Nos. 24-1317, 24-1318, 24-1385

In the United States Court of Appeals
for the First Circuit

ASSOCIATION TO PRESERVE AND PROTECT LOCAL LIVELIHOODS; B.H. PIERS, L.L.C.; GOLDEN ANCHOR, L.C., d/b/a Harborside Hotel; B.H.W.W., L.L.C.; DELRAY EXPLORER HULL 495 LLC; DELRAY EXPLORER HULL 493 LLC; ACADIA EXPLORER 492, LLC; PENOBSCOT BAY AND RIVER PILOTS ASSOCIATION,

Plaintiffs - Appellants/Cross-Appellees,

v.

CHARLES SIDMAN,

Defendant - Appellee/Cross-Appellant,

TOWN OF BAR HARBOR, a Municipal Corporation of the State of Maine,

Defendant - Appellee.

On Appeal from the United States District Court
for the District of Maine, No. 1:22-CV-00416-LEW
Hon. Judge Lance E. Walker

RESPONSE AND REPLY BRIEF OF PLAINTIFF - APPELLANT/CROSS-APPELLEE PENOBSCOT BAY AND RIVER PILOTS ASSOCIATION

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SUMMARY OF ARGUMENT

The district court largely rejected the Pilots' and Plaintiffs' claims that a citizen's initiative passed by Bar Harbor voters (the "Ordinance") violates the Commerce and Supremacy Clauses by restricting disembarkations from cruise ships into Bar Harbor to no more than 1,000 people per day. In so doing, the district court erred as a matter of law and of fact.

The Town of Bar Harbor ("Town") and Charles Sidman ("Sidman") invoke, defensively, the "convenient apologetics of the police power." *Morgan v. Com. of Va.,* 328 U.S. 373, 380 (1946) (quoting *Kansas City S. Ry. Co. v. Kaw Valley Drainage Dist.,* 233 U.S. 75, 79 (1914)). Their arguments cannot disguise or salvage the record-supported reality that the Ordinance is a direct, aggressive local obstruction of interstate and foreign maritime commerce of the United States.

The Town and Sidman contend that the Ordinance is a land use measure that does not operate on maritime commerce. But the Ordinance's constitutional affront derives not from its label but from its effects—severely restricting disembarkation operations of vessels lying

in Town-adjacent federal anchorages by prohibiting passengers' entry into Bar Harbor.

The Ordinance advances a citizen-activist's "expressed preference for smaller cruise ships because the passengers on smaller cruise ships tend to be more well-to-do" and a concomitant "dislike" of larger vessels. (Pilots-Add. 13.) The vessels subject to this local aversion operate within a complex structure of federal and international certifications and permissions based on international undertakings and authorizations. A locality's annoyances, or the preferences of its more vocal residents, do not entitle it to opt out of carefully constructed federal mechanisms of safety, security, efficiency, and free interstate and international movement of goods and people.

As a measure supposedly devised to reduce downtown pedestrian congestion, the Ordinance fails miserably. The Town itself states that it has no means or intention of trying to stop people from entering Bar Harbor. (Town-Br. at 19 n.3; *see* Tr. 13-Jul. at 22:9-18; PX 197 at 24.) But the complained-of restrictive effects of the Ordinance on cruise operations are not in doubt. The Ordinance's design correctly projects that cruise ships will not call at ports if they cannot disembark their

entire complement of passengers. (Pilots-Add. 16-17.) The district court accepted that the Ordinance has this restrictive impact. (Pilots-Add. 16-17, 56.) The Ordinance is perfectly constructed to "get rid of the biggies" (App. 261), yet the near-elimination of cruise passengers will do little to lessen congestion in areas where, and at the times when, congestion is at its highest.

The Ordinance is unique in the United States.[1] Its impacts may encourage and cause, through spread by imitation to other port localities, precisely the crippling distortion and suppression of the flow of interstate and foreign maritime commerce that the Framers intended the Constitution to prevent. See *Wabash, St. L. & P. Ry. Co. v. State of Illinois*, 118 U.S. 557, 577 (1886). The district court's decision admits of no limiting principle. Under its rationale, any seaside town that engages in maritime commerce can severely restrict, or even abolish, the operations of particular vessel types or landings of cargoes or

[1] Sidman attempts to minimize the significance and unique severity of this case by implying that Bar Harbor is just one of many locations in the United States that has imposed disembarkation limitations on cruise operations. (Sidman-Br. at 43-44 n.7; *see id.* at 8.) Absolutely nothing in the record supports his claim.

passengers in response to perceived inconveniences or annoyances that inevitably attend the conduct of commercial transport, regardless of conveyance.

The Ordinance is not a measure prohibiting in-state sales of agricultural products raised in inhumane conditions. *Cf. Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023).[2] Ships are not pigs. They and the maritime pilots who guide them are instrumentalities of commerce. Thus, this case compels the Court to "face a law that impedes the flow of commerce" and to determine its constitutionality. *Id*. Long-standing case law renders that determination a foregone conclusion. The Ordinance is incompatible with the Commerce Clause's protection of the flow of commerce within a national market and the commercial vitality of the Nation's maritime commerce. It is unconstitutional.

[2] The plurality opinion acknowledged that "[n]othing like" a regulation of "instrumentalities of interstate transportation – trucks, trains, and the like" existed in *National Pork*, and that it did "not face a law that impedes the flow of commerce" because "[p]igs are not trucks or trains." *Nat'l Pork*, 598 U.S. at 379 n.2.

ARGUMENT

I. The Ordinance's Practical Effects Form the Correct Analytical Framework for Judicial Review

It is a perennial characteristic of unsuccessful defenses of local measures for advocates, knowing they are treading on parlous terrain, to engineer ingenious constructions that can be labeled as entirely local measures. That ingenuity is present here. The Town contends that the Ordinance has no constitutionally-cognizable impact on vessels and interstate maritime activities because it does not "dictate how cruise ships are to be constructed, equipped, or operated" or "compel them to change their configuration or reduce the number of passengers they are carrying."[3] (Town-Br. at 51-52). Sidman posits that the Ordinance merely regulates how landowners can use their land to receive disembarking cruise ship passengers.[4] (Sidman-Br. at 27.)

To base constitutional review of a local measure on structure and taxonomy elevates form over substance and incentivizes ingenuity as a

[3] The Town's efforts to minimize the Ordinance's impact on cruise ships starkly conflict with the record. The Ordinance dictates how cruise ships must be operated in order to visit Bar Harbor. They cannot have a design capacity of more than 1,000 persons (passengers and crew), or, if they do and carry more than 1,000 persons, they will not be permitted

to disembark persons onboard who would cause more than 1,000 persons to touch the shore (based on the aggregate of all ship disembarkations on a given day). (*See* PX 191 at 7-9, 12; PX 192 at 13-14; PX 193 at 4.) This reality will compel them to change their operations, change their configurations, or reduce the number of persons they carry, if they call at Bar Harbor at all.

[4] Sidman argues that the Ordinance is no different from the local laws at issue in *New Hampshire Motor Transportation Association v. Town of Plaistow*, 67 F.3d 326 (1st Cir. 1995), and *Town of Southold v. Town of East Hampton*, 477 F.3d 38 (2d Cir. 2007). (Sidman-Br. at 27 n.5.) These cases could not be more different. In *New Hampshire Motor*, the local curfew at issue prohibited arrivals and departures at one terminal in the state during six late-night hours, imposed lesser restrictions for three hours, and imposed no limitations for the remaining 15 hours of the day. 67 F.3d at 333. The court concluded that the curfew sometimes limited the ability of the terminal to make early morning deliveries but there was "no indication that customers [could not] be served from other terminals or that the flow of commerce into and out of New Hampshire [was] seriously affected." *Id*. Nor did the curfew involve a "state wide restriction" or constrict a "major artery of commerce." *Id*. In contrast, the Ordinance severely restricts the ability of vessels to engage in their primary conduct (passenger disembarkations) in Bar Harbor at any time of day or year. It purposefully constricts the flow of cruise tourism into Bar Harbor. Its restrictions become the lowest common denominator for disembarkations at every port of call on any itinerary that includes Bar Harbor. It renders federal anchorages and the port of Bar Harbor (both arteries of commerce) unsuitable for the primary form of maritime commerce that has traveled through Bar Harbor for decades. *Southold* is similarly inapposite. The law at issue in *Southold* did not, as Sidman claims, "prohibit[ ] ferry operators from landing within the town." (Sidman-Br. at 27 n.5.) Rather, it placed limits on the new operation or expansion of ferry service. *Town of Southold*, 477 F.3d at 44-45. Like this case, however, there was evidence that the law "did not actually produce any of its intended benefits so as to justify the potential burden on interstate commerce." *Id*. at 52.

way to evade the Constitution. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 575 (1997) (state cannot "avoid the strictures of the dormant Commerce Clause by the simple device of labeling its discriminatory tax a levy on real estate"). The Court must look behind the Ordinance's text and characterization and "determine for itself the practical impact of the law." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) ("The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects."); *Colon Health Centers of Am., LLC v. Hazel*, 813 F.3d 145, 152 (4th Cir. 2016); *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 20 (1st Cir. 2014) ("The court must engage with the real and logical effects of the state statute, rather than simply assigning it a label.").

Here, the Ordinance's drafters selected an indirect but wholly effective means of ensuring that vessels over 1,000 lower berth capacity do not call at Bar Harbor. As enacted, the Ordinance compels private pier owners to block disembarkation of more than 1,000 persons per day in the aggregate. The Town cannot escape constitutional scrutiny by

denominating the Ordinance a "land use" ordinance and assessing fines against pier owners whose operations are essential to facilitate completion of the vessels' disembarkation operations. *Am. Trucking Associations, Inc. v. City of Los Angeles, Cal.*, 569 U.S. 641, 652 (2013) (finding preemption although criminal sanctions fell on terminal operators, not trucking companies); *Rowe v. New Hampshire Motor Transp. Assn.*, 552 U.S. 364, 371-73 (2008) (finding preemption although State's requirements directly targeted retailers rather than motor carriers); *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 255 (2004) (finding preemption under Clean Air Act although the requirements directly targeted car buyers rather than sellers); *see Smith v. Turner*, 48 U.S. 283, 458 (1849) ("It is a just and well-settled doctrine … that a State cannot do that indirectly which she is forbidden by the Constitution to do directly.").

The Ordinance's practical effect is to impose operational limits so restrictive on interstate cruise transportation into Bar Harbor that they are tantamount to a ban. No cruise line will call at a port under the

conditions created by the Ordinance.[5] (Tr. 12-Jul. at 181:23-182:21.) The Town and the district court acknowledged that the Ordinance renders Bar Harbor inaccessible to all vessels with lower berth capacities over 1,000 as a practical matter. The Town advised voters that the Ordinance would reduce cruise vessel disembarkations by 95 percent. (PX 37.) The district court found that the Ordinance would reduce passenger visitation volume by a significant percentage, "likely north of 80 and possibly as high as 90 percent." (Pilots-Add. 17.) The Ordinance's impacts on interstate commerce are neither trivial nor incidental.[6] That the Ordinance has, by design, been parked in the land

[5] Sidman argues that cruise line policies regarding calls at ports with disembarkation limitations are "malleable in the face of local regulation." (Sidman-Br. at 19.) In support, he claims that Holland America still visits Bergen, Norway, which since June 2022 has had an 8,000 passenger daily disembarkation limit. Sidman does not contend that Bergen, Norway is restricted in its decisions about permissible maritime operations by the U.S. Constitution. Sovereign niceties aside, and on a more practical level, a limit of 8,000 passengers per day accommodates vessels of far greater capacity than any calling at Bar Harbor. Cruise lines call at Bergen without concern of being barred from disembarking all their passengers.

[6] Given the Ordinance's substantial impact on cruise-based commerce, the Town's suggestion that the Court need not engage in a weighting exercise (Town-Br. at 41) is misplaced.

use section of the Town's municipal code does not render its effects any less relevant.

II. The Ordinance Cannot Be Reconciled With Limits on Local Authority Imposed by the Commerce Clause

Two primary principles guide judicial identification of local offenses to the Commerce Clause—"First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *S. Dakota v. Wayfair*, 585 U.S. 162, 173 (2018). Discriminatory state laws are "virtually *per se*" invalid, *id.* at 173. (quoting *Granholm v. Heald*, 544 U.S. 460, 476 (2005)), because the in-state benefits almost never outweigh the harm imposed on interstate markets.[7] When blatant economic protectionism is absent—because, for instance, the law "regulates even-handedly"—the Commerce Clause requires inquiry into whether the law advances a legitimate local interest and, if so, whether it burdens commerce more than it benefits the regulating jurisdiction. *Pike v. Bruce Church, Inc.*,

[7] A discriminatory law survives "only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality of Ore.*, 511 U.S. 93, 101 (1994)).

397 U.S. 137, 142 (1970). The degree of burden necessary to tip the scale in any specific case "will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.* Under both constructs, the analysis is a matter of degree.

"[C]ertain types of impacts on interstate commerce are of special importance in the balance with the state's putative interest," including the "disruption of travel and shipping."[8] *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994) (citing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-27 (1959)). By the late 19th century,

[8] The Town and Sidman claim that the Pilots and Plaintiffs have waived a right to travel argument. (Town-Br. at 54-55; Sidman-Br. at 29-31.) That is not the case. The constitutional right to travel—regarded as a "virtually universal right," *Saenz v. Roe*, 526 U.S. 489, 498 (1999), "so elementary" that it is a "necessary concomitant" to the nation-building elements of the Constitution, *United States v. Guest,* 383 U.S. 745, 758 (1966)—is unquestionably implicated by restrictions on passenger-bearing instrumentalities of commerce. Right to travel issues are subsumed in the Pilots' and Plaintiffs' Commerce Clause arguments, which they sufficiently preserved in their complaints, motion practice, and pleadings before the district court. (CLIA-Br. at 6 n.6.)

Supreme Court jurisprudence had firmly established the Commerce Clause's prohibition against "state interference with the *transit* of articles of commerce." Dan T. Coenen, *State User Fees and the Dormant Commerce Clause*, 50 Vand. L. Rev. 795, 823 (1997); *see In re State Freight Tax*, 82 U.S. 232, 275 (1872) ("[P]robably the *transportation* of articles of trade from one State to another was the *prominent idea* in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States."), *abrogation on other grounds recognized in Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). "[W]hatever may be the nature and reach of the police power," it "may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection." *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 471-72 (1877).

Not all local regulation of transportation offends the Commerce Clause. Absent action by Congress, states can regulate pilotage,[9]

[9] State pilotage is an integral component of the federally-administered system of maritime commerce and cannot operate effectively if subject to restrictive, commerce-burdening local impositions on maritime traffic. *See* Argument § IV, *infra*. Concurrent jurisdiction over pilotage

"quarantine and inspection" and the "policing of harbors," the "improvement of navigable channels," the "regulation of wharves, piers, and docks," the "construction of dams and bridges across the navigable waters of a state," and the "establishment of ferries."[10] *Covington & C. Bridge Co. v. Commonwealth of Kentucky*, 154 U.S. 204, 211 (1894) (internal citations omitted). Properly-structured local regulation in these areas facilitates, rather than impedes, interstate commerce.

However, even in the absence of affirmative federal action, states are without right to impede the interstate transit of goods and people in commerce. *Wabash, St. L. & P. Ry. Co.*, 118 U.S. at 571 (local legislation

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results from an express provision in legislation in which the first Congress forbore from asserting jurisdiction over existing pilotage arrangements that pre-dated the Constitution. Paul G. Kirchner & Clayton L. Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulation in the United States*, 23 U.S.F. Maritime L.J. 168, 171-76 (2010). Each system is designed to meet the particular circumstances of the state's waters, not the "blow with the wind" wishes of port communities.

[10] Sidman places great weight on the cases indicating state power to regulate wharves, piers, docks, and ferries. Local administration of traditional police power concerns are uncontroversial when applied to wharves and piers in such areas as fire codes, health measures during epidemics, and restrictions on smoking or alcohol consumption. But these applications cannot be facades for erecting barriers to the movement of maritime commerce and cannot be deployed as barriers to exclude commerce.

that "seeks to … interfere directly" with the "freedom" of interstate commerce encroaches upon "the exclusive power of [C]ongress"); *Gloucester Ferry Co. v. Com. of Pennsylvania*, 114 U.S. 196, 217 (1885) (Commerce Clause protects against local interference with "freedom of transportation between the States"); *Sherlock v. Alling*, 93 U.S. 99, 102 (1876) (states cannot prescribe the "conditions in accordance with which commerce … between particular places [is] to be conducted"). Thus, a state cannot deprive trains and ships of infrastructure or facilities necessary for interstate movement, *Kansas City S. Ry. Co.*, 233 U.S. 75 (1914); *Pittston Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653 (W.D.N.Y. 1981); or limit the number of passengers carried in interstate streetcars, *S. Covington & C. St. R. Co. v. City of Covington*, 235 U.S. 537, 546-47 (1915); or tax sleeping cars at a level so high as to "practically stop" the transportation of passengers "altogether," *Pickard v. Pullman S. Car Co.*, 117 U.S. 34, 44 (1886).

The Ordinance cannot be passed off as a solely local health, safety, or land use measure.[11] It is poorly designed to further the Town's

[11] This case does not present the types of health and safety concerns present in *Maine v. Taylor*, 477 U.S. 131 (1986), and *Tart v.*

putative interest in reducing downtown pedestrian congestion or make any difference in the complained-of overcrowding of parks and public spaces or the asserted "inundation" of local amenities and attractions. It deprives cruise vessels of landing facilities in operationally feasible proximity to Bar Harbor and Acadia National Park, thereby granting, even if not by conscious or primary design, local hoteliers a distinct competitive advantage in the pursuit of discretionary leisure spending in the Bar Harbor/New England vacation market.

A. The Ordinance Substantially Burdens Interstate Commerce

1. The Ordinance Obstructs Interstate Transportation

The Ordinance's obstructive design was well-established at trial. As a result of the Ordinance, cruise lines "will, necessarily, adjust their itineraries and re-route high-berth ships to other ports,"[12] and this "likely avoidance of the large vessels will reduce passenger visitation

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Commonwealth of Massachusetts, 949 F.2d 490 (1st Cir. 1991). (*Cf.* Sidman-Br. at 22-23; Town-Br. at 27.)

[12] The district court's use of terms like "high-berth" and "oversized" (Pilots-Add. 16, 17, 28 n.18) in reference to cruise vessels reflects the district court's subjective viewpoint. The terms are not based on any industry standards or empirical guidelines that establish such categories.

volume by a significant percentage, likely north of 80 and possibly as high as 90 percent."[13] (Pilots-Add. 17.) The Town's voter education pamphlet projected that the Ordinance would "eliminate 95 [percent] of current passenger counts." (PX 37.) The Ordinance impedes interstate travel by cruise vessel to Bar Harbor.[14] *See Pickard*, 117 U.S. at 44.

The Town nevertheless asserts that the Ordinance does not regulate or obstruct interstate transportation. (Town-Br. at 15.) In the Town's view, the Ordinance leaves cruise lines "free to continue to operate as they so choose." (*Id*. at 51-52.) Vessels can call at Bar Harbor so long as they do not, in the aggregate with other vessels, disembark

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[13] The district court's qualification of this finding as temporal only is inconsistent with its findings that there is no evidence to suggest that cruise lines will "adjust practices to maximize utilization" of the Ordinance's 1,000 person limit, that "any cruise lines with smaller ships have either a sufficient number of ships or that their cruises are in sufficient demand to approach" the 1,000 person limit "on a regular daily basis," and that even maximum visitation under the Ordinance still will result in a "significant" decrease in the "overall number of cruise ship passenger visits." (Pilots-Add. 17-18.)

[14] The Ordinance also will deprive tourists of the ability to enjoy Bar Harbor and Acadia National Park as part of cruise voyage up (or down) the New England coast. *Young v. Coloma-Agaran*, No. CIV.00-00774HG-BMK, 2001 WL 1677259, at *11 (D. Haw. Dec. 27, 2001) (ban on tour boat operations in Hanalei Bay had substantial effect on interstate commerce because it deprived tourists of the ability to experience Hanalei Bay by boat), *aff'd*, 340 F.3d 1053 (9th Cir. 2003).

more than 1,000 persons in a day, or they can call elsewhere. (*Id.*) The Town contends that this feature of the Ordinance distinguishes the Ordinance from the laws at issue in *Bibb* and *Southern Pacific*, where, the Town asserts, operators had no choice but to comply with the local law. (*Id.* at 52.)

Operators always have a choice. In *Bibb* and *Southern Pacific*, as well as in *Raymond Motor* and *Kassel*, the operators could have chosen to comply with the state law restrictions or simply "go elsewhere" by routing around the regulating state. *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 763 (1945) (where state law prohibited trains with "more than fourteen passenger or seventy freight cars"); *Bibb*, 359 U.S. at 527 (mudgards had to be interchanged to operate in Illinois and Arkansas, or carrier could not operate in one state or the other); *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 667 (1981) (where state law prohibited use of 65-foot doubles, common carrier has to use 55-foot singles or 60-foot doubles, detach trailers of 65-foot doubles and move them separately through the state, or divert 65-foot doubles around the state); *Raymond Motor*, 434 U.S. at 445-46 (same). If such an argument removed a state law's unlawful burden on

interstate commerce, it would save from invalidation the majority of state laws that seek to eliminate out-of-state commerce providers. That out-of-state entities can just "stop doing business" in a particular locality is not a defense to an asserted Commerce Clause violation—it is proof of it. *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 442 (6th Cir. 2000).

Unlike situations presented by proscribed state regulations affecting trucks and trains, the Ordinance as applied to vessels works even greater damage to federal interests in maritime commerce. Cruise vessels call at multiple ports in different localities around the United States. Vessels cannot adjust capacity between ports by adding or detaching trailers and rail cars as they move between localities and states. A vessel's size and capacity are fixed at birth and follow it to the scrapyard.

2. The Free Flow of Commerce Requires National Uniformity in Port Access

Sidman claims national uniformity is not required to regulate a "local municipality's appetite for cruise tourism" and that it would be "impracticable and functionally impossible" for Congress to "identically regulate" the volume of cruise visitation welcomed (or tolerated) by a

tourist town. (Sidman-Br. at 28 (internal quotations omitted).) Sidman's observation, while obvious, is irrelevant. The Commerce Clause invalidates local laws on uniformity grounds where the regulated *activity*, *not* the locality's *reason* for the regulation, is best dealt with on a national level.[15] *See S. Pac. Co.*, 325 U.S. at 781-84 (national uniformity in train length, not in the state's notion of what constituted rail safety); *Bibb*, 359 U.S. at 529 ("regulation of mudguards is not one of those matters 'admitting of diversity of treatment, according to the special requirements of local conditions'") (internal citation omitted); *Raymond Motor*, 434 U.S. at 443-46 (national uniformity in truck length and configuration, not safety); *Kassel*, 450 U.S. at 671-72 (national uniformity in truck length, not safety); *Morgan*, 328 U.S. at 385-86 (national uniformity in regulations for interstate travel, not promotion of amicable relations between the races). The Ordinance offends the Commerce Clause because it effectively closes, by local command without consultation or approval by the federal government, the port of Bar Harbor to virtually the entirety of the global cruise

[15] The decision below suffers this same defect. (Pilots-Add. 44-45.)

vessel fleet, thereby interfering with the need for uniform unimpeded movement between and access to the Nation's ports—a need that is evident in the Constitution itself. *See*, *e.g.*, U.S. Const. art. I, § 10.

This, of course, does not mean that the nation's ports must accept whatever level of maritime traffic shows up at the waterfront (contrary to the district court's misimpression and the polemical exaggerations of the Town and Sidman in defense of the decision below).[16] Port facilities

[16] The district court viewed the constitutional controversy as necessarily resolving one of two ways: either a "municipality with privately owned port facilities can restrain interstate cruise ship commerce for local welfare ends" or it "must make way and permit whatever level of commerce the local market can support." (Pilots-Add. 1-2.) The district court describes the Pilots as having advocated "maximal municipal participation in cruise tourism," and measures such as Bar Harbor's as potentially attractive to other ports hoping not to be "compelled to accommodate whatever level of traffic cruise lines and their local partners wish to impose." (Pilots-Add. 20, 44.) The district court also perceived the Pilots' and Plaintiffs' arguments as asserting a "constitutional right to maximize the burden that their commerce imposes on the commons." (Pilots-Add. 39.) The district court expressed this perception early in the case. (ECF No. 63, Order on Mtn. Intervene at 2-4.) It held to that view through final judgment, despite the fact that neither the Pilots nor Plaintiffs made such claims. The instant controversy arises from *this* Ordinance, its restrictive impact on commerce, and its conflict with federal authorities. The Pilots have repeatedly distanced themselves from the rhetorical implication that opposition to *this* Ordinance dictates that no measures can be lawfully taken to ameliorate local aggravations caused by tourism.

vary widely in terms of size, physical location and restrictions, and customers. Seaside municipalities may regulate maritime traffic in light of these considerations so long as they "do not impede the free flow of commerce." *Clyde Mallory Lines v. State of Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 267 (1935) (so long as state regulations of harbor traffic "do not impede the free flow of commerce and are not made the subject of regulation by Congress, they are not forbidden").

National uniformity can exist in the *absence* of affirmative regulation or imposition of a one-size-fits-all standard. (Pilots-Br. at 20.) *See Covington & C. Bridge Co.*, 154 U.S. at 212 (subjects requiring national uniformity are within exclusive powers of Congress, and Congress's nonaction "indicates its will that such commerce shall be free and untrammeled"); *see also Kassel*, 450 U.S. 662 (no national standard for truck length); *Bibb*, 359 U.S. 520 (no national standard for mudflap design); *S. Covington & C. St. R. Co.*, 235 U.S. 537 (no national standard for streetcar capacity). The national interests of the United States require that its maritime transportation systems are efficient, secure, and open to support the continued flow of interstate and international commerce.

"Commerce and uniformity go together." *Dailey v. United States*, No. C 77-0131, 1980 WL 128328, at *5 (D. Utah, May 16, 1980) (internal quotation omitted). When the same rules apply to "ships and their cargoes moving from port to port," this "uniformity promotes the free movement of trade by increasing the confidence of merchants in their ability to conduct business successfully." *Id*. The Ordinance fails to respect this principle. It, by design, renders cruise tourism in Bar Harbor impracticable. In so doing, it effectively bars the transportation of persons by cruise vessel into Bar Harbor. Thus, the Ordinance imposes a heavy burden on the free flow of commerce. *See Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1286 (7th Cir. 1992) (finding heavy burden on free flow of commerce by state law that "would effectively bar the importation of out-of-state waste into Indiana").

3. The Ordinance's Harms Are Harms to Commerce, Not the Cruise Lines' Business Model

Like the district court, both the Town and Sidman reduce the Pilot's and Plaintiffs' constitutional objections to mere "harm to the profits of cruise lines or their local partners" and disadvantaging a preferred business model. (Town-Br. at 10, 33-34; *see* Sidman-Br. at 12,

18-19.) The Town and Sidman rely on generalized pronouncements pulled from *National Pork* and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). Neither case controls here.

The Town contends that the Ordinance merely shifts market share between out-of-state suppliers, like Proposition 12 in *National Pork*, and affects the structure and method of operation of the cruise industry, as did the state law in *Exxon*. (Town-Br. at 43-44.) The Ordinance does not shift market share; it virtually eradicates the cruise industry's share of the Bar Harbor vacation market.

In *Exxon*, the Court concluded that the challenged Maryland statute "ha[d] no demonstrable effect whatsoever on the interstate flow of goods." *Exxon*, 437 U.S. at 126. There was no evidence that the total quantity of petroleum products shipped into the state would be affected. *Id.* at 123, 127. Here, the evidence establishes, and the district court acknowledged, that the Ordinance will, as it is designed to do, cause the majority of cruise vessels to exit the Bar Harbor vacation market.[17] No

[17] Distinguishing *Exxon*, the Seventh Circuit in *Government Suppliers Consolidating Services* noted that an Indiana statute had "in effect erected an economic barrier against the importation of municipal waste" because "if the backhaul ban is enforced, a significant number of the

other cruise lines can replace that activity.[18] (Pilots-Br. at 28.) The Ordinance effectively denies tourists the ability to enjoy Bar Harbor and Acadia National Park on a cruise vacation. *See Young*, 2001 WL 1677259, at *11, *15.

All cruise vessels must abide by the Ordinance's disembarkation limit. Every cruise ship, no matter its capacity, can run afoul of the Ordinance's disembarkation limit because the disembarkation limit applies to daily disembarkations *in toto*, not per vessel. Even a vessel

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remaining truckers now willing to haul trash to Indiana will become unwilling because they cannot afford to dedicate their trucks to so limited a range of payloads." 975 F.2d at 1279 (internal quotation omitted). This is the type of impermissible impact on commerce presented by the Bar Harbor prohibitions and contrasts sharply with a signal characteristic of the Maryland ban on vertically integrated retail gasoline sales outlets.

[18] Sidman asserts that there is no harm to commerce because other competitors will replace departing cruise lines. (Sidman-Br. at 19-20.) Sidman has no evidence to support this statement. (Pilots-Add. 17, 17 n.16.) A leitmotif of both the district court decision and Sidman's theorizing about alternative developing cruise industry attributes is an unrestrained willingness to venture into the speculative realm of market and industry re-design to accommodate one small but commercially and geographically important port's statutorily imposed operational distortions. The cruise industry is global, and vessel design is influenced by a multitude of economic, physical, safety, and geographic factors that do not revolve around a small port's changing, subjective decisions about non-annoying vessel sizes. (*See* Pilots-Add. 17 n.16.)

under 1,000 lower berth capacity may find its disembarkations prohibited if other vessels have already disembarked 1,000 persons. The Ordinance does not just inhibit cruise lines with "mega-ships"[19] from calling at Bar Harbor; it blocks every cruise line seeking to disembark persons at Bar Harbor.[20] *See Walgreen Co. v. Rullan*, 405 F.3d 50, 59 (1st Cir. 2005) (rejecting comparison to *Exxon* where local law perpetuated dominance of local pharmacies in the market at the expense of every pharmacy seeking to open in an area already occupied by an established pharmacy). This deterrent effect is magnified by the cruise lines' complex itinerary planning process and the inability of

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[19] The Town refers to vessels over 1,000 lower berth capacity as "mega-ships." (Town-Br. at 33.) The district court described larger ships as "oversized." (Pilots-Add. 28 n.18.) There is no support in the record for these characterizations. The ships that have historically called at Bar Harbor are typical of vessel sizes deployed throughout the global cruise vessel fleet.

[20] The Ordinance does not simply "eliminat[e] … efficiencies" for some cruise lines. (*Cf.* Town-Br. at 33.) The Ordinance renders *any* cruise line participation in the Bar Harbor vacation market a tenuous business proposition. No matter how a cruise line chooses to operate its business, it and every other cruise line visiting Bar Harbor will never be able to disembark more than 1,000 persons per day *in the aggregate*. Thus, the Ordinance's burdens fall on all cruise vessels, some more immediately than others by virtue of variations of capacity, but all because the limit is an aggregate daily limit.

individual cruise line planners to know for any given day how many disembarkations a vessel might be allowed.

4. The Ordinance Also Has a Discriminatory Effect

Cruise vessels are instrumentalities of interstate transportation. They transport tourists to various ports of call. Cruise vessels also are floating hotels. They provide overnight accommodations and other amenities to tourists over the course of a sea voyage. This feature of cruise transportation means that the Ordinance burdens interstate commerce in another way—exclusion of cruise lines as out-of-state providers of accommodations in the Bar Harbor vacation market.

Predictably, the Town and Sidman embrace the district court's dismissal of the Ordinance's discriminatory effects. (Town-Br. at 31-32; Sidman-Br. at 12-13.) They claim that cruise lines and local lodging providers are not similarly situated because a consumer cannot book a one-night stay on a cruise ship in Bar Harbor.[21] (Town-Br. at 34;

[21] If cruise lines and local hotels are not competitors because hotels offer a one-night stay and cruise lines do not, then one would need to look long and hard to find "direct" competitors in the Bar Harbor vacation market. The dormant Commerce Clause does not require such austerity. At the very least, cruise lines and hotels compete for the business of multiday vacation customers. That is enough. *See Bacchus*

Sidman-Br. at 15.) In the Town's view, cruise lines and local lodging providers provide different products for different consumers with different needs and priorities. (Town-Br. at 34.)

This defines the relevant market too narrowly. International cruise lines and local lodging providers compete for discretionary vacation dollars in leisure activity markets that include Bar Harbor visitation. Prior to enactment of the Ordinance, tourists had choices about how to visit this location. They came to Bar Harbor by a variety of conveyances, including cruise ships. Like other tourists, cruise tourists partake of all that Bar Harbor has to offer—scenery, dining, and proximity to Acadia National Park (one America's favorite parks). Unlike other tourists, however, cruise tourists do not book one of Bar Harbor's 3,000 hotel rooms, 620 short-term rentals, 726 seasonal homes, or 970 campsites.[22] The Ordinance narrows tourists' choices by eliminating the bulk of cruise providers from the market.

Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (if there is some competition between local and interstate entities, there is discriminatory effect).

[22] Bar Harbor's hotels and other lodging options can provide a place to sleep for nearly 15,000 visitors per night. (Pilots-Br. at 41 n.38.) Despite Bar Harbor's considerable capacity, demand for lodging remains high. (*Id.*)

The Ordinance hoards a local resource—Bar Harbor, its close proximity to Acadia National Park, and the demand to visit Bar Harbor and Acadia National Park—for the advantage of local hotels that provide tourists necessary lodging. *See C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390-92 (1994). It burdens the Bar Harbor vacation market as a whole by depriving travelers of the choice to visit Bar Harbor and/or Acadia National Park by cruise ship, a choice that may, for some, have cost, convenience, or other advantages that are negated by the Town's restrictions. It does not leave interstate cruise lines, as vacation providers, with equal access to Bar Harbor or Acadia National Park. Thus, the Ordinance discriminates in effect against interstate commerce. *See Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1244 (11th Cir. 2012) ("law discriminates by restricting market participation or curtailing the movement of articles of interstate commerce based on whether a market participant or article of commerce is in-state versus out-of-state").

B. Bar Harbor's Local Interests Do Not Justify the Ordinance's Substantial Obstruction of the Flow of Commerce

The Commerce Clause guards against the "potential conflicts that arise if each state acts simply to advance its local interests, reaching its own accommodation of the importance of the national interest." *Burlington N. R. Co. v. State of Neb.*, 802 F.2d 994, 1004 (8th Cir. 1986). It is the court's task to reach an "accommodation of the competing demands of the state and national interests," *id.*, by weighing the burdens on commerce against the "importance of the state's interest, but also the extent to which the challenged regulation furthers the interest" and "whether there are alternative ways to achieve the state's interest without imposing so great a burden on commerce," *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 753 F. Supp. 739, 776 (S.D. Ind. 1990) (citing *Pike*, 397 U.S. at 142).

1. *The Ordinance Does Not Advance the Town's Purported Local Interest in Reducing Downtown Pedestrian Congestion*

According to the initiative's purpose statement, the Ordinance was intended to combat "excessive congestion and traffic on public streets and sidewalks, frequent overcrowding of parks and other public spaces, and inundating local amenities and attractions" and preserve

the Town's "ability to deliver municipal services,"[23] particularly those associated with police, fire, and EMS activities. (Pilots-Add. 12 (quoting Ex. 243A); *see* Town-Br. at 36-37; Sidman-Br. at 21-22.) The district court took these "proffered interests in lessening congestion and conserving municipal resources" at face value, and deemed them not "illegitimate." (Pilots-Add. 58.)

A local law does not survive constitutional scrutiny just because it reflects local interests. *Dep't of Revenue of Ky.*, 553 U.S. at 366 ("That a law has the police power label—as all laws do—does not exempt it from Commerce Clause analysis."); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977) ("[A] finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry."). It must actually effectuate the asserted local interest. *Stephen D. DeVito,*

[23] The Ordinance does not enhance the delivery of municipal services, such as police, fire, and EMS activities. The district court noted the lack of evidence of "any past failure in the delivery of public services occasioned by passenger congestion at the waterfront." (Pilots-Add. 14.) Town officials testified unequivocally that crowds of people, at the pier or otherwise, have never prevented the fire department or EMS from performing their jobs. (PX 197 at 10; App. 259-61.)

Jr. Trucking, Inc. v. Rhode Island Solid Waste Mgmt. Corp., 770 F. Supp. 775, 783 (D.R.I.), *aff'd sub nom. DeVito v. Rhode Island Solid Waste Mgmt. Corp.*, 947 F.2d 1004 (1st Cir. 1991) ("mere recitation of a legitimate purpose" is "not conclusive"); *see Raymond Motor*, 434 U.S. at 444-45; *Island Silver & Spice, Inc. v. Islamorada, Vill. of Islands*, 475 F. Supp. 2d 1281, 1292-93 (S.D. Fla. 2007), *aff'd sub nom. Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008) (village did not establish that challenged ordinance "actually encouraged" asserted local interest).

Below, neither the Town nor Sidman established that the Ordinance would reduce pedestrian congestion in the downtown area or address "overcrowd[ed]" parks and public spaces and "inundate[ed]" local amenities and attractions in any meaningful way. In fact, there is no evidence that the Ordinance would reduce congestion anywhere beyond the waterfront area—which is *not* "a part of town that in [Sidman's] experience is the more heavily trafficked and congested area." (Tr. 13-Jul. at 324:22-325:13.) The congested area is where more retail establishments are—the "east side of Main Street" *not* the "water end of Main Street." (Tr. 13-Jul. at 325:14-18.) Reducing congestion at

the piers will not decrease pedestrian congestion where congestion is most prevalent and, based on this record, most annoying to the Ordinance's promoters. (*See* Pilots-Add. 186 (impact of cruise passengers on walking speeds is zero at about 1,400 feet from the port entry).) [24]

Evidence also demonstrated that the Ordinance would not reduce sidewalk congestion at peak times—afternoon and evening hours, after cruise visitors have departed.[25] (Pilots-Br. at 32 n.30.) The district court recognized that the evidence did not demonstrate that cruise passengers (who account for 7 percent of Bar Harbor visitation), as

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[24] The Town failed to rebut evidence that the Ordinance will not further the Town's purported interest in lessening pedestrian congestion. This fact alone should have doomed the Ordinance. *Burlington Northern R. Co.*, 802 F.2d at 1000 (noting that statute in *Raymond* failed because the state did not rebut evidence that the regulation did not further the state's safety objective).

[25] Sidman accuses the Pilots of "portray[ing] Bar Harbor as having no congestion whatsoever." (Sidman-Br. at 23 n.3.) His assertion, besides being incorrect, conveniently overlooks the heart of the Pilots' argument—that the Ordinance's putative purpose (reduce downtown pedestrian congestion) is disconnected from the means by which the Ordinance purports to further that purpose (eliminate cruise passengers who impact pedestrian congestion primarily at the waterfront, not where congestion is problematic, and who are not in Bar Harbor at the times when congestion is at its peak).

opposed to all other tourists (who make up the remaining 93 percent), cause more congestion downtown than other visitors or contribute to congestion at its peak. (*See* Pilots-Add. 8, 14; App. 247; PX 211.) The Ordinance "does not take the appropriate steps" to create a less-congested downtown area. *Island Silver & Spice*, 475 F. Supp. 2d at 1293. Viewed charitably, the Ordinance only marginally furthers Bar Harbor's interest in lessening downtown pedestrian congestion.

2. The Town's Purposes Can Be Accomplished With a Lesser Impact on Interstate and Foreign Commerce

Local regulations violate the Commerce Clause when local interests can be "promoted with a lesser impact on interstate activities," *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275, 279 (2d Cir. 1982), *aff'd*, 464 U.S. 909 (1983), or the local benefits can be "accomplished by less burdensome schemes," *Service Machine & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 75 (5th Cir. 1980), *aff'd*, 449 U.S. 913 (1980). *See Stephen D. DeVito, Jr. Trucking, Inc.*, 770 F. Supp. at 785 (mere fact that asserted local purpose may be legitimate "does not mean that any method of achieving" that purpose "is therefore legitimate"). The district court did not explore whether the Ordinance's putative local benefit (reduced pedestrian congestion) could be

accomplished by less burdensome means.[26] Had it done so, it would have been hard-pressed to conclude that the Town's alternatives to the Ordinance were nothing more than "abstract possibilit[ies]." *See Gov't Suppliers Consolidating Servs.*, 753 F. Supp. at 770 (distinguishing case in which state has "reasonable nondiscriminatory alternatives available to achieve its stated purpose" from "*Maine v. Taylor*, in which the alternatives were no more than 'abstract possibilit[ies].'" (quoting *Maine v. Taylor,* 477 U.S. 131, 147 (1986))).

The Town possesses ample authority to exercise its police powers in a host of constitutionally appropriate ways to mitigate the effects of Bar Harbor's popularity with tourists. It can control congestion through establishment of pedestrian and vehicular traffic patterns, limitations on motor vehicles on crowded streets, and restrictions on the placement

[26] The record established that there were many less burdensome means at the Town's disposal. Acting on those opportunities, the Town and the cruise industry worked cooperatively to improve efficiency and safety at the piers. (Tr. 12-Jul. at 93:13-98:6; App. 255-56.) The Town also negotiated a Memorandum of Understanding with the cruise lines in 2022 to reduce cruise passenger visitation significantly in the busy fall months and shorten the cruise ship season. (DX 327; App. 254-55.) The Ordinance was passed before these less burdensome, cooperative measures were fully implemented and their positive impact could be judged.

of obstacles on downtown sidewalks. It can set standards for and make physical improvements to existing pedestrian areas to enhance traffic flow. It can continue to forge through negotiation, as it has in the past, voluntary agreements with cruise lines to fashion non-coercive, mutually acceptable limits on cruise visitation. Against this array of legitimate options, the Ordinance instead erects a barrier against cruise visitors in a manner and at a level so extreme that obstruction of interstate and international maritime commerce is inevitable.

III. The Ordinance Is Preempted Under the Supremacy Clause

Markers of federal preemption can overlap in varying degrees. State or local incursion into the field of interstate and international maritime commerce presents intertwined Supremacy and Commerce Clause concerns. The Ordinance prohibits the disembarkation of substantial numbers of federally-cleared persons from federally-permitted vessels operating in federally-designated anchorages on the navigable waters of the United States. In so doing, it regulates (and, as established above, more than incidentally burdens) interstate and international maritime operations—a field recognized to embrace federal interests in foreign affairs and interstate commerce. *See*

Henderson v. Mayor of City of New York, 92 U.S. 259, 271 (1875) ("A law or a rule emanating from any lawful authority which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels coming from foreign ports, is a regulation of commerce with foreign nations."). The Framers recognized that trade and commerce, particularly maritime commerce, would be crippled and suppressed to the detriment of the Nation if left subject to disparate motivations of individual port communities. This "manifest" federal interest in maritime commerce required unambiguous national authority "to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations." *United States v. Locke,* 529 U.S. 89, 99 (2000) (citing The Federalist Papers Nos. 12, 44, and 64). Under either tributary of constitutional jurisprudence (*i.e.*, Supremacy or Commerce), the Ordinance violates these precepts.

The Ordinance inflicts impermissibly disruptive effects on federally-regulated aspects of cruise vessel operations in and around Bar Harbor in at least three exemplary ways: It conflicts with federal maritime security regulations governing seafarer access to federally-

regulated shoreside facilities. It imposes additional, non-federal conditions of entry on U.S. citizens and foreign nationals arriving by vessel in Bar Harbor after being inspected and cleared for entry by federal customs and immigration authorities. And it restricts, to the point of commercial impracticability, the use of federally-designated anchorage grounds for primary operations of ocean-going passenger vessels. Any one of these is sufficient individually to invalidate the Ordinance. Collectively, they operate in a regulatory landscape in which federal interests are predominant and irreconcilable with local deviations and intrusions.

The Town and Sidman defend the district court's conclusion that the Ordinance largely survives invalidation on preemption grounds by contesting the analytical significance of the substantial federal presence in the field of interstate and international maritime commerce, by minimizing impacts of the Ordinance's disembarkation restrictions on that commerce, and by characterizing the Ordinance's limitations as directed at landside activities and events, rather than as constraints on vessel operations. (Town-Br. at 15; Sidman-Br. at 34-39.) The Town further argues that the Ordinance's conflict with the federal seafarer

regulations is moot. (Town-Br. at 23-24.) None of these arguments preserves the Ordinance against invalidation.

A. There Is No Assumption of Non-Preemption For State Laws That Bear Upon National and International Maritime Commerce

The Town urges this Court to start its preemption analysis "with the assumption that the historic police powers of the States" are not superseded absent the "clear and manifest purpose of Congress," (Town-Br. at 12 (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)), and further to apply that assumption "with particular force" because a locality's "land use restrictions for on-shore port facilities" operate in a "field traditionally occupied by the States," (Town-Br. at 12-13 (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008), and *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 444-45 (D. Me. 2017)). Were the Ordinance merely a regulation of "on-shore port facilities," this would be a closer case—and arguably on point with the City of South Portland's zoning restrictions that blocked new construction of a landside export oil facility within municipal limits. This Ordinance, however, does not regulate simply on-shore port facilities. By its own express terms, it regulates "[d]isembarking persons from cruise ships

on, over, or across any property located within the Town of Bar Harbor." (Pilots-Add. 158 (emphasis added).) The embarkation, transport, and disembarkation of passengers from cruise ships are core vessel activities, and the Ordinance directly limits these functions. Where state or local laws "bear upon the national and international maritime commerce," as the Ordinance does here, there is "no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, the Court must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives *a uniformity of regulation for maritime commerce*." *Locke,* 529 U.S. at 106 (emphasis added). The Town cannot evade this result by dressing vessel restrictions in "land use ordinance" garments. *See* Argument § I, *supra*.

B. The Ordinance Regulates Primary Conduct of Vessels

Local regulation of interstate and international maritime commerce validly operates in a narrow, constrained context. State or local laws that require a vessel "to modify its *primary conduct* outside the specific body of water purported to justify the local rule" or that impose "a substantial burden on the vessel's operation within the local

jurisdiction itself" must give way to federal maritime interests. *Locke,* 529 U.S. at 112.

The Ordinance cannot be reconciled with *Locke's* instruction. By intent and effect, the Ordinance renders it impossible for a major component of the international passenger vessel fleet to provide transportation services from foreign and domestic points to and via Bar Harbor, affects primary-conduct vessel operations in the federal anchorage grounds adjacent to Bar Harbor, and affects business decisions and itinerary planning for routes that include other United States ports and ports in Europe and Canada. All of these negative impacts address "primary conduct" of vessels serving United States commerce. These are "substantial burden[s]" on the vessel's operation within the local jurisdiction itself." *Id*. These impacts, whether viewed through a Commerce Clause or a Supremacy Clause lens, place the matter squarely within matters of central importance and concern to the United States.

C. The Ordinance—Because It Regulates Primary Conduct of Vessels—Cannot Be Compared to Local Measures Regulating Non-Primary Vessel Activities

Huron Portland Cement Co. v. City of Detroit, Mich., 362 U.S. 440 (1960), *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325 (1973), and *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959)—properly understood and placed in their actual contexts—do not aid the Town and Sidman here. (*See* Town-Br. at 14-16; Sidman-Br. at 35.) These cases define a category of state or local activity in which the challenged measure affected non-primary vessel conduct in the absence or express declination of federal authority. In *Huron*, the Supreme Court upheld a generally applicable city smoke abatement measure as applied to vessels docked at the Port of Detroit. Unlike the Ordinance, the local measure in *Huron* did not single out or restrict the vessels' unloading or transport activities and required nothing of the vessels beyond what was expected of every other stationary source within city limits. It imposed no design or capacity limitations and did not affect the vessels' ability to trade in other ports. *Huron Portland Cement*, 362 U.S. at 448 ("The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free

passage. We cannot hold that the local regulation so burdens the federal license as to be constitutionally invalid."). If Bar Harbor had enacted a restriction on pedestrian movements within the Town limits governing all pedestrians, as opposed to singling out passengers from vessels, the *Huron* analogy would be more apt.

Similarly, *Askew* and *Romero* belong to a distinct family of cases governing remedies and damages for casualty or environmental injuries. They reflect a decided, long-emerging inclination to permit some state statutory or common law claims for personal injuries and environmental damage against arguments that the Admiralty Clause, federal statutes, and general maritime law bar such claims. These cases recognize a role for states in the assertion or disposition of these types of claims *as distinguished from* circumstances where a state or locality regulates the actual operations of vessels. (*See* ECF No. 199, Pilots' Post-Trial Reply Br. at 4-7.) Both this Court in *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994), and the Supreme Court in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), took pains to ring-fence validation of state penalties, civil liability determinations, *forum non conveniens* requirements, compensation measures, and

matters of judicial process with express reminders that these types of measures do not address primary conduct of vessels.[27]

D. The Ordinance Imposes an Additional Local Condition of Entry in Bar Harbor

The district court erred in rejecting the Pilots' claim that the Ordinance unlawfully frustrates and interferes with federal customs and immigration requirements. The district court, puzzlingly and without explanation, categorized this concern as "imagined, not real" (Pilots-Add. 32), and then created and dispatched a straw man argument not advanced by the Pilots: that the invalidity of the Ordinance, because of its dissonance with federal immigration inspection procedures, rests on a claim of discrimination against foreign-flag vessels. (Pilots-Add. 33.) The Town and Sidman repeat these conclusions. (Town-Br. at 18-20; Sidman-Br. at 39-42.)

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[27] *Ballard Shipping* noted that the state law did "not regulate the out-of-court behavior of ships or sailors – what is sometimes called 'primary conduct'; rather the act is concerned with the liability imposed for conduct that is already unlawful. State regulation of primary conduct in the maritime realm is not automatically forbidden but such regulation presents the most direct risk of conflict between federal and state commands, or of inconsistency between various state regimes to which the same vessel may be subject." 32 F.3d at 629 (internal citations omitted).

The Ordinance's 1,000 person limit vitiates federal border inspection processes applicable to all arriving entrants, regardless of nationality or citizenship. Arriving passengers of any nationality, arriving on vessels of any nationality, that fall in the "excess disembarkation" category are not able to enter the United States at Bar Harbor despite having cleared federal inspections that occur aboard the vessels in the Frenchman Bay anchorages.[28] This argument does not depend on an assertion (not made by the Pilots or Plaintiffs) that the vice of the Ordinance is discrimination against entrants based on their nationality or the nationality of the vessels.

States can "neither *add to or take from the conditions lawfully imposed by Congress upon admission*, naturalization and residence of

[28] That customs and immigration inspection takes place aboard the vessels is a matter of mutual convenience for federal personnel and for the vessel owners and passengers. The examination of entrants could, if CBP and USCIS so chose, take place onshore in Bar Harbor. The constitutional preemption analysis would be the same if the Town attempted to limit the 1,001st and greater arriving entrants from proceeding beyond a shoreside CBP/USCIS checkpoint. The situation is functionally no different than that which would arise if the municipal government of an international airport in a popular U.S. tourist destination were to prohibit more than a fixed number of deplaning passengers to proceed beyond the customs and immigration receiving areas on pain of large fines against the receiving airport operators.

aliens in the United States or the several states." *Toll v. Moreno,* 458 U.S. 1, 11 (1982) (quoting *Takahashi v. Fish & Game Comm'n.*, 334 U.S. 410, 419 (1948)) (emphasis added); *see Maine Forest Products Council v. Cormier,* 586 F. Supp. 3d 22 (D. Me. 2022), *aff'd*, 51 F.4th 1 (1st Cir. 2022). The requirement that an inspected entrant arriving at Bar Harbor not be the 1,001st or greater passenger to gain entry into the United States through Bar Harbor is an "auxiliary burden" on entrants not contemplated by Congress. *Graham v. Richardson,* 403 U.S. 365, 379 (1971). In an effort to avoid this result, the Town and Sidman, like the district court, observe that these cases involved allegations of discrimination based on alienage and contend that no discrimination against aliens is presented here. (Pilots-Add. 33; Town-Br. at 19-20; Sidman-Br. at 41-42.) While discrimination based on alienage was present in these cases, it is the vitiation of federal permissions to enter the United States following inspection that undergirds the Pilots' (and amicus CLIA's) preemption claim and which would have provided sufficient support for the outcome of those cases even if raw discrimination based on alienage had not been present. In each case, the challenged state action subverted and devalued the effect of the

granted federal permission. Federal regulations clearly require that both U.S. citizens and alien visitors must apply to lawfully enter at a U.S. port of entry, and that upon satisfaction of examining immigration officers, the entrant is eligible for admission by proof of citizenship, 8 C.F.R. § 235.1(b) or, in the case of aliens, otherwise entitled to enter the United States, 8 C.F.R. § 235.1(f). The clearance of immigration inspection confirms the entitlement to enter. Bar Harbor is one of three Class A ports of entry in Maine and, because of its geographic location, is the port of entry at which southbound vessels entering the United States from Canada and other international ports commonly present passengers for immigration inspection. 8 C.F.R. §§ 100.4(a), 235.1(a); 19 C.F.R. § 101.3. Federal interests in the efficacy of sovereign national controls at ports of entry are matters of acute national interest:

> On the sea-coasts and on the rivers [the federal government] has its ports of entry. In the interior it has its land offices, its revenue offices, and its subtreasuries. In all these it demands the services of its citizens and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a state to obstruct that right that would not enable it to defeat the purposes for which the [federal] government was established. . . If this right is dependent in any sense, however limited, upon the pleasure of a state, the government itself may be overthrown by an obstruction to its exercise.

Crandall v. State of Nevada, 73 U.S. 35, 44 (1867). Bar Harbor is such a port of entry, and its disembarkation limitation obstructs the federal government's use of the port for immigration purposes.

It is hardly an "imaginary" circumstance that the Ordinance's disembarkation limit is designed to prevent more than 1,000 persons from cruise vessels to disembark into the Town on a calendar day. This is clear from the Ordinance's express language, as well as the motivations behind its enactment. At several points in its analysis, the district court acknowledged the hard reality of the suppressive impact of the Ordinance on the movement of commerce. "The record in this case demonstrates that the Ordinance does indeed stem the flow of interstate commercial activity by reducing the daily volume of persons disembarked into Bar Harbor from cruise ships." (Pilots-Add. 51; *see* Pilots-Add. 16-17, 39, 48, 54, 56-60.) Nonetheless, the Town and Sidman ascribe to the district court's view that this limitation is not a limitation at all—that "[a]nyone admitted to the United States by CPB [sic] through a process that transpires aboard ship in Frenchman Bay may enter the United States, including in Bar Harbor." (Pilots-Add. 32; *see* Town-Br. at 18-19; Sidman-Br. at 39-40.) But, of course, this is not the

case for any person, regardless of citizenship, who has been cleared for entry by U.S. authorities aboard a ship anchored in Frenchman Bay, if that person happens to be the 1,001st or greater person to arrive in Bar Harbor on a cruise vessel within a calendar day. The Ordinance's fines, leveled against pier owners that operate the only shore access point in Bar Harbor, ensure that "anyone" who has cleared customs aboard arriving vessels will not be admitted if 1,000 of their fellow travelers have preceded them.

E. The Ordinance Conflicts with the Coast Guard's Establishment of Frenchman Bay's Anchorage Grounds

The Ordinance's disembarkation limit renders useless the Coast Guard's establishment of designated anchorage grounds in Frenchman Bay for use by passenger vessels to facilitate the landing of passengers in Bar Harbor. The district court peremptorily rejected this concern by concluding that the federal field was not "expansive enough to blockade local regulation in matters of cruise passenger shore access" and by noting that "cruise ships of whatever size are free to anchor in Frenchman Bay." (Add. 35.) In the district court's opinion, the Pilots viewed the creation of the Frenchman Bay anchorages as "conferr[ing] a

charter of privileges on cruise lines to disembark their entire complement of passengers in any municipality in which there are pier operators who would welcome them." (*Id.*) The Town's responsive brief echoes these inaccurate perceptions. (Town-Br. 20-22.)

The Secretary of Homeland Security has the authority "to define and establish anchorage grounds for vessels in all harbors, rivers, bays and other navigable waters of the United States whenever it is manifest to the said Secretary that the maritime or commercial interests of the United States require such anchorage ground for safe navigation." (Pilots-Add. 92.) The Coast Guard established the Frenchman Bay anchorages in 2002 pursuant to this authority. *Anchorage Grounds; Frenchman Bay, Bar Harbor, ME*, 67 Fed. Reg. 68517, 68518-19 (Nov. 12, 2002) (amending 33 C.F.R. part 110). It reserved Anchorage A "for passenger vessels, small commercial vessels and pleasure craft" and Anchorage B, which is more capacious and farther from the Town, "primarily for passenger vessels 200 feet or longer." 33 C.F.R. § 110.130(b)(1). The Coast Guard established the anchorages, particularly Anchorage B, to accommodate cruise activity in Bar Harbor. *Anchorage Grounds; Frenchman Bay, Bar Harbor, ME*, 67 Fed. Reg. 68517 (Nov.

12, 2002) (amending 33 C.F.R. part 110). Cruise vessels are the anchorages' primary, if not exclusive (for Anchorage B), users. *Id*. The Coast Guard imposed no conditions on their use. *Id*. at 68517, 68519.

The anchorages and the private piers together facilitate maritime commerce in Bar Harbor. Because the Town lacks shoreside facilities capable of permitting larger passenger vessels to dock at piers, vessels use the anchorages to perform their core conduct of disembarking passengers and complete those disembarkations by tendering passengers from the vessels to the private piers. The anchorages cannot facilitate commerce if the private piers are unavailable for receiving passengers. The Ordinance, by subjecting private pier owners to high penalties for receiving more than 1,000 disembarking persons, renders the private piers unavailable for the majority of cruise ship activity. The Ordinance undermines the intended utility of the federal anchorage grounds.

As in the context of vitiating the ability of persons cleared for entry by federal authorities, the Ordinance imposes an effectively prohibitive condition on use of the federal anchorages. There is no operational rationale for the Frenchman Bay anchorages if passenger

vessels cannot engage in their designed-for primary conduct in those anchorages. The notion that the anchorages remain fully fit-for-purpose when vessel operations are limited by the Ordinance's overlay of municipal operational restrictions is nonsensical. The district court, however, took the Ordinance at face value, determined that it did not directly bar vessel access, and incorrectly concluded that the Ordinance's impacts on anchorage utility were of no constitutional moment.[29] The Ordinance clearly deters and prevents use of the anchorages by even relatively modest-size vessels. In doing so, it imposes a non-federal condition that favors and promotes anchorage use only by the smallest of cruise vessels in the global fleet. As is the case with the impacts of the Ordinance on federal border and security

[29] For nearly twenty years, the Town has used a vessel reservation system coordinated by the Harbormaster and administered via permissions to use the anchorages to implement voluntary caps on cruise visitation. (Pilots-Add. 8.) The Ordinance mandates that the Harbormaster develop rules and regulations to apply the Ordinance's limitations to a reservation system for cruise vessels. (Pilots-Add. 11.) Any such reservation system would necessarily result in denial or inaction on reservation requests for anchorage space for vessels with lower berth capacities over 1,000 persons. (Pilots-Add. 158.) This is indeed what has happened post-March 1st, the date of issuance of the district court's decision. (Jt. Mot. Inj. Pending Appeal at 6-7.)

controls and seafarer access, these local incursions in a heavily trod area of federal activity violate Supremacy Clause and Commerce Clause limitations on local actions.

F. The Ordinance's Conflict with Federal Seafarer Regulations Is Not Moot

The Town argues that its adoption four and a half months ago of a "clean-up" disembarkation ordinance (Chapter 52 of the Bar Harbor Code), which purports to exclude seafarers from application of the Ordinance's disembarkation limit, removes the unlawful conflict between the Ordinance and federal regulations, rendering this aspect of the case moot. (Town-Br. at 23-24.) The Town's attempt at a preemption "fix" is substantively and procedurally invalid for, among other reasons, lack of Town Meeting approval.[30] Chapter 52 did not amend or repeal the Ordinance, and its validity is being contested in state court.[31] Until

[30] The district court acknowledged that Town Meeting approval (the procedure required for the Ordinance's enactment) is the only way to revise the Ordinance under Maine law. (Pilots-Add. 31 (citing 30-A M.R.S. § 3004(4).)

[31] *Golden Anchor L.C. v. Town of Bar Harbor,* Docket No. BCD-CIV-2024-00046 (Hancock Cnty. Sup. Ct.).

its legality is determined, the Ordinance remains controlling, and the controversy between the parties merits resolution by this Court.

G. The District Court Correctly Found a Preemptive Conflict between the Ordinance and the Federal Seafarer Access Rules

Sidman appeals the district court's judgment that federal regulations governing seafarer access to marine terminal facilities preempt the Ordinance's disembarkation limits as they apply to seafarers and other marine personnel engaged in serving vessels calling at Bar Harbor. (Sidman-Br. at 44-48.) He argues that the seafarer regulations do not prohibit "all fees associated with seafarer access" so long as seafarers are not charged for movement across the receiving piers. (Sidman-Br. at 46.) Thus, he suggests that penalties on pier owners for Ordinance violations are "consistent with" federal law because the penalties are not levied on seafarers themselves. (*Id.*) In Sidman's view, the per-person penalties imposed on private pier owners for permitting "excess disembarkations" are simply "additional costs associated with seafarer access" that must be borne by the pier owners. (*Id.*)

Sidman's interpretation disregards the very purpose of the Seafarer Access rules and their role in the larger structure of federal port security regulations. The Ordinance conflicts with the Seafarer Access rules based on its limitations on access, not the monetary penalties assessed against the pier owners for allowing more than 1,000 persons per day to move across the piers. The Seafarer Access rules mandate *access* to shoreside facilities that enables seafarers to *board and depart* the vessel *through the facility* in a *timely manner* at *no cost* to the seafarer. COAST GUARD AUTHORIZATION ACT OF 2010, P.L. 111-281, Oct. 15, 2010, 124 Stat. 2,905, 2,995. The rules do not exist solely to protect seafarers against the imposition of costs by terminal operators. Charging for shore access is just one forbidden impediment addressed by federal regulations.[32]

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[32] International conventions recognize an obligation to protect the interest of seafarers' shore leave, including shoreside access. Port security hardening measures in the wake of 9/11 raised issues of crew shoreside access, and the 2019 rule revisions addressed a particular element of access concern—the assessment of costs. However, physical access generally remains the subject of the rules' limitations on non-federal actions. Crew members are entitled to cross through shore facilities while the ship on which they arrive is in port, provided arrival formalities have been fulfilled and the public authorities have no public order, health, or safety reasons for exclusion. *Seafarers' Access to*

The Ordinance blocks seafarer access to shoreside facilities at Bar Harbor. It restricts seafarer boarding and departing through the pier owners' facilities after the 1,000th disembarking person. Whether the obstruction is attributed to cost or physical barriers and whether the municipality imposes the fine or the pier owner acts under legal compulsion to obstruct access in order to avoid the fine, the impact on the federal port security system is equally disruptive of federal prerogatives. The Ordinance threatens the United States' ability to honor its commitments with other maritime trading nations.

Sidman further suggests that the pier owners can comply with both federal Seafarer Access rules and the Ordinance by coughing up the any fines[33] for excessive disembarkations. (Sidman-Br. at 47-48.) Violating the Ordinance and absorbing the punishment is not what the

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Maritime Facilities, 84 Fed. Reg. 12102, 12104 (Apr. 1, 2019) (amending 33 C.F.R. part 105). Actions by marine terminal operators that "thwart or hinder the ability of the United States to fulfill its international obligations" raise legal and diplomatic concerns. *Id*.

[33] The Seafarer Access rules prohibit facility operators and vessel owners from passing on access costs to seafarers. The Ordinance's fines for "excess disembarkations" are not fees or cost-recovery charges. They are penalties imposed to force pier owners to block cruise ship disembarkations and access to Bar Harbor by "persons," a term that includes seafarers, under penalty of law.

Ordinance requires. It requires pier owners to *deny access* to Bar Harbor—something they cannot do without incurring legal exposure at the federal level, including loss of federal certification.

Sidman also suggests that the Ordinance does not interfere with "actual access" because refusal of access is an "imagined conflict" if "neither the [Harbormaster] nor [the pier owners] will stop anyone from coming ashore."[34] (Sidman-Br. at 47-48.) Whether the Ordinance has crafted a clear mechanism for in-the-moment physical enforcement is of little import in the constitutional context. The Ordinance is intended to

[34] At trial, Town officials expressed uncertainty as to precisely how the physical prevention of the 1,001st and subsequent passengers was to be accomplished. (Tr. 13-Jul. at 45:3-46:1; PX 66.) The Town now embraces this uncertainty—contending that "the Ordinance does not prohibit, nor authorize any Town official to prohibit any passenger from disembarking. It simply imposes a fine on pier owners for each excess disembarkation over 1,000 on a given day." (Town-Br. at 10 n.3.) This attempt to evade responsibility for the inevitable effect of the Ordinance's restrictions reflects awareness of the Ordinance's drafters that suppressing cruise vessel operations placed them in constitutional peril. They created a mechanism that will have marked restrictive impact, but will foist off the actual enforcement responsibility on pier owners acting under the duress of significant monetary penalties. This conscious structural choice does not affect the constitutional analysis, given the restrictive effects of the Ordinance.

block access to Bar Harbor by "persons," a term that includes seafarers, under penalty of law.

Finally, Sidman, relying on the district court's invocation of *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006), argues that the district court properly denied injunctive relief as to the entire Ordinance despite having found preemption based on the Seafarer Access rules. (Sidman-Br. at 48.)

Under *Ayotte*, a constitutionally-flawed statute escapes full invalidation only when a narrower remedy is "faithful to legislative intent" and does not require rewriting the law to "conform it to constitutional requirements." 546 U.S. at 329, 331. Bar Harbor voted for a disembarkation limit consciously drafted to apply to "persons," not just passengers. (PX 37 (circular informed voters that initiative would impose limit on "people (passengers and crew)"); App. 302 (Warrant Article explained that initiative would "limit the number of *persons*" allowed to disembark).) The district court's retroactive supposition that the voters "would prefer" an Ordinance limited to passengers over no

Ordinance at all[35] (Pilots-Add. 31) cannot create *post hoc* legislative intent.

Invalidating the Ordinance only as to seafarers required the district court to read "persons" out of the Ordinance. Passengers *cannot be distinguished* from seafarers in the Ordinance's application to "persons" *unless* the court "create[s] a provision which could stand by itself" to restrict passenger disembarkations but not seafarer disembarkations.[36] *Rhode Island Medical Soc. v. Whitehouse*, 239 F.3d 104, 106-07 (1st Cir. 2001) (court may not rewrite statute applicable to "all fetuses" to apply only to "viable" fetuses); *see Wyoming v. Oklahoma*, 502 U.S. 437, 460-61 (1992) (law that applied to "all entities" could not be read to apply only to state-owned utilities); *Club Madonna Inc. v. City of Miami Beach*, 42 F.4th 1231, 1256-57 (11th Cir.

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[35] Sidman incorrectly claims the March 16 version of the initiative's purpose statement was provided to voters. (Sidman-Br. at 50.) Bar Harbor voters did not vote on the initiative (in either of its iterations). They voted on the Warrant Article, which did not have a purpose statement and which used the term "persons" in every instance. (App. 302-04.)

[36] 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.

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"). Only a comprehensive injunction would have satisfied *Ayotte's* standard. There is no way to apply the Ordinance only to passengers without distorting its express wording. *See 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).

IV. The Ordinance Frustrates the Purpose of the Maine State Pilotage Act

Local action that frustrates the purpose, or prevents the efficient accomplishment of, a defined state purpose is an invalid exercise of home rule authority and preempted by the Maine Constitution. *Smith v. Town of Pittston*, 820 A.2d 1200, 1206 (Me. 2003); *Sawyer Env't Recovery Facilities, Inc. v. Town of Hampden*, 760 A.2d 257, 263-64 (Me. 2000). The Ordinance is just such a local action. It frustrates provision

of critical and necessary state pilotage services both by constraining the Pilots' statutory authority to pilot vessels in their pilotage area and by obstructing maintenance of a safe and efficient system of pilotage.

The Town contends that home rule authority and the Maine Harbor Masters Act ("HMA") entitle the Town to regulate all activities within the Town's "local waters," intimating that the Ordinance is a valid exercise of authority pursuant to the HMA.[37] (Town-Br. at 58-59; *see* Sidman-Br. at 59-60.) The HMA cannot save the Ordinance. The local authority the State reserved to municipalities in the HMA does not extend to the Town's enactment and enforcement of ordinances that conflict with the Maine Pilotage Act. *See Ullis v. Inhabitants of Town of Boothbay Harbor*, 459 A.2d 153, 160 (Me. 1983) ("Where the state legislature has preempted a field, a municipality may not invade that field in the guise of regulating a field still open to that municipality.") (internal citations omitted).

The Town also hypothesizes that the Ordinance will make Maine waters safer by reducing ship traffic and that the Pilots can offset

[37] It is ironic that the Town and Sidman rely on a *maritime* statute to justify a municipal *land use* ordinance.

revenue losses by increasing their rates. (Town-Br. at 59-61; *see* Sidman-Br. at 61-62.) The wishful logic of this position ignores the realities of the world in which the Pilots operate. A safe and efficient system of pilotage is an expensive, capital-intensive endeavor. (App. 271, 272.) Its fixed costs do not diminish in proportion to reductions in the vessel traffic that the system supports. The Ordinance deprives the Pilots of the federal uniformity, and therefore consistency, in maritime commerce afforded their peers in other coastal states. Eliminating revenue-contributing traffic does not increase safety; it deprives the system of resources that support pilotage services for considerable and diverse non-cruise vessel traffic in the pilotage area. The Town and Sidman assume that if obstacles to commerce significantly reduce maritime trade, the Maine Pilotage Commission can simply require the remaining traffic to bear a greater proportionate share of the system's fixed costs via increased rates. Pilotage is a state-created monopoly, and the Commission can control rates, but not demand, for pilotage services. If rates are too high and spread over declining vessel moves, demand will fall. While the Town can cavalierly hypothesize a scenario that risks Maine's pricing itself out of the maritime commerce market (*see*

Tr. 11-Jul. at 60:3-6), the Pilots cannot.

CONCLUSION

The Pilots request that this Court reverse the district court's judgment as to the Pilots' Commerce Clause claims and Supremacy Clause claims apart from their seafarer preemption claim, affirm the district court's judgment that the Ordinance is preempted by the Seafarer Access rules, and otherwise hold the Ordinance unlawful and permanently enjoin its enforcement.

Dated: November 4, 2024

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CERTIFICATE OF COMPLIANCE

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/s/ Kathleen E. Kraft

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I hereby certify that on November 4, 2024, I filed the foregoing document with the United States Court of Appeals for the First Circuit and served it upon all counsel receiving electronic service through the Court's CM/ECF system.

/s/ Kathleen E. Kraft