

# NOTE

## Course-Correcting the Jones Act: A Solution for the Unintended Costs of a Maritime “Buy American” Law

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### ABSTRACT

*The Jones Act, which mandates that coastwise trade between points in the United States be conducted by U.S.-built and flagged vessels, is a controversial piece of legislation. The century-old Act reserves the construction, crewing, and operation of all vessels engaged in domestic oceangoing shipping for American nationals and companies, shutting out foreign competition and making it an important “Buy American” law to U.S. shipping interests. Those who have called for its abolition point out the higher shipping costs it imposes upon industries facing vessel shortages and outlying regions of the United States, like Puerto Rico and Alaska. Its defenders argue that it plays an important role in making U.S.-flagged sealift available in times of war and that the already-struggling American shipping sector would face collapse without protection from lower-cost foreign shipping.*

*This Note argues that a compromise solution is possible: a limited and reasonable waiver process should be available on a showing of serious hull shortage. Burgeoning markets like offshore wind and liquefied natural gas should not be subject to years-long delays when specialized vessels to meet their needs are simply not available. The status quo does not serve the Jones Act’s purpose in making vessels available for wartime sealift, and only serves to impose arbitrary costs on U.S. industry. Similarly, under the status quo, areas affected by natural disasters are subject to delays in critical aid supplies.*

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*A rational system for waivers, beyond the current requirement of necessity to national security, could meet these needs while still supporting the purposes of the Jones Act.*

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## INTRODUCTION

The Merchant Marine Act of 1920,<sup>1</sup> commonly known as the “Jones Act,” is frequently referred to as “obscure[e]” or “[l]ittle-[k]nown” when the media finds a rare occasion to report on it.<sup>2</sup> To the American maritime sector, however, the Act is of great importance. The Act touches on a wide range of maritime activities, including seamen’s rights and workers’ compensation claims, shipbuilding, and vessel manning. Its obscurity among the general public—and the legal community, apart from specialists in admiralty and maritime law—is perhaps more a function of most Americans’ disengagement from the maritime sector than of the Act’s unimportance to their lives.<sup>3</sup>

<sup>1</sup> Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988.

<sup>2</sup> See, e.g., Colin Grabow, *The Obscure Shipping Law Leaving New Englanders in the Cold*, CATO INST. (Jan. 18, 2019), <https://www.cato.org/publications/commentary/obscure-ship-ping-law-leaving-new-englanders-cold> [<https://perma.cc/Y29Y-9T7Z>]; Gary Galles, *Little-Known Laws that Cripple American Trade*, MISES INST. (Mar. 3, 2015), <https://mises.org/library/little-known-laws-cripple-american-trade> [<https://perma.cc/AU4L-VKXL>].

<sup>3</sup> See LINCOLN PAINE, *THE SEA AND CIVILIZATION* 10 (2013). Maritime historian Lincoln Paine writes that people living in the twenty-first century “savor the fruits of maritime commerce

There is good reason for Americans to take notice of the Act. When the Jones Act was first enacted in 1920, its overall purpose was to maintain “a merchant marine . . . of the best-equipped, safest, and most suitable types of vessels” sufficient to support “the national defense and the development of the domestic and foreign commerce of the United States.”<sup>4</sup> The Act imposed “cabotage”<sup>5</sup> restrictions upon coastwise shipping in the United States to meet this goal, requiring that the conduct of any coastwise trade—that is, the carriage of goods between points in the United States—be conducted by vessels built in the United States and manned with a majority of U.S. nationals.<sup>6</sup>

Data demonstrates that this goal has largely not been met. The size of the U.S.-flagged merchant fleet has declined precipitously in the last century; for instance, waterborne carriage of goods declined by almost half between 1960 and 2014.<sup>7</sup> Various factors have driven this decline, including the availability of more efficient ground transportation.<sup>8</sup> Critics of the Jones Act have alleged that its “buy American” provisions increase the price of building and maintaining U.S.-flagged vessels, contributing to the decreased attractiveness of waterborne shipping between U.S. ports.<sup>9</sup> One unavoidable fact is that the size of the American merchant fleet has sharply decreased against global competitors.<sup>10</sup> Maritime Administrator Mark Buzby, the Department of Transportation’s top official in overseeing the U.S.

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without being remotely aware of its existence. . . . [O]ur collective relationship with maritime enterprise has undergone a profound metamorphosis in only half a century.” *Id.*

4 46 U.S.C. § 50101(a).

5 Cabotage is defined as the “carrying on of trade along a country’s coast; the transport of goods or passengers from one port or place to another in the same country.” *Cabotage*, BLACK’S LAW DICTIONARY (11th ed. 2019).

6 46 U.S.C. § 50101.

7 JOHN FRITTELLI, CONG. RSCH. SERV., R44831, REVITALIZING COASTAL SHIPPING FOR DOMESTIC COMMERCE 3 (2017) (indicating that domestic contiguous coastal shipping declined by 44% and domestic Great Lakes shipping declined by 43%).

8 *Id.* at 2 (“Over the same period, railroads have increased their transport volume by about 50%, and intercity trucks, oil pipelines, river barges, and coastal ships linking the United States with Canada and Mexico all have more than doubled their freight tonnage.”).

9 See Tomas Kristiansen, *This is How Much the US Jones Act Costs the Shipping Industry*, SHIPPINGWATCH (Dec. 10, 2018, 3:49 PM), <https://shippingwatch.com/carriers/article11061864.ece> [<https://perma.cc/TW75-MTN2>].

10 In 1960, the U.S. Merchant Marine constituted approximately 16.9% of global cargo vessels of 1,000 gross tons and more; however, by 2015, this figure fell to 0.4%. *Number and Size of the U.S. Flag Merchant Fleet and Its Share of the World Fleet*, BUREAU TRANSP. STAT., <https://www.bts.gov/content/number-and-size-us-flag-merchant-fleet-and-its-share-world-fleet> [<https://perma.cc/TMU2-XMC7>]. The tonnage of cargo vessels and tankers in the fleet fell in real terms over the same period; for instance, dead weight tonnage of cargo vessels declined from 21.8 million dead weight tons (“DWT”) in 1960 to 3.9 million DWT in 2019. *See id.*

Merchant Marine, stressed in a 2019 interview that the Merchant Marine had fewer than half the vessels it would need to conduct a major wartime sealift effort.<sup>11</sup> Thus, because the Act requires the use of U.S.-manned vessels and the U.S. fleet is shrinking, maritime needs remain unmet.

The impact of this problem is felt especially keenly in noncontiguous regions of the United States, notably Puerto Rico and Alaska.<sup>12</sup> When vessels are unavailable to carry goods, and non-U.S.-flagged vessels are legally barred from carrying goods between U.S. ports, the inevitable result is that shipments must be sourced from foreign ports. In such cases, the Jones Act robs Peter to pay Paul. The protection of American shipbuilders and shipping lines comes at a cost to American producers and consumers. Some defenders of the Act argue that this higher cost, even if it requires government subsidy, is worth the benefits that it brings in keeping U.S. shipyards operating.<sup>13</sup> This is an unsatisfactory solution to the problem. Shipbuilding efforts take years and can have price tags in the hundreds of millions.<sup>14</sup> For burgeoning industries that require specialized vessels, there are sometimes no U.S.-flagged vessels capable of meeting their needs, and this stifles their domestic market for years on end until the shipbuilding industry catches up.

The status quo is also unacceptable in periods of natural disaster.<sup>15</sup> The falling size of the merchant fleet poorly equips it to surge in response to unexpected needs for aid supplies in the wake of catastrophe. Though the federal government has provided Jones Act waivers for disaster response and recovery in the past, the ten-day waiver that President Trump authorized in 2017 to assist Puerto Rico post-Hurricane Maria did not provide sufficient time for foreign-flagged vessels to step in to meet the island's needs.<sup>16</sup>

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<sup>11</sup> See, e.g., Dana Merkel, *Keeping Up with the Jones Act*, USNI NEWS (June 4, 2019, 3:15 PM), <https://news.usni.org/2019/06/04/keeping-up-with-the-jones-act> [<https://perma.cc/3RQJ-94QA>].

<sup>12</sup> See *infra* Section II.B.

<sup>13</sup> See, e.g., Mike Stevens, *Preserve the Jones Act*, DEF. ONE (Oct. 22, 2020), <https://www.defenseone.com/ideas/2020/10/preserve-jones-act/169430/> [<https://perma.cc/C7NK-EH42>].

<sup>14</sup> See William W. Olney, *Cabotage Sabotage? The Curious Case of the Jones Act*, 127 J. INT'L ECON., Nov. 2020, at 1, 9.

<sup>15</sup> See *infra* Section I.B.

<sup>16</sup> Though it is unclear how many foreign-flagged vessels actually arrived in Puerto Rico during the ten-day period, estimates indicate that about ten additional sailings called into Puerto Rican ports due to the waiver. *Understanding the Jones Act: The America-First Cabotage Policy*, FREIGHT RIGHT (June 17, 2020), <https://www.freightright.com/news/understanding-the-jones-act-the-america-first-cabotage-policy> [<https://perma.cc/8M74-TMP7>]. Representative Nydia Velázquez

Critics of the Jones Act have called for its full repeal, or at least with respect to certain outlying regions of the United States. Proponents counter by pointing to the role the Act plays in national defense and buoying the ailing American maritime sector. This Note proposes a balance between these competing policy interests. Part I explores the legislative background of the Jones Act and the difficulties it creates for natural disaster response operations and developing industries. Part II addresses previous literature discussing the Jones Act's shortcomings and the legal problems presented by the current waiver system. Part III proposes a legislative solution in the form of expansion to the waiver process currently prescribed under 46 U.S.C. § 501, allowing specific waivers for shipping needs in the wake of disaster and specialized vessels that the U.S.-flagged fleet cannot provide. Such a system would be best calibrated to shore up the Jones Act's weaknesses without scuttling it entirely.

## I. BACKGROUND

The “Jones Act” is actually “a catch phrase covering more than one law” in Title 46 of the U.S. Code and “can be used to reference more than one law by the same name.”<sup>17</sup> The two most common invocations of the Jones Act are its provisions for seamen's rights and cabotage, two generally distinct sets of laws. This Note concerns the latter.

Cabotage laws are common in coastal nations—the Jones Act contains the U.S. cabotage scheme. A vessel that provides “transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply” must comply with a number of requirements to be certified for coastwise trade.<sup>18</sup> First, the vessel must be owned by a U.S. citizen or by an entity the majority of which is controlled by U.S. citizens.<sup>19</sup> Second, the vessel

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quez (D-N.Y.) stated, “A 10-day waiver . . . is far from sufficient given the scope of this tragedy . . . . Moreover, as Puerto Rico begins the long road of rebuilding, it will be difficult to do so if building supplies cost double what they are priced on the mainland.” Melanie Zanona, *Lawmakers Say Trump's 10-Day Shipping Waiver Not Enough for Puerto Rico*, THE HILL (Sept. 28, 2017, 1:37 PM), <https://thehill.com/policy/transportation/352908-lawmakers-say-trumps-10-day-shipping-waiver-not-enough-for-puerto-rico> [<https://perma.cc/2YBK-GKVK>].

<sup>17</sup> Constantine G. Papavizas & Brooke F. Shapiro, *Jones Act Administrative Waivers*, 42 TUL. MAR. L.J. 317, 319 (2018).

<sup>18</sup> 46 U.S.C. § 55102.

<sup>19</sup> 46 U.S.C. § 12103(a)–(b).

must have been built in the United States.<sup>20</sup> Finally, three-fourths of the vessel's crew must be U.S. citizens.<sup>21</sup>

The National Defense Authorization Act for Fiscal Year 2021 (“NDAA”)<sup>22</sup> recently tightened the standards for which an individual can waive the Jones Act's cabotage requirements.<sup>23</sup> First, the Secretary of Defense may issue a waiver where necessary “to address an immediate adverse effect on military operations.”<sup>24</sup> Second, the head of an agency “responsible for the administration of the navigation or vessel-inspection laws” may apply for certification of the Maritime Administrator, in his or her capacity as Director of the National Shipping Authority of “non-availability of qualified United States flag capacity to meet national defense requirements.”<sup>25</sup> Either waiver, then, must be explicitly tied to a showing of pressing defense concerns.

The Jones Act, by its very nature, is economically inefficient. Cabotage provisions cut against the market forces that compel ship-owners to register their vessels under flags of convenience, a substantial drop in market efficiency when the United States spends four times as much to build vessels than foreign builders do.<sup>26</sup> And although it may also be considerably more expensive to employ a Jones Act-compliant crew—in some cases, crew costs are over five times greater<sup>27</sup>—the alternative would likely be a serious reduction in shipping lines employing U.S. nationals as seamen. The declining size of the merchant fleet has meant a reduction in career opportunities for American seamen, and there are already too few U.S.-flagged vessels in service to provide jobs for the number of seamen needed in war-

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20 46 U.S.C. § 12112(a). Narrow exceptions exist, however, for vessels “captured in war,” forfeited, or wrecked in U.S. waters. *Id.*

21 46 U.S.C. § 8103(b)(1)(B) (“[N]ot more than 25 percent of the total number of unlicensed seamen on the vessel may be aliens lawfully admitted to the United States for permanent residence.”). In addition, only U.S. citizens may serve as “master, chief engineer, radio officer, or officer in charge of a deck watch or engineering watch.” *Id.* § 8103(a).

22 See National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 3502, 134 Stat. 3388 (2021).

23 See *id.*

24 46 U.S.C. § 501(a)(1).

25 *Id.* § 501(b)(1).

26 Olney, *supra* note 14, at 1–9 (“The cost of building a tanker in the U.S. is now four times the cost of building the same vessel abroad and the cost of building a container ship in the U.S. is five times foreign costs.”).

27 See Ryan Uljua, *Don't Stop with Puerto Rico, Trump Should Waive the Jones Act for Alaska Too*, ANCHORAGE DAILY NEWS (Apr. 17, 2018), <https://www.adn.com/opinions/2018/04/17/dont-stop-with-puerto-rico-trump-should-waive-the-jones-act-for-alaska-too/> [https://perma.cc/J9XE-6RVU].

time.<sup>28</sup> But, presumably, Congress accepted such costs to the market as a permissible tradeoff for maintaining a merchant fleet. Maintaining a base of U.S. vessels and seamen is a costly exercise, but it remains the core function of the Jones Act.<sup>29</sup>

Although cabotage provisions were originally intended as a national security measure, the American shipping companies that it protects from international competition have become its strongest supporters in recent decades.<sup>30</sup> Critics such as the Cato Institute have disparaged the “protectionist” act for the “economic burden it has placed on the United States” and for shielding a U.S.-flagged fleet “now largely notable for its expense and technological inferiority” from competition.<sup>31</sup> But efforts to curtail the extent of cabotage provisions have been met with significant political opposition, as industry groups and unions have lobbied heavily to keep the Jones Act in place. Even with strong arguments for repeal brought by legislators such as John McCain, advocates for full repeal of the Jones Act have failed to gain traction in Congress.<sup>32</sup> The Open America’s Waters Act,<sup>33</sup> sponsored by McCain in 2010, was read twice and referred to the Committee on Commerce, Science, and Transportation, but it never reached the Senate floor.<sup>34</sup> Senator Mike Lee (R-UT) introduced a similar bill in 2019,<sup>35</sup> but this bill also failed in committee.<sup>36</sup>

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<sup>28</sup> John Grady, *Buzby: Declining Ship Numbers, Opportunities Causing Merchant Marine Talent Loss*, USNI NEWS (Aug. 22, 2019, 2:56 PM), <https://news.usni.org/2019/08/22/buzby-declining-ship-numbers-opportunities-causing-merchant-marine-talent-loss> [https://perma.cc/KQ6T-H6HD].

<sup>29</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-260, PUERTO RICO: CHARACTERISTICS OF THE ISLAND’S MARITIME TRADE AND POTENTIAL EFFECTS OF MODIFYING THE JONES ACT 7 (2013) (“[W]hether or not the vessel is militarily useful, commercial U.S.-flag vessels provide employment to trained officers and unlicensed seamen, many of whom could be available to crew government-owned sealift vessels in times of war or national emergency.”).

<sup>30</sup> The Marine Engineers Beneficial Association spent \$238,000 in lobbying related to the Jones Act in the first quarter of 2019. Camille Erickson, *The Special Interests Lobbying to Uphold the Century-Old Law Hampering Relief to Puerto Rico*, OPENSECRETS (June 4, 2019, 10:51 AM), <https://www.opensecrets.org/news/2019/06/lobbying-to-uphold-the-jones-act-hampering-puerto-rico-relief/> [https://perma.cc/4HBZ-7MLK].

<sup>31</sup> Colin Grabow & Inu Manak, *The Jones Act at 100: Time to Make This Protectionist Law History*, CATO INST. (June 11, 2020, 3:59 PM), <https://www.cato.org/blog/jones-act-100-time-make-protectionist-law-history> [https://perma.cc/SV7E-H9CA].

<sup>32</sup> *McCain Takes the Floor on Jones Act Amendment*, MAR. EXEC. (Jan. 22, 2015, 2:40 PM), <https://www.maritime-executive.com/article/mccain-takes-the-floor-on-jones-act-amendment> [https://perma.cc/T5FR-BB26].

<sup>33</sup> Open America’s Waters Act, S. 3525, 111th Cong. (2010).

<sup>34</sup> *Actions Overview S. 3525—111th Congress (2009–2010)*, CONGRESS.GOV, <https://www.congress.gov/bill/111th-congress/senate-bill/3525/actions> [https://perma.cc/U4DD-5SUS].

<sup>35</sup> Open America’s Waters Act of 2019, S. 694, 116th Cong. (2019). The text of the two

The Biden Administration also appears poised to support the Act in its current form. President Biden has committed to being a “strong advocate for the Jones Act” and its cabotage provisions in particular.<sup>37</sup> In his first week in office, President Biden signed an executive order requiring agencies to “[b]uy American” for all federal procurement, explicitly requiring executive agencies to adhere to the Jones Act.<sup>38</sup> In the face of continuing legislative and executive support for the Act, any repeal or major reduction of its scope in the near future seems politically impossible.

Any realistic proposal for amending the Jones Act must be incremental and limited to survive the headwinds of support for the status quo. But amendment is vital given the detrimental impacts of the Act in its current form, which are especially acute in two sets of circumstances. The first circumstance is in periods of natural disaster, when the size of the U.S.-flagged merchant fleet is insufficient to meet an unanticipated demand for goods of all kinds. The aftermath of Hurricane Maria in 2017 is perhaps the highest-profile example, but one can easily imagine similar disasters raising equal, or more pressing, shipment concerns. The second circumstance arises in shipping goods that require specialized vessels unavailable under a U.S. flag. Case studies of two particular industries illustrate this problem. Wind turbine construction and the liquefied natural gas (“LNG”) industry each require specialized vessels, but there are no Jones Act-compliant options available. Current cabotage law imposes arbitrary roadblocks in the development of these burgeoning industries.

#### A. *Impact of the Jones Act on Natural Disaster Response and Recovery*

Perhaps the greatest public attention to the Jones Act in recent years—and the greatest controversy—came in 2017, in the wake of damage caused by Hurricane Maria. Discussion of the Act’s impact on Puerto Rico has decreased since the immediate aftermath of the hurri-

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bills is substantially similar, amending 46 C.F.R. § 12112(a) to open coastwise endorsements to any vessel that complies with U.S. law regardless of national flag or construction. *See id.*; S. 3525.

<sup>36</sup> *Actions Overview S. 694—116th Congress (2019–2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/694> [<https://perma.cc/7QK7-EBXZ>].

<sup>37</sup> Press Release, The White House, President Biden to Sign Executive Order Strengthening Buy American Provisions, Ensuring Future of America is Made in America by All of America’s Workers (Jan. 25, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/25/president-biden-to-sign-executive-order-strengthening-buy-american-provisions-ensuring-future-of-america-is-made-in-america-by-all-of-americas-workers/> [<https://perma.cc/S9R4-BUBS>].

<sup>38</sup> Exec. Order No. 14,005, 86 Fed. Reg. 7475, 7475 (Jan. 25, 2021).



cane, with little evident legal impact. There is, however, good reason to revisit the subject, as several studies conducted in the last few years have shed further light upon the scope of the economic harm that the Jones Act causes Puerto Rico. American Maritime Partnership, a U.S. maritime industry association, commissioned a study in July 2018 concluding that the Jones Act did not increase costs to goods sold in Puerto Rico.<sup>39</sup> However, policy analyst Colin Grabow questioned the methodology of this report, which was based solely upon price comparison of a “handful of items sold at Walmart” between locations in Jacksonville, Florida, and Puerto Rico.<sup>40</sup> Other recent studies have reached a conclusion opposite that of the July 2018 American Maritime Partnership study: not only has the Jones Act imposed costs upon transportation to Puerto Rico, but the overall cost to the Puerto Rican economy has been steep.<sup>41</sup> For instance, a 2019 study conducted by John Dunham & Associates found that the Act increases shipping costs to Puerto Rico by \$568.9 million, with a total increase of prices on the island of \$1.1 billion attributable to cabotage restrictions.<sup>42</sup>

Despite the debate on the overall economic impact of the Jones Act on Puerto Rico, its impact in the aftermath of Hurricane Maria is significantly clearer. Vincent H. Smith of the American Enterprise Institute argues that the value of aid dollars spent on hurricane recovery is undercut by the Jones Act.<sup>43</sup> He notes that the actual impact per dollar spent on shipping supplies is undercut by the higher rates charged by Jones Act-compliant vessels, at least tripling the cost per container.<sup>44</sup> It is likely that Puerto Rico will face this concern again, as

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<sup>39</sup> The study was conducted by management consulting groups Reeve & Associates and Estudios Técnicos, Inc. REEVE & ASSOCS. & ESTUDIOS TÉCNICOS, INC., *IMPACT OF THE U.S. JONES ACT ON PUERTO RICO* 14 (2018), [https://3snn221qaymolkgbj4a0vpey-wpengine.netdna-ssl.com/wp-content/uploads/2018/07/Report\\_Impact-of-the-Jones-Act-on-Puerto-Rico\\_FINAL2.pdf](https://3snn221qaymolkgbj4a0vpey-wpengine.netdna-ssl.com/wp-content/uploads/2018/07/Report_Impact-of-the-Jones-Act-on-Puerto-Rico_FINAL2.pdf) [<https://perma.cc/PM7R-DQE2>].

<sup>40</sup> Colin Grabow, *Duncan Hunter Should Stop Supporting the Jones Act and Sink This Rusted-Out Hulk of a Law*, *THE PRESS-ENTER*. (Aug. 6, 2018, 11:42 AM), <https://www.pe.com/2018/08/05/duncan-hunter-should-stop-supporting-the-jones-act-and-sink-this-rusted-out-hulk-of-a-law/> [<https://perma.cc/BZZ5-QG64>].

<sup>41</sup> See Colin Grabow, *New Reports Detail the Jones Act's Cost to Puerto Rico*, *CATO INST.* (Feb. 25, 2019, 9:31 AM), <https://www.cato.org/blog/new-reports-detail-jones-acts-cost-puerto-rico> [<https://perma.cc/X4CD-SSQR>] (summarizing studies finding costs to Puerto Rico).

<sup>42</sup> JOHN DUNHAM & ASSOCS., *THE JONES ACT: A LEGACY OF ECONOMIC RUIN FOR PUERTO RICO* 2–3 (2019), [https://docs.wixstatic.com/ugd/5b4228\\_4e79040fd1b043a59df921358825334a.pdf](https://docs.wixstatic.com/ugd/5b4228_4e79040fd1b043a59df921358825334a.pdf) [<https://perma.cc/SW67-52UF>].

<sup>43</sup> Vincent H. Smith & Philip G. Hoxie, *The Jones Act Undercuts Aid to Puerto Rico*, *AM. ENTER. INST.* (June 4, 2019), <https://www.aei.org/economics/the-jones-act-undercuts-aid-to-puerto-rico> [<https://perma.cc/98SB-R2XT>].

<sup>44</sup> *Id.* (“[A] recent quote for shipping a 20-foot container from Jacksonville, Florida to San Juan was \$3,390, or about \$3 per nautical mile. The quote for shipping a similar 20-foot container

it is only a matter of time before the island faces another hurricane. Hurricane Maria was the worst storm to make landfall in Puerto Rico in eighty years,<sup>45</sup> but there is evidence that global warming will make such storms more likely in the future.<sup>46</sup>

In the aftermath of Hurricane Maria, the Department of Homeland Security approved a ten-day waiver at the request of the Secretary of Defense under 46 U.S.C. § 501(a) in the interest of national defense.<sup>47</sup> However, waiver for such a short period had little effect upon recovery.<sup>48</sup> For instance, the limited period was “was not enough time for a Norwegian ship to transport 53 containers of aid from New Orleans to Puerto Rico, or for a Dutch vessel, owned by Greenpeace, to carry supplies to the beleaguered island.”<sup>49</sup> Waivers for too brief a period are meaningless in the context of ocean shipping. Mario Loyola, Senior Fellow at the Competitive Enterprise Institute, writes, “At a minimum, it would take months to rearrange the relevant supply chains, and shippers would only spend the time and money required to do that if they had some certainty that the new supply chains would last.”<sup>50</sup> He suggests that any effective waiver would need to extend for a period of several years for the market to effectively respond.<sup>51</sup> Congress, however, has since doubled down on the ten-day

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from Veracruz, Mexico to San Juan, a longer journey, was only \$1,350, or \$0.77 per nautical mile.”).

<sup>45</sup> *The Facts: Hurricane Maria's Effect on Puerto Rico*, MERCY CORPS (Sept. 9, 2020), <https://www.mercycorps.org/blog/quick-facts-hurricane-maria-puerto-rico> [<https://perma.cc/7QUJ-B86S>].

<sup>46</sup> The National Oceanic and Atmospheric Administration assesses that tropical cyclone rainfall and intensity, and the proportion of tropical cyclone systems that reach Category 4 or 5, are “very likely” to increase through the twenty-first century. Tom Knutson, *Global Warming and Hurricanes: An Overview of Current Research Results*, GEOPHYSICAL FLUID DYNAMICS LAB'Y, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Aug. 9, 2021), <https://www.gfdl.noaa.gov/global-warming-and-hurricanes/> [<https://perma.cc/526P-CVWG>].

<sup>47</sup> Memorandum from Elaine C. Duke, Acting U.S. Sec'y of Homeland Sec. (Sept. 28, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0928\\_AS1\\_Jones-Act-Waiver.pdf](https://www.dhs.gov/sites/default/files/publications/17_0928_AS1_Jones-Act-Waiver.pdf) [<https://perma.cc/43HM-D8VD>].

<sup>48</sup> Colin Grabow, Inu Manak & Daniel Ikenson, *The Jones Act: A Burden America Can No Longer Bear*, CATO INST. POL'Y ANALYSIS, no. 845, June 28, 2018, at 10–13, <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa845.pdf> [<https://perma.cc/DQ3U-7UM6>].

<sup>49</sup> *Id.* at 10.

<sup>50</sup> Mario Loyola, *America Last: The Grim Reality of the Jones Act*, COMPETITIVE ENTER. INST. ISSUE ANALYSIS, no. 5, June 2020, at 23 [https://cei.org/sites/default/files/Mario\\_Loyola\\_-\\_America\\_Last.pdf](https://cei.org/sites/default/files/Mario_Loyola_-_America_Last.pdf) [<https://perma.cc/ST3H-6B8L>].

<sup>51</sup> *Id.* at 23.

waiver period, and ten days is currently the default maximum waiver unless extended to a hard cap of forty-five days.<sup>52</sup>

It is difficult to justify the status quo on the grounds of the Jones Act's role in promoting national security. The Act fundamentally seeks to promote U.S. shipping by ensuring it a stable and protected market, but the magnitude of harm caused by delaying aid supplies outweighs the business interests of American shipping lines.

## B. *Impact of the Jones Act on Developing Industries*

Cabotage restrictions apply to all vessels engaged in coastwise trade regardless of their construction.<sup>53</sup> With the small size of the U.S.-flagged fleet, this presents particular difficulties for industries relying upon specialized vessels that simply do not exist among the pool of Jones Act-compliant shipping vessels. The difficulties faced by the wind energy and LNG industries illustrate the problem.

### 1. *Wind Energy*

Despite a growing appetite for offshore wind energy projects, the Jones Act can impede turbine construction. In European development projects, specially built heavy-lift vessels referred to as “jack-up vessels”<sup>54</sup> are available to convey oversized components, especially turbine blades, to the offshore installation site.<sup>55</sup> Proponents of the Jones Act note that there are available workarounds and that vessel unavailability is not a complete impediment to turbine construction.<sup>56</sup> At Block Island, the first U.S. offshore wind farm, smaller vessels shipped parts to the point of construction between Nova Scotia and Virginia

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<sup>52</sup> See National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 3502, 134 Stat. 3388 (2021).

<sup>53</sup> See 46 U.S.C. § 50101.

<sup>54</sup> See CROWN EST., JACK-UP VESSEL OPTIMISATION (2014), <https://www.thecrownstate.co.uk/media/1780/ei-km-in-om-construction-072014-jack-up-vessel-optimisation.pdf> [<https://perma.cc/6UGT-VPLT>].

<sup>55</sup> Of the tailor-made heavy lift vessels designed for turbine installation, 61% are located in Europe and 39% in China. *GWEC Market Intelligence Releases Global Offshore Wind Turbine Installation Vessel Database*, GLOB. WIND ENERGY COUNCIL (Sept. 30, 2020), <https://gwec.net/gwec-market-intelligence-releases-global-offshore-wind-turbine-installation-database/> [<https://perma.cc/AE7K-RKWK>]. Such “specialist ships are scarce, numbering about a dozen in the world” and “are almost exclusively in Europe.” Lars Paulsson, Jeremy Hodges & Chris Martin, *Offshore Wind Will Need Bigger Boats. Much Bigger Boats*, BLOOMBERG (May 13, 2019, 12:00 AM), <https://www.bloomberg.com/news/features/2019-05-13/offshore-wind-will-need-bigger-boats-much-bigger-boats> [<https://perma.cc/23SC-SZB9>].

<sup>56</sup> See, e.g., Joshua Sohn & Daniel Lewkowicz, *How the Offshore Wind Energy Industry Can Overcome the Jones Act*, POWER (Mar. 1, 2018), <https://www.powermag.com/how-the-offshore-wind-energy-industry-can-overcome-the-jones-act/> [<https://perma.cc/5BBF-49X4>].

because they lacked access to any American wind installation vessels.<sup>57</sup> These smaller “feeder” vessels “shuttle wind farm components from a port to the foreign installation ship, which . . . install[s] the turbines one-by-one.”<sup>58</sup> The use of such feeder vessels, however, is more costly and introduces concerns for safety and potential equipment damage.<sup>59</sup> The more times a particular part must be transferred to or from a vessel, the greater the likelihood of accident.<sup>60</sup>

The Jones Act also increases the total costs of construction projects. Ocean freight rates are based on multiple factors and are difficult to calculate precisely, but they increase with distance.<sup>61</sup> For an offshore project on the Atlantic seaboard, for example, the question is not *whether* a voyage from St. John, Newfoundland will cost more than one from Hampton Roads, Virginia, but *how much* more. Offshore construction projects require chartering vessels, so they lack the economies of scale that shippers to terminals enjoy. Any additional costs must be internalized.

In sum, critics argue that Jones Act requirements increase the costs of construction, thereby slowing or disincentivizing wind projects.<sup>62</sup> Proponents of the Jones Act counter that the costs imposed on construction projects are not significant.<sup>63</sup> It is true that the particu-

<sup>57</sup> Karl-Erik Stromsta, *How Dominion Energy Plans to Launch an Offshore Wind Empire*, GREENTECH MEDIA (May 20, 2020), <https://www.greentechmedia.com/articles/read/dominion-plans-to-use-a-pilot-project-to-launch-an-offshore-wind-empire> [<https://perma.cc/4SSC-HPUL>].

<sup>58</sup> Bobby Magill, *Wind Farms Jonesing for Long-Legged Ships Aground by Maritime Law*, BLOOMBERG L. (June 1, 2018, 7:30 AM), <https://news.bloomberglaw.com/environment-and-energy/wind-farms-jonesing-for-long-legged-ships-aground-by-maritime-law> [<https://perma.cc/T6T6-ALXF>].

<sup>59</sup> *See id.*

<sup>60</sup> According to Jay Borkland, Associate Professor in the Department of Civil and Environmental Engineering at Tufts University, the use of feeder vessels “is a risky prospect for wind farm developers because turbine components have to be transferred from vessel to vessel multiple times, increasing costs and exposing the parts to accidental damage.” *Id.*

<sup>61</sup> Broadly, sea freight rates are “influenced by the nature of the cargo, the weight or volume, the distance of the destination, and all of the other accumulated costs from other services.” *How to Calculate Sea Freight Rates with FCL and LCL*, MACH 1 GLOB. SERVS. (June 18, 2018), <https://www.mach1global.com/sea-freight-rates-with-fcl-lcl/> [<https://perma.cc/ES4H-J8YN>].

<sup>62</sup> *See, e.g.*, Andrew Sayer, *Barriers to Adoption: Offshore Wind Energy and the Jones Act*, J. ON EMERGING TECHS. BLOG (Feb. 25, 2020), <https://ndlsjet.com/barriers-to-adoption-offshore-wind-energy-and-the-jones-act/> [<https://perma.cc/HKU9-EQNL>].

<sup>63</sup> A study conducted by engineering consulting firm Hatch suggests that using Jones Act-compliant feeder barges increases costs by approximately the same amount as it speeds construction, compared with using purpose-built turbine construction vessels. Nathanael Shoemate & Mark Franklin, *Jones Act Externalities to US Offshore Wind Development*, HATCH, <https://www.hatch.com/en/About-Us/Publications/Technical-Papers/2019/05/Jones-Act-Externalities-To-US-Offshore-Wind-Development> [<https://perma.cc/6WJC-EDY4>].

lar jack-up vessels that are unavailable under a U.S. flag constitute only one of a number of different vessels required for the overall construction process.<sup>64</sup> However, that response does not account for the wind energy sector's sensitivity to increased costs as a developing sector of the market.<sup>65</sup> The attractiveness of development projects is closely tied to profit expectations by megawatt-hour, where wind energy producers must compete with established traditional energy sources.<sup>66</sup>

Some shipbuilding efforts are currently underway. Dominion Energy, a Virginia utility, is developing a U.S.-flagged heavy-lift vessel specialized to construct wind turbines.<sup>67</sup> Dominion expects the vessel to enter service in late 2023.<sup>68</sup> In addition, offshore services firm 2nd Wind Marine, LLC is developing two "superfeeder" vessels to service planned wind farm projects off the eastern seaboard.<sup>69</sup> That U.S. enterprises are stepping in with shipbuilding efforts suggests, on its face, that the Jones Act is working as intended, because shipping that would otherwise be conducted by foreign-flagged vessels built in non-U.S. ports will soon be carried out by American-built vessels. But, even when the argument for a waiver has passed, the costs of vessel construction and maintenance are additional barriers to the development of wind energy.<sup>70</sup> Offshore wind in the United States lags behind European development sharply,<sup>71</sup> and although the unavailability of

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<sup>64</sup> See *id.* (stating that "[a] variety of vessels are required" for offshore wind projects).

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* The cost of employing vessels alone "is a significant sum when considering the magnitude of an [offshore windfarm's] overall project cost." *Id.* at 3.

<sup>67</sup> See Stromsta, *supra* note 57.

<sup>68</sup> Nadja Skopljak, *First Jones Act Compliant Offshore Wind Installation Vessel Coming in 2023*, OFFSHORE WIND (May 8, 2020), <https://www.offshorewind.biz/2020/05/08/first-jones-act-compliant-offshore-wind-installation-vessel-coming-in-2023/> [https://perma.cc/5XSR-M6ER].

<sup>69</sup> Kirk Moore, 'Superfeeder' Design Offers Jones Act Solution for Offshore Wind Developers, WORKBOAT (June 15, 2020), <https://www.workboat.com/news/offshore/superfeeder-design-offers-jones-act-solution-for-offshore-wind-developers/> [https://perma.cc/B88B-Z7ZT].

<sup>70</sup> Specialized turbine installation may cost between \$250 and \$500 million per turbine. Matt Tremblay, *The Complicated U.S. Regulations for Offshore Wind Vessels*, WINDPOWER ENG'G & DEV. (Aug. 2, 2021), <https://www.windpowerengineering.com/the-complicated-u-s-regulations-for-offshore-wind-vessels/> [https://perma.cc/NE8L-AB9B].

<sup>71</sup> See Ella Foley Gannon, J. Daniel Skees & Scott D. Clausen, *U.S. Offshore Wind Is Under Sail, but Challenges Remain*, REUTERS (Sept. 30, 2021, 10:48 AM), <https://www.reuters.com/legal/legalindustry/us-offshore-wind-is-under-sail-challenges-remain-2021-09-30/> [https://perma.cc/QM5D-L6G5] ("[T]he U.S. only has about 30 MW of offshore wind production from a single operating utility-scale wind farm. This pales in comparison to other parts of the world, particularly Europe, which has more than 25 GW of grid-connected offshore wind capacity from more than 100 offshore wind farms."); Anmar Frangoul, *Europe's Offshore Wind Sector Saw a Record \$31 Billion of Investment in 2020*, CNBC (Feb. 8, 2021, 11:32 AM), <https://>

jack-up vessels is far from the sole factor driving that delay, it has contributed to it.

## 2. *The Liquefied Natural Gas Industry*

The LNG industry has expanded rapidly in recent years.<sup>72</sup> The LNG market for U.S. producers quadrupled in the first two decades of the twenty-first century and is projected to double again in the next twenty years.<sup>73</sup> In 2019, the United States became the third largest global LNG exporter.<sup>74</sup> Forecasts for the size of the market are, however, subject to a number of competing factors.<sup>75</sup> COVID-19, for example, stifled global economic activity.<sup>76</sup>

The United States has not built any LNG tankers since before 1980.<sup>77</sup> Although some American shipbuilders are working to launch articulated tug and barges for ship-to-ship transfer of “bunker fuel,” the fuel used by motor vessels, the capacity of these vessels is limited to 4,000 to 8,000 cubic meters.<sup>78</sup> This amount is minute compared with the LNG imported to Puerto Rico, averaging about 159 million cubic feet of natural gas each day from 2013 to 2016.<sup>79</sup> Transport of LNG in large volumes is typically conducted by far larger LNG tankers,<sup>80</sup> and

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[www.cnbc.com/2021/02/08/europes-offshore-wind-sector-saw-31-billion-of-investment-in-2020-.html](http://www.cnbc.com/2021/02/08/europes-offshore-wind-sector-saw-31-billion-of-investment-in-2020-.html) [<https://perma.cc/NX7D-MCUH>] (“When it comes to offshore wind, the U.S. still lags behind Europe.”).

<sup>72</sup> DELOITTE, *WORK IN PROGRESS: HOW CAN BUSINESS MODELS ADAPT TO EVOLVING LNG MARKETS?* 3 (2016).

<sup>73</sup> *Id.*

<sup>74</sup> Barry Parker, *US Becomes the World’s Third Largest LNG Exporter*, SEATRADE MAR. NEWS (Aug. 6, 2019), <https://www.seatrade-maritime.com/opinions-analysis/us-becomes-worlds-third-largest-lng-exporter> [<https://perma.cc/R4ZK-MUYS>].

<sup>75</sup> See, e.g., DELOITTE, *supra* note 72, at 11–12; Ajey Chandra & Ramin Lakan, *Export Potential and Challenges for North American LNG from Unconventional Gas*, GAS PROCESSING & LNG, <http://gasprocessingnews.com/features/201904/export-potential-and-challenges-for-north-american-lng-from-unconventional-gas.aspx> [<https://perma.cc/6NKC-FBKV>].

<sup>76</sup> See, e.g., EDUARDO LEVY YEYATI & FEDERICO FILIPPINI, BROOKINGS INST., *BROOKINGS GLOBAL WORKING PAPER No. 158, SOCIAL AND ECONOMIC IMPACT OF COVID-19 1* (2021) (“The COVID-19 global recession is the deepest since the end of World War II.”).

<sup>77</sup> See *US Needs 100 LNG Ships, 30 Years*, MAR. EXEC. (Dec. 7, 2015, 4:27 PM), <https://www.maritime-executive.com/article/us-needs-100-lng-ships-30-years> [<https://perma.cc/97PK-AF7C>].

<sup>78</sup> See *LNG Transport: Frequently Asked Questions*, AM. MAR. P’SHIP, <https://www.americanmaritimepartnership.com/u-s-maritime-industry/lng-transport/> [<https://perma.cc/9LSJ-8TTU>].

<sup>79</sup> See Kristen Tsai, *Puerto Rico’s LNG Imports Returned to Pre-Hurricane Maria Levels in Late 2018*, U.S. ENERGY INFO. ADMIN., (April 8, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=38972> [<https://perma.cc/GR7X-GGJM>].

<sup>80</sup> See *LNG Tanker*, WÄRTSILÄ, <https://www.wartsila.com/encyclopedia/term/lng-tanker> [<https://perma.cc/ZY45-86WF>] (“Since the 1970s the deep-sea LNG carrier has grown quite

there is not currently any public indication that shipbuilders plan to develop such vessels. The effect of the Jones Act is, therefore, to largely foreclose the possibility of shipping LNG between U.S. ports. New LNG tanker construction—if any were to begin—would not provide an immediate solution, but only alleviate the problem two to three years in the future.<sup>81</sup>

LNG differs from other liquid goods that can be transported by traditional bulk carrier vessels. To carry LNG, a vessel needs to be specially built with tanks constructed from “special alloys” to prevent gas from evaporating.<sup>82</sup> Their overall cost of construction is about \$175 million, “several times more than other ship types.”<sup>83</sup> The high cost of entry to shipping natural gas has so far been higher than U.S. shipbuilders are willing to bear.<sup>84</sup> And, despite the general upward trend of the U.S. natural gas market,<sup>85</sup> questions about the continued upward growth of the market continue,<sup>86</sup> and any shipper looking to enter U.S. coastwise trade would be in competition with ground transportation as well.<sup>87</sup> Because of the Jones Act, sourcing LNG by sea for domestic U.S. shipping requires a multimillion-dollar bet. Unsurprisingly, shipbuilders have not jumped at the opportunity to develop LNG-appropriate vessels.

Despite “abundant” domestic LNG production, U.S. demand for natural gas is met primarily with resources sourced abroad.<sup>88</sup> The

slowly in size . . .”); Will Cook-Clarke, James Jenden, Ellen Lloyd, Kandi Wong & Jason Donev, *Transportation of Liquefied Natural Gas*, ENERGY EDUC. (Nov. 13, 2015), [https://energyeducation.ca/encyclopedia/Transportation\\_of\\_liquefied\\_natural\\_gas](https://energyeducation.ca/encyclopedia/Transportation_of_liquefied_natural_gas) [<https://perma.cc/S7L3-TUPA>].

<sup>81</sup> See *America’s Gas Exports Keep Booming but a Dearth of Tankers Looms*, GULF TIMES (Apr. 1, 2018, 10:24 PM), <https://www.gulf-times.com/story/587332/America-s-gas-exports-keep-booming-but-a-dearth-of-tankers-looms> [<https://perma.cc/ZAK8-H6Q7>] (“Most LNG tankers take two-and-a-half years to build.”).

<sup>82</sup> See Costas Paris, *Shipping Companies Banking on Gas Carriers as LNG Demand Grows*, WALL ST. J. (Mar. 14, 2019, 5:30 AM), <https://www.wsj.com/articles/shipping-companies-banking-on-gas-carriers-as-lng-demand-grows-11552555800#:~:text> [<https://perma.cc/GJ9H-MF6P>].

<sup>83</sup> *Id.*

<sup>84</sup> *Cf. id.*; *US Needs 100 LNG Ships, 30 Years*, *supra* note 77.

<sup>85</sup> See DELOITTE, *supra* note 72, at 3; see also Victoria Zaretskaya, *U.S. Liquefied Natural Gas Exports Set a Record in November*, U.S. ENERGY INFO. ADMIN. (Dec. 16, 2020), <https://www.eia.gov/todayinenergy/detail.php?id=46296> [<https://perma.cc/CFV7-KT49>].

<sup>86</sup> See DELOITTE, *supra* note 72, at 13; Chandra & Lakan, *supra* note 75.

<sup>87</sup> *Cf.* FRITTELLI, *supra* note 7, at 2.

<sup>88</sup> See MICHAEL RATNER & JOHN FRITTELLI, CONG. RSCH. SERV., IF10878, *U.S. LNG TRADE RISING, BUT NO DOMESTIC SHIPPING 2* (2018) (“Even though Hawaii and Puerto Rico are in proximity to shipping routes for U.S. LNG exports, neither has been able to fully benefit from the large increase in U.S. natural gas production or the new liquefaction facilities, in part because of the Jones Act.”).

greatest impacts of the lack of LNG carriers have been felt in noncontiguous sectors of the United States. Puerto Rico imports a majority of its LNG from Trinidad and Tobago at higher costs than would be available if Jones Act-compliant LNG carriers operated routes between the territory and the U.S. mainland.<sup>89</sup> Puerto Rico imports about sixty billion cubic feet of LNG annually,<sup>90</sup> which is less than ports in the continental United States export every week.<sup>91</sup> What is more, fuel unavailability was a particular problem in the wake of Hurricane Maria. Because of a regional shortage of Jones Act LNG tankers capable of carrying LNG on the Atlantic seaboard, LNG shipments to Puerto Rico were subject to market distortions and inflated shipping costs that significantly slowed Puerto Rico's post-hurricane recovery time.<sup>92</sup>

The impact on Alaskan ports may be greater still.<sup>93</sup> The Jones Act's economic impact on Alaska is a longstanding source of controversy. A 1982 analysis by the Alaska Statehood Commission calculated that liner shipping service to Alaska cost the state over \$41 million per year, or \$100 per person, a premium attributable to Jones Act regulations.<sup>94</sup> The unavailability of coastwise shipment of LNG has arguably increased prices for New England as well, where it is widely used in heating homes.<sup>95</sup> What is certain is that New England's natural gas market is only partially supplied by pipeline, and that any demand in excess must be supplied by ships from foreign ports.<sup>96</sup> Meanwhile, new exploitation of natural gas in northern Alaska must be exported due to the lack of domestic shipping to carry it to other U.S. ports.<sup>97</sup> The effect of the Jones Act is to create this kind of mis-

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<sup>89</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 29, at 20.

<sup>90</sup> See Tsai, *supra* note 79.

<sup>91</sup> See Zaretskaya, *supra* note 85.

<sup>92</sup> Mark J. Perry, *Damage Done to Puerto Rico by the Jones Act Illustrates the Need to Repeal the Law*, THE HILL (Oct. 3, 2018, 4:00 PM), <https://thehill.com/blogs/congress-blog/politics/409752-damage-done-to-puerto-rico-by-the-jones-act-illustrates-the-need> [<https://perma.cc/T7FD-RH9D>].

<sup>93</sup> See Uljua, *supra* note 27.

<sup>94</sup> See SIMAT, HELLIESEN & EICHNER, INC., *THE JONES ACT AND ITS IMPACT ON THE STATE OF ALASKA 53* (1982). Adjusted for inflation, this equates to roughly \$267 per Alaskan per year. Colin Grabow, *Alaska Lawmakers Must Get Serious About Jones Act Repeal*, THE HILL (Oct. 10, 2018, 8:10 AM), <https://thehill.com/blogs/congress-blog/politics/410659-alaska-lawmakers-must-get-serious-about-jones-act-repeal> [<https://perma.cc/9D43-VCSP>].

<sup>95</sup> Grabow, *supra* note 2.

<sup>96</sup> Vincent H. Smith & Philip G. Hoxie, *To Lower Residential Energy Costs, Waive Goodbye to the Jones Act*, AEI (Sept. 3, 2019), <https://www.aei.org/economics/to-lower-residential-energy-costs-waive-goodbye-to-the-jones-act/> [<https://perma.cc/U84A-Q8VC>].

<sup>97</sup> For instance, none of the natural gas extracted from a project to exploit reserves in



match: Alaskan shippers may not sell their gas to buyers in Massachusetts, nor even receive shipments from other Alaskan ports with no U.S.-flagged ships to convey it.

Some signs of government interest in a waiver restricted to LNG carriers are emerging. President Trump reportedly considered a waiver for the Alaskan natural gas industry in 2019,<sup>98</sup> presumably on the grounds of national security, but decided against any such waiver following meetings with Senators from Alaska and Louisiana.<sup>99</sup> The reasons for this reversal are not publicly available, but commentators have suggested that lobbying from shipyards and labor unions defeated the possibility of a waiver.<sup>100</sup> There is, however, already contemplation of a waiver within the text of the Jones Act in its current form, specifically for the challenges of transporting LNG to Puerto Rico. Under 46 U.S.C. § 12120, a special provision was approved under which vessels constructed prior to 1996 need not meet the U.S. construction requirement for transportation of LNG to or from Puerto Rico.<sup>101</sup> This exception, however, is highly limited, as these vessels represent an increasingly aged and out-of-date component of the LNG carrier fleet, so the impact of the exemption will only decrease over time.

The Jones Act is not the sole source of trouble for the U.S. LNG markets. Global LNG supply chains have been delayed due to vessel unavailability, though foreign shipbuilders are rapidly expanding the size of the gas carrier fleet, with many vessels on order.<sup>102</sup> In addition, a decrease in global demand in 2020<sup>103</sup> suggests that non-U.S.-flagged hulls will become more available over the short term. But even though U.S. shippers would have to compete for a small number of foreign

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northern Alaska can currently be sourced to ports in the United States at all. See Eric Boehm, *Stupid Federal Shipping Regulations Will Prevent Alaskans from Buying Alaskan Natural Gas*, REASON (Nov. 7, 2019, 11:40 AM), <https://reason.com/2019/11/07/stupid-federal-shipping-regulations-will-prevent-alaskans-from-buying-alaskan-natural-gas/> [<https://perma.cc/ZHR5-MFYP>].

<sup>98</sup> Jennifer A. Dlouhy, Jenny Leonard & Jennifer Jacobs, *Trump Considering Waiving Jones Act Mandate for Natural Gas, Sources Say*, BLOOMBERG (Apr. 24, 2019, 11:12 AM), <https://www.bloomberg.com/news/articles/2019-04-23/trump-jones-act-natural-gas> [<https://perma.cc/S66M-4HBT>].

<sup>99</sup> Patrick Tyrrell, *The Peculiar Case of Alaskan Senators' Support for the Jones Act*, HERITAGE FOUND. (May 9, 2019), <https://www.heritage.org/international-economies/commentary/the-peculiar-case-alaskan-senators-support-the-jones-act> [<https://perma.cc/GG9H-V7ZD>].

<sup>100</sup> See, e.g., *id.*

<sup>101</sup> 46 U.S.C. § 12120.

<sup>102</sup> Paris, *supra* note 82.

<sup>103</sup> *Global Gas Review 2020*, IEA, <https://www.iea.org/reports/gas-market-report-q2-2021/global-gas-review-2020> [<https://perma.cc/BP6F-7YY5>].

hulls to move natural gas between U.S. ports, they currently have access to no tankers at all.<sup>104</sup>

If justified on the grounds of protecting U.S. industry, the Jones Act theoretically works to protect the expectations of U.S. shipbuilders that a market will exist for their ships. However, per *The Maritime Executive*, there was no indication by 2019 that any U.S. shipbuilder intended to step into the LNG market.<sup>105</sup> As of December 2021, there remains no information available in the public domain that the construction of any U.S.-flagged LNG carriers are planned. Until they are, the Act serves only to stifle potential business by preventing the use of foreign-built vessels.

## II. LEGAL SHORTCOMINGS OF THE JONES ACT AND ITS WAIVER SYSTEM

The Jones Act's unintended consequences call for a legal solution. Section II.A explores previous scholarly consideration of the Act's shortcomings, from which a revitalization of the waiver provision emerges as the best available answer. Section II.B discusses the shortcomings of the waiver system existing under current law.

### A. Previous Literature

Attention to the Jones Act within the legal community has, perhaps unsurprisingly, come chiefly from admiralty and maritime specialists. For those authors who have constructed proposals on a way forward for cabotage law, debate centers on whether to wholly abolish the Act. For instance, in *Sabotage by Cabotage*, then-law student Kyle Mason proposed that “the damages caused by the Jones Act could begin to be rectified either by partial relaxation or full repeal.”<sup>106</sup> William H. Yost III, in a student-written comment, called for full repeal of the U.S. construction requirement on economic efficiency grounds, writing that “it seems contrary to America’s general economic principles to prohibit” foreign-flagged competition.<sup>107</sup> In analyzing the impact of the Act on Puerto Rico in particular, Marie Olga Luis

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<sup>104</sup> *Garamendi: Give American Mariners a Role in LNG Exports*, MAR. EXEC., (Mar. 26, 2019, 5:28 PM), <https://www.maritime-executive.com/article/garamendi-give-american-mariners-a-role-in-lng-exports> [<https://perma.cc/9P62-GKDV>] (“At present, there are no U.S.-flagged LNG carriers . . .”).

<sup>105</sup> *Id.*

<sup>106</sup> Kyle Mason, Note, *Sabotage by Cabotage: The Jones Act's Attack on U.S. Energy*, 12 J. BUS., ENTREPRENEURSHIP, & L. 63, 87 (2019).

<sup>107</sup> William H. Yost III, Comment, *Jonesing for a Taste of Competition: Why an Antiquated Maritime Law Needs Reform*, 18 ROGER WILLIAMS U. L. REV. 52, 74 (2013).

Rivera—also a law student at the time—concluded, “[t]he Jones Act particularly overburdens noncontiguous jurisdictions, such as Puerto Rico; an Island in the midst of an economic crisis that can no longer bear the burden of protecting concentrated minority interests . . . . [F]ull exemption of the Jones Act is ultimately necessary for permanent resolution.”<sup>108</sup>

Other authors have argued that full repeal is ill-advised and that the Jones Act has a role to play in promoting shipbuilding and maintaining a fleet of U.S.-flagged vessels and trained merchant mariners.<sup>109</sup> Moreover, calls for sweeping repeal of the Act have had little effect in the face of opposition from the shipbuilding industry and shipping lines engaged in coastwise trade. In response to calls for repeal, both in scholarly literature and news media, Rear Admiral Christopher J. McMahon came to the defense of the Jones Act.<sup>110</sup> In his article *Double Down on the Jones Act?*, McMahon argues that weakening the Act “would seriously and negatively impact” the U.S. shipbuilding industry, with follow-on damage to the vessels available for national defense needs.<sup>111</sup> His proposed solution is investment in “short-sea-shipping,” or increased investment in transporting goods over internal waterways.<sup>112</sup> McMahon notes that European Union programs that incentivize the use of “marine highways” have been highly successful in building fleets available for strategic sealift, and that increased use of U.S. marine highways would help to spur the industry.<sup>113</sup>

However, McMahon’s arguments do not account for instances when these incentive structures fail to compel a market response. Although the status quo or further subsidies for shipbuilding and waterborne transportation might play a role, the Jones Act’s purpose in protecting the U.S.-flagged shipping industry is not met when it protects markets in which those shippers are not yet competing. In the LNG industry specifically, explored in Section I.B, *infra*, the private shipbuilding industry has simply not stepped in to fill a market need.

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<sup>108</sup> Marie Olga Luis Rivera, Comment, *Hard to Sea: Puerto Rico’s Future Under the Jones Act*, 17 LOY. MAR. L.J. 63, 135–36 (2018).

<sup>109</sup> See, e.g., *We and Mr. Jones: How the Misunderstood Jones Act Enhances Our Security and Economy*, 46 J. MAR. L. & COM., 493, 513 (2015).

<sup>110</sup> See Christopher J. McMahon, *Double Down on the Jones Act?*, 49 J. MAR. L. & COM. 153 (2018).

<sup>111</sup> *Id.* at 183.

<sup>112</sup> *Id.* at 187–92.

<sup>113</sup> *Id.* at 189, 192.

Although several authors call for waiver or relaxation of the Jones Act, few have considered the form a waiver might take. Highly critical analyses of the Act have also not sufficiently weighed the Act's legitimate policy goals. Arguments for relaxation of the current standard—as opposed to arguments to dig deeper into the Jones Act—provide a way forward. Indeed, further entrenchment in the American-vessel rule will only cause continuing harm to the shipping industry and others. Kyle Mason writes:

[W]aivers are only granted either “in the ‘interest of national defense,’” or *sometimes* if “no qualified U.S.-flagged vessels are available to meet the need.” But, this standard is historically hard to meet. A simple solution would be to begin granting waivers for economic hardship as opposed to just national emergency.<sup>114</sup>

Mason only touches briefly on this proposal, but his suggestion of a waiver system represents a practical solution to the shortcomings of the Jones Act in its current form. This idea can, and should, be built upon with a concrete model of a legislative solution for a relaxed waiver system. Further examination of the current waiver system and its shortcomings reveals what improvements could be made.

### B. *Waivers of the Jones Act Under Current Law*

Where waivers have been granted, they have typically related to the carriage of goods for defense needs. For instance, one early Jones Act waiver exempted iron ore shipped on the Great Lakes to meet steelmaking requirements during World War II.<sup>115</sup> Some waivers have touched on matters not directly related to national security, but each of these waivers was still justified on the grounds of impacting it. For instance, the Maritime Administration approved waivers in 1987 and 1990 for foreign shipping to be used if needed to draw down strategic oil reserves in case of defense requirements.<sup>116</sup>

Waivers have also been issued in response to hurricanes, beginning in the wake of Hurricane Katrina in 2005, and again for Hurricane Rita in the same year.<sup>117</sup> These waivers were limited to the

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<sup>114</sup> Mason, *supra* note 106, at 88 (footnote omitted) (citing Linda Chiem, *Oil Cos., Transporters Embrace Jones Act Waiver After Irma*, LAW360 (Sept. 21, 2017, 7:33 PM), <https://www.law360.com/articles/966565> [<https://perma.cc/AQ8T-UUT6>]).

<sup>115</sup> See JOHN FRITTELLI, CONG. RSCH. SERV., R45725, SHIPPING UNDER THE JONES ACT: LEGISLATIVE AND REGULATORY BACKGROUND 11 (2019).

<sup>116</sup> See Papavizas & Shapiro, *supra* note 17, at 335–36.

<sup>117</sup> See *id.* at 340–41.

transportation of petroleum products.<sup>118</sup> The next waiver came in 2012 after Hurricane Sandy, again including petroleum shipping, but expanded to include “feedstocks, blending components, and additives used to produce fuels.”<sup>119</sup> In calling for waivers for oil tankers after Hurricane Sandy, the Department of Energy explicitly cited national security concerns, stating that “petroleum availability is crucial to economic security and the national defense.”<sup>120</sup>

In certain cases, the justification for a waiver is more attenuated from defense concerns; for instance, Customs and Border Patrol (“CBP”) allowed a specialized Chinese-flagged vessel to transport an oil rig from the Gulf Coast to Alaska on the grounds of “addressing a fuel shortage in that region of Alaska.”<sup>121</sup> But such decisions are a rare exception, as CBP sets a high bar for a waiver request to implicate national defense. As Constantine G. Papavizas and Brooke F. Shapiro note, “[s]ince 1989, CBP’s public database contains numerous denials of Jones Act waiver requests. . . . In virtually every instance CBP has determined that there is an insufficient national defense interest.”<sup>122</sup> Indeed, CBP has consistently stated that “economic reasons such as commercial practicality or expediency” are not, absent more, sufficient grounds for waiver.<sup>123</sup> It is difficult to understand how such a blanket policy of denial on the grounds of commercial practicality serves the interests of the Jones Act.

Recent legislation has only raised the barrier for waiver. The text of 46 U.S.C. § 501, as originally implemented, provided that the Secretary of Defense could waive requirements where national defense interests required.<sup>124</sup> The 2021 NDAA added an additional required showing that a waiver is necessary “to address an immediate adverse effect on military operations.”<sup>125</sup> Some commentators have suggested that almost none of the recent Jones Act waivers would have been

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<sup>118</sup> *See id.*

<sup>119</sup> *Id.* at 342 (quoting Press Release, U.S. Dep’t of Homeland Sec., DHS Announces Expansion of Temporary, Blanket Jones Act Waiver (Nov. 3, 2012), <https://www.dhs.gov/news/2012/11/03/dhs-announces-expansion-temporary-blanket-jones-act-waiver> [<https://perma.cc/8CCM-HK3D>]).

<sup>120</sup> *Id.* (quoting Letters from Janet Napolitano, U.S. Sec’y of Homeland Sec., to various requesters (July 8, 2011–Sept. 9, 2011), <https://www.dhs.gov/sites/default/files/publications/jones-act-1.pdf> [<https://perma.cc/6WUR-878Z>]).

<sup>121</sup> FRITTELLI, *supra* note 115, at 12.

<sup>122</sup> Papavizas & Shapiro, *supra* note 17, at 352.

<sup>123</sup> FRITTELLI, *supra* note 115, at 13.

<sup>124</sup> *See* Codification of Title 46, Pub. L. No. 109-304, § 501(a), 120 Stat. 1485 (2006).

<sup>125</sup> National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 3502, 134 Stat. 3388 (2021).

authorized under this more stringent standard.<sup>126</sup> This increases the burdens of showing the need for a waiver and further shackles any waiver to the armed forces' needs alone. The 2021 NDAA also codified the ten-day period that the Trump Administration selected in response to Hurricane Maria.<sup>127</sup>

Congress is moving in the wrong direction on Jones Act waivers, making them even harder to obtain. Allowing waivers where necessary to avoid detrimental impacts to military operations is sensible, but requiring a showing that disaster relief itself constitutes a defense concern poses an unnecessary hurdle—the mere fact that people require aid in a disaster should be sufficient. Under the current standard, granting a waiver following a hurricane requires accepting the legal fiction that the actual reason for granting the waiver is to avoid adverse impact to military operations. Similarly, failing to waive Jones Act cabotage restrictions where U.S.-flagged vessels cannot meet industry needs produces an absurd result. There is likely no scenario in which employing a foreign wind turbine installation vessel would be *necessary* to ongoing military operations, but preventing one from operating could theoretically hinder national defense if wind energy were necessary to the national defense. Thus, the national defense requirement is ultimately a hurdle to economic growth and disaster relief.

Rather than requiring those requesting a waiver to justify that their hull unavailability directly implicates ongoing military operations, a process should be available for them to petition on more direct grounds.

### III. A LEGISLATIVE PROPOSAL FOR EXPANDED JONES ACT WAIVERS

The current text of 46 U.S.C. § 501, allowing waiver of the Jones Act only when national security or ongoing military operations so require,<sup>128</sup> is too narrow. There are circumstances that might reasonably require waiver for reasons beyond national security.

Such a waiver process would not defeat the overall scheme of supporting the U.S. Merchant Marine, nor would it counter the pur-

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<sup>126</sup> See, e.g., Colin Grabow, *New Legislation Casts Doubt on Future of Administrative Jones Act Waivers*, CATO INST.: CATO AT LIBERTY (Jan. 19, 2021, 10:16 AM), <https://www.cato.org/blog/new-legislation-restricts-presidential-ability-waive-jones-act> [<https://perma.cc/K2A8-PM4D>] (“[I]t’s not clear that the vast majority of administrative waivers issued over the last 20 years would have met this new standard.”).

<sup>127</sup> National Defense Authorization Act for Fiscal Year 2021 § 3502.

<sup>128</sup> See 46 U.S.C. § 501(a).

pose of promoting U.S. shipbuilding and shipping.<sup>129</sup> A more inclusive waiver process would, however, recognize a simple reality of the maritime sector: shipbuilding is a slow process that cannot quickly respond to market needs.<sup>130</sup> The needs of expanding industries and disaster relief demand a more flexible regulatory approach.

A waiver scheme with clear and explicit temporal limitations would balance these interests. The length of time necessary for a waiver to be effective must rest in the particular circumstances for which it is granted. For instance, ten days was demonstrably too short for hurricane recovery in Puerto Rico, where material needs beyond normal shipping capacity continued for months.<sup>131</sup> But imposing a hard upper limit on the length of time that a waiver shall extend provides a clear timeline for new vessel construction. Because the waivers that this Note proposes are based upon a showing of vessel unavailability or the exigent circumstance of natural disaster, they provide a clear timeline to shipbuilders for when they will again have a protected market. Two possible Jones Act waivers could alleviate some of the existing issues: a waiver for instances of natural disaster, and an industry-specific waiver.

#### A. *Natural Disaster Waiver*

Waivers on the basis of national security can be, and have been, granted in response to natural disasters.<sup>132</sup> The 2021 NDAA's heightened threshold, discussed in Section II.B,<sup>133</sup> makes clearing the way for disaster-specific waivers via a separate provision all the more necessary. Indeed, if waivers require a showing of immediate impact on military operations after the 2021 NDAA, industries now must tie any disaster-related requests to the military.

A showing that disaster recovery implicates national security creates a needless two-step inquiry. Rather, it should be sufficient to show that Americans are in need of disaster relief. 46 U.S.C. § 501 should be amended to empower the Secretary of Homeland Security to waive cabotage requirements in cases of natural disasters. Such a

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<sup>129</sup> See Grabow, *supra* note 126.

<sup>130</sup> See Loren Thompson, *Five Problems that Could Torpedo America's Naval Shipbuilding Capability*, FORBES (July 19, 2019, 10:54 AM), <https://www.forbes.com/sites/lorenthompson/2019/07/19/five-problems-that-could-torpedo-americas-naval-shipbuilding-capability/?sh=565d7e9e34d9> [<https://perma.cc/RWX9-7LBY>] (listing reasons for delays in growth of shipping capacity).

<sup>131</sup> See *supra* Sections I.A, II.B.

<sup>132</sup> See, e.g., Duke, *supra* note 47; Papavizas & Shapiro, *supra* note 17, at 340.

<sup>133</sup> See *supra* text accompanying note 125.

provision would place the waiver analysis in the agency best disposed to approach the question of whether U.S. shipping is capable of meeting the needs of disaster recovery, and the provision would reframe the issue in terms of communities' welfare in recovering from natural disaster, not in security interests. The following is a proposed addition to existing cabotage law:

ON REQUEST OF SECRETARY OF HOMELAND SECURITY.—

On request of the Secretary of Homeland Security, the head of an agency responsible for the administration of the navigation or vessel-inspection laws shall waive compliance with those laws to the extent the Secretary considers necessary in light of ongoing disaster relief or recovery operations.

This proposed text closely mirrors the waiver provision in 46 U.S.C. § 501(a) that empowers the Secretary of Defense to unilaterally waive the Act's requirements "in the interest of national defense."<sup>134</sup> Placing a similar authority to waive the Act during the course of disaster recovery in the hands of the Secretary of Homeland Security is sensible. First, in the Secretary's role overseeing the Federal Emergency Management Agency,<sup>135</sup> he or she would be well-informed of the particular needs of disaster-affected areas, notably including whether a surge of vessels would be needed to support disaster response efforts. Second, as a cabinet-level official, the Secretary routinely communicates with the President and is thus aware of potential disaster-related needs. Previous Presidents have been heavily involved in deciding whether to approve proposed waivers,<sup>136</sup> and thus this expansion in the Secretary's powers would only be a modest expansion of the current waiver process. If placed under 46 U.S.C. § 501, the proposed waiver would clearly remain subject to termination "at such time as the Congress by concurrent resolution or the President may designate."<sup>137</sup> Finally, modeling the waiver provision on § 501(a) would clearly communicate congressional intent that hull unavailability because of a natural disaster is an equally pressing need to national security concerns.

Future presidential administrations—through the Secretaries of Homeland Security—would retain the power to grant a waiver, or not, based upon the circumstances and a showing of vessel unavailability.

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<sup>134</sup> 46 U.S.C. § 501(a).

<sup>135</sup> *Organization*, FEMA, <https://www.fema.gov/about/organization> [<https://perma.cc/RP93-4AS4>].

<sup>136</sup> See Zanona, *supra* note 16.

<sup>137</sup> 46 U.S.C. § 501(c).



Because this would require considering whether existing U.S. shipping is sufficient to provide disaster relief, Jones Act-compliant shipping lines would retain a voice, and this amendment would, therefore, likely be acceptable to lobbying interests in favor of the Jones Act as it currently stands. Calls for a total repeal of the Act concerning Puerto Rico after 2017 have not succeeded, but a compromise solution limited to the needs of disaster-affected areas could prove more politically possible.

### *B. Industry-Specific Waiver*

The Jones Act should also allow a petition for waiver of cabotage requirements for certain, purpose-specific vessel types to support requirements of industries necessitating their use. Such petitions should originate from a designated person within the Department of Commerce pursuant to the agency's mission to promote the interests of U.S. commercial entities. This waiver process should be time-limited and narrowly tailored in scope to protect the future interests of U.S. shipbuilders in building vessels to meet industry needs, while also allowing those industries to avoid unnecessary costs where U.S.-flagged vessels are not yet available:

BY HEAD OF AGENCY.—

(1) *IN GENERAL.*—When the Secretary of Commerce considers it necessary due to non-availability of qualified United States flag capacity to meet the requirements of commercial activities substantially involving the waterborne carriage of goods between points in the United States, the Secretary, following a determination by the Maritime Administrator, acting in the Administrator's capacity as Director, National Shipping Authority, of the non-availability of such qualified vessel capacity, may waive compliance with those laws to the extent, in the manner, and on the terms the Secretary, in consultation with the Administrator, acting in that capacity, prescribes.

(2) *DETERMINATIONS.*—The Maritime Administrator shall—

(A) for each determination referred to in paragraph (1), identify any actions that could be taken to enable qualified United States flag capacity to meet the requirement identified by the Secretary of Commerce, considering, where specialized types of vessels are concerned, the safety, suitability, cost, of such actions;

(B) provide notice of each such determination to the Secretary of Transportation and the head of the agency referred to in paragraph (1) for which the determination is made; and

(C) publish each such determination on the Internet Web site of the Department of Transportation not later than 48 hours after notice of the determination is provided to the Secretary of Transportation.

This proposed waiver provision serves a different purpose than the natural disaster waiver and is therefore more restrictive. It is narrowly calibrated for industries that are stifled by a total lack of vessels to meet their needs, not those where there are simply insufficient hulls available. And, importantly, a time-limited waiver would not have a chilling effect on American shipbuilding efforts. A hypothetical three-year waiver of the Jones Act restricted to specialized LNG carriers—or other industry-specific carriers—would not prevent shipbuilders from entering the market. Because it would take years to construct such a compliant vessel, the proposed waiver would simply give shipyards a precise timeline for when they will have an exclusive market shielded from foreign competition.

Like Section 501(b) waivers, this proposal places final discretion for whether to grant a waiver in the hands of the Maritime Administrator.<sup>138</sup> Thus, this waiver would contemplate authority split between two entities: the Department of Commerce, which would initiate a waiver request for a particular commercial need, and the Maritime Administration, which is in the best position to decide whether U.S.-flagged shipping is already positioned to meet that need. By design, this proposed process is slower than the proposed natural disaster waiver process; the needs of industry are naturally less pressing than the needs of individuals impacted by natural disasters.

Shipbuilders and shipping lines would benefit from this proposal, and this model could potentially be of even more economic advantage to shipbuilders and shipping lines than the status quo. Rather than limiting LNG producers to exporting goods, producers could build supply lines between U.S. terminals using foreign-flagged vessels that Jones Act-compliant shippers could step into upon the expiration of the waiver. These increased profit expectations would incentivize new vessel construction and maintenance, although under the current legal framework, any coastwise shipping is foreclosed until a shipping line finds it advantageous to step into the market.

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<sup>138</sup> See 46 U.S.C. § 501(b).

## CONCLUSION

Currently, the Jones Act stands in the way of both disaster response and industry growth. The proposed waivers offer an opportunity to ameliorate the arbitrary and unintended restrictions that the Act poses. When disaster strikes, regulatory red tape cannot be allowed to stand in the way of rendering aid. Similarly, American cabotage law should not unnecessarily block American industrial growth. Sectors such as wind energy and LNG involve types of specialized vessels undreamed of decades ago, and the U.S. shipbuilding industry has dragged its feet in meeting these needs. The maritime sphere is dynamic, and further technological growth may introduce new shipping requirements that we cannot yet anticipate. When this occurs, the best outcome would be for U.S. shipbuilders to accommodate. But if they cannot respond again, the law should be positioned to provide for the growth of American industry.