No. 15-1442

IN THE

Supreme Court of the United States

THE GILLETTE COMPANY, THE PROCTER & GAMBLE MANUFACTURING COMPANY, KIMBERLY-CLARK WORLDWIDE, INC., AND SIGMA-ALDRICH, INC.,

Petitioners,

v.

CALIFORNIA FRANCHISE TAX BOARD,

Respondent.

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

BRIEF *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICUS CURIAE*

The Council On State Taxation ("COST") is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents nearly 600 multistate businesses in the United States. COST members represent the part of the nation's business sector that is most directly affected by state taxation of interstate and international business operations. And, COST is vitally interested in cases such as this one that involve the ability of multijurisdictional taxpayers to use the uniform and certain apportionment formula election included in the Multistate Tax Compact ("Compact"). This allows such taxpayers to fairly apportion their income to the Compact member states, easing the burden of multistate tax compliance.[1]

COST's existence and history has been closely intertwined with the Compact, which was created just two years prior to COST in 1967. Consistent with that fact, COST has participated in filing *amicus* briefs in litigation in other states related to the issue here, namely whether Compact member states' taxpayers may use the Compact's equally weighted three-factor apportionment election. *See Health Net Inc., v. Dep't of Rev.*, TC 5127, (Or. T. C. 2015); *Graphic Packaging Corp. v. Hegar*, 471 S.W.3d 138 (Tex. Ct. App. 2015);

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus's* intent to file this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

Int'l Bus. Mach. Corp. v. Dep't of Treasury, 852 N.W.2d 865 (Mich. 2014).[2]

COST also has a history of submitting *amicus* briefs to this Court when it is considering a state and local tax issue. Last year, COST submitted *amicus* briefs in all three significant state tax cases decided by the Court: *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136 (2015); *Comptroller of the Treasury of Maryland v. Wynne.*, 135 S. Ct. 1787 (2015); and *Direct Marketing Association v. Brohl*, 135 S. Ct.. 1124 (2015). Through its connection to the Compact and distinctive status representing large multijurisdictional taxpayers, COST is in a unique position to provide this Court with background information that substantiates the Compact was created as, and remains, a binding interstate compact and supports this Court granting review of the California Supreme Court decision to the contrary. Moreover, several COST members are directly impacted by the California Supreme Court's decision and would benefit from this Court reviewing this case.

[2] COST *amicus curiae* briefs are available online at: http://www.cost.org/StateTaxLibrary.aspx?id=3386.

STATEMENT OF THE CASE

This Court is being asked to determine whether the Multistate Tax Compact is a binding interstate agreement on the Compact member states, including California, until they properly withdraw from the Compact, and thus subject to the U.S. Constitution's Contract Clause.[3] Specifically at issue in this case is whether California was required to provide Petitioners with an election to utilize a uniform equally weighted three-factor apportionment formula provided in the Compact when it was still a member of the Compact.[4]

The Compact was enacted in 1967 to forestall federal preemption in the realm of state corporate income taxes. Fearing Congress would act to force the states to use one uniform formula to apportion income of multijurisdictional businesses, in 1966, the Council of State Governments began drafting an interstate compact. The Compact allowed the states to continue to use their own apportionment formulas; however, the member states were also required to provide multijurisdictional taxpayers with the ability to elect to use a uniform equally weighted three-factor apportionment formula.

The crux of this case is whether the Compact was formed as an advisory interstate agreement which, as California argues, would mean its provisions are not

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[3] California took legislative action to properly withdraw from the Compact in 2012. 2012 Cal. Stat. ch. 37, § 3.

[4] In addition to the named Petitioners, hundreds of multijurisdictional corporate taxpayers' have filed suits in California and other states asserting they are entitled to utilize the three-factor election provided in the Compact. This Court's determination would resolve many of these suits.

binding on the state. This is the position taken by the California Supreme Court in *Gillette Co. v. Franchise Tax Bd.*, 363 P.3d 94 (Cal. 2015). Or, alternatively, as the Petitioners and *amicus* argue, whether the states that joined the Compact entered into a binding agreement that provided multijurisdictional taxpayers with the ability to elect to use a uniform equally weighted three-factor apportionment formula. The California Court of Appeals agreed with this position. *Gillette Co. v. Franchise Tax Bd.*, 147 Cal. Rptr. 3d 603 (2012) ("We conclude that the Compact is a valid multistate compact, and California is bound by it and its apportionment election provision throughout the years in question because California had not repealed [the Compact]."). Although federal legislation was proposed in 1965 for Congress to consent to the states creation of this interstate compact, that legislation was never enacted.[5] However, this Court has determined that interstate agreements without Congressional approval can still be binding under the Contract Clause, *see Cuyler v. Adams*, 449 U.S. 433, 440 (1981). Petitioners, and *amicus*, seek this Court's review to determine if the Compact remains binding on a member state until it properly withdraws.

[5] *See* S. 3892, 89th Cong., 2d Sess. (1966); S. 883, 90th Cong., 1st Sess. (1967); S. 1551, 90th Cong., 1st Sess. (1967); H.R. 9476, 90th Cong., 1st Sess. (1967); H.R. 13682, 90th Cong., 1st Sess. (1967); S. 1198, 91st Cong., 1st Sess. (1969); H.R. 6246, 91st Cong., 1st Sess. (1969); H.R. 9873, 91st Cong., 1st Sess. (1969); S. 1883, 92d Cong., 1st Sess. (1971); H.R. 6160, 92d Cong., 1st Sess. (1971); S. 3333, 92d Cong., 2d Sess. (1972); S. 2092, 93d Cong., 1st Sess. (1973).

SUMMARY OF THE ARGUMENT

Several of the states that signed onto the Multistate Tax Compact almost 50 years ago are now trying to assert that they were never bound by the terms to which they originally agreed. Currently litigation is ongoing or appeals have not been exhausted in five states,[6] and the highest state courts in California, Michigan and Minnesota have rendered decisions on the ongoing validity of the Compact's requirement for its member states to provide an election for multi-jurisdictional businesses to apportion their income using an equally weighted three-factor apportionment formula.[7]

From all of these decisions, one thing is clear—direction is needed from this Court on what constitutes a binding compact amongst the states. The three highest courts in Michigan, Minnesota and California arrived at different conclusions regarding whether the Compact's apportionment election constituted a binding contract. Michigan's Supreme Court held the election was still available to taxpayers based on a

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[6] California (*see Gillette Co. v. Franchise Tax Bd.*, 363 P. 3d. 94 (Cal 2015); Michigan (*see Int'l Bus. Mach. Corp. v. Dep't of Treasury*, 852 N.W.2d 865 (Mich. 2014) and *Gillette Commercial Operations North America, v. Dep't of Treasury*, 312 Mich. App. 394 (2015)); Oregon (*see Health Net Inc. v. Dep't of Revenue*, TC 5127, (Or. T.C. 2015)); Texas (*see Graphic Packaging Corp. v. Hegar*, 471 SW3d 138 (Tex. App. 2015)); and, Minnesota (*see Kimberly-Clark Corp. v. Comm'r of Revenue*, No. A15-1322 (Minn. June 22, 2016)).

[7] *See Kimberly-Clark Corp. v. Comm'r of Revenue*, No. A15-1322, *Gillette Co. v. FTB*, 363 P.3d 94; and *Int'l Bus. Mach. Corp. v. Dep't of Treasury*, 852 N.W.2d 865; Cal. Rev. & Tax Code § 38006, Art. III (1974).

statutory construction analysis.[8] Minnesota's Supreme Court applied its "unmistakability doctrine" to hold that the State did not make a "separate and distinct promise" to not alter the election.[9] In contrast, while the California Supreme Court came to the same result, its conclusion was based on this Court's decision in *Northeast Bancorp v. Board of Governors*, 472 U.S. 159 (1985). Based on that case, it held the Compact was not a binding interstate compact, but was instead merely advisory.[10] This Court needs to review the California Supreme Court's interpretation of *Northeast Bancorp* and clarify what test should be used in determining when states' compacts are binding.

This is an issue of national importance, the reach of which goes far beyond the outcome in Petitioners' case. Guidance is needed to help resolve the litigation in multiple states regarding whether the Compact is binding and whether multistate taxpayers are entitled to use the uniform three-factor apportionment formula

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[8] *See Int'l Bus. Mach. Corp. v. Dep't of Treasury*, 852 N.W.2d 86. Note, not an issue in this case, the Michigan Legislature subsequently enacted retroactive legislation, 2014 Mich. Pub. Acts. 282, which attempts to retroactively to 2008 withdraw Michigan from the Compact and to remove the Compact's apportionment election. The Court of Appeals of Michigan upheld the retroactive legislation. *See Gillette, v. Dep't of Treasury*, 312 Mich. App. 394. The Michigan Supreme Court has decided not to review the case. *Gillette Commercial Operations North America v. Dep't of Treasury*, No. 152588 (Mich. June 24, 2016).

[9] *Kimberly-Clark Corp. v. Comm'r of Revenue* at 15.

[10] *See Gillette Co. v. FTB*, 363 P.3d 94. In addition, on June 22, 2016, the Minnesota Supreme Court determined that the Compact was not binding pursuant to the unmistakability doctrine and did not reach the parties' constitutional arguments. *Kimberly-Clark Corp. v. Comm'r of Revenue*, A15-1322.

election that was key to the Compact's adoption. When interstate compacts are binding also has a broader significance for determining when collaborative efforts by the states can be relied upon to resolve common problems. Finally, if the Court does not accept this case, there is a risk numerous other non-tax related compacts will be endangered because many of them may not meet the criteria applied by the California Supreme Court to determine whether the states' agreements are binding.

The Compact helped the states to stave off congressional intervention in the state corporate income tax arena. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).[11] At the time it was adopted, the Compact was a binding contract among the member states, which provided multijurisdictional businesses with a uniform apportionment election. The Compact thereby discouraged Congress from utilizing its Commerce Clause power to impose a prescribed apportionment formula for corporate income taxes. States enter into interstate compacts to address shared interests or problems. The unique characteristic of interstate compacts is that they can contractually tie participating states to each other and impose agreed to requirements upon themselves. *Id.* at 459. Thus, the issue before this Court is whether California, as a Compact member state, was bound by the Compact during the period California remained a member state. Critical

[11] "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." Multistate Tax Comm'n, First Annual Report 1 (1968).

to that determination is the parties' intent. Considering the history and nature of the Compact, the Compact was binding on a member state from the date it became a member to the date it properly withdrew.

ARGUMENT

I. FROM ITS INCEPTION, THE MULTISTATE TAX COMPACT WAS A BINDING CONTRACT BETWEEN ITS MEMBER STATES AND THE CALIFORNIA SUPREME COURT MISAPPLIED THE *NORTHEAST BANCORP* DECISION.

The California Supreme Court held the Compact was not binding on its member states, relying exclusively upon a three-part "test" which it claimed was established by this Court in *Northeast Bancorp v. Board of Governors*, 472 U.S. 159 (1985). That test was proposed by the Multistate Tax Commission ("MTC") as this Court's definitive statement on how to determine whether a multistate agreement lacking Congressional approval is binding on its member states. The California Supreme Court accepted the MTC's version of that test and agreed the Compact failed to satisfy its three components: "The Commission asserts the Compact does not satisfy any of the indicia of binding interstate compacts noted in Northeast Bancorp. We agree." *Gillette Co. v. FTB*, 363 P.3d at 100.

The California Supreme Court's reliance on the MTC's interpretation of *Northeast Bancorp* is inappropriate for several reasons. First, the facts here are completely different than those in *Northeast Bancorp*. In *Northeast Bancorp*, there was no interstate agreement. Rather, two states unilaterally enacted separate legislation that was similar. *Northeast*

Bancorp at 163-166. By contrast, in this case, the Compact constituted a mutual agreement entered into after extensive discussions between the states and did not take effect until at least seven member states adopted the same statute. Moreover, the driving force behind the Compact was to reach an interstate agreement that would forestall Congressional intervention into state income taxation – a goal which could only be achieved by a binding compact.

Second, in *Northeast Bancorp*, this Court did not create a "test" or fixed criteria that would apply broadly to all interstate compacts to determine if a particular compact was binding upon the member states. Rather, it created a non-exhaustive and non-exclusive list of factors as evidenced by the introductory phrase: "But several of the classic indicia of a compact are missing." *Id.* at 175. Moreover, the so-called definitive test actually constituted only one paragraph of dicta in the *Northeast Bancorp* case not relied upon by this Court in making its final decision.[12]

States use interstate compacts as a mechanism to come together and address shared problems. Ann O'M. Bowman & Neal D. Woods, *Strength in Numbers: Why States Join Interstate Compacts*, 7 State Pol. & Pol'y Q. 347, 349 (2007). And, it is well settled that not all compacts require Congressional approval. *U.S. Steel* at 459. In addition, whether or not ratified by Congress, compacts have the status of contracts and are binding upon the member states. *Petty v. Tennessee-Missouri Bridge Commission* 359 U.S. 275, 285. As such, "[i]nterstate compacts are construed as

[12] As this Court noted, "But even if we were to assume that these state actions constitute an agreement or compact, not every such agreement violates the Compact Clause." *Northeast Bancorp* at 175.

contracts under the principles of contract law." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013). Completely missing from the California Supreme Court's decision was an analysis of the Compact based on the traditional factors governing contracts, including an examination of the specific provisions of the contract and the intent of the parties, as well as whether there was an offer, acceptance and consideration. Its failure to do so is particularly glaring given the many indications that the Compact was intended to be a binding, as opposed to a model, advisory law. The evidence of its binding nature includes the repeated use of the word "compact," the exchange of obligations (namely, a taxpayer's election to use the Compact's three-factor formula), the requirement the Compact not take effect until it was enacted by a minimum of seven states, and the specific withdrawal provision contained within the Compact.[13]

Although this Court has on several occasions opined on interstate compacts that did not obtain Congressional approval, the Compact litigation in California and other States highlights the lack of clear guidance as to the factors to be used in determining when interstate compacts are binding upon the member states. The California Supreme Court attempted to fill this gap by asserting this Court's opinion in *Northeast Bancorp* is the one and only guiding principle needed for determining whether certain interstate compacts are binding. As a result, it is imperative for this Court to accept *certiorari* in this case so it, rather than the California Supreme Court, has the final word on this issue.

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[13] Cal. Rev. & Tax Code § 38006, Art. X (1974).

II. THE HISTORY AND NATURE OF THE COMPACT REVEAL IT IS BINDING.

The California Supreme Court failed to properly consider the Compact's history and all the facts and circumstances surrounding the Compact's enactment. These are key to understanding whether there was a "meeting of the minds" between the Compact's member states that it was binding. Instead of carefully considering the contemporaneous history of the Compact and the states' actions to forestall Congressional intervention by providing multijurisdictional taxpayers the option to use a uniform apportionment formula, the California Supreme Court inappropriately looked at "after-the-fact" conduct of other Compact states as evidence the Compact was not binding. *Amicus* will show the history and purpose of the Compact provide clear evidence the member states meant to be bound by the Compact when it was enacted. Thus, this Court needs to consider not only the California Supreme Court's misapplication of the *Northeast Bancorp* precedent but also its highly selective consideration of the underlying facts relating to the Compact's enactment and implementation to determine the intent of the member states.

With the rapid growth of interstate and international commerce, states and multistate taxpayers were faced with a difficult problem in the 1950s—how to devise an equitable and constitutional method for taxing corporations doing business in multiple states and countries. States understood there was a need for uniformity to avoid double taxation; however, the states did little to achieve such uniformity. As one commentator noted: "Before 1957, the need for uniformity in state income taxation of multistate businesses was something like the weather—

everybody talked about it, but nobody did anything about it." John S. Warren, *UDITPA—A Historical Perspective*, 38 State Tax Notes 133, 133 (2005). That was the year a uniform model statute to apportion the income of multijurisdictional businesses was formulated—the Uniform Division of Income for Tax Purposes Act ("UDITPA").

UDITPA was adopted as a model law in 1957 by the National Conference of Commissioners for Uniform Laws ("NCCUSL").[14] UDITPA had two main objectives: "(1) to promote uniformity in allocation practices among the * * * states which impose taxes on or measured by the income of corporations, and (2) to relieve the pressure for congressional legislation in this field." Frank M. Keesling & John S. Warren, *California's Uniform Division of Income for Tax Purposes Act, Part 1*, 15 UCLA L. Rev. 156, 156 (1967). UDITPA utilizes the "gold standard" of apportionment formulas—a three-factor formula that uses equally weighted property, payroll, and sales factors (33.3 percent each). The policy rationale behind the UDITPA apportionment formula is to equitably divide a multistate business's income among states. After weighing different options, NCCUSL decided this should be done using the three factors of production: (1) property representing capital, (2) payroll representing labor, and (3) sales representing the market. After its adoption in 1957, few states initially adopted UDITPA, and those states that enacted it did so with substantial variations of the uniform terms.[15]

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[14] NCCUSL is now known as the Uniform Law Commission.

[15] While the states touted the uniformity provided by UDITPA, they remained free to enact whatever parts they thought beneficial or change them entirely. UDITPA, therefore, was "uniform in name only." *See* John Dane, Jr., *A Solution to the*

Increased concern the states might unfairly tax multijurisdictional businesses arose in the aftermath of this Court's decision in 1959, *Northwestern States Portland Cement*, 358 U.S. 450 (1959). This Court held that the in-state solicitation by an out-of-state corporation was sufficient to create nexus for the purpose of imposing a state income tax. *Id*. at 464. Congress and the business community were alarmed by the Court's decision in *Northwestern States Portland Cement*. As one commentator noted:

> "There were predictions of the most dire consequences to business and, indeed, the entire nation. Two Senate Committees promptly held hearings, and there was vociferous demand for immediate congressional action. Congress reacted with astonishing speed and, for the first time in its history, adopted an act restricting the states' power to tax interstate businesses."

Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 6.17 (3d ed. 2013 & Supp. 2015) (citations omitted).

Congress quickly realized that if states exercised the authority of *Northwestern States Portland Cement*, businesses could face double taxation and increased compliance burdens. Congress swiftly acted, passing Pub. L. No. 86-272 within just six months of the Court's decision.[16] The breadth of Pub. L. 86-272 was,

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Problem of State Taxation of Interstate Commerce, 12 Vill. L. Rev. 507, 510 (1967).

[16] Pub. L. No. 86-272 limits the states' ability to impose net income taxes on businesses that have no presence in a state other than to merely solicit sales of tangible personal property in a

however, limited. Of relevance to this case, Pub. L. 86-272 did not address how the income of a multistate business should be divided or apportioned among the states. Thus, the business community continued to be concerned about the possible double taxation of multijurisdictional businesses' income.

Conversely, the states continued to fear further Congressional intervention to address how the states apportion multijurisdictional businesses' income. Their fears were realized when Congress formed the Willis Committee to study state taxation of interstate commerce and make recommendations to *promote uniformity*. One of the Willis Committee's conclusions was the existing system used by states to tax the income of interstate businesses created substantial inequities for those businesses. H.R. Rep. No. 88-1480, at 1135 (1964). The Willis Committee's report called for sweeping federal legislation to resolve this problem, and it would have severely limited the states' authority to tax interstate businesses, including imposing a uniform apportionment regime on the states. *See id.*; *see also* Richard D. Pomp, *State and Local Taxation* 11-14 (7th ed. 2011). The Willis Committee's recommendations were incorporated into House Report 11798, entitled the Interstate Taxation Act, which was introduced in October 1965. H.R. Rep. No. 11798, 89th Cong., 2d Sess. (1965).[17]

The Willis Committee's findings and threat of federal legislation prodded the states into action. Soon

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state. Interstate Income Act, Pub. L. No. 86-272, 73 Stat. 555 (1959) (codified at 15 U.S.C. §§ 381-391).

[17] The bill utilized a uniform *two* factor formula (property and payroll) for the apportionment of income, leaving out the sales factor included in the UDITPA and most existing state apportionment formulas.

after the Willis Committee made its recommendations, the Council of State Governments began drafting an interstate compact—the Multistate Tax Compact. Council of State Governments, *The Multistate Tax Compact, Summary and Analysis* (1967).[18] The Compact's purpose was to provide multijurisdictional taxpayers uniformity in member states (*i.e.*, the ability to use a uniform apportionment formula) and to stave off federal legislation. *See id.*; *Gillette Co. v. Franchise Tax Bd.*, 147 Cal. Rptr. 3d 603 (2012), *reversed in* 363 P.3d 94 (Cal. 2015).

In 1966, the Compact was finalized, and it was presented to state legislatures in January 1967. The Compact became effective under its terms, on August 4, 1967, when seven states enacted it. Multistate Tax Comm'n, First Ann. Rep. 1-2 (1968). "The Compact [was] the state's answer to Federal control of state taxing policies and programs." Multistate Tax Comm'n, *1968 Brochure on the Multistate Tax Compact*, *reprinted in* 66 State Tax Notes 600, 600 (2012). The MTC, in its own words, affirmed the UDITPA three-factor apportionment formula was, in fact, the uniformity glue underlying the Compact:

> The Multistate Tax Compact makes UDITPA available to each taxpayer on an optional basis. . . . *The Multistate Tax Compact thus preserves the right of the states to make such alternative formulas available to taxpayers even though it makes uniformity available to taxpayers where and when desired.*

Id. at 3 (italics added).

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[18] Available at https://www.pwc.com/us/en/state-local-tax/multistate-tax-compact/pdfs/csg_1967_mtc_summary_and_analysis.pdf.

Against this background, it is clear the member states entered into the Compact knowing it was binding. This intent is also made clear by a statement made by the Chairman of the newly formed MTC at its meeting in San Francisco, California on June 15, 1967, who stated: "the Compact was a legally binding instrument without Congressional consent."[19] By entering into the Compact and modestly limiting their freedom, the states avoided a Congressionally mandated uniform apportionment formula.

A key component of the Compact is it did not entirely strip states of their ability to enact their own apportionment formulas, so long as they still offered taxpayers the UDITPA three-factor formula election. Consistent with this fact, California in 1993 amended a separate section of its tax code but not the Compact, providing an apportionment formula giving more weight to the sales factor than in the traditional three-factor formula. Cal. Rev. & Tax Code § 25128(a).

The states' selection of an interstate compact as the mechanism to offer a uniform apportionment election is also strong evidence of the intent of the member states to be bound. California and the other states had previously entered into other interstate compacts and were very familiar with the use of this mechanism not as an advisory agreement but as an instrument to bind states together for a common goal. The historical evidence above indicates the drafters and the states were familiar with how interstate compacts worked, called the document a compact, used the form of a compact, and fully intended this Compact to work in

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[19] Amy Hamilton, *First MTC Chair Called Compact 'Legally Binding Instrument'*, 2016 State Tax Today 119-1 (June 21, 2016).

the same way as other compacts in binding the member states.

The contemporaneous analysis of the Compact by the Council of State Governments (the organization responsible for its drafting) also makes clear the Compact's election was intended to be vested in taxpayers and *required* to be provided by the member states:

> The compact would permit any multistate taxpayer, at his option, to employ the Uniform Act for allocations and apportionments involving party States or their subdivisions. Each party State could retain its existing division of income provisions *but it would be required to make the Uniform Act available to any taxpayer wishing to use it.* Consequently, any taxpayer could obtain the benefits of multi-jurisdictional uniformity whenever he might want it.

Council of State Governments, *The Multistate Tax Compact, Summary and Analysis* at 1 (italics added).

While the states were working to stop Congress from passing a federal law that would preempt their right to tax, they also understood that by joining the Compact, under which they were bound to provide multijurisdictional taxpayers with a uniform apportionment election, they were giving up some autonomy. A state's right to tax is fundamental to a state's independence and autonomy—a right a state is reluctant to assign away completely. Thus, the drafters knew states would not join the Compact unless the member states were also able to exit the Compact. Pursuant to the terms of the Compact, a member state may withdraw from the Compact by the

same means it used to adopt it. Cal. Rev. & Tax Code § 38006, Art. X (1974).

The Compact's withdrawal provision, however, does not give a state unbridled discretion to get out of the Compact. Rather, if a state determines withdrawal is in its best interest, it must do so by passing a bill which repeals the Compact from the state's tax code. This is not an insignificant action as it requires an overt public repeal of the Compact through the legislative process. Further, a state cannot simply amend or eliminate a Compact provision piecemeal; it is an all or nothing endeavor.[20]

The reasons for the withdrawal provision in conjunction with the requirement for a state to seek legislative approval to withdraw from the Compact, provide further evidence that states entering the Compact, like California, knowingly gave up a piece of their sovereignty to the extent of the Compact's terms. States enacting the Compact bound themselves with the mutual promise of providing a uniform apportionment election. And, although a member state has the option to withdraw, until it does so in accordance with the terms of the Compact, it is bound to the terms of Compact, including the apportionment election.

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[20] Several states have ultimately withdrawn from the Compact. See Michigan (2014 Mich. Pub. Acts 282), California (2012 Cal. Stat. ch. 37, § 3), Nevada (1981 Nev. Stat. ch. 181 at 350), Maine (2005 Me. Legis. Serv. ch 332, § 29 (West)), Minnesota (H.F. 677, 2013 Leg. 88th Sess. (Minn. 2013)), Nebraska (1985 Neb. Laws 344, § 9), South Dakota (S.B. 239, 2013 Leg Assemb. 88th Sess. (S.D. 2013)), and West Virginia (1985 W. Va. Acts ch. 160). If the Compact was not binding, then it would not have been necessary for those states to withdraw in accordance with the terms of the Compact.

California's enactment of the Compact further illustrates this point. In 1974, California passed legislation enacting the Compact, entering California as a full member of the MTC. 1974 Cal. Stat. 193 (A.B. 1304 (Russell)). California's entry into the Compact occurred several years after the Compact became effective. The delay was partially attributed to California objecting to two provisions of the Compact: (1) MTC actions were approved by one vote per state, substantially diluting California's power in relation to its size, and (2) the Compact provided for the settlement of apportionment disputes by arbitration. The voting procedures were resolved in the MTC's by-laws, which provided, in addition to the one vote per state, decisions must also be adopted by a vote weighted by population. The arbitration clause could not be stricken from the Compact without returning to the several states for reenactment as the Compact includes no express provisions for amendment. The solution was the enactment of uncodified statutory language automatically withdrawing California from the Compact should the arbitration clause be put into effect or the weighted voting procedure violated. *See* 1974 Cal. Stat.193. If California was not bound by the Compact's arbitration clause, the enacted automatic withdrawal provision would be superfluous.

Further, a 1997 opinion of the Office of the Attorney General of the State of California confirms California's understanding it could not unilaterally modify its membership in the Compact. In that opinion, the State Board of Equalization queried whether the Compact required "California to remain a member of the Multistate Tax Commission unless and until the compact is repealed in accordance with its provisions." 80 Ops. Cal. Atty. Gen. 213, 213 (Aug. 5, 1997). Because "[n]o provision of the Compact allows for a

state to withdraw from the Commission separate and apart from withdrawing from the Compact[,]" the Attorney General concluded California could only withdraw from the MTC through repeal of the Compact. *Id*. That is, California was not permitted to override and ignore the provisions in the Compact obligating member States to participate in the MTC. Those Compact provisions are directly analogous to the Compact's apportionment election provision.

The historical record is compelling and provides ample evidence of the parties' intent to be bound by the Compact. The states understood they had to do more than they had done with UDITPA to forestall Congressional intervention. While the contemporaneous history of the intent of the member states in enacting the Compact is compelling, the California Supreme Court virtually ignores all of this evidence as it mechanically applies what it proclaims to be this Court's three-part test from *Northeast Bancorp*. With its failure to consider the circumstances surrounding the enactment of the Compact, the California Supreme Court has forgotten Justice Holmes's famous observation that, in tax matters, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). This Court should clarify that *Northeast Bancorp* is not the definitive test for establishing whether a compact is binding and also affirm the import of contemporaneous history in determining the states' intent in forming a compact.

III. THE ISSUE BEFORE THIS COURT IS ONE OF NATIONAL IMPORTANCE.

The resolution of whether the Compact is a binding contract giving taxpayers in member states the right to elect to use the UDITPA apportionment formula is an issue of national importance. First, this issue is

being litigated in multiple states, and guidance from this Court on the appropriate criteria to be used in determining when the states have entered into a binding interstate compact is needed. This case alone has been ongoing since 2010. *Gillette Co. v. FTB*, 147 Cal. Rptr. 3d 603 (2012), *rev'd in* 363 P.3d 94 (Cal. 2015). In addition, this issue is being currently litigated or appeals have not be exhausted in Michigan, Minnesota, Oregon and Texas. *See Gillette Commercial Operations North America v. Dep't of Treasury*, 312 Mich. App. 394; *Health Net Inc. v. Dep't of Rev.*, TC 5127; *Graphic Packaging Corp. v. Hegar*, 471 S.W.3d. 138; *Int'l Bus. Mach. Corp. v. Dep't of Treasury*, 852 NW2d 865; and *Kimberly-Clark Corp. v. Comm'r of Revenue*, No. A15-1322.

Second, this issue's resolution has a much broader significance for state tax administration. Federal, state and local governments rely upon a system of voluntary compliance to account for the vast majority of tax collections from taxpayers. However, unlike the federal tax system where taxpayers are only required to understand and comply with one set of rules, multijurisdictional taxpayers may be required to understand and comply with thousands of different state and local tax rules. To this end, the Compact was an important historical development that created a measure of uniformity for multijurisdictional corporate taxpayers.

The Compact has been held up as an example of the states' ability to work together to craft more uniform laws for taxpayers and alleviate the need for Congressional preemption under the Commerce Clause. Decades later, the states are now trying to disavow the Compact, without properly withdrawing, suggesting their collective effort was just a ruse to

avoid federal preemption without any binding commitment by the states. Again, the contemporaneous evidence provides otherwise. If the Compact is found to not be worth the paper on which it is printed, the harm will be widespread. This will undermine future collaborative efforts by states that the public can rely on to resolve common problems through multistate agreements. Instead there will be increased demands for Congress to preempt the states. This is precisely the result the Compact was intended to avoid.

Finally, the importance of this issue extends beyond state taxes. As noted in the Petitioners' brief, there are dozens of existing compacts between states that cover a range of different issues such as: regulatory uniformity, responses to criminal activities, licensing coordination, and emergency response and management. Pet'rs' Br. 30-33. Those compacts are materially the same as this Compact and take effect after adoption by statute by the member states, contain the terms governing operation of the compact, and contain a withdrawal provision. *Id.* If this Court does not provide guidance regarding the California Supreme Court's misuse of the *Northeast Bancorp* precedent, there is a risk that other state compacts will be subject to challenges on whether the compacts are binding upon the member states.

Thus, COST respectfully urges this Court to accept *certiorari* in this case and determine whether the Compact is binding upon its member states. This is an issue of national importance extending beyond California. Guidance is needed to determine when states' compacts are binding. Leaving the California Supreme Court's decision in place will have broad repercussions and create uncertainty for current and future multistate compacts.

CONCLUSION

For the reasons stated above and for the reasons identified by the Petitioners, *amicus* respectfully request this Court grant the Petitioners' Petition for Writ of *Certiorari*.

Respectfully submitted,

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