No. 22O156

IN THE

Supreme Court of the United States

STATE OF NEW YORK,

Plaintiff,

v.

STATE OF NEW JERSEY,

Defendant.

BRIEF IN RESPONSE OF DEFENDANT NEW JERSEY

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INTRODUCTION

This Court should grant New York's motion for leave to file the Bill of Complaint. The question presented in this case is whether the Waterfront Commission Compact permits New Jersey to withdraw from the Compact without New York's consent. As New Jersey and New York agree, this important question of compact interpretation falls well within the heartland of this Court's original and exclusive jurisdiction.

New Jersey and New York also both agree that this Court should address and resolve dispositive motions on the merits without first appointing a special master. As detailed in a joint motion filed concurrently with this brief, where an original jurisdiction case involves one or more questions of law that are likely dispositive of the claims at issue, this Court has ordered the parties to brief those legal questions before, or in lieu of, referring the case to a special master. That approach makes sense here. This case turns on a question of compact interpretation, and factual development is unnecessary to resolve it. Moreover, because the Commission, a bistate agency, exercises broad regulatory and law-enforcement authority within the borders of both States, New York and New Jersey share an interest in expeditiously resolving their dispute regarding its continued authority. Thus, if the Court grants New York's motion for leave to file the Bill of Complaint, it should also grant the parties' joint motion and resolve the core legal question itself.

If the Court grants the parties' joint motion and sets a briefing schedule on the merits, it need not address or resolve the merits at this stage. But because New York contends in its motion that its claims will succeed on the merits, N.Y. Br. in Support of Mot. for Leave to

File Bill of Complaint 23-28 (hereinafter Mot. Br.), New Jersey briefly explains in this response why that is wrong as a matter of law. In short, the Waterfront Commission Compact's plain text is silent as to withdrawal, and this Court has repeatedly refused to construe silence in an interstate compact as stripping the States of their sovereign powers. In particular—and as the U.S. Solicitor General has explained—if a compact involves an ongoing delegation of a State's regulatory authority, as this Compact does, the member States retain a sovereign right to withdraw except when the Compact says otherwise. That result flows from background principles of contract and treaty law, as well as the text and history of the Compact Clause. And it draws further support from the text and structure of this specific compact. Accordingly, if the Court grants the parties' joint motion, it should ultimately hold—after full briefing and argument—that New York's claims fail as a matter of law.

COUNTERSTATEMENT OF THE CASE

1. In 1953, New Jersey and New York entered into the Waterfront Commission Compact to combat problems of "crime, corruption, and racketeering on the waterfront of the port of New York." *De Veau v. Braisted*, 363 U.S. 144, 150 (1960). In the Compact, the States established the Waterfront Commission of New York Harbor (Commission), a bistate agency imbued with the "power to license, register, and regulate . . . waterfront employment." *Id.*, at 149. The Commission is an "instrumentality of the States" endowed with their "police power[s]." Compl. App. 3a (art. I.4), 6a (art. III.1). The States delegated to the Commission the authority to engage in regulatory and law-enforcement activity on the New Jersey side of the

port (relying on New Jersey's police powers) and the New York side (relying on New York's).

The Compact was established to handle a problem that was then in the headlines: organized crime at the port. Two years before, New York Governor Thomas Dewey created the New York Crime Commission to investigate crime, corruption, and intolerable working conditions at the waterfront. See *New Jersey-New York Waterfront Comm'n Compact: Hearing on H.R. 6286, H.R. 6321, H.R. 6343, and S. 2383 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 83d Cong. 165 (1953) ("*Commission Compact Hearing*"). The Crime Commission found that the mob had infiltrated the docks and was demanding payments from the workers and shippers through extortion and violence. See, *e.g.*, *Record of the Public Hearings Held by Thomas E. Dewey on the Recommendations of the N.Y. State Crime Commission for Remedying Conditions on the Waterfront of the Port of N.Y.* 661-63 (N.Y. 1953) ("*New York Hearings*"). The Crime Commission thus recommended establishing a "temporary" agency that would register and license companies at the port and that would exist only "as long as necessary" to eliminate the then-extant "evils." *Id.*, at 665-66. Negotiations between New Jersey and New York, followed by swift Congressional approval, led to the Waterfront Compact and Commission.

Because the Commission was temporary and reliant on delegated police powers from both States, the Compact ensured that the Commission could function only with their continued mutual assent. To that end, the two States agreed that the Commission "shall consist of two members, one to be chosen by the State of New Jersey and one to be chosen by the State of New York," Compl. App. 6a (art. III.2); that each member

"shall be appointed by the Governor of such State with the advice and consent of the Senate thereof," *id.*; and that the Commission could "act only by unanimous vote of both members thereof," *id.* (art. III.3). This structure empowered either State to veto any actions by the Commission. Moreover, each State retained authority to veto Commission budgets, Compl. App. 31a (art. XIII.2), which would in turn prevent the agency from raising revenue and, ultimately, from operating, *id.* (art. XIII.3) (allowing the Commission to levy assessments only to cover "budgeted expenses").

The Compact states that "[a]mendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the Legislature of either State concurred in by the Legislature of the other." Compl. App. 34a-35a (art. XVI.1). Congress also added language to confirm that it "expressly reserved" its "right to alter, amend, or repeal this Act," Compl. App. 35a (art. XVI §2), consistent with the truism that one Congress cannot bind future Congresses. But the Compact is silent as to whether either State can withdraw.

2. Profound concerns with the Commission—and changed circumstances at the port—led New Jersey to withdraw from the Compact in 2018.

In 2009, the New York Inspector General issued a scathing 63-page report outlining the Commission's misconduct. See N.Y. Office of the Inspector Gen., *Investigation of the Waterfront Comm'n of N.Y. Harbor* (Aug. 2009), https://tinyurl.com/ydxvbk3m ("OIG Report"). The report identified a "climate of abuse" at the Commission, including a "lack of accountability fueled by perceived immunity from oversight by outside entities"; the "abrogation of legal responsibilities undermining the very purposes of the

Commission"; and other misconduct from "improper hiring and licensing to . . . misuse of Homeland Security grants." *Id.*, at 1.

In 2018, the New Jersey Legislature recognized the Commission was no longer fulfilling its mission to "investigate, deter, and combat criminal activity and influence in the port." Compl. App. 37a. Because "changes in the industry" had eliminated the Commission's ability to fulfill its mandate, the Commission was "over-regulat[ing] the businesses at the port in an effort to justify its existence as the only waterfront commission in any port in the United States." *Id.* To make matters worse, the Legislature found, the Commission had "become an impediment to future job growth and prosperity at the port," had "been tainted by corruption in recent years," and had regularly violated the terms of the Compact. *Id.* The Legislature acknowledged the need "to regulate port-located business to ensure fairness and safety" and root out crime, *id.*, but found those goals better served by reclaiming its police powers and exercising them via the New Jersey State Police. See Compl. App. 37a-38a.

The Legislature thus voted to withdraw New Jersey from the Compact by enacting Chapter 324, which was signed by Governor Chris Christie on January 16, 2018. See Compl. App. 36a-109a. The statute explicitly reclaimed New Jersey's police powers over the portion of the port within its borders, and left to New York the sovereign police powers it had delegated. See Compl. App. 46a (reassuming "powers" and "duties" "of the commission within this State," and delegating them to State Police); Compl. App. 47a (assuming the assets, property, and funds "applicable to this State"); Compl. App. 47a-48a (assuming all New Jersey-based "debts, liabilities, obligations, and contracts").

The Legislature aimed to withdraw from the Compact seamlessly. The statutory withdrawal would not take effect for up to 120 days: the Governor would first provide notice, including to New York, within 30 days, and New Jersey would reclaim its sovereign powers 90 days later. See Compl. App. 38a, 45a. Even then, the New Jersey law ordered State Police to "continu[e] the functions, contracts, obligations, and duties of the commission within this State," mandated "all operations of the commission within this State … continue as operations of [State Police] until altered," and required that "all rules and regulations of the commission [would] continue in effect as the rules and regulations of the division until amended, supplemented, or rescinded by" State Police. Compl. App. 48a.

3. Following the enactment of Chapter 324, the Commission sued the New Jersey Governor, challenging the withdrawal in federal district court. Although the district court enjoined the withdrawal, the Third Circuit reversed on June 5, 2020, finding New Jersey's sovereign immunity barred the Commission's lawsuit. See *Waterfront Comm'n of N.Y. Harbor v. Murphy*, 961 F.3d 234 (CA3 2020). The Supreme Court subsequently denied the Commission's petition for certiorari on November 22, 2021. As a result, on December 3, the district court lifted its injunction, which allowed New Jersey to move forward with implementing Chapter 324 and withdrawing from the Compact. See *Waterfront Comm'n of N.Y. Harbor v. Murphy*, No. 18-cv-650 (D.N.J.), ECF No. 76.

On December 27, 2021, New Jersey gave its formal notice of withdrawal, which triggered a transfer date of March 28, 2022. See PI App. 32a-39a (letter from S. Oliver) (cited at Compl. ¶ 84); Compl. App. 45a (statute setting transfer date as 90 days after notice).

On March 14, 2022, New York filed a motion for leave to file a Bill of Complaint, complaint, motion for preliminary injunction, and motion to expedite in this Court. On March 24, this Court granted a preliminary injunction, enjoining New Jersey "from enforcing Chapter 324 or taking action to withdraw unilaterally from the Compact or terminate the Commission pending disposition of the motion for leave to file a bill of complaint and, if granted, disposition of the case." Order in No. 22O156 (Mar. 24, 2022).

ARGUMENT

I. This Court Should Grant New York's Motion For Leave And Expeditiously Resolve This Case On Dispositive Cross-Motions.

The Court should grant the motion for leave to file the Bill of Complaint. The question at the heart of the case is whether the Waterfront Commission Compact bars New Jersey from withdrawing from the Compact absent New York's consent. New Jersey agrees this pure question of compact interpretation falls squarely within this Court's original jurisdiction. See, *e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice* ch. 10-2, at 10-7, 10-9 (11th ed.) (Stern & Gressman) (recognizing that complaints seeking "to construe and enforce an interstate compact" are among the suits that "most frequently" justify this Court's original jurisdiction); *Alabama v. North Carolina*, 560 U.S. 330, 338 (2010) (exercising jurisdiction to determine whether a State could withdraw from another compact).

Indeed, the legal question this case presents is important and is well-suited for resolution by this Court. See, *e.g.*, *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (describing this Court's criteria for evaluating motions for leave to file original suits). Resolution

of this case will dictate whether a Compact that is silent on withdrawal nevertheless binds its members in perpetuity to the ongoing delegation of their sovereign regulatory and law-enforcement powers to a bistate agency. See *Dyer v. Sims*, 341 U.S. 22, 28 (1951) (expressly leaving this question open). And resolution of that interpretive question will dictate which sovereign entity maintains control over one of the Nation's largest ports. Thus, this Court should exercise its jurisdiction to resolve the parties' competing legal interpretations of the Compact.

If this Court grants the motion for leave, the parties agree this Court should immediately allow New York and New Jersey to file dispositive cross-motions. To that end, New York and New Jersey have concurrently filed a joint motion requesting this Court permit the parties to file cross-motions for judgment on the pleadings, set a briefing schedule, and hear oral argument on the cross-motions. See Jt. Mot. 4. Specifically, the parties ask this Court to permit them to "file cross-motions for judgment on the pleadings, in the nature of motions under Rule 12(c) of the Federal Rules of Civil Procedure," *id.*, consistent with the well-established practice in the lower courts.

The parties' joint motion explains that this Court has repeatedly permitted parties in the original action to brief dispositive questions of law—including on the merits—at the outset. See Stern & Gressman, *supra*, ch. 10-12, at 10-37 to -40 (collecting examples); Jt. Mot. 1-2 (same). As the United States has recognized, this process allows the Court to "resolve[] preliminary or potentially controlling legal issues before, or in lieu of, referring the case to a Special Master." Br. for U.S. as Amicus Curiae at 21-22, *Texas v. New Mexico*, No. 141 (Dec. 10, 2013), 2013 WL 6917383.

A similar course is warranted here for two reasons. First, as New York and New Jersey have agreed, this case involves pure questions of law that will likely dispose of the claims in full. Jt. Mot. 2-3. Consistent with the familiar domain of Federal Rule of Civil Procedure 12, this Court generally allows the parties in an original action to file dispositive motions at the outset of the case where "the questions presented are legal rather than factual." Stern & Gressman, *supra*, ch. 10-12, at 10-37; see, *e.g.*, *Texas v. New Mexico*, 571 U.S. 1173 (2014); *Montana v. Wyoming*, 552 U.S. 1175 (2008); *New Hampshire v. Maine*, 530 U.S. 1272 (2000); *Kansas v. Nebraska*, 527 U.S. 1020 (1999); *California v. United States*, 457 U.S. 273, 278 (1982); *S. Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966); *United States v. Louisiana*, 338 U.S. 806 (1949).

The core question presented here is one of compact interpretation: whether the Compact allows New Jersey to withdraw absent New York's consent. And compact construction, like any ordinary question of statutory construction, can be resolved without any factual development. See *Oklahoma v. New Mexico*, 501 U.S. 221, n.5 (1991) ("We have previously pointed out that a congressionally approved compact is both a contract and a statute."); Br. for U.S. as Amicus Curiae at 13, *Kansas v. Nebraska*, No. 126 (Sept. 10, 1999), 1999 WL 35639273 (agreeing that if a motion "places before this Court a discrete and controlling question of law" involving compact interpretation, that question can be appropriately "resolved at th[e] preliminary stage of the litigation through the application of familiar principles of compact construction"). That is why the parties' briefing to date—both on this motion for leave to file and at the preliminary injunction stage—focused on pure questions of interpretation. See Mot. Br. 23 (New York acknowledging that its "claims here

turn on a clear issue of compact interpretation"); Mot. Br. 12 (agreeing original jurisdiction is needed "to resolve two States' competing interpretations"). And both parties rely on familiar interpretive tools—text, history, and structure—in support of their respective arguments. See Mot. Br. 23-28; *supra*, at 11-25. These commonplace interpretive arguments neither require nor depend on any additional factual development. Since a special master is thus unnecessary, the resolution of these competing interpretations is particularly well-suited to a decision on the pleadings.

Second, granting the parties' request to file dispositive cross-motions that would resolve the entirety of the suit would also serve the Court's general "object in original cases . . . to have the parties, as promptly as possible, reach and argue the merits of the controversy presented." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). The need for expeditious resolution is particularly pertinent here. Pursuant to the Court's preliminary injunction, the parties remain joint participants in directing the Waterfront Commission. The Commission oversees one of the Nation's largest ports, and it exercises broad regulatory and law-enforcement authority within the borders of both States. See Mot Br. 5. New York and New Jersey share an interest in expeditiously resolving the dispute concerning the Commission and their roles at the port. Mot. Br. 23 (agreeing resolution of the "significant impasse over the correct interpretation of the Compact" is "urgent").

Moreover, New Jersey will suffer irreparable and profound sovereign injury until the Court ultimately resolves this case. This Court's preliminary injunction has prevented New Jersey from implementing Chapter 324, despite its initial enactment in 2018, and despite months of preparations to implement that statute.

Abbott v. Perez, 138 S. Ct. 2305, 2324 n.17 (2018) (noting "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"). And it means that until this case reaches final resolution, another sovereign will continue to exercise police powers within New Jersey's borders without the latter's continued consent. That profound sovereign injury counsels strongly in favor of the expeditious resolution that dispositive cross-motions under Rule 12 can provide.

This Court has repeatedly entertained briefing on dispositive motions based on Rule 12 at the outset of prior actions. It should do the same here.

II. New York's Claims Will Ultimately Fail As A Matter Of Law.

If the Court grants the joint motion, it need not address the merits of New York's claims at this time. But because New York contends that its claims will succeed on the merits, Mot. 23-28, New Jersey briefly explains why this Court should reject New York's claims as a matter of law. To preview: Because the Compact is silent on withdrawal, the core legal issue is whether to read that silence as preserving or divesting New Jersey of its ability to withdraw from the Compact and exercise its sovereign powers within its borders. On this "clear issue of compact interpretation," Mot. 23, all indicia point to the same result. Traditional rules of compact interpretation, bedrock principles of sovereignty, the text and history of the Compact Clause, and analogous contract and treaty doctrines demonstrate that New Jersey can withdraw from the Compact without New York's consent. The language and structure of this particular compact are also in accord. New Jersey should prevail as a matter of law.

A. The Compact Does Not Cabin Withdrawal.

Because the plain text of the Waterfront Commission Compact places no limits on either State's withdrawal, the member States maintained their right to reclaim their sovereign police powers.

1. Under hornobook rules of construction, because the Compact does not place limits on withdrawal, the States retain their ability to do so. "States entered the federal system with their sovereignty intact," *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), and they "rarely relinquish their sovereign powers," *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 632 (2013). "The background notion that a State does not easily cede its sovereignty" thus consistently "inform[s]" this Court's "interpretation of interstate compacts." *Id.*, at 631. Accordingly, this Court would "expect a clear indication," and "not inscrutable silence," before finding that States gave up their sovereign authority. *Id*. So where this Court has been "confronted with silence in compacts touching on the States' authority," it has consistently interpreted that silence as *preserving* States' sovereign power. *Id.*; see also *Virginia v. Maryland*, 540 U.S. 56, 67 (2003) ("If any inference at all is to be drawn from [the compact's] silence . . . we think it is that each State was left to regulate the activities of her own citizens.").

Applied here, that maxim means that unless such a compact limits withdrawal, a State is presumed not to have ceded the right of its legislature, accountable to the people, to decide on an ongoing basis how to exercise sovereign police powers within its borders. As the U.S. Solicitor General explained in a brief to this Court three years before enactment of the Compact, if an interstate compact "requires a continuing exercise of governmental functions by the signatory States,"

those States retain their ability to withdraw absent a textual provision limiting that power. Br. for U.S. as Amicus Curiae at 26, *Dyer v. Sims*, No. 147 (Nov. 22, 1950) ("U.S. *Dyer* Br."), 1950 WL 78371. After all, absent such an indication in the compact itself, the State lacks sufficient notice that a delegation of police powers in a compact will result in the irrevocable loss of the sovereign right to govern itself.

This Compact illustrates the danger well. Almost seventy years ago, New Jersey and New York chose to delegate both regulatory and law-enforcement powers within their borders to the Commission in a compact that contained no provision suggesting that the delegation of sovereign authority was somehow irreversible. See Compl. App. 7a-9a (describing Commission's powers). But now, New York would read the Compact as depriving the New Jersey Legislature of the ability to reevaluate how to optimally balance regulation and economic growth, protect public safety, and appropriate revenue at a key port. That view would undermine the "continuing authority in the legislature to regulate activities bearing on the public welfare as circumstances may require." U.S. *Dyer* Br. 27.

Compacting States *can*, of course, expressly give up their sovereign right to reclaim their police powers. And Congress likewise *can*, as a condition of consent, circumscribe or eliminate States' power to withdraw. In either circumstance, a State will have clear notice that a delegation of sovereign authorities can never be reclaimed by the Legislature. But if a compact "is *silent* on the power of the State to terminate its adherence," that silence should be "construe[d] ... as admitting of withdrawal at will." U.S. *Dyer* Br. 26 (emphasis added); *id.*, at 27 (explaining that analogous silence in similar compact shows States "did not

intend to bind themselves in perpetuity to the continuing exercise of their police powers"). In this respect, compacts involving the indefinite transfer of police powers are readily distinguishable from any agreements that resolve disputes over borders or give rise to vested rights. See *id.*, at 29-31. When, as here, a compact is based upon the *ongoing* exercise of delegated police power, it will not prevent a State from reclaiming its sovereignty absent express limits on withdrawal.

This result draws support from the text and history of the Compact Clause. Before ratification of the Constitution, each State retained unfettered power to enter into any "treaty, compact, or agreement." *Rhode Island v. Massachusetts*, 37 U.S. 657, 725 (1938). In ratifying the Constitution, the States "surrender[ed]" that unfettered power. *Id.* But the rights they gave up were quite specific. The Compact Clause establishes that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State." U.S. Const. Art. 1, §10, cl. 3. The Clause thus requires "Consent of Congress" to "enter into" a compact, *id.*, meaning Congressional consent to forming a Compact reflects "the sole limitation imposed." *Rhode Island v. Massachusetts*, 37 U.S., at 725. The Clause puts no such limits on the authority to withdraw, and in our system, States retain "fundamental aspect[s] of the sovereignty which the States enjoyed before ratification . . . except as altered by the plan of the Convention," *Alden v. Maine*, 527 U.S. 706, 713 (1999).

That language was by design. The Framers sought to prevent "the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just suprem-

acy of the United States." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). Withdrawal and termination raise no similar concerns. When interstate combinations dissolve, the parties return to their original positions as separate sovereigns within the union, which imposes no danger of "encroach[ment] upon the supremacy of the United States." *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 472 (1978). More than silence is necessary to cede that right. See *Tarrant*, 569 U.S., at 632; *Virginia v. Maryland*, 540 U.S., at 67.

2. Hornbook principles of contract and treaty law—the sources of law on which compacting relies—confirm this Compact's silence allows New Jersey's withdrawal. See, *e.g.*, *Tarrant*, 569 U.S., at 628 (applying contract law); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938) (treaty law); see also U.S. *Dyer* Br. 25-26.

Contract law is particularly instructive. See, *e.g.*, *Tarrant*, 569 U.S., at 628 ("Interstate compacts are construed as contracts under the principles of contract law."); Mot. Br. 23-24. Under blackletter rules, contracts that require indefinite and continuing performance of the parties—like the Waterfront Compact—are "valid for a reasonable time but . . . [are] terminable at the will of either party." 1 Williston on Contracts §4:22 (4th ed.); see *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 763-64 (2018) ("[C]ontracts that are silent as to their duration will ordinarily be treated . . . as 'operative for a reasonable time.'") (quoting 3 A. Corbin, Corbin on Contracts §553, p. 216 (1960)).

It has thus long been "well settled" that contracts "which contemplate[] continuing performance for an indefinite time" are "terminable at will." U.S. *Dyer* Br. 23-24. New Jersey and New York follow this rule. See *In re Estate of Miller*, 447 A.2d 549, 554 (N.J. 1982) ("if

a contract contains no express terms as to its duration, it is terminable at will or after a reasonable time"); *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 976 F.3d 239, 245 (CA2 2020) (in New York "contract of indefinite duration is terminable at will"). Because the best reading of a compact's "silence is that the parties drafted [it] with this legal background in mind," *Tarrant*, 569 U.S., at 632, this Compact—which expressly involves indefinite continuing performance—is terminable by either party.

The history and tradition of treaty withdrawal further support this approach. See, *e.g.*, *Dyer*, 341 U.S., at 31 ("[t]he compact . . . adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations"). From the Founding, it has been understood that the United States can unilaterally withdraw from a treaty. In 1798, well before the appearance of any treaty expressly authorizing unilateral withdrawal,[1] President Adams signed legislation withdrawing the United States from several treaties with France. See Act of Congress of July 7, 1798, 1 Stat. 578. In the decade before enactment of this Compact, President Roosevelt withdrew from a spate of treaties. See, *e.g.*, Presidential Proclamation of August 9, 1941, 55 Stat. 1660 (declaring International Load Lines Convention of July 5, 1930, , 47 Stat. 2229, "inoperative in [U.S.] ports"). And in the past fifty years, the Nation "terminated dozens of treaties," Restatement (Fourth) of the Foreign Relations Law of the U.S. §313 n.3 (Mar. 2022 Update), including a treaty that had no provision for unilateral withdrawal,

[1] See Curtis A. Bradley, *Treaty Termination & Historical Gloss*, 92 Texas L. Rev. 773, 779 & n.25 (2014) (noting that an 1822 treaty "was the first treaty concluded by the United States containing a unilateral withdrawal clause").

see Opp. App. 61a (letter from C. Rice, 3/7/05). Since interstate compacts function like treaties, that history is instructive.

3. New York's contrary claim—that the Compact's silence should be construed to *prevent* unilateral withdrawal—fails. See Mot. Br. 25-28.

First, New York wrongly contends that permitting withdrawal would introduce an "absent term[]" into the Compact. Mot. Br. 25 (citing *Alabama v. North Carolina*, 560 U.S., at 352). The Compact itself has no textual provision addressing withdrawal; it neither authorizes *nor* limits a State's right to reclaim its police powers. The question is thus whether to interpret silence as permitting withdrawal (as New Jersey argues) or prohibiting it (as New York argues). Implying a "limit" on withdrawal into the agreement would implicate New York's same concern.

Nor does the fact that some other interstate compacts expressly authorize unilateral withdrawal, Mot. Br. 25, support reading this Compact to implicitly prohibit it. New York is correct that some compacts explicitly authorize unilateral termination. See *id.* But New York ignores that other compacts, including contemporaneous ones, expressly *limit* withdrawal. See, *e.g.*, Pecos River Compact, Pub. L. No. 81-91, 63 Stat. 159 (1949); Goose Lake Basin Compact, Pub. L. No. 98-334, 98 Stat. 291 (1984). Compacts thus can and do address withdrawal in either direction—expressly authorizing or limiting it. That says little about how to interpret a compact that does neither.

Second, New York's claim that *Dyer* requires construing silence to bar withdrawal, Mot. Br. 25, misreads that opinion. New York points to the line that a compact cannot "be unilaterally nullified, or given

final meaning by an organ of one of the contracting States." *Dyer*, 341 U.S., at 28. But the passage dealt with a different matter: whether this Court must "defer[]" to the "highest court of a State" when construing a compact. *Id. Dyer* specifically recognized as separate the question whether a compact's silence is "read as to allow any signatory State to withdraw from its obligations at any time," *id.*, at 26; acknowledged the U.S. Solicitor General read silence to permit withdrawal, *id.*; and expressly declined to resolve the issue, see *id.* (refusing to "be tempted by these inviting vistas" because they were not addressed below).[2]

B. The Compact's Procedures for "Amendments" Do Not Cabin Withdrawal.

1. New York contends that the Compact's requirement of unanimity to adopt any "amendments or supplements to [the] compact to implement the purposes thereof" precludes unilateral withdrawal. See Mot. Br. 24; Compl. App. 34a-35a (art. XVI). That contradicts the Compact's text, the history of interstate compacting, state sovereignty, and contract law.

Initially, New York's argument runs headlong into the plain text of the Compact. In short, "amendments" to an agreement and "withdrawal" from that agreement are fundamentally distinct. That is made clear by contemporaneous dictionary definitions. See, *e.g.*,

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[2] Justice Brennan's concurrence in *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990), did not pass on unilateral withdrawal either. See Mot. Br. 25. That concurring opinion contrasted a State's "plenary power to create and destroy its political subdivisions" with a State's power over interstate agencies, which can be limited by a compact. *Feeney*, 495 U.S., at 314. Here, the Compact does not impose limits on withdrawal—a separate subject his opinion does not address.

Black's Law Dictionary 124 (4th ed. 1951) (defining "amendment" as "modification or alteration" to a law); *id.*, at 1794 (defining "withdraw" as "to remove"); Webster's Collegiate Dictionary 34 (5th ed. 1945) (defining "amendment" as "alteration or change, esp. for the better"); *id.*, at 1159 (defining "withdraw" as "[t]o retire; retreat; to go away"); cf. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) (discussing scope of "modify"). And it is clearer still in ordinary usage. If a Senator recommends changes to a bill, she is offering an "amendment." But if the Senator pulls the bill from consideration entirely, that bill has been "withdrawn"; it has not been "amended."

Interstate compacts thus regularly distinguish between amendments (which commonly require States' agreement) and withdrawal or termination (which often do not). See Joseph F. Zimmerman, Interstate Relations 40 (1996) (contrasting "Compact Amendment and Termination," and explaining that while amendments require "all party states [to] agree," compacts often separately allow termination or "withdrawal of a member"). Contemporaneous examples abound. See, *e.g.*, Gulf State Marine Fisheries Compact, Pub. L. No. 81-66, 63 Stat. 70 (1949) (stating "two or more" States can "amend" compact "by acts of their respective legislatures subject to approval of Congress," but a single State may withdraw "by act of the legislature of such state"); Washington Metropolitan Area Transit Compact, Pub. L. No. 86-794, 74 Stat. 1031 (1960) (providing compact "shall be terminated . . . [i]n the event of a withdrawal of one of the signatories," but amendments must "be adopted by each of the signatories"). New York is itself party to other compacts that distinguish the two. See Interstate Compact for Adult Offender Supervision, N.Y. Exec. Law §259-mm

(McKinney 2004); Compact for Juveniles, N.Y. Unconsol. Law §§1801-06 (McKinney 2011).[3]

This well-worn distinction between amendments and withdrawal safeguards State sovereignty. When a compact agency exercises multiple States' delegated powers, the unilateral decision to expand the agency's powers would allow one State to trample on the sovereignty of another State without the latter's consent. So it is no surprise that compacts usually require concurrency of all parties to effectuate any amendments. See Interstate Relations, *supra*, at 40. By contrast, a decision to *withdraw* from such a compact does not undermine the sovereignty of any other State; it returns the sovereigns to their pre-compact position of controlling their respective domains. While "bistate entities created by compact . . . are not subject to the unilateral control of any of the States," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994), permitting the member States to withdraw and reclaim their respective sovereignty is a different matter.

Contract law likewise disproves New York's claims. A contract that requires the parties' indefinite continuing performance permits either contracting party to withdraw from the contract unilaterally. See *supra* at 15-16. But either party's attempt to *amend* a contract, without acceptance from the remaining par-

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[3] In other words, notwithstanding New York's claim that the inability of a state to "modify or repeal its law unilaterally" is one of "the classic indicia of a compact," Mot. Br. 20 (quoting *Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985)), binding compacts regularly allow for unilateral withdrawal. And *Northeast Bancorp* in no way suggests that limits on State withdrawal can be *implicitly* read into a compact that does not *expressly* include them.

ties to the agreement, is ineffective. See Restatement (Second) of Contracts §3 (1981); 1 A. Corbin, Corbin on Contracts §4.13 (2021); 17A C.J.S. Contracts §566 (2022). That is sensible: termination frees every party from the duties that they are otherwise obligated to perform forever, whereas amendments bind parties to new commitments. And it makes sense here too. An express limit on compact *amendments*—like limits on contract amendments—cannot itself bar withdrawal.

2. The congressional repeal provision of the Compact Act does not help New York either. Mot. Br. 24; Compl. App. 35a (art. XVI §2) (Congress reserving its "right to alter, amend, or repeal th[e] Act" consenting to the Compact). There is no conflict between the Congressionally-reserved right to repeal and a provision respecting States' right to withdraw. That is why compacts frequently have a repeal provision and a distinct State withdrawal proviso. See, *e.g.*, Northwest Wild-land Fire Protection Agreement, Pub. L. No. 105-377, 112 Stat. 3391 (1998); Wabash Valley Compact, Pub. L. No. 86-375, 73 Stat. 694 (1959). New York knows it well: the Port Authority Compact included a standard reservation of Congress's right to repeal while providing for a (long-elapsed) provision for withdrawal. See New York-New Jersey Port Auth. Compact of 1921, S.J. Res. 88, 67th Cong., 42 Stat. 174 (1921). Because other compacts contemplate Congressional repeal *and* unilateral withdrawal, this Compact's inclusion of the former in no way forecloses the latter.

Nor does inconsistency exist between the two. The United States reserves the power to repeal its consent to a compact to ensure, among other things, that it can eliminate combinations that "encroach upon or interfere with the just supremacy of the United States," *U.S. Steel*, 434 U.S., at 471, and to follow the rule that

"one Congress cannot bind a later Congress," *Dorsey v. United States*, 567 U.S. 260, 274 (2012). Withdrawal serves a different function—to protect the States' ability to reclaim their sovereignty. That Congress could *also* terminate the Compact thus does not mean New Jersey has to accept the Commission's exercise of police powers within its borders forever.

C. Remaining Tools of Construction Confirm The Compact Does Not Cabin Withdrawal.

The structure and history of this Compact buttress New Jersey's interpretation. See *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (examining Compact structure); *Tarrant*, 569 U.S., at 636 (examining the parties "understanding of the compact's terms").

1. As to structure, given the parties' decision to condition the Commission's operation on each State's continued assent, it is exceptionally unlikely that the Compact nevertheless binds a non-assenting State in perpetuity. To the contrary, two critical aspects of the Compact expressly ensure the Commission can function only with the continuing assent of both States.

First, the Commission can only act if both commissioners, representing each State, assent. Initially, Article III states that each of the commissioners will be "appointed by the Governor of such State with the advice and consent of the Senate." Compl. App. 6a (art. III.2). And the agency can "act only by unanimous vote of *both* members thereof." *Id.* (art. III.3) (emphasis added). Thus, either State can prevent the Commission from operating by declining to appoint a commissioner (which prevents a quorum under the Compact) or having the State's commissioner consistently vote the Commission's actions down. See OIG Report, *supra*, at 6 n.4 ("[T]he two commissioner structure has led to

stalemates and inaction."). That provision guarantees each State authority to bring Commission operations to a halt without the concurrence of the other.

Second, either State's commissioner or Governor can prevent the Commission from funding operations. Not only does the commissioners' veto power include the power to veto the Commission budget outright, see Compl. App. 6a (art. III.3), but the Compact further clarifies that "either Governor may . . . disapprove or reduce any item or items" in the budget, and that the budget "shall be adjusted accordingly." App. 31a (art. XIII.2). That provision gives either Governor authority to reject the entire budget. And without a budget, the Commission cannot levy the assessments it needs to operate. *Id.* (art. XIII.3) (allowing agency to levy assessments to cover only "the balance of the commission's budgeted expenses").

Because the Compact grants *each* State power to stop the Commission from acting, it would strain credulity to find the Compact requires New Jersey to remain indefinitely absent New York's consent to leave.

2. The history of this Compact further undermines New York's view. For one, "background" principles of contract law known at the time of the Compact reinforced that a State could withdraw absent express textual limits. See *Tarrant*, 569 U.S., at 632; *supra* at 15-16. For another, just three years before the Compact's passage, the United States itself had advocated that an analogous interstate compact should be read to allow unilateral withdrawal—a position of which New York would have been well aware because it also participated as amicus in that same case. See Br. of Ohio, et al., *Dyer v. Sims*, No. 147 (Dec. 4, 1950), 1950 WL 78374. Finally, the legislative

history on the question indicates the drafters understood each State retained the right to reclaim its own sovereignty. See *New York Hearings*, *supra*, at 815 (drafters informing New York officials that the terms would give the "Legislature an opportunity to end this legislation").[4]

In short, all relevant tools of compact interpretation demonstrate that the Compact permits New Jersey's unilateral withdrawal. Thus, when the Court ultimately reaches the merits of the claims presented, it should hold—after full briefing and argument—that New York's claims fail as a matter of law.

[4] New York's remaining claims—that New Jersey's statute is preempted by federal law, Compl. 33, and violates the Contract Clause, *id.*, at 35—collapse for the same reasons. Because the Compact permits New Jersey to withdraw, there is no violation of federal law and no impairment of any contract.

CONCLUSION

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

Respectfully submitted,

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