

# PROTECTING PASSENGER FEES: REAWAKENING CONGRESS'S TONNAGE CLAUSE AUTHORIZATION POWERS

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## ABSTRACT

*For 20 years, the City of Juneau has collected passenger fees from cruise lines that enter its port. These fees are assessed based on the number of passengers that arrive on each cruise vessel, and amount to \$8.00 per passenger. On December 6, 2018, in *Cruise Lines International Association Alaska v. The City and Borough of Juneau*, the U.S. District Court of Alaska held that Juneau's use of the passenger fees violates the U.S. Constitution's Tonnage Clause. Rather than appeal the decision, the City of Juneau subsequently settled the litigation with the cruise lines. This Note will examine Juneau's passenger fees in light of the Tonnage Clause. It will argue that because Juneau and the State of Alaska depend on these fees and other tourism revenue, Alaska policymakers should lobby Congress to use its Tonnage Clause authorizing powers to grant Alaska port cities the authority to charge set passenger fees to visiting cruise lines. Part One will analyze the Court's historical understanding of the Tonnage Clause. Part Two will examine the litigation, the court's decision in *Cruise Lines International*, and the recent settlement between the City and the cruise lines. Part Three will consider how this case may disrupt Alaska's tourism industry and economy and will focus on other Alaska laws that may be invalidated on the basis of this decision. Part Four will propose a model law for passage by Congress, to help Alaska work around the holding in *Cruise Lines International*.*

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\* J.D. Candidate, Duke University School of Law, 2019. Thank you to the editors of the *Alaska Law Review* for your hard work and excellent edits to this Note, to Professor Rebecca Rich and the Scholarly Writing Workshop for the helpful feedback on earlier drafts of this work, and to Professor Erik M. Jensen for insightful conversations on the Tonnage Clause and comments on my draft. All mistakes are my own.

Just off the boat, cruise line tourists visiting Juneau may explore the city's downtown shops, restaurants, and other local amenities. They may meander down Franklin Street and head to the nearby waterfront Seawalk bordering the scenic harbor.<sup>1</sup> Seasonal crossing guards usher more than 1,000,000 visitors along this journey during peak tourist season—from May to September.<sup>2</sup> At the far end of the Seawalk, visitors are greeted by vast mountains; the harbor water curves through these mountains and extends beyond view. On the journey back into town, the Seawalk culminates at the base of a life-size, bronze statue of a humpback whale.<sup>3</sup> A fountain and an array of lights decorate the whale—the brainchild of former Juneau mayors Bill Overstreet and Bruce Botelho.<sup>4</sup>

According to Cruise Lines International Association Alaska (CLIAA), the trade association that represents cruise lines operating in Alaska, much of this downtown infrastructure has been funded inappropriately.<sup>5</sup> The Seawalk and seasonal crossing guards, along with the recent upgrades to Franklin Street, Front Street, and the downtown area, are all on a long list of items that CLIAA believes have been financed illicitly through a misappropriation of funds collected from cruise passengers.<sup>6</sup> The passenger fees that Juneau charges the cruise lines amount to \$8.00 per passenger entering the port and total more than

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1. CITY/BOROUGH OF JUNEAU ALASKA'S CAPITAL CITY, ENG'G DEP'T, MARINE PARK/SEAWALK PROJECT, [http://www.juneau.org/engineering/Marine\\_Park/MarinePark.php](http://www.juneau.org/engineering/Marine_Park/MarinePark.php) (describing the marine sea walk project) (last visited Feb. 23, 2019).

2. MCDOWELL GROUP, ALASKA VISITORS STATISTIC PROGRAM 7 – SUMMER 2016: SECTION 12 – SUMMARY OF ALASKA DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT 12-1 (2016), <https://www.commerce.alaska.gov/web/Portals/6/pub/TourismResearch/AVSP/2016/12.%20AVSP%207%20Summ%20Profiles%20Southeast.pdf?ver=2017-06-06-133940-030>. Of more than 1,200,000 visitors to the Alaska Southeast region, over ninety percent of people visiting Juneau, Ketchikan, Skagway, Glacier Bay, and Hoonah were cruise tourists. *Id.* at 1–2.

3. Gregory Philson, *Whale Worth the Wait: Lights, Fountain Complete Full-size Bronze Whale Statue Downtown*, JUNEAU EMPIRE (May 16, 2018), <https://www.juneauempire.com/news/whale-worth-the-wait-lights-fountain-complete-full-size-bronze-whale-statue-downtown/>.

4. *Id.*

5. Complaint for Declaratory and Injunctive Relief at 2–3, *Cruise Lines Int'l Ass'n Alaska v. City & Borough of Juneau, Alaska*, No. 1:16-cv-0008-HRH (D. Alaska Apr. 13, 2016) (No. 1).

6. *See id.* (noting that CLIAA alleges that the proceeds generated from entry fees were misappropriated); *see also* Sam DeGrave, *Lawsuit Looms Heavier over Chamber Luncheon*, JUNEAU EMPIRE (Apr. 15, 2016), <https://www.juneauempire.com/news/lawsuit-looms-heavy-over-chamber-luncheon/> (describing CLIAA President John Brinkley's announcement of the litigation against Juneau).

\$8,000,000 every year.<sup>7</sup> CLIAA believes that under the U.S. Constitution,<sup>8</sup> these funds must be used on projects more directly related to the cruise lines' well-being.<sup>9</sup> In 2016, CLIAA sued to enjoin the City from further collecting and misusing the passenger fees.<sup>10</sup> CLIAA pointed to the large bronze whale as a symbol of the City's excess.<sup>11</sup>

On December 6, 2018, in *Cruise Lines International Association Alaska v. The City and Borough of Juneau*,<sup>12</sup> the U.S. District Court of Alaska announced its opinion that Juneau's use of the passenger fees violates the U.S. Constitution's Tonnage Clause.<sup>13</sup> The Tonnage Clause says that "No State shall, without the Consent of Congress, lay any Duty of Tonnage."<sup>14</sup> Traditionally, the Tonnage Clause has been interpreted to apply broadly to any duty on a ship charged "for the privilege of entering, lying in, or trading in a port."<sup>15</sup> Because the passenger fees here were levied upon the ships and assessed on a per-passenger basis, they fell within the purview of the clause.<sup>16</sup> Moreover, the court rejected Juneau's argument that the passenger fees were exempted from the Tonnage Clause as a "service fee," one of the narrow classes of taxes, charges, and fees that are deemed permissible under this body of jurisprudence.<sup>17</sup> The court ruled that Juneau may continue to collect passenger fees from visiting cruise ships,

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7. Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 5–8. This fee is comprised of a \$5.00 Marine Passenger Fee and a \$3.00 Port Development Fee, both of which are contested by CLIAA. *Id.* These fees are assessed to each of the 1,000,000 cruise line tourists who visit the city. *See id.*

8. *See generally id.* CLIAA's complaint raises questions of law under the U.S. Constitution's Tonnage Clause, the Commerce Clause, and the Rivers and Harbors Act. *See id.* at 8–12 (describing each cause of action).

9. *Id.* at 9.

10. *See generally id.*

11. *See CLIA Alaska Files Suit Over \$10 Million Whale Sculpture and Artificial Island* (Apr. 12, 2016), <http://www.cliaalaska.org/2016/04/clia-alaska-challenges-juneau-passenger-entry-fee-cites-10-million-artificial-island-project-as-unconstitutional/> (advertising on the CLIAA website that the industry is litigating the issue over the whale and artificial island).

12. No. 1:16-cv-0008-HRH, 2018 U.S. Dist. LEXIS 210665 (D. Alaska Dec. 6, 2018) [hereinafter *Cruise Lines International*].

13. *Id.*

14. U.S. CONST. art. I, § 10, cl. 3. As will be discussed *infra* Part I, a duty of tonnage was historically recognized as any tax that was levied against a vessel for the privilege of entering port.

15. *See Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1 (2009). In this case, the U.S. Supreme Court invalidated an ordinance in the City of Valdez that charged oil tankers a fee for using the city's ports. *Id.* at 16. Interestingly, *Polar Tankers* was the first Tonnage Clause case to reach the U.S. Supreme Court since 1935. Erik M. Jensen, *Quirky Constitutional Provisions Matter: The Tonnage Clause*, *Polar Tankers, and State Taxation of Commerce*, 18 GEO. MASON L. REV. 669, 670 (2011).

16. *Cruise Lines International*, 2018 U.S. Dist. LEXIS 210665, at \*11.

17. *Id.* at \*14–16.

but that it would be strictly limited in how it spends those fees.<sup>18</sup> Juneau would only be able to spend passenger fees on projects that directly benefit the cruise *vessels* themselves.<sup>19</sup> Although the City contemplated appealing this decision, Juneau and CLIAA ultimately announced a settlement to this lawsuit.<sup>20</sup> The settlement allows Juneau to continue collecting and spending passenger fees, but requires them to consult with CLIAA before raising the fees or spending them on new projects in the future.<sup>21</sup>

This Note argues that although Juneau and CLIAA settled their dispute here, the Alaska District Court's holding in *Cruise Lines International* may still be harmful to the Alaska tourism industry, and unfair to Alaska citizens. The case narrowed the kinds of charges that are permissible as "service fees" in a way that stands to invalidate passenger fees in other Alaska cities.<sup>22</sup> Juneau's passenger fees closely mirror a statewide head tax charged to cruise lines by the Alaska state government, as well as other comparable fees assessed by similarly situated Alaska port cities.<sup>23</sup> Though the cruise line industry may be hesitant to litigate against these laws in the immediate wake of this decision, they ultimately may use the district court's holding as precedent to mount a new attack against other laws of this kind in Alaska.<sup>24</sup> Many

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18. *Id.* at \*46.

19. *Id.*

20. See *Juneau Assembly Accepts Settlement Agreement with Cruise Industry*, ALASKA PUB. MEDIA (Mar. 25, 2019), <https://www.alaskapublic.org/2019/03/25/juneau-assembly-accepts-settlement-agreement-with-cruise-industry/> (describing the Juneau Assembly's vote to end the three-year legal battle with CLIAA); see also 2019 CLIA v. CBJ Settlement Agreement, <https://packet.cbjak.org/CoverSheet.aspx?ItemID=6766&MeetingID=1087> (last visited May 1, 2019) [hereinafter *Juneau Settlement*].

21. See *Juneau Settlement*, *supra* note 20, at 7 ("the Parties shall endeavor to meet in person to discuss in good-faith any new proposed projects and services for which Fees are sought to be expended in the following Fiscal Year with the ultimate decision resting with the Assembly.").

22. See Jacob Resneck, *Cruise Industry's Juneau Lawsuit Could Set Wider Precedent*, KTOO PUB. MEDIA (Nov. 1, 2017), <https://www.ktoo.org/2017/11/01/cruise-industrys-juneau-lawsuit-set-wider-precedent/> (discussing the other Alaska city and state laws that may be susceptible to attacks as violations of the Tonnage Clause).

23. Ten years ago, CLIAA's predecessor organization—the Alaska Cruise Association—challenged the state's Commercial Passenger Vehicle excise tax as a violation of the Tonnage Clause, but dropped the litigation when the state agreed to lower the tax. See Paul Motter, *Breaking Down the Alaska Head Tax*, CRUISEMATES, <http://cwww.cruisemates.com/articles/feature/Alaska-Cruise-Tax-072310.cfm> (last visited May 1, 2019).

24. Resneck, *supra* note 22. Indeed, many state officials believed that this was CLIAA's intention from the outset. See, e.g., *id.* Former Juneau City Attorney Amy Mead said, "If it were just a Juneau case, their motion would be tied to very specific expenditures and this case would all be about very specific

Alaska cities may become economically imperiled if these laws are struck down; this would be an inequitable outcome in light of the historical relationship between the parties.<sup>25</sup>

This Note seeks to identify a way for Juneau and Alaska policymakers to secure long-term protections for the Alaska tourism industry against this disruptive Tonnage Clause jurisprudence. Specifically, it argues that Juneau and Alaska should appeal to the U.S. Congress for recourse. The Tonnage Clause expressly endows Congress with the ability to grant cities and states with the right to charge duties of Tonnage.<sup>26</sup> Congress has not addressed whether Juneau or Alaska may collect passenger fees,<sup>27</sup> but its intervention here could ensure that each parties' best interests are protected. On the one hand, it would benefit Alaska by ensuring that its cities do not lose much-needed revenue from tourism fees.<sup>28</sup> At the same time, Congress could set the fee with a standard formula that would protect the cruise lines against sudden or unexpected increases in the passenger fees.<sup>29</sup> Finally, congressional action here would act as a back-stop to the Juneau-CLIAA settlement agreement, ensuring good faith by the parties, and protection against third-party intervention. The main obstacle in pursuing this path would be to get Congress to act in an area where it has little experience,<sup>30</sup> nor an overt motive to legislate.<sup>31</sup> However, if Congress could be persuaded to legislate in this domain, it could provide a lasting protection for Alaska tourism.<sup>32</sup>

This Note will examine Juneau's passenger fees in light of the Tonnage Clause. It will argue that because Alaska developed a dependence on these fees and other tourism revenue based on representations made by the cruise industry, Congress should grant

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expenditures . . . [t]hat is not how CLIA has fashioned this lawsuit. They challenge the constitutionality of the fees." *Id.*

25. See *infra* Part III.

26. See U.S. CONST. art. I, § 10, cl. 3 (noting that under the Tonnage Clause, states may pass duties of tonnage with the approval of Congress).

27. Neither party has suggested that Congress granted its consent in their briefs, and the author could find no evidence of such consent in the U.S. Code. The only clear instance where Congress used its Tonnage Clause authorization powers occurred over 200 years ago when the legislature expressly authorized South Carolina to collect duties of Tonnage. See Jensen, *supra* note 15, at 672.

28. See *infra* Part III.

29. Although the Juneau-CLIAA settlement agreement seems to commit Juneau to consult with CLIAA before raising passenger fees in the future, it leaves ultimate decision-making authority with the city. See Juneau Settlement, *supra* note 20, at 7. Moreover, the cruise-industry relies on its settlement agreement with the state to prevent the CPV tax from raising. See ACA Settlement, *infra* note 160.

30. See Jensen, *supra* note 15, at 672 n.17.

31. See *infra* Part IV.

32. See *id.*

Alaska port cities the unique authority to charge passenger fees to visiting cruise lines, at a set rate. Part One will analyze the Court's historical understanding of the scope of the Tonnage Clause. Part Two will examine the *Cruise Lines International* litigation and the court's decision in that case. It will briefly examine the announced settlement agreement between Juneau and CLIAA. Part Three will discuss the Alaska tourism industry and will consider how this case may disrupt that industry and the Alaska economy. It will focus on other Alaska laws that may be invalidated on the basis of this decision. Part Four will propose a model law for passage by Congress that could help Alaska work around the holding in *Cruise Lines International*. It argues that policymakers in Alaska should be prepared to lobby Congress to pass legislation to protect revenues secured from cruise line tourism. Part Five provides brief concluding remarks.

## I. THE TONNAGE CLAUSE

There is a long history of Tonnage Clause jurisprudence in the United States.<sup>33</sup> Originally designed as a limit on state economic power,<sup>34</sup> the Tonnage Clause has been interpreted to bar a wide variety of taxes and fees levied against vessels entering state ports.<sup>35</sup> Equally numerous, however, are the fees that ports charge to maritime vessels which do not implicate the Tonnage Clause. These non-violate charges include property taxes and service fees.<sup>36</sup> The CLIAA litigation focused on whether passenger fees fell within one of those separate classes of charges, or whether Juneau was using the fees in a way that violated the spirit of the Founders' Tonnage Clause prohibition.<sup>37</sup> This Section will examine the underlying purposes of the Tonnage Clause, as well as the scope of the clause's prohibitions.

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33. See generally Jensen, *supra* note 15 (describing the origins and history of the Tonnage Clause).

34. See, e.g., Angelo J. Suozzi, *The Misinterpretation of the Tonnage Clause in Polar Tankers, Inc. v. City of Valdez*, 26 ALASKA L. REV. 289, 290–92 (2009) (the Framers recognized “that certain states with access to shipping lanes or natural resources would be able to leverage their superior situation to the detriment of their neighbors. To that end, the Constitution that arose from the Philadelphia Convention contained provisions to facilitate trade among the states. Among these provisions was the *Tonnage Clause*.”).

35. *Id.*

36. See Jensen, *supra* note 15, at 698–706 (discussing several classes of fees that are not considered duties of tonnage under the Tonnage Clause).

37. See *Cruise Lines International*, No. 1:16-cv-0008-HRH, 2018 U.S. Dist. LEXIS 210665, at \*14–16 (D. Alaska Dec. 6, 2018) (discussing whether the passenger fees qualified as a service fee).

### A. A Restraint on Interstate Competition

The U.S. Constitution was designed to establish a strong central government that could withstand the growing tensions and interstate rivalries that had begun to develop under the Articles of Confederation.<sup>38</sup> The Framers recognized that if each state was left to its own devices, conflict would arise.<sup>39</sup> They were particularly concerned that if the states were given strong economic power, they would wield that power against one another.<sup>40</sup> Thus, the Constitution, by design, promotes a strong central government with the authority to regulate the economy<sup>41</sup> and commerce among the states.<sup>42</sup> It also limits states' control over economic matters.<sup>43</sup> The Tonnage Clause is one such limitation.<sup>44</sup>

The Framers designed the Tonnage Clause to prohibit individual states from levying taxes, without Congress' approval, against vessels "for the privilege of entering, trading in, or lying in a port."<sup>45</sup> Notably, the Tonnage Clause does not restrict the federal government from issuing tonnage fees of its own.<sup>46</sup> Rather, it prevents the states from taxing one

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38. See, e.g., Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 53 (1988) (arguing that "interstate rivalry was the [Constitutional] Convention's greatest concern").

39. See THE FEDERALIST NO. 7 (Alexander Hamilton) (arguing that without the Constitution, "[e]ach State, or separate confederacy, would pursue a system of commercial policy peculiar to itself."). See also JOHN FERLING, *A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC* 274 (2003) (addressing rumors, at the time, that America "would go the way of Europe, and ultimately three or four, or more, confederacies would spring up").

40. THE FEDERALIST NO. 7 (Alexander Hamilton).

41. See U.S. CONST. art. I, § 8 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts . . . To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.").

42. See *id.* ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

43. See *id.* art. I, § 10 (limiting states' economic powers through the prohibition that "No State shall . . . Coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts" or "pass any . . . law impairing the Obligation of Contracts.").

44. See Jensen, *supra* note 15, at 688–98 (arguing that the Tonnage Clause reinforces the Import-Export Clause and is part of a doctrine that gives primacy to the federal government via the Dormant Commerce Clause).

45. *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265–66 (1935).

46. See Jensen, *supra* note 15, at 674 (noting that a federal duty of tonnage must only satisfy constitutional rules that apply to the national taxing power, an easy set of requirements for this sort of levy); see also *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 216 (1870) (suggesting that federal Tonnage Duties "have been imposed by Congress ever since the Federal government was organized under the Constitution"); 46 U.S.C. §§ 60301–12 (2008) (codifying duties of tonnage on foreign vessels that enter U.S. ports).

another competitively, as they had been able to do under the Articles of Confederation.<sup>47</sup> If states wanted to institute a tax or fee against vessels visiting their ports, they would need congressional approval.<sup>48</sup>

## B. What Counts as Tonnage?

The word tonnage is defined as the size or carrying capacity of a ship measured in tons.<sup>49</sup> Plainly applied, the clause would only prohibit states from instituting taxes that charge a vessel based on its shipping capacity.<sup>50</sup> However, if the Tonnage Clause only proscribed levies explicitly measured by a vessel's capacity, it would be easy for states to circumvent the prohibition, so long as they could find a surrogate metric.<sup>51</sup> Thus, courts have understood "tonnage" to have a more expansive meaning, encompassing taxes that operate as a charge for the privilege of entering a port, regardless of whether that tax is based on a vessel's tonnage per se.<sup>52</sup>

While there is no bright-line rule for applying the Tonnage Clause,<sup>53</sup> case law over the centuries has indicated what the rule prohibits. The plain meaning of tonnage holds force under the clause; though not per se illegal, state charges that are measured by "tonnage" are often regarded

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47. See Jensen, *supra* note 15, at 690 (noting that states were able to engage in "competitions of commerce" under the Articles of Confederation).

48. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, *without the Consent of Congress*, lay any Duty of Tonnage.") (emphasis added).

49. Tons were not a measure of weight. Rather, they were a measure of a ship's cubic carrying capacity. See *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 212 ("The word tonnage, as applied to American ships and vessels, means their entire cubical capacity, or the contents of the vessel expressed in tons of 100 cubic feet, as estimated and ascertained by the rules of admeasurement and computation prescribed by those Federal statutes."); see also Jensen, *supra* note 15, at 682 (arguing that if the Tonnage Clause actually prohibited something other than levies on ships carrying goods, it would be largely redundant with the Import-Export Clause which has broadly interpreted prohibitions).

50. See Jensen, *supra* note 15, at 684.

51. See *Smith v. Turner*, 48 U.S. (7 How.) 283, 458 (1849) (Grier, J., concurring) (arguing that if the Tonnage Clause only applied to the size of a vessel, it would be possible for states to tax a vessel "indirectly which she is forbidden by the [Tonnage Clause] to do directly," and thus, that a state must be forbidden from "effecting 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.").

52. See THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 87 (3d ed. 1898) (arguing that states are not "competent to levy dues upon vessels measured by their capacity, nor indeed any dues at all which are imposed upon the vessels as instruments of commerce, or are levied for the mere privilege of trading to a port").

53. See Jensen, *supra* note 15, at 703 (arguing that one cannot make bright-line distinctions in this area).



with increased scrutiny under the Tonnage Clause.<sup>54</sup> By contrast, other taxes have been struck down even though they have been disguised. For example, the Supreme Court voided a tax that charged vessels a single, set fee, rather than a graduated tax based on the vessels' carrying capacity in a seeming attempt to circumvent Tonnage Clause restrictions.<sup>55</sup>

### C. The Limits of the Tonnage Clause

To understand the scope of the Tonnage Clause, it is helpful to know what kinds of taxes and fees a port may charge incoming vessels without implicating the clause. Property taxes are one example of a charge assessed to vessels entering port which are not considered duties of tonnage.<sup>56</sup> Though not immediately relevant to *Cruise Lines International*, the recent *Polar Tankers, Inc. v. City of Valdez*<sup>57</sup> case focused on whether a fee charged by the City of Valdez was best characterized as a duty of tonnage, or a property tax.<sup>58</sup> Similarly, courts have distinguished "service

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54. See *id.* at 686.

55. See *Steamship Co. v. Portwardens*, 73 U.S. (6 Wall.) 31, 34 (1867) (holding that a fee charged of every ship entering the port does not fall into the exceptions to the general rule designating regulation of commerce among the states to Congress).

56. See Jensen, *supra* note 15, at 700 ("[A] property tax levied on a vessel might not be a 'duty of tonnage' because it would not be a duty at all."). When determining whether a tax to a vessel is a property tax, courts try to determine whether the vessel was taxed at an equal rate as compared to other properties in any given municipality. *Id.* at 701-07.

57. 557 U.S. 1 (2009). Some scholars have credited this case with reviving interest in the Tonnage Clause. See Jensen, *supra* note 15, at 670 ("The Tonnage Clause has been understudied in recent years. One reason that law reviews are not filled with articles on the Clause is that it had largely disappeared from judicial dockets."). Tonnage Clause cases were quite common, even in the U.S. Supreme Court, during the nineteenth and early-twentieth centuries. *Id.* Then, beginning in 1935, almost seventy-five years passed without a Tonnage Clause case reaching the Supreme Court. *Id.* The last Supreme Court case about the Tonnage Clause, before *Polar Tankers*, was *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 266 (1935). Tonnage Clause cases have not been entirely absent from state courts during this period, though they have not been particularly common. A search for the exact term "Tonnage Clause" in LexisNexis as of February 22, 2019, delivered fifty-one cases, approximately one-half of which were decided in the ten years since the *Polar Tankers* decision. This simple measurement is illustrative of the resurgence in Tonnage Clause interest.

58. See *Polar Tankers*, 557 U.S. 1 (2009). The U.S. Supreme Court ruled that the Valdez charge violated the Tonnage Clause and was not a permissible property tax, though the Court was divided as to the reasoning. The plurality opinion, which was written by Justice Breyer and joined by Justices Ginsburg, Scalia, and Kennedy, determined that the charge was not a permissible property tax because it did not reach vessels "in the same manner" as it did other personal property. *Id.* at 1-16. Justice Alito concurred, writing that even if the Tonnage Clause permits a true, evenhanded property tax on the vessels, the tax here did not qualify as one,

fees” as a type of charge that is not normally implicated by the Tonnage Clause.<sup>59</sup>

Service fees are those that a ship is charged “for services rendered to and enjoyed by the vessel.”<sup>60</sup> If a city or state charges a visiting vessel for entering its ports, it does not violate the Tonnage Clause so long as the vessel received something in return that is reasonably related to the value of the charge; the charge in such a case is a service fee and not a duty of tonnage.<sup>61</sup> Ironically, this exception applies even if the tax is assessed, and graduated, according to a vessel’s tonnage.<sup>62</sup>

Case law around the service fee exception has shown that courts often act deferentially when applying the rule.<sup>63</sup> While the legislature should not describe a charge as a “service fee” if it does not give a reciprocal service to the vessels, some courts have gone to great lengths to avoid second-guessing a legislature’s characterization of a fee.<sup>64</sup> Deference, of course, is not guaranteed. The ultimate question that courts ask to determine if a charge is a service fee is whether the charge acts as a *quid pro quo*.<sup>65</sup> If a charge is primarily intended to raise revenue for a community, the charge is a tax or duty,<sup>66</sup> but if it renders an equal service to the vessel, it is acceptable under the Tonnage Clause.<sup>67</sup> One example of a common, qualifying class of service fees are fees paid for pilotage (i.e., the process of directing the movement of a ship by observations of

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and was thus an unconstitutional duty of tonnage. *Id.* at 19–20. Chief Justice Roberts and Justice Thomas also agreed that the charge was a duty of tonnage, but in their view, the personal property tax exception to the Tonnage Clause should not exist; thus Alaska could not circumvent the Tonnage Clause with such taxes here, whether or not the statute discriminated against visiting tankers. *Id.* at 17–19. Justices Souter and Stevens were the lone dissenters, finding that the charge was a traditional property tax and thus acceptable under Tonnage Clause jurisprudence. *Id.* at 20–28.

59. *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm’n*, 296 U.S. 261, 266 (1935).

60. *Id.*

61. *See, e.g., Packet Co. v. City of St. Louis*, 100 U.S. 423, 427–30 (1879) (The charges “were exacted and paid as compensation for the use of an improved wharf.”).

62. *See Jensen, supra* note 15, at 707.

63. *Id.* at 708.

64. *Id.* (describing *Transp. Co. v. Parkersburg*, 107 U.S. 691 (1882), “where the Supreme Court refused to look beyond the language of a municipal ordinance. The ordinance characterized a charge imposed on vessels using city docks as a wharfage fee, with the measure of the charge determined by the tonnage of the vessel, and the Court, over one dissent, looked no further.”).

65. *Id.* at 703.

66. *See, e.g., State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 220 (1870) (“Beyond question the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed.”).

67. *Id.*

recognizable landmarks).<sup>68</sup> Similarly, wharfage fees<sup>69</sup> qualify as service fees and do not implicate the Tonnage Clause.<sup>70</sup>

Other fees have also qualified as fair service fees. For example, in *Clyde Mallory Lines v. Alabama ex rel. State Docks Commission*, the Supreme Court found that a fee used to police the harbor qualified as a service fee even though it was assessed based on the vessel's tonnage.<sup>71</sup> The Court reasoned that although the benefit to the ships was not as direct as in the pilotage and wharfage cases, the vessels nonetheless received a clear benefit because the local government's police activities ensured the safety of the vessels. As described below, Juneau failed to convince the court in *Cruise Lines International* that its charges would qualify as a service fee, and thus, implicated the Tonnage Clause.

## II. CLIAA LITIGATION

In *Cruise Lines International*, the District Court of Alaska held that Juneau's use of passenger fees collected from visiting cruise vessels violated the Tonnage Clause.<sup>72</sup> In coming to this conclusion, the court first determined that the fees fell among the general class of charges that were prohibited under the Tonnage Clause.<sup>73</sup> The court then assessed whether the fees would qualify as a "service fee," and ultimately concluded that

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68. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1851) (upholding a pilotage fee imposed upon vessels by the Port of Philadelphia). The Court noted that imposts on tonnage were "known to the commerce of a civilized world to be as distinct from fees and charges for pilotage . . . as they were from charges for wharfage or towage, or any other local port charges for services rendered to vessels or cargoes." *Id.* at 314.

69. According to the Federal Maritime Commission, "[w]harfage means a charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels and (to or from barge, lighter, or water), when berthed at wharf or moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service." FEDERAL MARITIME COMMISSION, 46 CFR § 525.1(c)(23) (2018).

70. *Packet Co. v. Keokuk*, 95 U.S. 80, 88 (1877) (stating a fee based on tonnage imposed for docking at the town's wharf could not be considered a duty of tonnage); *Packet Co. v. City of St. Louis*, 100 U.S. 423, 429 (1879) (upholding wharfage fees based on tonnage because they were "paid as compensation for the use of an improved wharf and not for the mere privilege of stopping at the port" and were "reasonable in amount"); *see also* Suozzi, *supra* note 34, at 292 ("The Constitutional Framers could not, when they drafted the Tonnage Clause, have had in mind charges for services rendered or for conveniences furnished to vessels in port, which are facilities to commerce rather than hindrances to its freedom.") (citation omitted).

71. 296 U.S. 261 (1935).

72. *See generally* *Cruise Lines International*, No. 1:16-cv-0008-HRH, 2018 U.S. Dist. LEXIS 210665 (D. Alaska Dec. 6, 2018).

73. *Id.* at \*10.

they did not.<sup>74</sup> Though the court ruled that the fees were not per se violations of the clause, the City was enjoined from using these fees on anything other than services to the cruise vessels themselves.<sup>75</sup> Ultimately, however, Juneau settled the litigation with CLIAA. The terms of this settlement allow the City to continue collecting and spending passenger fees, subject to several restrictions described below.

### A. Juneau Passenger Fees

The City of Juneau owns and operates two of the four cruise ship docks that are located in downtown Juneau.<sup>76</sup> Each year, between May and September, approximately 1,000,000 cruise ship passengers enter the City through these docks, and the City collects about \$8,000,000 in passenger fee revenue.<sup>77</sup> The passenger fees Juneau levies are comprised of two separate fees: a Marine Passenger Fee (MPF), and a Port Development Fee (PDF).<sup>78</sup> In its complaint, CLIAA collectively referred to these fees as “Entry Fees” and claimed that both fees were being collected and used in violation of the Tonnage Clause.<sup>79</sup>

The MPF was first instituted on October 5, 1999, after Juneau voters approved the fee through a public initiative.<sup>80</sup> The MPF charges cruise lines a \$5.00 fee per cruise vessel passenger.<sup>81</sup> By design, the MPF was appropriated in support of the marine passenger ship industry, though it was also intended to be used to mitigate the impact of tourism on local

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74. *Id.* at \*14.

75. *Id.*

76. *Id.* at \*2 (Juneau “owns and operates the Cruise Ship Terminal and the Alaska Steam Ship Dock . . . the other two cruise ship docks, AJ Juneau Dock and Franklin Dock, are privately owned.”).

77. See First Amended Complaint for Declaratory and Injunctive Relief at 8, Cruise Lines International, *supra* note 12 (No. 16) (“From Fiscal Year 2012 to Fiscal Year 2016, CBJ has levied and collected more than \$35 million in Entry Fees from the Cruise Lines.”).

78. *Id.* at 5–6.

79. *Id.* at 5–6, 9.

80. *Marine Passenger Fee Program*, THE CITY AND BOROUGH OF JUNEAU, <https://beta.juneau.org/manager/marine-passenger-fee-program> (last visited May 1, 2019) (This was called the Marine Passenger Fee Initiative, Proposition 1 and was passed by a public vote.)

81. CITY AND BOROUGH OF JUNEAU, ALASKA, CODE CH. 69.20 *et seq.* [hereinafter JUNEAU CODE].

infrastructure.<sup>82</sup> Revenues from the MPF are placed in the Marine Passenger Fee Special Revenue Fund.<sup>83</sup>

The second fee, the PDF, was passed in April 2002, and imposed a fee of \$1.73 per arriving passenger, per day, on vessels carrying passengers for compensation that are not otherwise exempt.<sup>84</sup> On January 1, 2007, a second resolution increased the fee to \$3.00.<sup>85</sup> Revenues from the PDF are placed in the Port Development Special Revenue Fund.<sup>86</sup> This fund, which is overseen by the City Manager, “shall be used for capital improvements to the downtown waterfront for the provision of service to the cruise ship industry.”<sup>87</sup>

The City of Juneau has used the MPF and PDF fees to fund a variety of projects and services.<sup>88</sup> Part of the MPF is allocated towards city services like libraries, police, the Parks and Recreation Department, the hospital, the City Finance Department, and the City Manager’s Office.<sup>89</sup> Other parts of the MPF are earmarked for specific services, such as downtown foot and bike police patrols, weather monitoring, downtown restroom cleaning, sidewalk maintenance, pay phones, security, tourism training services, and Air Medevacs.<sup>90</sup> Portions of the fees also go directly to the docks, harbors, and general building operations.<sup>91</sup> For example, a large portion of the PDF has funded the 16B project, which involved the construction of a new public dock and the reconstruction of the Alaska Steamship Wharf.<sup>92</sup> Both funds have been used on the waterfront Seawalk, along with associated capital projects, like the large, bronze whale.<sup>93</sup>

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82. See JUNEAU CODE § 69.20.005 (The MPF was designed to “address the costs to the City and Borough for services and infrastructure usage by cruise ship passengers visiting the City and Borough, including emergency services, transportation impacts and recreation infrastructure use, and to mitigate impacts of increased utilization of City and Borough services by cruise ship passengers.”).

83. JUNEAU CODE § 69.20.120(a) (“The fees collected under this chapter shall be placed in the marine passenger fund.”).

84. City and Borough of Juneau Res. No. 2150.

85. City and Borough of Juneau Res. No. 2294(b)am. While this provision was originally only temporary, the sunset of this resolution was repealed several years later. City and Borough of Juneau Res. No. 2423(b)am.

86. City and Borough of Juneau Res. No. 2423(b)am § 1(c)(3) (“Proceeds of the fee shall be placed in the Port Development Fund.”).

87. See *id.* § 1. Port Development Fee.

88. Cruise Lines International, No. 1:16-cv-0008-HRH, 2018 U.S. Dist. LEXIS 210665, at \*4–6 (D. Alaska Dec. 6, 2018).

89. *Id.*

90. *Id.* at \*5.

91. *Id.*

92. *Id.* at \*7 n.33.

93. *Id.* at \*6 n.27.

## B. The Litigants' Arguments

### 1. *Should the Tonnage Clause Apply?*

In their argument, CLIAA likened the passenger fees to the oil tax that the Supreme Court recently struck down in *Polar Tankers*.<sup>94</sup> Like the Valdez ordinance in that case, the passenger fees only apply to ships of a certain size that call at the port, and failure to pay the fee can result in the vessel being barred from entry to Juneau.<sup>95</sup> CLIAA argued that because the charges are calculated and assessed based on the ships' cargo—i.e., how many passengers the ship is carrying—the fees fall squarely within the historical understanding of the Tonnage Clause.<sup>96</sup> Just as Valdez assessed fees directly to the ship in *Polar Tanker*, Juneau assesses fees directly to the ships, and not to the passengers individually in this case.<sup>97</sup>

On the other hand, Juneau argued that the *Polar Tanker's* analysis should not apply to the cruise ships that enter their port because they are inherently different than the oil tankers and other vessels that fall within the scope of the Tonnage Clause.<sup>98</sup> In other words, Juneau argued on policy grounds that the Tonnage Clause should not protect cruise ships from fees because of the very nature of their industry.<sup>99</sup> Juneau believed that a key part of the Tonnage Clause analysis was about whether the port was using its fees against a vessel from “less advantageously situated parts of the country” and that tourism was not the kind of commerce the clause was meant to protect.<sup>100</sup>

### 2. *Should Passenger Fees Fall Under the Service Fee Exception?*

Juneau also argued that the passenger fees in this case were best characterized as service fees rather than as duties of tonnage.<sup>101</sup> Just as there has been no bright-line rule as to what counts as tonnage,<sup>102</sup> courts have been unclear about what constitutes a service to a vessel. While the

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94. See Plaintiffs' Reply in Support Of Plaintiffs' Motion for Summary Judgment & Opposition to City & Borough of Juneau's Cross-Motion for Summary Judgment at 9-16, Cruise Lines International, *supra* note 12 (No. 148).

95. *Id.*

96. *Id.*

97. *Id.*

98. See The City & Borough of Juneau and Rorie Watt's Cross Motion for Summary Judgment & Opposition to Plaintiffs' Motion for Summary Judgment at 50-52, Cruise Lines International, *supra* note 12 (No. 118).

99. *Id.*

100. See *id.* (arguing that there is no evidence that the passenger fees are “local hindrances to trade and carriage by vessels”).

101. *Id.* at 54.

102. See, e.g., Jensen, *supra* note 15, at 673.

most common service fees are pilotage and wharfage fees, some courts have upheld fees that were directed towards services such as the policing of harbors and vessels,<sup>103</sup> or to cover the cost of unloading a ship's cargo.<sup>104</sup> Juneau argued that the only difference here is that the "cargo" for cruise lines is their passengers.<sup>105</sup> Consequently, they believe that the money spent on crossing guards, local infrastructure, and other services benefits the vessel both directly and indirectly via their passengers.<sup>106</sup> It is on this basis that they insist the passenger fees are actually service fees.<sup>107</sup>

CLIAA argued that Juneau's concept of service fees is too broad and antithetical to the goals of the Tonnage Clause. Specifically, they believe that the clause only allows fees for commercial-like services rendered to a *vessel*.<sup>108</sup> Permissible services include only those that enable a vessel's movement in the flow of commerce, such as the regulation of harbor traffic, pilotage, wharfage, the use of locks on a navigable river, medical inspection of vessels, or emergency services for vessels (fire prevention, security, etc.).<sup>109</sup> 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."<sup>110</sup> CLIAA argued, on policy grounds, that it is important not to extend the permissible bounds of fees acceptable under the Tonnage Clause because it would open the door to abuse.<sup>111</sup> By allowing passenger fees here, they claimed that any municipality could charge fees to vessels so long as they could show that the fees were used to benefit someone or something in the community.<sup>112</sup>

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103. *Id.* at 707 (citing *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 263 (1935)).

104. *See* The City & Borough of Juneau and Rorie Watt's Cross Motion for Summary Judgment & Opposition to Plaintiffs' Motion for Summary Judgment *supra* note 98, at 54 n.194. (citing *Cooley v. Board of Wardens*, 53 U.S. 299, 314 (1851)).

105. *Id.* at 54.

106. *Id.*

107. *Id.*

108. *See* Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment & Opposition to City & Borough of Juneau's Cross-Motion for Summary Judgment, *supra* note 94, at 16.

109. *Id.* at 17.

110. *Id.* (citing *Maher Terminals, LLC v. Port Auth. of N.Y. and N.J.*, 805 F.3d 98, 108 (3d Cir. 2015)).

111. *Id.* at 21 ("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.").

112. *Id.*

### C. The District Court's Opinion and the Path Forward for Juneau

Ultimately, the District Court of Alaska adopted CLIAA's Tonnage Clause analysis. Citing to *Polar Tankers*, the court reasoned that because the fees are imposed upon the vessels themselves,<sup>113</sup> the Tonnage Clause would apply to the passenger fees.<sup>114</sup> Similarly, the court said that while the Tonnage Clause does have an exception for service fees,<sup>115</sup> the services had to benefit the *vessel* itself.<sup>116</sup> The court rejected Juneau's argument that the exception would also apply to services that were beneficial to the passengers of a vessel.<sup>117</sup> Indeed, the court said that passenger benefits were tangential to the analysis.<sup>118</sup> Because the passenger fees were used on general city services, many of which benefited cruise line tourists but not the ships themselves, Juneau's use of the fees was in violation of the Tonnage Clause.<sup>119</sup>

#### 1. Effect of the Decision

The District Court of Alaska decided that the MPF and PDF were not per se unconstitutional, and that Juneau could continue to collect these fees.<sup>120</sup> However, the court enjoined the City from spending the fees on services that do not benefit the cruise vessels.<sup>121</sup> The court did not enumerate which specific spending practices Juneau would need to discontinue, and immediately after the opinion, the City publicly contended that it would not need to change many of its spending practices.<sup>122</sup> However, if the court were to clarify its opinion, Juneau

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113. Cruise Lines International, No. 1:16-cv-0008-HRH, 2018 U.S. Dist. LEXIS 210665, at \*11 (D. Alaska Dec. 6, 2018) (stating that the Tonnage Clause "seeks to prevent states with 'convenient ports' from placing other States at an economic disadvantage by laying levies that would 'ta[x] the consumption of their neighbors'" (citing *Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1, 7 (2009))).

114. *Id.* at \*11-12 (The court wrote further that "[t]he prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of the name or form, and even though not measured by the tonnage of the vessel which operate to impose a charge for the privilege of entering, trading, or lying in port.") (citing *Polar Tankers*, 557 U.S. at 8).

115. *Id.* at \*16 (noting that "the Tonnage Clause does not prohibit the imposition and expenditure of fees imposed upon a vessel that reflect the costs of services provided to a vessel or which further the vessel's marine enterprise").

116. *Id.* at \*16-19.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. See Suzanne Downing, *Are Juneau officials misleading public about cruise industry lawsuit?*, MUST READ ALASKA (Jan. 26, 2019), <http://mustreadalaska.com>



would likely need to discontinue its spending on services like crossing guards, police bike and foot patrol, security lighting, security services, and infrastructure investments.<sup>123</sup> These services benefit the City and the tourists arriving by cruise vessels, but not the actual vessels themselves.<sup>124</sup> Similarly, the City would likely be prevented from using the funds on any future capital projects like the Seawalk or 16B – even where these projects are focused on harbor and dock maintenance – because they are probably not sufficiently relevant to the *vessel* to qualify as a “service fee.”<sup>125</sup>

## 2. A Settlement for the City

In light of the sustained divisiveness over the City’s spending practices, and the continued threat of an appeal,<sup>126</sup> Juneau announced a

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/are-juneau-officials-misleading-public-about-cruise-industry-lawsuit/.

123. *Id.*

124. *Id.*

125. Because the judge did not specify which projects violated the Tonnage Clause, city officials in Juneau were uncertain about how they could continue to spend the passenger fees in the future. *See, e.g.,* Jacob Resneck, *Ruling Limits How Juneau Can Spend Cruise Passenger Fees*, KTOO PUB. MEDIA (Dec. 6, 2018), <https://www.ktoo.org/2018/12/06/ruling-limits-how-juneau-can-spend-cruise-passenger-fees/>. The Juneau City Manager said that the City does not “know exactly what this means yet and we’re still trying to digest the sum total of [the judge’s] order.” *Id.* To further investigate, Juneau opened the issue for public comment. Mollie Barnes, *City Accepting Proposals for Marine Passenger Fee Proceeds*, JUNEAU EMPIRE (Dec. 4, 2018), <https://www.juneauempire.com/news/city-accepting-proposals-for-marine-passenger-fee-proceeds/>.

126. Multiple Alaska municipalities offered to support Juneau’s litigation fees if the City were to appeal this litigation. *See, e.g.,* Juneau Settlement, *supra* note 20, at 2 (“WHEREAS, other communities in Southeast Alaska are concerned about the impact of the Court Rulings on their communities and have voluntarily offered the CBJ monetary support to appeal the Court Rulings”). Though unavailing in the District Court, the policy arguments that Juneau put forward may be successful in an appellate court. Particularly, the District Court of Alaska, when identifying the underlying policies behind the Tonnage Clause, said that the service fee exception is justified because it “further[s] the marine enterprise” of a vessel. *Cruise Lines International, No. 1:16-cv-0008-HRH*, 2018 U.S. Dist. LEXIS 210665, at \*16 (D. Alaska Dec. 6, 2018). The court was correct that this has typically only applied to fees that benefit the vessel itself. *See id.* at 16. However, an appellate court might be more likely to rule that, in this context, benefits to passengers help to achieve that underlying goal. Indeed, because the citizens of Juneau and other Alaska cities are disproportionately outnumbered by the tourists who visit their cities, investments in infrastructure near the ports may be said to benefit the tourists more than the townspeople themselves. Under that view, a court *might* agree that because the fees are being spent to draw more tourists to Alaska by increasing the state’s beauty, the investment is being used in service of the cruise vessels’ “marine enterprise.” This would be a novel argument, but the cruise industry did not exist when the Tonnage Clause was written, and there is certainly room to interpret the clause more broadly than it has been interpreted, historically. That said, an appeal would have been a costly

settlement with CLIAA in March 2019.<sup>127</sup> Under the terms of this agreement, the City could collect passenger fees without further objection from CLIAA.<sup>128</sup> The City could continue to use these passenger fees to provide services and infrastructure to cruise ships including restrooms, signage, wayfinding, motor coach staging, crossing guards, fire and emergency medical services, and police patrols.<sup>129</sup> Moreover, it may continue to develop the downtown waterfront in accordance with the Long Range Waterfront Plan.<sup>130</sup> In exchange, the City agreed that the passenger fees would not increase for the next three years,<sup>131</sup> and that the City would consult with CLIAA before raising the fees after that term.<sup>132</sup> The Agreement would last for renewing ten year periods, subject to written termination by either of the parties.<sup>133</sup> This settlement agreement was heralded by both the City and CLIAA as a fair and equitable conclusion to three years of litigation.<sup>134</sup>

### III. THE EFFECT OF *CRUISE LINE INTERNATIONAL* ON ALASKA TOURISM AND PASSENGER FEES

This Note argues that the District Court of Alaska's holding in *Cruise Lines International* is dangerous because it may ultimately reduce or destroy Juneau and Alaska's ability to profit from cruise tourism. Tourism and cruise revenue are among the largest sources of revenue for the State of Alaska.<sup>135</sup> Traditionally, passenger fees have been a primary

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endeavor, and Juneau would be fighting an uphill battle with unclear chances of success.

127. See *CBJ and CLIA reach tentative agreement, ending further litigation*, CITY AND BOROUGH OF JUNEAU (Mar. 14, 2019), <https://beta.juneau.org/newsroom-item/cbj-and-clia-reach-tentative-agreement-ending-further-litigation>.

128. See, e.g., *Juneau Settlement*, *supra* note 20, at 4-7 (describing the fee collection and spending practices which the parties agreed are acceptable).

129. *Id.* at 5.

130. *Id.* at 2.

131. *Id.* at 7.

132. *Id.* ("The Parties agree for each and every Fiscal Year, the Parties shall endeavor to meet in person to discuss in good-faith any new proposed projects and services for which Fees are sought to be expended in the following Fiscal Year with the ultimate decision resting with the Assembly.").

133. *Id.* at 8 ("The term of this Agreement shall be ten years from the effective date with automatic ten year renewals unless either Party provides written notice to the other, sixty days prior to the renewal date, to terminate this Agreement.").

134. See Ben Hohenstatt, *City and cruise line make lawsuit settlement official*, JUNEAU EMPIRE (Mar. 22, 2019), <https://www.juneauempire.com/news/city-and-cruise-line-make-lawsuit-settlement-official/>.

135. See ALASKA DEP'T OF COM., CMTY., AND ECON. DEV., 2017 ECONOMIC IMPACT OF ALASKA'S VISITOR INDUSTRY 2 (2018), [https://www.commerce.alaska.gov/web/Portals/6/pub/TourismResearch/VisitorImpacts2016-17Report11\\_2\\_18.pdf?ver=2018-11-14-120855-690](https://www.commerce.alaska.gov/web/Portals/6/pub/TourismResearch/VisitorImpacts2016-17Report11_2_18.pdf?ver=2018-11-14-120855-690) ("The 43,300 jobs connected to Alaska's visitor

mechanism for revenue collection in Juneau and for Alaska.<sup>136</sup> Though the settlement bars CLIAA from litigating against Juneau's passenger fees for ten years, it leaves other Alaska laws exposed to future suits,<sup>137</sup> and thus, may ultimately be disruptive to the Alaska economy.<sup>138</sup> Moreover, the terms of the settlement seem to leave the passenger fees open to attack, simply at a later date.<sup>139</sup> This Section argues that in light of the state's past dealings with the cruise industry, the holding in *Cruise Line International*, and the subsequent settlement agreement represent an unsatisfactory outcome for the City. Ultimately, the City should seek additional protections to safeguard its tourism interests.

### A. Alaska Tourism

Tourism benefits the state economy in direct and indirect ways. Indirectly, tourism generates revenue in the form of increased economic activity and job growth. Visiting tourists rent vehicles, use local lodging, take tours, buy gifts, and consume food and beverages.<sup>140</sup> Individual municipalities often benefit from this spending.<sup>141</sup> Tourism also leads to growth through the development of local jobs. In Juneau, the tourism industry is one of the largest employers in the city, and the sector continues to grow.<sup>142</sup> It is similarly large in Sitka,<sup>143</sup> where a community

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industry represented 10 percent of total statewide employment in 2017. Total visitor industry-related labor income of \$1.5 billion represented 5 percent of the statewide total.”).

136. See e.g., ALASKA DEP'T OF REVENUE, TAX DIV., ANNUAL REPORT 2017 (2018), <http://www.tax.alaska.gov/programs/programs/reports/AnnualReport.aspx?Year=2017#program40170> (showing that the state's CPV excise tax is one of the state's ten largest sources of revenue).

137. See, e.g., Juneau Settlement, *supra* note 20, at 2 (“The Parties also acknowledge that CBJ's Marine Passenger Fee and Port Development Fee are fees imposed upon a vessel, and not fees imposed upon a passenger like the State Commercial Passenger Vessel excise tax.”).

138. See ALASKA DEP'T OF REVENUE, TAX DIV., *supra* note 136 (The CPV passenger fee collected by the state accounted for almost 2% of the state's total revenue and was the only item in the state's official statement of revenues collected which explicitly accounted for tourism revenue).

139. See, e.g., Juneau Settlement, *supra* note 20, at 8.

140. See 2017 ECONOMIC IMPACT OF ALASKA'S VISITOR INDUSTRY, *supra* note 135, at 10-11. These activities collectively accounted for \$2.2 billion in visitor spending. *Id.* at 9.

141. *Id.* at 3 (“Revenues accruing to municipalities from Alaska's out-of-state visitor industry are estimated at \$88.5 million in 2017, including \$37.6 million in sales tax revenues, \$32.2 million in lodging tax revenues, and \$17.8 million in dockage/moorage payments.”).

142. See e.g., TRAVEL JUNEAU, JUNEAU VISITOR PROFILE AND ECONOMIC IMPACT STUDY 2016 5 (2016) (noting that “[v]isitor industry spending-related employment (2,800 jobs) represented roughly 12 percent of total Juneau employment”).

143. See Evan Jordan et al., *Coping with Tourism: The Case of Sitka, Alaska*, TRAVEL

of only 9000 people accommodates around 250,000 cruise passengers every year.<sup>144</sup> The tourism industry employed about 14% of Sitka's workforce and accounted for about nine percent of total work earnings in the city in 2016.<sup>145</sup> Cruise tourism has also become the dominant industry in Ketchikan.<sup>146</sup>

The primary economic benefits of cruise tourism come from revenues generated via direct payments from the cruise industry to the cities and state. Just as the state charges the oil industry for its production, the mining industry for licensing fees, and the fishing industry for catch size, the state uses passenger fees to collect its fair share from the cruise industry.<sup>147</sup> These fees are the only mechanism by which state and local governments collect "direct" tourism revenue, and thus, they are incredibly important for the state's economy.<sup>148</sup> In 2017, for example, state taxes levied upon cruise vessels through the Alaska Commercial Passenger Vessel (CPV) Excise Tax accounted for almost two percent of the state's total revenue.<sup>149</sup> At the municipal level, the CPV and passenger fees combined represent nearly five percent of some city budgets.<sup>150</sup>

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AND TOURISM RESEARCH ASS'N (2016) <https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1672&context=ttra> ("Sitka is an island community in [southeast] Alaska, populated by slightly less than 9,000 residents as of the turn of the millennium, making it the fourth largest city in Alaska."). The citizens live with a ratio of one resident for every twenty-five cruise passengers. *See id.*

144. *Id.*; *see also* CITY OF SITKA, SITKA COMPREHENSIVE PLAN 2030, PUBLIC HEARING DRAFT (2018), <http://www.cityofsitka.com/government/departments/planning/documents/TechnicalPlanDraft8Feb2018.pdf>.

145. *Id.* at 45. This equals about 800 workers and \$23 million. *See id.*

146. *See* CITY OF KETCHIKAN, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED DECEMBER 31, 2016 5 (2017), <https://www.commerce.alaska.gov/dcra/dcrarepoext/RepoPubs/FinDocs/KetchikanCY2016Audit.pdf> ("Ketchikan's most dominant economic sector is tourism and its popularity as a major port of call for large cruise ships and their passengers continues to grow.").

147. *See* ALASKA DEPT OF REVENUE, TAX DIV., ANNUAL REPORT 2017 (2018), <http://www.tax.alaska.gov/programs/programs/reports/AnnualReport.aspx?Year=2017#program40170> (showing that oil, mining and fishing create a large portion of the state's annual revenue; similarly, passenger fees are among the state's ten largest sources of revenue).

148. *Id.*

149. *Id.*

150. In its 2018 biennial budget, Juneau projected that it would have approximately \$320,000,000 in revenue. CITY AND BOROUGH OF JUNEAU, BIENNIAL BUDGET ADOPTED FISCAL YEAR 2018 DOC-2 1 (2018), <http://www.juneau.org/financeftp/documents/FY18BudgetBookAdopted-ForInternet.pdf>. The passenger fees at issue in this litigation account for approximately \$8,000,000 of the total anticipated revenue. *Id.* at 33-34. Combined with the \$5,000,000 annual passenger fees collected from the state, these fees represent 4% of the budget.

## B. The Growth of the Alaska Tourism Industry Was Planned

In *Cruise Lines International*, Juneau argued that CLIAA should not be able to enjoin the City's passenger fees because it was the cruise industry itself that persuaded Juneau to pass those fees.<sup>151</sup> Though this argument was rejected, it has merit. The rise of cruise tourism in Alaska was a planned process which required Alaska cities to consciously elect to work with the tourism industry. In Sitka, for example, after the city's pulp mill closed in the 1990s, residents carefully weighed their options for reinvesting in their community.<sup>152</sup> They chose to invest in tourism after meeting and planning with representatives of the cruise industry.<sup>153</sup> Similarly, the citizens of Ketchikan consciously turned to cruise tourism as a community investment after some of its local pulp mills closed in the 1990s.<sup>154</sup> The city has focused its development on accommodating this industry and the tourists that the cruises bring to the city.<sup>155</sup> Likewise, Juneau only agreed to pass the MPF and PDF after the Northwest Cruise Association endorsed the acts and persuaded the city to use the fees to maintain local infrastructure.<sup>156</sup> In partnership with the cruise organizations, Sitka, Juneau, and similarly situated port cities invested in local infrastructure in order to support the annual influx of visitors to the state.<sup>157</sup>

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151. See generally *The City & Borough of Juneau and Rorie Watt's Cross Motion for Summary Judgment & Opposition to Plaintiffs' Motion for Summary Judgment*, *supra* note 98. Juneau asserted that CLIAA should be prevented from pursuing its claims based on theories of waiver, laches, equitable estoppel, and quasi estoppel. *Id.*

152. See Evan Jordan, *supra* note 143, at \*5 ("Tourism planning started with a public forum in 1994 when the pulp mill was closing.").

153. *Id.*

154. See, e.g., Melissa Block, *Leaving Timber Behind, An Alaska Town Turns to Tourism*, NPR (May 17, 2017), <https://www.npr.org/2017/05/17/528453624/leaving-timber-behind-an-alaska-town-turns-to-tourism> (describing the transition away from pulp mills).

155. See, e.g., CITY OF KETCHIKAN, *supra* note 146, at 5 ("The growth in tourism has led local government and private businesses to make significant investments in the land-based facilities and port infrastructure necessary to accommodate the needs of the industry.").

156. See *The City & Borough of Juneau and Rorie Watt's Cross Motion for Summary Judgment & Opposition to Plaintiffs' Motion for Summary Judgment*, *supra* note 98, at 7-10. A representative of the Northwest Cruise Association, the Plaintiff's predecessor, unequivocally endorsed the PDF Resolution when it was being considered and confirmed the support of colleagues in the industry. *Id.*

157. See, e.g., CITY OF KETCHIKAN, *supra* note 146, at 5 ("The City invested over \$40 million in 2006 to expand and improve its port berthing facilities. Private companies have invested millions of dollars to develop a retail complex at the former Spruce Mill property and Berth IV and its adjacent ground transportation

### C. Future Threats to Alaska Tourism

In the wake of *Cruise Lines International*, many laws that provide direct funding for the state and its port cities may be struck down.<sup>158</sup> Admittedly, the cruise lines would likely be reluctant to attack these laws immediately in the wake of the decision, due to the high costs of litigation and the associated media scrutiny. However, the cruise lines are not constrained by their settlement with Juneau from litigating against these fees.<sup>159</sup> If the cruise lines ultimately wanted to attack the CPV excise tax, the law would be susceptible to the same criticisms that felled Juneau's passenger fees in the Alaska District Court. Other port-city passenger fees, like those charged in Ketchikan, may also be invalidated. If these laws are struck down, the state and municipal economies that have become reliant on cruise tourism could be harshly impacted.

#### 1. *The Commercial Passenger Vessel Excise Tax*

Following the *Cruise Lines International* decision, cruise lines have a firm foundation on which to challenge the state's CPV excise tax.<sup>160</sup> Like the Juneau passenger fees, the CPV excise tax is imposed on passengers traveling on commercial passenger vessels.<sup>161</sup> The \$34.50 fee is collected at the cruise ships' first port-of-call,<sup>162</sup> then the fees are distributed

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area. The City recently completed phase three of a \$26 million four-phase project to replace Berths I and II.").

158. It is possible that the cities and state will unilaterally change their passenger fee collection and spending practices in order to comply with the decision. *See, e.g., Resneck, supra* note 125 (suggesting that the state attorney general may give guidance to municipalities about how to spend CPV funds).

159. The Settlement Agreement specifically distinguishes Juneau's Passenger Fees from the CPV tax. *See, Juneau Settlement, supra* note 20, at 2. Moreover, although the settlement does protect Juneau from litigation by CLIAA or CLIAA's successor organizations, it does not protect the city's passenger fees from challenges from other third parties. *See id.*

160. In fact, CLIAA's predecessor organization, the Alaska Cruise Association, already challenged the CPV as a violation of the Tonnage Clause in 2009. *See Complaint for Declaratory and Injunctive Relief, Alaska Cruise Association v. Patrick Galvin*, No. 3:09-cv- (D. Alaska Sept. 17, 2009), <http://www.sitnews.us/0909news/092109/ComplaintRelief.pdf> [hereinafter ACA Complaint]. They only dropped the lawsuit when Alaska governor Sean Parnell agreed to lower the rate of the CPV. *See* 2010 ACA Settlement Agreement, <http://www.law.state.ak.us/pdf/press/041310-ACAagreement.pdf>.

161. *See* ACA Complaint, *supra* note 160. The CPV only applies to those cruise lines that provide overnight accommodations, that anchor or moor on the state's marine water with the intent to allow passengers to embark or disembark, and in the cases where a voyage lasts more than seventy-two hours on the state's marine water. *Id.* As a practical matter, this applies to most cruise lines.

162. *See* ALASKA DEP'T OF REVENUE, TAX DIV., *supra* note 136 ("The Department of Revenue's Tax Division deposits all proceeds from the CPV excise tax into the

between the state and the first seven port communities that the ships visit.<sup>163</sup> The cities and boroughs can each receive up to \$2.50 per passenger.<sup>164</sup> Between 2007 and 2016, this tax was shared with 17 city or borough governments.<sup>165</sup>

The cruise industry has already threatened to challenge the CPV on one prior occasion.<sup>166</sup> In 2009, the Alaska Cruise Association filed a complaint in the District Court of Alaska against the CPV.<sup>167</sup> Their first claim for relief was that the CPV violated the Tonnage Clause.<sup>168</sup> At the time, they were persuaded to drop the suit when the state agreed to lower the CPV tax rate.<sup>169</sup> Now, however, CLIAA has clear grounds on which to sue.

If the cruise industry revamps its challenge against the CPV, the law will likely fall. Like the Juneau passenger fees, there are no clear restrictions on how cities may use the CPV funds once they are distributed to the different ports-of-call;<sup>170</sup> in many cities, they are commingled with the city's general funds.<sup>171</sup> Likewise, the state has used the CPV on a wide variety of projects, many unrelated to the cruise industry in general.<sup>172</sup> A court would likely find that the tax was under the purview of the Tonnage Clause and that it could not qualify under the service fee exception, nor any other exception recognized by the courts.<sup>173</sup>

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Commercial Vessel Passenger (CVP) tax account in the General Fund. Subject to appropriation by the Legislature from this account, the division distributes \$5 per passenger to each of the first seven ports of call in Alaska.”).

163. *Commercial Passenger Vessel Excise Tax: Community Needs, Priorities, Shared Revenue, and Expenditures*, ALASKA DEP'T OF COM., CMTY., AND ECON. DEV. (Feb. 2017) at 2, <https://www.commerce.alaska.gov/web/Portals/6/pub/TourismResearch/00%20FULL%20CPV%20RPT%2016%202017.pdf?ver=2017-03-23-160339-903>.

164. *Id.*

165. *Id.* Overall, these municipalities have shared \$114.3 million in CPV excise tax funding. *Id.*

166. *See* ACA Complaint, *supra* note 160.

167. *Id.*

168. *Id.* at 10.

169. *See* Motter, *supra* note 23. The state lowered the fee from \$46 per passenger to the current rate of \$34.50. *Id.*

170. *See generally* *Commercial Passenger Vessel Excise Tax*, *supra* note 163 (showing which cities benefit from CPV funding and how these communities use CPV funds).

171. *Id.*

172. *See* ACA Complaint, *supra* note 160, at 6. Proponents of the CPV explicitly argued for the law's passage on the basis that it would help the state raise revenue by taxing visitors from out of state. *Id.*

173. One key difference, however, is that the state is not the end-user of the CPV excise tax fees. *See* *Commercial Passenger Vessel Excise Tax*, *supra* note 163, at 6. Whereas Juneau collected the passenger fees and applied them for its own city-projects, the state, in most instances, merely collects the fees and redistributes them between the cities. *Id.*

If this happens, Alaska could lose a full two percent of its annual revenue, and would collect essentially no income directly from the cruise lines or visitors industry.

## 2. Ketchikan's Head Tax

Ketchikan, like Juneau, is one of the most visited port cities in the state of Alaska. With less than 10,000 full time residents,<sup>174</sup> the city welcomes 1,000,000 visitors every year.<sup>175</sup> Like Juneau, the city passed an additional tax to help it compensate for the burden that the tourism industry puts on its infrastructure and local services.<sup>176</sup> This head tax may also be susceptible to challenge in the wake of the *Cruise Lines International* decision. As with the CPV excise tax and Juneau's passenger fees, Ketchikan's head tax is levied upon ships based on the number of visiting passengers who enter the city on a cruise vessel.<sup>177</sup> Thus, it likely implicates the Tonnage Clause. That said, the city spends this money in ways that *might* allow it to qualify under the service fee exception. For example, the city initially used the head tax towards paying off city debt that it accumulated during the construction of Berths 3 and 4 of the downtown cruise dock.<sup>178</sup> The head tax money has also gone directly to port improvement projects.<sup>179</sup> It is unclear whether such projects would qualify as a service to the vessel, and thus, exempt the fees from violating the Tonnage Clause; Ketchikan public officials have expressed their doubt and concern about the issue after the *Cruise Lines International* ruling.<sup>180</sup>

## D. Alaska Ports Should Be Immune From Future Attack

This Note argues that the cruise industry's attack on Juneau's passenger fees was inequitable, and that a future attack against Alaska's

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174. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION (2017). According to the 2017 United States census estimates, Ketchikan's population is approximately 8,272. *Id.*

175. See *Commercial Passenger Vessel Excise Tax*, *supra* note 163, at 2.

176. See KETCHIKAN, ALASKA, MUNICIPAL CODE No. 13.10.030 (2018) (codifying imposition of passenger wharfage fees).

177. *Id.*

178. Leila Kheiry, *Head Tax Lawsuit Could Affect Ketchikan*, KTOO PUB. MEDIA (Apr. 16, 2016), <https://www.ktoo.org/2016/04/16/head-tax-lawsuit-could-affect-ketchikan/>.

179. *Id.*

180. See *Ketchikan City Officials Mull Cruise Passenger Fee Ruling*, U.S. NEWS & WORLD REPORT (Dec. 10, 2018), <https://www.usnews.com/news/best-states/alaska/articles/2018-12-10/ketchikan-city-officials-mull-cruise-passenger-fee-ruling> (stating that reactions among the city council members "varied from wanting to talk with the industry to perhaps looking at whether to cap the number [of] passengers who visit").



passenger laws would be unfair to the citizens of the state. If the CPV tax, or other municipal passenger fees are struck down, then Alaska citizens would bear the sole burden of maintaining their local tourism infrastructure without support from the cruise industry.<sup>181</sup> While the state would still be able to collect and benefit from “indirect” tourism revenue, experience has shown that it would not be enough to sustain the expenses associated with this infrastructure maintenance.<sup>182</sup> Moreover, the burdens on the cities would only grow over time.<sup>183</sup> Juneau and other similarly

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181. Juneau, for example, will have to continue maintaining downtown sidewalks, restrooms, etc., as more than 1,000,000 visitors use these amenities every year.

182. Before Juneau passed the MPF in 1999, there were no direct passenger fees in Alaska. The City, and the State, passed these laws because their early relationship with the cruise lines was unsustainable for Alaska municipalities, and the passenger fees could help the City compensate for the large impact that the visitors were having on the city:

On certain days, the City may have as many as 5 ships (4 docking and 1 lightering) in port with a potential of more than 10,000 passengers and crew. This can increase Juneau’s total population by one-third. The vast majority of cruise ship passengers visiting Juneau are either walking in the downtown core area or on local shore excursions. Congestion and noise are the issues that have generated a significant amount of concern. In response to these concerns, citizens approved a \$5 per passenger fee to mitigate the impacts of large-scale tourism. These fees have been used for construction and maintenance of additional public restroom facilities, road and sidewalk improvements, harbor and dock improvements, increased public transportation service, noise abatement programs, acquisition of waterfront open space, public trail maintenance and security improvements.

JUNEAU FIN. DEP’T, BUDGET HISTORY AND OVERVIEW 13 (2009), [http://www.juneau.org/finance/FY08AdoptedBudget/Overview-Budget\\_History\\_Overview\\_FY08\\_Adpt.pdf](http://www.juneau.org/finance/FY08AdoptedBudget/Overview-Budget_History_Overview_FY08_Adpt.pdf) (last visited May 1, 2018).

183. The Alaska cruise industry has doubled in size over the last 20 years. *See History of Alaska Cruise Industry*, CRUISE LINE INT’L ASS’N, <http://www.cliaalaska.org/economy/alaska-cruise-history/> (last visited Feb. 16, 2019). In 1998, 560,000 tourists entered the state via cruise line, yet 1.2 million visitors were expected to visit in 2018. *Id.* If that growth continues, Alaska could expect to host more than 2 million annual cruise-line visitors by 2035. During this period, the cruise companies have earned unprecedented profits. *See* James DeTar, *Here’s Why the Big 3 Cruise Lines are Seeing Strong Profits and Rising Stock Prices*, *Forbes* (Aug. 14, 2017), <https://www.forbes.com/sites/jamesdetar/2017/08/14/heres-why-the-big-3-cruise-lines-are-seeing-strong-profits-and-rising-stock-prices/#6719b04c214c> (stating that the cruise lines that are members of CLIAA are experiencing record-breaking profits); *see also Here’s How Much Cruise Ships Make Off Every Passenger*, CRUZELY (Dec. 17, 2016), <https://www.cruzely.com/heres-how-much-money-cruise-ships-make-off-every-passenger-infographic/> (showing annual profits of \$665,000,000 for Royal Caribbean International, a CLIAA member cruise line). Conversely, the populations of cities like Juneau, Sitka, and Ketchikan have remained remarkably stagnant over the last twenty years. *See* ALASKA DEP’T OF LABOR AND WORKFORCE DEV., 2018 POPULATION ESTIMATES BY BOROUGH, CENSUS AREA, AND ECONOMIC

situated cities would need to find new ways to compensate for this loss in revenue, which may be a difficult task.<sup>184</sup> This is not what the state bargained for and it is not fair to Alaska citizens. The cruise lines should not be able to escape their obligations to Alaska, either now, or in ten years, by arguing for the invalidation of the very law they induced the state to pass. Alaska should look to the U.S. Congress for protection against future abuse.

#### IV. CONGRESSIONAL CONSENT TO LEVY A DUTY OF TONNAGE

This Note argues that the City and State should be prepared to seek congressional authorization for the collection of passenger fees. Congress could use its power under the Tonnage Clause to grant Alaska, Juneau, and other similarly situated Alaska ports with a special permission to charge passenger fees; such action would benefit both the state and the cruise lines. For the state, whose economy is uniquely intertwined with tourism, express permission to charge passenger fees for a certain period would protect an important revenue stream against future attacks. Similarly, for the City of Juneau, congressional action would serve as a back-stop for their recent settlement agreement, protecting the fees from attack by third parties or from a sudden withdrawal by CLIAA from the agreement (e.g., at the conclusion of the first ten year renewal period). Finally, congressional action would benefit the cruise lines themselves by pegging the state fees at a set rate. This is important because an amicable solution that benefits both the state and the cruise industry could preserve their public-private partnership and prevent future discord.

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REGION, <http://live.laborstats.alaska.gov/pop/> (last visited Feb. 16, 2019). If cruise lines continue to bring tourists into Alaska at increased rates, the burden on each individual Alaska citizen will be intensified.

184. In order to make up for the lost revenue, Alaska cities could pass a seasonal sales tax, cut budgeted spending, or draw from the state's Permanent Dividend Fund. The state considered each of these options when trying to manage its recent fiscal crisis, yet found each to be wildly unpopular with the state's citizens. See, e.g., Alana Samuels, *The Stingiest State in the Union*, THE ATLANTIC (Aug. 31, 2015), <https://www.theatlantic.com/business/archive/2015/08/alaska-budget-crisis/402775/> (describing intense opposition to some efforts to reduce the state's budget deficit); Anne Hillman, *Anchorage Students Rally Against Education Funding Cuts*, ALASKA PUB. MEDIA (Apr. 16, 2015), <https://www.alaska-public.org/2015/04/16/anchorage-students-rally-against-education-funding-cuts/>. Ultimately, the problem with any of these solutions is that the costs of maintenance would be unfairly imposed on the Alaska citizens, while the cruise industry continues to reap the benefits of the cities' investments.

### A. A Model Tonnage Act

This Note offers a model for endowing Alaska cities with the power to collect duties of tonnage for a period of twenty years. In Appendix I, it proposes a model act for passage. This proposal would give Juneau, Ketchikan, and the State of Alaska the ability to continue charging fees to cruise vessels based on the number of passengers that they bring to port. These fees would be set at a standard rate based on the current charges issued by the Alaska port cities; they would last for a period of twenty years.

This model law is based on the only prior law in which Congress expressly authorized a city to assess a duty of tonnage.<sup>185</sup> Specifically, in 1804, South Carolina persuaded Congress to pass a law authorizing the state to collect tonnage duties to fund local hospital services.<sup>186</sup> This bill utilizes the language of that Act to achieve the same goal.<sup>187</sup> Like the prior law, it enumerates the local ordinances and names specifically which provisions it intends to authorize for passage. It also specifically states the fee rate at which the cities are allowed to charge passenger fees. As with the original provision, the law specifically describes which agents are authorized to collect the taxes from the cruise lines. Whereas the South Carolina law was passed for a period of three years, this model act authorizes Juneau, Ketchikan, and the Alaska state government to implement its fees for a period of twenty years. This period would allow the cities to plan around the future costs that they may have to bear if the cruise industry resumes its attack on Alaska passenger fees.<sup>188</sup>

### B. Overcoming Barriers to Passage: A Wary Congress

One of the biggest barriers to the successful passage of a Tonnage Clause statute is that it is not entirely clear what congressional action looks like. Congress has only granted a state the power to impose a tonnage duty once, for a brief period of time, more than two centuries

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185. See Act of Dec. 21, 1804, 2 ACTS OF THE GEN. ASS'Y OF S.C. 553–55 (seeking consent of Congress to charge a duty of tonnage so it may “erect[] and support[] an [sic] hospital in the vicinity of Charleston for the reception and relief of sick and disabled seamen”).

186. *Id.*

187. See *infra* Appendix I.

188. Of course, if policymakers see wisdom in allowing municipalities to continue spending passenger fees as they please, this model law can be reauthorized after its initial passage.

ago.<sup>189</sup> Similarly, there is no evidence that any court has upheld a state statute or ordinance based on an implicit authorization from Congress.<sup>190</sup>

It is unclear why Congress has not wielded its power to grant states the authority to collect tonnage duties on more than one occasion. One possibility is that states simply have not asked Congress to authorize state-tonnage duties in the past.<sup>191</sup> Alternatively, Congress may be hesitant to use the power because it has only been used once, is untested, and could have uncertain effects on interstate commerce.<sup>192</sup> Congress may also be concerned about a slippery slope issue: that by offering one state (e.g., Alaska) the ability to charge passenger fees to cruise lines, they would have to let all U.S. coastal states and port cities do the same. Congress may simply have no incentive to act where the benefit is only to an individual state and not the nation as a whole.

Although it would likely require considerable efforts on the part of Alaska to persuade Congress to pass a law authorizing passenger fees, the payoff would be worthwhile. As demonstrated above, Alaska and its port cities are facing a difficult predicament and congressional action would result in significant benefits. Unlike other port cities in “the lower forty-eight,” where only a small percentage of visitors arrive to the city by cruise lines,<sup>193</sup> Alaska cities are reliant on the cruise and tourism industries.<sup>194</sup> Overall, the U.S. Congress is best positioned to solve this problem. The state has the incentive to initiate lobbying efforts and a model law by which to act. All they need is congressional support.

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189. See Jensen, *supra* note 15, at 672. This occurred when South Carolina sought Congress’ approval to charge a duty of tonnage so it could erect a hospital near Charleston. Congress permitted the city to collect a duty of tonnage for up to three years. *Id.*

190. *Id.*

191. This is hard to measure because many lobbying efforts are not open to public disclosure. However, if a state had tried to do this, they might have followed South Carolina’s lead by publicly asking for congressional support. See Jensen, *supra* note 15, at 672 (describing how South Carolina “sought consent” for its tonnage duties). The author could find no public records of any state asking for such support.

192. See *supra* Part I (discussing the Framers’ intentions for the Constitution).

193. For example, Seattle, Los Angeles, and other port cities are much less reliant on cruise-tourism revenue. Indeed, many port cities in the contiguous United States are easily accessible via plane, highway, or train, in addition to cruise-line passage. *But see* U.S. ARMY CORPS OF ENG’RS, KEY WEST HARBOR RECONNAISSANCE REPORT, APPENDIX A 6 (2010), [http://www.cityofkeywest-fl.gov/egov/documents/1372338411\\_97252.pdf](http://www.cityofkeywest-fl.gov/egov/documents/1372338411_97252.pdf). Key West is a more isolated port city that is reliant on cruise tourism. For cities like Key West, there may be strong arguments for passing similar Tonnage Clause-authorizing statutes, however, that discussion is beyond the scope of this Note.

194. See *supra* Part III.

## V. CONCLUSION

This Note proposes a model law under which Congress could grant Alaska and its port cities the authority to charge passenger fees to visiting cruise lines without violating the Tonnage Clause. Because Alaska and its ports are uniquely reliant on cruise tourism, this would be an advantageous solution that would protect the Alaska economy. It would also yield benefits to the cruise lines. It is time for Congress to reawaken its Tonnage Clause authorizing powers.

**APPENDIX 1:****MODEL LAW TO GRANT TONNAGE CLAUSE POWERS TO ALASKA**

*An act declaring the consent of Congress to grant Alaska's State Legislature and its Cities the power to impose and collect a duty of tonnage from vessels entering its ports.*

**Preamble.**

The State of Alaska, founded in 1959, is geographically separate and apart from the contiguous United States, and is uniquely reliant on tourism revenue for its sustained economic survival. The Tonnage Clause shall not impede the State's collection of this revenue.

This Law grants the State of Alaska, and its duly authorized cities Juneau and Ketchikan, with the right to continue collecting and appropriating fees from cruise lines for reinvestment in local infrastructure and tourism projects, without violating the Tonnage Clause.

**SEC. 1.** Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the consent of Congress be granted and declared to:

- (A) the operation of Ordinance No. 2000-01am by the City Council of Juneau, passed by popular initiative on October 5 in the year 1999 titled "Marine Passenger Fee," so far as the same extends to authorizing the City Council of Juneau to impose and levy a duty not exceeding \$5.00, per passenger, on all ships and vessels of the United States, which shall arrive and be entered in the port of Juneau from any foreign port;
- (B) the operation of Res. No. 2294(b)am by the City Council of Juneau, passed in April of the year 2002 titled "Port Development Fee," so far as the same extends to authorizing the City Council of Juneau to impose and levy a duty not exceeding \$3.00, per passenger, on all ships and vessels of the United States, which shall arrive and be entered in the port of Juneau from any foreign port;
- (C) the operation of Ordinance No. 13.10.030 by the City Council of Ketchikan, passed on January 1 in the year 2007 titled

“Passenger Wharfage Fee,” so far as the same extends to authorizing the City Council of Juneau to impose and levy a duty not exceeding \$7.00, per passenger, on all ships and vessels of the United States, which shall arrive and be entered in the port of Ketchikan from any foreign port;

- (D) the operation of Alaska Statutes 43.52.200–295 by the State legislature of Alaska, passed on December 17 in the year 2006 titled “Commercial Passenger Vessel Excise Tax,” so far as the same extends to authorizing the Alaska Port Cities to impose and levy a duty of \$34.50, per passenger, of all ships and vessels of the United States, which shall arrive and be entered in the Alaska port cities from any foreign port;

**SEC. 2.** And be it further enacted, that the collectors of Juneau, Ketchikan, and other Alaska municipalities and their duly authorized port-representatives, may hereby collect the duties that are authorized by this act, and pay the same to such persons as shall be authorized to receive the duty on behalf of the state.

**SEC. 3.** And be it further enacted, that this act shall be in force for twenty years, and from thence to the end of the next session of Congress thereafter, subject to renewal by this Congress.