STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. FED-20-40

PORTLAND PIPE LINE CORPORATION AND
THE AMERICAN WATERWAYS OPERATORS,
Plaintiffs-Appellants

v.

CITY OF SOUTH PORTLAND AND 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

Amici Curiae Brief of the International Municipal Lawyers Association, and Legal Scholars, in support of Defendants-Appellees

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

Constitutional Provisions:

Maine Attorney General Opinions:

Ordinances

Periodicals:

Treatises:

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

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The legal academics listed above are national experts in, and professors of, state and local government law, land use law, and/or environmental law. They come before the Court with decades of scholarly experience dedicated to these fields. They do not have a personal interest in this case, but rather a scholarly interest in the principles and governance traditions of local government and land use law in the United States.

INTRODUCTION

The Clear Skies Ordinance (the "Ordinance") passed by the City of South Portland (the "City") is a straightforward exercise of municipal planning and self-governance. After studying the potential for bulk loading of crude oil within its boundaries, the City concluded that the infrastructure requirements and environmental impacts of this activity posed a threat to public health and welfare, and were incompatible with the community's vision of itself for the future. It therefore decided to prohibit the storing and handling of petroleum or petroleum products for the bulk loading of crude oil onto any marine tank vessel in specified zoning districts. In acting in this way to protect the public health and welfare and to give effect to its long-term municipal vision, the City operated well within its municipal authority to dictate the locations of certain land uses within its borders.

Municipalities in Maine operate under strong grants of home rule authority from the State, and the City of South Portland enacted the Ordinance pursuant to such a grant. Land use decisions are at the core of this local authority to protect the public health, safety, and general welfare. Carrying out that mission frequently requires the use of restrictions on certain types of harmful land use, and the ability of local governments to exercise their power in that way has been repeatedly affirmed. The Ordinance is in keeping with many similar uses of local land use authority across Maine, and across the country.

The exercise of authority seen in the Ordinance has not been preempted by the State. There is no evidence in Maine's Oil Discharge Prevention Law, also known as the Coastal Conveyance Act ("CCA"), that the Legislature intended to strictly circumscribe local authority only to matters beyond those contained in Maine Department of Environmental Protection ("MDEP") orders. Interpreting MDEP's permission for Plaintiff-appellants to operate as a preemptive order, instead of as a license, would undermine the goals of the CCA.

Looking more broadly to the statute, there is nothing within it that either expressly or impliedly preempts the City's Ordinance. On the contrary, the CCA contains an express savings clause that preserves a role for local governments in attaining the statutory goals of "maintaining the coastal waters, estuaries, tidal flats, beaches and public lands adjoining the seacoast in as close to a pristine condition as possible 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." 38 M.R.S. §§ 541, 556. To find preemption here would be to find unjustified displacement of local powers by the State. It would also leave communities like South Portland vulnerable to cycles of continued harm as they attempt to transition out of an industrial past and to position their communities for a healthier future.

FACTUAL AND PROCEDURAL HISTORY

IMLA and Legal Scholars hereby accept and incorporate the factual and procedural history as presented in the Brief of Defendants-appellees.

ARGUMENT

I. DECISIONS REGARDING LAND USE ARE AT THE HEART OF LOCAL GOVERNMENT FUNCTIONS

Regulation of land use in the United States "is traditionally a function performed by local governments," and courts have long recognized it as one of local governments' most critical functions. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979); *see also, e.g., Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994); *D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50, 56 (1st Cir. 1999), *quoting, Schad v. Mount Ephraim*, 452 U.S. 61, 68(1981) ("Generally, '[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.'"); *Bryant Woods Inn, Inc. v. Howard Cty., Md.*, 124 F.3d 597, 603 (4th Cir. 1997) ("[l]and use planning and the adoption of land use restrictions constitute some of the most important functions performed by local government."); *Evans v. Bd. of Cty. Comm'rs of Cty. of Boulder, Colo.*, 994 F.2d 755, 761 (10th Cir. 1993) ("[l]and use policy customarily has been considered a feature of local

government"); *Chez Sez III Corp v. Township of Union,* 945 F.2d 628, 633 (3d Cir. 1991) ("[l]and use issues are an area of particularly local concern").

A long tradition of scholarship confirms this judicial interpretation. *See, e.g.*, Percival *et al., Environmental Regulation: Law, Science, and Policy* 807 (8th ed. 2018)("regulation of land use generally remains the fiercely guarded province of local levels of government"); Sterk, Peñalver & Bronin, *Land Use Regulation* (2d ed. 2016) ("In the United States, zoning is principally the province of municipalities."); Ashira Pelman Ostrow, *Land Law Federalism*, 61 Emory L.J. 1397, 1405 (2012) (noting the "national understanding that land use is primarily a prerogative of local governments," and collecting sources reflecting same); Patricia E. Salkin, *Zoning and Land Use Planning*, 32 Real Estate L.J. 429 (2004) ("in almost every state, decisions on land use planning and adoption of land use laws to implement these plans is entirely a function of local government"); John Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 Harvard Envtl. L. REV. 365, 373 (2002) ("It is widely understood that local governments have been given a key, if not the principal, role in land use regulation.")

A. Local authority over land use reflects the highly localized impacts of land use decisions for public health and welfare

Deference to local control over land use is rooted in and reflective of the direct impacts that land use has on communities. *See, e.g.*, Alice

Kaswan, *Climate Adaptation and Land Use Governance: The Vertical Axis*, 39 Columbia J. Envtl. L. 390, 440 (2014) ("land-use decisions impact local residents more profoundly than many other kinds of governmental decisions"). Decisions about land use within a city determine where people live, work, go to school, and recreate—they quite literally dictate the shape of a community and the physical realities of the lives of its citizens. Because uses of land have such direct impacts, authority to engage in land use planning is often critical to a city's ability to meet the needs of its population. This is particularly true because both physical and social conditions vary widely from one city to another, even within the same state. Geographic and demographic differences—urban versus rural, coastal versus landlocked, agricultural versus industrial, and others—are in place across the country, and require a variety of responses from local governments. Local governments are generally well positioned to know about the special circumstances and environmental conditions within their community. *See, e.g.*, Jonathan Rosenbloom & Keith H. Hirokawa, *Foundations of Insider Environmental Law*, 49 Envtl. L. 631, 635 (2019); Keith Hirokawa, *Environmental Law from the Inside: Local Perspective, Local Potential*, 47 Envtl. L. Rep. News & Analysis 11048, 11051 (2017). That specialized knowledge helps them to understand what uses of land are appropriate when it comes to balancing competing claims to resources.

Local governments are also often most in tune with community preferences, and have detailed knowledge of their communities' future economic prospects. By having control over the important function of land use, local authorities—subject, of course, to state and federal law, and public policy—are able to adjust to these preferences. For example, at the time of passage of the Ordinance, South Portland was in the middle of reevaluating its economic future and community priorities. *See Portland Pipe Line Corp., et al. v. City of South Portland, et al.*, 15-cv-00054, Order on Motions for Summary Judgment (Woodcock, J.), ECF No. 200 at 119 ("SJ Decision") (noting changing priorities reflected in Comprehensive Plan update process). Those priorities included a desire to lessen the environmental and health impacts from bulk loading of crude oil loading and other industrial uses—notably, impacts that are not shared by many of South Portland's neighboring communities, given their long-accepted use of land use planning to exclude such uses.

Recognizing the authority of local governments to use land use planning to address the particular circumstances of their environment and community plays a crucial role in giving effect to the unique needs of localities. It also places the authority for making highly impactful decisions at the level of government with the greatest degree of local accountability to citizens. *See, e.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Columbia L. Rev.

1, 99 (1990); *see also, e.g.*, Eric T. Freyfogle, *The Particulars of Owning*, 25 Ecol. L.Q. 574, 581 (1999) ("The long-term residents of a region live with the consequences of land use choices, including scars of development and industry, polluted waterways, and disrupted wildlife populations. Local people are simply too implicated not to have a major voice."). For all of these reasons, local authority over land use is a well-established feature of the American legal landscape.

B. Local governments exercise their land use power through zoning ordinances and comprehensive plans

Local power over land use is exercised in large part through the use of zoning ordinances and comprehensive plans. *See, e.g.*, Percival *et al.*, *Environmental Regulation: Law, Science, and Policy,* 820 (8th ed. 2018); Haar & Wolf, *Land Use Planning and the Environment: A Casebook*, ELI Press (2010), at 119 ("Since the early decades of the 20th century, the most widely employed land use control has been zoning . . ."); Nolon, *Protecting the Environment Through Land Use Law: Standing Ground* ("Standing Ground"), Environmental Law Institute (2014), at 11 (noting that zoning is the "foundational device" for local governments exercising their power over land use). Zoning authority is delegated to local governments by the state. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Maine has delegated authority to local governments like the City of South Portland to enact zoning ordinances, and has required that any

such enactments be pursuant to and consistent with a comprehensive plan. 30-A M.R.S. §§ 4352, 4352(2).

At its most basic level, the zoning power gives cities the ability to prescribe what uses of land will be allowed, and where. *See, e.g.*, Sprankling & Coletta, *Property: A Contemporary Approach,* 784, (3d ed. 2012). The importance of local control over zoning as a means by which to shape the community and adjust to changing needs has been repeatedly affirmed by the Supreme Court. *See, e.g., City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 (1995); *Village of Euclid*, 272 U.S. 365, at 394-95; *Village of Belle Terre v. Boraas,* 416 U.S. 1, 13 (1974) (Marshall, J., *dissenting on other grounds*) (zoning "may indeed be the most essential function" of local government, since it is the "primary means by which we protect that sometimes difficult to define concept of quality of life"); *cf.* Haar & Wolf, at 329 ("it has been an unshaken principle of American constitutional jurisprudence since . . . 1926 that local governments are entitled to generous deference when exercising their traditional police powers, including zoning and planning"). Consistent with this national trend, local control over zoning is well-recognized in Maine. *See, e.g., Portland Cellular P'ship v. Inhabitants of the Town of Cape Elizabeth*, 2015 WL 438826, at *4 (D. Me. Feb. 3, 2015) ("local zoning issues clearly are matters of local importance"); Hope Creal Jacobson, *Securing Local Land Use Permits: An Ounce of Prevention Is Worth A*

Pound of Cure, 16 Me. Bar J. 12, 12 (2001) ("The importance of local permitting has been bolstered by the increasingly broad authority of Maine municipalities to regulate a variety of land uses.")

C. Zoning authority allows local governments to protect public health and environmental quality, and to respond to their communities' changing needs

A city's zoning authority can be used to accomplish many goals, chief among them protection of public health and environmental quality. Land use decisions have "an immense impact on environmental conditions." *See* Percival *et al.*, at 808. Given that, zoning is an important tool for local governments in protecting environmental health and quality. Nolon, *Standing Ground*, at 12, 62 (discussing local governments' "nearly plenary authority under state law to control land use and protect natural resources in the process"). Zoning allows local governments to regulate development and land use with an eye to a variety of environmental factors, including, among other things, access to air, light, views and scenic resources; quality of air and water; and protection of critical and sensitive areas. *See, e.g., Growing Smart Legislative Guidebook*, at 8-50 - 8-51 (Meck, ed. 2002). Moreover, the particularized nature of the zoning authority gives cities the ability to respond to the expected environmental impacts from any given land use. *See, e.g.*, Keith H. Hirokawa, *Sustaining Ecosystem Services Through Local Environmental Law*, 28 Pace Envtl. L. Rev. 760, 768 (2011); *see also, e.g.*, Nolon,

Standing Ground, at 56 ("The diversity of local conditions such as climate, terrain, hydrology, and biodiversity suggests that centralized approaches to environmental protection are not necessarily desirable when dealing with environmental problems.").

Cities also use their zoning authority to give effect to their vision of themselves for the future. Like Maine, most states require that local zoning authority be exercised in accordance with a comprehensive plan. McQuillin, *The Law of Municipal Corporations,* § 25:86. (3d ed. 2010). Comprehensive plans provide an opportunity for cities to look at the overall picture of land use within their community, including "housing, economic development, provision of public infrastructure and services, environmental protection, and natural and manmade hazards and how they relate to one another." *Growing Smart Legislative Guidebook*, at 7-6. In this way, "[t]he comprehensive plan creates a blueprint for the future development and preservation of a community." Nolon, *Standing Ground*, at 63. Once a comprehensive plan is in place, communities can adapt their zoning as needed to ensure that they reach their land use planning goals. In this very meaningful way, then, the zoning power is the legal operation by which a city can change its mind about ongoing land use, and implement its vision for the future.

II. THE CLEAR SKIES ORDINANCE IS A PRESUMPTIVELY VALID EXERCISE OF THE CITY OF SOUTH PORTLAND'S CONSTITUTIONAL AND STATUTORY HOME RULE AUTHORITY.

With the Clear Skies Ordinance, the City of South Portland exercised its prerogative to protect its citizens and to dictate its shape as a community. In the Ordinance, the City identified a possible new use of land—bulk loading of crude oil onto marine tank vessels—and determined that the use would negatively impact the health of its citizens, its environmental quality, and its goals for the future of its waterfront. The City's subsequent decision to prohibit bulk loading of crude oil onto marine tank vessels is a textbook example of a community exercising its zoning authority to screen out unwanted uses. *Cf.* Haar & Wolf, at 453.

The City had the authority to take this action. The home rule provision of the Maine Constitution, art. VIII, pt. 2, § 1, states that "[t]he inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character." The Maine Legislature has also provided that "[a]ny municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter." 30-A M.R.S. § 3001. "There is a rebuttable presumption that any ordinance

enacted under this section is a valid exercise of a municipality's home rule authority." *Id.* at § 3001(1). Beyond that, "the Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law." *Id.* at § 3001(2); *see also, e.g., Dubois Livestock, Inc. v. Town of Arundel*, 2014 ME 122, ¶¶ 18-19, 103 A.3d 556; *E. Perry Iron & Metal Co. v. City of Portland*, 2008 ME 10, ¶ 14, 941 A.2d 457. In 1988, the Legislature revamped the municipal home rule laws in order to "reemphasize the Legislature's commitment to municipal home rule." Op. Me. Att'y Gen. No. 92-5 (June 19, 1992). Combined, the constitutional and statutory home rule law of Maine offers a great deal of authority and flexibility to local governments.

With regard to land use regulation, relevant state law says that "[a] municipal zoning ordinance may provide for any form of zoning consistent with this chapter." 30-A M.R.S. § 4352. Maine courts have recognized the validity of the delegation of zoning authority from the state to local governments. *See, e.g., Inhabitants of Town of Boothbay Harbor v. Russell*, 410 A.2d 554, 557 (Me. 1980). Maine's subchapter on zoning provides "express limitations on municipal home rule authority," 30-A M.R.S. § 4351, meaning only that "municipalities may not, under the guise of home rule authority, circumvent the zoning procedures of the land use regulation statute." *See Pike Indus., Inc. v. City of Westbrook*, 2012

ME 78, ¶ 17, 45 A.3d 707. Taken together, these statutory provisions mean that local zoning ordinances in Maine are "adopted pursuant to section 3001 and in accordance with section 4352." *See, e.g.*, 30-A M.R.S. § 4452. In exercising their zoning authority, Maine cities may consider "the nature and character of the community and of its proposed zone districts, the nature and trend of the growth of the community and that of surrounding municipalities, the areas of undeveloped property and such other factors that necessarily enter into a reasonable and well-balanced zoning ordinance." *Wright v. Michaud*, 200 A.2d 543, 548 (Me.1964). Section 556 of the CCA preserves this role for local authority. It states that "[n]othing in this subchapter may be construed to deny any municipality, by ordinance or by law, from exercising police powers under any general or special Act; provided that ordinances and bylaws in furtherance of the intent of this subchapter and promoting the general welfare, public health and public safety are valid unless in direct conflict with this subchapter or any rule or order of the board or commissioner adopted under authority of this subchapter." 38 M.R.S. § 556.

South Portland was in full compliance with this legal framework in enacting the Ordinance. The City began by assessing the potential for bulk loading of crude oil onto marine tank vessels in the Shipyard District, Commercial District, and Shoreland Area Overlay District. It reviewed the possibility for air pollution, and for interference with present and anticipated uses of the waterfront. *See* South

Portland Ordinance No. 1-14/15 at 5-9, Appendix ("App.") at 112-116. As a result of this careful review, it concluded that it was appropriate within the aforementioned districts to limit activities related to storage and handling of petroleum products. *Id.*

The straightforward nature of the Ordinance becomes even clearer when comparing it to other aspects of the South Portland zoning ordinance. The restrictions that the Ordinance imposes on storage and handling of petroleum products are similar to a number of other land use limitations implemented by the City. For instance, the City prohibits certain kinds of retail establishments in the Commercial District (City of South Portland Code of Ordinances[1] § 27-780(a)), recreational or community activity buildings in the Commercial District (*id.* at § 27-780(j)), and accessory buildings and uses in both the Commercial and Shipyard Districts (*id.* at § 27-922(k)). Beyond that, in the non-residential industrial districts (INR), bulk loading of crude oil joins thirty other prohibited uses that are explicitly prohibited in addition to the general prohibition on uses that are "injurious, noxious, or offensive to a neighborhood by reason of the emission of fumes, dust, smoke, vibration, or noise." *Id.* at § 27-964.

[1] Available at City of South Portland website, https://www.southportland.org/our-city/code-ordinance/ (last visited 7/4/20).

Restrictions like the ones found in the Ordinance are in place to ensure that the health of the general public is protected, and that the unique natural surroundings of the City are preserved. In this way, they have an obvious relationship to legitimate public purposes. *See, e.g., Your Home, Inc. v. City of Portland*, 432 A.2d 1250, 1258 (Me. 1981). As noted, the City's study of the possibility of bulk loading of crude oil made clear that such activities would have negative impacts for the health and welfare of the community and the surrounding environment. The intended site for Plaintiff-appellants' operations adjoins a popular public park and war memorial, and is quite close to a marina, a community college, and a daycare center. The restrictions imposed by South Portland to avoid negative impacts to these neighboring land uses were a reasonable means of carrying out its municipal authority and obligations. Zoning's origins lie in the separation of incompatible uses, *see, e.g., Euclid*, 272 U.S. at 378, and the Ordinance is a classic example of community use of this planning tool.

Both Plaintiff-appellants and their *amici* would have the Court find that the Ordinance is something other than an act of zoning. Their arguments are seemingly that because the Ordinance operates as a complete restriction on a certain kind of activity in a certain place, it cannot constitute an act of zoning. *See* Plaintiff-Appellants Br. at 19-20; Chamber of Commerce, *et al.*, at 10. Neither brief offers any support for that reading of Maine zoning authority, and both arguments are as

telling as they are inapposite. Local governments in Maine frequently exercise their authority to zone, or to dictate the use of land within their community and its impacts upon their citizens, in ways that exclude certain uses entirely. As discussed, when local governments act to restrict certain activities in certain locations, they do so at the height of their land use planning authority. Thus, it is clear why Plaintiff-appellants and their *amici* would like to characterize the Ordinance as something other than an act of zoning. But their interpretation is not borne out by the understanding of zoning detailed above, nor by the actual operation of zoning provisions within Maine.

Looking only at the communities immediately surrounding the City, it is possible to find many instances of restricted activities in different parts of the city. *See, e.g.*, Town of Cape Elizabeth Zoning Ordinance, §§19-6-11-B, 19-6-11-D (banning, among other things, a number of uses within the shoreland overlay zone and others)[2]; City of Portland Zoning Ordinance, §§ 14-233, 14-249, 14-301.2 (prohibiting commercial petroleum storage facilities, petroleum tank farms, and bulk freight facilities in some waterfront zones)[3]; City of Westbrook Land Use Ordinance, § 310.3 (prohibiting, among other things, commercial petroleum

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[2] Town of Cape Elizabeth website, https://www.capeelizabeth.com/government/rules_regs/ordinances/zoning/zoning.pdf (last visited 7/4/20).

[3] City of Portland website, https://www.portlandmaine.gov/DocumentCenter/View/1080/Chapter-14-Land-Use---Revised-12152019 (last visited 7/4/20).

storage yards in a manufacturing district)[4]. A broader survey of Maine communities is too voluminous to set out here, but would reveal the same. *See generally, e.g.*, Cowan & Scannell, 1 *Maine Real Estate Law & Practice* § 9:1 (2d ed., 2007) (noting that "general alienability of land and use of the land as an owner chooses may be restricted by governmental zoning"). The ability to dictate the location of certain activities is fundamental to local home rule authority in Maine.

The Ordinance and its restrictions also serve to give effect to the City's comprehensive plan. As noted, comprehensive plans are the means by which cities set out a plan for the future, and the blueprint for altering the course of land use in the city as needed. Moreover, Maine law requires that "[a] zoning ordinance must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body." 30-A M.R.S. § 4352. In 2012, the City unanimously adopted an update to its Comprehensive Plan. *See* SJ Decision at 118-20. In performing that update, it recognized the importance of existing industrial uses while also articulating a vision for South Portland that included mixed use development of the waterfront and acknowledging the need for continued reassessment of demand for and impacts of industrial activity in the city. *Id.* The Ordinance balances the competing goals of maintaining existing uses while preventing increases in air and

[4] City of Westbrook website, https://www.westbrookmaine.com/DocumentCenter/View/2337/Appendix-A-Land-Use-Ordinance--20200205 (last visited 7/4/20).

noise pollution that would negatively impact the current uses of waterfront property in South Portland. *Cf. Nestle Waters N. Am., Inc. v. Town of Fryeburg,* 2009 ME 30, ¶ 23, 967 A.2d 702 ("A zoning ordinance is consistent with its parent comprehensive plan if it "[strikes] a reasonable balance among the [municipality's] various zoning goals.").

In short, in adopting the Ordinance, the City was doing nothing more than creating rules for the allowable uses of land within its boundaries. In doing so, it was acting with the full extent of its home rule authority as a local government. The City considered the possible impacts of bulk loading of crude oil, and decided that, to protect its citizens and to give effect to its vision of itself as a community going forward, a particular type of land used needed to be prohibited. That this decision had negative consequences for Plaintiff-appellants' interests is neither surprising nor dispositive. Local governments often must choose between competing planning goals; those choices, once made, produce winners and losers. But the act of choosing is squarely within the prerogative of local government.

As the United States District Court for the District of Maine has previously ruled, interpreting the term "order" in § 556 of the CCA to include MDEP licenses would effect an unintended and unjustified blow to municipal home rule authority. *See* SJ Decision at 226. The ability to plan for and adjust land uses within a city's boundaries is one of the fundamental roles of local government. Moreover, many

communities in Maine are already using their authority to exclude activity potentially covered by an MDEP license. An interpretation of the CCA that reads the word "order" to mean any license issued by MDEP would be hugely disruptive to the planning and operation of numerous local governments in Maine, and would undermine the ability of local governments in Maine to fulfill their role in promoting the general health, public health and public safety of their communities.

III. THE CLEAR SKIES ORDINANCE IS NOT EXPRESSLY OR IMPLIEDLY PREEMPTED BY THE MAINE COASTAL CONVEYANCE ACT.

The Maine Supreme Judicial Court has consistently held that local ordinances will be invalidated only "when the Legislature has expressly prohibited local regulation, or when the Legislature has intended to occupy the field and the municipal legislation would frustrate the purpose of a state law." *Dubois Livestock,* 2014 ME 122, ¶13, 103 A.3d 556 (citing *Int'l Paper Co. v. Town of Jay,* 665 A.2d 998, 1001–02 (Me.1995)). "Accordingly, an ordinance will be preempted only when state law is interpreted to create a comprehensive and exclusive regulatory scheme inconsistent with the local action, or when the municipal ordinance prevents the efficient accomplishment of a defined state purpose." *See id.* (internal citations omitted). Moreover, the Court will "avoid an interpretation that will render it unconstitutional." *State v. Brown*, 2014 ME 79, ¶ 24, 95 A.3d 82.

There is nothing in the CCA that expressly preempts the Ordinance. On the contrary, § 556 expressly reserves a role for local governments through its statement that "[n]othing in this subchapter may be construed to deny any municipality, by ordinance or by law, from exercising police powers under any general or special Act." With that statement, the Legislature expressed its intent not to occupy the field and to preserve municipal home rule authority. *See, e.g., E. Perry Iron & Metal Co.*, 2008 ME 10, ¶ 8, 941 A.2d 457. Interpreting the word "order" in § 556 to be coextensive with licenses granted by MDEP would undermine that recognition of continued local activity. When presented with a choice of construction that would preserve local authority versus one that would undermine it, Maine courts have chosen the former. *See, e.g., State v. Brown*, 2014 ME at ¶ 24, 95 A.3d 82 (noting, in the context of reviewing a municipal ordinance for conflict with state law, "[w]hen reviewing the constitutionality of an ordinance, we presume that the ordinance is constitutional and will reasonably construe the ordinance so as to avoid an interpretation that would render it unconstitutional").

The purpose of the CCA is to ensure safe transport of petroleum products and prevent environmental damage *when* that regulated activity occurs. The law nowhere evidences an intent to require that each municipality provide a location for these commercial activities. That lack of a clear statement is telling—when the Maine Legislature intends to expressly preempt action by local governments, it

does so clearly and unequivocally. *See, e.g.*, 22 M.R.S. § 2429-D ("A municipality may not . . . Prohibit or limit the number of registered caregivers"); 33 M.R.S. § 1601-106 ("A zoning, subdivision, building code or other real estate use law, ordinance or regulation may not prohibit the condominium form of ownership."); 30-A M.R.S. § 4358(2) ("Municipalities shall permit manufactured housing to be placed or erected on individual house lots in a number of locations on undeveloped lots where single-family dwellings are allowed, subject to the same requirements as single-family dwellings, except as otherwise provided in this section. . . ."); 30-A M.R.S. § 4361 ("A municipality may not enact or enforce a land use ordinance that prohibits siting of renewable ocean energy projects, including but not limited to their associated facilities, within the municipality."); 25 M.R.S. § 2011 ("The State intends to occupy and preempt the entire field of legislation concerning the regulation of firearms, components, ammunition and supplies. . . . no political subdivision of the State, including, but not limited to, municipalities, counties, townships and village corporations, may adopt any order, ordinance, rule or regulation concerning the sale, purchase, purchase delay, transfer, ownership, use, possession, bearing, transportation, licensing, permitting, registration, taxation or any other matter pertaining to firearms, components, ammunition or supplies."); 12 M.R.S. § 13201 ("A municipality or political subdivision of the State may not enact any ordinance, law or rule regulating or charging a fee for the hunting,

trapping or fishing for any species of fish or wildlife; the possession or use of any equipment expressly permitted for use in hunting under this Part; the operation, registration or numbering of all-terrain vehicles, watercraft or snowmobiles or any other subject matter relating to all-terrain vehicles, watercraft or snowmobiles regulated under chapter 935 or 937 or under any other provisions of this Part . . ."); 30-A M.R.S. § 3014 ("Except as provided in this section, a municipality may not adopt or enforce any ordinance or bylaw addressing persons who have been convicted of a sex offense in this State or in another jurisdiction that would impose on them restrictions or requirements not imposed on other persons who have not been convicted of a sex offense in this State or in another jurisdiction."); 38 M.R.S. § 1310-U ("Municipalities are prohibited from enacting stricter standards than those contained in this chapter and in the solid waste management rules adopted pursuant to this chapter governing the hydrogeological criteria for siting or designing solid waste disposal facilities or governing the engineering criteria related to waste handling and disposal areas of a solid waste disposal facility."); 38 M.R.S. § 1611 ("To ensure maximum effectiveness through uniform statewide application, the State intends to occupy the whole field of regulation of single-use carry-out bags at retail establishments . . . . A local government may not adopt an ordinance regulating single-use carry-out bags at retail establishments and . . . any ordinance or regulation that violates this subsection is void and has no force or

effect."); 29-A M.R.S. § 1677 (". . . a municipality or other political subdivision may not adopt an ordinance, regulation or procedure governing the operations of a transportation network company, driver or motor vehicle used by a transportation network company driver to provide a prearranged ride or impose a tax or fee on or require a license for a transportation network company, driver or motor vehicle used by a transportation network company driver to provide a prearranged ride, except as provided in subsection 2."). That kind of express preemption is simply not a part of the CCA.

Nor does the CCA impliedly preempt the Ordinance. Implied preemption of local authority poses a large threat to local decision-making. S*ee, e.g.*, Daniel B. Rodriguez, *Localism and Lawmaking*, 32 Rutgers L.J. 627, 640 (2001)(noting the potential for "severe constraints on local innovation and choice" from judicial use of implied preemption). Maine courts have recognized that municipal ordinances will be deemed preempted only where they "prevent the efficient accomplishment of a defined state purpose." *See Smith v. Town of Pittston*, 2003 ME 46, ¶ 24, 820 A.2d 1200 (*citing* 30-A M.R.S. § 3001(3)).

The purpose section of the CCA is extensive, but telling in its breadth and nuance. 38 M.R.S. § 541. In particular, the competing goals of environmental protection and protection of the natural resources of Maine for private and public

use are laid out explicitly from the first paragraph.[5] *Id.* ("The Legislature finds and declares that the highest and best uses of the seacoast of the State are as a source of public and private recreation and solace from the pressures of an industrialized society, and as a source of public use and private commerce in fishing, lobstering and gathering other marine life used and useful in food production and other commercial activities."). Read in conjunction with the savings clause of § 556, it is very clear that the Ordinance does not contravene the legislative purpose at work in the CCA. On the contrary, it is explicitly a part of the balancing act that the CCA acknowledges, and for which the savings clause reserves a role for local governments. The Ordinance does not frustrate the purpose of the CCA, and for that reason there is no basis under Maine law for finding it preempted.

The Clear Skies Ordinance cannot "directly conflict" with the purpose of the CCA because the CCA addresses completely different matters—namely, establishing specific measures to prevent and mitigate environmental hazards inherent in the transfer of petroleum products near water. The CCA, MDEP regulations promulgated thereunder, and the MDEP license issued to Plaintiff-

[5] In this statement of purpose, the Legislature explicitly acknowledged the many industries in Maine that depend on a healthy waterfront, and the fact that burdens on extractive industries are justified in light of the importance of maintaining Maine's ecological health. In that light, arguments by *amici* Chamber of Commerce, *et al.* that focus on the importance of the economic health of the oil industry in Maine without acknowledging the economic importance of industries like tourism and fishing that are reliant on a healthy coastal environment ring particularly incomplete. *See* Br. of *Amici Curiae* at 11-15.

appellants focus on technical design and construction standards, tanks, equipment, testing protocols, spill prevention measures, and similar matters. App. at 175-183. *See also,* 06-096 C.M.R., ch. 600 (2016)[6]. In contrast, the Ordinance contains no such technical standards. Instead, it is focused on land use impacts related to siting and compatibility of uses within specific zoning districts. The Ordinance expressly references the community's vision, preserving and enhancing the current mix of uses in relevant zoning districts, the City's objective to balance various uses, and its determination that certain types of facilities for bulk loading of crude oil would be inconsistent with, and conflict with, said uses. App. at 109-115. The Ordinance does not address spill prevention or mitigation, or impose requirements on the same technical matters as either the CCA or MDEP license. Thus, the City has not enacted restrictions that are directly in conflict with the CCA or the MDEP license. While the Ordinance restricts the location of a use that may be eligible for a state license under the CCA, it does not follow that the municipal ordinance is in conflict with the standards contained in the state law. *See E. Perry Iron & Metal Co.,* 2008 ME 10 ¶ 23, 941 A.2d 457 (ordinance was not preempted because it did not establish "stricter" rules on the *same* standards addressed in the state law regulating solid waste facilities).

[6] Me. Secretary of State website/State Agency Rules/Rules for the MDEP (last visited 7/1/20).

Moreover, even if the CCA and Ordinance regulate similar matters, the goals of the South Portland ordinance are in furtherance of the CCA's stated purposes of preserving the seacoast as "a source of public and private recreation" and "as a source of public use and private commerce in fishing, lobstering, and gathering other marine life used and useful in food production and other commercial activities." 38 M.R.S. § 541. As a consequence, the Ordinance cannot be said to frustrate a state purpose. *See, e.g.*, *International Paper Co.*, 665 A.2d at 1002 ("To the extent [the] Jay ordinance compels a more strict level of emissions compliance, it shares and advances the same purposes and concerns expressed by the state law."); *Central Maine Power Co. v. Town of Lebanon,* 571 A.2d 1189, 1195 (Me. 1990)(finding that the state and local ordinance shared the same purpose, and that, therefore, the local ordinance did not frustrate state law).

Although operating against different legal backdrops, it may be useful to consider examples of how courts in other states have thought about implied preemption and land use. Over the course of its roughly one hundred years of existence, municipal zoning authority in the United States has been exercised often by cities to impose siting limits on unwanted land uses. Courts have upheld these limitations as appropriate exercises of local authority in contexts very similar to the case at issue. An early example arose as Los Angeles was well on its way to developing into the megacity it is today. As the city expanded outward, it passed a

zoning ordinance prohibiting oil and gas development on certain parcels of land within the city's line of development. The United States Court of Appeals for the Ninth Circuit heard a challenge to that ordinance brought by Standard Oil, which owned oil and gas leases on parcels subject to the new prohibition. The court found that the prohibition on oil and gas activities, even where such activities had been previously allowed, was a reasonable exercise of the city's zoning authority. *See Marblehead Land Co. v. City of Los Angeles*, 47 F.2d 528, 534 (9th Cir. 1931). Pointing to concerns regarding fire dangers and diffusion of noxious gases, the court in *Marblehead* determined that the city had properly exercised its authority to provide for the general welfare. *Id.*

Similar exercises of municipal authority have been repeatedly upheld by courts. Thus, for instance, in *Blancett v. Montgomery*, the Court of Appeals of Kentucky upheld a zoning ordinance by the City of Calhoun that prohibited exploration for oil and gas within the municipal boundaries. 398 S.W.2d 877, 881 (Ky. 1966). Citing concerns regarding the potential for land and water contamination, as well as dust, noise, and interference with daily life, the court in *Blancett* found that Calhoun's zoning ordinance was a proper exercise of its zoning power and that it was not preempted by a state law that set out a policy of promoting exploration of mineral resources. *Id.* at 879, 881; *see also, e.g.*, *Town of Beacon Falls v. Posick*, 212 Conn. 570, 583, 563 A.2d 285, 292 (1989) (upholding

town prohibition on operation of private dumps despite grant of state permit for private operation of such a dump, noting that Connecticut courts and others "have upheld prohibitions of certain activities within municipalities through zoning after determining that the prohibitions were rationally related to the protection of the municipalities' public safety, health and general welfare," and collecting cases regarding same).

Courts have also more recently affirmed the authority of local governments to take action very similar to the Ordinance at issue here—namely, to enact amendments to zoning ordinances that impose restrictions on land use in response to proposed uses seen as incompatible with local goals. For instance, in *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009), the Supreme Court of Pennsylvania considered an appeal from a lower court's judgment that a local zoning ordinance that regulated the location of oil and gas wells was preempted by the state's Oil and Gas Act. *Id.* at 860. The relevant portion of the Oil and Gas Act read, "[e]xcept with respect to ordinances adopted pursuant to the . . . Municipalities Planning Code . . . , all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations

regulated by this act or that accomplish the same purposes as set forth in this act." *Id.* at 858. Thus, the task for the court was to determine whether the borough's zoning ordinance—which prohibited commercial development in certain parts of the borough—was preempted by the statute.

The local government argued that its authority had not been preempted. It argued that the "'very essence' of zoning is the designation of areas where different uses are permitted, subject to the appropriate level of municipal review." *Id.* at 861. The borough noted that the Oil and Gas Act "distinguished the technical features of oil and gas operations, which the Act regulates and which the Department oversees statewide, from local zoning authority under the MPC, which the Act preserves." *Id.* Thus, the borough argued that the lower court had erred in failing to consider the "how-versus-where" nuances of how the local ordinance operated. *Id.* In this reading, the borough was free to restrict *where* an oil or gas well was sited, as long as the borough was not regulating *how* extraction from such a well was conducted. *Id.*

The Pennsylvania Supreme Court agreed. It found that the preemptive language of the act referred to technical features of the oil well, and not to its location. *Id.* at 864. Thus, the borough's ability to restrict the location of oil wells was not preempted by the Oil and Gas Act. *Id.* Next, the Court considered the argument that the zoning ordinance was preempted because it "accomplish[ed] the

same purpose as the Act," in contravention of relevant statutory provisions. *Id.* at 864-65. The Court looked to the purpose of the Act, which it deemed to be development of oil and gas resources, along with safety in operation of oil and gas operations. *Id.* The Court compared those purposes with that of the borough, which it said were focused primarily on public health and safety. *Id.* at 865.

In its discussion of the Act's purpose, the Court noted that

> [w]hile the governmental interests involved in oil and gas development and in land-use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct. . . . Given the rather distinct nature of these interests, we reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be clearly and unequivocally stated.

Id. at 865-66 (quoting *Board of County Comm'rs of La Plata County v. Bowen/Edwards Assocs., Inc.,* 830 P.2d 1045, 1057 (Colo.1992). The Court therefore deferred to the borough's local knowledge and expertise, and found that its zoning ordinance was not preempted by the Oil and Gas Act. *Id.*

In *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 16 N.E.3d 1188 (2014), the court came to a similar conclusion. In that case, the towns of Dryden and Middlefield were faced with the new possibility of hydrofracking in their communities. *Id.* at 739, 741. In response to concerns about the risks to the environment and public safety posed by this new kind of industrial activity, and after careful study of the likely impacts on the environment and community, each

of the towns passed an amendment to its zoning ordinance that prohibited hydrofracking within its boundaries. *Id.* at 740-741. These amendments were challenged by two energy companies that had purchased leases for hydrofracking activities in Dryden and Middlefield. *Id.* The energy companies argued that the zoning amendments were invalid because they were preempted by the state oil and gas regulatory structure.

The *Wallach* court stated at the outset that "regulation of land use through the adoption of zoning ordinances [is] one of the core powers of local governance." *Id.* at 743. It noted that the towns had studied the issue, and had concluded that hydrofracking had the potential to "permanently alter and adversely affect" the character of the communities. *Id.* at 754. The court found that the towns' prohibitions on hydrofracking, made after careful study of these possible consequences, were reasonable and within their respective zoning authorities. *Id.* As to whether such the zoning ordinances had been preempted, the court found that the state statutory framework spoke to *how* oil and gas activities were conducted, not *where*. *Id.* at 746. Consequently, that latter determination, which fell squarely within traditional land use decisions, remained a matter of local control.

As the foregoing cases demonstrate, courts regularly uphold local zoning restrictions, even against the backdrop of statewide regulatory schemes. These examples and others stand firmly for the proposition that local authority can be

used to limit harmful uses of land. They also help to illustrate two additional important principles: 1) that local authority can be, and often is, reconciled with simultaneous exercises of local, state and/or federal power over a particular kind of land use; and 2) that local authority over land use extends equally to decisions made in reaction to the onset of a given land use and to decisions made against a blank slate. Given the long tradition of local control in this area, deference to local government authority in these circumstances is not surprising. Courts' willingness to find a place within various regulatory frameworks for local authority acknowledges the significance of the local role in land use planning, and ensures that the benefits attendant to that role are realized. And the recognition that local governments can, and often do, amend their zoning ordinances to adapt to changing land uses gives full effect to the function of zoning as a planning and protective tool.

CONCLUSION

The City of South Portland was acting within well-established home rule authority when it decided to enact the Clear Skies Ordinance and prohibit the use of land within its boundaries for the bulk loading of crude oil. For the many reasons outlined by the United States District Court for the District of Maine and by Defendants-appellees, no state scheme preempts the City's exercise of that core local planning function. Thus, for all of the foregoing reasons, the *amici curiae*

urge this Court to find that 1) that the term "order" in § 556 of the Coastal Conveyance Act does not include licenses issued by the Maine Department of Environmental Protection; 2) the Ordinance is not expressly preempted by the Coastal Conveyance Act; and 3) the Ordinance is not impliedly preempted by the Coastal Conveyance Act or any other provision of Maine law.

DATED: July 7, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

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