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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' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO CITY AND BOROUGH OF JUNEAU'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska ("Plaintiffs" or "CLIA") reply in support of CLIA's Motion for Summary Judgment, ECF No. 67, ("CLIA Mot. Summ. J.") and oppose the Cross-Motion for Summary Judgment, ECF No. 118, ("CBJ Mot. Summ. J.") 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 resolution of the pending motions in CLIA's favor.

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I. INTRODUCTION

This is a challenge to the imposition, collection, and future expenditure of two municipal fees levied by CBJ against large cruise vessels operating in the interstate and foreign commerce of the United States. These fees—a $5.00 per passenger Marine Passenger Fee and a $3.00 per passenger Port Development Fee (collectively, the "Entry Fees")—are charged against every large cruise vessel that enters the Port of Juneau. Vessels of 20 or fewer berths, day excursion vessels, ships operated by non-profits, and government-owned vessels (including vessels of the State Ferry System) are exempt from the Marine Passenger Fee. Vessels of less than 200 tons laden, as well as government owned vessels and tribal vessels are exempt from the Port Development Fee. Failure to remit the fees subjects the vessel to exclusion from the port. CLIA Smt. Facts Supp. Mot. Summ. J. at Ex. 11, ECF No. 68 ("CLIA Supp. Facts"). The fees are not tied to any specific service or set of services rendered to the vessels paying the fees. Rather, the Entry Fee revenue is collected by CBJ to cover or offset the costs of projects and services that can vary from year to year and that are generally indistinguishable from the types of civic expenditures and infrastructure investments that might be undertaken by any municipality anywhere. CLIA moves this Court for a summary judgment ruling that CBJ's fees violate the Tonnage Clause of United States Constitution, the Rivers and Harbors Appropriation Act of 1884 ("RHAA"), and the Supremacy Clause of the United States Constitution, and deprive CLIA of its federal rights under 42 U.S.C § 1983.

CBJ defends against CLIA's motion by, among other things, contending that CBJ's fees

and the uses thereof are constitutional under the Commerce Clause.[1] The fees' purported Commerce Clause validity, however, is not dispositive or necessarily even relevant here. Rather, favorable resolution of this case for CLIA on Tonnage Clause, Supremacy Clause, or RHAA grounds makes consideration of Commerce Clause claims superfluous.[2]

CLIA seeks purely prospective relief:[3] (1) A declaratory judgment confirming that the

[1] CBJ has responded to CLIA's Motion for Summary Judgment and has filed its own Cross-Motion for Summary Judgment on the apparent premise that all claims of constitutional and federal statutory violations are measured by identical standards. CBJ does not address separately the requirements of the Tonnage Clause, the Commerce Clause, and the RHAA. Rather, CBJ "lumps" CLIA's allegations of constitutional and federal statutory violation together and relies heavily on fact-intensive Commerce Clause jurisprudence to make a case for constitutionality of its Entry Fees. *See, .e.g.*, CBJ Mot. Summ. J. at 37-41. Nothing in the history of the Tonnage Clause or Supreme Court jurisprudence interpreting the Clause supports CBJ's theory that purported compliance with the Commerce Clause constitutes Tonnage Clause compliance. The tests for these two separate limitations on state and local power are as different as the provisions themselves. *See* CLIA Opp'n to CBJ Mot. to Determine the Law of the Case, ECF No. 97, at 6-9. The Tonnage Clause is a separate, explicit limitation on a State's ability to interfere with or burden ocean commerce (which, at the time of adoption, largely was dependent on maritime conveyance)—separate and apart from express or inherent limitations in other parts of the Constitution. As such, CBJ's proffer that its Entry Fees *might* comply with the distinct constitutional restrictions on "user fees" under the Commerce Clause does not preclude summary judgment in CLIA's favor on its Tonnage Clause, RHAA, Supremacy Clause, and Section 1983 claims.

[2] As noted below, this position is not an abandonment of CLIA's Commerce Clause Claim, but rather a recognition that favorable resolution of the Tonnage Clause, RHAA, and Supremacy Clause claims would render further proceedings unnecessary. *See, e.g.*, *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 6 (2009) ("We begin, and end, with Polar Tankers' Tonnage Clause claim. We hold that Valdez's tax is unconstitutional because it violates that Clause. And we consequently need not consider Polar Tankers' alternative Commerce Clause and Due Process Clause argument.").

[3] CLIA is not seeking reparation, reimbursement, or money damages to compensate its member cruise lines for past payment of Entry Fees that were unlawfully imposed and collected by CBJ. CLIA seeks only to halt future constitutionally and statutorily violative uses of revenues. CLIA's requested relief is targeted to the uses of the Entry Fee revenue that are unlawful. Primary examples of clearly unlawful uses are revenues directed to general government operations; legal fees and costs (internal or external); infrastructure construction, maintenance, and improvements such as sidewalks, roadways, walkways, promenades; hospital costs; internet service and library upgrades; police and crossing guard costs; parks and beautification projects; and public transit. CLIA does not seek to enjoin the collection or expenditure of Entry Fees that are used for purposes consistent with established constitutional and statutory proscriptions. Fees that are collected and used for a proper purpose are not at issue in this lawsuit. It is CJB's misuse of the fees for purposes other than services to the vessels that render their imposition unlawful.

Entry Fees may lawfully be imposed only for identifiable services rendered directly to vessels, such as dockage (accommodation or berthing of vessels), wharfage (loading, unloading, and storage of goods from vessels), and pilotage (enforcing rules of navigation), but only to the extent that CBJ does not assess separate fees directed at compensating CBJ for providing such vessel services; (2) A ruling that Entry Fee revenues used for general revenue purposes, civic improvements, infrastructure installation, maintenance, and repair, municipal beautification projects, public transit, or the construction, operation, or maintenance of tourist attractions are not services to vessels as a matter of law and therefore may not lawfully be imposed or collected by CBJ; (3) A ruling that Entry Fee revenues collected from vessels docking at the private docks may not be used to fund identifiable services rendered to vessels at the municipally-owned docks, such as debt service on bonds sold for public (municipally-owned) dock infrastructure projects; and (4) Entry of a permanent injunction prohibiting CBJ from using Entry Fee revenues for anything other than identifiable services rendered to vessels and from using Entry Fee revenues collected from vessels docking at the private docks to fund identifiable services rendered to vessels at the municipally-owned docks, such as debt service on bonds sold for public (municipally-owned) dock infrastructure projects.

II. STANDARD OF REVIEW

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Rather, Rule 56(c) only requires

the absence of *genuine* issues of *material* fact. *Id*. at 248. A fact is "material" if it "might affect the outcome of the suit under the governing [substantive] law"[4] and its existence is subject to "genuine dispute" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. Irrelevant or unnecessary factual disputes do not prevent entry of summary judgment. *Id*.

Where both parties move for summary judgment, the court "evaluate[s] each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." *A.C.L.U. of Nev. v. City of Las Vegas*, 466 F.3d 784, 790-91 (9th Cir. 2006) (citation omitted); *see also Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 674 (9th Cir. 010) ("Cross-motions for summary judgment are evaluated separately under [the] same standard."). The court considers each party's evidence "regardless under which motion the evidence is offered." *Las Vegas Sands, LLC v. Nehme,* 632 F.3d 526, 532 (9th Cir. 2011).

"Inferences may be drawn in favor of the nonmoving party only if they are rational, reasonable, and otherwise permissible in light of the governing substantive law and substantive evidentiary burden." *Bathony v. Transamerica Occidental Life Ins. Co.*, 795 F. Supp. 296, 298 (D. Alaska 1992) (citing *Liberty Lobby,* 477 U.S. at 253-54; *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 631, 631 n.3 (9th Cir. 1987)). In deciding a motion for summary judgment, the judge does not "weigh the evidence and determine the truth of the matter, but [instead] determine[s] whether there is sufficient evidence favoring the non-moving

[4] *Liberty Lobby* states that the "materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination." 477 U.S. at 248. In other words, "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. . . . [M]ateriality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim . . . ." *Id.*

party for the jury to return a verdict for that party." *Id*. at 298 (citing *Bukoskey v. Shuham*, 666 F. Supp. 181, 185 (D. Alaska 1987)).

III. ARGUMENT: REPLY IN SUPPORT OF CLIA'S MOTION FOR SUMMARY JUDGMENT

The parties' submissions to date describe two widely-disparate views of this case. CLIA's challenge to the Entry Fees rests on these salient facts: First, the Entry Fees are assessed against vessels operating in interstate and foreign commerce of the United States. Second, the Fees are based on vessel capacity. Third, non-payment of the Fees carries the threat of exclusion from the Port of Juneau. Fourth, the Fee revenues fund a variety of general civic or municipal projects, services, and activities that do not compensate CBJ for particularized vessel services or facilities that enhance the operations or security of the vessels.

By contrast, CBJ advances an elaborate and bewildering welter of assertions and theories that divert attention from the Tonnage Clause's straightforward prohibition and invite consideration of novel, abstract, and ethereal rationalizations for its Entry Fees.[5] But, for all the complexity and sheer volume of CBJ's filings to date, CBJ has not directed the Court to *any* Tonnage Clause case validating a general charge against vessels has been found constitutionally valid when it is used to fund a variety of general civic uses, or *any* Commerce Clause in which a challenged fee that passes constitutional muster under Commerce Clause jurisprudence is also deemed, by force of its Commerce Clause validity, to be valid under the Tonnage Clause; or *any* Tonnage Clause case in which a court, having found Tonnage Clause invalidity of a vessel fee,

[5] CLIA succinctly stated its counter-arguments to CBJ's legal theories in its Opposition to CBJ's Motion to Determine the Law of the Case. *See* CLIA Opp'n to CBJ Mot. to Determine the Law of the Case, ECF No. 97. These arguments are equally applicable here.

validates that same fee under Commerce Clause principles. The absence of such cases in the constitutional jurisprudence of the last century are not an oversight.

A. The Material Facts Necessary To Decide CLIA's Motion For Summary Judgment Are Not In Dispute.

The *material* facts supporting CLIA's constitutional and federal statutory law claims are clear, limited in number, and not subject to *genuine* dispute:

1. The contested Entry Fees are assessed against large cruise vessels operating in the interstate and international commerce of the United States. Pls.' Resp. CBJ Smt. Facts Supp. Mot. Summ. J. & Mot. Strike at Ex. A (contemporaneously filed) ("CLIA Resp. CBJ Supp. Facts"). These fees may ultimately be passed on to passengers in the form of increased fares, but CBJ does not assess these fees against passengers individually and the passengers are not responsible for remitting the payments to CBJ. *Id*. Rather, the vessel's owner or agent must make these payments upon docking for every passenger on board whether or not that passenger disembarks. *Id.*

2. The Entry Fee amounts assessed by CBJ are calculated by reference to the number of passengers carried by each vessel on each Juneau port call. *Id.* The Entry Fees are assessed against the vessel based on the number of passengers on board when the vessel arrives in port, regardless of whether the passengers leave the ship to go ashore in Juneau. *Id.*

3. Failure of a vessel owner or agent to remit the Entry Fees is a misdemeanor offense that subjects the vessel to being barred from calling at the Port of Juneau. *Id.*

4. CBJ has a long history of using the Entry Fee revenues to fund projects that are unrelated to vessels themselves. In fact, the Entry Fee revenue uses are not limited to the services provided by CBJ's Docks and Harbors Board. The revenues collected by Juneau from the cruise vessels are applied, *inter alia*, to general government operations, to pay legal fees, to expand and

improve internet service at the local library, for improvements to a local museum and an arts and cultural center, to support public transportation, to repair , maintain, and construct stairs, sidewalks, walkways, and restrooms in public areas of downtown Juneau, to fund foot police and bicycle patrols and crossing guards, to fund infrastructure improvements along Juneau's waterfront, and to construct or improve parks featuring a whale statute nearly one mile from the cruise ship docks. *Id*. CBJ does not deny that Entry Fees have been used for these purposes. *See* CBJ Obj. & Resp. to Pls.' Smt. Facts Supp. Mot. Summ. J. at 29-84 (claiming that CLIA did not object to such uses, but not disputing the uses themselves) ("CBJ Obj."). Instead, CBJ argues that CLIA or its predecessor approved these uses. While CLIA disputes many of CBJ's factual allegations, such factual disputes are irrelevant given the allegations of ongoing constitutional invalidity and the purely prospective relief sought.[6]

The only genuine issue raised by CBJ's filings is a legal dispute—Whether general municipal projects, services, and activities that Juneau claims to make "available" to cruise ship passengers who disembark from the cruise vessel in Juneau are "services to the vessel," such that charging the ships for those services is constitutional under the Tonnage Clause. *See, e.g.*, CBJ Smt. Facts Not in Dispute & Genuine Issues of Mat. Fact in Dispute at 4-5, ECF. No. 118-1; *see, e.g., Marr v. Anderson*, 611 F. Supp. 2d 1130, 1141 (D. Nev. 2009) ("the 'ultimate constitutional significance of the facts as found' is a question of law" (*citing Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 1129-30 (9th Cir. 2008))).[7]

[6] CBJ even acknowledges the constitutional problem. In its Cross-Motion and Opposition, CBJ states that "substantial uses of the fees" are constitutional, the indication being that even they admit that some of the uses are not constitutional.

[7] CBJ agrees that this is question of law. In its response to CLIA's Statement of Facts, CBJ notes that the question of whether the purposes of the PDF "are unrelated to providing any services to the vessels,"

As the parties' filings demonstrate, the parties do not disagree with respect to material facts, they disagree as to the *application* of the various Constitutional and federal statutory issues presented by CLIA's Amended Complaint to the undisputed facts. The material facts needed to enter a final judgment on Plaintiffs' Tonnage Clause, Supremacy Clause, Rivers and Harbors Appropriation Act, and Section 1983 claims are not in dispute and provide a solid basis for the entry of summary judgment in favor of CLIA. CLIA Resp. CJB Supp. Facts at Ex. A.

B. The Challenged Entry Fees Are Unconstitutional Under The Tonnage Clause.

1. Fees Assessed Against Vessels That Operate As Conditions Of Entry Are Unconstitutional.

The Tonnage Clause prohibits "Dut[ies] of Tonnage[,]" U.S. CONST., Art. I, § 10, cl. 3. At the time of the Constitution's adoption, such duties were generally understood as "levies upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state." *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265 (1935). The Constitution's prohibition on Tonnage duties encompasses any duty on a ship charged "for the privilege of entering, lying in, or trading in a port." *Polar Tankers,* 557 U.S. at 9; *S.S.S. Co. of New Orleans v. Portwardens,* 73 U.S. 31, 35 (1867); *see New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1023 (5th Cir. 1989) (describing an unconstitutional tonnage duty as any graduated duty charged "to raise general revenues, to regulate trade, or to charge for the privilege of entering, lying in, or trading in a port"). Every private cruise vessel over 20 berth capacity and 200 tons laden that calls in Juneau is subject to both contested fees. A levy assessed as a condition of entry into a port violates the Tonnage

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CLIA Supp. Facts ¶ 29, "is a legal conclusion, not a fact," CBJ Objs. & Resp. to Pls.' Smt. Facts Supp. Mot. Summ. J. at 11, ECF No. 118-3.

Clause and is unconstitutional, regardless of any alleged consistency with other constitutional provisions. *See* CLIA Mot. Summ. J. at 28-30.

2. The Supreme Court's Analysis Of The Tonnage Clause In *Polar Tankers* Mandates Invalidation Of The Entry Fees.

The Supreme Court's disposition of *Polar Tankers* made clear that the Tonnage Clause prohibits levies--of any form and however denominated--that operate as a charge "for the privilege of entering, trading in, or lying in a port." *Polar Tankers*, 557 U.S. at 8-9. *Polar Tankers* analyzed whether the Valdez *ad valorem* tax "impose[d] 'a charge for the privilege of entering, trading in, or lying in a port'" by focusing on the identity of the payer, whether it was calculated based on a factor related to tonnage, and whether it was one for "services rendered" to a "vessel."[8] *Polar Tankers*, 557 U.S. at 9-10.

> Certainly, the ordinance that imposes the tax would seem designed to do so. It says that the tax applies to ships that travel to (and leave) the City's port regularly for business purposes, that are kept in the City's port, that take on more than $1 million in cargo in that port, or that are involved in business transactions in that amount there. In practice, the tax applied in its first year to 28 vessels, of which 24 were oil tankers, 3 were tugboats, and 1 was a passenger cruise ship. App. 53. The ordinance applies the tax to no other form of personal property. See Valdez Municipal Code § 3.12.030(A)(2) (2008).
>
> Moreover, the tax's application and its amount depend upon the ship's capacity. That is to say, the tax applies only to large ships (those at least 95 feet in length), while exempting small ones. See § 3.12.020(A)(1).
>
> Nor can Valdez escape application of the Clause by claiming that the ordinance imposes, not a duty or a tax, but a fee or a charge for "services rendered" to a

[8] CBJ appears to dispute whether *Polar Tankers* posed these three questions for analysis of a charge under the Tonnage Clause. CBJ Mot. Summ. J. at 61. As the above discussion illustrates, the Supreme Court relied on three findings: that the Valdez tax was assessed against vessels only, that it was graduated according to value, and that it was not charged in exchange for services rendered by the City to the fee-paying vessels. The first two elements are indisputably present in this case. CBJ seeks to evade the thrust of the third point by crafting an elaborate and novel rationalization that the challenged fees fund "passenger services" (as defined by CBJ) and that passengers are somehow surrogates for the vessel itself.

> "vessel," such as "pilotage," "wharfage," "medical inspection," the "use of locks," or the like. *Clyde Mallory Lines,* 296 U.S., at 266, 56 S.Ct. 194; see also *Inman,* 94 U.S., at 243. To the contrary, the ordinance creates a tax designed to raise revenue used for general municipal services. See 182 P.3d, at 623; Valdez, Alaska Resolution No. 00–15, App. to Pet. for Cert. 53a–56a. Tonnage Clause precedent makes clear that, where a tax otherwise qualifies as a duty of tonnage, a general, revenue-raising purpose argues in favor of, not against, application of the Clause. See *Steamship Co.,* 6 Wall., at 34, 18 L.Ed. 749.
>
> This case lies at the heart of what the Tonnage Clause forbids. The ordinance applies almost exclusively to oil tankers. And a tax on the value of such vessels is closely correlated with cargo capacity. Because the imposition of the tax depends on a factor related to tonnage and that tonnage-based tax is not for services provided to the vessel, it is unconstitutional.

Id.; *see* CLIA Mot. Summ. J. at 15.

CBJ bridles against the Supreme Court's clear analysis, arguing that: (1) Entry Fees are not Tonnage Duties because CLIA members recover fees from passengers as part of their cruise ticket prices; (2) it does not matter for constitutional analysis how the Entry Fees are calculated; and (3) the Entry Fees do not "raise revenue for general municipal services." CBJ Mot. Summ. J. at 61-62.

The undisputed, material facts say otherwise. CBJ does not dispute that, by both ordinance and resolution, the Entry Fees are assessed against and charged to "marine passenger ships"[9] meeting certain size thresholds and their owners or agents, not against individual passengers.[10] CBJ Code § 69.20.020 ("A fee of $5.00 per passenger per visit shall be assessed for

[9] "Marine passenger ship" and "ship" are each defined by CBJ Code as "a vessel carrying passengers for compensation." CBJ Code § 69.20.010; CLIA Supp. Facts at Ex. 11, at 1.

[10] Even if the fees were assessed against individual passengers, the Constitutional analysis does not change. A state cannot escape the prohibitions of the Tonnage Clause simply by changing the object of the assessment. *Polar Tankers,* 557 U.S. at 8 ("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 of a great principle by producing a dictionary or a dictum to prove that a

every marine passenger ship not otherwise exempted."); CBJ Code § 69.20.040 ("The passenger fees shall be paid by the owner or agent of the ship to the City and Borough within 60 days from entry of the ship into any port within the City and Borough."); CBJ Res. No. 2552; CLIA Supp. Facts ¶¶ 13, 16, 27, Exs. 11, 16.[11] There is no genuine dispute that the Entry Fees are charged against vessels.[12]

Based on the mistaken premise that the graduated nature of the fee or duty is "of no import here[,]" CBJ Mot. Summ. J. at 62, CBJ ignores virtually the entirety of Tonnage Clause case law, including *Polar Tankers*, that places strong emphasis on the manner in which the charging authority calculates the challenged fee, *see* CLIA Mot. Summ. J. at 15-16. CBJ calculates the required fee for each vessel entering the port based on the number of passengers the vessel carries. CBJ Code § 69.20.020 ("A fee of $5.00 per passenger per visit shall be assessed for every marine passenger ship not otherwise exempted."); CBJ Res. No. 2552 ("every vessel carrying passengers for compensation on port calls in the City and Borough . . . shall pay

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ship-captain is not a vessel, nor a supercargo an import.'" (citing *Passenger Cases*, 48 U.S. (7 How.) 283 (1849))); *see infra* note 10.

[11] CBJ takes issue with 81 of CLIA's 223 statements of fact. CBJ's asserted disagreements are quibbles over relevance and significance, rather than genuine disputes of material fact. *See* Pls.' Smt. Opp'n CBJ's Obj. & Resps. to Pls.' Smt. Facts Supp. Mot. Summ. J. (filed contemporaneously herewith).

[12] Portions of CBJ's filing suggest that CBJ implicitly challenges CLIA's standing to bring this lawsuit on the grounds that cruise line members may pass on the Entry Fees to cruise passengers as part of the ticket price (as they would do with other taxes, fees, and charges). This Court should have no trouble rejecting this line of reasoning. The cruise lines are responsible for payment of the Entry Fees *regardless* of whether they succeed in recouping these costs as part of the cruise ticket price or otherwise. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 805 F.3d 98, 105 n.4 (3rd Cir. 2015) ("Maher Terminals II") (rejecting district court's argument that Maher did not have constitutional standing to bring its claims because Maher "was responsible for the fees regardless of whether it passe[d] them on to vessels") (citing *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 267 (1984) (concluding that wholesalers had alleged an economic injury caused by a tax that they were liable to pay even if they could pass on the tax to customers)). In *Maher Terminals*, of course, the question arose because an entity *other than the vessel* was the object of the Port Authority's charge. Here, Juneau charges the Entry Fees to vessels in the first instance.

. . . a Port Development Fee of $3.00 per arriving passenger per day for all vessels."); CLIA Supp. Facts ¶¶ 15, 26, Exs. 11, 16. The fee liability of the vessel owner or agent is calculated by the number of passengers listed on the vessel's manifest, regardless of whether any or all passengers leave the vessel and go ashore to Juneau. CLIA Supp. Facts ¶¶ 15, 26. All cruise vessels above a certain size must pay the Entry Fees when calling at Juneau and failure to pay the MPF can result in the vessel being barred from entry to Juneau. *Id.* at ¶¶ 14, 19, 26. There is no genuine dispute that the Entry Fees are calculated based on a factor related to capacity.[13]

Finally, misappropriating this Court's order denying CBJ's earlier Motion to Dismiss, CBJ argues that this Court has already found that the PDF and MPF do not raise revenue for general municipal services. CBJ Mot. Summ. J. at 62-63. CBJ misconstrues the Court's findings. The issue before the court on early motion practice was whether the Tax Injunction Act deprived this Court of subject-matter jurisdiction to hear CLIA's constitutional challenges. In finding that the PDF and MPF "are not taxes[,]" Order Denying Mot. to Dismiss 13-14, ECF No. 34, the Court did not reach the issue of whether the PDF and MDF were *actually* spent on projects and activities constituting general municipal services. Rather, the Court found that the PDF and MPF

> were not intended to raise general revenue. Rather, the Entry Fees were placed in special funds and were intended to raise revenue to be used for purposes specifically related to large cruise ships and their passengers. That plaintiffs have alleged that the Entry Fees were misused and were actually used to benefit the general public does not change the fact that the ultimate use of the Entry Fees was intended to be only for the benefit of the narrow class on which the fees were imposed.

[13] That the Entry Fees are calculated based on a vessel's passenger capacity compels the obvious conclusion that the Entry Fees are unconstitutional duties of Tonnage. *See Polar Tankers*, 557 U.S. at 8 ("[T]he Clause, which literally forbids a State to 'levy a duty or tax ... graduated on the tonnage,' must also forbid a State to 'effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries.' (citing to previous Tonnage Clause cases)).

Id. at 13 (initial emphasis in original, subsequent emphasis added).

This Court's earlier ruling addressed the structure of the municipal ordinance and resolutions establishing the Entry Fees. It did not address the lawfulness of the actual uses of the revenues generated by the Fees. Moreover, it is well-established that a state may not escape the Tonnage Clause's reach by labeling a fee as one imposed for specific services and then diverting that revenue to projects and activities that do not provide service to the fee-paying vessel. *See Maher Terminals II*, 805 F.3d at 107 ("a state may not escape the Tonnage Clause's reach merely by labelling a tax as a charge for services") (citing *Keokuk N. Line Packet Co. v. City of Keokuk*, 95 U.S. 80, 86 (1877); *Cannon v. City of New Orleans*, 87 U.S. 577, 580 (1874)).[14] Fees for services "still violate the Tonnage Clause if they have 'a general, revenue-raising purpose[,]'" *i.e.*, are used to pay for projects that do not benefit the fee payer and services that the fee payer cannot use. *Lil' Man in the Boat, Inc. v. City & Cty. of San Francisco*, No. 3:17-CV-00904-JST, 2017 WL 3129913, at *4 (N.D. Cal. July 24, 2017) (Order Denying Motion to Dismiss) (Fees for services "still violate the Tonnage Clause if they have 'a general, revenue-raising purpose[,]'")[15]

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

[15] CBJ persists throughout its filings in commingling the standards under which courts evaluate Tonnage Clause and Commerce Clause claims. For instance, CBJ argues that *Lil' Man in the Boat, Inc. v. City of San Francisco*, No. 17-CV-00904-JST, 2017 WL 3129913 (N.D. Cal. July 24, 2017), supports use of vessel fees for security, maintenance, overhead, and debt service regardless of connection to the physical fee-paying vessel. CBJ Mot. Summ. J. at 69-70. The *Lil' Man* opinion reveals that the court addressed motion to dismiss arguments as to both Tonnage Clause and Commerce Clause claims. The court found that allegations of fee diversion to general revenue funds plausibly stated a claim under the Tonnage Clause. 2017 WL 3129913, at *4-5. Separately, the court cited to *Alamo Rent-A-Car*'s approval of fees for "security, maintenance, overhead, and debt service costs" when discussing the plaintiff's Commerce Clause claim. *Id.* *5-6. CBJ's suggestion that *Alamo Rent-A-Car* had any bearing on the court's

(quoting *Polar Tankers*, 557 U.S. at 10) (citing *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 82–83 (2d Cir. 2009) ("Bridgeport II")); *id*. ("Fees that are diverted to general revenue funds and that are not actually used to defray the costs for which they are collected violate the Tonnage Clause."); *see Captain Andy's Sailing, Inc. v. Johns*, 195 F. Supp. 2d 1157, 1173 (D. Haw. 2001) (fee violated the Tonnage Clause "because it [did] not relate to a specific service that confers a 'readily perceptible' benefit to vessels operating in the Na Pali Coast ocean waters."); *Maher Terminals II*, 805 F.3d at 107 ([T]he "[v]essels that pay a purported service charge must actually receive a proportionate benefit in return" (citing *State Tonnage Tax Cases*, 79 U.S. 204, 220 (1870) (striking down a tax because it was "an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed"))).[16] Simply because this Court found that the PDF and MPF "were not intended to raise general revenue" does not mean that the PDF and MPF revenues are expended on to constitutional uses.

To avoid the patently adverse implications of *Polar Tankers* for its defense, CBJ argues that older Supreme Court jurisprudence requires that a charge must operate as a "hindrance to trade and carriage by vessels"[17] and that failure to show such a hindrance (presumably evidenced

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consideration of the Tonnage Clause is inaccurate and misleading.

[16] CBJ also misreads *Polar Tanker*'s discussion of "less advantageously situated parts of the country." This phrase has nothing to do with where cruise passengers or vessels come from, but everything to do with Juneau's geographic position. The Framers intended to prevent states with convenient ports from having a taxing advantage over states with inconvenient or no ports.

[17] CBJ cites to *Keokuk*, which stated that the Tonnage Clause was "designed to guard against local hindrances to trade and carriage by vessels, not relieve them of liability for claims for assistance rendered to trade and facilities furnished for trade and commerce." CBJ Mot. Summ. J., at 63 (quoting *Keokuk*, 95 U.S. at 85). CLIA does not dispute this language. The idea that vessels cannot escape liability for services rendered to them is the very essence of what distinguishes an unconstitutional Tonnage duty from a fee for a service rendered to that vessel by a public entity operating a port.

by the loss of business or customers) precludes finding a Tonnage Clause violation. CBJ Mot. Summ. J. at 59, 63. CBJ contorts these words far beyond their obvious meaning. Rather than imposing an implied element necessary to support a Tonnage Clause violation, *Keokuk* used the phrase "hindrance to trade and carriage by vessels" to describe the difference between a fee that is charged to a vessel simply because it has entered a port and a fee that is charged to a vessel because that vessel has incurred the cost of a service provided to it by the charging authority.[18]

> The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited: something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a State, a municipal corporation, or a private individual; and, when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property. A passing vessel may use the wharf or not, at its election, and thus may incur liability for wharfage or not, at the choice of the master or owner. No one would claim that a demand of compensation for the use of a dry-dock for repairing a vessel, or a demand for towage in a harbor, would be a demand of a tonnage tax, no matter whether the dock was the property of a private individual or of a State, and no matter whether proportioned or not to the size or tonnage of the vessel. There is no essential difference between such a demand and one for the use of a wharf. It has always been held that wharfage dues may be exacted; and it is believed that they have been collected in ports where the wharves have belonged to the State or a municipal corporation ever since the adoption of the Constitution.

[18] The courts in *Keokuk* and *Huse v. Glover*, 119 U.S. 543 (1886), did not require evidence of hindrance to commerce or decide the constitutional challenge based on the lack of such evidence. The inquiry is whether a charge is compensation for services rendered to the vessel fee payer, not whether it so "hinders" that fee payer as to prevent profit. *See* CBJ Mot. Summ. J. at 67. CBJ's contention that CLIA must show monetary loss as a result of CBJ's imposition of unconstitutional fees has no basis in the case law. Nor does CBJ's suggestion that the financial success of CLIA's cruise line members—companies that run cruises all over the world—remedies the unconstitutionality of CBJ's Entry Fees. The Alaska Cruise Market is an important, but numerically very small (around four percent) component of the global cruise industry. Constitutional infirmity or validity of government levies is not dependent on the financial status of the targets of those levies.

Keokuk, 95 U.S. at 84-85.[19]

2. CBJ's Fee Expenditures On Projects And Activities That Are Not Reasonable Compensation For Services Rendered Directly To The Vessel, Including General Municipal Operating Expenses And Attorneys' Fees, Are Not Defensible As "Services Rendered To Vessels."

As set forth in Argument Point III.B.1. above, to rule favorably on CLIA's Tonnage Clause claims and, conversely, to deny CBJ's request for approval of some of its most obvious misallocations of the Entry Fee revenues (*e.g.*, general municipal operations and attorneys' fees to defend against claims of unconstitutional uses), this Court need only look to the standard for Tonnage Clause compliance set forth by the Supreme Court in *Polar Tankers*.[20] *Polar Tankers* instructs that where a vessel charge is imposed to compensate the charging authority for something other than a service rendered to a vessel, that charge is a prohibited Duty of Tonnage. 557 U.S. at 10. Supreme Court consideration of Tonnage Clause disputes teaches that a service rendered to a vessel for which payment can be demanded without Tonnage Clause consequences is a commercial-like service and specifically enables the vessel's movement in the flow of

[19] The service at issue in *Keokuk* and in many other 19th century Tonnage Clause cases was wharfage, a service provided directly to vessels that just as readily could be provided by a private wharfinger. If CBJ were merely charging commercially reasonable fees for wharfage, this case would not be before this COurt.

[20] In support of its cross-motion, CBJ argues that *Polar Tankers* "offers little guidance" to this Court. CBJ Mot. Summ. J. at 37 n.87. CBJ again relies on this Court's previous order denying CBJ's Motion to Dismiss to argue that because the levy at issue in *Polar Tankers* was an ad valorem tax and the levy at issue here is not a tax, *Polar Tankers* does not control. *Id.* This distinction is of no consequence in analyzing the validity of the levies under the Tonnage Clause. What matters is whether the charge, however denominated, is directed at vessels and is not compensatory for a particular service provided to those vessels. *Polar Tankers*, 557 U.S. at 10 (finding Valdez tax unconstitutional under the Tonnage Clause because it "applie[d] only to large ships" and was "not for services provided to the vessel[s]"); *see Maher Terminals II*, 805 F.3d at 109 ("What actually made the tax in *Polar Tankers* unconstitutional, and what Maher cannot show here, is that the tax was directed at *vessels* and was not in exchange for services."). In any event, CBJ contradicts itself on the point, later acknowledging that *Polar Tankers* itself recognized that the Valdez tax would have been unconstitutional even if it had been denominated a fee. CBJ Mot. Summ. J. at 62.

commerce, *i.e.*, 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.). Fees for these types of 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[.]"*Maher Terminals II*, 805 F.3d at 108 (citing *Keokuk*, 95 U.S. at 85).

There is no genuine dispute as to *what* projects and services CBJ appropriates the Entry Fee revenues. CBJ does not dispute that it has used MPF revenues to defend itself in the lawsuit, to fund the City's museum and arts and cultural center, to expand wireless services at its library, to fund public transportation, to repair, maintain, and construct stairs, sidewalks, and public restrooms, to pay for crossing guards, to fund capital improvement projects, and municipal improvements along the waterfront, including the Seawalk. CLIA Resp. CBJ Supp. Facts at Ex. A.

4. CBJ's Novel Interpretation Of The Tonnage Clause Jurisprudence Does Not Justify Departure From Controlling Supreme Court Precedent Limiting Constitutional Vessel Fees To Those Fees Charged For A Service Rendered To And Enjoyed By Vessels.

CBJ attempts to construe in its favor the controlling Tonnage Clause cases by arguing that the cases' characterization of permissible vessel fees as fees levied to compensate the charging authority for "services rendered to and enjoyed by the vessel" does not limit the charging authority to collecting revenue *only* as compensation for services rendered to vessels. *See* CBJ Mot. Summ. J. at 64-70. CBJ's position ignores every Supreme Court decision on the Tonnage Clause that describes a permissible vessel fee in terms of its character as compensation for a service rendered to and enjoyed by a vessel. In no Tonnage Clause case has a federal court ever validated a general, non-specific purpose fee used to generate revenue for a host of civic projects and activities.

Clyde Mallory does not justify CBJ's Entry Fee expenditures under the Tonnage Clause. In *Clyde Mallory*, the Supreme Court found that a reasonable harbor fee charged to defray the cost of local regulation of harbor, *i.e.*, vessel, traffic was permissible. 296 U.S. at 267. *Clyde Mallory* sanctioned fees that were being spent on services directly related to a vessel's movement through the port. *See id*. CBJ's crossing guards, police bike and foot patrol, security lighting, and security services are inapposite. *See* CBJ Mot. Summ. J. at 60. None of these expenditures assist vessel movement in a harbor, as did the fee charged in *Clyde Mallory*.[21, 22]

The conclusion to be drawn from *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist*., 874 F.2d 1018, 1023 (5th Cir. 1989), is similar. In that case, the circuit court upheld a fee imposed to compensate the port district for fees charged to vessels for emergency services such as response to fire, explosion, and other perils that might befall a *vessel* in the port. *Id*. Charging vessels for the availability of services to assist *vessels* in the event of an emergency while in anchorage of the levying jurisdiction is not analogous to a vessel fee that is used to subsidize the local hospital[23] or fund helicopter and airlift services that have no direct relation to

[21] CBJ also uses *Clyde Mallory* to argue that the other fees charged to vessels by CBJ are irrelevant to this Court's consideration of CLIA's Tonnage Clause claim. CBJ Mot. Summ. J. at 60. CBJ excerpts language from *Clyde Mallory* that does not mean what CBJ says it does. The Court simply noted that in considering the local fee at issue, it need not also decide whether other fees charged for services (harbor dredging, other harbor improvements) were constitutional. *Clyde Mallory*, 296 U.S. at 267. In this case, CBJ's other vessel fees are very relevant because they demonstrate that the Entry Fees are *not* collected for typical vessel services – since CBJ has other fees in place to compensate itself for a vessels' use of the port, etc.

[22] CBJ's case law distinctions are unhelpful for other reasons as well. CBJ argues that the fee upheld in *Clyde Mallory* was for a "general service" that the plaintiff (a vessel owner) did not use, and in upholding the fee, the Court does not say that "fees had to be used for the benefit only of the vessel paying the fees." CBJ Mot. Summ. J. at 59. The Supreme Court merely differentiated the service of policing a harbor, which may not result in "special assistance," to a vessel from "wharfage and other services which benefit only the particular vessels using them." *Clyde Mallory*, 296 U.S. at 266-67. *Clyde Mallory*'s reasoning does not justify the spending of vessel fee revenues on general municipal services.

[23] CLIA Supp. Facts ¶¶ 154-56.

services provided at the port or for the safety of the vessel itself. *Cf.* CBJ Mot. Summ. J. at 61 (arguing that emergency services provided to vessels are the same as defraying expenses for medical assistance offered by Juneau to cruise passengers).[24]

So too for *Keokuk*, where the Supreme Court held that the locality could charge "wharfage . . . for the use of a wharf, built, paved, and improved by the city at large expense." *Keokuk*, 95 U.S. at 89. The decision in *Keokuk* rests on the implicit understanding that the locality provided a specific facility (a wharf) used by the paying vessel. *Keokuk*, 95 U.S. at 89 ("A different question would be presented had the steamboats landed at the bank of the river where no wharf had been constructed or improvement made to afford facilities for receiving or discharging cargoes."); *see also Nw. Union Packet Co. v. City of St. Louis*, 100 U.S. 423, 427-28 (1879) (approving "reasonable fees as will fairly remunerate [the charging entity] for the use of its property"). Not everything "improved at great expense" is justified as a charge for vessel services, particularly where, as here, the locality undertakes expensive improvements beyond the facilities required for a vessel to navigate in and out of the port. *Compare* CBJ Mot. Summ. J. at 64 (arguing that "security improvements, covered walkways, street improvements for the CLIA member buses, [and] restrooms on the docks" are the same as wharves) *with John J. Sesnon Co.*

[24] CBJ wishfully suggests that the *Plaquemines* holding is not limited to emergency services to vessels, but that is exactly what the court considered—a fee charged to compensate the port for providing port-related disaster response services to protect vessels from fires, explosions, and other similar incidents. *See New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1020 & n. 7 (5th Cir. 1989) ("By virtue of its police power and an agreement with the United States Coast Guard, the Port has primary responsibility for responding to fires, explosions, and other emergencies that occur within its territory. The Port operates several ships with firefighting and rescue capabilities, a helicopter, land-based pumping units, and a staff to maintain these facilities.").

v. U.S., 182 F. 573, 576-77 (9th Cir. 1910) (defining "wharf" as "an artificial landing place . . . commonly used by vessels in harbors and seaports") (internal citation omitted).[25]

Morgan's Louisiana[26] and *Captain Andy's* do not negate the necessary "service to vessel" connection under the Tonnage Clause. 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. The Court focused on the benefit to the vessel's progress to other ports by virtue of having been certified to be free of plague and pestilence. *Id.* Any personal benefit of treatment for diseased passengers was incidental and irrelevant to the Tonnage Clause analysis. Similarly, the fee upheld in *Captain Andy's* paid for harbor maintenance and improvement of the Kukui'ula small boat harbor, including breakwater,[27] limited parking, and lights.[28] 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*. In fact, the court's conclusion that a

[25] This definition of "wharf" disposes of CBJ's contention that a "wharf" means more than an improved location on a body of water where vessels may make fast to conveniently load or discharge their contents (people or goods).

[26] *Morgan's S.S. Co. v. La. Bd. of Health*, 118 U.S. 455 (1886). The name of this case has been incorrectly reported on Westlaw, and appears incorrectly in prior pleadings with this Court. For consistency with prior pleadings, CLIA continues to refer to this case as *Morgan's Louisiana*.

[27] 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.

[28] 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* CBJ Mot. Summ. J. at 76.

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 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").[29]

More alarming than CBJ's stretching of settled jurisprudence, however, is the far-reaching mischief in which states and localities will be able to engage should this Court find that *any* "charge [assessed against vessels] for services or conveniences provided" is permissible under the Tonnage Clause, regardless of the service's or convenience's connection to the vessel.[30] CBJ's contention—that charges assessed against vessels do not need to be spent on services rendered to those vessels, so long as the locality can demonstrate that the charge pays for services or conveniences to *someone* or *something*—sets the fox upon the henhouse. According to CBJ, then, the Tonnage Clause has no limiting principle and has meaning only to

[29] 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.").

[30] CBJ clearly argues for such a construction. *See* CBJ Mot. Summ. J. at 65 (arguing that the *Keokuk* court's allowance for charges for services rendered or conveniences provided is not limited to services to or conveniences for vessels);

the extent permitted by local governments. *See* CLIA Opp'n Mot. Determine Law of the Case at 24-25, ECF No. 97.[31]

5. *Bridgeport* Does Not Preclude Summary Judgment In Favor Of CLIA.

CBJ argues that *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority* precludes the entry of summary judgment for CLIA or otherwise necessitate a trial for three reasons: (1) the fee at issue in *Bridgeport* funded the entirety of the port authority's operations, whereas the Entry Fee revenues only make up a small percentage of CBJ's overall operating budget; (2) the *Bridgeport* plaintiff did not show loss of ridership resulting from imposition of the passenger fee, and CLIA cannot show loss of cruise ridership here; and (3) the district court in *Bridgeport* analyzed the port authority's expenditures in terms of "benefits to passengers." None of these reasons requires the deep consideration of *Bridgeport* that CBJ suggests. *See* CBJ Mot. Summ. J. at 70.

First, CBJ suggests that its Entry Fees are distinguishable from the fee at issue in *Bridgeport* because the Entry Fees make up only a small percentage of CBJ's overall operating budget. CBJ Mot. Summ. J. at 70. CBJ is a large municipality with the responsibility for providing countless general services to its citizens. In contrast, the port authority in *Bridgeport* was "a quasi-independent agency of the City of Bridgeport . . . with jurisdiction over the [city's] Port District." *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 566 F. Supp. 2d 81, 83-84 (D. Conn. 2008) ("Bridgeport I"), *aff'd*, 567 F.3d 79 (2d Cir. 2009). If a

[31] As in its Motion to Determine the Law of the Case, CBJ posits that there is no legal difference between cruise ship passengers and cargo, and if the Tonnage Clause permits charges for services for the latter, it should also for the former. CBJ Mot. Summ. J. at 65. Even "services to cargoes", however, must have a limit. Would it be permissible for a municipality to levy a fee against vessels to pay for road improvements because those improvements allowed for the more expedient transfer of cargo from the port to ultimate destination?

charging authority (whether it be a State, municipality, or special port district) could escape the prohibition of the Tonnage Clause simply by showing that the challenged fee revenues do not fund the entirety of the charging authority's operating budget, the Tonnage Clause could be avoided by creative accounting.[32]

Second, CLIA is not required to show loss of ridership to prevail on its constitutional claims. Unlike the plaintiffs in *Bridgeport*, CLIA is not seeking monetary damages. *Compare Bridgeport I*, 566 F. Supp. 2d at 83, 92-93 (plaintiffs claimed unjust enrichment; sought money damages) *with* CLIA Am. Compl. 14-15, ECF No. 28. CLIA seeks a prospective injunction preventing future unconstitutional collection and use of the Entry Fees. *Bridgeport* supports such relief, regardless of the presence or absence of economic or ridership loss. *See Bridgeport I*, 566 F. Supp. 2d at 106-07 (granting permanent injunction).

Third, *Bridgeport*'s focus on whether the port authority expended passenger fee revenues in support of projects and activities that "benefited passengers" does not control this Court's Tonnage Clause analysis as to CBJ's Entry Fees. The *Bridgeport* court's focus on passenger benefits may well have been the result of the district court's decision to first consider the plaintiffs' claims under the Commerce Clause (a constitutional provision that, unlike the Tonnage Clause, does not directly prohibit taxes and fees against vessels). *See Bridgeport I*, 566 F. Supp. 2d at 96 (court addressed Commerce Clause claim first). Having found that the

[32] CBJ also argues that CLIA has not provided evidence that CBJ "diverts" Entry Fee revenues to the general operating budget. CBJ Mot. Summ. J. at 70. CLIA's evidence dispels this contention. *See* CBJ Supp. Facts ¶¶ 111-114.

passenger fees violated the Commerce Clause, the court's finding of a Tonnage Clause violation was a foregone conclusion.[33]

C. CLIA Is Entitled To A Remedy Under Federal Law Because The Entry Fees Violate 33 U.S.C. § 5(b).

CBJ defends against CLIA's RHAA-based claims on three grounds: (1) the alleged lack of a private cause of action under Section 5 of the RHAA;[34] (2) that Section 5 does not preempt *all* passenger fees; and (3) that the Entry Fees at issue do not violate the RHAA and therefore do not violate Supremacy Clause of the Constitution. *See* CBJ Mot. Summ. J. at 79-88. CLIA addresses each of these arguments below.

1. Congress Did Not Foreclose The Availability of A Private Right Of Action For Violations Of Section 5(b) Of The RHAA.

CBJ asserts that *California v. Sierra Club*, 451 U.S. 287 (1981), controls whether a private right of action exists to enforce Section 5 of the RHAA.[35] CBJ Mot. Summ. J. at 79-80. *Sierra Club* considered whether an RHAA provision generally banning the creation of any obstruction to the navigable capacity of any waters of the United States created a private right of action. In determining that Section 10 did not create such a right, the Supreme Court relied on a unique set of legislative and decisional facts. First, the language of the at-issue provision

[33] The *Bridgeport* court's focus on passenger benefits may well be considered misguided against the history of Tonnage Clause cases that focused on services rendered to the vessel. Regardless, *Bridgeport* is a Second Circuit case and therefore, to echo an oft-used phrase in CBJ's responding brief, the case is not binding precedent on this Court.

[34] The parties' previous citations to Section 5(b) of the RHAA may have caused confusion. To clarify, CLIA's references to Section 5 of the RHAA in this brief (and in previous briefs) are intended to refer to 33 U.S.C. § 5(b). As originally enacted, the first subsection of Section 5 (33 U.S.C. § 5(a)) was passed into law as Section 4 of the RHAA in July 1884. *See* 33 U.S.C. § 5 (credits).

[35] In *Sierra Club*, the Supreme Court declined to find an implied private right of action to enforce the requirements of Section 10 of the RHAA. 451 U.S. 287.

reflected a "general ban" designed to "benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers" in response to directly contrary decisional law declaring the absence of federal common law prohibiting such obstructions. *Sierra Club*, 451 U.S. at 294-95. Second, other provisions in the RHAA provided for criminal penalties for violations of Section 10[36] and vested the Justice Department with authority to "conduct the legal proceedings necessary to enforce" Section 10.[37] *Id*. at 295 n.6.

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[36] Section 12 of the RHAA provides:

> Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

33 U.S.C. § 406. The provision explicitly references Section 10 of the RHAA, 33 U.S.C. § 403. In contrast, violations of Section 5 of the RHAA do not come within the purview of this provision.

[37] Section 17 of the RHAA provides:

> The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, and 412 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts

Neither of these circumstances exists here.[38] Section 5(b) is not a "general ban" on vessel fees enacted to fill a void in federal common law that prevented the *government* from exercising its authority to prevent navigable waterway obstructions. *See id.* at 451 U.S. at 294-95. Rather, Section 5(b) is a synthesis and codification of pre-existing federal law developed over more than one hundred years by the Supreme Court permitting certain narrowly defined categories of vessel fees despite the Constitution's direct prohibition on duties of Tonnage and interference with interstate and foreign commerce by non-Federal entities. *See Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, No. CIV. 2:12-6090 KM, 2014 WL 3590142, at *10 (D.N.J. July 21, 2014) ("Maher Terminals I") (noting that Section 5(b)'s language "closely tracks that of the Commerce and Tonnage clauses, and it makes sense to interpret it in a parallel fashion"); *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 ("the 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) ("The exception noted in 33 U.S.C. § 5(b)(2) tracks [the] language" of *Clyde Mallory*'s pronouncement that reasonable fees for services

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> or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further*, That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a magistrate judge, judge, or court of the United States for examination of the offenses alleged against him; and such magistrate judge, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.

33 U.S.C. § 413. Again, this provision explicitly references Section 10 of the RHAA, 33 U.S.C. § 403, but does not cite to Section 5 of the RHAA.

[38] It should go without saying that because *Sierra Club* did not address the statutory provision at issue in this case, it cannot be assumed that *Sierra Club*'s analysis preordains any determination with respect to Section 5(b). *Cf.* CBJ Mot. Summ. J. at 80.

rendered, like towage and pilotage are not constitutionally prohibited.). Congress also did not find it necessary to criminalize violations of Section 5(b) or direct the government to institute legal proceedings incident to its enforcement. *Cf. Sierra Club*, 451 U.S. at 295 n.6.

Should this Court engage in a *Cort v. Ash* analysis[39] of Section 5(b)(2)—an exercise that, for reasons set forth below, we contend is not necessary at this juncture—Congress's clear intent to mirror the federal common law of Commerce Clause and Tonnage Clause jurisprudence compels the conclusion that Congress did *not* intend to deprive private plaintiffs of the ability to challenge state and local laws imposing vessel fees in contravention of the Constitution and federal law. Where Congress drafts legislation against a backdrop of established constitutional or common law concepts, as it did in Section 5(b), courts are justified in presuming that Congress did not intend to disturb the accepted constitutional and common law concepts developed in the courts. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 813 (1989); *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). For over a century, private plaintiffs have enforced the prohibitions of the Tonnage Clause in the courts. *See Polar Tankers*, 557 U.S. 1 (2009); *Passenger Cases*, 48 U.S. (7 How.) 283 (1849). This private enforcement of the Tonnage Clause (and Section 5(a), the

[39] 422 U.S. 66 (1975); *First Pac. Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1121-22 (9th Cir. 2000) (reiterating the Supreme Court's four-factor test to determine whether a given statute creates a private right of action as set forth in *Cort v. Ash*):

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

existing statutory provision to which Section 5(b) was appended) was "part of the contemporary legal context in which Congress legislated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381 (1982) (discussing Congressional adoption of judicial construction of a statute by silence); *Ind. Port Comm'n v. Bethlehem Steel Corp.*, 835 F.2d 1207 (7th Cir. 1987) (upholding private party's challenge to harbor use fees as violative of Section 5). Had Congress intended *not* to permit private actions relying on Section 5(b)'s prohibitions, it would have said so. *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (when Congress reenacts a statutory provision that has been subject to judicial construction, Congress adopts that construction unless it states otherwise). Congress's silence on *who* is entitled to enforce its codification of permissible vessel fees compels the conclusion that Congress did not intend to change the state of the law that it codified. As such, private plaintiffs continue to have standing to challenge state and local laws that impose fees in contravention of Section 5(b).[40]

CBJ also cites to a number of recent cases addressing violations of Section 5 to support its position against private enforcement of Section 5(b). CBJ Mot. Summ. J. at 80-81. These cases questioned, but did not decide or otherwise analyze, the availability of a private right of action under Section 5(b).[41] Another recent case, not cited by CBJ, supports CLIA's position that Congress did not intend to disturb private enforcement of restrictions on vessel fees. In *Maher*

[40] Similarly, if Congress intended to vest exclusive authority to vindicate Section 5(b)'s prohibitions in the Justice Department, it could easily have done so, as it did with respect to other restrictive provisions of the RHAA. *See* 33 U.S.C. § 413 and n.37 above.

[41] CBJ incorrectly asserts that the Tennessee state court in *Moscheo* "found that the Act did not provide a private cause of action." CBJ Mot. Summ. J. at 81. The court's comment in that case was dictum because, as the court itself pointed out, Moscheo's claim was not even brought under 33 U.S.C. § 5(b). In addition, the court only indicated that the party asserting the lack of a private right of action under Section 5(b) *appeared* to be correct. *Moscheo*, 2009 WL 2868754, at *6 ("Polk County appears to be correct when it argues that 33 U.S.C. § 5(b) does not give a private cause of action. However, we find that Moscheo did not bring this suit under 33 U.S.C. § 5(b).").

Terminals, a landside marine terminal operator challenged certain fees and charges assessed by the New York, New Jersey Port Authority under the Tonnage Clause, the RHAA, and other statutory and common law theories. *Maher Terminals I*, 2014 WL 3590142, at *5. The district court dismissed the terminal operator's Tonnage Clause and RHAA claims for failure to allege that the challenged fees were even indirectly charged to the limited class of persons entitled to enforce the constitutional and federal statutory law restrictions on vessel fees. *Id.* at *8 (finding that terminal operator did not have standing to assert the Tonnage Clause claim); *id*. at *10 (same; terminal operator did "not allege that it is a 'vessel, or water craft, or . . . its passengers or crew' . . . Therefore, Maher does not have standing to bring a claim under the RHA . . . ."); *see Maher Terminals II*, 805 F.3d at 110-11 (Maher is not a vessel, passenger, or crew and "therefore cannot state a claim under the RHA"). Thus, *Maher Terminals* indicates that entities that are intended to be protected by the express language of Section 5(b)—vessels, their passengers, and their crews—have standing to sue to enforce the statute's restrictions.

2. The Court Need Not Determine Whether Congress Intended To Deprive Private Plaintiffs The Ability To Challenge Vessel Fees Under The RHAA Because A Federal Private Right Of Action Is Not A Necessary Prerequisite To Relief For Violation Of The Supremacy Clause.

This Court need not undertake analysis to determine whether Section 5(b) of the RHAA provides an implied right of action in order to enter summary judgment in CLIA's favor. CLIA alleges that Section 5(b) of the RHAA preempts the local CBJ enactments establishing the Entry Fees. CLIA Mot. Summ. J. at 20-21; Am. Compl. ¶¶ 57-61. CLIA may bring this claim under the Supremacy Clause regardless of whether Section 5(b) of the RHAA creates a private right of action. *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1058-59 (9th Cir. 2008):

> Our holding in *Bud Antle* is consistent with established practice in the other circuits, which have universally affirmed the right of private parties to seek injunctive relief under the Supremacy Clause regardless of whether the allegedly

preemptive statute confers any federal "right" or cause of action. As the Tenth Circuit explained,

> A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law.
>
> A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action.

Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1266 (10th Cir. 2004) (internal citations omitted); *see also Local Union No. 12004 v. Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004) (holding that "in suits against state officials for declaratory and injunctive relief, a plaintiff may invoke the jurisdiction of the federal courts by asserting a claim of preemption, even absent an explicit statutory cause of action"); *Ill. Ass'n of Mortgage Brokers v. Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002); *St. Thomas–St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000) (holding that "a state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption"); *Village of Westfield v. Welch's*, 170 F.3d 116, 124 n. 4 (2d Cir. 1999) (holding that a cause of action under the Supremacy Clause "do[es] not depend on the existence of a private right of action under the [preempting statute]"); *Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor*, 107 F.3d 1000, 1005–07 (2nd Cir. 1997) (holding that plaintiff could assert ERISA preemption under the Supremacy Clause, even though it was "beyond dispute" that plaintiff fell outside ERISA's express enforcement provisions); *First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775, 776 n.3 (8th Cir. 1990).[42]

3. CLIA Has Established The Preemptive Effect Of Section 5(b) Of The RHAA.

CBJ argues that CLIA has not "established" Section 5(b)'s preemptive effect because CLIA does not support its argument with a binding federal court decision holding that Section

[42] This litany of case law also disposes of CBJ's argument that CLIA's RHAA and Supremacy Clause claims are foreclosed because neither is a "source of federal rights." CBJ Mot. Summ. J. at 82. Clearly, a federal statutory right or cause of action is not a necessary prerequisite to challenging a local ordinance as preempted by federal law. *See Shewry*, 543 F.3d at 1058-59, and all cases cited therein.

5(b) "preempts all state and local laws regarding the imposition of passenger fees."[43] CBJ Mot. Summ. J. at 82. CBJ overstates CLIA's position. Section 5(b) does not preempt *all* laws imposing fees, and CLIA does not so contend. Rather, the RHAA prohibits non-federal interests from levying or collecting "taxes, tolls, operating charges, fees, or any other impositions whatever" from "any vessel or other water craft, or from its passengers or crew[,]"except where an otherwise-compliant fee is "used solely to pay the cost of a service to the vessel[.]"[44] 33 U.S.C. § 5(b).

CBJ cannot contest the fundamental principle that preemption exists where the federal law or regulation at play includes language explicitly preempting state action in a given area, *see Young v. Coloma-Agaran*, No. CIV. 00-00774HG-BMK, 2001 WL 1677259, at *5 (D. Haw. Dec. 27, 2001) (citing *Barber v. Hawaii*, 42 F.3d 1185, 1189 (9th Cir. 1994)); or where Congress has manifested its preemptive intent by enacting a "pervasive scheme of federal regulation" or legislating on a field dominated by a federal interest, *see id*.; *see also Haw. Floriculture & Nursery Ass'n v. Cty. of Hawaii*, No. CIV. 14-00267 BMK, 2014 WL 6685817, at *9 (D. Haw. Nov. 26, 2014); *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996); or even where "compliance with both federal and state [laws] is a physical impossibility" or the state law impedes "the accomplishment and execution of the full purposes and objectives of

[43] CBJ also argues that "[i]f the PDF and MPF do not violate the Tonnage Clause, then those fees cannot violate the RHAA under existing federal court decisions." CBJ Mo. Summ. J. at 82. CBJ is, again, incorrect. This Court may well find that the plain language of Section 5(b) prohibiting fees other than those "solely to pay the cost of a service to the vessel" invalidates the Entry Fees regardless of its determination of CLIA's Tonnage Clause claim.

[44] Section 5(b) permits fees for three separate purposes. Only Section 5(b)(2)'s permission is at issue here. *See* CLIA Mot. Summ. J. at 18-19, 18 n.12. Of course, CLIA contends that a major constitutional and statutory defect of the challenged fees is that they are not "used solely to pay the cost of a service to the vessel."

Congress[.]" *Haw. Floriculture & Nursery Ass'n*, 2014 WL 6685817, at *9 (citation omitted); *see also Barnett Bank*, 517 U.S. at 31 (state or local law preempted where it stands in direct "irreconcilable conflict" with federal law); CLIA Mot. Summ. J. at 27. As a result, CBJ does not even attempt to respond to CLIA's legal arguments in support of the preemptive effect of Section 5(b) other than to assert that there is no binding federal precedent confirming the provision's preemptive effect. *Compare* CLIA Mot. Summ. J. at 20-21 (discussing the various ways in which courts find that federal law is preemptive) *with* CBJ Mot. Summ J. at 82 (incorrectly asserting that CLIA's preemption argument relies on only two cases).

The preemptive effect of Section 5(b) is clear from the language of the statute itself. Congress provided "a clear mandate that '[n]o taxes . . . shall be levied upon or collected from' vessels or watercraft operating on navigable waters of the United States." *Kittatinny Canoes, Inc. v. Westfall Twp.*, No. 183 CV 2013, 2013 WL 8563483, at *10 (Pa. Com. Pl. May 6, 2013).[45] "Absent an express provision declaring invalid any state or local taxes on watercraft operating on navigable waters, Congress could scarcely have been more clear about its intention to deny state and local governments the ability to levy taxes on watercraft operating on navigable waters." *Id.* Furthermore, it is beyond dispute that a local law levying a fee on vessels operating in the navigable waters of the United States outside the narrow permissions of Section 5(b) is in direct conflict with Section 5(b), and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Kittatinny*, 2013 WL 8563483, at *12; *Moscheo*, 2009

[45] The Pennsylvania Court of Common Pleas' analysis of Section 5(b) preemption effect is the most detailed analysis of the issue to date. Simply because this case, and the Tennessee state court decision which it cites with favor, are not binding on this Court does not mean that this Court "cannot turn to them for guidance when considering a nearly identical issue, particularly when there is so little state or federal case law[,]" the cases "have been properly decided[,] and the rationale expressed by the [those courts is] persuasive." *Kittatinny*, 2013 WL 8563483, at *14.

WL 2868754; *High Country Adventures, Inc. v. Polk Cty.*, No. E2007-02678-COA-R3-CV, 2008 WL 4853105 (Tenn. Ct. App. Nov. 10, 2008). And were that still not enough, Section 5(b) exists as part of a comprehensive federal legislative scheme regulating the navigable waters of the United States. That scheme—covering all manner of wide-ranging and far-reaching subjects touching on the country's navigable waters—confirms Congress's foreclosure of the states' ability to regulate activities on the navigable waters of the United States, let alone impose fees on those vessels, passengers, and crew traversing the waters that Congress has reserved to itself the ability to regulate. *Arizona v. United States*, 567 U.S. 387, 401 (2012) ("Where Congress occupies an entire field . . . even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."). This Court need look no further than *Kittatinny* to find that Section 5(b) preempts state and local laws that impose fees, including the Entry Fees at issue here, that do not fit within the three permissible purposes outlined by Congress.

4. The Entry Fees Violate Section 5 Of The RHAA.

Finally, CBJ argues that the use of the Entry Fees for services to cruise ship passengers do not violate the RHAA because a fee need not meet all the elements of Section 5(b)(2) to be permissible under that section, CBJ Mot. Summ. J. at 82-84, and nothing in Section 5(b)(2) requires that the fee revenue be spent solely for the cost of a service to the vessel, *id*. at 83-84. These arguments, for which CBJ cites no authority, are flatly inconsistent with the plain language of Section 5(b)(2).

Section 5(b)(2) provides:

> **(b)** No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from <u>any vessel or other water craft, or from its passengers or crew, by any non-Federal interest</u>, 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
>
> *** * ***
>
> **(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
> **(C)** do not impose more than a small burden on interstate or foreign commerce; . . .

33 U.S.C. § 5 (emphasis added). In enacting Section 5(b)(2), Congress used the word "and" to link the three sub-requirements of a permissible "reasonable fee." When Congress uses the word "and" in a statute, "courts normally interpret the statute as requiring satisfaction of [all of] conjunctive terms." *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 279 F. Supp. 3d 846 (D. Minn. 2017) (quoting *United States v. Ganadonegro*, 854 F. Supp. 2d 1068, 1081 (D.N.M. 2012) (in turn, citing *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011)); *see Wyeth*, 562 U.S. at 263 ("[L]inking independent ideas is the job of a coordinating conjunction like 'and.'"). Here, by linking the three requirements set out in Section 5(b)(2)(A), (B), and (C) with the conjunctive "and," Congress explicitly required that a permissible fee meet all conditions of the subsection to avoid invalidation. CBJ's position that a fee need not meet all of the elements of Section 5(b)(2) to escape its prohibitory effect contradicts the plain language of the statute.

CBJ's second argument—that Section 5(b)(2) does not require that the fee revenue be spent solely for the cost of a service to the vessel—is also contradicted by the statute's plain language. Section 5(b)(2)(A) states that a permissible fee must, among other things, be "used solely to pay the cost of a service to the vessel or water craft." 33 U.S.C. § 5(b)(2)(A). Interpretation of this provision begins with the plain language of the statute. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 831 (9th Cir. 2000) (citing *United States v. Alvarez–Sanchez*, 511 U.S. 350, 356 (1994)); *United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999) (citing

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). When Congress does not define terms in a statute, courts give those terms "their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (citing *FDIC v. Meyer*, 510 U.S. 471, 476, (1994)); *see Gazelle v. Shulkin*, 868 F.3d 1006, 1010-11 (Fed. Cir. 2017) ("In the absence of an express definition, we presume that Congress intended to give those words their plain and ordinary meanings"). A term's ordinary meaning may be derived from a dictionary. *Gazelle*, 868 F.3d at 1011 (citing *United States v. Rodgers*, 466 U.S. 475, 479 (1984)). Furthermore, where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Hanousek*, 176 F.3d at 1121 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Here, Congress did not specially define the term "solely," and therefore is presumed to have used the term in accordance with its ordinary meaning. The dictionary defines "solely" as "without another" or "to the exclusion of all else." *Solely*, *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001). Congress also chose to describe the purposes to which permissible vessel fees could be expended as only services to "vessels" or "watercraft." 33 U.S.C. § 5(b)(2)(A) (referencing only "vessel" and "watercraft"). Thus, Section 5(b)(2)'s plain meaning is that a reasonable fee must, in addition to the other two conjunctive requirements, be used to pay the cost of a service to a vessel *to the exclusion of all else*. If Congress intended for states and municipalities to fund "services to passengers" with vessel fees, it could have said so, but it did not. *Compare* 33 U.S.C. § 5(b)(2)(A) (referencing only "vessel") *with* 33 U.S.C. § 5(b) (clarifying that statute's prohibition reaches fees charged to a "vessel or other water craft, or . . . its passengers or crew"). Congress's clear statutory language is conclusive and forecloses further

judicial inquiry. *See Hanousek*, 176 F.3d at 1120; *Botosan*, 216 F.3d at 831 (citing *Cal. Franchise Tax Bd. v. Jackson (In re Jackson)*, 184 F.3d 1046, 1051 (9th Cir. 1999)).[46]

D. CBJ's Violations Of The Tonnage Clause Entitle CLIA To Relief Under 42 U.S.C. § 1983.

CBJ's contention that CLIA must establish a "custom, practice, or policy" relating to Tonnage Clause violations to pursue a 42 U.S.C. § 1983 claim is clearly mistaken. CBJ Mot. Summ. J. at 88-90. In *West v. Atkins*, 487 U.S. 42, 48 (1988), the Supreme Court held that "[t]o state a claim under Section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." Put simply, "[a] broad construction of § 1983 is compelled by the statutory language, which speaks of the deprivation of "*any* rights, privileges, or immunities secured by the Constitution and laws." *Dennis v. Higgins*, 498 U.S. 439, 443-46 (1991). Adhering to *West* and *Dennis*, federal courts have held that "[t]he right to engage in interstate commerce free of discriminatory taxes or fees has been recognized as a general right." *See Bridgeport I*, 566 F. Supp. 2d at 86. That same approach must be followed here.

To prevail on a Section 1983 claim, CLIA need not prove that CBJ violated the Tonnage

[46] For this reason, CBJ's reliance on the limited legislative history of Section 5(b) is misguided. *See Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1042-43 (9th Cir. 2013) (noting that it is "improper to consider legislative history" when the statute's language is plain); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("'[W]hen the statute's language is plain, the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'" (citation omitted)).

Clause through a custom, practice, or policy. Nor must it establish harm or injury. CLIA need only establish that CBJ's Entry Fees violate the Tonnage Clause, the Commerce Clause, *or* Section 5(b) of the RHAA. CLIA is not asking the Court to make new federal law or consider an issue of first impression. Under Supreme Court precedent, "the coverage of [§ 1983] must be broadly construed" and such relief is proper here. *Dennis*, 498 U.S. at 444; *see also Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989).

E. CLIA Has Not Abandoned Or Waived Its Commerce Clause Claim.

CBJ argues that CLIA has abandoned or waived its Commerce Clause claim under Local Rule 56.1 because CLIA did not move for summary judgment on Commerce Clause grounds. CBJ Mot. Summ. J. at 91. This argument is mistaken. A party that has properly pled a claim in its complaint is not required to file a motion for summary judgment to preserve that claim. *See Villante v. VanDyke*, 93 Fed. App'x 307, 309 (2d Cir. 2004). The purpose of Local Rule 56.1 is to prevent the filing of piecemeal motions without leave of court. It cannot operate to bar properly-pled claims that have not otherwise been waived or abandoned. If CLIA wishes to move for summary judgment on its Commerce Clause claim, it will seek leave of Court to do so.[47]

F. A Permanent Injunction Is Necessary To Prevent Future Expenditures Of The Entry Fee Revenues That Violate The Constitution And Controlling Federal Law.

[47] CBJ makes this same waiver argument in the context of CLIA's RHAA claim. CBJ Mot. Summ. J. at 83 n.286. CLIA's decision to limit the scope of its Motion to fewer than all elements of Section 5(b)(2) of the RHAA does not mean that CLIA has waived or abandoned the right to show the Entry Fees' non-compliance with the whole of Section 5(b)(2).

CBJ should be permanently enjoined from future unlawful collection and use of Entry Fee revenues because CLIA's cruise line members will suffer irreparable harm, the balance of equities tips in CLIA's favor, and a permanent injunction is in the public interest.

1. A Constitutional Violation Constitutes Irreparable Harm.

Courts have found that "[a]n alleged constitutional infringement will often alone constitute irreparable harm." *Bailey v. Clovis Unified Sch. Dist.*, 08-CV-0146-AWIGSA, 2008 WL 410613, at *3 (E.D. Cal. Feb. 12, 2008) (citing *Goldies' Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984)). CBJ misstates *Bridgeport* when it asserts that the court found that the ferry company *did not* suffer irreparable harm. CBJ Mot. Summ. J. at 94. Rather, *Bridgeport* found that irreparable harm existed as to the *fee payers* because the port authority violated the Tonnage Clause and the Commerce Clause. *See Bridgeport I*, 566 F. Supp. 2d at 107. The court could not have been clearer in stating that "there is no adequate remedy at law which would prevent the occurrence of this future constitutional harm." *Id*. Future constitutional harm is irreparable almost by definition. CLIA need not prove financial or economic harm to its cruise line members (the fee payers) for a permanent injunction to issue.

2. The Balance Of Equities And Public Interest Favors CLIA's Requested Relief.

CBJ also argues that CLIA is not entitled to a permanent injunction because the balance of equities favors CBJ rather than CLIA. CBJ alleges that CLIA's cruise line members have experienced record profits and do not pay federal income taxes. CBJ Mot. Summ. J. at 97. CBJ does not explain how either of the factors would act to grant immunity to CBJ against continuing and prospective violations of constitutional or statutory prohibitions. CBJ further asserts that enjoining the Entry Fees would result in a windfall to CLIA's members. The windfall assumption is completely counter-factual because any reduction or elimination of local port

charges would act to increase by the same amount the cruise lines' indirect tax liability to the State of Alaska.

The law is clear. The Ninth Circuit has held "'the public interest and the balance of the equities favor 'prevent[ing] the violation of a party's constitutional rights.'" *Az. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). In fact, courts have found that "government cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Because the Entry Fees implemented and collected by CBJ violate the Constitution, the balance of equities weighs in CLIA's favor. It is in the public's interest to issue a permanent injunction preventing the continued violation of CLIA's members' constitutional rights.

IV. ARGUMENT: OPPOSITION TO CBJ'S CROSS-MOTION FOR SUMMARY JUDGMENT

A. CBJ Is Not Entitled To Summary Judgment On Any of Its Proffered Affirmative Defenses.

In its cross-motion, CBJ relies upon a variety of affirmative defenses to CLIA's claims. All are premised on assertions of unfairness, inequity, the costs to CBJ in defending patently unconstitutional uses of the Entry Fees, and CBJ's purported reliance on conduct of third parties associated with the cruise line industry. None of these defenses bars the relief requested by CLIA or supports entry of summary judgment in CBJ's favor.

1. Waiver Does Not Bar Entry Of Summary Judgment In CLIA's Favor Or Justify Entry Of Summary Judgment For CBJ.

Waiver of a constitutional right is a serious matter. Courts must indulge "every reasonable presumption" against it. *Brandner v. Providence Health & Servs.-Wash.*, 394 P.3d 581, 588 (Alaska 2017). Waiver may defeat a constitutional claim only if there is "voluntary,

intentional relinquishment or abandonment" of that claim. *Zenith/Kremer Waste Sys., Inc. v. W. Lake Superior Sanitary Dist.*, No. CIV. 5-95-228, 1996 WL 612465, at *6 (D. Minn. July 2, 1996) (declining to find waiver of right to raise constitutional challenge to ordinance under the Commerce Clause). To constitute waiver, the party's conduct "should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible." *Bechtel v. Liberty Nat'l Bank,* 534 F.2d 1335, 1340 (9th Cir. 1976). Waiver must be established by "clear" and "compelling" evidence. *Zenith/Kremer*, 1996 WL 612465, at *6 (quoting *Curtis Publ'g Co. v. Butts,* 388 U.S. 130, 145 (1967)).[48]

CBJ asserts that CLIA waived its right to challenge the imposition of future Entry Fees based on its purported past acquiescent conduct and the conduct of third parties with respect to past fees that already have been collected, spent, and not the object of CLIA's requested relief. More specifically, CBJ argues that CLIA's challenge to future unlawful collection of the PDF was waived through the conduct of a different cruise line industry association, NWCA,[49] when it purportedly agreed to and paid the PDF. CBJ Mot. Summ. J. at 18. Similarly, CBJ asserts that CLIA waived its right to challenge future imposition, collection, and expenditures of the MPF because it did not challenge the constitutionality of past collections of the MPF, collections which also are not the object of CLIA's requested relief. *Id*. at 30-31.

[48] Both cases that CBJ cites to support its defense of waiver are inapposite. *Ostlund v. Bobb*, 825 F.2d 1371 (9th Cir. 1987), addressed waiver of the right of due process based on a failure to request a hearing. *Shenzhenshi Haitiecheng Sci. & Tech. Co. v. Rearden, LLC*, No. CV 15-cv-00797-SC, 2015 WL 6082028 (N.D. Cal. Oct. 15, 2015), considered implied waiver or estoppel of a contractual anti-waiver provision. It did not address waiver of a constitutional challenge in any way.

[49] CBJ asserts, without support, that NWCA is the "predecessor" of CLIA and that its actions bind CLIA in this lawsuit. *See* CLIA Mot. Strike Costello Aff. (filed contemporaneously herewith).

CBJ cites no authority for its assertion that conduct relating solely to already-collected past fees could constitute "clear and compelling evidence" of a "voluntary and intentional abandonment" of CLIA's constitutional right to challenge the future imposition, collection, and expenditure of fees (the gravamen of CLIA's lawsuit). The alleged conduct cited by CBJ does not relate to future fees, much less constitute evidence that CLIA knowingly and intentionally abandoned its right to challenge fees in the future. Nor is it relevant to CLIA's claims, much less sufficient to overcome every reasonable presumption against waiver that the Court must indulge.

None of the purported conduct cited by CBJ is sufficient to overcome the strong presumption against waiver of a constitutional right. CLIA's constitutional rights cannot be waived by someone else. *Zenith/Kremer*, 1996 WL 612465, at *6-8 (waiver not proved by conduct of predecessors to plaintiff's current interests or participation in and support for the District's facility). Actual or attempted past compliance with the CBJ provisions setting the Entry Fees does not constitute waiver of the right to challenge future enforcement, *Bonollo Rubbish Removal, Inc. v. Town of Franklin*, 886 F. Supp. 955, 961-62 (D. Mass. 1995) (agreement to comply with a requirement contained in the challenged by-law does not constitute a waiver of the right to challenge that by-law on constitutional grounds); *Salla v. Monroe Cty.*, 409 N.Y.S.2d 903, 906-07 (App. Div. 1978) (a party's attempts to comply with a statute in order to avoid breach of a contract does not constitute waiver of a constitutional right);[50] *Wendlandt v. Indus. Comm'n*, 39 N.W.2d 854, 856 (Wis. 1949) (finding that compliance with Wisconsin's workers compensation law was mandatory on employers and thus an employer's compliance

[50] In *Salla*, the consequence of non-compliance was potential liability for breach of a construction contract with a public entity. Here, the consequences of non-compliance included potential criminal liability and denial of vessel entry to the Port of Juneau.

with the law did not waive his right to challenge its constitutionality in court). For all of these reasons, CBJ's waiver argument is not a bar to entry of summary judgment in CLIA's favor and does not support entry of summary judgment for CBJ.

2. Laches Does Not Bar Entry Of Summary Judgment In CLIA's Favor Or Justify Entry Of Summary Judgment For CBJ.

Laches requires proof of (1) inexcusable delay or lack of diligence in pursuing a claim and (2) resulting evidentiary or expectations-based prejudice. *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1226-27 (9th Cir. 2012); *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1411 (9th Cir. 1993); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998). Delay alone is insufficient. The defendant also must show prejudice, such as "lost, stale, or degraded evidence, or witnesses whose memories have faded, or who have died" or that the "defendant 'took actions or suffered consequences that it would not have, had the plaintiff brought suit promptly.'" *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1227 (9th Cir. 2012) (citations omitted); *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 696 (9th Cir. 1990) ("Common forms of prejudice to defendant are loss of evidence to meet the claim of plaintiff, change in situation induced by the delay, and change in the value of the subject-matter involved . . . ." (quoting H. McClintock, *Handbook of the Principles of Equity* 71-72 (2d ed. 1948)); *Trs. For Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell*, 812 F.2d 512, 518 (9th Cir. 1987); *Boone v. Mech. Specialties Co.*, 609 F.2d 956, 959 (9th Cir. 1979) (finding prejudice where defendant's witnesses no longer were available due to the passage of time). Importantly, "[l]aches cannot be successfully raised in absence of the defendant's pleading and proof of prejudice caused by the delay in filing suit. . . . Difficulties caused by the pendency of a lawsuit, and not by delay in bringing the suit do not

constitute prejudice within the meaning of the laches doctrine." *Shouse v. Pierce Cty.*, 559 F.2d 1142, 1147 (9th Cir. 1977).

CBJ's laches arguments rest on the bald assertion that CBJ should be protected from "untimely" claims, the length of time that the Entry Fees have been in existence without direct legal challenge, and asserted changes in CLIA's position (with emphasis on purported changes during the pendency of this lawsuit) regarding the use of Entry Fees for what CBJ calls "services to passengers." *See* CBJ Mot. Summ. J. at 19, 32. The prejudice that CBJ appears to assert consists of the cost of defending this lawsuit and the prospective inability to use future Entry Fee revenues for municipal and tourism-related projects that would result from enforcement of the Tonnage Clause.[51] CBJ Mot. Summ. J. at 32.

CBJ is not prejudiced by any alleged delay. CBJ's defense costs would have been incurred regardless of when the complaint was filed. That CBJ will be enjoined prospectively from the unlawful collection and expenditure of Tonnage Duties and therefore be required to fund its municipal and tourism-related projects from other sources of revenue is unrelated to any alleged delay.[52] *Wauchope*, 985 F.2d at 1412 ("[T]he mere prospect that a defendant might lose a

[51] As CBJ notes in its own briefing, raising new arguments on reply is strongly discouraged and may entitle the other party to a sur-reply. CBJ Mot. Summ. J. at 73 n.241. Here, CBJ has not alleged any evidentiary prejudice to support its laches defense. Further, it has not sufficiently alleged expectations-based prejudice. CLIA seeks prospective relief in this litigation to prohibit CBJ from prospectively appropriating Entry Fee revenues unconstitutionally. The only Entry Fee revenues that CBJ claims to have relied upon for future payment obligations are those PDF revenues allocated to paying down the revenue bonds for the cruise ship dock infrastructure. *See* CBJ Mot. Summ. J. at 50 (not in relation to CBJ's laches arguments).

[52] CLIA's alleged "completely new theory" that constitutional vessel fees must be expended for services directly to the fee-paying vessel is not a "harm" occasioned by CLIA's alleged delay in bring suit. CBJ cannot feign surprise at CLIA's interpretation of the Constitution's restrictions. CBJ's own legal counsel identified the infirmities of the MPF, CLIA Supp. Facts at Ex. 120, ECF No. 75-15, and CLIA has

case does not suffice to warrant the imposition of laches as a barrier to a plaintiff's action. '[T]he prejudice requirement does not mean merely that the defendant will be worse off if the relief is granted than he would be if it were not; that sort of prejudice could be claimed by all defendants all of the time.'" (alteration in original) (quoting *Am. Coupon Exch.*, 913 F.2d at 696)). CBJ's asserted "prejudice" is exactly the type that the doctrine of laches does not protect against.[53]

CBJ's laches argument fails for two additional reasons. First, laches does not bar a claim if the claimant shows special circumstances, such as tolling, that excuse the alleged delay. *See Brown v. Kayler*, 273 F.2d 588, 592 (9th Cir. 1959). As demonstrated below, the statute of limitations has not run on any of CLIA's claims. *See infra.* Argument Point IV.A.4. Second, laches cannot serve as a basis to bar prospective injunctive relief because, by definition, such relief relates to ongoing violations that threaten future harm. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 906 (9th Cir. 2003), *rev'd on other grounds on reh'g en banc*, 344 F.3d 914 (9th Cir. 2003) ("As the Fourth Circuit has similarly observed: 'A prospective injunction is entered only on the basis of current, ongoing conduct that threatens future harm. Inherently, such conduct cannot be so remote in time as to justify the application of the doctrine of laches." (citation omitted)); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959-60 (9th Cir. 2001) ("Laches stems from prejudice to the defendant occasioned by the plaintiff's past delay, but almost by definition, the plaintiff's past dilatoriness is unrelated to a defendant's ongoing behavior that threatens future harm."); *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d

objected to CBJ's expenditures of the MPF and PDF revenues, *see, e.g.*, CBJ Mot. Summ. J. at Ex. CC, ECF No. 121-3.

[53] As CBJ correctly notes in its filing, CBJ is unable to bring up additional prejudice in the reply without CLIA being entitled to a sur-reply.

789, 799 (4th Cir. 2001) ("[I]f the claim is one for injunctive relief, laches would not apply. A prospective injunction is entered only on the basis of current, ongoing conduct that threatens future harm. Inherently, such conduct cannot be so remote in time as to justify the application of the doctrine of laches."). For all of these reasons, the defense of laches is not a bar to entry of summary judgment in CLIA's favor and does not support entry of summary judgment for CBJ.

3. Equitable Estoppel and Quasi-Estoppel Do Not Bar Entry of Summary Judgment in CLIA's Favor or Justify Entry of Summary Judgment for CBJ.

Quasi-estoppel "applies when a party advances a position so inconsistent with a previous position that it would be unconscionable to allow the party to assert the second position." *Roberts v. State, Dep't of Revenue*, 162 P.3d 1214, 1223 (Alaska 2007); *see Sowinski v. Walker*, 198 P.3d 1134, 1147 (Alaska 2008) (Quasi-estoppel "precludes a party from taking a position in litigation that is inconsistent with a position taken earlier by that same party—but only if allowing that party to maintain the latter, inconsistent position would be unconscionable.").[54] Courts consider "whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage through the first position; whether the inconsistency was of such significance as to make the present assertion unconscionable; and whether the first assertion was based on full knowledge of the facts." *Keener v. State*, 889 P.2d 1063, 1067-68 (Alaska 1995) (citation omitted). Put another way—more appropriate for the case at bar—quasi-estoppel "forbids a party from accepting the benefits of a . . . statute and then subsequently taking an

[54] CBJ cites only to *TKC Aerospace v. Muhs*, No. 3:11-cv-0189-HRH, 2015 WL 6394481 (D. Alaska Oct. 22, 2015), to support its claims of equitable estoppel and quasi-estoppel. The case provides a succinct statement of Alaska law on both doctrines. On the facts, however, the case could not be more inapposite to the case at bar. In *TKC Aerospace*, this court applied the doctrines to bar the defendant from arguing that he did not agree he would be bound in the current lawsuit by the results of a former lawsuit. Here, there is no former lawsuit against which to measure CLIA's allegedly-inconsistent current position.

inconsistent position to avoid the corresponding obligations or effects." *In re Kritt*, 190 B.R. 382, 388 (B.A.P. 9th Cir. 1995) (citation omitted).

CBJ's assertion of quasi-estoppel rests on the notion that CBJ has only collected the Entry Fees and spent the Entry Fee revenues because of CLIA's alleged support of the Fees over the years.[55] CBJ Mot. Summ. J. at 20, 34-35. CBJ argues that CLIA's current challenge to the constitutionality of the Entry Fees is unconscionable because CLIA members have profited, at best indirectly, from CBJ's revenue-collecting and appropriating activities.[56] *Id.* CBJ's logic is flawed. For as long as CBJ has been collecting and spending the Entry Fee revenues, CLIA's cruise line members have been paying the Entry Fees, *see, e.g.*, Bartholomew Aff. ¶ 31, and objecting to those expenditures that CLIA determined to be in violation of the constitutional restraints on the spending of the Fees, *see, e.g.*, Botelho Aff. ¶¶ 9, 10, 24, 25, 28, 29. The majority of these expenditures occur as annual appropriations from the Assembly that are determined by a committee according to a process outlined in the CBJ Code. *See* CBJ Supp. Facts at 16-17; CLIA Supp. Facts ¶¶ 101-02. Each year, the process starts anew and the projects and activities on which the money will be spent is determined for that year and that year only. *See, e.g.*, CBJ Mot. Summ. J. at CBJ Ex. JB, ECF No. 128-2; *id.* Ex. II, ECF No. 127-9; *id.* Ex. CG, ECF No. 121-7. To the extent—if any—that CLIA and its members were "advantaged" by

[55] CBJ's allegations of support rest on the report of statements made by John Hanson, relayed by Don Habeger—hearsay within hearsay within hearsay. CBJ has not shown that the statements of these individuals can be attributed to CLIA. *See* Mot. Strike Portions Costello Aff. (contemporaneously filed). Further, it seems implausible that a municipality would rely on a single statement to plan and develop multi-million dollar infrastructure projects solely for the benefit of private parties.

[56] CBJ asks this Court to infer that the earnings of CLIA's cruise line members are a direct result of those cruise lines' stops in Juneau. *See* CBJ Mot. Summ. J. at 20. The cruise lines are global companies that offer cruises all over the world. It is quite a leap to argue that the cruise lines' favorable bottom lines are a direct result of CBJ's exaction of levies from the lines for infrastructure that may be used by passengers or other tourists.

CBJ's levying fees on CLIA's members and spending of those fees on projects and activities aimed at enhancing CBJ's cruise-tourism appeal, CLIA's members have paid handsomely for that advantage. Am. Compl. ¶ 29 (asserting that CBJ collected more than $35 Million in Entry Fees from Fiscal Year 2012 to Fiscal Year 2016); CBJ Answer Am. Compl. ¶ 29, ECF No. 40 (admitting same). CLIA's constitutional challenge to the Entry Fees does not seek a return of those funds (a request that could be viewed as benefits CLIA's membership). Rather, CLIA seeks prospective relief mandating constitutional uses of the Entry Fee revenues. CLIA is not seeking to avoid any obligation owed to CBJ for past projects and activities, whether or not those past projects' and activities' "advantage" to CLIA's members. To the extent of any advantage, CLIA's members have satisfied any corresponding obligations by providing the revenue stream CBJ used to provide those advantages.[57]

Equitable estoppel, on the other hand, protects reasonable expectations by barring a party "from taking a position inconsistent with a prior statement when [the defending party] has reasonably and detrimentally relied on the earlier statement." *Sowinski*, 198 P.3d at 1147. In the context of constitutional challenges to legislation, there is judicial precedent prohibiting the result CBJ seeks here—legislation by estoppel. A constitutionally or procedurally invalid law may not be kept alive simply because those who seek to challenge it previously supported it. *See New York v. United States*, 505 U.S. 144, 183 (1992) (finding that the State's prior support for the Act did not estop it from challenging the Act's constitutionality because the fact "[t]hat a

[57] Because CLIA has objected to CBJ's uses of the Entry Fees in the past, CBJ cannot now say that CLIA's litigating position is so significantly inconsistent that applicable of quasi-estoppel is justified. *See Roberts*, 162 P.3d at 1223 ("Any slight variations in the State's explanation—such as whether Earth was a "charitable organization" or fell into the more broad category of "qualified organization"—do not rise to the level of inconsistency or unconscionability required for application of quasi-estoppel.").

party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation."); *O'Brien v. Wheelock*, 184 U.S. 450, 489 (1901) ("We are unwilling to assent to the doctrine of legislation by estoppel."); *Lloyd E. Clarke, Inc. v. City of Bettendorf*, 158 N.W.2d 125, 129 (Iowa 1968).[58]

CBJ essentially argues that this Court should apply estoppel to foreclose CLIA's constitutional challenge because CLIA's cruise line members have benefited indirectly from CBJ's collection and expenditure of the Entry Fees. Application of estoppel in this manner has been questioned and rejected by a variety of courts in favor of reaching the merits of claims challenging the constitutionality of a statute. *See Surmeli v. State*, 412 F. Supp. 394 (S.D.N.Y. 1976) (rejecting application of estoppel where alien physicians "enjoyed the benefits" of medical licenses obtained under statutory provision and challenged constitutionality of that provision when physicians were in imminent danger of losing licenses); *Louisville & Nashville R.R. Co. v. Bass*, 328 F. Supp. 732 (W.D. Ky. 1971) (dismissing claim that defendants were estopped from challenging constitutionality of Act by acceptance of the monetary benefits of that Act); *see also Begin v. Inhabitants of Sabattus*, 409 A.2d 1269, 1273 (Me. 1979) (finding that party was not estopped from raising constitutional challenge and noting the "shifting view of the proper balance of the equities, such that estoppel will infrequently be found to operate against one asserting his or her constitutional rights[,]" especially in cases where it is the state or locality that

[58] *Lloyd* dealt with a city ordinance that imposed a $125 fee for the connection of new homes to a sewer system. 158 N.W.2d 125. Several land developers had negotiated with the City and orally agreed to a $125 fee in exchange for the city expanding the sewer system. *Id.* at 126. After the ordinance passed, these same developers sought to have it overturned as exceeding the city's legislative authority. *Id.* The city argued that the developers should be estopped from challenging the ordinance as they had earlier agreed to its essential terms. *Id.* The court found for the developers, that the ordinance clearly exceed the city's statutory authority and could not be maintained simply as a matter of estoppel. *Id.* at 129.

is seeking to prevent challenges to its regulations by those regulated); Louisville & N. R. Co. v. Bass, 328 F. Supp. 732, 741 (W.D. Ky. 1971) (court rejected estoppel defense based on "acceptance of monetary benefits," concluding that defense was not "operable against defendants as to their right to attack by litigation the constitutionality of [the challenged law]" because "when one believes seriously that rights accorded to him by law have been or are being violated, the proper forum in an orderly society for the vindication and protection of such rights is the courts").

4. No Statutes of Limitation Preclude This Court From Reaching The Merits Of CLIA's Constitutional and Federal Statutory Challenges to the Entry Fees or Justify Entry of Summary Judgment for CBJ.

CBJ asserts that CLIA's claims are barred by various statutes of limitation. In particular, CBJ argues that CLIA's claims based on the RHAA and Supremacy Clause should be barred because CLIA did not file this lawsuit within four years of the original enactment of the PDF, CBJ Mot. Summ. J. at 21; and CLIA's constitutional challenges (Tonnage Clause, Commerce Clause, Section 1983) to the MPF should be barred as to any expenditures that occurred more than two years prior to the lawsuit filing, CBJ Mot. Summ. J. at 26-29.[59]

CBJ's statute of limitations arguments do not preclude this Court from reaching the merits of CLIA's claims for two reasons. First, "[t]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations." *Havens Realty Corp. v.*

[59] CBJ's legal analysis focuses solely on the applicable statute of limitations for Section 1983 claims, and does not address in any way the applicable statute of limitations for CLIA's Tonnage Clause and Commerce Clause claims. CBJ acknowledges that the U.S. Supreme Court has not addressed what statute of limitations period applies to Tonnage and Commerce Clause claims. For purposes of CLIA's response, CLIA assumes that CBJ intends for this Court to apply the same statute of limitations period to CLIA's Commerce and Tonnage Clause claims as CBJ urges for CLIA's Section 1983 claim. For the reasons set forth herein, however, no limitation period prevents the Court from reaching the merits of CLIA's claims or requires judgment to be entered in favor of CBJ.

Coleman, 455 U.S. 363, 380-81 (1982) ("Under the continuing violations doctrine, the statute of limitations is tolled for a claim that otherwise would be time-barred where the violation giving rise to the claim continues to occur within the limitations period."); *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989) (tolling statute of limitations for Section 1983 claim) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Eldridge v. Bouchard*, 645 F.Supp. 749 (W.D. Va. 1986), *aff'd*, 823 F.2d 546 (4th Cir. 1987); *Long v. Florida*, 805 F.2d 1542 (11th Cir. 1986); *see 3570 E. Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268, 1278 (C.D. Cal. 1996) (A statute that "violates the First Amendment's guarantee of free speech inflicts a continuing harm . . . . [that] continues until the statute is either repealed or invalidated."); *Chaudhuri v. Tennessee*, 767 F. Supp. 860, 867 (M.D. Tenn. 1991) (holding that ongoing unconstitutional conduct tolls the statute of limitations for Section 1983 claim). CBJ's collection and expenditure of the Entry Fee revenues and enforcement of the underlying PDF Resolution and MPF Ordinance have been ongoing since 2002 and 2000, respectively, and constitute a continuing constitutional harm that tolls any relevant statute of limitations period.[60] Where, as here, "the injury-causing activity continues over time, unabated, that conduct is not legitimized by the passage of time . . . . [A]cquiescence to a continuing violation of constitutional rights does not extinguish the individual's rights." *Chaudhuri v. Tennessee*, 767 F. Supp. 860, 866-67 (M.D. Tenn. 1991)

[60] That CBJ's request is to bar consideration of expenditures occurring before April 16, 2014 or after April 16, 2012, *see* CBJ Mot. Summ. J. at 21-22, 28-29, does not change the correct result in this case. In *Virginia Hospital Association*, the Fourth Circuit considered whether the statute of limitations should partially bar the plaintiff from suing based on conduct occurring after a certain date. 868 F.2d at 663. The court declined to entertain the possibility of a partial bar because it would "preclude a challenge to the entire reimbursement system . . . [which would be] patently incompatible with the district court's holding that the limitations period cannot protect an allegedly unconstitutional program." *Id*.

(alterations in original) (applying continuing violations doctrine to toll statute of limitations for Section 1983 claim).

Second, statutes of limitation generally do not apply in cases where the only remedy sought is equitable relief. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("Traditionally, and for good reasons, statute of limitations are not controlling measures of equitable relief."); *see Castner v. First Nat'l Bank of Anchorage*, 278 F.2d 376, 385 (holding that Alaska statute of limitations would not bar equitable relief related to a mortgage dispute); *Metcalfe v. State*, 382 P.3d 1168, 1175-76 (Alaska 2016) ("We have held that equitable relief claims are not subject to statutes of limitations and are instead controlled by the doctrine of laches"). Any applicable statutes of limitations should not preclude the Court from reaching the merits of CLIA's claims because CLIA seeks prospective equitable relief only.

5. Any Failure to Exhaust Administrative Remedies Under the CBJ Code Does Not Preclude The Court From Reaching The Merits Of CLIA's Constitutional and Federal Statutory Challenges to the MPF.

CBJ asserts that CLIA's failure to protest the MPF under CBJ Code § 69.20.100 requires this Court to dismiss CLIA's MPF-related claims without prejudice. CBJ Mot. Summ. J. at 22-26. CBJ's only cited authority easily disposes of this argument. Under Alaska state law, dismissal for failure to exhaust administrative remedies is warranted where the plaintiff was required to exhaust administrative remedies, the plaintiff did not exhaust administrative remedies, and the failure to exhaust administrative remedies was unexcused.[61] *S. Peninsula Hosp. v. Xerox State Healthcare LLC*, 223 F. Supp. 3d 929, 936 (D. Alaska 2016). Whether a

[61] CBJ simply assumes that exhaustion of remedies is required (thereby satisfying the first prong of the test) because the CBJ Code provides for administrative review. CBJ Mot. Summ. J. at 24. As discussed herein, however, an analysis the threshold issue of *whether* exhaustion is required in the first place is essential.

plaintiff is required to exhaust administrative remedies in the first instance is governed by the "reach of the administrative review process" alleged to cover the plaintiff's claims. *Id.* at 937 (determining that exhaustion of remedies was not required because the dispute was outside the scope of the applicable statute's review process). In *South Peninsula Hospital*, the district court found that a party was not required to assert its claims through the State's administrative review process for resolving Medicaid payment disputes before bringing common law and statutory claims against the State's management information system contractor for failure to timely pay Medicaid reimbursements. *Id.* at 936-37. Underlying this determination was the court's finding that the plaintiffs' claims were beyond the reach of disputes that the administrative review process was designed to resolve. *See id*. at 937.

The CBJ Code provides a mechanism whereby a fee payer can protest the calculated amount of fees by first paying a specific assessment of the MPF under protest and then "provid[ing] the [CBJ] manager with a written statement of protest specifying the amount of fees paid and the basis for the protest." City and Borough of Juneau, Alaska, Code § 69.20.100. In other words, CBJ's administrative procedure provides a vehicle for a fee payer to contest the amount of a specific assessment of the MPF and, presumably, obtain a refund from the city for improperly calculated fees.[62] CLIA's lawsuit, however, is not about improperly calculated fees,

[62] CBJ's protest provision is similar to Alaska Stat. § 29.45.500(a):

> If a taxpayer pays taxes under protest, the taxpayer may bring suit in the superior court against the municipality for recovery of the taxes. If judgment for recovery is given against the municipality, or, if in the absence of suit, it becomes obvious to the governing body that judgment for recovery of the taxes would be obtained if legal proceedings were brought, the municipality shall refund the amount of the taxes to the taxpayer with interest at eight percent from the date of payment plus costs.

CBJ Code § 69.20.100 speaks to refund of the MPF. There is no corollary provision for refund of the PDF.

but about seeking prospective relief from fee collection and spending that violates the United States Constitution and controlling federal statutes. Like the claims in *South Peninsula Hospital*, CLIA's claims here are outside the reach of CBJ's administrative review process.

Even if CBJ's administrative review process could be said to have some relevance to CLIA's claims, there is no basis for finding that exhaustion is required. The doctrine of exhaustion of administrative remedies "is not a strict jurisdictional rule; rather it is a rule of sound judicial administration. 'Whether a court will require exhaustion of remedies turns on an assessment of the benefits obtained through affording an agency an opportunity to review the particular action in dispute.'" *Nunamta Aulukestai v. State*, 351 P.3d 1041, 1053 (Alaska 2015) (citation omitted). The purpose of the exhaustion doctrine is to allow an "administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Voigt v. Snowden*, 923 P.2d 778 (Alaska 1996). This purpose would not be served by resort to local administrative procedures in this case. Judgments as to the constitutional and federal statutory claims in this lawsuit, or as to the relief requested, are not within the "special competence" of the CBJ City Manager or CBJ.

The substance of a plaintiff's claims also determines whether exhaustion of administrative remedies is required. If a complaint raises only constitutional issues, the doctrine of exhaustion generally does not apply because these questions are within the special expertise of the court. *Moore v. State, Dep't of Transp. & Pub. Facilities*, 875 P.2d 765, 767-68 (Alaska 1994); *see Nunamta Aulukestai v. State*, 351 P.3d 1041, 1053 (Alaska 2015) (exhaustion generally not required "when a case raises solely constitutional issues"). Further, the exhaustion doctrine does not apply to constitutional claims under 42 U.S.C. § 1983. *Sengupta v. Univ. of*

Alaska, 21 P.3d 1240, 1263 (Alaska 2001) ("[A] party need not exhaust administrative remedies before bringing a § 1983 claim in state court."); *Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341, 1354 (C.D. Cal. 1995) ("As a general rule, suits under § 1983 of the United States Code are exempted from the exhaustion requirement because the remedy afforded by the Civil Rights Act is supplementary to the state court remedy." (citing *Bd. of Regents v. Tomanio*, 446 U.S. 478, 491 (1980)); *Monroe v. Pape*, 365 U.S. 167, 183 (1961)). Similarly, a claimant is not required to exhaust administrative remedies "if the claim does not challenge any particular decision by an agency and instead calls upon the superior court to review only the validity of a statute," or if the remedy sought is "judicial rather than administrative." *State, Dep't of Transp. & Pub. Facilities v. Fairbanks N. Star Borough*, 936 P.2d 1259, 126 (Alaska 1997).[63] Here, CLIA raises constitutional and federal statutory questions of law that fit squarely within this Court's special expertise and seek a remedy that is "judicial rather than administrative." Therefore, exhaustion of administrative remedies is not required.[64]

[63] For example, in *Dep't of Transp. & Pub. Facilities v. Fairbanks N. Star Borough*, the Alaska Supreme Court held that the complainant was not required to exhaust administrative remedies where the complaint did not allege any error in administrative action, but instead sought declaratory relief that the ordinance at issue was invalid because it exceeded the Borough's statutory authority. *Id.* at 1261. As the Supreme Court of Alaska similarly explained in *Bruns v. Municipality of Anchorage*:

> Exhaustion of administrative remedies is not required when an administrative remedy is not appropriate. An administrative remedy is not appropriate when the claimant challenges the validity of a statute authorizing or requiring administrative action and does not seek a particular analysis or application of a statute. [ ] In other words, exhaustion is required when the plaintiff seeks relief that the administrative agency in question could have (but didn't) grant -- this relief is "administrative." On the other hand, if the plaintiff seeks relief that the administrative agency could not have granted, such as overturning or interpreting a statute, exhaustion is not required because the relief sought is "judicial."

32 P.3d 362, 370 (Alaska 2001).

[64] It appears that CBJ's former Mayor, Bruce Botelho would agree. *See* Bothelo Aff. ¶ 28, ECF No. 131 ("More than once an executive argued that a particular expenditure was likely unconstitutional. . . . I

Even if exhaustion were required, it nevertheless may be "excused" due to inadequate remedy or futility due to the uncertainty of an adverse decision or the inability of the agency to address the issue,[65] *Bruns*, 32 P.3d at 371; *Damico v. California,* 389 U.S. 416, 416-17 (1967); *Houghton v. Shafer,* 392 U.S. 639, 640 (1968); bias in the administrative process, *Winterrowd v. State*, 288 P.3d 446, 541 n.16 (Alaska 2012) (citing *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992)); danger of irreparable harm from the administrative process, *id.* (citing *Bowen v. City of New York*, 476 U.S. 467, 483-84 (1986)); and lack of meaningful access to the review procedures, *id.* (*citing Robyns v. Reliance Standard Life Ins. Co.*, 130 F.3d 1231, 1236 (7th Cir. 1997)).

Here, CBJ's administrative procedures are not designed to resolve the constitutional and federal statutory challenges that CLIA raises in this lawsuit. They do not empower the City Manager to determine the legality of the MPF, to abolish the MPF to the extent of such illegality, to adjust the fee schedule to collect reasonable fees for services rendered directly to vessels, or to issue a declaration that the fees are unlawful under the United States Constitution and federal statutes.[66, 67]

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disagreed and suggested that if there was no other alternative our dispute should be resolved in court so that we would all know the rules of road.").

[65] *See Dep't of Revenue v. Andrade*, 23 P.3d 58, 67 (Alaska 2001) ("Exhaustion is excused in this case because the refusal of the department to address the Andrade family's constitutional challenge rendered pursuit of administrative relief futile. The Andrade family was informed, in summary adjudication, that the department could not decide the constitutional challenge.").

[66] The CBJ Manager's powers are set out as follows:

> The manager shall be chief administrative officer of the municipality and shall be responsible to the assembly. The manager shall execute the provisions of this Code, all ordinances of the municipality, and all applicable laws. Without limiting the foregoing or excluding other or broader powers consistent therewith, the manager shall:

Finally, requiring exhaustion of administrative remedies here would risk depriving CLIA of right to seek federal court review of CLIA's constitutional and federal statutory claims, *see* CBJ Code § 69.20.100 (requiring that any appeal of the City Manager's decision on a protest "shall be to superior court"),[68] and effectively grant CBJ the ability to preclude an exercise of federal court jurisdiction over challenges to its fees. But only Congress has the power to expand or curtail federal court jurisdiction. *Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."). A failure to exhaust lack of resort to local administrative procedures does not prevent this Court from reaching the merits of CLIA's claims in this action. *See Weathington v. Mayberg*, No. 107CV 00870OWW WMWHC, 2008 WL 1970643, at *2-3 (E.D. Cal. May 2, 2008) (alleged failure to exhaust state administrative remedies was not controlling in federal

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> (a) Make application for state, federal or other grants and, upon assembly approval of the project or the appropriation therefor, execute and carry out the terms and conditions of such grant agreements;
>
> (b) Establish rates, fees or charges for services and programs provided or administered by the City and Borough except where such rates, fees or charges have been established by the assembly by ordinance or resolution or the authority to establish such rates, fees or charges has been delegated to a board or other body.

CBJ Code § 03.05.050; CLIA Supp. Facts at Ex. 10. The MPF is established by ordinance. Therefore, the CBJ Manager has no authority to establish or change the amount of the MPF. *Id.*

[67] CLIA disputes CBJ's assertions that the CBJ administrative process is adequate, not futile, and reasonable. CBJ Mot. Summ. J. at 25-26. CLIA objected to CBJ's Entry Fee expenditures on multiple occasions. It also objected, as best it could, to participation, in the CBJ-directed process of determining how CBJ would spend the MPF revenues each year, a process that occurred in the context of separate, unrelated procedures (those outlined in CBJ Code § 69.20.120(b) or through interactions in public meetings with the CBJ Assembly). These interactions have no bearing on the adequacy of CBJ's separate protest provision.

[68] In the context of a tax, a requirement that appeal of agency action to the state court is not so problematic because Congress itself has curtailed federal district court jurisdiction over suits seeking to enjoin state taxes. *See* 28 U.S.C. § 1341. Here, however, CLIA is not aware of any Congressional pronouncement that would deprive this Court of subject-matter jurisdiction to consider the constitutionality of a local fee.

action and did not deprive federal court of jurisdiction); *Griffith v. Concoran Dist. Hosp.*, No. CVF09-2132 LJO GSA, 2010 WL 1239086, at *10 (E.D. Cal. Mar. 25, 2010) (finding federal claims were ripe where defendant failed to cite to authority to support its position that plaintiff was required to exhaust state administrative remedies prior to pursuing federal claims in federal court); *see also Johnson v. D.C.*, 368 F. Supp. 2d 30, 41 n.3 (D.D.C. 2005) ("[T]he fact that a state legislatures express provision for exhaustion may create a jurisdictional exhaustion requirement for state courts does not necessarily mean that exhaustion is a jurisdictional requirement in federal courts.").

B. CBJ Has Not Shown That CBJ's Fee Allocations to General Government Operating Expenses Are Permissible As A Matter Of Law Under The Commerce Clause, Tonnage Clause, and RHAA.

1. CBJ's Application of Commerce Clause "User Fee" Analysis to Fee Expenditures Challenged Under the Tonnage Clause Is Inapposite and Ignores the Singular Importance of the Tonnage Clause as an Independent Restriction on the Levying of Fees on Vehicles of Maritime Commerce.

CBJ requests that this Court sanction CBJ's use of Entry Fee revenues for general municipal operating costs based upon the assertion that no Supreme Court case *explicitly precludes* the CBJ from spending vessel fees in these ways. CBJ Mot. Summ. J. at 37. In attempting to frame the issue as one of "first impression," CBJ cites to standards developed for fees under the Commerce Clause and advocates, as it did in its Motion to Determine the Law of the Case, that neither the Tonnage Clause nor the RHAA merit a different standard. *See, e.g.*, CBJ Mot. Summ. J. at 39 ("There is no legal reason to distinguish between the collection of a fee based on airline passengers and the collection of a fee based on cruise ship passengers.").[69] To

[69] CBJ follows this brazen statement with: "Like the airline passengers, the cruise ship and the cruise ship passengers are using port facilities *and related services of CBJ*." The airport fee analogy ignores, among

the contrary, there is a very clear reason to distinguish between aviation and maritime contexts in evaluating the validity of local fees under the Constitution. The Tonnage Clause provides this Court with a legal and Constitutional reason to distinguish between fees based on airline passengers and fees based on cruise ship passengers. The Tonnage Clause is an additional, explicit limitation on a State's ability to interfere with or burden commerce. It is separate and apart from other limitations (express or inherent) in the Constitution, including those limitations imposed by the Commerce Clause. CBJ's approach to Tonnage Clause analysis disregards the special consideration that the Framers gave to vessels as vehicles of commerce in the Tonnage Clause.[70] If the Tonnage Clause prohibited only those charges that ran afoul of the Commerce

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many other distinctions, the maritime-specific constitutional prohibitions presented by the Tonnage Clause—the prohibition at the heart of this case and a prohibition for which there is no aviation-specific counterpart.

[70] 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*, 296 U.S. at 265 n.1:

> 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 II, 805 F.3d at 106 (3d Cir. 2015) (noting disagreement about whether the Commerce Clause would, ex propriō vigore, prohibit duties of Tonnage).

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.[71]

The Court should decline CBJ's invitation to conflate these standards. "Though the Tonnage Clause supports the Commerce Clause (as well as the Import–Export Clause), the Tonnage Clause is not the Commerce Clause." *Maher Terminals II*, 805 F.3d at 109. Thus, it goes without saying that analysis of constitutionality under the Commerce Clause is different from, and not a substitute for, analysis of the Tonnage Clause.

2. There Is No Basis For Finding That CBJ's Method Of Allocating MPF Revenues To Fund General Departmental Operating Expenses Complies With The Constitutional Restrictions.

There is no legal basis for sanctioning CBJ's decision to allocate vessel fee revenue to its general operating fund pursuant to the authorities proffered by CBJ. CBJ discusses *Evansville*[72] and *Northwest Airlines*. CBJ Mot. Summ. J. at 38-39. As CBJ argues, *Evansville* sets forth a test for "determining whether a user fee imposed by a government transportation authority is valid." CBJ Mot. Summ. J. at 38 (emphasis added). In *Evansville*, the Supreme Court found that a "user fee" to defray the cost of a government-provided facility does not violate the Commerce Clause

[71] CLIA made this point clearly in its Opposition to CBJ's "law of the case" motion. The constitutional limitations on states' and localities' authority to levy interstate and foreign commerce are particularly and expressly rigorous with respect to maritime commerce. The Tonnage Clause prohibition was viewed from the earliest days of the Republic as " . . . a prudent precaution, to prohibit the States from exercising this power [to raise revenue]." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 202 (1824).

[72] *Evansville* refers to *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). In *Evansville*, the Supreme Court found that a "user fee" does not violate the Commerce Clause if it "is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the government benefit conferred[.]" *Id.* at 707, 716-17 (1972); *see Nw. Airlines, Inc. v. Cty. of Kent*, 510 U.S. 355, 369 (1994) (affirming that the standards set forth in *Evansville–Vanderburgh* are still good law, although that decision otherwise has been statutorily overruled). "Black's Law Dictionary defines 'user fee' as '[a] charge assessed for the use of a particular item or facility.'" *Vizio, Inc. v. Klee*, No. 3:15-CV-00929 (VAB), 2016 WL 1305116, at *15 (D. Conn. Mar. 31, 2016).

if it "is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the government benefit conferred[.]" 405 U.S. at 707, 716-17. *Northwest Airlines* affirmed the standards set forth in *Evansville,* although by then *Evansville* had been statutorily overruled. *Nw. Airlines,* 510 U.S. at 369 (1994).

Northwest and *Evansville* are inapposite. Neither address vessel fees (both are airport fee cases) nor consider the impact that a constitutional clause, like the Tonnage Clause, might have had on Commerce Clause analysis in a maritime context. Further, both decisions are limited by their facts. In these cases, as with the others cited by CBJ, the identity of the charging authority and the "facilities" or "benefits" being provided for the fee payers' use and enjoyment are significant, if not determinative. *Nw. Airlines,* 510 U.S. 368-70 (government benefit to airlines as users of airport); *Massachusetts v. United States*, 435 U.S. 444 (1978) (government benefits to civil aircraft as users of government provided civil aviation facilities); *Evansville*, 405 U.S. at 720 (government benefit was use of airport facilities); *Alamo Rent–A–Car v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516, 521 (11th Cir. 1990) (off-site rental car agency received government benefit of improved airport facilities, including roads upon which its vans travel). In these cases, the charging authority, an entity with specific (and in many cases, limited) authority over a government-run facility (typically, an airport, which has demarcated boundaries) assessed a fee to users for the use of the facility.

Here, however, CBJ levies the Entry Fees against vessels, but spends the Entry Fee revenue all across Juneau. *See, e.g,* CLIA Supp. Facts ¶¶ 128-31 (wireless internet at the library), ¶¶ 132-35 (transit services in CBJ), ¶¶ 136-38 (funds for the Juneau Douglas City Museum), ¶ 141 (downtown street reconstruction), ¶¶ 146-53 (Waterfront Seawalk). The whole of Juneau is

the purported "facility." CBJ Mot. Summ. J. at 45 (arguing that CBJ can "take into account not only each passenger-specific use, but the passenger's access to the 'entire government-provided facility's . . ."). CBJ also funds general government services that would still exist, regardless of the existence of the cruise industry. CBJ Supp. Facts at 29-30. CBJ's construction of the law essentially permits CBJ to define the entire municipality as the governmental benefit it confers on vessels. Such a construction takes the "user fee" exception to the Commerce Clause too far.

The facts of *Bridgeport*[73] counsel against blind application of the *Evansville* as well. In *Bridgeport*, the district court found constitutional invalidity because the fee paid for "many projects beyond the Dock that are not functionally related to the ferry operation." *Bridgeport I*, 566 F. Supp. 2d at 99–100; *cf. Auto. Club of N.Y. v. Port Auth. of N.Y. & N.J.*, 887 F.2d 417, 422–23 (2d Cir. 1989) (toll revenue from tunnels and bridges could permissibly fund commuter train where facilities were functionally related because all facilities contributed to Port Authority's performance of duty to provide transportation to travelers over and under waterways between southern New York and northern New Jersey). As in *Bridgeport*, many of the activities and projects that CBJ funds with the MPF and PDF are not functionally related to the operation of Juneau's port. CBJ's Docks and Harbors Board is responsible for the "operation, development and marketing of [CBJ] owned and operated ports and harbors, including such facilities as boat harbors, docks, ferry terminals, boat launching ramps, and related facilities . . . ." CLIA Supp. Facts at Ex. 12, at 3, ECF No. 68-13. Yet, each year, only a small portion of the MPF revenues

[73] *Bridgeport* essentially is a Commerce Clause case in the factual context of a fee charged directly against ferry passengers (as opposed to vessels) by a port authority. The Tonnage Clause defects of the *Bridgeport* fees were derivative of a direct passenger fee and were decided following Commerce Clause analysis of the passenger fees. Here, by contrast, CLIA challenges direct vessel levies under the Tonnage Clause as its threshold indicium of constitutional invalidity.

are appropriated to the Docks and Harbors Board. *See* CBJ Mot. Summ. J. at Ex. LB, at 5, ECF No. 130-2.

Bridgeport also confirmed that "a government benefit conferred on fee payers in their capacities as members of the general public, rather than of users of the government facilities," does not satisfy *Evansville*. *Bridgeport I*, 566 F. Supp. 2d at 99–100. Significantly, CBJ funds portions of its general government operations with MPF revenues – its City Attorney, City Manager, Streets, Fire, Police, CBJ Mot. Summ. J. at Ex. FM, at 1, ECF No. 124-13 – that it would fund regardless of the presence of the cruise vessels, cruise passengers, or cruise industry in Juneau. Any benefits that may inure to vessels, cruise passengers, or the cruise industry from the funding of general government operations are no different than governmental benefits conferred on members of the general public. Moreover, when cruise ship passengers get off the cruise vessels and walk the streets of Juneau, they are indistinct from members of the general public or other tourists arriving by air or ferry.

The Supreme Court's decision in *Smith v. Turner* is instructive here. In *Smith*, the Supreme Court invalidated state taxes imposed upon alien passengers arriving in the states' ports. 48 U.S. 283, 572 (1849). The City of Boston defended on the grounds that a tax collected to indemnify it for the burdens imposed by the influx of immigrant paupers withstood constitutional scrutiny. *Id*. ("Yet this is all that Massachusetts does. She says to shipmasters, If you will bring among us the insane, the imbecile, the infirm, and such as are incapable of providing for themselves, I will receive even these. I will permit those sent from the poor-houses of Europe to find a refuge here, but you shall indemnify me to some extent for the expense which will be incurred."). Needless to say, Boston's rationale did not win the case. For the same reasons, CBJ's argument must be rejected. *See* CBJ Mot. Summ. J. at 35-36 (recounting the

burdens placed upon Juneau cruise visitors). CBJ cannot constitutionally charge vessels for the burdens imposed upon it as a result of the cruise passengers that these vessels bring to Juneau.[74]

3. There Is No Basis For Reading *Evansville*'s Standard For Reasonableness Into Section 5(b) Of The RHAA.

Finally, CBJ argues that the RHAA allows CBJ to allocate MPF revenues to general operating expenses. *See* CBJ Mot. Summ. J. at 45-47. CBJ relies on legislative history to argue that the RHAA codifies pre-existing Commerce Clause and Tonnage Clause jurisprudence, and that pre-existing jurisprudence sanctions CBJ's funding of government operations through vessel fees like the MPF. CBJ is wrong.

To the extent CBJ's argument may be construed as an invitation to this Court to use the *Evansville* standards as the baseline for determining the reasonableness of vessel fees under the RHAA, such an invitation should be rejected. *Cf. Nw. Airlines*, 510 U.S. at 366-67 (in absence of congressionally-set standards for determining a reasonableness exception to prohibition of airport user fees under the Anti-Head Tax Act and agency interpretations of the term, Court employed *Evansville* formulation of reasonableness).[75] In the RHAA, Congress described in

[74] In this regard, the Court should not forget that cruise visitors contribute to CBJ's revenue stream in other ways, including purchases of goods and services in Juneau and the generation of sales tax revenue for CBJ. *See* CLIA Supp. Facts ¶¶ 77-90.

[75] *Compare* the language in the Anti-Head Tax Act, discussed in *Northwest Airlines*:

> The AHTA provides in pertinent part:
>
> "(a) Prohibition; exemption
>
> "No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .
>
> "(b) Permissible State taxes and fees

explicit detail those "taxes, tolls, operating charges, fees [and] other impositions" that could be saved from Section 5(b)'s mandatory prohibition. 33 U.S.C. § 5. As relevant here, only those fees that (1) "are used solely to pay the cost of a service to the vessel or water craft;" (2) "enhance the safety and efficiency of interstate and foreign commerce; and (3) "do not impose more than a small burden on interstate or foreign commerce" are excepted from Section 5(b)'s mandatory prohibition. *Id*. There is no reason to resort to judicial constructions of reasonableness in other contexts to determine what is a "reasonable" fee under Section 5(b)(2) of the RHAA. Congress has stated clearly what a reasonable vessel fee is, and the courts may go no further.

C. CBJ Has Not Shown That CBJ's Use Of MPF Revenues For Its Litigation Costs Is Permissible As A Matter Of Law Under The Commerce Clause, Tonnage Clause, And RHAA.

> "[N]othing in this section shall prohibit a State (or political subdivision thereof ...) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof ...) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C.App. § 1513.

Nw. Airlines, 510 U.S. at 363-64, *with* the language of the RHAA:

> **(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
>
> *** * ***
>
> **(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
>
> **(C)** do not impose more than a small burden on interstate or foreign commerce; . . .

33 U.S.C. § 5.

Finally, CBJ asks this Court to sanction its use of MPF revenues to fund its defense of this case. CBJ's request is eloquent testimony to the degree to which CBJ has lost its constitutional bearings. The prohibitions of the Tonnage Clause and Section 5(b) of the RHAA are abundantly clear.[76] Litigation at the margins of these prohibitions has focused the Tonnage Clause inquiry on whether a challenged fee is compensatory for a service rendered a vessel. As competent and zealous as CBJ's advocates may be, their efforts in this litigation are not providing any essential service for the safety, security, and navigation of CLIA's members' vessels.

CBJ points to *Bridgeport* in defense of its request. In that case, the defendant port authority surcharged the ferry passengers to pay its litigation costs. *Bridgeport I*, 566 F. Supp. 2d at 86. And as CBJ notes, the court denied the plaintiffs' request for a preliminary injunction against the surcharge without addressing the merits of their claim. *Bridgeport, Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, No. CIV.A. 3:03CV599CFD, 2004 WL 840140, at *4 (D. Conn. Apr. 15, 2004). In the end, however, the district court invalidated the entire fee and noted the unconstitutionality of the port authority's legal spending. *See Bridgeport I*, 566 F. Supp. at 91 ("The Port Authority has expended resources in the form of employee time, travel, and legal fees in connection with the trade zone. The foreign trade zone project does not benefit ferry passengers."); *id*. at 102 ("The Passenger Fee imposed by the Port Authority is used for the impermissible purpose of raising general revenues . . . [A] significant portion of the Passenger

[76] The absurdity of CBJ's position is illuminated by hypothesizing a per-passenger fee denominated "the Juneau Constitutional Defense Against Cruise Vessel Litigation Port Fee" and assessed against all large cruise vessels entering the Port. No Tonnage Clause case provides any support for the notion that such a fee would pass constitutional muster. Nor would this hypothetical fee fall within the applicable exception of the RHAA requiring use solely to pay the cost of a service to the vessel or water craft.

Fee funds projects completely unrelated and unavailable to the fee payers, such as negotiations, legal fees, and development proposals for the BRMC, Derecktor, the foreign trade zone, the barge feeder service, harbor dredging, and the high-speed ferry."); *id*. at 92 ("The Port Authority has also devoted time and resources to the following activities which are not related to the ferry and do not benefit ferry passengers: (1) retention and payment of attorneys and other professionals to create, select, and register a new trademark for the Port Authority. . ."); *Bridgeport II*, 567 F.3d at 85 (affirming the district court's conclusions regarding legal fees charged to engage in projects that did not benefit the fee payers). *Bridgeport* does not support CBJ's use of MPF revenues to fund its defense in this lawsuit.[77]

Finally, CBJ argues that unless its costs of defense are permitted to be funded by the Entry Fees at issue, it will be unable to sustain its infrastructure and CLIA's member lines will receive a windfall of "free money." CBJ Mot. Summ. J. at 48-50. These assertions, of course, are wholly unrelated to the question of whether CBJ may lawfully fund its costs of defending this lawsuit with Entry Fee revenue. And, as addressed above, CLIA members will not gain "free money" if this Court declares the Entry Fees invalid because any reduction or elimination of CBJ's Entry Fees will increase by the same amount the cruise lines' indirect tax liability to the

[77] CBJ once again suggests that counsel for CLIA is precluded from contesting the constitutionality of CBJ's use of Entry Fee revenues for CBJ's defense in this litigation because other lawyers previously with CLIA's counsel's law firm a decade past represented the port authority in *Bridgeport*. There is no basis for CBJ's intimation. "[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).

State of Alaska.[78] *See supra* Argument Point III.F.2.; CLIA Supp. Facts ¶¶ 54-57, 59. Furthermore, CBJ itself describes the magnitude of the Entry Fees at issue as "nominal," even as it argues that the loss of such fees would devastate the Juneau economy.[79] CBJ Mot. Summ. J. at 50. CBJ's unsupported assertion that its use of the Entry Fees to pay its costs of defending this lawsuit is lawful must be rejected.

V. CONCLUSION

For all the reasons set forth above, CLIA respectfully requests that the Court grant summary judgment in favor of CLIA and deny CBJ's Cross-Motion in its entirety.

In rendering judgment for CLIA, CLIA respectfully requests that the Court:

1. Enter a declaration confirming that the Entry Fees may lawfully be imposed only for identifiable services rendered to vessels, such as dockage (accommodation or berthing of vessels), wharfage (loading, unloading, and storage of goods from vessels), and pilotage (enforcing rules of navigation), and only to the extent that CBJ does not assess separate fees directed at compensating CBJ for providing such vessel services; ruling that Entry Fee revenues used for general revenue purposes, civic improvements, infrastructure installation maintenance and repair, port beautification projects, public transit, or the construction, operation, or maintenance of tourist attractions are not services to vessels as a matter of law and therefore may not lawfully be imposed or collected by CBJ; and further ruling that Entry Fee revenues

[78] This is true whether or not CLIA's member lines pass on the cost of CBJ's Entry Fees to the ultimate consumer.

[79] Potential impacts on CBJ's fiscal planning and organization of an adverse decision do not write the Tonnage Clause or federal statutes out of existence. The inconveniences or hardships of having to adjust to constitutional compliance are ones that political leaders sometimes wish to avoid, but, in all cases, must face because of their obligations to their electorate and the Constitution.

collected from vessels docking at the private docks may not be used to fund identifiable services rendered to vessels at the municipally-owned docks, such as debt service on bonds sold for public (municipally-owned) dock infrastructure projects.

2. Permanently enjoin CBJ from using Entry Fee revenues for anything other than identifiable services rendered to vessels; specifically enjoin CBJ from using Entry Fee revenues on general revenue purposes, civic improvements, infrastructure installation, maintenance, and repair, municipal beautification projects, public transit, or the construction, operation, or maintenance of tourist attractions; and further specifically enjoin CBJ from using Entry Fee revenues collected from vessels docking at the private docks to fund identifiable services rendered to vessels at the municipally-owned docks, such as debt service on bonds sold for public (municipally-owned) dock infrastructure projects.

DATED: March 23, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 23, 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