No. 20-772

IN THE

Supreme Court of the United States

WATERFRONT COMMISSION OF NEW YORK HARBOR,
Petitioner,

v.

GOVERNOR OF NEW JERSEY, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As the Commission explained, this case warrants the Court's review because the Third Circuit's decision departs from this Court's decisions applying *Ex parte Young*, 209 U.S. 123 (1908); conflicts with decisions of two other circuits; and undermines the stability and utility of interstate compacts. Respondents' brief does nothing to rebut these points. Instead, it reinforces the need for this Court's review.

Respondents argue that the injunction sought by the Commission against enforcement of Chapter 324 would prevent New Jersey from realizing a new source of funding. But this Court has never held that prospective relief is barred by state sovereign immunity

because one effect of it is to prevent the State from obtaining monies that never belonged to it. To the contrary, the relief this Court has deemed impermissible would have forced the State to disgorge funds already in state coffers—and even then, only when that effect was not ancillary to prospective relief permissible under *Ex parte Young*. *See* Pet. 14-18.

Moreover, Chapter 324 purported to "dissolve[]" the Commission and to transfer its functions on the New Jersey side of the harbor to the New Jersey State Police. Pet. App. 4a. The financial consequences of Chapter 324 are merely one aspect of New Jersey's broader effort to dismantle the Commission and the Compact. If the decision stands, it will signal to States that they can destroy compact commissions they find irksome simply by appropriating the commission's functions for themselves.

Respondents invoke a subsequent Third Circuit decision—*Delaware River Joint Toll Bridge Commission* v. *Secretary Pennsylvania Department of Labor & Industry* ("*DRJTBC*"), 985 F.3d 189 (3d Cir. 2021)—but that case only underscores the troubling effect of the decision below. In *DRJTBC*, the Third Circuit held that under *Ex parte Young*, a compact agency could sue to prevent a Pennsylvania official from enforcing state regulations that would violate the compact, because the financial impact of the prospective relief on Pennsylvania was ancillary and the relief did not require specific performance of the compact. The Third Circuit's principal justification for those conclusions was that Pennsylvania—unlike New Jersey in this case—"did not seek to disavow the Compact." *Id.* at 194. In the Third Circuit, therefore, compact agencies can sue to enforce minor violations of a compact, but they cannot sue when a State illegally repudiates a compact altogether

and threatens the very existence of the compact and the agency.

Respondents' remaining arguments are equally misguided. Respondents suggest that the State of New York could have sued to enforce the Compact against New Jersey, but this Court has emphasized that original actions are cumbersome and disfavored when another avenue of relief is available. Respondents also suggest that the federal government could sue to enforce an interstate compact, but the United States' authority to do so is doubtful. Finally, respondents' assertion that the Commission lacked authority to bring this lawsuit is a diversion; they conspicuously fail to inform the Court that the district court squarely rejected that contention. The petition should therefore be granted.

ARGUMENT

I. THE DECISION BELOW IS ERRONEOUS

The Third Circuit gave two reasons for holding *Ex parte Young* inapplicable to this suit. First, the court stated, a judgment for the Commission would impermissibly "expend itself on the public treasury or domain." Pet. App. 10a. Second, the court concluded, this suit "effectively seeks 'specific performance of a state contract.'" Pet. App. 12a. Respondents barely attempt to defend the court's second rationale, and their effort to redeem the first fails.

A. This Court has consistently stated that prospective relief is not barred by sovereign immunity when the relief would have only an ancillary impact (even a large one) on the public fisc. *See* Pet. 15-16. The court of appeals recited that rule, but did not follow it; instead, it focused on the degree of the financial impact

on the State. *See* Pet. 17-18. But that is not the proper analysis; as this Court has noted, permissible "'[a]ncillary' costs may be very large.'" *Hutto* v. *Finney*, 437 U.S. 678, 690 n.15 (1978). Here, Chapter 324 purports to dissolve the Compact and the Commission, and as part of that dissolution, appropriates the Commission's revenue stream to New Jersey. Ensuring that the Commission retains those funds is an ancillary effect of the injunction—*i.e.*, it is the "necessary result," *Edelman* v. *Jordan*, 415 U.S. 651, 667-668 (1974), of preventing New Jersey from violating the Compact.

Respondents emphasize (Opp. 20-22) that the injunction would prevent transfer of the Commission's assets and future assessments to the State. But no decision of this Court holds that a suit is barred by sovereign immunity merely because one effect of the relief is to prevent the State from laying claim, in the future, to funds that did not belong to it. To the contrary, *Ex parte Young* authorized an injunction that prevented Minnesota from boosting its revenue through "substantial monetary penalties." *Edelman*, 415 U.S. at 667; *see Young*, 209 U.S. at 127-128. And respondents acknowledge that prospective relief in this case would not force the State to pay out anything, as was true in decisions such as *Edelman*. Respondents note, for example, that Chapter 324 would "transfer the revenue collected on its side of the border *from* the Waterfront Commission *to* the State's treasury," Opp. 21 (emphases added)—*i.e.*, the State wants to take funds it never had. A judgment cannot impermissibly "'expend itself on the public treasury,'" *Virginia Office for Protection & Advocacy* v. *Stewart* ("*VOPA*"), 563 U.S. 247, 255 (2011), if it reaches no funds that were ever in the public treasury in the first place.

Respondents also suggest (Opp. 21-22) that a judgment for the Commission would affect New Jersey's "public administration." But this Court has authorized prospective relief with ancillary effects far more intrusive on state operations—including restructuring of state education and prison systems. *See Milliken* v. *Bradley*, 433 U.S. 267, 289-290 (1977); *Hutto*, 437 U.S. at 690-691. By contrast, the relief sought here would preserve the decades-old status quo and maintain the continued operations of the Commission. It would not prevent New Jersey from doing anything it did before, or force New Jersey to do anything it has not done before.[1]

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[1] Respondents seek to denigrate the Commission's essential law-enforcement work and recent accomplishments by quoting (Opp. 21-22) the New Jersey legislature's self-serving statements impugning the Commission as "corrupt[]." But as the State itself has recognized, the Commission—after undergoing transformational reforms in 2009—has successfully fought organized crime and corruption at the port. *E.g.*, Office of the New Jersey Attorney General ("ONJAG"), *Six Men Sentenced for Roles in Illegal Loansharking, Check Cashing, Gambling & Money Laundering Schemes Linked to Genovese Crime Family* (Sept. 20, 2019), https://tinyurl.com/y2rc7puf; ONJAG, *Racketeering Indictment Charges 10 Alleged Members and Associates of Genovese Crime Family With Reaping Millions of Dollars From Loansharking, Illegal Check Cashing, Gambling & Money Laundering* (Apr. 27, 2016), https://tinyurl.com/epwhee4v; ONJAG, *Former Top Union Official Sentenced to State Prison for Conspiring In Scheme To Extort Money From Dock Workers* (Apr. 17, 2015), https://tinyurl.com/rx9uxsya. Nor is there any merit to respondents' assertion (Opp. 22) that the Commission overstepped its authority in its enforcement actions. Courts have consistently dismissed suits raising similar arguments. *E.g.*, *Daggett* v. *Waterfront Comm'n of N.Y. Harbor*, 774 F. App'x 761 (3d. Cir. 2019); *New York Shipping Ass'n.* v. *Waterfront Comm'n of N.Y. Harbor*, 2014 WL 4271630 (D.N.J. Aug. 27, 2014), *aff'd*, 835 F.3d 344 (3d Cir. 2016).

B. Respondents minimally defend the Third Circuit's second rationale, that prospective relief would compel New Jersey's specific performance (*see* Opp. 22; *cf.* Pet. 18-23).[2] Instead, respondents invoke (Opp. 22) *DRJTBC*, which post-dated the decision below, to argue that the Third Circuit limited its holding to the facts of this case. But *DRJTBC* only highlights the need for this Court's review.

In *DRJTBC*, the Third Circuit held that a compact commission's suit to prevent a Pennsylvania official from enforcing state building regulations in violation of an interstate compact did not require specific performance because Pennsylvania "did not seek to disavow the Compact." 985 F.3d at 192, 194. The Third Circuit held, in other words, that declaratory judgment preventing Pennsylvania's lesser violation of a compact means a state official would only have to "respect the [c]ompact as written," but enjoining New Jersey's much more significant violation of unlawfully dissolving the Compact is "an impermissible order of specific performance." *Id.*

Respondents do not try to defend that rationale. The Third Circuit's decision will have the perverse effect of encouraging States to maximize conflicts with each other and to threaten to renounce congressionally approved compacts to secure concessions, knowing that federal district courts will be powerless to enjoin such a

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[2] Respondents misunderstand the Commission's argument in discussing "'mandatory'" and "'prohibitory'" injunctions. Opp. 23 n.7. As the Commission explained (Pet. 21-22), the prohibitory injunction here is nothing like the relief at issue in *Hagood* v. *Southern*, 117 U.S. 52 (1886), and *Ex parte Ayers*, 123 U.S. 443 (1887), which required courts to assume control of States' fiscal affairs, including their tax systems.

violation. The Third Circuit's conclusion that the injunction sought here would be impermissible specific performance *because* New Jersey "'decided to renounce'" the Compact (Opp. 22) only highlights the need for this Court to grant review, to avoid the absurd outcome of barring a compact agency's suit only when a State violates the compact in the most fundamental way—by jeopardizing the compact and the agency.

II. THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS

A. Respondents acknowledge (Opp. 8-9) that the Eighth and Tenth Circuits reached "different results" than the Third Circuit below. Respondents cast the circuit conflicts as "illusory," purportedly because the Eighth and Tenth Circuits addressed "different facts" and questions than the Third Circuit (*id.*). Those arguments are meritless.

The fundamental question all three circuits answered is whether a suit seeking to prevent a state official from implementing a state law or action that violates an interstate compact is permissible under *Ex parte Young*. The Eighth and Tenth Circuits held that the suits in those cases could proceed because they alleged an ongoing violation of federal law (the compact) and sought prospective relief. *See Entergy, Ark., Inc.* v. *Nebraska*, 210 F.3d 887, 897-898 (8th Cir. 2000); *Tarrant Reg'l Water Dist.* v. *Sevenoaks*, 545 F.3d 906, 911-914 (10th Cir. 2008). The Third Circuit, by contrast, held that the Commission's suit could not proceed, even though it satisfies both of those criteria. Pet. 14, 24-25. It does not matter that *Entergy* involved Nebraska's alleged failure to "fulfill licensing duties" (Opp. 10 (emphasis omitted)) and *Tarrant* involved apportionment of water (Opp. 11-12). Decisions involving different

facts still conflict with each other when they reach contrary legal conclusions.[3]

Respondents argue that a "common rule" explains the different outcomes among the circuits: "immunity attaches when the goal of the relief is to 'divert state treasury funding.'" Opp. 10; *see* Opp. 12-13 & n.2. Respondents misstate both the doctrine and the effects of a judgment in this case. The consistent rule articulated by this Court is that although immunity attaches when the judgment would "expend itself" on the state treasury, prospective relief does not impermissibly "expend itself" when it has only ancillary financial impact on the State. Pet. 14-16. For the reasons explained above (*supra* I.A.), any fiscal impact on the State would be ancillary to appropriate prospective relief.

B. Respondents argue that there is no "sweeping disagreement" among the circuits because the Third Circuit found in *DRJTBC* that prospective relief would have only ancillary impact on Pennsylvania's revenues. Opp. 13 n.2; *see* Opp. 11. But a subsequent decision that merely distinguishes a prior case does not affect the split engendered by that prior decision, since the prior decision is still binding. Nor does *DRJTBC* offer any principled basis to treat the circuit cases as turning on "the unique facts of each case," as respondents assert (Opp. 11). *DRJTBC* concluded that any impact on Pennsylvania was ancillary in a mere two sentences,

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[3] Respondents argue (Opp. 10) that the Eighth Circuit's application of *Ex parte Young* as "'an alternate basis for [exercising] jurisdiction'" (to waiver of sovereign immunity) was "dicta." But "where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

with no analysis bearing on what made the effect "ancillary" under this Court's precedents. 85 F.3d at 194.

The decision below also conflicts with *Tarrant* because the Third Circuit held *Ex parte Young* inapplicable even though any financial effects of the injunction would be ancillary (and the injunction does not constitute specific performance)—not because, as respondents argue (Opp. 13-14), the court analyzed the effect of the relief sought. As for the effect of the relief that respondents emphasize, any financial effects of the relief are "ancillary," and so sovereign immunity is no bar to the suit. That is, and should be, the end of the matter.

III. THE QUESTION PRESENTED HAS BROAD IMPLICATIONS

The Third Circuit's decision destabilizes the interstate compact regime by significantly limiting one of the most effective enforcement mechanisms—compact agencies' suits against member state officials to remedy States' violations. It also encourages States that wish to be free of interstate compacts to maximize conflicts over those compacts and to threaten to withdraw from them, knowing that such withdrawal could not be enjoined by a federal district court. Respondents' attempt to minimize that impact is incorrect.

First, respondents argue (Opp. 14-15) that States can always resort to the original jurisdiction of this Court. But interstate compact agreements exist to avoid the need for cumbersome, costly litigation between member States. *See* Pet. 3-4. Although respondents assert that not many agencies have sued state officials, the reason may well have been that States have generally adhered to their compacts thus far, and until the decision below they had every reason

to believe the compact agency could enforce the compact against them.

Second, respondents claim (Opp. 16) that even if a compact agency could not sue, the United States could sue a State to enforce an interstate compact. Respondents do not cite a single case where that has occurred, and their proposition is doubtful at best. In *Texas* v. *New Mexico*, 138 S. Ct. 954 (2018), this Court questioned whether the United States may even *intervene* in compact dispute litigation. *Id.* at 959. Although the Court ultimately allowed the United States to intervene in that original jurisdiction action, it did so only after noting that "[t]his case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States." *Id.* at 960. Compact agencies cannot take solace in the highly uncertain prospect of the United States enforcing an interstate compact against a State.

Third, respondents claim (Opp. 16-17) that this case has limited reach because some States may have consented to suit by the compact agency and others can amend their compacts to do so. But there is no need for, or benefit to, requiring States to go through the complicated process of negotiating changes to existing interstate compacts—which could also require congressional approval—when the whole purpose of such compacts is to provide a comprehensive framework for resolving interstate disputes. Before the Third Circuit created a circuit split, the only rule—as expressed by the Eighth and Tenth Circuits—was that interstate compact agencies could sue member States' officials to enforce the compact. *See supra* II. That included the agency's ability to prevent unilateral withdrawal

where, as here, the compact agreement provides that modifications and amendments to the compact must be by the consent of all member states. Pet. App. 103a-104a. Accordingly, the prospect of compelling member States to reopen dozens of interstate compacts to ensure that disputes over those compacts can be definitively resolved by the courts does little to mitigate the harm done by the Third Circuit's decision.

IV. RESPONDENTS' PURPORTED VEHICLE CONCERNS ARE MERITLESS

Respondents' arguments (Opp. 24-26) that the Commission lacked authority to bring this suit have no bearing on whether review should be granted, and are meritless in any event. In a ruling nowhere mentioned by respondents, the district court considered these arguments and rejected them, "[b]ased on the plain text of the Compact, the Bylaws, as well as certifications and declarations annexed to the parties' briefs." Pet. App. 24a. The court explained that, because the Commission had delegated its authority to sue to Commission Counsel, Commission Counsel was authorized to bring this suit. *Id.* The court also ruled that the New Jersey Commissioner's recusal from this matter and the New York Commissioner's ratification of the suit provided an alternative basis for the Commission's authorization to bring this suit.[4] Pet. App. 25a.

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[4] In arguing that the New Jersey Commissioner rescinded his recusal from this litigation, respondents ignore that the New Jersey State Ethics Commission held that it lacked jurisdiction to determine whether the New Jersey Commissioner's obligations under the Compact required recusal. N.J. State Ethics Comm'n, *Request for Advisory Opinion: Commissioner Murphy* 5, 7 (Oct. 19, 2020), https://tinyurl.com/z7bxy5kf.

Moreover, this petition asks the Court to resolve a threshold jurisdictional issue. The Third Circuit did not reach any issue other than sovereign immunity. If the Court rules in the Commission's favor and remands this case to the court of appeals for further proceedings, respondents can challenge the district court's ruling regarding the Commission's ability to sue, as well as the district court's final ruling on the merits. This Court is the wrong forum for that argument at least until the *Ex Parte Young* question is resolved and the court of appeals has had a chance to fully consider that issue. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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