No. 156, Original

In the Supreme Court of the United States

STATE OF NEW YORK, PLAINTIFF

v.

STATE OF NEW JERSEY

ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEW JERSEY'S MOTION FOR JUDGMENT ON THE PLEADINGS AND IN OPPOSITION TO NEW YORK'S MOTION FOR JUDGMENT ON THE PLEADINGS

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QUESTION PRESENTED

Whether New Jersey may unilaterally withdraw from the Waterfront Commission Compact, Act of Aug. 12, 1953, ch. 407, 67 Stat. 541.

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INTEREST OF THE UNITED STATES

This is an original action brought by the State of New York seeking to prevent the State of New Jersey from unilaterally withdrawing from an interstate compact entered into by the two States. The compact at issue was approved by Congress pursuant to the Compact Clause of the Constitution, Art. I, § 10, Cl. 3. Because interstate compacts often implicate regional or national concerns, the United States has an interest in the circumstances under which a State may withdraw from such a compact. At the Court's invitation, the United States filed a brief as amicus curiae in a previous iteration of this dispute. See *Waterfront Commission of N.Y. Harbor* v. *Murphy*, 142 S. Ct. 561 (2021) (No. 20-772).

STATEMENT

1. Each State has the sovereign power to enter into a compact with another State. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938). The Constitution imposes a "single limitation" on that power, *Poole* v. *Fleeger's Lessee*, 36 U.S. (11 Pet.) 185, 209 (1837), by providing that "[n]o State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State," U.S. Const. Art. I, § 10, Cl. 3. Once an interstate compact receives congressional approval, it becomes federal law and preempts contrary state law. See *Tarrant Reg'l Water Dist.* v. *Herrmann*, 569 U.S. 614, 627 n.8 (2013).

In 1953, the States of New York and New Jersey entered into the Waterfront Commission Compact (Compact) in an effort to combat corruption, crime, and undesirable labor practices at the Port of New York, which spans the shared border of the two States. See Compl. App. 1a-35a. The Compact declared that regulation of the port "shall be deemed an exercise of the police power of the two States." *Id.* at 3a. To that end, the Compact created the Waterfront Commission of New York Harbor (Commission), a "body corporate and politic" and "an instrumentality of the States of New York and New Jersey" consisting of two members, one appointed by the Governor of each State. *Id.* at 6a.

The Compact grants the Commission a variety of powers for regulating the port. See Compl. App. 7a-9a (listing "general powers of Commission") (capitalization altered); see also *id.* at 27a-30a. It also establishes a detailed set of rules governing occupational categories and activities at the port. See *id.* at 9a-26a. Among other things, the Compact requires various classes of employees to obtain a license or registration in order to

work at the port, and vests the Commission with the power to grant, suspend, or revoke licenses. See *id.* at 9a-18a, 20a-22a, 24a-29a. In connection with its licensing authority, the Commission is authorized to collect an assessment from employers at the port to fund its activities. *Id.* at 31a-32a. The Compact also imbues the Commission with the power to inspect the port and engage in law-enforcement activities. See *id.* at 7a-8a, 32a-34a.

The Compact provides for the Commission "[t]o make annual and other reports to the Governors and Legislatures of both States" describing "the commission's finding and determination as to whether the public necessity still exists for" regulation at the port. Compl. App. 8a-9a. The Compact further specifies that "[a]mendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the Legislature of either State concurred in by the Legislature of the other," *id.* at 34a-35a; pursuant to that provision, the parties have amended the Compact numerous times since its adoption, see Compl. 12 & n.3; Answer 13. The Compact does not explicitly address withdrawal.

Congress approved the Compact by federal statute. See Act of Aug. 12, 1953, ch. 407, 67 Stat. 541. In doing so, Congress "expressly reserved" the "right to alter, amend, or repeal" the statute. Compl. App. 35a.

In 2018, New Jersey enacted a statute known as Chapter 324 withdrawing the State from the Compact and abolishing the Commission. See ch. 324, 2017 N.J. Laws 2102 (Chapter 324); Compl. App. 36a-109a. New Jersey concluded that the Compact no longer reflects current needs. In New Jersey's view, the Commission has ceased to serve its function of facilitating fair and

efficient trade at the port because, among other things, it has "been tainted by corruption," "exercised powers that do not exist within the authorizing compact," and "over-regulated the businesses at the port." *Id.* at 37a. Thus, New Jersey concluded that the Commission "has become an impediment to future job growth and prosperity at the port" and the Commission's responsibilities on the New Jersey side of the port would be more effectively managed by the New Jersey State Police. *Id.* at 37a; see *id.* at 37a-38a.

Chapter 324 required the Governor of New Jersey to notify Congress, the Governor of New York, and the Commission of the State's intent to withdraw from the Compact, Compl. App. 38a-39a, and provides that the Compact and Commission shall be "dissolved" 90 days after notification, *id.* at 104a; see *id.* at 45a, 103a-104a. Following dissolution, the statute provides for the general transfer of the Commission's powers, duties, and assets in New Jersey to its state police, *id.* at 41a, 46a; directs those who hold Commission funds "applicable" to New Jersey to deliver those funds to the state treasurer, *id.* at 47a; and instructs the state police to assume all liabilities and obligations "applicable only" to New Jersey, *id.* at 47a-48a.

2. After New Jersey enacted Chapter 324, the Commission sued the Governor of New Jersey in federal district court, alleging that Chapter 324 was invalid and seeking to enjoin its enforcement. See *Waterfront Comm'n of N.Y. Harbor* v. *Murphy*, 429 F. Supp. 3d 1, 3 (D.N.J. 2019). The district court granted a preliminary injunction and then entered summary judgment in the Commission's favor on the ground that the Compact's provision requiring the consent of both States to amend the Compact bars New Jersey from unilaterally

withdrawing from the Compact. *Id.* at 3, 12. But the court of appeals vacated the judgment, holding that New Jersey's sovereign immunity barred the suit. See *Waterfront Comm'n of N.Y. Harbor* v. *Governor of N.J.*, 961 F.3d 234, 236 (3d Cir. 2020). This Court denied the Commission's petition for a writ of certiorari. See *Waterfront Comm'n of N.Y. Harbor* v. *Murphy*, 142 S. Ct. 561 (2021).

After dismissal of the Commission's suit, on December 27, 2021, the Acting Governor of New Jersey notified the Governor of New York, the Commission, and Congress of the State's intent to withdraw from the Compact. Compl. ¶ 84. That notification triggered Chapter 324's 90-day period, meaning that dissolution of the Compact and Commission under the statute would occur on March 28, 2022. Compl. ¶¶ 67-68, 86. In the months following notification, New Jersey took steps to prepare for the anticipated withdrawal, including by requesting documents and information from the Commission and coordinating with law-enforcement partners at the port. Compl. ¶¶ 85-93; Br. in Opp. to Mot. for Prelim. Relief App. 2a-16a.

3. On March 14, 2022, New York sought leave to file a bill of complaint against New Jersey in this Court, seeking permanent injunctive and declaratory relief barring New Jersey's unilateral withdrawal from the Compact. See Compl. 36-37. The complaint alleges that Chapter 324 breaches the Compact, violates the Contract Clause, U.S. Const. Art. I, § 10, Cl. 1, and is preempted by federal law. See Compl. ¶¶ 107-136. That same day, New York filed a motion for a preliminary injunction barring New Jersey from enforcing Chapter 324 or otherwise withdrawing from the Compact. See Mot. for Prelim. Relief 35.

On March 24, this Court granted New York's motion for preliminary relief pending disposition of the bill of complaint. The Court subsequently granted New York's motion for leave to file a bill of complaint, as well as the parties' joint motion to file cross-motions for judgment on the pleadings on the question "whether the * * * Compact permits either member State to unilaterally withdraw," Joint Mot. 2; see Order (June 21, 2022).

SUMMARY OF ARGUMENT

The Compact permits New Jersey to withdraw unilaterally.

A. "Interstate compacts are construed as contracts under the principles of contract law." *Tarrant Reg'l Water Dist.* v. *Herrmann*, 569 U.S. 614, 628 (2013). Any interpretation of the Compact must therefore begin with its plain text and structure. Unlike many other interstate compacts, the text of the Compact does not expressly address the question whether or when one of the compacting States may unilaterally withdraw from (and thereby terminate) the Compact. The Compact's structure, in contrast, does shed some light on the question. The Compact establishes a framework that enables either party effectively to veto the Commission's ongoing operations. That framework suggests that the parties also enjoy the more direct power to withdraw.

In contending otherwise, New York emphasizes three provisions of the Compact. It principally relies on a provision stating that "[a]mendments and supplements to this compact to implement the purposes thereof may be adopted" by concurrent legislation of the two States. Compl. App. 34a; see *id.* at 34a-35a. But amendment and termination are distinct concepts: an amendment modifies ongoing obligations, whereas

termination ends those obligations. For that reason, requiring concurrency for amendment but not termination is sensible, as the former affects prospective obligations but the latter merely restores the status quo ante.

New York also invokes the statement in the Act of Congress approving the Compact that "[t]he right to alter, amend, or repeal this Act is hereby expressly reserved." Compl. App. 35a. Nothing in that statement or the Compact indicates that Congress's reservation of its own power to withdraw its consent is exclusive of the parties' right to withdraw. Rather, the reservation provision makes express Congress's right to terminate its consent to a compact if it concludes that the compact has proven to be inconsistent with federal interests. In addition, like similar provisions in other statutes, the reservation provision shields the federal government from any potential liability in the event it decides to terminate its undertaking.

Lastly, New York points to the Compact's instruction that it "shall be liberally construed." Compl. App. 35a. But that provision supplies a rule for giving effect to the parties' intentions, not displacing them. It does not overcome the other, more probative indicia of party intent in this case.

B. Because the Compact's text does not definitively resolve whether a party may withdraw unilaterally, the Court should also look to the background principles of law that would have informed the parties' understanding of their obligations when they entered the Compact.

The default contract-law rule, both now and at the time the Compact was adopted, is that where a contract "contemplates a continuing performance" for an "indefinite" period of time, the contract "is to be interpreted

as stipulating only for performance terminable at the will of either party." 1 Samuel Williston, *A Treatise on the Law of Contracts* § 4:22 (Richard A. Lord ed., 4th ed. 2007) (Williston on Contracts); see 1 Samuel Williston, *The Law of Contracts* § 38 (1924). That common-law understanding supplies the default rule of decision here and supports New Jersey's effort to withdraw unilaterally. Importantly, the same default rule would not apply to compacts that establish territorial boundaries or apportion water between States, rather than (as in this case) require the ongoing exercise of sovereign authority.

Interpretive presumptions designed to protect sovereign authority also support recognizing a right of unilateral withdrawal. Because States rarely relinquish their sovereign powers, this Court requires a clear statement in a compact that they have done so. See *Tarrant Reg'l Water Dist.*, 569 U.S. at 631-632. More generally, the Court seeks to construe contracts to avoid foreclosing the exercise of sovereign authority. See *Bowen* v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52-53 (1986). Those principles militate against a holding that New Jersey is barred in perpetuity—absent consent by New York or Congress—from providing for the exercise of its police powers as it sees fit within its own borders.

New York invokes a different presumption: That courts should not read absent terms into a compact. New York argues that this presumption militates against inserting a withdrawal provision into the Compact. But the presumption is inapt here because the express terms of the Compact are silent as to withdrawal. This case therefore requires the Court to ascertain the

parties' intent using background principles of interpretation.

C. The Compact's history furnishes at most mixed signals as to the parties' intent and thus does not override the principles discussed above. On the one hand, the hearings preceding the Compact's enactment suggest that the States viewed the Commission as temporary, and there is some indication that they believed unilateral termination would be available. On the other hand, New York points out that no party attempted unilateral termination until 2015, when the Governor of New Jersey vetoed a bill substantially similar to Chapter 324. But that evidence bears only modest probative value given the New Jersey legislature's view that withdrawal is permissible and the Governor's later change of position in approving Chapter 324.

ARGUMENT

THE COMPACT PERMITS UNILATERAL WITHDRAWAL BY ONE OF THE PARTIES

A. The Text Of The Compact Suggests That Unilateral Withdrawal Is Permissible

"Interstate compacts are construed as contracts under the principles of contract law." *Tarrant Reg'l Water Dist.* v. *Herrmann*, 569 U.S. 614, 628 (2013). Thus, "as with any contract," this Court must "begin by examining the express terms of the Compact," as well as its structure, "as the best indication of the intent of the parties." *Ibid.*; see *id.* at 628-630; Restatement (Second) of Contracts §§ 202(2), 203(b) (1981); Restatement (First) of Contracts § 235(a) and (c) (1932).

1. The express terms of the Compact do not address whether one of the parties may unilaterally withdraw from the Compact, thereby terminating it. The Compact does not mention "withdrawal" or "termination" in

any relevant context, nor does it include any provision governing the dissolution of the Compact or the Commission.

"[O]ther interstate compacts" provide a useful contrast. *Tarrant Reg'l Water Dist.*, 569 U.S. at 633. Unlike the compact here, many interstate compacts unambiguously address the subject by authorizing withdrawal or prohibiting it except in particular circumstances. See, *e.g.*, Central Interstate Low-Level Radioactive Waste Compact art. VII(d), Pub. L. No. 99-240, Tit. II, § 222, 99 Stat. 1863, 1870 ("Any party state may withdraw from this compact by enacting a statute repeating the same."); Delaware River Basin Compact art. 1, § 1.6(a), Pub. L. No. 87-328, Pt. I, 75 Stat. 688, 691 (authorizing unilateral withdrawal only after 100 years); Pecos River Compact art. XIV, Act of June 9, 1949, ch. 184, 63 Stat. 159, 165 ("This Compact may be terminated at any time by appropriate action of the legislatures of both of the signatory states."). "The absence of comparable language" in the Compact suggests that it does not, by its terms, address withdrawal. *Tarrant Reg'l Water Dist.*, 569 U.S. at 633-634.

Although the Compact's text does not expressly address withdrawal, "[f]undamental structural considerations" suggest that unilateral withdrawal is permissible. *Texas* v. *New Mexico*, 462 U.S. 554, 568 (1983); see Restatement (Second) of Contracts § 202(2) (1981) ("A writing is interpreted as a whole.") (emphasis omitted). Under the Compact, the Commission is structured and funded in such a way that the continuing cooperation of each State (or its representative) is necessary for the Commission to function effectively. Among other things, the Compact provides that the Commission "shall consist of two members," one chosen by the

Governor of each compacting State with the advice and consent of its Senate, and that the Commission "shall act only by unanimous vote of both members thereof." Compl. App. 6a. Moreover, the Commission must "adopt a budget of its expenses for each year" and submit that budget to the Governors of New York and New Jersey, either of whom may "disapprove or reduce any item or items, and the budget shall be adjusted accordingly." *Id.* at 31a. The Commission, in turn, may collect assessments only to cover its "budgeted expenses." *Ibid.* And any "budget" shortfall may be certified, "with the approval" of each State's Governor, to each legislature for payment based on the proportionate share of employment in that State. *Id.* at 32a.

That carefully drawn structure enables either State unilaterally to impair the Commission's continued operations. The representative of either State may refuse to concur in Commission actions, thereby depriving it of the unanimity required for action. And the Governor of either State may decline to approve a budget, thereby depriving the Commission of the ability to fund its operations through assessments or certification to the state legislatures. It is improbable that the Compact permits either State to grind Commission operations to a halt, but at the same time precludes either State from simply withdrawing from the Compact.

2. New York relies on three aspects of the Compact and its enacting legislation to argue that it precludes unilateral withdrawal. New York's reading of the Compact is unpersuasive.

a. New York first points to the Compact's provision stating that "[a]mendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the Legislature of either State

concurred in by the Legislature of the other." Compl. App. 34a-35a. In New York's view, see Mot. for Prelim. Relief 24, that language requires concurrent agreement by the States to terminate the Compact, because termination "is the ultimate amendment," Mot. for Prelim. Relief Reply Br. 8.

New York is mistaken. Amendment and termination are distinct concepts. With respect to legislation, an "amendment" "is an alteration in the law already existing, leaving some part of the original still standing." *Black's Law Dictionary* 106 (4th ed. 1951) (capitalization and emphasis omitted). And, more generally, it is "[a]n amelioration of the thing without involving the idea of any change in substance or essence." *Ibid.* By contrast, to "terminate" is "[t]o put an end to; to make to cease; to end." *Id.* at 1641 (capitalization and emphasis omitted); see *id.* at 1776 (defining "withdraw" as "[t]o remove") (capitalization and emphasis omitted). In short, an amendment modifies certain prospective obligations, whereas termination eliminates all prospective obligations. Cf. *MCI Telecommunications Corp.* v. *American Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) (observing that "modify" "has a connotation of increment or limitation"); *Wilson* v. *Northwest Mut. Ins. Co.*, 625 F.3d 54, 60-61 (2d Cir. 2010) (concluding that "termination" fell outside provisions governing "modifi[cations]" and "'changes'") (citations omitted).

The provision's context confirms this interpretation. The Compact provides for amendment "to implement the purposes thereof." Compl. App. 34a. But that language only makes sense if "amendment" refers to changes to the Compact's ongoing operation. Termination does not "implement the purposes" of the Compact, *ibid.*; it dissolves the Compact.

The Compact's drafters had good reason to require unanimity for amendments but not for termination. Because amendment modifies the parties' prospective obligations, unilateral amendment could subject a party to obligations that it never contemplated and to which it never consented. Termination, in contrast, simply restores the status quo ante, enabling each State to exercise its full sovereign authority as it could have prior to the Compact's adoption.

Consistent with that understanding, interstate compacts frequently distinguish between amendment and termination and require different procedures for each. See, *e.g.*, Washington Metropolitan Area Transit Regulation Compact (Transit Compact), Tit. I, art. IX(1)-(2), Act of Sept. 15, 1960, Pub. L. No. 86-794, 74 Stat. 1031, 1032, 1035 (requiring an amendment to be "adopted by each of the signatories," but permitting "[a]ny signatory" to "withdraw from the compact" and providing that, in the event of withdrawal by one party, "the compact shall be terminated"); Gulf States Marine Fisheries Compact arts. X, XIII, Act of May 19, 1949, ch. 128, 63 Stat. 70, 72-73 (providing that "two or more states party hereto may further amend this compact" in a specified respect but that any party may "renounce[]" the compact).

New York suggests that treating amendment and termination separately is necessary only in multistate compacts, since "one State's withdrawal might not fundamentally alter the remaining States' obligations to each other, but amendment of the Compact's terms would." Mot. for Prelim. Relief Reply Br. 9. That argument is inconsistent with the fact that some bistate compacts make the same distinction. See, *e.g.*, Delaware Valley Urban Area Compact art. I, §§ 5 and 7, 73

Pa. Stat. Ann. § 701, Pt. I (2020) (providing that "[a]mendments * * * may be adopted by concurrent legislation of the party states," but "either" of the parties may "terminate" the compact); New York-New Jersey Port Authority Compact arts. 3, 21, Act of Aug. 23, 1921, ch. 77, 42 Stat. 174, 176, 179 (providing that amendments be "concurred in" by both States, but that "[e]ither State may * * * withdraw from th[e] agreement" in specified circumstances).

Finally, New York briefly suggests (Mot. for Prelim. Relief 24) that Chapter 324 may violate the Compact's amendment provision in the specific way that it purports to divide and distribute the Commission's assets. In the event those issues are not amenable to negotiated resolution, New York may be able to seek judicial relief. Cf. *Texas* v. *New Mexico*, 482 U.S. 124, 130 (1987) ("The Court has recognized the propriety of money judgments against a State in an original action and specifically in a case involving a compact.") (citations omitted). But New York does not press those claims in its bill of complaint, and they do not provide a basis for precluding New Jersey's withdrawal from the Compact altogether.

b. New York additionally relies (Mot. for Prelim. Relief 24-25) on the statement in the Act of Congress approving the Compact that "[t]he right to alter, amend, or repeal this Act is hereby expressly reserved." Compl. App. 35a. New York argues (Mot. for Prelim. Relief 25) that this provision prevents New Jersey from terminating the Compact because "Congress reserved that right for itself."

New York's argument is internally inconsistent. If Congress's reservation of the authority to repeal its approval of the Compact, and thereby terminate it, is exclusive, then the parties could not terminate the

Compact even by mutual consent. But New York concedes that option is available. See Mot. for Prelim. Relief 25. Congress's reservation of its own right to withdraw consent cannot be read to permit mutual termination but preclude unilateral withdrawal.

In any event, Congress's reservation is not the exclusive means of terminating the Compact. Nothing in the statutory text suggests that Congress intended to preclude unilateral termination on the part of either State by reserving its own authority to withdraw approval for the Compact. Rather, consistent with the basic purpose of the Compact Clause, the reservation provision simply makes express Congress's power to withdraw its consent in the event it determines that the Compact's continued existence unreasonably "encroach[es] upon or interfere[s] with the just supremacy of the United States." *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978) (citations omitted). The provision also serves to shield the federal government from liability in the event Congress decides to abrogate the Compact in the future. Congress frequently includes such reservations in federal statutes for precisely this purpose. See, *e.g.*, *Sinking Fund Cases*, 99 U.S. 700, 720 (1879); *National R.R. Passenger Corp.* v. *Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 467 & n.22 (1985).

A congressional termination right is accordingly fully consistent with a state withdrawal right. The many interstate compacts that explicitly specify both rights confirm the point. See, *e.g.*, Transit Compact, Tit. I, art. IX, 74 Stat. 1035, and § 7(a), 74 Stat. 1051; Wabash Valley Compact art. VII, Act of Sept. 23, 1959, Pub. L. No. 86-375, 73 Stat. 694, 698, and § 4, 73 Stat. 698.

c. Lastly, New York relies (Mot. for Prelim. Relief 25-26) on the Compact's interpretive proviso that "[i]n accordance with the ordinary rules for construction of interstate compacts this compact shall be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof." Compl. App. 35a. That proviso adds little to the analysis in this case. Rules of liberal construction are designed to "carry out the intention of the parties * * * when it is plain that a strict and literal construction of a contract does not convey the real meaning of the parties." 11 Williston on Contracts § 30:9 (4th ed. 2012). That rule has no application here. And the Compact's proviso by its terms does not purport to displace "the ordinary rules" of compact interpretation, Compl. App. 35a. The best available inference about the parties' intent under those ordinary rules—based on the Compact's structure and other interpretive tools, see Part B, *infra*—is that unilateral withdrawal is permissible.

New York disputes the notion that the Commission's structure supports unilateral withdrawal. It contends (Mot. for Prelim. Relief Reply Br. 9) that "the need for unanimity suggests that the drafters intended the Commissioners to work together to further the Compact's purposes, not use their votes to paralyze the Commission." New York may well be correct that the Compact's drafters did not envision either State acting to sabotage the Commission's work. But, as explained above, the Compact plainly gives each State the ability to do so. Thus, to the extent the drafters did not anticipate that one of the States would take such measures, that suggests they expected that a dissatisfied State would simply withdraw instead.

B. Other Interpretive Tools Confirm That The Compact Permits Unilateral Withdrawal

Because the text and structure of the Compact do not definitively resolve the question whether New Jersey may withdraw unilaterally, the Court should "turn to other interpretive tools to shed light on the intent of the Compact's drafters." *Tarrant Reg'l Water Dist.*, 569 U.S. at 631. Here, those tools confirm New Jersey's right to withdraw.

1. Contract Law

When a compact does not itself specify a rule of decision, this Court has looked to "background principles of contract law," *State of Mississippi* v. *Tennessee*, 142 S. Ct. 31, 41 (2021), to ascertain "the intent of the parties" in entering the compact, *Montana* v. *Wyoming*, 563 U.S. 368, 375 n.4 (2011). Here, the Compact contemplates an ongoing exercise of each State's sovereign authority—through the Commission—to police misconduct and regulate employment at the port. The Compact is thus analogous to contracts that require continuing performance by the parties, as opposed to contracts that transfer or recognize property rights or otherwise create vested rights. See U.S. Amicus Br. at 23-24, *State ex rel. Dyer* v. *Sims*, 341 U.S. 22 (1951) (No. 147).

Both at the time the Compact was adopted and now, the basic contract-law rule was that "a contract of indefinite duration is terminable at will unless the contract states expressly and unequivocally that the parties intend to be perpetually bound." *Compania Embotelladora Del Pacifico, S.A.* v. *Pepsi Cola Co.*, 976 F.3d 239, 245 (2d Cir. 2020); see, *e.g.*, 1 Williston on Contracts § 4:22 (4th ed. 2007) (observing that a contract "contemplating continuing performance for an indefinite time is

to be interpreted as stipulating only for performance terminable at the will of either party" or after "a reasonable time"); 1 Samuel Williston, *The Law of Contracts* § 38 (1924) (similar); Restatement (Second) of Contracts § 33, cmt. d (1981) ("When the contract calls for successive performances but is indefinite in duration, it is commonly terminable by either party."); Restatement (First) of Contracts § 32 (1932) (similar); see also U.S. Amicus Br. at 23-24, *Dyer*, *supra* (No. 147).

The "parties' silence" on the question of withdrawal in the Compact "showed no intent to modify" this "settled law." *New Jersey* v. *New York*, 523 U.S. 767, 783 n.6 (1998). Applying that background rule here means that either State has the ability to withdraw at will, thereby terminating the Compact.

Some authorities suggest that contracts contemplating indefinite performance may be terminated at will or after a "reasonable time." 1 Williston on Contracts § 4:22 (4th ed. 2007). Courts tend to apply the "reasonable time" proposition when one party to the contract—such as in an exclusive distributorship arrangement—must make upfront investments "in equipment, materials, and other assets to perform its obligations under the contract." *Compania*, 976 F.3d at 246; see Restatement (Second) of Agency § 442, cmt. c (1958); *Colony Liquor Distribs., Inc.* v. *Jack Daniel Distillery-Lem Motlow Prop., Inc.*, 254 N.Y.S.2d 547, 549-550 (App. Div. 1964). In that context, a reasonable-term requirement affords some protection against the prospect that a party will make upfront investments "only to have the other party pull the rug out from under [it] by terminating the contract." *Compania*, 976 F.3d at 247; see 19 Williston on Contracts § 54:55 (4th ed. 2016). There is no similar asymmetry present here that would call for a

reasonable-time limitation on either State's ability to withdraw. Even if there were doubt on that point, in light of the presumption against a sovereign's ceding of its authority discussed below, see Part B.2, *infra*, the Court should apply a principle of at-will termination here. In any event, New York makes no argument that the nearly 70 years that have elapsed since the Compact was adopted in 1953 fail to constitute a "reasonable" period under any standard.

New York generally does not dispute any of these principles. Instead, it argues that they are inapt because the Compact "does not require perpetual performance," but rather "contemplates termination by Congress or by joint state action." Mot. for Prelim. Relief Reply Br. 11. But each of those circumstances is typically present with both private and public contracts: parties may rescind a contract by mutual agreement, and the sovereign with ultimate authority may take actions that prevent the performance of existing contracts. See Restatement (Second) of Contracts § 283(1) (1981) (explaining that "each party [may] agree[ ] to discharge all of the other party's remaining duties of performance under an existing contract") (emphasis omitted); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982) ("Contractual arrangements remain subject to subsequent legislation by the presiding sovereign."); *Manigault* v. *Springs*, 199 U.S. 473, 480 (1905) (describing State's broad police powers to prevent the "continuance" of performance under existing contracts). Those circumstances thus provide no basis for distinguishing the general rules otherwise applicable in this context.

Finally, it is important to clarify the limits of the background or default rule at issue here. That rule applies to a compact that calls for indefinite performance

through the continuous exercise of sovereign authority, either directly or through a commission; it does not extend to contracts that create territorial or other vested rights. Many compacts settle boundary disputes or apportion water rights in an interstate stream. See, *e.g.*, Virginia-Maryland Boundary Compact, Act of Mar. 3, 1879, ch. 196, 20 Stat. 481. Those compacts do not require continuing exercises of sovereign authority by the compacting States and thus do not fall within the general rule governing contracts for ongoing performance. To the contrary, this Court has recognized that a boundary compact "finally settle[s]" state boundaries "with the same effect as a treaty between sovereign powers," and those new boundaries "are to be treated to all intents and purposes, as the true real boundaries." *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-107 (1938) (quoting *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 725 (1838)); see *Poole* v. *Fleeger's Lessee*, 36 U.S. (11 Pet.) 185, 209 (1837) (similar); *Greene* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 92-93 (1823) (holding that a State may not impair property rights recognized by a compact); see also *Hinderlider*, 304 U.S. at 102-104, 107 (discussing binding effect of compact apportioning water between States and analogizing to boundary compacts). If the Court agrees that the default rule permits unilateral withdrawal in this case, it should make clear that the same rule does not apply to compacts vesting territorial or property rights or apportioning water or other natural resources.

2. The Presumption Against Ceding Sovereign Authority

"The background notion that a State does not easily cede its sovereignty has informed [this Court's] interpretation of interstate compacts," *Tarrant Reg'l Water*

Dist., 569 U.S. at 631, and further indicates that the Compact here allows unilateral withdrawal. "[W]hen confronted with silence in compacts touching on" state regulatory authority, the Court has "concluded that '[i]f any inference at all is to be drawn from [such] silence[,] * * * it is that each State was left to regulate the activities of her own citizens.'" *Id.* at 632 (quoting *Virginia* v. *Maryland*, 540 U.S. 56, 67 (2003)) (brackets in original).

That presumption is consistent with the related principle "that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *Bowen* v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52-53 (1986). The Court recognized this principle as early as 1830, see *Providence Bank* v. *Billings*, 29 U.S. (4 Pet.) 514, 561 (1830), and has repeatedly reaffirmed that no "power of sovereignty" will be surrendered by contract "unless such surrender has been expressed in terms too plain to be mistaken," *Jefferson Branch Bank* v. *Skelly*, 66 U.S. (1 Black) 436, 446 (1862); see, *e.g.*, *The Delaware R.R. Tax*, 85 U.S. (18 Wall.) 206, 226 (1874) (observing that "the surrender [of sovereign power] when claimed must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power").

Both presumptions serve as useful guides to the intent of the parties in cases where the compact (or other contract) is silent. Because "States rarely relinquish their sovereign powers," "when they do," "we would expect a clear indication of such devolution, not inscrutable silence." *Tarrant Reg'l Water Dist.*, 569 U.S. at 632. The presumptions protect important public interests as well. They impose a high threshold for any legislature

to bind its successors, thus helping to ensure that legislatures retain the authority to respond to current problems. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 875 (1996) (plurality opinion). They also reflect the fact that enforcing a cession of sovereign authority when no such cession was intended would redound to the detriment of all that sovereign's citizens. The Court has thus appropriately explained that "[n]othing can be taken against the State by presumption or inference," because "[t]here is no safety to the public interests in any other rule." *The Delaware R.R. Tax*, 85 U.S. (18 Wall.) at 225.

Those principles counsel in favor of reading the Compact to permit unilateral withdrawal. That reading preserves each State's sovereign authority to determine the best way in which to exercise its police power to protect the persons, property, and economic activity within its borders by reclaiming the ability to do so directly rather than through the Compact and the Commission. The ability to protect the people, property, and economic activity within its borders is a fundamental aspect of a sovereign's power. See, *e.g.*, *Energy Reserves Grp., Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983); *Manigault*, 199 U.S. at 480. Through the Compact, New Jersey delegated to the Commission its police powers to address the problems at the port as they existed in 1953. See p. 2, *supra*. But it has since concluded that the Commission "has become an impediment to future job growth and prosperity at the port," and that the Commission's responsibilities would be more effectively managed by the New Jersey State Police, which "is suited to undertake an investigation of any criminal activity in the ports of northern New Jersey without impeding economic prosperity." Compl. App. 37a-38a.

Regardless of whether those determinations by New Jersey are correct, or whether New York has the same view, they represent precisely the sort of regulatory and public safety determinations that the New Jersey legislature is entitled to make. Preventing New Jersey from effectuating those judgments would impair the State's core authority to regulate in its preferred fashion, on a prospective basis, for the benefit of its own citizens within its own borders.

New York contends (Mot. for Prelim. Relief Reply Br. 10) that the presumption against a State's ceding of its sovereign authority is inapplicable here because the Compact "makes clear that New Jersey *expressly* ceded certain sovereign police powers." That premise is correct so far as it goes: As in many compacts, New York and New Jersey unambiguously delegated a limited aspect of their sovereign authority when they entered the Compact. But the principles discussed above counsel that any constraint on the parties' sovereignty should be limited to the express terms of the contract. A court should not extend one limitation on sovereignty into a different, and broader, limitation. New York contends that New Jersey ceded its police powers over the port not merely for the period during which it maintains its consent to the Compact, but *in perpetuity*, absent the concurrent agreement of New York or repeal by Congress. Because the text of the Compact does not mandate that outcome, this Court should reject it under the "'strong presumption' against defeat" of a State's sovereign authority. *Tarrant Reg'l Water Dist.*, 569 U.S. at 631 (citations omitted).

3. New York's Invocation Of Other Asserted Interpretive Guides Is Unsound

New York invokes three other purported interpretive guides to support its construction of the Compact. None is persuasive.

a. New York contends that permitting unilateral withdrawal would conflict with the rule that courts should not "read[ ] absent terms into an interstate compact." Mot. for Prelim. Relief 26 (quoting *Alabama* v. *North Carolina*, 560 U.S. 330, 352 (2010)). As New York acknowledges, that rule is designed to preclude courts from displacing express contract rights with "implied" terms. *Id.* at 26-27. It thus has no application here, where the Compact is silent on the question of withdrawal. If anything, it is *New York's* position that runs afoul of the rule, since New York seeks to displace well-established background principles permitting unilateral withdrawal with an implied limitation on that usual prerogative.

In support of its argument, New York relies principally on *Alabama* v. *North Carolina*, *supra*, but that decision illustrates why permitting unilateral withdrawal would not require reading an absent term into the Compact. There, the compact provided an express right for each compacting State to withdraw. Unlike other compacts, however, it did not impose a duty of good faith on parties exercising that right. See *Alabama*, 560 U.S. at 352. This Court declined the plaintiffs' invitation to insert an "implied duty of good faith and fair dealing." *Id.* at 351. In the Court's view, implying such a duty would improperly "add [a] provision[ ]" to the compact, despite the fact that "nothing in the [c]ompact suggests the parties understood there were 'certain purposes for which the expressly conferred power could not be employed.'"

Id. at 352 (citation and ellipsis omitted). The Court observed that "an interstate compact is not just a contract; it is a federal statute enacted by Congress," and "[w]e do not—we cannot—add provisions to a federal statute." *Id.* at 351-352.

Here, by contrast, New Jersey does not request "relief inconsistent with [the] express terms" of the Compact. *Alabama*, 560 U.S. at 352 (brackets in original; citation omitted). It does not ask this Court to "restrict[]" any express powers conferred by the Compact or "add" to the parties' obligations under the Compact. *Ibid.* Rather, it asks the Court to apply longstanding background norms to ascertain the parties' intent on an issue where the Compact is silent. In that context, the background "rule speaks in the silence of the Compact," and the Court should "follow it." *New Jersey*, 523 U.S. at 784.

b. Next, New York contends that a right of unilateral withdrawal would conflict with the very nature of a compact. It points to *Northeast Bancorp, Inc.* v. *Board of Governors*, 472 U.S. 159 (1985), where the plaintiffs alleged that parallel state laws violated the Compact Clause because they had not been approved by Congress. *Id.* at 175. The Court noted that "several of the classic indicia of a compact [we]re missing" from the purported agreement, including that neither State's statute was conditioned on action by the other State and that "each State [wa]s free to modify or repeal its law unilaterally." *Ibid.* That observation was dicta, as the Court ultimately concluded that the Compact Clause did not apply even if the parallel state laws did amount to an agreement or compact. *Id.* at 175-176. And regardless, the Court's offhand observation could not have been intended as a universal rule, given the many

compacts that expressly authorize unilateral withdrawal. See p. 10, *supra*; see generally N.J. Br. App.

c. Finally, New York argues that permitting unilateral withdrawal "would undermine the fundamental purpose of interstate compacts—to forge stable and lasting solutions to problems." Mot. for Prelim. Relief 28. That argument begs the question, because it assumes that unilateral withdrawal would undermine the intent of the parties in entering the Compact. That premise is unfounded. In cases involving the ongoing exercise of sovereign regulatory authority, parties may well prefer the ability to opt out of a compact when circumstances change, as New Jersey has concluded is the case here. Moreover, the far better inference in this case "is that the parties drafted the Compact" with the legal principles discussed above "in mind, and therefore did not intend" to preclude unilateral withdrawal. *Tarrant Reg'l Water Dist.*, 569 U.S. at 632.

New York also appears to misunderstand the nature of the proposed default rule, because parties could choose to contract around it. See, *e.g.*, *US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 102 (2013) ("Contracts are enacted against a background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' contrary intent.") (brackets, citation, and ellipsis omitted). To the extent compacting States believe that long-term stability is particularly important to achieving the goals of a specific compact, they remain free to restrict unilateral withdrawal. Thus, contrary to New York's contention, permitting withdrawal in this case would not "disincentivize States

from entering into compacts," Mot. for Prelim. Relief 28.

C. History Does Not Demonstrate An Understanding By The Parties That Unilateral Withdrawal Would Be Impermissible

This Court has also looked to "extrinsic evidence of the negotiation history of the Compact," *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991), and "the parties' course of performance under the Compact," *Alabama*, 560 U.S. at 346, to ascertain the parties' intent. Here, those sources at most furnish mixed signals, and therefore do not override the considerations discussed above.

1. Beginning in 1951, the New York Crime Commission and the Law Enforcement Council of New Jersey undertook an investigation into conditions at the port. See *De Veau* v. *Braisted*, 363 U.S. 144, 147 (1960) (plurality opinion). Based on that investigation, in 1953, the New York Crime Commission "published a detailed report" calling for a legislative solution to the problems it had identified. *Ibid.* The two States responded by adopting the Compact through concurring legislation, which Congress then approved. *Id.* at 149.

The historical materials associated with this process indicate that the parties anticipated the Compact would serve only a temporary role. At a public hearing, special counsel to the Crime Commission emphasized its "conviction" "that all the remedial measures that it advocates shall be only temporary and continue only as long as necessary." *Record of the Public Hearings Held by Governor Thomas E. Dewey on the Recommendations of the New York State Crime Commission for Remedying Conditions on the Waterfront of the Port of New York* (June 8 and 9, 1953), in *Public Papers of Thomas*

E. Dewey, Fifty-First Governor of the State of New York 731 (N.Y. 1953) (*Dewey Papers*). In response to suggestions that a sunset period be included in the proposed legislation, counsel responded that the annual reports (later called for in the Compact, see p. 3, *supra*) were "intended to give the Legislature an opportunity to end this legislation." *Id.* at 815.

The Governor of New York emphasized the same themes in a letter to the state legislature, commenting that "[m]y earnest hope is that the Waterfront Commission need not be permanent and that government regulation may be terminated as quickly as possible." Letter from Thomas E. Dewey, Governor of N.Y., to N.Y. Legislature (June 20, 1953), in *Dewey Papers* 930. And in a similar message, New Jersey's Governor stated that "after there has been a reasonable time to test the value of the law * * * , the whole problem may be reappraised in the light of future conditions." Minutes of N.J. Gen. Assembly 1078 (June 22, 1953).

This evidence, though far from conclusive, at least indicates that the parties conceived of the Compact as a temporary measure and may have contemplated the possibility of unilateral termination at the time the Compact was adopted.

2. New York asserts that the parties' course of performance supports its interpretation. Mot. for Prelim. Relief 29-31. It notes that the two States "have successfully amended the Compact on multiple occasions by enacting concurrent legislation," and that "[n]either State asserted that it could have accomplished these amendments to the Compact without the consent of the other State." *Id.* at 30. But that pattern simply reflects the Compact's express requirement of unanimity for amendments. See Compl. App. 34a-35a.

New York further emphasizes that, in 2015, then-New Jersey Governor Christie "vetoed a bill nearly identical to Chapter 324." Mot. for Prelim. Relief 30. Any inference from that act is weak, given that the New Jersey legislature plainly believed unilateral withdrawal was permissible and Governor Christie later signed Chapter 324 into law. See Compl. ¶ 8. Governor Christie's message to the legislature explaining his veto the first time the measure was presented to him was also ambiguous. He stated: "I am advised that federal law does not permit one state to unilaterally withdraw from a bi-state compact approved by Congress." Mot. for Prelim. Relief App. 85a. In light of that explanation, it is far from clear that the veto reflected Governor Christie's understanding of the terms of this particular compact, as opposed to external constraints derived from federal law. And of course, Governor Christie approved a similar measure shortly thereafter. That brief episode does not constitute a continuing course of performance by the parties of the sort that would illuminate their intent in a meaningful way. See, *e.g.*, Restatement (Second) of Contracts § 202 cmt. g (1981) (rejecting reliance on "action on a single occasion" or "action of one party only").

In cases where this Court has substantially relied on the parties' prior course of performance, the relevant conduct has been far clearer than the conduct here. In *Tarrant Regional Water District*, the Court observed that one party had previously "attempted to purchase water from Oklahoma" for years but now contended that "it was entitled to demand such water without payment under the Compact." 569 U.S. at 636. And in *Alabama*, the Court rejected an argument that the compact required a compacting State to proceed with a

"very expensive licensing process without any external financial assistance," in part because "[f]rom the beginning" the State had asserted that it required—and the interstate commission had agreed to provide—substantial funding "to do the extensive work required for obtaining a license." 560 U.S. at 346. The evidence identified by New York does not rise to that level and does not shed significant light on the Compact's meaning.

* * *

This Court should conclude that the Compact entitles New Jersey to withdraw unilaterally, as it has done in Chapter 324. The Court should therefore also reject New York's claim under the Contract Clause, which requires a plaintiff to show that the challenged law "impaired a contractual obligation." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 21 (1977). And the Court should reject New York's preemption claim for largely the same reason, since the federal statute adopting the Compact does not preempt conduct that the Compact permits. See, *e.g.*, *Tarrant Reg'l Water Dist.*, 569 U.S. at 639 (concluding that plaintiff's claim that the challenged state "statutes are pre-empted because they prevent Texas from exercising its rights under the Compact must fail for the reason that the Compact does not create any cross-border rights").

CONCLUSION

New Jersey's motion for judgment on the pleadings should be granted. New York's motion for judgment on the pleadings should be denied.

Respectfully submitted.

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