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 OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF CERTIORARI

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov
Counsel for Amicus Curiae State of Ohio

QUESTION PRESENTED

The Multistate Tax Compact is a multistate agreement that addresses significant aspects of the state taxation of multistate businesses. In this case, the California Supreme Court, applying what it described as a special and novel approach to the interpretation of interstate compacts derived from this Court's decision in *Northeast Bancorp v. Board of Governors*, 472 U.S. 159 (1985), held that the Compact is not binding on the signatory States. The question presented is:

Whether the Multistate Tax Compact has the status of a contract that binds its signatory States.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

STATEMENT OF *AMICUS* INTEREST[1]

Ohio has not adopted the Multistate Tax Compact ("Compact"), but is a party to many interstate compacts, most of which have not been ratified by Congress. *See* Council of State Governments, National Center for Interstate Compacts, *Ohio Compacts*, http://apps.csg.org/ncic/State.aspx?search=1&id=35. Many of these agreements, such as the Interstate Mining Compact, *see* Ohio Rev. Code § 1514.30, bear similarities to the Compact. Ohio has an interest in ensuring that interstate agreements are evaluated by clear, uniform standards. This case provides the Court with a useful opportunity to clarify the framework for evaluating interstate compacts.

SUMMARY OF THE ARGUMENT

The California Supreme Court committed two errors in its analysis that hold the potential for widespread future confusion. *First*, it converted a non-exhaustive list of "indicia of a compact" appearing in this Court's dicta into exhaustive, binding criteria for determining whether interstate agreements have been formed. *Second*, it overlooked this Court's cases holding that an interstate compact must be analyzed like any other contract, and thus failed to situate the "indicia" within that framework. These errors warrant this Court's review because they create confusion about the proper standard for analyzing interstate compacts and could affect other agreements among the States.

---

[1] Under Supreme Court Rule 37.2(a), Ohio notified counsel for the parties of its intent to file this *amicus* brief.

ARGUMENT

I. THE COURT SHOULD CLARIFY THE TEST FOR ANALYZING INTERSTATE AGREEMENTS

The California Supreme Court's decision creates ambiguity regarding how States should enter binding agreements.

A. The court misinterpreted both the *authoritativeness* and the *exclusivity* of the three "indicia of a compact" established in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985). Pet. App. 11a-20a.

As for the indicia's authoritativeness, the court failed to recognize that they were dicta. This Court used the indicia to illustrate "some doubt" about the existence of a compact, *Ne. Bancorp*, 472 U.S. at 175, but did not decide the question. Instead, it held that, "even if we were to assume that these state actions constitute an agreement," the actions did not violate the Compact Clause because they "cannot possibly infringe federal supremacy." *Id.* at 175, 176.

Unsurprisingly, many commentators who have interpreted *Northeast Bancorp* have described or treated its "indicia" discussion as dicta. *See, e.g.*, Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 Harv. L. Rev. 1958, 1973 (2007); L. Mark Eichorn, *Cutler v. Adams and the Characterization of Compact Law*, 77 Va. L. Rev. 1387, 1398 (1991); Dale D. Goble, *The Council and the Constitution: An Article on the Constitutionality of the Northwest Power Planning Council*, 1 J. Envtl. L. & Litig. 11, 35 (1986).

Perhaps for this reason, only three courts have even applied the "indicia of a compact" when analyz-

ing interstate agreements in the more than 30 years since *Northeast Bancorp*. *See Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1363 (9th Cir. 1986); *Gillette Commercial Operations N. Am. & Subsidiaries v. Dep't of Treasury*, __ N.W.2d __, 2015 WL 5704567, at *6 (Mich. Ct. App. 2015); *In re Manuel P.*, 263 Cal. Rptr. 447, 457-58 (Cal. Ct. App. 1989). Like those outliers, the California Supreme Court erred by treating the factors as binding precedent governing interstate agreements.

As for the indicia's exclusivity, the court relied solely on the three "indicia," but *Northeast Bancorp* did not purport to espouse an exhaustive list of factors indicating the existence of a binding agreement. It listed some factors that were present and "several" "indicia" that were "missing." *Ne. Bancorp*, 472 U.S. at 175. In other words, it simply "outlined *some of* the indicia of compacts." *Seattle Master Builders*, 786 F.2d at 1363 (emphasis added). This makes sense because, as discussed below, the case cannot be squared with this Court's other cases if the factors are viewed as exhaustive rather than illustrative.

B. By focusing narrowly on the *Northeast Bancorp* factors, the California Supreme Court overlooked many cases holding that compacts are contracts among States, and should be construed accordingly. *See Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) ("Interstate compacts are construed as contracts under the principles of contract law."); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("[a] Compact is, after all, a contract" (citation and quotation marks omitted)); *Green v. Biddle*, 21 U.S.

1, 92 (1823) ("the terms compact and contract are synonymous").

Indeed, in the courts below, both Gillette and the California Franchise Tax Board used contract-law principles to analyze the Compact rather than the *Northeast Bancorp* "indicia." *See* Opening Brief for Tax Board at 12-13, *Gillette Co. v. Franchise Tax Bd.*, 363 P.3d 94 (Cal. 2015) (No. S206587); Answer Brief for Gillette at 22-24, *Gillette Co.*, 363 P.3d 94. While the parties did not so much as cite *Northeast Bancorp*, the California Supreme Court relied on it exclusively.

C. The court did not attempt to reconcile its view of *Northeast Bancorp* with the cases holding that compacts must be interpreted like contracts (let alone grapple with the question of whether the relevant benchmark is federal common law or state law governing contracts, itself a cert-worthy question, *cf.* Pet. 12-13). It is black-letter law that contract formation requires mutual assent (manifested through offer and acceptance) and consideration. *Restatement (Second) of Contracts* §§ 17, 22 (1981) ("*Restatement*"). The California Supreme Court, however, used the three "indicia" identified in *Northeast Bancorp* to impose different requirements on States seeking to form compacts.

First, the court held that the Compact lacked "reciprocity" because the provision allowing a taxpayer to pick between the three-factor apportionment test "or any other state formula does not create an obligation of member states *to each other*." Pet. App. 13a. But *Northeast Bancorp* never suggested that such an obligation is necessary. It noted that neither of the two state banking laws at issue "requires a reciprocation

of the regional limitation" in order to reject "petitioners' theory" that such a limitation existed. *Ne. Bancorp*, 472 U.S. at 175. The Court did not analyze other types of obligations because none were at issue. Thus, it did not suggest that States must provide goods or services or otherwise obligate themselves *directly* to each other to create a binding compact.

Such a conclusion would be at odds with contract law, under which an act, forbearance, or modification of a legal relationship constitutes sufficient consideration. *Restatement* § 71. Moreover, "[i]t matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous." *Id.* cmt. e; *In re Rolfe*, 710 F.2d 1, 2-3 (1st Cir. 1983) (argument that consideration is lacking because only third parties benefit from contract "is not a serious argument" since "the consideration that promisor A receives when C lends money to B is the loan to B, not some *additional* benefit to A").

Second, the court concluded that the Compact was not binding because it does not "depend[] on the conduct of others members" and States may "unilaterally come and go as they please." Pet. App. 14a-15a; *Ne. Bancorp*, 472 U.S. at 175. These arguments also misread *Northeast Bancorp* and contravene contract law.

The first observation—that the Compact does not depend on the conduct of other States—rests on the same assumption as the court's "reciprocity" analysis. That is, the court assumed that a contract does not depend on other parties' actions if it only benefits third parties. The court also hedges, however, noting that the Compact *did* "require[] efficacious member

action" at its inception because its enactment depended on the participation of at least seven States. Pet. App. 14a, 87a. But the fact that other States could later join and leave without affecting the agreement, reasoned the court, "militates against a finding that the Compact is a binding interstate agreement under *Northeast Bancorp*." Pet. App. 15a. Thus, the court suggests that the Compact may have been binding initially, but did not bind later States.

Implicit in this conclusion is the assumption that a compact allowing new States to join, thus gaining the ability to enforce the compact and the obligation to comply with it, requires some *additional* rights and obligations to be binding. That conclusion finds no support in *Northeast Bancorp*. But *even if* the court correctly disregarded the enforcement ability of new party States, *Northeast Bancorp* still does not support the court's decision. In that case, no mutual agreement required *any action* by the States. Thus, the Court had no occasion to address compacts that "require[] efficacious member action" by at least some party States at least some of the time.

Such an agreement raises considerations that the California Supreme Court failed to address. For example, the court did not ask why a compact would require a certain number of members to "enact" rules that were always intended to be nonbinding. Nor does it determine whether a compact like the one at issue here would terminate if membership dropped below the number of States required to enact it. If so, under the court's rationale a compact may vacillate between binding and nonbinding status. Here, the Compact would be binding as to the first seven States that enacted it, since it "required efficacious

member action" on their part. But once an eighth State joined, States could leave without affecting the Compact, thus rendering it nonbinding. If a State *did* leave, however, the Compact would again become binding, because its existence would depend on the remaining States' membership. (Even if the Compact did not require seven States to remain in effect, the same problem would arise if only two States remained and a third entered or withdrew.) The fact that *Northeast Bancorp* did not address any of these issues demonstrates the necessity of looking to broader contract principles to analyze this case.

In addition, the California Supreme Court's second observation—that States may "come and go" at will—also poses problems. *Northeast Bancorp* noted that "each State is free to modify or repeal its law unilaterally," 472 U.S. at 175, because the statutes at issue were not part of, and did not reference, an interstate agreement of any kind; they were merely independent statutes dealing with the same subject. The Court had no occasion to address the effect of a common document requiring States to pass a repealing statute before declining to follow the agreement's terms. Indeed, most interstate compacts impose such requirements for withdrawal.

But even if passing a repealing law is viewed as inconsequential, the fact that a contract expressly allows parties to terminate the agreement at will does not necessarily suggest that it is nonbinding. Courts have not only enforced such contracts; they have refused to invalidate the termination provisions. For example, the Sixth Circuit has held that, "'[w]hen a contract contains a provision expressly sanctioning termination without cause there is no

room for implying a term that bars such termination,'" noting that the contrary conclusion would "invalidate thousands of . . . termination-at-will clauses in existing contracts." *Highway Equip. Co. v. Caterpillar Inc.*, 908 F.2d 60, 65 (6th Cir. 1990) (quoting *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 138-39 (5th Cir. 1979)). The California Supreme Court's rationale, by contrast, would risk invalidating *entire contracts* between States due to such provisions.

Finally, the court held that the commission established by the compact "is not a joint regulatory organization as contemplated by *Northeast Bancorp*" because it "lacks any binding authority over the states." Pet. App. 19a. This factor has no analog in contract analysis. That is, a contract is no less valid because it does not appoint an arbitration committee to govern disputes about its meaning or promulgate rules to effectuate its provisions.

Moreover, as discussed below, interstate compacts purporting to bind party States regularly omit such committees without being called into question. It would be curious to conclude, for example, that the lack of a committee rendered compacts setting state boundaries ineffective. Thus, placing significant weight on a compact's creation of a committee introduces not only conceptual but *literal* line-draw problems into the analysis of compact formation.

* * *

By treating the *Northeast Bancorp* factors as both binding and exhaustive rather than looking to traditional factors governing contract formation, the California Supreme Court's decision creates uncertainty

about how States create binding agreements. This Court should grant review to clarify its precedents and provide guidance to States seeking to create or abide by interstate compacts.

II. THE CALIFORNIA SUPREME COURT'S DECISION CALLS INTO QUESTION OTHER INTERSTATE COMPACTS

The decision below could affect other compacts. The Council of State Governments maintains a database of all currently existing interstate compacts. *See* Council of State Governments, National Center for Interstate Compacts, *State Search*, http://apps.csg.org/ncic/Default.aspx. A search of that database reveals 211 interstate compacts, 117 of which have not been ratified in federal law. Several of those (46, by Petitioner's estimate, Pet. 31) have some similarities to the Compact. Those compacts demonstrate that the characteristics relied on by the California Supreme Court here are commonplace.

First, the California Supreme Court noted that the Compact did "not create an obligation of member states *to each other*." Pet. App. 13a. Other compacts could be characterized in the same way. Take, for example, the Interstate Mining Compact. It requires each party State to "formulate and establish an effective program for the conservation and use of mined land" addressing, among other things, the "adaptation, restoration, and rehabilitation of mined lands" and the "prevention, abatement and control of water, air and soil pollution resulting from mining." *Interstate Mining Compact* Art. III. Under the California Supreme Court's approach, since the compact requires the party States to do something within their

own borders that does not directly affect other States, it could be deemed nonbinding.

As another example, the court's decision suggests that the Interstate Compact to Conserve Oil and Gas is binding not because the party States explicitly "agree[d]" to "enact laws" addressing oil and gas conservation, Art. III-IV, but only because Congress ratified the agreement, 49 Stat. 939. Thus, a congressionally ratified compact in which the States agree to benefit third parties is binding, but a substantially similar compact passed to obviate the need for congressional action (like the agreement at issue here, *see* Pet. 4-5) is nonbinding. The court's decision suggests that this distinction is compelled by this Court's precedent. In fact, this Court has explicitly declined to address the issue. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 n.24 (1978) (declining to address "whether congressional consent was necessary" to make the Interstate Compact to Conserve Oil and Gas binding).

Second, the court noted that the Compact allows the States to "unilaterally come and go as they please," Pet. App. 14a-15a, by enacting legislation withdrawing their membership. But virtually every compact permits as much. Even the most stringent withdrawal provisions permit unilateral withdrawal through repealing statutes so long as the withdrawing State provides advance notice. *See, e.g.*, *Boating Offense Compact* Art. IV(2) (no notice); *Interstate Product Regulation Compact* Art. XIV(1)(a) (same); *Nurse Licensure Compact* Art. X(a) (six-month notice); *Agreement on Qualifications of Education Personnel* Art. VIII(2) (one-year notice); *Interstate Mining Compact* Art. VIII(b) (same).

Finally, the court noted that the Multistate Tax Commission "lacks any binding authority over the states." Pet. App. 19a. But other compacts impose binding requirements in one article and establish committees to recommend additional measures in others. *See, e.g.*, *Interstate Mining Compact* Art. IV (commission may "recommend" policies). More importantly, some compacts, despite purporting to bind members, create no commission, committee, or board at all. Under the decision below, the lack of a committee could cast doubt on compacts establishing jurisdiction for offenses committed in interstate waters, *see Boating Offense Compact* Art. III(1); establishing uniform procedures governing interstate child placement, *see Compact on Placement of Children* Arts. III-VI; requiring States to provide mutual aid after earthquakes, *see Interstate Earthquake Emergency Compact* Arts. II-III; imposing reciprocity for nursing licenses, *Nurse Licensure Compact* Art. III; and fixing state boundaries, *see Oregon-Washington Columbia River Boundary Compact* Art. II.

In sum, this case gives the Court the opportunity to offer needed guidance as to the proper criteria for deciding the binding nature of interstate compacts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Amicus Curiae
State of Ohio

JUNE 2016