No. 22O156, Original

IN THE

Supreme Court of the United States

STATE OF NEW YORK,

Plaintiff,

v.

STATE OF NEW JERSEY,

Defendant.

BRIEF AMICI CURIAE OF PROFESSORS JEFFREY B. LITWAK, PHILLIP J. COOPER, ET AL., IN SUPPORT OF PLAINTIFF STATE OF NEW YORK

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INTEREST OF AMICI CURIAE[1]

Jeffrey B. Litwak has been general counsel to an interstate compact agency since 1999 and is an adjunct law professor at the Lewis and Clark Law School, where he has taught Interstate Compact Law since 2004.[2] He is the author of *Interstate Compact Law: Cases and Materials* (Semaphore Press 4th ed. 2020), the only casebook on interstate compact law, and co-author of *The Evolving Use and Law of Interstate Compacts* (ABA Publ'g 2d ed. 2016), and he has long had a strong interest in interstate compact law and, in particular, in the nature of compacts as binding agreements between states independent of other methods of interstate cooperation.

Bernard W. Bell is a professor of law and Herbert Hannoch Scholar at Rutgers Law School.[3] His scholarship focuses on interstate compacts within the context of his broader interest in administrative and

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[1] No counsel for a party in this case authored this brief in whole or in part. No one other than amici curiae or their counsel contributed monetarily to the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing.

[2] Mr. Litwak is also in-house General Counsel to the Columbia River Gorge Commission, an interstate compact agency authorized by Congress and created by Oregon and Washington. He is submitting this brief with the consent of, but independent of, the Columbia River Gorge Commission. Mr. Litwak used no agency time, equipment, or other resources to prepare this brief, and the brief reflects his views, not those of the Gorge Commission or Lewis and Clark Law School.

[3] Professor Bell participates in this brief independent of Rutgers University and the State of New Jersey. The brief reflects his views, not those of Rutgers University, Rutgers Law School, or the State of New Jersey.

constitutional law. Professor Bell also has a strong interest in the proper definition of the federal interest in interstate compacts and in the proper allocation of responsibilities and powers between signatory states.

Phillip J. Cooper is a professor of public administration at the Mark O. Hatfield School of Government at Portland State University with expertise in intergovernmental relations, administrative law, and public policy. He is also a fellow of the National Academy of Public Administration.[4] Dr. Cooper deals with interstate compact law in teaching graduate classes and in scholarly research. Clarity with respect to the status and binding authority of agreements is important to both sets of activity.

Neal D. Woods is a professor in the Department of Political Science at the University of South Carolina.[5] Professor Woods specializes in bureaucracy, federalism, state politics, and public policy, and has written dozens of articles, including on the evolution of intergovernmental cooperation, why States join interstate compacts, and interstate compacts as policy innovation in the States.

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[4] Dr. Cooper participates in this brief independent of the University and of the State of Oregon. The brief reflects his views, not those of the University, the State of Oregon, or the National Academy of Public Administration.

[5] Dr. Woods participates in this brief independent of the University and the State of South Carolina. The brief reflects his views, not those of the University or the State of South Carolina.

of the National Academy of Public Administration.[6] Professor Bowman has studied interstate compacts and written articles in many political science journals on the evolution of intergovernmental cooperation, why States join interstate compacts, and interstate compacts as policy innovation in the States.

Amici have no personal interest in the outcome of this case, but have a professional interest in the development of interstate compact law. The State of New Jersey and its amici have advanced an approach to analyzing the binding nature of interstate compacts that is inconsistent with longstanding principles of compact law, which date back to this Court's first compact case in 1823, and this Court's promotion of interstate compacts, and would have far-reaching negative ramifications on the use of interstate compacts and on interstate relations.

SUMMARY OF ARGUMENT

In the 199 years since this Court's first compact case, the Court has never held that a State may unilaterally terminate or withdraw from a congressionally approved interstate compact absent an express right to do so. New Jersey, however, has asserted a right to unilaterally withdraw from the Waterfront Commission Compact, Pub. L. No. 83-252, 67 Stat. 541 (1953) ("Waterfront Compact"), and dictate the terms of that withdrawal, even though the Waterfront Compact nowhere provides New Jersey

[6] Dr. Bowman participates in this brief independent of the University, the State of Texas and the National Academy of Public Administration. The brief reflects her views, not those of the University, the State of Texas, or the National Academy of Public Administration.

with that right. This Court should hold New Jersey to the bargain it struck with New York—and that Congress approved—and reject New Jersey's attempt to rewrite the Waterfront Compact based on default rules applicable to commercial contracts but which do not apply to congressionally approved interstate compacts.

I. The Court should decline New Jersey and its amici's invitation to unquestioningly apply default rules of contract interpretation to the Waterfront Compact. In so arguing, New Jersey and its amici ignore a substantial portion of this Court's jurisprudence, as well as the unique characteristics of interstate compacts and their role in the federal system.

While this Court has acknowledged that interstate compacts are contracts and that traditional tools of contract interpretation should guide courts in interpreting compacts, it has also stressed that a congressionally approved compact, such as the Waterfront Compact, is not just a contract—it is federal law. As a result, the rules of statutory interpretation apply to congressionally approved compacts. In many respects, the rules of contractual interpretation and statutory interpretation mirror each other. For instance, both begin from the principle that the text's plain meaning should control. But when rules of contractual interpretation conflict with rules of statutory interpretation, the former must yield to the latter. Here, New Jersey requests that this Court read a provision into the Waterfront Compact allowing it to unilaterally withdraw, based on default rules applicable to commercial contracts. But New Jersey's approach conflicts with the rule of statutory

interpretation that bars courts from adding terms to statutes, particularly when those terms conflict with the statute's express language. Because the Waterfront Compact was approved by Congress and is therefore federal law, the rules of statutory interpretation must prevail.

Not only does New Jersey's proposed default rule conflict with rules of statutory interpretation; it also makes little sense when applied to interstate compacts. Unlike commercial contracts, which are presumed to be temporary absent express language to the contrary, interstate compacts are designed to provide long-term solutions to problems that, by their nature, cannot be resolved by one State alone. Interstate compacts are thus designed to be permanent in nature, unless the contracting States explicitly say otherwise. That is not simply a hypothetical point. Many interstate compacts *do* expressly address termination or withdrawal, including compacts contemporaneous with the Waterfront Compact. If New Jersey's proposed default rule were the default rule, then one would expect States to omit an express provision granting themselves that right. Yet state practice shows the opposite. That practice reveals that the default rule for interstate compacts is not what New Jersey claims.

II. New Jersey and its amici also misunderstand the nature of interstate compacts when they argue that principles of sovereignty require that the Court read into the Waterfront Compact an implied right to unilaterally withdraw. By compacting with another State, a State necessarily cedes a portion of its sovereignty. This Court has thus rejected States' arguments that their sovereignty allows them to shed

themselves of their compact obligations in a manner inconsistent with the compact itself, noting that interstate compacts are often used as a substitute for interstate litigation before the Supreme Court. There is no reason to deviate from that conclusion here.

III. The harmful effects of allowing New Jersey to unilaterally withdraw from the Waterfront Compact will resonate beyond this case and the Waterfront Compact, and thus underscore why New Jersey's position cannot be the default rule. Recognizing that interstate compacts promote certainty and minimize interstate litigation, for more than 100 years, this Court has encouraged States to negotiate compacts to resolve their disputes. Yet a rule allowing States to withdraw from compacts at will absent an express term in the compact would discourage States from enacting new compacts and introduce instability into a number of existing compacts, which touch on nearly every policy area of interstate concern. The rule that New Jersey proposes would therefore be widely felt and would undermine considerable efforts by this Court to encourage States to enter into compacts. The Court should not endorse such a destabilizing result.

ARGUMENT

I. The Waterfront Compact is federal law, not a mere commercial contract, and should be interpreted to preserve compact stability.

New Jersey and its amici wrongly urge the Court to mechanically apply default rules of contract interpretation to imply an at-will withdrawal provision in the Waterfront Compact. New Jersey argues (Br. 14–18) that because the Waterfront Compact is silent on termination or withdrawal, it is terminable at will—a position in which the United

States (Br. 17–18) and the State amici concur, citing "ordinary principles of contract law" (Texas Br. 19).

In so arguing, New Jersey and its amici start from an incorrect premise—that the Waterfront Compact is silent on the question of withdrawal. As discussed in New York's brief (Br. 19–20), the Waterfront Compact contains language governing withdrawal: the "concurred in" provision requires the consent of both New York and New Jersey to alter the responsibilities of the Waterfront Commission. But even if the Waterfront Compact were silent on withdrawal, the Court should not apply default contract-interpretation rules to imply an at-will termination provision. To do so would be inconsistent with this Court's jurisprudence, federalism and separation-of-powers principles, background assumptions about interstate compacts, and the parties' intent.

A. Implying an at-will termination provision in a congressionally approved interstate compact clashes with this Court's jurisprudence, as well as federalism and separation-of-powers principles.

New Jersey's assertion (Br. 14) that the Waterfront Compact is terminable at will rests chiefly on this Court's statement in *Tarrant Regional Water District v. Hermann* that "[i]nterstate compacts are construed as contracts under the principles of contract law." 569 U.S. 614, 628 (2013). Yet in case law that New Jersey and its amici ignore, this Court has declined to interpret interstate compacts by mechanically applying contract-law principles. On the contrary, the Court recognizes that while contract-law principles will inform how interstate compacts are construed, they are not the only interpretive tools. For

once Congress approves an interstate compact, the compact is "transform[ed] . . . into a law of the United States." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). At that point, the compact is "not just an agreement, but federal law," *Kansas v. Nebraska*, 574 U.S. 445, 454 (2015), and this Court will interpret it as "a federal statute enacted by Congress," *Alabama v. North Carolina*, 560 U.S. 330, 351 (2010). So when principles of statutory interpretation clash with principles of contractual interpretation, the Court has applied the former, not the latter, to interstate compacts. *See id.* at 351–52.

Applying that rule, the Court has declined to imply default contract-law provisions in interstate compacts, as New Jersey urges, when doing so would impermissibly add provisions to federal law. In *Alabama v. North Carolina*, for instance, the Court held that, unlike "every [other] contract[]," congressionally approved interstate compacts do not include an implied duty of good faith and fair dealing. *Id.* at 351–52. The Court rested that holding on the reality that such compacts are "not . . . just contract[s], but federal statute[s]." *Id.* at 351; *see also Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (applying principles of statutory interpretation to an interstate compact because "a congressionally approved compact is both a contract and a statute"). And because courts "do not—[and] cannot—add provisions to a federal statute," this Court could not add an implied covenant to an interstate compact. *Alabama v. North Carolina*, 560 U.S. at 352. To do so, the Court reasoned, would infringe on the rights of the "sovereign States" who drafted the compact and on "the political branches" who "consented" to it. *Id.* Declining to read unwritten terms into a

congressionally approved interstate compact accordingly avoids "federalism and separation-of-powers concerns that would arise" when courts "rewrite" interstate compacts. *Id.*; *see also International Union of Operating Eng'rs, Local 542 v. Delaware River Joint Toll Bridge Comm'n*, 311 F.3d 273, 280 (3d Cir. 2002) (declining to imply a term permitting amendments to the compact through the passage of similar legislation in both states in the absence of an express right to do so).

So too here. What New Jersey paints as a default rule of contract interpretation is really a grant of a right—to unilaterally withdraw—that the Waterfront Compact nowhere contains. New Jersey's proposed default rule would therefore require the Court to impermissibly add a provision not only to the Waterfront Compact (a federal statute), but also to the many other interstate compacts that do not create vested rights and that lack withdrawal provisions, as New Jersey acknowledges (Br. 1a–43a). Under first principles of statutory interpretation, this Court should decline to do so.

B. The logic underlying default rules of at-will contract termination does not extend to interstate compacts generally or to the Waterfront Compact specifically.

Even if the Court could imply provisions into congressionally approved compacts, it would make little sense to apply default rules of contract termination to imply a provision authorizing at-will withdrawal from an interstate compact. Those rules allow parties to a commercial contract of indefinite duration to terminate the contract at will because "few commercial concerns remain viable for even a

decade"—a principle that "[m]en and [w]omen of commerce know . . . intuitively." *Jespersen v. Minnesota Min. & Mfg. Co.*, 700 N.E.2d 1014, 1017 (Ill. 1998); *accord Baldwin Piano, Inc. v. Deutsche Wurlitzer GmbH*, 392 F.3d 881, 885 (7th Cir. 2004). A rule allowing at-will termination thus helps those men and women "achieve the flexibility needed to respond to market demands by entering into agreements terminable at will." *Jespersen,* 700 N.E.2d at 1017. But interstate compacts are not commercial contracts. Compacts embody political compromises between the "constituent elements of the Union" and serve as tools to address "interests and problems that do not coincide nicely either with national boundaries or with State lines." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994); *see KMOV TV, Inc. v. Bi-State Dev. Agency of the Mo.-Ill. Metro. Dist.*, 625 F. Supp. 2d 808, 811 (E.D. Mo. 2008) (noting that interstate compacts "represent a political compromise between states, not a commercial transaction").

Interstate compacts also "perform[] high functions in our federalism," as "one of two methods under our Constitution of settling controversies between States," the other being lawsuits in this Court. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 279 & n.5 (1959); *accord Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938). Indeed, this Court has recognized that interstate compacts stand on equal footing with the Court's decisions in cases within its original jurisdiction. *See State ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951). So just as a decision of this Court under its original jurisdiction binds a State such that the State's legislature "could not alter" or "disregard it," interstate compacts bind States not to alter or

disregard their commitments when they decide to resolve their disputes "by the more effective means of an agreement with other States." *Id.*

Given their lofty place in our federal system and the subjects they cover, many compacts may be permanent in nature. That permanency enables States "to develop dynamic, self-regulatory systems . . . through a coordinated legislative and administration process" and adapt to "evolv[ing] . . . new and increased challenges that naturally arise over time." Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Suspension: Using Old Tools to Solve New Problems*, 9 Roger Williams U. L. Rev. 71, 92 (2003). Put another way, interstate compacts enable States not only to "control the solution to a problem" in the immediate term but also to "shape the future response as the problem changes." *Id.*

Thus, an interstate-compact dispute, like any "controversy concern[ing] two States," presents "a world wholly different from that of a law-suit between John Doe and Richard Roe over the metes and bounds of Blackacre." *Kansas v. Nebraska*, 574 U.S. at 453–54 (quoting Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 705 (1925)). And this Court's "role" in resolving such disputes "differs from the one the Court undertakes in suits between private parties." *Id.* (cleaned up). In a private contractual suit, the Court's decisions "directly affect only the rights and obligations of the individual [contracting] parties." *Entergy Ark., Inc. v. Nebraska*, 358 F.3d 528, 542 (8th Cir. 2004). In an interstate-compact suit , by contrast, the decision "may directly

impact the population, the economy, and the physical environment in the whole of the compact area," with the Court ultimately resolving "delicate questions bearing upon the relationship among sovereign polities with respect to matters of both regional and national import." *Id.*; *see also League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 507 F.2d 517, 523 (9th Cir. 1974) (noting that an interstate compact "deals with much more than mere local concerns").

Given the wide-ranging interests at stake in interstate compacts, the default presumption has always been and should be that interstate compacts of indefinite duration will remain viable in the long term. This ensures compacts remain on the same footing as federal law (of which congressionally approved compacts are a part) and treaties, which, like interstate compacts, are contracts between sovereign entities.

Indeed, in the treaty context, the default rule governing withdrawal is the opposite of what New Jersey urges here: under the Vienna Convention on the Law of Treaties, a treaty may be terminated, or a party may withdraw from a treaty, either "in conformity with the provisions of the treaty" or "at any time by consent of all the parties after consultation with the other contracting States." Vienna Convention on the Law of Treaties, May 23, 1969, art. 54, 1155 U.N.T.S. 331.[7] So when a treaty contains no provision

[7] This Court has long recognized the similarities between treaties and interstate compacts. *See, e.g.*, *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 725 (1838) (describing congressionally approved interstate compacts as "operating with the same effect as a treaty between sovereign powers"); *see also*

regarding termination, denunciation, or withdrawal, it is "not subject to denunciation or withdrawal unless: (*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (*b*) a right of denunciation or withdrawal may be implied by the nature of the treaty." *Id.* art. 56(1).[8] In fact, a default right of unilateral withdrawal is even more questionable in the context of interstate compacts than international treaties, since the relationship between States that are part of one national sovereign is far closer and more interdependent than sovereign States. The Court should therefore decline to rely on default rules of commercial contract termination, which derive from an assumption of impermanency rather than permanency, to imply that States can terminate interstate compacts at will.

In short, the distinction between interstate compacts and ordinary commercial contracts compels the result that New York urges in this case. As this Court has acknowledged, the Waterfront Compact was a "joint action by way of constitutional compact," *De Veau v. Braisted*, 363 U.S. 144, 147 (1960), and

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New Jersey v. New York, 523 U.S. 767, 831 (1998) (Scalia, J., dissenting) ("[T]he Compact here is of course a treaty.").

[8] No right of denunciation or withdrawal would be implied by the nature of the Waterfront Compact here under the law of treaties. The International Court of Justice, for example, has concluded that no such right was implied by the nature of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System between Hungary and Slovakia, because "the Treaty," like the Waterfront Compact here, "establishe[d] a long-standing and durable regime of joint investment." *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, 7 ¶ 100 (Sept. 25).

that it was "not for this Court to substitute its judgment for that of Congress and the Legislatures of New York and New Jersey regarding the social surgery required by a situation as gangrenous as exposure of the New York waterfront had revealed," *id.* at 158.[9] A decision favoring New Jersey here would let New Jersey unilaterally dictate the terms of terminating the Waterfront Compact and determine the manner of law enforcement on the States' joint waterfront. That is the antithesis of joint action by Congress, New York, and New Jersey.

C. Implying an at-will termination provision is inconsistent with the parties' intent.

The "customary practice[]" of other compacting States also shows that "the intent of the parties" here was not to permit at-will termination. *Tarrant*, 569 U.S. at 633.

States and Congress know how to provide for at-will withdrawal expressly in compacts and have frequently done so. Interstate compacts, including those contemporaneous with the Waterfront Compact, expressly allow one party to terminate or withdraw at will. In one particularly relevant example, New York and New Jersey (in the congressionally approved Palisades Interstate Park Compact) specified that

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[9] New Jersey's highest court has recognized as much, holding that the New Jersey and New York Legislatures, in entering into the Waterfront Compact, "intended to deal with joint problems existing throughout a single port area situated partly in New York and partly in New Jersey, and not with separate problems in separate ports of each State." *In re Waterfront Comm'n of N.Y. Harbor*, 189 A.2d 36, 48 (N.J. 1963). The court found it "doubtful whether a single legislature could unilaterally impair the powers of the Waterfront Commission, even if it so desired." *Id.*

"[e]ither the state of New York or the state of New Jersey may[,] . . . without the concurrence of the other state, withdraw, . . . any of the functions, jurisdiction, rights, powers and duties transferred to the commission." H.R.J. Res. 445, 75th Cong., 50 Stat. 719, 721 (1937).

Other compacts are in accord. For instance, the interstate compact that created the Western Interstate Commission for Higher Education, which Congress approved just four days before it consented to the Waterfront Compact, provides that "[a]ny state or territory may at any time withdraw from this Compact by means of appropriate legislation to that end." Pub. L. No. 83-226, 67 Stat. 490, 493 (1953). And the South Central Interstate Forest Fire Protection Compact, which Congress approved in 1954 (just one year after Congress approved the Waterfront Compact), provides that it "shall continue in force and remain binding on each state ratifying it until the legislature or the Governor of such state takes action to withdraw therefrom." Pub. L. No. 83-642, 68 Stat. 783, 785 (1954).[10]

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[10] Other interstate compacts that permit at-will withdrawal or termination similarly do so explicitly. *See, e.g.*, Southeast Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, 99 Stat. 1909, 1922 (1986) ("Any state may withdraw from the compact by enacting a law repealing its authorization legislation . . . ."); Mississippi-Louisiana Bridge Construction Compact, Pub. L. No. 95-35, 91 Stat. 175, 176 (1977) ("This compact shall continue in force and remain binding upon each party State until the Legislature or Government of each or either State takes action to withdraw therefrom . . . ."); Interstate Compact on Mental Health, Pub. L. No. 92-280, 86 Stat. 126, 130 (1972) ("A state party to this compact may

New Jersey has conceded (Br. 12, 27–30) that States cannot withdraw unilaterally from compacts that set boundaries or apportion water rights absent an express right to do so, and so has sought to carve out an exception to its proposed default rule for interstate compacts that create "vested rights." But none of the interstate compacts discussed above create vested rights. They concern issues such as park management, higher-education coordination, forest-fire prevention, radioactive-waste management, mental-health treatment, transportation, and bridge construction. Even so, the parties to those compacts included express termination and withdrawal provisions—provisions that would be unnecessary if New Jersey's proposed rule were in fact the default.

That these other, contemporaneous compacts explicitly provide for at-will withdrawal strongly suggests that neither New York nor New Jersey nor Congress intended for the Waterfront Compact to be terminable at will. In other words, because "[m]any . . . other compacts feature language that unambiguously permits signatory States" to withdraw unliterally, "[t]he absence of comparable language" here "counts heavily against" interpreting the Waterfront Compact to permit the parties to do so. *Tarrant*, 569 U.S. at 633–34. This Court is "not free to rewrite" the Waterfront Compact to give New Jersey the right that the parties "[o]ther compacts, approved

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withdraw therefrom by enacting a statute repealing the same."); Compact related to the regulation of mass transit in the Washington, District of Columbia metropolitan area, Pub. L. No. 86-794, 74 Stat. 1031, 1035 (1960) ("Any signatory may withdraw from the compact upon one year's written notice to that effect to the other signatories. In the event of a withdrawal of one of the signatories from the compact, the compact shall be terminated.").

contemporaneously with the [Waterfront Compact]," chose to grant to themselves. *Texas v. New Mexico*, 462 U.S. at 565.

II. Principles of sovereignty do not require the Court to imply a right of unilateral withdrawal into the Waterfront Compact.

The Court should also not accept New Jersey's argument (Br. 18–24) that principles of sovereignty require it to be able to withdraw from the Waterfront Compact unilaterally and at will.

While statutory-interpretation principles require that surrenders of sovereignty be "expressed in terms too plain to be mistaken," *Jefferson Bank Branch v. Skelly*, 66 U.S. (1 Black) 436, 446 (1861), entering into a compact is a plain statement of an intention to surrender sovereignty. As this Court has acknowledged, "bistate entities created by compact . . . are not subject to the unilateral control of any one of the States [because] '[a]n interstate compact, by its very nature, shifts a part of a state's authority to another state or states, or to the agency the several states jointly create to run the compact.'" *Hess*, 513 U.S. at 42 (quoting Marian Elizabeth Ridgeway, *Interstate Compacts: A Question of Federalism* 300 (1971)); *see also Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1497–98 (2019) ("The Constitution also reflects implicit alterations to the States' relationships with each other . . . . Thus, no State can apply its own law to . . . the interpretation of interstate compacts."); *New Jersey v. Delaware*, 552 U.S. 597, 629–30 (2008) (Scalia, J. dissenting) ("There is no way [a compact] can be interpreted *other than* as a yielding by both States of what they claimed to be their sovereign powers. The only issue is *what* sovereign

powers were yielded, and that is best determined from the language of the Compact, with no thumb on the scales."). At bottom, the Waterfront Compact is just like any ordinary delegation to an administrative body, which is "one of the axioms of modern government." *Dyer*, 341 U.S. at 30.

Dyer strongly supports New York's position here. The case involved the Ohio River Valley Water Sanitation Compact. Echoing arguments that New Jersey has made in this case (*see, e.g.*, Br. 38–39), West Virginia's courts ruled that West Virginia never validly approved the compact, because it (i) delegated police powers to other States and to the federal government, and (ii) bound future West Virginia legislatures to fund the resulting commission in violation of West Virginia's Constitution, *see* 341 U.S. at 26. This Court disagreed. As to the first point, the Court held that by delegating police powers to an interstate compact commission, West Virginia engaged in a "conventional grant of legislative power" that consisted of "a reasonable and carefully limited delegation of power to an interstate agency." *Id.* at 31. As to the second point, the Court was not concerned that West Virginia lacked an easy way to extricate itself from the compact—even though the Ohio River Valley Water Sanitation Compact lacks any express withdrawal provision, *see* New Jersey Br. 30a. Instead, the Court emphasized that if West Virginia, "in the exercise of its original jurisdiction, were to enter a decree requiring West Virginia to abate pollution of interstate streams, that decree would bind the State," and saw no reason for treating the State's decision to "[bind] itself to control pollution by the more effective means of an agreement with other States" any differently. *Dyer*, 341 U.S. at 31.

New Jersey's invocation of sovereignty here is equally unpersuasive. New Jersey necessarily surrendered that sovereignty by entering the Waterfront Compact, delegating its sovereign police powers to an interstate agency to address the problem of corruption on the waterfront, and binding future New Jersey legislatures to fund the resulting agency. Having surrendered its sovereignty in relevant part, New Jersey cannot now invoke sovereignty principles to unilaterally withdraw itself from obligations to which it bound itself.

III. The effects of allowing New Jersey to unilaterally withdraw from the Waterfront Compact would resonate beyond this case.

Contrary to New Jersey's claim (Br. 12) that its proposed default rule permitting unilateral withdrawal would apply only to "a narrow category of compacts," a ruling in New Jersey's favor would in fact be widely felt. It would also introduce undesirable instability into interstate compact law by undermining the binding nature of interstate compacts that would be subject to New Jersey's default rule.

The Court has consistently held that interstate compacts are binding on States and has recommended many times that States use interstate compacts to resolve their disputes.

In the nearly two centuries since this Court decided its first compact case, the Court has never concluded that a State may unilaterally terminate, withdraw from, amend, or dictate the terms of an

interstate compact absent an express right to do so.[11] On the contrary, Court has consistently held States to the terms of their interstate compacts. For instance, in *Green v. Biddle*, this Court's first case involving an interstate compact, the Court concluded that Kentucky could not apply its own real-property law, because it was a party to an interstate compact with Virginia that required it to apply Virginia's real-property law. *See* 21 U.S. (8 Wheat.) 1, 87–88 (1823). Similarly, in *Dyer*, the Court concluded that West Virginia could not refuse to pay its assessment to a compact commission under the guise of a conflict with its state constitution. *See* 341 U.S. at 31–32. And this Court has emphasized that "bistate entities created by

[11] The history of compacts dates back farther than this Court's compact-law jurisprudence, and even farther than the United States itself. *See* Rohan Koosha Hiatt, *Constellating History: An Investigation into the Supreme Court's Treatment of Congressional Consent Under the Compact Clause*, 26 Lewis & Clark L. Rev. 275, 285–95 (2022) (noting that the first formal compact between colonies was concluded in 1656, in addition to discussing other intercolonial compacts). Compacts are associated with the period leading up to the American Revolution, when Lord Dunmore, the last colonial governor of Virginia, refused to recognize the Crown's authority in approving agreements between the colonies. *Id.* at 291. Compacts are also associated with the transition from the Articles of Confederation to the Constitution: George Washington invited delegates from Virginia and Maryland to Mount Vernon to negotiate the Virginia–Maryland Compact of 1785, leading those participants to later propose the Annapolis Convention, which resulted in the Philadelphia Convention. *See* Richard B. Morris, *The Mount Vernon Conference: First Step Toward Philadelphia*, *in* Project 87, Am. Hist. Soc'y & Am. Pol. Sci. Ass'n, *This Constitution* 38 (Spring 1985). No other tool for interstate cooperation has such a long and deeply rooted history, or has played such a critically important role in the creation of the United States and the management of interstate relationships.

compact . . . are not subject to the unilateral control of any one of the States that compose the federal system." *Hess*, 513 U.S. at 42. By forbidding States to alter compacts unilaterally, the Court has made interstate compacts predictable.

That predictability jibes with this Court's case law encouraging States to compact. Indeed, for more than a century, this Court has recommended that States enact interstate compacts to resolve their interstate disputes. *See Florida v. Georgia*, 138 S. Ct. 2502, 2509 (2018); *Vermont v. New York*, 417 U.S. 270, 274–75 (1974); *Arizona v. California*, 373 U.S. 546, 564 (1963); *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945); *Colorado v. Kansas*, 320 U.S. 383, 392 (1943); *Washington v. Oregon*, 214 U.S. 205, 217–18 (1909).[12] As this Court has recognized, "so awkward and unsatisfactory is the available litigious solution for [interstate] problems that this Court deemed [it] appropriate to emphasize the practical constitutional alternative provided by the Compact Clause," a strategy that "has had fruitful response." *Dyer*, 341 U.S. at 27; *see also Hinderlider*, 304 U.S. at 105 ("The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary.").

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[12] This Court has also recommended that States negotiate a resolution to their disputes without expressly recommending an interstate compact, or else negotiate a resolution to their compact dispute. *See, e.g.*, *Texas v. New Mexico*, 462 U.S. at 575; *New York v. New Jersey*, 256 U.S. 296, 313 (1921); *Minnesota v. Wisconsin*, 252 U.S. 273, 283 (1920) (citing the Court's recommendation to enact a compact in *Washington v. Oregon*, 214 U.S. at 218).

States have followed this Court's recommendations in resolving their disputes. Colorado and New Mexico enacted the Animas-La Plata Project Compact, Pub. L. No. 90-537, 82 Stat. 898 (1968), in partial fulfilment of the Supreme Court's decree in *Arizona v. California*; Colorado and Kansas enacted the Arkansas River Compact in 1949, Pub. L. No. 81-82, 63 Stat. 145 (1949); and Oregon and Washington enacted their compact in 1956, Oregon-Washington Boundary Compact, Pub. L. No. 85-575, 72 Stat. 455 (1958).[13]

Interpreting the Waterfront Compact to allow the parties to withdraw at will undermines "the peace, good neighborhood, and welfare" that interstate compacts promote. *Wharton v. Wise*, 153 U.S. 155, 166 (1894). Critical to maintaining that interstate harmony and cooperation is stability of States' rights and obligations under interstate compacts. Allowing parties to unilaterally terminate indefinite interstate compacts would "stir up an air of uncertainty in those areas of our national life presently affected by the existence of these compacts." *Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1962). Courts have therefore unsurprisingly cautioned that "the suspicion

[13] One scholar has noted that "[m]ost commentators suspect the Court is not particularly effective at resolving [state-to-state] disputes. The Court concurs . . . . It is an odd state of affairs for a supreme tribunal typically empowered to order compliance to have futilely to beg for" States to settle their disputes. Jonathan Horne, *On Not Resolving Interstate Disputes*, 6 N.Y.U. J. L. & Liberty 95, 102 (2011) (citations omitted). This critique is not accurate when the Court has expressly recommended that the States enact a compact. In half of those cases, the Court successfully nudged the States to enact a compact.

of even potential impermanency would be damaging to the very concept of interstate compacts." *Id.*

New Jersey tries to sidestep that admonition by arguing (Br. 29) that a rule permitting at-will withdrawal "applies only to a narrow set of compacts." But New Jersey is wrong. The rule for which New Jersey advocates would be widely felt. There are roughly 260 compacts currently in effect, and every State is party to at least 25.[14] States rely on compacts to address nearly every category of policy, including social-services delivery, child placement, education policy, emergency and disaster assistance, corrections, law enforcement and supervision, professional licensing, water allocation, land-use planning, environmental protection and natural-resource management, and transportation and urban-infrastructure management. More compacts are also in development: the Council of State Governments is currently helping drafting teams to develop six new compacts that every State will be eligible to join, *see* Nat'l Ctr. for Interstate Compacts, The Council of State Gov'ts, Dep't of Def. Interstate Compact Support, https://compacts.csg.org/our-work/ics/ (last visited Oct. 26, 2022), and, in 2021 alone, state legislators introduced dozens of bills and resolutions that proposed at least seven other new compacts, *see* Jeffrey B. Litwak & Elie Steinberg, *Developments in*

[14] The number of effective compacts is difficult to precisely determine. This number is based on amici's original research of federal statutes at large dating back to volume 1 of the *Statutes at Large*, state session laws for all states dating back to their date of admission to the union, and territorial and colonial laws as applicable.

Interstate Compact Law and Practice 2021, 51 Urb. L. 283, 313–17 (2022).

And yet many compacts—including those that address important issues that require long-term interstate cooperation and coordination even though they do not create "vested rights," *see supra* p. 9—do not expressly address withdrawal. A ruling that the Waterfront Compact is terminable at will would inject uncertainty into these interstate compacts too, leaving States unable to rely on the long-term viability of these agreements, which, by their nature, address issues that cannot be addressed by only one State. *See Hess*, 513 U.S. at 40.

In practical terms, this would mean that the interstate solutions that this Court, Congress, and the States have relied on since colonial times could be undermined by a State's withdrawal from an interstate compact at any time. Thus, the Columbia River fisheries, managed through the Columbia River Fish Compact, Pub. L. No. 64-123, 40 Stat. 515 (1918), would be left in limbo, as would the use of that compact to fulfill federal and state treaty obligations with the four Columbia River treaty tribes, 2018–2027 *United States v. Oregon* Management Agreement, § II.F.5.[15] Flood control in interstate watersheds could be managed with little concern for downstream States. *See, e.g.*, Wheeling Creek Watershed Protection and Flood Prevention District Compact, Pub. L. No. 90-181, 81 Stat. 553 (1967); The Thames River Flood Control Compact, Pub. L. No. 85-526, 72

[15] The Agreement, updated every ten years, is a stipulated court order in *United States v. Oregon*, No. 3:68-cv-00513 (D. Or. Feb. 26, 2018), ECF 2607-1.

Stat. 364 (1958). Similarly, a default rule permitting at-will withdrawal would put in doubt access to and joint management of transit resources and infrastructure, including bridges, aviation, and public transit. For example, Pennsylvania could abandon its compacts with New Jersey, potentially leaving the Court to find a way to dissolve the compact entity and distribute its assets and responsibilities for the maintenance of two dozen interstate bridges. Delaware River Joint Toll Bridge Commission, Pub. L. No. 74-411, 49 Stat. 1051 (1935) (managing 20 bridges); Delaware River Port Authority, Pub. Res. No. 26, 72nd Cong., 47 Stat. 308 (1932) (managing four bridges); *see also* Delaware-New Jersey Compact, Amendment, Pub. L. No. 101-565, 104 Stat. 2784 (1990) (establishing The Delaware River and Bay Authority, which operates and maintains certain bridge and ferry transportation and aviation services); Arkansas-Mississippi Bridge Commission Compact, Pub. L. No. 76-80, 53 Stat. 747 (1939), as amended by Pub. L. No. 80-701, 62 Stat. 499 (1948). None of the above compacts expressly allow unilateral withdrawal.

A decision favoring New Jersey here would thus contravene this Court's long history of recommending that States enact interstate compacts to resolve pending disputes and thorny public policy problems. States will simply choose to ignore the Court's recommendation when they know that the Court would also let a State unilaterally terminate that compact.

That would be a harmful development. While States have many ways to cooperate on policy matters that cross state lines, only an interstate compact is

stable and binding, allowing States to make long-term commitments to one another without needing to resort to expensive and unnecessary litigation. *See supra* p. 21. Letting New Jersey withdraw unilaterally from the Waterfront Compact would inject significant uncertainty and instability into the longstanding practice of managing multistate policy problems and interstate disputes through mutually binding interstate compacts. The Court should avoid that result.

CONCLUSION

New York does not take the position that New Jersey is forever bound by the Waterfront Compact. A decision favoring New York will merely ensure that, when an interstate compact does not provide a right to unilateral withdrawal, the State parties must jointly develop an exit plan. A decision in New York's favor would return this matter back to the two States to *jointly* resolve New Jersey's dissatisfaction. Perhaps the States will settle their dispute, as Texas and New Mexico did after this Court concluded that it could not modify their compact to provide for a tie-breaker vote on the Pecos River Compact Commission. *See Texas v. New Mexico*, 462 U.S. at 566. Perhaps the States will agree to enact new implementing legislation authorized in the Waterfront Compact. *See De Veau*, 363 U.S. at 154 (describing congressional consent to implementing legislation "not formally part of the compact" as "so extraordinary as to be unique in the history of compacts"). Or perhaps the States will jointly develop a plan to terminate and wind up the Waterfront Compact and the Waterfront Commission. But whatever comes next will be at the direction of *both* States, as the parties and Congress intended.

New York's motion for judgment on the pleadings should be granted, and New Jersey's motion for judgment on the pleadings denied.

Respectfully submitted,

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