

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

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

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

PLAINTIFFS’ FINAL PRETRIAL MEMORANDUM

Plaintiffs, Association to Preserve and Protect Local Livelihoods (“APPLL”), B.H. Piers, L.L.C. (“BH Piers”), Golden Anchor, L.C., doing business as Harborside Hotel (“Harborside” and with BH Piers, the “Pier Owners”), B.H.W.W., L.L.C. (“BHWW”), Delray Explorer Hull 495 LLC (“495”), Delray Explorer Hull 493 LLC (“493”), and Acadia Explorer 492, LLC (“492” and together with 495 and 493, the “Tender Vessel Owners” or “Tender Owners”) (herein, APPLL, the Pier Owners, BHWW, and the Tender Owners may be referred to collectively as “Plaintiffs”), hereby submit the following Pretrial Memorandum:

I. STATEMENT OF PLAINTIFFS’ CLAIM

On November 8, 2022, at a Special Town Meeting, the voters of Bar Harbor adopted a popularly initiated ordinance (the “Ordinance”). The Ordinance limited the number of persons (passengers and crew) who could disembark from a cruise ship in a given 24 hour period to

1,000 persons. For any person disembarking in such 24 hour period, the Ordinance imposed a fine of no less than \$100. The Ordinance provided that the fine must be assessed against the owner of the pier onto which any persons in excess of 1,000 were to disembark. The Pier Owners are the only entities subject to this fine under the Ordinance. The fine may not be assessed against any person who disembarks and, thereby, exceeds the 1,000 person per day cap. Nor can it be assessed against any cruise line from which that passenger or passengers has disembarked.

The Ordinance imposes the same 1,000 person cap for every day of the year, 365 days a year. In addition, neither this Ordinance nor any other Town ordinance imposes any limitation of any kind whatsoever on persons arriving within the Town's limits by any other means of conveyance. The effect of the Ordinance, if enforced, would be to bar all visits to cruise ships above a capacity of 1,000 passengers or any combination of cruise ships above that capacity.

Plaintiffs include the Pier Owners, four tender boat operators, who ferry passengers and crew from the cruise ships to the piers and back again, and, APPLL, a league of businesses whose revenues would be reduced if the Ordinance were enforced.

Plaintiffs' Claims and Relief Sought in General: Plaintiffs' claims are based on federal question jurisdiction. Plaintiffs ask this Court to declare that the Ordinance is unconstitutional on grounds set forth in three counts, each of which is described in more particularity below. In addition, Plaintiffs seek permanent injunctive relief. At no time have Plaintiffs sought damages nor do they now seek damages.

At present, the Town has agreed to forebear enforcing the Ordinance until such time as this Court has adjudicated Plaintiffs' claims (and those of Plaintiff-Intervenor, Penobscot Bay and River Pilots' Association).

Count I: Supremacy Clause—Preemption: The field of maritime law and policy is the province of the federal government. The effect and intent of the Ordinance is to bar and thereby control certain types of cruise ships—those with large passenger capacities—from visiting Bar Harbor. In so doing, the Town is effectively attempting to set policy in the field of maritime law in contravention of the constitutional powers of the United States in this field.

In addition, federal statutes and regulations either expressly or implicitly preempt the authority of the Town to impose such a limit on this segment of the coastwise trade by passenger vessels.

Count II: Interstate and Foreign Commerce Clause: The Ordinance discriminates against interstate and foreign commerce by barring large cruise ships, including foreign-flag cruise ships, engaged in commerce in the transportation of persons in favor of both small cruise ships and in favor of persons traveling to Bar Harbor by land-based modes of conveyance. *See, e.g. City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The Ordinance also risks spawning imitators in other ports resulting in a cacophony of standards and, thereby, with respect to foreign commerce, preventing the United States from “speaking with one voice.” *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 450 (1979).

The Ordinance engages in economic discrimination against interstate and foreign commerce in the form of cruise ship lines using large capacity vessels in favor of small, more local cruise ships and in favor of land-based transportation which must, of necessity, reach Bar Harbor by traveling through the state of Maine.

In addition, the Ordinance is not even-handed; it lacks a legitimate public purpose; and, its effect on interstate commerce is not incidental. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141 (1970). Moreover, the objectives of the Ordinance, to the extent they are even ascertainable,

could be promoted with a lesser impact on interstate commerce. *Id.* Finally, the Ordinance impedes the flow of interstate commerce, in this case the movement of persons, an activity long entitled to commerce clause protection. *See, e.g., Gibbons v. Ogden*, 22 U.S. 1, 6 L.Ed. 23 (9 Wheat.) (1824).

Count III: Due Process: The constitution requires that a law have a rational basis; that it not be arbitrary or capricious in its design and effect. *Brimmer v. Rebman*, 138 U.S. 78 (1891); *Varqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464 (1st Cir. 2009).

The Initiated Ordinance is not rationally related to its purpose and objectives in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In particular, there is no rational basis for the Ordinance's limit of 1,000 disembarking persons in each calendar day, irrespective of the seasons or the capability of the Town to accommodate larger numbers; and, further, there is no rational basis for the Ordinance's imposition of the 1,000 person cap on persons disembarking from large cruise ships without placing any limitation whatsoever on persons arriving in Bar Harbor by all other means of conveyance.

II. STATEMENT OF DAMAGES

Plaintiffs are not seeking monetary damages.

III. CONTROVERTED POINTS OF LAW

Defendants dispute that the federal control over maritime matters preempts the field. Defendants dispute that the Ordinance is either expressly or impliedly preempted.

Defendants dispute that the Ordinance violates the foreign commerce clause. Defendants dispute that the Ordinance, either in intent or effect, discriminates against foreign or interstate commerce in favor of local or Maine-based commerce. Defendants dispute that the

Ordinance lacks a legitimate purpose and dispute that it unconstitutionally burdens interstate commerce.

Defendants dispute that the 1,000 person per day cap on disembarking passengers every day of the year, without exception, and the Ordinance's limitation to persons disembarking from cruise ships as opposed to persons arriving in Bar Harbor by all other means of conveyance lack a rational basis.

Finally, Defendants may be disputing that effectively barring as many as 250,000 persons from visiting Bar Harbor as tourists or crew will result in a decline in revenue for the Pier Owners, the Tenders Owners, or any APPLL members.

IV. PROPOSED STIPULATIONS

The Parties filed Joint Stipulations on June 20, 2023 [Dkt No. 137]. In addition, subject to possible objection to particular exhibits, Plaintiffs are generally prepared to stipulate to the authenticity of copies in lieu of originals of all documents offered as exhibits in the trial of this case.

V. PLAINTIFFS' WITNESS LIST

1. Eben Salvatore
2. Rich Ade
3. Cruise Line Rep's via depos
4. Kristi Bond
5. Sarah Flink
6. Todd Gabe
7. James Willis
8. Chris Wharff

9. Matt Bartlett
10. Sarah Gilbert
11. Paul Paradis
12. Charles Phippen
13. Mike Simeon
14. Heather Davis
15. Kevin Desveaux
16. All witnesses listed by other parties.

Plaintiffs reserve the right to utilize additional witnesses upon reasonable notice to the Court and opposing counsel. Further, Plaintiffs reserve the right to call witnesses not listed herein for the sole purpose of impeachment and/or rebuttal.

VI. LIST OF DOCUMENTS

1. All documents produced by the Defendant and not otherwise objected to by Plaintiffs.
2. All documents produced by the Defendant-Intervenor and not otherwise objected to by Plaintiffs.
3. Deposition transcripts and deposition exhibits of all witnesses deposed.
4. Deposition transcripts and deposition exhibits of all expert witnesses and rebuttal expert witnesses deposed.
5. News articles relating to Cruise Ships in Bar Harbor and the Article 3 Initiative Petition.
6. News articles reflecting commentary by Charles Sidman relating to this case.
7. Tender Captain's Log Books.

8. Photographs or videography depicting the Town of Bar Harbor on Cruise Ship visitation days and non-cruise ship visitation days.
9. Any and all exhibits produced by Plaintiffs, Plaintiff-Intervenor, Defendant or Defendant-Intervenor during discovery and not otherwise objected to by Plaintiffs.
10. Communications to or from the Town of Bar Harbor, including the Town Council, relative to cruise ship visits.
11. Any and all exhibits introduced, identified or referred to by Plaintiffs at trial.

Dated this 21st day of June, 2023.

Respectfully submitted,

/s/ Janna L. Gau
Timothy C. Woodcock, Bar #1663
P. Andrew Hamilton, Bar # 2933
Patrick W. Lyons, Bar #5600
Janna L. Gau, Bar #6043

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2023, I caused the foregoing document to be served upon all counsel of record via the Court's CM/ECF system.

/s/ Janna L. Gau
Janna L. Gau