

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

ASSOCIATION TO PRESERVE AND )  
 PROTECT LOCAL LIVELIHOODS, et al., )  
 )  
*Plaintiffs,* )  
 )  
 PENOBSCOT BAY AND RIVER PILOTS )  
 ASSOCIATION, )  
 )  
*Plaintiff-Intervenor,* )  
 )  
 v. )  
 )  
 TOWN OF BAR HARBOR, )  
 )  
*Defendant.* )

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Case No. 1:22-cv-416-LEW

**PLAINTIFF-INTERVENOR PENOBSCOT BAY AND RIVER PILOTS ASSOCIATION’S OPPOSITION TO CHARLES SIDMAN’S MOTION TO INTERVENE**

Proposed Intervenor Charles Sidman (“Mr. Sidman”) seeks intervention in this case, on the side of Defendant Town of Bar Harbor (“Town”), as of right or by permission pursuant to Fed. R. Civ. P. 24, or alternatively to participate as *amicus curiae*. See Verified Motion to Intervene and Alternate Verified Motion to Participate as Amicus Curiae (“Motion”) (ECF No. 45). Mr. Sidman argues that his varying roles as a Bar Harbor resident, property and business owner, and lead petitioner for the citizens’ group petition (the “Initiative”), which became an ordinance of the Town effective December 8, 2022 (the “Ordinance”), support his intervention in this constitutional challenge to the Ordinance.

Plaintiff-Intervenor Penobscot Bay and River Pilots Association (the “Pilots Association”) opposes Mr. Sidman’s participation in this case. Mr. Sidman has not shown that he is entitled to intervention as of right or that his intervention on a permissive basis would not cause undue delay and prejudice to the parties. Mr. Sidman’s participation as a party or an

*amicus curiae* is unnecessary and unhelpful to the resolution of this case. The Pilots Association respectfully requests that the Court deny the Motion.

### **Argument**

#### **1. Mr. Sidman Is Not Entitled To Intervene As Of Right.**

To prevail on a request for intervention as of right, a proposed intervenor must demonstrate:

(1) the timeliness of [his] motion; (2) a concrete interest in the pending action; (3) “a realistic threat” that resolution of the pending action will hinder her ability to effectuate that interest; and (4) the absence of adequate representation by any existing party.

*T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 39 (1st Cir. 2020) (quoting *R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009)). Failure to satisfy any one of these four mandatory requirements “sounds the death knell” for the request. *Id.* (internal citations omitted). Here, Mr. Sidman’s Motion struggles -- unsuccessfully -- to satisfy these mandatory requirements.

A proposed intervenor must “show that no existing party fairly represents [his] interests.” *T-Mobile Ne. LLC*, 969 F.3d at 39 (internal citation omitted). This showing must be more than “empty conjecture.” *Id.* (citing *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998)). And where, as in this case, the would-be intervenor’s objective aligns with that of an existing party and the would-be intervenor “seeks to appear alongside a governmental body in defense of the validity of some official action,” the would-be intervenor must overcome the presumption that the existing party (the government) adequately represents his interests with a “strong affirmative showing” of the alleged inadequacy. *Id.* (internal citation omitted).

Here, Mr. Sidman alleges that the Town does not adequately represent his interests because “[t]here is a real threat that the Town will refuse to defend the Ordinance.” Motion at 8.

In support, Mr. Sidman raises the Town's decision to mediate Plaintiffs' Motion for Preliminary Injunction and isolated comments of the former Town Manager to speculate about the Town's legal strategy going forward.<sup>1</sup> Then, he summarily concludes that "[w]ithout [his] involvement, the Town could nullify a voter-led legislative enactment without any judicial determination." *Id.* Mr. Sidman paints the Town's decision to mediate a resolution of Plaintiffs' Motion for Preliminary Injunction as a capitulation. In reality, Mr. Sidman's argument is merely disagreement with the Town's litigation strategy. While Mr. Sidman's zeal for the Ordinance is admirable, it does not render the Town's defense of the Ordinance or its ability to represent Mr. Sidman's interests inadequate. *T-Mobile Ne. LLC*, 969 F.3d at 40 (stating that appellants' "worry that the Town 'ultimately may settle this matter' and suggest[ion] that the Town 'appears to be adopting a litigation strategy that seems inadequate'" did not establish inadequate representation).

When determining whether representation is adequate, courts also consider whether an existing party "is likely to raise the putative intervenor's preferred arguments and it seems improbable that the putative intervenor will add any missing element." *Id.* (citing *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982)). Here, Mr. Sidman has not identified specific arguments that the Town is unlikely to advance. Nor has he articulated any convincing reason upon which the Court could conclude that his participation will "inject some missing ingredient into the Town's defense." *Id.* Rather, Mr. Sidman argues generally and without

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<sup>1</sup> Those comments, presented without full context or elaboration, can be fairly read as a frank discussion of how best to protect the interests of the Town in a litigation environment of uncertain duration and an effort to engage in rational contingency planning pending resolution by this Court of the issues in controversy between the parties.

support that the Town may refuse to defend the Ordinance. Mr. Sidman’s arguments do not support a finding of inadequate representation.

Mr. Sidman also argues that there is a “genuine potential” for a divergence of interests because the Town might “change or soften” on its desire to uphold the Ordinance “based on its broader geographic and institutional interests.” Motion at 7 (case citations and quotations omitted). The possibility that the Town may take into account “broader geographic and institutional interests” in its defense of this case does not render the Town’s representation inadequate. *See Victim Rts. L. Ctr. v. Rosenfelt*, 988 F.3d 556, 562 (1st Cir. 2021) (“[T]he government’s putative interests in ‘regulatory flexibility’ and minimizing future legal challenges do not create a sufficient case-specific conflict . . .”), *cert. denied sub nom. Found. for Individual Rts. in Educ. v. Victim Rts. L. Ctr.*, 142 S. Ct. 754 (2022). In other words, “perfect identity of motivational interests” between the Town and Mr. Sidman is not necessary to a finding of adequate representation. *Victim Rts. L. Ctr.*, 988 F.3d at 562 (internal citation omitted). Mr. Sidman’s assertion of the potential for a divergence of motivational interests does not establish the Town’s inability to fairly represent Mr. Sidman’s interests in this case.

A proposed intervenor also must demonstrate “a concrete interest in the pending action.” *Sec. & Exch. Comm’n v. LBRY, Inc.*, 26 F.4th 96, 99 (1st Cir. 2022). Mr. Sidman argues that his interest lies in “seeing the Ordinance enforced,” much like a “legislator[,]” because he is the “genesis” of the Initiative that became the Ordinance. Motion at 4-5. Alternatively, Mr. Sidman asserts that his need to shield himself from “potential . . . decreased property values” and a reduction in fine art clientele constitutes a concrete interest supporting intervention. Neither, however, supports Mr. Sidman’s request for intervention as of right.

Mr. Sidman relies on a Ninth Circuit decision, *Yniguez v. State of Arizona*,<sup>2</sup> to assert that his role as lead petitioner on the Initiative is a sufficient interest to support intervention. 939 F.2d 727 (9th Cir. 1991). *Yniguez*, however, is an outlier almost everywhere except the Ninth Circuit. See *Nat'l Right to Life Pol. Action Comm. State Fund v. Devine*, No. CIV. 96-359-P-H, 1997 WL 33163631, at \*1 (D. Me. Mar. 19, 1997) (“Only the Ninth Circuit has conferred on initiative proponents the mantle of virtually automatic qualification to intervene as of right.”). Other cases, including one from this District, have concluded that initiative proponents do not have a substantial legal interest in a lawsuit challenging the legality of the initiative-induced law. See, e.g., *Nat'l Right to Life*, 1997 WL 33163631 (denying motion to intervene of association that had participated in drafting, securing petition signatures, and campaigning for legislation); *Northland Fam. Plan. Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007) (holding that an organization involved in the process leading to the adoption of a challenged law does not have a substantial legal interest in the subject matter of a lawsuit challenging the legality of that already-enacted law, unless the challenged law regulates the organization or its members); *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007) (affirming denial of motion to intervene by groups substantially involved in process leading to adoption of challenged amendment); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309 (6th Cir. 2005) (affirming the denial of motion to intervene as of right by committee that existed to support the passage of a local referendum to amend a zoning ordinance).

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<sup>2</sup> Mr. Sidman’s cases are distinguishable on their facts. *Yniguez* concerned a ballot initiative that was held unconstitutional, after which the only defendant in the case, the Governor, chose not to appeal to adverse ruling. 939 F.2d at 729. Similarly, *Windsor v. United States* concerned a challenge to the constitutionality of Section 3 of the Defense of Marriage Act, in which the U.S. Department of Justice “made clear that it [would] not defend the constitutionality” of the statute “in any way.” 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011). These cases find a concrete interest in enforceability outside the government when the law in question would otherwise go undefended. Here, the Town is defending the Ordinance, so there is no need for this Court to go looking for another party to champion the Ordinance.

The reasons underlying the denials in *Nat'l Right to Life, Coalition to Defend Affirmative Action*, and *Northland Family Planning* apply with equal force here. Mr. Sidman's interest in seeing the Ordinance enforced is "only the interest that all citizens possess who support particular legislation." *Nat'l Right to Life*, 1997 WL 33163631, at \*1. His dedication to the cause (*i.e.*, time [and money] spent to bring the Ordinance into effect through the initiative process) do not afford him special status. *Id.* (comparing initiator's efforts to those of a lobbyist) (citing *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir.) (stating that an "interest as chief lobbyist . . . is not a direct and substantial interest sufficient to support intervention"), *cert. denied*, 474 U.S. 980 (1985); *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1498-99 (S.D. Fla. 1991) (same)). As the lead petitioner, Mr. Sidman's interest, if any, lies in the passage of the Initiative, not the Town's implementation and enforcement of the Ordinance. *See Coal. to Defend Affirmative Action*, 501 F.3d at 781. Mr. Sidman's status and interest as lead petitioner of the Initiative do not support intervention as of right.<sup>3</sup>

Mr. Sidman's interests as a property owner and local business operator also do not support intervention. These interests are no different than other citizens of Bar Harbor who own property or have businesses might assert. In fact, Mr. Sidman admits that his interest in avoiding harm to his business and his property value is "common among a large portion of businesses in Town that support the Ordinance." Motion at 6. An "undifferentiated, generalized interest in the

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<sup>3</sup> As the Town discusses in its Objection to Mr. Sidman's Motion, Mr. Sidman's asserted interest as lead petitioner likely dooms his intervention request for another reason – lack of standing. *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (once proposition became a duly-enacted constitutional amendment or statute, petitioners had "no 'personal stake' in defending its enforcement that [was] distinguishable from the general interest of every citizen of California" and therefore lacked standing); *Defendant Town of Bar Harbor's Verified Objection to Proposed Defendant-Intervenor Charles Sidman's Verified Motion to Intervene* ("Town Obj.") at 4-7 (ECF No. 55). The Supreme Court's reasoning in *Hollingsworth* on the issue of standing echoes the Sixth Circuit's reasons for denying intervention to ballot initiators in *Coalition to Defend Affirmative Action* and *Northland Family Planning*.

outcome of an ongoing action is too porous a foundation on which to premise intervention as of right.” *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998) (internal citations omitted); see *Walgreen Co. v. de Melecio*, 194 F.R.D. 23, 26 (D.P.R. 2000), *aff’d sub nom. Walgreen Co. v. Feliciano de Melecio*, 6 F. App’x 27 (1st Cir. 2001).

Even if Mr. Sidman’s interests in avoiding a claimed potential for decreased property values and a reduction in customer traffic were somehow unique, they are too conjectural and contingent to support intervention as of right. Mr. Sidman asserts that he will suffer harm from non-enforcement of the Ordinance because his “clientele ... refuse to come to his business on cruise ship days[.]”<sup>4</sup> Motion at 6, and leaves this Court to assume, and accept, that any course of action other than immediate full enforcement of the Ordinance will cause a diminution of his business due to his clientele's alleged aversion to visiting his premises on cruise ship days. Suffice it to say, Mr. Sidman’s interest is in an as yet unrealized expectancy of increased customer traffic should the Ordinance survive constitutional review. Since the Town has not yet enforced the Ordinance, no one knows how, or whether, a near-ban on cruise ship disembarkations at Bar Harbor will impact foot traffic at Mr. Sidman’s art gallery. Mr. Sidman’s interest is too conjectural to support intervention as of right. See *Patch*, 136 F.3d at 205-06 (affirming denial of motion to intervene because litigation did not “directly threaten[] an economic right or benefit presently enjoyed by any would-be intervenor” and would-be intervenors’ “professed economic interest in an as yet unrealized expectancy of lower electric rates” was “fatally contingent”) (internal citations omitted).

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<sup>4</sup> There may be good reason to question Mr. Sidman’s claims of economic harm. In December 2022, following the return to Bar Harbor of no fewer than 129 cruise ships for the 2022 cruise season, Mr. Sidman’s art gallery lauded the conclusion of “another splendid season” that was “tantalizingly close to last year’s record.” Argosy Gallery - Fine Art available online and in downtown Bar Harbor, Maine, <http://argosygallery.com> (last visited Feb. 2, 2023) (screenshot attached hereto as Exhibit A).

## 2. Mr. Sidman's Intervention By Permission Is Not Warranted.

The Court may grant permissive intervention to a party who “has a claim or defense that shares with the main action a common question of law or fact” provided the intervention does not “unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b). In making this determination, the Court may consider “almost any factor rationally relevant to the intervention determination.” *T-Mobile Ne. LLC*, 969 F.3d at 40 (internal citations and quotations omitted).

When intervention “as a right” fails because the government’s representation is adequate, “the case for permissive intervention diminishes . . . or disappears entirely.” *Tutein v. Daley*, 43 F. Supp. 2d 113, 131 (D. Mass. 1999); *Mass. Food Ass'n v. Sullivan*, 184 F.R.D. 217, 224-25 (D. Mass.), *aff'd sub nom. Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560 (1st Cir. 1999). Here, the Town’s ability to adequately represent Mr. Sidman’s interests in this case weighs heavily against Mr. Sidman’s request for permissive intervention.

The Court also may consider whether the would-be intervenor “may be helpful in fully developing the case.” *T-Mobile Ne. LLC*, 969 F.3d at 41 (quoting *Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 113 (1st Cir. 1999)). Mr. Sidman alleges that he “brings a unique and necessary perspective to the issues” in this case as lead petitioner of the Initiative. Motion at 9. Beyond this broad statement, however, Mr. Sidman does not articulate what, if anything, he could contribute to the Town’s defense of the Ordinance.<sup>5</sup> His silence speaks volumes. This case raises important federal and state constitutional questions, and the parties are represented by competent and experienced counsel. Under this rubric, Mr. Sidman is

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<sup>5</sup> Mr. Sidman did not provide the Court or the parties with his proposed pleading in response to Plaintiffs’ and the Pilots Association’s complaints. Instead, Mr. Sidman leaves this Court and the parties to guess at what substance or clarity Mr. Sidman would hope to add to the Town’s defense in this case.



unlikely to contribute meaningfully to the parties' presentation of the legal issues or the Court's ability to reach a prompt judicial resolution of the same.

Mr. Sidman also asserts that his participation will not cause delay or prejudice. Motion at 9 (arguing that because case is in its "infancy," Mr. Sidman's participation "cannot conceivably cause any delay"). To the contrary, delay and prejudice are the only certainties of Mr. Sidman's intervention. Even though the parties vehemently disagree as to the constitutionality of the Ordinance, they have engaged in substantial efforts, through counsel, to resolve Plaintiffs' Motion for Preliminary Injunction without further briefing and a hearing. As a result of those efforts, counsel for the parties have consensus on the framework of an agreement that would manage risk and resources for all parties, enable the parties to focus their efforts and energies on litigating the merits of the parties' claims and defenses, and position the case for decision by the Court before the end of the year.<sup>6</sup> Mr. Sidman opposes the Town's participation in mediation of the Motion for Preliminary Injunction and any agreement to suspend enforcement of the Ordinance. *See* Motion at 8 (suggesting that the Town's participation in mediation and any agreement to suspend enforcement of the Ordinance is akin to a failure to defend the Ordinance). If granted intervention, Mr. Sidman will unnecessarily frustrate the parties' efforts to resolve the Motion for Preliminary Injunction and may very well prevent the parties from reaching any agreement at all. Mr. Sidman's intervention will prolong and complicate this case. For that reason alone, his request for permissive intervention should be denied. *See Daggett*, 172 F.3d at 113 (affirming denial of permissive intervention where addition of parties "would complicate a case that badly needed to be expedited"); *Students for Fair Admissions, Inc. v. President &*

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<sup>6</sup> The Town's Objection accurately summarizes the framework for a stipulated preliminary injunction as discussed between counsel for the parties at the January 26, 2023 judicial settlement conference. *See* Town Obj. at 2 n.2.

*Fellows of Harvard Coll.*, 308 F.R.D. 39, 52 (D. Mass.) (denying intervention where addition of parties would “complicate proceedings, lengthen the discovery process, add expense, and significantly delay the ultimate resolution of this case”), *aff’d*, 807 F.3d 472 (1st Cir. 2015).

**3. Mr. Sidman’s Participation As *Amicus Curiae* Will Not Assist The Court.**

Mr. Sidman’s participation as *amicus curiae* is not necessary or helpful to the Court’s resolution of this case. Both sides are well represented, and no amicus is needed to supplement the efforts of existing counsel. Mr. Sidman does not assert that he is a constitutional scholar or an expert in a field relevant to this case, so he is unlikely to contribute meaningfully to the resolution of the constitutional questions before the Court. He offers his perspective as lead petitioner on the Initiative, but “an amicus who argues facts should rarely be welcomed.” *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Mr. Sidman’s participation as an amicus will unnecessarily complicate the case without adding any advantage. For these reasons, the Court should decline Mr. Sidman’s offer to participate as *amicus curiae*.

**Conclusion**

Plaintiff-Intervenor Penobscot Bay and River Pilots Association respectfully requests that the Court deny Mr. Sidman’s Motion.

Respectfully submitted,

Twain Braden  
Thompson Bowie & Hatch LLC  
415 Congress Street  
P.O. Box 4630  
Portland, ME 04112-4630  
(207) 774-2500  
tbraden@thompsonbowie.com

/s/ Kathleen E. Kraft

C. Jonathan Benner (*pro hac vice*)  
Kathleen E. Kraft (*pro hac vice*)  
Thompson Coburn LLP  
1909 K Street N.W., Suite 600  
Washington, D.C. 20006  
(202) 585-6900 (main)  
(202) 585-6969 (fax)

*Attorneys for Plaintiff-Intervenor Penobscot Bay  
and River Pilots Association*

Date: February 6, 2023

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of February, 2023, I caused the foregoing document to be served upon all counsel of record via the Court's CM/ECF system.

/s/ Kathleen E. Kraft

# Exhibit A

Browse the site's online database of available paintings which emphasize the scenic beauty of Maine's Coast, Mt. Desert Island and Acadia National Park.

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Click [HERE](#) to receive Argosy Gallery announcements!

## GALLERY NEWS

December 2022: Once again our artists join us in a huge thanks for another splendid season. We are tantalizingly close to last year's record.

On the local news front, next year's show will be called "A Next Generation". It will feature the work of seven of our younger artists, regulars and past guests. The exhibition dates are July 29 and 30, with the reception at the Bar Harbor Inn on Saturday evening, the 29th. As always, we hope you will join us. The show will then continue in the gallery. Special thanks to everyone who attended this year's particularly lively event with ten artists on hand.

Our other news is that, after 27 years, we are leaving the small Main St. space and consolidating at 6 Mt. Desert St. Facing the Village Green, it is more spacious, visible and tranquil. We look forward to many more years of welcoming visitors there.

Our artists always put a high priority on offering our customers their best work. Since late September they've given us approximately 100 new paintings for winter browsing.

September 2022: A huge thank you to everyone for the spectacular opening of the "Acadian Eleven" show. Well over 200 visitors enjoyed the full exhibition at the Bar Harbor Inn, and many of these also spent time at the gallery. Guests came from near and far, from all over the Northeast as well as hometowns in PA, VA, GA and TX.

In turn, nine of the eleven featured artists enjoyed meeting "their" collectors at the lively evening reception. They and we (Charlie and myself) are most grateful for the friendship of these collectors and their strong support during the show and