

# PROPOSED

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## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL  
ASSOCIATION ALASKA, *et al.*,

Plaintiffs,

v.

THE CITY AND THE BOROUGH OF  
JUNEAU, ALASKA, *et al.*,

Defendants.

Case No. 1:16-cv-00008-HRH

### **MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska (“Plaintiffs”) hereby move this Court, pursuant to Federal Rule of Civil Procedure 56, for judgment in their favor on the First, Third, and Fourth Causes of Action set forth in Plaintiffs’ *First Amended Complaint* (ECF No. 28). In support, Plaintiffs rely on the *Statement of Facts* and Exhibits filed herewith and the arguments and authorities set forth below.

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## I. INTRODUCTION

The U.S. Constitution and controlling federal statutes flatly and unequivocally prohibit states and localities from imposing duties, taxes, tolls, operating charges, fees, or “any other impositions” on vessels engaged in the interstate and foreign commerce of the United States. The specific Constitutional and federal statutory prohibitions are clear and direct: No state “shall, without the Consent of Congress, lay any Duty of Tonnage . . . [.]” U.S. CONST., Art. I, § 10, cl. 3, nor shall it (or any other non-federal interest) levy upon or collect from any vessel “taxes, tolls, operating charges, fees, or any other impositions . . . if the vessel or water craft is operating on any navigable waters subject to the authority of the United States . . . [.]” 33 U.S.C. § 5(b).

The CBJ Assembly<sup>1</sup> has enacted ordinances and passed resolutions that assess fees against interstate and foreign commerce passenger vessels. These fees are calculated according to the number of passengers each vessel carries at every visit to the Port of Juneau. Failure to remit these fees subjects vessels to being barred from entering or docking in Juneau. In isolation, these fees appear modest -- \$5.00 and \$3.00 per passenger. When multiplied by the approximately 1,000,000 cruise passengers that Plaintiffs’ member cruise lines’ vessels bring to the Port of Juneau annually, however, these fees result in a substantial engorgement of the City’s coffers. The fees are creatively designed to avoid imposition on state and local interests, thereby placing the burden of payment on those who do not live, work, or vote in Juneau or Alaska.

By collecting these fees and appropriating the resulting funds to municipal projects, programs, and activities, the City has used these unlawful exactions in violation of the Constitution and controlling federal law without a semblance of Congressional consent. The City thus treads heavily and recklessly into a prohibitory minefield of stark federal proscription. The

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<sup>1</sup> All capitalized or abbreviated terms not otherwise defined herein shall have the meaning ascribed to such terms in Plaintiffs’ separate Statement of Facts (“Smt.”), filed concurrently herewith.

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gravamen of Plaintiffs' cause is that the City's levies extract revenues that support general local government operations, municipal infrastructure, artwork, police, hospitals, transit service, and similar projects unrelated to the navigation and security of the fee-paying vessels and thus are patently irreconcilable with the federal structure established by the Constitution.

### II. SUMMARY OF FACTS

Each year, cruise vessels from Plaintiffs' member lines land thousands of passengers in Juneau. Smt. ¶¶ 70-71, 73. In the 2016 cruise season, more than 1,000,000 cruise passengers disembarked in Juneau. *Id.* ¶ 73. These passengers come from all areas of the United States and from many foreign countries. *Id.* ¶ 74. Voyages to Juneau originate both in the United States and in foreign ports, most commonly Seattle, Washington and Vancouver, British Columbia. *Id.* ¶ 75. Cruise vessels generally stay in Juneau several hours. *Id.* ¶ 76. During this time, cruise passengers can disembark, travel throughout the Juneau city limits, and take excursions outside the immediate port and central Juneau area to locations like Mendenhall Glacier and Statter Harbor, both of which are approximately 10 to 12 miles from the cruise ship docks. *Id.* ¶ 77. The peak cruise season lasts from May through September. *Id.* ¶ 78.

Vessels docking at the Port of Juneau pay a number of different fees to CBJ, including the Entry Fees that Plaintiffs challenge in this case. The MPF is a \$5.00 per passenger fee paid by owners or agents of cruise vessels and is calculated by reference to passenger manifests required to be submitted to the CBJ government. *Id.* ¶¶ 11-22. The MPF has been part of CBJ's fee revenue structure since 2000. *Id.* ¶¶ 11-12. Despite the Constitution's prohibition against Tonnage duties and the equally unequivocal requirement developed in case law that graduated fees assessed against vessels must be limited to reimbursement for services provided to the vessels (*see* Section IV.A., *infra*), the original municipal ordinance establishing this fee stated



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that its purpose was “to address the costs to the City and Borough for services *and infrastructure usage by cruise ship passengers* visiting the City and Borough, including emergency services, *transportation impacts and recreation infrastructure use, and to mitigate impacts* of increased utilization of City and Borough services by Cruise ship *passengers*.” City and Borough of Juneau, Ak., Ordinance, Serial No. 2000-01am (2000) (emphasis added); Smt. ¶ 20. Exempted from this levy are vessels that have berths for 20 or fewer passengers, vessels that do not have overnight passenger accommodations (*i.e.*, day-trip excursion vessels), non-commercial ships or ships operated by non-profit organizations, and ships operated by the State, the government of the United States, or foreign governments. CITY AND BOROUGH OF JUNEAU, AK., CODE OF ORDINANCES (“CBJ Code”) § 69.20.050; Smt. ¶ 14. State Ferry System vessels thus are exempt from the MPF. Smt. ¶¶ 14, 48. In reality, MPF is primarily, if not exclusively, imposed on vessels engaged in interstate and foreign commerce. (Vessels closely tied to local government or local private interests are exempt.) *See id.* ¶¶ 46-48. Failure to pay the MPF is classified by municipal ordinance as a misdemeanor, and a vessel that does not pay is barred from mooring at any port facility owned by CBJ. CBJ Code §§ 69.20.080(b), 69.20.110; Smt. ¶ 19.

The PDF is a \$3.00 per passenger fee imposed to “provide funding for capital improvement *to the downtown waterfront*.” City and Borough of Juneau, Ak., Res. (“CBJ Res.”) 2552 (2010) (emphasis added); Smt. ¶ 26. The PDF has been part of CBJ’s fee revenue structure, in one form or another, since 2002. Smt. ¶¶ 23-26. Like the MPF, the PDF is paid by vessel owners or their agents to CBJ. CBJ Res. 2552, § 1; Smt. ¶ 27. Exempted are vessels of less than 200 tons burden, non-commercial vessels, vessels owned and operated by the State (*i.e.*, the State Ferry System), the United States, or a foreign government, and vessels operated by federally recognized native American tribes. *Id.* ¶ 26. As with the MPF, the PDF is imposed primarily on

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vessels engaged in interstate and foreign commerce. *Id.* ¶ 46.

Revenues from the Entry Fees are placed in special revenue funds. *See* CBJ Code § 69.20.120; CBJ Res. 2552; Smt. ¶¶ 31-33. Monies in these funds are then appropriated back to specific projects and, in the case of MPF revenues, general CBJ operating accounts according to an allocation formula adopted by the CBJ Assembly in May 2000. Smt. ¶¶ 34, 36-42. These revenues currently total approximately \$8 million per year. *See id.* ¶¶ 110, 223.

The Entry Fees are a subpart of a much larger network of financial and economic relationships between the cruise industry and CBJ. Cruise passengers have a significant economic impact on commerce in Juneau, purchasing millions of dollars in goods and services and generating sales tax revenues of approximately \$6.9 million in FY 2016. *Id.* ¶¶ 87-88. In addition, sales tax is applied to local Juneau purchases of materials and services (*e.g.*, food, potable water, supplies, fuel, waste haulage, utilities) by the vessels themselves. *Id.* ¶¶ 83-87. Vessels docking at CBJ's public ports directly pay CBJ for vessel services they do receive from CBJ through port dues and fees for dockage, maintenance, and wharfage charges. *See id.* ¶¶ 49-51. By ordinance or regulation, CBJ assesses port dues calculated on the basis of registered net tonnage of the vessel, separate charges based on vessel length, maintenance charges based on a vessel's time in port and net registered ton of vessel displacement, and potable water charges. *Id.* In the aggregate, CBJ collects approximately \$900,000 annually in dockage fees, separate and apart from the Entry Fees, and in FY 2016 collected \$1.4 million in revenues for charges for services and licenses, permits, and fees. *Id.* ¶ 52. The total revenue impact of cruise-related activities for CBJ was over \$23 million in 2016, *id.* ¶ 90, of which approximately \$8 million was attributable to the Entry Fees, *id.* ¶¶ 110, 223.

The Entry Fees are collected from all vessels regardless of whether they dock at CBJ-

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owned and operated facilities or privately owned docks. Even though vessels pay separate fees at the private docks, CBJ assesses the Entry Fees against vessels using the private docks. *Id.* ¶¶ 168, 187; *see id.* ¶ 85. Revenues extracted from vessels using the private docks are allocated by CBJ to uses beyond the private dock boundaries, including to service debt on the public, CBJ-owned docks. *Id.* ¶¶ 168, 187; *see id.* ¶¶ 164-207.

An additional cruise-related source of revenues for Juneau (and other State ports) is revenue from the State. *Id.* ¶¶ 54-65. The State collects a CPV Tax of \$34.50 per cruise passenger. ALASKA STAT. § 43.52.210; Smt. ¶ 54. The State distributes CPV Tax revenues to cruise ports in the State, including Juneau. Smt. ¶ 55. For the period FY 2012 to FY 2016, CBJ has received from the State \$5.00 per cruise passenger annually, or on average somewhat in excess of \$4 million per year. *Id.* ¶¶ 60, 64. Cruise lines can offset, subject to a cap of \$17.50, their passengers' tax obligation to the State by the total amount of taxes imposed and collected by home rule or general law municipalities. ALASKA STAT. § 43.52.255; Smt. ¶ 57. The enactment of the offset provision was intended to ensure that CPV Tax revenues are used to benefit vessels. Smt. ¶ 58. Along with PDF revenues, the CPV Tax funds are intended to fund CBJ's cruise ship terminal project and offshore-floating cruise ship dock improvements. *Id.* ¶ 61. The cumulative revenue impact of the Entry Fees and the Juneau portion of the CPV Tax is \$13 per passenger, or approximately \$13 million annually based on recent passenger volumes. *See id.* ¶¶ 63-64, 110, 223.

CBJ has allocated CPV Tax and dock fee revenues to fund improvements at Statter Harbor in Auke Bay, Alaska.<sup>2</sup> *Id.* ¶ 95. This site is approximately 12 miles away from the

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<sup>2</sup> The use of the CPV Tax revenues is subject to the same Constitutional and federal statutory law restrictions as the Entry Fees. The CPV Tax revenues, however, are not the subject of CLIA's Complaint. CLIA's predecessor organization brought suit on similar constitutional grounds against the CPV Tax in

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downtown cruise vessel berths and can be accessed by cruise vessel passengers when they book side excursions from Statter Harbor. *Id.* ¶¶ 91, 94. Statter Harbor also is used by local residents, tourists, fishermen, kayakers, neighborhood residents, and tourism businesses. *Id.* ¶¶ 92-93.

Improvements to Statter Harbor include a proposed facility that would provide approximately 800 linear feet of additional moorage for local whale watching and fishing charter businesses. *Id.* ¶ 98. Other improvements include replacing a boat launch ramp and expanding an existing parking area to accommodate large vehicles with boat trailers. *Id.* ¶ 99. The improvements will accommodate commercial users and local residents, as well as reduce conflicts between the two groups. *Id.* ¶ 100. The use of CPV Tax funds and CBJ dock fee revenues for purposes unrelated to any service to cruise vessels means that CBJ imposes higher Entry Fees than it would otherwise if the latter fees were used exclusively to cover costs of providing services to vessels.

The present legal dispute between Plaintiffs and CBJ focuses on CBJ's uses of revenues collected from the Entry Fees.<sup>3</sup> Entry Fee revenues have been allocated to general governmental operations of CBJ, transit bus services available to the general public and for which fares are collected at the farebox, wireless internet expansion in the downtown Juneau area, civic beautification and park improvements and developments, city street maintenance improvements, airport and hospital expenses, and the payment of legal fees incurred by CBJ in defense of this action. *Id.* ¶¶ 111-222. Entry Fees collected from vessels using privately-owned docks are being

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2009. The suit was settled in 2010, following the U.S. Supreme Court's decision in *Polar Tankers v. City of Valdez*, 557 U.S. 1 (2009).

<sup>3</sup> Plaintiffs maintain that both Entry Fees are prohibited levies under the Tonnage Clause and the express restrictions of the Rivers and Harbors Appropriations Act, 33 U.S.C. § 5. As discussed in detail below, however, case law under the Tonnage Clause and the language of Section 5 recognize that these prohibitions do not forbid non-federal entities from assessing reasonable compensatory fees for services provided to a vessel when those services assist in the navigation or enhance the safety of the vessel. Plaintiffs contend herein that none of the disputed uses conforms to these criteria or remove the challenged fees definitionally from prohibited Tonnage Clause categorization. In this motion, Plaintiffs submit that Entry Fee revenues as used by CBJ can in no way be justified as being compensation for services rendered to Plaintiffs' members' vessels.

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used by CBJ to pay for public obligations at publicly-owned port facilities. None of these uses can be reconciled with the flatly prohibitive constraints of the Constitution and federal law.

There are sufficient undisputed facts upon which the Court may find that CBJ's imposition and use of the Entry Fees are unlawful and should be enjoined.

### III. STANDARD OF REVIEW

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *United States v. Stang*, No. 3:13-CV-0190-HRH, 2015 WL 12803593, at \*1 (D. Alaska Mar. 25, 2015). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Stang*, 2015 WL 12803593, at \*1 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Then, the burden shifts to the non-moving party to set forth specific facts showing a genuine issue for trial. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242-247-48 (1986)). The Court should grant judgment for the movant *unless* the “‘specific facts’ set forth by the non-moving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence.” *Id.* (quoting *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987)).

### IV. ARGUMENT

#### A. The Entry Fees Are Unconstitutional Duties of Tonnage

##### 1. **The Tonnage Clause Prohibits Any State or Local Tax or Fee Imposed on a Vessel for the Purpose of Raising General Revenues, Regulating Trade, or for the Privilege of Entering, Lying in, or Trading in a Port**

The Tonnage Clause provides that “no State shall, without the Consent of Congress, lay any Duty of Tonnage.” U.S. CONST., Art. I, § 10, cl. 3.<sup>4</sup> At the time of the Constitution’s

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<sup>4</sup> The Constitutional provision of which the Tonnage Clause is a part also prohibits the maintenance by states of troops, warships, the negotiation of agreements with other states or nations, or entry into war.

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adoption, the term “tonnage” was “a well-understood commercial term signifying . . . the internal cubic capacity of a vessel,” and duties of Tonnage “were known to commerce as levies upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state.” *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265 (1935).

Given its declarative simplicity, the Tonnage Clause has not been the subject of extensive interpretive litigation since 1789, but certain clear principles emerge from federal case law. The Supreme Court, over a span of approximately a dozen cases in the last two centuries, has determined that the Tonnage Clause not only prohibits duties on the weight or capacity of a vessel (as implied by the term “Tonnage”), “but *any duty on a ship*, whether a fixed sum upon its whole tonnage, or a sum ascertained by comparing the amount of tonnage with the rate of duty[.]” *S.S.S. Co. of New Orleans v. Portwardens*, 73 U.S. 31, 35 (1867) (emphasis added), charged “for the privilege of entering, lying in, or trading in a port.” *Polar Tankers*, 557 U.S. at 9; see *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1023 (5th Cir. 1989) (describing an unconstitutional tonnage duty as any graduated duty charged “to raise general revenues, to regulate trade, or to charge for the privilege of entering, lying in, or trading in a port”). Thus, the Tonnage Clause prohibits States and localities with “convenient ports” from “tak[ing] advantage of their favorable geographical position in order to exact a price for the use of their ports from the consumers dwelling in less advantageously situated parts of the country.” *Polar Tankers*, 557 U.S. at 7 (internal citations and quotations omitted).

The Supreme Court has recognized that the Clause does not operate as “a ban on *any and*

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These proscribed activities describe a fundamental, bedrock category of activities that the Framers considered inconsistent with and corrosive of the necessary powers and authorities granted to the national government by the Constitution. Taxation of vessels absent consent of Congress was clearly deemed a threat to the structure of the more perfect union created by the Constitution. See *Polar Tankers*, 557 U.S. at 17 (Roberts, C.J., concurring opinion).

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all taxes[, duties, or fees] which fall on vessels that use a State’s port, harbor, or other waterways.” *Polar Tankers*, 557 U.S. at 9; see *Keokuk N. Line Packet Co. v. City of Keokuk*, 95 U.S. 80, 84–85 (1877). Rather, as the Court’s jurisprudence makes clear, the Clause prohibits taxes, fees, or duties charged “for the privilege of entering, trading in, or lying in a port.” As such, any tax, duty, or fee is an unconstitutional duty of tonnage when the following questions are answered in the affirmative:

- (1) Is the tax, fee, or duty imposed on vessels or their owners?
- (2) Is the tax, fee, or duty calculated or graduated based on a factor related to vessel size or capacity? *and*
- (3) Does the tax, fee, or duty have a general, revenue-raising purpose, as opposed to charging compensation for services rendered to a vessel?

See *Polar Tankers*, 557 U.S. at 9-11.

### **2. An Unconstitutional Tonnage Duty Is Imposed on Vessels According to a Factor Related to Size, Capacity, or Other Measure**

In literal application, the Tonnage Clause prohibits duties calculated based on the weight or capacity of a vessel.<sup>5</sup> The intent of the Clause, however, is much broader. As a result, the Tonnage Clause prohibits any duty on a vessel based on any factor related to the capacity or size of a vessel. See generally *Polar Tankers*, 557 U.S. at 8. This is so regardless of whether the particular duty is “a fixed sum upon [the ship’s] whole tonnage, or a sum ascertained by comparing the amount of tonnage with the rate of duty[.]” *S.S.S. Co. of New Orleans*, 73 U.S. at 35, or a duty based on another factor related to the size or capacity of the ship like the “number of masts, or of mariners, the size and power of the steam-engine, or the *number of passengers* which she carries[.]” *Smith v. Turner*, 48 U.S. 283, 458-59 (1849) (emphasis added), or even a flat tax imposed regardless of capacity, see *S.S.S. Co. of New Orleans*, 73 U.S. at 35. The

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<sup>5</sup> At the time of the drafting of the Constitution, the terms “tonnage” or “tonnes” referred to the internal capacity measure of a vessel, as opposed to its physical weight. See *Clyde Mallory Lines*, 296 U.S. at 265.

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Tonnage Clause also prohibits any duty on a vessel regardless of the stated object or target of the duty. “A State cannot take what would otherwise amount to a tax on the ship’s capacity and evade the Clause by calling that tax ‘a charge on the owner or supercargo,’ thereby ‘justify[ing] this evasion . . . by producing a dictionary or a dictum to prove that a ship-captain is not a vessel . . . .” *Polar Tankers*, 557 U.S. at 8 (quoting *Smith*, 48 U.S. at 459).

Here, the Entry Fees are imposed based on a factor related to tonnage. The MPF applies to all commercial passenger vessels of a certain size entering any port within the City. *See* CBJ Code §§ 69.20.010, 69.20.020, 69.20.030(a), 69.20.040; *see* Smt. ¶¶ 13-14. Similarly, the PDF applies to all commercial passenger vessels over 200 tons on port calls in the City. *See* CBJ Res. 2552, § 1; *see* Smt. ¶ 26.

Further, the Entry Fees’ application and amount depend upon the ship’s capacity. The MPF applies only to vessels that have accommodations for more than 20 passengers or berths or overnight accommodations for passengers, CBJ Code § 69.20.050; *see* Smt. ¶ 14, and its amount is graduated based on the number of the passengers the vessel carries into port,<sup>6</sup> CBJ Code § 69.20.020; *see* Smt. ¶¶ 11, 15. The same is true for the PDF, which applies only to vessels over 200 tons and is graduated based on the number of passengers brought into port, CBJ Res. 2552, § 1; *see* Smt. ¶ 26. Thus, the Entry Fees are imposed on vessels based on a factor related to tonnage – the number of passengers the vessels carry into any port within the City.

### **3. An Unconstitutional Tonnage Duty Is Imposed for the Privilege of Entering the Port, Rather Than as Reasonable Compensation for Services Rendered to, and Enjoyed by, the Vessel**

The Tonnage Clause’s prohibition encompasses taxes, fees, and duties that are imposed

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<sup>6</sup> That CBJ uses the number of passengers carried by a vessel, instead of the vessel’s tonnage, as the multiplier for calculating the amount of Entry Fees owed makes no difference in the Tonnage Clause analysis. *See Smith*, 48 U.S. at 458-59.



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on vessels (or their owners) for the “privilege of entering, trading in, or lying in a port.” *See Polar Tankers*, 557 U.S. at 9; *see Keokuk*, 95 U.S. at 84–85. In other words, the Tonnage Clause does not preclude States and localities from exacting reasonable compensation for services rendered to, and enjoyed by, the vessel. *See Clyde Mallory Lines*, 296 U.S. at 265-66; *Keokuk*, 95 U.S. at 84–85 (the Constitution’s prohibition against duties of tonnage was not designed “to relieve [vessels] from liability to claims for assistance rendered and facilities furnished for trade and commerce”). Courts have recognized that there are circumstances in which States or municipal interests provide goods and services to vessels much like private wharfingers, suppliers, chandlers, or terminal operators, and that vessel interests cannot evade commercial responsibility for debts and obligations incurred for these goods and services when the provider is a non-federal governmental entity. As such, the Tonnage Clause does not prohibit cost-recoupment charges for regulation of harbor traffic, pilotage, wharfage, the use of locks on a navigable river, medical inspection of vessels, or emergency services for vessels (such as fire prevention, security, etc.). *See, e.g., Clyde Mallory*, 296 U.S. at 263 (charge for policing of harbor to ensure safety of vessels and providing protection from fire); *Cooley v. Board of Wardens*, 12 How. 299, 314, 13 L.Ed. 996 (U.S. 1851) (pilotage); *Keokuk*, 95 U.S. at 87-88 (wharfage)<sup>7</sup>; *Nw. Union Packet Co. v. St. Louis*, 100 U.S. 423 (1879) (wharfage); *Cincinnati, P. B.S. & P. Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881) (wharfage); *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U.S. 691 (1883) (wharfage); *Ouachita & M. River Packet Co. v. Aiken*, 121 U.S. 444 (1887) (wharfage); *Huse v. Glover*, 119 U.S. 543 (1886) (charges for use of locks on a navigable river); *Morgan's Louisiana & T.R. & S.S. Co. v. Board of Health*, 118 U.S.

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<sup>7</sup> Wharfage is clearly a service rendered to a vessel. “Providing a wharf to which vessel may make fast, or at which they may conveniently load or unload, is rendering them a service.” *Keokuk*, 95 U.S. at 85. Wharfage is not at issue in this case, as Plaintiffs’ member cruise lines pay separate fees for wharfage and dockage, and those charges are not the subject of this Complaint.

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455 (1886) (fees for medical inspection of ship); *see also New Orleans Steamship Ass'n*, 874 F.2d at 1023 (emergency services such as response to fire, explosion, and other perils to vessel). In these cases, state or local authorities were found to have charged reasonable compensation for services rendered to, enjoyed by, and available to the vessels entering their ports that protect and enable the free flow of commerce and of vessels as vehicles of commerce.

Simply denominating a charge as a “fee for services”, however, would invite evasion of the Constitution if reviewing courts failed to scrutinize the actual substance of a local charge. *See Maher Terminals, LLC v. Port Auth. of New York & New Jersey*, 805 F.3d 98, 107 (3d Cir. 2015) (“a state may not escape the Tonnage Clause's reach merely by labelling a tax as a charge for services”) (citing *Keokuk*, 95 U.S. at 86; *Cannon v. City of New Orleans*, 87 U.S. 577, 580 (1874)).<sup>8</sup> Fees for services “still violate the Tonnage Clause if they have ‘a general, revenue-raising purpose[,]’” *i.e.*, are used to pay for projects that do not benefit the fee payer and services that the fee payer cannot use. *Lil' Man in the Boat, Inc. v. City & Cty. of San Francisco*, No. 3:17-CV-00904-JST, 2017 WL 3129913, at \*4 (N.D. Cal. July 24, 2017) (Order Denying Motion to Dismiss) (quoting *Polar Tankers*, 557 U.S. at 10, and citing *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 82–83 (2d Cir. 2009)); *id.* (“Fees that are diverted to general revenue funds and that are not actually used to defray the costs for which they are collected violate the Tonnage Clause.”); *see Captain Andy's Sailing, Inc. v. Johns*, 195 F. Supp. 2d 1157, 1173 (D. Haw. 2001) (fee violated the Tonnage Clause “because it [did] not relate to a specific service that confers a ‘readily perceptible’ benefit to vessels operating in the Na Pali Coast ocean waters.”); *Maher Terminals*, 805 F.3d at 107 (the “[v]essels that pay a

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<sup>8</sup> The Court must carefully scrutinize the instrument through which the tax, duty, or fee is imposed. *Keokuk*, 95 U.S. at 86 (“No doubt, neither a State nor a municipal corporation can be permitted to impose a tax upon tonnage under cover of laws or ordinances ostensibly passed to collect wharfage. This has sometimes been attempted, but the ordinances will always be carefully scrutinized.”).

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purported services charge must actually receive a proportionate benefit in return”) (citing *State Tonnage Tax Cases*, 79 U.S. 204, 220 (1870) (striking down a tax because it was “an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed”)).

CBJ’s Entry Fees are not compensation for services rendered to and enjoyed by vessels. Nothing in the circumstance, history, or text of the MPF Ordinance or the PDF Resolution indicates that the Entry Fees were enacted to charge vessels for services provided to vessels by CBJ or that the Entry Fees are calculated to pay for any such services. The Entry Fees are not intended to, nor do they, provide recompense to CBJ for services like pilotage, wharfage, dockage, use of locks, medical inspection of vessels, emergency services for vessels (fire prevention, security, etc.), storage, charges for loading or unloading cargo (stevedoring), towage, and the like. In fact, CBJ charges vessels for some of these vessel services and others through fees and dues *separate and apart from* the Entry Fees. *See, e.g.*, Smt. ¶¶ 49-52.

Rather, CBJ designed and enacted the Entry Fees to raise revenues for services and infrastructure of general public benefit, including the shoreside activities of passengers who disembark when cruise vessels dock at Juneau, and to “mitigate the cost of tourism and tourism development.” Smt. ¶¶ 20, 32, 35, 132-162, 213-220; *see* CBJ Code §§ 69.20.005, 69.20.120; CBJ Res. 2552, § 1(c)(4). CBJ grants itself broad authority to appropriate MPF revenues for “capital improvements” without regard to services to vessels, “operating funds for personnel, training, commodities, rentals, services and equipment for services provided, made available to, or required as a result of marine passenger ships and marine passengers[,]” projects intended to promote “safety, environmental improvements efficiency of interstate and international commerce, or enforcement of laws caused or required by marine passenger ships and marine passengers[,]” “[s]urveys, analyses, polls, plans, monitoring, and similar efforts to measure,

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describe or predict, or manage marine passenger ships and marine passengers[,]" and land acquisition in support of MPF-funded activities. CBJ Code § 69.20.120(a); Smt. ¶ 35.

These are costs of municipal governance. They are not services provided to the vessels against which the Entry Fees are assessed. CBJ's vague reference to funding of measures that "support the marine passenger industry" is inadequate to protect the Entry Fees from constitutional attack. To remove a levy from the prohibited category of a Tonnage duty, the fee must compensate the assessing authority for a service rendered *to the vessel*. The Entry Fees do not do that. Instead of providing a means for the recoupment of costs of providing vessel-specific services, the Entry Fees handsomely bankroll CBJ's general civic and tourism enhancements (enhancements that benefit CBJ's residents and CBJ's tourism industry) and supplement CBJ's general municipal operations.

CBJ has budgeted Entry Fee revenues to pay for improvements and additions to CBJ's civic infrastructure outside the harbor area and civic beautification, art, and park projects, including a man-made island and installation costs for a whale statue approximately one mile from the cruise ship docks. *Id.* ¶¶ 136-153. Entry Fee revenues are paying for a large portion of CBJ's Waterfront Seawalk Project. The Waterfront Seawalk Project is part of Juneau's Long Range Waterfront Plan, the goals of which include enhancing community quality of life, strengthening tourism product offerings and downtown retail entertainment, residential, and service activities, and improving Juneau's image and attractiveness for investment. *Id.* ¶¶ 146-153. CBJ has budgeted revenues from the Entry Fees to pay for design costs, examination of right-of way issues, pedestrian access and safety, construction of the seawalk, and other costs. *Id.* ¶¶ 152-153. None of these activities constitutes "services to vessels."

Revenues from the MPF also are being spent on tourism infrastructure and supportive

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activities beyond CBJ's docks. CBJ has routinely budgeted MPF revenues to support the Juneau Convention and Visitors Bureau, to provide for downtown pay phones, to maintain the downtown restrooms, to fund a downtown crossing guard program, to support a downtown foot/bike patrol, and to fund a downtown security program. *See Smt.* ¶¶ 213-221. CBJ also uses MPF revenues to fund additional staff positions at the Juneau Douglas City Museum year-round, allowing the museum to plan long-term exhibits that change on a yearly basis; to provide community outreach; to offer additional educational programs to enhance the current Juneau school curriculum; to provide better management and collection records; to enhance museum acquisitions; to provide for better oversight and security of current exhibits; and to allow for expanded local access by increasing operating hours to six days a week, with flexible hours to meet community needs and events. *Id.* ¶¶ 136-138. Clearly, none of these constitute “services to vessels” – vessels do not use downtown restrooms, make calls at downtown pay phones, visit museums, or benefit from crossing guards or extra security in downtown Juneau.

MPF revenues support the Bartlett Regional Hospital. *Id.* ¶ 154. This allows the hospital to hire a dedicated part-time case manager to service the logistical and financial needs of cruise ship passengers; to increase overtime staffing in the emergency department; and to contract with a passenger liaison to interface with the cruise ship industry and to expedite cruise ship passenger patient care. *Id.* ¶¶ 155-156. MPF revenues also support Airlift Northwest's provision of air ambulance services for visitors and residents of Juneau and surrounding communities. *Id.* ¶ 157. These are not services provided to or enjoyed by vessels entering the Port of Juneau – vessels do not visit the hospital and certainly are not being airlifted for medical or other reasons. (The actual users of hospital services are charged separately for those services.) These services are available to non-cruise tourists and permanent and seasonal residents of Juneau.

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CBJ uses MPF revenues to supplement the costs of general municipal operations, services, and projects. Since 2000, CBJ has transferred a portion of the MPF revenues to CBJ's General Government Fund. *Id.* ¶ 111. For the past six years, CBJ has used \$1.4 million of this annual transfer to support "identified government operations." *Id.* ¶ 114. General municipal services and operations are paid out of the General Government Fund. *Id.* ¶ 43. This includes the operating costs of CBJ departments like the Mayor and Assembly, Law, Administration, Libraries, Finance, Community Development, Capital City Fire Rescue, General Engineering, Building Maintenance, Parks and Recreation, Police, Streets, and Capital Transit. *Id.* ¶ 113.

MPF revenues subsidize CBJ's public transportation system, Capital Transit. *Id.* ¶¶ 132-135. Users of the transportation system, including visitors to Juneau, pay fares to ride the buses. *Id.* ¶¶ 132-133. Vessels, however, are not users of Juneau's public transportation. Thus, bus transportation – no matter how clean or safe – is not a service provided to, available to, or enjoyed by vessels, nor is it one that supports the free flow of vessels as vehicles of commerce.

CBJ has allocated MPF revenues to finance the expansion of wireless internet service at the Marine Park Downtown Public Library. *Id.* ¶¶ 128-131. Following the expansion, wireless service will be available from the Marine Park Pavilion to and around the Marine Park parking garage. *Id.* ¶ 131. The project will benefit all users of wireless internet in the immediate area year-round, but it is not a service provided to or enjoyed by vessels.

CBJ uses MPF revenues for various capital improvement projects in addition to tourism infrastructure. In FY 2018, CBJ plans to use MPF revenues to finance downtown street reconstruction at Front Street, N. Franklin Street from Front Street to Second Street, and a portion of First Street. *Id.* ¶ 140. CBJ also plans to use MPF revenues to reconstruct and repair sidewalks and stairways in the downtown area to promote pedestrian safety. *Id.* ¶ 140. Vessels

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are not pedestrians and do not drive on streets, no matter how large or well-constructed.

Maintenance and reconstruction of streets, sidewalks, and stairways in downtown Juneau are not services provided to or available to vessels.

CBJ used MPF revenues to pay its outside lawyers to defend it in this litigation. *Id.* ¶¶ 115-119. Legal services provided to CBJ to defend CBJ in an action brought by Plaintiffs, a trade association representing the interests of the owners of the vessels assessed the Entry Fees, are not “services” rendered to a vessel; they are services rendered to CBJ.<sup>9</sup>

None of CBJ’s uses of the Entry Fee revenues and none of the projects and activities that CBJ has bankrolled off of the Entry Fee revenues are “services rendered” to a vessel. *See Clyde Mallory*, 296 U.S. at 266 (services rendered to a vessel are pilotage, wharfage, medical inspection, the use of locks, and the like). CBJ’s uses of the Entry Fee revenues go far beyond what the Supreme Court has determined to be a constitutional graduated levy imposed upon a vessel as compensation for services rendered to a vessel. CBJ’s Entry Fees do not impose a constitutional charge for reimbursement for services rendered. Rather, CBJ has levied, and continues to levy, unconstitutional duties of Tonnage upon all interstate and foreign commerce passenger-carrying vessels entering the Port of Juneau.<sup>10</sup> In so doing, CBJ is exploiting its “favorable geographical position” to exact a price for the use of its ports, thereby heavily subsidizing its tourism industry to the great benefit of the Juneau residents and businesses that

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<sup>9</sup> Plaintiffs fully expect CBJ to argue that this use of Entry Fee revenues is justified and constitutionally proper because a district court outside the Ninth Circuit declined to enjoin, during the course of litigation, a port authority’s imposition of a surcharge on its passenger fee to defray the costs of litigation over the constitutionality of that same passenger fee. Although the plaintiffs in *Bridgeport* did not succeed in enjoining the surcharge during the litigation, the *Bridgeport* court did invalidate the passenger fee – surcharge and all – in its final decision on the merits of the plaintiffs’ claims. *Bridgeport & Port Jefferson Steamboat Co.*, 566 F. Supp. 2d at 85-86, 102 (finding that a significant portion of the fee revenues funded projects “completely unrelated and unavailable to the fee payers, such as . . . legal fees . . .”). The fee payers in *Bridgeport* were the passengers, not the vessels, and the case can be distinguished from the present one on that and other bases. The ultimate merits, however, command a similar result in this case.

<sup>10</sup> With the significant exception of the State Ferry vessels.

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would otherwise pay for CBJ's municipal activities and grand plans of tourism infrastructure expansion through increased taxes or otherwise.<sup>11</sup>

### **B. CBJ's Entry Fees Impermissibly Conflict with Federal Law, 33 U.S.C. § 5, and Violate the Supremacy Clause of the U.S. Constitution**

#### **1. Federal Law Prohibits Any State or Local Levy Imposed on a Vessel Unless the Levy Is Used Solely to Pay the Cost of a Service to the Vessel**

The Rivers and Harbors Appropriations Act ("RHAA") adds an additional layer of prohibition to the Constitution's bar to state vessel levies. The RHAA prohibits non-federal interests from levying or collecting "taxes, tolls, operating charges, fees, or any other impositions whatever" from "any vessel or other water craft, or from its passengers or crew[.]" 33 U.S.C. § 5(b), subject only to narrow and limited statutory permissions.<sup>12</sup> One such permission allows states to charge "reasonable fees" "on a fair and equitable basis" that "are used solely to pay the cost of a service to the vessel[.]" "enhance the safety and efficiency of . . . commerce[.]" *and* "do not impose more than a small burden on interstate or foreign commerce." *Id.* § 5(b)(2).

The ability to charge reasonable fees solely to pay the cost of a service to a vessel under the RHAA "codifies the common law" that has developed around the Tonnage Clause and the Commerce Clause with regard to fees imposed on vessels engaged in interstate commerce. *State, Dep't of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1222 (Alaska 2010) (citing *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 566 F. Supp. 2d 81, 102

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<sup>11</sup> Juneau's geographic position means that it is the most visited Alaska port for cruise vessels. It is often the first or last Alaska port call for cruise vessels en route from or to Vancouver or Seattle, the two most frequently used cruise termini in the Alaska cruise trade.

<sup>12</sup> In addition to this statutory permission, Section 5(b) also permits fees for two other purposes. First, Section 5(b) permits "fees charged under section 2236 of this title." 33 U.S.C. § 5(b)(1). Section 2236 allows non-federal interests to levy port or harbor dues only in conjunction with a harbor navigation project whose construction is complete. 33 U.S.C. § 2236(a)(1). Section 2236 is limited in scope and sets forth very specific purposes and limitations on Congress's consent to the levying of such port or harbor dues. Second, Section 5(b) permits state and local governments to charge "property taxes on vessels or watercraft . . . if those taxes are permissible under the United States Constitution." 33 U.S.C. § 5(b)(3). The Entry Fees at issue here do not fit within either of these permissions.



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(D. Conn. 2008) (“the requirements [of 33 U.S.C. § 5(b)] closely track[ ] the Commerce Clause and Tonnage Clause cases”); *Moscheo v. Polk County*, No. E2008–01969–COA–R3–CV, 2009 WL 2868754, at \*15 (Tenn. App. Sept. 2, 2009) (“[t]he exception noted in 33 U.S.C. § 5(b)(2) tracks [the] language” of *Clyde Mallory*’s pronouncement that reasonable fees for services rendered, like towage, pilotage, and the like, are not constitutionally prohibited). Like the Constitutional provisions from which it emanates, when a levy is charged under Section 5(b)(2), it must be reasonable by fairly approximating the cost incurred by the levying authority in providing the service. *See Alaska Riverways, Inc.*, 232 P.3d at 1222 (finding lease fee based on passenger count “clearly impermissible because it [did] not approximate the benefit conferred or cost incurred by the State of Alaska”).<sup>13</sup>

A levy imposed under this permission must satisfy *all elements* of Section 5(b)(2) to escape the generally prohibitory direction of the RHAA. Conversely, the failure to meet just one of those elements places the levy in direct, and impermissible, conflict with Section 5(b). Here, the Entry Fees do not satisfy any of these elements, let alone all of them. As set out in Section IV.A above, CBJ does *not* use the Entry Fees solely “to pay the cost of a service to the vessel.” CBJ uses the Entry Fees almost exclusively for projects and services that have no connection to the vessel whatsoever, instead benefitting CBJ, its tourism industry and infrastructure, its residents and businesses, and its general revenue needs in violation of federal law.<sup>14</sup> As a result,

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<sup>13</sup> The benefit conferred in *Alaska Riverways* was the use of state-owned shorelands. The court found that a per-passenger fee was not a fair approximation of the benefit (indeed, had no relation to the benefit) because whether Alaska Riverways had 100 or 100,000 passengers, the benefit was the same.

<sup>14</sup> In deeming it unnecessary for purposes of this motion to discuss the other elements of the RHAA’s permission for reasonable fees for services, Plaintiffs do not concede and reserve the right to argue that CBJ’s Entry Fees do not satisfy those other elements – namely, that such levies be reasonable, imposed on a fair and equitable basis, enhance the safety and efficiency of interstate commerce, and not impose more than a small burden on commerce. While Plaintiffs anticipate that CBJ might argue that approximately \$8 million in annual levies against Plaintiffs’ members’ vessels is “not more than a small burden” on the interstate and foreign commerce of the United States, CBJ cannot seriously contend that

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the Entry Fees violate Section 5(b) of the RHAA as levies on vessels operating in navigable waters, outside of the narrow confines of Congress's consent to levies solely to pay the cost of a service to the vessel.

### **2. Because the Entry Fees Are Contrary to, and in Fact Violate the Express Prohibition of, Section 5(b) of the RHAA, the Supremacy Clause Invalidates the MPF Ordinance and PDF Resolution**

The laws of the United States “shall be the supreme Law of the Land.”<sup>15</sup> U.S. CONST., Art. VI. As a result of this directive, state or local laws “that interfere with, or are contrary to, federal law” are invalid. *Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824)); see *SilverWing at Sandpoint, LLC v. Bonner Cty.*, No. 2:12-CV-00287-EJL, 2014 WL 6629600, at \*6 (D. Idaho Nov. 21, 2014) (quoting *Goodspeed Airport, LLC v. East Haddam Inland Wetlands & Watercourses Com'n*, 681 F. Supp. 2d 182, 199 (D. Conn. 2010), in turn quoting *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 220 (2d Cir. 2008)).

Whether a state or local law is found incompatible with federal law depends on the particularities on the federal and state or local laws at issue. In some cases, preemption is clear because the federal law or regulation at play includes language explicitly preempting state action in a given area. See *Young*, 2001 WL 1677259, at \*5 (citing *Barber v. Hawaii*, 42 F.3d 1185, 1189 (9th Cir. 1994)). In others, preemption is present because Congress has manifested its preemptive intent by enacting a “pervasive scheme of federal regulation” or legislating on a field

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the Entry Fees are used “solely” for services rendered to vessels or that the projects and services funded by the Entry Fees “enhance the safety and efficiency” of the Nation’s commerce.

<sup>15</sup> The Supremacy Clause is the Constitutional basis for the doctrine of federal preemption. See *Young v. Coloma-Agaran*, No. CIV. 00-00774HG-BMK, 2001 WL 1677259, at \*4 (D. Haw. Dec. 27, 2001) (citing *Int'l Ass'n of Indep. Tank Owners(Intertanko) v. Locke*, 148 F.3d 1053, 1058-59 (9th Cir. 1998), *aff'd in part United States v. Locke*, 529 U.S. 89 (2000), and *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982)).

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dominated by a federal interest. *See id.*; *see also Hawaii Floriculture & Nursery Ass'n v. Cty. of Hawaii*, No. CIV. 14-00267 BMK, 2014 WL 6685817, at \*9 (D. Haw. Nov. 26, 2014); *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (“A federal statute, for example, may create a scheme of federal regulation ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’”) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). And yet in others, preemption must be found because “compliance with both federal and state [laws] is a physical impossibility” or the state law impedes “the accomplishment and execution of the full purposes and objectives of Congress[.]” *Hawaii Floriculture & Nursery Ass'n*, 2014 WL 6685817, at \*9 (internal citations, quotations omitted); *see also Barnett Bank*, 517 U.S. at 31 (state or local law preempted where it stands in direct “irreconcilable conflict” with federal law).

In Section 5(b), Congress expressly *denied* state and local governments “the ability to levy taxes on watercraft operating on navigable waters.” *Kittatinny Canoes, Inc. v. Westfall Tp.*, No. 183 CV 2013, 2013 WL 8563483, at \*10 (Pa. Com. Pl. May 6, 2013) (determining that Section 5(b) preempted the challenged law). Clearly, any state or local law that does what Section 5(b) of the RHAA says it must not do is preempted by federal law and void under the Supremacy Clause of the Constitution. Because CBJ’s Entry Fees violate Section 5(b) of the RHAA, the MPF Ordinance and PDF Resolution cannot stand.

### **C. The Aforementioned Violations of the Tonnage Clause and Section 5(b) of the RHAA Give Rise to a Right to Relief Under 42 U.S.C. § 1983**

Section 1983 provides a cause of action for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” by any person acting “under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory.” 42 U.S.C. § 1983. The Tonnage Clause and Section 5(b) of the RHAA confer rights on Plaintiffs to be free from

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Tonnage duties as prohibited by the Constitution and Congress's subsequent federal enactments on that same subject. Because the Court can find that CBJ's Entry Fees violate the Tonnage Clause and Section 5(b) of the RHAA, Section 1983 is a proper basis for relief.<sup>16</sup>

### **D. The Entry Fees Cannot Be Saved from Unconstitutionality Under the Tonnage Clause and the Supremacy Clause by Alleged Constitutionality Under the Commerce Clause**

The Commerce Clause vests the right “[t]o regulate Commerce with foreign Nations, and among the several states” with Congress. U.S. CONST., Art. I, § 8. The Supreme Court has long interpreted this grant of power to Congress as “an implicit restraint on state authority, even in the absence of a conflicting federal statute.” *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (internal citations omitted). As applicable here, a state or local “user fee” violates the dormant Commerce Clause unless the fee is based on a fair approximation of use, is not excessive in relation to the benefits conferred, and does not discriminate against interstate commerce. *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 369 (1994); *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) (superseded by statute on other grounds).

Here, it is likely that CBJ's Entry Fees violate the Commerce Clause. The Entry Fees discriminate against out-of-state interests. Both the MPF Ordinance and the PDF Resolution impose their levies on large, commercial, passenger-carrying vessels. Thus, predominately, the vessels subject to these levies are large, out-of-state cruise vessels operating in the interstate and foreign commerce of the United States. Exempt from the levies, by comparison, are smaller vessels more likely to be owned by in-state interests and passenger vessels of any size owned by the State, local Tribes, and non-commercial operators. Further, the Entry Fees do not fairly

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<sup>16</sup> If and when the Court enters judgment in favor of Plaintiffs on these grounds, Plaintiffs, as the prevailing party, intend to seek attorneys' fees pursuant to 42 U.S.C. § 1988.

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approximate a fee-paying vessel's use of the Port of Juneau and are excessive in relation to any benefits conferred by CBJ in exchange for the Entry Fees. CBJ uses the Entry Fees almost exclusively for projects and services that have no connection to vessel services and infrastructure and that benefit a wide range of non-vessel interests, including visitors, tourists, and residents. The vessel fee payer cannot use the majority of the projects and services paid for by the Entry Fees. This is true particularly with respect to the MPF, which revenues CBJ budgets for general government services unrelated to vessel services.

While Plaintiffs do not concede that the Entry Fees could be found to be constitutional under the Commerce Clause, Plaintiffs submit that *it does not matter* here. In cases where a court has been presented with levies alleged to violate both the Tonnage Clause and the Commerce Clause and a Tonnage Clause violation is found, it takes one of two approaches. Either it finds that *both* Constitutional violations exist, *see, e.g., Inman S.S. Co. v. Tinker*, 94 U.S. 238 (1876) (finding both Tonnage Clause and Commerce Clause violations); *Smith*, 48 U.S. 283 (finding both clauses violated); *S. S. S. Co. of New Orleans*, 73 U.S. 31 (finding both clauses violated); *Bridgeport & Port Jefferson Steamboat Co.*, 567 F.3d 79 (affirming district court's finding of violations under Commerce and Tonnage Clauses); or it declines to address the Commerce Clause claim because a Tonnage Clause violation has been found, *see, e.g., Polar Tankers*, 557 U.S. 1 (found Valdez, Alaska property tax on tank vessels violated the Tonnage Clause; consequently, U.S. Supreme Court did not consider alternative Commerce Clause and Due Process Clause arguments); *Cannon*, 87 U.S. 577 (mooring fee violated the Tonnage Clause; Court did not reach Commerce Clause issues).

Here, the Entry Fees violate the Tonnage and Supremacy Clauses and cannot be saved by alleged compliance with the Commerce Clause. *See Reitz v. Kipper*, 674 F. Supp. 2d 1194, 1204-

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05 (D. Nev. 2009) (rejecting argument that a state statute's constitutionality under one Constitutional provision made that same statute's unconstitutionality under a separate provision less likely). Therefore, there is no need for the Court to reach the Commerce Clause claim.

### **E. CBJ's Persistent Failure to Abide by Controlling Constitutional and Federal Law Supports the Entry of a Declaratory Judgment and Permanent Injunction**

Plaintiffs ask this Court to enter a declaratory judgment and permanent injunction to halt CBJ's levying, collection, and spending of the Entry Fees. A permanent injunction may issue where a plaintiff establishes actual success on the merits and the lack of an adequate legal remedy. *Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1104 (9th Cir. 1994); *see Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016, 1042-43 (E.D. Cal. 2014).<sup>17</sup> A constitutional violation is generally sufficient to establish lack of an adequate legal remedy. *Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008) (“[u]nlike monetary injuries, constitutional violations cannot be adequately remedied through damages”), *rev'd and remanded on other grounds*, 562 U.S. 134 (2011); *see Prison Legal News v. Columbia Cty.*, 942 F. Supp. 2d 1068, 1090–91 (D. Or. 2013) (finding inadequacy of damages where constitutional violation was established).<sup>18</sup> Further, injunctive relief is “appropriate in cases involving challenges to government policies that result in a pattern of constitutional violations.”

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<sup>17</sup> In the Ninth Circuit, “the threat of irreparable injury is not a prerequisite for a permanent injunction.” *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 1000 (9th Cir. 1994) (citing *Continental Airlines, Inc.*, 24 F.3d at 1104); *see Valley View Health Care, Inc.*, 992 F. Supp. 2d at 1042-43. Rather, irreparable injury is “only one basis for showing the inadequacy of the legal remedy.” *Continental Airlines, Inc.*, 24 F.3d at 1104. Even if it were necessary to show irreparable injury, a constitutional violation alone would constitute all the irreparable harm needed to support a permanent injunction. *See Assoc. Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (same).

<sup>18</sup> Other circumstances, present here, also demonstrate that Plaintiffs lack an adequate legal remedy. *See Valley View Health Care*, 992 F. Supp. 2d at 1042-43 (“[i]f there is the possibility of future wrongful conduct, a legal remedy is inadequate.”) (citing *Gathright v. City of Portland*, 482 F. Supp. 2d 1210, 1214 (D. Or. 2007), in turn citing *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 564 (9th Cir. 1990)); *Koniag, Inc.*, 39 F.3d at 1000 (finding no adequate remedy at law where plaintiff's only choice would be multiplicity of suits if defendant “continue[d] to use Koniag's rock without paying a reasonable price”).

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*Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998); *see Allee v. Medrano*, 416 U.S. 802, 815 (1974) (noting that a permanent injunction is proper when there is a persistent pattern of government misconduct).

Plaintiffs have shown that CBJ's Entry Fees violate the U.S. Constitution and controlling federal law (*see* Section IV.A-D., *supra*) and in fact have resulted in continuing violations of law every time CBJ levies and spends Entry Fees for unconstitutional and improper purposes. Plaintiffs are entitled to a permanent injunction generally preventing CBJ from levying and spending the Entry Fees inconsistent with the requirements of the U.S. Constitution, and specifically preventing CBJ from spending Entry Fees on projects, services, costs, or expenses that are not related to vessels use of or access to port facilities in Juneau. CBJ should be clearly and permanently enjoined from collection and expenditure of vessel-sourced funds for general municipal operating expenses, payments for legal services, improvements to general tourism infrastructure, city beautification projects, or costs or services incurred to enhance ancillary services, excursions, or attractions for residents, visitors, or passengers unrelated to the vessel's safe navigation, or services for which vessels or passengers separately pay a fee.

### V. CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that the Court grant judgment in favor of Plaintiffs on the First Cause of Action (Violation of the Tonnage Clause of the U.S. Constitution), Second Cause of Action (Violation of the Rivers and Harbors Appropriations Act of 1884, as amended, 33 U.S.C. § 5), and Fourth Cause of Action (Violation of Rights Protected by 42 U.S.C. § 1983 and the Supremacy Clause of the U.S. Constitution) set forth in the *First Amended Complaint*; find it unnecessary for the Court to address the Third Cause of Action (Violation of the Commerce Clause of the U.S. Constitution); enter a judgment

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declaring the Entry Fees in violation of the United States Constitution and controlling federal law and the MPF Ordinance and PDF Resolution preempted and therefore void; and enter a permanent injunction prohibiting CBJ from levying and spending the Entry Fees inconsistent with the requirements of the U.S. Constitution, forbidding the collection of the PDF from vessels calling at privately owned docks, and prohibiting CBJ from spending Entry Fees on projects, services, costs, or expenses unrelated to reimbursement for services provided by CBJ that enhance the safe navigation, operation and security of vessels while entering, mooring in, or departing Juneau.

DATED: October 20, 2017

Respectfully submitted,

By: /s/ C. Jonathan Benner

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## CERTIFICATE OF SERVICE

I certify that on October 20, 2017, I caused a true and correct copy of the foregoing document to be filed using the Court's Electronic Case Files System ("ECF"). The document is available for review and downloading via the ECF system, and will be served by operation of the ECF system upon all counsel of record.

/s/ Kathleen E. Kraft

Kathleen E. Kraft