

**Case Nos. 24-1317, 24-1318**

---

**United States Court of Appeals for the First Circuit**

---

ASSOCIATION TO PRESERVE AND PROTECT  
LOCAL LIVELIHOODS, *et al.*

*Plaintiffs – Appellants,*

PENOBSCOT BAY AND RIVER PILOTS ASSOCIATION,

*Plaintiff-Intervenor – Appellant,*

v.

TOWN OF BAR HARBOR,  
a municipal corporation of the State of Maine,

*Defendant – Appellee.*

---

On Appeal from the United States District Court for the District of Maine  
Civil Action No. 1:22-cv-416-LEW

---

**JOINT MOTION FOR INJUNCTION PENDING APPEAL**

Appellants BH Piers, LLC and Golden Anchor, LC (“Pier Owners”), owners of tender vessels (“Tender Owners”), and the Association to Preserve and Protect Local Livelihoods<sup>1</sup> (“APPLL” and collectively, “Plaintiffs”), and Appellant Penobscot Bay and River Pilots Association (“Pilots” and together with Plaintiffs, “Appellants”), pursuant to Federal Rule of Appellate Procedure 8(a) and Local Rule of Appellate Procedure 8(a), move this Court to enjoin Appellee Town of Bar Harbor (“Town”) from enforcing a local Ordinance that restricts the disembarkation of more than 1,000 persons per day into the Town from cruise vessels operating in interstate and international commerce and anchored in nearby federal anchorages.

Appellants challenged the Ordinance as violative of federal and state constitutional constraints. In its March 1, 2024 order (the “Order”), the district court concluded that the Ordinance conflicted with federal law and was preempted as applied to seafarers but did not offend the Constitution in any other manner urged by Appellants. Exhibit A, Order at 28-32, 61 (preemption); *id.* at 18-28, 32-61 (other federal claims). Although it found the Ordinance preempted as to seafarers, it failed to grant Appellants’ requests for a permanent injunction. *See*

---

<sup>1</sup> APPLL’s members include approximately 200 local residents, businesses, and employers.

Order. Had the district court correctly applied established statutory construction and severability principles, it would have enjoined the Ordinance *in toto*.

Acting on the district court’s indulgence, the Town is now enforcing the Ordinance by, among other things, refusing to confirm vessel requests for use of federal anchorages in Frenchman Bay for 2025 (even though the Ordinance, by its terms, imposes “no restriction whatsoever” on anchorage access (Order at 35))—increasing the risk each day that the 2025 cruise season will be eliminated altogether. These actions irreparably harm Appellants now and will cause further irreparable harm unless enjoined. Thus, Appellants ask this Court to enjoin the Town from enforcing the Ordinance pending these appeals.

## **I. BACKGROUND**

### **A. Cruise Tourism in Bar Harbor and the Ordinance**

Situated near Acadia National Park, Bar Harbor is a popular tourist destination and a “marquee port” for cruise itineraries in the New England/Canada trade. Order at 6. Ships anchor in federal anchorages in Frenchman Bay, and tenders bring visitors to shore. *Id.* at 3. Although most of the vessels calling at Bar Harbor each carry more than 1,000 passengers and hundreds of crew (*id.* at 16),

cruise passengers “account for a limited portion of the total number of annual visitors to greater Bar Harbor and Mount Desert Island” (*id.* at 8).<sup>2</sup>

Since 2008, the Town managed cruise visitation through voluntary passenger “caps” (3,500 passengers/day in the peak summer months of July and August and 5,500 passengers/day in the less intense months of May, June, September, and October) negotiated with the cruise lines. *Id.* at 7. The Harbor Master coordinated requests from ships and confirmed vessel bookings for the federal anchorages based on these voluntary caps. *Id.* at 8.

Post-COVID, local concern over the scale of tourism in general, and cruise tourism in particular, emerged. *Id.* at 9 & n.5. In 2022, public sentiment prompted the Town to negotiate memoranda of agreement (“MOAs”) with the cruise lines, imposing reduced daily caps (3,800 passengers/day in May, June, September, and October) and aggregate monthly caps (the highest at 65,000 passengers for September and October). *Id.* at 10-11; Exhibit E, Affidavit of Sarah Flink (“Flink Aff.”) ¶ 22.

Also in 2022, independent of the Town’s contractual approach to managing cruise visitation, a group of residents proposed an amendment to the Town’s Land Use Ordinance to restrict disembarkations from cruise ships to 1,000 persons per

---

<sup>2</sup> “[M]any” of the four million annual visitors to Acadia National Park also visit Bar Harbor. *Id.* at 8. *cf.*, Flink Aff. ¶ 45 (258,157 passengers in 2023).

day. Order at 11. Although initially drafted to restrict disembarking “passengers,” the group revised its proposal to replace “passengers” with “persons” to ensure that the restriction applied to *all* persons (including, principally, crewmembers) disembarking from cruise ships, not just passengers. *Id.* at 11-12. At the November 8, 2022, Town Meeting, the voters approved the 1,000-*person* disembarkation limit.<sup>3</sup> *Id.* at 13. The proposal thus became the Ordinance. Exhibit B, Ordinance.<sup>4</sup>

The Ordinance prohibits the disembarkation (from cruise vessels anchored in federal anchorages) and entrance “on, over, or across any property located in the Town” of more than 1,000 persons per day. *Id.* § 125-77(H)(2). Each daily disembarkation over 1,000 persons carries a minimum \$100 per person penalty,<sup>5</sup> which the Ordinance imposes on the landowners receiving such persons. *Id.* Persons arriving by cruise ship come ashore at one of two piers owned by the Pier Owners. Order at 14-15. Thus, the Pier Owners are the only entities subject to the Ordinance’s penalties. Ordinance § 125-77(H)(4).

---

<sup>3</sup> Bar Harbor voters were not presented with the initial proposal to impose a 1,000-*passenger* limit.

<sup>4</sup> The Ordinance is retroactive to March 17, 2022. Ordinance § 127-77(H)(5).

<sup>5</sup> The penalty provision is tied to 30-A M.R.S. § 4452, which provides a \$100 per person fine as a floor up to a maximum of \$5,000 per incident. *Id.* § 125-77(H)(4); *see also* 30-A M.R.S. § 4452(3)(B).

## **B. District Court Action**

Plaintiffs sued the Town in December 2022, alleging that the Ordinance violated the Supremacy, Commerce, and Due Process Clauses of the U.S. Constitution. Order at 2, 18. The Pilots, as intervenors, similarly alleged that the Ordinance was invalid under the Supremacy and Commerce Clauses, as well as the Maine Constitution. *Id.* at 18. Both Plaintiffs and Pilots sought a judgment declaring the Ordinance unconstitutional and injunctive relief barring the implementation, enforcement, and application of the Ordinance.

Charles Sidman, a primary proponent and co-author of the Ordinance, intervened on the side of the Town. *Id.* at 4.

Plaintiffs moved for a preliminary injunction to bar enforcement of the Ordinance. *See id.* at 2. Because the Town agreed “not to enforce” the Ordinance “pending the outcome of the litigation,” Plaintiffs withdrew their motion. *Id.*<sup>6</sup> Appellants’ requests for a permanent injunction remained.

## **C. The Order**

The district court found that the Ordinance conflicts with 33 C.F.R. § 105.237 (protecting seafarer shore access) and is preempted under the Supremacy

---

<sup>6</sup> The Town’s agreement not to enforce the Ordinance included honoring cruise line applications for the 2023 season that the Town had approved under the MOAs but which were barred by the Ordinance’s retroactivity clause. *See* Ordinance § 125-77(H)(5). This allowed the 2023 season to proceed largely intact and without incident.

Clause, but it entered judgment for the Town on Appellants' other constitutional arguments. *Id.* at 60-61. The district court concluded that the Ordinance's clear conflict with federal law did not justify awarding Appellants "any meaningful relief." *Id.* at 29, 61.

#### **D. Post-Order Actions**

The Town, supported by the district court's failure to grant "any meaningful relief" and no longer bound by its agreement not to enforce, has directed immediate enforcement of the Ordinance. Exhibit C, Town Council statement, Mar. 6, 2024; *see* Exhibit K, Town Motion to Dismiss Excerpts. It has broadcast its intent to "go to court" against the Pier Owners "to obtain fines and injunctive relief" if they exceed the disembarkation limits and against "any party that disobeys the orders of the Harbor Master." *Id.* It has directed that the Ordinance's limits must govern any pending vessel reservation for the 2025 season made and accepted after March 17, 2022.<sup>7</sup> *Id.* It has instructed its Harbor Master to "cancel, or reject, requests for reservations [for anchorage access] made after ... the [November 8, 2022] vote for all ships with lower berth capacities greater than

---

<sup>7</sup> Mr. Sidman, dissatisfied with the Town's March 6 enforcement plan, filed suit against the Town and its councilmembers in Hancock County Superior Court seeking an order directing the Town to cancel all vessel reservations for the 2024 season made after April 1, 2022, including those made pursuant to the MOAs (an estimated cancellation of between 134 and 149 reservations). Exhibit D, Sidman Complaint Excerpts.

1,000 passengers”<sup>8</sup> (*id.*), even though (according to the district court) vessels “of whatever size are free to anchor in Frenchman Bay” under the explicit terms of the Ordinance (Order at 35).

## II. ARGUMENT

This Court’s power to issue injunctive relief is “firmly embedded in our judicial system.” *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4, 13 (1942). Four factors govern a request for injunction pending appeal: (1) whether the movant “has made a strong showing that [it] is likely to succeed on the merits;” (2) whether the movant “will be irreparably injured absent a stay;” (3) whether issuance of relief “will substantially injure the other parties interested in the proceeding;” and (4) “where the public interest lies.” *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 44 (1st Cir. 2021) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Here, each factor favors an injunction.

### A. **Likelihood of Success**

The Court first considers whether the movant is likely to “succeed on the merits.” *Id.* The movant must show, at a minimum, “serious legal questions.” *Providence J. Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir.

---

<sup>8</sup> Prior to the Ordinance, cruise lines voluntarily complied with the Town’s reservation system and will not schedule calls at Bar Harbor without reservations. Flink Aff. ¶ 37.



1979). Actual success on the merits satisfies this factor. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546, n.12 (1987). Appellants meet these standards.

1. Appellants prevailed on their claim that the Ordinance, being broadly applicable to “persons,” conflicts with federal regulations that require owners or operators of shore facilities (including the Pier Owners) to guarantee access to, among others, “seafarers assigned to a vessel at that facility.” Order at 28-29 (discussing 33 C.F.R. § 105.237). Instead of enjoining the Ordinance *in toto*, the district court concluded that it could preserve the Ordinance’s application to passengers. In the district court’s view, “little imagination” was required to “appreciate that the voters of Bar Harbor ... would prefer that the Ordinance remain operative as to passengers rather than invalidated as to passengers,” and the Town assuredly would address any actual conflict “in advance” through rulemaking.<sup>9</sup> *Id.* at 31, 32 n.21. The district court’s conclusions are not supported by the Ordinance’s text and history or by the Town’s subsequent actions. Its decision on remedy is erroneous and has deprived Appellants of the injunctive relief that should have issued.

---

<sup>9</sup> The district court did not support its assertions as to the Town’s prospective remedial measures. The record is devoid of any proof of the Town’s commitment to any particular remedy or the timetable on or process by which such a remedy might be adopted and become effective.

Partial preemption necessitates a severability analysis. *Panhandle E. Pipeline Co. v. State of Okl. ex rel. Comm'rs of Land Off.*, 83 F.3d 1219, 1229 (10th Cir. 1996). Severability is a state law issue. In Maine, an ordinance is not severable if the invalid portion “is such an integral portion of the entire ... ordinance that the enacting body would have only enacted the legislation as a whole.” *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 18, 856 A.2d 1183, 1190 (citing *Bayside Enters., Inc. v. Me. Agric. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me. 1986)). Importantly, severability “requires textual provisions that can be severed.” *Rhode Island Med. Soc. v. Whitehouse*, 239 F.3d 104, 106 (1st Cir. 2001) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 882 (1997)).

The Ordinance’s acknowledged constitutional infirmity is its application to “persons.”<sup>10</sup> Order at 28-32. “Persons” is used throughout the Ordinance. Exhibit B-1, Highlighted Ordinance.<sup>11</sup> Excising “persons” would make the Ordinance inapplicable to seafarers, and also to everyone else, rendering it unintelligible and unenforceable.

As determined by the Harbor Master, no more than 1,000 ~~persons~~, in the aggregate, may disembark on a single calendar day from any cruise ship(s) and come to shore on, over, or across any property located within the Town of Bar Harbor ....;

---

<sup>10</sup> The Ordinance is unconstitutional in other respects.

<sup>11</sup> Exhibit B-1 is a copy of the Ordinance with all references to “persons” highlighted.

Ordinance § 125-77(H)(2) (strikethrough added). No text of the Ordinance can be severed to render it applicable only to passengers. *Wyoming v. Oklahoma*, 502 U.S. 437, 460 (1992) (state law’s unconstitutional application to private entities could not be severed from law’s constitutional application to public entities where law applied to “all entities”). The district court failed to undertake any analysis on this point.

Instead, relying solely on wished-for or anticipated Town action and citing (but not clearly applying) *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the district court determined that it could sever the Ordinance’s unconstitutional application, even though the Ordinance is “not readily susceptible to a narrowing construction” because its “use of ‘persons’ unambiguously extends to seafarers.” Order at 31 (internal quotation omitted). *Contra Rhode Island Med. Soc.*, 239 F.3d at 106 (“Even if what appellant would have this court do is sever an application of the Act, rather than any section of the Act, we may impose a limiting construction on a statute *only if* it is readily susceptible to such a construction.”) (emphasis added; internal quotation omitted).

In the absence of a severable provision or readily susceptible limiting construction, the general proposition that courts should resolve “a constitutional flaw in a statute” by severing the “problematic portions while leaving the remainder intact,” *Ayotte*, 546 U.S. at 328-29, simply does not apply. Nor does it

empower courts to “blue-pencil” the law to conform it to constitutional requirements. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509-10 (2010); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)); see *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 489 (2018) (Thomas, J., concurring) (“Because courts cannot take a blue pencil to statutes, the severability doctrine must be an exercise in statutory interpretation.”); *Consumer Data Indus. Ass'n v. Platkin*, No. CV1919054GCTJB, 2024 WL 1299256, at \*27 (D.N.J. Mar. 27, 2024) (applying *Ayotte* principle where unconstitutional provision was severable). Nevertheless, the district court used its blue pencil to change “persons” to “passengers.”<sup>12</sup>

If the Ordinance were amenable to severability, the record of the Ordinance’s legislative history, not imagination, should have guided the district court’s inquiry as to “whether [the] invalid provisions were integral to the [Ordinance’s] enactment.”<sup>13</sup> *Opinion of the Justs.*, 2004 ME 54, ¶¶ 26-28, 850

---

<sup>12</sup> Both the Town Charter and Section 125-9 of the Land Use Ordinance require an initiative election or Town Meeting to amend the Ordinance. Efforts to amend the Ordinance by rule would be unavailing. See Order at 31.

<sup>13</sup> “In evaluating citizen initiatives, the Law Court applies the ordinary rules of statutory construction.” *Opinion of the Justs.*, 2004 ME at ¶ 10, 850 A.2d at 1149 (internal citations omitted). If the meaning is clear from the “plain text” of the ordinance, the Law Court does not search legislative history or the intent of the enacting body to divine a different interpretation. *N.A. Burkitt, Inc. v. Champion Rd. Mach. Ltd.*, 2000 ME 209, ¶ 13, 763 A.2d 106, 109 (“[I]f the meaning of the

A.2d 1145, 1152 (internal citations omitted). As an initiated law, the Ordinance lacks a robust legislative record. *See id.* But, as the trial record showed, the Ordinance’s proponents intentionally chose “persons” over “passengers”—Mr. Sidman explained that “[c]rew on these ships is often about half of the passenger capacity” and “many crew are allowed off at each port of call” so “[n]et:net, the total numbers of disembarking persons could be wildly different from (and likely higher than) the ostensible passenger capacities” which is “why we modified the petition to limit ‘disembarking persons’ rather than ‘passengers.’” Exhibit F, PX 230. The drafters intended for the Ordinance to “operate without the rejected limitation” to passengers. *See State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 700 (1st Cir. 1994). The Town presented voters with, and the voters approved, a ban that applied to “persons,” not “passengers.” Exhibit G, PX 243B.

Moreover, at the time the record closed, the Town had neither amended the Ordinance nor issued rules (whether valid or not) to rectify the Ordinance’s unconstitutional application. Thus, the district court’s review was limited to the Ordinance before it. Its speculation that the Town *might* correct the Ordinance’s constitutional infirmity deserves no weight.

---

statute is clear on its face, then we need not look beyond the words themselves.”) (quoting *Cook v. Lisbon Sch. Comm.*, 682 A.2d 672, 676 (Me. 1996)).

2. The district court’s error in rejecting Appellants’ requested remedy is not the sole reason Appellants are likely to succeed on the merits of their appeals. Appellants established on the record that the Ordinance is unconstitutional because of its impermissible effects on the flow of interstate commerce.

State laws that, in purpose or effect, discriminate against interstate commerce almost invariably violate the Commerce Clause. *National Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) (The “antidiscrimination principle lies at the ‘very core’ of our dormant Commerce Clause jurisprudence.”). Even absent discrimination, however, state regulation of instrumentalities of interstate transportation raises special concerns. *Id.* at 379 n.2 (acknowledging “a line of cases... in which [the] Court refused to enforce certain state regulations on instrumentalities of interstate transportation—trucks, trains, and the like”); *id.* at 380. For this reason, the Commerce Clause prohibits state interference with “transportation into or through” a state “beyond what is absolutely necessary for its self-protection.” *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 472 (1877). *Accord Bayley’s Campground, Inc. v. Mills*, 985 F.3d 153, 159-60 (1st Cir. 2021) (quoting *Husen*).

This undisputed principle has yielded a phalanx of decisions protecting the flow of commerce from restrictive local laws, irrespective of whether, either in purpose or effect, they were intended to benefit local economic interests. For

example, States may not impede the efficiency of interstate movements. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (contour mudguards on trucks); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (length of trains); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (use of “doubles”). They may not deprive trains and ships of the infrastructure or facilities necessary for interstate movement. *Kansas City S. Ry. Co. v. Kaw Valley Drainage Dist. of Wyandotte Cnty., Kan.*, 233 U.S. 75 (1914) (bridge used by railroad lines); *Pittston Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653 (W.D.N.Y. 1981) (use of port for interstate commercial shipping activities); *see also Cincinnati, P., B.S. & P. Packet Co. v. Catlettsburg*, 105 U.S. 559, 564 (1881) (would be “oppressive and arbitrary” for locality to designate an exclusive place for landing vessels that then did not accommodate vessels whose business required them to land there). States may not control the manner in which interstate carriers conduct their businesses. *Morgan v. Com. of Va.*, 328 U.S. 373, 380-81 (1946) (seating arrangements in interstate motor travel); *S. Covington & C. St. R. Co. v. City of Covington*, 235 U.S. 537, 546-48 (1915) (number of passengers in streetcars); *see also Hall v. De Cuir*, 95 U.S. 485, 488-89 (1877); *Illinois Cent. R. Co. v. State of Illinois ex rel. Butler*, 163 U.S. 142, 153 (1896). Nor may States burden the transportation of passengers so as to “practically stop altogether [that] particular species of commerce.” *Pickard v. Pullman S. Car Co.*, 117 U.S. 34, 44 (1886) (tax on

sleeping cars employed in the transportation of passengers into, or through, or out of state).

The Commerce Clause would be a “very feeble and almost useless provision” if, at any point in the interstate transportation of goods or people from origin to destination, the states within which that transportation travels through or to “could impose [restrictive] regulations ... interfering with and seriously embarrassing this commerce.” *Wabash, St. L. & P. Ry. Co. v. State of Illinois*, 118 U.S. 557, 573 (1886); see *Leisy v. Hardin*, 135 U.S. 100, 112-13 (1890) (transportation between states should be “free,” except where “positively restricted” by Congress or “by states in particular cases” with Congress’ “express permission”). Thus, the Commerce Clause’s preemptive force is most expansive when local regulations threaten to impede the flow of interstate commerce. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978) (noting that Commerce Clause “pre-empts an entire field from state regulation ... when a lack of national uniformity would impede the flow of interstate goods”) (internal citation omitted). *Accord Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41, 46 (1st Cir. 2005) (states may not “imped[e] the free flow of goods”).

Rather than acknowledging the Ordinance’s similarities to laws invalidated as restrictions on the *flow* of commerce, the district court likened the Ordinance’s regulation of “traffic in persons based on that traffic’s distinctive contribution to



locally disfavored conditions” to California’s decision to “prohibit traffic in [pork] produced under locally disfavored [inhumane] conditions.” Order at 48. It treated ships more like hog breeders than trucks or trains. *Contra Ross*, 598 U.S. at 379 n.2 (distinguishing law at issue in *Ross* from state laws that regulated instrumentalities of interstate transportation because “[p]igs are not trucks or trains”). Or, more fundamentally, the district court regarded a law impeding the *flow* of commerce (the transportation of passengers from port to port) as no different than a law conditioning the in-state sale of pork products on the humane treatment of breeding pigs. The district court’s narrow view of the Commerce Clause is far too restrictive,<sup>14</sup> and its logic unconstitutionally subjects the flow of commerce to the local vagaries of the states, cities, and towns through which that commerce must travel.

## **B. Irreparable Injury**

Appellants will be irreparably injured absent an injunction. The Pier Owners face irreparable injury in two forms. If ships disembark more than 1,000 persons (passengers, pilots, crew) per day, the Pier Owners will have to comply with the unconstitutional Ordinance by denying entrance to the 1,001st disembarking person and all who follow or else risk the Ordinance’s potentially ruinous and

---

<sup>14</sup> The district court engaged in other equally-erroneous rationalizations, which Appellants will detail during merits briefing.

escalating per-person fines.<sup>15</sup> This dilemma constitutes the requisite “threat of substantial and immediate irreparable injury” justifying an injunction. *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

More likely, though, the supermajority of ships will no longer call at Bar Harbor.<sup>16</sup> Order at 16-17, 56; *see* Flink Aff. ¶¶ 27, 37. The Ordinance’s prohibitory impact is already causing a near-total disappearance of 2025 vessel calls. Order at 16-17, 56; Flink Aff. ¶¶ 47-49. Harm to Appellants is all the more imminent because of actions the Town failed to take during the pendency of the district court case. Though the Town agreed not to implement or enforce the Ordinance, Appellants now know that the Harbor Master has not confirmed (has failed to act on) any reservation requests from ships with a lower berth capacity over 1,000 since July 2021. Flink Aff. ¶ 40. Owners and operators of these vessels require long lead times for their itineraries (many months and even years) and generally do not plan itineraries around unconfirmed port calls. *Id.* ¶¶ 12, 49. By failing to act

---

<sup>15</sup> The Pier Owners will be subject to fines of at least \$100, up to as much as \$5,000, per “unauthorized excess person” violation. *See supra* note 5. While the Pier Owners’ legal challenges were awaiting adjudication, the Town’s non-enforcement agreement insulated them from the Ordinance’s penalties. *See* Order at 2.

<sup>16</sup> Indeed, the district court found that the decline in visits by cruise passengers would be “likely north of 80 and possibly as high as 90 percent.” Order at 17; *see* Flink Aff. ¶ 27.

on requests for 2025, the Town has prevented, and continues to prevent, forward scheduling decisions, thereby ensuring the demise of the 2025 cruise season.

As a result, the Pier Owners will suffer a dramatic decline in their revenues. Order at 17. The Tenders Owners will see substantially reduced revenues and forced idling of their purpose-built tenders. *Id.* at 8, 17. APPLL members will “experience a reduction in business and will perhaps close during the shoulder season or retain fewer employees in those months.” *Id.* at 17. Employee members of APPLL will suffer reduced employment hours or the loss of their jobs as the business members of APPLL constrict their business operations. *Id.* at 3, 17.

Approximately 50 percent of the Pilots’ annual revenues come from piloting cruise vessels. Exhibit I, DX 442; *see* Exhibit H, Trial Transcript Excerpts, July 11, 2023 (extent of cruise ship revenue loss). Loss of this revenue, which cannot be replaced, will severely impact the Pilots’ ability to maintain the personnel, vessels, and equipment necessary to provide statutorily-required pilotage to all traffic (cargo and passenger) throughout midcoast Maine's commercial seaports. *Id.*; *see* Order at 17. Economic losses under these circumstances and on this scale are irreparable; there is no remedy at law that can rectify them. *Maine Forest Prod. Council v. Cormier*, 586 F. Supp. 3d 22, 63-64 (D. Me.), *aff'd*, 51 F.4th 1 (1st Cir. 2022). *Accord Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 217 F.3d 8,13 (1st Cir. 2000).

Also, Appellants assert that the Ordinance raises substantial Commerce Clause questions. “[C]onstitutional violations in general, and dormant Commerce Clause violations in particular, constitute irreparable injury warranting injunctive relief.” *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. Cnty.*, 893 F. Supp. 301, 308 (D.N.J. 1995); *see Allen v. Minnesota*, 867 F. Supp. 853, 859 (D. Minn. 1994); *Citicorp Servs., Inc. v. Gillespie*, 712 F. Supp. 749, 753-54 (N.D. Cal. 1989) (Commerce Clause violation “give[s] rise to a presumption of irreparable harm”); *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 734 F.Supp. 853 (S.D. Ind. 1990) (waste flow regulation which violates Commerce Clause causes irreparable injury regardless of showing of economic harm); *C & A Carbone, Inc. v. Town of Clarkstown*, 770 F. Supp. 848, 854 (S.D.N.Y. 1991).

### **C. Injury to Other Parties**

An injunction pending appeal will not injure other parties. Rather, the requested injunction would preserve the *status quo* in place since the Town agreed not to enforce the Ordinance during the pendency of the district court proceedings. The *status quo* will enable the Town and cruise lines to abide by the reduced daily passenger caps under the MOAs that the Town itself negotiated in 2022, which accommodate the Town’s health and safety objectives. Exhibit J, Trial Transcript Excerpts, July 13, 2023. The *status quo* will not jeopardize municipal services and

will enable the Town to manage any safety concerns as it has done effectively for many years.<sup>17</sup> Order at 13-14. (The proponents’ “stated concern for generalized welfare and quality-of-life considerations” (*id.* at 16), which they attribute to cruise-related congestion, hardly rises to the level of a public health or safety crisis. *Cf. Bayley’s Campground*, 985 F.3d 153.) When cruise visitation managed under the MOAs’ passenger caps is considered against the irreparable injuries to Appellants caused by Ordinance enforcement, the balance of equities favors Appellants.

#### **D. The Public Interest**

The final factor also favors Appellants. The Ordinance is unconstitutional because it is preempted by federal regulations governing shore access for seafarers, and there are serious questions as to the Ordinance’s constitutionality under the Commerce Clause. “Just as the government has no interest in enforcing an unconstitutional law, the public interest is harmed by the enforcement of laws repugnant to the constitution.” *Siembra Finca Carmen, LLC v. Sec’y of Dep’t of*

---

<sup>17</sup> The district court rejected the proponents’ broad claims that cruise passengers “jeopardized...the provision of public safety services (police, fire), emergency medical services (EMS), in-patient and out-patient services at local hospitals, pandemic control measures, and public sanitation.” Order at 12-14. No data supported the claim that alleged degradation in overall municipal public safety could be attributed to passenger-related congestion. *Id.* Although it concluded that waterfront pedestrian congestion was sufficient to raise safety concerns, it noted the lack of evidence of any prior public service delivery failure occasioned by that congestion. *Id. Cf. Bayley’s Campground*, 985 F.3d at 159-60 (collecting cases).

*Ag, Puerto Rico*, 437 F. Supp. 3d 119, 137 (D.P.R. 2020). *Accord Maine Forest Products Council*, 586 F. Supp. 3d at 64 (“[I]t is hard to conceive of a situation in which the public interest would be served by enforcement of an unconstitutional law.”) (quoting *Condon v. Andino*, 961 F. Supp. 323, 331 (D. Me. 1997)); *Gordon*, 721 F.3d at 652-53 (enforcement of potentially unconstitutional law with severe economic effects is not in the public interest) (collecting cases). Enjoining Ordinance enforcement would mean only that cruise visitation in Bar Harbor would remain at the reduced levels negotiated by the Town with cruise lines in the MOAs. Further, the Town’s interest in less congested sidewalks and public spaces for public safety reasons would not be impaired by maintenance of the *status quo*, given that safety has been managed effectively and without incident for more than fifteen years. Order at 13-16. Under these circumstances, the public interest would be served by the issuance of the requested injunction.

#### **E. Request at the District Court**

Injunctive relief pending appeal is conditioned upon the district court’s failure to grant the requested injunction or a showing that moving first in the district court would have been impracticable. Fed. R. App. P. 8(a)(2)(A). Here, moving first in the district court is impracticable for two reasons. First, the district court already rejected Appellants’ requests for permanent injunctive relief, even though it found for the Appellants on the merits of one of their preemption claims.

Thus, Appellants' position is not like parties who claim impracticability on grounds that the district court rejected their claims on the merits. Second, time is of the essence. Since the Order issued, the Town has indicated it will immediately enforce the Ordinance and has taken steps toward that goal by, among other things, directing the Harbor Master not to accept anchorage reservations for ships carrying more than 1,000 passengers (even though the explicit language of the Ordinance does not restrict access to the anchorages in any way (Order at 35)). The Town's refusal to even accept reservations for the 2025 season ensures the demise of cruise visitation in 2025. Because cruise lines plan itineraries many months and years in advance (Flink Aff. ¶ 12), the risk to the 2025 season (as well as future seasons) grows each day that the Town is permitted to enforce the Ordinance by, among other things, refusing ship requests for use of federal anchorages in Frenchman Bay. In addition, Mr. Sidman has engaged in separate litigation to spur even more aggressive enforcement measures. *See supra* note 7. Thus, minimizing delay is essential.

WHEREFORE, Appellants respectfully request that this Court issue an injunction pending appeal under which the Town is prohibited from: (1) implementing, applying, or enforcing the Ordinance, (2) relying on the Ordinance to reject, deny, or fail to act on vessel reservation requests, and (3) relying on the Ordinance (which, by its terms, does not restrict access to the anchorages) to deny

vessels access to the federal anchorages in Frenchman Bay; and provide for such other relief as is just and appropriate under the circumstances.



Dated: May 3, 2024

*/s/Timothy C. Woodcock*

---

Timothy C. Woodcock (Bar No. 10224)  
P. Andrew Hamilton (Bar No. 120694)  
Patrick W. Lyons (Bar No. 1212075)  
EATON PEABODY  
80 Exchange Street (04401)  
Post Office Box 1210  
Bangor, Maine 04402-1210  
(207) 992-0111  
twoodcock@eatonpeabody.com  
ahamilton@eatonpeabody.com  
plyons@eatonpeabody.com

*Attorneys for Association to Preserve  
and Protect Local Livelihoods, B.H.  
Piers, L.L.C., Golden Anchor, L.C.,  
doing business as Harborside Hotel,  
B.H.W.W., L.L.C., Delray Explorer Hull  
495 LLC, Delray Explorer Hull 493  
LLC, and Acadia Explorer 492, LLC*

*/s/ Kathleen Kraft*

---

C. Jonathan Benner (Bar No. 115870)  
Kathleen E. Kraft (Bar No. 1212058)  
THOMPSON COBURN LLP  
1909 K Street N.W., Suite 600  
Washington, D.C. 20006  
(202) 585-6900 (main)  
(202) 585-6969 (fax)  
kkraft@thompsoncoburn.com  
jbenner@thompsoncoburn.com

John S. Kingston (Bar No. 1139164)  
THOMPSON COBURN LLP  
One U.S. Bank Plaza  
St. Louis, Missouri 63101  
(314) 552-6000 (main)  
(314) 552-7000 (fax)  
jkingston@thompsoncoburn.com

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

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing document complies with Fed. R. App. P. 27(d), in that it was prepared using Times New Roman 14-point font and contains 5,200 words.

/s/ Kathleen E. Kraft

Kathleen E. Kraft

### **CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2024, I filed the foregoing document with the United States Court of Appeals for the First Circuit and served it upon all counsel receiving electronic service through the Court's CM/ECF system.

/s/ Kathleen E. Kraft

Kathleen E. Kraft

# Exhibit A

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ASSOCIATION TO PRESERVE )  
AND PROTECT LOCAL )  
LIVELIHOODS, B.H. PIERS, L.L.C., )  
GOLDEN ANCHOR L.C., )  
B.H.W.W., L.L.C., DELRAY )  
EXPLORER HULL 495 LLC, )  
DELRAY EXPLORER HULL 493 )  
LLC, and ACADIA EXPLORER 492 )  
LLC, )

Plaintiffs, )

No. 1:22-cv-00416-LEW

PENOBSCOT BAY AND RIVER )  
PILOTS ASSOCIATION, )

Plaintiff-Intervenor, )

v. )

TOWN OF BAR HARBOR, )

Defendant, )

CHARLES SIDMAN, )

Defendant-Intervenor )

**AMENDED<sup>1</sup> DECISION AND ORDER**

In this action, a group of Bar Harbor businesses and business owners who seek to preserve commercial relationships with cruise lines and their passengers challenge a local exercise of popular sovereignty by the people of Bar Harbor who seek to curtail cruise ship

<sup>1</sup> This Amended Decision and Order exclusively corrects typographical errors.

visitation to maintain a certain quality of local life. The resulting controversy is of constitutional dimension and tenders a host of questions, but chiefly asks whether a municipality with privately owned port facilities can restrain interstate cruise ship commerce for local welfare ends or must make way and permit whatever level of commerce the local market can support.

The matter proceeded to a bench trial following the Court’s issuance of an expedited schedule and Plaintiffs’ withdrawal of a motion for preliminary injunction. The Town of Bar Harbor has agreed not to enforce the challenged land use ordinance pending the outcome of litigation. Following a three-day trial in July 2023, the parties submitted closing arguments in writing. Based on my consideration of the evidentiary record, the arguments of counsel, and the law, judgment will enter in favor of the Defendant Town of Bar Harbor on every count but one, and even as to that one count, judgment will enter partially for the Town, as only limited declaratory relief is awarded in recognition of a partial preemption problem, without affording Plaintiffs and Plaintiff-Intervenor the relief they are seeking.

## **FINDINGS**

### The Parties

The Plaintiffs in this action are the Association to Preserve and Protect Local Livelihoods (“APPLL”); B.H. Piers, L.L.C.; Golden Anchor, L.C., doing business as Harborside Hotel; BHWW LLC, doing business as Bar Harbor Whale Watch; Delray Explorer Hull 495 LLC; Delray Explorer Hull 493 LLC; and Acadia Explorer 492, LLC.

APPLL is a business league comprised of members who own or operate businesses in Bar Harbor and seek to capitalize on the economic opportunities associated with the provision of goods and services to cruise ship passengers. APPLL members include owners and employees of local restaurants, retail stores, and tour-related businesses.

The Delray Explorer Hulls and the Acadia Explorer are tender vessels owned by similarly named limited liability companies. The vessels carry cruise ship passengers from cruise ships anchored in Frenchman Bay to Bar Harbor. B.H. Piers and Golden Anchor own piers in Bar Harbor where the tender vessels disembark and embark cruise ship passengers. BH Piers operates the pier located at 1 West Street, known as Harbor Place. Golden Anchor operates the pier located at 55 West Street. The pier owners have received approval from the Coast Guard for the use of the piers for this purpose.

BHWW is a limited liability company doing business as Bar Harbor Whale Watch Company. BHWW coordinates whale watching tours to cater to the cruise lines' passengers.

The Penobscot Bay and River Pilots Association appears in this matter as Intervenor-Plaintiff. The Pilots Association is a private corporation that provides pilotage services in a region that extends 75 miles from Boothbay Harbor to Frenchman Bay and 75 miles from the west pilot station on Penobscot Bay to the Penobscot River Port of Brewer. By law, foreign-flagged and certain domestic cruise ships must be piloted within Frenchman Bay by a local pilot who is familiar with the Bay and its channels. Pilots board cruise ships (and other large vessels) eight to twelve miles offshore and direct navigation to anchorage grounds in Frenchman Bay (or to other destinations in Penobscot Bay). The

anchorage grounds in Frenchman Bay are roughly two miles from the Bar Harbor waterfront and piers. The Pilots Association's pilotage operations are regulated by the Maine Pilotage Commission. In response to the expansion of cruise vessel traffic, the Pilots Association has invested in vessels and has expanded its employment of pilots. In particular, the Pilots Association now has a dedicated crew and purpose-built vessel to handle the piloting demands associated with cruise vessel traffic in Frenchman Bay. Fees for piloting services are established by law and are a function of the size of the vessel. Ex. 39. The larger the ship, the greater the fee.

The Defendant is the Town of Bar Harbor. Bar Harbor is, among other things, a Class A port of entry for foreign-flagged cruise vessels reentering the United States and a popular port-of-call on North Atlantic cruise ship itineraries. Bar Harbor is governed by a Town Council. The Bar Harbor Town Council has sponsored a cruise ship committee for more than a dozen years, but recently disbanded the committee. The Town of Bar Harbor has a year-round population of roughly 5,500 persons, a number comparable to the lower berth capacity (a rough measure of passenger capacity) of a solitary large cruise ship.

One of the residents of Bar Harbor is Charles Sidman, Intervenor Defendant. Mr. Sidman owns an art gallery in town. Mr. Sidman was a primary proponent and co-author of the initiative that resulted in the land use ordinance challenged in this case.

#### Non-Parties of Note

Among the cruise lines that visit Bar Harbor are several lines owning foreign-flagged cruise vessels. When they call, these vessels typically spend about nine hours at

anchorage, enough time for passengers to clear customs and participate in a shore visit of reasonable duration.

The State of Maine has two other Class A ports of entry, Eastport and Portland. Neither is as proximate to Acadia National Park as Bar Harbor. If a cruise ship called in Eastport or Portland, travel by motor coach to reach and return from Acadia National Park would consume much of the day.

The Maine Office of Tourism is a marketing agency for the State of Maine. CruiseMaine, part of the Maine Office of Tourism, promotes cruise communities in Maine and Maine-based cruise ship tourism in general. CruiseMaine engages with cruise lines and the cruise industry trade association and sometimes functions as a municipality-to-cruise-line liaison. The Maine Office of Tourism and CruiseMaine perceive cruise travel as a positive type of tourism for Maine because it introduces many first-time visitors to Maine from a broader geographical region as compared to visitors who travel by land, most of whom are from east coast states and Canada. CruiseMaine maintains a software platform called the PortCall system, <https://maine.portcall.com>. Through the PortCall system, CruiseMaine posts real-time data related to vessel movements and port operations. State funding supports CruiseMaine.

Carnival, Royal Caribbean, and Norwegian are among the cruise line companies that are active in New England and market cruise itineraries that feature Bar Harbor as a marquee port. These three cruise lines are noted because they operate foreign-flagged vessels and operate some of the largest cruise vessels that call in Bar Harbor and elsewhere



along the Maine coast.<sup>2</sup> The foreign-flagged lines see Bar Harbor as the most convenient and desirable port of entry when coming from foreign waters (such as Canadian waters).

### Background Facts

The Town of Bar Harbor lies on the shores of Frenchman Bay in the North Atlantic on the eastern side of Mount Desert Island. The Town is nestled in an area of great scenic beauty abutting Acadia National Park, a national asset that the Park Service refers to as the Crown Jewel of the North Atlantic Coast. Given Bar Harbor and Acadia National Park's placement and prominence among other North Atlantic attractions accessible by sea, the cruise ship industry regards Bar Harbor as a marquee destination, the kind which appeals to customers and around which an appealing cruise itinerary can be built.

Although Bar Harbor had long experienced healthy tourist seasons, in the 2000s there was room for growth. Additionally, the season was limited to the period between Memorial Day and Labor Day. Local businesses and their representatives on the Town Council hoped to expand the tourist season and saw cruise tourism as one means of doing so.

In 2006, the Maine Department of Transportation, the Maine Port Authority, and the Town of Bar Harbor joined in a task force to commission a cruise tourism destination management plan for Bar Harbor. The authors of the management plan proposed architectural and engineering improvements to develop the Town to facilitate expanded

---

<sup>2</sup> MSC Cruises is a fourth cruise line that fits the description. The executive director of CruiseMaine characterized the domestic cruise lines as "smaller." In addition to Bar Harbor, Eastport, Portland, and Rockland have ports suited to larger foreign vessels. Only Bar Harbor and Portland have significant traffic involving foreign cruise vessels seeking a Class A port of entry, with Bar Harbor and Portland having roughly 60% and 40%, respectively.

cruise ship passenger access, chiefly by means of improved pier facilities. Ex. 260. In 2008, the Town accepted a recommendation from the task force to embody a cruise ship committee and establish a policy of daily cruise passenger caps of 3,500 passengers for the peak-tourism, summer months of July and August, and 5,500 passengers for the shoulder-season months of May, June, September, October, and November. The cruise ship lines were receptive to the invitation and amenable to the passenger caps, and cruise ships began to call in Frenchman Bay in ever-increasing numbers. Local enterprise and investment gradually expanded to meet the increased demand for passenger tendering and other local services.

The Town established its daily passenger caps largely by reference to the lower berth capacities of existing cruise vessels. The caps were understood to be “voluntary” in that they were mutually acceptable to the then-existing Council and the cruise lines. The Council and the cruise line industry were able to agree that cruise line passengers generally would not be well served in Bar Harbor if two or more cruise ships each with an especially large lower berth capacity were to disembark on the same day, even during the quieter shoulder season. They also recognized that it was sensible to lower the cap during Bar Harbor’s peak summer season, given the competing demand for local services generated by peak, land-based tourism. The progenitors of Bar Harbor’s cruise ship management plan also understood that cruise ship visitations impose certain municipal burdens,<sup>3</sup>

---

<sup>3</sup> Bar Harbor maintains a per-passenger fee structure for cruise ship visits. Ex. 29. The Town has used the fees generated in this manner (roughly \$1 million per year) to fund town salaries and enlarge its police force, among other things. The increase in personnel, particularly law enforcement, is itself indicative of the localized impacts of increased traffic.

including congestion, that can detract from the character of the Town and reduce the quality of life for residents. To manage the cap, the Town instituted a reservation system overseen by its harbormaster. When the new reservation system was first instituted, cruise ship visits were not yet a daily phenomenon, despite the reference to “daily” caps.

Over the past 15 years, Bar Harbor has experienced a steady growth in its tourist season, due chiefly to its proximity to Acadia National Park. In 2021, Acadia National Park attracted roughly four million visitors. For many of these visitors, a trip to Acadia includes a visit to downtown Bar Harbor. Meanwhile, more and larger cruise ships anchored in Frenchman Bay and cruise ship passenger visitation levels started to approach or meet the established daily caps on an ever-increasing and consistent basis. Although cruise ship passengers account for a limited portion of the total number of annual visitors to greater Bar Harbor and Mount Desert Island, they arrive at a destination that is already blessed and burdened by land-based tourism and at a waterfront of rather limited area. Cruise ship passenger traffic also has a pronounced impact on and near the waterfront, including the eastern portion of West Street and the northern portion of Main Street.

Over the same period of years, the process of tendering passengers to shore has become a more efficient operation. In the early years, the Tender Parties (i.e., the pier owners, tender-vessel LLCs, and BHWW) would augment the cruise lines’ tender operations so that passengers came ashore in a variety of ships, including whale watch ships. In 2017, the Tender Parties designed and built three vessels dedicated to tendering cruise ship passengers. They also invested in barges to facilitate the movement of passengers from the cruise ships to the tender vessels. While these developments are

commendable from the standpoint of market efficiency, part of the transactional cost is that the demand for tender operations means that cruise ship tenders have become the dominant harbor traffic during the expanded cruising season.<sup>4</sup>

For some, the expansion of tourism resulted in a return on planning and investment. For others, it resulted in a growing disaffection with municipal life. Increasingly, town leaders heard from constituents who were experiencing this disaffection.<sup>5</sup> Then came COVID. During the visitation-hiatus brought about by COVID quarantine orders—which restrictions impacted both land and sea visitation to Bar Harbor and Acadia National Park—some residents of Bar Harbor were reminded that there are measures of a municipality’s success other than its volume of business.

In January of 2021, Bar Harbor commissioned a marketing research firm to perform a quantitative study and write a report concerning local opinions.<sup>6</sup> Ex. 323. The survey

---

<sup>4</sup> Each of the three tender vessels is licensed to hold 149 passengers and they steadily rotate into and out of the harbor in roughly 30-minute intervals, primarily disembarking passengers onto the piers mid-morning and embarking them again in the afternoon, though passengers move back and forth throughout the day. Consequently, there are times of day that involve more intense movement of people in either direction, not unlike the tide, albeit more regular in terms of timing. Foreign-flagged vessels, for example, arrive mid-morning and spend on average nine hours at anchorage. Their passengers spend on average six to seven hours on land in various locations, including downtown Bar Harbor. In the morning, passengers congregate near the piers and waterfront, including at motor coach staging areas, while some passengers walk into the Town. Passengers may be in any number of locations during the day, such as on a whale watch tour or an Acadia bus tour, or at a local restaurant or business. In the afternoon, passengers (and their assorted conveyances) again congregate near the piers to obtain passage back to their cruise ship.

<sup>5</sup> Town Council Chair Valerie Peacock testified that in 2020 and continuing residents of Bar Harbor have expressed strong feelings of angst over the perceived negative impact of the cruise ship industry, but also concern over the expansion of tourism in general. July 13 Tr. at 112–13, 121–25.

<sup>6</sup> Pan Atlantic Research’s study surveyed year-round and seasonal residents, property owners, and business owners of Bar Harbor to examine what they thought about sea-based tourism. *See generally* Ex. 323. Overcrowding, too many ships/tourists, and environmental concerns ranked among the most popular answers to Bar Harbor’s greatest challenges in managing cruise ship tourism. Ex. 323 at 29; *see also* July 13 Tr. at 212:14–214:9 (describing the increased street traffic and congestion at the waterfront when cruise ships arrive).

had a healthy response rate. Many respondents voiced concern for the congestion<sup>7</sup> caused by cruise ship visits and ranked cruise ship tourism a net negative for the Town. The growing concern over popular sentiment was also acknowledged by the cruise industry. In July of 2021, the president of the Cruise Lines International Association proposed new passenger caps as part of a “negotiation” with the Town. The proposal, accepted by the Town Council, involved a daily passenger reduction for the shoulder season<sup>8</sup> and a new monthly cap of 65,000 visitors specifically to address concerns of capacity. Although public pressure was growing, the Bar Harbor Town Council, ultimately, was not then constituted to provide the pressure relief that many citizens hoped for.<sup>9</sup>

On February 15, 2022, the Council approved the formation and membership of a new working group to explore the modification of the daily passenger limits for the 2023 and 2024 cruise seasons.<sup>10</sup> On August 16, 2022, the Town Council accepted the task force’s recommendation to enter into a memorandum of agreement (“MOA”) with each

---

<sup>7</sup> Congestion is not exclusively a matter of pedestrian congestion on sidewalks. Congestion includes vehicular congestion and overcrowding of stores, parks, and other public spaces.

<sup>8</sup> By 2019, it was a misnomer to describe the months of September and October as a “shoulder season” when describing the volume of cruise ship passengers coming ashore in Bar Harbor. In fact, over 60 percent of Bar Harbor’s annual cruise ship passenger visits occur in September and October. September and October are also the months that see the most visitation by the very largest vessels (>3,500 passengers). *See, e.g.*, Ex. 165. According to CruiseMaine’s director, the number of cruise visitors entering Bar Harbor in September and October is roughly equivalent to the number of tourists on town streets in June and July.

<sup>9</sup> At trial, counsel for Plaintiffs worried that testimony concerning public disaffection and council activities (much of Chair Peacock’s testimony) was an attempt to construct a false legislative history in support of the Ordinance. I have not interpreted the testimony in that fashion. Rather, the testimony related some of the contemporaneous local history that set the stage for the success of the Initiative.

<sup>10</sup> Separately, the Bar Harbor Cruise Ship Committee was already corresponding with the Cruise Lines International Association to explore ways of reducing cruise visitation. Ex. 214.

cruise line and directed the preparation of a form MOA for circulation.<sup>11</sup> The resulting MOA withdrew the months of April and November from the Town’s reservation system, lowered daily passenger caps from 5,500 to 3,800 for the months of May, June, September, and October (with a +200-passenger leeway), and instituted a new monthly cap of 65,000. In September and October of 2022, the Town entered into MOAs with American Cruise Lines, Disney Cruise Lines, Holland America Line, Hurtigruten Expeditions, Norwegian Cruise Line, Pearl Seas Cruises, Princess Cruises, Rogay Caribbean Cruises, Seabourn Cruise Line, Viking Cruises, and Windstar Cruises Marshall Islands.

While the Town Council publicly pursued its voluntary measures, a group of local residents formed a petitioning committee to advance a citizens’ initiative that would achieve more significant reductions by mandatory means. Their initiative proposed amending the Bar Harbor Code to require a permit to disembark cruise ship passengers “on, over, or across any property located within the Town of Bar Harbor.” Ex. 243A. It also specified that “no more than 1,000 passengers, in the aggregate, may disembark on a single calendar day.” *Id.* The Initiative called for a \$100 minimum penalty per excess unauthorized disembarkation, which would be assessed against the property owners (the Pier Operators). The Initiative states that the harbormaster shall develop rules and regulations to establish a reservation system for disembarkation, a mechanism for counting and tracking disembarkations, a procedure for reporting violations, and “any other

---

<sup>11</sup> Two weeks prior, on August 2, 2022, the Town Council went into executive session to discuss the citizens’ petition that would become the Ordinance but was, at that time, still in need of voter approval. Exs. 207–210. The Town Council also conducted a workshop on that date to discuss the future of cruise tourism in Bar Harbor. Among other matters under consideration were cautionary litigation warnings from the Cruise Lines International Association. Ex. 211.

provisions” deemed necessary. *Id.* By the time the Initiative went to vote, the citizens’ group had revised it by substituting the word “persons” for “passengers.” Ex. 243B. They did this based on a group member’s observation that cruise ships carry a great many crewmembers as well as passengers. The group decided it would be best to use the term persons to capture both passengers and crew. Ex. 230.

The Initiative included a lengthy statement of purpose focusing on quality of life, but also expressing concern for public safety and the commercial interests of businesses other than those seeking the patronage of cruise ship passengers.

Concerning quality of life, the Initiative’s sponsors wrote:

Underlying this proposed amendment is the fact that, in recent years, the Town has been a popular port of call for cruise ships of varying sizes, from which passengers disembark via tender boats that offload passengers directly into the downtown area. The large numbers of passengers have overwhelmed the downtown area, resulting in excessive congestion and traffic on public streets and sidewalks, frequent overcrowding of parks and other public spaces, and inundating local amenities and attractions, all of which result in a diminished quality of life for Town residents.

Ex. 243A. Concerning public safety and other business interests, the sponsors wrote:

The unchecked and continued influx of disembarking cruise ship passengers in the downtown area jeopardizes the Town’s ability to deliver municipal services to Town residents and visitors (for example, cruise ship passengers), including the provision of public safety services (police and fire), emergency medical services (EMS), in-patient and out-patient services at local hospitals, pandemic control measures, and public sanitation services, and also impacts the ability of local shops, restaurants, and other businesses to attract and serve customers.

*Id.* The sponsors then summarized:

A town-wide survey was conducted in 2021, showing that a majority of respondents believe that the 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.

*Id.*

The Initiative was listed as an article on the warrant for Bar Harbor’s November 8, 2022, special town meeting. A majority of the registered voters who voted supported the article. Bar Harbor now has a land use ordinance that establishes a disembarkation cap of 1,000 persons per day.

During trial, Mr. Sidman testified that the 1,000-person cap was not the product of “a rigorously defensible finding or study or calculation.” July 13 Tr. at 312:20–21. The group proposed various caps, some higher, but ultimately arrived at 1,000 persons. In communication with other members of his group, Mr. Sidman expressed a preference for smaller cruise ships because the passengers on smaller cruise ships tend to be more well-to-do. He also expressed a dislike of “the biggies,” meaning the larger cruise ships.

#### Subsequent Rulemaking

A variety of details remain for purposes of sorting out the best approach to implementing the Ordinance. These include proposed rulemaking to exclude crew from the 1,000-person limit (for reasons that will be explained shortly), determining how best to monitor passenger volume, and determining how to proceed in the event the limit is disregarded by the Pier Owners. *See, e.g.*, Exs. 66, 204. However, at present implementation and rulemaking are suspended pending this immediate facial challenge to the Ordinance.

#### Findings Concerning the Initiative’s Stated Purposes

To the extent the Initiative expresses concern for public safety due to congestion located anywhere other than the waterfront, West Street and lower Main Street, there is no



empirical data to enable a fact finder to allocate responsibility for a degradation in overall municipal public safety between cruise and land-based tourism. But at the waterfront, the press of cruise ship passengers is sufficient to raise safety concerns. Indeed, the initiative sponsors' stated concern for public safety is echoed by the cruise industry. Ex. 32 §§ 5.3, 5.4. However, at least to date there does not appear to be an incident illustrating any past failure in the delivery of public services occasioned by passenger congestion at the waterfront.

Where the stated purposes have greater significance is in regard to congestion and all that congestion entails, such as overtaxed public facilities, long lines, crowded sidewalks and businesses, slowed traffic, and the like. To be fair, some days with pronounced congestion in Bar Harbor may occur when a cruise ship is not at anchorage. Nighttime congestion may be particularly bad on some evenings, despite the absence of cruise ship passengers. But the idea proposed by Plaintiffs and Plaintiff-Intervenor that cruise ship traffic has a negligible impact on local conditions is disingenuous. What video evidence was presented by Plaintiffs or Plaintiff-Intervenor was more in the nature of pro-cruise marketing material that was not representative of the daily impact of cruise-related visitation and, instead, depicted quieter moments on quieter days.

It is not the fault of cruise ship passengers that the area is congested; it simply is the reality of conditions existing on the ground. Cruise ship passengers come ashore in an area of limited space nestled between the Public Pier and Harborside Hotel. One of the piers over which cruise ship passengers travel sits at the east end the harbor, adjacent to the Public Pier, near the juncture of Main Street and West Street. The other pier sits at the

west end of the harbor. Between them is a short stretch of commercialized waterfront along West Street. The passengers' impact on the relatively confined waterfront area is marked,<sup>12</sup> though their spillover impact on the Town more widely is best described as cumulative. But even further up Main Street and in public areas the impact is real and tangible to locals who visit the downtown.

As attested to by witnesses Dr. Bill Horner, Nathan Young, and Seth Libby, the press of people in the downtown intensifies on cruise ship days. Dr. Horner described it as a dramatic growth in the press of people with a tremendous amount of traffic, particularly in the waterfront area. Mr. Young described sidewalks busy enough that he prefers to walk in the street when he has to go downtown on a cruise ship day. Mr. Libby described the scene similarly, stating that cruise ship visits produce greater crowding. The witnesses also testified that they avoid the downtown on cruise ship days due to the extent of the congestion. Horner, Libby, and Young all testified that they voted in favor of the initiative because they felt that elected officials had failed to act in a timely or meaningful manner to curtail the impact of cruise ship visits. I find that these witnesses provided a fair and accurate assessment of the impact of cruise ship visits in terms of both the intensification of congestion and the undesirability of a trip downtown for many residents on "cruise ship days," which increasingly means most days of the cruise ship season.<sup>13</sup>

---

<sup>12</sup> See, e.g., Ex. 32 § 5.3. Congestion is bad enough that the Cruise Line Industry Association has proposed that Bar Harbor give over to cruise passenger traffic most of the public pier as well. *Id.* at §§ 5.3, 5.8. This would effectively give over the vast majority of Bar Harbor's waterfront to the primary function of facilitating cruise ship passenger arrival and departure during the cruising season.

<sup>13</sup> Plaintiffs and Plaintiff-Intervenor offered the testimony of Professor Todd Gabe, Ph.D., of the University of Maine, who studied congestion in Bar Harbor's tourist district. One study occurred at the tail end of August and essentially concluded that allowing 680 *additional* cruise ship passengers (i.e., more than the

Congestion in downtown Bar Harbor is a seasonal fact of life, but it is empirically exacerbated by the regular morning and afternoon pulse of cruise ship passengers and the tour buses and other vehicles<sup>14</sup> that arrive to cater to them. In addition, fall congestion is largely a function of cruise ship visitation, resulting in an undeniable change to the annual rhythm of municipal life. Cruise ship passenger visitations may well be viewed by rational voters as indulgent and burdensome surplusage in an already taxed ecosystem. In this sense, the initiative sponsors' stated concern for generalized welfare and quality-of-life considerations is neither unsubstantiated nor unrelated to the unique congestion problem associated with high-berth cruise tourism, let alone arbitrary and irrational.<sup>15</sup>

#### Findings Concerning the Ordinance's Impacts

Most of the cruise lines that schedule visits to Bar Harbor plan visits in cruise ships having a lower berth capacity in excess of 1,000. Only 27 of the 134 ships scheduled to make calls in the 2023 season would be able to disembark their entire complement of passengers without exceeding the cap. It appears unlikely that a cruise line will schedule

---

daily 3,500 passenger cap for August) would result in only a negligible *further* experience of congestion in a town already impacted by land-based tourism and the baseline 3,500 cruise ship passengers. Ex. 319 at 2. Professor Gabe also spent a number of days walking about Bar Harbor and recording his subjective experience at various times and locations. About half of the walks he took were “at times early in the morning, during months outside the peak tourism seasons and in inclement weather, or at places located on the outskirts of the tourism district.” Ex. 319 at 6. I did not find Professor Gabe’s testimony or reports to be helpful in terms of achieving whatever finding Plaintiffs and Plaintiff-Intervenor intended me to draw.

<sup>14</sup> See, e.g., Ex 12A; Ex. 32 § 4.2. In addition to tour buses, there are vans, minibuses, motor coaches, taxis, and bike tours. While the pulses of congestion are most keen in the mid-morning and afternoon, there is a greater mid-day press as well, which the restaurateur members of APPLL seek to capitalize on.

<sup>15</sup> Plaintiffs insist that the Town of Bar Harbor must prove that the Ordinance can be based on a finding that the one-thousand-and-first passenger disembarked and every passenger who follows is somehow a “noxious” or “toxic” threat to the well-being of the Town. See, e.g., Pls.’ Reply Br. at 6, 16, 20, 34. I do not believe that is the test. The Ordinance is obviously designed to draw a line between levels of impact occasioned by the berth capacities of cruise ships, not the relative innocuousness or noxiousness of individuals.

a port call for purposes of a shore visit if it cannot disembark its ship's entire complement of passengers on a single day. Consequently, in terms of the volume of visitors disembarking from cruise ships, the likely avoidance of the large vessels will reduce passenger visitation volume by a significant percentage, likely north of 80 and possibly as high as 90 percent (in the short term) compared with the peak numbers experienced in 2022 and 2023.

Cruise lines with large ships will, necessarily, adjust their itineraries and reroute high-berth ships to other ports. Plaintiffs would likely feel a financial impact occasioned by reduced cruise passenger patronage. The pier and tender boat operators will likely lose fees, the APPLL members will likely experience a reduction in business and will perhaps close during the shoulder season or retain fewer employees in those months, and the Pilots Association will have decisions to make related to maintaining personnel, vessels, and equipment without the revenue generated by regular piloting of the largest cruise ships into and out of Frenchman Bay.

Because no ecosystem is static, presumably some cruise lines will adjust practices to maximize utilization of the new caps. However, the record does not contain evidence that would allow for a reliable calculation on that score, nor would I expect it to.<sup>16</sup> There is no evidence to suggest, for example, that the cruise lines with the smaller ships have

---

<sup>16</sup> The cruise industry stated in 2019 that it “is poised to continue its overall expansion, adding new ships faster than retiring them.” Ex. 32 § 6. “The demographics of the passengers seeking cruises in a given area will largely dictate the size and amenities of vessels. Vessels should be considered moveable high-value assets for generating shareholder profits. To this end, cruise companies will evaluate the yield achievable by a ship assignment in a given market.” *Id.* Conceivably, if, as the cruise lines evidently fear, more municipalities impose capacity restrictions, then certain cruise lines will reconsider their decision to focus on maximization of economies of scale in cruise ship design.

either a sufficient number of ships or that their cruises are in sufficient demand to approach the caps on a regular daily basis. Even if visitation is eventually maximized under the Ordinance, the overall number of cruise ship passenger visits would be significantly less than the level of visitation experienced in 2022 and 2023 and less than a third of the level authorized under the recent MOAs.

## **DISCUSSION**

Plaintiffs allege in their Complaint (ECF No. 1) that Bar Harbor’s new Ordinance is preempted by operation of the United States Constitution’s Supremacy Clause (Count 1), violates the Commerce Clause (Count 2), and offends “substantive due process” (Count 3). Plaintiff-Intervenors similarly allege in their Complaint-in-Intervention (ECF No. 43) that the ordinance violates the Supremacy Clause (Count 1) and the Commerce Clause (Count 2), but additionally allege that the ordinance is preempted under the Maine Constitution based on alleged conflict with Maine’s statutory pilotage system (Count 3) and its statutory economic and community development program (Count 4).

I address the Maine Constitution first before turning to the federal claims.

### **A. The Maine Constitution**

The Maine Constitution affords municipalities home rule authority. “The 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 Legislature shall prescribe the procedure by which the municipality may so act.” Me. Const. art. VIII, pt. 2, § 1. Home rule authority has been conferred on Maine municipalities by the Maine Legislature to the maximum extent of the Legislature’s power

to grant it, excepting only home rule authority that is elsewhere denied expressly or by clear implication in Maine law, *see* 30-A M.R.S. § 3001, or where “the municipal ordinance in question would frustrate the purpose of any state law,” *id.* § 3001(3). When the exercise of home rule is challenged, the municipal power authorized under Maine law is to be “liberally construed to effect its purposes” and courts must apply a “rebuttable presumption that any ordinance . . . is a valid exercise of a municipality’s home rule authority.” *Id.* § 3001(1), (2).

The Maine Constitution also extends to each Maine municipality the authority to provide for their electors to exercise “the direct initiative . . . in regard to its municipal affairs.” Me. Const. art IV, pt. 3, § 21. The authority of municipal electors (i.e., voters) to legislate by means of a direct initiative is coextensive with the authority of the municipality to exert its home rule authority. *Portland Reg’l Chamber of Commerce v. City of Portland*, 253 A.3d 586, 592–93 (Me. 2021). It was thus an exercise of home rule authority when the petition committee circulated the initiative that resulted in Bar Harbor’s challenged Ordinance.

Plaintiff-Intervenor does not contend that the petition process and resulting initiative exceeded any state or municipal law or rule insofar as the Ordinance’s enactment is concerned. Nor does it contend that the initiative is not an exercise of home rule authority involving municipal affairs. Instead, Plaintiff-Intervenor contends that the Ordinance prevents the accomplishment of state priorities articulated in state laws respecting the establishment of a system of pilotage and a program of economic and community development. Challenges involving the “implied” prohibition “must be evaluated on a

case-by-case basis by examining the language of the ordinance and any statutes enacted by the Legislature.” *Id.* at 593.

In Maine Revised Statutes Title 38 the Maine Legislature has declared a policy and purpose “to provide for a system of state pilotage in order to provide maximum safety from the dangers of navigation,” “to maintain a state pilotage system devoted to the preservation and protection of lives, property, the environment and vessels,” and “to insure the availability of pilots” 38 M.R.S. § 85. The pilotage statute then goes on to define terms, outline jurisdiction, specify the vessels that must take pilots, prohibit piloting without a license, establish a pilotage commission and outline its duties, and set up a system of licensure for pilots. None of these statutory provisions prohibits a municipality from enacting an ordinance that restricts local passage from private piers onto municipal property. Nor does the Ordinance conflict with the objective of the Legislature when it comes to pilotage. Pilots remain free to conduct their profession and to pilot vessels within the region, including by piloting them to Frenchman Bay anchorages. Nothing in the pilotage statute can reasonably be construed as a legislative intention, express or implied, to divest municipalities of home rule authority over local, land-based, police power concerns whenever the exercise of that authority could foreseeably impact the volume of business available to pilots. The establishment of a pilotage system is not an implicit statutory surrogate for compulsory, maximal municipal participation in cruise tourism.

Plaintiff-Intervenor also argues that Maine’s statutory intention of “formulat[ing] and implement[ing] economic development policies and programs” that are coordinated among the State’s several agencies and various “municipal and regional economic efforts,”

5 M.R.S. § 13052, will not tolerate an exercise in municipal home rule that curtails cruise tourism. With the statute in question, the Maine Legislature organized a Department of Economic and Community Development. *Id.* §§ 13054, 13055. The Department is empowered to, among other things, implement policies and programs, work with other organization including municipalities, conduct planning and research, communicate with the private sector, prepare and distribute publications, and implement programs assigned to it by the Governor or Legislature. *Id.* § 13056. The Department's Office of Tourism is empowered to engage in promotional and informational activities, encourage development, review and comment activities, and similar activities. *Id.* §§ 13090-C, 13090-E. However, it has no power to compel or even regulate municipal engagement with cruise line tourism.

While the Department and the Office have rule-making authority, Plaintiff-Intervenor does not rely on any rules to support its preemption claim. Instead, Plaintiff-Intervenor argues that any municipal action inconsistent with greater economic development necessarily prevents coordination as well as economic and community development. The argument is essentially that through declaration of an economic and community development goal and creation of a related department and tourism office, the Maine Legislature has imposed a duty on every municipality and political subdivision to act in the best interest of the Chamber of Commerce. Of course, if the maximization of commerce were compulsory, a vast body of zoning and land use regulation would not be worth the paper it is written on. To be certain, most municipalities yearn for the types of burdens of fortune that Bar Harbor experiences. The broad and undifferentiated aspiration toward commercial health made manifest by the Legislature's creation of the Office of



Tourism and CruiseMaine is sensible and one supposes is in league with the desires of most municipalities most of the time. However, the picture of commercial development is not painted in primary colors alone but rather exists in a pastiche of other municipal considerations. A municipality that rationally exercises its home rule authority in a manner which is modestly in tension with the highest marginal commercial harvest, the type which is the sine qua non of the tourism office, is not an outlaw.

The fact is that the Legislature has not empowered these instrumentalities to override municipal home rule authority. The Legislature has not even empowered these instrumentalities to wield the interstitial power of a special master or an ombudsman in matters of municipal and cruise line conflict. If it had, then some manner of administrative process would have preceded before or alongside this litigation. Yes, CruiseMaine may support, educate, promote, and play the part of a sales broker when it comes to cruise tourism, but decidedly missing from the enumerated powers is the power to trump home rule authority to dictate acceptable levels of municipal participation in cruise tourism.

Nor can the mere existence of the Department or its tourism-focused instrumentalities be regarded as an implied prohibition against a local municipal determination to reduce engagement with the cruise line industry. Public bodies may exercise only the powers conferred upon them by law. The conferral of powers must be found “in the enabling statute either expressly or by necessary inference as an incidence essential to the full exercise of powers specifically granted.” *Hallissey v. Sch. Admin. Dist. No. 77*, 755 A.2d 1068, 1072 (Me. 2000). The derogation of home rule authority must rest on something more immediate and direct than the Legislature’s pro-commerce

proclamations and the institution of a body tasked with broadly supporting and promoting, but not regulating, tourism. If home rule authority is to be overcome it ought to be based on something with a little more starch, such as the text of the law. As is so often the case, when textual (i.e., legal) support for a challenge to home rule authority is lacking, an invitation is made to the court to begin at the intellectual equivalent of divining legislative intent from high upon the pillars, which is to say, an appeal toward sophistry. To be certain, for some there is an intoxicating appeal to wielding such authority, acting as a sort of judicial “God of the gaps” and the line is long of those only too eager to cast their light upon the unwashed masses to shepherd us through the darkness left by the democratic process. For ease of analysis, this case does not present a close call of implied prohibition of home rule. Any argument of implied prohibition of municipal home rule authority must be attended by a particularly muscular example of how the purpose of the enabling legislation is at cross purposes with the home rule. The analysis cannot be one of contingencies or at least if it is, must ultimately be tethered to the noncontingent, a prime mover example in the law that demonstrates how home rule errs.

The Legislature should not be viewed as having impliedly prohibited the exercise of municipal home rule authority in an area that the Legislature has not even attempted to regulate in any direct manner. Even in areas that the Legislature has regulated directly, municipal home rule authority is not so easily preempted. *See, e.g., Portland Reg'l Chamber*, 253 A.3d at 591 (upholding Portland’s minimum wage ordinance despite existence of state minimum wage statute); *Portland Pipe Line Corp. v. City of S. Portland*, 240 A.3d 364, 368 (Me. 2020) (holding that Maine Coastal Conveyance Act, which

involved the State's exercise of police power in matters of oil transfers, did not preempt a local ordinance that prohibited an activity even though the Maine Department of Environmental Protection ("DEP") had issued an approval that allowed for but did not require the activity in question); *E. Perry Iron & Metal Co., Inc. v. City of Portland*, 941 A.2d 457, 463 (Me. 2008) (upholding municipal regulation of junkyard in absence of evidence that it frustrated the purposes of Maine's Solid Waste Act); *Smith v. Town of Pittston*, 820 A.2d 1200, 1201 (Me. 2003) (4-3) (upholding municipal ordinance banning the spread of septage in the Town of Pittston despite existence of DEP rules establishing minimal performance criteria for such spreading, DEP's award of permit application to conduct such spreading, and legislative intent to encourage development of affordable, environmentally suitable waste disposal sites). When it comes to the growth of tourism in Maine there simply is no state-sanctioned regulatory scheme to frustrate, only a broadly worded aspirational objective of regional economic coordination and an associated initiative of the Office of Tourism to support, educate, and promote cruise communities.

Plaintiff-Intervenor's claims of preemption under the Maine Constitution (Complaint in Intervention Counts 3 and 4) fail.

## **B. The United States Constitution**

Plaintiffs and Plaintiff-Intervenor mount challenges to Bar Harbor's Ordinance based on the Supremacy Clause and the Commerce Clause. Pls.' Compl. Counts 1–2; Compl. in Intervention Counts 1–2. Plaintiffs add a claim under the Due Process Clause. Pls.' Compl. Count 3. I begin my review with the Supremacy Clause, move on to the Due Process Clause, and finish with the Commerce Clause.

### 1. *The Supremacy Clause*

The Supremacy Clause provides that “the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Due to the Supremacy Clause, when Congress enacts a statute, state law is preempted to the extent of any conflict with the federal statute. *Haaland v. Brackeen*, 599 U.S. 255, 287 (2023). Sometimes a federal statute will expressly preempt state law, but preemption also can arise “by virtue of restrictions or rights that are inferred from statutory law.” *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020). Preemption can result, for example, based on the inference that Congress has effectively occupied the field in a certain area of regulation even though Congress has not announced a preemptive intention. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973). Preemption can also result based on the existence of competing commands, allowances, or standards in federal and state law. “If federal law ‘imposes restrictions or confers rights on private actors’ and ‘a state law confers rights or imposes restrictions that conflict with the federal law,’ ‘the federal law takes precedence and the state law is preempted.’” *Garcia*, 140 S. Ct. at 801 (quoting *Murphy v. National Collegiate Athletic Assn.*, 138 S. Ct. 1461, 1480 (2018)). However, “[i]nvoicing some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law.” *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019).

“[T]he basic question involved in [Supremacy Clause] cases . . . is never one of

interpretation of the Federal Constitution but inevitably one of comparing two statutes.” *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965). “[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.” *Hillsborough Cnty., Fla. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

a. Federal regulation of maritime matters

Plaintiffs point to the many ways in which federal law applies to vessels, seafarers, and ports or “maritime terminal facilities” to argue that there is no room for a municipality to restrict shore access via port facilities. The cited federal law, rules, and regulations, however, do nothing to legislate in the area of cruise tourism (or even—with one exception—landward passage). Plaintiffs cite the Federal Maritime Transportation Security Act, 46 U.S.C. §§ 70101-70132, which governs “port security,” and the entire Coast Guard Authorization Act, Pub. L. 111-281, 124 Stat. 2905 (Oct. 15, 2010), which as the title suggests authorizes appropriations for the Coast Guard. Bar Harbor’s Ordinance clearly does not compete with federal law in the area of port security or Coast Guard operations.<sup>17</sup>

Plaintiff-Intervenor advances similar preemption arguments to those pressed by Plaintiffs but shifts the focus slightly to contemplate the regulatory burdens imposed on

---

<sup>17</sup> In Plaintiffs’ rundown of federal law touching on vessels and maritime facilities, they cite 33 C.F.R. § 105.105(a)(2) for the proposition that Coast Guard regulations under the Maritime Transportation Security Act are intended to be preemptive. Pls.’ Br. at 20. The reference is perplexing because it merely states that the requirements of maritime security for facilities apply to the owner or operator of a facility that receives vessels certified to carry more than 150 passengers, yet Plaintiffs have elsewhere informed the Court that the tender vessels are licensed to hold 149 passengers. In any event, clearly the Bar Harbor Ordinance was not drawn to impose competing security standards for maritime facilities.

cruise lines and pilots. The Pilots Association argues that because “[t]he federal presence in the area of navigation, safety, and environmental protection is extensive, pervasive, demanding, and complex,” and “follows a vessel from its design phase through its ultimate scrapping,” and “link[s with] a series of international agreements dependent upon the predictability of access to ports,” and involves oversight by the Coast Guard, Customs and Border Protection, the Centers for Disease Control and Prevention, the Environmental Protection Agency, and the Federal Maritime Commission, “[l]ocal restrictions on vessel operations . . . pose a direct threat to the necessary uniformity of federal oversight and the efficient operation of cruise . . . vessels.” Pl.-Int.’s Br. at 9–10 (ECF No. 190). This language checks off the lawyerly rhetoric box but fails to tease out any actual conflict. The Ordinance simply does not purport to regulate vessel requirements or make the operation or navigation of cruise vessels any less safe, environmentally sound, or efficient. Nor does it interfere in any way with the performance of cruise line oversight by the Coast Guard, CBP, CDC, EPA, or the FMC. Nor can it be said that any one of the identified agencies has attempted to occupy the regulatory field when it comes to balancing competing interests related to a municipality’s participation in cruise tourism. Federal regulation in this arena is not even extant, let alone pervasive. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973) (“It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption.”).

Plaintiffs and Plaintiff-Intervenor’s invocation of all the many ways that federal law touches upon maritime traffic is precisely the kind of “brooding federal interest” mentioned in *Hillsborough*, 471 U.S. at 713. As such, it does not suffice to support the preemption of

Bar Harbor’s disembarkation restriction.<sup>18</sup>

b. Seafarer shore access

When Plaintiffs and Plaintiff-Intervenors do dive down into the maritime regulations to retrieve something specific, the palatable<sup>19</sup> oyster they surface with is a preemptive maritime security regulation that requires the owners or operators of maritime facilities (such as Plaintiff Pier Owners) to ensure shore access for seafarers who wish to transit from a vessel through or over regulated facilities. 33 C.F.R. § 105.237.<sup>20</sup>

(a) Access required. Each facility owner or operator must implement a system . . . for providing access through the facility that enables individuals to transit to and from a vessel moored at the facility and the facility gate in accordance with the requirements in this section. The system must provide timely access as described in paragraph (c) of this section and incorporate the access methods described in paragraph (d) of this section at no cost to the individuals covered.

(b) Individuals covered. The individuals to whom the facility owner or operator must provide the access described in this section include—

---

<sup>18</sup> Plaintiffs muse in their post-trial brief that the Ordinance is unenforceable because the Pier Owners lack the authority to stop or turn back cruise ship passengers who arrive at the pier. Pls.’ Br. at 31 n.27 (also noting that this point is “not part of this legal challenge”). The idea that the Pier Owners cannot lawfully comply ignores the reality that cruise ship passengers (and crew) arrive at the piers pursuant to a prearranged reservation system and have long done so with the understanding that a free-for-all would result in chaos and passenger dissatisfaction with the shoreside experience. Besides, compliance should present no difficulty as we are assured by Plaintiffs and Plaintiff-Intervenor that oversized cruise ships will no longer call at Bar Harbor.

<sup>19</sup> Plaintiff-Intervenor also cites 33 U.S.C. § 5, which prohibits the levying of tolls “or any other impositions whatever,” upon vessels, water craft, or their passengers or crew, by “any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States.” Pl.-Int.’s Reply Br. at 12. This oyster has spoiled. The argument is waived for purposes of this litigation since it was first raised in a reply brief. But in any event, the Ordinance is designed to prevent excessive disembarkations from cruise ships, subject to a fine imposed against the pier owner to ensure compliance. It is not a toll, fee, or other imposition directed toward cruise ships or their passengers and crew associated with their use or enjoyment of navigable waters.

<sup>20</sup> The regulations provide that part 105 has preemptive effect “insofar as a State or local law or regulation applicable to the facilities . . . would conflict with the regulations in part 105, either by actually conflicting or by frustrating an overriding Federal need for uniformity.” 33 C.F.R. § 101.112(b).

- (1) Seafarers assigned to a vessel at that facility;
- (2) Pilots; and
- (3) Representatives of seafarers' welfare and labor organizations.

*Id.* § 105.237. Cruise ship passengers are not seafarers. Seafarers are persons “assigned to a vessel” (i.e., crew) or “pilots” or “[r]epresentatives of seafarers’ welfare and labor organizations.” *Id.* § 105.237(b); *see also id.* § 96.250(f)(4) (providing that safety management systems include personnel procedures ensuring that “[e]ach vessel is properly crewed with qualified, certificated and medically fit seafarers”).

Because the Bar Harbor Ordinance is drawn as a restriction on the numbers of “persons” and not just “passengers” who may be disembarked on or over municipal land, Plaintiffs and Plaintiff-Intervenor proclaim a victory. I agree with Plaintiffs and Plaintiff-Intervenor (and evidently with Defendant and Defendant-Intervenor) that the Ordinance cannot stand as a barrier to seafarers’ shore access when a seafarer is assigned to a vessel moored at either pier facility owned by the Plaintiff Pier Owners. To the extent the Ordinance might be read to require a different conclusion, it cannot be enforced. However, it does not follow that the entire Ordinance is invalidated or that any meaningful relief is to be awarded in this litigation as a result of the limited (and hypothetical) preemption occasioned by the seafarers’ access regulation.

The scope of preemption “is guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (cleaned up). “That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.” *Medtronic, Inc. v.*



*Lohr*, 518 U.S. 470, 485 (1996); *see also Consumer Data Indus. Ass’n v. Frey*, 26 F.4th 1, 12 (1st Cir. 2022) (remanding for district court to analyze the scope of a federal law’s preemptive impact), *cert. denied*, 143 S. Ct. 777 (2023). Here, the purpose of the federal regulation is to assure seafarer access to shore when seafarers are aboard and assigned to a vessel moored at the regulated facility. Consequently, the preemptive reach of the federal seafarers’ access regulation extends no farther than to a controversy involving an attempt by Bar Harbor to deny shore access to a seafarer on a vessel moored at either facility.

This case does not present any actual controversy of that (or any other actual) kind. Moreover, even if the conflict preemption associated with the seafarers’ access regulation is appropriately resolved in the context of this litigation, it would not achieve the result that Plaintiffs and Plaintiff-Intervenor seek, which is total invalidation of the Ordinance. A limited invalidation of the Ordinance for purposes of seafarers’ access would not render the Ordinance an ineffective instrument to impose a disembarkation cap against cruise ship passengers, since passengers are not seafarers.

Plaintiffs and Plaintiff-Intervenor insist nonetheless that invalidation of the Ordinance based on its use of the word “persons” instead of “passengers” should be total. I digress to address this assertion, though it is unavailing. The genesis of the digression is the fact that Bar Harbor has indicated that it will author a rule that limits the Ordinance by recognizing an exception for shore access for seafarers. When a state, municipality or local agency interprets or enforces a law in a manner that avoids a conflict with federal law, ordinarily mere facial constitutional challenges are effectively deflected. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 456 (2008); *Ward v. Rock Against*

*Racism*, 491 U.S. 781, 795–96 (1989); *McGuire v. Reilly*, 386 F.3d 45, 58 (1st Cir. 2004). However, here the Ordinance’s use of “persons” unambiguously extends to seafarers, so it is “not readily susceptible to a narrowing construction.” *Rhode Island Ass’n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 35 (1st Cir. 1999).

Plaintiffs also cite Maine Supreme Judicial Court opinions that they say preclude efforts by a municipality to confine the reach of a citizen initiative by means of a rulemaking process. They contend that the only available fix requires an initiative and election do-over. The cases Plaintiffs cite do not support the proposition. *See Wawenock, LLC v. Dep’t of Transp.*, 187 A.3d 609, 618 (Me. 2018) (discussing methods of interpreting the “will of the people” when construing citizen initiatives); *Davis v. SBA Towers II, LLC*, 979 A.2d 86, 92–93 (Me. 2008) (“Although Gridcom argues that the Planning Board’s decision to redefine the term was also procedurally improper, we need not address this claim.”). And while Plaintiffs correctly observe that Maine law requires that an ordinance be revised “only by following the procedure required for its original enactment,” 30-A M.R.S. § 3004(4), it does not compel that an ordinance be invalidated *in toto* based on a limited conflict with federal law. The default rule of constitutional jurisprudence is to the contrary, and here it takes little imagination to appreciate that the voters of Bar Harbor intended and would prefer that the Ordinance remain operative as to passengers rather than be invalidated as to passengers. *See Town of Windham v. LaPointe*, 308 A.2d 286, 292 (Me. 1973); *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–30 (2006).

In summary, yes, the Ordinance has the potential to conflict with the preemptive

seafarers’ access regulation and requires that Bar Harbor avoid any application of the Ordinance that would run afoul of 33 C.F.R. § 105.237. However, the limited conceptual conflict does not achieve the result that Plaintiffs and Plaintiff-Intervenor are after, which is total invalidation of the Ordinance.<sup>21</sup>

c. Customs and immigration

Plaintiff-Intervenor also argues that the Ordinance “obstructs customs and immigration screening of entrants to the United States.” Pl.-Int.’s Br. at 14. The idea is that cruise itineraries in the North Atlantic often include calls in Canadian ports before returning to U.S. waters, so if the first port of call in the U.S. chosen by the cruise ship’s captain is Bar Harbor, then Bar Harbor must permit unrestricted disembarkation from the cruise ship as a logical consequence of any immigration and customs inspection that transpires aboard the ship while it is anchored in Frenchman Bay.

The conflict is imagined, not real. The Ordinance does not prohibit or otherwise prevent entry to the United States. Anyone admitted to the United States by CPB through a process that transpires aboard ship in Frenchman Bay may enter the United States, including in Bar Harbor. The Ordinance does not impose an additional condition for admission or otherwise purport to supply a basis for exclusion from the United States, it

---

<sup>21</sup> Plaintiffs and Plaintiff-Intervenor fail to articulate a set of circumstances in which an as-applied challenge by a seafarer necessarily would arise and hypothetical notions about what might transpire do not suffice since “litigants mounting a facial challenge to a statute normally ‘must establish that *no set of circumstances* exists under which the [statute] would be valid.’” *United States v. Hansen*, 599 U.S. 762, 769 (2023) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987), and discussing the exception for overbroad restraints on free speech)). Assuming reservations are booked and tendering arrangements are made such that a combined total of more than 1,000 passengers and seafarers would be disembarked on a given day, further constitutional litigation based on the preemptive force of 33 C.F.R. § 105.237 is susceptible to avoidance when the Court is assured that the handling of any such scenario will be addressed in advance by the Town’s rulemaking process in recognition of the partial preemption of the Ordinance. The facial challenge presented in this litigation should not prevent that process from unfolding.

imposes only a limitation on local disembarkations and a fine for excessive disembarkations, regardless of the admission status of persons disembarked.<sup>22</sup> Nevertheless, Plaintiff-Intervenor likens this case to *Takashi v. Fish & Game Commission*, 334 U.S. 410 (1948), and *Maine Forest Products Council v. Cormier*, 586 F. Supp. 3d 22 (D. Me. 2022). Pl.-Int.’s Br. at 14–16. This case is unlike either.

In *Takashi*, the Supreme Court invalidated, on a variety of grounds, a discriminatory California law that banned lawful residents ineligible for citizenship from engaging in commercial fishing. 334 U.S. at 413–415, 422. Plaintiff-Intervenor says the Ordinance similarly discriminates. The discrimination argument relies on the fact that the largest cruise ships are all foreign-flagged vessels and the fact that all cruise ships customarily carry passengers who are foreign nationals. However, the Ordinance is not drawn in discriminatory language and nothing that transpired at trial betrayed a discriminatory purpose to exclude foreign-flagged vessels or the citizens of other nations. The Ordinance is drawn with the passenger capacity of ships in mind, not the nationality of the ships’ owners or passengers.

In *Cormier*, Judge Woodcock issued a preliminary injunction enjoining enforcement of a protectionist state statute designed to prevent foreign workers from

---

<sup>22</sup> It bears repeating that cruise ships with passenger capacities in excess of 1,000 will likely not have Bar Harbor on their itineraries. Visitation at a port is arranged many months in advance, with local, daily passenger caps in mind. Consequently, the imagined conflict between an admission decision and a refusal to allow disembarkation (or imposition of a fine on the Pier Owners for excessive disembarkations) is entirely at odds with the actual practices long observed in Bar Harbor in relation to pre-scheduled port calls. Plaintiff-Intervenor also neglected to call an expert witness to substantiate its hypothetical customs scenario of a cruise ship returning from foreign waters intent on making an appointment with CPB in Frenchman Bay as a means of forcing an unreserved port call in Bar Harbor (assuming CBP would even condone such a maneuver).

engaging in the intrastate transportation of forest products. There, the federal regulatory regime for alien work visas resulted in the issuance of work visas for the performance of specific jobs identified as part of a certification process and based on the Department of Labor's specific findings that domestic workers were not available in sufficient numbers and employment of the aliens would not negatively impact local wages and work conditions. *Id.* at 39–41 & n.12. In that context, the federal government's occupation of the field of foreign worker authorization was manifest, as was the conflict between the Maine act and federal law. *Id.* at 46. That is not the situation in this case. There is no evidence in this case or cited law demonstrating that cruise lines obtain advance federal authorization to disembark their entire complement of passengers specifically in Bar Harbor. Cruise lines present their passengers for inspection when they arrive at the Class A port designated on their own itineraries. Cruise lines are not required by federal law to apply for preauthorization to call at a particular port, let alone to disembark every passenger upon arrival. Nor does CPB make specific findings based on any federal law or regulation that cruise line passengers may disembark in any particular location in any particular numbers based on the cruise ship's passenger capacity and local conditions.

Plaintiff-Intervenor's customs- and immigration-based arguments for preemption fail to make way.

d. Anchorages

Finally, Plaintiff-Intervenor argues that because the Secretary of Homeland Security has established federal anchorages in Frenchman Bay for purposes of safe navigation, *see* 46 U.S.C. § 70006; 33 C.F.R. § 110.130, the Ordinance's regulation of onshore

disembarkation is preempted since large cruise ships with North Atlantic itineraries will otherwise have rare occasion to use the anchorages. Pl.-Int.’s Br. at 17–18. This final Supremacy Clause challenge is like the others. It fails to support an inference of federal field preemption expansive enough to blockade local regulation in matters of cruise line passenger shore access. It also fails to expose any actual conflict between federal and state law as the Ordinance imposes no restriction whatsoever on Frenchman Bay anchorage access. Cruise ships of whatever size are free to anchor in Frenchman Bay. If cruise lines chose not to anchor in Frenchman Bay because of the Ordinance, that is a function of the cruise lines’ own cost and benefit calculations. By the mere act of establishing anchorages the Secretary of Homeland Security has not conferred a charter of privileges on cruise lines to disembark their entire complement of passengers in any municipality in which there are pier operators who would welcome them. Like the other shots fired in Plaintiff-Intervenor’s Supremacy Clause fusillade, the final shot fails to sink the Ordinance.

## **2. *The Due Process Clause***

Plaintiffs, but not Plaintiff-Intervenor, claim that the Ordinance offends the Due Process Clause. The Fourteenth Amendment prohibits the States from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. Around the dawn of the Twentieth Century—an era sometimes described as the “*Lochner* era” by Supreme Court historians—the Supreme Court instilled in the Due Process Clause substantive overtones based on a natural-law preoccupation with the freedom to contract. Essentially, if two parties were willing to engage in a commercial relationship, an expression of their individual liberty, what should stand in their way or interfere with their

decisions about how to structure the relationship? According to the Court, not the majority of their peers acting through their elected representatives. *See, e.g., Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (invalidating a law regulating marine insurance); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a labor law designed to limit the hours worked by bakers); *Adkins v. Children’s Hosp. of the D.C.*, 261 U.S. 525 (1923) (invalidating a law establishing a board and an investigative and consultative process to establish minimum wages for women).

When we speak of the *Lochner* Era’s substantive due process jurisprudence today, it is mostly to express bewilderment that the Court engaged in such a freehanded practice of judicial policymaking in favor of those having commercial advantage in the marketplace, or else to extol the noteworthy dissents of the era, such as the work of Justice Oliver Wendell Holmes in *Lochner* and the work of Justice Holmes and Chief Justice William Howard Taft in *Adkins*. It reminds us, and is worthy of perennial reminding, that judicial policymaking is an insidious, antidemocratic, and narcissistic instinct still very much alive that must be resisted. Lessons from the *Lochner*-era season of judicial mischief making that are worthy of mention include the observance that “[t]he 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics,” *Lochner*, 198 U.S. at 75; that a court should avoid “pricking out a line in successive cases” when the process is akin to legislative policymaking, *Adkins*, 261 U.S. at 562 (Taft, C.J., dissenting); that the substantive “contours” of the Due Process Clause are decidedly “vague” in relation to the freedom to contract, *id.* at 568 (Holmes, J., dissenting); that when it comes to liberty “pretty much all law consists in forbidding men to do some things that they want to do,” *id.*; and that

deciding whether a law's benefits are worth its costs is a matter assigned to the legislative rather than the judicial branch of government, *id.* at 571.

When the Supreme Court finally abandoned using the freedom to contract as an antidemocratic talisman, it reaffirmed what a great many of its other decisions had long established, summing up the concern over individual liberty as follows:

[F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one will or to contract as one chooses. The guarantee of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to the government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulation and prohibitions imposed in the interest of the community.

*W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937).

And so it comes as something of a surprise that I now consider a due process challenge to the Bar Harbor Ordinance that pits the Plaintiffs' freedom to contract<sup>23</sup> against restrictions imposed in the interest of the community. But to their credit, Plaintiffs do not come right out and say it. Instead, they adopt the language of modern due process standards, contending that there is no "rational nexus" between the Ordinance's "purpose and standards and the processes . . . employe[ed] to achieve [them]." Pls.' Br. at 52 (ECF No. 191) (citing *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988) (upholding municipal rent control ordinance over a due process challenge)).

When it comes to the evaluation of the existence of a rational nexus, "courts should

---

<sup>23</sup> Plaintiffs have also asserted that the Ordinance unlawfully restrains the non-party cruise lines' and their passengers' right to travel. Presumably the freedom to travel is no more sacrosanct than the freedom to contract. I can see no reasons why natural law would elevate one over the other. Plaintiffs did not assert that the Ordinance violates individuals' right to travel in their complaint; instead, they raised this issue for the first time in their post-trial brief in a perfunctory fashion. Consequently, I do not consider the freedom to travel in this Decision and Order.



refrain from substituting their regulatory wisdom for that of the legislature. *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 483 (1st Cir. 2009). “[A] court’s Due Process inquiry should be satisfied ‘[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory.’” *Id.* (quoting *Nebbia v. New York*, 291 U.S. 502, 537 (1934)). “This inquiry should focus on whether a program’s procedures are inadequate or whether, overall, a program is arbitrary, discriminatory or irrelevant to a legitimate legislative goal.” *Id.* (internal quotation marks omitted).

Plaintiffs argue that the Ordinance defies the rational nexus requirement because it imposes a strict limit of 1,000 persons per day “for every single day of the year,” without accounting for seasonal variation in the congestion experienced in Bar Harbor as the result of tourism. Pls.’ Br. at 53. In support of their position, Plaintiffs emphasize that Mr. Sidman testified that the fixed restriction to 1,000 persons daily was not the product of “a rigorously defensible finding or study or calculation,” July 13 Tr. at 312:20–21, and that his group “just didn’t want to get into various limits at different times of the year.” *Id.* at 313:24–25.

Plaintiffs’ argument is that because Bar Harbor long employed different summer-season and shoulder-season caps it is now irrational for Bar Harbor to do otherwise. I am not convinced that adopting this rationale would be any different than imposing by judicial fiat the rule that a fixed cap is unwise policy and therefore unconstitutional because it fails to maximize tourism—because, in effect, it is my opinion or another judge’s opinion that the Ordinance’s local benefits are not worth their costs. That might as well be said about

fixing a minimum wage or imposing rent control. It is of course rational to propose that passenger caps rise and fall inversely to land-based tourism, but it does not follow that a fixed cap is therefore irrational.<sup>24</sup> The Constitution “is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question.” *Lochner*, 198 U.S. at 75–76 (1905) (Holmes, J., dissenting). The Due Process Clause does not compel Bar Harbor to eliminate visitation lulls during the shoulder season by means of increased cruise ship visitation. Nor, to my knowledge, does the Due Process Clause forbid municipalities from enacting ordinances that have the effect of preserving seasonal fluctuations in the blessings and burdens of tourism. Though Plaintiffs evidently see it as their constitutional right to maximize the burden that their commercial activity imposes on the commons, at least up to a level that approaches their capacity to serve, they have not cited any authority for that proposition.

The Ordinance’s 1,000-person daily cap reduces the profit that can be achieved from commercial engagement with cruise lines and cruise ship passengers, but it also preserves that engagement to a degree. Is it irrational for the citizens of Bar Harbor to desire a passenger cap that enhances their own relative enjoyment of their community during the summer and shoulder seasons while maintaining a measure of cruise tourism commerce? I cannot say that it is. If I were to conclude otherwise, I would simply be ratifying the

---

<sup>24</sup> I am not concerned here with the alleged irrationality of a “year-round” cap because this case does not involve year-round cruise ship traffic. When the Ordinance came into being, the MOAs between the Town and the cruise lines involved a season beginning in May and ending in October. The cruise lines have voluntarily passed on visitation between November 1 and April 30.

Plaintiffs' policy preference as being in league with my own, not because the Ordinance is discordant with the Due Process Clause. I adhere to an antiquated notion that judges should not allow robes to suffocate a sense of judicial humility by steering wildly outside their lane into the role delegated to elected representatives. Whether the Ordinance is the wisest expression of democratic will is a question for which the Constitution does not hold the answer. What may seem like a sensible policy today may strike voters as needing some renovation down the road. This is merely a *Schoolhouse Rock*-level civics lesson that nevertheless bears repeating in constitutional challenges that more appear to challenge the marginal wisdom of the law than satisfy the more capacious test of whether it offends the Constitution. Even if I were equipped to play the role of the Oracle of Delphi to answer the question of whether the Ordinance is sensible, which I am not, that is not the role assigned to me by the Constitution, contemporary trends notwithstanding.

Plaintiffs argue that it is discriminatory that the amelioration of congestion falls exclusively on them, without imposing restrictions on other accommodations or tourists who contribute to the problem. Based on my review of the record, I am not persuaded that the Ordinance discriminates in an irrational manner. Congestion in Bar Harbor is real and is experienced throughout the summer and fall months. When the Pier Owners and Tender LLCs disembark several thousand persons on a daily basis, they substantially burden Bar Harbor's waterfront and intensify the experience of congestion more widely.

Cruise line passenger traffic stands out as worthy of special consideration for a variety of reasons. For purposes of this context, among these reasons are the industry's own longstanding selective and voluntary approach to municipal engagement and its

acknowledged need for management by means of a reservation system that employs caps. Land-based tourism is not equally amenable to management and Plaintiffs have not suggested any ready means of stemming that particular stream of visitation. Cruise-based tourism is also unlike land-based tourism in that cruise ships carry passengers in numbers quite unlike any land-based conveyance. While cruise lines evidently consider local conditions in terms of the capacity of the area to provide their passengers with goods and services, they are not deterred by local “no vacancy” conditions that would deter land-based visitors. Upon arrival, cruise line passengers congregate in volume, in relatively intense morning and afternoon waves, though they also enhance congestion throughout the day. When they arrive, they are joined by a caravan of the vehicles that cater to them, congesting the waterfront area with buses, minibuses, vans, motor coaches, and taxis. Their arrival demands significant attention by municipal authorities, mostly law enforcement personnel hired to manage the press of people and conveyances. Cruise lines also have the relatively unique ability to transform the shoulder season, calling in Bar Harbor on a near daily basis in especially large cruise ships. These are distinct features of cruise tourism in Bar Harbor that make differential treatment rational.

Ultimately, the costs and benefits of the various features of cruise tourism and the 1000-person daily passenger cap do not boil down to a neat finding of arbitrariness, irrationality, irrelevance, or discrimination. A rational voter could take these features into consideration and conclude that a 1,000-passenger cap is an appropriate means of recalibrating the Town’s approach to this very local concern.

### 3. *The Commerce Clause*

Among the powers the Constitution vests in Congress is the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art I, § 8. The conferral upon Congress of the power to regulate commerce clearly authorizes Congress to override competing regulations adopted by the states, but it also acts as a bulwark against state and local regulations that would, if permitted to stand, either discriminate against foreign and interstate commerce for local protectionist purposes or produce a Balkanized system in which commerce among the states and with other nations is overburdened by a need to satisfy multifarious regulations imposed by different states on the very same commercial activity. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 571, 576–77 (1997) (concerning discriminatory regulation); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523–530 (1959) (concerning regulation inimical to the orderly movement of good across state lines). The bulwark against pernicious regulation is varyingly described as the “dormant” Commerce Clause or the “negative command” of the Commerce Clause. *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 368 (2023). Judicial decisions discussing the dormant Commerce Clause are legion and not all of the precedent fits neatly into the categories outlined above.

Plaintiff-Intervenor breaks its argument into three overarching assertions with subparts. Pl.-Int.’s Br. at 18–44. The first contention is that the Bar Harbor Ordinance is protectionist and discriminatory. *Id.* at 22–38. The second contention is that the burdens of the Ordinance far exceed the local benefits. *Id.* at 38–43. The third is that the Ordinance violates the Foreign Commerce Clause. *Id.* at 43–44. Plaintiffs, on the other hand, advance

their position under twelve headings, three of which are prefatory. Pls.’ Br. at 22–52. The resulting nine arguments cover a similar range of subjects and bounce back and forth thematically. I address Plaintiff-Intervenor’s and Plaintiffs’ arguments together but impose my own outline.

a. Discrimination against foreign commerce

“[T]he’ Commerce Clause is really three distinct Clauses rolled into one: a Foreign Commerce Clause, an Interstate Commerce Clause, and an Indian Commerce Clause.” *Haaland v. Brackeen*, 599 U.S. 255, 320 (2023) (Gorsuch, J., concurring). Each clause is construed to effectuate its purposes, resulting in differing applications. *Id.* Here, the contention is that the Ordinance discriminates against foreign commerce because cruise lines conduct an international operation, some utilizing exclusively foreign-flagged vessels, and their vessels frequently call in the ports of two or more nations during a solitary tour. Plaintiffs assert that cruise lines have the right to call on any Class A port that is convenient, such as the Port of Bar Harbor, and, consequently, the Ordinance disrupts the flow of foreign commerce. Pls.’ Br. at 51. Plaintiff-Intervenor agrees, arguing that the Ordinance overwhelmingly burdens foreign commerce because the largest ships are foreign-flagged, and it is essential that there be uniformity in regulation. Pl.-Int.’s Br. at 43.

These assertions lack persuasive force. The Ordinance does not discriminate on the basis of a “foreign” attribute. The Ordinance is indifferent to whether passengers arrive on foreign-flagged vessels or are themselves citizens of foreign states. The Ordinance also is silent on the subject of foreign navigation. The Ordinance imposes a capacity limitation

on the disembarkation of passengers regardless of the origin of the vessel carrying them or the itinerary that informs the vessel's movements. The imposition of a restriction on local daily disembarkations into a small town does not meddle in an area of commerce that must of necessity be ironed out between nations.<sup>25</sup>

There is no cause to think that the ability of municipalities to govern the extent of their participation in cruise tourism for local welfare reasons will undermine the cruise tourism industry or result in cruise lines having to modify their vessels, crews, passenger capacities or anything else in order to continue plying the seas to visit whatever nations, states, and municipalities remain on their itineraries, of which there are, evidently, a great many. If anything, permitting municipalities to establish terms and conditions on local participation in cruise tourism may encourage more municipalities to consider participation, knowing that they will not thereby be compelled to accommodate whatever level of traffic the cruise lines and their local partners wish to impose. That more ports may be open to smaller vessels is to be expected rather than condemned on "constitutional" grounds.

The record fails to justify the notion that there is a need for uniformity<sup>26</sup> in the terms and conditions of municipal partnering with the cruise tourism industry, let alone that

---

<sup>25</sup> This case is unlike *Henderson v. Mayor of the City of New York*, in which the Supreme Court struck down a state statute that imposed certain financial obligations on ship owners whose ships carried foreign subjects migrating to the United States, explaining that the terms of our Nation's immigration policy, 92 U.S. 259, 270 (1875), "require exclusive legislation by Congress," as the subject "in an eminent degree . . . concerns our international relations." *Id.* at 273.

<sup>26</sup> Plaintiffs assert: "No other significant port physically capable of disembarking passengers from similar-sized vessels restricts disembarkation in the same manner as the Ordinance." Pls.' Br. at 30. The statement not only admits that other ports impose restrictions, but also is so laden with qualifiers that its meaning is uncertain. No party introduced the kind of evidence that would enable me to unpack this assertion, let alone give it any weight in my analysis.

uniformity is necessary to foreign (or interstate) commerce. Congress has not seen fit to regulate the terms and conditions of municipality and cruise line engagement and it is not at all apparent or even probable that allowing municipalities the ability to regulate their level of engagement will undermine the ability of any of the several coastal states to participate fully in cruise tourism involving every size cruise ship imaginable and bearing whatever flag. What this case really involves is the contention that cruise lines are able to compel local accommodation of their private assessment of the ideal economies of scale for cruise tourism. *See* Pl.-Int.’s Br. at 30–31; Pls.’ Br. at 26. The Foreign Commerce Clause does not demand such a result.<sup>27</sup>

**b. Discrimination-qua-protectionism**

At the “very core” of the Supreme Court’s Commerce Clause jurisprudence lies an “anti-discrimination principle.” *Nat’l Pork Producers Council*, 598 U.S. at 369. The anti-discrimination principle “prohibits the enforcement of state laws driven by economic protectionism.” *Id.* (cleaned up). Protectionist state and local laws are those that impose restrictions or grant benefits that favor in-state or local economic interests and disadvantage their out-of-state competitors. *Id.* Such measures are barred by the negative command of the dormant Commerce Clause because the alternative would result in the existence of state-by-state protectionist initiatives and reprisals that would prevent the operation of a

---

<sup>27</sup> Cases cited in support of the “foreign commerce” argument are distinguishable. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (holding that state law boycotting companies that do business with Burma violated Supremacy Clause); *United States v. Locke*, 529 U.S. 89 (2000) (holding Washington law regulating oil tankers was preempted in part by comprehensive federal regulatory regime and remanding for further consideration of certain state regulations); *Kraft Gen. Foods, Inc. v. Iowa Dep’t of Revenue and Fin.*, 505 U.S. 71 (1992) (invalidating state corporate tax law that gave preferential tax treatment to dividend-income received from domestic subsidiaries versus dividends from foreign subsidiaries).



national, cohesive and competitive marketplace. *Id.* at 371–73 (discussing cases illustrating this core concern). Thus:

We have understood this construction to serve the Commerce Clause’s purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus “reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”

*Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179–80 (1995); *see also* *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). The Framers feared interstate commercial strife, not impartial regulations enacted for local welfare ends, with which they were no doubt familiar.

State and local regulations that are not protectionist in purpose or effect are not prohibited by the negative command of the Commerce Clause simply because they impact an out-of-state economic interest associated with commerce. *Nat’l Pork Producers Council*, 598 U.S. at 374. After all, “[i]n our interconnected national marketplace, many (maybe most) state laws have the practical effect of controlling extraterritorial behavior,” *id.* (internal quotation marks omitted), including “an immense mass of inspection laws, quarantine laws, and health laws of every description that have a considerable influence of commerce outside their borders.” *Id.* at 375 (cleaned up, quotation marks omitted);<sup>28</sup> *see*

---

<sup>28</sup> In *National Pork Producers Council v. Ross*, the Supreme Court rejected a challenge to a California law requiring that all pork sold in California derived from breeding pigs or their offspring be raised according

also *Camps Newfound/Owatonna*, 520 U.S. at 596 (“In our zeal to advance [open markets] we must take care not to overstep our mandate, for the Commerce Clause was not intended ‘to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.’” (Scalia, J., dissenting) (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443–444 (1960))).

Plaintiffs argue that Bar Harbor’s Ordinance is facially and per se discriminatory and protectionist because it impacts only travelers arriving by sea, without attempting to regulate the congestive impact of land-based travelers. Pls.’ Br. at 28 (citing *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992) (explaining that a per se rule of invalidity applies “not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade”)). In *Hunt*, the Supreme Court struck down an Alabama law that imposed fees on the deposit of out-of-state hazardous waste (but not in-state hazardous waste) in an in-state commercial landfill, classifying the law as a facial violation of the Commerce Clause. 504 U.S. at 336–37; see *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of State of Or.*, 511 U.S. 93, 98–99 (1994) (invalidating protectionist surcharge imposed on solid waste trucked from out of state destined for in-state landfill). However, unlike these protectionist circumstances, the circumstances here involve a

---

to certain standards. 598 U.S. at 365. The law did not discriminate based on the state or country of origin of the pork, but the impact of the law was felt predominantly by producers operating outside of California, most if not all of whom want to access California’s enormous marketplace. *Id.* at 367. The Supreme Court affirmed the dismissal of the case at the pleading stage for lack of any plausible inference of a discriminatory/protectionist purpose or effect. *Id.* at 368, 391.

neutral regulation that applies regardless of the state of origin of those passengers arriving after exhaustion of the 1,000-person limitation. Additionally, the supposed preference afforded to land-based travelers is not one that is conditioned on the state or national citizenship of land-based travelers.<sup>29</sup>

The burdens and benefits of Bar Harbor's Ordinance do not discriminate based on the interstate or international character of those persons seeking to participate in the local economy. The burden is not imposed because of the interstate nature of the traffic but rather because of various features of that traffic, already discussed, that hamper the experience of local welfare. Like Californians' decision to prohibit traffic in certain food products produced under locally disfavored conditions, *Nat'l Pork Producers Council*, 598 U.S. at 363, Bar Harbor's voters have decided to regulate traffic in persons based on that traffic's distinctive contribution to locally disfavored conditions. Doing so, they have not advanced any discernable local commercial interest. In fact, a primary consequence of the Ordinance is to frustrate local commercial interests.

Nor have the voters of Bar Harbor engaged in a parochial or isolationist exercise. They have, instead, engaged in the exercise of imposing a restriction based on their first-hand experience of the relative deleterious impact of high-volume disembarkations at the waterfront while remaining open to the entire world's visitation. In both purpose and effect, they have acted only to limit the extent to which Bar Harbor must be victim to its

---

<sup>29</sup> Another oft-cited precedent under the discrimination heading is *Hughes v. Oklahoma*, 441 U.S. 322 (1979), in which the Supreme Court invalidated a state law that prohibited the out-of-state sale of locally grown minnows, effectively hoarding them for local purchase. *Id.* at 336–37. This case is unlike *Hughes*. Bar Harbor is not hoarding local resources for local consumption. Bar Harbor is open to global traffic.

own success, while continuing to welcome travelers from every corner of the world. These on-the-ground realities are quite unlike the isolationist and protectionist circumstances discussed in the expansive corpus of dormant Commerce Clause jurisprudence.

Plaintiffs and Plaintiff-Intervenor persist by arguing that the Ordinance is discriminatory and protectionist because it has the effect of favoring hotels and other land-based overnight accommodations. They explain that cruise lines are in competition with land-based accommodations because they are competing for the patronage of travelers seeking to visit a particular destination. Pl.-Int.'s Br. at 35–36; Pls.' Br. at 28, Pl.-Int.'s Reply Br. at 27–28 (ECF No. 199). However, the Ordinance is not drawn to effectuate an advantage for local hoteliers, and I do not find that the Ordinance in fact produces such a result.<sup>30</sup> I have no evidence from which to draw the conclusion other than the testimony of former or current cruise line executives who stated that cruise lines compete in the hospitality sector against land-based accommodations for the consumer's discretionary travel dollar. As interesting as the testimony was, it was reductionist in the extreme. The same comparison might be drawn between two non-Californian producers of pork products seeking to place their products in California stores, where one complies with California law and the other does not. Or we might compare a non-Californian producer of pork products with a Californian producer of beef products. In either example, the producers compete for dollars directed toward meat consumption, yet that obvious point did not

---

<sup>30</sup> Plaintiff-Intervenor also argues that the Ordinance is protectionist because reduced waterfront traffic will enable the Town to collect more paid parking revenue and because Mr. Sidman stated that he preferred smaller ships with their more well-to-do passengers. Pl.-Int.'s Br. at 26. The paid parking contention is a straw grasp and as such does not warrant serious consideration. As for Mr. Sidman's personal opinion about passengers arriving on smaller ships, there is no evidence to support a finding that his opinion informed the public's assessment of the Ordinance's merits or that his opinion is "protectionist" in nature.

inform the Supreme Court’s evaluation of the merits in *National Pork Producers Council*. I can see no reason why it should control here. Reducing the constitutional inquiry so that discrimination is found and heightened standards are imposed whenever one product or service is impacted by a regulation but a competing product or service is not is a recipe for widescale elimination of state and local regulations impacting the provision of goods and services.<sup>31</sup>

c. Arteries of Commerce

Finally, the negative command of the Commerce Clause means that state and local governments have restricted power to issue legislation or regulations that serve to slow or obstruct the flow of commerce. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089–90 (2018). Obstructions that are protectionist in nature are routinely struck down, as discussed in the preceding section. Like the concern over protectionist measures that stack the deck in favor of in-state economic interests, the concern for the health of the Nation’s arteries ensures that the Nation avoids economic Balkanization, meaning the isolation of neighboring states into separate economic units. *Id.* at 2089. Unlike discriminatory scenarios, classic “free-flow” commerce cases are cases in which a state enacts a law evenhandedly to regulate in-state economic activity (*e.g.*, trucking), but does so in a manner that prevents operation of the enterprise within the enacting state according to a standard observed in neighboring or surrounding states, effectively halting interstate transportation

---

<sup>31</sup> The argument also disregards the fact that travelers staying in hotels are dispersed throughout the Town and Mount Desert Island. They do not impact the waterfront the same way that cruise lines and their passengers do. Many land-based tourists intent upon visiting Acadia National Park may well avoid Bar Harbor’s waterfront (and its downtown) for the same reason that local citizens do.

through that state. See *Kassel v. Consolidated Freightways Corporation of Delaware*, 450 U.S. 662, 671 (1981) (invalidating Iowa law barring trucks longer than 60 feet); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (invalidating state law that prohibited the operation of interstate trains having more than a certain number of railroad cars). Less common, but similarly concerning cases arise out of a state’s creation of a monopolistic enterprise that prohibits competition. See, e.g., *Buck v. Kuykendall*, 267 U.S. 307, 315–16 (1925) (invalidating state law prohibiting common carriers from using highways to carry persons between Seattle, Washington and Portland, Oregon without first obtaining a certificate of public convenience and necessity from the State of Washington, where issuance of a certificate to one carrier for purposes of a given route precluded issuance of a certificate to another carrier for the same route). The Ordinance does not fit into either category.

Plaintiffs argue that the Ordinance clogs “the arteries of commerce” by impeding “the ability of large cruise ships to move persons from port to port according to itineraries that are interstate and frequently international.” Pls.’ Br. at 26. They emphasize that cruise lines are engaged in the transportation of persons free to travel as they see fit. *Id.* at 26–27. Plaintiff-Intervenors observe that the Commerce Clause exists in part to ensure open access to the facilities of interstate traffic and the free flow of persons and property without undue restraint. Pl.-Int.’s Br. at 19–23.

The record in this case demonstrates that the Ordinance does indeed stem the flow of interstate commercial activity by reducing the daily volume of persons disembarked into Bar Harbor from cruise ships. However, the mere fact that a state or local law impedes the

free flow of commerce does not result in an automatic finding of invalidity. “State laws that ‘regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’” *Wayfair*, 138 S. Ct. at 2091 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The burden-benefit calculus recognizes that, “in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.” *S. Pac. Co.*, 325 U.S. at 767.<sup>32</sup> When considering whether local regulation comes within the residuum of state power, courts may consider factors such as whether the matter regulated is a localized concern, the extent to which the regulation interferes with national commerce, and the incentive at the national level to attempt to regulate what would amount to multifarious and diverse local concerns. *Id.*; *Duckworth v. Arkansas*, 314 U.S. 390, 394 (1941); *see also Sproles v. Binford*, 286 U.S. 374, 390 (1932) (recognizing “the established principle that in matters admitting of diversity of treatment, according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act.”). “But ever since *Gibbons v. Ogden*, [22 U.S. (9 Wheat.) 1 (1824)], the states have

---

<sup>32</sup> *See National Pork Producers Council*, 598 U.S. at 375 (recognizing “the usual legislative power of a State to act upon persons and property within the limits of its own territory, a feature of our constitutional order that allows different communities to live with different local standards” (internal quotation marks and citation omitted)); *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (“The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.” (internal quotation marks omitted)).

not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.” *S. Pac. Co.*, 325 U.S. at 767.<sup>33</sup>

I reject the contention that the question of a local municipality’s relative tolerance of cruise tourism based on local conditions is an aspect of the national commerce that requires the national uniformity that only Congress can provide. There are a great many varieties of port facilities and communities that house them. Cruise tourism, based on the record before me, is a function of cruise line and local community collaboration.<sup>34</sup> *See, e.g.*, Exs. 32 & 161. It has always proceeded on that basis in Bar Harbor. *See, e.g.*, Ex. 260 at 1 (Bar Harbor Cruise Tourism Destination Management Plan, “prepared for the use of the Town of Bar Harbor residents, stakeholders, municipal agencies and cruise industry partners”). I have no reason to conclude that it does not proceed on a similar basis elsewhere. The parties are agreed that different municipalities impose a variety of constraints, such as caps and limited cruise ship days, though no party has attempted to canvas the variety of measures employed by domestic municipalities for purposes of this litigation.<sup>35</sup> In any event, this case illustrates that the impact of cruise tourism on local

---

<sup>33</sup> *Gibbons v. Ogden* is a formative Commerce Clause decision that struck down a New York enactment that granted one company the exclusive right to navigate coastal waters in vessels powered by steam, which enactment was in direct conflict with the federal government’s grant of coasting licenses to other steamboat owners. 22 U.S. at 221.

<sup>34</sup> For example, Rockland has “a very limited number of slots that it allows for ships over a lower berth capacity of 500.” Ex. 195 at 56. Rockland permits only “six bookings per year per season unless” it “authorize[s] a waiver to add any ships beyond that.” *Id.*

<sup>35</sup> This phenomenon may well suggest a nationwide interest among cruise tourism communities to impose restrictions. *Cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978) (“The evil that appellants



living conditions is a hyperlocal concern that is not well suited to a one-size-fits-all regulatory approach at the federal level.

Furthermore, Bar Harbor is regulating a “matter[ ] of local concern” in both “character and effect.” *S. Pac. Co.*, 325 U.S. at 767. The history of cruise tourism at Bar Harbor demonstrates the unique challenges that cruise tourism imposes on Bar Harbor. These challenges gave rise to a democratic effort, where the voters weighed the relevant local commercial and noncommercial interests and ultimately adopted the Ordinance. Modern-day, board-directed cruise practices (particularly those of foreign-flagged cruise lines<sup>36</sup>) do not allow much room for smaller municipalities to manage their local experiences based on daily limits on the number of passengers coming ashore. Cruise lines are utilizing ever larger vessels to achieve unprecedented economies of scale, principally for shareholder profit. At the same time, cruise lines will not call at a port unless the entire complement of passengers is permitted to come ashore.<sup>37</sup> These characteristics of cruise tourism make it unworthy of overly solicitous judicial action that would negate an exercise in democratic self-determination that is better informed of existing, localized conditions. Nothing in the Constitution dictates municipal obeisance to the economies of scale of cruise tourism. Nor, as far as I can tell, does the dormant Commerce Clause legislate adherence

---

perceive in this litigation is not that the several States will enact differing regulations, but rather that they will all conclude that divestiture provisions are warranted.”).

<sup>36</sup> The representative voices of cruise tourism offered at trial, like Plaintiffs’ and Plaintiff-Intervenor’s briefing, did not speak to a need for moderation but rather have thematically favored catering to the interests of the cruise lines with the very largest capacity vessels. Those cruise lines happen to conduct their trade with foreign-flagged vessels.

<sup>37</sup> *But see* Ex. 193 at 8–9. Chris Martin, Director of Port Operations for Holland America, testified at his deposition that Holland America stops at ports that limit the number of passenger disembarkations, such as in Bergen, Norway. *Id.*

to neoclassical liberalism any more than the Due Process Clause compels observation of Mr. Herbert Spencer's Social Statics.

In the absence of federal or state law dictating the outcome, reasonable citizens at the municipal level will come to different conclusions about the proper balance between unabated cruise tourism and relative calm, and the outcome of their democratic process is the best measure of the polity's tolerance in light of local conditions. For this reason, I conclude that non-discriminatory and non-monopolistic state laws and local regulations that have the impact of restraining outside cruise tourism do not deserve per se invalidation or a heightened standard of review through which judges rather than citizens become the final arbiters of the terms by which cruise tourism will be conducted in every port in the Nation. In other words, "[c]ompelling reasons justify treating these laws differently from laws favoring particular private businesses over their competitors." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007) (relying, in part, on *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (internal quotation marks omitted))).

d. Burdens versus benefits

Although the Bar Harbor Ordinance "regulates even-handedly to effectuate a legitimate local public interest" while imposing "incidental" effects on commerce, it remains necessary to determine whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Under this

standard, “the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Id.* But even so, “[p]reventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of ‘extreme delicacy,’ something courts should do only ‘where the infraction is clear.’” *Nat’l Pork Producers Council*, 598 U.S. at 390 (quoting *Conway v. Taylor’s Executor*, 66 U.S. (1 Black) 603 (1862)).

The parties disagree as to whether the Ordinance’s burdens on commerce are clearly excessive in comparison to the local benefits. Plaintiffs and Plaintiff-Intervenor view the Ordinance’s benefits as purely speculative and Bar Harbor’s interest in reducing cruise tourism as illegitimate. On the other hand, Bar Harbor and Mr. Sidman characterize the Ordinance as imposing a burden on the cruise industry’s business model rather than on interstate commerce. To the extent that the Ordinance does affect commerce, they argue that its burdens are not clearly excessive in relation to the local benefits.

I first consider the Ordinance’s burdens on commerce. There is no doubt that the Ordinance will have some effect on commerce since almost 80% of the cruise ships that presently visit Bar Harbor have a lower berth capacity in excess of 1,000 and are thus unlikely to call at Bar Harbor.<sup>38</sup> But it is impossible to predict the Ordinance’s precise consequences. The Ordinance continues to permit the daily disembarkation of persons traveling by cruise ship in large numbers, even if those numbers are inadequate to

---

<sup>38</sup> As of December 2022, 107 of the 134 cruise vessel calls for the 2023 cruise season were scheduled for vessels that have a lower birth capacity in excess of 1,000. Ex. 8.

accommodate most of the cruise ships plying the Atlantic seaboard these days. Milton Friedman and the Chicago school would recoil at the claim made by business interests that the free market economy of private actors cannot adapt to the limitation at the Bar Harbor waterfront, and who instead seek snug harbor behind a constitutional challenge that strikes me as not well fitted to the facts on the ground. Given the attractiveness of the port of Bar Harbor, it is to be expected that cruise enthusiasts intent of reaching Bar Harbor will find a cruise line to carry them there. Some cruise lines already offer suitable vessels with Bar Harbor itineraries. Other cruise lines no doubt will adjust to serve the emerging market charted by municipalities interested in following Bar Harbor's example by accommodating cruise tourism subject to more constituency-pleasing passenger caps (something that is unlikely to develop so long as cruise lines and their proxies threaten constitutional litigation over limited access). *See id.* at 385 (plurality opinion) (“But from all anyone can tell, *other* out-of-state competitors seeking to enhance their own profits may choose to modify their existing operations or create new ones to fill the void.”).

Insofar as the Ordinance causes visitors to travel to Bar Harbor through other means, like smaller cruise ships, the Ordinance is best described as burdening the cruise line industry's business model, rather than interstate commerce. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (reasoning that Maryland's law prohibiting petroleum producers from operating retail gas stations in-state did not unduly burden commerce because “interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another” when “there [was] no reason to assume that their share of

the entire supply [would] not be promptly replaced” by other companies). Unfortunately for Plaintiffs and Plaintiff-Intervenor, the Commerce Clause does not protect the cruise line industry’s “particular structure [and] methods of operation.” *Id.* While the Ordinance will likely cause visitation to Bar Harbor to decrease, thereby affecting interstate commerce, it is impossible to know exactly how many fewer visitors will travel to Bar Harbor. Thus, I conclude that the Ordinance will impose an uncertain burden on interstate commerce.

I next consider the Ordinance’s local benefits. I reject Plaintiffs and Plaintiff-Intervenor’s arguments that Bar Harbor’s proffered interests in lessening congestion and conserving municipal resources are illegitimate.<sup>39</sup> Courts have held that similar local interests are legitimate in a variety of contexts. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 151 (1986) (“The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values” [because] States “retain[ ] broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.”); *Memphis v. Greene*, 451 U.S. 100, 126–27 (1981) (describing a city’s “decision to reduce the flow of traffic” as “legitimate” and the “residential interest in comparative tranquility” as “unquestionably legitimate” in analyzing a claim under the Thirteenth Amendment);<sup>40</sup>

---

<sup>39</sup> On this point, they rely on *Young v. Coloma-Agaran*, No. 1:00-CV-00774-HG-BMK, 2001 WL 1677259, at \*11 (D. Haw. Dec. 27, 2001) (stating that “[e]liminating the presence of tourists from the Bay is not a proper reason for the Ban as it directly contradicts the very purpose of the Commerce Clause”), *aff’d*, 340 F.3d 1053 (9th Cir. 2003). The district court cited no authority for this proposition, and while the Ninth Circuit affirmed the district court, the Ninth Circuit decided the case on alternative grounds and thus did not opine on the Commerce Clause.

*Tart v. Massachusetts*, 949 F.2d 490, 501 (1st Cir. 1991) (discussing the legitimate local interest in promoting public health). Insofar as the Ordinance reduces the number of persons who visit Bar Harbor by cruise ship, the Ordinance commensurably advances Bar Harbor’s local interest in lessening congestion—particularly at the waterfront, over which the cruise industry will otherwise domineer. This noneconomic benefit, while not precisely measurable, is both real and reasonably well calibrated to ameliorate the particularized excesses of modern cruise tourism and how it interfaces with Bar Harbor’s waterfront.

In short, the Ordinance imposes some burden on the “free flow” of commerce, but that burden is impossible to quantify. The 1,000-person limitation is a significant downshift from the passenger caps previously observed in Bar Harbor. But that downshift also promotes noneconomic interests.<sup>41</sup> Bar Harbor with the MOA passenger limits and Bar Harbor with the 1,000 daily passenger limit are significantly different places. The voters of Bar Harbor “weigh[ed] the relevant ‘political and economic’ costs and benefits for themselves,” and the voters evidently decided that the noneconomic benefits of the Ordinance favored adopting it. *Nat’l Pork Producers Council*, 598 U.S. at 382 (plurality opinion) (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279 (1978)). Considering the

---

<sup>40</sup> The circumstances in *Greene* gave rise to a lively dissent based on the observation that the interest in comparative tranquility can be a pretext for walling off white communities from communities of color. *Greene*, 451 U.S. at 136 (Marshall, J., dissenting). Unlike *Greene*, this case has no undertones of invidious discrimination.

<sup>41</sup> Plaintiffs and Plaintiff-Intervenor see the impact on the movement of vessels and persons as burdens so weighty as to compel per se invalidation of the Ordinance. Obviously, I have not viewed it the same way. The lead authority they cite is *Edwards v. California*, 314 U.S. 160 (1941), in which California attempted to minimize the extent to which it would bear the burden of indigent migration secondary to the Dust Bowl—a “grave and perplexing social and economic dislocation” (i.e., the greatest natural disaster of our Nation’s history), *id.* at 173. The analogy between Dust Bowl migration and cruise tourism is strained, to say the least.

intimate “nature of the local interest[s]” involved in Bar Harbor’s decision to limit cruise tourism, I cannot say that the Ordinance imposes a burden on commerce that “is clearly excessive in relation to the putative local benefits.” *Pike*, 397 U.S. at 142.<sup>42</sup>

### CONCLUSION

For the reasons set forth above, I conclude as follows:

The challenged Bar Harbor Ordinance, Bar Harbor Code Chapter 125, Article VII, Section 125-77, is a lawful exercise of home rule authority under the Maine Constitution and is not preempted by state law.

The Ordinance does not violate the Due Process Clause or the Commerce Clause of the United States Constitution.

The Ordinance is in part conflict preempted under the Supremacy Clause. Specifically, the 1,000-person cap is conflict preempted insofar as seafarer shore access is concerned. But insofar as cruise ship passengers are concerned, the 1,000-person cap survives challenge under the Supremacy Clause.

Based on these legal conclusions, judgment will enter for the Town of Bar Harbor on Counts II and III of Plaintiffs’ Complaint and on Counts II, III, and IV of Plaintiff-Intervenor’s Complaint in Intervention. As for the Supremacy Clause claims stated in the first counts of the Plaintiffs’ Complaint and the Plaintiff-Intervenor’s Complaint in Intervention, judgment will enter IN PART for the Town of Bar Harbor, as Plaintiffs and

---

<sup>42</sup> *Cf. Nat’l Pork Producers Council*, 598 U.S. at 382 (plurality opinion) (describing that weighing out-of-state producers’ costs of compliance against the moral and health interests of California’s residents as “a task no court is equipped to undertake” and stating that in “a functioning democracy, policy choices like these usually belong to the people and their elected representatives”).

Plaintiff-Intervenor fail to demonstrate cause to invalidate the Ordinance insofar as it operates as a restriction on passenger disembarkations, and IN PART for Plaintiffs and Plaintiff-Intervenor, as they have demonstrated that the Ordinance is partially preempted in relation to seafarer shore access, although it is by no means self-evident that any material alteration of the legal relationship of the parties has thereby been achieved.

**SO ORDERED.**

Dated this 1<sup>st</sup> day of March, 2024.

/s/ Lance E. Walker  
UNITED STATES DISTRICT JUDGE



# Exhibit B

Town of Bar Harbor, ME

**§ 125-77. Permit required for certain activities. [Amended 5-7-1991 ; 11-2-1999 ]**

After the effective date of this chapter, a written permit from the Code Enforcement Officer shall be required for the following activities, regardless of whether such activities have received site plan or subdivision approval or whether they also require review by the Design Review Board pursuant to Article XIII, Design Review:

- A. Flood hazard areas. All construction or earthmoving activities or other improvements within the one-hundred-year floodplain designated on the Flood Insurance Rate Maps published by the Federal Emergency Management Agency.
- B. New construction. New construction of buildings and structures.
- C. Alteration. Alteration of a building, structure, or land, or parts thereof, including but not limited to: **[Amended 5-3-2004 ]**
  - (1) Change in size of windows or doors;
  - (2) Repair of foundations, whether concrete, cinder block, granite and posts, or piles;
  - (3) Interior renovations for change in use;
  - (4) Remodeling interior walls to create new rooms;
  - (5) Enclosing open frame porch;
  - (6) Installing skylights;
  - (7) Erection of fences;
  - (8) Construction of new steps;
  - (9) Creation of roads or driveways;
  - (10) Erection of panels for winter closure or the erection of winter storm vestibules in the Downtown Village or Waterfront Development Districts; provided, however, that a permit need only be obtained in the first year of the useful life of the structure to be erected. **[Amended 6-8-2010 ]**
- D. Placement of signs. Placement of signs except temporary signs. **[Amended 5-3-2004 ]**
- E. Moving or demolition. All buildings or structures which are removed from or moved onto, or moved around within, a lot or demolished.
- F. Change of use. The change of any premises from one category of land use to any other land use.
- G. Activities. Any other activities described in Article III as requiring a permit from the Code Enforcement Officer.
- H. Disembarking persons from cruise ships on, over, or across any property located within the Town of Bar Harbor. **[Added 11-8-2022 ]**

Town of Bar Harbor, ME

§ 125-77

§ 125-77

- (1) For the purposes of this section, "cruise ship" has the same meaning as set forth in § 153-22B of the Town of Bar Harbor Code.
- (2) As determined by the Harbor Master, no more than 1,000 persons, in the aggregate, may disembark on a single calendar day from any cruise ship(s) and come to shore on, over, or across any property located within the Town of Bar Harbor; provided, however, that this subsection shall not apply with regard to any cruise ship reservations that have been accepted by the Harbor Master prior to March 17, 2022.
- (3) The Harbor Master shall develop rules and regulations in order to establish (a) a reservation system for cruise ships that transport persons by watercraft for disembarkation in the Town of Bar Harbor; (b) a mechanism for counting and tracking the number of persons disembarking each day; (c) a mandatory procedure for reporting violations to the Code Enforcement Officer; and (d) any other provisions that the Harbor Master deems necessary under this subsection. Any property owner issued a permit under this § 125-77H shall comply with all rules and regulations promulgated by the Harbor Master under this subsection.
- (4) This subsection shall be enforced by the Code Enforcement Officer in accordance with § 125-100 of this chapter, based on information as to violations provided by the Harbor Master, and property owners in violation of this subsection shall be subject to such fines, penalties, actions and orders as are authorized by 30-A M.R.S. § 4452, as the same may be amended, provided that each disembarking person exceeding the permitted daily limit in § 125-77H(2) is a specific violation under 30-A M.R.S. § 4452(3)(B), resulting in a minimum \$100 penalty per excess unauthorized person.
- (5) Notwithstanding 1 M.R.S. § 302, and regardless of the date on which it is approved by the voters, this subsection will be applicable as of March 17, 2022, and shall govern any and all applications for permits or approvals required under this subsection that were or have been pending before any officer, board, or agency of the Town of Bar Harbor on or at any time after March 17, 2022; provided, however, that the Town will not take any enforcement action under this subsection with regard to any cruise ship visits occurring prior to the date of adoption by voters at Town Meeting.

# Exhibit B-1

Town of Bar Harbor, ME

**§ 125-77. Permit required for certain activities. [Amended 5-7-1991 ; 11-2-1999 ]**

After the effective date of this chapter, a written permit from the Code Enforcement Officer shall be required for the following activities, regardless of whether such activities have received site plan or subdivision approval or whether they also require review by the Design Review Board pursuant to Article XIII, Design Review:

- A. Flood hazard areas. All construction or earthmoving activities or other improvements within the one-hundred-year floodplain designated on the Flood Insurance Rate Maps published by the Federal Emergency Management Agency.
- B. New construction. New construction of buildings and structures.
- C. Alteration. Alteration of a building, structure, or land, or parts thereof, including but not limited to: **[Amended 5-3-2004 ]**
  - (1) Change in size of windows or doors;
  - (2) Repair of foundations, whether concrete, cinder block, granite and posts, or piles;
  - (3) Interior renovations for change in use;
  - (4) Remodeling interior walls to create new rooms;
  - (5) Enclosing open frame porch;
  - (6) Installing skylights;
  - (7) Erection of fences;
  - (8) Construction of new steps;
  - (9) Creation of roads or driveways;
  - (10) Erection of panels for winter closure or the erection of winter storm vestibules in the Downtown Village or Waterfront Development Districts; provided, however, that a permit need only be obtained in the first year of the useful life of the structure to be erected. **[Amended 6-8-2010 ]**
- D. Placement of signs. Placement of signs except temporary signs. **[Amended 5-3-2004 ]**
- E. Moving or demolition. All buildings or structures which are removed from or moved onto, or moved around within, a lot or demolished.
- F. Change of use. The change of any premises from one category of land use to any other land use.
- G. Activities. Any other activities described in Article III as requiring a permit from the Code Enforcement Officer.
- H. Disembarking **persons** from cruise ships on, over, or across any property located within the Town of Bar Harbor. **[Added 11-8-2022 ]**

Town of Bar Harbor, ME

§ 125-77

§ 125-77

- (1) For the purposes of this section, "cruise ship" has the same meaning as set forth in § 153-22B of the Town of Bar Harbor Code.
- (2) As determined by the Harbor Master, no more than 1,000 persons, in the aggregate, may disembark on a single calendar day from any cruise ship(s) and come to shore on, over, or across any property located within the Town of Bar Harbor; provided, however, that this subsection shall not apply with regard to any cruise ship reservations that have been accepted by the Harbor Master prior to March 17, 2022.
- (3) The Harbor Master shall develop rules and regulations in order to establish (a) a reservation system for cruise ships that transport persons by watercraft for disembarkation in the Town of Bar Harbor; (b) a mechanism for counting and tracking the number of persons disembarking each day; (c) a mandatory procedure for reporting violations to the Code Enforcement Officer; and (d) any other provisions that the Harbor Master deems necessary under this subsection. Any property owner issued a permit under this § 125-77H shall comply with all rules and regulations promulgated by the Harbor Master under this subsection.
- (4) This subsection shall be enforced by the Code Enforcement Officer in accordance with § 125-100 of this chapter, based on information as to violations provided by the Harbor Master, and property owners in violation of this subsection shall be subject to such fines, penalties, actions and orders as are authorized by 30-A M.R.S. § 4452, as the same may be amended, provided that each disembarking person exceeding the permitted daily limit in § 125-77H(2) is a specific violation under 30-A M.R.S. § 4452(3)(B), resulting in a minimum \$100 penalty per excess unauthorized person.
- (5) Notwithstanding 1 M.R.S. § 302, and regardless of the date on which it is approved by the voters, this subsection will be applicable as of March 17, 2022, and shall govern any and all applications for permits or approvals required under this subsection that were or have been pending before any officer, board, or agency of the Town of Bar Harbor on or at any time after March 17, 2022; provided, however, that the Town will not take any enforcement action under this subsection with regard to any cruise ship visits occurring prior to the date of adoption by voters at Town Meeting.

# Exhibit C

## Town Council statement on cruise ship ordinance enforcement

The Bar Harbor Town Council issued the following statement at a special meeting Wednesday, March 6, 2024.

The Town Council is pleased the United States District Court affirmed what we have known to be true: The Town of Bar Harbor has the authority, under Home Rule, to enact ordinances to limit the volume of cruise ship visitations in order to ensure the Town's quality of life is preserved.

While it is no secret that many of us on this Council have had concerns with some aspects of the cruise ship ordinance proposed by a citizen initiative, the fact remains that this initiative was voted on and approved at Town Meeting and is now the law of the land. This Council will now see to its immediate implementation and enforcement, in a way that is lawful, fair, and fiscally responsible.

Pending rulemaking, enforcement will begin immediately. This Council has already directed the Harbor Master to cancel, or reject, requests for reservations made after the day of the vote for all ships with lower berth capacities greater than 1,000 passengers. The disembarkation of passengers of cruise ships with reservations for the 2024 season that are made and accepted after this date are subject to the current Ordinance. However, the Council will honor reservations made before the town voted. Passengers from these 2024 ships will not be subject to the disembarkation limits of the Ordinance.

Together with the reductions already achieved by implementing the Memorandum of Agreement between the cruise lines and the Town our community will experience a 50% reduction from peak year cruise ship visitation. This will be a good opportunity for us all to experience the impact of such a reduction on our quality of life and Town operations.

It is the position of this Council that this is the fairest and most legally responsible approach, based upon careful consideration of costs and risks associated with enforcement.

We disagree with the demands from some to delay all enforcement until any appeal of the court decision is resolved which would result in no additional reductions. We also disagree with the demands from others to cancel all reservations made prior to the adoption of the Ordinance, which would result in at least an 80% reduction.

Most of the ships in question are scheduled to arrive in less than 90 days. Cancelling the bulk of the 2024 season now would be fundamentally unfair, would potentially expose the Town to additional legal liabilities, and would have a drastic fiscal impact on an already strained and nearly complete municipal budget.

In reviewing the 2025 season, the Council will ensure that the disembarkation of any cruise lines with reservations made and accepted after March 17, 2022, will be subject to the Ordinance. The Town is prepared to go to court to obtain fines and injunctive relief against any landowner that exceeds the disembarkation limits, and any party that disobeys the orders of the Harbor Master.

The Council hereby directs the Town Manager to prepare draft rules for Council consideration necessary to ensure the Ordinance may be implemented efficiently, and in compliance with the Court's decision. This includes updating the Cruise Ship Standard Operating Procedures to govern shoreside operations and any changes made to confirmed and honored reservations.

The Town Manager shall present these draft rules to the Council as soon as possible, and these draft rules will be subject to a public hearing and a final enactment by the Town Council.



Additionally, the Town Manager shall recommend any additional ordinance amendments or polices necessary to efficiently and effectively manage cruise ship reservations and disembarkations. Any substantive amendments to the Land Use Ordinance will require a Town Meeting vote.

The Council remains committed to listening to all individuals, parties, and stakeholders to ensure that the regulation of cruise ship tourism works for the entire community.

In conclusion, we would like to give special thanks to the Town Attorney Stephen Wagner as well as to Jonathan Hunter and the Attorneys at Rudman Winchell for their tireless advocacy for the Town of Bar Harbor in this matter.

# Exhibit D

## (Excerpts)

STATE OF MAINE  
HANCOCK, ss.

SUPERIOR COURT  
CIVIL ACTION  
Docket No. CV-2024-\_\_\_\_\_

CHARLES SIDMAN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 TOWN OF BAR HARBOR and VALERIE )  
 PEACOCK, GARY FRIEDMANN, )  
 MATTHEW HOCHMAN, MAYA CAINS, )  
 JOE MINUTOLO, EARL BRECHLIN and )  
 KYLE SHANK, in their capacities as elected )  
 members of the Bar Harbor Town Council, )  
 )  
 Defendants. )

**COMPLAINT FOR REVIEW OF  
GOVERNMENTAL ACTION  
(M. R. Civ. P. 80B) WITH  
INDEPENDENT CLAIMS**

Plaintiff Charles Sidman for his complaint against the Town of Bar Harbor and Valerie Peacock, Gary Friedmann, Matthew Hochman, Maya Cains, Joe Minutolo, Earl Brechlin and Kyle Shank, in their capacities as elected members of the Bar Harbor Town Council, alleges and states as follows:

PARTIES

1. Charles Sidman is a resident of the Town of Bar Harbor, County of Hancock, State of Maine.
2. The Town of Bar Harbor is a municipal corporation in the State of Maine (the “Town”).
3. Valerie Peacock is a resident of the Town of Bar Harbor and is an elected member of the Bar Harbor Town Council.
4. Gary Friedmann is a resident of the Town of Bar Harbor and is an elected member of the Bar Harbor Town Council.

37. On March 6, 2024, the Town Council held a special meeting whereby it issued a resolution that it would not enforce the Ordinance as adopted, but rather it would “honor reservations made before the town voted” and not subject passengers from cruise ships that made reservations before November 8, 2022, to the disembarkation limits imposed by the Ordinance (the “Resolution”).

38. Further, the Town Council stated that it had “already directed the Harbor Master” to enforce the Ordinance as limited by its fiat.

39. The Town Council’s Resolution was memorialized by a press release issued by the Town Council on the same day.

40. As of April 1, 2022, 56 ships were scheduled to arrive in Bar Harbor for the 2024 cruise ship season.

41. After the Resolution was issued, either 134 or 149 ships are scheduled to arrive in Bar Harbor for the 2024 cruise ship season.

42. The Resolution’s change to the Ordinance results in a difference of up to 93 additional ships being allowed to come to Bar Harbor in 2024, with at least 193,277 passengers coming ashore, with no regard to the permitting requirements, fines, and restrictions placed on land owners by the Ordinance.

43. The Council did not take a vote in issuing its Resolution.

44. The Town Council’s Resolution will result in an increase of cruise ship passengers disembarking to the Town beyond what the Ordinance permits.

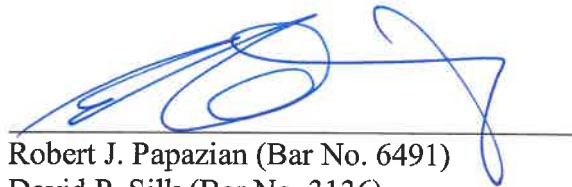
45. The increase of passengers in Town will result in more congestion in the Town.

46. The increase of passengers in Town will result in more municipal services being used by the Town.

95. The Town Council's *ultra vires* actions deprive Plaintiff of his substantive right to petition the Town for amendments to the Land Use Code.

WHEREFORE, Plaintiff Charles Sidman respectfully requests this Court to declare that the Town and its Town Council acted unlawfully in issuing its Resolution, declare that the Town Council lacked any lawful authority to order or direct the Harbor Master and CEO to not enforce or disregard the Ordinance pursuant to their mandatory obligations, grant injunctive relief barring the Town Council from ordering or directing the Harbor Master and CEO from enforcing the Ordinance pursuant to their mandatory obligations, and to grant such other relief, including equitable relief, in order to ensure that the Town Council does not attempt through *ultra vires* and pretextual acts to nullify the will of the voters, find that the Town has unlawfully deprived Plaintiff of his substantive rights to petition the government by initiative and through a Town vote to amend the Land Use Code, and award Plaintiff his costs, and to the extent permitted by law, his attorneys' fees.

Dated: April 2, 2024



Robert J. Papazian (Bar No. 6491)  
David P. Silk (Bar No. 3136)  
CURTIS THAXTER LLC  
One Canal Plaza, Suite 1000/P.O. Box 7320  
Portland, Maine 04112-7320  
(207) 774-9000  
rpapazian@curtisthaxter.com  
dsilk@curtisthaxter.com  
*Attorneys for Plaintiff Charles Sidman*

# Exhibit E

Case Nos. 24-1317, 24-1318

---

United States Court of Appeals for the First Circuit

---

ASSOCIATION TO PRESERVE AND PROTECT  
LOCAL LIVELIHOODS, *et al.*

*Plaintiffs – Appellants,*

PENOBSCOT BAY AND RIVER PILOTS ASSOCIATION,

*Plaintiff-Intervenor – Appellant,*

v.

TOWN OF BAR HARBOR,  
a municipal corporation of the State of Maine,

*Defendant – Appellee.*

---

On Appeal from the United States District Court for the District of Maine  
Civil Action No. 1:22-cv-416-LEW

---

**AFFIDAVIT OF SARAH FLINK**

I, Sarah Flink, do hereby depose and say that I make this affidavit in connection with the appeals of the Association to Preserve and Protect Local Livelihoods, BH Piers, LLC, Golden Anchor, LC, B.H.W.W., LLC, Delray Explorer Hull 495, LLC, Delray Explorer 493, LLC, Acadia Explorer 492, LLC, and Penobscot Bay and River Pilots Association as follows:

## CruiseMaine

1. I am over 18 years of age, reside in the State of Maine where I own and operate a business entity, Spring Line Group, LLC, which is located at 254 Commercial Street, Portland, Maine.

2. In 2018, the Maine Office of Tourism retained my services by contract with Spring Line Group to assist with an initiative of the Tourism Office called “CruiseMaine.” Since that time, I have provided services to the Tourism Office for CruiseMaine and continue to do so.

3. CruiseMaine’s mission is to work with Maine communities which are seeking sustainable cruise ship tourism and to serve as a resource to support those communities, to educate them as to developing this opportunity, and to promote cruise ship tourism locally and for the state of Maine in general.

4. My duties with CruiseMaine require that I work in conjunction with the Office of Tourism, the Maine Port Authority, the Maine Department of Transportation, and the Maine Department of Economic & Community Development.

5. My duties also require that I work with Maine communities that host cruise ship visits, including the Town of Bar Harbor, the City of Portland, the City of Eastport, and other Maine coastal communities, on cruise ship matters.



6. My duties also require that I work with representatives and employees of cruise lines and owners and operators of cruise lines that deploy the full range of cruise ships—those with “lower berth capacities” of more than 1,000, as well as those with capacities under 1,000. (The term “lower berth capacity” is commonly used in the industry to estimate the numbers of passengers who may occupy a given cruise ship. The term does not include crew members needed to support a cruise ship’s operation).

7. At times, I work with the Cruise Lines International Association (“CLIA”), a trade association of cruise lines which represents the collective interests of the owners and operators of cruise ships, including those with lower berth capacities higher than 1,000 passengers as well as those with lower berth capacities below 1,000.

### **Cruise Ship Itineraries and Planning**

8. In my work with representatives and employees of the owners and operators of cruise ships with passenger capacities higher than 1,000, I have become familiar with the itineraries they employ and the planning that precedes the issuance of those itineraries to the market.

9. In the Canada/New England market, cruise itineraries for ships with lower berth capacities higher than 1,000 typically encompass the area from the middle of the mid-Atlantic coast to Quebec, though some cruise ship itineraries may

reach as far south as Florida. These itineraries have beginning and endpoints, where the cruise begins at one port, makes a series of port calls on succeeding days (which typically do not extend beyond a single calendar day), and then terminate, sometimes at the port of origin and sometimes at a different port. These trips usually last seven to 14 days.

10. These trips are often international. For vessels over 1,000 in lower berth capacity, in addition to calls at American ports, the vessels will call at one or more Canadian ports, including Halifax, Nova Scotia, Quebec City, and Montreal, Quebec or some other foreign port.

11. In the United States, stops might be some combination of the following: Baltimore, Maryland; New York City, New York; Newport, Rhode Island; Boston, Massachusetts; Portland, Maine; Bar Harbor, Maine or, at times, Eastport, Maine.

12. In working with cruise lines representatives and employees, I learned that for the cruise lines, the development of a given itinerary takes a long time and requires significant planning, including continuous study and assessment of market preferences. The planning that precedes the actual cruise ship voyage begins from 18 to 30 months before that voyage commences. Also in working with cruise line representatives and employees, I have learned that cruise lines are diligent in avoiding circumstances in which they market a cruise as including a particular port if they cannot be confident that, in the end, they will be able to call on that port.

13. I recently attended a global cruise ship conference in Miami, Florida and spoke with several agents for cruise lines as well as representatives and employees of the owners of the cruise lines. They again confirmed my understanding that planning the itinerary for a given cruise ship tour begins 18 to 30 months before the date set for that tour.

### **Bar Harbor**

14. In my work with CruiseMaine, I frequently worked with government officials of the Town of Bar Harbor as well as Bar Harbor residents, business owners, members and representatives of organizations, and others. Hereafter, at times, I refer to the Town of Bar Harbor as “the Town.”

15. When I assumed my duties with CruiseMaine, virtually all cruise ship representatives and employees with whom I dealt, as well as their agents, considered Bar Harbor to be a “marquee” port, meaning that it had such significant appeal to patrons of cruise ship travel that it was seen as a selling point for cruise ship itineraries. To a significant degree, Bar Harbor’s status as a marquee port is due to its proximity to Acadia National Park. Bar Harbor, itself, has great appeal because it is a charming town with a business sector that has long catered to tourists.

16. Because of Bar Harbor’s appeal, it often received approximately 60 percent of the total cruise ships visits to Maine; Portland often received slightly less than 40 percent; and the other Maine ports divided the remainder.

17. Bar Harbor is a “tender port” which means that the cruise ships do not dock at land-based piers but, rather, anchor at one of two federally designated anchorages. If the ships are arriving at Bar Harbor from an international port, anyone disembarking must be cleared by agents of Customs and Border Protection.

18. Through my work with the Town, I became aware that, since 2008, the Town of Bar Harbor has applied daily passenger caps to cruise ship visits. The daily passenger caps were tied to the lower berth capacities of cruise ships. The daily caps were higher during the months of April through June and September through November (5,500 passengers per day) and were lower for the months of July and August (3,500 passengers per day).

19. These variations were based on Bar Harbor’s experience with the tourist season in which, long before the Bar Harbor’s development as a significant cruise ship destination, large numbers of land-based visitors would come in the months of July and August. Land-based visitation to Bar Harbor in the months of May and June and September and October was much lower, so the daily caps for those months were higher.

20. The Town of Bar Harbor did not seek to mandate these caps; rather they were “voluntary”, meaning that the Town presented them to the cruise lines and the cruise lines agreed to adhere to them. Therefore, they were frequently referred to as “voluntary caps.”

21. In 2022, I was part of a Work Group established by the Town Council of Bar Harbor, serving in an advisory capacity. In August of 2022, the Work Group recommended replacing the voluntary cap system with “Memoranda of Agreement” (“MOAs”) which eliminated April and November as cruise ship months, lowered the daily passenger caps in May through October (with higher numbers in May and June and September and October and lower numbers in July and August), and, introduced a monthly cap on cruise ship passengers. The monthly caps also varied with the intensity of the tourist season, being lower in the months of July and August and higher in the months of May and June and September and October.

22. In August of 2022, the representatives of the cruise lines advised that, in principle, they accepted the MOA’s daily and monthly caps. The Town signed the MOA and presented it to the cruise lines for signature. The Town intended that, once a cruise line had signed the MOA, it would be binding on both the cruise lines and the Town. Beginning in September, the cruise lines began signing the MOAs. Before the November 8, 2022 Town Meeting, all the cruise lines had signed an MOA.

### **Ordinance Limiting Daily Disembarkation from Cruise Ships**

23. At about the same time the MOA was under development, a citizen-originated proposal to limit disembarkation from cruise ships to 1,000 persons per day was under consideration.

24. Before this proposal was considered at the November 8, 2022, Town Meeting, I helped prepare a public education circular comparing the expected impacts of the MOAs on Bar Harbor's future cruise visitation vs. the likely impacts if the citizen's initiative were to pass.

25. The Town provided the information in the circular on impacts of the recently-signed MOAs. The MOAs were referred to in the circular as the "Cruise Management Plan" or "CMP". The Town was responsible for preparing the part of the circular pertaining to the expected impacts of the CMP, and I was responsible for the part of the circular pertaining to the potential impacts of the citizen's initiative.

26. My contribution to the circular was an estimate of the impact of the citizen's initiative on cruise ship visitors to Bar Harbor. My estimate was based on "lower berth capacities" as a reference point. In using lower berth capacity in this way, I was aware that, because the proposal limited the disembarkation of all "persons," not just "passengers," the cruise ships' "berth capacity," was not an exact guide. Nevertheless, since the proposal included all passengers and all crew, I concluded that using the vessel's lower berth capacity as a reference point was a reliable indicator of the proposal's probable effect, if adopted.

27. In consultation with representatives and employees of cruise lines and with their agents, I concluded that, if Bar Harbor voters approved the proposal, cruise

ships with lower berth capacities greater than 1,000 would no longer come to Bar Harbor. Based on those same consultations and a review of the vessels which typically come to Bar Harbor, I calculated that, if the proposal were adopted by voters, the numbers of cruise ship visitors to Bar Harbor would decline by about 95 percent. The circular reflected my conclusion on this point. A copy of the circular is attached hereto as Attachment A.

28. The circular was intended to inform the voting public. It was not intended to and did not take a position on the merits of the proposal. The Town intended that it would serve only to inform Bar Harbor voters on the proposal's probable impact on visits by cruise ships with lower berth capacities higher than 1,000 as compared to the MOAs.

29. After the circular was complete, the Town disseminated it to Bar Harbor residents.

30. At the November 8, 2022, Town Meeting, Bar Harbor voters approved the proposal, and it became a Bar Harbor law.

### **PortCall.com**

31. In 2019, CruiseMaine paid for a subscription to a web-based platform—"PortCall.com"—through which cruise lines or their agents could submit requests to visit Maine's nine cruise ports.

32. Portcall.com documents requests by cruise lines to visit particular ports; allows those requests to be “booked”, meaning confirmed, by the requested port; allows for the identification of conflicts which may bear on a port’s suitability for the applicant-cruise line; and can also register cancellations of cruise ship visits.

33. Once a cruise line has submitted an application to visit a particular port, the “berth manager” for the port in question, often the Harbormaster, will use PortCall.com to determine whether there is a conflicting request from another cruise ship for the day in question or whether the new request would exceed the allowed daily passenger cap if applicable, and, if not, will typically confirm the visit.

34. The information displayed on Maine.PortCall.com is always up to date and is a “real time” accounting of applications by cruise ship agents and the status of those applications with each of the ports included on the website. Possible statuses in PortCall.com are “requested,” “booked,” “conflicted,” or “canceled”.

35. My work with the Town since 2018 has required that I work with the Town’s Harbormaster. I am familiar with the Harbormaster’s practices in the consideration of cruise line applications and how those practices have varied over time.

36. When the voluntary caps were in place, the Harbormaster’s decision on a given cruise ship request was typically governed by whether the cruise line’s request would result breach the voluntary caps for the day in question. Prior to the



use of PortCall.com, the Harbormaster would notify the cruise line by email of that decision not long after it had been made. After CruiseMaine joined the PortCall.com platform and facilitated training of all berth managers in each of Maine's cruise ports, the Harbormaster would enter the decision to confirm a booking on the PortCall.com site.

37. In my experience, the cruise lines have voluntarily complied with the reservation system and, without an approved reservation from the Harbormaster, they will not schedule calls at Bar Harbor.

38. In July of 2021, the Town Council directed the Harbormaster to not approve (or "book") any cruise line requests submitted after the issuance of the Town Council's directive. As a result, from July 2021 to August of 2022, the Harbormaster suspended the approval of any such applications.

39. Over time, a backlog of cruise ship applications built up, noted in PortCall.com as being in "requested" status. In August of 2023, after the cruise lines agreed in principle to the MOA, the Harbormaster approved all pending cruise ship applications that complied with the MOA caps for the 2023 cruise season, which under the MOA began on May 1 and closed on October 31. After the cruise lines had all signed their respective MOA, the Harbormaster approved pending requests for the 2024 cruise season.

40. The MOA did not initially apply to seasons 2025 and beyond, so the Harbormaster did not act on any requests for the 2025 cruise season after the July 2021 Town Council directive to pause all confirmations. To date, the Harbormaster has still not approved any request for the 2025 cruise season submitted after the issuance of that directive.

41. The Harbormaster's approval of each of the pending cruise line requests was entered into the PortCall.com website.

### **History of Harbormaster Approval of Cruise Ship Requests/Current Status of 2025 Cruise Season Requests**

42. At the start of the 2019 cruise season, 180 cruise ships of all sizes were scheduled to visit Bar Harbor with a total lower berth capacity of approximately 292,000 passengers.

43. The 2020 and 2021 cruise season were canceled due to COVID-19, other than a few small, domestic ships in 2021.

44. At the start of the 2022 cruise season, 174 cruise ships of all sizes were scheduled to visit Bar Harbor with a total lower berth capacity of 292,212 passengers.

45. The 2023 cruise season was subject to the MOAs. At the start of the 2023 cruise season 134 cruise ships of all sizes were scheduled to visit Bar Harbor with a total lower berth capacity of 258,157 passengers.

46. For the 2024 cruise season that is just beginning, the Harbormaster has approved the requests of 100 cruise ships with a total lower berth capacity of 181,926 passengers.

47. For the 2025 cruise season, at present, Maine.Portcall.com shows that the Harbormaster has approved the requests of 18 cruise ships with a total lower berth capacity of 57,482 passengers.


48. Maine.Portcall.com also shows that 102 cruise ships of all sizes with a total lower berth capacity of 141,928 have requested to visit Bar Harbor but have not been approved. Of these 102 requests, 40 cruise ships have a lower berth capacity greater than 1,000 passengers. These 40 ships represent 125,642 passengers.

49. In my experience in working with representatives and employees of cruise lines, because of the long lead times required to set itineraries, if a request to visit a given port is not acted on, a cruise is likely to devise an alternative itinerary omitting the nonresponding port. If it comes to the point that that itinerary must be issued for sale to potential cruise ship passengers—typically 12-18 months before the ship sets sale—the omission of the nonresponding port will become final, and the cruise lines will not offer an itinerary with the nonresponding port for sale to the public.

50. As noted earlier, since the Town Council directive of July 2021, the Harbormaster has not approved any cruise applications for the 2025 season that were received after the date of the Town Council issued that directive.


*Remainder of Page Intentionally Left Blank*

Dated at Ellsworth, Maine, this 2<sup>nd</sup> day of May, 2024.

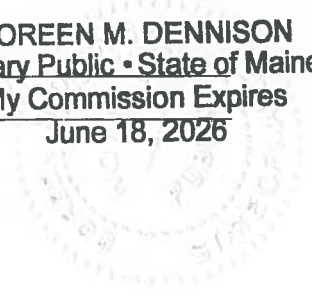
  
\_\_\_\_\_  
Sarah Flink

STATE OF MAINE  
HANCOCK, ss.

Personally appeared, before me, the above-named Sarah Flink who, being duly sworn, made oath that the statements made in the foregoing affidavit are based on her personal knowledge and as set forth herein are true.

  
\_\_\_\_\_  
Notary Public

Print Name: \_\_\_\_\_ **DOREEN M. DENNISON**  
My commission expires: \_\_\_\_\_ **Notary Public - State of Maine**  
**My Commission Expires**  
**June 18, 2026**



Case: 24-1317 Document: 00118140661 Page: 16 Date Filed: 05/03/2024 Entry ID: 6640290

# Exhibit E

## Attachment A

## What Does Bar Harbor's New Cruise Management Plan Do?

In August of 2022, Bar Harbor's town council endorsed a new cruise management plan that will be implemented beginning with the 2023 season. This plan was created in response to a town survey conducted in 2021, and importantly, it is the result of extensive negotiation with the cruise industry to achieve significant reductions in cruise visitation.

### The Cruise Management Plan is a holistic approach to tourism management which includes:

- Lower daily and new monthly passenger caps.
- No more ships over 4,000 passengers.
- Memoranda of Agreement (MOAs) - signed annually with each visiting cruise line.
- Standard Operating Procedures for cruise operations - reviewed annually.
- Shoreside vendor ordinance - to be developed over the winter months.
- Annual review and evaluation - with adjustments to the MOAs as necessary.



DX471.001

## What Would Warrant Article #3 Do?

### Proposed Limitation

1,000 people (passengers and crew) disembarking per day, excepting ships booked before July 18, 2021.

### Regulatory Mechanism

Land Use Ordinance, to be administered by the harbormaster and the code enforcement officer.

### Status

The measure will be on the ballot in November as Warrant Article #3. Per Bar Harbor's town charter, it will be noted beneath the Article language that the Warrant Committee opposes the referendum 9-6 and that the Planning Board opposes it 7-0.

See the official language here: <https://tinyurl.com/2p9cvexd>

### Implications if Passed

95% of current passengers arrive on ships with a capacity for more than 1,000. Cruise lines would be unlikely to bring these larger ships to Bar Harbor. As a result, the net effect of this referendum would be to eliminate 95% of current passenger counts. The remaining 5% come on small ships that will likely continue to arrive.

### Economic Impacts

- Using figures from research conducted by UMaine Orono in 2016 and CruiseMaine in 2018, the loss of passenger and crew spending will be between \$20 and 30 million/year for MDI businesses.
- The town would lose nearly \$1 million/year in cruise ships fees.
- Cruise ships make up nearly half of the workload that pays for the "Pilotage System" that benefits Frenchman Bay and Penobscot Bay. If there is a significant decrease in cruise ship visits, it would have trickle down effects that would impact the service provided by the pilots.

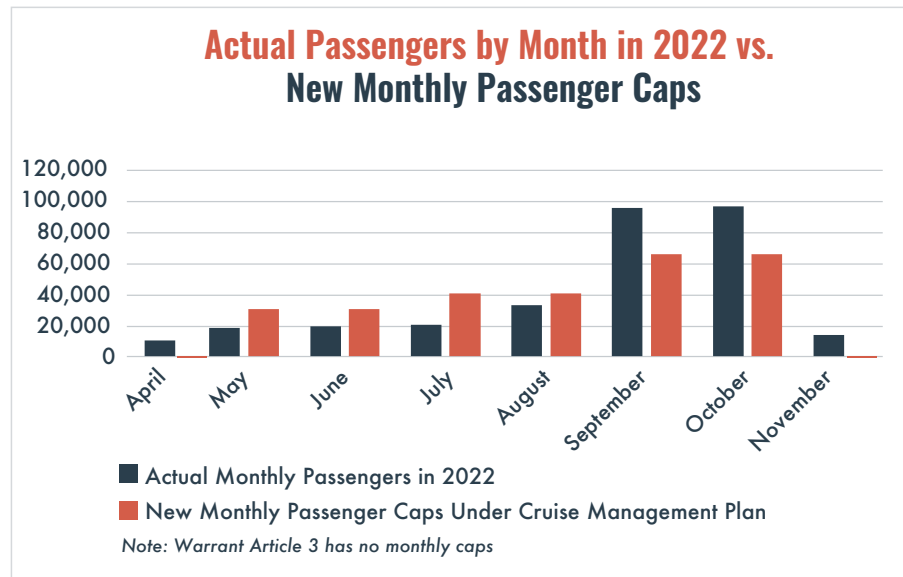
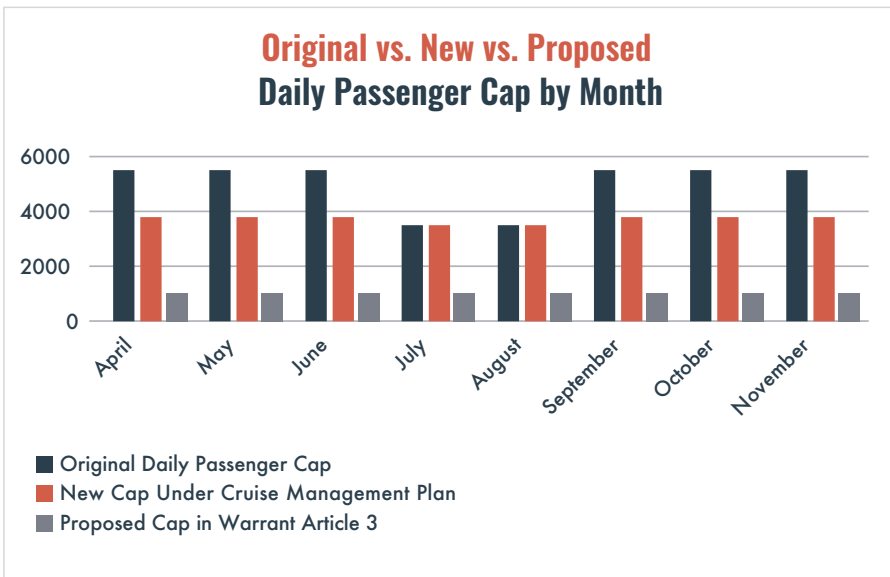
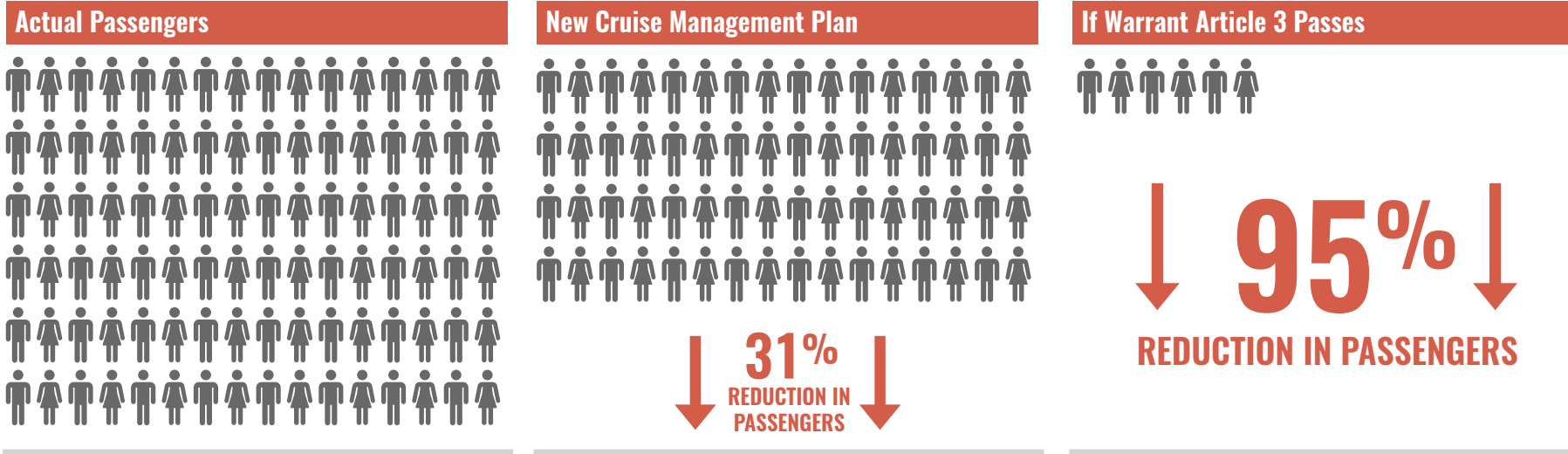
Exhibit E  
Attachment A

TOWN25979

## By the Numbers

### Passenger Counts by Day and by Month

#### COMPARISON OF SEPTEMBER 2022





# Exhibit F

**From:** [Eddie Anne Damm](#)  
**To:** [Charles Sidman](#)  
**Cc:** [Lincoln Millstein](#)  
**Subject:** Crew numbers  
**Date:** Tuesday, March 22, 2022 6:42:14 PM

---

Anne here:

The town of Bar Harbor's website has the schedule of 2022 season cruise ships, which includes the number of guests (passengers).

<https://maine.portcall.com/#!?tab=2&port=Bar%20Harbor>

You have to click on the separate list that has details about each ship to find out the number of crew.

<https://www.beyondships1.com/cruise-ship-profile-pages.html>

There used to be a concise list that had both numbers of guests (passengers) and crew, but I have not been able to find that yet. Perhaps the harbor master would have such a list.

It is not on the Chamber of commerce book or website.

I am not an expert on the ratio of passengers to crew, but many of the ships have about half as many crew compared to guests.

It could work for ships to only allow guests(passengers) to disembark in order to keep the numbers down.

Sincerely,

Anne Damm

(207)460-2401

PO Box 25

Hulls Cove ME 04644

On Tue, Mar 22, 2022, 5:48 PM Charles Sidman <[csidman@acadia.net](mailto:csidman@acadia.net)> wrote:

Dear Lincoln,

Until now, the limitations were based on a subset (the published lower berth numbers) of the passenger capacity of each ship. Crew on these ships is often about half of the passenger capacity. No official effort has ever been made to my knowledge to count the numbers actually disembarking, and I know to certain knowledge that many crew are allowed off at each port of call. Net:net, the total numbers of disembarking persons could be wildly different from (and likely higher than) the ostensible passenger capacities, and noone other than the ship operators knows for sure. Eddie's astute catch is why we modified the petition to limit "disembarking persons" rather than "passengers".

:)

Charlie

---

**From:** Lincoln Millstein <[lmillstein@gmail.com](mailto:lmillstein@gmail.com)>

**Date:** Tuesday, March 22, 2022 at 5:18 PM

**To:** Eddie Anne Damm <[eddieannedamm@gmail.com](mailto:eddieannedamm@gmail.com)>, Charles Sidman <[csidman@acadia.net](mailto:csidman@acadia.net)>

**Subject:** Re: BREAKING NEWS: citizens group seeks to limit cruise ship visitors to 1,000/day

**SIDMAN02028**

**Exhibit F**

How reliable is your estimate on crew coming onshore? Did they ever count them in the total. In 2019, the number was around 250,000, I think. Was the crew number a subset? If not this changes everything if crew can take the overall number well above 300,000. Why are there so many crew members coming onshore?

On Wed, Mar 16, 2022 at 8:27 PM Eddie Anne Damm <[eddieannedamm@gmail.com](mailto:eddieannedamm@gmail.com)> wrote:

Dear Lincoln Milstein and Charles Sidman,

Do you know if the crew will be counted as part of the 1000 passenger limit per day? That can sometimes double the number of people coming off the ships. It would be helpful to clarify in your article and the petition.

Sincerely,

Anne Damm

(207)460-2401

PO Box 25

Hulls Cove ME 04644

On Wed, Mar 16, 2022, 4:55 PM The Quietside Journal, published by Long Pond Advisors LLC <[theqsjournal@substack.com](mailto:theqsjournal@substack.com)> wrote:

## **BREAKING NEWS: citizens group seeks to limit cruise ship visitors to 1,000/day**



Lincoln Millstein

Mar 16

BAR HARBOR, March 16, 2022 - The citizens group led by resident Charles Sidman today filed its anticipated petition for a townwide vote to change land-use ordinances so that cruise ships may not be permitted to disembark more than 1,000 passengers a day.

“Today we took a big step, thus initiating a voter-driven process of (hopefully) drastically reducing the scourge of excessive cruise ship visitors inundating our town and disfiguring the entire region,” Sidman wrote in an email.

“Anyone interested in signing the official form now or helping gather signatures is welcome to contact me at [csidman@acadia.net](mailto:csidman@acadia.net),” he wrote after taking action which the town council did not have the political will to do. Sidman needs about 250 signatures to place the question on the November town meeting ballot.

Sidman said lawyers he hired suggested this method because the town has more

**SIDMAN02029**

**Exhibit F**

power amending its own ordinance than to try to regulate cruise ships.

“As determined by the Harbor Master, no more than 1,000 passengers, in the aggregate, may disembark on a single calendar day from any cruise ship(s) and come to shore on, over, or across any property located within the Town of Bar Harbor,” the petition stated.

Even though the vote isn’t anticipated to occur until November, the petition applies retroactively to all bookings after March 16, 2022.

“The purpose of this amendment to the Code is to require a permit to be issued to any property owner wishing to allow for the discharge of cruise ship passengers in the Town of Bar Harbor from their property, and to establish a codified limit on the number of passengers who may disembark from cruise ships and be transported to the Town of Bar Harbor per day.

“Property owners in violation of this subsection shall be subject to such fines, penalties, actions and orders ... resulting in a minimum \$100 penalty per passenger.”

The petition takes square aim at Eben Salvatore, chair of the town cruise ship committee who operates the major tender service owned by his employer Ocean Properties.

It also challenges the town council and the town manager who opted for a meeker approach, with a small subcommittee of members Val Peacock and Jill Goldthwait along with town manager Kevin Sutherland to negotiate with the cruise ship industry after having already signaled that they would be willing to accept a 30 percent reduction of passengers in 2023. Sutherland failed in his singular attempts and sought reinforcement.

A total of 279 ships and 290,000 passengers are forecast to visit Bar Harbor this season. Without large cruise ships last season, the town reported records number of land-based visitors.

Sidman said the petition can only help the town council negotiate and that if it can achieve the same limit, he’d be willing to withdraw the petition.

Sidman is no stranger to asserting citizens power in the face of a timid town council

and manager. In 2019 he led the fight to prohibit berthing piers for large cruise ships. The definition of large in the petition was “more than five hundred passengers.”

“Underlying this proposed amendment is the fact that, in recent years, the Town has been a popular port of call for cruise ships of varying sizes, from which passengers disembark via tender boats that offload passengers directly into the downtown area. The large numbers of passengers have overwhelmed the downtown area, resulting in excessive congestion and traffic on public streets and sidewalks, frequent overcrowding of parks and other public spaces, and inundating local amenities and attractions, all of which result in a diminished quality of life for Town residents,” the petition stated.

“The unchecked and continued influx of disembarking cruise ship passengers in the downtown area jeopardizes the Town’s ability to deliver municipal services to Town residents and visitors (for example, cruise ship passengers), including the provision of public safety services (police and fire), emergency medical services (EMS), in-patient and out-patient services at local hospitals, pandemic control measures, and public sanitation services, and also impacts the ability of local shops, restaurants, and other businesses to attract and serve customers. A town-wide survey was conducted in 2021, showing that a majority of respondents believe that the 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.

“The Town’s existing, uncodified limits of 5,500 passengers per day (for May, June, September and October) and 3,500 passengers per day (for July and August) have proven to be insufficient to mitigate the impacts described above, and furthermore, are currently subject to adjustment at the discretion of the Harbor Master without further input from the voters of the Town. This discretion is removed, and the limits herewith are made absolute.

“By statute, 38 M.R.S. § 439-A, the Town is expressly authorized to regulate activities that occur within its own shoreland areas. Further, in accordance with the Town’s home rule authority under the Maine Constitution (Article VIII, Part Second, Section 1) and by statute (30-A M.R.S. § 3001) the Town may adopt ordinances to protect the health, safety and welfare of its residents, including Chapter 125 of the Town of Bar Harbor Code, which regulates the use of land and permitted structures in Bar

# Exhibit G

**Exhibit B**

Entry ID: 6640290

Date Filed: 05/03/2024

Page: 2

Document: 00118140663

Case: 24-1317

**Order  
of the Bar Harbor Town Council  
for the November 8, 2022 Town Meeting**

It is hereby ordered that the following article be placed on the town meeting warrant with voting thereon to be held by Australian ballot.

---

**WARRANT ARTICLE**

**Article XX CITIZEN PETITION FOR LAND USE ORDINANCE AMENDMENT — Daily Limits on Cruise Ship Disembarkations Ordinance — Shall an ordinance dated July 19, 2022 and entitled “An amendment to the Town of Bar Harbor Code to Impose Daily Limits on Cruise Ship Disembarkations,” be enacted?**

---

**SUMMARY**

The amendment, with a retroactive date of March 17, 2022, will limit the number of persons allowed to disembark in Bar Harbor from cruise ships to a maximum of 1,000 per day.

---

**EXPLANATION**

The amendment for daily limits on cruise ship disembarkations has a retroactive date of March 17, 2022.

The amendment will limit the number of persons from cruise ships allowed to disembark in Bar Harbor to a maximum, in the aggregate, of 1,000 per day. Exempt from this limit are persons disembarking from cruise ships that have made reservations prior to March 17, 2022. A cruise ship is defined as a watercraft carrying passengers for hire which is capable of providing overnight accommodations for 49 or more passengers.

The Harbor Master will develop rules and regulations to include, but not limited to, a cruise ship disembarkation reservation system, a daily counting and tracking system for persons disembarking, and a violation reporting system.

The Code Enforcement Officer will be responsible for enforcement of the disembarkation daily limit. Pursuant to the rules and regulations developed by the Harbor Master, property owners will be required to secure a written permit from the Code Enforcement Officer for any person disembarking from a cruise ship on, over, or across their land. The Harbor Master will report violations to the Code Enforcement Officer.

Each disembarking person exceeding the daily limit will constitute a specific violation resulting in a minimum civil penalty of \$100 per person.



**AN AMENDMENT TO THE TOWN OF BAR HARBOR CODE TO IMPOSE DAILY LIMITS ON CRUISE SHIP DISEMBARKATIONS**

The Town of Bar Harbor hereby ordains that Bar Harbor Code Chapter 125, Article VII, Section 125-77 shall be amended as follows (additions are underlined, and deletions are ~~struck-through~~):

§ 125-77 Permit required for certain activities.

\*\*\*

H. Disembarking persons from cruise ships on, over, or across any property located within the Town of Bar Harbor.

- (1) For the purposes of this section, "cruise ship" has the same meaning as set forth in § 153-22 B. of the Town of Bar Harbor Code.
- (2) As determined by the Harbor Master, no more than 1,000 persons, in the aggregate, may disembark on a single calendar day from any cruise ship(s) and come to shore on, over, or across any property located within the Town of Bar Harbor; provided, however, that this subsection shall not apply with regard to any cruise ship reservations that have been accepted by the Harbor Master prior to March 17, 2022.
- (3) The Harbor Master shall develop rules and regulations in order to establish (a) a reservation system for cruise ships that transport persons by watercraft for disembarkation in the Town of Bar Harbor; (b) a mechanism for counting and tracking the number of persons disembarking each day; (c) a mandatory procedure for reporting violations to the Code Enforcement Officer; and (d) any other provisions that the Harbor Master deems necessary under this subsection. Any property owner issued a permit under this § 125-77 H. shall comply with all rules and regulations promulgated by the Harbor Master under this subsection.
- (4) This subsection shall be enforced by the Code Enforcement Officer in accordance with § 125-100 of this chapter, based on information as to violations provided by the Harbor Master, and property owners in violation of this subsection shall be subject to such fines, penalties, actions and orders as are authorized by 30-A M.R.S. § 4452, as the same may be amended, provided that each disembarking person exceeding the permitted daily limit in § 125-77 H. (2) is a specific violation under 30-A M.R.S. § 4452(3)(B), resulting in a minimum \$100 penalty per excess unauthorized person.
- (5) Notwithstanding 1 M.R.S. § 302, and regardless of the date on which it is approved by the voters, this subsection will be applicable as of March 17, 2022,

and shall govern any and all applications for permits or approvals required under this subsection that were or have been pending before any officer, board, or agency of the Town of Bar Harbor on or at any time after March 17, 2022; provided, however, that the Town will not take any enforcement action under this subsection with regard to any cruise ship visits occurring prior to the date of adoption by voters at Town Meeting.

\*\*\*

Given under our hands and seal at Bar Harbor this 2nd day of ~~July~~ AUG, 2022:

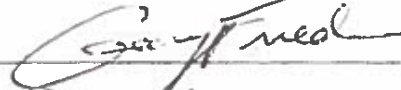
**Municipal Officers of the Town of Bar Harbor**



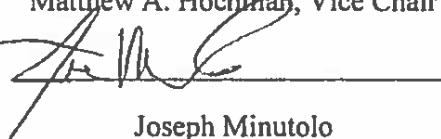
Valerie Peacock, Chair



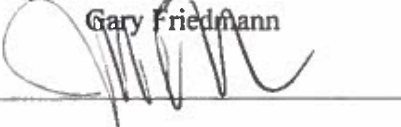
Matthew A. Hochman, Vice Chair




Gary Friedmann



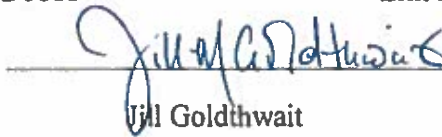
Joseph Minutolo



Jefferson G. Dobbs



Erin E. Cough

  
Jill Goldthwait

# Exhibit H

## (Excerpts)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

---

ASSOCIATION TO PRESERVE AND  
PROTECT LOCAL LIVELIHOODS, et  
al.,

Plaintiffs,

PENOBSCOT BAY AND RIVER PILOTS  
ASSOCIATION,

Plaintiff-Intervenor,

-vs-

TOWN OF BAR HARBOR,

Defendant,

CHARLES SIDMAN,

Defendant-Intervenor.

CIVIL ACTION NUMBER:

1:22-cv-00416-LEW

BENCH TRIAL

---

Margaret Chase Smith United States Courthouse  
202 Harlow Street  
Bangor, Maine 04401  
July 7, 2023

B E F O R E: THE HONORABLE LANCE E. WALKER  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

EATON PEABODY

BY: TIMOTHY C. WOODCOCK, ESQUIRE

P. ANDREW HAMILTON, ESQUIRE

JANNA L. GAU, ESQUIRE

and

PATRICK W. LYONS, ESQUIRE

On behalf of the Plaintiffs, Association To Preserve and  
Protect Livelihoods, et al.,

1 CONT'D APPEARANCES:

2 THOMPSON COBURN LLP

BY: JONATHAN S. KINGSTON, ESQUIRE

3 KATHLEEN E. KRAFT, ESQUIRE

CHARLES JONATHAN BENNER, ESQUIRE

4 and

TWAIN BRADEN, ESQUIRE

5 On behalf of the Plaintiff-Intervenor, Penobscot Bay & River  
Pilots Association.

6

RUDMAN WINCHELL

7 BY: ALLISON A. ECONOMY, ESQUIRE

STEPHEN WAGNER, ESQUIRE

8 and

JONATHAN HUNTER, ESQUIRE

9 On behalf of the Defendant, Town of Bar Harbor.

10 CURTIS THAXTER LLC

BY: ROBERT PAPA ZIAN, ESQUIRE

11 RICHARD OLSON, ESQUIRE

and

12 DAVID P. SILK, ESQUIRE

On behalf of the Defendant-Intervenor, Charles Sidman.

13

14

Cathy J. Ford, Official Court Reporter

15 cfordccr@gmail.com

609.367.2777

16

17 Proceedings recorded by manual stenography; transcript  
produced by computer-aided transcription.

18

19

20

21

22

23

24

25

1	<u>I N D E X</u>	
2	<u>WITNESS</u>	<u>PAGE</u>
3		
4	DAVID GELINAS	12
5	DIRECT EXAMINATION BY MR. KINGSTON	13
6	CROSS-EXAMINATION BY MS. ECONOMY	85
7	CROSS-EXAMINATION BY MR. PAPAIZIAN	101
8	REDIRECT EXAMINATION BY MR. KINGSTON	127
9		
10	PAUL PARADIS	130
11	DIRECT EXAMINATION BY MR. WOODCOCK	130
12	<u>E X H I B I T S</u>	
13	<u>NUMBER</u>	<u>EVID.</u>
14		
15	Plaintiffs' Exhibit 161 Flink Exhibit in evidence.	11
16	Plaintiffs' Exhibit 162 Flink Exhibit in evidence.	
17	Plaintiffs' Exhibit 162 Flink Exhibit in evidence.	11
18	Plaintiffs' Exhibit 163 Flink Exhibit in evidence.	11
19	Plaintiffs' Exhibit 164 Flink Exhibit in evidence.	11
20	Plaintiffs' Exhibit 165 Flink Exhibit in evidence.	11
21	Plaintiffs' Exhibit 166 Flink Exhibit in evidence.	11
22	Plaintiffs' Exhibit 167 Flink Exhibit in evidence.	11
23	Plaintiffs' Exhibit 211 7/30/2021 Letter from Cruise Lines International Assoc. (CLIA) to Bar Harbor Town council re changes to cruise ships in Bar Harbor in evidence.	12
24	Plaintiffs' Exhibit 212 11/12/2021 Letter from CLIA to Bar Harbor Town council re visitors to Bar Harbor in evidence.	12
25	Plaintiffs' Exhibit 213 12/15/2021 Letter from CLIA to Bar Harbor Town council re December 7 Town council meeting in evidence.	12
26	Plaintiffs' Exhibit 214 2/2/2022 Letter from CLIA to E. Salvatore re comments to recommendations to Town council in evidence.	12
27	Plaintiffs' Exhibit 215 Winter 2022 Memo of Agreement Between the Town of Bar Harbor, Maine and cruise lines anchoring in Bar Harbor	12

1	Plaintiffs' Exhibit 195 Sarah Flink Designation List Report in evidence.	12
2	Plaintiffs' Exhibit 417 re Cruise Management Plan Article 3 in evidence.	12
3	Plaintiffs' Exhibit 22 12/5/2022 NOAA Coast Survey in evidence.	18
4	Plaintiffs' Exhibit 146.92 Photo Pilots 005891 in evidence.	20
5	Plaintiffs' Exhibit 146.40 Photo Pilots 005929 in evidence.	23
6	Plaintiffs' Exhibit 146.87 Photo Pilots 005976 in evidence.	24
7	Plaintiffs' Exhibit 141 Ship Movement Spreadsheet for 2021 in evidence.	26
8	Plaintiffs' Exhibit 146.2 Photo Pilots 005891 in evidence.	38
9	Plaintiffs' Exhibit 146.10 Photo Pilots 005899 in evidence.	40
10	Plaintiffs' Exhibit 23 3/27/2023 NOAA Coast Survey 13312 in evidence.	45
11	Plaintiffs' Exhibit 25 4/3/2020 NOAA Coast Survey 13323 in evidence.	45
12	Plaintiffs' Exhibit 150 Bar Harbor Map with Town Lines in evidence.	49
13	Plaintiffs' Exhibit 151 Bar Harbor Map with Town Lines overlaid on maritime chart in evidence.	50
14	Plaintiffs' Exhibit 39 1/1/2023 Maine Pilotage Commission Endorsed Rates in evidence.	61
15	Plaintiffs' Exhibit 7 PortCall Excerpt in evidence.	63
16	Plaintiffs' Exhibit 357 Email 03-17-2022 - Re: Slightly revised BH Cruise Ship Petition resubmitted today (3/17/22) in evidence.	67
17	Plaintiffs' Exhibit 48 Photo - East down Mount Desert Street from Village Green 3:08 p.m. in evidence.	79
19	Plaintiffs' Exhibit 50 Photo - Harbor Place tendering location 2:56 p.m. in evidence.	83
20	Plaintiffs' Exhibit 55 Photo - Main & Cottage looking west 10:58 a.m. in evidence.	83
21	Defendants' Exhibit 426 Re: 8-31-2022 Re: Port Development worksheet in evidence.	117
22	Defendants' Exhibit 442 Re: 2/12/21 Survey vessels; letter to Governor in evidence.	119
23	Defendants' Exhibit 443 Re: 10-4-21 Re: BH Town council proposal and effect in evidence.	123
24		
25		

GELINAS - DIRECT - KINGSTON

1 Q. And were you involved in amendments to the purpose  
2 provision of the Maine Pilotage Act in 1999?

3 A. Yes.

4 Q. I'm not going to ask you -- I'm not going to ask you to  
5 interpret the law, Captain Gelinas. But do you have a sense  
6 as to whether some component of the purpose of the Maine  
7 Pilotage Act is geared towards safety?

8 A. Yes. Safety is a huge component of the Maine Pilotage  
9 Act.

10 Q. Explain to me -- well, explain that to the Court.

11 A. So the Act -- the Act refers to a system of pilots. It's  
12 more than just about giving people licenses to go drive ships.

13 The system of pilotages, in addition to well-trained,  
14 state-licensed pilots, it's the support system necessary to  
15 keep those pilots going and keep new pilots coming in,  
16 well-trained, to execute their job.

17 So it's not just the pilots. It's getting the pilots  
18 safely out to sea and back. It's getting the pilots up and  
19 down the coast. There's a lot of logistics involved in the  
20 job.

21 And so that's more inclusive of what the system of  
22 pilotage is as opposed to just, yeah, we've got five guys with  
23 licenses, and they can do the work. There's a lot more to it.

24 Q. So it sounds like of the one of the purposes of the  
25 pilotage act is efficiency. Is that so?



GELINAS - DIRECT - KINGSTON

1 moving that much. And that's a lot safer for moving the large  
2 laden ships when you can set the dockings and undockings up to  
3 occur during those windows.

4 Q. I want to go -- we got a little bit sidetracked there,  
5 Captain Gelinias. I think it was my fault. But we were  
6 talking about the purposes of the Maine Pilotage Act. Do you  
7 recall that, sir?

8 A. Yes.

9 Q. Does pilot availability factor into that as well?

10 A. Yeah, very much.

11 Q. Explain that.

12 A. Well, again, it's a -- you know, it's an on-demand  
13 system. When the ships call for a pilot, we're there to bring  
14 them up the bay, we avoid -- sometimes delays do occur because  
15 of weather. But, you know, in terms of pilot boats and rested  
16 pilots being available, we try to make that available 24/7 as  
17 needed.

18 Q. So it's an as-needed system. And does that contrast with  
19 a different kind of system?

20 A. Well, it could contrast with a system where you don't  
21 have sufficient pilots or the revenues to support sufficient  
22 pilots. And then you might have to have a system whereby the  
23 schedule would have to be done differently so that you could  
24 make sure that there was somebody available to do a piloting  
25 job.

GELINAS - DIRECT - KINGSTON

1 Q. Are you familiar with the phrase of an "as-available  
2 system"?

3 A. Yeah. That's kind of what I just described is you would  
4 have to look at, okay, how are we going to make the system  
5 work with a limited number of pilots or a limited number of  
6 resources.

7 Q. So there's one way in which piloting services could be  
8 provided, and that would be an as-needed system. And then a  
9 contrasting way would be an as-available system. Is that  
10 right?

11 A. That's fair to say, yes.

12 Q. And then the as-needed system, when the boat shows up,  
13 the pilot shows up. And then the as-available system, what  
14 happens?

15 A. The vessel would be waiting until there's a pilot that's  
16 available.

17 Q. What sort of system is in place now, Captain Gelinias?

18 A. We have an as-needed system for all of Penobscot Bay and  
19 Frenchman Bay.

20 Q. Now, in addition to boats that move products, the pilots  
21 provide piloting services for boats that move people; is that  
22 right?

23 A. That's correct.

24 Q. And what kind of boats are those?

25 A. So we move the cruise ships that move in and out of

GELINAS - DIRECT - KINGSTON

1 A. 31 years.

2 Q. And has piloting gotten safer or less safe or stayed the  
3 same during your tenure?

4 A. Well, we've tried to make it safer. I think it's -- I  
5 think it's gotten better with the improvements we've been able  
6 to make incrementally due to the system.

7 Q. And do the boats that the pilots use factor into that  
8 improved safety?

9 A. They do. Because that's the most dangerous part of the  
10 job is just, you know, getting out to work, getting back and  
11 forth, and then being alongside and climbing the ladder.

12 MR. KINGSTON: Ms. Bedard, can you pull up  
13 Plaintiffs' Exhibit 146.10.

14 For the record, your Honor, Plaintiffs' Exhibit  
15 146.10 is a photograph Bates-labeled Pilots 5899 that depicts  
16 a boat that -- that depicts a boat.

17 Q. Captain Gelinis, do you recognize Plaintiff  
18 Exhibit 146.10?

19 A. I do.

20 Q. And what is depicted there, sir?

21 A. So this is the lobster vessel Frenchman Bay, which, until  
22 2019, served as our pilot vessel in the port of Bar Harbor.

23 Q. And so why did the pilots switch from the lobster vessel  
24 to a dedicated pilot boat?

25 A. Well, the increase in traffic in our region allowed us to

GELINAS - DIRECT - KINGSTON

1 Gelinas. But what -- do they just lose their footing, fall in  
2 between them?

3 A. It could be any number of factors: slipping on the  
4 ladder, slipping between the ladder and the pilot boat, the  
5 pilot boat riding up -- pilot's already on the ladder and the  
6 pilot boat rides up and hits them. You know, poorly rigged  
7 ladders, broken rungs. There's any number of things that can  
8 lead to a fall.

9 Q. And so this -- a dedicated pilot boat with the features  
10 that you've described for us, that's consistent with one of  
11 the goals of the Maine Pilotage Act of maximizing safety; is  
12 that right?

13 A. It is in that it currently enhances the safety of the  
14 state pilots just getting back and forth to doing their job.

15 MR. KINGSTON: Ms. Bedard, could you pull up  
16 Exhibit 23.

17 Q. I think we talked about half your territory, but we  
18 didn't talk -- or we didn't, at least, look at a map of the  
19 other half.

20 Do you recognize Exhibit 23, Captain Gelinas?

21 A. Yes, I do.

22 Q. And what is it?

23 A. It's Chart 13312, which is the small-scale chart of  
24 approaches to Frenchman Bay, Blue Hill Bays.

25 Q. And is that Mount Desert Island there in the middle, sir?

GELINAS - DIRECT - KINGSTON

1 right?

2 A. That's correct.

3 Q. Tell me what happened in 2021.

4 A. 2021, we had no boat service in Bar Harbor. We had no  
5 cruise ships. We had no work, so we couldn't keep the boat,  
6 and we did not have a boat in Bar Harbor that year and no  
7 employees for Bar Harbor.

8 Q. And you have an understanding, don't you, Captain  
9 Gelinas, that one of kind of the broader claims we're making  
10 in Count 3 of this -- of the pilots' complaint in this lawsuit  
11 is that the reduction in revenue is going to have a negative  
12 impact on our ability to perform -- to efficiently accomplish  
13 the purposes of the pilotage act.

14 Do you understand that?

15 A. Yes.

16 Q. Why didn't that happen during the pandemic, when the  
17 cruise ship market dried up?

18 A. That did happen. We lost all of our cruise ship traffic,  
19 so we lost 50 percent of revenue.

20 And the only way that we were able to maintain our four  
21 pilots and at least keep the pilot boats -- we actually  
22 upgraded them during that time for future use -- was because  
23 of the pandemic relief, the grants and federal programs and  
24 state programs that were available during COVID.

25 Q. So it was relief money that filled the gap left by the

GELINAS - DIRECT - KINGSTON

1 Q. And what does that depict?

2 A. That depicts guests on the vessels.

3 Q. And so is that the lower berth capacity that you were  
4 referring to, sir?

5 A. I assume that is the lower berth capacity of the vessels,  
6 yes.

7 Q. And so is it possible, Captain Gelinas, to sort this  
8 Excel spreadsheet in such a fashion that we can identify which  
9 ships were disallowed and which were not under the ordinance?

10 A. Yes. It would be possible.

11 Q. Is it also possible, Captain Gelinas, to calculate the  
12 pilotage fee for the vessels listed in the spreadsheet?

13 A. Yes, it is.

14 Q. And if we have the list of the disallowed vessels and the  
15 pilotage fees for those ships, could we take a run at  
16 estimating the economic impact of the ordinance on the pilots?

17 A. Yes, we can.

18 Q. And have you performed that exercise, sir?

19 A. Yes, we have.

20 Q. What would be the economic impact of the ordinance when  
21 it's ultimately fully in play? What's an estimate of that  
22 number, Captain Gelinas?

23 A. With relation to what we're earning this year or the  
24 total?

25 Q. Yes, sir.

GELINAS - DIRECT - KINGSTON

1 A. So if you were to apply -- if you apply the standards of  
2 the ordinance to this year's vessel traffic, it will amount to  
3 about \$146,000 of gross revenue billed.

4 Q. What are you projected to -- the ships this year are  
5 largely grandfathered in; is that right?

6 A. That's correct.

7 Q. And so that's not the actual number that's going to come  
8 in this year. Is that so?

9 A. That's correct.

10 Q. What is the number that's going to come in in 2023 as  
11 currently booked?

12 A. I forget the exact number, but I believe it's north of  
13 100 vessels coming in.

14 Q. Can you translate that number into a dollar amount,  
15 Captain Gelinias?

16 A. So providing we don't lose any vessels to weather -- we  
17 always lose a little bit of traffic to weather days, vessel  
18 cancellations. But if everybody that is scheduled comes right  
19 now, the billable revenue to the pilots would be about  
20 \$1,080,000.

21 Q. And so when you -- applying the ordinance to 2023 to get  
22 an estimate, when it ultimately goes into effect, that revenue  
23 would reduce from somewhere in the neighborhood of a million  
24 dollars to somewhere in the neighborhood of \$150,000; is that  
25 correct?

GELINAS - DIRECT - KINGSTON

1 A. That's correct.

2 Q. Now, that's not -- we're discussing the ultimate effect  
3 of the ordinance, Captain Gelinas. Could we talk about sort  
4 of the near-term effect of the ordinance as well?

5 A. Yes.

6 Q. And what would that be?

7 A. So for next season, with the grandfathered vessels  
8 allowed to come, the effect would be a billable revenue of  
9 about \$506,000.

10 Q. So looking at that near-term reduction and then that  
11 ultimate reduction, Captain Gelinas, if the ordinance remains  
12 in place, do you think that you can maintain a dedicated pilot  
13 boat in Bar Harbor?

14 A. Not with that level of revenue, no.

15 Q. If the ordinance remains in place, Captain Gelinas, can  
16 you continue -- can the Pilots Association continue to employ  
17 four pilots?

18 MR. OLSON: Objection, your Honor. This is all  
19 speculation again.

20 MR. KINGSTON: I'll rephrase, your Honor.

21 THE COURT: Sustained.

22 Go ahead.

23 BY MR. KINGSTON:

24 Q. With \$150,000 of revenue coming in from Bar Harbor, can  
25 the Pilots Association continue to employ four pilots?



GELINAS - DIRECT - KINGSTON

1 A. No.

2 Q. With \$150,000 in revenue coming in from Bar Harbor,  
3 Captain Gelinias, can the Pilots Association continue to  
4 provide pilotage service on an as-needed basis?

5 MR. OLSON: Same objection, your Honor.

6 THE COURT: Overruled.

7 Go ahead. You can answer.

8 THE WITNESS: Not as-needed. What we would have to  
9 do with that dramatic decrease in traffic is we would have to  
10 figure out a way of still addressing the needs of whatever  
11 smaller ships were going to Bar Harbor, but we'd have to  
12 figure -- we'd have to figure out how to do it with, you know,  
13 potentially a limited -- a reduced number of pilots and,  
14 certainly, a reduced number of pilot boats. We couldn't  
15 afford to keep a pilot boat in Bar Harbor.

16 Q. Is figuring out how to operate with only \$150,000 coming  
17 from Bar Harbor something that you are currently doing,  
18 Captain Gelinias?

19 A. We're discussing that amongst our membership, yes.

20 Q. Do you recall our discussion, Captain Gelinias, about a  
21 boat with people and a boat with stuff coming in at the same  
22 time?

23 A. Yes.

24 Q. And under the ordinance, there will still be boats with  
25 people coming in sometimes. Those will be boats of -- that

# Exhibit I

Message

---

**From:** David Gelinis [pbpilot.dg@gmail.com]  
**Sent:** 2/12/2021 12:48:58 PM  
**To:** Brian Downey [brian.downey@marinecs.com]  
**Subject:** Survey vessels; letter to Governor  
**Attachments:** scanned Janet Mills Covid relief letter.pdf

Brian,

I saw this article in the local paper today, describing the arrival of survey vessels in Boothbay and Penobscot Bay.

<https://www.penbaypilot.com/article/seabed-surveys-scheduled-aqua-ventus/143580>

Could I ask you to reach out in your official capacity as Administrator of the Maine Pilot Commission to remind them to contact our organization to coordinate their movements when in State waters? It looks to me like they will be in State waters for all of their work, however only one of the three vessels would require a State pilot.

On that note, we all made our 12 round trips over the Boothbay Route last fall, though we still need to submit those to you. How soon could we arrange for testing for Boothbay in order to qualify more pilots there?

Finally, I am attaching a copy of a letter that I am sending today to Governor Mills. This letter was precipitated by the decision last week by Canadian officials to cancel another year of cruise ship visits, which in effect shuts down our work for another year as well. We were able to limp through last year and certainly the recent rate increase will help if yachts show back up (a big "if"), but we had not anticipated a complete cancellation of another cruise ship season. With a second year in a row of a 50% loss of revenue, I want the State and the Pilot Commission to understand that we may be forced to make some operational changes which could adversely affect our ability to service the ports and the Pilotage System. I hope that we may benefit from some of the Federal assistance mentioned in the letter to the Governor, but if not our operation is likely to change. Thanks for sharing this with Commission members.

Kind regards,  
David

# Exhibit J

## (Excerpts)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

---

ASSOCIATION TO PRESERVE AND  
PROTECT LOCAL LIVELIHOODS, et  
al.,

Plaintiffs,

PENOBSCOT BAY AND RIVER PILOTS  
ASSOCIATION,

Plaintiff-Intervenor,

-vs-

TOWN OF BAR HARBOR,

Defendant,

CHARLES SIDMAN,

Defendant-Intervenor.

CIVIL ACTION NUMBER:

1:22-cv-00416-LEW

BENCH TRIAL

---

Margaret Chase Smith United States Courthouse  
202 Harlow Street  
Bangor, Maine 04401  
July 13, 2023

B E F O R E: THE HONORABLE LANCE E. WALKER  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

EATON PEABODY

BY: TIMOTHY C. WOODCOCK, ESQUIRE

P. ANDREW HAMILTON, ESQUIRE

JANNA L. GAU, ESQUIRE

and

PATRICK W. LYONS, ESQUIRE

On behalf of the Plaintiffs, Association To Preserve and  
Protect Livelihoods, et al.,

1 CONT'D APPEARANCES:

2 THOMPSON COBURN LLP

BY: JONATHAN S. KINGSTON, ESQUIRE

3 KATHLEEN E. KRAFT, ESQUIRE

CHARLES JONATHAN BENNER, ESQUIRE

4 and

TWAIN BRADEN, ESQUIRE

5 On behalf of the Plaintiff-Intervenor, Penobscot Bay & River  
Pilots Association.

6

RUDMAN WINCHELL

7 BY: ALLISON A. ECONOMY, ESQUIRE

STEPHEN WAGNER, ESQUIRE

8 and

JONATHAN HUNTER, ESQUIRE

9 On behalf of the Defendant, Town of Bar Harbor.

10 CURTIS THAXTER LLC

BY: ROBERT PAPA ZIAN, ESQUIRE

11 RICHARD OLSON, ESQUIRE

and

12 DAVID P. SILK, ESQUIRE

On behalf of the Defendant-Intervenor, Charles Sidman.

13

14

Cathy J. Ford, Official Court Reporter

15 cfordccr@gmail.com

609.367.2777

16

17 Proceedings recorded by manual stenography; transcript  
produced by computer-aided transcription.

18

19

20

21

22

23

24

25

<u>1</u>	<u>I N D E X</u>	
<u>2</u>	<u>WITNESS</u>	<u>PAGE</u>
<u>3</u>	CHRISTOPHER WHARFF	13
	DIRECT EXAMINATION BY MS. ECONOMY	13
<u>4</u>	CROSS-EXAMINATION	24
	CROSS-EXAMINATION BY MR. WOODCOCK	26
<u>5</u>	CROSS-EXAMINATION BY MR. KINGSTON	43
	REDIRECT EXAMINATION BY MS. ECONOMY	50
<u>6</u>	RECROSS-EXAMINATION BY MR. PAPAZIAN	52
	RECROSS-EXAMINATION BY MR. WOODCOCK	53
<u>7</u>	RECROSS-EXAMINATION BY MR. KINGSTON	58
	FURTHER REDIRECT EXAMINATION BY MS. ECONOMY	59
<u>8</u>	FURTHER RECROSS EXAMINATION BY MR. PAPAZIAN:	61
<u>9</u>	SARAH GILBERT	62
	DIRECT EXAMINATION BY MS. ECONOMY	62
<u>10</u>	CROSS-EXAMINATION BY MR. PAPAZIAN	74
	CROSS-EXAMINATION BY MR. WOODCOCK	76
<u>11</u>	CROSS-EXAMINATION BY MR. KINGSTON	92
	REDIRECT EXAMINATION BY MS. ECONOMY	99
<u>12</u>	RECROSS-EXAMINATION BY MR. PAPAZIAN	103
	RECROSS-EXAMINATION BY MR. WOODCOCK	104
<u>13</u>		
	VALERIE PEACOCK	108
<u>14</u>	DIRECT EXAMINATION BY MS. ECONOMY	108
	VOIR DIRE EXAMINATION BY MR. KINGSTON	147
<u>15</u>	CROSS-EXAMINATION BY MR. PAPAZIAN	167
	CROSS-EXAMINATION BY MR. WOODCOCK	177
<u>16</u>	REDIRECT EXAMINATION BY MS. ECONOMY	194
<u>17</u>	GARY FRIEDMANN	198
	DIRECT EXAMINATION BY MS. ECONOMY	199
<u>18</u>		
	WILLIAM RAY HORNER	211
<u>19</u>	DIRECT EXAMINATION BY MR. PAPAZIAN	211
<u>20</u>	NATHAN YOUNG	216
	DIRECT EXAMINATION BY MR. PAPAZIAN	217
<u>21</u>		
	SETH LIBBY	223
<u>22</u>	DIRECT EXAMINATION BY MR. PAPAZIAN	223
	CROSS-EXAMINATION BY MR. KINGSTON	239
<u>23</u>		
	CHARLES SIDMAN	248
<u>24</u>	DIRECT EXAMINATION BY MR. PAPAZIAN	249
	CROSS-EXAMINATION BY MR. WOODCOCK	298
<u>25</u>	CROSS-EXAMINATION BY MR. KINGSTON	319
	CROSS-EXAMINATION BY MS. ECONOMY	329

<u>E X H I B I T S</u>		
<u>Number</u>		<u>Page</u>
1		
2		
3		
4	Defendants' Exhibits 12A 9/20/2019 Memo from Mount Desert and Bar Harbor Police Departments re Cruise Ship Post Orders, Responsibilities and Policies in evidence.	9
5	Defendants' Exhibit 47 12/2/2011 Feasibility Study for the Acquisition of the Bar Harbor ferry terminal in evidence.	9
6	Defendants' Exhibit 204 5/31/2023 Letter from S. Gilbert Town of Bar Harbor in evidence.	9
7	Defendants' Exhibit 327 Memorandum of Understanding Between Town and Cruise Lines in evidence.	9
8	Plaintiffs' Exhibit Paul Grigsby (Holland) Designation List Report in evidence.	11
9	Plaintiffs' Exhibit Juan Kuryla (Norwegian) Designation List Report in evidence.	11
10	Plaintiffs' Exhibit 194 Rob Van Den Hof (Holland) Designation List Report in evidence.	11
11	Plaintiffs' Exhibit 197 Deposition Designations (Bartlett, Chamberlain, Gilbert, Peacock, Wharff, and Willis) in evidence.	11
12	plaintiffs' Exhibit 29A Color Version of 29 in evidence.	19
13	plaintiffs' Exhibit 66 12/15/2022 Memo from Mount Desert and Bar Harbor Police Departments re Land Use Ordinance change governing Cruise Ship Passenger in evidence.	49
14	Defendants' Exhibit 348 Cruise Ship Fund Details Town Budget FY22 in evidence.	67
15	Defendants' Exhibit 349 Cruise Ship Fund Details Town Budget FY23 in evidence.	67
16	Defendants' Exhibit 345 Town of Bar Harbor Parking Revenue in evidence.	71
17	plaintiffs' Exhibit 14 4/21/2023 Email from M. Gagnon to S. Gilbert re Cruise Ship litigation in evidence.	95
18	Defendants' Exhibit 250A 2007 Comprehensive Plan Update in evidence.	118
19	Plaintiffs' Exhibit 256 2035 Comprehensive Plan Bar Harbor Existing Conditions Analysis Report in evidence.	121
20	Defendants' Exhibit 323 June 2021 Pan Atlantic Quantitative Research Regarding Cruise Ship Tourism in evidence.	151
21	Plaintiffs' Exhibit 202 Pier Permit Golden Anchor	205
22		
23		
24		
25		



1	Plaintiffs' Exhibit 203 Pier Permit B.H.H. Piers in evidence.	205
2	Plaintiffs' Exhibit 207 8/2/2022 Bar Harbor Town Council Meeting Minutes in evidence.	206
3	Plaintiffs' Exhibit 208 7/19/2022 Amendment to the Town of Bar Harbor Code to Impose Daily Limits on Cruise Ship Disembarkations in evidence.	206
4		
5	Plaintiffs' Exhibit 209 3/18/2022 Amendment to the Town of Bar Harbor Code to Impose Daily Limits on Cruise Ship Disembarkations in evidence.	206
6		
7	Plaintiffs' Exhibit 210 11/8/2022 Order of the Bar Harbor Town Council for Town Meeting - Amendment imposing Limit to Number of Persons Allowed to Disembark in evidence.	206
8		
9	Plaintiffs' Exhibit 216 2/16/2017 Memo to Bar Harbor Town Council from E. Salvatore re 2016 Annual Report in evidence.	206
10		
11	Plaintiffs' Exhibit 217 11/5/2018 CLIA Proposal for Study in evidence.	206
12	Plaintiffs' Exhibit 218 10/17/2022 Email chain re Viewpoint submission in evidence.	206
13	Plaintiffs' Exhibit 220 Bar Harbor Fire Department presentation re FY 2024 Budget in evidence.	206
14	Plaintiffs' Exhibit 221 Town of Bar Harbor, Maine, Marine Mass Casualty Incident Response Guidelines in evidence.	206
15		
16	Plaintiffs' Exhibit 222 6/28/2019 Bar Harbor Fire Department Cruise Ship Emergency guidelines in evidence.	206
17	Plaintiffs' Exhibit 223 10/18/2022 2022 Emergency Operations Plan in evidence.	206
18	Plaintiffs' Exhibit 224 2/12/2008 Bar Harbor Town Council minutes re Cruise Ship Study task force in evidence.	207
19		
20	Plaintiffs' Exhibit 225 12/15/2021 Memo to Town Council from E. Salvatore re Motion to limit passengers' arrivals to 70% in evidence.	207
21	Plaintiffs' Exhibit 226 1/5/2022 Article "Citizen petition to regulate cruise ships likely" in evidence.	207
22		
23	Plaintiffs' Exhibit 227 12/20/2021 Email from The Quietside Journal to C. Sidman re article "Anti-cruise ship activists up the stakes for 2022 ahead of Bar Harbor council meeting tomorrow" in evidence.	207
24		
25		

1	Plaintiffs' Exhibit 228 5/3/2022 Email from The Quietside Journal to C. Sidman re article	207
2	"Citizen group gain enough signatures for petition to cap cruise ships" in evidence.	
3	Plaintiffs' Exhibit 229 1/3/2023 Email from Bar Harbor Story to C. Sidman re article "Businesses	207
4	Take the New Cruise Ship Disembarkation Plan to Court" in evidence.	
5	Plaintiffs' Exhibit 230 3/22/2022 Email chain re crew numbers in evidence.	207
6	Plaintiffs' Exhibit 231 3/7/2022 Email chain from C. Sidman to C. Sidman re Final DRAFT of 2022 BH	207
7	Cruise Ship Initiative in evidence.	
8	Plaintiffs' Exhibit 232 1/17/2023 Email to Bar Harbor Town Council from C. Sidman re Cruise Ship Suit and Town manager in evidence.	207
9	Plaintiffs' Exhibit 233 10/30/2022 Email from C. Sidman to Council and Maine State Dept of	208
10	Transportation re Anti-initiative in Bar Harbor in evidence.	
11	Plaintiffs' Exhibit 235 1/19/2023 Proposed Defendant-Intervenor C. Sidman's Verified Motion	208
12	to Intervene and Alternative Verified Motion to Participate as Amicus Curiae and Memorandum in	
13	Support of Motions in evidence.	
14	Plaintiffs' Exhibit 236 2/6/2023 Plaintiff-Intervenor Penobscot Bay and River	208
15	Pilots Association's Opposition to Charles Sidman's Motion to Intervene in evidence.	
16	Plaintiffs' Exhibit 237 12/29/2022 Memo from C. Sidman to Town Council re Amendment to Code to	208
17	Impose Daily Limits on Disembarking Cruise Ship Passengers in evidence.	
18	Plaintiffs' Exhibit 240 4/13/2022 Email chain re April visits for 2023 in evidence.	208
19	Plaintiffs' Exhibit 241 10/27/2022 Website Article, "Something is rotten in the state of	208
20	Denmark" by C. Sidman in evidence.	
21	Plaintiffs' Exhibit 242 10/30/2022 Email re Anti-Initiative in Bar Harbor from C. Sidman in	208
22	evidence.	
23	Plaintiffs' Exhibit 243 Ordinance, Purpose Section and Warrant Articles in evidence.	208
24	Defendants' Exhibit DX 502 Re: CV Charles Lawrence Sidman in evidence.	251
25	Defendants' Exhibits 503 Re: Photo 9229 in evidence.	255
	Defendants' Exhibit 504 Re: Photo 9230 in evidence.	255
	Defendants' Exhibit 505 Re: Photo 9233	255

1	Plaintiffs' Exhibit 506 Re: Photo 9243 in evidence.	319
2	Plaintiffs' Exhibit 72 2/19/2022 Email chain re Cruise Ship Initiative in evidence.	320
3	Plaintiffs' Exhibit 415 re: BREAKING NEWS: Citizens group seeks to limit cruise ship	322
4	visitors to 1,000/day in evidence.	
5	Plaintiffs' Exhibit 412 re: BH Cruise Ship Initiative in evidence.	322
6	Plaintiffs' Exhibit 414 re: Slightly revised BH Cruise Ship Petition resubmitted today (3/17/22) in evidence.	323
7	Defendants' Exhibit DX 32 7/15/2019 Cruise Tourism & Traffic Congestion in Bar Harbor:	330
8	Improving the Visitor & Resident Experience in evidence.	
9	Defendants' Exhibit DX 252 2016 Email to Cornell Knight Re 2016 Park Loop Closures Congestion in	331
10	evidence.	
11	Defendants' Exhibit DX 259 A. Powers to D. Gelinas Eastport Alternative Email in evidence.	331
12	Defendants' Exhibit DX 337 Town Council Minutes July 20, 2021 in evidence.	331
13	Plaintiffs' Exhibit Chris Martin (Holland) Designation List Report in evidence.	332
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

—PEACOCK - DIRECT - ECONOMY—

1 do enough for the Town to reduce visitation.

2 Q. There's a suggestion in the course of this litigation  
3 that the passenger caps set forth in the MOA, were the Town  
4 council's determination of what is reasonable for caps; is  
5 that accurate?

6 A. It definitely -- I definitely wouldn't have put my name  
7 or brought anything forward on a passenger cap that I felt  
8 like the Town could not manage or have or do effectively or do  
9 well. You know, I definitely spent some time with the  
10 harbormaster really trying to understand all the different  
11 inputs and outputs that would create an experience or  
12 visitation or congestion or things on the Town pier really  
13 tapping into a lot of his knowledge of understanding of the  
14 different whole systems of how things happen. But I would say  
15 that -- we -- you heard -- we heard in testimony like how  
16 complicated it is to schedule a cruise ship, for them to  
17 create a cruise ship season from cruise lines and all the  
18 things that they put into that. And so, in the process of  
19 trying to actually get a reduction, we had to listen to the  
20 concerns or the inputs of the cruise ship industry in terms of  
21 the logistical practical nature of actually getting them to  
22 reduce visitation and to be able to respond to that. You  
23 know, they talked to us about the number of ships that they  
24 have and the size of the ships and sort of the future planning  
25 of those things. And so, you know, this cap is both the

—PEACOCK - DIRECT - ECONOMY—

1 result of what we were trying to accomplish as well as the  
2 negotiation with a pretty complicated global industry, right.

3 So when you say "is it reasonable"? I think -- can the  
4 Town of Bar Harbor, like, manage this type of visitation?

5 Yes, we can. We already have been doing it. It's less than  
6 what we've been doing. We know we can do it. You heard the  
7 harbormaster say that safety has never been an issue. That's  
8 Number 1 for me. Quality of experience is definitely a big  
9 piece of that too, but, I think, you know, whether this is  
10 reasonable to me, it's a starting place and a set of tools  
11 that allows us to adjust over time in a much more, like,  
12 explicit and slow and in a more timely way of being able to  
13 respond to changes.

14 Q. And to be clear, the Town initially proposed a cap of  
15 3,000 passengers per day, correct?

16 A. Yeah, we had -- the original council proposal is even  
17 less than that, but I think the proposal that we were pulling  
18 out, when we did get some feedback from the cruise ship  
19 committee, and other folks, was that -- it was fairly  
20 complicated. The harbormaster was concerned about, you know,  
21 how he would actually be able to manage and schedule into  
22 that. The cruise ship industry was sort of pulling back on  
23 us, so we simplified it to that 3,000.

24 Q. And that is to be renegotiated on an annual basis, you  
25 said?

PEACOCK - DIRECT - ECONOMY

1 A. Yes. So the way that the MOA is setup is that it  
2 actually applies to 18 months out from when it's signed, so it  
3 includes two seasons of time but it's renegotiated every year.  
4 So, you know, as we start to see issues arise or things that  
5 we might want to address through caps, we can -- we can -- we  
6 can do that within. Do that in a way that is timely enough to  
7 not let things get so far ahead -- out of hand, but also  
8 within the constraints of the industry and how it works in  
9 terms of scheduling out, you know, the -- I think 18 months  
10 probably feels tight for them, but it felt hard for us to give  
11 more time into the future in terms of thinking about how to be  
12 able to respond.

13 Q. Okay. When does the current MOA expire?

14 A. It expires on December 31st.

15 MS. ECONOMY: And I believe Exhibit 327 is already in  
16 evidence.

17 Q. Ms. Peacock, we heard testimony throughout the course of  
18 this litigation about info graphic that was disseminated -- I  
19 guess a joint effort between CruiseMaine and the Town of Bar  
20 Harbor, and we are in the process of pulling that up  
21 currently.

22 This is confidential. If you can either close out. The  
23 document being shown was confidential, not Exhibit 37.

24 While this is being brought up, Ms. Peacock. Do you know  
25 the document to which I am referring --

PEACOCK - CROSS - WOODCOCK

1 only representatives of the Town council but communications  
2 with industry representatives and CruiseMaine and others,  
3 correct?

4 A. Correct.

5 Q. And so, in making the recommendation for the caps that  
6 are in the memorandum of agreement, that -- it was understood  
7 the Town council was going to have to approve those caps,  
8 right?

9 A. Yes.

10 Q. And so, the caps themselves represented a level of  
11 visitation by cruise ship passengers that the Town felt it  
12 could accommodate; is that correct?

13 A. Yes. Like I said earlier, the Town had already been  
14 accommodating caps that were higher than that. We were, like,  
15 proven to be able to do that effectively. I think, we were  
16 trying to balance not so much just what the -- the caps we're  
17 putting out there in terms whether the Town can handle it or  
18 not, like, logistically or within, like, the space of the  
19 Town, but whether what we were going to put out there would  
20 result in a reduction that felt like a reduction to the Town  
21 and the way that the Town was asking us to do. So there are  
22 two different things that we're trying to put out there, you  
23 know. I -- I don't think -- yeah. I'm going to stop there.

24 Q. Let me ask you just a few questions about this  
25 infographic that was circulated shortly before the election.

# Exhibit K

## (Excerpts)



STATE OF MAINE  
HANCOCK, ss.

SUPERIOR COURT  
Civil action  
Docket No.: CV-2024-004

CHARLES SIDMAN,

Plaintiff

v.

TOWN OF BAR HARBOR, et al.,

Defendants

**MOTION TO DISMISS**

NOW COMES Defendants Town of Bar Harbor and Valerie Peacock, Gary Friedmann, Matthew Hochman, Maya Caines,<sup>1</sup> Joe Minutolo, and Kyle Shank, in their capacities as elected members of the Bar Harbor Town Council (collectively, the “Councilors,” and together with the Town of Bar Harbor, the “Town”),<sup>2</sup> by and through undersigned counsel, Rudman Winchell, and move to dismiss Plaintiff Charles Sidman’s Complaint for failure to state a claim upon which relief may be granted. In support of this motion, Defendants submit the following incorporated memorandum of law.

**BACKGROUND**

Facts Alleged

On a motion to dismiss, the material allegations of the complaint must be taken as admitted. *Moody v. State Liquor & Lottery Comm’n*, 2004 ME 20, ¶ 7, 843 A.2d 43. Although a court typically may not consider materials outside the pleadings in the context of a motion to dismiss or for judgment on the pleadings without converting the motion into one for summary judgment, a

<sup>1</sup> Plaintiff has misspelled Councilor Caines’ surname in all his filings as “Cains.”

<sup>2</sup> A seventh member of the Town Council, Earl Brechlin, is named in the Complaint, but has not yet been served. Undesignated counsel’s appearance does not presently include Councilor Brechlin.

(Exhibit A § 125-77(H)(3); *see also* Complaint ¶¶ 27-28 (recognizing need for development and adoption of rules and systems to implement Ordinance)).

With regard to enforcement, Code § 125-101 provides that if a violation is not corrected after notice by the Code Enforcement Officer (CEO), the CEO shall report the violation to the Town Council. (Exhibit A § 125-101(A)(1).) The Council “shall vote to accept” the CEO’s report of the violation. (*Id.*; Complaint ¶ 69.) The Council is “authorized to enter into administrative consent agreements for the purpose of eliminating violations of this chapter and recovering fines without court action.” (Exhibit A § 125-101(A)(2); Complaint ¶ 75.)

Shortly after passage of the Ordinance, the Town was sued in U.S. District Court by business interests challenging the constitutionality of the Ordinance. (Complaint ¶ 33.) Sidman intervened in that suit. (Complaint ¶¶ 35-36.) After a bench trial, the Town prevailed, with the federal court upholding the constitutionality of the Ordinance by an Amended Decision and Order dated March 1, 2024 (the “Decision”). (Complaint ¶ 33.) A true and accurate copy of the Decision is attached hereto as **Exhibit B**.<sup>4</sup> The federal court noted that development and promulgation of rules was required before the Ordinance could be enforced. (Exhibit B at 11, 13, 30, 32 n.21.) That necessary rulemaking and implementation had been paused pending the federal court’s Decision. (Exhibit B at 13.)

A few days after the Decision, on March 6, 2024, the Town Council held a meeting at which it issued a public statement regarding the Decision and discussing enforcement of the Ordinance. (Complaint ¶ 37.) The Council released the same statement in the form of a press release. (Complaint ¶ 39.) A true and accurate copy of the minutes of the Council’s March 6, 2024,

---

<sup>4</sup> The Decision is a public document that is specifically referenced in the Complaint (Complaint ¶ 33), and Sidman can hardly question its authenticity where he has already submitted it in support of his Motion for Trial of the Facts and to Specify the Future Course of Proceedings filed April 11, 2024, with an affidavit from his counsel swearing to its authenticity. (Affidavit of Robert Papazian, Esq., ¶ 5 & Exhibit B.)

meeting is attached as **Exhibit C**, and a true and accurate copy of the Council’s press release is attached as **Exhibit D**.<sup>5</sup> In its statement, the Council indicated that it would “see to [the Ordinance’s] immediate implementation and enforcement, in a way that is lawful, fair, and fiscally responsible,” and that contrary to requests by some to delay enforcement of the Ordinance until any appeals of the Decision were resolved, “[p]ending rulemaking, enforcement will begin immediately.” (Exhibit D at 1.) The Council therefore “direct[ed] the Town Manager to prepare draft rules for Council consideration necessary to ensure the Ordinance may be implemented efficiently, and in compliance with the [Federal] Court’s decision.” (Exhibit D at 2.) Those draft rules were to be “presented to the Council as soon as possible,” and would be “subject to a public hearing and a final enactment by the Town Council.” (Exhibit D at 2.)

However, the Council indicated that, with respect to the 2024 cruise season only, it would honor cruise ship reservations made before voters approved the Ordinance on November 8, 2022, and not subject disembarkations from those ships to the 1,000-passenger daily limit set by the Ordinance. (Exhibit D at 1; Complaint ¶ 37.) As the Council explained, “[m]ost of the ships in question are scheduled to arrive in less than 90 days. Canceling the bulk of the 2024 season now would be fundamentally unfair, would potentially expose the Town to additional legal liabilities, and would have a drastic fiscal impact on an already strained and nearly complete municipal budget.” (Exhibit D at 1-2.) As to those reservations made after November 8, 2022, the Council stated that it “ha[d] already directed the Harbor Master to cancel, or reject, requests for reservations made after the day of the vote for all ships with lower berth capacities greater than 1,000

---

<sup>5</sup> The Council’s minutes and press release are both public documents, referenced throughout Sidman’s Complaint, and plainly “central” to his claims. Moreover, Sidman has already submitted both the meeting minutes and the press release in support his Motion for Trial of the Facts and to Specify the Future Course of Proceedings filed April 11, 2024, with an affidavit from Sidman himself swearing to the documents’ authenticity. (Affidavit of Charles Sidman ¶¶ 15-16 & Exhibits 1-2.)

passengers.” (Exhibit D at 1.) The Council indicated that, with respect to the 2025 season, it “will ensure that the disembarkation of any cruise lines with reservations made and accepted after March 17, 2022, will be subject to the Ordinance,” and is “prepared to go to court to obtain fines and injunctive relief” for any violations. (Exhibit D at 2.)

#### Procedural History

On or about April 2, 2024, Sidman filed his four-count Complaint in this matter against the Town, seeking judicial review of the Council’s March 6 statement under M.R. Civ. P. 80B (Count I), and seeking declaratory relief (Count II), injunctive relief (Count III), and relief under 42 U.S.C. § 1983 (Count IV). Sidman contends that the Council’s March 6 statement—which he dubs, without explanation, a “Resolution”—was beyond the Council’s authority. Sidman requests variously that the Court “order the Town Council to revoke its Resolution,” “[o]rder the Town . . . to not direct Town employees to not enforce the Ordinance,” declare that the Town Council has no authority to “veto, suspend or amend . . . the Ordinance,” “declare that the Town and its Town Council acted unlawfully,” enjoin the Town Council from “ordering or directing the Harbor Master and CEO from enforcing the Ordinance,” and award him his costs and attorney fees. (Complaint ¶¶ 85, 87, 89, 93; Complaint at 13.) On or about April 11, 2024, Sidman filed a Motion for Trial of the Facts and to Specify Future Course of Proceeding. In that motion, Sidman seeks discovery and a trial of the facts under M.R. Civ. P. 80B(d) and (j), and requests that the Court specify the future course of proceedings under M.R. Civ. P. 80B(i). The Town has filed its opposition to Sidman’s motion simultaneously with this Motion to Dismiss.

#### **ARGUMENT**

On a motion to dismiss pursuant to Rule 12(b)(6), the court reviews the legal sufficiency of the complaint in the light most favorable to the non-moving party to determine whether the