP
1800 Avenue of the Stars
Los Angeles, CA 90067
Telephone: (310) 277-1010
Facsimile: (310) 203-7199

Attorneys for *Amicus Curiae* Pipeline Safety Trust
in support of Plaintiff-Appellant City and County
of San Francisco

CORPORATE DISCLOSURE STATEMENT

The Pipeline Safety Trust is a nonprofit corporation organized under the laws of the State of Washington. The Pipeline Safety Trust has no parent corporation and no corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND BACKGROUND.....	3
A. Catastrophic Pipeline Incidents Occur With Frightening Regularity and Cost Millions of Dollars to Clean Up and Repair	3
B. Congress Promulgates an Initial Statutory Framework to Establish Nationwide Pipeline Safety Regulations	4
C. Congress Continues to Amend Pipeline Laws in the Face of Repeated Systemic Failures	6
II. ARGUMENT	15
A. The Court Should Adopt the City’s Interpretation of the Citizen-Suit Provision of the Pipeline Safety Act Based on Its Plain Language and Legislative History	15
B. Congress’s Pervasive and Longstanding Concerns Regarding the DOT’s Failure to Fulfill its Regulatory Obligations Further Justify Reversal in This Case	18
III. CONCLUSION	23

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	17
<i>Biodiversity Legal Found. v. Badgley</i> , 309 F.3d 1166 (9th Cir. 2002)	18
<i>Coos Cnty. Bd. of Cnty. Comm’rs v. Kempthorne</i> , 531 F.3d 792 (9th Cir. 2008)	18
<i>Ctr. for Food Safety v. Hamburg</i> , -- F. Supp. 2d --, 2013 WL 1741816 (N.D. Cal. Apr. 22, 2013).....	18
<i>Friends of the Aquifer, Inc. v. Mineta</i> , 150 F. Supp. 2d 1297 (N.D. Fla. 2001)	18
<i>Hibbs v. Winn</i> , 542 U.S. 88, 101 (2004)	16
<i>United States v. Olympic Pipe Line Co., et al.</i> , Case No. 2:01-cr-338-BJR, Dkt. Nos. 229–31 (W.D. Wash. June 18, 2003)	1, 21
<i>Williams Pipe Line Co. v. City of Mounts View, Minn.</i> , 651 F. Supp. 551 (D. Minn. 1987)	20
<u>Statutes</u>	
49 U.S.C. §§ 60101–60301	passim
Hazardous Liquid Pipeline Safety Act of 1979, Pub. Law 96-129, 93 Stat. 989	6
Natural Gas Pipeline Safety Act Amendments of 1976, Pub. Law 94-477 (1976).....	7
Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, Pub. Law 109-468, 120 Stat. 3486	10

	<u>Page(s)</u>
Pipeline Safety Reauthorization Act of 1988, Pub. Law 100-561, 102 Stat. 2805	7
Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. Law 112-90, 125 Stat. 1904.....	13
 <u>Other Authorities</u>	
122 CONG. REC. 32719, 94th Cong. (2d Sess.) (Sept. 27, 1976).....	16, 17
122 CONG. REC. 32723, 94th Cong. (2d Sess.) (Sept. 27, 1976) (statement of Rep. Staggers).....	5
122 CONG. REC. 33388, 94th Cong. (2d Sess.) (Sept. 29, 1976).....	7, 14
146 CONG. REC. H7841–42 (2000).....	21
147 CONG. REC. S524 (2001).....	21
<i>Application for a Certificate of Need for a Crude Oil Pipeline</i> , Enbridge Energy, at 61 (rev. Aug. 16, 2013)	4
Biancardi & Bogardus, “ <i>Command And Control</i> ” <i>To Risk Management: The Evolution Of The Federal Natural Gas Pipeline Safety Program</i> , 16 ENERGY L. J. 461 (1995)	5
<i>Central Arkansas Water may sue ExxonMobil, Agency over Pipeline</i> , ARKANSAS ONLINE (Sept. 20, 2013).....	22
H.R. REP. No. 102-247, at 14(1991).....	21
H.R. REP. No. 90-1390 (1968).....	4
H.R. REP. No. 94-1660, at 8 (1976).....	6
H.R. REP. No. 98-780, at 10 (1984).....	21
McCown & Theiss, <i>Safeguarding The Energy Pipeline Transportation System & The Pipes Act Of 2006</i> , 3 TEX. J. OF OIL, GAS, AND ENERGY L. 23, 35–37 (2008)	11

Page(s)

National Transportation Safety Board , Pipeline Accident Report No. 6362A, <http://www.nts.gov/doclib/reports/1995/PAR9501.pdf>, at 11–114 (Jan. 18, 1995) 8

National Transportation Safety Board, Pipeline Accident Brief No. DCA90FP001, http://www.nts.gov/doclib/recletters/1991/P91_13_16.pdf, (July 10, 1992) 7

National Transportation Safety Board, Pipeline Accident Report No. NTSB/PAR-03/01, <http://www.nts.gov/doclib/reports/2003/PAR0301.pdf>, (Aug. 19, 2000) 9

National Transportation Safety Board, Pipeline Accident Report No. NTSB/Par-11-01, <http://www.nts.gov/investigations/summary/PAR1101.html> (Sept. 9, 2010) 12, 14

National Transportation Safety Board, Pipeline Accident Report No. NTSB/PAR-12/01, <http://www.nts.gov/doclib/reports/2012/par1201.pdf>, at 121 (July 25, 2010) 12

National Transportation Safety Board, Pipeline Accident Summary Report No. NTSB/PAR-98/02/SUM, <http://www.nts.gov/doclib/reports/1998/PAR9802.pdf>, (Aug. 24, 1996) 8

NATIONAL TRANSPORTATION SAFETY BOARD, SAFETY STUDY-PROTECTING PUBLIC SAFETY THROUGH EXCAVATION DAMAGE PREVENTION 1 (1997)..... 4

Parfomak, *Keeping America’s Pipelines Safe and Secure: Key Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE, (Jan. 9, 2013)..... 13

Parker, *The Pipeline Industry Meets Grief Unimaginable: Congress Reacts with the Pipeline Safety Improvement Act of 2002*, 44 NATURAL RES. J. 243 (2004) 8, 9, 10

	<u>Page(s)</u>
S. REP. No. 96–182, at 2–3 (1979).....	21
<i>Significant Pipeline Incidents By Cause</i> , U.S. Dept. of Transp., http://primis.phmsa.dot.gov/comm/reports/safety/SigPSIDet_1993_2012_US.html?nocache=5381#_ngtranson	19
<i>Significant Pipeline Incidents</i> , U.S. Dept. of Transp., http://primis.phmsa.dot.gov/comm/reports/safety/sigpsi.html?nocache=402	3
<i>The Pipeline Safety Act—Track PHMSA’s Progress</i> , http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=3bf33dd3892fb310VgnVCM1000001ecb7898RCRD&vgnnextchannel=d248724dd7d6c010VgnVCM10000080e8a8c0RCRD&vgnnextfmt=print#page2	10
U.S. GOV’T ACCOUNTING OFFICE, GAO/RCED-00-128, PIPELINE SAFETY: THE OFFICE OF PIPELINE SAFETY IS CHANGING HOW IT OVERSEES THE PIPELINE INDUSTRY, 51 (May 2000) (Appendix IV)	10
Van Derbeken, <i>Old PG&E pipe used in San Bruno blast, San Carlos, SF</i> GATE (Oct. 7, 2013).....	13, 22
 <u>Rules</u>	
Administrative Ruling No. R.11-02-019 MF1/MAB/cla, at 1 (Aug. 19, 2013)	12
Fed. R. App. P. 25	1
Fed. R. App. P. 29	1

INTEREST OF AMICUS CURIAE¹

The Pipeline Safety Trust (“Trust”) was created in 2003, four years after the June 10, 1999 gasoline pipeline rupture and explosion in Bellingham, Washington. The families of the 3 boys who were killed in the fire and other community members formed a group focused first on ensuring the safety of the Olympic Pipeline before it was to be restarted, and then on improving the safety of pipelines nationwide, so that no other communities would have to endure the pain and suffering caused by preventable pipeline failures.

The Trust was formed with funds set aside to establish a permanent, independent pipeline safety watchdog group by order of Federal District Judge Barbara Rothstein, as part of a plea agreement on the criminal penalties paid by the pipeline’s operators.² Since its founding in 2003, the Trust has regularly testified before Congress on pipeline safety issues, educated local governments and individuals with concerns about the safety of pipelines in their communities, and

¹ The parties have consented to the filing of this brief. No party’s counsel authored this brief; no party or party’s counsel contributed money to fund this brief; and no person—other than *amicus curiae*—contributed money to fund preparation and submission of this brief. Fed. R. App. P. 25(c)(5), 29(a).

² See *United States v. Olympic Pipe Line Co., et al.*, Case No. 2:01-cr-338-BJR, Dkt. Nos. 229–31 (W.D. Wash. June 18, 2003) (transcripts of sentencing hearings).

worked closely with industry, regulators, and the public to improve pipeline safety regulations and their effectiveness.³

The Trust exists because of a failure in the pipeline safety regulatory system. It has never before participated in litigation, but chose to participate as *amicus curiae* here because the outcome of this case may determine whether the Trust or others are able to prevent or remedy future failures by ensuring enforcement of existing pipeline safety laws. The Trust seeks to familiarize the Court with the frequency and consequences of failures in the pipeline safety regulatory system and to heighten the Court’s awareness of the critical nature of the roles the Department of Transportation (“DOT”) plays in that system—as creator of the standards that pipeline operators must meet, as enforcer of those standards for interstate lines, and in oversight of state implementation and enforcement of those standards on intrastate lines. When the DOT fails in any one of those roles, the system fails, pipelines fail, and the public is harmed. By creating a statutory right to bring a citizen suit in the Pipeline Safety Act, 49 U.S.C. §§ 60101–60301 *et seq.*, Congress provided organizations like the Trust, the City and County of San Francisco (the “City”), and any other interested person another way to ensure that the DOT fulfills its duties. The Trust’s interest is to protect that statutory right. The Trust is authorized by its Board of Directors to file this brief.

³ See examples of the Trust’s work at www.pstrust.org.

I. INTRODUCTION AND BACKGROUND

A. Catastrophic Pipeline Incidents Occur With Frightening Regularity and Cost Millions of Dollars to Clean Up and Repair

On average, someone in the United States is admitted to the hospital or killed from injuries sustained in a pipeline incident once every ten days.⁴ A significant pipeline incident occurs in the United States, on average, two out of every three days.⁵ As reported by the National Transportation Safety Board (“NTSB”) in 1997, a single pipeline accident “can injure hundreds of persons, affect thousands more, and cost millions of dollars in . . . property damage, loss of work opportunity, community disruption, ecological damage, and insurance

⁴ *All Reported Pipeline Incidents*, U.S. Dept. of Transp., <http://primis.phmsa.dot.gov/comm/reports/safety/Allpsi.html?nocache=7572> (last visited Oct. 7, 2013). The Office of Pipeline Safety (“OPS”) was created by Congress in 1968 within the DOT. At that time, it was housed in the Research and Special Programs Administration (“RSPA”). OPS is currently part of the Pipeline and Hazardous Materials Safety Administration (“PHMSA”).

⁵ “Significant” incidents are those reported by pipeline operators when any of the following specifically defined consequences occur:

1. fatality or injury requiring in-patient hospitalization;
2. \$50,000 or more in total costs, measured in 1984 dollars;
3. highly volatile liquid releases of 5 barrels or more or other liquid releases of 50 barrels or more; or
4. liquid releases resulting in an unintentional fire or explosion.

Significant Pipeline Incidents, U.S. Dept. of Transp., <http://primis.phmsa.dot.gov/comm/reports/safety/sigpsi.html?nocache=402> (last visited Oct. 7, 2013).

liability.”⁶ More recently, the costs of the continuing cleanup following the 2010 failure of Enbridge’s Line 6b in Marshall, Michigan now exceed \$1 billion, according to Enbridge’s disclosure in an Application for a Certificate of Need before the Minnesota Public Utilities Commission.⁷

Pipeline failures are costly, tragic, and worst of all, often preventable. In 1968, as the population continued to boom in the United States and more and more pipelines were constructed in urban areas, Congress attempted to address the problems posed by pipeline failures by enacting nationwide pipeline safety laws.

B. Congress Promulgates an Initial Statutory Framework to Establish Nationwide Pipeline Safety Regulations

Congress enacted the PSA in 1968—the first statute of its kind—in response to the growing number of pipelines in urban areas,⁸ the absence of pipeline

⁶ NATIONAL TRANSPORTATION SAFETY BOARD, SAFETY STUDY-PROTECTING PUBLIC SAFETY THROUGH EXCAVATION DAMAGE PREVENTION 1 (1997).

⁷ *Application for a Certificate of Need for a Crude Oil Pipeline*, Enbridge Energy, at 61 (rev. Aug. 16, 2013), <https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId=%7bF1B13575-3D71-4CAA-A86A-05CE1EBBCA38%7d&documentTitle=20138-90363-03> (last visited Sept. 28, 2013).

⁸ H.R. REP. NO. 90-1390 (1968).

regulations in nearly half the states,⁹ and requests from the industry to establish a single set of overarching federal regulations.¹⁰

Until 1968, pipeline regulation was left entirely to the states, resulting in a patchwork of regulations of varying efficacy. In fact, only 26 states had regulations governing natural gas pipeline safety;¹¹ the variations among the state regulations were burdensome for operators, and had proven to be ineffective.¹² Because pipelines had become more pervasive in urban areas, Congress became concerned about several pipeline failures in the immediately preceding years, most dramatically the explosive failure of a Tennessee Gas transmission line near Natchitoches, Louisiana that killed 17 people in their homes in 1965.

The 1968 Act designated the newly created DOT as the agency responsible for establishing minimum federal safety standards, and established the state-federal partnership for enforcement of the regulations. Specifically, states were authorized to adopt the regulations for intrastate pipelines within their borders if they certified

⁹ Paul Biancardi & Lisa M. Bogardus, “*Command And Control*” *To Risk Management: The Evolution Of The Federal Natural Gas Pipeline Safety Program*, 16 ENERGY L. J. 461, 463 (1995).

¹⁰ 122 CONG. REC. 32723, 94th Cong. (2d Sess.) (Sept. 27, 1976) (statement of Rep. Staggers) (describing history of pipeline regulation and need for 1976 amendments).

¹¹ Biancardi & Bogardus, *supra* note 9.

¹² *See supra* note 10.

to the DOT that they had the authority to implement the standards and the ability to enforce the standards.

After only eight years, however, Congress expressed concern about the certifications and directed the DOT to fulfill its role in ensuring their validity:

While 45 States have been certified under section 5(a) of the Act to enforce the safety regulations, there are serious questions as to whether all of those States are in fact meeting their obligations required by the statute for certification. The conferees will not tolerate “paper” certifications and *the Secretary is directed to closely scrutinize the natural gas pipeline safety program of each State to insure that the State is fulfilling its responsibilities.*¹³

Congress added responsibility for hazardous liquid pipeline regulation to the DOT’s duties in the Hazardous Liquid Pipeline Safety Act of 1979.¹⁴ Yet, more than 35 years later, it is still unclear whether the DOT has followed congressional direction to “closely scrutinize” the certification of the California Public Utilities Commission (“CPUC”) “to insure that the State is fulfilling its responsibilities.”¹⁵

C. Congress Continues to Amend Pipeline Laws in the Face of Repeated Systemic Failures

Each change in the pipeline laws has been prompted by one or more failures of the previously existing system. For example, amendments in 1976 added several important provisions to the law, including the citizen suit provision at the

¹³ H.R. REP. No. 94-1660, at 8 (1976) (emphasis added); *see also* ER 204.

¹⁴ Hazardous Liquid Pipeline Safety Act of 1979, Pub. Law 96-129, 93 Stat. 989.

¹⁵ *See, e.g.*, City’s Opening Brief (“AOB”) at 10.

core of this dispute.¹⁶ In the first nine months of 1976, when the amendments were under consideration, the nation had seen a series of dramatic gas pipeline explosions and fires sweep across the country killing 72 people.¹⁷

In the Pipeline Safety Reauthorization Act of 1988, Congress made incremental improvements in the statutes, primarily involving requirements that operators provide accurate information to regulators about their systems and certify the qualifications of their operators.¹⁸ Following the August 1990 fatal explosion and fire in Allentown, Pennsylvania caused by the failure of a cast iron line that had been undermined by a leaking water line, the reauthorization of the program in 1992 included changes to the gas and hazardous liquid pipeline laws, again increasing available civil penalties, and bringing attention to submerged pipelines creating navigation hazards and the risks of cast iron distribution lines.¹⁹

¹⁶ Natural Gas Pipeline Safety Act Amendments of 1976, Pub. Law 94-477 (1976).

¹⁷ The highest previous annual count of fatalities had been 45 in 1971. 122 CONG. REC. 33388, 33393, 94th Cong. (2d Sess.) (Sept. 29, 1976).

¹⁸ Pipeline Safety Reauthorization Act of 1988, Pub. L. No. 100-561, 102 Stat. 2805. Congress also mandated the promulgation of rules requiring certain inspections of pipelines, a mandate largely ignored by the DOT until a decade or more had passed. *See infra* note 26.

¹⁹ National Transportation Safety Board, Pipeline Accident Brief No. DCA90FP001, http://www.nts.gov/doclib/recletters/1991/P91_13_16.pdf (July 10, 1992). Allentown had suffered a previous explosion in 1976 and was to suffer two additional deadly explosions and fires after 1991: one from an excavator-damaged steel service line to a retirement home in 1994, and one from a failed cast iron line in 2010.

A series of deadly pipeline incidents in the 1990s and a record bad year for incidents in 2000 further highlighted weaknesses in the regulations and their implementation by the federal Office of Pipeline Safety, and resulted in significant changes to the pipeline safety laws in 2002.²⁰ Among the worst incidents in that decade:

- 1994: A natural gas transmission line ruptured catastrophically in Edison, New Jersey, destroying eight apartment buildings, injuring dozens of people, and sending flames 500 feet in the air.²¹
- 1996: A liquid butane pipeline ruptured near Lively, Texas, sending a butane vapor cloud into a surrounding residential area. Two teenagers on their way to a neighbor's house to report the rupture were killed when their vehicle engine ignited the vapor cloud. The NTSB determined that the probable cause of the rupture was "the failure of [the operator] to adequately protect its pipeline from corrosion."²²

²⁰ See generally Carol Parker, *The Pipeline Industry Meets Grief Unimaginable: Congress Reacts with the Pipeline Safety Improvement Act of 2002*, 44 NATURAL RES. J. 243 (2004).

²¹ National Transportation Safety Board, Pipeline Accident Report No. 6362A, <http://www.nts.gov/doclib/reports/1995/PAR9501.pdf>, at 11–114 (Jan. 18, 1995).

²² National Transportation Safety Board, Pipeline Accident Summary Report No. NTSB/PAR-98/02/SUM, <http://www.nts.gov/doclib/reports/1998/PAR9802.pdf> (Aug. 24, 1996).

- 1999: A gasoline pipeline ruptured in Bellingham, Washington, spilling a quarter of a million gallons of gasoline into a creek running through the heart of the city. The fumes overcame one young fisherman who drowned in the creek. When the fuel ignited, the ensuing explosion killed two more boys playing in a city park, sent a fireball over a mile and a half along the creek, and created a mushroom cloud over five miles high. This incident still stands as the first and only one ever resulting in criminal convictions and jail time for pipeline operator employees.²³
- 2000: Twelve members of a family were killed near Carlsbad, New Mexico by an explosion and fire caused by the failure of a high-pressure natural gas pipeline 700 feet away from their Pecos River campsite.²⁴ The failure was a result of internal corrosion in a pipeline that had never been internally inspected or pressure tested with water to determine its strength.²⁵

The 2002 Act improved on certain aspects of pipeline safety regulation, including the first statutory requirement for regular inspections of natural gas

²³ Parker, *supra* note 19, at 248.

²⁴ National Transportation Safety Board, Pipeline Accident Report No. NTSB/PAR-03/01, <http://www.nts.gov/doclib/reports/2003/PAR0301.pdf> (Aug. 19, 2000).

²⁵ *Id.* at 21.

transmission pipelines in high population areas to determine their continuing integrity,²⁶ increases in authorized penalties, and substantial increases in appropriations for the pipeline agency.²⁷ The 2002 Act also refined the important federal-state partnership by defining requirements to ensure states adequately inspected interstate pipelines if they chose to take on additional inspection authority as agents of DOT for interstate lines within their boundaries.

The Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006²⁸ extended the requirements for operators to undertake risk assessments and implement integrity management plans for the nation's vast network of distribution

²⁶ Although the 1988 and 1992 amendments had directed OPS to issue rules requiring inspections in certain areas, the rules were not timely adopted. In 2000, the Government Accounting Office reported that 22 statutory mandates to the Department remained incomplete, some dating from 1988. U.S. GOV'T ACCOUNTING OFFICE, GAO/RCED-00-128, PIPELINE SAFETY: THE OFFICE OF PIPELINE SAFETY IS CHANGING HOW IT OVERSEES THE PIPELINE INDUSTRY 51 (May 2000) (Appendix IV).

PHMSA's website devotes a webpage to tracking its fulfillment of the mandates in the 2011 Act. That page currently shows the agency having missed deadlines on two of the most substantive provisions of the Act, relating to validation of pipe strength for determining operating pressure and leak detection improvements. *See The Pipeline Safety Act—Track PHMSA's Progress*, <http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=3bf33dd3892fb310VgnVCM1000001ecb7898RCRD&vgnextchannel=d248724dd7d6c010VgnVCM10000080e8a8c0RCRD&vgnnextfmt=print#page2> (last visited October 10, 2013).

²⁷ Parker, *supra* note 19, at 261–264.

²⁸ Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, Pub. Law 109-468, 120 Stat. 3486.

pipelines in an effort to reduce the number of major incidents affecting natural gas services in residential and urban areas. The 2006 Act also dramatically strengthened efforts to prevent damage to pipelines from excavation damage by authorizing states to assess penalties for violations of state “one-call” laws, and establishing a grant program for states to strengthen their damage prevention programs.²⁹

Yet despite Congress’s best efforts to curb pipeline failures by implementing stringent regulatory and administration requirements, three more pipeline tragedies rocked the United States in 2010–2011:

- July 2010: A pipeline operated by Enbridge, Incorporated ruptured near Marshall, Michigan, spilling approximately one million gallons of diluted bitumen, sometimes referred to as tar sands crude, into Talmadge Creek and the Kalamazoo River, resulting in the nation’s largest inland oil spill. Cleanup costs for this incident now exceed \$1 billion.³⁰ The probable cause of the rupture was determined to be corrosion fatigue cracks that grew under a disbonded coating, the

²⁹ Brigham A McCown & Dawn Whalen Theiss, *Safeguarding The Energy Pipeline Transportation System & The Pipes Act Of 2006*, 3 TEX. J. OF OIL, GAS, AND ENERGY L. 23, 35–37 (2008).

³⁰ *See supra* note 7.

operator's "pervasive organizational failures," and PHMSA's "weak regulations" and "ineffective oversight."³¹

- September 2010: The tragedy that spawned the present case occurred: an intrastate natural gas transmission pipeline operated by Pacific Gas and Electric Company ("PG&E") ruptured in a residential neighborhood of San Bruno, California, killing eight people and destroying dozens of homes.³² The rupture occurred on a substandard weld on a seam in a segment of pipe identified in PG&E's records as seamless.³³ The incident investigation exposed the failure of PG&E to undertake an adequate risk assessment of its system and implement an integrity management plan to neutralize those risks. It also exposed CPUC's failure to identify the operator's regulatory violations and lack of knowledge about its own system.³⁴

³¹ National Transportation Safety Board, Pipeline Accident Report No. NTSB/PAR-12/01, <http://www.nts.gov/doclib/reports/2012/par1201.pdf>, at 121 (July 25, 2010).

³² National Transportation Safety Board, Pipeline Accident Report No. NTSB/Par-11-01, <http://www.nts.gov/investigations/summary/PAR1101.html> (Sept. 9, 2010).

³³ *Id.*

³⁴ *Id.* Recently, on its own motion, the CPUC ordered PG&E to show cause why "all commission decisions authorizing increased operating pressure should not be stayed pending demonstration that records are reliable." *See Order to Show Cause*, Administrative Ruling No. R.11-02-019 MF1/MAB/cla, at 1 (Aug. 19, 2013),

- February 2011: A 1920s vintage cast iron gas main failed in a residential neighborhood of Allentown, Pennsylvania, exploding and fueling a fire that killed five, damaged 50 buildings, and required 500 people to be evacuated.³⁵

Congress responded to these incidents by enacting the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011.³⁶ The 2011 Act increased potential penalties that the DOT could assess, and required a series of studies on various aspects of possible future regulations, including better leak detection technology and the use of automatic shutoff valves, the presence of which may

https://www.pge.com/regulation/GasPipelineSafetyOIR/Rulings/CPUC/2013/GasPipelineSafetyOIR_Ruling_CPUC_20130819_284585.pdf. The order to show cause indicates that PG&E continues to misidentify pipe segment types in its records more than three years after the San Bruno explosion. *Id.* at 4–6. Not only are pipe segments misidentified in its “validated” records, suggesting that no valid risk assessment has yet been completed, but the CPUC again failed to recognize the utility’s failings until PG&E notified them. *Id.* These continued failures within the California regulatory system again call into question the adequacy of PHMSA’s oversight of the state certification process. *See* Jackson Van Derbeken, *Old PG&E pipe used in San Bruno blast, San Carlos*, SF GATE (Oct. 7, 2013, 10:40 pm), <http://www.sfgate.com/news/article/Old-PG-amp-E-pipe-used-in-San-Bruno-blast-San-4877187.php>.

³⁵ Paul W. Parfomak, *Keeping America’s Pipelines Safe and Secure: Key Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE (Jan. 9, 2013).

³⁶ Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. Law 112-90, 125 Stat. 1904.

have dramatically altered the consequences of the September 2010 San Bruno explosion.³⁷

What Congress has never changed, however, is the duty imposed on the DOT in the original Pipeline Safety Act of 1968 (as reiterated during 1976 congressional hearings): the underlying “important and continuing responsibility not only to make certain that the standards are adequate to assure the public safety, but also that they are enforced. . . . **[I]f DOT does not insist that the states do so, they are derelict in their duty and responsibilities under the Act.**”³⁸ In this case, it is PHMSA’s failure to properly oversee California’s regulators, *i.e.* to insist that California adequately administer and enforce pipeline safety standards, that the City seeks to remedy. The efficacy of the pipeline safety regulatory system depends on PHMSA fulfilling its statutory duties by promulgating adequate regulations and ensuring proper enforcement. Yet the district court foreclosed the possibility of redress by dismissing this case before ever reaching the merits of the City’s allegations. As set forth below, the district court’s interpretation of the Pipeline Safety Act (“PSA”) is erroneous. This Court should reverse and remand for full adjudication on the merits.

³⁷ *Id.*; see also National Transportation Safety Board, Pipeline Accident Report No. NTSB/Par-11-01, <http://www.nts.gov/investigations/summary/PAR1101.html> (Sept. 9, 2010).

³⁸ 122 CONG. REC. 33388, 33391, 94th Cong. (2d Sess.) (Sept. 29, 1976) (statement of Sen. Beall) (emphasis added).

II. ARGUMENT

A. The Court Should Adopt the City’s Interpretation of the Citizen-Suit Provision of the Pipeline Safety Act Based on Its Plain Language and Legislative History

The language of the PSA plainly anticipates actions for injunctions against the United States:

A person may bring a civil action in an appropriate district court of the United States for an injunction against another person (*including the United States Government* and other governmental authorities to the extent permitted under the 11th amendment to the Constitution) for a violation of this chapter or a regulation prescribed or order issued under this chapter.³⁹

Despite this plain language, the district court concluded that the citizen suit provision of § 60121 is “not an appropriate vehicle for seeking mandamus relief regarding defendants’ performance of their regulatory duties” because Congress did not include “specific provisions” granting citizens that right.⁴⁰ But as argued in the City’s Opening Brief, the PSA makes clear that the federal government is *not subject to the PSA’s requirements, even if it operates and constructs pipelines*.⁴¹ Thus, the district court’s reading of § 60121 renders the citizen suit provision a legal nullity, and flies in the face of the basic interpretive canon that a “statute should be construed so that effect is given to all its provisions, so that no part will

³⁹ 49 U.S.C. § 60121(a) (emphasis added).

⁴⁰ ER 14–15.

⁴¹ AOB at 15–22.

be inoperative or superfluous, void or insignificant[.]”⁴² The Court need not look past the plain language of the PSA that provides a person “may bring a civil action” for an injunction against another person “*including the United States government*” to reverse the ruling in this case.⁴³

The district court not only erred by misinterpreting the plain language of the statute, but also improperly disregarded the legislative history that confirms Congress’s intent to permit citizen suits for injunctive relief against the United States. During the House floor debate on the 1976 amendments to the Natural Gas Pipeline Safety Act, for example, Representatives John Dingell and Clarence Brown engaged in a long debate specifically about the citizen suit provision. Representative Brown was particularly concerned about the prospect of injunctive relief against a utility that might leave other customers without service. Nevertheless, despite his concerns, Representative Brown acknowledged that a citizen could bring suit for “enforcement actions *against the Federal Government* to require them to enforce regulations.”⁴⁴

Representative Dingell, who was in favor of the bill’s passage, verified Congress’s intent that the language of the statute meant exactly what it says—*i.e.*,

⁴² *Id.* at 15; *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

⁴³ 49 U.S.C. § 60121(a) (emphasis added).

⁴⁴ 122 CONG. REC. 32719, 32725, 94th Cong. (2d Sess.) (Sept. 27, 1976).

that injunctive relief could be sought against an operator or against the DOT in its regulatory capacity:

Mr. Speaker, I do not think it is too much to ask that where this kind of peril exists, we will allow citizens, under these very narrowly restricted rights, to initiate suits. Now what are those? It includes notice to the Attorney General. . . . It requires the passage of 60 days, during which the persons involved could come forward, including the pipeline that fixed the leak in order to correct the abuses, . . . *or the Federal agency, if it was to be a participant, could take the necessary steps to bring into conformity their regulations with the requirements of the law and to abate and terminate the threat of irreparable harm.*⁴⁵

Following Representative Dingell's statements, Representative Brown reiterated that he opposed the inclusion of the citizen suit provision—but *not* because of the possibility of “enforcement actions against the Federal Government.”⁴⁶ Immediately following this debate, the House passed the bill.⁴⁷

The district court's erroneous conclusion that the PSA bars citizen suits for injunctive relief must be reversed.⁴⁸ The plain language of the PSA, combined

⁴⁵ 122 CONG. REC. 32719, 32724–25, 94th Cong. (2d Sess.) (Sept. 27, 1976).

⁴⁶ *Id.* at 32725. Representative Brown was only concerned about the possible shut down of utilities without concern for their customers. *Id.* at 32726.

⁴⁷ *Id.*

⁴⁸ The district court relied in part on a provision in the employee whistleblower section of the PSA authorizing mandamus relief against the Secretary for violations of that section as a basis for its conclusion that § 60121's silence on the subject must have been purposeful. ER 14 (citing 49 U.S.C. § 60129). But the whistleblower provision is “removed by several sections from the primary citizen's suit provision.” *Bennett v. Spear*, 520 U.S. 154, 173 (1997).

with explicit statements by two congressmen acknowledging the availability of a suit such as the City's in this case, demonstrates the breadth of the district court's error. Congress explicitly considered and provided for mandamus actions against the DOT as regulator to ensure enforcement of the pipeline safety regulations.

This Court should reverse and remand for further proceedings on the merits of the City's PSA claim.⁴⁹

B. Congress's Pervasive and Longstanding Concerns Regarding the DOT's Failure to Fulfill its Regulatory Obligations Further Justify Reversal in This Case

Congress has long been aware of the critical nature of the role of the DOT and the consequences of its failure to fulfill its responsibilities under the PSA. Congress has also frequently expressed concerns about the DOT's regulatory and

The district court therefore had no justification to read into the "silence" of § 60121 to support its interpretation of the PSA.

⁴⁹ In passing, the district court cited *Friends of the Aquifer, Inc. v. Mineta*, 150 F. Supp. 2d 1297 (N.D. Fla. 2001), to support its construction of the PSA. ER 15. But *Mineta* is both wrongly decided and contravened by Ninth Circuit authority. In *Mineta*, the district court dismissed a mandamus petition to compel the Secretary to promulgate regulations under the PSA in compliance with statutory deadlines. *Id.* at 1300–01. The *Mineta* court reasoned that Congress did not authorize suits "to compel compliance with statutory deadlines." *Id.* Yet this Court has repeatedly held that violation of a congressionally mandated deadline compels a court to enter injunctive relief without balancing agency priorities or other factors. *See, e.g., Coos Cnty. Bd. of Cnty. Comm'rs v. Kempthorne*, 531 F.3d 792, 807–08 (9th Cir. 2008); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177–78 (9th Cir. 2002); *see also Ctr. for Food Safety v. Hamburg*, -- F. Supp. 2d --, 2013 WL 1741816, at *5 (N.D. Cal. Apr. 22, 2013) ("[W]here Congress has specifically provided a deadline for performance by an agency, no balancing of factors is required or permitted.") (internal quotation marks and citation omitted).

enforcement efforts. Current incident data confirms the continuing need for improved regulations and stronger enforcement of existing ones.

In recent years, PHMSA has begun making available a public accounting of reportable incidents by year, by type of incident, by type of pipeline, and by cause. That data discloses that most incidents are still caused by factors within the control of the operator or another person, typically an excavator. Comparatively few incidents are caused by natural forces such as hurricanes, landslides and floods, or by human-created forces such as electrical arcing, damage from a vehicle, or vandalism.⁵⁰ For example, 48.9% of onshore gas transmission pipeline “significant” incidents—of which the September 2010 PG&E explosion in San Bruno is one of 922 such incidents recorded in the past 20 years—were caused by forces within the operator’s control, such as corrosion, incorrect operation, or material/weld/equipment failure.⁵¹ An additional 19.4% of such incidents were caused by excavation damage to the pipeline. In total, *more than 65%* of the significant incidents over 20 years have been caused either by operators failing to properly maintain and operate their pipelines, or by excavators digging into the

⁵⁰ *Significant Pipeline Incidents By Cause*, U.S. Dept. of Transp., http://primis.phmsa.dot.gov/comm/reports/safety/SigPSIDet_1993_2012_US.html?nocache=5381#_ngtranson (last visited October 10, 2013).

⁵¹ *Id.* All of the statistics in this paragraph are presented in a pie chart near the bottom of the cited page.

pipes. By contrast, only 13.4% of incidents during those two decades were caused by natural damage or other outside forces.

Three logical conclusions can be drawn from this data: (1) although the standards to be promulgated by the DOT are identified as “minimum safety standards,” they must also provide “adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities”⁵²—yet the frequency of preventable incidents strongly suggests that current regulations are not meeting that standard of “adequacy”; (2) in the absence of sufficient pipeline safety standards, the industry is not adequately self-regulating to prevent incidents within their control; and (3) efforts to prevent damage from excavation (such as pipeline markers, “one-call” utility location laws, etc.) are not yet sufficiently effective. Thus, to maintain public safety in the face of the risks posed by the presence of pipelines in our communities, effective nationwide regulation and enforcement is necessary.

For decades, Congress has been keenly aware of this need, and has frequently expressed its concern that the DOT is not adequately fulfilling its regulatory and enforcement roles.⁵³ Even the Department of Justice has expressed

⁵² 49 U.S.C. § 60102

⁵³ *See, e.g., Williams Pipe Line Co. v. City of Mounts View, Minn.*, 651 F. Supp. 551, 565 n.28 (D. Minn. 1987) (“Congress has, in the past, expressed considerable concern about the DOT’s pipeline safety enforcement efforts.”); *see*

its concerns with the DOT's regulatory behavior.⁵⁴ Congressional criticism of the DOT's pipeline safety enforcement efforts has continued to the present. For example, Congress again criticized the DOT during debates on the Pipeline Safety Acts of 2000 and the Pipeline Safety Improvement Act of 2001:

[T]here is little or no enforcement of existing regulations. The General Accounting Office found that the Office of Pipeline Safety had not enforced 22 of the 49 safety regulations that are already on the books. . . . Madam Speaker, *this inaction of the Office of Pipeline Safety will not be excused by this Congress.*⁵⁵

In this case, if the District Court's decision were to be upheld by the Court, and the effective citizen suit provision intended by Congress were to be stricken from the PSA, the possibility of a private right of action against the DOT for failing to fulfill its regulatory duties would be foreclosed. This would remove an important tool to ensure pipeline safety when the DOT—a Department that has

also S. REP. NO. 96-182, at 2-3 (1979) (criticizing the DOT for “not doing an adequate job of regulating [liquefied natural gas] and [liquefied petroleum gas] safety. . . . [T]he Committee has been concerned for several years that DOT has not placed sufficiently high priority on . . . programs in general”); H.R. REP. NO. 98-780, at 10 (1984) (criticizing the DOT's pipeline safety program as “a poorly managed program that needs a reevaluation of its direction”); H.R. REP. NO. 102-247, at 14 (1991) (DOT's performance in implementing the law since the last reauthorization in 1988 “has been mixed”).

⁵⁴ See *United States v. Olympic Pipe Line Co., et al.*, Case No. 2:01-cr-338-BJR (W.D. Wash. 2002), Dkt. No. 60 at 17 (“Congressional criticism of the DOT's pipeline safety enforcement efforts has continued to the present.”).

⁵⁵ 146 CONG. REC. H7841-42 (2000) (remarks of Rep. Pascrell) (emphasis added); see also 147 CONG. REC. S524 (2001) (statement of Sen. Domenici) (“Unfortunately, the Office of Pipeline Safety has had a poor history of regulation and enforcement. It is true that the Office has traditionally been slow to act.”).

been criticized by Congress, courts, and Justice Department lawyers as failing to fulfill its duties to regulate and administer the pipeline safety statutes—inevitably fails to comply with its obligations in the future, leading to yet another pipeline catastrophe.

Already, multiple entities either plan to or have already initiated lawsuits under the PSA's citizen suit provision. For example, in Arkansas, the purveyor of water for more than 400,000 residents has recently filed a 60-day notice of its intent to use the citizen's suit provision against PHMSA.⁵⁶ In San Marcos, California, the city has already pursued injunctive relief⁵⁷ to shut down the PG&E pipeline; PG&E only recently reported to the CPUC that the pipeline is not of the type reflected by its records, casting doubt as to whether the pipeline has been maintained and operated in a sufficiently conservative manner to protect the public. The City of San Marcos likely has concerns about the very same certification that is the subject of this litigation, provided by the CPUC and accepted by PHMSA as sufficient evidence of the Commission's implementation and enforcement of the federal safety regulations. Yet lawsuits by Central Arkansas Water, the City of San Marcos, and others might be foreclosed if the

⁵⁶ *Central Arkansas Water may sue ExxonMobil, Agency over Pipeline*, ARKANSAS ONLINE (Sept. 20, 2013, 10:06 AM), <http://www.arkansasonline.com/news/2013/sep/20/central-arkansas-water-says-it-may-sue-exxonmobil-/>.

⁵⁷ *See Van Derbeken, supra* note 34.

district court's decision is upheld, permitting PHMSA's inadequate oversight to continue to the detriment of public safety.

In short, the district court's evisceration of the PSA's citizen suit provision could have drastic real-world consequences. As the plain language of the statute allows and the legislative history confirms, citizens should be permitted to seek injunctive relief against the federal government in its regulatory capacity. This Court should reverse the district court's order and remand for further proceeds on the merits.

III. CONCLUSION

In accordance with the foregoing, the Pipeline Safety Trust respectfully submits that the Court adopt the City's arguments and reverse the decision below.

Dated: October 11, 2013

Respectfully submitted,

s/ Glenn K. Vanzura

GLENN K. VANZURA
IRELL & MANELLA LLP
Attorneys for *Amicus Curiae* Pipeline Safety
Trust in support of Plaintiff-Appellant City
and County of San Francisco

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d), and contains 5,400 words, including footnotes.

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point.



LEE LINDERMAN

October 11, 2013

9th Circuit Case Number(s) 13-15855

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > PDF Printer/Creator).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Oct 11, 2013 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Glenn K. Vanzura

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

[Empty box for listing non-CM/ECF participants]

Signature (use "s/" format)

[Empty box for signature]