

No. 20-1761

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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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**REPLY BRIEF**

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## REASONS FOR GRANTING THE WRIT

The delegation of any State's sovereign power is such a "grave act," *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U.S. 265, 273 (1908), that for two centuries this Court has consistently reaffirmed that 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); *see also, Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146, 148 (1982). This principle, which is older than the Founding, is particularly true for a State's police power over health and safety, which is "one of the most essential powers of government [and] one that is the least limitable." *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915). Thus, silence in an interstate compact retains a State's sovereign power over health and safety regulations, it does not relinquish it.

In its scant response to the Secretary's petition, the Delaware Joint Toll Bridge Commission (Commission) does not, because it cannot, dispute that this principle governs the surrender of state sovereignty. Instead, the Commission suggests that the Court of Appeals' analysis is somehow consistent with that principle. It is not. That court's analysis is in direct conflict with it. The Court of Appeals explicitly announced that the mere "creation of a bi-state entity pursuant to the Compact Clause is an unambiguous surrender" of sovereign authority. App. 12a. If that were somehow not clear enough, the Court of Appeals reiterated that "[b]y expressly creating the Commission, the compacting States relinquished all control over the Commission unless otherwise stated in the compact." *Ibid.* (cleaned

up). Thus, it is not the Secretary who “misstates the Third Circuit’s decision,” Response at 4, but the Commission. This holding, that silence relinquishes sovereignty, so threatens state sovereignty, and so disrupts existing compacts, that it must be reviewed.

The Commission’s argument that there exists no “split in the authority” among the courts is not based on any discussion of the conflicting caselaw. Rather, the Commission bases this argument entirely upon its erroneous assertion that the Court of Appeals did not hold that Pennsylvania surrendered its sovereign authority through silence. Response at 4. As discussed above, that assertion is unmoored from the express language of the opinion.

The Commission’s analysis of the Compact’s text fares no better. The Commission wrongly suggests that the Compact’s text expressly grants the Commission sovereign authority over all health and safety matters in the construction and operation of any building. But there is simply nothing in the Compact — express or implied — that cedes Pennsylvania’s sovereign authority over health and safety to the Commission.

As explained in the Petition, the Compact is both a contract and a federal statute. Petition at 15. As such, the Compact must be interpreted in accordance with principles of statutory and contractual construction, which is to give effect to the intent of the parties or, in the case of a statute, to the legislature. *See Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013); *State of New Jersey v. Delaware*, 552 U.S. 597, 610 (2008). The “best evidence” of that “intent is the statutory [or contractual] text.” *Nat’l Fed’n of Indep.*

*Bus. v. Sebelius*, 567 U.S. 519, 544 (2012); see *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015). That text must be construed as a whole. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

Looking at the Compact as a whole, the Commission is authorized to effectuate the following purposes: administering, operating, maintaining, and constructing bridges that span certain portions of the Delaware River. App.63a (Art. I(a) and (c)). In conducting those authorized purposes, the Commission also has the power “[t]o acquire, own, use, lease, operate, and dispose of real property and interest in real property, and to make improvements thereon.” App. 66a. Notably absent from this list is any indication—let alone a clear and unmistakable communication—of surrendering state regulatory authority. See e.g. *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987) (waiver of sovereign authority “will not be implied, but instead must be surrendered in unmistakable terms”) (citation omitted); A. SCALIA & B. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 195 (2012) (when several words “are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar”). The Commission can do no more than any other “natural person or a private corporation”—acquire and use real property consistent with governing state law. Appx. 67a (Compact Art. II(p); Petition at 18).

The Court of Appeals’ upending of this Court’s settled law and its explicit determination that silence can cede sovereignty also poisoned its interpretation of the

Compact's text. *See* Petition at 18-20. For example, the Court of Appeals concluded that the "reasonably necessary or incidental" clause, App. 12a-13a, surrendered state sovereignty because it failed to "provide a limitation retaining the Commonwealth's police power." App. 13a. As discussed in the Petition, such a reading of the Compact "turns the concept of sovereignty on its head," *Merrion*, 455 U.S. at 148. The Court of Appeals' misinterpretation of the Compact cannot be disentangled from its incorrect holding that silence relinquishes state sovereignty. The Court of Appeals' ruling conflicts with relevant decisions of this Court on an important federal question, which is a compelling reason for granting certiorari review. Sup. Ct. R. 10(c).

In stark contrast to the Compact's silence regarding health and safety laws, two traditional aspects of sovereignty are expressly relinquished through the Compact—eminent domain and taxation. The Commission is granted "the power of eminent domain," App. 66a (Art. II(m)), and is "not \* \* \* required to pay any taxes or assessments upon any property acquired or used by it for purposes authorized by" the Compact. App. 73 (Art. VIII). These were the sovereign powers the Commonwealth expressly relinquished, and nothing else.

The Commission raises no other arguments in its response. "Under this Court's rule 15.2, a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari 'may be deemed waived.'" *Caterpillar Inc., v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (quoting Sup. Ct. R. 15.2); *see also Stop the Beach Renourishment, Inc., v. Florida Dep't of Envtl. Protection*, 560 U.S. 702, 729 (2010) (respondent's objections were waived by its failure to raise them



in opposition to the petition for writ of certiorari). Accordingly, the Commission, by its response, waives any challenge to and acknowledges:

- That silence is a retention of sovereign power, not a relinquishment. *See* Petition at 10-15.
- That the Court of Appeals decided “an important federal question.” Sup. Ct. R. 10(c); Petition at 27 (explaining that there are over “200 active interstate compacts,” “covering diverse aspects of state sovereignty,” and the “Court of Appeals’ decision threatens the very viability of these compacts”).
- That “[b]ecause of the special origin and function of compacts,” it is “the function and duty of the Supreme Court of the Nation’ to determine the ‘nature and scope of obligations’ under an interstate compact.” Petition at 4 (quoting *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951)).

The Court should review this important federal question and reverse the Court of Appeals’ upending of fundamental principles concerning relinquishment of state sovereignty, resolve the conflict created by the Court of Appeals in compact jurisprudence, and reaffirm this Court’s longstanding precedent that 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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