No. 156, Original

IN THE

Supreme Court of the United States

STATE OF NEW YORK,

Plaintiff,

v.

STATE OF NEW JERSEY,

Defendant.

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF DEFENDANT

JAYNEE LAVECCHIA
Counsel of Record
MICHELLE PALLAK MOVAHED
BRIAN W. CARROLL
SCOTT WEINGART
MCCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 848-8300
jlavecchia@mccarter.com

Counsel for Amici Curiae

August 29, 2022

315167

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

Page

Page

CONSTITUTION

STATUTES AND COMPACTS

OTHER AUTHORITIES

Cited Authorities

Page

INTEREST OF AMICI CURIAE[1]

The law professors joining in this amicus submission have produced scholarship involving the law of contract, specifically addressing contracts of indeterminate duration and sovereignty concerns arising in governmental agreements. Their submission can offer the Court insight into doctrines relevant to the compact interpretation issue before the Court. Amici curiae are:

Janice C. Griffith is a Professor of Law at Suffolk University Law School.[2] She has previously chaired the American Bar Association's Section of State and Local Government Law and the Association of American Law Schools' Section on State and Local Government Law. She has also written extensively on issues of sovereignty in the state and local government context, including *State and Local Government In A Federal System* (9th ed., 2021) (with Daniel R. Mandelker, et al.) and *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 Iowa L. Rev. 277 (1990).

David Horton is the Martin Luther King, Jr. Professor of Law at the University of California, Davis School of Law

1. All parties have consented to the filing of this brief. Counsel for the parties did not author this brief in whole or in part. Neither of the parties nor counsel for the parties made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than counsel for amici, made a monetary contribution to the preparation or submission of this brief.

2. Institutional affiliations are included for identification purposes only.

where he teaches and writes in the areas of wills and trusts, arbitration law, and contracts. His scholarship has addressed such topics as contracts of indefinite duration, including *Infinite Arbitration Clauses*, 168 U. Pa. L. Rev. 633 (2020).

Christopher Serkin is the Elisabeth H. and Granville S. Ridley Jr. Chair in Law at Vanderbilt Law School. He has authored a wide range of publications regarding local governments, property theory, the Takings Clause, and eminent domain, with particular focus on anti-entrenchment rules preventing governments from passing unrepealable legislation that binds subsequent governments. Representative publications include *Penn Central Take Two*, 92 Notre Dame L. Rev. 913 (2016), *Public Entrenchment through Private Law: Binding Local Governments*, 78 U. Chi. L. Rev. 879 (2011), and *Entrenching Environmentalism: Private Conservation Easements over Public Land*, 77 U. Chi. L. Rev. 341 (2010).

Amici view basic common law contract principles and their interaction with sovereignty as integral in the resolution of this interstate compact dispute. They are well-positioned to identify and explain justifications for the longstanding principle that contracts providing for continuous performance and silent as to duration are ordinarily terminable at the will of either party. This brief addresses the desirability of that default rule, its importance when considering agreements by governmental actors, and the doctrinal foundations for the principle that government actors are presumed not to contract away their sovereign powers. In particular, this brief explains why that presumption should apply to the context of interstate compacts of indefinite duration that are silent as to termination.

SUMMARY OF ARGUMENT

This Court should allow New Jersey to withdraw from the Compact for several reasons. First, compacts begin as contracts and never shed their contractual essence. Courts therefore use black letter contracts principles to determine what a compact means. And courts do not interpret contracts to bind parties forever unless they clearly express an intent to do so. Because the Compact does not clear that high hurdle, it triggers the default rule that contracts of indefinite duration are terminable at the will of either party.

Second, just like perpetual contracts, contracts that surrender sovereign powers are disfavored and will not be implied. Sovereignty concerns are at their zenith where — as here — an agreement implicates a state's police powers. Concerns about entrenchment — the general reluctance to permit a democratic government to tie the hands of its successors — underlie the presumption against contractual surrender of sovereign powers.

Third, insisting on a clear statement before construing a Compact to last forever honors the reasonable expectations of both legislators and the electorate, furthers democratic accountability by ensuring transparency, and ensures that, should a state choose to cede police powers in a compact, it does so consciously, rather than by accident or judicial fiat.

ARGUMENT

I. BEDROCK CONTRACT PRINCIPLES DISFAVOR INTERPRETING THE COMPACT TO HAVE INFINITE DURATION

Almost 70 years ago, New Jersey and New York, acting through their elected legislatures, entered into the Waterfront Commission Compact (Compact), *see* L. 1953, c. 202 (codified at N.J.S.A. 32:23-1 to -73); C. 882, § 1, 1953 N.Y. Laws 2417, 2417-36, which Congress approved pursuant to its Compact Clause powers, *see* Waterfront Commission Compact Act, ch. 407, 67 Stat. 541 (1953); *see also* U.S. Const. art. I, § 10, cl. 3. That Compact created the Waterfront Commission of New York Harbor (Commission) as a bi-state agency having jurisdiction over the Port of New York and New Jersey. After more than half a century of Commission operation, New Jersey determined to end its participation in the Commission and to provide its own police and other regulatory services within its jurisdictional region of the Port. In 2018, New Jersey enacted legislation withdrawing from the Compact, terminating the Commission and providing for a planned distribution of assets and powers. According to New Jersey, because the Compact is silent as to term and termination, it may terminate the agreement at will. New York disagrees. Amici urge the Court to apply established common law contract principles in resolving the dispute over this Compact.

Compacts are contracts between states, *Texas v. New Mexico*, 482 U.S. 124, 128 (1987); *Williams v. Norris*, 25 U.S. 117, 124 (1827), and, as such, "are construed as contracts" using familiar "principles of contract law."

Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 628 (2013). Thus, in interpreting compacts, this Court seeks to ascertain and effectuate the intent of the signatory States. *Montana v. Wyoming*, 563 U.S. 368, 375 n.4 (2011). And, because the best evidence of contracting parties' intent is the express terms of a written agreement, a compact "must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. at 128 (citing *W. Va. ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951)); *see also Tarrant Reg'l Water Dist.*, 569 U.S. at 628.

States, like private parties, cannot draft agreements that anticipate every contingency that may arise. When a dispute arises between contracting parties over a question on which their agreement is silent, courts often employ common law default rules to fill the gap. *See* Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 Va. L. Rev. 1523 (2016). Applying established background rules to fill gaps in contracts advances the ultimate goal of contract interpretation — upholding the reasonable expectations of the parties. *See* 11 Williston on Contracts § 31:11 (4th ed.) ("[T]he standard of interpretation which most courts accept, and which is supported by sound principle, is the standard of reasonable expectation…."). As one member of this Court put it in another compact dispute between these same two States, "silence is not ambiguity; silence means that ordinary background law applies." *New Jersey v. New York*, 523 U.S. 767, 813 (1998) (Breyer, J., concurring); *see also id.* at 783 n.6 (maj. op.) (explaining that an agreement's "silence on an issue" on which a default rule governs cannot be converted "into contractual ambiguity").

One such gap-filler rule is that a contract that does not expressly address term and termination but contemplates successive or continuing performance for an indefinite period of time is terminable at the will of either party. 1 Williston on Contracts § 4:22 (4th ed.); *see also* Restatement (Second) of Contracts § 33 cmt. d ("When the contract calls for successive performances but is indefinite in duration, it is commonly terminable by either party, with or without a requirement of reasonable notice."); 17B C.J.S. Contracts § 609 ("[A] contract containing no provision for its duration is ordinarily terminable at will.").[3]

The rule that indefinite-duration, continuing-performance contracts are terminable at will has been applied in a wide range of contexts, including employment, *Cape v. Greenville Cnty. Sch. Dist.*, 618 S.E.2d 881, 883 (S.C. 2005), partnerships, *Wood v. Warner*, 15 N.J. Eq. 81, 87 (Ch. 1862), distributorships, *Util. Appliance Corp. v. Kuhns*, 143 A.2d 35, 37 (Pa. 1958), and leases, *Greenwich Vill. Beverages, Inc. v. Food Merchandisers, Inc.*, 186 N.Y.S.2d 96, 97 (App. Div. 1959). It is also embedded in the Uniform Commercial Code, which provides that a contract of sale of indefinite duration that calls for successive performances "is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party." U.C.C. § 2-309(2).

---

3. Another rule governs contracts that are silent as to duration but "call[] for a single performance" or some discrete number of performances; such contracts must be performed within a "reasonable time." Restatement (Second) of Contracts § 33 cmt. d; *see also* 1 Williston on Contracts § 4:22 (4th ed.). That rule appears inapplicable to the facts and for that reason we do not in this brief address it or the principle that termination of a contract cannot ordinarily extinguish vested rights.

This default rule has deep roots in American common law. In 1862, a New Jersey court recognized the "well settled principle[]" that a partnership agreement of indefinite duration could be terminated by either party "at his pleasure." *Wood*, 15 N.J. Eq. at 87. The South Carolina Supreme Court in 1911 observed that courts had "held with practical unanimity" that a contract with no express term specifying duration, and for which no definite term can be implied from the nature of the contract or the surrounding circumstances, is terminable by either party on reasonable notice. *Childs v. City of Columbia*, 70 S.E. 296, 298 (S.C. 1911) (collecting cases). The ubiquity of the rule during that time period is reflected in the decisions of several other state high courts. *See, e.g.*, *Bartlett v. Hipkins*, 23 A. 1089, 1092 (Md. 1892) (recognizing that if a contract is "for an indefinite time, then it is a contract at will, terminable any time, at the will of either party"); *Stonega Coke & Coal Co. v. Louisville & N.R. Co.*, 55 S.E. 551, 553 (Va. 1906); *Baldwin v. Kansas City, M. & B.R. Co.*, 20 So. 349, 352 (Ala. 1896).

By 1953, the year the Compact was entered into, courts throughout the nation recognized that a contract with an indefinite term "may be terminated at will upon reasonable notice." *Clarkson v. Standard Brass Mfg. Co.*, 170 S.W.2d 407, 415 (Mo. App. 1943); *see also Grand Lodge Hall Ass'n, I. O. O. F. v. Moore*, 70 N.E.2d 19, 22 (Ind. 1945) ("[A] contract containing no specific termination date is terminable at will and … where the parties fix no time for the performance or discharge of obligations created by the contract they are assumed to have had in mind a reasonable time."); *Braddom v. Three Point Coal Corp.*, 157 S.W.2d 349, 352 (Ky. 1941) ("[A] contract covering an indefinite period is terminable at the will of either party.").

This default rule reflects the common law's aversion to perpetual contractual obligations. Under the common law, "contracts of perpetual duration are disfavored as a matter of public policy." *Glacial Plains Coop. v. Chippewa Valley Ethanol Co., LLLP*, 912 N.W.2d 233, 236 (Minn. 2018); *see also Carolina Cable Network v. Alert Cable TV, Inc.*, 447 S.E.2d 199, 201 (S.C. 1994) (perpetual contracts "not … favored"); *MS Real Est. Holdings, LLC v. Donald P. Fox Fam. Tr.*, 864 N.W.2d 83, 92 (Wis. 2015) ("Wisconsin courts do not favor perpetual contracts."); *Jespersen v. Minnesota Min. & Mfg. Co.*, 700 N.E.2d 1014, 1017 (Ill. 1998).[4] The reason is simple: perpetual contracts lock parties into relationships and obligations that may become undesirable as facts or circumstances change. As the court in *Jespersen* aptly stated, "'[f]orever' is a long time." 700 N.E.2d at 1017; *see also Echols*, 52 Miss. at 614 (perpetual contracts "subject incautious persons — a class, it may be remarked, which includes the majority of mankind — into life-long servitudes, and greatly fetter and embarrass the commerce of the world"). Those concerns apply beyond commercial domains. *See, e.g.*, *Koch v. Koch*, 232 A.2d 157 (N.J. App. Div. 1967);[5] *see generally* 6 Williston on

4. Indeed, if anything, the common law was historically harsher on perpetual contracts than it is today. *See Echols v. New Orleans, J. & G.N.R. Co.*, 52 Miss. 610, 614 (1876) ("Perpetual contracts of this character will not be tolerated by the law, or rather, will not be enforced as imposing an eternal and never-ending burden.").

5. *Koch* reflects the recognized nature of the principle in New Jersey as not limited to commercial settings. The court held that a pre-marriage agreement under which one spouse agreed to accept the other spouse's family member into her household could not be enforced indefinitely. *Id.* at 160 (applying the principle that "affirmative promises" of indefinite duration will "[r]arely … be interpreted as calling for perpetual performance" in context of domestic relations matters).

Contracts § 13:4 (4th ed.) (citing example of covenants not to compete which are unenforceable unless reasonably limited in time (among other requirements)).

In contexts where perpetual contracts might be enforceable, "the common law has long bent over backwards to deem seemingly-perpetual contracts to be terminable within a reasonable time." David Horton, *Infinite Arbitration Clauses*, 168 U. Pa. L. Rev. 633, 677 (2020). Courts routinely invoke the public policy against perpetual obligations to avoid construing contracts to impose one. *Bell v. Leven*, 90 P.3d 1286, 1288 (Nev. 2004); *Jespersen*, 700 P.3d at 1017. Thus, if it is debatable whether the parties intended to create a perpetual contract, the agreement is construed as an indefinite-duration contract terminable at will. *E.g.*, *Glacial Plains Coop.*, 912 N.W.2d at 236.

Put another way, a perpetual obligation will be enforced only if the intent to create it is clear. *In re Miller's Estate*, 447 A.2d 549, 553–54 (1982) (requiring a "clear manifestation" of intent to create perpetual contract). Although the exact formulation differs from state to state, the prevailing rule is that creating a perpetual obligation requires vaulting the threshold of having provided a clear statement to that effect so all parties have notice and knowledge of the unceasing commitment being made. *See, e.g.*, *Glacial Plains Coop.*, 912 N.W.2d at 236 (contract must "unambiguously express[] an intent to be of perpetual duration"); *Bell v. Leven*, 90 P.3d 1286, 1288 (Nev. 2004) (language of contract must "clearly provide[]" for perpetual duration); *Barton v. State*, 659 P.2d 92, 94 (Idaho 1983) (contract must be "expressly made perpetual by its terms"); *City of Billings v. Pub. Serv. Comm'n of*

Montana, 631 P.2d 1295, 1306 (Mont. 1981) (contract must be "expressly made perpetual by its terms"); *Capital Invs., Inc. v. Whitehall Packing Co.*, 280 N.W.2d 254, 261 (Wis. 1979) (intent to enter perpetual contract must be "clearly stated").

In this instance, there is no clear statement of intent to enter into a perpetual contract. The Compact calls for continuing performance and specifies no duration. *See* Pub. L. 252, arts. III, XIII, 67 Stat. 541, 543, 555–56. Common law principles impose a default rule that dictates that such contracts are terminable at the will of either party. That default rule should prevail in this instance. It is particularly apt because state actors with sovereign responsibilities are affected by this contractual agreement.

II. THE COMPACT SHOULD BE CONSTRUED IN OBEISANCE TO THE ROLE OF SOVEREIGN ENTITIES AS GUARDIANS AND ADVOCATES FOR THE INTERESTS OF THEIR CITIZENS

A. Sovereign Entities Must Retain Flexibility in Contracting and Cannot Be Deemed to Have Ceded Police Powers in Perpetuity, if at all

Our legal system's longstanding commitment to preserving sovereignty has dovetailed into two separate, but oft-considered interchangeable[6] doctrines aimed at limiting potentially insidious incursions into sovereign power.

---

6. Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 Iowa L. Rev. 277, 282–83 (1990).

The first, known as the "unmistakability doctrine," is a canon of contract construction that disfavors surrender of sovereign power by mere implication or inference. *See, e.g.*, *Providence Bank v. Billings*, 29 U.S. 514 (1830); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837). Under that doctrine, this Court has routinely reiterated that "contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52–53 (1986). Indeed, because sovereign power is an enduring presence governing all contracts subject to a sovereign's jurisdiction, these powers are presumed to remain intact unless relinquished in clear and unmistakable terms. *Id.* at 52. In other words, when construing contracts involving sovereign entities, there has long been a presumption that government actors have not bargained away their sovereign powers absent unambiguous and unequivocal evidence to the contrary. *Jefferson Branch Bank v. Skelly*, 66 U.S. 436, 446 (1862) ("[no] power of sovereignty, will be held ... to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken").

The presumption against contractual surrender of sovereign prerogatives stems largely from concerns over "entrenchment," or the general reluctance to permit a democratic government to tie the hands of its successors. Due to the inherent difficulties in forecasting future public needs as well as the need for flexibility upon an unexpected change in circumstances, this Court's jurisprudence respects that sovereigns should not be hamstrung in their ability to pivot from the course paved by prior legislatures when the public welfare is at stake. *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996)

(citing "centuries-old concept that one legislature may not bind the legislative authority of its successors"). A newly elected legislature's ability to chart its own course in this regard is a fundamental tenet of democracy.[7] Forcing New Jersey to remain a party to the Compact and Commission in perpetuity is inconsistent with longstanding jurisprudence precluding legislatures from being held captive by the decisions of their predecessors, regardless of any exigencies that may arise.

The concern over entrenchment is exacerbated when one considers the nature of the powers purportedly bargained away by New Jersey: the so-called "police powers." That implicates the second doctrine curbing incursions into the exercise of certain sovereign powers, namely the "reserved powers doctrine" or "inalienable powers doctrine." That doctrine encapsulates the principle that certain core sovereign powers are sacrosanct, and thus incapable of being ceded by contract even if so done in unmistakable terms. Paramount among those is the police power, or the authority of a legislative body to enact such legislation as is necessary to protect and further the health, safety, welfare, and morals of the public. *Butchers' Union Slaughter–House & Live–Stock Landing Co. v. Crescent City Live–Stock Landing & Slaughter–House Co.*, 111 U.S. 746, 750–54 (1884) (Field, J., concurring).

Both parties to this action recognize the police power as an indispensable attribute of sovereignty itself, if

7. Christopher Serkin, *Penn Central Take Two*, 92 Notre Dame L. Rev. 913, 928 (2016); Christopher Serkin, *Public Entrenchment through Private Law: Binding Local Governments*, 78 U. Chi. L. Rev. 879, 881 (2011) ("In a democracy, governments are not allowed to bind future governments.").

not the bedrock of civilized government. *See Schmidt v. Bd. of Adjustment of City of Newark*, 9 N.J. 405, 414 (1952) ("The police power does not have its genesis in a written constitution. It is an indispensable attribute of our society, possessed by the state sovereignties before the adoption of the Federal Constitution."); *Flushing Nat. Bank v. Mun. Assistance Corp. for City of N.Y.*, 358 N.E.2d 848, 863 (N.Y. 1976) ("The police power of the State, difficult of exact definition and demarcation, is ... the basic authority inherent in every sovereignty to pass all laws for the internal regulation and government of the State, necessary for the public safety and welfare. It is one of the necessary attributes of civilized government." (citations omitted)).

Within its sphere of substantive authority, this Court has remained skeptical about state governments contractually relinquishing such power. In the face of claims of federal contract impairment violations, the Court has protected the police power from contractual limitations. *See, e.g.*, *Boyd v. Alabama*, 94 U.S. 645, 650 (1876) ("We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare…."); *Boston Beer Co. v. State of Massachusetts*, 97 U.S. 25, 33 (1877) ("The legislature cannot, by any contract, divest itself of the power to provide for [the exercise of police powers]."); *Stone v. State of Mississippi*, 101 U.S. 814, 819 (1879) ("No legislature can bargain away the public health or the public morals."); *Butchers' Union*, 111 U.S. at 751 ("It cannot be permitted that … the power which enables it to perform this duty [to guard health of citizens and prevent crime] can be sold, bargained away, under any circumstances….").

Like the unmistakability doctrine, the reserved powers doctrine recognizes the ability to act in the public interest as a hallmark attribute of sovereignty; it works to prevent improper delegation or diminution of state sovereignty. *See, e.g.*, *Butchers' Union*, 111 U.S. at 750–51 (addressing doctrine's application when finding a government act or contract, purporting to restrict the regulatory power of future legislatures, to be ultra vires); Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 Iowa L. Rev. 277, 283–84 ("[Under] our democratic form of government… [,] the powers [to promote the general welfare] granted to the government come from the people and remain with the government unless withdrawn by the people. * * * Any contract that requires a governmental body to relinquish important powers even for a short … time is suspect." (footnote omitted)).

The underlying rationale can, again, be traced to concerns over government entrenchment. Writing for the Court in one of the earliest cases addressing a state legislature's purported divesture of its police powers, Chief Justice Waite succinctly stated:

> No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, *and they are to be dealt with as the special exigencies of the moment may require.*

Stone, 101 U.S. at 819 (emphasis added).

Against the backdrop of such reasoning, it would be unexpected, indeed startling, to now construe a compact — silent as to termination — as ceding a state's police powers *in perpetuity*. To do so would hamstring that sovereign state's ability to re-examine and determine it necessary and appropriate to take new and different action for the advancement of its citizens' safety and welfare. To compel a state to remain in servitude to such a compact would betray existing bedrock principles of contract construction and sovereignty.

B. Construing the Compact as Terminable at Will Protects State Sovereignty, Upholds the Reasonable Expectation of the Parties, and Promotes Public Accountability

Analysis of this Compact is drawn into a vortex of contract principles and state sovereignty considerations. All counsel against interpreting the Compact's silence regarding term and termination as an agreement to be bound forever. For several reasons, this Court should insist on a clear statement before considering holding a state bound to a compact requiring continuing performance of infinite duration.

First, by requiring a compact that affects police powers to clearly state its intention to create permanent obligations, the Court avoids unsettling common law default rules governing contract interpretation. And, whenever state sovereignty concerns are affected, the presumption against ceding such powers should pertain. Thus, adherence to common contract gap-filler rules, which allow termination at will of either party, should prevail when there is silence on term and termination in a contract that cedes a state's police powers.

Second, a clear statement requirement promotes reasonable expectations of the legislators who voted to enter into the Compact, which is silent regarding termination. Those legislators had every right to expect that the body of contract law principles accepted at the time, and today, would apply in answering questions that might arise about the Compact's interpretation, including questions concerning termination. Like any other contract, compacts "are enacted against a background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' contrary intent." *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 102 (2013) (alterations, citations, and internal quotation marks omitted). Thus, with compacts, as with contracts, silence on an issue on which background law provides a settled default rule is not ambiguity, but evidence of an intention to adopt the default rule as part of the compact. *See New Jersey v. New York*, 523 U.S. at 784 n.6 ("But this is to convert an agreement's utter silence on an issue into contractual ambiguity; no such translation is possible here, for the silence of the Compact was on the subject of settled law governing avulsion, which the parties' silence showed no intent to modify.").

In general, government entities contract against the same set of background legal principles and default rules as do private parties. *See, e.g.*, *City of Dardanelle v. City of Russellville*, 277 S.W.3d 562, 565 (Ark. 2008) (observing that "the leading treatise on municipal corporations informs us that contracts between municipalities are considered to be the same as contracts between natural persons and are governed by the same rules as to validity

and effect, as well as the same rules of construction"); *Caldwell Land & Lumber Co. v. Bd. of Comm'rs of Caldwell Cnty.*, 94 S.E. 406, 406 (N.C. 1917) (observing that "[t]he same rules apply" to a real estate contract between the state and a private party as between two private parties).[8] To the extent different rules apply to contracts involving government parties, those rules tend to be more, not less, protective of sovereign powers. *See supra* § II.A.

While upholding the expectations of the parties is important for every contract, it is particularly important where a State has entered into an agreement which affects an element of its sovereign power. Like private parties that enter into a contract, government parties can reasonably expect that ordinary rules of contract law apply and need not be expressly incorporated into every contract. As with private parties, ignoring those rules frustrates government parties' intentions.

---

8. Indeed, New York and New Jersey have enacted statutes providing that contract actions against those states are governed by the same legal rules — including rules of construction and rules that fill gaps in incomplete contracts — as those against individuals and corporations. N.J.S.A. 59:13-3 (waiving sovereign immunity "from liability arising out of an express contract" and providing that, except for exclusion of liability for punitive or consequential damages, breach of implied warranty, or contracts implied in law, contract claims against the state are to be "determined in accordance with the rules of law applicable to individuals and corporations"); N.Y. Ct. Cl. Act § 8 (waiving sovereign immunity and consenting to have claims "determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of" the N.Y. Court of Claims Act).

Just as the legislators would have had a reasonable expectation that those contract principles would apply, so too would their constituents. As citizens, they would have been in a position, at the time, to evaluate the performance of those legislators and hold them accountable. In making that assessment, citizens too were entitled to reasonably expect that contract principles applicable to a contract of continuing performance but silent on termination would pertain here. This Court's observation that ignoring default rules in interpreting contracts "is likely to frustrate the parties' intent and produce perverse consequences," *US Airways*, 569 U.S. at 102, is particularly salient in the context of interstate compacts. Voters' ability to hold legislators accountable is undermined if a judicial ruling unexpectedly displaces the commonly recognized and pertinent contract law principle allowing termination of such agreements.

Third, democratic accountability demands that legislators entering into compacts with other states say exactly what is being surrendered. It would make such action transparent. It should be; indeed, when the state's police powers are being diminished or worse given up in perpetuity by some form of agreement, all should know exactly what is being done.[9] *Cf. Hourigan v. N. Bergen*

9. In other contexts, this Court has jealously guarded state sovereignty against accidental or unintended erosion through "clear statement" rules. For example, before this Court will read a statute as abrogating state sovereign immunity, Congress's intention to do so must be "obvious from 'a clear legislative statement.'" *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991)). Likewise, "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously,

Twp., 113 N.J.L. 143, 149–50 (1934) ("The proper exercise of the police power is the highest duty of government. The state may … never relieve itself of the duty of providing for the safety of its citizens."); *see also* Serkin, *Penn Central Take Two*, 92 Notre Dame L. Rev. 913, 934 ("[T]he police power is so important that a government seeking to bargain it away must do so expressly."). To be of value, democratic accountability requires that legislators understand what they are voting on and voters understand what their legislators are doing. If a state legislature chooses to permanently cede certain powers to a third party, or share them with another state, at least some measure of democratic accountability is possible — the voters can elect different lawmakers, if not stop such action.

Absent transparency, the people are unable to properly judge the adequacy of their representatives' performance and whether those representatives are acting in their best interests. *Charles River Bridge*, 36 U.S. at 547–48 (noting "the object and end of all government is to promote the happiness and prosperity of the community by which it is established"). The people are likewise incapable of discerning whether their representatives have attempted to bargain away the sacrosanct police powers uniquely entrusted in them, and with that, divested their duty to protect and provide for their citizens. *Boston Beer*, 97 U.S. at 33 ("there seems to be no doubt that [the police power] does extend to the protection of the lives, health,

---

enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (alterations and internal quotation marks omitted).

and property of the citizens, and to the preservation of good order and the public morals. * * * [T]hey are to be attained and provided for by such appropriate means as the legislative discretion may devise.").

Which leads to a fourth point for this Court to consider, one again in favor of requiring a clear statement for the Compact to perpetually bind the party states. Such required transparency avoids the surprise of an unexpected holding that a state cannot adopt a new and improved way of protecting the health, safety and welfare of its citizens. It would be a surprise if the *absence* of an explicit termination clause in a decades-old bi-state compact is interpreted to have irrevocably ceded the state's powers to a body that is not in tune with the needs of its people, much less accountable to them.

The unexpected aspect to such a holding has one further dimension. This is a bi-state compact created subject to the history and purpose of the Compact Clause. As such, the Compact is, at its core, an *agreement* between the states. Congress cannot force these two states to bind together in the first instance without their consent.[10]

---

10. Congress may of course legislate the creation of a federal agency to perform a task, but it has no authority to compel two states to agree to combine and form a bi-state agreement to perform a task. *Cf. Printz v. United States*, 521 U.S. 898, 929 (1997); *New York v. United States*, 505 U.S. 144 (1992). The latter remains an agreement between the states, subject to the terms and conditions in the agreement and any required by Congress as a condition of its consent to its formation. Here, no condition about termination was required by Congress. What exists is an agreement between the States that New Jersey claims is silent as to termination and therefore never bound that sovereign state to the Compact in perpetuity but rather could be terminated at will.

Congressional consent renders the agreement part of the federal law and, without question, provides this Court with clear authority to definitively interpret it when such disputes arise. *Cuyler v. Adams*, 449 U.S. 433, 438 n.7 (1981). But Congress's consent to agree to the formation of the Compact does not alter the need for state agreement to be bound to the compact.

The Court must be vigilant to ensure that there exists consent for a performance contract in perpetuity, particularly since sovereign powers are at stake. If Congress could not force two states to bind themselves to such an agreement to begin with, then a court should not have that power as a matter of interpretation. This is at odds with the limited purpose of the Compact Clause's requirement of congressional approval — to prevent the aggregation of power in states, unless Congress finds it appropriate because it is not contrary to a national interest and fosters a salutary purpose for the United States. *See Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

In sum, the Court should not construe the Compact's silence as giving New York a perpetual veto over whether New Jersey can withdraw from the Compact. It would render New Jersey, and most importantly, its constituents, beholden to the wishes and demands of their neighboring state's legislature without any recourse. This should not be. *See People v. Adirondack Ry. Co.*, 54 N.E. 689, 692 (N.Y. 1899) (the police power "belong[s] to the state because it is sovereign, and [it is] a necessity of government. The state cannot surrender [the police power], because it cannot surrender a sovereign power. It cannot be a state without [the police power]. [It is] as enduring and indestructible as the state itself."), aff'd sub nom. *Adirondack Ry. Co. v. New York*, 176 U.S. 335 (1900).

CONCLUSION

Amici urge the Court to recognize the importance of adhering to the application of bedrock contract principles. The vitality of those principles is too important, generally and especially when considered in a setting involving state sovereignty concerns, to be disregarded, diminished, or distinguished in pertinence here. In this instance, in which the Court must construe the Compact between New Jersey and New York that is silent on termination and calls for continuous performance in a manner affecting New Jersey's police powers, the Court should affirm the application of contract principles which would allow for termination at will.

Respectfully submitted,

Jaynee LaVecchia
Counsel of Record
Michelle Pallak Movahed
Brian W. Carroll
Scott Weingart
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 848-8300
jlavecchia@mccarter.com

Counsel for Amici Curiae

August 29, 2022