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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning -- well, this morning, in Original Case 156, New York versus New Jersey.

Ms. Vale.

ORAL ARGUMENT OF JUDITH N. VALE

ON BEHALF OF THE PLAINTIFF

MS. VALE: Mr. Chief Justice, and may it please the Court:

When New York and New Jersey formed the Waterfront Commission Compact in 1953, they intended to prohibit unilateral termination. We know that from both the historical practice of compacting at the time and the circumstances of this compact.

The history and tradition of compacts leading to 1953 shows the prevailing understanding that unilateral termination is not allowed unless the compact expressly grants that power. Out of 80 compacts before 1953, approximately 56 omitted a termination provision. New Jersey seems to admit that, despite that omission, most of these compacts

1 did not allow unilateral termination. When New
2 York and New Jersey omitted a termination clause
3 here, they intended the same result, no
4 unilateral termination.

5 New Jersey points to commercial
6 contracts and treatises about them, but states
7 agreeing to jointly regulate labor and protect
8 against organized crime do not have the same
9 expectations as buyers and sellers of goods.
10 Prior compacts and the authoritative treatise
11 about compacts formed the states' expectations
12 here. That treatise says that unilateral
13 termination is not allowed unless the compact
14 expressly says so.

15 The text and circumstances of this
16 compact further show the state -- that the
17 states did not allow unilateral termination.
18 For example, the compact requires joint
19 agreement for nearly everything. The likely
20 expectation was that joint agreement would be
21 required to abolish the Commission.

22 This intent makes sense because, by
23 1953, the states already jointly managed
24 terminals in a shared port district through the
25 Port Authority Compact, a compact that predated

1 and is expressly linked to the Waterfront
2 Compact, and that compact, the Port Authority
3 Compact, is silent on termination after the Port
4 Authority began operating.

5 The states exercised their sovereignty
6 in forming the compact here and then relied on
7 that sovereign arrangement in developing their
8 shared port. The states would have said
9 expressly if they were going to allow this --
10 one state to withdraw at any time and regulate
11 alone in their shared port.

12 I welcome the state's -- the Court's
13 questions.

14 JUSTICE THOMAS: If you were suing New
15 Jersey, would you concede that you have
16 subjected your sovereignty to this compact by
17 not being able to withdraw?

18 MS. VALE: Well, I think, I mean,
19 entering a compact is itself a sovereign
20 arrangement that both states --

21 JUSTICE THOMAS: But does -- are you
22 --

23 MS. VALE: -- enter.

24 JUSTICE THOMAS: But, if you enter
25 into it, are you permanently subjecting

1 yourself, your sovereignty, to the compact
2 terms?

3 MS. VALE: Well, you are agreeing to a
4 sovereign arrangement. I don't think that the
5 states intended it here to be permanent. They
6 did think there might come a time when they
7 would jointly decide that it was time to end the
8 compact, but when you -- when states -- when the
9 two states here, and I think generally, when
10 many states turn to the compact form, they do
11 that because it is a special sovereign
12 arrangement where the states are meaning to bind
13 --

14 JUSTICE THOMAS: I --

15 MS. VALE: -- themselves going
16 forward.

17 JUSTICE THOMAS: -- I think we agree
18 on that, but, once doing it, does -- is it
19 permanent, unless they agree jointly to end it
20 if there is nothing said about the length of the
21 compact?

22 MS. VALE: Yes, it is -- it is -- you
23 -- the two states here contemplated that they
24 would end it, either together when they jointly
25 decided that it was no longer needed, or they

1 might come together and just decide, even though
2 we think it's needed, it's too much hassle --

3 JUSTICE THOMAS: But --

4 MS. VALE: -- and we're going to do
5 something else. And in this compact, there's
6 also one other way to -- for it end, which is
7 the congressional repeal.

8 JUSTICE THOMAS: But they --

9 MS. VALE: So that is the other way.

10 JUSTICE THOMAS: -- they said nothing
11 about ending it. They had other modifications
12 and other terms that had to be jointly decided
13 but nothing about terminating it.

14 So what I'm hearing you say is that if
15 they say nothing about terminating it, they
16 basically sacrifice their sovereignty
17 permanently, unless the other party agrees.

18 MS. VALE: Well, two -- two responses
19 to that. I don't think it's a sacrifice of
20 sovereignty. I don't think compacting is a
21 sovereign giveaway. It is a mutual exchange of
22 sovereignty where each state gets a benefit.
23 Each state here would get to have some sovereign
24 regulatory authority over the port terminals in
25 the other, and they did agree to keep that going

1 until they decided together to end it.

2 And there are indications in both this
3 compact and the history of compacts generally
4 that that is what the states would understand,
5 that they would understand that when you do a
6 compact and you don't say anything express about
7 termination, that you are sticking together
8 until you jointly decide to end it.

9 But what about --

10 CHIEF JUSTICE ROBERTS: You said in
11 your opening -- you said that the parties
12 omitted a termination clause. But there's no
13 evidence that they made a conscious decision to
14 do that, is there? We're just dealing with a
15 situation where, as far as we know, they didn't
16 address the issue at all?

17 MS. VALE: We don't have a discussion
18 specifically about a termination clause in the
19 history, but we do have indications both in the
20 compact -- in the compact and the history about
21 what they intended, and -- and I think there are
22 five indications in the compact, and there --
23 it's important here to read them in the context
24 of the history because there isn't an express
25 termination provision either way.

1 And the first indication is the
2 express link between this compact and the Port
3 Authority Compact. So this is in Article II of
4 the Port Authority -- in the Waterfront Compact
5 at 3a in the Complaint Appendix. It defines the
6 port district as the preexisting port district
7 that was created by the Port Authority Compact
8 and that already existed at the time of the
9 Waterfront Compact. And that's very important
10 because the shared port was the reality for
11 these two states when they entered the
12 Waterfront Compact.

13 By 1953, through the Port Authority,
14 both of the states were already managing Port
15 Newark on the New Jersey side, and they were
16 managing two ports -- piers on the New York
17 side.

18 CHIEF JUSTICE ROBERTS: Well, but
19 that's a whole different level of -- of -- of
20 cooperation. The whole port, that's a lot of
21 stuff going on. This is a very important but
22 relatively small enterprise dealing with a
23 particular problem.

24 It's one thing to say that, well, you
25 can unilaterally change the Port Authority of

1 New York and New Jersey. It's quite another
2 thing to say, well, you can unilaterally change
3 this -- how many employees does this Commission
4 have?

5 MS. VALE: Around 70 right now, Your
6 Honor.

7 CHIEF JUSTICE ROBERTS: Okay. Well,
8 that -- that's not a big number when you're
9 talking about the Port Authority. So I'm not
10 sure that either practice or the terms of the
11 compact for the whole Port Authority itself is
12 necessarily pertinent to this really small
13 enterprise.

14 MS. VALE: Well, I think the link is
15 very important because, although the Commission
16 might not have as many employees as the Port
17 Authority, it was a very big deal when it was
18 formed. And it was -- and it was -- has still,
19 over the past 70 years, been a big deal for this
20 port.

21 When they entered the -- the
22 Waterfront Compact, the two states together,
23 because of their shared port, they faced a
24 really tremendous problem of crime and
25 corruption at the shared port that the Port

1 Authority was not set up to deal with.

2 CHIEF JUSTICE ROBERTS: "Big" -- "big
3 deal" --

4 MS. VALE: And then the states --

5 CHIEF JUSTICE ROBERTS: -- "big deal"
6 might not have been the most felicitous term.
7 What I -- what I meant to convey is that it's --
8 it -- it's hard to unscramble the eggs when
9 you're talking about the Port Authority as a
10 whole.

11 Here, it's -- it's not that
12 disruptive.

13 MS. VALE: Well, we do think it would
14 be disruptive, and one reason is because, even
15 if you unscrambled the Commission, the Port
16 Authority will remain. I think the parties here
17 agree that the Port Authority Compact does not
18 allow unilateral withdrawal even though it was
19 silent about withdrawal after a very short
20 development period.

21 And so, even if you unscrambled the
22 Commission, New York still has sovereign and
23 proprietary interests in the terminals in New
24 Jersey that belong to the Port Authority. And
25 you'd be taking away New York's sovereign

1 interest in having a regulatory say over that.

2 And the point of doing a bistate
3 commission was to prevent -- better prevent
4 government capture. It is harder for corruption
5 and undue influence to take hold if it has to
6 succeed in both states.

7 JUSTICE JACKSON: Can I --

8 MS. VALE: And this --

9 JUSTICE JACKSON: -- ask you about --
10 in response to the Chief Justice, who was asking
11 about the parties' intent and the evidence and
12 what we know about it, what about the evidence
13 in the negotiation history that they were silent
14 on termination in part because they did not want
15 to signal to those who would be governed by this
16 contract -- compact when it ended?

17 I thought there was some evidence
18 about that. And so, in that world, we -- if
19 you're thinking about that, you're not really
20 drawing all that much from the silence that, in
21 fact, they did think should we put in a
22 termination clause and the answer was no,
23 because then people would know that we would be
24 leaving and the corruption that you're talking
25 about would start.

1 But that doesn't undermine the thought
2 that everybody knew that this was going to be
3 temporary, just until we got ahold of this
4 corruption problem.

5 So what do we do with that evidence?

6 MS. VALE: Yeah, there -- you're
7 right, there -- there is evidence that there
8 were suggestions to put in, like, a sunset
9 clause, you know, you know, three years, 10
10 years, whatever it was, and that was rejected
11 because they wanted to guard against letting the
12 corruption and undue influence come back.

13 JUSTICE JACKSON: Right --

14 MS. VALE: And I think that --

15 JUSTICE JACKSON: -- but why doesn't
16 that undermine your argument that nobody was
17 thinking about termination or that they thought
18 that this would go on in perpetuity and -- and,
19 therefore, both parties would be forever bound?

20 MS. VALE: Well --

21 JUSTICE JACKSON: It seems to me that
22 that undermines that view, so why -- why doesn't
23 it?

24 MS. VALE: I don't think so, because
25 it shows that there was some thought about

1 termination, and they decided not to say
2 expressly that it would end at a certain point.
3 And what they also discussed was this idea of
4 government capture.

5 New York Governor Dewey said at the
6 time during the crime commission hearings that
7 we want to do a bistate solution because, if you
8 only have one -- if you have the two states
9 doing parallel -- you know, let's say, parallel
10 commissions, then sometime down the line, and
11 Governor Dewey even said this, not immediately
12 but sometime down the line, corruption and undue
13 influence will take -- may -- may take hold in
14 one state or the other, and that would ruin the
15 effect of this --

16 JUSTICE JACKSON: Right. But I guess
17 you want us to infer from the silence that they
18 intended for this to continue forever and that
19 no -- or that they would jointly agree to leave
20 but that one couldn't decide I'm done and out.

21 And I guess what I'm trying to push
22 back on is that if the reason they were silent
23 was not because they thought this was an
24 agreement for all times but because they were
25 worried about signaling to the mob bosses that

1 they would be leaving, I don't know that we can
2 draw the inference that you want us to draw.

3 MS. VALE: Well, I think -- I don't
4 think -- I -- I -- I'll push back on the idea
5 that it was supposed to be for all time. I do
6 think they intended to decide together when it
7 wasn't needed anymore.

8 And I think they didn't intend for one
9 state to be able to make the decision to -- to
10 say: Okay, now the -- the mob bosses and the --
11 and the undue influence could -- could be able
12 to come back.

13 And I think, you know, there are other
14 indications in the compact as well and in the
15 history of the compact, such as the annual
16 reporting to both states' governors about
17 whether the public necessity for this compact
18 was still needed and if you read that provision
19 together with the Article I declarations about
20 what the public necessity is.

21 So, in Article I, the compact talks
22 about the public need and it's a public need
23 that's joint. It is, they say, in Article I,
24 that "regulating port labor is deemed to be the
25 exercise of the power of both states for the

1 benefit, the public safety, of both states."

2 And --

3 JUSTICE GORSUCH: Ms. Vale, in that
4 respect, as I understand it, and I am no expert
5 on New Jersey and New York compacts, I confess,
6 that -- that it does require funding from the
7 legislature -- from both legislatures to work on
8 an annual basis.

9 And what's the difference functionally
10 between New Jersey deciding not to fund the
11 Commission any longer and what it's done here,
12 withdrawing from it?

13 MS. VALE: Sure. Sure. Well, it's
14 just -- the assessments come from the shipping
15 industry, but then the budget is presented to
16 both governors and either governor does have a
17 veto power. But that provision and some of the
18 other provisions that require joint votes in
19 order to act, they do not suggest an implied
20 power to unilaterally terminate.

21 JUSTICE GORSUCH: But do you --

22 MS. VALE: It's the opposite.

23 JUSTICE GORSUCH: -- do you agree,
24 though, that New Jersey could unilaterally
25 refuse to fund?

1 MS. VALE: They could -- the governor
2 could unilaterally veto pieces of the budget.
3 So the money doesn't come directly from either
4 New Jersey or New York.

5 JUSTICE GORSUCH: No, I appreciate
6 that clarification.

7 MS. VALE: Yes.

8 JUSTICE GORSUCH: But it would still
9 leave New Jersey effectively able to withdraw by
10 vetoing?

11 MS. VALE: Well, they have the power
12 to veto the budget, but that is not the same as
13 effectively --

14 JUSTICE GORSUCH: Well --

15 MS. VALE: -- withdrawing.

16 JUSTICE GORSUCH: -- yeah, that's what
17 I'm trying to --

18 MS. VALE: Yes.

19 JUSTICE GORSUCH: -- get at. What's
20 the difference?

21 MS. VALE: The difference is -- yes.

22 JUSTICE GORSUCH: If you say they can
23 do that --

24 MS. VALE: Yeah.

25 JUSTICE GORSUCH: -- but they can't do

1 this, what's the delta? What are we complaining
2 about?

3 MS. VALE: Sure. The difference is,
4 if either state blocks the whole budget, but the
5 compact remains, that would harm both states
6 because it would up-end operations at the port
7 because now, you know, longshoremen and other
8 workers can't get licenses. Now the Commission
9 won't be able to revoke licenses if there are,
10 you know, criminals at the port.

11 When the industry would want to add
12 jobs, that wouldn't be able to happen if --

13 JUSTICE GORSUCH: Well --

14 MS. VALE: -- the Commission is shut
15 down.

16 JUSTICE GORSUCH: -- presumably, all
17 the -- all those complaints flow from
18 terminating the -- the -- the compact too, no?

19 MS. VALE: Well, but what New Jersey
20 wants to do is terminate the compact and then
21 set up by itself almost the exact same
22 commission --

23 JUSTICE GORSUCH: Right.

24 MS. VALE: -- so then it would be able
25 to keep going.

1 JUSTICE GORSUCH: All right. And I --
2 I'm sorry for dragging this out.

3 MS. VALE: Sure.

4 JUSTICE GORSUCH: But -- but let's say
5 they veto the budget and then set up their own
6 operations.

7 MS. VALE: I see. No, so that would
8 --

9 JUSTICE GORSUCH: What would prevent
10 them from doing exactly what they've done so far
11 or seek to do so far?

12 MS. VALE: Sure. That's because the
13 compact requires, for someone to work in the
14 specified jobs in the compact, you have to have
15 a license from the Commission.

16 So, if New Jersey set up a shadow
17 commission while this compact remained, it could
18 give out licenses, but that wouldn't help
19 anybody because they still couldn't work at the
20 port without a Commission license.

21 And so that's why, if either state
22 tried to take the Commission to the brink by
23 just vetoing the budget, they have the power to
24 do that, but that shows that they have the power
25 to get both states back to the negotiating table

1 to find a compromise, and that's what we think
2 these provisions show.

3 JUSTICE SOTOMAYOR: Counsel, can --
4 can I --

5 JUSTICE ALITO: Ms. Vale -- go -- go
6 ahead.

7 JUSTICE SOTOMAYOR: Sorry. Can I turn
8 to a different question?

9 I don't know if you gave up the game
10 when you said the parties didn't intend for this
11 to last perpetually. I've been stepping back
12 from this case, and let me walk you through my
13 thinking.

14 What does a compact that lasts in
15 perpetuity mean? It can only mean that it will
16 last so long as both parties want it to last.
17 Any party, both of these parties, even if it
18 said you can't unilaterally get out of this,
19 both parties could come together and say, we
20 don't think this is right, correct?

21 MS. VALE: Correct.

22 JUSTICE SOTOMAYOR: So, in my mind, a
23 perpetual contract is different from a
24 non-perpetual contract when one party can keep
25 somebody on the hook indefinitely. That can be

1 the only difference, correct?

2 MS. VALE: Well, I do agree that it's
3 always the case that two states could come
4 together and decide --

5 JUSTICE SOTOMAYOR: So --

6 MS. VALE: -- we don't want to do this
7 anymore, yes.

8 JUSTICE SOTOMAYOR: -- so it seems to
9 me that really, when we're talking about a
10 non-perpetual contract, it -- or a perpetual
11 contract, it is one where a party can force the
12 other party to stay in even when they don't want
13 to, correct?

14 MS. VALE: Yes, and then they also can
15 go to Congress.

16 JUSTICE SOTOMAYOR: So we know here
17 that the parties never intended for this to be
18 perpetual. And so I see the question as, what
19 are the situations in which one party can
20 withdraw? Once you said they didn't intend for
21 it to be perpetual, I think that's the end of
22 the game.

23 MS. VALE: Well, I -- I don't --

24 JUSTICE SOTOMAYOR: I think, once you
25 assume that, and it's very clear they didn't

1 intend this to be perpetual -- Justice Jackson
2 pointed out the reasons -- then, really, what we
3 have to be able to say is one party can't keep
4 the other on the hook forever.

5 MS. VALE: Well, I think, when they
6 refer to perpetual in the history here, they
7 were acknowledging that they thought at some
8 point the two states would come together and
9 decide to end it. And I think what --

10 JUSTICE SOTOMAYOR: I don't -- that
11 doesn't make any sense, because both
12 legislatures get the annual reports, and I don't
13 see what they can do with it, other than to
14 choose to either veto items or say, I don't want
15 to be in this anymore. It doesn't make any
16 sense to say we don't intend this to be
17 perpetual, but we're going to let one of the
18 parties keep us there forever. It's a
19 contradiction in terms in my mind.

20 MS. VALE: Well, I think there's also
21 a difference between -- it's always the case
22 that states could come together and decide to
23 end a compact even if they think this is still a
24 great idea, but, for whatever reason, we just
25 don't like it anymore, it's too much of a

1 hassle. But what they meant here when they said
2 it's not perpetual was that they had a joint
3 problem in a shared port and they wanted to take
4 care of it together with a bistate commission
5 because that commission provided extra
6 protection against government capture and --

7 JUSTICE ALITO: Well, Ms. Vale, if the
8 -- if the compact had not been entered into,
9 both New Jersey and New York could exercise
10 criminal law enforcement authority and
11 regulatory authority over the portions of the
12 covered area within their borders, right?

13 MS. VALE: That's right, although I
14 just -- both states do still have criminal law
15 enforcement authority in their borders and --

16 JUSTICE ALITO: They would have --
17 they would have plenary authority, except --
18 except insofar as the federal government had --
19 had authority, but another state would not have
20 authority there?

21 MS. VALE: Correct.

22 JUSTICE ALITO: Okay. Now your
23 argument is -- and this may -- the parties may
24 have agreed to do this -- to surrender this
25 sovereign authority perpetually. I think that's

1 been the thrust of some of the questions.

2 So isn't that an extraordinary thing?
3 And shouldn't there be a presumption against a
4 state having done that, which could be overcome
5 by a clear indication of a contrary intent?

6 MS. VALE: Well, I think it's not an
7 extraordinary thing in compacts, in compacts.
8 And this is where, if you look at the history of
9 compacts leading up to this one and if you look
10 at the three compacts that these two states
11 themselves had entered before this one, it shows
12 that it was quite the tradition and practice to
13 enter compacts without having a termination
14 provision in it and to understand that those
15 compacts would continue until both states
16 decided --

17 JUSTICE BARRETT: But --

18 MS. VALE: -- to end it.

19 JUSTICE BARRETT: -- is there a
20 distinction? I mean, my understanding is that
21 this background rule that you're referring to
22 about no unilateral withdrawal applies primarily
23 in the context of boundary disputes or shared
24 water, which is an entirely different thing.

25 MS. VALE: Well, we don't think that

1 that distinction, this vested rights theory,
2 holds up when you apply it to compacts. And
3 even if you did apply it here, we think this
4 compact fits within it because the regulatory
5 authority is tied to a geographic district.

6 And I think, if we look maybe a little
7 bit at the history and how it -- how it
8 unfolded, that might help. So I --

9 JUSTICE BARRETT: Can I just clarify
10 one thing --

11 MS. VALE: Yes.

12 JUSTICE BARRETT: -- though? When you
13 said it's tied to a geographic district, there
14 was no ceding of any sovereign authority over
15 water? I mean, New Jersey and New York didn't
16 say, here, we're going to move the line between
17 the states, anything like that. You're just
18 saying that it was joint regulatory authority
19 over the same geographic area?

20 MS. VALE: Well, yeah, the -- the
21 geographic area had already been designated,
22 like, with metes and bounds in the Port
23 Authority Compact. That's the port district.
24 And then this compact expressly refers to that
25 Port Authority Compact and says the port

1 district that preexists, that these two states
2 have already decided to have a shared -- a
3 shared regulatory power over, that's going to be
4 the district where the Commission's power is
5 also linked to.

6 JUSTICE BARRETT: But it's just about
7 regulatory authority?

8 MS. VALE: This --

9 JUSTICE BARRETT: It's not changing
10 who owns the property?

11 MS. VALE: Correct. No, correct.

12 JUSTICE BARRETT: It doesn't change
13 where the border is?

14 MS. VALE: That's correct. It was --
15 yes.

16 JUSTICE BARRETT: Okay. That's all
17 I'm trying to establish. It's just shared
18 regulatory authority?

19 MS. VALE: Yeah. I mean, it's in -- I
20 guess one way to think about it is, in this
21 compact, it's in -- it's in two different pieces
22 of paper, right? So sometimes you have compacts
23 that both set the boundary and set up the
24 jurisdiction sharing in one piece of paper. In
25 this -- and what happened here was that they did

1 the Port Authority Compact, they set the
2 district, they had some sharing, and then later
3 they had a problem that the Port Authority
4 wasn't able to handle, so they did a second
5 compact linked to the first that has more
6 sharing, that has more sharing.

7 And this is -- if you look at the
8 evolution of compacts, this was the tradition,
9 to omit a termination clause and yet understand
10 it to not allow --

11 JUSTICE KAGAN: Ms. Vale --

12 JUSTICE KAVANAUGH: Is it the --

13 JUSTICE KAGAN: Go ahead.

14 JUSTICE KAVANAUGH: You go.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: Do you understand
17 ordinary contract principles to cut against you?
18 In other words, do you accept the proposition
19 that to rule for you, we would have to say that
20 there's a different tradition and practice and
21 default rule in compacts than there is in
22 ordinary contracts?

23 MS. VALE: Yes. Yes, although even
24 under regular contract principles, the first
25 order of business is to look for the parties'

1 intent, which we think can be discerned here.

2 And even in contract law, there are
3 times when the default rule is different for
4 certain specific kinds of contracts, like
5 settlement agreements, you can't usually
6 withdraw at will, covenants that run with the
7 land --

8 JUSTICE KAGAN: But the usual --

9 MS. VALE: -- you can't usually
10 withdraw --

11 JUSTICE KAGAN: -- rule, I take it you
12 agree, you know, if -- if there's no specific
13 provision in the contract and if there's no
14 clear indication of the parties' intent from
15 their negotiating positions or -- or their
16 performance or, you know, where we're kind of at
17 sea, the usual rule in contract interpretation
18 is, oh, there's a contract with continuing
19 obligations on both sides; that means one party
20 could walk away.

21 MS. VALE: That is the usual rule, is
22 -- for commercial contracts, we -- we agree,
23 although some specific types of contracts are
24 different. And this Court said in Alabama v.
25 North Carolina that we don't just look to

1 contract law and imply in default terms to
2 compacts, even when those default terms are very
3 common and -- and very well-settled --

4 JUSTICE KAGAN: So is your view --

5 MS. VALE: -- in contract law.

6 JUSTICE KAGAN: -- that the reason why
7 we shouldn't use regular contract principles --
8 I mean, there -- there has to be something
9 special and different about compacts. What --
10 what is it?

11 MS. VALE: Yes.

12 JUSTICE KAGAN: Is it found in the
13 history? Is it found in some understanding of
14 the function of compacts? What is it?

15 MS. VALE: Yes. Yes. There are --
16 there are several things that are unusual and
17 different about compacts. One is the history
18 and tradition, which I can go through. I think
19 another one, before I march through the history,
20 is that this is a -- a unique form of sovereign
21 agreement that has some features of contracts,
22 but it also has features of a treaty since it's
23 between coequal sovereigns. And for treaties --

24 JUSTICE KAGAN: Well, the presence --

25 MS. VALE: -- the default --

1 JUSTICE KAGAN: -- of sovereignty, I
2 think some of the questions from the bench have
3 suggested to you, at least cut both ways. You
4 might say, well, it's a unique form of sovereign
5 agreement, but Justice Alito just said to you
6 isn't it a kind of weird thing to think that any
7 state gives up its sovereignty forever?

8 So, at the very least, this -- this --
9 these considerations of sovereignty cut both
10 ways. It makes me think we should just go back
11 to ordinary contract principles.

12 MS. VALE: Well, I think there is a
13 very different tradition and understanding for
14 compacts, and that's because, if you look at --
15 if you -- the pre-50 -- the pre-1953 compacts,
16 as I said at the beginning, 80 of those -- and
17 these are listed in the Appendix A in the blue
18 brief. There were 80, and 56 omitted a
19 termination clause.

20 And yet, New Jersey admits that many
21 of them, I think about 36, do not allow
22 termination. And that 36, they do a couple
23 different things. There are boundary compacts,
24 which I think we all agree don't allow
25 unilateral termination, but there's also shared

1 jurisdiction provisions in some of those
2 boundary compacts, and also there are some
3 compacts that have shared jurisdiction without
4 setting the boundary.

5 And New York and New Jersey had one of
6 those about this same harbor -- this is the 1834
7 boundary compact between New York and New
8 Jersey -- that both set the boundary and created
9 a shared jurisdiction swap where sometimes New
10 York has jurisdiction over the water up to the
11 New Jersey line, sometimes New Jersey has
12 service of process jurisdiction up to the New
13 York line, and that compact is understood not to
14 allow unilateral withdrawal even though it
15 omitted a clause.

16 JUSTICE KAVANAUGH: But it sounds like
17 then that there's not any clear history, that
18 there -- as you're saying, there are distinctive
19 kinds of compacts. And I -- I guess the
20 question then is, in a compact like this, what
21 should the default rule be and why shouldn't the
22 default rule be, when there's silence, this
23 would be a big deal for a state to give away its
24 sovereignty and give away its right to
25 unilateral withdrawal, so we, as a Court, are

1 going to establish the default rule being that
2 you can unilaterally terminate, and the parties
3 can always negotiate around that and put in an
4 express provision in the contract that would
5 require both states to withdraw?

6 Why isn't that the better default
7 rule?

8 MS. VALE: Well, I think one reason is
9 because we think the history and tradition
10 before 1953 was pretty clear. All of those
11 different compacts I was describing did the same
12 thing. They omitted a termination clause and
13 yet were understood not to allow it. And they
14 viewed --

15 JUSTICE JACKSON: Were any of them
16 temporary?

17 JUSTICE KAVANAUGH: Well, 36 -- there
18 were 36 out of 50? Can you give the numbers
19 again?

20 MS. VALE: Oh, sure. Well, there are
21 56 that omitted a provision.

22 JUSTICE KAVANAUGH: Yeah.

23 MS. VALE: We think that New Jersey
24 agrees that at least 36 of those did not allow
25 unilateral withdrawal. Then there's some more

1 that I think we disagree about. So I can --
2 maybe the next most important group is the
3 compacts.

4 JUSTICE KAVANAUGH: But, of the 36 --
5 sorry to interrupt.

6 MS. VALE: Yeah, sure.

7 JUSTICE KAVANAUGH: I think you were
8 saying some of them were boundary ones --

9 MS. VALE: Yep.

10 JUSTICE KAVANAUGH: -- and those are
11 going to be different altogether, right?

12 MS. VALE: Well, some of them were
13 boundary. Some of them had jurisdiction
14 sharing, which we actually think is quite
15 similar to this compact. And then some of them
16 did water allocations. But some of those set up
17 agencies, which at least is similar to this as
18 well. And all of those have this same feature
19 of omitting a termination clause and yet being
20 understood not to allow it.

21 And then the next group is the 12
22 bistate compacts that set up regulatory
23 agencies, the first being the Port Authority
24 Compact, and that compact omitted a general
25 withdrawal clause after the Port Authority was

1 up and running, and yet I think the parties
2 agree that unilateral withdrawal is not allowed.

3 The Port Authority Compact did have an
4 unusual provision that allowed unilateral
5 withdrawal only at a one-time option after an
6 early two-year development period, and during
7 that two-year development period, the Port
8 Authority couldn't operate yet, and the states
9 were still trying to figure out if they could
10 ever even come up with a -- a plan to -- to make
11 this work. And --

12 CHIEF JUSTICE ROBERTS: You -- you
13 may -- you may want to save a minute or two for
14 rebuttal.

15 MS. VALE: I think I saved five
16 minutes for -- for rebuttal, Your Honor.

17 CHIEF JUSTICE ROBERTS: Well, but I
18 think you've used up a good bit of it.

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: It's up to
21 you.

22 MS. VALE: I'm happy to -- happy to --
23 to stop.

24 CHIEF JUSTICE ROBERTS: Okay. Thank
25 you. You know, the -- what was the allocation

1 of business between the New York side and the
2 New Jersey side in 1953?

3 MS. VALE: It was predominantly on the
4 New York side. It was about 70 percent on the
5 New York side.

6 CHIEF JUSTICE ROBERTS: And today?

7 MS. VALE: It's predominantly on the
8 New Jersey side.

9 CHIEF JUSTICE ROBERTS: Eighty/twenty
10 is the numbers that -- okay.

11 MS. VALE: Yes.

12 CHIEF JUSTICE ROBERTS: That's a
13 fairly substantial change in the mix, and that
14 may have something to do with an effort to
15 reallocate or withdraw from a compact that was
16 entered into in 1953.

17 What if what happens is, because of
18 silt coming out of the Hudson or whatever,
19 there's no business in -- in this area on the
20 New York side, it's all on the New Jersey side?
21 Would that be a basis for New Jersey to say, you
22 know, it's time for us to get out of this
23 historic and, you know, useful but no longer
24 relevant allocation because what it's doing then
25 is giving New York considerable authority over

1 what is just New Jersey business?

2 MS. VALE: No, for two reasons. I
3 mean, first, the idea that more business would
4 come in on one side or the other was
5 contemplated by these parties. New Jersey's
6 governor at the time talked about that and said
7 even though more business may be coming in on
8 one side, this is a joint endeavor, a joint
9 responsibility, and the reason for that is
10 because, even if a lot of the goods come in on
11 one side or the other, it's still a joint port
12 and the goods still come in.

13 I mean, massive amounts of goods come
14 into New York even if they land on the New
15 Jersey side. And so it's a huge driver of our
16 economy for our consumers, and New York will
17 still have sovereign and proprietary interests
18 in the terminals that the Port Authority owns on
19 the New Jersey side.

20 CHIEF JUSTICE ROBERTS: So let's just
21 say, obviously, a hypothetical, if the Port
22 Authority Compact is dissolved for one reason or
23 another, surely, they would be able -- then be able
24 to get out of this one?

25 MS. VALE: I do think that would

1 potentially be a more fundamental change since,
2 when they agreed to this compact --

3 CHIEF JUSTICE ROBERTS: Okay.

4 MS. VALE: -- the Port Authority
5 Compact was there.

6 CHIEF JUSTICE ROBERTS: So, if it's a
7 fundamental change, one state can unilaterally
8 withdraw?

9 MS. VALE: Well, I still don't know
10 that they could unilaterally withdraw. I think
11 that would maybe give each -- if the Port
12 Authority was dissolved, that might give either
13 state a good reason to -- to go talk to the
14 other and say maybe -- maybe we should dissolve
15 this.

16 CHIEF JUSTICE ROBERTS: Well, I -- I
17 assume they talked to each other before this
18 too.

19 MS. VALE: Well, unfortunately, we
20 don't think that New Jersey really did put in
21 efforts to negotiate with New York, use the
22 tools available to it expressly in the compact
23 to try to find some agreement.

24 CHIEF JUSTICE ROBERTS: Now you just
25 think they didn't do it enough, or are you

1 saying they didn't talk to you about this at
2 all?

3 MS. VALE: They didn't -- there was
4 not a lot of communication about this as far as
5 I know. I think the New Jersey legislature at
6 times would just pass an amendment and then the
7 New York legislature would consider it and
8 decide this is a really bad idea, but there
9 wasn't, as far as I know, a ton of
10 communication.

11 And I think you can't just divide up
12 the port or -- or unscramble this that easily
13 because both states relied on the Commission's
14 bistate protections in moving forward with the
15 overall joint endeavor of the Port Authority.

16 So they set up the Commission to do
17 this together, and then they relied on it in
18 building out the port together. So New York and
19 New Jersey together, for example, through the
20 Port Authority, built Port Elizabeth, the first
21 modern container terminal, which is on the New
22 Jersey side, and the Port Authority still owns
23 that facility, and --

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas, anything further?

2 JUSTICE THOMAS: One question. What
3 role does the requirement, the constitutional
4 requirement that Congress give its consent to
5 this compact, what should that play in our
6 analysis?

7 MS. VALE: Sure. I think it plays --
8 it shows that Congress did look at this compact
9 and thought it wouldn't harm the federal
10 interests. Congress did specifically reserve
11 the power to repeal the compact or its approval
12 if it wanted to, and that does show that these
13 two states do have another out should there
14 really be a horrible impasse.

15 We don't actually think these states
16 are necessarily at a horrible impasse. We think
17 they can find a way to work together if they use
18 the tools available to them in the -- in the
19 compact, but Congress does provide another
20 avenue if needed.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE ALITO: If this were a treaty,
23 could New Jersey unilaterally withdraw?

24 MS. VALE: No, the default rule for
25 treaties is that unilateral withdrawal is not

1 allowed if it's -- if it's not expressly given
2 in the treaty. And so we think that default
3 rule is another piece to look at about what the
4 states' expectations would have been here,
5 because we're not saying the compact is exactly
6 like a treaty, but it has features of a treaty
7 such that it's between coequal sovereigns.

8 And that form of the coequal
9 sovereigns matters because states have
10 historically gone to the compact when they want
11 to bind each other. That's why they went to it
12 for boundaries, for water, and then for the Port
13 Authority and then for agencies that followed.

14 JUSTICE ALITO: Has the United States
15 unilaterally withdrawn from treaties?

16 MS. VALE: Yes, they have sometimes.
17 Often, those treaties -- there was -- you know,
18 either expressly allowed it or it was wartime.
19 There was some -- there are exceptions to any
20 default, and that happens.

21 But I don't think New Jersey is
22 seeking an exception to a default here.
23 They're -- they're seeking the default itself,
24 which for treaties is against unilateral
25 withdrawal.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Assume that I
4 don't think anything points clearly. You rely
5 on one treaty to say the default rule is no
6 unilateral termination, yet one of the
7 professors you rely on, Zimmermann, wrote
8 approvingly of a U.S. position in a Dyer case in
9 1951 that predated this compact, and, there, he
10 wrote that outside of certain kinds of contracts
11 -- and I think he meant setting boundaries --
12 the presumption should be that compacts call --
13 calling for indefinite continuing performance
14 are subject to unilateral withdrawal.

15 So he took their position contrary to
16 yours. I look at the 86 contracts that you
17 mentioned, many of them are boundaries, many are
18 water rights. I'm -- I'm actually not sure that
19 -- where we get the default provision that those
20 are indefinite because what we're saying is
21 states shouldn't be presumed to give up their
22 sovereignty, and particularly with water rights
23 cases, that's exactly what they're doing. They
24 have sovereignty over that water and its use.
25 So I don't know where this general rule comes.

1 I also look at the contracts, and
2 certain numbers do reflect unilateral
3 withdrawal. Some don't. The history is just
4 all over the map.

5 I keep going back to my simple point:
6 Isn't the simplest rule is not one that makes
7 presumptions about 86 contracts or compacts that
8 I know nothing about, all of them seem very
9 varied, some of them have commissions, some of
10 them don't, some of them set boundaries, but
11 they also create independent agencies.

12 Why isn't a simple one, if the parties
13 don't expect this contract to be indefinite,
14 unilateral withdrawal is presumed? It's a
15 simple rule. Here, the parties clearly stated
16 it wasn't going to be forever, unlike your Port
17 Authority Compact.

18 Why isn't that a better rule?

19 MS. VALE: I think it --

20 JUSTICE SOTOMAYOR: It --

21 MS. VALE: Yep?

22 JUSTICE SOTOMAYOR: -- would rule
23 against you in this case, but isn't that the
24 simplest way to decide this case?

25 MS. VALE: Well, no, Your Honor. I

1 mean, I do think that it is also a simple rule
2 to say that you -- you know, states don't have
3 the power of unilateral withdrawal unless they
4 expressly say so, which is the --

5 JUSTICE SOTOMAYOR: But that doesn't
6 have anything to do with the parties' intent.
7 My rule does. I look at the contract and say,
8 here, by your own admission, the contract was
9 not intended to be indefinite.

10 MS. VALE: But I think --

11 JUSTICE SOTOMAYOR: I don't go to
12 rules. I go to what the contract intends.

13 MS. VALE: But I think what these
14 parties intended was to do the same thing that
15 had been done before then in many other
16 compacts, in the Port Authority Compact, in
17 their own prior compacts.

18 JUSTICE SOTOMAYOR: No. The contracts
19 are -- the compacts are mixed. Some give
20 unilateral; some don't. Some are explicit; some
21 aren't. They're all over the map.

22 MS. VALE: But I -- I -- I don't think
23 that's accurate for the pre-1953 compacts. I
24 think, before 1953, it was fairly unified. It
25 was -- there was no tradition at all of allowing

1 unilateral withdrawal.

2 JUSTICE SOTOMAYOR: The problem with
3 that argument is, until 1921 or so, most of the
4 compacts only had to do with setting boundaries.

5 MS. VALE: That's right, but after the
6 --

7 JUSTICE SOTOMAYOR: Post- -- so you're
8 talking about a very short history that goes
9 both ways after.

10 MS. VALE: But I don't think the
11 history before 1953 does go both ways because,
12 before 1953, if you look at the bistate
13 compacts, which we think are most relevant
14 because, for a bistate compact, withdrawal
15 terminates the whole compact, which isn't
16 necessarily true for multistate compacts.

17 For bistate compacts, there was no
18 tradition of allowing unilateral withdrawal.
19 They either omitted a provision and seemed to
20 have been mostly understood not to allow it, or
21 they expressly prohibited unilateral withdrawal.

22 And those that expressly prohibited
23 unilateral withdrawal were boundary and water
24 allocation compacts, so they seemed to have just
25 been confirming the very same default rule that

1 New Jersey agrees applies to boundary and water
2 allocation compacts.

3 And the Zimmermann -- the Zimmermann
4 treatise cuts in favor of New -- New York
5 because there is an article where Zimmermann
6 sort of mused about the position taken by the
7 federal government in the Dyer amicus brief, but
8 both in 1951 and 1961, Zimmermann wrote a -- the
9 authoritative treatise on compacts, and he said
10 that unilateral withdrawal is not allowed unless
11 there's an express provision for it.

12 And I think it is much more likely
13 that the states would have been turning to
14 treatises about compacts than treatises about
15 contracts. And the Zimmermann treatise is not a
16 law review article. It was published by the
17 Council of State Governments. Zimmermann
18 advised on compacts that New Jersey was a
19 signatory to. And this really was a resource at
20 the time on compacts.

21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 JUSTICE KAGAN: Ms. Vale, I think you
25 said to Justice Thomas that you don't view New

1 York and New Jersey as at an impasse. But, you
2 know, most of the time parties don't get to this
3 Court unless they're at an impasse.

4 (Laughter.)

5 JUSTICE KAGAN: And I'm just wondering
6 what -- what New York's view of the end game is
7 here. I mean, I think one of the reasons why
8 the normal contract rule is the way it is is a
9 sense that committing parties who are at
10 loggerheads to indefinite performance just
11 doesn't work and makes no sense for anyone.

12 And so how is that going to be any
13 different here?

14 MS. VALE: Well, yeah, I agree that
15 we're at an impasse over unilateral withdrawal,
16 but I think, if unilateral withdrawal was not
17 allowed, then the states could move forward. We
18 don't think that then the Commission would
19 necessarily be completely frozen and hobbled,
20 because both states have a lot of power in this
21 compact. They each do have power to say no to
22 things that they don't like. They each do have
23 power to, you know, adjust the budget if they
24 want to.

25 And so the states can use those tools

1 to keep working together. And when New Jersey
2 appointed its commissioner recently --

3 JUSTICE KAGAN: They can also use
4 those tools to shut things down.

5 MS. VALE: But we don't think -- they
6 could, but we don't think that they really would
7 because, as I was saying earlier, I think, to
8 Justice Gorsuch, if you do that while the
9 compact is intact, you bring pain to both
10 states, you bring pain to the shipping industry,
11 and you bring pain to the workers.

12 And I think the states set it up this
13 way so that they would have to come back to the
14 table and work together. And these two states
15 need to keep working together for the Port
16 Authority Compact, for other compacts that
17 they're in together, and for other endeavors
18 that they do.

19 JUSTICE KAGAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 Justice Kavanaugh?

23 Justice Barrett?

24 JUSTICE BARRETT: I have a question.

25 So you mentioned that if -- if withdrawal

1 happens here, that there's some properties, you
2 said something about the port belonging to both,
3 except you can, you agree, terminate it by
4 mutual consent or Congress could terminate it.

5 So I just wanted to -- to clarify.
6 It's not your position, right, that the fact
7 that there might still be some things to unwind,
8 that's no barrier because, presumably, those
9 things would have to be unwound if it were
10 terminated in the way you propose?

11 MS. VALE: Yeah, I think there -- you
12 know, if the states came together, they could
13 find a way to unwind things. But --

14 JUSTICE BARRETT: What if Congress
15 just terminated it?

16 MS. VALE: Then they would have to
17 find a way to unwind things.

18 JUSTICE BARRETT: Unwind things.

19 MS. VALE: But we think that allowing
20 one state to both trigger the unwinding and
21 dictate the terms is not what these states
22 intended, and it doesn't make sense because of
23 that continuing interest.

24 So New Jersey says we're out of the
25 Commission. But New York -- that harms New

1 York's sovereign interests in a couple different
2 ways. First of all, it allows one state to
3 destroy a sovereign entity that belongs in part
4 to another state. It also takes away the
5 bistate protections that these two states wanted
6 in order to prevent the harms coming to either
7 state if one state started regulating --

8 JUSTICE BARRETT: Is that really why
9 -- I mean, I'm just wondering, it seems very odd
10 that New York's hanging on to this when New
11 Jersey has 82 percent of the shipping on its
12 side, and, as the Chief Justice was pointing
13 out, the industry has so dramatically changed to
14 container shipping and no longer net unloading
15 and all of that. Is this fees? Like, what is
16 New York really -- is this just --

17 MS. VALE: No, it's not that --

18 JUSTICE BARRETT: -- on principle?

19 MS. VALE: No. I mean, the fees go to
20 the Commission. They don't go to New York.
21 It's because the port itself, through the Port
22 Authority, is a joint endeavor. I mean, New
23 York still has strong sovereign and proprietary
24 interests in the terminals on the New Jersey
25 side, and massive amounts of goods come into New

1 York.

2 So, if corruption and undue influence
3 take hold on one side, that hurts consumers.
4 That's the -- you know, it ends up getting
5 passed down to consumers and harming New
6 Yorkers.

7 JUSTICE BARRETT: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: Can I just ask you
11 whether you know whether any of the prior
12 compacts that you're putting so much stock in
13 were intended to be temporary? I mean, you've
14 talked a lot about how there were former
15 compacts and there were -- some of them were
16 border, some of them were water.

17 Justice Kagan pointed out that, you
18 know, are we looking at contract law or compact
19 law? And I thought your answer was compact was
20 sort of a species of contract law and that
21 you've identified all of these compacts.

22 But I think this might be yet another
23 species of compact law insofar as this compact
24 might be distinct because the parties that
25 entered it went into it believing this is only

1 going to be temporary.

2 So do you have any analogue for that
3 in the other compacts that you've identified?

4 MS. VALE: The only analogue I can
5 think of is there was a compact to build a --
6 the Lake Champlain Compact was a bridge. It was
7 a compact between New York and Vermont, and they
8 did go into that thinking we're going to do this
9 together, and then, once the bridge is totally
10 done, we'll -- we'll figure out what we're going
11 to do next. That's what -- that's basically
12 what the compact said. And then, once the
13 bridge was built, I think there were some
14 funding issues, and eventually they decided
15 together to end it and to do -- and to --

16 JUSTICE JACKSON: Well, I mean,
17 that -- I don't know how analogous that is
18 because they -- they went into it with a project
19 that seemed to have a definite duration, that
20 is, the building of the bridge. I don't -- I'm
21 just going off of what you said.

22 So, when the bridge is done, I can
23 assume that people thought, okay, we'll end it.

24 MS. VALE: Right. I mean, that's --

25 JUSTICE JACKSON: But, here --

1 MS. VALE: -- the best example I can
2 think of, of one where one where the states,
3 again, went into it thinking we'll end it
4 together, and then that's what happened. And we
5 think that that is what they --

6 JUSTICE JACKSON: Do you --

7 MS. VALE: -- intended here.

8 JUSTICE JACKSON: -- do you have
9 evidence that they, when they were talking about
10 termination -- because there is negotiation
11 history evidence concerning people thinking
12 about termination and saying we don't want to
13 say anything about termination because -- but
14 they assumed it would terminate.

15 Do you have some evidence that they
16 said eventually we're only going to -- we're
17 going to terminate this by mutual agreement?

18 MS. VALE: We think that comes out of
19 the fact that they talked so much about how it
20 was a joint responsibility, how it was a one
21 single port with ships and vessels and people
22 moving in between piers, that they understood it
23 as a joint endeavor. And so, even though they
24 thought we will end it at some point, it was a
25 joint endeavor, and so they thought they would

1 end it jointly when the time came.

2 JUSTICE JACKSON: One last question
3 about treaties. I understood that there were
4 exceptions to the sort of unilateral withdrawal
5 point that you made and that one of them was
6 commercial or trading agreements could be the
7 subject of unilateral withdrawal if they were in
8 a treaty. So why wouldn't this fall into that
9 exception, even if we thought that this was like
10 a treaty?

11 MS. VALE: I don't think that this is
12 like a commercial treaty. The two states are
13 not, you know, sending -- buying and selling
14 goods between each other or sending commerce
15 between --

16 JUSTICE JACKSON: But they're
17 regulating commerce.

18 MS. VALE: They're regulating
19 commerce, but they're doing it through licensing
20 of labor. They're doing it through a law
21 enforcement role to protect against organized
22 crime and corruption at the port.

23 It's not a, you know, I -- I'm going
24 to -- I, New York, am going to give you these
25 goods and you, New Jersey, are going to give me

1 these goods, which I think is more of a
2 commercial -- a commercial treaty.

3 JUSTICE JACKSON: All right. Thank
4 you.

5 CHIEF JUSTICE ROBERTS: Thank you, Ms.
6 Vale. You will have five minutes for rebuttal.

7 MS. VALE: Thank you.

8 CHIEF JUSTICE ROBERTS: Sorry -- sorry
9 for my confusion.

10 Mr. Feigenbaum.

11 ORAL ARGUMENT OF JEREMY M. FEIGENBAUM

12 ON BEHALF OF THE DEFENDANT

13 MR. FEIGENBAUM: Mr. Chief Justice,
14 and may it please the Court:

15 The question this case presents is
16 whether the Waterfront Commission Compact
17 prevents New Jersey from reclaiming its police
18 powers. As New York admits, there is nothing in
19 the plain text of the compact that expressly
20 limits New Jersey's withdrawal.

21 And as New York this morning has
22 confirmed, there is nothing that justifies a
23 perpetual veto in an agreement New York now
24 admits is not itself perpetual.

25 Instead, the compact's silence

1 confirms that settled background rules apply,
2 and those rules, contract law and state
3 sovereignty, both well established by the 19th
4 Century, allow New Jersey to withdraw.

5 Indeed, under this Court's cases,
6 including those cases involving government
7 contracts, different categories of agreements
8 are subject to different rules.

9 On the one hand, there are agreements
10 to convey property or to settle legal disputes
11 over a particular res. Those agreements are
12 presumptively permanent, meaning that states
13 cannot withdraw from agreements settling
14 boundaries or settling water rights.

15 On the other hand, as New York has
16 conceded this morning, contracts of continuing
17 performance are different, that in the face of
18 silence, parties can withdraw from agreements
19 that would otherwise require them to keep
20 performing forever.

21 This compact is precisely the sort of
22 arrangement from which parties can presumptively
23 withdraw. In 1953, New York and New Jersey
24 agreed to each delegate their own licensing and
25 policing powers to the bistate agency. But 70

1 years have passed, and the New Jersey
2 legislature has concluded that the Commission
3 now engages in overregulation of business and is
4 ill-equipped to handle 21st Century security
5 challenges.

6 New York believes that the New Jersey
7 legislature can never reclaim its police powers.
8 But New York's perpetual veto would deprive our
9 legislature of the flexibility and the
10 accountability to the people that are at the
11 heart of sovereignty.

12 I welcome this Court's questions.

13 JUSTICE THOMAS: But, on the other
14 hand, it seems as though, if you can just walk
15 away, you deprive New York of any sort of
16 binding characteristics of -- of a compact?

17 MR. FEIGENBAUM: I don't think that's
18 right, Your Honor, which is why compacts so
19 frequently do include express unilateral
20 withdrawal provisions.

21 While the parties remain subject to
22 the compact, they are, of course, bound to its
23 terms, but as in contracting law and consistent
24 with what this Court has said since the 19th
25 Century in *Newton* and *Providence Bank* about

1 government contracts, it can still be binding on
2 the sovereign while nevertheless not preventing
3 the sovereign from controlling its own police
4 powers going forward and making changes where
5 necessary to stay accountable to the people.

6 JUSTICE THOMAS: Do you think that
7 would also be your view if New York had walked
8 away?

9 MR. FEIGENBAUM: We do think that
10 would be our view. I realize that what's good
11 for the goose is good for the gander, Your
12 Honor. And in particular, for this compact,
13 especially after 70 years have passed, as we
14 have in this situation, we do think New York
15 could walk away.

16 We think the compact structure
17 confirms that it would be incongruous to allow
18 the parties to bring the Commission to a halt
19 but nevertheless remain trapped when it -- in
20 it -- within it forever, but we also think
21 contract law and sovereignty principles cut this
22 way.

23 JUSTICE THOMAS: Well, finally, in
24 water cases and boundary cases, there's a vested
25 interest on the part of the parties, the

1 sovereign parties.

2 Do you think that New York or even New
3 Jersey have -- either has any vested interests
4 in aspects of this compact?

5 MR. FEIGENBAUM: No, Your Honor. And
6 I think this Court's cases going back about 200
7 years now help make clear exactly what that kind
8 of settled right is and what that kind of
9 settled right is not.

10 So this Court has used the phrase
11 "vested rights" as effectively a shorthand to
12 convey the sort of settled property promises or
13 the settled legal disputes over res from which
14 parties, including sovereigns, cannot later
15 withdraw. So that's cases like Fletcher versus
16 Peck in the land grant context and that's cases
17 like Hinderlider in the water rights resolution
18 context.

19 What this Court has said on the other
20 side, again going back to the 19th Century in
21 cases like Newton and in cases like Providence
22 Bank, is relying on how the government is
23 exercising or delegating its police powers is
24 not the sort of thing another party, even
25 another state, is entitled to rely on forever.

1 Those are our police powers. And
2 making sure that future legislatures have the
3 ability to legislate as they see fit means not
4 committing their exercise of those powers
5 through mere silence.

6 CHIEF JUSTICE ROBERTS: You say that
7 either party can just walk away, right? But, of
8 course, that's not true. This has been going on
9 for 70 years. There are buildings here,
10 buildings there, you know, bank accounts,
11 ongoing investigations.

12 It seems to me it's going to take a
13 long time and hard work to kind of unravel all
14 this. So isn't that a reason that the proper
15 rule may be that you can't just walk away?

16 MR. FEIGENBAUM: So I don't think so
17 for two reasons, Your Honor.

18 The first is that courts have always
19 understood the withdrawal from an agreement and
20 the dissolution of whatever's been built on that
21 agreement to be separate terms, and that's why,
22 in compacting practice, even when you see
23 express unilateral withdrawal provisions or
24 where you see express unanimous withdrawal
25 provisions, you infrequently see dissolution

1 terms.

2 So this is true as a matter of
3 compacting generally that these are severable
4 questions, and the lack of any language about
5 dissolution tells us very nothing -- tells us
6 very little about how to construe silence, not
7 unlike what Justice Barrett was pointing out
8 earlier this morning.

9 CHIEF JUSTICE ROBERTS: Now you --

10 MR. FEIGENBAUM: The second point --
11 I'm sorry, Your Honor.

12 CHIEF JUSTICE ROBERTS: I'm sorry. Go
13 ahead.

14 MR. FEIGENBAUM: I was going to say,
15 the second point to this compact in particular
16 is that I don't think this one will be terribly
17 hard to unwind. So this is a compact about
18 continuing exercise of regulatory authority.

19 This was not like the Port Authority.
20 This was not about constructing tunnels and
21 bridges and anything of the sort. This is about
22 licensing workers on an ongoing basis and
23 inspecting and revoking their licenses if the
24 Commission concludes they shouldn't be working
25 at the port anymore.

1 And those duties are easy to separate.
2 We have four marine terminals in New Jersey, we
3 have two marine terminals in New York, and each
4 state returns to its plenary sovereign power.

5 CHIEF JUSTICE ROBERTS: I don't see
6 the -- the distinction you draw between ongoing
7 responsibilities and -- what do you call the
8 other category?

9 MR. FEIGENBAUM: So I think conveying
10 settled property rights --

11 CHIEF JUSTICE ROBERTS: Conveying
12 settled --

13 MR. FEIGENBAUM: -- resolving legal
14 disputes.

15 CHIEF JUSTICE ROBERTS: But I don't
16 see that in our opinions. I mean, whether
17 they're dicta or not, certainly, the language in
18 our opinions cuts pretty strongly against you.

19 They have, you know, in the -- in the
20 Sims case, an interstate compact cannot be
21 unilaterally nullified. In Northeast Bancorp,
22 no compacting party may modify or repeal its law
23 unilaterally. In Hess, entities created by
24 compact are not subject to the unilateral
25 control of any one of the states.

1 I mean, you can argue that that was
2 dicta in those cases or that this case is
3 particularly different, but we certainly don't
4 have any case adopting the distinction you draw.

5 MR. FEIGENBAUM: So yes and no to
6 that, Your Honor, I'm going to fight the premise
7 slightly. But let me start with Sims, which I
8 think is particularly helpful.

9 This Court specifically reserved the
10 question of withdrawal in Sims. It referred to
11 the Solicitor General's position in that case
12 and described it as a tempting vista that it
13 didn't have to go down. So we know Sims and the
14 language about unilateral nullification can't
15 possibly have spoken to withdrawal because this
16 Court itself distinguished between the two.

17 And I think that helps explain why
18 language like Hess and language like Northeast
19 Bancorp, I don't even need to call those dicta.
20 I just don't think they have anything to do with
21 the separate question of withdrawal because it's
22 regularly the case in contracting, including in
23 government contracts, that one party couldn't
24 control the exercise of those terms, but that
25 doesn't say if after 70 years the parties are

1 allowed to return to the status quo ante.

2 But here's where this Court has drawn
3 that distinction. It's drawn that distinction
4 throughout its government contracting case law,
5 including going back well -- a century before
6 this particular compact.

7 I think this Court's opinion in
8 Hinderlider is particularly helpful on that
9 score. This Court's opinion talking about a
10 water rights case says that in this case, we are
11 dealing with the resolution of a dispute over
12 water.

13 That's the sort of kind you would
14 expect to be presumptively permanent, just like
15 Virginia versus West Virginia, the boundaries
16 case, and just like Fletcher versus Peck, the
17 case about Georgia conveying land grants.

18 That's really different from what the
19 Court was simultaneously saying in cases like
20 Newton and Providence Bank about continuing
21 performance obligations, and that's why the
22 United States itself drew this exact distinction
23 in 1951 in its brief in that Sims case, which I
24 think is a part of the background of compacting
25 that the states would have been quite familiar

1 with.

2 JUSTICE BARRETT: What if --

3 JUSTICE JACKSON: So would you --

4 JUSTICE BARRETT: What if a compact
5 does both? What if it involves both vested
6 rights and it involves this kind of continuing
7 performance obligation? Then what presumption
8 kicks in?

9 MR. FEIGENBAUM: So I don't think
10 that's too difficult as a matter of presuming
11 intent. If you're conveying settled property
12 rights, so let's say you are resolving water
13 rights and setting up a commission to make sure
14 that no one is taking more water than they're
15 supposed to under your conveyance --

16 JUSTICE BARRETT: No, no, no, let's
17 just change this compact and let's say that in
18 addition to setting up the exact same Commission
19 that you have now, the compact also adjusted
20 water rights between New York and New Jersey.
21 So it did both things in the same agreement.

22 MR. FEIGENBAUM: No, I don't think
23 that you could withdraw from that situation,
24 Justice Barrett, and the reason would be because
25 you have a conveyance of a settled property

1 right, in that case, water instead of land, but
2 the point is the same.

3 And when you're conveying property
4 rights, cases from Merrion to Fletcher to
5 Virginia versus West Virginia make clear that
6 those conveyances are not the kind that you
7 would expect to be able to withdraw from.

8 JUSTICE BARRETT: Could you still get
9 out of the commission?

10 MR. FEIGENBAUM: So I don't think so
11 in that case because contract law and
12 sovereignty principles don't allow for partial
13 terminations. Those operate just like
14 amendments. And it may have been critical, in
15 your hypothetical, again, not a real-world
16 compact --

17 JUSTICE BARRETT: Right.

18 MR. FEIGENBAUM: -- but, in your
19 hypothetical, it might have been critical to say
20 in New Jersey that we got that bit of water in
21 exchange for a licensing agreement we didn't
22 otherwise particularly care for. And so just
23 pulling out of the ongoing performance but
24 keeping the property we got requires both states
25 to keep performing under the terms of an

1 agreement that aren't what they struck.

2 You don't see that in withdrawal, and
3 you don't see that in the ongoing performance
4 context.

5 JUSTICE KAGAN: Do you think that
6 there are any hard cases? I mean, you have this
7 world in which vested interests are in one box
8 and -- and compacts like this are in another.
9 But do we have to worry about any gray zone
10 between the two?

11 MR. FEIGENBAUM: Yeah, I could
12 conceive of them in some of the hypotheticals.
13 I think, in the real world of compacts that
14 exist so far, they largely do exist in buckets.
15 I mean, most compacts are dealing with boundary
16 agreements, they're dealing with settling water
17 rights. This Court is well familiar with those
18 kinds of cases.

19 And then you have on the other hand
20 some very pure regulatory ones. You've got an
21 agreement like this. You've got the Columbia
22 River Gorge Commission, where it's an interstate
23 zoning board that has to approve zoning
24 ordinances backed by legislative funding
25 obligations. Those are the sorts of agreements

1 we think that you can withdraw from.

2 Now I think there are some
3 hypotheticals like what if you've conveyed some
4 property and simultaneously had a commission
5 that monitors it and the like? I don't think
6 that's that hard because, again, the test we're
7 looking for is, have you conveyed the sort of
8 settled property that would speak to intent?

9 Now there may be --

10 JUSTICE SOTOMAYOR: So why should we
11 use this case to decide all those cases in
12 dicta? I -- I -- I -- you know, the word
13 "vested rights" has many meanings. We just
14 recently used it in the retroactivity case and
15 said -- I'll quote it for you because I found it
16 so amorphous, I don't know why we said it.

17 (Laughter.)

18 JUSTICE SOTOMAYOR: "Something more
19 substantial than immediate fix right of present
20 or future enjoyment."

21 I -- I read that and I said, okay, I
22 -- I hope I didn't write it.

23 (Laughter.)

24 JUSTICE SOTOMAYOR: But my point -- I
25 go back to my point, I don't know what vested

1 rights is. I don't -- in what context and
2 where. What's the difference between a compact
3 that does the settlement of the water rights,
4 and the commission is not set up in that
5 compact. Perhaps it's not set up in that
6 compact the next day, but it is two weeks later.
7 Does that give -- you know, was that intended to
8 be part of the boundary? We're going to have to
9 decide all those issues when those cases arise.

10 What's the simplest rule to decide
11 this case without dicta about what vested rights
12 means or anything else means?

13 MR. FEIGENBAUM: So --

14 JUSTICE SOTOMAYOR: Tell me your
15 simplest rule.

16 MR. FEIGENBAUM: -- I want to be very
17 careful as I answer this not to offend the
18 author of that vested rights opinion, whoever it
19 was.

20 (Laughter.)

21 MR. FEIGENBAUM: But what I want to
22 say is there's a couple different ways you could
23 rule for us that don't address that question. I
24 don't really see ways to rule for New York that
25 don't end up having to foreclose some of these

1 vested rights analyses in ways that I think
2 would be really troubling on the ground to
3 compacting.

4 So I think some of the simplest ways
5 to rule for us, one could be to say that
6 particularly as here, where, as you and Justice
7 Jackson have noted, there is evidence, as we've
8 discussed, that this was understood to be
9 temporary, and there's nothing in the text of
10 the compact that suggests any sort of perpetual
11 or binding obligations, paired with the
12 structural argument that we offered, you could
13 do a very specific to this compact argument.

14 You could also say there may be more
15 challenging cases in the future, where there is
16 a marginal application of whether you've
17 conveyed settled property rights or whether you
18 have only ongoing performance obligations. But
19 that's not this case.

20 This case is the classic example of
21 police powers. We are simply exercising and
22 delegating our taxing authority, our licensing
23 authority, and our law enforcement authority.

24 JUSTICE JACKSON: I don't understand
25 that species. Obviously, I understand the

1 first, because that was the thrust of my
2 questions to -- to your friend on the other
3 side, but help me to understand why it matters
4 that police powers are involved here.

5 I thought we were applying contract
6 principles, and the reason that you would win
7 was because the parties intended at the time of
8 the contract to, you know, have this agreement
9 go on not indefinitely, and the background
10 blackletter contract principle is that when you
11 don't speak to termination in a services kind of
12 contract like this, you get to withdraw.

13 What I'm a little worried about is
14 starting to turn this into something about
15 police powers or sovereignty even, because I
16 don't really understand what difference that
17 makes.

18 MR. FEIGENBAUM: So that offers the
19 third path, and I -- I, you know, teed up I
20 might have three here. I do think you could do
21 a contract-law-specific ruling.

22 Now I think one of the benefits here
23 that might give you some comfort, Justice
24 Jackson, is that the contract law principle and
25 the sovereignty principles track so neatly in --

1 JUSTICE JACKSON: So what is the --

2 MR. FEIGENBAUM: -- this particular
3 case.

4 JUSTICE JACKSON: -- sovereignty
5 principle that you're drawing on and why is it
6 helpful?

7 MR. FEIGENBAUM: So the reason I think
8 the sovereignty principle is helpful comes from
9 Newton in the 19th Century, where this Court
10 explained that in a government contracting
11 context, you would expect a clear statement as
12 to the secession -- or the cession of your
13 police powers as to their scope or duration.

14 And so, to the degree that you would
15 expect that we've given up some sort of police
16 power forever, in that case, it was the control
17 of a county --

18 JUSTICE JACKSON: But wait. Doesn't
19 that assume that you couldn't waive it
20 indefinitely? I mean, I -- the reason --

21 MR. FEIGENBAUM: No, Your Honor.

22 JUSTICE JACKSON: -- why I don't know
23 that it has any real force is that to the extent
24 that you're a sovereign and you have these
25 powers and you enter into a compact, isn't the

1 fact that you're entering into a compact your,
2 you know, assent to give up the powers for
3 whatever the terms of the agreement say? And if
4 you don't speak to that, I don't understand why
5 we couldn't also presume that you were willing
6 to cede them indefinitely.

7 MR. FEIGENBAUM: Two responses to
8 that, Your Honor. The first is I don't think
9 that's quite what was going on in the government
10 contracting cases because there were, by
11 definition of being a government contracting
12 case, a contract to which the government had
13 signed on, and, nevertheless, the Court was
14 saying that because of the importance of the
15 police powers, it is a momentous thing to
16 essentially give that up in perpetuity, subject
17 to the other party. So even when you can do it
18 as a constitutional matter, you would expect
19 something clearer.

20 It's like the canon against derogation
21 of the common law. You can derogate the common
22 law. There's no problem with Congress
23 derogating the common law. But it's a big deal
24 when it happens, and so you expect to see
25 something clearer.

1 That's the basic submission on
2 sovereignty here. It's a big deal to say New
3 York can control how we tax companies at four
4 marine terminals in New Jersey, and you would
5 expect something clearer before we do that.

6 Now, again, to the second point, as
7 Your Honor and Justice Kagan in a colloquy with
8 Ms. Vale pointed out, you don't necessarily have
9 to get into whether sovereignty gives us an
10 extra withdrawal rule because the contract law
11 baseline is so clear. And this Court's
12 government contracting cases have always tried
13 to figure out the delta between when do you
14 treat a private party and the government party
15 the same way and when the government is better
16 off from the perspective of protecting its
17 sovereign powers.

18 What New York is asking for here,
19 based on a history of compacting that I just
20 don't see and an analogy to Port Authority that
21 could hardly be more different, is that
22 government sovereigns are worse off than private
23 parties when it comes to the similar withdrawal
24 rule on their own performance and their --

25 JUSTICE BARRETT: Couldn't --

1 MR. FEIGENBAUM: -- own police powers.

2 JUSTICE BARRETT: -- couldn't we just
3 say, without getting into the sovereignty, and I
4 guess this goes back to one of your other paths,
5 there's a difference between contracts that are
6 about continuing performance, and in this
7 particular compact, the continuing performance
8 involves regulatory authority.

9 But, if we're just looking at a
10 contract that involves continuing performance,
11 that's different. If I sell you my house, I
12 can't come back later and say I want it back.
13 But if --

14 MR. FEIGENBAUM: I agree with that --

15 JUSTICE BARRETT: -- it's a continuing
16 --

17 MR. FEIGENBAUM: -- Your Honor.

18 JUSTICE BARRETT: -- if it's a
19 continuing performance contract, the rule about,
20 you know, unilateral withdrawal is different.

21 Can't we just say that?

22 MR. FEIGENBAUM: I think you could
23 just say that and rule for New Jersey on that
24 basis. I think contract law is quite clear
25 here. I think it's notable New York has never

1 contested contract law in this case and how it
2 would otherwise apply.

3 And what this Court said in the last
4 New York versus New Jersey in 1998 is, when you
5 have silence on a particular term in a compact,
6 that shows "no intent to modify" the settled
7 background rules that are already in place.
8 This Court has said since 1823 that those
9 background rules are contracting. It said
10 compacts and contracts are synonymous.

11 And so I don't really understand why
12 there would be a history of compacting that
13 justifies rejecting using the same doctrine this
14 Court used in Tarrant, that it used in Green
15 versus Biddle, that the United States was
16 discussing in the early 1950s as the backdrop
17 right before this compact was enacted. And so I
18 do think contract law, separate from the
19 sovereignty issues, provides a clean pathway to
20 ruling in New Jersey's favor.

21 JUSTICE ALITO: But an interstate
22 compact is not just a simple contract between
23 parties. It has other attributes. I mean, our
24 cases have mentioned that.

25 So do you want us to say that

1 interstate compacts should always be interpreted
2 in accordance with ordinary contract principles?
3 And, if not, what would we say to justify the
4 use of ordinary compact principles alone in this
5 case?

6 MR. FEIGENBAUM: I think this Court's
7 cases already provide a clear dividing line.
8 So, on the one hand, this Court has already said
9 that when the background contracting principle
10 would require you to conflict with the text of
11 the compact that the statutory interpretation
12 exercise does not allow you to do that. And
13 that's Alabama versus North Carolina.

14 But, at the same time, cases like
15 Tarrant and the last New York versus New Jersey
16 make clear that where you have silence on a
17 particular compact term, that the background
18 contract law speaks to the silence of that
19 agreement.

20 So that's our clean organizing
21 principle for when contract law steps in as the
22 backdrop and when it doesn't. When the parties
23 don't speak to the issue in their agreement,
24 that is a sign they did not intend to modify
25 what would otherwise have been the background

1 rule.

2 I don't know what New York's
3 organizing principle is for when you use
4 contract law and when you don't. I understand
5 they don't think it applies here. It obviously
6 did apply in Tarrant. But we have a clean,
7 don't allow a conflict, but do use it to fill
8 the silence of an agreement.

9 Now, to the degree this Court thinks
10 compacts are -- Your Honor, I see my --

11 CHIEF JUSTICE ROBERTS: You can --

12 MR. FEIGENBAUM: -- time has expired.

13 CHIEF JUSTICE ROBERTS: -- you can
14 finish your sentence.

15 MR. FEIGENBAUM: Thank you, Your
16 Honor. To the degree that this Court believes
17 compacts are distinct, I think that also
18 squarely cuts in our favor because of the
19 special sovereignty interests long established
20 before 1953 that suggest that a cession of our
21 taxing, licensing, and policing powers should
22 not be permanent.

23 JUSTICE ALITO: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas?

1 JUSTICE THOMAS: One quick question.
2 Does the -- the consent, Congress's consent,
3 provide -- play any role in our analysis?

4 MR. FEIGENBAUM: So I don't think that
5 Congress's consent in any way changes what I've
6 discussed today. Congress has the ability to
7 consent to compacts for a specific reason, as
8 this Court explained, which is to make sure that
9 compacts don't become aggrandizing vis-à-vis the
10 federal government.

11 And, obviously, with withdrawal,
12 returning the states to the status quo ante,
13 that's not a fear that anyone would have to
14 have.

15 CHIEF JUSTICE ROBERTS: Justice Alito?
16 Justice Sotomayor?
17 Justice Kagan?

18 JUSTICE KAGAN: Could you have walked
19 away five years in?

20 MR. FEIGENBAUM: I think we could have
21 walked away five years in. I think two points
22 about that. The first is I think that's the
23 better rule when it comes to sovereigns. I
24 think a contrary rule would require legislatures
25 to guess if enough time has passed before they

1 start exercising their own authority, and that's
2 never been applied to government contracts.

3 The second point I'll make about that
4 is that a reasonable time requirement, which
5 would be the only sort of contrary rule, would
6 be one that really only applies when you have
7 asymmetrical bargaining, as in a distribution
8 agreement, and one party had to do specific
9 upfront costs the other party didn't have to do.
10 The Second Circuit's case in *Compania* talks
11 about this. That doesn't apply here either.

12 And then third, even if this Court
13 disagrees or wants to reserve that question, New
14 York has never challenged that 70 years is not
15 enough time, and I think, as a matter of law, it
16 clearly is.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch?

19 Justice Kavanaugh?

20 Justice Barrett?

21 Justice Jackson?

22 JUSTICE JACKSON: Just one question.
23 So I -- I appreciate the very clear exposition
24 of what the purpose of silence is in relation to
25 background principles, but I assume the response

1 would be, and I want to give you a chance to
2 address it, that in a way assumes clarity and
3 certainty about what the background contract
4 principle is in this context, and New York says,
5 look at all these other compacts, look at the
6 circumstances, the background principle is, you
7 can't withdraw in this situation.

8 So what -- what do you have on that
9 point? What is the background principle in this
10 context?

11 MR. FEIGENBAUM: Two things on that
12 point, Your Honor, from the history of
13 compacting. The first is that it was
14 well-established by that point that compacts
15 were contracts. I talked about Green versus
16 Biddle from 1823.

17 And the United States in 1950 looked
18 at that, said, okay, if compacts are contracts,
19 what does contract law say at the time? And
20 contract law, by 1953, Williston, Section 38 and
21 39 speak to this, said specifically the same
22 rule I'm saying at the lectern today. This is
23 not some new contract rule we're trying to
24 retroactively impose on the parties. This was
25 well established at the time.

1 The second thing that I think was well
2 established, including in compacting, by the
3 early 1950s was that there are two different
4 kinds of agreements. There's the kind to convey
5 or settle property, and so I've talked about
6 cases like Fletcher and Hinderlider and Virginia
7 versus West Virginia, and there are cases
8 involving just the ongoing exercise of sovereign
9 power, whether that's delegation or just
10 regulation, and that's cases like Newton and
11 Providence Bank. So all of that was
12 well-established before 1953.

13 One final point about compacting to
14 your historical question, Justice Jackson. The
15 only bridge that New York offers for this world
16 of what was basically boundary compacts in the
17 19th Century and delegated police power compacts
18 in the 20th Century is the Port Authority
19 Compact.

20 But I think, as the Chief Justice's
21 colloquy showed this morning, those could hardly
22 be more different. The Port Authority was a
23 specific compact with a two-year period for both
24 states with their own vetoes to come up with a
25 unitary, comprehensive, development plan for

1 infrastructure, and then they could withdraw if
2 either state didn't go all in on that agreement.

3 We have nothing like that here. We
4 don't have silence in the Port Authority
5 Compact. We have a carefully reticulated
6 withdrawal provision in the Port Authority
7 Compact, and no one could have looked at the
8 Port Authority Compact and said that's exactly
9 what's happening in the Waterfront Compact
10 either. This workers' licensing agreement and
11 that comprehensive infrastructure development
12 plan with its own withdrawal provision couldn't
13 have looked more different.

14 And if I might to your negotiation
15 question, Justice Jackson, the negotiation
16 history at page 440 of the House hearings has
17 testimony from the executive director of the
18 Port Authority specifically emphasizing that the
19 Port Authority and the Waterfront Commission had
20 different models because they did different
21 things. One was propriety in -- proprietary
22 infrastructure and one was worker licensing, and
23 the latter needed to be more accountable to the
24 states. So even to the specific negotiation --
25 negotiation history, I don't see how that helps

1 New York.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Raynor.

6 ORAL ARGUMENT OF AUSTIN RAYNOR
7 FOR THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING THE DEFENDANT

9 MR. RAYNOR: Mr. Chief Justice, and
10 may it please the Court:

11 Under settled compact interpretation
12 principles, New Jersey should prevail in this
13 case. New York doesn't dispute most of those
14 principles. It agrees that the compact does not
15 expressly preclude unilateral withdrawal. It
16 agrees that contract law permits unilateral
17 withdrawal in cases of ongoing and indefinite
18 performance. And it agrees that courts presume
19 that a sovereign has not ceded its ongoing
20 police powers.

21 Instead, New York contends that
22 compacts have long been understood to preclude
23 unilateral withdrawal. But the historical
24 record doesn't support that claim for compacts
25 like this one that involve the ongoing and

1 indefinite exercise of sovereign police power.

2 New York also critiques the line
3 drawing that it says is required under New
4 Jersey's interpretation, but New York itself
5 avoids that line drawing only by adopting a
6 categorical rule that dispenses with settled
7 interpretive principles.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Mr. Raynor, is the
10 compact federal law, or is the -- is Congress's
11 consent federal law?

12 MR. RAYNOR: Yes, this was approved in
13 a federal statute by Congress, signed by the
14 President, so it is a federal law.

15 JUSTICE THOMAS: So what role does the
16 fact that it is a federal law play in our
17 analysis?

18 MR. RAYNOR: I think there are some
19 circumstances where that may affect the contract
20 law analysis. So, in Alabama v. North Carolina,
21 the Court said you can't apply background
22 principles of -- of contract law to overcome
23 clear terms in the compact. That's one example
24 where the two analyses might diverge.

25 It's also conceivable that Congress

1 could add a condition to its approval of a
2 compact saying that withdrawal is inappropriate,
3 except in certain circumstances, but it hasn't
4 done that here. And because the compact is
5 silent in this case on withdrawal, I think it
6 really doesn't change the analysis.

7 JUSTICE THOMAS: So, normally, a
8 federal law has preemptive effect as between the
9 federal government and states. This is
10 obviously not the type of law that you would
11 normally see in that context.

12 So, if it doesn't have preemptive
13 effect, does it have any overarching effect
14 similar to preemptive -- preemption?

15 MR. RAYNOR: I think it actually does
16 have preemptive effect. So New Jersey couldn't
17 act inconsistently with the compact while the
18 compact is in effect. It couldn't go down to
19 the waterfront and start obstructing what the
20 Commission is doing.

21 I don't think that the preemption
22 question answers the withdrawal question,
23 though, because, in our view, the compact is
24 best understood to permit withdrawal. So
25 there's nothing about the preemptive effect of

1 the compact that would somehow preclude that.

2 JUSTICE THOMAS: Thank you.

3 MR. RAYNOR: There's been some
4 questions this morning about whether we should
5 follow just regular private law contract rules,
6 and I think, actually, that's not a cause for
7 concern in this case because the sovereignty
8 principles point the same direction as the
9 contract law principles in this case.

10 New York has conceded that the
11 contract law principles are that unilateral
12 withdrawal is permissible for ongoing
13 performance contracts in the same rule as this
14 Court explained in Tarrant applies to compacts,
15 where we're talking about cession of sovereign
16 authority. We're not going to assume in the
17 face of silence that a state has given up its
18 ability to exercise its police powers forever.

19 So, in this case, we don't -- I don't
20 think you have to worry too much about
21 segregating sovereignty-specific principles from
22 private law principles because they dovetail and
23 they point in the same direction.

24 JUSTICE SOTOMAYOR: So what do we do
25 with a compact on water rights that many of

1 them, I suspect, have to do with licensing and
2 taxation? That's comparable to, here, police
3 power. In -- what do we do with a compact like
4 that?

5 MR. RAYNOR: So most of the water
6 rights compacts, Justice Sotomayor, are
7 essentially settlement agreements because the
8 states have conflicting claims to the water.
9 So, under this Court's cases, downstream states
10 are entitled to equitable apportionment of water
11 flowing from upstream.

12 And New York agrees, New Jersey
13 agrees, we all agree that that type of
14 settlement agreement presumptively you cannot
15 withdraw from. Now, as part of those settlement
16 agreements, they sometimes establish commissions
17 that are designed to facilitate the operation of
18 the settlement agreement.

19 JUSTICE SOTOMAYOR: The fact that
20 you've agreed tells us anything we say with
21 respect to that issue would still be dicta,
22 correct? You can't concede a point and bind
23 other parties in another case who might have a
24 compact of that nature and come in and say this
25 is just a secession of police power, and you've

1 announced in New Jersey versus New York, New
2 York versus New Jersey, that --

3 MR. RAYNOR: So I actually don't think
4 that that fits really in the police power
5 category because the commissions in those cases
6 just facilitate the operation of the settlement
7 agreement.

8 JUSTICE SOTOMAYOR: I'm just talking
9 about something in the future. I -- I'm beating
10 a dead horse.

11 Just one question. I have looked at
12 -- at some of the compacts, and the ones that I
13 found before 1953 that include permission to
14 withdraw unilaterally, all of them required
15 notice and notice of a particular amount of
16 months, six months.

17 I think it favors the government --
18 New York that this doesn't talk about withdrawal
19 and every other one that assumed unilateral
20 withdrawal did. What do I do with that
21 historical fact?

22 MR. RAYNOR: I agree that the absence
23 of any dissolution provision is a marginal point
24 in New York's favor, but I don't think it
25 carries the day here, in part because notice

1 provisions could be implied. There are some
2 sources, the Uniform Commercial Code, for
3 example, that suggest that notice is part of the
4 background rule here.

5 JUSTICE SOTOMAYOR: Yeah, I've been
6 thinking about that, but that really takes away
7 from Justice Scalia's point in Alabama that we
8 shouldn't be adding terms to compacts.

9 MR. RAYNOR: Yes, I recognize that,
10 Justice Sotomayor, but I think Alabama is
11 distinguishable because, there, there was an
12 express withdrawal provision, and the Court said
13 you can't qualify it.

14 But, here, since we're talking about
15 silence and you're going to be potentially
16 allowing withdrawal just as a matter of the
17 default rule, I don't think there would be any
18 Alabama problem with also saying that, under
19 that default rule, notice is required. New York
20 hasn't pressed that argument. They -- they
21 clearly have substantial notice in this case.

22 As to your earlier point about binding
23 future parties, if the Court wanted to adopt a
24 narrow interpretation here, I think a simple,
25 easy way to do it would be to say that when the

1 compact exclusively provides for joint ongoing
2 exercise of sovereign authority on an indefinite
3 basis, we're going to presume that unilateral
4 withdrawal is permissible. That way --

5 JUSTICE BARRETT: What about the
6 treaty --

7 JUSTICE JACKSON: Why is that better
8 than?

9 JUSTICE BARRETT: -- what about the
10 treaty rule? It was my understanding New York
11 said that it was the rule in treaties that
12 unilateral withdrawal was not permitted.

13 I thought the opposite was true from
14 the Restatement of -- the Restatement Third.

15 So what's the United States' position?
16 Which is the default?

17 MR. RAYNOR: So the treaty rule is not
18 very clear. The Vienna Convention says that the
19 default is that unilateral withdrawal is not
20 permitted. The United States is not a party to
21 the Vienna Convention, although we accept it as
22 a guide to these kinds of situations.

23 I think, under treaties, like under
24 contracts, you have sort of a spectrum. And at
25 one end, there's things that are clearly not

1 withdrawable, so like boundary treaties, for
2 example. And at the other end, you have
3 commercial treaties, which do permit withdrawal.

4 The United States has withdrawn from
5 treaties that imposed ongoing obligations. So,
6 in 2005, we withdrew from a dispute resolution
7 protocol, and that didn't expressly provide for
8 withdrawal. I think -- and in 1951, in the Dyer
9 brief, the Solicitor General also said treaty
10 law would generally permit withdrawal for this
11 category of compact.

12 So, if you're interested in treaty
13 law, I think it still supports New Jersey in
14 this case, but I acknowledge it's somewhat of a
15 murky area. And given that the Court has said
16 that contract law is the correct lens for
17 looking at these kinds of questions, I think
18 that's the better way.

19 JUSTICE BARRETT: But it doesn't
20 strongly support -- yeah, I mean, treaty law is
21 murky, that's one thing, but it doesn't -- it's
22 the United States' position that it does not
23 strongly support New York, that we shouldn't
24 take the Vienna Convention as a hard-and-fast
25 rule, that, oh, well, in treaty law, you can --

1 you can't unilaterally withdraw. So this is
2 different?

3 MR. RAYNOR: That's correct. And the
4 Vienna Convention itself says that it can be --
5 the default rule can be overcome by
6 circumstances or by the intent of the parties.
7 So it sort of throws it back onto a
8 context-specific inquiry.

9 JUSTICE BARRETT: Thank you.

10 JUSTICE JACKSON: Can I ask you --

11 JUSTICE ALITO: What if we looked
12 at --

13 CHIEF JUSTICE ROBERTS: Justice --

14 JUSTICE JACKSON: Can I -- can I just
15 ask about what appears to be the clear
16 preference in going the sovereignty route? And
17 I'm just trying to understand it.

18 If we would prefer to cabin this by
19 keeping it in the realm of contract, would that
20 be sufficient to rule for New York in its favor
21 -- in this case -- I mean, excuse me, New Jersey
22 in this case, or would we have to have some
23 reference to sovereignty?

24 And let me just tell you what my
25 concern is. You say don't worry about it

1 because, in this case, they both come out to the
2 same place. But I can imagine there could be a
3 future case in which they don't, in which you'd
4 have contracts leading in one way and
5 sovereignty leading in another.

6 And I don't know that I want to signal
7 at this point how that comes out, meaning we
8 preference the sort of sovereignty principles in
9 that scenario. So could I do this just on
10 contracts and, if so, how?

11 MR. RAYNOR: Yes, Justice Jackson.
12 So, to be clear, we don't have a clear
13 preference that you go the sovereignty route. I
14 mentioned that I think it points the same
15 direction, and in Tarrant, the Court unanimously
16 adopted the sovereignty presumption.

17 But, if you want to go just the
18 contract route, I think that would be perfectly
19 fine. You could say this isn't a case like
20 Alabama versus North Carolina, where we would be
21 using an implied contract rule to overcome the
22 clear text of a federal statute.

23 You would just say, look, there's
24 silence here. We have said over and over,
25 including in New York versus New Jersey, that

1 background common law rules speak into the
2 silence of a compact. And I think that would
3 basically be the end of the analysis.

4 JUSTICE ALITO: Why should we not look
5 to rules of statutory interpretation? Statutes
6 generally remain in effect until they are --
7 they remain in effect until they're repealed.
8 They don't have sunset provisions.

9 MR. RAYNOR: Yes, Justice Alito. So I
10 think the reason is that the Court has said
11 these are contracts, they only come into
12 existence by agreement of the parties. This
13 probably wasn't something that Congress could
14 have just done. It couldn't have just ordered
15 the states to enter this agreement. So the
16 consensual nature of it, I think, is critical,
17 and that's why the Court has looked to contract
18 law.

19 I do acknowledge there are some
20 situations where the federal statute status of
21 the compact will change the analysis, and we've
22 talked about Alabama versus North Carolina.
23 That's the easiest example of that.

24 But, otherwise, I think the Court has
25 been correct to look to contract law in

1 interpreting these kinds of agreements.

2 JUSTICE ALITO: Are the terms of an
3 interstate commerce -- compact federal law for
4 all purposes?

5 MR. RAYNOR: If you have something
6 specific in mind, Justice Alito, I don't
7 necessarily want to foreclose it. But I think
8 it's generally --

9 JUSTICE ALITO: If a claim -- if a
10 claim was asserted based on the terms of an
11 interstate commerce, is that a claim arising
12 under federal law?

13 MR. RAYNOR: Yes, I believe so,
14 Justice Alito, but I can't say that I've read a
15 case specifically about that, but it's
16 considered a federal statute.

17 And I'd like to talk for a moment
18 about New York's historical argument. I think
19 this is their principal affirmative argument,
20 that at the time this compact was entered, this
21 was understood to be not permitted, that it was
22 universally understood that withdrawal was not
23 permitted for compacts.

24 I think that doesn't hold water when
25 you look closely at it. As Justice Sotomayor

1 pointed out, two of the principal scholars on
2 which they rely actually said the opposite. In
3 an article around the same time, they
4 acknowledged the United States' brief in Dyer
5 and said that that's likely sound.

6 And then, in addition, this Court said
7 in 1951 it treated it as an open question. The
8 Solicitor General said in cases of this kind
9 withdrawal is permissible. And the Court said
10 we're not going to go down that road. So I
11 think it's difficult to claim that there's a
12 settled understanding in 1953 when the United
13 States has taken the opposite position and this
14 Court has treated it as an open question.

15 If there's no further questions, then
16 --

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. RAYNOR: Thank you.

20 CHIEF JUSTICE ROBERTS: You've had
21 your back-and-forth, right, the one-on-one
22 questioning?

23 JUSTICE THOMAS: Not yet.

24 CHIEF JUSTICE ROBERTS: Oh, you
25 haven't?

1 MR. RAYNOR: I have not.
2 CHIEF JUSTICE ROBERTS: Okay.
3 (Laughter.)
4 CHIEF JUSTICE ROBERTS: Tough day.
5 (Laughter.)
6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?
8 Justice Kagan?
9 Justice Gorsuch?
10 See, I knew that was --
11 (Laughter.)
12 CHIEF JUSTICE ROBERTS: Rebuttal?
13 REBUTTAL ARGUMENT OF JUDITH N. VALE
14 ON BEHALF OF THE PLAINTIFF
15 MS. VALE: Thank you, Your Honor.
16 I have four points here. I think
17 states and these states in particular go to the
18 compact form when they want to keep either
19 legislature from changing things going forward.
20 That is why -- and I think this is why
21 Congress's approval is important -- they go
22 through the bother of negotiating this whole
23 thing, going to Congress, and getting approval,
24 because it makes it a federal law, and that, by
25 its nature, means that they expect that each

1 state legislature can't change its mind going
2 forward. That's not extraordinary when it comes
3 to compacts and federal law.

4 And there is -- that is why these
5 states do that, because then you can rely on it.
6 And these states did rely on it, thinking that
7 we've done this, we've made it a federal law,
8 and now we can rely on it, which is what they
9 did in building the port together through the
10 Port Authority.

11 On this drawing lines between boundary
12 and water on one side and ongoing performance on
13 the other, I do not think those lines are at all
14 so clear in compacts. There are
15 jurisdiction-sharing compacts that do not draw
16 the boundary, so those do involve jurisdiction
17 sharing over a piece of land, but they're not
18 actually conveying a res.

19 There are compacts like the Port
20 Authority and other compacts that followed it
21 that have ongoing responsibilities over a set
22 piece of land, and I think those compacts, like
23 this one, they're -- they're not identical to
24 boundary compacts, but they're not that
25 different. They involve a piece of land and set

1 expectations that everybody makes, once they
2 make the compact, about that piece of land and
3 what they're going to do with it going forward.

4 And so New Jersey's default rule would
5 upset and destabilize a whole bunch of compacts
6 that are current -- that are currently in
7 existence. Those are listed in Appendix B in
8 our brief.

9 And the reliance on contract
10 principles, so much of that comes from contracts
11 between a sovereign and a private party. And
12 that is not what we have here, and that's a big
13 difference because the presumptions and
14 intuitions about what states expect are
15 different when they're with a coequal sovereign.
16 They expect to be giving each other some
17 sovereignty. That's the whole point of the
18 compact.

19 And I think that is some of what this
20 Court was saying in Hess and Bancorp. And in
21 Bancorp, this Court said a classic indicia of a
22 compact is that you can't unilaterally change it
23 or withdraw going forward, and states have other
24 options if they want to cooperate and retain
25 that flexibility.

1 They can do what they were doing in
2 Bancorp, which is to enact parallel laws. They
3 can do what was the original proposal here,
4 which was to have each two states do their own
5 commissions and their own laws. But that was
6 rejected. And the states did a compact instead
7 and they did that for a purpose.

8 I also don't think it's at all
9 possible to read the -- this -- the intent of
10 these states as thinking that either state could
11 have walked away after a year or two years or
12 five years. I don't think that's reasonable.

13 And it's not just 70 years. I don't
14 think that's just what we're judging it from.
15 The two states have come together and amended
16 this compact over the decades. As recently as
17 2006, they amended this compact to add powers to
18 the Commission. And so they were re-upping
19 their understanding over time that they are
20 still in this together and that they still
21 believe that the joint endeavor is needed.

22 And when it comes to the statements
23 about it being temporary, I don't think that is
24 an indication that they had definitely
25 determined that they would end it at any

1 specific point. It was a prediction about, we
2 hope, that we -- we hope that we can solve this
3 problem together and then jointly decide to end
4 it together.

5 But that's not how it played out. The
6 states continue to decide over and over again,
7 as they amended this compact, that they still
8 had a joint problem that still needed the joint
9 solution, and so they kept going.

10 And I don't think that statements
11 about temporary or permanent really solve the
12 question here, which is about who gets to decide
13 when to end it. It's not really about when.
14 It's about who gets to decide. And the -- the
15 intent of these states was that they would
16 decide together or, if they really absolutely
17 needed to, they would go to Congress.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 11:33 a.m., the case
22 was submitted.)

23

24

25

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