

No. 220156, Original

IN THE
Supreme Court of the United States

State of NEW YORK,
Plaintiff,

v.

State of NEW JERSEY,
Defendant.

**REPLY BRIEF ON MOTION FOR
PRELIMINARY RELIEF**

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INTRODUCTION

The Court should issue a preliminary injunction preserving the status quo that has governed the Port for six decades and preventing the irreparable harms that will otherwise flow from New Jersey's threatened actions on March 28. There is no merit to New Jersey's remarkable contention that preliminary relief will be ineffective because New Jersey will seek to obstruct the Commission's operations, thereby undermining the Court's order. This Court's preliminary injunction will be just as effective as the district-court injunction that preserved the Commission's authority and protected public safety and Port operations for the last four years.

New Jersey's merits arguments also fail. The Compact's terms and other indicia all point to the same conclusion: New York and New Jersey intended to relinquish sovereign authority to be jointly and indivisibly held by the bistate Commission. Such express relinquishment does not allow New Jersey to unilaterally withdraw, terminate the bistate entity, and seize the powers New Jersey shared, absent an express Compact term allowing such unilateral action. And the Compact's provisions requiring unanimity for Commission action and Compact changes indicate an intention for the States to work together to further the Commission's public purposes, not to terminate the Commission unilaterally or paralyze its operations.

ARGUMENT**I. New Jersey's Threatened Actions Will Encroach on New York's Sovereignty and Disrupt Port Operations.**

As New Jersey acknowledges (PI App. 63a), confusion and upheaval will likely result on March 28 when two sets of officials assert conflicting police powers over the Port. PI Mot. 13-16. Yet New Jersey contends (Opp. 30-32) that preliminary relief is unwarranted because it could obstruct the Commission's work even if a preliminary injunction issues. The Court should not allow New Jersey to defeat a preliminary injunction by threatening to undermine the relief sought. Also, there is no reason why a preliminary injunction would be ineffective at preserving the status quo, when the injunction in the Commission's litigation effectively did so.

As New Jersey does not dispute, preliminary relief preserving the Commission's jurisdiction and requiring New Jersey to abide by the Compact will maintain the safety of the Commission's law-enforcement officers, preserve the confidentiality of the Commission's investigations, and prevent the chaos and disruptions to Port operations that would flow from New Jersey's withdrawal. And it will prevent much of New Jersey's threatened obstructionist behavior as well. The Compact prohibits obstructing or interfering with the Commission's enforcement of the Compact. Compl. App. 8a. Preliminary relief will thus prevent New Jersey from, inter alia, seizing the Commission's confidential files, blocking the Commission's access to the Port, and disrupting the Commission's systems for licensing and background check.

The Compact also requires each State to appoint and maintain a Commissioner, who must hold office until a successor is appointed. Compl. App. 6a. Each Commissioner takes an oath of office, swearing to “faithfully, impartially and justly perform all the duties of the office.” Reply App. 11a.

Contrary to New Jersey’s contention (Opp. 29-31), the need for both Commissioners to agree on Commission actions does not imply that one Commissioner may refuse to participate meaningfully in decision-making. The Compact requires the Commissioners to work together to fulfill the Commission’s responsibilities. Refusing to consider Commission actions, as New Jersey threatens to do (Opp. 30-31), likely constitutes a breach of the Compact and a violation of a Commissioner’s oath of office (Reply App. 11a). New York does not seek an order compelling the New Jersey Commissioner to make any particular decision. *See* Opp. 31. Courts frequently order government officials to fulfill their obligations in good faith without directing the outcome. *E.g., In re People’s Mojahedin Org. of Iran*, 680 F.3d 832, 838 (D.C. Cir. 2012) (ordering determination on pending petition that is then entitled to deference).

Anyway, the Commission will likely continue functioning if preliminary relief is granted, even if New Jersey tries to obstruct its operations. The Commission’s ongoing law-enforcement investigations, and most of its licensing functions, do not need further votes from the Commissioners to continue. Reply App. 17a & n.3.

Finally, if New Jersey unilaterally undermines the Commission’s functions despite a preliminary injunction, the ensuing disruptions to the Port would hurt

the entire region. New Jersey's responsibility for those harms would be plain. The negative consequences—to public safety, workers, and the economy—will likely deter New Jersey from following through with its threats.

II. The Equities Decisively Favor Preserving the Status Quo.

The Compact and Commission have remained in force for more than sixty years. That established status quo has not “shifted” (Opp. 32); the Commission continues to fulfill its critical responsibilities. New Jersey's stated concerns about the Commission's performance are refuted by judicial decisions, statements of New Jersey officials, and its own cited sources.

New Jersey relies (Opp. 3, 6) on a 2009 report discussing the Commission's past leadership and transparency problems. But as the report explains, the Commission undertook extensive reforms to ameliorate those issues.¹ And a letter approved by New Jersey's declarant, then-Commissioner Michael Murphy, confirms that the Commission modernized its technology, streamlined licensing, and instituted accountability mechanisms. Reply App. 1a-8a, 13a-14a.²

New Jersey's other contentions are likewise incorrect. See Reply App. 13a-17a. To list two: court

¹ See N.Y. State, Off. of the Inspector Gen., *Investigation of the Waterfront Commission of New York Harbor* 5, 8, 36-38 (2009) ([internet](#)).

² The letter refutes the unsupported contention that the Commission has caused labor shortages (Opp. App. 38a-39a). See Reply App. 3a-4a; see also *id.* at 19a (New Jersey declarant previously disavowed this assertion).

decisions upholding the Commission's regulatory authority demonstrate that the Commission has not "overregulated" the industry (Opp. 3). *See New York Shipping Ass'n, Inc. v. Waterfront Comm'n of N.Y. Harbor*, 835 F.3d 344, 354-55, 357 (3d Cir. 2016). And unprecedented activity levels at the Port show that the Commission is not "stifling commerce" (Opp. 3). *See October Becomes the Largest Month on Record for Total Volume at the Port of NY and NJ*, Port of N.Y. & N.J.: Breaking Waves (Dec. 2, 2021) ([internet](#)).

Absent preliminary relief, New Jersey's threatened actions will undermine the Commission's law-enforcement and regulatory work. The resulting harms to public safety and Port operations will not be fully repairable. If on March 28, the Commission is forced to terminate or drastically reduce its activities, it will be difficult or in some cases impossible to restart the Commission's investigations and regulatory functions if New York ultimately prevails here.

By contrast, New Jersey will not be irreparably harmed by waiting to enforce Chapter 324 while this Court reviews the merits. New Jersey cites its purported preparations to seize the Commission's assets and powers (Opp. 29), but does not explain why these preparations cannot resume if this Court ultimately rules in its favor. New Jersey was enjoined from enforcing Chapter 324 for nearly four years during the Commission's lawsuit. Preliminary relief from this Court will extend that period for the short time needed to resolve this litigation.

Finally, New York did not unreasonably delay in filing this original action or seeking preliminary relief. Opp. 25-28. It is undisputed that invoking this Court's original jurisdiction should be a last resort. *See Arizona*

v. New Mexico, 425 U.S. 794, 796-98 (1976). While the Commission's lawsuit was pending, the Court likely would have denied a motion to file a bill of complaint. PI Mot. 19-20. That is true despite New York's sovereign interests (Opp. 27) because the Court often declines to exercise original jurisdiction where, as here, another lawsuit brought by *non-State parties* may resolve the same legal questions. See *Arizona*, 425 U.S. at 796-97.

New York was not required to intervene in the Commission's lawsuit (Opp. 27) to protect its interests, particularly when intervention likely would have created a jurisdictional quagmire. Intervention would have transformed that lawsuit into one between two States, risking a dismissal by the district court for lack of jurisdiction and jeopardizing the preliminary relief then protecting New York. See *Louisiana v. Mississippi*, 488 U.S. 990, 990 (1988) (White, J., dissenting). And this Court likely would have declined to exercise jurisdiction over an original action by New York because a district-court lawsuit by the Commission might have resolved the dispute. See *Massachusetts v. Missouri*, 308 U.S. 1, 19-20 (1939). New York was not required to create these risks rather than allowing the Commission's lawsuit to proceed—potentially obviating the need for this lawsuit.

That New York waited for the jurisdictional path to clear does not undermine the irreparable harms it now faces (Opp. 25-26), absent preliminary relief. New York did not wait until the harms came to pass before seeking preliminary relief. Cf. *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers). Rather, until recently, the district court's orders in the Commission's case preserved the status quo and prevented the irreparable harms that will now

flow from New Jersey’s threatened actions absent relief from this Court.

After the injunction was lifted, New York first reasonably sought to resolve the dispute through other avenues. New Jersey had sent a letter to the Commission on November 23 (Opp. App. 57a-59a), before the district court lifted its injunction on December 3, and officials from both States began a dialogue. New Jersey then triggered its statute’s withdrawal provision on December 27, 2021. PI App. 32a-39a. New York continued to engage with New Jersey to seek a joint solution without further litigation. *See* Opp. App. 45a (January 20, 2022 email referencing “prior calls”); PI App. 40a-42a. But New Jersey refused to engage in meaningful negotiations.³ *See* PI App. 57a-58, 61a-64a.

New York sought relief from this Court as soon as practicable thereafter. Governor Hochul—who assumed office on August 24, 2021, while the district court’s injunction remained in place—needed to consider and consult with other officials about the weighty decision to file an original action against another State. *Cf. United States v. Mendoza*, 464 U.S. 154, 161 (1984) (“successive Administrations” taking “differing positions with respect to the resolution of a particular issue” does not bar government from litigating issue). When it was clear that New York had no other feasible options to stop New Jersey from

³ There was little reason for New York to negotiate with New Jersey during the Commission’s lawsuit (Opp. 27) because the district court had found that New Jersey was acting unlawfully. New York also had reason to conclude that New Jersey would not withdraw unilaterally because New Jersey officials, including New Jersey’s Commissioner, had said that such unilateral withdrawal is unlawful. *See* Reply App. 14a-15a. *See* also PI Mot. 30.

terminating the Commission, the State acted quickly to file this original action and motion for preliminary relief.

III. New York Is Likely to Succeed on the Merits.

A. The Compact's Terms Unambiguously Prohibit Unilateral Termination.

New Jersey is incorrect (Opp. 19-22) that the Compact is silent about withdrawal. The Compact specifies the only two ways the agreement may be terminated: mutual consent of the compacting States or Congressional repeal. PI Mot. 23-25. New Jersey's attempt to engraft a third method into the agreement—unilateral termination—is contrary to the Compact's express terms.

New Jersey wrongly contends (Opp. 19-20) that the Compact's concurrency requirement does not govern because “withdrawal” and “amendment” have different dictionary definitions. Termination *is* a form of amendment: it is the ultimate amendment. None of the dictionary definitions suggest that the terms are mutually exclusive. New Jersey does not dispute that Chapter 324 will alter the Compact's terms by dissolving the Commission and redistributing its assets and obligations—fundamental “amendments” that require New York's consent. PI Mot. 8.

Indeed, the sweeping changes that Chapter 324 requires belie New Jersey's assertion (Opp. 20-21) that unilateral withdrawal does not “trample on the sovereignty of another State.” Particularly in a bistate compact, both “the unilateral decision to expand [an interstate] agency's powers” by amendment (Opp. 20) and the unilateral decision to terminate that entity

infringe the sovereignty of the other signatory by altering the scope of the States' jointly shared powers.

Compacts sometimes treat withdrawal differently from other amendments for practical reasons not present here. *See* Opp. 19-20. For example, in a multi-state compact, one State's withdrawal might not fundamentally alter the remaining States' obligations to each other, but amendment of the Compact's terms would. No such distinction lies here, because New York and New Jersey are the only Compact signatories.

The Compact's provision that the Commission "act only by unanimous vote of both" Commissioners (Compl. App. 6a) does not suggest that one compacting State may unilaterally withdraw. *See* Opp. 23. New Jersey relies on the theoretical power of its Commissioner to block any Commission action. But the need for unanimity suggests that the drafters intended the Commissioners to work together to further the Compact's purposes, not use their votes to paralyze the Commission. Indeed, New Jersey's contrary view contravenes the Compact's requirement that it "shall be liberally construed" to effectuate its purposes. Compl. App. 35a. And in any event, the ability to block Commission actions is wholly different from the power to terminate its existence. *See supra* at 3.

B. Additional Factors Confirm That Unilateral Termination Is Prohibited Here.

Even if the Compact was silent on withdrawal, other tools of interpretation establish that the Compact does not allow unilateral termination.

1. A core tenet of bistate compacts is the presumption that no signatory State may unilaterally alter or

end the agreement unless expressly authorized. PI Mot. 27-28. New Jersey's arguments in favor of a default rule *favoring* unilateral termination are meritless.

First, the “background notion that a State does not easily cede its sovereignty” offers no support for reversing the presumption here. Opp. 11 (quoting *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013)). In *Tarrant*, the Court declined to hold that an interstate compact granted members cross-border rights to water where the compact was silent about relinquishment of those rights. The Court relied on the settled presumption that “States possess an absolute right to all their navigable waters and the soils under them for their own common use.” *Tarrant*, 569 U.S. at 631 (quotation marks omitted). Thus, the compacting States could not have intended to cede their “core state prerogative to control water within their own boundaries” through silence. *Id.* at 632.

The Compact, by contrast, makes clear that New Jersey *expressly* ceded certain sovereign police powers to the Commission and thus to shared control with New York. Compl. App. 7a-9a, 114a-118a. Indeed, the fundamental purpose of the Compact was to combine the police powers of both States to create a bistate entity with authority to regulate the whole Port. Compl. App. 3a. Unlike in *Tarrant*, it is not plausible that New Jersey failed to understand that it was relinquishing powers over the Port by entering into the Compact.

And unlike the settled presumption governing water rights in *Tarrant*, there is no presumption that powers expressly relinquished to an interstate agency remain neatly divisible and subject to unilateral

withdrawal. *See* Opp. 11-13. Quite the opposite: when States join to form an interstate agency, the agency's powers belong *jointly* to the compacting States, and no compacting State may unilaterally control or terminate the agency unless the compact expressly so provides. PI Mot. 27-28.

Second, the Compact does not permanently divest New Jersey of any of its police powers over the Port. *See* Opp. 13. New Jersey may terminate the Commission with New York's consent. And New Jersey may petition Congress to repeal the Compact Act. Thus, New Jersey's argument about perpetual contracts (Opp. 15-16) misses the mark. The Compact does not require perpetual performance; it expressly contemplates termination by Congress or by joint state action when the Commission is no longer necessary. *Cf.* 3 Arthur Corbin, *Corbin on Contracts* § 553, at 212-13 (1960) (courts may read in "reasonable time" term to reform perpetual agreements).

Finally, New Jersey relies on an amicus brief filed by the U.S. Solicitor General in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 26 (1951), which argued in favor of reading an implied right of unilateral withdrawal into an interstate compact among eight States. But a brief is no substitute for judicial precedent. And this Court declined to adopt the United States' view, deciding "not [to] go beyond the issues on which the West Virginia court found the Compact not binding on the State." *Id.*

Anyway, the position of the United States turned, in large part, on that compact's broad reservation of rights to signatory States:

Nothing in this compact shall be construed to limit the powers of any signatory State or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction.

Br. for United States as Amicus Curiae at 27-28, *Dyer*, 341 U.S. 22 (No. 147). Based on this language, the United States reasoned that the signatory States' reservation of "complete freedom of action to subsequent legislatures" suggested that the States intended to reserve the right of unilateral withdrawal. *See id.* at 28. No analogous reservation of rights is present here.

2. Nothing in the Compact's legislative history demonstrates an intent to allow unilateral termination. New Jersey points (Opp. 24-25) to statements about the Commission being "temporary." But those excerpts at most show that the drafters intended the Commission to end *at some point*. They do not address the central issues here: *who* can decide that the Commission should end, and *how* that decision must be made. The Compact's requirement that the Commission file an annual report with "the Governors and Legislatures of both States" recommending whether the Commission is still necessary (Compl. App. 8a), together with the concurrency requirement, demonstrates the drafters' intent to require the States to *jointly* determine when the Commission may no longer be necessary. Indeed, prior to its about-face in 2018, New Jersey officials—including Commissioner

Murphy—recognized that unilateral termination is unconstitutional. *See* PI Mot. 29-31; Reply App. 15a.

CONCLUSION

The Court should grant preliminary relief.

Respectfully submitted,

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APPENDIX

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APPENDIX A

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[SEAL] WALTER M. ARSENAULT
RONALD GOLDSTOCK EXECUTIVE DIRECTOR
MICHAEL MURPHY
COMMISSIONERS

Via Email and First Class Mail August 9, 2017
Honorable Governor Chris Christie
State of New Jersey
Office of the Governor
PO Box 001
Trenton, New Jersey 08625-001

Re:Waterfront Commission of New York Harbor

Dear Governor Christie:

We are in receipt of your letter dated August 7, 2017 (copy attached) regarding the Waterfront Commission of New York Harbor (“Commission”). We respectfully submit this letter in response to various statements concerning the Commission’s practices and procedural safeguards, addressing each statement *seriatim*.

Statement:

“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. The Commission must embrace more efficient, transparent and cooperative approaches to its regulatory functions.”

Commission Response:

The well-publicized New York State Inspector General’s investigation, undertaken with the cooperation of the New Jersey Attorney General’s Office, criticized the Commission’s previous administration in its 2009 Report (“IG’s Report”) for failing to properly license and audit companies operating within its jurisdiction. The revitalized Commission dutifully undertook to license those covered entities which, contrary to the mandates of the Waterfront Commission Compact (“Compact”), had never before been regulated. Our authority to do so was affirmed by the United States Court of Appeals for the Second Circuit in 2015.

When we began doing so, warehouse operators and representatives of the commercial real estate industry publically expressed their concerns with what they argued was an undue burden imposed by the Commission on their membership. Indeed, in May of 2015, you expressed your own concern with the Commission’s practices. Bound by the dictates of the Compact and the IG Report’s criticism on the one hand, and the desire for administrative efficiency on the other, the Commission developed and proposed a unique solution — that of self-certification by the covered warehouses. The industry immediately expressed interest in that approach, as did the Governor’s Authorities Unit, and the Commission modified its regulations in order to completely streamline the licensing process. Now, upon the submission of an annual one-page self-certification of compliance, those entities are exempt from the more

comprehensive application requirements and audits that are necessary for other stevedoring companies.

Moreover, since the Compact's description of our geographical jurisdiction necessarily moves with the expansion and contraction of pier lines, we undertook to fix a permanent boundary, hired surveyors, and then published a map which clearly delineated that jurisdiction.

The Commission's new regulations promoted the Commission's mission of Port efficiency, economic growth, and fair hiring and employment, while ensuring that the operations of warehouses in the direct Port vicinity and that of the commercial real estate industry are not adversely impacted by the Commission's activities. Our efforts to improve Port commerce can also be seen as we continue to combat criminality and to eliminate "special packages," where individuals connected to organized crime figures or union leadership are given high paying, no-show or no-work jobs earning salaries of over \$500,000. Our joint investigation with the U.S. Attorney's Office and recent indictment of a foreman, Paul Moe Sr., is only one such example.

As to your reference to labor shortages, simply put, the Commission has not been responsible for any such shortages. To the contrary, we have worked tirelessly to anticipate them and to take emergency action to ensure labor needs are met. To do so, for the first time in Commission history we established a prequalified pool of diverse men and women, unencumbered by mob influence and criminality, to be added to the longshore workforce when there is an increased demand for labor. As the Governor's Authorities Unit is aware, the industry has been repeatedly compelled to withdraw its allegations that the Commission has

been responsible for shortages, or has not processed qualified applicants in a timely manner, in public statements and before a federal judge, among others.

Our repeated numerous attempts to take a “cooperative approach” with the industry — specifically, the New York Shipping Association, Inc. (NYSA), Metropolitan Marine Maintenance Contractors’ Association, Inc. (MMMCA) and the International Longshoremen’s Association, AFL-CIO (ILA) — have uniformly be met with staunch opposition, largely due to our insistence on the elimination of corrupt payments and the institution of fair and non-discriminatory hiring. Rather than ensuring that individuals are hired in a fair and nondiscriminatory manner, trained and put to work in the Port as expeditiously as possible, the NYSA, ILA and MMMCA instead chose to file a federal lawsuit against the Commission, alleging that we were overstepping our statutory authority (relying during oral argument, in part, on *Plessy v. Ferguson*). Two and a half years after the institution of that lawsuit, the Third Circuit Court of Appeals soundly rejected their arguments, and found that the Commission acted appropriately and pursuant to the mandates of the Compact.

Nonetheless, a year later, the industry still continues to oppose our efforts and to cling to a hiring plan that, inconsistent to the Compact’s ban on “the shape,” gives the union unfettered discretion and total control over hiring.

Statement:

“The Commission’s By-Laws were last updated in 1975 and do not properly delineate the decision-making authority retained by the Commissioners and that which is delineated to the executive staff. In addition,

the By-Laws should be updated to provide for the proper recording and maintenance of meeting minutes, the conduct of regular financial audits, open public meetings and records, confidentiality, conflict of interest, procurement, rulemaking and employment procedures, among other things.”

Commission Response:

As set forth in the IG’s Report, the agency suffered from a complete lack of accountability and failure of leadership that rendered it completely ineffective. The Commission’s new administration immediately took appropriate remedial measures to address each and every instance of abuse, waste and mismanagement identified in the IG’s Report. Policies and procedures were put into place from the most basic to the adoption/ implementation of a new Employee Handbook/Code of Ethics, Procurement Policy and Police Division Standard Operating Procedures.

As we candidly advised the Governor’s Authorities Unit two months ago in response to its requests for information, the Commission’s By-Laws are indeed outdated and do not provide comprehensive guidance regarding the day-to-day operations of the agency. We advised that we therefore also rely on the Compact and the Commission’s Rules and Regulations, which extensively provide clear directives regarding the Commission’s operations and the way that substantive decisions are made. And, to the extent that they do not, the updated Employee Handbook/ Code of Ethics, Standard Operating Procedures, and governing collective bargaining agreements provide the necessary guidance and directives. As a result, as described below, the proper procedural safeguards are already in place with regard to the functions described in your letter:

- *Decision-making authority retained by the Commissioner and that which is delineated to the executive staff.* The Compact (N.J.S.A. 32:23-10-11; McK. Unconsol. Laws 98109811), the Commission's Rules and Regulations, By-Laws (Article 3) and Employee Handbook extensively set forth the specific roles designated to the Commissioners and to the executive staff.
- *Proper recording and maintenance of meeting minutes.* The Commission has maintained meeting minutes since its first meeting in 1953. Shortly after the appointment of the Commission's new administration in 2008, we began forwarding a copy of the Commission's agenda to the Governor's Authorities Unit prior to every meeting, as well as a copy of the minutes after every meeting.
- *The conduct of regular financial audits.* Annual audits of the Commission's books and records are provided for, and required by, the Compact. (N.J.S.A. 32:23-74; McK. Unconsol. Laws 9901)
- *Open public meetings and records.* The Commission's By-Laws provide for regular public meetings. Meeting dates are published on the Commission's website and given to the Governor's Authorities Unit well in advance. The meetings are open to the public and indeed, a liaison from the Governor's Authorities Unit regularly attends telephonically. Moreover, the Commission's By-Laws and Rules and Regulations designate the Commission Secretary as the records officer; R. 1.23 comprehensively

provides, with certain exemptions, for public access to the Commission's records.

- *Conflict of interest.* The Commission's Conflict of Interest Policy is set forth in the Employee Handbook/Code of Ethics and its Police Division Standard Operating Procedures. In addition to this, the Commission has taken the position that Section 74 of the New York State Public Officers' Law applies to the New York Commissioner, and that the New Jersey Uniform Ethics Code applies to the New Jersey Commissioner.
- *Procurement.* As we previously advised the Governor's Authorities Unit in response to its request for information, the Commission — which is headquartered in New York — follows New York Procurement Guidelines.
- *Rulemaking.* The Commission's rulemaking authority and procedures are set forth in, and governed by, the Compact. (N.J.S.A. 32:23-10(7&11); N.Y. Unconsol. 9810(7) & 9811). Notably, the Third Circuit recently dismissed the NYSA, ILA and MMMCA's challenge to the Commission's rulemaking authority, and upheld the Commission's rulemaking procedures in the matter entitled *NY Shipping Ass'n v. Waterfront Comm'n of N.Y. Harbor*, 835 F.3d 344 (3d Cir. 2016).
- *Employment Procedures.* The Compact (N.J.S.A. 32:23-10(5); N.Y. Unconsol. Laws 9810(5), By-Laws (Article III(2)), Employee Handbook, and the Commission's governing collective bargaining agreements comprehensively provide for employment procedures.

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We welcome the opportunity to update the By-Laws to incorporate the statutory directives, policies and procedures set forth above. In the meantime, we are submitting this letter to provide you with the necessary assurance that the appropriate managerial controls and procedural safeguards are in place to address those issues delineated in your letter.

Respectfully,

/s/ Walter M. Arsenault

Walter M. Arsenault

Executive Director

cc: Honorable Andrew Cuomo, Governor of New York
John Spinello, Director, Governor's Authorities Unit
Michael Murphy, New Jersey Commissioner
Ronald Goldstock, New York Commissioner
Phoebe S. Sorial, Waterfront Commission
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9a

APPENDIX B

[SEAL]

STATE OF NEW JERSEY
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CHRIS CHRISTIE

Governor

August 7, 2017

Walter Arsenault, Esq.

Executive Director

Waterfront Commission of New York Harbor

39 Broadway

New York, New York 10006

Dear Mr. Arsenault,

Today, I signed into law a bill that provides the Governors of New York and New Jersey the authority to veto any action, with limited exceptions, taken by the Commission. This measure ensures the Commission continues to effectively carry out its important investigation and licensing responsibilities with appropriate independence, and is more accountable to the public.

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. The Commission must embrace more efficient, transparent and cooperative approaches to its regulatory functions.

The measure I signed into law today will take effect upon the enactment of a similar law by the State of

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New York. In the interim, I direct the Commission to review and update, within 90 days, the By-Laws that govern the way substantive decisions are made. The Commission's By-Laws were last updated in 1975 and do not properly delineate the decision-making authority retained by the Commissioners and that which is delegated to the executive staff.

In addition, the By-Laws should be updated to provide for the proper recording and maintenance of meeting minutes, the conduct of regular financial audits, open public meetings and records, confidentiality, conflict of interest, procurement, rulemaking and employment procedures, among other things.

Please contact John Spinello, Director of the Governor's Authorities Unit, if you have any questions.

Sincerely,

/s/ Chris Christie

Chris Christie

Governor

- c. Honorable Andrew Cuomo, Governor of New York
- Michael Murphy, Commissioner
- Ronald Goldstock, Commissioner
- Phoebe Soriel, General Counsel, Waterfront
Commission
- John Spinello, Director, Governor's Authorities Unit

APPENDIX C

OATH OF ALLEGIANCE AND OATH OF OFFICE
STATE OF NEW JERSE COUNTY OF Bergen

I, Joseph M. Sanzari, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will bear true faith and allegiance to the same and to the Governments established in the United States, and in this State, under the authority of the people; and that I will faithfully, impartially and justly perform all the duties of the office of Commissioner of Waterfront Commission of New York Harbor according to the best of my ability. So help me God.

/s/ Joseph M. Sanzari
Signature

Sworn to and Subscribed before me on the 29th day of December 2021

/s/ Christopher W. Eilert
Name

File -- with Secretary of State

CHRISTOPHER W. EILERT
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 1/28/2023

APPENDIX D**REPLY DECLARATION OF
WALTER M. ARSENAULT**

1. I am the Executive Director of the Waterfront Commission of New York Harbor (“Commission”). I am familiar with the matters set forth in this declaration from my personal knowledge and, if called upon as a witness, I could and would competently testify to the statements made herein. I have reviewed the brief of the State of New Jersey in opposition to the State of New York’s Motion for Preliminary Relief. I submit this Reply Declaration in further support of the State of New York’s Motion for Preliminary Relief.

**The Commission—After Undergoing
Transformational Reforms in 2009—Has
Successfully Fought Organized Crime and
Corruption at the Port**

2. Relying on an August 2009 report by the State of New York Office of Inspector General (OIG), New Jersey denigrates the Commission’s current essential law enforcement work and recent accomplishments, and echoes the New Jersey Legislature’s self-serving statements impugning the Commission as being “tainted by corruption in recent years.” (Opp. at 7).

3. I was appointed as the Commission’s Executive Director in September 2008 while the OIG’s investigation was still ongoing, and was “regularly informed as the Inspector General uncovered problems and abuses in order that remedial measures be initiated as soon as possible.” https://www.wcnyh.gov/news/IG%20Investigation_8-11-2009.pdf at page 5. I, along with the newly appointed New York Commissioner Ronald Goldstock, was tasked with implementing the necessary reforms, many of which were extensively

described in the Inspector General's Report. https://www.wcnyh.gov/news/IG%20Investigation_8-11-2009.pdf (“[U]nder Arsenault’s leadership, a number of reforms have already been instituted and are discussed, where relevant, in this report”). In its 2008-2009 Annual Report, the Commission reported that: “[b]y the time the Inspector General’s Report was issued, the Commission had already instituted virtually every one of the 15 reforms suggested by the IG. Indeed, the Commission faulted in the Report no longer existed.” https://www.wcnyh.gov/docs/WCNYH_2009_Annual_Report.pdf. The Commission’s new administration openly acknowledged its past faults, and beginning in 2009 began reporting on the progress it was making in rededicating itself to its core mission. https://www.wcnyh.gov/docs/WCNYH_2010_Annual_Report.pdf.

4. I have reviewed the March 20, 2022 declaration of former New Jersey Commissioner Michael Murphy, who makes broad claims that the Commission has “grown increasingly unaccountable to both states,” and has failed to implement necessary transparency measures and basic audits. Def. App. 25a (Murphy Decl. ¶ 21). Mr. Murphy relies on an August 7, 2017 letter from then New Jersey Governor Chris Christie to the Commission demanding that the agency implement remedial measures, and contends that “this call went unheeded.” Def App. 25a (Murphy Decl. ¶ 21).

5. To the contrary, every single one of the measures identified by Governor Christie had already been implemented by August 2017. By letter dated August 9, 2017 to Governor Christie, I reported in detail every measure in place to address each instance of abuse, waste and mismanagement identified in the OIG’s Report. (Letter from W. Arsenault, 8/9/2017). I

identified the policies and procedures that were in place to ensure proper decision-making authority; proper recording and maintenance of meeting minutes; the conduct of regular financial audits; open public meetings and records; adequate protections against conflict of interest; procurement; rulemaking; and employment procedures. (Letter from W. Arsenault, 8/9/2017). That letter was reviewed and expressly approved by Mr. Murphy before it was sent to Governor Christie.

6. During my tenure as Executive Director, the Commission has devoted itself to transparency. All of the Commission's meetings are posted on the Commission's website, and are open to the public. (<https://www.wcnynh.gov/>). Certified court reporters transcribe every meeting in which a respondent appears before the Commissioners on an administrative matter. Annual audits are conducted pursuant to the Compact, and annual financial statements are included in the Commission's publicly available annual reports. Financial reports are sent to the New Jersey Governor's Office prior to the Commission's bi-weekly meetings. And this year, in connection with his review of the budget, Mr. Murphy was provided with two years' worth of the Commission's financial statements, bank records and an accounting of all litigation expenditures.

**Former New Jersey Commissioner
Michael Murphy Has Acknowledged That New
Jersey's Legislation to Unilaterally Withdraw
From the Bi-State Waterfront Commission is
Unconstitutional**

7. Over the past seven years, Mr. Murphy has repeatedly expressed his view that New Jersey's legislation to unilaterally withdraw from the bi-state

Waterfront Commission Compact (“Compact”) is unconstitutional. In the Commission’s testimony before the New Jersey State Senate Budget Committee on October 9, 2014, Mr. Murphy requested to be on the record as saying that he was “concerned that the legislation will not survive a constitutional challenge since it is a federally authorized bi-state compact.” Then-Commissioner Murphy reiterated this concern during his testimony before the Assembly Law and Public Safety Committee on October 23, 2014.

8. In late 2017 when New Jersey again began to consider the bill to unilaterally withdraw from the Compact and dissolve the Commission, Mr. Murphy continued to express his belief that the proposed measure was unconstitutional and assured that he was working to “derail” the bill.¹ As reported by The Wall Street Journal on January 3, 2018, Mr. Murphy even voiced his position to the press. <https://www.wsj.com/articles/n-j-legislators-push-to-back-out-of-waterfront-commission-1515003456> (“Michael Murphy, New Jersey’s representative on the commission’s two-person board of commissioners, said he believes the bill is unconstitutional.”)²

¹ Mr. Murphy is a registered lobbyist and a partner in a New Jersey public relations firm, and appears before the New Jersey legislature. <https://www.murphyorlando.com/michael-murphy/>

² In subsequent discussions with then New York Commissioner Ronald Goldstock, Mr. Murphy confirmed that he had told the Wall Street Journal reporter that the proposed measure was unconstitutional.

**New Jersey’s Arguments Demonstrate a
Fundamental Lack of Information and
Knowledge Regarding the Commission’s
Basic Operations, Its Protocols and
Operating Procedures**

9. Mr. Murphy’s opinion that the Commission is “no longer effective at fighting crime” is contrary to the well supported positions of the Commission’s federal law enforcement partners. Mr. Murphy’s declaration also demonstrates a fundamental lack of knowledge and information regarding the Commission’s most basic operations. For instance, he indicates that the Commission today “operates two satellite employment information centers (both in New Jersey).” Def. App. 23a-24a (Murphy Decl. ¶ 14). That is incorrect. The Commission is statutorily required to maintain Employment Information Centers in both states, and oversees three Employment Information Centers—two in New Jersey and a third located in New York. This information is readily available in the Commission’s annual report. https://www.wcnyh.gov/docs/2019-2020_WCNYH_Annual_Report.pdf at page 45.

10. I have reviewed the declaration of Major Frederick P. Fife of the New Jersey Division of State Police, Investigation Bureau, dated March 20, 2022. That declaration also demonstrates a lack of information and understanding regarding the Commission’s resources, protocols and operating procedures. For instance, Major Fife states, “State Police’s review of the Commission’s operations revealed that the Commission lacks an Originating Agency Identifier (ORI), which is a standardized identifier assigned by the FBI to validate legal authorization to access Criminal Justice Information. As a result, the Commission

lacks basic credentials and technologies to implement formalized deconfliction protocols.” Def App. 7a (Fife Decl. ¶ 24). Major Fife states that New Jersey has expended resources to “implement formalized deconfliction protocols that the Commission lacks.” Def. App. 7a (Fife Decl. ¶ 22).

11. To the contrary, the Commission has its own ORI which is assigned by the FBI; its law enforcement officers are extensively trained in this area and routinely implement the proper deconfliction protocols in connection with Commission investigations. This information is readily available to the New Jersey State Police, which is responsible for conducting the periodic audits of the Commission’s use of the New Jersey Criminal Justice Information System. New Jersey indicates that it expended millions of dollars in salary and pension resources implementing withdrawal and, as part of those measures, “established deconfliction protocols for port-related actions.” These protocols, however, are already in place.

The Commission’s Critical Law Enforcement and Licensing Functions

12. In opposition to the State of New York’s motion for preliminary relief, New Jersey has argued that the Commission will not be able to continue carrying out its law enforcement and regulatory functions because it will operate without a budget and without the unanimous approval of the Commissioners. That is incorrect. The Commission’s investigations and a majority of the Commission’s core licensing functions which are not subject to any formal approval process would continue.³

³ The Commissioners’ approval is not required to background and issue licenses/registrations – their vote is only required to

13. On the other hand, if Chapter 324 is not stayed, the New Jersey State Police will begin conducting background checks next week, and will begin issuing registrations and licenses to incoming Port workers. This would all be invalidated following a declaration that Chapter 324 is without effect. The entire pool of incoming workers would have to once again be backgrounded and re-registered by the Commission. This would not only cause the unnecessary expenditure of funds, but it would cause future disruptions to Port operations.

**The Commission Will Continue to Operate
Under a Holdover Budget**

14. The Commission is currently operating under a holdover budget. On July 30, 2021, the Commissioners adopted a ninety-day budget. Eighty-nine days later, on October 27, 2021, Mr. Murphy sent me an email asking, “do we have a budget extension issue this month?” This was the first time he had inquired about the budget since its adoption. By email dated October 27, 2021 I advised Mr. Murphy that, “[w]e haven’t been advised by either state of an issue with the budget.” Mr. Murphy did not respond, and I did not receive any communications from him or anyone from the New Jersey Governor’s Office regarding the Commission’s budget until well after the ninety-day period had elapsed.

15. On November 8, 2021, the Commission held its regularly scheduled Commission meeting which was attended by then-Commissioner Murphy and a representative from the New Jersey Governor’s Office.

deny an individual’s application to work on the waterfront, or to remove workers from the waterfront for violations of the Compact.

Commission business was transacted, and the Commissioners voted on other matters. Neither Mr. Murphy nor the representative from the New Jersey Governor's Office mentioned the budget, and they did not object to the fact that by then, the Commission was operating under a holdover budget. It was only afterwards that New Jersey took the position that the Commission is operating without a budget.

**The Industry's Unsubstantiated Allegations
of Labor Shortages.**

16. I have reviewed the declaration of John Nardi, President of the New York Shipping Association, Inc. (NYSA) who avers that the Commission is responsible for hiring delays, labor shortages and "economic harm to businesses." Def. App. 38a (Nardi Decl. ¶ 4). To the contrary, the Commission has worked tirelessly to anticipate any labor shortages, and to take emergency action to ensure that the industry's labor needs are met. Each and every time that Mr. Nardi and other industry representatives have been confronted with the true facts, they have had to publicly retract their statements and to concede that the Commission has not been responsible for labor shortages or Port delays. *See, e.g.*, [https://www.njleg.state.nj.us/archived-media/2014/SLA-meeting-list/media-player?committee=SLA&agendaDate=2014-04-28-10:00:00&agendaType=M&av=A\(102:45-55;122:14-123:50;133:40-135:20\)](https://www.njleg.state.nj.us/archived-media/2014/SLA-meeting-list/media-player?committee=SLA&agendaDate=2014-04-28-10:00:00&agendaType=M&av=A(102:45-55;122:14-123:50;133:40-135:20)) (audio of testimony wherein Mr. Nardi admitted before the New Jersey Senate that labor shortages were not related to the Commission, but were instead due to delays in training and administrative issues with identification cards).

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I declare under penalty of perjury that the foregoing is true and correct.

Executed: March 22, 2022, in New York, New York

/s/ Walter M. Aresenault
Walter M. Aresenault