

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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SECRETARY PENNSYLVANIA DEPARTMENT OF  
LABOR AND INDUSTRY,  
*Petitioner*

v.

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION,  
*Respondent*

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

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Under the Compact Clause of the Constitution, the States may contract with each other to cooperatively address issues of mutual concern. U.S. CONST., Art. I, § 10, cl. 3. In 1934, Pennsylvania and New Jersey entered into an interstate compact to construct bridges across the Delaware River and created the Delaware River Joint Toll Bridge Commission. The Third Circuit Court of Appeals held that Pennsylvania relinquished *all* sovereign authority over that Commission merely by entering into the compact.

The question presented is:

Do compacting States, simply by creating an interstate compact, relinquish all sovereign authority over that compact entity unless expressly reserved?

## **PARTIES TO THE PROCEEDING**

Petitioner is the Acting Secretary of the Pennsylvania Department of Labor and Industry, Jennifer Berrier.

Respondent is the Delaware River Joint Toll Bridge Commission.

## **RELATED PROCEEDINGS**

*Delaware River Joint Toll Bridge Commission v. W. Gerald Oleksiak*, No. 2-19-cv-02978, United States District Court for the Eastern District of Pennsylvania. Preliminary injunction entered August 2, 2019. Judgment entered March 26, 2020.

*Delaware River Joint Toll Bridge Commission v. Secretary Pennsylvania Department of Labor and Industry*, No, 20-1898, United States Court of Appeals for the Third Circuit. Judgment entered January 12, 2021.

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## INTRODUCTION

Interstate compact entities are created by a triad of sovereigns—two States plus the Federal Government. Because of the origin and function of compacts, and the necessary interaction between sovereigns, the Court has recognized that it has a special role with respect to these entities. This Court has also recognized a related fundamental principle: a State's sovereignty must be expressly surrendered in unmistakable terms.

In direct contravention of this principle, the Court of Appeals here held that when States create interstate compacts, they relinquish *all* aspects of sovereignty not expressly retained, including the most essential and least limitable—police powers. If the Court of Appeals' decision is allowed to stand, the effects could be profound and far-reaching. Every State has construction codes to ensure building safety. But under this holding, a compact entity need not comply with any of those requirements. Additionally, under the Court of Appeals' reasoning, a compact entity could ignore: zoning laws and build a 60-story office building; environmental laws and build a coal-fired power plant; or fire codes and build structures without proper fire suppression.

The Court of Appeals' decision threatens the very balance of sovereign interests at play when compact entities are created, and thus the future of such compacts. To protect state sovereignty and the future viability of compacts, this Court should reaffirm its longstanding precedent—only a State's express relinquishment of sovereignty will work a surrender; every other aspect of sovereignty is retained.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 985 F.3d 189 and is appended to this petition at 1a. The decision of the District Court on summary judgment is not reported, but is appended at 14a.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 2021. This petition is being filed within 150 days thereafter as authorized under the Court's March 19, 2020 order. The Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, Clause 3 of the United States Constitution provides in pertinent part that “[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State \* \* \*.” U.S. CONST. Art. I, Sec. 10, Cl. 3.

The Tenth Amendment to the United States Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST., Amend. X.

## STATEMENT OF THE CASE

1. The mission of interstate compacts “is to address interests and problems that do not coincide nicely either with the national boundaries or with State lines.” *Hess v. Port. Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994). These problems “may be badly served or not

served at all by the ordinary channels of National or State political action.” *Ibid.* Compacts have proven useful for addressing these shared state problems, through a common agenda, all while spreading the costs of doing so among those States. *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951); see Felix Frankfurter & James Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 Yale L.J. 685, 704, 707-708 (1925); see also James F. Blumstein & Thomas J. Cheeseman, *State Empowerment and the Compact Clause*, 27 Wm. & Mary Bill Rts. J. 775, 778-779 (2019).

Because of the special origin and function of compacts, they present special concerns. Compact entities “typically are creations of three discrete sovereigns: two States and the Federal Government.” *Hess*, 513 U.S. at 40. A compact is one of “two peaceful modes of settling disputes among the states.” Frankfurter & Landis, *supra* at 692; see *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275, 279 n.5 (1959). The other is through litigation, that is, this Court’s Article III original jurisdiction. *Petty*, 359 U.S. at 279 n.5. Litigation, however, cannot create an entity “to regulate a public work.” Notes, *Charting No Man’s Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts*, 111 Harv. L. Rev. 1991, 1995 n.29 (1998). As the “pressure of modern interstate problems” mounted, this Court “emphasize[d] the practical constitutional alternative provided by the Compact Clause.” *Sims*, 341 U.S. at 27, citing *People of State of N.Y. v. State of N.J.*, 256 U.S. 296, 313 (1921); Frankfurter & Landis, *supra* at 691.

Given the origin and function of compacts, and the necessary interaction between States, the Court has

long recognized that these entities require its special attention. Because of compacts' inherent structure, involving multiple States, and the need to foster peace between compacting States, this Court has emphasized that "the function and duty of the Supreme Court of the Nation" is to determine the "nature and scope of obligations" under an interstate compact. *Sims*, 341 U.S. at 28; *see also Petty*, 359 U.S. at 279 & n.5.

2. In 1934, the Commonwealth of Pennsylvania and the State of New Jersey created the Delaware River Joint Toll Bridge Commission (the Commission) for the "authorized purposes" of jointly owning and operating bridges spanning the Delaware River. Appx. 3a; Appx. 64a (Compact Art II). The Commission was created by interstate compact under Article I, Section 10, Clause 3 of the United States Constitution and codified in legislation enacted by each State. 36 P.S. § 3401 *et seq.*; N.J. STAT. ANN. § 32:8-1 *et seq.* (the Compact). The Compact was approved by Congress in 1935.<sup>1</sup> The States and Congress approved amendments to the Compact in 1947,<sup>2</sup> 1952,<sup>3</sup> and 1987.<sup>4</sup> Appx. 23a. The States attempted to expand the Commission's jurisdiction to port and terminal facilities in 1953, but the proposed amendment "failed to gain full congressional approval." *Ibid.* (cleaned up).<sup>5</sup>

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<sup>1</sup> 49 Stat. 1058-64.

<sup>2</sup> 61 Stat. 752-56.

<sup>3</sup> 66 Stat. 28-32.

<sup>4</sup> 101 Stat. 205-08.

<sup>5</sup> Because the 1953 proposed amendment was not approved by Congress, the version of the Compact codified in the States' respective statutes does not reflect the federally-approved



The Compact, which can be found in full at Appendix 61a through 90a, does not state that the States generally waive their sovereignty. As to the specific police power at issue here—ensuring building safety within Pennsylvania’s borders—the Compact makes no mention of it. The Compact mentions health, safety, or welfare only once: in a provision giving the Commission authority to make and enforce rules and regulations regarding the safe use of its bridges. Appx. 80a (Compact Art. X(g)).

The Commission currently controls seven toll bridges and thirteen toll-supported bridges along the northern 140 miles of the States’ shared border. Appx. 18a.

3. Two decades before the Commission was formed, Pennsylvania created its Department of Labor and Industry (the Department) empowering it to ensure a safe workplace. Act of June 2, 1913, P.L. 396, No. 267. In the ensuing decades leading up to the creation of the Commission, Pennsylvania enacted numerous statutes outlining the Department’s authority over building safety. *See, e.g.*, the Fire and Panic Act, Act of Apr. 27, 1972, P.L. 465, No. 299, 35 P.S. § 1221 *et seq.*; State Fire Marshall Law, Act of Apr. 27, 1927, P.L. 450, 452-53, No. 291, § 3, 35 P.S. § 1181 *et seq.*; Elevator Regulation Law, Act of May 2, 1929, P.L. 1518, No. 452, 35 P.S. § 1341 *et seq.* (repealed).

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Compact. Appx. 23a at n.35. The Court of Appeals mistakenly quoted language from the Compact using the 1953 proposed language. *Compare* Appx. 4a (quoting 1953 version of Art. II(p)) *with* 49 Stat. 1060 (original 1935 language the Court of Appeals purports to quote). A copy of the Congressionally-approved Compact can be found in the Appendix at 61a.

In 1999, the Commonwealth enacted the Pennsylvania Construction Code Act, 35 P.S. § 7210.101, *et seq.*, “[t]o provide [construction] standards for the protection of life, health, property and environment and for the safety and welfare of the consumer, general public and the owners and occupants of buildings and structures.” 35 P.S. § 7210.102(b)(1). This act authorizes the Department to promulgate regulations to implement construction standards, which collectively are known as the Pennsylvania Uniform Construction Code. 35 P.S. §§ 7210.105, 7210.301. This act also empowers the Department to, *inter alia*, “maintain Statewide administration and inspection authority over \* \* \* elevators,” inspect State-owned buildings, and ensure that “municipalities, municipal code officials, third-party agencies, construction code officials and code administrators” are enforcing the standards. 35 P.S. § 7210.105(b),(c)(1).

For more than eighty years, the Commission submitted to Pennsylvania’s health and safety laws. Appx. 58a. For example, in February 1952 the Commission applied to the Department for a permit to install an elevator at its Morrisville, Pennsylvania building.<sup>6</sup> The Department inspected the elevator and issued a certificate of operations. From July 1994 through November 2018, annual safety inspections were performed in conformance with the Commonwealth’s elevator safety regulations on the Morrisville elevator by a certified elevator inspector.

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<sup>6</sup> The following facts are from the Department’s Statement of Undisputed Facts in Support of Summary Judgement. E.D.Pa., No. 2:19-cv-2978, Doc. No. 43-2 at pp. 8-22. These facts are undisputed, as the Commission did not timely challenge them. Appx. 58a n.140.

Likewise, in August 1989 the Commission applied to the Department to install a new elevator in its Delaware Water Gap Toll Bridge Plaza. The Department annually inspected the elevator pursuant to Commonwealth law until November 2008, when the elevator was taken out-of-service.

Beginning in October 2014, the Commission sought and received from the Department Certificates of Operations for its elevator at the I-78 Toll Plaza building located in Easton, Pennsylvania. On July 17, 2019, the Department noted several safety violations in the operations of the elevator, requiring the Commission to correct these safety violations. The Commission had also complied with the Commonwealth's Boiler and Unfired Pressure Vessel Law in no fewer than five of its buildings.<sup>7</sup>

This compliance with Pennsylvania law ended in 2018 with the construction of the Scudder Falls administration building.

4. The Commission owns the Scudder Falls Bridge, which carries Interstate 295 over the Delaware River. Appx. 18a. In 2016, the Commission purchased a ten-acre parcel of land in Pennsylvania near the bridge to construct a new administration building. *Ibid.* The Commission began construction of the administration building without obtaining a building permit, in violation of the Uniform Construction Code.

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<sup>7</sup> These buildings include the Milford-Montague Toll Bridge building in Milford, Pennsylvania; Delaware Water Gap building in Delaware Water Gap, Pennsylvania; Portland Columbia Bridge operations building in Portland, Pennsylvania; Morrisville Bridge building in Morrisville Pennsylvania; and New Hope Lambertville Bridge facility in New Hope, Pennsylvania.

Appx. 19a (citing 34 Pa. Code § 403.42a). In November 2018, two Department inspectors drove past and noticed the unauthorized construction. *Ibid.* “The two inspectors notified the Department’s Uniform Construction Code Field Operations Manager[,]” who advised the Commission that he intended to send a building inspector to issue a stop work order. Appx. 19a-20a (citing 34 Pa. Code § 403.81). “[T]he Commission responded by stating it is not subject to the regulatory authority of the Commonwealth of Pennsylvania including the Department’s Uniform Construction Code.” Appx. 20a (internal quotation marks omitted).

In February 2019, the Secretary of the Pennsylvania Department of Labor and Industry (the Secretary) responded to the Commission’s assertion, stating that the Commonwealth “has not surrendered its sovereignty, especially as it extends to its sovereign police power to protect the safety, health and welfare of its citizens.” Appx. 20a (citing 35 P.S. § 7210.102(b)(1); 34 Pa. Code § 403.34(b)). The Secretary explained that “to carry out that police power and to protect life, health, property and environment and to ensure the safety and welfare of the general public and the owners, occupants and users of buildings and structures, the Uniform Construction Code mandates plans review and inspections of all building construction projects.” *Ibid.* (cleaned up). The Secretary offered to excuse the Commission’s violation of the Uniform Construction Code if it agreed to submit to the Department’s regulations in other areas, such as allowing inspection over the construction of elevators and fuel-pumping stations. Appx. 20a-21a. The Commission did not agree and pushed forward with construction of the administration building without state inspection. Appx. 21a.

5. The Commission subsequently sued the Secretary seeking declaratory relief as to the parties' rights under the Compact and to enjoin it from imposing the Commonwealth's building regulations on the Commission. Appx. 21a. The District Court granted the Commission's preliminary injunction motion, enjoining the Secretary from directing the Department to "seek[] to inspect or approve the elevators in the \* \* \* Scudder Falls Administration Building or from further impeding, interfering or delaying the Plaintiff's contractors or subcontractors from immediately repairing and activating the elevator systems." Appx. 5a (quoting preliminary injunction order).

The Secretary filed an answer and counterclaim for declaratory relief explaining that Pennsylvania had "reserved its regulatory power over certain property use matters as an exercise of its fundamental police powers to protect the health, safety and welfare of its citizens." Appx. 6a (quoting answer). Among these reserved regulatory powers was the ability to enforce "critical safety-based laws applying to building construction, elevator construction, boiler installation and operation, and combustible and flammable liquid storage and dispensing." *Ibid.*

Because of the preliminary injunction, the Commission completed construction of its administration building with uninspected elevators and fuel-dispensing devices in place. Appx. 21a.

The District Court granted the Commission's motion for summary judgment, declaring that "under the express terms of the \* \* \* Compact creating the [Commission]," the Secretary "may not \* \* \* unilaterally interfere, direct, inspect, or regulate" the Com-

mission’s “elevator operations” under the Uniform Construction Code or the Commission’s “tanks, pumps, and other fuel-dispensing devices” under the Combustible and Flammable Liquids Act regulations, at the Scudder Falls Administration Building. Appx. 6a (quoting district court order).

6. The Secretary appealed to the Third Circuit Court of Appeals, which affirmed. Appx. 13a. The Court of Appeals held that “[b]y expressly creating” the Commission, Pennsylvania and New Jersey “relinquished all control over the [Commission] unless otherwise stated in the compact.” Appx. 12a (quoting *HIP Heightened Independence & Progress, Inc. v. Port Authority*, 693 F.3d 345, 358 (3d Cir. 2012)). The mere creation of the Compact, the Court of Appeals concluded, was an “expansive and clear” surrender of state sovereignty over the Commission: “Pennsylvania and New Jersey ‘relinquished *all* control over the [Commission].” Appx. 12a (emphasis in original) (quoting *HIP, supra.*).

## REASONS FOR GRANTING THE WRIT

### **I. The Court of Appeals’ decision conflicts with two centuries of this Court’s precedents, which establish that silence is a retention of sovereign power, not a relinquishment.**

The Court has long held that “the police power of a state \* \* \* [is] one of the most essential powers of government—one that is the least limitable.” *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915). “The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals \* \* \*.” *Barnes v. Glen Theatre*, 501 U.S. 560, 569

(1991) (plurality). This police power extends to ensuring the safety of buildings and their components. *See, e.g., United States v. Locke*, 471 U.S. 84, 104 (1985).

The delegation of any state sovereign power is “a very grave act,” *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U.S. 265, 273 (1908), so potentially perilous to the “safety [of] the public interests,” *In re Delaware R.R. Tax*, 85 U.S. 206, 225 (1873), that only one rule has sufficed—no “power of sovereignty, will be held by this court to have been surrendered, 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 (1861). This rule is universal. Whoever the sovereign—Federal, State, or Tribal—whatever the aspect of sovereignty at issue—taxing, regulatory authority, or property rights—the rule is the same. This rule is older than the Founding, is reflected in the Nation’s foundational documents, and has been consistently upheld by the Court for two centuries.

At the time of separation from Great Britain, the “United Colonies” declared themselves “Free and Independent States.” The Declaration of Independence para. 32 (U.S. 1776); *see Franchise Tax Bd. of Cal. v. Hyatt*, \_\_\_ U.S. \_\_\_, 139 S.Ct. 1485, 1493 (2020). Those States enjoyed “all the rights and powers of sovereign states,” including rights to self-government, independence, and equality. *Hyatt*, 139 S.Ct. at 1493. Because of the paramount importance of those rights, “to prevent the inadvertent surrender” of sovereign rights and potential conflicts between States over ambiguous surrenders, “the law of nations” required the surrender of sovereign rights “to be set forth in clear and express terms.” *Id.* at 852, 854-855, citing 1 M. de Vat-

tel, *The Law of Nations* (London, J. Newberry et al. eds., 1760), intro § 22, bk. II, §§ 57, 300.

The Tenth Amendment embodies this principle: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” See *Hyatt*, 139 S.Ct. at 1496; *Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122, 193 (1819); Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 Colum. L. Rev. 835, 871 (2020). Madison emphasized the rationale in Federalist No. 45, stating “[t]he powers delegated \* \* \* to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite,” and, therefore, impractical to delineate.

Just as the Country, in its founding documents, has followed this principle, so has this Court. In the words of Chief Justice John Marshall, “[w]hen the American people created [Congress], with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states.” *Sturges*, 17 U.S. at 193.

The necessity of express relinquishment of sovereignty has been emphasized in the specific context of interstate compacts. In *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614 (2013), a Texas Water District claimed that it had the right, under a compact between several States, to cross state lines and divert water from Oklahoma. *Id.* at 626. That right was premised on the compact’s “silence concerning state lines,” which, the Water District argued, created “a borderless common in which each of the four signatory



States may cross each other’s boundaries to access a shared pool of water.” *Id.* at 627. The Court rejected this argument, refusing to infer from “silence regarding state borders that the signatory States have dispensed with the core state prerogative to control water within their boundaries.” *Id.* at 632. Because “States rarely relinquish their sovereign powers,” the Court “expect[ed] a clear indication of such devolution, not inscrutable silence.” *Ibid.* Therefore, by their silence, the intent of the States was exactly the opposite of a surrender of state sovereignty—they did not intend to grant each other cross-border rights.

In every other context as well, when the surrender of sovereignty has been at stake, this Court has required a clear and express relinquishment.

Early, in *Providence Bank v. Billings*, 29 U.S. 514 (1830), a bank claimed that its charter, granted by the Rhode Island Legislature, rendered it exempt from a later-enacted taxing statute. *Id.* at 560. The Court rejected that argument because there was no express provision in the charter promising exemption from the State’s taxing authority. The Court emphasized that “the relinquishment of such a power is never to be assumed.” *Id.* at 561.

The Court reaffirmed this principle when a Delaware bank claimed a similar exemption. *See In re Delaware R.R. Tax*, 85 U.S. at 225-26. The language exempting or limiting a sovereign’s right to tax “must be clear beyond a reasonable doubt.” *Id.* at 225. Indeed, “[a]ll public grants are strictly construed,” for “[n]othing can be taken against the State by presumption or inference. The established rule of construction

in such cases is that rights, privileges, and immunities not expressly granted are reserved.” *Ibid.*<sup>8</sup>

More recently, oil companies argued that a Native Tribe surrendered its sovereign power to impose a severance tax on them by not expressly reserving that power in the parties’ lease agreements. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982). The oil companies claimed the Tribe waived its taxing power by “silence.” *Id.* at 148. This Court once again rejected that argument because “sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms.” *Ibid.* To presume otherwise, the Court admonished, would be to “turn the concept of sovereignty on its head.” *Ibid.*

In *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987), the Court applied the unmistakability rule to a treaty between the United States and the Cherokee Nation. Under that treaty, the Nation acquired fee simple title to a riverbed. *Id.* at 701. The Cherokee claimed that the United States had not reserved in the treaty its navigational servitude and so, when the United States constructed a navigational channel that destroyed mineral interests in the riverbed, the Nation had suffered a Fifth Amendment taking entitling it to damages. *Ibid.* The Court sided with the federal government and held that waiver of the United States’ “sovereign authority” over the control and improvement of navigable waters, entrusted to it through the Commerce Clause, “will not be im-

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<sup>8</sup> The Court had other occasions to apply this same principle. *See, e.g., Home Tel. & Tel. Co.*, 211 U.S. at 273, 277.

plied, but instead must be ‘surrendered in unmistakable terms.’” *Id.* at 707, quoting *Merrion*, 455 U.S. at 148).

The Court of Appeals’ holding that Pennsylvania ceded its sovereign authority through silence cannot be reconciled with this Court’s precedents.

**A. A compact is a unique legal document in that it is a contract, a treaty, and a federal statute. But in whatever form, silence cannot cede sovereignty.**

The rule set forth in the above precedents—that silence cannot cede sovereignty—holds true regardless of whether an interstate compact is considered a contract, a treaty, or a federal statute. A compact bears the hallmarks of all three. *Tarrant*, 569 U.S. at 628; *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1821); *see*; *Alabama v. North Carolina*, 560 U.S. 330, 351 (2010); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938); Zimmerman & Wendell, *The Law and Use of Interstate Compacts*, 1-2, 7 (The Council of State Governments 1976) (comparing a compact to a contract, a treaty, and a statute).<sup>9</sup>

Where a contract is silent on a particular subject, the “background” or “common-law rule speaks in the silence of the Compact[.]” *New Jersey v. New York*, 523 U.S. 767, 784 (1998); *see Tarrant*, 569 U.S. at 632. Thus, the “background notion that a State does not

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<sup>9</sup> A compact “is almost always a [state] statute,” too, just as the Compact is here. Zimmerman and Wendell, *supra* at 1; 36 P.S. § 3401 *et seq.*; *see also Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399 (1979).

easily cede its sovereignty” fills the silence in a compact. *Tarrant*, 569 U.S. at 631-32, *see New Jersey*, 523 U.S. at 783 n.6 (“the silence of the Compact was on the subject of settled law governing avulsion, which the parties’ silence showed no intent to modify”); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 435 (1934) (“existing laws [are] read into contracts,” including “the reservation of essential attributes of sovereign power”).

For a treaty, it is the same, silence means the matter must “be treated as not covered”—“a principle so obvious that it seems absurd to recite it.” *GE Energy Power Comm’n France SAS Corp. v. Outkumpu Stainless USA LLC*, \_\_ U.S. \_\_, 140 S.Ct. 1637, 1645 (2020), quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012). And if not covered, then, as “the founding era’s foremost expert on the law of nations,” Emmerich de Vattel, explained in his classic text, *The Law of Nations*, the default rule or presumption that sovereignty is retained applies. Vattel, *supra*, at bk. II, §§ 57, 300; *see Hyatt*, 139 S.Ct. at 1493.

For a statute, likewise, it must “be read with presumption favoring the retention of long-established and familiar principles.” *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). Again, the long-standing presumption is that sovereignty is retained unless expressly relinquished.

**B. The Court of Appeals upended fundamental principles concerning the relinquishment of state sovereignty.**

Previously, the Court of Appeals had correctly applied these principles. For example, in *Pivesky v. Ridge*, 98 F.3d 730 (3d Cir. 1996), the compact in question did “not explicitly state whether the commissioners” of the Delaware River Port Authority “may be removed by the governor prior to the expiration of their term.” *Id.* at 734. However, because the compact gave the governor the power to appoint commissioners, the federal law presumption applied, meaning that, in the absence of a contrary intent, the power of removal from office is incident to the power of appointment. *Ibid.*

In *International Union of Operating Engineers v. Delaware River Joint Toll Bridge Commission*, 311 F.3d 273 (3d Cir. 2002), the Court of Appeals correctly recognized and applied the unmistakability rule. “By compacting together to form the Commission, New Jersey and Pennsylvania have each surrendered a *portion* of their sovereignty over certain Delaware River bridge operations \* \* \*.” *Id.* at 276 (emphasis added). But because of the importance of state sovereignty, such a surrender had to “be treated with great care,” which meant following the rules of strict construction and unmistakability. *Id.* at 276, 280, citing *Jefferson Branch Bank*, 66 U.S. at 446.

Yet, a decade later, the Court of Appeals broke from this settled law. In *HIP*, that court stated that “[b]y expressly creating the bi-state entity, [the compacting states] relinquished *all* control over the [compact entity] unless otherwise stated in the compact.”

693 F.3d at 358 (emphasis added). The Court of Appeals repeated that same error here.

The established principle, with respect to any aspect of sovereignty, including police powers, is that its surrender must be express and unmistakable. Rather than apply that principle, the Court of Appeals held that compacting states “relinquish[ ] *all* control” over the compact entity except for those powers expressly reserved. Appx. 12a (emphasis in original). Because of this fundamental error, the Court of Appeals not only failed to focus on what the Compact did not say concerning police powers, but focused on provisions that had nothing to do with those powers.

The Court of Appeals pointed to Article II, Section j of the Compact, which authorizes the Commission “[t]o acquire, own, use, lease, operate, and dispose of real property and interest in real property, and to make improvements thereon.” Appx. 12a (opinion); Appx. 66a (Compact Art. II(j)). This allows the Commission to do nothing more than what other individuals or entities may do: acquire real property and use it as the owner sees fit—consistent with governing law. Nothing inherent in the right of ownership of property, or the specific uses the Commission is authorized to make of it, grants the Commission an exemption from a police power regulation of that property.<sup>10</sup> See, e.g., *Lucas v. South Carolina Coastal Council*, 505

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<sup>10</sup> Even the Commonwealth’s own buildings are not exempt from safety regulations. Section 105(b) of the Pennsylvania Construction Code Act provides that the Department “shall maintain plan and specification review and inspection authority over all State-owned buildings. State-owned buildings shall be subject to regulations promulgated under this act.” 35 P.S. § 7210.105(b).

U.S. 1003, 1034 (1992) (Kennedy, J. concurring) (“Property is bought and sold, investments are made, subject to the State’s power to regulate”).

Another Compact provision authorizes the Commission to “[t]o determine the exact location, system, and character of, and all other matters in connection with, any and all improvements or facilities which it may be authorized to own, construct, establish, effectuate, maintain, operate or control.” Appx. 66a (Compact Art. II(n)). This provision allows the Commission to determine where to locate facilities or improvements that it acquires or constructs, an entirely unremarkable, un-sovereign-like authority. The Commission, like other owners of real property within Pennsylvania, may operate and maintain its property. But nothing in the Compact or applicable law supports the leap from this unremarkable premise to the District Court’s conclusion that the “states agreed to surrender their power to regulate the Commission’s building improvements to the Commission.” Appx. 57a (district court opinion); *see also*, Appx. 12a-13a (circuit court opinion).

Finally, Article II, Section p, authorizes the Commission to “exercise all other powers” not inconsistent with the constitutions of the United States or the creating states that “may be reasonably necessary or incidental” to the effectuation of those purposes or the exercise of other powers granted by the Compact. Appx. 67a (Compact Art. II(p)). Largely on the basis of this “all other powers” language, the Court of Appeals determined that Pennsylvania and New Jersey “ceded sovereign authority to the Commission” over health and safety police powers and “did not intend to retain the authority to enforce building safety regulations.”

Appx. 13a. Respectfully, the provision says nothing of the sort.

This provision does not even mention the compacting States' sovereign authority (or any of their authority), so it can hardly be an express and unmistakable basis on which they relinquish such authority. Rather, it simply grants the Commission those powers that are reasonably necessary or incidental to effectuating its authorized purposes or exercising its other powers. Moreover, in its analysis, the Court of Appeals ignores the remainder of this provision, which cabins the authority to "generally exercise, in connection with its property \* \* \* any and all powers which might be exercised by *a natural person or a private corporation* in connection with similar property and affairs." Appx. 67a (Compact Art. II(p) (emphasis added)). This language confirms what the rest of the Compact makes clear: the Commission is subject to the same sovereign authority of the Commonwealth to regulate building safety as are other individuals or entities owning real property within Pennsylvania.

In sum, the Court of Appeals "turn[ed] the concept of sovereignty on its head," *Merrion*, 455 U.S. at 148, presuming that the compacting States "[b]y expressly creating the bi-state entity \* \* \* relinquished all control over the entity unless otherwise stated in the compact." Appx. 12a. The Court needs to address this radical departure from its long-established precedent concerning the fundamentals of sovereignty. *See* Sup. Ct. R. 10(c).



## II. The Court of Appeals' decision on the surrender of sovereignty conflicts with decisions from the Second Circuit and New York's highest court.

The Court's review is also necessary to resolve a split between the Third and Second circuits, and between New York's and New Jersey's highest courts. *See* Sup. Ct. R. 10(a).

Since at least 1949, the State of New York has recognized that creatures of a compact are “not a sovereign” and “[i]n executing [a] Compact the State of New York has parted with none of its sovereign rights.” *Dep't of Conservation*, 1949 N.Y. O. Atty. Gen. No. 118, \*2 (1949) (internal quotation marks omitted). “The fact that [a compact entity] is a bi-state agency does not vest it with powers, exemptions and immunities beyond those specifically granted to it or incidental or necessary thereto[.]” *Ibid.* Accordingly, when asked if the Port of New York Authority, an entity created by a 1921 interstate compact, was subject to the jurisdiction of the New York Water Power and Control Commission, the Attorney General answered unequivocally yes. “The assumption by the Port Authority that, as a matter of law, it is not bound by the provisions of [New York's water conservation law] is contrary to law and transcends its powers. [The Water Power and Control] Commission has full jurisdiction in the premises to protect the public health and public welfare of the citizens of Long Island \* \* \*.” *Id.* at \*3.

Citing this opinion a generation later, New York's highest court proclaimed that “New York and New Jersey have each undoubted power to regulate the external conduct of [a compact entity], and it may hard-

ly be gainsaid that the [compact entity], albeit bistate, is subject to New York’s laws involving health and safety, insofar as its activities may externally affect the public.” *Matter of Agesen v. Catherwood*, 260 N.E.2d 525, 526-27 (N.Y. 1970).<sup>11</sup> That court held that only the internal operations of the Port Authority, particularly its power to fix the salaries of its employees, were protected from unilateral state regulation because that was among the powers delegated to the Port Authority by the compacting States. *Ibid.*

In recognizing this internal/external dichotomy, the Second Circuit has classified health and safety laws as regulating external operations. *See Dezaio v. Port Auth. of N.Y. & N.J.*, 205 F.3d 62, 65 (2d Cir. 2000). Under this dichotomy, “states can still regulate compact entities, as they can foreign corporations, when their actions affect the health or welfare of the citizens of the state through sufficient contacts with the state.” Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 Yale L. & Pol’y Rev. 163, 182 (2005).

The Third Circuit and New Jersey Supreme Court, however, have explicitly rejected the internal/external dichotomy. *See HIP Heightened Indep. & Progress, Inc. v. Port Auth. of New York & New Jersey*, 693 F.3d

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<sup>11</sup> The notion that compacting States have “undoubted power to regulate the external conduct” of a compact entity may stem from this Court’s “reserved powers” doctrine. *U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 22-23 (1977), citing *Stone v. Mississippi*, 101 U.S. 814, 817 (1880); *see also U.S. v. Winstar Corp.*, 518 U.S. 839, 922 (1987) (Scalia, J., concurring) (stating that the “reserved powers” doctrine has “not been well defined by [the Court’s] prior cases”).

345, 357 (3d Cir. 2012) (“There is no basis in Third Circuit precedent for the internal-external distinction, nor would such a distinction necessarily be well-founded”); *Eastern Paralyzed Veterans Ass’n, Inc. v. City of Camden*, 545 A.2d 127, 132 (N.J. 1988).

A split exists where the “conflicting courts would actually reach different results given the same set of facts.” Timothy S. Bishop, *et al.*, “Considering Supreme Court Review,” *Federal Appellate Practice*, 648 (ed. Philip Allen Lacovara 2008). That is the case here. Under Second Circuit and New York law, the Commission would have been required to comply with Pennsylvania’s health and safety laws, including the elevator operations and fuel safety regulations. The Scudder Falls Administration Building is open to the public, with a public reception area and public parking. Pennsylvania residents who visit the building could be injured by improperly installed and maintained elevators. And Pennsylvania firefighters and emergency personnel could be placed in unnecessary peril by improper fuel dispensing operations.

Moreover, this split impacts the largest compact entity in the Nation: the Port Authority of New York and New Jersey. The Port Authority, established by compact in 1921, covers 1,500 square miles in both states and manages five airports, four bridges, two tunnels, a rail system, bus terminals, one of the Nation’s largest ports, and the World Trade Center.<sup>12</sup> Because the Port Authority straddles this jurisprudential divide, different legal rules apply when it is

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<sup>12</sup> See Port Authority’s 2019 Annual Report at 2, 10, found at <https://www.panynj.gov/corporate/en/financial-information/annual-report.html#annualreports> (last visited June 2021).

sued on the New York side of the Hudson River and when it is sued on the New Jersey side.

These divergent approaches stem from ambiguities inherent in interstate compacts. Again, compacts are a departure from the traditional role of individual states, which oversee and are responsible for what occurs within well-defined state borders. *See, e.g., Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (“no state law can reach beyond its own border”). Entering into a compact changes that; for specified purposes, the compacting States take on a less familiar role. They become jointly responsible for what the compact entity does through shared power. *See Hess*, 513 U.S. at 42 n.11, citing *Port Auth Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 314 (1990) (Brennan, J., concurring). How, if at all, each State’s own laws will, or should, have a bearing on compact operations—which, by definition, bleed across formal state boundaries—falls outside traditional principles of horizontal and vertical federalism. It is the role of this Court to address, when necessary, this reality and determine when a compact entity can achieve its purpose without undermining the autonomy of the compacting states.

Once entered and legislatively approved, a compact is generally designed to remain in force indefinitely. As the Court itself has emphasized, for compacting states it is impossible to anticipate every possible contingency and address every possible issue in the compact itself. *Sims*, 341 U.S. at 28 (“all avoidance of disputes as to scope and meaning [of a compact] is not within human gift”). “[L]egislatures often do not contemplate the myriad of issues that the bi-state entity will face and instead use vague language that creates ambiguity.” *Tripolitsiotis*, *supra* at 166-

167. At the same time, paradoxically, compacts have become increasingly complex in recent years. Jacob Finkel, Note, *Stranger in the Land of Federalism: A Defense of the Compact Clause*, 71 *Stan. L. Rev.* 1575, 1579 (2019). Ambiguity and complexity, in turn, beget legal uncertainty about what each compacting state may or must do, independently or jointly, and under what legal authority. *Ibid.* (“states considering compact formation struggle to understand what they are permitted to do”).

In addition, this case presents a separate problem on which this Court’s guidance is desperately needed. With regard to the applicability or inapplicability of one state’s health and safety laws to the operations or activities of a compact entity, both case law, *e.g.*, *Agesen*, 260 N.E.2d at 526-527, and scholarly commentary, *e.g.*, *Tripolitsiotis*, *supra* at 181-183, attempt to differentiate between situations involving the compact entity’s “internal” conduct or operations and those situations involving “external” conduct or operations. *See, e.g.*, *Dezaio*, 205 F.3d at 65 (“internal operations of the Authority—unlike its external conduct which is subject to each of the Compact State’s health and safety laws—are independent from the unilateral control of either State without the other’s concurrence”). Under this rubric, an individual state’s law is basically irrelevant, and therefore inapplicable, in the former scenario, but will govern as usual in the latter.

There are, however, no established benchmarks whereby states, compact entities, and others can confidently determine what is “internal” and what is “external.” New York’s Highest Court characterized the employment-related policies of the Port Authority of New York and New Jersey as affecting “internal oper-

ations,” meaning New York’s prevailing wage statute could not be applied to the Port Authority. *Agesen*, 260 N.E.2d at 525. Yet even that court rightly recognized that “the lines of external and internal operation may shift.” *Id.* at 527; *see also* Tripolitsiotis, *supra* at 182 (“the line between internal and external is blurred at times”). Are a compacting entity’s employment-related policies strictly “internal” and so need not conform to state labor laws? *Cf. HIP*, 693 F.3d at 357-58 (finding “no basis in [controlling] precedent for the internal-external distinction”).

The Second Circuit in *Dezaio* suggested that “a Compact State’s health and safety laws” pertain, by definition, to “external conduct.” If so, Pennsylvania’s statutory building safety and inspection requirements qualify as state “health and safety laws” that remain applicable when, as here, a brand-new building is erected, notwithstanding Pennsylvania’s earlier entry into a compact. Even if the Commission’s general decision to provide its officials and employees with a suitable new facility within which to do their jobs is deemed “internal,” at some point the process of effectuating that decision will also entail “external” conduct and concerns, with public health and safety implications.

In short, because of the nature of compacts, the law surrounding these entities is murky. And this Court has long recognized the special role it plays as the source of clarity. *See Sims*, 341 U.S. at 26; *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419, 427 (1940). Only an answer from this Court will bring an end to this confusion and clarify whether a State abandons its sovereignty over the health and safety of its citizens through silence.

**III. The use of compacts is widespread, affecting the National interest, and the Court of Appeals' decision has the potential to destabilize compacts across the United States.**

From the Nation's founding through the early twentieth century, just 36 compacts were adopted. Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 Fla. L. Rev. 1, 4 n.18 (1997). Since then, the number has ballooned, such that now "compacts are everywhere." Finkel, *supra*, at 1577. Today, there are more than 200 active interstate compacts. Council for State Governments, National Center for Interstate Compacts, Frequently Asked Questions at 1, <https://tinyurl.com/y6jsky9d> (visited May 20, 2021) (CSG Compacts). They run the gamut, covering diverse aspects of state sovereignty, such as civil defense, education, emergency management, energy, law enforcement, probation and parole, transportation, and taxes. *Id.* at 2; see Finkel, *supra* at 1578 ("countless little-noticed compacts are the sine qua non backbone of interstate initiatives integral to our daily lives"). The Court of Appeals' decision threatens the very viability of these compacts.

The Court of Appeals held that "Pennsylvania ceded its sovereign authority to enforce its building safety regulations as to the Scudder Falls Administration Building." Appx. 3a. In light of the Court of Appeals' decision, by extension, the Commission need not install fire alarm systems, 34 Pa. Code § 50.52, can dump raw sewage from its building into the Delaware River, 35 P.S. § 691.202, and is exempt from elevator inspection, 34 Pa. Code § 7.15.

More critically, if all aspects of state sovereignty are relinquished unless expressly retained, as the Court of Appeals held, then the Commission is an independent entity. It is a sovereign, akin to Vatican City, not along the Tiber, but along the Delaware River. Such a sovereign is free to determine its own laws and regulations. And not just the Commission, but every other compact entity, which, by virtue of their creating States' failure to do the impossible—to reserve every aspect of state sovereignty, even aspects unimaginable at the time of creation—is now independent.

Further, with the Third Circuit's rule in place, States will hesitate before entering into compacts. The drafting of a compact is already a difficult task, even when done with "great care and deliberation." *Sims*, 341 U.S. at 28; *Tripolitsiotis*, *supra* at 203 (the drafting and negotiating "process is a slow and deliberate exercise"); *CSG Compacts* at 2 (highlighting that compacts "require a great deal of time to \* \* \* develop"). The Court of Appeals' rule makes drafting a comprehensive compact that protects every aspect of sovereignty impossible. States would have to anticipate the future loss of sovereignty<sup>13</sup> and fear the unwitting loss of sovereignty they rightly believe they possess. Consequently, regional problems—including

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<sup>13</sup> For example, in the 1930s, the drafters of this Compact could not have envisioned the explosion of state environmental regulatory authority or freedom of information laws and their impacts on compacts. See *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986); *Mitskovski v. Buffalo & Fort Erie Public Bridge Auth.*, 689 F.Supp.2d 483, 489-91 (W.D. N.Y. 2010); *KMOV TV, Inc. v. Bi-State Dev. Agency*, 625 F.Supp.2d 808, 814 (E.D. Mo. 2008).



those that implicate national interests—will go unaddressed. *See Hess*, 513 U.S. at 40; *Sims*, 341 U.S. at 27; Finkel, *supra*, at 1593. But all this can be avoided by this Court’s reaffirmance of its longstanding precedent—only a State’s express relinquishment of sovereignty will work a surrender; every other aspect of sovereignty is retained.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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June 11, 2021

COUNSEL FOR PETITIONER

## **APPENDIX**

**PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 20-1898

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DELAWARE RIVER JOINT TOLL BRIDGE  
COMMISSION

v.

SECRETARY PENNSYLVANIA DEPARTMENT  
OF LABOR AND INDUSTRY,  
Appellant

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On Appeal from the United States District Court for  
the Eastern District of Pennsylvania  
(D.C. No. 2-19-cv-02978)  
District Judge: Honorable Mark A. Kearney

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Argued on November 12, 2020

Before: HARDIMAN, SCIRICA, and RENDELL,  
*Circuit Judges*

(Filed: January 12, 2021)

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OPINION OF THE COURT

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HARDIMAN, Circuit Judge.

This dispute concerns an interstate compact between Pennsylvania and New Jersey that created the Delaware River Joint Toll Bridge Commission. The Commission obtained from the District Court a declaratory judgment that prohibited the Secretary of the Pennsylvania Department of Labor and Industry from regulating aspects of the Commission's new Scudder Falls Administration Building in Bucks County, Pennsylvania. The Secretary appeals, claiming the District Court erred by holding that Pennsylvania ceded its sovereign authority to enforce its building safety regulations when it entered into the Compact. We will affirm.

## I

In 1934, the Pennsylvania and New Jersey legislatures enacted laws creating the Commission, which Congress approved in 1935 under the Compact Clause of the United States Constitution. See U.S. CONST. art. I, § 19, cl. 3. The Commission was tasked with, among other things, “the acquisition of toll bridges over the Delaware River,” and “[t]he administration, operation, and maintenance” of such bridges. Act of Aug. 30, 1935, Pub. L. No. 74-411, § 9, 49 Stat. 1051, 1059.<sup>1</sup>

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<sup>1</sup> The Compact has been amended several times since its creation in 1935; none of these amendments have altered the relevant language here. See *e.g.*, Federal Aid Highway Act of 1987, § 151, Pub. L. No. 100-17, 101 Stat. 132, 206. The Compact is also codified in Pennsylvania's and New Jersey's statutes. See 36 PA. CONS. STAT. § 3401; N.J. STAT. § 32:8-1 *et seq.*

To assist the Commission in the discharge of its duties, Pennsylvania and New Jersey granted it the power “[t]o acquire, own, use, lease, operate, and dispose of real property and interest in real property, and to make improvements thereon,” as well as “[t]o determine the exact location . . . and all other matters in connection with, any and all improvements or facilities which it may be authorized to own, construct, establish, effectuate, maintain, operate or control.” *Id.* at 1060. The Commission also was granted sweeping authority

[t]o exercise all other powers . . . reasonably necessary or incidental to the effectuation of its authorized purposes or to the exercise of any of the powers granted to the commission . . . except the power to levy taxes or assessments for benefits; and generally to exercise, in connection with its property and affairs and in connection with property under its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.

*Id.* Since its creation, the Commission has “owned, constructed, operated, and maintained bridges between the two states under the Compact.” *Del. River Joint Toll Bridge Comm’n v. Oleksiak*, -- F. Supp. 3d --, 2020 WL 1470856, at \*2 (E.D. Pa. 2020).

The controversy giving rise to this appeal began in 2017, when the Commission undertook a project to replace the Scudder Falls Bridge that connects Bucks County, Pennsylvania with Mercer County, New Jersey. As part of that project, the Commission purchased ten acres of land near the bridge on the Pennsylvania side of the river and broke ground on the Scudder Falls Administration Building, which

would house the Commission's executive and administrative staff in a single location. A year later, inspectors with the Pennsylvania Department of Labor and Industry observed construction at the site, even though the Commission never applied for a building permit as required under the Department's regulations. The Department stated it would issue a stop-work order for want of a permit. The Commission responded that it was exempt from Pennsylvania's regulatory authority under the express terms of the Compact.

The Commission pushed forward and completed the Scudder Falls Administration Building. The Department eventually turned its attention to the Commission's elevator subcontractor, threatening it with regulatory sanctions for its involvement in the project.

Within weeks of the threat against its elevator subcontractor, the Commission filed a complaint against the Secretary in the District Court seeking declaratory and injunctive relief. The Commission sought a declaration that the Department lacked the authority to enforce Pennsylvania's building regulations (as well as its flammable and combustible liquid regulations) "absent express language in the Compact itself." Dist. Ct. Dkt. No. 1. It also sought a preliminary injunction to prevent the Secretary from enforcing the Department's regulations.

The District Court granted the Commission's preliminary injunction motion, enjoining the Secretary from directing the Department to "seek[] to inspect or approve the elevators in the . . . Scudder Falls Administrative Building or from further impeding, interfering or delaying the Plaintiff's contractors or subcontractors from immediately

repairing and activating the elevator systems.” Dist. Ct. Dkt. No. 16, at 2.

After the District Court granted the preliminary injunction, the Secretary filed an answer and counterclaim for declaratory relief. The Secretary denied the Commission’s claims that Pennsylvania lacked the power to enforce its building and safety regulations against the Commission. In the Secretary’s view, Pennsylvania “reserved its regulatory power over certain property use matters as an exercise of its fundamental police powers to protect the health, safety and welfare of its citizens.” Dist. Ct. Dkt. No. 17, at 24. Among the claimed reserved regulatory powers was the ability to enforce “critical safety-based laws applying to building construction, elevator construction, boiler installation and operation, and combustible and flammable liquid storage and dispensing.” *Id.*

In February 2020, the parties filed cross-motions for summary judgment. As relevant here, the District Court granted the Commission’s motion for declaratory relief, reasoning that “under the express terms of the . . . Compact creating the [Commission],” the Secretary “may not . . . unilaterally interfere, direct, inspect, or regulate” the Commission’s “elevator operations” under the Pennsylvania Uniform Construction Code or the Commission’s “tanks, pumps, and other fuel-dispensing devices” under the Department’s Combustible and Flammable Liquids Act regulations, at the Scudder Falls Administration Building. Dist. Ct. Dkt. No. 67, at 2. The Secretary timely appealed.



## II

The interpretation of a bi-state compact approved by Congress presents a federal question. *Int’l Union of Operating Eng’rs, Local 542 v. Del. River Joint Toll Bridge Comm’n*, 311 F.3d 273, 275 (3d Cir. 2002) (citation omitted). The District Court had jurisdiction under 28 U.S.C. § 1331, and our jurisdiction lies under 28 U.S.C. § 1291. *Id.*

## III

The Secretary first claims the District Court lacked jurisdiction because the Commission’s complaint was barred by the Eleventh Amendment to the United States Constitution. The Eleventh Amendment states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. Although the text of the Eleventh Amendment only explicitly mentions “Citizens of another State, or . . . Citizens . . . of any Foreign State,” the Supreme Court has consistently held the scope of state immunity extends beyond the text of the Eleventh Amendment. See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 14–15 (1890) (holding the Eleventh Amendment bars suits against a state commenced by its own citizens); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (same as to foreign nations); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991) (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms.”). As a

general rule, “federal courts may not entertain a private person’s suit against a State’ unless the State has waived its immunity or Congress has permissibly abrogated it.” *Waterfront Comm’n of N.Y. Harbor v. Governor of N.J.*, 961 F.3d 234, 238 (3d Cir. 2020) (quoting *Va. Off. for Prot. & Advoc. v. Stewart (VOPA)*, 563 U.S. 247, 254 (2011)).<sup>2</sup>

Under a federal court’s equitable powers, however, there is an important exception to this general rule: in certain circumstances, a plaintiff may bring a federal suit against state *officials*. See *Ex parte Young*, 209 U.S. 123 (1908). In such cases, state officials are stripped of their official or representative character and thereby deprived of the State’s immunity when they commit an ongoing violation of federal law. *Waterfront Comm’n*, 961 F.3d at 238.

The legal fiction recognized in *Ex parte Young* is narrow in scope. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984). It requires us to “conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law” and whether it “seeks relief properly characterized as prospective.” *Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002) (cleaned up).

The terms of the Compact adopted by Congress are federal law. See *Operating Eng’rs*, 311 F.3d at 275. By alleging the Secretary’s actions would violate the

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<sup>2</sup> A state-created entity, such as the Commission, with the power “[t]o sue and be sued,” Pub. L. No. 74-411, § 9, 49 Stat. at 1060, may bring an action against a state subject to the same Eleventh Amendment limitations as a private citizen. See *VOPA*, 563 U.S. at 256 (“[T]he validity of an *Ex parte Young* action [does not] turn on the identity of the plaintiff.”).

Compact the Commission has alleged an ongoing violation of federal law.

The relief sought by the Commission—a declaration as to Pennsylvania’s power to regulate the Scudder Falls Administration Building—is prospective. Just as the injunction upheld in *Ex parte Young* enjoined the Attorney General of Minnesota to conform his conduct with federal law (the Fourteenth Amendment), the relief sought here likewise requires the Secretary to conform his conduct to federal law (the Compact). *See Ex parte Young*, 209 U.S. 123, 145. In sum, the Commission’s suit seeks prospective relief to prevent an ongoing violation of federal law by the Secretary. It falls squarely within the *Ex parte Young* exception to sovereign immunity.

The Secretary argues *Ex parte Young* does not apply because the Commonwealth of Pennsylvania, not the Secretary, is the real party in interest. We disagree. The relief sought—a declaration that the Secretary cannot lawfully enforce Pennsylvania’s building regulations against the Commission—neither “expend[s] itself on the public treasury or . . . interfere[s] with public administration,” nor operates as “an order for specific performance of a State’s contract.” *Waterfront Comm’n*, 961 F.3d at 239 (internal citations and quotation marks omitted).

First, the relief sought does not resemble a money judgment that interferes with public administration. While the declaratory judgment may have an impact on Pennsylvania’s revenues (such as the loss of inspection fees), “[s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*.” *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

Second, the relief sought is not specific performance of a Pennsylvania contract. In arguing

otherwise, the Secretary relies heavily on our recent decision in *Waterfront Commission*. There, we overturned the District Court’s order requiring New Jersey “to continue to abide by the terms of [a bi-state] agreement” after the State had taken the affirmative step of repealing its earlier legislation that had contributed to the formation of the compact. *Waterfront Comm’n*, 961 F.3d at 237, 241–42. Forcing New Jersey to abide by a compact it had expressly rejected through proper legislative channels, we held, was “tantamount to specific performance [that] would operate against the State itself.” *Id.* at 241. Quite unlike that situation, here Pennsylvania did not seek to disavow the Compact. A declaratory judgment requiring the Secretary to respect the Compact as written does not constitute an impermissible order of specific performance—to hold otherwise would allow state officials to evade federal law by merely invoking the Eleventh Amendment.

Because the relief sought would neither drain public funds nor amount to “an order for specific performance of a State’s contract,” *Waterfront Comm’n*, 961 F.3d at 239, Pennsylvania is not the real party in interest; the Secretary is.

Having confirmed our jurisdiction, next we consider the scope of the powers Pennsylvania ceded under the Compact.

#### IV

The District Court found Pennsylvania unambiguously ceded some of its sovereign authority through the Compact. “[W]e review *de novo* the text of the Compact to determine whether we agree with the District Court that it is unambiguous.” *Wayne Land & Min. Grp. LLC v. Del. River Basin Comm’n*, 894 F.3d

509, 528 (3d Cir. 2018). “[I]f we agree that the text is unambiguous, then we also review de novo whether [the Secretary’s] proposed activities . . . fall within the scope of the Compact’s text.” *Id.*

Our decisions in *Operating Engineers* and *HIP Heightened Independence & Progress, Inc. v. Port Authority (HIP)*, 693 F.3d 345, 358 (3d Cir. 2012), two similar Compact Clause cases, guide our approach to the Compact here. In *Operating Engineers*, we were asked to determine whether New Jersey or Pennsylvania collective bargaining laws could be applied against the Commission. 311 F.3d at 274. We refused “[t]o read into the Compact any collective bargaining requirements” because the Compact’s silence as to the authority of the States to enforce such laws did not amount to a grant of permission. *Id.* at 281. Mindful of the important “[p]rinciples of federalism” at issue, we held that, absent express language to the contrary, “[a] bi-state entity created by compact, is ‘not subject to the unilateral control of any one of the States that compose the federal system.’” *Id.* (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994)). To interpret the Compact otherwise “would be to rewrite the agreement between the two states without any express authorization to do so.” *Id.* Now, as then, “[t]hat is simply not our role.” *Id.*

Similarly, in *HIP* we considered a bi-state compact that created the Port Authority of New York and New Jersey, and addressed the power of New Jersey to apply its civil rights and construction laws to property of the Port Authority. *HIP*, 693 F.3d at 349. We declined to enforce New Jersey’s statutes against the Port Authority even though the Compact lacked an “express surrender of state sovereignty regarding external relations.” *Id.* at 358. Such an argument, we

held, “misapprehends the notion of sovereignty surrender” discussed by the Supreme Court in *Hess* and this Court in *Operating Engineers*. *Id.* Although “court[s] must be hesitant to find a surrender of sovereignty where it is ambiguous,” the creation of a bi-state entity pursuant to the Compact Clause is an unambiguous surrender. *Id.* “By expressly creating the bi-state entity, [the compacting States] relinquished all control over the [entity] unless otherwise stated in the compact.” *Id.* Here, as in *HIP*, the surrender of sovereignty was expansive and clear; Pennsylvania and New Jersey “relinquished *all* control over the [Commission].” *See id.* (emphasis added).

The specific language of the Compact also indicates that Pennsylvania and New Jersey delegated the relevant regulatory authority. “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). So we look to “the express terms of the Compact as the best indication of the intent of the parties.” *Wayne Land*, 894 F.3d at 527 (quoting *Tarrant*, 569 U.S. at 628).

As the District Court held, the Compact’s text unambiguously cedes Pennsylvania’s sovereign authority over building safety regulations. It grants the Commission the power “[t]o acquire, own, use, lease, operate, and dispose of real property and interest in real property, and to make improvements thereon,” as well as power over “all other matters in connection with[] any and all improvements or facilities which it may be authorized to own, construct, establish, effectuate, maintain, operate or control.” Pub. L. No. 74-411, § 9, 49 Stat. at 1060. In defining real property, the Compact includes “structures,” *id.* at 1062, *i.e.*, “[t]hat which is built or

constructed; an edifice or building of any kind,” *see Structure*, BLACK’S LAW DICTIONARY (3d ed. 1933). Thus, the Compact grants the Commission the authority to acquire property (the Scudder Falls site), the ability to make improvements upon the property (construction of the Administration Building), and the power over “all other matters in connection with . . . [its] facilities” (the operation and maintenance of elevators).

Pennsylvania (and New Jersey) also ceded sovereign authority to the Commission when they authorized it, in the broadest terms, “[t]o exercise *all other powers* . . . which may be reasonably necessary or incidental to the effectuation of its authorized purposes . . . *except* the power to levy taxes.” Pub. L. No. 74-411, § 9, 49 Stat. at 1060 (emphasis added). As the District Court noted, “[t]he ordinary meaning of ‘all other powers’ does not provide a limitation retaining the Commonwealth’s police power.” *Del. River*, 2020 WL 1470856, at \*13. Finally, the fact that Pennsylvania and New Jersey expressly reserved their taxing power—but not other powers—supports the District Court’s conclusion that they did not intend to retain the authority to enforce building safety regulations.

\* \* \*

For the reasons stated, we hold Pennsylvania ceded its sovereign authority to enforce its building safety regulations as to the Scudder Falls Administration Building. We will therefore affirm the District Court’s declaratory judgment against the Secretary of the Pennsylvania Department of Labor and Industry.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

**DELAWARE RIVER** : **NO. 19-2978**  
**JOINT TOLL BRIDGE** :  
**COMMISSION** : **CIVIL ACTION**  
:   
v. :   
:   
**W. GERALD OLEKSIK** :

**MEMORANDUM**

**KEARNEY, J.**

**March 26, 2020**

Faced with balancing competing interests of thirteen sovereign states in forming a national government, our Framers negotiated and the states ratified the Compact Clause to the Constitution. The Compact Clause authorized the sovereign states to reach agreements, or “compacts,” for their common welfare such as setting boundaries or forming independent bi-state entities governed by the compact terms to manage common interests. A compact creating bi-state entities requires the states’ elected representatives agreeing to surrender certain of their citizens’ sovereign authority to this bi-state entity to further their common welfare. The compact terms are not federal law until approved by Congress. Over 230 years later, we today affirm the meaning of the Compact Clause applied to a 1934 Compact approved by Congress in 1935 after being negotiated by Pennsylvania’s and New Jersey’s elected representatives forming and defining the powers of a bi-state commission to manage several bridge



properties between the states north of Philadelphia. The elected representatives agreed, and have not changed their mind since, to grant the bi-state commission the power to operate, improve, and maintain its property including the structures relating to the bridges.

In 2019, Pennsylvania asserted the bi-state commission must pass its elevator inspections and comply with its fuel storage law compliant with Pennsylvania's sovereign police power to ensure the safety of her citizens as to a new administration building for one of the bridges. The bi-state commission disagreed. Both now move for summary judgment representing there is no question of material fact. They each ask we declare their rights under the compact relating to the elevator inspections and fuel storage at a newly constructed administration building complex for the Scudder Falls Bridge over the Delaware River connecting Bucks County, Pennsylvania and Mercer County, New Jersey.

We interpret the compact to unambiguously grant the bi-state commission the authority to operate and maintain its real property. Pennsylvania fails to identify compact language where the elected representatives retained sovereign police power over the bi-state commission's building improvements and maintenance, or language where Pennsylvania's retention may be found ambiguous and we could examine the parties' course of dealing.

Pennsylvania agreed to create a bi-state commission free from its unilateral control unless both states agreed to regulate certain aspects of the ongoing activities of the bi-state commission. They did not agree to do so as to elevator inspections or fuel storage regulations; they instead surrendered each

state's sovereign power to compel the bi-state commission to subject its buildings to one state's inspection and building operation regulations. In today's Order, we declare Pennsylvania may not impose its elevator inspection and fuel storage regulations upon the administration building complex for the Scudder Falls Bridge owned by the bi-state commission.

### **I. Undisputed facts<sup>1</sup>**

The Delaware River forms the entire border between the Commonwealth of Pennsylvania and the State of New Jersey. The two states share a natural interest in safe and reliable river crossings to facilitate national and regional trade and transportation. During the 1800s, the states assigned bridge building and maintenance responsibilities to private companies.<sup>2</sup> These companies charged tolls to bridge travelers to finance bridge operations while profiting the excess.<sup>3</sup> In the 1910s, the states—

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<sup>1</sup> Our Policies require a statement of undisputed material facts and an appendix of exhibits in support of a Rule 56 motion. The Commission filed a statement of undisputed material facts and appendix in support of its motion for summary judgment. See ECF Doc. No. 42. Secretary Oleksiak filed a statement of undisputed material facts and appendix in support of his motion for summary judgment. See ECF Doc. No. 43. We reference the Commission's Statement of Undisputed Facts as "Comm'n SUMF" and its appendix as "Comm'n App." We reference the Secretary's Statement of Undisputed facts as "Sec'y SUMF" and his appendix as "Sec'y App."

<sup>2</sup> Delaware River Joint Toll Bridge Commission: 2016 Annual Report, [https://www.njleg.state.nj.us/OPI/Reports\\_to\\_the\\_Legislature/DR\\_JTBC\\_AR\\_2016.pdf](https://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/DR_JTBC_AR_2016.pdf).

<sup>3</sup> *Id.*

motivated by the public's increased use of cars—changed course and formed the Joint Commission for Elimination of Toll Bridges to acquire bridges for joint state ownership.<sup>4</sup> The states granted this Joint Commission the power to use eminent domain to acquire the land necessary to manage the bridges.<sup>5</sup> By the mid-1930s, the Joint Commission had successfully purchased sixteen bridges from private owners.<sup>6</sup>

***The states form the Commission governed by Compact.***

Over eighty-six years ago, the states then agreed to create the Delaware River Joint Toll Bridge Commission to jointly own and operate their purchased bridges.<sup>7</sup> The states carried forward powers they granted to the earlier Joint Commission to the new Commission, including the power to acquire new bridges and use eminent domain.<sup>8</sup> The elected representatives of both states passed laws surrendering certain of their sovereign powers first recognized by our Framers in the Tenth Amendment to the new Commission through an interstate compact.<sup>9</sup> Congress approved the states' compact in 1935.<sup>10</sup> The Commission has continually owned,

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<sup>4</sup> *Id.*

<sup>5</sup> 1919 Pa. Laws 148, Sec. 1; 1912 N.J. Laws 1594–97.

<sup>6</sup> Delaware River Joint Toll Bridge Commission: 2016 Annual Report, *supra*.

<sup>7</sup> *Id.*

<sup>8</sup> Sec'y App. 88a, Article III.

<sup>9</sup> ECF Doc. No. 1 at ¶¶ 18–19; ECF Doc. No. 17 at ¶¶ 18–19.

<sup>10</sup> ECF Doc. No. 1 at ¶ 20; ECF Doc. No. 17 at ¶ 20.

constructed, operated, and maintained bridges between the two states under the Compact since then.<sup>11</sup> The Commission today controls seven toll bridges and thirteen toll-supported bridges along the northern 140 miles of the states' shared border.<sup>12</sup>

***The Commission's long-planned Scudder Falls Bridge project.***

One of the Commission's toll bridges is the Scudder Falls Bridge carrying Interstate 295 over the Delaware River connecting Lower Makefield Township in Bucks County, Pennsylvania with Ewing Township in Mercer County, New Jersey.<sup>13</sup> In 2002, the Commission began discussing a project to replace the Scudder Falls Bridge.<sup>14</sup> Fifteen years later in 2017, the Commission began a four-and-a-half-year project to replace the Scudder Falls Bridge.<sup>15</sup>

As a part of the project, the Commission purchased a ten-acre parcel of land in Pennsylvania near the Scudder Falls Bridge to construct a new administration building to consolidate its executive and administrative staff at a single location.<sup>16</sup> The Commission purchased the parcel from Lower Makefield Township, Pennsylvania in 2016.<sup>17</sup> The Commission began constructing the facility the next

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<sup>11</sup> Sec'y App. 35a–38a (ECF Doc. No. 43-3).

<sup>12</sup> *Id.* at 31a.

<sup>13</sup> *Id.* at 35a-38a.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 76a.

<sup>17</sup> *Id.*

year.<sup>18</sup> The Commission hired a contractor and various subcontractors to finish the project.<sup>19</sup>

***Pennsylvania demands compliance with its regulations leading to this lawsuit.***

After years of planning and after the Commission purchased and began construction on its property, the Commission's project caught the eye of Pennsylvania's Department of Labor & Industry, an agency charged with enforcing the Commonwealth's Uniform Construction Code.<sup>20</sup> In November 2018, two Department inspectors drove past the Scudder Falls administration building construction site and "observed that building construction had begun, despite the [Commission's] failure to apply for a building permit" as required under Department regulations.<sup>21</sup> The two inspectors notified the Department's Uniform Construction Code Field Operations Manager Jeffrey Criss.<sup>22</sup> Manager Criss

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 35a-38a.

<sup>20</sup> Pennsylvania's Department of Labor & Industry is a cabinet-level agency administering and monitoring many regulatory programs including through its Bureau of Occupational and Industrial Safety, which "administers and enforces the Uniform Construction Code, Fire and Panic Law, Universal Accessibility Law, Energy Conservation Law, General Safety Law, Boiler Law, Elevator Law, Liquefied Petroleum Gas Law, Flammable & Combustible Liquids Law, Asbestos and Lead Laws, Bedding and Upholstery Law, Stuffed Toy Law and Private Employment Agency Licensing Law." Laws and Regulations Home, *Department of Labor & Industry*, <https://www.dli.pa.gov/laws-regs/Pages/default.aspx>.

<sup>21</sup> ECF Doc. No. 17 at ¶ 40 (citing 34 Pa. Code § 403.42a).

<sup>22</sup> *Id.*

advised the Commission he intended to send a building inspector to the administration building to issue a stop work order under the Department regulations because the Commission did not have a valid building permit.<sup>23</sup> On November 30, 2018, the Commission responded by stating it “is not subject to the regulatory authority of the Commonwealth of Pennsylvania” including the Department’s Uniform Construction Code.<sup>24</sup>

On February 8, 2019, the Department’s Secretary, W. Gerard Oleksiak, confirmed his disagreement with the Commission asserting the Department “does not concur with the [Commission’s] position” about not being subject to the Uniform Construction Code.<sup>25</sup> The Secretary explained the Department “has not surrendered its sovereignty, especially as it extends to its sovereign police power to protect the safety, health and welfare of its citizens.”<sup>26</sup> The Secretary stated: “[t]o carry out that police power and to protect life, health, property and environment and to ensure the safety and welfare of the general public and the owners, occupants and users of buildings and structures, the [Uniform Construction Code] mandates plans review and inspections of all building construction projects.”<sup>27</sup> The Secretary offered to excuse the Commission from obtaining a building

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<sup>23</sup> *Id.* (citing 34 Pa. Code § 403.81).

<sup>24</sup> Sec’y App. 512a (ECF Doc. No. 43-4).

<sup>25</sup> ECF Doc. No. 12-2 at p. 18. The Department’s Deputy Secretary of Safety and Labor-Management Relations, Jennifer L. Berrier, authored this letter. *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing 35 P.S. § 7210.102(b)(1); 34 Pa. Code § 403.34(b)).

permit “on this occasion only” if the Commission agreed to submit to the Department’s regulations in other areas, including allowing the Department to “enforce the [Uniform Construction Code] with regard to the elevators in the administration building at Scudder Falls Bridge, and the Combustible and Flammable Liquids Act with regard to any fuel-pumping station that may be constructed.”<sup>28</sup>

The Commission did not agree with the Secretary. It pushed forward with its long-planned administration building. The Secretary began threatening to regulate Commission’s elevator subcontractor. Facing this involvement, the Commission sued the Secretary seeking declaratory relief as to the parties’ rights under the Compact and to enjoin him from imposing the Commonwealth’s building regulations on the Commission.<sup>29</sup> We enjoined the Secretary from enforcing the elevator inspection.<sup>30</sup> The Secretary defended his earlier position and counterclaimed for declaratory judgment arguing the Department may unilaterally regulate the Commission’s buildings.<sup>31</sup> The Commission completed construction with its elevators in place. The parties do not have present dispute with either the elevator inspection or fuel-pumping regulations. At oral argument both parties represented these are recurring as periodic licensing and inspection.

New Jersey did not take a position before us.

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<sup>28</sup> *Id.* at p. 19.

<sup>29</sup> ECF Doc. No. 1.

<sup>30</sup> ECF Doc. No. 16.

<sup>31</sup> ECF Doc. No. 17 at ¶¶ 242–78.

## II. Analysis<sup>32</sup>

After extensive discovery and agreeing there are no genuine issues of material fact, the Commission and Secretary Oleksiak cross move for a declaratory judgment: the Commission argues the Compact precludes the Secretary from unilaterally imposing the Commonwealth's elevator and fuel-pumping inspection regulations on the Commission without the express intent of Pennsylvania's and New Jersey's legislatures manifest in the Compact; and, the Secretary argues the Commonwealth retains its

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<sup>32</sup> Summary judgment is proper when “the movant shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(a). “Material facts are those ‘that could affect the outcome’ of the proceeding, and ‘a dispute about a material fact is ‘genuine’ if the evidence is sufficient to permit a reasonable jury to return a verdict for the non-moving party.” *Pearson v. Prison Health Services*, 850 F.3d 526, 534 (3d Cir. 2017) (quoting *Lamont v. New Jersey*, 637 F.3d 177, 181 (3d Cir. 2011)). On a motion for summary judgment, “we view the facts and draw all reasonable inferences in the light most favorable to the non-movant.” *Pearson*, 850 F.3d at 533-34 (3d Cir. 2017) (citing *Scott v. Harris*, 550 U.S. 372, 378 (2007)). “The party seeking summary judgment ‘has the burden of demonstrating that the evidentiary record presents no genuine issue of material fact.’” *Parkell v. Danberg*, 833 F.3d 313, 323 (3d Cir. 2016) (quoting *Willis v. UPMC Children’s Hospital of Pittsburgh*, 808 F.3d 638, 643 (3d Cir. 2015)). If the movant carries its burden, “the nonmoving party must identify facts in the record that would enable them to make a sufficient showing on essential elements of their case for which they have the burden of proof.” *Willis*, 808 F.3d at 643 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). “If, after adequate time for discovery, the nonmoving party has not met its burden, pursuant to Federal Rule of Civil Procedure 56, the court must enter summary judgment against the nonmoving party.” *Id.* (citing *Celotex Corp.*, 477 U.S. at 322-323).



sovereign police power both through the Compact and otherwise to enforce regulations at the Commission's buildings in Pennsylvania to ensure the safety of Pennsylvania citizens.

Whether the Secretary may unilaterally regulate the Commission's maintenance and operation of its buildings is a question of the rights and powers Pennsylvania and New Jersey surrendered to the Commission in their negotiated Compact. While the Framers recognized each state's sovereignty over matters not given to the national government such as local laws, property rights, and local law enforcement, the Framers also granted each state the right to enter into compacts agreeing to surrender their reserved sovereign power to a third interstate agency not controlled by the states but approved in the national interest by Congress. These interstate agencies generally are not subject to one state's unilateral control or to state regulation unless the compacting states expressly agree.

States effect the purposes and powers of interstate agencies through a negotiated agreement known as a compact. The Compact before us negotiated by Pennsylvania and New Jersey is largely the same agreement Congress approved in 1935.<sup>33</sup> The states and Congress approved additional jurisdiction and financing powers to the Commission in 1947, 1952, and 1987.<sup>34</sup> But the states' agreement to expand the Commission's jurisdiction to "port and terminal facilities" in 1953 "failed to gain full congressional approval[.]"<sup>35</sup>

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<sup>33</sup> ECF Doc. No. 1 at ¶ 20; ECF Doc. No. 17 at ¶ 20.

<sup>34</sup> Sec'y App. 53a (ECF Doc. No. 43-3).

<sup>35</sup> *Id.* Congress did not consent to the 1953 Compact Amendments when approving the supplemental agreement in

We may only consider the terms of the Compact approved by Congress.<sup>36</sup> Through the congressionally approved Compact, the states create the Commission

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1987. See H.R. 2, 100th Cong. § 151 (1987) (enacted). At oral argument, the Commission conceded the 1953 Compact Amendments are not operative without the consent of Congress. The Secretary attaches a copy of the Compact highlighting the changes proposed 1953 Compact Amendments. See Sec’y App. 82a-96a (ECF Doc. No. 43-3). We cite this version of the Compact throughout this Memorandum because the 1953 Amendments, while never consented to by Congress, are still reflected in the statutory codes of Pennsylvania and New Jersey. Compare 36 Pa. Stat. Ann. § 3401 and N.J. Stat. Ann. § 32:8-1 with Sec’y App. 82a-96a (ECF Doc. No. 43-3). The 1953 amendments contain important language delegating the Commission with additional purposes and powers. See *Delaware River Joint Toll Bridge Commission: Hearing on H.R. 5347 and H.R. 6199 Before the H. Interstate and Foreign Commerce Committee*, 88th Cong. 17 (1963) (statement of Representative Willard S. Curtin). For instance, the 1953 amendments expand the Commission’s purposes to include: “The acquisition, construction, administration, operation and maintenance of such port and terminal facilities within the district as the commission may deem necessary to advance the interests of the two states[.]” See Sec’y App. 84a (ECF Doc. No. 43-3).

The Secretary did not raise this issue when opposing the Commission’s request for a preliminary injunction July 2019. In then granting injunctive relief to the Commission, we looked to the Compact as reflected in Pennsylvania’s statutory code. See ECF Doc. No. 15. We now understand the compacting state statutes contain language we cannot consider because Congress never approved this 1953 language.

<sup>36</sup> See Joseph F. Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements* 59 (2nd ed. 2002) (“All proposed compact amendments must pass through what can be termed the hazardous process of obtaining their enactment by each state legislature, approval of each governor, consent of Congress, and approval of the president if the original compact received such approval.”).

as “a body corporate and politic” and “the public instrumentality” of the two states.<sup>37</sup> Pennsylvania and New Jersey define the Commission’s purposes as including “administration, operation, and maintenance of the joint State-owned bridges” and “preparation of plans and specifications for, and location, construction, administration, operation and maintenance of, such additional bridge communications over the Delaware River[.]”<sup>38</sup>The states agreed the Commission “shall be deemed to be exercising an essential government function[.]”<sup>39</sup>

We start with the powers the two states agreed to give to the Commission “[f]or the effectuation of its

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<sup>37</sup> Sec’y App. 83a (ECF Doc. No. 43-3), Article I.

<sup>38</sup> *Id.* As the states defined “bridge” in the Compact:

The word “bridge” . . . shall include such approach highways and interests in real property necessary thereto in said Commonwealth or said State as may be determined by the commission to be necessary to facilitate the flow of traffic in the vicinity of any such bridge, or to connect such bridge with the highway system or other traffic facilities in said Commonwealth or said State: Provided, however, That the power and authority herein granted to the commission in connection with the approach highways shall not be exercised unless and until the Department of Highways of the Commonwealth of Pennsylvania shall have filed with the commission its written approval as to approach highways to be located in said Commonwealth and the State Highway Department of the State of New Jersey shall have filed with the commission its written approval as to approach highways to be located in said State.

*Id.* at 91a, Article X.

<sup>39</sup> *Id.* at 82a, Article I.

authorized purposes.”<sup>40</sup> Among these powers include the authority:

- “To sue and be sued.”<sup>41</sup>
- “To enter into contracts.”<sup>42</sup>
- “To acquire, own, use, lease, operate, and dispose of real property and interest in real property, and to make improvements thereon.”<sup>43</sup>
- “To exercise the power of eminent domain.”<sup>44</sup>
- “To determine the exact location, system, and character of, and all other matters in connection with, any and all improvements or facilities which it may be authorized to own, construct, establish, effectuate, maintain, operate or control.”<sup>45</sup>

In addition to these specific powers, the elected representatives of Pennsylvania and New Jersey agreed to more broadly grant the Commission the ability:

To exercise all other powers, not inconsistent with the Constitutions of the States of Pennsylvania and New Jersey or of the United States, which may be reasonably necessary or incidental to the effectuation of its authorized

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<sup>40</sup> *Id.* at 84a, Article II.

<sup>41</sup> *Id.*, Article II(b).

<sup>42</sup> *Id.* at 85a, Article II(h).

<sup>43</sup> *Id.*, Article II(j).

<sup>44</sup> *Id.* at 85a, Article II(m). In Article III of the Compact, the states specify the Commission may exercise its eminent domain power in each state consistent with the respective Pennsylvania and New Jersey laws granting eminent domain authority to the earlier Joint Commission. *Id.* at 88a, Article III.

<sup>45</sup> *Id.* at 86a, Article II(n).

purposes or to the exercise of any of the foregoing powers, except the power to levy taxes or assessments for benefits; and generally to exercise, in connection with its property and affairs and in connection with property under its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.<sup>46</sup>

The states further agreed: “[t]he effectuation of [the Commission’s] authorized purposes . . . is and will be in all respects for the benefit of the people of the Commonwealth of Pennsylvania and the State of New Jersey, and for the increase of their commerce.”<sup>47</sup> The states agreed the Commission could exercise all powers reasonably necessary to effect its stated purposes and authorized powers including acquiring, operating and improving their real property and to determine the character of improvements or facilities which it may be authorized to maintain, operate or control.

While the states retained sovereign police power over the Commission’s delegated power of eminent domain and power to maintain streets and highways, the Commonwealth and New Jersey did not retain interests in the Commission acquiring, operating and improving real property. Three specific examples highlight the states’ reserving powers they arguably surrendered. Pennsylvania and New Jersey first agreed the Commission could exercise the powers of eminent domain. But then, unlike when they addressed improvement and maintenance of the

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<sup>46</sup> *Id.*, Article II(p).

<sup>47</sup> *Id.* at 90a, Article VIII.

Commission's facilities, the states specifically required the Commission exercise eminent domain powers in Pennsylvania consistent with the Pennsylvania law creating the earlier Joint Commission for the Elimination of Toll Bridges, and to exercise eminent domain powers in New Jersey consistent with the New Jersey law creating the earlier Joint Commission.<sup>48</sup> In a like manner, the states, while granting the Commission power to maintain streets and highways necessary to effect its purpose, require the Commission seek consent from the governing body of the local municipality and be subject to reasonable police regulations established by the local municipality.<sup>49</sup> The states also reserved the power to levy taxes and to "assess[] for benefits."<sup>50</sup> The states did not carve out a similar retained interest for the states in the surrendered power of improving and maintaining the Commission's property.

The immediate issue before us focuses on whether the Commission must submit to the Department's

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<sup>48</sup> *Id.* at 88a, Article III.

<sup>49</sup> *Id.* at 93a, Article X(d):

The commission may enter upon, use, occupy, enlarge, construct and improve, any street, road or highway, located within the limits of any municipality, and deemed by the commission to be necessary in connection with the acquisition, construction, improvement, maintenance or operation, of any bridge, owned or operated by the commission, or of any bridge approaches, bridge plazas, or approach highways to any such bridge, subject however to the consent of the governing body of such municipality, and to such reasonable police regulations as may be established by such governing body.

<sup>50</sup> *Id.* at 86a, Article II(p).

elevator inspection and Combustible and Flammable Liquid laws at the Scudder Falls administration building.<sup>51</sup> We apply a four-step analysis. First, we determine whether there is a ripe need for declaratory relief. Second, we inspect the background law on the nature of interstate agreements under the Compact Clause to understand whether there is an overarching sovereign power preempting language in the Compact. Third, we interpret the plain language chosen by the states in the Compact, i.e., did the states reserve their rights to inspect and approve improvements to the Commission's property. And, fourth, if we find the Compact's language is ambiguous, we must look to other tools to aid our interpretation, such as whether the Secretary imposed building safety regulations against the Commission in the past without objection or with court approval.

After confirming our jurisdiction and reviewing the background law governing compacts, we find the elected representatives of Pennsylvania and New Jersey unambiguously did not reserve Pennsylvania's or New Jersey's sovereign police power to regulate the Commission. They unambiguously surrendered "any and all powers" to the Commission to make improvements to its buildings other than those they reserved (eminent domain, local police, and taxes). Because the compacting states surrendered specific power to the Commission to improve and maintain its

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<sup>51</sup> To the extent the parties seek a declaration beyond this question, these requests fail to present an "actual controversy," see 28 U.S.C. § 2201, or are not ripe for our review under the framework announced by our Court of Appeals for determining the ripeness of requests for declaratory relief applied in Section II.A of this Memorandum.

buildings when they otherwise excepted other specific powers, we cannot find the Commission is subject to a silent overriding sovereign police power allowing one of the two compacting states to interfere with the Commission's improvement and maintenance of its property. The elected representatives have not, to date, reserved or limited this authority given to the Commission. We are not stretching or extending the states' chosen language. We are enforcing the language of the Compact as negotiated by the representatives of the sovereign states and approved by Congress as in the national interest. Consistent with the Compact's unambiguous language, we grant summary judgment for the Commission and enter a declaratory judgment in its favor relating to the construction, improvement, and maintenance of the Scudder Falls administration building as it affects elevator inspections and fuel storage regulations.

**A. The parties' requests for declaratory relief are ripe.**

The Commission and the Secretary agree we have federal subject matter jurisdiction over the requests for declaratory relief presently before us. The parties also agree their claims are ripe for our review even though the parties have progressed in completing the elevators and do not presently have a dispute on a particular fuel-storage regulation. We must still independently assess our subject matter jurisdiction and the ripeness of the parties' claims.

We first consider whether we enjoy our limited subject matter jurisdiction over the parties' requests for declaratory relief. The Constitution requires



interstate compacts be approved by Congress.<sup>52</sup> Congressional approval transforms a compact into federal law sustaining our jurisdiction under 28 U.S.C. § 1331.<sup>53</sup>

But our jurisdiction extends only to claims ripe for resolution.<sup>54</sup> “The function of the ripeness doctrine is to determine whether a party has brought an action prematurely, and counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine.”<sup>55</sup> “The Supreme Court has stated that a claim is ripe for review if it is fit for judicial decision and withholding court consideration of the issue would constitute a hardship to the parties.”<sup>56</sup>

The ripeness doctrine’s contours “are particularly difficult to define with precision when a party seeks a declaratory judgment.”<sup>57</sup> To determine if a claim for a declaratory judgment is ripe, our Court of Appeals instructs us to consider three factors: “the adversity of the parties’ interests, the conclusiveness of the judgment, and the practical utility of that

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<sup>52</sup> U.S. Const. art. I, § 10, cl. 3 (“No State shall, without the consent of Congress ... compact with another State.”).

<sup>53</sup> *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 620 (2013); *Wayne Land & Mineral Grp. LLC v. De. River Basin Comm’n*, 894 F.3d 509, 521 (3d Cir. 2018).

<sup>54</sup> *Peachlum v. City of York*, 333 F.3d 429, 433 (3d Cir. 2003).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 434 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105, (1977)).

<sup>57</sup> *Wayne Land*, 894 F.3d 509 at 527 (quoting *Marathon Petroleum Corp. v. Sec’y of Fin. for Del.*, 876 F.3d 481, 496 (3d Cir. 2017)).

judgment.”<sup>58</sup> While the parties both believe this case is ripe, we still independently consider these three factors. Applying these factors, we agree the parties’ claims are ripe.

We look first to the adversity of the parties’ interests. We assess adversity by asking “[w]hether the claim involves uncertain and contingent events or presents a real and substantial threat of harm.”<sup>59</sup> The Commission and Secretary both present real and substantial threats of harm. The Commission adduces facts showing the Secretary has attempted and will apply building safety and fuel-pumping regulations on the Commission at its new administration building. The Commission argues compliance with Department regulations will cause it to incur substantial monetary harm. The Secretary cites his duties—to apply Department regulations to ensure buildings in the Commonwealth are safe—and his inability to exercise those duties as a legitimate and substantial threat of harm.

Second, we must consider whether the parties present “sufficiently concrete facts to allow for a conclusive legal judgment.”<sup>60</sup> A claim is fit “for adjudication if a ‘declaratory judgment would in fact determine the parties’ rights, as distinguished from an advisory opinion based on a hypothetical set of facts.”<sup>61</sup> “Cases presenting predominantly legal questions are particularly amenable to a conclusive determination in a pre-enforcement context, and

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (quoting *Surrick v. Killion*, 449 F.3d 520, 527 (3d Cir. 2006)).

generally require less fact development.”<sup>62</sup> The Commission adduced sufficiently concrete facts to allow for a conclusive judgment: the Commission built its new administration building in Pennsylvania near the Scudder Falls Bridge and the Secretary insists the Commission submit to Department safety regulations regarding the building’s elevators and fuel-pumping stations at this building.

Third, we consider whether ruling on the parties’ request for declaratory relief has utility. “In the context of the Declaratory Judgment Act, utility exists when the judgment would ‘materially affect the parties and serve . . . [to] clarify[] legal relationships so that plaintiffs . . . [can] make responsible decisions about the future.’”<sup>63</sup> A ruling today would provide particular utility. The Commonwealth, the State of New Jersey, and Congress created the Commission in 1934 with Congress approving in 1935. Now, eighty-five years later, one of the contracting states argues it may unilaterally regulate the Commission’s building located within its sovereign borders. The Commission argues it is not subject to unilateral regulation unless specified in the Compact. Resolving this issue will allow the Commission and the Secretary to make responsible decisions about the future.

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<sup>62</sup> *Id.* (quoting *Surrick*, 449 F.3d at 527).

<sup>63</sup> *Id.* (quoting *Surrick*, 449 F.3d at 529).

**B. Pennsylvania’s and New Jersey’s  
congressionally approved Compact  
creating the Delaware River Joint Toll  
Bridge Commission.**

The parties’ claims for a declaratory judgment rest on rights under the Compact creating the Commission. We first inspect law governing interstate agreements. We then interpret the Compact creating the Commission “under the principles of contract law.”<sup>64</sup> “As with any contract, the analysis begins with ‘the express terms of the Compact as the best indication of the intent of the parties.’”<sup>65</sup> Only when the express terms of the text are ambiguous must we “turn to other interpretative tools to shed light on the intent of the Compact’s drafters.”<sup>66</sup>

*1. The purpose of compacts requires we follow their negotiated terms.*

Our Framers through the United States Constitution established a federal system, delegating certain political powers to Congress, President, and federal courts and reserving—through the Tenth Amendment—all other powers not prohibited to the states and the people. The Framers did not “abolish the sovereign powers of the States, which retained ‘a residuary and inviolable sovereignty.’”<sup>67</sup> Instead, the

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<sup>64</sup> *Tarrant*, 569 U.S. 614, 620 (2013).

<sup>65</sup> *Wayne Land*, 894 F.3d at 527 (quoting *Tarrant*, 569 U.S. at 628).

<sup>66</sup> *Tarrant*, 569 U.S. at 620.

<sup>67</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1475 (2018) (quoting *The Federalist* No. 39, p. 345 (C. Rossiter ed. 1961)).

Framers created a system “of dual sovereignty” where “the Federal Government and the States wield sovereign powers.”<sup>68</sup>

The States also ratified the Framers prohibiting them “from exercising some attributes of sovereignty” in Section 10 of Article 1.<sup>69</sup> The Framers’ prohibitions largely relate to the sovereign rights “to be able to make contracts and give consents bearing upon the exertion of governmental power.”<sup>70</sup> In one clause termed the “Contract Clause,”<sup>71</sup> the Framers prohibited a state from “pass[ing] any . . . Law impairing the Obligation of Contracts[.]”<sup>72</sup> This prohibition may include contracts entered by the state with a private party.<sup>73</sup> In another clause termed the “Compact Clause,”<sup>74</sup> the Framers provided: “No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State[.]”<sup>75</sup>

Through the Compact Clause, the Framers set a mechanism to allow states to solve regional problems and address interstate disputes. The Framers mandated these interstate compacts receive congressional consent so Congress could “exercise

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<sup>68</sup> *Id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

<sup>69</sup> *Id.*

<sup>70</sup> *U.S. v. Bekins*, 304 U.S. 27, 51-52 (1938).

<sup>71</sup> *See, e.g., U.S. v. Winstar Corp.*, 518 U.S. 839, 873 (1996) (referring to U.S. Const. art. I, § 10, cl. 1 as the “Contract Clause”).

<sup>72</sup> U.S. Const. art. I, § 10, cl. 1.

<sup>73</sup> *See Jefferson Branch Bank v. Skelly*, 66 U.S. 436 (1861).

<sup>74</sup>, 434 U.S. 452, 472 (1978) (referring to U.S. Const. art. I, § 10, cl. 3 as the “Compact Clause”).

<sup>75</sup> U.S. Const. art. I, § 10, cl. 3.

national supervision” and ensure no interstate agreement would threaten the Federal government.<sup>76</sup> The interstate compacts establish a contractual relationship between the party states protected from impairment by the Contract Clause.<sup>77</sup>

States exercising the sovereign right to enter into interstate compacts may yield certain rights reposed in them by the Framers in the Tenth Amendment.<sup>78</sup> As a seminal commentator in this subject observed: “Just as, for the common peace and welfare, the thirteen, sovereign States, in 1787, were willing to relinquish the sovereign right of immunity from suit, so the American states have, in the succeeding years, found it feasible and desirable, by means of compact, to relinquish the exercise of sovereign rights.”<sup>79</sup> “By such compacts, the authority over certain domestic affairs of one state—part of the police power—a power which the States have never surrendered to the National Government and which they do not desire to so surrender, may be yielded by one State to another, if it shall be deemed to tend to peace and mutual benefit.”<sup>80</sup>

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<sup>76</sup> Marian E. Ridgeway, *Interstate Compacts: A Question of Federalism* 27 (1971).

<sup>77</sup> Joseph F. Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements* 35 (2nd ed. 2002).

<sup>78</sup> See *Bekins*, 304 U.S. at 52 (“The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution.”).

<sup>79</sup> Charles Warren, *The Supreme Court and Sovereign States* 70 (1924).

<sup>80</sup> *Id.* at 74.

With the benefit of studying over two hundred years of compacts, we learn states enter interstate compacts for varied reasons. One reason is the “settlement of boundaries.”<sup>81</sup> Another reason is to “deal[] with instances in which the States concerned [are] willing to surrender a rigid insistence on their rights and powers of sovereignty, in order to attain some mutually desirable end.”<sup>82</sup> This second type of compact creates “[a] specially created body or department[] and agencies of the member states [to] administer interstate concordats[.]”<sup>83</sup>

There are obvious differences between a boundary compact and a compact creating a commission specifically empowered to address a regional problem.<sup>84</sup> Boundary compacts aim to resolve claims to land; for instance, Virginia and Maryland entered into a compact concerning disputed land around the Potomac River.<sup>85</sup> When states enter into a boundary compact, each state is left to “regulate the activities of her own citizens” unless the states agree otherwise in their compact.<sup>86</sup>

On the other hand, interstate compacts creating a bi-state entity “are not extensions of each compacting state’s authority, but are instead formed through each state’s surrender of a portion of its sovereignty to the

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<sup>81</sup> *Id.* at 70.

<sup>82</sup> *Id.*

<sup>83</sup> Joseph F. Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements* 75 (2nd ed. 2002)

<sup>84</sup> Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *Yale L.J.* 685, 696 (1925).

<sup>85</sup> *Id.* at 696 n. 43.

<sup>86</sup> *Virginia v. Maryland*, 540 U.S. 56, 67 (2003).

compact entity.”<sup>87</sup> “An interstate compact, by its very nature, shifts a part of a state's authority . . . to the agency the several states jointly create to run the compact. Such an agency under the control of special interests or gubernatorially appointed representatives is two or more steps removed from popular control, or even of control by a local government.”<sup>88</sup> “Bi-state entities occupy a significantly different position in our federal system than do the States themselves. The States, as separate sovereigns, are the constituent elements of the Union. Bi-state entities, in contrast, typically are creations of three discrete sovereigns: two States and the Federal Government.”<sup>89</sup>

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<sup>87</sup> *Int'l Union of Operating Engineers, Local 542 v. De. River Joint Toll Bridge Comm'n*, 311 F.3d 273, 276 (3d Cir. 2002).

<sup>88</sup> *Hess v. Port Author. Trans-Hudson Corp.*, 513 U.S. 29, 42 (1994) (quoting Marian E. Ridgeway, *Interstate Compacts: A Question of Federalism* 300 (1971)).

<sup>89</sup> *Id.* at 40. As Professor Ridgeway explains:

It is clear that an interstate compact agency takes orders only from parent states acting in unison, not from an individual state party to the compact acting unilaterally. This means that if an agency such as the Port Authority [of New York and New Jersey] takes independent legal action in a matter such as acquisition of land thirty miles outside its legal geographical boundaries for the location of an airport, the people of one state may strenuously object only to find that the people of the other state or states are delighted or are, more generally, indifferent to the matter. If such a situation were an ordinary decision of a county or a municipality, the people directly concerned would be able through established political channels to take action for or against the decision. Likewise, an objecting state could control its municipal corporation so acting. In interstate compact agencies, Congress has provided the public with the



While we are guided by these principles, neither the parties nor we could find a wealth of cases explaining to what degree a state surrenders its sovereign powers by entering an interstate compact creating a bi-state commission. But the few cases we found instruct states may surrender significant aspects of sovereignty by forming a bi-state commission such as this Delaware River Joint Toll Bridge Commission. For example, in *Operating Engineers*, an engineers' union sued this same Commission in federal court for injunctive relief compelling the Commission to comply with New Jersey collective bargaining laws.<sup>90</sup> The District Court for the District of New Jersey granted the Commission summary judgment, holding the states' legislatures did not express "a clear intent to impose their labor laws upon the Commission."<sup>91</sup>

Our Court of Appeals held it would not impose state collective bargaining laws on the Commission absent both states' "express intent to amend the Compact or apply their collective bargaining laws to

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image of a protector of interstate interests, a general supervisor, a guarantor that respective state and local rights and desires will not be overridden by a powerful agency independent of any single state's control. By removing Congress from this role, or emasculating its and the public's conceptions of its role, the courts in effect create a totally new governmental entity, independent and unrestrained by any government superior to it.

Marian E. Ridgeway, *Interstate Compacts: A Question of Federalism* 39-40 (1971).

<sup>90</sup> *Operating Engineers*, 311 F.3d at 275.

<sup>91</sup> *Id.* at 274.

the Commission's employees."<sup>92</sup> The Court explained the Compact did not address Commission employees' right to collectively bargain. The union argued because the Commonwealth and New Jersey passed similar labor laws allowing collective bargaining, the states intended to amend the Compact applying these laws.

Our Court of Appeals explained no language in the Compact permitted the Commonwealth and New Jersey to amend the Compact by enacting similar legislation. The Court also found no language in the Compact allowing Pennsylvania or New Jersey to modify the Compact through legislation "concurrent in" by the other state.<sup>93</sup> The Compact is also "silent" on this ability. The Court refused to adopt the union's argument the states' similar legislation evinced intent to amend the Compact without Congress's approval. Each state's legislation could not bind the Commission if not allowed for in the Compact approved by Congress or in both of the states' respective laws.<sup>94</sup> Neither the Compact nor Pennsylvania's and New Jersey's labor laws contained "express legislative intent" to apply the labor laws to the Commission.<sup>95</sup> Silence is not consent in this regard. Without "express legislative intent" of both states to impose New Jersey's labor laws on the Bridge Commission in the Compact, our Court of Appeals affirmed the district court's declaration the

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<sup>92</sup> *Id.* at 280.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 281.

states' collective bargaining laws did not apply to the Commission.<sup>96</sup>

In *Operating Engineers*, our Court of Appeals cited with approval the New Jersey Supreme Court's decision in *Eastern Paralyzed Veterans*.<sup>97</sup> In *Eastern Paralyzed Veterans*, the Delaware River Port Authority, a different bi-state entity created by compact by Pennsylvania and New Jersey governing bridge and related transportation operations closer to Philadelphia and Camden, and the Camden Housing Authority planned to construct a transit terminal to operate a regional train service crossing the Delaware River between the Commonwealth and New Jersey.<sup>98</sup> A veterans association sued arguing the Port Authority must submit to the New Jersey Uniform Construction Code requiring it install an elevator in the terminal for handicapped persons.<sup>99</sup> The New Jersey trial court granted summary judgment for the veterans association holding the Port Authority must submit to New Jersey's Construction Code. The New Jersey appellate division affirmed.

The New Jersey Supreme Court reversed explaining the Commonwealth and New Jersey created the Port Authority under a compact as a "bi-state entity" meaning neither state "can unilaterally impose additional duties, powers or responsibilities upon the Authority."<sup>100</sup> Neither the Commonwealth

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<sup>96</sup> *Id.* at 276.

<sup>97</sup> *Id.* at 281 (citing *Eastern Paralyzed Veterans Ass'n Inc. v. City of Camden*, 545 A.2d 127, 128 (N.J. 1988)).

<sup>98</sup> *Eastern Paralyzed Veterans*, 545 A.2d at 128.

<sup>99</sup> *Id.* at 130.

<sup>100</sup> *Id.* (quoting *Nardi v. De. River Port Auth.*, 490 A.2d 949, 950 (Pa. Commw. Ct. 1985)).

nor New Jersey could impose regulations on the Port Authority unless both states expressly agreed.<sup>101</sup> While the New Jersey legislature provided its Construction Code applied to bi-state entities, the court held it would not impose the Construction Code without a similar express statement of intent from the Pennsylvania General Assembly.<sup>102</sup>

In *Eastern Paralyzed Veterans*, the New Jersey Supreme Court found no support for what other courts referred to as the “internal-external distinction” theory.<sup>103</sup> This theory posits a single state may not regulate internal operations, but may regulate the external operations, of a bi-state entity.<sup>104</sup> External operations include laws involving “health and safety, insofar as its activities may externally affect the public.”<sup>105</sup> In declining to apply this theory, the New Jersey Supreme Court explained: “[o]nly when the compact itself recognizes the

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<sup>101</sup> *Id.* at 132.

<sup>102</sup> *Id.* at 134. In *Eastern Paralyzed Veterans*, the New Jersey Supreme Court also considered whether the Delaware River Port Authority impliedly consented to New Jersey’s Uniform Construction Code regulations by participating in a project with a New Jersey entity subject to New Jersey regulations (the Camden Housing Authority). *Id.* The Court remanded the case to allow fact inquiry into this question. *Id.* As we are not presented with the Commission acting in tandem with an entity subject to Pennsylvania regulations, we do not consider this part of the Court’s analysis pertinent. The Secretary argues implied consent but only to show as a form of extrinsic evidence aiding our interpretation of the Compact. We may not use custom to vary from terms of the Compact if not ambiguous.

<sup>103</sup> *Id.* at 132 (citing *Agesen v. Catherwood*, 260 N.E.2d 525 (N.Y. Sup. Ct. 1970)).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (quoting *Eastern Paralyzed Veterans*).

jurisdiction of the compact states may it be subject to single-state jurisdiction.”<sup>106</sup> This view is consistent with *Operating Engineers* and principles shared by the Supreme Court of the United States: “Each State's sovereign will is circumscribed by that of the other States in the compact and circumscribed further by the veto power relinquished to Congress in the Constitution.”<sup>107</sup>

Against this backdrop, we review the negotiated and congressionally approved Compact terms. Unlike *Operating Engineers*, we are not addressing an amendment by state conduct without Congressional approval. Like *Eastern Paralyzed Veterans*, we must examine the negotiated and congressionally approved Compact's terms.

*2. We define the parties' rights by interpreting the Compact terms.*

The parties assert various textual and policy arguments in support of their respective positions. We attempt to categorize the arguments. Mindful of our review begins with the Compact terms, the parties' dispute largely relates to the powers surrendered to the Commission in the Compact. The Commission argues the states gave it broad authority to control its buildings; the Secretary argues the states unambiguously limited the Commission's authority to powers exercised by a “natural person,” while also limiting the Commission's powers to only control bridges within its authority, which did not extend the

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<sup>106</sup> *Id.*

<sup>107</sup> *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 312–16 (1990) (Brennan, J., concurring).

Commission's authority to administration buildings. The Secretary also asserts the Compact has an ambiguous term requiring us to consider extrinsic evidence. The second fundamental argument relates to unilateral state regulation of the Commission. The Commission argues the Compact unambiguously does not contemplate state agencies like Pennsylvania's Department of Labor & Industry unilaterally regulating the Commission; the Secretary argues the Compact's unambiguous silence about state regulation is proof the states did not expressly surrender their sovereignty.

We must analyze the parties' arguments by looking to the text of the Compact. "Interstate compacts are construed as contracts under the principles of contract law."<sup>108</sup> "As with any contract, the analysis begins with 'the express terms of the Compact as the best indication of the intent of the parties.'"<sup>109</sup> Only when the text is ambiguous must we "turn to other interpretative tools to shed light on the intent of the Compact's drafters."<sup>110</sup>

We find the elected representatives of Pennsylvania and New Jersey delegated broad authority to the Commission to control and make improvements to the building, which supersede the Secretary's ability to enforce elevator safety and fuel-storage regulations to the Commission's administration building at the Scudder Falls Bridge. We also find the states did not reserve Pennsylvania's

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<sup>108</sup> *Tarrant*, 569 U.S. at 620.

<sup>109</sup> *Wayne Land*, 894 F.3d at 527 (quoting *Tarrant*, 569 U.S. at 628).

<sup>110</sup> *Id.*

ability to regulate construction and improvement of the Commission's property.

*a. The Compact delegates authority to the Commission to maintain and improve its real property.*

We first review the powers Pennsylvania and New Jersey granted to the Commission to determine if the powers expressly relinquish the states' sovereign police powers over building maintenance and operations. We find they do.

The states granted the Commission the authority to "acquire, own, use, lease, operate, and dispose of real property and interest in real property, and to make improvements thereon."<sup>111</sup> The Compact defines:

The term "real property," as used in this compact, includes lands, structures, franchises, and interests in land, including lands under water and riparian rights, and any and all things and rights usually included within the said term, and includes not only fees simple and absolute but also any and all lesser interests, such as easements, rights of way, uses, leases, licenses, and all other incorporeal hereditaments, and every estate, interest or right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages, or otherwise, and also claims for damage to real estate.<sup>112</sup>

The Supreme Court instructed when interpreting a contract, language in the contract "presumably takes

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<sup>111</sup> Sec'y App. 85a (ECF Doc. No. 43-3), Article II(j).

<sup>112</sup> *Id.* at 88a, Article III.

its ordinary meaning[.]”<sup>113</sup>The Supreme Court employs the same rules when interpreting statutory language.<sup>114</sup> The term “real property” takes its ordinary meaning: “Real property can be either corporeal (soil and buildings) or incorporeal (easements).”<sup>115</sup> The word “structure” also takes its ordinary meaning: “[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together.”<sup>116</sup>

Applying these bedrock principles, Pennsylvania and New Jersey granted the Commission with the authority to acquire and make improvements to its real property, including the Commission’s administration building at Scudder Falls Bridge. The states also empowered the Commission “[t]o determine the exact location, system, and character of, and all other matters in connection with, any and all improvements or facilities which it may be authorized to own, construct, establish, effectuate, maintain, operate or control.”<sup>117</sup>

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<sup>113</sup> *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469 (2015).

<sup>114</sup> *Hardt v. Reliance Standard Life Insurance Co.*, 560 U.S. 242, 251 (2010) (“[W]e begin by analyzing the statutory language, ‘assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.’”).

<sup>115</sup> *Property*, Black’s Law Dictionary (11th ed. 2019); *see also* 34 Pa. Code § 401.1 (defining building as a “structure used or intended for supporting or sheltering any occupancy.”).

<sup>116</sup> *Structure*, Black’s Law Dictionary (11th ed. 2019); *see also* 34 Pa. Code § 401.1 (defining structure as “[a] combination of materials that are built or constructed with a permanent location or attached to something that has a permanent location.”).

<sup>117</sup> Sec’y App. 86a (ECF Doc. No. 43-3), Article II(n).



The compacting states then agreed to forfeit their sovereign power in these limited aspects and authorize the Commission:

To exercise all other powers, not inconsistent with the Constitutions of the States of Pennsylvania and New Jersey or of the United States, which may be reasonably necessary or incidental to the effectuation of its authorized purposes or to the exercise of any of the foregoing powers, except the power to levy taxes or and affairs and in connection with property under its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.<sup>118</sup>

The Commonwealth and New Jersey grant the Commission “all other powers, not inconsistent with the Constitutions of the States of Pennsylvania and New Jersey or of the United States[.]”<sup>119</sup> The states authorize this extensive grant to the Commission to carry out “any of the foregoing powers” including the power to make improvements to its real property. The ordinary meaning of “all other powers” does not provide a limitation retaining the Commonwealth’s police power. We cannot read the Commission’s authority to make improvements to its real property as being conditioned on approval from either compacting state. This interpretation defies the text agreed by the two states. To read the Compact in the

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<sup>118</sup> *Id.*, Article II(p).

<sup>119</sup> *Id.* The parties do not argue any provision of the Constitution of Pennsylvania or the Constitution of New Jersey apply to the questions we face today.

manner suggested by the Secretary would be, like expanding amendments in *Operating Engineers*, adding language not agreed by Pennsylvania and New Jersey or approved by Congress.

***The Secretary's arguments are belied by the Compact language.***

To overcome this direct language, the Secretary raises several arguments. First, he reads the "all other powers" grant different than the Commission. The Secretary argues the second clause granting powers exercised "by a natural person or a private corporation" limits the first clause. Because he reads the second clause to limit the first clause, the Secretary argues the Commission must submit to the Department's regulations just like a private corporation. The Secretary argues the provision is superfluous unless read as a limitation.

We disagree with the Secretary's reading. We read the second clause as an additional grant of authority to the Commission because the word "and" connects these clauses in the later grant. This grant is not superfluous: it enables the Commission to exercise powers on its property "which might be exercised by a natural person or a private corporation" even if these powers are not within express purposes or powers otherwise granted to the Commission. We consider this the only natural reading and find its meaning unambiguous.

We also note the compacting states understood the plain language of the sweeping grant of authority they provided to the Commission in this clause. They specifically carve out the Commission's power to "levy

taxes.”<sup>120</sup> The compacting states unambiguously granted the Commission the authority to construct and operate its authorized buildings without intervention from the compacting states.

Second, the Secretary then argues the Commission cannot operate buildings without state regulation because operating buildings is too attenuated from the core purpose of the Commission to operate and maintain bridges. We can only assess the purposes and powers of the Commission as specified by the compacting states in the Compact. The states unambiguously state one of the core purposes of the Commission is to administer bridges. To carry out its purposes, including the purpose of administering bridges, the states consented to the Commission’s use and occupation of any “real property of the said two states, or of either of them, which may become necessary or convenient[.]”<sup>121</sup> The states then unambiguously authorized the Commission all powers to acquire and improve its real property. It did not limit the Commission’s powers to “bridges,” which the states separately define as “approach highways and interests in real property necessary. . . to facilitate the flow of traffic . . . , or to connect such bridge with” other roads.<sup>122</sup> We find it significant the compacting states drew clear distinctions between “real property” and “bridges.”<sup>123</sup>

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<sup>120</sup> See *Jefferson Branch Bank v. Skelly*, 66 U.S. at 446 (1861) (“that neither the right of taxation, nor any other power of sovereignty[.]”).

<sup>121</sup> Sec’y App. 88a (ECF Doc. No. 43-3), Article III.

<sup>122</sup> *Id.* at 91a, Article X.

<sup>123</sup> The parties do not ask us whether the Commission had the authority under the Compact to own and construct its administration building. We are only asked if this real property

At oral argument, the Secretary focused on a third basis to avoid the power surrendered to the Commission in the Compact: the Commission's planned conduct is inconsistent with the United States Constitution and thus excepted from the broad grant of authority. We do not see inconsistency. Our Framers designed the Constitution to reserve certain powers to the states under the Tenth Amendment. Our Framers also expressly granted the states the right—but not the mandate—to be able to bind together with other states to address regional problems by creating interstate entities not controlled by either state. Our Framers left it to the states to negotiate creations of interstate entities and define the powers and rights granted to new third interstate entities which are not citizens or under the control of either state. The Framers only limited the states' rights by requiring an interstate compact receive Congress's consent to become federal law. When forming an interstate compact, a state is left to negotiate its desires to regulate the bi-state entity's function within its borders. But once the state agrees to the terms forming the compact, the state relinquishes its unilateral control because the third entity now operates as an instrumentality of multiple states unless the compact reserves each state's authority. If it does not, both compacting states must consent to unilaterally regulate the interstate entity.

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as constructed, owned, and operated by the Commission is subject to Commonwealth regulatory authority. A challenge to the authority of an interstate commission is a separate challenge than the challenge we face today. See Marian E. Ridgeway, *Interstate Compacts: A Question of Federalism* 88 (1971) (“In October 1954 the Madison County (Illinois) state's attorney filed a suit challenging Bi-State's authority to acquire the bridge”).

The Secretary's argument would nullify the Compact Clause.

And in this Compact, the states announce the entity they form. The states create the Commission as "a body corporate and politic" and "the public instrumentality" of the two states.<sup>124</sup> The states declare the Commission should develop additional bridge facilities "without the expenditure of large sums from the public revenues."<sup>125</sup> The states also agree it be "highly desirable that there be a single agency for both states empowered to further the transportation interests of these States with respect to that part of the Delaware River north of the stone arch bridge of the Pennsylvania Railroad from Morrisville to Trenton[.]"<sup>126</sup> The Compact's express terms confirm the elected representatives' agreement for this bi-state commission to not be subject to one state's unilateral regulations as to building operations and management.

*b. The Compact is not silent as to the Commonwealth's power to regulate the Commission's buildings, and the states did not reserve sovereign police power as to powers expressly granted to the Commission.*

The Secretary argues because the Compact does not give the Commission this power, this silence must be read as reserving this sovereign power with Pennsylvania (at least as to property in

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<sup>124</sup> Sec'y App. at 83a (ECF Doc. No. 43-3), Article I.

<sup>125</sup> *Id.* at 82a, Preamble.

<sup>126</sup> *Id.* at 82a–83a, Preamble.

Pennsylvania). The Secretary argues the Compact does not immunize the Commission from Pennsylvania building regulations, regardless of New Jersey's view. He believes the Commission must submit to Department regulations because these regulations are an exercise of Pennsylvania's sovereign police power to regulate the health and safety of its citizens. Despite the language granting "any and all powers" to the Commission to carry out its purposes and powers including maintaining and operating its buildings, the Secretary argues there is silence in the Compact on this issue. He then argues this silence means Pennsylvania retains its regulatory authority because the states did not "expressly relinquish[] . . . sovereignty 'in terms too plain to be mistaken.'"<sup>127</sup>

The Secretary argues he retains sovereignty to regulate building improvements in Pennsylvania notwithstanding the Compact citing *Virginia v. Maryland and Tarrant Regional Water Dist. v. Herrmann*, "if any inference is to be drawn from such silence, it would be that each State was left to regulate the activities of her own citizens[.]"<sup>128</sup> We distinguish these cases. They do not instruct a bi-state agency is a "citizen" subject to unilateral regulation. We see no authority for treating a bi-state entity as a citizen of a single state, especially when created as a "body corporate and politic" of both states. These are boundary cases where states disputed whether they surrendered certain claims to land or water by agreeing to a compact.

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<sup>127</sup> *Operating Engineers*, 311 F.3d at 280 (quoting *Skelly*, 66 U.S. at 446).

<sup>128</sup> ECF Doc. No. 43-1 at p. 15 (quoting *Tarrant*, 595 U.S. at 632).

We disagree with the Secretary's starting point: if the Compact is silent on this specific power, then the compacting states can invoke their police power. This is not how we interpret compacts. We read compacts as contracts. The plain language grants the Commission power over its property, including its building improvements, subject to limiting its eminent domain power consistent with the law of each state. We are not faced with a power claimed by one of the compacting states which is arguably not addressed in the Compact. We are only faced with compacting states agreeing to a specific grant of authority to a bi-state entity accompanied by another specific grant of "any and all powers" to carry out this same authority.

Despite the broad grant of authority to the Commission, the Secretary cannot point to language in the Compact reserving Pennsylvania's power to regulate building improvements in the Commission's buildings. The Secretary cites Compact language outlining how the Commission may exercise its eminent domain powers as proof the parties did not intend to grant the Commission sovereign police powers—otherwise, the parties would have specifically described how the Commission may exercise those powers as it specifically described how the Commission may exercise eminent domain.<sup>129</sup> The

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<sup>129</sup> The parties offer differing reasons why the states included this eminent domain provision specifying which law to apply. The Secretary argues this provision shows the states only intended to relinquish sovereign rights—such as right of eminent domain—when the states specifically address how the interstate agency may use the delegated state sovereign right. The Commission argues this provision shows the states knew their laws would not apply to the Commission absent express reservation.

Secretary's argument does not specifically address language relating to the state's sovereign police powers of ensuring safety and asks us to assume the parties' intent based on an unrelated power delegated to the Commission.<sup>130</sup>

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The historical context reveals the parties may be over-analyzing the states' thought processes in their proffered interpretations. The states originally granted the power of eminent domain to the Joint Commission in the 1910s to acquire privately owned bridges for the two states. The states realized this would not be easy: cars were just starting mass production and mass consumption by the American public. The states understood the Joint Commission would need leverage against private bridge owners, so they both granted the Joint Commission with its sovereign eminent domain authority. The states also considered it rather likely the Joint Commission may ultimately need to use its eminent domain right and detailed specific procedures. *See* 1919 Pa. Laws 148, Sec. 1; 1912 N.J. Laws 1594–97. The Joint Commission was able to acquire bridges for the states. But this original grant of eminent domain seemed to be purely pragmatic.

The states, then in possession of the bridges, empowered today's Commission with bridge ownership and maintenance powers in 1934. The states agreed to grant the Commission with the same eminent domain power held by its predecessor entity. In the Compact, the states direct the Commission to use eminent domain as used by the earlier Joint Commission in the 1910s and 1920s. They specifically cite to the laws creating and empowering the Joint Commission. *See* Sec'y App. 88a (ECF Doc. No. 43-3), Article III.

This history drawn from the Compact confirms the states originally inserted the eminent domain provisions for pragmatic reasons. We do not think it is plausible the states placed this provision in the Compact because it knew of potential other implications of waiving or delegating its sovereign rights. The states originally drafted this provision to enable the Joint Commission to carry out its mission and carried this authority over to the new Commission.

<sup>130</sup> We note the Commission does not claim the Compact delegates it the authority to exercise the states' sovereign power of ensuring health and safety as to any building within its



Pennsylvania could have, consistent with the Compact, reserved its power to regulate building improvements as it did with the power to levy taxes, apply its laws of eminent domain, and protect local police authority. For example, we contrast the Compact's silence on the states' sovereign police power over building improvements to the Interstate Oil & Gas Compact Commission, another interstate compact entered by Pennsylvania. Originally formed in 1935, Pennsylvania joined the Interstate Oil & Gas Compact in 1961.<sup>131</sup> Congress approved the Compact in 1969.<sup>132</sup> The compacting states aimed to work together to efficiently extract natural resources but specified the listed subjects of the Compact "shall not limit the scope of the authority of any state."<sup>133</sup>

The Compact creating the Commission does not expressly reserve the compacting states' scope of authority as to building improvements. The states addressed police power relating to the local municipalities regulating local roads.<sup>134</sup> The Secretary cannot credibly argue the two states knew how to reserve police power in one section of the Compact but failed to do so in another section.<sup>135</sup>

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jurisdictional control. The Commission only argues it is free from Pennsylvania's unilateral regulation without its consent at the buildings it owns and operates.

<sup>131</sup> S.J. Res. 54, 91st Cong. (1969) (enacted).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Sec'y App. at 93a, Article X(d).

<sup>135</sup> See *In re New Valley Corp.*, 89 F.3d 143, 149 (3d Cir. 1996) ("A court cannot interpret words in a vacuum, but rather must carefully consider the parties' context and the other provisions in the plan."); see, e.g., *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 497 (1992) (explaining Congress's use

Our Court of Appeals cautioned in interpreting the Compact we “may not read into [the Compact] language or intent that is simply not there.”<sup>136</sup> We see no language expressing the intent of single state regulation or expressly reserving the compacting states’ sovereign police power despite the wide authority granted to the Commission.

We are also not persuaded by the Secretary’s argument a sovereign state must expressly relinquish its authority in a Compact to be effective. First, as we describe above, the states surrendered the power over improving and maintaining Commission property to the Commission. Second, the Secretary’s cited principle—that a state must relinquish sovereign rights “in terms too plain to be mistaken”—is taken from a Civil War-era case involving a state contracting with a bank under the Contract Clause; it did not involve the Compact Clause. This Contract Clause principle announced in *Jefferson Branch Bank v. Skelly* would only offer a mode of interpretation when presented with ambiguous terms.<sup>137</sup> The Court in *Skelly* was not tasked with reviewing an interstate compact under the Compact Clause, but rather an issue presented under the Contract Clause as to whether Ohio surrendered its sovereignty when authorizing a private banking company by contract. Our context is entirely distinct.

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in one section of a statute of the term “employee” and the term “person entitled to compensation” which courts had interpreted more narrowly shows “Congress intended the two terms to have different meanings”).

<sup>136</sup> *Operating Engineers*, 311 F.3d at 280.

<sup>137</sup> 66 U.S. 436 (1861).

In our Compact Clause analysis, this *Skelly* principle does not define the sovereign's ability to regulate a bi-state commission when the states clearly define the Commission's powers and purposes as including power over operating and maintaining the Commission's buildings. We see an example from the standard of review announced by our Court of Appeals in *Wayne Land*: "As with any contract, the analysis begins with 'the express terms of the Compact as the best indication of the intent of the parties[.]'"<sup>138</sup>

The states agreed to surrender their power to regulate the Commission's building improvements to the Commission. They can negotiate and work to amend their Compact and obtain Congressional approval but, as of today, the Compact must be enforced as written without a judge crafting language differing from the elected representatives' negotiated terms.

3. *We do not look at course of performance because the Secretary fails to show the Compact contains ambiguous terms.*

In addition to arguing the states did not surrender this authority despite the express Compact language, the Secretary also argues we should find the Compact is ambiguous. If the text of the Compact is ambiguous, we must then 'turn to other interpretative tools to shed light on the intent of the Compact's drafters.' One of those interpretative tools is the background notion 'that states do not easily cede their sovereign powers[.]'"<sup>139</sup> The Secretary argues the custom and

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<sup>138</sup> *Wayne Land*, 894 F.3d at 527 (quoting *Tarrant*, 569 U.S. at 620).

<sup>139</sup> *Id.* (quoting *Tarrant*, 569 U.S. at 620).

practices over the last eighty-six years can inform our review of the asserted ambiguity; in other words, the Commission never asserted its rights before consistent with the Secretary's view of the states' intent so why can it do so now.

We agree with the Secretary if we found ambiguity.<sup>140</sup> But as we do not see an ambiguity in the Compact, we do not turn to other these other interpretative methods when considering whether the states secretly retained their respective sovereign police power rights so as to allow the Secretary to unilaterally regulate the Commission's building improvements. We cannot read certain language of the Compact to mean the compacting states contemplated single state regulation when the Compact includes no language to this effect.

The Secretary argues the Commission acquiesced to his Department's building safety regulations for decades, showing a "course of performance" which would define the terms in the Compact when interpreted as a contract. We treat compacts "as contracts under the principles of contract law."<sup>141</sup> We may look at extrinsic evidence including "the parties' course of performance under the Compact" if the terms are ambiguous.<sup>142</sup> The Secretary fails to

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<sup>140</sup> The Secretary adduces largely undisputed evidence the Commission sought, and obtained, the Commonwealth's approval for a variety of similar issues over the Compact's history. The Commission did not timely challenge the accuracy of this evidence and we today deny its motion for leave to untimely challenge as untimely and moot. The Commission's argument is based on the Law governing the Compact. We agree with the Commission as to declaratory relief. We cannot read ambiguity into the Compact and the history is not material.

<sup>141</sup> *Tarrant*, 569 U.S. at 628.

<sup>142</sup> *Id.*

identify ambiguous language in the Compact. We independently find no ambiguous language.

“All other powers” takes its ordinary meaning: all powers, including any police power the Commonwealth unsuccessfully claims it retained, to carry out powers granted to the Commission. The Secretary fails to show it retained police power to regulate the Bridge Commission’s elevators or fuel-pumping stations. We decline to add language not agreed by the elected officials of the Commonwealth and New Jersey.

We do not need to review the largely undisputed course of conduct. The Framers set the standard and Pennsylvania’s and New Jersey’s elected representatives defined the powers surrendered to the Commission including surrendering certain rights regarding the Commission’s buildings to the joint bilateral Commission.

### **III. Conclusion**

Our “first and last order of business is interpreting the compact[;]’ we may not read into it language or intent that is simply not there.”<sup>143</sup> Pennsylvania and New Jersey created the Commission by Compact in 1934. Congress approved in 1935. The states agreed to grant the Commission “all other powers” to carry out its powers and purposes. The states granted the Commission the power to operate and maintain its real estate. The states did not reserve their sovereign powers to regulate the Commission. Pennsylvania now argues it retains sovereign rights it surrendered in 1934. They

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<sup>143</sup> *Operating Engineers*, 311 F.3d at 276 (quoting *Texas v. New Mexico*, 462 U.S. 554, 567–68 (1983)).

could get it back. But the states have not agreed to do so. As our Court of Appeals instructed in *Operating Engineers*, Pennsylvania and New Jersey may amend the Compact to provide for unilateral state regulation of Commission buildings. But without an amendment to the Compact approved by Congress, the Secretary may not force the Commission to submit to Pennsylvania's elevator or fuel-storage regulations and laws after it unequivocally surrendered its sovereign authority over maintaining and operating Commission property in the Compact. We grant summary judgment to the Commission to declare its rights under the Compact to be free from the Secretary's interference as to elevator operations and fuel storage at the Scudder Falls administration building complex through the accompanying Order.<sup>144</sup>

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<sup>144</sup> The Commission withdrew its request for injunctive relief at oral argument.

Because the 1953 proposed amendment was not approved by Congress, the version of the Compact codified in the States' respective statutes does not reflect the federally-approved Compact. Appx. 23a at n.35. The following Congressionally-approved Compact language is from an exhibit utilized by the District Court, *see* Appx. 23a-28a, and found in its docket at number 43-3, pages 82a-96a (Exhibit 5).

**AGREEMENT  
BETWEEN  
THE COMMONWEALTH OF PENNSYLVANIA  
AND  
THE STATE OF NEW JERSEY  
CREATING THE DELAWARE RIVER JOINT  
TOLL BRIDGE COMMISSION AS A BODY  
CORPORATE AND POLITIC AND DEFINING  
ITS POWERS AND DUTIES**

Whereas, The Commission, on behalf of the Commonwealth of Pennsylvania, existing by virtue of the act, approved the eighth day of May, one thousand nine hundred and nineteen (Pamphlet Laws, one hundred forty-eight),<sup>1</sup> and its supplements and amendments, and the commission, on behalf of the State of New Jersey, existing by virtue of the provisions of the act, approved the first day of April, one thousand nine hundred and twelve (Chapter, two hundred ninety-seven), and its supplements and amendments, acting as a joint commission, have acquired various toll bridges over the Delaware River between the Commonwealth of Pennsylvania and the State of New Jersey; and

Whereas, Additional bridge facilities between the two States will be required in the future for the

accommodation of the public and the development of both States; and

Whereas, Such additional bridge facilities should be developed without the expenditure of large sums from the public revenues; and

Whereas, It is highly desirable that there be a single agency for both States empowered to further the transportation interests of these States with respect to that part of the Delaware River north of the stone arch bridge of the Pennsylvania Railroad from Morrisville to Trenton; now therefore,

The Commonwealth of Pennsylvania and the State of New Jersey do hereby solemnly covenant and agree, each with the other, as follows:

#### **ARTICLE I**

There is hereby created a body corporate and politic, to be known as the Delaware River Joint Toll Bridge Commission (hereinafter in this agreement called the "commission") which shall consist of the commissioners, on behalf of the Commonwealth of Pennsylvania, provided for by the act, approved the eighth day of May, one thousand nine hundred and nineteen (Pamphlet Laws, one hundred forty-eight), and its supplements and amendments, for the acquisition of toll bridges over the Delaware River, and of commissioners, on behalf of the State of New Jersey, provided for by the act, approved the first day of April, one thousand nine hundred and twelve (Chapter two hundred ninety-seven), and its supplements and amendments, for the acquisition of toll bridges over the Delaware River, which said



commissions have heretofore been acting as a joint commission by virtue of reciprocal legislation.

No action of the commission shall be binding unless a majority of the members of the commission from Pennsylvania and a majority of the members of the commission from New Jersey shall vote in favor thereof.

The commission shall constitute the public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey for the following public purposes, and shall be deemed to be exercising an essential governmental function in effectuating such purpose, to wit:

(a) The administration, operation, and maintenance of the joint State-owned bridges across the Delaware River between the Commonwealth of Pennsylvania and the State of New Jersey, and located north of the present stone arch bridge of the Pennsylvania Railroad across the Delaware River from Morrisville to Trenton:

(b) The investigation of the necessity for additional bridge communications over the Delaware River north of the said railroad bridge, and the making of such studies, surveys, and estimates as may be necessary to determine the feasibility and cost of such additional bridge communications;

(c) The preparation of plans and specifications for, and location, construction, administration, operation and maintenance of, such additional bridge communications over the Delaware River, north of the aforesaid railroad bridge, as the commission deems

necessary to advance the interests of the two States and to facilitate public travel; and the issuance of bonds and obligations to provide moneys sufficient for the construction of such bridges; and the collection of tolls, rentals, and charges for the redemption of such bonds and obligations, and the payment of interest thereon;

(d) The procurement from the Government of the United States of any consents which may be requisite to enable any project within its powers to be carried out.

## ARTICLE II

For the effectuation of its authorized purposes, the commission is hereby granted the following powers as limited and supplemented by the act of July 1, 1996 (P.L. 457, No. 70), entitled "A supplement to the act of June 25, 1931 (P.L. 1352, No. 332), entitled 'An act providing for joint action by the Commonwealth of Pennsylvania and the State of New Jersey in the administration, operation, and maintenance of bridges over the Delaware River, and for the construction of additional bridge facilities across said river; authorizing the Governor, for these purposes, to enter into an agreement with the State of New Jersey; creating a Delaware River Joint Toll Bridge Commission and specifying the powers and duties thereof, including the power to finance the construction of additional bridges by the issuance of revenue bonds to be redeemed from revenues derived from tolls collected at such bridges; transferring to said commission all powers now exercised by existing commission created to acquire toll bridges over the Delaware River; and making an appropriation,'

requiring the commission to adopt competitive purchasing, equal opportunity employment and competitive hiring practices”:

- (a) To have perpetual succession.
- (b) To sue and be sued.
- (c) To adopt and use an official seal.
- (d) To elect a chairman, vice-chairman, secretary and treasurer, and appoint an engineer. The secretary, treasurer, and engineer need not be members of the commission.
- (e) To adopt suitable by-laws for the management of its affairs.
- (f) To appoint such other officers, agents and employees as it may require for the performance of its duties.
- (g) To determine the qualifications and duties of its appointees, and to fix their compensation, except that the commission shall not employ directly or as an independent contractor a member of the commission for a period of two years after the expiration of the term of office of that member.
- (h) To enter into contracts.
- (i) To acquire, own, hire, use, operate, and dispose of personal property.

(j) To acquire, own, use, lease, operate, and dispose of real property and interest in real property, and to make improvements thereon.

(j.1) At its option, to authorize the Department of Property and Supplies to prescribe standards and specifications and make contracts and purchases of various materials and services for the commission, pursuant to the provisions of sections 2403,3 2403.14 and 24095 of the act of April 9, 1929 (P.L. 177), known as "The Administrative Code of 1929."

(k) To grant the use of, by franchise, lease, and otherwise, and to make and collect charges for the use of, any property or facility owned or controlled by it.

(l) To borrow money upon its bonds or other obligations, either with or without security.

(m) To exercise the power of eminent domain.

(n) To determine the exact location, system, and character of, and all other matters in connection with, any and all improvements or facilities which it may be authorized to own, construct, establish, effectuate, maintain, operate or control.

(o) In addition to the foregoing powers, to exercise the powers, duties, authority and jurisdiction heretofore conferred and imposed upon the aforesaid commissions, hereby constituted a joint commission by reciprocal legislation of the Commonwealth of Pennsylvania and the State of New Jersey, with respect to the acquisition of toll bridges over the Delaware River, the management, operation and maintenance of such bridges, and the location,

construction, operation and maintenance of additional bridge communications over the Delaware River north of the aforesaid railroad bridge of the Pennsylvania Railroad.

(p) To exercise all other powers, not inconsistent with the Constitutions of the States of Pennsylvania and New Jersey or of the United States, which may be reasonably necessary or incidental to the effectuation of its authorized purposes or to the exercise of any of the forgoing powers, except the power to levy taxes or assessments for benefits; and generally to exercise, in connection with its property and affairs and in connection with property under its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.

### **ARTICLE III**

If for any of its authorized purposes (including temporary purposes), the commission shall find it necessary or convenient to acquire for public use any real property in the Commonwealth of Pennsylvania or the State of New Jersey, whether for immediate or future use, the commission may, by resolution, determine to acquire such property by a fee simple absolute or a lesser interest, and the said determination shall not be affected by the fact that such property has theretofore been taken for or is then devoted to a public use, but the public use in the hands or under the control of the commission shall be deemed superior to the public use in the hands or under the control of any other person, association, or corporation.

If the commission is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property, in the Commonwealth of Pennsylvania, for any reason whatsoever, then the Commission may acquire such real property by the exercise of the right of eminent domain, in the manner provided by the act, approved the eighth day of May, one thousand nine hundred and nineteen (Pamphlet Laws, one hundred forty-eight), entitled "An act providing for the joint acquisition and maintenance by the Commonwealth of Pennsylvania and the State of New Jersey of certain toll bridges over the Delaware River," and the acts amendatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River.

If the commission is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property, in the State of New Jersey, for any reason whatsoever, then the commission may acquire such property by the exercise of the right of eminent domain, in the manner provided by the act of the State of New Jersey, entitled "An act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware River; and providing for free travel across the same," approved the first day of April, one thousand nine hundred and twelve (Chapter, two hundred ninety-seven), and the various acts amendatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River.

The power of the commission to acquire real property by condemnation or the exercise of the power of

eminent domain in the Commonwealth of Pennsylvania and the State of New Jersey shall be a continuing power and no exercise thereof shall be deemed to exhaust it.

The commission and its duly authorized agents and employe[e]s may enter upon any land, in the Commonwealth or the State of New Jersey, for the purpose of making such surveys, maps, or other examinations thereof, as it may deem necessary or convenient for its authorized purposes.

However, anything to the contrary contained in this compact notwithstanding, no property, now or hereafter vested in or held by any county, city, borough, village, township or other municipality, shall be taken by the commission without the consent of such municipality, unless expressly authorized so to do by the Commonwealth or State in which such municipality is located. All counties, cities, boroughs, villages, townships and other municipalities, and all public agencies and commissions of the Commonwealth of Pennsylvania and the State of New Jersey, notwithstanding any contrary provision of law, are hereby authorized and empowered to grant and convey to the commission upon its request, but not otherwise, upon reasonable terms and conditions, any real property which may be necessary or convenient to the effectuation of its authorized purposes, including real property already devoted to public use.

The Commonwealth of Pennsylvania and the State of New Jersey hereby consent to the use and occupation by the commission of any real property of the said two States, or of either of them, which may be or become

necessary or convenient to the effectuation of the authorized purposes of the commission, including lands lying under water and lands already devoted to public use.

The term "real property," as used in this compact, includes lands, structures, franchises, and interests in land, including lands under water and riparian rights, and any and all things and rights usually included within the said term, and includes not only fees simple and absolute but also any and all lesser interests, such as easements, rights of way, uses, leases, licenses, and all other incorporeal hereditaments, and every estate, interest or right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages, or otherwise, and also claims for damage to real estate.

#### **ARTICLE IV**

Notwithstanding any provision of this agreement, the commission shall have no power to pledge the credit of the Commonwealth of Pennsylvania, or of the State of New Jersey, or of any county, city, borough, village, township and other municipality of said Commonwealth or State, or to create any debt against said Commonwealth or State or any such municipality.

#### **ARTICLE V**

The commission is hereby authorized to make and enforce such rules and regulations, and to establish, levy and collect (or to authorize, by contract, franchise, liens or otherwise, the establishment, levying and collection of) such tolls, rates, rents, and



other charges, in connection with any such bridge across the Delaware River which it may hereafter construct and operate, as it may deem necessary, proper, desirable and reasonable, which tolls, rates, rents, and other charges shall be at least sufficient to meet interest and sinking fund charges on bonds and obligations issued by the commission, the maintenance of such bridge, and the administrative expenses of the commission properly chargeable to such bridge. The commission is hereby authorized and empowered to pledge such tolls, rates, rents, and other revenues, or any part thereof, as security for the repayment, with interest, of any moneys borrowed by it or advanced to it for any of its authorized purposes, and as security for the satisfaction of any other obligation assumed by it in connection with such loans or advances.

#### **ARTICLE VI**

The Commonwealth of Pennsylvania and the State of New Jersey hereby covenant and agree with each other and with the holders of any bonds or other obligations of the commission, for which tolls, rents, rates, or other revenues have been pledged, that, so long as any of said bonds or obligations remain outstanding and unpaid (unless adequate provision is otherwise made by law for the protection of those advancing moneys upon such bonds or obligations), the Commonwealth of Pennsylvania and the State of New Jersey will not diminish or impair the power of the commission to own, operate and control said properties and facilities, or to establish, levy and collect tolls, rents, rates, and other charges in connection with such properties and facilities.

The Commonwealth of Pennsylvania and the State of New Jersey hereby covenant and agree with each other and with the holders of any bonds or obligations of the commission, for which tolls, rents, rates, or other revenues shall have been pledged, that the said Commonwealth and State will not authorize or permit the construction, operation and maintenance of any additional bridge or tunnel for the transportation of passengers by vehicles over the Delaware River by any other person or body, than the commission, within a distance of ten miles in either direction from any such toll bridge, measured along the boundary line between the said Commonwealth and the said State.

## ARTICLE VII

The bonds or obligations which may be issued by the commission for any of its authorized purposes, and as security for which tolls, rents, rates, and other revenues shall have been pledged, are hereby made securities in which all State and municipal officers and bodies of the Commonwealth of Pennsylvania and the State of New Jersey, and all banks, bankers, trust companies, savings banks, savings and loan associations, investment companies, and other persons carrying on a banking business, or insurance companies, insurance associations, and other persons carrying on an insurance business, and all administrators, executors, guardians, trustees, and other fiduciaries, and all other persons whatsoever, who now or may hereafter be authorized to invest in bonds or other obligations of the Commonwealth of Pennsylvania or of the State of New Jersey, may properly and legally invest funds, including capital belonging to them or within their control; and said

bonds or other obligations are hereby made securities which may properly and legally be deposited with and received by any State or municipal officer, or agency of the Commonwealth of Pennsylvania and the State of New Jersey, for any purpose for which the deposit of bonds or other obligations, either of the Commonwealth or of the State, is now or may hereafter be authorized.

#### **ARTICLE VIII**

The effectuation of its authorized purposes by the commission is and will be in all respects for the benefit of the people of the Commonwealth of Pennsylvania and the State of New Jersey, and for the increase of their commerce and prosperity, and since the commission will be performing essential governmental functions in effectuating said purposes, the commission shall not be required to pay any taxes or assessments upon any property acquired or used by it for purposes authorized by this agreement; and the bonds or obligations issued by the commission, their transfer and the income therefrom, including any profits made on the sale thereof, shall, at all times, be free from taxation within the Commonwealth of Pennsylvania and the State of New Jersey.

#### **ARTICLE IX**

The commission shall make annual reports to the Governors and Legislatures of the Commonwealth of Pennsylvania and the State of New Jersey setting forth in detail its operations and transactions, and may make such additional reports from time to time to the Governors and Legislatures, as it may deem advisable.

The commission shall submit biennially to a performance audit jointly conducted by the Auditor General of Pennsylvania and the State Auditor of New Jersey, which shall include expenditures and operations of the commission. These auditors shall complete the performance audit and prepare a joint report by December 31 of every odd-numbered year, with the first audit and report to be completed by December 31, 1997. A report of those audits shall be submitted to the Governors and Legislatures of the Commonwealth of Pennsylvania and the State of New Jersey and to the Delaware River Joint Toll Bridge Commission.

An annual financial audit shall be conducted at the expense of the commission by an independent accounting firm in accordance with generally accepted accounting principles. A written report of each audit shall be submitted to the commission and shall be retained by the commission for at least five years.

## **ARTICLE X**

Notwithstanding any other provision of this Agreement, the commission shall have the following powers:

(a) The commission may acquire, construct, rehabilitate, improve, maintain, repair and operate bridges for vehicular or pedestrian traffic across the Delaware River between the Commonwealth of Pennsylvania and the State of New Jersey at any locations north of the boundary line between Bucks County and Philadelphia County in the Commonwealth of Pennsylvania as extended across the Delaware River to the New Jersey shore of said

river. The commission may also, subject to the approval of the State Highway Department of the State of New Jersey and the Department of Highways of the Commonwealth of Pennsylvania, lease such bridges as lessor to, and contract for the operation of such bridges by, one or more public bodies, instrumentalities, commissions or public agencies.

Whenever any bridge north of the boundary line described above in this paragraph (a) proposed to be acquired by the commission pursuant to the provisions of this agreement has been constructed pursuant to consent or authorization granted by Federal law, the acquisition of such bridge by the commission shall be by purchase or by condemnation in accordance with the provisions of such Federal law, or the acquisition of such bridge by the commission shall be pursuant to and in accordance with the provisions of sections 48:5-22 and 48:5-23 of the Revised Statutes of New Jersey, and for all the purposes of said provisions and sections, the commission is hereby appointed as the agency of the State of New Jersey and the Commonwealth of Pennsylvania, exercising the rights and powers granted or reserved by said Federal law or sections to the State of New Jersey and Commonwealth of Pennsylvania jointly, or to the State of New Jersey acting in conjunction with the Commonwealth of Pennsylvania. The commission shall have authority to so acquire such bridge whether the same be owned, held, operated or maintained by any private person, firm, partnership, company, association or corporation, or by any instrumentality, public body, commission, public agency or political subdivision (including any county or municipality) of, or created by or in, the State of New Jersey or the

Commonwealth of Pennsylvania, or by any instrumentality, public body, commission or public agency of, or created by or in, a political subdivision (including any county or municipality) of the State of New Jersey or the Commonwealth of Pennsylvania.

In addition to other powers conferred upon it, and not in limitation thereof, the commission may acquire all right, title and interest in and to the Tacony-Palmyra Bridge across the Delaware River at Palmyra, New Jersey, together with any approaches and interests in real property necessary thereto. The acquisition of such bridge, approaches and interests by the commission shall be by purchase or by condemnation in accordance with the provisions of the Federal law consenting to or authorizing the construction of such bridge and approaches, or the acquisition of such bridge, approaches or interests by the commission shall be pursuant to and in accordance with the provisions of sections 48:5-22 and 48:5-23 of the Revised Statutes of New Jersey, and for all the purposes of said provisions and sections, the commission is hereby appointed as the agency of the State of New Jersey and the Commonwealth of Pennsylvania, exercising the rights and powers granted or reserved by said Federal law or sections to the State of New Jersey and Commonwealth of Pennsylvania jointly, or to the State of New Jersey acting in conjunction with the Commonwealth of Pennsylvania. The commission shall have authority to so acquire such bridge, approaches and interests, whether the same be owned, held, operated or maintained by any private person, firm, partnership, company, association or corporation, or by any instrumentality, public body, commission, public agency or political subdivision (including any county

or municipality) of, or created by or in, the State of New Jersey or the Commonwealth of Pennsylvania, or by any instrumentality, public body, commission or public agency of, or created by or in, a political subdivision (including any county or municipality) of the State of New Jersey or the Commonwealth of Pennsylvania. The power and authority herein granted to the commission to acquire said Tacony-Palmyra Bridge, approaches and interests shall not be exercised unless and until the Governor of the State of New Jersey and the Governor of the Commonwealth of Pennsylvania have filed with the commission their written consents to such acquisition.

The word "bridge" as used in this agreement shall include such approach highways and interests in real property necessary thereto in said Commonwealth or said State as may be determined by the commission to be necessary to facilitate the flow of traffic in the vicinity of any such bridge, or to connect such bridge with the highway system or other traffic facilities in said Commonwealth or said State: Provided, however, That the power and authority herein granted to the commission in connection with the approach highways shall not be exercised unless and until the Department of Highways of the Commonwealth of Pennsylvania shall have filed with the commission its written approval as to approach highways to be located in said Commonwealth and the State Highway Department of the State of New Jersey shall have filed with the commission its written approval as to approach highways to be located in said State.

Notwithstanding any other provision of this agreement or any provision of law, state or Federal, to the contrary, the commission may combine, for

financing purposes, any bridge or bridges hereafter constructed or acquired by it with any or all of the bridges described or referred to in any trust indenture securing bridge revenue bonds of the commission at the time outstanding, subject to any limitations or restrictions contained in such trust indenture.

Notwithstanding any provision of this agreement, nothing herein contained shall be construed to limit or impair any right or power granted or to be granted to the Pennsylvania Turnpike Commission or the New Jersey Turnpike Authority, acting alone or in conjunction with each other, to provide for the financing, construction, operation and maintenance of one bridge across the Delaware River south of the City of Trenton in the State of New Jersey: Provided, That such bridge shall not be constructed within a distance of ten miles, measured along the boundary line between the Commonwealth of Pennsylvania and the State of New Jersey, from the bridge being constructed across the Delaware River by the commission between the borough of Morrisville in said Commonwealth and the City of Trenton in said State, so long as there are any outstanding bonds or obligations of the commission for which the tolls, rents, rates or other revenues, or any part thereof, of said bridge now being constructed shall have been pledged; but such bridge may be constructed at any other location north of the boundary line described above in this paragraph (a). Nothing contained in this agreement shall be construed to authorize the commission to condemn any such bridge.

(b) The commission may replace any one or more existing bridges across the Delaware River between the Commonwealth of Pennsylvania and the State of



New Jersey north of said line with one or more new bridges at such locations as the commission may determine to be adequate and convenient for the traffic to be served thereby.

(c) The commission may acquire by purchase or by the exercise of the power of eminent domain any existing ferry or bridge, the acquisition of which, the commission may determine to be necessary or advisable in connection with the construction of a new bridge, the cost of such acquisition to be deemed to be a part of the cost of such construction.

(d) The commission may enter upon, use, occupy, enlarge, construct and improve, any street, road or highway, located within the limits of any municipality, and deemed by the commission to be necessary in connection with the acquisition, construction, improvement, maintenance or operation, of any bridge, owned or operated by the commission, or of any bridge approaches, bridge plazas, or approach highways to any such bridge, subject however to the consent of the governing body of such municipality, and to such reasonable police regulations as may be established by such governing body.

(e) The commission may demolish and remove any bridge now operated by it, when such bridge has been or is being replaced by a new bridge at the same or a different location, which in the determination of the commission will serve substantially the same traffic as that served by such existing bridge, and the commission may sell or otherwise dispose of any ferry or other property of the commission deemed by it to be

no longer useful or needed for the purposes of the commission.

(f) The commission may acquire for the purposes of this article any real property which it shall find necessary or convenient to acquire for public use in the manner provided by Article III of this Agreement, or in the alternative in the Commonwealth of Pennsylvania in the same manner and with the same right of entry as the Highway Department of the Commonwealth may acquire lands by condemnation for highway purposes, and in the State of New Jersey in the same manner and with the same right of entry as the Highway Department of the State may acquire lands by condemnation for highway purposes.

(g) The commission may make and enforce such rules and regulations with respect to the use of any bridge operated by it as it shall deem proper and reasonable, including regulations limiting the loads permitted on any such bridge, and closing to traffic any such bridge deemed by the commission to be unsafe.

(h) The commission may provide from time to time for the issuance of its bridge revenue bonds for any one or more of the following purposes, (1) providing funds for the acquisition, construction, rehabilitation or improvement of any one or more bridges, the acquisition, construction, rehabilitation or improvement of which is herein authorized, (2) providing funds for the construction or improvement of approach facilities deemed by the commission to be necessary or desirable in connection with the acquisition, construction, maintenance or operation, of any bridge owned or operated by the commission, including but without limitation, bridge approaches,

entrance plazas, overpasses, underpasses and approach highways, and (3) refunding any bridge revenue bonds or bridge revenue refunding bonds of the commission. The bridge or bridges (including any approach facilities) on account of which a single issue of bonds shall be issued, as herein authorized, shall constitute a single project for financing purposes.

(i) The commission may fix, charge and collect tolls, rates, rents and other charges for the use of any bridge or bridges constituting a single project, such tolls to be so fixed and adjusted, subject to any applicable Federal law, as to provide funds at least sufficient, (1) to pay the cost of maintaining, repairing and operating such bridge or bridges, including the administrative expenses of the commission chargeable thereto, (2) to pay the bridge revenue bonds or the bridge revenue refunding bonds issued on account of such project and the interest on such bonds, and (3) to provide reserves for such purposes: Provided, however, That no tolls shall be charged or collected for the use of any bridge now operated by the commission as a free bridge, but only for the use of bridges constructed or acquired by the commission under the provisions of this compact or agreement. Subject to any applicable Federal law the commission may pledge such tolls, rates, rents and other revenues or any part thereof for such purposes. The commission may establish separate schedules of tolls, rates and charges for use of any bridge on which tolls may be established hereunder by residents of areas adjacent to or served directly by such bridge under such conditions and on such terms as it shall determine to be proper and reasonable including tolls, rates and charges for unlimited use of any such bridge.

No member of the commission shall be subject to any personal liability or accountability by reason of any act or omission of the commission.

### **1984 Supplemental Agreement**

Act 1984, Dec. 18, P.L. 1052, No. 206, §§ 1 to 10, provided:

“§ 1. Authority to enter into supplemental agreement.

“The Governor is hereby authorized to enter into a supplemental compact or agreement on behalf of the Commonwealth of Pennsylvania with the State of New Jersey, supplementing the compact or agreement entitled ‘Agreement between the Commonwealth of Pennsylvania and the State of New Jersey creating the Delaware River Joint Toll Bridge Commission as a body corporate and politic and defining its powers and duties,’ which was executed on behalf of the State of New Jersey by its Governor on December 18, 1934, and on behalf of the Commonwealth of Pennsylvania by its Governor on December 19, 1934, and which compact or agreement was thereafter amended and supplemented by compacts or agreements executed by the respective states in July 1945, July 1951 and July 1953, such supplemental compact or agreement to be in substantially the following form:

“ ‘Supplemental Agreement between the Commonwealth of Pennsylvania and the State of New Jersey supplementing the compact or agreement entitled “Agreement between the Commonwealth of Pennsylvania and the State of New Jersey creating the Delaware River Joint Toll Bridge Commission as a body corporate and politic and defining its powers and

duties,” as heretofore amended and supplemented in July 1945, July 1951 and July 1953, to establish the purposes for which the commission may fix, charge and collect tolls, rates, rents and other charges for the use of commission facilities and properties.'

“The Commonwealth of Pennsylvania and the State of New Jersey do hereby solemnly covenant and agree each with the other as follows:

“(1)(i) Notwithstanding any other provision of the compact or agreement hereby supplemented, or any provision of law, State or Federal, to the contrary, as soon as the existing outstanding bonded indebtedness of the commission shall be refunded, defeased, retired or otherwise satisfied and thereafter, the commission may fix, charge and collect tolls, rates, rents and other charges for the use of any commission facility or property and, in addition to any purpose now or heretofore or hereafter authorized for which the revenues from such tolls, rates, rents or other charges may be applied, the commission is hereby authorized to apply or expend any such revenue for the management, operation, maintenance, betterment, reconstruction or replacement (1) of the existing non-toll bridges (formerly toll or otherwise) over the Delaware River between the State of New Jersey and the Commonwealth of Pennsylvania heretofore acquired by the commission pursuant to the provisions of the act of the State of New Jersey approved the first day of April, 1912 (Chapter 297), and all supplements and amendments thereto [N.J.S.A. § 32:9-1 et seq.], and the act of the Commonwealth of Pennsylvania approved the eighth day of May, 1919 (P.L. 148,

No. 102) [§ 3271 et seq. of this title], and all supplements and amendments thereto and (2) of all other bridges within the commission's jurisdiction and control. Betterment shall include, but not be limited, to parking areas for public transportation services and all facilities appurtenant to approved projects.

“(ii) The commission may borrow money or otherwise incur indebtedness and provide, from time to time, for the issuance of its bonds or other obligations for one or more of the purposes authorized in this supplemental agreement. The commission is hereby authorized and empowered to pledge its tolls, rates, rents and other revenues, or any part thereof, as security for the repayment, with interest, of any moneys borrowed by it or advanced to it for any of its authorized purposes and as security for the satisfaction of any other obligation assumed by it in connection with such loan or advances.

“(iii) The authority of the commission to fix, charge and collect fees, rentals, tolls or any other charges on the bridges within its jurisdiction, including the bridge at the Delaware Water Gap, is hereby confirmed.

“(iv) The covenants of the State of New Jersey and the Commonwealth of Pennsylvania as set forth in Article VI of the compact to which this is a supplemental agreement shall be fully applicable to any bonds or other obligations issued or undertaken by the commission. Notwithstanding Article VI or any other provision of the compact, the State of New Jersey and the Commonwealth of Pennsylvania may construct a bridge across the Delaware River in the vicinity of Easton, Pennsylvania, and Phillipsburg,

New Jersey, within ten miles of the existing toll bridge at that location. All the rest and remainder of the compact, as amended or supplemented, shall be in full force and effect except to the extent it is inconsistent with this supplemental agreement.

“(2) The commission is hereby authorized and empowered to fix, charge or collect fees, rentals, tolls or any other charges on the proposed bridge to be constructed in the vicinity of Easton, Pennsylvania, and Phillipsburg, New Jersey, in the same manner and to the same extent that it can do so for all other toll bridges under its jurisdiction and control provided that the United States Government has approved the bridge to be a part of the National System of Interstate and Defense Highways, with 90% of the cost of construction to be contributed by the United States Government, and provided further that the non-Federal share of such bridge project is contributed by the commission. The commission is further authorized and empowered in the same manner and to the same extent that it can do so for all other toll bridges under its jurisdiction and control to fix, charge and collect fees, rentals, tolls or any other charges on any other bridge within its jurisdiction and control if such bridge has been constructed in part with Federal funds.

“(3) The consent of Congress to this compact shall constitute Federal approval of the powers herein vested in the commission and shall also constitute authority to the United States Department of Transportation or any successor agency and the intent of Congress to grant any Federal approvals required hereunder to permit the commission to fix, charge and collect fees, rentals, tolls or any other charges on the

bridges within its jurisdiction to the extent provided in paragraphs (1), (2) and (3) hereof and the compact.

“(4) Notwithstanding above provisions, the commission shall not fix, charge or collect fees, rentals, tolls or any other charges on any of the various bridges formerly toll or otherwise over the Delaware River between the State of New Jersey and the Commonwealth of Pennsylvania heretofore acquired by the commission pursuant to the provisions of the act of the State of New Jersey approved the first day of April 1912 (Chapter 297), and all supplements and amendments thereto, and the act of the Commonwealth of Pennsylvania approved the eighth day of May 1919 (P.L. 148, No. 102), and all supplements and amendments thereto. •

“(5) At any time that the commission shall be free of all outstanding indebtedness, the State of New Jersey and the Commonwealth of Pennsylvania may, by the enactment of substantially similar acts, require the elimination of all tolls, rates, rents and other charges on all bridges within the commission's jurisdiction and control and, thereafter, all costs and charges in connection with the construction, management, operation, maintenance and betterment of bridges within the jurisdiction and control of the commission shall be the financial responsibility of the states as provided by law.

“§ 2. Effect upon signature. • “Upon its signature on behalf of the State of New Jersey and the Commonwealth of Pennsylvania, the supplemental compact or agreement set forth in section 1 of this act shall become binding and shall have the force and effect of a statute of the Commonwealth of



Pennsylvania, and the Delaware River Joint Toll Bridge Commission shall thereupon become vested with all the powers, rights and privileges, and be subject to the duties, obligations, conditions and limitations contained therein, as though the same were specifically authorized and imposed by statute, and the Commonwealth of Pennsylvania shall be bound by all of the obligations assumed by it under such supplemental compact or agreement, and the Governor shall transmit an original signed copy thereof to the Secretary of the Commonwealth for filing in his office.

“§ 3. Consent and approval of Congress. • “The Governor is hereby authorized to apply, on behalf of the Commonwealth of Pennsylvania, to the Congress of the United States for its consent and approval to such supplemental compact or agreement.

“§ 4. Authority to construct bridge. • “Notwithstanding the authority granted to the Delaware River Joint Toll Bridge Commission in its compact to construct bridges across the Delaware River, the Secretary of Transportation, in cooperation with the Department of Transportation of the State of New Jersey and the United States Department of Transportation, is hereby authorized to construct, as part of the National System of Interstate and Defense Highways, a bridge across the Delaware River in the vicinity of Easton, Pennsylvania, and Phillipsburg, New Jersey, within ten miles of the existing toll bridge owned and operated by the commission. • “§ 5. Authority to enter into agreement for construction, operation and maintenance.

“The Secretary of Transportation is further authorized to enter into an agreement with the Department of Transportation of New Jersey, the United States Department of Transportation and the Delaware River Joint Toll Bridge Commission providing for the operation and maintenance or the construction, operation and maintenance of the proposed Easton-Phillipsburg bridge by the commission. The provisions of the compact and all amendments and supplements thereto shall be applicable to the construction, operation and maintenance of the bridge facility except as otherwise provided for by Federal law or in the agreement between the parties.

“§ 6. Authority to provide funds. • “The Commonwealth, at its discretion, shall have authority to provide funds to the Delaware River Joint Toll Bridge Commission for major capital improvements to or the replacement of the commission's non-toll bridges or for such other financial assistance as may be requested.

“§ 7. Authority of commission to take property.

“For the purposes of the location, construction, management, operation, maintenance, betterment or replacement of any bridges now existing or to be constructed within its jurisdiction and control, the commission is granted the power and authority to enter upon, use, overpass, occupy, enlarge, construct, improve or close any easement, street, road or highway located within the limits of, or to use, occupy or take property, now or hereafter vested in or held by any municipality in accordance with the provisions

and procedures of the laws of the Commonwealth governing such takings.

“§ 8. Limitation on Governor. • “The Governor of the Commonwealth of Pennsylvania shall not enter into the supplemental compact or agreement set forth in section 1 on behalf of the Commonwealth of Pennsylvania until passage by the State of New Jersey of a substantially similar act, including a substantially similar supplemental compact or agreement between the two states. [See N.J.S.A. 32:8-17 to 32:8-22 enacted by L.1985, c. 342, of New Jersey, on Oct. 21, 1985]

“§ 9. Repeals.

“The following acts and parts of acts are repealed: • “Section 8 of the act of May 8, 1919 (P.L. 148, No. 102), entitled ‘An act providing for the joint acquisition and maintenance by the Commonwealth of Pennsylvania and the State of New Jersey of certain toll-bridges over the Delaware River.’ [§ 3278 of this title]

“Act of June 28, 1968 (P.L. 281, No. 136), entitled ‘An act concerning highways and bridges over the Delaware River, and responsibilities of the Delaware River Joint Toll Bridge Commission and the Department of Highways of the Commonwealth of Pennsylvania with regard to the construction of additional crossings.’ [§§ 3418.1 to 3418.5 of this title]

“§ 10. Effective date.

“(a) Except as provided in subsection (b), this act shall take effect immediately.

“(b) As much of section 9 as relates to the repeal of section 8 of the act of May 8, 1919 (P.L. 148, No. 102), entitled ‘An act providing for a joint acquisition and maintenance by the Commonwealth of Pennsylvania and the State of New Jersey of certain toll-bridges over the Delaware River,’ [§ 3278 of this title] shall take effect July 1, 1986, provided that on or before such date the Secretary of Transportation publishes in the Pennsylvania Bulletin a notice indicating ratification of the compact by the Congress of the United States.”