#S206587

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The Gillette Company & Subsidiaries, **Plaintiffs-Appellants,** **v.** **California Franchise Tax Board, an Agency of the State of California,** **Defendant-Respondent.**	Case No. S206587

First Appellate District Division Four, Case No. Al30803
San Francisco County Superior Court, Case No. CGC-10-495911
The Honorable Richard A. Kramer, Judge

BRIEF *AMICUS CURIAE* OF THE MULTISTATE TAX COMMISSION IN SUPPORT OF DEFENDANT-RESPONDENT CALIFORNIA FRANCHISE TAX BOARD

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission respectfully submits this brief in support of the California Franchise Tax Board.[1] California's adoption of a mandatory double-weighted sales factor[2] is consistent with the Multistate Tax Compact,[3] an advisory compact which accords its members the flexibility to vary — directly or indirectly — with respect to the model uniform apportionment provisions contained in Articles III.1 and IV. Even if the Compact were characterized as a binding interstate compact rather than an advisory compact, the terms of the enabling statute and the Compact itself allow members the flexibility to vary from Articles III.1 and IV. It is the compact members themselves who determine any limitations on that flexibility, consistent with the purposes of the Compact. And the members have indicated by their course of performance that the California legislation is compatible with those purposes.

The Commission is the administrative agency for the Compact, which became effective in 1967 when the required minimum number of states had enacted it. The United States Supreme Court upheld the validity of the Compact in *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978), and today forty-seven states and the District of Columbia participate in the Commission's activities. Seventeen of those jurisdictions

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any member state.

[2] Calif. Rev. & Tax. Code § 25128(a).

[3] Model Multistate Tax Compact, *available at* http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf (last visited Oct. 20, 2013).

adopt the Compact by statutory enactment. Six are sovereignty members. Another twenty-five are associate members.[4]

The stated purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation.[5]

These purposes are central to the Compact, which was an effort by states to improve state taxation of interstate commerce at a time when Congress appeared poised to impose reform through federal legislation that would preempt important aspects of state taxation.[6] Preserving state tax sovereignty under our vibrant federalism remains a key focus of the Compact and the Commission.

The Commission's interest in this case arises from the Compact's goals of promoting uniformity and preserving member states' sovereign

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[4] *Compact Members*: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, Minnesota, New Jersey, and West Virginia. *Associate Members*: Arizona, California, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming.

[5] Multistate Tax Compact, Art. I.

[6] *See* H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1143 (1965) and *Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the Judiciary*, 89th Cong., 2d Sess. (1966), illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax.

authority to effectuate their own tax policies. Our interest is particularly acute because the achievement of those goals is being challenged, perversely, on the basis of the Compact itself. As the administrative agency for the Compact, the Commission is uniquely situated to inform the Court regarding the Compact's proper interpretation and the course of performance of its members. *We interpret the Compact to allow for the flexibility which California and other member states have exercised.*

This is so because the Compact is not a binding interstate compact, the terms of which cannot be unilaterally modified. Rather, it is an advisory compact that contains two apportionment provisions (Articles III.1 and IV) which are more in the nature of model uniform laws. Even if the Compact were construed to be a binding interstate compact, the course of performance of its members demonstrates that, from its inception, the Compact afforded its members the flexibility to modify or disable the apportionment election at issue in this case. This course of performance is consistent with the purposes of the Compact, the holdings of the United States Supreme Court, and compact jurisprudence from other federal and state courts. To hold otherwise would have the contrary effect of frustrating the very purposes that the Compact is intended to promote.

INTRODUCTION

In 1993, when the California Legislature first required taxpayers to apportion their income using a double-weighted sales factor, California joined a nation-wide transition away from an equal-weighting of the property, payroll, and sales factors and toward an emphasis on the sales factor in state apportionment formulas. Today, thirty-eight of forty-seven

states with a corporate income tax at least double-weight the sales factor.[7] The question we address is whether the Multistate Tax Compact adopted by California afforded its legislature the flexibility to participate in this nation-wide trend, consistent with the Compact's purposes of preserving state sovereignty and promoting uniformity. The answer is that it did.

Understanding the historical context in which the Compact was adopted helps explain how California's 1993 legislation is consistent with the Compact and its purposes. In the early days of corporate income taxes, a myriad of different apportionment methodologies were in use by the states. The Uniform Law Commission had promulgated the model Uniform Division of Income for Tax Purposes Act (UDITPA), which sets out the equal-weighted formula, in 1957, but states were not rushing to adopt it.[8] Then, in 1959, the United States Supreme Court decided *Northwestern States Portland Cement Co. v. Minnesota*, holding that a small sales force and office in a state established a sufficient nexus for the state to impose tax on a share of the corporation's income.[9]

The Court's decision upset multistate taxpayers' expectations. Within seven weeks Congress was holding hearings; and within seven months it had passed Public Law 86-272, Title II, 73 Stat. 555 (1959), which restricted the application of *Northwest States Portland Cement* and created a Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary — the Willis Committee — to

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[7] *State Apportionment of Corporate Income;* Federation of Tax Administrators, *available at* http://www.taxadmin.org/Fta/rate/apport.pdf (last visited Oct. 20, 2013).

[8] Uniform Division of Income for Tax Purposes Act, § 2, 7A U.L.A. 155 (2002).

[9] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

study state business taxes.[10] The Willis Committee found that although "each of the state laws contains its own inner logic, the aggregate of these laws — comprising the system confronting the interstate taxpayer — defies reason."[11] To address this concern, the Committee recommended federal legislation that would, among other things, establish a state income tax base (federal adjusted gross income) and a state apportionment formula (equal-weighted two-factor formula based on property and payroll) — both of which are fundamental aspects of a state tax policy, the federal pre-emption of which would be a significant affront to state sovereignty.[12]

The states responded to stave off federal pre-emption and protect their sovereignty. Many enacted the model UDITPA. Some enacted the Multistate Tax Compact, Article IV of which incorporates the model UDITPA nearly word for word. And some, like California, did both.[13] The Compact's most significant contribution toward greater uniformity was that it provided, for the first time, a dedicated forum for the continuing study of multistate tax issues and development of model state tax laws by its member states.[14] In its 46 years, the Commission has adopted approximately 40 model laws.[15] These model laws are advisory only.[16] They provide a framework for the member states to design their tax systems with a view to making them more uniform.

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[10] The Willis Committee's study was sanctioned by Title II of Pub. L. 86-272, 73 Stat. 555, 556 (1959).
[11] H.R. Rep. No.952, 89th Cong., 1st Sess., Pt. VI, at 1143 (1965).
[12] H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1139*ff* (1965).
[13] Cal.Stats 1966 ch.2 §7. C.R.&T. §§25120-25139. C.R.&T. §38006. *et seq*.
[14] Articles VI.3(b) and VII.
[15] For a compilation of the Commission's completed model laws, see: http://www.mtc.gov/Uniformity.aspx?id=524.
[16] Articles VI.3(b) and VII.

By 1978, the United States Supreme Court recognized that the UDITPA equal-weighted formula had become "the prevalent practice."[17] But at the same time the Court recognized that "political and economic considerations vary from state to state," and that states may constitutionally address those considerations by requiring alternative factor weightings.[18] Over time, the states have done so. And while they have moved away from requiring the equal-weighted formula, they have moved in a decidedly uniform manner — by emphasizing the sales factor.

Today, 38 of the 47 states with a corporate income tax at least double weight the sales factor.[19] Only nine states exclusively require an equal-weighted formula.[20] Among compact members, the movement is the same. Of the 17 compact member states, only six continue to require the equal-weighted apportionment formula.[21] Nine members require at least a double-weighted sales factor.[22] None of these nine permits the apportionment election of Article III.1.[23] Only one compact member explicitly allows the election.[24]

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[17] *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 279 (1978).

[18] *Id.*

[19] *State Apportionment of Corporate Income*; Federation of Tax Administrators http://www.taxadmin.org/Fta/rate/apport.pdf

[20] *Id.*

[21] *Id.* Alaska, Hawaii, Kansas, Montana, New Mexico, and North Dakota.

[22] *Id.* Alabama, Arkansas, Colorado, Dist. of Columbia, Idaho, Michigan, Oregon, Texas, and Utah. The Texas franchise tax is not imposed on net income. In 2013, Utah, Oregon, and the District of Columbia each repealed the Compact and enacted a version without Articles III.1 and IV. 2013 Utah Laws, c. 462; 2013 Oregon Laws Ch. 407 (SB 307); 2013 District of Columbia Laws Act. 20-130. The remaining provisions of the Utah Multistate Tax Compact are to be repealed June 30, 2014.

[23] *Supra,* fn. 19

[24] Missouri Rev. Statutes § 32.200. *Note,* Colorado recognized the election until the passage of H.B. 08-1380, signed May 20, 2008, effective for tax years commencing on or after January 1, 2009.

The compact members clearly interpret their compact to allow these adjustments. As explained below, that interpretation is consistent with the laws of statutory and contract construction. And it is consistent with the goals of the Compact, among them promoting uniformity and preserving state sovereignty, including uniformity and sovereignty with respect to apportionment policy choices such as factor weighting and elections. This interpretation is also consistent with the conclusions of the United States Supreme Court in *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978).

To the extent there may be limitations on the exercise of this flexibility, it is the members of the Compact themselves who make that evaluation. The cornerstone being that, when viewed as a whole, a state's enactment remains supportive of the Compact's purposes. Ensuring that the purposes are met ensures that the benefits the members expected when adopting the Compact will continue to be received. And, in the case of California's 1993 legislation, the members have long indicated by their course of performance that the Compact's purposes continue to be met, and their expected benefits continue to be received.

ARGUMENT

I. California May Vary from Compact Articles III.1 and IV Because the Multistate Tax Compact is Not a Binding Interstate Compact; Rather it is an Advisory Compact, Articles III.1 and IV of Which Are More in the Nature of a Model Uniform Law

The California Court of Appeal held that the state legislature's 1993 mandate of a double-weighted sales factor was a unilateral modification of the Multistate Tax Compact in violation of the United States and California constitutions' prohibition against impairment of contracts.[25] In order to

[25] U.S. Const., art. I, §10, Cal. Const., art I, §9.

reach that holding, the Court first had to find that the Multistate Tax Compact is a binding compact, and thus a contract, among its member states.[26] This is not a simple determination. The presence of similar language in multiple state statutes is not necessarily evidence of a binding interstate compact. The fact that an act is titled a "compact" is not controlling. The language could be the enactment of an advisory compact, which is more akin to an administrative agreement, or it could be the enactment of a model uniform law.[27] Neither constitutes a contract among the states that have enacted it. And both may be unilaterally modified.[28]

The Court of Appeal's finding that the Multistate Tax Compact is a binding compact, rather than an advisory compact or a model uniform law, relied heavily on the United States Supreme Court's analysis in *Northeast Bancorp v. Board of Governors*, 472 U.S. 159 (1985), as interpreted by the 9th Circuit Court of Appeals in *Seattle Master Builders Association v. Pacific Northwest Electric Power and Conservation Planning Council*, 786 F. 2d 1359 (CA 9 1986), together with the United States Supreme Court's recognition of the Multistate Tax Compact in *U.S. Steel*, *supra*.[29] None of these cases support the court's conclusion.

In *Northeast Bancorp*, the United States Supreme Court identified three "classic indicia" of a binding compact, which were slightly restated in *Seattle Master Builders* as:

(1) the establishment of a joint regulatory body,

(2) the requirement of reciprocal action in order to be effective, and

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[26] *Interstate Compacts vs. Uniform Laws*; Council on State Governments – National Center for Interstate Compacts, available at: http://www.cglg.org/projects/water/CompactEducation/Compacts_vs_Uniform_laws--CSGNCIC.pdf

[27] Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts*, pp. 12, 14 (2006).

[28] *Id*., p. 17

[29] Court of Appeal Decision, p. 9.

(3) the prohibition of unilateral modification or repeal.

Northeast Bancorp., supra, 472 U.S. at p. 175. *Accord, Seattle Master Builders, supra,* 786 F. 2d at p. 1363.

The Multistate Tax Compact does not meet any of these indicia of a binding interstate compact. Rather, the Compact is merely an advisory compact, Articles III.1 and IV of which are more in the nature of a model uniform law.

A. The Multistate Tax Compact Does Not Exhibit Any Indicia of a Binding Interstate Compact

(1) The Compact does not establish a joint regulatory body.

The Compact established the Multistate Tax Commission, but the Commission is *not* a regulatory body. It has *no* regulatory authority over the member states. In joining the Compact, the members did *not* surrender any aspect of state sovereignty. Indeed, that was one of the primary reasons the United States Supreme Court ruled that the Compact did not require Congressional approval under the Compact Clause.

> 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.
> [Emphasis added]

U.S. Steel Corp., supra, 434 U.S. at 473. Further,

> [I]ndividual 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.

Id. at 457.

The members exercise sovereign control over their tax laws precisely as they would in the Compact's absence. The Commission's powers are strictly limited to an advisory and informational role.[30] In no way can the Commission be considered a joint regulatory organization or body with the power to administer or regulate state tax laws within the member states. The Commission is therefore distinguishable from a joint regulatory organization or body.

By contrast, the commissions and interstate agencies created by the compacts at issue in the case law cited by Gillette had significant regulatory authority. For one example, in *Alabama v. North Carolina,* 560 U.S. 330 (2010), the Southeast Interstate Low-Level Radioactive Waste Management Compact created a commission with the power to designate a member state as the host for a low-level radioactive waste disposal facility.

Gillette cites to *Alabama v. North Carolina* throughout its Answer Brief. But Gillette repeatedly fails to acknowledge that the Radioactive Waste Management Compact at issue in that case is fundamentally different than the Multistate Tax Compact. First, the Radioactive Waste Management Compact is a congressionally approved compact. Congressionally approved compacts essentially become federal law, and in all cases require congressional approval to be modified.[31] Second, the Radioactive Waste Management Compact, unlike the Multistate Tax Compact, creates a regulatory agency with the authority to administer a detailed regulatory scheme. It is in that context that the rule barring unilateral modification or repeal of a compact evolved. Allowing one state to modify such a compact would render the regulatory scheme ineffective. Such a rule would serve no purpose as applied to the Multistate Tax

[30] In *U.S. Steel,* the U.S. Supreme Court described the powers of the Commission at pp. 456-457. *See also,* p. 9, *supra.*

[31] *Cuyler v. Adams*, 443 U.S. 433, 440 (1981).

Compact, under which the member states continue to exercise *all* aspects of state tax sovereignty and the Commission lacks authority to impose a uniform apportionment method on any of its members.

(2) The Compact does not require reciprocal action to be effective.

Nothing in the Compact requires one member state to take any particular action in order to meet any obligation to another member state, as the Compact creates no reciprocal obligations. The apportionment provisions of Articles III.1 and IV are no exception. Each state administers its tax laws wholly without reference to the laws and practices of any other member state.[32] In applying the Article III.1 election, a state that has retained that election is indifferent to whether or not another member has repealed or disabled the election because each state's calculation of the correct amount of tax due to that state is entirely unaffected by another state's calculation of tax or even whether the second state imposes an income tax at all.[33] In contrast, examples of compacts that do impose reciprocal obligations are:

- The Driver's License Compact, West's Ann.Cal.Vehicle Code § 15024. Requires the compacting states to refuse to issue a driver's license based upon the driving records of license applicants previously licensed in another compacting state.
- The Interstate Compact on Juveniles, West's Ann.Cal.Welf. & Inst.Code § 1400. Provides for the supervision of juveniles who have moved from one compacting state to another.

[32] *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978).

[33] Indeed, three states — South Dakota, Texas, and Washington — joined the Compact even though they do not generally impose a corporate net-income based tax (South Dakota does impose an income tax on financial institutions; but financials are excluded from the rule in Article IV, and thus Article III.1, under the Compact.)

- The Interstate Compact for Adult Offender Supervision, West's Ann.Cal.Penal Code § 11180. Provides for the supervision of adult parolees and probationers convicted in one compacting state who are eligible to serve their parole or probation in another compacting state.

A single state member of any of these three compacts could not unilaterally repeal or disable a provision of the compact without destroying the effectiveness of the compact. These compacts create mutual obligations and therefore must require mutual action to revise or repeal those obligations. Gillette cites to all of these compacts in its Answer Brief.[34] As with the Radioactive Waste Management Compact, Gillette fails to note the key distinction between these compacts and the Multistate Tax Compact — these compacts create mutual obligations.

In contrast, the Multistate Tax Compact does not create any mutual obligations to maintain the Article IV apportionment formula or the Article III election. As Gillette itself states, the Compact "is not the type of contract where the parties exchange obligations and are in a meaningful position to gauge each other's compliance."[35] By contrast, regulatory compacts such as the three listed above *do* require their members "to exchange obligations" such that they "are in a meaningful position to gauge each other's compliance."[36]

In light of Gillette's own recognition that the Compact does not involve the exchange of mutual obligations, there is no foundation for its central argument — that the Compact creates a mutual obligation for each state to retain the election, absent a repeal of the entire Compact.

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[34] Answer Brief on the Merits, p. 26.
[35] Answer Brief on the Merits, p. 36.
[36] Answer Brief on the Merits, p. 36.

Nothing in the history or language of the Compact supports the argument that the states are forever locked into an apportionment election that time and changing political and economic considerations have rendered obsolete. The United States Supreme Court has upheld "the basic principle that the States have wide latitude in the selection of apportionment formulas." *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 274 (1978). As the United States Supreme Court recognized, the determination of the division of income is "based on political and economic considerations that vary from State to State." *Id.* at p. 279. Gillette's assertion that the mere fact that the election was included in the Compact in 1967 demonstrates that the states intended to forever surrender their long-standing "wide latitude in the selection of apportionment formulas" ignores the unique political and economic considerations in each state that guided the Court's decision in *Moorman*. Consistent with *Moorman*, each state remains free to compute the proper amount of tax due under its laws (including the application of its own apportionment formulas); a computation wholly unaffected by the computations of any other state.

The cases which hold that the compacts at issue could not be unilaterally altered, including compacts that do not require federal approval, turned on the fact that the parties to those compacts undertook mutual obligations to each other that were *critical* for the proper function of the compact across state lines.[37] For example, interstate compacts that provide for the supervision of parolees or the placement of children across state lines cannot function if one state could unilaterally change the terms under which it will perform its compact obligations.[38] A further example is the

[37] *See, for example, McComb v. Wambaugh*, 934 F. 2d 474 (3d Cir. 1991), *Doe v. Ward*, 124 F. Supp. 2d 900 (WD Pa. 2000).
[38] *Id.*

compact creating the Port Authority of New York and New Jersey.[39] The Port Authority simply could not maintain bridges and tunnels that connect those two states if one state could unilaterally decide that it will change the rules by which the bridges and tunnels operate. The compact creating the Port Authority, therefore, specifically requires the legislatures of both states to concur in or authorize rules and regulations promulgated by the Port Authority for those rules and regulations to be binding and effective upon all persons affected thereby.[40]

In contrast, the Multistate Tax Compact allows each member to fully exercise its sovereign power to tax independent of any requirement of concurrence by the other members and with no delegation of power to the Commission to bind the members.[41] The United States Supreme Court has recognized that the rights and obligations of state tax law apply entirely within the jurisdiction of the taxing state, irrespective of the taxpayer's obligations in another.[42] No compact member state has a reliance interest in another state's retaining the Article IV mandatory apportionment formula, which in no way impacts the function of the Compact in another state.

(3) The Compact does not prohibit unilateral modification or repeal.

The Multistate Tax Compact explicitly allows for unilateral repeal.[43] And whether or not members can also unilaterally modify is the issue in this case. Taxpayers' argument that members cannot vary from the model Compact derives from compact cases that are not germane to the Multistate

[39] N.J.S.A. § 32:1-19.
[40] *Id*.
[41] *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 473 (1978).
[42] *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279 (1978).
[43] Compact Article X.

Tax Compact.[44] The majority of the cases on which Gillette relies concern congressionally approved compacts. Because a congressionally approved compact becomes federal law, it is axiomatic that no state can modify its terms unilaterally – modification requires congressional approval.[45] The Multistate Tax Compact does not require, and has not received, congressional approval.[46]

Furthermore, while *Northeast Bancorp* and its progeny often state that compacts cannot be unilaterally modified or repealed, a close examination of the case law as cited herein and in Gillette's Answer Brief on the Merits reveals that courts rarely base the holdings in these cases on a finding that a state has or has not attempted to unilaterally modify or repeal a compact.[47] Rather, a close reading of these cases reveals that in most such cases the parties differ as to *the meaning* of the compact in question.[48] The courts apply interpretative tools, including course of performance, to determine that meaning. Consequently, there is a dearth of decided cases that provide context or meaning to the purported bar on unilateral modification or repeal.

The requirement that a compact does not allow for unilateral modification or repeal appears to derive from the first two classic indicia of

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[44] Answer Brief on the Merits, pp. 17 – 20.

[45] *Cuyler v. Adams*, 443 U.S. 433, 440 (1981).

[46] *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978).

[47] Answer Brief on the Merits, pp. 15 – 20.

[48] An exception is *In re O.M.*, 565 A. 2d 573 (D.C. Ct. App. 1989). In *In re O.M.*, the court ruled that the District of Columbia could not override the Interstate Compact on Juveniles by enacting a subsequent contrary statute. But Gillette's reliance on cases construing the Juvenile Compact and the Compact on the Placement of Children at pages 19 — 20 of its Answer Brief on the Merits is misplaced. Those compacts are regulatory compacts which satisfy the three classic indicia of a compact as articulated in *Northeast Bancorp.* The Multistate Tax Compact is purely an advisory compact which contains the Article III election as a model apportionment law.

a compact. If the compact creates a regulatory agency, requires reciprocal action, or both, it necessarily follows that it cannot be unilaterally modified or repealed. For example, the Red River Compact, considered by the United States Supreme Court in June of this year, established a detailed regulatory scheme for use of water from the Red River and therefore bars any member state from taking or diverting water from within another state's borders.[49] Similarly, the Compact of 1905 governing riparian rights on the Delaware River bars any member from exercising exclusive jurisdiction over those rights.[50] But where no regulatory organization exists and no reciprocal action is required to make a compact effective — as is true of the Multistate Tax Compact — it would be completely illogical to bar unilateral modification or repeal. No purpose would be served by requiring mutual consent to repeal or modify a compact provision if the compact does not require mutual action and regulation *without* amendment or repeal. Such a strained interpretation of the Compact must be avoided, whether the Compact is analyzed as a contract or as a statute.[51]

B. The Multistate Tax Compact is an Advisory Compact, Articles III.1 and IV of which Are More in the Nature of a Uniform Law

There are different forms of compacts. Many are binding interstate compacts. But some are merely advisory. When viewed as a whole, the Multistate Tax Compact is best described as an advisory compact.

Articles IV and III.1 of the Multistate Tax Compact contain apportionment provisions that are more in the nature of uniform laws. The

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[49] *Tarrant Regional Water District v. Herrman,* 133 S.Ct. 2120 (2013).
[50] *New Jersey v. Delaware,* 552 U.S. 597 (2008).
[51] *Rafael v. Superior Court,* 1 Cal.App.3d 457 (1969) (statute); *Segal v. Silberstein,* 156 Cal.App.4th 627 (2007) (contract)

view that we express to this Court today is the same that we expressed to the United States Supreme Court thirty-six years ago:

> [The Compact] consists solely of uniform laws, an advisory mechanism for the uniform interpretation and application of those laws, and an advisory mechanism for otherwise developing uniformity and compatibility in state and local taxation of multistate businesses.

Brief of Multistate Tax Commission in United States Steel Corporation v. Multistate Tax Commission, United States Supreme Court No. 76-635, 1977 WL 189138, p. 12.

Advisory compacts are characterized as "lack[ing] formal enforcement mechanisms and are designed not to actually resolve an interstate matter, but simply to study such matters."[52] In *The Evolving Use and the Changing Role of Interstate Compacts*, the authors explain that "[b]y their very terms, advisory compacts cede no state sovereignty nor delegate any governing authority to a compact-created agency."[53]

This is precisely how the United States Supreme Court characterized the Multistate Tax Compact in *U.S. Steel.* The Court recognized that the Compact delegates no state sovereignty to the Commission and that the Commission has no regulatory authority over the states.[54] The Court describes the powers of the Commission which are set out in Section 3 of Art. VI:

> (i) to *study* state and local tax systems; (ii) to *develop and recommend* proposals for an increase in uniformity and compatibility of state and local tax laws in order to encourage simplicity and improvement in state and local tax law and administration; (iii) to *compile and publish* information that may assist member States in implementing the Compact and taxpayers in complying with the tax laws; and (iv) to do all

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[52] Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts*, p. 13 (2006).
[53] *Id.* p. 14.
[54] *U.S. Steel,* 434 U.S. pp. 457, 473. *See also* pp.9-10, *supra.*

> things necessary and incidental to the administration of its functions pursuant to the Compact.

U.S. Steel, 434 U.S. pp.456-457, *citing to* Compact Art. VI. [Emphasis added.]

The Court also notes Articles VII and VIII, which detail more specific responsibilities of the Commission, recognizing that these responsibilities are advisory only:

> Under Art. VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. *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. Article VIII applies only in those States that specifically adopt it by statute. It authorizes any member State or its subdivision to request that the Commission perform an audit on its behalf. The Commission, as the State's auditing agent, may seek compulsory process in aid of its auditing power in the courts of any State that has adopted Art. VIII. Information obtained by the audit may be disclosed only in accordance with the laws of the requesting State.

U.S. Steel, 434 U.S. at 457, emphasis added,[55] and

> Moreover, 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. Article X permits any party to withdraw from the Compact by enacting a repealing statute.

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[55] Note that "perform[ing] an audit" is not the same as issuing an assessment – the Commission's audit results are recommendatory only. While the Commission conducts the audit on behalf of the auditing states, the commission has no authority to and does not issue assessments. Each state individually decides whether to accept, in whole or part, the audit recommendations and to issue an assessment, under its own state laws.

U.S. Steel, 434 U.S. at 457.

The advisory nature of the Multistate Tax Compact is not unique. For example, the Compact for Education, West's Ann.Cal.Educ.Code § 12510 cited by Gillette[56] appears to be very similar to the Multistate Tax Compact in that the Education Compact appears to merely establish an Educational Commission of the States whose purpose and function is simply to serve as a clearinghouse to exchange information on best educational practices, to conduct research into improving those practices and to recommend educational policies to further those best practices. The Multistate Tax Compact similarly established the Multistate Tax Commission to facilitate joint action by its members to promote uniformity in taxation by developing proposed uniformity recommendations. In both cases, the respective Commissions would have no power or authority to implement their recommendations where the states retain the individual sovereign authority to administer their respective tax and educational systems. In neither case does the compact establish a joint regulatory body or require reciprocal action to be effective.

Advisory compacts "are more akin to administrative agreements between states,"[57] which "are clearly subject to unilateral change" by individual members.[58] As an advisory compact, then, the members of the Multistate Tax Commission may unilaterally modify its provisions. And here, California's modifications continue to support the purposes of the compact, as determined by the Compact's members.

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[56] Answer Brief on the Merits, p. 26.
[57] Broun, *supra,* p. 14.
[58] *Id.* p. 17

Moreover, member states' enactments of Article IV are enactments of a model uniform apportionment law: UDITPA.[59] Article III.1 is simply an extension of UDITPA in that it creates a model uniform apportionment election. This has been the Commission's understanding since its beginning, more than forty years ago. The Commission's early annual reports regularly included a list of the states in which "the Multistate Tax Compact has been enacted *as a uniform law* …"[60] And as far back as thirty-six years ago, in *U.S. Steel*, the Commission informed the United States Supreme Court that both Article IV and Article III.1 are essentially uniform acts that "could be adopted by any state independently of any compact …:"[61]

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[59] Uniform Division of Income for Tax Purposes Act, § 2, 7A U.L.A. 155 (2002). The model UDITPA was developed by the Uniform Law Commission. http://www.uniformlaws.org/Act.aspx?title=Division%20of%20Income%20for%20Tax%20Purposes

[60] *See* MTC Annual Report, FY 67-68, p. 12, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY67-68.pdf (last visited 10/19/13)
MTC Annual Report, FY 68-69, p. 25, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY68-69.pdf (last visited 10/19/13)
MTC Annual Report, FY 70-71, p. 13, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY70-71.pdf (last visited 10/20/13)
MTC Annual Report, FY 71-72, p. 14, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY71-72.pdf (last visited 10/20/13)
MTC Annual Report, FY 72-73, p. 8, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY72-73.pdf (last visited 10/20/13)
MTC Annual Report, FY 73-74, p. 26, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY73-74.pdf (last visited 10/20/13). Emphasis added.

[61] MTC *U.S. Steel* Brief, p. 8.

> [The Compact] consists solely of uniform laws, an advisory mechanism for the uniform interpretation and application of those laws, and an advisory mechanism for otherwise developing uniformity and compatibility in state and local taxation of multistate businesses.

Brief of Multistate Tax Commission in United States Steel, p. 12

Uniform laws may be unilaterally modified. As the Broun treatise on compacts explains, model uniform laws do not constitute a contract between the states and thus, unlike contracts, are not binding:

> Although legislatures are urged to adopt model uniform laws as written, they are not required to do so and may make changes to fit individual state needs. ***Uniform acts do not constitute a contract between the states***, even if adopted by all states in the same form, and thus, unlike contracts, ***are not binding*** upon or enforceable against the states. Each state retains complete authority to unilaterally amend or change such codes to meet its unique circumstances. There is no prohibition in uniform acts limiting the ability of state legislatures to alter particular provisions as times change or to address the peculiar domestic political circumstances in a state."

Broun, *supra*, p. 16. [Emphasis added.]

The fundamental nature of Articles III.1 and IV is that they are model uniform laws. Their nature is in no way altered by their incorporation in the advisory Multistate Tax Compact.

II. If the Compact is Characterized Instead as an Interstate Contract, California May Vary from Articles III.1 and IV Because the Compact May Be and Has Been Interpreted by Its Members to Allow for Variations in the Enactment of Articles III.1 and IV

A. The Compact May Be Interpreted to Allow for Variations in the Enactment of Articles III.1 and IV

The Multistate Tax Compact is best characterized as an advisory interstate compact, not a binding interstate compact. But even if it were determined to be a binding compact, it should still be interpreted to allow

states the flexibility to vary with respect to Articles III.1 and IV. The first step of this interpretation begins in the same place an interpretation of any other statute begins – the language of the enacted Compact and its enabling act.[62] Importantly, the language contains no explicit prohibition against unilateral modification of the apportionment provisions. And both the enabling act and the Compact itself contain language that anticipates and supports flexibility in the adoption of the Compact's apportionment provisions.

Section 1 of both the California enabling act and the model Compact suggested enabling acts contains ample evidence of this intended flexibility by declaring that "[t]he 'Multistate Tax Compact' is hereby enacted into law and entered into with all jurisdictions legally joining therein, in the form *substantially* as follows …"[63] [emphasis added]. This language does not require member states enacted compacts to match verbatim, or even "nearly verbatim." The relevant criterion is merely that the enacted compacts be in *substantially* similar form.

Moreover, California's similarity to the model Compact is not the relevant comparison. The relevant comparison, according to the enabling act, is whether the California's enactment is substantially similar to the *other states'* enactments. When the relevant comparisons are made, California's treatment of Articles III.1 and IV is hardly a variation at all.

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[62] "The statute's plain meaning controls the court's interpretation unless its words are ambiguous." *Green v. State of California*, 42 Cal.4th 254, 260 (2007); *see also, Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 567 (2007).

[63] The Multistate Tax Compact Suggested Legislation and Enabling Act is available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf (last visited October 18, 2013). The California Enabling Act was codified at Calif. Rev. & Tax. Code §38001, repealed by Stats.2012, c. 37 (S.B.1015), § 3.

Rather, it is in line with the majority of Compact members. At the time the Court of Appeal rendered its opinion, nine other compact members had enacted a version of the Multistate Tax Compact that — one way or another, directly or indirectly — emphasizes the sales factor and does not recognize an Article III.1 election. Three Compact members eliminated or limited the election directly.[64] Three amended Article IV to be consistent with their statutory apportionment formula that emphasizes the sales factor.[65] And three, like California, indicated by separate statute or other guidance that the Compact election does not apply to factor-weighting.[66] *Only one Compact member explicitly recognizes the election.*[67] The remaining members require an equal-weighted formula, identical to Article IV of their respective enacted compacts, such that the election is of no consequence with respect to factor-weighting.[68]

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[64] Colorado (C.R.S. §§ 39-22-303.5 and 39-22-303.7), Michigan (as applied to the Michigan Business Tax after January 1, 2008; MCL 205.581; See also, H.B. 4479 (2011)), Minnesota (Minn. Statutes § 290.171). Minnesota repealed its version of the compact entirely in 2013. MN Laws 2013, c. 143, art. 13, § 24.

[65] Alabama (Code of Ala. § 434 40-27-1), Arkansas (Ark. Code Ann. § 26-5-101), Utah (Utah Code § 59-1-801.IV.9). In 2013 Utah repealed the Compact and enacted a version that does not contain either Articles III,1 or IV (Utah Senate Bill 247, effective June 30, 2013).

[66] Idaho (Idaho Stat. § 63-3027(i)), Oregon (O.R.S. § 314.606) In 2013 Oregon repealed the Compact and enacted a version that does not contain either Articles III,1 or IV. 2013 Oregon Laws Ch. 407 (S.B. 307).Texas (letter ruling 201007003L – The Texas franchise tax is not imposed on net income in any case). *See also,* California (Calif. Rev. and Tax. Code § 25128(a)). California repealed its version of the compact entirely in 2012. CA Stats.2012, c. 37 (S.B.1015), § 3.

[67] Missouri Rev. Statutes § 32.200. *Note,* Colorado recognized the election until January, 2009.

[68] Alaska, Hawaii, Kansas, Montana, New Mexico, North Dakota; *supra,* fn.17. The Franchise Tax Board notes in its brief that members have also diverged from the Compact in other ways. Opening Brief on the Merits, pp. 5 -8.

The California enactment does vary with respect to the one compact member that allows the election, and arguably with respect to the six compact members that continue to require the three-factor equal-weighted formula. But even with respect to these variances, the California compact is in "substantially" similar form.[69] Moreover, the apportionment provisions of Articles III.1 and IV are not required for the achievement of the Compact's purposes. Far more important to the purposes of the Compact are the participation of its members in the development of model uniform laws and the performance of joint multistate audits.

In addition to the enabling statutes, various provisions of the Compact itself provide evidence that some degree of variation across state enactments is anticipated. For example, paragraph 2 of Article I of both the model Compact and the California enactment states that the Compact is designed "to *promote* uniformity *or compatibility*" in tax systems (emphasis added).[70] "Promote" is defined as "to forward; to advance; to contribute to the growth, enlargement, or excellence of."[71] Enactment, by itself, is not expected to *achieve* uniformity in any particular component of tax systems, including uniformity in apportionment formulae or elections among the member states. Rather, enactment is intended to create the forum by which members may work to advance the growth and enlargement of uniformity or compatibility in their tax systems.[72]

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[69] *See*, Part II.B., *supra*.

[70] Calif. Rev. & Tax. Code § 38006, I.2.

[71] Webster's New Universal Unabridged Dictionary, Deluxe 2d Edition.

[72] Pursuant to Compact Articles VI.3(b) and VII, the Commission works to advance uniformity through its Uniformity Committee. The Uniformity Committee works to draft model uniform statutes and regulations for the states to consider. The Commission's model statutes and regulations are advisory only. Articles VI.3(b) and VII. They provide a framework for the member states to design their tax systems with a view to making

Additional evidence that the Compact anticipates some variation among its members is found in Article VII. Article VII authorizes the Commission to initiate a uniformity project when two or more party States have *similar* provisions of law regarding *any phase* of tax administration, and permits it to act with respect to the provisions of Article IV of the Compact. Article VII is not limited to instances in which the Compact provisions are uniform. Thus Article VII also indicates that some variations are anticipated.

The model Compact's severability provision in Article XII also demonstrates the value placed on inclusiveness over standardization. Article XII provides:

> 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.* [emphasis added.]

Under this severability provision, the Compact continues in full force in a particular member state even if some of its provisions are found to be unconstitutional in that state. A legislature's decision to include such a clause in a statute is evidence of the legislature's intent that the remaining portions of the statute should stand if the court declares some of its provisions to be unconstitutional or otherwise invalid. Thus, the inclusion of a severability clause in the model Compact indicates the intent that a member state remain a compact member even if its Compact provisions ultimately vary from the model Compact because a court's use of the severability clause will inevitably cause variations among the member states. If the intent were otherwise, a severability clause would not have

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them more uniform. For a compilation of the Commission's completed uniformity projects, see http://www.mtc.gov/Uniformity.aspx?id=524.

been included. If preserving a uniform compact were truly critical, the model Compact may well have included a *non-severability* clause instead.

Given that Article XII of the Compact requires it to be "liberally construed so as to effectuate [its] purposes," the inherent flexibility suggested by its plain meaning should be given weight, and it should not be construed in a rigid manner. If the only options available to a state that would like to depart from the Compact's equally weighted apportionment election are to withdraw in full, acquiesce in a provision that is contrary to the state's preferred policy, or convince every other state — including states whose policy choices may be quite different — to amend their enacted versions of the Compact, the Compact could not long endure and its efforts toward uniformity would be entirely frustrated. The Compact does not require such a destructive set of choices.

B. The Members' Course of Performance Shows That They Have Interpreted the Compact to Allow for Variations in the Enactment of Articles III.1 and IV

As far back as the early 1800's, the United States Supreme Court expressly recognized that binding interstate compacts, even though statutory, are also contractual in nature, stating "… the terms 'compact' and 'contract' are synonymous." *Green v. Biddle*, 8 Wheat. 1, 40 (1823). Thus, in addition to general principles of statutory construction, substantive contract law applies in the interpretation of a binding interstate compact:

> When adopted by a state, the compact is not only an agreement between the state and other states that have adopted it, but it becomes the law of those states as well, and must be interpreted as both contracts between states and statutes within those states.

1 A Sutherland, *Statutes and Statutory Construction* §32.5.

Where the issue is the proper interpretation of a binding compact — a binding contract — the governing law is state contract law.[73]

Most relevant to this case is the basic premise of contract law that "the parties [to the contract] themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was."[74] In this case, both the California enabling statute and the model Compact's suggested enabling statute state that variances are acceptable, as long as the enacted compacts are in "substantially" similar form.[75] But "substantially" is not defined. The members' *course of performance* is relevant in determining whether the compacts that vary with respect to Articles III.1 and IV remain in "substantially similar form."

Under Section 2-208 of the Uniform Commercial Code, *course of performance* is relevant even if the express terms of the compact seem clear on their face.[76] In interpreting the obligations of the parties to a compact, courts have long recognized that, as for contracts generally, the actual performance of a compact by the parties has high probative value in determining the scope of those obligations: "In determining [the meaning of a compact] the parties' course of performance under the Compact is highly

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[73] *See* Guantt Construction Company v. the Delaware River and Bay Authority, 575 A. 2d 13 (N.J. Super. A.D. 1990); Gothic Construction Group v. Port Authority Trans-Hudson Corp., 711 A. 2d 312 (N.J. Super. A.D. 1998).

[74] U.C.C. §2-208 cmt. 1 Section 2-208 of the U.C.C. is codified, without substantive change, at Cal. Comm. Code §1303(a).

[75] The Multistate Tax Compact Suggested Legislation and Enabling Act is available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf (last visited October 18, 2013). The California Enabling Act was codified at Calif. Rev. & Tax. Code §38001, repealed by Stats.2012, c. 37 (S.B.1015), § 3.

[76] 1 Hawkland, Uniform Commercial Code ¶2-208:1 (2001).

significant." *Alabama v. North Carolina, supra,* 130 S.Ct. 2295, 2309 (2010).

The course of performance doctrine has two material elements, both of which have been satisfied in this case. According to Cal. Comm. Code §1303(a):

> A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:
>
> > (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
> >
> > (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

The primacy of course of performance in interpreting modern compacts is demonstrated by the United States Supreme Court's reliance on the actions of the compacting parties taken years or even decades after the compacts became effective in order to ascertain the original understanding of those parties in entering into the compact. For example, in *New Jersey v. Delaware,* 552 U.S. 597 (2008), the parties' course of performance beginning more than 60 years after the Compact of 1905 was enacted demonstrated that the parties to the compact never intended either party to exercise exclusive jurisdiction over riparian rights on the Delaware River. In *Alabama v. North Carolina, supra,* the parties' course of performance over the eleven year period after Congress approved interstate compacts providing for the disposal of low-level radioactive waste proved that no member state of the Southeast Interstate Low-Level Radioactive Waste Management Commission was obligated to continue to meet its licensing obligations under the compact if the costs of doing so became prohibitively expensive. And in *Tarrant Regional Water District v. Herrman, supra,* the

Water District's actions starting twenty-two years after Congress ratified the Red River Compact in 1980 established that the compacting parties did not authorize any member of the Compact to take or divert water from within another member's borders.

In this case, the members of the Multistate Tax Compact have demonstrated almost from the inception of the Compact that a state could unilaterally repeal or disable its Article III apportionment election and remain "substantially" similar to the other compact enactments. In 1972 — only five years after the Compact went into effect — the member states, acting through their legislatively designated representatives to the Commission, unanimously passed a resolution that Florida remained a member in good standing of the Compact and of the Commission notwithstanding Florida's unilateral repeal of Articles III and IV and its adoption of double-weighting.[77] This is exactly the variance at issue in this case.[78] California, as an associate member of the Commission, attended the meeting at which the resolution was passed and was therefore on notice, prior to its enactment of the Compact in 1974, that a state could disable the Article III.1 apportionment election and nevertheless remain a member in good standing.[79]

Since 1972, at least ten additional members, including California, have varied from Articles III.1 and IV by enacting mandatory

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[77] Franchise Tax Board's Request for Judicial Notice (RJN), Exs B and C.

[78] Pursuant to Article VI.1.(a) of the Compact, the Multistate Tax Commission is "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." When those members collectively meet and issue such a resolution, they speak as the Commission and not merely as the heads of their respective tax departments.

[79] Minutes of Multistate Tax Commission Meeting of December 1, 1972, Franchise Tax Board RJN Exs. B and C.

apportionment formulae other than the Article IV equal-weighted formula, without allowing an Article III.1 election.[80] As these enactments are a matter of public record, having been adopted by statute, the other members are charged with knowledge of each of these ten occasions. In no case has any compact member in any way objected that such an action was inconsistent with the letter or the spirit of the Compact.

Unlike the typical compact case where course of performance is exclusively determined by examining the actions of the executive branch of state government in administering the compact, in this case the actions of the state legislatures in enacting mandatory variances from the Article IV equal-weighed formula establishes *legislative* course of performance that allows for that variation. In addition, pursuant to Article VI.1(l) of the Compact, "the Commission annually shall make to the Governor and legislature of each party State a report covering its activities for the preceding year." And with the Commission's annual report for fiscal year 1973, following the Commission's 1972 resolution approving Florida's position as a member in good standing of the Compact notwithstanding its repeal of the Article III election, the legislatures of each party state were informed that "Florida enacted the Multistate Tax Compact in 1969. When it enacted its corporate income tax in 1971, it deleted UDITPA from its statutes. Yet its corporate income tax statute is substantially in accord with UDITPA."[81] None of the legislatures or governors of the party states have ever indicated in any way that the Commission's 1972 resolution is

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[80] *Supra*, fn. 64-67. Note that several compact members have also departed from the apportionment provisions of Article IV in ways other than by adopting an apportionment formula that emphasizes sales. Opening Brief on the Merits, pp. 5 – 8.

[81] Seventh Annual Report, Multistate Tax Commission, Appendix B, page 27, at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY73-74.pdf.

inconsistent with the view of the chief executive or the legislative branch of any of those states and indeed have ratified the Commission's views in each state that has subsequently repealed or disabled the election. This is direct evidence that the legislatures *themselves* share their representatives' views as to the flexibility of the compact.

The Compact member states have had numerous opportunities to object to the adoption of a varying mandatory apportionment formula by any or all of the ten states, and have declined to do so. Pursuant to Commission bylaw 6, the Executive Committee of the Commission meets periodically throughout the year.[82] In addition, the Commission itself meets at least once a year.[83] Therefore, the parties to the Compact have had repeated opportunities to object to the adoption by any or all of the ten states of an apportionment formula that precludes a taxpayer from exercising the Article III.1 election. No member state has ever raised such an objection. Indeed, compact members have *supported* California's compact membership by repeatedly electing its representatives to serve as Commission officers and chairs of Commission committees notwithstanding California's 1993 adoption of mandatory double-weighted apportionment.[84]

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[82] Commission bylaw 6 is available at http://www.mtc.gov/About.aspx?id=2232.

[83] Compact, Article VI.1 (e).

[84] For example, Kristine Cazadd, Interim Executive Director of the California State Board of Equalization was elected to serve on the Commission's Executive Committee for FY 2011-2012; Selvi Stanislaus, Executive Officer, California Franchise Tax Board, was elected to the Commission's Executive Committee for FY 2011 (MTC Annual Report FY 2011, p.3); Ramon J. Hirsig, Executive Director, California State Board of Equalization, was elected to the Commission's Executive Committee for FY 2010 (MTC Annual Report FY 2010, p.3); Selvi Stanislaus, Executive Officer, California FTB, was elected to the Commission's Executive Committee for FY 2008 (MTC Annual Report

Thus, compact members' course of performance strongly supports an interpretation of the Compact as sufficiently flexible to recognize California's 1993 legislation as fully consistent with the purposes of the Compact. In contract terms, the promotion of the Compact's purposes is analogous to the benefit the parties expected to receive upon joining the agreement. Many benefits could be expected from the participation of large and influential states such as California. Every additional state enactment of the Compact enlarges the membership of the Commission, broadens the Commission's base with the addition of the views of that state's tax administrator to its deliberations, and increases the weight of the results of those deliberations in the courts and in the Congress. These and other benefits of membership would be frustrated by a rigid and inflexible interpretation of the Compact.

CONCLUSION

This case does not involve states that disagree in their interpretation of the compact, requiring a reviewing court to analyze those conflicting interpretations of the compact's meaning. Rather, the consensus of both the executive and legislative branches of the member states is that the Multistate Tax Compact allows its members to replace the Article III election with a mandatory apportionment formula on a prospective basis.

FY 2006-2007, p. 5); Will Bush, California FTB was elected to serve on the Commission's Executive Committee for FY 2006 and FY 2007 (MTC Annual Report FY 2004-2005, p.5) and MTC Annual Report FY 2005-2006, p.4. All MTC Annual Reports are available at http://www.mtc.gov/Resources.aspx?id=174

The Court therefore is not required in this case to ascertain the meaning of the compact, but merely to give effect to that undisputed meaning as interpreted by the members.

Respectfully submitted this 21st day of October, 2013.

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Attachment

STATE APPORTIONMENT OF CORPORATE INCOME

(Formulas for tax year 2013 -- as of January 1, 2013)

ALABAMA *	Double wtd Sales	NEBRASKA	Sales
ALASKA*	3 Factor	NEVADA	No State Income Tax
ARIZONA *	Double wtd Sales/80% Sales, 10% Property & 10% Payroll	NEW HAMPSHIRE	Double wtd Sales
		NEW JERSEY	90% Sales, 5% Payroll, & 5% Property (1)
ARKANSAS *	Double wtd Sales		
CALIFORNIA *	Sales	NEW MEXICO *	3 Factor
COLORADO *	Sales	NEW YORK	Sales
CONNECTICUT	Double wtd Sales/Sales	NORTH CAROLINA *	Double wtd Sales
DELAWARE	3 Factor	NORTH DAKOTA *	3 Factor
FLORIDA	Double wtd Sales	OHIO	Triple Weighted Sales (3)
GEORGIA	Sales	OKLAHOMA	3 Factor
HAWAII *	3 Factor	OREGON	Sales
IDAHO *	Double wtd Sales	PENNSYLVANIA	Sales
ILLINOIS *	Sales	RHODE ISLAND	3 Factor
INDIANA	Sales	SOUTH CAROLINA	Sales
IOWA	Sales	SOUTH DAKOTA	No State Income Tax
KANSAS *	3 Factor	TENNESSEE	Double wtd Sales
KENTUCKY *	Double wtd Sales	TEXAS	Sales
LOUISIANA	Sales/3 Factor	UTAH	Sales
MAINE *	Sales	VERMONT	Double wtd Sales
MARYLAND	Sales/Double wtd Sales	VIRGINIA	Double wtd Sales/Triple wtd Sales (1)
MASSACHUSETTS	Sales/Double wtd Sales		
MICHIGAN	Sales	WASHINGTON	No State Income Tax
MINNESOTA	96% Sales, 2% Property, & 2% Payroll (1)	WEST VIRGINIA *	Double wtd Sales
		WISCONSIN *	Sales
MISSISSIPPI	Sales/Other (2)	WYOMING	No State Income Tax
MISSOURI *	3 Factor/Sales	DIST. OF COLUMBIA	Double wtd Sales
MONTANA *	3 Factor		

Source: Compiled by FTA from state sources.

Notes:
The formulas listed are for general manufacturing businesses. Some industries have a special formula different from the one shown.
* State has adopted substantial portions of the UDITPA (Uniform Division of Income Tax Purposes Act).
Slash (/) separating two formulas indicates taxpayer option or specified by state rules.
3 Factor = sales, property, and payroll equally weighted.
Double wtd Sales = 3 factors with sales double-weighted
Sales = single sales factor

(1) Minnesota, New Jersey and Virignia (certain manufactures) are phasing in a single sales factor which will reach 100% in 2014.
(2) Mississippi provides different apportionment formulas based on specific type of business. A single sales factor formula is required if no specific business formula is specified.
(3) Formula for franchise tax shown. Department publishes specific rules for situs of receipts under the CAT tax.

FEDERATION OF TAX ADMINISTRATORS -- JANUARY 2013

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court (14)(c)(1), I hereby certify that this Amicus Curiae brief is in 13-point Roman type and, according to the word count of the computer program used to prepare this brief, contains 9,419 words (including footnotes).

Dated: October 21, 2013

Respectfully submitted,

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