ORAL ARGUMENT NOT YET SCHEDULED

No. 23-01052

IN THE

United States Court of Appeals for the District of Columbia Circuit

EVERGREEN SHIPPING AGENCY (AMERICA) CORP., *et al.*,

Petitioners,

v.

FEDERAL MARITIME COMMISSION, *et al.*,

Respondents.

On Petition for Review of an Order of the Federal Maritime Commission

BRIEF AMICI CURIAE OF WORLD SHIPPING COUNCIL AND NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amici* certify the following:

Parties and Amici. a. All parties and intervenors appearing before this Court are listed in Petitioners' brief. The amici submitting this brief are the World Shipping Council and National Association of Waterfront Employers.

b. The World Shipping Council is the primary industry trade association representing the international liner shipping industry. WSC members include some of the world's largest shipping lines and have invested hundreds of billions of dollars in the infrastructure required to keep the global shipping economy afloat. WSC has no parent company and no entity owns 10% or more of an interest in WSC. WSC is a trade association for purposes of Circuit Rule 26.1(b).

National Association of Waterfront Employers represents the interests of U.S. marine terminal operators and aims to promote marine cargo efficiency, security, health, and economic growth. Marine terminal operators are the providers of wharfage, docking, warehouses, and other marine terminal facilities for ocean common carriers moving commerce into and out of the United States. NAWE has no parent company and no entity owns 10% or more of an interest in NAWE. NAWE is a trade association for purposes of Circuit Rule 26.1(b).

Rulings Under Review. The rulings under review are listed in Petitioners' brief.

Related Cases. Counsel is not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Catherine E. Stetson
Catherine E. Stetson

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GLOSSARY

FMC or the Commission:	Federal Maritime Commission
Final Interpretive Rule:	Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29,638, 29,638 (May 18, 2020)
NAWE:	National Association of Waterfront Employers
Proposed Interpretive Rule:	Interpretive Rule on Demurrage and Detention Under the Shipping Act, 84 Fed. Reg. 48,850, 48,851 (proposed Sept. 17, 2019)
WSC:	World Shipping Council

STATEMENT OF INTEREST OF AMICI CURIAE

The World Shipping Council (WSC) and the National Association of Waterfront Employers (NAWE) submit this brief as *amici curiae* in support of Petitioners.[1]

The World Shipping Council is the primary industry trade association representing the international liner shipping industry. WSC members include some of the world's largest shipping lines and have invested hundreds of billions of dollars in the infrastructure required to keep the global shipping economy afloat. The shipping industry provides U.S. importers and exporters with end-to-end service, delivering virtually every commodity to virtually every country in the world. The container shipping industry is a critical facilitator of the entire global economy: Each year, over 1,000 ocean-going liner vessels make more than 28,000 calls at ports in the United States alone. WSC has testified before the House Committee on Transportation and Infrastructure, submitted written comments to

[1] We certify that no party or counsel for a party authored this brief in whole or in part. We note that Cozen O'Connor attorneys serve as counsel for Petitioners and that a different Cozen O'Connor attorney is general counsel for the National Association of Waterfront Employers. But the Cozen O'Connor attorney that serves as general counsel for NAWE has not provided input on this brief greater than the coordination permitted by Federal Rule of Appellate Procedure 29(a)(4)(E). *See* Fed. R. App. P. 29 advisory committee's note to 2010 amendment. We further certify that no one other than *amici* and their members made a contribution intended to fund the preparation of this brief. All parties have consented to this brief.

the Federal Maritime Commission regarding several of the agency's actions implementing the Shipping Act, and participated in the Commission's fact-finding investigations.

NAWE represents the interests of U.S. marine terminal operators and aims to promote marine cargo efficiency, security, health, and economic growth. Marine terminal operators are the providers of wharfage, docking, warehouses, and other marine terminal facilities for ocean common carriers moving commerce into and out of the United States. NAWE's membership includes both public and private port authorities across the nation, handling over 42 million containers annually representing over $1.8 trillion in U.S. international trade. Like WSC, NAWE has been actively engaged in testifying before Congress, submitting comments to the Federal Maritime Commission's rulemaking actions, and actively participating in the Commission's fact-finding efforts focused on a range of Shipping Act implementation efforts, including with regard to demurrage and detention.

WSC and NAWE have been actively involved in efforts to address inefficiencies in the shipping supply chain, as these failures harm both their members and the entire American economy. They also bring a unique perspective on this case, including a nuanced understanding of the particular interpretive rule at issue, as well as the importance of efficiency, predictability, and transparency to

the shipping industry. WSC and NAWE have long been troubled by the potentially far-reaching, prescriptive implications of the Commission's Final Interpretive Rule on demurrage and detention fees and the harms of the Commission's misguided application of that Rule on the shipping industry's efficiency and efficacy.

This may be a $510 case, but it implicates legal principles that lie at the core of an industry that transports $1.8 trillion in goods annually into and out of the United States. WSC and NAWE write to share with the Court their practical perspectives on the legal principles at issue and how upholding the Commission's decision would harm shipping lines, marine terminal operators, and the American consumer. WSC and NAWE also write to encourage the Court to bring much-needed certainty and predictability to this area of Commission practice.

SUMMARY OF ARGUMENT

I. The Shipping Act of 1984 requires that common carriers, marine terminal operators, and ocean transportation intermediaries "establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). The Federal Maritime Commission published a Final Interpretive Rule on demurrage and detention fees in May 2020 with the purpose of clarifying the "factors it may consider when assessing the reasonableness of demurrage and detention practices

under" the Shipping Act. Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29,638, 29,638 (May 18, 2020) (Final Interpretive Rule). The Rule was intended to promote transparency, predictability, and efficiency in the flow of cargo to and from U.S. ports. *Id*. The Rule was also intended to be "flexible" and non-prescriptive "to account for the variety of marine terminal operations nationwide and to allow for innovative commercial solutions to commercial problems." *Id*. at 29,639.

The facts here—the three weeks of free time Evergreen already contractually provided to TCW, the Port of Savannah's public and far-in-advance notice of its holiday operating schedule, and the four days of detention already accrued by TCW before the holiday weekend the Commission cited—all weigh in favor of assessing a detention charge. But the Commission ignored those facts entirely in its myopic focus on a single issue: whether the Port was "closed" on the day the claimant finally chose to return its equipment. That wooden approach to implementing the Final Interpretive Rule demonstrates that it is a hard-and-fast rule, not the flexible guidance that it claimed to be—just as WSC and NAWE warned in their respective comments to the Commission in response to the agency's notice of proposed rulemaking. Even worse, the Commission has told regulated parties that the Commission expects them to conform their conduct to its

decision below for detention and demurrage charges going forward, meaning that the Commission's errors will not be limited to this $510 small-claims matter.

II. The container shipping industry relies on fair, transparent, and predictable business arrangements to function efficiently and on schedule. Many parties with many different interests must coordinate with each other to ensure that cargo is moved at the right time to the right places. For decades, detention and demurrage fees have been an integral part of that process, helping ensure both the timely movement of containers and communication between interested parties and fair compensation for the use of equipment and terminal space. The agency's application of the Final Interpretive Rule runs roughshod over that historical contractual practice, replacing a flexible, fact-sensitive system with a prescriptive prohibition against charges when port gates are closed that is untethered to the fees' underlying purposes. And the consequences of injecting inefficient and impractical regulation into the shipping supply chain could be severe. As COVID-19 recently illuminated, the shipping industry is delicately balanced, and disruptions can have harmful ripple effects. Detention and demurrage fees mitigate these disruptions by imposing the cost of delays on those responsible for them and encouraging systemic improvements to ensure timely pickups and drop-offs of equipment.

The Commission's order should be vacated.

ARGUMENT

I. THE COMMISSION'S DECISION VIOLATES THE ADMINISTRATIVE PROCEDURE ACT BECAUSE IT IMPOSES AN INFLEXIBLE STANDARD INSTEAD OF THE FACT-SENSITIVE, CASE-BY-CASE APPROACH THE COMMISSION PROMISED IN ITS FINAL INTERPRETIVE RULE.

An agency violates the Administrative Procedure Act when it says one thing but does another. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (holding that "an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice' ") (citation omitted). That is just what the Commission did in its decision here. The Commission promised a fact-sensitive, case-by-case approach in its Final Interpretive Rule, but imposed a rigid, inflexible standard in its order on review. And the Commission has subsequently made clear that its standard is as inflexible as it seems, notifying regulated parties that it expects their policies to conform to the standard announced in the decision. The Court should vacate the Commission's decision.

1. The Shipping Act of 1984 requires that common carriers, marine terminal operators, and ocean transportation intermediaries "establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). In response to "repeated criticisms" of detention and demurrage practices, *see*

Interpretive Rule on Demurrage and Detention Under the Shipping Act, 84 Fed. Reg. 48,850, 48,851 (proposed Sept. 17, 2019) (Proposed Interpretive Rule)—criticisms largely driven by "port congestion, labor strife, an ocean-carrier bankruptcy, inclement weather, and other disruption events"[2]—the Commission undertook a fact-finding investigation. Federal Maritime Commission, *Fact Finding Investigation No. 28 Final Report* (Dec. 3, 2018), *available at* https://tinyurl.com/mvbk6s8y. After the investigation concluded, the Commission issued a proposed interpretive rule that attempted to clarify the statutory "reasonableness" standard as it applied to detention and demurrage charges.

The Proposed Interpretive Rule stated that "[t]he intended purposes of demurrage and detention charges are to incentivize cargo movement and the productive use of assets." 84 Fed. Reg. at 48,852. According to the Commission, "[t]o pass muster under § 41102(c)," any charges must be "tailored to meet [that] intended purpose." *Id*. (citation omitted). But the Commission also stated that the Rule's "application will vary depending on the facts of a given case." *Id*. The Commission went on to list several factors that might weigh in assessing whether a charge was reasonable in light of the incentive principle, including whether cargo was actually available for pickup during free time, whether containers could be

[2] *E.g.*, Coalition for Fair Port Practices Petition for Rulemaking at 3, FMC Dkt. No. P4-16 (Dec. 7, 2016), *available at* https://tinyurl.com/3wnu8td5.

returned during free time, whether regulated entities provided adequate notice regarding cargo retrieval and return processes, and whether regulated entities had made their policies and practices clear. *Id*. at 48,852-54. The Commission assured regulated parties, however, that the incentive principle's "application will vary depending on the facts of a given case." *Id.* at 48,852.

WSC raised the alarm in response to the Proposed Interpretive Rule. WSC agreed that "an interpretive rule that is properly constructed could be useful in promoting fluidity and reducing confusion." Comments of the World Shipping Council on the Interpretive Rule on Demurrage and Detention at 2, FMC Dkt. No. 19-05 (Oct. 31, 2019), *available at* https://tinyurl.com/4jht9r55. But WSC warned that "[t]he Commission grossly oversimplifies the underlying purposes of demurrage and detention to the sole criterion of whether the charge acts to incentivize the movement of a shipping container." *Id.* WSC explained that the Commission's Proposed Interpretive Rule had reduced the multifaceted statutory reasonableness standard to a "single-factor test." *Id*. at 7. Moreover, the incentive principle in the Proposed Interpretive Rule effectively dictated processes with respect to certain aspects of container shipping—such as when free-time periods begin and end and how billing may be structured—that had previously been left to competitive market forces. *Id.* at 11.

WSC was concerned that the Proposed Interpretive Rule's "sweeping new standards" would "use[] a broad brush to make new substantive law under the guise of merely providing guidance." *Id*. at 2-3. Inflexible standards, WSC observed, were the province of *legislative* rules, which carry with them APA-mandated safeguards and analytical requirements that the Commission had not followed. *Id.* at 3-7, 10. WSC stressed that its opposition to the Proposed Interpretive Rule was not opposition to regulating detention and demurrage charges at all, but rather WSC's perception that the Commission's approach was "fundamentally at odds with the need to consider the totality of the circumstances in making an equitable 'reasonableness' determination." *Id.* at 19.

NAWE expressed similar concerns in its comments, noting that while the Proposed Interpretive Rule was "careful to state that it is 'guidance' and an 'interpretative rule' " that as drafted the rule could have a " 'practical binding effect' on regulated parties." Comments of the National Association of Waterfront Employers on the Interpretive Rule on Demurrage and Detention at 7, FMC Dkt. No. 19-05 (Oct. 28, 2019), *available at* https://tinyurl.com/357swa4n (citing *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974)). NAWE predicted that the interpretive rule would have legislative effect that would require a "change [in] the behavior of terminal operators concerned about the liability they might incur if their individual regulations and practices were to be

deemed "unreasonable." *Id.* NAWE anticipated that the rule would be treated inflexibly as "cargo interests and truckers would point to the interpretative rule as a basis for alleging that certain conduct is 'unreasonable,' and the [Commission] staff and administrative law judges would similarly be guided by the rule." *Id.*

The Commission's Final Interpretive Rule purported to address WSC's, NAWE's, and others' concerns about the Proposed Interpretive Rule's inflexibility. 85 Fed. Reg. at 29,641. The Commission contended that commenters' criticisms "bear little resemblance to the proposed rule," which, the Commission claimed, "consists of a *non-exclusive* list of *factors*." *Id.* (emphases added). The Commission contended that the examples WSC, NAWE, and others had criticized as inflexible rules were merely "some examples of the attributes of demurrage and detention practices that might, in the abstract, weigh favorably or unfavorably" in its analysis, but that "each . . . case would continue to be decided on the particular facts of the case." *Id.* (citation omitted). That is, "the Commission would consider any additional or countervailing arguments or evidence raised by the parties in a particular case." *Id.* But, because commenters "may have misunderstood the nature of the proposed rule," the Commission added to the Final Interpretive Rule "a new paragraph confirming that nothing in the rule precludes the Commission from considering other factors, arguments, and evidence in addition to the ones specified." *Id.*

Addressing WSC's argument that the Proposed Interpretive Rule was in fact a legislative rule masquerading as an interpretive one, the Commission denied that the rule could be used as a rule of decision or as the basis for an enforcement action or private claim, stating that: "The rule does not . . . have 'legal effect' " and "could not be the basis for a Commission enforcement action or a private party reparation action. There are no 'requirements" or mandates or dictates in the rule for an ocean carrier to violate. In other words, one cannot bring an action based on the rule alone—the basis for any legal action would be" the Shipping Act's reasonableness requirement. 85 Fed. Reg. at 29,642. Taking the Commission at its word, WSC and NAWE did not challenge the Final Interpretive Rule because interpretive rules are not judicially reviewable.

The Final Interpretive Rule, as codified, states that "[n]othing in this rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule." 46 C.F.R. § 545.5(f). But the Final Interpretive Rule also provides that "[a]bsent extenuating circumstances, practices and regulations that provide for imposition of detention . . . when empty containers cannot be returned, are likely to be found unreasonable." *Id.* § 545.5(c)(2)(ii).

2. The Commission's decision under review contradicts its promises to decide detention-and-demurrage issues in case-specific ways. *See National Fam.*

Plan. & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (agency violated APA where "subsequent interpretation [of a rule] runs 180 degrees counter to the plain meaning" of the prior regulation). To start, the Commission adopted the claims officer's statement that the Final Interpretive Rule "is intended to reflect . . . the principle that: 'importers, exporters, intermediaries, and truckers should not be penalized by demurrage and detention practices when circumstances are such that they cannot retrieve equipment from or return equipment to marine terminals because under those circumstances the charges cannot serve their incentive function.' " Initial Decision at 25, *TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp.*, FMC Dkt. No. 1966(I) (Feb. 19, 2021) (citation omitted); *see generally* Order Affirming Initial Decision, *TCW, Inc.*, FMC Dkt. No. 1966(I) (Dec. 29, 2022). That statement reflects the Commission's treatment of the incentive principle generally and the port-closure rule specifically as an overarching legal standard, not as one factor considered in the totality of the circumstances. Yet it is contrary to the Commission's promise in the Final Interpretive Rule that "each . . . case would continue to be decided on the particular facts of the case," and that "[t]he application of the 'incentive principle' . . . would 'vary depending on the facts of a given case.' " 85 Fed. Reg. at 29,641 (internal footnotes and citations omitted).

Moreover, the Commission's decision ignores that there are many scenarios where it would be just and reasonable to assess a detention charge on days when a port's truck gates are closed. Where, for instance, a party's own negligence is the cause of a delay in container return—by say, delaying return of a container from a Friday to a Monday—precedent teaches that it is reasonable for an innocent counterparty to contract so it is not forced to bear the costs of that delay, such as by imposing weekend charges to incentivize return before the weekend. *E.g.*, *American Export-Isbrandtsen Lines, Inc. v. FMC*, 444 F.2d 824, 831 (D.C. Cir. 1970) (determining it was a "just and reasonable practice for Terminals to be made responsible . . . for delays due to insufficient or inefficient labor" when the labor situation was "heavily affected by the policies" of the Terminals themselves); *see also Adenariwo v. FMC*, 808 F.3d 74, 80 (D.C. Cir. 2015) (considering, but rejecting, the common-law damage-mitigation defense in light of one party's malfeasance in demurrage-fee dispute). The decision also does not consider the distinction between unpredictable events that force the closure of the entire port—for example, severe weather—for which detention and demurrage fees are generally waived and, like here, widely advertised times when terminal gates are closed but terminal operations continue. *See, e.g.*, Colin Campbell, *Truckers Protest Delays at Port of Baltimore's Container Terminal*, Balt. Sun (Jan. 30, 2019), https://tinyurl.com/3yy8pun9 ("Even when the gates are closed to trucks or

labor action causes slowdowns at the terminal . . . the ships continue to be loaded and unloaded to make sure the shipping lines don't opt to use other East Coast ports.").

These principles are particularly relevant in light of the Commission's stated intent to facilitate "*commercial* solutions to *commercial* problems." 85 Fed. Reg. at 29,639 (emphases added). But the Commission's decision erases factual nuance in favor of a flat prohibition on charges when ports are closed. That prohibition drastically limits the ability of carriers and marine terminal operators to structure their contracts and conduct their business according to commonly recognized, commercially reasonable terms. *See, e.g.*, *Middle Atlantic Conf. v. United States*, 353 F. Supp. 1109, 1120 (D.D.C. 1972) ("[T]he parties to a contract of carriage are perfectly free among themselves to contract with respect to the payment of demurrage . . . ."); *Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273, 1276 (11th Cir. 2009) (at common law, "demurrage charges are properly assessed even if the cause for delay is beyond the party's control, unless the carrier itself is responsible for the delay"). And by ruling out these additional factors, the Commission overlooked an important part of the issues before it. *See United Parcel Serv., Inc. v. Postal Regul. Comm'n*, 955 F.3d 1038, 1050-51 (D.C. Cir. 2020) (a "statutorily mandated factor"—like reasonableness—"by definition, is an important aspect of any issue before an administrative agency") (citation omitted).

As Commissioner Bentzel explained in dissent, "terms such as 'incentive principle' do not replace 'reasonableness' which is the underpinning of the Shipping Act. In this case, my concern is that we are at risk of overstating the manufactured principle at the peril of usurping reasonableness." Order Affirming Initial Decision at 17 (Bentzel, C., dissenting). Unlike both the claims officer and his colleagues, Commissioner Bentzel engaged with the record facts, noting that TCW "had 21 days of total free time" to return the equipment; "the[] closures [at issue] were communicated widely," *id*. at 19; and TCW was "already exceeding limits of free time before implementation of the per diem penalties," *id*. at 17. Any reasonable evaluation of all of the facts would have concluded, as Commissioner Bentzel did, that Evergreen had provided a "reasonable time allotment even with reductions due to Saturday closures and the Memorial Day holiday" and that TCW was "provided more than adequate notification of the operational policies." *Id*. at 20.

The Commission dismissed this fact-sensitive analysis as an argument in favor of "once-in-demurrage, always-in-demurrage," where a shipper that exceeds its allotted free time is at risk for all demurrage (or detention) costs, regardless of fault. *Id*. at 10-11. But that—once again—shows the Commission's commitment to inflexible thinking contrary to the Final Interpretive Rule. The argument that, *in this case*, TCW's extensive free-time period and advance notice of the impending

truck-gate closure warranted detention charges even during the period the port was not accepting returns over the Memorial Day weekend is not the same as arguing that TCW was on the hook for detention charges no matter what happened after its free time expired. By viewing the arguments presented as black-and-white absolutisms rather than case-by-case considerations, the Commission broke from the Final Interpretive Rule and the APA. *See PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("An agency's 'failure to respond meaningfully' to objections raised by a party renders its decision arbitrary and capricious.") (citation omitted).

The Commission has since made clear that its application of the Final Interpretive Rule in this case is not a one-off. The Commission in March sent an industry-wide notification seeking compliance with its "precedential decision" in this case, and ordering carriers to "cease and desist from imposing charges . . . when empty equipment cannot be returned on weekdays, holidays, and port closures." *FMC Checking Ocean Carrier & MTO Compliance with Recent Ruling on Per Diem Charges*, Federal Maritime Commission (Mar. 23, 2023), https://tinyurl.com/2sr6f8d7. That sure sounds a lot like the Commission "saying 'regulated entities must do X,'" despite the Commission explicitly disavowing that approach in the Final Interpretive Rule. 85 Fed. Reg. at 29,644 n.89. The Commission's treatment of the Final Interpretive Rule in this case and after has not

made the statutory target—just and reasonable practices—"crisper and more detailed." *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). It has moved the target entirely.

II. THE CONTAINER SHIPPING INDUSTRY'S CAREFULLY BALANCED SYSTEM IS CRITICAL TO THE FUNCTIONING OF THE GLOBAL ECONOMY AND RELIES ON PREDICTABLE, FAIR, AND TRANSPARENT BUSINESS ARRANGEMENTS.

A. Container Shipping Is The Backbone Of The Global Supply Chain.

1. The liner shipping industry is vast. Every day, thousands of containers move through ports across the globe. In the U.S. alone, liner shipping contributes to 17% of GDP, 28 million jobs, and 311 billion tons of international trade transported per year. World Shipping Council, *Liner Shipping—Powering the U.S. Economy*, https://tinyurl.com/yjap8ham.

Both East and West Coast ports handle a tremendous volume of inbound and outbound ocean liners, containers, truckers, and personnel. The Port of Los Angeles and the Port of Long Beach, for instance, accounted for 40 percent of all seaborne imports to the United States in 2020, the latest year for which aggregated results have been released by the Bureau of Transportation Statistics. Soumya Karlamangla, *The Busiest Port in the U.S.*, N.Y. Times (Oct. 18, 2021), https://tinyurl.com/2xz7j33p. But East Coast ports—including the Port of Savannah—are facing increasing traffic; the Port of New York and New Jersey

processed more import and export containers than any other U.S. port in August of 2022. Lisa Fickenscher, *New York Now the Busiest Shipping Port in the U.S., Leapfrogging California*, N.Y. Post (Sept. 26, 2022), https://tinyurl.com/yr74ch4r.

Like a bus or train system, these pickups and deliveries rely on a fixed, continuous schedule. And also like public-transit systems, each route is unique: The result is an incredibly complex, intricate network of thousands of supply chains criss-crossing the globe, all relying on a finite set of containers, ships, and ports to facilitate the international exchange of goods. World Shipping Council, *Liner Shipping: The Backbone of World Trade* 2 (Dec. 2021), https://tinyurl.com/y8w8mmur (*Liner Shipping*). "Manufacturers and retailers normally operate with many months of forward planning, and cargo flows have for the past couple of decades followed predictable seasonal patterns, with sufficient capacity allowing for just-in-time operations and low inventories." *Id*. at 28. Contracts govern when ocean carriers will arrive at a given port, how much cargo they will be carrying, and where that cargo must ultimately go. Ocean carriers can then enter into operational agreements, vessel sharing arrangements, and other coordinated efforts with fellow industry players to maximize the efficient use of time, equipment, and labor across the world's ports in reliance on these contracts. *Id*. at 9.

Underlying this complex, enormous economic engine is a familiar system: one built on borrowing, using, and returning shared items. Central locations—marine terminals and ports—house equipment that is in a constant cycle of use and return. In many respects, the liner shipping system is analogous to a rental car agency. *See* Katrien Storms et al., *Demurrage and Detention: From Operational Challenges Towards Solutions*, 8 J. Shipping & Trade 8-9 (2023). The owner of the rental fleet schedules returns and pickups to maximize the use of each vehicle. Like ports and terminals, rental car dropoff sites do not truly "close" on weekends and holidays; rather, workers behind the scenes must clean, prepare, and service the returned equipment so that it is ready for the next borrower. Delays in returns throw sand in the gears, which is why borrowers must return a vehicle where and when they promised or else pay a fee. *E.g.*, *Late Return Policy*, Enterprise, https://tinyurl.com/5etcfmww (last accessed June 6, 2023).

2. Timeliness and predictability are critical worldwide, but they are especially acute issues in the United States, which during the COVID-19 pandemic was the "epicenter of the import cargo surge and import/export imbalance." *Impacts of Shipping Container Shortages, Delays, and Increased Demand on the North American Supply Chain: Hearing Before the Subcomm. on Coast Guard & Maritime Transp. of the H. Comm. on Transp. & Infrastructure*, 117 Cong. 39 (2021) (written statement of John W. Butler, President & CEO, World Shipping

Council) (Butler Testimony). Asia and North America constitute the world's largest trade route. But it is an asymmetric route, and involves "significantly more loaded containers moving from than to Asia, and therefore require[s] the constant movement of empty containers back to Asia to meet the high export demand," *Liner Shipping*, *supra*, at 16, with "all trades . . . effectively competing for vessel space and container equipment," *id*. at 19. It is therefore not only important to move containers out of terminals promptly when they arrive, but crucial to return empty containers promptly to terminals so they can be used to transport U.S. exports or re-positioned overseas to carry U.S. imports.

To maintain the system's equilibrium and avoid delays and inefficiencies, certain common transactions and fees undergird the movement of containerized cargo. In fact, "tailored pricing" that "align[s] the interests" of all involved parties is one of the tools that industry experts have flagged as a tool for industry growth and innovation. Steve Saxon & Matt Stone, McKinsey & Co., *Container Shipping: The Next 50 Years*, at 13-14 (Oct. 2017), *available at* https://tinyurl.com/4ftu4zet.

Detention and demurrage fees are two decades-old tools in the tailored-pricing toolbox. Although related, the two terms refer to different charges: Demurrage fees are assessed when containers are not picked up in a timely fashion and are instead left in the terminal, whereas detention fees are assessed when

containers are not timely returned. Detention fees are only assessed after "free time"—essentially, a grace period, which typically runs for much less than the three weeks in this case—has elapsed. *See* John Frittelli, Cong. Rsch. Serv., IF11852, *Shipping, Ports, and the Federal Maritime Commission* 2 (2021). Moreover, these rates are competitive: They can be published and established by multiple parties, including "specified in a [vessel-operating common carrier]'s tariff, a terminal or port authority's [marine terminal operator] schedule, or in a service contract between a shipper and" a vessel operating common carrier. Federal Maritime Commission, *Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports & Exports Moving Through Selected United States Ports* 10 (Apr. 3, 2015), *available at* https://tinyurl.com/mt3jm5vh (*Rate Report*).

B. Failures In The Timely Retrieval Of Containers, Unloading Of Cargo And Return Of Equipment Can Have Harmful Ripple Effects, Which Detention And Demurrage Charges Help To Prevent And Mitigate.

1. When this carefully balanced system breaks down, the results can be catastrophic, as COVID-19 demonstrated. A spike in consumer purchasing during the pandemic's later half rendered major ports on the West Coast unable to handle the vast increase in imports. Karlamangla, *supra*. Container ships were delayed—sometimes for over a week—in unloading their cargo, forced to drop anchor in the Pacific. These container ships were running idle, adding to Los Angeles' already

significant air-quality concerns. Tony Briscoe, *Ports Reveal Unprecedented Surge In Harmful Emissions; Officials Blame COVID-19 Logjam*, L.A. Times (Oct. 17, 2022), https://tinyurl.com/3vk6j36f. Containers waiting to be loaded were stacked rows deep on top of one another, creating additional delays when ships were finally able to dock. David J. Lynch, *Biden Administration Struggles To Fix Ailing Supply Chain As Holiday Season Looms*, Wash. Post (Sept. 24, 2001), https://tinyurl.com/yckws8sc.

These backlogs "put[] pressure not just on ocean carriers, but on every link in the complex global and North American supply chain." Butler Testimony, *supra*, 117 Cong. 37-38. Or, as the Commission put it, "congestion begets further congestion, which in turn may result in higher costs for everyone in the supply chain." *Rate Report*, *supra*, at 21. Disruption in any part of the shipping industry has knock-on effects that delay the arrival of necessary goods and raise prices for ocean lines, marine terminal operators, and shippers, all of which must eventually be passed on to the American consumer.

Although there is no silver-bullet solution for delays or system failures, demurrage and detention fees help maintain accountability and communication along links in the supply chain. *See Case Study 1: Ports of Los Angeles and Long Beach, United States*, United Nations Conf. on Trade & Dev., https://tinyurl.com/crnyurjn (last visited June 6, 2022) (explaining that "incentives

and deterrents" are part of a "joint strategy to deal with empty containers and ensure their availability to exporters"). Since their common-law birth as standard clauses in contracts of carriage, detention and demurrage charges have allocated risk and responsibility among interested parties. The fees help to "maintain an uninterrupted container flow by turning them around as quickly as possible," with detention charges in particular "ensur[ing] that a shipper returns the container in time so that the shipping line can reuse it." Storms et al., *supra*, at 10. Similarly, "[m]arine terminals are a zero-sum game—each container sitting on a terminal is occupying space that is needed for another container coming off of (or going on to) the next ship." *Maritime Transportation Supply Chain Issues: Hearing Before the Subcomm. on Coast Guard & Maritime Transp. of the H. Comm. on Transp. & Infrastructure*, 118 Cong. __ (2023) (written statement of Matthew Leech, President & CEO, Ports America). Terminal demurrage acts as "an incentive for cargo interests to remove cargo in a timely fashion to avoid using the terminal as a warehouse" and to create space for additional containers. *Id.* These charges are features, rather than bugs, of a properly working system.

Blanket, fact-insensitive rules prohibiting detention and demurrage charges would raise costs to *all* parties. Shipping lines and marine terminal operators, after all, can recoup denied detention and demurrage charges by raising prices on all customers, including those that pick up and return equipment on time. Against this

alternative, detention and demurrage charges are preferrable because they impose the costs of delays in pickups and returns on the parties responsible for them and encourage the tardy parties to make systemic improvements to avoid charges in the future. Those improvements, in turn, benefit everyone. Carriers and marine terminal operators don't want the fees; they want their equipment returned on time.

2. Detention and demurrage fees thus have an important role to play in containerized shipping. Containers function as a kind of public good, handled and exchanged by multiple interested parties within the closed loop of global container shipping. But in reality, containers are not truly public goods; they are owned by a single ocean carrier and the costs of maintenance are borne largely by the shipping company. Similarly, while marine terminals function as the public conveyance point for the transfer of containers between vessels and land, the tremendous costs of maintaining the expensive waterfront property and cargo handling equipment is borne by the private marine terminal operator. Detention fees help to "compensate the shipping line for the use of its containers, as [they] represent[] a substantial investment." Storms et al., *supra*, at 13. Demurrage charges compensate marine terminal operators for storing, protecting, and sheltering the shipper's cargo, which has been long-recognized by the Commission. *See, e.g.*, *Free Time and Demurrage Charges – New York*, 3 F.M.C. 89, 93 (1948) (citing *Practices of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588, *aff'd, California v. United States*,

320 U.S. 577 (1944)) (holding that carriers are legally bound to impose compensatory demurrage charges after expiration of free time). If the cost of delays is not borne by the party that delays returning or picking up the container, containers and terminal space are unlikely to be optimally maintained or utilized, which will harm everyone who uses and benefits from the global container stock. *See Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1378 n.19 (D.C. Cir. 1977) ("The Tragedy of the Commons arises . . . under conditions in which the rational but independent pursuit by each decisionmaker of its own self-interest leads to results that leave all decisionmakers worse off than they would have been . . . .") (citation omitted).

None of this is to say that every detention or demurrage charge is just and reasonable. Instead, we end where we began: Assessment of detention and demurrage charges requires a case-by-case, fact-sensitive inquiry, not bright-line rules. The Commission in its Final Interpretive Rule said that it agreed with that approach, but in its first opportunity to apply the Final Interpretive Rule, it broke its repeated promises. In construing its Final Interpretive Rule to always deny detention and demurrage charges when a port's truck gates are closed, the Commission not only violated the Administrative Procedure Act, but also upset the delicate container-shipping ecosystem.

CONCLUSION

For the foregoing reasons, and those in Petitioners' brief, the Commission's decision should be vacated.

Respectfully submitted,

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I certify that on June 6, 2023, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

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