UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ASSOCIATION TO PRESERVE AND PROTECT LOCAL LIVELIHOODS, *et al.* *Plaintiffs,* PENOBSCOT BAY AND RIVER PILOTS ASSOCIATION, *Plaintiff-Intervenor,* v. TOWN OF BAR HARBOR, *Defendant,* CHARLES SIDMAN, *Defendant-Intervenor*.	)	Civil Action No. 1:22-cv-416-LEW

MOTION FOR INJUNCTION PENDING APPEAL WITH INCORPORATED MEMORANDUM OF LAW

Plaintiffs BH Piers, LLC and Golden Anchor, LC ("Pier Owners"), B.H.W.W., LLC, Delray Explorer Hull 495, LLC, Delray Explorer 493, LLC, Acadia Explorer 492, LLC, ("Tender Owners"), and the Association to Preserve and Protect Local Livelihoods[1] ("APPLL"), and Plaintiff-Intervenor Penobscot Bay and River Pilots Association ("Pilots") and collectively, "Plaintiffs"), pursuant to Federal Rule of Civil Procedure 62, move this Court to enjoin, pending appeal, Defendant Town of Bar Harbor ("Town") from enforcing Bar Harbor Code § 127-75(H).

[1] APPLL's members include approximately 200 local residents, businesses, and employers.

I. PROCEDURAL BACKGROUND

On November 8, 2022, Bar Harbor voters approved an initiative-proposed ordinance that restricts the disembarkation of all persons from cruise ships to no more than 1,000 per day, every single day of the year (the "Ordinance"). Plaintiffs sued the Town seeking a declaratory judgment that the Ordinance violates the Constitution and an injunction barring the Town from applying, implementing, and enforcing the Ordinance. ECF Nos. 1, 32, 43.

Following a three-day bench trial and subsequent briefing, on March 1, 2024, this Court issued an Amended Decision and Order ("Order," ECF No. 206) denying most of Plaintiffs' claims but finding for Plaintiffs on their claim that the Ordinance's broad application to disembarking "persons" was preempted by a federal regulation, 33 C.F.R. § 105.237, which guarantees shore access to seafarers (a term that includes crew members aboard cruise ships) and others. Order at 28-32. The Court entered judgment for Plaintiffs on this claim. *Id.* at 61. It also determined that, despite demonstrating that federal law preempted the Ordinance, Plaintiffs were not entitled to "any meaningful relief." *Id.* at 29; *see also id.* at 61.

Plaintiffs timely appealed the Order. *Ass'n to Preserve and Protect Local Livelihoods, et al. v. Town of Bar Harbor, et al.*, Nos. 24-1317, 24-1318 (1st Cir. docketed Apr. 9, 2024). Defendant-Intervenor Charles Sidman cross-appealed. *Ass'n to Preserve and Protect Local Livelihoods, et al. v. Sidman*, Nos. 24-1385 (1st Cir. docketed Apr. 30, 2024). On May 3, 2024, Plaintiffs requested the First Circuit Court of Appeals enjoin the Town from applying, implementing, and enforcing the Ordinance. On May 24, 2024, the First Circuit dismissed Plaintiffs' motion without prejudice. Order Denying Mot. Without Prejudice (1st Cir. May 24, 2024). Consistent with the First Circuit's order, Plaintiffs now move this Court for an injunction pending appeal.

II. POST-ORDER EVENTS

Shortly after this Court's Order issued, the Town Council publicly declared that "rulemaking and enforcement [of the Ordinance would] begin immediately."[2] Exhibit C, Town Council statement, Mar. 6, 2024. It broadcast its intent to "go to court to obtain fines and injunctive relief against any landowner" (a reference to the Pier Owners, as only they can be sanctioned for violations of the Ordinance (Exhibit B at § 125-77(H)(4)) if they exceed the disembarkation limits and against "any party that disobeys the orders of the Harbor Master." Exhibit C. It also directed that the Ordinance's limits must govern any pending vessel reservation for the 2025 season made/accepted after March 17, 2022. *Id*. It instructed its Harbor Master to "cancel, or reject, requests for reservations [for anchorage access] made after … the [November 8, 2022] vote for all ships with lower berth capacities greater than 1,000 passengers" (*id*.), even though (according to this Court) vessels "of whatever size are free to anchor in Frenchman Bay" under the explicit terms of the Ordinance (Order at 35).

On April 1, 2024, Mr. Sidman, dissatisfied with the Town's March 6 enforcement plan, filed suit against the Town and its councilors individually in Hancock County Superior Court seeking to compel the Town to enforce the Ordinance for the 2024 season, which would entail cancelling all vessel reservations for the 2024 season made after April 1, 2022, including those made pursuant to the MOAs (an estimated cancellation of between 134 and 149 reservations). Exhibit D, Sidman Complaint Excerpts. On May 2, the Town moved to dismiss Sidman's

[2] At the outset of this litigation, the Pier Owners, Tender Owners, and APPLL moved for a preliminary injunction to bar enforcement of the Ordinance. *See* Order at 2. Because the Town agreed "not to enforce" the Ordinance "pending the outcome of the litigation," the Pier Owners, Tender Owners, and APPLL withdrew the motion. *Id*. The Town's agreement not to enforce the Ordinance included honoring cruise line applications for the 2023 season that the Town had approved under the Memoranda of Agreement ("MOAs") with the cruise lines but which were barred by the Ordinance's retroactivity clause. *See* Exhibit B, Bar Harbor Code § 125-77(H)(5). This allowed the 2023 season to proceed largely intact and without incident.

complaint, reiterating the policy and directives that the Town had set forth in its March 6 statement. Exhibit K, Town Motion to Dismiss Excerpts.

The Town is enforcing the Ordinance by, among other things, refusing to confirm vessel reservation requests for use of federal anchorages in Frenchman Bay for 2025[3]—increasing the risk each day that the 2025 cruise season will be eliminated altogether.

On May 10, Royal Caribbean Group ("RCCL") advised Sarah Flink, Executive Director of CruiseMaine, that it was cancelling all 2024 visits to Bar Harbor. Exhibit E, Affidavit of Sarah Flink (Flink Aff.") ¶ 30. On May 24, 2024, RCCL formally confirmed this decision, advising Ms. Flink that RCCL was cancelling all Royal Caribbean and Celebrity Cruises visits to Bar Harbor for the 2024 and 2025 cruise seasons due to the "uncertainty" for cruise ship visits to Bar Harbor. *Id*. ¶¶ 30-31. As a result, RCCL's planned 17 visits to Bar Harbor will not occur, resulting in a decline in cruise ship passenger visits of 49,806 in the 2024 season alone. *Id*. ¶ 34. The withdrawal of the RCCL visits will result in a decline in fees for the Pier Owners (Exhibit R, Affidavit of William Joseph Walsh for BH. Piers, LLC and Golden Anchor, LC ("Pier Owners Aff."), ¶¶ 8-12, the Tender Owners,(Exhibit P, Affidavit of William Joseph Walsh for B.H.W.W., LLC ("BHWW Aff.") ¶¶ 9-13; and, the Pilots. Exhibit Q, Declaration of Captain David Gelinas ("Gelinas Decl.") ¶¶ 7-10) and will result in a loss of revenues for APPLL business owners and a reduction in hours for APPLL employees.

These Town actions have already irreparably harmed Plaintiffs and, without injunctive relief, will continue do so. Thus, Plaintiffs ask this Court to enjoin the Town from applying, implementing, and enforcing the Ordinance pending a decision on the merits on their appeals.

[3] This Court correctly observed that the Ordinance, by its terms, imposes "no restrictions whatsoever" on anchorage access. Order at 35.

III. ARGUMENT

Four factors govern a request for injunction pending appeal: (1) whether the movant "has made a strong showing that [it] is likely to succeed on the merits;"[4] (2) whether the movant "will be irreparably injured absent" the requested relief; (3) whether issuance of relief "will substantially injure the other parties interested in the proceeding;" and (4) "where the public interest lies." *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 44 (1st Cir. 2021) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

As this Court has recognized, when presented with a request for an injunction pending appeal, the court also may consider "whether the appeal raises 'serious legal questions' and whether the denial of the request would compromise the appellant's access to 'meaningful review.'" *Sierra Club v. United States Army Corps of Eng'rs*, No. 2:20-CV-00396-LEW, 2020 WL 7682552, at *1 (D. Me. Dec. 23, 2020) (citing *NCTA - Internet & Television Ass'n v. Frey*, No. 2:19-CV-420-NT, 2020 WL 2529359, at *2 (D. Me. May 18, 2020)); *see Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979). In a request for injunctive relief pending appeal, "likelihood of success remains the weightiest factor." *Sierra Club*, 2020 WL 7682552, at *2.

A. Likelihood of Success[5]

1. Plaintiffs have already succeeded on the merits of their claim that the Ordinance is preempted by federal law. Order at 28-32, 61; *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S.

[4] Actual success on the merits satisfies this factor. *Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 546 n. 12 (1987).

[5] Although Plaintiffs advanced several claims in their respective complaints and have appealed all adverse rulings on those claims, for purposes of this Motion, Plaintiffs rely on two of their claims: (1) the Ordinance's conflict with federal law and preemption by 33 C.F.R. § 105.237 renders the Ordinance facially unconstitutional in its entirety; and (2) the Ordinance offends the dormant Commerce Clause's protection of the flow of commerce and the instrumentalities and arteries of commerce.

531, 546, n.12 (1987) (actual success on the merits satisfies the "likelihood of success" factor). Furthermore, Plaintiffs are likely to succeed on the merits of their claim that the Ordinance, having been found preempted, cannot be protected from invalidation through a severability analysis.

Plaintiffs' claim that the Ordinance's undifferentiated application to "persons" places the Ordinance in conflict with federal law's guarantee of shoreside access to seafarers and others pursuant to 33 C.F.R. § 105.237. This Court agreed. Order at 28-32, 61. In concluding that the Ordinance is preempted by 33 C.F.R. § 105.237, the Court made several salient findings. It found that the word "persons" as used in the Ordinance encompasses seafarers and all those covered by the seafarer access rule. Order at 29. It found that the purpose of 33 C.F.R. § 105.237 is" to assure seafarer access to shore when seafarers are abroad and assigned to a vessel moored at the regulated facility." *Id.* at 30. And it found that "the Ordinance's use of 'persons' unambiguously extends to seafarers, so it is not 'readily susceptible to a narrowing construction.'" *Id.* at 31 (internal citation omitted).

The Court's conclusions on these points are correct. Analysis of the Ordinance begins with its plain text. When the "meaning of the [statutory] language is clear," the statute must be "interpret[ed] … to mean what it says." *N.A. Burkitt, Inc. v. Champion Rd. Mach., Ltd*., 2000 ME 209, ¶ 6, 763 A.2d 106. As this Court found, the words "persons" is clear, the "use of 'persons' unambiguously extends to seafarers," and the word "is not 'readily susceptible to a narrowing construction.'" Order at 31 (internal citation omitted). Moreover, "[w]hen a statute specifically defines a term, [the court] cannot redefine it." *Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, ¶ 10, 772 A.2d 256, 260 (citing *Musk v. Nelson*, 647 A.2d 1198, 1201 (Me. 1994)). The Ordinance, itself, does not define "persons," but the Bar Harbor Land Use Ordinance, of

which the instant Ordinance is a part, does. A "person," for purposes of every section of the Land Use Ordinance, is "[a]n individual, corporation, governmental agency, municipality, trust, estate, partnership, association, two or more individuals having a joint or common interest, or other legal entity." Exhibit N, Bar Harbor Code Ch. 125, Section 109, definition of "person."[6] "Persons" certainly does not mean anything less than passengers, seafarers, and all other humans disembarking from cruise ships into Bar Harbor.

The invalidity of the word "persons" as applied to seafarers necessarily raises the question of severability.[7] In Maine, courts review the statute as a whole to determine whether "the remainder [of the statute] can be given effect without the invalid provision." *Bayside Enters., Inc. v. Maine Agr. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me. 1986) (internal citations omitted).[8]" If the invalid provision is such an integral part of the statute that the Legislature would only have enacted the statute as a whole, then the entire statute is invalid." *Id.* (citing *Town of Windham v. LaPointe*, 308 A.2d 286, 291 (Me. 1973)); *see In re Opinion of the Justs.*, 132 Me. 502, 167 A. 174, 175 (1933) ("When legislative provisions are so related in substance and object that it is impossible to suppose that the statute would have been enacted except as an entirety, if one portion offends the Constitution, the whole must fall."); *Ayotte v. Planned*

[6] Even if the Court had to revert to legislative history, the Ordinance's legislative history, which included striking the original word "passengers" in favor of "persons" for the express purpose of sweeping in "crewmembers as well as passengers," Order at 12 (citing PX 243B), reinforces this result.
[7] "Severability is a matter of state law." *Rhode Island Med. Soc. v. Whitehouse*, 239 F.3d 104, 106 (1st Cir. 2001) (citing *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam)).
[8] *Bayside Enterprises* concerned a federal preemption challenge to a state statute. 513 A.2d at 1359-60. Applying severability rules, the court concluded that the reach of the preempted section was "short" and "in no way central to any of [the Act's] purposes." *Id*. at 1360. The section could be "*removed*" without jeopardizing the Act's effective regulation of "the relationship between handlers and associations and the enforcement of its enumerated unfair practices." *Id.* at 1360 (emphasis added). The court in *Opinion of the Justices* reached the opposite conclusion on review of a preemption challenge to another state statute, finding the whole statute unconstitutional because with the "part of section 8 of the act, to which the inquiry of the Senate relates, being *stricken out*, the remaining portion of the legislation appears incomplete and incapable of being executed in accordance with apparent intent." 167 A. at 175-76 (emphasis added).

Parenthood of N. New Engl., 546 U.S. 320, 330 (2006) (court must ask "[w]ould the legislature have preferred *what is left of its statute* to no statute at all?") (emphasis added) (internal citations omitted); *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757 (N.D. Tex. 2007) (declining to rely on *Ayotte* where enjoining only the unconstitutional applications involved, among other things, reading "eligible immigration status" as "immigration status").

Consistent with its manifest purpose, the Ordinance establishes a limit on disembarkations that is reached cumulatively by each *person* disembarking from a cruise ship, including seafarers. It is comprehensive and admits to no exceptions. Order at 12, 30-31. There can be no doubt that, when Bar Harbor voters approved the Ordinance on November 8, 2022, they fully understood and intended that "persons" would apply to all disembarking persons without respect to any of the myriad of possible categorical distinctions the Ordinance might have included. The voters, and the Ordinance they approved, rejected the possibility of any categorical distinctions. Both the word "persons" and the application of the disembarkation limit to all persons are integral to the Ordinance. It is impossible to suppose that, when the voters approved the Ordinance, they understood it to mean anything different.

The Ordinance restricts disembarkation of *persons*. It does not "draw lines" between different "persons." Its language "simply makes it not susceptible to severance." *Rhode Island Medical Soc.*, 239 F.3d at 107 (internal quotation omitted). Its application to passengers *cannot be separated* from its application to seafarers *unless* the court "create[s] a provision which could stand by itself" to restrict passenger disembarkations but not seafarer disembarkations.[9] *Id*. *Contra Ayotte*, 546 U.S. at 329 (cannot rewrite state law to achieve constitutionality).

[9] The Ordinance neither describes persons by category nor provides a mechanism for differentiating between such categories. It provides *no* means by which the Town or the Pier Owners may *not* apply it to seafarers.

As this Court recognized, "persons" is unambiguous. Order at 31. Therefore, "persons" cannot be judicially rewritten as "passengers." *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (Oklahoma law that applied, without limitation, to "all entities" could not be severed, *i.e.*, limited to those entities to which it could be constitutionally applied while excluding those to which it could not); *Club Madonna Inc. v. City of Miami Beach*, 42 F.4th 1231, 1256-57 (11th Cir. 2022) (state law requires "employment verification of both 'performers 'and 'workers, 'so even if performers are 'employees 'under the [federal law], the Ordinance directly conflicts with Congress's choice not to require employers to verify the employment eligibility of independent contractors or casual hires"); *Rhode Island Med. Soc*., 239 F.3d at 106 (court may not rewrite statute applicable to "all fetuses" to apply only to "viable" fetuses). The Ordinance is unconstitutional in its entirety. *Eastler v. State Tax Assessor*, 499 A.2d 921, 927 (Me. 1985); *Opinion of the Justs.*, 167 A. 174.

The Court's decision that Plaintiffs were not entitled to "any meaningful relief" (Order at 29), even though federal law preempts the Ordinance, rested in part on the conclusion that Plaintiffs had "fail[ed] to articulate a set of circumstances in which an as-applied challenge by a seafarer necessarily would arise and hypothetical notions about what might transpire do not suffice since 'litigants mounting a facial challenge to a statute must normally 'establish that *no set of circumstances* exists under which [statute] would be valid'" (Order at 32, n.21 (quoting *United States v. Hansen*, 599 U.S. 762, 769 (2023))).[10]

For purposes of this Motion, Plaintiffs respectfully request this Court to consider that in a facial preemption case, the question is *not* whether the Town "can *apply*" the Ordinance "in a

[10] The Order reinforced this point by describing that the conflict with the seafarer access rule was "hypothetical" and not an "actual controversy." Order at 29-30; *see also id*. at 32 (seafarer preemption presents a "limited conceptual conflict").

constitutional way," *United States v. Arizona*, 641 F.3d 339, 346 (9th Cir. 2011), *aff'd in part, rev'd in part and remanded*, 567 U.S. 387 (2012), but whether the Ordinance "fails the relevant constitutional test," *Club Madonna*, 42 F.4th at 1256. That the Town *could* apply the Ordinance to persons who are not seafarers does not mean the Ordinance is facially valid. By that logic, states could "sidestep facial challenges and the unambiguous command of federal law so long as they crafted some instance" when the law at issue "aligned with federal objectives." *Id.* (internal quotation omitted); *see Ayotte*, 546 U.S. at 330 ("'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied.") (internal citation omitted)).

Moreover, where the Ordinance's application to disembarking persons—that is, its enforcement at the piers—is concerned, the Ordinance's unambiguous breadth and its lack of any standards authorizing selective enforcement make such selective enforcement impossible. The Ordinance does not set forth any means or standards by which, under the Ordinance's authority, responsible officials can apply it to some classes of persons and not others.[11]

The Court also relied on the Town's "indicat[ion] that it will author a rule that limits the Ordinance by recognizing an exception for shore access for seafarers" at some point in the indefinite future[12] in deciding to withhold "any meaningful relief." Order at 29-30; *see also id.* at 32, 61. The Order appeared to tie this conclusion to the assumption that the voters of Bar Harbor "intended and would prefer that the Ordinance remain operative as to passengers rather than be invalidated as to passengers." *Id*. at 31.

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[11] Put differently, the Ordinance contains no means by which it *cannot* be enforced against seafarers.
[12] Courts do "not uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly." *Cent. Maine Power Co. v. Maine Comm'n on Governmental Ethics & Election Pracs*., No. 1:23-CV-00450-NT, 2024 WL 866367, at *6 (D. Me. Feb. 29, 2024) (quoting *United States v. Stevens*, 559 U.S. 460, 480-81 (2010)).

These rationales should not deprive Plaintiffs of injunctive relief pending appeal. First, whatever the quality of the Town's intent to exempt seafarers from the Ordinance, it remains that, to date, the Town has not approved any such rule. Until the Ordinance is validly amended or the Town issues purportedly curative rules,[13] it is as applicable to seafarers as it is to all other disembarking persons. Further, whether voter intent is viewed retrospectively or prospectively (*see id*. at 31), the terms of the Ordinance remain unchanged. Whatever Bar Harbor voters may have intended[14] or may intend for the future, the Ordinance continues to apply to seafarers with no means or standards by which it may not be applied to seafarers. Under these circumstances, Plaintiffs respectfully suggest that this Court should determine whether injunctive relief pending appeal is justified based on the Ordinance as it stands today, not as how it might be changed in the future.

2. In addition to the Court's decision to deny relief to Plaintiffs despite federal law's preemption of the Ordinance, Plaintiffs also seek injunctive relief pending appeal on the grounds that they are likely to succeed on the merits of their claim that the Ordinance is unconstitutional because it impedes or stems the flow of interstate commerce.

[13] Plaintiffs dispute that the Town can cure the Ordinance's violation of the seafarer rule through rulemaking or by revision or amendment by Council Ordinance until the Ordinance is formally amended or revised through a land use or zoning ordinance amendment by Town Meeting. *See* Town Charter, C-10(A)(9)(D); Bar Harbor Code Ch. 125, Section 125-9(E). As this Court noted, Maine law provides that an ordinance can only be revised in the manner it was adopted. Order at 31. Further, it remains that, when the trial record closed, the Town had submitted no evidence that it had formally issued such purportedly curative rules. Moreover, because the Ordinance would impose penalties on the Pier Owners for allowing (or not preventing) "excess unauthorized persons" into Bar Harbor, irrespective of their highly questionable validity, any such rules would have to meet basic due process standards. *Grayned v. City of Rockford*, 408 U.S. 104, 106 (1972).

[14] As Plaintiffs have noted, the intent of Bar Harbor voters in enacting the Ordinance is clear—they intended that it would apply, without distinction, to all disembarking "persons."

The Order principally addressed Plaintiffs' flow of commerce claim by reducing "'free-flow' of commerce" jurisprudence into two categories[15] and then concluding that "[t]he Ordinance does not fit into either category." *Id*. at 50-51. Instead, the Order found that the Ordinance was more like the type of state law that must rise or fall according to the principles set forth in *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970). *Id*. at 52.

The Order acknowledged the Ordinance's impact on the flow of commerce, finding that "the Ordinance does indeed stem the flow of interstate commercial activity by reducing the daily volume of persons disembarking into Bar Harbor by cruise ship."[16] *Id*. at 51. The Court predicted that the cruise ship market would adjust to the Ordinance and, more broadly, that" [o]ther cruise lines no doubt will adjust to serve the emerging market charted by municipalities interested in following Bar Harbor's example[.]" *Id.* at 57.

The Order then concluded that the Ordinance regulates a matter of "local concern" in both "character and effect" (*id*. at 54 (internal quotations omitted)) and the Ordinance's burden on commerce is not "clearly excessive" in relation to its objective of "ameliorat[ing] the particularized excesses of modern cruise tourism" (*id*. at 59). In this Court's view, "the question of a local municipality's relative tolerance of cruise tourism based on local conditions" is not "an aspect of the national commerce that requires the national uniformity that only Congress can provide." *Id*. at 53. With these findings, the Order concluded that the Ordinance came within the

[15] The Court divided the cases between those in which a state law regulating transportation was inconsistent with standards in "neighboring or surrounding states, effectively halting transportation through that state" and those in which a state law creates a "monopolistic enterprise that prohibits competition." Order at 50-51.

[16] Earlier, the Order found that the Ordinance would reduce visitation by cruise ship passengers by "likely north 80 and possibly 90 percent (in the short term) compared with the peak numbers experienced in 2002." Order at 17. Later, the Order found that the Ordinance would "have some effect on commerce since almost 80% of cruise ships currently visiting Bar Harbor have a lower berth capacity in excess of 1,000 and are thus unlikely to call at Bar Harbor." *Id.* at 56. The Order characterized these effects as "incidental." *Id*. at 55 (internal quotation omitted).

"great latitude" of the Town's residual police powers. *Id.* at 55.

Notwithstanding these findings, for purposes of this Motion, Plaintiffs submit that the Ordinance violates a well-established Commerce Clause restriction by interfering with "transportation into or through" Bar Harbor (and Maine) "beyond is absolutely necessary for [Bar Harbor's] self-protection." *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 472 (1877). *Accord Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 159-60 (1st Cir. 2021) (quoting *Husen*). Numerous decisions demonstrate that the Commerce Clause does, in fact, protect the flow of commerce from restrictive local laws, irrespective of whether, either in purpose or effect, they were intended to benefit local interests. States may not impede the efficiency of interstate movements. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (contour mudguards on trucks); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (length of trains); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (use of "doubles"). They may not deprive trains and ships of the infrastructure or facilities necessary for interstate movement. *Kansas City S. Ry. Co. v. Kaw Valley Drainage Dist. of Wyandotte Cnty., Kan.*, 233 U.S. 75 (1914) (bridge used by railroad lines); *Pittston Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653 (W.D.N.Y. 1981) (use of port for interstate commercial shipping activities); *see also Cincinnati, P., B.S. & P. Packet Co. v. Catlettsburg,* 105 U.S. 559, 564 (1881) (would be "oppressive and arbitrary" for locality to designate an exclusive place for landing vessels that then did not accommodate vessels whose business required them to land there). States may not control the manner in which interstate carriers conduct their businesses. *Morgan v. Com. of Va.*, 328 U.S. 373, 380-81 (1946) (seating arrangements in interstate motor travel); *S. Covington & C. St. R. Co. v. City of Covington*, 235 U.S. 537, 546-48 (1915) (number of passengers in streetcars); *see also Hall v. De Cuir*, 95 U.S. 485, 488-89 (1877); *Illinois Cent. R. Co. v. State of Illinois ex rel. Butler*, 163 U.S.

142, 153 (1896). Nor may States burden the transportation of passengers so as to "practically stop altogether [that] particular species of commerce." *Pickard v. Pullman S. Car Co*., 117 U.S. 34, 44 (1886) (tax on sleeping cars employed in the transportation of passengers into, or through, or out of state).

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

B. Irreparable Injury

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

Ordinance's potentially ruinous and escalating per-person fines.[17] This dilemma constitutes the requisite "threat of substantial and immediate irreparable injury" justifying an injunction. *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

It is more likely, though, that the supermajority of ships will no longer call at Bar Harbor.[18] Order at 16-17, 56; *see* Flink Aff. ¶¶ 27, 37. The Ordinance's prohibitory impact has already caused a near-total disappearance of 2025 vessel calls. Order at 16-17, 56; Flink Aff. ¶¶ 47-49. Owners and operators of these vessels require long lead times for their itineraries (many months and even years) and generally do not plan itineraries around unconfirmed port calls. Flink Aff. ¶¶ 12, 49; *see* Exhibit L, PX 192 (excerpts); Exhibit M, PX 191(excerpts).

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

Approximately 50 percent of the Pilots' annual revenues come from piloting cruise vessels. Exhibit I, DX 442; *see* Exhibit H, Trial Transcript Excerpts, July 11, 2023 (extent of cruise ship revenue loss). Loss of this revenue, which cannot be replaced, will severely impact the Pilots' ability to maintain the personnel, vessels, and equipment necessary to provide

[17] The Pier Owners will be subject to fines of at least $100, up to as much as $5,000, per "unauthorized excess person" violation. While the Pier Owners' legal challenges were awaiting adjudication, the Town's non-enforcement agreement insulated them from the Ordinance's penalties. *See* Order at 2.
[18] The Court found that the decline in visits by cruise passengers would be "likely north of 80 and possibly as high as 90 percent." Order at 17; *see* Flink Aff. ¶ 27.

statutorily-required pilotage to all traffic (cargo and passenger) throughout midcoast Maine's commercial seaports. Exhibit I; Exhibit H; *see* Order at 17. Just the loss of calls from one cruise operator for the 2024 season will result in a loss of more than one-fifth of a *normal* cruise season's revenue (Exhibit H; Gelinas Decl. ¶ 9); but the upcoming seasons will be anything but normal. Economic losses under these circumstances and on this scale are irreparable; there is no remedy at law that can rectify them. *Maine Forest Prods. Council v. Cormier*, 586 F. Supp. 3d 22, 63-64 (D. Me.), *aff'd*, 51 F.4th 1 (1st Cir. 2022). *Accord Ross-Simons of Warwick, Inc. v. Baccarat, Inc.,* 217 F.3d 8,13 (1st Cir. 2000).

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

Plaintiffs' harms are not remote. The Town's enforcement actions and inactions—failing to confirm reservations for the 2025 cruise season and directing the Harbor Master to cancel or reject any reservations requests for ships with passenger capacities in excess of 1,000—are causing harm now. Cruise itinerary planning is complicated—lines must market the cruises, secure bookings, and arrange myriad commitments from a network of shoreside providers, who

must ensure the availability of sufficient personnel and equipment to accommodate vessel calls. Flink Aff. ¶¶ 9, 10, 23; Exhibit L; Exhibit M. Hence, most lines secure port reservations at least 18 months in advance. *Id*. Cruise lines are planning their future itineraries *now* for the 2025 cruise season. *See* Flink Aff. ¶¶ 9, 10, 23. The Town's enforcement actions today make such planning impossible.

Plaintiffs depend on cruise visitation. The (now inevitable) precipitous drop in cruise traffic to Bar Harbor will force irrevocable decisions long before the 2025 season. APPLL members will operate fewer months, if they operate at all, and their employees will lose hours or employment. *See* Order at 17. The Pilots will reduce personnel and divest themselves of purpose-built vessels and equipment. *Id*. The Ordinance imminently threatens the Pilots' ability to maintain its system of state pilotage, limiting, among other things, pilot availability on an as-needed basis, which negatively impacts all maritime commerce in their pilotage area, including tankers and cargo vessels calling on other Maine ports. *See* Exhibit H. If cruise vessels cannot schedule Bar Harbor while Plaintiffs' appeals are pending, Plaintiffs can only hope to claim a Pyrrhic victory should the Court of Appeals render a decision in their favor.

Moreover, Plaintiffs' harms are not speculative. There is no doubt as to how the cruise lines will conduct their business if the Ordinance is enforced. Ships will not call at Bar Harbor without confirmed reservations or the ability to disembark all their passengers. Order at 17, 54; Exhibit L; Exhibit M. At this point, one cruise line has already are canceled Bar Harbor calls for the 2024 and 2025 seasons given the uncertainty of their ability to visit the port. Flink Aff. ¶¶ 30-35; Pier Owners Aff, ¶¶ 8-12; BHWW Aff. ¶¶ 9-13; Gelinas Decl. ¶ 7. Even "if visitation is eventually maximized under the Ordinance," it will be "significantly less" than the "visitation experienced in 2022 and 2023 and less than a third of the level authorized under the recent

MOAs." Order at 17-18; see also, *id.* at 56. Enforcement of the Ordinance will be devastating. *See NACM-New Engl., Inc. v. Nat'l Ass'n of Credit Mgmt.*, 927 F.3d 1, 5 (1st Cir. 2019).

C. Injury to Other Parties—Balance of Equities

An injunction pending appeal will not injure other parties. Rather, the requested injunction would preserve the *status quo* in place since the Town agreed not to enforce the Ordinance during the pendency of the district court proceedings. That *status quo* will enable the Town and cruise lines to abide by the reduced daily passenger caps under the MOAs that the Town itself negotiated in 2022, which accommodate the Town's health and safety objectives. Exhibit J, Trial Transcript Excerpts, July 13, 2023. The *status quo* will not jeopardize municipal services and will enable the Town to manage any safety concerns as it has done effectively for many years.[19] Order at 13-14. (The proponents' "stated concern for generalized welfare and quality-of-life considerations" (*id.* at 16), which they attribute to cruise-related congestion, hardly rises to the level of a public health or safety crisis. *Cf. Bayley's Campground*, 985 F.3d 153.) When cruise visitation managed under the MOAs' passenger caps is considered against the irreparable injuries to Plaintiffs caused by Ordinance enforcement, the balance of equities favors Plaintiffs.

D. The Public Interest

The final factor also favors Plaintiffs. The Ordinance is unconstitutional because it is preempted by federal regulations governing shore access for seafarers, and there are serious

[19] This Court rejected the Town's and Sidman's broad claims that cruise passengers "jeopardized…the provision of public safety services (police, fire), emergency medical services (EMS), in-patient and out-patient services at local hospitals, pandemic control measures, and public sanitation." Order at 12-14. No data support the claim that alleged degradation in overall municipal public safety is attributable to passenger-related congestion. *Id.* Although the Court concluded that waterfront pedestrian congestion was sufficient to raise safety concerns, it noted the lack of evidence of any prior public service delivery failure occasioned by that congestion. *Id. Cf. Bayley's Campground*, 985 F.3d at 159-60 (collecting cases).

questions as to the Ordinance's constitutionality under the Commerce Clause. "Just as the government has no interest in enforcing an unconstitutional law, the public interest is harmed by the enforcement of laws repugnant to the constitution." *Siembra Finca Carmen, LLC v. Sec'y of Dep't of Ag, Puerto Rico*, 437 F. Supp. 3d 119, 137 (D.P.R. 2020). *Accord Maine Forest Prods. Council*, 586 F. Supp. 3d at 64 ("[I]t is hard to conceive of a situation in which the public interest would be served by enforcement of an unconstitutional law." (quoting *Condon v. Andino*, 961 F. Supp. 323, 331 (D. Me. 1997)); *Gordon*, 721 F.3d at 652-53 (enforcement of potentially unconstitutional law with severe economic effects is not in the public interest) (collecting cases). Enjoining Ordinance enforcement pending appeal would mean only that cruise visitation in Bar Harbor would remain at the reduced levels negotiated by the Town with cruise lines in the MOAs. Further, the Town's interest in less congested sidewalks and public spaces for public safety reasons would not be impaired by maintenance of the *status quo*, given that safety has been managed effectively and without incident for more than fifteen years. Order at 13-16. Under these circumstances, the public interest would be served by the issuance of the requested injunction.

III. SUMMARY

Plaintiffs respectfully submit that they have shown that they merit the issuance of injunctive relief from this Court pending their appeal.

Plaintiffs have shown a likelihood of success on their seafarer preemption claim inasmuch as this Court has found that the seafarer rule preempts the Ordinance as, by its plain terms, it applies to seafarers. Plaintiffs' flow of commerce claim under the dormant Commerce Clause presents a "serious legal question" on appeal. *Sierra Club v. U.S. Army Corp. of Eng.*, 2020 WL 768552 at *1-2. In addition, Plaintiffs' demonstration of irreparable injury as of the close of

evidence on July 13, 2023 has been augmented by the Town's aggressive enforcement of the Ordinance from March 6, 2024 forward, following the issuance of this Court's March 1, 2024 Amended Decision and Order and the recent cancellation of its 2024 and 2025 cruise season visits to Bar Harbor by Royal Caribbean Group. The balance of equities favors Plaintiffs in that they face real, serious imminent injuries from the decline and withdrawal of cruise ship visits whereas the Town would only be required to host cruise visits commensurate with the MOA limitations that the Town, itself, negotiated and concluded that it could accommodate. Finally, for the reasons set forth above, the public interest also supports Plaintiffs' motion for injunctive relief pending appeal.

WHEREFORE, Plaintiffs respectfully request that this Court issue an injunction pending appeal prohibiting the Town from: (1) implementing, applying, or enforcing the Ordinance, (2) relying on the Ordinance to reject, deny, or fail to act on vessel reservation requests, and (3) relying on the Ordinance (which, by its terms, does not restrict access to the anchorages) to deny vessels access to the federal anchorages in Frenchman Bay;[20] and provide for such other relief as is just and appropriate under the circumstances.

[20] A comprehensive injunction is consistent with *Ayotte*. There is no way to apply the Ordinance, as it stands today, in a narrower manner. *Ayotte*, 546 U.S. at 331 (narrow remedy must be "faithful to legislative intent"); *Pharm. Care Mgmt. Ass'n v. Maine Att'y Gen.*, 324 F. Supp. 2d 74, 80 (D. Me. 2004) (upholding comprehensive preliminary injunction where it was unlikely that legislature intended "serendipitous enforcement" and there was no certainty as to how enforcement would work, given preemption). *Ayotte*-type relief is not available.

Dated: May 30, 2024

/s/Timothy C. Woodcock
Timothy C. Woodcock
P. Andrew Hamilton
Patrick W. Lyons
EATON PEABODY
80 Exchange Street (04401)
Post Office Box 1210
Bangor, Maine 04402-1210
(207) 992-0111
twoodcock@eatonpeabody.com
ahamilton@eatonpeabody.com
plyons@eatonpeabody.com

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

/s/ Kathleen Kraft
C. Jonathan Benner (*pro hac vice*)
Kathleen E. Kraft (*pro hac vice*)
THOMPSON COBURN LLP
1909 K Street N.W., Suite 600
Washington, D.C. 20006
(202) 585-6900 (main)
(202) 585-6969 (fax)
kkraft@thompsoncoburn.com
jbenner@thompsoncoburn.com

John S. Kingston (*pro hac vice*)
THOMPSON COBURN LLP
One U.S. Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000 (main)
(314) 552-7000 (fax)
jkingston@thompsoncoburn.com

Twain Braden
ARCHIPELAGO
One Dana Street, 4th Floor
Portland, Maine 04101
(207) 558-0102 (main)
tbraden@archipelagona.com

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

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2024, I caused the foregoing document to be served upon all counsel of record via the Court's CM/ECF system.

/s/ Timothy C. Woodcock