No. 20-772

In the

Supreme Court of the United States

WATERFRONT COMM'N OF NEW YORK HARBOR,
PETITIONER,
v.
PHIL MURPHY, GOVERNOR OF NEW JERSEY, ET AL.
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO CERTIORARI

GURBIR S. GREWAL
Attorney General
State of New Jersey
JEREMY M. FEIGENBAUM*
State Solicitor
JEAN P. REILLY
Assistant Attorney General
JAMIE M. ZUG
KRISTINA L. MILES
Deputy Attorneys General
25 Market Street
Trenton, NJ 08625
(609) 292-4925
jeremy.feigenbaum@njoag.gov
* *Counsel of Record*

Counsel for Respondent Governor Murphy

LEON J. SOKOL*
STEVEN SIEGEL
CULLEN AND DYKMAN LLP
433 Hackensack Avenue
Hackensack, NJ 07601
lsokol@cullenllp.com
* *Counsel of Record*

Counsel for Respondents New Jersey Senate, Senate President Stephen M. Sweeney, New Jersey General Assembly and Assembly Speaker Craig J. Coughlin

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

The question this case presents is not whether interstate compacts play important roles in addressing policy issues that cross state lines. They do. The question this case presents is also not whether interstate compact agencies can ever "sue a state official to prevent that official from implementing a state law that would be preempted under a congressionally approved interstate compact." Pet. i. They can. Instead, the core question presented is whether—on the specific facts of this case—New Jersey retained its sovereign immunity in a lawsuit implicating the diversion of revenue from its treasury to an interstate compact agency. As the unanimous Third Circuit panel explained, its "fact-specific" conclusion that New Jersey retained its immunity follows from this Court's precedents.

That holding does not warrant certiorari. Although Petitioner believes that this Court must engage in error correction because the Third Circuit's holding renders interstate compacts unenforceable in "every geographic corner" and "every imaginable field," Pet. 26, its view is misguided. Whether New Jersey retains immunity to a particular suit filed by a particular interstate compact agency says next to nothing about the enforceability of interstate compacts generally. After all, myriad other options exist to hold States accountable for violating an interstate compact: one or more signatory States can sue them; the Federal Government can do so; or the signatories can agree to waive their immunity to suit in the interstate compact itself. And in any event, the decision below will rarely even prevent interstate compact agencies from filing claims against state officials; indeed, the Third Circuit itself has already since allowed another interstate compact

agency to sue state officials in federal court. See *Del. River Joint Bridge Comm. v. Sec'y Pa. Dep't of Labor & Indus.* (*DRJBC*), 985 F.3d 189 (CA3 2021). Rather than portend the end of interstate compacts, the narrow question presented will hardly ever arise.

Nor are there other bases for certiorari. For one, while Petitioner alleges a circuit split, the two cases it cites confronted materially different facts, and their application of the law to the facts differed accordingly. For another, although Petitioner contends the Third Circuit flatly contradicted this Court's precedents, the panel's careful application of sovereign immunity case law to the record before it proves otherwise. Finally, contrary to Petitioner's claims, this case is a poor vehicle to address any sovereign immunity questions because an ongoing dispute exists as to whether Petitioner enjoyed the authority to file this Petition in the first place. There is thus no basis for certiorari in this record-specific case, especially when a subsequent decision of the Third Circuit already directly addressed the concerns Petitioner raises here.

STATEMENT OF THE CASE

1. In 1953, the States of New Jersey and New York entered into the Waterfront Commission Compact—a bi-state agreement designed to combat "crime, corruption, and racketeering on the waterfront of the port of New York." *DeVeau v. Braisted*, 363 U.S. 144, 150 (1960). As part of that Compact, the signatories established the Waterfront Commission of New York Harbor (Commission), a bi-state agency "with power to license, register, and regulate … waterfront employment." *Id.* at 149. Although the Compact did not contain specific language regarding the methods or procedures for withdrawing from the agreement, see Pet.

App. 70-104, the legislative history contains evidence that the signatories viewed the Commission as "temporary" and "transitional" to solve the then-sweeping problem of crime at the waterfront, see CA3 App. 342-43, 405, 408, 416. That made sense: although most interstate compacts involve permanent problems such as the allocation of water resources or disposal of hazardous waste, this Compact dealt with the supervision and regulation of employment and finances to prevent then-extant crime.

In the intervening seven decades, conditions at the New York Harbor have changed dramatically. Unfortunately, the Commission itself has become the source of the very corruption and problems it was created to combat. In 2009, the New York State Office of the Inspector General issued a scathing 63-page report outlining the Commission's misconduct. See State of New York Office of the Inspector General, *Investigation of the Waterfront Commission of New York Harbor* (Aug. 2009), https://tinyurl.com/ydxvbk3m. The New York Inspector General identified a "climate of abuse," focusing in particular on a "lack of accountability fueled by perceived immunity from oversight by outside entities," the "abrogation of legal responsibilities undermining the very purposes of the Commission," and actions ranging from "improper hiring and licensing to fiscal lapses involving the misappropriation of forfeiture funds, unsound overtime pay and misuse of Homeland Security grants." *Id.*, at 1.

New Jersey later reached the same conclusions. In 2018, the New Jersey Legislature found that the "commission itself has been tainted by corruption in recent years and, moreover, has exercised powers that do not exist within the authorizing compact." Pet. App. 106.

Among other things, the Commission had been impermissibly "dictating the terms of collective bargaining agreements of organized labor" at the port; requiring "companies to hire and retain independent inspectors … in order for those companies to continue to operate in the port"; and "over-regulat[ing] the businesses at the port in an effort to justify its existence as the only waterfront commission in any [U.S.] port." *Id.*; see also *id.* (noting the Commission was now "an impediment to future job growth and prosperity at the port").

The Legislature thus voted to withdraw New Jersey from the Compact by enacting Chapter 324. Pet. App. 105-178. The legislation provides that after notice is provided to Congress, the New York Governor, and the Commission, the Commission must transfer to the State its real and personal "property and assets, contracts … and finances" in New Jersey. Pet. App. 27. The transfer includes the Commission's "reserves," employer "assessments," and "penalty" monies. Pet. App. 121, 160, 161. The assessments that went to the Commission will instead go to the New Jersey State Police, Pet. App. 11, which will assume New Jersey's "portion of the [C]ommission's law enforcement responsibilities." Pet. App. 107.

2. The instant suit was filed just one day after the enactment of Chapter 324. Notably, although the suit was filed in the Waterfront Commission's name, Commission staff initiated this litigation without bringing the matter to vote before the two Commissioners. Pet. App. 49-50. Because the Waterfront Compact explicitly sets forth that the "commission shall act only by unanimous vote of both members thereof," Pet. App. 75, Commission staff sought to remedy this defect by seeking *post hoc* approval of their lawsuit. But they

succeeded in securing approval of the New York Commissioner alone, because New Jersey's Commissioner voluntarily recused himself over the concern that he might have a conflict of interest. Pet. App. 50.

Undeterred—and even though the other signatory State declined to sue New Jersey—Petitioner moved forward with its action in the District of New Jersey. Among other things, Petitioner's Complaint requested a declaratory judgment that Chapter 324 is unconstitutional and an injunction restraining the New Jersey Governor from providing notice to Congress and New York regarding the State's decision to withdraw from the Waterfront Compact. In particular, Petitioner emphasized that Chapter 324 "would take away the Commission's primary revenue stream" by allocating "the assessments that it collects from Port employers" to the New Jersey State Police instead. Pet. App. 11; see also *id.* (explaining reallocation of revenue "will virtually eliminate the Commission's budget").

The Governor of New Jersey moved to dismiss, as did the New Jersey Senate and the New Jersey General Assembly, which intervened in the case. Among other things, the motions explained that Petitioner's claims are barred by sovereign immunity, and that the Commission's staff lacked authority to file suit in the Commission's name. See Pet. App. 44-55. The court granted Plaintiff's motion for summary judgment and denied the State's cross-motion. Pet. App. 36.

3. The Third Circuit reversed. In a unanimous decision by Chief Judge Smith and joined by Judges Hardiman and Krause, the panel held that the State was

the real party in interest in this lawsuit and was thus entitled to sovereign immunity. Pet. App. 10-14.[1]

The panel explained that its conclusion flowed naturally from this Court's sovereign immunity decisions. The Third Circuit recognized, of course, that if a party is harmed by "an 'ongoing violation of federal law,'" it can usually "seek prospective relief" against that official "by suing him in his official capacity." Pet. App. 7 (quoting *Va. Office for Prot. & Advocacy v. Stewart (VOPA)*, 563 U.S. 247, 254-55 (2011)). As the court noted, however, the *Ex Parte Young* doctrine "'has been narrowly construed.'" *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984)). As the court laid out, even if a suit is formally pled against a State's official, "the doctrine 'does not apply when the state is the real, substantial party in interest.'" *Id.* at 8 (quoting *VOPA*, 563 U.S., at 255). In conducting that analysis, courts ask "whether 'relief sought nominally against an officer is in fact against the sovereign' based on whether the relief would 'operate against' the sovereign." *Id.* (quoting *Pennhurst*, 465 U.S., at 101).

The panel identified two circumstances in which a judgment operates against the State itself. First, the panel explained that a "State is generally the real, substantial party in interest if the 'judgment sought would expend itself on the public treasury or domain or interfere with public administration' or if relief consists of 'an injunction requiring the payment of funds from the State's treasury.'" Pet. App. 8 (quoting

---

[1] The panel found that because of its holding that New Jersey retained immunity, it "need not resolve" whether "this suit was properly filed in the Commission's name." Pet. App. 5 n.3.

VOPA, 563 U.S. at 255-56). Second, States are the real party if a judgment "effectively seeks 'specific performance of a State's contract.'" Pet. App. 12 (quoting *VOPA*, 563 U.S., at 257). Based on a close assessment of "the[] facts" in this case, the unanimous panel found under each framework that the relief Petitioner was seeking "unquestionably operates against the State itself." Pet. App. 12 & 12 n.11.

The Third Circuit first engaged in a "fact-specific" assessment of whether the relief sought "'would expend itself on the public treasury'" so that the real defendant was the State itself. Pet. App. 8, 12 n.11. Answering in the affirmative, the Third Circuit explored the Complaint's "frank … recitation of the expected financial effects" of the New Jersey statute and quoted extensively from Chapter 324. Pet. App. 11. The court noted that the legal dispute centered on which litigant is entitled to certain financial "assessments," "assets," and "budget[s]"—New Jersey (which would use revenues to fund State Police operations at the port) or the Commission. *Id.*; see also Pet. App. 12 (emphasizing Petitioner's efforts to "divert state treasury funding"); Pet. App. 12 n.11 (noting dispute arose because "[t]he Commission has no quibble with the assessments continuing but wants to keep the revenue coming to its own account instead of New Jersey's"). Because such a dispute over revenue allocations, "nominally sought from the Governor," would really "operate against the State itself," the State was necessarily "the real, substantial party in interest." Pet. App. 10.

Second, the Third Circuit independently "reach[ed] the same outcome" by assessing whether Petitioner's relief would "effectively seek[] 'specific performance of a State's contract.'" Pet. App. 12 (citing *VOPA*, 563

U.S., at 257). In this unique case, the New Jersey Legislature itself "has chosen to discontinue its performance of the Compact and to resume the full exercise of its police powers on its own side of the Harbor." Pet. App. 1. Unlike a case that merely holds officials to account for violations of a compact, the relief sought in this case would have the direct effect of "compel[ling] New Jersey to continue to abide by the terms of an agreement it has decided to renounce." Pet. App. 13. Because that request was "tantamount to specific performance," the relief would "operate against the State itself," rendering New Jersey the real party in interest. *Id.* For either or both independent reasons, New Jersey retained immunity on these facts.

The Third Circuit denied a motion for rehearing en banc without noted dissent. Pet. App. 67-68.

REASONS FOR DENYING THE PETITION

Far from destabilizing interstate compacts across the country, this case presents a fact-bound question of routine state sovereign immunity application. The Third Circuit's resolution of that question did not generate a split, will not have the consequences Petitioner fears (and in fact has not had such consequences), and reflects the appropriate result under this Court's precedents. And were that not enough, this Petition presents a poor vehicle for review—because it is not clear Petitioner has authority to pursue it.

I. The Alleged Circuit Split Is Illusory.

The decision below does not conflict with—or even create tension with—the decision of any other circuit. While Petitioner alleges conflicts with the Eighth and Tenth Circuits, the different facts of those cases, and

the different questions that they answered, easily explain the different results they reached.

1. No split exists with the Eighth Circuit. Although Petitioner relies upon *Entergy Arkansas v. Nebraska*, 210 F.3d 887 (CA8 2000), the cases could not be further afield. *Entergy* involved an interstate compact "to develop disposal facilities for low level nuclear waste generated within their borders." *Id.*, at 890. Although Nebraska signed the compact, it had failed to fulfill its duty to license such a facility in its borders. *Id.*, at 893. The commission established by that compact sued Nebraska, its agencies, and its officers to require compliance with that compact's terms. *Id.* at 890.

But while the Eighth Circuit found that the Commission could sue Nebraska, it reached its conclusion largely on grounds inapplicable to this case. Since the Commission sued Nebraska itself (not just the State's officers), the primary question was "whether the language of the compact" Nebraska signed "constitute[d] a 'clear declaration' of consent to suit [by the Commission] in federal court." *Id.*, at 897. In other words, the case did not turn on the identity of the real party in interest (as here), but on whether Nebraska waived its sovereign immunity. *Id.* Analyzing in detail the interstate compact's provisions, the Eighth Circuit determined that it "authorize[d]" the Commission to "enforce" in court "the obligations it imposes upon party states," meaning that Nebraska had in fact waived its immunity. *Id.* And in subsequent rulings, the Eighth Circuit repeatedly confirmed that *Entergy I* was based on Nebraska's waiver of sovereign immunity in this specific compact. See *Entergy Arkansas, Inc. v. Nebraska*, 241 F.3d 979 (CA8 2001); *Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528 (CA8 2004).

That conclusion in no way conflicts with the Third Circuit's decision. Indeed, it is undisputed in this case that the Waterfront Commission Compact contains no such waiver provisions. Pet. App. 70-104. Although the Compact allows Petitioner to "enforce [its] provisions" against "persons" to "compel" compliance, Pet. App. 76-78, the Compact excludes States from the definition of "person." See Pet. App. 73 ("'Person' ... shall not include the United States, any State or territory thereof or any department, division, board, commission or authority of one or more of the foregoing."). That is why the Commission sought to reframe its suit as against the Governor of New Jersey rather than the State. And that is why Petitioner never alleged—and the Third Circuit did not grapple with—the waiver issues at the heart of *Entergy*.

Seeking to establish a conflict, Petitioner focuses on the Eighth Circuit's brief and ancillary statement that "an alternate basis for jurisdiction under *Ex parte Young*" further supported a suit against Nebraska and its officials. *Entergy I*, 210 F.3d, at 897. Even leaving aside that this language is dicta, there is still no split. In *Entergy*, the Commission sought to order Nebraska officials to fulfill *licensing duties* required by a compact to which the State remained a part. *Id.*, at 897-98. The case did not implicate Nebraska's expenditure of treasury funds and/or a requirement that the State perform a contract it had terminated. As a result, the considerations that led the Third Circuit to find New Jersey enjoys immunity here were not present in *Entergy*. See Pet. App. 8. A common rule thus explains both: immunity attaches when the goal of relief is to "divert state treasury funding," Pet. App. 12 & n.11, but not if a judgment would merely enforce a licensing duty. That hardly qualifies as a split.

Indeed, a more recent Third Circuit decision offers other compelling proof that no split exists. In *DRJBC*, an interstate compact agency sought an order requiring a signatory State to adhere to a compact's limits on its inspection authority. While the requested relief might have had a derivative "impact on [the State's] revenues" (as in *Entergy*), the Third Circuit still found that the proposed relief would not directly expend itself on the public treasury. 985 F.3d, at 194. The court thus found that the official—and not the State itself—was the proper defendant. *Id.*, at 193-94. That *DRJBC* reached the same outcome as *Entergy* on more similar facts confirms the lack of any split between the Third and Eighth Circuits, and instead confirms that each panel is applying a shared body of sovereign immunity law to the unique facts of each case.

2. There is no split between the Third and Tenth Circuits. The case Petitioner cites involved an interstate compact to apportion the Red River and its tributaries. See *Tarrant Reg'l Water District v. Sevenoaks*, 545 F.3d 906, 909 (CA10 2008). A Texas agency sued the members of the Oklahoma Water Resources Board (OWRB) to bar them from implementing a state statute that "established a moratorium on the sale or exportation of water outside the state," which Texas argued contravened the Red River interstate agreement. *Id.* at 908-10. The Tenth Circuit rejected Oklahoma's sovereign immunity defense, reasoning that "defendants are state officials within the ambit of the Eleventh Amendment"; the plaintiff "seek[s] only prospective, injunctive relief" regarding its application for water use; and the special interests applicable to state land under *Idaho v. Coeur d'Alene Tribe*. 521 U.S. 261 (1997), could not apply to that case. See *Tarrant*, 545 F.3d, at 911-12.

Rather than establishing a split, this case and *Tarrant* addressed different circumstances and resolved them accordingly. Indeed, although Petitioner emphasizes *Tarrant*'s statement that prospective-relief suits can proceed against a State's officials even if they will have ancillary financial consequences upon the State, the Third Circuit agrees. Compare *id.*, at 911, *with* Pet. App. 7-9, n.7 (agreeing *Ex Parte Young* permits suits for prospective relief, "[e]ven if the relief would affect the State's treasury," so long as any "effect on the public fisc is merely ancillary to permissible prospective relief"). But the issue in *Tarrant* was whether a State maintained immunity from a prospective-relief suit because the suit implicated the State's "ownership interests in its natural resources." 545 F.3d, at 913. This case, by contrast, asks whether the State retains immunity in a dispute regarding whether certain revenues should "com[e] to [the Commission's] account instead of New Jersey's" public fisc. Pet. App. 12 n.11. There is no conflict between a decision addressing the intersection of sovereign immunity and *Couer d'Alene*, and a decision at the intersection of immunity and the treasury. See *VOPA*, 563 U.S., at 256-57.

More than that, it makes eminent sense that these real-party-in-interest analyses would come out differently. For one, the lawsuit in *Tarrant* did not seek to "expend itself on the public treasury or domain," Pet. App. 8; instead, the Texas agency sought only to *purchase* water from Oklahoma, which benefitted the latter's fisc. 545 F.3d, at 908. For another, the Tenth Circuit found the judgment in *Tarrant* would have had no impact of "public administration," Pet. App. 8; the judgment requested would have put the Texas agency "on the same footing as instate applicants seeking water appropriations," but would have left to Oklahoma

"discretion to determine whether [that] application meets other state statutory and regulatory standards." 545 F.3d, at 913. Materially different facts justify reaching different results.[2]

Finally, even if this Court perceived any tension between the Third Circuit and its sister circuits (and there is none), it would be explained by an intervening decision of this Court. In Petitioner's view, *Tarrant* adopts a "straightforward" immunity inquiry in which the only issue is whether the relief "is properly characterized as prospective." 545 F.3d, at 911-12; see also *id.* at 911 (stating generally "the issue of sovereignty is no longer a part of our analysis regarding Eleventh Amendment immunity"). To the degree that this is the best reading of *Tarrant*, this Court later dispelled this misapprehension explicitly in *VOPA*—confirming the "straightforward" *Ex Parte Young* test *is* "limit[ed]" by "the principle that the 'general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought'" and by whether "the state is the real, substantial party in interest." 563 U.S., at 255-56 (*quoting Pennhurst*, 465 U.S., at 101, 107).

---

[2] And again, the Third Circuit's recent decision in *DRJBC* undermines any claims of a split. As noted above, six weeks ago, the Third Circuit resolved another case in which an interstate compact agency sued a state official, and the official responded that he was immune. 985 F.3d, at 191. The Third Circuit disagreed, finding the relief did *not* operate against the State because the judgment would not "interfere with public administration" and the effect on the fisc was "ancillary." *Id.*, at 194. This decision confirms there is no sweeping disagreement between the Third and Tenth Circuits, and that each decision is being narrowly resolved on the facts before each panel.

That principle is relevant to this case: the Third Circuit cited *VOPA* no fewer than twelve times across its fourteen-page opinion. See Pet. App. 7, 8, 9, 11, 12, 14. That *VOPA* post-dates *Tarrant* counsels in favor of percolation rather than certiorari.

II. This Case Does Not Otherwise Warrant Certiorari.

Absent a split, this case is not certworthy for two reasons. First, Petitioner dramatically overstates the consequences of the decision below, which will almost never (if ever) arise again. Second, the decision below was correctly decided on its facts.

A. Petitioner Overstates The Consequences Of The Decision Below.

Although Petitioner claims that the Third Circuit's decision will render compacts unenforceable in "every geographic corner" and "every imaginable field," Pet. 26, that is false. In Petitioner' view, allowing New Jersey to retain immunity will mean States can disregard commitments under interstate compacts with abandon. But there are many ways to hold States accountable without upending their immunity. And the decision below applies only where the facts show the State itself is the real party in interest.

1. The question presented will rarely arise, and the consequences Petitioner fears will not follow, because there are myriad ways to hold States accountable consistent with their immunity.

First, the consequences Petitioner fears could only arise *if no other signatory States* wished to hold the State accountable for an alleged violation of an interstate compact. After all, States surrendered their sovereign immunity to "suits by sister States" at the

Founding. *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775, 782 (1991). So when States allegedly violate an interstate compact, one or more of the other signatories can sue them. That Petitioner's parade-of-horribles can arise only if *no other signatory State* deems the alleged compact violation important enough to justify a suit is compelling proof that Petitioner's concerns are overstated.

While Petitioner asserts that State-on-State suits are inadequate substitutes because they increase the Court's original jurisdiction docket, Petitioner is mistaken. For one, Petitioner ignores the deterrent effect of these potential lawsuits: if a State knows that another signatory would sue for the violation of a compact, that State is unlikely to violate those terms. For another, suits by interstate compact agencies are already rare; the Petition identifies *one case* in which an interstate compact agency sued a member State, and that case involved an explicit waiver of sovereign immunity by that compact's members. See *Entergy I*, 210 F.3d, at 897. The paucity of such actions is unsurprising: interstate compact agencies often are jointly controlled by member States through appointees, making such lawsuits unlikely. See Part III, *infra* (noting Petitioner's own lack of authority to sue). But the dearth of such cases undermines Petitioner's claim that the Third Circuit's decision will have a meaningful impact on this Court's original jurisdiction docket.[3]

---

[3] Further, while Petitioner complains that an interstate compact agency "ha[s] no court to which it could turn for redress" because it may not participate in an original jurisdiction action, Pet. 30, that is incorrect. This Court has held that if a signatory State files a compact violation lawsuit in this Court, the relevant interstate compact agency may bring its derivative claims in this

Second, the alleged consequences could only arise if the Federal Government also declined to sue an allegedly offending State. Petitioner argues throughout its brief that "interstate compacts approved by Congress have the status of federal law." Pet. 2; see also Pet. 5, 7, 10, 13, 14, 17, 20, 22, 24. Because the United States can file suit against the States for violations of federal law, see *Blatchford*, 501 U.S., at 782, the Federal Government can hold them accountable for violations of compacts. (And these suits do not implicate original jurisdiction.) This means the consequences Petitioner fears only come to pass when neither a single signatory State *nor* the Federal Government believes the alleged violation justifies suit.

Third, Petitioner's concerns will likewise only arise where the signatory States did not consent in the compact to suits by the interstate compact agency. States, of course, can waive their sovereign immunity, *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999), and the *Entergy* case Petitioner cites confirms that they can and have done so when signing other interstate compacts. See *Entergy I*, 210 F.3d, at 897. That matters in two respects. For one, this limits the universe of compacts in which the question presented can arise—only those compacts where the member States did *not* acquiesce to suits by the commission they created. For another, this offers a simple solution to the alleged destabilization of interstate compacts: if the signatory States believe it is warranted, they can subject themselves and each other to suits by the interstate agency by making

---

forum as well. See *Alabama v. North Carolina*, 560 U.S. 330, 357 (2010). The problem for Petitioner is that the remaining State did not find the alleged violation here worthy of litigation.

that waiver part of their compact. That simply did not happen here. See Pet. App. 14 n.13.[4]

Far from telegraphing the end of interstate compacts, the question presented can only arise if no other sovereign views the violation as important enough to justify suit *and* the signatory States never agreed to suits by an interstate body. It is the rare case that will meet these qualifications, and they are almost by definition unimportant to that compact's members.[5]

2. Even in the rare situations in which the question presented does arise, the decision below will not have the consequences Petitioner fears. After all, the Third Circuit did not provide States carte blanche to violate interstate compacts, but instead issued a narrow holding that New Jersey retained its sovereign immunity in the unique circumstances of this case.

The fact-bound nature of the decision below is clear from the face of the Third Circuit's opinion. The panel began by simply reciting legal principles this Court already confirmed—that lawsuits for prospective relief against state officials can go forward under *Ex Parte Young*, but that there is an exception if "the 'judgment sought would expend itself on the public treasury or domain, or interfere with public administration,'" or if

---

[4] Importantly, a waiver of sovereign immunity must be "unequivocally expressed." *Pennhurst*, 465 U.S., at 99. That rule, of course, applies to interstate compacts. But that is a problem for Petitioner: as described above, this Compact confirms Petitioner may *not* sue the member States.

[5] This case is a perfect example. In the three years since the enactment of Chapter 324, the only other signatory State has not sued New Jersey. That confirms how unimportant this dispute is—and how undeserving it is of this Court's limited time.

a challenger seeks to compel specific performance of a contract. Pet. App. 8 (quoting *VOPA*, 563 U.S. at 255, 256). Instead of breaking doctrinal ground, the panel held that this case was fundamentally about whether "these facts" implicated those exceptions. Pet. App. 12; see also Pet. App. 12 n.11 (noting it was rendering a "fact-specific holding"). Based on the language of the Compact and the challenged legislation—and because the case involved a dispute over whether the revenue from certain assessments will go into New Jersey's account or Petitioner's—the panel found that New Jersey was the real party in interest under *VOPA*.

Although Petitioner claims that the Third Circuit's understanding of what qualifies as a "judgment … on the public treasury" and the "specific performance of a contract" is so broad as to eviscerate all or nearly all interstate compacts, see Pet. 26-29 (citing Pet. App. 8), a recent decision of the Third Circuit confirms Petitioner's fears are misplaced. As noted above, in January, the Third Circuit faced a question regarding the reach of the decision below. In that case, Pennsylvania claimed the right to engage in certain inspections notwithstanding commitments it had made in an interstate compact. *DRJBC*, 985 F.3d, at 191-93. The interstate compact agency sued the relevant Pennsylvania official, which claimed the State was the real party in interest. But the *DRJBC* panel—in a ruling authored by Judge Hardiman, a member of the panel below—rejected that assertion. *Id.*, at 194.

In so doing, *DRJBC* clarified the limited reach of the decision below. For one, in contrast to Petitioner's view that nearly all suits enforcing an interstate compact will have a sufficient impact on the State's fisc to implicate immunity, *DRJBC* held that any "impact on

Pennsylvania's revenues," including a "loss of inspection fees," was the "permissible," "ancillary effect" of relief sought under *Ex Parte Young*. *Id.* For another, while Petitioner worries that nearly every lawsuit by an interstate compact agency will be read to seek specific performance of such a compact, *DRJBC* held that in general a "judgment requiring the Secretary to respect [such a] Compact as written does not constitute an impermissible order of specific performance" and "to hold otherwise would allow state officials to evade federal law." *Id.* The Third Circuit thus follows the rules Petitioner proposes and it allows suits by other interstate commissions to proceed—it simply reached a different result on these particular facts.

In short, a State only enjoys immunity if *all* of the following steps are satisfied:

- No other signatory State to the interstate compact wishes to hold the defendant to its alleged commitments under that compact;
- The Federal Government does not wish to hold the defendant to its alleged commitments under the interstate compact;
- The States in enacting the interstate compact did not authorize the interstate commission to sue the signatories for violations; *and*
- The specific facts of the interstate commission's suit demonstrate that relief operates against a State and not its officials—a finding that is still rare in the Third Circuit.

Far from signaling the end of interstate compacts, it is hard to see how a decision with such a limited reach justifies certiorari.

B. The Decision Below Is Correct.

Not only does Petitioner seek certiorari in a split-less, fact-bound case, but the panel's decision reflects the proper application of this Court's precedents.

Begin with the principles on which the Third Circuit relied. In framing its analysis, the court explicitly hewed to the sovereign immunity rules this Court articulated most recently in *VOPA*. The panel first recognized that under *Ex Parte Young*, suits may be filed against state officers to enjoin the ongoing violation of federal law, Pet. App. 7 (citing *VOPA*, 563 U.S., at 254-55; *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)), even if the relief sought would have an ancillary impact on the public fisc, Pet. App. 8 n.7 (citing *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974)). But it noted, in line with this Court's rulings, that *Ex Parte Young* does not apply if the State is the real party in interest. Pet. App. 8 (citing *VOPA*, 563 U.S., at 255; *Pennhurst*, 465 U.S., at 101). The panel added that this analysis turns on whether relief would operate against the State itself. *Id.* (citing *Pennhurst*, 465 U.S., at 101). And, again reciting this Court's instructions, the Third Circuit concluded that relief operates against a State if the plaintiff seeks a judgment that "would expend itself on the public treasury or domain, or interfere with public administration," and/or if the "relief consists of … 'an order for specific performance of a State's contract.'" *Id.* (citing *VOPA*, 563 U.S., at 256-57; *Edelman*, 415 U.S., at 666-67; *In re Ayers*, 123 U.S. 443 (1887)). Petitioner does not contest any of these rules, nor could it: they have all been established explicitly by this Court.

The Third Circuit also applied these analyses correctly to the facts. In assessing whether this is a case

where relief would expend itself on the public treasury and/or interfere with government administration, the panel canvassed the record, including the Complaint's "frank … recitation of the expected financial effects" of the New Jersey law as well as the relief requested. Pet. App. 11. The Third Circuit explained that because New Jersey's Chapter 324 would transfer the revenue collected on its side of the border from the Waterfront Commission to the State's treasury, the goal of the litigation was to "divert state treasury funding" back to the Commission. Pet. App. 12. Indeed, there was no doubt that this suit is designed to prevent transfer of Petitioner's "assets," "contracts," and "finances" to the State, Pet. App. 27—including "reserves," employer "assessments," and "penalty" monies. Pet. App. 121, 160, 161. In other words, Petitioner aims to "pry back its authority to assess [New Jersey] employers" and retain a "revenue stream" that would otherwise flow to the State's treasury. Pet. App. 11, 12. The "suit is no mere attempt to compel or forestall a state official's actions" under *Ex Parte Young*, Pet. App. 12, but a demand that operates on the public fisc.[6]

The relief Petitioner seeks also goes to the heart of important public administration. As the New Jersey Legislature explained when enacting Chapter 324, the Commission has "been tainted by corruption in recent

[6] Petitioner disagrees with the Third Circuit's view of its requested relief, see Pet. 16 (claiming that its "injunction would not require the payment of funds from the State's treasury at all"), but that is the very sort of case-specific dispute inappropriate for certiorari. In any event, Petitioner is wrong. Chapter 324 renders the funds at issue New Jersey treasury funds. The injunctive relief seeks to claw back those treasury funds and allocate them to Petitioner's budget. Absent that relief, the funds unquestionably are New Jersey's.

years," and has even "exercised powers that do not exist within the authorizing compact." Pet. App. 106. The Legislature therefore found that "[a]bolishing the commission and transferring the New Jersey portion of the commission's law enforcement responsibilities to the New Jersey State Police" would secure the Port, Pet. App. 107, and better promote "future job growth" for "one of the backbones of the region's economy," Pet. App. 105-06. That Petitioner's suit implicates whether New Jersey can pay its State Police to secure the port or whether Petitioner can claim the revenues to handle those responsibilities provides yet more indication that New Jersey itself is the real party in interest.

Similarly, the Third Circuit did not err in deciding on "these facts" that relief would require New Jersey's "specific performance of a State's contract." Pet. App. 12. The Third Circuit acknowledges that interstate compacts enjoy the status of federal law and in most cases a judgment requiring an official to follow a "[c]ompact as written does not constitute an impermissible order of specific performance." *DRJBC*, 985 F.3d, at 194. But the Third Circuit found that the facts here were unique: Petitioner did not just seek to compel compliance with a compact's provision, but to compel a sovereign to remain party to a contract "that it[s] [Legislature] has decided to renounce." Pet. App. 13. That demand implicated the need of a "sovereign [to] be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution," *Pennhurst*, 465 U.S., at 117, and meant the real party in interest was not an official but the sovereign itself. Pet. App. 10, 13; see also *DRJBC*, 985 F.3d, at 194 (in discussing the decision below, confirming New Jersey was the real defendant because relief would "[f]orc[e]

New Jersey to abide by a compact it had expressly rejected through proper legislative channels"). Whatever one thinks of the sovereign's choice to withdraw from the underlying Compact, the sovereign itself is plainly the true defendant.[7]

Notably, the panel below reached the wrong result in this case only if this Court disagrees with *both* of its analyses. Said another way, if this Court believes that the Third Circuit correctly held that Petitioner's relief would expend itself on the public treasury, it is irrelevant whether it also agrees with the assessment of the specific-contract-performance test. The same is true in reverse. That is because either holding independently establishes New Jersey as the real, substantial party in interest. Pet. App. 12. And because the panel correctly applied both immunity analyses to the facts before it, certiorari is inappropriate.

---

[7] Petitioner's attempt to draw a distinction between "mandatory injunction[s]," which it concedes are barred by sovereign immunity, and "prohibitory injunction[s]," which it contends are not, is without merit. Pet. 22. A suit, "the object of which is by injunction, indirectly, to compel the specific performance of the contract, by *forbidding all those acts* and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State." *In re Ayers*, 123 U.S., at 502 (emphasis added); see also *Hagood v. Southern*, 117 U.S. 52 (1886) (finding immunity when plaintiff sought injunction restraining officers from executing provisions of legislative act alleged to be in violation of plaintiff's contract rights). In short, "[t]he general rule is that a suit is against the sovereign … if the effect of the judgment would be 'to *restrain the Government from acting*, or to compel it to act.'" *Pennhurst*, 465 U.S. at 101 (emphasis added).

III. This Case Is A Poor Vehicle In Which To Review The Question Presented.

Although certiorari is unwarranted because there is no split and the fact-bound decision below will have none of the consequences (and has had none of the consequences) Petitioner fears, there is another problem: this case is a poor vehicle for addressing the question presented. In short, there are serious questions as to whether Petitioner even had the authority to file this Petition and seek this Court's review.

As the Third Circuit noted below, there is an open question as to "whether this suit was properly filed in the Commission's name." Pet. App. 5 n.3. While this action is denominated "Waterfront Commission of N.Y Harbor v. Phil Murphy, Governor of New Jersey," the suit was filed without Commission authorization. The Compact explicitly states that "[t]he commission shall act only by unanimous vote of both members thereof," meaning the combined votes of a Commissioner from New York and a Commissioner from New Jersey. Pet. App. 75. But here, the Commission's Executive Director and General Counsel hired outside counsel and initiated the underlying litigation without bringing the matter to a vote before the Commission. Pet. App. 49-50. Then—after the fact and in an apparent attempt to rectify this fatal defect—Commission staff brought the matter to the Commissioners, but succeeded in securing approval of the New York Commissioner alone, with the New Jersey Commissioner recusing himself. Pet. App. 50. Nevertheless, Commission staff continued moving forward with this litigation.

Although the Third Circuit could simply sidestep this issue after finding that New Jersey retained immunity, the same is not true for this Court—because

the lack of authority for Petitioner to go forward has grown more glaring. After the Third Circuit issued the decision below, New Jersey's Commissioner (Commissioner Michael Murphy) rescinded his recusal, N.J. State Ethics Comm'n, *Request for Advisory Opinion: Commissioner Murphy* ("SEC Op.") (Oct. 19, 2020) at 3, available at https://tinyurl.com/yap7lxun, and he attempted to prevent the filing of this Petition—generating a 1-1 split as to whether it could be filed. Cf. *Texas v. New Mexico*, 462 U.S. 554, 565 (1983) (explaining that an interstate compact's requirement of unanimity governs even where it increases "the structural likelihood of impasse" for an interstate compact agency). The Commission's staff, however, refused to acknowledge Commissioner Murphy's decision, insisting he remained recused. SEC Op., at 3.

The issue went before the New Jersey State Ethics Commission. First, the staff of the State Ethics Commission confirmed that Commissioner Murphy is not recused and can participate in decisions about this Petition. *Id.* But even that was not enough: Waterfront Commission staff demanded the State Ethics Commissioners themselves weigh in. *Id.* So the State Ethics Commissioners did so on October 19, 2020, finding Commissioner Murphy "did not and does not have a personal or financial interest requiring his recusal" and that "he is not precluded from rescinding his prior recusal to the extent that the recusal was based on these concerns." *Id.*, at 7.[8] Yet Petitioner persists in

[8] Nor is there any inherent reason why the New Jersey Commissioner has to be recused. To be sure, a critical question in this case is whether revenues should go to New Jersey's treasury rather than to the Commission's accounts. But the potential bene-

pursuing this lawsuit. The bottom line is this: the decision of New Jersey's Commissioner to participate in votes regarding this litigation (despite the staff's continued refusal to acknowledge him) thus confirms the 1-1 split, and deprives the Commission of the unanimity it requires to proceed in this case.

That this Petition for Certiorari was filed in the Waterfront Commission's name even as this dispute rages on presents a substantial potential obstacle to review. If New Jersey's Commissioner succeeds in having his voice duly heard and in bringing this litigation to a 1-1 vote, this Court could grant certiorari only to have to later dismiss the writ as improvidently granted based upon Petitioner's inability to proceed. There is simply no reason for this Court to take up a split-less issue in light of the serious dispute over Petitioner's authority to press it.

CONCLUSION

This Court should deny the petition.

---

fits to New Jersey from ending this lawsuit recuses the New Jersey Commissioner no more than the alleged harms to New York recuse the New York Commissioner from participating.

Respectfully submitted,

GURBIR S. GREWAL
Attorney General
State of New Jersey
JEREMY M. FEIGENBAUM
State Solicitor
JEAN P. REILLY
Assistant Attorney General
JAMIE M. ZUG
KRISTINA L. MILES
Deputy Attorneys General
25 Market Street
Trenton, NJ 08625
(609) 292-4925
jeremy.feigenbaum@njoag.gov

Counsel for Respondent Governor Murphy

LEON J. SOKOL
STEVEN SIEGEL
CULLEN AND DYKMAN LLP
433 Hackensack Avenue
Hackensack, NJ 07601
lsokol@cullenllp.com

Counsel for Respondents New Jersey Senate, Senate President Stephen M. Sweeney, New Jersey General Assembly, and Assembly Speaker Craig J. Coughlin

March 1, 2021