No. 22O156

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 *AMICUS CURIAE* STATE OF OREGON IN SUPPORT OF PLAINTIFF

ELLEN F. ROSENBLUM
Attorney General of Oregon
BENJAMIN GUTMAN
Solicitor General
Counsel of Record
PEENESH SHAH
Assistant Attorney General
1162 Court Street NE
Salem, Oregon 97301-4096
Phone: (503) 378-4402
benjamin.gutman@
doj.state.or.us

QUESTION PRESENTED

When construing a congressionally approved interstate compact that addresses the management of lands along a state border, should this Court presume—in the absence of an express provision to the contrary—that the compact requires mutual assent for either State to withdraw?

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INTEREST OF THE AMICUS CURIAE

This case implicates the interests that Oregon has as a participant and signatory to present and future interstate compacts that may be affected by any rule announced in this case. States regularly use interstate compacts to fully and finally resolve cross-state disputes over matters as significant as water rights and borders. Likewise, when States face problems that are best solved by the collective action of all interested parties, interstate compacts are the only way to ensure long-term cooperation of all affected States. Any rule governing Oregon's ability to persistently bind itself and other States will necessarily affect the viability of interstate compacts as solutions to the problems just discussed.

SUMMARY OF ARGUMENT

State sovereignty is enhanced by recognizing States' power to enter compacts that restrict their ability to withdraw unilaterally, even for compacts that affect the States' police powers. Although it may seem paradoxical that sovereignty-restricting agreements enhance sovereignty, some problems are amenable to solution only if the States can credibly bind themselves indefinitely. Multistate compacts do not implicate the reserved-powers doctrine because they do not delegate sovereign power to private parties; they allocate that power among co-sovereigns. This Court should confirm that interstate compacts are not required to allow unilateral withdrawal.

This Court also should clarify the default rule of interpretation for compacts that do not expressly

address withdrawal. That silence generally should be read to foreclose unilateral withdrawal when the compact relates to land, at least when Congress retains authority to terminate the compact itself.

Compacts that relate to land differ from other kinds of compacts. This Court looks to general principles of contract law to interpret interstate compacts, and those principles distinguish agreements for goods and services from covenants that run with the land. Although agreements for goods and services are presumptively terminable at will after a reasonable time, the presumption is the opposite for covenants that run with the land: They generally cannot be terminated unilaterally absent an express reservation of the right to do so. That rule is the most analogous principle of law for interpreting interstate compacts that relate to land or the regulation of land, like compacts that resolve border disputes, allocate water rights, or determine how to administer a shared geographic area.

Although the parties to a compact are free to depart from that default rule, there is little reason to assume that they intended to do so when, as here, Congress retains authority to terminate the compact itself. When States enter into a compact that requires congressional consent to be effective, they know that they are not beholden to one another to negotiate a withdrawal. Each State always retains the option to ask Congress to withdraw its consent and thereby terminate the compact. That safety valve deters States from unreasonably obstructing fellow States from withdrawing. Congressional authority to terminate a compact thus weighs against

reading unilateral authority to withdraw into an agreement that otherwise is silent on the subject.

Applying those principles here, this Court should conclude that the Waterfront Commission Compact—which does not expressly allow either State to withdraw unilaterally—does not implicitly allow unilateral withdrawal. The subject of the Compact is the regulation of a port, a geographic area along the parties' shared border, making the States' mutual promises most analogous to covenants that run with the land. The nature of the Compact also bolsters that analogy, as it created a Commission that possesses significant assets, which make unilateral withdrawal impractical. And the Compact required congressional approval, which Congress remains free to withdraw if New York and New Jersey cannot negotiate an acceptable resolution. Because New Jersey did not expressly reserve its right to withdraw from the compact unilaterally, it lacks authority to do so.

ARGUMENT

Our federalism requires multiple sovereigns—federal, state, and tribal—to work together. The Constitution's solution to that problem, at least as for the States, is to preserve their sovereign right to contract with each other, subject only to a requirement of congressional consent for compacts that enhance the political power of the States in relation to the federal government. U.S. Const. Art. 1, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."); *U.S. Steel Corp. v.*

Multistate Tax Comm'n, 434 U.S. 452, 459–72 (1978) (explaining the scope of the Compact Clause).

The question in this case is whether and when States can use such interstate compacts to bind themselves not to withdraw unilaterally. As explained below, compacts prohibiting unilateral withdrawal can enhance, rather than restrict, state sovereignty by facilitating multistate solutions to problems that arise at or near, but extend beyond, their borders. Thus, when an interstate compact governs relationships connected with state lands, and especially when it requires congressional consent to be effective, that compact generally requires—absent an express provision to the contrary—mutual assent before any State may withdraw.

A. Limits on unilateral withdrawal from certain compacts enhance, rather than restrict, state sovereignty.

Multistate compacts "address interests and problems that do not coincide nicely either with the national boundaries or with State lines—interests that may be badly served or not served at all by the ordinary channels of National or State political action." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (internal quotation marks omitted). That is, they help States extend the reach of their sovereignty to solve problems that they cannot solve with the tools of their own governments alone.

Often—as in this case—States will use interstate compacts as a tool for fashioning cooperative solutions to complex multistate problems involving uniquely sovereign interests such as water rights,

borders, common resources, or shared transportation hubs.[1] But those solutions are effective only if they are enduring. For example, allocating water rights will prevent disputes only if those allocations are binding and not easily subject to revision. Similarly, borders are meaningful only if they can be expected to persist long into the future; indeed, one of their purposes is to provide local citizens at such borders with the stability and predictability that will encourage their investment of time and money into their local institutions.

Likewise, when faced with complex problems that call for multistate solutions over shared lands, States may need to expend resources to stand up interstate bodies to administer those solutions, but they are less likely to do so without some assurance that their fellow States will not unexpectedly abandon those joint ventures.

In some cases, the absence of such assurances will undermine the solutions themselves. Here, for example, one of the goals of the Waterfront Commission Compact was to root out "crime, corruption, and racketeering on the waterfront" of a port straddling the New York-New Jersey border. *See generally De Veau v. Braisted,* 363 U.S. 144, 147–50 (1960) (plurality op.) (detailing the history and

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[1] *See, e.g.*, Delaware River Port Authority Compact, ch. 258, 47 Stat. 308 (1932); Kansas City Area Transportation District and Authority Compact, Pub. L. No. 89-599, 80 Stat. 826 (1966); Gulf State Marine Fisheries Compact, Pub. L. No. 81-66, 63 Stat. 70 (1949); Oregon-Washington Boundary Compact, P.L. 85-575, 72 Stat. 455 (1958); Upper Colorado River Basin Compact, Pub. L. No. 81-37, 63 Stat. 31 (1949).

purposes of the Waterfront Commission Compact). Some of the tools used to achieve that goal have been confidential informants and undercover investigations. *See* PI App. 17a ¶ 45. But asking citizens to infiltrate or inform on organized criminals is no small thing—few have the stomach for that kind of personal risk even when operating under the aegis of a government agency, and likely no one would volunteer such help to a temporary agency. The durability of the compact—and the commission it establishes—was a key part of the solution it offered.

Thus, States can achieve more with multistate compacts when they can bind themselves and each other with the permanence that comes with an agreement not to unilaterally withdraw. Put differently, a prohibition on unilateral withdrawal can enhance, rather than limit, a State's sovereignty.

That analysis does not run afoul of the reserved-powers and related doctrines, which have no role to play in the context of interstate compacts. Arguing to the contrary, *amici* point to the principle of "parliamentary supremacy" at the root of the reserved-powers doctrine. *See* Br. of Amici States of Texas, et al. 5. But that argument fails to recognize that our federal system accommodates multiple sovereigns, unlike the single sovereign in the English system from which the reserved-powers doctrine is drawn. *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 366 (2006) (explaining that, [i]n England, where there was only one sovereign, a single discharge could protect the debtor from his jailer and his creditors," but no similarly simple solution was

available under this country's federal "patchwork of insolvency and bankruptcy laws").

Unsurprisingly for a doctrine rooted in a single-sovereign system, the reserved-powers doctrine limits a sovereign state's ability to contract away certain sovereign powers only to *non*-sovereign entities—the only possible contractual counterparties in England's single-sovereign system. *See U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 23 n.20 (1977) (collecting cases—all involving private parties—in which this Court has held that a State "is without power to enter into binding contracts not to exercise its police power in the future"); *see also United States v. Winstar Corp.*, 518 U.S. 839, 875 (1996) (discussing cases giving rise to the "unmistakability doctrine," which disfavors "implied governmental obligations in public contracts"; describing those cases as ones in which "a state or local government entity had made a contract granting *a private party* some concession (such as a tax exemption or a monopoly)" (emphasis added)); *id.* at 888 (rejecting an argument under the reserved-powers doctrine by relying on analysis of the related unmistakability doctrine).

But that doctrine has nothing to say about contracting with *other* sovereigns over such matters as borders, water rights, or police powers. To the extent that this Court has held that the reserved-powers doctrine cabins the reach of affirmative constitutional protections such as the Contract Clause, it has done so only to withdraw some public-private contracts from those protections. *U.S. Tr. Co.*, 431 U.S. at 21–22 (exploring circumstances when the Contract Clause does not protect "private

contracts" from "modification under the police power"). Neither New Jersey nor its aligned *amici* cite any case in which this Court has applied the reserved-powers doctrine to limit one sovereign's unfettered right to contract with another co-equal sovereign,[2] or to delegate police powers to an interstate body rather than a private party.

In short, the reserved-powers doctrine has no place in the analysis of the interstate compact at issue in this case. And because that is the sole basis argued in support of a rule preventing States from ever entering into permanent interstate compacts, this Court should confirm that the States' sovereign powers include the power to bargain away the right to unilaterally withdraw from agreements with other sovereign powers. Allowing states to create such permanent obligations to each other with respect to

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[2] No different analysis is required by *Bowen v. Pub. Agencies Opposed To Soc. Sec. Entrapment*, 477 U.S. 41 (1986). That case involved a purported contract between the federal government and the States, and it held that an "unmistakable" waiver was required before the federal government could be held to have surrendered its right to amend the contract. *Id.* at 49, 52. But, in fact, the purported contract in that case "created no contractual rights" at all—rather, it was a unilateral act of Congress in which the federal government expressly reserved the right to alter, amend, or repeal any provision of that law. *Id.* at 51–52. For that reason alone, the case has nothing to teach about bilateral contracts between sovereigns. And even if it did, its holding would necessarily be limited to a contract between *unequal* sovereigns, given the federal government's supremacy over state sovereigns. Indeed, that feature of the putative contract in *Bowen*—the unequal footing between the parties—makes the contract in that case more like a contract between a state and a private party and less like an interstate compact.

their land is little different from well-accepted rules imposing other permanent obligations on states by virtue of their roles as stewards and owners of state lands. *Cf., e.g.*, *Gold Coast Neighborhood Ass'n v. State*, 403 P.3d 214, 237 (Haw. 2017) (holding that the State of Hawaii should be "jointly responsible with the relevant property owners for the repair and maintenance of" a seawall over which the state enjoyed an easement in favor of the public).

B. When interstate compacts govern relationships connected with state lands and require congressional consent to be effective, they presumptively require mutual assent before any State may withdraw.

Because interstate compacts are not required to allow unilateral withdrawal, the availability of that option depends on the nature and terms of the particular compact at issue. Certainly, if the compact expressly allows a State to withdraw unilaterally, then it is available. The more difficult question arises in compacts, like the one at issue in this case, that contain no provision expressly governing unilateral withdrawal and therefore require the identification of a default rule.

Two considerations support a default rule of mutual assent for compacts like the one at issue here. First, the most analogous contract principle for compacts concerning state lands is the principle that covenants running with land require mutual assent for withdrawal. Second, when Congress retains authority to terminate the compact itself, fears about

perpetual obligations do not support departing from that basic contract principle.

1. Contract principles generally require mutual assent to terminate a covenant that runs with the land.

"Interstate compacts are construed as contracts under the principles of contract law." *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013) (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). New Jersey correctly starts its analysis there, but it analogizes to the wrong kind of contracts, looking to principles applicable to contracts governing goods and services. Under those principles, contracts that require indefinite and continuing performance are commonly terminable by either party at will. *See generally* Defendant's Mot. for Judgment on the Pleadings at 14–18 (discussing those rules).

Yet the principles of contract law also include those that govern covenants running with land. *See* 29 *Williston on Contracts* § 74:2 (4th ed. Supp. May 2022) (recognizing that certain contracts or "covenants" are "said to run with the land"); *see also id*. (explaining that, although the law on covenants running with the land "has grown up rather in connection with the law of real property," "analytically the subject belongs with contracts").

When a covenant runs with the land, its duration is governed by a different rule than the ones that apply to ordinary contracts pertaining only to goods and services. Because such covenants run with land, and because land is essentially perpetual in nature, such a covenant is also perpetual by default: it "may

be modified or terminated" only (1) "by agreement of the parties," (2) "pursuant to its terms," or (3) under various special circumstances such as abandonment, merger, estoppel, condemnation, or the like. *See Restatement (Third) of Property (Servitudes)* § 7.1 (2000 & Supp. Sept. 2022) (stating such a rule as to "servitudes"); *see also id*. § 1.3(1) (stating that a covenant is a "a servitude if either the benefit or the burden runs with land").

Thus, where an interstate compact is one that "runs with the land," contract principles support a default rule that is the opposite of the one suggested by New Jersey. Under that rule, unilateral withdrawal is *not* allowed by default, and a State may unilaterally withdraw only if the terms of the compact expressly allow it to do so.

That leaves, of course, the question of how to determine whether an interstate compact is one that "runs with the land." The answer to that question can likewise be found in well-established principles of contract law. Generally, the "test whether a covenant runs with the land" depends on whether it "concerns the land and the enjoyment of it" and whether it contemplates an act that "concern[s] the land"; where both are true, the covenant runs with the land. 29 *Williston on Contracts* § 74:2.

As with most matters of contract, this is a question of intent. *Restatement (First) of Property* § 544 (1944) ("The benefit of a promise respecting the use of land of the beneficiary of the promise runs with the land only in so far as it was intended by the parties to the promise that it should run."). But "the

manifestation of" such intent "is subject to no special requirements of form" and "[n]ot infrequently . . . is found entirely by inference from the circumstances under which the promise was made." *Id*. cmt. c; *see also Restatement (Third) of Property (Servitudes)* § 2.2 cmt. b (2000 & Supp. Sept. 2022) (stating that "intent to create a servitude may be express or implied"). The requisite intent may be inferred "by the permanency of the situation apparently sought to be produced by the performance of the promise," as the "more permanent the situation intended to be produced the more likely the successors of the promisor were intended to be bound by his promise since the control of the land by the promisor himself may be but temporary." *Restatement (First) of Property* § 531.

For example, the *Restatement* offers the following illustration:

> A and B are the owners and possessors respectively of Blackacre and Whiteacre, neighboring lands. They enter into an agreement whereby A agrees to permit B to take water from Blackacre for the purpose of irrigating Whiteacre. B agrees to pay at a certain rate for the water thus taken, payments to be made monthly for all water taken in the preceding month. The promise to pay is a promise respecting the use of Blackacre and is, therefore, capable of running with it.

Restatement (First) of Property § 543 cmt. f, ill. 4. As that illustration reveals, an obligation—like the

financial obligation in the illustration, or like the regulatory obligations in this case—may run with the land even when the obligation by itself has little connection with the land, as long as the parties' intent and the context of its negotiation supply that connection. The illustration likewise reveals that the normal preference against perpetual contracts is not applicable to obligations that run with land.

Not all interstate compacts are related to land. When a State enters into a compact with another state purely for goods or services—for example, in compacts governing extradition of criminals or the housing of convicts,[3] or the marketing of dairy products[4]—those compacts do not run with any land, and they may be subject to the default rule allowing unilateral withdrawal, as suggested by New Jersey. But for compacts that are inextricably connected with land, faithful application of contract principles suggests that a State may withdraw only by mutual consent unless the compact expressly contemplates unilateral withdrawal.

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[3] *See, e.g.*, National Interstate Corrections Compact, P.L. 81-138, 63 Stat. 107 (1949); N.H. Rev. Stat. Ann. §§ 622-B:1 to 622-B:3.

[4] *See* Northeast Dairy Compact, 7 U.S.C. § 7256; Vt. Stat. Ann. tit. 6, §§ 1801–22; N.Y. Agric. & Mkts. Law § 258-KK (McKinney).

2. When Congress retains authority to terminate the compact itself, fears about perpetual obligations do not support departing from those basic contract principles.

Without doubt, States cannot escape obligations running with land as easily as private landowners can—whereas a private landowner can always sell the burdened land, that option is more difficult, sometimes approaching impossible, for a State. Moreover, the usual equitable doctrines for revising such obligations—such as abandonment, merger, estoppel, condemnation, impossibility or the like, *see generally Restatement (Third) of Property (Servitudes)* § 7.1 (discussing *id.* §§ 7.4–7.12)—may not be sufficient to protect States from bearing unreasonable obligations for perpetuity.

But the solution in those situations will typically be found in a provision authorizing congressional termination of the compact. Where a compact contains such a provision, this Court will not need to depart from normal contract principles to ensure a safety valve that prevents the perpetuation of unreasonable obligations.

Indeed, Congress may be the best positioned authority to determine whether and how to wind down an interstate compact that affects interstate lands or resources when the States themselves are unable to agree to do so. In any compact where congressional consent is required, the federal government has a sovereign interest as strong as those of the participating States. *See Hess*, 513 U.S.

at 40 ("Bistate entities . . . typically are creations of three discrete sovereigns: two States and the Federal Government."). When Congress plays this kind of special role in an interstate compact running with land, its authority to terminate the compact ensures that no State has an absolute veto on the question of termination or continuation of the compact.

C. The Waterfront Commission Compact—which does not expressly allow either State to withdraw unilaterally—does not implicitly allow unilateral withdrawal.

Applying the foregoing principles here leads to the conclusion that the Waterfront Commission Compact does not implicitly allow unilateral withdrawal, because the duties and obligations created by the Compact are ones that run with the land and that can be terminated by Congress. Although the Compact is silent on the subject of unilateral withdrawal, "the better understanding" of that "silence is that the parties drafted the Compact with this legal background"—that is, the special rules governing contracts that run with the land—"in mind." *See Tarrant*, 569 U.S. at 632.

The Compact clearly is concerned with the occupation and enjoyment or use of land, specifically the waterfront in the Port of New York and New Jersey, which is bisected by the boundary between the states of New York and New Jersey and geographically defined in an earlier compact between those states. Compl. ¶¶ 2, 4; Ans. ¶¶ 2, 4; *see also* Compl. App. 36a–37a; *see also* Compl. App. 3a (defining "The Port of New York district" as the

district created by the New York-New Jersey Port Auth. Compact, ch. 77, S.J. Res. 88, 67th Cong., 42 Stat. 174 (1921)). Also connected to that land are the acts contemplated by the Compact, which effected a comprehensive plan to combat corruption and crime at that location through a jointly created administrative body that would improve the operation of the port. *See De Veau*, 363 U.S. at 149 (summarizing essential terms of the Compact); *see also, e.g.*, Compl. App. 9a (Compact art. V, § 1 (governing who can act as a pier superintendent or hiring agent "within the port of New York district"); Compl. App. 14a (Compact art. VI, § 2 (requiring certain acts be performed by any person "intending to act as a stevedore within the Port of New York district"); Compl. App. 31a (Compact art. XIII, § 3 (calling for assessments to be paid by employers on account of "work or labor performed within the port of New York district").

The very nature of the Compact—which arose out of New York's and New Jersey's ownership of waterfront land at the Port—thus supports an inference that its obligations were intended to run with ownership or dominion over the waterfront. Further supporting that inference is the complexity of that plan—the Compact creates a commission with significant assets, such as information compiled from investigations and operations, a substantial budget, and funds collected from assessments on employers operating at the Port. Compl. App. 8a ¶ 11, 31a ¶¶ 2–3; PI App. 18a ¶ 50 (estimating a budget for FY2022 of approximately $14.2 million). That complexity suggests that the party States presumed the

Compact's plan to be durable, even if they expected that the plan would at some point be wound down. *Cf. Restatement (First) of Property* § 531 ("If the promise was procured by the promisee in pursuit of a general plan of development which includes not only the land with respect to which the promise was made but other land as well, the likelihood that the promise was expected to be binding upon the successors of the promisor is great, as it would in all probability seriously interfere with the successful carrying out the plan if this were not true.").

That complexity further suggests that the terms of the Compact cannot be satisfied—as *amicus* the United States incorrectly suggests, *see* Br. of *Amicus* United States 14—by the simple award of money damages for any losses caused through unilateral withdrawal. Rather, it suggests that terminating the compact requires a deliberate and thoughtful wind-down of the Commission, which is possible only through a negotiated withdrawal or congressional legislation.

Concluding that the Compact forbids unilateral withdrawal does not result in impermissible delegation of sovereign police powers to a non-sovereign in violation of the reserved-powers doctrine. To the contrary, the Compact expressly provides that the commission it creates "shall be a body corporate and politic, *an instrumentality of the States of New York and New Jersey*." Compl. App. 6a (Compact art. III, § 1; emphasis added). This Court has never held that the reserved-powers doctrine forbids that kind of delegation, having instead recognized the need for states to sometimes create and delegate their powers

to multistate entities designed to address "broad, region-wide problems" of such national importance that "no one State alone" should be permitted to "control" their "course." *Hess*, 513 US at 40–42, 47 (internal quotation marks omitted); *see also id*. at 42 n.11 (citing *Port Authority Trans–Hudson Corp. v. Feeney*, 495 U.S. 299, 314–316 (1990) (Brennan, J., concurring in part and concurring in judgment).

Nor does that conclusion leave New York and New Jersey without a solution in the event of a deadlock between them. As contemplated above, the Compact allows termination by congressional action. Compl. App. 35a (Compact art. XVI, § 2). Indeed, allowing only Congress, rather than a single participating State, authority to unilaterally terminate the Compact makes good sense because the Port is of such vital national interest. *See* Compl. App. 36a (New Jersey Legislature's findings that the Port's "strategic location, within one day's drive of a significant percentage of the national market and developed transportation infrastructure, are key assets that have made the region a gateway for international trade").

CONCLUSION

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

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General of Oregon
BENJAMIN GUTMAN
Solicitor General
Counsel of Record
PEENESH SHAH
Assistant Attorney General
1162 Court Street NE
Salem, Oregon 97301-4096
Phone: (503) 378-4402
benjamin.gutman@
doj.state.or.us