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

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[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 obliga-

tions 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 selec-

tion 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—equit-

able 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

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[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. Accord-

ing 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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