
**United States Court of Appeals
For the First Circuit**

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

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

**REPLY BRIEF OF APPELLANTS / CROSS-APPELLEES ASSOCIATION
TO PRESERVE AND PROTECT LOCAL LIVELIHOODS, B.H. PIERS,
LLC, GOLDEN ANCHOR, L.C., d/b/a Harborside Hotel, B.H.W.W., L.L.C.,
ACADIA EXPLORER 492, LLC, DELRAY EXPLORER HULL 493 LLC,
AND DELRAY EXPLORER HULL 495 LLC**

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ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE ORDINANCE DID NOT IMPEDE THE FLOW OF COMMERCE IN VIOLATION OF THE DORMANT COMMERCE CLAUSE

A state or local law violates the dormant commerce clause when either its purpose or its effect unduly impedes or burdens the interstate movement of persons and goods. The purpose and effect of the Ordinance precisely does both.

A. PURPOSE AND EFFECT OF THE ORDINANCE

The district court expressly found that the Ordinance would deter 1,000+ cruise ships from visiting Bar Harbor resulting in a reduction of “passenger visitation volume by...at least 80 and possibly north of 90 percent.” APPLL Add. at 17; *see also, id.* at 56. But this is only the start. From here, the district court went on to find that cruise lines may devise itineraries avoiding Bar Harbor (APPLL Add. at 17) and some will likely “adjust to serve the emerging market charted by [Bar Harbor and those following Bar Harbor’s example]” to meet “more constituency-pleasing passenger caps.” *Id.* at 57.

In its subsequent Order denying Appellants injunctive relief pending appeal, the district court was more explicit saying: “it remains the case that the Ordinance is almost entirely capable of achieving the end for which it was drawn, *i.e.*, stemming the tide of daily cruise ship visitation to vessels with lower berth capacities of 1,000 or less.” App. at 290; Denial Order, 287-294. In sum, as the district court made

clear, the Ordinance’s purpose was to bar cruise ships with 1,000+ lower berth capacities and, as the district court ultimately found, if enforced, the Ordinance would have that very effect.

B. THE DISTRICT COURT ERRED IN DENYING APPELLANTS’ AND PILOTS’ CLAIMS THAT THE ORDINANCE VIOLATED THE COMMERCE CLAUSE’S PROTECTION OF THE “FLOW OF COMMERCE”

As is explained below, the Ordinance imposes substantial burdens on the flow of commerce in violation of the dormant Commerce Clause because, in purpose and in effect, the Ordinance impedes cruise ships in the transporting of persons in interstate and foreign commerce. In upholding the Ordinance against this challenge, the district court erred.

1. The dormant Commerce Clause protects the national economy.

Supreme Court decisions have consistently recognized that an essential purpose of the Commerce Clause was to enable the creation of a national economy and to protect that economy from state and local laws that would frustrate it. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979) (Constitution intended to end “Balkanization” of economy); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935) (Constitution was “framed upon the theory that the peoples of the several states must sink or swim together[.]”)

In *Cooley v. Board of Wardens*, the Court recognized this overriding objective of the Commerce Clause noting that certain areas of commerce were fit only for the

exercise of federal power. 53 U.S. 299, 319 (1851). The Supreme Court has repeatedly cited *Cooley* as authority for the principle that the Commerce Clause, of its own force, reserves some areas of policymaking—those essential to creation and preservation of a national economy—exclusively to the federal government. *See, e.g., Tennessee Wine and Spirits Retailers v. Thomas*, 588 U.S. 504, 514 (2017); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 88 (1984); *Exxon v. Governor of Maryland*, 437 U.S. 11, 128 (1978); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945); *Minnesota Rate Cases*, 230 U.S. 352, 399-400 (1913); *Ex Parte McNeil*, 80 U.S. (13 Wall.) 236, 240 (1871).

Southern Pacific succinctly summarized the Commerce Clause’s preemptive effect as depriving the states of the “authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, **if any**, be prescribed by a single authority.” 325 U.S. at 767-768 (citations omitted) (emphasis supplied). The *Minnesota Rate Cases*, which *Southern Pacific* cited for this point (*id.* at 767-68), described this same point more expansively observing that the Commerce Clause, “of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the which

are of such a nature as to demand that, **if regulated at all**, their regulation should be prescribed by a single authority.” 230 U.S. at 399 (emphasis supplied).

In sum, the Commerce Clause’s preemptive force is not limited to those areas essential to a national economy where Congress may one day act; it extends to those areas essential areas in which it may be impractical for Congress ever to act but which, nonetheless, must be insulated from discordant and inconsistent state and local laws. Among these protected areas is the continuous flow of interstate commerce, throughout its course and the instrumentalities and arteries essential to it.

2. The dormant Commerce Clause specially protects the free flow of commerce and the instrumentalities and arteries of commerce.

In *Exxon v. Governor of Maryland*, the Supreme Court highlighted and explained the Commerce Clause’s protection of that aspect of the national economy dependent on interstate transportation saying, “this Court has only rarely held that the Commerce Clause itself preempts an entire field from state regulation, and only then when a lack of national uniformity would impede the flow of interstate goods.” 437 U.S. 11, 128 (1978).

Exxon supported this statement with a general citation to *Wabash St. L. & P. Co. v. Illinois*, 118 U.S. 557 (1886) and a particular citation to *Cooley* 53 U.S. at 319 (1851).

Exxon's citation to *Cooley* confirmed the Commerce Clause's preemption of elements essential to the national economy. *Exxon*'s citation to *Wabash* is telling. *Wabash* concerned an Illinois law setting interstate rates for the railroad company. Finding the law violated the Commerce Clause, the Court observed, "[i]t cannot be too strongly insisted upon that the right of **continuous transportation**, from one end of the country to the other, is **essential**, in modern times, to that freedom of commerce, from the restraints which the states might choose to impose upon it, that the commerce clause was intended to secure. *Wabash*, 118 U.S. at 572-73 (emphases supplied).¹

Noting that this area of Commerce Clause jurisprudence preempted "an entire field" from state or local regulation, *Exxon* then described the contours of this field—that is, it applies where 1) "lack of national uniformity" would 2) "impede the flow of interstate goods." 437 U.S. at 128.

National Pork Producers Council v. Ross expressly noted and confirmed the continued vitality and distinctiveness of the flow-of-commerce line of dormant Commerce Clause jurisprudence. 598 U.S. 356, 379 n. 2 (2023). In addition,

¹ The district court divided "flow of commerce" cases into two categories: 1) those in which a state transportation rule was inconsistent with those of neighboring jurisdictions and 2) those that concerned a state law that "create[d] a monopolistic enterprise that prohibits competition." APPL Add. at 51; *see also, id.* at 55 (Ordinance not discriminatory nor monopolistic). Appellants disagree that this line of cases is limited to these two categories.

National Pork made it clear that this line of authority embraced the “instrumentalities of interstate transportation—trucks, trains, and the like.” *Id.* And, in her concurring opinion, in which she adopted Footnote 2, Justice Sotomayor noted that it also protected the “arteries of commerce.” *Id.* at 392.

A closer examination of *National Pork*’s Footnote 2 informs this point. Footnote 2 acknowledged “a line of cases that originated before *Pike* in which this Court refused to enforce certain state regulations on instrumentalities of interstate transportation—trucks, trains, and the like.” 598 U.S. at 379 n. 2. The cases cited were *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523-530 (1959); and, *Southern Pacific*, 325 U.S. at 763-782. *Id.*

Bibb concerned an Illinois law requiring trucks to use a particular type of mudguard, different from those required in surrounding states. 359 U.S. at 522-523. The *Bibb* Court noted earlier decisions had recognized that regulatory authority over their highways was “broad and pervasive” power to regulate highways. *Id.* at 523, citing, *inter alia*, *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); *Sproles v. Binford*, 286 U.S. 374 (1932). And that state highway “safety measures carry a strong presumption of validity.” *Id.* at 524.

Even so, the Court found Illinois’ safety rationale insufficient to overcome “the great burden of delay and inconvenience” the mudguard rule imposed on

“interstate motor carriers”; thus, running afoul of the Commerce Clause. *Id.* at 529-530.²

Raymond presented a similar case where Wisconsin laws governing the length and configuration of trucks that were inconsistent with comparable regulations in surrounding states. 434 U.S. at 430-431. In invalidating the Wisconsin rule, the Court observed that, “[l]ong ago it was settled that even in the absence of a congressional exercise of this power, the Commerce Clause prevents states from erecting barriers to the free flow of interstate commerce.” *Id.* at 440, citing, *Cooley and Great A&P Tea Company v. Cottrell*, 424 U.S. 366, 370-317 (1976). As with *Bibb*, notwithstanding the significant presumption of validity to which the Wisconsin laws were entitled, it was insufficient to overcome the “substantial burden” those regulations imposed “on the interstate movement of goods.” *Id.* at 444.³

Taken together, *Bibb* and *Raymond* (as well as the plurality opinion in *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662 (1981)), stand for the principle that where state highway safety regulations clash with comparable regulations in surrounding states and thereby impede the continuous interstate

² The *Bibb* Court also noted that there was no “contention” that the mudguard rule was based on economic discrimination. 359 U.S. at 523, n. 3.

³ The *Raymond* Court noted that, although the Wisconsin laws might be considered discriminatory, that consideration was “not decisive” to the Court’s decision. 434 U.S. at 446.

transport of goods, unless those inconsistent rules are strongly justified, they will fall afoul of the Commerce Clause.

Bibb and *Raymond*, then, along with *Southern Pacific* clearly come within the standards first summarized in *Exxon* and then confirmed in *National Pork*: In each case, by acting on the instrumentalities and arteries of commerce, the state laws at issue 1) impeded the flow of interstate transport of goods and persons and 2) created a lack of national uniformity. *Exxon*, 437 U.S. at 128; *National Pork*, 598 U.S. 379, n. 2.

These cases also constitute a distinct subset of the cases coming under the general rule that, for some areas of interstate commerce, the absence of federal rule does mean the states may make their own. *See, Southern Pacific*, 325 U.S. 767 (states may not “regulate those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, **if any**, be prescribed by a single authority”) (emphasis supplied); *see also, Minnesota Rate Cases*, 230 U.S. 399-400 (same). In *Bibb*, *Raymond* and *Southern Pacific*, the Court recognized that, in the absence of controlling federal rule, the states may make rules affecting the transportation of goods and persons but the Commerce Clause commands that

such rules may not so conflict with those of neighboring jurisdictions that they impede that flow.⁴

In sum, *Exxon* and *National Pork* recognized a distinct line of Commerce Clause jurisprudence protecting the right of continuous interstate transport of goods and persons from state and local regulations that would frustrate or defeat it.

3. The Commerce Clause’s protection of the flow of commerce and the instrumentalities and arteries of commerce remains a distinct line of Commerce Clause jurisprudence

The Town and Mr. Sidman assert that Appellants and Pilots have failed to address what the Town terms “modern” Commerce Clause jurisprudence. Town Br. at 47-48; Sidman Br. 25-29. They assert that “modern” dormant Commerce Clause jurisprudence does not recognize a separate line of “flow of commerce” applying to “instrumentalities” and “arteries” of commerce. Town Br. at 47-52; Sidman Br., *id.* Implying that the substantial body of caselaw that comprises flow-of-commerce jurisprudence is confined to the Nineteenth Century⁵ Appellees argue that only two

⁴ The district court appeared to conclude that the Ordinance was valid because a federal rule governing cruise ship passenger disembarkations was impractical. APPLL Add. at 53; *see also*, Sidman Br. at 9, 18. But, as *Exxon* and *National Pork* and the authorities on which they rely make clear, there are some areas of national commerce where no rule at all is mandated over a multiplicity of state or local rules. *See, e.g., Southern Pacific*, 325 U.S. at 767; *Minnesota Rate Cases*, 230 U.S. at 399-400.

⁵ Town Br. at 47-48 (Appellants “rely[] on all manner of 19th century precedent”); Sidman Br. at 28 (Appellants “pry open a labyrinth of 19th Century case law”).

lines of dormant Commerce Clause jurisprudence remain: economic discrimination and *Pike*.

But in advancing this novel interpretation, Appellees fail in two essential respects. First, they cite no Supreme Court precedent that holds that the protection that the dormant Commerce Clause has long extended to the right of continuous transport and to the instrumentalities and arteries of commerce has been exclusively relegated to *Pike*.⁶

Second, neither explains why, if the Supreme Court had actually confined this long and distinctive line of Commerce Clause cases to *Pike*'s analytical construct, first *Exxon* and then *National Pork* took pains to recognize these cases as constituting "an entire field" of jurisprudence in which "the Commerce Clause, itself, pre-empts" state and local laws when those laws frustrate needed "national uniformity" and "impede the flow of goods". *Exxon*, 437 U.S. at 128; *accord*, *National Pork*, 598 U.S. 379, n. 2. In sum, it seems certain that, if Appellees' view were correct, neither *Exxon*'s exception nor *National Pork*'s footnote 2 would have appeared in either decision.

Even as they contend that the whole body of dormant Commerce Clause case law has been reduced to economic discrimination or *Pike*, the Town and Mr. Sidman

⁶ That *Pike* may be applied to a state or local law that stems the flow of commerce does **not** mean that *Pike* is the **only** way to test whether that law violates the Commerce Clause.

rely on *Southern Pacific*, tacitly endorsing it as good law (which it is). *See*, Town Br. at 50-52; Sidman Br. at 17, 26. But, as has been shown above, in confirming the preemptive effect of the dormant Commerce Clause, *Southern Pacific* cited one classic continuous transport decision. *See* 325 U.S. at 767 citing, *inter alia*, *Leisy v. Hardin*, 135 U.S. at 108.⁷

The real reason that it is rare to encounter more recent Supreme Court decisions expressly protecting flow of commerce, *per se*, is because this line of decisions firmly closed the door on such obstructionist state and local laws. It is likely that the clear holdings of those decisions that, more recently, the Supreme Court has encountered state laws ostensibly based on health or safety justifications that both impeded the flow of commerce and, in purpose and effect, were blatantly discriminatory. *see, e.g. Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (“The clearest example of such [discriminatory] legislation is a law that overtly blocks the flow of interstate commerce at a State's borders.” *Citing Welton v. Missouri*, 91 U.S. 275(1875)).⁸ Or, on the other hand, (as Footnote 2 in *National Pork* noted),

⁷ In its order denying Appellants’ and Pilots’ Joint Motion for an injunction pending appeal, the district court described *Leisy* as “puzzling Prohibition Era jurisprudence.” App. at 293. But, as has been seen, *Leisy* is not an isolated precedent. The Supreme Court has repeatedly recognized that, along with other decisions, *Leisy* stands for the principle that states cannot bar the importation from other states of lawful products carried in the continuous interstate transport of goods. *See, e.g., Minnesota Rate Cases*, 230 U.S. at 401; *Southern Pacific*, 325 U.S. at 767.

⁸ That the *Philadelphia* Court held that the New Jersey law was invalid as economic discrimination does not mean that it might not also have been invalid as stemming

concerned idiosyncratic laws or regulations governing rail or truck transport that were inconsistent with those of surrounding jurisdictions. 598 U.S. at 579, n. 2.

Seen against this background, then, it is not the continuous transport caselaw that is a throwback; rather, it is **this** Ordinance with a 1,000 person daily limit and with its brazen claim to brand travelers as both “excess” and “unauthorized” that smacks of an earlier era. *Cf. Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Henderson v. Mayor of New York*, 92 U.S. 259, 271 (1875).

In short, the Supreme Court has never held that the distinctive flow-of-commerce line of authority highlighted in *Exxon* and reconfirmed in *National Pork* has been subsumed by and relegated to analysis within the exclusive confines of *Pike*.

4. The Ordinance’s purpose and effect impede the continuous interstate transport of persons.

At issue is the transport of persons by cruise ships in interstate commerce. This form of commerce comes within the protection of the Commerce Clause. As the Supreme Court has made plain: “All objects of interstate trade merit Commerce Clause protection; none is excluded by definition from the outset.” *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978). To evaluate the Ordinance’s validity under

the continuous transport of goods had the actual transport of solid waste been at issue in that case. *Cf. Minnesota Rate Cases*, 230 U.S. at 400-402 (collecting and categorizing Commerce Clause limits on state authority).

the dormant Commerce Clause, its purpose must be ascertained and its effect determined.

First, as noted at the outset, as to the Ordinance’s **purpose**, the record is clear: the district court found that the Ordinance was “drawn with the passenger capacity of cruise ships in mind” (APPLL Add. at 033) and that “[the Ordinance] was drawn [for the end of] stemming the tide of daily cruise ship visitation to vessels with lower berth capacities of 1,000 or less.” App. 290.

Next, the record as to the Ordinance’s **effect** is equally clear. As has been noted, the district court found that the Ordinance would deter 1,000+ cruise ships from visiting Bar Harbor resulting in a reduction of “passenger visitation volume by...at least 80 and possibly north of 90 percent.” APPLL Add. at 17; 56. The district court went on to find that cruise lines may devise itineraries avoiding Bar Harbor (APPLL Add. at 17) and some will likely “adjust to serve the emerging market charted by [Bar Harbor and those following Bar Harbor’s example]” to meet “more constituency-pleasing passenger caps.” *Id.* at 57.

In other words, the Ordinance will force cruise lines not only to reroute the destinations of 1,000+ vessels but will also force them, if they want to continue to offer visits to Bar Harbor, to design and build “constituency-pleasing” vessels, compliant to whatever limits the Town or any other jurisdiction may choose to impose. Beyond this effect, the district court also found that the Ordinance would

affect the Pilots’ “personnel, vessels, and equipment” and would affect the operations of the Pier Owners and Tender Owners as well. *Id.* at 17.⁹

Finally, in its denial of Appellants’ and Pilots’ Joint Motion for injunctive relief pending appeal, the district court advised that the Order’s “primary point” was that “the Commerce Clause does not protect the cruise line industry’s particular structure [and] method of operation.” App. 291, quoting, APPLL Add. at 058. The Town and Mr. Sidman both argue the same point, treating it, as the district court did, as dispositive. Town Br. at 33-34, 42-44; Sidman Br. at 18-21.

Appellants agree that the dormant Commerce Clause does not broadly protect “free trade” or particular market models. It does, however, protect the free flow of commerce in the transport of goods and persons and it protects the instrumentalities and arteries of commerce essential to that the preservation of that flow. This was of paramount concern in *Exxon*, is shown not only by its citation to *Wabash*, (437 U.S. at 128), but also by its express finding that, even though the Maryland law might cause some refiners to withdraw from the market, “there is no reason to assume that their share of the market will not be promptly replaced by other interstate refiners.” 437 U.S. 117, 127 (1978).

⁹ The piers and tender vessels as well as the Pilots are all “instrumentalities of commerce.” *See, e.g., Henderson.* at 92 U.S. 259.

Beyond that, each of the three decisions cited in Footnote 2 of *National Pork* concerned state laws that disrupted the business models of the rail and trucking companies at issue. In *Southern Pacific*, the Arizona law placed a significant burden on the railroad's preferred model of running longer passenger and freight trains and avoiding the significant additional costs that accommodating that law imposed on it. 325 U.S. at 763-766. Similarly, the state laws in *Bibb* and *Raymond Transport* burdened the trucking companies' chosen business models of using standardized mudguards and running longer trucks. *Bibb*, 359 U.S. at 526-529; *Raymond Transport*, 434 U.S. at 445-446; accord, *Kassel*, 450 U.S. at 674-675.¹⁰

These cases make clear that, although the Commerce Clause does not, in general, protect market structures, it does protect the arteries and instrumentalities essential to the commerce that those markets generate. That is why *National Pork* found that the Commerce Clause did not protect the **production** models of out-of-state pork producers from the standards required by the California statute but that, a state law which impeded the **transport** of cattle did. *St. Jos. & Hannibal Railroad Co. v. Husen*, 95 U.S. 465. 473-474 (1877).

¹⁰ *Bibb* and *Raymond* also recognized the states' strong interest in highways because of their significant monetary contributions to highway construction and maintenance. The Town has no such claim for the maritime arteries of commerce nor the instrumentalities that serve them that are at issue in this case.

The dormant Commerce Clause, then, provides special protection to the preservation of the national economy and the flow of commerce, the right of continuous transport, and the arteries and instrumentalities essential to the preservation of that flow. Where, as here, a law “does indeed stem the flow of interstate commercial activity” in the transport of persons (APPLL Add. 51), the bar for sustaining that law is high. See, *Husen*, 95 U.S. at 473, (“absolute necessity”); accord, *Bayley’s Campground v. Mills*, 985 F3d 153, 159-160 (1st Cir. 2021).

Yet, here, notwithstanding the Ordinance’s purpose and effect, as found by the district court, the court, itself, endorsed the lowest of hurdles finding that the Ordinance passed Commerce Clause muster by promoting the Town’s “comparative tranquility.” APPLL Add. at 58, citing *Memphis v. Greene*, 451 U.S. 100, 126-127 (1981).¹¹ Both the Town and Mr. Sidman argue for similar insubstantial standards of review. Town Br. at 46-47; Sidman Br. at 22-23.

As a Commerce Clause standard, *Greene*’s test “comparative tranquility” and similar standards urged by Appellees, particularly Mr. Sidman, is so low that it is no standard at all. Cf., *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (“generic influence theory...is unbounded and susceptible to no limiting principle.”)

¹¹ *Greene* concerned an Equal Protection challenge to the City of Memphis’ change to a zoning ordinance. The Commerce Clause was not at issue. 451 U.S. 100, *passim*. *Greene* has no pertinence to Appellants’ or Pilots’ claims.

As the district court found, the Ordinance stems the flow of the interstate and international transport of persons. Yet the local interests that the district court found the Ordinance served do not meet the high standard the Commerce Clause requires for such an effect. Therefore, the Ordinance fails the standard.

C. THE ORDINANCE EFFECTS ECONOMIC DISCRIMINATION.

Appellants adopt the arguments of Pilots that the Ordinance effects economic discrimination.

D. THE ORDINANCE FAILS THE COMMERCE CLAUSE REVIEW MANDATED BY *PIKE V. BRUCE CHURCH, INC.*

Although *Pike* is not the exclusive test for the Ordinance’s validity, the Ordinance fails the *Pike* test. *Pike requires that*, “...once a state law has been shown to discriminate against interstate commerce ‘either on its face or in practical effect,’ the burden falls on the state to demonstrate both that the statute ‘serves a legitimate local purpose’ and that this purpose could not be served as well by available nondiscriminatory means.” *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)); *see also Washington State Apple Advertising Commission v. Hunt*, 432 U.S. 333, 353 (1977); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This test requires—as all Commerce Clause tests require—that the state or local interest served must be “legitimate.” Town public officials testified that cruise

ship visitors posed no public safety risk. App. 260 at ¶229; PX 197 at ¶113, *see also*, App. 259-260 ¶¶223-230.

As has been discussed above, the district court found that the Ordinance was designed to “stem[] the tide of daily cruise ship visits to vessels with lower berth capacities of 1,000 or less.” App. 293. And it found that the Ordinance had that effect. APPLL Add. at 051. It found further that the Ordinance would force cruise lines to change their ports of call and even their vessels to accommodate “more constituency-pleasing caps.” *Id.* at 057. Thus, the district court found that Ordinance imposed a severe burden on an economic sector exclusively dedicated to the interstate and international transport of persons.

As has also been discussed above, the local interest the Ordinance purports to serve is limited in the extreme—that is, to bring “comparative tranquility” to Bar Harbor. APPLL Add. at 058.¹²

With these findings, under *Pike*, the Town was required to show that it could not address these “congestion” interests through less burdensome means. *Hunt*, 432 U.S. 336. The Appellees have not done so and the district court erred.

¹² Although the district court singled out the waterfront as an area of particular concern, it also acknowledged that the Town had successfully managed cruise ship disembarkation at this point. APPLL Add. at 013-014.

E. THE DISTRICT COURT ERRED IN DENYING APPELLANTS' CLAIM THAT THE ORDINANCE VIOLATED THE RIGHT TO TRAVEL AS PROTECTED BY THE DORMANT COMMERCE CLAUSE

1. The District Court erred in finding that the Complaint did not plead the right to travel

Without explaining how it had reached this conclusion, the District Court refused to consider Appellants' right to travel claim brought under the dormant Commerce Clause on the grounds that Appellants had not pled this claim. APPLL Add. 037, n. 23. Whatever may have been the district court's reasoning on this point, it is wrong.

To begin with, Appellants consider the district court's summary treatment of this claim as the functional equivalent of dismissal for failure to state a claim. This Court has articulated the standards for judging the sufficiency of a complaint. *Doe v. Stonehill College*, 55 F.4th 302, 316 (1st Cir. 2022). The Complaint allegations on the Ordinance's impact on cruise ship travelers meets these standards

Both APPLL and the Pilots' Complaints alleged that the Ordinance limited the ability of passengers to travel by cruise ship to Bar Harbor. Appellants' Complaint set forth these allegations at App. 26-59 at ¶¶ 2 & 3 (Summary), 12, 13-15, 77. 82-83, 96-97, 99, 104, 107, 114-116, 118-120. The Pilots' Complaint made

similar allegations. App. 80-117 at ¶¶ 1-10, 38, 61-76, 99-126.¹³ Appellants and Pilots sufficiently pled the right to travel under the Commerce Clause.

2. The right to travel is included in the protection that the dormant Commerce Clause provides to the interstate transportation of persons and goods.

Although the Supreme Court has found that several constitutional sources guarantee the right to travel, it is beyond question that it is firmly grounded in the Commerce Clause. *United States v. Guest*, 383 U.S. 745, 758-759 (1966), citing, *Edwards v. California*, 314 U.S. 160 (1941). *Guest* also confirmed that as protected by the Commerce Clause, the right to travel was not an exotic outlier detached from the extensive body of case law protecting the interstate transport of goods and persons.

As *Guest* explained, to the contrary, the right to travel as upheld by *Edwards* “was consistent with precedents firmly establishing that the federal commerce power surely encompasses the movement in interstate commerce of persons as well as

¹³ The Town and Mr. Sidman contend they may not maintain a right to travel claim because, in their Motion for Preliminary Injunction, Appellants were not “plead[ing] the rights of the traveling public.” Town Br. at 54 (citing Mot. for Prel. Inj., U.S. District Court ECF 12, at 24, n. 12.); Sidman Br. at 30. Appellees’ point is both wrong and irrelevant. It is wrong because the Motion for Preliminary Injunction does not control the Complaint. Second, Appellants’ point is consistent with Appellants’ right to travel claim. The right to travel has been recognized under several constitutional theories. Appellants’ right to travel challenge is based on the right to travel as a collective right which the dormant Commerce Clause protects for the benefit of the national economy. *Edwards v. California*, 314 U.S. 160, 173-174 (1941).

commodities.” *Id.*, citing *Gloucester Ferry Co. v. Commonwealth of Pennsylvania*, 114 U.S. 196, 203 (1885); *Covington & Cincinnati Bridge Co. v. Commonwealth of Kentucky*, 154 U.S. 204, 218-219 (1894). Shortly after *Edwards*, the Supreme Court cited it in support of general Commerce Clause principles. *Southern Pacific*, 325 U.S. at 727; *see also Morgan v. Commonwealth of Virginia*, 328 U.S. 373 (1946).¹⁴ But Supreme Court recognition of the right to travel long pre-dates *Edwards*. *See Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 47-49 (1867) (invalidating a tax on interstate passengers).

As has been seen, the Commerce Clause protects the national economy. And, where the right to travel is concerned, it serves that goal by not only protecting the individual’s right to travel but those participants in that economy—including Appellants—who benefit from that freedom of movement. Through coercion, the Ordinance seeks to sanction the Pier Owners into barring the admission of the 1,001st person and all who follow. This offends general Commerce Clause principles as well as the right to travel. *See, Minnesota Rate Cases*, 230 U.S. at 401 (“states have no power to prohibit interstate trade in legitimate articles of commerce”).

The Ordinance bars the admission into Bar Harbor of cruise ship visitors in numbers above 1,000 on every calendar day without limiting any other persons

¹⁴ Contrary to Mr. Sidman’s assertions, Appellants’ Commerce Clause arguments on the Ordinance’s impact on the interstate movement of good and persons were fully applicable to the right to travel claim. Appellants did not have to repeat them.

coming by other modes of transportation. As such, it violates the right to travel as guaranteed by the Commerce Clause.

II. THE DISTRICT COURT ERRED IN FAILING TO GRANT INJUNCTIVE RELIEF ON APPELLANTS’ AND PILOTS’ SEAFARER PREEMPTION CLAIM AND CHAPTER 52 HAS NOT RENDERED APPELLANTS’ APPEAL MOOT

A. THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF BASED ON SEAFARER PREEMPTION

The district court found that the insertion of the word “persons” into the Ordinance was deliberate and intended to expand its reach to all disembarking persons. APPLL Add. at 12. Upon its incorporation into the Land Use Ordinance, “persons” as used in the Ordinance assumed the meaning of that term as long defined in the Land Use Ordinance. Chapter 125-109. Persons. The meaning of “persons” is unambiguous; it applies to seafarers. APPLL Add. 031. Moreover, upon its enactment, the meaning of all material terms in the Ordinance, including “persons” became fixed. *Loper-Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024).

When the Order was issued, the Town had not changed the meaning of “persons” and the Ordinance still applied to seafarers. APPLL Add. at 28-32. Under these circumstances, Appellants and Pilots were entitled to an injunction barring the Town from enforcing the Ordinance until such time as the Town validly amended it to exclude seafarers.

B. THE TOWN COUNCIL'S ADOPTION OF CHAPTER 52 DID NOT MOOT THIS APPEAL

The Town argues that the Town Council's adoption of Chapter 52 on June 18 mooted this appeal. Town Br. 22-25. The Town is wrong.

First, by its plain terms, Chapter 52 neither amended nor repealed the Ordinance; indeed, Chapter 52 does not even amend the Land Use Ordinance of which the Ordinance is a part. Town Add. at 42-44, Ch. 52, *passim*. The Ordinance remains in full force and effect.

Second, to the extent the Town is claiming that Chapter 52 effects a substantive change to the Ordinance, Chapter 52 violates the Town Charter and LUO Section 125-9 that reserves changes to the Land Use Ordinance to the Town Meeting. APPLL Add. at 69-75.

Third, when the Town issued a Notice of Violation to Golden Anchor, one of the Pier Owners in this appeal, Golden Anchor sued the Town alleging, *inter alia*, that Chapter 52 was invalid under the Town Charter and state law. See **Exhibit A**. Golden Anchor's complaint is pending in the Business and Consumer Court as Docket No. BCD-CIV-2024-00046.

For these reasons, the Town Council's enactment of Chapter 52 has not rendered Appellants' appeal moot.

III. THE DISTRICT COURT ERRED IN DENYING APPELLANTS' AND PILOTS' CLAIM THAT THE ORDINANCE WAS PREEMPTED BY FEDERAL LAWS GOVERNING THE ADMISSION OF FOREIGN NATIONALS

Appellants and Pilots assert that the Ordinance imposes an additional criterion for entry into the United States, over and above any imposed by the United States, itself—that is, that the person that Customs and Border Protection has screened as the 1,001st person to disembark may not enter that day. The Town and Mr. Sidman deny that this is so. The Ordinance’s plain language, by itself, refutes their defense.

The Ordinance imposes an additional condition for entry into Bar Harbor and, thereby, the United States. This is shown by its designation of all disembarking persons above 1,000 as “excess” and, thereby, “**unauthorized.**”¹⁵ It renders the 1,001st person and all who follow that person as threats of sufficient magnitude to the general public of Bar Harbor that the Town is justified in invoking its police to coerce and sanction certain private pier owners in order to keep those persons from entering the Town.

But the Town denies a conflict with federal entry standards because “[t]he pier owners simply face penalties if they permit more than 1,000 daily disembarkations.”

¹⁵ *Cf.* “**Authorize. 1.** To grant authority or power to. **2.** To approve or give permission for; to sanction. *Authorize a highway project.* **3.** To be sufficient grounds for: justify.” The American Heritage Dictionary of the English Language (ed. 1976).

Town Br. at 19; 19, n. 3. But that overlooks both the Ordinance’s structure and its intended effect.

First, all of the persons meeting the numerical status of “excess unauthorized persons” under the Ordinance have been lawfully admitted to the United States. Certainly, as far as the Federal Government is concerned, they may all come ashore.

Notwithstanding this federal clearance, the Ordinance imposes sanctions on the Pier Owners “if they **permit** more than 1,000 daily disembarkations in Bar Harbor.” (emphasis supplied). *Id.*¹⁶ *Cf.* Footnote 8.

Rather than fully engage with Appellants on this point (or even with the inexorable force of the Ordinance’s penalties), both the Town and Mr. Sidman take refuge in the illusory haven provided by the Amended Decision—that is, that the cruise lines won’t come to Bar Harbor so then neither the Town nor the Pier Owners will ever confront the circumstance of barring a CBP-cleared person from entering the Town. APPLL Add. 032-034; Town Br. at 19, n. 3; Sidman Br. at 41. But this is sheer avoidance. And Appellants’ and Pilots’ argument on this point is no less strong because the Town and Mr. Sidman chose not to address it.

¹⁶ Absent entirely from the Town’s brief is any explanation of the source, nature and extent of the Pier Owners’ authority to refuse to “permit” persons otherwise lawfully to come across their piers and enter into Bar Harbor; piers which, though privately owned, are open to the public.

In both its purpose and its effect, the Ordinance necessarily places “a discriminatory burden upon the entrance or residence of an alien lawfully within the United States.” *Toll v. Moreno*, 458 U.S. 1, 11 (1982) (quoting *Takashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948)).

Under these circumstances, the *only* impediment to their entry into the Town is the Ordinance. For the 1,001st person to disembark (and all who follow), their federal immigration and customs clearance means nothing.¹⁷

IV. THE DISTRICT COURT ERRED WHEN DENYING APPELLANTS’ DUE PROCESS CLAIM

As this Court has explained, a law will survive a Due Process challenge if it has a “reasonable relation to a proper legislative purpose” and is “neither arbitrary nor discriminatory.” *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 483 (1st Cir. 2009) quoting, *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

Appellants’ Due Process challenge is based on the lack of rational connection between the Ordinance’s ostensible purpose—reducing pedestrian congestion, and the means it employs—singling out the relatively small number of persons disembarking from cruise ships from the millions of persons who visit Bar Harbor by land-based transportation. APPLL Add. at 008.

¹⁷ In Chapter 52, the Town Council went even further effectively designating the 1,001st person and all who follow as public nuisances within the meaning of the Town’s Land Use Ordinance. Town Add. at 44 (§52-8(b); 125-101).

In addition, the Ordinance imposes its 1,000-person limit every day of the year, including which the record demonstrated, did not involve large scale visits by persons arriving by means of conveyance other than by cruise ship. APPLL Add. at 077, Section 2.

Given its ostensible goal, the Ordinance irrationally and arbitrarily singles out 1,000+ cruise ships and cruise ship visitors. But the disparity between the Ordinance's putative objective—not its actual purpose and objective as found by the district court—and the means it employs to achieve it coupled with its irrational targeting of the thousands of persons disembarking from cruise ships while ignoring the millions that arrive at Bar Harbor by all other means of conveyance violate even the very low bar that substantive Due Process sets. In addition, it applies to times of year when the Town's own long experience has demonstrated that the volume of pedestrians poses no problems.

The Ordinance, then, cannot be justified in terms of its ostensible goals but, rather, by its purpose and effect, as found by the district court, to exclude cruise ships with lower berth capacities in excess of 1,000 persons. APPLL Add. at 33; App. 293. For these reasons, the Ordinance fails muster under Due Process standards.

V. CONCLUSION

For the reasons set forth above, Appellants ask this Court to declare and judge that the Ordinance violates the Commerce Clause, is preempted by federal law and

rules, and, arbitrary and irrational in violation of the Due Process Clause and to enter a permanent injunction barring the Town from enforcing it.

Respectfully submitted,

/s/Timothy C. Woodcock

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CERTIFICATE OF COMPLIANCE WITH RULE 32

1. This brief complies with the page length limitation of Fed. R. App. P. 32(a)(7)(A) because this brief contains 28 pages, and Fed. R. App. P. 32(a)(7)(B) as it contains 6,486 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Standard in Times New Roman 14-point font.

/s/Timothy C. Woodcock

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2024, I electronically filed the foregoing with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

/s/Timothy C. Woodcock

STATE OF MAINE
HANCOCK, SS

SUPERIOR COURT
DOCKET NO. 2024-

GOLDEN ANCHOR L.C.,)	
Plaintiff)	
vs.)	COMPLAINT FOR DECLARATORY
)	JUDGMENT PURSUANT TO 14
TOWN OF BAR HARBOR,)	MRS § 5951, <i>ET SEQ.</i> AND FOR
Defendant)	INJUNCTIVE RELIEF PURSUANT TO
)	RULE 65(b) OF THE MAINE RULES
)	OF CIVIL PROCEDURE
)	

NOW COMES, Golden Anchor L.C., Plaintiff, and files its complaint against the Town of Bar Harbor, Defendant, seeking declaratory and injunctive relief as follows:

I. PARTIES

1. Plaintiff, Golden Anchor L.C., is a limited liability company, duly organized under the laws of the State of Florida with a principal place of business in Delray Beach, County of Palm Beach, State of Florida, and authorized to transact business in the State of Maine.
2. The Town of Bar Harbor is a municipal corporation, duly organized under the laws of the State of Maine, and located within the County of Hancock, State of Maine.

II. JURISDICTION

3. This Court has jurisdiction over these proceedings under the Declaratory Judgment Act, 14 M.R.S. § 5951, *et seq.*, and under authority providing for the issuance of preliminary injunctive relief, pursuant to Rule 65(b) of the Maine Rules of Civil Procedure 42 U.S.C. §§ 1983, 1988, common law and equitable authority of this Court, regarding violations of the Constitutions of the United States and the State of Maine.

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III. VENUE

4. Venue lies in this Court pursuant to 14 M.R.S. § 501, *et seq.*

IV. FACTUAL BACKGROUND

Notice of Violation –Summary of Claims

5. On August 5, 2024, the Town of Bar Harbor (“the Town”) issued a Notice of Violation (“NOV”) to Plaintiff, Golden Anchor L.C., for allegedly violating an ordinance, termed the Disembarkation Ordinance, that the Town Council had approved on June 18, 2024 over written and in person objections by representatives of Plaintiff. The Disembarkation Ordinance purported to govern the Plaintiff’s operations at the Golden Anchor dba Harborside Pier (the “Pier”). A true copy of the NOV and all attachments thereto are attached herewith. **Exhibit A.1 and Exhibits A.2-7 inclusive.**

6. In this action, Plaintiff challenges the Disembarkation Ordinance on the following grounds;

- a) the Town Council’s adoption of the Disembarkation Ordinance violated the Town Charter and the Town’s implementing ordinance provision governing substantive amendment of the Town’s Land Use Ordinance at Section 125-9(E) (Count I);
- b) that, by employing an invalid process for adopting the Disembarkation Ordinance, the Town violated the United States Constitution and the Maine Constitution (Count II);
- c) that, by unilaterally rendering void the prior Town site plan approval of the Planning Board and the prior Wharves and Weirs Act permit issued by the Town Council to Plaintiff for its pier for marina and cruise ship disembarkation purposes, among other purposes, and to force Plaintiff to accede to the replacement of said prior Town permits with a new permit for the longstanding Pier, that the Disembarkation

Ordinance violates the Town’s protection of longstanding uses under Sections 125-52 through 124-54 that are made lawfully nonconforming by virtue of any amendment of the Land Use Ordinance, and further violates Plaintiff’s vested rights in said prior permits in violation of the United States Constitution and the Maine Constitution (Count III);

- d) that, in attempting to delegate to Plaintiff, a private party, duties, responsibilities and authorities that are inherently governmental and were assigned to the Harbor Master under 125-77(H) and which the government is wholly barred from delegating, the Disembarkation Ordinance violated the Maine Constitution and related statutes (Count IV);
- e) that, in seeking to delegate to Plaintiff inherently non-delegable governmental powers and duties and sanctioning Plaintiff for failing to accept and execute those non-delegable powers and duties, the Disembarkation Ordinance violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and both the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution (Count V);
- f) that, in subjecting Plaintiff to fines for the actions of third parties without providing Plaintiff with the authority and powers to avoid or prohibit the conditions giving rise to such fines and without authorizing Town officials to exercise powers to enable Plaintiff to avoid the conditions giving rise to such fines, the Disembarkation Ordinance violates the United States Constitution and the Maine Constitution (Count VI);

- g) that, in requiring Plaintiff to commit to the terms of permits issued by the Town under the authority of the Disembarkation Ordinance, which terms are invalid and unconstitutional, the Town has violated Plaintiff's constitutional rights (Count VII);
- h) that, by categorizing and distinguishing "Persons" (with a capital "P") coming to the Town by cruise ship, as opposed to all other persons coming within the Town by all other means of conveyance and by imposing a rigid limitation of 1,000 on such "Persons", applicable every day of the year irrespective of the seasonal variations in visitation to the Town that the Town, itself, had recognized, permitted and allowed for decades and, through the voluntary caps and the MOAs, had applied as official Town policy, the Disembarkation Ordinance is discriminatory, arbitrary and capricious and lacks a rational nexus between its purpose and the means it employs in violation of the U.S. Constitution and Maine Constitution (Count VIII); and,
- i) that, in providing that each human being fitting the definition of "Persons" (with a capital "P") arriving at the Pier in numbers greater than 1,000 as a "nuisance" (within the meaning of Section 99 of Chapter 125 the Town's Land Use Ordinance and implicitly under 30-A M.R.S. Section 4302) and subjecting Plaintiff to fines and other sanctions, including revocation of the Town Permits, for "allow[ing]" such "Persons" to disembark at the Pier, the Town Council has tacitly acknowledged under 30-A MRS Section 4302 that Chapter 52 is a Land Use Ordinance that can only be adopted by the Voters, has exceeded its Charter authority, has exceeded its Home Rule Authority under Article VIII, Part Second, Section 1 of the Maine Constitution and 30-A M.R.A. Sections 3001 and 4302 as well as other provisions of the Maine Constitution and of the United States Constitution. (Count IX).

7. Since 2000, Plaintiff has owned and operated the Golden Anchor dba Harborside pier (“the Pier”) located at 55 West Street in the Town of Bar Harbor. At all times material, Plaintiff has held and continues to hold a property interest in the Pier.

8. The Pier is the principal disembarkation point for visitors arriving in Bar Harbor by cruise ship.

9. In 2001 to 2008, the Town issued permits (“Town Permits”) to operate the Pier as such, including for the purpose of facilitating the disembarkation of all persons arriving at Bar Harbor by cruise ship and their return from Bar Harbor to those cruise ships. In issuing recommendations from the Planning Staff prior to the Planning Board issuance of Site Plan Approval and in the Harbor Committee’s recommendation to the Town Council prior to issuance of the Wharves and Weirs Act Permit, the Town officials and officers recognized the use of the Pier for cruise ship disembarkation. Indeed in March 2008, the Harbor Committee unanimously agreed to recommend approval of the Wharf License for the expansion of the Golden Anchor Pier on the north side of the existing pier. In so doing, the Harbor Committee memo of March 14, 2008 cited “the primary reason for the recommendation is move the cruise ship tender landing and associated traffic to a more isolated part of the harbor.”

10. At no time from April 1, 2008, until June 18, 2024 did the Town change the terms of the Town Permits nor Plaintiff’s duties and responsibilities pursuant thereto, including but not limited to the Town Permit’s authorization to Plaintiff to use the Pier for the disembarkation of persons arriving at Bar Harbor by cruise and for the return of those persons from Bar Harbor to the cruise ships. And, at no time over the subsequent long use of the Pier was a notice of violation for disembarkation of cruise passengers issued for the Pier until August 5, 2024.

Cruise Ship Visits and Bar Harbor

11. In 1998, the Town adopted a master plan to encourage cruise ships to visit Bar Harbor to provide greater economic opportunity and to extend the more active tourist-based season from July and August into the “shoulder seasons” of April through June and from September into November.

12. After the cruise ships anchor, several tender vessels then bring passengers and crew to one of two privately-owned piers of which the Pier is one.

13. Plaintiff made significant investments to acquire the property on which the Pier was located and to make improvements to the Pier so that it could, among other purposes, accommodate the cruise ship visits and enable the Town to realize its goal of encouraging more cruise ship visits and expanding economic opportunities throughout the Town and the surrounding area.

14. The cooperative efforts of the Town, the State, and other essential participants, including Plaintiff, were successful. Cruise ship visits increased, particularly in September and October. In 2016 a peer-reviewed economic study prepared by University of Maine economic professor, Todd Gabe, Ph.D. estimated that cruise ship visits generated \$20.2 million in local spending, \$5.4 million in labor income, and helped support 379 local jobs.

15. Cruise ship visits have played and continue to play a crucial role in expanding the narrow tourist season, permitting many businesses, which had been unable to do so before, to operate in the April to June and September to November shoulder seasons beyond the late June to late August peak summer season when land-based tourism visitation occurs.

Voluntary Caps

16. Early on, Town leaders recognized that cruise ship visits to Bar Harbor required planning and management. Working cooperatively with cruise ship representatives, the Town developed a system of “voluntary caps” which were based on the Lower Berth Capacities of visiting cruise ships—that is, the capacity of cruise ships to accommodate passengers rather than on their actual disembarkation and occupancy on a given visit—and which placed a daily ceiling on cruise ship visitation. These daily limits were tailored to conform to the tourist season with higher daily limits applying in the months of April through June and September into November and with lower ceilings applying in the heavier tourist months of July and August.

17. The Town also established a committee to review cruise ship visits and, each year, to report its findings and recommendations, which were non-binding, to the Town Council. The Town Council was also required, each year, to review those reports and recommendations and to approve voluntary caps for the coming season. This process remained in effect from 2008 until 2022 when the Town Council replaced it with contractual agreements between the Town and individual cruise lines, which was also based on the cruise ships’ Lower Berth Capacities, setting daily, monthly and annual limits for cruise ship visits. These contractual agreements were termed “Memoranda of Agreement” (“MOAs”).

Ordinance Limiting Persons Disembarking from Cruise Ships

18. In March of 2022, a citizen-originated initiative (“the Initiative”) was circulated to Bar Harbor voters that would limit to 1,000 the number of “persons” who could disembark from a cruise ship and enter into the Town on each calendar day without the imposition of a penalty.

19. On November 8, 2022, meeting in Town Meeting, Bar Harbor voters approved the initiative in its entirety; thereafter, it was codified at Chapter 125-77(H) (“the Ordinance”)

Exhibit A.4.

20. As approved at the November 8, 2022 Town Meeting, the Ordinance provided as follows: a) that no more than 1,000 persons, in the aggregate, may disembark on a single calendar day from a any cruise ship(s) and come to shore on, over, or across a property located in the Town[.]”; b) that the determination as to whether more than 1,000 persons had so disembarked was to made by the Harbor Master; *id.* at § 77(H)(2); c) that the Harbor Master was required to “develop rules and regulations” i) for cruise ship reservations, ii) a “mechanism for counting and tracking the number of persons disembarking each day”; iii) “a mandatory procedure for reporting violations to the Code Enforcement Officer” and, iv) that the Harbor Master was authorized to develop “any other provisions” pursuant to Subsection 77(H)(3). *Id.* at § 77(H)(3).

21. For each “excess unauthorized person” disembarking at the Pier—that is, each person over the Ordinance’s “1,000-persons-per-day limit,” the Ordinance authorized the Code Enforcement Officer to impose fines ranging from \$100 to \$5,000 for each such “excess unauthorized person.” *Id.* at § 77(H)(3), (4); see also, 30-A M.R.S. §§ 4452 and 4452(3)(B).

22. The Ordinance did not provide sanctions for any persons or entities other than owners and operators of the private piers. The Ordinance did not provide owners and operators of the two private piers with any authority to prevent the disembarkation of “excess unauthorized persons” from cruise ships into Bar Harbor. *Id.* at 77(H), *passim*.

23. The Ordinance did not provide any authority for the Town, itself, whether through the Harbor Master, the Code Enforcement Officer, the Town Police or any other Town official, to

prevent the disembarkation of “excess unauthorized persons” from cruise ships into Bar Harbor. *Id., passim.*

24. At all times material, including when Bar Harbor voters approved the Ordinance, the Town’s Land Use Ordinance has defined the word “person” as meaning “[a]n individual, corporation, governmental entity, agency , municipality, trust, estate, partnership, association, two or more individuals having a joint or common interest, or other legal entity.” Town Code at Chapter 125-109, “PERSON”. **Exhibit B.1.**

25. Under the Town Charter, except under limited conditions not applicable to the Town Council’s adoption of the Disembarkation Ordinance, the Town Council may not alter, amend, or add to the Town’s Land Use Ordinance. Town Charter, Section C-10A(9)(d)(1)-(2); see, also, Section C-14C(3). **Exhibits B.2 and B.3.** At Section 125-9(E), the Land Use Ordinance provides an “amendment” provision that makes clear the distinction between the Town Council’s charter authority to adopt “minor technical and conformance” changes to the Land Use Ordinance and the Town Meeting’s charter authority to adopt all other amendments to the Land Use Ordinance when it declares, in 125-(9)(E) that the manner of amending the Land Use Ordinance is by action of the Town Meeting (i.e., the voters of the Town). **Exhibit B.4.**

Plaintiff’s Challenge to Ordinance/U.S. District Court Decision

26. Following the approval of the Ordinance at the November 8, 2022 Town Meeting, Plaintiff and others filed a complaint in the U.S. District Court for the District of Maine against the Town seeking a declaratory judgment that the Ordinance violated certain provisions of the U.S. Constitution and, further, seeking injunctive relief barring the Town from enforcing the Ordinance.

27. Among other claims, Plaintiff challenged the Ordinance on the grounds that its application to “persons” covered crew members who would seek to disembark from cruise ships and enter into the Town. Plaintiff alleged that the Ordinance’s application to crew members violated U.S. Coast Guard regulation 33 C.F.R. § 105.237, which protects the disembarkation rights of crew members (also referred to as “seafarers”).

28. On May 31, 2023, shortly before the July 11-13 bench trial in U.S. District Court on Plaintiff’s Complaint, a “Working Group” composed of Town officials, issued a memorandum to the Town Council advising that it would present “proposed rules that would clarify the meaning of the term ‘persons’ as that term (or the singular of that term) is used in Sections 125-77(H)((2,)3) and (4) (“Town Memorandum”).” **Exhibit C**. The Town Memorandum explained that the “clarification” was necessary “to avoid potential conflict with...33 C.F.R. § 200 and 33 C.F.R. § 105.237.” *Id.*

29. The Working Group never issued any such proposed rules.

30. On March 1, 2024, the district court issued an Amended Decision and Order (“Order”) denying most of Plaintiff’s constitutional challenges to the Ordinance but finding that the Ordinance’s application to disembarking crew members conflicted with and was preempted by Section 105.237. **Exhibit D** (Order) at 28-32, 60.

31. In reaching its decision on this point, the District Court expressly found that, as originally proposed, the Ordinance had not used the word “persons” for purposes of calculating the numerical limit but, instead, had used the word “passengers.” *Id.* at 12.

32. The District Court found that, before its enactment, proponents of the Initiative had struck the word “passengers” wherever it appeared in the proposed legislation and replaced it

with “persons” for the purpose of expanding its reach to encompass all persons disembarking from cruise ships including crew members. *Id.*

Disembarkation Ordinance—June 18, 2024

33. On June 18, 2024, the Town, acting by and under the authority of the Town Council, enacted a new law governing disembarkation from cruise ships (“Disembarkation Ordinance”). **Exhibit A.5**.

34. Following approval by the Town Council, the Disembarkation Ordinance was codified at Chapter 52, Sections 1-8 of the Town Code.

35. The Disembarkation Ordinance provides that, “[t]he purpose of this Chapter is to govern disembarkation of Persons to docks or land within the Town from cruise ships and implement the purpose and intent of § 125-77(H) [the Ordinance] of the Town Code.” **Exhibit A.5**, § 52-1.

36. The Disembarkation Ordinance provides further its definition of the word “Persons” with a capital “P”, governs “the enforcement of § 125-77(H)”; that is, it changes and governs the meaning of the word “persons” with a small “p” as used in the Ordinance and as defined in the Land Use Ordinance. *Id.* at §5, “Persons.”; *cf.*, **Exhibit A.4**, §§ 77(H(2)-(4)); with **Exhibit B.1**, § 125-109, “PERSON”.

37. In particular, the Disembarkation Ordinance purports to change the meaning of “persons” in the Ordinance to exempt seafarers whose disembarkation rights are protected by 33 C.F.R. § 105.237.

38. The Chapter 52 Disembarkation Ordinance purports to accomplish this change in the meaning of “persons” in the Ordinance by providing its own definition of “Persons” with a capital “P”. As redefined in the Chapter 52 Disembarkation Ordinance, “‘Person’ means

passengers of cruise ships and **not** those covered by 33 C.F.R. § 200 and 33 C.F.R. § 105.237 (titled, “System for seafarers’ access”), namely, ‘vessel personnel,’ ‘vessel crew,’ ‘seafarers assigned to a vessel,’ ‘pilots,’ and ‘representatives of seafarers’ welfare and labor organizations’ (collectively ‘crew’). The word ‘person’ (i.e. not capitalized) shall have the meaning provided by § 125-109 of the Town Code.” **Exhibit A.5** § 52-5, “Person”.

39. In addition, the Disembarkation Ordinance applies to any “Cruise Ship Disembarkation Facility” (“CSDF”). *Id.* at 52-6(A) It defines a Cruise Ship Disembarkation Facility as “a public or private property, or a public or private structure, used for disembarkation of persons arriving on land from cruise ships.” *Id.* at § 52-5, Cruise Ship Disembarkation Facility (“CSDF”). The Disembarkation Ordinance defines a “CSDF Owner” as “an individual, corporation, governmental agency, municipality, trust, estate, partnership, association, two or more individuals having a joint or common interest, other than a legal entity that owns, operates, or otherwise is authorized to represent the CSDF.” *Id.* at § 52-5, CSDF Owner.

40. The Disembarkation Ordinance requires CSDF owners to obtain a permit to operate the CSDF. *Id.* at § 52-6(A).

41. In addition to requiring a permit, the Chapter 52 Disembarkation Ordinance also provides that all “CSDF Owner[s] shall submit an application to the Code Enforcement Officer, or designee, for a Disembarkation Permit to allow on a specified calendar day a specified number of Persons not exceeding 1,000 to disembark from one or more cruise ship(s) with a confirmed reservation for anchorage.” *Id.* at § 52-6(C)(1).

42. In effect, without expressly so providing, the Disembarkation Ordinance voids Plaintiff’s prior Town Permits for the Pier, rendering it without force and effect and seeks to require Plaintiff to apply for a new permit, in conformity with the Disembarkation Ordinance.

Id. at § 52-6(A), 52-6(C)(1)-(4); see, also, *id.* at A.6-7, contrary to the protections given to lawfully nonconforming uses under Sections 125-52 through 124-54 of the Town’s Land Use Ordinance.

43. Under the Disembarkation Ordinance, the Pier is a CSDF and Plaintiff is a CSDF Owner. Therefore, the Disembarkation Ordinance applies to both the Pier and to Plaintiff as owner and operator of the Pier.

44. The Disembarkation Ordinance provides further that the Code Enforcement Officer “shall grant the [the CSDF Owner’s] application and issue a Disembarkation Permit for the maximum number of Persons that does not cause the Daily Disembarkation Limit established by § 6(C)(4) of this Chapter to be exceeded.”

45. As has been set forth above, the Chapter 52 Disembarkation Ordinance is intended to override, superseded, and effectively replace the underlying Ordinance’s undifferentiated application to all “persons” including seafarers protected by 33 C.F.R. § 105.237 which the District Court found unconstitutional. **Exhibit D** (Order) at 28-32, 60. The Disembarkation Ordinance attempts to do so, not by directly amending and changing the meaning of “persons” as it appears in the Ordinance. To the contrary, the Disembarkation Ordinance leaves the Ordinance unchanged and ostensibly in full force and effect. Instead, it changes the meaning of “persons” in the Ordinance indirectly by declaring that, by force of the Disembarkation Ordinance, the word “persons” in the Ordinance (and as defined in the Land Use Ordinance) now means “Persons” (with a capital “P”), and that “Persons” excludes seafarers.

46. Although the Chapter 52 Disembarkation Ordinance purports to exclude seafarers from all other disembarking persons, it provides no standards and procedures by which CSDF owners may consistently and reliably make this distinction. *Id., passim.* Yet, the Disembarkation

Ordinance provides for the imposition of sanctions on CSDF owners—sanctions which mimic but effectively change and supersede comparable terms in the Ordinance—in the event, *inter alia*, that more 1,000 “Persons” disembarks in a single calendar day and provides further that each such “person” constitutes a separate offense triggering fines ranging from \$100 to \$5,000 per “excess unauthorized Person.” *Id.* at § 52-8(B).

47. The Chapter 52 Disembarkation Ordinance provides no standards and procedures by which Plaintiff or Town officials may consistently and reliably distinguish between the two distinct categories the Disembarkation Ordinance, itself, has created of “Persons” who **are** subject to its daily numerical limitations and those who are **not** covered by 33 C.F.R. §§ 2105.237 and 200); that is, disembarking seafarers. *Id.*

48. The Disembarkation Ordinance provides that the failure to make the required distinction between “Persons” and disembarking seafarers subjects Plaintiff to fines ranging from a “minimum” of \$100 to \$5,000 for each “excess unauthorized Person”. *Id.*

49. While subjecting Plaintiff to potentially devastating fines for failing to distinguish between “Persons” and seafarers, the Disembarkation Ordinance purports to delegate to Plaintiff the responsibility for developing the “Counting Method” by which Plaintiff and Town officials responsible for sanctioning Plaintiff can consistently, reliably and demonstrably make this distinction to Plaintiff. *Id.* at § 52-7(A).

50. The Counting Method requires that Plaintiff, as a CSDF Owner, “shall employ a means to electronically count each individual person that disembarks at a given CSDF (“Counting Method”). “ *Id.* The Counting Method requirement provides further that, “[t]he Counting Method must include a means for discounting from the total count of individuals all

crew”; and provides further that “[t]he Counting Method shall be approved by the Harbor Master, or their respective designee, and subject to annual review.” *Id.*

51. In addition, the Disembarkation Ordinance requires Plaintiff as a CSFD Owner to “submit a certification to the Code Enforcement Officer specifying how many Persons were in fact disembarked on the calendar day specified on the Disembarkation Permit and from what cruise ship said Persons disembarked.” *Id.* at § 52-7(B).

52. Consistent with the underlying Ordinance, the Chapter 52 Disembarkation Ordinance does not provide the CSDF owners and operators, including Plaintiff with any authority to prevent disembarkation of Persons in excess of the 1,000-Person limit. Exhibit A.5, *passim*. Nor does the Disembarkation Ordinance provide any Town officials with the authority to prevent the disembarkation of Persons in excess of the 1,000-Person limit.

Notice of Violation

53. On August 5, 2024, the Town’s Code Enforcement Officer issued a Notice of Violation (“NOV”) to Plaintiff asserting that Plaintiff was in violation of the Disembarkation Ordinance. In particular, the NOV asserted that Plaintiff had not obtained a “permit to operate a CSDF (“CSDF Permit”). on July 25, 2024, “passengers were being unloaded from the tenders onto the dock. Exhibit A.1.

54. Although the Disembarkation Ordinance was an **ordinance**, the NOV characterized it as “constitut[ing] the **rules** anticipated by and necessary to enforce the [Ordinance].” *Id.* (emphasis supplied).

55. The NOV was supported by a “Violation Report” which asserted that, on July 25, 2024, Code Enforcement Officer Angela Chamberlain and Harbor Master Christopher Wharff “witnessed passengers being unloaded from tenders onto the dock.” *Id.* The Violation Report

did not reveal how CEO Chamberlain and Harbor Master Wharff Enforcement Officer differentiated disembarking seafarers, protected by 33 C.F.R. § 105.237, from “passengers.”

Exhibit A.2.

56. The Violation Report asserted that Plaintiff had not only violated the Disembarkation Ordinance but had also violated the Ordinance. It asserted further that the alleged violations of the Chapter 52 Disembarkation Ordinance and the underlying Ordinance constituted ‘nuisances’ under the Land Use Ordinance and that sanctions could be imposed on Plaintiff under any or all of these authorities. *Id.*

57. The Violation Report required Plaintiff to take “corrective action” which included “submit[ting] an application to allow for the disembarkation of individuals meeting the definition of Person under the [Disembarkation Ordinance].” *Id.*

58. The Violation Report provided further that Plaintiff’s failure to apply for “the applicable permits within 30 days will result in further enforcement action.”

59. By its terms, the Violation Report confirmed that, without expressly acknowledging it, the Disembarkation Ordinance purported to void and render a nullity the longstanding prior Town Permits that the Town had issued to Plaintiff for the operation of the Pier, which Town Permits, before the Town Council’s adoption of the Disembarkation Ordinance, the Town had never sought to withdraw, void, alter, or otherwise condition or limit.

Required Permit Applications

60. The NOV was also supplemented by a Cruise Ship Disembarkation Facility Permit form. **Exhibit A.6.**

61. Among other things, the CSDF facility permit application requires Plaintiff to attach “a written description approved by the Harbor Master describing the means to count each

individual person that disembarks at this [CSDF]”; providing further that “[t]his includes a means for discounting the crew from the total amount of individuals disembarking.” *Id.*

62. Section V of the CSDF facility permit—headed “Acceptance”—requires Plaintiff to make the additional representation that, “[b]y accepting this permit, I acknowledge that no more than the number of persons approved by the Disembarkation permit are entitled to disembark from any cruise ship on a single day at the permitted site” with the further representation that Plaintiff will “abide by the 1,000-person limit”, not in accordance with the Ordinance’s application to all “persons”, but in accordance with the Disembarkation Ordinance’s definition of “Persons” (with a capital “P”). *Id.*

63. The NOV was also supplemented by a Cruise Ship Disembarkation Permit Application governing daily disembarkation of persons from cruise ships. **Exhibit A.7.**

64. Among other things, the CSDF permit application required Plaintiff to represent that “no more than the number of persons approved by a Disembarkation permit are entitled to disembark from cruise ships on any single day at the permitted site” and required Plaintiff to make the further representation that “I agree to abide by the 1,000-person per day limit”, providing that, “‘Persons’ shall have the meaning provided by the Cruise Ship Disembarkation Ordinance.” *Id.*

V. CLAIMS AGAINST THE TOWN

COUNT I

(Ultra Vires—Violation of Town Charter)

65. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 64 as if fully set forth herein.

66. Under the Town’s Charter, the Town Council may not alter, amend or add to the Town’s Land Use Ordinance. All such changes to the Land Use Ordinance may only be adopted

by Bar Harbor voters at large in a Town Meeting. **Exhibits B.2** and **B.3**. As provided in the Town Charter and as confirmed in Section 125-9(E) of the Land Use Ordinance, Bar Harbor voters, meeting in a Town Meeting, have the sole authority, in the first instance, to enact and to amend or otherwise alter the Land Use Ordinance. **Exhibit B.4**.

67. Because it proposed to amend the Land Use Ordinance, before its enactment, the underlying Ordinance now codified at Section 125-77(H) was presented to Bar Harbor voters at a Town Meeting held on November 8, 2022 where the voters passed it.

68. As alleged above, the Chapter 52 Disembarkation Ordinance was not approved by Bar Harbor voters at Town Meeting but, rather, was approved by and purportedly enacted into law under the sole authority of the Town Council.

69. Although not approved at a Town Meeting and although not openly and expressly amending (1) the underlying Ordinance at Section 125-77(H), as part of the Land Use Ordinance, and also (2) the definition of “persons” as defined by Section 125-109 of the Land Use Ordinance and as employed in the underlying Ordinance at Section 125-77(H), the Chapter 52 Disembarkation Ordinance nonetheless clearly changes the Ordinance’s central terms, supersedes all its materials terms, and, without repealing it, renders the Ordinance superfluous and without force and effect; that is, a nullity.

70. The Disembarkation Ordinance supersedes and nullifies the Ordinance in the following ways:

A. The Disembarkation Ordinance asserts that it “govern[s] the disembarkation of Persons...and implements the purpose and intent of § 125-77(H) and that “language” and “words” in the Land Use Ordinance shall control “[e]xcept as provided in this Chapter.” **Exhibit A.5**, §§ 52-1, 52-5. These provisions means that the meaning of terms as

defined in the Land Use Ordinance and as used in Section 125-77(H) are controlled by and subordinate to the Chapter 52 Disembarkation Ordinance.

B. Although the Ordinance employs the word “person” as its central and essential limitation on the numbers of individuals allowed to disembark from a cruise ship in a single calendar day and although in doing so, the Ordinance necessarily incorporated the existing definition of “person” in the Land Use Ordinance, the Chapter 52 Disembarkation Ordinance redefines “persons” with a small “p” to mean “Persons” with a capital “P”, thus exempting seafarers, and purports to make that new definition control the meaning of “persons” as used in Section 125-77(H) and as defined in Section 125-109. *Cf.*, Exhibit A.4, 125—77(H)(2)-(4), Exhibit B.1; Exhibit A.5, Section 52-5, “Persons”.

C. Although the Ordinance mandated that the Harbor Master “shall develop...a mechanism for counting and tracking the number of persons disembarking each day”—an ordinance-based assignment that the Working Group acknowledged in the Town Memorandum—the Disembarkation Ordinance strips the Harbor Master of this responsibility and reassigns it to the CSDF Owners. *Cf.*, Exhibit A.4, § 125—77(H)(3), Exhibit C (Town Memorandum); Exhibit A.5, § 52-7(A).

D. Although the Ordinance mandated that the Harbor Master was required to “develop the rules and regulations” for the implementation of the underlying Ordinance, the comprehensive regime set forth in the Chapter 52 Disembarkation Ordinance has usurped and rendered superfluous the rulemaking duties that the underlying Ordinance assigned to the Harbor Master. *Cf.*, Exhibit A.4, § 125-77(H)(3); Exhibit A.5, § 52, *passim*; *see also*, Exhibit A.1 (NOV) (“This CSD Ordinance...**constitutes the rules** anticipated and necessary to enforce **Section 125-77(H)** of the Town Code.” (emphases supplied)).

E. Although the Ordinance provides a particular regime for the imposition of sanctions on private pier owners (CSDF Owners under the Disembarkation Ordinance), the Disembarkation Ordinance expanded the breadth of mandates with which the CSDF owners must comply “in accordance with Sections 125-100 and 125-101 of the Land Use Ordinance without amending the Land Use Ordinance, in general, or the Ordinance, in particular, to accomplish this purpose. Cf. **Exhibit A. 4**, § 125-77(H)(4); **Exhibit A.5**, §52-(8)(B).

F. In addition to the foregoing specific instances in which the Disembarkation Ordinance overrides, renders superfluous and effectively nullifies the Ordinance, in its full sweep and effect, the Disembarkation Ordinance also overrides, renders superfluous and effectively nullifies the underlying Ordinance approved by the voters.

71. In addition to overriding and supplanting the Ordinance, the Disembarkation Ordinance, itself, is the legal and functional equivalent of a land use ordinance and, as such, consistent with the Town Charter, could only become effective through the vote of Bar Harbor voters meeting in a Town Meeting.

72. The Disembarkation Ordinance is the legal and functional equivalent of a land use ordinance in several respects which include but are not limited to the following:

A. Although the Land Use Ordinance expressly provides that any violation of its terms constitutes a “nuisance” and although the Ordinance expressly invokes and requires the application of the Land Use Ordinance’s nuisance-based enforcement regime (**Exhibit A.4**, § 125-77(H)(4), the Chapter 52 Disembarkation Ordinance, though purporting not amend the Land Use Ordinance and purporting not, itself, to be a land use ordinance in its own right, expressly invokes and relies upon the Land Use Ordinance’s nuisance-based enforcement regime. **Exhibit A.5**, § 52-8((B)).

B. The Violation Report confirms the Chapter 52 Disembarkation Ordinance's invocation of and reliance on the Land Use Ordinance's nuisance-based enforcement regime and its invocation of and reliance on Section 127-77(H) for its enforcement authority asserting that the "actions" charged against Plaintiff by the NOV "are in violation of Chapter [52] Section 52-6 of the [Cruise Ship Disembarkation] Ordinance and Section 125-77(H) of the Land Use Ordinance. Such violations are a nuisance in violation of Chapter 125-99. See, Section 125-77(H) and 125B for possible maximum fines." **Exhibit A.5.**

73. The Charter of the Town of Bar Harbor is the Town's fundamental law and is superior to any ordinance, whether approved by the Town Council or Bar Harbor voters at a Town Meeting.

74. Any ordinance approved by the Town Council alone which overtly or by implication purports to alter the meaning of any part of the Land Use Ordinance violates the Town Charter's requirement and the Land Use Ordinance amending provision at 125-9(E) that only Bar Harbor voters, meeting in a Town Meeting, may amend any provision of the Land Use Ordinance.

75. By attempting to change the meaning of the Land Use Ordinance by means of a Town Council-approved ordinance, the Disembarkation Ordinance exceeded the powers of the Town Council, violated the Town Charter, as well as Section 125-9(E) of the Land Use Ordinance, and is null and void.

76. Any ordinance approved by the Town Council which is, in purpose and effect, the functional equivalent of the Land Use Ordinance or any substantive part thereof but which does directly amend the Land Use Ordinance and is not approved by Bar Harbor voters in a Town

Meeting in accordance with the Town Charter violates the Town Charter and is void and without force or effect.

77. Chapter 52, the Disembarkation Ordinance, is, in purpose and effect, the functional equivalent of a land use ordinance within the meaning of the Town Charter and Section 125-9(E); the Disembarkation Ordinance was not approved by the voters of Bar Harbor at a Town Meeting as required by the Town Charter; and the Disembarkation Ordinance, therefore, is null and void and without force and effect.

WHEREFORE, Plaintiff prays this Court to declare that Chapter 52, the Disembarkation Ordinance constitutes an invalid exercise of the Town Council's authority inconsistent with and violative of the Town Charter as confirmed by Section 125-9(E) of the Land Use Ordinance and is null and void and, further, to declare that the Disembarkation Ordinance is, in purpose and effect, a land use ordinance and, as such, was required to have been approved by Bar Harbor voters at a Town Meeting in accordance with the Town Charter and, for failing to comply with the Town Charter, the Disembarkation Ordinance is void and of no force and effect, and, further, to enjoin the Town from enforcing the Disembarkation Ordinance in general and, in particular, to bar the Town from enforcing the NOV against Plaintiff and, further, to provide such additional relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT II

(Due Process—U.S. Constitution and Maine Constitution—Violation of Town Charter)

78. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 77 as if fully set forth herein.

79. Plaintiff has property interests in its ownership and operation of the Pier within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States

Constitution and within the meaning of the Law of the Land Clause of Article I, Section 6 and the Due Process Clause of Article I, Section 6-A of the Maine Constitution.

80. Plaintiff has liberty, property and equality interests in its ownership and operation of the Pier within the meaning of Article I, Section 1 of the Maine Constitution.

81. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the Law of the Land and Due Process Clauses of the Maine Constitution require that any Ordinance that the Town adopts that may affect or impair Plaintiff's property interests must fully comply with any requirements in the Town Charter or other Town provision having the force of law with the failure to do so constituting denials of Due Process.

82. The Disembarkation Ordinance effected substantive changes to both the underlying Ordinance at 125-77(H) and the Land Use Ordinance without complying with the procedures required by the Town Charter and 125-9(E) of Land Use Ordinance for amending or otherwise changing and limiting the meaning of "person" as it appears in the underlying Ordinance, which is incorporated into and made a part and of the Land Use Ordinance and by changing and limiting the meaning of "person" as defined by the Land Use Ordinance as used in the Ordinance.

WHEREFORE, Plaintiff prays that this Court declare that, by altering the meaning of the underlying Ordinance at 125-77(H) without having complied with the Town Charter's requirements and the Land Use Ordinance Section 125-9(E) requirement for amendments of and changes to the Land Use Ordinance, the Chapter 52 Disembarkation Ordinance violated Plaintiff's right to Due Process as protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and by the Law of the Land and Due Process Clauses of the Maine Constitution, and violated Plaintiff's liberty, property, and equality interests as protected

by Article I, Section 1 of the Maine Constitution, and to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT III
(Due Process—Violation of Plaintiff's Vested Rights)

83. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 83 as if fully set forth herein.

84. In 2001-2008, the Town issued the Town Permits to Plaintiff.

85. The Plaintiff's interests and rights in the Town Permits are recognized and protected under Sections 125-52, *et seq.* in Chapter 125 of the Town Code that is the Bar Harbor Land Use Ordinance.

86. Plaintiff's interests and rights in the Town Permits have vested within the meaning of the Due Process Clause of the United States Constitution and within the meaning of the Law of the Land and Due Process Clauses of Article I, Section 6 and Article I, Section 6-A of the Maine Constitution.

87. Plaintiff's interests and rights in the Town Permits are also protected by the liberty, equality and property provisions of Article I, Section 1 of the Maine Constitution.

88. The Chapter 52 Disembarkation Ordinance effectively voids the Town Permits, rendering them legal nullities, and replaces them with an entirely new permit imposing preconditions and compliance obligations, including new and distinct sanctions for failure to comply therewith, that are materially different from those required by the prior Town Permits for the Pier.

89. The Chapter 52 Disembarkation Ordinance's purported voiding of the prior Town Permits that issued from 2001 until 2008 and replacement of same by the new and materially

different duties, obligations, and potential sanctions provided by the new permit violate Plaintiff's vested rights in the prior Town Permits in violation of Sections 125-52 and 125-54 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution and the liberty, equality and property provisions of Article I, Section 1 of the Maine Constitution which protects individuals' rights to protect their property.

WHEREFORE, Plaintiff prays that this Court declare that, by altering the meaning of the Ordinance without having complied with the Town Charter's requirements for amendments of and changes to the Land Use Ordinance, the Disembarkation Ordinance violated Plaintiff's right to Due Process as protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and by the Law of the Land and Due Process Clauses of the Maine Constitution, that in the aforementioned respects, the Disembarkation Ordinance also violates Plaintiff's liberty, equality, and property interests as protected by Article I, Section 1 of the Maine Constitution, and to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT IV
(Ultra Vires—Unlawful Delegation of Governmental Power)

90. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 89 as if fully set forth herein.

91. The Disembarkation Ordinance imposes fines on Plaintiff for every "excess unauthorized Person"—that is, above the 1,000-Person per day limit—who disembarks from a cruise and enters into the Town on a given calendar day. **Exhibit A.5**, § 52-8(B).

92. The Disembarkation Ordinance purports to exclude seafarers from the 1,000-Person per day limit. *Id.* at §5, “Persons”; see also, *id.* at § 7(A), §8(B).

93. The Disembarkation Ordinance provides no standards or procedures by which Plaintiff can consistently and reliably distinguish between disembarking seafarers and all others who disembark. *Id., passim.*

94. The Ordinance also provides no standards or procedures by which Plaintiff can consistently distinguish between disembarking seafarers and all others who disembark and, to the contrary, bars Plaintiff from making any such distinction. **Exhibit A.5**, §§ 52-1-8, *passim.*

95. In the provision captioned “Counting Method”, the Disembarkation Ordinance purports to delegate to Plaintiff the responsibility to develop the standards and procedures by which disembarking seafarers can consistently and reliably be distinguished from Disembarking Persons (capital “P”). *Id.*, at, § 52-7(A).

96. The authority to designate particular conduct or status which is unlawful and subject to criminal or civil sanction is an inherently governmental power residing in the legislative branch of government. Me. Const., art. IV, Pt. 3d, § 1.

97. The United States Constitution and the Maine Constitution both require that any laws or rules adopted by a governmental entity that prohibit particular conduct or status and provide penalties for engaging in such conduct or assuming such status meet Due Process standards to ensure that persons can understand the terms and conditions of such laws or rules and that such laws or rules will provide government officials charged with enforcing them with sufficient guidance so that they do not enforce them arbitrarily and disproportionately.

98. If governmental entities adopt laws or rules that fail to meet the foregoing Due Process requirements, persons potentially aggrieved or aggrieved by such law or rules may sue

the governmental entities under the authority of such laws at 42 U.S.C. § 1983 and, if successful, receive an award for attorney fees and costs under 42 U.S.C. § 1988.

99. These Due Process requirements further demonstrate that the authority to designate conduct or status that constitutes a civil wrong subject to penalties is an inherently governmental function and no governmental entity, including the Town, may delegate such authority and the responsibilities attendant to it to any private party, including Plaintiff.

100. The authority to set the standards and procedures by which conduct or status that the legislative authority has made unlawful may result in the lawful imposition of a particular criminal or civil sanction is also an inherently governmental power residing in the legislative branch of government. *Id.*

101. Under the Home Rule amendment to the Maine Constitution, Article VIII, Part Second, Section 1 and under 30-A .M.R.S. § 3001, Maine municipalities may have broad powers, including legislative powers, but are not empowered to delegate to private parties the power to set the standards and procedures by which civil fines may be imposed.

102. The Counting Method provision of the Disembarkation Ordinance purports to delegate to Plaintiff, as owner of the Pier (CSDF), the authority and the responsibility to develop and issue the standards and procedures by which Plaintiff must distinguish between seafarers and “Persons” (with a capital “P”).

103. The attempt to delegate such power to a private party—Plaintiff—as set forth in the Counting Method constitutes an unlawful and invalid delegation of inherently governmental power to a private party in violation of the Maine Constitution and Maine statutory law.

WHEREFORE, Plaintiff prays that this Court declare that The Counting Method in the Chapter 52 Disembarkation Ordinance constitutes an unlawful and invalid attempt to delegate to

a private party the power and obligation to develop standards and processes by which civil sanctions may be imposed and as such violates the Home Rule provisions of the Maine Constitution, Article VIII, Part 2, Section 1 and, 30-A M.R.S. § 3001, *et seq.*, and all other pertinent and applicable laws of the State of Maine, and further, prays this Court to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT V
(Due Process—U.S. Constitution and Maine Constitution—Unlawful Delegation of Governmental Power)

104. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 103 as if fully set forth herein.

105. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the Law of the Land and Due Process Clauses of the Maine Constitution require that any Ordinance that the Town adopts that may affect or impair Plaintiff's property interests fully comply with any requirements in the Home Rule provisions of the Maine Constitution and with Maine statutory law, including but not limited to 30-A M.R.S. § 3001.

106. For the reasons set forth above, The Counting Method provision of the Disembarkation Ordinance lies outside of the Town's lawful powers and the Town's attempt to impose such duties and responsibilities, therefore, violates Plaintiff's right to Due Process as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the Law of the Land and Due Process Clauses of Article I, Section 6 and Article I, Section 6-A of the Maine Constitution.

WHEREFORE, Plaintiff prays that this Court declare that, the Counting Measure provision of the Disembarkation Ordinance violates Plaintiff's right to Due Process as protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and by the Law of the Land and Due Process Clauses of the Maine Constitution and to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT VI
(Unlawful Exposure to Civil Sanction)

107. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 106 as if fully set forth herein.

108. The Disembarkation Ordinance provides that, in general, its enforcement authority is derived from 30-A M.R.S. § 4452. **Exhibit A.5**, §52-(8)(B). The Ordinance also invoked 30-A M.R.S. § 4452 in general for its enforcement authority. **Exhibit A.4**, § 125-77(H)(3).

109. In particular, the Disembarkation Ordinance relies on 30-A M.R.S. § 4452 for the sanctions it imposes on Plaintiff, which sanctions range from a "minimum" of \$100 to as much as \$5,000 for each "excess authorized Person" (with a capital "P") who disembarks in a given calendar day over the number 1,000. **Exhibit A, 5**, at § 52-(8)(B); *cf.*, *Id.* at 4, at § 125-77(H)(3); see also, 30-A M.R.S. § 4452(3)(B).

110. Although exposing Plaintiff to the risk of the Town's imposition of these potentially catastrophic fines, the Disembarkation Ordinance does not provide Plaintiff with any authority to bar any such "excess unauthorized Persons" from disembarking at the Pier and entering the Town.

111. Nor does the Disembarkation Ordinance authorize any Town official to bar any such “excess unauthorized Person” from disembarking at the Pier and entering the Town.

112. No law can impose civil liability for actions of third parties upon a person unless that person has the capability to conform his conduct in order to avoid or prevent the circumstances by which the actions of third parties would otherwise precipitate such civil liability.

113. More particularly, 30-A M.R.S. § 4452 assumes that “violators” subject to sanction under its authority have the legal and practical authority to “abate” the conditions giving rise to the violation. 30-A M.R.S. § 4452(3)(C).

114. Plaintiff does not have the authority to bar Persons (with a capital “P”) who are otherwise entitled to disembark at the Pier from doing so solely on the ground that the 1,000st Person, and those Persons who may follow that Person, exceed the 1,000-person-per-day limit imposed by the Disembarkation Ordinance.

115. Neither in the Disembarkation Ordinance, nor in the Ordinance, nor in any other law adopted by the Town has the Town authorized Town officials to bar Persons (with a capital “P”) who are otherwise entitled to disembark at the Pier from doing so solely on the ground that the 1000th Person and those Persons who may follow that Person exceed the 1,000-person-per-day limit imposed by the Disembarkation Ordinance.

116. Neither does the Town possess the authority under the Maine Constitution, nor under any Maine laws, whether derived from statute, common law or other source, to bar Persons (with a capital “P”) who are otherwise entitled to disembark at the Pier from doing so solely on the ground that that Person and those Persons who may follow that Person exceed the 1,000-person-per-day limit imposed by the Disembarkation Ordinance.

117. The Disembarkation Ordinance exposes Plaintiff to civil liability based on the conduct of third parties which conduct the Disembarkation Ordinance does not authorize Plaintiff or any Town Official to bar.

118. Exposing Plaintiff to civil fines under the circumstances alleged above exceeds the Town's authority under the Article VIII, Part Second, Section 1 of the Maine Constitution and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution and also violates the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution.

WHEREFORE, Plaintiff prays this Court to declare that by exposing Plaintiff to civil sanctions under the circumstances and conditions set forth above, the Disembarkation Ordinance violates the Town's Home Rule authority and violates Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and under the Law of the Land and Due Process Clause of Article I, Sections 6 and 6-A of the Maine Constitution and also violates the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution and prays this Court to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT VII
(Permit Applications Invalid)

119. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 118 as if fully set forth herein.

120. The Disembarkation Ordinance requires Plaintiff, as a CSDF Owner, to apply for a permit to operate the Pier, as a CSDF, for the purpose of disembarking “Persons” and “persons” into Bar Harbor. **Exhibit A.5**, § 52-(6)(A).

121. To implement this new permit requirement, the Town has devised a form entitled Cruise Ship Disembarkation Facility Permit (“CSDF Permit”) which the Town attached to the NOV. **Exhibit A.6** “Cruise Ship Disembarkation Facility Permit.”

122. The CSDF Permit requires Plaintiff to attach to the application “a written description approved by the Harbor Master describing the means to count each individual person that disembarks at this [CSDF]” and requires Plaintiff to ensure that the “means” so described “discount[] the crew from the total amount of individuals disembarking.”

123. The Disembarkation Ordinance also requires Plaintiff, as a CSDF Owner, to apply for and obtain a Disembarkation Permit to enable it to “allow a specified calendar day a specified number of Persons not exceeding 1,000 to disembark” from cruise ships. *Id.* at § 52-6(C)(1).

124. To implement this requirement, the Town has devised a form entitled Cruise Ship Disembarkation Permit Application Permit (“Disembarkation Application”) which the Town attached to the NOV. **Exhibit A.7** “Cruise Ship Disembarkation Permit Application.”

125. The Disembarkation Permit requires Plaintiff to “acknowledge that no more than the number of persons [with a small “p”] approved by a Disembarkation permit may disembark” on a given day and to commit that Plaintiff “will abide by the 1-000 person [with a small “p”] daily limit.”

126. By its terms, the Disembarkation Permit is invalid because it is based on the Disembarkation Ordinance which, as alleged above, is an invalid exercise of the Town Council’s authority and violative of the Town Charter as confirmed by the Land Use Ordinance’s amending

provision at Section 125-9(E), and is also violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Law of the Land and Due Process Clause of Article I, Sections 6 and 6-A of the Maine Constitution; violates Plaintiff's vested rights in the Town Permits as protected by Sections 125-52 through 125-54 of the Town's Land Use Ordinance, as well as the United States and Maine Constitutions; violates Plaintiff's constitutional rights by requiring Plaintiff to exercise non-delegable governmental powers in devising a "Counting Method"; and, further, the Disembarkation Permit uses the word "person" with a small "p" in a way that is materially inconsistent with the Disembarkation Ordinance's use of the word "Persons" with a capital "P", rendering the Disembarkation Permit materially ambiguous and further rendering compliance with its terms incapable of ascertainment and enforcement to the degree required by the Due Process Clause of the Fourteenth Amendment and the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution and also violates the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution.

127. In addition, and as has been alleged above, the CSDF Permit is invalid because it is based on the Disembarkation Ordinance which, as alleged above, is an invalid exercise of the Town Council's authority and violative of the Town Charter and the Land Use Ordinance amending provision, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution, Plaintiff's vested rights as protected by the United States and Maine Constitutions, and Plaintiff's rights under the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution.

WHEREFORE, Plaintiff prays this Court to declare that in each of the foregoing respects, the CSDF Permit application form and the Disembarkation Permit application form violate the Town Charter and violate the Due Process Clause of the Fourteenth Amendment and the Law of the Land and Due Process Clauses of Article I, Sections 6 and 6-A of the Maine Constitution and the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution, and to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

COUNT VIII

(Due Process and Equal Protection—U.S. Constitution, Due Process Equal Protection—Maine Constitution, Rational Nexus—Maine Constitution)

128. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 127 as if fully set forth herein.

129. The Disembarkation Ordinance discriminates between "Persons" (with a capital "P") arriving in the Town in numbers greater than 1,000 and all other persons arriving in the Town by all other means of conveyance who are subject to no Town-imposed limitation whatsoever.

130. The Disembarkation Ordinance sets an arbitrary limit of 1,000 as the disembarkation limit for "Persons" (with a capital "P") which applies every day of the year without exception when, in fact, the Town has actual knowledge spanning decades that the numbers of persons visiting Bar Harbor is highest in the months of July and August, is less in the months of April through June and September through November, and the Town has adopted and approved policies recognizing these seasonal variations in such visits through its adoption and

approval of voluntary caps from 2008 through 2022 and its adoption and approval by the Town Council in 2022.

131. The Disembarkation Ordinance’s discrimination against “Persons” (with a capital “P”) and all others arriving in Town by any other means of conveyance is arbitrary and capricious and lacks a rational nexus between the Disembarkation Ordinance’s purpose and the means it employs to achieve that purpose, all in violation of the Due Process and Equal Protection Clauses of the United States Constitution, the Law of the Land and Due Process Clauses of Sections 6 and 6-A of the Maine Constitution, and the Equal Protection Clause of Article 6 of the Maine Constitution, and the liberty, equality and property provisions of Article I, Section 1 of the Maine Constitution, and, limitations on the legislative power set forth in Article IV, Part Third, Section 1 of the Maine Constitution.

132. The Disembarkation Ordinance’s application of a rigid limit of 1,000 on the disembarkation of “Persons” (with a capital “P”) applicable every day of the year without any means of adjustment for the seasonal variation in visits to the Town is arbitrary and capricious and lacks a rational nexus between the Disembarkation Ordinance’s purpose and the means it employs to achieve that purpose, all in violation of the Due Process and Equal Protection Clauses of the United States Constitution, the Law of the Land and Due Process Clauses of Sections 6 and 6-A of the Maine Constitution, and the Equal Protection Clause of Article 6 of the Maine Constitution, and the liberty, equality and property provisions of Article I, Section 1 of the Maine Constitution, and, limitations on the legislative power set forth in Article IV, Part Third, Section 1 of the Maine Constitution.

WHEREFORE, Plaintiff prays this Court to declare that the Disembarkation Ordinance is discriminatory, arbitrary and capricious, and lacks the requisite rational nexus between its

purpose and the means its employes all in violation of the Due Process and Equal Protection Clauses of the United States Constitution, the Land of the Land Clause of the Maine Constitution, the Due Process and Equal Protection Clauses of the Maine Constitution, the liberty and property clauses in Article I, Section 1 of the Maine Constitution, and, the limitations imposed on the legislative power by Article IV, Part Third, Section 1, which limitations are made applicable to municipalities by Article VIII, Part Second, Section 1 of the Maine Constitution and 30-A M.R.S. § 3001 and prays this Court to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff and by issuing such other relief as may be warranted, including Plaintiff’s attorney fees and costs.

COUNT IX
(Ultra Vires—Unlawful Designation as a “Nuisance”)

133. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 132 as if fully set forth herein.

134. The Town interprets the Disembarkation Ordinance to provide that a violation of its terms constitutes a public nuisance. **Exhibit A.2, Exhibit B.5**. In so doing, and as has been alleged above, the Town is effectively acknowledging that the Chapter 52 Disembarkation Ordinance , itself, is a Land Use Ordinance. see, **Exhibit B.5** (Section 125-99) and 30-A M.R.S. § 4302. And, as has also been alleged above, under the Town’s Charter, as confirmed by the Land Use Ordinance, the Town Council lacks the authority to alter or amend the Land Use Ordinance or to adopt the functional equivalent of a land use ordinance. **Exhibits B.2, B.3, and B.4**.

135. The mere entry of a person within the limits of a municipality also cannot, without more, constitute a public nuisance.

136. The mere disembarkation of a “Person” (with a capital “P”) into Bar Harbor as the 1,001st such “Person” to disembark in single calendar cannot, by itself, constitute a public nuisance either under Maine common law, Maine statutory law, or the laws and rules of the Town. Nor can the mere disembarkation of other Persons above the Disembarkation Ordinance’s 1,000-Person-per-day limit constitute a public nuisance under Maine common law, Maine statutory law or the laws and rules of the Town.

137. A “Person” (with a capital “P”) and constituting an “excess unauthorized Person” under the Ordinance (see, Exhibit A.5, § 52-(8)(B); see also, *id.*, A.4, § 125-77(H)(3)) cannot, without more, constitute a public nuisance either under Maine common law, Maine statutory law, or the laws and rules of the Town.

138. In designating all violations of the Chapter 52 Disembarkation Ordinance a “nuisance”, the Town has exceeded its Home Rule authority under Article VIII, Part Second, Section 1 of the Maine Constitution.

WHEREFORE, Plaintiff prays this Court to declare that by treating Plaintiff’s ownership and operation of the Pier as a nuisance under Chapter 52 and by treating the disembarkation of “Persons” (with a capital “P”) in numbers greater than 1,000 on each calendar day, the Town Council has exceeded its authority to declare and set limits on a public nuisance under the laws of Maine and, in doing so, the Disembarkation Ordinance violates the Town’s Home Rule authority and violates Plaintiff’s rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and under the Law of the Land and Due Process Clause of Article I, Sections 6 and 6-A of the Maine Constitution and, the liberty, equality, and property provisions of Article I, Section 1 of the Maine Constitution and prays this Court to issue injunctive relief barring the Town from enforcing the Disembarkation Ordinance against Plaintiff

and by issuing such other relief as may be warranted, including Plaintiff's attorney fees and costs.

PRAYER FOR RELIEF

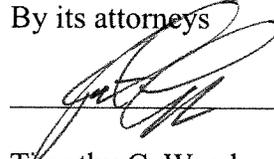
WHEREFORE, for the reasons set forth above and in accordance with and in addition to the requests for relief set forth above, Plaintiff respectfully for relief as follows:

1. that, pursuant to 14 M.R.S. § 5951, *et seq.*, this Court declare that the Disembarkation Ordinance violates the Constitution of Maine and the state laws of Maine on the grounds set forth above and enter judgment against the Town pursuant to and in accordance with such declaration;
2. that, pursuant to 14 M.R.S. § 5951, *et seq.*, this Court declare that the Disembarkation Ordinance violates the United States Constitution on the grounds set forth above and enter judgment against the Town pursuant to and in accordance with such declaration;
3. that, this Court issue an injunction against the Town barring the Town from each of the following: a) barring the Town enforcing the Disembarkation Ordinance in general, including any enforcement against Plaintiff and Plaintiff's Pier, b) barring the Town from enforcing the Notice of Violation against Plaintiff; c) barring the Town from directly to indirectly voiding Plaintiff's Town Permits to operate the Pier; and, d) barring the Town from requiring Plaintiff to complete any permits required and imposed upon Plaintiff by the Disembarkation Ordinance;
4. that, this Court award Plaintiff its attorney fees and costs pursuant to 42 U.S.C. § 1988; and,
5. that, this Court issue such other the further relief that this Court deems just and proper.

Dated at Bangor, Maine, this 10th day of September, 2024.

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