

No. 129 Original

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

**EXCEPTIONS OF THE STATE OF MARYLAND
TO THE REPORT OF THE SPECIAL MASTER**

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

MAUREEN MULLEN DOVE
Chief of Litigation

ANDREW H. BAIDA*
Solicitor General

M. ROSEWIN SWEENEY
ADAM D. SNYDER
RANDOLPH S. SERGENT
Assistant Attorneys General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6318

**Counsel of Record*

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Attorneys for Defendant
State of Maryland

QUESTIONS PRESENTED

1. Does Maryland's ownership of the Potomac River to the low-water mark on the Virginia side include the authority to regulate the waterway construction and withdrawal activities that Virginia and its citizens carry out from the Virginia shore across the Maryland/Virginia boundary line into Maryland territory?

2. Has Virginia, since the Black-Jenkins Award of 1877, acquiesced in the low-water mark boundary as an absolute line of sovereignty for all purposes by (a) recognizing Maryland's regulation of the Potomac River to the low-water mark throughout the 1900s; (b) stating repeatedly that Maryland has jurisdiction over the River beyond that point and Virginia does not; (c) never exercising any sovereign authority of its own over the Potomac; and (d) taking no action to interrupt Maryland's assertion of sovereignty until the initiation of this action?

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This case presents the issue whether the State of Maryland's ownership of the Potomac River to the low-water mark on the Virginia side includes the right to regulate the waterway construction and withdrawal activities of Virginia and its citizens when those activities take place in Maryland. Maryland's governmental authority over the Potomac traces back almost four hundred years to 1632, when the Potomac was included in territory granted by King Charles I to Lord Baltimore. Maryland's rights of governance over that territory pursuant to its Charter were explicitly recognized in Virginia's first Constitution in 1776, and were reaffirmed a century later by the Black-Jenkins Award of 1877. Those rights apply to the construction and withdrawal activities that Virginia now claims are beyond Maryland's jurisdiction because neither the Compact of 1785, nor the Black-Jenkins Award, contains any language that strips Maryland of this most fundamental aspect of its ownership of, and sovereignty over, the River. On the contrary, both States have acted in innumerable ways since the Award that reflect their clear understanding that the boundary between the two States represents the line of sovereignty for all purposes and that Maryland has the right to regulate waterway construction activity in, and water withdrawals from, the Maryland portion of the Potomac River.

The State of Maryland files these exceptions, therefore, to the December 9, 2002 Report of the Special Master, which recommends that the Court hold that Maryland may not regulate Virginians' waterway construction and withdrawal activities in the Maryland portion of the Potomac River.

JURISDICTION

This Court has original jurisdiction over this case under Article III, section 2 of the United States Constitution and 28 U.S.C. § 1251(a).

CONSTITUTIONS AND STATUTES INVOLVED

1776 Va. Const., *reprinted in* 9 Hening's Statutes at Large Ch. II (1821).

Compact of 1785 between Maryland and Virginia, 1785-86 Md. Laws Ch.1; 1785 Va. Acts Ch. 17.

Black-Jenkins Award of 1877, 1878 Md. Laws, Ch. 274; 1878 Va. Acts Ch. 246; 20 Stat. 481 (1879).

Potomac River Compact of 1958, 1958 Md. Laws Ch. 269; 1959 Va. Acts. Ch. 28; 76 Stat. 797 (1962).

STATEMENT OF THE CASE

1. Statement of Facts

A. Colonial And Post-Revolution History

In 1632, King Charles I issued to Lord Baltimore the Charter that marks the origin of the Province and State of Maryland. (MD Ex. 1.) The Charter encompassed land included within an annulled grant that King James I had issued previously to the London Company in 1609, and, as this Court noted in *Morris v. United States*, 174 U.S. 196, 225 (1899), included the entire Potomac River from bank to bank. The colony of Virginia objected to the breadth of the Maryland Charter, which provided Maryland, as a proprietorial rather than a royal colony such as Virginia, with “more extensive powers of governance within its respective bounds” than other colonies. (Appendix to Maryland’s Brief (“MD App.”) 244.) Virginia took its objections to the King and the Lords Commissioners for Foreign Plantations, arguing that the Charter improperly granted Lord Baltimore almost royal power to grant lands, declare war, and manage his colony more independently than the other colonies.¹ The Lords Commissioners, after “having heard and maturely considered the sayde propositions, answers and reasons, and whatsoever else was alleged in either parte, did think fit to leave the Lord Baltimore to his Patent.”²

Following the issuance of the Maryland Charter and the rejection of Virginia’s objections, King Charles II issued

¹ Browne, ed., *Proceedings of the Council of Maryland, 1636-67* at 17-19 (Considerations upon the Patent to Lord Baltimore, 1632) (MD Ex. 2).

² *Id.* at 22 (Order of the Lords Commrs. For Foreign Plantation, July 3, 1633).

patents in 1649 and 1688 for what is commonly known as the “Northern Neck” of Virginia – the land lying between, and including, the Potomac and Rappahannock rivers.³ As this Court subsequently recognized, the 1688 grant to Lord Culpeper was of no effect to the extent it purported to alter the boundary in Maryland’s prior Charter. *See Morris v. United States*, 174 U.S. at 225 (stating that Maryland’s Charter was “never divested by any valid proceedings prior to the Revolution, nor was such grant affected by the subsequent grant to Lord Culpeper,” who never made “any substantial claim . . . to property rights in the Potomac river, or in the soil thereunder”); *see also Marine Ry. & Coal Co., Inc. v. United States*, 257 U.S. 47, 63 (1921) (“The latter grant is subordinate to the former.”).

Recognizing that the 1609, 1649, and 1688 grants had no effect on the scope of Maryland’s Charter, Virginia’s first Constitution in 1776 formally renounced any rights or claims Virginia may have once asserted with respect to Maryland territory by stating that:

[T]he territories within the charters erecting the colonies Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the people of those colonies respectively, with all the rights of *property, jurisdiction, and government*, and all other rights whatsoever which may at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potowmack and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been made or shall be made thereon.

(MD App. 3) (emphasis added).

Because Maryland knew that Virginia had no territorial rights over the Potomac or any other portion of Maryland

³ *Morris v. United States*, 174 U.S. at 223-24; *Maryland v. West Virginia*, 217 U.S. 1, 28 (1910).

territory, Maryland immediately passed a resolution at a convention of its delegates in October of that year:

Resolved unanimously, That it is the opinion of this convention, that the state of Virginia hath not any right or title to any of the territory, bays, rivers, or waters, included in the charter granted by his majesty Charles the first to Caecilius Calvert, baron of Baltimore.

(MD App. 7.) Maryland explicitly rejected the claim that Virginia had even limited rights in the Potomac (*id.* at 7-8):

Resolved unanimously, That it is the opinion of this convention, That the sole and exclusive jurisdiction over the territory, bays, rivers, and waters, included in the said charter, belongs to this state; and that the river Potowmack, and almost the whole of the river Pocomoke, being comprehended in the said charter, the sole and exclusive jurisdiction over the said river Potowmack, and also over such part of the river Pocomoke as is comprehended in the said charter, belongs to this state; and that the river Potowmack and that part of Chesapeake bay which lies between the capes and the south boundary of this state, and so much thereof as is necessary to the navigation of the rivers Potowmack and Pocomoke, ought to be considered as a common highway, free for the people of both states, without being subject to any duty, burthens or charge, as hath been heretofore accustomed.

Following the Revolution, the emergence of Maryland and Virginia as independent sovereign States immediately raised the potential for commercial conflict. Prior to 1776, the English Crown governed the collection of tolls, duties, and levies on vessels entering the colonies. Upon independence, the States assumed the power to impose duties on foreign vessels, including vessels of other States, entering their respective waters. Maryland was concerned that Virginia would impose duties on those ships coming through the capes of the Chesapeake Bay en route to Maryland harbors. Virginia was likewise concerned that ships entering the Potomac bound

for Alexandria would be assessed Maryland duties. (Appendix to the Report of the Special Master (“SMR App.”) E-1 - E-2.) After earlier efforts failed to resolve these commercial issues, commissioners from both States met at Mount Vernon in March of 1785 and negotiated the thirteen articles of what came to be known as the Mount Vernon Compact of 1785. (SMR App. B-1.) *See generally Wharton v. Wise*, 153 U.S. 155, 163-66 (1894).

These articles addressed a number of different subjects concerning the two States’ attempt “to regulate and settle the jurisdiction and navigation of Patowmack, Pocomoke rivers, and that part of Chesapeake bay which lieth within the territory of Virginia.” (SMR App. B-1.) The article at issue in this case, Article VII, provides (SMR App. B-3):

Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states; provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seans on the shores of the other.

B. The Black-Jenkins Award Of 1877

Although the Compact resolved a number of issues, it left others unaddressed. Virginia by its 1776 Constitution relinquished any claim to the Potomac River beyond its “shores or strands,” while Maryland continued to claim the entire River under its Charter to the high water mark. The two States also disagreed about the location of the boundary line, called for in the Maryland Charter, that extended across the Chesapeake Bay and Eastern Shore to the Atlantic. To avoid litigation over the issues, Maryland and Virginia appointed commissioners in 1872 and 1873 to negotiate a settlement of

the outstanding disputes. When that effort failed, the two States turned to binding arbitration. Arbitrators Jeremiah S. Black and Charles A. Jenkins issued their award on January 16, 1877 (the “Black-Jenkins Award”), and determined that the boundary of Maryland’s jurisdiction and ownership was the low-water mark on the south shore of the Potomac. (SMR App. C-1.)

Although Virginia had initially made a new “claim for a boundary on the left [or north] bank of the Potomac” and then withdrew that claim to the “middle of it” (SMR App. D-7), the Arbitrators noted that “[t]he intent of the [Maryland] charter is manifest all through to include the whole river within Lord Baltimore’s grant.” (SMR App. D-9.) The Arbitrators thus stated that “the charter line was on the right [south] bank of the Potomac, where the high-water mark is impressed upon it, and that line follows the bank along the whole course of the river, from its first fountain to its mouth.” (*Id.*) The Arbitrators concluded, however, that Virginia had acquired title through prescription to the strip of land lying between high water mark and low-water mark. (SMR App. D-18 - D-19.) Accordingly, the Award stated that “Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership.” (SMR App. C-4.) This right could not be exercised with the effect of “impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.” (SMR App. C-4 - C-5.)

C. Events Since The Black-Jenkins Award

Since adopting the Black-Jenkins Award, Maryland and Virginia have followed a course of conduct, for more than a century, that manifests the understanding of both States that the low-water mark boundary line set forth in the Award represents the line at which Virginia’s sovereignty ends and Maryland’s begins. That understanding was reflected, in part, in opinions and statements the Virginia Attorney General and Governor made in the 20th century, in a wide variety of contexts.

Shortly after the century began, an assistant to the Virginia Attorney General observed, in 1906, that the Potomac River beyond the low-water mark was not Virginia territory, that Virginia had no authority to license or otherwise regulate the sale of liquor upon a vessel anchored below low-water mark, and that the liquor laws of Maryland controlled because Maryland had jurisdiction over that activity. 1906 Va. Att’y Gen. Op. 87 (MD App. 24). In 1935, the Virginia Attorney General recognized the territorial limitation on Virginia’s sovereignty in another context, stating to the Virginia Commissioner of Fisheries that Virginia’s oyster tax did not apply to oysters taken from the Potomac River because the tax was limited to oysters taken from the river beds of Virginia, and the bed of the Potomac is not owned or leased by the Commonwealth. 1935 Va. Att’y Gen. 147 (MD App. 26).

Piers and wharves affixed to the Virginia side, and activities taking place on them, were governed by the same understanding. Stating that “[b]y the Compact of 1785 between Virginia and Maryland, the territorial bounds of Virginia extend only to the low-water of the Potomac River on its southern or Virginia shore,” the Virginia Attorney General informed Virginia’s Governor in 1944 that “the Potomac River lies wholly in the State of Maryland” and that “the State of Virginia has no jurisdiction to enforce the slot machine statutes on the waters of the Potomac River.” 1944 Va. Att’y Gen. Op. 91 (MD App. 27-28). Four years later, the Virginia Attorney General issued an opinion stating that Virginia has no jurisdiction over that portion of a pier built from the Virginia side of the Potomac that extends beyond the low-water mark. Stating that his opinion was triggered by an individual’s sale of beer on a pier “which is clearly fastened to the Virginia shore,” 1948 Va. Att’y Gen. Op. 118 (MD App. 29), the Attorney General quoted the Virginia law that declares the boundary between the two States is the low-water mark, and stated, “[w]hile the above section also provides that the citizens of Virginia shall have full property in the southern shores of the Potomac river and the privilege of building piers so long as navigation is not obstructed, it can be seen that the *territorial jurisdiction* of the Commonwealth ends at the low-water mark.” (MD App. 30) (emphasis added). “Therefore,

it is my opinion that that portion of a pier which is beyond the low-water mark on the southern shores of the Potomac River is in the State of Maryland and is not subject to the laws of the Commonwealth.” (*Id.*)

During the same time period in which Virginia’s Attorneys General issued these opinions, the Maryland General Assembly enacted legislation legalizing slot machines in two Maryland counties abutting the Potomac, Charles and St. Mary’s. *See* 1947 Md. Laws, Extra Session, Ch. 32; 1949 Md. Laws Chs. 417 and 678; 1951 Md. Laws Chs. 181 and 183. Because Virginia did not have jurisdiction over slot machine activities taking place over the Potomac on piers that extend from Virginia beyond the low-water mark, a number of taverns and restaurants featuring slot machines were constructed on piers affixed to the Virginia side of the Potomac but extending onto Maryland’s side of the boundary line in Charles and St. Mary’s counties. Recognizing that Maryland had authority to regulate activity taking place on piers and wharves extending from Virginia’s shore beyond the low-water mark *and* that Virginia lacked the power to control that activity, Virginia’s Governor made a “formal request” that Maryland enact legislation making unlawful gambling activity taking place on piers and wharves built from the Virginia side of the Potomac over Maryland waters. *Miedzinski v. Landman*, 218 Md. 3, 8, 145 A.2d 220, 222 (1958). The Maryland Court of Appeals upheld the validity of the subsequently enacted legislation against a challenge brought by the owners and operators of these businesses, thus ending the slot machine activity that Virginia’s Attorney General had recognized 14 years earlier his State had no jurisdiction to control. “Following the announcement of the Appeal Court’s action, Virginia’s Governor J. Lindsay Almond, Jr., said: ‘While I have not seen the opinion, I feel it is a wholesome decision and I again applaud the Maryland General Assembly for taking constructive action in enacting laws to control a situation which was beyond the control of Virginia.’” (MD Ex. 920.)

Virginia has recognized in other contexts that its boundary with Maryland controls the jurisdiction of the laws of each State. In 1952, for example, the Virginia Attorney General

opined that the Commonwealth did not have the authority to license waterfowl blinds beyond its boundary in the Potomac. 1952 Va. Att’y Gen. Op. 116 (MD App. 31). Fifteen years following that recognition, the Virginia Attorney General concluded that the lawful exercise of the right to build a wharf or pier does not change the Maryland/Virginia boundary line so as to alter Maryland’s jurisdiction over the sale of liquor by a restaurant built on a pier offshore Virginia. 1967 Va. Att’y Gen. Op. 48 (MD App. 34). During the same period of time, the Maryland Attorney General stated that the Compact of 1785 does not alter Maryland’s right to tax improvements extending from the Virginia side of the Potomac into Maryland. 1956 Md. Att’y Gen. Op. 335 (MD App. 32).

This common understanding remains the same today, namely, that although Virginia citizens have access rights to the Potomac, only Maryland has ownership of the River up to the low-water mark and, as the result of that ownership, the right to regulate all activity that takes place on the Maryland side of the boundary line. Virginia has stipulated in this case that since at least the turn of the last century, it has not enforced any general criminal jurisdiction, gambling, gaming, health, or occupational safety laws with respect to activities or structures in the River beyond the low-water mark (MD App. 38-39 ¶¶ 7-8, 10), and it has admitted that, with respect to the same activities and structures, Virginia does not, to this day, enforce any laws relating either to these subjects or to alcohol, public safety, hunting or fishing. (MD App. 50.)

During this same time frame, Maryland has exercised the precise regulatory authority that Virginia has recognized it could not. Since the beginning of the 1900s, Maryland law has provided that the jurisdiction of every Maryland county bounded by navigable waters extends from the shore to the inside of the channel, “except where said waters adjoin neighboring States, in which case the jurisdiction of said counties shall continue to the ultimate limits of the State at the place in question.” (MD Ex. 40.) Pursuant to this law and its right as the owner of the Potomac, Maryland and its political subdivisions have asserted and extended their police power authority to the low-water mark on the Virginia side of the River in virtually every way in which that authority could be

exercised.

Maryland has, for example, routinely applied and enforced its criminal laws with respect to a broad range of activities occurring on Maryland's side of the low-water mark, including those that have taken place on piers and wharves attached to the Virginia side of the River. (MD App. 100; 121; 150; 288.) Maryland has also regularly issued a variety of liquor, amusement, restaurant, and other licenses with respect to structures and activities extending from the Virginia side of the Potomac into Maryland. (MD App. 81; 110; 119; 125; 145; 158; 218; 271; 290.) Maryland has taxed those structures and activities (MD App. 113; 153; 181; 191; 218; 285); it has performed health and safety inspections, not only for activities on the piers and wharves, but also for the structures themselves (MD App. 127; 166; 258; 260); and it has exercised its regulatory authority at the specific request of Virginia officials to accomplish what those officials recognized they had no authority to do because of the jurisdictional limitations imposed on them by the low-water mark boundary line. (MD App. 136-38 ¶¶ 24-29, 33; MD App. 101-02 ¶¶ 3-4; MD App. 108.)

The two States have treated the boundary line set forth in the Black-Jenkins Award in the same way with respect to waterway construction and appropriation activities in the Potomac River. Virginia has stipulated, for example, that neither the Virginia Marine Resources Commission ("VMRC") – the Virginia agency charged with regulating the construction of riparian improvements on submerged lands – "nor any of its predecessor agencies has issued a permit, certification, or other authorization governing construction in the Potomac River on the Maryland side of the Maryland-Virginia line." (MD App. 38 ¶ 6.) The Commonwealth "has never set or enforced water quality standards with respect to the Potomac River on the Maryland side of the Maryland-Virginia line." (*Id.*, ¶ 4.) Virginia also admits that "no agency of the State government of Virginia currently requires a permit from any Virginia user to withdraw water from the Potomac River" (MD App. 42), and that "it has not issued or been requested to issue any licenses or permits for the withdrawal of water from the Potomac River." (MD App. 43-44; *see also*

MD App. 52.) In an effort to fill this void following the April 24, 2002, hearing before the Special Master on Maryland's summary judgment motion, and during the mediation proceedings that took place at the Special Master's directions, Virginia issued a non-binding Guidance Memorandum purporting to enable it to issue permits to Virginia users with respect to waterway withdrawal and construction activities taking place on the Virginia side of the Potomac. (VA Ex. 129.) The Guidance Memorandum will not take effect, however, until the Virginia Attorney General "certifies" that this litigation "has been concluded or resolved in a manner not inconsistent with the exercise of authority described in this guidance." (*Id.*)

Maryland, in contrast, has long regulated the Potomac in these areas. The modern Maryland regulatory system for controlling waterway construction and water withdrawals, currently codified at Md. Envir. Code Ann. §§ 5-501 *et seq.*) ("Water Resources Law"), was established in 1933. (MD Ex. 41.) The Water Resources law established permitting systems for both water withdrawals and waterway construction in the waters of the State.

Maryland issued the first water appropriation permits under the law in the 1930s. (MD App. 195 ¶¶ 4-5.) Fairfax County, Virginia – the first Virginia entity to apply for a Maryland permit to withdraw water from the Potomac – submitted an application in 1956 and was issued a permit on February 25, 1957, authorizing the withdrawal of up to 15 million gallons per day from the Potomac. (MD App. 195-96 ¶¶ 8-9.) Four months after the Fairfax County Water Authority was created in 1957, Fairfax County requested that the Maryland permit be transferred to the Authority, which Maryland did on January 24, 1958. (MD App. 196 ¶ 10.) Since then, Virginia applicants have continued to come to Maryland for both new and renewed permits, applying for them without objection or protest. (MD App. 197-98 ¶¶ 16, 18; MD App. 208-09 ¶¶ 55-58.) Virginia entities have been granted at least 29 permits to withdraw water from the Potomac. (MD App. 196 ¶ 9; MD App. 197-205 ¶¶ 16-18, 20-44.)

Maryland's regulation of waterway construction in the Potomac since enactment of the 1933 Water Resources Law follows the same pattern as its regulation of water appropriations. Several Virginia governmental entities and other applicants have requested Maryland permits for construction activity in the non-tidal portion of the Potomac, and in some cases have been referred by Virginia to Maryland for review of their projects. (MD App. 276-80 ¶¶ 3-20; MD App. 20; MD Exs. 106, 112-13.)

In 1970 Maryland enacted the Tidal Wetlands Act to regulate more closely construction on the tidewater stretch of the Potomac River. This law established a formal licensing system for obtaining the approval of the Maryland Board of Public Works for dredging, filling, and placing structures in Maryland's tidal waters and wetlands, defined to include all the lands beneath the high water mark within the State. 1970 Md. Laws Ch. 241. On the Virginia side of the Potomac, Maryland regulates all structures extending beyond low-water mark as established in the Black-Jenkins Award and mapped by the Mathews-Nelson Survey.

The first Maryland licenses for projects on the Virginia shoreline of the Potomac River were issued in 1971. While most of these early licenses were for dredging projects, Maryland soon licensed a number of jetties, groins, bulkheads, piers, and other similar structures. From the earliest period, Virginia has referred these applicants to Maryland.⁴ The VMRC has routinely notified Potomac applicants that it does not have jurisdiction over their projects, and has copied Maryland on the letter. (MD App. 58-59 ¶¶ 21-23.) Under a policy established by the Maryland Board of Public Works to clarify, at Virginia's request, the types of activities that would require Virginia riparian owners along the Potomac to obtain a formal license from Maryland, the Commonwealth continues

⁴ Virginia advised its citizens to contact Maryland for permits even before the establishment of Maryland's current licensing regime. *See, e.g.*, MD App. 9 (April 20, 1967 letter from George H. Badger, Jr., Commonwealth of Virginia, Commission of Fisheries).

to refer Virginia applicants to Maryland through letters informing them of Maryland's jurisdiction. Maryland has issued between 250 and 350 authorizations to Virginia citizens for the placement of piers, bulkheads, and other structures extending beyond the low-water mark on the Virginia shore of the Potomac River. (MD App. 57 ¶¶ 15-18.) Virginia has issued roughly the same number of letters to its citizens along the Potomac acknowledging that Maryland has jurisdiction over the construction of improvements beyond low-water mark in the Potomac River. (*See, e.g.*, MD Ex. 495.) Even after this Court granted Virginia's Motion for Leave to File a Bill of Complaint in May, 2000, Virginia has continued to acknowledge Maryland's jurisdiction over the construction of riparian improvements on the Virginia shoreline of the Potomac. (MD App. 60-61 ¶¶ 29-30; MD App. 77-78.)

2. Prior Proceedings

Virginia initiated this action in 2000 against Maryland following Maryland's preliminary denial of the Fairfax County Water Authority's application for a waterway construction permit to build a new water intake facility in the middle of the Potomac River. Although the permit was eventually issued, Virginia requested relief prohibiting Maryland from requiring Virginia, its governmental subdivisions or its citizens to obtain a Maryland permit to withdraw water from the Potomac or to construct improvements from the Virginia side of the River. After this Court granted Virginia's motion for leave, 530 U.S. 1201 (2000), Maryland filed an Answer, Counterclaim, and Motion for Appointment of Special Master. The Counterclaim sought a declaration that "Maryland's territorial sovereignty includes the right to regulate the activities of Virginia entities that take place in the bed and waters of the Potomac River lying within Maryland and extending to the low-water mark on the Virginia side."

This Court subsequently granted the motion and ordered that Ralph I. Lancaster, Jr., be appointed Special Master. 531 U.S. 922 (2000). Following two rounds of briefing and hearings that were separated by a brief discovery period, the Special Master issued a final Report recommending that the

relief sought by Virginia be granted. The Special Master first concluded that the rights set forth in the Compact apply to the entire length of the Potomac River. Relying principally on the language of Article VII, its comparison with the rest of the Compact, and the Compact's historical context, Report at 16-44, the Special Master stated that the conclusion was also compelled by the Black-Jenkins Award, subsequent legislation and agreements, and this Court's decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910). Report at 54-55, 58-68.

The Special Master also concluded that Maryland did not have the right to regulate waterway construction and appropriation activity carried out by Virginia and its citizens from the Virginia side of the Potomac into Maryland. Stating that "unambiguous and unrestricted" language in Article VII of the Compact makes clear that Maryland has no such right, Report at 45, the Special Master found additional support in "the circumstances surrounding its negotiation and adoption," *id.* at 46, the "clear and unequivocal" language of the Black-Jenkins Award, *id.* at 57, *Maryland v. West Virginia*, *id.* at 65, and the Potomac River Compact of 1958, which "suggests that both States understood that Maryland had no right to regulate Virginia's rights and privileges declared in the 1785 Compact." *Id.* at 70.

The Special Master also rejected Maryland's claim that Virginia's long acquiescence in Maryland's regulation of the Potomac gave Maryland the power to do so. Stating that some of Maryland's evidence did not involve "Virginia's construction appurtenant to its own shore and Virginia's Potomac water appropriation," the Special Master concluded that "the many different ways that Maryland regulates other activities of Virginians in and on the River are irrelevant to a showing that it has the specific regulatory power over the particular activities at issue here." *Id.* at 79. As to the latter activities, the Special Master acknowledged that "there is some evidence of the required type of regulation by Maryland and of acquiescence on the part of Virginia," *id.* at 81, but nevertheless concluded that Maryland's evidence showed only that "Virginians may have generally followed Maryland's water appropriation and waterway construction permitting requirements for some 30 to 40 years," which is insufficient

because it is not a long enough period of time and because Virginia objected to Maryland's permitting authority in the 1970s. *Id.* at 94.

SUMMARY OF ARGUMENT

The Special Master's Report neither questions nor disputes three unshakable truths: Maryland has held continuous title to the bed and waters of the Potomac River since 1632; Maryland has proven its ownership and sovereignty by exercising every possible police power with respect to any and all property and activities in the River on the Maryland side of the boundary line; and Virginia has never exercised any authority beyond low-water mark nor taken a single action that has in any way interfered with Maryland's sovereignty over the Potomac. Maryland files these exceptions because the River belongs to Maryland and is subject to Maryland's sovereign and regulatory authority.

Maryland takes exception from the Special Master's Report for the principal reason that the relief Virginia seeks is based on an incorrect interpretation of Maryland's ownership rights that Virginia recognized in its own Constitution and that the Black-Jenkins Award subsequently confirmed. Maryland has acted properly in regulating the Potomac because Maryland's broad authority over property within its territory includes the power to regulate the waterway construction and appropriation activities carried out by the citizens of both States in the Maryland portion of the River. Although Article VII of the Compact provides that "[t]he citizens of each state respectively shall have full property in the shores of [the] Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging," the Compact "did not determine the boundary between the States," Complaint ¶ 9, much less relinquish any of the rights of government, sovereignty, and jurisdiction that accompany such a boundary determination. Rather, Article VII merely recognizes that Virginia citizens may exercise the same "privilege of making and carrying out wharfs and other improvements" in the Potomac as Maryland citizens may. The exercise of such a privilege is subject to Maryland regulatory authority because that authority is an inherent part of its ownership of the

riverbed on which the wharf or other improvement is to be placed, and the Compact contains no clear and unambiguous language that either stripped Maryland of, or vested Virginia with, the right to regulate access to the River.

Maryland also notes exception from the Special Master's Report because Virginia has acquiesced in Maryland's assertion of authority over the Potomac. Since the beginning of the 1900s, Virginia's Attorneys General, Governors, and other government officials have expressed unequivocally that Virginia has no jurisdiction of any kind beyond the low-water mark, either over a wharf or other improvement built from the Virginia side, or otherwise. Indeed, Virginia has stipulated that it does not exercise its authority beyond that point *and* that it has not objected when Maryland has exercised its authority up to the low-water mark by subjecting property and activity on Virginia's side of the River to taxes, criminal jurisdiction, occupational safety and health laws, liquor regulations, gambling statutes, and many other laws and ordinances that Maryland has enforced on the Potomac. Virginia's claims fail, therefore, because Maryland's proof shows that both States have long recognized that Virginia's authority ends, and Maryland's begins, at the boundary line on the Virginia side of the Potomac.

ARGUMENT

I. MARYLAND HAS THE RIGHT TO REGULATE THE POTOMAC BECAUSE IT IS THE OWNER OF THE RIVER AND HAS NOT RELINQUISHED THIS FUNDAMENTAL SOVEREIGN POWER.

A. Maryland's Ownership Of The Potomac Includes The Authority To Regulate Waterway Construction And Appropriation Activities.

Maryland agrees with the Special Master that "[t]he Compact neither addressed ownership of the bed of the River nor altered ownership of the shores of the River," nor did "anything other than *confirm* existing rights in or on the River." Report at 23 (emphasis in original). Those rights belonged to Maryland because Maryland had clear and unencumbered title to the Potomac River when the Compact

was written in 1785. Maryland takes exception, therefore, from the Special Master's conclusion that the waterway construction and appropriation activities of Virginia and its citizens are not subject to Maryland regulation. Judgment should be entered against Virginia because Maryland has never relinquished, at any time during its ownership of the Potomac River over the course of five centuries, 10 British monarchs, and 43 United States presidents, the sovereign authority its ownership rights confer over the activities that Virginia claims are beyond Maryland's power.

Maryland's territorial claim over the Potomac derives from the Charter granted on June 20, 1632 by King Charles I to Cecilius Calvert, Lord Baltimore. As this Court long ago recognized, that grant "in unmistakable terms included the Potomac River, . . . and declared that thereafter the province of Maryland and its freeholders and inhabitants should not be held or reputed a member or part of the land of Virginia, 'from which we do separate both the said province and the inhabitants thereof.'" *Morris v. United States*, 174 U.S. at 223 (quoting Maryland Charter). Although King James II in 1688 purported to give by patent to Lord Culpeper territory that also included the Potomac River, "the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution, nor was such grant affected by the subsequent grant to Lord Culpeper." *Id.* at 225. That title gave Maryland substantial rights in and authority over the Potomac.

"The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away." *McCready v. Virginia*, 94 U.S. 391, 394 (1876). This principle is reinforced by a "strong presumption of state ownership" because "navigable waters uniquely implicate sovereign interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997). The "ownership of this land was considered an essential attribute of sovereignty," as "title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes." *Utah Division of State Lands v. United States*, 482 U.S. 193, 195 (1987). *See also Idaho v. United States*, 533 U.S. 262,

272 (2001) (citing cases); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452 (1894).

This sovereign power has for centuries included the authority to regulate the construction of wharves and other improvements in the Potomac. While “[w]harves, quays, piers, and landing places, for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in colonial times,” *Dutton v. Strong*, 66 U.S. 23, 31-32 (1861), “[b]y the law of England, also, every building or wharf erected, without license, below high-water mark, where the soil is the king’s, is a purpresture, and may, at the suit of the king, either be demolished, or seized and rented for his benefit, if it is not a nuisance to navigation.” *Shively v. Bowlby*, 152 U.S. 1, 14 (1894). Following the American Revolution, the construction of these riparian improvements remained, as they had been before, “subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public.” *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870).

The “legislature” responsible for regulating this activity is the legislature of the State that owns the riverbed, as “title necessarily carries with it control over the waters above them, whenever the lands are subjected to use.” *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 452. As set forth earlier and more fully later in this brief, Virginia has recognized that legislature to be Maryland’s, and has on many occasions informed Virginia citizens that construction on the bed of the Potomac beyond low-water mark falls within Maryland’s regulatory control. This control includes such regulation or “control over the location, erection, and use of such wharves or landings, which will prevent their being made obstructions to navigation and standing menaces of danger. . . [T]he control which the State exercises over them is such as to secure at once their usefulness and their safety.” *Atlee v. Packet Co.*, 88 U.S. 389, 393 (1874). See also *Norfolk City v. Cooke*, 68 Va. 430, 434 (1876) (“These rights both at common law and by statute, are secured to the riparian owner, to erect wharves, piers, or bulk heads . . ., subject only to such general rules and regulations as the legislature may prescribe; and the only

limitation upon such right is, that navigation may not be obstructed, or the rights of others be injured.”).

Thus, at the time it formed the Compact with Virginia, Maryland had well-settled sovereign authority over the Potomac, which included the right to regulate the construction of wharves and other improvements in the River. *See also Dutton v. Strong*, 66 U.S. at 32 (“the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time”); *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 354 (1933) (stating in a case involving the proposed construction of a wharf from the Virginia side of the Potomac that “it is conceded that the bed of the river below high-water mark, where the proposed wharf is to be built, lies within the District of Columbia, and that title to it and sovereignty over it were vested in the United States by cession from the state of Maryland of the area constituting the present District of Columbia”); *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875, 880 (1904) (“we think it well established that the right to build wharves is one which is subject to state regulation”).

That authority was and remains a significant aspect of Maryland’s ownership of the Potomac. Indeed, a State’s control and “dominion over navigable waters and property in the soil under them are so identified with the sovereign powers of government that a presumption against their separation from sovereignty must be indulged.” *Massachusetts v. New York*, 271 U.S. 65, 89 (1926). *See also Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. at 283-84; *Montana v. United States*, 450 U.S. 544, 552 (1981). This presumption applies “in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself,” *United States v. Oregon*, 295 U.S. 1, 14 (1935), and is applicable in this case: Maryland had title to the Potomac River when the Compact was written, *see Morris v. United States*, 174 U.S. at 223, and its right to regulate waterway construction and appropriation activities in the Potomac is a fundamental

feature of Maryland's sovereign control over the River.

In light of Maryland's ownership of the Potomac, therefore, it is presumed that Maryland has retained its sovereignty over the River until it is proven otherwise. Judgment should be entered in Maryland's favor because Virginia did not overcome this presumption.

**B. The Compact Left Undisturbed
Maryland's Authority Under The
1632 Charter To Regulate Activities
Carried Out From The Virginia
Side Of The Potomac.**

Virginia's claims should be dismissed because Virginia presented no evidence demonstrating that Maryland surrendered its sovereign right to regulate improvements and other activities in the Potomac when it ratified either the Compact or the Black-Jenkins Award. The Special Master nevertheless concluded that such a presumption does not apply in this case because "Virginia had long claimed broad territorial interests encompassing the Potomac," and thus "the men who negotiated the Compact could not have understood that Maryland exercised exclusive sovereign jurisdiction over the entire Potomac." Report at 47. This conclusion is flawed for two fundamental reasons.

First, it is wrong for the principal reason that, as this Court held in *Morris*, the source of Virginia's claim and understanding – King James II's 1688 patent – was invalid and did not strip Maryland of any sovereign rights it had over the Potomac pursuant to the Charter that King Charles I previously gave to Lord Baltimore. Virginia's bare claim to the River was an utterly insufficient basis for giving Virginia, or divesting Maryland of, any rights of sovereignty over the Potomac. The Special Master erred, therefore, in reversing the presumption and determining that "the only way Maryland could have gained the regulatory authority it now asserts would be in the language of the Compact," Report at 53, because Maryland, as the Potomac's owner since the early part of the 1600s, already had those rights when it entered into the 1785 Compact with Virginia a century and a half later. Maryland has no obligation to prove anything else. Rather, to

prevail in this case, Virginia has the burden to show that Maryland surrendered that authority in the Compact or by some other means. See *New Jersey v. Delaware*, 291 U.S. 361, 374 (1934) (“Delaware’s chain of title has now been followed from the feoffment of 1682 to the early days of statehood, and has been found to be unbroken. The question remains whether some other and better chain can be brought forward by New Jersey. Unless this can be done, Delaware must prevail.”).

Second, the Special Master’s conclusion is also flawed because Virginia did not claim any rights of government in the Potomac. On the contrary, it expressly disavowed any such assertion of sovereignty in its first Constitution in 1776. Explicitly acknowledging the rights of Maryland and several other States to the territories described in the charters establishing those colonies, Virginia stated that those territories “are hereby ceded, released, and forever confirmed to the people of those colonies, respectively, with all the rights of *property, jurisdiction, and government*, and all other rights whatsoever which might, at any time heretofore, have been claimed by Virginia.” *Maryland v. West Virginia*, 217 U.S. 1, 23 (1910) (quoting Virginia Constitution) (emphasis added). See also *Virginia v. Tennessee*, 148 U.S. 503, 509 (1893); *Johnson and Graham’s Lessee v. M’Intosh*, 21 U.S. 543, 558 (1823). In contrast to this broad relinquishment of any claim of property, jurisdiction, government, and any other right that Virginia might have asserted with respect to the territories of any of these States, Virginia reserved only limited claims with respect to two rivers, namely, “the free navigation and use of the rivers Potowmack and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon.” (MD App. 3.)

Virginia’s attempt to reserve the right to “use” the Potomac did not encompass the sovereign right to regulate that use within Maryland territory. Rather, its Constitution, as James Madison stated in a letter to Thomas Jefferson upon learning of Virginia’s expansive and unequivocal renunciation of any rights or claims over the Potomac, was an “entire relinquishment of the Jurisdiction” of the River. (MD Ex. 69.)

The Maryland legislature nevertheless rejected even the limited claim Virginia made with respect to the Potomac, declaring that “the state of Virginia hath not any right or title to any of the territory, bays, rivers, or waters, included in the charter granted by his majesty Charles the first to Caecilius Calvert, baron of Baltimore;” that “the sole and exclusive jurisdiction over the territory, bays, rivers, and waters, included in the said charter belongs to this state; and that the river Potowmack, . . . being comprehended in the said charter, the sole and exclusive jurisdiction over the said river Potowmack, . . . as is comprehended in the said charter, belongs to this state.” (MD App. 7-8.)

The Special Master thus should have applied the presumption against separating sovereignty from title, and, by applying the presumption, ruled in Maryland’s favor because the Compact does not set forth any language showing that Maryland relinquished its sovereign authority over the rights described in Article VII of the Compact. That Article provides only that the “citizens” of each State shall have “full property in the shores of Patowmack river adjoining their lands” and the “privilege of making and carrying out wharfs and other improvements.” (SMR App. B-3.) These are rights of property, not governance. Under the presumption and rule of construction that applies in cases such as this, Maryland retained the governmental authority it had over the Potomac under the 1632 Charter, as Virginia expressly recognized in its 1776 Constitution.

In *Massachusetts v. New York*, 271 U.S. 65 (1926), for example, this Court applied a rule of strict construction in holding that Massachusetts did not acquire any title to the bed of Lake Ontario under the Treaty of Hartford, even though the Treaty provided that New York ceded “the Right of pre-emption of the Soil” and all other “Estate, Right, Title and Property (the Right and Title of Government Sovereignty and Jurisdiction excepted)” which New York had in the lake. *Id.* at 81. The Court invoked the “principle derived from the English common law and firmly established in this country that the title to the soil under navigable waters is in the sovereign, except so far as private rights in it have been acquired by express grant or prescription.” *Id.* at 89.

Applying the “rule, generally applicable, that all grants by or to a sovereign government as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction,” *id.*, the Court concluded that under the Treaty, New York retained, “as incident to its sovereignty, title to all lands under navigable waters.” *Id.* at 90.

This Court took the same approach in upholding New Jersey’s right under a compact it formed with New York to tax land in New York Bay on the New Jersey side of the boundary between the two States, even though the compact gave New York “exclusive jurisdiction” over that land. *Central Railroad Co. of New Jersey v. Mayor and Aldermen of Jersey City*, 209 U.S. 473, 478 (1908). Stating that “boundary means sovereignty, since, in modern times, sovereignty is mainly territorial, unless a different meaning clearly applies,” *id.* at 479, the Court rejected the argument that a “different meaning does appear in the article (3) [of the compact] that gives New York exclusive jurisdiction over this land as well as the water above it.” *Id.* Rather, the Court concluded, “the purpose was to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of article 1,” *id.*, which established the boundary between New Jersey and New York.

The Compact of 1785 was likewise “a regulation of commerce,” *Marine Ry. & Coal Co., Inc. v. United States*, 257 U.S. at 64, not an attempt to take back the sovereignty that was the consequence of Maryland’s ownership of the Potomac under the 1632 Charter from King Charles I. As this Court’s cases demonstrate, Virginia’s claims fail unless it can point to unambiguous language in the Compact showing that Maryland intended to separate, and then surrender, its right to regulate wharves and other improvements from the bundle of other rights accompanying its ownership of the lands beneath the Potomac. “Such a waiver of sovereign authority will not be implied, but instead must be ‘surrendered in unmistakable terms.’” *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987) (quoting *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986), quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S.

130, 148 (1982)). The mere formation of the Compact does not constitute such a waiver and is no proof that Maryland relinquished any sovereign right over the River. *Cf. Nicoulin v. O'Brien*, 248 U.S. 113, 114 (1918) (“And we think it clear that no limitation upon the power of [Kentucky] to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact.”).

Rather, such an “important change” in Maryland’s sovereign authority over the Potomac “would have been clearly indicated by appropriate terms; and would not have been left for inference from ambiguous language.” *Martin v. Waddell*, 41 U.S. 367, 416 (1842). *Accord* MD App. 19 (historian Jack N. Rakove’s declaration stating that the Mount Vernon Compact is “consistent with both the state’s conception of its sovereignty and the idea, fundamental to the Founding era, that such diminutions of a state’s sovereignty as it chose to make had to be phrased in precise terms, with the residual authority not surrendered remaining among the larger body of police powers that the state retained”). *See also Jefferson Branch Bank v. Skelly*, 66 U.S. 436, 446 (1861) (“[N]either the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.”); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 548 (1837) (“[W]henver any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same.”). *See generally United States v. Winstar*, 518 U.S. 839, 871-79 (1996). No such terms exist here, nor does this case involve language that clearly or even ambiguously indicated such a fundamental alteration of Maryland’s sovereignty over the Potomac River.

On the contrary, the Compact does not contain any language remotely suggesting that Maryland transferred to Virginia any authority over the construction of wharves and other improvements in the Potomac. The Compact, like the treaty between the United States and the Crow Indian Tribe in *Montana v. United States*, “in no way expressly referred to the

riverbed, nor was an intention to convey the riverbed expressed in ‘clear and especial words,’ or ‘definitely declared or otherwise made very plain.’” 450 U.S. at 554 (citations omitted). The plain language of the Compact shows only that Maryland clearly understood that Virginians, like Maryland citizens, had “full property” in the shores of the Potomac and the “privilege” to build wharves and piers from their property. Maryland’s recognition of such a privilege does not constitute a surrender of its pre-existing authority to regulate these improvements within its territory, as it does not “indicate an abandonment by the Sovereign of title to the soil. . . . [R]iparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state.” *New Jersey v. Delaware*, 291 U.S. at 375.

Virginia’s claims fail, therefore, because, as this Court stated in noting that “Article 7 gave the citizens of each State full property in the shores of the River adjoining their lands and the privilege of carrying out wharves etc.,” *Smoot Sand & Gravel Corp. v. Washington Airport*, 283 U.S. 348, 351 (1931), such “private ownership does not affect State boundaries,” and the use of the word “shores” “is merely a topographical indication and imports nothing as to the sovereignty over them.” *Id.* Maryland’s bare recognition that the “citizens” of Virginia would have the “privilege” of building wharves and other improvements into the Potomac, like Delaware’s “approval” of identical construction in the Delaware River, *New Jersey v. Delaware*, 291 U.S. at 375, gives rise to “no legitimate inference” that either Maryland or Delaware relinquished its “title to the stream up to the middle of the channel or even the soil under the piers. The privilege or license was accorded to the owners individually and even as to them was bounded by the lines of their possession.” *Id.* at 376.

The Compact’s qualification of Maryland’s regulatory authority in other respects underscores the absence of any intention to relinquish that authority with respect to the waterway construction activities described in Article VII. Article VIII expressly requires the “mutual consent and

approbation of both states” in passing “laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Patowmack, or for preserving and keeping open the channel and navigation thereof.” (SMR App. B-3.) Article X specifically conditions the exercise of the “jurisdiction of each state over the river Patowmack” for certain “piracies, crimes or offences,” depending on where they occur and the citizenship of both the victim and the criminal. (SMR App. B-5.) Conversely, Article VII of the Compact is completely silent on the question of how the exercise of the “privilege” described in that provision would be regulated.

The Special Master found it significant that Article VII “prescribed its own regulations on carrying out wharves and other improvements (i.e., no obstruction of navigation),” Report at 46, but this is not regulation; rather, it is an inherent limitation on the riparian right to build any wharf or pier. *See, e.g., Shively v. Bowlby*, 152 U.S. at 14. Such a right has always been subject to governmental regulation above and beyond the limitation as to navigation. *See Norfolk City v. Cooke*, 68 Va. at 434. The Compact says nothing about which State has the right to regulate these structures or to determine whether such an obstruction exists. The Compact’s silence on such an important question is no basis upon which to conclude that Virginia has such a right, especially when, as demonstrated by language found elsewhere in the Compact and Virginia’s Constitution, both States were well aware of the differences between the words “property,” “jurisdiction,” “government,” and “sovereignty.” It truly would have been “at least foreign to the Maryland Commissioners and legislators” (Report at 46) to learn that Maryland’s silence meant that it was relinquishing a fundamental aspect of its “control over the property underlying navigable waters,” *Montana v. United States*, 450 U.S. at 552, simply by recognizing that Virginia citizens had the same private property right as Maryland citizens to build wharves and other improvements in a river with respect to which Maryland asserted it had “the sole and exclusive jurisdiction” and “the State of Virginia hath not any right or title.” (MD App. 7.)

Maryland confirmed that the Compact of 1785 did

nothing to divest Maryland's control over wharves and other improvements when it enacted legislation six years later that ceded territory for the formation of the District of Columbia, and vested the commissioners appointed by the President with licensing authority over the building of wharfs in the Potomac in that territory. *See Morris v. United States*, 174 U.S. at 282 (quoting Kilty's Laws of 1791, Ch. 45, § 12 (MD Ex. 28)); *see also United States ex rel. Greathouse v. Dern*, 289 U.S. at 354. The Compact, in contrast, is completely silent on this key aspect of sovereignty that Maryland, when it intended to, relinquished in explicit terms in its cession of property to the federal government. That cession manifests Maryland's plain understanding that the sovereign right to regulate the construction of wharves is a fundamental component of its ownership of the Potomac that is to be surrendered in explicit terms only.

Disputing that Maryland had such an understanding, the Special Master cited a 1794 map of Maryland showing the boundary between the two States "as running down the middle of the Potomac." Report at 51. This map, which purports to describe "the situation of the cities, towns, villages, houses of worship and other public buildings, furnaces, forges, mills, and other remarkable places," does not even attempt to properly ascertain the boundary between Maryland and Virginia on the Potomac, leaving disconnected the boundary line across the Chesapeake and the River's mouth. *See MD Ex. 1083*. More importantly, the map is an insufficient substitute for the plain language that the Compact must contain to surrender Maryland's regulatory authority over the Potomac. No such language exists.

Rather than support the conclusion that Maryland's silence meant it was surrendering its sovereignty, this Court's cases require that the opposite conclusion be reached and hold that the "common-law rule speaks in the silence of the Compact." *New Jersey v. New York*, 523 U.S. 767, 784 (1998). Under that rule, "[d]ominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation must be indulged." *United States v. Oregon*, 295 U.S. at 14 (citing *Massachusetts v. New York*, 271 U.S. at

89). Virginia's challenge to Maryland's assertion of authority over waterway construction and appropriation activity in the Potomac should thus be rejected because Article VII contains no language that overcomes this presumption.

C. The Black-Jenkins Award Conclusively Reaffirmed Maryland's Ownership And Authority Over The River And Its Bed Up To The Low-Water Mark.

In upholding Maryland's ownership of the lands beneath the Potomac up to the low-water mark on the Virginia side of the River, the Black-Jenkins Award confirmed Maryland's authority over the Potomac to that point. The Arbitrators relied upon the settled rule that was "well illustrated" in *Ingersoll v. Howard*, 54 U.S. 381 (1851), namely, that a boundary that runs "along" the far bank of a river includes the entire river, and concluded, based on language in the 1632 Charter giving to Lord Baltimore land "to the further bank" of the Potomac, that "[t]he intent of the charter is manifest all through to include the whole river within Lord Baltimore's grant. It seems to us a clearer case than that decided in *Ingersoll v. Howard*." (SMR App. D-7, D-8, D-9.) See also *Handly's Lessee v. Anthony*, 18 U.S. 374, 379 (1820) ("[W]hen, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only.").

Rather than place the boundary at the usual high-water mark that accompanies such a grant, the Arbitrators determined, based on the doctrine of prescription and acquiescence, that "Virginia has a proprietary right on the south shore to low-water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership." (SMR App. D-19). They rejected, however, Virginia's argument that, in addition to having "rights on the river[,] . . . she acquired, or that Maryland lost, the islands or the bed of the river, in whole or in part." (*Id.*) The Arbitrators determined that the evidence demonstrated "satisfactorily that Maryland had granted all the islands, taxed the owners, and

otherwise exercised proprietary and political dominion over them.” (SMR App. D-20.) Thus, “the jurisdictional line and boundary were declared to be the low-water mark on the Virginia shore.” *Morris v. United States*, 174 U.S. at 218.

Noting that “the arbitrators recognized the unity of Virginia and its citizens and ruled that *Virginia* had a proprietary right,” Report at 57 (emphasis in original), the Special Master stated that “it would be anomalous to conclude that the rights of that sovereign State and its citizens are subject to regulation by the other co-equal without the slightest suggestion of that fact.” *Id.* There is nothing anomalous, however, about such a conclusion in light of the Arbitrators’ determination that Maryland, not Virginia, owned the bed of the Potomac up to the low-water mark. Just as New York’s compact right of “exclusive jurisdiction” over land in New Jersey did not strip New Jersey of its sovereign right to tax that property, *Central Railroad Co. of New Jersey v. Mayor and Aldermen of Jersey City*, 209 U.S. at 478, Virginia’s rights under the Black-Jenkins Award did not bar Maryland, as the owner of the lands underlying the Potomac, from exercising its sovereign “control over the waters above them,” *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 452, including “control over the location, erection, and use of such wharves and landings,” *Atlee v. Packet Co.*, 88 U.S. at 393, constructed by Virginia or its citizens.

Although the Black-Jenkins Award provided that “Virginia” rather than its “citizens” had certain access rights beyond low water-mark, this did not, as the Special Master suggested, confer on Virginia sovereign authority over those rights. On the contrary, as the Special Master observed, the Black-Jenkins Award merely “confirmed” the language of Article VII, Report at 55-56, which only recognized the private property rights of Virginia citizens and, for the reasons stated, did not give Virginia the sovereign authority to regulate. Rather than elevate the private rights recognized by the Compact into sovereign rights of government by using the word “Virginia,” the Arbitrators stated that “[w]e are not authority for the construction of this compact, because nothing which concerns it is submitted to us.” (SMR App. D-18.) Similarly, both States made clear in their legislation

authorizing the arbitration proceeding that the Arbitrators' decision could not affect the Compact. *See* 1874 Acts of Virginia, Ch. 135 (MD Ex. 37) (“[N]either of the said states, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year seventeen hundred and eighty-five, but that the same shall remain to and be enjoyed by the said states and the citizens thereof forever.”). *Accord* 1874 Md. Laws, Ch. 247.

The Special Master also stated that during the proceedings before the Black-Jenkins Arbitrators, the Maryland commissioners, based on their contemporaneous interpretation of the Compact and understanding of how the two States and their citizens treated the Virginia side of the Potomac as of 1785, proposed drawing the boundary line around all construction from the Virginia side of the Potomac beyond low-water mark. Report at 52 (quoting VA Ex. 57 at 27). The Arbitrators did not draw the boundary line this way, however, nor does the commissioners' settlement proposal in the 1870s provide an adequate basis for concluding that Maryland lacked authority to regulate such construction when the Compact was written a century before. Indeed, rather than concede Maryland's sovereignty, the Maryland commissioners unequivocally opposed Virginia's attempt to assert any authority over the Potomac. In summarizing Maryland's position, Maryland's counsel explicitly stated not only that Maryland was the owner of the Potomac to the bank on the Virginia side of the River, but also that, in direct response to the Virginia Constitution's recognition in 1776 of Maryland's authority over the River, the people of Maryland “did not hesitate, formally by resolutions in their Convention, on the 30th day of October, 1776, to protest against Virginia's pretensions to jurisdiction even over the ‘shores and strands’ on the southern side of the Potomac.” (VA Ex. 367 at 19.)

Maryland's commissioners did not, therefore, relinquish Maryland's rights in the River or the sovereign authority that accompanies those rights. Instead of deeming the commissioners' statements as a surrender of Maryland's authority, the Arbitrators respected Maryland's sovereignty by drawing the boundary line at low-water mark, and recognized

Maryland's superior rights in the Potomac by providing that Virginia's exercise of the right to use the Potomac beyond that line could be made only without impeding navigation, "or otherwise interfering with the proper use of it by Maryland." (SMR App. C-4 - C-5.)

D. Maryland's Authority Over The River Is Consistent With *Maryland v. West Virginia* And The Potomac River Compact Of 1958.

The Special Master also misplaced his reliance on *Maryland v. West Virginia*, 217 U.S. 577 (1910), for the proposition that this Court "explicitly recognized Virginia's rights to the Potomac as rights of an independent sovereign." Report at 65. That case, which involved a boundary dispute between Maryland and West Virginia, neither addressed nor decided whether Maryland has the right to regulate activity carried out from the Virginia side of the Potomac across the boundary line into Maryland. Rather, the Court simply held that the privileges reserved in the Compact to the citizens of Virginia are inconsistent with a high-water mark boundary, 217 U.S. at 580, but are in full accord with "a uniform southern boundary along Virginia and West Virginia, at low-water mark on the south bank of the Potomac river." *Id.* at 581. In reaching that conclusion, the Court stated in *dictum* that the Compact and its "subsequent ratifications[] indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river," *id.*, but the Court did not decide, because the case did not present, the question whether Maryland could regulate those rights of access. On the contrary, as the Special Master acknowledged, "Virginia's rights of access to and use of the River were not specifically before the Court." Report at 58.

Although the Special Master also suggested that the Potomac River Compact of 1958 constitutes additional evidence that Maryland cannot regulate Virginians' rights of access to the Potomac River, Report at 69-70, the Compact of 1958 proves just the opposite. That Compact was the result of a settlement that the two States entered into after Virginia sued Maryland for enacting legislation that sought to repeal the Compact of 1785. Maryland passed this legislation because

of its dissatisfaction with Virginia's failure to enforce concurrent laws governing fisheries of the Potomac River. Maryland could not exercise exclusive jurisdiction with respect to this subject because Article VIII of the Compact of 1785 requires the "mutual consent and approbation of both states" in enacting "laws and regulations which may be necessary for the preservation of fish . . . in the river Patowmack." (SMR App. B-3.) In resolving this dispute by creating a bi-state commission to regulate the fisheries of the Potomac River, the Compact of 1958 underscored that, despite the use of the word "Virginia" in the Black-Jenkins Award, the rights described in Article VII of the Compact of 1785 belong to "the citizens of each State along the shores of the Potomac River adjoining their lands," and that those rights "shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this Compact." (SMR App. E-23 - E-24.) With respect to the two States' sovereign rights, the 1958 Compact stated unequivocally that "Maryland and Virginia each recogniz[e] that Maryland is the owner of the Potomac River bed and waters to the low water mark of the southern shore." (SMR App. E-10.) Maryland's recognized ownership rights in the 1958 Compact reaffirmed its authority to regulate the exercise of the rights described in Article VII of the Compact of 1785.

For these reasons, this Court should hold that Maryland has the authority to regulate waterway construction and appropriation activities carried out by Virginia and its citizens from the Virginia side of the Potomac into Maryland.

II. VIRGINIA HAS ACQUIESCED IN MARYLAND'S ASSERTION OF AUTHORITY OVER THE POTOMAC.

Maryland's authority over the Potomac River is supported by the additional and independent reason that Maryland has long exercised regulatory authority over the River without any interruption from Virginia. "The rule, long settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." *Michigan v. Wisconsin*, 270 U.S.

295, 308 (1926). Accordingly, “[i]ndependently of any effect due to the compact,” Maryland’s authority, “recognized and acquiesced in for a long course of years, is conclusive.” *Virginia v. Tennessee*, 148 U.S. at 522. See also *New Jersey v. New York*, 523 U.S. at 78-87; *California v. Nevada*, 447 U.S. 125, 131-32 (1980); *Ohio v. Kentucky*, 410 U.S. 641, 649-52 (1973); *Vermont v. New Hampshire*, 289 U.S. 593, 613-20 (1933); *Michigan v. Wisconsin*, 270 U.S. at 306-08, 316-19; *Maryland v. West Virginia*, 217 U.S. at 40-46.

Since the time both States accepted the Black-Jenkins Award, and in recognition of the well-settled rule that “ownership of land under navigable waters is an incident of sovereignty,” *Montana v. United States*, 450 U.S. at 551, each State for the last 125 years has “asserted jurisdiction on its side up to the line designated, and recognized the lawful jurisdiction of the adjoining state up to the line on the opposite side.” *Virginia v. Tennessee*, 148 U.S. at 515. During that time frame, there simply was no “dispute as to the boundary between them.” *New Jersey v. Delaware*, 291 U.S. at 376.

Indeed, the Virginia Department of Health and the Virginia Marine Resources Commission (“VMRC”) both stated unequivocally that the Fairfax County Water Authority’s mid-river intake – the very waterway construction that gave rise to this case – extended into Maryland territory and thus “does not fall within the jurisdiction of the Marine Resources Commission; therefore, no authorization will be required from this agency.” (MD App. 20. See also MD App. 18.) Recognizing that the “project will, however, encroach on subaqueous bottom under the jurisdiction of the State of Maryland” (MD App. 21), the VMRC informed the Fairfax County Water Authority that its permit application was forwarded to Maryland. (*Id.*)

The conduct of both States in this and countless other contexts reflects their clear understanding that, with the exception of concurrent jurisdiction over fisheries provided for in the Compact, the boundary determination made in the Black-Jenkins Award was the dividing line of sovereignty with respect to all areas and activities. Virginia’s claims in this case are barred because both States have repeatedly

recognized, through the actions and words of their officials and citizens, that Maryland has the right to regulate the Potomac.

A. Both States Have Treated The Boundary Line As An Absolute Line Of Sovereignty.

Long prior to the Black-Jenkins Award, Maryland had engaged in a number of regulatory activities in the Potomac, ranging from regulating wharves and other improvements to overseeing water withdrawals, taxing bridges, and issuing permits for railway crossings. *See* Brief in Support of Maryland's Motion for Summary Judgment at 7-11, 41-44. These regulatory activities continued after the Arbitrators rendered their decision, and expanded with the passage of time. In the decade following the Award, Maryland enacted a criminal statute that forbade "any person to dig, dredge, take and carry away any sand, gravel or other material from the bed of the Potomac River." 1888 Md. Laws. Ch. 363 (MD Ex. 39.) The turn of the century witnessed a number of additional assertions of jurisdiction, particularly in the wake of a Maryland law enacted in 1908 providing that the jurisdiction of any county bounded by waters that adjoined a neighboring State extended to the "ultimate limits" of Maryland "at the place in question." 1908 Md. Laws Ch. 487 (MD Ex. 40).

Pursuant to this law and Maryland's fundamental right as the owner of the bed and waters of the Potomac, Maryland and its political subdivisions have extended every type of police power authority to the low-water mark on the Virginia side of the Potomac River, and have included within their broad regulatory sweep piers, wharves, and water intake pipes attached to Virginia, and activities that take place on structures built from the Virginia side. Conversely, Virginia has failed to exert any regulatory authority over the Potomac, subject only to the exception of the limited jurisdiction given it by the Compact of 1785 concerning fisheries and certain crimes, and has not only recognized its lack of authority but has also asked Maryland to exercise its regulatory power over property and activity on the Virginia side of the River that is beyond Virginia's jurisdictional reach.

A State's "taxing power" is "one of the primary indicia of

sovereignty.” *Illinois v. Kentucky*, 500 U.S. at 385. Such a manifestation of a State’s sovereignty has been found to be “particularly persuasive in prior cases.” *New Jersey v. New York*, 523 U.S. at 792 (citing cases). Although Virginia in one instance argued before the Court of Appeals of Maryland one hundred and forty years ago that the “privilege” set forth in the Compact of 1785 to build wharves and other improvements “surrendered in favor of Virginia her power to tax the property within her chartered limits on that shore, and all improvements projected therefrom,” *O’Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. 1, 9 (1861), Virginia never renewed that argument after it accepted the Black-Jenkins Award, even though since that time Maryland officials have engaged in a number of taxation and other regulatory activities with respect to property built from the Virginia side of the River.

Maryland has been able to document, for example, that since at least 1951 it has imposed sales, entertainment, property and other taxes on structures and businesses built on piers and wharves extending from the Virginia side of the River. (MD App. 113; 153; 181; 191; 232.) Virginia has stipulated that it “has not objected to Maryland’s jurisdiction to impose any” of these taxes and that “Virginia has not imposed any sales or use, litter, entertainment, personal property, or income tax on activities that take place in the Potomac River, or on structures located in the Potomac River, on the Maryland side of the Maryland-Virginia line.” (MD App. 39 ¶¶ 13, 14.)⁵

The sale of alcohol and operation of slot machines on

⁵ Although Virginia’s localities tax structures built from the Virginia side of the Potomac, these structures are taxed as part of the value of the real property to which they are attached on Virginia’s side of the low-water mark. (VA Ex. 276, ¶¶ 3-4; VA Ex. 282, ¶ 3; MD App. 47.) In cases where that connection is absent, *i.e.*, when the structure on Maryland’s side of the low-water mark has value independent of the land in Virginia, Maryland taxes those properties and Virginia does not. (*Id.*)

piers built from the Virginia side of the Potomac, discussed earlier, are illustrative examples of how Maryland and Virginia have demonstrated in the area of criminal law enforcement the same understanding that the boundary line set forth in the Black-Jenkins Award represents the line at which Virginia's sovereignty ends and Maryland's begins. The Sheriff's office of Charles County, Maryland, like the St. Mary's County Sheriff's office and other Maryland law enforcement agencies, has long been responsible for enforcing Maryland's criminal laws with respect to criminal activities occurring past the low-water mark on piers and wharves built from the Virginia side of the Potomac. (MD App. 100; 121; 150; 288.)

Conversely, as Virginia has stipulated, "[s]ince at least 1900, Virginia's statutory laws have not provided for general criminal jurisdiction over crimes alleged to have occurred in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line." (MD App. 38 ¶ 7.) Virginia has also stipulated that, during the same time frame, it "has not exercised general criminal jurisdiction" over such crimes. (*Id.*, ¶ 8.) Virginia also "has not objected to Maryland's exercise of its general criminal jurisdiction over" these crimes. (MD App. 39 ¶ 9.) Rather than object, Virginia agencies and officials have asked for assistance, and have entered into agreements with local Maryland officials in which the Maryland officials have delegated to Virginia officials law enforcement authority over activities taking place on Virginia piers on the Maryland side of the boundary line. (MD App. 101-02 ¶¶ 3-4; MD App. 108; MD Exs. 572, 573.)

Both States have also recognized in the licensing context that the jurisdictional dividing line set forth in the Black-Jenkins Award marks the point at which Virginia's general police power authority terminates and Maryland's starts. Maryland presented the Special Master with documentation showing that, since at least the 1940s, Maryland authorities have been issuing to business establishments located on piers and wharves affixed to the Virginia side of the Potomac River not simply licenses for the slot machines discussed earlier, but also trader's licenses, music box licenses, cigarette licenses, restaurant licenses, amusement licenses, dance licenses,

vending machine licenses, billiards licenses, soda fountain licenses, liquor licenses, food service facility licenses, food and drink permits, and other licenses and permits. MD App. 81-98; 110-11; 125-26; 145-49; 158-59; 219-28.)

Conversely, just as Virginia has recognized Maryland's criminal law enforcement authority over piers, wharves, and activities taking place on the Maryland side of the boundary, the Commonwealth has also stipulated that "Virginia has not objected to Maryland's enforcement of any law relating to gambling, gaming, health, or occupational safety with respect to any activity taking place in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line." (MD App. 39 ¶ 11. *See also id.*, ¶ 12 ("Virginia has not objected to Maryland's jurisdiction to issue liquor licenses to structures located in the Potomac River on the Maryland side of the Maryland-Virginia line.").) Rather than object to these exercises of Maryland's regulatory authority, Virginia governmental entities have appealed to Maryland to exercise that authority for Virginia's benefit.⁶

Virginia has also recognized that it lacks jurisdiction over the same activities. Virginia has stipulated that, "[s]ince at least 1900, Virginia has not enforced any law relating to gambling, gaming, health, or occupational safety with respect to any activity taking place in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the

⁶ *See, e.g.*, MD App. 143 (letter dated August 12, 1993, from the Rappahannock Area Health District of the Virginia Department of Health to the Charles County Department of Health asserting that an onsite sewage disposal system located in Fairview Beach, Virginia was "not adequate to handle the sewage" that would be generated by a restaurant on the Fairview Beach Pier if the restaurant was to be open for business, and that "[s]ince the restaurant is located in the jurisdiction of the Charles County Environmental Health Department, the Rappahannock Area Health District and King George County Health Department request that the restaurant not be allowed to open as long as it is connected to the onsite sewage disposal system.").

Maryland-Virginia line.” (MD App. 39 ¶ 10.) Virginia’s interrogatory responses expand on this, stating that Virginia “does not presently enforce its laws relating to public safety, occupational safety, health, alcohol, gambling, gaming, hunting or fishing in that portion of the Potomac River that lies below the low-water mark of the Potomac River beyond the Virginia/Maryland line.” (MD App. 50.)

Perhaps more significant are the many express and unqualified opinions Virginia’s Attorneys General have made over the course of the century following the Black-Jenkins Award in which the highest law enforcement officers of the Commonwealth acknowledged, starting in 1906, Virginia’s utter lack of any “legal right,” 1906 Va. Att’y Gen. Op. 87 (MD App. 24); “authority,” 1935 Va. Att’y Gen. 147 (MD App. 26); *accord* 1952 Va. Att’y Gen. Op. 116 (MD App. 31); “jurisdiction,” 1944 Va. Att’y Gen. Op. 91 (MD App. 28); or “territorial jurisdiction,” 1948 Va. Att’y Gen. Op. 118 (MD App. 30), over a broad range of activities occurring beyond the low-water mark on Virginia’s side of the Potomac. The only time that Virginia’s Attorneys General have ever claimed authority beyond low-water mark has been in connection with “the right to fish.” 1955 Va. Att’y Gen. Op. 117, 118 (VA Ex. 334); *accord* 1927 Va. Att’y Gen. Op. 182 (VA Ex. 333). In all other matters, including those involving the right to build piers and wharves, the Virginia Attorney General has treated the boundary as an absolute line of sovereignty.

Indeed, two of these opinions specifically acknowledge that the exercise of the right to build a pier from the Virginia side of the Potomac does not vest Virginia with, or strip Maryland of, any authority over that portion of the pier that extends beyond the low-water mark. In response to a question concerning Virginia’s jurisdiction over a pier affixed to the Virginia side of the Potomac, the Commonwealth’s Attorney General stated expressly that the “territorial jurisdiction of the Commonwealth ends at the low-water mark,” notwithstanding any exercise of the “privilege of building piers” set forth in the Compact, with the result that any “portion of a pier which is beyond the low-water mark on the southern shores of the Potomac River is in the State of Maryland and is not subject to the laws of the Commonwealth.” 1948 Va. Att’y Gen. Op.

118 (MD App. 30). Two decades later, in response to another question concerning Virginia's authority over a pier built from the Virginia side of the River, the Virginia Attorney General again focused on the "right to build a pier or wharf" and stated that "the lawful exercise" of such a right "would not change the boundary line between Virginia and Maryland." 1967 Va. Att'y Gen. Op. 48, 49 (MD App. 35, 36). As do the other Virginia Attorney General opinions dating back to the beginning of the 1900s, each of these opinions makes clear that the jurisdiction and boundary of the two States are one and the same under the Black-Jenkins Award, without regard to the activity in question, including the exercise of any Compact rights.⁷

The two States have treated waterway construction activities in precisely the same way they have addressed every other activity that takes place on Maryland's side of the boundary line. Maryland regulates this activity, Virginia does not, and, in case after case and project after project, Virginia has not objected to Maryland's jurisdiction but rather has referred applicants to Maryland.

The vast majority of waterway construction on the Potomac occurs in the tidal portion, below Washington, D.C. Owners of riparian property on both sides of the Potomac routinely seek to build wharves, docks, piers, or landings to allow for easier access to the navigable channels of the River, or bulkheads, groins, jetties, or breakwaters to protect their shoreline property against erosion. Virginia has conceded that the VMRC, which is the Virginia agency that issues permits for all reasonable uses of state-owned bottomlands (MD App. 45), issues permits only for "structures in the Potomac River

⁷ During the same time period in which these opinions were issued, Maryland's Attorney General expressed the view that the Compact of 1785 "does not in any way detract from Maryland's right to levy taxes against improvements located in the River beyond the low watermark," even "when those improvements were made to shore properties on the Virginia side of the river." 1956 Md. Att'y Gen. Op. 335, 336 (MD App. 33).

which are within those embayments that are within the boundaries of Virginia; they are not issued for structures below the low-water mark of the Potomac River where that low-water mark is the boundary between Virginia and Maryland.” (MD App. 45-46.)

Maryland, in contrast, has actively regulated the placement of structures in the tidal portion of the Potomac beyond the low-water mark on the Virginia side of the River by issuing between 250 and 350 authorizations for Virginia shoreline projects, including piers, decks, bulkheads, jetties, groins, and other exercises of the “privilege” encompassed under the Compact. (MD Ex. 498.) Rather than object to this assertion of authority, Virginia has acknowledged on hundreds of occasions, as it has with respect to the other regulatory activities discussed earlier, that Maryland has jurisdiction over construction activities taking place beyond low-water mark on the Potomac. (*See generally* MD Exs. 170-495; *see also, e.g.*, MD App. 16; 68; 71; 75; 77; 79.)

At first, in the 1970s, the VMRC acknowledged Maryland’s jurisdiction by copying the Maryland Department of Natural Resources on letters to applicants informing them that, because their projects extend out beyond low-water mark, they are not subject to the VMRC’s jurisdiction. (MD Ex. 166.) Beginning in the 1980s, Virginia’s acknowledgment of Maryland’s jurisdiction became more explicit, stating, for example, in an April 6, 1982, letter to an individual who had objected to the timber groin project proposal of his neighbor, that the VMRC “would not have jurisdiction” over the project because it extended beyond the low-water mark of the Potomac and that the VMRC only “has jurisdiction over all State-owned subaqueous land, channelward of the mean low water, not conveyed by special grant or compact according to law.” (MD Ex. 495 at VA-MRC-F-00274.) After stating it lacked jurisdiction over the project, the VMRC informed the individual that it was “forwarding a copy of your letter to the U.S. Army Corps of Engineers, Baltimore Maryland District, and the Maryland Department of Natural Resources. Both of these agencies would have jurisdiction over this project.” (*Id.*)

In hundreds of other similarly-worded letters to Virginia

applicants, Virginia has acknowledged Maryland's jurisdiction and referred applicants to Maryland for authorization, based on the VMRC's understanding of the boundary line as the justification for both Maryland's jurisdiction beyond low-water mark and the VMRC's lack of authority over Virginia applicants who proposed building past that boundary line. (See, e.g., MD Ex. 170 at VA-MRC-F-00186; MD App. 65-66 ¶¶ 39-43.) Indeed, in one effort to help an applicant "in understanding the agencies with jurisdiction along the shoreline of the Potomac River at Colonial Beach," the VMRC in a letter dated April 4, 1984, stated that "[i]n 1785, Maryland and Virginia signed a compact in which Maryland took jurisdiction over the subaqueous lands of the Potomac River to the mean low water mark of the Virginia shore. As a consequence, projects constructed channelward of mean low water in the Potomac River fall under the jurisdiction of the Maryland Department of Natural Resources, rather than the Virginia Marine Resources Commission." (MD App. 80.) A more direct admission and understanding about the jurisdictional nature of the boundary line between the two States would be hard to imagine.

Virginia continues to acknowledge Maryland's jurisdiction, and to refer its citizens and political subdivisions to Maryland for piers, jetties, bulkheads and every other variety of riparian improvement, pursuant to a Maryland wetlands licensing policy that is presently promulgated as a regulation, see Code of Maryland Regulations 23.02.04.21, and that was adopted initially by the Maryland Board of Public Works in 1987 (MD App. 177) after the policy had been developed, at Virginia's request, with representatives of the Virginia counties along the Potomac, the VMRC, and Virginia's Counsel of Record in this case. (MD App. 60-61 ¶¶ 25-30.) Even after Virginia filed its Motion for Leave to File a Bill of Complaint and this Court agreed to review this case, Virginia has continued to refer its citizens to Maryland when they seek permission to engage in construction activity in the tidal portion of the Potomac River. (*Id.* ¶¶ 29-30.)

Both States have also recognized in the context of water withdrawals from the Potomac that the boundary line established by the Black-Jenkins Award represents the point

at which Virginia's territorial sovereign jurisdiction terminates and Maryland's starts. Virginia concedes that, to this day, it has never implemented an administrative system for regulating the withdrawal of water from the Potomac River. (MD App. 42-44.) Although during the mediation ordered by the Special Master Virginia issued a Guidance Memorandum to provide "a framework" governing Potomac River permit requirements (VA Ex. 128), that document expressly states that it "does not establish or affect legal rights or obligations" and that it is not even to become effective unless and until this case has been resolved in a way that is consistent with the authority that the guidance describes. (*Id.*)

In contrast, Maryland has long regulated water withdrawals from all waters of the State, including the Potomac, and in 1933 established the first and only formalized water appropriation permitting system in use on the Potomac River.⁸ Ironically, while Virginia now claims the right to withdraw water from the Potomac River without submitting to Maryland's authority, Fairfax County, a political subdivision of the Commonwealth, was among the first to apply for, and obtain, a Maryland permit to engage in that activity. Fairfax County submitted its application on October 10, 1956 (MD App. 195-96 ¶ 8), two years before Virginia formally conceded in the 1958 Compact that Maryland is "the owner of the Potomac bed and waters to the low water mark on the southern shore." (SMR App. E-10.) The Maryland Department of Geology, Mines and Water Resources issued the permit on February 25, 1957, and it was accepted by Fairfax County on March 22, 1957. (MD App. 196 ¶ 9.)

⁸ As set forth in the Brief in Support of Maryland's Motion for Summary Judgment, at 9-10, 43-44, Maryland regulated water rights in the Potomac in the 19th century through its courts, legislature, and land records commissioner. For example, a Maryland court ruled that Virginia riparian owners did not have the right to withdraw water from the Potomac. (MD Ex. 140.) Rather than contest that decision, the Virginia owner took out a Maryland patent to the water rights. *See United States v. Great Falls Mfrg. Co.*, 21 Md. 119 (1864).

Fairfax County's submission to Maryland's regulatory authority in this area was another example of how widely all parties understood that the boundary line represented the line of sovereignty for all purposes.

That understanding has continued through the present. Virginia entities have on at least 29 occasions applied for and obtained Maryland permits to withdraw water from the Potomac. (MD App. 196-205 ¶¶ 9, 16, 17, 18, 20-44.) As with Fairfax County four decades earlier, not one of these Virginia applicants contested or in any way objected to Maryland's jurisdiction. (MD App. 205 ¶ 45.) On the contrary, throughout the forty-plus years since Fairfax County first applied in 1956, Virginia and its political subdivisions have actively participated in the Maryland permit process by submitting comments on proposed applications and stating their position. (MD App. 206, 208-10 ¶¶ 47, 55-61; MD App. 216.)

In sum, since the Black-Jenkins Award in 1877 drew the boundary line at the low-water mark on Virginia's side of the Potomac, both Maryland and Virginia have recognized that boundary line as the line of sovereignty in all respects. Maryland has exercised authority over water withdrawals and wharves and piers extending from the Virginia side of the Potomac onto Maryland's side of the boundary line by subjecting them to permitting, taxing, licensing, policing, public safety, health, gambling, and other regulatory actions. In contrast, Virginia has not engaged in such regulation, has not taken any action to impede Maryland's regulation, and, in many instances, has recognized, participated in, and aided Maryland's regulation. Maryland's "longstanding assumption of jurisdiction" "not only demonstrates the parties' understanding . . . but has created justifiable expectations which should not be upset." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977).

B. The Special Master Erred In Concluding That Maryland Did Not Present Sufficient Evidence Of Virginia's Acquiescence.

In concluding that Maryland did not present enough evidence in support of its acquiescence defense, the Special Master rejected as irrelevant all of Maryland's evidence of regulatory activities falling outside the area of waterway construction and appropriation, stating that these activities "demonstrate nothing at all about the parties' understanding of regulatory authority over Virginia's rights specifically agreed to in the Compact, upheld in the Award, and involved in the present action." Report at 80. Evidence of these activities is relevant for two reasons.

First, Maryland's evidence shows that Maryland has long regulated Virginia's Compact rights, without any objection from the Commonwealth, by regulating what Virginia's Attorney General claimed, prior to the Black-Jenkins Award, is "Virginia property, or property attached to the Virginia shore," that is "exempt" under the Compact from the "power of Maryland." *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. at 9. Maryland has executed that authority and regulated the ability of Virginians to exercise both their right of "full property," with "all emoluments and advantages thereto," and their "privilege of making and carrying out wharfs and other improvements," by subjecting those rights not simply to Maryland's waterway permitting laws, but also to Maryland's taxation statutes, criminal jurisdiction, environmental regulations, alcohol licensing requirements, occupational health and safety standards, and a panoply of other laws. All of these regulatory powers flow from a single source – Maryland's ownership of the bed and waters of the Potomac River. A Virginia citizen who wishes to build a pier restaurant extending from the Virginia side of the Potomac into Maryland, just like a Maryland citizen who wishes to build from the Maryland side, cannot do so without obtaining a waterway construction permit, or paying Maryland taxes, or securing a Maryland restaurant or liquor license. Similarly, a Virginia (or Maryland) citizen who wishes to enjoy his or her full property rights on the Potomac may do so, as long as no Maryland law is violated when the activity

occurs in Maryland. The Special Master thus erred in deeming irrelevant all non-waterway construction or appropriation activities.

Second, Maryland's evidence shows that Virginia has "never exercised, or attempted to exercise, a single right of sovereignty or ownership" beyond low-water mark, *Indiana v. Kentucky*, 136 U.S. 479, 510 (1890) (emphasis added), and that Virginia's "long inaction in the face of [Maryland's] continuing and obvious exercise of dominion," *Georgia v. South Carolina*, 497 U.S. 376, 391 (1990), was based on Virginia's unwavering understanding – as expressed through the affirmative opinions and statements made throughout the 1900s by its Attorneys General and other officials on several hundred occasions in a variety of contexts – that Virginia's jurisdiction over the Potomac ends at the low-water mark, that the Commonwealth does not have any authority beyond that point over activities or piers or wharves, that the exercise of the right to construct improvements from the Virginia side does not change the boundary line between the two States and is under the jurisdiction of Maryland, and that Maryland has jurisdiction over the River because Maryland owns the Potomac. These opinions and statements, when considered in conjunction with the hundreds of other exhibits that Maryland has produced, evidence a clear and uniform understanding handed down from generation to generation from the time of the Black-Jenkins Award, through the turn of the next century, and reaffirmed continuously through the present in a multitude of ways that Maryland has identified in those exhibits and that Virginia has not refuted.

Although much of this evidence consists of conduct that Maryland has been able to document for the last 60 years, the various opinions of the Virginia Attorneys General prove that this conduct did not suddenly materialize out of thin air but, rather, is based upon a documented historical chain of custody that links the last half century with the contemporaneous interpretation that both States shared when the boundary between them was conclusively identified in 1877. The Special Master thus erred in choosing "to ignore the conduct of the states and the belief of the people concerning the purpose of the boundary line." *Maryland v. West Virginia*,

217 U.S. at 44. That conduct and belief relate directly to the question whether Virginia has acquiesced in Maryland's assertion of authority over the Potomac. *See also Massachusetts v. New York*, 271 U.S. at 94 ("If any further support were required for the conclusion we reach, it is to be found in the practical construction by the two states of the Treaty of Hartford and of the grants made by Massachusetts immediately following it, and in long-continued acquiescence by Massachusetts in that construction."); *Indiana v. Kentucky*, 136 U.S. at 510 ("Such acquiescence in the assertion of authority by the state of Kentucky, such omission to take any steps to assert her present claim by the state of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome except by the clearest and most unquestioned proof.").

As this Court has stated in determining whether one State has acquiesced in another's exercise of such authority, "we are concerned not only with what its officers have done, but with what they have said, as well." *Illinois v. Kentucky*, 500 U.S. at 386. As a result of what its officers have done and said, Virginia and its political subdivisions and citizens have turned to Maryland seeking permission to erect piers, wharves, jetties, and other structures from the Virginia side beyond the low-water mark into Maryland, they have asked Maryland to allow them to withdraw water from the River, and the Governor of Virginia requested his Maryland counterpart to sponsor legislation outlawing activity taking place on piers and wharves that the highest law enforcement official in the Commonwealth stated was beyond Virginia's reach. Virginia's "long continued failure . . . to assert any dominion over the . . . river" and "long acquiescence in the dominion asserted there by" Maryland, *Vermont v. New Hampshire*, 289 U.S. at 613, "is of substantial weight in indicating acquiescence . . . in the boundary line restricting her jurisdiction to the River at the low-water mark." *Id.* at 616.

The Special Master also erred in rejecting Maryland's acquiescence defense on the basis of what he labeled "numerous challenges by Virginia to Maryland's permitting authority." Report at 94. Rather than refute Maryland's evidence, Virginia offered no proof at all that it has ever

challenged Maryland's assertion of authority over waterway construction activities. On the contrary, Virginia continues to refer its citizens to Maryland when they seek permission to construct improvements from the Virginia side beyond the low-water mark of the Potomac River.⁹

Similarly, the minimal evidence from the mid-1970s that Virginia offered to show it has not acquiesced in the area of water appropriation proves just the opposite to be true. Indeed, one letter that Virginia relies upon informed Maryland's chief water appropriation regulator that Virginia "is agreeable to your continued operation of the permit system in the interest of the riparian owners on both sides of the River." (MD App. 10.) Neither this letter, nor the handful of statements referred to in the Special Master's Report at 83-88, defeat Maryland's acquiescence defense because none of those statements interrupted Maryland's "long and continuous possession of, and assertion of sovereignty over, the territory delimited by the transient low-water mark." *Illinois v. Kentucky*, 500 U.S. at 384. *See also New Jersey v. New York*, 523 U.S. at 787 (quoting *Arkansas v. Tennessee*, 310 U.S. 563, 570 (1940), for the proposition that "sovereign rights to land can be won and lost by 'open, long-continued and uninterrupted possession of territory'"). Rather, in rejecting the suggestion Virginia made in a 1977 letter that in the future the Commonwealth might create its own permit system for its political subdivisions, Maryland replied that "Maryland's appropriation law would still be applicable" (MD App. 12),

⁹ Although Virginia asserted before the Special Master that its reason for doing so is based on § 401 of the Clean Water Act, the construction of piers and wharves typically does not involve a "discharge into the navigable waters" that would trigger that provision. *See* 33 U.S.C. § 1341; 33 C.F.R. § 323.3(c)(2). More importantly, none of the hundreds of letters the VMRC has written referring applicants to Maryland makes any reference to the Clean Water Act as Virginia's justification for informing its citizens that it does not have "jurisdiction" over their permit requests but that Maryland does. *See, e.g.*, MD App. 16; 68; 71; 75; 77; 79.

thus making clear that it did not regard Virginia as having any choice about Maryland's regulation of water withdrawals. As the Black-Jenkins Arbitrators stated in commenting upon a similar assertion of sovereignty that Lord Baltimore made over the islands in the Potomac, this is "the most emphatic contradiction" that anyone "could give to any adverse claim, or pretense of claim." (SMR App. D-20.)

Recognizing this, even Virginia's counsel expressed the concern to Virginia officials during that time frame that "[i]f Maryland continues to require permits of Virginia localities, and if its permit program is not challenged by Virginia, in time Maryland will acquire by prescription the right to require a permit from Virginia riparian users." (MD App. 303.) Maryland had already "acquired" such a right, however, in light of its longstanding assertion of control over the Potomac. Just as significantly, Virginia's statements in the 1970s did nothing to interrupt the continuity of Maryland's adverse claim. Instead, Virginia has continued to reinforce Maryland's control by foregoing then, as it has through the present day, any permitting system of its own. The Commonwealth has reinforced again Maryland's control in the related context of waterway construction activities by referring hundreds of applicants to Maryland because Maryland, and not Virginia, has jurisdiction over those activities. In that context, as in every other context involving Maryland's regulation of activities taking place beyond low-water mark, Virginia has taken many actions that reaffirm Maryland's authority, but none that challenge it.

While "inaction alone may constitute acquiescence when it continues for a sufficiently long period," *Georgia v. South Carolina*, 497 U.S. at 393, there is more here than mere inaction. Notwithstanding Virginia's brief public posturing during the mid-1970s about Maryland's authority to regulate water withdrawals, the Commonwealth has failed to come forward with any proof showing "any official act," *Massachusetts v. New York*, 271 U.S. at 95, that it has undertaken, ever, to interfere with, much less stop, Maryland's "continuous and undisturbed exercise of sovereignty," *Arkansas v. Tennessee*, 310 U.S. at 570 (quoting 1 L. Oppenheim, *International Law*, p. 455 (H. Lauterpacht 5th

ed.1937)), over the Potomac River. As Virginia's counsel cautioned the Virginia Water Control Board 25 years ago, words alone, "unless supported by other direct Virginia actions, will not be sufficient to prevent Maryland's acquiring, in time, by prescription, authority to subject Virginia's riparian rights to the Maryland permit system." (MD App. 301.) Despite that warning, the Commonwealth has not identified any "direct Virginia actions" that it has ever taken, prior to filing this lawsuit, to disturb Maryland's continuous exercise of sovereignty over the Potomac River. Rather than take any action to disrupt Maryland's assertion of authority, Virginia has admitted on hundreds of occasions that Maryland, and not Virginia, has jurisdiction beyond low-water mark. This suit represents Virginia's "first well-authenticated instance of an effort . . . in the period of over a century" to assert sovereignty beyond the boundary line. *Vermont v. New Hampshire*, 289 U.S. at 616.

While "no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription," *New Jersey v. New York*, 523 U.S. at 789 (quoting 1 L. Oppenheim, *International Law* § 242 at 456-57 (H. Lauterpacht 5th ed.1937)), this Court stated, in addressing the conduct of the United States and the Delaware Indians who each claimed up to a boundary line established by a survey, that "[i]n the case of private persons, a boundary surveyed by the parties and acquiesced in for more than thirty years, could not be made the subject of dispute by reference to courses and distances called for in the patents under which the parties claimed, or on some newly discovered construction of their title deeds. We see no reason why the same principle should not apply in the present case." *United States v. Stone*, 69 U.S. 525, 537 (1865) (quoted in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 605 n.28). Rather than establish any "minimum period of prescription," this Court has stated that 64 years is "a period that is not insufficient as a matter of law," *New Jersey v. New York*, 523 U.S. at 789, and has deemed even shorter periods of time satisfactory. See *Nebraska v. Wyoming*, 507 U.S. 584, 595 (1993) (41 years); *New Mexico v. Colorado*, 267 U.S. 30, 40-41 (1925) (51 years). Similarly, the Arbitrators who established the

boundary between Maryland and Virginia stated not once but three times that twenty years “creates a right by prescription” (SMR App. D-18) that confers ownership of and “title” (SMR App. D-29) to territory upon one State even if that territory “originally belonged to the other.” (SMR App. D-32.) Regardless of the period of time required, Maryland’s longstanding assertion of authority over the Potomac in all respects, coupled with Virginia’s equally longstanding acquiescence in that authority and continuing failure to exercise any of its own, confirm Maryland’s right to regulate the Potomac up to the low-water mark on the Virginia side.

CONCLUSION

For the reasons stated, judgment should be entered in favor of Maryland and against Virginia.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

MAUREEN MULLEN DOVE
Chief of Litigation

ANDREW H. BAIDA*
Solicitor General

M. ROSEWIN SWEENEY
ADAM D. SNYDER
RANDOLPH S. SERGENT
Assistant Attorneys General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6318

**Counsel of Record*

Attorneys for Defendant
State of Maryland