No. 22O156, Original

IN THE

Supreme Court of the United States

State of NEW YORK,
Plaintiff,

v.

State of NEW JERSEY,
Defendant.

REPLY BRIEF IN SUPPORT OF NEW YORK'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

New Jersey errs in urging the Court to apply an abstract default rule gleaned from commercial contracts to the Waterfront Commission Compact. That is not how compact, or contract, interpretation works. Each interstate compact is a unique agreement between coequal sovereigns, forged under particular circumstances and against the backdrop of the distinct history and tradition of compacts under the Constitution.

The features and history of this Compact make clear the drafters never intended the remarkable result that New Jersey urges: for one State to renege on its commitments, abolish the bistate Commission, and seize the Commission's assets and powers. The drafters' intent must control and ends the case.

New Jersey points to nothing in the Compact's text or history that suggests the drafters intended to allow at-will termination by implication. By contrast, all indicia of the drafters' intent demonstrate that the agreement terminates when either (i) the States mutually agree that the problems necessitating joint regulation of their shared Port have sufficiently abated, or (ii) Congress repeals its consent. There is thus no merit to New Jersey's assertion that at-will termination is needed to prevent the Compact from continuing unchanged "forever." New Jersey may pursue lawful termination mechanisms, but it has failed to try. And it may pursue compromise or change through other tools expressly provided by the Compact, but it has failed to try those too. An implied right of at-will termination would not foster compromise but rather would allow New Jersey to renege on its commitment to a bistate approach to bistate problems that New Jersey acknowledges still affect the Port.

Principles of sovereignty confirm that compacts are not presumptively terminable at will. The core purpose of compacts, centuries of history and tradition, and compact scholarship instead underscore that compacts are, by constitutional design, presumptively enduring arrangements. While States must be clear about which sovereign powers they intend to share by compact, both States clearly agreed to vest specific regulatory authorities in the Commission to jointly regulate the entire Port. There is no sovereign "right" to renege on these express commitments. Doing so would trample New York's sovereignty and destroy New York's bargained-for rights.

New Jersey attempts to cabin the disruptive effect of a default rule favoring at-will termination by arguing that compacts creating "vested rights" are exempt. But "vested rights" are not limited to real property or water rights, as New Jersey suggests. This Court's Contracts and Due Process Clause jurisprudence uses that term to refer instead to an array of enforceable contractual or statutory entitlements. No "vested rights" inquiry is needed here because compacts indisputably create enforceable rights. In any event, New Jersey concedes that compacts implicating both "vested rights" and ongoing regulatory authority are presumptively enduring. That admission is dispositive because this Compact involves regulatory authority over conduct in a Port District in which the States jointly own land. The Court should reject New Jersey's proposed default because it is unmoored from compact law, contract law, and the States' actual intent.

ARGUMENT

I. THE COMPACT PROHIBITS UNILATERAL TERMINATION.

A. The Touchstone of Compact Interpretation Is the States' Intent.

This Court interprets compacts according to the States' intent. *Montana v. Wyoming*, 563 U.S. 368, 375 n.4 (2011). New Jersey is wrong that, by following precedent, New York somehow disavows that "compacts are construed as contracts under the principles of contract law." *See* N.J. Response to N.Y. Cross-Mot. & Reply 8 (quoting *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013)). Under compact and contract law alike, "the avowed purpose and primary function of the court is to ascertain the intention of the parties." *See* 30 *Williston on Contracts* § 30:2 (4th ed. Westlaw, through May 2022 update).

New Jersey bypasses this interpretive lodestar (Response 2) and instead urges the Court to rely on an abstract default rule for private commercial contracts. This foundational error is fatal to New Jersey's argument. Applying a default rule is unnecessary when, as here, the drafters' intent is discernible. *See* Restatement (Second) of Contracts § 204 & cmt. c (1981); *cf.* 1 William D. Hawkland et al., *Uniform Commercial Code Series* § 1-303:2 (Westlaw, through June 2022 update) (gap-filling terms "are subordinated in rank to course of performance, course of dealing and usage of trade"). And courts are especially hesitant to read implied terms into compacts given "federalism and separation-of-powers concerns." *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010).

Moreover, New Jersey's insistence (Response 7) that interstate compacts and private commercial contracts must be construed in exactly the same way is belied by precedent, common sense, and its own arguments. While the Court looks to contract law as a guide, it has long construed compacts as federal law and in view of their unique constitutional purpose. *See* Litwak et al. ("Compacts Profs.") Amicus Br. 9-14 (citing cases). New Jersey itself attempts to rely on sovereignty principles that differentiate compacts from private contracts (Response 11-15), though its analysis is incorrect.

Contrary to New Jersey's contentions (*id.* at 4-7, 18-22), the Court readily looks to a compact's purpose and negotiation history, the parties' course of performance, and customary practice to discern the parties' intent.[1] *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991); Restatement (Second) of Contracts § 202; U.S. Amicus Br. 10, 27. These indicia of intent are not "vague notions" (N.J. Response 4) but rather the backbone of compact and contract interpretation. New Jersey has not identified any evidence that the parties actually intended to permit unilateral termination and, perhaps for that reason, insists its proposed default rule reflects the drafters' intent. But all interpretive tools establish that the States intended to prohibit unilateral withdrawal, not allow it.

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[1] New Jersey's cited cases (Response 4) did not hold that purpose is irrelevant. Rather, they explained that the Court's interpretation accorded with the purposes of the compacts at issue. *See Alabama*, 560 U.S. at 349; *New Jersey v. New York*, 523 U.S. 767, 785 (1998).

B. All Tools of Compact Interpretation Confirm That the States Did Not Intend to Permit Unilateral Termination.

1. Text and structure

The Compact's text and structure establish that the States contemplated two ways the Compact may end: (i) mutual agreement that joint regulation of Port labor is no longer needed or (ii) congressional repeal. N.Y. Br. 19-21. Thus, when properly considered as a whole, *see* Restatement (Second) of Contracts § 202(2), the text dispels New Jersey's false premise that the Compact is "perpetual" absent an implied right to unilateral withdrawal, *see* Response 1-2. New Jersey's attempts to divide and downplay the Compact's provisions are meritless.

First, the Compact contains powerful evidence that the drafters intended the States to determine together when joint regulation of the Port is no longer needed—at which point the agreement would end. The Compact expressly declares that joint regulation was required to protect public safety and welfare in *both* States. Compl.-App. 3a. And it expressly requires the Commission to report annually to *both* States "whether the public necessity still exists" for that joint regulation to continue. Compl.-App. 8a-9a. Given these commitments to jointly regulate the Port until the States jointly determine such regulation should end, it makes little sense for the drafters to have incorporated a right of at-will termination by implication.[2] Unlike compacts that

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[2] New Jersey misplaces its reliance (Response 6) on dissimilar reporting provisions in compacts expressly authorizing unilateral withdrawal. Those provisions did not require an ongoing assessment of whether the compacts should continue.

expressly authorize unilateral withdrawal (*see* Response 4), nothing in this Compact suggests an intent to subject the States' joint endeavor to at-will termination.

New Jersey misses the point in observing (Response 8-9) that contracting parties can always mutually agree to terminate their agreement. The text of this Compact reflects that the States contemplated a specific endpoint: when they agreed that the evils requiring joint regulation had sufficiently abated. Although the parties may agree to dispense with this requirement and end the Compact earlier, New Jersey may not do so alone.

Second, Congress's express reservation of the right to repeal the Compact further underscores the States' understanding that the agreement was not perpetual, but neither could it be ended unilaterally. New Jersey misses the mark in arguing (Response 5) that Congress's power to repeal does not preclude States from reserving their own power to withdraw. Although the States could have reserved that right, they did not opt to do so here.

New Jersey is incorrect in labelling the provision for congressional repeal irrelevant boilerplate. Response 5-6. Congress has exercised its reserved powers in other compacts—including to amend the compact's duration.[3] New Jersey's objection that the repeal provision was added after the Compact was drafted (*see* Response 6) lacks merit. States are presumed to accept the conditions Congress imposes on its consent. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 281-

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[3] *E.g.*, Pub. L. No. 92-322, 86 Stat. 383, 386 (1972) (amending Interstate Compact to Conserve Oil and Gas to remove sunset provision); Ch. 763, § 3, 64 Stat. 467, 467 (1950) (striking sunset provision in statute consenting to Atlantic States Marine Fisheries Compact).

82 (1959). And here, New Jersey's Governor participated in discussing the import of the repeal provision during the congressional hearings. *See New Jersey-New York Waterfront Commission Compact: Hr'g Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 83d Cong. 27-28 (1953).

New Jersey has not identified a single provision of the Compact that supports at-will withdrawal. New Jersey points to the Compact's voting structure, which requires unanimity. Response 16-17. But unanimity requirements occur both in compacts expressly authorizing unilateral withdrawal and in those that are silent or expressly forbid it. See N.Y. Br. 24. The Compact's unanimity provisions thus do not support the claim that unilateral withdrawal is necessary to ensure flexibility and compromise.

To the contrary, the Compact's carefully crafted governance mechanisms foster flexibility and compromise by giving each State coequal power. New Jersey's unsupported assertions of "dysfunction[]" (Response 8) are belied by the States' repeated exercise of their coequal authority to respond to change, amend the Compact, and resolve disagreements. N.Y. Br. 27-29. For example, the States have successfully caused the Commission to correct the issues identified in the 2009 New York Inspector General report, and the Commission has also readily adopted other reforms proposed by New Jersey. *See* Movant Waterfront Comm'n (Comm'n) Amicus Br. 17-22 & n.26. New Jersey's predictions of perpetual deadlock are therefore baseless—especially when entirely paralyzing the Commission (*see* Response 16) would inflict substantial harms on both States.

Far from encouraging flexibility, allowing New Jersey to terminate the Compact at will would disincentivize New Jersey from having to compromise at all. The Compact promotes compromise, not deadlock. New Jersey notes only *one* instance of disagreement in which New York rejected a New Jersey proposal—namely, to give each State's Governor veto power over certain Commission actions. Response 17 (referring to Ch. 201, § 1, 2017 N.J. Laws 1551, 1551-52). But New York's reluctance to fundamentally alter the Commission's governance structure does not constitute or predict perpetual deadlock.

2. Negotiation history

The Compact's negotiation history reflects the drafters' view that a bistate approach to regulating waterfront labor is the *only* viable antidote to entrenched crime and corruption at the Port. N.Y. Br. 7, 25. And the history shows the drafters' understanding that these regulatory measures should continue until the problems are sufficiently addressed. *Id.* at 7-9. New Jersey does not dispute either of these points.

This history refutes New Jersey's assertion (Response 7) that the Compact must allow at-will termination to accommodate "changed circumstances." As a threshold matter, New Jersey has failed to show that relevant circumstances have changed. To the contrary, corruption and organized crime continue to affect the Port.[4] *See* Comm'n Amicus Br. 9-15. New Jersey agrees that licensing and regulation of Port labor is still needed

[4] The persistence of these threats does not support dismantling the Commission. *See* N.J. Response 17 n.5. New Jersey surely would not dismantle its own State Police simply because crime continues in their jurisdiction.

to combat these threats (Compl.-App. 37a (Ch. 324, § 1(c))—it just wants to exercise the Commission's core functions itself (*see* Compl.-App. 49a-63a). But the drafters specifically rejected that approach. See N.Y. Br. 6-7.

Moreover, no negotiation history suggests that the drafters intended to give "each legislature an opportunity to withdraw" (Response 5 n.1). The only source on which New Jersey relies—the United States' amicus brief—reaches no such conclusion. *See* U.S. Amicus Br. 28. And the historical evidence the United States cites does not relate to the Commission or concern the possibility of the Compact's unilateral termination. Rather, it addresses the New York Crime Commission's original proposal for a standalone New York agency and reporting requirements for the New York Legislature to assess whether such New York-specific measures should continue. *See Record of Hr'gs Before N.Y. Governor Thomas Dewey*, June 8, 1953, *reprinted in Public Papers of Thomas E. Dewey* 815 (1953) (statement of Special Counsel Theodore Kiendl). New Jersey thus cites no history in support of unilateral withdrawal. Indeed, the fact that the Compact ultimately required reporting to both States shows the opposite.

3. Course of performance

New York and New Jersey's joint regulation of the Port for over six decades, including through periods of disagreement, provides compelling evidence that they understood the Compact could not be unilaterally terminated. This Court should not ignore that course of performance, despite New Jersey's efforts to minimize it (Response 21). That neither State threatened to withdraw, even when the Commission was temporarily compromised by corrupting influences (*see* Comm'n

Amicus Br. 2-3), demonstrates the States' understanding that the Compact confers no such right and instead provides other tools to forge compromise.

New Jersey offers no support for its assertion (Response 22) that the only "performance" relevant to this inquiry is its own enactment of Chapter 324. This Court has never cabined the course-of-performance inquiry to enacted laws. *See Tarrant Reg'l Water Dist. v. Hermann*, 569 U.S. 614, 636-37 (2013) (conduct of Texas agencies); *New Jersey v. Delaware*, 552 U.S. 597, 621 (2008) (environmental impact submission). And the fact remains that multiple New Jersey officials over multiple years consistently expressed their understanding that unilateral termination is prohibited. See N.Y. Br. 29. Thus, it is Chapter 324 that is an "isolated" act (N.J. Response 22) that contravenes the parties' course of performance and the drafters' intent.

4. Tradition and state practice

The history and tradition of interstate compacts underscore that the drafters negotiated against a background presumption that compacts are not terminable at will unless the compact expressly provides otherwise. See N.Y. Br. 30-35. New Jersey errs (Response 18-21) in criticizing New York's historical analysis, while offering none of its own.

First, there is a clear historical through line from boundary compacts—which New Jersey concedes are permanent—to this Compact. *See* Response 19. New Jersey contends (*id.* at 9-10, 18) that compacts involving ongoing delegations of authority are presumptively terminable at will. But many early compacts established shared, ongoing authority over a waterbody or boundary. N.Y. Br. 4 & n.2. New Jersey concedes

(Response 10) that these compacts are permanent under its "vested rights" theory. Although that theory is incorrect (see *infra* at 19-22), New Jersey's concession demonstrates that States did not understand ongoing delegations of authority to necessarily trigger a right to withdraw unilaterally. The majority of interstate agency compacts through the first half of the twentieth century likewise omitted an express withdrawal provision yet were understood to be enduring arrangements. See N.Y. Br. 4-5, 30-32.

Contemporaneous scholarship confirms what the history demonstrates: unilateral withdrawal is prohibited absent the member States' express agreement—regardless of whether the compact involves ongoing regulatory authority. See N.Y. Br. 31-32. It is implausible that the States lacked awareness of this prevailing view. *See* N.J. Response 20. The treatise on which New Jersey relies (Br. 22 n.5) surveys much of the same scholarship. *See* Joseph F. Zimmerman, *Interstate Cooperation* 220-24 (2d ed. 2012). And Frederick Zimmermann, a leading scholar who explained in 1951 that compacts cannot be revoked unilaterally absent an express withdrawal clause (*see* N.Y. Br. 32), consulted on the drafting of several compacts before this one to which both New York and New Jersey were signatories. *See* Frederick L. Zimmermann & Mitchell Wendell, Council of State Gov'ts, *The Interstate Compact Since 1925*, at v (1951).

Moreover, nine of the eleven bistate agency compacts following the formation of the Port Authority Compact in 1921 were silent on withdrawal, and *none* expressly authorized unilateral withdrawal. N.Y. Br. 5. Against this backdrop, it is exceedingly unlikely that the Compact's drafters intended *the omission* of a with-

drawal clause to confer a right of unilateral termination. Contrary to New Jersey's assertion (Response 20), contemporaneous bistate agency compacts are the compacts most likely to reflect the customary practices and understandings applicable to this Compact. Whereas a member State's withdrawal from a bistate agency compact necessarily terminates the agreement and abolishes the bistate agency, unilateral withdrawal does not necessarily engender such profound consequences in a multistate arrangement.

Second, the Port Authority Compact contradicts, rather than supports, New Jersey's position. New Jersey retreats from its earlier contention that a "clear statement" is needed to preclude unilateral termination (Br. 23), by conceding that the Port Authority Compact's withdrawal clause *impliedly* precludes unilateral termination today (Response 19). And the fact that the Port Authority Compact and this Compact are expressly linked suggests that the drafters would have understood both compacts to be subject to the same presumption against at-will termination.

Third, New Jersey ignores New York's principal point about best practices in drafting and interpreting interstate compacts. The customary practice has always been "to include a revocation clause" when such an outcome is contemplated. *See* Zimmermann & Wendell, *supra*, at 90. New Jersey's examples of compacts with express withdrawal clauses confirm this practice. *See* Response 20. And its three purported examples of unilateral withdrawals from compacts that lacked an express withdrawal clause have no relevance here. One agreement appears to be a "voluntary association," not a congressionally approved compact. *See* Md. State Archives, *Maryland Manual Online – Delmarva Advisory Council* (Mar. 14, 2022). And the other two

compacts were already inoperative by mutual agreement when the withdrawing State took uncontested action.[5]

Finally, New Jersey misplaces its reliance (Response 20-21) on the United States' amicus brief in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), which favored reading an implied right of unilateral withdrawal into a multistate compact addressing water pollution. New Jersey offers no reason why the United States' position—which the Court declined to consider, *id.* at 26—better reflects the prevailing view on withdrawal than leading scholarship at the time. Indeed, *Dyer* was understood to "reinforce[] the binding effect of interstate compacts" that delegate ongoing regulatory authority to an interstate agency. *See* Frederick L. Zimmermann & Mitchell Wendell, *The Interstate Compact and* Dyer v. Sims, 51 Colum. L. Rev. 931, 949 (1951).

In any event, the United States' arguments in *Dyer*—which were in service of *preserving* the compact in that case—were based on the same abstract contract-law defaults that it advances here—not "the history of interstate compacts," as New Jersey claims (Response 18). *See* Br. for United States as Amicus Curiae at 26-28, *Dyer*, 341 U.S. 22 (No. 147), 1950 WL 78371. And the United States' position turned largely on the compact's express reservation of the signatory States' power to enact future legislation further addressing water

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[5] *See* *Written Testimony by Kansas Dep't of Transp. Before House Transp. Comm. Regarding H.B. 2147* (Feb. 20, 2013) (proposing repeal of 1933 law enacting Missouri River Toll Bridge Compact because "[n]o toll bridge exists"); Joseph F. Zimmerman, *Dissolution of the New Hampshire-Vermont Solid Waste Compact*, Connections (Nat'l Ctr. for Interstate Compacts), Spring 2008, at 4 (all participating towns voted to withdraw).

pollution. *Id.* at 27-28. The United States reasoned that this broad reservation of "complete freedom of action to subsequent legislatures" demonstrated an intent to allow unilateral withdrawal. *Id.* at 28. But the opposite is true here. Thus, consistent with the federal government's long-held "general interest in the preservation of interstate compacts," *id.* at 11, the Court should not engraft an implied right of at-will termination onto this Compact.

II. NEW JERSEY'S PURPORTED RIGHT OF UNILATERAL TERMINATION LACKS ANY BASIS IN COMPACT OR CONTRACT LAW.

A. An Implied Right of At-Will Termination Is Inconsistent with State Sovereignty and the Constitutional Purpose of Compacts.

Settled principles of sovereignty and federalism further confirm that compacts are terminable at will only if member States expressly reserve that right in advance. New Jersey's contrary arguments are meritless.

1. Implied termination at will is incompatible with the nature of interstate compacts—one of the only two methods of settling interstate disputes provided by the Constitution. Courts and scholars have long recognized that a compact's formation inherently requires a mutual exchange of state sovereignty. Allowing one State to unilaterally destroy a bistate agency would thus trample the sovereign interests of the other. See N.Y. Br. 31-32, 35-37; *see also* Compacts Profs. Amicus Br. 17-19; Compact Entities Amicus Br. 6-13.

New Jersey mischaracterizes this settled understanding as the position espoused solely in law reviews. Response 20. This Court has recognized that "bistate entities created by compact . . . are not subject to the

unilateral control of any one of the States." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994); *see Northeast Bancorp, Inc. v. Board of Governors, FRS,* 472 U.S. 159, 175 (1985) (presumption against unilateral modification or repeal is among "classic indicia" of compacts). Although these decisions did not involve a State seeking to withdraw unilaterally, they make the relevant sovereignty principles clear. Indeed, New Jersey's own Supreme Court has applied these principles to this Compact, explaining that the Commission "was intended to be free from any unilateral restraint by either State which might thwart the Commission in its efforts to eliminate evil conditions." *In re Waterfront Comm'n of N.Y. Harbor*, 39 N.J. 436, 456-57 (1963), *aff'd in part, vacated in part on other grounds sub nom. Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

2. None of New Jersey's sovereignty arguments has merit. To start, New Jersey now concedes that each State expressly agreed to vest regulatory authority in the Commission, and to jointly regulate the Port through this bistate agency. *See* Response 12. It nevertheless urges the Court to sanction its repudiation of the Compact on the ground that the Compact does not contain a clear "statement to foreclose withdrawal." *Id.* at 11. But clear statement principles do not aid New Jersey given the clear commitments it made.

Although this Court has relied on the presumption that States do not surrender sovereign powers through silence, it has never suggested that the *express* surrender of sovereign powers by compact is presumptively time limited or recallable at will. New Jersey's cited cases (Response 12) hold only that the express grant of certain sovereign powers by compact should not be stretched to impliedly endorse the surrender of other, distinct powers. *See Tarrant*, 569 U.S. at 632; *Virginia*

v. Maryland, 540 U.S. 56, 66-67 (2003). But there is no dispute here about which regulatory powers the States granted to the Commission; the dispute instead concerns the *duration* of their express commitments. Centuries of history, tradition, and practice establish that those commitments are enduring unless the compacting States say otherwise (*supra* at 10-14).[6]

States do not possess some separate sovereign right to withdraw unilaterally from interstate agreements. *See* Response 11-12. New Jersey cites no support for this remarkable proposition and fails to address the considerable authority to the contrary. See N.Y. Br. 35-36, 40-41; *see also* Compact Entities Amicus Br. 4-17; Compacts Profs. Amicus Br. 17-19. New Jersey does not dispute that the default presumption among nations is that unilateral treaty withdrawal is prohibited. It instead suggests that this Compact falls under an exception to the default rule because a right of withdrawal "may be implied" from its "nature." Response 15 (quoting Vienna Convention on the Law of Treaties (VCLT), art. 56(1)(b), May 23, 1969, 1155 U.N.T.S. 331, 345). Scholars have theorized that certain agreements that turn on continuing friendship, such as treaties of alliance or commerce, may imply a right of unilateral withdrawal. *See, e.g.*, T.O. Elias, *The Modern Law of Treaties* 106 (1974). But there is no implied right of revocation when a treaty commits to a joint undertaking like this one. *See* Compacts Profs. Amicus Br. 12-13 & n.8 (collecting sources).

Treaty practice does not show otherwise. New Jersey points to only two examples of treaty withdrawal

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[6] *Merrion v. Jicarilla Apache Tribe* addressed only whether the Tribe had waived its power to tax in the first place, not whether it could renege on an express waiver at will. 455 U.S. 130, 148 (1982).

where both (i) the agreement lacked an express withdrawal clause, and (ii) the withdrawal was not justified by a fundamental change in circumstances (e.g., VCLT art. 62), such as actual or impending war. *See* Response 15 (citing United States' 1985 withdrawal from the compulsory jurisdiction of the International Court of Justice, and 2005 withdrawal from an optional protocol affecting that court's jurisdiction). These outliers do not alter the undisputed presumption under treaty law. *See* John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences,* 19 Duke J. Comp. & Int'l L. 263, 298 (2009) (criticizing 2005 withdrawal as contrary to default rule). And while there is little to prevent nations from shirking their treaty obligations, the Constitution holds States to their compacts.

The unmistakability doctrine also has no bearing here. New Jersey is not aided by its observation that the Court has applied clear-statement principles to agreements between the United States and a State or Tribe. Response 12-13. The fact remains that unmistakability has never been applied to an agreement between *coequal sovereigns*. This distinction matters because the doctrine protects a sovereign from impliedly surrendering authority over its contractual counterparty. N.Y. Br. 42-45. But that risk was not present here, because the States entered into this Compact on equal footing to merge their regulatory authority.

More fundamentally, unmistakability does not require "a *further* promise not to go back on the promise," even for agreements with private parties. *See United States v. Winstar*, 518 U.S. 839, 921 (1996) (Scalia, J., concurring). New Jersey offers no reason why the Court should nevertheless require a redundant commitment here. Contrary to New Jersey's assertion

(Response 14), New York does not contend that compacts are nonbinding unless they bar unilateral withdrawal. States can and do expressly authorize unilateral withdrawal. But little would separate compacts from other forms of interstate cooperation if compacts were *presumptively* terminable at will.

States regularly collaborate through means other than compacts when they want greater flexibility to leave or alter the arrangement at will. For example, States have long enacted uniform state laws, authorized their agencies to enter into administrative agreements, and issued informal memoranda of understanding. *See* Zimmerman, *Interstate Cooperation*, *supra*, at 171-85, 229. Such alternatives were well established before this Compact was enacted. *See id.* at 229. But the States nevertheless chose to reject parallel state action in favor of entering into the binding Compact. See N.Y. Br. 6. It is implausible that they intended their years of studying the issue, negotiating the Compact, and obtaining congressional approval to be undone by an implied right of at-will termination.

Finally, New Jersey's asserted accounting of the sovereign interests and harms at stake (Response 14-15) does not add up. New York's vindication of its rights under the Compact cannot be characterized as an incursion on New Jersey's "sovereign domain." *Id.* As explained (N.Y. Br. 25), the States jointly own land in the Port District over which the Commission's regulatory jurisdiction extends. And the States already share certain regulatory oversight over the Port District through the Port Authority Compact, and share concurrent law enforcement jurisdiction over that same area with other state, local, and federal entities. *Id.* at 44. Continuation of the Compact does not "block" New Jersey's exercise of sovereign powers. *See* N.J. Response

13. To the contrary, New Jersey can continue to exercise concurrent jurisdiction over the Port District; veto Commission actions with which it disagrees; and pursue amendment or termination of the Compact through lawful means.

By contrast, unilateral termination of the Compact would cause grave sovereign injury to New York. When New York committed to this bistate solution in 1953, it had no notice that New Jersey might break its commitment if the balance of shipping business shifted to New Jersey. And New York would not likely have consented to giving New Jersey the right to unilaterally dissolve the Commission and seize for itself assets and powers that, under the Compact, belong jointly to both States. New Jersey's actions here not only deprive New York of its bargained-for rights but also oust New York from exercising joint oversight over labor in the Port District—an area that the States already share through the Port Authority Compact.

B. New Jersey's "Vested Rights" Theory Is Meritless.

Perhaps recognizing the destabilizing effects of a rule that would allow at-will termination of compacts, New Jersey limits its proposed rule by asserting that it would not extend to compacts involving "vested rights," i.e., boundaries or water rights. Response 9-11. This distinction lacks merit.

1. New Jersey takes the term "vested rights" from various cases involving the Contracts or Due Process Clauses—not interstate compacts. But those cases do not use "vested rights" to mean solely real property or water rights. Rather, they generally use the term

"vested rights" to mean preexisting contractual or statutory entitlements that are sufficiently settled such that the government cannot fairly take them away. *See Weaver v. Graham*, 450 U.S. 24, 29-30 (1981); 16B Am. Jur. 2d Constitutional Law § 738; *cf.* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696 (1960) ("right is vested when it has been so far perfected that it cannot be taken away by statute"). Such "an affirmative, enforceable right" is protected by the Contracts or Due Process Clauses, *Weaver*, 450 U.S. at 30, whereas "inchoate expectations and unrealized opportunities" are not, *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 n.10 (2006). Although such entitlements certainly can be real property or water rights, they are not so limited. *See* 2 *Sutherland on Statutes and Statutory Construction* § 41:4 (8th ed. Westlaw, through Nov. 2022 update). Instead, "vested rights" are identified through various factors, such as the nature of the right, reliance interests, and settled expectations. *See Northern Ohio Traction & Light Co. v. Ohio ex rel. Ponitius*, 245 U.S. 574, 585 (1918); *Pearsall v. Great N. Ry.*, 161 U.S. 646, 660-74 (1896); *see also* Hochman, *supra*, at 695-724.

This "vested rights" inquiry has no application to compacts. There is no need to search for enforceable rights, *see Dodge v. Board of Educ. of Chicago*, 302 U.S. 74, 78-79 (1937), because compacts are indisputably enforceable as contracts and statutes, regardless of whether they implicate boundaries, ongoing regulatory authority, or both. *See Kansas v. Nebraska*, 574 U.S. 445, 455-56 (2015). New Jersey fails to identify any case in which the Court applied "vested rights" to ascertain whether a compact was terminable at will.

In any event, if the "vested rights" inquiry applied, the Compact gives New York such rights in the Commission. History and practice establish that both (i) compacts involving boundaries and water rights, and (ii) those involving ongoing regulatory authority have long been understood to be enduring arrangements, unless the parties expressly provide otherwise. N.Y. Br. 4-5, 38-39. And for sixty years, both States have relied on their mutual commitment to jointly regulate the entire Port through the Commission to protect public welfare and their economies. New York reasonably expected the Commission to continue regardless of any shift in the amount of commerce on either side of the Port. *Id.* at 7.

2. New Jersey's concessions establish that the Compact implicates "vested rights," and thus precludes unilateral withdrawal, even under New Jersey's theory that such rights are limited to real property or water rights. New Jersey admits that "compacts involving vested rights *and* 'ongoing regulatory authority'" cannot be unilaterally terminated unless the compact expressly provides that power. Response 10. New Jersey does not dispute that the Compact involves the regulation of activities on land that the States already jointly own, lease, or regulate through the Port Authority—land in which the States indisputably have "vested rights" under New Jersey's theory.[7] *See* Port Auth. of N.Y. & N.J., *Port Master Plan 2050*, at 6 (2019); N.J. Br. 27 (vested rights include grant of "possessory or property interests"). Thus, the Compact "implicate[s]" vested rights (N.J. Response 11) and cannot be unilaterally terminated.

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[7] The Compact also authorizes the Commission to acquire and hold real and personal property. Compl.-App. 7a.

New Jersey argues that unilateral termination is presumptively prohibited where "vested rights" and ongoing regulation are addressed in the *same* compact. But it also maintains that, where, as here, the States choose to address the same two issues in *successive* compacts, the compact providing for ongoing regulation is instead presumptively terminable at will. *See* Response 10. New Jersey cites no support for this distinction, and it makes no sense because the States are expressly agreeing to the same arrangement in both scenarios: joint regulation of business on land that they also jointly own or control.

Not only does New Jersey's vested rights theory break down in practice (see N.Y. Br. 38-39), but it also threatens to destabilize numerous existing compact agencies that serve critical roles in regulating parks, infrastructure, and the development of metropolitan areas. *See* Compacts Profs. Amicus Br. 19-26; N.Y. Br. App.-B. New Jersey does not dispute that its proposed rule would destabilize numerous bistate and multistate compacts that are silent on withdrawal. It merely speculates that withdrawal from these compacts will be rare—even if declared lawful. Response 9-10. This Court should decline to adopt a default rule that would forcibly terminate this Compact and profoundly weaken others.

C. Contract Law Does Not Require At-Will Termination of This Compact.

As explained (at 3), there is no basis to apply a default rule of at-will termination here because established tools of contract and compact interpretation demonstrate the two ways the drafters intended the Compact to end. But even assuming a default rule is needed, settled contract law confirms that implied terms

must be "reasonable in the circumstances" presented, Restatement (Second) of Contracts § 204, and reflect "what the parties probably would have said if they had spoken about the matter," *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543 (1903); *see* Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 Va. L. Rev. 1523, 1536-37 (2016).

New Jersey violates this basic principle by relying on a default rule applicable to private commercial contracts. *See, e.g.*, Restatement (Second) of Contracts § 33 cmt. d (transactions involving goods); 1 *Williston on Contracts*, *supra*, § 4:23 (other commercial contexts). New Jersey fails to explain why this default rule accords with the reasonable expectations of compacting States. *See* Response 7. And it offers no response to the commonsense reasons why this assertion is wrong. See N.Y. Br. 47-48.

Unlike private commercial parties, States enter into compacts to forge political compromises with coequal sovereigns and to achieve lasting solutions to regional problems. Compacts likewise implicate historical understandings, practices, and sovereignty principles inapplicable to private contracts. Thus, to the extent a default rule is needed, the proper default is one that reflects the reasonable expectations of the States when they entered into this Compact: compacts are not terminable at will unless the agreement expressly confers such a right.

CONCLUSION

The Court should grant New York's Cross-Motion for Judgment on the Pleadings and deny New Jersey's Motion for Judgment on the Pleadings.

Respectfully submitted,

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