STATE OF MICHIGAN
IN THE SUPREME COURT

INTERNATIONAL BUSINESS MACHINES CORPORATION, Plaintiff/Appellant, v. DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN, Defendant/Appellee.	Supreme Court No. 146440 Court of Appeals No. 306618 Court of Claims No. 11-033-MT

BRIEF OF AMICUS CURIAE JEFFREY B. LITWAK

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I. INTRODUCTION

During the nearly 200 years of interstate compact jurisprudence, no court has held that an interstate compact is not binding on a party state or that a state may apply its own law in a manner that conflicts with the express terms of an interstate compact. Article III of the Multistate Tax Compact ("Compact") (codified in Michigan at MCL 205.581) expressly provides that member states may enact their own apportionment formula as an alternative to the Compact's uniform formula but must give multistate taxpayers the election to apportion using the Compact's formula. Michigan is thus not free to interpret its own law, MCL 208.1301, in a manner that disallows the election.

Long ago, Justice Jackson on the U.S. Supreme Court stated, "But if the compact system is to have vitality and integrity, [West Virginia] may not raise an issue of *ultra vires*, decide it, and release herself from an interstate obligation." *West Virginia ex rel. Dyer v. Sims*, 341 US 22, 35; 71 S Ct 557; 95 L Ed 713 (1951) (Jackson, J. concurring). The Department of Treasury's argument that the Compact is somehow not binding and that MCL 208.1301 overrides the Compact violates the express election in Article III, violates Justice Jackson's caution, and conflicts with nearly two centuries of compact jurisprudence. A decision from this court holding that the Multistate Tax Compact is not binding and that Michigan may interpret its way out of a mandatory provision of an interstate compact would also allow Michigan to similarly undermine its continued participation in other current compacts, and create unwillingness in other states to join with Michigan in future compacts.

This brief principally argues that the Multistate Tax Compact, like every other interstate compact, is binding on the states that have enacted it, and specifically, Article III is a mandatory provision of the Compact that the party states are not free to amend by subsequently enacting or

interpreting their own state law. The proper framework for this case is the long-standing compact jurisprudence that allows states to apply and interpret state law only as the compact expressly provides, and not in a manner that conflicts with express terms of the compact. The Appellant (taxpayer) has fully and correctly briefed the prohibition against conflicting state law; this brief concurs with the Appellant's briefing and does not repeat its lengthy recitation here.

II. STATEMENT OF INTEREST

Amicus is an Adjunct (and previously Visiting) Professor of Law at Lewis and Clark Law School, where he developed and has taught the country's only law school course on interstate compact law since 2004.[1] Amicus has also been in-house general counsel to an interstate compact entity, the Columbia River Gorge Commission (compact between Oregon and Washington), for the past 14 years, arguing numerous compact law issues in the states' courts. Amicus has studied and speaks nationally about compact law and administration and importance of compacts within the U.S. federalist system. Amicus has written the only law school text on interstate compact law[2] and numerous chapters on interstate compact law in Oregon, Washington, and American Bar Association books.

Amicus submits this brief *pro se*, representing no institution, entity, group, or association; none of the entities with which Amicus is associated has provided any technical or research assistance, time, funding, use of facilities, or any other assistance, and none would directly benefit or be directly impaired by any decision of this court. The views in this brief are solely those of the author based on his practice and scholarship in interstate compact law. Although

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[1] See https://law.lclark.edu/courses/catalog/law_365.php (accessed November 3, 2013) (description of course).
[2] Jeffrey B. Litwak, *Interstate Compact Law: Cases and Materials* v. 1.1 (Semaphore Press 2012), available online only at www.semaphorepress.com.

Appellant helped with costs to prepare and submit this brief, Amicus has no personal or financial interest in the outcome of this matter. Amicus has a professional scholarly interest in this area of law. Amicus also uses current events and litigation as teaching tools and has used the prior proceedings in this matter as such. In short, Amicus presents the law in this brief from a disinterested perspective, which happens to align with the Appellants in this matter.

III. COMPACTS ARE AN IMPORTANT PART OF THE NATIONAL UNION.

"Compacts are not one of the traditional local, state or federal governments, but they are pervasive in the governance of the United States." Litwak, *supra* n.2. at i. The Supreme Court discussed their important purpose, relatively recently and quite succinctly:

> Their mission is to address "'interests and problems that do not coincide nicely either with the national boundaries or with State lines'"—interests that "'may be badly served or not served at all by the ordinary channels of National or State political action.'" V. Thursby, *Interstate Cooperation: A Study of the Interstate Compact* 5 (1953) (quoting National Resources Committee, *Regional Factors in National Planning and Development* 34 (1935)); *see* Grad, *Federal-State Compact: A New Experiment in Cooperative Federalism*, 63 Colum. L. Rev. 825, 854-855 (1963) (Compact Clause entities formed to deal with "broad, region-wide problems" should not be regarded as "an affirmation of a narrow concept of state sovereignty," but as "independently functioning parts of a regional polity and of a national union.").

Hess v. Port Authority Trans-Hudson Corp., 513 US 30, 40; 115 S Ct 394; 130 L Ed 2d 245 (1994). State courts have similarly described the purposes of compacts. For example:

> Bi-state agencies exist by virtue of compacts between the states involved, entered into by their respective legislatures with the approval of Congress. When formed, they become a single agency of government of both states. Their primary purpose is to cooperate in advancing the mutual interests of the citizens of both states by joint action to overcome common problems. We fail to see how either state could enact laws involving and regulating the bi-state agency unless both states agree thereto. To sanction such practice would lead to discord and a destruction of the purposes for which such bi-state agencies are formed.

Delaware River & Bay Auth. v. New Jersey Pub. Emp't Relations Comm'n, 112 NJ Super 160, 165-166; 270 A2d 704 (1970).

Compacts predated the U.S. Constitution. The original colonies used compacts and the Articles of Confederation, art VI, cl 2, authorized compacts. The importance of maintaining the relationships created by compact is so essential that the U.S. Supreme Court has concluded several times that enactment of the U.S. Constitution did not invalidate compacts entered into under the Articles of Confederation. E.g., *Wharton v. Wise*, 153 US 155; 14 S Ct 783; 38 L Ed 669 (1894).

Early interstate compacts established state boundaries, see, e.g., *New Jersey v. New York*, 523 US 767; 118 S Ct 1726; 140 L Ed 2d 993 (1998) and *Rhode Island v. Massachusetts*, 37 US (12 Pet) 657; 9 L Ed 1233 (1838); granted equal (or in some cases unequal) rights of citizens in adjoining states to use common waters, see, e.g., *New Jersey v. Delaware*, 552 US 597; 128 S Ct 1410; 170 L Ed 2d 315 (2008); and specified the conditions under which new states would be carved out of existing states, see, e.g., the Virginia-Kentucky Compact in *Green v. Biddle*, 21 US (8 Wheat) 1; 5 L Ed 547 (1823) and the Virginia-Tennessee Compact in *Robinson v. Campbell*, 16 US (3 Wheat) 212; 4 L Ed 372 (1818).

The use of compacts changed dramatically after 1900. In the first couple of decades, states enacted regulatory compacts such as the Columbia River Compact (1915) (cooperative management of fishery resource) and the Colorado River Compact (1921) (water allocation), which state officials managed. The biggest shift, however, came with the 1921 amendment to the New York-New Jersey Agreement of 1834 creating the Port Authority of New York Harbor, now known as the Port Authority of New York and New Jersey. This was the first time the states created a completely new and independent compact entity. See Felix Frankfurter and James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L J 685, 697 (1925) (stating, "the New York Port Authority furnishes a most hopeful

story of effective treatment of interstate relations." Frankfurter and Landis also describe the myriad subject matters of compacts at that time).

Once used only for physical interstate geographic issues, compacts today address a wide range of geopolitical problems for non-adjoining states, such as social service delivery; emergency management; law enforcement, corrections and post-conviction supervision; educational opportunities; professional licensing; and insurance product regulation. Some compacts are advisory in nature—that is, the purpose of the compact is to develop advisory reports or regulations for the members states to consider. Some compacts are mandatory, specifying express terms for the states to follow or creates a compact commission with the authority to write regulations that bind the states. Some compacts, like the Multistate Tax Compact, have advisory and mandatory characteristics. In the Multistate Tax Compact, Article III expressly mandates that taxpayers may elect to apportion their income using the Compact formula in Article IV or a state's generally applicable formula, and Article VI provides for the Multistate Tax Commission to study state and local tax systems and recommend tax proposals. Compacts that have an advisory component are no less binding than mandatory compacts. The advisory work of a compact commission does not change requirements in the compact for states to participate in and fund the commission or other mandatory provisions of the Compact.

Like most states, Michigan is a party to 25 to 30 compacts. Compared to all else the state and federal governments do, compacts are relatively unfamiliar to legislators, administrators, courts, and the general public, and correspondingly get relatively little attention. Illustrating this, one scholar recently asked: "[H]ow are [interstate compacts] to fit into a doctrinal reality based on a federalist conception of dual—but no more than dual—sovereignty?" Note, *Charting No*

Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts, 111 Harv L R 1991, 1996 (1998).

The answer is that over time courts have developed jurisprudential principles that recognize the special nature of compacts and the need to preserve the cooperation they represent in solving regional problems that cross state lines. See, e.g., *Entergy Arkansas Inc. v. Nebraska*, 358 F3d 528, 541-542 (CA 8, 2004) (discussing numerous cases in which courts have described compacts as performing "high functions in our federalism," and "represent[ing] a political compromise between 'constituent elements of the Union,' as opposed to a commercial transaction," and stating, "While a common law contract directly affects only the rights and obligations of the individual parties to it, an interstate compact may directly impact the population, the economy, and the physical environment in the whole of the compact area."). In short, courts do not rigidly apply contract principles; they apply contract principles in a manner that respects the "unique features and functions of such a compact." *Id.*

IV. INTERPRETIVE PRINCIPLES FOR EVALUATING THE APPLICATION OF STATE LAW TO A COMPACT

A. Courts enforce the express terms of an interstate compact.

"An interstate compact is a binding, enforceable agreement between two or more states. Note that this definition uses the term 'states.' State legislatures enact compacts, which differentiates compacts from the myriad cooperative agreements between state officials.[3] Compacts are statutes and contracts at the same time." Litwak, *supra* n.2 at 12.

[3] Compacts are fundamentally different than administrative agreements such as those enacted pursuant to authority in Michigan's Urban Cooperation Act, MCL 124.501 to 124.512. Administrative agreements are agreements between agencies. Compacts, like the Multistate Tax Compact, are agreements between states as states, not between, for example, the Department of Treasury and agencies in other states.

Consistent with well-established statutory and contract interpretation principles, courts enforce the express terms of a compact. See, e.g., *Texas v. New Mexico*, 462 US 554, 564; 103 S Ct 2558; 77 L Ed 2d 1 (1983) (stating that unless a compact is unconstitutional, "no court may order relief inconsistent with its express terms"); *Kansas v. Colorado*, 514 US 673, 690; 115 S Ct 1733; 131 L Ed 2d 759 (1995) (enforcing "clear language" of the compact, "[r]egardless of the subsequent practice by the parties"). This principle ensures courts are enforcing the terms of the compact (which is also a statute) rather than rewriting the terms, which would be a legislative act. *Id.* The Supreme Court has recognized that "An interstate compact, by its very nature shifts a part of a state's authority to another state or states, or to the agency the several states jointly create to run the compact." *Hess, supra* at 42 (declining to follow a Special Master recommendation to impose a tie-breaking vote that the compact did not provide for). This sovereignty does not shift to the courts to interpret compacts in a manner that changes the terms of the agreement that one or more or all of the member states may agree is inconvenient or no longer desirable.

This is not a difficult case; it does not require complex interpretation or legal analysis into state contract and constitutional authorities. One need look no further than to observe that by entering into the Multistate Tax Compact, party states have shifted (ceded) some of their sovereignty. Having enacted a Compact that authorizes taxpayers to elect the method of apportionment, the compacting states are thus no longer sovereign to enact legislation that conflicts with the Compact—states may not individually (or *en masse*) eliminate that election—until all the party states jointly amend the Compact or withdraw from the Compact.

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B. State law only applies when the compact specifically preserves that law and only when it does not conflict with the compact.

Since the very first compact law cases (e.g., *Green v. Biddle*, as cited in the Appellant's opening brief), courts have consistently held that one state may not apply its own state law to a compact when that law conflicts with the express terms of a compact. The Appellant fully discussed many more recent cases applying this principle on pages 27 through 30 of its brief; this brief does not repeat those cites here.

The Ninth Circuit Court of Appeals explained this compact interpretative principle as, "A state can impose state law on a compact organization only if the compact specifically reserves its right to do so." *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Cons. Planning Council*, 786 F2d 1359, 1371 (CA 9, 1986). Surprisingly, the Ninth Circuit provided no reasoning beyond a reference to *California Dep't of Transp. v. City of South Lake Tahoe*, 466 F Supp 527, 537 (ED Cal, 1978), which also offered no reasoning. Nevertheless, courts regularly cite to *Seattle Master Builders* in cases where the court must interpret a compact provision. See, e.g., *Salmon For All v. Dep't of Fisheries*, 118 Wash 2d 270; 821 P2d 1211 (1992) (Columbia River Compact was not an "instrument" nor was it "created" as envisioned by state open public meetings law); *Klickitat County v. Columbia River Gorge Comm'n*, 770 F Supp 1419, 1426-1429 (ED Wash, 1991) (term "disclosure of information" in Columbia River Gorge Compact meant freedom of information law, not state environmental policy act).

Other courts have expressed this compact interpretive principle in different terms, but reach the same result. For example, in *C.T. Hellmuth & Assoc. v. Washington Metro. Area Transit Auth.*, 414 F Supp 408, 409 (D Md, 1976), the court rejected application of Maryland's freedom of information law, even though the other signatories had "equivalent" laws. See also *Eastern Paralyzed Veterans Assoc.*, 111 NJ 389, 398-400; 545 A2d 127 (1988); *California*

Tahoe Reg'l Planning Agency v. Harrah's Corp., 509 F Supp 753, 758-759 (D Nev, 1981); *Mitskovski v. Buffalo & Fort Erie Public Bridge Auth.*, 689 F Supp 2d 483, 491 (WDNY, 2010) (all following *C.T. Hellmuth*).

These authorities all involve compacts that have received congressional consent; however, this does not mean this principle of compact law is limited to only compacts that have received consent. Quite simply, there are many more compacts that have received consent than compacts that do not need consent, like the Multistate Tax Compact, so the issue arises more frequently in cases involving compacts with consent.

The Appellant briefed several cases that have concluded a state may not apply its own law that conflicts with a compact. One of those cases, *McComb v. Wambaugh*, 934 F2d 474 (CA 3, 1991), illustrates that this principle is not based on congressional consent. The Third Circuit first noted that the Interstate Compact on the Placement of Children did not require consent, then continued:

> Nevertheless, uniformity of interpretation is important in the construction of a Compact because in some contexts it is a contract between the participating states. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27-28, 71 S. Ct 557, 560, 95 L. Ed. 713 (1951). Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states.

Id. at 479. The lack of consent was not part of the Third Circuit's reasoning. What mattered was, and still is, the importance of uniformity. The well-accepted rules that one state may not unilaterally change the terms of a compact that it has enacted and that a compact takes precedent over conflicting statutory law in member states (not consent) ensures uniformity. The court's citation to *West Virginia ex rel. Dyer v. Sims* as authority, which involved the Ohio River Valley Water Sanitation Compact, a compact that did receive consent) suggests no distinction between compacts that received consent and compacts that do not require consent.

Treating all compacts under that same principle makes sense when considering the purpose of congressional consent. The U.S. Supreme Court explained the purpose of consent in its seminal compact law case, *Cuyler v. Adams*, 449 US 433; 101 S Ct 703; 66 L Ed 2d 641 (1981):

> By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority.

Id. at 439-440, citing Frankfurter & Landis, *The Compact Clause of the Constitution -- A Study in Interstate Adjustments*, 34 Yale L J 685, 694-695 (1925). The purpose of consent is unrelated to the need for uniform and consistent application of the express terms of a compact.

The Department of Treasury argues that a compact without consent presents only state law questions. Appellee's Br. at 8. This argument is not completely accurate. Courts that interpret compacts and consider the interpretation and applicability of state law that conflicts with a compact do not simply look to the interpretive principles in their own state law; they apply the principles from *Seattle Master Builders* and the other principles that prohibit states from applying their law in a manner that conflicts with the express terms of the compact. This is because compacts are agreements between states; if each state simply applied its own state law interpretive principles, different courts would end up with different interpretations. *Simpson v. Bijou Irrigation Co.*, 69 P3d 50 (Colo, 2003) illustrates that courts consider compact-specific principles. There, the Colorado Supreme Court considered the obligation of the State Engineer under a compact and under the state's constitution and statutes. The Court reasoned,

> Given an irreconcilable conflict between intrastate priority administration and compliance with an interstate compact, it is compact compliance that must take precedence. . . . 'If interstate allocation is subordinate to individual rights, interstate compacts would be valueless.' This court has nevertheless recognized

> that the State Engineer, while enforcing compact delivery requirements, must simultaneously adhere, insofar as possible, to the [State's] constitutional and statutory provisions for priority administration.").

Id. at 69. In another example, a New Jersey Court had to determine which of the compacting states' laws concerning the enforceability of arbitration agreements to apply when reviewing an arbitration award involving the Delaware River and Bay Authority, a compact agency. The court considered cases from all of the compacting states—New Jersey, Delaware, and Pennsylvania (all of which rejected the application of state law to the compact) and conflict of laws principles. *Gauntt Constr. Co. v. Delaware River and Bay Auth.*, 241 NJ Super 310, 575 A2d 13 (1990). These two cases involved compacts with consent, but neither court considered or raised consent or the Supremacy Clause in its reasoning.

In short, there is no relevant doctrinal or functional distinction between compacts that have received consent and compacts that do not need consent. Similarly, there is no relevant distinction between compacts that have an advisory component and compacts that are mandatory. One type of compact is no more or less binding than another. States must apply the express terms of <u>all</u> compacts; states cannot apply or interpret their own law in a manner that conflicts with the express terms of a compact. Here, the Court cannot simply resolve this matter as a question of state law as if the Compact is no more than a state statute. Under applicable compact law principles, the Department of Treasury's interpretation of MCL 208.1301 cannot override the election provision in MCL 205.581—in the Multistate Tax Compact.

C. The Multistate Compact's election provision is express, and there is no silence that warrants interpretation.

The Department of Treasury argues that the Court must draw an inference from silence or ambiguity in favor of finding that the state did not cede its sovereignty and thus the state may apply its own law. Appellee's Br. at 10. Here, however, the Multistate Tax Compact is not

silent; Article III expressly requires the states to allow the election. There is no need for the Compact to contain a corresponding term also expressly prohibiting the states from disallowing the election. Such a holding would lead to the absurd result that every compact term would need to expressed twice—once to state what the term requires and then again to state that the term prohibits impairing that requirement. In more than 200 years of compact drafting, no compact is written in this manner and there is no statutory or contract construction principle that suggests this manner of drafting is clearer than simply providing a clear express term. The legal principle is clear and well established. Where there is an express term, courts apply that term.

In re C.B., 188 Cal App 4th 1024; 116 Cal Rptr 3d 294 (2010), provides a perspective into the difficulty of true silence in compacts. The Interstate Compact on the Placement of Children is silent about whether it applies to placement with a natural parent and the California Court of Appeal observed that the states are nearly equally split in their interpretation of whether the compact applies to placement with a natural parent. The Court of Appeal published its decision in part, "to point out that the resulting lack of uniformity is dysfunctional." *Id.* at 1027.

Here, the Multistate Tax Compact has an express election that applies uniformly in the party states. To hold that the election is not sufficiently express, and instead the drafters needed to also state that the election could not be overridden, would undermine the ability of Michigan and other states to rely on the express terms of all of their existing compacts.

V. THE MULTISTATE TAX COMPACT IS A BINDING AND ENFORCABLE INTERSTATE COMPACT.

A. The Multistate Tax Compact is not a "model" or "uniform" law and is not an advisory compact.

The Department of Treasury argues that the Multistate Tax Compact is not binding because it is a model law. The Department of Treasury states that the U.S. Supreme Court

referred to the Compact as a model law. Appellee's Br. at 14, citing *US Steel Corp. v. Multistate Tax Comm'n*, 434 US 452, 456, n. 5; 98 S Ct 799; 54 L Ed 2d 682 (1978). This argument belies the Supreme Court's decision. If the Multistate Tax Compact were no more than a "model law," there would have been no reason for the Supreme Court to analyze it under the Compact Clause of the U.S. Constitution. Rather, the Supreme Court would have followed its other precedent in analyzing the constitutionality of model laws. See, e.g., *New York v. O'Neill*, 359 US 1; 79 S Ct 564; 3 L Ed 2d 585 (1959) (upholding the constitutionality of Florida's enactment and enforcement of the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings).

The Department of Treasury also suggests that the Compact is not binding because the Multistate Tax Commission acts in an advisory capacity. Appellee Br. at 14. The advisory nature of the Multistate Tax Commission has no relationship to the binding nature of the Compact—the actual agreement that created the Commission. The Multistate Tax Commission's studies, research, recommended proposals, and compiled information may not bind the states, but the Compact still binds the states to establish the Commission (Art VI.1(a)); provide by law representatives to consult with the Commission member from that state (Art VI.1(b)); have a vote on the Commission (Art VI.1(c)); and fund the Commission (Art VI.4). The states have these and other responsibilities to the Multistate Tax Commission independent of the advisory powers of the Commission. The Department of Treasury's argument suggests that the states are not even bound to create (or continue) the Commission, consult with it, or fund it.

Similarly, the advisory nature of the Commission has no relationship to the Article III election. The Article III election does not mention the Commission; the Commission has no role

in the Article III election. The Article III election is completely independent of any powers of the Commission. The Article III election is separate and binding provision of the Compact.

B. The *Northeast Bancorp* "indicia" are not all mandatory elements to create a compact, but the Multistate Tax Compact meets the meaningful indicia.

The Department of Treasury argues that the Multistate Tax Compact does not contain the "classic indicia" of a compact creating a contract. Appellee's Br. at 9, citing *Northeast Bancorp Inc. v. Bd. of Governors*, 472 US 159, 175; 105 S Ct 2545; 86 L Ed 2d 112 (1985). In *Northeast Bancorp,* the U.S. Supreme Court concluded that similar statutes in Massachusetts and Connecticut did not constitute an interstate compact that required congressional consent. The court mentioned several "classic indicia" of a compact. Those "indicia" are just that—they are not mandatory prerequisites to a compact. Nevertheless, the Multistate Tax Compact satisfies these indicia.

First, the Multistate Tax Compact establishes a joint organization or body that the states may authorize to conduct interstate audits (Art VIII). In fulfilling this role, the Commission has a right to access accounts, books, paper, and other document; require the attendance of any person within a state to give testimony; and seek court orders in aid of its powers and responsibilities. These are powerful responsibilities that are typically associated with state tax agencies and other regulatory agencies. That the Commission arguably does not directly "regulate taxation," does not undermine the status of the Multistate Tax Compact as a compact.

Second, the Multistate Tax Compact is conditioned on the action of other states—Article X.1 of the Compact requires at least seven states to enact the Compact before it becomes effective. This is an express requirement—a condition of the Compact—that requires action by at least six other states.

Third, the Multistate Tax Compact does not freely allow the party states to modify their compact statute unilaterally. The compact expressly allows taxpayers to make the Article III election; Michigan is permitted to enact its own apportionment formula as an alternative to the Compact's uniform formula, but it must give multistate taxpayers the election to apportion using the Compact's formula. The states are free to withdraw from the Multistate Tax Compact—as allowed by Article X.2—but this is not an accurate indicator of a compact. Very few compacts prohibit withdrawal.[4] Instead, orderly withdrawal provisions are common elements in compacts and should not be interpreted to suggest that a compact loses its compact status simply by allowing the party states to withdraw. Indeed, without exception, scholars and drafters have stated that such withdrawal provisions are critical to the successful administration of a compact. See, e.g., Frederick L. Zimmermann & Mitchell Wendell, *The Interstate Compact Since 1925* 100 (Council of State Governments 1951); Caroline N. Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide* 118-119 (ABA Press 2006). Litwak, *supra* n.2 at 250-257 (discussing withdrawal problems). Withdrawal provisions exist to obviate the need for violating a compact—a state that no longer wants to abide by the terms of a compact may withdraw in accordance with the terms of the compact. This ensures that the withdrawing party does not interrupt the administration of the compact in the other remaining states.

Finally, and most importantly, as discussed by the Supreme Court in *Northeast Bancorp*, the Multistate Tax Compact creates reciprocity between the party states. For example, Article I states that one purpose of the Compact is to avoid duplicative taxation, and Article II defines

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[4] The Great Lakes-St. Lawrence River Basin Water Resources Compact is one of the few compacts that expressly prohibit unilateral withdrawal; the compact is binding unless terminated by a majority of parties (Art 8, § 7).

"tax" as "income tax, capital stock tax, gross receipts tax, sales tax, use tax, *and any other tax which has a multistate impact* . . ." (emphasis added). The states are not independent of each other when the purpose of the Compact is to avoid duplicative taxation and tax is defined to include all taxes with a multistate impact. Similarly, Article III.1, the relevant piece of the Compact in the instant case that allows allow taxpayers to choose the Compact apportionment formula, creates a single national (in the party states) approach that jointly allows taxpayers to elect to use a uniform apportionment formula. Article V.1 states, "Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes *paid by him with respect to the same property to another State and any subdivision thereof*." (emphasis added). This credit provision of the Compact is an express reciprocal requirement that affects other member states. Michigan is required to give such a credit for taxes paid to other states, and those other states are required to give such a credit for taxes paid to Michigan. Article X.1 further requires that the Compact is only effective after seven states enact it. Michigan is reliant on at least six other states enacting (or retaining) the Compact. In short, the parties to the Multistate Tax Compact are acting collectively by agreeing to treat multistate taxpayers in the same way. It is this agreement to act uniformly that forms the reciprocity of this Compact. See *US Steel v. Multistate Tax Comm'n, supra* at 491 (White, J., dissenting) (stating, "Reciprocal legislation is adopted by each State independently, yet derives its force from the knowledge that other States are acting in identical fashion.").

C. The Multistate Tax Commission's unusual explanation of the Compact is not a binding interpretation and is not persuasive.

The Department of Treasury argues that the Multistate Tax Compact is not binding because numerous states have enacted only sections of the Compact, and yet remain members of

the Commission. Appellee Br. at 16. However, no provision of the Compact gives the Commission or the other member states the power to approve a state's alteration to or variance from an express term of the Compact. Membership in the Commission is not the equivalent to an interpretation of the Compact. The Commission's vote to approve a state's membership in the Commission (or inaction to remove a member that has varied from the Compact) is not an interpretation of the Compact by the Commission or the party states.

The Department of Treasury also points to the Multistate Tax Commission's explanation of the states' performance of Compact in its brief to the Court of Appeals in this case and to the California Court of Appeal in the related *Gillette* case. Appellee Br. at 16. The Commission's explanation is the Compact is not really binding because the states have migrated away from the express terms of the Compact. However, again, no provision in the Compact gives the Commission any unique authority to interpret the Compact. The Commission's enumerated powers are limited (art VI.3), and making binding interpretations of the Compact is not one of those powers.

The Commission's explanation is also not persuasive. First, the Commission's course of performance argument is its prior briefs is based on the compact not expressly prohibiting states from eliminating the Article III election. However, as explained above, the compact expressly requires the election and thus there is no need for the Compact to contain a corresponding term also expressly prohibiting the states from eliminating the election. There is simply no silence and no ambiguity that warrants turning to course of performance to interpret the Compact. Second, the Commission's explanation contradicts the documented drafting history of the Compact, see Plaintiff's Br. at 40-41, which shows the intent to guarantee one uniform formula and an ability for multistate taxpayers to choose between that formula and a state's own formula.

Finally, the Commission's explanation is unprecedented; this amicus is unaware of any other case in which a compact commission has affirmatively argued that states are not bound to the express terms of a compact.

D. The Plaintiff may properly enforce the Multistate Tax Compact.

The Department of Treasury argues that the plaintiff has no claim as a third-party beneficiary to the Multistate Tax Compact. Appellee's Br. at 29-30. However, since the beginning of Compact jurisprudence, there have always been cases where third parties allege one state has violated an interstate compact by enacting or applying a conflicting state law. For example, in *Green v. Biddle, supra,* Green, a private citizen, alleged that two Kentucky statutes violated the Virginia-Kentucky Compact as part of his suit against Biddle, another private citizen. See also *Int'l Union of Operating Eng'rs, Local 542 v. Delaware River Joint Toll Bridge Comm'n,* 311 F3d 273, 276-279 (CA 3, 2002) (citing numerous state and federal cases). Despite the common posture of a private party claiming that a state law violates a compact, none of the decisions question whether third parties may make such a claim.

Scholars have also noted that third parties may assert rights conferred by a compact, but only in a cursory manner, which similarly suggests that there is no significant question that parties may do so. See, e.g., Frederick L. Zimmermann and Mitchell Wendell, *The Law and Use of Interstate Compacts* (Council of State Governments 1976):

> "For the most part, interstate compacts have not created any privately assertable rights. Customarily, their subject matter has been cooperative governmental administration or the rights of governmental units as such rather than the specific rights of private person. However, this is not invariably the case. For example water allocation compacts, while they apportion water among states, may affect the rights of individual water users in such a way as to make them proper parties to suits. In such situations, the governing fact is that compacts are statutory law. Consequently, the assertion of private rights created or otherwise affected by a compact is procedurally similar to the assertion of such rights conferred by other statutes of the jurisdiction dealing with similar subject matter."

Id. at 14–15. See also Jerome C. Muys, Nat'l Water Comm'n, Report No. NWC-L-71-011, *Interstate Water Compacts—The Interstate Compact and Federal-Interstate Compact* 310 (1971) (stating, "Since an interstate compact is considered to be a law of each of the compacting states, actions thereunder may be challenged just as any other state action," and citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 US 92; 58 S Ct 803; 82 L Ed 1202 (1938), as an example).

Article III.1 of the Multistate Tax Compact creates a right for taxpayers, i.e., third parties, if they choose to elect that right. The Interstate Agreement on Detainers (IAD) is structured similarly to the Multistate Tax Compact in that a regulated private party must initiate his or her rights under the compact.[5] Under the Multistate Tax Compact, the taxpayer is entitled to elect the method of apportionment. Under the Detainers Agreement, "a prison inmate in any of its jurisdictions, against whom criminal charges are pending in another such jurisdiction, *may make demand* on the latter jurisdiction that he be tried on such charges." *People v. Williams*, 194 Cal App 3d 124, 128; 239 Cal Rptr 375 (1987) (emphasis added). If the inmate does not make a compact demand, then non-compact state or federal law applies. The IAD has been in existence for more than 40 years and there are countless cases in state and federal courts in which the private party beneficiaries of the IAD (inmates) allege the government has violated the compact.

E. The express terms of the Multistate Tax Compact are unmistakable shifts of sovereignty.

The Department of Treasury also argues that the Multistate Tax Compact is not a binding contract on the state because it did not cede its sovereign power of taxation to the Multistate Tax

[5] IAD, Art III.a. Michigan's enactment of the Interstate Agreement on Detainers is at MCL 780.601.

Commission. Appellee's Br. at 17–18. The Department of Treasury argues that a surrender of sovereignty must be unmistakable, and cites *Tarrant Regional Water Dist. v. Herrmann*, 596 US ___; 133 S Ct 2120, 2132; 186 L Ed 2d 153 (2013) for its argument that compact silence is not an unmistakable surrender or sovereignty. Appellee's Br. at 9–10.

The express terms of the Multistate Tax Compact are unmistakable shifts of sovereignty. The Multistate Tax Compact contains an express term (Article IIII) requiring member states to provide taxpayers an election between a state-enacted formula and the uniform formula specified in Article IV of the Compact. Article III expressly and unmistakably cedes Michigan's sovereignty to mandate solely its own apportionment formula as applied to multistate taxpayers.

Tarrant is distinguishable because it involved an ambiguous term of the compact that was ambiguous because it was silent as to a key point. This case does not. Tarrant Regional Water District, a Texas entity, argued that Article 5.05(b)(1) of the Red River Compact (stating, "The Signatory States shall have equal rights to the use of runoff . . . .") authorized it to divert water directly from Oklahoma. *Tarrant*, 133 S Ct at 2129. The Red River Compact did not have an express term allowing or prohibiting the diversion of water directly from another state, and the Supreme Court would not infer that Oklahoma ceded its sovereign control over its own water.

The Department of Treasury also argues that if the state ceded its sovereign taxation authority in the Multistate Tax Compact, then it did so in violation of the state constitution. Appellee's Br. at 17–18. This argument does not recognize that the Multistate Tax Compact preserved the states' sovereignty by allowing the states to withdraw from the Compact. Rather than *sua sponte* violating the Compact, the state may exercise its sovereignty to impose only its internal apportionment formula by withdrawing from the Compact in accordance with Article X.2. The Department of Treasury's argument at this date, several decades after enacting the

Compact, is also too late. Justice Jackson, concurring in *West Virginia ex rel. Dyer v. Sims*, *supra*, recognized that if the compact system is to work, as it has for more than two centuries, states cannot later claim that they never had authority to enter into the compact. He wrote:

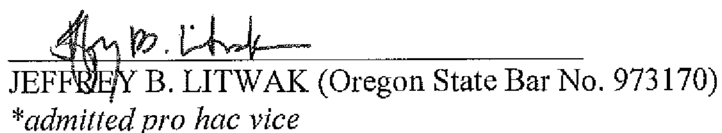
> West Virginia officials induced sister States to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate Compact by reading into her Constitution a limitation upon the powers of her Governor and Legislature to contract.
>
> West Virginia, for internal affairs, is free to interpret her own Constitution as she will. But if the compact system is to have vitality and integrity, she may not raise an issue of *ultra vires*, decide it, and release herself from an interstate obligation.

Id. at 35.

VI. CONCLUSION

This is not a difficult case. The Multistate Tax Compact is a binding interstate compact because party states ceded authority (the apportionment election) and it has other meaningful indicia of interstate tax compacts. Despite the Department of Treasury's many attempts to argue otherwise, the proper interpretive principle remains that Michigan could not amend its enactment of Article III or apply its own state law to disallow the election that the Multistate Tax Compact expressly requires it to offer taxpayers. Doing so violates the express term of the compact and well-established principles for interpreting interstate compacts. Holding Michigan to the express terms of the Compact ensures that this and all other compacts will continue to have vitality and the continue to achieve the original intent of the party states.

RESPECTFULLY SUBMITTED this 18 day of November 2013



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