No. 129 Original

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

On Motion For Leave To File Bill Of Complaint

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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QUESTIONS PRESENTED

1. Is the exercise of original jurisdiction appropriate when (a) the waterway construction permit request that triggered Virginia's complaint is the subject of an ongoing administrative proceeding in which no final determination has yet been made; (b) the same Compact issues asserted in this case have been raised by a political subdivision of Virginia in that proceeding and must be resolved there if the permit request is to be denied; and (c) Maryland has never denied Virginia a permit to withdraw water from the Maryland portion of the Potomac River ?

2. Has Maryland violated interstate compacts entered into with Virginia by regulating construction activity on, and water withdrawals from, Maryland territory in the Potomac River?

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STATEMENT OF THE CASE

The original 1632 charter from Charles I to Cecilius Calvert, Lord Baltimore, included within the territory of Maryland the entire width of the Potomac River to the high water mark on the Virginia side. (App. 19a.) However, in recognition of Virginia's historical use of the south shore of the river, the Black-Jenkins Award arbitrators subsequently set the final boundary between the two States at the low water mark on the Virginia side of the Potomac River. (App. 29a.) The territory of the State of Maryland, therefore, now extends to the low water mark. (App. 45a.)

A. Maryland Regulation Of Potomac Water Use.

Maryland regulates the appropriation of water from all territorial waters of the State, including the Maryland portion of the Potomac. *See* MD. CODE ANN., ENV'T ART. § 5-502 (1996 Repl. Vol.). Maryland law requires any person seeking to appropriate or use the waters of the State to obtain a permit from the Maryland Department of the Environment (MDE). *Id.*, §§ 5-502, 5-507. The Maryland permitting program is based on the riparian water law principle of "reasonable use." Under the Maryland program, MDE allows all riparian users an appropriation that is reasonable in relation to their projected level of use over a 12-year permit period so long as the use does not harm other riparian users or degrade the waters of the State. Code of Maryland Regulations (COMAR) 26.17.06.05A. Maryland considers a number of factors in determining "reasonableness," including the cumulative impact that all uses may have on the water resource. COMAR 26.17.06.05B(2). The purpose of the program is to conserve the State's water resources while ensuring that all riparian users have sufficient water for their needs. COMAR 26.17.06.02A

Virginia users have for years applied to Maryland for permits to withdraw water from the Maryland portion of the Potomac. For example, a permit was issued in 1964 to the Great Eastern Utilities Corporation, a Virginia entity. Other Virginia users include the Town of Leesburg, Virginia (1968), the Fairfax County Water Authority (the Authority)

(1974), and the Northern Virginia Regional Park Authority (1976). As Virginia acknowledges, Maryland has never denied a Virginia user a permit to appropriate water from the Potomac. Br. at 29.

In addition to regulating water withdrawals, Maryland has worked cooperatively with other regional jurisdictions and water utilities in devising a plan, known as the Low Flow Allocation Agreement (LFAA) (App. 78a), for allocating water use in the Metropolitan Washington area during times of low flow in the Potomac. The LFAA is designed to balance water use and "instream" environmental values by maintaining a minimum base flow in the river during times of drought. The effectiveness of the LFAA, however, is limited by its jurisdictional reach, which extends only to an 18-mile stretch of the Potomac between Little Falls within the District of Columbia and the "Seneca Pool." (App. 82a ¶ A.1.) This is problematic because intense development has occurred, and rapid growth is expected to continue, in the areas along the Potomac upstream of the portion governed by the LFAA. The Maryland permitting program is the only mechanism in place for allocating and monitoring water use from this part of the Potomac – a distance of approximately 250 miles. In these upstream areas, Maryland includes in all permits low flow augmentation provisions that are designed to ensure adequate water supply for all water users on the Potomac. COMAR 26.17.07.02. The LFAA specifically recognizes the Maryland permitting program and declares that nothing in the LFAA restricts or limits Maryland's authority to regulate water use from the Potomac River. (App. 79a, 94a ¶ C.)

B. Maryland Regulation Of Waterway Construction Within The Potomac.

Maryland also regulates the construction of bridges, wharves, pipelines, cables, and other structures in all territorial waters of the State, including the Maryland portion of the Potomac. *See* MD. CODE ANN., ENV'T ART.

§ 5-503, 5-504. Maryland law requires any person seeking to place any structure within the Maryland portion of the Potomac to obtain a waterway construction permit from MDE. *See id.* at §§ 5-504, 5-507. Applications for these permits are evaluated under a public interest standard that requires MDE to "weigh all respective public advantages and disadvantages and make all appropriate investigations," and to base its permit decision on whether the proposed construction is in the "best public interest." *Id.*, § 5-507(a). In determining whether a proposed project is in the best public interest, MDE evaluates a variety of factors, including the project's flood risk and its effect on fish, aquatic habitat, and other instream values. *See* COMAR 26.17.04.11.

As in the water use context, out-of-state users have for years applied for permits to build structures on Maryland territory in the Potomac. In 1967, the Town of Leesburg, Virginia applied for and obtained a permit to construct a drinking water intake in the Potomac. In 1977, the Authority applied for and obtained a permit to construct a drinking water intake structure on the Potomac shoreline. In 1985, the Town of Harper's Ferry, West Virginia, likewise obtained a permit to construct a water intake structure. In none of these cases did the out-of-state user contest Maryland's jurisdiction over the Potomac within its territory.

C. The Present Administrative Litigation.

In 1996, the Authority again applied for a permit from the Water Management Administration (WMA), a division of MDE, this time to build a second water intake structure reaching more than a third of the way across the Potomac into Maryland. The primary purpose of the project, according to the Authority, was to move its intake point far enough out into the Potomac to avoid sediment plumes and other pollutants from Broad Run and Sugarland Run, two Potomac River tributaries located just upstream of the existing intake on the Virginia side of the river. The

Authority's application was based on the premise that, during the localized flood events that generate the sediment plumes from these Virginia tributaries, water quality at the middle of the river would be better than at the Virginia shore.

The Authority's proposal raised complicated issues concerning how water quality and quantity in the Potomac are being affected by rapid development within the river basin. In July 1997, the WMA stated that it was not inclined to issue a permit for a mid-river intake without a more careful consideration of these larger basin-wide issues, and suggested that the Authority consider withdrawing its application pending the completion of the appropriate studies. The Authority declined to withdraw its application. In December 1997, the WMA issued a preliminary denial of the permit on the grounds that there existed alternatives to disturbing the river that would address water quality problems at their source, and that, based on all of the information submitted, the purported benefits of the proposed construction did not justify its environmental impacts.

The Authority exercised its rights under Maryland law to contest the WMA's denial in an administrative contested case hearing. MDE is the final decision maker in matters involving waterway construction permits, *see* MD. CODE ANN., ENV'T ART. §§ 5-503, 5-504, 5-507, and has delegated to an Administrative Law Judge of the Maryland Office of Administrative Hearings the authority to hold trial-type adjudicatory hearings, render findings of fact and conclusions of law, and issue a Proposed Decision recommending how MDE should rule. *See* MD. CODE ANN., STATE GOV'T ART. §§ 10-205, 10-220 (1999 Repl. Vol.). The parties have the right to file "Exceptions" to the Proposed Decision and to request oral argument. *Id.*, § 10-216; COMAR 08.01.04.23. Based on the evidence collected at the hearing, the exceptions, and oral argument, MDE may either adopt, revise, or reverse the Proposed Decision within 30 days of the exceptions hearing. MD.

CODE ANN., STATE GOV'T ART. § 10-221; COMAR 08.01.04.24. MDE's final decision in a contested case constitutes final agency action that is subject to judicial review, and may be reversed if the reviewing court determines that the agency's decision, among other things, is unconstitutional, exceeds the statutory authority or jurisdiction of the final decision maker, results from an unlawful procedure, or is affected by any other error of law. MD. CODE ANN., STATE GOV'T ART. § 10-222(h).

The contested case concerning the Authority's permit application began in September 1998 with a pre-hearing conference at which the Authority raised the same arguments that Virginia raises in its brief concerning the effect of the Compact of 1785. The parties then briefed the Compact issue, with the Authority arguing, as does Virginia here, that it was entitled to a permit pursuant to its Compact rights.

Prior to the administrative hearing, the Administrative Law Judge ruled that, under the Maryland waterway construction statute, MDE could not consider the applicant's "need" or justification for its proposed project in deciding whether to issue a waterway construction permit. (App. 143a.) Accordingly, the WMA was limited at the hearing to putting on evidence describing the environmental impact that construction of the intake would have, and neither party could address the purported benefits of a mid-river intake. (App. 152a-153a.) At the close of WMA's case, the Authority moved for judgment on the strength of the ALJ's pre-trial ruling. (App. 144a.) The ALJ granted the Authority's motion and issued a Proposed Decision recommending that MDE issue a permit for the intake. Because the ALJ ruled in the Authority's favor on the merits, she did not reach the Compact issue. (*Id.*)

The WMA exercised its right to file exceptions to the ALJ's Proposed Decision, arguing that the ALJ's pre-trial ruling conflicted with the statute's mandate that MDE "weigh the respective advantages and disadvantages of the

proposed construction" and base its decision on the outcome. MD. CODE ANN., ENV'T ART. § 5-507(a). Oral argument on the exceptions was held on April 30, 1999 (App. 146a), and the final decision maker issued his Opinion and Order on June 7, 1999, remanding the case to the ALJ to hear evidence on the "need" issues (*i.e.*, the project's benefits or "advantages") that the ALJ had ruled were irrelevant. (App. 166a-169a.)

On remand, the parties agreed upon a November 12, 1999 date for resumption of the hearing, which was held over six days ending on November 23, 1999. The hearing focused on a comparison of water quality at both the middle of the river and at the Virginia shore, and also addressed differences in water quality that may affect the efficiency of the water treatment process and the relative health risks posed by the potential presence of *Cryptosporidium* in different spots within the Potomac – precisely those issues that Virginia cites in support of the gravity of its claim. Br. at 28-29. At the ALJ's request, the parties filed post-hearing Proposed Findings of Fact and Conclusions of Law, including extensive briefing of the Compact issue. The ALJ is required to issue a Proposed Decision by May 30, 2000. COMAR 08.01.04.22C. The parties will then have the opportunity to file exceptions to the proposed decision. A final decision is expected this Fall.

REASONS FOR DENYING THE MOTION

I. THE CONTROVERSY IN THIS CASE IS NOT JUSTICIABLE AND CAN BE RESOLVED IN A PENDING PROCEEDING IN WHICH THE SAME CLAIMS BROUGHT HERE HAVE BEEN RAISED BY A VIRGINIA POLITICAL SUBDIVISION.

Virginia's motion for leave should be denied for the principal reason that this Court's original jurisdiction extends to "Controversies between two or more States," and no controversy exists between Maryland and Virginia other than the one that is the subject of an ongoing administrative proceeding in which the exact claims asserted in this case can be and have been raised on behalf of Virginia by one of its political subdivisions. The resolution of that controversy has not resulted in any actual, concrete injury because no conclusive determination has been made whether to issue a permit allowing the construction of the water intake facility that lies at the heart of that case and this one. The need for such a determination is critical because the issuance of the requested permit would eliminate the dispute giving rise to Virginia's complaint against Maryland. Stripped of that dispute, this case involves only an abstract disagreement between these States as to the proper interpretation of the Compacts they previously executed. Such disagreements do not give rise to a justiciable controversy warranting the exercise of this Court's original jurisdiction.

Recognizing the "delicate and grave" nature of its original jurisdiction, *Louisiana v. Texas*, 176 U.S. 1, 15 (1900), and the concern that the Court not "reduce drastically" its "attention to those controversies for which this Court is a proper and necessary forum," *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 505 (1971), the Court has stated "more than once that our original jurisdiction should be exercised 'sparingly.'" *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992); *Maryland v.*

Louisiana, 451 U.S. 725, 739 (1981); *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976)). It is "justified only by the strictest necessity," *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 505, and "obligatory only in appropriate cases" that present a claim of sufficient "seriousness and dignity," *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972), and lack "an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. at 77. Virginia's request for leave should be denied because the issues it asks this Court to resolve have been asserted prematurely, and those issues are not only pending in another forum in which appropriate relief may be obtained, but must be addressed there if the permit request triggering this suit is to be denied.

A. Virginia's Complaint Does Not Allege A Justiciable Controversy.

As Virginia makes clear in its brief, this case has been filed because the Fairfax County Water Authority has not prevailed in proceedings it commenced to obtain from the Maryland Department of the Environment a waterway construction permit allowing it to build a new water intake facility in the Potomac River. *See, e.g.*, Br. at 19 ("For more than four years Maryland has refused to grant Virginia a permit to build a new intake in the waters of the Potomac."); *id.* at 10 ("Maryland's treatment of Virginia over the course of the past four years gives rise to the present controversy."). Virginia acknowledges, however, that the Maryland administrator responsible for making a conclusive determination on the Authority's permit request has not yet rendered such a decision. Br. at 16. Without a final decision, Virginia's complaint does not present a justiciable "controversy" within the meaning of Article III, § 2 of the Constitution.

Article III, § 2 does not "confer jurisdiction upon the court merely because a state is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation

of the constitutional grant." *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923). "To constitute such a (justiciable) controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress." *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). The complaint should be dismissed because Virginia has not suffered any concrete injury and so cannot "demonstrate that the injury for which it seeks redress was directly caused by the actions of another State." *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976).

Despite Virginia's complaints about the ongoing Maryland administrative permit proceeding, that proceeding has not generated any "actual or threatened injury amenable to judicial remedy." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982). On the contrary, the Authority's permit request is still pending and awaiting from the administrative decision maker "a final and authoritative determination." *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). Until such a "conclusive determination" is rendered this Fall, neither the Authority nor Virginia can claim that "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985).

"Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U.S. 296, 309 (1921). Such an invasion simply does not exist here. Rather, Virginia asks this Court "to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of

government." *Massachusetts v. Mellon*, 262 U.S. at 484-85. That is not a sufficient basis for the exercise of this Court's original jurisdiction because that jurisdiction can be asserted "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made. . . ." *Id.* Virginia points to no such injury here.

While Virginia complains that thousands of dollars in "unnecessary solids treatment expenses" have been incurred annually during the pendency of the Authority's waterway construction permit request (and, presumably, the 14 years prior to that request), Br. at 10, 28, virtually any permit applicant sustains some kind of opportunity costs while awaiting a final decision, but that is not enough to constitute an actual or concrete injury warranting judicial relief. The theoretical "increased health risks" that Virginia cites (Br. at 29) similarly do not establish a justiciable controversy, particularly in light of Virginia's acknowledgment that "the Authority currently produces finished drinking water that complies with all federal and state water quality standards . . . ." Br. at 11. The motion for leave should thus be denied because no justiciable controversy exists between Virginia and Maryland.

B. An Alternative Forum Exists In Which Virginia's Claims Have Been Asserted And Can Be Resolved.

Original jurisdiction should not be exercised for the additional reason that the Maryland proceeding "provides an appropriate forum in which the issues tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. at 797. This Court has stated in similar contexts that it is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973). The ongoing Maryland proceeding is such a forum and confirms the absence of any need to exercise original jurisdiction in this case.

First, Virginia's asserted reason for filing suit would

disappear if the administrative decision maker or the Maryland courts hold that the Authority is entitled to the permit it has requested. Indeed, the very issues that Virginia posits as the basis for the gravity and seriousness of its claim – water quality at the middle of the river and at the Virginia shore, the comparative efficiency of the treatment process at the two locations, and the relative health risk from *Cryptosporidium* posed by withdrawing water from the two locations – are being litigated in this alternative forum. Br. at 28-29. These are complicated issues, some of which – most notably, those involving *Cryptosporidium* – involve scientific issues of essentially first impression. Resolution of these issues in favor of the Authority in the pending Maryland proceeding means that the Authority and Virginia "will have been vindicated," *Arizona v. New Mexico*, 425 U.S. at 797, and no need would exist to address the "controversy" Virginia cites as the basis for filing its suit against Maryland.

Second, much like Arizona was in *Arizona v. New Mexico*, 425 U.S. at 794, Virginia is directly represented in the pending Maryland proceeding because the Authority, as Virginia acknowledges, is "a political subdivision created under the laws of the Commonwealth of Virginia." Br. at 7. *See also Maryland v. Louisiana*, 451 U.S. at 743 (distinguishing *Arizona v. New Mexico* on the ground that "one of the three electric companies involved in the state-court action in New Mexico was a political subdivision of the State of Arizona. Arizona's interests were thus actually being represented by one of the named parties to the suit."); *Wyoming v. Oklahoma*, 502 U.S. at 452 (stating that "no pending action exists to which we could defer adjudication on this issue" and that "[e]ven if such action were proceeding, however, Wyoming's interests would not be directly represented").

Conversely, the legal support Virginia offers for the exercise of original jurisdiction in this case misses the mark. Although Virginia asserts that "[t]his Court is the only forum situated to pass fairly upon the proper interpretation

of the interstate compacts and arbitration awards between Maryland and Virginia," Br. at 24, the case that Virginia cites in support of its contention that "[t]he Maryland administrative proceeding is not competent to determine Virginia's rights," *id.*, was not even an original action but rather was decided after certiorari was granted to the Supreme Court of Appeals of West Virginia. *See State ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). Rather than hold that the West Virginia court was "not competent" to address the Compact at issue in that case, this Court simply observed that "it must have *final* power to pass upon the meaning and validity of compacts" and that "[a] State cannot be its own *ultimate* judge in a controversy with a sister State." *Id.* at 28 (emphases added). In making these observations, the Court relied on *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), which also originated in a State court. The mere presence of an interstate Compact thus no more warrants the invocation of original jurisdiction than did the existence of the constitutional claim in *Arizona v. New Mexico* in which this Court refused to intervene in Arizona's dispute with New Mexico, and instead deferred to an ongoing State proceeding in which the same issue had been raised. *See also Louisiana v. Mississippi*, 488 U.S. 990 (1988).

There is similarly no merit in Virginia's contention that it would be "futile to require that Virginia, through the Authority, litigate the scope of Virginia's interstate compact rights in a Maryland tribunal." Br. at 25. The administrative law judge in the ongoing Maryland proceeding did not reach the Compact issue because it was her view that the Authority was entitled to the waterway construction permit as a matter of Maryland law. (App. 144a.) This does not evidence an improper failure to address the Compact issue, as Virginia suggests, but rather is in complete accord with the settled principle that constitutional issues should be avoided when a case can be decided on a non-constitutional ground. *See, e.g., Dept. of Commerce v. United States House of Representatives,* 525 U.S. 316, 337 (1999).

Related principles of federalism and comity reflected in the Court's abstention jurisprudence also counsel against accepting Virginia's invitation for this Court "to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941). Although the Maryland administrative law judge was reversed by the final decision maker in her interpretation of Maryland law, she initially held and may again reach the conclusion that the Authority is entitled to a waterway construction permit as a matter of State law. The Maryland courts could also render such a determination in the event of an appeal from the grant or denial of the permit. "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court" that obviates the need to resolve the federal issue. *Id.*

Similarly, in light of Maryland's comprehensive administrative and judicial review process discussed earlier, in which Virginia's Compact claims can be raised and preserved for this Court's review, exercising original jurisdiction also creates needless friction with Maryland's "unified method for the formation of policy and determination of cases" involving water management and the environment. *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 (1943). This friction is only heightened by the ongoing nature of the Maryland administrative proceedings. *See Younger v. Harris*, 401 U.S. 37 (1971).

Claiming that the outcome of these proceedings has been influenced by "parochial factors," Br. at 27, Virginia complains that "submitting the compact issue to Maryland's legal system has been pre-determined by Maryland" (*id.* at 26) because that issue was decided by the Maryland Court of Appeals in *Middlekauff v. LeCompte*, 149 Md. 621, 132 A. 48 (1926). This assertion is fundamentally flawed for the principal reason that, as stated previously, the waterway construction permit request can be granted on State law grounds without regard to the Compact issue.

Moreover, Virginia assumes too much in suggesting that the current Maryland Court of Appeals would follow a decision issued three-quarters of a century ago if, as Virginia contends, that case was "wrongly decided." Br. at 26 n.10. Refusing to accept the same "assumption that state judges will not be faithful to their constitutional responsibilities," *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975), this Court rejected the similar contention "that exhaustion of state appellate remedies should not be required because an appeal would have been 'futile.'" *Id.* at 610. *See also Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 500 ("While this Court, and doubtless Canadian courts, if called upon to assess the validity of any decree rendered [by Ohio courts] against either Dow Canada or Wyandotte, would be alert to ascertain whether the judgment rested upon an even-handed application of justice, it is unlikely that we would totally deny Ohio's competence to act if the allegations made here are proved true.").

There is likewise no merit in Virginia's complaint that this Court's jurisdiction should be exercised because proposed Maryland legislation "would prevent MDE from issuing the Authority's waterway construction permit." Br. at 17. That proposed legislation has since been amended, and the law enacted by the Maryland legislature preserves MDE's ability to issue a waterway construction permit to the Authority in the administrative proceeding. *See* Maryland Senate Bill 729 (enrolled April 7, 2000). Even if this legislation did have the effect, however, of blocking the Authority's mid-river intake proposal, the Maryland administrative and judicial process is fully able to adjudicate and determine whether the same Compact claim raised here overrides such a law.[1]

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[1] There is similarly no merit in Virginia's contention that the Maryland Governor's views of the permit request constitute evidence of impermissible "partiality" (Br. at 27)

(continued...)

Virginia's claim that "Maryland's water appropriation permitting system violates Virginia's interstate compact rights," Br. at 29, is even less appropriate for the exercise of this Court's original jurisdiction. Virginia concedes that "Maryland, to date, has not denied any Virginia user a permit to appropriate water from the Potomac River." *Id.* This includes the Authority, which obtained its most recent appropriation permit in 1996. Br. at 13. This concession confirms the absence of any justiciable controversy as to the water appropriation issue.

Moreover, despite Virginia's assertion that the pending Maryland administrative proceeding is "not an alternative forum to resolve Virginia's claim" with respect to water appropriation, Br. at 29, that claim would properly be the subject of a future administrative proceeding in the unlikely event that a Virginia entity is ever denied an appropriation permit. As with the pending waterway construction litigation, Virginia's Compact claim would have to be decided in any such future Maryland administrative litigation if a waterway appropriation permit request is to be denied.

Virginia has simply failed to demonstrate any manifest need for this Court to exercise its jurisdiction, as an alternative forum exists in which Virginia's claims can be resolved and in fact are now in the process of being decided. The motion for leave should accordingly be denied.

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[1] (...continued)
that detracts from the adequacy of the ongoing Maryland proceeding. Indeed, Virginia concedes elsewhere in its brief that "the Governor of Maryland has no role under Maryland law in the granting or denying of waterway construction permits . . . ." *Id.* at 15.

II. THE RIPARIAN RIGHT TO BUILD FROM THE VIRGINIA SHORE INTO THE POTOMAC IS A PRIVATE RIGHT THAT IS SUBJECT TO MARYLAND'S POLICE POWER AUTHORITY TO REGULATE THE ENVIRONMENT.

Even if this case presented a justiciable controversy that cannot be remedied in another forum, Virginia's motion for leave should be denied because Maryland has not transgressed Virginia's Compact rights by regulating the Potomac as it has in this case. As this Court has stated, "the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) (citing *Alabama v. Texas*, 347 U.S. 272 (1954); *California v. Washington*, 358 U.S. 64 (1958); *Virginia v. West Virginia*, 234 U.S. 117 (1914)). Referring this case to a special master is unwarranted and would "needlessly add to the expense that the litigation must bear," *Ohio v. Kentucky*, 410 U.S. at 644, because Virginia has no cause of action as a matter of law.

A. Maryland Has Not Surrendered Its Police Power Authority To Regulate The Submerged Lands Beneath The Potomac.

Virginia places heavy reliance on the Compact of 1785 in arguing that Maryland does not have the authority to regulate the placement by Virginia citizens of wharves and improvements beyond the low water mark in the Maryland portion of the Potomac River. Br. at 22, 30. Nothing in the Compact, however, strips Maryland of its inherent ability to exercise regulatory jurisdiction over construction within its territory.

Article VII of the Compact, upon which Virginia's claims rest, provides:

> The citizens of each state respectively shall have full property in the shores of [the] Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river. . . .

(App. 3a.) The "privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river" is a private property right, traditionally referred to as a "riparian right." *See, e.g., Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1870) (riparian ownership includes "the right to make a landing, wharf or pier . . . subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public"); *Dutton v. Strong*, 66 U.S. (1 Black) 23, 31-32 (1861) (riparian right to construct wharves and piers limited so as not to obstruct "the paramount right of navigation"); *Norfolk City v. Cooke*, 68 Va. (27 Gratt.) 430, 434 (1876) ("These rights both at common law and by statute, are secured to the riparian owner, to erect wharves, piers, or bulk heads . . . subject only to such general rules and regulations as the legislature may prescribe; and the only limitation upon such right is, that navigation may not be obstructed, or the rights of others be injured."); *Baltimore & Ohio R. Co. v. Chase*, 43 Md. 23, 35-36 (1875). *See generally Shively v. Bowlby*, 152 U.S. 1, 18-25 (1894) (summarizing the riparian rights available to citizens of the original thirteen colonies).

Courts in Virginia, Maryland, and elsewhere have universally recognized that, like all private property rights, "riparian rights" such as the property rights reserved in the Compact are subject to regulation under the government's police power. *See, e.g., Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875, 880 (1904) ("we think it well established that the right to build wharves is one which is subject to state regulation"); *Harbor Island Marina, Inc. v. Board of County Com'rs of Calvert County*, 286 Md. 303, 318-19,

407 A.2d 738, 746-47 (1979) (as property, the riparian right to wharf out is subject to public regulation). It is well-settled that the States' police power includes the right to regulate for environmental protection. *See, e.g., Bureau of Mines of Maryland v. George's Creek Coal & Land Co.*, 272 Md. 143, 175, 321 A.2d 748, 765 (1974) (mining regulation constitutes a "reasonable regulation under the State's police power calculated to protect the environment and to preserve State-owned land for public use for present and future generations of citizens"); *Kepo'o v. Watson*, 87 Hawaii 91, 99, 952 P.2d 379, 387 (1998) (environmental regulation is an exercise of the State's police power); *Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 129 Wash.2d. 464, 479 n.18, 918 P.2d 923, 930 n.18 (1996) (same); *Hayes v. Howell*, 251 Ga. 580, 585, 308 S.E.2d 170, 176 (1983) (same).

Article VII of the Compact contains no language waiving the power of either Maryland or Virginia to regulate those reserved rights, which have always been subject to governmental regulation on both sides of the Potomac. On the contrary, the Compact does not give rise to even a suggestion that either State intended to give up such a power. Nor could it, as implying an intent to relinquish such an attribute of sovereignty would directly contravene two fundamental principles, each of which confirms that Maryland retained its sovereign right to regulate the exercise of riparian rights within its territory.

First, under the "reserved powers" doctrine, a State may not contract away certain sovereign powers, including its police power. *See, e.g., Stone v. Mississippi*, 101 U.S. 814 (1879); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848). *See also United States v. Winstar Corp.*, 518 U.S. 839, 874 & n.20, 888-89 & nn.33 and 34 (1996). In these cases, "the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable even by express grant." *Atlantic Coast Line R.*

Co. v. City of Goldsboro, 232 U.S. 548, 558 (1914) (quoted in *United States v. Winstar*, 518 U.S. at 888). Regulation of riparian rights is no exception to the rule that a State cannot surrender its police power, as "all contract and property rights are held subject to its fair exercise." *Id.*

Second, even when a sovereign power can be relinquished by contract, such a contract is subject to the well-established canon of construction that no sovereign power will be considered surrendered absent clear and unambiguous language set forth in "unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)). *See generally United States v. Winstar*, 518 U.S. at 871-79. Thus, in these cases, "neither the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken." *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446 (1861); *see also Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830).[2]

The principles set forth in these cases confirm that Maryland has not waived its right to regulate the exercise of

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[2] While these principles have been developed under the Contract Clause, they have been applied to treaties between sovereigns. *See United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987) (holding that the United States had not waived its sovereign interest in its navigational servitude in submerged lands when it entered into a treaty with the Choctaw Indian tribe of the sovereign Cherokee Nation conveying title to those lands). Therefore, "whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same." *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837).

riparian rights within its portion of the Potomac, whether by Virginians or Marylanders. Virginia retains the same right with respect to construction within the Virginia portion of the river. *See* Compact of 1958, Preamble (App. 60a) (declaring that "Maryland is the owner of the Potomac River bed and waters to the low water mark of the southern shore thereof" and that "Virginia is the owner of the Potomac River bed and waters southerly from said low water mark"). The Compact did not surrender or restrict Maryland's police powers within its own territory because those powers cannot be surrendered, and the Compact in any event contains no language – much less the requisite "unmistakable terms" – demonstrating that Maryland intended such a surrender. *See also United States v. Winstar*, 518 U.S. at 877-78 (describing *Jicarilla Apache Tribe*, 455 U.S. 130, and *Cherokee Nation of Oklahoma*, 480 U.S. 700, as refusing to infer from silence a waiver of sovereign power).

Consistent with these principles, courts have repeatedly upheld Maryland's jurisdiction over piers, structures, and other riparian interests extending from Virginia into Maryland territory. *See, e.g., O'Neal v. Virginia & M. Bridge Co.*, 18 Md. 1 (1861) (upholding over arguments of Virginia Attorney General Maryland's right to tax portions of cross-Potomac bridge within Maryland); *Miedzinski v. Landman*, 218 Md. 3, 145 A.2d 220 (1958) (upholding Maryland statute passed at request of Governor of Virginia barring the operation of gaming devices on piers built out into the Potomac from the Virginia shore); *Bostick v. Smoot Sand & Gravel Corporation*, 260 F.2d 534 (4th Cir.1958) (upholding application of Maryland law to Virginians' riparian right to sand and gravel in the Potomac River).

Similarly, Virginians have for years recognized Maryland's jurisdiction over structures in the Maryland portion of the Potomac by applying to MDE and its predecessors for permits. For example, both the Town of Leesburg, Virginia in 1967, and the Authority in 1977 and again in 1996, applied to Maryland for permits to undertake

waterway construction in the Potomac. These actions further illustrate that Maryland did not relinquish its police power authority over the exercise of riparian rights when it entered into the Compact with Virginia in 1785, as "[i]t is hornbook contracts law that the practical construction of an ambiguous agreement revealed by later conduct of the parties is good indication of its meaning." *New Jersey v. New York*, 523 U.S. 767, 830-31 (1998) (Scalia, J., dissenting). *See also Air France v. Saks*, 470 U.S. 392, 396 (1985), quoting *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Vermont v. New Hampshire*, 289 U.S. 593, 619 (1933).

Interpreting the Compact as effecting a surrender of Maryland's jurisdiction over the exercise of riparian rights within the navigable portions of the Potomac would also conflict with the responsibilities of both Maryland and Virginia under the public trust doctrine. This doctrine provides that the States have the responsibility to preserve the navigable waters and the lands submerged beneath them for public use. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410-12 (1842); *Shively v. Bowlby*, 152 U.S. at 14-16; *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 435 (1892); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988). Recognizing that the public trust doctrine is an aspect of State sovereignty, this Court has observed that "the State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of peace." *Illinois Central*, 146 U.S. at 453.

This abdication is precisely what Virginia claims was the intent of both States when they entered into the Compact. Under Virginia's interpretation of the Compact, neither Maryland nor Virginia would be able to act under the public trust to regulate the exercise of riparian rights between the low water mark and the navigable channel of the Potomac River. Virginia would be powerless to act beyond the low water mark because that is the limit of its

jurisdiction. Maryland would similarly be precluded by the Compact from regulating in the same area for any purpose other than navigation. Such a construction of the Compact should be rejected because it directly contravenes public trust responsibilities that this Court has long held the States may not relinquish.

B. The Authority Has No Compact Right To Build The Proposed Intake Because The Compact Does Not Apply To The Non-Tidal Portion Of The Potomac.

Virginia's claim that the Compact surrendered Maryland's power to regulate the Authority's proposed intake fails for the additional and independent reason that the 1785 Compact was never meant to apply to the non-tidal stretches of the Potomac upstream of the District of Columbia – where the proposed intake would be located. In two decisions, the first of which dates back more than 170 years, Maryland courts have held that the Compact was entered into to resolve the two States' competing claims to the navigable tidewater and its rich fisheries, and did not apply to the non-navigable, non-tidal portion of the Potomac. *See Binney's Case*, 2 Bland 99 (Md. Ch. 1829); *Middlekauff v. LeCompte*, 149 Md. 621, 132 A. 48 (1926). Rather than challenge either of these decisions, Virginia entered into another Compact with Maryland in 1958 that replaced the 1785 Compact, limited itself to the tidewater portions of the Potomac (App. 60a, 66a), and carried forward prior cases construing Article VII of the 1785 Compact. (App. 75a.) This history has two consequences.

First, "[t]he rule, long settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926). Since 1829, Maryland courts have construed the 1785 Compact to be inapplicable to the non-navigable portion of the Potomac and have upheld

Maryland's right to pass laws regulating that part of the river. While Virginia argues that the first of the Maryland courts' interpretations "was rejected by the Black-Jenkins arbitrators in 1877" and that the second one "was wrongly decided," Br. at 26 n.10, Virginia never initiated any proceedings in this Court challenging those interpretations, as it acknowledges it did in 1957 when it sought "to enjoin Maryland from abrogating the Compact of 1785 by unilaterally regulating fishing activities in the *tidal* portion of the Potomac River." *Id.* at 6 (emphasis added) (citing *Virginia v. Maryland*, 355 U.S. 269 (1957)). It is too late now to challenge Maryland's right to regulate the non-tidal portion of the Potomac. *See Ohio v. Kentucky*, 410 U.S. 641, 650 (1973) (rejecting motion for leave to add claim when "Ohio for over 150 years has failed to assert, through proceedings available in this Court, the claim it now would raise in the face of Kentucky's legislative and judicial assertions of sovereignty over the river.") (footnotes omitted).[3]

Second, the Compact does not address the non-tidal stretches of the Potomac because Maryland did not have the power to grant riparian privileges to the submerged lands of the non-navigable Potomac. Upon statehood, Maryland and the other original colonies succeeded to the King of England's title to the land beneath the navigable waters. *Shively v. Bowlby*, 152 U.S. at 11-15. Under the English

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[3] *See also California v. Nevada*, 447 U.S. 125, 132 (1980) ("If Nevada felt that those [boundary] lines were inaccurate and operated to deprive it of territory lawfully within it[s] jurisdiction the time to object was when the surveys were conducted, not a century later."); *Michigan v. Wisconsin*, 270 U.S. at 307 (observing that "for a period of more than 60 years [Michigan] stood by without objection, with full knowledge of the possession, acts of dominion, and claim and exercise of jurisdiction on the part of the state of Wisconsin over the area in question.").

common law definition of navigability, "navigable waters" were limited to waters that were subject to the ebb and flow of the tide – tidewaters. *See The Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 453-57 (1851). *See also Barney v. Keokuk*, 94 U.S. (4 Otto) 324, 336 (1876) ("[I]n England, no waters are deemed navigable except those in which the tide ebbs and flows."). American courts applied the English common law "ebb and flow of the tide" test to determine navigability until 1851. *Compare The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825) *with The Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) at 453-57; *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); *Barney v. Keokuk*, 94 U.S. (4 Otto) at 337-38. Accordingly, at the time the two States entered into the Compact, Maryland held title only to the submerged lands beneath the tidal waters. *Browne v. Kennedy*, 5 Harris & J. 195 (Md. 1821).

Maryland did not have the power, therefore, to grant Virginians riparian privileges to the submerged lands in the non-tidal Potomac because those lands were privately held as of 1785. *Cf. United States v. Percheman*, 32 U.S. (7 Pet.) 51, 87 (1833) (in entering into treaties, "[t]he king cedes that only which belonged to him"). In the tidal Potomac, by contrast, Maryland could convey Virginians a right-of-way beyond the low water mark because Maryland owned the submerged lands. The Compact thus applies only to the tidal portions of the Potomac. *See Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 438 (1838) ("No construction of a treaty which would impair that security to private property which the laws and usages of nations would without express stipulation have conferred, would seem to be admissible further than its positive words require.").

The rights reserved by Article VII of the 1785 Compact ensured that Virginia's citizens would not be cut off from the navigable portion of the Potomac and would continue to be able to exercise their riparian rights to wharf out. Without entering into such an agreement, Maryland could have reserved the submerged lands beyond the low water

mark for the exclusive use of Marylanders. *See, e.g., McCready v. Virginia*, 94 U.S. (4 Otto) 391 (1876) (upholding conviction of a Maryland citizen under Virginia statute making it illegal for any non-Virginian to plant oysters in the submerged lands of Virginia's navigable waters); *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. at 879 (observing *McCready* established that "the navigable waters and the soil under them, within the territorial limits of a state, are the property of the state, to be controlled by the state, in its own discretion, for the benefit of the people of the state"). Thus, the Compact gave Virginians the valuable right to wharf out beyond the low water mark to the navigable channel in the Maryland portion of the Potomac. Such a riparian right, however, had always been subject to government regulation under the police power and the States' paramount interest in lands covered by the navigable waters.

C. Maryland Has The Authority To Regulate Water Withdrawals From Its Territory.

Virginia's claim that Maryland may not regulate the withdrawal of water from its own territory is similarly without merit. For support of this remarkable proposition, Virginia relies entirely on the "equitable apportionment" doctrine frequently applied to resolve two States' competing interests in interstate waters. Br. at 23. But none of the Court's equitable apportionment cases have involved a situation where, as here, one State seeks to withdraw water from another State's territory. As the Court declared in a seminal equitable apportionment decision, "[i]t is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters." *Kansas v. Colorado*, 206 U.S. 46, 93 (1907). *See also United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702-03 (1899) ("as to every stream within its dominion a state may . . . permit the appropriation of the flowing waters for such purposes as it deems wise"); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956-57 (1982) (recognizing State's

police power to regulate water withdrawals within its boundaries, while striking down Nebraska's reciprocity requirement as discriminating against interstate commerce in appropriated groundwaters). There is simply no authority to support the proposition that a State may not regulate the reasonable use of waters within its boundaries.

In sum, even if this case presented a justiciable issue for which there is no adequate alternative forum, Virginia's motion for leave should be denied because Maryland has not violated any rights in regulating the Potomac as it has for the past two centuries. This case presents no question warranting the exercise of this Court's jurisdiction.

CONCLUSION

For the reasons stated, the motion for leave should be denied.

Respectfully submitted,

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