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 A Writ Of Certiorari To The Supreme Court Of California

AMICUS CURIAE BRIEF OF DAVID DOERR IN SUPPORT OF THE PETITIONERS

WILLIAM HAYS WEISSMAN
LITTLER MENDELSON, P.C.
Treat Towers
1255 Treat Boulevard
Suite 600
Walnut Creek, CA 94597
Telephone: 925.932.2468
Facsimile: 925.946.9809
WWeissman@littler.com
Counsel for
Amicus Curiae David Doerr

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae David Doerr is the Dean of California tax policy. Mr. Doerr served as the Chief Consultant to the California Assembly Committee on Revenue and Taxation from 1963 to 1987. From 1963 to 1965, Mr. Doerr coordinated the California Assembly Revenue and Taxation Committee's 12-volume major study of California tax structure. As a part of this study, he co-authored Part 10, entitled "Taxation of Corporate Income in California" with UCLA Professor Harrold Somers. Over the years Mr. Doerr also served as the Chief Tax Consultant for Assembly members Nick Petris, Jack Veneman, Bill Bagley, Willie Brown, Joe Gonsalves, among others.

Importantly, Mr. Doerr attended the first meeting of the Multistate Tax Commission in San Francisco on June 15, 1967, and also attended the December 12-13, 1966, MTC meeting at which the Compact was adopted as the personal representative of Assembly Speaker Jesse Unruh. Mr. Doerr is likely the last living person to have attended those meetings.

Since 1987, Mr. Doerr has served as the California Taxpayers Association's (CalTax) Chief Tax Consultant, analyzing tax policies and reporting on tax issues.

---

[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or his counsel made a monetary contribution to its preparation or submission. The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

In 1988, he founded the *CalTaxletter*, a publication that keeps CalTax members informed about key tax legislation, court cases, elections, regulatory activity and more. Mr. Doerr's book, *California's Tax Machine: A History of Taxing and Spending in the Golden State*, is used as a reference work by the state's policy makers and has been called "the bible on California taxes" by respected political columnist Dan Walters of *The Sacramento Bee.* The book has over 70 pages devoted to apportionment issues.

Mr. Doerr's interest in filing this *amicus* brief is to aid the Court by providing his own personal, firsthand knowledge of the events and discussions that led to the adoption of the Compact by the states as well as California's own thinking at the time. In addition, having spent over 60 years of his professional career devoted to California state taxation, he has a keen and continuing interest in California tax policy and concerns about the California Supreme Court's misunderstanding of the Compact.

STATEMENT OF THE CASE

At issue is whether the Multistate Tax Compact is binding upon its signatory states. The Compact allows a taxpayer to elect to use either the equally weighted three-factor apportionment formula established by the Uniform Division of Income for Tax Purposes Act (UDITPA) or an alternative formula established by a state. Petitioner elected to use UDITPA rather than

California's alternative formula. California rejected Petitioner's election, asserting that the election did not exist because "notwithstanding" the Compact's apportionment formula, California only allows its own apportionment formula. (Cal. Rev. & Tax. Code, § 25128.)[2] The California Supreme Court's opinion in *The Gillette Co. v. Franchise Tax Bd.*, 62 Cal.4th 468 (2015), relying almost exclusively upon the MTC's *amicus* brief, concluded that the Compact is merely advisory in the nature of a model act, rather than a binding contract among the signatory states. Therefore, California was free to repeal the Compact's election provision and require Petitioner to use its own apportionment formula.

SUMMARY OF ARGUMENT

The Compact was adopted by the states as a political solution to forestall Congressional interference in the field of state taxation. By agreeing to allow multistate taxpayers to elect, *at their option*, either an apportionment formula that was uniform in all states that adopted the Compact (i.e., UDITPA), or a separate formula enacted by the state, if any, the states sought to ensure the problems caused by the lack of uniformity prior to the Compact would be alleviated. There is no support in the historical record for the *Gillette* court's conclusion that the Compact is akin to a model act that is advisory in nature and subject to

[2] All further "Section" references are to the California Revenue and Taxation Code.

unilateral modification as a matter of state law. As a binding contract among states, California's attempt to eliminate the Compact's election is akin to states' efforts to nullify federal law, and should be rejected.[3]

ARGUMENT

I. ADOPTION OF THE MULTISTATE TAX COMPACT

A. Early efforts to address the lack of uniformity in state apportionment formulas were a failure.

This Court has long acknowledged the inherent right of the states to tax income earned within its borders, limited only by the United States Constitution and "the will of the people." (*Union Pacific Railroad Co. v. Peniston*, 85 U.S. 5, 29-30 (1873).) The states began using various conflicting apportionment formulas as they enacted income taxes in the early 1900s. For example, according to Frank Keeling, a former attorney at the Franchise Tax Board in the 1930s, California was using a three factor formula "on a somewhat haphazard, hit or miss basis. There was no definite policy about when it should be used." (DAVID DOERR, *California's Tax Machine: A History of Taxing and*

[3] Petitioner addresses the legal grounds for why the Compact is a binding contract that may not be unilaterally changed by California in its petition at pages 11 through 28. *Amicus curiae* does not repeat those legal grounds, but provides the historical context based on his personal involvement and experience that supports them.

Spending in the Golden State (2d ed. 2008), p. 573 [DOERR].) By the mid-1950s, 20 states were using a three factor formula, but several other formulas were also in use. Further, even among the states using a three factor formula, wide divergence existed as to how those factors were applied. (Paul J. Hartman, *State Taxation of Corporate Income from a Multistate Business*, 13 VAND. L. REV. 21, 65-66 (1959) [describing the various formulas in use].)

The lack of uniformity was seen as a significant problem by business because of the risk of over taxation and administrative burden. (See, e.g., H. Rep. 89-952 (89th Cong. 1st Sess.) [WILLIS COMMITTEE REPORT], p. 1127 ["Overtaxation is implicit in inconsistencies in the rules prescribed by the various States."] While the states have long struggled to determine valid methods to apportion a multistate taxpayer's income earned within the state's borders, this Court has held that the Constitution does not mandate any particular apportionment method, while also acknowledging that "national uniform rules for the division of income" are necessary to prevent duplicative taxation. (*Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278-280 (1978).)

In order to address concerns about the growing administrative burden and risk of over taxation caused by the lack of uniformity, in the 1950s several organizations, including the Controllership Foundation and Council on State Governments (CSG), issued reports addressing apportionment, and the National Governor's Association supported adoption of a uniform three factor apportionment formula in 1954. (John A.

Swain, *A Brief History of UDITPA*, 49 STATE TAX NOTES 759 (2008).) In 1957 the National Conference of Commissioners on Uniform State Laws proposed UDITPA. (See William J. Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 TAXES 747 (1957).)

Despite these efforts, the states showed little interest in adopting a uniform law. For example, only eight states showed up at the meeting of the National Association of Tax Administrators held to comment on UDITPA, "which was evidence of their coolness toward collaboration on this subject." (John S. Warren, *UDITPA – A Historical Perspective*, 38 STATE TAX NOTES 125 (2005).) Further, only Alaska, Arkansas and Kansas adopted UDITPA between 1957 and 1964. It was apparent that while uniformity was a nice goal in theory, in practice the states preferred to adopt apportionment formulas that best suited their own interests. (*Id*. ["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."].)

B. States react to potential Congressional interference with state taxation by enacting the Compact.

The business community "reacted sharply" to *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), which held constitutional an apportioned net income tax on the interstate activities of

a foreign corporation, expressing "apprehension" that the states would push the limits of their jurisdiction even where multistate businesses' "activities and income were relatively insignificant." (H. Rep. 88-1480 (88th Cong. 2d Sess.), p. 7.) Congress responded by enacting Public Law 86-272, which prohibited a state from imposing an income-based tax on a firm whose only contacts with such state were through the solicitation of sales of tangible personal property. Criticism of Public Law 86-272 surfaced at the time it was being debated for its failure to "deal in any way with the major problem involved in state income taxation, the conflict in methods of allocation or apportionment of income between states." (Jack Hofert, *State Income Taxation – A Suggested Solution to the Present Confusion*, 37 ACCT. REV. 231, 232 (1962).)

Congress also created the "Willis Committee" to study the matter of state taxation, intending Public Law 86-272 to be only a stopgap measure. The Willis Committee recommended broad reforms, including a two-factor apportionment formula with uniform rules to be promulgated by the Treasury Department. (WILLIS COMMITTEE REPORT, at pp. 1135-1136.) H.R. 11798, the bill introduced to implement the Willis Committee's recommendation of a two-factor apportionment formula, was "followed immediately by uproarious dissent from both business and state government." (Frank M. Keesling & John S. Warren, *California's Uniform Division of Income for Tax Purposes Act (Part I)*, 15 UCLA L. REV. 156, 159 (1967).)

By 1965 the states were cognizant of the growing threat to their sovereign taxing powers from potential Congressional action. There were three possible solutions to the constitutional problem of limiting states' rights to tax the income earned by a multistate taxpayer: (1) states could voluntary agree to uniform apportionment rules; (2) states could adopt a Compact that binds them to a specific set of uniform rules; or (3) Congressional intervention. (*Id*., at 158.) The States chose the second option as the most effective solution.

A multistate tax compact and multistate tax commission were first proposed at a meeting of state tax officials in January 1966.[4] Through the rest of the year state tax officials drafted the Compact, which was adopted at the December 1966 meeting, attended by *amicus curiae*. (See MTC, *First Annual Report* (1968), pp. 1-4 [discussing meetings].) State officials at the meetings stressed that the Compact was essential because of "(1) the desirability of achieving a significant measure of interjurisdictional compatibility in state and local tax systems, and (2) the growing likelihood that federal action will seriously curtail existing state and local taxing power if appropriate coordinated action is not taken very soon by the states." (MTC, *Explanatory Statement The Multistate Tax Compact* (October 28, 1966), p. 1); see also DOERR, at p. 145 ["Much of the discussion was dominated by fear that

[4] According to the MTC, the idea of a multistate tax compact was proposed over 40 years earlier in a *Yale Law Journal* article. (MTC, *Third Annual Report* (1970), p. 6.)

Congress would establish federal standards for state taxation of corporations."].)

In June 1967 the MTC held its first meeting, which was also attended by *amicus curiae*. On August 4, 1967, the Compact became effective by its own terms, having been adopted by seven states.

C. The election provision was the Compact's key solution to resolving the uniformity issue.

At the time the Compact was drafted it was understood by the states, Congress and scholarly commentators that its key feature was multistate taxpayers' right to elect UDITPA as an alternative to whatever apportionment formula the states enacted. For example, in its October 28, 1966, *Explanatory Statement The Multistate Tax Compact*, the MTC stated that UDITPA:

> will be available in all party states to any multistate taxpayer wishing to use it. Consequently, taxpayers will be able to have the benefits of uniformity whenever they want it. On the other hand, to the extent that there may be disagreement over the precise merits of the Uniform Act, states adopting the compact will be able to provide alternatives to it, without destroying the advantages of uniformity. This result is achieved under the compact by providing that the party states agree to make the Uniform Act available to any taxpayer electing it, but they also reserve the

> right to enact any other laws dealing with apportionment and allocation of income that may seem to them to have a special appropriateness or to meet their own policies.

(MTC, *Explanatory Statement The Multistate Tax Compact*, supra, at p. 4; see also MTC, *Third Annual Report* (1970), p. 3 [the "Compact makes UDITPA available to each taxpayer on an optional basis, thereby preserving for him the substantial advantages with which lack of uniformity provides him in some states"]; Keesling & Warren, *supra*, 15 UCLA L. REV. at 158 [noting that the Compact "would adopt the Uniform Act on an optional basis, *i.e.*, it would give taxpayers the election of following either the Uniform Act or the established state law in allocating their income."]; Congressional Record – Senate, S2097 (February 28, 1969) [Senator Magnuson stating that the Compact "would permit any multistate taxpayer, at his option, to employ [UDITPA] for allocations and apportionments involving party States or their subdivisions."]; *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 457 n. 6 (1978) [describing the Compact as allowing multistate taxpayers "to apportion and allocate their income under formulae and rules set forth in the Compact or by any other method available under state law"].)

In seeking to preserve their sovereign taxing powers, the states made the political choice to voluntarily agree to be bound by the Compact. (MTC, *Second Annual Report* (1969), p. 14 ["The Compact . . . represents the exercise of sovereign jurisdiction by each state,

agreeing to procedures and laws in areas where their independent actions may otherwise either collide, overlap or at least call for joint procedures of administration"].) During the first MTC meeting, Chairman Kinnear stated that in "his view the Compact was a legally binding instrument without Congressional consent." (MTC, *Summary of Meeting*, June 15, 1967, p. 3.) The decision of the signatory states to agree to uniform procedures through the Compact was sanctioned by this Court because it did not expand states' powers at the expense of federal law's supremacy. (*U.S. Steel Corp. v. Multistate Tax Commission*, *supra*, 434 U.S. at 472-473.) Neither the FTB nor MTC has cited to any document showing that the states considered the Compact to be anything but binding, nor does the *Gillette* court cite any such evidence.

The election provision was the cornerstone of the uniformity efforts because it allowed taxpayers the opportunity to have a single apportionment formula in every state that adopted the Compact. Without the election, there was no way to achieve uniformity, and no point to the Compact. In creating a uniformity solution, the Compact achieved its initial intended result of "forestall[ing] federal legislation and creat[ing] a uniform state tax system that embodied those elements acceptable to the concerned states." (James H. Peters, *Why The Multistate Tax Compact*, 12 STATE TAX NOTES 1607, 1608 (1997); see also MTC, *Second Annual Report* (1969), pp. 6-13 [discussing the Compact's status and federal legislation].)

II. CALIFORNIA CANNOT NULLIFY A SINGLE PROVISION OF THE COMPACT WITHOUT CONSENT OF THE OTHER COMPACT MEMBERS

A. California's adoption of UDITPA and the Compact.

California adopted UDITPA in 1966. However, while a dozen states had adopted the Compact by the end of 1967, California was not interested in doing so at the time. Assembly Speaker Unruh felt that it was not fair for California to shoulder a major share of the MTC's costs when smaller "destination states" had control of the commission, and further that California had little in common with such smaller destination states. In addition, Speaker Unruh was cognizant of the significant business opposition to the Compact, which was seen at the time as a way to extract more revenue from large multistate taxpayers by smaller states. (DOERR, at pp. 146-147.) Such opposition manifested itself in businesses' lawsuit seeking to declare the Compact unconstitutional for want of Congressional approval, which this Court rejected. (*U.S. Steel Corp. v. Multistate Tax Commission*, *supra*, 434 U.S. 452; see also Peters, *supra*, 12 STATE TAX NOTES at 1610-1611.)

By 1973 Speaker Unruh was out of office and the FTB mounted a successful effort to get California to adopt the Compact. (Stats. 1974, ch. 93, § 3, p. 193.) Nothing in the legislative history of California's adoption of the Compact suggested that California was seeking to adopt an advisory model law that could be

unilaterally modified by California or any other signatory state. Rather, to the contrary, the FTB pushed California to join the MTC so that it could convince other states to join its then controversial practice of worldwide apportionment, which the MTC endorsed in 1977 and which this Court approved of in *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983). (DOERR, at pp. 147-148, 241-242, 582-585.)

Prior to 1994 the right to make an election under the Compact was academic for California taxpayers because California's apportionment formula mirrored UDITPA. (*Compare* prior version of Section 25128 *with* Section 38006.) In 1994 California abandoned UDITPA's three equally weighted factors in favor of a double weighted sales factor. In amending its apportionment formula, California for the first time triggered the Compact's election provision. However, to prevent taxpayers from having the right to elect between the two apportionment formulas as mandated by the Compact, California also added language to Section 25128 stating "*notwithstanding* Section 38006" taxpayers "*shall*" apply California's preferred double weighted sales factor apportionment formula.

Shortly after California's amendment of Section 25128 some California policymakers expressed second thoughts about the MTC, which had morphed from a body intended to promote uniformity to an aggressive advocate for expansive state taxation. In 1996 all funding for the MTC was deleted from the Assembly version of the budget bill, but California's Attorney General opined that "the Legislature's budget control

language may not amend [Section 38006] to effectuate California's withdrawal from the Commission, [and] California's fiscal obligations under the Compact may not be changed by such language." (80 Ops. Cal. Atty. Gen. 213, 217-218 (Aug. 5, 1997).) Further efforts in the late 1990s to withdraw from the MTC failed. (E.g., AB 753 (Cal. 1999).) The FTB and others advocated for staying in the MTC, arguing that the best way to effectuate change was to do so from within the organization. (DOERR, at pp. 356-358.)

B. California's "notwithstanding" language is akin to the discredited concept of nullification.

A compact is a contract, even if not elevated by Congressional consent to the status of federal law, as is the case with the Compact. As a contract, and not as a matter of federal law, "one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories." (*Hellmuth v. Wash. Metro Area Transit Auth.*, 414 F.Supp. 408, 409 (D. Md. 1976).) By adding the "notwithstanding" language to Section 25128, California sought to eliminate the Compact's election as a matter of state law because it no longer agreed with the Compact's goal of uniformity. The *Gillette* court upheld that legislative enactment as a matter of state law, thereby sanctioning California's unilateral change to its obligations to the other parties to the Compact. (*The Gillette Co. v. Franchise Tax Bd.*, *supra*, 62 Cal.4th at 476-477.)

By enacting state legislation that unilaterally altered the Compact without the consent of the other signatory states, California was violating the fundamental principles that govern the Compact *as a contract*. (*Doe v. Ward*, 124 F.Supp.2d 900, 914-915 (W.D. Pa. 2000) [" 'Interstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes. . . . Having entered into a contract a participant state may not unilaterally change its terms.' "].) Because the Compact is a binding contract among the states that could not be unilaterally altered by California alone, its legislative amendment to add the "notwithstanding" language should be held ineffective in the same way that states' attempts to nullify a federal law are ineffective. (Accord *Ableman v. Booth*, 62 U.S. 506, 515-516 (1859); *Cooper v. Aaron*, 358 U.S. 1, 17 (1958).)

Take, for example, the Interstate Compact on the Placement of Children (ICPC), a compact entered into by all 50 states, the District of Columbia and the U.S. Virgin Islands that has not received Congressional consent. The ICPC is designed to create uniform rules relating to the interstate placement of children. The ICPC also allowed for the creation of the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC), which in turn has authority to "promulgate rules and regulations to carry out more effectively the terms and provisions of this compact." (ICPC, Art. VII.) The AAICPC describes the ICPC on its website as "a binding contract between member jurisdictions."

Assume that California decided that it was no longer interested complying with the ICPC. Would it be acceptable, as a compact member, to use its own criteria for placing children in other states? Or could California decide that any compact member that sent a child to California had its jurisdiction terminated? (*Id*., at Art. V(a) [sending member "shall retain jurisdiction"].) Are the penalties for violations of the placement rules under ICPC unenforceable and merely advisory as the *Gillette* court's reasoning suggests? (*Id*., at Art. IV.) The language in the ICPC is essentially identical to the Compact in stating it shall become "effective" when enacted into state law, and that a member may withdraw by enacting "a statute repealing the same." (*Id*., at Art. IX.) It is hard to believe that California entered into numerous compacts, such as the ICPC, expecting to be bound by their terms, but for some reason carved out the Multistate Tax Compact without any clear intention in any document stating as much.

Take another example: what if California decided to shift its boundary with Arizona from the middle of the Colorado River to Arizona's shoreline, claiming the river for itself? (See Arizona-California Boundary Compact of 1963; see also *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 29-31 (1951).) As a non-binding agreement akin to a "model uniform law," would Arizona be without any recourse to enforce its boundary compact with California as a matter of contract law? If so, what is the point of a compact at all? (*Texas v. New Mexico*, 482 U.S. 124, 128 (1983) [Court has authority

"to provide one State a remedy for the breach of another"].)

No state was required to adopt the Compact, and many states never did. The states that adopted the Compact were still free to adopt alternative apportionment formulas, and many, including California, did so "even though [the Compact] makes uniformity available to taxpayers where and when desired." (MTC, *Third Annual Report* (1970), p. 3.) Further, any state that adopted the Compact but later decided it did not want to comply was entitled to withdraw at any time. (Compact, Art. X ["Any party State may withdraw from this compact by enacting a statute repealing the same."]; *U.S. Steel Corp. v. Multistate Tax Commission*, *supra*, 434 U.S. at 473 ["each State is free to withdraw at any time."].) California did just that in 2012. (S. 1015 (Cal. 2012).) California's repeal of the Compact would have been unnecessary if Section 25128's "notwithstanding" language was already effective in nullifying the Compact's election provision. California's conduct in repealing the Compact belies its argument that the Compact was not binding, and is itself evidence that California knew all along that it was bound by the Compact's terms.

C. The *Gillette* court's reasoning based on the MTC's *amicus* brief does not comport with the historical record.

The *Gillette* court claims that the Compact "was never ratified by Congress as required under the compact clause." (*The Gillette Co. v. Franchise Tax Bd.*, *supra*, 62 Cal.4th at 476.) However, it merely cites the Contract Clause for this statement, ignoring this Court's holding that Congressional approval was not required for the Compact to be effective as a contract among the states. (*U.S. Steel Corp. v. Multistate Tax Commission*, *supra*, 434 U.S. at 472-473.) The *Gillette* court then relies almost exclusively upon the MTC's *amicus* brief, which asserts that the Compact's election provision and UDITPA are "more in the nature of model uniform laws" to hold that the Compact is not a binding contract. (*The Gillette Co. v. Franchise Tax Bd.*, *supra*, 62 Cal.4th at 478.) The MTC supports its view not with citations to contemporaneous statements by the states that they intended the Compact to be advisory in nature, but by suggesting that the Compact is not a "binding reciprocal agreement" through a novel test it derives from *Northeast Bancorp v. Board of Governors, FRS*, 472 U.S. 159 (1985). In taking the MTC's suggestion and applying the *Northeast Bancorp* test, the *Gillette* court mischaracterizes the historical record and makes dubious assumptions.

For example, the *Gillette* court claims that because California was free to withdraw from the Compact at any time through repeal as set forth in Article X, California did not intend for the Compact to be binding.

(*The Gillette Co. v. Franchise Tax Bd.*, *supra*, 62 Cal.4th at 480.) However, if the Compact was not binding, why would withdrawal through repeal be necessary at all? The fact that even the *Gillette* court acknowledges that some action must be taken to withdraw from the Compact does not give rise to the court's inference that California could unilaterally nullify a single provision of the Compact.

The court also claims that the adoption of alternative apportionment formula demonstrates that the Compact was not binding and that the states were free to take unilateral action. (*Id.*, at 480-481.) But the Compact specifically allows for some unilateral action, such as the adoption of an alternative apportionment formula. There is a fundamental difference between unilateral adoption of an alternative formula as an alternative to UDIPTA as specifically allowed by the Compact, and unilateral repeal of a single provision of the Compact by one of its members. The former conduct is entirely consistent with the Compact's terms; the latter is not.[5]

The historical background setting forth the reasons for adoption of the Compact refute both the MTC's

[5] The court's example of Florida's repeal of Articles III and IV (addressing income taxes) of the Compact, and the MTC's decision to allow Florida to continue as a member, also does not support the court's conclusion that the compact is not binding and may be unilaterally amended by a single member because Florida does not impose an income tax. (*The Gillette Co. v. Franchise Tax Bd.*, *supra*, 62 Cal.4th at 480.) Thus, Articles III and IV had no effect in Florida regardless of whether they were enacted.

revisionist history and the *Gillette* court's implication that states never considered the Compact and its election provision to be binding. Had the states not agreed to be bound by the Compact's election provision, the Compact itself would have served no actual purpose and been unlikely to stave off Congressional interference. The MTC's first few annual reports, its 1966 explanatory statement on the Compact, and scholarly articles by respected commentators at the time the Compact was written all demonstrate that the states knew they were agreeing to be bound by the election provision if they chose to adopt the Compact. The *Gillette* court's decision implies that the states in effect hoodwinked Congress by agreeing to be bound by a Compact that was not binding, when the historical facts show the opposite to be true. While the Constitution may not mandate a single, uniform apportionment formula, political considerations in the 1960s did in order to solve the multistate tax problem. The Compact and its election provision were the uniformity solution adopted by the States at the time, and their decision should be respected.

CONCLUSION

One should do what they say, and say what they mean. The States that adopted the Compact, in doing so, said they would allow multistate taxpayers the option to elect to apportion their income by means of a uniform law. The states meant to be bound by their statement as manifested in the Compact. For the

Gillette court to claim the States never made such a statement cannot be squared with the historical record.

Respectfully submitted,

LITTLER MENDELSON, P.C.

WILLIAM HAYS WEISSMAN,
Counsel for Amicus
Curiae David Doerr