

No. 22O156, Original

In the **Supreme Court of the United States**

STATE OF NEW YORK,
Plaintiff,

v.

STATE OF NEW JERSEY,
Defendant.

**BRIEF OF *AMICI CURIAE* PORT BUSINESSES
AND OTHER ENTITIES WITH AN INTEREST
IN THE SUCCESS OF THE PORT OF NEW
YORK AND NEW JERSEY IN SUPPORT OF
THE STATE OF NEW JERSEY'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

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INTEREST OF THE *AMICI CURIAE*¹

The New York Shipping Association, Inc. (“NYSA”) is a nonprofit, incorporated trade association that represents the companies that are regulated by the Waterfront Commission of New York Harbor (the “Commission”) and that employ the longshore and port security workers registered by the Commission. In addition to its role in negotiating and administering collective bargaining agreements that govern the terms and conditions of employment for its members’ workforce, NYSA represents the interests of its members in maximizing the efficiency, cost-competitiveness, security, and quality of marine cargo operations through advocacy within the government and the business community.

Sustainable Terminal Services, Inc. (“STS”) is a nonprofit corporation whose members are the six container terminal operators in the Port of New York and New Jersey (the “Port”). Its mission is to promote environmentally sensitive, efficient, and secure marine terminal operations at the Port. STS members are required to be licensed by the Commission and their longshore and port security employees are required to be registered by the Commission.

¹ Pursuant to Supreme Court Rule 37.6, Amici state that no counsel for any party authored this Brief in whole or in part, and no entity or person, aside from Amici, their members, and their counsel, made any monetary contribution toward the Brief’s preparation or submission. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing.

United States Maritime Alliance, Ltd. (“USMX”) is a management collective bargaining association that negotiates and administers the Master Contract with the International Longshoremen’s Association, which covers the terms and conditions of employment for longshore and related craft workers from Maine to Texas. USMX members include port associations, ocean carriers, marine terminal operators, and stevedores. Some USMX members have operations at the Port that are subject to Commission regulation.

The Maritime Association of the Port of New York and New Jersey (“MAPONYNJ”) serves the commercial maritime industry in the Port region by monitoring and disseminating data regarding vessel activity, by acting as an advocate for commercial maritime interests at the municipal, state, and federal levels, and by promoting the security of maritime assets, the sustainability of the marine environment, and the competitiveness of port services. MAPONYNJ represents stakeholders responsible for the movement of cargo within the Northeast Mid-Atlantic region and the ports and waterways within this region. MAPONYNJ membership includes organizations that are subject to the Commission’s regulation.

The New Jersey Motor Truck Association (“NJMTA”) is a nonprofit trade association whose members are trucking companies in the State of New Jersey. The trucking industry moves the bulk of the freight transported into and from the Port. The ability of the trucking industry to keep the supply chain moving depends on the efficiency and productivity of

the marine cargo-handling businesses at the Port that are regulated by the Commission.

The New Jersey Business & Industry Association (“NJBIA”) is a trade association whose members range from Fortune 100 companies to sole proprietor Main Street businesses. NJBIA members’ ability to sustain economic growth and job creation in New Jersey is dependent upon supply chain efficiency and the productivity of the marine cargo-handling businesses that are regulated by the Commission.

The New Jersey State Chamber of Commerce (“State Chamber”) advocates for initiatives that will improve New Jersey’s business climate and enhance job creation. With a broad-based membership ranging from Fortune 500 companies to mom-and-pop establishments, the State Chamber represents every industry sector. The State Chamber works with all levels of government - state and federal courts, the New Jersey State Legislature, the New Jersey Congressional Delegation, and various state and federal agencies - to promote the economic prosperity of its members. Its members’ ability to sustain economic growth in New Jersey is dependent upon supply chain efficiency and the productivity of the marine cargo-handling businesses that are regulated by the Commission.

The African American Chamber of Commerce of New Jersey (“AACCNJ”) is an association whose members are Black-owned businesses in the State of New Jersey. AACCNJ members' ability to sustain economic growth and create jobs in New Jersey is dependent upon supply chain efficiency and

the productivity of the marine cargo-handling businesses at the Port that are regulated by the Commission.

NAIOP New Jersey (“NAIOP NJ”) is a nonprofit corporation representing nearly 850 developers, owners, investors, asset managers, and related professionals in office, industrial, and mixed-use real estate that advocates for effective public policy at the legislative, regulatory, and judicial levels of government for its members. NAIOP NJ advances responsible, sustainable development that creates jobs and benefits the communities in which its members work and live. NAIOP NJ also provides member education and professional development, facilitates communication with the media, and fosters business development opportunities. NAIOP NJ members, especially those active in the logistics (warehouse and distribution center) sector, have a stake in the outcome of this litigation.

The New Jersey Retail Merchants Association (“NJRMA”) is a trade association whose members include the largest online and brick-and-mortar retail brands in the State of New Jersey. Its members’ ability to sustain economic growth and create jobs in New Jersey is dependent upon supply chain efficiency and the productivity of the marine cargo-handling businesses at the Port that are regulated by the Commission.

The Association of Bi-State Motor Carriers (“ABMC”) is an organization whose motor carrier members are responsible for moving a majority share of the freight at the Port. ABMC members’ ability to

transport container freight efficiently is directly impacted by the productivity of the marine cargo-handling businesses that are regulated by the Commission.

The NYSA and the other ten amici (collectively, the “Amici”) have an interest in maintaining efficient operations at the Port to protect the investments and future interests of their members and to realize projected growth at the Port that will play a critical role in supporting these businesses and the economies of New Jersey and the United States. Amici represent a wide variety of business interests and have experienced firsthand the Commission’s negative impact on Port businesses and local industry, and are uniquely situated to explain these realities to the Court.

Amici submit this amicus brief (“Brief”) to bring the Court’s attention to facts not addressed in the briefs previously filed in this action. In addition, Amici submit this Brief to present legal arguments in further support of the submissions of the State of New Jersey.

SUMMARY OF THE ARGUMENT

New Jersey should be permitted to withdraw from the Waterfront Commission Compact (the “Compact”) because to hold otherwise would improperly impinge on its sovereignty in violation of the Tenth Amendment, the anti-commandeering doctrine, and tenets of contract law. The harm that the Commission poses to Port business as compared to its minimal continued utility provides critical context to appreciate the impact of this threatened denial of State sovereignty.

Part I of the Brief explains the economic stakes at the Port and the harm caused by the arbitrary, outdated, and over-burdensome requirements imposed by this rogue agency. *Part II* of the Brief details why New Jersey is better positioned than the Commission to ensure secure and efficient Port operations. *Part III* explains how the facts referenced above implicate significant constitutional and contract law issues.

Given the damage caused by the Commission’s conduct, the established contract law principles that guide the interpretation of the Compact, and the sovereignty guaranteed to the States through the Tenth Amendment, this Court should permit the State of New Jersey’s withdrawal from the Compact.

ARGUMENT

I. The Conduct of the Commission Has Been and Continues to Be Harmful to the Port and to Business Interests in the State of New Jersey.

A. The Amici Have Significant Interests in Ensuring Efficient Operations at the Port.

Amici have economic interests at the Port that are in jeopardy. The outcome of this litigation will have immediate and long-term impact on Amici, as both New Jersey and Amici's member companies and other businesses are reliant on the success of the Port's operations. Preventing New Jersey's withdrawal from the Compact would pose significant risk to the public and private investments that have been made to sustain the Port's position as the highest-volume port on the East Coast and to attract "discretionary" port cargo to enable future growth. See The Port Auth. of N.Y. & N.J., *Our Port*, <https://www.panynj.gov/port/en/our-port.html> (last visited Aug. 23, 2022) (noting the Port is the largest on the East Coast by cargo volume and receives the most "first port of calls" of any East Coast port).

Amici's members and the Port Authority of New York and New Jersey ("PANYNJ") have collectively invested billions of dollars over recent years to ensure they are equipped to meet current and anticipated cargo volume demands. These investments funded raising the Bayonne Bridge to permit the largest container vessels to call the Port, dredging Port channels to a 50-foot depth, reconfiguring terminals,

increasing the number of vessel berths, purchasing additional and more advanced cargo-handling equipment, and other infrastructure improvements. See, e.g., The Port Auth. of N.Y & N.J., *Terminal Improvements*, <https://www.panynj.gov/port/en/our-port/port-development/terminal-improvements.html> (last visited Aug. 23, 2022); Ports America, *Facilities*, <https://www.pnct.net/content/show/facilities> (last visited Aug. 19, 2022); Hugh R. Morley, *New Rail Link Deepens NY-NJ Port's Midwest Reach*, JOC.com (Jan. 7, 2019 5:13 PM), https://www.joc.com/port-news/us-ports/port-new-york-and-new-jersey/new-rail-facility-deepens-ny-nj-port%E2%80%99s-midwest-reach_20190107.html; Michael Angell, *NY-NJ port terminals upping capacity amid import wave*, JOC.com (May 5, 2021 7:00 AM), https://www.joc.com/port-news/us-ports/port-new-york-and-new-jersey/ny%E2%80%93nj-port-terminals-upping-capacity-amid-import-wave_20210505.html; Mike Schuler, *APM Terminals: \$200 Million Investment to Bring 'Megaships' to Port of New York and New Jersey*, gCaptain (Feb. 22, 2017), <https://gcaptain.com/apm-terminals-200-million-investment-to-bring-megaships-to-port-of-new-york-and-new-jersey/>.

These investments have spurred job and industry growth and brought about financial benefits for the entities at the Port, the national economy, and residents of the region. Anne Strauss-Wieder, *The Economic Impact of the New Jersey-New York Port Industry*, N.Y. Shipping Assn., Inc. (2017), <http://nysanet.org/wp-content/uploads/NYSAEconomicImpact2017Report.pdf>. Those financial benefits include approximately \$12 billion in federal, state,

and local tax revenues. Anne Strauss-Wieder, *A 21st Century Supply Chain Critical to the Region and Nation: The 2020 Report on the Economic Value of the New York-New Jersey Port Industry*, N.Y. Shipping Assn., Inc. i (July 2020), https://nysanet.org/wp-content/uploads/2020_NYSA_Economic_Impact_Study.pdf. In the State of New Jersey alone in one recent year, Port industry supported nearly 205,000 direct jobs, nearly 430,000 total jobs, more than \$29.3 billion in personal income, and nearly \$80.4 billion in business activity. *Id.*, at 5; see also Ports America, <https://www.pnct.net/> (last visited Aug. 19, 2022).

PANYNJ projects significant future growth at the Port, including a substantial increase in the volume of containers, automobile imports and exports, and passengers on cruise ships. The Port Auth. of N.Y. & N.J., *Port Master Plan: 2050* 21–24 (July 2019), <https://www.panynj.gov/content/dam/port/our-port/port-development/port-master-plan-2050.pdf>. More specifically, PANYNJ estimates that over the next several decades, Port container volumes will double or triple, automobile imports and exports will grow to between 800,000 and 1.3 million vehicle units, and cruise ship passenger volume will grow by between 1.3 and 2.6 million passengers. *Id.* To promote this potential growth, PANYNJ crafted the “Port Master Plan 2050,” which proposes short- and long-term actions for each of the Port’s six container terminals, four of which are in New Jersey. *Id.* These projects are expected to create a more sustainable and resilient model for the movement of goods through the Port and the region it serves. *Id.*, at 29–30.

This growth, far from being guaranteed, is predicated in large part on a steady and reliable longshore work force. Indeed, it is difficult to maintain sufficient labor to fulfill even current needs at the Port due to the regular attrition of workers. See, e.g., Opp'n App. 38a–40a (Decl. of John J. Nardi, New York Shipping Assn.); Chris Dupin, *New York/New Jersey seeks to add dockworkers*, American Shipper (Dec. 14, 2018), <https://www.freightwaves.com/news/new-york-new-jersey-seeks-to-add-dock-workers>. To meet increasing demand and respond to the anticipated scaling up of Port cargo volumes, a pool of labor candidates who can be hired, trained, and on-boarded quickly is critical.

Beyond these financial investments, Amici have direct involvement in the daily operations of the Port. For example, on behalf of its members, NYSA negotiates and administers local collective bargaining agreements establishing the terms and conditions of employment of longshore and related craft workers and security officers, and facilitates the daily hiring of thousands of these workers. See N.J. Stat. Ann. § 32:23-105.1.² In addition, NYSA oversees the initial hiring and onboarding of these workers. NYSA's efforts in hiring new longshore workers and checkers in 2021 involved screening over a thousand interested candidates, interviewing approximately 400 of them, and hiring a total of 307 new workers. N.Y. Shipping Assn., Inc., *Supply Chain Fluidity – A Gateway Built*

² All citations to the Waterfront Commission Act, N.J. Stat. Ann. § 32.23 *et seq.*, refer to the statutory text as published prior to its repeal upon the enactment of the law at issue in this litigation. See 2017 N.J. Sess. Law Serv. c. 324.

for Resistance: NYSA 2021 Annual Report (2021), <https://nysanet.org/wp-content/uploads/NYSA2021AnnualReport.pdf>.

Some of Amici's members are directly regulated by the Commission. For example, the Commission licenses NYSA's stevedoring-company members. See N.J. Stat. Ann. § 32:23-19. Similarly, the longshore employees of NYSA's stevedoring-company members and the Port security officers employed by NYSA's security-company members are required to be registered, see § 32:23-27, and licensed by the Commission, see § 32:23-39. In addition, NYSA's stevedoring-company members are subject to audit by the Commission, see § 32:23-60, and are required to pay assessments based on the gross wages of their registered and licensed employees to fund the operations of the Commission, see § 32:23-58.

As explained below, the resulting extensive interactions with Commission staff have illustrated a troubling picture of problems caused by the Commission's unaccountable conduct.

B. The Original Duties of the Commission Have Been Corrupted and Improperly Expanded Over Time Such that Arbitrary Overregulation Now Threatens to Stifle Industry Growth.

For most of its history, the Commission generally adhered to its prescribed role in vetting candidates for the longshoremen's register and performing its other authorized functions. Over recent years, however, the Commission unilaterally

has expanded and corrupted its role (in some cases beyond its statutorily prescribed duties) and assumed a more intrusive posture in Port hiring that has suppressed efficient operations of NYSA's members and other businesses at the Port. This overregulation is particularly damaging for this highly competitive industry where entities maintain their business only when they can guarantee the secure, timely, and reliable movement of goods. New Jersey has found itself unable to reign in the rogue actions of Commission staff in the State's efforts to protect its economic interests at the Port.

The Waterfront Act of 1953 (the "Act") vested the Commission with specified, delineated powers, including the ability to establish employment information centers, register and license employees, and assess and collect fees from employers for the purposes of covering Commission expenses. See Compl. App. 9a-26a (arts. V-X). The Commission has expanded its authority beyond the role originally intended through purported reliance on section 5-p of the Act, referred to as the "Closed-Register" provision. See N.J. Stat. Ann. § 32:23-114; see also § 32:23-229. By invoking this provision, the Commission periodically has opened and closed the register of persons licensed to work at the Port, effectively denying employers the ability to perform the most basic of management functions – hiring new workers when needed and replacing workers lost through attrition or retirement. In recent years, the Commission has imposed arbitrary requirements on hiring that make conducting business at the Port more burdensome and inefficient, without furthering the

Commission's original goals. See N.Y. Office of the Inspector Gen., *Investigation of the Waterfront Comm'n of N.Y. Harbor* (Aug. 2009), <https://tinyurl.com/ydxvbk3m> (finding Commission had engaged in unchecked misconduct that demonstrated both ineptitude and corruption, including through overregulation of business and misuse of funds). The Commission also has unilaterally, and without statutory support, interfered in the collective bargaining process to the detriment of both labor and management. See Opp'n App. 38a–40a (Decl. of John J. Nardi, New York Shipping Assn.).

Unnecessary restrictions have caused significant hiring delays, which in turn have caused a shortage of Port workers. The limited number of workers jeopardizes the safe and efficient function of Port operations and undermines efforts to meet increasing and projected Port needs. See Opp'n App. 38a–40a (Decl. of John J. Nardi, New York Shipping Assn.). In some cases, these hiring delays have lasted months or even years. For example, when the industry requested 682 new workers in 2013 to meet basic labor needs, the Commission did not approve the first hire until the following year, and it took over two years to complete the full course of new hiring, which the Commission limited to 225 new workers. See, e.g., Dupin, *New York/New Jersey Seeks to Add Dockworkers*, *supra*; Ted Mann, *On the Waterfront: A Dispute Over Hiring*, Wall St. J. (Nov. 4. 2013 10:17 PM), <https://www.wsj.com/articles/on-the-waterfront-a-dispute-over-hiring-1383621250>.

Labor shortages pose a real threat to port operations, safety, and development. As one example, experts estimated that a breakdown in labor-management negotiations at West Coast ports in 2015 would have cost the national economy \$2 billion per day. See James Nash and Alison Vekshin, *West Coast Ports Employers, Dockworkers Reach Tentative Five-Year Contract Deal*, gCaptain (Feb. 21, 2015), <https://gcaptain.com/west-coast-employers-dockworkers-reach-five-year-contract-deal/>. The nine-month standoff before a contract was signed led to spoiled product, increased shipping costs, and rationing of goods. *Id.* Today, ports are particularly sensitive to labor disruptions as they continue to work through residual pandemic-related backlogs. Emma Griffith, *Global Port Labor Issues Add to Bottlenecks, Limited Credit Effect*, FitchRatings (July 21, 2022 1:48 PM), <https://www.fitchratings.com/research/infrastructure-project-finance/global-port-labor-issues-add-to-bottlenecks-limited-credit-effect-21-07-2022>.

The Commission's chaotic and inefficient regulation is intertwined with its mismanagement of its own affairs. The Commission has had difficulty maintaining basic functions, including the mission-critical responsibility of passing a budget to fund its operations. As noted, NYSA's stevedoring-company members fund the Commission's budget through an assessment based on gross payroll of registered and licensed workers. See N.J. Stat. Ann. § 32:23-58. Under Article XIII of the Compact, the Commission is required to adopt a budget each year. The dysfunction of the entity has impacted even this core requirement, as the Commission is currently operating without any

budget and is not presently authorized to collect assessments. In addition, it has amassed a warchest of reserves, hidden from financial reporting and statutorily mandated budgeting requirements, far in excess of that permitted by its enabling legislation. See Compl. App. 31a (art. XIII, § 3). Moreover, instead of using those ill-gotten gains to modernize its cumbersome operations or fulfill its defined mission, or returning these excess reserve funds to the employers who paid them, the Commission's efforts appear to be focused on paying high-priced lobbyists and outside counsel and engaging in media tours to justify its continued existence.

All of this has placed the Port at a competitive disadvantage, stifled job growth, and interfered with Port prosperity. See Opp'n App. 38a–40a (Decl. of John J. Nardi, New York Shipping Assn.).

II. New Jersey Is Better Equipped to Regulate Businesses in Its Own Port District, as the Commission Has Outlived Its Utility and Is Out of Touch with the Needs of the Industry and the People of New Jersey.

A. The Commission Has Proven to Be Unable to Adapt to Current Needs at the Port.

The Commission was designed to be a temporary entity to assist with a temporary need. See *Record of the Public Hearings Held by Gov. Thomas E. Dewey on the Recommendations of the N.Y. State Crime Commission for Remedying Conditions on the*

Waterfront of the Port of N.Y. 661–663 (1953) (hereinafter Dewey Hearings).

The productive operation of the Commission is premised on the joint, collaborative participation of New York and New Jersey, as indicated by its structure that includes one commissioner from each State who in theory must act with unanimity for Commission action to take place. See Compl. App. 6a (art. III, §§ 2–3). State representatives are intended to work in tandem to support mutually beneficial goals. Instead, over time, the Commission has minimized New Jersey’s interests in favor of the interests of Commission staff with the acquiescence of the New York legislature. Whereas Port activity historically was focused in New York, that has shifted over time such that, as reported in the business records of NYSA in 2021, more than 90 percent of the work activity at the Port now occurs in New Jersey, where the four largest of the Port’s six terminals are located. See M. Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger* 78–80 (2006); N.J. Stat. Ann. § 32:23-229; N.Y. Shipping Assn., Inc., *People, Priorities and Progress: 2015 Annual Report 2* (2015) (reporting that 85 percent of the work activity occurs in New Jersey), <http://nysanet.org/wp-content/uploads/NYSA2015AR.pdf>; The Port Auth. of N.Y. & N.J., *Containerized Cargo*, www.panynj.gov/port/containerized-cargo.html (last visited Aug. 19, 2022).

Multiple times in recent history, New Jersey has sought to reform the Compact and the Commission to make them more compatible with and more responsive to the economic needs of the State.

See Prelim. Inj. App. 96a (letter from Gov. C. Christie, Aug. 7, 2017) (“In 2015, I emphasized the imperative that the Commission work hand in hand with the State to improve port commerce and, to that end, called upon the Commission to modernize its practices. Since that time, however, the Commission has continued to expand its jurisdiction and allowed brief but damaging labor shortages in the Port.”). For example, in 2007, New Jersey passed legislation to modernize the process for hiring longshoremen at the Port. New York did not pass corresponding legislation. See 2007 N.J. Sess. Law Serv. c. 167, §§ 1, 2. In 2014, the New Jersey Legislature enacted Joint Resolution No. 61, in which the State implored New York to pass legislation consistent with the 2007 legislation, explaining that the processes in place hindered the ability of employers and labor organizations to add new workers to the register. New York did not do so. Three years later, the majority and minority leaders in the New Jersey Senate and Assembly sent a letter to the majority leaders in the New York Senate and Assembly, seeking once again to have New York pass legislation amending the Compact. Again, New York did not act. Indeed, New Jersey has enacted specific amendments to the Closed-Register provision of the Act to end the Commission’s micromanagement of hiring at the Port, but New York has refused to enact companion legislation. See N.J. Stat. Ann. § 32:23-114; Waterfront Comm’n of N.Y. Harbor, *Annual Report 2008-2009* 12 (2009), https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/20814/WCNYH_2008_Annual_Report.pdf?sequence=1&isAllowed=y (boasting that “[t]he Executive Division, working in conjunction with the Law

Division, was able to successfully stymie legislation in New York State that would have ended the Commission's 5-p powers").

In light of this continued effort on the part of Commission staff to influence New York legislators, resulting in New York's unwillingness to make necessary updates to Commission functions, New Jersey ultimately made the decision to withdraw from the Compact altogether and reclaim its police powers at its ports. The outdated structure of the Commission, which fosters stagnation and archaic processes, was seen as a threat to New Jersey's economy. New Jersey is not seeking to abandon responsibility for Port oversight, nor does it argue that the original purpose of the Compact is entirely defunct. Instead, as described more fully below, it intends to utilize its own resources to employ more flexible, efficient, and modern law enforcement capabilities at the Port to optimize the Compact's original goals. New Jersey's interests in being able to control its own ports as a sovereign aligns with prospects for long-term economic success at the Port.

B. New Jersey Is Fully Prepared to Assume, and Indeed to Optimize, Policing Responsibilities at the Port.

New Jersey is able to provide more sophisticated and effective law enforcement capabilities at the Port. With support of organizations such as NYSA, New Jersey has undertaken extensive efforts to prepare the New Jersey State Police ("NJSP") for assumption of the Commission's functions. As the State's primary law enforcement

body, NJSP is well-positioned to assume the vetting and law enforcement responsibilities of the Commission on the New Jersey side of the harbor. In addition, a robust network of entities, including the PANYNJ Police, the Coast Guard, Customs and Border Patrol, the Drug Enforcement Administration, the Federal Bureau of Investigation, and local police departments, retain jurisdiction over law enforcement concerns at the Port and remain primary points of contact for addressing problems as they arise. See, e.g., Opp'n App. 3a–5a (Decl. of Major Frederick P. Fife, New Jersey State Police, Investigation Bureau).

NJSP has a demonstrated history of success in operations management, most recently by playing a critical role in New Jersey's response to the COVID-19 pandemic, including through use of a unified command structure that will play a critical role in Port management. See, e.g., Opp'n App. 1a–3a (Decl. of Major Frederick P. Fife, New Jersey State Police, Investigation Bureau). NJSP can engage necessary staff, use advanced technologies, and employ time-tested operations management strategies to ensure Port safety, compliance, and efficiency. *Id.*

Shifts in the most pressing policing needs at the Port support New Jersey's proposed plan to have NJSP assume law enforcement responsibilities there. The Commission was formed to address organized crime activity at the Port and is structured around that mission. See *De Veau v. Braisted*, 363 U.S. 144, 150 (1960). The body that originally recommended the creation of an oversight entity at the Port envisioned a temporary agency that would exist only “as long as necessary” to eliminate the identified organized crime

issues. See Dewey Hearings 661–663. Though organized crime potentially remains a threat at ports and in other industries, terrorism and cyber threats have emerged in recent years as more significant and present dangers that require increased focus at ports. See, e.g., Stephen S. Cohen, University of California, Berkley, *Boom Boxes: Containers and Terrorism*, in *Protecting the Nation’s Seaports: Balancing Security and Costs* 91 (Jon D. Haveman & Howard J. Shatz eds., 2006), https://www.ppic.org/wp-content/uploads/R_606JHR.pdf. In particular, events of recent years have brought heightened concerns that shipping containers, which are well-suited to transporting and hiding a variety of potentially dangerous items, will be employed to conduct nefarious activity. *Id.*

Perhaps because it is accountable to no one, the Commission has made minimal effort to update itself and respond to the Port’s 21st century challenges. It remains, despite New Jersey’s efforts, a 1950s-era agency using paper and pencil to combat sophisticated threats. Restrictions on hiring practices will not be sufficient to detect cyber-crime, foreign counterintelligence, terrorism, and drug trafficking as they relate to the Port. NJSP, in contrast, has a proven track record of gathering intelligence and coordinating with local and federal law enforcement that will better serve the interests of the Port and the people of New Jersey.

NJSP remains equally prepared to manage any issues with organized crime activity at the Port, as evidenced by its successful history investigating such crimes. See Opp’n App. 3a (Decl. of Major Frederick P. Fife, New Jersey State Police, Investigation Bureau);

New Jersey State Police, *Violent & Organized Crime Control Central Bureau*, <https://nj.gov/njsp/division/investigations/violent-organized-crime-control-central.shtml> (last visited Aug. 24, 2022); United States Congress, Senate Committee on Governmental Affairs, Permanent Subcommittee on Governmental Affairs, 98th Cong., 2d Sess., Rep. on Waterfront Corruption (Comm. Print 1984) (detailing NJSP's success in undercover investigation of organized crime activity at a Newark, New Jersey trucking company).

It is noteworthy in this context that the Commission is the only entity of its kind in the nation. Other states have demonstrated success in managing port operations without such a burdensome construct, and New Jersey stands ready, willing, and able to do the same.

III. The Circumstances Described Above Demonstrate the Real Impacts of the Current Encroachment on New Jersey's Sovereign Authority.

The facts outlined above demonstrate the consequences of any continued usurpation of New Jersey's sovereign authority. As explained below, it would be constitutionally improper and violative of State sovereignty to hold New Jersey perpetually subservient to this 1950s-era Commission and forever deprive New Jersey of the ability to police its own ports. There is no compelling reason to do so where even basic tenets of contract law would permit New Jersey's withdrawal from the Compact.

A. Principles of State Sovereignty Permit Withdrawal.

The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Thus, the Constitution sets the boundaries of federal authorities, as “[s]tates possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

State legislatures are therefore vested with the authority to decide on an ongoing basis how best to exercise state police powers. In recognition of these core principles, the Court has held that Congress does not possess “the power to issue direct orders to the governments of the States.” *Murphy v. Nat’l Collegiate Athletic Assn.*, 138 S. Ct. 1461, 1476 (2018). Moreover, Congress may not “commandeer the legislative processes of the States.” *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Va. Surface & Mining Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)).

The Court has broadly applied these anti-commandeering principles. For example, Congress may not “compel the States to enact or administer a federal regulatory program.” *Printz v. United States*, 521 U.S. 898, 926 (1997) (citation omitted). Most recently, the Court held that the Tenth Amendment precludes the federal government from requiring a

state legislature to refrain from repealing existing gaming laws. *Murphy*, 138 S. Ct., at 1476.

The fact that almost seventy years ago, elected officials in New Jersey agreed to a partial and limited surrender of sovereignty does not disrupt these conclusions. The Court has held that a federal law may be “an unconstitutional infringement of state sovereignty” even “when state officials consented to the statute’s enactment.” *New York*, 505 U.S., at 181. Thus, what New Jersey’s elected officials did 33 legislatures and 13 governors ago is not dispositive here since the elected officials of the people of New Jersey today have stated a desire to chart a different course. Indeed, in *Murphy*, the Court held unconstitutional a federal law that forbade states from authorizing sports betting, even though New Jersey had the opportunity to opt out of that law at the time of enactment but declined to do so. 138 S. Ct., at 1470–1471.

Particularly when a compact does not contain any statement of duration or explicit limitation on termination or withdrawal, the fact that a State once consented to it ought not to be construed to mean that the State is perpetually bound. In such circumstances, anti-commandeering and related principles of State sovereignty permit a state to withdraw at its discretion, where, as here, vested rights are not at issue. See N.J. Br. in Support of J. on the Pleadings 27–30.

Denying New Jersey the right to withdraw from the Compact would deprive New Jersey of the ability to regulate its own ports and interfere with the right

of New Jersey's residents to govern themselves. When New Jersey agreed to the Compact in 1953, its Legislature neither directly nor indirectly consented to any limitation on its right to withdraw therefrom. Yet now, New York's ongoing opposition to change threatens to render the Compact effectively perpetual. If New Jersey is required to remain in the Compact, the State will have been deprived of its right to govern itself within its borders, "as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine." *Murphy*, 138 S. Ct., at 1478.

Similar considerations underlie the Guarantee Clause of Article IV, Section 4 of the Constitution, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government" U.S. Const. Art. IV, § 4. By the Constitution, "a republican form of government is guaranteed to every state in the Union, *and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration*" *In re Duncan*, 139 U.S. 449, 461 (1891) (emphasis added). While the Court historically has been reluctant to entertain challenges under the Guarantee Clause, see *Luther v. Borden*, 7 How. 1 (1849); *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion), the Court has recognized the possibility that not all claims under the Guarantee Clause present nonjusticiable political questions, opening the door to hearing such claims in some circumstances. See *Reynolds v. Sims*, 377 U.S. 533,

582 (1964); see also L. Tribe, *American Constitutional Law* 398 (2d ed. 1988) (challenging use of political question doctrine to insulate Guarantee Clause challenges). A case brought by a State itself as opposed to a private party presents an especially compelling context for justiciability. See *Agua Caliente Band of Cahuila Indians v. Superior Court*, 116 Cal. App. 4th 545, 10 Cal. Rptr. 3d 679, 689–690 (2004) (“[W]ithout a right to bring suit, [a] state’s constitutional right to preserve its republican form of government would be ‘ephemeral’”), superseded on other grounds, 40 Cal. 4th 239, 148 P.3d 1126 (2006).

In *New York v. United States*, 505 U.S. 144 (1992), which involved a challenge to waste disposal incentives under the Low-Level Radioactive Waste Policy Amendments Act of 1985, the Court addressed New York’s claim regarding violations of the Guarantee Clause. In ultimately determining that it was not required to reach the question of whether such claims raised nonjusticiable questions, the Court noted that even if the claim was justiciable, the incentives under scrutiny could not “reasonably be said to deny any State a republican form of government” as they represented “permissible conditional exercises of Congress’ authority.” *Id.*, at 185. The Court emphasized that through the incentives, “Congress offer[ed] the States a legitimate choice rather than issuing an unavoidable command. The States thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate.” *Id.* Here, however, New Jersey would face a direct and significant loss of its constitutional authority and its

inherent autonomy if denied the right to exit the Compact. The Commission's officials are standing in the stead of New Jersey officials, and the people of New Jersey are negatively impacted as a result, particularly where the Commission has proven to be accountable to no one and cannot be "voted out" by New Jersey residents. Compare *id.*, at 168 ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.").

B. Principles of Contract Law Also Permit Withdrawal.

The constitutional issues here are even more pronounced since the language of the Compact itself does not preclude withdrawal or termination. As the Court has explained, "when confronted with silence in compacts touching on the States' authority to control their waters, . . . '[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, . . . it is that each State was left to regulate the activities of her own citizens.'" *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 632 (2013) (quoting *Virginia v. Maryland*, 540 U.S. 56, 67 (2003)). Here, the absence of express language on withdrawal from the Compact should be interpreted to allow for parties to exit the arrangement. *Id.*; cf. Restatement (Third) of Foreign Relations Law of the United States § 332, Comment *b* (1987) (treaty that is silent on termination is generally construed to have an implied right of withdrawal).

Compacts between States operate generally according to “principles of contract law.” *Tarrant*, 569 U.S., at 628. Contract principles dictate that where a provision is ambiguous, context is necessary to infer meaning. *Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm’n*, 894 F.3d 509, 527 (CA3 2018). In this case, there is no support for New York’s suggestion that the Compact’s requirement that both New York and New Jersey concur on “amendments” was understood to prevent one member from withdrawing.

First, the plain meaning of the word “amendment” does not include withdrawal. See Black’s Law Dictionary 102 (11th ed. 2019) (defining “amendment” as “[a] formal and usu. minor revision or addition proposed or made to a statute . . .; specif., a change made by addition, deletion, or correction; esp., an alteration in wording”); Black’s Law Dictionary 106 (4th ed. 1951) (defining “amendment” in the context of legislation as “a modification or alteration proposed to be made in a bill on its passage, or an enacted law”); Webster’s New International Dictionary 83 (2d ed. 1961) (defining “amendment” as “[a]ct or instance of amending, as by alteration or change, esp. for the better; correction of a fault or faults” or “a revision of an act, charter, or the like”). The plain meaning of the term “amendment” does not capture the outright withdrawal of a party to a contract, and instead centers on revisions to the terms therein that are binding on the other party. To the extent there is any ambiguity here, courts should “turn to other interpretive tools to shed light on the intent of the Compact’s drafters,” such as “the background notion

‘that States do not easily cede their sovereign powers, including their control of waters within their own territories.’” *Wayne Land*, 894 F.3d, at 527 (quoting *Tarrant*, 569 U.S., at 631).

Second, the stated purpose of the Compact and its structure demonstrate the weakness of New York’s interpretation. The Commission was intended to be a temporary entity with limited goals, and was intended to balance the interests of New Jersey and New York through reliance on unanimous action of two commissioners who would in theory represent the respective interests of their state. See Compl. App. 6a (art. III, § 2); Dewey Hearings 661–663. A Commission that one State has decided to abandon entirely simply cannot function.

Preventing New Jersey’s withdrawal from the Compact would fly in the face of contract interpretation principles and would serve to throw away the key to New York’s handcuffs on New Jersey’s sovereignty.

CONCLUSION

New Jersey should not be blocked from withdrawing from the Compact. Amici respectfully request that the Court grant New Jersey’s motion for judgment on the pleadings.

Respectfully submitted,

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