No. 156, Original

In the Supreme Court of the United States

NEW YORK, PLAINTIFF

v.

NEW JERSEY, DEFENDANT

ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

BRIEF FOR THE STATES OF TEXAS, ALASKA, LOUISIANA, MONTANA, NEVADA, SOUTH CAROLINA, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF DEFENDANT

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QUESTION PRESENTED

Whether the Waterfront Commission Compact permits either signatory State to withdraw.

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alaska, Louisiana, Montana, Nevada, South Carolina, Utah, and Virginia.[1] Individually and collectively, they are parties to dozens of interstate compacts that have been drafted over a period of decades. As a result, they have a direct and deep-seated interest in this case, which concerns whether one sovereign State can prevent another from withdrawing from a compact due to the absence of an express withdrawal clause. That interest is particularly acute here where, if read the way New York maintains, the compact would implicitly divest the State of New Jersey of a portion of the most core of its police powers—namely, the ability to protect its citizens from criminal activity—in perpetuity.

Assuming that States might permissibly enter into an interstate compact involving their police powers that expressly delineates how a State may withdraw (which is a significant assumption), the power to enter into such an agreement exists at the outer limits of what a State's legislature may do to bind future legislatures. Fundamental principles of our democratic system do not permit a State—or any sovereign—to forever contract away its police powers by *implication*. Amici ask the Court to apply these principles when filling any gaps in the present compact and to hold that in the absence of an express provision to the contrary, a State may terminate at will a compact that delegates the State's core police powers.

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

STATEMENT

In the 1950s, New Jersey and New York entered an interstate compact to address the "crime, corruption, and racketeering on the waterfront of the port of New York" and New Jersey. *De Veau v. Braisted*, 363 U.S. 144, 149-51 (1960) (plurality op.) (quoting S. Rep. No. 83-653, at 49-50 (1953)); *see* Compl. ¶ 2. This Compact created and empowered the Waterfront Commission of New York "to license, register, and regulate the waterfront employment of pier superintendents, hiring agents, longshoremen and port watchmen, and to license and regulate stevedores." *De Veau*, 363 U.S. at 149. Because "[t]he Compact grants the Commission broad regulatory authority and law-enforcement powers over all operations at the Port," which spans the sovereign territory of both States, the Compact required each State to cede some part of its sovereignty during the life of the Commission. Compl. ¶ 5. But, wary of each other, each State sought to preserve its sovereign prerogatives by allowing the Commission to act only if the appointed Commissioners of *both* States agreed. *Id.* ¶¶ 31-33.

Decades later, New York's own Inspector General published a report describing how what started as an effort to prevent infiltration from the mob had developed its own "climate of abuse," and suffered from a "lack of accountability." N.Y. Office of the Inspector Gen., Investigation of the Waterfront Comm'n of N.Y. Harbor at 1 (Aug. 2009), https://tinyurl.com/ydxvbk3m. For example, the report explained, "[t]he two commissioner structure has led to stalemates and inaction." *Id.* at 6 n.4.

New Jersey understandably grew dissatisfied with this arrangement, which left it unable to enforce its criminal laws in a port that is vital to its survival. In 2018, its

Governor signed into law a statute withdrawing the State from the Compact. Compl. ¶ 66.

Three years later, New York filed a Bill of Complaint against New Jersey in this Court contending that New Jersey had breached the Compact, *id.* ¶¶ 116-17; that New Jersey's withdrawal statute is preempted by Congress's ratification of the Compact, *id.* ¶ 128; and that New Jersey's effort to reassert its sovereign control over its side of the Port violated the Contract Clause, *id.* ¶ 135.

SUMMARY OF ARGUMENT

I. New York's claims are troubling from the outset because, as a general matter, States may not contract away their core police powers. That principle derives from the reserved-powers doctrine, which holds that a sovereign's current political leadership cannot alienate certain aspects of its sovereignty. And it applies with particular force here where the alleged contract pertains to the State's ability to deprive certain of the State's citizens of their phsycial liberty in order to protect other citizens from violence and extortion in that State's sovereign territory. Indeed, it is difficult to hypothesize an issue closer to the core of a sovereign's police power.

II. Even if a State could contract away such a police power, principles of law older than this Country require that it do so in unmistakable terms. That foundational constitutional principle, known as the unmistakability doctrine, limits the ability of one Legislature to bind a future one. And it protects the polity's ability to exercise ultimate control over the legislature by replacing legislators who pass unpopular measures with those who will rescind them.

The unmistakability doctrine and basic contract law principles defeat New York's claims that New Jersey has breached the Compact or violated the Contract Clause.

Though New Jersey may have expressly agreed to give up a portion of its police powers to the Commission, it did not do so in perpetuity. Unlike many modern interstate compacts, the Waterfront Commission Compact contains no express terms limiting when and how New Jersey may withdraw its consent. In the absence of such limitations, both the unmistakability doctrine and principles of contract law provide default rules governing withdrawal. Those rules provide that New Jersey does not need New York's permission to exercise its sovereign will to withdraw from the Compact.

III. New York's effort to avoid that conclusion by arguing preemption fails for related reasons. Amici States do not dispute that the Compact became federal law when Congress validly ratified its terms. *See* Compl. ¶ 22. But that begs the question of *what terms* Congress ratified. This Court presumes that Congress is aware of existing law when it passes legislation, including both common-law principles and this Court's precedents. Because the unmistakability doctrine and contract principles that permit New Jersey to withdraw predate the Compact by centuries, the Court should presume that Congress expected them to be incorporated into the Compact absent an express term to the contrary. Because no such term exists, Congress's ratification of the Compact should be understood to incorporate the unmistakability doctrine and contract principles.

ARGUMENT

I. The Reserved-Powers Doctrine Limits The Extent To Which States Can Alienate Their Police Powers.

As a general matter, States may not contract away their core police powers. That rule is often called the reserved-powers doctrine, but it stands for the bedrock

principle that "certain substantive powers of sovereignty" may not be alienated. *United States v. Winstar Corp.*, 518 U.S. 839, 874 (1996) (plurality op.). Indeed, this Court has recognized that it is of such fundamental importance that it limits even certain textual provisions of the Constitution.

A. The reserved powers doctrine derives from the principle of parliamentary supremacy, *see Winstar*, 518 U.S. at 872-74, the importance of which is difficult to overstate in the law of mid-18th century England. Amongst medieval legislative assemblies, England's Parliament alone survived the rise of absolute monarchism at the start of the seventeenth century in Europe. 4 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 184-85 (1924). And by the end of that century, Parliament was itself the ultimate legal authority in England. Paul Langford, *A Polite and Commercial People: England 1727-1783*, *in* NEW OXFORD HIST. OF ENGLAND 703-04 (J.M. Roberts ed., 1998).

As delegates gathered in Philadelphia in 1787, the reserved powers of Parliament were arguably at their apex. Indeed, by the time of Coke and Blackstone, it was accepted that Parliament's power could not be "confined . . . within any bounds." 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF THE COURTS 36 (1644). Instead, Parliament could do "every thing that is not naturally impossible." 1 WILLIAM BLACKSTONE, COMMENTARIES *161. The only task that fell outside the scope of that "omnipotence" was that it could not bind its future self. *Id.* at *156, 158, 178-79. "'Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no

superior upon earth, which the prior legislature must have been, if it's [sic] ordinances could bind the present parliament.'" *Id.* at *90. Moreover, as the "very keystone of the law of the [British] Constitution," A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 67 (3d ed. 1889), parliamentary supremacy meant that no court, official, or royal could question the legality of (or decline to enforce) its statutes, 4 HOLDSWORTH, *supra*, at 187.

B. The Founders incorporated a modified version of this view of parliamentary supremacy into our Constitution. The Founders recognized both that "We the People" are the ultimate repository of sovereignty in our republican system, U.S. CONST. pmbl., and that the Legislature was the branch of government closest to, and therefore "ha[d] an immediate dependence on, and an intimate sympathy with, the people." THE FEDERALIST NO. 52, at 258 (Madison) (Dover Thrift eds., 2014). As a result, it has been generally understood since the earliest days of the Republic that one legislature—whether it be state or federal—cannot bind a future one. *See, e.g.*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810).

Nevertheless, having been the witnesses of (and subject to) Parliamentary excess, the Founders became wary of the "danger from legislative usurpations" that arises from "assembling all power in the same hands"—whether those hands belong to the Legislature or the Executive. THE FEDERALIST NO. 48, at 242 (Madison) (Dover Thrift eds., 2014). For that reason, the Founders did *not* adopt parliamentary supremacy in its purest form, but instead enabled legislatures under certain limited circumstances "to place effective limits on its successors, or to authorize executive action resulting in such a limitation." *Winstar*, 518 U.S. at 873. These two

constitutional norms—namely, the desire to empower the people's closest representatives to pass laws to benefit the people and the need to protect the rights of individual persons—have always lived in "some tension" with each other. *Id.*

C. That tension is resolved—to the extent it can be—through the proper understanding and application of the reserved-powers doctrine. This doctrine "h[olds] that certain substantive powers of sovereignty c[an] not be contracted away." *Id.* at 874.

Where it applies, this doctrine is powerful: it deprives the State of the "power to create irrevocable contract rights." *U.S. Tr. Co. of N. Y. v. New Jersey*, 431 U.S. 1, 23 (1977). And it limits other Constitutional protections, including the Contract Clause upon which New York relies. *See id.*; Compl. ¶ 130. That Clause announces that no State shall pass any law "impairing the Obligation of Contracts." U.S. CONST. art. I § 10, cl. 1. But this Court has long recognized that "[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)). As a result, "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *U.S. Tr. Co.*, 431 U.S. at 23. To say otherwise would be to permit one legislative majority to bind all future legislatures. *See Winstar*, 518 U.S. at 872-74.

The Court has, however, never tried to delineate the outer boundaries of when the reserved-powers doctrine applies. The Court has stated that the principle applies to prohibit a State's political leadership from

surrendering the power of eminent domain, *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848), or from surrendering the power to pass health and safety legislation, *Butchers' Union Slaughter–House & Live–Stock Landing Co. v. Crescent City Live–Stock Landing & Slaughter–House Co.*, 111 U.S. 746 (1884). By contrast, "[t]he Court has regularly held that the States are bound by their debt contracts." *U.S. Tr. Co.*, 431 U.S. at 24. The outer limits of the doctrine remain unclear. But this Court *has* made clear that "formalistic distinctions perhaps" are not, indeed, "cannot be dispositive" in determining whether the reserved-powers doctrine applies, and thus "[a] State's contract was invalid ab initio." *U.S. Tr. Co.*, 431 U.S. at 23-24. Instead, the Court looks to a variety of factors—for example, whether the State is performing a traditional state function in creating the contract. *E.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978); *Blaisdell*, 290 U.S. at 444-47.

Take the example of compacts allocating water rights in interstate rivers. By their nature, interstate rivers are shared resources that must be allocated between two (or more) States. Traditionally, treaties were the means to resolve water disputes. *See* UNDESA, Int'l Decade for Action 'Water for Life' 2005-2015: Transboundary Waters, https://www.un.org/waterforlifedecade/transboundary_waters.shtml (last updated Oct. 2014). The Founders forbade States from entering such treaties, *see* U.S. CONST. art. I, § 10, cl. 1, allowing instead the entry of Compacts, subject to the approval of Congress, *id.* cl. 3. Moreover, rivers were at the time of the Founding some of the principal pathways of interstate commerce, *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197-98 (1824)—the sovereign power to regulate which was *expressly* ceded to Congress. U.S. CONST. art. I, § 8, cl. 3.

As a result, States likely have greater leeway to enter into irrevocable contracts over interstate rivers than this Court's precedents suggest is permitted in the context of more core police powers such as protecting health and safety.

D. This case demonstrates why permitting a State to delegate such a core police power could "become a threat to the sovereign responsibilities of state governments." *Winstar*, 518 U.S. at 874. New York seeks to unilaterally prevent its neighbor from withdrawing from a compact that New York's own Inspector General has concluded is an ineffective way to ensure that criminal laws are enforced in the docks along the shores of a harbor that spans the border of—and is economically vital to—both States. *See* N.Y. Office of the Inspector Gen., *supra,* at 6 n.4. This Court has found it to be "[b]eyond question" that "the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160, 170-71 (2009) (citing *Patterson v. New York*, 432 U.S. 197, 201 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government."). If that core, reserved sovereign authority means anything, it prevents the New Jersey legislature of the 1950s from consigning to a bureaucrat from New York—in perpetuity—the authority and responsibility to protect the people of New Jersey from the violence and corruption associated with organized crime.[2]

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[2] *See* Br. in Support of New Jersey's Motion for Judgment on the Pleadings 4-5; *De Veau*, 363 U.S. at 150 (noting Congress's conclusion that "[t]he extensive evidence of crime, corruption, and racketeering on the waterfront of the port of New York . . . has made it clear beyond all question that the plan proposed by the States of

II. Even If New Jersey Could Perpetually Contract Away Its Police Powers, It Has Not Done So.

Assuming that New Jersey could contract away its police powers in perpetuity, it cannot do so by implication. This derives from another venerable constitutional rule—the unmistakability doctrine—which plays a key role in preserving state and federal sovereignty.

A. Fundamental principles of law prevent States from inadvertently contracting away their sovereignty.

Derived from the same source as the reserved-powers doctrine, the unmistakability doctrine holds that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986).

1. The unmistakability doctrine prevents States from implicitly contracting away sovereign power.

Like the reserved-powers doctrine, *supra* at 5-9, the unmistakability doctrine serves to balance a strong tradition that Parliament, as the representative of the people, was supreme, with the need to limit that power to protect individual rights. Indeed, the doctrine developed—in part—in conformity with evolutions in how the reserved-powers doctrine has applied in this country.

Early on, this Court concluded that—unlike in England—the Constitution did, in effect, permit one

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New York and New Jersey to eradicate those public evils is urgently needed").

Legislature to bind its successors in certain narrow instances. In *Fletcher v. Peck*, "the Court held that the Contract Clause barred the State of Georgia's effort to rescind land grants made by a prior state legislature." *Winstar*, 518 U.S. at 873 (citing *Fletcher*, 10 U.S. (6 Cranch) 87) (second citation omitted). Chief Justice Marshall recognized that "one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature." *Fletcher*, 10 U.S. (6 Cranch) at 135. But the Chief Justice held that the Georgia Legislature's intrusion on "vested rights" might have exceeded the legislative power, and that the Contract Clause limited Georgia's legislative sovereignty. *Winstar*, 518 U.S. at 873-74.

Soon, however, it became apparent that certain contracts "could become a threat to the sovereign responsibilities of state governments." *Id.* at 874. Thus, decisions after *Fletcher*, "were accordingly less willing to recognize contractual restraints upon legislative freedom of action." *Id.*; *see W. River Bridge,* 47 U.S. (6 How.) 507; *Winstar*, 518 U.S. at 874-75.

Reconciling these cases—and the competing constitutional norms they reflect—led to the development of the unmistakability doctrine, which holds that "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." *Id.* at 874-75 (quoting *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446 (1861)). This Court read early Contract Clause cases to impose a "requirement that the government's obligation unmistakably appear," which "served the dual purposes of limiting contractual incursions on a State's sovereign powers and of

avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power." *Id.* at 875.

In other words, the unmistakability doctrine provides a key limiting principle in cases where States *must* be able to contract away aspects of their sovereignty in order for the Constitution to function. It permits States to form binding and enforceable contracts, particularly under the Compact Clause. But it also recognizes that the Contract and Compact Clauses did not entirely abrogate the foundational principle that one Legislature cannot bind a future one. *Id.* at 877-79. And it prevents ambiguous terms from ceding fundamental aspects of state sovereignty, lest the people's current representatives find themselves unable to reverse decisions made by past representatives that the electorate has rebuked through the ballot box.

2. The unmistakability doctrine benefits all sovereigns.

The significance of the unmistakability doctrine has only grown over time as this Court expanded it "from its Contract Clause origins dealing with state grants and contracts" to other sovereigns, including the federal government. *Id.* at 875. As a result, New York's argument that New Jersey ceded its sovereign prerogative to withdraw from a failed compact has implications far beyond the already-significant questions of who may police criminal activity in New York Harbor.

For example, in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court applied the doctrine to hold that an Indian Tribe retains the prerogative to tax proceeds from oil and gas leases even where the leases already provided the lessees pay the Tribe-specific royalties. *Id.* at 148. As this Court explained, the power to

tax—like the power to police—is a core aspect of sovereignty, and under the unmistakability doctrine, "the absence of a reference to the tax in the leases themselves hardly impairs the Tribe's authority to impose the tax." *Id.* at 147.

Similarly, in *Bowen,* the Court applied the unmistakability doctrine in a case involving the federal government. *Bowen* involved a 1983 amendment to the Social Security Act, which eliminated the ability of a State to agree with the federal government "to cover the State's employees under the Social Security scheme subject to a right to withdraw them from coverage later." *Winstar*, 518 U.S. at 877 (citing *Bowen*, 477 U.S. at 51). When California sued, this Court applied the unmistakability doctrine, holding that absent an unmistakable contrary provision, contractual arrangements in which the sovereign is a party "'remain subject to subsequent legislation' by the sovereign." *Bowen*, 477 U.S. at 52 (quoting *Merrion*, 455 U.S. at 147).

In extending the unmistakability doctrine from States to other types of sovereigns, the Court has rejected arguments that differences between the type of sovereignty impact how the doctrine should apply. The Court explained "[t]hese differences . . . do not alter the principles for determining whether any of these governments has waived a sovereign power through contract." *Merrion*, 455 U.S. at 148. That different sovereigns have different attributes of sovereignty "does not justify ignoring the principles announced by this Court for determining whether a sovereign has waived" its sovereign powers. *Id.* Thus, "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in

unmistakable terms." *Id.* Because the oil and gas leases in *Merrion* did not contain a "clear and unmistakable surrender of taxing power," none existed. *Id.*

Perhaps more important here, the Court also repeatedly "rejected the proposal to find that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in the contract." *Winstar*, 518 U.S. at 877 (quotation marks omitted) (quoting *Bowen*, 477 U.S. at 52). Indeed, *Merrion* held that "[t]o presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power . . . turns the concept of sovereignty on its head, and we do not adopt this analysis." 455 U.S. at 148.

B. The unmistakability doctrine and contract law principles defeat New York's breach of compact and Contract Clause claims.

The unmistakability doctrine applies to interstate compacts, and it limits the Contract Clause's requirement that States not impair contracts. *Winstar*, 518 U.S. at 875; *see also U.S. Tr. Co.,* 431 U.S. at 23. The principle that "unmistakability was needed for waiver, not reservation," *Winstar*, 518 U.S. at 878, defeats New York's insistence that because New Jersey did not expressly reserve the right to withdraw unilaterally from the Waterfront Commission Compact, it has no such right. Further, because an interstate compact is fundamentally a contract, principles of contract law supply default rules governing withdrawal in the absence of express terms. Like the unmistakability doctrine, default rules of contract law dictate that New Jersey may withdraw from the Compact.

1. The compact contains no express terms of withdrawal.

The Compact is silent on withdrawal—notwithstanding the Compact's amendment provisions, which say nothing about withdrawal. "Interstate compacts are construed as contracts under the principles of contract law." *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013). Courts interpret contracts according to the "plain, common, or normal meaning of language." 11 WILLISTON ON CONTRACTS § 32:3 (4th ed. May 2022 update).

Not even New York claims that the Compact expressly discusses withdrawal. Thus, rules regarding the interpretation of both interstate compacts, *Tarrant*, 569 U.S. at 631-32, and contracts, *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 763-64 (2018), would hold that the Compact is subject to default rules regarding withdrawal.

a. New York cannot avoid this conclusion by pointing to the provision of the Compact stating that "[a]mendments and supplements" to it must be adopted by the Legislatures of both states. Pub. L. No. 83-252, art. XVI, §§ 1-2, 67 Stat. 541, 557 (1953). Such an effort to elide "amend" and "withdraw" is inconsistent with the ordinary meaning of those terms, with Congress's statutory choices in ratifying the compact, and with how other compacts are written or interpreted.

First, ordinary speakers of the English language in 1953 would not consider "amend" synonymous with "withdraw." To "[a]mend" in the legislative context means "to alter (as a bill or resolution) formally by some addition, taking away, or modification." WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 83 (2d ed. 1948). An "[a]mendment" in the context of legislation thus means "an alteration in the law

already existing, leaving some part of the original still standing." BLACK'S LAW DICTIONARY 106 (4th ed. 1951). By contrast, to "withdraw" means "[t]o remove," *id.* at 1776, or "[t]o recall or retract" WEBSTER'S, *supra*, at 2940. Put another way, the act of amending a compact implies that some substance of the compact will still exist after the amendment; withdrawing from a compact, however, indicates intent to remove oneself from it entirely.

Second, to the extent their ordinary meanings left any doubt that "amend" and "withdraw" are not synonymous, Congress laid the issue to rest when it approved the Compact. Specifically, Congress expressly reserved the right to "alter," "amend," and "repeal" it, thus using the words "amend" and "repeal" separately. Pub. L. No. 83-252, art. XVI, § 2, 67 Stat. at 557. Because statutes must be construed so that no part becomes superfluous, *Corley v. United States*, 556 U.S. 303, 314 (2009), Congress's own approval language shows that "repeal"—synonymous with "withdraw"—has a different meaning than "amend."

Third, New York's argument is inconsistent with this Court's practice to look "to the customary practices employed in other interstate compacts" to help "ascertain the intent of the parties to this Compact." *Tarrant*, 569 U.S. at 633. As New Jersey has explained, interstate compacts regularly distinguish between amendment and withdrawal. *See* Br. in Support of New Jersey's Motion for Judgment on the Pleadings 33-34; Br. in Response of Defendant New Jersey 19. Had the parties to this Compact wished to include express withdrawal terms, they could have done so, but they chose not to.

b. New York is on no firmer ground to assert that by stating that "[t]he right to alter, amend, or repeal this Act is hereby expressly reserved," Pub. L. No. 83-252,

art. XVI, § 2, 67 Stat. at 557, Congress meant that States need congressional consent to withdraw from the Compact. *Contra* Compl. ¶ 110. That clause of the Compact simply restates the basic principle of parliamentary supremacy, discussed above, that "statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute," and "Congress remains free to express any such intention either expressly or by implication as it chooses." *Dorsey v. United States*, 567 U.S. 260, 274 (2012). And perhaps more basically, Congress expressly reserved the power to "repeal" the Compact but did not expressly state that *no party* could withdraw. In sum, while the Compact speaks to the process by which to amend it, it says nothing about how a State may withdraw from it.[3]

2. In the absence of express withdrawal terms, the unmistakability doctrine permits New Jersey to withdraw.

In the absence of express terms, the unmistakability doctrine provides a default rule that does not permit the Compact to bind New Jersey's police powers in perpetuity. "The background notion that a State does not easily cede its sovereignty has informed our interpretation of interstate compacts." *Tarrant*, 569 U.S. at 631. And nothing in the Compact indicates that New Jersey and New York agreed to depart from that principle. "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not"—as seen here—"inscrutable silence." *Id.* at 632.

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[3] Even if New York were correct that the Compact's amendment provision or Congress's verification language also govern withdrawal, the Compact is (at most) ambiguous as to withdrawal. *See* Pub. L. No. 83-252, art. XVI, § 2, 67 Stat. at 557.

As discussed above (at 2), the Waterfront Commission Compact implicates the police powers of both New York and New Jersey—classically, one of the State's most sovereign powers. *See, e.g.*, Compl. App. 3a (Pub. L. No. 83-252, art. I, § 4, 67 Stat. at 542); *see also* Compl. ¶ 2 (explaining that the States entered into the Compact "for the purpose of addressing racketeering and other criminal, corrupt, and abusive conditions on the waterfront in the Port of New York and New Jersey"). Indeed, both States expressly "declare[d]" that regulation by the Commission "shall be deemed an exercise of the police power of the two States for the protection of the public safety, welfare, prosperity, health, peace[,] and living conditions of the people of the two States." Pub. L. No. 83-252, art. I, § 4, 67 Stat. at 542.

Thus, under the unmistakability doctrine, the police power will "remain intact unless surrendered in unmistakable terms," *Bowen*, 477 U.S. at 52—which conspicuously do not exist. Although the creation of the Commission may have surrendered a portion of New Jersey's police powers *while it was in effect*, the Compact does not limit New Jersey's ability to reassert that sovereignty by withdrawing from the Compact. As discussed above (at 15-17), the Compact says nothing about the parties' ability to withdraw.

The absence of express withdrawal terms means that the unmistakability doctrine dictates the terms of withdrawal. As this Court has explained "the better understanding" of "silence is that the parties drafted the Compact with this legal background in mind." *Tarrant*, 569 U.S. at 632. That means that the Compact cannot be read to bind New Jersey's police powers forever. To say otherwise would "turn[] the concept of sovereignty on its

head," and the Court should "not adopt this analysis." *Merrion*, 455 U.S. at 148.

3. Default contract-law rules also permit New Jersey to withdraw.

In the absence of express withdrawal terms in the Compact, ordinary principles of contract law also supply default rules—which also permit New Jersey to withdraw. "Interstate compacts are construed as contracts under the principles of contract law." *Tarrant*, 569 U.S. at 628.

Under "traditional principle[s]" of contract law, *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 441 (2015), contracts "that are silent as to their duration will ordinarily be treated not as 'operative in perpetuity' but as 'operative for a reasonable time.'" *CNH Indus.*, 138 S. Ct. at 763-64 (quoting 3 A. CORBIN, CORBIN ON CONTRACTS § 553, at 216 (1960)). And contracts that require continuing performance with no express termination terms, such as the Compact here, are terminable at will after a reasonable period of time. 1 WILLISTON ON CONTRACTS § 4:22 (4th ed. May 2022 update).

New Jersey suggests that the "reasonable time" aspect of this rule should not apply to contracts involving sovereigns, because to do otherwise would "limit [a legislature's] 'exercise of [its] governmental powers' for a set period without express support, and would subject the legislature to tremendous uncertainty regarding its sovereign powers." Br. in Support of New Jersey's Motion for Judgment on the Pleadings 29-30 n.7 (citing *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 391 (Tex. 1977) and citing *inter alia Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 455 (1892)). The amici States agree with this principle. It is—depending on the type of contract—either a limited version of the

reserved-powers doctrine, *see supra* at 4-9, or a specific application of the unmistakability doctrine, *see supra* at 10-14.

The Court need not reach that question in this case, however, because by any measure, New Jersey *has* abided by the terms of its failed Compact for a reasonable time. A reasonable time is determined "in light of all surrounding circumstances." 1 WILLISTON, *supra*, § 4:22. Here, New Jersey has abided by this contract for nearly seventy years. It has attempted to abide by the contract for years after New York's own Inspector General excoriated the failures of the Commission in 2009. *See* N.Y. Office of the Inspector Gen., *supra*, at 1. Given these circumstances, New Jersey has abided by the Compact for a reasonable time.

Accordingly, default rules of contract law lead to the same conclusion as the unmistakability doctrine: in the absence of express withdrawal terms, New Jersey may withdraw from the Compact.

* * *

In sum, New Jersey neither breached the Compact nor violated the Contract Clause when it sought to protect its citizens and its sovereignty by withdrawing from a system of policing New York Harbor that has not worked in decades. Both the unmistakability doctrine and contract law supply default withdrawal rules that allow New Jersey to exercise that sovereign prerogative where, as here, there is no express contrary term. And New Jersey has not violated the Contract Clause because the unmistakability doctrine limits the Contract Clause's requirement that States not impair contracts. *See Winstar*, 518 U.S. at 875; *U.S. Tr. Co.*, 431 U.S. at 23 (holding that "the Contract Clause does not require a

State to adhere to a contract that surrenders an essential attribute of its sovereignty").

III. Because Congress Is Presumed To Legislate Consistent With Background Legal Principles, New York's Preemption Claim Fails.

New Jersey also has not run afoul of the Supremacy Clause because Congress has not preempted New Jersey's law purporting to withdraw it from the Compact. No one disputes New York's contention that because Congress approved the Compact, it is federal law. Compl. ¶ 122. But New York's next logical step—that New Jersey's state law purporting to withdraw it from the Compact is preempted because it conflicts with federal law, *id.* ¶ 123—is fallacious. Congress is presumed to have legislated against background principles such as those discussed above. *See United States v. Wells*, 519 U.S. 482, 495 (1997). Because Congress was also silent on the terms of New Jersey's withdrawal, it is presumed not to have intended to displace them.

It is undisputable that the Compact was approved by Congress, Pub. L. No. 83-252, pmbl., 67 Stat. at 541. And it is undisputed that an interstate compact approved by Congress "counts as federal law." *Kansas v. Nebraska*, 574 U.S. 445, 455 (2015).

But New York's preemption claim fails because it ignores the presumption that "Congress is aware of existing law when it passes legislation." *Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014). And more specifically, the Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents," *Wells*, 519 U.S. at 495, and requires that when Congress seeks to change a "declaration of federal common law," it must "'speak[] directly to [the] question' at issue." *Am. Elec. Power Co. v. Connecticut*,

564 U.S. 410, 424 (2011) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). Under these principles of statutory construction, Congress is presumed to have known about the unmistakability doctrine as well as the federal common law of contracts, which have formed part of this Court's jurisprudence for decades—if not centuries. *See Winstar*, 518 U.S. at 874.

Further, Congress also knew the relevant facts that would trigger application of these principles when it approved the Compact. Congress knew that the Compact required New Jersey to forfeit part of its police powers. Pub. L. No. 83-252, art. I, § 4, 67 Stat. at 542; Compl. ¶¶ 2-5. And that the Compact lacked a withdrawal provision is apparent from its face. *See, e.g.*, Compl. App. 3a (Pub. L. No. 83-252, art. I, § 4, 67 Stat. at 542). Because Congress knew both the relevant legal principles and the underlying facts that would trigger them, the Court may presume that Congress understood that the Compact permitted either New York or New Jersey to exercise their sovereign prerogatives to withdraw unilaterally rather than submit to a perpetual cession of their police powers. Because Congress did nothing to include express withdrawal language in the Compact, the Court must read the statute as it was passed in accordance with ordinary default rules applicable in this country—"not revise [the] legislation . . . just because the text as written creates an apparent anomaly as to some subject it does not address." *Michigan v. Bay Mills Ind. Cmty.*, 572 U.S. 782, 794 (2014).

CONCLUSION

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

Respectfully submitted.

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