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P R O C E E D I N G S

(10:04 a.m.)

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

Ms. Vale.

ORAL ARGUMENT OF JUDITH N. VALE

ON BEHALF OF THE PLAINTIFF

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MS. VALE: -- enter.

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

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

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

14 JUSTICE THOMAS: I --

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

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

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

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

3 JUSTICE THOMAS: But --

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

8 JUSTICE THOMAS: But they --

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

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

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

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



1 keep that going until they decided together to  
2 end it.

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

10           But what about --

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

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

1 termination provision either way.

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

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

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

25           It's one thing to say that, well, you

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

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

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

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

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

1 corruption at the shared port that the Port  
2 Authority was not set up to deal with.

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

5 MS. VALE: And then the states --

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

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

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

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

1 you'd be taking away New York's sovereign  
2 interest in having a regulatory say over that.

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

8 JUSTICE JACKSON: Can I --

9 MS. VALE: And this --

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

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

1 about would start.

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

6 So what do we do with that evidence?

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

14 JUSTICE JACKSON: Right --

15 MS. VALE: And I think that --

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

21 MS. VALE: Well --

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

25 MS. VALE: I don't think so, because

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

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

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

23 And I guess what I'm trying to push  
24 back on is that if the reason they were silent  
25 was not because they thought this was in -- an

1 agreement for all times but because they were  
2 worried about signaling to the mob bosses that  
3 they would be leaving, I don't know that we can  
4 draw the inference that you want us to draw.

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

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

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

23 So, in Article I, the compact talks  
24 about the public need and it's a public need  
25 that's joint. It is, they say, in Article I,



1 that "regulating port labor is deemed to be the  
2 exercise of the power of both states for the  
3 benefit, the public safety, of both states."

4 And --

5 JUSTICE GORSUCH: Ms. Vale --

6 MS. VALE: Yes.

7 JUSTICE GORSUCH: -- in that respect,  
8 as I understand it, and I am no expert on New  
9 Jersey and New York compacts, I confess, that --  
10 that it does require funding from the  
11 legislature -- from both legislatures to work on  
12 an annual basis.

13 And what's the difference functionally  
14 between New Jersey deciding not to fund the  
15 Commission any longer and what it's done here,  
16 withdrawing from it?

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

25 JUSTICE GORSUCH: But do you -- do you

1 --

2 MS. VALE: It's the opposite.

3 JUSTICE GORSUCH: -- do you agree,  
4 though, that New Jersey could unilaterally  
5 refuse to fund?

6 MS. VALE: They could -- the governor  
7 could unilaterally veto pieces of the budget.  
8 So the money doesn't come directly from either  
9 New Jersey or New York.

10 JUSTICE GORSUCH: No, I appreciate  
11 that clarification.

12 MS. VALE: Yes.

13 JUSTICE GORSUCH: But it would still  
14 leave New Jersey effectively able to withdraw by  
15 vetoing?

16 MS. VALE: Well, they have the power  
17 to veto the budget, but that is not the same as  
18 effectively --

19 JUSTICE GORSUCH: Well --

20 MS. VALE: -- withdrawing.

21 JUSTICE GORSUCH: -- well -- yeah,  
22 that's what I'm trying to --

23 MS. VALE: Yes.

24 JUSTICE GORSUCH: -- get at. What's  
25 the difference?

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

2 JUSTICE GORSUCH: If you say they can  
3 do that --

4 MS. VALE: Yep.

5 JUSTICE GORSUCH: -- but they can't do  
6 this, what's the delta? What are we complaining  
7 about?

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

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

18 JUSTICE GORSUCH: Well --

19 MS. VALE: -- the Commission is shut  
20 down.

21 JUSTICE GORSUCH: -- presumably, all  
22 the -- all those complaints flow from  
23 terminating the -- the -- the compact too, no?

24 MS. VALE: Well, but what New Jersey  
25 wants to do is terminate the compact and then

1 set up by itself almost the exact same  
2 commission --

3 JUSTICE GORSUCH: Right.

4 MS. VALE: -- so then it would be able  
5 to keep going.

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

8 MS. VALE: Sure.

9 JUSTICE GORSUCH: But -- but let --  
10 let's say they veto the budget and then set up  
11 their own operations.

12 MS. VALE: I see. No, so that would  
13 --

14 JUSTICE GORSUCH: What -- what would  
15 prevent them from doing exactly what they've  
16 done so far or seek to do so far?

17 MS. VALE: Sure. That's because the  
18 compact requires, for someone to work in the  
19 specified jobs in the compact, you have to have  
20 a license from the Commission.

21 So, if New Jersey set up a shadow  
22 commission while this compact remained, it could  
23 give out licenses, but that wouldn't help  
24 anybody because they still couldn't work at the  
25 port without a Commission license.

1                   And so that's why, if either state  
2                   tried to take the Commission to the brink by  
3                   just vetoing the budget, they have the power to  
4                   do that, but that shows that they have the power  
5                   to get both states back to the negotiating table  
6                   to find a compromise, and that's what we think  
7                   these provisions show.

8                   JUSTICE SOTOMAYOR: Counsel, can --  
9                   can I --

10                  JUSTICE ALITO: Ms. Vale -- go -- go  
11                  ahead.

12                  JUSTICE SOTOMAYOR: Sorry. Can I turn  
13                  to a different question?

14                  I don't know if you gave up the game  
15                  when you said the parties didn't intend for this  
16                  to last perpetually. I've been stepping back  
17                  from this case, and let me walk you through my  
18                  thinking.

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

1 MS. VALE: Correct.

2 JUSTICE SOTOMAYOR: So, in my mind, a  
3 perpetual contract is different from a  
4 non-perpetual contract when one party can keep  
5 somebody on the hook indefinitely. That can be  
6 the only difference, correct?

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

10 JUSTICE SOTOMAYOR: So --

11 MS. VALE: -- we just don't want to do  
12 this anymore, yes.

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

19 MS. VALE: Yes, and then they also can  
20 go to Congress --

21 JUSTICE SOTOMAYOR: So we know here  
22 that the parties never intended for this to be  
23 perpetual. And so I see the question as, what  
24 are the situations in which one party can  
25 withdraw? Once you said they didn't intend for

1 it to be perpetual, I think that's the end of  
2 the game.

3 MS. VALE: Well, I -- I don't think --

4 JUSTICE SOTOMAYOR: I -- I think, once  
5 you assume that, and it's very clear they didn't  
6 intend this to be perpetual -- Justice Jackson  
7 pointed out the reasons -- then, really, what we  
8 have to be able to say is one party can't keep  
9 the other on the hook forever.

10 MS. VALE: Well, I think, when they  
11 refer to perpetual in the history here, they  
12 were acknowledging that they thought at some  
13 point the two states would come together and  
14 decide to end it. And I think what --

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

25 MS. VALE: Well, I think there's also

1 a difference between -- it's always the case  
2 that states could come together and decide to  
3 end a compact even if they think this is still a  
4 great idea, but, for whatever reason, we just  
5 don't like it anymore, it's too much of a  
6 hassle. But what they meant here when they said  
7 it's not perpetual was that they had a joint  
8 problem in a shared port and they wanted to take  
9 care of it together with a bistate commission  
10 because that commission provided extra  
11 protection against government capture and --

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

18 MS. VALE: That's right, although I  
19 just -- both states do still have criminal law  
20 enforcement authority in their borders and  
21 compacts --

22 JUSTICE ALITO: They would have --  
23 they would have plenary authority, except --  
24 except insofar as the federal government had --  
25 had authority, but another state would not have



1 authority there?

2 MS. VALE: Correct.

3 JUSTICE ALITO: Okay. Now your  
4 argument is -- and this may -- the parties may  
5 have agreed to do this -- to surrender this  
6 sovereign authority perpetually. I think that's  
7 been the thrust of some of the questions.

8 So isn't that an extraordinary thing?  
9 And shouldn't there be a presumption against a  
10 state having done that, which could be overcome  
11 by a clear indication of a contrary intent?

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

23 JUSTICE BARRETT: But --

24 MS. VALE: -- to end it.

25 JUSTICE BARRETT: -- is there a

1 distinction? I mean, my understanding is that  
2 this background rule that you're referring to  
3 about no unilateral withdrawal applies primarily  
4 in the context of boundary disputes or shared  
5 water, which is an entirely different thing.

6 MS. VALE: Well, we don't think that  
7 that distinction, this vested rights theory,  
8 holds up when you apply it to compacts. And  
9 even if you did apply it here, we think this  
10 compact fits within it because the regulatory  
11 authority is tied to a geographic district.

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

15 JUSTICE BARRETT: Can I just clarify  
16 one thing --

17 MS. VALE: Yes.

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

1 MS. VALE: Well, yeah, the -- the  
2 geographic area had already been designated,  
3 like, with metes and bounds in the Port  
4 Authority Compact. That's the port district.  
5 And then this compact expressly refers to that  
6 Port Authority Compact and says the port  
7 district that preexists, that these two states  
8 have already decided to have a shared -- a  
9 shared regulatory power over, that's going to be  
10 the district where the Commission's power is  
11 also linked to.

12 JUSTICE BARRETT: But it's just about  
13 regulatory authority?

14 MS. VALE: This compact --

15 JUSTICE BARRETT: It's not changing  
16 who owns the property?

17 MS. VALE: Correct. No, correct.

18 JUSTICE BARRETT: It doesn't change  
19 where the border is?

20 MS. VALE: That's correct. It was --  
21 yes. It --

22 JUSTICE BARRETT: Okay. That's all  
23 I'm trying to establish. It's just shared  
24 regulatory authority?

25 MS. VALE: Yeah. I mean, it's in -- I

1 guess one way to think about it is, in this  
2 compact, it's in two -- it's in two different  
3 pieces of paper, right? So sometimes you have  
4 compacts that both set the boundary and set up  
5 the jurisdiction sharing in one piece of paper.  
6 In this -- and what happened here was that they  
7 did the Port Authority Compact, they set the  
8 district, they had some sharing, and then later  
9 they had a problem that the Port Authority  
10 wasn't able to handle, so they did a second  
11 compact linked to the first that has more  
12 sharing, that has more sharing.

13           And this is -- if you look at the  
14 evolution of compacts, this was the tradition,  
15 to omit a termination clause and yet understand  
16 it to not allow --

17           JUSTICE KAGAN: Ms. Vale --

18           JUSTICE KAVANAUGH: Is it -- is it the  
19 --

20           JUSTICE KAGAN: Go ahead.

21           JUSTICE KAVANAUGH: You go.

22           CHIEF JUSTICE ROBERTS: Justice Kagan?

23           JUSTICE KAGAN: Do -- do you  
24 understand ordinary contract principles to cut  
25 against you? In other words, do you accept the

1 proposition that to rule for you, we would have  
2 to say that there's a different tradition and  
3 practice and default rule in compacts than there  
4 is in ordinary contracts?

5 MS. VALE: Yes. Yes, although even  
6 under regular contract principles, the first  
7 order of business is to look for the parties'  
8 intent, which we think can be discerned here.

9 And even in contract law, there are  
10 times when the default rule is different for  
11 certain specific kinds of contracts, like  
12 settlement agreements, you can't usually  
13 withdraw at will, covenants that run with the  
14 land --

15 JUSTICE KAGAN: But the usual --

16 MS. VALE: -- you can't usually  
17 withdraw --

18 JUSTICE KAGAN: -- rule, I -- I take  
19 it you agree, you know, if -- if there's no  
20 specific provision in the contract and if  
21 there's no clear indication of the parties'  
22 intent from their negotiating positions or -- or  
23 their performance or, you know, we're -- we're  
24 kind of at sea, the usual rule in contract  
25 interpretation is, oh, there's a contract with

1 continuing obligations on both sides; that means  
2 one party could walk away.

3 MS. VALE: That is the usual rule, is  
4 -- for commercial contracts, we -- we agree,  
5 although some specific types of contracts are  
6 different. And this Court said in Alabama v. --  
7 v. North Carolina that we don't just look to  
8 contract law and imply in default terms to  
9 compacts, even when those default terms are very  
10 common and -- and very well-settled --

11 JUSTICE KAGAN: So is your view --

12 MS. VALE: -- in contract law.

13 JUSTICE KAGAN: -- that the reason why  
14 we shouldn't use regular contract principles --  
15 I mean, there -- there has to be something  
16 special and different about compacts. What --  
17 what is it?

18 MS. VALE: Yes.

19 JUSTICE KAGAN: Is it found in the  
20 history? Is it found in some understanding of  
21 the function of com -- compacts? What is it?

22 MS. VALE: Yes. Yes. There are --  
23 there are several things that are unusual and  
24 different about compacts. One is the history  
25 and tradition, which I can go through. I think

1 another one, before I march through the history,  
2 is that this is a -- a unique form of sovereign  
3 agreement that has some features of contracts,  
4 but it also has features of a treaty since it's  
5 between coequal sovereigns. And for treaties --

6 JUSTICE KAGAN: Well, the presence --

7 MS. VALE: -- the default --

8 JUSTICE KAGAN: -- of sovereignty, I  
9 think some of the questions from the bench have  
10 suggested to you, at least cut both ways. You  
11 might say, well, it's a unique form of sovereign  
12 agreement, but Justice Alito just said to you  
13 isn't it a kind of weird thing to think that any  
14 state gives up its sovereignty forever?

15 So, at the very least, this -- this --  
16 these considerations of sovereignty cut both  
17 ways. It makes me think we should just go back  
18 to ordinary contract principles.

19 MS. VALE: Well, I think there is a  
20 very different tradition and understanding for  
21 compacts, and that's because, if you look at --  
22 if you look -- the pre-50 -- the pre-1953  
23 compacts, as I said at the beginning, 80 of  
24 those -- and these are listed in the Appendix A  
25 in the blue brief. There were 80, and 56

1 omitted a termination clause.

2           And yet, New Jersey admits that many  
3 of them, I think about 36, do not allow  
4 termination. And that 36, they do a couple  
5 different things. There are boundary compacts,  
6 which I think we all agree don't allow  
7 unilateral termination, but there's also shared  
8 jurisdiction provisions in some of those  
9 boundary compacts, and also there are some  
10 compacts that have shared jurisdiction without  
11 setting the boundary.

12           And New York and New Jersey had one of  
13 those about this same harbor -- this is the 1834  
14 boundary compact between New York and New  
15 Jersey -- that both set the boundary and created  
16 a shared jurisdiction swap where sometimes New  
17 York has jurisdiction over the water up to the  
18 New Jersey line, sometimes New Jersey has  
19 service of process jurisdiction up to the New  
20 York line, and that compact is understood not to  
21 allow unilateral withdrawal even though it  
22 omitted a clause.

23           JUSTICE KAVANAUGH: But it sounds like  
24 then that there's not any clear history, that  
25 there -- as you're saying, there are distinctive



1 kinds of compacts. And I -- I guess the  
2 question then is, in a compact like this, what  
3 should the default rule be and why shouldn't the  
4 default rule be, when there's silence, this  
5 would be a big deal for a state to give away its  
6 sovereignty and give away its right to  
7 unilateral withdrawal, so we, as a Court, are  
8 going to establish the default rule being that  
9 you can unilaterally terminate, and the parties  
10 can always negotiate around that and put in an  
11 express provision in the contract that would  
12 require both states to withdraw?

13 Why isn't that the better default  
14 rule?

15 MS. VALE: Well, I think one reason is  
16 because we think the history and tradition  
17 before 1953 was pretty clear. All of those  
18 different compacts I was describing did the same  
19 thing. They omitted a termination clause and  
20 yet were understood not to allow it. And they  
21 viewed --

22 JUSTICE JACKSON: Were any of them  
23 temporary?

24 JUSTICE KAVANAUGH: Well, 36 -- there  
25 were 36 out of 50? Can you give the numbers

1 again?

2 MS. VALE: Oh, sure. Well, there are  
3 56 that omitted a provision.

4 JUSTICE KAVANAUGH: Yeah.

5 MS. VALE: We think that New Jersey  
6 agrees that at least 36 of those did not allow  
7 unilateral withdrawal. Then there's some more  
8 that I think we disagree about. So I can --  
9 maybe the next most important group is the  
10 compact --

11 JUSTICE KAVANAUGH: But, of the 36 --  
12 sorry to interrupt.

13 MS. VALE: Yeah, sure.

14 JUSTICE KAVANAUGH: I think you were  
15 saying some of them were boundary ones --

16 MS. VALE: Yep.

17 JUSTICE KAVANAUGH: -- and those are  
18 going to be different altogether, right?

19 MS. VALE: Well, some of them were  
20 boundary. Some of them had jurisdiction  
21 sharing, which we actually think is quite  
22 similar to this compact. And then some of them  
23 did water allocations. But some of those set up  
24 agencies, which at least is similar to this as  
25 well. And all of those have this same feature

1 of omitting a termination clause and yet being  
2 understood not to allow it.

3 And then the next group is the 12  
4 bistate compacts that set up regulatory  
5 agencies, the first being the Port Authority  
6 Compact, and that compact omitted a general  
7 withdrawal clause after the Port Authority was  
8 up and running, and yet I think the parties  
9 agree that unilateral withdrawal is not allowed.

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

19 CHIEF JUSTICE ROBERTS: You -- you  
20 may -- you may want to save a minute or two for  
21 rebuttal.

22 MS. VALE: I think I saved five  
23 minutes for -- for rebuttal, Your Honor.

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

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: It's up to  
3 you.

4 MS. VALE: I'm happy to -- happy to --  
5 to stop.

6 CHIEF JUSTICE ROBERTS: Okay. Thank  
7 you. You know, the -- what was the allocation  
8 of business between the New York side and the  
9 New Jersey side in 1953?

10 MS. VALE: It was predominantly on the  
11 New York side. It was about 70 percent on the  
12 New York side.

13 CHIEF JUSTICE ROBERTS: And today?

14 MS. VALE: It's predominantly on the  
15 New Jersey side.

16 CHIEF JUSTICE ROBERTS: Eighty/twenty  
17 is the numbers that -- okay.

18 MS. VALE: Yes.

19 CHIEF JUSTICE ROBERTS: That's a  
20 fairly substantial change in the mix, and that  
21 may have something to do with an effort to  
22 reallocate or withdraw from a compact that was  
23 entered into in 1953.

24 What -- what if what happens is,  
25 because of silt coming out of the Hudson or

1     whatever, there's no business in -- in this area  
2     on the New York side, it's all on the New Jersey  
3     side?  Would that be a basis for New Jersey to  
4     say, you know, it's time for us to get out of  
5     this historic and, you know, useful but no  
6     longer relevant allocation because what it's  
7     doing then is giving New York considerable  
8     authority over what is just New Jersey business?

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

20            I mean, massive amounts of goods come  
21    into New York even if they land on the New  
22    Jersey side.  And so it's a huge driver of our  
23    economy for our consumers, and New York will  
24    still have sovereign and proprietary interests  
25    in the terminals that the Port Authority owns on

1 the New Jersey side.

2 CHIEF JUSTICE ROBERTS: So let's just  
3 say, obviously, a -- a hypothetical, if the Port  
4 Authority Compact is dissolved for one reason or  
5 another, surely, they would be able -- then be able  
6 to get out of this one?

7 MS. VALE: I do think that would  
8 potentially be a more fundamental change since,  
9 when they agreed to this compact --

10 CHIEF JUSTICE ROBERTS: Okay.

11 MS. VALE: -- the Port Authority  
12 Compact was there.

13 CHIEF JUSTICE ROBERTS: So, if it's a  
14 fundamental change, one state can unilaterally  
15 withdraw?

16 MS. VALE: Well, I still don't know  
17 that they could unilaterally withdraw. I think  
18 that would maybe give each -- if the Port  
19 Authority was dissolved, that might give either  
20 state a good reason to -- to go talk to the  
21 other and say maybe -- maybe we should dissolve  
22 this.

23 CHIEF JUSTICE ROBERTS: Well, I -- I  
24 assume they've talked to each other before this  
25 too.

1 MS. VALE: Well, unfortunately, we  
2 don't think that New Jersey really did put in  
3 efforts to negotiate with New York, use the  
4 tools available to it expressly in the compact  
5 to try to find some agreement.

6 CHIEF JUSTICE ROBERTS: Now you just  
7 think they didn't do it enough, or you're saying  
8 they didn't talk to you about this at all?

9 MS. VALE: I -- they didn't -- there  
10 was not a lot of communication about this as far  
11 as I know. I think the New Jersey legislature  
12 at times would just pass an amendment and then  
13 the New York legislature would consider it and  
14 decide this is a really bad idea, but there  
15 wasn't, as far as I know, a ton of  
16 communication.

17 And I think you can't just divide up  
18 the port or -- or unscramble this that easily  
19 because both states relied on the Commission's  
20 bistate protections in moving forward with the  
21 overall joint endeavor of the Port Authority.

22 So they set up the Commission to do  
23 this together, and then they relied on it in  
24 building out the port together. So New York and  
25 New Jersey together, for example, through the

1 Port Authority, built Port Elizabeth, the first  
2 modern container terminal, which is on the New  
3 Jersey side, and the Port Authority still owns  
4 that facility, and --

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Justice Thomas, anything further?

8 JUSTICE THOMAS: One question. What  
9 role does the requirement, the constitutional  
10 requirement that Congress give its consent to  
11 this compact, what should that play in our  
12 analysis?

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

21 We don't actually think these states  
22 are necessarily at a horrible impasse. We think  
23 they can find a way to work together if they use  
24 the tools available to them in the -- in the  
25 compact, but Congress does provide another



1 avenue if needed.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: If this were a treaty,  
4 could New Jersey unilaterally withdraw?

5 MS. VALE: No, the default rule for  
6 treaties is that unilateral withdrawal is not  
7 allowed if it's -- if it's not expressly given  
8 in the treaty. And so we think that default  
9 rule is another piece to look at about what the  
10 states' expectations would have been here,  
11 because we're not saying their compact is  
12 exactly like a treaty, but it has features of a  
13 treaty such that it's between coequal  
14 sovereigns.

15 And that form of the coequal  
16 sovereigns matters because states have  
17 historically gone to the compact when they want  
18 to bind each other. That's why they went to it  
19 for boundaries, for water, and then for the Port  
20 Authority and then for agencies that followed.

21 JUSTICE ALITO: Has the United States  
22 unilaterally withdrawn from treaties?

23 MS. VALE: Yes, they have sometimes.  
24 Often, those treaties -- there was -- you know,  
25 either expressly allowed it or it was wartime.

1 There was some -- there are exceptions to any  
2 default, and that happens.

3 But I don't think New Jersey is  
4 seeking an exception to a default here.  
5 They're -- they're seeking the default itself,  
6 which for treaties is against unilateral  
7 withdrawal.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Sotomayor?

10 JUSTICE SOTOMAYOR: Assume that I  
11 don't think anything points clearly. You rely  
12 on one treaty to say the default rule is no  
13 unilateral termination, yet one of the  
14 professors you rely on, Zimmermann, wrote  
15 approvingly of a U.S. position in a Dyer case in  
16 1951 that predated this compact, and, there, he  
17 wrote that outside of certain kinds of contracts  
18 -- and I think he meant setting boundaries --  
19 the presumption should be that compacts call --  
20 calling for indefinite continuing performance  
21 are subject to unilateral withdrawal.

22 So he took their position contrary to  
23 yours. I look at the 86 contracts that you  
24 mentioned, many of them are boundaries, many are  
25 water rights. I'm -- I'm actually not sure that

1 -- where we get the default provision that those  
2 are indefinite because what we're saying is  
3 states shouldn't be presumed to give up their  
4 sovereignty, and particularly with water rights  
5 cases, that's exactly what they're doing. They  
6 have sovereignty over that water and its use.  
7 So I don't know where this general rule comes.

8 I also look at the contracts, and  
9 certain numbers do reflect unilateral  
10 withdrawal. Some don't. The history is just  
11 all over the map.

12 I keep going back to my simple point:  
13 Isn't the simplest rule is not one that makes  
14 presumptions about 86 contracts or compacts that  
15 I know nothing about, all of them seem very  
16 varied, some of them have commissions, some of  
17 them don't, some of them set boundaries, but  
18 they also create independent agencies.

19 Why isn't a simple one, if the parties  
20 don't expect this contract to be indefinite,  
21 unilateral withdrawal is presumed? It's a  
22 simple rule. Here, the parties clearly stated  
23 it wasn't going to be forever, unlike your Port  
24 Authority Compact.

25 Why isn't that a better rule?

1 MS. VALE: I think it --

2 JUSTICE SOTOMAYOR: It's a -- it --

3 MS. VALE: Yep?

4 JUSTICE SOTOMAYOR: -- would rule  
5 against you in this case, but isn't that the  
6 simplest way to decide this case?

7 MS. VALE: Well, no, Your Honor. I  
8 mean, I do think that it is also a simple rule  
9 to say that you -- you know, states don't have  
10 the power of unilateral withdrawal unless they  
11 expressly say so, which is the --

12 JUSTICE SOTOMAYOR: But that doesn't  
13 have anything to do with the parties' intent.  
14 My rule does. I look at the contract and say,  
15 here, by your own admission, the contract was  
16 not intended to be indefinite.

17 MS. VALE: But I think --

18 JUSTICE SOTOMAYOR: I don't go to  
19 rules. I go to what the contract intends.

20 MS. VALE: But I think what these  
21 parties intended was to do the same thing that  
22 had been done before them in many other  
23 compacts, in the Port Authority Compact, in  
24 their own prior compacts.

25 JUSTICE SOTOMAYOR: No. The contracts

1 are -- the compacts are mixed. Some give  
2 unilateral; some don't. Some are explicit; some  
3 aren't. They're -- they're all over the map.

4 MS. VALE: But I -- I -- I don't think  
5 that's accurate for the pre-1953 compacts. I  
6 think, before 1953, it was fairly unified. It  
7 was -- there was no tradition at all of allowing  
8 unilateral withdrawal, but --

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

12 MS. VALE: That's right, but after the  
13 --

14 JUSTICE SOTOMAYOR: Post nine -- so  
15 you're talking about a very short history that's  
16 -- that goes both ways after that.

17 MS. VALE: But I don't think the  
18 history before 1953 does go both ways because,  
19 before 1953, if you look at the bistate  
20 compacts, which we think are most relevant  
21 because, for a bistate compact, withdrawal  
22 terminates the whole compact, which isn't  
23 necessarily true for multistate compacts.

24 For bistate compacts, there was no  
25 tradition of allowing unilateral withdrawal.

1 They either omitted a provision and seemed to  
2 have been mostly understood not to allow it, or  
3 they expressly prohibited unilateral withdrawal.

4 And those that pro -- expressly  
5 prohibited unilateral withdrawal were boundary  
6 and water allocation compacts, so they seemed to  
7 have just been confirming the very same default  
8 rule that New Jersey agrees applies to boundary  
9 and water allocation compacts.

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

19 And I think it is much more likely  
20 that the states would have been turning to  
21 treatises about compacts than treatises about  
22 contracts. And the Zimmermann treatise is not a  
23 law review article. It was published by the  
24 Council of State Governments. Zimmermann  
25 advised on compacts that New Jersey was a

1 signatory to. And this really was a resource at  
2 the time on compacts.

3 JUSTICE SOTOMAYOR: Thank you,  
4 counsel.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 JUSTICE KAGAN: Ms. Vale, I think you  
7 said to Justice Thomas that you don't view New  
8 York and New Jersey as at an impasse. But, you  
9 know, most of the time parties don't get to this  
10 Court unless they're at an impasse.

11 (Laughter.)

12 JUSTICE KAGAN: And I'm just wondering  
13 what -- what New York's view of the end game is  
14 here. I mean, I think one of the reasons why  
15 the normal contract rule is the way it is is a  
16 sense that committing parties who are at  
17 loggerheads to indefinite performance just  
18 doesn't work and makes no sense for anyone.

19 And so how -- how is that going to be  
20 any different here?

21 MS. VALE: Well, yeah, I agree that  
22 we're at an impasse over unilateral withdrawal,  
23 but I think, if unilateral withdrawal was not  
24 allowed, then the states could move forward. We  
25 don't think that then the Commission would

1 necessarily be completely frozen and hobbled,  
2 because both states have a lot of power in this  
3 compact. They each do have power to say no to  
4 things that they don't like. They each do have  
5 power to, you know, adjust the budget if they  
6 want to.

7           And so the states can use those tools  
8 to keep working together. And when New Jersey  
9 appointed its commissioner recently --

10           JUSTICE KAGAN: They can also use  
11 those tools to shut things down.

12           MS. VALE: But we don't think -- they  
13 could, but we don't think that they really would  
14 because, as I was saying earlier, I think, to  
15 Justice Gorsuch, if you do that while the  
16 compact is intact, you bring pain to both  
17 states, you bring pain to the shipping industry,  
18 and you bring pain to the workers.

19           And I think the states set it up this  
20 way so that they would have to come back to the  
21 table and work together. And these two states  
22 need to keep working together for the Port  
23 Authority Compact, for other compacts that  
24 they're in together, and for other endeavors  
25 that they do.



1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Gorsuch?

4 Justice Kavanaugh?

5 Justice Barrett?

6 JUSTICE BARRETT: I do have a  
7 question. So you mentioned that if -- if  
8 withdrawal happens here, that there's some  
9 properties, said something about the port  
10 belonging to both, except you can, you agree,  
11 terminate it by mutual consent or Congress could  
12 terminate it.

13 So I just wanted to -- to clarify.  
14 It's not your position, right, that the fact  
15 that there might still be some things to unwind,  
16 that's no barrier because, presumably, those  
17 things would have to be unwound if it were  
18 terminated in the way you propose?

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

22 JUSTICE BARRETT: What if Congress  
23 just terminated it?

24 MS. VALE: Then they would have to  
25 find a way to unwind things.

1 JUSTICE BARRETT: Unwind things.

2 MS. VALE: But we think that allowing  
3 one state to both trigger the unwinding and  
4 dictate the terms is not what these states  
5 intended, and it doesn't make sense because of  
6 that continuing interest.

7 So New Jersey says we're out of the  
8 Commission. But New York -- that harms New  
9 York's sovereign interests in a couple different  
10 ways. First of all, it allows one state to  
11 destroy a sovereign entity that belongs in part  
12 to another state. It also takes away the  
13 bistate protections that these two states wanted  
14 in order to prevent the harms coming to either  
15 state if one state started regulating --

16 JUSTICE BARRETT: Is that really why  
17 -- I mean, I'm just wondering, it seems very odd  
18 that New York's hanging on to this when New  
19 Jersey has 82 percent of the shipping on its  
20 side, and, as the Chief Justice was pointing  
21 out, the industry has so dramatically changed to  
22 container shipping and no longer net unloading  
23 and all of that. Is this fees? Like, what is  
24 New York really -- is this just --

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

1 JUSTICE BARRETT: -- on principle?

2 MS. VALE: No. I mean, the -- the  
3 fees go to the Commission. They don't go to New  
4 York. It's because the port itself, through the  
5 Port Authority, is a joint endeavor. I mean,  
6 New York still has strong sovereign and  
7 proprietary interests in the terminals on the  
8 New Jersey side, and massive amounts of goods  
9 come into New York.

10 So, if corruption and undue influence  
11 take hold on one side, that hurts consumers.  
12 That's the -- you know, it ends up getting  
13 passed down to consumers and harming New  
14 Yorkers.

15 JUSTICE BARRETT: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Jackson?

18 JUSTICE JACKSON: Can I just ask you  
19 whether you know whether any of the prior  
20 compacts that you're putting so much stock in  
21 were intended to be temporary? I mean, I -- you  
22 -- you've talked a lot about how there were  
23 former compacts and there were -- some of them  
24 were border, some of them were water.

25 Justice Kagan pointed out that, you

1 know, are we looking at contract law or compact  
2 law? And I thought your answer was compact was  
3 sort of a species of contract law and that  
4 you've identified all of these compacts.

5 But I think this might be yet another  
6 species of compact law insofar as this compact  
7 might be distinct because the parties that  
8 entered it went into it believing this is only  
9 going to be temporary.

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

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

24 JUSTICE JACKSON: Well, I mean,  
25 that -- I don't know how analogous that is

1 because they -- they went into it with a project  
2 that seemed to have a definite duration, that  
3 is, the building of the bridge. I don't -- I'm  
4 just going off of what you said.

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

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

8 JUSTICE JACKSON: But, here --

9 MS. VALE: -- the best example I can  
10 think of, of one where the states, again, went  
11 into it thinking we'll end it together, and then  
12 that's what happened. And we think that that is  
13 what they --

14 JUSTICE JACKSON: Do you --

15 MS. VALE: -- intended here.

16 JUSTICE JACKSON: -- do you have  
17 evidence that they, when they were talking about  
18 termination -- because there is negotiation  
19 history evidence concerning people thinking  
20 about termination and saying we don't want to  
21 say anything about termination because -- but  
22 they assumed it would terminate.

23 Do you have some evidence that they  
24 said eventually we're only going to -- we're  
25 going to terminate this by mutual agreement?

1 MS. VALE: We think that comes out of  
2 the fact that they talked so much about how it  
3 was a joint responsibility, how it was a one  
4 single port with ships and vessels and people  
5 moving in between piers, that they understood it  
6 as a joint endeavor. And so, the -- even though  
7 they thought we will end it at some point, it  
8 was a joint endeavor, and so they thought they  
9 would end it jointly when the time came.

10 JUSTICE JACKSON: One last question  
11 about treaties. I understood that there were  
12 exceptions to the sort of unilateral withdrawal  
13 point that you made and that one of them was  
14 commercial or trading agreements could be the  
15 subject of unilateral withdrawal if they were in  
16 a treaty. So why wouldn't this fall into that  
17 exception, even if we thought that this was a --  
18 like a treaty?

19 MS. VALE: I don't think that this is  
20 like a commercial treaty. The two states are  
21 not, you know, sending -- buying and selling  
22 goods between each other or sending commerce  
23 between --

24 JUSTICE JACKSON: But they're  
25 regulating commerce.

1 MS. VALE: They're regulating  
2 commerce, but they're doing it through licensing  
3 of labor. They're doing it through a law  
4 enforcement role to protect against organized  
5 crime and corruption at the port.

6 It's not a, you know, I -- I'm going  
7 to -- I, New York, am going to give you these  
8 goods and you, New Jersey, are going to give me  
9 these goods, which I think is more of a  
10 commercial -- a commercial treaty.

11 JUSTICE JACKSON: All right. Thank  
12 you.

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

15 MS. VALE: Thank you.

16 CHIEF JUSTICE ROBERTS: Sorry -- sorry  
17 for my confusion.

18 Mr. Feigenbaum.

19 ORAL ARGUMENT OF JEREMY M. FEIGENBAUM

20 ON BEHALF OF THE DEFENDANT

21 MR. FEIGENBAUM: Mr. Chief Justice,  
22 and may it please the Court:

23 The question this case presents is  
24 whether the Waterfront Commission Compact  
25 prevents New Jersey from reclaiming its police

1 powers. As New York admits, there is nothing in  
2 the plain text of the compact that expressly  
3 limits New Jersey's withdrawal.

4 And as New York this morning has  
5 confirmed, there is nothing that justifies a  
6 perpetual veto in an agreement New York now  
7 admits is not itself perpetual.

8 Instead, the compact's silence  
9 confirms that settled background rules apply,  
10 and those rules, contract law and state  
11 sovereignty, both well established by the 19th  
12 Century, allow New Jersey to withdraw.

13 Indeed, under this Court's cases,  
14 including those cases involving government  
15 contracts, different categories of agreements  
16 are subject to different rules.

17 On the one hand, there are agreements  
18 to convey property or to settle legal disputes  
19 over a particular res. Those agreements are  
20 presumptively permanent, meaning that states  
21 cannot withdraw from agreements settling  
22 boundaries or settling water rights.

23 On the other hand, as New York has  
24 conceded this morning, contracts of continuing  
25 performance are different, that in the face of



1     silence, parties can withdraw from agreements  
2     that would otherwise require them to keep  
3     performing forever.

4             This compact is precisely the sort of  
5     arrangement from which parties can presumptively  
6     withdraw. In 1953, New York and New Jersey  
7     agreed to each delegate their own licensing and  
8     policing powers to the bistate agency. But 70  
9     years have passed, and the New Jersey  
10    legislature has concluded that the Commission  
11    now engages in overregulation of business and is  
12    ill-equipped to handle 21st Century security  
13    challenges.

14            New York believes that the New Jersey  
15    legislature can never reclaim its police powers.  
16    But New York's perpetual veto would deprive our  
17    legislature of the flexibility and the  
18    accountability to the people that are at the  
19    heart of sovereignty.

20            I welcome this Court's questions.

21            JUSTICE THOMAS: But, on the other  
22    hand, it seems as though, if you can just walk  
23    away, you deprive New York of any sort of  
24    binding characteristics of a -- of a compact?

25            MR. FEIGENBAUM: I don't think that's

1 right, Your Honor, which is why compacts so  
2 frequently do include express unilateral  
3 withdrawal provisions.

4           While the parties remain subject to  
5 the compact, they are, of course, bound to its  
6 terms, but as in contracting law and consistent  
7 with what this Court has said since the 19th  
8 Century in *Newton* and *Providence Bank* about  
9 government contracts, it can still be binding on  
10 the sovereign while nevertheless not preventing  
11 the sovereign from controlling its own police  
12 powers going forward and making changes where  
13 necessary to stay accountable to the people.

14           JUSTICE THOMAS: Do you think that  
15 would also be your view if New York had walked  
16 away?

17           MR. FEIGENBAUM: We do think that  
18 would be our view. I realize that what's good  
19 for the goose is good for the gander, Your  
20 Honor. And in particular, for this compact,  
21 especially after 70 years have passed, as we  
22 have in this situation, we do think New York  
23 could walk away.

24           We think the compact structure  
25 confirms that it would be incongruous to allow

1 the parties to bring the Commission to a halt  
2 but nevertheless remain trapped when it -- in  
3 it -- within it forever, but we also think  
4 contract law and sovereignty principles cut this  
5 way.

6 JUSTICE THOMAS: Well, finally, in  
7 water cases and boundary cases, there's a vested  
8 interest on the part of the parties, the  
9 sovereign parties.

10 Do you think that New York or even New  
11 Jersey have -- either has any vested interests  
12 in aspects of this compact?

13 MR. FEIGENBAUM: No, Your Honor. And  
14 I think this Court's cases going back about 200  
15 years now help make clear exactly what that kind  
16 of settled right is and what that kind of  
17 settled right is not.

18 So this Court has used the phrase  
19 "vested rights" as effectively a shorthand to  
20 convey the sort of settled property promises or  
21 the settled legal disputes over res from which  
22 parties, including sovereigns, cannot later  
23 withdraw. So that's cases like Fletcher versus  
24 Peck in the land grant context and that's cases  
25 like Hinderlider in the water rights resolution

1 context.

2           What this Court has said on the other  
3 side, again going back to the 19th Century in  
4 cases like Newton and in cases like Providence  
5 Bank, is relying on how the government is  
6 exercising or delegating its police powers is  
7 not the sort of thing another party, even  
8 another state, is entitled to rely on forever.

9           Those are our police powers. And  
10 making sure that future legislatures have the  
11 ability to legislate as they see fit means not  
12 committing their exercise of those powers  
13 through mere silence.

14           CHIEF JUSTICE ROBERTS: You say that  
15 either party can just walk away, right? But, of  
16 course, that's not true. This has been going on  
17 for 70 years. There are buildings here,  
18 buildings there, you know, bank accounts,  
19 ongoing investigations.

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

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

1           The first is that courts have always  
2 understood the withdrawal from an agreement and  
3 the dissolution of whatever's been built on that  
4 agreement to be separate terms, and that's why,  
5 in compacting practice, even when you see  
6 express unilateral withdrawal provisions or  
7 where you see express unanimous withdrawal  
8 provisions, you infrequently see dissolution  
9 terms.

10           So this is true as a matter of  
11 compacting generally that these are severable  
12 questions, and the lack of any language about  
13 dissolution tells us very nothing a -- tells us  
14 very little about how to construe silence, not  
15 unlike what Justice Barrett was pointing out  
16 earlier this morning.

17           CHIEF JUSTICE ROBERTS: Now I -- you  
18 --

19           MR. FEIGENBAUM: The second point --  
20 I'm sorry, Your Honor.

21           CHIEF JUSTICE ROBERTS: I'm sorry. Go  
22 ahead.

23           MR. FEIGENBAUM: I was going to say,  
24 the second point to this compact in particular  
25 is that I don't think this one will be terribly

1 hard to unwind. So this is a compact about  
2 continuing exercise of regulatory authority.

3 This was not like the Port Authority.  
4 This was not about constructing tunnels and  
5 bridges and anything of the sort. This is about  
6 licensing workers on an ongoing basis and  
7 inspecting and revoking their licenses if the  
8 Commission concludes they shouldn't be working  
9 at the port anymore.

10 And those duties are easy to separate.  
11 We have four marine terminals in New Jersey, we  
12 have two marine terminals in New York, and each  
13 state returns to its plenary sovereign power.

14 CHIEF JUSTICE ROBERTS: I don't see  
15 the -- the distinction you draw between ongoing  
16 responsibilities and -- what do you call the  
17 other category?

18 MR. FEIGENBAUM: So I think conveying  
19 settled property rights --

20 CHIEF JUSTICE ROBERTS: Conveying  
21 settled --

22 MR. FEIGENBAUM: -- resolving legal  
23 disputes.

24 CHIEF JUSTICE ROBERTS: -- prop -- but  
25 I don't see that in our opinions. I -- I mean,

1 whether they're dicta or not, certainly, the  
2 language in our opinions cuts pretty strongly  
3 against you.

4           They have, you know, in the -- in the  
5 Sims case, an interstate compact cannot be  
6 unilaterally nullified. In the Northeast  
7 Bancorp, no compacting party may modify or  
8 repeal its law unilaterally. In Hess, entities  
9 created by compact are not subject to the  
10 unilateral control of any one of the states.

11           I mean, you can argue that that was  
12 dicta in those cases or that this case is  
13 particularly different, but we certainly don't  
14 have any case adopting the distinction you draw.

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

19           This Court specifically reserved the  
20 question of withdrawal in Sims. It referred to  
21 the Solicitor General's position in that case  
22 and described it as a tempting vista that it  
23 didn't have to go down. So we know Sims and the  
24 language about unilateral nullification can't  
25 possibly have spoken to withdrawal because this

1 Court itself distinguished between the two.

2 And I think that helps explain why  
3 language like Hess and language like Northeast  
4 Bancorp, I don't even need to call those dicta.  
5 I just don't think they have anything to do with  
6 the separate question of withdrawal because it's  
7 regularly the case in contracting, including in  
8 government contracts, that one party couldn't  
9 control the exercise of those terms, but that  
10 doesn't say if after 70 years the parties are  
11 allowed to return to the status quo ante.

12 But here's where this Court has drawn  
13 that distinction. It's drawn that distinction  
14 throughout its government contracting case law,  
15 including going back well -- a century before  
16 this particular compact.

17 I think this Court's opinion in  
18 Hinderlider is particularly helpful on that  
19 score. This Court's opinion talking about a  
20 water rights case says that in this case, we are  
21 dealing with the resolution of a dispute over  
22 water.

23 That's the sort of kind you would  
24 expect to be presumptively permanent, just like  
25 Virginia versus West Virginia, the boundaries



1 case, and just like Fletcher versus Peck, the  
2 case about Georgia conveying land grants.

3 That's really different from what the  
4 Court was simultaneously saying in cases like  
5 Newton and Providence Bank about continuing  
6 performance obligations, and that's why the  
7 United States itself drew this exact distinction  
8 in 1951 in its brief in that Sims case, which I  
9 think is a part of the background of compacting  
10 that the states would have been quite familiar  
11 with.

12 JUSTICE BARRETT: What if --

13 JUSTICE JACKSON: So would you --

14 JUSTICE BARRETT: What if a compact  
15 does both? What if it involves both vested  
16 rights and it involves this kind of continuing  
17 performance obligation? Then what presumption  
18 kicks in?

19 MR. FEIGENBAUM: So I don't think  
20 that's too difficult as a matter of presuming  
21 intent. If you're conveying settled property  
22 rights or -- so let's say you are resolving  
23 water rights and setting up a commission to make  
24 sure that no one is taking more water than  
25 they're supposed to under your conveyance --

1 JUSTICE BARRETT: No, no, no, let's  
2 just change this compact and let's say that in  
3 addition to setting up the exact same Commission  
4 that you have now, the compact also adjusted  
5 water rights between New -- New York and New  
6 Jersey. So it did both things in the same  
7 agreement.

8 MR. FEIGENBAUM: No, I don't think  
9 that you could withdraw from that situation,  
10 Justice Barrett, and the reason would be because  
11 you have a conveyance of a settled property  
12 right, in that case, water instead of land, but  
13 the point is the same.

14 And when you're conveying property  
15 rights, cases from Merrion to Fletcher to  
16 Virginia versus West Virginia make clear that  
17 those conveyances are not the kind that you  
18 would expect to be able to withdraw from.

19 JUSTICE BARRETT: Could you still get  
20 out of the commission?

21 MR. FEIGENBAUM: So I don't think so  
22 in that case because contract law and  
23 sovereignty principles don't allow for partial  
24 terminations. Those operate just like  
25 amendments. And it may have been critical, in

1 your hypothetical, again, not a real-world  
2 compact --

3 JUSTICE BARRETT: Right.

4 MR. FEIGENBAUM: -- but, in your  
5 hypothetical, it might have been critical to say  
6 in New Jersey that we got that bit of water in  
7 exchange for a licensing agreement we didn't  
8 otherwise particularly care for. And so just  
9 pulling out of the ongoing performance but  
10 keeping the property we got requires both states  
11 to keep performing under the terms of an  
12 agreement that aren't what they struck.

13 You don't see that in withdrawal, and  
14 you don't see that in the ongoing performance  
15 context.

16 JUSTICE KAGAN: Do you think that  
17 there are any hard cases? I mean, you have this  
18 world in which vested interests are in one box  
19 and -- and compacts like this are in another.  
20 But do we have to worry about any gray zone  
21 between the two?

22 MR. FEIGENBAUM: Yeah, I could  
23 conceive of them in some of the hypotheticals.  
24 I think, in the real world of compacts that  
25 exist so far, they largely do exist in buckets.

1 I mean, most compacts are dealing with boundary  
2 agreements, they're dealing with settling water  
3 rights. This Court is well familiar with those  
4 kinds of cases.

5 And then you have on the other hand  
6 some very pure regulatory ones. You've got an  
7 agreement like this. You've got the Columbia  
8 River Gorge Commission, where it's an interstate  
9 zoning board that has to approve zoning  
10 ordinances backed by legislative funding  
11 obligations. Those are the sorts of agreements  
12 we think that you can withdraw from.

13 Now I think there are some  
14 hypotheticals like what if you've conveyed some  
15 property and simultaneously had a commission  
16 that monitors it and the like? I don't think  
17 that's that hard because, again, the test we're  
18 looking for is, have you conveyed the sort of  
19 settled property that would speak to intent?

20 Now there may be --

21 JUSTICE SOTOMAYOR: So why should we  
22 use this case to decide all those cases in  
23 dicta? I -- I -- I -- you know, the word  
24 "vested rights" has many meanings. We just  
25 recently used it with -- in the retroactivity

1 case and said -- I -- I'll quote it for you  
2 because I found it so amorphous, I don't know  
3 why we said it.

4 (Laughter.)

5 JUSTICE SOTOMAYOR: "Something more  
6 substantial than" ... "immediate fix[ed] right  
7 of present or future enjoyment."

8 I -- I read that and I said, okay, I  
9 -- I hope I didn't write it.

10 (Laughter.)

11 JUSTICE SOTOMAYOR: But my point -- I  
12 -- I go back to my point, I don't know what  
13 vested rights is. I don't -- in what context  
14 and where. What's the difference between a  
15 compact that does the settlement of the water  
16 rights, and the commission is not set up in that  
17 compact. Perhaps it's not set up in that  
18 compact the next day, but it is two weeks later.  
19 Does that give -- you know, was that intended to  
20 be part of the boundary? We're going to have to  
21 decide all those issues when those cases arise.

22 What's the simplest rule to decide  
23 this case without dicta about what vested rights  
24 means or anything else means?

25 MR. FEIGENBAUM: So --

1 JUSTICE SOTOMAYOR: Tell me your  
2 simplest rule.

3 MR. FEIGENBAUM: -- I want to be very  
4 careful as I answer this not to offend the  
5 author of that vested rights opinion, whoever it  
6 was.

7 (Laughter.)

8 MR. FEIGENBAUM: But what I want to  
9 say is there's a couple different ways you could  
10 rule for us that don't address that question. I  
11 don't really see ways to rule for New York that  
12 don't end up having to foreclose some of these  
13 vested rights analyses in ways that I think  
14 would be really troubling on the ground to  
15 compacting.

16 So I think some of the simplest ways  
17 to rule for us, one could be to say that  
18 particularly as here, where, as you and Justice  
19 Jackson have noted, there is evidence, as we've  
20 discussed, that this was understood to be  
21 temporary, and there's nothing in the text of  
22 the compact that suggests any sort of perpetual  
23 or binding obligations, paired with the  
24 structural argument that we offered, you could  
25 do a very specific to this compact argument.

1           You could also say there may be more  
2 challenging cases in the future, where there is  
3 a marginal application of whether you've  
4 conveyed settled property rights or whether you  
5 have only ongoing performance obligations. But  
6 that's not this case.

7           This case is the classic example of  
8 police powers. We are simply exercising and  
9 delegating our taxing authority, our licensing  
10 authority, and our law enforcement authority.

11           JUSTICE JACKSON: I don't understand  
12 that species. Obviously, I understand the  
13 first, because that was the thrust of my  
14 questions to -- to your friend on the other  
15 side, but the -- help me to understand why it  
16 matters that police powers are involved here.

17           I thought we were applying contract  
18 principles, and the reason that you would win  
19 was because the parties intended at the time of  
20 the contract to, you know, have this agreement  
21 go on not indefinitely, and the background  
22 blackletter contract principle is that when you  
23 don't speak to termination in a services kind of  
24 contract like this, you get to withdraw.

25           What I'm a little worried about is

1 starting to turn this into something about  
2 police powers or sovereignty even, because I  
3 don't really understand what difference that  
4 makes.

5 MR. FEIGENBAUM: So that offers the  
6 third path, and I -- I, you know, teed up I  
7 might have three here. I do think you could do  
8 a contract-law-specific ruling.

9 Now I think one of the benefits here  
10 that might give you some comfort, Justice  
11 Jackson, is that the contract law principle and  
12 the sovereignty principles track so neatly in --

13 JUSTICE JACKSON: So what is the --

14 MR. FEIGENBAUM: -- this particular  
15 case.

16 JUSTICE JACKSON: -- sovereignty  
17 principle that you're drawing on and why is it  
18 helpful?

19 MR. FEIGENBAUM: So the reason I think  
20 the sovereignty principle is helpful comes from  
21 Newton in the 19th Century, where this Court  
22 explained that in a government contracting  
23 context, you would expect a clear statement as  
24 to the secession -- or the cession of your  
25 police powers as to their scope or duration.



1           And so, to the degree that you would  
2           expect that we've given up some sort of police  
3           power forever, in that case, it was the control  
4           of a county capital --

5           JUSTICE JACKSON: But wait. Doesn't  
6           that assume that you couldn't waive it  
7           indefinitely? I mean, I -- the reason --

8           MR. FEIGENBAUM: No, Your Honor.

9           JUSTICE JACKSON: -- why I don't know  
10          that it has any real force is that to the extent  
11          that you're a sovereign and you have these  
12          powers and you enter into a compact, isn't the  
13          fact that you're entering into a compact your,  
14          you know, assent to give up the powers for  
15          whatever the terms of the agreement say? And if  
16          you don't speak to that, I don't understand why  
17          we couldn't also presume that you were willing  
18          to cede them indefinitely.

19          MR. FEIGENBAUM: Two responses to  
20          that, Your Honor. The first is I don't think  
21          that's quite what was going on in the government  
22          contracting cases because there were, by  
23          definition of being a government contracting  
24          case, a contract to which the government had  
25          signed on, and, nevertheless, the Court was

1 saying that because of the importance of the  
2 police powers, it is a momentous thing to  
3 essentially give that up in perpetuity, subject  
4 to the other party. So even when you can do it  
5 as a constitutional matter, you would expect  
6 something clearer.

7           It's like the canon against derogation  
8 of the common law. You can derogate the common  
9 law. There's no problem with Congress  
10 derogating the common law. But it's a big deal  
11 when it happens, and so you expect to see  
12 something clearer.

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

18           Now, again, to the second point, as  
19 Your Honor and Justice Kagan in a colloquy with  
20 Ms. Vale pointed out, you don't necessarily have  
21 to get into whether sovereignty gives us an  
22 extra withdrawal rule because the contract law  
23 baseline is so clear. And this Court's  
24 government contracting cases have always tried  
25 to figure out the delta between when do you

1 treat a private party and the government party  
2 the same way and when the government is better  
3 off from the perspective of protecting its  
4 sovereign powers.

5 What New York is asking for here,  
6 based on a history of compacting that I just  
7 don't see and an analogy to Port Authority that  
8 could hardly be more different, is that  
9 government sovereigns are worse off than private  
10 parties when it comes to the similar withdrawal  
11 rule on their own performance and their --

12 JUSTICE BARRETT: Couldn't --

13 MR. FEIGENBAUM: -- own police powers.

14 JUSTICE BARRETT: -- couldn't we just  
15 say, without getting into the sovereignty, and I  
16 guess this goes back to one of your other paths,  
17 there's a difference between contracts that are  
18 about continuing performance, and in this  
19 particular compact, the continuing performance  
20 involves regulatory authority.

21 But, if we're just looking at a  
22 contract that involves continuing performance,  
23 that's different. If I sell you my house, I  
24 can't come back later and say I want it back.  
25 But if --

1 MR. FEIGENBAUM: I agree with that --

2 JUSTICE BARRETT: -- it's a continuing

3 --

4 MR. FEIGENBAUM: -- Your Honor.

5 JUSTICE BARRETT: -- if it's a  
6 continuing performance contract, the rule about,  
7 you know, unilateral withdrawal is different.

8 Can't we just say that?

9 MR. FEIGENBAUM: I think you could  
10 just say that and rule for New Jersey on that  
11 basis. I think contract law is quite clear  
12 here. I think it's notable New York has never  
13 contested contract law in this case and how it  
14 would otherwise apply.

15 And what this Court said in the last  
16 New York versus New Jersey in 1998 is, when you  
17 have silence on a particular term in a compact,  
18 that shows "no intent to modify" the settled  
19 background rules that are already in place.  
20 This Court has said since 1823 that those  
21 background rules are contracting. It said  
22 compacts and contracts are synonymous.

23 And so I don't really understand why  
24 there would be a history of compacting that  
25 justifies rejecting using the same doctrine this

1 Court used in Tarrant, that it used in Green  
2 versus Biddle, that the United States was  
3 discussing in the early 1950s as the backdrop  
4 right before this compact was enacted. And so I  
5 do think contract law, separate from the  
6 sovereignty issues, provides a clean pathway to  
7 ruling in New Jersey's favor.

8 JUSTICE ALITO: But an interstate  
9 compact is not just a simple contract between  
10 parties. It has other attributes. I mean, our  
11 cases have mentioned that.

12 So do you want us to say that  
13 interstate compacts should always be interpreted  
14 in accordance with ordinary contract principles?  
15 And, if not, what would we say to justify the  
16 use of ordinary compact principles alone in this  
17 case?

18 MR. FEIGENBAUM: I think this Court's  
19 cases already provide a clear dividing line.  
20 So, on the one hand, this Court has already said  
21 that when the background contracting principle  
22 would require you to conflict with the text of  
23 the compact that the statutory interpretation  
24 exercise does not allow you to do that. And  
25 that's Alabama versus North Carolina.

1           But, at the same time, cases like  
2           Tarrant and the last New York versus New Jersey  
3           make clear that where you have silence on a  
4           particular compact term, that the background  
5           contract law speaks to the silence of that  
6           agreement.

7           So that's our clean organizing  
8           principle for when contract law steps in as the  
9           backdrop and when it doesn't. When the parties  
10          don't speak to the issue in their agreement,  
11          that is a sign they did not intend to modify  
12          what would otherwise have been the background  
13          rule.

14          I don't know what New York's  
15          organizing principle is for when you use  
16          contract law and when you don't. I understand  
17          they don't think it applies here. It obviously  
18          did apply in Tarrant. But we have a clean,  
19          don't allow a conflict, but do use it to fill  
20          the silence of an agreement.

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

23                 CHIEF JUSTICE ROBERTS: You can --

24                 MR. FEIGENBAUM: -- time has expired.

25                 CHIEF JUSTICE ROBERTS: -- you can

1 finish your sentence.

2 MR. FEIGENBAUM: Thank you, Your  
3 Honor. To the degree that this Court believes  
4 compacts are distinct, I think that also  
5 squarely cuts in our favor because of the  
6 special sovereignty interests long established  
7 before 1953 that suggest that a cession of our  
8 taxing, licensing, and policing powers should  
9 not be permanent.

10 JUSTICE ALITO: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you.

12 Justice Thomas?

13 JUSTICE THOMAS: One quick question.

14 Does the -- the consent, Congress's consent,  
15 provide -- play any role in our analysis?

16 MR. FEIGENBAUM: So I don't think that  
17 Congress's consent in any way changes what I've  
18 discussed today. Congress has the ability to  
19 consent to compacts for a specific reason, as  
20 this Court explained, which is to make sure that  
21 compacts don't become aggrandizing vis-à-vis the  
22 federal government.

23 And, obviously, with withdrawal,  
24 returning the states to the status quo ante,  
25 that's not a fear that anyone would have to

1 have.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 Justice Sotomayor?

4 Justice Kagan?

5 JUSTICE KAGAN: Could you have walked  
6 away five years in?

7 MR. FEIGENBAUM: I think we could have  
8 walked away five years in. I think two points  
9 about that. The first is I think that's the  
10 better rule when it comes to sovereigns. I  
11 think a contrary rule would require legislatures  
12 to guess if enough time has passed before they  
13 start exercising their own authority, and that's  
14 never been applied to government contracts.

15 The second point I'll make about that  
16 is that a reasonable time requirement, which  
17 would be the only sort of contrary rule, would  
18 be one that really only applies when you have  
19 asymmetrical bargaining, as in a distribution  
20 agreement, and one party had to do specific  
21 upfront costs the other party didn't have to do.  
22 The Second Circuit's case in *Compania* talks  
23 about this. That doesn't apply here either.

24 And then third, even if this Court  
25 disagrees or wants to reserve that question, New



1 York has never challenged that 70 years is not  
2 enough time, and I think, as a matter of law, it  
3 clearly is.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch?

6 Justice Kavanaugh?

7 Justice Barrett?

8 Justice Jackson?

9 JUSTICE JACKSON: Just one question.  
10 So I -- I appreciate the very clear exposition  
11 of what the purpose of silence is in relation to  
12 background principles, but I assume the response  
13 would be, and I want to give you a chance to  
14 address it, that in a way assumes clarity and  
15 certainty about what the background contract  
16 principle is in this context, and New York says,  
17 look at all these other compacts, look at the  
18 circumstances, the background principle is, you  
19 can't withdraw in this situation.

20 So what -- what do you have on that  
21 point? What is the background principle in this  
22 context?

23 MR. FEIGENBAUM: Two things on that  
24 point, Your Honor, from the history of  
25 compacting. The first is that it was well

1 established by that point that compacts were  
2 contracts. I talked about Green versus Biddle  
3 from 1823.

4 And the United States in 1950 looked  
5 at that, said, okay, if compacts are contracts,  
6 what does contract law say at the time? And  
7 contract law, by 1953, Williston, Section 38 and  
8 39 speak to this, said specifically the same  
9 rule I'm saying at the lectern today. This is  
10 not some new contract rule we're trying to  
11 retroactively impose on the parties. This was  
12 well established at the time.

13 The second thing that I think was well  
14 established, including in compacting, by the  
15 early 1950s was that there are two different  
16 kinds of agreements. There's the kind to convey  
17 or settle property, and so I've talked about  
18 cases like Fletcher and Hinderlider and Virginia  
19 versus West Virginia, and there are cases  
20 involving just the ongoing exercise of sovereign  
21 power, whether that's delegation or just  
22 regulation, and that's cases like Newton and  
23 Providence Bank. So all of that was well  
24 established before 1953.

25 One final point about compacting to

1 your historical question, Justice Jackson. The  
2 only bridge that New York offers for this world  
3 of what was basically boundary compacts in the  
4 19th Century and delegated police power compacts  
5 in the 20th Century is the Port Authority  
6 Compact.

7           But I think, as the Chief Justice's  
8 colloquy showed this morning, those could hardly  
9 be more different. The Port Authority was a  
10 specific compact with a two-year period for both  
11 states with their own vetoes to come up with a  
12 unitary, comprehensive, development plan for  
13 infrastructure, and then they could withdraw if  
14 either state didn't go all in on that agreement.

15           We have nothing like that here. We  
16 don't have silence in the Port Authority  
17 Compact. We have a carefully reticulated  
18 withdrawal provision in the Port Authority  
19 Compact, and no one could have looked at the  
20 Port Authority Compact and said that's exactly  
21 what's happening in the Waterfront Compact  
22 either. This workers' licensing agreement and  
23 that comprehensive infrastructure development  
24 plan with its own withdrawal provision couldn't  
25 have looked more different.

1                   And if I might to your negotiation  
2                   question, Justice Jackson, the negotiation  
3                   history at page 440 of the House hearings has  
4                   testimony from the executive director of the  
5                   Port Authority specifically emphasizing that the  
6                   Port Authority and the Waterfront Commission had  
7                   different models because they did different  
8                   things. One was propriety in -- proprietary  
9                   infrastructure and one was worker licensing, and  
10                  the latter needed to be more accountable to the  
11                  states. So even to the specific  
12                  negotiation -- negotiation history, I don't  
13                  see how that helps New York.

14                   JUSTICE JACKSON: Thank you.

15                   CHIEF JUSTICE ROBERTS: Thank you,  
16                  counsel.

17                   Mr. Raynor.

18                   ORAL ARGUMENT OF AUSTIN RAYNOR  
19                  FOR THE UNITED STATES, AS AMICUS CURIAE,  
20                  SUPPORTING THE DEFENDANT

21                   MR. RAYNOR: Mr. Chief Justice, and  
22                  may it please the Court:

23                   Under settled compact interpretation  
24                  principles, New Jersey should prevail in this  
25                  case. New York doesn't dispute most of those

1 principles. It agrees that the compact does not  
2 expressly preclude unilateral withdrawal. It  
3 agrees that contract law permits unilateral  
4 withdrawal in cases of ongoing and indefinite  
5 performance. And it agrees that courts presume  
6 that a sovereign has not ceded its ongoing  
7 police powers.

8           Instead, New York contends that  
9 compacts have long been understood to preclude  
10 unilateral withdrawal. But the historical  
11 record doesn't support that claim for compacts  
12 like this one that involve the ongoing and  
13 indefinite exercise of sovereign police power.

14           New York also critiques the line  
15 drawing that it says is required under New --  
16 New Jersey's interpretation, but New York itself  
17 avoids that line drawing only by adopting a  
18 categorical rule that dispenses with settled  
19 interpretive principles.

20           I welcome the Court's questions.

21           JUSTICE THOMAS: Mr. Raynor, is the  
22 compact federal law, or is the -- is Congress's  
23 consent federal law?

24           MR. RAYNOR: Yes, this was approved in  
25 a federal statute by Congress, signed by the

1 President, so it is a federal law.

2 JUSTICE THOMAS: So what role does the  
3 fact that it is a federal law play in our  
4 analysis?

5 MR. RAYNOR: I think there are some  
6 circumstances where that may affect the contract  
7 law analysis. So, in Alabama v. North Carolina,  
8 the Court said you can't apply background  
9 principles of con -- of contract law to overcome  
10 clear terms in the compact. That's one example  
11 where the two analyses might diverge.

12 It's also conceivable that Congress  
13 could add a condition to its approval of a  
14 compact saying that withdrawal is inappropriate,  
15 except in certain circumstances, but it hasn't  
16 done that here. And because the compact is  
17 silent in this case on withdrawal, I think it  
18 really doesn't change the analysis.

19 JUSTICE THOMAS: So, normally, a  
20 federal law has preemptive effect as between the  
21 federal government and states. This is  
22 obviously not the type of law that you would  
23 normally see in that context.

24 So, if it doesn't have preemptive  
25 effect, does it have any overarching effects

1 similar to preemptive -- preemption?

2 MR. RAYNOR: I think it actually does  
3 have preemptive effect. So New Jersey couldn't  
4 act inconsistently with the compact while the  
5 compact is in effect. It couldn't go down to  
6 the waterfront and start obstructing what the  
7 Commission is doing.

8 I don't think that the preemption  
9 question answers the withdrawal question,  
10 though, because, in our view, the compact is  
11 best understood to permit withdrawal. So  
12 there's nothing about the preemptive effect of  
13 the compact that would somehow preclude that.

14 JUSTICE THOMAS: Thank you.

15 MR. RAYNOR: There's been some  
16 questions this morning about whether we should  
17 follow just regular private law contract rules,  
18 and I think, actually, that's not a cause for  
19 concern in this case because the sovereignty  
20 principles point the same direction as the  
21 contract law principles in this case.

22 New York has conceded that the  
23 contract law principles are that unilateral  
24 withdrawal is permissible for ongoing  
25 performance compact -- contracts in the same

1 rule as this Court explained in Tarrant applies  
2 to compacts, where we're talking about cession  
3 of sovereign authority. We're not going to  
4 assume in the face of silence that a state has  
5 given up its ability to exercise its police  
6 powers forever.

7 So, in this case, we don't -- I don't  
8 think you have to worry too much about  
9 segregating sovereignty-specific principles from  
10 private law principles because they dovetail and  
11 they point in the same direction.

12 JUSTICE SOTOMAYOR: So what do we do  
13 with a compact on water rights that many of  
14 them, I -- I suspect, have to do with licensing  
15 and taxation? That's comparable to, here,  
16 police power. In -- what do we do with a  
17 compact like that?

18 MR. RAYNOR: So most of the water  
19 rights compacts, Justice Sotomayor, are  
20 essentially settlement agreements because the  
21 states have conflicting claims to the water.  
22 So, under this Court's cases, downstream states  
23 are entitled to equitable apportionment of water  
24 flowing from upstream.

25 And New York agrees, New Jersey



1 agrees, we all agree that that type of  
2 settlement agreement presumptively you cannot  
3 withdraw from. Now, as part of those settlement  
4 agreements, they sometimes establish commissions  
5 that are designed to facilitate the operation of  
6 the settlement agreement.

7 JUSTICE SOTOMAYOR: The fact that  
8 you've agreed tells us anything we say with  
9 respect to that issue would still be dicta,  
10 correct? You can't concede a point and bind  
11 other parties in another case who might have a  
12 compact of that nature and come in and say this  
13 is just a secession of police power, and you've  
14 announced in New Jersey versus New York, New  
15 York versus New Jersey, that --

16 MR. RAYNOR: So I actually don't think  
17 that that fits really in the police power  
18 category because the commissions in those cases  
19 just facilitate the operation of the settlement  
20 agreement.

21 JUSTICE SOTOMAYOR: I -- I -- I -- I'm  
22 just talking about something in the future. I  
23 -- I'm beating a dead horse.

24 Just one question. I have looked at a  
25 -- at some of the compacts, and the ones that I

1 found before 1953 that include permission to  
2 withdraw unilaterally, all of them required  
3 notice and notice of a particular amount of  
4 months, six months.

5 I think it favors the government --  
6 New York that this doesn't talk about withdrawal  
7 and every other one that assumed unilateral  
8 withdrawal did. What do I do with that  
9 historical fact?

10 MR. RAYNOR: I agree that the absence  
11 of any dissolution provision is a marginal point  
12 in New York's favor, but I don't think it  
13 carries the day here, in part because notice  
14 provisions could be implied. There are some  
15 sources, the Uniform Commercial Code, for  
16 example, that suggest that notice is part of the  
17 background rule here.

18 JUSTICE SOTOMAYOR: Yeah, I've been  
19 thinking about that, but that really takes away  
20 from Justice Scalia's point in Alabama that we  
21 shouldn't be adding terms to contact --  
22 compacts.

23 MR. RAYNOR: Yes, I recognize that,  
24 Justice Sotomayor, but I think Alabama is  
25 distinguishable because, there, there was an

1 express withdrawal provision, and the Court said  
2 you can't qualify it.

3 But, here, since we're talking about  
4 silence and you're going to be potentially  
5 allowing withdrawal just as a -- a matter of the  
6 default rule, I don't think there would be any  
7 Alabama problem with also saying that, under  
8 that default rule, notice is required. New York  
9 hasn't pressed that argument. They -- they  
10 clearly have substantial notice in this case.

11 As to your earlier point about binding  
12 future parties, if the Court wanted to adopt a  
13 narrow interpretation here, I think a simple,  
14 easy way to do it would be to say that when the  
15 compact exclusively provides for joint ongoing  
16 exercise of sovereign authority on an indefinite  
17 basis, we're going to presume that unilateral  
18 withdrawal is permissible. That way --

19 JUSTICE BARRETT: What about the  
20 treaty --

21 JUSTICE JACKSON: Why is that better  
22 than --

23 JUSTICE BARRETT: -- what about the  
24 treaty rule? It was my understanding New York  
25 said that it was the rule in treaties that

1 unilateral withdrawal was not permitted.

2 I thought the opposite was true from  
3 the Restatement of -- the Restatement Third.

4 So what's the United States' position?  
5 Which is the default?

6 MR. RAYNOR: So the treaty rule is not  
7 very clear. The Vienna Convention says that the  
8 default is that unilateral withdrawal is not  
9 permitted. The United States is not a party to  
10 the Vienna Convention, although we accept it as  
11 a guide to these kinds of situations.

12 I think, under treaties, like under  
13 contracts, you have sort of a spectrum. And at  
14 one end, there's things that are clearly not  
15 withdrawable, so like boundary treaties, for  
16 example. And at the other end, you have  
17 commercial treaties, which do permit withdrawal.

18 The United States has drawn --  
19 withdrawn from treaties that imposed ongoing  
20 obligations. So, in 2005, we withdrew from a  
21 dispute resolution protocol, and that didn't  
22 expressly provide for withdrawal. I think --  
23 and -- and -- and in 1951, in the Dyer brief,  
24 the Solicitor General also said treaty law would  
25 generally permit withdrawal for this category of

1 compact.

2           So, if you're interested in treaty  
3 law, I think it still supports New Jersey in  
4 this case, but I acknowledge it's somewhat of a  
5 murky area -- area. And given that the Court  
6 has said that contract law is the correct lens  
7 for looking at these kinds of questions, I think  
8 that's the better way.

9           JUSTICE BARRETT: But it doesn't  
10 strongly support -- I -- yeah, I mean, if treaty  
11 law is murky, that's one thing, but it doesn't  
12 -- it's the United States' position that it does  
13 not strongly support New York, that we shouldn't  
14 take the Vienna Convention as a hard-and-fast  
15 rule, that, oh, well, in treaty law, you can --  
16 you can't unilaterally withdraw. So this is  
17 different?

18           MR. RAYNOR: That's correct. And the  
19 Vienna Convention itself says that it can be a  
20 -- the -- the default rule can be overcome by  
21 circumstances or by the intent of the parties.  
22 So it sort of throws it back onto a  
23 context-specific inquiry.

24           JUSTICE BARRETT: Thank you.

25           JUSTICE JACKSON: Can I ask you --

1 JUSTICE ALITO: What if we looked  
2 at --

3 CHIEF JUSTICE ROBERTS: Justice --

4 JUSTICE JACKSON: Can I -- can I just  
5 ask about what appears to be the clear  
6 preference in going the sovereignty route? And  
7 I'm just trying to understand it.

8 If we would prefer to cabin this by  
9 keeping it in the realm of contract, would that  
10 be sufficient to rule for New York in its favor  
11 -- in this case -- I mean, excuse me, New Jersey  
12 in this case, or would we have to have some  
13 reference to sovereignty?

14 And let me just tell you what my  
15 concern is. You say don't worry about it  
16 because, in this case, they both come out to the  
17 same place. But I can imagine there could be a  
18 future case in which they don't, in which you'd  
19 have contracts leading in one way and  
20 sovereignty leading in another.

21 And I don't know that I want to signal  
22 at this point how that comes out, meaning we  
23 preference this sort of sovereignty principles  
24 in that scenario. So could I do this just on  
25 contracts and -- and, if so, how?

1           MR. RAYNOR: Yes, Justice Jackson.  
2       So, to be clear, we don't have a clear  
3       preference that you go the sovereignty route. I  
4       -- I mentioned that I think it points the same  
5       direction, and in Tarrant, the Court unanimously  
6       adopted the sovereignty presumption.

7           But, if you want to go just the  
8       contract route, I think that would be perfectly  
9       fine. You could say this isn't a case like  
10      Alabama versus North Carolina, where we would be  
11      using an implied contract rule to overcome the  
12      clear text of a federal statute.

13          You would just say, look, there's  
14      silence here. We have said over and over,  
15      including in New York versus New Jersey, that  
16      background common law rules speak into the  
17      silence of a compact. And I think that would  
18      basically be the end of the analysis.

19          JUSTICE ALITO: Why should we not look  
20      to rules of statutory interpretation? Statutes  
21      generally remain in effect until they are --  
22      they remain in effect until they're repealed.  
23      They don't have sunset provisions.

24          MR. RAYNOR: Yes, Justice Alito. So I  
25      think the reason is that the Court has said

1 these are contracts, they only come into  
2 existence by agreement of the parties. This  
3 probably wasn't something that Congress could  
4 have just done. It couldn't have just ordered  
5 the states to enter this agreement. So the  
6 consensual nature of it, I think, is critical,  
7 and that's why the Court has looked to contract  
8 law.

9 I do acknowledge there are some  
10 situations where the federal statute status of  
11 the compact will change the analysis, and we've  
12 talked about Alabama versus North Carolina.  
13 That's the easiest example of that.

14 But, otherwise, I think the Court has  
15 been correct to look to contract law in  
16 interpreting these kinds of agreements.

17 JUSTICE ALITO: Are the terms of an  
18 interstate com -- compact federal law for all  
19 purposes?

20 MR. RAYNOR: I -- if you have  
21 something specific in mind, Justice Alito, I  
22 don't necessarily want to foreclose it. But I  
23 -- I think it's generally --

24 JUSTICE ALITO: If a claim -- if a  
25 claim was asserted based on the terms of an



1 interstate commerce, is that a claim arising  
2 under federal law?

3 MR. RAYNOR: Yes, I believe so,  
4 Justice Alito, but I can't say that I've read a  
5 case specifically about that, but it's  
6 considered a federal statute.

7 And I'd like to talk for a moment  
8 about New York's historical argument. I think  
9 this is their principal affirmative argument,  
10 that at the time of -- this compact was entered,  
11 this was understood to be not permitted, that it  
12 was universally understood that withdrawal was  
13 not permitted for compacts.

14 I think that doesn't hold water when  
15 you look closely at it. As Justice Sotomayor  
16 pointed out, two of the principal scholars on  
17 which they rely actually said the opposite. In  
18 an article around the same time, they  
19 acknowledged the United States' brief in Dyer  
20 and said that that's likely sound.

21 And then, in addition, this Court said  
22 in 1951 it treated it as an open question. The  
23 Solicitor General said in cases of this kind  
24 withdrawal is permissible. And the Court said  
25 we're not going to go down that road. So I

1 think it's difficult to claim that there's a  
2 settled understanding in 1953 when the United  
3 States has taken the opposite position and this  
4 Court has treated it as an open question.

5 If there's no further questions, then  
6 --

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 MR. RAYNOR: Thank you.

10 CHIEF JUSTICE ROBERTS: You've had  
11 your back-and-forth, right, the one-on-one  
12 questioning is?

13 JUSTICE THOMAS: Not yet.

14 CHIEF JUSTICE ROBERTS: Oh, you  
15 haven't?

16 MR. RAYNOR: I have not.

17 CHIEF JUSTICE ROBERTS: Okay.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: Tough day.

20 (Laughter.)

21 CHIEF JUSTICE ROBERTS: Justice  
22 Sotomayor?

23 Justice Kagan?

24 Justice Gorsuch?

25 Good? Okay. See, I knew that was --

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: Rebuttal?

3 REBUTTAL ARGUMENT OF JUDITH N. VALE

4 ON BEHALF OF THE PLAINTIFF

5 MS. VALE: Thank you, Your Honor.

6 I -- I have four points here. I think  
7 states and these states in particular go to the  
8 compact form when they want to keep either  
9 legislature from changing things going forward.  
10 That is why -- and I think this is why  
11 Congress's approval is important -- they go  
12 through the bother of negotiating this whole  
13 thing, going to Congress, and getting approval,  
14 because it makes it a federal law, and that, by  
15 its nature, means that they expect that each  
16 state legislature can't change its mind going  
17 forward. That's not extraordinary when it comes  
18 to compacts and federal law.

19 And there is -- that is why these  
20 states do that, because then you can rely on it.  
21 And these states did rely on it, thinking that  
22 we've done this, we've made it a federal law,  
23 and now we can rely on it, which is what they  
24 did in building the port together through the  
25 Port Authority.

1           On this drawing lines between boundary  
2           and water on one side and ongoing performance on  
3           the other, I do not think those lines are at all  
4           so clear in compacts. There are  
5           jurisdiction-sharing compacts that do not draw  
6           the boundary, so those do involve jurisdiction  
7           sharing over a piece of land, but they're not  
8           actually conveying a res.

9           There are compacts like the Port  
10          Authority and other compacts that followed it  
11          that have ongoing responsibilities over a set  
12          piece of land, and I think those compacts, like  
13          this one, they're -- they're not identical to  
14          boundary compacts, but they're not that  
15          different. They involve a piece of land and set  
16          expectations that everybody makes, once they  
17          make the compact, about that piece of land and  
18          what they're going to do with it going forward.

19          And so New Jersey's default rule would  
20          upset and destabilize a whole bunch of compacts  
21          that are current -- that are currently in  
22          existence. Those are listed in Appendix B in  
23          our brief.

24          And the reliance on contract  
25          principles, so much of that comes from contracts

1 between a sovereign and a private party. And  
2 that is not what we have here, and that's a big  
3 difference because the presumptions and  
4 intuitions about what states expect are  
5 different when they're with a coequal sovereign.  
6 They expect to be giving each other some  
7 sovereignty. That's the whole point of the  
8 compact.

9           And I think that is some of what this  
10 Court was saying in *Hess and Bancorp*. And in  
11 *Bancorp*, this Court said a classic indicia of a  
12 compact is that you can't unilaterally change it  
13 or withdraw going forward, and states have other  
14 options if they want to cooperate and retain  
15 that flexibility.

16           They can do what they were doing in  
17 *Bancorp*, which is to enact parallel laws. They  
18 can do what was the original proposal here,  
19 which was to have each two states do their own  
20 commissions and their own laws. But that was  
21 rejected. And the states did a compact instead  
22 and they did that for a purpose.

23           I also don't think it's at all  
24 possible to read this -- this intent of these  
25 states as thinking that either state could have

1 walked away after a year or two years or five  
2 years. I don't think that's reasonable.

3           And it's not just 70 years. I don't  
4 think that's just what we're judging it from.  
5 The two states have come together and amended  
6 this compact over the decades. As recently as  
7 2006, they amended this compact to add powers to  
8 the Commission. And so they were re-upping  
9 their understanding over time that they are  
10 still in this together and that they still  
11 believe that the joint endeavor is needed.

12           And it -- when it comes to the  
13 statements about it being temporary, I don't  
14 think that is an indication that they had  
15 definitely determined that they would end it at  
16 any specific point. It was a prediction about,  
17 we hope, that we -- we hope that we can solve  
18 this problem together and then jointly decide to  
19 end it together.

20           But that's not how it played out. The  
21 states continue to decide over and over again,  
22 as they amended this compact, that they still  
23 had a joint problem that still needed the joint  
24 solution, and so they kept going.

25           And I don't think that statements

1 about temporary or permanent really solve the  
2 question here, which is about who gets to decide  
3 when to end it. It's not really about when.  
4 It's about who gets to decide. And this -- the  
5 intent of these states was that they would  
6 decide together or, if they really absolutely  
7 needed to, they would go to Congress.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel. The case is submitted.

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

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## Official

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