No. 20-772

IN THE

Supreme Court of the United States

WATERFRONT COMMISSION OF NEW YORK HARBOR,
Petitioner,

v.

PHIL MURPHY, 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

SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

The United States acknowledges that the decision below conflicts with the precedents of this Court and the Eighth and Tenth Circuits. The government nonetheless argues that to the extent intra- or inter-circuit conflict exists after the Third Circuit's subsequent decision in *Delaware River Joint Toll Bridge Commission* v. *Secretary Pennsylvania Department of Labor & Industry* ("*DRJTBC*"), 985 F.3d 189 (3d Cir.), *cert. denied*, No. 20-1761 (Oct. 4, 2021), the Third Circuit can resolve it via en banc review. But *DRJTBC distinguished* the decision below on the ground that New Jersey sought to withdraw from the Compact—which highlights both that en banc review is unlikely and that this Court's review is needed to redress the Third Circuit's bizarre rule barring compact agencies from suing

a member State only when it engages in the most serious violations.

The government's only other argument is that this case is a poor vehicle because the New Jersey Commissioner opposed the Commission's filing of the certiorari petition. That is irrelevant because the district court held that Commission Counsel has delegated authority under the Compact to litigate without affirmative authorization from the Commissioners. To the extent the Court believes that it needs to resolve the Commission's litigation authority under the Compact before reaching the merits, moreover, the Court should grant the petition and resolve that issue at the merits stage.

The question presented in this case is fundamentally important. New Jersey seeks to withdraw unilaterally from a congressionally approved compact and dissolve the Commission, in violation of federal law, thereby jeopardizing the critical regulatory and law-enforcement work that the Commission performs at one of the country's busiest ports. Although the government says not to worry because New York can sue, this Court has repeatedly discouraged original actions. The Court should not decline this chance to reverse a decision that conflicts with other circuits' decisions and that cripples compact agencies' ability to enforce an interstate compact against a member State.

ARGUMENT

I. THE GOVERNMENT ACKNOWLEDGES THAT THE DECISION BELOW IS INCORRECT AND CONFLICTS WITH OTHER CIRCUITS' DECISIONS

A. The government says (at 4) that the Third Circuit "may have erred in holding that" the Commission's suit against the New Jersey Governor is barred by sovereign immunity. Despite that equivocal language, the

government's discussion leaves no doubt that it agrees with the Commission that the decision below is wrong.

The government acknowledges (at 5-6) that the Commission's suit "appear[s] to satisfy th[e] straightforward inquiry" that this Court has prescribed for determining *Ex parte Young*'s applicability: "The complaint alleges an ongoing violation of federal law" and seeks only "prospective relief." *Accord* Pet. 13-14.

The government then recognizes that the Third Circuit's first reason for holding this suit nonetheless barred—that the injunction would "'expend itself on the public treasury,'" Pet. App. 10a-11a—is "incorrect" because any diversion of revenue would be "simply the 'ancillary effect' of 'compliance with'" the requested injunction. U.S. Br. 6-7 (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 667-668 (1974)); *accord* Pet. 14-18.

The government further refutes (at 7-9) the Third Circuit's second reason for holding this suit barred, *i.e.*, that the injunction is tantamount to specific performance under *Hagood* v. *Southern*, 117 U.S. 52 (1886), and *Ex parte Ayers*, 123 U.S. 443 (1887). "Since *Ex parte Young*," the government correctly explains, "this Court has read *Ayers* and *Hagood* narrowly," holding that "a plaintiff *could* sue state officials to prevent them from enforcing a law that allegedly violated the Contract Clause" where the complaint—like the Commission's complaint—is "'not framed as a suit for specific performance'" and does not seek "'affirmative action by the State.'" U.S. Br. 8 (quoting *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U.S. 299, 304 & n.15 (1952)); *accord* Pet. 19-22. The government also notes (at 8-9) that, even at its zenith, the specific-performance exception "was recognized in circumstances that arguably differ from" this case—in all the ways the Commission identified: The Compact is "not

an ordinary contract" but rather "is federal law … like any other federal statute"; and this suit is "not 'framed as a suit for specific performance' of the Compact" but rather "simply" seeks "the cessation" of the Governor's "'unconstitutional conduct.'" *See* Pet. 19-20.

Yet, the government remarks (at 9) that "this suit can be seen as involving something beyond the mere violation of federal law" because it may implicate a State's purportedly unique "sovereign interests." But that musing provides no reason to affirm the decision below, or even indicates approval of that decision. Tellingly, the government does not cite any authority or explain why it should matter for purposes of *Ex parte Young* that the New Jersey legislature both approved the Compact and now purports unilaterally to withdraw from it. This Court's precedent, of course, teaches that under *Ex parte Young*, courts "should not[] linger over the question whether 'special' or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought." *Hill* v. *Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007) (Gorsuch, J.) (citing *Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). And no State has the sovereign authority to unlawfully "terminate [an interstate compact's] effect *as federal law*." U.S. Br. 9 (emphasis added). After all, suits challenging the validity of a state statute routinely proceed under *Ex parte Young* on the premise that state sovereign immunity yields to the need for "'the federal courts to vindicate federal rights.'" *Virginia Office for Prot. & Advocacy* v. *Stewart*, 563 U.S. 247, 254-255 (2011).

B. The government also agrees that the decision below conflicts with the Eighth Circuit's decision in *Entergy, Arkansas, Inc.* v. *Nebraska*, 210 F.3d 887 (8th Cir. 2000), and the Tenth Circuit's decision in *Tarrant*

Regional Water District v. *Sevenoaks*, 545 F.3d 906 (10th Cir. 2008). *See* Pet. 23-25; Reply Br. 7-9. Its attempt to downplay those conflicts actually highlights the need for this Court's review.

1. The government acknowledges (at 11-12) that "the Third Circuit's specific-performance rationale in this case" is "in some tension with" the Eighth Circuit's holding in *Entergy* that a compact agency's suit against state officials could proceed under *Ex parte Young*. As the government notes (at 12), the decision in *Entergy* "could be viewed as an order requiring specific performance of an obligation under the compact," but the Eighth Circuit (unlike the Third Circuit here) still declared the suit permissible under *Ex parte Young*.

Likewise, the government recognizes (at 11) that the decision below cannot be "squared" with the Tenth Circuit's decision in *Tarrant Regional*, which held that a suit against Oklahoma officials to prevent them from enforcing a state law that would violate an interstate compact was viable under *Ex parte Young*. Unlike the court below, the government notes, the Tenth Circuit concluded that "'the fact that prospective relief could have financial consequences did not give rise to immunity.'" *Id.* (quoting *Tarrant Regional*, 545 F.3d at 911-913) (brackets omitted).

2. The government tries (at 10-11) to temper these direct conflicts by arguing that the Third Circuit's subsequent decision in *DRJTBC* "receded from much of the reasoning of the decision below" and used analysis that is "consistent with" *Entergy* and *Tarrant Regional*. Thus, the government says (at 13), *DRJTBC* "mitigates the practical consequences of" the decision below. *DRJTBC*, however, *heightens* the need for this Court's review. *See* Reply Br. 2-3, 6-7.

As the government concedes, *DRJTBC* did not overturn the decision below but rather "distinguished [it] on the ground that the State in this case had 'expressly rejected' the compact here, while the State in [*DRJTBC*] 'did not seek to disavow' the compact there." U.S. Br. 12 (quoting *DRJTBC*, 985 F.3d at 194). This Court has never suggested that such a distinction matters for purposes of *Ex parte Young*; to the contrary, the Court has noted that States' lack of authority to "modify or repeal" an interstate compact unilaterally is among the "classic indicia of a compact." *Northeast Bancorp, Inc.* v. *Board of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985); *see West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951). It cannot be that a State that violates a congressionally approved compact in a run-of-the-mill way can be held accountable in district court, but a State that violates a compact in the most fundamental way—by attempting unilaterally to withdraw from it and thereby dismantle the compact agency—is immune from suit in district court.

Nor does the government's assertion (at 13) that States are unlikely to renounce a compact "in full" mitigate the need for review. States previously had no reason to think they could unilaterally withdraw from an interstate compact with practical impunity, whereas *DRJTBC* will now perversely *encourage* States to do so whenever a dispute arises, knowing that the only possible recourse would likely be costly and cumbersome original-jurisdiction litigation. *See infra* III.

Thus, under the line *DRJTBC* drew, unilateral withdrawal from interstate compacts could become the norm for dissatisfied States, rather than "the unusual case" (U.S. Br. 13), thereby destabilizing a regime that has existed since "before the adoption of the Constitution," *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359

U.S. 275, 279 n.5 (1959), and that this Court has long encouraged as the practical solution to interstate disputes, *e.g.*, *Dyer*, 341 U.S. at 31. Those are not consequences this Court should ignore. Even the government eventually admits (at 13) uncertainty about "the ultimate soundness of that distinction," undoubtedly because it is unsound.

II. THE GOVERNMENT'S REASONS FOR RECOMMENDING DENIAL ARE MERITLESS

The United States offers two reasons for denying certiorari. Neither has merit.

A. The government argues (at 13) that the en banc Third Circuit could resolve "[a]ny tension between the decision below and *Tarrant*, *Entergy*, and" *DRJTBC*. But there is no reason whatever to think the en banc Third Circuit will do so.

First, the Third Circuit already denied a request for rehearing en banc to resolve the circuit conflict created by the panel below. Pet. App. 67a-68a.

Second, while this Court often leaves it to courts of appeals "'to reconcile [their] internal difficulties,'" U.S. Br. 13 (quoting *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam)), the Third Circuit perceives no "'internal difficult[y].'" *DRJTBC*—in an opinion by a judge who sat on the panel below—expressly *distinguished* the decision below. *See* 985 F.3d at 194. Thus, in the Third Circuit's view, the two decisions have already been reconciled and there is no need for en banc proceedings. No one here has argued that there is any intra-circuit conflict, either: Respondents contend (at 18-19) the two decisions are compatible, and the government says (at 11-12) *DRJTBC*'s reasoning only "appears to differ somewhat from the reasoning of

the decision below," before noting that *DRJTBC* "distinguished" the decision here.[1]

Moreover, in the Third Circuit en banc rehearing is "not favored," 3d Cir. IOP 9.3.1 (2018), and is exceedingly rare, *e.g.*, Table B-10—U.S. Courts of Appeals Judicial Business (Sept. 30, 2020), https://tinyurl.com/h6vppnxh (of 228 cases terminated on the merits after oral argument in a given year, only one was after en banc review). Unless and until that miniscule chance materializes, the decision below will govern as the law of the circuit, disabling compact agencies from enforcing interstate compacts against member States that threaten the very existence of the compact. If the government is to be believed, compact agencies in the Eighth and Tenth Circuits may fare no better.

B. The United States' vehicle argument is equally meritless. The government contends (at 14-16) that the New Jersey Commissioner's opposition to the filing of the certiorari petition after he attempted to rescind his recusal raises "doubts about this Court's appellate jurisdiction" and that, at any rate, the "case-specific and fact-bound disputes" make this case unsuitable for review. The government is wrong.[2]

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[1] Justice Kagan's chambers opinion in *Joseph* v. *United States*, 574 U.S. 1038 (2014), cited by the government (at 13), is farther afield because she agreed with denial of certiorari for the "*combined* reasons" that (1) the Court does "not often review the circuit courts' procedural rules" and (2) the Court leaves "intra-circuit divisions" to courts of appeals. *Id.* at 1040 (emphasis added). This case involves neither.

[2] Contrary to the government's argument (at 14) that "[t]he vote on filing the petition was … 1-1," the Commissioners never voted. The New Jersey Commissioner merely stated that he opposed the petition's filing after he purportedly rescinded his recusal. *See infra* n.4.

1. The purported recission of recusal is irrelevant. The district court held that the Commission does not need to affirmatively authorize Commission Counsel to litigate because the Commission has delegated that authority to Commission Counsel. Under that holding, Commission Counsel had authority to file the certiorari petition without the Commission's affirmative authorization and thus regardless of one Commissioner's purported rescission of his recusal. *See* Reply Br. 11.

As the district court explained, although the Compact ordinarily requires the Commission to act only by a unanimous vote of both Commissioners, the Compact also provides that the Commission may designate its officers, employees, and agents to exercise the "power '[t]o sue' as well as [the] power to 'retain and employ counsel.'" Pet. App. 48a-49a. Moreover, as the district court noted, the Commission's bylaws authorize Commission Counsel to "'handle … legal matters and perform such other duties as may be assigned to [her] by'" the Executive Director, and the Executive Director has "affirmed that he 'delegated to General Counsel the power to bring legal actions.'" Pet. App. 23a-24a; *accord* Pet. App. 49a.[3] Accordingly, the district court held, Commission Counsel had authority to bring this suit even without the Commission's affirmative authorization, *see* Pet. App. 23a-25a, 48a-51a, and the Third Circuit declined to address that ruling, Pet. App. 5a n.3.

The government and respondents ignore that conclusion. The supposed vehicle problem they raise goes only to the district court's *alternative* ground for up-

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[3] Indeed, in the Commission's "sixty-five-year history, neither the Executive Director nor General Counsel" was *ever* "required to obtain authorization from the [C]ommissioners to commence" the dozens of lawsuits the Commission has filed. Pet. App. 51a (citing Dist. Ct. Dkt. 29-1, ¶6).

holding the Commission's authority to sue: that after the New Jersey Commissioner's recusal, the New York Commissioner provided authorization. *See* Pet. App. 24a-25a. Their objection, therefore, is irrelevant because even if the New Jersey Commissioner's subsequent rescission of his recusal and opposition to the filing of this certiorari petition were valid, Commission Counsel would still have the delegated authority to continue the litigation.[4]

2. Even if the Court thought there were a live question about Commission Counsel's authority under the Compact to petition for certiorari, the Court should grant the petition and resolve the issue at the merits stage so that it also has the opportunity to resolve the important question presented.

The government cites (at 14) *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98-99 (1994), and *United States* v. *Providence Journal Co.*, 485 U.S. 693, 699 & n.5 (1988), to suggest that the lack of authority to file a certiorari petition "may affect this Court's jurisdiction." But the government concedes (at 14-15) that those decisions are of limited import because they may be out of step with this Court's current views on jurisdiction, *see Hamer* v. *Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 21 (2017) (the Court has in the past been "'less

[4] In any event, the "unrecusal" issue is insubstantial. When the New Jersey Commissioner sought to withdraw his recusal, the Commission's ethics liaison officer advised that he could not do so because the grounds for his initial recusal persisted. The New Jersey Commissioner then sought an opinion from the New Jersey State Ethics Commission, but that Commission lacked the authority to address the federal-law question of whether the New Jersey Commissioner owes a duty of loyalty to the Waterfront Commission that conflicts with his perceived duty to New Jersey. The ethics liaison officer's opinion that the New Jersey Commissioner must stay recused thus remains undisturbed.

than meticulous' in [its] use of the term 'jurisdictional'"), and because they were based on a particular federal statute and thus may not control the question here.

Even if the Commission's litigation authority might be jurisdictional, the Court should grant the petition, resolve the Commission's authority, and if it finds authority, decide the question presented. This approach is within the Court's power. *See NRA Political Victory Fund*, 513 U.S. at 90 (although question regarding agency's authority to petition was raised at certiorari stage, Court granted petition to resolve question presented and resolved authority question at merits stage); U.S. Amicus Br., *NRA Political Victory Fund*, 1994 WL 16100276, at *1 (U.S. May 27, 1994). Indeed, there is "no mandatory 'sequencing of jurisdictional issues.'" *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007).

III. SUIT BY NEW YORK IS NOT AN ADEQUATE ALTERNATIVE REMEDY

The United States does not embrace respondents' view that the federal government can sue a State to enforce an interstate compact. *See* Opp. 16. Nonetheless, the government argues (at 16) that denying certiorari would not prevent New York from suing New Jersey in this Court. That prospect provides little solace because original actions are cumbersome and disfavored. Pet. 30-31. Indeed, interstate compacts exist to avoid the need for "awkward and unsatisfactory" original actions. *Dyer*, 341 U.S. at 27. As this Court explained, "[w]hen [a compact agency] is able to act," it is "a completely adequate means for vindicating either State's inter-

ests." *Texas* v. *New Mexico*, 462 U.S. 554, 571 n.18 (1983).[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[5] As the government acknowledges (at 16-17), whether New York could sue New Jersey officials in district court despite this Court's "exclusive jurisdiction of all controversies between two or more States," 28 U.S.C. §1251(a), is itself the subject of a circuit split. *Compare Connecticut* v. *Cahill*, 217 F.3d 93, 112 (2d Cir. 2000) (yes), *with Safe Streets Alliance* v. *Hickenlooper*, 859 F.3d 865, 913 (10th Cir. 2017) (no).