IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE GILLETTE COMPANY & SUBSIDIARIES, Plaintiffs and Appellants, v. CALIFORNIA FRANCHISE TAX BOARD, an Agency of the State of California, Defendant and Respondent.	Case No. S206587
Consolidated with the following cases: *1) The Procter & Gamble Manufacturing Co. v. Franchise Tax Board, CGC-10-495912* *2) Kimberly-Clark Worldwide, Inc. & Subsidiaries et al. v. Franchise Tax Board, CGC-10-495916* *3) Sigma-Aldrich, Inc. v. Franchise Tax Board, CGC-10-496437* *4) RB Holdings (USA) Inc. v. Franchise Tax Board, CGC-10-496438* *5) Jones Apparel Group v. Franchise Tax Board, CGC-10-499083*	SUPREME COURT FILED DEC - 3 2012 Frank A. McGuire Clerk Deputy

First Appellate District, Division Four, Case No. A130803
San Francisco County Superior Court, Honorable Richard A. Kramer
Case No. CGC-10-495911 (and consolidated cases listed above)

APPELLANTS' ANSWER TO PETITION FOR REVIEW

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WHY REVIEW SHOULD BE DENIED

This Court should decline review of the Court of Appeal's thorough, well-reasoned and unanimous opinion in this case (the "Opinion") involving the Multistate Tax Compact (the "Compact"). As evidenced by a review of the Opinion itself and discussed below, the Court of Appeal correctly concluded that California, after enacting and entering into the Compact with other sovereign states, could not unilaterally alter or eliminate piecemeal the Compact's binding provisions. Therefore, California's attempt to eliminate the Compact's express provision giving taxpayers an election of apportionment methods by enacting a subsequent contrary statute was invalid.

The Court of Appeal's Opinion rests on three independent grounds, each fully substantiated:

> First, under established compact law, the Compact superseded subsequent conflicting state law. Second, the federal and state Constitutions prohibit states from passing laws that impair the obligations of contracts. And finally, the FTB's construction of the effect of the amended section 25128 runs afoul of the reenactment clause of the California Constitution.

Op. at 16. Defendant and Respondent below, the Franchise Tax Board ("FTB"), takes issue with each of these holdings, but raises no serious question that any of these holdings was incorrect or that review is necessary to secure uniformity in the law.

As to the first and principal holding applying compact law to preclude California from altering the Compact through a subsequent statute, FTB ignores the bedrock compact law principles carefully analyzed by the Court of Appeal. Rather, FTB argues narrowly that the Court of Appeal erred in its interpretation of the express terms of the Compact by not re-reading the Compact's mandatory terms as flexible ones (based on subsequent conduct of other party states). Neither the facts nor the law

supports such a strained interpretation of the express terms and stated purposes of the Compact, as well-reasoned in the Opinion.

As to the second holding, FTB's attempt to argue that Appellants[1] should not have been able to invoke the constitutional bar on statutes that impair contracts is unsupported by the Petition and contrary to established law that compacts are *both* statutes and contracts. Finally, as to the Court's third holding, California's attempt to completely and directly eliminate provisions from the Compact by enacting a later statute but leaving the Compact itself on the books, untouched, lies at the heart of the conduct barred by the constitutional reenactment rule, as the Opinion correctly concluded.

As each of the holdings is fully substantiated in the Court of Appeal's Opinion on the basis of well-settled law and each would independently uphold the Court's ultimate conclusion, review is not warranted.

RELEVANT BACKGROUND

The Opinion itself contains a detailed recitation of the history and provisions of the Compact (Op. at 3-8) which FTB does not dispute. Therefore, Appellants provide only this truncated summary in order to aid the Court in ruling on FTB's Petition.

The Compact, originally codified in Rev. & Tax. Code Section 38006 ("Section 38006"),[2] is a valid and binding interstate compact entered

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[1] For purposes of this Answer, "Appellants" refers to Plaintiffs and Appellants at the Court of Appeal, The Gillette Company & Subsidiaries, as well as the plaintiffs in the consolidated cases.

[2] As the Opinion indicates, Senate Bill No. 1015 was enacted after oral argument in this case and purports to repeal the Compact in full. Op. at n. 1. The validity of that repeal will likely be the subject of future litigation but is not at issue here. Nevertheless, it is worth noting that California chose to attempt a *full* repeal of the Compact soon after the Court of Appeal signaled at oral argument in this case that it was unlikely to accept FTB's

into by California with the other signatory states to secure a base-line level of uniformity in state taxation of multistate taxpayers and to stave off federal legislation seeking to impose such uniformity. Op. at 3-4, 12-15; *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 454-56 (1978). FTB concedes these important background facts. *See* Pet. at 3 ("the Compact [was drafted] in an effort to avoid federal intervention into state sovereignty over tax laws"); Pet. at 1-2 (describing Compact as interstate agreement).

The central uniformity provision at issue is that states must provide taxpayers with an election to use either the Compact's three-factor apportionment formula (the "Compact Formula") or the state's own apportionment formula (the "State Formula"):

> Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party State . . . may elect to apportion and allocate his income in the manner provided by the laws of such States . . . without reference to this compact, or may elect to apportion and allocate in accordance with Article IV.

Section 38006, Art. III(1); *see also,* Art. IV(9)(setting forth the equal-weighted, three-factor apportionment formula that "shall" be used by taxpayers electing to apportion under the Compact). This election ensures that multistate taxpayers in all Compact states in which they are taxable have the option to utilize a common uniform apportionment formula, which was critical to stave off federal intervention in state taxation.

Other relevant Compact terms include its express purposes:

1. Facilitate proper determination of State and local tax

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argument that the Compact could be *partially* repealed or altered by member states.

liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.
3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
4. Avoid duplicative taxation.

Id. Art. I; *see also, U.S. Steel,* 434 U.S. at 456. The Compact also expressly allows withdrawal by party states only through enactment of a statute repealing the Compact:

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

Section 38006, Art. X(2). Finally, when a Compact provision is optional, the Compact expressly says so. *Id.* Art. VIII(1) ("This Article [relating to audits by the Multistate Tax Commission] shall be in force only in those party states that specifically provide therefor by statute."); *U.S. Steel,* 434 U.S. at 457 ("Article VIII applies only in those States that specifically adopt it by statute."). Importantly, the Compact reserves the right of states to define their tax base and set the tax rate. Section 38006, Art. XI(a).

Until 1993, California's State Formula (set forth in Rev. & Tax. Code Section 25128) and the Compact Formula were the same (equal-weighted, three-factor formulas). In 1993, the California Legislature amended Section 25128 to read:

> *Notwithstanding Section 38006*, all business income shall be apportioned to this state by multiplying the business income by a fraction, the numerator of which is the property factor plus the payroll factor plus twice the sales factor, and the denominator of which is four....

Rev. & Tax. Code § 25128 (emphasis added).

Appellants elected to compute their taxable income based on the Compact Formula, not based on the State Formula set forth in Section 25128. FTB responded that Appellants could not use the Compact Formula and that Section 25128 was the *sole* apportionment formula for California taxpayers as it had eliminated the election to use the Compact Formula through the phrase "[n]otwithstanding Section 38006." Appellants exhausted all administrative remedies and timely filed suit.[3]

The Court of Appeal reversed the trial court's order sustaining FTB's demurrer and concluded that California could not unilaterally eliminate the Compact's binding election provision through its subsequent revisions to Section 25128. FTB seeks review by this Court.

ARGUMENT

I. THE COURT OF APPEAL'S OPINION COMPORTS WITH WELL-SETTLED COMPACT LAW

As set forth above, the Opinion rests on three independent grounds, foremost that "under established compact law, the Compact superseded subsequent conflicting state law." Op. at 16. In its attack on this primary holding by the Court of Appeal, FTB contends that the Opinion "conflicts with established law." Pet. at 8-11. FTB's Petition does not support this contention. Notably, FTB does not take issue with the bedrock principles of compact law that the Court of Appeal thoroughly and correctly analyzed and that are the linchpins of the Opinion. As detailed below, those well-settled principles direct that, due to the unique status of interstate compacts as both statutes and binding agreements among sovereign states, one party

[3] It is irrelevant that Appellants did not elect to apportion under the Compact until 2003 (*see* Pet. at 5; Op. at n. 9). There is no question that the issue was timely raised for tax years that remained open under the law. And there is no risk of a so-called "windfall" to Appellants, as FTB contends, if California is required to refund taxes collected pursuant to an unconstitutional or otherwise invalid tax statute.

state cannot unilaterally amend a compact piecemeal, as California invalidly attempted to do in Section 25128.

Rather, the crux of FTB's argument actually presents a much narrower question — whether the Court of Appeal's *interpretation* of the actual terms of the Compact was incorrect. Accepting the core compact law principle that states cannot unilaterally alter compact provisions, FTB argues that, despite the Compact's express language that multistate taxpayers may elect apportionment methods, the party states understood that the election provision was optional and, therefore, the express election terms should have been interpreted as flexible ones (so that Section 25128 is not in conflict with the Compact). This more limited interpretation argument does not warrant review. The Court of Appeal's rejection of this argument was thorough and well-substantiated. The express terms and stated purposes of the Compact, as well as compact law, direct that the election to apportion under the Compact is mandatory. FTB's newly-uncovered document regarding Florida's deviation from the Compact cannot shed light on the intent of the California Legislature in enacting the Compact and does not alter the Court of Appeal's analysis. As the Opinion properly concludes, there is simply no basis in law or fact to interpret the Compact's express terms to allow partial repeal or unilateral alteration of the central election provision.

A. FTB's Petition Does Not Question the Core Principle of Compact Law that Party States Cannot Unilaterally Amend Compact Provisions Piecemeal

The Court of Appeal's conclusion that California could not alter or partially repeal the election provisions of the Compact stands on the well-developed body of compact law establishing the principle that one party state cannot unilaterally amend an interstate compact (unless authorized by the compact's terms) due to its unique dual status as both a statute and a

binding agreement among sovereign states. *See* Op. at 9-11; 16-17. As the Opinion summarizes:

> By its very nature an interstate compact shifts some of a state's authority to another state or states. Thus signature states cede a level of sovereignty over matters covered in a compact in favor of pursuing multilateral action to resolve a dispute or regulate an interstate affair. (*Hess v. Port Authority Trans-Hudson Corporation* (1994) 513 U.S. 30, 42; Broun on Compacts, *supra,* § 1.2.2, p. 23). Because the Compact is both a statute and a binding agreement among sovereign signatory states, *having entered into it, California could not, by subsequent legislation, unilaterally alter or amend its terms.* Instead as an interstate compact, the Compact *is superior to prior and subsequent statutory law of member states.* (*McComb v. Wambaugh, supra,* 934 F.2d [474, 479]; *Hellmuth* [*v. Washington Metro. Area Trans.*] *supra,* 414 F.Supp. [408] at p. 409).

Op. at 16 (emphasis in original); *see also,* Op. at 8-11, 15-17. In reaching its conclusion, the Opinion draws from a wide swath of cases and treatises analyzing and applying compact law principles. *Id.* These authorities — and others — all confirm that the Opinion correctly analyzes the bedrock compact law principles at issue here. *See, e.g., West Virginia ex rel. Dyer v. Sims,* 341 U.S. 22, 23, 28 (1951) ("an agreement entered between states by those who alone have political authority to speak for a state cannot be unilaterally nullified" or altered by any one of the contracting states); *Texas v. New Mexico,* 482 U.S. 124, 128 (1987); *Alcorn v. Wolfe,* 827 F. Supp. 47 (D.D.C. 1993) ("[T]he terms of the MWAA compact cannot be modified unilaterally by state legislation and take precedence over conflicting state law."); *Doe v. Ward,* 124 F. Supp. 2d 900, 914 (W.D. Penn. 2000) ("An interstate compact functions as a contract and takes precedence over statutory law in member states."); *General Expressways v. Iowa Reciprocity Board,* 163 N.W.2d 413, 419 (Iowa Sup. Ct. 1968) (subsequent legislation could not "unilaterally alter the terms of the compact previously

entered into by the board"). California cases also adhere to these principles. *In re CB,* 188 Cal. App. 4th 1024, 1031 (2010) ("Interstate compacts . . . are formal agreements among and between states that have the characteristics of both statutory law and contractual agreements."); *In re Crockett,* 159 Cal. App. 4th 751, 761-62 (2008).

FTB does not contend that the Opinion incorrectly presents or analyzes this well-developed body of compact law that is the linchpin of the Opinion. Indeed, FTB concedes that "[n]on-congressionally approved compacts, such as the Compact, should properly be analyzed as both a statute and a contract," citing *McComb v. Wambaugh,* 934 F.2d 474 (3rd Cir. 1991). *McComb* is the *only* compact case cited by FTB in this section of its Petition (pages 8-11) and it fully confirms the bedrock principle that party states cannot unilaterally alter compact provisions. There, the Third Circuit, after noting that the Interstate Compact for the Placement of Children did not receive Congressional consent, expressly held "a participant state may not unilaterally change [a compact's] terms. A Compact also takes precedence over statutory law in member states." *Id.* at 479.

Given this settled law, the California Legislature's attempt to eliminate the Compact's election provision through Section 25128 was invalid, as the Court of Appeal concluded.

B. The Opinion Properly Interprets the Compact's Terms

Instead, the crux of FTB's argument that the Court of Appeal got it wrong rests on FTB's strained view that the Compact can somehow be interpreted to allow California's piecemeal elimination of the Compact's election provisions. Fundamentally, the flaw in FTB's argument is that it ignores the well-settled principle that compacts are both statutes and contracts between sovereign entities and must be analyzed consistent with

this *dual* status. *See, e.g., Hellmuth,* 414 F. Supp. at 409 ("when enacted, a compact constitutes not only a law, but a contract which may not be amended, modified or otherwise altered . . ."). [4] Given that they are agreements among sovereign states, courts engaged in compact interpretation must be especially careful to remain true to the express terms of the Compact and may not read in absent terms or "order relief inconsistent with [the] express terms." *Texas v. New Mexico,* 462 U.S. 554, 564 (1983); *Alabama v. North Carolina,* 130 S. Ct. 2295, 2313 (2010); *see* Op. at 17.

FTB's strained interpretation of the Compact (rejected by the Court of Appeal) and now served up to this Court flouts these directives for compact interpretation. Based on sparse citations to contract cases, FTB argues that the election provision must be interpreted as "not a strict contractual requirement" and the withdrawal provision as "allow[ing] for partial repeal of Compact terms absent a complete withdrawal from the Compact." Pet. at 9.[5] FTB's argument is unhinged from the actual terms of the Compact, including its express purposes, and rests entirely on the conduct of some other party states, subsequent to enactment of the Compact, deviating from the Compact's terms. The Court of Appeal's Opinion carefully considered and rejected this argument. Op. at 19-20.

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[4] FTB also cites a non-compact case, *U.S. v. Winstar Corp.,* 518 U.S. 839, 872 (1996), for the principle that "[a]s a purely statutory matter, there is no dispute that one legislature can validly supersede, amend, repeal, and limit the effect of legislation adopted by a prior legislature . . ." Pet. at 8. Compact law does not present a "purely statutory" matter. FTB's efforts to cherry-pick statements from cases that either involve statutory issues *or* involve contract issues (but do not involve compacts at all) is a distraction from the proper analysis of the issues at hand. *See also,* Op. at 17-18, 19 n.11 (criticizing FTB's multiple citations to selected passages from cases with crucial context omitted).

[5] FTB has abandoned its additional argument to the Court of Appeal that the Compact's severability provision also somehow allowed California to alter provisions piecemeal. Op. at 18.

First, any issue of interpretation must start with the provisions themselves, yet FTB's argument is devoid of discussion of the actual terms of the Compact. By contrast, the Opinion reviews these actual terms with care (Op. at 4-6) and analyzes them in detail (Op. at 13-14, 17-18). Article III(1), the central provision at issue here, provides that states joining the Compact *must* offer the UDIPTA equal-weighted, three-factor formula as an option to taxpayers, but that states may also craft their own alternative apportionment provisions. *See* p. 3 above. As the Opinion correctly explains, "[t]he election provision is not optional for party states. Because any multistate taxpayer 'may elect' either approach, the party states must make the election available." Op. at 13; *see also, U.S. Steel,* 434 U.S. at 457 n.6 (this provision "allows multistate taxpayers to apportion and allocate their income under formulae and rules set forth in the Compact or by any other method available under state law.")

Further, the Compact is express that member states may withdraw from the Compact "by enacting a statute repealing the same." Section 38006, Art. X (2). Again, as the Opinion correctly concludes, "[i]t is obvious that the plain language of the withdrawal provision . . . allows only for complete withdrawal from the Compact." Op. at 17; *see also,* 80 Ops. Cal. Atty Gen. 213 (Aug. 5, 1997) (opinion from Attorney General recognizing that the Compact is binding on California according to its terms and that California's obligations under the Compact can only be altered by repeal of the enacting legislation). In addition, the Compact explicitly states when any provisions are optional (and did not state that the election provision was an optional one). Section 38006, Art. VIII (1).

As the Court of Appeal correctly concluded, these Compact provisions are express and unambiguous. Op. at 19. In matters of compact interpretation, courts must pay special deference to the express terms and may not read in contrary ones. *See, Alabama v. North Carolina,* 130 S. Ct.

at 2313. This alone bars FTB's strained interpretation. Further, in employing statutory interpretation to determine legislative intent, the primary source is the express language of the statute and courts need go no further if the language is clear. *See, e.g., In re Steele,* 32 Cal. 4th 682, 693-4 (2004). As the Compact terms are express and unambiguous, they control. Even under straight contract principles, the terms are not reasonably susceptible to FTB's interpretation. Importantly, any evidence about other party states' conduct is not probative to support an interpretation contrary to express terms. Op. at 19; *Cedars-Sinai Medical Center, v. Shewry,* 137 Cal. App. 4th 964, 980 (2006).

Second, as the Court of Appeal properly reasoned, the express and stated purposes of the Compact as enacted are a much truer measure of the parties' intent at enactment of the Compact than any subsequent deviations. Op. at 19. The first stated purpose of the Compact is to secure the "equitable apportionment of tax bases" (Section 38006, Art. I(1)) – the very provision of the Compact that FTB now seeks to eviscerate through its interpretation of the election provision as an optional one. Indeed, the apportionment election provision is vital to all four expressly stated purposes of the Compact – the other three are to promote uniformity in significant components of state tax systems, to facilitate taxpayer convenience, and to avoid duplicative taxation. *Id.*, Art. I(2-4). Evidence that some other states have deviated from the Compact cannot be used to support an interpretation so flagrantly contrary to the Compact's expressly stated purposes. *See Burden v. Snowden,* 2 Cal. 4th 556, 562 (1992) (courts may not add to or alter statutory terms to accomplish a purpose that does not appear on the face of the statute or from its legislative history); *Dyna-Med, Inc. v. Fair Empl. & Housing Comm'n,* 43 Cal. 3d 1379, 1392-3 (1987) (statutes must be interpreted consistent with legislative purposes).

Third, as the Court of Appeal correctly reasoned, some other party

states' course of performance of the Compact's terms is not a reliable indicator of the meaning of those terms, even under contract principles, because the states do not perform or deliver obligations to one other and, therefore, have no incentive to monitor each other's compliance with the Compact's terms. Op. at 20; *Cedars-Sinai Medical Center,* 137 Cal. App. 4th at 983. This is particularly true in this case. Once the threat of federal preemption of state taxation waned, the party states had no incentive to monitor each other's compliance with the election provision in the Compact. Nor does the Multistate Tax Commission have authority to bring states into compliance with the Compact terms (and has other incentives to secure dues and fees from member states). Therefore, as the Court of Appeal properly concluded, the conduct of the states under these circumstances has no probative value in interpreting the Compact provisions. *See, also, Peralta Community College Dist. v. Fair Employment & Housing Com.*, 52 Cal. 3d 40, 52 (1990) (explaining that conduct of a later legislature is of little weight in determining the relevant intent of the earlier legislature that actually enacted the law, and it is of no relevance when it is inconsistent with the terms of the enactment and other evidence). For all of these reasons, the Court of Appeal properly determined that party states' subsequent deviations from the Compact could not be used to establish that the parties shared FTB's current interpretation of the Compact terms (as allowing partial and piecemeal alteration) at the time of entering into the Compact.[6]

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[6] FTB will likely discuss a recent unpublished decision out of the Michigan Court of Appeals, *IBM Corp. v. Dep't of Treasury,* 2012 Mich. App. LEXIS 2293 (Nov. 20, 2012), refusing to allow IBM to apportion pursuant to the Compact's election provision and addressing Michigan's subsequent deviations from Compact terms. A cursory review of that decision makes clear that the Michigan Court of Appeal failed to properly analyze Michigan's codification of the Compact *as a compact* (but rather treated the issue as one of straightforward statutory interpretation of two conflicting statutes) and, therefore, failed to consider and address the mandatory

In its Petition, FTB tries to take another run at the issue of the proper interpretation of the Compact by unearthing a copy of 1972 minutes of the Commission discussing a deviation by Florida that pre-dates California's enactment of the Compact. Pet. at 9. This document was not part of the record before the trial court or the Court of Appeal, and it is the policy of this Court to refuse consideration of matters not timely raised in the Court of Appeal. Cal. R. Ct. Rule 8.500(c). There is no reason to depart from this policy here. FTB's multiple assertions that this document reflects the understanding and intent of the *California Legislature* when it enacted the Compact are unsupported and unsupportable. At most, the document shows that a representative from California (likely either from FTB itself or the State Board of Equalization, but certainly not from the Legislature) was present at the meeting discussing Florida's deviation from the Compact. This document does not constitute cognizable evidence of the intent of the California Legislature in its enactment of the Compact. FTB provides no evidence that this document was part of the legislative history for Section 38006 or that it was before the California Legislature in any way. *Burden,* 2 Cal. 4th at 564 (refusing to consider evidence that was not "logically probative of the Legislature's intent in enacting the law); *Whaley v. Sony Computer Entertainment America, Inc.,* 121 Cal. App. 4th 479, 487-88 (2004) ("In the absence of any evidence that the State Bar committee report was considered by the legislators, it is not a proper indicator of legislative intent."); *Kaufman & Broad Communities, Inc.,* 133 Cal. App. 4th 26, 30, 38-9 (2005) ("in order to be cognizable, legislative history must shed light on the collegial view of the Legislature as a whole"). Therefore, this "new"

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bedrock principles of compact law discussed herein and in the California Court of Appeal's Opinion. As the Michigan decision is out of step with well-settled law, it does not provide a basis for review here. Further, IBM intends to seek review of the decision.

document sheds no light on what the California Legislature understood the Compact terms to mean when it enacted the Compact.

As it is not cognizable California legislative history, it is (at most) additional evidence of other party states' conduct already presented by FTB and thoroughly considered by the Court of Appeal, as detailed above. Op. at 19-20.

In sum, the Opinion thoroughly and correctly rejected FTB's arguments that the Compact could somehow be interpreted to allow California to eliminate the election provision piecemeal, and FTB's Petition should be denied.

II. THE COURT OF APPEAL PROPERLY DETERMINED THAT SECTION 25128 VIOLATED THE CONTRACTS CLAUSE

FTB's argument in its Petition regarding the Contract Clause entirely misses the point that compacts must be analyzed as *both* statutes and contracts. Again, FTB attempts to treat this as purely a matter of contract law and acts as if taxpayers were pursuing an action for breach of contract. Indeed, the *only* case cited by FTB in this section of its Petition (Pet. at 12-13) is a pure contract case regarding third-party beneficiaries, not a compact case or even a case involving the Contract Clause. According to FTB's view, the constitutional ban on statutes impairing contracts can only be invoked by taxpayers if they are parties to, or third-party beneficiaries of, the Compact. (In other words, FTB's position is that even if the Compact was unconstitutional, Appellants and other taxpayers can do nothing about it.) This is not the law, and FTB offers no case in support of its position.

Indeed, the key case relied on in the Opinion, *Green v. Biddle,* 21 U.S. 1 (1823), expressly upheld a challenge on Contract Clause grounds by a plaintiff who was not a party to the compact at issue. There, the Supreme

Court invalidated a Kentucky statute that diminished the remedies of land owners that had been secured by the terms of an interstate compact between Virginia and Kentucky. *Id.* at 9 ("a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals"); *see also,* U.S. Const., art. I, § 10, clause 1; Cal Const., art. I, § 9 ("A . . . law impairing the obligation of contracts may not be passed."); *Doe v. Ward,* 124 F. Supp. 2d at 915 n. 20 ("As with other contracts, the Contract Clause of the United States Constitution protects compacts from impairment by the states. This means that upon enacting a compact, it takes precedence over the subsequent statutes of signatory states . . ."); *General Expressways,* 163 N.W.2d at 420-21 (interpreting later statute not to conflict with compact in order to avoid violation of constitutional prohibition (federal and state) on impairment of contractual obligations).

As the Court of Appeal properly concluded, the Compact is both a contract *and a statute*, and it expressly accords statutory rights to taxpayers which they are entitled to enforce under California law. Op. at 10-12, 20. Taxpayers clearly have standing to pursue refunds of corporate taxes paid to California and, in that context, to argue for the proper determination of their tax liability (including the proper apportionment formula) under the law (including applicable constitutional restrictions on state statutes). Rev. & Tax Code § 19382. In light of the explicit statutory rights afforded Appellants to elect to apportion under the Compact, they were fully entitled to bring to bear arguments that Section 25128 could not be interpreted to strip those rights because such interpretation was unconstitutional under the Contract Clause and as a matter of compact law, and the Court of Appeal properly concluded that Taxpayers were entitled to prevail on this basis. Op. at 20; *see also, Cuyler v. Adams,* 449 U.S. 433, 449-50 (1981); *Borough of Morrisville v. Delaware River Basin Comm'n,* 399 F. Supp. 469, 479 n.3 (E.D. Pa. 1975) ("To hold that the Compact is an agreement

between the political signatories imputing only to this signatories standing to challenge actions pursuant to it would be unduly narrow in view of the direct impact on plaintiffs and taxpayers.").

Contrary to FTB's assertions, whether Taxpayers have a contractual basis to enforce the Compact's terms is immaterial to the Court of Appeal's reasoning and holding under the constitutional Contract Clause in this case. In any event, Appellants also do not agree that they would lack a contractual basis on which to challenge the Compact, given the very express rights afforded *directly to taxpayers* to elect to apportion under the Compact. Section 38006, Art. III(1).

FTB's Petition provides no basis for review of the Contract Clause issue. The Court of Appeal's holding that Section 25128 was unconstitutional because it violated the Contract Clause is fully supported by the governing law. Further, the Court of Appeal's Opinion is also independently supported by the Court of Appeal's analysis of the proper interpretation of the Compact and, as discussed below, by its finding that Section 25128 violated the constitutional reeenactment rule.

III. THE COURT OF APPEAL PROPERLY CONCLUDED THAT SECTION 25128 VIOLATES THE CONSTITUTIONAL REENACTMENT RULE

As the Court of Appeal determined, FTB's attempt to interpret Section 25128 as eliminating parts of the Compact also runs afoul of the constitutional reenactment rule. Op. at 20-21; Cal. Const., art. IV, § 9. The reenactment rule is triggered when a new statute is intended to amend an existing statute, and the public would not be reasonably notified of the direct change in the law unless the existing statute is reenacted. *American Lung Ass'n v. Wilson,* 51 Cal. App. 4th 743, 748 (1996). This is exactly what the FTB argues Section 25128 did – completely eliminate the election provision from the Compact codified in a separate section (38006)

of the Rev. & Tax Code, rendering that provision no longer available to *any taxpayer* for *any purpose*. Yet, until California's recent repeal of the Compact (*see* n. 2), Section 38006 remained on the books in its entirety (including the election provision). Without reenactment of Section 38006 in its amended form to show the deletion, neither taxpayers nor legislators would be able to tell that Section 38006 has been eviscerated by later law.

FTB's argument that implied repeals are free from scrutiny under the reenactment rule is flatly wrong. "The key to the enactment rule's applicability . . . does not turn on a particular method of amendment but on whether legislators and the public have been reasonably notified of direct changes in the law." *American Lung,* 51 Cal. App. 4th at 749. The cases cited by FTB establish the principle that the reenactment rule is not violated when a later statute *impliedly* (rather than directly) affects existing statutes. In other words, if the new provision could potentially impact the application of other statutes, those statutes do not need to be amended and reenacted to reveal that potential impact. *See Hellman v. Shoulters,* 114 Cal. 136, 151-153 (1896) (reenactment rule not violated by later statute that "leave[s] in full operation all the language of the earlier statute but might affect the operation of the earlier act in certain situations); *White v. California,* 88 Cal. App. 4th 298, 314 (2001) (reenactment rule does not apply to new code sections that impliedly affect other code sections). However, when a new provision *directly* impacts the application of other statutes – here, eliminating the election to apportion under the Compact for all purposes by specific reference to Section 38006, the Compact's provisions had to be re-enacted to reflect that those provisions had been eliminated.

Nor does the Court of Appeal's application of the reenactment rule under the circumstances of this case call into question the use of "notwithstanding" clauses in all other California statutes, as FTB predicts.

As the case law makes clear, "notwithstanding" means different things in different contexts. Commonly, it does not act to repeal other provisions in the law for all purposes (as FTB contends it does here) but merely acknowledges the general application of those provisions, while providing that they will not apply to the specific subject addressed, and those usages do not implicate the reenactment rule. *See, e.g., People v. Flannery,* 164 Cal. App. 3d 1112, 1120 (1985) (explaining that use of the phrase "notwithstanding [a specific statute]" expresses the legislative intent to "carve out an exception" to that statute); *Klasjic v. Castaic Lake Water Agency,* 121 Cal. App. 4th 5 (2004) (interpreting "notwithstanding" to mean that different provisions applied under different circumstances, not as repealing other provisions for all circumstances); *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors,* 263 Cal. App. 2nd 41, 54 (1968).

Finally, FTB claims that since the Legislature and some taxpayers purportedly had notice that Section 25128 intended to eliminate portions of the Compact, the reenactment rule does not apply. Again, this is not supported by the case law. No case supports looking at evidence of a specific legislature's intent or the awareness of certain members of the public.[7] Whether the public and the Legislature have adequate notice that changes were made to existing statutes by later ones must be evaluated *by the language of the statutes themselves*, as this is the issue at the heart of the rule. *See Hellman,* 114 Cal. at 152; *American Lung,* 51 Cal. App. 4th at 749. In this case, because there is no notice in Section 38006 that the Legislature had purportedly eliminated several core provisions, the notice is

[7] Further, FTB's assertions about the factual record are flawed. As established in the record below, the legislative history of Section 25128 does not contain a single reference to the Multistate Tax Compact. And, the fact that some taxpayers apportioned using the State Formula has no bearing on their understanding as to the existence of the Compact Formula.

not adequate. *Id.*

FTB's Petition provides no basis for review of the reenactment rule issue. The Court of Appeal's holding is correct under well-settled law. Further, the Opinion is also independently supported by the Court of Appeal's analysis of the proper interpretation of the Compact and by its finding that Section 25128 violated the Contracts Clause.

CONCLUSION

For all the reasons set forth herein, Appellants respectfully request that the Petition for Review be denied.

Dated: December 3, 2012

Respectfully submitted,

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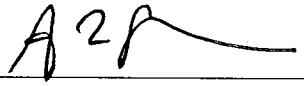
By 
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 5,823 words as counted by the Microsoft Word word-processing program used to generate this brief.

Dated: December 3, 2012

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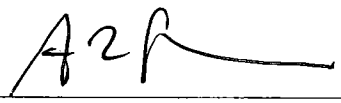
By 
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PROOF OF SERVICE

I declare that I am employed with the law firm of Silverstein & Pomerantz LLP, whose address is 55 Hawthorne Street, Suite 440, San Francisco, California 94105-3910. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on December 3, 2012, I served a copy of:

APPELLANTS' ANSWER TO PETITION FOR REVIEW

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California, this 3rd day of December, 2012.

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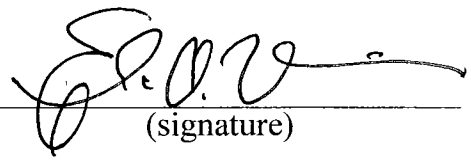
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