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VIA EMAIL and U.S. MAIL

June 19, 2024

Robert Palmer, III
Municipal Attorney
City and Borough of Juneau
155 Heritage Way
Juneau, Alaska 99801
robert.palmer@juneau.gov

RE: "Ship Free Saturdays" Initiative Petition
(Our Matter No: 11105-1)

Dear Robert:

On behalf of Royal Caribbean Cruises, Ltd.,[1] I write to you regarding your April 30, 2024 approval of the Initiative known as the "Ship Free Saturday" measure (the "SFS Measure"). This measure seeks to bar any cruise vessels with more than 250 passengers from "dock[ing], moor[ing], or disembark[ing] passengers" within Juneau on all Saturdays, plus the holiday of July Fourth.

The SFS Measure is unlawful for several reasons. First, it is a clear example of an "appropriation" of public assets prohibited by Article XI, Section 7 of the Alaska Constitution. Second, it also violates the fundamental right to travel guaranteed by the Alaska Constitution. Finally, the SFS Measure conflicts with multiple aspects of federal law, including federal statutes, the United States Constitution, and international law principles incorporated by federal law.

Juneau Ballot Measure Provisions

Article 7 of the Juneau Charter provides for the right to propose initiatives. However, that right is subject to restrictions in the state constitution and state statutes.[2] Juneau code acknowledges this limitation.[3]

State Law and Constitution Prohibits Ballot Measures Making an Appropriation

[1] Although I write today on behalf of my client, the reasoning in this letter applies with equal force to the interests of all similarly situated cruiselines.
[2] Alaska Constitution Article XI, Section 1; *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418 (Alaska 2006).
[3] CBJC 29.10.025(b)(2) and (c).

Under AS 29.26.100 "[t]he powers of initiative and referendum are reserved to the residents of municipalities, except the powers do not extend to matters restricted by Art. XI, Sec. 7 of the state constitution." In addition, AS 29.10.030(c) states that: "[a municipal] charter may not permit the initiative and referendum to be used for a purpose prohibited by Art. XI, Sec. 7 of the state constitution."

Article XI, Section 7 of the Alaska Constitution makes clear that an initiative cannot be used to "dedicate revenues, **make or repeal appropriations**, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation."[4] Any such attempted misuse of the initiative process should result in a measure being rejected.

The Alaska Supreme Court has implemented a two-part test for determining whether the provisions of an initiative constitute a prohibited appropriation:

> First, we determine whether the initiative deals with a public asset. In a series of cases, we have determined that public revenue, **land**, a municipally-owned utility, and wild salmon are all public assets that cannot be appropriated by initiative. Second, we determine whether the initiative would appropriate that asset. In deciding where the initiative would have that effect, we have looked at the "two core objectives" of the limitation on the use of the initiative power to make appropriations. One objective is preventing "give-away" programs that appeal to the self-interest of voters and endanger the state treasury. … **The other objective is preserving legislative discretion by "ensur[ing] that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs**."[5]

The SFS Measure purports to prohibit certain sizes and classes of cruise ships from utilizing moorage and docks within Juneau on Saturdays and July Fourth. Not only does this prohibition ban such uses, by extension it effectively prohibits such ships' crews and passengers from accessing the entirety of the City of Juneau itself on those days.

Accordingly, the SFS Measure takes control of public assets—both Juneau docking structures *and* access to the City of Juneau itself—and allocates them amongst competing needs. On Saturdays and July Fourth, any cruise ship passenger or crew member will not be able to disembark or have access to Juneau, while everyone else will. This usurps the authority and control provided to the Juneau Assembly by law.

The Alaska Supreme Court has specifically found a prohibited appropriation where, as is the case here, a ballot measure allocates a public resource amongst competing user groups. In that case, it was a ban on fishing for salmon via set net in a particular region. Specifically, the Court said that the ballot measure at issue was an unconstitutional appropriation because the proposed measure "would completely appropriate salmon away from set netters and prohibit the legislature from

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[4] (Emphasis added).
[5] *Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422-23 (Alaska 2006) (citations omitted and emphasis added).

allocating any salmon to that user group."[6] The SFS Measure is materially identical to the invalid set netting initiative because it would completely appropriate public docks—and indeed access to Juneau itself—on Saturdays and July Fourth away from cruise ship passengers and crew towards other user groups (e.g., small passenger vessels, charters, sightseeing tours), and the Assembly would have no discretion to otherwise allow docking.

The SFS Measure therefore violates the Alaska Constitution because it has the purpose and effect of making an appropriation of public assets and because it interferes with the Assembly's exclusive ability to control these assets and allocate them amongst competing needs. As a result, the SFS Measure also fails to satisfy AS 29.26.110(a)(1).

Accordingly, the decision not to reject the SFS Measure as an unconstitutional appropriation was made in error.

The SFS Measure would be Unenforceable as a Matter of Federal Law

An initiative must be enforceable as a matter of law to be placed on a ballot under AS 29.26.110(a)(4). However, the SFS Measure would likely be enjoined because it conflicts with several aspects of federal law including, but not limited to, the following:

- The fundamental right to travel in the U.S. Constitution, contained in the Fourteenth Amendment's Privileges and Immunities Clause, as well as other constitutional provisions.[7] By arbitrarily blocking citizens from Juneau on certain days, the SFS Measure clearly violates the right to travel.

- The Commerce Clause in the U.S. Constitution at Article I, Sec. 8 providing that: the U.S. Congress has the exclusive power "to regulate commerce with foreign nations, among states, and with the Indian tribes." Cruise ship travel, particularly through the inside passage, necessarily implicates interstate and foreign commerce. Both areas are exclusively regulated by federal law, meaning the SFS Measure clearly violates the Commerce Clause.

- The SFS Measure conflicts with established principles of international and federal maritime law guaranteeing freedom of navigation, passage, and entry to ports, as well as federal statutes governing those subjects.

- The Takings Clause in both the U.S. Constitution at the Fifth Amendment and the Alaska Constitution at Article I, Sec. 18 prohibit the taking of private property without just compensation. The SFS Measure directly impacts private dock owners by dramatically limiting the docks' use without compensation. It also will have a massive indirect impact

[6] *Lieutenant Governor v. Alaska Fisheries Conservation Alliance, Inc.*, 363 P.3d 105, 106 (Alaska 2015).
[7] *See also* discussion of a right to travel in the Alaska Constitution based in its equal protection clause, *Thomas v. Bailey*, 595 P.2d 1, 9-16 (Alaska 1979).

on business owners throughout Juneau. Accordingly, the SFS Measure violates the Takings Clauses of both the U.S. and Alaska Constitutions.

Conclusion

The SFS Measure is unenforceable as a matter of state and federal law. The decision not to reject the SFS Measure as an unconstitutional appropriation was made in error. If the measure is certified, placed on the ballot and approved by the voters, it will be invalidated for the reasons enumerated in this letter, and numerous additional defects.

Sincerely,

s/Scott Kendall/

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VIA EMAIL to Beth.McEwen@juneau.gov

Ms. Beth McEwen
Municipal Clerk
City and Borough of Juneau
155 Heritage Way
Juneau, Alaska 99801

RE: "Ship Free Saturdays" Initiative

Dear Ms. McEwen:

Allen Marine Tours, Inc. ("Allen Marine") is formally voicing its opposition to the application (the "Application") for the proposed "Ship Free Saturdays" initiative (the "Proposed Initiative") filed by Ms. Karla Hart and other members of a Petitoners Committee (the "Petitioners"). In turn, Allen Marine requests that you deny the Application and not issue a petition on the Proposed Initiative.

The Petitioners have filed the Application seeking the petition and vote on the Proposed Initiative, which, if adopted, would prohibit cruise ships with a capacity of 250 passengers or more "to dock, moor, or disembark passengers within the City and Borough of Juneau boundaries on any Saturday or July 4." By seeking to extend the regulatory authority of Juneau seaward to regulate – really ban – fundamental cruise ship operations, such as docking and mooring, the Proposed Initiative, if adopted, would clearly be an unconstitutional attempt to regulate vessel operations which squarely, and exclusively, falls within federal maritime authority. Such ban would violate other laws too, and cause negative impacts on Juneau as a whole.

1. **The Proposed Initiative would clearly violate the Supremacy Clause of the U.S. Constitution by attempting to impose regulations and requirements that conflict with federal maritime law.** The Supremacy Clause in the Constitution (Article VI, clause 2) makes federal law "the supreme law of the land" and no state or local government may enact or enforce laws that conflict with federal law. Maritime commerce, navigation, operations, safety, crewing, etc. are all matters nearly exclusively within the domain of federal maritime law. For a city and borough to restrict – really prohibit – such fundamental cruise ship operations as docking and mooring would be a clear seaward intrusion into matters that are left to the U.S. Coast Guard and other federal maritime authorities. The blanket, seaward prohibition of docking and mooring within waters of and adjacent to Juneau proposed by the Proposed Initiative would be

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unprecedented, and would also present a real problem in the event an emergency necessitates a cruise ship to dock or moor in Juneau or neighboring waters on a Saturday or July 4. There is no emergency or "exigent circumstances" exception written into the Proposed Initiative.

Nor is there any allowance for disembarkation of crewmembers from cruise ships on Saturdays and July 4, which is is a fundamental federal maritime right of seafarers, particulary when disembarkation is necessitated by emergency, other exigent circumstances, or simply circumstances such as termination of employment (whether voluntarily, involuntarily, or by expiration of employment contract). Even in those scenarios where restrictions on cruise ship landings have been permitted, such as Bar Harbor, Maine, the restrictions are clear about two things – they cannot prohibit seafarer disembarkation, and they are limited in application to disembarkation of passengers and cannot attempt or purport to regulate at sea vessel operatons such as docking or mooring. We have no doubt that the Proposed Initiative, as written, would not survive scrutiny under the Supremacy Clause because it would conflict with and interfere with uniform application of fundamental, long-standing principles of federal maritime law.

2. **The Proposed Initiative would clearly violate the fundamental Constitutional right to travel that every American has.** The Privileges and Immunities Clause in the U.S. Constitution (Article IV, § 2: "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states") protects fundamental rights of individual citizens and prevents state and local governments from discriminating against out-of-state citizens, at least with respect to such fundamental rights. The right to travel freely within the United States is fundamental right of all Americans, and this includes the right of citizens of one state to enter another state. More importantly, the Privileges and Immunities Clause embraces "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily in the second State." *Saenz v. Roe*, 526 U.S. 489 (1999).

Section 1 of the 14th Amendment to the Consititution also contains a similar Privileges and Immunities Clause, but more importantly contains the Equal Protection Clause, which states that "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause clearly prohibits a state or local government from denying a citizen of another state (and even its own state) equal protection of the laws. A resident of Juneau may freely be in Juneau regardless of the day of the week without any limits, as would any vistor visting Juneau to whom the restrictions of the Proposed Initiative would not apply. In turn, citizens coming into town aboard larger cruise ships must be allowed this same

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privilege under their fundamental right to travel regardless of the size of the ship on which they enter.

3. **The Proposed Initiative would clearly violate the Commerce Clause in the Constitution by discriminating against certain participants engaged in interstate and international commerce.** The Commerce Clause in the Constitution (Article I, § 8) gives the U.S. Congress the power "to regulate commerce with foreign nations, among states, and with the Indian tribes." In turn, in what is known as the "Dormant Commerce Clause," courts have held that implicit in the Commerce Clause is the prohibition against states and local governments enacting legislation that discriminates against or excessively burdens interstate commerce. The large cruise ships calling on Juneau operate in interstate and international commerce, and barring or limiting cruise ship visits and otherwise imposing restrictions on their operations clearly discriminates against and burdens interstate commerce and those engaging in such commerce. "Discrimination" in this context simply means different treatment of in-state versus out-of-state economic interests that benefits the former and burdens the latter.

The Petitioners may refer to the recent opinion in the "Bar Harbor case" that the United States District Court of Maine issued in the case *Association to Preserve and Protect Local Livelihoods v. Town of Bar Harbor*, but the initiative in the Bar Harbor case is fundamentally different than that proposed here. The initiative in the Bar Harbor case imposed a capacity limitation on the disembarking of cruise ship passengers regardless of the origin of the vessel carrying them. Faced with that initiative, the District Court in the Bar Harbor case held that a daily cap on the number of passengers who could disembark did not violate the Commerce Clause. The initiative there applied equally to all cruise vessels, both large and small – the limitation there was simply on the number of cruise ship passengers who could enter the town of Bar Harbor, without any mention of the cruise ships from which they disembark or the size of such cruise ships.[1]

The Proposed Initiative presents a fundamentally different prohibition. Here, the Proposed Initiative specifically targets cruise ships that have a capacity of 250 or more passengers. In other words, the Proposed Initiative does not present a "neutral regulation" because it expressly targets mid- to large-sized cruise ships and is, therefore, discriminatory under the Commerce Clause. That discrimination is made worse when considering that nearly all (if not all) such cruise ships are foreign-flagged. Not allowing these larger ships to dock, moor, or disembark their passengers on Saturdays and July 4, while smaller, American cruise ships are still able to, would be inherently discriminatory

[1] The decision in the Bar Harbor case is now on appeal to the U.S. Court of Appeals.

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towards foreign vessels and the interstate commerce in which they are Constitutionally protected to participate.

4. **The Proposed Initiative would also clearly violate the Commerce Clause by placing an excessive burden on interstate commerce that clearly exceeds any local benefit.** As stated above, the Commerce Clause, in particular the Dormant Commerce Clause thereunder, also prohibits state and local governments from enacting legislation that excessively burdens interstate commerce. The large cruise ships calling on Juneau operate in interstate and international commerce, and barring cruise ships from docking, mooring, and landing passengers in Juneau clearly imposes restrictions on their operations which would, if adopted, burden interstate commerce for these vessels and their owners and operators engaging in such commerce. That burden, particularly when weighed against the interests for which the Proposed Initiative is presented, is excessive and undue and, thus, impermissible under the Commerce Clause.

The impact the Proposed Initiative would have on the commerce of these vessels and their owners and operators is not incidental. On Saturdays and July 4, they would be prohibited from re-fueling and -provisioning in Juneau, disembarking seafarers, landing passengers, and engaging in all other commerce in Juneau. Juneau is a major port in Southeast Alaska, and to deny docking and moorring on Saturdays would place a heavy burden on cruise ships to find alternative ports for operational support on that day. While such impact is quantifiable both in economic and other terms, the long list of recitals introducing the Proposed Initiative say nothing about the measure of "benefit" that Juneau and its residents would receive from the proposed cruise ship ban on Saturdays and July 4. While it attempts to describe the benefit of such a ban, the Proposed Initiative speaks in generalities of "enjoyment" and the like. There must, at a minimum, be some empirically stated benefit for the Proposed Initiative, and then that benefit must be measured to determine whether it clearly outweighs the heavy burden the Proposed Initiative, if adopted, would impose on the interstate commerce of cruise ships. No such showing is even attempted here, and as a result, the Proposed Initiative must be denied as a clear, unconstitutional attempt to interfere with interstate commence. As even the court in the Bar Harbor case stated, "State law that 'regulat[es] even-handedly to effectuate a legitimate local public interest… will be upheld unless the burden imposed on such commerice is clearly excessive in relation to the putative local benefits.'"

5. **The Proposed Initiative would also violate the Alaska Constitution.** Under AS 29.26.100, the initiative power does not extend to matters restricted by Article XI, Section 7 of the state constitution. Under Article XI, Section 7, an initiative may not "make appropriations" or "enact local or special legislation, " among other prohibitions.

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If you determine that the Proposed Initiative does either of these things, you must deny the Proposed Initiative. In our view, the Proposed Initiative violates both prohibitions.

a. The Proposed Initiative Would Unlawfully "Make Appropriations". An initiative proposes to make an appropriation if it "would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that it is executable, mandatory, and reasonably definite with no further legislative action." *Alaska Action Center v. Municipality of Anchorage*, 84 P.3d 896, 993 (Alaska 2004). The Proposed Initiative would set aside property – both Juneau municipal property and private property – for specific purposes in violation of Article XI, Section 7. In fact, it does so in three ways.

First, the Proposed Initiative appropriates public Juneau docks and other facilities that are or will be used for or by cruise ships and disembarking passengers and crew members. It makes that appropriation by denying the use and operation of such public facilities from their intended use – docking cruise ships and disembarking their passengers, for which fees and revenue are received by Juneau.

Second, the same taking and appropriation are made with respect to private docks and other facilities used by cruise ships. While case law addresses appropriation in the context of public funds and property, Article XI, Section 7 makes no distinction between public and private appropriation. It simply prohibits "appropriations."

The Proposed Initiative would simply shut down these public and private facilities, and deny their owners and operators the expected revenue generated from such operations. In fact, it would go one step further with respect to private docks – it would force those owners into an enforcement capacity, as they would be required to deny dockage and passenger landings on Saturdays and July 4 – putting them into a psuedo public enforcement role.

Third, the navigable waters of the State of Alaska off Juneau would likewise be unconstitutionally appropriated by the Proposed Initiative. Waters of the state are a public asset that cannot constitutionally be appropriated by initiative. The state has a propety-like interest in these waters based on its public trust responsibilities, and the waters provide a revenue-raising function. *Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1074 (2009). By banning cruise ships from docking and mooring in those waters – and by regulating when a cruise ship may call on Juneau and by banning passengers and crew who may disembark – Juneau would clearly be intruding on, and appropriating from, the State of Alaska for its own regulatory purposes those waters that are only for the State of Alaska (and the federal government) to govern and

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regulate. That is not to mention the fact that Juneau has no authority to do so seaward of its land boundary. It is for the state legislature and state executive to determine whether, and how so, to regulate Alaska's navigable waters and their use.

While Juneau, as a home rule municipality, may have expansive local powers, its ability to regulate is not unlimited. AS 29.35.020 sets bounds on the extraterritoriality of Juneau's regulatory powers. While subsection (a) of the statute permits Juneau to provide "wharves, harbors and other marine facilities outside its boundaries and [to] regulate their use and operation", the statute does not permit it to exercise extraterritorial authority or jurisdiction over cruise ships and their operators outside those facilities. The statute also does not permit Juneau to regulate the use and operation of non-Juneau-provided marine facilities, such as private docks. This is reinforced in subsection (c) which limits a municipaliy's extraterritorial authority over vessel operations to very narrow, specific circumstances. A municipality may regulate vessel operations only when done in agreement "with the United States Coast Guard, the United States Environmental Protection Agency, and other persons relating to development and enforcement of vessel traffic control and monitoring systems for oil barges and tank vessels carrying oil operating in or near the waters of the state." Since the Proposed Initiative neither conditions its applicability on an agreement with the U.S. Coast Guard, nor regulates oil barges and oil-carrying tank vessels, Juneau may not extend its extraterritorial jurisdiction to operation of cruise ships or to private docks and other facilities serving cruise ships and their crew members and passengers.

b. The Proposed Initiative Would Constitute "Local or Special Legislation". Article XI, Section 7 of Alaska's constitution also prohibits use of initiatives to "enact local or special legislation." *See* also AS 15.45.010.That is exactly what the Proposed Initiative attempts to do. There is a two-step analysis for determining whether a proposed initiative is local or special legislation that is barred by the state constitution. The first step is a threshold inquiry as to whether the proposed initiative is of general, statewide applicability. *Pebble*, 215 P.3d at 1078-80. In cases where, as is obvious here, the proposed initiative does not have statewide applicablilty, the second step specifically focuses on the proposed initiative and its purpose. That focus must assess whether the proposed ordinance bears a fair and substantial relationship to legitimate purposes. *Id.*

The Proposed Initiative does not bear a fair and substantial relationship to a legitimate purpose. This is in part because the the Proposed Initiative is vague and arbitrary in what it sets out to accomplish (*i.e.*, its purpose). Its long list of recitals importantly omit any evidence whatsoever – or even an anecdotal example – to support the general, vague ambitions of the Proposed Initiative. There is absolutely nothing in the

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Proposed Initiative on which you can conclude that vistors from cruise ships are creating unsafe and unhealthy and otherwise intolerable or adverse conditions. Perhaps more importantly, there is nothing whatsoever in the Proposed Initiative which explains, let alone justifies, how a Saturday and July 4 ban on cruise ships and their passengers will improve or otherwise address any health or safety concerns Juneau's residents and visitors. As a result, no one can say that the proposed ordinance will at all, or is even designed to, serve a legitimate purpose, let alone bear a fair and substantial relationship to a legitimate purpose.

As a result, the ordinance proposed by the Proposed Initiative is nothing more than an attempt to enact local or special legislation, which Article X1, Section 7 puts in the sole province of the state legislature or the Juneau assembly.

6. **The Proposed Initiative Would Otherwise Violate the U.S. and Alaska Constitutions.** An initiative application must be rejected where the proposed initiative is "clearly unconstitutional or clearly unlawful" under "controlling authority that leaves no room for argument about its unconsitutionality." *Alaska Action*, 84 P.3d at 992, or unlawfulness. The Proposed Initiative is clearly unenforceable as a matter of law under AS 29.26.110(4). In addition to the reasons stated above, the attempt to ban the operation and use of private docks on Saturdays and July 4 is unconstitutional under both the U.S. and Alaska Constitutions for another reason. Such ban would constitute an unconstitutional regulatory taking of private property without just compensation.

a. **The Proposed Initiative is Clearly Unlawful Under AS 29.35.020 as an Unauthorized Assertion of Extraterritorial Jurisdiction.** The Proposed Initiative would have Juneau extend extraterritorial jurisdiction and authority in violation of AS 29.35.020. For the reasons outlined above, Juneau is without statutory authority to regulate cruise ships at sea, and Juneau is without authority to regulate the marine use and operation of docks and other marine facilities over Alaska's navigable waters that are not owned or operated by Juneau.

b. **The Propsoed Initiative is Clearly Unconstitutional Under the "Takings Clauses" of the U.S. Constitution and Alaska Constitution.** The Proposed Initiative is clearly unconstitional under controlling authority for another reason. Both the U.S. Constitution and the Alaska state constitution prohibit the taking of private property for a public use without just compensation. The Fifth Amendment of the U.S. Constitution states, "nor shall private property be taken for public use, without just compensation;" and this clause is made applicable to the states through the Fourteenth Amendment. *See Chicago, B & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897). Section 18 of

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the Alaska Constitution similarly states, "Private property shall not be taken or damaged for public use without just compensation."

The Proposed Initiative's Saturday and July 4 ban on the use of private docks and other facilities that serve cruise ships is clearly a regulatory taking. It would deprive the owners and operators of those docks from using and generating revenue from the use of their cruise ship docks. The Constitution guarantees that private property shall not be taken for a public use without just compensation was designed to bar a government authority from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A "regulatory taking" occurs when governmental regulations limit the use of private property to such a degree that the landowner is effectively deprived of economically reasonable use or value of their property. *Murr v. Wisconsin*, 582 U.S. 383, 394, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017).

The Proposed Initiative calls for neither the execise of the eminent domain process, nor the payment of just compensation, for such taking, which makes it an unconstitutional exercise of regulatory power. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 178-180 (1979) (imposition of a navigational servitude upon a private marina constitutes a taking). For "controlling authority" confirming the proposed ordinance would constitute a regulatory taking (and thus be unconstitutional by not calling for an eminent domain process or just compensation), we refer you to the following case authority: *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (factors considered in determining whether a regulation constitutes a taking are: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (law aiming to protect erosion and destruction of barrier islands that barred Lucas from erecting permanent habitable structures on his land deemed a regulatory taking).

As a result of the concerns noted above, Allen Marine is voicing its strong opinion that this Proposed Initiative should not be certified. Certification of this ordinance will result in legal challenge, which is not in the best interest of Juneau, nor the tourism industry as a whole. We believe this issue is better served by working with the industry to establish levels that satisfy all stakeholders of the community, minimizing the harm done to any one respective group. Alternatively, another better way to handle the concerns raised by the Petitioners would be to allow the Juneau Assembly process to run its course – and

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thereby assess the many competing interests and the complexities – that a cruise ship ban raises.

We appreciate your attention to this issue.

Jeremy Plank
Chief Financial Officer
Allen Marine Tours, Inc.

Jamey Cagle
Chief Executive Officer
Allen Marine Tours, Inc.

cc (by email):
Robert Palmer III
CBJ Municipal Attorney
Robert.Palmer@juneau.gov

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April 19, 2024

Robert Palmer III
Municipal Attorney
City and Borough of Juneau
155 Heritage Way
Juneau, AK 99801

Re: Initiative Petition Prohibiting Cruise Vessels in Juneau

Dear Mr. Palmer:

On behalf of my client, A.J. Juneau Dock, LLC, ("A.J. Dock") I write regarding the application for an initiative petition filed on April 9, 2024 seeking to prohibit cruise vessels with a capacity over 250 passengers from "dock[ing], moor[ing], or disembark[ing] passengers" in Juneau on all Saturdays and July 4, and to convert downtown commercial parking intended to benefit cruise vessels into free public parking during the days that cruise vessels are prohibited from docking.

For the reasons explained below, we believe that both aspects of the initiative clearly infringe on legislative discretion over public resources, and therefore constitute "appropriations" in violation of Article XI, Section 7 of the Alaska Constitution.

Moreover, the petition seeks to use the infrastructure paid for through passenger and development fees imposed on cruise vessels passengers for a purpose having nothing to do with services benefitting cruise vessels or their passengers, in violation of the Tonnage Clause of the U.S. Constitution and the Memorandum of Agreement between the City and Borough of Juneau ("CBJ") and Cruise Lines International Association ("CLIA") for use of these fees.

Finally, as explained below, the proposed initiative violates the fundamental right to travel under the Alaska Constitution.

I. The Proposed Initiative Constitutes an Appropriation by Infringing on Legislative Discretion Over Public Resources

Article XI, Section 7 of the Alaska Constitution prohibits ballot initiatives from addressing certain subjects, including making appropriations. The Alaska Supreme Court has held that these restrictions "were devised to prevent certain questions from going to the electorate at all"[1] and the executive "must play the gatekeeper role in the first instance."[2] Initiatives that "touch[] upon the

[1] *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 992 (Alaska 2004).

[2] *Id*.

allocation of public. . . assets require careful consideration because the constitutional right of direct legislation is limited by the Alaska Constitution."[3] Although appropriation is often understood to concern money, an initiative setting aside state or municipal assets, including land, may also be an appropriation.[4]

Here, the proposed initiative amounts to an appropriation in two ways. *First*, by prohibiting cruise vessels from docking on state tidelands, the initiative infringes on the state legislature's discretion over allocation of state resources – state submerged lands – which the state exercised when it granted a 25-year lease to A.J. Dock specifically for a facility serving large cruise ships.[5] *Second*, the initiative appropriates what are clearly public assets – land used for commercial parking in downtown Juneau – and dictates that such land must be used in a certain manner. Only the legislative body with authority over this land – the CBJ Assembly – may make such decisions.

a. Prohibiting Cruise Vessels From Docking on State Tide and Submerged Lands Infringes on the Legislature's Discretion Over These Lands

The Alaska Supreme Court has recently held that initiatives may not "narrow[] the legislature's range of discretion to make decisions regarding how to allocate Alaska's lakes, streams, and rivers among competing needs"[6] because the Constitution's prohibition against initiative appropriations "'*was designed to preserve to the legislature the power to make decisions concerning the allocation of state assets*.'"[7] This "ensures that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs."[8]

In *Mallott v. Stand for Salmon*, sponsors submitted a ballot initiative to the state that would have regulated mine permitting through the Department of Fish and Game. The initiative would have "'effectively preclude[d] some uses [of anadromous fish habitat],' therefore 'leaving insufficient discretion to the legislature to determine how to allocate these state assets.'"[9] The Court found the

[3] *Pullen v. Ulmer*, 923 P.2d 54, 57 (Alaska 1996) (quoting *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1155 (Alaska 1991) (cleaned up)).

[4] *Alaska Conservative Political Action Committee v. Municipality of Anchorage*, 745 P.2d 936, 938 (Alaska 1987) ("The prohibition against appropriation by initiative applies to all state and municipal assets").

[5] The state lease granted to for the A.J. dock, ADL 106934, is currently in good standing and in effect until 2032.

[6] *Mallott v. Stand for Salmon*, 431 P.3d 159, 166 (Alaska 2018).

[7] *Id.* at 165 (quoting *Pullen*, 923 P.2d at 63 (emphasis in original)).

[8] *McAlpine v. University of Alaska*, 762 P.2d 81, 88 (Alaska 1988) (emphasis in original).

[9] *Stand for Salmon*, 431 P.3d at 163 (quoting review by the Department of Law).

initiative to be an unconstitutional appropriation, since it narrowed the discretion granted to the legislature under the Alaska Constitution.

State submerged lands and public waters are undoubtedly public resources on par with the lakes, streams, and rivers at issue in *Stand for Salmon*. Article VIII, Section 2 of the Alaska Constitution provides that:

> The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Moreover, the Alaska Supreme Court has held that the legislature has "plenary authority" to provide for the utilization of state lands – including tide and submerged lands – through leasing.[10] The legislature has exercised this authority by passing the Alaska Land Act, including AS 38.05.070, which governs leasing of non-mineral state lands and vests in the Commissioner of the Department of Natural Resources ("DNR") the authority to manage tide and submerged lands.

In the case of the A.J. Dock, DNR has exercised its authority under the Alaska Land Act by issuing a lease for the use of state submerged lands for a dock facility pursuant to AS 38.05.070. In 2009, DNR issued a 25-year lease[11] to Taku Investments, LLC (an affiliate of A.J. Dock) for a cruise ship dock to accommodate the vessels specifically prohibited by the proposed initiative.[12] In doing so, DNR was required to find[13] – and specifically made the determination – that leasing state land to the A.J. Dock for berthing large cruise ships is in the best interests of the State.[14]

The proposed initiative would prevent cruise ships from docking at a facility on state submerged lands leased by the DNR Commissioner, frustrating the purpose of the lease, the intent of the legislature, and DNR's management decisions for the use of state lands. Just like the initiative at issue in *Stand for Salmon*, which limited the discretion over state waterways granted to the Department of Fish and Game by the legislature, the proposed initiative here would limit DNR from exercising its legislatively-granted discretion over state land, including to allocate state submerged lands for large cruise vessel moorage. An initiative that narrows the range of discretion available to the legislature over state assets constitutes an appropriation under Article XI, Section 7 of the Alaska Constitution, and CBJ should not certify the proposed initiative for this reason.

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[10] *State v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1212 (Alaska 2010).

[11] Lease Agreement for ADL 106934 between DNR and Taku Investments, LLC.

[12] *Id.*

[13] AS 38.05.035(e) requires written findings by DNR "finding that the interests of the state will be best served" before approving a lease.

[14] *See* DNR's June 12, 2003 Preliminary Finding and Decision for ADL 106934, and August 3, 2003 Final Finding and Decision.

b. Appropriating City Property for Public Parking Unconstitutionally Infringes on the Assembly's Authority Over Municipal Lands

The constitutional prohibition against appropriation by initiative also applies to municipal assets, including municipal land.[15] Only the CBJ Assembly may decide how to allocate municipal assets among competing needs, and here the proposed initiative runs directly afoul of this principle.

The proposed initiative would appropriate municipal lands – downtown parking spaces allocated to commercial parking – and re-allocate them to free public parking. Clearly controlling authority from the Alaska Supreme Court prohibits doing this through ballot initiative.

In *Thomas v. Bailey*, the Court found a ballot initiative directing disposal of state lands to residents violated the appropriations clause.[16] The Court extended this holding in *McAlpine v. University of Alaska*, finding that even an initiative that does not dispose of public lands, but rather designates that public lands be used for a particular purpose, constitutes an illegal appropriation if done by initiative.[17] The Court went on to affirm the *McAlpine* holding in *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, where an initiative would have designated public lands as a park in Girdwood. The municipal clerk rejected the initiative as an improper designation of public lands and the Court affirmed, finding that "the proposed Girdwood initiative was properly rejected because the designation of parkland would effect an appropriation."[18]

In this case, the designation of municipal land for free public parking is a power that may not be exercised by ballot initiative under the Alaska Constitution, and the municipality should not certify the initiative for this reason.

We note that the Sitka Municipal Attorney recently came to a similar conclusion after reviewing a proposed initiative that would have regulated land use in Sitka for the purpose of limiting cruise passengers, in that case through zoning changes. There, the Municipal Attorney found the initiative would "allow the voters to control public land. . ." thereby "usurp[ing] the authority and control provided to the Assembly by law."[19]

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[15] *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422-23 (Alaska 2006); *Alaska Conservative Political Action Committee*, 745 P.2d at 938.

[16] *Thomas*, 595 P.2d 1, 9 (Alaska 1979).

[17] *McAlpine*, 762 P.2d at 89 ("We conclude that the constitutional prohibition against appropriations by initiative applies to appropriations of state assets, regardless of whether the initiative would enact a give-away program or simply designate the use of the assets.").

[18] *Alaska Action Ctr.*, 84 P.3d at 990.

[19] Memorandum of Brian E. Hanson, Sitka Municipal Attorney, to Sara Peterson, Sitka Municipal Clerk, September 29, 2023, at 4.

II. The Proposed Initiative Would Contravene Judge Holland's Ruling Governing the Use of Vessel Fees and the Settlement Agreement Between CLIA and CBJ

This initiative is improper not only because the proposed initiative would appropriate public assets in violation of the Alaska Constitution, but also because the appropriated assets were funded by fees levied on cruise vessel passengers, including those mooring at the A.J. Dock. This is contrary to Judge Holland's ruling in *Cruise Lines International Association Alaska and Cruise Lines International Association v. The City and Borough of Juneau*,[20] and the resulting Memorandum of Agreement between the CLIA and CBJ.

As you are aware, Judge Holland's ruling found that the expenditure of fees imposed on cruise vessels for services benefitting passengers, but which do not benefit the vessels, is unlawful under the Tonnage Clause of the U.S. Constitution.[21] In the aftermath of this ruling, CLIA and CBJ reached a carefully negotiated settlement that, among other things, provided for the expenditure of vessel fees on "parking facilities for vehicles serving a vessel."[22]

Here, instead of benefiting the vessels, the proposed initiative would prohibit the vessels from docking and then appropriate the infrastructure paid for by the vessels – parking facilities – for purposes having nothing to do with benefiting either vessel passengers or the vessels themselves. Such a result is directly contrary to the interests of cruise vessels and their passengers, and for that reason is inconsistent with clearly established case law directly on point and the Memorandum of Agreement reached by the parties.

III. The Proposed Initiative Infringes on the Right to Travel Under the Alaska Constitution

In addition to violating the right to travel under the Federal Constitution, the proposed initiative would be contrary to Alaska Supreme Court decisions establishing a right to travel under the Alaska Constitution, which is protected to an even greater degree than under the Federal Constitution.

In *Thomas v. Bailey*, discussed above, Justice Rabinowitz agreed with invalidating the proposed initiative as an unconstitutional appropriation, but wrote separately to explain how the preferential treatment to citizens based on duration of residency violates the right to travel under Alaska's

[20] Case number 1:16-cv-0008-HRH.

[21] Order on Cross-motions for Summary Judgment and Motion to Determine Law of the Case, December 6, 2018, at 30-31.

[22] Resolution of the City and Borough of Juneau, Alaska authorizing amendment of the CLIA Settlement Agreement, Serial No. 2979, 2022, Exhibit A (Memorandum of Agreement (Amendment 1)).

equal protection clause.[23] His concurrence explains the fundamental nature of the right to travel in Alaska, including that:

> [T]he right of interstate travel is itself a fundamental right under the state constitution and that any classification which serves to penalize the exercise of that right must be subjected to strict scrutiny.[24]

And that:

> The uniquely important status of right-to-travel protection in the Alaska Constitution reflects, in part, an awareness of the distinctive character of this state in attracting many new residents to participate in Alaska's growth and expansion.[25]

The proposed initiative would unconstitutionally infringe on the right to travel of those passengers who happen to be on a ship of 250 passengers or larger, including those passengers who would disembark at the A.J. Dock. Such a classification cannot survive strict scrutiny, as the classification is arbitrary and there are undoubtedly less restrictive alternatives.

IV. Conclusion

For the three independent bases explained above – both aspects of the proposed initiative constitute an appropriation by impermissibly limiting legislative discretion, by violating the Tonnage Clause, and by unconstitutionally burdening the right to travel – the Municipality should decline to certify the petition.

Sincerely,

Jonathan W. Katchen
Partner
of Holland & Hart LLP

[23] *Thomas*, 595 P.2d at 9.

[24] *Id.* at 11.

[25] *Id.* at 16.

Holland & Hart

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Partner
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April 22, 2024

VIA EMAIL TO ROBERT.PALMER@JUNEAU.GOV

Robert Palmer III
Municipal Attorney
City and Borough of Juneau
155 Heritage Way
Juneau, AK 99801

Re: Ship Free Saturdays Initiative Petition

Dear Mr. Palmer:

I write on behalf of Franklin Dock Enterprises, LLC, regarding the initiative petition "Ship Free Saturdays" to oppose certification of the petition by the City and Borough of Juneau. The initiative, if approved, would prohibit any vessel with a capacity of 250 passengers or greater from "dock[ing], moor[ing], or disembark[ing] passengers" in Juneau on any Saturday and on July 4. The prohibition would apply to all docks, whether privately or publicly owned, and thus seeks to restrict commerce at privately-owned facilities in a discriminatory manner in violation of the Commerce Clause of the U.S. Constitution. A municipal government is free to close its own docks, but the Commerce Clause limits the government's ability to prevent private businesses from engaging in interstate commerce.

While we think that the proposed initiative has many legal infirmities, and if passed will be subject to legal challenges on a variety of grounds, of particular importance is that the initiative unconstitutionally restricts interstate commerce. Article I, Section 8 of the U.S. Constitution reserves to Congress the right to regulate interstate and foreign commerce. Courts have consistently held that, by negative implication, the Commerce Clause prohibits regulation of interstate and international commerce at the state level which discriminates against or unduly burdens such commerce.

Laws that discriminate against interstate or international commerce, in favor of intrastate businesses, are subject to strict judicial scrutiny and are virtually always found to violate the Commerce Clause.[1] This sort of economic protectionism may occur either on the basis of "discriminatory purpose. . . or discriminatory effect." [2] Thus, even if the intent of the proposed initiative is not discriminatory, if the effect of the law burdens interstate commerce

[1] *See, e.g. Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

[2] *Bacchus Imps. v. Dias*, 468 U.S. 263, 270 (1984).

disproportionately, the law would still violate the Commerce Clause. Here, the proposed initiative, by prohibiting medium and large cruise vessels from docking at private facilities, discriminates against these vessels in favor of small ships that are more likely to be engaged in commerce within Alaska. Whether the members of the Petitioners Committee intend to benefit in-state vessels or not is immaterial – the initiative is subject to strict scrutiny and invalidation under the Commerce Clause. Here, we note that the title of the petition – "Ship Free Saturdays" – is misleading in that it would not ban all passenger vessels. Rather, the initiative privileges certain types of passenger vessels over the medium and large size cruise ships that use the Franklin Street Dock.

In addition to prohibiting local laws that discriminate, the Commerce Clause also restricts laws that unduly burden or restrict the flow of commerce among the states.[3] The proposed initiative clearly interferes with the flow of interstate commerce because it will effect a shut-down of interstate cruise ships landing in Juneau one day each week. While such a substantial burden on interstate commerce does not automatically invalidate the proposed initiative, the burden cannot be excessive in comparison to the purported benefit.[4] The initiative petition makes generalized and unsupported statements about the effects of cruise passengers on health and quality of life of Juneau residents, but these claims are not supported by reference to any study, data, or supporting evidence. Balanced against the easily quantifiable negative impacts on local businesses and government tax revenue, including the negative health and social welfare impacts that inevitably accompany reduced trade and commerce, the burden of the proposed initiative is excessive.

For these reasons, we respectfully ask that the City and Borough of Juneau not certify the initiative petition.

Sincerely,

Jonathan W. Katchen
Partner
of Holland & Hart LLP

cc: City Clerk (City.Clerk@juneau.gov)

[3] *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 178 (2018).

[4] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).