No.

In the Supreme Court of the United States

KIMBERLY-CLARK CORPORATION AND SUBSIDIARIES,

Petitioner,

v.

MINNESOTA COMMISSIONER OF REVENUE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Multistate Tax Compact is a multistate agreement that addresses significant aspects of the state taxation of multistate businesses. Among other things, the Compact is designed to prevent the over-taxation of out-of-state businesses, guaranteeing that Compact member States will allow taxpayers to elect use of a specified formula when apportioning their income for tax purposes. In this case, the Minnesota Supreme Court agreed that the Compact "clearly provide[s] for the apportionment election." But applying the "unmistakability doctrine" discussed in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), the Minnesota court held that Compact member States nevertheless may preclude taxpayers from using the apportionment election because the Compact does "not contain a separate and distinct promise that the State would not alter or repeal the election."

The question presented is:

Whether, under the "unmistakability doctrine," States are bound by contractual promises embodied in multistate compacts only if the contracting States make a separate and express "second promise" to abide by their initial contractual promise.

RULE 29.6 STATEMENT

Kimberly-Clark Corporation has no parent company, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Kimberly-Clark Corporation respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court in this case.

OPINIONS BELOW

The decision of the Minnesota Supreme Court (App., *infra*, 1a-15a) is reported at 880 N.W.2d 844. The decision of the Minnesota Tax Court (App., *infra*, 16a-87a) is available at 2015 WL 3843986.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on June 22, 2016. On September 13, 2016, Justice Alito extended the time for filing the petition for a writ of certiorari to October 20, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the U.S. Constitution, Art. I, § 10, cl. 1, provides in relevant part:

> No State shall * * * pass any * * * Law impairing the Obligation of Contracts.

Former Minn. Stat. § 290.171, art. III(1) provided in relevant part:

> Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party State * * * may elect to apportion and allocate his income in the manner provided by the laws of such States * * * without reference to this compact, or may elect to apportion and allocate in accordance with article IV.

Former Minn. Stat. § 290.171, art. IV(9) provided in relevant part:

> All business income shall be apportioned to this State by multiplying the income by a fraction the numerator of which is the property factor plus the payroll factor plus the sales factor and the denominator of which is three.

STATEMENT

The Multistate Tax Compact ("the Compact") is a multistate agreement providing that the signatory States will permit interstate businesses to use a specified apportionment formula in calculating their state income tax liability. In this case, the Minnesota Supreme Court acknowledged that the Compact grants taxpayers the right to use that formula. But applying the "unmistakability doctrine" of contract construction, the state court held that Compact member States nevertheless are free to deny taxpayers that right because the States did not make an express *second*, separate promise to abide by their initial promise. For this reason, the court below rejected petitioner's argument that Minnesota's unilateral modification of the Compact's terms violates the Constitution's Contract Clause.

This holding should not stand. It exacerbates a conflict in the lower courts about the meaning of the "unmistakability doctrine" that stems from this Court's fractured ruling in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), a decision that courts and commentators repeatedly have identified as the source of confusion. It misapplied that doctrine and therefore misconstrued the Compact, an error that has enormously important consequences; resolution of the question here will affect approximately $3 billion in tax liability, while determining the tax rules that apply in numerous States. And the Minnesota court's approach to "unmistakability" calls into question the meaning and enforceability of many dozens of other significant interstate agreements that are now in force across the Nation. Because this Court has an obligation to determine for itself the existence and meaning of contracts for purposes of Contract Clause analysis as a matter of federal law—and because the Court also has a special obligation to police state-court decisions, like the one in this case, that have the effect of discriminating against out-of-state interests—further review is warranted.

In saying this, we recognize that the Court recently denied review in *Gillette* v. *California Franchise Tax Board*, No. 15-1442 ("*Gillette*"), which involved a challenge to the California Supreme Court's holding that the Compact is not a binding contract. But the case for review is stronger here than in *Gillette*, in which Justice Alito did not participate: although the California court focused narrowly on the rules governing compact interpretation, the decision below turns on the meaning of the unmistakability doctrine, a principle that applies in a wide range of contexts, is the source of widely acknowledged confusion, and that this Court was unable to explain clearly in *Winstar*.

In at least one respect, however, the presentation in *Gillette* is relevant here. The petition in *Gillette* was supported by dozens of amici who filed nine separate briefs, including the State of Ohio; academic experts on compacts; the Chamber of Commerce of the United States and the Council of State Chambers; the National Association of Manufacturers; individuals involved in the drafting of the Compact; groups that advocate fairness, predictability, and uniformity in taxation; and other businesses. The arguments of these amici, which apply with equal force in this case, establish the doctrinal and practical importance of review here. Rather than ask amici to refile substantially identical briefs in this case, we instead here refer the Court to the amicus briefs filed in *Gillette*.

A. The Multistate Tax Compact

1. The Compact addresses problems that arise from the state taxation of businesses that operate in more than one State. One of these problems concerns the division of a business's income between the relevant States so as to avoid duplicative taxation. To determine the percentage of the interstate company's income that is taxable by any one State, each State uses an apportionment formula. But when States use different formulas, taxpayers face complexity, burdensome compliance costs, and the risk of being taxed on more than 100% of their income. See H.R. Rep. No. 1480, vol. 1 (1964) ("Willis Report").

In an attempt to counter these problems, the National Conference of Commissioners for Uniform State Laws drafted a model law in 1957, the Uniform Division of Income for Tax Purposes Act ("UDITPA"). UDITPA adopts an approach to income apportionment that averages three fractions: (1) the cost of the taxpayer's real property in the taxing State, divided by the total cost of its property; (2) the compensation the taxpayer pays employees in the State, divided by its total payroll; and (3) the taxpayer's gross sales in the State, divided by its total sales. That figure is multiplied by the taxpayer's total income to determine its state taxable income. Although UDITPA's formula is widely regarded as the most neutral and least discriminatory approach to apportionment, by 1965 only three States had adopted it.

Separately, in 1959, this Court issued a decision, *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), that was generally understood to expand state authority to tax the income of interstate businesses. See *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 455 (1978). Alarm by the business community about the reach of this newfound authority "prompted Congress to enact a statute" that, for the first time, "set[] forth certain minimum [federal] standards for the exercise of [state income taxation] power." *Ibid*. (citing Pub. L. No. 86-272). At the same time, Congress's so-called Willis Commission embarked on an extensive and, ultimately, highly critical review of the state taxation of interstate business. It concluded that taxation of multistate taxpayers was inefficient and inequitable, particularly criticizing the diversity in apportionment formulas and the propensity of States to change those formulas frequently. To address these problems, the Willis Commission recommended federal legislation to mandate uniformity in state taxation, which would have preempted critical aspects of state taxation. See H.R. Rep. No. 89-952, at 1143-1164 (1965). Members of Congress introduced several bills to implement this preemptive recommendation. *E.g.*, H.R. 11798, 89th Cong., 2d Sess. (1965).

2. In response, state officials adopted the Compact, which took effect in 1967. There is no doubt that the Compact's purpose was to forestall federal preemption; the contemporaneous summary and analysis of the Compact offered by the Council of State Governments ("CSG"), under whose auspices the Compact was prepared, explained that the Compact "is the result of * * * the growing likelihood that federal action will curtail seriously existing State and local taxing power if appropriate coordinated action is not taken very soon

by the States." CSG, *The Multistate Tax Compact, Summary and Analysis* 1 (1967) ("CSG *Summary*"); see *U.S. Steel*, 434 U.S. at 455-56. Following the Compact's adoption, none of the proposed federal bills became law.

The Compact directly addressed the Willis Commission's concerns regarding burdens on out-of-state companies. After providing an express statement of purposes that emphasized the importance of uniformity and the avoidance of duplicative taxation (Art. I (App., *infra*, 89a)), the Compact offered several substantive taxpayer protections. Most significant for present purposes is Article III(1), which provides unequivocally that "[a]ny taxpayer * * * may elect to apportion and allocate" its income using UDITPA's equal-weighted, three-factor approach, while also allowing States to craft their own alternative formulas that taxpayers may, but need not, use. App., *infra*, 91a. The Compact expressly provides that it does not affect specified other matters, including state authority "to fix rates of taxation[.]" Art. XI(a) (App., *infra*, 112a).

To join the Compact, States enact its text into their domestic statutory codes. The Compact thus provides that it "shall become effective as to any * * * State upon its enactment" by that State. Art. X, § 1 (App., *infra*, 111a). And it offers a specific mechanism for withdrawal: after enactment, "[a]ny party State may withdraw from th[e] compact by enacting a statute repealing the same." Art. X(2) (App., *infra*, 111a).

The Compact provided that it "shall enter into force when enacted into law by any seven States." Art. X(1) (App., *infra*, 111a). Nine States joined the Compact within six months, making it effective. This Court subsequently rejected the contention that the Compact is invalid under the Constitution's Compact Clause, Art. I, § 10, cl. 3, because it has not been approved by Congress. In *U.S. Steel*, the Court held that congressional approval of agreements between States is required only when an interstate agreement contains provisions "that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States." 434 U.S. at 472. The "pact" embodied by the Compact, the Court concluded, has no such effect on congressional supremacy. *Id.* at 473.

B. Proceedings below

1. Minnesota became a member State of the Compact in 1983 by enacting the Compact's terms, including the guarantee that taxpayers could make use of the UDITPA apportionment formula. Minn. Stat. § 290.171 (1984); see App., *infra*, 3a-6a. But in 1987, the Minnesota Legislature purported to repeal the portion of state law that had enacted Articles III and IV of the Compact. Act of May 28, 1987, ch. 268, art. I, § 74, 1987 Minn. Laws 1039, 1098; see App., *infra*, 6a-7a. This change, which eliminated taxpayers' entitlement under the Compact to select use of the neutral UDITPA apportionment formula, required taxpayers to use a formula that gave added weight to Minnesota sales, substantially increasing the tax liability of many out-of-state taxpayers. The legislation did not, however, repeal or otherwise withdraw Minnesota from the Compact, the step that the Compact mandates for member States that seek to depart from its terms.[1]

Petitioner paid state tax under the formula mandated by the 1987 legislation, but subsequently

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[1] In 2013, Minnesota withdrew from the Compact, repealing in its entirety the statute that enacted the Compact's terms. See App., *infra*, 6a. The effect of that enactment is not at issue here.

filed amended returns that used the election guaranteed by the Compact. When the state tax commissioner denied refunds, petitioner appealed to the state tax court, arguing that "'Minnesota's attempted elimination of Articles III and IV of the Compact was invalid as a unilateral modification of core provisions of a binding interstate compact and contract entered into between Minnesota and the other signatory states.'" App., *infra*, 32a. Moreover, petitioner's argument continued, because the Compact is a binding agreement, Minnesota's attempt to eliminate that election without complying with the Compact's withdrawal provision violates the U.S. Constitution's Contract Clause. *Id.* at 32a-33a.

Sitting en banc, the tax court rejected the challenge. App., *infra*, 16a-87a. For purposes of its decision, the court assumed "that the Compact was a contract among Minnesota and the other States that adopted it and that the Compact created binding obligations." *Id.* at 46a. But citing the plurality opinion in *Winstar* and invoking the "unmistakability doctrine," the tax court held that, "[w]hen a contract provision implicates a State's sovereign power, the doctrine requires the State to make a clear 'second promise' to refrain from using that sovereign power to alter the primary promise." *Id.* at 48a. In the tax court's view, this requirement of an express "second promise" "applies to interstate compacts." *Id.* at 53a. And under this understanding, the court held that the Compact should not be read to require member States to abide by their promise to provide a taxpayer election: "although Articles III and IV [of the Compact] unambiguously provide for the apportionment election, no Compact provision contains or constitutes a separate clear and unmistakable promise that the State would not alter or repeal the election." *Id.* at 59a (footnotes omitted). See *id.* at 57a (no "separate and distinct promise"), 63a (no "clear and unmistakable promise").

Accordingly, the court held that Minnesota did not violate its contractual obligations under the Compact because "no Compact provision constitutes a clear and unmistakable promise by the State to refrain from using its sovereign authority to alter or repeal the apportionment election contained in Articles III and IV." *Id*. at 65a.

2. The Minnesota Supreme Court affirmed. App., *infra*, 1a-15a. Also assuming the Compact to be a binding contract (see *id.* at 8a & n.4), the court described "the dispositive issue [in the case to be] whether this compact, as a matter of contract interpretation, constrained the authority of the Minnesota Legislature to repeal portions of a statute that adopted the Compact." *Id.* at 9a n.5. See also *id*. at 8a-9a ("the fundamental legal issue we must decide" is "whether the Legislature's enactment of the Compact—specifically Articles III and IV—created a contractual obligation that prohibited the Legislature from later repealing Articles III and IV * * * without withdrawing completely from the Compact"). The court held that the Compact should not be given such a reading.

As an initial matter, the court opined that, "[e]ven assuming that the State undertook a contractual obligation to Kimberly Clark when it enacted [the Compact's terms], the obligation was and is invalid" under the Minnesota Constitution. In particular, the court pointed to a state constitutional provision providing that the State's "'power of taxation shall never be surrendered, suspended or contracted away.'" App., *infra*, 11a (quoting Minn. Const. art. X, § 1). Under this rule, the court indicated, "the State is constitutionally barred from surrendering, suspending, or contracting away its authority to amend or repeal tax provisions." *Id.* at 11a.

"Having concluded that the mere act of enacting legislation did not bar the Legislature from later amending the enacted statute," the court then "turn[ed] to the language of [the Compact]." App., *infra*, 11a-12a. As to this, the Minnesota Supreme Court agreed with the state tax court: it held that the Compact member States may change their laws to bar use of the UDITPA formula by taxpayers because the Compact does not contain a separate and express promise to abide by the Compact's terms. *Id.* at 11a-15a. Pointing to the unmistakability doctrine and to the plurality opinion in *Winstar*, as well as to prior Minnesota unmistakability authority that also had relied on *Winstar*, the court below found "no unmistakable or express promise surrendering the State's legislative authority." *Id.* at 13a. That was so, the court explained, because, "[a]s the tax court articulated, 'articles III and IV clearly provide for the apportionment election, *but do not contain a separate and distinct promise that the State would not alter or repeal the election*.'" *Id.* at 14a (emphasis added). As a result, the court concluded, the absence of an express promise to abide by the Compact meant that Minnesota had no contractual obligation "that prohibited the Legislature from later repealing Articles III and IV." *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

The Minnesota Supreme Court's central holding is that the unmistakability doctrine governs the interpretation of multistate compacts and that, under this doctrine, States are free to disregard contractual commitments touching on the exercise of sovereign authority unless the compact contains a separate promise to abide by the compact terms—that is, an express "second promise" *to keep* the State's promise. For several reasons, this holding warrants further review.

First, the decision below exacerbates a conflict in the lower courts on the need for such a "second promise" when a State contracts to limit the exercise of sovereign authority. The decision also reflects a widely acknowledged confusion about the meaning of the unmistakability doctrine that stems from this Court's fractured decision in *Winstar*.

Second, the Minnesota court's decision is incorrect. For the reasons noted by the Justices concurring in the result in *Winstar*, "the very *subject matter* of [the Compact], an essential part of the *quid pro quo*," is a commitment to permit taxpayer use of a specified apportionment formula. 518 U.S. at 921. Accordingly, even without a separate promise not to withdraw the availability of that formula, it is unmistakably clear that the Compact States committed themselves to permit use of the formula; the Minnesota court's contrary holding rendered the contract's guarantees wholly illusory. Indeed, almost all interstate compacts have as their central purpose a surrender of aspects of state sovereignty, which makes the requirement of a "second promise" in this setting inapposite.

Third, the holding below involves matters of great practical and doctrinal importance. The Compact sets rules affecting the obligations of innumerable taxpayers and billions of dollars in tax liability in jurisdictions across the Nation. And the Minnesota Supreme Court's decision adopts an approach to the interpretation of interstate compacts that calls into question the binding nature of *all* compacts, creates grave uncertainty for persons now engaged in the drafting of compacts, and makes it impossible for States to know the scope of their obligations when they decide whether to join compacts that are or will become open for membership. This Court should review and set aside that holding.

A. The Meaning Of The Compact Is A Matter Of Federal Law.

It is helpful to begin with the context in which the issue here is presented: the meaning of the Compact, and of the rules that govern its interpretation, are matters of federal law that should be settled by this Court.

1. This Court determines the meaning of contracts for Contract Clause purposes.

All compacts, whether or not ratified by Congress, have the status of contracts between the signatory States. This Court has recognized for almost two centuries that, "[i]n fact, the terms compact and contract are synonymous" (*Green* v. *Biddle*, 21 U.S. 1, 92 (1823)), and that "[a] compact is a contract" or a "bargained-for exchange between its signatories." *Kansas* v. *Colorado*, 533 U.S. 1, 20 (2001). And although the Compact is not a law of the United States because it was not ratified by Congress,[2] this Court has jurisdiction—indeed, it has an obligation—to determine both whether the Compact *is* a contract and what its terms mean.

In cases like this one involving the Contract Clause, the Court repeatedly has explained that, "ultimately[,] we are 'bound to decide for ourselves

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[2] Congressional approval transforms a compact into law of the United States for purposes of the Supremacy Clause and of federal jurisdiction. See *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981).

whether a contract was made.'" *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 187 (1992) (citation omitted). That is because "[t]he question whether a contract was made is a federal question for purposes of Contract Clause analysis, * * * and 'whether it turns on issues of general or purely local law, [this Court] can not surrender the duty to exercise [its] own judgment.'" *Ibid.* (citation omitted). Accord *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561 (1942).

That imperative applies with particular force when the contract at issue is one *between* States:

> Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States * * * can be unilaterally nullified, or given final meaning by an organ of one of the contracting States.

State ex rel. Dyer v. *Sims*, 341 U.S. 22, 28 (1951).

2. Federal common law governs the interpretive rules used to interpret contracts between States.

As this last point suggests, the Court in determining the meaning of agreements between States must apply interpretive rules that are grounded in federal common law. Necessarily, one State's rules of decision "do not obtain in all the States of the Union, and there are variations in their application" even among those States that subscribe to similar rules. *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670 (1931) (determination of riparian rights). Here, for example, if variable state-law rules of contract construction were applied to construe a textually identical body of rights and obligations under a single multistate compact, the contract's meaning would vary from State to State. Such an outcome would be intolerable.

In such circumstances, "it becomes [this Court's] responsibility * * * to adopt a [federal] rule [to] settle the [dispute]." *Texas* v. *New Jersey*, 379 U.S. 674, 677 (1965). The Court employs that approach in a wide range of contexts in which there is an "obvious need for rules of decision controlled by the Supreme Court." 17 Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4052 (3d ed.) (citing cases). The court below seemed to recognize that is so, regarding this case as governed by this Court's approach to unmistakability in *Winstar*. Indeed, in *U.S. Steel*, this Court itself determined the meaning of the Compact in resolving its constitutionality.[3]

B. The Lower Courts Are In Conflict On The Application Of The Unmistakability Doctrine.

1. The lower courts are in conflict on the need for a "second promise."

Against this background, the Minnesota Supreme Court held that the Compact's surrender of sovereignty is not "unmistakable"—and therefore that Minnesota is not bound by its contractual promise to make the UDITPA option available to taxpayers—because, although Compact "articles III and IV clearly provide

[3] Federal common law interpretive rules must govern even though the dispute here is not between two States. Because the same agreed-upon terms govern the obligations of Compact member States and the rights of individuals conducting business in those States, the same interpretive rules should apply in each of those States.

for the apportionment election, [they] do not contain a separate and distinct promise that the State would not alter or repeal the election." App., *infra*, 14a (internal quotation marks omitted). The court below therefore found dispositive the absence of what the Justices concurring in the judgment in *Winstar* characterized as "a *further* promise not to go back on the promise to accord favorable regulatory treatment." 518 U.S. at 921 (Scalia, J., concurring in the judgment). Given this lack of an express second "promise to keep the State's promise," the Minnesota court found it unnecessary to conduct any inquiry at all into the Compact's context, purpose, or other provisions—which is to say, the court looked to none of the usual tools of contract construction in determining whether Minnesota is free to revoke its contractual guarantee.

This holding exacerbates a conflict among state and federal courts on the meaning and proper application of the unmistakability doctrine. In particular, courts disagree on whether a governmental entity will be found to have agreed by contract to limit its exercise of sovereign powers only if the government made an express promise to abide by an unambiguous initial limit on the exercise of sovereign authority.

On one side, the Minnesota Supreme Court required a "clear and unmistakable promise by the State to refrain from amending or repealing Articles III and IV of the statute." App., *infra*, 14a-15a. Some other courts similarly have emphasized the need for a *specific* promise protecting a plaintiff's contractual rights against future legislative action.

Thus, the Second Circuit ruled, in a divided decision, that a court must "have a clear indication that a state has intended to surrender its normal authority to amend its statutes." *Doe* v. *Pataki*, 481

F.3d 69, 78 (2d Cir. 2007). The court in *Doe* held that although the plaintiffs were entitled to certain contractual benefits under a consent decree, the decree would not be read to guarantee those benefits against future statutory changes "unless the decree clearly states that intention." *Ibid.* In contrast, the dissent sharply criticized the majority for inventing a "novel clear statement rule" that effectively required a "provision in the contract stating that the government will be liable in the event that it cannot perform" on account of changes in the law, "which would be superfluous." *Id.* at 83-84 (Pooler, J., dissenting).

Similarly, in a case dealing with cost-of-living adjustments, the New Jersey Supreme Court held that, "[t]o construe a statute as creating a contractual right, the Legislature's intent to limit the subsequent exercise of legislative power must be clearly and unequivocally expressed." *Berg* v. *Christie*, 137 A.3d 1143, 1147 (N.J. 2016); see also *id.* at 1153. The court required express language: "if there is any ambiguity requiring resort to legislative history, one is already outside the realm of unmistakable clarity needed to find a statutory contract right." *Id.* at 1159.

The Sixth Circuit used a similar test in likewise addressing a legislative change to cost-of-living adjustments. The court *agreed* that the plaintiffs had specific contractual rights to benefits guaranteed by statute, but required an additional "unmistakable promise precluding [the State] legislature from exercising its sovereign power to reduce the extent of future COLA increases." *Puckett* v. *Lexington-Fayette Urban Cty. Gov't*, -- F.3d --, 2016 WL 4269802, at *5 (6th Cir. Aug. 15, 2016). Although the court noted the absence of probative legislative history, its *holding* was that, "[b]ecause the Act contains no language evincing a clear and unequivocal intent to create a binding contract, Plaintiffs cannot establish a violation of the Contract Clause as a matter of law." *Ibid.*

On the other hand, the Federal Circuit has held that such a second promise is *not* required. In the context of a discussion of the contractual implied-covenant of good faith and fair dealing, the court explained that, although "the parties could have included a clause specifically ensuring against legislation that destroyed the benefits of the contract, such covenants have not been required in the past." *Centex Corp.* v. *United States*, 395 F.3d 1283, 1306 (Fed. Cir. 2005); see also *id.* at 1311. The court expressly referred to Justice Scalia's statement in *Winstar* disclaiming the need for a "*further* promise not to go back on the promise." *Ibid.* (quoting *Winstar*, 395 F.3d at 921). See also *Local Okla. Bank, N.A.* v. *United States*, 452 F.3d 1371, 1377 (Fed. Cir. 2006) (reiterating *Centex*'s holding and citing *Winstar*).

And the First Circuit, albeit rejecting the contract claim before it, agreed that a statute *does* create binding contractual obligations if it "uses the language of contract," or if its "apparent purpose, context, and any pertinent evidence of actual intent, including legislative history," demonstrates that the State intended that result. *Me. Ass'n of Retirees* v. *Bd. of Trs. of Me. Pub. Emps. Ret. Sys.*, 758 F.3d 23, 29-30 (1st Cir. 2014) (citation omitted). As that court added, "analysis cannot end with the bare language of the statute, since a clear and unequivocal intent to contract can also be demonstrated by circumstances." *Id.* at 30 (citation and internal quotation marks omitted). Here, in contrast, the court below limited its analysis to just such a search for a "second promise" in the Compact.

2. Winstar *is the source of persistent confusion on the meaning of the unmistakability doctrine*.

These disparate outcomes stem from the Court's fractured decision in *Winstar*—where a majority of the Court was unable to state a rule governing the proper approach to unmistakability.

Winstar addressed the question whether the United States was bound by contract not to alter the accounting treatment guaranteed the purchasers of failed savings and loans at the time of purchase. When a legislative change precluded use of that accounting treatment, those purchasers maintained that the government had breached its contract; the government responded, in relevant part, by arguing that the contract did not establish in sufficiently unmistakable terms that the government had committed itself to continue the permitted accounting treatment. See 518 U.S. at 858-861 (plurality opinion).

The four Justices in the *Winstar* plurality, in dicta, embraced *an* unmistakability doctrine, under which "an ambiguous term of a grant or contract" will not "be construed as a conveyance or surrender of sovereign power." 518 U.S. at 878. But the plurality found it unnecessary to specifically resolve whether or when a second promise to abide by the government's initial promise is required by the doctrine, finding that the unmistakability doctrine did not apply in *Winstar* at all because the contract in that case did not impinge upon sovereign power. *Id*. at 880. In particular, the plurality determined that a breach of the government's promise could be remedied by the payment of money damages—which "supposes no surrender of sovereign power by a sovereign with the power to contract." *Id*. at 881.

At the same time, Justice Breyer, who joined the plurality opinion—and is the only member of the *Winstar* plurality still on the Court—questioned whether the unmistakability doctrine adds anything to the usual rules of contract interpretation governing the determination "of the existence of the claimed promise." 518 U.S. at 914-915, 918 (Breyer, J., concurring). Thus, he found it doubtful that the doctrine "disable[s] future courts from inferring, from language and circumstance under ordinary contract principles * * * a promise not to abrogate, or to restrict severely through legislation and without compensation, the very right that a sovereign explicitly granted by contract." *Id.* at 917.

Meanwhile, Justice Scalia, joined by Justices Kennedy and Thomas, took a tack that differed from the plurality's (and overlapped in some degree with Justice Breyer's separate concurrence). In their view, the unmistakability doctrine "has little if any independent legal force beyond what would be dictated by normal principles of contract interpretation. It is simply a rule of presumed (or implied-in-fact) intent." 518 U.S. at 920 (Scalia, J., concurring in the judgment). As they explained, "the very *subject matter* of these agreements [in *Winstar*], an essential part of the *quid pro quo*, was Government regulation; unless the Government is bound *as to that regulation*, an aspect of the transactions that reasonably must be viewed as a *sine qua non* of their assent becomes illusory." *Id.* at 921. These Justices therefore expressly rejected the need for a separate promise to keep the government's promise:

> In these circumstances, it is unmistakably clear that the promise to accord favorable regulatory treatment must be understood as

> (unsurprisingly) a *promise* to accord favorable regulatory treatment. I do not accept that unmistakability demands that there be a *further* promise not to go back on the promise to accord favorable regulatory treatment.

Ibid.

Finally, Chief Justice Rehnquist, joined by Justice Ginsburg, dissented. They understood the unmistakability doctrine to be a "special rule" under which "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms." 518 U.S. at 924, 926 (Rehnquist, C.J., dissenting). Although the dissent did not say so in terms, the dissenters appeared to embrace the "second promise" requirement.

These disparate opinions have left the law regarding unmistakability in a state of confusion: members of the Court differed on whether there really *is* a separate unmistakability doctrine; *when* such a doctrine (if it exists) applies; *how* to apply it when it does apply; and whether a separate promise to keep the government's promise is necessary.

It therefore is no surprise that, "[s]ince the decision in *Winstar*, courts have struggled with its meaning." *Grass Valley Terrace* v. *United States*, 46 Fed. Cl. 629, 637 (2000). See, *e.g.*, *DBSI/TRI IV Ltd. P'Ship* v. *United States*, 465 F.3d 1031, 1040 n.6 (9th Cir. 2006) ("Without doubt, there is substantial inconsistency in courts' descriptions of 'the unmistakability doctrine.'"); *Tamarind Resort Assocs.* v. *Gov't of Virgin Islands*, 138 F.3d 107, 112 (3d Cir. 1998) ("It is somewhat unclear after the *Winstar* plurality opinion as to the type of contract to which the unmistakability doctrine applies."); *United States* v. *Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1148 (E.D. Cal. 2001) ("cases applying the unmistakability doctrine after *Winstar* * * * diverge in their formulation and interpretation of the [unmistakability] doctrine"); *Pitney Bowes, Inc.* v. *U.S. Postal Serv.*, 27 F. Supp. 2d 15, 23 (D.D.C. 1998) ("Courts have struggled with the meaning of *Winstar*."); *Cuyahoga Metro. Hous. Auth.* v. *United States*, 57 Fed. Cl. 751, 772 (2003) ("one might struggle mightily to weave a controlling rule of law from the opinions in *Winstar*").

Commentators also have flagged the uncertainty, noting the "significant unresolved and ambiguous points that flow from the decision of the splintered majority in the Supreme Court in *Winstar*." Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of* Winstar*: An Interim Report*, 51 Ala. L. Rev. 1177, 1177 (2000).

The Minnesota Supreme Court's decision thus deepens an existing split among the lower courts, and exacerbates the already profound confusion among those courts about the proper application of the unmistakability doctrine. Further review is warranted.

C. The Decision Below Is Wrong.

1. Compact States are contractually bound to offer the taxpayer election unless they withdraw from the Compact according to its terms.

The need for review is especially acute because the Minnesota court misapplied the governing federal common law standard in a manner that led it to misconstrue the Compact. However the unmistakability doctrine applies to contracts between sovereign entities and private parties, States should not be presumed to have retained all sovereign authority—and there accordingly is no requirement of a "second promise" to keep the State's initial promise to refrain from exercising that authority—in the context of an interstate compact. That is so for a simple reason: generally speaking, the essential *purpose* of a compact is for the signatory States to surrender a portion of their sovereignty. "'An interstate compact, by its very nature, shifts a part of a state's authority to another state or states, or to the agency the several states jointly create to run the compact.'" *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994) (citation omitted). See Caroline Broun, et al., *The Evolving Use and the Changing Role of Interstate Compacts* 21, 22 (ABA 2006) ("interstate compacts represent a political compromise between constituent elements of the union"; "states may effectively cede a portion of their individual sovereignty over the subject of the agreement").

The point should be beyond dispute. As Justice Scalia noted, in an observation joined by Justice Alito, "the commonsense intuition that a State will rarely contract away its sovereign power" is "sound enough in almost all state dealings with private citizens, and in some state dealings with other States." *New Jersey* v. *Delaware*, 552 U.S. 597, 629 (2008) (Scalia, J., dissenting). But it "has no application [where] the whole purpose of [a] * * * Compact was precisely to come to a compromise agreement on the exercise of the [compacting] States' sovereign powers." *Ibid*. In such a case,

> [t]here is no way the Compact can be interpreted o*ther than* as a yielding by both States of what they claimed to be their sovereign powers. The only issue is *what* sovereign powers were yielded, and that is best determined from the language of the Compact, with no thumb on the scales.

Id. at 629-30.

That description applies fully to the Multistate Tax Compact. As the Compact itself declares, the member States adopted it to provide for uniform rules and avoid duplicative taxation (see App., *infra*, 89a); as we show above (at 5-6), the States' immediate aim was to put in place enforceable restrictions on state authority that would make unnecessary the enactment of preemptive federal legislation. The Compact accomplishes these goals by providing unequivocally that taxpayers "may elect to apportion and allocate in accordance with [the UDITPA formula]." App., *infra*, 91a.

This arrangement *necessarily* reflects a promise by the member States that they will not enact legislation departing from the Compact's substantive guarantees (unless the member States jointly agree to change the agreement or a State withdraws from the Compact in accord with its express terms). After all, the "whole purpose" of the Compact "was precisely to come to a compromise agreement on the exercise of the [compacting] States' sovereign powers" to tax (*New Jersey*, 552 U.S. at 629 (Scalia, J., dissenting)), and, "[i]n these circumstances, it is unmistakably clear that the promise to accord favorable [tax] treatment must be understood as (unsurprisingly) a *promise* to accord favorable [tax] treatment." *Winstar*, 518 U.S. at 921 (Scalia, J., concurring in the judgment). Yet under the holding below, *none* of the Compact's substantive taxpayer protection provisions—all of which limit the exercise of state taxing authority—actually promise anything at all.

Moreover, the plain terms of the Compact do not permit such a construction, for several reasons:

First, the Compact provides that, after signatory States join, "[a]ny party State may withdraw from this compact by enacting a statute repealing the same." Art. X(2) (App., *infra*, 111a). By describing the one method for withdrawing from the Compact's terms, this provision implicitly shows that member States otherwise are obligated to adhere to their contractual commitments. In fact, this language would be superfluous if States were not otherwise committed to abide by the Compact's substantive terms; there is no need for a withdrawal provision when States are individually enacting a model law, any substantive provision of which may be modified unilaterally at will.

Second, the drafters elected to call their agreement a "compact," a term that is used no fewer than twenty-five times in the Compact's title and text. This choice of language is significant. As we have noted, at the time the Compact was adopted, the word "compact" had long been understood to be "synonymous" with "contract," and to refer to an interstate agreement that establishes binding obligations. *Green*, 21 U.S. at 92. It must be presumed that the drafters of the Compact, who labeled the document a "compact" rather than a "model law," had that meaning in mind.

Third, the text of the Compact contains statements of purpose that are best furthered by understanding the member States to have committed themselves to maintaining the promised taxpayer election. The Compact declares that it is intended to "[f]acilitate * * * the equitable apportionment of tax bases and settlement of apportionment disputes"; "[p]romote uniformity or compatibility in significant components of tax systems"; "[f]acilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration"; and "[a]void duplicative taxation." Art. I (App., *infra*, 89a). The Compact then goes on to provide that it "shall be liberally construed so as to effectuate the[se] purposes." Art. XII (App., *infra*, 112a). Yet a holding that the member States have not committed to abide by the Compact's substantive provisions would undermine all of these purposes, leading to complexity and higher compliance costs, less uniformity, and double taxation. In requiring liberal construction to effectuate its purposes, the Compact expressly directs that it be interpreted to avoid such consequences.

Fourth, as participants in other interstate compacts, the Compact States were familiar with this established mechanism for resolving interstate problems. The drafters included compact experts from CSG and other state organizations. See CSG *Summary*, at 1. And the CSG's summary and analysis of the Compact leaves no doubt that these drafters intended the Compact to function as an agreement that limited the exercise of state authority so long as the Compact remained in effect. Thus, the summary expressly analogized the Compact to other already operational compacts, as "the accepted instrument" for "handling significant problems which are beyond the unaided capabilities of * * * individual State governments." *Id.* at 8; see also, *e.g.*, *id.* at 1 ("[e]ach party State * * * would be required to make the [Compact formula] available to any taxpayer wishing to use it").

Fifth, that understanding is confirmed by the context in which the Compact was written and adopted. As we have explained, there is no doubt that the Compact was drafted as a direct reaction to congressional criticism of state tax regimes that were characterized by inconsistency and repeated modification, in an effort to forestall impending federal preemption of state taxing authority. See pages 5-6, *supra*. In this setting, a compact that did not limit state authority could not have been effective in accomplishing the States' goal; in fact, at the time of the threatened congressional action, a model uniform law—UDITPA itself—*already* had been in existence for almost a decade. That Congress chose to not go forward with preemptive legislation after adoption of the Compact suggests a general understanding that the Compact did, in fact, put in place a binding structure.

It is no answer to this point that the Compact itself provides a means by which member States may withdraw. The requirement of *complete* withdrawal imposes a significant check, both political and practical, on state departure from the Compact's terms. A State may be unwilling to surrender the benefits of Compact membership if that is the price of repudiating the taxpayer election. And the obligation to enact a statute of repeal gives the issue a visibility and political currency that may engender substantial opposition, as happened when the California legislature took up a failed measure to withdraw in 1999. See AB 753 (Cal. 1999).

For all of these reasons, the decision below—which turned entirely on the absence of a "second promise" and otherwise disregarded the Compact's language, purpose, and context—is incorrect.

2. Minnesota's contractual commitment is not rendered unenforceable by the State's constitution.

We also note that the Minnesota Constitution neither renders the State's agreement to the Compact's terms unenforceable nor limits this Court's ability to decide the question presented. Although the court below invoked the State's constitution in indicating that any obligation undertaken by the State "when it enacted Minn. Stat. § 290.171, * * * was and is invalid"

(App., *infra*, 11a), the court appears to have meant this observation to address only the enactment of the state statute, as opposed to the distinct contractual undertaking consummated in the Compact. That is why the court went on to observe that, "[h]aving concluded that the mere act of enacting legislation did not bar the Legislature from later amending the enacted statute, we turn to the language of section 290.171," which incorporates the Compact's operative terms. *Id*. at 11a-12a. If the court did not regard the statutory enactment as a matter separate from the State's contractual undertaking, there would have been no need for the court to proceed to its lengthy discussion of the unmistakability doctrine and the question whether the contract's terms limited the State's exercise of sovereign authority, the discussion leading to the court's holding that, "*[f]or these reasons*, the Legislature's enactment of Minn. Stat. § 290.171—specifically, [Compact] Articles III and IV—did not create a contractual obligation between the Minnesota Legislature and Kimberly Clark that prohibited the Legislature from later repealing Articles III and IV." *Id*. at 15a (emphasis added).

Moreover, invocation of the state constitution would not be an impediment to review by this Court even if the state court had understood the constitution to limit Minnesota's authority to enter into the Compact. That is just what this Court held in essentially identical circumstances in *Dyer*, where it considered for itself the relationship between a state constitution and the State's contractual commitments. There, West Virginia maintained that it lacked the authority under its state constitution to enter into particular compact agreements. See 341 U.S. at 30. Analogizing the situation to that under the Contract Clause, where this Court determines for itself the existence and meaning of contracts entered into under state law (see *id.* at 29-30), the Court reviewed the state's constitution and found both (1) that "[n]othing in its constitution" precluded West Virginia's contractual commitments and (2) that "the obligation of the State under the Compact is not in conflict with" the state constitution. *Id.* at 31, 32. Justice Jackson, concurring, would have gone further, observing that a State "may not raise an issue of ultra vires, decide it, and release herself from an interstate obligation." *Id.* at 35 (Jackson, J., concurring). "Whatever she now says her Constitution means, she may not apply retroactively that interpretation to place an unforeseeable construction upon what the other States to this Compact were entitled to believe was a fully authorized act." *Ibid.*

Here, it would be a plain error to read the Minnesota Constitution as barring the State from committing itself to the Compact's terms. States adopted constitutional provisions like Minnesota's to preclude state legislatures from *permanently* surrendering their authority to tax. See Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L. Rev. 1301, 1319; see also *Anderson* v. *State*, 435 N.W.2d 74, 77 (Minn. Ct. App. 1989) (a "*permanent* tax exclusion" would have been "*ultra vires*" under the Minnesota Constitution) (emphasis added). But the Compact has only a very limited effect on state power to tax, leaving intact state authority over the tax base, rates, and revenues. And it has *no* permanent effect at all; all Compact members retain the right to withdraw from the Compact, which Minnesota in fact did after the tax years at issue here. No Minnesota decision interprets its state constitution to invalidate state agreements in these circumstances.

Accordingly, were the State's constitution at issue in the case, it would be plain that "the obligation of the State under the Compact is not in conflict with" the Minnesota Constitution. *Dyer*, 341 U.S. at 32.

D. The Question Presented Is One Of Substantial And Recurring Importance.

The decision below accordingly errs regarding a matter that bears directly on the interests of numerous States and innumerable taxpayers; that is reason enough to grant review. And the need for consideration by this Court is especially compelling because the question presented in the case is one of significant practical and doctrinal importance.

1. The meaning of the Compact is a matter of national importance.

Most obviously, the meaning of the Multistate Tax Compact should be settled, and settled correctly. The issue presented here may arise in each of the nine States that have repudiated the Compact's apportionment election without taking the steps required by the Compact to withdraw. Challenges involving that issue have taken place in at least five of those States.[4] Unsurprisingly, the sums at stake are enormous; the aggregate amount at stake nationwide is on the order of $3 billion. At the same time, absent a definitive resolution of the Compact's meaning, taxpayers in

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[4] In addition to the decision below, the highest courts to address the issue in California and Michigan held that the Compact does not preclude States from eliminating the election guarantee, although their rationales differed from those used by the Minnesota court. The issue is pending in Oregon and Texas. See *Graphic Packaging Corp.* v. *Hegar*, 471 S.W.3d 138 (Tex. Ct. App. 2015)); *Health Net. Inc.* v. *Or. Dep't of Revenue*, 22 Or. Tax. 128 (Or. Tax. Ct. 2015).

Compact States will face a greatly enhanced danger of continuing duplicative taxation, while also facing uncertainty about the governing tax rules going forward. See generally H.R. Rep. No. 89-952, at 1127.

2. The proper application of the unmistakability doctrine involves a recurring question of great importance.

Second, this Court should settle the rules governing application of the unmistakability doctrine. The doctrine is invoked frequently, in a wide range of contexts, and often determines the outcome of cases in which it is held to apply. Unmistakability may be at issue in cases (like this one) that involve multistate contracts that are governed by federal common law interpretive rules; in cases (also like this one) that present questions under the Contract Clause, where this Court must determine for itself the existence and meaning of a contract; in cases (like *Winstar*) that involve federal contracts; and in contract cases where state courts follow this Court's guidance.

In fact, the unmistakability doctrine has been of critical importance in at least twenty-two federal appellate decisions[5] and eleven state supreme court

[5] See, *e.g.*, *Puckett*, 2016 WL 4269802; *Kendall* v. *Gov't of the V.I.*, 596 F. App'x 150 (3d Cir. 2015); *Me. Ass'n of Retirees*, 758 F.3d 23; *Taylor* v. *City of Gadsden*, 767 F.3d 1124 (11th Cir. 2014); *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.* v. *Westchester Cty., N.Y.*, 712 F.3d 761 (2d Cir. 2013); *Doe*, 481 F.3d 69; *DBSI/TRI IV Ltd. P'ship*, 465 F.3d 1031; *Local Okla. Bank, N.A.*, 452 F.3d 1371; *Centex Corp.*, 395 F.3d 1283; *Franklin Fed. Sav. Bank* v. *United States*, 431 F.3d 1360 (Fed. Cir. 2005); *First Nationwide Bank* v. *United States*, 431 F.3d 1342 (Fed. Cir. 2005); *Admiral Fin. Corp.* v. *United States*, 378 F.3d 1336 (Fed. Cir. 2004); *R.I. Bhd. Of Corr. Officers*, 357 F.3d 42; *Rio Grande Silvery Minnow* v. *Keys*, 333 F.3d 1109 (10th Cir. 2003), *vacated*, 355 F.3d 1215 (10th Cir. 2004); *Kimberly Assocs.* v. *United States*, 261 F.3d

decisions (including this one)[6] since *Winstar* was decided. Yet as we have shown, the law in this area is in conflict—and that confusion stems from uncertainty about the meaning of this Court's divided decision in *Winstar*. This Court should bring clarity to the area.

3. The decision below creates uncertainty about the meaning of dozens of interstate compacts.

Third, the decision below undermines the effectiveness, and calls into question the meaning, of virtually all multistate compacts. The Minnesota Supreme Court held that the unmistakability doctrine applies to the interpretation of compacts and that, under the doctrine, a compact will not be read to limit the exercise of state sovereign authority unless the compact contains an express "second promise" to that effect. But compacts typically commit States to exercise sovereign powers in particular ways—and, so far as we are aware, virtually never include a second promise to

864 (9th Cir. 2001); *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327 (Fed. Cir. 2001); *Sanders* v. *United States*, 252 F.3d 1329 (Fed. Cir. 2001); *Tamarind Resort Assocs.* v. *Gov't of Virgin Islands*, 138 F.3d 107 (3d Cir. 1998); *R.I. Laborers' Dist. Council* v. *Rhode Island*, 145 F.3d 42 (1st Cir. 1998); *Far W. Fed. Bank, S.B.* v. *Office of Thrift Supervision-Dir.*, 119 F.3d 1358 (9th Cir. 1997); *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569 (Fed. Cir. 1997); *Parker v. Wakelin*, 123 F.3d 1 (1st Cir. 1997).

[6] See, *e.g.*, *S. States Police Benevolent Ass'n, Inc.* v. *Bentley*, -- So. 3d --, 2016 WL 5338749, at *8 (Ala. 2016); *Berg*, 137 A.3d 1143; *Moro* v. *State*, 351 P.3d 1 (Or. 2015); *Justus* v. *State*, 336 P.3d 202 (Colo. 2014); *Prof'l Fire Fighters of N.H.* v. *State*, 107 A.3d 1229, (N.H. 2014); *Madison Teachers, Inc.* v. *Walker*, 851 N.W.2d 337 (Wis. 2014); *State ex rel. Humphrey* v. *Philip Morris USA, Inc.*, 713 N.W.2d 350 (Minn. 2006); *Dairyland Greyhound Park, Inc.* v. *Doyle*, 719 N.W.2d 408 (Wis. 2006); *State ex rel. Horvath* v. *State Teachers Ret. Bd.*, 697 N.E.2d 644 (Ohio 1998); *SC Testing Tech., Inc.* v. *Dep't of Envtl. Prot.*, 688 A.2d 421 (Me. 1996).

keep that promise. Under the approach taken below, all of these compacts lack meaningful legal force.

The implications of this rule are striking. States use compacts to address nearly every core function of state government. A small, representative sample of compacts in which States have committed themselves to regulate or otherwise to exercise sovereign authority include:

Compacts to regulate industries. These include the Interstate Insurance Product Regulation Compact and the Interstate Insurance Receivership Compact (ensuring uniform regulation of the insurance industry); the Interstate Mining Compact (commits member states to drafting plans for regulating surface mining within their borders); and the Multistate Highway Transportation Agreement (ensures uniformity in how states regulate the size and weight of vehicles traveling on interstate highways).

Compacts to ensure uniform response to criminal activities. These compacts include the Interstate Wildlife Violator Compact; the Boating Offense Compact; the Interstate Compact on the Mentally Disordered Offender; and the Interstate Compact for Adult Offender Supervision.

Compacts obligating states to assist one another in emergencies. These compacts include the Great Lakes Forest Fire Compact; the Kansas-Missouri Flood Prevention and Control Compact, the Interstate Earthquake Emergency Compact, and the Interstate Mutual Aid Compact; and the National Guard Mutual Assistance Counter-Drug Activities Compact.

The binding nature of all of these compacts, however, is jeopardized by the decision below.[7] That decision thus threatens to undermine state coordination and cooperation in a multitude of regulatory domains. It likewise creates grave uncertainty for persons drafting compacts and for States that are considering whether to join one of the at least eight new compacts that currently are open for membership (see *Gillette* Amicus Curiae Brief of Jeffrey B. Litwak, at 13-14 (No. 15-1442)), which are left uncertain about the meaning of standard compact language. The confusion generated by this decision confirms the need for intervention by this Court.

* * * *

In cases like this one, where States are departing from their obligations in a manner that disadvantages the residents of other States, the Court often has acknowledged that a State "cannot be its own ultimate judge"; resolving such a dispute "is the function and duty of the Supreme Court of the Nation." *Dyer*, 341 U.S. at 28. Cf., *e.g.*, *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994). The error here, coming in one of several recent decisions in which state courts have refused to enforce the plain terms of the Compact so as to benefit local tax-collection authorities, is manifest. Because that error also leaves the law in a state of confusion and concerns recurring legal issues that have great practical significance, this Court should grant review.

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[7] We address in text only a selection of those compacts that, like the Multistate Tax Compact, have not been approved by Congress. But the implications of the decision below are not so limited. Congressional approval makes a compact into law of the United States for purposes of federal jurisdiction, but does not change the interpretive tools used to determine the compact's meaning .

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

KIMBERLY–CLARK CORPORATION & SUBSIDIARIES, Relators/Cross–Respondents,

v.

COMMISSIONER OF REVENUE, Respondent/Cross–Appellant.

No. A15–1322.

Supreme Court of Minnesota.

June 22, 2016.

OPINION

HUDSON, Justice.

This appeal presents a constitutional challenge to a legislative repeal of provisions of a multistate tax compact that permitted corporate taxpayers, for a period of time, to calculate their Minnesota tax liability using a formula promulgated by a multistate tax commission. In 2013, relators Kimberly–Clark Corporation and its subsidiaries (collectively "Kimberly Clark") sought to amend their Minnesota corporate franchise tax returns for tax years 2007 through 2009 by re-calculating their state tax liability using an income apportionment formula that the Minnesota Legislature enacted in 1983, Act of June 14, 1983, ch. 342, art. 16, § 1, 1983 Minn. Laws 2168, 2339, but later repealed, Act of May 28, 1987, ch. 268, art. 1, § 74, 1987 Minn. Laws 1039, 1098 (repealing Articles III and IV in Minn. Stat. § 290.171). The Commissioner of Revenue denied the corresponding refund claims that accompanied the amended returns. Kimberly Clark appealed to the tax court, arguing that its refund claims were allowable because the Legislature's enactment of the Multistate Tax Commission's apportionment formula was a contractual obligation that was unconstitutionally impaired when the 1987 Legislature repealed the provisions that authorized the use of that formula.

On June 19, 2015, the Minnesota Tax Court, sitting en banc, concluded that the Legislature's 1987 repeal of the apportionment formula was constitutional and therefore the Commissioner properly denied Kimberly Clark's refund claims. Kimberly Clark thereafter petitioned our court for review pursuant to Minn. Stat. § 271.10 (2014).[1] Because we conclude that the Legislature made no unmistakable commitment in 1983 when it enacted section 290.171 that was impaired when the Legislature later repealed portions of that statute, we affirm.

I.

The resolution of this appeal requires a basic understanding of Minnesota's taxation of the income earned by multi-state businesses and the multistate compact developed to facilitate uniformity in that process. We therefore begin with an overview of the relevant tax principles and statutes.

Minnesota uses the unitary-business/formula-apportionment method to determine a unitary business's local tax base. Minn. Stat. § 290.191 (2014).

[1] The Commissioner filed a cross-appeal to challenge the tax court's conclusion that she failed to adequately preserve her argument on the advisory nature of the compact.

Under this method, the income of a unitary business is combined, then allocated to individual states based on an apportionment formula that generates a fair share of the combined income attributable to each state for tax purposes. *See, e.g., Caterpillar, Inc. v. Comm'r of Revenue*, 568 N.W.2d 695, 696–97 (Minn.1997) (explaining that "[c]ombined reporting is an accounting device" used to properly and fairly approximate the income of a multi-state business that is attributable to the business's activities in the taxing state). Kimberly Clark constitutes a combined group for purposes of Minnesota's corporate franchise tax, with Kimberly–Clark Corporation as the reporting entity for the combined group. Kimberly Clark has done business in Minnesota since 1958 and has filed Minnesota tax returns since at least 1983. During the tax years in issue (2007, 2008, and 2009), Kimberly Clark engaged in a unitary, multistate business and therefore used an apportionment method to report its Minnesota tax liability.

It is undisputed that, during the tax years in issue, multistate businesses could: (1) apportion income to Minnesota using the apportionment formula set forth in Minn. Stat. § 290.191, subd. 2 (2008), which weighted one factor—sales—more heavily than the other two factors in the formula— property and payroll; or (2) petition the Commissioner of Revenue to permit the use of an alternative method to determine the taxpayer's income attributable to Minnesota. Minn. Stat. § 290.20, subd. 1 (2014) (providing for petition process). The dispute in this case concerns whether, during the tax years in issue, multistate businesses *also* enjoyed a third option, namely, the option to use the apportionment formula that was part of Article IV of Minn. Stat. § 290.171 (1984), between 1983 and its repeal in 1987. *See*

Firstar Corp. v. Comm'r of Revenue, 575 N.W.2d 835, 838 (Minn.1998) (explaining that "Article IV contained an optional apportionment formula that taxpayers could elect to use"); *see also* Act of May 28, 1987, ch. 268, art. 1, § 74, 1987 Minn. Laws 1039, 1098 (repealing Articles III and IV in Minn. Stat. § 290.171).

This optional apportionment formula, enacted in Minnesota in 1983, was based on model legislation that was part of the Multistate Tax Compact. The model legislation was developed by a state tax workgroup established in the wake of the United States Supreme Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959). *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 455–56, 98 S.Ct. 799, 54 L.Ed.2d 682 (1978) (reviewing the origins of the Multistate Tax Compact). The purposes of the Compact, as stated in Article I, included "[f]acilitat[ing] proper determination of state and local tax liability of multistate taxpayers" and "[p]romot[ing] uniformity or compatibility in significant components of tax systems." Minn. Stat. § 290.171, art. I, §§ 1–2.[2] To facilitate these and other goals, Articles III and IV, which are at the center of the parties' dispute in this appeal, incorporated almost verbatim the uniform act drafted by the National Conference of Commissioners on Uniform State Laws in 1957, known as the Uniform Division

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[2] The citations to the various articles of the Multistate Tax Compact are to section 290.171 as enacted by the 1983 Minnesota Legislature. *See* Minn. Stat. § 290.171 (1984). The original version of the model legislation that became the Multistate Tax Compact is available at http://www.mtc.gov/The–Commission/Multistate–Tax–Compact.

of Income for Tax Purposes Act. *See Firstar Corp.*, 575 N.W.2d at 838 (explaining the provisions of the Uniform Act). Article III, section 1, allowed a multistate taxpayer to "elect to apportion and allocate his income in the manner provided by the laws of [a member] state … without reference to this compact" or "in accordance with Article IV" of the Compact. Minn. Stat. § 290.171, art. III, § 1. Article IV, in turn, provided for the apportionment of income by a three-factor, equally weighted formula using sales, payroll, and property.[3] *Id.,* art. IV, § 4.

Article VI established the Multistate Tax Commission, which included one "member" from each "party state." *Id.*, art. VI, § 1. Article VI further required that any binding action of the Commission be approved by a majority of members, required the Commission to adopt bylaws, established the Commission's governing and financial structure, and enumerated the powers of the Commission. *Id.,* art. VI, §§ 2–4.

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[3] When the Legislature repealed Articles III and IV in 1987, *see* Act of May 28, 1987, ch. 268, art. 1, § 74, 1987 Minn. Laws 1039, 1098, an apportionment formula that used the same factors to apportion income by a fraction of the property factor plus the payroll factor plus the sales factor was codified. *See* Minn. Stat. § 290.191, subd. 2 (1988). The weight attributed to the individual factors has varied over time. In 2005, the Legislature amended section 290.191 to provide, beginning in 2007, for a graduated annual increase for the weight given to the sales factor with corresponding decreases in the property and payroll factors until 2014, when apportionment was based exclusively on the sales factor. Act of July 13, 2005, 1st Spec. Sess., ch. 3, art. 3, § 13, 2005 Minn. Laws 2273, 2330; *see also* Minn. Stat § 290.191, subd. 2(3)(b) (2014).

Article IX provided for arbitration of "disputes concerning apportionments and allocations" by taxpayers "dissatisfied with the final administrative determination of the tax agency of the state" and established procedures for such arbitrations. *Id.*, art. IX. Article X provided in section 1 that the Compact "shall enter into force when enacted into law by any seven States." *Id.*, art. X, § 1. Article X also provided: "Any party State may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal." *Id.*, art. X, § 2.

Finally, Article XII of the Compact provided that it "shall be liberally construed so as to effectuate the purposes thereof." *Id.*, art. XII. It further provided that the provisions of the Compact were "severable." *Id.* If any portion of the Compact was declared unconstitutional, "the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters." *Id.*

In 1987 the Minnesota Legislature repealed only Articles III and IV of Minn. Stat. § 290.171. Act of May 28, 1987, ch. 268, art. 1, § 74, 1987 Minn. Laws 1039, 1098. In 2013 the Legislature repealed the remaining provisions of Minn. Stat. § 290.171. Act of May 23, 2013, ch. 143, art. 13, § 24, 2013 Minn. Laws 2445, 2680. Kimberly Clark contends that by enacting section 290.171 in 1983, the option provided in Article III to use the equally weighted formula provided in Article IV was part of a binding multistate tax compact that Minnesota was obligated to continue to make available to taxpayers unless and until the State fully withdrew from the Compact. Thus, Kimberly Clark argues, the 1987 repeal of only Articles III and IV, without an accompanying full withdrawal from the Compact itself, did not terminate that binding obligation. Further, to conclude otherwise Kimberly Clark contends would impair a contractual obligation in violation of the Contract Clauses of the U.S. and Minnesota Constitutions. We must decide if the Minnesota Legislature's decision in 1987 to repeal Articles III and IV of section 290.171, without repealing the entirety of the statute, impaired any contractual obligation to the detriment of Kimberly Clark.

II.

Because we review only legal issues in this appeal, our standard of review is de novo. *See Nelson v. Am. Family Ins. Grp.,* 651 N.W.2d 499, 503 (Minn.2002) (holding that where the trial court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that appellate courts review de novo); *Progressive Specialty Ins. Co. v. Widness ex rel. Widness,* 635 N.W.2d 516, 518 (Minn.2001); *Lake Superior Paper Indus. v. State,* 624 N.W.2d 254, 258 (Minn.2001). We also presume that statutes are constitutional, *Greene v. Comm'r of Minn. Dep't of Human Servs.,* 755 N.W.2d 713, 724 (Minn. 2008); the party that asserts otherwise bears a heavy burden to overcome that presumption. *Caterpillar, Inc.,* 568 N.W.2d at 697–98 (stating that the challenger must demonstrate unconstitutionality beyond a reasonable doubt).

Kimberly Clark argues that Minnesota's 1983 enactment of the Multistate Tax Compact formed a binding contract that, until the State withdrew from the Compact in 2013, prevails over any conflicting state law.[4] The Commissioner disagrees, arguing that the Compact is advisory because it does not meet the criteria for a binding contract set out in *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System,* 472 U.S. 159, 105 S.Ct. 2545, 86 L.Ed.2d 112 (1985).

In its opinion, the tax court focused on whether the Commissioner of Revenue waived or preserved her argument that the Compact is an advisory model law, rather than a binding contract. The parties likewise devote considerable attention to this issue. We need not resolve this debate, however, because the fundamental legal issue we must decide is whether the Legislature's enactment of the Com-

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[4] Kimberly Clark cites to the Compact Clause of the U.S. Constitution, which states: "No State shall, without the Consent of Congress, … enter into any Agreement or Compact with another State…." U.S. Const. art. I, § 10, cl. 3. Read literally, the Compact Clause "would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States." *U.S. Steel,* 434 U.S. at 459, 98 S.Ct. 799. The U.S. Supreme Court has rejected this literal interpretation, stating, "application of the Compact Clause is limited to agreements that are directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States," *id.* at 471, 98 S.Ct. 799 (internal quotation marks and citations omitted), and thus, "[c]ongressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause." *Cuyler v. Adams,* 449 U.S. 433, 440, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981). As the parties agree that congressional consent was not required for the Multistate Tax Compact, Kimberly Clark's reliance on the Compact Clause is misplaced.

pact—specifically Articles III and IV—created a contractual obligation that prohibited the Legislature from later repealing Articles III and IV of section 290.171 without withdrawing completely from the Compact.[5]

III.

Although Kimberly Clark contends that by enacting the Compact, Minnesota ceded a portion of its own sovereignty in order to benefit from the collective action of multiple states, Kimberly Clark's principal argument is that by enacting the apportionment formula in 1983, the State created a binding obligation that could not be terminated without a full and complete withdrawal from the Multistate Tax Compact—something the State did not do until 2013. Thus, according to Kimberly Clark, the Minnesota Legislature violated the Contract Clauses of the United States and Minnesota Constitutions by simp-

[5] We do not necessarily agree that the Commissioner waived the argument that the compact is advisory in nature but conclude that we need not resolve this issue for the same reasons the tax court articulated: regardless of any waiver, the dispositive issue is whether this compact, as a matter of contract interpretation, constrained the authority of the Minnesota Legislature to repeal portions of a statute that adopted the compact. *See, e.g., Texas v. New Mexico,* 482 U.S. 124, 128, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987) (stating that even a compact approved by Congress is a contract that "must be construed and applied in accordance with its terms"). The Commissioner, in her cross-appeal, also raised an issue regarding the tax court's interpretation of a Florida apportionment statute. The Florida statute need not be construed to resolve the issues presented by this appeal. Accordingly, we decline to reach this issue as well.

ly repealing Articles III and IV of section 290.171. We disagree.

The Contract Clauses of the United States and Minnesota Constitutions prohibit the states from passing laws that "impair[ ] the Obligation of Contracts." U.S. Const. art. 1, § 10, cl. 1; *accord* Minn. Const. art. 1, § 11. Although we apply a three-part test to evaluate whether legislative action unconstitutionally impairs a contractual obligation, *see In re Individual 35W Bridge Litig.,* 806 N.W.2d 820, 834–35 (Minn.2011) (citing *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.,* 459 U.S. 400, 410–13, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983)), the "prohibition of the Contract Clause is not absolute." *Acton Constr. Co. v. Comm'r of Revenue,* 391 N.W.2d 828, 833 (Minn.1986). In any event, we do not reach constitutional issues if the appeal can be resolved on other grounds. *State ex rel. Humphrey v. Philip Morris USA, Inc.,* 713 N.W.2d 350, 355 (Minn.2006).

We therefore begin with the underlying premise of Kimberly Clark's argument: the adoption of the Multistate Tax Compact in a legislatively enacted statute was a binding contractual obligation that continued until the Legislature withdrew from the Compact by repealing the entirety of section 290.171. Stated otherwise, Kimberly Clark contends that by enacting section 290.171 in 1983, the Minnesota Legislature could not later amend that statute, it could only repeal the statute in its entirety. This argument has no support in the law. *See* Minn. Stat. § 645.27 (2014) ("The state is not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear, and unmistakable as to leave no doubt as to the intention of the legislature.").

Even assuming that the State undertook a contractual obligation to Kimberly Clark when it enacted Minn. Stat. § 290.171, the obligation was and is invalid. The Minnesota Constitution states that "[t]he power of taxation shall never be surrendered, suspended or contracted away." Minn. Const. art. X, § 1; *see also Anderson v. State,* 435 N.W.2d 74, 77 (Minn.App.1989) ("If the state did attempt to contract away its taxing power to appellants, the action would be invalid under Minn. Const. art. X, § 1."). Thus, regardless of the language of Minn. Stat. § 290.171, the State is constitutionally barred from surrendering, suspending, or contracting away its authority to amend or repeal tax provisions. "What the legislature has authority to enact it obviously has like authority to amend or even to repeal." *State ex rel. Bergin v. Washburn,* 224 Minn. 269, 273, 28 N.W.2d 652, 654 (1947); *see also Meriwether Minn. Land & Timber, LLC v. State,* 818 N.W.2d 557, 566 (Minn.App.2012) (stating, in rejecting claims for breach of contract and unconstitutional impairment of contract, that "any promise to be found in a statute is inherently limited by the legislature's power to amend a statute"); *Anderson,* 435 N.W.2d at 80 (rejecting a Contract Clause challenge to the repeal of a tax exemption, stating that when the Legislature enacts a law, it does not "intend[ ] to create private contractual or vested rights but merely declares a policy to be pursued until the legislature" decides otherwise (internal citation omitted)).

IV.

Having concluded that the mere act of enacting legislation did not bar the Legislature from later amending the enacted statute, we turn to the language of section 290.171. *See Texas v. New Mexico,* 482 U.S. 124, 128, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987). Based primarily on the so-called "unmistakability doctrine," the tax court concluded that nothing in the language of section 290.171 evidenced a clear, separate, and distinct promise by the State to refrain from amending or repealing Articles III and IV of the statute without also entirely withdrawing from the Compact.

The unmistakability doctrine is a rule of contract construction that provides the sovereign powers of a state cannot be contracted away except in 'unmistakable' terms." *Philip Morris USA,* 713 N.W.2d at 359. The unmistakability doctrine was developed in early Contract Clause cases "to protect state regulatory powers." *Id.* at 359–60 (citing *United States v. Winstar Corp.,* 518 U.S. 839, 871–74, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (plurality opinion)).

> Under this rule that all public grants are strictly construed, we have insisted that nothing can be taken against the State by presumption or inference, and that neither the right of taxation, nor any other power of sovereignty, will be held … to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.

Winstar Corp., 518 U.S. at 874–75, 116 S.Ct. 2432.

In *Philip Morris,* we examined the language of a settlement agreement between the State and certain tobacco companies, in which the State accepted payments from the companies in exchange for a release of the State's claims for damages made in the State's lawsuit against the tobacco companies. 713 N.W.2d at 353. When the Legislature, several years later, imposed a fee on tobacco companies to recoup some of the State's costs related to tobacco use, the tobacco companies sued, arguing that the release terms in the settlement agreement were a "complete bar" to that legislative effort. *Id.* at 353–54. We turned to the unmistakability doctrine to determine whether the settlement agreement supported "a waiver of the legislature's power to enact future revenue measures" in unmistakable terms. *Id.* at 362–63. We reviewed terms in the settlement agreement that released future liabilities, statutory liabilities, and "liabilities of any nature whatsoever," but concluded this language was "insufficiently specific to meet the requirements of" the doctrine because there was no express waiver of the State's right to impose future taxes or fees or regulate the tobacco industry. *Id.* at 363; *see also Winstar Corp.,* 518 U.S. at 874–75, 116 S.Ct. 2432 (plurality opinion) (holding in part that the doctrine of unmistakability did not bar enforcement of the relevant government contracts because the contracts' terms did not bind the government's exercise of its sovereign power); *State v. Great N. Ry. Co.,* 106 Minn. 303, 322–23, 119 N.W. 202, 205 (1908) (stating the contract "must be in language and terms too clear to admit of doubt").

Kimberly Clark argues that by enacting the apportionment option in Article III, the State "unmistakably … promised to be bound by the Compact's terms until it withdraws from the Compact or the member States collectively agree to amend the Compact." We find no unmistakable or express promise surrendering the State's legislative authority in section 290.171 as enacted in 1983. The statute did provide that the Compact is "enacted into law," Minn. Stat. § 290.171 (1984), and that a member state may withdraw from the Compact "by enacting a statute repealing the same." *Id.,* art. X. But nothing in the statute dictated the "all or nothing" position advanced by Kimberly Clark. At best, the statute is silent, but it is well established that "neither silence nor ambiguous terms in a contract will be construed as effecting a waiver of sovereign authority." *Philip Morris,* 713 N.W.2d at 360 (citing *Winstar,* 518 U.S. at 878, 116 S.Ct. 2432 ("[A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act …, nor will an ambiguous term of a … contract be construed as a conveyance or surrender of sovereign power.")). Nor can we conclude that the directive in Article XI to "implement" Article III of the Compact represents an unmistakable, clear promise to allow multistate taxpayers to utilize the optional apportionment formula until the State withdrew from the Compact. "[T]he legislature uses [mandatory language] to avoid giving discretion to officials, not to abdicate its future amendment authority." *Meriwether Minn. Land & Timber,* 818 N.W.2d at 566.

Kimberly Clark's argument in this appeal is, at base, a "claim for enforcement of contractual obligations" that cannot be recognized without limiting the Legislature's sovereign authority to repeal or amend its own statutory enactments. But, section 290.171 contains no language evidencing a clear surrender of sovereign power on the part of the State. As the tax court articulated, "articles III and IV clearly provide for the apportionment election, but do not contain a separate and distinct promise that the State would not alter or repeal the election." As a result, no provision in section 290.171 represents a clear and unmistakable promise by the State to refrain from amending or repealing Articles III and IV of the statute.[6]

For these reasons, the Legislature's enactment of Minn. Stat. § 290.171—specifically Articles III and IV—did not create a contractual obligation between the Minnesota Legislature and Kimberly Clark that prohibited the Legislature from later repealing Articles III and IV.

Affirmed.

STRAS, J., took no part in the consideration or decision of this case.

CHUTICH, J., not having been a member of this court at the time of submission, took no part in the consideration or decision of this case.

[6] Kimberly Clark raised an alternative argument, namely that the repeal of Articles III and IV unconstitutionally impaired its alleged contract with the State. Because we hold that no provision of section 290.171 provides a clear and unmistakable promise from the State to refrain from amending or repealing Articles III and IV of the statute, we need not reach Kimberly Clark's impaired-contract argument. The parties also presented arguments based on standing, the statute of limitations, waiver, and laches. We have considered those arguments and conclude that they need not be addressed based on our holding that the Legislature's enactment of Minn. Stat. § 290.171 did not create a contractual obligation between the Minnesota Legislature and Kimberly Clark prohibiting the Legislature from later repealing Articles III and IV of that statute.

APPENDIX B

STATE OF MINNESOTA
TAX COURT

COUNTY OF RAMSEY
REGULAR DIVISION

Kimberly-Clark Corporation &
Subsidiaries,

Appellants,

vs.

Commissioner of Revenue,

Appellee.

ORDER GRANTING THE COMMISSIONER'S MOTION FOR SUMMARY JUDGMENT

File No. 8670-R

Filed: June 19, 2015

This matter came before the Minnesota Tax Court, sitting *en banc,* on the parties' cross-motions for summary judgment.

Walter A. Pickhardt, Faegre Baker Daniels LLP, Minneapolis, Minnesota, and Amy L. Silverstein and Edwin P. Antolin, Silverstein & Pomerantz LLP, San Francisco, California, represent appellants Kimberly-Clark Corporation and its subsidiaries.

Alan I. Gilbert, Minnesota Solicitor General, and Alethea M. Huyser, Assistant Minnesota Attorney General, represent appellee Commissioner of Revenue.

We grant the Commissioner's motion for summary judgment and deny Kimberly-Clark's motion.

The undersigned judges, upon all the files, records, and proceedings herein, now make the following:

ORDER

1. The Commissioner's motion for summary judgment is granted.

2. Kimberly-Clark's motion for summary judgment is denied.

IT IS SO ORDERED. THIS IS A FINAL ORDER. LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT,

/s/____________________________
Bradford S. Delapena, Judge
MINNESOTA TAX COURT

/s/________________________
Thomas G. Haluska, Judge
MINNESOTA TAX COURT

DATED: June 19, 2015

MEMORANDUM

I. FACTUAL BACKGROUND

Appellant Kimberly-Clark Corporation and its subsidiaries (collectively Kimberly) constitute a combined group for purposes of Minnesota's corporate franchise tax.[1] Kimberly-Clark Corporation is the reporting entity for the combined group.[2] Kimberly has done business in Minnesota since 1958 and has filed Minnesota tax returns since at least 1983.[3] During the tax years in issue (2007, 2008 and 2009), Kimberly engaged in a unitary, multi-state business.[4] This case concerns the computation of Minnesota corporate franchise tax liability for Kimberly's unitary business conducted partly within and partly without Minnesota.

Under the unitary-business / formula-apportionment method of deriving local taxable income, a state combines the total income of a unitary business, then uses an apportionment formula to allocate to itself a fair share of that combined income for tax purposes. As the United States Supreme Court has succinctly explained, this approach

> rejects geographical or transactional accounting, and instead calculates the local tax base by first defining the scope of the "unitary business" of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income

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[1] Stip. ¶¶ 1, 4.

[2] Stip. ¶ 5.

[3] Stip. ¶ 6.

[4] Stip. ¶ 9.

> of that "unitary business" between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction.

Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 165 (1983). Minnesota uses the unitary-business / formula-apportionment method to determine a unitary business' local tax base. *See Comm'r of Revenue v. Associated Dry Goods, Inc.,* 347 N.W.2d 36, 38 (Minn. 1984); Minn. Stat. § 290.191, subd. 1(a) (2014) ("[T]he net income from a trade or business carried on partly within and partly without this state must be apportioned to this state as provided in this section.").

It is undisputed that during the tax years in issue, multistate businesses could: (1) apportion income to Minnesota using the apportionment formula set forth in Minn. Stat. § 290.191; or (2) *petition* the Minnesota Commissioner of Revenue to permit the use of an alternative apportionment formula. *See* Minn. Stat. § 290.20, subd. 1 (2014) (providing for such petitions). The dispute in this case concerns whether, during the tax years in issue, multistate businesses *also* enjoyed a third option, namely, the unfettered right to use the apportionment formula contained in Articles III and IV of Minn. Stat. § 290.171 (Minnesota's version of the Multistate Tax Compact) between 1983 and its repeal in 1987. A proper explication of this dispute requires us to briefly explain the emergence of the Multistate Tax Compact from a controversy over how states tax multistate businesses.

A. State Taxation of Multistate Businesses

In 1959, the United States Supreme Court held that a state could tax net income from the interstate operations of a foreign corporation whose only connections to the taxing state were the solicitation of sales within the state and the maintenance of a modest sales office. *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 453-57, 472 (1959). Within seven months of the Supreme Court's decision, Congress passed Public Law No. 86-272, Title II, 73 Stat. 555 (1959), which barred states from imposing an income tax on a business whose only activity in the state was (1) soliciting orders or (2) using an independent contractor to make sales in the state.[5] Congress also established the Special Subcommittee on State Taxation of Interstate Commerce to

> make full and complete studies of all matters pertaining to the taxation by the States of income derived within the States from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce, for the purpose of recommending to the Congress proposed legislation providing uniform standards to be observed by the States in imposing income taxes on income so derived.[6]

In 1964, the Special Subcommittee (known as the Willis Committee) issued the first in a series of reports.[7] The subcommittee characterized the existing

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[5] *See* Ex. J51 (H.R. Rep. No. 88-1480 (1964)), at 7-8.

[6] Ex. J51, at 8-9; *see* Pub. L. No. 86-272, Title 11, 73 Stat. 555, 556 (1959).

[7] Ex. J51.

system as one "which calls upon tax administrators to enforce the unenforceable, and the taxpayer to comply with the uncompliable."[8] The subcommittee further found "inescapable" the conclusion "that the voluntary adoption by the States of any kind of uniform system [for taxing the income of multistate businesses] is a slow and halting process, if not a virtual impossibility."[9] The subcommittee recommended that all corporate income be apportioned among the states by a two-factor formula based on property and payroll attributed to the state, with no provision for state-specific formulas.[10]

B. Development and Summary of the Multistate Tax Compact

Following the issuance of the Willis Report, the National Association of Tax Administrators convened a special meeting in January 1966 to both oppose pending federal legislation and "to suggest workable alternatives which would eliminate the need for the kind of congressional action embodied in" the federal legislation.[11] The text of the Multistate Tax Compact was released in December 1966 by the Council of State Governments.[12]

Article I of the Compact lists its purposes, including "[f]acilitat[ion of] proper determination of

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[8] Ex. J51, 598.

[9] Ex. J51, at 133.

[10] Ex. J52, at KC1135, KC1144, KC1162 ("[N]o modifications should be permitted which involve the use of specific allocation or of factors other than those based on tangible property and payroll.").

[11] Ex. J36, at KC11434.

[12] Ex. J32.

State and local tax liability of multistate taxpayers" and "[p]romot[ion of] uniformity or competibility [sic, compatibility] in significant components of tax systems."[13]

Article II sets out definitions of various terms used in the Compact, none of which need be recited here.[14]

Articles III and IV are at the center of the parties' dispute. Articles III and IV incorporate, almost verbatim, the Uniform Division of Income for Tax Purposes Act, a uniform act drafted by the National Conference of Commissioners on Uniform State Laws in 1957.[15] Article III, section 1, allows a multistate taxpayer to "elect to apportion and allocate his income in the manner provided by the laws of such State ... without reference to this compact" or "in accordance with Article IV."[16] Article IV, in turn, provides for the apportionment of income by a three-factor, equally-weighted formula using sales, payroll, and property:

> All business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.[17]

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[13] Ex. J32, at KC11505.

[14] Ex. J32, at KC11505-06.

[15] *See* Ex. J35, at KC11530 (explaining the history of the Uniform Division of Income for Tax Purposes Act).

[16] Ex. J32, at KC11506.

[17] Ex. J32, at KC11509.

Article IV, sections 10, 13, and 15, define the three factors.[18] Under Article III, section 1, the taxpayer may elect which apportionment formula to use "without reference to the election made" in any other state.[19] Article V, section 1, allows a credit against use tax on tangible personal property imposed in one state for use tax paid to another state with respect to the same property.[20] Article V, section 2 allows a seller to rely on an exemption certificate.[21]

Article VI establishes the Multistate Tax Commission, composed of one "member" from each "party State."[22] Article VI further requires that any action of the Commission be approved by a majority of members, requires the Commission to adopt bylaws, establishes the Commission's governing and financial structure, and enumerates the powers of the Commission.[23]

Article VII allows the Commission to "adopt uniform regulations for any phase of the administration" of income taxes.[24] It requires the Commission to submit such regulations "to the appropriate officials of all party States and subdivisions to which they might apply" and provides that each such state "shall

[18] Ex. J32, at KC11509-10.

[19] Ex. J32, at KC11506.

[20] Ex. J32, at KC11510-11.

[21] Ex. J32, at KC11511.

[22] Ex. J32, at KC11511-12.

[23] Ex. J32, at KC11511-12.

[24] Ex. J32, at KC11514.

consider any such regulation for adoption in accordance with its own laws and procedures."[25]

Article VIII allows any party state to ask the Commission to perform audits on its behalf and sets procedures for such audits.[26] Article VIII must be specifically adopted by a party state.[27]

Article IX provides for arbitration of "disputes concerning apportionments and allocations" by taxpayers "dissatisfied with the final administrative determination of the tax agency of the State" and establishes procedures for such arbitrations.[28]

Article X, also important to the parties' dispute, provides in section 1 that the Compact "shall enter into force when enacted into law by any seven States."[29] Article X, section 2, provides:

> Any party State may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal.[30]

Article XI states that "[n]othing in this compact shall be construed to," among other things, "[a]ffect the power of any State or subdivision thereof to fix rates of taxation, except that a party State shall be obligated to implement Article III [section] 2 of this

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[25] Ex. J32, at KC11514.

[26] Ex. J32, at KC11514-15.

[27] Ex. J32, at KC11514.

[28] Ex. J32, at KC11516.

[29] Ex. J32, at KC11517.

[30] Ex. J32, at KC11517.

compact."[31] Article III, section 2, allows a taxpayer whose only activity in a state consists of sales, and whose sales do not exceed $100,000 during the tax year, to "elect to report and pay any tax due on the basis of a percentage" of sales, and further requires the state to "adopt rates which shall produce a tax which reasonably approximates the tax otherwise due."[32]

Finally, Article XII of the Compact provides that it "shall be liberally construed so as to effectuate the purposes thereof."[33] It further provides that the provisions of the Compact "shall be severable."[34] If any portion of the Compact is declared unconstitutional, "the compact shall remain in full force and effect as to the remaining party States and in full force and effect as to the State affected as to all severable matters."[35]

By August 4, 1967, at least nine states (not including Minnesota) had enacted the Compact.[36]

C. Post-Adoption History

In 1972, Florida—one of the first states to adopt the Compact—repealed Articles III and IV. Act of December 16, 1971, ch. 71-980, § 1, 1971 Fla. Laws 51, 52 (Aff. of Pickhardt Ex. 1). At the same time, Florida provided by statute for the apportionment of income to Florida based on a three-factor, equally-

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[31] Ex. J32, at KC11518.

[32] Ex. J32, at KC11506-07.

[33] Ex. J32, at KC11518.

[34] Ex. J32, at KC11518.

[35] Ex. J32, at KC11518.

[36] Ex. J36, at KC11435.

weighted formula using a "property" factor, a "payroll" factor, and a "sales" factor. § 2, 1971 Fla. Laws at 52. After these legislative actions, the Multistate Tax Commission determined that Florida remained "a regular member in good standing of the Multistate Tax Compact and the Multistate Tax Commission."[37]

In August 1972, U.S. Steel Corporation and three other multistate corporations brought suit on behalf of themselves and all other multistate taxpayers threatened with audits by the Multistate Tax Commission. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 458 (1978). Plaintiffs sought two things: (1) declaratory judgment that the Multistate Tax Compact was invalid because (among other things), it had never received the consent of Congress under Article I, section 10, clause 3 of the United States Constitution; and (2) a permanent injunction barring the operation and enforcement of the Compact. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 417 F. Supp. 795, 797 (S.D.N.Y. 1976). The district court granted the Commission's motion for summary judgment. *Id.* at 805.

Plaintiffs appealed to the United States Supreme Court. *U.S. Steel*, 434 U.S. 452. In its brief to the Court, the Multistate Tax Commission characterized itself as "only [ ] an advisory agency" whose "work product is not binding on anyone," and the Compact as consisting "solely of uniform laws, an advisory mechanism for the uniform interpretation and application of those laws, and an advisory mechanism for otherwise developing uniformity and compatibility in

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[37] Ex. J43, at MDOR 00015.

state and local taxation of multistate businesses."[38] In addition, the Commission wrote:

> Under the Compact, the member states administer their own tax laws and do not delegate any of their authority to anyone. Each state, independent of the Compact, has the power to adopt uniform legislation, to audit Appellants' books and records on its individual account, to grant multistate taxpayers certain options in the determination of their tax liability, and to enter into reciprocal joint audit agreements with other states. By adoption of the Compact, each state has retained complete and absolute control over its own tax system.[39]

Noting that "[a]ny state is free to join or withdraw from the Compact at will," the Commission argued that "'there is a serious question as to whether the Compact is an 'agreement or compact'" within the meaning of the Compact Clause or merely a reciprocal arrangement among the member states.[40]

The Supreme Court affirmed the district court, agreeing that the Compact was not invalid for lack of Congressional approval. *U.S. Steel*, 434 U.S. at 479. The Supreme Court also commented, in part:

> This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the

[38] Ex. J54, at MDOR 03904-05, 3909.

[39] Ex. J54, at MDOR 03919-20.

[40] Ex. J54, at MDOR 03920-21.

> Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, ... each State is free to withdraw at any time.

Id at 473.

D. Minnesota's Adoption of the Compact

Against this backdrop, Minnesota enacted the Compact in 1983. Act of June 14, 1983, ch. 342, art. 16, § 1, 1983 Minn. Laws 2168, 2339-52 (codified as Minn. Stat. § 290.171). Minnesota did not, however, adopt certain portions of Article IV, specifically, section 4 (allocating "[r]ents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties"), section 5 (allocating "[n]et rents and royalties from real property"), section 6 (allocating "[c]apital gains and losses from sales of real property"), section 7 (allocating "[i]nterest and dividends"), and section 8 (allocating "[p]atent and copyright royalties").[41]

E. Minnesota's Repeal of Articles III and IV

Four years after adopting the Compact, Minnesota amended its version of the Compact to eliminate Articles III and IV. Act of May 28, 1987, ch. 268, art. 1, § 74, 1987 Minn. Laws 1039, 1098-1112. At the same time, Minnesota amended its equally-weighted three-factor apportionment formula, placing greater weight on the sales factor and correspondingly lesser weight on the property and payroll factors. §§ 75, 127, 1987 Minn. Laws 1039, 1112-19, 1156 (codified

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[41] *Compare* Ex. J44, art. IV, *with* Minn. Stat. § 290.171, art. IV (1984).

at Minn. Stat. § 290.191).[42] In proposing these changes, the Minnesota Department of Revenue offered that doing so "would simplify the tax, improve predictability, improve conformity with other states, and transfer tax burdens away from in-state corporations."[43] Nothing in the Department's proposal, however, addressed the legal effect of repealing only articles III and IV. Even after repeal of Articles III and IV, Minnesota remained a member in good standing of the Commission.[44] Indeed, Minnesota's then-Commissioner of Revenue was vice-chair and chair of the Commission in 1988 and 1989, respectively.[45]

F. Minnesota's Subsequent Withdrawal from the Compact

In 1993, California (which had adopted the Compact and its equally-weighted three-factor apportionment formula in 1974, *see Gillette Co. v. Franchise Tax Bd*, 147 Cal. Rptr. 3d 603, 608 (Cal. Ct. App. 2012), *review granted and opinion superseded*

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[42] Under Minn. Stat. § 290.191, subd. 2 (1987), as originally enacted, the apportionment formula assigned a weight of 70% to the proportion of the taxpayer's total sales made in Minnesota; a weight of 15% to the proportion of the taxpayer's total tangible property used in Minnesota; and a weight of 15% to the proportion of the taxpayer's total payroll either paid or incurred in Minnesota. *See* § 75, 1987 Minn. Laws at 1112-19. Over time, the weight given to sales increased; since 2013, no weight has been given to either the property or the payroll factor. *See* Minn. Stat. § 290.191, subd. 2(b) (2014) (setting out the percentages to be applied to each of the three factors starting with the 2007 taxable year).

[43] Ex. J47, at MDOR 03419.

[44] Stip. ¶¶ 23-24.

[45] Huddleston Aff. ¶ 11; Ex. J41, at 7 (Twenty-First Annual Report, Multistate Tax Commission).

sub nom. Gillette v. Franchise Tax Bd, 291 P.3d 327 (Cal. 2013) (No. S206587) (citing former § 38001, Cal. Stats. 1974, ch. 93, § 3, p. 193)), amended its statutory apportionment formula to give double weight to the sales factor, and made the new apportionment formula mandatory "[n]ot withstanding" the provisions of the Compact, *Id*. at 610 (citing § 25128, subd. (a), Cal. Stats. 1993, ch. 946, § 1, p. 5441). In 2010, the Gillette Company and others sought refunds of California state income taxes totaling about $34 million, claiming that they could continue to use the Compact's equally-weighted three-factor apportionment formula. *Id* at 606-07. The California Franchise Tax Board denied the requested refunds, but California's intermediate appellate court reversed. *Id.* at 619.[46]

In 2013, the Minnesota Department of Revenue recommended to the Legislature that Minnesota repeal Minn. Stat. § 290.171 in its entirety, citing the California court's decision in *Gillette.*[47] Although the Department indicated its "strong belie[f] that the leg-

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[46] Similar cases have been brought by other taxpayers in other states, with varying results. *See, e.g.*, *Int'l Bus. Machs. Corp. v. Dep't of Treasury,* 852 N.W.2d 865, 870 (Mich.), *reh. denied* (Mich. 2014) (concluding that the taxpayer was entitled to use the Compact's three-factor apportionment formula for tax year 2008 because the Michigan Legislature's enactment of the Business Tax Act did not repeal the Compact's apportionment formula, even by implication); *Health Net, Inc. v. Dep't of Revenue,* No. TC 5127 (Or. T.C. filed Jan. 17, 2013) (appeal of denial of refund claim pending); *Graphic Packaging Corp. v. Combs*, No. D-1-GN-12-003038 (Travis Cnty. Dist. Ct. Jan. 15, 2014) (order dismissing without opinion a petition denying claim for refund based on three-factor apportionment formula), appeal granted.

[47] Ex. J53, at MDOR 02297.

islature's repeal of Articles III and IV of the compact [in 1987] properly eliminated the option to use the Uniform Law to apportion income," the Department nevertheless recommended repeal of section 290.171 "in its entirety to avoid even the possibility going forward of the State having to pay refunds on some previously filed returns or lose future tax revenue" if *Gillette* were affirmed by the California Supreme Court, and Minnesota courts likewise concluded that Minnesota taxpayers could still use the Compact's apportionment formula.[48] In 2013, Minnesota repealed section 290.171 in its entirety. Act of May 23, 2013, ch. 143, art. 13, § 24, 2013 Minn. Laws 2445, 2680.[49]

II. PROCEDURAL BACKGROUND

Between 1989 and 2009, Kimberly and its subsidiaries determined their Minnesota taxable income using the non-equally-weighted apportionment formula found in Minn. Stat. § 290.191, subd. 2.[50]

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[48] Ex. J53, at MDOR 02298.

[49] In 2013, Oregon, Utah, and the District of Columbia also eliminated articles III.1 and IV from their respective statutes. Walter Hellerstein, *State Taxation* ¶ 9.01 The State Statutory Framework Governing Division of Corporate Income (3rd ed. 2015). According to the Multistate Tax Commission, by 2013 only six of its members continued to require use of an equally weighted apportionment formula. Ex. J55, at MDOR 03475 & n.23 (Brief of *Amicus Curiae* Multistate Tax Comm'n filed in *Int'l Business Machines Corp. v. Dept. of Treasury of State of Michigan*).

[50] Stip. ¶ 11; *see* Exs. J11-28 (Minnesota corporate franchise tax returns for years 1989-2006), Ex. J4, at Sch. M4A (2007 Minnesota corporate franchise tax return), Ex. J6, at Sch. M4A (2008 Minnesota corporate franchise tax return), Ex. J8, at Sch. M4A (2009 Minnesota corporate franchise tax return).

In April 2013, Kimberly filed amended tax returns and claims for refund for the 2007, 2008, and 2009 tax years, using the equally-weighted formula found in Articles III and IV of the Compact.[51] According to Kimberly's amended returns, it is entitled to a total refund of $1,205,749 for those three years combined.[52] By order dated October 14, 2013, the Commissioner denied Kimberly's refund claims.[53]

Kimberly timely appealed the Commissioner's order to this court.[54] Kimberly's notice of appeal alleged, among other things, that "Minnesota's attempted elimination of Articles III and IV from the Compact was invalid as a unilateral modification of core provisions of a binding interstate compact and contract entered into between Minnesota and the other signatory states," and that "Minnesota's attempted elimination of Articles III and IV from the Compact" violated the Compact Clause of the United

[51] Stip. ¶¶ 14-15; Ex. J3 (amended return for tax year 2007), Ex. J5 (amended return for tax year 2008), Ex. J7 (amended return for tax year 2009).

[52] Stip. ¶¶ 14-15, 20; *see* Exs. J3, J5, J7.

[53] Stip. ¶ 18; Ex. J2

[54] Not. Appeal (filed Dec. 12, 2013). As part of the notice of appeal, Kimberly also appealed "the failure by the Commissioner of Revenue … to allow or deny its claim for refund for the tax period ending December 31, 2010." Not. Appeal 1; *see* Minn. Stat. § 289A.50, subd. 7(d) (2014) (allowing the taxpayer to bring an action in the tax court if the commissioner fails to deny a claim for refund within six months of the filing of the claim). By stipulation filed on March 31, 2014, Kimberly dismissed its claims with respect to tax year 2010, without prejudice to either the right of the Commissioner to audit tax year 2010 or the right of Kimberly to appeal tax year 2010. Stip. Partial Dismissal Without Prejudice (filed March 31, 2014), ¶ 7.

States Constitution and the Contract Clauses of both the United States and Minnesota Constitutions.[55]

Because the notice of appeal raised constitutional issues, the parties jointly moved to refer those issues to the district court for decision or transfer back to this court and proposed specific transfer language.[56] *See Erie Mining Co. v. Comm'r of Revenue*, 343 N.W.2d 261, 264 (Minn. 1984) (prescribing the procedure for giving the tax court subject matter jurisdiction over constitutional questions). On September 5, 2014, this court stayed further proceedings in the appeal and referred the constitutional issues, as framed by the parties, to the Ramsey County District Court for decision or transfer back to this court.[57] By order dated September 15, 2014, the Ramsey County District Court transferred the constitutional issues, as framed by the parties, back to this court for decision.[58]

The parties filed their respective motions for summary judgment in October 2014.[59] As part of their cross-motions for summary judgment, the parties also filed a partial stipulation of facts and a joint

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[55] Not. Appeal ¶¶ 24-25.

[56] Joint Mot. Refer Issues District Ct. (filed Sept. 4, 2014). The parties framed the issue to be referred as follows: "Whether the Minnesota Legislature's repeal of the apportionment formula election codified in 1983 at Minn. Stat. § 290.171 (1983 Supp.) violated the Compact Clause of the United States Constitution and the Contract Clauses of the United States and Minnesota Constitution." Joint Mot. 1.

[57] Order (Sept. 5, 2014).

[58] Order of Transfer (Sept. 15, 2014).

[59] Kimberly's Not. Mot. Mot. Summ. J. (filed Oct. 21, 2014); Comm'r's Not. Mot. Mot. Summ. J. (filed Oct. 28, 2014).

exhibit list.[60] Briefs and supporting affidavits followed. The court heard oral argument on the parties' motions on March 19, 2015.[61]

III. THE PARTIES' PRINCIPAL CONTENTIONS

Kimberly contends that the Compact is a binding contract among party States,[62] which requires Minnesota, among other things, both: (1) to furnish multistate taxpayers with an election to use the Compact's equally-weighted three-factor apportionment

[60] Partial Stip. Facts (filed Oct. 21, 2014); Joint Ex. List Stip. Regarding Admissibility of Exhibits (filed Oct. 21, 2014).

[61] On April 14, 2014, in preparation for a pretrial conference call, this matter was assigned to The Hon. Joanne H. Turner. On April 21, 2014, the Commissioner filed a notice of removal, requesting the removal of Judge Turner. *See* Minn. R. Civ. P. 63.03 (allowing "[a]ny party or attorney" to file a notice of removal of a judge within 10 days after the party receives notice of the identity of the assigned judge). On April 24, 2014, the matter was reassigned to The Hon. Bradford S. Delapena. Order (Apr. 24, 2014). On November 4, 2014, Judge Delapena moved to hear the parties' cross-motions *en banc*. *See* Minn. Stat. § 271.04, subd. 1 (2014) ("Upon petition by a party to a case, or upon a motion by a Tax Court judge, and approval by a majority of the Tax Court, a case may be tried before the entire Tax Court."). The motion was approved by unanimous decision. Order En Banc Consideration (Nov. 4, 2014). The Commissioner subsequently objected to *en banc* consideration on the ground of the previous notice of removal of Judge Turner and requested that the matter be heard by Judge Delapena alone. Appellee Comm'r Revenue's Objection Order En Banc Consideration & Mot. Reset Case (filed Nov. 18, 2018). The court (Judge Turner abstaining) overruled the Commissioner's objections and denied the Commissioner's motion to reassign the matter. Order Overruling Appellee's Objections *En Banc* Consideration Denying Mot. Re-Assign Case (Jan. 16, 2015).

[62] Kimberly's Mem. Supp. Summ. J. 1, 10, 22 n.7, 29-30; Kimberly's Reply Mem. Supp. Summ. J. 6-10.

formula;[63] *and,* more importantly, (2) to refrain from exercising its sovereign power to eliminate the apportionment election unless and until it first withdraws from the Compact.[64] Although acknowledging that Article X, section 1, of the Minnesota Constitution provides, "[t]he power of taxation shall never be surrendered, suspended or contracted away," Kimberly asserts that—because enacting states may *reacquire* full sovereignty over apportionment by completely withdrawing from the Compact—Minnesota's 1983 Compact enactment did not violate this constitutional prohibition.[65] And, although implicitly acknowledging that a State's contractual surrender of sovereign power *normally* must be stated in unmistakably clear language, Kimberly argues that this requirement is inapplicable to interstate compacts, the very purpose of which (according to Kimberly) is to surrender sovereign power.[66] So reasoning, Kimberly contends that Minnesota validly enacted the Compact in 1983, and thereby contractually obligated itself both to furnish the apportionment election *and* to refrain from using its sovereign power to repeal the election.[67]

The United States and Minnesota Constitutions separately prohibit the State from passing any law

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[63] Kimberly's Mem. Supp. Summ. J. 6-7.

[64] Kimberly's Mem. Supp. Summ. J. 10, 12, 16, 30; Kimberly's Rely Mem. Supp. Summ. J. 1-2, 4.

[65] Kimberly's Mem. Supp. Summ. J. 17, 26-28; Kimberly's Reply Mem. Supp. Summ. J. 7, 9.

[66] Kimberly's Mem. Supp. Summ. J. 17; Kimberly's Reply Mem. Supp. Summ. J. 5, 7; Tr. 100-01, 111.

[67] Kimberly's Mem. Supp. Summ. J. 1, 8, 28, 32; Kimberly's Reply Mem. Supp. Summ. J. 2.

impairing the obligation of contracts, including its own.[68] Kimberly contends that Minnesota violated these constitutional prohibitions in 1987 by repealing Articles III and IV of the Compact, the sections furnishing the apportionment election. More specifically, Kimberly asserts that the Minnesota Legislature's 1987 exercise of sovereign power repealing the election both violated the terms of the Compact[69] and impaired the State's obligation under the Compact to furnish taxpayers the apportionment election.[70] Kimberly thus asserts that we must strike down the 1987 repeal as an unconstitutional legislative act, that we must recognize the continued vitality of Articles III and IV (notwithstanding the Legislature's purported repeal of those provisions), and that we must therefore allow Kimberly's refund claim based upon its invocation of the election.[71]

The Commissioner responds that, for numerous reasons, the Legislature's 1987 repeal of Articles III and IV was a valid legislative act that does not unlawfully impair the obligation of contracts. First, the Commissioner asserts that the Compact is actually a

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[68] U.S. Const. art. I, § 10, cl. 1 states: "No state shall … pass any … law impairing the obligation of Contracts." Minn. Const. art. I, §11 states: "No … law impairing the obligation of contracts shall be passed."

[69] Kimberly's Mem. Supp. Summ. J. 16-17, 32; Kimberly's Reply Mem. Supp. Summ. J. 2-6; Tr. 57. Although Kimberly insists that it alleges only impairnent of contract (not breach of contract), it repeatedly asserts that the Legislature violated the terms of the Compact by repealing Articles Ill and IV.

[70] Kimberly's Mem. Supp. Sumrn. J. 30-35; Kimberly's Reply Mem. Supp. Summ. J. 13-15.

[71] Kimberly's Mem. Supp. Summ. J. l, 10, 30, 34; Kimberly's Reply Mem. Supp. Summ. J. 2; Tr. 56-58, 60-61.

model law with only advisory effect.[72] Second, she contends that the State's purported entry into a contract obligating it to refrain from exercising sovereign taxing power to alter or repeal the apportionment election would be void *ab initio* as a violation of Minnesota Constitution Article X, section 1.[73] Third, the Commissioner argues that no Compact provision surrenders in unmistakable terms the State's sovereign power to alter or repeal the election and, again, that even unmistakably clear language purporting to do so would violate Article X, section 1.[74] Fourth, she contends that—even if the State had promised not to exercise its sovereign power to repeal the apportionment election—Kimberly could not enforce that contractual obligation because: (a) it was not a party to the contract, and lacks standing to enforce the obligation; (b) the 6-year statute of limitations for a contract-impairment claim based on a 1987 legislative act expired long ago; (c) Compact party States have waived enforcement of the particular obligation in question; and (d) enforcement is barred by the doctrine of laches.[75] Finally, the Commissioner argues that, even assuming the existence of both an enforceable contract right and a litigant who could demand its enforcement, Kimberly cannot demonstrate

[72] Comm'r's Mem. Supp. Summ. J. 2, 4, 18, 32.

[73] Comm'r's Mem. Supp. Summ. J. 14, 15-16; Comm'r's Reply Mem. Supp. Summ. J 2-3.

[74] Comm'r's Mem. Supp. Summ. J. 14, 17-19; Comm'r's Reply Mem. Supp. Summ. J. 3-4, 7-8.

[75] Comm'r's Mem. Supp. Summ. J. 14, 22-27; Comm'r's Reply Memo. Supp. Summ. J. 10-12.

that the 1987 repeal substantially impaired the right.[76]

IV. DECISIONAL STANDARDS

Kimberly asks us to rule as a matter of law that the Legislature's 1987 act of repealing Articles III and IV of the Compact violated the contract clauses of the United States and Minnesota Constitutions. The Commissioner asks us to rule as a matter of law that the 1987 repeal was a lawful and valid legislative act.

Summary judgment shall be rendered if the pleadings, the record in the case, and any supporting affidavits show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). When, as here, parties file cross-motions for summary judgment, they tacitly agree that there are no genuine issues of material fact. *Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790 (Minn. 1993). Summary judgment is a suitable vehicle for addressing the application of law to undisputed facts. *See, e.g., Anderson v. Christopherson,* 816 N.W.2d 626, 630 (Minn. 2012); *A.J. Chromy Constr. Co. v. Commercial Mech. Serv., Inc.,* 260 N.W.2d 579, 581 (Minn. 1977); *Sauter v. Sauter*, 244 Minn. 482, 486, 70 N.W.2d 351, 354 (1955).

"It is well settled that acts of the legislature are presumed to be constitutional and will not be declared unconstitutional unless their invalidity appears clearly or unless it is shown beyond a reasona-

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[76] Comm'r's Mem. Supp. Summ. J. 14, 27-30; Comm'r's Reply Mem. Supp. Summ. J. 12-13.

ble doubt that they violate some constitutional provisions." *Minn. Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319, 338 n.1 (Minn. 1984) (citation omitted) (internal quotation marks omitted). A court invokes every presumption "in favor of the constitutionality of an act of the legislature," *Contos v. Herbst*, 278 N.W.2d 732, 736 (Minn. 1979), including the presumption that "the legislature does not intend to violate the Constitution of the United States or of this state." Minn. Stat. § 645.17(3) (2014); *McLane Minn., Inc. v. Comm'r of Revenue*, 773 N.W.2d 289, 298 (Minn. 2009) (applying presumption). Courts exercise the power to declare a legislative act unconstitutional with extreme caution and only when absolutely necessary. *78th St. OwnerCo, LLC v. Cnty. of Hennepin*, 813 N.W.2d 409, 416 (Minn. 2012); *Dohs v. Holm*, 152 Minn. 529, 536, 189 N.W. 418, 421 (1922). The party challenging a legislative act carries the heavy burden of showing unconstitutionality beyond a reasonable doubt. *See, e.g.*, *Singer v. Comm'r of Revenue*, 817 N.W.2d 670, 675 (Minn. 2012).[77]

V. Analysis

To determine whether the Legislature's 1987 repeal of Articles III and IV impaired Minnesota's obligations under the Compact, we must first determine what, if any, obligations were created by the Legisla-

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[77] The Commissioner agrees that Kimberly is entitled to a refund in the requested amount if Kimberly was entitled to use the Compact's apportionment formula. Stip. ¶ 20. Likewise, Kimberly agrees that it is entitled to no refund if it was not so entitled. Stip. ¶ 21. Consequently, there are no disputed material facts in dispute and we can resolve this case by deciding the disputed legal issues.

ture's 1983 enactment of the Compact. This requires us to interpret the Compact.

A. Interstate Compacts Generally

Interstate compacts are "negotiated agreements among member states that have the status of both contract and statutory law." Caroline N. Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts* 2 (2006); *id.* at 128 (same); *see also Alabama v. N Carolina*, 560 U.S. 330, 351 (2010); *Doe v. Pennsylvania Bd of Prob. & Parole*, 513 F.3d 95, 105 (3d Cir. 2008) (emphasizing contractual nature of compacts). States enter compacts by enacting statutes containing model compact language. *See, e.g.*, *Doe*, 513 F.3d at 105. The United States Supreme Court has thus characterized compacts as a legislative means "for adjusting interstate controversies" that "adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938). Because interstate compacts can involve matters that concern states as sovereigns, compacts sometimes involve a partial surrender of sovereign power. *See, e.g.*, *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 314 (1990) (Brennan, J., concurring) ("[T]o achieve the practical advantages of coordinated planning and administration through the Port Authority, New York and New Jersey each has ceded partial control over the regulation and operation of transportation facilities in its own State since 1921 ...."); *Int'l Union of Operating Eng'rs, Local 542 v. Delaware River Joint Toll Bridge Comm'n*, 311 F.3d 273, 276 (3d Cir. 2002) ("By compacting together to form the Commission, New Jersey and Pennsylvania have each surrendered a portion of their sovereignty over certain Delaware River bridge operations in order to better serve the regional interest.").

The Compact Clause of the United States Constitution provides: "No State shall, without the Consent of Congress, ... enter into any agreement or compact with another State ...." U.S. Const. art. I, § 10, cl. 3. Read literally, this provision "would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States." *U.S. Steel*, 434 U.S. at 459. The United States Supreme Court, however, has rejected this literal interpretation, holding instead that the "application of the Compact Clause is limited to agreements that are directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Id.* at 471 (internal quotation marks and citations omitted). Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause as so interpreted. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

Congressional consent is nevertheless significant: it "transforms an interstate compact ... into a law of the United States ...." *Cuyler,* 449 U.S. at 438. Consequently, the Supreme Court has held "that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question." *Id.* Where Congressional consent is neither given nor required, an interstate compact is construed as state law. *See, e.g.*, *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991).

B. Interpretive Principles

Because compacts "have the status of both contract and statutory law," Broun et al., at 2, we set forth the governing principles for interpreting both statutes and contracts.

1. Statutes

"The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2014). Legislative intent is determined "primarily from the language of the statute itself." *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010) (quoting *Gleason v. Geary*, 214 Minn. 499, 516, 8 N.W.2d 808, 816 (1943)). Nevertheless, "[i]t is a cardinal rule of statutory construction that a particular provision of a statute cannot be read out of context but must be taken together with other related provisions to determine its meaning." *Kollodge v. F & L. Appliances, Inc.*, 248 Minn. 357, 360, 80 N.W.2d 62, 64 (1956). Courts thus "read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations," *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000), and to "harmonize and give effect to all its parts," *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 73-74, 93 N.W.2d 690, 698 (1958). Likewise, separate statutes in pari materia—those "relating to the same person or thing or having a common purpose"—are construed in light of one another. *Apple Valley Red–E–Mix, Inc. v. State*, 352 N.W.2d 402, 404 (Minn. 1984). Finally, it is presumed that "[i]n enacting statutes ... the legislature acts with full knowledge of existing law." *Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 244 (Minn. 2005).

"When the Legislature's intent is discernible from plain and unambiguous language, statutory construction is neither necessary nor permitted; and courts apply the statute's plain meaning." *State v. Jones*, 848 N.W.2d 528, 535 (Minn. 2014) (citing *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001)). Statutory language is ambiguous if it is reasonably susceptible to more than one interpretation. *Christianson v. Henke*, 831 N.W.2d 532, 539 (Minn. 2013). Multiple parts of a statute may be read together to ascertain whether the statute is ambiguous. *Id.* at 537.

2. Contracts

Correspondingly, the primary goal of contract interpretation is "to ascertain and enforce the intent of the parties." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). In so doing, the court looks to the contract as a whole. *Savela v. City of Duluth*, 806 N.W.2d 793, 801 (Minn. 2011). The intent of the parties is not ascertained "by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract ... as a whole." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 324 (Minn. 2003) (quoting *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.,* 279 N.W.2d 349, 354 (Minn. 1979)) (alteration in original); *Country Club Oil Co. v. Lee,* 239 Minn. 148, 151-52, 58 N.W.2d 247, 249 (1953) (holding that "[a]s far as is reasonably possible [a contract] is to be construed so as to harmonize all of its parts.").

"Where there is a written instrument, the intent of the parties is determined from the plain language of the instrument itself." *Travertine Corp. v. Lexington–Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). When a contract's language is clear and unambiguous, the court enforces the parties' agreement as expressed in the contract. *Caldas v. Affordable Granite* & *Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012). A contract is ambiguous if its language is susceptible to two or more reasonable interpretations. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010).

Contracting parties are presumed to know of laws that directly affect their rights. *Albrecht v. Sell*, 260 Minn. 566, 569-70, 110 N.W.2d 895, 897 (1961). Moreover, they are generally presumed to enter contracts "with reference to the existing rules and principles of law applicable to the subject matter." *Propp v. Johnson*, 211 Minn. 159, 163-64, 300 N.W. 615, 617 (1941).

Courts disfavor construing *government* contracts as relinquishing a state's sovereign powers, and have long held that any such relinquishment must be stated "in language and terms too clear to admit of doubt." *State v. Great N Ry. Co.,* 106 Minn. 303, 322, 119 N.W. 202, 205 (1908), *aff'd*, 216 U.S. 206 (1910). This clear-statement requirement is known as the unmistakability doctrine. *See generally United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996); *State ex rel. Humphrey v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 359-63 (Minn. 2006); *see also Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013) (applying clear-statement requirement to Congressionally approved interstate compact).

C. Compact Interpretation

Kimberly contends that Articles III and IV of the Compact unambiguously provide for the apportionment election and that, because section 290.171 enacts a multistate compact containing a withdrawal provision, the State bound itself to provide the election to multistate taxpayers unless and until it completely withdrew from the Compact.[78] Kimberly reasons that because the 1987 legislation repealing Articles III and IV was not a *complete* withdrawal, it violated the State's contractual obligation to provide the apportionment election until withdrawal, and was therefore unlawful as an impairment of that obligation.[79] The Commissioner acknowledges that Articles III and IV clearly provide for the apportionment election,[80] but asserts that the Compact is merely a model law with only advisory force.[81] In the alternative, she argues that even though Minnesota was obligated to provide the election *while Articles III and IV remained in force*, the State made no unmistakably clear promise not to amend or repeal it.[82] Reasoning that the State had no enforceable obligation not to amend the election, the Commissioner argues that the Legislature's 1987 repeal neither violated nor impaired a contractual obligation.[83]

[78] Kimberly's Mem. Supp. Summ. J. 7-10, 12, 24, 30; Kimberly's Reply Mem. Supp. Summ. J. 1-2, 4.

[79] Kimberly's Mem. Supp. Summ. J. 12, 29-30; Kimberly's Reply Mem. Supp. Summ. J. 2.

[80] Comm'r's Reply Mem. Supp. Summ. J. 7.

[81] Comm'r's Mem. Supp. Surnm. J. 2, 4, 18, 32.

[82] Comm'r's Mem. Supp. Summ. J. 14, 15-16; Comm'r's Reply Mem. Supp. Summ. J. 2-3.

[83] Comm'r's Mem. Supp. Summ. J. 21-22.

1. Binding Force

As a preliminary matter, we reject the Commissioner's claim that the Compact is actually a model law with only advisory effect.[84] Although *asserting* this position, the Commissioner never actually *argues* that the Compact creates no binding obligations—never identifies and applies criteria for determining the Compact's legal effect. Instead, she argues more narrowly, for example, that "[t]he enactment of section 290.171 did not form a contract surrendering the Legislature's authority to modify or repeal Articles III and IV of the Statute."[85] This ambiguous formulation can be read either: (a) as arguing that no contract was formed, or (b) as conceding that a contract was formed, but asserting that it contained no provision prohibiting the repeal of Articles III and IV.[86] Because the Commissioner never actually argues that the Legislature's enactment of section 290.171 did not form a binding contract, that argument is waived. *See, e.g.*, *State v. Krosch,* 642 N.W.2d 713, 719 (Minn. 2002) (finding argument waived when a "brief contain[ed] no argument or citation to legal authority in support of the allegations"). Consequently, we assume (without deciding) that the Compact was a contract among Minnesota and the other States that adopted it and that the Compact created binding obligations.[87]

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[84] Comm'r's Mem. Supp. Summ. J. 2, 4, 18, 32.

[85] Comm'r's Mem. Supp. Summ. J. 15.

[86] *See also* Comm'r's Mem. Supp. Summ. J. 16, 17, 18, 19, 20, 21, 31, 32 (making similarly qualified and therefore ambiguous assertions); Tr. 40-41, 86 (same).

[87] The Michigan Court of Claims recently concluded that the Compact (as drafted in 1966, presented to the States in 1967,

2. Unmistakability Doctrine

The rule of contract construction requiring that government contracts must be strictly construed against the relinquishment of sovereign powers is known as the "unmistakability doctrine." *Winstar*, 518 U.S. at 874 (plurality opinion); *Philip Morris*, 713 N.W.2d at 359.

a. Rationale and Requirements

As the United States Supreme Court has explained, "sovereign power ... governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Winstar,* 518 U.S. at 872 (ellipsis in original) (internal quotation marks omitted) (quoting *Bowen* v. *Pub. Agencies Opposed to Soc. Sec. Entrapment,* 477 U.S. 41, 52 (1986)). The doctrine recognizes that the Contracts Clause of the United States Constitution *can* limit the sovereign power of a State, but that this potential limitation can be problematic. *Id.* at 873-74. "Although [the Contracts] Clause made it

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and enacted by Michigan in 1969) was an "advisory compact" rather than a binding interstate compact, because it lacked the three "classic indicia" of a binding compact. *See Ingram Micro, Inc. v. Dep't of Treasury,* No. 11-000035-MT, slip op. at 7-12 (Mich. Ct. Cl. Dec. 19, 2014), *appeal docketed,* No. 325507 (Mich. Ct. App. Jan. 9, 2015); *Yaskawa Am. Inc. v. Dep't of Treasury,* No. 11-000077-MT, slip op. at 7-11 (Mich. Ct. Cl. Dec. 19, 2014), *appeal docketed*, No. 325475 (Mich. Ct. App. Jan. 8, 2015). In contrast to binding compacts, advisory compacts "cede no state sovereignty nor delegate any governing power to a compact-created agency." Broun et al., at 14. The California Court of Appeals previously concluded that the Compact (as enacted by California in 1974) was a binding interstate compact that had all three "classic indicia" of such compacts. *Gillette*, 147 Cal. Rptr. 3d at 613-15. For the reasons we explain, we need not and do not reach the issue.

possible for state legislatures to bind their successors by entering into contracts, it soon became apparent that such contracts could become a threat to the sovereign responsibilities of state governments." *Id.* at 874.

Courts thus developed the unmistakability doctrine in early Contracts Clause cases "to protect state regulatory powers." *Winstar*, 518 U.S. at 874; *Philip Morris*, 713 N.W.2d at 359-60.

> Under this rule that all public grants are strictly construed, we have insisted that nothing can be taken against the State by presumption or inference, and that neither the right of taxation, nor any other power of sovereignty, will be held ... to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.

Winstar, 518 U.S. at 874-75 (alteration in original) (internal quotation marks and citations omitted). As a result of this plain-statement requirement,

> a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.

Id. at 878. When a contract provision implicates a State's sovereign power, the doctrine requires the State to make a clear "second promise" to refrain from using that sovereign power to alter the primary promise. *Id.* at 887 (commenting in a case where the doctrine did *not* apply, "[t]here being no need for an unmistakably clear 'second promise' not to change the capital requirements, it is sufficient that the Government undertook an obligation that it subsequently found itself unable to perform"). The doctrine serves "the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power." *Id.* at 875.

The unmistakability doctrine does not apply to all government contracts. *Winstar*, 518 U.S. at 871, 879-84; *Philip Morris*, 713 N.W.2d at 360-63. Its applicability to a particular claim "turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government." *Winstar*, 518 U.S. at 879.

> At one end of the spectrum are obligations to which the unmistakability doctrine always applies, that is, claims for enforcement of contractual obligations that could not be recognized without effectively limiting sovereign authority .... At the other end of the spectrum are ordinary contracts, such as humdrum supply contracts, where sovereign power is not compromised by enforcement of the promise made, and the unmistakability doctrine therefore never applies.

Philip Morris, 713 N.W.2d at 361 (citations and internal quotation marks omitted).

The Minnesota Supreme Court has long applied the unmistakability doctrine to resist construing contracts as abrogating the State's sovereign power. For example, before the passage in 1906 of Article X, section 1, of the Minnesota Constitution (providing that "[t]he power of taxation shall never be surrendered, suspended or contracted away"), it was settled law that the State could "by contract, irrevocably bind itself not to exercise, or may irrevocably limit the exercise of, its power of taxation." *State ex rel. Hahn v. Young*, 29 Minn. 474, 538, 9 N.W. 737, 747 (1881). Despite the State's then clear *authority* to abrogate its own power of taxation, the Minnesota Supreme Court nevertheless resisted finding that this authority had been exercised.

> The right of a state government ... by contract to limit its power of taxation, is a doctrine too firmly established to admit of discussion at this time.... The contract to be irrepealable, however, must clearly and conclusively appear. The power of taxation is a sovereign prerogative; its exercise is indispensable to the maintenance of the state and its institutions, and no inferences or presumptions arising from indefinite and uncertain language that it has relinquished, limited, or abandoned the right as to any particular person or corporation should be indulged by the court in support of an immunity not enjoyed by all taxpayers alike. *Therefore the contract is strictly to be construed, and must be in language and terms too clear to admit of doubt.*

Great N Ry., 106 Minn. at 322, 119 N.W. at 205 (emphasis added) (citations omitted). Thus, even when the Minnesota Constitution *permitted* surrender of the taxing power, the supreme court resisted construing contracts to effect that purpose. All ambiguity must be resolved in favor of reserving the State's sovereign power. *Id.* at 323; *see also Minneapolis Gas*

Co. v. Zimmerman, 253 Minn. 164, 184, 91 N.W.2d 642, 656 (1958) ("[A]ll contracts made by the state are entered into subject to the implied condition that they are ever subordinate to a reasonable and proper exercise of the state's inalienable police power.").

The Minnesota Supreme Court most recently applied the unmistakability doctrine to reject a claim by cigarette manufacturers that their 1998 settlement agreement with the State contractually prohibited the Legislature from subsequently imposing a health impact fee on cigarettes. *Philip Morris,* 713 N.W.2d at 353. The court ruled that imposition of the fee "does not violate the settlement agreement because the terms of the settlement agreement do not unmistakably relinquish the state legislature's sovereign authority to impose such an exaction on tobacco products." *Id*. Along the way, the court rejected the manufacturers' claim that the doctrine did not apply because the settlement agreement was a simple risk-shifting instrument that could be enforced without implicating sovereign power. *Id.* at 360-63. "[T]he very relief respondents seek requires the state either to exempt respondents from the exercise of the state's sovereign powers to tax and to regulate, or to surrender those powers with respect to the cigarette industry altogether." *Id*. at 361.

b. Applicability

We reject Kimberly's contention that the unmistakability doctrine does not apply to interstate compacts.[88] Indeed, a treatise addressing the modern use

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[88] Kimberly's Mem. Supp. Summ. J. 17; Tr. 51 ("The fact that this is a Compact, an interstate compact, … that's the reason that the State can't repeal Articles 3 and 4. A compact does not

of interstate compacts indicates that they *exemplify* implementation of the unmistakability doctrine, rather than representing an exception to that doctrine: "Many compacts constitute an unmistakable surrendering of state authority that is binding on subsequent state legislative action. Such compacts are, therefore, examples of the so-called 'unmistakability doctrine' at work." Broun et al., at 20.

Kimberly's assertion that the doctrine does not apply to interstate compacts is further belied by *Tarrant Regional Water District v. Herrmann*, adjudicating a dispute involving the Red River Compact, which allocates water rights within the Red River basin among the States of Oklahoma, Texas, Arkansas, and Louisiana. 133 S. Ct. 2120, 2125 (2013). Petitioner Tarrant Regional Water District, a Texas state agency responsible for providing water to north-central Texas, alleged that "it [wa]s entitled to acquire water under the Compact from within Oklahoma and that therefore the Compact pre-empt[ed] several Oklahoma statutes that restrict out-of-state diversions of water." *Id.* Specifically, Tarrant claimed that under a compact provision that did *not* mention state borders, it had "the right to cross state lines and divert water from Oklahoma located in [a particular] subbasin ...." *Id.* at 2129.

The Supreme Court commented that "[u]nraveling the meaning of [the contested provision's] silence with respect to state lines is the key to resolving whether the Compact pre-empts the Oklahoma water statutes." *Tarrant,* 133 S. Ct. at 2130. The Court concluded that problems with Tarrant's

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need to say, you may not repeal this provision, or you may not repeal any provision. That's the premise of a compact.").

proposed textual interpretation "suggest that [the provision's] silence is ambiguous regarding cross-border rights under the Compact." *Id.* at 2132. The Court therefore turned "to other interpretive tools to shed light on the intent of the Compact's drafters." *Id.* The first of these tools was "the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories." *Id.*

The Court commented: "The background notion that a State does not easily cede its sovereignty has informed our interpretation of interstate compacts." *Tarrant*, 133 S. Ct. at 2133. In spite of this longstanding principle, Tarrant asked the Court "to infer from [the provision's] silence regarding state borders that the signatory States ha[d] dispensed with the core state prerogative to control water within their own boundaries." *Id.* at 2132-33. The Court not only rejected this request, but concluded that a precisely contrary inference was warranted:

> [A]s the above demonstrates, States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence. We think that the better understanding of [the provision's] silence is that the parties drafted the Compact with this legal background in mind, and therefore did not intend to grant each other cross-border rights under the Compact.

Tarrant, 133 S. Ct. at 2133.

Based on the foregoing, we conclude that the unmistakability doctrine's clear-statement requirement applies to interstate compacts, and that compacts are drafted with this requirement in mind. *See Ingram*, No. 11-000035-MT, slip op. at 10-11 (applying *Tarrant* to the Multistate Tax Compact). Kimberly's effort to exempt compacts from the doctrine[89] is nothing more than an attempt to impermissibly shift the burden to the Commissioner to demonstrate that some provision of the Compact expressly *reserved* to the State its sovereign power. *See Winstar*, 518 U.S. at 878 (noting that "unmistakability [i]s needed for waiver [of sovereign power], not reservation").

We further conclude that the doctrine applies to Kimberly's Contract Clause claim in particular. Kimberly contends that the Legislature's 1987 repeal of the election unconstitutionally impaired the State's alleged obligation under the Compact to furnish taxpayers the election.[90] Kimberly thus asserts that we must strike down the 1987 repeal as an unconstitutional legislative act, recognize the continued vitality of Articles III and IV during the tax years at issue, and allow Kimberly to invoke the election for those tax years.[91] Plainly, Kimberly's requested relief "would block the exercise of a sovereign power of the [State]." *Winstar*, 518 U.S. at 879. First, it would retroactively block the Legislature's sovereign act of repealing the election. Second, it would prevent the

[89] Tr. 103 ("[W]hen the Compact allows a state to deviate from [its] terms, it expressly says this provision is optional.").

[90] Kimberly's Mem. Supp. Summ. J. 30-35; Kimberly's Reply Mem. Supp. Summ. J. 13-15.

[91] Kimberly's Mem. Supp. Summ. J. 1, 10, 30, 34; Kimberly's Reply Mem. Supp. Summ. J. 2; Tr. 56-58, 60-61.

Commissioner from enforcing existing Minnesota law, which does *not* include the election.[92]

c. Analysis

The unmistakability doctrine requires that "a contract purporting to limit the state's right to tax in the future 'is to be strictly construed, and must be in language and terms too clear to admit of doubt.' " *Philip Morris*, 713 N.W.2d at 360 (internal quotation marks and citation omitted); *see also Winstar,* 518 U.S. at 875. Although Kimberly asserts that Articles III and IV provide for the apportionment election "[i]n unmistakable terms,"[93] its written submissions do not identify any Compact provision satisfying the unmistakability doctrine. During oral argument, Kimberly again declined to identify any *particular* Compact provision satisfying the doctrine, and in-

[92] The unmistakability doctrine's purpose of constitutional avoidance is doubly implicated in the present case. First, application of the doctrine may eliminate the need to address Kimberly's Contracts Clause claim that the 1983 Compact enactment limited the Legislature's subsequent authority to control apportionment. *See Winstar*, 518 U.S. at 875 (explaining that the doctrine was developed to avoid difficult constitutional questions concerning "the extent of state authority to limit the subsequent exercise of legislative power"). In this case, moreover, application may also eliminate the need to address an additional constitutional issue raised by the Commissioner: whether the 1983 enactment of the Compact violated Article X, section 1, of the Minnesota Constitution, which provides that "[t]he power of taxation shall never be surrendered, suspended or contracted away." Comm'r's Mem. Supp. Summ. J. 15-16, 21; Comm'r's Reply Mem. Supp. Summ. J. 2-3.

[93] Kimberly's Mem. Supp. Summ. J. 6; *id.* at 17 (arguing that "the Compact's terms are plain and unmistakable – they require that the election be provided to taxpayers").

stead pointed to the document as a whole and to its status as an interstate compact.[94]

We have already rejected Kimberly's assertion that the unmistakability doctrine does not apply to interstate compacts. We now address Kimberly's apparent contention that the language of Articles III and IV prohibited Minnesota from revoking the apportionment election (unless it first completely withdrew from the Compact). Article III(1) provides that any qualifying taxpayer "may elect to apportion and allocate his income in the manner provided by the laws of such state ... without reference to this compact, or may elect to apportion and allocate in accordance with article IV." Minn. Stat. § 290.171, Art. III(1). Kimberly argues that this provision "requires party states to allow taxpayers to elect either the Compact Formula or a party state's own alternative State Formula"[95] and concludes on this basis that "[t]he election provision is not an option for party states."[96]

The Commissioner acknowledges the premise, but argues that it does not support Kimberly's conclusion: "There is no dispute that a taxpayer could use the election prior to the repeal of articles III and IV in 1987. The issue here is whether section 290.171 prohibited the legislature from repealing articles III and IV."[97] We agree with both the Commissioner's formulation of the issue and her assertion that nothing in the text of Articles III and IV constitutes a

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[94] Tr. 100-04.

[95] Kimberly's Mem. Supp. Summ. J. 16.

[96] Kimberly's Mem. Supp. Summ. J. 16.

[97] *See* Comm'r's Reply Mem. Supp. Summ. J. 7.

promise that Minnesota would not amend or repeal the election. Put another way, Articles III and IV clearly provide for the apportionment election, but do not contain a separate and distinct promise that the State would not alter or repeal the election. If the Compact contains such a separate promise, it must be located elsewhere.

A treatise on interstate compacts contains an example of compact language clearly surrendering sovereign power against the background of the unmistakability doctrine:

> A perfect example of states ceding their sovereignty through an interstate compact can be found in Article XIV, Sections A and B of the Interstate Compact for Adult Offender Supervision. These two sections of the compact provide, in part, that (1) "[a]ll compacting States' laws conflicting with this Compact are superseded to the extent of the conflict;" and (2) "All lawful actions of the Interstate Commission, including all Rules and By-laws promulgated by the Interstate Commission, are binding upon the Compacting States."

Broun et al., at 22 (quoting Interstate Compact for Adult Offender Supervision (2002)).

As Kimberly acknowledges,[98] the Compact contains no language similarly stating that Minnesota laws conflicting with the Compact are superseded or that actions of the Multistate Tax Commission are binding upon Minnesota. The absence of such a provision "counts heavily" against Kimberly's interpre-

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[98] Tr. 100-04; *see also* Comm'r's Reply Mem. Supp. Summ. J. 3.

tation that the Compact surrenders sovereign power. *See Tarrant*, 133 S. Ct. at 2133 (noting that many compacts "feature language that unambiguously permits signatory States to cross each other's borders to fulfill obligations under the compacts" and concluding that "[t]he absence of comparable language in the Red River Compact counts heavily against Tarrant's reading of it."). Although Article IX of the Compact, titled "Arbitration," provides in part that "[e]ach party state ... hereby consents to the arbitration as provided herein, *and agrees to be bound thereby*," Minn. Stat. § 290.171, Art. IX(3) (emphasis added), there is no similar language binding party States to other Compact provisions generally, or to Articles III and IV, in particular. Moreover, the United States Supreme Court has concluded that the Compact involves no "delegation of sovereign power to the [Multistate Tax] Commission." *U.S. Steel*, 434 U.S. at 453. No Compact provision in clear and unmistakable language bars Minnesota from amending or repealing the apportionment election.

In response to a parallel invocation of the Compact election by IBM in Michigan, three dissenting Justices similarly concluded that the Compact created "no contractual obligation to strictly adhere to Articles III and IV." *Int'l Bus. Machines Corp. v. Dep't of Treasury,* 852 N.W.2d 865, 888 (Mich. 2014) (McCormack, J., dissenting). This conclusion rested, in large part, on "principles of state sovereignty." *Id.* Under Michigan law, as under Minnesota law, "surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments." *Id.* In the dissenters' view, "[t]he Compact's silence on the effect of a member state's ability to elect an exclusive apportionment formula indicates that Michigan did not contract away its right to do exactly that." *Id.*[99]

We agree with the Commissioner that although Articles III and IV unambiguously provide for the apportionment election,[100] no Compact provision contains or constitutes a separate clear and unmistakable promise that the State would not alter or repeal the election.[101] *See Ingram*, No. 11-000035-MT, slip op. at 10 (noting that although the Compact expressly permits unilateral withdrawal, "[w]hether unilateral *modification* is permitted under the Compact is less clear and is not directly addressed under the Compact."). Accordingly, we conclude that no Compact provision satisfies the unmistakability doctrine's clear-statement requirement.[102]

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[99] Because the *IBM* majority concluded that the Michigan Legislature had never repealed the Compact, *IBM,* 852 N.W.2d at 872-77, and accordingly that "the Compact's election provision remained in effect" for the tax years in issue, *id.* at 876, the majority had no occasion to consider whether the Compact contractually obligated Michigan not to alter the election.

[100] Comm'r's Reply Mem. Supp. Summ. J. 7.

[101] Comm'r's Mem. Supp. Summ. J. 18; Comm'r's Reply Mem. Supp. Summ. J. 3-4.

[102] In considering a California taxpayer's claim that the Compact (as adopted by California in 1974) prohibited the State from eliminating the apportionment election, the California Court of Appeals concluded that the Compact surrendered sovereign authority: "[S]ignatory states cede a level of sovereignty over matters covered in a compact.… Because the Compact is both a statute and a binding agreement among sovereign signatory states, *having entered into it, California could not, by subsequent legislation, unilaterally alter or amend its terms*." *Gillette*, 147 Cal. Rptr. 3d at 616 (citations omitted). The court found a contractual surrender of sovereign power, however, without applying the unmistakability doctrine's clear-statement

Kimberly implies in the alternative that a surrender of sovereignty can be *inferred* from the Compact's audit and withdrawal provisions.[103] We disagree.

The Compact's audit provision, Article VIII, "authorizes any member State ... to request that the Commission perform an audit on its behalf." *U.S. Steel*, 434 U.S. at 457. Article VIII, Section 3, in turn, authorizes the Commission "as the State's auditing agent, [to] seek compulsory process in aid of its auditing power in the courts of any State that has adopted Art. VIII." *Id.* It also provides that "[t]he provisions of this paragraph apply only to courts in a state that has adopted this article." Minn. Stat. § 290.171, Art. VIII(3).

Based on the foregoing language, Kimberly infers: (1) that States were free *not* to adopt Article VIII; and, by negative implication, (2) that they were therefore *required* to adopt the Compact's remaining articles.[104] Then, characterizing the remaining arti-

requirement. *See, e.g.*, *Standard Oil Co. of Cal. v. Johnson*, 76 P.2d 1184, 1189 (Cal. 1938) ("The taxing power of the state is never presumed to have been relinquished unless the language in which the surrender is made is clear and unmistakable.") (citation and internal quotation marks omitted); *Coso Enerv Developers v. Cnty. of Inyo*, 19 Cal. Rptr. 3d 669, 685 (Cal. Ct. App. 2004) (applying doctrine). We note that *Gillette* was filed on October 2, 2012, approximately eight months before *Tarrant* reiterated that the clear-statement requirement applies to interstate compacts. *Tarrant*, 133 S. Ct. at 2133. In any event, applying the unmistakability doctrine, we conclude that the Compact does not surrender state sovereign power.

[103] Kimberly's Mem. Supp. Summ. J. 7-8, 17; Kimberly's Reply Mem. Supp. Summ. J. 7; Tr. 51, 103-04.

[104] Kimberly's Mem. Supp. Summ. J. 17; Tr. 51-52.

cles as "mandatory,"[105] Kimberly argues in substance that party States surrendered the sovereign authority to alter or repeal the mandatory provisions, including Articles III and IV.[106] There are several flaws in this reasoning.

First, other Compact language undermines Kimberly's initial inference that all Compact provisions other than Article VIII were mandatory. Article XI provides in part that nothing in the Compact shall be construed to "[a]ffect the power of any state ... to fix rates of taxation, except that a party state *shall be obligated to implement article III 2.*" Minn. Stat.

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[105] Kimberly's Mem. supp. Summ. J. 6-8, 15-17; Tr. 51-52, 108-09.

[106] Kimberly's Mem. Supp. Summ. J. 17. We say "argues in substance" because Kimberly avoids *directly* stating that Minnesota surrendered sovereign power to alter or repeal the election Instead, Kimberly asserts *generally* that "parties to an interstate compact cede some sovereignty." Kimberly's Reply Mem. Supp. Summ. J. 7; Tr. 101 (asserting that interstate compacts "cede some sovereign authority"). Then, invoking the notion of "mandatory" provisions, *see* Kimberly's Mem. Supp. Summ. J. 17 ("the Compact is express when it allows variations from its terms"), Kimberly finesses the sovereignty issue by asserting that Minnesota "simply obligated itself to comply with the Compact's terms until such time as it withdrew in accordance with the Compact." Kimberly's Mem. Supp. Summ. J. 17. Accordingly, what Kimberly means by a "mandatory" provision is one that the state may not alter or repeal. Thus, in substance, Kimberly argues that Minnesota lacked sovereign authority to alter or amend the legislation that established the apportionment election unless and until it completely withdrew from the Compact. As to Chief Judge Turner's concurrence, we are unaware of any principle that prohibits a court from critically evaluating a litigant's submissions and plainly stating the true import of its arguments. We trust that the careful reader, in particular, will perceive that this is precisely what we have done.

§ 290.171, Art. XI(a) (emphasis added). If, as Kimberly asserts, all Compact provisions other than Article VIII were mandatory, then the emphasized passage *expressly* making Article III(2) mandatory would be superfluous. Moreover, by specifically mandating the implementation of Article III(2) *alone,* Article XI(a) suggests that all provisions other than Article III(2) were *optional.* Article VIII(3) actually supports this interpretation, because it specifically contemplates that some party States might not adopt Article VIII.

In any event, there is a second, more fundamental, problem with Kimberly's reasoning. Even if Articles III and IV were "mandatory," this would establish only that party States had to adopt the articles and to honor the obligations stated therein *while those articles remained in force.* The question presented by the unmistakability doctrine, however, is *not* whether government contracts create binding obligations; the entire impetus for the doctrine arises from the assumption that they surely do, and can thus prevent the proper exercise of state regulatory powers. *Winstar*, 518 U.S. at 874-75. Specifically to avoid the difficult constitutional questions that arise *because* government contracts bind, *Id.* at 872, the doctrine also assumes that, "absent an unmistakable provision to the contrary, contractual arrangements, including those to which a sovereign itself is a party, remain subject to subsequent legislation by the sovereign," *Id.* at 877 (citation and internal quotation marks omitted). The determinative question for unmistakability purposes is thus whether the Compact includes a "second promise" clearly indicating that party states were surrendering the sovereign power generally assumed to govern all contracts. *Id.* Even if Articles III and IV are considered "mandatory," this does not *resolve* the unmistakability inquiry; to the contrary, it actually *triggers* that inquiry.

Finally, Kimberly's assertion that Article VIII satisfies the unmistakability doctrine fails on the merits. Section 3 provides simply that its provisions "apply only to courts in a state that has adopted this article." Minn. Stat. § 290.171, Art. VIII(3). This limitation upon the applicability of a single Compact provision is not a clear and unmistakable promise that party states are surrendering sovereign power. Nor can Kimberly's tenuous inference of surrender (as previously summarized) satisfy the doctrine because "[n]othing can be taken against the State by presumption or inference." *Winstar,* 518 U.S. at 874 (citation and internal quotation marks omitted).

We likewise reject Kimberly's argument that the Compact's withdrawal provision, Article X(2), satisfies the unmistakability doctrine.[107] That section provides: "Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal." Minn. Stat. § 290.171, Art. X(2). Kimberly's argument—which again conflates whether the Compact is binding with whether it surrenders sovereign power—runs as follows: "The withdrawal provision supports the binding nature of the Compact.... Because parties to an interstate compact cede some sovereignty, a withdrawal provision allows a state to regain complete sovereignty. Many other compacts contain similar withdrawal provisions."[108] The Commissioner responds that the with-

[107] Kimberly's Reply Mem. Supp. Summ. J. 7; Tr. 7, 66, 104.

[108] Kimberly's Reply Mem. Supp. Summ. J. 7 (citation omitted).

drawal provision is silent concerning whether Articles III and IV may be repealed.[109]

We conclude that the withdrawal provision does not satisfy the unmistakability doctrine. First, the withdrawal provision addresses how a party State may entirely withdraw from the agreement, not whether party States are surrendering sovereign power to legislate with respect to the Compact's subject matter. We thus agree with the Commissioner that Article X(2) is silent concerning the surrender of sovereignty. Second, some compacts containing withdrawal provisions *also* contain separate provisions expressly indicating that compact provisions prevail over conflicting state laws and that actions of the compact's commission are binding on party States. *See, e.g.*, Interstate Compact for Adult Offender Supervision, Art. XII(A) ("Withdrawal"), Art. XIV(A)-(B) ("Binding Effect of Compact and Other Laws"). The inclusion of such separate and express provisions demonstrates an understanding that the surrender of sovereignty cannot be accomplished by means of a standard withdrawal provision that is silent as to sovereignty. As the United States Supreme Court has noted, compacts are drafted against the legal background of the unmistakability doctrine's clear-statement requirement, and a surrender of state sovereignty will not be inferred from ambiguity or silence. *Tarrant*, 133 S. Ct. at 2133.

d. Unmistakability Conclusion

The unmistakability doctrine applies only when "enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the

[109] Comm'r's Reply Mem. Supp. Summ. J. 3-4; Tr. 21.

Government." *Winstar*, 518 U.S. at 879; *see also Philip Morris*, 713 N.W.2d at 361. The doctrine applies here because Kimberly: (1) asserts that the State contractually promised not to alter the apportionment election provided by Articles III and IV of the Compact; and (2) asks that we invalidate the 1987 repeal of Articles III and IV and allow it to invoke the election for the tax years at issue, remedies that would block the exercise of State sovereign power. Applying the doctrine, we conclude that no Compact provision constitutes a clear and unmistakable promise to refrain from using the State's sovereign power to alter the apportionment election provided by Articles III and IV.[110]

3. Silence as Ambiguity Concerning Surrender of Sovereign Power

Although application of the unmistakability doctrine reveals that the Legislature did not—by enacting the Compact—promise to refrain from using its sovereign power to alter the apportionment election, consideration of both the Compact's history and of the party States' course of performance under the Compact furnishes an alternative route to the same conclusion.

As *Tarrant* indicates, interstate compacts are drafted against the legal background of the unmistakability doctrine's clear-statement requirement. *Tarrant*, 133 S. Ct. at 2133. Thus, absence from the Compact of a provision clearly surrendering sover-

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[110] We have no occasion to consider or decide whether the doctrine would apply to other claims involving the Compact (which might neither implicate sovereign power in the first place nor request a remedy ultimately blocking the exercise of such a power).

eign power to alter the apportionment election renders the Compact ambiguous as to any such surrender. *See id.* at 2132 (ruling that contested provision's "silence is ambiguous regarding cross-border rights under the Compact"). Put another way, the absence of a clear surrender provision renders the Compact reasonably susceptible to an interpretation (a) that it surrenders sovereign power (leaving aside application of the unmistakability doctrine), or (b) that it does not. *Christianson*, 831 N.W.2d at 538-39 (stating standard for ambiguity of a statute); *Dykes*, 781 N.W.2d at 582 (stating standard for ambiguity of a contract).

"When a statutory provision is ambiguous, it is appropriate to turn to the canons of statutory construction to ascertain a statute's meaning." *State v. Leathers*, 799 N.W.2d 606, 611 (Minn. 2011). To determine legislative intent, a court also may "consider the legislative history of the act under consideration, the subject matter as a whole, the purpose of the legislation, and objects intended to be secured thereby." *Sevcik v. Comm'r of Taxation*, 257 Minn. 92, 103, 100 N.W.2d 678, 686-87 (1959); *see also* Minn. Stat. § 645.16(1)–(8) (2014) (setting out factors for statutory interpretation); *Oklahoma v. New Mexico*, 501 U.S. 221, 234-36 & n.5 (1991) (noting that extrinsic evidence of negotiating history may be used to interpret an ambiguous interstate compact).

Correspondingly, in construing ambiguous contract language, "resort may be had to extrinsic evidence." *Cut Price Super Markets v. Kingpin Foods, Inc.,* 256 Minn. 339, 354, 98 N.W.2d 257, 268 (1959). Pertinent extrinsic evidence includes the parties' course of performance. *See id.* at 354; 98 N.W.2d at 268; *see also* Restatement (Second) of Contracts

§ 202(5) (1981) ("Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.").

a. Compact's Drafting History

The parties largely agree on the Compact's drafting history.[111] In 1959, the United States Supreme Court clarified its jurisprudence with respect to the power of States to tax interstate businesses, holding that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." *Portland Cement*, 358 U.S. at 452. The Court thus affirmed state taxes on the net income of nonresident businesses whose only connection to the taxing state was the maintenance of a modest sales office and the solicitation of sales within the state. *Id.* at 453-57 (describing the taxed businesses' in-state facilities and activities).

As relevant here, *Portland Cement* engendered two Congressional responses. First, within seven months, Congress passed Public Law 86-272, which prohibited States from taxing the net income of interstate businesses whose sole activity in the taxing state was soliciting orders for the sale of tangible personal property. *See Heublein, Inc. v.* S.C. *Tax Comm'n*, 409 U.S. 275, 278-81 (1972).

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[111] *See, e.g.*, Kimberly's Mem. Supp. Summ. J. 4-6; Comm'r's Mem. Supp. Summ. J. 4-5.

> In this statute, Congress attempted to allay the apprehension of businessmen that "mere solicitation" would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, Northwestern States Portland Cement did not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax. [The statute] was designed to define clearly a lower limit for the exercise of that power. Clarity that would remove uncertainty was Congress' primary goal.

Id. at 280.

Second, Congress "authorized a study for the purpose of recommending legislation establishing uniform standards to be observed by the States in taxing income of interstate businesses." *U.S. Steel*, 434 U.S. at 455. More specifically, Congress established "[a] special subcommittee (the Willis Committee)" which "reported five years later with specific recommendations for federal statutory solution to the interstate allocation problem." *Id.* at 487 (White, J., dissenting). The 1965 Willis Report criticized the variety and changeability of state apportionment formulas and made specific recommendations to increase the uniformity of state taxation of interstate businesses.[112] Shortly after the Report's publication, a bill was introduced in Congress to implement its recommendations. *See* H.R. 11798, 89th Cong., 2nd Sess. (1965). That bill, however, failed to become law. *U.S. Steel,* 434 U.S. at 455-56 & n.4.

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[112] Ex. J51, at 118-19, 1133-38 (H.R. Rep. No. 89-952 (1965)).

Given this congressional activity in the wake of *Portland Cement*, States perceived a "growing likelihood that federal action will curtail seriously existing State and local taxing power if appropriate coordinated action is not taken very soon by the States."[113] Consequently, "[a] special meeting of the National Association of Tax Administrators was called in January 1966; that gathering was the genesis of the Multistate Tax Compact." *U.S. Steel,* 434 U.S. at 487 (White, J., dissenting). In its first annual report dated January 28, 1969, the Multistate Tax Commission stated:

> The origin and history of the Multistate Tax Compact are intimately related and bound up with the history of the states' struggle to save their fiscal and political independence from encroachments of certain federal legislation introduced in congress during the past three years. These were the Interstate Taxation Acts, better known as the Willis bills.[114]

A completed draft of the Compact "was presented to the states in January 1967."[115] The Compact became effective on August 4, 1967, after it was enacted into law by seven states.[116]

Again conflating the separate questions of whether the Compact is binding and whether its terms "remain[ed] subject to subsequent legislation' [sic] by the sovereign," *Winstar*, 518 U.S. at 877 (citation and

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[113] Ex. J35, at KC11525.

[114] Ex. J36, at KC11434.

[115] Ex. J36, at KC11435.

[116] Ex. J36, at KC11433.

internal quotation marks omitted)—Kimberly argues that "the Compact drafters intended the apportionment election to be mandatory and binding."[117] According to Kimberly:

> Variation in state apportionment formulas was a primary focus of the Congressional [Willis] report, and Congress was poised to impose a mandatory apportionment formula on all states. The election was a core element of the Compact in order to secure a base-line level of uniformity and thus critical for states to avoid federal imposition of a one-size-fits-all apportionment formula.[118]

In Kimberly's view, the Compact's drafting history is "compelling evidence" that "the election is not optional."[119]

We have no difficulty agreeing with Kimberly's general thesis: that through coordinated action, States sought to increase uniformity and thereby to reduce the perceived need in Congress for federal intervention. We question, however, whether the numerous State officials who either directly drafted the Compact, or cooperated in its drafting, would have considered an agreement surrendering the States' sovereign taxing powers as a viable means for achieving this purpose.

As the Commissioner observes, "Minnesota and at least 13 current or former Compact members have provisions in their state constitutions prohibiting the

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[117] Kimberly's Mem. Supp. Summ. J. 21.

[118] Kimberly's Mem. Supp. Summ. J. 21-22 (citation omitted).

[119] Kimberly's Mem. Supp. Summ. J. 22.

surrendering or contracting away of taxation authority."[120] Five of the eleven States represented at a June 15, 1967 meeting to organize the Multistate Tax Commission created by the Compact had such provisions in their state constitutions.[121] Sophisticated parties, in particular, are presumed to know the law. *Brekke* v. *THM Biomedical, Inc.*, 683 N.W.2d 771, 782-83 (Minn. 2004) (Gilbert, J., dissenting). In addition, the "settled law of the land at the time a contract is made become[s] part of it and must be read into it except where the contract discloses an intention to depart therefrom." *William Lindeke Land Co.* v. *Kalman*, 190 Minn. 601, 607, 252 N.W. 650, 653 (1934).

Considering that the Compact was developed "under the auspices of the Council of State Governments, with the cooperation of the National Association of Tax Administrators, the National Association of Attorneys General and the National Legislative Conference,"[122] it is unreasonable to suppose that state constitutional limitations upon contracting away the taxing power were not raised and considered during the Compact's drafting. Put another way, it is unlikely that state tax administrators and attorneys general would have drafted an agreement: (1) that many States had questionable authority to enact; and (2) that, immediately upon enactment in

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[120] Comm'r's Mem. Supp. Summ. J. 16 n.12 (listing the other states as Alaska, Arkansas, California, Hawaii, Illinois, Michigan, Missouri, Montana, North Dakota, South Dakota, Texas, Washington, and Wyoming).

[121] Ex. J36, at KC11435 (Arkansas, Illinois, Missouri, Texas and Washington).

[122] Ex. J30, at KC11496.

such states, would be subject to challenge on the ground that it had unlawfully contracted away the state's taxing power.[123] An agreement that was either void *ab initio* or ultimately unenforceable against approximately one third of all States would hardly have advanced the States' contemplated objective of appeasing Congress. Indeed, the States would likely have concluded that uniformity could better be achieved by creating an agreement that all States had clear authority to enact, even if some party States might later alter certain of the Compact's provisions or withdraw from the agreement altogether.

As an aside, we cannot agree with Kimberly's argument that the Compact *must* have deprived states of their power to alter the apportionment election, because only a mandatory election could be expected to stave off congressional intervention.[124] This argument makes little sense considering that Article X(2) of the Compact expressly permits party States to completely withdraw from the agreement at any time. Even if the States hoped federal intervention might be avoided if Congress perceived the Compact as a viable means of increasing state tax uniformity, they had no reason to believe that Congress would have considered alteration of the apportionment election as a greater threat to uniformity than complete

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[123] Here, citing Minnesota Constitution Article X, section 1, the Commissioner argues both that the Legislature could not lawfully have enacted an agreement obligating the State to refrain from altering the apportionment election and that, if the Contract did create such an obligation, its enactment was void *ab initio*. Comm'r's Mem. Supp. Summ. J. 15-16; Comm'r's Reply Mem. Supp. Summ. J. 2-3.

[124] Kimberly's Mem. Supp. Summ. J. 21-22 & n.6.

withdrawal from the agreement. Either way, party States could avoid the election and defeat the uniformity at the heart of Congressional concern.

b. Course of Performance Before Minnesota Enacted the Compact

We need not decide, however, whether the Compact as originally drafted in 1966 and enacted by numerous States in 1967 was intended to surrender party States' sovereign taxing powers. For the Minnesota Legislature did not enact the Compact until 1983, over fifteen years after it first became effective. By that time, party States operating under the Compact had clearly manifested their understanding that they retained sovereign authority to alter or eliminate the Compact's apportionment election.

When an interstate compact provision is ambiguous, courts may consider extrinsic evidence including the party States' course of performance. *Tarrant*, 133 S. Ct. at 2132, 2135. Course of performance refers to the actions of parties during performance of the contract at issue. *Cut Price Super Mkts.*, 256 Minn. at 354, 98 N.W.2d at 268. Evidence of course of performance is useful because it demonstrates the parties' practical construction of the terms of a contract, which is probative of their intent. *Cornell v. N.F.C. Eng'g Co.,* 274 Minn. 391, 395-96, 144 N.W.2d 369, 372 (1966).[125] "A 'part[y's] course of performance un-

[125] Although not expressly invoking the concept "course of performance," other Minnesota cases similarly recognize that the parties' own construction of an ambiguous contract term is highly probative of its intended meaning. *See Brachmann v. Netzinger,* 293 Minn. 405, 407, 196 N.W.2d 616, 618-19 (1972) (commenting with respect to ambiguous option agreement that "parol evidence concerning the parties' interpretation of the

der the Compact is highly significant' evidence of its understanding of the compact's terms." *Tarrant,* 133 S. Ct. at 2135 (alteration in original) (citation and internal quotation marks omitted).

The Compact became effective on August 4, 1967, after it was enacted into law by seven states,[126] one of which was Florida.[127] *See* Fla. Stat. § 213.15 (1969). In December 1972, however, Florida enacted legislation: (1) repealing Articles III and IV of the Compact; and (2) adopting as a matter of Florida law an equally-weighted three-factor apportionment formula. *See* § 1, 1971 Fla. Laws at 52. In response to Florida's repeal of Articles III and IV, no party State alleged a violation of the Compact. To the contrary, during a Multistate Tax Commission meeting held on December 1, 1972, the party States unanimously passed a resolution (with Florida abstaining) providing that whereas "the State of Florida has repealed Articles III and IV of the Multistate Tax Compact, while still legislatively, adhering to the spirit of the compact;" and whereas "the State of Florida will continue to strive together with tax administrators, national tax groups, and representatives of the business community to develop new and additional methods of resolving multistate tax problems;" there-

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[agreement's] language must control in determining their understanding"); *Kastner v. Dalton Dev., Inc.*, 265 Minn. 511, 517, 122 N.W.2d 183, 187 (1963) (where the parties had agreed "that the option [to purchase] must be exercised on the entire 23 lots," the court noted that "the rule is that the interpretation placed upon the contract by the parties themselves is to be considered by the court, and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms").

[126] Ex. J36, at KC11433.

[127] Ex. J36, at KC11445.

fore "be it resolved that the State of Florida be recognized as a regular member in good standing of the Multistate Tax Compact and the Multistate Tax Commission."[128] The meeting minutes note that "associate member[ ] Minnesota ... had been taking part in the meeting during the week."[129] By late 1972, then, party States—both individually and collectively through the Multistate Tax Commission—had unanimously concluded and publicly declared that Florida, a party State that originally enacted Articles III and IV, remained a Compact member in good standing despite its subsequent repeal of those two Articles.

Party States soon had further occasion to indicate their understanding of the Compact's effect on their sovereign powers. In 1972, the United States Steel Corporation sued the Multistate Tax Commission "its individual Commissioners, and its Executive Director," challenging the constitutionality of the Compact on four stated grounds. *U.S. Steel*, 434 U.S. at 458. In its 1977 brief to the United States Supreme Court, the Commission addressed, among other things, its understanding of the Compact's effect on the sovereign taxing power of party States: "Individual member states of the Compact retain exclusive control over any and all legislation or administrative actions including (i) the rate of tax; (ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any

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[128] Ex. 143, at MDOR 00015 (Minutes of Meeting of the Multistate Tax Commission, Dec. 1, 1972).

[129] Ex. J43, at MDOR 00014.

taxes which may be determined to be due ....”[130] The Supreme Court plainly credited this statement by the Commission, for it commented that “individual member States retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due.” *Id.* at 457.

Approximately twenty years later, the Supreme Court likewise credited an agency’s interpretation of the multistate compact it administered. In *Alabama v. North Carolina*, eight states including Alabama and North Carolina entered into the Southeast Interstate Low–Level Radioactive Waste Management Compact, which provided for the development of a new facility for the long-term disposal of low-level radioactive waste generated in the region. 560 U.S. at 334. The Compact was administered by a Commission composed of two voting members from each party State. *Id.* North Carolina was designated to “host” the new facility, and thus became obligated by the compact to “take appropriate steps” to obtain a license to construct and operate the contemplated facility. *Id.* at 335.

Although the compact specifically provided that the Commission was not responsible for any costs associated with creating the new facility, North Carolina “asked the Commission for financial assistance with building and licensing costs.” *Alabama*, 560 U.S. at 335. “The Commission responded by adopting a resolution, which declared it was both ‘appropriate

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[130] Ex. J54, at MDOR 03903.

and necessary' for the Commission 'to provide financial assistance' to North Carolina." *Id.* (quoting record). Thereafter, the Commission provided North Carolina with approximately $80 million in financial assistance towards obtaining licensing. *Id* at 336-37. After South Carolina withdrew from the agreement, and North Carolina and the Commission reached an impasse concerning a long-term financing plan, North Carolina "informed the Commission it would commence an orderly shutdown of its licensing project." *Id.*

Several party States, joined by the Commission, filed a complaint against North Carolina alleging, among other things, that North Carolina had breached the compact because it was no longer taking "appropriate steps" to obtain licensing. *Alabama,* 560 U.S. at 338, 345. After concluding that the compact term "appropriate steps" was ambiguous, the Court looked to the parties' course of performance to ascertain its meaning: "In determining whether, in terminating its efforts to obtain a license, North Carolina failed to take what the parties considered 'appropriate' steps, the parties' course of performance under the Compact is highly significant." *Id.* at 346. Such evidence "firmly establishes that North Carolina was not expected to go it alone .... The history of the Compact consists entirely of shared financial burdens." *Id.*

> There is nothing to support the proposition that the other States had an obligation under the Compact to share the licensing costs through the Commission; but we doubt that they did so out of love for the Tarheel State. They did it, we think, because that was their understanding of how the Compact was sup-

> posed to work. *One must take the Commission at its word*, that it was "appropriate" to share the cost—which suggests that it would not have been appropriate to make North Carolina proceed on its own.

Id. (emphasis added).

Taken together, *U.S. Steel* and *Alabama v. North Carolina* demonstrate that the United States Supreme Court places considerable weight on the manner in which a representative commission interprets the interstate compact it is charged with administering. Naturally, such evidence cannot be used to *contradict* a compact's plain meaning. *Kansas v. Colorado*, 514 U.S. 673, 690-91 (1995). When a contested term is ambiguous, however, course of performance evidence, including the interpretation of a representative administrative commission, is highly significant. *Tarrant*, 133 S. Ct. at 2135.

The *U.S. Steel* Court plainly took the Multistate Tax Commission "at its word" concerning the Compact's effect on the sovereignty of party States. Closely paraphrasing the Commission's appellate brief, the Court concluded not only that the States had "retain[ed] complete control over all legislation ... affecting the rate of tax, the composition of the tax base ... , and the means and methods of determining tax liability ... ," *U.S. Steel*, 434 U.S. at 457, but also that the States had delegated no sovereign power to the Commission itself, *Id.* at 473.

By 1979, then, the Compact's party States had expressly declared in the United States Supreme Court their understanding that the Compact did not abridge their taxing powers. In addition, the Supreme Court had adopted this understanding of the

Compact. Consequently, following the 1979 publication of *U.S. Steel*, the Compact could not reasonably be understood as requiring party States to contract away sovereign powers.

We note that Minnesota's own enactment of the Compact in 1983 indicates that the Minnesota Legislature, in particular, did not consider itself bound to adopt the Compact's allocation and apportionment provisions. When enacting section 290.171, Minnesota omitted from the Model Act (as drafted in 1966) five of Article IV's eighteen sections. Article IV(4) of the Model Compact provides that "[r]ents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs 5 through 8 of this Article."[131] Minnesota omitted this Model Compact allocation provision from section 290.171, along with Articles IV(5)-(8), which facilitate its implementation. Thus, whereas Article IV of the Model Compact contained eighteen sections, Article IV of section 290.171 had only thirteen sections.[132] The Minnesota Legislature's conclusion that it was free to enact only certain portions of Article IV manifests its understanding that member States were free to adopt or alter the Compact's allocation and apportionment provisions as they saw fit.

By 1979, the Compact's existing party States had clearly and consistently manifested their understanding that they retained sovereign authority to alter or eliminate the Compact's apportionment and

[131] Ex. J32, at KC11508.

[132] *Compare* Ex. J32 at KC11507-10 *with* Minn. Stat. § 290.171, Art. IV (1984).

allocation provisions. Consequently, we conclude that by the time Minnesota enacted section 290.171 in 1983, the Compact could not reasonably be understood as contractually requiring party states to refrain from using their sovereign powers to alter the apportionment election.

c. Course of Performance after 1983

Although the Compact's drafting history and the party States' pre-1983 course of performance are most relevant to our conclusion that the Legislature's 1983 Compact enactment did not constitute a relinquishment of the State's sovereign power to alter the apportionment election, the party States' subsequent course of performance is fully consistent with that conclusion.

As previously noted, the version of the Compact Minnesota enacted in 1983 omitted Articles IV(4)-(8) of the Model Compact governing the allocation of nonbusiness income.[133] Despite this alteration of Article IV, the Multistate Tax Commission admitted Minnesota as a full member of the Commission.[134] Perhaps more significantly, the Commission allowed Minnesota to remain a full member even after it repealed Articles III and IV in 1987.[135] Indeed, then-Minnesota Commissioner of Revenue John James was Vice-Chair of the Multistate Tax Commission for

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[133] *Compare* Ex. J32 at KC11507-10 with Minn. Stat. § 290.171, Art. IV (1984).

[134] Stip. ¶ 23; Ex. J40, at 12 (Sixteenth Annual Report, Multistate Tax Commission).

[135] Stip. ¶¶ 23-24; Ex. J42, at 3 (Annual Report FYI11-12, Multistate Tax Commission); Huddleston Aff. ¶ 10; Getschel Aff. ¶¶ 3, 7-8.

fiscal year 1988, and was its Chair for fiscal year 1989.[136]

The Commission has similarly treated other party States that have eliminated or altered the election. In a 2013 amicus curiae brief filed in the California Supreme Court (supporting the State of California's claim that—despite its enactment of the Compact in 1974—the State retained lawful authority to abrogate the apportionment election), the Commission indicated that as of October 2012,

> nine other compact members had enacted a version of the Multistate Tax Compact that ... emphasizes the sales factor and does not recognize an Article III.1 election [to use the Compact's equally weighted apportionment formula]. Three Compact members [including Minnesota] eliminated or limited the election directly. Three amended Article IV to be consistent with their statutory apportionment formula that emphasizes the sales factor. And three, like California, indicted by separate statute or other guidance that the Compact election does not apply to factor-weighting.[137]

The Commission further noted that "[i]n no case has any compact member in any way objected that such

[136] Huddleston Aff ¶ 11; Ex. J41, at 7.

[137] Ex. J57, at 03891 (footnotes omitted); *see also id.* at 03896 ("Since 1972, at least ten additional members, including California, have varied from Articles III.1 and IV by enacting mandatory apportionment formulae other than the Article IV equally-weighted formula, without allowing an Article III.1 election.") (footnote omitted).

an action was inconsistent with the letter or spirit of the Compact."[138]

The record indicates that the Commission has "never sanctioned or expelled a state that amended or repealed Articles III and IV. To the contrary, states that repealed Articles III and IV remained

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[138] Ex. J57, at 03896; *see also* Huddleston Aff. ¶¶ 6-7 (indicating that neither the MTC nor any party state ever objected to a repeal of Articles Ill or IV). In response to a parallel invocation of the Compact election by IBM in Michigan, three dissenting Justices similarly noted:

> [I]t is plain that the member states did not view strict adherence to Articles III and IV as a binding contractual obligation, as Compact members have deviated from the Compact's election provision and apportionment formula without objection from other members.... Nondeviating members have not pursued actions against those states that have deviated, and no member state has intervened on IBM's behalf in this case. Further, the Multistate Tax Commission—the organization charged with administering the Compact—has urged us to reject IBM's rigid interpretation of the Compact. These facts weigh heavily in favor of rejecting IBM's argument that the Compact creates a binding contractual obligation on its member states to refrain from amending the election provision.

IBM, 852 N.W.2d at 888 (McCormack, J., dissenting) (citation omitted). Because the *IBM* majority concluded that the Michigan Legislature had never repealed the Compact, *id.* at 872-77, and accordingly that "the Compact's election provision remained in effect" for the tax years in issue, *id.* at 876, the majority had no occasion to consider whether the Compact contractually obligated Michigan not to alter the election and, more specifically, had no occasion to consider the party States' course of performance under the Compact.

members in good standing with the Multistate Tax Commission."[139] The Commission's ongoing acceptance of party States that alter or eliminate the Compact's apportionment election, and its express and public support of State authority to do so, further evidence the party States' understanding that the Compact does not contractually require them to refrain from using their sovereign powers to alter the Compact's apportionment election.[140]

4. Extrinsic Evidence Conclusion

Leaving aside application of the unmistakability doctrine, the Compact's silence concerning the surrender of sovereign power renders it ambiguous as to such surrender. Considering that at least fourteen States have constitutional provisions prohibiting them from contracting away their taxing power, it is highly unlikely that the state tax officials and attorneys general who drafted the Compact intended that party States would surrender their sovereign authority to alter or repeal the apportionment election. Moreover, the party States' course of performance indicates that by the time Minnesota enacted section 290.171 in 1983, the Compact could not reasonably be understood as contractually requiring party states to refrain from using their sovereign powers to alter

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[139] Huddleston Aff. ¶¶ 8-9.

[140] At some point in time (although on this record we cannot determine exactly when), the Multistate Tax Commission amended the Compact's preface to indicate that it is "a model law," and that it is "not truly a compact in that actions taken under its authority have only an advisory and/or recommendatory effect on its member states." Ex. J44, at 02415. Although these statements are further evidence of the Commission's views concerning the effect of the Compact, we do not rely on them.

the apportionment election. We conclude that extrinsic evidence independently supports the conclusion that the Legislature's 1983 Compact enactment did not constitute a relinquishment of the State's sovereign power to alter or repeal the Compact's apportionment election.

D. Contracts Clause Claim

The Contract Clause of the United States Constitution provides that "[n]o state shall ... pass any ... Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. The Minnesota Constitution likewise provides that "[n]o ... law impairing the obligation of contracts shall be passed." Minn. Const. art. I, § 11.

Whether an enactment unconstitutionally impairs a contract is determined by applying a three prong test. *See Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983); *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 17-22 (1977); *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 872 (Minn. 1986). The threshold question is whether the challenged law substantially impairs a contractual relationship. *Energy Reserves*, 459 U.S. at 411. If so, the State must demonstrate a "significant and legitimate public purpose" for the statute, "such as the remedying of a broad and general social or economic problem." *Id.* at 411-12. Finally, if the State identifies such a purpose, the court must examine whether "the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Id.* at 412 (alterations in original) (quoting *U.S. Trust Co.*, 431 U.S. at 22).

The substantial-impairment inquiry focuses on "the extent to which the law has contravened the reasonable [contract] expectations of the parties." *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 506 (5th Cir. 2001); *see also Acton Const. Co. v. Comm'r of Revenue*, 391 N.W.2d 828, 833 (Minn. 1986); *Drewes v. First Nat. Bank of Detroit Lakes*, 461 N.W.2d 389, 391 (Minn. App. 1990). Kimberly asserts that by enacting the Compact, Minnesota "committed to provide multistate taxpayers with the election to apportion under the Compact unless and until [it] withdrew from the Compact" and, consequently, that taxpayers reasonably expected "that the Compact's terms w[ould] not be amended on a piecemeal basis."[141] From these premises, Kimberly concludes that "the 1987 Amendment's attempt to eliminate the Compact election [wa]s a *substantial* impairment of the entire Compact."[142] We disagree.

As previously indicated, we have assumed (without deciding) that the Compact is a contract that created binding obligations. *See supra* § V.C.l. Moreover, the Commissioner has acknowledged, and we agree, that the State was bound to honor the Compact's apportionment election while Articles III and IV remained in force.[143] *See supra* § V.C.2.c. We have concluded, however that no Compact provision constitutes a clear and unmistakable promise by the State to refrain from using its sovereign power to alter or repeal the apportionment election contained in Articles III and IV. *See supra* § V.C.2.c. Absent such an obligation, taxpayers could have no reasonable

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[141] Kimberly's Mem. Supp. Summ. J. 32.

[142] Kimberly's Mem. Supp. Summ. J. 32.

[143] Comm'r's Reply Mem. Supp. Summ. J. 7.

expectation that the Legislature would not alter or eliminate the election. Consequently, the Legislature's 1987 repeal of Articles III and IV did not substantially impair a contractual relationship. *Energy Reserves*, 459 U.S. at 411. We need go no further in the analysis. *See Acton Const.*, 391 N.W.2d at 833 (so holding).

For the foregoing reasons, we conclude that Kimberly has failed to carry its heavy burden to prove beyond a reasonable doubt that the Legislature's 1987 repeal of Articles III and IV was unconstitutional as a violation of the state and federal contracts clauses. *See, e.g., Singer,* 817 N.W.2d at 675. Because this ruling fully resolves the matter, we need not address the parties' remaining contentions.

B.S.D & T.G.H.

TURNER, C.J. (concurring specially)

I respectfully concur in all but section III of the court's opinion.

I agree that in enacting the Compact in 1983, Minnesota in no way agreed not to alter or repeal the three-factor equally weighted apportionment election. I further agree that determination resolves both Kimberly's Compacts Clause claim and its Contracts Clause claim.

But I believe a section of an opinion specifically labeled "The Parties' Principal Contentions" and which purports to reference the parties' briefs in doing so, should recite those contentions and cite those briefs accurately. The court's opinion does not follow this principle. For example, the opinion states that appellants contend that the Compact requires Minnesota "to refrain from exercising its sovereign power to eliminate the apportionment election unless and until it first withdraws from the Compact." Slip op. at 16 (citing Kimberly's Mem. Supp. Summ. J. 10, 12, 16, 30; Kimberly's Reply Mem. Supp. Summ. J. 1-2, 4); *see also* slip op. at 16 (claiming that appellants contend that Minnesota "contractually obligated itself both to furnish the apportionment election *and* to refrain from using its sovereign power to repeal the election"). Not even the careful reader will find any mention on any of the cited pages of the phrase "sovereign power" or much of anything, for that matter, like the opinion's recitation of Kimberly's contentions. The opinion goes on to state that appellants "implicitly acknowledg[e] that a State's contractual surrender of sovereign power *normally* must be stated in unmistakably clear language." Slip op. at 16 (citing Kimberly's Mem. Supp. Summ. J. 17; Kimberly's Reply Mem. Supp. Summ. J. 5, 7; Tr. 100-01, 111). There is no such acknowledgment, implicit or explicit, on any of the cited pages. Indeed, many pages later, the opinion concedes that Kimberly in fact "avoids *directly* stating that Minnesota surrendered sovereign power to alter or repeal the [apportionment] election." Slip op. at 37 n.106.

I agree wholeheartedly that a court is entitled to "critically evaluat[e] a litigant's submissions" and to "plainly stat[e] the true import of [the litigant's] arguments." Slip op. at 37 n.106. But in doing so, a court should clearly distinguish between its own editorializing and the litigant's actual submissions. Because of this opinion's failure to do so, I respectfully decline to concur in section III.

J.H.T.

APPENDIX C

Original Model Multistate Tax Compact

TEXT OF THE MODEL MULTISTATE TAX COMPACT

Article I. Purposes.

The purposes of this compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicative taxation.

Article II. Definitions.

As used in this compact:

1. "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any Territory or Possession of the United States.

2. "Subdivision" means any governmental unit or special district of a State.

3. "Taxpayer" means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than one State.

4. "Income tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, one or more forms of

which expenses are not specifically and directly related to particular transactions.

5. "Capital stock tax" means a tax measured in any way by the capital of a corporation considered in its entirety.

6. "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.

7. "Sales tax" means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by State or local law to be separately stated from the sales price by the seller, or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

8. "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

9. "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other

tax which has a multistate impact, except that the provisions of Articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of Article IX of this compact shall apply only in respect to determinations pursuant to Article IV.

Article III. Elements of Income Tax Laws.

Taxpayer Option, State and Local Taxes.

1. Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party State or pursuant to the laws of subdivisions in two or more party States may elect to apportion and allocate his income in the manner provided by the laws of such States or by the laws of such States and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. This election for any tax year may be made in all party States or subdivisions thereof or in any one or more of the party States or subdivisions thereof without reference to the election made in the others. For the purposes of this paragraph, taxes imposed by subdivisions shall be considered separately from State taxes, and the apportionment and allocation also may be applied to the entire tax base. In no instance wherein Article IV is employed for all subdivisions of a State may the sum of all apportionments and allocations to subdivisions within a State be greater than the apportionment and allocation that would be assignable to that State if the apportionment or allocation were being made with respect to a State income tax.

Taxpayer Option, Short Form.

2. Each party State or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property and whose dollar volume of gross sales made during the tax year within the State or subdivision, as the case may be, is not in excess of $100,000 may elect to report and pay any tax due on the basis of a percentage of such volume and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The Multistate Tax Commission, not more than once in five years, may adjust the $100,000 figure in order to reflect such changes as may occur in the real value of the dollar, and such adjusted figure, upon adoption by the Commission, shall replace the $100,000 figure specifically provided herein. Each party State and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

Coverage.

3. Nothing in this Article relates to the reporting or payment of any tax other than an income tax.

Article IV. Division of Income.

1. As used in this Article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipeline, or the production, transmission, sale, delivery, or furnishing of electricity, water or steam; and (2) whose rates of charges for goods or services have been established or approved by a Federal, State or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article.

(h) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any Territory or Possession of the United States, and any foreign country or political subdivision thereof.

(i) "This State" means the State in which the relevant tax return is filed or, in the case of application of this Article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

2. Any taxpayer having income from business activity which is taxable both within and without this State, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this Article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this Article, the taxpayer may elect to allocate and apportion his entire net income as provided in this Article.

3. For purposes of allocation and apportionment of income under this Article, a taxpayer is taxable in another State if (1) in that State he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that State has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the State does or does not do so.

4. Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs 5 through 8 of this Article.

5. (a) Net rents and royalties from real property located in this State are allocable to this State.

(b) Net rents and royalties from tangible personal property are allocable to this State: (1) if and to the extent that the property is utilized in this State, or (2) in their entirety if the taxpayer's commercial domicile is in this State and the taxpayer is not organized under the laws of or taxable in the State in which the property is utilized.

(c) The extent of utilization of tangible personal property in a State is determined by multiplying the rents and royalties by a fraction the numerator of which is the number of days of physical location of the property in the State during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the State in which the property was located at the time the rental or royalty payer obtained possession.

6. (a) Capital gains and losses from sales of real property located in this State are allocable to this State.

(b) Capital gains and losses from sales of tangible personal property are allocable to this State if (1) the property had a situs in this State at the time of the sale, or (2) the taxpayer's commercial domicile is in this State and the taxpayer is not taxable in the State in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this State if the taxpayer's commercial domicile is in this State.

7. Interest and dividends are allocable to this State if the taxpayer's commercial domicile is in this State.

8. (a) Patent and copyright royalties are allocable to this State: (1) if and to the extent that the patent or copyright is utilized by the payer in this State, or (2) if and to the extent that the patent or copyright is utilized by the payer in a State in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(b) A patent is utilized in a State to the extent that it is employed in production, fabrication, manufacturing, or other processing in the State or to the extent that a patented product is produced in the State. If the basis of receipts from patent royalties does not permit allocation to States or if the accounting procedures do not reflect States of utilization, the patent is utilized in the State in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a State to the extent that printing or other publication originates in the State. If the basis of receipts from copyright royalties does not permit allocation to States or if the accounting procedures do not reflect States of utilization, the copyright is utilized in the State in which the taxpayer's commercial domicile is located.

9. All business income shall be apportioned to this State by multiplying the income by a fraction the numerator of which is the property factor plus the payroll factor plus the sales factor and the denominator of which is three.

10. The property factor is a fraction the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented

and used in this State during the tax period and the denominator of which is the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the tax period.

11. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

12. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period; but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

13. The payroll factor is a fraction the numerator of which is the total amount paid in this State during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

14. Compensation is paid in this State if:

(a) the individual's service is performed entirely within the State;

(b) the individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or

(c) some of the service is performed in the State and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the State, or (2) the base of operations or the place from which the service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State.

15. The sales factor is a fraction the numerator of which is the total sales of the taxpayer in this State during the tax period and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

16. Sales of tangible personal property are in this State if:

(a) the property is delivered or shipped to a purchaser, other than the United States Government, within this State regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this State and (1) the purchaser is the United States Government or (2) the taxpayer is not taxable in the State of the purchaser.

17. Sales, other than sales of tangible personal property, are in this State if:

(a) the income-producing activity is performed in this State; or

(b) the income-producing activity is performed both in and outside this State and a greater proportion of the income-producing activity is performed in this State than in any other State, based on costs of performance.

18. If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator

may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article V. Elements of Sales and Use Tax Laws.

Tax Credit.

1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another State and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the State, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Exemption Certificates. Vendors May Rely.

2. Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate State or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.

Article VI. The Commission.

Organization and Management.

1. (a) The Multistate Tax Commission is hereby established. It shall be composed of one "member" from each party State who shall be the head of the State agency charged with the administration of the types of taxes to which this compact applies. If there is more than one such agency, the State shall provide by law for the selection of the Commission member from the heads of the relevant agencies. State law may provide that a member of the Commission be represented by an alternate, but only if there is on file with the Commission written notification of the designation and identity of the alternate. The Attorney General of each party State or his designee, or other counsel if the laws of the party State specifically provide, shall be entitled to attend the meetings of the Commission, but shall not vote. Such Attorneys General, designees, or other counsel shall receive all notices of meetings required under paragraph 1(e) of this Article.

(b) Each party State shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the Commission member from that State.

(c) Each member shall be entitled to one vote. The Commission shall not act unless a majority of the members are present, and no action shall be binding unless approved by a majority of the total number of members.

(d) The Commission shall adopt an official seal to be used as it may provide.

(e) The Commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its Executive Committee may determine. The Commission bylaws shall specify the dates of the annual and any other regular meetings and shall provide for the giving of notice of annual, regular and special meetings. Notices of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The Commission shall elect annually, from among its members, a Chairman, a Vice Chairman and a Treasurer. The Commission shall appoint an Executive Director who shall serve at its pleasure, and it shall fix his duties and compensation. The Executive Director shall be Secretary of the Commission. The Commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party State, the Executive Director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the Commission and shall fix their duties and compensation. The Commission bylaws shall provide for personnel policies and programs.

(h) The Commission may borrow, accept or contract for the services of personnel from any State, the United States, or any other governmental entity.

(i) The Commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The Commission may establish one or more offices for the transacting of its business.

(k) The Commission shall adopt bylaws for the conduct of its business. The Commission shall publish its bylaws in convenient form and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party States.

(l) The Commission annually shall make to the Governor and legislature of each party State a report covering its activities for the preceding year. Any donation or grant accepted by the Commission or services borrowed shall be reported in the annual report of the Commission and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The Commission may make additional reports as it may deem desirable.

Committees.

2. (a) To assist in the conduct of its business when the full Commission is not meeting, the Commission shall have an Executive Committee of seven members, including the Chairman, Vice Chairman, Treasurer and four other members elected annually by the Commission. The Executive Committee, subject to the provisions of this compact and consistent with the policies of the Commission, shall function as provided in the bylaws of the Commission.

(b) The Commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the Commission, including problems of special interest to any party

State and problems dealing with particular types of taxes.

(c) The Commission may establish such additional committees as its bylaws may provide.

Powers.

3. In addition to powers conferred elsewhere in this compact, the Commission shall have power to:

(a) Study State and local tax systems and particular types of State and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of State and local tax laws with a view toward encouraging the simplification and improvement of State and local tax law and administration.

(c) Compile and publish such information as would, in its judgment, assist the party States in implementation of the compact and taxpayers in complying with State and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

Finance.

4. (a) The Commission shall submit to the Governor or designated officer or officers of each party State a budget of its estimated expenditures for such period as may be required by the laws of that State for presentation to the legislature thereof.

(b) Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party States. The total amount of appropriations required under any such budget shall be apportioned among the party States as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party State and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In determining such amounts, the Commission shall employ such available public sources of information as, in its judgment, present the most equitable and accurate comparisons among the party States. Each of the Commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The Commission shall not pledge the credit of any party State. The Commission may meet any of its obligations in whole or in part with funds available to it under paragraph 1(i) of this Article; provided that the Commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it under paragraph 1(i), the Commission shall not incur any obligation prior to the allotment of funds by the party States adequate to meet the same.

(d) The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the Commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the Commission.

(e) The accounts of the Commission shall be open at any reasonable time for inspection by duly constituted officers of the party States and by any persons authorized by the Commission.

(f) Nothing contained in this Article shall be construed to prevent Commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Commission.

Article VII. Uniform Regulations and Forms.

1. Whenever any two or more party States or subdivisions of party States have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, or sales or use tax, the Commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax or prescribing uniform tax forms. The Commission may also act with respect to the provisions of Article IV of this compact.

2. Prior to the adoption of any regulation, the Commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party States and subdivisions thereof and to all taxpayers and other persons who have made timely request of the Commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party States and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the Commission.

3. The Commission shall submit any regulations adopted by it to the appropriate officials of all party States and subdivisions to which they might apply. Each such State and subdivision shall consider any

such regulation for adoption in accordance with its own laws and procedures.

Article VIII. Interstate Audits.

1. This Article shall be in force only in those party States that specifically provide therefor by statute.

2. Any party State or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the Commission to perform the audit on its behalf. In responding to the request, the Commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The Commission may enter into agreements with party States or their subdivisions for assistance in performance of the audit. The Commission shall make charges, to be paid by the State or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

3. The Commission may require the attendance of any person within the State where it is conducting an audit or part thereof at a time and place fixed by it within such State for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the Commission within the State of which he is a resident.

4. The Commission may apply to any court having power to issue compulsory process for orders in

aid of its powers and responsibilities pursuant to this Article, and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the Commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the State or subdivision on behalf of which the audit is being made or a court in the State in which the object of the order being sought is situated.

5. The Commission may decline to perform any audit required if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the Commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party States or their subdivisions, it may offer to make the audit or audits, the offer to be contingent upon sufficient participation therein as determined by the Commission.

6. Information obtained by any audit pursuant to this Article shall be confidential and available only for tax purposes to party States, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the States or subdivisions on whose account the Commission performs the audit and only through the appropriate agencies or officers of such States or subdivisions. Nothing in this Article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party States or any of their subdivisions are not superseded or invalidated by this Article.

8. In no event shall the Commission make any charge against a taxpayer for an audit.

9. As used in this Article, "tax," in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes.

Article IX. Arbitration.

1. Whenever the Commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this Article in effect, notwithstanding the provisions of Article VII.

2. The Commission shall select and maintain an Arbitration Panel composed of officers and employees of State and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

3. Whenever a taxpayer who has elected to employ Article IV, or whenever the laws of the party State or subdivision thereof are substantially identical with the relevant provisions of Article IV, the taxpayer, by written notice to the Commission and to each party State or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation if he is dissatisfied with the final administrative determination of the tax agency of the State or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by two or more party States or subdivi-

sions thereof. Each party State and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

4. The Arbitration Board shall be composed of one person selected by the taxpayer, one by the agency or agencies involved, and one member of the Commission's Arbitration Panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the Arbitration Panel. The two persons selected for the Board in the manner provided by the foregoing provisions of this paragraph shall jointly select the third member of the Board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the Arbitration Panel. No member of a Board selected by lot shall be qualified to serve if he is an officer or employee of or is otherwise affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

5. The Board may sit in any State or subdivision party to the proceeding, in the State of the taxpayer's incorporation, residence or domicile, in any State in which the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

6. The Board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The Board shall act by majority vote.

7. The Board shall have power to administer oaths, take testimony, subpoena and require the attendance of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the Board. In case of failure to obey a subpoena, and upon application by the Board, any judge of a court of competent jurisdiction of the State in which the Board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoena, and the court may punish failure to obey the order as a contempt.

8. Unless the parties otherwise agree, the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the Board in such manner as it may determine. The Commission shall fix a schedule of compensation for Arbitration Board members and of other allowable expenses and costs. No officer or employee of a State or local government who serves as a member of a Board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such Board member shall be entitled to expenses.

9. The Board shall determine the disputed apportionment or allocation and any matters necessary thereto. The determinations of the Board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

10. The Board shall file with the Commission and with each tax agency represented in the proceeding: the determination of the Board; the Board's written statement of its reasons therefor; the record of the Board's proceedings; and any other documents re-

quired by the arbitration rules of the Commission to be filed.

11. The Commission shall publish the determinations of Boards together with the statements of the reasons therefor.

12. The Commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party States.

13. Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceedings.

Article X. Entry Into Force and Withdrawal.

1. This compact shall enter into force when enacted into law by any seven States. Thereafter, this compact shall become effective as to any other State upon its enactment thereof. The Commission shall arrange for notification of all party States whenever there is a new enactment of the compact.

2. Any party State may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal.

3. No proceeding commenced before an Arbitration Board prior to the withdrawal of a State and to which the withdrawing State or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the Board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI. Effect on Other Laws and Jurisdiction.

Nothing in this compact shall be construed to:

(a) Affect the power of any State or subdivision thereof to fix rates of taxation, except that a party State shall be obligated to implement Article III 2 of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than sales tax; provided that the definition of "tax" in Article VIII 9 may apply for the purposes of that Article and that the Commission's powers of study and recommendation pursuant to Article VI 3 may apply.

(c) Withdraw or limit the jurisdiction of any State or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States.

Article XII. Construction and Severability.

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States and in full force and effect as to the State affected as to all severable matters.