

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

ASSOCIATION TO PRESERVE AND	)	
PROTECT LOCAL LIVELIHOODS, et al.,	)	
	)	
<i>Plaintiffs,</i>	)	
	)	Case No 1:22-cv-416
v.	)	
	)	
TOWN OF BAR HARBOR, a municipal	)	
corporation of the State of Maine,	)	
	)	
<i>Defendant.</i>	)	
_____	)	

**PROPOSED DEFENDANT-INTERVENOR CHARLES SIDMAN’S VERIFIED MOTION TO INTERVENE AND ALTERNATIVE VERIFIED MOTION TO PARTICIPATE AS AMICUS CURIAE AND MEMORANDUM IN SUPPORT OF MOTIONS**

Pursuant to Federal Rule of Civil Procedure 24, Proposed Defendant-Intervenor Charles Sidman, as lead petitioner of the citizens’ initiative that became the Ordinance in dispute, hereby moves to intervene in the above-captioned case on the side of Defendant. Alternatively, Mr. Sidman moves for leave to participate as *amicus curiae*. Mr. Sidman also requests a one-week enlargement of the January 20, 2023 deadline to file a response to Plaintiffs’ Motion for Preliminary Injunction. (ECF Doc. 12). Given Plaintiffs’ Motion for Preliminary Injunction, Mr. Sidman respectfully requests expedited consideration.

In support of this Motion, Mr. Sidman states as follows:

**BACKGROUND**

Mr. Sidman is a resident of Bar Harbor (the “Town”). He owns property and a local business in the Town. Like many residents and local businesses in the Town, Mr. Sidman has been adversely affected by the influx of cruise ship passengers overwhelming the Town, causing excessive congestion, overcrowding, and inundating local services, amenities, and attractions.

He believes that the large volume of disembarking cruise ship passengers is too high and has a negative impact on the Town and the health, safety, and welfare of its residents.

On March 17, 2022, Mr. Sidman led a seven-member Petitioning Committee to submit a citizens' initiative ballot petitioning the Town Council to amend Bar Harbor Code Chapter 125, Article VII, § 125-77(H), to limit the number of disembarking cruise ship persons into Town to 1,000 persons per day. *See* Exhibit B to Pl.'s Verified Complaint (ECF Doc. 1-3). The Town Council voted to place the citizen's initiative on the warrant articles for the November 2022 Town Meeting. Nearly 1,800 citizens voted in favor of the initiative, despite the Planning Board having unanimously voted, and a majority of the Warrant Committee recommending, rejection of the amendment. *See* Exhibit D to Pl.'s Verified Complaint (ECF Doc. 1-5). With overwhelming voter support, on November 8, 2022, the initiative passed and became an ordinance (the "Ordinance"), pursuant to the Town Charter, effective December 8, 2022 (ECF Doc. 1 at ¶ 52).

On December 29, 2022, Plaintiffs filed the instant lawsuit challenging enforcement of the Ordinance. The next day, Plaintiffs filed a motion for preliminary injunction, seeking to pause the implementation of the Ordinance. (ECF Doc. 12). On January 5, 2023, the Town Manager, Kevin Sutherland, attended a public Town Cruise Ship Committee meeting by Zoom, where he discussed the lawsuit with industry insiders and opponents of the Ordinance, and seemed to support the imposition of an injunction, or alternatively, "figure out some sort of terms in which [the Town] allows [passengers of cruise ships] to show up anyway." *See* Exhibit A (a true copy of a partial transcript of the Jan. 5, 2023 Cruise Ship Committee Meeting).

After waffling back and forth about whether the Town was going to oppose the Plaintiffs' Motion for Preliminary Injunction, the Town Council made its decision in executive session on January 17, 2023. The following day, the Town issued a press release stating that it intended to

participate in a mediation of the preliminary injunction, which allows the Town to “use the existing Memoranda of Agreement with the industry [which allows thousands of cruise passengers to disembark daily] while litigation is pending [and] limits possible monetary damages [despite Paragraph 1 of the Verified Complaint explicitly stating Plaintiffs are not asking for money damages].” Exhibit B (Jan. 18, 2023 Press Release). The Memoranda of Agreement was put in place after the ballot initiative was introduced to appease the cruise ship industry, and was supposed to go into effect only if the initiative did not pass. Mr. Sidman does not believe that the Town has the ability to bargain away the voter-passed Ordinance in favor of the Memoranda of Agreement.

## **DISCUSSION**

### **I. Mr. Sidman is entitled to intervene as of right.**

A party is entitled to intervene “as of right” under Rule 24(a) of the Federal Rules of Civil Procedure when it shows that (1) it timely moves to intervene; (2) it has an interest relating to the property or transaction that forms the basis of the ongoing suit; (3) the disposition of the action threatens to create a practical impediment to its ability to protect its interest; and (4) no existing party adequately represents its interests. *R&G Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 584 F.3d 1, 7 (1st Cir. 2009). While all four prongs of this test must be satisfied, *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989), courts “should utilize a holistic approach, read the requirements together, and weigh the factors with a commonsense view of the overall litigation.” *Canadian Nat. Ry. Co. v. Montreal Maine & Atl. Ry., Inc.*, No. CV 10-452-B-W, 2010 WL 5168003, at \*4 (D. Me. Dec. 14, 2010) (citing *Walgreen Co. v. Feliciano de Melecio*, 194 F.R.D. 23, 25 (D.P.R. 2000), *aff’d*, No. 00–2012, 2001 WL 355531 (1st Cir. March 28, 2001)). Each of the factors should be liberally construed in

favor of intervention. *Northrop Grumman Info Tech., Inc. v. United States*, 74 Fed. Cl. 407, 412 (Fed. Cl. 2006).

**a. This Motion is timely.**

A motion to intervene is timely if the potential intervenor acts “reasonably promptly” after obtaining knowledge of its interest in the case. *Banco Popular de P.R. v. Greenblatt*, 964 F.2d 1227, 1231 (1st Cir. 1992). The First Circuit has set forth four factors that determine the timeliness of a motion to intervene under Rule 24(a):

- (i) the length of time that the putative intervenor knew or reasonably should have known that his interests were at risk before he moved to intervene;
- (ii) the prejudice to existing parties should intervention be allowed;
- (iii) the prejudice to the putative intervenor should intervention be denied; and
- (iv) any special circumstances militating for or against intervention.

*R&G Mortg. Corp.*, 584 F.3d at 7.

Here, Mr. Sidman’s request to intervene comes just three weeks after Plaintiffs filed this action, and approximately one week after Mr. Sidman discovered the existence of the case. Second, because the litigation is in its infancy, there will be no prejudice to the other parties. *See N. Am. Specialty Ins. Co. v. Seacoast Crane Co.*, 226 F.R.D. 27, 29-30 (D. Me. 2005) (finding motion to intervene timely when filed within two months of the main action and before the filing of an answer, but denying intervention on other grounds); *Canadian Nat. Ry.*, 2010 WL 5168003, at \*5 (finding request for intervention filed right after the main suit timely). Third, if not permitted to intervene, Mr. Sidman’s interests in seeing the Ordinance enforced, discussed below, would be greatly prejudiced. Finally, there is uncertainty regarding the Town’s willingness to vigorously defend this voter-initiated Ordinance. Thus, Mr. Sidman’s request is timely.

**b. Mr. Sidman has a concrete interest in the pending action, and the pending action may impair or impede his ability to protect his interest.**

To intervene as of right, the proposed intervenor must demonstrate that he has a concrete interest in the property or transaction at issue in the pending action and that the pending action may, as a practical matter, impair or impede its ability to protect that interest. Often, courts consider these factors together because they are closely related. *Canadian Nat. Ry.*, 2010 WL 5168003, at \*5; *see also Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 81 (D. Me. 1988) (explaining that the “two requirements are closely related” because the extent of an intervenor’s interest could be determined by whether “the disposition of the action may . . . impair or impede” its ability to protect that interest) (quoting *Federal Deposit Ins. Corp. v. Jennings*, 816 F.2d 1488, 1492 (10th Cir. 1987)), *aff’d sub nom. Travelers Indem. Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989).

A proposed intervenor has a concrete interest in the pending litigation when the intervenor’s interest is “direct, not contingent” and its “claims . . . bear a ‘sufficiently close relationship’ to the dispute between the original litigants.” *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 42 (1st Cir. 1992) (citing *Travelers*, 884 F.2d at 638). Potential economic harm weighs heavily in the interest inquiry. *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998).

Here, Mr. Sidman has a concrete interest in the outcome of the pending litigation because he is the genesis of the voter initiative that passed and became the challenged Ordinance. Mr. Sidman has an interest in seeing the Ordinance enforced, much like a legislator’s interest in defending the enforceability of a statute. *See Yniguez v. Arizona*, 939 F.2d 727, 733 (9th Cir. 1991) (“[The citizen group sponsor] argues that as the principal sponsor of the [ballot] initiative, it stands in an analogous position to a state legislature. We agree.”), *rev’d on other*

*grounds, Arizonans for Official English v. Arizona*, 520 U.S. 43, 48–49, 117 S.Ct. 1055 (1997)); *see also Windsor v. United States*, 797 F. Supp. 2d 320 (S.D.N.Y. 2011). “[O]fficial sponsors of a ballot initiative have a strong interest in the vitality of a provision of the state constitution which they proposed and for which they vigorously campaigned.” *Yniguez*, 939 F.2d at 733. This concept, known as legislative standing, is an important tool against “instances where a single state executive official . . . could nullify the people’s will, as expressed through its democratically elected legislature, without the possibility of a means of review.” *Priorities USA v. Nessel*, 978 F.3d 976, 980 (6th Cir. 2020). Therefore, Mr. Sidman is in the same position as the sponsor of a bill enacted into law whose legality is being challenged and has the right to intervene. *See Yniguez*, 939 F.2d at 733 (“The district court’s decision striking down Article XXVIII essentially nullified the considerable efforts [the citizen group sponsors] made to have the initiative placed on the ballot and to obtain its passage.”).

Additionally, Mr. Sidman faces the potential for decreased property values if the Ordinance is not enforced because of the unending flow of cruise ship passengers into Bar Harbor. *See Portland Cellular P’ship v. Inhabitants of the Town of Cape Elizabeth*, No. 2:14-cv-274-JDL, 2015 WL 12990147 at \*2 (D. Me. Feb. 3, 2015). As a local business owner for the past twenty-eight years, he also would suffer concrete harm from the non-enforcement of the Ordinance because his clientele—collectors of fine art—refuse to come to his business on cruise ship days. This harm is common among a large portion of businesses in Town that support the Ordinance. Thus, Mr. Sidman has a concrete interest supporting intervention. These interests would undoubtedly be adversely affected if Plaintiffs prevail because cruise ship passengers would continue to overrun the Town.

**c. Mr. Sidman's interests is not adequately represented by the named parties.**

The final element for intervention of right is whether there is a possibility that the existing parties will not adequately represent the interests of the proposed intervenor. Typically, this requires only a “minimal showing” and can be satisfied if the intervenor’s interests are sufficiently different in kind or degree from those of the named parties. *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 545-46 (1st Cir. 2006) (internal quotations omitted); *see also Canadian Nat. Ry.*, 2010 WL 5168003, at \*7 (“A difference in kind or degree provides sufficient explanation.”). Doubt about the adequacy of representation should be resolved in favor of intervention. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Inadequate representation can be shown by demonstrating adversity of interest, collusion, or nonfeasance. *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979); *see also Massachusetts Food Ass'n v. Massachusetts Alcoholic Bevs. Control Comm'n*, 197 F.3d 560, 566-67 (1st Cir. 1999) (courts presume adequacy of government representation unless there is a showing to the contrary).

Mr. Sidman’s interest is different, both in substance and degree, from the interests of the Town. The Town purports to represent the public’s interest, while Mr. Sidman represents his own private interests. *See Portland Cellular P’ship*, 2015 WL 12990147 at \*1. “[G]overnment representation [is] often inadequate to protect the interests of ‘private proprietors.’” *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982) (citing *National Farm Lines v. I.C.C.*, 564 F.2d 381, 383 (10th Cir. 1977)). This gives rise to a “genuine potential for divergence of interests because, while the Town presently [states it wants to uphold the Ordinance], it might change or soften that position based on its broader geographic and institutional interests.” *Portland Cellular P’ship*, 2015 WL 12990147 at \*2 (quoting *Nextel*

*Communications of Mid-Atlantic, Inc. v. Town of Hanson*, 311 F. Supp. 2d 142, 153 (D. Mass. 2004)). Mr. Sidman’s interests are not subject to those sort of pressures.

There is a real threat that the Town will refuse to defend the Ordinance, essentially nullifying the Ordinance and the will of the voters without any ultimate judicial determination. As intimated by the Town Manager to industry insiders, the Town is attempting to “figure out” a way to let cruise ships ignore the Ordinance and proceed with the Memoranda of Agreement, allowing thousands of cruise ship passengers to disembark daily. Without Mr. Sidman’s involvement, the Town could nullify a voter-led legislative enactment without any judicial determination. A wholly partisan mediation allows the Town cover to agree to suspend the enforcement of the Ordinance, in disregard to the will of the voters. Mr. Sidman, as lead petitioner of the voter initiative, deserves the opportunity to defend the Ordinance from legal challenges.

## **II. Mr. Sidman should be granted permissive intervention.**

If the Court denies intervention as of right, Mr. Sidman requests leave to intervene by permission under Rule 24(b). That rule provides that “[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). In considering a request for permissive intervention, the court may “consider almost any factor rationally relevant,” such as “whether a named party will adequately represent the intervenor’s interests;” “whether intervention will either ‘delay the lawsuit or prejudice the adjudication of the rights of the original parties,’” *Canadian Nat. Ry.*, 2010 WL 5168003, at \*8 (quoting *Daggett v. Comm’n on Governmental Ethics and Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999)), and whether the intervenor “may be helpful in fully developing the case,” *Daggett*, 172 F.3d at 113.



As discussed above, Mr. Sidman was the main proponent of the Ordinance being challenged by Plaintiffs. Participation by Mr. Sidman will not delay the pending case or prejudice the adjudication of the rights of the named parties. This case is in its infancy, so Mr. Sidman's participation as a defendant cannot conceivably cause any delay. As the lead petitioner in the voter initiative, Mr. Sidman brings a unique and necessary perspective to the issues raised in this case.

**III. Alternatively, Mr. Sidman should be granted leave to participate as amicus curiae.**

If the Court denies Mr. Sidman's request to intervene, Mr. Sidman respectfully requests leave of the Court to participate as amicus curiae in support of Defendant's position.

Although there is no provision in the Federal Rules of Civil Procedure or the Local Rules for the District of Maine as to the circumstances under which a trial court should permit *amicus* appearances and briefing, this Court has the inherent authority to authorize *amicus* participation to assist it. *See Portland Pipe Line Corp. v. City of South Portland*, No. 2:15-cv-00054-JAW, 2017 WL 79948, at \*4 (D. Me. Jan. 9, 2017); *Animal Prot. Inst. v. Martin*, No. CV-06-128, 2007 WL 647567, at \*1 (D. Me. Feb. 23, 2007). Allowing *amicus* participation is a matter committed to "the sound discretion of the court." *Animal Prot. Inst.*, 2007 WL 647567, at \*2 (quoting *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970)). This Court grants amicus status "where there is an issue of general public interest, the amicus provides supplemental assistance to existing counsel, or the amicus insures a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Id.* (quoting *Alliance of Auto Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 307 (D. Me. 2003)). Relatedly, courts look to whether the *amicus* has a "special interest that justifies his having a say," *Strasser*, 432 F.2d at 569, or would provide a

“difference in perspective” from the parties,” *Animal Prot. Inst.*, 2007 WL 647567, at \*3 (quoting *Verizon N.E., Inc. v. Me. Pub. Utils. Comm’n*, 229 F.R.D. 335, 338 (D. Me. 2005)).

There is no greater public interest than seeing that the will of the voters be enforced. As discussed above, Mr. Sidman’s role as lead petitioner provides him with a unique and necessary perspective that will aid the Court in deciding this case. If the Court does not allow Mr. Sidman to intervene as a party to this case, Mr. Sidman respectfully requests that he be permitted to participate as *amicus curiae*.

### **CONCLUSION**

Mr. Sidman strongly prefers to be named a party to the case. Without Mr. Sidman’s involvement, it is unlikely that the Ordinance and the will of the voters will be vigorously defended. Mr. Sidman respectfully requests the Court grant him leave to intervene, or alternatively, leave to participate as *amicus curiae*. Mr. Sidman also requests a one-week enlargement of time so that he may file a response to Plaintiffs’ Motion for Preliminary Injunction.

Respectfully submitted,

Dated: January 19, 2023

/s/ David P. Silk

David P. Silk

Robert Papazian

CURTIS THAXTER LLC

One Canal Plaza, Suite 1000/P.O. Box 7320

Portland, Maine 04112-7320

(207) 774-9000

dsilk@curtisthaxter.com

rpapazian@curtisthaxter.com

*Attorney for Defendant-Intervenor*

*Charles Sidman*