No. 156, Original

IN THE
Supreme Court of the United States

STATE OF NEW YORK,

Plaintiff,

v.

STATE OF NEW JERSEY,

Defendant.

On Cross-Motions for Judgment on the Pleadings

BRIEF OF COMPACT ENTITIES AS AMICI CURIAE IN SUPPORT OF PLAINTIFF

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INTEREST OF AMICI CURIAE

Amici curiae are the Interstate Commission for Juveniles, the Interstate Medical Licensure Compact Commission, and the Interstate Commission of Nurse Licensure Compact Administrators (the "Compact Entities").[1] These entities are governmental creations of the respective state legislatures, whose authority is set forth in the language of their respective compact statutes.[2]

The Interstate Commission for Juveniles ("ICJ") protects the public and juveniles who are runaways, on probation, or on parole and need to transfer their supervision from one State to another. The ICJ is a congressionally approved compact. 4 U.S.C. § 112. All fifty states, plus the District of Columbia and the U.S. Virgin Islands have enacted the ICJ's compact into law.

The Interstate Medical Licensure Compact Commission ("IMLCC") and the Interstate Commission of Nurse Licensure Compact Administrators ("ICNLCA") administer the compacts through which licensed physicians and nurses,

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than Amici and their counsel contributed monetarily to its preparation or submission.

[2] Consent is not required to file this amici brief under Supreme Court Rule 37(4) (providing no consent required when brief is "on behalf of a city, county, town, or similar entity when submitted by its authorized law officer"). Nevertheless, Amici sought consent to file and received it on October 17, 2022.

respectively, are permitted to practice across State lines in all member States (currently 39 States and territories). Through one uniform license application process, the IMLCC and ICNLCA each provide both license portability and increased patient access to health care. The IMLCC and ICNLCA are not congressionally approved compacts because their police power does not touch on an area of federal concern.[3]

The Compact Entities Amici have an interest in preventing the unilateral withdrawal of Compact Clause members (absent compact provisions granting express permission to do so) as withdrawal threatens both the function of the Compact Entities and the existence of the Compact Entities themselves. Allowing unilateral withdrawal impacts not only the parties or Amici here, but all other interstate compact entities across the nation.

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[3] *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (Brennan, J.) (clarifying congressional consent is only required where the agreement affects the balance of power between the States and the federal government or threatens the prerogatives of the national government).

SUMMARY OF THE ARGUMENT

I. Compact Clause entities provide multi-state solutions to regional problems. To create such entities, compacting States cede a portion of their sovereignty to the Compact Clause entity. Compact Clause jurisprudence has protected these compact entities from state interference. Indeed, courts have been reluctant to interfere with the sovereignty of compact entities over their designated areas and have affirmed compacts' preeminence over state law. Once approved, the compacts govern, absent consent from the other compacting States.

States know how to—and at times do—provide for a unilateral right of withdrawal. However, in the absence of an explicit provision retaining sovereignty, States have no right to control, interfere, impact, or dissolve the compact entity. The Court should not condone a signatory state undermining the compact by unilaterally withdrawing where the compact's language does not expressly provide.

New York and New Jersey, here, unmistakably came together to agree on the shared exercise of their sovereign police power over New York Harbor. They made no provision for unilateral withdrawal. The entire purpose of this compact was the ceding of the sovereignty that New Jersey claims to reclaim via executive order. Contrary to the Texas Amici's argument regarding the inability to contract away police power, contracting away such powers is precisely what the compact mechanism accomplishes.

II. New Jersey recognizes that allowing States to withdraw from compacts would have devastating effects, and therefore attempts to limit its proposed rule to certain groups of compacts. However, there is no rational basis to draw this line at so-called "vested rights" compacts. Compacts that deal with the delegation of sovereign authority similarly create expectation and reliance interests that will be undermined by unilateral withdrawal.

III. The compact revisionism New Jersey proposes jeopardizes the many compacts States have statutorily bound themselves to over the years. It will also chill the use of compacts in the future because States will have fewer guarantees that the other compacting States will fulfill their obligations.

If this Court concludes that States inherently retain the unilateral right to withdraw, despite explicit intent to cede sovereignty, it will destabilize interstate compacts across the nation and relegate the interstate compact to no more than an administrative agreement or model law.

ARGUMENT

I. In Agreeing to Enter a Compact, a State Necessarily Relinquishes Some Portion of Sovereignty

When creating an entity pursuant to the Compact Clause of the Constitution, Art. I., § 10, cl. 3, each creating sovereign no longer has exclusive control over the area of the entity's jurisdiction. Rather, the State agrees to cede sovereignty over a specified subject

area of common concern to a multi-state governmental body established by the compact.

As one court explained, "Upon entering into an interstate compact, a State effectively surrenders a portion of its sovereignty . . . ."[4] "Bistate entities thus are not 'extensions of each compacting state's authority,' but are instead formed through [this surrender of sovereignty] to the compact entity." *Spence-Parker v. Del. River & Bay Auth.*, 616 F. Supp. 2d 509, 515 (D.N.J. 2009) (quoting *Int'l Union of Operating Engineers, Loc. 542 v. Del. River Joint Toll Bridge Comm'n*, 311 F.3d 273, 276 (3d Cir. 2002) (hereinafter *Local 542*)). Only when the compacting States work together may they change the entity that they, together, created.

The history of the Compact Clause and decisions protecting compact entities from state interference reinforce the conclusion that compacts necessarily involve the relinquishing of state sovereignty. This jurisprudence also undermines the arguments by New Jersey and its amici that the reserved powers doctrine protects the police powers it has compacted away.

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[4] *C.T. Hellmuth & Assocs., Inc. v. Wash. Metro. Area Transit Auth.*, 414 F. Supp. 408, 409 (D. Md. 1976); *see KMOV TV, Inc. v. Bi-State Dev. Agency of Missouri-Illinois Metro. Dist.*, 625 F. Supp. 2d 808, 811 (E.D. Mo. 2008) ("Interstate compacts thus entail the cession of elements of sovereignty by signatory states."); *Del. River Joint Toll Bridge Comm'n v. Oleksiak*, --- F. Supp. 3d ----, 2020 WL 1470856, at *1 (E.D. Pa. Mar. 26, 2020) ("A compact . . . requires the states' elected representatives agree[] to surrender certain of their citizens' sovereign authority to this bi-state entity to further their common welfare.").

A. Compact Clause Jurisprudence Recognizes the Ceding of Sovereignty

Justice Felix Frankfurter and James Landis explained, in their seminal *Yale Law Review* article, that compacts always involve a sacrifice of sovereignty and, in most cases, require the agreement of at least three, distinct sovereigns. *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 Yale L.J. 685, 691-95 (1925). Compact "entities occupy a significantly different position in our federal system than do the States themselves" as they "typically are creations of three discrete sovereigns: two States and the Federal Government." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (Ginsburg, J.).

Before the Constitution, colonies entered into agreements with each other to resolve border disputes, which were a regular occurrence. These pacts involved setting an agreed-upon border pending "approval of the Crown."[5] The Compact Clause adopted this system of regional agreement into the Constitution, requiring approval from a higher governmental authority in most cases.[6]

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[5] *See* Frankfurter and Landis, *supra*, at 692-94.

[6] *See* U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State"); *see also* Herbert N. Naujoks, *Compacts and Agreements Between States and Between States and a Foreign Power*, 36 Marq. L. Rev. 219, 222-24 (1953) (discussing the colonial origins of the Compact Clause).

In including the Compact Clause, the Framers of the Constitution embraced a tool for States to reach their own agreements over areas of overlapping sovereignty and to facilitate interstate cooperation.[7] The Framers also mandated these compacts receive congressional consent so Congress could ensure no interstate agreement would threaten the Federal government.[8]

As far back as 1823, this Court recognized that a State could cede away its sovereignty through the compact process. *See Green v. Biddle*, 21 U.S. 1, 85-87 (1823) (finding that Virginia's agreement to cede its territory to Kentucky adhered to the requirements of the Constitution). The American system of federalism assumes and assures the sovereignty of a State, "until it yields it up by compact or conquest." *See id.* at 12.

In the early twentieth century, Frankfurter and Landis made a case for the greater use of compacts as a regional solution to address regional problems.[9] States have largely followed this vision of regional cooperation, expanding the application of compacts to

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[7] *See* Frankfurter and Landis, *supra*, at 694-95; *see also Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528, 542 (8th Cir. 2004) (noting interstate compacts "perform[] high functions in our federalism") (internal quotation marks and citations omitted).

[8] *See Oleksiak*, 2020 WL 1470856, at *8; *see also supra* note 3 (noting that this consent requirement does not apply to all compacts between States; it applies only to those affecting the political balance between the States and the Federal government).

[9] *See* Frankfurter and Landis, *supra*, at 708.

address regional issues beyond border disputes.[10] Today, compact entities have been authorized to study, govern, or operate a wide variety of areas that are not contained by borders.[11] For example, in the case of the Waterfront Commission of New York Harbor, New York and New Jersey entered into a compact to address corruption and other problems that plagued the harbor spanning the two States.[12]

To achieve this cross-border cooperation, each of the compacting States must agree to cede some sovereignty to the resulting entity. *See Hess*, 513 U.S. at 42 ("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."); *C.T. Hellmuth*, 414 F. Supp. at 409. Surrendering their sovereignty over designated matters allows the States to create Compact Clause entities that are not subject to the exclusive control of any of the compacting

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[10] *See* Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 Yale L. & Pol'y Rev. 163, 171-73 (2005); *see also* Charles Warren, *The Supreme Court and Sovereign States* 70 (1924) ("[T]he American states have, in the succeeding years, found it feasible and desirable, by means of compact, to relinquish the exercise of other sovereign rights.").

[11] For a thorough discussion on the history of interstate compacts from their origins to the present, *see generally* Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 Roger Williams U. L. Rev. 71 (2003); Michael L. Buenger, et al., *The Evolving Law and Use of Interstate Compacts: A Practitioner's Guide* (2016).

[12] *See* Br. Supp. New Jersey's Mot. J. on the Pleadings 1.

States and largely exempt from their state laws. *See Oleksiak*, 2020 WL 1470856, at *14 ("Our Framers left it to the states to . . . define the powers and rights granted to new third interstate entities which are not citizens or under the control of either state.").

"[A]bsent 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." *Del. River Joint Toll Bridge Comm'n v. Sec'y Pa. Dep't of Lab. & Indus.*, 985 F.3d 189, 195 (3d Cir. 2021) (internal quotation marks and alternations omitted). Despite the control the States and Congress wield before the inception of the compact, once formed, compact entities are beholden neither to the States, nor to Congress. They are beholden only to the agreement from which they were born.[13]

A compacting State now needs a sister State to act in areas where it previously could have acted alone.[14] In exchange for this loss of unilateral control, States gain the expected efficiencies of the new entity and the knowledge that it must work with partner States to alter the compact's provisions. This commitment to the compact creates a stable working relationship between the entity and the compacting States.

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[13] *See Tripolitsiotis*, *supra*, at 181.

[14] *See Oleksiak*, 2020 WL 1470856, at *4 ("These interstate agencies generally are not subject to one state's unilateral control or to state regulation unless the compacting states expressly agree.").

While an interstate compact inherently involves the loss of sovereignty, States are not helpless in this arrangement because they control the terms of the compact.[15] States can retain certain sovereign rights through the language of the compact, which the courts must respect. In evaluating the distribution of sovereignty in a compact, "the analysis begins with 'the express terms of the Compact as the best indication of the intent of the parties.'"[16] Only if the text is ambiguous should a court "turn to other interpretive tools to shed light on the intent of the Compact's drafters."[17] As detailed below, *see* Part I.B., where the compact lacks explicit provisions preserving state sovereignty, the only way for the States to impose their will is through joint action, rather than through unilateral action or the courts. *See Spence-Parker*, 616 F. Supp. 2d at 516 ("Joint amendment of the compact itself was the only means available to these states to adjust the legal obligations imposed upon the compact entity.").

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[15] *See Texas v. New Mexico II*, 482 U.S. 124, 128 (1987) (stating that a compact is "a legal document that must be construed and applied in accordance with its terms").

[16] *Wayne Land & Min. Grp. LLC v. Del. River Basin Comm'n*, 894 F.3d 509, 528 (3d Cir. 2018) (quoting *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013)).

[17] *Id.* (quoting *Tarrant*, 569 U.S. at 631).

B. Courts Have Refrained from Interfering with the Operation of Compact Entities

Since Compact Clause entities have sovereignty over their designated areas, courts have been reluctant to intervene in the internal operations of these entities, even on request of the compacting States. As the Eighth Circuit explained, "One party to an interstate compact may not enact legislation which would impose burdens upon the compact absent the concurrence of other signatories."[18]

Allowing the States to use courts to regain sovereignty would undermine the independence granted to such entities in the compact. An expansive reading of state power over the compact entity would neither comport with the historical norms surrounding compacts, nor meet the expectations of the compacting States.[19]

Returning to the majority opinion in *Green*, Justice Story invoked the Constitution to protect compacts from state interference, specifically drawing from the Constitution's bar on States passing laws that impair

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[18] *Kansas City Area Transp. Auth. v. State of Mo.*, 640 F.2d 173, 174 (8th Cir. 1981); *see also Local 542*, 311 F.3d at 273; *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Plan. Council*, 786 F.2d 1359, 1371 (9th Cir. 1986) ("A state can impose state law on a compact organization only if the compact specifically reserves its right to do so."), *cert. denied,* 479 U.S. 1059 (1987).

[19] *See supra*, Part I.A. for a discussion of the historical emphasis placed on compacts as contracts and as tools to cede state sovereignty.

the obligation of contracts. *See* 21 U.S. at 91-92; U.S. Const. art. I, § 10, cl. 1. After recognizing compacts as contracts between the States, Justice Story held that "a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals." *Green*, 21 U.S. at 92. Therefore, Justice Story concluded that an interstate compact cannot be impaired by subsequent legal enactments of one of the compacting States. *See id.* at 92-93.[20]

Subsequent courts have largely affirmed compacts' preeminence over state law. *See McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991) ("A compact also takes precedence over statutory law in member states.").[21] The terms of the compact, rather than state law, govern the internal operations of a compact entity. *See Spence-Parker*, 616 F. Supp. 2d at 516 (citing *Local 542*, 311 F.3d at 280) ("[T]he extent

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[20] Compacts stand as exceptions to the general rule that a sitting state legislature cannot irrevocably bind future state legislatures. *See* Buenger, et al., *supra,* at 35-43.

[21] *See also KMOV TV*, 625 F. Supp. 2d at 812 ("[O]ne party to an interstate compact may not enact legislation that would impose burdens upon the compact absent the concurrence of the other signatories."); *Spence-Parker*, 616 F. Supp. 2d at 518 (rejecting the argument that "in ceding a limited portion of its sovereignty to the Authority," a State agreed to allow subsequent state law of another compacting State to burden the compact); *see generally* Jill E. Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 Fla. L. Rev. 1 (1997) (explaining that contemporary jurisprudence generally does not allow state legislation to burden compacts); Tripolitsiotis, *supra* (same).

to which each compacting state's laws apply to a compact entity turns exclusively on the language of the compact and the intent of the contracting states.").

Courts have applied this premise to find state law—even when congruent in the compacting States—cannot apply to a compact entity. For example, while workers have the right to unionize and force collective bargaining in both Pennsylvania and New Jersey, workers on the compact controlled bridges between the two States do not enjoy such a right.[22] Similarly, New York and New Jersey both have anti-discrimination laws, but those laws do not apply to people working on bridges connecting the two States.[23] Lastly, Maryland, Virginia, and the District of Columbia have all adopted freedom of information laws, but the agency that operates rail bridges between them is not subject to these laws.[24] In each case, the courts recognized that, once approved, the compact governed; the States could not interfere, absent consent from the other compacting States.

C. States Know How to (and Often Do) Reserve Sovereignty.

As the drafters of the compact, the compacting States bear the consequences of including sweeping

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[22] *Local 542*, 311 F.3d 273 (holding collective bargaining rights to not apply to workers for the Compact Clause entity).

[23] *Dezaio v. Port Auth. of N.Y. & N.J.*, 205 F.3d 62 (2d Cir. 2000) (holding New York's anti-discrimination laws inapplicable to employees of the Port Authority of New York and New Jersey).

[24] *C.T. Hellmuth*, 414 F. Supp. 408 (holding Maryland's freedom of information law inapplicable to the WMATA).

grants of authority and foregoing sovereignty preserving provisions. *See Oleksiak*, 2020 WL 1470856, at *13 ("[T]he compacting states understood the plain language of the sweeping grant of authority they provided to the Commission."). "Interstate compacts . . . are presumed to be 'the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties.'" *New Jersey v. Delaware*, 552 U.S. 597, 615–16 (2008) (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)). Therefore, when States form a compact, a court may conclude that the States intended to contract away their sovereignty. *See Del. River Joint Toll Bridge Comm'n*, 985 F.3d at 195.

"By expressly creating the bi-state entity," the compacting States relinquish "all control over the Authority unless otherwise stated in the compact." *HIP Heightened Indep. & Progress, Inc. v. Port Auth. of N.Y. & N.J.*, 693 F.3d 345, 358 (3d Cir. 2012) (finding that the States clearly intended to create the compact entity, and therefore cede sovereignty, even without an express surrender of the power at issue). If a State argues, *post hoc*, for a unilateral power, courts should require a high degree of textual evidence for the power. In the absence of an explicit sovereignty preserving provision, States have no right to control, interfere, or impact the compact entity. *See Oleksiak*, 2020 WL 1470856, at *1 (rejecting the application of state law to a compact entity where the State failed to identify compact language explicitly retaining sovereign police power).

States know how to preserve their sovereignty when they desire. *See Oleksiak*, 2020 WL 1470856, at *16 ("The [State] 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."). As New Jersey concedes, many compacts have clear preservation of sovereignty provisions, including provisions that allow for unilateral withdrawal.[25] If a compact lacks these common, but important, provisions, the compacting States likely intended the omission. A court "may not read into [the compact] language or intent that is simply not there." *Local* 542, 311 F.3d at 280.[26] The compacting States must clearly indicate an intent to reserve their sovereignty. *See Del. River Joint Toll Bridge Comm'n*, 985 F.3d at 195.

In compacts where this intent is not explicit, courts have refused to read such intent into the compact; instead, courts have strictly construed the retention of

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[25] *See* Br. Supp. New Jersey's Mot. J. on the Pleadings 22-23, 37 ("[C]ompacts can and do address withdrawal in each direction—authorizing or limiting it."); Br. States of Texas, et al. Amici Curiae Supp. Def. 16 ("Had the parties to this Compact wished to include express withdrawal terms, they could have done so, but they chose not to."); Br. United States Amici Curiae Supp. New Jersey's Mot. J. on the Pleadings 10 ("[M]any interstate compacts unambiguously address the subject by authorizing withdrawal or prohibiting it except in particular circumstances.").

[26] *See Alabama v. North Carolina*, 560 U.S. 330, 341–42 (2010) (refusing to infer into a compact the inclusion of a power where other contemporaneous compacts expressly included the power).

state sovereignty. *See, e.g.*, *id.* at 196 (viewing the reservation of a particular aspect of State sovereignty as evidence that the compacting States did not intend to reserve any other power); *Oleksiak*, 2020 WL 1470856, at *16 (rejecting the argument that a sovereign State must expressly relinquish aspects of its sovereignty to give effect to a compact's general grant of authority). A court should hesitate to retroactively preserve areas of sovereignty the States failed to preserve themselves. *See Local 542*, 311 F.3d at 280 ("Judicial restraint dictates that we not divine a way for them" to amend the terms of the compact).

This is not to say that courts should expansively read the ceding of sovereignty where it is ambiguous. "Such a surrender of state sovereignty should be treated with great care, and the Supreme Court has stated that courts should not find a surrender unless it has been 'expressed in terms too plain to be mistaken.'" *Local 542*, 311 F.3d at 276 (quoting *Jefferson Branch Bank v. Skelly*, 66 U.S. 436, 446 (1861)). However, "the creation of a bi-state entity pursuant to the Compact Clause is an unambiguous surrender." *Del. River Joint Toll Bridge Comm'n*, 985 F.3d at 195. Therefore, a compact's silence does not amount to a grant of permission. *See id.* (citing *Local 542*, 311 F.3d at 281). "To interpret the Compact otherwise 'would be to rewrite the agreement between the two States without any express authorization to do so.'" *Id.* (quoting *Local 542*, 311 F.3d at 281). As this Court has explained, "[W]e will not order relief inconsistent with [the] express terms of a compact, no matter what the equities of the circumstances might otherwise invite." *Alabama*, 560 U.S. at 352 (internal

quotation marks omitted) (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998)).

Simply put, courts should not allow one State to break its compact without the agreement of all the compacting States—whether as a right provided for expressly by the compact or through amendment or dissolution. Judicial restraint is the only way to protect the expectation and reliance interests of the sister States. *See Oleksiak*, 2020 WL 1470856, at *16 ("[T]he Compact must be enforced as written without a judge crafting language differing from the elected representatives' negotiated terms.").

Interpreting a compact to include an implicit reservation of sovereignty would vitiate the compact and limit the effectiveness of the compact entity. If circumstances change and a compact loses its purpose, then those affected should seek redress in the legislatures of the compacting States or through joint administration, rather than the courts. Achieving change through legislatures requires the mutual assent of the compacting States, thereby preserving the principle of cooperation embedded in interstate compacts.

D. Arguments Regarding Reserved Powers and Police Powers are Misplaced.

Amici supporting New Jersey argue that "As a general matter, States may not contract away their core police powers."[27] However, as detailed above,

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[27] Br. States of Texas, et al. Amici Curiae Supp. Def. 4.

contracting away certain police powers is precisely what the compact mechanism accomplishes.

While it is true that this Court has developed jurisprudence recognizing that States do not easily share, limit, or surrender their sovereignty unless in terms too plain to be mistaken,[28] the "unmistakability doctrine" was originally raised in the context of public contracts, involving States, arising under the Contracts Clause.[29]

This Court has subsequently explained that an interstate compact, as a joint undertaking, is itself an unmistakable declaration that the party States intend to share and indeed are sharing their sovereignty.[30] As detailed above, the Court in *Hess* noted that compacts, by their nature, shift sovereignty away from the compacting States.[31] This logic accords with Justice Scalia's opinion in *New Jersey v. Delaware*, where he explained that the "strong presumption against defeat of a State's title" in interpreting agreements has "no application here, however, because the whole purpose of the . . . Compact was precisely to come to a compromise agreement on the exercise of the two States' sovereign powers."[32]

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[28] *See Jefferson Branch Bank*, 66 U.S. at 446.

[29] *See Fletcher v. Peck*, 10 U.S. 87, 135-36 (1810).

[30] *See* Buenger, et al., *supra,* at 53.

[31] 513 U.S. at 42 (citing Marian E. Ridgeway, *Interstate Compacts: A Question of Federalism* 300 (1971)).

[32] *New Jersey v. Delaware*, 552 U.S. at 629 (Scalia, J., dissenting).

Similarly, here, two States came together to agree on the exercise of their sovereign police power over New York Harbor. The entire purpose of the compact at issue was the ceding of sovereignty that New Jersey and its amici claim to retain via executive order.

II. New Jersey is Incorrect to Distinguish "Vested Rights" Compacts as *Sui Generis*

Recognizing that allowing States to withdraw from compacts would have devastating effects in many circumstances, New Jersey attempts to segregate certain groups of compacts as *sui generis*.

It argues unilateral withdrawal is not appropriate "where the compacts create vested rights. Contract law provides that parties cannot withdraw at will from contracts creating vested rights—*e.g.*, contracts that create permanent legal entitlements or grant certain possessory or property interests to the parties."[33] New Jersey claims that "whether the signatories have acquired permanent property or contract entitlements under the compact" is the relevant inquiry.[34] It notes the "classic example" of "a compact setting the boundaries between States" and concedes that, of course, States "cannot withdraw at will from such compacts."[35] Similarly it concedes, "States also cannot withdraw at will from various compacts apportioning water rights among the

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[33] Br. Supp. New Jersey's Mot. J. on the Pleadings 27.

[34] *Id.* at 28.

[35] *Id.*

signatory States."[36] In short, New Jersey recognizes the need to prevent unilateral withdrawal in a host of compacts. It then attempts to carve out this compact as different—as one that "does not create or assign vested rights."[37]

There is no rational basis to draw this line at so-called vested rights compacts nor, to date, have the courts drawn this line in connection with compacts. Compacts that deal with the delegation of sovereign authority similarly create expectation and reliance interests that will be undermined by unilateral withdrawal. Indeed, there are now over two hundred fifty interstate agreements that all rely on the default assumption that a compact cedes authority not expressly reserved. New Jersey's argument defeats the fundamental purpose of all interstate compacts as contracts in which States, rather than private entities or individuals, are parties.[38] New Jersey is forced to arbitrarily delineate between compacts because it recognizes the absurdity that would result from

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[36] *Id.*

[37] *Id.* at 29.

[38] Compacts constitute solemn "treaties" between the member States acting as quasi-sovereigns within a federal union. *See Rhode Island v. Massachusetts*, 37 U.S. 657, 725 (1838) (compacts operate with the same effect as treaties between sovereign powers). Therefore, Compacts are not administrative agreements between States executed by executive branch agencies. *Gen. Expressways, Inc. v. Iowa Reciprocity Bd.*, 163 N.W.2d 413, 419 (Iowa 1968) ("We conclude the uniform compact herein was more than a mere administrative agreement and did constitute a valid and binding contract of the State of Iowa.").

inferring a right to unilaterally withdraw from compacts.

If any line drawing is to be done, it is by the text of the compact—not what the compact does. If a compact provides for unilateral withdrawal, courts should enforce those provisions. Where it does not, it should not add the term to the compact.

III. Finding for New Jersey Will Have a Destabilizing Effect on All Compacts

Withdrawal—whether from a water appropriating, boundary defining, or police power ceding agreement—has dramatic effects and undermines the expectation interests of compacting States. This Court should uphold the continued use of and reliance upon interstate compacts as long-term effective policy tools for States to collectively engage in problem-solving. Accomplishing this objective requires determining that a State cannot enter a compact—clearly imposing obligations among the member States—and then unilaterally renounce those obligations where the compact language does not expressly allow.

Compact revisionism potentially jeopardizes the many compacts States have statutorily bound themselves over the years. Under the practical effect of New Jersey's position, any compacting State could decide for itself that a compact policy is inconvenient and then unilaterally release itself from its bargained-for obligations. New Jersey's proposed understanding of compacts would also chill the use of compacts in the future. States will be slow to cede their sovereignty

when they have no guarantee that the other compacting States will live up to their obligations under the compact. There would forever be the risk of a State seeking judicial intervention into the affairs of the independent governmental entity.

If this Court concludes that States inherently retain the unilateral right to withdraw despite explicit intent to cede sovereignty, it would be relegating the interstate compact to no more than an administrative agreement or model law. Justice Jackson distilled the issue to one sentence in his concurrence in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 35 (1951): "But if the compact system is to have vitality and integrity, [one State] may not raise an issue of *ultra vires*, decide it, and release herself from an interstate obligation."

The proper interpretation of the Waterfront Commission Compact, or any other compact, should be consistent with the long-term cooperation among States. A decision in favor of New Jersey in this case undermines precedent placing interstate compacts above conflicting state law and undermines the enforceability of all compacts.

Allowing the unilateral amendment of the terms of an interstate compact by one member State has serious implications not only for the parties and Amici, but also for other interstate compacts across the nation. Their authority to uniformly regulate areas as diverse as juvenile offender transfers and occupational licenses for health professionals is

dependent upon the validity and reliability of compact law.

CONCLUSION

The Court should grant New York's motion for judgment on the pleadings and find that States do not retain a unilateral right to withdraw from compacts where the compact's language does not so provide.

Respectfully submitted,

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