IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

PORTLAND PIPE LINE CORP., et al., *Plaintiffs,*	
v.	No. 2:15-cv-00054-JAW
CITY OF SOUTH PORTLAND, et al., *Defendants*.	

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Chamber of Commerce of the United States of America ("Chamber") submits this reply in response to the Defendants' opposition to the Chamber's motion for leave to file an amicus brief (Doc. 111) ("Opp.").

INTRODUCTION

For the reasons provided in its initial motion (Doc. 105), the Court should grant the Chamber leave to file an amicus brief in this matter. In opposition, the Defendants: (1) fail to recognize the difference between legislative and adjudicative facts, and the limited purpose for which the Chamber (briefly) cited a publicly available economic-impact report; (2) greatly exaggerate the Chamber's reliance on the report and ignore the *legal* arguments that are the focus of the Chamber's brief; and (3) mischaracterize an isolated statement from the First Circuit as setting a far higher bar for amicus participation than this Court has applied in recent cases. As the First Circuit has recognized—even in the primary case Defendants rely upon—"the acceptance of amicus briefs is within the sound discretion of the court." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). The Chamber's interest in enforcing the constitutional limits on the local regulation of international commerce supports its request to participate here, and nothing in its brief departs from the sources routinely cited in amicus filings or suggests any abuse of the briefing process.

ARGUMENT

The Defendants' opposition centers around the Chamber's citation of a publicly-available report by Planning Decision Inc. ("PDI"), prepared during the consideration of a prior version of the challenged Ordinance.[1] The report is the only public document providing any recent analysis of the economic footprint of the oil shipping industry, including the operations of Plaintiff Portland Pipe Line Co. ("PPLC"). The Chamber's few references to some of the report's conclusions about the scope of the local industry is neither extraordinary nor erroneous, and none of the Defendants' arguments support denying the Chamber's motion for leave to file its brief.

First, the Chamber's citation to the PDI report is in no way improper. Setting aside the fact that the report is in the record—which Defendants concede in a footnote, *see* Opp. at 3 n.4—the Chamber is not submitting its contents as expert testimony under Rule 702. Nor is the Chamber contending that the facts in the report are "adjudicative facts" in this case. None of the Chamber's legal arguments depend upon a factual finding from the Court about the number of jobs adversely affected, the amount of direct spending reduced, or the extent of PPLC's share of the oil-products industry. Rather, this information is provided only to illustrate the Chamber's *bona fide* interest in this proceeding and to show that the Ordinance implicates the precise kinds of policy concerns that led the Founders to adopt the Foreign Commerce and Supremacy Clauses. *See* Chamber Br. at 2-11, 13-14. Facts submitted to support these types of policy arguments are routinely included in amicus briefs without issue because they are "legislative facts," which Courts may consider notwithstanding the rules of evidence. *See* Advisory Comments to Fed. R. Evid. 201 (noting that "legislative facts . . . are those which have relevance to legal reasoning and the lawmaking process,

[1] Contrary to the Defendants' assertions, the Chamber expressly described the timing of the report and explained that it analyzed a prior version of the challenged ordinance. *See* Chamber Amicus Br. at 13 n.5.

whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body"); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999) (noting that "so-called 'legislative facts,' which go to the justification for a statute, usually are not proved through trial evidence but rather by material set forth in the briefs, the ordinary limits on judicial notice having no application to legislative facts"). Indeed, this Court has previously recognized the distinction between adjudicative and legislative facts and granted amici wide latitude to reference and argue legislative facts. *All. of Auto. Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 308 (D. Me. 2003) (citing *Daggett*). That is all the Chamber is doing here.

Second, the Defendants grossly overstate the Chamber's reliance on the economic-impact report. Although the Defendants repeatedly contend that the Chamber's brief is "replete with expert opinion, new purported facts, and unsworn testimony," *see* Opp. at 1-4, the Chamber's brief refers to the report in only *three paragraphs*, spanning two pages. The Defendants nonetheless assert that *five pages* of the Chamber's brief contain "unattributed facts, hearsay quotations, and unsworn opinion testimony"—a page total that the Defendants reach only by including counsel's signature page and the certificate of service. Even if the Defendants were correct that this small portion of the brief was "arguing facts," there is little justification for its request to strike the Chamber's *entire* brief—the rest of which makes exclusively legal arguments.

Third, all of the legal authorities that the Defendants cite are inapplicable. In light of the limited purpose of the Chamber's citation to the PDI report, the Chamber is not attempting to "assist[] [a] party with its evidentiary claims." *Banerjee v. Bd. of Trustees of Smith Coll.*, 648 F.2d 61, 65 (1st Cir. 1981). Nor is it raising any new *legal* arguments that were not preserved by the Plaintiffs. *United States v. Wahchumwah*, 710 F.3d 862, 865 (9th Cir. 2013). Setting those points aside, the Defendants are left to argue that the First Circuit's decision in *Strasser* holds that there

only are "rare occasions when *amici* are appropriate in District Court proceedings." Opp. at 8. This is a major distortion of both the point made in *Strasser* and the standard for granting amicus status.

To begin, the First Circuit recognized in *Strasser* that "*the acceptance of amicus briefs is within the sound discretion of the court*." *Id.* at 569 (emphasis added). *Strasser* went on to note that the district court in that case may have overstepped its bounds by inviting, *sua sponte*, "a member of the bar who is nationally prominent in the civil liberties field" to file an amicus brief. *Id.* The court correctly noted that such invitations may raise the burdens for the opposing party, and suggested that a district court should "go slow" when accepting or inviting amicus briefs unless the proposed amicus "as a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance." *Id.*

The Chamber has exactly that kind of "special interest"—a point made in its motion, *see* Doc. 105, and which the Defendants fail to contest in their opposition.[2] In similar cases, this Court has correctly granted amicus status to parties with interests similar to the Chamber's, even when the parties were capably represented. *See Gwadowsky*, 297 F. Supp. 2d at 307 (citing *Strasser* and granting the Maine Auto Dealers' Association leave to participate as amicus in a constitutional challenge to a state statute); *Animal Prot. Inst. v. Martin*, No. CV-06-128 BW, 2007 WL 647567,

[2] The closest the Defendants come on this point is a single sentence suggesting that the Chamber's failure to intervene precludes granting it status as amicus. Opp. at 7-8. This turns the standard for intervention on its head; the First Circuit has routinely held that amicus status is a preferred alternative to intervention for parties whose interests overlap with those of the litigants, but whose legal rights would not be directly affected by the case. *See, e.g., Daggett,* 172 F.3d at 112; *Mass. Food Ass'n v. Mass. ABC Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999) (noting that prospective intervenors' desire to offer additional legal arguments "were easily presented in amicus briefs" rather than as intervenor); *see also All. of Auto. Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 307 (D. Me. 2003) (rejecting argument that amicus status should be denied where party failed to intervene).

at *2-3 (D. Me. Feb. 23, 2007) (citing *Strasser* and granting leave for interested parties to participate as amici). As this Court noted in *Martin*:

> At the time of the motion, the court can rarely assess the potential benefit of an *amicus* brief, since the brief has not yet been filed. If denied, the court may be deprived of the advantage of a good brief, but if granted, the court can readily decide for itself whether the brief is beneficial. If beneficial, the court will be edified; if not, the brief will be disregarded. Thus, it is "preferable to err on the side of granting leave."

Id. at *3 (quoting *Neonatology Assocs., P.A. v. CIR*, 293 F.3d 128, 132-33 (3d Cir. 2002) (Alito, J.)). Indeed, the balance of interests supporting leave weighs more heavily in the Chamber's case than in *Gwadosky* or *Martin*, because the Chamber is not seeking to participate in argument or otherwise file memoranda or motions beyond the current dispositive motion pending before the Court, and because the Defendants in this case are supported by at least one amicus of their own. *See* Doc. 101-1 (proposed amicus brief from the Conservation Law Foundation). The Defendants' failure to even mention these decisions, let alone explain why the Chamber should be treated differently than the amici in those cases, underscores the weakness of its opposition.

Finally, nothing in the Defendants' brief establishes any improper coordination by the Chamber, or any attempt to evade page limits. The Chamber has independently filed briefs making similar legal arguments in dozens of cases throughout the United States. In this respect, its brief in support of the Plaintiff is no different from the amicus brief that was filed in support of the Defendants. *See* Doc. 101-1. The suggestion that the Chamber's participation in this important case is "abusive" is completely unfounded, and the Defendant's reliance on Judge Posner's opinion in *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997), ignores this Court's more thoughtful approach in *Martin*, 2007 WL 647567, at *2-3 (analyzing Judge Posner's approach to amicus briefs and rejecting argument to bar a "legitimate amicus" brief).

CONCLUSION

For the foregoing reasons, the Chamber respectfully asks this Court to grant the Chamber's motion for leave to file its amicus brief.

Respectfully submitted,

/s/ *Patrick Strawbridge*

Patrick Strawbridge (Me. Bar No. 10024)
CONSOVOY MCCARTHY PARK PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

Cameron T. Norris*
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
cam@consovoymccarthy.com

*Licensed in Tennessee, but not Virginia.
Practice supervised by members of the firm.

Kate Comerford Todd
Sheldon Gilbert
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

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Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, a copy of the foregoing was electronically filed. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the court's system.

/s/ Patrick Strawbridge