No. 22O156

IN THE

Supreme Court of the United States

State of NEW YORK,
Plaintiff,
v.
State of NEW JERSEY,
Defendant.

REPLY BRIEF ON MOTION TO FILE BILL OF COMPLAINT

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
JUDITH N. VALE
Deputy Solicitor General
GRACE X. ZHOU
Assistant Solicitor General
HELENA LYNCH
Assistant Attorney General

28 Liberty Street
New York, New York 10005
(212) 416-8020
barbara.underwood@ag.ny.gov
**Counsel of Record*

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INTRODUCTION

On March 14, 2022, New York brought this original action to address New Jersey's unlawful attempt to unilaterally terminate the Waterfront Commission Compact and abolish the bistate Waterfront Commission. After six decades of jointly regulating the New York-New Jersey Port with New York, New Jersey enacted state law Chapter 324, which purports to authorize its unilateral withdrawal from the Compact and forced dissolution of the Commission.

Given New Jersey's announcement that its Division of State Police would begin to assume the Commission's assets and powers on March 28, New York filed this motion for leave to file a bill of complaint and moved for a preliminary injunction. On March 24, 2022, the Court issued an order preliminarily enjoining New Jersey "from enforcing Chapter 324 or taking action to withdraw unilaterally from the Compact or terminate the Commission pending disposition of the motion for leave to file a bill of complaint and, if granted, disposition of this case." *New York v. New Jersey*, 142 S. Ct. 1410 (Mem.) (2022).

At this juncture, New York and New Jersey agree that their dispute falls squarely under the Court's original (and exclusive) jurisdiction. *See* Mot. for Leave to File Bill of Compl. ("Mot.") 12-23; Br. in Response ("Resp.") 7-11. And because the case turns on purely legal issues of compact interpretation, the parties further agree that it can be resolved on dispositive cross-motions for judgment on the pleadings without the aid of a Special Master. *See* Joint Mot. for Leave to File Cross-Mots. for J. on the Pleadings 1-4. The Court should therefore grant both New York's motion for leave

to file the bill of complaint and the parties' joint motion to set the case for full merits briefing and oral argument on the proposed briefing schedule set forth in the parties' joint motion.

ARGUMENT

I. The Parties Agree That This Dispute Warrants the Exercise of the Court's Original Jurisdiction.

This Court should grant New York's motion for leave to file the bill of complaint. As New York and New Jersey both agree, the parties' dispute over whether the Compact permits New Jersey to unilaterally terminate the agreement and dissolve the Commission warrants the exercise of the Court's original and exclusive jurisdiction over interstate disputes. Mot. 12-13; Resp. 7-8.

Both factors that the Court has historically considered in deciding whether to grant leave are amply satisfied here. First, the nature of this dispute warrants the Court's exercise of original jurisdiction because it is well settled that disputes between States over their rights and obligations pursuant to an interstate compact fall within the heartland of the Court's original jurisdiction. Mot. 14-15; Resp. 7-8. And, as the parties have demonstrated (Mot. 14-20; Resp. 7-8, 10-11), the current controversy implicates important sovereign interests and has significant consequences for other interstate compacts as well. Second, this Court is the only forum with jurisdiction to decide this important issue. *See* Mot. 21-23; Resp. 1. Accordingly, as the parties agree, the Court should grant leave to file the bill of complaint and grant the parties' joint motion proposing a schedule for merits briefing through dispositive cross-motions.

II. The Merits of New York's Claims Also Weigh Decisively in Favor of Granting Leave to File the Bill of Complaint.

The parties agree that the Court need not consider, let alone resolve, the merits of New York's claims at this time. Mot. 23; Resp. 11. But to the extent the Court considers the merits in deciding this motion (Mot. 23), and because New Jersey contends that New York's claims will ultimately fail as a matter of law (Resp. 11-24), New York offers this brief response to address a few of the arguments raised by New Jersey.

In short, New Jersey's merits "preview" (Resp. 11-24) overlooks the text of the Compact, its history, and bedrock principles governing interstate compacts—all of which confirm that New Jersey is barred from unilaterally terminating the agreement and the bistate Commission that has existed for over six decades. As shown below, the strength of New York's claims warrants the exercise of the Court's original jurisdiction and further demonstrates the need for full merits briefing and oral argument to resolve these important issues.

1. New Jersey's arguments rest heavily on the assertion that the Compact is entirely silent about withdrawal. *See* Resp. 11-22. But the Compact is not silent on that subject; it specifies the only two ways the agreement may be terminated: by mutual consent of the compacting States or by congressional repeal. Compl. App. 34a-35a (art. XVI, § 1); Compl. App. 35a (Ch. 407, § 2). New Jersey's attempt to engraft a third method of termination onto the agreement—unilateral withdrawal—is contrary to the Compact's express terms.

New Jersey is incorrect in arguing (Resp. 18-20) that the Compact's concurrency requirement for amending the agreement does not govern termination because "withdrawal" and "amendment" have different dictionary definitions. In a bistate compact, the withdrawal of either signatory necessarily terminates the agreement. And termination plainly *is* a form of amendment: it is the ultimate amendment. None of the dictionary definitions New Jersey cites (Resp. 19) suggests that the terms are mutually exclusive. Nor does New Jersey dispute that Chapter 324 would alter the terms of the agreement by dissolving the Commission and redistributing its assets and powers (Mot. 9-12)—fundamental "amendments" that require New York's consent.

That *some* multistate compacts treat withdrawal differently from other amendments (Resp. 19-20) does not mean *this* compact must do so. Distinguishing between the two sometimes makes sense as a practical matter, for example, when there are multiple parties to a compact, and the withdrawal of a single State neither terminates the compact nor fundamentally alters the remaining signatories' obligations to each other. *See, e.g.*, Gulf State Marine Fisheries Compact, ch. 128, 63 Stat. 70, 73 (1949) ("This compact shall continue in force and remain binding upon each compacting state until renounced by act of the legislature of such state . . . ."). But this is not such a case, because New York and New Jersey are the only parties to the Compact, and withdrawal of either State effectively terminates the Compact. In any event, New Jersey's cited examples (Resp. 19-20) provide no support for its contention that its withdrawal should be subject to *less* stringent requirements than other amendments. To the contrary, the examples show that when there is cause for distinguishing between withdrawal and amendment, a

compact can be expected to do so, and to say so expressly.

The Compact's requirement that the Commission "act only by unanimous vote of both" Commissioners (Compl. App. 6a (art. III, § 3)) also does not suggest that one compacting State may unilaterally terminate the agreement. *See* Resp. 22-23. New Jersey relies on the theoretical power of its Commissioner to block all Commission actions. But the ability to block individual actions is wholly different from the power to terminate the Commission's existence altogether. The need for unanimity in fact reflects the drafters' intent that the Commissioners would work together to further the Compact's purposes, not use their votes to paralyze the Commission. *See, e.g.*, *New Jersey-New York Waterfront Commission Compact: Hearing on H.R. 6286, H.R. 6321, H.R. 6343, and S. 2383 Before Subcomm. No. 3 of the H. Comm. on the Judiciary,* 83d Cong. 23 (1953) (testimony of then–New Jersey Governor Driscoll describing the Commission as "a pioneering effort in interstate cooperation"). New Jersey's contrary view plainly contravenes the Compact's requirement that it "shall be liberally construed" to effectuate its purposes. Compl. App. 35a (art. XVI, § 3).

2. Even if the Compact were silent on withdrawal, the other tools of compact interpretation would amply confirm that the drafters intended the agreement to prohibit unilateral termination. And the parties have always until now shared that understanding.

First, as explained in New York's opening brief (Mot. 20, 25-26), one of the "classic indicia of a compact" is that no signatory State may unilaterally alter or end the agreement unless expressly authorized. *Northeast Bancorp., Inc. v. Board of Governors of Fed. Reserve*

Sys., 472 U.S. 159, 175 (1985). This core feature of a compact—and the stability it fosters—is essential to the viability of compacts as a tool for resolving interstate disputes and addressing regional issues. *See* Frederick L. Zimmerman & Mitchell Wendell, *The Law and Use of Interstate Compacts* 40-41 (1976) (observing that compacts were originally used to broker permanent boundary adjustments and have since evolved to encompass arrangements "where a high degree of stability is desired").[1]

New Jersey's arguments in favor of a default rule *favoring* unilateral termination are inconsistent with the stabilizing purpose of compacts, and with the fact that they are ultimately ratified by Congress. To start, the "'background notion'" in *Tarrant Regional Water District v. Herrmann* that "'a State does not easily cede its sovereignty'" (Resp. 12 (quoting 569 U.S. 614, 631 (2013)), sheds no light on the issue here: whether a State by compact cedes its right to unilateral withdrawal, unless expressly reserved. *Tarrant* held that a multistate compact did not grant members cross-border water rights by implication, in light of the settled presumption that States possess "an absolute right" to all navigable waters within their borders. *See* 569 U.S. at 631 (quotation marks omitted). The case did not address—let alone refute—the settled principle that forming a compact and obtaining federal ratification carries with it a commitment to continue the compact

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[1] *See also* Michael L. Buenger et al., *The Evolving Law and Use of Interstate Compacts* 48 (2d ed. 2017) ("Interstate compacts are one of the few examples of the power of one state legislature to bind future legislatures to specific policy principles governing the subject matter of the agreement.").

unless provisions for termination or amendment are satisfied. *See* Mot. 17, 20, 25-26 (citing cases).

This principle makes sense: unauthorized unilateral termination of a compact does not simply "return" the signatories "to their original positions." Resp. 15. Particularly in a bistate compact, both "the unilateral decision to expand [an interstate] agency's powers" by amendment (Resp. 20) and the unilateral decision to terminate that entity affect the sovereignty of the other signatories by altering the scope of the States' jointly shared powers and destroying weighty reliance interests in the agency's continued operation.

This case precisely illustrates those types of harms. The dissolution of the Commission and seizure of its assets and powers would not only infringe New York's sovereign interests (Mot. 16-18) but also interfere with the federal interests underlying Congress's approval of the Compact. Indeed, New Jersey's abrupt and unilateral termination of the Commission—an action not sanctioned by the agreement to which Congress consented—would jeopardize Congress's interest in ensuring the safe and orderly flow of interstate commerce through one of the nation's largest ports. *Cf. Virginia v. West Virginia*, 246 U.S. 565, 601 (1918) (power to "refuse or to assent to a contract between states" carries with it the right "to see to its enforcement").

New Jersey's reliance on the power of nations to withdraw unilaterally from international treaties (Resp. 16-17) is equally inapt. For one thing, States do not have the sovereign power to enter treaties. *See* U.S. Const. art. I, § 10, cl. 1. In any event, the power to enter into treaties and the power to enter into compacts have always been treated as wholly distinct. *See* Buenger et

al., *supra*, at 8 ("The Framers apparently perceived compacts and agreements as differing from treaties."); *see also* Zimmerman & Wendell, *supra*, at 7 ("[I]n view of the much closer affinity of compacts with contracts and statutes, treaty law is a poor source of compact law.").

Second, there is nothing unusual about the fact that the Compact confers on the Commission ongoing police powers over the Port. *See* Resp. 12-13. It is not uncommon for States to enter compacts creating interstate agencies that exercise broad regulatory powers.[2] Under New Jersey's theory here, these interstate agencies—such as the New York-New Jersey Port Authority—may be terminated at any time and for any reason by a single compacting State unless the Compact expressly forbids this surprising and disruptive result. But the default rule is to the contrary precisely because States would not likely establish interstate agencies, give those agencies sovereign powers, and allow those agencies to perform important and ongoing regulatory functions if the entire endeavor could be easily upended by one State's unilateral withdrawal.

Nor is it the case that the Compact here permanently divests New Jersey of any police powers over the Port. *See* Resp. 13. New Jersey may terminate the Commission with New York's consent. And New Jersey may petition Congress to repeal the Compact Act. Thus, New Jersey's argument about perpetual contracts (Resp. 20-21) misses the mark. The Compact does not

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[2] *See, e.g.*, Delaware River Port Authority Compact, ch. 258, 47 Stat. 308 (1932); Kansas City Area Transportation District and Authority Compact, Pub. L. No. 89-599, 80 Stat. 826 (1966); New York-New Jersey Port Authority Compact of 1921, ch. 77, 42 Stat. 174.

require perpetual performance; it expressly contemplates termination by Congress or by joint state action when the Commission is no longer necessary. *Cf.* 3 Arthur Corbin, *Corbin on Contracts* § 553, at 212-13 (1960) (courts may read in "reasonable time" term to reform perpetual agreements).

Third, New Jersey relies (Resp. 12-14) on an amicus brief filed by the U.S. Solicitor General in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 26 (1951), which argued in favor of reading an implied right of unilateral withdrawal into an interstate compact among eight States. *See* Br. for United States as Amicus Curiae 22-26, *Dyer*, 341 U.S. 22 (No. 147), 1950 WL 78371. But this Court declined to adopt the United States' view, deciding "not [to] go beyond the issues on which the West Virginia court found the Compact not binding on the State." *Dyer*, 341 U.S. at 26.

In any event, the position of the United States turned, in large part, on that compact's broad reservation of rights to signatory States:

> Nothing in this compact shall be construed to limit the powers of any signatory State or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction.

Br. for United States as Amicus Curiae at 27-28. Based on this language, the United States reasoned that the signatory States' reservation of "complete freedom of action to subsequent legislatures" suggested that the

States intended to reserve the right of unilateral withdrawal. *See id.* at 28. No analogous reservation of rights is present here.

Finally, nothing in the Compact's legislative history demonstrates an intent to allow unilateral termination. *See* Resp. 3, 23-24. New Jersey points to statements about the Commission being "temporary." *Id.* at 3. But those excerpts at most show that the drafters intended the Legislatures of both States to be able to jointly end the Commission *at some point*. They do not address the central issue here: *how* that decision must be made. Indeed, prior to its about-face in 2018, New Jersey and its officials repeatedly recognized that unilateral termination is unconstitutional (Mot. 26-27)—a course of conduct that is "'highly significant' evidence of," *see Tarrant Reg'l Water Dist.*, 569 U.S. at 636, the proper understanding of the Compact's terms.

CONCLUSION

The Court should grant both New York's motion for leave to file the Bill of Complaint and the parties' joint motion to govern further proceedings in this case.

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
JUDITH N. VALE
Deputy Solicitor General
GRACE X. ZHOU
Assistant Solicitor General
HELENA LYNCH
Assistant Attorney General

barbara.underwood@ag.ny.gov

* *Counsel of Record*

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