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, a municipal corporation of the State of Maine, *Defendant,* CHARLES SIDMAN, *Defendant-Intervenor.*	)	Civil Action No. 1:22-cv-416

DEFENDANT-INTERVENOR CHARLES SIDMAN'S
POST-TRIAL MEMORANDUM

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Defendant-Intervenor Charles Sidman ("Mr. Sidman"), by and through undersigned counsel, respectfully submits this Post-Trial Memorandum pursuant to the Court's August 2, 2023, Order on Consent Post-Trial Briefing Schedule and Page Limitations (Doc. No. 187), and states as follows:

I. INTRODUCTION

The Ordinance represents the will of the voters in the Town of Bar Harbor (the "Town"), who decided that the volume and concentration of disembarking cruise ship passengers are too high and negatively impact the Town, its residents, and visitors. This case will determine whether the cruise ship industry and its allies can subvert the rational desire of Town residents to put reasonable limits on congestion and crowding in their much-loved downtown. Against the citizens' most elemental exercise of small-town sovereignty, Plaintiffs Association to Preserve and Protect Local Livelihoods, et al., and Plaintiff-Intervenor Penobscot Bay and River Pilots Association (collectively, "Plaintiffs") offer specious arguments that are not supported by the record or well-settled law.

As discussed below, the Ordinance is not preempted by any federal law. Rather, the Ordinance is a valid exercise of local police power that reaches "landward" and only regulates how land within the Town is used. Second, the Ordinance does not violate the Commerce Clause because it does not discriminate against or burden interstate or foreign commerce and serves legitimate interests of improving the health, safety, and welfare of the Town. Third, the Ordinance does not violate Plaintiffs' due process rights because, *inter alia*, the Ordinance easily passes the applicable rational basis test, and there is no basis for heightened scrutiny. Finally, Plaintiff-Intervenor's state law arguments—that the Ordinance is preempted by Maine's pilotage and tourism laws—are fatally flawed, as they improperly put the onus of sustaining broad policy

goals on a small coastal town while ignoring the Town's fundamental authority to regulate the use of land within its boundaries.

II. FACTUAL AND PROCEDURAL BACKGROUND

As the Court discerned from trial, most of the facts relevant to the claims and defenses in this case are not in dispute. In large part because of its small-town charm, Bar Harbor serves as a popular tourist destination and is frequented by an increasingly large number of cruise ships. PX032.005-007; PX212. These cruise ships regularly disembark thousands of people into the Town on a daily basis. PX032.007. The influx of passengers has long created recognized and often-discussed problems in the Town.[1] PX032.004. These problems include pollution, congestion, safety concerns, and a drain on municipal resources. PX243A.003; PX047.008; PX161.05-06. Over the past fifteen years, the Town has attempted to ameliorate these problems by imposing voluntary caps on cruise ship disembarkations. PX029.001; PX224.001-002; PX224b.001; DX260.005-010. A majority of residents in the Town, along with numerous local businesses, opposed the daily disembarkation of large numbers of passengers into their Town, and believed that the voluntary caps were too high. PX243A.003; DX323.030; 7/13/23 Tr. 272:1-7. Concerned about the negative impacts caused by the high numbers of cruise ship passengers in Town, Mr. Sidman formed a citizens' group focused on enacting a local ordinance to limit and more beneficially regulate the number and manner of people disembarking into the Town. On March 17, 2022, Mr. Sidman led a Petitioning Committee to submit a citizens' initiative ballot petitioning the Town Council to amend Bar Harbor Land Use Code Chapter 125, Article VII, § 125-77(H) (the "Initiative"). PX243A.

[1] At trial, Attorney Woodcock conceded that "[c]learly, there's – there are [longstanding] issues within the Town with respect to cruise ships." 7/13/23 Tr. 127:25-128:2; *see also* Pilots Br. at 26 (alleging that the Ordinance makes "other ports and States deal with the 'burden' of cruise vessel disembarkations").

The Initiative limits the number of passengers from cruise ships allowed to disembark in Bar Harbor without imposing a fee on the land owners to a maximum, in the aggregate, of 1,000 per day. PX243A. It also seeks to broaden participation in the tendering and landing of cruise ship passengers beyond the current monopoly controlled by Plaintiff Ocean Properties at a single localized portion of Town. PX243A. Under the Initiative and pursuant to the rules and regulations developed by the Harbor Master, property owners are required to secure a written permit from the Code Enforcement Officer for any passenger disembarking from a cruise ship on, over, or across their land. PX243A.003. Once permitted, the property owner must abide by the reservation system developed by the Harbor Master. But rather than prevent passengers from disembarking after the passenger limit has been met, the Harbor Master reports violations to the Code Enforcement Officer. 7/13/23 Tr. 22:9-23:2. Each disembarking passenger exceeding the location specific permitted daily limit is a violation levied against the property owner and subject to a minimum $100 penalty per excess unauthorized passenger disembarking at a property owner's site. PX243B.003; § 125-77(H)(4).[2]

Despite opposition from the Town Council, on November 8, 2022, the Initiative overwhelmingly passed by a vote of 1,780 to 1,273 (58.3%) and amended the Town's land use ordinance (the "Ordinance"), pursuant to Town Charter. PX243B.003. The Ordinance took effect on December 8, 2022, and has been incorporated into the Town's Land Use Code Chapter 125, Article VII, § 125-77(H). The Town is in the process of creating rules to enforce the Ordinance, pending the outcome of this litigation.

[2] Apart from any decision the Court may render regarding the validity of the 1,000 passenger limit, Mr. Sidman respectfully asks that the remainder of the Ordinance, which prescribes a permitting and reservation system for land owners, be left in place and explicitly recognized as constitutional.

On December 29, 2022, a coterie of business owners located in the Town filed the instant lawsuit, challenging the constitutionality of the Ordinance, focusing on the new and lower aggregate passenger cap but not contesting the more generally participatory and site-specific permitting rules. The following day, Plaintiffs filed a motion for preliminary injunction, seeking to stop the implementation of the Ordinance. On January 19, 2023, the Penobscot Bay and River Pilots Association (the "Pilots") intervened and its Intervenor Complaint was entered in the lawsuit against the Town. Order (Doc. Nos. 41, 43). On February 28, 2023, Mr. Sidman successfully intervened as a defendant. Order (Doc. No. 63). After the Town agreed not to enforce the Ordinance during the pendency of this lawsuit, Plaintiffs withdrew their motion for preliminary injunction. (Doc. No. 83).

Plaintiffs' Complaint alleges three causes of action: (I) violation of the Supremacy Clause of the Constitution; (II) violation of the Commerce Clause; and (III) violation of Substantive Due Process. (Doc. No. 1). The Pilot's Complaint for Declaratory Judgment and Injunctive Relief alleges four causes of action: (I) violation of the Supremacy Clause; (II) violation of the Commerce Clause; (III) violation of the Maine Constitution by preemption of 38 M.R.S. §§ 85, et seq.; and (IV) violation of the Maine Constitution by preemption of 5 M.R.S. §§ 13052, et seq. (Doc. No. 43).

A three-day bench trial was held in July 2023. As the Court can discern from the evidence presented at trial, the major "factual" arguments are really differing opinions about the impact of the arrival of approximately 272,000 (2022) cruise ship passengers on a town of approximately 5,400 people. 7/13/23 Tr. 167:21-22; DX007; DX323.004. Predictably, at trial Plaintiffs attempted to portray Bar Harbor as having no congestion whatsoever, and whatever congestion exists as not attributable to cruise ships. But these assertions are contradicted by

record evidence, including Plaintiffs' own expert, who directly attributed an increase in congestion to cruise ship passengers. DX319; DX402.019; *see also* PX032.022-023 (picture showing pedestrian overflow into street with description that "the area is quickly overwhelmed when tenders carrying passengers arrive. It becomes clear, even on a light cruise day with fewer than 2000 PAX, that the area can neither contain nor ensure the safety of passengers"). Additionally, Plaintiffs ignore evidence about residents' safety concerns and the increased need for municipal services, including police and sanitation, caused by the rising popularity of Bar Harbor as an exceedingly localized cruise ship destination. PX032.021-023; 7/13/23 Tr. 226:22-227:8, 270:4-12; PX222; DX348 (accounting for portion of police wages dedicated to cruise operations).

Despite Plaintiffs' attempts to paint Mr. Sidman as a lone crusader against the cruise ship industry, Mr. Sidman has shown himself to be a moderate and voice of reason in Bar Harbor, where there were calls to ban cruise ships entirely. 7/13/23 Tr. 301:17-302:5; DX357.001. Indeed, the Ordinance offers a reasonable solution to the problems residents felt were inadequately addressed by the voluntary limits previously agreed upon by the cruise ship industry and its enablers. Plaintiffs essentially argue that the 58% of Bar Harbor voters who voted in favor of the Ordinance are unreasonable for wanting a change in their Town.

At trial, Plaintiffs employed the same strategy that failed with the voters of attempting to portray an apocalyptic future if the Ordinance is enforced: cruise ship tourism will screech to a halt, businesses will be forced to close their doors, the Pilots will not be able to adapt, and cruise lines will be unwilling to visit any port in the northeast. *See, e.g.*, DX471. Plaintiffs were unable to show that these hyperbolic fantasies are anything more than conjecture.[3] DX386 (Salvatore

[3] Although most of Plaintiffs' witnesses' testimony at trial was aimed at persuading the Court of these outcomes, none of this evidence is relevant to Plaintiffs' claims, because "[w]hether the enactment of a local law that

admitting the "likely effect" is that cruise ship passengers would be replaced by other visitors); 7/12/23 Tr. 321:5-326:20.

The evidence at trial established that the Ordinance only threatens the preferences, not the rights, of the cruise ship industry and the few businesses that most profit from it. Plaintiff businesses prefer to have lunch rushes caused by cruise ship visitation. 7/12/23 Tr. 283:1-11, 313:15-314:1, 320:3-5. Cruise lines prefer to visit Bar Harbor over other ports in Maine. 7/12/23 Tr. 173:19-174:10; PX192.08-09. Cruise lines prefer to maximize cruise ship size and occupancy. 7/12/23 Tr. 172:20-173:3. The Pilots prefer to receive an increased bonus attributable to cruise ship visitation to Bar Harbor. 7/11/23 Tr. 90:5-17. None of these preferences are guaranteed by the Constitution or federal or state law. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 386-87 (2023) (pleaded facts "merely allege harm to some [pork] producers' favored 'methods of operation'") (*quoting Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978)).

III. LEGAL DISCUSSION

1. The Ordinance is not preempted by federal law.

No federal law prohibits the municipal regulation of cruise ships disembarking passengers into towns, nor is there any statutory or regulatory language that would implicate such preemption. Under the Supremacy Clause, a federal law may preempt state or local law. U.S. Const. art. VI, cl. 2. This Clause gives Congress and federal agencies "the power to preempt state law," either expressly or impliedly. *Arizona v. United States*, 567 U.S. 387, 399 (2012); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Express

effectively puts a lawful local business out of business is good public policy falls within the aegis of the duly-elected representatives of the [Town]." *Portland Pipe Line Corp. v. City of S. Portland*, 332 F.Supp.3d 264, 316 (D. Me. 2018) ("*Portland Pipe II*"). Indeed, "[t]he Court's job is a narrow one. It is not charged with determining whether the [Town] should have adopted the Ordinance; only whether it legally could do so." *Id*.

preemption occurs "when Congress has 'unmistakably . . . ordained' that its enactments alone are to regulate a [subject and], state laws regulating that [subject] must fall." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). "Implied preemption is more elusive . . . [and] encompasses both 'field' and 'conflict' preemption principles." *Mass. Ass'n of Health Maint. Orgs. v. Ruthardt,* 194 F.3d 176, 179 (1st Cir. 1999) (internal quotation marks and citations omitted). Field preemption "reflects the view that Congress's intent to occupy a given field can be inferred from the pervasiveness of federal regulation and/or the dominance of the federal interest in a particular area of legislative activity." *Id.* Conflict preemption "reflects the idea that congressional intent also can be deduced from circumstances such as inconsistency or impossibility." *Id.*

Courts apply the federal maritime power sparingly and uphold local regulation of maritime matters unless the federal interest in the uniformity of regulation clearly outweigh any corresponding local or state interest. *See, e.g.*, *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 327 (1973) (state statute imposing strict liability on those causing oil spills was not preempted); *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 628-29 (1st Cir. 1994) (applying "a balancing of the state and federal interests" and upholding a state law because the state's interest "in avoiding pollution in its navigable waters and on its shores" was legitimate and expansion of oil polluters' liability was not an excessive burden on maritime commerce). It "cannot be denied" that "general maritime law may be changed, modified, or affected by state legislation." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917). "[T]o claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 373-74 (1959).

Here, Plaintiffs' contention that the Ordinance is preempted by federal maritime law is premised on a mischaracterization that the Ordinance attempts to regulate conduct on the water, an interpretation that "'push[es] the line shoreward' and 'engulf[s] everything' historically left to coastal jurisdictions." *Portland Pipe Line Corp. v. City of S. Portland*, 288 F.Supp.3d 321, 447 (D. Me. 2017) ("*Portland Pipe I*") (*quoting Askew*, 411 U.S. at 344). Indeed, the Supreme Court has repeatedly held that absent an express act of Congress, federal law does not supplant a local government's regulation of interstate transportation of people to and from its own shore. *Port Richmond & Bergen Point Ferry Co. v. Bd. of Chosen Freeholders of Hudson Cnty.*, 234 U.S. 317, 325 (1914) ("During [the time the Constitution has been in place], as before the Constitution had its birth, the states have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any act of Congress which involves the exercise of this power. That the authority lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the states respectively, we think too clear to admit of doubt.'") (*quoting Conway v. Taylor's Ex'r*, 66 U.S. 603, 635 (1861)); *see also Conway*, 66 U.S. at 620 (holding the power to establish and regulate interstate ferries did not belong to congress under the power to regulate commerce, and local regulation would be upheld "to preserve the peace and protect the public and private interests within the limits of such states . . . until it became apparent that such State action was in direct conflict with the acts of Congress upon the same subject-matter"); *Wilmington Transp. Co. v. R.R. Comm'n of California*, 236 U.S. 151, 278 (1915) ("In the case of ferries over boundary waters, it has always been recognized that ferriage from the shore of a state is peculiarly a matter of local concern . . . ."). Accordingly, federal maritime law does not preempt the Ordinance.

Plaintiffs cannot point to any federal statute, nor any case law, which is relevant to the Ordinance's land-based restriction on disembarking passengers from cruise ships. Congress can expressly curb local restrictions on transportation when it chooses to. In fact, Congress has explicitly done so for airplane transportation and bus transportation after the Supreme Court upheld local statutes imposing head taxes on both. *See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc*., 405 U.S. 707, 717 (1972) (upholding local head tax on passengers boarding flights at airports, ruling that the tax did not violate the Commerce Clause); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (upholding Oklahoma's sales tax on purchase of interstate bus tickets, ruling that the tax did not violate the dormant Commerce Clause). In 1973, Congress passed § 7(a) of the Airport Development Acceleration Act to limit head taxes on air carriers. *See* Pub. L. 93-44, § 7(a), 87 Stat. 88, 90. In 1995, Congress passed 49 U.S.C. § 14505 to limit head taxes on bus travel. Notably, Congress has not limited "water carrier transportation" in any way. *See* 49 U.S.C. § 13521.

Plaintiffs' reliance on federal regulations are equally unavailing. *See, e.g.*, 46 C.F.R. §§ 70-80 (regulating combustible liquid cargo, lifesaving appliances, fire detection system, safety information); 46 C.F.R. §§ 70.01 *et seq*. (inapplicable Coast Guard regulations). The Town's authoritative interpretation of the Ordinance forecloses Plaintiffs' only plausible preemption argument. Plaintiffs point to shore leave regulations, whereby facility and vessel operators must provide a system for access to the mainland for seafarers, pilots, and union representatives, 33 C.F.R. § 105.237(b), and cannot charge fees to those individuals, 33 C.F.R. § 105.237(e). The Town's authoritative interpretation of the Ordinance reads "persons" as "passengers," only counts passengers in daily counts, and will not enforce the Ordinance against vessel personnel, vessel crew, seafarers, pilots, or representatives of seafarers' welfare and labor

organizations. PX204. This enforcement memo was written by Town officials charged with interpreting and enforcing the Ordinance. PX204.

The Town's interpretation and implementation of a regulation are "highly relevant to [the Court's] analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (*quoting Village of Hoffman Estates v. The Flipside*, *Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982)); *accord IMS Health Inc. v. Ayotte*, 550 F.3d 42, 63 (1st Cir. 2008); *McGuire v. Reilly*, 386 F.3d 45, 58, 64 (1st Cir. 2004) (interpreting statute to exclude trained volunteer "escorts" from definition of "employees or agents" of abortion clinic). Here, the Town and those responsible for enforcing the Ordinance do not interpret the Ordinance to limit the ability of seafarers, pilots, or union representatives to come ashore freely. Accordingly, the Ordinance does not conflict with 33 C.F.R. § 105.237.[4]

Plaintiffs' claim that their Coast Guard licenses forbid local regulation also fails. *See Douglas v. Seacoast Prods., Inc*., 431 U.S. 265, 277 (1977) ("States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power."); *Portland Pipe I,* 288 F.Supp.3d at 447-48 ("In the exercise of [police] power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. Thus, a federally licensed vessel is not, as such, exempt from local pilotage laws . . . or local quarantine laws . . . or local safety inspections . . . *or the local regulation of wharves and docks*.") (emphasis

[4] Even if the Town were to count seafarers, pilots, and union representatives in their daily counts, § 105.237 is unaffected because the Ordinance levies any fines associated with disembarkation against the landowner, rather than the person disembarking. Section 105.237(e) only prevents facility owners and operators from charging fees "*to the individual* to whom such access is provided." (Emphasis added). Additionally, the imposer of the fine – the Town – is not subject to these prohibitions because it is not a facility owner or operator. Accordingly, § 105.237 only prevents Plaintiffs like Ocean Properties from charging fees to disembarking seafarers, pilots, and union representatives.

added). In *Tart v. Commonwealth of Massachusetts*, the First Circuit reasoned that Massachusetts' fishing licensing requirement was not preempted by the federal commercial fishing license statute. 949 F.2d 490 (1st Cir. 1991). The state statute prohibited the "land[ing of] raw fish" within the boundaries of the state. *Id.* at 493. The court reasoned that although "[a] federal commercial fishing license entitles the vessel to fish beyond State territorial waters, generally unimpeded by state regulation," the state law's "prohibition against *landing* raw fish" within state boundaries was part of an appropriate exercise of state police power. *Id*. at 501. *Tart*'s holding is fully applicable in this case – regulating the *landing* of passengers from cruise ships is a valid exercise of local police power and not preempted by federal law because it regulates land use. *See also Conway*, 66 U.S. at 616 ("The control by States of ferries and ferry landings are clearly police regulations.").

Plaintiffs also claim, for the first time, that the Ordinance disrupts Customs and Border Protection ("CBP") from carrying out their duties. Pl. Br. at 22; Pilots Br. at 14. This is demonstrably false. As established at trial, CBP inspects cruise ship passengers while they are aboard cruise ships at anchorage. 7/11/23 Tr. 107:14-25; 7/12/23 Tr. 89:21-25; *see also* PX032.015 ("[G]uests cannot go ashore if they have not been cleared through immigration."). The Ordinance does not impact any cruise ship's ability to anchor in Frenchman Bay. 7/11/23 Tr. 108:21-23; 7/12/23 Tr. 132:24-133:4. There is nothing in the record that establishes that cruise ships will refuse to anchor in Frenchman Bay—as opposed to the dubious representations about refusing to disembark passengers into Bar Harbor—if the Ordinance is enforced. The record also establishes that both Portland and Eastport are also Class A ports within the state of Maine that are capable of clearing cruise ship passengers re-entering the United States. DX259.001. Even if cruise lines choose to bypass Frenchman Bay, the Ordinance does not

prevent ships from anchoring anywhere else in the country, including any of the two other Class A ports in Maine. Accordingly, CBP can still perform their duties at anchorages in Frenchman Bay or elsewhere, unimpeded by the Ordinance. DX259.001.

Plaintiffs also incorrectly assert that the Ordinance "imposes another condition of entry" into the United States and treats any disembarking passenger after the 1,000-person threshold has been met as "having failed to qualify for admission into the United States," thereby making it "impossible to comply with U.S. Customs laws." Pl. Br. at 22; *accord* Pilots Br. at 15. But the Ordinance does not deny entry to anyone or impose any additional requirement of any passenger, whether they be foreign nationals or U.S. citizens; they may still come ashore, even if they are the 1,001st passenger. Evidence at trial established that neither the harbor master nor Ocean Properties will stop anyone from coming ashore. 7/13/22 Tr. 22:9-23:2; 7/12/23 Tr. 110:6-13. Any potential fine associated with their disembarkation is levied against the land owner, not the passenger. 7/12/23 Tr. 109:15-110:1. Thus, no additional criteria are required from a disembarking passenger.

Nor does the Ordinance distinguish between foreign nationals and U.S. citizens, making it impossible for the Ordinance to "impose discriminatory burdens upon the entrance . . . of aliens" within the United States. *See Maine Forest Prods. Council v. Cormier*, 586 F.Supp.3d 22, 38-39 (D. Me. 2022). "The mere fact that a state law implicates the interests of persons who are the subject of federal regulation, even with respect to immigration, does not alone provide a basis for inferring that the federal regulatory scheme was intended to preempt a field that encompasses such a state law." *Capron v. Office of Attorney Gen. of Massachusetts*, 944 F.3d 9, 24-25 (1st Cir. 2019) (rejecting preemption challenge and differentiating laws that apply "only" to undocumented aliens). The cases cited by Plaintiffs all involve discriminatory laws that single

out foreign nationals. *See* Pilots Br. at 15-16 (citing *Graham v. Richardson*, 403 U.S. 365 (1971); *Cormier*, 586 F.Supp.3d 22). Here, the Ordinance applies to all passengers, regardless of national origin or site of embarkation.

Relatedly, the Ordinance does not target any foreign countries. *See Portland Pipe I*, 288 F.Supp.3d at 442 (distinguishing between generally applicable laws and those which single out particular foreign countries). Rather, it applies with equal force to all cruise ships, regardless of what flag they sail under or where their companies are headquartered. *Id.* at 444-45 ("The Ordinance is a law of 'general applicability' within the traditional realm of state and local police power – local land use restrictions for on-shore port facilities."). Therefore, the Ordinance's impact on federal foreign affairs, if any, is "in a facially neutral manner and has no more of an incidental or indirect effect on foreign relations," which is insufficient to strike down a law. *Id.* at 445. Plaintiffs fail to identify any agreement or policy where the U.S. pledges to accept cruise ships, least of all an agreement that *every* U.S. town must accept *every* passenger from *every* ship, regardless of number of passengers or logistical feasibility. These matters are inherently best suited to municipalities that understand local conditions and limitations. *See Gloucester Ferry Co. v. Com. of Pennsylvania*, 114 U.S. 196, 217 (1885) ("[S]tates can more advantageously manage such interstate ferries than the general government.")

Relatedly, no uniformity exists among coastal towns, nor is it necessary or even possible, to provide efficient operation of cruise ships. *See Conway*, 66 U.S. at 617 ("[Ferriage and wharfage] and kindred subjects of purely internal police were not, and could not have been, by the Constitution of the United States, committed to the exclusive jurisdiction of Congress, seems evident from the impossibility which would attend the regulation of such subjects by the Federal Government."); *Portland Pipe I*, 288 F.Supp.3d at 445-46 (concluding that local prohibition

against loading of crude oil onto tankers was not preempted under general maritime law because it did not concern a topic where general consistency with federal law was necessary). No uniform rule could contemplate the abilities of differently situated towns to accommodate varying amounts of individuals disembarking on land within their towns. Indeed, cruise ships are not welcome *at all* in many ports throughout the country, including all other coastal towns on Mount Desert Island. Many popular cruise ship destinations have imposed restrictions on cruise ship visitation.[5] On the other hand, other port towns, even in Maine, are trying to attract cruise ship tourism. DX426. These ports can aide in the efficient operation of cruise ships within Maine in the event that cruise ships no longer prefer to come to Bar Harbor.

Finally, the Town's historically important and legitimate interests in restricting the manner and number of people disembarking into its own borders outweigh any federal interests at issue. "The maritime nature of an occurrence does not deprive a state of its legitimate concern over matters affecting its residents or the conduct of persons within its borders." *Ballard Shipping*, 32 F.3d at 629 (*quoting* David. P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158, 169). The Town has been imposing daily caps on visiting cruise ship passengers since at least 2008 and has been governing its own land since its founding. PX029.001; PX224.001-002; PX224b.001; DX260.005-010. The Town's Comprehensive Plan, enacted in 2007, discusses the need to limit cruise ship visitation to a manageable level. DX250 (envisioning "[t]he number of cruise ship passengers has been limited to protect the capacity of the downtown to handle them"); *see also* DX260 (Destination Management Plan 2007 Study);

[5] Although cruise lines have dubiously stated that their company policies – and only their company policies – prevent them from traveling to destinations that impose passenger limitations, their policies are undermined by their own actions. PX193.08-09; Martin Dep. 27:4-28:8. For example, Bergen, Norway has imposed a similar passenger limitation, and Holland America still calls at that port and others that impose similar limitations. PX193.08-09; Martin Dep. 26:17-27:3.

7/11/2023 Tr. 138:25-139:19); PX224B. The very purpose of adopting voluntary passenger caps was "to control the number of people coming in during specific times" as a crowd "management tool." 7/12/23 Tr. 48:2-8; *see also* 7/12/2023 Tr. 21:12-22:14 (Paradis: "We knew that we probably couldn't handle two big ships."), 53:20-54:5 (Paradis: "[W]e didn't want two big ships because, A, we weren't sure if Bar Harbor could handle it…. Cruise line[s] … didn't want… a negative passenger experience… [and] it affected – could affect residents . . . and just would give us a bad reputation or the Town a bad reputation."). Congestion in Bar Harbor has only grown since the enactment of the voluntary caps. 7/12/23 Tr. 52:13-18. Cruise ships have gotten larger, with the ability to carry more people. 7/13/23 Tr. 136:13-137:4; PX032.006. These changes have precipitated the need for voters to find a manageable level of disembarkations into Town for themselves.

As provided for in the Initiative's Purpose section, the Town undoubtedly has a legitimate interest in preventing "excessive congestion and traffic on public streets and sidewalks, frequent overcrowding of parks and other public spaces, and inundating local amenities and attractions," and maintaining local services in an effort to improve the health, safety, and welfare of the Town's residents and local businesses. PX243A.003; s*ee Berman v. Parker*, 348 U.S. 26, 33 (1954) ("The values [the public welfare] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."); *City of Memphis v. Greene*, 451 U.S. 100, 126-29 (1981) (holding that safety, tranquility, and reduction of traffic are legitimate state interests to justify burden on motorists by closure of street); *Tart*, 949 F.2d at 500 ("[R]esource conservation is not the only legitimate purpose served by permissible [state regulations]. The police powers of the State may supplement a federal regulatory scheme as reasonably required for the protection

of the health and welfare of the State's citizens."). Indeed, there are few other purposes of local government. These legitimate aims are amply supported by the record. DX323.029; 7/13/23 Tr. 212:21-216:4, 218:11-222:23, 225:2-238:23, 251:16-262:14, 267:17-274:7, 53:1-14. Therefore, the Ordinance is not preempted by federal law.

This case presents similar issues to those raised in *Portland Pipe I*, where this same Court granted summary judgment on the issues of federal and state preemption in favor of a local ordinance prohibiting the loading of crude oil onto tankers and the building of new onshore structures for such purposes. 288 F.Supp.3d at 447. First, the *Portland Pipe I* court observed that there was no law preempting "a local restriction on the loading or unloading of a particular good, or prohibiting new on-shore structures," and that it was not an area requiring "harmony and uniformity" with maritime law. *Id*. Second, it reasoned that "the federal interest in uniformity is weak" because the ordinance "restricts on-shore facilities and conduct, and therefore, only incidentally affects a tanker during the narrow window of time in which it is docked in the Harbor" and does "not regulate the activity of tankers and sailors at sea." *Id*. Third, the court reasoned that "in regulating on-shore facilities and restricting sources of air pollution within its borders, the state and local interest is at its peak." *Id*. at 447-48.

The court's reasoning in *Portland Pipe I* is equally applicable here. First, there is no law restricting municipal authority to make rules concerning the loading or unloading of cruise ship passengers within its borders, an area where harmony and uniformity among all coastal jurisdictions would be impossible. *See id.* at 315 (nothing "requires all coastal jurisdictions to permit all activities that might contribute to a significant international market"). Second, the Ordinance only restricts on-shore facilities and conduct and does not regulate any activity of cruise ships at sea. Third, the local interest is at its peak here because the *land use* Ordinance

only controls use of the Town's *own land* by sensibly administering and limiting the number of disembarking passengers *on land located within the Town*. *See id.* at 447 ("There is no indication that the federal government has sought to remove local control" over on-shore activities); *see also Tart*, 949 F.2d 490 (state statute prohibiting the "land[ing] of raw fish" within state boundaries an appropriate exercise of state police power because it regulates land use). Additionally, the generally applicable fine imposed on the *land owner* by the Ordinance "does not ban or wholly exclude licensed vessels from using the waterway, and" applies to all vessels, "so it cannot discriminate against federal licensees in favor of local vessels." *See Portland Pipe I*, 288 F.Supp.3d at 448. Applying the same logic as this court did in *Portland Pipe I*, the Ordinance at issue here is not preempted by federal law.

2. The Ordinance does not violate the Commerce Clause.

The Commerce Clause prevents states from creating protectionist barriers to interstate trade. *Lewis v. BT Inv. Managers, Inc*., 447 U.S. 27, 35 (1980). However, "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." *Portland Pipeline II*, 332 F.Supp.3d at 296 (*citing Maine v. Taylor*, 477 U.S. 131, 151 (1986)); *see also Nat'l Pork Producers*, 598 U.S. at 380 ("[T]he dormant Commerce Clause [is not] a roving license for federal courts to decide what activities are appropriate for state and local government to undertake.") (internal quotations omitted); *Lewis*, 447 U.S. at 36 ("[T]he States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected."). The threshold inquiry is "directed to determining whether [an ordinance] is basically a protectionist measure, or whether it can fairly

be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978). A local ordinance may violate the commerce clause if it "(1) has an impermissible extraterritorial reach, (2) discriminates against interstate or foreign commerce, (3) excessively burdens interstate or foreign commerce, or (4) interferes with the federal government's ability to speak with one voice when regulating commerce with foreign nations." *Portland Pipeline II*, 332 F.Supp.3d at 296 (internal citations omitted). Here, the Ordinance does not run afoul of any of these prohibitions.

A plaintiff challenging a law bears the initial burden of demonstrating that it discriminates against interstate commerce. *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 40 (1st Cir. 2005). If a plaintiff shows that a law discriminates against interstate commerce, the burden shifts to the government to show that the local benefits of the law outweigh its discriminatory effects, and that there is no nondiscriminatory alternative by which it could protect those benefits. If the plaintiff does not prove discrimination – that is, the statute "regulates evenhandedly and has only incidental effects on interstate commerce" – courts apply a lower level of scrutiny known as the *Pike* balancing test, which weighs local public interests against effects on interstate commerce. *Id.* at 35 (citation and internal quotation marks omitted); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As discussed in Section III.2.b, *infra*, the Ordinance easily passes the *Pike* balancing test. The primary purposes and effects of the Ordinance are to effectuate legitimate local public interests of reducing congestion in the streets of Bar Harbor and improving the quality of life for its residents, visitors, and local businesses. PX243A.003. The incidental effects on interstate commerce, if any, are minimal and outweighed by the Town's legitimate interests in enforcing the Ordinance.

a. Heightened scrutiny is not appropriate.[6]

Heightened scrutiny is not appropriate because the Ordinance does not attempt to regulate commerce occurring wholly beyond the Town boundaries, does not discriminate against or excessively burden interstate or foreign commerce, and does not have the primary purpose or effect of discriminating against interstate commerce. The land use Ordinance regulates land within Town boundaries and applies to *all* passengers disembarking cruise ships. It does not matter what state or country a ship or its passengers are from; even Maine ships are included.

First, the Ordinance does not have extraterritorial reach.[7] "A statute will have an extraterritorial reach if it necessarily requires out-of-state commerce to be conducted according to in-state terms." *Pharm. Research and Mfrs. of America v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001) (internal quotation marks omitted). The Ordinance imposes no requirements on out-of-state commerce. Contrary to Plaintiffs' allegations, the Ordinance does not "directly regulate[] cruise ships." Pl. Br. at 2. It does not regulate cruise ships from anchoring or even docking. 7/12/23 Tr. 132:24-133:4; *see also* 33 C.F.R. § 110.130 (regulating anchorage grounds in Frenchman Bay "under the coordination of the local Harbormaster"). It does not control ship design, construction, accessibility, or navigation. In *Portland Pipe II*, the court reasoned that an ordinance prohibiting the loading of crude oil within city boundaries does not control conduct outside of the boundaries of the city. 332 F.Supp.3d at 297-99. That was true even though the likely "effect of the Ordinance is to influence the functions of [the pipeline's] infrastructure outside the City." *Id*. Cognizant of the complexities of today's modern economy, the court

[6] At trial, Attorney Woodcock conceded that the *Pike* test applies, not strict scrutiny. 7/13/23 Tr. 128:25-129:5.
[7] The Supreme Court has recently rejected the theory that laws having extraterritorial reach are *per se* invalid under the dormant Commerce Clause. *Nat'l Pork Producers*, 598 U.S. at 376 ("This Court has never before claimed so much 'ground for judicial supremacy under the banner of the dormant Commerce Clause.'") (*quoting United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth*., 550 U.S. 330, 347 (2007)). Rather, such inquiries are aimed at preventing the "purposeful discrimination against out-of-state economic interests." *Id*. at 371.

explained, "[e]very local prohibition on particular goods or services has the effect of preventing distant merchants from employing their capital and labor to sell those goods or services within the boundaries of the restrictive locality, and local merchants with distant contacts from doing the same. In the modern age of highly interconnected commerce, there would be virtually no room for local historic police powers if this sort of extraterritorial effect were enough to invalidate an ordinance under the dormant Commerce Clause." *Id*. at 297. Rather, the court identified "the Ordinance's indirect economic effects on out-of-state transactions" as "a natural implication of cross-border projects and local government control, not an indication of unconstitutional extraterritorial regulation." *Id*. at 298; *see also Nat'l Pork Producers*, 598 U.S. at 1156 ("In our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior."). Similarly here, the Ordinance only regulates the number of disembarking passengers on land within Town boundaries. There is no reach outside of the Town's own shores. Any extraterritorial effects the Ordinance might have are merely indirect and incidental.

Second, the Ordinance does not discriminate against interstate commerce. A state law is discriminatory in effect when, in practice, it affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests. *Oregon Waste Sys. Inc. v. Dep't. of Envtl. Quality,* 511 U.S. 93, 99 (1994). Laws with discriminatory effects commonly "cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market." *Exxon Corp.*, 437 U.S. at 126 n.16. A court must seek out the primary purpose and primary effect of the state law in question; "[i]ncidental purpose, like incidental effect, cannot suffice to trigger strict scrutiny under the dormant Commerce Clause." *Alliance of Auto. Mfrs.*, 430 F.3d at 39.

Plaintiffs bear the initial burden of showing discrimination. *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 9 (1st Cir. 2010).

In *Portland Pipe II*, the court held that the crude oil ordinance did not discriminate against interstate commerce. The court reasoned that "[o]n its face, the Ordinance does not distinguish between out-of-state and in-state interests. . . . [because it] applies with equal force to any entity seeking to load crude oil [in city boundaries], . . . [and that] [t]here is no explicit mention of source, destination, or residency" and applied in equal force to in-state and out-of-state crude oil producers, even though no in-state oil producers exist in Maine. 332 F.Supp.3d at 293, 300; *see also Evansville-Vanderburgh*, 405 U.S. at 717 (holding that ordinance does not "discriminate[] against interstate commerce and travel" because "[w]hile the vast majority of passengers who board flights at the airport involved are traveling interstate, both interstate and intrastate flights are subject to the same charges").

The same is true here. The Ordinance is "indifferent to the point of origin, destination, and ownership" of cruise ships, and applies equally to in-state and out-of-state ships. *See Town of Southold v. Town of East Hampton*, 477 F.3d 38, 48 (2d Cir. 2007). Indeed, the Ordinance does not distinguish between ships coming from Canada, New York, Portland, or even originating in Bar Harbor. Plaintiffs theorizes that because large cruise ships often fly under a foreign flag, the Ordinance targets interstate or foreign commerce. Pl. Br. at 51.[8] But "[j]ust because commerce in a market originates in another state or country does not mean that otherwise evenhanded regulations or prohibitions on that market automatically have the

[8] The flag a cruise ship sails under is irrelevant to the commerce clause inquiry. In fact, the three largest cruise companies are headquartered in Miami, Florida. These cruise lines choose to sail under foreign flags to avoid taxes, lower operating costs, and avoid regulations. *See Cruise Connections Charter Management 1, LP v. Attorney General of Canada*, 967 F.Supp.2d 115, 131 (D.D.C. 2013). The Commerce Clause does not protect these chosen business strategies. *See Nat'l Pork Producers*, 598 U.S. at 385.

'practical effect' of discriminating against interstate or foreign commerce." *Portland Pipe II*, 332 F.Supp.3d at 302; *see also Exxon Corp.,* 437 U.S. at 125 (the fact that a state prohibition fell "solely on interstate companies," without more, "does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce"); *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 402 (3d Cir. 1987) ("Showing that out-of-state firms happen to be the only ones currently interested in engaging in activity foreclosed by facially evenhanded state regulation has not by itself been held to trigger heightened scrutiny.").

As was true in *Portland Pipe II*, "[t]he fatal flaw in [Plaintiffs'] discrimination argument is that there can be no disparate burden on interstate or foreign competitors when there are no such competitors." 332 F.Supp.3d at 300. Plaintiffs hypothesize that local hoteliers are somehow benefitted by the Ordinance, and that hotels are competitors of cruise ships. But "any notion of discrimination assumes a comparison of substantially similar entities." *Id.* at 300 (*quoting Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997)).[9] Plaintiffs offer no market study or expert testimony to support their theory of competition between hotels and cruise lines. Instead, they rely on inapposite case law to try to introduce facts that require expert testimony. *See* Pl. Br. at 28 (*citing Gen. Motors*, 519 U.S. at 300 (discussing disparate taxes on frozen canned and fresh fish)); Pilots Br. at 35-36 (*citing Vavoules v. Kloster Cruise Ltd*., 822 F. Supp. 979, 982-83 (E.D.N.Y. 1993) (in dicta, discussing equity of well-settled law that "passenger cruise ticket is a maritime contract" and applies federal maritime statute of limitations)).

As underscored through trial testimony, large cruise ships do not stay in Bar Harbor overnight—a quintessential function of hotels—and tourists cannot book rooms on a cruise ship just to visit Bar Harbor. 7/12/23 Tr. 186:2-9. Rather, a stop at Bar Harbor is only one stop on a

[9] For instance, the court in *Portland Pipe II* looked only at crude oil producers or shippers as competitors to the pipeline. 332 F.Supp.3d at 300. It did not consider alternative forms of energy as competitors to crude oil.

one or two week itinerary, where passengers come into Town for only a few hours. PX032.012; 7/12/23 Tr. 173:10-14, 200:18-201:8. Notably, the lead Plaintiffs' (Ocean Properties) own status as a conglomerate of hotels undermines their theory that they are in competition with cruise lines. 7/12/23 Tr. 62:16-63:18, 134:16-22.[10] And because Plaintiffs are all local businesses that allege the Ordinance will cause them harm, they cannot seriously claim that the Ordinance privileges local interests. *See Portland Pipe II*, 332 F.Supp.3d at 301 ("The Ordinance cannot be said to favor in-state commercial interests at the expense of out-of-state competitors when the entities most directly harmed by the practical effects of the Ordinance are in-state, local businesses."). Indeed, "[t]he Supreme Court has displayed more deference to legislative judgments under the dormant Commerce Clause when the challengers are in-state, rather than out-of-state, interests." *Id*. at 313 (*citing Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978)). The Court should not adopt Plaintiffs' expansive and unsupported theory of competition. With no identifiable local competitor to large cruise ships, the Ordinance cannot confer any relative advantage or disadvantage, and thus poses no risk of economic protectionism that the Commerce Clause prohibits.

Plaintiffs' reliance on *Henderson v. Mayor of City of New York*, is misplaced. 92 U.S. 259 (1875). *Henderson* involved a New York state tax on immigration, which is clearly the province of the federal government, and was imposed upon the owner of vessels "arriving in the port of New York *from any country out of the United States, or from any other State of the United States*." *Id*. at 265 (emphasis added). The Ordinance, on the other hand, does not target

[10] By separate ordinance, Bar Harbor imposes limits on the number of short-term rentals available, thus limiting terrestrial visitation to the Town. *See* 7/13/23 Tr. 164:5-165:13; Bar Harbor Code Ch. 125, art. III, § 125-17 to -109 (as amended by voter referendum Nov. 2, 2021). No evidence was presented that established the short-term rental ordinance benefit cruise lines, as purported competitors.

out-of-state ships. Rather, it applies to all cruise ships, Maine ships included. Nor does the Ordinance target out-of-state or foreign passengers. Indeed, trial testimony established that cruise ship passengers are not identifiable if they are not wearing identification, nor whether they are from out of state. 7/13/23 Tr. 306:8-307:1; *see Portland Pipe II*, 332 F.Supp.3d at 305 ("The Court is left with the impression that the City Council and the public supporters would have been equally motivated to enact the Ordinance if the tar sands crude oil originated in Vermont, New Hampshire, Bethel, Westbrook, or even western portions of South Portland."); *Southold*, 477 F.3d at 48 (concluding that ferry ban was not motivated by "discriminatory animus but by the need to address a growing traffic problem in the Town"). Additionally, the Court saw New York's tax as one that would be passed onto the passengers themselves. *Henderson*, 92 U.S. at 267-68. More recently, the First Circuit has distinguished fees that directly tax passengers from those that impose a tax indirectly. *See Jalbert Leasing, Inc. v. Massachusetts Port Auth.*, 449 F.3d 1, 4 (1st Cir. 2006) (indirect tax "may mimic the effect of a charge forbidden by [bus statute,] . . . . But that is true of many taxes – say, the state tax on gasoline – and could be said of *any* state charge or fee that affects buses, including parking tickets."). Here, the generally applicable fine for violation of the Ordinance is levied against real property owners, not the cruise ships or passengers. And cruise lines have explicitly proclaimed that they are unwilling to pay the Ordinance's disembarkation fines imposed on land owners. 7/12/23 Tr. 184:1-19.[11]

Accordingly, the Court should not apply heightened scrutiny and instead should examine the Ordinance under the *Pike* balancing test.

b. <u>The Ordinance passes the *Pike* balancing test.</u>

[11] Plaintiffs' reliance on civil rights cases and attempts to compare cruise ship passengers to historically disadvantaged persons is, at best, distasteful. *Cf. Greene*, 451 U.S. at 128 (claims that decision to close street to traffic is restraint of liberties on racial groups "trivialize the great purpose" of the Thirteenth Amendment).

"A state statute that regulates evenhandedly and has only incidental effects on interstate commerce engenders a lower level of scrutiny. Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Portland Pipe II*, 332 F.Supp.3d at 308 (internal citations and quotation marks omitted). This standard is fact sensitive and difficult to apply, and should be undertaken by "eschewing formalism for a sensitive, case-by-case analysis of purposes and effects." *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005) (*quoting West Lynn Creamery*, 512 U.S. at 201). "State laws frequently survive this *Pike* scrutiny." *Dept. of Revenue of Kentucky v. Davis*, 553 U.S. 328, 339 (2008).

Here, the Ordinance's burden on commerce, if any, is minimal. Approximately 10% of visitors to Bar Harbor come via cruise ship. Under the Ordinance, cruise ships of all sizes can and will be able to continue to disembark passengers into Town.[12] In the event that "some out-of-state [cruise lines] may face difficulty complying (or may choose not to comply) with [the Ordinance], . . . *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." *Nat'l Pork Producers*, 598 U.S. at 385. Additionally, visitors are not foreclosed from using other methods of visitation if some large cruise ships choose not to visit Bar Harbor, including by smaller cruise ship.[13]

[12] The prophesied 95% reduction of cruise ship visitation is a fiction created by CruiseMaine and designed to influence the outcome of the referendum vote. *See* DX471.001. Evidence shows that cruise ships will still come to Bar Harbor. PX162; Martin Dep. 26:17-27:21 (Holland America still frequents ports that limit number of disembarking passengers, despite company policy to contrary).

[13] Smaller cruise ships do not have the same negative impact on the Town as larger ones. *See* PX032.023 (recommending that "area for receiving tenders should service only very small ships, as the area cannot accommodate a large number of tour buses, nor can it absorb large numbers of passengers without interfering with traffic").

The potential harm to the profits of cruise lines that choose not to come to Bar Harbor, or their local partners, is not harm to commerce. The Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp*., 437 U.S. at 127-28. Nor is it meant to protect against speculative harm. *See Nat'l Pork Producers*, 598 U.S. at 387 ("A substantial harm to interstate commerce remains nothing more than a speculative possibility" because other out-of-state competitors may fill void). Accordingly, the Commerce Clause does not protect the few large cruise lines that *may* alter their behavior once the Ordinance is enforced. The cruise lines' representations that they will not visit Bar Harbor if the Ordinance is enforced is undermined by deposition testimony that they still visit foreign ports that impose similar restrictions. PX193.08-09; Martin Dep. 26:17-27:21 (Holland America still frequents ports like Bergen, Norway, which limits number of disembarking passengers, despite purported company policy to contrary). Thus, the Ordinance only has the *potential* to have an insignificant impact on interstate commerce.

Additionally, any incidental burden on interstate commerce is reasonable—after all, the Ordinance still allows all ships to anchor and disembark passengers. The fines associated with violation of the Ordinance are also reasonable—its reasonableness is enshrined by generally applicable state law for violations of land use ordinances and approved of by 58% of Bar Harbor voters for violations of the Ordinance.[14] 30-A M.R.S. § 4452(3)(B) (civil penalties associated with enforcement of land use laws and ordinances); *see also Conway*, 66 U.S. at 631 (upholding

[14] Plaintiffs hypothesize that the fine could increase up to $5,000 for frequent violations. Pl. Br. at 16. There is nothing in the record to support their theory that the Town would increase the amount of the fine based on frequency of violations.

sixteen dollar fine for every offense of unlicensed transport of person or thing across Ohio River – equating to a $558 fine in today's dollars).[15]

Even if the Ordinance has an incidental effect on cruise ship travel, the Ordinance passes the *Pike* balancing test because it serves legitimate local purposes. *See Pike*, 397 U.S. at 142. The Town undoubtedly has a legitimate interest in preventing "excessive congestion and traffic on public streets and sidewalks, frequent overcrowding of parks and other public spaces, and inundating local amenities and attractions," and maintaining local services in an effort to improve the health, safety, and welfare of the Town's residents and local businesses. PX243A.003; *see* 30-A M.R.S. § 3001; *Greene*, 451 U.S. at 126-29; *Tart*, 949 F.2d at 500. The evidence at trial clearly establishes that congestion is a major problem that impacts the health, safety, and welfare of the Town. DX323.029. As evidenced by the conclusions of Plaintiffs' own expert, cruise ships directly contribute to that congestion. DX319.001; DX402.019.[16] Additionally, defense witnesses testified that they perceive cruise lines as a major and unique contributor to congestion downtown. 7/13/23 Tr. 212:21-216:4, 218:11-222:23, 225:2-238:23, 251:16-262:14, 267:17-274:7, 53:1-14. Indeed, the record reflects that the majority of residents

[15] Plaintiffs complain that "[t]here is nothing out-of-state cruise lines or visitors can do to change [the Ordinance], politically at least." Pilots Br. at 26. Plaintiffs forget that the Ordinance is the very result of political process. *See Portland Pipe II*, 332 F.Supp.3d at 313 ("[I]t is not the Court's place to second-guess the findings of South Portland's political process [of voters passing the crude oil prohibition]. . . . [T]he remedy for this collective action problem is federal legislation, not judicial intervention."); *see also Gloucester Ferry Co.*, 114 U.S. at 215 ("Should such [local] regulations interfere with the exercise of the commercial power of congress, they may at any time be superseded by its action."); *Nat'l Pork Producers*, 598 U.S. at 382 ("If, as petitioners insist, California's [humane pork] law really does threaten a 'massive' disruption of the pork industry, if pig husbandry really does 'imperatively demand' a single uniform nationwide rule, they are free to petition Congress to intervene.").

[16] Mr. Sidman agrees with Gabe's ultimate conclusion that cruise ships contribute to congestion. 7/13/23 Tr. 297:18-22. However, Gabe's methodologies are flawed and his conclusions minimize the impact that cruise ship passengers have on congestion. Gabe's pedestrian count study fails to measure actual congestion (i.e., crowding) or sidewalk walkability. 7/12/23 Tr. 252:6-256:19. Additionally, his study fails to consider any basic measurement of pedestrian level of service, including sidewalk width, sidewalk conditions, pedestrian safety, ideal walking speed, perceptions of comfort, obstacles, mobility, or peak load. 7/12/23 Tr. 252:6-254:21. Gabe's economic impact study is flawed from the outset, as it was solicited by CruiseMaine and the Chamber of Commerce, whose loyalties lay with the cruise ship industry. 7/12/23 Tr. 25:19-26:6; 5 M.R.S. § 13090-C (CruiseMaine, as part of the Office of Tourism, is obligated to "support and expand the tourism industry and promote the State as a tourist destination"); Flink Dep. 9:3-6, 108:1-5.

have sincere concerns about the congestion, pollution, and other problems caused by cruise ships. DX323.029; 7/13/23 Tr. 171:8-22, 264:10-22. These concerns pervaded the public's dialogue about cruise ship visitation. PX226; DX323.029; 7/13/23 Tr. 138:20-22. There is no evidence in the record to conclude that these concerns were pretextual.[17]

Voters weighed the costs and benefits of limiting cruise ship visitors in their Town and voted for stricter limits on disembarkations. Courts are not in a position to disregard the competing policies decided by voters. *Nat'l Pork Producers*, 598 U.S. at 382. "In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. . . . [who are] entitled to weigh the relevant political and economic costs and benefits for themselves, and try novel social and economic experiments if they wish." *Id.* (internal citations and quotation marks omitted).

The Supreme Court has repeatedly held that the Commerce Clause is not violated by a local government's regulation of interstate transportation of people to and from its own shore. *See, e.g.*, *Conway*, 66 U.S. at 635 (holding the interstate power to establish and regulate ferries did not belong to congress under the power to regulate commerce, but belonged to the states, and "l[ay] within the scope of 'that immense mass' of undelegated powers which 'are reserved to the States'"); *Port Richmond*, 234 U.S. at 325 ("[T]he commercial power of Congress did not 'interfere with the police power of the states in granting ferry licenses.'") (*quoting Wiggins Ferry Co. v. City of E. St. Louis*, 107 U.S. 365, 374 (1883)); *Wilmington Transp. Co*., 236 U.S. at 278 ("In the case of ferries over boundary waters, it has always been recognized that ferriage from

[17] Plaintiffs' proposed alternatives to the Ordinance are absurd. Plaintiffs propose the Town could eliminate amenities like benches in order to improve pedestrian traffic. 7/13/23 Tr. 326:7-13. The Town does not have to change the character of its community to accommodate, rather than ameliorate, a burden. PX032.010 ("[B]uilding shoreside accommodations for a large number of tourists . . . fundamentally alters the landscape."); DX250.017 (listing amenities including sidewalks, benches, public restrooms, and trash receptacles). Rather, the Ordinance follows the will of the residents, who chose to reduce the number of cruise ship passengers to reduce congestion. DX323.

the shore of a state is peculiarly a matter of local concern . . . ."); *Gloucester Ferry Co*., 114 U.S. at 217 ("Reasonable charges for the use of property, either on water or land, are not an inter[fer]ence with the freedom of transportation between the states, secured under the commercial power of congress. . . . That freedom implies exemption from *charges other than such as are imposed by way of compensation for the use of the property employed* . . . .") (emphasis added). These cases alone foreclose Plaintiffs' Commerce Clause claims.

In *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*, the Court rejected the argument that municipal fixing of rates for an interstate ferry is a direct regulation of interstate commerce. 234 U.S. at 332-33. In *Conway v. Taylor's Executor*, the Court upheld a Kentucky statute that imposed on unlicensed ferries a sixteen dollar fine for every offense of transporting a person across the Ohio River and reasoned that the "[r]ights of commerce give no authority to their possessor to invade the rights of property." 66 U.S. at 634. Under longstanding Supreme Court precedent, the Ordinance cannot be said to violate the Commerce Clause.[18]

c. The Ordinance does not violate the Foreign Commerce Clause.

Nor does the Ordinance violate the Foreign Commerce Clause, which protects the federal government's ability to speak with one voice in matters of commerce with foreign nations. *See Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 449 (1979). "The same analytical framework applies to the dormant Foreign Commerce Clause as is used for the dormant Interstate Commerce Clause, except that state restrictions that burden foreign commerce 'are

[18] Plaintiffs also cite inapposite cases involving the instrumentalities of interstate commerce. Pl. Br. at 26; Pilots Br. at 27-30. As discussed throughout this brief, and as made clear from the ferry line of Supreme Court cases, the Ordinance does not regulate cruise ships in any way. Rather it regulates the use of land within the boundaries of the Town. Nor does the Ordinance cause the kind of disruption to interstate commerce that the instrumentality cases hinged on.

subjected to a more rigorous and searching scrutiny,' and consideration is given to any impediment of the federal government's ability to speak with one voice in regard to regulation of foreign commerce." *Hartford Enters., Inc. v. Coty*, 529 F. Supp. 2d 95, 104 (D. Me. 2008) (citations omitted). For the same reasons discussed above, the Ordinance does not violate the Foreign Commerce Clause.

Portland Pipeline II is again instructive for the Court's Foreign Commerce Clause analysis. There, the court reasoned that South Portland's crude oil prohibition does not violate the foreign commerce clause because, *inter alia*, the ordinance did not target any foreign countries. *Portland Pipe II*, 332 F.Supp.3d at 314-15. Rather, that ordinance "merely has 'foreign resonances' because it impacts a piece of cross-border infrastructure and a large industry," which "inevitably touch[es] on federal commerce in a broad sense, given the realities of a modern globalized economy. But that does not mean it impermissibly interferes with the government's ability to 'speak with one voice' when regulating foreign commerce or impairs uniformity in an area where federal uniformity is essential." *Id*. at 315-16; *accord Exxon Corp*., 437 U.S. at 128 ("[W]e cannot adopt appellants' novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas.").

Here, as discussed above, the Ordinance does not target any foreign countries and applies to domestic and foreign ships alike. It is inevitable that the Ordinance touches on international commerce in a broad sense, given the size of the cruise ship industry in a modern globalized economy. But this does not mean that the Ordinance violates the Foreign Commerce Clause. Like municipal limits on crude oil pipelines, Congress has not prevented local municipalities from exercising authority over docking facilities within its boundaries. *See Portland Pipe II*, 332

F.Supp.3d at 315. And like restrictions on crude oil pipelines, national uniformity among coastal towns for cruise ship visitation is far from essential—it is impossible.

Plaintiffs fear that other towns will enact "copycat bans" and cause "cruise traffic . . . to grind to a halt." Pilots Br. at 33. The plaintiff in *Portland Pipe II* made a similar copycat argument, namely that if other municipalities enacted similar legislation, the "oil markets would shut down." 332 F.Supp.3d at 315. The court rejected this logic, reasoning that the plaintiff's argument could apply to any good or service that municipalities routinely regulate and concluded that nothing "requires *all* coastal jurisdictions to permit all activities that might contribute to a significant international market." *Id*. at 315. The court reasoned that "[i]f other municipalities enacted similar ordinances, there would simply be a smaller list of potential sites for loading crude oil. That situation would be indistinguishable from the current state of affairs, where some coastal localities devote their waterfronts to uses they deem inconsistent with petroleum handling, forcing companies to pursue those uses in other localities where the local government permits them." *Id.* at 297. As discussed above, it would be impractical and functionally impossible to require all coastal jurisdictions to welcome and identically regulate all cruise ship activities.

Nor would similar municipal ordinances cause inconsistent obligations on cruise lines in an area that purportedly requires national uniformity. As discussed in *Portland Pipe II*, "[Petroleum companies] would not be subject to inconsistent obligations if other localities passed similar statutes. . . . The most apparent effect of similar [ordinances] being passed in other [localities] would be a loss in profits for [petroleum companies]. It does not appear. . .that [ordinances] similar to the [Clear Skies Ordinance], if enacted, would result in [petroleum companies] having inconsistent obligations to [localities]." *Id*. at 297-98; *see also Port*

Richmond, 234 U.S. at 322 n.2 (". . . I do not see that there would be any important conflict of authority [for several counties to impose different ferry rates]. Each power regulated what was done within its own jurisdiction, and left to others to regulate what was done in theirs."). Similarly here, the result of municipalities passing similar ordinances would not be to impose different obligations on cruise lines—it would simply establish another factor on where cruise lines choose to visit. Plaintiffs dislike the "simply unfavorable uniformity" potentially caused by similar ordinances. *See Portland Pipe II*, 332 F.Supp.3d at 315. Cruise ships can continue to disembark their passengers at other ports more favorable to their visitation if they choose not to comply with the Ordinance or ones similarly enacted.

d. The Ordinance does not violate the right to travel.

Plaintiffs have failed to plead their newfound claim that the Ordinance violates the right (of others) to travel. Laws that "impose a penalty on the exercise of the right to travel" may violate the Equal Protection Clause, not the Commerce Clause. *Saenz v. Roe*, 526 U.S. 489, 499 (1999) (*citing Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)); *see also Lutz v. City of York*, 899 F.2d 255, 265 (3d Cir. 1990) (cases involving penalizing group of people on basis of having exercised right to travel are Equal Protection cases); *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982) ("In reality, right to travel analysis refers to little more than a particular application of equal protection analysis."). Plaintiffs argue for the first time in their post-trial brief that the Ordinance penalizes the right to travel, but their Complaint fails to plead an Equal Protection claim. Pl. Br. at 27 ("The Ordinance places Plaintiffs at economic . . . [and] punitive risk . . . ."). They cannot now shoehorn a right to travel claim under their Commerce Clause cause of action.

Regardless of where the right originates, the Ordinance does not run afoul of the right to travel. There are three components to the right to travel: 1) the right of a citizen of one state to

enter and leave another state, 2) the right to be a welcome visitor, not an unfriendly alien, when temporarily present in another state, and 3) for those travelers who become permanent residents, the right to be treated like other citizens of that state. *Saenz*, 526 U.S. at 500–01. Plaintiffs allege their claim is based on the right of a citizen of one State to enter and to leave another State, as expressed in *Edwards v. People of State of California*, 314 U.S. 160 (1941). *Edwards* involved a state statute making it a misdemeanor to help indigent *nonresidents* enter the state, imposing an "intended and immediate" burden on interstate commerce. *Id.* at 165-66. Here, in contrast, the Ordinance is facially neutral as to interstate commerce because it does not target nonresident passengers. The appropriate inquiry is therefore the *Pike* balancing test. *See Lutz*, 899 F.2d at 265; *State of Kansas v. United States*, 16 F.3d 436, 442 (D.C. Cir. 1994) ("[S]omething more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied."). As discussed in the application of the *Pike* balancing test, the benefits of the Ordinance are significant, and any burdens it imposes on interstate commerce are clearly negligible. Therefore, any right to travel argument in this case based on the Commerce Clause is frivolous.

Additionally, "burdens on a single mode of transportation do not implicate the right to interstate travel." *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999). Here, the only alleged burden on travel into Bar Harbor is on transportation by cruise ship. With other modes of transportation untouched, the Ordinance does not violate the right to travel. *See Southold*, 477 F.3d at 54 ("[T]ravelers do not have a constitutional right to the most convenient form of travel, and minor restrictions on travel simply do not amount to the denial of a fundamental right."); *City of Houston v. F.A.A.*, 679 F.2d 1184, 1198 (5th Cir. 1982) (noting that passengers do not possess "a constitutional right to the most convenient form of travel").

Furthermore, not all deterrents to travel burden the right to travel. *Matsuo v. United States*, 586 F.3d 1180, 1183 (9th Cir. 2009). For instance, "[t]he right to travel does not prevent toll roads, speed limits, or travel-related taxes." *Hughes v. City of Cedar Rapids*, *Iowa,* 840 F.3d 987, 995 (8th Cir. 2016). "States and the federal government would otherwise find it quite hard to tax airports, hotels, moving companies, or anything else involved in interstate movement." *Matsuo*, 586 F.3d at 1183. Rather, the right prohibits a state from "preventing citizens from entering or leaving." *Id*. at 1183. The Ordinance here imposes no barrier to entry for cruise ship passengers because no fine is imposed on them. Rather, the generally applicable fine is incurred by the land owner within the jurisdiction of Town Ordinances. *See id*. at 1183.

Lastly, the right to travel is not implicated "when a State enacts and enforces reasonable regulations to promote public safety." *State v. Elliott*, 2010 ME 3, ¶ 18, 987 A2d 513 (citing *State v. Quinnam*, 367 A.2d 1032, 1034 (Me. 1977)). "As long as a statute constraining such activity bears a rational relationship to the state's legitimate governmental purpose, the government action is not unconstitutional." *Id*. This is no more evident than in state quarantine laws. *See Smith v. Turner*, 48 U.S. 283 (1849) ("The States of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from. . .ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same."). The record supports the Ordinance's rational aims at promoting public safety, including but not limited to protecting the public against the Covid-19 pandemic and other diseases. PX243.003. Therefore, the Ordinance's promotion of public safety are legitimate purposes that do not violate a person's right to travel.

3. The Ordinance does not deprive Plaintiffs of Substantive Due Process.

Perhaps tipped off by the Court's skepticism of their claims in its Order on Defendant-Intervenor's Motion to Dismiss (i.e., "build it and they *must* come") (Doc. No. 87), Plaintiffs appear to have abandoned their arguments that a mercurial due process right of theirs is violated by the Ordinance. Rather, they vaguely proclaim that the Ordinance violates the Due Process clause because "the 1,000-person limit [is] uniform and inflexible."[19] Pl. Br. at 53. It is well settled law that when considering substantive due process challenges to a land use ordinance,[20] "a court should not set aside the determination of public officers in [land use] matter[s] unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 246 (1st Cir. 1990) (*quoting Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928)). The exercise of police power in enforcing land use ordinances is not narrowly constrained, because "[t]he concept of the public welfare is broad and inclusive." *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1375 (11th Cir. 1993); *accord Berman*, 348 U.S. at 33.

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[19] Importantly, Attorney Woodcock conceded that Plaintiffs are "not taking the position that no caps can ever be imposed unilaterally." 7/13/2023 Tr. 174:1-3. Instead, Plaintiffs argue that the disembarkation threshold "should" vary to allow more visitors during the shoulder seasons. Pl. Br. at 53. Plaintiffs may *wish* that the Ordinance allowed more passengers to disembark, or that it was redundantly limited to the contours of the cruise ship season. But nothing requires, and Plaintiffs fail to cite to any authority requiring, that lines be drawn to perfectly eclipse a problem a law seeks to remedy. *See U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[T]he fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."); *Nat'l Pork Producers*, 598 U.S. 356, 380 (2023) (courts cannot "strike down duly enacted state laws . . . based on nothing more than their own assessment of the relevant law's costs' and 'benefits'").

[20] Plaintiffs futilely argue that the Ordinance is not really a land use ordinance. Pl. Br. at 1, 44. However, *Portland Pipeline II* again forecloses their argument. *See Portland Pipeline II*, 332 F.Supp.3d at 297 ("[T]he Court sees little difference between the [land use] Ordinance [prohibiting the loading of crude oil within the boundaries of the city] and other zoning prohibitions."). There is no principled difference between a town limiting the use of land within its boundaries for purposes of loading of crude oil or disembarking of passengers. *Cf. Nat'l Pork Producers*, 598 U.S. at 385 ("[T]he dormant Commerce Clause does not protect a particular structure or metho[d] of operation. That goes for pigs no less than gas stations.") (internal quotation marks and citations omitted).

"In adjudicating substantive due process challenges to zoning ordinances, a court asks only whether a *conceivable* rational relationship exists between the zoning ordinance and legitimate governmental ends." *Smithfield Concerned Citizens*, 907 F.2d at 244.[21] "A land-use regulation will thus stand if a rational relationship exists between it and a legitimate governmental objective." *Id*. "It is sufficient for the purposes of due process that the ordinance be aimed at such legitimate government purposes as 'enhanc[ing] the quality of life.'" *Id*. (*quoting Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978)). "The Supreme Court . . . ha[s] repeatedly held . . . noise, traffic, congestion, safety, aesthetics, valuation of adjoining land, and effect on city services . . . are rational and permissible bases for land use restrictions." *Corn*, 997 F.2d at 1387; *see also Greene*, 451 U.S. at 126-29; *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1580 & n.20 (11th Cir. 1989); *Spence v. Zimmerman*, 873 F.2d 256, 260 (11th Cir. 1989) (protection of surrounding neighborhoods from economic, environmental, and aesthetic harm is legitimate); *Constr. Indus. Assoc. of Sonoma Cnty. v. City of Petaluma*, 522 F.2d 897, 905–09 (9th Cir. 1975) (land use may be governed in order to preserve small town character and avoid problems associated with uncontrolled growth), *cert. denied*, 424 U.S. 934 (1976).

The purposes of the Ordinance, as clearly described in the Purpose section of the Ordinance and expanded upon by defense witness testimony, are legitimate government purposes. The rational nexus is clear: fewer cruise ship passengers disembarking into Town will reduce congestion, increase pedestrian safety, conserve municipal resources, and improve quality of life. The trial record supports these goals. PX243A.003; PX032.021-022 (describing security

[21] Unless a fundamental right is implicated, a local law is reviewed under the rational basis standard. *Kenyon v. Cedeno-Rivera*, 47 F.4th 12, 24 (1st Cir. 2022). At trial, Attorney Woodcock conceded that the rational basis test applies to Plaintiffs' due process claim. 7/13/23 Tr. 128:12-17.

measures and need for greater police presence in dense pedestrian traffic areas); 7/13/23 Tr. 172:9-11.

Plaintiffs speciously complain that the Ordinance is arbitrary and capricious because no empirical study was performed prior to enactment. Pl. Br. at 3.[22] No formal investigation is required for land use legislation to be enacted. *Corn*, 997 F.2d at 1385-88 ("There is no basis in the Constitution for such a requirement [that land use decisions must be the product of formal investigations], which would be antithetical to our democratic form of government."); *Smithfield Concerned Citizens*, 907 F.2d at 245 ("Although such planning and study are doubtless desirable, due process does not require a legislative body to perform any particular studies or prepare any particular analysis to justify its decisions.") (*citing Vance v. Bradley*, 440 U.S. 93, 109-12 (1979)); *Greenbriar*, 881 F.2d at 1579 (city's action in denying permission for development, based upon political pressure from citizen voters, was not arbitrary and capricious). Nor does a lack of legislative history render the Ordinance arbitrary. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[T]he absence of 'legislative facts' explaining [its reasons for enacting a statute] '[o]n the record' has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."). A legislative body need not articulate its reasons for enacting a statute. *Fritz*, 449 U.S. at 179 (1980). "This is particularly true where the legislature must necessarily engage in a process of line-drawing." *Id*. Such precepts would render *any* citizens' initiative automatically invalid since the citizenry cannot develop a formal legislative history and lacks the resources and authority to commission town-sponsored studies. In most cases, citizen input will be a sufficient basis for a rational government land use decision,

[22] Notably, there were no empirical studies performed to formulate the voluntary caps in the preceding fourteen years, nor the caps imposed by the MOA. PX206; 7/12/23 Tr. 48:14-24 and 52:3-12.

especially where "citizens consistently come before their [Town] council in public meetings on a number of occasions and present their individual, fact-based concerns that are rationally related to legitimate general welfare concerns." *Corn*, 997 F.2d at 1387.[23]

Here, the Ordinance was drafted and passed by the citizens, which in and of itself constitute a quantitative determination of citizen sentiment. Further, the Ordinance is supported by both empirical studies performed by the Town and de facto legislative history, no matter how much Plaintiffs refuse to acknowledge it. The Pan Atlantic study was conducted because of the persistent outcry from residents complaining about cruise ship visitation. 7/13/23 Tr. 139:6-140:10, 143:22-145:3; DX323.004. The purpose of the Pan Atlantic study was to understand the opinions of year round residents, seasonal residents, and business owners on cruise ship visitations to the Town, and to explore "specific solutions or strategies" to address those concerns. 7/13/23 Tr. 138:7-139:18; DX323.028. As a result of the survey, the Town agreed that it "needed to look at reducing caps . . . reducing visitation somehow." 7/13/23 Tr. 151:22-25. Mr. Sidman used the survey to reach the same conclusion and draft the Ordinance. The Purpose section of the Initiative explicitly relies on the Pan Atlantic study. PX243A.003. Indeed, Mr. Sidman testified that the Pan Atlantic study helped him develop the 1,000 passenger threshold—i.e., the quintessential process of line drawing. 7/13/23 Tr. 271:4-25.

[23] Mr. Sidman's motivations for helping to pass the Ordinance are irrelevant to the Court's substantive due process inquiry. The First Circuit "precludes the trial court from inquiring into actual as opposed to the declared motives of the local legislative body in passing the ordinance." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992) (*citing Smithfield Concerned Citizens*, 907 F.2d at 246); *see also Wawenock, LLC v. Dep't of Transp.*, 2018 ME 83, ¶ 16, 187 A.3d 609 ("Interpreting citizen-enacted legislation requires us to 'ascertain the will of the people' rather than the will of the Legislature."). Every step of this case, Plaintiffs have tried to malign Mr. Sidman by baselessly alleging that he is prejudiced against the cruise ship industry in transparent attempts to sway the Court's sympathies with irrelevant and untruthful allegations. In truth, Mr. Sidman has maintained that he is a "moderate" on cruise ships, that they have a place in society, and has even shared his appreciation for them. 7/13/23 Tr. 301:17-305:1, 265:8-15.

Legislative attempts to stem the influx of cruise ship passengers while leaving untouched other forms of tourism do not deprive Plaintiffs of due process. Plaintiffs argue that the Ordinance arbitrarily singles out passengers disembarking from large cruise ships and "omits everyone else" arriving into Bar Harbor by other means. Pl. Br. at 54. But "[m]unicipal governments, like people, act to deal with the problems with which they are confronted. There is no basis in the Constitution or in common sense for holding that a government cannot solve a problem with which it is confronted unless its solution solves all future problems that may arise as well. Municipal governments have the power to deal independently with the problems of their cities on an as-needed basis; the Constitution does not require that they address in one all-encompassing action every conceivable problem that could arise." *Corn*, 997 F.2d at 1388-89; *see also Clover Leaf Creamery Co*., 449 U.S. at 466 ("[The Supreme Court] has made clear that a legislature need not strike at all evils at the same time or in the same way, and that a legislature may implement its program step by step, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations."); *Beach Commc'ns, Inc.*, 508 U.S. at 316 ("[T]he legislature must be allowed leeway to approach a perceived problem incrementally.").

It is true that the Town's congestion, safety concerns, and drain on municipal resources cannot be solely attributable to cruise ship passengers. But the Ordinance cannot solve all of the potential causes of these problems in Town, nor does it have to.[24] Rather, the Ordinance is aimed at what residents rationally perceive to cause disruption to their daily lives—thousands of

[24] In fact, other actions by the Town do limit other forms of visitation. The Town only provides a certain number of parking spaces available to the public, thus limiting the number of visitors coming by car. The Town also limits the amount of short-term housing rentals, thus limiting the number of visitors arriving by means other than cruise ship and staying overnight. 7/13/23 Tr. 164:5-165:13. And Acadia National Park has instituted similar limitations on visitors to the popular and overcrowded summit of Cadillac Mountain. DX252.001.

cruise passengers exiting tender ships and entering downtown Bar Harbor in waves. 7/13/23 Tr. 237:3-238:23; DX323.035-039 ("Pedestrian congestion is perceived as a much more concerning impact of cruise ship tourism" and overcrowding due to cruise ship tourism preventing local residents from accessing the town pier, parks, and local businesses).

4. The Ordinance is not preempted by state law.

The Pilots cannot show that the Ordinance is preempted by the general policy considerations of state law. Under Maine law, citizen-initiated legislation must be interpreted liberally to effectuate its purpose and enjoy a "heavy presumption of constitutionality." *Opinion of the Justices*, 2017 ME 100, ¶ 59, 162 A.3d 188. A municipality may adopt any ordinance or "exercise any power or function" which is "not denied expressly or by clear implication." 30–A M.R.S. § 3001. "Municipal legislation will be invalidated, therefore, only when the Legislature has expressly prohibited local regulation, or when the Legislature has intended to occupy the field and the municipal legislation would frustrate the purpose of a state law." *Int'l Paper Co. v. Town of Jay*, 665 A.2d 998, 1002 (Me. 1995). The determinative factor is, therefore, whether the ordinance "would frustrate the purpose of any state law." *School Comm. of Town of York v. Town of York*, 626 A.2d 935, 939 (Me.1993) (discussing 30–A M.R.S.A. § 3001(3)). Courts will only find that municipal action is preempted if a local ordinance "prevents the efficient accomplishment of a defined state purpose." *Id.* at 938 n.8.

The Pilots cannot point to any statute or regulation that could possibly be preempted by the Ordinance. Maine's Harbor Masters Act permits municipalities to enforce regulations related to the function of municipal harbors. *See* 38 M.R.S. § 7. Both laws the Pilots cite—Maine's pilotage statutory scheme and broad goal of economic development—contemplate this grant of authority municipalities have over their own harbors. *See* 5 M.R.S. § 13052; 38 M.R.S. §§ 85, *et*

seq. The ability to enforce regulations relating to disembarkations into the Town is part of the authority the state legislature bestowed upon municipalities. *See* 38 M.R.S. § 7 ("Nothing in this subchapter may be construed to be a limitation on the authority of municipalities to enact ordinances to regulate the assignment or placement of moorings *and other activities in their harbors*.") (emphasis added).

a. The Ordinance is not preempted by the Pilotage Act.

The Ordinance does not interfere with the Pilotage Act. The Pilotage Act does not require the maintenance of an unwelcome cruise ship industry to buoy the State's system of pilotage. The Pilots insist on the tail wagging the dog: rather than building a system to cater to the demand, they want to require the demand to cater to the system. Although couched as a preemption argument, Pilots simply hypothesize that the Ordinance will reduce the profitability of their business for its four full-time pilots. 7/11/23 Tr. at 90:5-17. Nothing in the state statutory scheme mandates a local municipality to maximize the demand for pilots.[25]

The Ordinance does not affect any provision of the Pilotage Act. It does not affect the Pilots' jurisdictional waters. 38 M.R.S. § 86-A. It does not affect the types of vessels they are required to escort. 38 M.R.S. §§ 86, 87-A, 97. It does not affect the qualifications or licensing for pilots. 38 M.R.S. §§ 90, 91. It does not affect the criminalization of unlicensed piloting. 38 M.R.S. § 88. It does not affect the state controls on pilots' compensation. 38 M.R.S. §§ 96, 98. It does not affect the authority of pilots over ships requiring their services. 38 M.R.S. § 97.

Instead of relying on specific provisions, the Pilots point to the policy statement of the Pilotage Act to support their argument that the Act requires general safety and efficiency. Pilots'

[25] The Ordinance may even increase the demand for pilots by increasing the number of smaller ships visiting the Town that require pilots. *See* 38 M.R.S. § 86 (requiring every vessel with a draft of 9 feet or greater to use pilot). The effect on the Pilot's profit and loss is simply unknown.

Br. at 45-47. When there is tension between two laws, "a court must be particularly reluctant to elevate a [general] policy to the status of a . . . right." *Jackson v. Consolidated Rail Corp*., 717 F.2d 1045, 1051 (7th Cir. 1983). Plaintiffs claim that their system of pilotage will need to change if the Ordinance goes into effect. But nothing in the Pilotage Act requires the Pilots to employ an "as-needed," as opposed to an "on-demand," system of pilotage. 7/11/23 Tr. 117:17-24. Conversely, the Pilots cannot point to any attenuated impact beyond conjecture that the Ordinance will reduce pilot safety.

The Pilotage Act's duty to maintain a safe and efficient pilotage system falls on the Maine Pilotage Commission, not a small coastal town. 38 M.R.S. § 90(1)(I) (duties of Commission include "[t]o do all other things reasonable, necessary and expedient to insure proper and safe pilotage and to facilitate the efficient administration of this subchapter"). Among the controls the Commission has at its disposal, it establishes the fee rates received by pilots as compensation for their services. 38 M.R.S. § 90(1)(B). The Pilots periodically petition the Commission for rate increases. 7/11/23 Tr. 56:15-58:20. There is no evidence that the Commission—of which Captain Gelinas is a member—has ever denied the Pilots a rate increase in the past. 7/11/23 Tr. 96:5-13, 56:15-59:3; Gelinas Dep. Tr. 62:4-8. If the Pilots' income reduces as a result of the Ordinance, they can simply request another rate increase. There is no record evidence to conclude that the Pilots would be denied a rate increase or that the Commission would otherwise breach their statutory duty if a reduction of income risks the Pilots' objectives.

b. <u>The Ordinance does not frustrate Maine's economic and community development statutes.</u>

Invoking 5 M.R.S. §§ 13052, *et seq*., the Pilots last allege that the Ordinance is inconsistent with Maine's strategy of economic development, and specifically, tourism-based

revenue growth. Pilots Br. at 48-49. The Pilots neglect to include important language from § 13052, which states that state economic growth and development policies and programs require coordination "on the state level, *as well as with local and regional levels*." 5 M.R.S. § 13052 (emphasis added). Additionally, the "duties and responsibilities" of the Department of Economic and Community Development include "work[ing] with other state agencies, municipalities and regional planning, community and economic development organizations for the purpose of assisting and encouraging the orderly and coordinated development of the State." 5 M.R.S. § 13056(2). The state legislature could not state more clearly its intention not to occupy the field of economic growth and development. Indeed, those policies ultimately depend on a local government's appetite for such business. *See* 30-A M.R.S. § 3001.

The Pilots imply that a municipality cannot do anything that opposes the Office of Tourism's purported goal of maximizing tourism. But the Office of Tourism does not have hegemonic rule over local municipalities. Nowhere does the statutory scheme limit the judgment of a municipality to govern land within its boundaries in the name of tourism. Otherwise, a municipality could not, for instance, preserve its small-town character by regulating parking, hotels, or attractions. *See, e.g.*, 30-A M.R.S. § 3009 (giving municipalities "exclusive authority" to "regulate pedestrian traffic," "regulate the operation of all vehicles in the public ways and on publicly owned property," and parking). Essentially, the Pilots' wish to privilege tourism above all other purposes and thereby usurp the sovereign power of municipalities to legislate for the health, safety, and welfare of the town and its residents.

IV. CONCLUSION

For the foregoing reasons, Defendant-Intervenor Charles Sidman respectfully requests that this Court hold that the Ordinance is constitutional and enter judgment in favor of the Defendants.

Respectfully submitted,

Dated: October 6, 2023

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V. CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2023, the foregoing was electronically filed with the Clerk of this Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: October 6, 2023

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