No. 15-1442

In the
Supreme Court of the United States

THE GILLETTE COMPANY, ET AL.,
Petitioners,

v.

CALIFORNIA FRANCHISE TAX BOARD, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION FOR CALIFORNIA FRANCHISE TAX BOARD

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QUESTION PRESENTED

Whether California's adoption of legislation enacting the terms of the Multistate Tax Compact imposed on the State a contractual obligation, enforceable under the Contracts Clause by private taxpayers that are not parties to the Compact, not to modify the availability of an income-apportionment method set out in the Compact without first repealing the entire Compact.

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STATEMENT

Petitioners contend that the California Supreme Court's decision in this case reflects "a fundamental misunderstanding of the nature of interstate agreements" and "calls into question the meaning and enforceability of many dozens of other significant interstate agreements." Pet. 2-3. On the contrary, the decision below addresses only the terms, history, and nature of one interstate arrangement, the Multistate Tax Compact. It properly concludes that the state parties to that arrangement never intended to confer on anyone, let alone private taxpayers, a contractual right to constrain future changes in any state's own tax policies—or, more precisely, to constrain the precise way in which a party state could change one aspect of its tax laws. The decision is consistent with the results reached to date in every other case addressing the question at issue. It is also consistent with the position of the Multistate Tax Commission and of every state that is actually a party to the Compact. It says nothing about the nature or enforceability by other parties of other terms of other interstate arrangements. There is no reason for further review.

1. As petitioners and the court below explain, one issue that arises in state taxation is how to apportion the income of a multistate business among various states that have jurisdiction to tax it. *See generally* Pet. App. 2a-5a; Pet. 3-4. In 1966, California adopted for this purpose the formula suggested in 1957 by the Uniform Division of Income for Tax Purposes Act (UDITPA), using three equally weighted factors based on a business's in-state property, payroll, and sales. *See* Pet. App. 2a-3a.

In 1967, a number of other states enacted legislation adopting the Multistate Tax Compact. *See* Pet. App. 5a-6a, 14a; *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 454, 456 n.5 (1978). The Compact creates the Multistate Tax Commission, an advisory body composed of tax administrators from member states that is empowered to, for example, "study state and local tax systems" and "recommend proposals to increase uniformity or compatibility of state and local tax laws." Pet. App. 5a-6a; *U.S. Steel*, 434 U.S. at 456. Article IV of the Compact sets out UDITPA's equal-weighted three-factor apportionment formula; and Article III provides that a taxpayer whose income is subject to apportionment under the laws of a party state may elect to apportion that income either under the Compact/UDITPA formula or in another manner allowed by the laws of the party state. *See* Pet. App. 6a, 67a; *U.S. Steel*, 434 U.S. at 457 n.6.

The Compact provides that it will "enter into force when enacted into law by any seven States," and thereafter "become effective as to any other State upon its enactment thereof." Pet. App. 87a. Similarly, "[a]ny party State may withdraw from th[e] compact by enacting a statute repealing the same." *Id*. The Compact does not expressly address whether a state may become or remain a "party State" if it adopts only some provisions of the Compact, or varies or limits a term of the model Compact in its enacting legislation, or amends or repeals only one or some provisions.

That issue arose early in the Compact's history. In 1972, Florida, which had been one of the first states to enact the Compact in 1967, changed its law to eliminate the apportionment election provided by Articles III and IV. Pet. App. 15a. Taxpayers were instead required to use a formula that double-

weighted the sales factor. *See* MTC Br. 29 (filed Nov. 7, 2013); *see also* Fla. Stat. § 220.15(4) (1971). At a meeting of the Commission that year, representatives of the Compact party states unanimously adopted a resolution making clear that, despite this change, Florida remained a member in good standing. Pet. App. 15a.

Two years later, in 1974, California enacted the text of the Compact as former Revenue and Taxation Code § 38006. Pet. App. 6a. Enactment of the Compact's election and apportionment provisions made no practical difference at that time, because California had been using the equal-weighted UDITPA apportionment formula since 1966. *See id*. at 3a, 6a-7a.

In 1993, however, the state legislature decided to require use of a different apportionment method, double-weighting the sales factor in relation to the property and payroll factors. Pet. App. 7a.[1] The new method was to be used for all business income, "'[n]otwithstanding'" the separate statutory provisions setting out the terms of the Compact, including the election provision. *Id*. (emphasis omitted, quoting Rev. & Tax. Code § 25128(a)). Although the new law superseded that aspect of the Compact, it did not repeal § 38006, or entirely "withdraw" California from the Compact. *Id.*

2. For more than a decade, petitioners duly applied the new apportionment formula in computing their California taxes. Pet. App. 8a. Beginning in or around 2006, however, petitioners and some other

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[1] This change was consistent with a trend among many states, including Compact states, moving toward heavier weighting (or even exclusive use) of the sales factor. *See, e.g.*, Franchise Tax Board Cal. Sup. Ct. Opening Br. on the Merits 5-8 (filed April 17, 2013); MTC Cal. Sup. Ct. Br. 3-4 (filed Nov. 7, 2013).

taxpayers began to claim that California (and other states) had violated a right that the taxpayers asserted they had to avail themselves of the Compact apportionment election. *Id.*; *see also id.* at 33a & n.9. They maintained (among other things) that California's 1993 decision to change its factor-weighting, without allowing an election of the Compact equal-weighting and without completely repealing § 38006, impaired a contractual obligation that California had assumed by enacting the Compact and that the taxpayers were entitled to enforce. *See id.*

After the California Franchise Tax Board (the respondent here) rejected petitioners' refund claims, petitioners pursued the matter in state court. Pet. App. 8a. The trial court sustained the Board's demurrer. *Id.* at 53a-62a. The court recognized that "there can be contracts binding on states which are in the form of compacts," *id.* at 60a, but that the effect of any given arrangement "depends on the provisions of the Compact," *id.* at 61a. Relying on the reasoning of this Court's decision in *U.S. Steel*, the court concluded that "the provisions of [the Multistate Tax Compact] are advisory and do not deprive the individual state members of the ultimate control of their ability to set what the taxes are going to be." *Id.* at 60a. Because the provisions of the Compact were advisory, eliminating the election to use the equally weighted UDITPA apportionment formula was "not impermissible" and involved "no violation of the contract, which is the Compact." *Id.* at 61a.

The California Court of Appeal reversed. Pet. App. 24a-52a. As relevant here, it concluded that the Compact was a binding contract (*id.* at 40a-43a); that the taxpayers were entitled to enforce its election provision (*id.* at 38a-40a); that an attempt to vary or eliminate the election provision without completely repealing and withdrawing from the Compact was a

violation of the Compact (*id.* at 46a; *see id.* at 43a-50a); and that the 1993 enactment overriding the Compact election amounted to an unconstitutional impairment of a contractual obligation (*id.* at 50a-51a).[2]

The California Supreme Court in turn reversed the court of appeal. Pet. App. 1a-23a. It first observed that the Compact at issue was never approved (or required to be approved) by Congress, and therefore does not have the force of federal law. *Id.* at 9a. Petitioners' position thus turned on their contention that the Compact was a binding contract among the party states, and that California's decision to eliminate the apportionment election, without completely repealing the statute enacting the Compact, violated the Compact and unconstitutionally impaired a contractual obligation that petitioners were entitled to enforce. *Id.* at 10a. Rejecting that contention, the court concluded that "this Compact is [not] a binding contract among its members" in that sense. *Id.*

The court noted that the Multistate Tax Commission, created by the Compact, agrees that the Compact's election and apportionment provisions are "not binding" on party states, but rather are "'more in the nature of model uniform laws.'" Pet. App. 11a (quoting amicus brief filed by the Commission in the proceedings below). Like the Commission, the court found guidance in this Court's decision in *Northeast Bancorp Inc.* v. *Board of Governors*, 472 U.S. 159 (1985). Pet. App. 11a-20a. And like the Commission, it concluded (*id.* at 12a) that the particular arrangement at issue here "does not satisfy any of the indicia

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[2] While the case was pending before the court of appeal California enacted new legislation entirely repealing § 38006 and related provisions and thus completely withdrawing from the Compact. Pet. App. 8a n.7, 24a n.1.

of binding interstate compacts noted in *Northeast Bancorp*."

First, the court reasoned that the Compact "creates no reciprocal obligations, especially with respect to maintaining the election provision." Pet. App. 12a; *see id*. at 12a-14a. Indeed, petitioners themselves agreed that "'party states do not perform or deliver obligations to one [another],'" and that the Compact is "'not the type of contract where the parties exchange obligations[.]'" *Id*. at 13a (quoting Pet. Cal. Sup. Ct. Br. 36 (filed July 22, 2013); first alteration in court's opinion). The Compact's election provision "does not create an obligation of member states *to each other*," and is "more akin to the adoption of a model law rather than the creation of any mutual obligations among Compact members." *Id*. Indeed, the UDITPA formula set out in the Compact was originally drafted (and separately adopted by California in 1966) as a traditional model law; and "[n]othing in the language of the Compact, nor California's enactment of it, suggested any change in the Legislature's authority to modify the apportionment formula." *Id*. at 14a.

Second, the court explained that the Compact neither depends on joint action by member states nor prohibits unilateral action. Pet. App. 14a-16a. Any state "may join or leave the Compact without notice." *Id*. at 15a; *U.S. Steel*, 434 U.S. at 473. Moreover, the presence of a provision for complete withdrawal "says nothing about a member state's ability to unilaterally modify the Compact"; and "no express language of the Compact or any California enabling statute proscribes unilateral amendment of our own state law." Pet. App. 15a. Indeed, "the history of the Compact is replete with examples of unilateral state action," starting with Florida's 1972 elimination of the UDITPA apportionment election, noted above. *Id*.;

see pp. 2-3, *supra*. "Numerous member states have subsequently enacted different apportionment formulae," and "[c]urrently, only seven of the Compact's [now] 16 members employ the equal-weighted UDITPA formula." Pet. App. 15a & n.9. "The freedom of members to engage in such unilateral conduct is inconsistent with the type of binding agreement contemplated by *Northeast Bancorp*." *Id*. at 16a.

Finally, the court recognized that the Multistate Tax Commission established by the Compact "has no authority ordinarily associated with a *regulatory* organization." Pet. App. 16a; *see id*. at 16a-20a. Rather, as the Commission itself observed in its amicus brief, its "powers 'are strictly limited to an advisory and informational role.'" *Id*. at 16a; *see id*. at 19a. Indeed, the one set of Compact provisions that might have given the Commission an ability to bind party states, relating to potential arbitration of tax disputes, has never been implemented. The California Legislature made that point an express condition of its approval of the legislation enacting the Compact language as California law. *Id*. at 17a-18a.

In sum, the court concluded, "[n]othing in the language of former § 38006 [setting out the Compact text], the circumstances of its enactment, the subsequent conduct of other member[] states, or the position taken by the Commission, indicate[s] our Legislature intended to be bound by the taxpayer election provision." Pet. App. 19a-20a.

ARGUMENT

Petitioners argue that the California Supreme Court has misinterpreted the Multistate Tax Compact in a way that departs from this Court's precedents and "jeopardiz[es] critical agreements between States" that are "embodied in many dozens of similar compacts." Pet. 10. No part of that argument is cor-

rect. The decision below holds only that a particular interstate arrangement, the Multistate Tax Compact, was never intended by its state parties to create any contractual right, enforceable by private taxpayers, to prohibit a member state from doing what several of them have, in fact, done—changing a particular aspect of its tax laws without first completely repealing its initial statute enacting the Compact.

That decision does not conflict with any decision of this Court or any other. To the contrary, although one would hardly know it from the petition, the judgment in this case is consistent with those of a number of other courts addressing similar challenges brought by petitioners or their counsel in other states. It is also consistent with the conduct of the state parties to the Compact over many years, starting shortly after its initial adoption; and with the position of the Multistate Tax Commission and of every state that is actually a party to the Compact. Nothing about it "jeopardiz[es]" the proper interpretation or enforcement of any other compact or other interstate arrangement. There is no reason for review by this Court.

1. The California Supreme Court's decision properly construes the Multistate Tax Compact in light of its unique text, structure, and history.

a. First, the court correctly recognized that the text and structure of the Compact create no reciprocal obligations among party states to maintain the taxpayer election provision of Article III or the availability of the equal-weighted UDITPA apportionment formula in Article IV. *See* Pet. App. 12a, 13a. Still less is there anything to suggest an intention to create such a contractual obligation that would be enforceable by private, third-party taxpayers. "Nothing in the language of the Compact, nor

California's enactment of it, suggested any change in the Legislature's authority to modify the apportionment formula" in the future if it chose to do so. *Id.* at 14a. "[N]o express language of the Compact or any California enabling statute proscribes unilateral amendment of our own state law." *Id.* at 15a. On the contrary, in this respect the most salient textual features of the Compact are those providing that "any state may join or leave the Compact without notice," meaning that states may "unilaterally come and go as they please." *Id.* [3]

Because of these textual limitations, petitioners have always been left to argue that states enacting the Compact must have intended to commit to an "all or nothing" proposition: A state must agree to maintain every aspect of the Compact as part of its own law, or to renounce all of it by "enacting a statute repealing [all of] the same." Pet. App. 87a (Compact Art. X.2). They have never, however, been able to explain why it would make sense for the party states to have intended to bind themselves to such an all-or-nothing arrangement. That is especially true in light of the fact that a state could always either (i) enact only some portions of the model Compact into its law or (ii) "withdraw" from the Compact in a way acceptable to petitioners, by completely repealing an initial enacting law, but then immediately reenact whatever provisions it chose, without the others.

Petitioners have sometimes contended that the states intended to bind themselves in this peculiar way because it was the only way to stave off the

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[3] Petitioners note that "the drafters elected to call their agreement a 'compact.'" Pet. 17. As the court below recognized, however, this Court has made clear that the label attached to a particular arrangement is not dispositive. Pet. App. 12a-13a; *Northeast Bancorp*, 472 U.S. at 175; *U.S. Steel*, 434 U.S. at 470.

imposition of a federal structure to govern state taxation. *See, e.g.*, Pet. 2, 33. Any possible fear of federal action does not, however, explain why the states would have embraced the particular claimed constraint at issue here—or why doing so would have been sufficient to satisfy the posited federal concerns.

Now, petitioners suggest that a state might be "unwilling to surrender the benefits of Compact membership if that is the price of repudiating" a particular provision. Pet. 29-30. That would be a good argument if the "benefits of Compact membership" in fact depended on a state's willingness to adhere to all provisions of the model Compact. In this instance, however, they do not—as confirmed by the course of the state parties' conduct over time, and by the position of the Commission and participating states. *See e.g.*, 2-3, *supra*; Pet. App. 15a. Indeed, this very point is why it made sense for the court below to look first to the question whether the Compact here "create[s] reciprocal obligations among member states"—and to conclude that it does not. Pet. App. 12a; *see id*. at 12a-14a.[4]

Finally, petitioners suggest that the compacting states here might have intended to bind themselves to an all-or-nothing withdrawal arrangement because the need to enact a complete repeal could make it more difficult, as a practical or political matter, for a state to vary one provision. Pet. 30. That argument is speculative at best, especially given the option of

[4] On the other hand, an unfortunate consequence of this case and others that petitioners or their counsel have pursued around the country has been to prompt a number of states, including California, both to pass complete-repeal statutes and to stand back from participation in multistate consultations or similar activities sponsored by the Multistate Tax Commission. Those litigation-driven precautions interfere with pursuit of the goals of uniformity, interstate cooperation, and sound tax policy.

repealing all of the Compact provisions but then immediately reenacting whichever ones a state wished to keep. It also fails to address why the compacting parties would have wanted to impose any such procedural impediments on themselves. In any event, this conjecture is far too weak to support the radical position petitioners advance here. That position requires concluding that states enacting the Multistate Tax Compact intended to assume contractual obligations—enforceable against them by third-party private taxpayers—limiting their ability to change their own state tax laws in the future. The law has long recognized that such promises, limiting the future exercise of core sovereign authority, are exceedingly unlikely. For that reason, any such purported obligation is enforceable, if at all, only if expressed in "unmistakable" terms. *See, e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 871-880 (1996) (plurality opinion) (describing history and scope of "unmistakability" doctrine). There is nothing like such a term here.

b. The decision below also properly recognizes that the unique history of the Multistate Tax Compact flatly refutes petitioners' position. *See* Pet. App. 15a-16a.

Before California enacted the Compact text as state law in 1974, the existing party states and the Multistate Tax Commission had already considered and unanimously approved Florida's decision to supersede the election provision and require use of a non-UDITPA apportionment formula—while remaining a member of the Compact and the Commission. Pet. App. 15a; *see also* pp. 2-3, *supra*.[5] Thus, the con-

[5] Petitioners argue that Florida's repeal of Articles III and IV of the Compact does not support California's argument because the Florida tax code contained a "safety valve" (continued…)

duct of the state parties had confirmed that nothing in the Compact bound a joining state to adopt every term of the model Compact without variation, or to promise the other party states (let alone third-party taxpayers) that it would not later change or modify any Compact provision without first completely repealing its original enacting legislation.

Moreover, as the court below observed (Pet. App. 15a-16a), that course of conduct among party states continued in later years. The amicus brief filed by the Commission in the proceedings below pointed out that since 1972 at least ten additional members, including California, had varied from the Compact by modifying the apportionment formula. MTC Br. 29-30 (filed Nov. 7, 2013). No party state ever objected that such changes in individual state laws violated

(…continued)
provision that provided "an election comparable to the one provided by Article III of the Compact." Pet. 22 n.9. As the statutory text shows, however, Florida's provision did not permit taxpayers to elect to use the Compact's equally weighted three-factor formula. Fla. Stat. § 220.15(4) (1971). It applies only when a taxpayer makes a specific showing that using a double-weighted sales factor in Florida resulted in all states, taken together, actually taxing more than 100% of the taxpayer's income, and permits a Florida refund equal to 5% of the lesser of two amounts – the difference between Florida income computed using the double-weighted method and using the equal-weighted method, or the amount by which the taxpayer had shown that the total amount subject to state taxation exceeded 100% of its nationwide income. That limited refund provision is surely not the same as retaining the election and apportionment provisions of the Compact. Notably, petitioners have never alleged in this case that they have actually been subjected to state taxation on more than 100% of their income. If they could make such a showing, California law includes the potentially applicable "safety valve" set forth in the UDITPA. *See* Cal. Rev. & Tax Code § 25137; *see also* Pet. App. 74a-75a (Compact Art. IV.18).

the Compact or were inconsistent with participation in Commission activities. *Id.* On the contrary, both the Commission and other states have strongly and consistently supported California's position in this case. *See, e.g.*, *id.* at 1; Pet. App. 11a-12a; Br. of Texas, Alabama, Alaska, Arkansas, Colorado, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, Utah, Washington, and the District of Columbia 19 (filed Oct. 25, 2013) (agreeing Compact does not bar states from requiring use of different apportionment formulas, as fourteen states did while still Compact members).[6]

This longstanding and consistent history, and the uniform position of every state that is an actual party to the Compact, confirms the California Supreme Court's interpretation of the Compact's text and structure. There is no force to petitioners' contrary submission that the compacting states instead intended to confer on third-party taxpayers, such as petitioners, a constitutionally enforceable contractual right to prevent any party state from later changing its individual tax laws, or to require the state to

[6] California has not argued that no provision of the Compact could ever be enforceable. If, for example, a state were to incur financial obligations related to Commission activities (*see* Pet. App. 79a-80a (Compact Art. VI.4(a)-(c))), Article X.2 provides that no withdrawal from the Compact "shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal." *Id.* at 87a. A 1997 opinion of the California Attorney General, cited by petitioners (Pet. 19-20), addressed a similar question regarding potential financial obligations. Any attempt by the Commission or other party states to enforce such obligations would, however, be a far cry from this taxpayer litigation seeking to constrain the State's exercise of its legislative and taxing powers.

adopt any such change in a particular procedural way.

2. The decision below is also consistent both with this Court's precedents and with a uniform body of lower-court authority rejecting the specific position advanced by petitioners in this case.

a. To begin with, this Court's decision in *U.S. Steel*, addressing the same Compact that is at issue here, supports the California Supreme Court's conclusion that the Compact does not confer constitutionally enforceable contractual rights on private taxpayers. In *U.S. Steel*, the Court held that the Compact did not require congressional approval because it did not enhance collective state power "*quoad* the National Government." 434 U.S. at 473. There is no "delegation of sovereign power to the Commission," and "each state is free to withdraw at any time." *Id.* By the same reasoning, the Compact also did not enhance the collective power of the party states as against *each other*. And there is certainly nothing to suggest that the party states intended to impair or subordinate their individual sovereign authority, particularly with respect to taxation, as against third-party private taxpayers. *Cf. id.* at 472-473 (suggesting the Compact might have incrementally *increased* "the bargaining power of the member States *quoad* the corporations subject to their respective taxing jurisdictions").

The decision below also properly looks to this Court's decision in *Northeast Bancorp*, which discussed several "classic indicia" of a compact, 472 U.S. at 175. These include whether states have established a joint regulatory organization or body, whether the legal effectiveness of a state law is conditioned on similar action by other states, whether each state is free to modify or repeal its law unilaterally, and whether the arrangement imposes

reciprocal obligations on participating states. *Id.* The California Supreme Court sensibly considered the same factors in evaluating whether the Multistate Tax Compact was intended to provide taxpayers such as petitioners with enforceable contractual rights. Nothing in its discussion either holds or suggests, as petitioners claim, that the court viewed these factors as some sort of "universal list" or inflexible "test" (Pet. 23), or "ignored" other relevant considerations (Pet. 15).[7]

On the contrary, as discussed above, the court took full account of other factors, including "the contract language, the intent of the parties, the form of the agreement, and so on." *See* Pet. 15. Indeed, it properly took account of factors that petitioners would prefer to discount or ignore, such as the interpretation of the Compact by the Commission and party states and, in particular, the actual compacting parties' consistent course of conduct over time. *Compare, e.g.*, Pet. 20, 23 n.10 *with, e.g.*, Pet. App. 11a, 13a-14a, 15a, 19a-20a.

That, too, is consistent with this Court's cases. In *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2132 (2013), for example, the Court looked to three primary factors in construing an ambiguous compact: the member states' course of conduct, the likelihood that states would surrender vital sovereign interests without unmistakably stating so, and similar treatment of the subject matter in other com-

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[7] Petitioners cite nothing for their assertion that the court below "appl[ied] what it described as a special and novel approach to the interpretation of interstate compacts" (Pet. i). Likewise, the opinion below does not "h[o]ld that *Northeast Bancorp* states a novel and singular rule that governs the construction of interstate agreements" (Pet. 10).

pacts. And the Court explained that "[a] 'part[y's] course of performance under the Compact is highly significant' evidence of its understanding of the compact's terms." *Id.* at 2135 (quoting *Alabama* v. *North Carolina*, 560 U.S. 330, 345-346 (2010)). As Justice Kennedy observed, a court's "duty in interpreting a compact involves ascertaining the intent of the parties." *Alabama*, 560 U.S. at 359 (Kennedy, J., concurring in part and in the judgment). Here, the state parties' course of conduct, and the implausibility of the contention that the terms of this Compact were ever intended to confer on third-party taxpayers a contractual right to block or condition future changes in state tax laws, strongly confirm the correctness of the judgment below.

b. The California Supreme Court's decision is also consistent with the results reached to date in every other similar case. Although petitioners barely advert to the point (*see* Pet. 28-29 & n.12), this case is one of five similar challenges brought in different states, all by the same or similar taxpayers and the same lead counsel. To date, none of these challenges has met with success.

Oregon, for example, joined the Multistate Tax Compact at its inception in 1967. In 1993, like California, it eliminated a taxpayer's ability to elect to use the equal-weighted UDITPA apportionment formula, without entirely repealing the statute that had originally enacted the Compact. Nearly three decades later, in 2010, a corporate taxpayer filed amended tax returns and claimed refunds for the years 2005-2007, arguing (among other things) that elimination of the election unconstitutionally impaired a contractual obligation that the state owed to the taxpayer under the Compact. *See HealthNet, Inc. and Subs.* v. *Dep't of Revenue*, 22 Or. Tax 128, 129-130, 133 (2015). The Oregon Tax Court rejected the

refund claims, holding in an extensive opinion that disablement of the election provision did not violate the federal or state Contracts Clauses because there was no binding contract among the compacting states to maintain the election. *See id.* at 140-162, 173. The taxpayer's appeal is pending before the Oregon Supreme Court (No. S063625).

Minnesota first enacted legislation based on the model Compact in 1983. *Kimberly-Clark & Subs.* v. *Commissioner of Revenue*, -- Minn. --, 2016 WL 3474383, *2 (June 22, 2016). In 1987, it repealed the provisions of Compact Articles III and IV, containing the Compact election and the equal-weighted apportionment formula. *Id.* at *1, *3. In 2013, Kimberly-Clark Corporation amended its state tax returns for the years 2007-2009. *Id.* at *1.[8] It argued, familiarly, that the Compact election "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." *Id.* at *3.

The Minnesota Tax Court rejected these refund claims, and the Minnesota Supreme Court recently affirmed. *Kimberly-Clark*, 2016 WL 3474383, *1, *4, *6. The court held that nothing in the state law enacting the Compact evinced any "unmistakable or express promise surrendering the State's legislative authority" to make later changes short of a full repeal. *Id.* at *6. "[N]othing in the statute dictated

[8] Kimberly-Clark is also a petitioner in this case. Notably, its Minnesota refund claims were filed the year after the California Court of Appeal rendered its decision in favor of the taxpayers in this case. *See* Pet. App. 24a. After the commencement of that litigation, Minnesota, like California, took the precaution of accommodating petitioners' legal theory by completely repealing its Compact legislation. *Compare id.* at 24a n.1 *with Kimberly-Clark*, 2016 WL 3474383, *4.

the 'all or nothing' position advanced by Kimberly Clark." *Id.*

In Michigan, a 2014 decision of the state Supreme Court concluded that state tax law changes beginning in 2008 did not clearly show a legislative intent to supersede the Compact's election provision as a matter of state statutory law, at least for the tax years at issue. *IBM* v. *Mich. Dep't of Treasury*, 496 Mich. 642, 653-662 (2014) (plurality opinion); *id.* at 668-670 (Zahra, J., concurring). The state legislature later clarified its intent to eliminate the election, and a number of challenges similar to this case again came before the state courts. *See Gillette Commercial Ops. N. Am. & Subs.* v. *Dep't of Treasury*, 312 Mich. App. 394, 400-401, 403-405 (2015). The state Court of Claims and Court of Appeals rejected the challenges, ruling (as most relevant here) both that "the Compact is not a binding contract under Michigan law" (*id.* at 409) and that, applying the factors from *Northeast Bancorp*, "the Compact contained no features of a binding interstate compact and, therefore, was not a compact enforceable under the Contracts Clause" (*id.* at 411). On June 24, 2016, the Michigan Supreme Court denied review. *See, e.g.*, 880 N.W.2d 230.

In Texas, a taxpayer has also pursued litigation raising similar claims. *See Graphic Packaging Corp.* v. *Hegar*, 471 S.W.3d 138, 141 (Tex. App. 2015), *pet. for review filed* (Dec. 14, 2015). To date, the decision in that case turned on state-specific grounds. *Id.* at 147 (concluding that the state's franchise tax is not an "income tax" within meaning of Compact).

Accordingly, despite a coordinated nationwide litigation campaign conducted over the last several years, the courts in each case have so far reached the same conclusion as the California Supreme Court.

Petitioners' frustration with that uniform lack of success provides no basis for review by this Court.

3. Finally, there is no support for petitioners' assertions that the decision below "calls into question the meaning and enforceability of many dozens of other significant interstate agreements," will "jeopardiz[e] critical agreements between States," and "threatens to render non-binding virtually all compacts that have not been approved by Congress." Pet. 3, 10, 30.

Petitioners provide a long list of compacts that they claim are "jeopardized by the decision below." Pet. 31, 31-33. They fail, however, to support their contention (Pet. 31) that these other arrangements are "similar in material respects" to the Compact at issue here. One of the first examples they suggest, for instance, is the Interstate Insurance Receivership Compact. *See id*. The text of that compact is available at http://apps.csg.org/ncic/compact.aspx?id=87. When it was in force, the IIRC created a commission that was expressly empowered to, for example, "promulgate rules which shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this Compact." Art. IV(1); *see also* Art. XIV(B)(1). It also expressly provided that no amendment to the compact would "become effective and binding upon the Commission and the compacting states unless and until it is enacted into law by unanimous consent of the compacting states." Art. XI(3). And it provided that the compact would "remain binding upon each and every compacting state" unless the state withdrew "by enacting a statute specifically repealing the statute which enacted the Compact into law." Art. XII(A)(1). As it happens, two of the only three states that ever enacted the compact eventually did enact such repealing statutes,

thus apparently triggering a further express "[d]issolution" provision and rendering the compact "null and void and … of no further force or effect" (Art. XII(C)(1)-(2)).[9]

Those terms and circumstances are materially *different* from those at issue here. *Cf., e.g.*, Pet. App. 16a-18a (discussing purely advisory and consultative role of Multistate Tax Commission); *id.* at 15a-16a (course of conduct of party states); *id.* at 87a-89a (different effectiveness and withdrawal provisions and no provision addressing modification or amendment). Indeed, the terms and circumstances of each interstate arrangement are unique. And neither California nor the decision below raises any question about the general proposition that terms of a compact that are meant to be enforceable may be enforced by appropriate parties in an appropriate case. That may explain why no actual compact organization has joined the various amici urging review here.[10]

Indeed, if this case highlights any threat to the usefulness and flexibility of the interstate compact mechanism, it is not one arising from the decision below or from any position advanced by California, the Multistate Tax Commission, or any compacting state. The threat would arise if states became wary of participating in constructive government-to-government arrangements because of concern that doing so might result in their being drawn into lengthy and distracting litigation, brought by private

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[9] *See* Mich. Comp. Laws § 550.11-550.13 (repealed by 1996 Mich. Pub. Acts 385, § 3, effective Jun. 1, 2006); Neb. Rev. Stat. § 44-6501 (repealed by 2006 Neb. Laws 875, § 24, effective Mar. 14, 2006).

[10] The only state amicus has never been a party to the Compact at issue, and appears to express no view on the ultimate merits.

parties, seeking to impose both improper limitations on sovereign prerogatives and substantial financial costs, based on purported contractual obligations that the states never meant to undertake. The point is aptly illustrated by the fact that, in the wake of the litigation campaign of which this case is a part, several states, including California, have withdrawn completely from the Multistate Tax Compact and severely limited their participation in the consultative and advisory activities of the Commission. That sort of forced retreat from flexible, purpose-built forms of interstate collaboration benefits no one.

The California Supreme Court's decision in this case correctly applies general principles drawn from this Court's cases to the unique terms, structure, and history of a particular interstate collaboration. It holds only that, under the particular circumstances here, the Multistate Tax Compact gives private, third-party taxpayers no constitutionally enforceable contractual right to prevent California from changing its tax laws, or to require it to do so in a particular procedural way. It creates no threat to the proper interpretation and enforcement of any other interstate arrangement, and it does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: August 1, 2016

Respectfully submitted,

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