No. 07-A1016

In The
Supreme Court of the United States
October Term, 2007

Port Authority Police Benevolent Association, Inc.,
Petitioner,

v.

Port Authority of New York and New Jersey,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of New Jersey was required by the Compact Clause, as interpreted by *Kansas v. Colorado*, to apply federal law when reviewing the decision of an administrative agency created by the congressionally sanctioned Compact to monitor its day-to-day labor relations practices.

2. Whether the Supreme Court of New Jersey improperly applied New Jersey law instead of federal law to review the Panel decision.

3. Whether the decision of the Supreme Court of New Jersey is compatible with federal law.

PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the Supreme Court of New Jersey:

Port Authority of New York and New Jersey

Port Authority Employment Relations Panel

Port Authority Police Benevolent Association, Inc.

CORPORATE DISCLOSURE

The Port Authority Police Benevolent Association, Inc., is a New York not-for-profit membership corporation with membership limited to employees of the Port Authority and employees of the Association.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

RELEVANT STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION . . . 12

A. Federal Law Governs the Scope of Judicial Review 15

B. As the Creation of the Compact, the Instruction Must Be Interpreted According to Federal Law 19

CONCLUSION 24

APPENDICES 26

A. Supreme Court of New Jersey 1a

B. Hearing Officer's Report 43a

C. Port Authority Employment Relations Panel 44a

D. Superior Court of New Jersey 45a

E. Appellate Division 62a
F. Pertinent Constitutional and Statutory Provisions 63a
Compact Clause of the United States Constitution, Art. I, Sec. 10, cl. 3 . . . . . 63a
N.J.S.A. §32:1-175 . . . . . 63a
McKinney Unconsolidated Laws §7141 . . . . . 64a
G. *Port Authority Police Sergeants Benevolent Association v. Port Authority of New York and New Jersey* 66a

TABLE OF AUTHORITIES

CASES Page

Agesen v. Catherwood, 260 N.E.2d 525 (N.Y. 1970) 20

Auto Workers v. NLRB (General Motors), 381 F.2d 265 (D.C. Cir.), *cert. denied*, 389 U.S. 857 (1967) 22

Baron v. Port Authority of New York and New Jersey, 968 F.Supp. 924 (S.D.N.Y. 1997) 20

Beebe v. Washington Metropolitan Area Transit Authority, 129 F.3d 1283 (D.C. Cir. 1997) 15, 16

Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978) 18

Blanchette v. Cataldo, 734 F.2d 869 (1st Cir. 1984) 23

Bunk v. Port Authority of New York and New Jersey, 676 A.2d 118 (N.J. 1996) 14

City of Jersey City v. Jersey City Police Officers Benevolent Association, 713 A.2d 472 (N.J. 1998) 11, 20, 21

Curtin-Matheson Scientific v. NLRB, 494 U.S. 775 (1990) 18

Cuyler v. Adams, 449 U.S. 433 (1981) 12

Delaware River and Bay Authority v. Operating Engineers Local 68, 688 A.2d 569 (N.J. 1996), *cert. denied*, 522 U.S. 861 (1997) 20

Delaware River Port Authority v. Fraternal Order of Police, Penn-Jersey Lodge 30, 290 F.3d 567 (3rd Cir. 2002) 20

Dezaio v. Port Authority of New York and New Jersey, 205 F.3d 62 (2nd Cir.), *cert. denied*, 531 U.S. 818 (2000) 20

Doe v. Pennsylvania Board of Probation and Parole, 513 F.3d 96 (3rd Cir. 2008) 23

Eastern Paralyzed Veterans Assoc., Inc. v. City of Camden, 545 A.2d 127, 131 (N.J. 1988) 14

Energy Arkansas, Inc. v. Nebraska, 210 F.3d 887 (8th Cir. 2000) 15

Energy Arkansas, Inc. v. Nebraska, 358 F.3d 528 (8th Cir.), *cert. dismissed*, 542 U.S. 960 (2004) . . . 15, 23

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) 6-9, 11, 20, 22, 23

First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) 23

Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994) 12, 13

Hunterdon County Bd. of Chosen Freeholders and Communications Workers,
561 A.2d 597 (1989) 16, 17

In re Local 195, IFPTE, 443 A.2d 187 (1982) . . 20, 21

Kansas v. Colorado, 514 U.S. 673 (1995) 19

Kiska Construction Corporation-U.S.A. v. Washington Metropolitan Airport Authority,
167 F.3d 608 (D.C. Cir. 1999) 16

Lieberman v. Port Authority of New York and New Jersey, 622 A.2d 1295 (N.J. 1993) 14, 17

New York v. Hill, 528 U.S. 110 (2000) 12

New York v. O'Neill, 359 U.S. 1, 9 (1959) 23

Niagara Frontier Transportation Authority,
18 PERB 3038 (19xx) 21

NLRB v. Borg-Warner, 356 U.S. 342 (1958) 11

Operating Engineers Local 542 v. Delaware River Joint Toll Bridge Commission,
311 F.3d 273 (3rd Cir. 2002) 19

Pagano v. Port Authority,
705 N.Y.S.2d 230 (N.Y. App. Div. 2000) 17

Pell v. Bd. of Educ.,
313 N.E.2d 321 (N.Y. 1974) 17

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959) 12

Port Authority Police Sergeants Benevolent Association v. Port Authority of New York and New Jersey, C.A. No. 97-1651 (WHW) (D.N.J. 1997) 20

Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990) 12

Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965) 22

The Lieutenant's Case, 77 PAERP 6 (1978) 22

United Capitol Ins. Co. v. Kapiloff, 155 F.3d 488 (4th Cir. 1998) 23

Vaca v. Sipes, 386 U.S. 171 (1967) 24

Washington-Dulles Transportation, Ltd., v. Metropolitan Washington Airports Authority, 263 F.3d 371 (4th Cir. 2001) 19

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) 3, 12, 24

STATUTES Page

29 U.S.C. §160(e) 17

McKinney's Unconsolidated Laws §6401 *et seq.* . . . 3

McKinney's Unconsolidated Laws §6415 4

McKinney's Unconsolidated Laws §7141 . . . 5, 8, 15, 19

N.J.S.A. 32:1-175 . . . . . 5, 15, 19

N.J.S.A. 52:14B-1 to -25 16

N.J.S.A. Title 32 3

N.J.S.A. Title 34 9

N.J.S.A. §32:1-15 4

REGULATIONS Page

14 C.F.R. Part 107 (1997) 6, 24

49 C.F.R. Part 1542 6

MISCELLANEOUS Page

42 Stat. 174 (1921) 4, 12

Constitution of the United States
(Art. I, §10, cl. 3) 3, 12, 23

Council of State Governments
http://ssl.csg.org/compactlaws/comlistlinks.html . . 12

RESTATEMENT (SECOND) OF AGENCY §5(1) (1958) . 23

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PETITION FOR A WRIT OF CERTIORARI

The Port Authority Police Benevolent Association, Inc., petitions for a writ of certiorari to review the decision and judgment of the Supreme Court of New Jersey in *In the Matter of the Alleged Improper Practice under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction; IP 97-28, Final Decision and Order of the Port Authority Employment Relations Panel: Port Authority of New York and New Jersey, v. Port Authority Employment Relations Panel and Port Authority Police Benevolent Association, Inc.*, Docket No. A-6 September Term 2007.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 194 N.J. 314, 944 A.2d 611 and is attached as Appendix A, pp. 1a-42a. The opinion of the Port Authority Employment Relations Panel Hearing Officer is attached as Appendix B, pp. 43a-..... The opinion of the Port Authority Employment Relations Panel is reported at 97 PAERP 28 (2001). and is attached as Appendix C, pp. 1-..... The Opinion of the Superior Court of New Jersey is unreported and is attached as Appendix D, pp. 1-..... The opinion of the Appellate Division is unreported and is attached as Appendix E, pp. 1-...

JURISDICTION

The opinion of the Supreme Court of New Jersey was entered on April 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

RELEVANT STATUTORY PROVISIONS

Pertinent provisions of the Constitution of the United States and the laws of New Jersey and New York are provided in Appendix F, pp. .....

STATEMENT OF THE CASE

In establishing a federal Constitution, the Founders included a mechanism to enable states to

address regional concerns extending beyond a particular state's boundaries without requiring a federal resolution. This mechanism is the Compact Clause (Art. I, §10, cl. 3), which, while permitting states to join together to advance regional interests, is predicated on the requirement of congressional consent. The Compact Clause has been utilized with Congress's consent to great effect by states to address regional issues of enormous importance – including interstate transportation, waste disposal, and allocation of natural resources – as well as to spur economic development. This ingenious feature of our federal system has been so effective that this Court has observed that the interstate "compact is more than a supple device for dealing with interests confined within a region," "it is also a means of safeguarding the national interest." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Like many states, New York and New Jersey are separated by a common boundary, the Hudson River and New York Bay. To administer the common harbor interests of New York and New Jersey, the states formed the Port Authority of New York and New Jersey ("Port Authority"). That Compact – embodied in virtually identical legislation passed by each state[1] – established the Port Authority as "a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either State concurred in by the legislature of the

[1]N.J.S.A. Title 32; McKinney's Unconsolidated Laws, §6401 *et seq*.

other, or by Act or Acts of Congress, ..." 42 Stat. 174, 176 (1921). Among the powers granted the Port Authority was the ability to hire employees.[2]

In 1947, the Port Authority entered into an agreement with the City of New York providing that the Port Authority would lease and operate the municipal airports then owned by the City, including what later became known as JFK. Section 11(c) of the agreement stipulates that "[t]he Port Authority will provide police for patrolling, for guarding and for traffic control in the demised premises [and that t]he City will have no responsibility for maintaining ... police personnel in the demised premises." The contract also permitted the Port Authority to enter into subcontracts and subleases "provided that all such things shall be done by the Port Authority in its own name ...." Pursuant to its contract with the City, the Port Authority Police Department began to patrol JFK.

In 1976 the Port Authority adopted the Port Authority Labor Relations Instruction ("Instruction") governing labor relations with its employees. The Instruction provides that it would be an improper practice for the Authority to refuse to negotiate "salaries, wages, hours, and other terms and conditions of employment in good faith ...." Instruction, §XI(A)(d). The Instruction also provides that "organization, staffing, planning, operating and financial policies shall not be subjects of negotiations ...." Instruction, §III(D). [A. .....]. The Instruction created the Port

[2]N.J.S.A. 32:1-15; McKinney's Unconsolidated Laws §6415.

Authority Employment Relations Panel ("Panel") to resolve disputes between the Port Authority and its employee organizations. [A 5a-6a].

The Compact was amended to approve the Panel's creation and to provide for judicial review of its decisions.[3] The Compact does not specify what law a court or agency must apply when construing its provisions.

The Port Authority Police Benevolent Association, Inc. ("PBA"), became the exclusive bargaining agent for the Authority's Police Officers. [A. 6a]. In July 1991, the Port Authority entered into a Memorandum of Agreement with the PBA ("Memorandum"). In Section XXXI(1) of the Memorandum, the Port Authority agreed that there would be

> no further or additional transfer and/or reassignment of unit work currently and heretofore performed by unit employees without negotiation and all other unit work currently and heretofore performed by Police Officers shall be maintained. [A. 8a-9a].

In 1997, however, the Port Authority accepted a proposal from JFK International Air Terminal LLC ("JFKIAT") that provided for the reconstruction of the international terminal at an overall cost of $1.2 billion.

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[3] N.J.S.A. 32:1-175; McKinney's Unconsolidated Laws §7141.

The Port Authority and JFKIAT entered into an exhaustive lease that outlined each party's obligations with regard to the international terminal. JFKIAT assumed some of the security obligations imposed on the Port Authority by its contract with New York City. The Port Authority remained obligated to provide federally required security. [A. 10a-11a].[4]

On May 13, 1997, JFKIAT assumed responsibility for all security operations at the international terminal and for frontage management of pedestrians and vehicles. JFKIAT hired unarmed civilian guards to perform work previously done by police officers represented by the PBA. [A. 11a].

The PBA filed an unfair labor practice charge against the Port Authority alleging that the Port Authority had unilaterally subcontracted bargaining unit airport security work to JFKIAT without bargaining. After the Port Authority denied the charge, the Panel assigned the matter to a hearing officer. [A. 13a].

In its post-hearing brief, the PBA cited extensively to decisions of the Panel, of the National Labor Relations Board ("NLRB"), and to *Fibreboard Paper Prods. Corp. v. NLRB.*, 379 U.S. 203 (1964). In its post-hearing brief, the Port Authority relied upon *Fibreboard and* upon New Jersey authority.

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[4]At the time, Federal Aviation Administration regulations applied. 14 C.F.R. Part 107 (1997). The current regulation of the Department of Homeland Security is 49 C.F.R. Part 1542.

Relying exclusively on Panel and National Labor Relations Act precedent, the Hearing Officer found that work previously performed by bargaining unit police officers had been transferred to civilian guards, but that the Port Authority did not transfer the disputed work and no longer had "the requisite authority to dictate" which employees would perform the disputed work. [B. ...]. Applying Panel precedent, he found that (1) the Port Authority had altered its basic operation by "remov(ing) itself from the business of managing and operating the [International Arrivals Building] IAB"; (2) the Port Authority had "not only ceded operational management and day-to-day traffic control to [JFKIAT] but the decision to privatize also included a $1.2 billion lease agreement with JFKIAT to rebuild and operate the IAB ..."; (3) the PBA had failed to show that the decision was based on factors amenable to collective bargaining; and (4) the police officers suffered no adverse impact, either qualitatively nor quantitatively, from the decision, even though they had lost overtime opportunity. [B. ...]. He recommended dismissing the charge.

The PBA filed Exceptions and a supporting brief, again citing Panel and NLRB authority and *Fibreboard*. Given the opportunity to comment on the Panel's tentative decision, the Port Authority did not rely on New Jersey authority.

Although it accepted the Hearing Officer's factual findings, the Panel concluded that the Port Authority had violated the Instruction and the Memorandum by transferring unit work without bargaining. The Panel found that (1) the PBA was

attempting to preserve the disputed work for its police officers; (2) the Port Authority did not, and could not without violating its agreement with New York City, go out of the business of providing security at JFK; (3) the Port Authority did not alter its basic operation because it continues to provide law enforcement functions at the IAB; (4) the Port Authority "made no capital investment with respect to how security functions are performed within the IAB or in the frontage areas; (5) the "financing arrangements which the Port Authority utilized to construct a new IAB are irrelevant to the unit work issues in dispute."; (6) the impact of competing wage rates for different classifications of employees was "peculiarly suitable" for collective bargaining; and (7) the transfer of work had a substantial impact on wages, hours, and working conditions because positions were eliminated and employees lost overtime opportunity. [C. .....]. The Panel therefore ordered the Port Authority to restore the disputed work and to negotiate before unilaterally changing terms and conditions of employment. [C. .....]. In reaching this conclusion, the Panel relied exclusively upon its own precedent, including its "*Fibreboard* plus" test. [C. .....].

Given the choice of seeking review of the Panel decision in the Superior Court of New Jersey or the New York Supreme Court,[5] the Port Authority filed in New Jersey. In its brief to the Superior Court, the Port Authority relied exclusively on New Jersey authority and on *Fibreboard*, although it purportedly conceded

[5]N.J.S.A. 32:1-175; McKinney's Unconsolidated Laws §7141.

that neither New Jersey nor New York law is applicable to the Port Authority.[6]

The PBA's brief cited *Fibreboard*, New Jersey and New York authority. The PBA argued that

> neither creator state may unilaterally impose its legislative will on the bi-state entity. ... It is inappropriate for either compacting state to seek to impose its legislative policy on any issue, including issues of public labor law, without joint legislative action by the compacting states. [citation omitted].

The PBA expressly argued that "the law that must be applied is the ... Instruction, not New Jersey's Title 34." Furthermore, the PBA argued that New York courts "would assuredly endorse the findings of the Panel under these facts."[7]

Applying the New Jersey standard of review, the Superior Court found that the Panel's findings of fact were supported by substantial evidence, that the Panel's decision was neither arbitrary, capricious, or unreasonable, and deferred to the Panel's expertise. "It is an uncontested fact that when the operation of the IAB was turned over to [JFKIAT] in May 1997, the PAPBA officers who had been previously stationed outside for the management of pedestrians and

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[6]Citation

[7]Citation

vehicles were removed, assigned elsewhere, and replaced by non-unit civilian security personnel" in violation of the Memorandum. Applying Panel precedent, the Superior Court found that the Port Authority had subcontracted the disputed work without the negotiation required by the Panel's "*Fibreboard* Plus Substantial Impact" test. [D. —].

In its brief to the Appellate Division, the Port Authority again acknowledged that neither New Jersey nor New York law was applicable to the Port Authority. Nevertheless, the Port Authority relied extensively upon New Jersey and New York authority to support its position.[8]

The PBA opposed the Port Authority's "attempts to directly apply the legislative policy of New Jersey applicable to public employers ...." The PBA reiterated the choice of law arguments presented to the Superior Court.

The Appellate Division applied New Jersey's standard of review and the Panel's "*Fibreboard* plus" analysis. The Appellate Division found that "the decision of the Panel, their findings of facts, and conclusions of law are well supported in the record and reflect the opinion of this Court." [E. —].

In its Petition for a Writ of Certiorari to the Supreme Court of New Jersey, the Port Authority relied on New Jersey and National Labor Relations Act

[8] citation

authority concerning the scope of judicial review. The Port Authority argued that in *City of Jersey City v. Jersey City Police Officers Benevolent Association*, 713 A.2d 472 (N.J. 1998), the court had rejected an order of the New Jersey Public Employment Relations Commission in a factually analogous situation.[9]

The PBA and the Panel opposed the Petition. The PBA again argued that because neither New Jersey nor New York law controlled, the Port Authority's reliance on *Jersey City* was improper.[10] The Panel did not address the choice of law issue.[11]

The Supreme Court of New Jersey granted the Writ. Relying on the briefs submitted to the Appellate Division, the court applied the New Jersey Administrative Procedure Act and New Jersey case law to establish the standard of review of Panel decisions. [A. 21a-24a]. The court then concluded that *Jersey City* had "refined" this Court's analysis in *NLRB v. Borg-Warner*, 356 U.S. 342 (1958), and *Fibreboard*. [A. 27a-28a]. Applying that "refined analysis," the majority rejected the Panel's conclusions. [A. 28a-32a]. Having determined that the law of New Jersey governed the matter, the New Jersey Supreme Court failed to consider whether other law might govern the matter.

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[9] citation

[10] citation

[11] citation

Also applying a New Jersey standard of review [A. 36a-37a], the dissent concluded that the Panel decision was not "arbitrary, capricious, or unreasonable" under New Jersey or NLRB authority. [A. 40a-42a]. Like the majority, the dissent did not mention the PBA's choice of law argument.

REASONS FOR GRANTING THE PETITION

As a congressionally sanctioned interstate compact, the Port Authority Compact is a federal law subject to federal construction. *See, e.g., New York v. Hill*, 528 U.S. 110, 111 (2000); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 278-279 (1959) ("we must treat the compact as a living interstate agreement which performs high functions in our federalism, including the operation of vast interstate enterprises."). While the Court shows "deference to state law in construing a compact, state law as pronounced in prior applications and rulings is not binding." *Petty*, 359 U.S. at 278, n. 4. Furthermore, such deference cannot be transformed into "submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it ...." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Because the Compact establishing the Port Authority of New York and New Jersey[12] is but one of at least 195 interstate compacts[13] authorized by Congress under the Compact Clause of the Constitution, the impact of this case extends well

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[12] 42 Stat. 174 (1921). See also *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 35-36 (1994); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 301 (1990).

[13] http://ssl.csg.org/compactlaws/comlistlinks.html

beyond the subcontracting dispute between the Port Authority and its Police Officers.

This Petition asks the Court to determine whether the Instruction adopted by the Port Authority is also a federal law subject to federal court review and, if so, whether the Supreme Court of New Jersey erred by applying New Jersey authority instead of federal law when reviewing the Panel decision.

The questions presented are not abstract, for throughout the New Jersey proceedings the PBA consistently argued that a New York court would affirm the Panel decision. If the Panel rules against the PBA in another subcontracting case, the PBA could, indeed, should and would, seek review in the New York courts. The conflict between the courts of the two states on the interpretation of the Compact (and of the Instruction) is not hypothetical; the conflict exists today and will continue to surface in future cases unless resolved.

But the choice of forum should not control either the choice of law or the result of judicial review of a Compact's actions. Avoiding strategic forum shopping is one reason interstate Compacts must be governed by a uniform federal law, subject to review by this Court. As this Court has already held in a case involving the Port Authority, "bistate entities created by compact ... are not subject to the unilateral control of any one of the States that compose the federal system." *Hess v. Port Authority Trans-Hudson Corp*, 513 U.S. at 42. Yet that is precisely what the New Jersey Supreme Court did here.

Despite the PBA's repeated assertions that neither New York nor New Jersey law controlled, and despite the Port Authority's implicit agreement or failure to dispute that point, and despite the PBA's claim that New York law would require affirmance of the Panel decision, the Supreme Court of New Jersey applied only New Jersey precedent concerning both the scope of appellate review and the substantive claim by the Port Authority.

Contrary to its own precedent, the New Jersey Supreme Court made no pretense of considering either New York or federal authority.[14] In *Lieberman v. Port Authority of New York and New Jersey*, 622 A.2d 1295, 1299 (N.J. 1993), the court explained that "although we are not bound by New York law, we deem it to be an influential precedent because of the bi-state nature of the Port Authority." In other cases, the court had held that the interpretation of bi-state compacts is a matter of federal law and that neither of the signatory states may impose its law on the entity without permission in the compact itself. *Bunk v. Port Authority of New York and New Jersey*, 676 A.2d 118, 122 (N.J. 1996); *Eastern Paralyzed Veterans Assoc., Inc. v. City of Camden*, 545 A.2d 127, 131, 136 (N.J. 1988). *Bunk* and *Camden* applied the doctrine of "complementary or parallel

[14]Although the PBA did not label its argument below as a contention that federal law applied, it did argue that the New Jersey courts must consider New York as well as New Jersey authority. The amalgam of these state authorities, combined with the Panel's authority, constitutes a federal common law and is a model applicable in litigation involving all compacts.

state legislation," thereby requiring consideration of New York law.

Although this case presents the question in the context of labor relations, federal courts have considered the law governing compacts in a number of substantive areas. The Eighth Circuit has held that a compact agency was enforcing a federal right created by the compact when it sued Nebraska for refusing to permit the construction of a nuclear waste facility. *Energy Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000). The Eighth Circuit later held that in the absence of federal common law on the meaning of compact language, the district court properly sought guidance from the Restatement of Contracts, not state law. *Energy Arkansas, Inc. v. Nebraska*, 358 F.3d 528, 547 (8th Cir.), *cert. dismissed*, 542 U.S. 960 (2004). The District of Columbia Circuit has similarly applied the "federal common law standard" to determine whether employees of a compact enjoy immunity in tort actions even where the compact provides that state law applies to the tort itself. *Beebe v. Washington Metropolitan Area Transit Authority*, 129 F.3d 1283, 1289 (D.C. Cir. 1997).

A. Federal Law Governs the Scope of Judicial Review

Although the Compact provides a choice of forum for seeking review of a Panel decision,[15] the New Jersey courts violated the well-established principle that the

[15] N.J.S.A §32:1-175; McKinney's Unconsolidated Laws §7141.

construction of an interstate compact approved by Congress presents a federal question. Unlike the compact provisions discussed in *Beebe*, which expressly specify that the law of the forum state will apply to certain claims against the bi-state compact, the pertinent New Jersey and New York statutes that form the Compact do not provide that the law of the forum controls. Where the compact does not provide that state law controls, "federal law governs ...." *Beebe v. Washington Metropolitan Area Transit Authority*, 129 F.3d at 1288

The Supreme Court of New Jersey's decision to apply its State Administrative Procedure Act standard of review conflicts with *Kiska Construction Corporation-U.S.A. v. Washington Metropolitan Airport Authority*, 167 F.3d 608, 611-612 (D.C. Cir. 1999), which held that WMAA, as a compact, was not an "agency" within the meaning of the District of Columbia Administrative Procedure Act.

The New Jersey Supreme Court applied the State's Administrative Procedure Act, N.J.S.A. 52:14B-1 to -25. [A.1a, 21a?]. Citing *Hunterdon County Bd. of Chosen Freeholders and Communications Workers*, 561 A.2d 597, 600 (1989), the court concluded "Therefore, it is *only* 'in situations where agency expertise is essential towards understanding the proper context of a dispute [that] a deferential standard of review is appropriate.'" [emphasis supplied] [A. ...]. The court, however, was less deferential than in *Hunterdon*, where it had stated that it would defer "particularly" in such situations. *Id.*

Interestingly, *Hunterdon* involved review of a decision of the New Jersey Public Employee Relations Committee ("PERC"). For no rational reason, the Supreme Court of New Jersey now accords less deference to Panel decisions than to PERC decisions.

At the same time, the New Jersey court conceded that New York courts would apply a more deferential standard:

> In its reported case law, New York has applied a deferential standard of review to Panel decisions. *See Pagano v. Port Authority*, 270 A.D.2d 206, 705 N.Y.S.2d 230 (N.Y. App. Div. 2000) (applying standard that Panel determination "may not be disturbed since substantial evidence supports [it]"); *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833, 839 (N.Y. 1974) (explaining that administrative tribunal's factual determinations are sustained if supported by substantial evidence, and exercise of discretion by administrative tribunal will be sustained "unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.'").

[A-1a, 21a n. 10]. The court did not explain why this "influential precedent" could be ignored or distinguished. *Lieberman*, 622 A.2d at 1299.

Although Section 10(e) of the National Labor Relations Act, 29 U.S.C. §160(e), mandates the "substantial evidence" standard for judicial review of the NLRB's findings of fact, the degree of deference accorded to NLRB statutory interpretations has been developed by the Court. In *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-501 (1978), the Court stressed that such judicial review must be "limited," for it "is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy. ... The function of striking [the balance between competing interests] to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review." More recently, the Court said that it would uphold the NLRB's construction of the Act when it is "rational and consistent with the Act ... even if we would have formulated a different rule had we sat on the Board." *Curtin-Matheson Scientific v. NLRB*, 494 U.S. 775, 787 (1990).

This Court's standard is compatible with the New York standard rejected by the New Jersey Supreme Court. It is not compatible with the New Jersey standard applied in this case.

Both the New Jersey Superior Court and the Appellate Division deferred to the Panel's interpretation of the Instruction. The Supreme Court did not. The less deferential standard of review chosen by the Supreme Court of New Jersey mandated its wrongful rejection of the Panel's decision.

B. As the Creation of the Compact, the Instruction Must Be Interpreted According to Federal Law

The Supreme Court of New Jersey's decision conflicts with *Kansas v. Colorado*, 514 U.S. 673 (1995), in which the Court held that a violation of the Trinidad River Operating Principles promulgated by the Arkansas River Compact would constitute a violation of the compact. See also *Washington-Dulles Transportation, Ltd., v. Metropolitan Washington Airports Authority*, 263 F.3d 371 (4th Cir. 2001) (federal court has jurisdiction to require adherence to compact's published competitive bidding procedure). The Port Authority's Instruction became part of the Compact upon its approval by both State legislatures[16] and must be treated as a federal law in the same way as the compact's Operating Principles in *Kansas* and the published bidding procedures in *Washington-Dulles Transportation*.

The Supreme Court of New Jersey's decision also conflicts with *Operating Engineers Local 542 v. Delaware River Joint Toll Bridge Commission*, 311 F.3d 273, 274, 276 (3rd Cir. 2002), in which the Third Circuit held that neither the New Jersey nor the Pennsylvania collective bargaining laws applied to an interstate compact because neither state legislature

[16]N.J.S.A. §32.1-175; McKinney's Unconsolidated Laws §7141.

had expressed a "clear intent to impose their labor laws upon the Commission."[17]

Indeed, when it suited its purpose, the Port Authority has successfully argued that courts could not impose aspects of either state's labor laws. *Dezaio v. Port Authority of New York and New Jersey*, 205 F.3d 62, 65 (2nd Cir.), *cert. denied*, 531 U.S. 818 (2000) (New York anti-discrimination laws); *Agesen v. Catherwood*, 260 N.E.2d 525 (N.Y. 1970) (New York minimum wage law); *Baron v. Port Authority of New York and New Jersey*, 968 F.Supp. 924 (S.D.N.Y. 1997) (New York or New Jersey human rights laws); *Port Authority Police Sergeants Benevolent Association v. Port Authority of New York and New Jersey*, C.A. No. 97-1651 (WHW) (D.N.J. 1997) (unreported decision attached as Appendix G) (New York or New Jersey interest arbitration laws).

In concluding that the Port Authority had no obligation to bargain, the Supreme Court of New Jersey relied upon two of its earlier decisions, *In re Local 195, IFPTE*, 443 A.2d 187 (1982), and *City of Jersey City v. Jersey City Police Officers Benevolent Ass'n*, 713 A.2d 472 (1998), both of which reviewed PERC decisions interpreting New Jersey law. In *Local 195*, the court stated that *Fibreboard* "is not persuasive

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[17]But see *Delaware River Port Authority v. Fraternal Order of Police, Penn-Jersey Lodge 30*, 290 F.3d 567 (3rd Cir. 2002), where the Third Circuit reluctantly followed *Delaware River and Bay Authority v. Operating Engineers Local 68*, 688 A.2d 569 (N.J. 1996), *cert. denied*, 522 U.S. 861 (1997), which applied New Jersey law to impose bargaining obligations on a compact agency.

authority" in the public sector. 443 A.2d at 191 n. 8. Instead, the court formulated its own three-part test for scope of negotiability decisions. 443 A.2d at 191-192. In *Jersey City*, the court applied its own *Local 195* test.

Although the New Jersey court might be correct in refusing to apply *Fibreboard* in New Jersey public sector cases, the state court was not acting in a vacuum when it considered the Panel decision. It was reviewing a Panel decision applying the "*Fibreboard* plus" standard which the Panel had developed in 1978 [A. 26a n. 12], two years after its creation, and had applied consistently thereafter. The New Jersey Supreme Court applied New Jersey precedent contrary to the express directive in the Instruction:

> In all matters relating to this Instruction, including determinations as to mandatory and non-mandatory subjects of negotiation, Paenl [*sic*] members and other persons appointed by the Panel shall be guided but not bound by administrative and judicial interpretations of the public sector labor law of the states of New York and New Jersey.

Instruction, Section III, Paragraph D. [A. ....]

Relying upon *Niagara Frontier Transportation Authority*, 18 PERB 3038 (19xx), and New York's highly deferential standard of review, the PBA argued that the New York courts would have affirmed the

Panel decision. Yet the New Jersey Supreme Court did not consider the views of New York State when it rejected the Panel decision.

Because it found *Fibreboard* was "not persuasive," the New Jersey court ignored the requirement in the Instruction that State law *not* apply "[i]n all matters relating to this Instruction, including determinations as to mandatory and non-mandatory subjects of negotiation ...." Indeed, pursuant to this directive, the Panel in 1978 had expressly applied *Fibreboard*, not the laws of either State, as the "framework for determining whether a decision made by management is a mandatory or non-mandatory subject of negotiation." The Panel then created the "*Fibreboard* plus substantial impact" test. Citing *Auto Workers v. NLRB (General Motors)*, 381 F.2d 265 (D.C. Cir.), *cert. denied*, 389 U.S. 857 (1967), and New Jersey and New York authority, the Panel noted that "even in the absence of layoffs, a reduction in the size of the bargaining unit as a result of a decision to subcontract has been held to be a mandatory subject of bargaining in the private sector ... and ... in the public sector." *The Lieutenant's Case*, 77 PAERP 6 (1978) (sl. op. 31, 34-38). The New Jersey Court's rejection of *Fibreboard* colored its rejection of the Panel's decision in this case.

Because it found *Fibreboard* was "not persuasive," the New Jersey court did not consider this Court's clear distinction between going out of business and subcontracting an operation. In *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), the Court held that an employer had an absolute right to terminate its entire business for any reason, but

distinguished a complete closing from a partial closing. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Court found no obligation to bargain over an economically motivated decision to shut down part of a business. These decisions left unaltered *Fibreboard's* principle that the decision to subcontract is a mandatory subject of bargaining if bargaining unit employees are replaced with those of an independent contractor to do the same work under similar conditions of employment. *Fibreboard Paper Prods. Corp. v. NLRB.*, 379 U.S. at 215.

A major distinction between going out of business and subcontracting that business is that under generally accepted law the prime contractor remains responsible for the work performed by the subcontractor. *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 498 (4th Cir. 1998); *Blanchette v. Cataldo*, 734 F.2d 869, 875 (1st Cir. 1984); RESTATEMENT (SECOND) OF AGENCY §5(1) (1958).[18] Thus, if the Port Authority subcontracted IAB security work to JFKIAT, as the Panel concluded, the Port Authority remained responsible to New York City for JFKIAT's work. However, if the Port Authority terminated its security business at IAB, New York City has no claim against the Port Authority for nonfeasance or malfeasance by JFKIAT and/or its subcontractors.

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[18]Courts rely upon the Restatements to develop federal common law in Compact Clause litigation. *See, e.g., New York v. O'Neill*, 359 U.S. 1, 9 (1959); *Doe v. Pennsylvania Board of Probation and Parole*, 513 F.3d 96, 106 (3rd Cir. 2008); *Energy Arkansas*, 358 F.3d at 546.

After 9/11, indeed, after the first attack on the World Trade Center in 1993, is the federal government prepared to say, as the New Jersey Supreme Court did, that a port authority can terminate its contractually required responsibility for port or airport security?[19] Despite its agreement with New York City that "[t]he Port Authority will provide police for patrolling, for guarding and for traffic control in the demised premises," the Port Authority's contract with JFKIAT allowed the replacement of Port Authority police officers by guards without arrest authority, requiring the guards to summon the police to make arrests. [FACT CITE]

Even where, as here, the Compact permits litigation in state courts, federal law applies. This Court has jurisdiction to review state court decisions misapplying federal law. *Vaca v. Sipes*, 386 U.S. 171, 174 (1967); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 30.

CONCLUSION

The petition for the writ of certiorari should be granted and the decision of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

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[19]With its contract with JFKIAT, the Port Authority subcontracted (or terminated) its responsibility for all airport security except that required by Federal Aviation Administration regulations. 14 C.F.R. Part 107 (1997).

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