UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ASSOCIATION TO PRESERVE AND PROTECT LOCAL LIVELIHOODS, *et al*.,	)	
Plaintiffs,	)	
v.	)	Case No.
TOWN OF BAR HARBOR, a municipal corporation of the State of Maine,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Association to Preserve and Protect Local Livelihoods ("APPLL"), BH Piers, L.L.C. ("BH Piers"), Golden Anchor, L.C., doing business as Harborside Hotel ("Harborside"), B.H.W.W., L.L.C. ("BHWW"), Delray Explorer Hull 495, L.L.C. ("495"), Delray Explorer Hull 493, L.L.C. ("493"), and Acadia Explorer 492, L.L.C. ("492" and together with APPLL, BH Piers, Harborside, BHWW, 495, and 493, "Plaintiffs"), through their attorneys, respectfully move this Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for an order preliminarily enjoining Defendant Town of Bar Harbor ("Defendant" or the "Town") from implementing or enforcing the Ordinance created, pursuant to the Charter of the Town of Bar Harbor, by the Citizens' Ballot Initiative Amending Bar Harbor Town Code, Chapter 125, Article VIII, § 125(H)(2), passed by the Bar Harbor Town Meeting on November 8, 2022.

Plaintiffs request that such an Order and Injunction be entered after full notice to Defendant and after a hearing before this Court. Plaintiffs further request that this Court set a hearing date on this motion as soon as possible and then, upon the evidence and legal arguments presented, issue the requested relief.

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

By their attorneys,

DATED: December 30, 2022

/s/_____
Timothy C. Woodcock, Bar #1663
P. Andrew Hamilton, Bar #2933
Patrick W. Lyons, Bar #5600
Counsel for Plaintiffs

EATON PEABODY
80 Exchange Street
Bangor, ME 04401
(207) 992-4318
twoodcock@eatonpeabody.com
ahamilton@eatonpeabody.com
plyons@eatonpeabody.com

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MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Association to Preserve and Protect Local Livelihoods ("APPLL"), BH Piers, L.L.C. ("BH Piers"), Golden Anchor, L.C., doing business as Harborside Hotel ("Harborside"), B.H.W.W., L.L.C. ("BHWW"), Delray Explorer Hull 495, L.L.C. ("495"), Delray Explorer Hull 493, L.L.C. ("493"), and Acadia Explorer 492, L.L.C. ("492" and together with APPLL, BH Piers, Harborside, BHWW, 495, and 493, "Plaintiffs"), through their attorneys and in support of their Motion, state as follows:

BACKGROUND

The Town of Bar Harbor (the "Town") is a popular seasonal tourist destination. Among other things, it serves as a popular access point for Acadia National Park, which experienced approximately four million visitors in 2021. Visitors come to Bar Harbor by land, air, and sea. Both overnight and daytime visitors are drawn to Bar Harbor because of its proximity to the Maine coast and Acadia National Park. First Affidavit of Eben Salvatore ("Salvatore Aff.") ¶¶ 4, 30, 32, and 35, including Attachments 1-3 (Study Reports of Dr. Todd Gabe, U Maine economist, as to cruise ship visitation effects on Bar Harbor tourism). In support of the tourism

industry, area businesses in the Town provide a broad array of hospitality services, including hotels, restaurants, tour-related businesses and retail shops. The Town and surrounding area also provide health and safety-related services for all persons who visit Bar Harbor.

Over the last twenty years, through deliberate and coordinated state, local, and industry efforts, Bar Harbor has become a marquee cruise destination and popular port-of-call on a wide variety of cruise ship itineraries, especially in the autumn months (September and October).[1] In 2006, the Maine Department of Transportation and the Town of Bar Harbor, in cooperation with the Maine Port Authority, issued a Request for Proposals for a Cruise Tourism Destination Management Plan for Bar Harbor ("RFP"), for the express purpose of "continu[ing] to develop [the Town's] cruise tourism business in a manner that maintains the character of the town, is sustainable for the cruise industry, takes into account the land based tourism operations, and provides consideration for the needs of local citizens, fishermen, and businesses." Salvatore Aff. ¶ 18. The work under the RFP culminated in a May 2007 report titled "Bar Harbor Cruise Tourism Destination Management Plan" (the "Cruise Tourism Plan"). The Cruise Tourism Plan thoroughly and comprehensively reviewed the capacity of Bar Harbor and Acadia National Park and any impact cruise ship visitation might have on the Town. The Town of Bar Harbor formed a Cruise Ship Task Force to further review the Cruise Tourism Plan. Salvatore Aff. ¶ 21.

In 2008, the Bar Harbor Town Council, at the request of the Cruise Ship Task Force, adopted several recommendations of the Plan, including establishing voluntary, daily passenger caps to manage cruise ship visitation in coordination with land-based visitation patterns (so as to manage overall tourism in the Town) and forming a permanent committee to review cruise ship activity, which would report annually to the Town Council. Salvatore Aff. ¶ 22. The Town

[1] In comparison, land-based transportation tourism is highest in July and August. Salvatore Aff. ¶34(c).

established voluntary and variable cruise ship "daily caps" as follows: 5,500 passengers per day for the months of May, June, September and October, and 3,500 passengers per day for the months of July and August. The lesser variable amount of 3,500 for July and August was based on the understanding that land-based visitation is the highest in Bar Harbor, and Acadia National Park, during these months, and it was important to minimize any impact that additional visitors might have on the area during periods of time that were already busy with land-based visitors. Salvatore Aff. ¶ 23. All of these limitations were cooperatively developed by the Town and the cruise ship industry for the purpose of ensuring a proper balance between cruise ship visitation and other forms of tourism commerce (including land-based visitors) into Bar Harbor. Neither the Town nor the industry was under any impression that the Town had the authority to regulate cruise ship passenger visitation through any ordinance, policy, law, or other unilateral means. Salvatore Aff. ¶ 24.

In 2010, the Town of Bar Harbor formed the Cruise Ship Committee. Salvatore Aff. ¶ 25. Among other things, the Cruise Ship Committee annually reviewed cruise ship operations and reconsidered the voluntary daily cruise ship passenger limitations. Salvatore Aff. ¶ 25. The Cruise Ship Committee met ninety-three (93) times between 2010 and 2021; all meetings were open to the public. Salvatore Aff. ¶ 27. The Cruise Ship Committee also submitted annual reports to the Town Council containing the Committee's review of the season and a recommendation on adjustments, if any, to the voluntary daily cruise ship passenger limitations. Salvatore Aff. ¶ 29. From 2016 to 2020, the Bar Harbor Town Council annually reviewed and endorsed maintaining the voluntary daily cruise ship passenger limitations at 5,500 passengers per day for the months of May, June, September, and October and 3,500 passengers per day for the months of July and August. Salvatore Aff. ¶ 29.

Development of Infrastructure and Businesses to Support the Cruise Industry

Significant infrastructure, services, businesses, and shoreside operations are necessary to support the cruise industry in Bar Harbor. Bar Harbor does not have berthing facilities for cruise ships. Instead, Bar Harbor is a tender port. Salvatore Aff. ¶ 56. Cruise ships anchor in federal-designated anchorages in Frenchman Bay, outside the Town's municipal jurisdiction. Passengers and crew are ferried to shore on tender boats to piers on property owned by Plaintiffs BH Piers and Golden Anchor.

In the early 2000s, BH Piers and Golden Anchor invested millions of dollars in the properties and operations that now facilitate the disembarkation of all cruise ship passengers that come to Bar Harbor. *See* First Affidavit of B.H. Piers, LLC ("BH Piers Aff."),¶¶ 6-11; First Affidavit of Golden Anchor, L.C. ("Golden Anchor Aff."), ¶¶ 6-11. In 2017-2019, this investment included the design, development, and construction of three custom-made tender boats specifically created to safely and comfortably tender persons between Bar Harbor and cruise ships anchored in Frenchman Bay. BH Piers Aff. ¶¶ 9-10; Golden Anchor Aff. ¶¶ 9-10. The tendering businesses have required substantial purchases and investments in training employees engaged in the tendering and marine side operations, acquisition of related properties, barges, tenders, ramps, docks and related equipment and facilities. BH Piers Aff. ¶ 11; Golden Anchor Aff. ¶ 11. Plaintiffs BH Piers and Golden Anchor (also doing business as Harborside) have filed requisite plans and secured necessary approvals, pursuant to 33 C.F.R. Part 105, from the U.S. Coast Guard to operate the disembarkation facilities in Bar Harbor. BH Piers Aff. ¶ 13; Golden Anchor Aff. ¶ 13. These facilities have enabled the port to operate as a Class A Port.

Notably, the more than $18 million in total private investments in pier facilities (including piers, ramps and dock improvements) by BH Piers and Golden Anchor/ Harborside,

as well as in the customized tender vessels owned by the Tender Owners[2] and custom barges owned by BHWW, have facilitated the establishment and growth of the tender port capacities of Bar Harbor and enabled cruise ships to anchor up to two miles away from Town at federal anchorages outside the harbor. *See* Affidavits of William Walsh for BH Piers, Golden Anchor, B.H.W.W., and the Tender Owners. Additionally, the restaurants and retail shops and tour-related businesses of APPLL members that have developed in immediate proximity to the cruise ship tender terminal facilities have supported the establishment and growth of business in Bar Harbor. *See* First Affidavit of Kevin DesVeaux ("DesVeaux Aff.") (West Street Café restaurant business) ¶¶ 4, 10; First Affidavit of Loren Hubbard ("Hubbard Aff.") (Little Village Gifts retail shops) ¶¶ 9, 11; and First Affidavit of Glenn Tucker ("Tucker Aff.") (New England Shore Excursions tour-related businesses) ¶¶ 9, 11.

Bar Harbor Benefits from the Cruise Industry

Cruise ship visitation has a positive, outsized economic impact in Bar Harbor. As of 2016, cruise ship passengers generated an estimated annual economic impact in Bar Harbor—including multiplier effects—of $20.2 million in local spending, 379 jobs (full-time, part-time, and seasonal) and $5.4 million in labor income. *See* Salvatore Aff. Attach. 1, *Economic Impact of Cruise Ship Passengers Visiting Bar Harbor (Maine) in 2016*.[3] Subsequent studies underscore the cruise industry's positive economic impact in the region. In 2019, for

[2] The "Tender Owners" own and operate cruise ship tender vessels that ferry cruise ship passengers to and from the BH Piers and Harborside for their disembarkation visits to the Town. *Complaint,* ¶¶11-15.

[3] Since 2016, Dr. Gabe has conducted subsequent studies on the effects of cruise ships in Bar Harbor and published two additional reports as to the impact of cruise ship visitation in Bar Harbor. *See* Salvatore Aff. Attach. 2, Impacts of COVID-19 on Tourism in Bar Harbor, Maine, *Maine Policy Review,* Volume 30, Issue 2 (2021); Salvatore Aff. Attach. 3, Measurement and Analysis of Neighborhood Congestion: Evidence from Sidewalk Pedestrian Traffic and Walking Speeds, *Growth and Change:* 2021; 52, pages 1633-1651.

example, the overall economic impact of cruise ship passengers, which includes spending at restaurants and other purchases, was estimated to range from $23,500,000.00 to $31,500,000.00. Salvatore Aff. ¶ 40.

This economic activity is essential to many businesses that have grown to support the cruise industry in Bar Harbor, including restaurants, retail, and tour-based businesses. When the COVID-19 pandemic forced the shutdown of cruise travel in 2020, and no cruise ships came to Bar Harbor, Bar Harbor businesses immediately felt the impact. Salvatore Aff. ¶ 42. For example, Bar Harbor restaurant sales in October 2020 decreased by 47 percent as compared to that same month in 2019. *Id*.

Dr. Gabe's studies also measured the impact of cruise ship passengers on sidewalk congestion in Bar Harbor.[4] Specifically, Dr. Gabe examined the effect of passengers getting off the *Anthem of the Seas* (a cruise ship with a capacity of 4,180 passengers) when a voluntary cap of 3,500 passengers per day agreed to by the cruise ship industry was lifted by the Town and the industry by mutual agreement on August 27, 2018. Salvatore Aff. ¶ 43. The increase of 680 cruise ship passengers presented a pedestrian traffic increase from 11.1 to 12.1 persons in the number of pedestrians walking the first 100 feet on the most proximate Bar Harbor street to the Harbor Place pier where cruise ship passengers disembarked. *Id*. Dr. Gabe's research also found that the increase of pedestrians fell to zero at a distance of approximately 2,000 feet from the Harbor Place pier. Salvatore Aff. ¶ 43.

[4] *See* Salvatore Aff., Attach. 3, Measurement and Analysis of Neighborhood Congestion: Evidence from Sidewalk Pedestrian Traffic and Walking Speeds, *Growth and Change:* 2021; 52, pages 1633-1651.

MOA and Scheduling of the Cruise Industry in Bar Harbor

As recently as February 2022, the Town Council formed another working group to negotiate with the cruise industry for a modified cruise schedule for 2023 and beyond. In August 2022, the Town adopted a cruise ship scheduling plan, which included a shortened cruise ship season and passenger caps that deals with disembarking at Bar Harbor. In furtherance of that plan, on September 28, 2022, the Town entered into a Memorandum of Agreement ("MOA") with various cruise lines, whereby the cruise lines agreed that, in the months of May, June, September, and October, they would limit aggregate daily passenger disembarkations to 3,800 passengers, and in the months of July and August would limit aggregate daily passenger disembarkations to 3,500 passengers. *See* Pl.'s Compl., Ex. B.

The Initiative

On March 16, 2022, a citizens' group submitted a citizens' initiative ballot petition to the Bar Harbor Town Council. The ballot petition proposed an amendment to the land use ordinance of the Town Code prohibiting the disembarkation of more than 1,000 passengers from cruise ships per day on, over, or across any property located within the Town of Bar Harbor. A copy of the March 16, 2022 ballot petition presented to the Town as the "Initiative" is attached hereto as Exhibit A. Ostensibly, the ballot petition proposed the cruise ship disembarkation limitations to alleviate any alleged burdens that cruise ship passengers, and cruise ship passengers alone, place on municipal services.

On August 2, 2022, the Bar Harbor Town Council voted to place the citizen's initiative on the warrant articles calling the November Town Meeting. The Council Order codified the language, with limited changes, as proposed by the ballot petition. On November 8, 2022, the Initiative was passed by the Bar Harbor Town Meeting and became an ordinance (the "Initiated

Ordinance") of the Town, pursuant to the Town Charter, effective as of December 8, 2022.[5] A copy of the Initiated Ordinance is attached hereto as Exhibit B.

The Initiated Ordinance mandates that "no more than 1,000 persons, in the aggregate, may disembark on a single calendar day from any cruise ship(s) and come to shore on, over, or across any property located within the Town of Bar Harbor." *Id.* at § 125-77(H)(2) (emphasis added). Its limitations exclusively apply to "cruise ships" as defined in the Town Code.[6] They do not apply to any other vessel of any type or size, or any other type or form of conveyance. The Initiated Ordinance charges the Town's Harbor Master with duties that include but are not limited to "determin[ing]" whether and when the 1,000-person limit has been met in each calendar day. *Id.* It also charges the Harbor Master with devising "a reservation system for cruise ships that transport persons by watercraft for disembarkation in the Town of Bar Harbor;" a "mechanism for counting and tracking the number of persons disembarking each day;" a "mandatory procedure for reporting violations to the Code Enforcement Officer." *Id.*

The Initiated Ordinance imposes a system under which private property owners that facilitate cruise ship disembarkations over their property must be issued a permit, comply with "rules and regulations promulgated by the Harbor Master," and be subject to the imposition of "fines, penalties, [and] actions[,]" including a $100 fine for each disembarking person in excess of the Initiated Ordinance's limits. *Id.* at § 125-77(H)(4). BH Piers and Golden Anchor are the

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[5] If a proposed initiative ordinance is approved, "it shall be considered adopted upon certification of the election results and shall be treated in all respects in the same manner as ordinances or resolutions of the same kind adopted by the Council." Bar Harbor, Me., Charter § C-49(A).

[6] Section 153-22(B) in the Town Code defines "cruise ship" as "a watercraft carrying passengers for hire which is capable of providing overnight accommodations for 49 or more passengers." The Town's definition of a cruise ship is markedly different from the federal definition. *Cf.* 1 U.S.C. § 3; 46 U.S.C. § 2101(22); 33 C.F.R. § 165.123 ("Cruise ship means a passenger vessel . . . that is authorized to carry more than 400 passengers and is 200 or more feet in length.").

only entities subject to penalties under the Initiated Ordinance, as well as any regulatory regime the Town may adopt to implement it.

By memorandum dated December 15, 2022, the Town's Harbormaster (and lieutenant in the Town's Police Department) Christopher Wharff, described steps that must be taken to implement the Initiated Ordinance. Salvatore Aff. ¶ 56 (including Attachment 5, the "Wharff Memorandum"). Discussing subsection 3 of the Initiated Ordinance, he noted that the Initiated Ordinance divided authority over cruise ships between the Harbormaster and the Code Enforcement Officer noting that, "the Harbormaster cannot make a reservation until a permit is obtained." *Id.* Only the CEO, however, has the authority to issue the required permits and, therefore, although "the Harbormaster could technically schedule a place for the ship to anchor [the Harbormaster] cannot give permission to come ashore unless a permit has been obtained from Code Enforcement." *Id.* His memorandum concluded that, "[w]e believe that this technically denies the Harbormaster's ability to make any booking confirmation as the sole confirmation for a booking must be tied to a valid permit, which must come from Code Enforcement." *Id.* As complicated and unwieldy as this staggered process is, it becomes seriously disruptive when it is applied, as the Initiated Ordinance requires, to booking confirmations dating back as far as March 17, 2022.

Finally, the Initiated Ordinance is expressly retroactive to March 17, 2022, but includes a proviso that it will not apply to "any cruise ship reservations that have been accepted by the Harbormaster prior to March 17, 2022" and provides further that "the Town will not take any enforcement action . . . with regard to any cruise ship visit occurring prior to the date of adoption at Town Meeting [that is, November 8, 2022]." *Id.* §§ 125-77(H)(1), (5). By its plain language,

this retroactivity element means that the Town must apply the terms of the Initiated Ordinance to all cruise ship bookings dating from March 17, 2022.

The Initiated Ordinance is directed at a particular category of persons—that is, those who come ashore from a cruise ship. Persons visiting Bar Harbor by any other means of conveyance are unaffected. The Initiated Ordinance itself contains no justification for such a targeted classification in either its text or its summary and explanation. *Initiated Ordinance*, § 125-77(H)(2).

The Initiated Ordinance's Impact on Bar Harbor

By the numbers alone, the Initiated Ordinance is estimated to cause a 95 percent reduction in cruise ship passengers visiting Bar Harbor. *See* Salvatore Aff., Attach. 4, *Cruise Ship Management Plan vs. Warrant Article #3*. Its actual impact, however, promises to be much greater.

Cruise lines call at the port of Bar Harbor because it has proved popular with cruise passengers. Cruise passengers want to get off the ship at Bar Harbor to visit the town and fit in a visit to Acadia National Park. Cruise lines only visit destination ports-of-call that allow all of their passengers the choice to disembark and visit that port. First Affidavit of Shawn Moody ("Moody Aff.") ¶ 12. Cruise lines do not schedule visits to destination ports-of-call that either cannot accommodate disembarkation of all of the passengers that their ships are designed to carry, or, whether by law or otherwise, prevent the disembarkation of all their passengers. Moody Aff. ¶ 13. By drastically limiting the number of persons that can disembark into Bar Harbor on a daily basis, the Initiated Ordinance renders the port of Bar Harbor unsuitable as a destination port-of-call on cruise itineraries. Cruise lines will not book itineraries that include calls at Bar Harbor and will send their ships to ports without such disembarkation ceilings. And

because cruise lines plan itineraries years in advance (most are planning 2025 cruise itineraries *now*), it is highly unlikely that there will be any room on cruise itineraries for a call at Bar Harbor when, at the conclusion of this litigation, the Initiative Ordinance is declared unconstitutional. *See* Moody Aff. ¶ 13; Salvatore Aff. ¶ 52. Therefore, the terms of the Initiated Ordinance effectively prevent cruise lines from planning and booking calls at the port of Bar Harbor. Moody Aff. ¶ 11.

STANDARD OF REVIEW

Injunctive relief is an equitable remedy intended to "preserve the status quo pending a final determination of the questions raised by the [complaint]." *Decker v. Independence Shares Corp*., 311 U.S. 282, 290 (1940); *see also Matos v. Clinton School Dist*., 367 F.3d 68, 72 (1st Cir. 2004) ("The aim of a preliminary injunction 'is to preserve the status quo, freezing the existing situation so as to permit the trial court, upon full adjudication of the case's merits, more effectively to remedy discerned wrongs.'" (citation omitted)). The "propriety of its issue is dependent on the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009).

Before a court may issue injunctive relief, it address four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure other parties interested the proceeding; and, (4) where the public interest lies." *Id.* at 434; *see also A.M. by & through Norris v. Cape Elizabeth Sch. Dist.*, 422 F. Supp. 3d 353, 358 (D. Me. 2019), *aff'd on other grounds sub nom. Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12 (1st Cir. 2020) (internal citations omitted); *see Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102

F.3d 12, 15 (1st Cir. 1996). "There is substantial overlap between these and the factors governing preliminary injunctions, [citing *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 24 (2008)], not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken,* 556 U.S. at 434.

Of the four factors, the first two—likelihood of success and irreparably injury "are the most critical." *Id.* "The sine qua non of this four part test is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *New Comm. Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002).

On the first factor, the court "is only required to make an estimation of the likelihood of success and 'need not predict the eventual outcome on the merits with absolute assurance.'" *Norris*, 422 F. Supp. 3d at 359, quoting in part, *Corps Techs, Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013).

On the second factor, an injury is "irreparable" if it "cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy." *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005). A plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction," not merely that it is a possibility. *Winter*, 555 U.S. 22, (emphasis in original); *see also Canadian Nat'l Ry. Co. v. Montreal, Me. & Atl. Ry., Inc.*, 786 F. Supp. 2d 398, 432 (D. Me. 2011) ("[P]roof of a mere possibility of injury is insufficient to justify an injunction"). Irreparable harm, however, does not require a showing that "the denial of injunctive relief will be fatal to [the plaintiff's] business." *Ross-Simons*, 102 F.3d 18.

The degree of irreparable harm necessary to support injunctive relief also depends, in part, on how likely it is that the plaintiff's claims will succeed. *Braintree Labs., Inc. v. Citigroup Glob. Markets Inc.*, 622 F.3d 36, 42-43 (1st Cir. 2010) (quoting *Vaqueria Tres Monjitas, Inc. v. Irizarry,* 587 F.3d 464, 485 (1st Cir. 2009)). Therefore, when "the likelihood of success on the merits is great, a movant can show somewhat less in the way of irreparable harm and still garner preliminary relief." *Irizarry*, 587 F.3d at 485, quoting, *EEOC v. Astra USA, Inc*., 94 f.3d 738, 743 (1st Cir. 1996); that is, a court may apply a "sliding scale" to the likelihood of success and irreparable harm factors. *Id.*

ARGUMENT

Plaintiffs challenge the Initiated Ordinance as unconstitutional in violation of the Supremacy and Commerce Clauses of the United States Constitution. Plaintiffs also challenge the Initiated Ordinance as unconstitutional in violation of the Due Process Clause of the United States Constitution. As explained below, Plaintiffs are likely to succeed on the merits of one or more of their claims. The Initiated Ordinance conflicts with numerous federal maritime laws in violation of the constitutional maxim that local laws must give way to federal law in areas of federal supremacy. Further, the Initiated Ordinance represents a clear local effort to interfere with interstate and foreign commerce—the governance of which is specifically designated to federal authorities by the Constitution.

Finally, the Initiated Ordinance violates the Due Process Clause because it is arbitrarily and unlawfully discriminatory and is disconnected from a legitimate legislative goal. Given the strength of Plaintiffs' claims, and the consequent likelihood of Plaintiffs' success, the "sliding scale" tips in Plaintiffs' favor and in favor of granting the requested injunction. *Braintree Labs*, 622 F.3d at 42-43.

I. Plaintiffs Are Likely to Succeed on the Merits of One or More of Their Claims.

A. Plaintiffs Are Likely to Succeed on the Merits of Their Claim That the Initiated Ordinance Violates the Supremacy Clause.

The Supremacy Clause of the Constitution states that the laws of the United States "shall be supreme Law of the Land." U.S. CONST., art. VI, cl. 2. Simply put, state or local laws that "interfere with, or are contrary to, federal laws" are invalid. *Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.,* 471 U.S. 707 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824)).

A state law gives way to federal law in three circumstances. First, Congress may expressly preempt state law when it "enact[s] a statute containing an express pre-emption provision." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (internal quotation marks omitted). Second, Congress may preempt state law by occupying the "field" in which the state seeks to act. *Id*. And third, state law is preempted when it conflicts with federal law such that "compliance with federal and state regulations is a physical impossibility" or where "the challenged state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Id*.

i. The Initiated Ordinance Is Preempted Because It Interferes with the Primacy of Federal Authority Over Admiralty and Maritime Law.

Since the earliest days of the republic, the Framers saw fit to assign responsibility for admiralty and maritime issues to federal authorities, ensuring that federal courts would resolve cases that might implicate the nation's foreign policy. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1666 (1833). The importance of *mare liberum* in relation to the Framers' understanding of foreign policy can hardly be overstated. HUGO GROTIUS, THE FREEDOM OF THE SEAS 7 (James Brown Scott ed., Oxford University Press 1916) (1608).

As a result, Article III, § 2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction;" and Article I, § 8, confers upon the Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." U.S. CONST. art. III, § 2, cl. 1; art. I, § 8. "And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917) (superseded by statute).

The overriding federal national interest in maritime commerce is fulfilled only when "all operators of vessels on navigable waters are subject to uniform rules of conduct." *Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 674-75 (1982). The necessity of uniformity of regulation and standards is obvious:

> The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the states might prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme.

State of Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).

ii. The Initiated Ordinance Is Preempted Because It Regulates the Same Activity as Federal Maritime Laws and Regulations Governing Maritime Vessel Operations.

A substantial body of federal law controls and regulates the operations of cruise vessels serving the interstate and maritime foreign commerce of the United States. These vessels are subject to federal inspection and supervision in a variety of areas, including construction standards, environmental protection requirements, operational and navigational procedures,

customs and immigration compliance, security measures, maritime navigation, and health and safety requirements. The federal government, through the United States Coast Guard[7] and other federal agencies, routinely prescribes practices, procedures, and standards for vessel operations. *See, e.g.*, 46 C.F.R. Subchapter H (containing requirements for inspection, certification, and operations). These Coast Guard regulations expressly have "the force of law" and "preempt[ ] … State or local regulations in the same field." 46 C.F.R. § 70.01-1. Further, in the interests of safety, environmental protection, and maritime and national security, Coast Guard regulations direct where vessels may (and may not) operate or anchor. *See* 33 C.F.R. Subchapter I.

The extensive, sophisticated federal regulatory regime is not limited to the Coast Guard. Other federal agencies, such as the Center for Disease Control and Prevention ("CDC"), Environmental Protection Agency ("EPA"), and Federal Maritime Commission ("FMC") all regulate aspects of the passenger cruise line industry. During the COVID-19 crisis, the CDC made clear that the federal government, not State or local governments, issues "controlled free pratique" in international, interstate, or intrastate waterways subject to the jurisdiction of the United States. CDC, *Second Modification and Extension of No Sail Order and Other Measures Related to Operations* (July 16, 2020);[8] *see also* 42 C.F.R. § 71.1(b) (defining "controlled free pratique" as "permission for a carrier to enter a U.S. port, disembark, and begin operation under certain stipulated conditions.").

Under this comprehensive federal statutory and regulatory regime, granting (or revoking) permission for a carrier to enter a U.S. port, disembark, and begin operation, lies solely with the

[7] "The Coast Guard shall . . . administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." 14 U.S.C. § 102 (2018).

[8] These orders were issued under authority of Sections 361 and 365 of the Public Health Service Act. *See* 42 U.S.C. §§ 264, 268; 42 C.F.R. §§ 70.2, 71.31(b), 71.32(b).

federal government, and state or local laws that ban federally-licensed vessels from calling at a port violate the Supremacy Clause. *See Young v. Coloma-Agaran*, 340 F.3d 1053, 1057 (9th Cir. 2003) (concluding that a state law precluding tour boat operators from operating their vessels in a particular bay in Hawaii was preempted because "the ban completely excludes the plaintiffs from conducting their federally licensed tour boat business in Hanalei Bay."); *see* U.S. CONST. art. III, § 2, cl. 1; art. I, § 8.

The Initiated Ordinance's daily 1,000-person cap (a limit that does not exist in other U.S. ports) operates as a design limitation on vessels that have been federally-certified to operate in maritime commerce. Vessels call at the port of Bar Harbor expressly for the purpose of disembarking passengers and crew. With the cap in place, vessels that can carry more than 1,000 persons (passengers and crew), and are federally-certified to do so, have little incentive to call at the port because, once they arrive, they cannot do the one thing they are there to do – disembark their potential full complement of passengers and any crew. Thus, the Initiative Ordinance excludes from the port the majority of cruise vessels currently operating in interstate and foreign commerce due to their design (1,000 or more lower berth capacity). *See* First Declaration of Chris Mastrippolito ("Mastrippolito Dec.") ¶¶ 10, 15-16. It excludes these vessels despite the fact that these vessels have operated safely in the local waters for roughly the past twenty years and meet all applicable federal (and international) standards.

The Initiated Ordinance's disembarkation limitation will severely inhibit and frustrate cruise ships from conducting their federally-licensed activities. *See Young*, 340 F.3d at 1057. If applied to Bar Harbor disembarkations from 2019, the limitation would have prevented approximately 95 percent of the cruise vessels ships that visited Bar Harbor from disembarking their passengers (and crew). Salvatore Aff. ¶¶ 50-51, Attach. 4, p. 2.

In effect, the Initiative Ordinance goes further. Cruise vessels simply do not call at destination ports where, by law or by the happenstance of timing, all passengers cannot choose to disembark and enjoy shoreside activities. *See* Moody Aff. ¶ 13; *see also Doe v. Celebrity Cruises, Inc*., 394 F.3d 891, 901 (11th Cir. 2004) (emphasis in original):

> Ports-of-call not only add to the enjoyment of a cruise but form an essential function of the cruise experience . . . [p]lainly, individuals choose cruise ship vacations because they want to visit unfamiliar places ashore. Cruises . . . offer fundamentally different experiences, not generally because of any material difference between ships, but often because of where the ships elect to *stop. See Isham v. Pacific Far East Line, Inc.,* 476 F.2d 835, 837 (9th Cir. 1973) ("Where a passenger or cruise vessel puts into numerous ports in the course of a cruise, these stopovers are the sine qua non of the cruise."). When a passenger selects a particular cruise, ports-of-call or stopovers provide those passengers with the "cruise experience" for which they are paying. Simply put, the destinations or ports-of-call are frequently the main attraction.

The Initiative Ordinance renders the port of Bar Harbor unsuitable as a destination port-of-call and therefore is functionally indistinguishable from a ban on entering the port.

iii. The Initiated Ordinance Is Preempted Because It Regulates the Same Activity (Seafarer Shore Access) as Federal Laws and Regulations Governing Maritime Facilities.

The federal government also regulates various aspects of port and maritime facility operations through, among other laws, the Federal Maritime Transportation Security Act of 2002, Pub. L. 107-295, codified at 46 U.S.C. 70101, *et seq*., and the Coast Guard Authorization Act of 2010, Pub. L. 111-281, 124 Stat. 2905 (2010). These federal laws and regulations apply to maritime facilities, like the ones operated by Plaintiffs BH Piers and Harborside, that receive vessels certified to carry more than 150 passengers. *See* 33 C.F.R. § 105.105(a)(2). These laws and regulations require, among other things, that the owner or operator of such a facility ensure shore access to individuals who work on the vessels ("seafarers") and those who provide services to seafarers. U.S. Dep't of Homeland Security, Coast Guard, *Final Rule: Seafarers' Access to Maritime Facilities*, 84 Fed. Reg. 12,102 (Apr. 1, 2019); 33 C.F.R. § 105.200(b)(9); 33 C.F.R. §

105.237. These regulations make clear that maritime terminal facilities must provide safe, timely, and uniform access for all seafarers seeking to disembark from cruise ships and all other vessels using such facilities. Like the federal regulations governing vessels, the regulations governing maritime facilities "have preemptive effect over State or local regulations insofar as a State or local law or regulation applicable to the facilities covered by part 105 would conflict with the regulations in part 105, either by actually conflicting or by frustrating an overriding Federal need for uniformity." 33 C.F.R. § 101.112(b).

The Initiated Ordinance's 1,000-person daily cap directly conflicts with, and is expressly preempted by, federal law and regulations requiring that maritime facilities, like those operated by Plaintiffs BH Piers and Golden Anchor/ Harborside, provide timely access to all seafarers (*i.e.*, crew) seeking to disembark at the facility.[9] The Initiated Ordinance applies, by virtue of its specific terms, to all "persons" (passengers, crew, and any others) seeking to disembark from cruise vessels and makes no allowance for the crew of ships anchoring off of Bar Harbor to come ashore unrestricted by local regulation. Under federal law, Plaintiffs BH Piers and Harborside cannot provide access to some seafarers and not others. Yet access for some, not all, seafarers is exactly the Initiated Ordinance's effect. Plaintiffs BH Piers and Harborside cannot comply with both federal law and the Initiated Ordinance.

iv. The Initiated Ordinance Is Preempted Because It Interferes and Conflicts with the United States' Obligations Under Treaties and International Agreements.

The cruise industry is inherently international, involving vessels registered in many nations trading in complex itineraries to all parts of the world. In addition to the U.S. federal

[9] "[W]hen Congress has unmistakably ordained that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." *Arcadian Health Plan, Inc. v. Korfman*, No. 1:10-CV-322-GZS, 2010 WL 5173624, at *4 (D. Me. Dec. 14, 2010), *aff'd*, No. CIV. 10-322-P-S, 2011 WL 22974 (D. Me. Jan. 4, 2011) (quoting *Jones v. Rath Packing Co.*, 430 U .S. 519, 525 (1977) (internal punctuation and citation omitted)).

statutory and regulatory requirements discussed above, the "scheme of regulation includes a significant and intricate complex of international treaties and maritime agreements bearing upon the licensing and operation of vessels." *United States v. Locke*, 529 U.S. 89, 102 (2000).

Among the treaties and conventions that govern cruise vessel operations to which the United States is a party are the *International Convention for the Safety of Life at Sea*, 1974, 32 U.S.T. 47, T.I.A.S, No. 9700, the *International Convention for Prevention of Pollution from Ships*, 1973, S. Exex. Doc. C, 93-1, 12 I.L.M. 1319, as amended by 1978 Protocol, S. Exec. Doc. C., 96-1, 17 I.L.M. 546, and the *International Convention of Standards of Training, Certification and Watchkeeping for Seafarers, With Annex*, 978 (STCW), S. Exex. Doc. EE-96-1, C.T.I.A. No. 7624. These conventions, established under the auspices of the International Maritime Organization (IMO) and, by extension, the United Nations, bind signatory nations to minimum standards for vessels flying their own flag, but also impose the sole enforceable standards that each party may impose on the vessels of other signatory nations' flags. A key structural component of this network of maritime treaties and conventions to which the United States is a party is the notion of reciprocity—signatory nations, including the United States, accept compliance by another nation as satisfying conditions for port entry.

Because the Constitution expressly delegates the power to make, and interfere with, treaties to federal authorities, *see* U.S. CONST. art. II, § 2, cl. 2. (the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties."), the Supremacy Clause dictates that a disparate state law "must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement[,]" *United States v. Pink*, 315 U.S. 203, 231 (1942); *see* U.S. CONST. art. II, § 2, cl. 2. When the federal government has exercised its indisputable foreign affairs powers to commit the nation to vessel standards agreed

to by various maritime countries, a municipality cannot seek to restrict the operation of a vessel that the federal government has pledged to accept in U.S. ports.

B. Plaintiffs Are Likely to Prevail on the Merits of Their Claim That the Initiated Ordinance Violates the Commerce Clause.

Article I, section 8 of the United States Constitution entrusts to Congress the authority to issue laws "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. VIII, § 8, cl. 3. The Commerce Clause's express grant of power carries with it "a further, negative command, known as the dormant Commerce Clause," *Okla. Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 179 (1995), which limits the power of local governments to enact laws affecting interstate commerce, *Hughes v. Oklahoma,* 441 U.S. 322, 326 (1979); *see South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984).[10] Even in the absence of congressional legislation, the Commerce Clause restricts "the powers of the States to interfere with or impose burdens on interstate commerce." *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375, 390 (1983). It "prevents the States from erecting barriers to the free flow of interstate commerce." *Raymond Transport, Inc. v. Rice*, 434 U.S. 429, 440 (1978). With regard to foreign commerce, the federal government's power is "exclusive and absolute[,]" *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904), and "may not be limited, qualified, or impeded to any extent by state action[,]" *Bd. of Trustees v. United States,* 289 U.S. 48, 56-57 (1933).

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[10] In explaining the need for and reach of the Commerce Clause, the Supreme Court has said: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig,* 294 U.S. 511, 523 (1935). Indeed, the "immediate reason for calling the Constitutional Convention [was the Framers'] conviction that the nation's success depended upon the avoidance of tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

A local law violates the Commerce Clause if it attempts to regulate beyond the boundaries of the enacting state; if it discriminates against interstate commerce on its face, in purpose, or in effect; if it is an excessive burden on interstate commerce in relation to the putative local benefits; or if it interferes with the federal government's ability to speak with one voice when regulating commerce with foreign nations. *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 269 (D. Me. 2018), amended, No. 2:15-CV-00054-JAW, 2018 WL 4901162 (D. Me. Oct. 9, 2018).[11]

i. The Initiated Ordinance Discriminates Against Interstate Commerce.

The Initiated Ordinance discriminates against interstate commerce on its face, in purpose, and in effect. The Initiated Ordinance severely restricts the transport of persons by water. The transport of persons by water is part of interstate and foreign commerce. *Chy Lung v. Freeman*, 92 U.S. 278 (1879)*; Gibbons v. Ogden*, 22 U.S. at 9.[12]

The transport of persons by water to Bar Harbor is an inherently "out-of-state" activity. Almost exclusively, cruise ships call at the port of Bar Harbor following one or more calls at

[11] The City of South Portland ordinance at issue in the *Portland Pipe Line* decision illustrates the circumstances in which a local ordinance may validly affect interstate and foreign commerce. The *Portland Pipe Line* Court found that the ordinance was well supported by evidence from experts supporting highly localized health and safety risks posed by the pipeline operations. 332 F.Supp.2d 311—313. Here, by contrast, as is discussed further below, the Initiated Ordinance lacks a rational connection to any valid legislative purpose. Moreover, it clearly restricts the movement of both persons and vessels in interstate and foreign commerce. *Portland Pipe Line* provides a stark demonstration of the very rationale that the Initiated Ordinance must have to survive this constitutional challenge but which it clearly lacks.

[12] Although Plaintiffs do not, themselves, plead the rights of the traveling public, it is evident that the Initiated Ordinance undercuts the right to travel. By its plain terms, it purports to dictate under what circumstances and by what means the public may travel to and from Bar Harbor. In doing so, it necessarily burdens the right to travel by directing the traveling public away from one means of conveyance—cruise ships—and directing them to other means of conveyance—foot, bicycle, motorized, vehicle, airplanes, and, even smaller vessels, or some combination thereof, none of which would trigger any limitation or enforcement action by the Town. Yet, the right to travel will not admit to such parochial restriction. "[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Bayley's Campground, Inc. v. Mills*, 463 F.Supp.3d 22, 33 (D. Me. 2020), quoting, *Dunn v. Blumstein*,, 405 U.S. 330, 338 (1972).

ports in other states and often ports in other countries (*i.e.*, Canada, Bermuda). Transport by water, however, is not the only (or even the primary) way that persons enter Bar Harbor. Less than 10 percent of visitors come to Bar Harbor by cruise ship. Salvatore Aff. ¶ 39. More than 90 percent of visitors reach Bar Harbor by land-based, regional transportation (automobile, bus, or bicycle). *Id*. The Initiative, however, seeks only to restrict the number of persons who enter Bar Harbor by cruise ship. Persons gaining access to Bar Harbor by any other means of conveyance are unaffected. Thus, the Initiated Ordinance expressly discriminates against the transport of persons by water, while favoring the transport of persons by land-based (inherently regional) means.

Because the Initiated Ordinance discriminates against interstate commerce, it is invalid unless the Town can show that the Initiated Ordinance has a non-protectionist purpose and employs the least discriminatory means for achieving that purpose.[13] Although the Initiated Ordinance lacks a stated rationale, the Initiative (on which the Initiated Ordinance is based) includes a "purpose" section which sets forth an explanation of sorts.

The purpose section of the Initiative purportedly aims to alleviate the burdens that cruise ship passengers impose on the Town's "ability to deliver municipal services to Town residents and visitors, including the provision of public safety services, emergency medical services, and in-patient and out-patient services at local hospitals." Exhibit A. It does not, however, demonstrate that the alleged impacts on the Town and its residents caused by persons coming via cruise ship, either individually or collectively, is any different from those impacts caused by persons arriving in Bar Harbor by other means of conveyance. Indeed, the Initiative does not

[13] "[T]he evils of protectionism can reside in legislative means as well as legislative ends." *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources,* 504 U.S. 353, 360 (1992). Thus, a legitimate state goal may not be "achieved by the illegitimate means of isolating the State from the national economy." *Id.*

even refer to the impact of non-cruise visitors in Bar Harbor. Given that less than 10 percent of the visitors to Bar Harbor each year come by cruise ship, it is hard to imagine how a disembarkation limit applicable to cruise ships only is not a protectionist act in violation of the Commerce Clause or the least discriminatory means of alleviating any purported burdens on municipal resources caused by visitors. The effect of the Initiated Ordinance will be to erect a wall around the port of Bar Harbor. This is exactly the kind of local obstruction of commerce that the Commerce Clause is designed to avoid. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984).

ii. The Initiated Ordinance Is an Excessive Burden on Interstate Commerce in Relation to the Putative Local Benefits.

A non-discriminatory local law violates the Commerce Clause if it burdens interstate commerce in a way that is clearly excessive in relation to the law's putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The Supreme Court has invalidated numerous state laws, purportedly enacted to promote public health or safety, which limited the size or regulated the features of vehicles operating in interstate commerce. In *S. Pac. Co. v. State of Ariz. ex rel. Sullivan,* the Supreme Court invalidated an Arizona law that prohibited trains containing more than seventy freight cars from crossing the state as a safety measure designed to minimize the risk of "slack action" accidents. 325 U.S. 761 (1945). The Supreme Court also struck down an Illinois law requiring trucks to have contoured rear fender mudguards rather than the straight mud guard flaps required by most other states. *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520 (1959). And in *Raymond Motor Transportation, Inc. v. Rice*, the Supreme Court invalidated a Wisconsin law that limited truck length to 55 feet at a time when most long-haul truck lines operated 65-foot trucks. 434 U.S. 429 (1978); *see Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662 (1981) (same). In

each of these cases, the Court found that the burden on interstate commerce was too great to justify the law's putative local public health and safety benefits. State laws that "further [a public health and safety] purpose so marginally, and interfere with commerce so substantially, [are] invalid under the Commerce Clause." *Kassel*, 450 U.S. at 670.

Here, the plain language of the Initiated Ordinance does not contain any indication of its purpose, safety or otherwise, or how the arbitrary and draconian daily disembarkation limits are intended to achieve any such purpose. The only rationale for the Initiated Ordinance comes from the purpose section of the Initiative, which was not included in the Initiated Ordinance. The Initiative claims, without support, that the disembarkation limit is necessary to "protect, preserve and promote the general health, safety, welfare and peace of the community." *Initiative*, § 125-77(H), Purpose ¶ 1. It asserts, though does not demonstrate, that the "large numbers" of persons coming to the Town via cruise ships jeopardize the Town's ability to deliver municipal services to Town residents and visitors (including those visitors that the Initiative seeks to exclude) and "diminish[es]" the "quality of life for Town residents." *Initiative,* § 125-77(H), *Purpose* ¶ 1. It fails to explain how cruise visitors alone (without help or assistance from the millions of visitors that come to Bar Harbor each year by non-cruise modes of transportation) impose this alleged burden. It also fails to provide any reasoning for its approach to fixing the asserted problem—namely, the cumulative limit of 1,000 cruise ship disembarkations in each 24-hour period. Lacking any justification, the 1,000-person daily cap is both discriminatory and arbitrary.[14]

[14] For example, in each twenty-four-hour period, this ceiling is absolute so that, if 1,000 persons disembarked, were counted, and one hour later, all 1,000 persons returned to the cruise ships, no more persons could come ashore that day. The Initiated Ordinance would force them all to wait for the start of the next twenty-four-hour period before they could disembark. This is both arbitrary and impractical, as no cruise ship could work with such a restriction—a restriction that is designed, not to regulate, but to outright ban, cruise ships from Bar Harbor. *See* Mastrippolito Dec. ¶ 15; Moody Aff. ¶¶ 11-13.

Interestingly, the Initiative's "cries of wolf" are not supported by the Town officials who should know whether the Town's municipal services are overburdened. Neither the Police Chief, the Fire Chief, the Public Works Director, nor the Town Manager have stated that cruise ship visitation jeopardizes the Town's ability to deliver municipal services. Salvatore Aff. ¶¶ 45-46. Nor has the CEO of Mount Desert Island Hospital ever stated to the Cruise Ship Committee that cruise ship visitation jeopardizes the hospital's ability to deliver the highest quality of care to its patients. Salvatore Aff. ¶ 47. Thus, any public health or safety purpose of the Initiated Ordinance is illusory at best.

Like in *Kassel*, where a truck length limit was found to be out of step with the laws of all other midwestern and western states and therefore a burden on interstate commerce, the Initiative Ordinance's 1,000-person daily disembarkation limit is out of step with the practices of other ports and works a significant burden on interstate commerce. First, Plaintiffs are aware of no other port that imposes such draconian and arbitrary limits on cruise disembarkations. Second, the limits make it exceedingly difficult for persons to visit Bar Harbor via a cruise ship. Cruise lines wishing to call at Bar Harbor will not be able to disembark their full complement of passengers (and any crew), if calling with a vessel designed to carry more than 1,000 passengers (based on lower berth capacity). Cruise lines wishing to call at Bar Harbor with a vessel designed to carry less than 1,000 passengers (based on lower berth capacity) also will not be able to disembark their full complement of passengers (and any crew) if the happenstance of timing places that vessel behind any other vessel(s) disembarking passengers (or crew) on the day of the call. Therefore, if a cruise line wants to include Bar Harbor on a cruise itinerary, it will have to "route around" the port of Bar Harbor (possibly by calling at another port and delivering passengers to Bar Harbor by land) or use a vessel so small as to be assured that its passengers

and crew will not be denied disembarkation. Each of these options engenders inefficiency and added expense, and in the case of a "route around," eliminates the very purpose of the Initiative (the reduction in cruise passenger traffic in the Town). For these reasons, the Initiated Ordinance violates the Commerce Clause.

If other ports were to imitate Bar Harbor and, each on its own, devise their own daily disembarkation limits, the cruise ship industry would become the very definition of "Balkanization" that the Framers of the Constitution strove to avoid. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).

iii. The Initiated Ordinance Unduly Restricts Foreign Commerce.

The federal government has "exclusive and absolute" authority in matters pertaining to foreign commerce. *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904). This federal supremacy, inherent in the Foreign Commerce Clause and the Foreign Affairs Power and essential in areas of maritime commerce (which is inherently international), leaves little room for state or local action. *See e.g.*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Locke*, 529 U.S. at 108 (recognizing a need for "uniformity of regulation for maritime commerce"); *Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue and Fin.*, 505 U.S. 71, 79 (1992) ("the Foreign Commerce Clause recognizes that discriminatory treatment of foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole.").

The Initiated Ordinance facially discriminates against foreign commerce. It imposes its arbitrary disembarkation limitation only on the transport of persons by cruise vessel. These cruise vessels operate in foreign commerce and facilitate the international transportation of passengers. Because of Bar Harbor's operational convenience as a Class A port, a majority of cruise vessels call at the port *after* calling at a foreign port (*i.e.*, in Canada or Bermuda).

The Initiated Ordinance prescribes arbitrary limitations on foreign commerce coming into Bar Harbor and essentially prohibits foreign travelers on international vessels from disembarking at Bar Harbor. The Initiated Ordinance essentially places Bar Harbor off-limits to cruise vessel calls and disrupts the flow of foreign commerce. *See* Moody Aff. ¶¶ 6-9, 11. The Town does not have any authority to make such sweeping changes to the free flow of foreign commerce.

Nor does the Town have the authority to impose its own rules upon the landing of passengers in the United States. *See Henderson v. Mayor of City of New York*, 92 U.S. 259, 273 (1875) ("The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco."). Many times, the Supreme Court has found that local laws frustrating the international transportation of passengers violate the foreign Commerce Clause. In *Henderson*, the Court struck down an attempt by New York to require a surety for passengers arriving in New York from foreign countries. 92 U.S. 259. Similarly, in *Chy Lung v. Freeman*, the Supreme Court struck down a California law requiring an examination of passengers arriving from foreign countries upon landing because Congress alone "has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations." 92 U.S. 275, 280 (1875).

In foreign commerce, it is critical that the federal government "speak with one voice." *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979). The Initiated Ordinance creates different rules for disembarkations of passengers and ships' crews traveling in foreign commerce in Bar Harbor than those in other ports in the United States. The Initiated Ordinance threatens to transform the federal government's "one voice" into a discordant cacophony of

passenger limits lacking the slightest semblance of coherence. Such an outcome is not permitted under the Constitution, which specifically assigns control of foreign commerce to federal authorities—not to individual ports.

C. Plaintiffs are Likely to Succeed on the Merits of Their Claim that the Initiated Ordinance Violates the Due Process Clause of the Fourteenth Amendment.

Due process "demands … that [a] law shall not be unreasonable arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 510-11 (1934). A party challenging a law on due process grounds must show that the law is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt …." *Teneco Oil Co., Inc. v. Dep't of Consumer Affairs*, 876 F.2d 1013 1021 (1st Cir. 1989) (quoting, *Pennell v. City of San Jose*, 390 U.S. 485 U.S. 1, 11 (1988)). While the bar that the Due Process Clause sets for legislation is admittedly low, it is nonetheless a bar – and one that the Initiated Ordinance fails to reach.

As has been discussed above, the Initiated Ordinance seeks to limit—effectively ban—cruise ships from calling at the Town's port but does so through transparent indirection. Rather than simply banning cruise ships—an approach that would be manifestly beyond the Town's powers—the Initiated Ordinance takes refuge in masquerading as a "land use" ordinance purporting to limit access not to cruise ships themselves, but to "persons" disembarking from those cruise ships and entering the Town's limits. Thus, it is evident that the Initiated Ordinance's most direct object is "persons"—but not all persons; rather, only those persons who choose to visit the Town by cruise ship.[15]

[15] *See*, supra n. 14.

The Initiated Ordinance, itself, does not reveal the rationale for singling out for special restrictions persons disembarking from cruise ships and differentiating from all other persons who visit the Town by all other means of conveyance. For that, one must turn to the purpose section of the Initiative.

The Initiative's purpose section asserts that cruise ship passengers have caused overcrowding in parks and other public spaces; have inundated local amenities and attractions; have jeopardized the Town's ability to deliver municipal services to Town residents and visitors; have jeopardized the Town's ability to deliver public safety services, including police, fire, and EMS services; and have jeopardized the provision of healthcare services. In addition, the purpose section asserts that cruise ship passengers have "impacted" local shops, restaurants, and other businesses."[16] Exhibit A.

Yet, nowhere does the purpose section explain how persons arriving by cruise ship cause (or create the risk of causing) any of the health and safety concerns listed, but persons entering the Town by all other means do not. Given the centrality of the purpose's "justification," it is evident that this is no mere oversight. The purpose section does not explain this distinction because it cannot. There is no rational basis for distinguishing the effects of persons arriving in the Town by cruise ship from those arriving by all other means.

Though, as noted, the due process bar is low, legislation may nonetheless fail to meet it. See *Irizarry,* 587 F.3d 483-484. (invalidating law regulating milk production and sale). Here, the Initiative as proposed does no more than recite police power formulas as the equivalent of formulaic incantations with no real attempt to relate those claims to the presence of cruise passengers (and now crews) on the Town. The Initiated Ordinance procedures are "inadequate"

[16] As has been discussed above, the Initiated Ordinance broadened the daily cruise ship cap from "passengers" to all "persons" including the ships' crews. The rationale set forth in the purpose section of the Initiative, therefore, must be extended to those persons as well.

and, overall, the limitations are "arbitrary, discriminatory, [and] irrelevant to [any] legitimate legislative goal." *Id.* at 483.

The Initiated Ordinance is both unreasonable and lacks a substantial relationship to its purpose. Plaintiffs are, therefore, likely to succeed on their merits of their claim that the Initiative violates the Due Process Clause.

II. Plaintiffs Will Suffer Irreparable Harm in the Absence of Preliminary Relief.

Irreparable injury requires "a colorable threat of immediate injury and the absence of any adequate remedy at law for such injury." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 70 (D. Me. 1993) (citing *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency,* 649 F.2d 71, 74 (1st Cir. 1981)). A party is "irreparably injured in the face of the threatened enforcement of a preempted law." *Arcadian Health Plan, Inc. v. Korfman*, No. 1:10-CV-322-GZS, 2010 WL 5173624, at *8 (D. Me. Dec. 14, 2010), *aff'd*, No. CIV. 10-322-P-S, 2011 WL 22974 (D. Me. Jan. 4, 2011) (quoting *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 878 (N.D. Tex. 2008) (in turn, citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)); *see also Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). Plaintiffs assert that the Initiated Ordinance is preempted by the Supremacy Clause. Enforcement of the Initiative Ordinance, therefore, will irreparably harm Plaintiffs.

Further, a party is injured if its economic injury lacks an adequate remedy at law, such as where a plaintiff will suffer loss of "incalculable revenues" and "harm to [ ] goodwill." *Id*. at 71; *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009) (citing *Ross–Simons of Warwick, Inc. v. Baccarat, Inc.,* 102 F.3d 12, 19 (1st Cir. 1996)). As long as assumptions supporting loss of business and damage to reputation are "reasonable and consistent with

available evidence", a finding of irreparable injury will be sustained even if "the adverse impact on sales nor the concomitant insult to goodwill can be measured accurately." *Ross-Simons*, 102 F.2d at 20; 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 2948.1 (1995). This follows because, "[b]y its very nature injury to goodwill and reputation is not easily measured or fully compensable in damages." *Ross-Simons*, 102 F.3d 20.

"[T]raditional economic damages" are not appropriate for injunctive relief because they can be remedied by "compensatory awards." *Irizarry,* 587 F. 3d at 485. However, "it has also been recognized that some economic losses can be deemed irreparable. For instance, 'an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business.'" *Irizarry, Id*., quoting, *Performance Unlimited, Inc. v. Questar Publishers*, *Inc*. 52 F.3d 1373, 182 (6th Cir. 1995) (citing *Doran v. Salem Inn, Inc*., 422 U.S. 922, 932 (1975)). It is very difficult to "calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come." *Ticor Title Ins. Co. v. Cohen,* 173 F.3d 63, 69 (2d Cir. 1999); *Ferrero v. Associated Materials Inc.,* 923 F.2d 1441, 1449 (11th Cir. 1991); *Medtronic, Inc. v. Gibbons,* 684 F.2d 565, 569 (8th Cir. 1982); *Spiegel v. City of Houston,* 636 F.2d 997, 1001–02 (5th Cir. 1981) (loss of customers and goodwill gives rise to an irreparable injury). For the reasons set forth below, the Initiated Ordinance would inflict injuries on each of the Plaintiffs which, absent injunctive relief, would be substantial and could not be remedied at law.

Injury to APPL Members: APPLL's members rely on the tourism industry generally, and cruise ship passengers, specifically, for the survival of their businesses. *See* DesVeaux Aff. (West Street Café restaurant business), ¶¶ 6-7; Hubbard Aff. (Little Village Gifts retail shops), ¶¶ 7-10; Tucker Aff. (New England Shore Excursions tour-related businesses), ¶¶ 6-7. APPLL's

members have invested significant resources, both pecuniary and otherwise, in building their businesses to serve the cruise ship passenger industry specifically. *See* DesVeaux Aff. ¶ 8; Hubbard Aff. ¶ 11; Tucker Aff. ¶¶ 9-11. As a result of these investments, APPLL's members have built immeasurable goodwill among their customers, as well as customer contacts and referral sources with the cruise lines. *See* DesVeaux Aff. ¶ 18; Hubbard Aff. ¶ 10; Tucker Aff. ¶ 12. The Initiated Ordinance destroys the goodwill, referral sources, and customer contacts that APPLL members have spent decades working to create. *See* DesVeaux Aff. ¶ 18; Hubbard Aff. ¶¶ 3, 5-6, 16; Tucker Aff. ¶¶ 3, 18. Once the Initiated Ordinance erases these business assets – assets that APPLL's members have spent years, if not decades, developing – APPLL members will not be able to recover them. *See* DesVeaux Aff. ¶ 16. The Initiated Ordinance's elimination of cruise traffic in Bar Harbor will result in many of APPLL's members being forced to close their doors or restructure their businesses entirely in the near term. *See* DesVeaux Aff. ¶ 16; Hubbard Aff. ¶¶ 17, 19; Tucker Aff. ¶¶ 15, 17. Once done, the effects cannot be undone nor can they be compensated by any remedy at law.

Absent a preliminary injunction, APPLL members will suffer harms that "cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy." *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005).

The irreparable injury faced by APPLL's member is likely, indeed, *very likely* to occur in the absence of the requested injunction. *See Winter*, 555 U.S. at 22 (irreparable injury must be likely, not just possible). Without the 2023 cruise ship season, consonant with its predecessor seasons, Little Village Gifts will be forced to lay off employees, lose its $1.5 million investment in its Main Street location, and lose the goodwill, customer contacts, and referral sources that it

has spent decades developing. *See* Hubbard Aff. ¶¶ 11, 16, 17, 19. West Street Café will likewise lose employees and may be forced to close. *See* DesVeaux Aff. ¶¶ 11, 12 16-18. New England Shore Excursions will lose its investment in vehicles and equipment, which it made specifically to service the cruise ship industry and its passengers. *See* Tucker Aff. ¶¶ 9-11.

Injury to BH Piers, Harborside, and Tender Operators: The entire tendering business of Plaintiffs BH Piers, Harborside, and the Tender Operators is sustained by the cruise ships that call at the port of Bar Harbor. *See* BH Piers Aff. ¶¶ 24-27;Golden Anchor Aff. ¶ 21-26. In the early 2000s, BH Piers and Harborside invested millions of dollars in the properties now used to disembark cruise ship passengers. *See* BH Piers Aff. ¶¶ 6-11; Golden Anchor Aff. ¶¶ 6-11. This investment included the design, development, and construction of a fleet of tender boats specifically created to safely and comfortably tender persons between Bar Harbor and cruise ships anchored in Frenchman Bay. BH Piers Aff. ¶¶ 9-10; Golden Anchor Aff. ¶¶ 9-10. In order to operate these tendering businesses, Plaintiffs BH Piers and Golden Anchor have made substantial purchases and investments in training employees engaged in tendering and marine side operations, acquisition of related properties, barges, tenders, ramps, docks and related equipment and facilities in reliance on the Town of Bar Harbor's and the State of Maine's continuing commitment over many decades to promote and grow cruise ship tourism. BH Piers Aff. ¶ 11; Golden Anchor Aff. ¶ 11. As part of these investments, Plaintiffs BH Piers and Golden Anchor have filed requisite plans and secured necessary approvals, pursuant to 33 C.F.R. part 105, from the U. S. Coast Guard to operate the disembarkation facilities in Bar Harbor. BH Piers Aff. ¶ 13; Golden Anchor Aff. ¶ 13.

The Initiated Ordinance will cause cruise ship lines to eliminate Bar Harbor as a port of call. Moody Aff. ¶¶ 11-13. In so doing, they will necessarily terminate their relationship with

BH Piers, Harborside, and the Tender Operators who depend entirely on the cruise ships to conduct their highly-specialized, single-purpose business. In the absence of injunctive relief staying the implementation and enforcement of the Initiated Ordinance, these Plaintiffs suffer the loss of "an indeterminate amount of business" and associated goodwill which, but for the Initiated Ordinance, they would realize into the indefinite future through hundreds of cruise ship visits and tens of thousands of passenger and crew disembarkations. Moody Aff. ¶ 13. With the Initiated Ordinance in effect, retroactive to March 17, 2022, 40 cruise ship that already have Town-confirmed reservations are at risk; indeed, the whole 2023 cruise ship season is at risk. Salvatore Aff. ¶ 57. It is apparent that no remedy at law could make these plaintiffs whole, even in part, for losses of this magnitude and immediacy. Plaintiffs, therefore, ask this Court to issue injunctive relief enjoining the implementation and enforcement of the Initiated Ordinance and, thereby, preserving the *status quo* until the Court can fully consider and finally adjudicate this case on the merits.

As to the harm to the Plaintiffs specifically, the Initiated Ordinance will immediately make these Plaintiffs' tendering businesses obsolete. *See* BH Piers Aff. ¶¶ 24-27; Golden Anchor Aff. ¶¶ 24-26; *Ticor*, 173 F.3d at 69; *see also* Moody Aff. ¶¶ 11-13. It also prohibits a particular category of customer (cruise ship passengers and crew) from frequenting Plaintiffs' businesses and so will erase the goodwill that Plaintiffs have worked diligently to establish with those customers. *See* BH Piers Aff. ¶ 18; Golden Anchor Aff. ¶ 18. "It will be very difficult, if not impossible, for the Court to determine how and if that [goodwill]" would have translated into increased sales for Plaintiffs. *Waldron v. George Weston Bakeries, Inc.*, 575 F. Supp. 2d 271, 278 (D. Me. 2008), *aff'd*, 570 F.3d 5 (1st Cir. 2009); *see, e.g.*, *Dominion Video Satellite, Inc. v. EchoStar Satellite,* 269 F.3d 1149, 1156–57 (10th Cir. 2001); *Ross–Simons,* 102 F.3d at 18–

19; *SMC Corp., Ltd. v. Lockjaw, LLC,* 481 F. Supp. 2d 918, 928 (N.D. Ill. 2007). Finally, the Initiated Ordinance will render obsolete the Coast Guard approvals held by Plaintiffs BH Piers and Harborside, which permit them to operate their maritime facilities, as well as define the economic utility of those facilities.

It bears emphasis that the Initiated Ordinance identifies only two property owners—BH Piers and Harborside—as being subject to penalty for a violation of its terms. § 127(H)(4). This also means that only BH Piers and Harborside (as the Wharff Memorandum tacitly notes) are subject to investigations that would involve entry onto the property, possible search warrants, documentation of possible violations, and, prosecution. Salvatore Aff. ¶ 56 (including Attachment 5).

Similar to the APPLL members discussed above, Plaintiffs BH Piers and Harborside are *very likely* to experience these injuries in the absence of the requested injunction. *See Winter*, 555 U.S. at 22 (irreparable injury must be likely, not just possible). Plaintiffs BH Piers and Harborside will be forced to lay off employees, lose their investment in the piers and tender boat fleet, and lose the good will, customer contacts, and referral sources that they have spent decades developing. *See* BH Piers Aff. ¶¶ 6-11, 24-27; Golden Anchor Aff. ¶¶ 3-10, 16-18, 21-26. These economic harms "threaten the existence of the [BH Piers' and Harborside's] business." *Irizarry*, 587 F.3d at 485. Indeed, these Plaintiffs face damages that "cannot be measured in numerical or monetary terms, and neither can the damages to these interests that [Plaintiffs] will suffer without injunctive relief." *Sizewise Rentals, Inc. v. Mediq/PRN Life Support Servs.,* 87 F. Supp. 2d 1194, 1200 (D. Kan. 2000), *aff'd,* 216 F.3d 1088, 2000 WL 797338 (10th Cir. 2000); *see Basicomputer Corp. v. Scott,* 973 F.2d 507, 512 (6th Cir. 1992); *Curtis 1000, Inc. v.*

Youngblade, 878 F.Supp. 1224, 1273 (D. Iowa 1995); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 2948.1 (1995).

III. The Balance of Equities (Hardships) Weighs in Favor of Preliminary Relief.

The moving party must show that, "the balance of equities tips in his favor." *Voice of the Arab World, Inc. v. MDTC Medical News Now, Inc.*, 645 F.3d 26, 32 (1st Cir. 2011). On this factor, the balance of relative hardships—also weighs in favor of the requested relief.

The harm to Plaintiffs is great. Absent injunctive relief, Plaintiffs are threatened with enforcement of an unconstitutional law and will suffer economic harms to their businesses that cannot be remedied by an injunction or money damages at the conclusion of this case. On the other hand, any hardship to the Town is minimal at best. The Town has been developing, growing, and enhancing its investment in the cruise ship tourism industry for nearly twenty years. Salvatore Aff. ¶¶ 14-27.

Moreover, the Initiated Ordinance lacks any reasonable connection between its objective—effectively eliminating cruise ships visits to Bar Harbor—and its own stated rationale purporting to explain the need for this measure. Lacking such a tie, it is difficult if not impossible to identify a valid public purpose that the Initiated Ordinance would actually serve. Under these circumstances, the balance of harms clearly favors Plaintiffs.

Finally, preliminarily enjoining enforcement of the Initiated Ordinance will maintain the *status quo* while the merits of Plaintiffs claims are determined, while ensuring that Plaintiffs will not be irreparably harmed in the interim. *Decker v. Independence Shares Corp*., 311 U.S. at 290; *Matos v. Clinton School Dist*., 367 F.3d 72.

IV. The Public Interest Weighs in Favor of the Requested Relief.

As established above, Plaintiffs are likely to succeed on the merits of their constitutional challenge to the Initiated Ordinance. The Initiated Ordinance conflicts with federal law and otherwise attempts to regulate activities that fall squarely within arenas long-committed to federal control. As this very Court has held, "[i]t is hard to conceive of a situation where the public interest would be served by enforcement of an unconstitutional law or regulation." *Condon v. Andino, Inc.*, 961 F. Supp. 323, 331 (D. Me. 1997), *aff'd as modified by Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 192 (1st Cir. 1999).

The Initiated Ordinance is a misguided attempt by a number of activist citizens to "fix" perceived problems by strangling the cruise line industry in Bar Harbor. It stands in stark contrast to the last sixteen years of the Town's management of the cruise industry in Bar Harbor in coordination with the State of Maine and the cruise line industry, through which the Town has established, encouraged, and promoted Bar Harbor as an open and welcoming destination port-of-call. *See* Moody Aff. ¶ 8; Salvatore Aff. ¶ 14. The public interest is best served by preserving the shoreside operations and businesses that support the cruise industry and the confidence of the cruise industry in the availability of Bar Harbor as a marketable destination port-of-call, and not by testing the Initiated Ordinance's questionable "solutions" to vague and unsubstantiated "burdens" allegedly imposed by cruise passenger disembarkations at Bar Harbor, during the pendency of this lawsuit.

Here, again, in addition to the foregoing, the Initiated Ordinance's own elusive justification for its enactment is decisive. Neither by Initiated Ordinance's plain terms nor by the Purpose, as set forth in the Initiative, states as public interest rationally connected to the means that the Initiated Ordinance employs. In a contest between protecting persons and entities

whose investments and even livelihoods have been placed at risk from the effects of an unconstitutional law and the law itself, which fails to even coherently express a public interest, the public interest weighs in favor of granting Plaintiffs' requested relief.

V. No Bond Is Necessary.

The Court has discretion regarding whether to order Plaintiffs to post a bond as security and over the amount of any bond. *See* Fed. R. Civ. P. 65(c) (providing courts may issue preliminary injunctions only if the movant gives security in the amount the court deems "proper"). In the First Circuit, in non-commercial cases, courts consider two factors: (1) "the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant"; and (2) "in order not to restrict a federal right unduly, the impact that a bond requirement would have on enforcement of the right." *Crowley v. Local No. 82*, 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984).

Plaintiffs are a non-profit organization and business owners seeking to protect their livelihoods, rights, and the public interest by exercising their rights to sue the Town for violating their constitutional rights and threatening their way of life. An order requiring more than a nominal bond would impose a significant hardship on Plaintiffs and effectively preclude their ability to enforce said rights. Such an order would be contrary to the public interest and congressional intent in providing for such security.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant their Motion for a preliminary injunction, enter an order preliminarily enjoining implementation and enforcement of the Initiated Ordinance, provide for the protection of vessel bookings in the port of Bar Harbor made or confirmed during the pendency of the lawsuit, prohibit the Town from declining or refusing to allow for the scheduling of vessel calls at the port of Bar Harbor during the pendency of the lawsuit, and provide Plaintiffs such other and further relief as is just and appropriate under the circumstances.

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

By their attorneys,

DATED: December 30, 2022

/s/ *Timothy C. Woodcock*
Timothy C. Woodcock, Bar #1663
P. Andrew Hamilton, Bar #2933
Patrick W. Lyons, Bar #5600
Counsel for Plaintiffs

EATON PEABODY
80 Exchange Street
Bangor, ME 04401
(207) 992-4318
twoodcock@eatonpeabody.com
ahamilton@eatonpeabody.com
plyons@eatonpeabody.com

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ASSOCIATION TO PRESERVE AND PROTECT LOCAL LIVELIHOODS, B.H. PIERS, LLC, GOLDEN ANCHOR, L.C., B.H.W.W., L.L.C., DELRAY EXPLORER HULL 495, LLC, DELRAY EXPLORER HULL 493, LLC, and ACADIA EXPLORER 492, LLC, *Plaintiffs*, v. TOWN OF BAR HARBOR, a municipal corporation of the State of Maine, *Defendant*.	)	Case No.

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

On consideration of Plaintiffs' Motion for Preliminary Injunction, Plaintiffs' Motion is GRANTED, as set forth below:

Likelihood of Success on the Merits. The Court finds that Plaintiffs have established a likelihood of success on the merits of their claims that the Initiated Ordinance, which places a per diem ceiling of 1,000 persons (which includes passengers, crew, and all other persons) on disembarkations from cruise ships, violates the Commerce Clause, Article I, Section 8 of the United States Constitution, is preempted by federal law pursuant to the Supremacy Clause, Article IV of the United States Constitution, and otherwise impermissibly conflicts with the primacy of federal authority in the areas of maritime, interstate, and foreign commerce, and violates the Due Process Clause of the Fourteenth Amendment.

The Court finds further that Plaintiffs are likely to succeed on the merits on their claims that the unilateral system and arbitrary limits imposed by the Initiated Ordinance (a)

unconstitutionally discriminate against the transport of persons by water in in interstate and foreign commerce in violation of the Commerce Clause, (b) impose a burden on commerce that is excessive in relation to any putative local benefits in violation of the Commerce Clause, (c) conflict with, and thus are preempted by, federal laws and U.S. Coast Guard regulations that manage the efficient and safe movement of crew and passengers from cruise ships to disembarkation on land, pursuant to the Supremacy Clause, and (d) violates the Due Process Clause of the Fourteenth Amendment.

Irreparable Injury. The Court finds further that Plaintiffs have shown that they will suffer irreparable injury in the absence of injunctive relief. In particular, Plaintiffs have shown that if the 1,000 person daily aggregate limit is implemented and enforced cruise ships will eliminate Bar Harbor as a port of call, and (a) cruise traffic into the port of Bar Harbor will drop by approximately 95 percent; (b) the reduction in cruise traffic will be immediate, because the Initiative Ordinance, by items terms, applies the limitations retroactively to any cruise reservation booked on or after March 17, 2022; and (c) enforcement of the limitations will impact *at least* the next three cruise seasons, if not beyond, because the cruise lines develop cruise itineraries years in advance and, once having removed Bar Harbor as a port of call, will be unlikely to restore it until the legal impediments to visiting Bar Harbor have been removed.

Further, Plaintiffs have demonstrated that the effect of the Initiated Ordinance cause a cessation of cruise ship visits similar in scale to the impact experienced as a result of cruise ship cancellations during the COVID-19 pandemic shutdown of the cruise industry. Specifically, Plaintiffs BH Piers, LLC, B.H.W.W., Golden Anchor LC and the private Tender Owners have shown that in the absence of injunctive relief they will suffer economic damages for which there is no adequate remedy at law and would otherwise suffer irreparable harm.

Plaintiffs BH Piers, LLC, B.H.W.W., and Golden Anchor, LC and the private Tender Owners have shown that, in the absence of injunctive relief, they will suffer the loss of affiliated tendering business and investment in properties, facilities, ships and barges, as well as loss of a substantial number of jobs for which loss there no adequate remedy at law.

Plaintiffs BH Piers, LLC, B.H.W.W., and Golden Anchor, LC and the private Tender Owners have shown that, in the absence of injunctive relief, they will suffer the loss of good will, customers and referrals associated with visits by cruise ship passengers to the facilities of Golden Anchor and BH Piers to an extent that there will be no adequate remedy at law.

Plaintiff APPLL has shown that in the absence of injunctive relief its members will suffer substantial economic damages of a nature and to a degree that they lack an adequate remedy at law to redress those damages.

Public Interest. The Court finds that, because Plaintiffs have shown that they are likely to succeed on the merits of their claims that the Initiated Ordinance is unconstitutional, enforcement of the Initiated Ordinance during the pendency of this case would not serve the public interest. *See Condon v. Andino*, 961 F.Supp. 323, 331 (D. Me. 1997). Further, the Court finds that the public interest is best served by preserving the *status quo* through an injunction. The Town of Bar Harbor and State of Maine have invested, facilitated and promoted the growth of cruise ship visits to the port of Bar Harbor over the last two decades. Implementation of the Initiative Ordinance during the pendency of this case would unnecessarily threaten decades of investment in promoting sustainable growth of the cruise industry in Bar Harbor by the Town, the State of Maine, and the many businesses and services that support the cruise industry.

Balance of Harms. The Court finds that the balance of harms weighs in favor of an injunction. Plaintiffs have shown that, if they are denied injunctive relief, they are likely to

sustain significant damages and losses for which there will be no adequate remedy at law. In contrast, any harm to the Town caused by delay in the implementation and enforcement of the Initiated Ordinance is minimal at best. Before the enactment of the Initiated Ordinance, the Town negotiated voluntary Memoranda of Agreement with various cruise lines regarding daily passenger disembarkations. For purposes of this Order, Court finds that the disembarkation limits imposed by the voluntary Memoranda of Agreement represent the Town's judgment that disembarkations at the agreement levels did not damage the Town. Therefore, continuation of the limits during the period in which this Order remains in effect will not harm the Town.

WHEREFORE, IT IS HEREBY ORDERED THAT Defendant Town of Bar Harbor its agents are hereby enjoined from implementing and/or enforcing the Initiated Ordinance, and are hereby further directed to accept, enter, take, and honor cruise ship reservations for calls at the port of Bar Harbor for the upcoming 2023, 2024, and 2025 cruise seasons.

DATED: January __, 2023
Bangor, Maine

_____
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2022, 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 as follows: