No. 22O156, Original

IN THE

Supreme Court of the United States

STATE OF NEW YORK,

Plaintiff,

v.

STATE OF NEW JERSEY,

Defendant.

RESPONSE TO NEW YORK'S CROSS-MOTION AND REPLY IN SUPPORT OF NEW JERSEY'S MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

New York's original action presents this Court with a stark choice. Seven decades after New Jersey and New York signed the Waterfront Commission Compact, the New Jersey Legislature found that the Commission's exercise of police powers was no longer consistent with its sovereign interests. The question before this Court is whether New Jersey retains its sovereign power to withdraw, or whether this Compact's silence requires New Jersey to cede its powers to the Commission forever. The Compact's text and structure, understood in light of the ordinary tools of compact interpretation, provide a ready answer: this Compact does not restrict withdrawal.

New York insists that the Compact's text and history impose a perpetual restriction on withdrawal, yet its textual analysis is anything but. For the first time, New York admits that the Compact does not expressly limit withdrawal. Instead, New York relies on the Compact's abstract statements of purpose and legislative history, along with its liberal construction provision. But New York's sweeping invocations of purpose provide no substitute for textual analysis. And New York's sources establish only that New Jersey and New York previously concluded that a Commission was the right way to solve a joint, temporary problem in 1953. That hardly resolves whether New Jersey can withdraw seventy years later.

Nor does the Compact's decision to establish separate processes for amendments and congressional repeal imply a perpetual limit on withdrawal. Contract law and compact practice consistently distinguish between amendments and withdrawal, often requiring unanimity for the former but not the latter. And the congressional repeal provision is a standard term included in compacts to protect the rights of future

Congresses and bears no relevance to whether the Compact itself allows withdrawal.

Because it nowhere limits withdrawal, the Compact's text and structure—read consistently with bedrock principles of contract law and sovereignty—establish that New Jersey must prevail. New York concedes that contract law is clear: if an agreement involves continuing performance obligations and is silent on withdrawal, contracting parties can withdraw. But New York contests whether these contract principles apply at all. Not only is that claim foreclosed by precedent, but the interests animating the contract law rule are especially important when sovereigns are involved. As this Court has explained, States are especially unlikely to cede their police powers forever. States need flexibility to respond to changing circumstances and remain accountable to the people they serve. And fair notice is particularly warranted whenever their sovereignty is at stake.

This rule applies only to a narrow set of compacts. But the compacts covered—the ones that would otherwise lock sovereigns into perpetual performance by silence alone—are the agreements in which these interests are at their peak. And that resolves this case: the Compact does not restrict withdrawal in perpetuity. This Court should grant judgment to New Jersey.

ARGUMENT

I. The Waterfront Commission Compact Allows Either State To Withdraw.

The Compact's text does not address withdrawal. Based on that silence, traditional tools of compact interpretation—already established by 1953—allow for New Jersey's withdrawal here.

A. The Compact's Text Does Not Bar Either State From Withdrawing.

New York rightly admits for the first time that this Compact "does not contain an express provision prohibiting unilateral termination." Br. 21. It suggests, however, that the text implicitly does so. But what New York calls "textual analysis" rests on freestanding invocations of purpose, unmoored from the actual question presented. See *id.*, at 14, 19, 21-23, 25-27.

New York's allegedly textual argument falters right out of the gate. The first provision it cites for support is telling—not a provision addressing withdrawal, but a paragraph in the "findings and declarations" stating that regulation of port workers is "affected with a public interest" and is "an exercise of the police power of the two States for the protection of the public safety, welfare, prosperity, health, peace and living conditions of the people of the two States." Compl. App. 3a (art. I.4); N.Y. Br. 19. Referring again to this goal, New York also relies on a provision stating that the Compact "be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof." Br. 21-22 (quoting Compl. App. 35a (art. XVI.3)). But these provisions are silent on whether each State can withdraw.

New York's argument makes precisely the sort of interpretive move this Court has warned against. It is a foundational principle that "vague notions of a statute's 'basic purpose'" are "inadequate to overcome the words of its text regarding the specific issue under consideration." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). For good reason: "[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means." *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). Compacts are the same. See *Alabama v. North Carolina*, 560 U.S. 330, 349 (2010) (refusing to interpret compact based upon "intuition" about "the whole *point* of the Compact" instead of ordinary tools of compact interpretation); *New Jersey v. New York*, 523 U.S. 767, 785 (1998) (same).

That proves fatal here. The cited provisions confirm that in 1953, New York and New Jersey agreed that the Compact and Commission were the preferred way to handle contemporaneous challenges at the port. But nothing in the text or abstract statements of purpose demand achieving those temporary goals by foreclosing withdrawal *forever*. And while New York opines without any support that it is "implausible" for New York and New Jersey to have both wanted to sign a binding compact and to allow unilateral withdrawal, Br. 26, unrebutted history establishes that compacting States frequently do have both goals in mind. See N.J. Br. 22-23 (finding States more commonly prefer unilateral termination).[1]

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[1] New York's extended discussion of abstract legislative history has no more relevance. See Br. 5-8, 25-27. New York offers nothing actually speaking to the drafters' views on withdrawal. Instead, New York cites comments noting that contemporaneous

Second, New York wrongly asserts that because the Compact requires unanimity to adopt "[a]mendments and supplements," it also requires unanimity for withdrawal. Br. 19-20 (quoting Compl. App. 34a-35a (art. XVI.1)). To be clear, faced with a mountain of evidence to the contrary, New York no longer claims that withdrawal *is* an "amendment." See N.J. Br. 31-32 (citing definitions and ordinary use); U.S. Br. 12-13 (same). Rather, New York contends there is simply something unlikely about requiring unanimity for amendments but not for withdrawal. But this precise dichotomy is common in contract law and compact practice alike, see N.J. Br. 33-34, a point New York nowhere rebuts. And it is logical: New Jersey's withdrawal only reclaims sovereign powers within its borders and does not "trample" on New York's sovereignty. See *infra* at 13-14. A unilateral amendment, by contrast, would limit each State's powers within its borders.

Third, New York errs when arguing that Congress's right to repeal confirms the States cannot withdraw. See Br. 20-21 (citing Compl. App. 35a (§ 2)). The repeal provision is a standard term to confirm "Congress cannot bind a later Congress," *Dorsey v. United States*, 567 U.S. 260, 274 (2012), and to ensure States cannot combine via compact to encroach on federal supremacy, *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978). New York provides no evidence that this one was any different. New York also overlooks

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challenges at the port were "joint[]" and required "the creation of a single bistate agency." Br. 25. Again, however, States could simultaneously wish to resolve a joint problem through an interstate agency while preserving their authority to withdraw later. Indeed, other legislative history indicates the drafters' belief that the Commission was temporary and would allow each legislature an opportunity to withdraw. See U.S. Br. 27-28.

that congressional repeal provisions appear in other compacts that both expressly allow and foreclose state withdrawal, refuting the position that they bear upon withdrawal at all. See, *e.g.*, Wabash Valley Compact, Pub. L. 86-375, 73 Stat. 694 (1959) (expressly allowing withdrawal); Potomac River Compact of 1958, Pub. L. 87-783, 76 Stat. 797 (1962) (foreclosing withdrawal). And contrary to New York's assertion, Br. 20-23, the repeal provision does not speak to the drafters' intent because it was added *after* the Compact was approved by both States. Compl. ¶¶ 9, 22.

Fourth, New York's reliance upon the Commission's duty to issue annual reports about "whether the public necessity still exists" for aspects of its employment-regulation regime lacks merit. See N.Y. Br. 19; Compl. App. 8a-9a (art. IV.13). That the agency sends an annual report to each State is irrelevant to the separate question of how those States can withdraw. Indeed, similar reporting requirements exist in other compacts that permit unilateral withdrawal, confirming there is no inconsistency between the two. See, *e.g.*, Atl. Interstate Low-Level Radioactive Waste Management Compact, Pub. L. 99-240, 99 Stat. 1842, sec. 227 (1986); Quad Cities Interstate Metropolitan Authority Compact, Pub. L. 101-288, 104 Stat. 178 (1990).

New York's last argument about the Compact's text and purpose—its assertion that ruling for New Jersey would impermissibly "read[] absent terms into an interstate compact," Br. 22 (citing *Alabama v. North Carolina*, 560 U.S., at 532)—only highlights the flaws in its position. This claim does not rely on any text; it is just an argument that silence should support New York, notwithstanding that compacting States could be (and have been) clearer in *either* direction. See N.J. Br. 36-37. But the import of the Compact's silence is

New York's ultimate conclusion, not textual proof. Nothing in the Compact supports foreclosing New Jersey's withdrawal in perpetuity.

B. Ordinary Rules Of Compact Interpretation Establish Either State Can Withdraw.

Given the Compact's silence on withdrawal, established tools of compact interpretation—contract law, sovereignty, and structure—support New Jersey.

1. Contract Law.

Contract law principles foreclose New York's effort to thwart New Jersey's withdrawal. New York never contests that, for an agreement between two private parties, New Jersey has accurately described the contract law rules. See N.Y. Br. 45-48. It is hornbook law that contracts requiring continuing and indefinite performance are "commonly terminable by either party." Restatement (Second) of Contracts § 33 cmt. d (1981); N.J. Br. 14-15; U.S. Br. 17-18. That principle was well-established when this Compact was drafted. See N.J. Br. 15-16. It accords with the likeliest intent of parties. See *M&G Polymers USA v. Tackett*, 574 U.S. 427, 441 (2015); 1 Williston on Contracts § 4:23 (4th ed. Oct. 2022 update). And it affords the parties flexibility to accommodate the passage of time and changed circumstances. N.J. Br. 16-17.

Because New York cannot dispute how contract law operates,[2] it instead challenges whether contract law

[2] New York does object that if contract law applies, this Court must effectuate the drafters' intent. See Br. 46. But New York identifies no evidence in either the text or history that the drafters sought to cabin withdrawal in perpetuity. See *supra* at 3-7.

applies and warns of the consequences that would follow. Neither argument withstands scrutiny.

a. New York's insistence that contract law does not apply to this Compact, Br. 16, 17, 43, 47-48, conflicts with centuries of precedent. This Court has long explained that "the terms compact and contract are synonymous," and that compacts must be interpreted in accordance with contract law. *Green v. Biddle*, 21 U.S. 1, 92 (1823); see also, *e.g.*, *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013) ("compacts are construed as contracts under the principles of contract law"); *Kentucky Union Co. v. Kentucky*, 219 U.S. 140, 161 (1911). That principle was settled at the time this Compact was drafted, and the drafters would have understood it well. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

There are good reasons to apply the relevant contract principles to compacts. Allowing withdrawal ensures that neither parties nor the public are held hostage to a contract that has become dysfunctional; accommodates changed circumstances; and better promotes compromise. See N.J. Br. 16-17. Although New York claims these justifications somehow do not apply if the contracting parties are sovereign States, Br. 47-48, flexibility is *more* important—not less—for sovereigns. See, *e.g.*, *Newton v. Comm'rs*, 100 U.S. 548, 559 (1880) (finding legislature "should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require"); N.J. Br. 19-22.

New York also erroneously contends that contract law's withdrawal protections are unnecessary here because the Compact allows for termination by "mutual [agreement] . . . or congressional repeal." Br. 46. But that is regularly true of contracts as well: parties can

always decide by mutual agreement to terminate their contract, and a sovereign can often "take actions that prevent the performance of existing contracts." U.S. Br. 19. To conclude that these pathways suffice to justify avoiding the traditional contract law withdrawal rule would vitiate that rule altogether.

b. New York also misunderstands the consequences of applying contract law to interstate compacts. Contract law limits the types of compacts for which unilateral withdrawal is appropriate. See N.J. Br. 26-30. *First*, whenever a compact expressly addresses withdrawal, the parties must adhere to their choice. *Second*, such withdrawal is presumed only if a compact requires ongoing and indefinite performance. *Third*, no State can unilaterally withdraw from silent compacts that create vested rights. This rule thus applies only to a narrow set of compacts—those that are silent on withdrawal, involve ongoing and indefinite performance, *and* do not create vested rights.

New York's claim that the contract law rule would "destabilize" compacts is wrong. Br. 39. The best New York can do is highlight "fifteen existing bistate compacts" that might be affected. *Id.*; N.J. Br. App. 1a-43a (listing 160 compacts). As a threshold matter, even that low number is inflated: the Port Authority Compact has an express provision limiting withdrawal, see *infra* at 19, and the Costilla Creek Compact conveys vested water rights, see Pub. L. 79-408, 60 Stat. 246 (1946). But even taking New York's number at face value, the compacts it identifies represent a vanishingly small fraction of the compacts in existence, because most compacts address withdrawal or involve vested rights. See N.J. Br. 26-28. And even for the few compacts affected, withdrawals will be rare—

just as they are rare for those compacts with express unilateral withdrawal provisions. See N.J. Br. 30.[3]

Although New York responds that the vested rights inquiry "does not lend itself to practical application," Br. 38, vested rights are nothing new. Federal courts have been evaluating whether agreements establish vested rights for two centuries. See, *e.g.*, *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37, 44 n.10 (2005); *Green*, 21 U.S., at 28-29; *Fletcher v. Peck*, 10 U.S. 87, 135 (1810). This Court has applied this inquiry not just to private contracts, but to contracts between sovereigns. See *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986). And contrary to New York's misapprehension, see Br. 38-39, compacts involving vested rights *and* "ongoing regulatory authority" do not complicate the analysis: where the compact creates vested rights, a State cannot withdraw unilaterally. See N.J. Br. 27-29.

Nor does this inquiry "break[] down" for this Compact. N.Y. Br. 39. New York suggests that this Compact involves "shared regulation of physical land" and so "involve[s] . . . property." *Id.*, at 39-40. But the mere fact that regulation operates within a defined area of land (say, one that only affects workers at a particular facility) does not mean it creates a property or contract right. See *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994). Here, nothing in the Compact creates a permanent right for New York,

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[3] Nor should this Court credit amici Compact Entities' claim that New Jersey's position would destabilize compacting. *None* of the three Entities would be affected by this rule because their compacts all expressly authorize unilateral withdrawal. See N.J. Stat. Ann. § 9:23B-11(a) (Interstate Compact for Juveniles); *id.*, § 45:9-6.2(21)(b) (Interstate Medical Licensure Compact); *id.*, § 45:11A-9(X)(c) (Nurse Multistate Licensure Compact).

New Jersey, or any other party. See N.J. Br. 29 & n.7. It thus does not implicate any vested rights and does not preclude withdrawal.

2. State Sovereignty.

Settled principles of state sovereignty point to the same conclusion: New Jersey may withdraw. See N.J. Br. 18-24; U.S. Br. 20-23; Tex. Br. 10-19. This Court's "interpretation of interstate compacts" is "informed" by "[t]he background notion that a State does not easily cede its sovereignty." *Tarrant*, 569 U.S., at 631. Therefore, "when confronted with silence in compacts touching on" sovereign authority, this Court consistently draws the "inference" that "each State was left to regulate the activities of her own citizens." *Id.*, at 632 (citation omitted).

New York primarily argues that this presumption applies only to whether a State ceded powers "in the first place," and not to whether a compact requires the State to cede its sovereignty in perpetuity. Br. 40. But this Court does not lightly "presume that a sovereign *forever* waives the right to exercise one of its sovereign powers." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (emphasis added).

Indeed, the justifications for this Court's presumption all readily apply to this dispute over withdrawal. See N.J. Br. 19-24. Requiring a clearer statement to foreclose withdrawal safeguards the continuing right of the legislature to address new problems and changing circumstances. See *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality op.). It ensures that States can remain accountable to their people. See *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 561 (1830). It aligns with the likeliest intent of States, which "rarely relinquish their sovereign powers" in

perpetuity. *Tarrant*, 569 U.S., at 632. And it provides compacting States fair notice before they forever delegate police powers. See *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1568, 1570 (2022).

New York's distinction between a delegation of authority "in the first place" and the scope of that delegation, Br. 40, is also illusory. In *Tarrant*, for example, it was undisputed that the compacting States had ceded some sovereign water rights, and the question was how far that surrender extended—specifically, whether the States could cross state borders to access that water. 569 U.S., at 618. Although those States had ceded some of their sovereignty, the Court refused to extend that provision any further absent a clear statement. *Id.*, at 632; see also *Virginia v. Maryland*, 540 U.S. 56, 66-67 (2003) (refusing to extend provision requiring consent to regulate fishing rights to require consent for building improvements).

This case is no different. The parties agree that the States ceded some sovereignty to the Commission, but do not agree whether that delegation also locks in the surrender of their police powers in perpetuity. Nor does one automatically imply the other: multiple compacts delegate sovereign authority while still permitting unilateral withdrawal. See U.S. Br. 23; see also, *e.g.*, Appalachian States Low-Level Radioactive Waste Compact, Pub. L. 100-319, 102 Stat. 471 (1988); Interstate Compact for Juveniles, N.J. Stat. Ann. § 9:23B-11; Nurse Multistate Licensure Compact, N.J. Stat. Ann. § 45:11A-9. This Compact's silence thus preserves the signatories' sovereign rights.

New York also claims that the doctrine protecting sovereignty—and its close cousin, unmistakability—has no role in agreements between sovereigns. See Br. 42-45. But *Tarrant* itself involved a compact between

sovereigns. See 569 U.S., at 631. And this Court has applied analogous principles to other legal disputes between multiple sovereigns. See *Bowen*, 477 U.S., at 52-53 (reiterating in case involving contract between United States and State that contracts "should be construed, if possible, to avoid foreclosing exercise of sovereign authority"); see also *United States v. Alaska*, 521 U.S. 1, 35 (1997) (United States and State); *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987) (United States and tribe).

There are good reasons why these principles apply here. Although New York emphasizes that state legislatures *can* bind future legislatures in a compact, see Br. 44, that misses the point. Tying the hands of future legislatures to a particular exercise of police powers is a momentous choice—even if a sovereign sits on the other side of the bargaining table—and one would expect more than silence to achieve that end. See *Merrion*, 455 U.S., at 148 ("presum[ing]" such a delegation "turns the concept of sovereignty on its head"). This Compact is the perfect example: New Jersey ceded an essential aspect of its sovereignty—"exclusive jurisdiction and sovereignty over persons and property within its territory." *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977). The Commission, not New Jersey, enjoys exclusive authority to regulate labor via licensing at the port. Compl. App. 9a-26a. And the Compact bars New Jersey from pursuing a less burdensome regulatory scheme. It thus "block[s]" New Jersey's "sovereign power" to regulate within its territory—and under New York's reading, in perpetuity. N.Y. Br. 44-45. To achieve that end without fair notice works a serious sovereign harm.

New York also musters no support for its assertion that sovereignty principles *prohibit* withdrawal here.

See *id.*, at 35. New York argues that it has a sovereign right, "[i]nherent in the act of forging a compact," for "each state" to "keep its commitment to the other." *Id.* But that assumes New York's conclusion—that *silence* is a commitment not to withdraw. New York also suggests compacts cannot be "binding," *id.*, at 37, if they authorize withdrawal. But many compacts do exactly that. See N.J. Br. 36-37 (collecting examples).

New York's claim that it would suffer a sovereign harm from withdrawal also misunderstands state sovereignty. New York and New Jersey both have strong sovereign interests in exercising police powers within their own borders. Indeed, as the Compact itself recognizes, the Commission's police powers in New Jersey were delegated by New Jersey, and its police powers in New York were delegated by New York. Compl. App. 3a (art. I.4), 6a (art. III.1). Chapter 324, in withdrawing New Jersey from the Compact, does not disturb New York's full sovereignty within its territory. New York's arguments amount to a complaint that it can no longer exercise police powers within New Jersey's sovereign domain. But New York has no inherent right to take such actions in the first place.[4]

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[4] Nor does any purported harm from New Jersey's proposal for dissolution support New York's argument. See N.Y. Br. 20, 34. Because the question whether a party can withdraw from a contract is different from what it owes in dissolution, any harm from dissolution would at most entitle New York to a difference in dollars, not an injunction forcing New Jersey to remain. Regardless, that claim would be doomed to fail: New Jersey only claims the assets tied to activity in its borders, and not revenues properly owed to New York. Compl. App. 46a-48a. Moreover, contrary to New York's claim, Br. 33, the lack of express language in this Compact governing dissolution does not bear on whether withdrawal is allowed. Myriad compacts with express unilateral withdrawal provisions are also silent regarding the terms of

Finally, New York's reliance on treaty law to support its sovereignty argument, see N.Y. Br. 17-18, only harms its position. Since the early days of the Republic, the United States has "terminated dozens of treaties." Restatement (Fourth) of the Foreign Relations Law of the U.S. § 313 n.3 (Mar. 2022 update); see N.J. Br. 41-42. Some of these treaties lacked withdrawal clauses. See N.J. Br. 41 n.10. And despite New York's assertion, a number of withdrawals occurred without "actual or threatened war." Compare N.Y. Br. 42 n.15, with PI Opp. App. 61a (Mar. 7, 2005 letter from C. Rice) (withdrawal from treaty based on concerns with interference in criminal system); Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579, 1583 (2005) (noting withdrawal from treaty establishing International Court of Justice). That practice is also consistent with longstanding principles of international law, which confirm "a right of . . . withdrawal may be implied by the nature of the treaty." Vienna Convention on the Law of Treaties art. 56(1)(b), May 23, 1969, 1115 U.N.T.S. 331. Thus, to the extent treaty law is relevant here, it supports New Jersey's withdrawal.

3. Compact Structure.

Although the Compact's drafters did not specifically address withdrawal, the structure they adopted confirms each State can unilaterally withdraw.

As New Jersey and the United States explained, the Compact depends on each State's ongoing assent. See N.J. Br. 24-25; U.S. Br. 10-11. The Commission can operate only by mutual consent of the States' individual commissioners, Compl. App. 6a (art. III.3), and

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dissolution. See, *e.g.*, Del. Valley Urban Area Compact, N.J. Stat. Ann. § 32:27-7; Interstate Compact on Industrialized/Modular Buildings, N.J. Stat. Ann. §§ 32:33-1 to -13.

either State's commissioner or Governor may prevent the Commission from funding its operations, Compl. App. 6a (art. III.3), 31a (art. XIII.2). It would be incongruous for the Compact to permit either State to paralyze the Commission's work and yet require the States to remain forever bound.

New York wrongly insists that the incongruous interpretation is the right one. New York claims that it makes no sense "to design a governance structure that requires unanimity of the States" but allows States to withdraw. Br. 23. But New York gets the logic backwards: if the Commission can only continue to operate successfully based upon the "unanimity of the States," that means *either State*, on its own, can shut down the agency's work. And New York provides no reason why the drafters would have given each State the right to unilaterally shut down the Commission's funding and actions while requiring both to stay in the Compact forever. To the contrary, multiple compacts allow for unilateral withdrawal while requiring the agreement of every signatory state before the compact agency can take action. See, *e.g.*, Wabash Valley Compact, Pub. L. 86-375, 73 Stat. 694 (1959); Tahoe Regional Planning Compact, Pub. L. 91-148, 83 Stat. 360 (1969).

New York's alternative rebuttal—that this bistate structure makes withdrawal *unnecessary*—also fails. New York contends that "New Jersey's co-equal power over the Commission . . . obviates any need for unilateral withdrawal." Br. 14. But the docket in this action proves otherwise. The Commission now wishes to join this very suit as amicus against its own co-creator despite New Jersey's refusal to consent—arguing that "[a]cross its seven decades," the Commission has "participated in dozens of lawsuits without" approval

from its two state commissioners. See Mot. for Leave to File Amicus Br. of Waterfront Comm'n of N.Y. Harbor at 1. And when New Jersey proposed amendments years ago to rein in precisely this sort of behavior, New York rejected them out of hand. See N.J. Br. 8.[5]

Nor does *Texas v. New Mexico*, 462 U.S. 554 (1983), rebut this structural analysis. N.Y. Br. 23-24. *Texas* correctly recognized that an agency structure dependent on States' ongoing assent increases the "likelihood of impasse." 462 U.S., at 565. *Texas* also correctly recognized that such "paralyzing impasses" do not make a Compact "void," *id.*, the point New York highlights. But that has no relevance to this suit. There is nothing *void* about a compact—or a contract, for that matter—that permits withdrawal, and that is a choice States often make. See N.J. Br. 22-23. *Texas* thus lends no support to New York's unprecedented theory.

II. New York Finds No Support In Other Tools Of Interpretation.

New York also claims support for its approach from compact practice and from New Jersey's course of performance. Neither advances its cause.

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[5] The Commission dedicates nearly its entire brief to arguing that the continued presence of organized crime justifies its existence. See Br. 4-27. But to the degree that a significant criminal element persists at the port, that is hardly a point in the agency's favor. And the question is not whether this Court *agrees* the New Jersey State Police can better police the port, but whether New Jersey can make that sovereign choice within its borders. U.S. Br. 22-23; see also N.J. Br. in Opp. to Prelim. Inj. 29-30, 33 (detailing how New Jersey State Police is better situated to protect the port from 21st-century challenges).

A. Compact Practice.

New York attempts to infer "the actual intent of the drafters" from the "history and tradition of compacts." Br. 30. But the evidence undermines its position.

To begin, New York's thin account of history sheds no light on how to interpret continuing performance compacts. As New York admits, history from the early days of the Republic is consistent with New Jersey's rule: because the "earliest compacts" involved "boundary and water disputes," they did not allow for withdrawal. N.Y. Br. 30; see N.J. Br. 27-28.

The central defect in New York's argument comes in its next shift. After citing Founding-era compacts, New York baldly claims that "[t]his understanding"—that States could not withdraw from boundary agreements—"was carried forward into compacts through the first half of the twentieth century that shared jurisdiction or vested regulatory powers in interstate agencies," even where those agreements conferred no vested rights. Br. 30. But New York cites nothing to support that assumption, and its claim cannot withstand scrutiny. As noted, it was already well-established by 1953 that compacts are interpreted as contracts, *supra* at 8-9; that contracts of continuing performance permit withdrawal, *supra* at 7; and that these contracts are understood differently than those in which vested rights are conveyed, *supra* at 9-11. The Compact's drafters had no reason to believe compacts would be any different.

Indeed, when the United States in 1950 canvassed the history of interstate compacts and contemporaneous rules of law, the Solicitor General reached the opposite conclusion from what New York asserts was so obvious at the time. See Br. for U.S. as Amicus

Curiae at 23-24, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951) (No. 147), 1950 WL 78371. As the U.S. Government explained then—just as it reiterates today—compacts like this one must be read to allow unilateral withdrawal. See *id.*, at 23-27; U.S. Br. 21-22.

New York cannot bridge the gap between early boundary compacts and 20th-century compacts of performance. New York relies on the Port Authority Compact, which in New York's view establishes the "background understanding that unilateral termination is prohibited" in performance compacts—not just boundary compacts. Br. 31. But that compact is not silent on withdrawal at all. The Port Authority Compact features an express withdrawal clause: it permitted each party to withdraw "prior to July 1, 1923"—its first two years. N.Y.-N.J. Port Auth. Compact, ch. 77, S.J. Res. 88, 67th Cong., 42 Stat. 174, art. 21 (1921). That provision forecloses the signatory States from unilaterally withdrawing *later*. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 96-99 (2012) (describing *expressio unius* canon). After all, a receipt that permits returns within 30 days does not allow the customer to return the merchandise on day 60. Because New York errs in claiming that the Port Authority Compact "lacked a provision addressing termination," Br. 31, its inferences cannot follow.

New York likewise misses the mark in arguing that "[c]ustomary practice" supports imputing to the drafters an intention to limit withdrawal. Br. 32. New York says that unilateral withdrawal provisions were unprecedented before 1953. That is incorrect: numerous compacts before this one contained unilateral withdrawal provisions. See, *e.g.*, Atl. States Marine Fisheries Compact, Pub. L. 77-539, 56 Stat. 267

(1942); Northeastern Interstate Forest Fire Protection Compact, Pub. L. 81-129, 63 Stat. 271 (1949). While New York urges this Court to ignore these compacts and consider only "bistate agency compacts," Br. 31, New York cites no precedents subjecting bistate compacts to different legal rules than multistate agreements, and nothing in the historical record suggests that the drafters saw them as unique.

New York also claims that no other State has "successfully revoked a compact without express authorization or the other compacting State's consent." Br. 34. That is incorrect. See N.H. Laws of 2008, Ch. 28 (withdrawing from N.H.-Vt. Solid Waste Compact, Pub. L. 97-278, 96 Stat. 1207 (1982), which was silent on withdrawal); Md. Laws of 2007, Ch. 193 (withdrawing from Delmarva Advisory Council Agreement, Md. Code, Art. 32B, §§ 1-101 to -111, which was silent on withdrawal); Kansas Laws of 2013, Ch. 16, § 1 (withdrawing from Missouri River Toll Bridge Compact, H.J. Res. 159, 73d Cong., 48 Stat. 105 (1933), because bridge was never built). Nor do the two allegedly unsuccessful withdrawals that New York cites, see Br. 34, shed light on the drafters' intent. One involved a boundary compact, *Virginia v. West Virginia*, 78 U.S. 39 (1870), and the other settled before it could be adjudicated. See N.Y. Br. 34.

Finally, New York's reliance on law reviews to fill in the missing history underscores the weakness of its argument. New York cites two works from the 1950s, Br. 31-32, but provides no evidence that New York or New Jersey was aware of them—let alone influenced by them—during negotiations. By contrast, New York would have been aware of the Solicitor General's 1950 brief in *Dyer* taking the opposite view of withdrawal because New York filed an amicus brief in *Dyer* too.

That provides far better evidence of what the drafters understood about withdrawal.

B. Subsequent Performance.

Nothing in the States' course of performance undermines New Jersey's withdrawal. New York's first error is relying on the States' behavior throughout the six decades in which neither State wished to withdraw. While the New Jersey Legislature did not seek to withdraw until 2015, it had no desire to do so until that time. See *Minister of Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co.*, 214 N.Y. 268, 274 (1915) (finding it "doubtful whether evidence . . . that people had not exercised certain rights [i]s a means of proving that they did not possess the rights when such failure of exercise might be entirely due to other causes"). Indeed, as New York acknowledges, the parties worked cooperatively throughout this period. Br. 27-28. It was only when that changed, see N.J. Br. 8-9, that New Jersey decided to withdraw.

Nor does New York make any headway in citing a series of *unenacted* bills proposing to transfer powers to the Port Authority with concurrence, or to petition Congress to repeal the Compact. N.Y. Br. 29. For one, none of these bills were referred out of committee and thus hardly reflect the views or the performance of the State itself. See *Mims v. Arrow Fin. Servs.,* 565 U.S. 368, 385 (2012). For another, unenacted proposals introduced six decades after the fact shed especially little light on drafter intent. Finally, there would have been a perfectly good reason to first seek repeal by Congress or withdrawal by concurrence—to avoid litigation and attendant delays.

Finally, the course of performance in 2015 and 2018 cannot foreclose New Jersey's withdrawal. Although

then-Governor Chris Christie did veto withdrawal legislation in 2015, that was an isolated event. See Restatement (Second) of Contracts § 202 cmt. g (course of performance tool "does not apply to action on a single occasion"); *Stanford Hosp. & Clinics v. NLRB*, 370 F.3d 1210, 1214 (CADC 2004) (collecting cases).[6] Even were it relevant, the New Jersey Legislature overwhelmingly supported withdrawal in 2015 and 2018, and the Governor subsequently agreed. An isolated and temporary disagreement between the Legislature and the Governor seven decades after the enactment of a compact does not establish any course of performance, let alone one sufficient to overcome contemporaneous interpretive evidence. Each time New Jersey has spoken with a *unified* voice, it has unequivocally found that it can withdraw of its own accord.

[6] The views of other, unelected individuals during that single episode, see N.Y. Br. 29, are especially unhelpful for imputing the State's official position on this legal question. See *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) (warning against "judicial reliance on legislative materials" generated by "unelected staffers").

CONCLUSION

This Court should grant New Jersey's motion for judgment on the pleadings and deny New York's cross-motion for judgment on the pleadings.

Respectfully submitted,

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