No. 18-2118

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PORTLAND PIPELINE 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

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

Amicus Curiae Brief of the International Municipal Lawyers Association, and Legal Scholars, in support of Defendants-Appellees and Affirmance (*filed with assent*)

Sarah J. Fox
Northern Illinois University
College of Law
Swen Parson Hall
1425 Lincoln Highway
DeKalb, IL 60115
815-753-0285

Lisa C. Goodheart, Bar No. 14910
William L. Boesch, Bar No. 32761
C. Dylan Sanders, Bar No. 49965
Sugarman Rogers Barshak & Cohen, P.C.
101 Merrimac Street
Boston, MA 02114
617-227-3030

Counsel for Amici Curiae

FRAP 26.1 Disclosure

Amicus curiae International Municipal Lawyers Association is a nonprofit organization that does not have parent corporations, and no publicly held corporation owns 10% or more of its stock. The other *amici* are individuals.

FRAP 29(a)(4)(E) Statement

No counsel for any party to this litigation authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund, or did fund, the preparation or submission of this brief, and no person, other than the *amici curiae*, contributed money that was intended to fund, or did fund, the preparation or submission of this brief.

Authority to File

All parties to this case have consented to the filing of this *amicus* brief.

Table of Contents

Table of Authorities

Cases

Statutes

Journal Articles

Treatises

Constitutional Provisions

Ordinance Provisions

Statement of Identities 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.

Sara Bronin is the Thomas F. Gallivan Chair in Real Property Law and Faculty Director of the Center for Energy and Environmental Law at the University of Connecticut School of Law.

Nestor Davidson is Professor of Law and Associate Dean for Academic Affairs at the Fordham University School of Law and Faculty Director of the Urban Law Center.

Keith Hirokawa is Professor of Law at Albany Law School.

Ashira Ostrow is the Peter S. Kalikow Distinguished Professor of Real Estate and Land Use Law and Executive Director of the Wilbur F. Breslin Center for Real Estate Studies at the Maurice A. Deane School of Law at Hofstra University.

Dave Owen is Professor of Law at University of California-Hastings College of the Law.

Laurie Reynolds is the Prentice H. Marshall Professor of Law, Emerita, at the University of Illinois College of Law.

Jonathan Rosenbloom is the Dwight D. Opperman Distinguished Professor of Law at Drake University Law School.

Sarah Schindler is the Edward S. Godfrey Professor of Law and Associate Dean for Research at the University of Maine School of Law.

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. The City 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.

Local governments in the United States hold primary responsibility for land-use decisions. Courts and scholars alike have noted the fundamental nature of this principle, and of the importance of safeguarding local control over the shape of communities. The core of a local government's mandate is 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. *Amici* do not introduce a particularly complicated legal argument regarding zoning authority; neither does this case. Instead, *amici* aim to contextualize the actions taken by South Portland and to explain how the basic law of local government and land use applies to the case at hand.

The trial court correctly held that the City had the authority to enact the Ordinance, and that the Ordinance is not preempted by either state or federal law. The lower court's reasoning is in keeping with a long national tradition of local control over land use, and gives effect to the zoning powers granted to the City by the State of Maine. To hold otherwise would be to permit unjustified displacement of these powers by the state and federal government, and to prefer a particular industrial activity over a local government's special knowledge of its citizens and its environment. Moreover, invalidating the City's ability to act would leave vulnerable to cycles of continued harm communities like South Portland that attempt to transition out of an industrial past and to position their communities for a healthier future.

The Court should affirm the lower court's finding that the City's actions are not preempted by any state or federal law, and uphold the City's

right to exercise its municipal authority and to shape its community as it deems appropriate.

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.*, Robert V. 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"); Stewart E. Sterk, Eduardo Peñalver & Sara C. Bronin, LAND USE REGULATION (2nd 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 EST. 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 HARV. 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 control 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 COLUM. 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 critical to a city's ability to serve and 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. Intimate familiarity with local conditions is critical for understanding what kinds of land use are appropriate for a given area. Local governments are best

positioned to know about the special circumstances of their city, and to know what uses of land are appropriate, and where. As one scholar explains,

> Sensible land use decisions require knowledge of the land itself, in its many variations. One can categorize land parcels based on slope, soil type, drainage, and vegetation, but no list of factors can ever capture the land's full diversity. Local people typically know the land better than outsiders. For land planning to prove successful, their knowledge is needed just as much as their cooperation.

Eric T. Freyfogle, *The Particulars of Owning*, 25 ECOL. L.Q. 574, 580-81 (1999). Local governments are also 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 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* District Court's Order on Motions for Summary Judgment (Dec. 29, 2017) ("SJ Decision") at 119 (noting changing priorities reflected in Comprehensive Plan update process).

Recognizing the authority of local governments to use land-use planning to address the unique circumstances of their environment and community plays a crucial role in giving effect to all of these differences that

arise between 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 COLUM. L. REV. 1, 99 (1990); *see also, e.g.*, Freyfogle, 25 ECOL. L.Q. at 581 ("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.*, Robert V. Percival *et al.*, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 820 (8th ed. 2018); Charles M. Haar & Michael Allan Wolf, LAND USE PLANNING AND THE ENVIRONMENT: A CASEBOOK, ELI Press 119 (2010) ("Since the early decades of the 20th century, the most widely employed land use control has been zoning...."); John Nolon, PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND 11 (Environmental Law Institute 2014)

("STANDING GROUND") (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). The State of Maine has expressly 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 Me. Rev. Stat. § 4352.

At its most basic level, the zoning power gives cities and towns the ability to prescribe what uses of land will be allowed, and where. *See, e.g.*, John G. Sprankling & Raymond R. 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. 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 widely acknowledged norm, 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. B.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.*, American Planning Association, GROWING SMART LEGISLATIVE GUIDEBOOK (2002 ed.).[1] 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 Mun. Corp., ZONING PLANS—COMPREHENSIVE PLANS § 25:86 at 8 (3d ed.).

[1] Available at https://perma.cc/NY5V-VJN5

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 means by which a city can "change its mind" about existing land uses, and implement its vision for the future.

II. Local governments around the country routinely exercise their zoning power to prohibit unwanted land uses

Municipal zoning authority in the United States is exercised often by cities and towns to impose siting limits or prohibitions on unwanted land uses, and 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 the City of 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 likely path of development. The 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 made subject to the 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*, 398 S.W.2d 877, 881 (Ky. Ct. App. 1966), 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. 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 in response to proposed uses seen as incompatible with local goals. For instance, in *Zimmerman v. Board of County Comm'rs of Wabaunsee County*, 289 Kan. 926, 218 P.3d 400 (2009), the Kansas Supreme Court considered a prohibition on large wind turbine farms passed by Wabaunsee County. The County, an 800 square mile tract of land in central Kansas, had been contacted by a company that desired to construct a wind farm. *Id.*, 289 Kan. at 931. The County did not have any zoning regulations specifically related to wind farms in place at the time. *Id.* It decided, however, to pass a temporary moratorium on acceptance of applications for wind farm projects until the

County reviewed its zoning regulations. *Id.* Upon review of the zoning regulations, numerous public meetings and focus groups, and updates to the County's comprehensive plan, the County amended its zoning amendments to prohibit commercial wind farms. *Id.* at 932-33. The justification for this ban was set out in a resolution that noted that commercial wind farms would be incompatible with the "historical, existing and anticipated land uses in the County," and that they would not be in keeping with the goals and objectives of the comprehensive plan or the character of the area. *Id.* at 933.

The amendments to the County's zoning regulations were challenged by owners of land in the County who had entered into contracts for development of commercial wind farms on their properties. *Id.* at 930-31. Plaintiffs challenged the amendments on a variety of grounds, including preemption under state and federal laws. *Id.* at 934-35. The lower court found in favor of the County, and the Kansas Supreme Court affirmed. Notably, the court looked to the County's consideration of aesthetic factors, nonconformance with the comprehensive plan, and desires of its residents, and found that the prohibition on commercial wind farms was reasonable. *Id.* at 953-60. Because the court also found that the action by the County was not preempted by either state or federal law, it upheld the lower courts' decision, and the ban on commercial wind farms.

In *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 16 N.E.3d 1188 (2014), the Court of Appeals of New York 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.*, 23 N.Y.3d at 739, 741. In response to concerns about the risks to the environment and public safety posed by this new industrial activity, and after careful study of the likely impacts on the environment and community, each of these 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 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 on unwanted land uses. These examples and others stand firmly for the proposition that local authority can be used to limit harmful or otherwise undesirable uses of land. They also help to illustrate two 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 for local authority within complex regulatory frameworks 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.

III. The Clear Skies Ordinance is a textbook example of a community exercising its authority to regulate land use for public health and welfare

With the Clear Skies Ordinance, the City of South Portland exercised its traditional 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 Me. Rev. Stat. § 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 § 3001.2. 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 § 3001.3.

With regard to land-use regulation, "[a] municipal zoning ordinance may provide for any form of zoning consistent with this chapter." 30-A Me. Rev. Stat. § 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 Me. Rev. Stat. § 4351, meaning 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*, 45 A.3d 707, 714 (Me. 2012). 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 Me. Rev. Stat. § 4452. In exercising their zoning authority, Maine cities and towns 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).

South Portland fully complied 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. 1-14/1 at 5-9. 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 Zoning chapter of the South Portland Code of Ordinances. 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[2] § 27-780(a)), recreational or community activity buildings in the Commercial District (*id.* at § 27-780(a)(j)), and accessory buildings and uses in both the Commercial and Shipyard Districts (*id.* § 27-922(k)). Beyond that, in the non-residential industrial districts (INR), bulk loading of crude oil joins thirty other 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.* § 27-964.

These 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-

[2] Available at https://www.southportland.org/our-city/code-ordinance/

appellants' operations adjoins a popular public park and war memorial, and is quite close to a marina, a community college, a daycare center, and several elementary schools. *See, e.g.*, at 15. 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. The origins of zoning lie in the separation of incompatible uses, *see, e.g.*, *Village of Euclid*, 272 U.S. at 378, and the Ordinance is a classic example of municipality's legitimate use of zoning to preclude undesirable land uses in particular locations.

The Ordinance and its restrictions also serve to give effect to the City of South Portland Comprehensive Plan. Comprehensive plans are the means by which cities set out their vision for the future, and create the blueprint for desired alterations to existing land uses. 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 Me. Rev. Stat. § 4352. In 2012, the City unanimously adopted an update to its Comprehensive Plan. *See* SJ Decision at 118-20. In making that update, it recognized the importance of existing industrial uses while also articulating a forward-looking vision for South Portland that included mixed use development of the waterfront and acknowledging the need for continued reassessment of

the demand for, and the impacts of, industrial activity in the City. *Id.* As the City learned from its extensive investigation, adding the new use of bulk loading of crude oil to already existing uses would have resulted in increased air emissions and negative health effects. See SJ Decision at 102-109. The Ordinance balances the competing goals of maintaining existing uses while preventing new negative impacts to the current uses of waterfront property in South Portland. *Cf. Nestle Waters N. Am., Inc. v. Town of Fryeburg*, 967 A.2d 702, 709 (Me. 2009) ("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 well within its authority as a local governmental body. 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 use needed to be prohibited in certain locations. 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—indeed, as discussed, it is a core function of local government.

Moreover, that local power was not preempted by any act of the state or federal government. Plaintiff-appellants would have the Court find that the City's actions were preempted by Maine's Oil Discharge Prevention Law, also referred to as the Coastal Conveyance Act ("CCA"). Plaintiffs-Appellants' Br. at 54-55. However, as the City points out, the CCA has a savings clause that preserves local authority to act unless "in direct conflict with this subchapter or any rule or order...." Defendants-Appellees' Br. at 55 (citing 38 Me. Rev. Stat. § 556). The Ordinance is not in direct conflict with any rule or order, *id.*, and does not frustrate the purpose of any state law. 30-A Me. Rev. Stat. § 3001(2). For that reason, the district correctly found no preemption of the Ordinance by the CCA. Beyond that, as the lower court held and as Defendants-Appellees have argued extensively before this Court, there has been no preemption of local authority to act by the federal government. *See* Defendants-Appellees' Br. at 16-26. The City's power to determine what uses of land will be permitted within its borders therefore remains firmly within its control.

Conclusion

The City of South Portland was acting within well-established authority when it enacted the Clear Skies Ordinance and prohibited the use of landde within its boundaries for the bulk loading of crude oil. For the many reasons outlined by the trial court and by defendants-appellees, no state or federal 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 affirm the lower court's decision in this case and uphold the Clear Skies Ordinance and the protections it contains.

Dated: April 12, 2019

Respectfully submitted,

THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, PROFESSOR SARA BRONIN, PROFESSOR NESTOR DAVIDSON, PROFESSOR KEITH HIROKAWA, PROFESSOR ASHIRA OSTROW, PROFESSOR DAVE OWEN, PROFESSOR LAURIE REYNOLDS, PROFESSOR JONATHAN ROSENBLOOM, and PROFESSOR SARAH SCHINDLER

By their attorneys:

Sarah J. Fox
NORTHERN ILLINOIS UNIVERSITY COLLEGE OF LAW
Swen Parson Hall
1425 Lincoln Highway
DeKalb, IL 60115
(815) 753-0285
sarah.fox@niu.edu

/s/ William L. Boesch

Lisa C. Goodheart, Bar No. 14910
William L. Boesch, Bar No. 32761
C. Dylan Sanders, Bar No. 49965
SUGARMAN ROGERS BARSHAK & COHEN, P.C.
101 Merrimac Street, 9th Floor
Boston, MA 02114
(617) 227-3030
goodheart@sugarmanrogers.com
boesch@sugarmanrogers.com
sanders@sugarmanrogers.com

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed.R.App.P. 32(a)(7)(C), that this brief complies with the applicable type-volume limitation, because it contains 5,564 words, excluding the parts of the brief exempted. This brief also complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type-style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ William L. Boesch

CERTIFICATE OF SERVICE

I hereby certify that counsel for the parties in this matter are registered users of this Court's ECF system, and therefore I am relying on the system to complete service upon the parties on this date through counsel:

John J. Aromando, Bar No. 34926
Matthew D. Manahan, Bar No. 74501
Catherine R. Connors, Bar No. 7451
Nolan L. Reichl, Bar No. 1148010
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
Tel: 207-791-1100
Attorneys for Appellants
Portland Pipe Line Corporation and
The American Waterways Operators

Jonathan M. Ettinger
(1st Cir. Bar #32604; BBO #552136)
Euripides Dalmanieras
(1st Cir. Bar #108837; BBO #650985)
Jesse H. Alderman
(1st Cir. Bar #1151792; BBO #678604)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210-2600
jettinger@foleyhoag.com
edalmani@foleyhoag.com
jalderman@foleyhoag.com
(617) 832-1000

/s/ William L. Boesch

4833-6910-5556, v. 1