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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

PLAINTIFFS' OPPOSITION TO CITY AND BOROUGH OF JUNEAU'S MOTION TO DETERMINE THE LAW OF THE CASE ON THE TONNAGE CLAUSE AND RIVERS AND HARBORS ACT

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska ("Plaintiffs" or "CLIA") oppose the *Motion to Determine the Law of the Case on the Tonnage Clause and Rivers and Harbors Act*, ECF No. 81, (the "Motion") filed by Defendants City and Borough of Juneau, Alaska, and Juneau's City Manager Rorie Watt, in his official capacity (collectively, "CBJ" or "Juneau"). CLIA respectfully urges denial of the Motion for reasons stated in detail below.

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I. INTRODUCTION

CLIA has sought federal judicial review of two local levies imposed on passenger cruise vessels by Juneau. The Marine Passenger Fee, a charge of $5.00 per passenger listed on vessel manifests, is described as a charge "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). The second fee is the $3.00 (per passenger) Passenger Development Fee, imposed "to provide funding for capital improvement to the downtown waterfront." City and Borough of Juneau, Ak., Res. 2552 (2010). Revenues from these two fees (collectively referred to by CLIA as "Entry Fees") have been used to support, *inter alia*, general municipal government operations, transit bus services, wireless internet facilities, civic improvements and beautification projects in public spaces, street and walkway maintenance, airport and hospital expenses, legal fees, and retirement of public debts.

On October 24, 2017, CLIA moved the Court for summary judgment in its favor based on an extensive factual record the material components of which are, CLIA contends, not disputed. Pls.' Mot. Summ. J., ECF No. 67. That motion is pending before the Court and will be fully briefed by March 6, 2017. Order, Briefing Schedule, ECF No. 95. CLIA's request for Summary Judgment is based on a core contention that the particular uses of the Entry Fee revenues are of a nature that places both fees within the prohibitory ambit of the Tonnage Clause of the U.S. Constitution and violate federal statutory restrictions on local charges against vessels.

Notwithstanding the pendency of CLIA's Summary Judgment motion, CBJ filed the instant Motion on October 30, 2017 seeking six rulings relating to the lawfulness of the uses of

the Entry Fees, which CBJ has described as determinations on the "scope of the law to be applied in this case in analyzing specific expenditures challenged by CLIA."[1] Motion at 27-28. The Motion presumes—incorrectly and without legal or factual support—that the Entry Fees are lawful and the only issue to be decided by this Court is the specific uses or expenditures to which CBJ may apply the Entry Fee revenue. It also requests these rulings in a factual vacuum that obscures the incongruity inherent in CBJ's Entry Fee collection and spending—CBJ assesses the Entry Fees against vessels, yet seeks to defend their collection and use by legitimizing the provision of unsolicited and unmeasurable "services to passengers."[2]

CLIA urges denial of CBJ's motion on both procedural and substantive grounds. While CLIA is aware that state practice in Alaska recognizes motions such as CBJ's as acceptable devices for adjudicating purely legal questions,[3] the Court has ample discretion to deal with the

[1] The Motion's filing appears to have been an attempt by CBJ to divert immediate attention from CLIA's pending Summary Judgment motion and to interpose, without the development or identification of any factual record whatsoever, broad legal findings that would control disposition of the pending Summary Judgment motion and inveigle the Court into reaching sweeping legal conclusions detached from the peculiar circumstances of this particular dispute. This diversionary purpose was clearly revealed by CBJ's request that the Court delay disposition of CLIA's earlier filed Summary Judgment motion until after ruling on CBJ's Motion. The Court denied CBJ's request (ECF No. 92) and now has before it concurrent motion practice on the pending motions.

[2] In its 24-page pleading on this issue, CBJ manages to avoid even one mention of the challenged uses of the Entry Fees. CBJ also neglects to mention the stream of general revenues it collects from cruise ship passengers directly through local sales tax. *See* Pls.' Mot. Summ. J., ECF No. 67, at 10 (Juneau derives approximately $6.9 million in yearly revenue from sales taxes on cruise ship passenger purchases).

[3] *Slade v. State Dep't of Transp.,* No. 3AN1108466, 2012 WL 11894230 (Alaska Super. Ct. Mar. 7, 2012); *Christianson v. First Nat'l Bank of Alaska*, No. 3AN0613690, 2009 WL 9058226 (Alaska Super. Ct. July 26, 2009). The utility of such rulings is questionable given the non-binding nature of any resulting opinion. *See West v. Buchanan*, 981 P.2d 1065, 1067 (Alaska 1999) (judge's determination of the law of the case is non-binding, even within the same action).

issues presented in the context of the summary judgment pleadings that have been and will be submitted. The ultimate question of the constitutionality of CBJ's ordinances assessing cruise vessels with the Entry Fees and Juneau's practices in applying fee revenues to a wide range of activities, functions, and projects is best decided not in the abstract, as CBJ now urges, but against an extensive, but undisputed record concerning the imposition and uses of the Entry Fees. There is no question of law governing this case's correct disposition that cannot be better determined in the combined legal and factual context of Rule 56 motion practice.[4]

Beyond this procedural objection, however, CLIA opposes the instant Motion on substantive grounds. CBJ's Motion invites this Court to embrace a novel view of a stark and elemental prohibition on State and local vessel fees that lies at the core of the federalist structures deemed by the Founders to be critical to the functions of a strong Republic. The Tonnage Clause

[4] CLIA has been advised by counsel for CBJ that CBJ may file, in addition to this Motion, an additional cross-motion for summary judgment. While CLIA believes that its pending Summary Judgment motion provides an adequate vehicle for determining the extent to which issues in this litigation can be resolved prior to trial, the possibility that CBJ will file an additional cross-motion militates against consideration of the instant Motion. The Court should exercise its broad discretion in pre-trial matters and its inherent power to manage its docket to prioritize the pending and anticipated motions for summary judgment. *See FDIC v. Glickman*, 450 F.2d 416, 419 (9th Cir. 1971) (district courts are generally "given broad discretion in supervising the pre-trial phase of litigation, with a view towards sifting the issues in order that the suit will go to trial only on questions involving honest disputes of law"); *Gallagher v. Ocular Therapeutix, Inc.*, No. CV-17-5011(SDW)(LDW), 2017 WL 4882487, at *2 (D.N.J. Oct. 27, 2017) ("the decision as to which motion to address first is a matter of discretion that falls within the Court's inherent power to manage its docket"); *Moore v. Shands Healthcare, Inc.*, 617 F. App'x 924, 927 (11th Cir. 2015) (a court may suspend filing deadlines on pending motions to consider a party's dispositive motion); *Channel Bell Assocs. v. W.R. Grace & Co.*, No. 91 Civ. 5485 (PKL), 1992 WL 232085, at *2 (S.D.N.Y. Aug. 31, 1992) (prioritizing a cross-motion for summary judgment over a motion to transfer); *see also All. for the Wild Rockies v. Marten*, 200 F. Supp. 3d 1129, 1130 (D. Mont. 2016) ("[T]he Court possesses broad discretion to manage its own docket, which includes the inherent power 'to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'") (citation omitted)).

is lodged within a short, but fundamental, list of actions that are beyond the authority of individual States to undertake absent consent of Congress. These include engaging in war, keeping troops or warships, entering into treaties, coining money, granting titles of nobility, granting Letters of Marque and Reprisal, and imposing duties on imports or exports. U.S. CONST., art. I, § 10.[5] The prohibition is clear: "No State shall, without Consent of Congress, lay any Duty of Tonnage. . . ." *Id.* CBJ's Motion solicits evasion of this prohibition by the creation of a nebulous general class of municipal programs that CBJ describes as passenger "services." The requested rulings, framed against the abstraction of a vague and formless factual background, are that a non-federal entity may lawfully assess taxes or fees against interstate and foreign commerce passenger vessels if their passengers use (or have an opportunity to use), participate in, or enjoy civic infrastructure and services funded by the fees. Motion at 8-9, 27-28.

The logic behind Juneau's effort is strained—it requires the Court to accept that a municipality seeking to assess duties against vessels in interstate and foreign commerce can treat passengers of those vessels as if they are the vessel itself;[6] that a municipality can unilaterally categorize as a "service" a wide and conceptually unlimited range of challenged uses of levies (in this case, physical infrastructure such as roads and walkways, library facilities, parks, statuary, and general municipal expenses such as administration and personnel costs and legal fees); and that, by this conveniently self-aggrandizing taxonomy, slip the long-recognized

[5] Other prohibitions include enactment of Bills of Attainder, ex post factō laws, laws impairing contractual obligations, and denominating legal tender (other than gold or silver). The relative brevity of this list emphasizes, rather than diminishes, the centrality of these prohibitions to the federal constitutional structure. These are core functions of a national government that the Constitution deems antithetical, if exercised locally, to the viability of the Republic.

[6] Motion at 14-15.

constraints of the Tonnage Clause and other federal restrictions in order to create a revenue stream for local facilities and improvements without the political inconvenience of imposing on the pocketbooks of local citizens and interests.

It is difficult to find a limiting principle in the relief CBJ requests. The uses and services that CLIA challenges are not "services" that fee-paying vessels can use or have requested of Juneau. They are not akin to direct vessel services that assist in the navigation, security, and operation of the vessels, services which reviewing courts have regarded as amenable to recovery of costs by non-federal government entities. In many cases, they are projects, activities, or functions for which other, additional charges are exacted from users, whether those users be vessel passengers, tourists, visitors, or residents of Juneau. CBJ's decisions about use of revenues from the contested fees are not commercial transactions between fee-paying vessel owners and Juneau, as would be the purchase of essential services such as wharfage, utilities, vessel supplies, tug assists, or pilotage. The expenditures are instead formulated by Juneau only after seeking annual input from local interests as to projects of general public desirability against which to apply revenues obtained from the vessels.[7] The category of "passenger services" advanced by CBJ is so vague and inexact that CLIA can observe here, as did the United States Supreme Court in 1867, that:

> [i]f the constitutionality of the charge for [local government functions and port wardens] can be maintained upon the ground that it secures compensation for services, it is difficult to perceive upon what grounds the constitutionality of any State law imposing taxes for the benefit of the State government upon vessels

[7] *See CBJ now accepting project proposals for Marine Passenger Fee proceeds,* City and Borough of Juneau (Dec. 8, 2017), https://beta.juneau.org/newsroom-item/cbj-now-accepting-project-proposals-for-marine-passenger-fee-proceeds (last visited Jan. 30, 2018), attached hereto as Exhibit 1.

landing in its ports, can be questioned.

S. S. S. Co. of New Orleans v. Portwardens, 73 U.S. (6 Wall.) 31, 34 (1867).

CBJ's over-reaching interpretations contradict the express nature of the Tonnage Clause's prohibition on interference with vessels as vehicles of maritime commerce and the very essence of the Clause as a stand-alone limitation of State authority; they directly conflict with judicial interpretation of the Tonnage Clause to preclude not only levies against vessels for the privilege of entering a non-federal entity's port, but also levies that seek to "do that indirectly which [a State or locality] is forbidden . . . to do directly[,]" *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 8 (2009) (quoting *Passenger Cases*, 48 U.S. (7 How.) 283, 458 (1849)); and they offend Congress's understanding of existing law with respect to Constitutionally-permitted fees against vessels as embodied in the plain language of 33 U.S.C. § 5 (the Tonnage Clause's legislative offshoot). CBJ seeks to unmoor the Tonnage Clause from two centuries of judicial interpretation and open the door for "convenient ports" to "take advantage of their favorable geographical position in order to exact a price . . . from the consumers dwelling in less advantageously situated parts of the country[,]" *Polar Tankers*, 557 U.S. at 7 (citations omitted).

II. ARGUMENT

A. The Tonnage Clause Is An Express, Stand-Alone Prohibition Against State Or Local Levies On Vessels For The Privilege Of Access To Ports; Analysis Of Unconstitutionality Under The Tonnage Clause Is Distinct From Analysis Under The Commerce Clause.

The Tonnage Clause prohibits *any* duty—no matter the method or gauge of calculation[8]—charged "for the privilege of entering, lying in, or trading in a port." *Polar*

[8] It does not matter that the particular tax, duty, or fee is a fixed sum, a flat rate, or an amount calculated based on the size or capacity of a vessel, however figured (*i.e.*, tons, masts, mariners,

Tankers, 557 U.S. at 9; *see Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265 (1935) (stating that duties of Tonnage, at the time of the Constitution's passage, "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"); *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").

The Tonnage Clause did not receive extended debate at the Constitutional Convention, yet the record of its consideration speaks to the Clause's central importance to the Framer's grant of authority over commerce to the Federal government through the Import-Export Clause, U.S. CONST., art. I, § 10, cl. 2, and the Commerce Clause, U.S. CONST., art. I, § 8, cl. 3. The Framers declined to rest on the arguably implicit protections of the Commerce Clause and instead explicitly barred States from imposing duties of Tonnage absent consent of Congress. *See* James Madison, 2 *Records of the Federal Convention of 1787* 625-36 (Max Farrand ed., 1911); *see also Clyde Mallory Lines*, 296 U.S. at 265 n.1:

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steam-engines, passengers). *See Portwardens*, 73 U.S. (6 Wall.) at 35; *Passenger Cases*, 48 U.S. (7 How.) at 458-59. Nor does it matter that the levying jurisdiction elects to impose the charge on an object or target other than the vessel. "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 *Passenger Cases*, 48 U.S. (7 How.) at 459); *see* Erik M. Jensen, *Quirky Constitutional Provisions Matter: The Tonnage Clause,* Polar Tankers, *and State Taxation of Commerce*, 18:3 GEO. MASON L. REV. 669, 684 (2011) ("The constitutional phrase is 'duty of tonnage,' and a plain-meaning proponent might reasonably argue that a duty, which by its terms has nothing to do with tonnage, however understood . . ., ought not to be treated as a 'duty of tonnage.' But if the Tonnage Clause proscribed only levies that were explicitly measured by a vessels' capacity or by some related concept, it would be too easy for the states to circumvent the Clause.").

> The adoption of the duty of tonnage clause followed a motion of Maryland delegates that: 'No state shall be restricted from laying duties of tonnage for the purpose of clearing harbors and erecting light houses.' Despite the assertion that such works were peculiarly necessary in the Chesapeake, the convention proved hostile to state tonnage levies. There was uncertainty whether the commerce clause would forbid such duties: Gouverneur Morris said that it would not, Madison thought that it should, Sherman argued for a concurrent power over commerce with power in the United States to control state regulations. Whereupon the clause was added in its present form[;]

Maher Terminals, LLC v. Port Auth. of N.Y. & N.J., 805 F.3d 98, 106 (3d Cir. 2015) (noting disagreement about whether the Commerce Clause would, ex propriō vigore, prohibit duties of Tonnage). The Framers thus imposed the Tonnage Clause as an additional, explicit limitation on a State's ability to interfere with or burden commerce (a commerce that at that time was largely dependent on maritime conveyance)—separate and apart from those limitations (express or inherent) in other parts of the Constitution.[9]

In its Motion, CBJ proposes that this Court determine the constitutionality of fees under the Tonnage Clause in the same manner as this Court would determine the constitutionality of fees under the Commerce Clause. *See* Motion at 12 (citing to and paraphrasing the three-part test for constitutionality under the Commerce Clause set forth in *Plaquemines*, 874 F.2d at 1021-22, in reliance on *Clyde Mallory*); *id*. at 19-20 (stating that the *Clyde Mallory* test applies to any fee that a port might charge, regardless of the designated ratepayer or the nature of the "services"). CBJ's approach ignores the special consideration that the Framers gave to vessels as vehicles of commerce in the Tonnage Clause. If the Tonnage Clause prohibited only those charges that ran

[9] "[I]t should hardly come as a surprise that a constitutional ban on tonnage duties would give preferential treatment to vessels. Such protection reflects the high value the Framers placed on the free flow of maritime commerce." *Polar Tankers*, 557 U.S. at 18 (Roberts, C.J., concurring).

afoul of the Commerce Clause regardless of the fee's lack of relation to services rendered to vessels, the Tonnage Clause's inclusion in the Constitution would have been superfluous.

Congress articulated the proper test for permissibility of fees charged against vessels in 33 U.S.C. § 5(b). Section 5(b) bars 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[,]" except for:

> reasonable fees charged on a fair and equitable basis that--
> (A) are used solely to pay the cost of a service to the vessel or water craft;
> (B) enhance the safety and efficiency of interstate and foreign commerce; and
> (C) do not impose more than a small burden on interstate or foreign commerce . . .

33 U.S.C. § 5(b) (emphasis added).[10] This test, which is stated in the conjunctive, permits a local authority's imposition of reasonable compensation on vessels and vessel interest to pay for costs of services to vessels, consistent with the special protection afforded to impositions against vessels by the cases that have interpreted the Tonnage Clause's prohibition over the last two centuries. As such, the Court need look no further than Section 5(b) to observe the breadth of the Tonnage Clause's prohibition, the narrow reach of its exceptions, and the lack of a defensible basis for granting the legal rulings CBJ seeks in its Motion. *See* Argument Point C, *infra*.

B. The Tonnage Clause's "Fee for Services" Exception Does Not Provide A Constitutional Safe Haven For Fees When The Fee Revenue Is Not Reasonable Compensation For Services Rendered To Vessels.

1. State- and Locally-Run Ports Are Entitled To Reasonable Compensation For Services Rendered To Vessels That Facilitate Maritime Commerce.

[10] Section 5(b) permits fees for two other limited purposes, neither of which is relevant to this case. *See* 33 U.S.C. § 5(b)(1) (permitting "fees charged under section 2236 of this title"); 33 U.S.C. § 5(b)(3) (permitting "property taxes on vessels or watercraft . . . if those taxes are permissible under the United States Constitution").

A fee imposed to compensate a provider of certain vessel services, such as wharfage or pilotage, is not a prohibited duty of Tonnage, even though the provider may be a non-Federal government entity. Indeed, "nothing in the Tonnage Clause prevents a state or state subdivision from charging for the services it renders—if that is what the charge actually represents." Jensen, *Quirky Constitutional Provisions*, *supra* note 8, at 702; *see Keokuk N. Line Packet Co. v. City of Koekuk*, 95 U.S. 80, 84-85 (1877) (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."). As such, courts have found that 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.) do not violate the Clause's prohibition on duties of Tonnage. Permitting cost-recoupment charges for vessel services related to the safe movement of the vessel is consistent with the Framer's original understanding of Tonnage duties. *See Maher Terminals, LLC*, 805 F.3d at 107 (quoting *Clyde Mallory Lines*, 296 U.S. at 266). Fees for such services "are allowed because they do not impede a vessel's free navigation in commerce and are only levied when a 'passing vessel' elects to use those services[.]" *Id.* at 108 (citing *Keokuk*, 95 U.S. at 85). None of the vessel Entry Fee uses challenged by CLIA compensates CBJ for the provision of such services.

The Supreme Court has found that a challenged levy was *not* a prohibited duty of Tonnage because the levy reasonably compensated the locality for a service rendered *to a vessel* as a vehicle of commerce. For example, in *Keokuk Northern Line Packet Co.*, the Supreme Court found that a fee charged for the use of wharves constructed and improved by the city could be collected from steamboats that moored and landed at the city's wharves. 95 U.S. at 85. The Court's reasoning was simple. The provision of a "wharf to which vessels may make fast, or at

which they may conveniently load or unload, is rendering [the vessels] a service[,]" and it is well-settled, common, and "essential to the interests of commerce and navigation" that owners of facilities like wharves and docks, whether governmental or private, must be able to exact reasonable compensation from those vessels that elect to use such facilities. *Id*. at 85-86; *Cannon v. City of New Orleans*, 87 U.S. (20 Wall.) 577, 582 (1874).

The Supreme Court has employed similar reasoning in other cases where wharfage charges were alleged as unconstitutional duties of Tonnage. *See, e.g., Nw. Union Packet Co. v. St. Louis*, 100 U.S. 423 (1879) (permitting fees against vessels that used wharves improved and maintained by the city); *Cincinnati, Portsmouth, Big Sandy, & Pomeroy Packet Co. v. Catlettsburg*, 105 U.S. 559, 562 (1881) (stating that there was no "room to question the right of a city or town situated on navigable waters to build and own a wharf suitable for vessels to land at, and to exact a reasonable compensation for the facilities thus afforded to vessels by the use of such wharves"). The facilities provided to vessels by the cities in these cases were essential to commerce by water. *Parkersburg & Ohio River Transp. Co. v. City of Parkersburg*, 107 U.S. 691, 701 (1883) ("[W]harves, levees, and landing places are essential to commerce by water, no less than a navigable channel and a clear river."). Thus, reasonable compensation for their existence and maintenance could be charged to vessels that used such facilities.

Fees for services closely analogous to wharfage also have passed constitutional muster. In *Huse v. Glover*, the Supreme Court found that charges for the use of locks on a navigable river did not violate the Tonnage Clause because the "exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed . . . like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels." 119 U.S. 543, 548 (1886). And in *Morgan's*

Louisiana, the Supreme Court found that charges for medical inspection of vessels under a system of quarantine provided a service to vessels as vehicles of commerce. *Morgan's La. & T.R. & S.S. Co. v. Bd. of Health*, 118 U.S. 455, 461-62 (1886):[11, 12]

> That the vessel itself has the primary and deepest interest in this examination it is easy to see. It is obviously to her interest, in the pursuit of her business, that she enter the city and depart from it free from the suspicion which, at certain times, attaches to all vessels coming from the Gulf. This she obtains by the examination, and can obtain in no other way. If the law did not make this provision for ascertaining her freedom from infection, it would be compelled to enact more stringent and more expensive penalties against the vessel herself when it was found that she had come to the city from an infected port, or had brought contagious persons or contagious matter with her, and throwing the responsibility for this on the vessel, the heaviest punishment would be necessary, by fine and imprisonment, for any neglect of the duty thus imposed. The state now says: 'You must submit to this examination. If you appear free of objection, you are relieved by the officer's certificate of all responsibility on that subject. If you are in a condition dangerous to the public health, you are quarantined and relieved in this manner. For this examination and fumigation you must pay. The danger comes from you, and though it may turn out that in your case there *is* no danger, yet, as you belong to a class from which all this kind of injury comes, you must pay for the examination which distinguishes you from others of that class.' It seems to us that this is much more clearly a fair charge against the vessel than that of half pilotage, where the pilot's services are declined, and where all the pilot has done

[11] CBJ cites to *Morgan's Louisiana* for the proposition that other courts have "considered and upheld fees for services to passengers of vessels." Motion at 15-16. CBJ misreads *Morgan's Louisiana*, as further described in Argument Point B.2(b), *supra*.

[12] In *Morgan's Louisiana*, the Supreme Court plainly noted that "no part of [the challenged levy] goes to defray the expenses of the state or city government." 118 U.S. at 461. Further, cases around the time of *Morgan's Louisiana* confirmed that state inspection, quarantine, and other health laws did not infringe on Congress's power to regulate commerce, *see, e.g.*, *Portwardens*, 73 U.S. (6 Wall.) at 33, and fees in aid of such laws may even be "necessary to promote the interests of commerce and the security of navigation[,]" *In re State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 219 (1870). Health inspections and protection of localities against pestilence have always been recognized as matters well within the police powers of the individual States. *See Holmes v. Jennison*, 39 U.S. (14 Pet.) 614, 616 (1840) ("Every state has acknowledged power to pass, and enforce quarantine, health, and inspection laws, to prevent the introduction of disease, pestilence, or unwholesome provisions . . . ."). As observed in the quoted passage above, the receipt of inspection certificates and the availability of quarantine facilities facilitated a vessels' continuation of its voyage to other localities.

> is to offer himself. This latter has been so repeatedly held to be a valid charge, though made under state laws, as to need no citations to sustain it.

The Supreme Court has also sanctioned fees imposed for the refusal to accept essential vessel navigation services (half-pilotage) and the availability of general harbor traffic and emergency services for vessels on the grounds that such fees are part and parcel of regulatory efforts by the locality to "secur[e] lives and property exposed to the perils of a dangerous navigation." *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 312 (1851) (upholding half-pilotage fees payable when a vessel refused pilotage services duly offered to it in or out of the port of Philadelphia);[13] *Clyde Mallory*, 296 U.S. 261 (finding that reasonable harbor fee charged to defray the cost of purely local regulation of harbor traffic was permissible); *see also Plaquemines*, 874 F.2d at 1023 (emergency services such as response to fire, explosion, and other perils to vessel); *Captain Andy's Sailing, Inc. v. Johns*, 195 F. Supp. 2d 1157, 1173 (D. Hawaii 2001) (connecting the fees upheld in *Clyde Mallory* to regulatory activity undertaken to ensure the safety of vessels and facilitation of movement of vessels in a harbor).[14]

In contrast, the Supreme Court has found unconstitutional state and local levies that cannot be shown to be reasonable compensation for services rendered. In *Portwardens*, the

[13] Congress recognized the validity of state pilotage laws in acts passed in 1789 and 1837. *Portwardens*, 73 U.S. (6 Wall.) at 33. Fees imposed in furtherance of state pilotage laws escape invalidity under the Tonnage Clause because of their direct assistance to the navigation and safety of the vessels paying the fee and Federal forebearance in not asserting Federal control over pilotage.

[14] The fees found permissible in *Cooley*, *Clyde Mallory*, and *Plaquemines* defrayed costs of the charging authority for enforcing local regulations intended to ensure or otherwise providing for the safe passage of vessels in, out, and through the port or harbor. Like the provision of wharves, levees, and landing places for water craft, the services provided to vessels funded by the fees in these cases facilitated commerce by water. The fee-paying vessels received the benefit of the service.

Supreme Court struck down a state law that imposed a fixed sum on every ship entering the Port of New Orleans to compensate the port's master and wardens, regardless of whether the ship was rendered a service. 73 U.S. (6 Wall.) 31 (1867). The Court reasoned that the at-issue fee violated the Tonnage Clause because, in contrast to pilotage, it was not of a subject that Congress recognized as "proper and beneficial" to maritime commerce and its imposition did not depend on services performed or "readiness to [be] perform by labor, risk, and cost, and . . . actually offered to perform." 73 U.S. (6 Wall.) at 34. Further, paying for the simple existence of the port master and wardens, without some corresponding service actually provided, too closely resembled a charge to raise general revenues, regardless of its supposed benefit to commerce.

> It may be true that the existence of [port masters and portwardens] is beneficial to commerce, but the same is true of the government of the State, of the city government, of the courts, of the whole body of public functionaries. If the constitutionality of the charge for the benefit of the master and wardens can be maintained upon the ground that it secures compensation for services, it is difficult to perceive upon what grounds the constitutionality of any State law imposing taxes for the benefit of the State government upon vessels landing in its ports, can be questioned.

Portwardens, 73 U.S. (6 Wall.) at 34 (emphasis added). In *Cannon v. City of New Orleans*, the Supreme Court similarly invalidated a duty that applied to all vessels mooring anywhere within the city limits, only two miles of which was improved with wharves. 87 U.S. (20 Wall.) at 580; *see also Inman S.S. Co. v. Tinker*, 94 U.S. 238 (1876) (invalidating port charge assessed against vessels entering the harbor of New York which was "not exacted for any services rendered or offered to be rendered"). Clearly, a charge ostensibly for "services provided" is constitutional only when actually assessed in aid of the vessel itself and its lawful movement in municipal or State jurisdiction.

2. CBJ's Position On Permissibility Of "Services To Passengers" Funded By Charges Against Vessels Contradicts Two Centuries Of Tonnage Clause Jurisprudence.

Two centuries of Tonnage Clause jurisprudence instruct that a fee assessed against a vessel (or its owner, crew, supercargo, or passengers) is constitutional only when it is imposed as direct compensation for services that facilitate a vessel's activities as a vehicle of maritime commerce. *See* Argument Point B.1, *supra*. In virtually every case where local fees or levies are challenged under the Tonnage Clause, the levying authority attempts to defend by arguing, as CBJ's Motion shows CBJ will do here, that the locality is merely trying to defray expenses incurred as a result of maritime commerce. Yet CBJ asks this Court to find that virtually any use of vessel fees that might affect passengers is a "service" under the Tonnage Clause's "fee for services" exception. CBJ's request relies on a vague reference to "services to passengers," a contrived reading of the cases, and an inventive analogy of passengers to vessels that mirrors reasoning previously rejected by the Supreme Court in Tonnage Clause cases. As such, CBJ's request is not sustainable.

(a) CBJ's Proposed "Services To Passengers" Category Of Constitutional Uses Is An Abstraction Upon Which This Court Cannot Offer A Sound Legal Ruling.

The Tonnage Clause permits fees seeking reasonable compensation for vessel services that are "essential to the interests of commerce and navigation[,]" *see Keokuk*, 95 U.S. at 85-86, and prohibits fees not meeting this standard, regardless of the benefits to commerce that may flow from their imposition, *see Portwardens*, 73 U.S. (6 Wall.) at 34 (invalidating fee even though existence of port masters and portwardens could be contended to benefit commerce). When questions of constitutionality arise, the courts carefully inquire as to the purpose of the charge. *See id.* at 33-34 (considering claim that tax was compensation to master and wardens); *see also Polar Tankers*, 557 U.S. at 10 (noting that tax was imposed to "raise [general] revenue," not for "services provided to the vessel"); *Keokuk*, 95 U.S. at 84 (considering the "object and

essence" of the charge).

Here, CBJ asks this Court to accept that "services to passengers" meets the Tonnage Clause's constitutional standard for permissibility without defining the contents of this newly-created "services to passengers" category.[15] CBJ does not explain to this Court or CLIA what "services to passengers" entail or even mention the various Entry Fee uses that have ignited this litigation.[16] CBJ has appropriated Entry Fee revenues for such things as pay telephone installations and maintenance, the construction of a man-made island park, the commissioning and installation of a statue of a whale, funding of general local government operations, upkeep and maintenance of roadways and sidewalks, airport and hospital costs, expansion of wireless internet access, and payment of legal fees for the defense of this litigation. Even a cursory review of this list reveals the fallacy of equating CBJ's supposed concept of "services to passengers" with legitimate charges collected as compensation for a service rendered a vessel in connection with the vessel's access and use of harbor and port facilities. CBJ's silence on how such expenditures fund "services," let alone services within the firmly-bounded "fee for services" exception to the Tonnage Clause's prohibition, ensures that CBJ's requested "law of the case" rulings would rest on completely hypothetical foundations.

(b) Tonnage Clause Jurisprudence Does Not Support CBJ's Contention

[15] Cruise vessels routinely pay service providers, including CBJ, for a variety of "services" rendered vessels in the Port of Juneau. These include docking fees, utilities, waste haulage, and pilotage. Those fees for services are not the subject of this lawsuit.

[16] Reading between the lines, CBJ's rationale seems to be that any expenditure of revenues exacted from vessels are "services" if related to objects or functions that passengers from cruise vessels may either use, witness, tread upon, enjoy, or at least have the opportunity to use, witness, tread upon, or enjoy. Under this rationale, it is hard to imagine any civic or infrastructure improvement or offering that could not be shoved into CBJ's "services to passengers" category.

That "Services To Passengers" Are Proper Funding Objects Under The Clause's "Fee for Services" Exception.

In any event, the cases touted by CBJ to have "considered and upheld fees for services to passengers of vessels," *see* Motion at 15, do not compel the conclusion that a taxing authority can constitutionally charge vessels for generalized "services to passengers." The fee upheld in *Morgan's Louisiana* paid for quarantine services rendered to vessels that had "the primary and deepest interest in [the quarantine] examination" in order to "enter the city and depart from it free from . . . suspicion . . . ." 118 U.S. at 461-62. Any benefit of treatment for diseased passengers was incidental. Similarly, the fee upheld in *Captain Andy's* paid for harbor maintenance and improvement of the Kukui'ula small boat harbor, including breakwater,[17] limited parking, and lights.[18] 195 F. Supp. 2d at 1174-75. The *Captain Andy's* court did not find that passenger access to the harbor improvements mandated constitutionality under the Tonnage Clause. *Id*.; *contra* Motion at 17. In fact, the court's conclusion that a separate two percent fee was an impermissible duty of Tonnage rested on the fee's failure to relate to "a specific service that confer[red] a 'readily perceptible' benefit *to vessels* operating in the Na Pali Coast ocean waters." *Captain Andy's*, 195 F. Supp. 2d at 1173-74 (emphasis added) (finding that the

[17] Breakwaters are artificial, offshore structures that protect a harbor, anchorage, or marine basin from ocean waves. Breakwaters are harbor improvements that benefit vessel movement in, out, and within a harbor. While breakwater construction funded by a levy against vessels or passengers would be suspect for the same reasons Maryland's hopes to use Tonnage duties to finance lighthouse construction were quashed by the Tonnage Clause at the Constitutional Convention, breakwaters do at least provide a benefit to the movement and operation of vessels.

[18] The *Captain Andy's* court analyzed the two percent use fee only as to services and facilities provided at the Kukui'ula small boat harbor—"a loading wharf, mooring area, breakwater, launch ramp, lit navigational aids, wash down facility, limited parking, and security lights." 195 F. Supp. 2d at 1161. The Kukui'ula facilities did not include public restrooms. *Id*.; *contra* Motion at 17.

challenged fee was a "revenue measure . . . used to recoup the costs of a statewide boating program whose many components [were] not limited to commercial navigation within the Na Pali Coast ocean waters.").[19]

Barber v. Hawaii, 42 F.3d 1185 (9th Cir. 1994), and *Hawaiian Navigable Waters Preservation Society v. Hawaii*, 823 F. Supp. 766 (D. Hawaii 1993), also do not support CBJ's position. In each case, the court could rely on the plaintiff's concession that services like rest room facilities, trash disposal, and security satisfied the Tonnage Clause's "fee for services" exception under *Clyde Mallory*, *see Barber*, 42 F.3d at 1196,[20] a concession not present here. Neither case provides a framework for analyzing Tonnage Clause compliance in the context of CBJ's undefined "services to passengers."[21]

[19] CBJ does not include the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), in its discussion of cases considering "services to passengers." In the *Passenger Cases* (a consolidation of two cases: *Smith v. Turner* and *Norris v. City of Boston*), the Supreme Court considered the constitutionality of two state laws (of New York and Massachusetts) that imposed a tax on alien passengers arriving in the ports of those States. Both laws were found to be unconstitutional, even though the funding objects of the laws were argued to be services available to the passengers who were charged, or imposed for their benefit. *See Passenger Cases*, 48 U.S. (7 How.) at 459 ("It was assumed as a fact, that all foreigners who arrived at the ports of Boston and New York and afterwards became paupers, remained in those cities, and there became a public charge; and that, therefore, this tax was for their own benefit, or that of their class.").

[20] *Hawaiian Navigable Waters* is the genesis of the Ninth Circuit's decision in *Barber*.

[21] For other reasons as well, the *Hawaii* cases are inapposite. Each dealt with fees charged at small boat harbors. *See Barber*, 42 F.3d at 1188 ("The focus of [this] action is the Ke'ehi Lagoon, a recreational area used by fisherman, swimmers, canoe racers, and recreational boaters on the island of Oahu."); *Hawaiian Navigable Waters*, 823 F. Supp. at 760 (same); *Captain Andy's Sailing*, 195 F. Supp. 2d at 1160-61 (describing the plaintiff as a corporation offering boating excursions from state boating facilities on Kauai). Passengers on the small vessels in the *Hawaii* cases are not akin to cruise ship passengers disembarking at Juneau. The differences in services necessary to facilitate secure navigation and operation of these very dissimilar vessel types are substantial.

Finally, the reasoning of *Bridgeport Port Authority*[22] is inapposite. In *Bridgeport*, the fee was assessed against the ferry passengers.[23] Thus, the *Bridgeport* analysis focused on benefits to the passenger fee payers for both its Commerce Clause and Tonnage Clause inquiries. *Bridgeport* did not conclude that fees paid by vessels pass constitutional muster under the Tonnage Clause solely because passengers might derive some benefits. *See Bridgeport I*, 566 F. Supp. 2d at 102 (no discussion of whether fees paying for "services to passengers" are constitutional). Here, the fee payers are the cruise vessels entering the Port of Juneau, not the cruise ship passengers who ostensibly "benefit" from the general municipal projects and services that CBJ funds with the Entry Fee revenue.[24]

(c) Extending The Clause's "Fee For Services" Exception To "Services To Passengers" Contradicts The Supreme Court's Efforts To Ensure That The Clause Prohibit A State From Doing Indirectly What It Is Prohibited From Doing Directly.

The Supreme Court consistently has interpreted the Tonnage Clause in light of its intent, *Polar Tankers*, 557 U.S. at 8 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 34 (1824)), and "has read its

[22] *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 566 F. Supp. 2d 81 (D. Conn. 2008) ("*Bridgeport I*"); *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79 (2nd Cir. 2009) ("*Bridgeport II*").

[23] In *Bridgeport*, the fee payor was the ferry passenger, *Bridgeport I*, 566 F. Supp. 2 at 82 (fee is "imposed on all ferry passengers"), and the court analyzed the services paid for by the fee revenues in that light, *id*. at 102 ("[A] significant portion of the Passenger Fee funds projects completely unrelated and unavailable to the fee payers . . . .").

[24] CBJ suggests in a footnote that counsel for CLIA is precluded from contesting the constitutionality of CBJ's Entry Fees because other lawyers previously with CLIA's counsel's law firm a decade past represented the port authority in *Bridgeport*. The intimation is ludicrous. "[T]here is nothing improper about a lawyer's arguing opposite positions for different parties in different cases: indeed, it is more or less inherent in an adversarial system of justice." *Rico Records Distribs., Inc. v. Ithier*, 04 CIV. 9782 (JSR), 2005 WL 2174006, at *2 (S.D.N.Y. Sept. 8, 2005); *O'Rear v. City of Carbon Hill*, 6:14-CV-0995-SLB, 2015 WL 5286140, at *5 (N.D. Ala. Sept. 8, 2015) (same).

language as forbidding a State to 'do that indirectly which she is forbidden ... to do directly.'" *Id.* (quoting *Passenger Cases*, 48 U.S. (7 How.) at 458). Thus, a State cannot escape the Tonnage Clause's prohibition merely by calculating a levy on a basis other than tonnage or charging the owner, supercargo, or passenger of a vessel, rather than the vessel itself. *Id.* (States cannot justify evasion by "producing a dictionary or a dictum to prove that a ship-captain is not a vessel, nor a supercargo an import" (quoting *Passenger Cases*, 48 U.S. (7 How.) at 459)).

CBJ, however, argues that "services to passengers" are permissible because passengers are cargo and the Tonnage Clause permits fees used to provide services to cargo.[25] Motion at 14-15. CBJ's logic mirrors the "dictionary or . . . dictum" logic rejected in some of the earliest Tonnage Clause cases. *See Passenger Cases*, 48 U.S. (7 How.) at 459. Just as a State cannot evade the Tonnage Clause by charging a non-vessel entity (the owner, supercargo, or passenger), a State cannot fashion constitutionality by spending vessel fee revenue on services ostensibly provided to non-vessels. To hold otherwise would permit the exception to swallow the rule. Thus, the Supreme Court's principal against circumvention of the Tonnage Clause's intent precludes CBJ's proposed expansion of the Clause's "fee for services" exception.

[25] CBJ cites to *Cooley* to support its assertion that "services to cargoes" are permissible. Motion at 14. *Cooley*, however, did not consider the viability of fees for services to cargo under the Tonnage Clause. In *Cooley*, the Supreme Court upheld a Pennsylvania law that imposed half-pilotage on all vessels refusing to take a pilot as part of the State's pilotage regulations. 53 U.S. 299. In any event, *Cooley*'s brief references to cargoes in the context of pilotage services can be interpreted only in that context (*i.e.*, that pilotage services benefit the vessel by ensuring safe passage and reducing the risk of accident-induced cargo loss). Further, vessel services involving cargo (*i.e.*, stevedoring, use of cargo staging areas, cargo storage) are very different than the "services to passengers" (*i.e.*, general municipal amenities, amusements, tourist attractions) CBJ is seeking to validate here.

C. Like The Tonnage Clause, 33 U.S.C. § 5 Permits Local Levies On Vessels, Passengers, And Crew Only If The Fee Revenue Is "Used To Pay The Cost Of A Service To The Vessel Or Water Craft."

Congress's 2002 amendment to the Rivers and Harbors Appropriations Act of 1884 ("RHAA") confirms that fees on vessels or vessel interests escape unconstitutionality *only* when imposed for the purpose of funding the services rendered to the vessel. The statutory language is plain and unambiguous. Federal law 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[,]" except for:

> reasonable fees charged on a fair and equitable basis that--
> (A) are used solely to pay the cost of a service to the vessel or water craft;
> (B) enhance the safety and efficiency of interstate and foreign commerce; and
> (C) do not impose more than a small burden on interstate or foreign commerce . . .

33 U.S.C. § 5 (emphasis added).[26] Congress's articulation of the "fee for services" exception in Section 5(b) confirms that a compliant fee is one that preserves the nexus between the fee payer and the service being used by that fee payer.

CBJ's Motion, however, proposes that this Court interpret Section 5(b)'s plain language ("used solely to pay the cost of a service to the vessel or water craft") as destroying that nexus and *permitting* fees imposed to pay costs other than those arising solely from the cost of a service to a vessel. CBJ's suggestion is untenable under established principles of statutory interpretation. A court's starting point is the "plain language of the statute[,]" *Alaska Native Tribal Health Consortium v. Cross*, No. 3:12-CV-0065-HRH, 2014 WL 12515344, at *4 (D. Alaska Oct. 15,

[26] Section 5(b) permits fees for two other limited purposes, neither of which are relevant to this case. *See supra* note 10. CBJ spends time discussing the 2003 amendment that led to the addition of Section 5(b)(3). The Entry Fees are not property taxes on vessels or water craft; therefore, this subsection, and CBJ's discussion of it, are irrelevant to the issues before the Court.

2014) (quoting *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011)), and its role is to "interpret the language of the statute enacted by Congress . . . presum[ing] that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id*. at 462 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The plain language of Section 5(b) permits reasonable fees only when used solely to pay the cost of a service to the vessel. If Congress has intended to permit localities to charge vessels, passengers, or crew for "services to passengers," it could (and would) have said so. Congress did not; so that is the end of the inquiry. No further examination, through legislative history or otherwise, is required.

If the Court inquired into the legislative history, however, it would find history that buttresses the statute's plain language, rather than detracts from it. *See* H.R. Rep. No. 107-777, at 107 (2002 Conf. Rep.) (reciting that the amendment "recognizes those circumstances under which non-Federal interests may charge reasonable port and harbor fees for services rendered."). Representative Young's post hoc remarks, cited by CBJ,[27] do nothing to alter the plain language

[27] Rep. Young's statement in the Conference Report, *see* Motion at 22-23, was entered into the record as an extension of remarks following completion of Congressional action. His comments entered the record on November 22, 2002, nearly one week *after* the passage of the U.S. House's Conference Report on November 14. *Compare* 148 Cong. Rec. E2143-44 (Nov. 22, 2002), *with* Actions—S.1214—107th Congress (2001-2002): Maritime Transportation Security Act of 2002, at https://www.congress.gov/bill/107th-congress/senate-bill/1214/all-actions?overview=closed#tabs (last visited Jan. 30, 2018) (showing the bill's passage by the Senate and the House on November 14, 2002, and presentation to the President on November 19, 2002), attached hereto as Exhibit 2. Rep. Young's comments to the media, through his spokesman, to inquiries from the Alaska governor, *see* Motion at 23-24, suffer from the same infirmity because they were made five months after passage of Section 5(b)'s amendment passage. They cannot be given weight in interpreting the statutory text.

of Section 5(b), and in any event, would "form a hazardous basis" for inferring legislative intent. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117–18 (1980) (according little weight to post hoc statements of a congressional committee); *Doe v. Chao*, 540 U.S. 614, 626–27 (2004) ("we have said repeatedly that subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment . . . .") (citations omitted)).

Further, the plain language of the statute is consistent with judicial application of 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 I*, 566 F. Supp. 2d at 102 ("[T]he requirements [of 33 U.S.C. § 5(b)] closely track[ ] the Commerce Clause and Tonnage Clause cases"); *Moscheo v. Polk Cty.*, No. E2008–01969–COA–R3–CV, 2009 WL 2868754, at *15 (Tenn. Ct. 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). Congress is "presumed to be knowledgeable about existing law pertinent to the legislation it enacts." *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 554 (9th Cir. 1991); *see Chavez v. Robinson*, 817 F.3d 1162, 1168 (9th Cir. 2016), as amended on reh'g (Apr. 15, 2016); *see generally Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 183-85 (1988). Had Congress understood Tonnage Clause jurisprudence to exclude passenger services from constitutional prohibition or desired such a result, it could have made the exception explicit in the statute. It did not. *Compare* 33 U.S.C. § 5(b) (Section 5(b)'s prohibition against tonnage duties encompasses impositions levied upon or collected from vessels, other water craft, "or from [vessel] passengers or crew . . . .") *with* 33 U.S.C. § 5(b)(2)(A) (requiring that otherwise

permissible fee revenue be "used solely to pay the cost of a service to the vessel or water craft"; passengers and crew absent from description of use of otherwise permissible fee revenue).

D. CBJ Advocates For A Dangerous Erosion Of The Tonnage Clause And A Judicial Sanction To Spend Vessel Fees On Any Local Civic Or Infrastructure Improvement Or Offering Simply By Designating It A "Service To Passengers."

By its Motion, CBJ asks this Court to accept, as a starting point and a conclusion, that "services to passengers" (undefined by CBJ, but implicitly encompassing the general civic and infrastructure improvements and offerings throughout Juneau on which CBJ currently spends the revenue) are like "services to cargoes" which in turn are like "services to vessels," and a locality is entitled to charge unilaterally for these "services" if even one single passenger visits, uses, walks over, gazes upon any of these civic improvements and offerings, or otherwise has the opportunity to do the same. CBJ's position divorces the Constitutional inquiry from the recurring theme in Tonnage Clause cases that non-Federal entities are entitled to reasonable compensation from vessels or vessel interests for services rendered to vessels in the same manner as private commercial enterprises within a port. *See Cannon*, 87 U.S. (20 Wall.) at 582 ("[W]e do not understand that this principle interposes any hindrance to the recovery from any vessel landing at a wharf or pier owned by an individual or by a municipal or other corporation, a just compensation for use of such property."). The concept of "services to passengers" championed by CBJ bears no resemblance to the sale of wharfage, dockage, the provision of government health inspections, or any other service found by past cases to justify a compensatory charge to vessel interests. It offers no limiting principle, and it is hard to imagine any civic or infrastructure project or offering that would escape description as a "service to passengers."

Here, the Entry Fees are not even compensation for services rendered, regardless of the beneficiary. Instead, CBJ collects the Fee revenue and then decides how it will be spent by

soliciting public comment and suggestion and recommendations for deserving local projects. CBJ's funding list varies from time to time, but never uniformly reflects requests from fee payers for the provision of vessel (or other) services.[28] CBJ's collection of the Entry Fees is one in search of needs, not in direct response to the incursion of costs in providing a service.[29]

The import of CBJ's Motion is clear. CBJ asks this Court to enter legal rulings that would immunize the exaction of significant levies against large ocean-going passenger vessels calling in Juneau (and presumably other ports in this District) so long as the resulting revenues are used to finance activities, functions, and objects that CBJ now or in the future denominates "services to passengers." The result CBJ seeks would protect a funding stream from out-of-state vessels that has little or nothing to do with vessel navigation, security, or operational needs and afford CBJ the distinct parochial advantage of insulating a large swath of its civic and infrastructure spending from the discipline of local electoral by placing the burden of revenue production on entities that neither vote or reside in Juneau.[30]

III. CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that the Court deny CBJ's Motion in its entirety.

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[28] Vessel interests have not negotiated to purchase sidewalks, road surfaces, hospital or emergency medical services, ambulances, bus transport, parks, or sculptures from CBJ.

[29] CBJ already derives significant revenue from cruise ship passengers through the general sales tax that it could apply to "services to passengers."

[30] The relatively recent Supreme Court review of efforts by the City of Valdez to exact revenues through the device of an *ad valorem* property tax on oil tankers loading in that City's port noted that among the defects of that particular levy was the fact that the selective application of the tax to non-resident vessel interests meant that "there is no effective electorate-related check (comparable to the check available where a property tax is broadly imposed) upon the City's vessel-taxing power." *Polar Tankers,* 551 U.S. at 15.

DATED: January 30, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 30, 2018, 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