



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #9

REQUESTED ACTION: Approval of the report and recommendations of the New York City Bar Association.

Attached is a report from the New York City Bar recommending support for legislation that permanently exempts Puerto Rico from the provisions of the Merchant Marine Act of 1920, 46 U.S.C. §§5501 et seq., commonly known as the Jones Act. The Jones Act requires that cargo shipped between two ports within the United States must be transported on ships that meet certain registration requirements. When enacted, the purpose of the Act was to ensure that domestic ships would be available to support the U.S. military during war.

According to the report, the application of the Jones Act to shipments to Puerto Rico results in increased costs to the people of Puerto Rico for their imports and causes Puerto Rico to import most goods from foreign countries rather than the United States. In addition, the Jones Act contains exemptions for other United States territories, including the Virgin Islands, American Samoa, and the Northern Mariana Islands. The report does not advocate for the complete repeal of the Jones Act.

The report notes that in the aftermath of Hurricane Maria, the Department of Homeland Security issued a 10-day waiver of the Jones Act; it does not believe this temporary waiver was sufficient.

This report was posted for comment in May 2018. You will be advised of any comments received with respect to the report.

The report will be presented at the June 16 meeting by Roger Juan Maldonado, President of the New York City Bar Association.

CONTACT

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org**REPORT BY THE TASK FORCE ON PUERTO RICO
IN SUPPORT OF PERMANENTLY EXEMPTING
PUERTO RICO FROM THE JONES ACT**

This report is respectfully submitted on behalf of the New York City Bar Association (“City Bar”) concerning Congressional attempts to provide aid and relief to the people of Puerto Rico as they recover from the devastation of Hurricane Maria.¹ Specifically, we write to strongly encourage Congress to permanently exempt Puerto Rico from the requirements of the Jones Act, just as the U.S. Virgin Islands have been exempted from that law’s requirements. Because Puerto Rico is an island economy, the restrictions imposed by the Jones Act have had a uniquely negative impact on the people of Puerto Rico by substantially increasing the cost of basic goods such as food and electricity. Now that Congress has taken up the task of addressing an aid package to Puerto Rico, we respectfully urge that this permanent exemption be granted so that the people of Puerto Rico can rebuild their economy.

All of the independent studies that have examined the impact of the Jones Act on Puerto Rico have unanimously found that it has had—and continues to have—a substantial negative impact.² The Jones Act raises the price of energy on the island³ at a time when Puerto Rican families are suffering through an energy crisis, and it raises the price of food when over 44% of the island is living in poverty.⁴ Estimates indicate that the Jones Act costs the Puerto Rican economy hundreds of millions of dollars every year, and in 2010 alone cost \$537 million.⁵ Because of these substantial costs, a wide range of voices, on a bi-partisan basis, have

¹ Founded in 1870, the New York City Bar Association (the “City Bar”) is a voluntary association of lawyers and law students with over 24,000 members. The City Bar regularly reviews, and sometimes addresses, complex legal issues that transcend the boundaries of New York City. The City Bar formed a Task Force on Puerto Rico in October 2016 comprised of members of the City Bar’s Committees on Bankruptcy and Corporate Reorganization, Inter-American Affairs, International Human Rights and International Law, and has been active in relief efforts for Puerto Rico in light of its financial crisis and the catastrophic devastation caused by Hurricane Maria. Post-Hurricane Maria, the City Bar advocated for a 1-year exemption to the Jones Act (*see* http://s3.amazonaws.com/documents.nycbar.org/files/Jones_Act_Puerto_Rico_TASK_FORCE_9.27.17.pdf). Upon further study, the City Bar has concluded that a permanent exemption is warranted for the reasons described herein.

² See *infra* Section B.

³ Ori, Sam, *Puerto Rico’s Challenges After Hurricane Strengthen Case Against The Jones Act*, Forbes, Nov. 17, 2017, <https://www.forbes.com/sites/ucenergy/2017/11/07/puerto-rico-has-had-a-hard-time-getting-fuel-for-our-next-disaster-lets-fix-the-problem/#136f9ccf6646> (all websites last visited May 7, 2018).

⁴ United States Census Bureau, <https://www.census.gov/quickfacts/PR>.

⁵ Economic Impact of Jones Act on Puerto Rico’s Economy, <http://docplayer.net/494027-Economic-impact-of-jones-act-on-puerto-rico-s-economy.html> (see p.75/88).

consistently requested that Puerto Rico be exempted from the substantial burdens of the Jones Act.⁶ The time to listen to these voices is now.

I. THE SCOPE OF THE JONES ACT

a. The Creation of the Jones Act

The Merchant Marine Act of 1920, 46 U.S.C. §55101 et seq., also known as the “Jones Act,” was signed by President Woodrow Wilson shortly after World War I, at a time when the annual budget for the United States Navy was only \$628,726,000.⁷ Arizona had only recently been admitted as the forty-eighth state in the union, the non-contiguous territories of Alaska and Hawaii would not be added as states for another thirty-nine years, and the small island of Puerto Rico had only recently been acquired from Spain in the Spanish-American War of 1898.

Pursuant to the terms of the Jones Act, all goods shipped between two points within the United States must be transported on a vessel that meets certain federal regulatory requirements. Specifically, the vessels cannot transport shipments between two United States ports unless they meet certain registration requirements, and can demonstrate, *inter alia*, that (i) the company that owns the transporting vessel is comprised of at least 75% of United States citizens; (ii) the transporting vessel was not built or re-built in a foreign country; and (iii) at least 75% of the crew are United States citizens.

By having U.S. consumers indirectly subsidize the domestic shipping industry (in addition to direct subsidies by the U.S. Navy) through these restrictions requiring use of domestic rather than international vessels, Congress sought to bolster the creation of a domestic fleet of ships that could be made available to provide essential support to the U.S. military for transporting cargo by sea in times of war. In so doing, “the Jones Act effects a transfer from U.S. consumers of water transportation services to U.S. maritime carriers, with the result being that domestic shippers can charge rates substantially above comparable world prices, increasing the revenue of domestic shippers by billions of dollars a year.”⁸ The federal government continues to believe that having a marine reserve force on standby to call up in times of war is necessary for national security and war-readiness; indeed, we understand that U.S. commercial ships were used in substantial volumes during the Gulf War and in Iraq and Afghanistan to supply U.S. military personnel. However, we also understand that a portion of the Navy’s current budget goes toward subsidizing that maritime fleet.⁹

⁶ Exhibit 1 (List of Organizations That Have Supported Exempting Puerto Rico from the Requirements of the Jones Act in Whole or in Part); Exhibit 2 (Members of Congress That Have Supported Exempting Puerto Rico from the Requirements of the Jones Act in Whole or in Part).

⁷ Budget of the U.S. Navy, <https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/b/budget-of-the-us-navy-1794-to-2004.html>.

⁸ The Jones Act in Perspective: A Survey of the Costs and Effects of the 1920 Merchant Marine Act, <http://www.grassrootinstitute.org/2017/04/the-jones-act-in-perspective/>.

⁹ Notably, the United States Navy now has an annual budget of \$171.5 billion, only a limited portion of which is used for direct subsidies to U.S. merchant vessels, and is the most powerful fleet in the world. *See* FY 2018 Department of the Navy (DON) President’s Budget (PB) Summary, http://www.secnav.navy.mil/fmc/fmb/Documents/18pres/DON_PB_OVERVIEW.pdf.

Putting aside the question of whether the Jones Act is still needed to maintain national security and military readiness, we respectfully submit that exempting Puerto Rico from Jones Act restrictions would have little to no effect on the overall scope and purpose of the law and the ability of the U.S. to maintain an effective marine reserve force. Even if somewhat greater direct subsidies funded by all U.S. taxpayers became necessary as a result of exempting Puerto Rico from the Jones Act—as is not at all clearly the case—having this national military priority funded by all taxpayers seems preferable to having it funded disproportionately by residents of that currently highly distressed and economically disadvantaged territory as it is now.

b. The Jones Act Does Not Apply to Foreign Shipments

Importantly, these Jones Act restrictions do not apply to foreign shipments going into, or out of, the United States. The Jones Act only applies to shipments that go between two United States ports. What this means is that the Jones Act does not directly restrict trade between Puerto Rico and foreign countries, such as Mexico. Rather, what the Jones Act does is restrict trade between Puerto Rico *and the mainland United States*. It does so by imposing restrictions that raise the price of common goods, such as food and fuel, when they are shipped from the mainland United States to Puerto Rico. As is discussed in further detail below, this has two significant impacts: (i) it causes the people of Puerto Rico to pay increased costs for everything that they import; and (ii) it drives Puerto Rico to import the majority of its goods by volume from foreign countries rather than the mainland United States, even for goods that the mainland United States could have provided at a cheaper price.¹⁰

c. The Jones Act Already Has Substantial Exemptions

Not all territories within the United States are required to abide by the Jones Act. The United States Virgin islands are exempt. Similarly, the territory of American Samoa and the commonwealth of Northern Mariana Islands are also exempt. There are also partial exemptions for the territory of Guam, and the coastal town of Hyder, Alaska. Puerto Rico is the only non-contiguous territory not wholly or partially exempt.¹¹

II. THE IMPACT OF THE JONES ACT ON PUERTO RICO

a. The Jones Act Has Cost Puerto Rico Billions of Dollars

Every independent study—with no exceptions that we have found—indicates that the Jones Act is significantly harming the people of Puerto Rico. This is because Puerto Rico is an island economy that imports approximately 85% of its food, a percentage which is likely to

¹⁰ GAO, *Puerto Rico: Characteristics of the Island’s Maritime Trade and Potential Effects of Modifying the Jones Act*, at 11-12 (“Over the entire year 2011, 67 percent of the vessels that operated in the port of San Juan were foreign-flag vessels, while 33 percent were U.S.-flag vessels”), <https://www.gao.gov/assets/660/653046.pdf>.

¹¹ Marie Olga Luis Rivera, *Hard to Sea: Puerto Rico’s Future Under the Jones Act*, 17 Loy. Mar. L.J. 63 (2018)

increase after the decimation of 80% of its crop value post-Hurricane Maria.¹² In addition to food, Puerto Rico imports chemicals, oil, electrical appliances, machinery and equipment, transport vehicles, and plastics.¹³ Just about everything that the people of Puerto Rico need to survive is imported. And to the extent that Puerto Rico seeks to import any of those goods from the United States, it is required to pay substantially increased shipping costs.

Simply put, the increased shipping costs imposed by the Jones Act cause an increase in the cost of goods on the island. Although some reports are uncertain of the exact amount of damage caused to Puerto Rico by this law, and it is impossible to predict the damage with absolute precision, they are unanimous in finding that the Jones Act substantially impacts the cost of goods.¹⁴ For instance, a 2012 report from the Federal Reserve Bank of New York, titled “Report on the Competitiveness of Puerto Rico’s Economy,” found that the shipping cost for a twenty-foot container from the mainland United States to Puerto Rico was *twice* as much as the same container from the mainland United States to the Dominican Republic.¹⁵ Similarly, an International Trade Commission report on the Jones Act found that the law’s requirements are generally the equivalent of a 64.6% tariff on shipping services.¹⁶ In addition, in 2015, three former International Monetary Fund economists—Anne O. Krueger, Ranjit Teja, and Andrew Wolfe—issued a report titled “Puerto Rico -A Way Forward,” in which they noted that Puerto

¹² Robles, Frances and Ferré-Sadurní, Luis, *Puerto Rico’s Agriculture and Farmers Decimated by Maria*, The New York Times, Sept. 24, 2017, <https://www.nytimes.com/2017/09/24/us/puerto-rico-hurricane-maria-agriculture-.html> (“Puerto Rico already imports about 85 percent of its food, and now its food imports are certain to rise drastically as local products like coffee and plantains are added to the list of Maria’s staggering losses. Local staples that stocked supermarkets, school lunchrooms and even Walmart are gone.”).

¹³ Puerto Rico Imports, <https://tradingeconomics.com/puerto-rico/imports>.

¹⁴ The GAO, in particular, noted in its March 2013 report that any precise mathematical estimate of the benefits of an exemption for Puerto Rico would be very difficult to predict, because Congress has not signaled the precise way that the Jones Act would be modified. However, this abstract type of uncertainty—which is present in any kind of economic analysis—is no reason to discount the wide range of voices that have clearly explained that the Jones Act has had a substantial negative impact on Puerto Rico. See Section B, subsection a. Moreover, it appears that the GAO has modified its position in a May 9, 2018 report, in which it comments that the Jones Act “likely ha[s] a negative effect on Puerto Rico’s economy.” GAO, *Puerto Rico: Factors Contributing to the Debt Crisis and Potential Federal Actions to Address Them*, at 30 (“According to current and former Puerto Rico officials, and other experts on Puerto Rico’s economy, complying with this law raised the cost of goods and energy—given Puerto Rico’s reliance on importing oil to generate electricity—for businesses operating in Puerto Rico.”), <https://www.gao.gov/assets/700/691675.pdf>.

¹⁵ Report on the Competitiveness of Puerto Rico’s Economy, <https://www.newyorkfed.org/medialibrary/media/regional/PuertoRico/report.pdf>. One lobby group for Jones Act carriers has disputed the Federal Reserve’s finding, but has not cited any support other than self-selected “anecdotal evidence.” American Maritime Partnership, <https://www.americanmaritimepartnership.com/puerto-rico-service/>. Because this anecdotal account from a lobby group is not independent, and has not cited any support for its position, we continue to rely on the Federal Reserve report, along with the numerous other studies cited in this letter.

¹⁶ The Economic Effects of Significant U.S. Import Restraints, <https://www.usitc.gov/publications/332/pub3201.pdf> (see p. 98). Since the publication of this estimate, the ITC has clarified that it is unable to provide “an estimate of the welfare gains that would result from removing the [Jones Act]” because Congress has not yet clarified what additional laws it may seek to impose on foreign vessels operating in the Puerto Rico market. See *The Jones Act in Perspective: A survey of the costs and effects of the 1920 Merchant Marine Act*, <http://assets.grassrootinstitute.org/wp-content/uploads/2017/04/Jones-Act-Final-4-8-17.pdf>. However, a group of economists believes that, if anything, the ITC’s estimates are “conservative.” *Id.*

Rico has “import costs at least twice as high as in neighboring islands on account of the Jones Act,” and concluded as follows:

Exempting Puerto Rico from the US Jones Act could significantly reduce transport costs and open up new sectors for future growth. In no mainland state does the Jones Act have so profound an effect on the cost structure as in Puerto Rico. Furthermore, there are precedents for exempting islands, notably the US Virgin Islands....¹⁷

Other reports agree. In particular, two economists from Harvard and Brandeis have aggregated prior analyses, finding that the “Jones Act raises the cost of transporting goods between American ports,” acting as a “structural impediment” for Puerto Rico that has, for example, raised the price of liquefied natural gas “by as much as 30 percent.”¹⁸

A dramatic illustration of this impediment is found in a broad analysis undertaken by two economists who studied the effects of the Jones Act on Puerto Rico for each year between 1971 and 2010. By their estimates, the Jones Act has cost Puerto Rico billions of dollars in aggregate, imposing costs of more than \$537 million in the year 2010 alone.¹⁹

In short, the negative impacts of the Jones Act on Puerto Rico are undeniable.

b. The Jones Act Has Also Imposed Costs on the Mainland United States By Decreasing Trade Between the Mainland and Puerto Rico

Even though it was not the law’s original intention, the Jones Act has had the undeniable effect of discouraging trade between the mainland United States and Puerto Rico. As the United States Government Accountability Office (“GAO”) has acknowledged, “[f]oreign-flag carriers serving Puerto Rico from foreign ports . . . generally have *lower costs to operate than Jones Act carriers* have.”²⁰ These lower costs “lead companies to source products from foreign countries rather than the United States” and, as a result, “Puerto Rico imports more by volume from foreign countries than from the United States.”²¹

The Jones Act has depressed trade between the mainland United States and Puerto Rico, particularly in the “bulk shipping market,” because foreign imports are simply more cost-

¹⁷ Puerto Rico – A Way Forward, <http://www.gdb.pr.gov/documents/PuertoRicoAWayForward.pdf> (see p.8).

¹⁸ The Jones Act and the Cost of Shipping Between U.S. Ports, <http://econofact.org/the-jones-act-and-the-cost-of-shipping-between-u-s-ports>.

¹⁹ Economic Impact of Jones Act on Puerto Rico’s Economy, <http://econofact.org/the-jones-act-and-the-cost-of-shipping-between-u-s-ports>.

²⁰ Puerto Rico: Characteristics of the Island’s Maritime Trade and Potential Effects of Modifying the Jones Act, <https://www.gao.gov/products/GAO-13-260>.

²¹ GAO, *Puerto Rico: Characteristics of the Island’s Maritime Trade and Potential Effects of Modifying the Jones Act*, at 4, <https://www.gao.gov/assets/660/653046.pdf>.

effective. This is the case even when the goods come “from more distant foreign locations,” and even when the mainland United States might otherwise be able to offer similar goods and services at a lower price. A few examples from the GAO report help to illustrate the point, showing that everything from animal feed to jet fuel is affected by this law:

- **Animal Feed.** “[A]ccording to representatives of the Puerto Rico Farm Bureau, the rate difference between Jones Act carriers and foreign carriers has led farmers and ranchers on the island to more often source animal feed and crop fertilizers from foreign sources than from U.S. domestic sources, even though commodity prices were stated to be similar. They provided an example that shipping feed from New Jersey by Jones Act carriers costs more per ton than shipping from Saint John, Canada, by a foreign carrier—even though Saint John is 500 miles further away. According to the representatives, this cost differential is significant enough that it has led to a shift in sourcing these goods from Canada.”
- **Corn and Potatoes.** For other companies, “corn and potatoes [were] being sourced from foreign countries rather than the United States,” due to “the lower cost of foreign shipping.”
- **Jet Fuel.** “[R]epresentatives of airlines purchasing jet fuel for use in Puerto Rico told us that they typically import fuel to the island from foreign countries, such as Venezuela, rather than from Gulf Coast refineries. They do so because of difficulty in finding available Jones Act vessels to transport jet fuel and, when vessels are available, the high cost of such shipments compared to shipping the product from foreign countries.”
- **Petroleum.** “An oil and gas importer in Puerto Rico told us that the company makes purchasing decisions based on the total price of oil or gas—including any applicable duties or other charges—plus transportation costs. The company looks at total prices from numerous suppliers around the world—including U.S. suppliers—but generally does not purchase from U.S. suppliers because the total cost is higher as a result of the differential in transportation costs.”

This is just a small sampling of the costs imposed by the Jones Act and the impact on businesses operating within the mainland United States.

The costs described above are important, because they tell us that exempting Puerto Rico from the Jones Act’s requirements would be beneficial to American businesses and to the United States as a whole. It is important to emphasize that repealing the Jones Act’s restrictions on Puerto Rico would “not cost *anything* for U.S. taxpayers.” To the contrary, it would “*increase*[] imports from the U.S.” to Puerto Rico, directing approximately \$341 million towards U.S. companies annually, and would therefore generate approximately \$13.5 million in tax revenues as estimated by Empresarios Por Puerto Rico.²²

²² Empresarios Por Puerto Rico to The Congressional Task Force on Puerto Rico, Oct. 7, 2016, <https://www.finance.senate.gov/imo/media/doc/Entrepreneurs%20for%20Puerto%20Rico.pdf>.

c. The Jones Act Leads to Inefficiencies and Distorted Trade Routes

The requirements of the Jones Act result in costly market distortions. For instance, a foreign-flagged vessel might deliver goods from the Mexican port of Veracruz to the Texas port of Houston. That is perfectly legal under the law. That same vessel might unload its cargo in Houston, and then pick up American-made goods to ship back to Veracruz. That is also perfectly legal. However, the vessel in question is legally prohibited from shipping those same American-made goods from Houston, Texas, to San Juan, Puerto Rico. The Jones Act does not allow it, and anyone who seeks to do so would face substantial fines and regulatory action. This result seems unjust and inefficient.²³

d. The Jones Act Shipping Restrictions Have Been Abused

In addition to reaping the *legal* benefits of the Jones Act, shipping companies that are meant to serve the people of Puerto Rico have also resorted to *illegal* antitrust conspiracies to further take advantage of their captive market. By granting monopoly powers to such a small group of shipping companies, the Jones Act made it possible for these entities to engage in illegal price fixing.

During the period from 2011 to 2013, most of the cargo shipped between the mainland United States and Puerto Rico was carried by four Jones Act carriers. By 2013, all four of those major carriers had either pled guilty, or been found guilty, of antitrust conspiracies against the people of Puerto Rico.²⁴ *See, e.g., U.S. v. Peake*, No. 14-1088 (1st Cir. Oct. 14, 2015) (affirming the conviction and five-year sentence of former Sea Star LLC president Frank Peake “for participating in one of the largest antitrust conspiracies in the history of the United States”); *U.S. v. Crowley Liner Services, Inc.*, 12-CR-590 (D.P.R. July 31, 2012) (plea agreement where Crowley Liner Services admitted to a conspiracy between Crowley executives and other providers of Puerto Rico freight services, to illegally fix prices for Puerto Rico freight services; jointly recommending a criminal fine of \$17 million”); *In re Puerto Rican Cabotage Antitrust Litigation*, 815 F.Supp.2d 448, 453 & n. 1 (D.P.R. 2011) (Horizon Lines, LLC plead guilty to one count of price fixing in violation of the Sherman Act and five guilty pleas from former employees of the Horizon and Sea Star Defendants); *United States v. Horizon Lines, LLC*, No. 3:11-CR-0071, Second Amended Judgment, 2011 WL 1587062 (D.P.R., Apr. 28, 2011); *Rivera-Muñiz v. Horizon Lines*, 737 F.Supp.2d 57, 60 (D.P.R.2010); *United States v. Chisholm*, No. 08-cr-00353, Plea Agreement (M.D.Fla., Oct. 20, 2008); *United States v. Serra*, No. 08-cr-00349, Plea Agreement (M.D.Fla., Oct. 20, 2008); *United States v. Glova*, No. 08-cr-00352,

²³ It is also worth noting that American-made goods from Texas could be transported to other mainland United States destinations by land on railcars and trucks. The island of Puerto Rico does not have similar access.

²⁴ Those four carriers were Crowley Puerto Rico Services, Inc.; Horizon Lines, Inc.; Sea Star Line, LLC; and Trailer Bridge, Inc. As the GAO noted in 2013, an antitrust investigation “led to, among other things, the imposition of about \$46 million in criminal fines and guilty pleas in 2011 and 2012 by *three of the four major Jones Act carriers*.” *See also* “Florida-Based Crowley Liner Services Inc. Pleads Guilty to Price Fixing on Freight Services Between U.S. and Puerto Rico,” <https://www.justice.gov/opa/pr/florida-based-crowley-liner-services-inc-pleads-guilty-price-fixing-freight-services-between>. “Florida-Based Sea Star Line LLC Agrees to Plead Guilty to and Its Former President is Indicted for Price Fixing on Coastal Freight Services Between the Continental United States and Puerto Rico,” <https://www.justice.gov/opa/pr/florida-based-sea-star-line-llc-agrees-plead-guilty-and-its-former-president-indicted-price>. Trailer Bridge filed for bankruptcy, where it settled the antitrust claims for \$275,000.

Plea Agreement (M.D.Fla., Oct. 20, 2008); *United States v. Gill*, No. 08-cr-00351, Plea Agreement (M.D.Fla., Oct. 20, 2008); and *United States v. Baci*, No. 08-cr-00350, Plea Agreement (M.D.Fla., Oct. 20, 2008).

In addition to the criminal and regulatory actions discussed above, there have also been civil lawsuits and penalties. A group impacted by the restrictions of the Jones Act in the United States and Puerto Rico brought a class action suit for antitrust violations against a group of defendants controlling 86% of the Puerto Rico cabotage market, including Horizon Lines, Inc., Crowley Maritime Corp. and affiliates and Sea Star Line, L.L.C., and their affiliates. The case was settled in 2010 without going to trial, after the defendants agreed to pay over fifty million dollars. *In re Puerto Rican Cabotage Antitrust Litigation*, 815 F.Supp.2d 448, 454 (D.P.R. 2011).

People trying to operate competitive businesses in Puerto Rico have not been pleased with these developments. The Puerto Rico Food Marketing, Industry and Distribution Chamber, which represents the chain of food distribution and retail in Puerto Rico, noted that the “cost of maritime transportation is vital for the price and availability of food in the Island.”²⁵ Therefore, this group expressed special concern with the added “indirect costs caused by the lack of competition and the abuse of market power of the two main carriers.”

As long as the Jones Act remains in place, there will be a risk of further antitrust conspiracies. Although this conspiracy was discovered by law enforcement, the next one may not be.²⁶

III. THE JUSTIFICATIONS FOR IMPOSING THE JONES ACT RESTRICTIONS ON PUERTO RICO DO NOT OUTWEIGH THE SUBSTANTIAL COSTS

Although we do not purport to analyze the full scope and utility of the Jones Act writ large, it may be worth noting the widely-held understanding that the Jones Act remains law because a group of commercial interests have engaged in an extensive lobbying effort to support the law. The editorial board at *Bloomberg* summarized the issue as follows:

In truth, *the Jones Act survives because narrow commercial interests want it to*. A protectionist thicket has long surrounded U.S. commercial shipping and shipbuilding. It has gradually hardened into a *political wall impervious to economic reason*.

...
Those people are backed by a flotilla of senators and representatives who are failing to put the broader interests of voters

²⁵ Puerto Rico Food Marketing, Industry and Distribution Chamber to The Congressional Task Force on Economic Growth in Puerto Rico, Sept. 1, 2016, [https://www.finance.senate.gov/imo/media/doc/Puerto%20Rico%20Food%20Marketing,%20Industry%20and%20Distribution%20Chamber%20\(MIDA\).pdf](https://www.finance.senate.gov/imo/media/doc/Puerto%20Rico%20Food%20Marketing,%20Industry%20and%20Distribution%20Chamber%20(MIDA).pdf).

²⁶ In order to guard against anticompetitive behavior in Puerto Rico, we urge you to work with the Federal Maritime Commission, the federal agency that is charged to “protect the shipping public from unlawful, unfair and deceptive ocean transportation practices.” Federal Maritime Commission, 53rd Annual Report for Fiscal Year 2014, p. 3-4, <https://www.fmc.gov/assets/1/Page/53rdAnnualReport.pdf>.

first. They include the 60-odd members of the Congressional Shipbuilding Caucus, one of the bigger and more active of such legislative groups. Filling their coffers and bending their ears are the American Maritime Partnership; the Shipbuilders Council of America; other like-minded industry groups; and scores of individual shipbuilders, shipping lines and labor unions. In 2016, donors associated with sea transport coughed up more than \$10 million in campaign contributions -- the most since at least 1990 -- and spent almost \$25 million on lobbying.²⁷

The President himself has taken notice that “the shipping industry doesn’t want the Jones Act lifted for Puerto Rico.”²⁸ These same forces have not been open to any attempt to amend the Jones Act, even when faced with reasonably modest requests—like ours—to exempt only Puerto Rico from the requirements of the law.

To be clear, we do not wish the hard-working men and women of the maritime industry any harm, and believe that amending the Jones Act to exempt Puerto Rico—a territory that is roughly the size of Connecticut—will not cause the industry to suffer in any substantial way. Nonetheless, we analyze below the two primary justifications that we have seen these groups offer in the past when defending the application of the Jones Act more generally, and our reasoning for why an exemption for Puerto Rico would not adversely affect those goals.

First, these groups have defended the Jones Act more broadly on the premise that it is necessary for protecting national security. These groups, which include the United States Navy, believe that the Jones Act is necessary to ensure a viable merchant fleet ready to be called upon in times of war or natural disaster. Notably, however, we are not proposing a wholesale repeal of the Jones Act. Rather, we are merely proposing that the island of Puerto Rico be exempted from that law’s requirements.

To date, we have not seen any independent study indicating that an exemption that applies to Puerto Rico would be harmful. To the contrary, in light of the relatively small number of Jones Act shippers that service Puerto Rico compared to the total number of Jones Act vessels that would be available, we believe that limiting the Jones Act exemption to Puerto Rico would not harm national security. Moreover, as the GAO has found, the Jones Act ships currently carrying goods back and forth from Puerto Rico “are less useful for military purposes,” and “are generally considered of lesser military value because of their slow speed.” Exempting Puerto Rico from the Jones Act will not realistically affect our military readiness.²⁹

²⁷ The Editorial Board, *Still Playing Politics With U.S. Ports: The Jones Act survives only because of narrow commercial interests*, Bloomberg, Dec. 19, 2017, <https://www.bloomberg.com/view/articles/2017-12-19/still-playing-politics-with-u-s-ports/>.

²⁸ Siegel, Josh, *Trump: Shipping Industry Doesn’t Want Jones Act Lifted for Puerto Rico*, The Washington Examiner, Sept. 27, 2017, <https://www.washingtonexaminer.com/trump-shipping-industry-doesnt-want-jones-act-lifted-for-puerto-rico/article/2635827>.

²⁹ If Congress determines that exempting Puerto Rico would be harmful in any way, we respectfully suggest that the Navy work with Congress to recommend targeted appropriations as a remedy, rather than continuing to impose the Jones Act restrictions on Puerto Rico. An approach of targeted subsidies has been adopted in the past through the

Second, these groups have defended the Jones Act more broadly on the premise that it promotes American jobs. Again, however, we do not believe that exempting Puerto Rico—and only Puerto Rico—from the requirements of the Jones Act would be harmful in this respect. Although the GAO noted that the impact of exempting Puerto Rico from the Jones Act would be “uncertain,” and could lead to a significant reduction in the U.S.-flagged vessels that serve this trade between the mainland United States and Puerto Rico,³⁰ we are unaware of any estimates of how exempting Puerto Rico from the Jones Act would impact the shipbuilding industry. Nonetheless, we do expect that an exemption for Puerto Rico could mean that some crew members who currently serve this route would have to find new routes to serve. Any potential loss of jobs is unfortunate; although, as noted above (Part B(b), *supra*), any such losses would likely be more than offset by exponential gains to U.S. businesses on the mainland. In any event, it is our strong position that the uncertainty and potential adverse effect on a small segment of the shipping industry is absolutely necessary to provide relief—including American jobs—to the people of Puerto Rico who have been suffering through a prolonged recession over the past decade, a bankruptcy proceeding that has caused economic uncertainty, and an unprecedented Category 5 hurricane that has exacerbated all of these substantial difficulties. Moreover, we strongly believe that the maritime industry will survive this limited exemption, just as it has survived the fact that the U.S. Virgin Islands and American Samoa are exempt from the law’s requirements.

The Jones Act’s application to Puerto Rico seems to persist mainly because it spreads its costs out among weaker and less organized groups, while localizing the gains among certain commercial interests within the shipping industry that *Bloomberg* and President Trump have already noted. The economic analysis of the Jones Act that was performed by George Mason University summarizes the dilemma well:

The Jones Act is an example of a policy that persists even though it is wasteful for the nation as a whole. Total costs exceed total benefits, but the benefits are concentrated and the losses are diffuse. Beneficiaries are shipbuilders and their employees, members of seafarer unions, and carriers that are protected from competition. Carriers like Matson are in a complex situation in which they lose from paying more for American-built ships but they gain from being protected from foreign competitors. ***These groups know how they are affected by the law, and it is easy for them to organize and lobby for continued protection.***

use of Operating Differential Subsidies (ODS) and Construction Differential Subsidies (CDS) as well as the current Maritime Security Program (MSP). *See, e.g.*, MARAD: Maritime Security Program, <https://www.marad.dot.gov/ships-and-shipping/strategic-sealift/maritime-security-program-msp/>. We believe that *if* a limited Puerto Rico exemption were to be found harmful—despite no current evidence indicating that this would be the case—then a series of targeted subsidies selected by the Navy would be preferable to the current system that disproportionately burdens the people of Puerto Rico to create vessels of “lesser military value.”

³⁰ It should also be noted that, since the GAO report was issued several years ago, the shipping industry has touted the introduction of several new Jones Act vessels. If these ships are capable of providing competitive service to Puerto Rico, then they will be able to compete more effectively in an open marketplace when Congress grants Puerto Rico an exemption from the Jones Act.

Conversely, the costs of the Jones Act are spread across millions of Americans, most of whom have never heard of the act. The annual cost per person is small, even though the total cost summed over millions of consumers is large. The additional cost of transportation is not very visible to consumers because it is shifted forward at every link in the supply chain; for example, the additional transportation costs of energy are one reason why electricity costs in Hawaii are the highest among the 50 states. Hence, individual consumers have little incentive to learn about the Jones Act and to lobby in favor of its repeal. Consequently, *Congress has been more responsive to the well-organized beneficiaries than to the diffuse and poorly organized losers.*

It is ultimately not necessary to determine whether this is a fair assessment of the costs and effects of the Jones Act generally, or whether the Jones Act is justified entirely by the backstop military capability asserted to result from it. In either event, Puerto Rico's contributions toward the goals of the Jones Act are minimal in relation to the entire scope of subsidies generated by the law for upkeep of the merchant marine, while release of Puerto Rico's residents from the special burdens they shoulder to support the Jones Act's purposes would provide much-needed incremental relief to the people of Puerto Rico. We respectfully urge that this burden be removed from Puerto Rico in order to boost its efforts to rebuild its economy and infrastructure.

IV. THE BRIEF TEN-DAY WAIVER OF THE JONES ACT WAS INSUFFICIENT

On September 27, 2017, we wrote a letter to the U.S. Department of Homeland Security, urging the agency to issue a one-year waiver of the Jones Act in light of Hurricane Maria.³¹ They ultimately imposed a ten-day waiver.³² With due respect, this was simply not sufficient. As the Niskanen Center astutely observed, that was “a window that was too short to organize effective transportation of relief supplies by non-American ships.”³³ What's more, this ten day waiver took effect at a time when only a few of the island's 22 ports were usable, with literally “thousands of shipping containers” held up at San Juan due to the “heavy damage to roads, computer systems and other critical infrastructure” necessary to distribute goods from the ports to their ultimate destinations.³⁴ Nonetheless, even with this narrow window and these substantial

³¹ See http://s3.amazonaws.com/documents.nycbar.org/files/Jones_Act_Puerto_Rico_TASK_FORCE_9.27.17.pdf.

³² Department of Homeland Security Waiver of Compliance with Navigation Laws, https://www.dhs.gov/sites/default/files/publications/17_0928_AS1_Jones-Act-Waiver.pdf.

³³ Nolan, Ed, *It's Time to Do Something About the Jones Act*, Niskanen Center, Dec. 22, 2017, <https://niskanencenter.org/blog/notes/time-something-jones-act/>; see also Shackford, Scott, *Trump Waives Jones Act for Puerto Rico for Ten Days. That's Good, but it's Not Enough*, Reason, Sept. 28, 2017, <http://reason.com/blog/2017/09/28/trump-waives-jones-act-for-puerto-rico-f>.

³⁴ Page, Paul, and Hughes, Siobhan, *Puerto Rico Port Reopens But Relief Distribution Remains Slow*, Wall Street Journal, Sept. 26, 2017, <https://www.wsj.com/articles/puerto-rico-port-reopens-but-relief-distribution-remains-slow-1506446137>.

obstacles, eleven international vessels were able to come to Puerto Rico.³⁵ That is quite a feat, in light of the limited time they had to organize effective transportation.

Ultimately, however, granting a permanent exemption for Puerto Rico is a matter that must be decided by legislators, not by a federal agency that has limited powers in this regard. The impact of this narrow exemption is not the deciding factor.

V. A DIVERSE RANGE OF VOICES HAS CLEARLY CALLED FOR EXEMPTING PUERTO RICO

A diverse group of economists, Puerto Rican business organizations, human rights groups, political commentators, and consumer rights advocates have all called for exempting Puerto Rico from the restrictions on the Jones Act. We have compiled a representative list, attached as Exhibit 1 to this letter, but below is a small sample of the voices on this issue:

- **CATO Institute.** The Jones Act “reduces choice and competition among shipping providers, driving transportation costs higher” for the people of Puerto Rico, who “needlessly pay higher prices for the many goods and products they import from the rest of U.S., driving up their cost of living for the sake of protecting” the law’s beneficiaries.³⁶
- **The Economist.** The Jones Act “inflated transportation costs for imports [to Puerto Rico] to twice the level of nearby islands.” This is because territories “[l]acking overland routes such as Alaska, Guam, Hawaii and Puerto Rico are hardest hit” by the law’s requirements.³⁷
- **National Review:** “On the merits, the Jones Act is a bad law. It cost Puerto Rico \$17 billion in economic growth between 1990 and 2010.”³⁸
- **The New York Times.** “This is a shakedown, a mob protection racket, with Puerto Rico a captive market. . . . If the United States has any interest in the

³⁵ MAREX, *Foreign Flag Ship Carries American Aid to Puerto Rico*, The Maritime Executive, Oct. 22, 2017, <https://www.maritime-executive.com/article/foreign-flag-ship-carries-american-aid-to-puerto-rico#gs.HZAKNnk>.

³⁶ Grabow, Colin, *Jones Act Swamp Creature That’s Strangling Puerto Rico*, Cato Institute, Oct. 1, 2017, https://www.cato.org/publications/commentary/jones-act-swamp-creature-thats-strangling-puerto-rico?utm_source=Cato+Institute+Emails&utm_campaign=038226d358-Cato+Today&utm_medium=email&utm_term=0_395878584c-038226d358-144885949&mc_cid=038226d358&mc_eid=0c5288ec7c.

³⁷ *How Protectionism Sank America’s Entire Merchant Fleet*, The Economist, Oct. 5, 2017, <https://www.economist.com/news/finance-and-economics/21730034-jones-act-hurts-american-consumers-and-destroyed-countrys-shipping>.

³⁸ Kupfer, Theodore, *Waiving the Jones Act for Puerto Rico is the Right Step*, National Review, Oct. 5, 2017, <https://www.nationalreview.com/2017/10/waive-jones-act-help-puerto-rico-ending-it-totally-would-be-better/>.

hurricane-battered people of Puerto Rico, it needs to take the law off their necks — and now.”³⁹

- **The Washington Monthly.** “[T]he Jones Act is Robin Hood in reverse,” imposing “rent-seeking” on the people of Puerto Rico, and is only tolerated because “the people who benefit from the regulation have big economic stakes on the line, while those who pay the costs may not even notice the effect on their individual well-being.”⁴⁰

In addition, citizens and voters concerned with the fate of Puerto Rico have been closely watching this issue. For instance, one petition “to waive the Jones Act for Puerto Rico” gathered half a million signatures *in just five days*.⁴¹ We sincerely hope that DHS and Congress will listen to these voices.

VI. CONCLUSION

Exempting Puerto Rico from the Jones Act, much like the U.S. Virgin Islands, would be a way for Congress to help Puerto Rico’s economy at no additional cost to American citizens. The New York City Bar urges a permanent exemption to allow the global markets to help Puerto Rico and remove impediments to its economic growth. There is broad bi-partisan support for this exemption from the Jones Act.⁴² The time to take action to help those in Puerto Rico is now.

John S. Kiernan
President, New York City Bar Association

Roger Juan Maldonado
Chair, New York City Bar Association
Task Force on Puerto Rico

May 2018

³⁹ Denis, Nelson A., *The Jones Act: The Law Strangling Puerto Rico*, The New York Times, Sept. 25, 2017, <https://www.nytimes.com/2017/09/25/opinion/hurricane-puerto-rico-jones-act.html>.

⁴⁰ Lindsey, Brink and Teles, Steven, *Why the Jones Act is Robin Hood in Reverse*, The Washington Monthly, Oct. 2, 2017, <https://washingtonmonthly.com/2017/10/02/why-the-jones-act-is-robin-hood-in-reverse/>.

⁴¹ P. Jessica, *Waive the Jones Act for Puerto Rico to Help Rebuild its Infrastructure and Economy*, Change.org, <https://www.change.org/p/departament-of-homeland-security-waive-the-jones-act-for-all-cargo-at-ports-in-puerto-rico-to-aid-hurricane-maria-relief>.

⁴² Gardner, Timothy, *McCain Introduces Bill to Kill Puerto Rico Shipping Restriction*, Reuters, Sept. 28, 2017, <https://www.reuters.com/article/us-usa-puertorico-shipping-mccain/mccain-introduces-bill-to-kill-puerto-rico-shipping-restrictions-idUSKCN1C32ZL>.

EXHIBIT 1

List of Organizations That Have Supported Exempting Puerto Rico from the Requirements of the Jones Act in Whole or in Part

1. Alliance for Free Association (ALAS)
2. Asociación de Detallistas de Gasolina de Puerto Rico, Inc. (Puerto Rico Gasoline Detailers Association, Inc.)
3. Asociación Nacional de Tiendas de Autoservicio y Departamentales (ANTAD)
4. American Enterprise Institute
5. Cámara de Mercadeo, Industria y Distribucion de Alimentos (Puerto Rico Food Marketing, Industry and Distribution Chamber)
6. Campbell Soup Company
7. CATO Institute
8. Climate Justice Alliance
9. College of Certified Public Accountants of Puerto Rico
10. Empresarios Por Puerto Rico (Entrepreneurs of Puerto Rico)
11. Empire Gas Company, Inc.
12. Federal Reserve Bank of New York
13. Fundación Libertad Puerto Rico
14. Grassroots Institute of Hawaii
15. Hawaii Shippers Council
16. Heritage Foundation
17. Hispanic Federation
18. LatinoJustice
19. National Grocers Association
20. Pan American Grain
21. PathStone Corporation
22. Puerto Rico Bar Association
23. Puerto Rico Chamber of Commerce
24. Puerto Rico Community Pharmacy Association
25. Puerto Rico Electric Power Authority (PREPA)
26. Puerto Rico Small Business Owners
27. Puerto Rico Society of CPAs
28. Puerto Rico United Retailers Association
29. Puma Energy Caribe, LLC

EXHIBIT 2

Members of Congress That Have Supported Exempting Puerto Rico from the Requirements of the Jones Act in Whole or in Part

1. Rep. Andy Biggs (R-AZ)
2. Rep. Mike Bishop (R-MI)
3. Rep. Dave Brat (R-VA)
4. Rep. Mo Brooks (R-AL)
5. Rep. Ken Buck (R-CO)
6. Rep. Mike Coffman (R-CO)
7. Rep. Warren Davidson (R-OH)
8. Rep. Luis Gutiérrez (D-IL)
9. Rep. Karen Handel (R-GA)
10. Rep. Barry Loudermilk (R-GA)
11. Rep. Grace Meng (D-NY)
12. Rep. Gary Palmer (R-AL)
13. Rep. Bill Posey (R-FL)
14. Rep. Dana Rohrabacher (R-CA)
15. Rep. Mark Sanford (R-SC)
16. Rep. José Serrano (D-NY)
17. Rep. Darren Soto (D-FL)
18. Rep. Nydia Velázquez (D-NY)
19. Rep. Roger Williams (R-TX)
20. Sen. Jeff Flake (R-AZ)
21. Sen. James Lankford (R-OK)
22. Sen. Mike Lee (R-UT)
23. Sen. John McCain (R-AZ)
24. Sen. Marco Rubio (R-FL)