No. 15-1442

IN THE

Supreme Court of the United States

THE GILLETTE COMPANY, ET AL.,
Petitioners,

v.

CALIFORNIA FRANCHISE TAX BOARD,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF OF AMICI CURIAE JEFFREY B. LITWAK AND PHILLIP J. COOPER IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Jeffrey B. Litwak is an adjunct law professor at the Lewis and Clark Law School, where he has taught Interstate Compact Law since 2004.[2] He is the author of *Interstate Compact Law: Cases and Materials* (Semaphore Press 2d ed. 2014) and co-author of *The Evolving Use and Law of Interstate Compacts* (ABA Pub. 2d ed. forthcoming 2016), and he has long had a strong interest in the proper understanding of compacts as binding agreements between states independent of other methods of interstate cooperation. He previously filed amicus briefs in this case in both the California Court of Appeal and the California Supreme Court.

Phillip J. Cooper is a professor of public administration at the Mark O. Hatfield School of Government at Portland State University with expertise in intergovernmental relations, adminis-

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[1] Pursuant to Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, amici state that counsel of record for all parties received notice of amici's intent to file this brief at least ten days before the due date. Both parties have consented to the filing of this brief, and copies of their letters of consent have been filed with the Clerk's office.

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

trative law, and public policy. He is also a fellow of the National Academy of Public Administration.[3] Dr. Cooper deals with interstate compact law in teaching graduate classes and in scholarly research. Clarity with respect to the status and binding authority of agreements is important to both sets of activity.

Amici have no personal interest in the outcome of this case, but have a professional interest in the proper development of Compact law. The California Supreme Court has advanced an approach to analyzing the binding nature of interstate compacts that is inconsistent with longstanding principles of Compact law, dating back to this Court's first compact case in 1823, and is likely to exacerbate serious disagreements in and between lower federal courts and state courts on the legal analysis of such compacts. Amici submit this brief because of their concern that, unless corrected, the California Supreme Court's decision will have far-reaching negative ramifications on the use of interstate compacts and on interstate relations.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court's first opportunity to consider the important question of whether an interstate compact is binding between the member states, without an entangled question of whether the compact requires the consent of Congress pursuant to the Compact Clause of the U.S. Constitution, art.

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

I, § 10, cl. 3. In *U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452 (1978), this Court concluded that the Multistate Tax Compact is a valid interstate compact that does not require such consent because it does not "threaten federal supremacy." *See id.* at 473. The instant case raises the issue whether the Multistate Tax Compact is a binding agreement between the states, thereby prohibiting California from enacting a statute that unilaterally amends one of its obligations under the compact.

This brief will focus on three reasons why the Court should grant certiorari in this case.

First, the California Supreme Court's decision largely rested on its conclusion that the Multistate Tax Compact did not satisfy the "classic indicia of a compact" that this Court expressed in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 175 (1985). That analysis misapplies *Northeast Bancorp*. The issue before the Court was whether similar statutes enacted in two states enlarged the power of states such that the statutes required congressional consent pursuant to the Compact Clause. Neither the *Northeast Bancorp* parties nor this Court used the cited indicia to determine whether a compact is binding, nor did the Court ever suggest that those indicia are unique or exclusive indicia of whether a compact exists.

Second, the California Supreme Court's decision conflicts with prior decisions of this Court—those that address both compacts generally and the Multistate Tax Compact in particular. The decision below, if allowed to stand, could cripple the ability of states and third parties to enforce the terms of

compacts without consent. That outcome would fly in the face of this Court's long history of recommending that states enact interstate compacts to resolve pending disputes and thorny public policy problems in lieu of litigation.

Third, it is vital for this Court to address the issue presented in this case because of the instability injected into Compact law by the California Supreme Court's decision. The question of what constitutes a binding compact affects current and future relationships between the states, and it is important to resolve the uncertainty that has now been created by the decision below. This case may affect the nearly 50 currently effective compacts without congressional consent that petitioners identify (Pet. 31), as well as the use of future compacts.[4] This issue affects every state in the Nation because each state is currently a party to several interstate compacts without consent. This issue is also timely because there are at least eight new compacts currently in various stages of formation that every state is eligible to join.

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[4] The number of currently effective compacts without consent is difficult to determine with precision. Principally, this is because there are disagreements about whether specific advance consent statutes apply to specific compacts. *See, e.g.*, *Dist. of Columbia v. Fitzgerald*, 953 A.2d 288, 302 (D.C. 2007) (Driver License Compact received consent); *Koterba v. Dep't of Transp.*, 736 A.2d 761 (Pa. Commw. Ct. 1999) (Driver License Compact does not require consent).

ARGUMENT

A. The *Northeast Bancorp* Indicia That the California Supreme Court Used Are Not Unique or Exclusive for Determining Whether a Compact Is Binding on Its Members

In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 175-76 (1985), this Court determined that similar statutes enacted by Massachusetts and Connecticut did not violate the Compact Clause, U.S. Constitution, art. I, § 10, cl. 3. The Court's analysis included a preliminary discussion of whether the statutes constituted a compact at all—a question the Court did not definitively resolve. The Court then held that, assuming these statutes did create a compact, they did not violate the Compact Clause because they did not "infringe federal supremacy" and hence did not require congressional consent. *Id.* at 176. In its preliminary discussion, the Court pointed both to features of the statutes that supported viewing them as a compact and to features that pointed against that conclusion. *Id.* at 175. With respect to the latter aspect of its discussion, the Court observed that "several of the classic indicia of a compact are missing," noting three: whether a joint organization or body has been established for any purpose; whether the states' statutes are conditioned on action by the other state and each state is free to modify or repeal its law unilaterally; and whether the states' statutes require reciprocity of the regional limitation. *Id.*

The California Supreme Court's decision focused almost exclusively on analyzing the binding nature of the Multistate Tax Compact under these three

indicia. That approach was misconceived in several respects, and the court's errors demonstrate the confusion that exists regarding the proper analysis of compacts and the need for this Court to clarify the intended use of these indicia.

First, the California Supreme Court's *exclusive* focus on these three indicia is directly contrary to this Court's opinion, which described them only as "several of" what the Court clearly understood to be a more numerous set of indicia. *Id.* Indeed, this Court mentioned a fourth indicator in the same paragraph in which it listed the three considered by the court below—namely, whether there is "evidence of cooperation" between the states in enacting the respective statutes. *Id.* The California Supreme Court did not discuss "evidence of cooperation," which was surely present in the case of the Multistate Tax Compact, or any of the other features of the Connecticut and Massachusetts statutes that this Court suggested were supportive of treating them as a compact. Other cases that have discussed the *Northeast Bancorp* indicia have not specifically addressed "evidence of cooperation" either.[5] Thus, the California Supreme Court's treatment of the three criteria as exclusive, and its attendant refusal to consider "evidence of cooperation," presents an issue where clarification by this Court is needed.

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[5] For example, in *Seattle Master Builders Ass'n v. Pacific Northwest Electric Power & Conservation Planning Council*, 786 F.2d 1359, 1363, 1372 (9th Cir. 1986), the court considered the three indicia and concluded that the interstate council was proper under the Compact Clause because the compact had received consent. The dissent maintained that the interstate council was a federal agency.

Second, and more importantly, the indicia noted in *Northeast Bancorp* were presented there not for the purpose of deciding whether there was an agreement binding on its members, but instead for the purpose of answering the question before the Court—namely, whether the Massachusetts and Connecticut statutes were unconstitutional in the absence of congressional consent. The parties and amici argued that analysis of the indicia was relevant to determining whether the Massachusetts and Connecticut statutes increased, or did not increase, the power of the states relative to the federal government or other states. That is the test for whether a compact requires consent as expressed in *Virginia v. Tennessee*, 148 U.S. 503, 518–19 (1893), and *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452 (1978). Courts have never considered whether those indicia are the appropriate or exclusive indicia to determine whether a compact is binding on the states, and no party in *Northeast Bancorp* argued that the presence or absence of the indicia were illustrative of whether a compact is a binding agreement.

Regarding the joint organization indicator, the State of Connecticut and several intervenor-respondents argued that there was no increase in the power of the states that interferes with federal supremacy because the Connecticut statute did not create an independent commission or other administrative body.[6] Similarly, the federal respondent

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[6] Brief of Respondent, State of Connecticut at 30, *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985) (No. 84-363); Brief of Bank of New England, et al. at 41, *Ne. Bancorp v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985) (No. 84-363).

argued that the presence of an interstate entity may suggest expanded political powers, but such an entity was absent.[7] Regarding the reciprocity indicator, Northeast Bancorp and Union Trust Company argued: "This Court has held that where two or more state statutes are reciprocal in nature, that fact alone mandates an inquiry as to whether the interstate arrangement intrudes upon the concerns embodied in the Compact Clause."[8] New York argued that the Connecticut and Massachusetts statutes were a compact within the meaning of the Compact Clause because they enacted virtually identical reciprocal and exclusive legislation within a six-month period.[9] Citicorp, Northeast Bancorp, and Union Trust Company argued that the Connecticut and Massachusetts laws constituted a compact requiring consent because the states enacted reciprocal discriminatory legislation and enacted their laws close in time, imposed virtually identical geographical limitations, and coordinated their

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[7] Brief of Federal Respondent at 29, *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985) (No. 84-363).

[8] Brief of Petitioners Northeast Bancorp and Union Trust Co., at 31, *Ne. Bancorp v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985) (No. 84-363).

[9] Brief of New York in Supp. of Petitioners at 6-7, *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985) (No. 84-363). Whether the parties enacted the statutes close in time is not a reliable indicator of whether the states have created a compact. There are many compacts in which the states have enacted the compact over a period of decades. For example, the Interstate Wildlife Violator Compact became effective in 1989 when the first two states enacted it. There are now 40 member states, and the latest states to enact it did so in 2014.

efforts.[10] Thus, contrary to the California Supreme Court, this Court's reference to "the classic indicia of a compact," *Northeast Bancorp*, 472 U.S. at 175, is properly understood to relate to consideration of the need for consent, not of whether a compact is binding.

Moreover, the three indicia on which the California Supreme Court relied are not necessarily predictive of whether a compact is binding. There are numerous binding compacts where one or more of the indicia are missing and, conversely, there are numerous non-binding joint state actions where the indicia are present. For example, only approximately two-thirds of interstate compacts create some type of joint administrative agency. Jeffrey B. Litwak, *Interstate Compact Law: Cases and Materials* 83 (Semaphore Press 2d ed. 2014). Many compacts do not have withdrawal or termination provisions, but others do have such provisions. *Id*. at 291. And, although the "most important" indicator of a compact cited by the California Supreme Court was the creation of "reciprocal obligations" (Pet. App. 12a), such obligations also exist outside of interstate compacts. *See, e.g.*, *New York v. O'Neill*, 359 U.S. 1, 9–10 (1959) (referring to a uniform law as "reciprocal legislation").[11] As stated by petitioners (Pet. 14-15),

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[10] Brief of Petitioner Citicorp at 40–41, *Ne. Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985) (No. 84-363); Brief of Petitioners Northeast Bancorp and Union Trust Co. at 33–35, *Ne. Bancorp v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985) (No. 84-363).

[11] *See also* Brief of Amici Council of State Governments, et al. at 16–17, *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985) (No. 84-363) (noting that many uniform laws confer reciprocal rights on the enacting parties).

the proper analysis for determining whether a compact is a binding agreement must look to all the principles ordinarily applicable to the construction of a contract.

B. The California Supreme Court's Decision Contradicts This Court's Decision in *U.S. Steel* and This Court's Longstanding Encouragement That States Should Use Compacts

This Court should also grant certiorari because the California Supreme Court's decision conflicts with prior decisions of this Court, which indicate that the Multistate Tax Compact is a binding agreement and which generally encourage states to resolve their disputes through interstate compacts that cannot be disregarded by the courts.

In *U.S. Steel*, *supra*, this Court concluded that the Multistate Tax Compact was a valid agreement that did not require congressional consent under the Compact Clause of the U.S. Constitution because it did not "threaten federal supremacy." 434 U.S. at 473. There, the Multistate Tax Commission argued that the Compact was not a binding agreement on the states,[12] but this Court referred to the Multistate Tax Compact as "reciprocal legislation," noted the "multilateral nature of the agreement," and concluded that the Compact had "facial validity." *Id.* at 470, 472, 479. This Court necessarily rejected the Commission's argument—albeit not expressly—in

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[12] *See* Brief of Appellee at 44, *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (No. 76-635). The Multistate Tax Commission is the only interstate compact entity that has ever argued that the compact it administers is not a binding agreement between the states.

proceeding to reach the issue of whether the Compact Clause required that Congress consent to the Multistate Tax Compact. If this Court had agreed that the Multistate Tax Compact was not a binding agreement, it would not have had reason to address whether the Compact Clause was implicated. The California Supreme Court's conclusion that the Multistate Tax Compact is not a binding compact cannot be reconciled with *U.S. Steel*.

The decision of the California Supreme Court also conflicts with this Court's longstanding precedent that states must observe the express terms of a compact and that no court may order a remedy inconsistent with the express terms of a compact. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 87–88 (1823). Here, the Multistate Tax Compact contains an express withdrawal provision. Multistate Tax Compact, art. X.2 (1967). California could have and should have used that provision if it believed the compact was no longer fulfilling the state's policy interest. Instead, California chose a self-help "remedy" of treating the Compact as not binding, so that California could selectively ignore one or more of its obligations while continuing to reap the benefits of membership in the Compact. That approach is inherently inconsistent with the Compact.

The decision of the California Supreme Court also conflicts with this Court's longstanding encouragement that states enact interstate compacts to resolve pending disputes and thorny public policy problems in lieu of litigation. For more than 100 years, this Court has periodically recommended, indeed implored, states to resolve their own disputes using

an interstate compact. *See, e.g.*, *Vermont v. New York*, 417 U.S. 270, 277–78 (1974); *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945); *Colorado v. Kansas*, 320 U.S. 383, 392 (1943); *New York v. New Jersey*, 256 U.S. 296, 313 (1921); *Minnesota v. Wisconsin*, 252 U.S. 273, 283 (1920); *Washington v. Oregon*, 214 U.S. 205, 217–18 (1909); *Kidd v. Alabama*, 188 U.S. 730 (1903). If states may so readily interpret their compact obligations as non-binding, this Court's repeated encouragement that states use compacts would be nullified because the states could not reasonably regard them as effective solutions.

C. The California Supreme Court's Decision Will Adversely Affect the Use of Existing and Future Interstate Compacts That Do Not Need Congressional Consent

Review is necessary here because the California Supreme Court's decision will potentially affect the nearly 50 currently effective compacts that do not have congressional consent (*see* Pet. 31), and the use of future compacts. Uncertainty about the binding nature of compacts is extremely damaging to the effectiveness of existing compacts and to the willingness of states to enter into such agreements in the future. Thus, clarification by this Court of the indicia that will govern construction of compacts is critically important to Compact law. And that issue affects every state in the Nation because, as noted above, each state is currently a party to several compacts without consent and is eligible to become a member of several new compacts.

There are many ways in which states cooperate to address multistate problems. The interstate compact

device is unique in that it creates a binding agreement between states. This has been a characteristic of compacts since the very first interstate compact decision in this Court in 1823, *Green v. Biddle*, *supra*. There are many non-binding means of cooperation. The California Supreme Court's decision frustrates the one device in which states bind themselves to each other, a device that states have relied on since Virginia and Maryland enacted the first interstate compact in 1785. The Virginia-Maryland Compact of 1785 governed fishing in the Potomac River, the Pocomoke River, and the Chesapeake Bay. There was no congressional consent. This Court applied that compact in *Wharton v. Wise*, 153 U.S. 155 (1894) (granting post-conviction relief to a Maryland citizen who was convicted for taking oysters in Virginia waters where the compact allowed Maryland citizens to enjoy a fishing right in common with Virginia citizens), and again in *Virginia v. Maryland*, 540 U.S. 56 (2003) (resolving a boundary dispute). The Maryland Court of Special Appeals also applied the Virginia-Maryland Compact in 2014, concluding that the states' boundary along the non-tidal portion of the Potomac River shifts over time through accretion and reliction. *Potomac Shores, Inc. v. River Riders, Inc.*, 98 A.3d 1048 (Md. Ct. Spec. App. 2014).

The California Supreme Court's decision will affect existing interstate compacts in profound ways. Most troubling, the decision will discourage states from using interstate compacts. States simply will be unwilling to enact compacts when they cannot be assured their compacting partners will treat the compact as binding. States enact compacts for many reasons, but an important reason is that compacts level the playing field between states with different

governmental and institutional capacities. *See* Ann O'M. Bowman and Neal D. Woods, *Strength in Numbers: Why States Join Compacts*, 7 St. Pol. & Pol'y Q. 347, 352 (2007) (noting that poorer states may look to compact membership as a way to increase capacity and that compacts provide a venue for states to gain institutional strength, so states with weaker institutions may be more attracted to them in order to help mitigate deficiencies in their capacities). Essentially, the decision of the California Supreme Court compromises the ability of some states to use compacts to handle difficult policy matters.

There are at least eight new compacts open to all states and territories that are in varying stages of drafting or that the states and territories are currently considering and enacting: Physical Therapists Licensure Compact, Enhanced Nurse Licensure Compact, Advanced Practice Registered Nurse Compact, Recognition of EMS Personnel Licensure Interstate Compact ("REPLICA"), Psychology Interjurisdictional Compact ("PSYPACT"), Interstate Compact on Thoroughbred Horse Racing, National Popular Vote Compact, and Driver License Agreement. The decision of the California Supreme Court that so easily interpreted the Multistate Tax Compact as non-binding will discourage states from enacting these agreements for the simple reason that states was be less willing enact a compact unless they are assured that the compact is binding on all of the member states.

The binding nature of compacts creates stability among the states and between states and third parties. Just as the Contract Clause creates stability in commercial contracts, it must also operate to

create stability of interstate compacts. *See, e.g.*, Note*, Rediscovering the Contract Clause*, 97 Harv. L. Rev. 1414, 1420 (1984) (describing one approach to Contract Clause analysis as an economic nationalism approach that "presents the contract clause as part of a constitutional scheme promoting commercial stability"). Courts have developed several principles of Compact law to create that stability. Most relevant, in *Green v. Biddle*, *supra*, the very first interstate compact case in this Court concluded that Kentucky could not enact state legislation that conflicts with its prior compact obligation, and other courts have held that states may apply state law to a compact only when the compact specifically preserves that state law. *See, e.g.*, *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conserv. Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986). The California Supreme Court's decision vitiates this principle and other principles by ruling, contrary to the parties' intent, that a compact obligation is not binding. Quite simply, the California Supreme Court's decision alters the way in which party states, compact agencies, and third parties have *always* treated compacts.

The Nation's best interest is served by ensuring states observe the obligations in their interstate agreements. As noted above, there are several new compacts that encourage mobility of medical providers; these compacts help ensure medical care in underserved communities. Similarly, the Interstate Compact on the Education of Military Children ensures an adequate national defense because soldiers can more freely move between the states knowing that their military careers will not interrupt their children's education. The Boating Offense Compact allows one state's law enforcement to

pursue boating offenders along the entirety of the Columbia River regardless of the Oregon-Washington state line. And there are many other examples. The analytical framework in the California Supreme Court's decision destabilizes these and numerous other compacts, and as a result destabilizes policy programs of national and localized importance.

CONCLUSION

The California Supreme Court's sole reliance on just three of the *Northeast Bancorp* indicia to determine that the Multistate Tax Compact was not a binding compact is inconsistent with this Court's precedent and creates an undesirable and legally incorrect analytical framework that allows member states to easily escape their compact obligations. If allowed to stand, the decision will compromise the effective use of compacts to handle multistate disputes and policy problems.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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