No. 22O156, Original

In the Supreme Court of the United States

STATE OF NEW YORK,
Plaintiff,

v.

STATE OF NEW JERSEY,
Defendant.

ON BILL OF COMPLAINT

BRIEF OF THE METROPOLITAN MARINE MAINTENANCE CONTRACTORS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANT

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INTERESTS OF AMICUS CURIAE[1]

The Metropolitan Marine Maintenance Contractors' Association ("MMMCA") is a not-for-profit trade association comprising twenty one companies that operate at the Port of New York and New Jersey. The MMMCA was founded in 1945 and incorporated in 1947. Its member companies are engaged in the maintenance and repair of marine containers and chassis, as well as the lashing and unlashing of freight on cargo vessels. The MMMCA serves as the collective bargaining unit for its members in negotiations with the International Longshoremen's Association and its local affiliates.

The MMMCA and its member companies have an interest in the efficient and effective regulation of labor and marine operations at the Port. As international trade continues to grow, it is essential that companies and labor work harmoniously in order to meet and exceed the rising demands of the global economy. The Waterfront Commission, however, no longer fosters such an environment. Instead, as the New Jersey Legislature found, the Commission has "become an impediment to future job growth and prosperity

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for Plaintiff and Defendant provided consent to the filing of this brief on August 15, 2022, and August 5, 2022, respectively.

at the port," has "been tainted by corruption," and has been "over-regulat[ing] the businesses at the port in an effort to justify its existence as the only waterfront commission" at any port in the United States. Compl. App. 37a. The MMMCA supports New Jersey's effort to improve Port operations through the democratically accountable exercise of its sovereign police powers, as envisioned by the Constitution.

New Jersey has comprehensively demonstrated why a State should be free to withdraw from a congressionally approved interstate compact, absent compact provisions to the contrary. Def. New Jersey's Br. in Supp. of Mot. for J. on the Pleadings ("Def.'s Br.") 14-44. MMMCA's brief does not endeavor to repeat New Jersey's analysis, but instead focuses on why a historically informed understanding of state sovereignty, the Compact Clause, and the Contract Clause favors a default rule that States may withdraw unilaterally from regulatory interstate compacts.

SUMMARY OF THE ARGUMENT

New York asks this Court to prevent New Jersey from withdrawing from the Waterfront Commission Compact and recovering the sovereign police powers it delegated to a bistate commission. As New Jersey has argued (*see* Def.'s Br. 14-44), New York's case rests on an untenable interpretation of the Waterfront Commission Compact—one that presumes that all ongoing

obligations are perpetual unless the parties specify otherwise. Its arguments also contravene historical understandings of state sovereignty, the Compact Clause, and the Contract Clause.

First, there is no basis to deny sovereign States well-established contractual rights of at-will termination. The States at the Founding were full sovereigns, no different from independent nations, including in their formation of interstate compacts. States unilaterally decided the scope and enforceability of contracts, like any independent sovereign. In the Constitution, the States ceded to Congress the power to consent to interstate compacts and to this Court the power to interpret and enforce interstate compacts. They also ceded their ability to interfere retroactively with vested property rights. But nothing in the constitutional scheme justifies any presumptions against powers of withdrawal, especially regarding *regulatory* interstate compacts. As this Court has long held, States may not irrevocably contract away their police powers. *See Stone v. Mississippi*, 101 U.S. 814, 817-18 (1879).

Second, the Compact Clause—the only constitutional provision qualifying the formation of interstate contracts—provides no help to New York. By its plain words, the Compact Clause merely requires congressional consent for States to form agreements. It does not expand or diminish a State's sovereign right to withdraw from those agreements; the Contract Clause provides the only such limitation. Rather, the Compact

Clause is a structural provision that protects Congress's prerogatives from state encroachment. It was never intended to limit the States' sovereign police powers. At the time of ratification, interstate compacts nearly all involved setting state boundaries, which implicated Congress's ability to set land policy and manage the new Nation's westward expansion. It was not until the twentieth century that interstate compacts involved delegating police power to agencies controlled in part by other States. The Compact Clause thus provides no support for New York's contention that police powers can be bargained away irrevocably in interstate compacts.

Third, New York invokes the Contract Clause, but this Court has held that the Contract Clause does not bind States to contracts that surrender essential attributes of sovereignty. As its history shows, the Contract Clause worked a narrow exception to the principle that sovereign States could change their minds: States could not do so when it interfered with *property rights already vested*. The aim of this exception was to ensure economic stability and the availability of capital post-Revolution. Neither this history nor the text of the Contract Clause suggests that its limitations on state sovereignty were any broader when a State's contract was with another State. And if the Contract Clause would not require a State to adhere to a surrender of essential attributes of state sovereignty, *a fortiori* an interstate compact should not be interpreted to restrict the right of a State to recover

sovereign regulatory powers by withdrawal from a compact that is silent on the issue.

Fourth, the requirement of congressional consent to interstate compacts cannot bear the weight that New York places on it. On New York's reading, congressional consent on its own can abrogate state sovereignty by transforming a compact into a federal mandate. But that is not the case in other contexts where the Constitution requires congressional consent—for example, in executive appointments or emoluments. Consent in those instances does not insulate appointees from removal or emoluments from being declined. By the same token, while approved compacts may generally be enforced, congressional consent does not abrogate a State's reserved police power.

ARGUMENT

I. Sovereign States may unilaterally withdraw from regulatory interstate compacts.

Before the Founding, States were fully sovereign entities no different from foreign nations in their powers to form contracts. During the period of the Articles of Confederation, the individual States

> were then sovereign states, possessing, unless thus restrained, all the rights and powers of independent nations over the territory

> within their respective limits, and could exercise any control and dominion over their navigable waters, and make any regulations necessary for the protection of their navigation, or to promote the commerce upon them of their respective states. Those articles expressly provided that each state composing the confederation retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right which was not by them expressly delegated to the United States in congress assembled.

Wharton v. Wise, 153 U.S. 155, 166-67 (1894). While States entered into compacts with other States (primarily relating to land, water, and navigational disputes) "to promote the peace, good neighborhood, and welfare of both states, and facilitate intercourse between their citizens," *id.* at 166; *see also* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution*, 34 Yale L.J. 685, 694, 730-34 (1925), the States were jealous of their sovereign prerogatives. States had unilateral powers to determine the meaning of contracts: "[The] sovereign states" had "no common superior and no tribunal to determine for them the true construction and meaning of its provisions in case of a conflict of opinion upon the subject. Each State was left to decide for itself as to their true construction and

meaning, and to its own sense of the obligations of the compact for their enforcement." *Wharton*, 153 U.S. at 171. Even the Articles of Confederation were not "a compact having any coherence or binding force other than that of a league of friendship." *Id.* at 167.

Thus, at the time of the Founding, each sovereign State was free individually to determine contract obligations, which would include the fundamental question of withdrawal. In the Constitution, "[t]he Framers split the atom of sovereignty." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Article III conferred on this Court the power to resolve "Controversies between two or more States," U.S. Const. art. III, § 2, cl. 1, which gives the Court the power to resolve disputes over the obligations of interstate compacts. And the Compact Clause provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State." *Id.* art. I, § 10, cl. 3.

But "[t]he States are equal to each other 'in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.'" *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911)). The States "entered the federal system with their sovereignty intact," *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), and the Constitution expressly reserves to each of them all

attributes of sovereignty not expressly curtailed, U.S. Const. amend. X; *Alden v. Maine*, 527 U.S. 706, 714 (1999).

Nothing in the Compact Clause detracts from the substantive contract rights of States, including rights of withdrawal. Consent to an interstate compact is "the sole limitation imposed" by the Clause. *Rhode Island v. Massachusetts*, 37 U.S. 657, 725 (1838). And as New Jersey persuasively demonstrates, the general principle, even for private contracts, is that contracts for continuing performance for an indefinite period are terminable at will, except when vested rights are created. Def.'s Br. 14-18, 27-28; *see also* Restatement (Second) of Contracts § 33 cmt. d (Am. L. Inst. 1981); 1 Williston on Contracts § 4:22 (4th ed. May 2022 update). The Compact Clause does not abrogate that default contract rule for interstate compacts.

Abrogation of the default right of at-will termination would be particularly untenable for interstate *regulatory* compacts such as the Waterfront Commission Compact. It is well-settled that a State may not irrevocably contract away its police power. "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." *Stone*, 101 U.S. at 817-18 (quoting *Metro. Bd. of Excise v. Barrie*, 34 N.Y. 657, 668 (1866)).

"Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding." *United States v. Winstar Corp.*, 518 U.S. 839, 921 (1996) (Scalia, J., concurring). Not only can States not forever contract away an "essential attribute of its sovereignty," *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977), but all sovereign powers "remain intact unless surrendered in unmistakable terms," *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).[2]

This presumption applies to interstate compacts. This Court's "interpretation of interstate compacts" is "informed" by "[t]he background notion that a State does not easily cede its sovereignty" and will "rarely relinquish [its] sovereign powers." *Tarrant Reg'l Water Dist. v. Herrmann*,

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[2] These bedrock rules are also in accord with the Constitution's Guarantee Clause, which "guarantee[s] to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. Though often nonjusticiable, where this Court has looked to the merits of a Guarantee Clause claim, it has examined whether a state has "retain[ed] the ability to set their legislative agendas" and whether "state government officials remain accountable to the local electorate." *New York v. United States*, 505 U.S. 144, 185 (1992). It has also rejected a Guarantee Clause challenge to a new school district in light of the state legislature's "power to create and *alter* school districts." *See Att'y Gen. v. Lowrey*, 199 U.S. 233, 239 (1905) (emphasis added). An irrevocable delegation of police power to an unelected bi-state commission runs afoul of the political accountability that the Guarantee Clause promises.

569 U.S. 614, 631-32 (2013). This Court thus will only find a surrender of sovereign rights where the compact gives "a clear indication" to that effect, "not inscrutable silence." *Id.* at 632; *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.").

New Jersey did not expressly abandon its right of unilateral withdrawal from the Waterfront Commission Compact. No restriction of that contractual right should be implied when it would amount to an effective surrender of New Jersey's sovereign police powers.

II. The Compact Clause was intended to safeguard federal prerogatives—not to intrude upon States' sovereignty.

For New York to prevail—and for New Jersey's delegation of its police power to be enforceable in perpetuity—such a limit on New Jersey's sovereignty must find support in the Constitution.

The Compact Clause provides no such support. The Clause prohibits States from entering into "any Agreement or Compact with another State" "without the Consent of Congress." U.S. Const. art. I, § 10, cl. 3. By its plain terms, it does not address a State's reserved powers to withdraw from a compact unilaterally. The Clause is procedural—it requires congressional consent

based on the identity of the parties. Its aim was to protect federal prerogatives from state encroachments. The vast majority of interstate compacts settled boundary disputes—a particular concern for Congress as it managed the Nation's westward expansion. Not until the twentieth century did compacts involve delegations of police power to multistate authorities.

A. The Compact Clause was a structural (not a substantive) check.

The Framers' central objective in adopting this conditional prohibition on interstate agreements was to set forth a mechanism to protect federal interests against possible state encroachment. The Framers' experience under the Articles of Confederation made them wary of "th[e] proclivity for states to encroach on national authority," and "fearful . . . of its corrosive effects." Larry D. Kramer, *Madison's Audience*, 112 Harv. L. Rev. 611, 627 (1999). James Madison in particular was concerned that, unless the Constitution contained a mechanism preventing States from unwarrantedly interfering with the federal government's operations, they would "continue to invade the national jurisdiction, to violate treaties and the law of nations & to harrass each other with rival and spiteful measures dictated by mistaken views of interest." *Id.* (quoting 9 *The Papers of Madison* 384 (Robert A. Rutland et al. eds., 1975)).

Madison's proposed safeguard against that danger was "to arm federal lawmakers with a power to negative state laws 'in all cases whatsoever.'" *Id.* (quoting 9 *The Papers of Madison* 318). This proposal sought to advance "two distinct purposes: enabling the federal government to defend itself against state encroachment and reforming internal state policy." James F. Blumstein & Thomas J. Cheeseman, *State Empowerment and the Compact Clause*, 27 Wm. & Mary Bill Rts. J. 775, 782 (2019) (citation omitted). The first purpose "was *defensive*: to protect the federal government from encroachments by the states on federal prerogatives." Kramer, *supra*, at 649. The second purpose "was *supervisory*: to take advantage of the national government's size to protect private rights from factious state legislatures." *Id.* Madison thus believed not only that the new federal government must be protected from States' potential attempts to encroach on its authority, but that a national government is better placed to preserve liberty than the individual States, which might be captured by local interests (or factions). *See* Blumstein & Cheeseman, *supra*, at 782-83.

The delegates at the Constitutional Convention overwhelmingly rejected various versions of Madison's proposal to vest Congress with a power to negate laws enacted by state legislatures. *See* Kramer, *supra*, at 648-52; Blumstein & Cheeseman, *supra*, at 783. Many delegates (as well as Thomas Jefferson, who followed the Con-

vention's proceedings while serving as the Ambassador to France) were "concern[ed] that an unlimited veto would needlessly injure the states while giving Congress more power than necessary to combat trespasses on federal territory." Kramer, *supra*, at 651. Some even worried that vesting Congress with that power "might restrain the States from regulating their internal police," or viewed it as "further evidence of the large-state design to 'crush the small ones.'" *Id.* (citations omitted). In sum, the Convention's delegates "preferred to leave power to the states." Blumstein & Cheeseman, *supra*, at 784 (citing Kramer, *supra*, at 648-52).

In defeating Madison's "national veto" proposal, however, the Constitutional Convention "primarily rejected the second purpose of the negative [limitation]—giving the federal government the power to improve internal state policy and curb factionalism." Blumstein & Cheeseman, *supra*, at 784 (citing Kramer, *supra*, at 649-53). The delegates "were far more receptive to [the proposal's] original purpose of protecting federal interests, as demonstrated by the adoption of the Supremacy Clause (which gave Congress the power to preempt contrary state laws) and Article I, Section 10 (which limits the power of the states to engage in certain activities that pose a unique risk to federal interests)." *Id.* (citing, *inter alia*, Kramer, *supra*, at 648, 652-53 n.180).

The Compact Clause, with its requirement of congressional consent for interstate agreements that may impinge upon federal prerogatives, is a reflection of this concern. *See* Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 Mo. L. Rev. 285, 289 (2003); Blumstein & Cheeseman, *supra*, at 782. The Compact Clause—which is part of Article I, Section 10—thus "comports with the convention-goers' acceptance of the legitimacy of the federal government's power to protect its own interests and their corresponding rejection of a broader power to oversee the internal affairs of the states." Blumstein & Cheeseman, *supra*, at 784 (citing Greve, *supra*, at 365-66).

Viewed in light of the circumstances of its enactment—and, specifically, against the backdrop of the Convention's rejection of Madison's proposed congressional veto of state legislation—the Compact Clause is best understood as a structural safeguard preventing the States' encroachment upon federal interests. The Compact Clause was never intended to limit the States' exercise of their regulatory authority, let alone to require a perpetual delegation of that authority to another State. In fact, such a construction of the Compact Clause would be anathema to the Framers, who were specifically concerned about "restrain[ing]" States "from regulating their internal police" or allowing large States to exert undue influence over "the small ones." Kramer, *supra*, at 651 (internal quotation marks and citations omitted).

Reading into the Compact Clause an implicit requirement that one State may not withdraw from the compact without the consent of another State would unwarrantedly limit a State's internal regulatory authority (or police power). It would lend the non-consenting State undue leverage over the State wishing to depart the compact and reclaim its sovereign powers. Such a reading of the Compact Clause finds no support in the circumstances of its adoption, and it would contravene the Framers' intent to avoid undue interference with state sovereignty.

B. Most interstate compacts settled boundary disputes.

An "Agreement or Compact" is distinct from a "Treaty, Alliance, or Confederation," to which Congress cannot consent. *See* U.S. Const. art. I, § 10, cl. 1.[3] At the time of the Framing, virtually all compacts between States, including during the colonial period, were boundary agreements. *See* Frankfurter & Landis, *supra*, at 694, 730-34.

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[3] This Court has also distinguished a compact, which is presumptively defeasible, from the Constitution, which is not. *See Texas v. White*, 74 U.S. 700, 725 (1868) ("When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final."), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476 (1885).

Boundary disputes between colonies, arising from ambiguities or imprecision in their royal charters, were commonplace. Before independence, they were settled either by agreement, which required the approval of the Crown, or by appeal to the Privy Council. *Id.* at 694. Immediately after independence, boundary disputes threatened civil war, especially as competing claims to large swathes of the unsettled West proliferated. *See* Merrill Jensen, *The Articles of Confederation* 113, 117 (1940).

Peacefully settling these disputes in the absence of British authority was a primary aim of the Articles of Confederation. The Articles, while giving Congress relatively little authority, did make Congress "the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other causes whatever . . . ." Articles of Confederation of 1781, art. IX, ¶ 2. Under the Articles, Congress also had jurisdiction to adjudicate private disputes over competing land grants in States whose boundaries had been adjusted. *Id.* ¶ 3.

By the time of the Philadelphia convention, Congress had asserted its prerogative to guide the settlement of the West, passing the Northwest Ordinance in 1787. The Compact Clause gave Congress a veto over interstate boundary agreements, helping to protect the new federal government's authority to set land policy and establish western territories. *Cf.* Lawrence M.

Friedman, *A History of American Law* 127-28 (4th ed. 2019) (describing the plan of the Northwest Ordinance); George William Van Cleve, *We Have Not a Government* 139-40, 144-45 (2017) (describing Congress's earlier attempts to set land policy).

These agreements rarely if ever implicated a State's police power over its own territory. It was not until the twentieth century that Congress encountered an interstate agreement that delegated police powers to an agency controlled, in part, by another State. (The first such compact, between New York and New Jersey, created the Port Authority of New York in 1921.) In other words, the experience of interstate compacts up until the Framing—and their practice for more than a century after—did not involve perpetually ceding police power to the control of another State. *See* Frankfurter & Landis, *supra*, at 730-46; Greve, *supra*, at 288.

In light of this history, the Compact Clause lends no support to New York's position—it does not allow a State to contract away its police powers in perpetuity simply because the contract is made with another State.

III. The Contract Clause does not bind a State to a contract surrendering an essential attribute of sovereignty.

New York asserts that, by directing the Governor to withdraw from the Waterfront Commission Compact, *see* Chapter 324 of the New Jersey

Laws of 2017 (2018), the New Jersey legislature violated the Contract Clause, U.S. Const. art. I, § 10, cl. 1, because it "not only impairs but entirely abolishes New Jersey's contractual obligations under the Compact, and no legitimate public purpose underlies the law." Bill of Compl. ¶¶ 134-35.

The argument is misplaced. Chapter 324 exercises New Jersey's contractual right to end its performance under the Compact; it does not impair a continuing obligation. But, regardless, "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *U.S. Tr. Co. of New York*, 431 U.S. at 23. This includes its police power. *See Stone*, 101 U.S. at 817-18. Rather, the Contract Clause limits state sovereignty in a narrow way: by preventing States from interfering with property rights *already vested*. *See Fletcher v. Peck*, 10 U.S. 87, 135 (1810). Nothing in the Clause's text or history indicates that this narrow limitation applies any differently to contracts with other States.

A. The Contract Clause was intended as a narrow limit to protect economic stability.

In eighteenth-century England, Parliament's sovereignty was absolute. Not even Parliament could limit its own power. As Blackstone explained, "[b]ecause the legislature, being in truth the sovereign power, is always of equal, always

of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind the present parliament." 1 William Blackstone, *Commentaries* *90; *see also Winstar*, 518 U.S. at 872 (plurality op.). Parliament's absolute sovereignty even allowed it to "transfer property from its owners by a judgment in direct violation of the private rights of the common law." Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 347 (1998 ed.).

After independence, this sovereign power was assumed by the States and eagerly asserted. Faced with a depressed economy, state legislatures "passed laws staying the collection of debts, allowing the payment of debts in installments, and authorizing the payment of debts in commodities." James W. Ely, Jr., *The Contract Clause* 8 (2016). South Carolina's Pine Barren Act of 1785, for example, allowed debtors to pay down their debts with near-worthless land. *Id.* The Vermont legislature "prohibit[ed] court actions in matters pertaining to land titles or private contracts involving bonds or debts." Wood, *supra*, at 407. Pennsylvania rescinded the corporate charter of the Bank of North America, in what James Wilson and others considered to be a contractual breach by the State. Ely, *supra*, at 9-10.

These excesses threatened economic ruin. "Who would lend money, it was repeatedly asked,

'if an omnipotent legislature can set aside contracts ratified by the sanction of law?'" Wood, *supra*, at 406 (quoting Rusticus, *On Ex Post Facto Laws*, *in* 2 *The American Museum* 170 (Aug. 1787)). Alexander Hamilton warned that "[l]aws in violation of private contracts, as they amount to aggressions on the rights of those States whose citizens are injured by them, may be considered as another probable source of hostility." The Federalist No. 7 (Alexander Hamilton).

The Founders included the Contract Clause among the limitations on state power included in Article I, Section 10:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, *or Law impairing the Obligation of Contracts*, or grant any Title of Nobility.

U.S. Const. art. I, § 10, cl. 1 (emphasis added).

Introduced by Rufus King of Massachusetts, the Contract Clause met initial opposition from Gouverneur Morris and George Mason, who worried that it would upset state procedural laws governing when contract actions could be brought. *See* Ely, *supra*, at 12. The Clause was

eventually adopted on the apparent understanding that it would apply only to retroactive laws—in essence, that it would be a civil-law counterpart to the Ex Post Facto Clause, which immediately preceded it. *See id.* at 13.

B. The Contract Clause only applies when property rights are already vested.

The Contract Clause is the only provision in the Constitution that limits a State's ability to rescind a previous act of its legislature. It applies to state compacts as well as private contracts. *See Green v. Biddle*, 21 U.S. 1, 92 (1823). And as this Court recognized early on, it bars only legislation that impairs vested rights:

> The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.
>
> The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estate, and, if

> those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

Fletcher, 10 U.S. at 135 (Marshall, C.J.). The Court would later elaborate on Chief Justice Marshall's reasoning, concluding that the Contract Clause did not prevent a State from freely exercising its sovereign police power, even when such exercise violated the terms of a contract the State had previously formed. *See Stone*, 101 U.S. at 817-18; *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 750-51 (1884).

Because the Contract Clause does not require a State to adhere to a contract surrendering an essential attribute of sovereignty, *U.S. Tr. Co. of New York*, 431 U.S. at 23, *a fortiori* this Court should not derive such a rule from the Compact Clause. Nowhere does the Constitution require the rule that New York requests—a rule barring a State from exercising its sovereign regulatory powers without the consent of another State.

IV. Congressional consent is not required for a State to withdraw from a compact.

New York argues that the requirement of congressional consent to the *formation* of an in-

terstate compact converts the compact into a federal mandate, and that New Jersey's unilateral *withdrawal* requires Congress's approval. That conclusion is equally unsupported by constitutional text or history.

The Constitution requires congressional consent in a number of provisions. The Emoluments Clause, for example, requires congressional consent for an executive officer to receive a gift of value from a foreign state. U.S. Const. art. I, § 9, cl. 8. The Senate must also consent to the appointment of certain executive officials. *Id.* art. II, § 2, cl. 2. In neither of these cases is congressional consent tantamount to a mandate. The President can unilaterally remove Senate-confirmed officers. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010). And a federal employee can certainly decline gifts from foreign states unilaterally, despite Congress's blanket consent. *Cf.* 5 U.S.C. § 7342(c) ("(1) The Congress consents to- (A) the accepting and retaining by an employee of a gift of minimal value tendered and received as a souvenir or mark of courtesy; . . . .").

To be sure, Congress can place conditions on its consent, as it has in the Waterfront Commission Compact and many others. But Congress cannot, by placing conditions on its consent, arrogate to itself powers not assigned it by the Constitution. The Court recognized this in *Coyle v. Smith*, finding that congressional conditions placed upon a State's admission to the Union

ceased to be binding once the admission was complete and the new State was sovereign. 221 U.S. at 567. If Congress lacks the power to enforce its conditions on admission to the Union, it certainly lacks power to hold States to a compact in perpetuity.

Perhaps the clearest evidence against New York's reading comes from the text of Section 10's earlier clause:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; *and all such Laws shall be subject to the Revision and Controul of the Congress*.

U.S. Const. art. I, § 10, cl. 2 (emphasis added). Clause 3 of Section 10, which immediately follows and contains the Compact Clause, does not include the italicized portion. In other words, when the Framers wished for Congress to maintain control over a law to which it consented, it knew how to specify as much. Mere consent—as in the case of executive appointments and emoluments—is not a mandate.

This is not to say that contracts between States cannot constitutionally be enforced. This Court has applied federal common law to compact disputes, appropriately holding States to their obligations. But a sovereign State can only be held to its obligations to a certain degree. As this Court has long held, a State cannot irrevocably bargain away its sovereign police power. That is true of all of its contracts, including those with other States. And the Constitution does not provide otherwise.

CONCLUSION

The Court should grant New Jersey's motion for judgment on the pleadings.

Respectfully submitted,

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