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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL ASSOCIATION ALASKA, and CRUISE LINES INTERNATIONAL ASSOCIATION, Plaintiffs, v. CITY AND BOROUGH OF JUNEAU, ALASKA, a municipal Corporation, and RORIE WATT, in his Official capacity as City Manager Defendants.	Case No. 1:16-cv-00008-HRH

AMICUS BRIEF IN SUPPORT OF
THE CITY AND BOROUGH OF JUNEAU'S OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 67)

Cruise Lines International Association Alaska and Cruise Lines International Association (referred to jointly as Cruise Lines) sued the City and Borough of Juneau contesting the legality of certain fees imposed on cruise ships and their passengers. These fees are the $5 Marine Passenger Fee under CBJ Code 69.20.020 and a $3 Port

Development Fee by the City and Borough of Juneau resolutions.[1] The purpose of the Marine Passenger Fee is for "support of the marine passenger ship industry" and to cover costs of improvements and services "caused or required by marine passenger ships and marine passengers."[2] The purpose of the Port Development Fee is for development of the wharf, port, and waterfront in "service to the cruise ship industry" and "with the intent that expenditures be made in consultation with the cruise ship industry."[3] Cruise Lines contest these fees.

Cruise Lines moved for summary judgment (ECF 67) on October 24, 2017. The City and Borough of Juneau moved to determine the law of the case on the Tonnage Clause and the Rivers and Harbors Act (ECF 81) on October 30, 2017. Based on the State's motion to participate as an amicus and the parties' joint proposed briefing schedule (ECF 94), the State of Alaska submits this amicus brief on the Tonnage Clause and the Rivers and Harbors Act.

At bottom, while the United States Constitution and federal statutes impose some restraints on fees on ships, they *do not*—as Cruise Lines suggest—"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

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1 *See* First Amended Complaint at 5 ¶¶ 16-17 (ECF 28 at 5 of 15).

2 CBJ Code 69.20.110.

3 Resolutions of the City and Borough of Juneau, Alaska, Serial No. 2423(b) (ECF 68-16), Serial No. 2163 (ECF 68-15), Serial No. 2552 (ECF 69-1).

commerce of the United States."[4] The Tonnage Clause and 33 U.S.C. § 5 employ a more nuanced approach.

I. The Tonnage Clause prohibits fees for the privilege of entering a port.

The Tonnage Clause says that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage."[5] Generally, a Duty of Tonnage refers "to 'a duty' imposed upon a ship . . . according to 'the internal cubic capacity of a vessel,' *i.e.*, its tons of carrying capacity."[6] However, "[a] duty of tonnage within the meaning of the constitution is a *charge* upon a vessel according to its tonnage, as an instrument of commerce, *for entering or leaving a port*, or navigating the public waters of the country."[7]

The focus of the Tonnage Clause is on "its object and essence."[8] It prohibits taxes that vary according to factors other than tonnage, such as "number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers."[9] It has

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[4] Cruise Lines' Motion for Summary Judgment at 1 (ECF 67 at 7 of 33).

[5] U.S. Const. art. I, § 10, cl. 3.

[6] *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 6 (2009) (quoting *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265 (1935)).

[7] *Huse v. Glover*, 119 U.S. 543, 549-50 (1886) (emphasis added).

The Tonnage Clause supports the Import–Export Clause, which "seeks to prevent states with 'convenient ports' from placing other States at an economic disadvantage by laying levies that would 'ta[x] the consumption of their neighbors.' " *Polar Tankers*, 557 U.S. at 7; *see* U.S. Const. art. I, § 10, cl. 2 (prohibiting states from imposing a duty on imports or exports). The Tonnage Clause was designed to prevent coastal states from taking advantage of their favorable geographic position, to the detriment of interior states, by exacting a price for the privilege of entering their ports. *Id.*

[8] *Keokuk N. Line Packet Co. v. City of Keokuk*, 95 U.S. 80, 84 (1877).

[9] *Polar Tankers*, 557 U.S. at 8.

been applied to strike down flat taxes that are not tied to vessel size.[10] And a state cannot evade the Clause by calling a tax "a charge on the owner or supercargo" rather than on the vessel itself.[11] This prohibition against tonnage duties "embrace[s] all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port."[12] Thus, the Tonnage Clause ensures that a tax imposed on a ship has a rational basis and is not for the privilege of entering the taxing jurisdiction's ports.

While the Tonnage Clause prohibits charges for the privilege of access by vessels to ports, "nothing in the history of the adoption of the Clause, the purpose of the Clause, or this Court's interpretation of the Clause suggests that it operates as a ban on *any and all* taxes which fall on vessels that use a State's port."[13] The Clause was meant to protect vessels from discrimination, not to give vessels preferential treatment.[14]

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[10] *S. S. S. Co. of New Orleans v. Portwardens*, 73 U.S. 31, 34 (1867) (invalidating flat fee because although the Clause "describe[s] a duty proportioned to the tonnage of the vessel . . . it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent").

[11] *Polar Tankers*, 557 U.S. at 8; *see also Maher Terminals, LLC v. Port Auth. of New York and New Jersey*, 805 F.3d 98, 108 (3d Cir. 2015) (noting that "[j]ust as a tax on a vessel impedes the vessel's ability to freely move in commerce, taxes on the people on board the vessel have the same effect" and therefore "the Tonnage Clause prohibits taxes on them just as it prohibits taxes on the vessels themselves").

[12] *Polar Tankers*, 557 U.S. at 8 (quoting *Clyde Mallory Lines*, 296 U.S. at 265-66).

[13] *Polar Tankers*, 557 U.S. at 9.

[14] *Id.*; *see also id*. at 11-12 (stating that "the Clause does not apply to 'taxation' of vessels 'as property *in the same manner* as other personal property owned by citizens of the State' " (quoting *Wheeling, P. & C. Transp. Co. v. City of Wheeling*, 99 U.S. 273, 284 (1878)) (emphasis added by the Supreme Court)).

Indeed, taxes and fees are *not* duties of tonnage when those taxes are rationally based and are "for services rendered to and enjoyed by the vessel."[15] The Clause allows "fees or charges by authority of a state for services facilitating commerce, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage, and the like."[16] The Clause also allows a charge for making emergency services available, as well as restroom, parking, trash disposal and security.[17] Charges for services do not violate the constitution because "they are not taxes—which are assertions of sovereignty—but are instead demands for reasonable compensation—which are assertions of a right of property" and "because they facilitate, rather than impede, commerce."[18] In determining whether a fee is a charge for services, the reality—not the label—controls.[19] For example,

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[15] *Clyde Mallory Lines*, 296 U.S. at 266; *see Polar Tankers*, 557 U.S. at 10 (finding tax unconstitutional because the "tonnage-based tax is not for services provided to the vessel"); *Maher Terminals,* 805 F.3d at 107 ("a reasonable charge for general services that benefit all ships that enter a port, such as policing services for a harbor, is constitutional").

[16] *Clyde Mallory Lines*, 296 U.S. at 265; *see also id.* at 266 (recognizing fees for use of locks and for medical inspection as not violating the Tonnage Clause);

[17] *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1023 (5th Cir.), *opinion amended on denial of reh'g*, 891 F.2d 1153 (5th Cir. 1989) (approving vessel "fee to insure that emergency services will be available; this is a transaction, not a revenue device"); *Captain Andy's Sailing, Inc. v. Johns*, 195 F. Supp. 2d 1157, 1172 (D. Haw. 2001) (finding that harbor fee used for restroom, parking, trash disposal and security is not a duty of tonnage).

[18] *Maher Terminals*, 805 F.3d at 107; *Huse*, 119 U.S. at 550 (stating that "a charge for services rendered, or for conveniences provided, is in no sense a tax or a duty" (quoting *Packet Co. v. Keokuk*, 95 U.S. 80 (1877)).

[19] *Maher Terminals*, 805 F.3d at 107 (stating that a jurisdiction "may not escape the Tonnage Clause's reach merely by labelling a tax as a charge for services"); *see also Captain Andy's Sailing*, 195 F. Supp. 2d at 1174 (finding that one fee was a general

not actually using the fees to defray the costs for which they are collected (such as dock upkeep) in conjunction with a revenue surplus reflected in the general fund would "raise a plausible inference" that the fees are not for services and violate the Tonnage Clause.[20]

Juneau's fees are for services provided to the cruise ship industry and cruise ship passengers. The City and Borough of Juneau has only 33,277 residents.[21] Yet the City and Borough of Juneau receives about 1 million cruise ship passengers a year—over 30 times its population.[22] Juneau uses the passenger fees to pay for the specific impact of this huge influx of passengers on its government operations and for specific services to the cruise ship passengers, such as increased police services, increased hospital staff, rest rooms, sidewalk cleaning, firefighter services, payphones, crossing guards, parking

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revenue-raising measure in violation of the Tonnage Clause where the state failed to provide evidence to support its claim that the fee was assessed to recover the costs of regulating a particular stretch of ocean, but finding that another fee was permissible because the record established that it was charged in return for "harbor maintenance and improvement").

[20] *Lil' Man In The Boat, Inc. v. City & Cty. of San Francisco*, 2017 WL 3129913, at *4 (N.D. Cal. July 24, 2017) (order granting in part and denying in part defendants' motion to dismiss; finding that "[f]ees 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" (citing *Captain Andy's Sailing*, 195 F. Supp. 2d 1157); *see also Polar Tankers*, 557 U.S. at 10 (stating that "a general, revenue-raising purpose argues in favor of, not against, application of the [Tonnage] Clause").

[21] Plaintiffs' Statement of Facts in Support of Motion for Summary Judgment at 14 ¶ 69 (ECF 68 at 16 of 38).

[22] Plaintiffs' Statement of Facts in Support of Motion for Summary Judgment at 14 ¶¶ 71-73 (ECF 68 at 16 of 38).

improvements, street lighting, and visitor information services.[23] Because Juneau's fees are for services provided to the cruise ship industry and cruise ship passengers, and are not imposed for the privilege of entering Juneau's port, the fees do not violate the Tonnage Clause.

II. Juneau's fees do not violate the Tonnage Clause.

A. The fees are not charged for the privilege of entering, lying in, or trading in port.

Cruise Lines posits boldly that "the Tonnage Clause prohibits any duty on a vessel based on any factor related to the capacity or size of a vessel."[24] As discussed above and as set out in the Constitution, this is not true. While the caselaw has recognized that the Tonnage Clause encompasses any form of tax, the focus is whether the tax is being charged for the privilege of entering harbors.[25] The Clause does not "ban . . . *any and all* taxes which fall on vessels."[26] If the Clause operated (as Cruise Lines suggest) as a ban on all taxes on vessels, it would give vessels preferential treatment.[27] A fee for

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[23] *See, e.g.*, Memorandum from Kimberly Kiefer, City and Borough Manager, to Jerry Nankervis, Chair, Assembly Finance Committee re: Amended FY17 Passenger Fee Proceeds Recommendations based on AFC April 6 meeting (dated April 8, 2016), Exh. 46 (ECF 71-1); Marine Passenger Fee Revenue and Expenditure History/Projections as of May 25, 2004, Exh. 26 (ECF 69-11 at 1 of 1);

[24] Motion for Summary Judgment at 9 (ECF 67 at 15 of 33) (also suggesting a flat tax would violate the Tonnage Clause).

[25] *See Polar Tankers*, 557 U.S. at 8 (citing *Clyde Mallory Lines*, 296 U.S. at 265).

[26] *Id.* at 9.

[27] *Id.*

"assistance rendered and fa[c]ilities furnished for trade and commerce" does not violate the Tonnage Clause.[28]

In deciding whether a tax is for the privilege of entering a harbor, the U.S. Supreme Court has suggested that "a general, revenue-raising purpose argues in favor of, not against, application of the Clause."[29] However, the Court did not state that "a general, revenue-raising purpose" was determinative of a Tonnage Clause violation—as Cruise Lines suggests.[30] Under the case law, the key is to look at the use to which the fees were put, not what fund the fees were put into.[31]

In any case, the Juneau's fee does not have a general, revenue-raising purpose. The Juneau ordinance is designed 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

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[28] *Keokuk*, 95 U.S. at 85. A fee where no service is provided violates the Tonnage Clause. *See Inman S.S. Co v. Tinker*, 94 U.S. 238, 243 (1876).

[29] *Polar Tankers*, 557 U.S. at 10.

[30] Motion for Summary Judgment at 9 (ECF 67 at 15 of 33) (stating that if three questions—including whether the tax has "a revenue-raising purpose—can be answered in the affirmative, then it is an unconstitutional duty of tonnage).

[31] *See Huse*, 119 U.S. at 549 (recognizing that surplus funds paid into state treasury do not change the character of the fee); *Lil' Man In The Boat, Inc.* 2017 WL 3129913, at *4 (N.D. Cal. July 24, 2017) (finding that diversion of fees to general fund where they were "not actually used to defray the costs for which they are collected violate the Tonnage Clause").

ship passengers."[32] The Juneau fee is designed to provide a multitude of services to the visiting cruise ships and their passengers, and to ameliorate the impact of the flood of tourists dropped off by the cruise ships on a regular basis.[33] Similarly the $5 per passenger fee that the State passes through to Juneau is required to be used "for port facilities, harbor infrastructure, and other services provided to the commercial passenger vessels and the passengers on board those vessels." [34] These fees, by their very definition, are for services provided to the cruise ship industry and their passengers.[35]

The fees here are unlike the invalid property taxes (in *Polar Tanker*) which were "designed to raise revenue used for general municipal services," unrelated to the impact of the oil tankers on municipal services.[36] The fees here pay for the services used by the cruise ship passengers and are closely tailored to the impact on the City and Borough of Juneau of the cruise ship industry and its passengers. Because the fees are not imposed for the privilege of entering Juneau's port, but rather are spent on addressing the very real

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[32] City and Borough of Juneau Ordinance, Serial No. 2000-01am (2000) (ECF 68-6); CBJ Code 69.20.005.

[33] *See, e.g.*, Memorandum from Kimberly Kiefer, City and Borough Manager, to Jerry Nankervis, Chair, Assembly Finance Committee re: Amended FY17 Passenger Fee Proceeds Recommendations based on AFC April 6 meeting (dated April 8, 2016), Exh. 46 (ECF 71-1); Ordinance of the City and Borough Of Juneau, Alaska, Serial No. 2015-20(AJ)(b), Exh. 6 (ECF 68-7); Marine Passenger Fee Revenue and Expenditure History/Projections as of May 25, 2004, Exh. 26 (ECF 69-11);

[34] AS 43.52.230(b); AS 43.52.200-43.52.295.

[35] City and Borough of Juneau Ordinance, Serial No. 2000-01am (2000) (ECF 68-6); CBJ Code 69.20.005; AS 43.52.230(b); AS 43.52.200-43.52.295

[36] *Polar Tankers*, 557 U.S. at 10.

impact to Juneau of 1 million passengers per year, these fees do not violate the Tonnage Clause.

B. The fee does not have to support the vessel itself.

Cruise Line argues that the fees must be used for services provided to the vessel itself (such as assisting in navigation or enhancing vessel safety)—that is, not for services provided to its passengers.[37] Case law does not so require. The Second Circuit has explicitly stated that in performing its Tonnage Clause analysis, it would look to whether the project could "benefit the ferry passengers"—*i.e.*, not the vessels themselves.[38] Using the fee to provide services to the passengers (and crew) of the vessel, rather than to the physical vessel itself, does not violate the Tonnage Clause.

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[37] Motion for Summary Judgment at 2-3 (ECF 67 at 8-9 of 33) ("limited to reimbursement for services provided to the vessels" as opposed to "infrastructure usage by cruise ship passengers"); *id.* at 6 n.3 (ECF 67 at 12 of 33) (Clause allows "fees for services provided to a vessel" for vessel navigation and vessel safety); *id.* at 11 (ECF 67 at 17 of 33) (Clause allows "reasonable compensation for services rendered to, and enjoyed by, the vessel"); *id.* at 14 (ECF 67 at 20 of 33) ("To remove a levy from the prohibited category of a Tonnage duty, the fee must compensate the assessing authority for a service rendered <u>*to the vessel*</u>"); *id.* at 15 (ECF 67 at 21 of 33) ("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 of extra security in downtown Juneau" and "vessels do not visit the hospital and certainly are not being airlifted for medical or other reasons"); *id.* at 16 (ECF 67 at 22 of 33) ("Vessels . . . are not users of Juneau's public transportation" and "wireless internet . . . is not a service provided to or enjoyed by vessels"); *id.* at 16-17 (ECF 67 at 22-23 of 33) (vessels do not uses streets, sidewalks, and stairs).

[38] *Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 88 (2d Cir. 2009) (quoting and affirming *Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Authority*, 566 F. Supp. 2d 81, 102 (D. Conn. 2008), based on fact that use of the fees did "not benefit the ferry passengers").

Further, the services and infrastructure that have passed Tonnage Clause scrutiny, are services clearly provided *to people*, not to the vessels. Specifically, the courts have held that fees collected to fund restroom facilities, parking, trash disposal, breakwater, lights, and security are not a duty of tonnage because services are provided in exchange for the fee.[39] A fee for a medical inspection of the sanitary condition of the passengers themselves (as well as the ship) is also not a duty of tonnage.[40] A fee for harbor maintenance and improvement, and for "accounting, legal, management and other support services," even if "the expense records do not account for the[se] services provided by the central office," does not violate the Tonnage Clause.[41]

Certainly, services like restrooms, lights, medical inspections, accounting and legal fees are not services in support of vessels themselves. Yet case law provides that fees to fund these services provided to ship passengers (and not to the ship vessels

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[39] *Barber v. Hawaii*, 42 F.3d 1185, 1196 (9th Cir. 1994) (holding that a fee providing a service is not a duty on tonnage); *Hawaiian Navigable Waters Pres. Soc'y v. Hawaii*, 823 F. Supp. 766 (D. Haw. 1993) (holding that fees covered use of restroom, parking, trash disposal and security; were reasonable fees for services rendered; and did not violate the Tonnage Clause); *see also Captain Andy's Sailing*, 195 F. Supp. 2d at 1174-75 (finding that ship had unfettered access to "use of the facilities, parking, and security, as well as any improvements made thereon," including breakwater, parking, and lights).

[40] *Morgan's Louisiana & T.R. & S.S. Co. v. Bd. of Health*, 118 U.S. 455, 459-60, 463 (1886).

[41] *Captain Andy's Sailing*, 195 F. Supp. 2d at 1174-75 (upholding fee based in part on shared services provided by the central office in support of the individual harbors).

themselves) are nevertheless valid under the Tonnage Clause.[42] Cruise Lines' argument to the contrary is without merit.

C. While the service provided by the fee should be available to all fee-payers, it does not need to be used by all fee-payers.

While the services must be available to the vessels and their passengers,[43] the services need not necessarily be used by all fee-payers.[44] For example, the U.S. Supreme Court upheld a policing fee against a Tonnage Clause challenge because the harbor policing was "not any the less a service beneficial to the appellant because its vessels have not been given any special assistance" and the benefits of the harbor policing "inure

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[42] In Tonnage Clause cases, the passengers and crew are viewed as an extension of the vessels themselves, so fees imposed on passengers and crew are subject to scrutiny under the Clause. *See Maher*, 805 F.3d at 108 (recognizing that Tonnage Clause extended to taxes imposed on owner, captain, and passengers; stating that "[t]hough these people are obviously not ships, the Tonnage Clause prohibits taxes imposed on them because they are representatives of the ships. . . . The interest of these people are the same as the interests of the vessels they occupy . . .").

[43] *Bridgeport & Port Jefferson Steamboat Co.*, 567 F.3d at 88 ("Charging the fee-payers for services that are not available to them is impermissible under the Tonnage Clause."); *see Clyde Mallory*, 296 U.S. at 266 (noting that policing is available to all who enter harbor).

[44] *Clyde Mallory*, 296 U.S. at 266 (rejecting argument that a harbor-policing fee violated the Tonnage Clause even though the plaintiff had "neither asked nor received any police service" because policing benefited all vessels in the harbor); *see also New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d at 1023, *opinion amended on denial of reh'g*, 891 F.2d 1153 (5th Cir. 1989) (although "not every ship paying the fee needs [emergency services]; they have paid for the assurance of its availability"); *Plaquemines Port, Harbor and Terminal Dist. v. Fed. Maritime Comm'n*, 838 F.2d 536, 545 (D.C. Cir. 1988) ("All vessels, whether or not they catch fire or need rescue services, benefit from their availability"); *Captain Andy's Sailing*, 195 F. Supp. 2d at 1172 (stating that a fee charged for a service is "not a duty of tonnage, even if 'not every ship paying the fee needs the service' ").

to all who enter it."[45] This reasoning goes beyond police and fire protection, and has been applied to services and infrastructure, such as rest rooms, lights, and parking.[46] The U.S. Supreme Court has upheld under the Tonnage Clause a fee where no service was rendered to the vessel that had refused pilotage services.[47] In Tonnage Clause analysis, it is the availability of the service—not the decision to use the service—that is key.

In this case, the emergency services, transportation infrastructure, recreation infrastructure, port facilities, harbor facilities, and other services focused on the needs of the commercial passenger vessels and their passengers, and are all available to the cruise ships and their passengers.

D. Use of the services by people who did not pay the fee does not create a Tonnage Clause violation.

Cruise Lines suggests that the availability of services "to non-cruise tourists and permanent and seasonal residents of Juneau" indicates a Tonnage Clause violation.[48] A

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45 *Clyde Mallory*, 296 U.S. at 266.

46 *Captain Andy's Sailing*, 195 F. Supp. 2d at 1175 (fee that paid for lights, rest rooms, parking, security, and other facilities did not violate Tonnage Clause "irrespective of whether [the boating company] chooses to use it").

47 *Cooley v. Bd. of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299, 313 (1851) (upholding a half-pilotage fee imposed on vessels refusing pilotage services where such fees were used by "the society for the relief of distressed and decayed pilots, their widows and children"), *abrogation recognize by Oklahoma Tax. Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995) (abrogation as to Commerce Clause analysis).

48 Motion for Summary Judgment at 15 (ECF 67 at 21 of 33); *see id.* at 17 (ECF 67 at 23 of 33) (the fee is "to the great benefit of the Juneau residents and businesses").

fee is not a prohibited duty of tonnage "just because the services provided by the fee are also used by persons not paying the fee."[49]

The Ninth Circuit has held that even though state services (in that case, restroom facilities, parking, trash disposal, and security) were also available to the public—not just the fee-payers—the fees were not a duty on tonnage because the services were provided to and regularly used by those mooring their boats.[50] The D.C. Circuit similarly upheld a fee under the Tonnage Clause because benefits were closely apportioned to fees even though "some who receive benefits do not pay."[51]

As discussed above, the services provided by Juneau through use of the fees are targeted to providing infrastructure and services to the cruise ship industry and the cruise ship passengers themselves. Even if some of those services might also be used by some Juneau residents, those closely tailored services survive the Tonnage Clause challenge.

E. Using fees for upcoming projects does not violate the Tonnage Clause.

That Juneau's collected fees might be "used to fund future projects"[52] does not make the fees a prohibited duty of tonnage. Where there is a surplus, it is acceptable to divert the money to the general fund for a future project. Specifically, the U.S. Supreme Court has recognized that "[t]he fact that if any surplus remains from the tolls over what

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49 *Captain Andy's Sailing*, 195 F. Supp. 2d at 1173.

50 *Barber*, 42 F.3d at 1196 (rejecting Tonnage Clause challenge to fees that paid for rest rooms, parking, trash disposal and security).

51 *Plaquemines Port, Harbor and Terminal Dist.*, 838 F.2d at 545 n.8.

52 First Amended Complaint at 2 ¶ 2 (ECF 28 at 2 of 15) (claiming therefore that "no direct benefits to the passengers who actually pay the fee or to the vessels that transport the passengers").

is used to keep the locks in repair, and for their collection, it is to be paid into the state treasury as a part of the revenue of the state, does not change the character of the toll or the impost. . . . . Some disposition of the surplus is necessary until its use shall be required, and it may as well be placed in the state treasure, and probably better, than anywhere else."[53] "[T]here is no requirement that the fee charged in return for the services rendered be an exact dollar for dollar scheme."[54] The key inquiry is whether the fees are used—as they were here—for services and infrastructure for the benefit of the passengers and the vessels.

III. 33 U.S.C. § 5(b) (aka Rivers and Harbors Appropriation Act or Maritime Transportation Security Act)

The Rivers and Harbors Appropriation Act of 1884, as amended, like the Tonnage Clause, restricts fees on vessels.[55] Subsection (b), added in 2002, provides:

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for
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> (1) fees charged under section 2236 of this title [which allows port or harbor dues in conjunction with a harbor navigation project];
>
> (2) 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

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53 *Huse*, 119 U.S. at 549.

54 *Captain Andy's Sailing*, 195 F. Supp. 2d at 1175.

55 33 U.S.C. § 5(b) (overhauled as part of the Maritime Transportation Security Act of 2002 following the September 11 terrorist attacks).

> (C) do not impose more than a small burden on interstate or foreign commerce; or
>
> (3) property taxes on vessels . . . if those taxes are permissible under the United States Constitution.

While this statute has not been interpreted by many courts,[56] multiple courts have opined that it codifies Commerce and Tonnage Clause jurisprudence.[57]

Alaska Riverways, an Alaska Supreme Court case, found that this statute "prohibits levying fees on the use of navigable waters unless those fees do not impose a significant burden on interstate commerce and represent a fair approximation of the benefit conferred or cost incurred by the charging authority."[58] This "fair approximation" formulation comes from Commerce Clause cases, which provide a three-part test for

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[56] Cases considering the statute: *Commercial Barge Line Co. v. Dir. of Revenue*, 431 S.W.3d 479, 484 (Mo. 2014) (holding that § 5(b) did not prohibit Missouri from imposing sales or use taxes on supplies delivered to towboats); *Kittatinny Canoes, Inc. v. Westfall Twp*., No. 183 CV 2013, 2013 WL 8563483, at *14 (Pa. Com. Pl. May 6, 2013) (holding that plaintiffs were likely to succeed on the merits of claim that § 5(b) prohibited applying an "amusement tax" to canoe rentals); *Reel Hooker Sportfishing, Inc. v. State, Dep't of Taxation*, 236 P.3d 1230, 1232 (Haw. Ct. App. 2010) (holding that § 5(b) did not prohibit general excise tax on charter fishing revenue); *Moscheo v. Polk Cty.*, 2009 WL 2868754, at *16 (Tenn. Ct. App. Sept. 2, 2009) (not reported) (holding that § 5(b) prohibited an amusement tax on float trips).

[57] *State, Dep't of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1222 (Alaska 2010) ("33 U.S.C. § 5(b) codified the common law concerning these constitutional provisions"); *see also Maher Terminals*, 805 F.3d at 111 ("the RHA codifies the body of law surrounding the Tonnage Clause"); *Bridgeport & Port Jefferson Steamboat Co.*, 566 F. Supp. 2d at 102, *aff'd*, 567 F.3d 79 (2d Cir. 2009) (the language of § 5 "closely tracks the Commerce Clause and Tonnage Clause cases . . . in its focus on reasonable fees used to cover the cost of service to vessels, and the parties agree the provision was intended to clarify, not change, the Commerce Clause jurisprudence concerning legal fees"); *Moscheo*, 2009 WL 2868754, at *15 (not reported) ("[t]he exception noted in 33 U.S.C. § 5(b)(2) tracks [the] language" of the U.S. Supreme Court in *Clyde Mallory*, 296 U.S. at 265-67, on the Tonnage Clause).

[58] *Alaska Riverways*, 232 P.3d at 1222.

assessing whether a fee is valid under the Commerce Clause: "(1) it does not discriminate against interstate commerce; (2) it is based on a fair approximation of use or privilege for use of the facilities for whose benefit they are imposed; and (3) it is not excessive in comparison with the government benefit conferred or in relation to the costs incurred by the charging authority."[59]

Alaska Riverways involved a rental fee for the exclusive use of state-owned submerged lands under a floating dock used by a riverboat company. The Court held that the "rent" (based on passenger count, and not land value) "is a charge exacted specifically for the use of navigable waters" and 33 U.S.C. § 5(b) therefore applied.[60] The Court struck down the fee because the State did not provide any facilities or services, and incurred no costs that would justify the fee.[61] The Court reasoned that "[w]hether Alaska Riverways has 100 or 100,000 passengers, the benefit conferred by the State is the same"—*i.e.*, exclusive use of the land under the docks—so "a per-passenger lease fee is not a fair approximation of this benefit."[62] Thus, like a Tonnage Clause dispute, a dispute about 33 U.S.C. § 5(b) will center on whether a particular fee really constitutes a reasonable charge for services.

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59 *See Bridgeport & Port Jefferson Steamboat Co.*, 566 F. Supp. 2d at 96, *aff'd*, 567 F.3d 79 (2d Cir. 2009) (citing *Evansville–Vanderburgh Airport Auth. Dist.. v. Delta Airlines*, 405 U.S. 707, 716-17 (1972)).

60 *Alaska Riverways,* 232 P.3d at 1222.

61 *Id*.

62 *Id*.

As discussed above, the fees here fund projects and services that are used by the cruise ship passengers visiting the City and Borough of Juneau, including emergency services, transportation, recreation infrastructure, port facilities, and harbor infrastructure. These fees are not the kind that section 5(b) was intended to prevent. This statute

> addresses the . . . problem . . . of local jurisdictions seeking to impose taxes and fees on vessels merely transiting or making innocent passage through navigable waters . . . adjacent to the taxing community. We are seeing instances in which local communities are seeking to impose taxes . . . where the vessel is not calling on, or landing, in the local community. These are cases where no passengers are disembarking, in the case of passenger vessels, or no cargo is being unloaded in the case of cargo vessels and where the vessels are not stopping for the purpose of receiving any other service offered by the port. In most instances, these types of taxes would not be allowed under the Commerce Clause of the United States Constitution.[63]

Thus the statute was designed to ensure that fees are "reasonable" and "charged on a fair and equitable basis for the cost of the service actually rendered to the vessel."[64] As discussed above, the fees here are imposed to compensate Juneau for services rendered to the cruise ships and their disembarking passengers. These fees do not violate the Rivers and Harbors Act.

Conclusion.

Juneau's fees are not imposed for the privilege of entering port, but rather are used to provide services and infrastructure to cruise ship passengers and industry that pay the

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[63] 148 Cong. Rec. E2143-04, 2002 WL 31633117 suggesting addition of § 5(b) would avoid "years of litigation" regarding what is "an impermissible burden under the Constitution").

[64] *Id.*

fee. This equation is not changed if the services are not used by all fee-payers, or are also used by persons who did not pay the fee. Reasonable fees used for services to vessels and their patrons do not violate the Tonnage Clause or the Rivers and Harbors Act.

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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/ Mary Ann Lundquist
Mary Ann Lundquist