No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Multistate Tax Compact is a multistate agreement that addresses significant aspects of the state taxation of multistate businesses. 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.

RULE 14.1(b) STATEMENT

Petitioners, The Gillette Company, The Procter & Gamble Manufacturing Company, Kimberly-Clark Worldwide, Inc., and Sigma-Aldrich, Inc., were appellants in the Supreme Court of California. Two other parties—RB Holdings (USA) Inc. and Jones Apparel Group, Inc.—were also appellants in the Supreme Court of California, but they are not petitioners before this Court.

Respondent, the California Franchise Tax Board, was the sole respondent in the Supreme Court of California.

RULE 29.6 STATEMENT

The Gillette Company and The Procter & Gamble Manufacturing Company are both wholly-owned subsidiaries of The Procter & Gamble Company, a publicly held corporation that has no parent company. No publicly held corporation owns 10% or more of the stock of The Procter & Gamble Company.

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

Sigma-Aldrich, Inc., is a wholly-owned subsidiary of Sigma-Aldrich Corporation. Sigma-Aldrich Corporation is a wholly-owned subsidiary of the Mario Finance Corporation. The ultimate parent of Mario Finance Corporation is Merck KGaA, a publicly held company traded on the German Stock Exchange. No publicly held corporation owns 10% or more of Merck KGaA.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of California in this case.

OPINIONS BELOW

The decision of the Supreme Court of California (App., *infra*, 1a-23a) is reported at 363 P.3d 94. The decision of the California Court of Appeal (App., *infra*, 24a-52a) is reported at 147 Cal. Rptr. 3d 603. The decision of the California Superior Court (App., *infra*, 53a-54a; see also *id.* at 54a-62a) is unreported.

JURISDICTION

The judgment of the Supreme Court of California was entered on December 31, 2015. On March 28, 2016, Justice Kennedy extended the time for filing the petition for a writ of certiorari to May 29, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

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

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

Former Cal. Rev. & Tax Code § 38001 provided in relevant part:

> The "Multistate Tax Compact" is hereby enacted into law and entered into with all jurisdictions legally joining therein, in the form substantially as set forth in Section 38006 of this part.

Cal. Rev. & Tax Code § 25128 provides in relevant part:

> (a) Notwithstanding Section 38006, for taxable years beginning before January 1, 2013, all business income shall be apportioned to this state by multiplying the business income by a fraction, the numerator of which is the property factor plus the payroll factor plus twice the sales factor, and the denominator of which is four, except as provided in subdivision (b) or (c).

STATEMENT

This case presents the question whether the Multistate Tax Compact ("the Compact") is a contract that binds the signatory States and therefore is subject to the Constitution's Contract Clause. Those States, including California, entered into the Compact specifically to forestall the enactment of congressional legislation that would have preempted significant aspects of the state taxation of multistate businesses. Having succeeded in deflecting congressional action, however, California now insists that the Compact has no legal significance at all, maintaining that signatory States may depart from the Compact's requirements without complying with its withdrawal provision. In the decision below, the California Supreme Court agreed, holding that the Compact, notwithstanding its contractual language, actually has no binding effect on the signatories.

This decision should not stand. It rests on a distortion of this Court's precedents and a fundamental misunderstanding of the nature of interstate agreements. It has enormously important consequences; the California Supreme Court's construction of the Compact will affect at least $750 million in taxes in that State alone, with vastly greater amounts at stake nationwide. The California court's aberrant approach to compact interpretation also calls into question the meaning and enforceability of many dozens of other significant interstate agreements that are now in force across the Nation. And the state court's decision misuses this Court's holdings in a manner that effectively discriminates against out-of-state taxpayers. Further review is warranted.

A. The Multistate Tax Compact

1. The Compact addresses problems that arise from the state taxation of businesses that operate in more than one State. One of these problems concerns the division or apportionment of a business's income between the relevant States so as to avoid duplicative taxation. Thus, each State uses an apportionment formula to derive the percentage of the interstate company's income that is taxable by that State. When States use different formulas, taxpayers face complexity, burdensome compliance costs, and the risk of being taxed on more than 100% of their income. See *State Taxation of Interstate Commerce, Report of the Special Subcommittee on State Taxation of Interstate Commerce*, H.R. Rep. No. 1480 (88th Cong., 2d Sess. (1964)), vol. 1 (the "Willis Report").

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

Meanwhile, in 1959, this Court issued a decision, *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), that was generally understood to expand state authority to tax the income of interstate businesses. See *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 455 (1978). Alarm by the business community about the reach of this newfound authority "prompted Congress to enact a statute" that, for the first time, "set[] forth certain minimum [federal] standards for the exercise of [state income taxation] power." *Ibid*. (citing Pub. L. No. 86-272). At the same time, Congress's so-called Willis Commission embarked on an extensive and, ultimately, highly critical review of the state taxation of interstate business. It concluded that taxation of multistate taxpayers was inefficient and inequitable, particularly criticizing the diversity in apportionment formulas and the propensity of States to change those formulas frequently. To address these problems, the Willis Commission recommended federal legislation to mandate uniformity in state taxation, which would have preempted critical aspects of state taxation. See H.R. Rep. No. 89-952, at 1143-64 (1965). Members of Congress introduced several bills to implement this preemptive recommendation. *E.g.*, H.R. 11798, 89th Cong., 2d Sess. (1965).

2. In response, state officials adopted the Compact, which took effect in 1967. There is no doubt that the Compact's purpose was to forestall federal preemption;

the contemporaneous summary and analysis of the Compact offered by the Council of State Governments ("CSG"), under whose auspices the Compact was prepared, explained that the Compact "is the result of * * * the growing likelihood that federal action will curtail seriously existing State and local taxing power if appropriate coordinated action is not taken very soon by the States." CSG, *The Multistate Tax Compact, Summary and Analysis* 1 (1967) ("CSG *Summary*"); see *U.S. Steel*, 434 U.S. at 455-56; App., *infra*, 4a-5a, 28a. Following the Compact's adoption, none of the proposed federal bills became law.

The Compact directly addressed the Willis Commission's concerns regarding burdens on out-of-state companies. It begins with an express statement of purposes: The Compact provides that it is intended to "[f]acilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes"; "[p]romote uniformity or compatibility in significant components of tax systems"; "[f]acilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration"; and "[a]void duplicative taxation." Art. I (App., *infra*, 65a).

The Compact contains four substantive taxpayer protections that are directly responsive to the Willis Commission's conclusions. Most significant for present purposes is Article III(1), which mandates that States joining the Compact *must* offer taxpayers the option of using the Compact's apportionment formula (UDITPA's equal-weighted, three-factor approach) while also allowing States to craft their own alternative formulas, which taxpayers may, but need not, elect to use. App., *infra*, 67a. Article IV(9) codifies UDITPA's formula. App., *infra*, 72a.[1] The Compact expressly provides that it does not affect specified other matters, including state authority "to fix rates of taxation[.]" Art. XI(a) (App., *infra*, 88a).

To join the Compact, States enact its text into their domestic statutory codes. The Compact thus provides that it "shall become effective as to any * * * State upon its enactment" by that State. Art. X, § 1 (App., *infra*, 87a). And it offers a specific mechanism for withdrawal: After enactment, "[a]ny party State may withdraw from th[e] compact by enacting a statute repealing the same." *Id.* § 2 (App., *infra*, 87a).

The Compact provided that it "shall enter into force when enacted into law by any seven States." Art. X, § 1 (App., *infra*, 87a). Nine States joined the Compact within six months, making it effective. Today, the Multistate Tax Commission ("MTC") counts sixteen full member States.[2]

3. This Court has addressed the Compact once, in *U.S. Steel*. There, several taxpayers contended that the Compact was invalid under the Constitution's Compact Clause, Art. I, § 10, cl. 3, because it has not been approved by Congress, and thus that the MTC was

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[1] The other protections are a simplified method for small businesses to compute income tax (Art. III(2) (App., *infra*, 68a)); a full use tax credit for taxpayers who previously paid sales or use tax to another State for the same property (Art. V(1) (App., *infra*, 75a)); and rules for honoring tax exemption certificates from other States (Art. V(2) (*ibid.*)). In addition, the Compact formed the Multistate Tax Commission, provides rules for the Commission's operation, and sets out its duties and authority. Arts. VI-IX (App., *infra*, 76a-87a).

[2] As reflected in this litigation, however, a number of these States have repudiated certain of the Compact's provisions. See App., *infra*, 15a & n.9.

without authority to conduct audits or other business. The Court rejected that argument, holding that not all arrangements in which States "enter[] into an[] agreement among themselves" must receive congressional approval. 434 U.S. at 459. Instead, such approval is required only when an interstate agreement contains provisions "that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States." *Id*. at 472. The "pact" embodied by the Compact, the Court concluded, has no such effect on congressional supremacy. *Id*. at 473. The Compact having been upheld, the MTC has continued to audit taxpayers and conduct substantial other business through the present day.

B. Proceedings Below

1. California became a full member of the Compact in 1972 by enacting the Compact's terms. But in 1993, the State amended a separate section of its tax code to provide that, "[n]otwithstanding [the provisions of the Compact], *all* business income *shall* be apportioned to this state" using a double-weighted sales factor. Cal. Rev. & Tax Code § 25128(a) (emphasis added). This change, which purported to eliminate a taxpayer's right under the Compact to select the neutral UDITPA apportionment formula, substantially increased the tax liability of many out-of-state business taxpayers that have a high volume of sales in California. Section 25128(a) did not, however, repeal or otherwise withdraw California from the Compact, the step that the Compact mandates for member States seeking to depart from its terms.

Between 1993 and 2005, six multistate corporations, including petitioners here, paid income tax calculated under California's new formula and then sought a refund, asserting their right under the

Compact to apportion income according to the UDITPA formula. They argued in the main that the Compact gave them the right to elect use of the evenly weighted UDITPA formula and that, because the Compact is a binding agreement, California's attempt to eliminate that election violates the Constitution's Contract Clause. The State denied their claims, and the taxpayers filed this refund action in California state court.

2. Although the trial court dismissed the suit (App., *infra*, 53a-54a), the Court of Appeal reversed, reasoning that the legislature could not unilaterally repudiate mandatory terms of the Compact. *Id.* at 24a-52a. In the appellate court's view, properly understood as a contract, a compact—whether or not approved by Congress—"'may not be amended, modified, or otherwise altered without the consent of all parties,'" and the state legislature "'may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories.'" *Id.* at 37a (citation omitted).

Here, the court continued, "the Compact builds in binding reciprocal obligations that advance uniformity." App., *infra*, 40a. Accordingly, "[f]aced with the desire to escape an obligation under the Compact," "a state's only option is to withdraw completely by enacting a repealing statute," in the manner required by the Compact itself. *Id.* at 46a. "That is what the plain language says," the court continued, "and we will not read into the language an inconsistent term allowing for piecemeal amendment or elimination of contract provisions." *Ibid.* Because California did not withdraw from the Compact in the contractually specified manner, the court concluded, Section 25128-

(a) violates the Contract Clause and is invalid under the Compact. *Id.* at 50a-51a.[3]

3. The California Supreme Court reversed, holding that the Compact is not a contract at all: "[The] Compact is [not] a binding contract among its members." App., *infra*, 10a.

In reaching that conclusion, the court below did not consult ordinary sources of contract law. Instead, it found that this Court identified "the [three] indicia of binding interstate compacts" in *Northeast Bancorp* v. *Board of Governors*, 472 U.S. 159 (1985). App., *infra*, 12a & n.8. Concluding that those indicia are not present here, the state court held that the Compact is not binding.

First, the court found that there are no "reciprocal obligations" between Compact States because the Compact's apportionment election provision "does not create an obligation of member states *to each other*," instead operating in a manner more akin to a "model law." App., *infra*, 12a-13a (emphasis in original). Second, the court believed that the Compact is not binding because its effectiveness does not "depend[] on the conduct of other members" and "any state may join or leave the compact without notice." *Id.* at 14a-15a. And third, the court found it significant that, although the Compact created a multistate commission, that body "is not a joint regulatory organization as contemplated by *Northeast Bancorp*." *Id.* at 19a. For these reasons, the court concluded, "[t]he Compact's provision of election between the [uniform Compact

[3] Following the Court of Appeal's decision, the California Legislature enacted a law that purports to withdraw from the Compact. The validity and effectiveness of that legislation is not at issue here. See App., *infra*, 8a n.7, 24a n.1.

formula] or any other state formula does not create an obligation." *Id*. at 13a.

Having thus held that the Compact is not binding, the California Supreme Court declined to decide whether a binding interstate compact that has not been approved by Congress takes precedence over other state law or whether California's departure from the Compact violates the Contract Clause. App., *infra*, at 10a.

REASONS FOR GRANTING THE PETITION

The California Supreme Court held that *Northeast Bancorp* states a novel and singular rule that governs the construction of interstate agreements and that, under this rule, the Compact is not binding on its signatories. That holding is wrong. It rests on a plain misunderstanding of *Northeast Bancorp*; it wholly disregards the broader body of this Court's decisions addressing the application of interstate agreements; and, as a consequence of these errors, it misconstrues the Multistate Tax Compact in a manner that benefits domestic state tax authorities at the expense of out-of-state taxpayers.

This holding involves matters of great importance. The Compact sets rules—intended to bolster taxpayer choice—that affect the liability and obligations of innumerable taxpayers in jurisdictions across the Nation. And the California Supreme Court's decision adopts a bizarre approach to the interpretation of interstate compacts generally, jeopardizing critical agreements between States that currently are embodied in many dozens of similar compacts. This Court should review and set aside that holding.

A. The Multistate Tax Compact Is Binding On Its Members.

1. The Compact must be interpreted according to federal common law.

a. In addressing the errors committed by the California Supreme Court, we begin with the governing background principles. This Court held in *U.S. Steel* that congressional consent to the Compact was unnecessary because it does not "threaten federal supremacy." 434 U.S. at 473. But all compacts, whether or not ratified by Congress, have the status of contracts between the signatory States. This Court has recognized for almost two centuries that "[i]n fact, the terms compact and contract are synonymous" (*Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823)), and that "[a] compact is a contract" or a "bargained-for exchange between its signatories." *Kansas* v. *Colorado*, 533 U.S. 1, 20 (2001) (citing *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987)).[4]

Moreover, although the Compact is not a law of the United States because it was not ratified by Congress,[5] this Court has jurisdiction—indeed, it has an obligation—to determine both whether the Compact *is* a contract and what its terms mean. In cases like this one involving the Contract Clause, the Court repeatedly has explained that "ultimately[,] we are 'bound to

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[4] As the Court explained in *U.S. Steel*, although the Framers evidently used the words "compact" and "agreement" as terms of art, any distinct meanings attributed to those words as used in the Compact Clause "were soon lost." 434 U.S. at 463. We do not attribute different meanings to those words in this petition.

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

decide for ourselves whether a contract was made.'" *General Motors Corp.* v. *Romein*, 503 U.S. 181, 187 (1992) (quoting *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938)). That is because "[t]he question whether a contract was made is a federal question for purposes of Contract Clause analysis, * * * and 'whether it turns on issues of general or purely local law, [this Court] can not surrender the duty to exercise [its] own judgment.'" *Ibid.* (quoting *Appleby* v. *City of New York*, 271 U.S. 364, 380 (1926)). Accord *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561 (1942).

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

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

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

b. As this last point suggests, the Court in determining the meaning of agreements between States must apply interpretive rules that are grounded in federal common law. It hardly could be otherwise. Necessarily, one State's rules of decision "do not obtain in all the States of the Union, and there are variations in their application" even among those States that subscribe to similar rules. *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670 (1931) (determination of riparian rights). Here, for example, if variable state-law rules of contract construction were applied to construe a textually identical body of rights and obligations under a single multistate contract, the contract's meaning would vary from State to State. Moreover, the prospect of such an outcome would open the door to gamesmanship and manipulation, as "every State is free to change its laws" to serve its own purposes. *Ibid.*

For these reasons, state laws are not a "just basis for the decision of controversies" involving multistate agreements. *Connecticut*, 282 U.S. at 670. "[T]he determination of the relative rights of contending States" and their respective citizens cannot "depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right." *Ibid.* In such circumstances, "it becomes [this Court's] responsibility * * * to adopt a [federal] rule [to] settle the [dispute]." *Texas* v. *New Jersey*, 379 U.S. 674, 677 (1965).

The Court employs that approach in a wide range of contexts in which there is "obvious need for rules of decision controlled by the Supreme Court." 17 Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4052 (3d ed.) (citing cases). Indeed, the court below itself appeared to recognize that is so, regarding this case as governed by this Court's approach to interstate compacts in *Northeast Bancorp*—a matter that does not call for deference to a state court's judgment.[6]

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[6] Although the dispute here is not between two States, so far as applicability of federal common law is concerned that is a distinction without a difference. There is no doubt that a central goal of the Compact was to establish a formula for apportioning multistate businesses' income that would avoid excessive or duplicative taxation, for their benefit.

2. The California Supreme Court misunderstood this Court's decisions.

a. Compacts are governed by ordinary rules of contract construction.

In interpreting the Compact, the lower court elevated the nonexhaustive "indicia of binding interstate compacts" stated in *Northeast Bancorp* into a "test" (App., *infra*, 11a-12a), crediting that decision with being "first [to] articulate[] the factors to consider in determining the binding nature of an interstate agreement." *Id.* at 12a n.8. It then measured the Compact against the considerations that this Court found relevant in assessing the state legislation at issue in that case, leading to the holding that the Compact is not "the type of binding agreement contemplated by *Northeast Bancorp*." *Id.* at 16a; see *id.* at 11a-20a.

This approach, however, both misreads *Northeast Bancorp* and fundamentally misunderstands the nature of interstate agreements—analytical errors that led the court below to misconstrue the Compact. In fact, it is settled—and has been from the earliest days of the Republic—that "[a] compact is a contract among its parties." *Oklahoma* v. *New Mexico*, 501 U.S. 221, 245 (1991) (Rehnquist, C.J., concurring in part and dissenting in part).[7] Consequently, "[i]nterstate com-

[7] The California Supreme Court's suggestion that there was some mystery about the binding nature of interstate agreements prior to *Northeast Bancorp* is puzzling. In fact, the compact mechanism "'adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and [was] extensively practiced in the United States'" after adoption of the Constitution. *Sims*, 341 U.S. at 31 (citation omitted).

pacts are construed as contracts under the principles of contract law" (*Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2130 (2013)), which means that they are "subject to normal rules of [contract] enforcement and construction." *Oklahoma*, 501 U.S. at 245. It has, accordingly, long been understood that "compact law *is* contract law." Matthew Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 Yale L. & Pol. Rev. 163, 179 (2005).

Compacts therefore must be construed by looking to all the indicia that ordinarily govern the interpretation of contracts: the contract language, the intent of the parties, the form of the agreement, and so on. Numerous decisions of this Court have looked to such materials in construing interstate agreements, invoking the *Restatement of Contracts* and other standard guides to contract interpretation.[8] But the California Supreme Court, believing itself constrained by what it understood to be the *Northeast Bancorp* template, ignored virtually all of these considerations.

b. Ordinary rules of contract construction show that the Compact is binding.

Unsurprisingly, that court's misreading of *Northeast Bancorp* and disregard of ordinary contract principles led it astray: as the California Court of Appeal correctly recognized, all of the relevant indicia—including those regarded as dispositive by this Court in other cases addressing interstate agreements—establish that the Compact *is* a binding contract.

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[8] See, *e.g.*, *Tarrant*, 133 S. Ct. at 2130, 2133; *Montana* v. *Wyoming*, 131 S. Ct. 1765, 1771 n.4 (2011); *Alabama* v. *North Carolina*, 560 U.S. 330, 345-46 (2010).

i. To begin with, the Compact has the form of a contract. As the Court of Appeal explained:

> The contractual nature of a compact is demonstrated by its adoption. "There is an offer (a proposal to enact virtually verbatim statutes by each member state), an acceptance (enactment of the statutes by the member states), and consideration (the settlement of a dispute, creation of an association, or some mechanism to address an issue of mutual interest)."

App., *infra*, 36a (quoting Carol Broun et al., *The Evolving Use and Changing Role of Interstate Compacts* § 1.2.2, at 18 (2006)). These characteristics, all present in the adoption of the Multistate Tax Compact, are the paradigmatic indicia of a binding contract. See, *e.g.*, *Green*, 21 U.S. at 92; *Restatement (Second) of Contracts* §§ 17-70 (1979) ("*Restatement*").

ii. The language of the Compact confirms that it created binding obligations on the signatory States. "[A]s with any contract, [the Court must] begin by examining the express terms of the Compact as the best indication of the intent of the parties." *Tarrant*, 133 S. Ct. at 2130. The Compact therefore must be "construed and applied in accordance with its terms." *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987). And as with any legal document, the Court "must presume" that the Compact "says * * * what it means and means what it says." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992); see *Alabama* v. *North Carolina*, 560 U.S. 330, 351-52 (2010).

Here, those terms demonstrate unambiguously that the Compact's election requirement is binding, for several reasons—*all* of which were disregarded by the California Supreme Court.

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

Second, the Compact provides that it "shall enter into force when enacted into law by any seven States," and that "[t]hereafter, this compact shall become effective as to any other State upon its enactment thereof." Art. X(1) (App., *infra*, 87a). Never found in model laws, such entry-into-force provisions are the mechanisms by which States enter into agreements; the provision here signifies that the Compact became binding at the time of initial enactment by the specified number of States. That is what it means for the Compact to "enter into force" and to "become effective as to" States that enact it subsequently.

In fact, the "enter into force" language would serve no purpose at all if, as the California Supreme Court believed, the Compact is in the nature of a nonbinding "uniform law." Yet it is the first rule of contract construction that "an interpretation which gives a[n] * * * effective meaning to all the terms is preferred to an interpretation which leaves a part * * * to no effect." *Restatement* § 203(a); see also, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (1001) (a "cardinal principle of statutory construction" is that statutes should be interpreted so as not to render any language "superfluous, void, or insignificant").

Third, the Compact provides that, after signatory States become bound, "[a]ny party State may withdraw from this compact by enacting a statute repealing the same." Art. X (App., *infra*, 87a). Under this provision, "[f]aced with the desire to escape an obligation under the Compact, a state's only option is to withdraw completely by enacting a repealing statute." App., *infra*, 46a. This language, too, would be wholly superfluous were the Compact not binding; there is no need for a withdrawal provision when States are individually enacting a model law, which can be modified unilaterally at will.

At the same time, the Compact contains other provisions that expressly allow for departure from the Compact's terms or that limit the Compact's reach. See Art. VIII(1) (App., *infra*, 82a) ("This Article [providing for taxpayer audits] shall be in force only in those party States that specifically provide therefor by statute."); Art. XI (*id.* at 88a) (providing that "[n]othing in this compact shall be construed to" affect the power of a State to fix tax rates, apply to motor vehicle or fuel taxes, or affect court jurisdiction). These provisions likewise are necessarily premised on the assumption that the Compact as a whole is binding—and have no significance at all if it is not.

Fourth, the Compact contains reciprocal provisions setting out the steps negotiated by the States to address the problem of threatened federal preemption. In expressly referring to "party states," this language plainly presupposes an agreement. See, *e.g.*, Art. III(2) ("[e]ach party State * * * shall provide by law" for short-form tax option) (App., *infra*, 68a); Art. VI(1) ("the State shall provide by law" for the selection of Commission members in specified circumstances and "[e]ach party State shall provide by law for the selection of representatives" from affected subdivisions) (*id.* at 76a). Provisions that expressly require action by or impose obligations on "party States" cannot sensibly be read as elements of an optional and unilaterally enacted model law, as to which the concept of "party States" would be meaningless.

Fifth, the text of the Compact contains statements of purpose that are best furthered by treating the agreement as binding. The Compact states that it is intended to "[f]acilitate * * * the equitable apportionment of tax bases and settlement of apportionment disputes"; "[p]romote uniformity or compatibility in significant components of tax systems"; "[f]acilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration"; and "[a]void duplicative taxation." Art. I (App., *infra*, 65a). The Compact then goes on to provide that it "shall be liberally construed so as to effectuate the[se] purposes." Art. XII (App., *infra*, 88a).

Yet as the Court of Appeal recognized, California's reading "runs counter to the[se] express purposes of the Compact," "eviscerate[ing] the availability of a common formula for all taxpayers to use as an alternative[] [and] thereby diluting a potent uniformity provision of the Compact." App., *infra*, 49a. The result would ensure complexity and higher compliance costs, result in less uniformity, and threaten double taxation. In requiring liberal construction to effectuate its express purposes, the Compact expressly directs that it be interpreted to avoid such consequences.

Against this background, it is unsurprising that California's Attorney General himself concluded almost twenty years ago that the State's obligations under the Compact are established by "the provisions of the Compact, *which is a contract among the member states*." 80

Ops. Cal. Atty. Gen. 213, 219 (1997) (emphasis added). Accordingly, the state Attorney General determined that California is bound by, and may not depart from, the Compact's terms, "unless and until the compact is repealed in accordance with its provisions" (*id.* at 213)—which is to say, through "the enactment of a state statute repealing the Compact." *Id.* at 216. In fact, as late as the filing of its briefs below in the California Supreme Court, the State did not contest the binding nature of the Compact, instead arguing as a matter of interpretation that the Compact's election provision is not mandatory. California's reading of the Compact language was correct then; it is wrong now.

iii. Because the Compact's language is plain and unambiguous, recourse to extrinsic evidence to determine the meaning of the Compact is inappropriate. See *Restatement* § 203(b) ("express terms are given greater weight than course of performance, course of dealing, and usage of trade"); see also *Tarrant*, 133 S. Ct. at 2132 (considering extrinsic evidence where contractual language is ambiguous). The Court of Appeal below thus properly refused to consider "course of conduct" evidence, noting that the Compact's language is not "reasonably susceptible to [California's] interpretation"; "the Compact's express, unambiguous terms require extending taxpayers the option of electing UDITPA." App., *infra*, 48a-49a.

Having said that, if extrinsic evidence is consulted, the most probative such evidence confirms that the signatories intended the Compact's terms to be binding. The evidence that bears most directly on the intent of the parties is the "negotiation history." *Oklahoma* v. *New Mexico*, 501 U.S. at 235 n.5; see *id.* at 234-37; *Texas* v. *New Mexico*, 462 U.S. 554, 568 n.14 (1983).

And as to this, there is no ambiguity: the drafters intended the Compact to bind its signatories.

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

That understanding is confirmed by the context in which the Compact was written and adopted. As we have explained, there is no doubt that the Compact was drafted as a direct reaction to congressional criticism of state tax regimes that were characterized by inconsistency and repeated modification, in an effort to forestall impending federal preemption of state taxing authority. See pages 3-6, *supra*. In this setting, a model law could not have been effective in accomplishing the States' goal; in fact, at the time of the threatened congressional action, a model uniform law—UDITPA itself—*already* had been in existence for almost a decade. And that Congress chose to not go forward with preemptive legislation after adoption of the Compact suggests a general understanding that the Compact did, in fact, put in place a binding structure.[9]

iv. This conclusion draws further support from the Court's decision in *U.S. Steel*, which held that the Compact is valid under the Compact Clause, notwithstanding the absence of congressional ratification. The Court's analysis in that decision appears to have been premised on the understanding that the Compact *is* a binding agreement. Thus, the Court repeatedly referred to the Compact as an "agreement," a "mode[] of interstate cooperation," and a "pact." See, *e.g.*, 434 U.S. at 459, 460, 473. Perhaps most fundamentally, the tenor of the Court's analysis in *U.S. Steel* appears

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[9] The California Supreme Court noted that a number of Compact member States in addition to California have purported to adopt apportionment formulas that are inconsistent with the election provision. App., *infra*, 15a & n.9. But even assuming that such extrinsic evidence is probative here at all, many Compact member States have never altered the election. See, *e.g.*, Missouri (R.S. Mo. § 32.200); North Dakota (N.D. Cent. Code § 57-59-01); Montana (Mont. Code Ann. § 15-1-601); New Mexico (N.M. Stat. Ann. § 7-5-1). Others have properly withdrawn from the Compact in accord with its terms. See *U.S. Steel*, 434 U.S. at 454 n.1 (citing States); Nevada (1981 Nev. Stat. ch. 181, at 350); Maine (P.L. 2005, c. 332); Nebraska (L.B. 344 (1985)); West Virginia (Act. 1985 (160)); see also Minnesota (2013 Minn. Ch. Law 143 (H.F. 677)) (formally withdrawing after previously altering the election); Utah (2013 Utah Laws 462 (S.B. 247)) (same). And although the California Supreme Court placed special emphasis on Florida's repeal of Articles III and IV of the Compact in 1971, Florida also provided a "safety valve" that gave taxpayers a mechanism for achieving "an election comparable to the one provided by Article III of the compact." Michael Herbert et al., *MTC and the Fallacy of Its Florida Resolution*, State Tax Notes 935, 936 (Sept. 14, 2015). Whether or not this process comported with the Compact has not been tested, but it is a far cry from California's action here.

directed at binding agreements. The Court thus expressly elected to follow the approach taken in *New Hampshire* v. *Maine*, 426 U.S. 363 (1976), and *Virginia* v. *Tennessee*, 148 U.S. 503 (1893), two decisions addressing interstate agreements that unquestionably functioned as binding contracts. See 434 U.S. at 459-60, 468-72. It would have been very odd for the Court to have looked to those decisions for guidance had it not also regarded the Compact as binding; indeed, much of the *U.S. Steel* analysis would have been beside the point if the Compact were thought to be simply a model law. As a consequence, the decision below is, at the very least, in considerable tension with *U.S. Steel*.

c. The decision below distorts the meaning of *Northeast Bancorp*.

In nevertheless holding that the Compact is not binding, the California Supreme Court relied almost exclusively on *Northeast Bancorp*, elevating that decision's nonexhaustive list of the "indicia of binding interstate compacts" into a test. App., *infra*, 12a & n.8 (*Northeast Bancorp* "articulated the factors to consider in determining the binding nature of an interstate agreement").[10] But this holding is premised on a manifest misunderstanding of that decision, which does not purport to identify a universal list of factors that bear on the existence of a binding compact. In fact, in several significant respects, the holding below departs from this Court's doctrine.

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[10] In its understanding of *Northeast Bancorp*, the California Supreme Court relied on the views of the MTC, which supported California's position below. See App., *infra*, 11a. But the Commission is not entitled to deference even as to the meaning of the Compact. See *Alabama* v. *North Carolina*, 560 U.S. 330, 344 (2010). It certainly has no special expertise as to the meaning of this Court's decisions.

Northeast Bancorp addressed legislation unilaterally enacted by two States that lifted the then-existing restriction on interstate banking, in a manner that permitted the creation of regional banking networks. See 472 U.S. at 164-66. Affected banks challenged the state laws as constituting a compact that, because not approved by Congress, was invalid under the Compact Clause. The Court expressed "some doubt as to whether there is an agreement amounting to a compact," noting that "[n]o joint organization or body has been established to regulate regional banking or for any other purpose"; that "[n]either statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally"; and that "neither statute requires a reciprocation of the regional limitation." *Id.* at 175. But, the Court continued, "even if we were to assume that these state actions constitute an agreement or compact," the state laws would be consistent with the Compact Clause because, in light of permissive federal legislation, they "cannot possibly infringe federal supremacy." *Id.* at 175, 176.

On the face of it, it is unlikely that the Court intended this discussion to establish a one-size-fits all, exclusive catalog of the considerations that are relevant to the existence of a binding interstate agreement. The Court's inconclusive discussion of its "doubt" about the existence of a compact appears in a single paragraph of dicta addressed to the particulars of the state legislation at issue in that case. The Court in *Northeast Bancorp* simply had no occasion to address many of the considerations that bear most strongly on whether an interstate agreement is binding. Most notably, because there was no agreed-upon text in

Northeast Bancorp (indeed, there was no formal "agreement" at all),[11] the Court said nothing about the central role of the contractual language in determining the meaning of an interstate agreement—although the Court elsewhere has described a compact's text as "the best indication of the intent of the parties." *Tarrant*, 133 S. Ct. at 2130.

In addition, the California Supreme Court was wrong even in its understanding of the particulars of the *Northeast Bancorp* decision. In fact, the legislation addressed in that case was fundamentally different from the Compact, in *every* respect addressed by the *Northeast Bancorp* Court.

First, the court below thought that it should look to "whether the Compact created reciprocal obligations among member states," evidently believing that a binding compact must "create an obligation of member states *to each other*." App., *infra*, 12a-13a (emphasis in original). The California court thus found the Compact nonbinding because the signatory States do not provide services for one another. This rule, however, has no basis in *Northeast Bancorp*, in this Court's broader compact precedent, or in general contract law.

In fact, when *Northeast Bancorp* addressed reciprocal legislation, the Court said nothing about the "creat[ion] [of] an obligation of member states *to each other*." App., *infra*, 12a-13a (emphasis in original). Instead, it found "[m]ost important[]" that "neither statute requires a reciprocation *of the regional limitation*"; thus, Maine and Rhode Island were "included in

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[11] The extent of the "agreement" in *Northeast Bancorp* was limited to "evidence of cooperation among legislators, officials, bankers and others in the two States in studying the idea [of regional banking] and lobbying for the statutes." 472 U.S. at 175.

the ostensible compact under [the challengers'] theory" even though they did not impose that limitation. 472 U.S. at 175 (emphasis added). Here, in contrast, the Compact provisions *were* agreed to by all the Compact States, meaning that the Compact *is* reciprocal in exactly the sense addressed by *Northeast Bancorp*. And in fact, the Court has described such arrangements as "reciprocal." See, *e.g.*, *New York* v. *O'Neill*, 359 U.S. 1, 11 (1959); see also *U.S. Steel*, 434 U.S. at 472 (describing *O'Neill* as "involving analogous multilateral arrangements" to the Compact). The factor that the Court described as "most important[]" to its consideration of the existence of a compact in *Northeast Bancorp* (472 U.S. at 175) therefore *supports* the conclusion that the Compact is binding.

Second, the California Supreme Court drew from *Northeast Bancorp* the proposition that "indicia of a binding compact include whether its effectiveness depends on the conduct of other members and whether any provision prohibits unilateral member action." The court concluded that the Compact failed this consideration because it "has not required efficacious member action since 1967" when it went into effect, and because member States may "unilaterally come and go as they please." App., *infra*, 14a-15a.

But this observation, too, misstates the language of *Northeast Bancorp*. The Court actually said of the legislation at issue there that "[n]either statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally." 472 U.S. at 175. By contrast, enactment of the Compact by its signatory States *was* expressly "conditioned on action by the other State[s]" because the Compact became effective only after seven States enacted it. Moreover, each of the Compact's stated goals—equitable apportionment, uniformity, taxpayer convenience, and the avoidance of duplicative taxation—can be achieved *only* if there is "action by the other State[s]" (*Northeast Bancorp*, 472 U.S. at 175) allowing the mandated taxpayer election. The assertion that Compact members may "unilaterally modify the Compact" (App., *infra*, 15a), meanwhile, simply assumes its conclusion; our submission is that such action is prohibited by the Compact. And it is immaterial that the Compact includes a withdrawal provision—as do nearly all interstate compacts (see pages 30-33, *infra*)—as it is black-letter law that contracts may be binding despite the inclusion of such provisions. See, *e.g.*, 3 *Williston on Contracts* § 7:13 (4th ed. 2015); 13-68 *Corbin on Contracts* § 68.9 (2015).

Third, the court below held that, under *Northeast Bancorp*, the Compact is not a binding compact because, although it establishes a commission, "that body has no authority ordinarily associated with a *regulatory* authority" and "has no binding regulatory authority upon member states." App., *infra*, 16a, 19a (emphasis in original). But this, too, is a misreading of *Northeast Bancorp*. The Court nowhere suggested that a regulatory organization with the authority to bind member States is a necessary characteristic of a compact; instead, it simply observed, of the challenged banking legislation, that "[n]o joint organization or body has been established to regulate regional banking *or for any other purpose*." 472 U.S. at 175 (emphasis added). And here, the Compact does, of course, establish just such a joint organization that serves a variety of significant "other purpose[s]." Many existing interstate compacts make use of this sort of non-regulatory commission; in fact, many make no use of a joint body at all. This Court surely did not mean to suggest that, for this reason alone, such agreements are not binding on their signatories.

Fourth, the California Supreme Court simply disregarded the material ways in which, as the Court of Appeal put it, "the situation in [*Northeast*] *Bancorp* * * * differs dramatically from the case at hand." App., *infra*, 42a. The Compact has a structure, negotiation history, and agreed-upon text that was wholly absent in *Northeast Bancorp*, where the purported compact was not negotiated by or enacted in virtually identical form by the supposedly participating States. In short, unlike the Compact, the legislation at issue in *Northeast Bancorp* looked nothing like an agreement. The California Supreme Court went fatally astray when it failed to appreciate the importance of these distinctions.

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

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

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

Most obviously, it is essential that the meaning of the Multistate Tax Compact be settled, and be settled correctly. The issue presented here may arise in each of the nine States that have repudiated the Compact's apportionment election without taking the steps required by the Compact to withdraw. Challenges involving that issue have taken place in at least five of those States.[12] Unsurprisingly, the amounts at stake are enormous. As we have noted, California has indicated that potential refund claims in that State alone may "exceed $750 million" (Cal. Opening Br. on the Merits at 9 n.16, *Gillette Co.* v. *Franchise Tax Bd.,* 363 P.3d 94 (Cal. 2015) (No. S206587), 2013 WL 2367416, at *9), while the aggregate amount nationwide is on the order of $3 billion.

Settling the meaning of the Compact, moreover, has a significance that transcends the immediate dollar amounts at issue. The Compact's taxpayer protections were put in place specifically to address serious, recurring problems in the fairness, consistency, uniformity, and predictability of state tax systems that Congress identified through the Willis Commission more than fifty years ago. The States' disregard for the Compact's requirements therefore returns them to a regime in which duplicative taxation of multistate businesses is inevitable and where "State and local taxation * * * cannot be made to operate efficiently and equitably." H.R. Rep. No. 89-952, at 1127.

Of course, we recognize that the Compact itself provides a means by which member States may withdraw. But the requirement of complete withdrawal

[12] In addition to California, those States are Texas (see *Graphic Packaging Corp.* v. *Hegar*, 471 S.W.3d 138 (Tex. Ct. App. 2015)); Michigan (see *IBM* v. *Mich. Dep't of Treasury*, 496 Mich. 642 (2014); *Gillette Commercial Operations N. Am.* v. *Mich. Dep't of Treasury*, No. 152588 (Mich. Sup. Ct.); *Harley Davidson Motor Co. v. Mich. Dep't of Treasury*, No. 325498 (Mich. Ct. App.); Oregon (see *HealthNet Inc.* v. *Or. Dep't of Revenue*, No. TC 5127 (Or. Tax Ct.)); and Minnesota (see *Kimberly-Clark Corp.* v. *Comm'r of Revenue*, No. 8670-R (Minn. Tax Ct. 2015)).

imposes a significant check, both political and practical, on state departure from the Compact's terms. A State may be unwilling to surrender the benefits of Compact membership if that is the price of repudiating the taxpayer election or any other provision. And the obligation to enact a statute of repeal gives the issue a visibility and political currency that may engender substantial opposition, as happened when the California legislature took up a failed measure to withdraw in 1999. See AB 753 (Cal. 1999). What the Compact means is, accordingly, a question of great practical importance.

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

In addition, the decision below has implications far broader than the Multistate Tax Compact. As this Court has long recognized, States use compacts "to promote the peace, good neighborhood, and welfare." *Wharton* v. *Wise*, 153 U.S. 155, 166 (1894); see also Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 729 (1925). And States have increased their use of interstate compacts over the last several decades, as "a function of [compacts'] potential for states to 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).

The rule adopted below, however, threatens to render non-binding virtually all compacts that have not been approved by Congress. The California Supreme Court understood this Court's decision in *Northeast Bancorp* to set out a *general* test for determining the effect of interstate compacts, and as listing the criteria that are relevant to that purpose. According to that court, interstate compacts that do not meet its aberrant standard are unenforceable—serving as nothing more than recommendations to their signatory States.[13]

The implications of this rule are striking. We have identified at least forty-six interstate compacts that lack congressional consent and that have characteristics similar in material respects to those of the Multistate Tax Compact. Like the Compact, each of these compacts became effective once a specified number of States enacted them as state law, and permits States to withdraw unilaterally by repealing the enacting statute or providing advance notice. And, like the Compact, many of these compacts regulate private parties, encourage some measure of state action, and create joint bodies that serve an advisory function. All of these compacts, which touch nearly every core function of state government, are jeopardized by the decision below.

Among these compacts are:

Compacts to ensure regulatory uniformity. These include the Interstate Insurance Product Regulation Compact and the Interstate Insurance Receivership Compact (ensuring uniform regulation of the insurance industry); the Interstate Mining Compact (commits member states to drafting plans for regulating surface

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[13] We address in text only those compacts that, like the Multistate Tax Compact, have not been approved by Congress. It is doubtful, however, that the implications of the decision below are so limited. Congressional approval makes a compact into law of the United States for purposes of federal jurisdiction, but does not change the interpretive tools used to determine the compact's meaning (*e.g.*, the compact's text, negotiating history, and the signatories' intent). There is, accordingly, every reason to believe that the test used below also would apply to congressionally ratified compacts.

mining within their borders); and the Multistate Highway Transportation Agreement (ensures uniformity in how states regulate the size and weight of vehicles traveling on interstate highways).

Compacts to coordinate licensing. These compacts include the Agreement on Qualifications of Education Personnel and the NASDTEC Interstate Agreement; the Interstate Compact on Licenses of Participants in Horse Racing with Pari-Mutuel Wagering; the Interstate Medical Licensure Compact; and the Nurse Licensure Compact.

Compacts to ensure uniform response to criminal activities. These compacts include the Interstate Wildlife Violator Compact; the Boating Offense Compact; the Interstate Compact on the Mentally Disordered Offender; and the Interstate Compact for Adult Offender Supervision.[14]

Compacts uniquely within the States' powers. Other compacts focus on policy problems that Congress will not—or cannot—solve. They include the Interstate Compact on Educational Opportunity for Military Children; the Interstate Compact on Placement of Children; and the New England Radiological Health Protection Compact.

Compacts for emergency response and management. These compacts work by "treat[ing] a disaster in one state as if it had occurred in any of the other participating states." Bowman & Woods, *supra*, at 360.

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[14] It is unclear whether advance consent by Congress to all compacts "for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies" (4 U.S.C. § 112) extends to any of these particular compacts, especially those that deal with offenders after conviction.

They include the Great Lakes Forest Fire Compact and the Interstate Forest Fire Suppression Compact; the Kansas-Missouri Flood Prevention and Control Compact, the Interstate Earthquake Emergency Compact, and the Interstate Mutual Aid Compact; and the National Guard Mutual Assistance Counter-Drug Activities Compact.

Thus, from a state perspective, the decision below threatens to undermine coordination and cooperation in a multitude of regulatory domains. It likewise means that private parties can no longer count on these interstate compacts to ensure that obligations are uniform across state lines, while providing that those parties may *themselves* seek to challenge the enforceability of interstate compacts as a means of avoiding regulatory burdens. The uncertainty and confusion generated by this decision confirms the need for intervention by this Court.

By the same token, the illusion of enforceability may discourage federal regulation when such regulation is truly needed. This case is an example. After California and the other member States affirmed their commitment to the Compact, Congress ultimately declined to regulate at the federal level. See pages 3-6, *supra*. Now that the threat of federal intervention has passed, California asserts that it was never bound to begin with. This Court should reject California's bait-and-switch.

* * * *

This Court repeatedly has recognized its special role in policing the actions of States and state courts that favor local interests, while disadvantaging the residents of other States. In light of this important principle, the Court has acknowledged that a State "cannot be its own ultimate judge" in such a controversy; resolving such a dispute "is the function and duty of the Supreme Court of the Nation." *Sims*, 341 U.S. at 28. Cf., *e.g.*, *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994).

Here, the discriminatory impact of the challenged California statute—and its departure from the binding undertaking assumed by the Compact signatory States—is manifest. Because the state court below declined to remedy that default, premised its holding on a distortion of this Court's precedent, leaves the law in a state of confusion, and addresses legal issues that have great practical significance, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

Supreme Court of California

The GILLETTE COMPANY et al.,
Plaintiffs and Appellants,

v.

FRANCHISE TAX BOARD,
Defendant and Respondent.

[And five other cases.[1]]

No. S206587.

Dec. 31, 2015.

Opinion

CORRIGAN, J.

Here we consider how California calculates income taxes on multistate businesses. In 1974, California joined the Multistate Tax Compact (Multistate Tax Com., Model Multistate Tax Compact (Aug. 4, 1967)) (Compact), which contained an apportionment formula and permitted a taxpayer election between the Compact's formula and any other formula provided by state law. (Former Rev. & Tax. Code § 38001 et seq., enacted by Stats.1974, ch. 93, § 3, p.

[1] *The Proctor & Gamble Manufacturing Co. v. Franchise Tax Bd.* (No. CGC–10–495912); *Kimberly–Clark Worldwide, Inc. v. Franchise Tax Bd.* (No. CGC–10–495916); *Sigma–Aldrich, Inc. v. Franchise Tax Bd.* (No. CGC–10–496437); *RB Holdings (USA) Inc. v. Franchise Tax Bd.* (No. CGC–10–496438); *Jones Apparel Group, Inc. v. Franchise Tax Bd.* (No. CGC–10–499083).

193 and repealed by Stats.2012, ch. 37, § 3.) The Legislature later amended the Revenue and Taxation Code to specify a different apportionment formula that "shall" apply "[n]otwithstanding" the Compact's provisions. (Rev. & Tax. Code,[2] § 25128, subd. (a) (section 25128(a)).) taxpayers here contend they remain entitled to elect between the new statutory formula and that contained in the Compact. We conclude the Legislature may properly preclude a taxpayer from relying on the Compact's election provision.

I. BACKGROUND

A. Apportionment of Business Income in California Before the Compact

When a business earns income in multiple jurisdictions, apportionment is necessary to avoid tax duplication or other inequity. The Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws, is "a nonprofit association of lawyers who draft model legislation regarding areas of law in which they believe it would be best to have uniformity of law among the states." (*Metso Minerals Industries v. FLSmidth–Excel LLC* (E.D.Wis.2010) 733 F.Supp.2d 969, 973, fn. 5.) In 1957, this commission drafted the Uniform Division of Income for Tax Purposes Act (7A pt. 1 West's U. Laws Ann. (2002) U. Div. of Income for Tax Purposes Act, § 1 et seq., p. 141) (the UDITPA or the Act). The Act was intended to provide a uniform guide for state laws and practices regarding multistate business taxation and to prevent taxation in

[2] Subsequent statutory references are to the Revenue and Taxation Code unless noted.

multiple jurisdictions based "on more than [a business's] net income." (7A pt. 1 West's U. Laws Ann., *supra*, prefatory note, p. 142; see *ASARCO Inc. v. Idaho State Tax Comm'n* (1982) 458 U.S. 307, 310, fn. 3, 102 S.Ct. 3103, 73 L.Ed.2d 787.) Our Legislature codified the provisions of the UDITPA in 1966. (See § 25120 et seq.) The statutory scheme included an apportionment formula based on three factors: (1) The value of real property the business held in California (the property factor); (2) compensation paid to California employees (the payroll factor); and (3) gross California sales (the sales factor). Each factor was divided by the worldwide property holdings, payroll, and sales of the business. (§§ 25129, 25132, 25134.) Those three factors were added, then divided by three, yielding a California apportionment figure. (Former § 25128, as added by Stats.1966, ch. 2, § 7, p. 179.) Under this approach, each constituent factor was given equal weight in calculating the ultimate apportionment figure. That figure was then multiplied by the business's worldwide income to determine its California income tax liability.[3] (§ 25101.)

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[3] For example, if a taxpayer had 40 percent of its property in California, paid 30 percent of its payroll to California employees, generated 20 percent of its gross receipts from California sales, and had $10 million of worldwide business income, the taxpayer would: (1) Calculate its apportionment factor by adding the property factor (40%), the payroll factor (30%), and the sales factor (20%), and dividing by three (90% divided by three equals 30%); then (2) calculate its taxable income by multiplying the apportionment factor (30%) by its total business income ($10 million) to arrive at a total taxable California income of $3 million.

B. Promulgation of the Compact and its Adoption in California

The UDITPA was not widely adopted. States had scant motive to enact a uniform apportionment scheme benefitting multistate corporations. (See Ryan, *Beyond BATSA: Getting Serious About State Corporate Tax Reform* (2010) 67 Wash. & Lee L.Rev. 275, 314, fn. 216 (Ryan); Swain, *Reforming the State Corporate Income Tax: A Market State Approach to the Sourcing of Service Receipts* (2008) 83 Tul. L.Rev. 285, 295; see also 61C West's Ann. Rev. & Tax.Code (2004 ed.) p. 456 [UDITPA adoption table].) The incentive arose with the specter of federal intervention. The United States Supreme Court held in *Northwestern States Portland Cement Co. v. Minnesota* (1959) 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421, that a state income tax could be levied on an out-of-state corporation based upon its in-state activities. "[T]he entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs." (*Id*. at p. 460, 79 S.Ct. 357.) This decision "prompted Congress to enact a statute ... which sets forth certain minimum standards for the exercise of that power."[4] (*U.S. Steel Corp. v. Multistate Tax Comm'n* (1978) 434 U.S. 452, 455, 98 S.Ct. 799, 54 L.Ed.2d 682, fn. omitted (*U.S.Steel*).) Congress also authorized a study to recommend legislation regulating state taxation of interstate business income. (*Ibid*.)

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[4] The statute prohibits states from imposing an income tax where the only activity in the state is the solicitation of sales fulfilled outside the state. (See 15 U.S.C. § 381(a).)

That study, known as the "Willis Report," "recommended a uniform two-factor apportionment formula based on the amount of property and payroll in each state, as well as a blanket nexus standard that limited income tax jurisdiction to states in which a business had either real property or payroll." (Ryan, *supra*, 67 Wash. & Lee L.Rev. at pp. 311–312, fns. omitted; see Judiciary Special Subcom. on State Taxation of Interstate Commerce, H.R.Rep. No. 89–952, 1st Sess., pp. 1135–1136 (1965).) Starting in 1965, several congressional bills proposed a comprehensive tax scheme for interstate business income. (*U.S. Steel*, *supra*, 434 U.S. at p. 456, fn. 4, 98 S.Ct. 799.) Most states objected to the loss of sovereignty inherent in the Willis Report recommendations. Some states also feared the proposals would cause lost revenue. (See McLure, Jr., *The Difficulty of Getting Serious About State Corporate Tax Reform* (2010) 67 Wash. & Lee L.Rev. 327, 337.)

The Willis Report and subsequent congressional action spurred an "unprecedented special meeting of the National Association of Tax Administrators" in January 1966, at which "the idea of a multistate tax compact was envisioned." (Multistate Tax Com., First Annual Rep., Period Ending Dec. 31, 1968, p. 1.) A draft of the Compact was presented to the states in January 1967. It provided an alternative to potential federal legislation restricting state taxation power. Nine states adopted it within six months. (*Id*. at p. 2.)

The Compact includes two central features. The first is the creation of the Multistate Tax Commission (Commission). The Commission is empowered to: (1) study state and local tax systems; (2) recommend proposals to increase uniformity or compatibility of state and local tax laws, thus improving tax law and administration; (3) compile and publish information to assist the implementation of the Compact; and (4) do anything "necessary and incidental to the administration of its functions pursuant to this compact." (Compact, art. VI, § 3.) While the Commission may adopt uniform regulations interpreting the tax laws of its member states, these regulations are not binding. (Compact, art. VII; *U.S. Steel*, *supra*, 434 U.S. at p. 457, 98 S.Ct. 799.) The Compact also empowers a member state to ask the Commission to conduct audits, but only if the state has enacted enabling legislation. (Compact, art. VIII.)

The second central feature is the adoption of the UDITPA's equal-weighted apportionment formula. (Compact, art. IV.) The formula is designed to address the lack of uniformity among the various states' apportionment schemes. (Com., Third Annual Rep. (Fiscal Year July 1, 1969–June 30, 1970) p. 2.) The Compact contains an election provision. A taxpayer subject to apportionment of income "in two or more party States may elect to apportion and allocate his income in the manner provided by the laws of such State...." (Compact, art. III, § 1.) Alternatively, the taxpayer may elect to rely on the Compact's apportionment formula. (*Ibid.*)

In 1974, the Legislature passed former section 38006, which included the entire text of the Compact, and made California a member state. (Stats.1974, ch. 93, § 3, p. 193.) This action resulted in no immediate apportionment change because, as noted, existing California law had previously adopted the UDITPA formula.[5]

C. Change in the Apportionment Formula: Amendment of Section 25128

This situation changed in 1993 when the Legislature adopted a different apportionment formula. It amended section 25128(a) to provide: "*Notwithstanding Section 38006* [i.e., the provisions of the Compact], *all* business income *shall* be apportioned to this state by multiplying the business income by a fraction, the numerator of which is the property factor plus the payroll factor plus *twice* the sales factor, and the denominator of which is *four*...."[6] (§ 25128(a), as amended by Stats.1993, ch. 946, § 1, p. 5441, italics added.) Under this new formula, in-state sales were double-counted. Those sales, then, amounted to half the calculation rather than the one-third used under the UDITPA approach. The 1993 legislation did not withdraw California as a member state or otherwise modify the Compact's election provision or apportionment formula set out in former article III, section 38006. (Compact, art. III, § 1, art. IV.)

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[5] In 2015, the Commission passed a resolution modifying article IV of the model Compact to delete the UDITPA formula and to allow the adopting member state to replace it with any state apportionment formula. (See Model Compact, art. IV, § 9, as revised by the Multistate Tax Com. on July 29, 2015, available online at <http://www.mtc.gov/getattachment/Uniformity/Article–IV/Model–CompactArticle–IV–UDITPA–2015.pdf.aspx> [as of Dec. 31, 2015].)

[6] Section 25128 has subsequently been amended in ways not pertinent here. (See Stats.1994, ch. 861, § 15, pp. 4269–4271; Stats.1996, ch. 952, § 52, pp. 5447–5449; Stats.1997, ch. 605, § 108, pp. 4025–4027.)

D. The Current Litigation

Between 1993 and 2005, six multistate corporations (Taxpayers) paid income tax calculated under the new formula. They then sought a refund, arguing that the Compact gave them the right to choose between the new legislative formula or the UDITPA approach. They claimed that under the UDITPA formula, they had overpaid their income tax by approximately $34 million. After the Franchise Tax Board (FTB) denied their claims, they filed a refund action. The trial court sustained the FTB's demurrer, concluding the Legislature could, consistent with the Compact, eliminate the election provision. The Court of Appeal reversed, reasoning in part that the Legislature could not unilaterally repudiate mandatory terms of the Compact, which permitted election.[7] We granted the FTB's petition for review.

II. DISCUSSION

The FTB contends section 25128(a)'s new apportionment formula should control, arguing that when member states entered the Compact their intent "was to allow them to change their state laws to establish alternate mandatory apportionment formulas." Taxpayers do not dispute that the Legislature has authority to enact an alternate formula. They

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[7] In the wake of the Court of Appeal's decision, the Legislature passed a bill repealing the Compact. (Stats.2012, ch. 37, § 3.) An uncodified portion of the bill also provided that "an election affecting the computation of tax must be made on an original timely filed return for the taxable period for which the election is to apply and once made is binding," and this doctrine is declaratory of existing law. (Stats.2012, ch. 37, § 4, subds. (a), (c).) This case does not involve application of that subsequent legislative action.

argue instead that the Compact explicitly permits election and the Legislature is bound to allow it. This case turns on whether the Legislature is so bound. We conclude it is not and California's statutory formula governs.

A. The Compact Constitutes State Law

Taxpayers recognize that the Compact does not have the force of federal law. It was never ratified by Congress as required under the compact clause. (See U.S. Const. art. I, § 10, cl. 3.) Even so, the United States Supreme Court held in *U.S. Steel* that states could enter into an agreement with each other without such ratification so long as the agreement was not " 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' " (*U.S. Steel*, *supra*, 434 U.S. at p. 468, 98 S.Ct. 799, quoting *Virginia v. Tennessee* (1893) 148 U.S. 503, 519, 13 S.Ct. 728, 37 L.Ed. 537.) *U.S. Steel* concluded the Compact did not run afoul of the compact clause: "[T]he test is whether the Compact enhances state power *quoad* the National Government. This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, as noted above, each State is free to withdraw at any time." (*U.S. Steel*, at p. 473, 98 S.Ct. 799.)

The Legislature ordinarily has authority to repeal or modify any enactment. "[T]he legislative power the state Constitution vests is plenary," and "[a] corollary of the legislative power to make new laws is the power to abrogate existing ones. What the Legislature has enacted, it may repeal." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 254, 255, 135 Cal.Rptr.3d 683, 267 P.3d 580; see Cal. Const. art. IV, § 1.) "We thus start from the premise that the Legislature possesses the full extent of the legislative power and its enactments are authorized exercises of that power. Only where the state Constitution withdraws legislative power will we conclude an enactment is invalid for want of authority." (*Matosantos*, at p. 254, 135 Cal.Rptr.3d 683, 267 P.3d 580.) Similarly, "the Legislature is supreme in the field of taxation, and the provisions on taxation in the state Constitution are a limitation on the power of the Legislature rather than a grant to it." (*Delaney v. Lowery* (1944) 25 Cal.2d 561, 568, 154 P.2d 674; see S*anta Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 247, 45 Cal.Rptr.2d 207, 902 P.2d 225.)

Taxpayers acknowledge the lack of congressional approval but argue "interstate compacts (approved or not) take precedence over other state laws" because "they are both contracts and binding reciprocal statutes among sovereign states." Taxpayers thus contend section 25128 violates the contract clauses of the federal and state Constitutions because it impairs an obligation created by an interstate compact. (See U.S. Const. art. I, § 10, cl. 1; Cal. Const. art. I, § 9.) We need not decide whether an interstate compact not approved by Congress necessarily takes precedence over other state law. Instead, we evaluate whether this Compact is a binding contract among its members. We conclude it is not.

B. The Compact is Not a Binding Reciprocal Agreement

The Commission, which was created by the Compact, has filed an amicus curiae brief here. In the Commission's own view, the Compact is not binding. "Rather, it is an advisory compact that contains two apportionment provisions, the UDITPA formula and the election provision ... which are more in the nature of model uniform laws." To support this interpretation, the Commission urges a test derived from *Northeast Bancorp v. Board of Governors*, FRS (1985) 472 U.S. 159, 105 S.Ct. 2545, 86 L.Ed.2d 112 (*Northeast Bancorp*). That case involved an attempt by several out-of-state banks to acquire banks in New England. Federal law prohibited the acquisition of local banks by out-of-state banks unless expressly authorized by state law. (See 12 U.S.C., former § 1842(d).) Some states passed laws permitting such acquisitions, but only if the home-state law contained a reciprocity provision allowing acquisitions by banks from the foreign state in question. Other states also allowed acquisitions only by banks from a particular geographic area. (*Northeast Bancorp*, at pp. 163–165, 105 S.Ct. 2545.) The out-of-state banks claimed these state laws violated the compact clause because they failed to garner congressional approval. Northeast Bancorp expressed "doubt as to whether there is an agreement amounting to a compact." (*Id*. at p. 175, 105 S.Ct. 2545.) The court reasoned "several of the classic indicia of a compact are missing. No joint organization or body has been established to regulate regional banking or for any other purpose. Neither statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally. Most importantly, neither statute requires a reciprocation of the regional limitation." (*Ibid*.) The

Commission asserts the Compact does not satisfy any of the indicia of binding interstate compacts noted in *Northeast Bancorp*. We agree.[8]

1. Reciprocal Obligations

We begin with the "[m]ost important[ ]" factor: whether the Compact created reciprocal obligations among member states. (*Northeast Bancorp*, *supra*, 472 U.S. at p. 175, 105 S.Ct. 2545.) The Commission argues the Compact creates no reciprocal obligations, especially with respect to maintaining the election provision. Like *Northeast Bancorp*, *U.S. Steel* emphasized the importance of reciprocity when determining whether a binding interstate compact exists. "[T]he mere form of the interstate agreement cannot be dispositive" of whether the compact clause applies. (*U.S. Steel*, *supra*, 434 U.S. at p. 470, 98 S.Ct. 799.) It went on to explain "[a]greements effected through reciprocal legislation may present opportunities for enhancement of state power at the expense of the federal supremacy similar to the threats inherent in a more formalized 'compact.' " (*Ibid.*, fn. omitted.) Conversely, as *U.S. Steel* suggested, simply

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[8] Taxpayers argue in passing that the *U.S. Steel* decision determined the Compact was a binding one, and "[i]f the Court had a doubt about whether the Compact was a binding interstate compact, it would have said so." The argument is unpersuasive. *U.S. Steel* concluded only that the compact clause did not require Congress to approve the Compact for it to be valid. (See *U.S. Steel*, *supra*, 434 U.S. at pp. 472–478, 98 S.Ct. 799.) The court had no occasion to decide whether the Compact constituted a binding agreement that could not be unilaterally amended by its members. Indeed, *U.S. Steel* predated *Northeast Bancorp*, wherein the high court first articulated the factors to consider in determining the binding nature of an interstate agreement.

because an agreement is labeled a "compact" is not dispositive of whether it is binding unless it contains key features, such as reciprocity. (See *Northeast Bancorp*, *supra*, 472 U.S. at p. 175, 105 S.Ct. 2545.)

Taxpayers admit that "party states do not perform or deliver obligations to one [another]" and "have no incentive to enforce the Compact," which "is not the type of contract where the parties exchange obligations and are in a meaningful position to gauge each other's compliance." Nevertheless, they argue the member states' commitment to the UDITPA formula is what prevented congressional intervention, and maintenance of that formula is mutual, reciprocal, and "critical to the effectiveness of the Compact."

As described *ante*, there is little doubt that, decades ago, the possibility of congressional action helped spur adoption of the Compact. But Taxpayers do not explain how a state's elimination of the UDITPA formula renders the Compact less "effective." More importantly, whether it does or not is a completely different question from whether the Compact constitutes a reciprocal obligation among members. The Compact's provision of election between the UDITPA or any other state formula does not create an obligation of member states *to each other*. Even if maintenance of the election provision in one member state might benefit taxpayers in another state, that benefit to the taxpayer applies whether the taxpayer is from a member or nonmember state. This application is more akin to the adoption of a model law rather than the creation of any mutual obligations among Compact members. We note the Commission, in its amicus curiae brief, does not urge that California's decision to discontinue use of the UDITPA formula in any way undermines the effectiveness of the Compact.

Indeed, as noted, the UDITPA was promulgated as a model law, and our Legislature adopted it years before joining the Compact. Clearly, the Legislature is free to amend its own legislation even if it is based on a model law. (See *Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 772, 47 Cal.Rptr.3d 216, 139 P.3d 1169 [noting the Legislature was "free" to amend the UDITPA].) 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. The Legislative Counsel commented that the Compact did not "alter any state tax." (Ops. Cal. Legis. Counsel, No. 11600 (May 27, 1973) Multistate Tax Compact (Assem. Bill No. 1304) (1973–1974 Reg. Sess.) 5 Sen. J. (1973–1974 Reg. Sess.) p. 8250.)

2. Conditional or Unilateral Action

Other indicia of a binding compact include whether its effectiveness depends on the conduct of other members and whether any provision prohibits unilateral member action. With respect to the former, the Compact has not required efficacious member action since 1967. By its terms, the Compact became effective once it had been "enacted into law by any seven States." (Compact, art. X, § 1.) Nine states other than California enacted the Compact within six months of its initial draft. (Com., First Annual Rep., *supra*, at p. 2.) Thereafter, the Compact was effective "as to any other State upon its enactment thereof." (Compact, art. X, § 1.) Thus, the Compact had long been effective when California joined it in 1974. No action by existing members was required to admit California.

Any state may join the Compact simply by enacting its provisions into law. As *U.S. Steel* observed, "each State is free to withdraw at any time." (*U.S. Steel*, *supra*, 434 U.S. at p. 473, 98 S.Ct. 799; see Compact, art. X, § 2.) Thus, any state may join or leave the Compact without notice. This ability of member states to unilaterally come and go as they please militates against a finding that the Compact is a binding interstate agreement under *Northeast Bancorp*. (See *Seattle Master Builders v. Pacific Northwest Elec. Power* (9th Cir.1986) 786 F.2d 1359, 1372 (*Seattle Master Builders*).)

Contrary to the Taxpayers' arguments, the presence of a withdrawal provision says nothing about a member state's ability to unilaterally modify the Compact. Indeed, no express language of the Compact or any California enabling statute proscribes unilateral amendment of our own state law. As the FTB observes, the history of the Compact is replete with examples of unilateral state action. Florida was one of the first states to enact the Compact in 1967. Yet it later passed statutes eliminating Compact articles III and IV from Florida law. The Commission subsequently resolved that, in spite of that action, Florida was recognized "as a regular member in good standing of the Multistate Tax Compact and the Multistate Tax Commission." (Com., Minutes of Meeting, Dec. 1, 1972, p. 2.) Numerous member states have subsequently enacted different apportionment formulae. Currently, only seven of the Compact's 16 members employ the equal-weighted UDITPA formula.[9]

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[9] Those states are Alaska, Hawaii, Kansas, Missouri, Montana, New Mexico, and North Dakota. (See Federation of Tax Admin-

Member state adoption of different formulae, coupled with the Compact's express grant of authority to join or leave the Compact at will, confirms that the Compact did not prohibit unilateral state action. The freedom of members to engage in such unilateral conduct is inconsistent with the type of binding agreement contemplated by *Northeast Bancorp*.

3. Regulatory Organization

The Taxpayers argue that the establishment of the Commission is "a classic characteristic of an interstate compact." The argument ignores an important point. Although the Compact established the Commission, that body has no authority ordinarily associated with a *regulatory* organization. Article VI of the Compact authorizes the Commission to "[*s]tudy* State and local tax systems and particularly types of State and local taxes," "[d]evelop and *recommend* proposals for an increase in uniformity or compatibility of State and local tax laws with a view toward *encouraging* the simplification and improvement of State and local tax law and administration," and "[c]ompile and publish such information as would, in its judgment, *assist* the party States in implementation of the compact and taxpayers in complying with State and local tax laws." (Compact, art. VI, § 3, subds. (a)-(c), italics added.) As the Commission observes, these powers "are strictly limited to an advisory and informational role."

The Commission may also promulgate administrative regulations "in the event that two or more States have uniform provisions relating to specified

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istrators, chart, State Apportionment of Corporate Income, available online at <http://www.taxadmin.org/assets/docs/Research/Rates/apport.pdf> [as of Dec. 31, 2015].)

types of taxes." (*U.S. Steel*, *supra*, 434 U.S. at p. 457, 98 S.Ct. 799; see Compact, art. VII.) However, as *U.S. Steel* observed: "These regulations are advisory only. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in accordance with its own law." (*U.S. Steel*, at p. 457, 98 S.Ct. 799.) While these regulations may play a *persuasive* role in shaping policy, the Commission's inability to bind member states to adopt them further confirms it is not a regulatory organization within the meaning of *Northeast Bancorp*.

Similarly, the Commission may conduct taxpayer audits but only if the member state has passed separate authorizing legislation and expressly requests the audit. (Compact, art. VIII.) In such a case, the Commission acts as "the State's auditing agent" and any power of compulsory process derives from the authority vested by the laws of the requesting member state. (*U.S. Steel*, *supra*, 434 U.S. at p. 457, 98 S.Ct. 799; Compact, art. VIII, § 4.) Further, although the Commission may "require the attendance of persons and the production of documents in connection with its audits," it "has no power to punish failures to comply" and "must resort to the courts for compulsory process, as would any auditing agent employed by the individual States." (*U.S. Steel*, at p. 475, 98 S.Ct. 799; Compact, art. VIII, §§ 3–4.)

Finally, the Compact authorizes the Commission to provide for binding arbitration of disputes between member states. (Compact, art. IX, § 1.) However, the Commission has never adopted such a regulation and no arbitration provisions are currently effective. (See *U.S. Steel*, *supra*, 434 U.S. at p. 457, fn. 6, 98 S.Ct.

799.) Indeed, California hesitated to join the Compact due, in part, to concerns that such an arbitration provision would not only displace California institutions as the forum for tax disputes, but that "easy access to arbitration" would lead to "erosion of the state's tax base." (Assem. Com. on Rev. & Tax., analysis of Assem. Bill No. 1304 (1973–1974 Reg. Sess.) as amended June 14, 1973, p. 3.) The Legislature approved California's membership upon explicit condition that the Commission not make the arbitration provision effective. An uncodified portion of our enacting statute provided that California would automatically withdraw from the Compact if the Commission changed its voting rules or if the arbitration provision was made effective. (Stats.1974, ch. 93, § 5, p. 208.)[10]

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[10] Section 5 of the enacting statute provided: "This act is hereby repealed and shall have no further force or effect, and this state is withdrawn from the Multistate Tax Compact as set forth in Section 38006 of the Revenue and Taxation Code, on the 10th day after the occurrence of any of the following events after the operative date of this act: [¶] (1) The Multistate Tax Commission adopts any regulation placing in effect Article IX of the Multistate Tax Compact, or any part thereof, as set forth in Section 38006 of the Revenue and Taxation Code, or [¶] (2) The Multistate Tax Commission places in effect any bylaw or regulation or parliamentary ruling for the conduct of its business which permits any matter voted upon to be adopted other than by receiving a majority of the number of member states and a majority of the total population of all the member states according to the current United States Statistical Abstract, or [¶] (3) The entry of a final judgment by any court of competent jurisdiction requiring the Multistate Tax Commission to place in effect Article IX of the Multistate Tax Compact as set forth in Section 38006 of the Revenue and Taxation Code, or requiring or approving any matter to be adopted by the Multistate Tax Commission by the employment of a different manner of voting

As discussed, *U.S. Steel* held the Compact did not encroach on federal authority in any way that would require congressional approval under the compact clause. The *U.S. Steel* court observed there is no "delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission." (*U.S. Steel*, *supra*, 434 U.S. at p. 473, 98 S.Ct. 799.) The Commission simply has no binding regulatory authority upon member states. Whatever power the Commission has to promulgate regulations or conduct audits exists solely at the pleasure of each member state. Further, the only express powers of the Commission *independent* of authority granted by each member is purely advisory. It may study tax laws, make proposals, and publish data. (Compact, art. VI, § 3.) Because the Commission lacks any binding authority over the member states, it is not a joint regulatory organization as contemplated by *Northeast Bancorp*. (*Northeast Bancorp*, *supra*, 472 U.S. at p. 175, 105 S.Ct. 2545.)[11]

Nothing in the language of former section 38006, the circumstances of its enactment, the subsequent conduct of other members states, or the position taken by the Commission, indicate our Legislature in-

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than that set forth in subparagraph (2) of this section." (Stats.1974, ch. 93, § 5, p. 208.)

[11] See also *In re Manuel P.* (1989) 215 Cal.App.3d 48, 66–67, 263 Cal.Rptr. 447 (statute regarding the deportation of minor wards did not create an interstate agreement within the meaning of *Northeast Bancorp*); compare with *Seattle Master Builders*, *supra*, 786 F.2d at p. 1363 (concluding the Pacific Northwest Electric Power and Conservation Planning Council constituted a compact agency within the meaning of *Northeast Bancorp*).

tended to be bound by the taxpayer election provision.

C. The Reenactment Rule Does Not Bar the Legislature's Amendment of Section 25128

Taxpayers alternatively argue that the Legislature's amendment of section 25128 is invalid because it violates the reenactment rule. That rule derives from article IV, section 9 of our Constitution, stating: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. *A section of a statute may not be amended unless the section is re-enacted as amended*." (Italics added.) One purpose of this provision "is to 'make sure legislators are not operating in the blind when they amend legislation, and to make sure the public can become apprised of changes in the law.' " (*St. John's Well Child and Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 983, fn. 20, 116 Cal.Rptr.3d 195, 239 P.3d 651; *Hellman v. Shoulters* (1896) 114 Cal. 136, 152, 44 P. 915 (*Hellman*).)

Generally, the reenactment rule does not apply to statutes that act to "amend" others only by implication. (*Hellman*, *supra*, 114 Cal. at p. 152, 44 P. 915.) We reasoned long ago in *Hellman*: "To say that every statute which thus affects the operation of another is therefore an amendment of it, would introduce into the law an element of uncertainty which no one can estimate. It is impossible for the wisest legislator to know in advance how every statute proposed would affect the operation of existing laws." (*Ibid.*) The Legislature's 1993 amendment of section 25128 replaced the equal-weighted UDITPA apportionment formula with a different formula double-counting the sales factor. This amendment expressly referenced the Compact, stating that it applied "[n]otwithstanding Section 38006...." (§ 25128(a) as amended by Stats.1993, ch. 946, § 1, p. 5441.) Although Taxpayers note that the legislative bill *analyses* of the amendment did not refer to the Compact or the election provision expressly, reference to the Compact in section 25128(a) itself is strong evidence that the Legislature acted with the Compact in mind. "Even without a re-enactment, the legislators and the public have been reasonably notified of the changes in the law." (*White v. State of California* (2001) 88 Cal.App.4th 298, 315, 105 Cal.Rptr.2d 714; see *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 256–257, 186 Cal.Rptr. 30, 651 P.2d 274.) So too here. Even without a reenactment of section 38006 to eliminate the election language, the amendment of section 25128 did not violate the reenactment rule.

D. The Legislature Intended to Supersede the Compact's Election Provision

Having concluded the Legislature had the unilateral *authority* to eliminate the Compact's election provision, we must determine whether it *intended* to do so. Taxpayers suggest it did not, arguing that the Legislature intended section 25128's double-sales factor formula to apply only "if the Compact Formula is not elected."

Both the language of section 25128 and its legislative history defeat such a claim. First, section 25128(a) explicitly provides that "*all business income shall be apportioned* to this state by" using the formula it sets out, "[*n]otwithstanding Section 38006* [i.e., the Compact]...." (Italics added.) There is no ambiguity in this language. The Assembly Committee on Revenue and Taxation's analysis of the bill explained the need for the amendment: "California and most other states have used an equal weighted three-factor apportionment formula for many years. This formula has been retained largely out of a belief that uniformity among states is the best way to ensure that corporations are not subject to double taxation or that some income 'falls through the crack'. While any apportionment formula may be somewhat arbitrary, supporters of the current system argue that it is still in California's best interest to remain uniform with other states. [¶] However, while uniformity in apportionment methods existed between states in the 1960's and may still be a desirable principle, this uniformity has been eroded significantly in recent years by the actions of other states. Currently twenty-five other states at least provide an option to certain taxpayers to place an additional weight on the sales factor in their apportionment formulas.... [¶] Proponents believe that California's continued reliance upon the three-factor apportionment system results in discriminatory taxation against California-based companies, particularly given the additional weight given to sales factors by other states." (Assem. Com. on Rev. & Tax., analysis of Sen. Bill No. 1176 (1993–1994 Reg. Sess.) as introduced Mar. 5, 1993, pp. 2–3; see also Sen. Com. on Rev. & Tax., analysis of Sen. Bill No. 1176 (1993–1994 Reg. Sess.) as introduced Mar. 5, 1993, p. 2.) In light of the statute's language and this legislative history, there is no credible argument that the Legislature intended to retain the Compact's election provision.

III. DISPOSITION

The Court of Appeal's judgment is reversed.

WE CONCUR: CANTIL–SAKAUYE, C.J., WERDEGAR, LIU, CUÉLLAR, KRUGER, JJ., and MURRAY, J.**

** Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

Court of Appeal, First District, Division 4, California.

The GILLETTE COMPANY et al.,
Plaintiffs and Appellants,

v.

FRANCHISE TAX BOARD,
Defendant and Respondent.

No. A130803.

Oct. 2, 2012.

Opinion

REARDON, J.

At the operative times, California was a signatory to the Multistate Tax Compact (Compact). (Former Rev. & Tax.Code,[1] § 38001, California's enactment of the Compact.) This binding, multistate agreement obligates member states to offer its multistate taxpayers the option of using either the Compact's three-factor formula to apportion and allocate income for state income tax purposes, or the state's

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[1] On June 27, 2012, after the oral argument in this case, the Governor signed into law Senate Bill No. 1015, which states: "Part 18 (commencing with Section 38001) of Division 2 of the Revenue and Taxation Code is repealed." (Stats.2012, ch. 37, § 3, eff. June 27, 2012.) Senate Bill No. 1015, and any issue concerning its effect or validity, were not before this court.

Unless noted otherwise, all statutory references are to the Revenue and Taxation Code.

own alternative apportionment formula. (§ 38006, art. III, subd. 1.) This is one of the Compact's key mandatory provisions designed to secure a baseline level of uniformity in state income tax systems, a central purpose of the agreement.

Prior to 1993, California subscribed to a single method of apportioning and allocating income, the Compact formula, which ascribed equal weight to three factors: property, payroll and sales. (Former § 25128, as added by Stats.1966, ch. 2, § 7, p. 179.) Then, in 1993 the Legislature amended section 25128 to give double weight to the sales factor for most business activity, specifying that "[n]otwithstanding Section 38006, all business income shall be apportioned to this state by multiplying the [business] income by a fraction, the numerator of which is the property factor plus the payroll factor *plus twice the sales factor*, and the denominator of which is four...." (Former § 25128, subd. (a), italics added, as amended by Stats.1993, ch. 946, § 1, p. 5441.)[2]

These consolidated appeals brought by appellants the Gillette Company and its subsidiaries, and other corporate entities (Taxpayers),[3] present the issue of whether, for the tax years at issue since 1993,

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[2] For purposes of this appeal, the current version of section 25128, subdivision (a) is similar in all material respects to the 1993 amendment, reading as follows: "Notwithstanding Section 38006, all business income shall be apportioned to this state by multiplying the business income by a fraction, the numerator of which is the property factor plus the payroll factor plus twice the sales factor, and the denominator of which is four...."

[3] Other appellants are Procter & Gamble Manufacturing Company; Kimberly–Clark Worldwide, Inc., and its subsidiaries; Sigma–Aldrich, Inc.; RB Holdings (USA) Inc., and Jones Apparel Group, Inc.

Taxpayers were entitled to elect the Compact formula, or, as respondent Franchise Tax Board (FTB) asserts, did the 1993 amendment to section 25128 repeal and supersede that formula, thereby making the state formula mandatory? We conclude that the Compact is a valid multistate compact, and California was bound by it and its apportionment election provision throughout the years in question because California had not repealed former section 38001 et seq. and withdrawn from the Compact during that timeframe. Accordingly, we reverse the trial court's order sustaining the FTB's demurrer without leave to amend.[4]

I. BACKGROUND

A. Historical Context Leading to Enactment of the Compact

Recognizing the need for uniformity in the apportionment of corporate income for tax purposes among the various taxing states, in 1957 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Division of Income for Tax Purposes Act (UDITPA). (7A pt. 1 West's U. Laws Ann. (2002) pp. 141–142 & § 9.) To apportion a multistate corporation's business income among the various taxing states, UDITPA uses a three-factor, equally weighted formula consisting of property, payroll and sales receipts. (*Id.*, § 9.) California

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[4] Despite the absence of a judgment of dismissal, we deem the order to incorporate such judgment because the trial court sustained a demurrer to all causes of action, and all that remains to render the order appealable is the formality of entering a judgment of dismissal. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 527–528, fn. 1, 107 Cal.Rptr.3d 481.)

adopted the UDITPA in 1966. (§ 25120 et seq.; Stats.1966, ch. 2, § 7, pp. 177–181.)

By 1959, only a few states had adopted the UDITPA. (7A pt. I, West's U. Laws Ann., *supra*, p. 141.) That year, the United States Supreme Court delivered its decision in *Northwestern Cement Co. v. Minn.* (1959) 358 U.S. 450, 452, 79 S.Ct. 357, 3 L.Ed.2d 421 (*Northwestern Cement*), holding that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." *Northwestern Cement* raised concerns in the business community and within weeks of the decision, Congress commenced hearings, culminating in the passage of Public Law No. 86–272 as an emergency, temporary measure some six months later. This law was intended to restrict the application of *Northwestern Cement* and created a subcommittee to study state business taxes and recommend legislation establishing uniform standards which states would observe in taxing income of interstate companies. (Fatale, Federalism and State Business Activity Tax Nexus; Revisiting Public Law No. 86–272 (Spring 2002) 21 Va. Tax Review, 435, 475–476; *U.S. Steel Corp. v. Multistate Tax Comm'n* (1978) 434 U.S. 452, 455, 98 S.Ct. 799, 54 L.Ed.2d 682 (*U.S.Steel*).) The subsequent study, commonly referred to as the "Willis Report" after Congressman Edwin E. Willis who chaired the subcommittee,[5] called for federal legislation that would have limited state authority to tax interstate business operations and imposed a uni-

[5] Fatale, *supra*, at page 477.

form apportionment regime on the states. (State Taxation of Interstate Commerce, Rep. of the Special Subcommittee on State Taxation of Interstate Commerce of the Com. on the Judiciary, House of Representatives (Sept. 2, 1965) vol. 4, chs. 38, 39, pp. 1135–1136, 1143, 1161.)

In the wake of the Willis Report, Congress introduced a number of bills incorporating its recommendations. (*U.S. Steel*, *supra*, 434 U.S. at p. 456, fn. 4, 98 S.Ct. 799; Sharpe, *State Taxation of Interstate Businesses and the Multistate Tax Compact: The Search for a Delicate Uniformity* (1974) 11 Colum. J. of Law and Social Problems, 231, 242 & n. 43.) To stave off federal encroachment on their taxing powers and devise workable alternatives that would eliminate the need for congressional action, state tax administrators and other state leaders drafted the Compact; by June 1967, nine states had enacted the Compact, which by its terms became effective after seven states had adopted it. (Multistate Tax Com., First Ann. Rep. (1968) pp. 1–2; § 38006, art. X, subd. 1.)

B. Compact Provisions[6]

California enacted the Compact in 1974. (Former § 38001, Stats.1974, ch. 93, § 3, p. 193.) Its purposes are to "1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes. [¶] 2. Promote uniformity or compatibility in significant components of tax systems. [¶] 3. Facilitate taxpayer convenience

[6] Because the Compact continues to exist despite a member state's repeal of its enabling legislation, we describe its operative terms in the present tense.

and compliance in the filing of tax returns.... [¶] 4. Avoid duplicative taxation." (Former § 38006, art. I.)

Article IV adopts the UDITPA and its equally weighted, three-factor apportionment formula, stating in part: "All business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three." (Former § 38006, art. IV, subd. 9.) However, article III allows taxpayers the option of apportioning and allocating income pursuant to the UDITPA formula *or* pursuant to a given state's alternative apportionment provisions: "Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party State ... may elect to apportion and allocate his income in the manner provided by the laws of such State ... without reference to this compact, or may elect to apportion and allocate in accordance with Article IV." (Former § 38006, art. III, subd. 1.) As noted in the Multistate Tax Commission's Third Annual Report (1969–1970),[7] "The Multistate Tax 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. Thus a corporation which is selling into a state in which it has little property or payroll will want to insist upon the use of the three-factor formula (sales, property and payroll) which is included in UDITPA because that will substantially reduce his tax liability to that state below what it would be if a single sales factor formula were applied to him[;]

[7] Hereafter, Third Commission Report.

on the other hand, he will look with favor upon the application of the single sales factor formula to him by a state from which he is selling into other states, since that will reduce his tax liability to that state. 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 p. 3.)

Article V sets out the rules for sales and use tax credits and exemptions, therein obligating each party state to provide a full credit to taxpayers who previously paid sales or use tax to another state with respect to the same property, and to honor sales and use tax exemption certificates from other states. (Former § 38006, art. V, subd. 1.)

The Compact leaves other matters entirely to state control. For example, it reserves to the states control over the rate of tax (former § 38006, art. XI, subd. (a)), and simply does not address the composition of a corporation's tax base.

As well, the Compact creates the Multistate Tax Commission (Commission) with powers to study state and local tax systems, develop and recommend proposals for greater uniformity of state and local tax laws, and compile and publish information helpful to the states. (Former § 38006, art. VI, subds. 1, 3.) Each party state appoints a member to the Commission and pays its share of expenses. (*Id.*, art. VI, subds. 1(a), 4(b).) The Commission may adopt uniform regulations in cases where two or more states have uniform or similar provisions relating to specific types of taxes. (*Id.*, art. VII.) However, such regulations are advisory only—each state makes its own decision whether to adopt the regulation in accordance with its own law. (*Id.*, art. VII, subd. 3.) Additionally, the Commission may perform interstate audits, if requested by a party state; the governing article applies only in states that specifically adopt it by statute. (*Id.*, art. VIII, subds. 1, 2.)

Finally, under the Compact, states are free to withdraw from the Compact at any time "by enacting a statute repealing the same." (Former § 38006, art. X, subd. 2.)

C. *U.S. Steel*

In 1972, a group of multistate corporate taxpayers brought an action on behalf of themselves and all other such taxpayers threatened with audits by the Commission. The complaint challenged the constitutionality of the Compact on several grounds, including that it was invalid under the compact clause of the United States Constitution.[8] (*U.S. Steel*, *supra*, 434 U.S. at p. 458, 98 S.Ct. 799.)

The high court acknowledged that the compact clause, taken literally, would require the states to obtain congressional approval before entering into any agreement among themselves, "irrespective of form, subject, duration, or interest to the United States." (*U.S. Steel*, *supra*, 434 U.S. at p. 459, 98 S.Ct. 799.) However, it endorsed an interpretation, established by case law, that limited application of the compact clause " 'to agreements that are "directed to the formation of any combination tending to the increase of political power in the States, which

[8] The compact clause of article I, section 10, clause 3 of the United States Constitution states: "No state shall, without the consent of Congress, ... enter into any agreement or compact with another state, or with a foreign power...."

may encroach upon or interfere with the just supremacy of the United States." [Citations.]' This rule states the proper balance between federal and state power with respect to compacts and agreements among States." (*Id.* at p. 471, 98 S.Ct. 799, initial quote from *Virginia v. Tennessee* (1893) 148 U.S. 503, 519, 13 S.Ct. 728, 37 L.Ed. 537.)

Framing the test as whether the Compact enhances state power with respect to the federal government, the court concluded it did not: "This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover ..., each State is free to withdraw at any time." (*U.S. Steel*, *supra*, 434 U.S. at p. 473, 98 S.Ct. 799.) In the end the court rejected all of the plaintiffs' challenges to the constitutional validity of the Compact. (*Id.* at p. 479, 98 S.Ct. 799.)

D. Amendment of Section 25128; Litigation

Prior to 1993, California required corporations to apportion their business income to California using the standard UDITPA, equally weighted three-factor apportionment formula. (§ 25128, as adopted in 1966; see also former § 38006, art. IV, subd. 9.) In 1993, the Legislature amended this formula to give double weight to the sales factor and specified that the new formula was mandatory, providing in relevant part: "*Notwithstanding Section 38006* [the Compact], all business income shall be apportioned to this state by multiplying the [business] income by a fraction, the numerator of which is the property factor plus the payroll factor *plus twice the sales factor*, and the denominator of which is four...."

(§ 25128, subd. (a), italics added; Stats.1993, ch. 946, § 1, p. 5441.)

In January 2010, the Taxpayers lodged six complaints for the refund of taxes which the court thereafter consolidated. Therein, they argued that the amended section 25128 did not override or repeal the UDITPA formula set forth in (former) section 38006, and sought a refund of approximately $34 million. The Taxpayers alleged that they began filing claims for refund in 2006,[9] based on their election to compute their California apportionable income "using the three-factor apportionment formula (property, payroll, and single-weighted sales) set forth in ... § 38006." The FTB denied the refund claims for the years at issue.

The FTB demurred on grounds that the amended section 25128 mandated the exclusive use of the double-weighted sales factor, and according to its plain and unambiguous language, negated the Taxpayers' claim of entitlement to elect the UDITPA formula. The trial court agreed that section 25128 "clearly express [ed] an intention to take away the alternative under [section] 38006," and additionally the court in U.S. Steel determined that this alternative statutory scheme "could be obviated in the manner that the Legislature did." Therefore, it sustained the FTB's demurrer to the complaints without leave to amend and entered judgment accordingly.

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[9] Sigma–Aldrich, Inc., began filing refund claims in 2003; RB Holdings (USA), Inc., began filing refund claims in 2007.

II. DISCUSSION

A. Introduction

The Taxpayers are adamant that the Compact is a valid compact, was binding on California during the operative timeframe, and as such, the Legislature could not override and eliminate the (former) section 38006 option for taxpayers to elect the Compact's apportionment formula. The FTB maintains as a threshold matter that the Taxpayers lack standing to complain of any purported violation of the Compact. On the substantive front, the FTB contends that the plain language of section 25128 mandates the exclusive use of the double-weighted sales apportionment formula, thereby eliminating use of the equally weighted three-factor apportionment formula set forth as a taxpayer option in (former) section 38006. Further, it urges that under California statutory and contract law, the Legislature had the power, and in 1993 properly enacted legislation, to repeal the Compact legislation to the extent necessary to impose this mandatory apportionment formula on taxpayers.

B. Nature of Interstate Compacts

Some background on the nature of interstate compacts is in order. These instruments are legislatively enacted, binding and enforceable agreements between two or more states. (Litwak, *Interstate Compact Law: Cases and Materials* (Semaphore Press 2011) pp. 5, 12.) Initially used to resolve boundary disputes, today interstate compacts are a staple of interstate cooperation and, in addition to taxes, span a wide range of subject matter and issues including forest firefighting; water allocation; mining regulation; storage of low level radioactive waste;

transportation; environmental preservation and resource conservation; regulation of electric energy; higher education and regional cultural development. (Davis, *Interstate Compacts in Commerce and Industry* (1998) 23 Vt. L.Rev. 133, 139–143.)

As we have seen, some interstate compacts require congressional consent, but others, that do not infringe on the federal sphere, do not. Questioning whether similar statutes in two states constituted a compact, the Supreme Court has outlined what it deemed "classic indicia" of such instruments: "We have some doubt as to whether there is an agreement amounting to a compact. The two statutes are similar in that they both require reciprocity and impose a regional limitation, both legislatures favor the establishment of regional banking in New England, and there is evidence of cooperation among legislators, officials, bankers, and others in the two States in studying the idea and lobbying for the statutes. But several of the classic indicia of a compact are missing. No joint organization or body has been established to regulate regional banking or for any other purpose. Neither statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally. Most importantly, neither statute requires a reciprocation of the regional limitation." (*Northeast Bancorp v. Board of Governors, FRS* (1985) 472 U.S. 159, 175, 105 S.Ct. 2545, 86 L.Ed.2d 112 (*Bancorp*).) The Ninth Circuit Court of Appeals has aptly summarized *Bancorp* as setting forth three primary indicia: "These are establishment of a joint organization for regulatory purposes; conditional consent by member states in which each state is not free to modify or repeal its participation unilaterally; and state enactments which require reciprocal action for their effectiveness." (*Seat-*

tle Master Builders v. Pacific N.W. Elec. Power (9th Cir.1986) 786 F.2d 1359, 1363.)

Where, as here, federal congressional consent was neither given nor required, the Compact must be construed as state law. (*McComb v. Wambaugh* (3d Cir.1991) 934 F.2d 474, 479.) Moreover, since interstate compacts are agreements enacted into state law, they have dual functions as enforceable contracts between member states and as statutes with legal standing within each state; and thus we interpret them as both. (*Aveline v. Bd. of Probation and Parole* (Pa.Cmwlth.1999) 729 A.2d 1254, 1257; see Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts* (ABA 2006) § 1.2.2, pp. 15–24 (Broun on Compacts); 1A Sutherland, Statutory Construction (7th ed.2009) § 32:5; *In re C.B.* (2010) 188 Cal.App.4th 1024, 1031, 116 Cal.Rptr.3d 294 [recognizing that Interstate Compact on Placement of Children shares characteristics of both contractual agreements and statutory law].)

The contractual nature of a compact is demonstrated by its adoption: "There is an offer (a proposal to enact virtually verbatim statutes by each member state), an acceptance (enactment of the statutes by the member states), and consideration (the settlement of a dispute, creation of an association, or some mechanism to address an issue of mutual interest.)" (Broun on Compacts, *supra*, § 1.2.2, p. 18.) As is true of other contracts, the contract clause of the United States Constitution shields compacts from impairment by the states. (*Aveline v. Bd. of Probation and Parole*, *supra*, 729 A.2d at p. 1257, fn. 10.) Therefore, upon entering a compact, "it takes precedence over the subsequent statutes of signatory states and, as such, a state may not unilaterally nullify, revoke or amend one of its compacts if the compact does not so provide." (*Ibid.*; accord, *Intern. Union v. Del. River Joint Toll Bridge* (3d Cir.2002) 311 F.3d 273, 281.) Thus interstate compacts are unique in that they empower one state legislature—namely the one that enacted the agreement—to bind all future legislatures to certain principles governing the subject matter of the compact. (Broun on Compacts, *supra*, § 1.2.2, p. 17.)

As explained and summarized in *C.T. Hellmuth v. Washington Metro. Area Trans.* (D.Md.1976) 414 F.Supp. 408, 409 (*Hellmuth*): "Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories." Cast a little differently, "[i]t is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact." (*Henderson v. Delaware River Joint Toll Bridge Com'n* (Pa.1949) 66 A.2d 843, 849–850.) Nor may states amend a compact by enacting legislation that is substantially similar, unless the compact itself contains language enabling a state or states to modify it through legislation " 'concurred in' " by the other states. (*Intern. Union v. Del. River Joint Toll Bridge*, *supra*, 311 F.3d at pp. 276–280.)

C. Taxpayers Have Standing to Pursue These Actions

The FTB asserts that even if California breached its obligations under the Compact, the Taxpayers have no judicial remedy, are not parties to the agreement and have no enforceable rights under it.

First, this is an action for the refund of corporate taxes paid to the state pursuant to section 19382, and without question the Taxpayers have standing in such an action to claim "that the tax computed and assessed is void in whole or in part...." (*Ibid.*)

Furthermore, the Compact, at former section 38006, article III, subdivision 1 explicitly gives taxpayers whose income is subject to apportionment and allocation under the laws of a party state the option to elect to apportion its taxes under UDITPA, the Compact formula. This is a right specifically extended not to the party states but to taxpayers as third parties regulated under the Compact, and as such Taxpayers may seek to enforce this right as part of its tax refund suit. Moreover, the stated purposes of the Compact explicitly embrace taxpayer interests. These purposes include facilitating (1) "proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases" and (2) "taxpayer convenience." (Former § 38006, art. I, subds. 1, 3.)

Alabama v. North Carolina (2010) 560 U.S. 330, 130 S.Ct. 2295, 176 L.Ed.2d 1070, characterized as "particularly instructive" by the FTB, is not. There, the Supreme Court ruled that the agency created by the Compact could not bring claims for breach of compact by a party state *in a stand-alone action under the Supreme Court's original jurisdiction* because it had "neither a contractual right to performance by the party States nor enforceable statutory rights under [the compact]." (*Id.* at p. 2315.) Our case has nothing to do with the unique features of federal original jurisdiction. (U.S. Const., art. III, § 2, cl.2.)

In any event, in contrast, here the codified compact extends the right to election to appropriate taxpayers. We find the decision in *Borough of Morrisville v. Delaware Riv. Bas. Com'n* (E.D.Pa.1975) 399 F.Supp. 469, 472–473, footnote 3 persuasive. There, the plaintiff municipalities who used water from the Delaware River claimed that the compact commission in question exceeded its authority and violated the compact and federal law by imposing certain water charges. Resolving the standing issue in favor of the plaintiffs, the district court further stated that "'[t]o hold that the Compact is an agreement between the political signatories imputing only to those signatories standing to challenge actions pursuant to it would be unduly narrow in view of the direct impact on plaintiffs and other taxpayers.' " (*Id.* at p. 473.) This view is reinforced by commentators: "For the most part, interstate compacts have not created any privately assertable rights.... However, this is not invariably the case. For example, water allocation compacts, while they apportion water among states, may affect the rights of individual water users in such a way as to make them proper parties to suits. In such situations, the governing fact is that compacts are statutory law. Consequently, the assertion of private rights created or otherwise affected by a compact is procedurally similar to the assertion of such rights conferred by other statutes of the jurisdiction dealing with similar subject matter." (Zimmerman & Wendell, *The Law and Use of Interstate*

Compacts (The Council of State Governments 1976) Compact Law, ch. 1, pp. 14–15.)

D. The Compact Is a Valid, Enforceable Interstate Compact

To reiterate, the high court in *U.S. Steel* upheld the facial validity of the Compact against various constitutional challenges. (*U.S. Steel*, *supra*, 434 U.S. at pp. 473–479, 98 S.Ct. 799.) A number of years ago, our own Attorney General acknowledged the binding force of the Compact at the time. (80 Ops. Cal. Atty. Gen. 213, 214 (1997): by virtue of enacting the Compact as part of the law of this state, the Compact made California a member of the Commission and the only way to withdraw from commission membership was by enacting repealing legislation.)

Moreover, the Compact satisfies indicia of a compact. (See *Seattle Master Builders v. Pacific N.W. Elec. Power*, *supra*, 786 F.2d at p. 1363.) The Commission is an operational body charged with duties and powers in furtherance of the Compact's purposes. It oversees the Compact, is composed of tax administrators from all member states, and is financed through a process of allocation and apportionment. (Former § 38006, art. VI.) Meeting on at least an annual basis, and with representation from each signatory state, the Commission is a vehicle for continuing cooperative action among those states.

Additionally, the Compact builds in binding reciprocal obligations that advance uniformity. First, as we have discussed, it secures an election for multistate taxpayers to opt for apportioning their business income under UDITPA, the Compact formula, or in accordance with the state's own apportionment formula. (Former § 38006, art. III, subd. 1.) The election provision is not optional for party states. Because any multistate taxpayer "may elect" either approach, the party states must make the election available. As set forth above, the Commission has explained that the mandate to make UDITPA available on an optional basis to taxpayers preserves "the substantial advantages with which lack of uniformity provides [the taxpayer] in some states." (Third Commission Report, *supra*, at p. 3.) Thus the Compact reserves to the states the right to provide taxpayers with alternative formulas, while at the same time making uniformity available when and where desired. (*Ibid.*)

As well, the Compact commits each state to provide sales and use tax credits and exemptions. (Former § 38006, art. V.) Again, the sales and use tax provisions are mandatory on signatory states.

Finally, the Compact provides for a state's orderly withdrawal, namely by enacting a statute repealing the Compact. However, any repealing legislation must be prospective in nature, because it cannot "affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal." (Former § 38006, art. X, subd. 2.) Although notice to sister states is not specifically required, by requiring repealing state legislation, the process itself calls for a measured, deliberative decision prior to withdrawal. Moreover, advance notice could easily be accomplished through the work of the Commission.

Nevertheless, the right to withdraw is unilateral. Citing *Bancorp*, the FTB suggests that the withdrawal provision renders the Compact something less than a binding agreement. However, this type of withdrawal provision is common in other interstate compacts and has not been the death knell rendering them nonbinding and invalid. California is a party to a number of interstate compacts containing virtually identical withdrawal provisions, coupled with some type of notice requirement. (See Gov.Code, § 66801 (art. X, subd. (c)) [delineating withdrawal provision for Tahoe Regional Planning Compact]; Veh.Code, § 15027 [same for Driver License Compact]; Welf. & Inst.Code, § 1400, art. XI, subd. (a) [same for Interstate Compact on Juveniles]; Pen.Code, § 11180, art. XII, § A [Interstate Compact for Adult Offender Supervision]; Ed.Code, § 12510, art. VIII [Compact for Education].)

Furthermore, the situation in *Bancorp*, cited by the FTB, differs dramatically from the case at hand. There, Massachusetts and Connecticut enacted similar statutes allowing regional interstate banking acquisitions. However, unlike former section 38006, these statutes were not jointly entered into as a binding agreement; they did not create an administrative body nor did they require reciprocation in key respects; and they could be changed as well as repealed at will. (*Bancorp*, *supra*, 472 U.S. at p. 175, 105 S.Ct. 2545.)

The FTB also points to a recent Commission document that refers to the Compact as a "model law" and "not truly a compact."[10] The Commission's statements do not alter the reality that the Compact was binding on California throughout the timeframe at issue. Indeed, the Compact operates as a model

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[10] Multistate Tax Compact, Suggested State Legislation and Enabling Act, accessed on the Web site of the Multistate Tax Commission on October 1, 2012. <http://www.mtc.gov/uploadedFiles/Multistate_Tax_ Commission/About_ MTC/MTC_ Compact/COMPACT(1).pdf>

law as to those states that choose to be associate members, rather than signatory members. Pursuant to the Commission bylaws, the Commission may grant associate membership to states which have not enacted the Compact but which have, for example, enacted legislation that makes effective adoption of the Compact dependent on a subsequent condition. (Third Commission Report, *supra*, at p. 96.) Before the Legislature enacted the Compact, California was an associate member. At the relevant time, California was a full Compact member, having enacted the Compact "into law and entered into [it] with all jurisdictions legally joining therein...." (Former § 38001.) That the Compact did not "enter into force" until enacted into law by seven states also distinguishes it from a model law.

The FTB also intimates that the Compact is invalid under article 13, clause 31 of our state Constitution, which states: "The power to tax may not be surrendered or suspended by grant or contract." But of course by entering the Compact, California neither surrendered nor suspended its taxing powers. California retained full control of its tax base, tax rate and tax revenues; it simply obligated itself to provide taxpayers with an option to use UDITPA or the state formula until such time as it withdrew from the Compact.

E. California Cannot Unilaterally Repeal Compact Terms

The thrust of the FTB on appeal is this: Confirming the Legislature's authority to amend, repeal or supersede existing statutes, it proceeds to urge as a matter of statutory construction that the Legislature's choice of the "[n]otwithstanding Section 38006" language in section 25128 overrode former section

38006, thus excising the taxpayer option to use UDITPA, the Compact apportionment formula. Indeed, it goes so far as to say that this language constituted "a repeal of section 38006 to the extent necessary to impose a mandatory double-weighted sales apportionment formula upon taxpayers."

Were this simply a matter of statutory construction involving two statutes—section 25128 and former section 38006—we would at least entertain the FTB's argument that section 25128 overrode the former section 38006 taxpayer election to apportion under the Compact formula, and mandated the exclusive use of the double-weighted sales apportionment formula at the pertinent times. This is the clear import of the statutory language. However, so construed section 25128 is invalid because it completely ignores the dual nature of former section 38006. Once one filters in the reality that former section 38006 was not just a statute but was also the codification of the Compact in California, and that through this enactment California entered a binding, enforceable agreement with the other signatory states, the multiple flaws in the FTB's position become apparent. First, under established compact law, the Compact superseded subsequent conflicting state law. Second, the federal and state Constitutions prohibit states from passing laws that impair the obligations of contracts. And finally, the FTB's construction of the effect of the amended section 25128 runs afoul of the reenactment clause of the California Constitution.

1. The Compact Superseded Section 25128

By its very nature an interstate compact shifts some of a state's authority to another state or states. Thus signatory states cede a level of sovereignty over matters covered in a compact in favor of pursuing multilateral action to resolve a dispute or regulate an interstate affair. (*Hess v. Port Authority Trans–Hudson Corporation* (1994) 513 U.S. 30, 42, 115 S.Ct. 394, 130 L.Ed.2d 245; Broun on Compacts, *supra*, § 1.2.2, p. 23.) Because the Compact is both a statute and a binding agreement among sovereign signatory states, *having entered into it, California could not, by subsequent legislation, unilaterally alter or amend its terms*. Indeed, as an interstate compact the Compact *is superior to prior and subsequent the statutory law of member states*. (*McComb v. Wambaugh*, *supra*, 934 F.2d at p. 479; *Hellmuth*, *supra*, 414 F.Supp. at p. 409.)

This means that at the times in question, the Compact trumped section 25128, such that, contrary to the FTB's assertion, section 25128 *could not override* the UDITPA election offered to multistate taxpayers in former section 38006, article III, subdivision 1. It bears repeating that the Compact *requires* states to offer this taxpayer option. If a state could unilaterally delete this baseline uniformity provision, it would render the binding nature of the Compact illusory and contribute to defeating one of its key purposes, namely to "[p]romote uniformity or compatibility in significant components of tax systems." (Former § 38006, art. I, subd. 2.) Because the Compact takes precedent over subsequent conflicting legislation, these outcomes cannot come to pass.

The FTB offers an alternative argument, namely that the UDITPA election can be superseded and repealed pursuant to the Compact's own withdrawal provision. Specifically, it casts the withdrawal clause as a flexible tool giving member states the "means of overriding any and all of its provisions, including the election and apportionment provisions. Member states can simply utilize the unrestricted withdrawal provision ... to repeal and withdraw from the Multistate Tax Compact, in whole or in part."

As a matter of compact law, this cannot be. Having established that the Compact is a binding, valid compact, we construe and apply it according to its terms. (*Texas v. New Mexico* (1983) 462 U.S. 554, 564, 103 S.Ct. 2558, 77 L.Ed.2d 1.) In part because compacts are agreements among sovereign states, we will not read absent terms into them or dictate relief inconsistent with their express terms. (*Alabama v. North Carolina*, *supra*, 130 S.Ct at p. 2313.)

With these concepts in mind, it is obvious that the plain language of the withdrawal provision, enabling a party state to withdraw from the Compact "by enacting a statute repealing the same," allows only for complete withdrawal from the Compact. After withdrawal, a state remains liable for any obligations incurred prior to withdrawal. Faced with the desire to escape an obligation under the Compact, a state's only option is to withdraw completely by enacting a repealing statute. That is what the plain language says, and we will not read into that language an inconsistent term allowing for piecemeal amendment or elimination of compact provisions. At the time of the trial court's ruling and the submission of the case to this court after oral argument, California had *not* withdrawn from the Compact.

The FTB refers us to *Alabama v. North Carolina*, *supra*, involving the same compact withdrawal provision, to support its position that we should not restrictively interpret the withdrawal provisions of the Compact. The FTB focuses on the following passage: "The Compact imposes no limitation on North Carolina's exercise of its statutory right to withdraw.... There is no restriction upon a party State's enactment of such a law...." (*Alabama v. North Carolina*, *supra*, 130 S.Ct. at p. 2313, italics omitted.) However, the FTB omits the context, which is crucial. North Carolina withdrew from the compact in question by enacting a law repealing its status as a member state, *as required by the compact*. (*Id*. at p. 2304.) The plaintiffs alleged that North Carolina withdrew *in bad faith* to avoid monetary sanctions. Holding that there was no limitation on North Carolina's exercise of its withdrawal right, the Supreme Court explained that there was nothing in the compact suggesting that there were certain purposes for which the conferred withdrawal power could not be employed. (*Id*. at p. 2313.) In context, it is apparent that the case does not support the principle of partial withdrawal or piecemeal alteration or amendment. Rather, the withdrawal provision calls for withdrawal from the Compact by passing a law repealing the Compact, period.

In further support of its position that the withdrawal provision should be construed to permit partial repeal or unilateral amendment, the FTB interprets the severability clause as providing for liberal construction of Compact provisions. This standard clause says that if any provision is declared invalid, the remaining provisions will not be affected. In other words, if a court declares any provision unconstitutional or invalid, it will be severed to avoid invalidation of the entire Compact. (Former § 38006, art. XII.) How this clause advances the FTB's cause is not apparent to this court. It has nothing to do with liberal construction or the validity of state action to alter or amend existing Compact provisions.

Taking a slightly different tact, the FTB points out that a number of parties to the Compact have adopted statutes over the years that deviate from the Compact's taxing provisions. According to materials furnished in the FTB's request for judicial notice and summarized in its brief, 14 of 20 member states have passed some variation of a *mandatory*, state-specific apportionment formula that departs from the Compact provisions. The states have accomplished this in a variety of ways.

The FTB recommends that we consider the extrinsic evidence of this "course of conduct" in ascertaining whether the Compact is reasonably susceptible to an interpretation that renders its taxing provisions nonbinding and capable of being amended, superseded and repealed, in whole or part, by member states. Both parties concur that the key is whether the Compact is reasonably susceptible to the interpretation offered. (*Cedars–Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 980, 41 Cal.Rptr.3d 48.)[11] It is not. As we have demonstrat-

[11] The FTB adds that "[i]n interpreting a compact, 'the parties' course of performance under the Compact is highly significant,'" quoting *Alabama v. North Carolina*, *supra*, 130 S.Ct. at page 2309. As a general statement this is highly misleading. The court's reference to the course of performance pertained to "whether, in terminating its efforts to obtain a license, North Carolina failed to take what the parties considered 'appropriate' steps...." (*Alabama v. North Carolina*, *supra*, 130 S.Ct. at p. 2309.) The compact in question obligated the defendant to take appropriate steps to ensure that an application to construct and operate the facility in question was filed and issued by the proper authority. (*Id.* at p. 2303.) The issue was what constituted "appropriate steps" under the compact. Of course, in this particular context, the parties' course of performance would help flesh out that concept.

ed, the Compact's express, unambiguous terms require extending taxpayers the option of electing UDITPA, and set forth reciprocal repeal terms allowing a member state to cease its participation and reclaim its sovereignty.

As important, the proffered interpretation runs counter to the express purposes of the Compact, which include facilitating "equitable apportionment of tax bases" and promoting "uniformity or compatibility in significant components of tax systems." (Former § 38006, art. I, subds. 1, 2.) The FTB's interpretation, that the Compact does not require states to provide multistate taxpayers with the election to use the UDITPA formula, would eviscerate the availability of a common formula for all taxpayers to use as an alternative, thereby diluting a potent uniformity provision of the Compact. Moreover, the course of performance of a contract is only relevant to ascertaining the parties' intention *at the time of contracting*. (Civ.Code, § 1636; *Cedars–Sinai Medical Center v. Shewry*, *supra*, 137 Cal.App.4th at p. 983, 41 Cal.Rptr.3d 48.) The express, stated purposes of the Compact are a much truer measure of that intent than the subsequent statutory changes to state apportionment formulae.

Similarly, the purpose of admitting course of performance evidence is grounded in common sense: "[W]hen the parties perform under a contract, without objection or dispute, they are fulfilling their understanding of the terms of the contract." (*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 922, 74 Cal.Rptr.3d 733.) The course of performance doctrine is thus premised on the assumption that one party's response to another party's action is probative of their understanding of the contract terms. But in the context of the Compact, the member states do not perform or deliver their obligations to one another, unlike a typical contract in which a party provides services or goods to the other party, who in turns monitors the first party's compliance with contract terms. Thus the foundation for finding course of performance evidence relevant and reliable is faulty. For example, in *Cedars–Sinai*, the reviewing court concluded that course of conduct performance was *not* relevant to interpret a disputed provision because the conduct in question had nothing to do with providing incentives to monitor or enforce contract compliance. (*Cedars–Sinai Medical Center v. Shewry*, *supra*, 137 Cal.App.4th at p. 983, 41 Cal.Rptr.3d 48.)

F. The FTB's Construction Violates the Federal and State Constitutional Prohibition Against Impairment of Contracts

Our federal and state Constitutions forbid enactment of state laws that impair contractual obligations. "No state shall ... pass any ... law impairing the obligation of contracts...." (U.S. Const., art. I, § 10, cl.1.) "A ... law impairing the obligation of contracts may not be passed." (Cal. Const., art. I, § 9.) This constitutional prohibition extends to interstate compacts. (*Green v. Biddle* (1823) 21 U.S. 1, 12–13, 17, 8 Wheat. 1, 5 L.Ed. 547 [Kentucky law that narrowed rights and diminished interests of landowners under compact between Kentucky and Virginia violated compact and was unconstitutional]; *Doe v. Ward* (W.D.Pa.2000) 124 F.Supp.2d 900, 915, fn. 20.) Section 25128, by its plain terms, sought to override and disable California's obligation under the Compact to afford taxpayers the option of apportioning income under the UDITPA formula. To this extent, and during the tax years at issue, section 25128 was unconstitutional as violative of the prohibition against impairing contracts.

G. The FTB's Construction Runs Afoul of the Constitutional Reenactment Rule

The FTB is adamant that the intent of the "[n]otwithstanding [former] Section 38006" language in section 25128 was to repeal and supersede the taxpayer election to apportion under the Compact formula. At a minimum this outcome would have eliminated or rewritten article III, subdivision 1 and eliminated article IV, subdivision 9 of former section 38006. However, this result flies in the face of the California Constitution, article IV, section 9, stating in part: "A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended."

Long ago our Supreme Court expressed the purpose of the reenactment rule as avoiding " 'the enactment of statutes in terms so blind that legislators themselves [are] sometimes deceived in regard to their effect, and the public, from the difficulty of making the necessary examination and comparison, fail[s] to become appraised [*sic*] of the changes made in the laws.' " (*Hellman v. Shoulters* (1896) 114 Cal. 136, 152, 44 P. 915; accord *American Lung Assn. v. Wilson* (1996) 51 Cal.App.4th 743, 748, 59 Cal.Rptr.2d 428.) Clearly the reenactment rule applies to acts " 'which are in terms ... amendatory of some former act.' [Citation.]" (*American Lung Assn. v. Wilson*, *supra*, 51 Cal.App.4th at p. 749, 59 Cal.Rptr.2d 428.) Its applicability does not depend on the method of amendment, but rather "on whether legislators and the public have been reasonably notified of direct changes in the law." (*Ibid.*)

The FTB's construct triggers the reenactment statute because it posits that the 1993 amendment to section 25128 repealed and superseded the UDITPA apportionment formula. Nonetheless, the purportedly deleted UDITPA election remained in former section 38006. The Legislature did not repeal, amend or reenact any part of the Compact at the time, and thus neither the public nor the legislators had adequate notice that the intent of this amendment was to eviscerate former section 38006.

III. DISPOSITION

The judgment of dismissal is reversed. FTB to bear costs on appeal.

We concur: RUVOLO, P.J., and SEPULVEDA, J.*

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* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX C

Superior Court of the State of California.
County of San Francisco

THE GILLETTE COMPANY & SUBSIDIARIES,
a Delaware Corporation,
Plaintiffs,

v.

CALIFORNIA FRANCHISE TAX BOARD,
an Agency of the State of California,
Defendant.

No. CGC-10-495911.

October 25, 2010.

Order on Demurrer

[Consolidated Case Nos. CGC-10-495912; CGC-10-495916; CGC 10-496437; CGC-10-15 496438; CGC-10-499083]

Action Filed: January 11, 2010

The demurrer of defendant Franchise Tax Board to the complaints of plaintiff Gillette Company & Subsidiaries, and each plaintiff in the six consolidated cases referenced above, came on for hearing in Department 304 of this Court on October 7, 2010. Lucy Wang, Deputy Attorney General, appeared on behalf of defendant Franchise Tax Board. Amy Silverstein, Ed Antolin and Johanna Roberts appeared on behalf of plaintiffs.

Having read and considered the demurrer, the memoranda and plaintiff's first Request for Judicial Notice, and having heard oral argument of counsel,

IT IS ORDERED THAT:

1. Plaintiffs' Request for Judicial Notice in Support of Opposition to Defendant's Demurrer is granted;

2. Defendant's Request for Judicial Notice in Support of Reply Brief to Demurrer is denied;

3. Plaintiff's Second Request for Judicial Notice in Support of Opposition to Defendant's Demurrer is denied;

4. Defendant's Demurrers to the Complaints filed in the above consolidated action are sustained without leave to amend are sustained on the ground that the Complaints fail to state facts sufficient to constitute a valid cause of action under section 430.10, subdivision (e), of the Code of Civil Procedure for the reasons set forth by the Court at the hearing of October 7, 2010.

IT IS SO ORDERED.

Dated: <u>10-29</u>, 2010 <u>/s/ Richard A. Kramer</u>

Hon. Richard Kramer

APPENDIX D

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
BEFORE THE HONORABLE
RICHARD A. KRAMER, JUDGE PRESIDING

DEPARTMENT NUMBER 304

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THE GILLETTE COMPANY AND
SUBSIDIARIES, A DELAWARE
CORPORATION,
Plaintiffs,

vs.

CALIFORNIA FRANCHISE TAX BOARD, AN
AGENCY OF THE STATE OF CALIFORNIA,
Defendants.

Case No. 495911

<u>Demurrer</u>

Pages 1 - 28

Consolidated with Case Nos. 495912; 495916;
496437; 496438; 499083

<u>Reporter's Transcript of Proceedings</u>

Thursday, October 7, 2010

<u>APPEARANCES OF COUNSEL:</u>

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By: **LUCY F. WANG, Deputy Attorney General**

Reported by: Joseph H. Vickstein, CSR No. 4780

THE CLERK: Calling the matters of the Gillette Company and Subsidiaries versus California Franchise Tax Board, Case No. 495911.

Also calling the Procter & Gamble Manufacturing Company versus California Franchise Tax Board, 495912.

Also calling Kimberly-Clark Worldwide, Incorporated and Subsidiaries, et al., versus California Franchise Tax Board, Case No. 495916.

Also calling Sigma-Aldrich Incorporated versus California Franchise Tax Board, Case No. 496437.

Also calling RB Holdings USA Incorporated versus California Franchise Tax Board, Case No. 496438.

And also calling Jones Apparel Group Incorporated, et al., versus California Franchise Tax Board, Case No. 499083.

THE COURT: I did that on purpose for a couple of reasons. First because we have to. That way we've got on record that each case is being heard today; and second, to underscore my first question, which isn't really much of a question, and that is each of the Complaints in each of the cases is the subject of demurrer, right?

MS. WANG: Correct, Your Honor.

THE COURT: All right. Now, we have your appearances. Welcome back. And the court reporter knows who everybody is.

We have these demurrers that start with Requests for Judicial Notice. It is my impression that the Plaintiffs' Request for Judicial Notice is not objected to. Am I right?

MS. WANG: That's correct, Your Honor.

THE COURT: Plaintiffs' Request for Judicial Notice is granted.

In the reply, the Franchise Tax Board requested judicial notice. That request is objected to in part on the argument that Plaintiffs didn't have time to think about these documents and didn't have an opportunity to reply to whatever significance might be made of them.

On that argument I am going to deny the Franchise Tax Board's Request for Judicial Notice that came in with the reply. It's a tentative ruling. I will give you a chance to argue that.

Do you wish to? I know I have the discretion to take judicial notice. Do you want to argue?

MS. WANG: Yes, I do, Your Honor. Thank you.

* * *

THE COURT: All right. The request is denied.

There's also a second Request for Judicial Notice. The tentative ruling is to deny it as not being not timely. Would you like to argue that one?

MS. WANG: No, Your Honor.

THE COURT: That is denied as well.

Now, tentative ruling on the demurrers is to sustain them without leave to amend. I think that Section 25128 is clear on its face. It needs no interpretation except understanding the English language.

There is no ambiguity and it's clear intent, which I am supposed to first ascertain from the words used in the statute, was to limit the alternative tax apportionment factors to that set forth in Code Section 25128.

In addition, *U.S. Steel vs. Multistate Tax Commission*, 434 U.S. 452 makes it clear that the alternative statutory scheme, which is Section 38006, is of the nature that it could be obviated in the manner that the Legislature did.

Anybody want to argue?

MS. SILVERSTEIN: Absolutely. Okay, may I stand up here?

* * *

THE COURT: Thank you. All right. Tentative ruling stands. Here's the way I see it:

Two questions here. What did the Legislature do when it enacted Revenue and Taxation Code Section 25128? That is did it obviate the alternative tax possibility under Revenue and Taxation Code Section 38006? This is the statutory interpretation question.

Everybody has focused on the words "Notwithstanding Section 38006." I believe that those words articulate an intention that Section 28 -- excuse me -- 25128 will be the only method of calculation of the factor that we are talking about.

I believe also that there are other words in the statute that cause me to reach the same conclusion, because it says, the statute says, "Notwithstanding Section 38006, all" -- and I emphasize "all" -- "business income shall be apportioned."

If what this was meant to do was to only apportion non -- not only apportion business income for which the taxpayer had failed to opt under 38006, the word "all" wouldn't make any sense. It says, "All business income." Not, "All business income, not otherwise subject to something else."

So I look at that, and I look at the word "shall" as being mandatory. So I interpret Revenue and Taxation Code Section 25128 as clearly expressing an intention to take away the alternative under 38006 of the Revenue and Taxation Code.

And I don't need legislative history, because nothing that I saw changed my view of that. And although I did not consider what other states subject to the Compact did -- that was part of the first Request for Judicial Notice by the State -- I didn't consider it because, frankly, I don't see why the way other states interpret this has anything to do with this Court's duties. But it doesn't matter because I didn't take judicial notice of it for the reasons previously stated.

All right. So first point, how do I interpret Revenue and Taxation Code Section 25128. That's how I interpret it. And I think it's very clear.

Next question. Could the State do that? Which is the argument about the effect of a contract or compact, however you want to call it. And I think that *United States Steel Corp. vs. Multistate Tax Commission* answers that question.

Justice Powell talked about whether or not this compact required Congressional approval. And he said no. And the reason he gave was that the provisions of that 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.

Quoting from Page 457, Justice Powell said:

> "Individual member states retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base, including the determination of the components of taxable income, and the means and methods of determining tax liability and collecting any taxes determined to be due."

That's why he said it doesn't require Congressional approval. It doesn't fit in with Article VIII of the United States Constitution requiring Congressional approval of certain kinds of contracts.

Now, it is true that there can be contracts binding on states which are in the form of compacts which are not subject to change. And the cases cited by the Plaintiffs give examples of that. They also give examples of cases that were approved by Congress.

But it depends on the provisions of the Compact. And here, given the way the U.S. Supreme Court has interpreted this Compact, the states, this states enactment of Section 25128 is in accordance with what Justice Powell said is provided for and allowed under the contract.

So it's not changing the Compact. It's not obviating the Compact. It's acting in compliance with it, is the way I see it. Acting in a manner that the U.S. Supreme Court has said is a characteristic of this Compact.

Now, there may be other compacts that don't have the degree of discretion that the Supreme Court found here. And as to those, whether or not approved by Congress, they could constitute binding contracts on member states. But that's different from this.

So my interpretation of this is that because of the nature of this Compact, which Justice Powell relied on when he said it didn't need Congressional approval, the nature of this Compact allows for the change in the tax calculation that we have here.

And it's not in any sense irreconcilable, and it's not impermissible. There's no violation of the contract, which is the Compact. That's the best way that I can explain it, and that's the ruling of the Court.

Now, this will be reviewed and rereviewed and rererereviewed maybe. So if the Defendant wishes to write an order, you may do so.

I think I said it the way I think it on the record here. And I think that's probably good enough to go up to the Court of Appeal for it to review what the heck did the trial judge have in mind.

But if you want to have a written order, that's fine. It should only reflect what I have said on the record and nothing else. And should reflect what I said on the record.

Anything else?

MS. SILVERSTEIN: Can you give us one moment?

MS. WANG: I have nothing further, Your Honor.

MS. SILVERSTEIN: We have nothing further.

THE COURT: Just so it's clear, and my Clerk has it for the minutes, Demurrers to the Complaints in each of the included actions are sustained without leave to amend. All right?

MS. WANG: Very good.

THE COURT: Thank you. Good job. Interesting job. I liked everybody's argument, but I call the balls and strikes.

(Whereupon, the proceedings are adjourned.)

APPENDIX E

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE GILLETTE COMPANY &
SUBSIDIARIES et al.,
Plaintiffs and Appellants,
v.
FRANCHISE TAX BOARD,
Defendant and Respondent.

A130803
San Francisco County Superior
Court Case Number CGC10495911, et al

BY THE COURT:

On its own motion and for good cause, this court hereby orders rehearing in this case. The decision and opinion in this case are hereby vacated.

Pending any further order by the court, additional briefing from any party or any amicus curiae is not requested.

Date: AUG – 9 2012 /s/ REARDON, ACTING P.J.

APPENDIX F

Original Model Multistate Tax Compact

TEXT OF THE MODEL MULTISTATE TAX COMPACT

Article I. Purposes.

The purposes of this compact are to:

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

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

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

4. Avoid duplicative taxation.

Article II. Definitions.

As used in this compact:

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

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

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

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

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

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

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

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

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

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

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

Article III. Elements of Income Tax Laws.

Taxpayer Option, State and Local Taxes.

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

Taxpayer Option, Short Form.

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

Coverage.

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

Article IV. Division of Income.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14. Compensation is paid in this State if:

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

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

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

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

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

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

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

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

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

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

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

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

(a) separate accounting;

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

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

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

Article V. Elements of Sales and Use Tax Laws.

Tax Credit.

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

Exemption Certificates. Vendors May Rely.

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

Article VI. The Commission.

Organization and Management.

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

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

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

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

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

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

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

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

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

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

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

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

Committees.

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

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

State and problems dealing with particular types of taxes.

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

Powers.

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

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

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

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

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

Finance.

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

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

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

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

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

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

Article VII. Uniform Regulations and Forms.

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

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

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

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

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

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

Article VIII. Interstate Audits.

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

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

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

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

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

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

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

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

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

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

Article IX. Arbitration.

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

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

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

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

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

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

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

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

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

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

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

Board's proceedings; and any other documents required by the arbitration rules of the Commission to be filed.

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

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

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

Article X. Entry Into Force and Withdrawal.

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

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

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

jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI. Effect on Other Laws and Jurisdiction.

Nothing in this compact shall be construed to:

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

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

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

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

Article XII. Construction and Severability.

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