IN THE SUPREME COURT OF THE

STATE OF OREGON

HEALTH NET, INC. and SUBSIDIARIES, Plaintiffs-Appellants, vs. **DEPARTMENT OF REVENUE, State of Oregon,** Defendant-Respondent.	Tax Court (Regular Division) Case No. TC 5127 S063625

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF DEFENDANT-RESPONDENT

On Appeal from the Judgment of the Oregon Tax Court
The Honorable Henry C. Breithaupt

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June 16, 2016

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Statutes and Regulations

I. IDENTITY AND INTEREST OF THE *AMICUS*[1]

Amicus curiae, Multistate Tax Commission (the Commission), respectfully submits this brief in support of the respondent, the Oregon Department of Revenue, and urges this court to affirm the decision of the Tax Court that the Oregon legislature was not constrained from repealing provisions of the Multistate Tax Compact, ORS 305.655 (the Compact).

The Commission is composed of the heads of the tax agencies of each state that has enacted the Compact. Currently, fifteen states and the District of Columbia are compact members, and thirty-two other states regularly participate in Commission activities as sovereignty or associate members.[2] Through the Commission, the state tax agencies and their personnel may choose to cooperate by studying issues affecting state taxation of multistate businesses, developing uniformity proposals, and participating in various joint programs

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief.

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

offered by the Commission. As the administrative body created by the Compact, the Commission's interest in this case is substantial.

Provisions concerning the organization and management of the Commission are found in Compact Articles VI-IX. Article VI.1 provides for the general organization and management of the Commission. Article VI.2 establishes the Commission's Executive Committee and provides that the Commission "may establish advisory and technical committees." Article VI.3 provides that the powers of the Commission are to: study state tax systems; develop and recommend uniformity proposals with "a view toward encouraging the simplification and improvement" of state tax administration; compile and publish information that would be helpful to the states; and do other things necessary and incidental to the administration of its functions. Article VI.4 provides for financing the Commission through requests for appropriations from member states. Article VII provides that the Commission "may adopt uniform regulations" and further specifies that states will consider such proposals in accordance with their own laws and procedures. Article VIII allows for the states to participate in joint audits and to have the Commission perform the audit on their behalf. Article IX provides a procedure for implementing an arbitration function, which is not in effect.

Compact members are not required to participate in any of the Commission's activities or programs, nor are they bound by any actions of the

Commission. A compact member is not required to follow the Commission's proposed model regulations, or the regulations adopted by any other compact state, when applying the provisions of the Compact's apportionment formula enacted in that state. States that are not parties to the Compact may participate in the Commission's activities and programs, including its Uniformity Committee and its Joint Audit and National Nexus Programs. If a state participates in the Joint Audit Program, it must authorize the Commission to act on its behalf in conducting each audit in which it wishes to participate. That audit is then conducted pursuant to the laws of that state. Any recommended audit adjustment is subject to review and approval by the state and any assessment is made by the state according to its own laws and subject to state procedures for protest or appeal. Similarly, National Nexus Program members participate in that program under the authority of their state laws and may choose not to authorize recommended actions of the Commission on behalf of that state. The Commission also conducts training programs, when requested, for state personnel on multistate tax issues.

In summary, while the Commission serves to staff certain joint state functions, it is granted no power over its member states. It does not function to create binding laws or regulations. It cannot act on behalf of any state to conduct an audit or undertake other program activities without that state's express permission. When it does act on behalf of a state, it does so under the

authority of that state's laws and regulations—and is bound to act in accordance with that state's particular directives.

While the Commission has no authority over its member states, it still serves an important purpose in the field of state taxation. The Commission benefits the participating states, not by creating some sort of bureaucratic "superstructure" acting independently to administer state taxes or compel action by its members, but by allowing the states themselves to work together voluntarily on shared problems and issues and by providing a process for exchanging information and expertise. Because state taxation of multistate business income is complex, states have found it necessary to cooperate with each other to better understand the problems they jointly face. The Commission believes that it is because of, not in spite of, the voluntary nature of the Commission's functions that the states are able to participate in those functions. Construing the terms of the Compact as binding or obligatory in a way that they are not designed to be would undermine the voluntary cooperation of states on important tax issues.

II. STATEMENT OF THE CASE

The Commission adopts the Statement of the Case as set forth by the Department of Revenue in its Respondent's Brief.

III. RESPONSE TO ASSIGNMENT OF ERROR

The Commission adopts the Response to the Assignment of Error as set forth by the Department of Revenue in its Respondent's Brief.

IV. SUMMARY OF ARGUMENT

The question in this case is whether the Multistate Tax Compact, as properly construed under state law, prohibits the Oregon legislature from unilaterally amending or partially repealing the Compact's apportionment provisions, in particular the provision in Article III allowing taxpayers to elect the Compact's apportionment formula. Both the opinion of the Oregon Tax Court and the respondent's brief thoroughly address the proper analysis of this question, as do the recent opinions of other courts. The Commission concurs with the respondent and expects that this court will be well briefed on the primary issues involved in this case. This brief, therefore, does not seek to duplicate that analysis, but instead addresses a contention by the Appellants (hereafter, "Health Net") and their *amici* that a ruling for the Department of Revenue would threaten other interstate agreements to which Oregon is a party.

The Oregon legislature's repeal of Article III's election did not impair any obligation Oregon had under the Compact. This is the Commission's long-held position, consistent not only with the Compact's own terms but also with

the course of performance of its member states. But Health Net theorizes that since some interstate compacts might properly be construed as prohibiting unilateral amendment or repeal of their provisions, the Multistate Tax Compact must be similarly construed.[3] The premise of this theory is simply incorrect—that is, that all compacts are the same. There is no support for this premise.

Unlike the compacts that are cited by Health Net and its *amici*, which are regulatory in nature, the Multistate Tax Compact is in the nature of an advisory compact. It is beyond dispute that the Compact has not been approved by Congress, that it became effective when enacted by a mere seven states, and that it allows withdrawal by any member state at any time for any reason. Further, there is no serious question that the Compact creates a commission with only limited advisory powers and without any authority to bind its member states in any fashion—including to a particular interpretation or application of the Compact's apportionment provisions.

In addition to not being a regulatory compact, the nature of provisions at issue is important. In general, the manner in which one state may choose to apportion multistate income for tax purposes has no bearing on other states. *Moorman Mfg. Co. v. Bair*, 437 US 267, 274, 98 S Ct 2340, 57 L Ed 2d 197 (1978). While the U.S. Supreme Court has held that state taxes imposed on

[3] "When Oregon entered the Compact in 1967, it became *bound by all its terms unless and until it withdrew pursuant to the Compact's withdrawal provision*." (Emphasis added.) Health Net Opening Brief at 4.

multistate income must meet certain constitutional requirements, including that they not discriminate or be imposed in an internally inconsistent manner, it has rejected the claim that one state is prohibited from imposing a tax simply because of the way in which another state imposes tax. *Comptroller of the Treasury v. Wynne*, ___ U.S. ___, 135 S Ct 1787, 1804, 191 L Ed 2d 813 (2015). The Compact does not alter this reality. Therefore, variation from the apportionment provisions of the Compact affects only the state which enacts that variation. The Compact includes no explicit prohibition against or penalty for unilaterally altering, amending or repealing any apportionment provision, including the Article III election. Even if the Compact could be construed as containing a prohibition for altering its apportionment provisions, it does not contain any mechanism for the Commission, the member states or a taxpayer to determine when such prohibition has been violated or to enforce conformity with the Compact's apportionment provisions. Nor does it contain any penalty or other incentive to refrain from such action.

Nor is this inconsistent with the way in which the apportionment provisions have been interpreted and applied. Those provisions are subject to interpretation and application by the particular state and it has no obligation to interpret or apply the provisions in the same way as any other state. Oregon has separately adopted a statutory policy of construing the apportionment provisions in a manner to promote uniformity. *See* ORS 314.605. But the

Compact itself contains no such provision. The drafters of the Compact certainly could have given the Commission's model regulations binding authority over member states, but chose not to. *See* Compact, Art. VII.3.

To demonstrate the fallacy of Health Net's contention that binding obligations of regulatory compacts to which Oregon is a signatory might be affected by a ruling in favor of the Department, this brief contrasts the provisions of the Multistate Tax Compact with compacts cited by Health Net and its *amici*. Because the Multistate Tax Compact lacks the kinds of substantive reciprocal obligations found in these regulatory compacts, there should be no concern that any ruling in this case would affect those obligations.

IV. ARGUMENT

A. *The Multistate Tax Compact is an advisory compact. Such compacts are designed to study multistate issues and are not designed or intended to impose binding obligations on their members.*

Not all compacts are created equal. The terms of each compact must be individually scrutinized to determine the extent to which it may create contractual obligations. Statutes are presumed not to create such obligations. Therefore, ORS 305.655 will not be construed as creating contractual obligations unless it "clearly and unequivocally" expresses the 1967 legislature's intent to prohibit future legislatures from repealing Articles III and IV of the Compact. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka Santa Fe*

Ry. Co., 470 US 451, 466, 105 S Ct 1441, 84 L Ed 2d 432 (1985). The Compact cannot be so construed because it belongs to a class of compacts that is advisory only and does not "clearly and unequivocally" express the requisite intent.

The nature of interstate compacts may differ. The largest category of interstate compacts is "regulatory" or "administrative" compacts. Caroline Broun, Michael L. Buenger, Michael H. McCabe & Richard L. Masters, *The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide* (ABA Publishing 2006) Ch. 1.2.1, at 14. Such compacts, by their express terms, create binding contractual or reciprocal obligations. The express terms of those obligations serve to bind a state legislature and its successors.[4]

But as the *Guide's* authors recognize:

> [a] second category of compacts is "advisory" compacts. Such compacts are more akin to administrative agreements between states, *primarily because they lack formal enforcement mechanisms and are designed not to actually resolve an interstate matter, but simply to study such matters.* …
>
> [A]dvisory compacts cede no sovereignty nor delegate any governing power to a compact-created agency.

Broun et al., *supra*, at 13-14 (emphasis added).[5]

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[4] Compacts can also be binding if they are congressionally approved, notwithstanding the absence of contractual obligations or other explicitly binding provisions. The Multistate Tax Compact was not approved by Congress and the U.S. Supreme Court ruled in *U.S. Steel Corp. v. Multistate Tax Commission,* 434 US 452, 98 S Ct 799, 54 L Ed 2d 682 (1978), that congressional consent was not required.

[5] Richard L. Masters is co-author of the aforementioned *Practitioner's Guide,* as well as Health Net's *amici* brief. Although the Guide discusses the

As discussed above, Compact Article VI.3 grants the Commission the power to study state and local tax systems, to develop and recommend proposals to foster uniformity or compatibility of state and local tax laws, and to compile and publish such information as would assist the party States in implementation of the compact and help taxpayers in complying with state and local tax laws. Nowhere does the Compact grant the Commission any authority over its members that would enable it to compel conformity or prevent states from enacting laws modifying the provisions of the Compact in their own states. Nor is there any mechanism set out in the Compact through which the Commission or its members might determine and enforce conformity of a member state's law with the apportionment provisions of the Compact, including Article III's election.

The member states surrender no aspect of their sovereignty under the Compact, either to the Commission or to each other. As recognized by the U.S. Supreme Court, "the individual member States retain complete control over all legislation … [affecting] the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability[.]" *U.S. Steel Corp. v. Multistate Tax Commission*, 434 US 452, 457, 98 S Ct 799, 54 L Ed 2d 682 (1978).

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distinction between advisory and regulatory compacts at length, it is not mentioned in the brief.

It is clear that the Multistate Tax Compact is in the nature of an advisory compact, rather than a regulatory compact, under the description set out above since it: (a) lacks both substantive reciprocal obligations and the necessary enforcement mechanisms; (b) is designed to facilitate the study of multistate taxation issues; and (c) neither cedes sovereignty nor delegates governing power to a compact-created agency.

B. *The compacts cited by Health Net and its amici are not merely advisory compacts but instead are regulatory or administrative in nature and impose specific obligations on the member states.*

1. Health Net's argument that a compact is a contract because it is a compact has been rejected by other courts.

Health Net bases its assertion that the Oregon legislature could not repeal Articles III and IV of the Multistate Tax Compact without withdrawing entirely from the Compact on the circular argument that a compact is a contract because it is a compact. Like all circular arguments, this is a logical fallacy, because it assumes the conclusion. No court has ever ruled that a compact is a contract merely because it is a compact. Health Net cobbles together support for its argument from boiler-plate dicta that originated in cases construing congressionally approved compacts - which are binding on the states under the Supremacy Clause - and which migrated without analysis into cases construing non-congressionally approved compacts. As the Tax Court demonstrated in exhaustive detail, in none of those cases was the question presented "is a

compact a contract because it is a compact?" and in all of those cases the dicta was wholly irrelevant to the actual issue in the case. *Health Net, Inc. v. Dep't of Revenue*, 2015 WL 5249431 (Or. Tax Regular Div. 2015).

To date, the only court that has accepted Health Net's argument is the California Court of Appeals, however the California Supreme Court unanimously rejected the argument, as have all other courts that have considered it. *Gillette Co. v. Franchise Tax Board,* 62 Cal 4th 468, 363 P 3d 94, 196 Cal Rptr 3d 486 (CA 2015), *petition for cert filed* (US May 27, 2016) (No. 15-1442) (Multistate Tax Compact is an advisory compact that is not binding on its members), *Gillette Commercial Ops. N. Am. & Subs. v. Dep't of Treasury*,__ NW2d __, 312 Mich App 394 (2015), 2015 WL 5704567 (appeal pending) (same); *Kimberly-Clark Corp. & Subs. v. Comm'r*, Minn. Tax Ct No. 8670-R (June 19, 2015), 2015 WL 3843986 (appeal pending in Minn S Ct No. A15-1322) (*en banc*), (assuming without deciding that the Compact is a contract, the court concluded that the Compact did not unmistakably create a binding obligation on its members to retain the Article III apportionment election indefinitely).[6]

Finally, although the majority of the Michigan Supreme Court did not reach the issue, three justices concluded that the Compact does not prohibit

[6] *Kimberly-Clark* was argued in the Minnesota Supreme Court on January 11, 2016.

members from unilaterally amending the apportionment regulation. *Int'l Bus. Machines Corp. v. Dep't of Treasury*, 496 Mich 642, 676-680, 852 NW2d 865, 869 (2014) (McCormack, J. dissenting). In listing *International Business Machines Corp.* as a "decision for the taxpayer," Health Net's footnote 6 misleadingly implies that the Michigan Supreme Court determined that the Compact election provision is effectively binding on the states. Only the dissent reached the issue, and rejected the argument Health Net now advances. That dissent was a basis of the Court of Appeal decision upholding the repeal of the apportionment election in *Gillette Commercial Ops.*, __ NW2d __ (2015), 2015 WL 5704567 *6 (appeal pending).

2. Common procedural provisions addressing when a compact, or any statute, becomes effective or providing for unconditional withdrawal provisions do not create consideration for a binding compact.

Health Net claims that the procedural requirements for the Compact's taking effect and for withdrawal suffice to provide consideration such that unilateral amendment of the Compact's apportionment provision is prohibited. This places more weight on these procedural provisions than they can bear. Every statute will contain a provision governing when it becomes effective. Most will simply state an effective date, but it is not uncommon for a statute to become effective following the satisfaction of a stated condition. The

Compact's provision that "[t]his compact shall enter into force when enacted into law by any seven States. Thereafter, this compact shall become effective as to any other State upon its enactment thereof" is just such a condition. Compact, Article X.1.[7] Furthermore, the Oregon version of the Compact provides that it was "entered into with all jurisdictions legally joining therein." ORS 305.655. Far from creating a reciprocal obligation with other states, this provision merely guaranteed that Oregon would not "go it alone." If the requisite seven states had never joined the Compact, ORS 305.655 would not have gone into effect. The most reasonable construction of the condition is that it is a *unilateral* legislative determination that barred Oregon's participation in the Compact until and unless the requisite critical mass of seven states had joined. And for any state that joined subsequent to the initial seven, the provision operated wholly without regard to any action of another state. Furthermore, no state needs the approval of any other state, or of the Commission, to enact the Compact, and the Compact creates no mechanism for the other states to give or withhold such approval. Rather, it was each state legislature's *unilateral* determination to enact the Compact's provisions. This alone does not create binding legislative commitments where none would otherwise exist.

Similarly, all statutes are subject to repeal. The Compact is no different. "Any party State may withdraw from this compact by enacting a statute

[7] Oregon joined the Compact in 1967, as one of the original seven members.

repealing the same." ORS 305.655. The Compact's statement that the legislature may unconditionally withdraw by repeal does nothing more than make explicit what would otherwise be implicit; legislatures have unlimited authority to repeal statutes.

Health Net attempts to show that there is consideration for the withdrawal provision by describing the specific acts the legislature would have to undertake to repeal it. "To withdraw, a state must draft a bill providing for withdrawal from the Compact, legislative committees must consider and pass the bill, the full Legislature must consider and pass the bill, and the Governor must sign it." Health Net Opening Brief, at 24. But these acts are identical to the procedures the legislature must follow to repeal *any* statute or for that matter, to enact or amend a statute. To say that the state entered into the Compact by voluntarily enacting a statute without the consent of any other state and that withdrawal requires no more than the repeal of that same statute is to admit that there is no consideration created by the withdrawal provision. In contrast, provisions in other compacts that require advance notice or a delayed effective date for withdrawal may provide consideration, or otherwise indicate the intent to be bound, because a legislature is not ordinarily required to undertake such obligations.

Health Net points out, correctly, that some compacts it construes as creating binding obligations contain unconditional withdrawal provisions. But the Commission maintains only that unconditional withdrawal provisions do not themselves create consideration for a binding compact. Rather, such unconditional withdrawal provisions are merely procedural and create no substantive obligations, nor are they necessarily at odds with a prohibition against the unilateral amendment of binding obligations that *are* created by a compact. In every case, the substantive provisions of a compact must be examined to determine the scope of any binding obligations, not the procedures by which states join, or withdraw from, a compact. The Tax Court's decision below, construing the Multistate Tax Compact, does not in any way threaten these or any other regulatory and administrative compacts to which Oregon may be a party.

3. Regulatory compacts create binding reciprocal obligations not by implication but through the use of explicit, mandatory contractual language.

It is significant that no state's attorney general has joined the taxpayer as an *amicus* in urging a reversal because of concern over the impact this case would have on other interstate compacts. And despite the plethora of state compacts and administrative bodies associated with those compacts, only the Interstate Commission for Juveniles and the Association of Compact

Administrators of the Interstate Compact On the Placement of Children have joined in the taxpayer's cause. Indeed, notwithstanding HealthNet's contention that the Insurance Product Regulation Compact is one of the compacts that would be threatened if this court were to affirm the Tax Court, Karen Schutter, Executive Director of the Insurance Product Regulation Commission, believes that "[t]he Interstate Insurance Product Regulation Compact … is clearly written as a contract, so the California Supreme Court's decision [in Gillette] is irrelevant to it." Peter Coy, *California Decides to Go It Alone on Taxes,* BLOOMBERG BUSINESS WEEK, January 28, 2016, *available at* http://www.bloomberg.com/news/articles/2016-01-28/california-decides-to-go-it-alone-on-taxes.

The following is a summary of the material differences between compacts cited by Health Net and the Multistate Tax Compact.

1. Interstate Compact on the Placement of Children (ORS 417.200 ("Placement Compact"). The purpose of the Placement Compact is for member states to cooperate in the interstate placement of minor children for the purposes of adoption or foster care. To do this, the Placement Compact establishes procedures to be followed by the sending state and the receiving state in the exchange of information necessary for the safe placement of the children. The Placement Compact also provides for penalties for the illegal placement of children. Furthermore, children adjudicated delinquent may be placed in an

institution in the receiving state, but only upon notice to the parent or guardian of the child with opportunity to be heard in court. States must give two years notice prior to withdrawal from this compact.

The reciprocal benefits and obligations created by the Placement Compact are unlike the apportionment election under Article III of the Multistate Tax Compact. While each state may rely on the others to comply with placement procedures to protect the children over which they have authority, the denial of the apportionment election in one state has no effect on other states. The Compact, understandably therefore, provides no requirement that a member state notify other states concerning the granting or denial of the election. Further, there are no penalties or other enforcement mechanisms to address a member state that denies the election.

Finally, unlike the Multistate Tax Compact's unconditional withdrawal provision, the Placement Compact's requirement of two years' notice prior to withdrawal further indicates that reciprocal obligations on which other states may rely are being created.

2. Interstate Insurance Product Regulation Compact (ORS 732.820) ("Insurance Compact"). The purposes of the Insurance Compact are to promote and protect the interest of consumers of individual and group annuity, life insurance, disability income and long-term care insurance products by developing uniform standards for such insurance products and by creating the

Interstate Insurance Product Regulation Commission to certify compliance with the commission's uniform product and advertising standards. The insurance commission's rules "have the force and effect of law and shall be binding in the Compacting States." Insurance Compact, Art. IV.1. Similarly, the insurance commission's Uniform Standards for Products and Advertising "shall have the force and effect of law and shall be binding in the Compacting States" for those products filed with the commission. Insurance Compact, Art. IV.2. The insurance commission's approval of the products and advertising filed with it likewise "have the force and effect of law and [are] binding on the Compacting States." Insurance Compact, Art. IV.3-4.

The insurance commission also has the power to designate Products and Advertisements that may be subject to a self-certification process without the need for prior approval by the commission. Insurance Compact, Art. IV.5. Further, the commission has the power to promulgate Operating Procedures "which shall be binding in the Compacting States." Insurance Compact, Art. IV.6. Compacting states may opt out of a uniform standard by legislation or regulation, but only by first making specific findings that the conditions in the State and the needs of its citizens outweigh (i) the intent of the legislature to participate in the interstate agreement, and (ii) the presumption that a uniform standard adopted by the commission provides reasonable protections to consumers. Insurance Compact, Art. VII.4. States must disclose all relevant

records, data or information to the commission, notwithstanding any state confidentiality or nondisclosure laws, unless the records are privileged. Insurance Compact, Art. VIII.2. The commission has the authority to monitor the member states for compliance with all duly adopted bylaws and rules including the Uniform Standards and Operating Procedures, and may initiate proceedings to find a noncompliant state in default of the compact, in which case, the state is suspended from the compact pending compliance. Insurance Compact, Art. VIII.3, XIV.2.

The Insurance Compact also contains explicit provisions for amending the compact. Insurance Compact, Art. XIII.3. States may withdraw from the Compact by enacting a statute repealing the same, provided the state's representative of the withdrawing state immediately notifies the commission's Management Committee in writing upon the introduction of legislation to repeal the Compact. Insurance Compact, Art. XIV.1. All prior approvals of products and advertising remain in effect following withdrawal and are given full force and effect in the withdrawing state, unless formally rescinded as provided by the laws of the withdrawing state. Insurance Compact, Art. XIV.1.(e).

The Multistate Tax Compact lacks analogous provisions and the Commission created by the Compact is granted no power to establish binding state apportionment rules or standards, whether of a substantive or of a

procedural nature. The Commission has no authority to suspend a "noncompliant" member. There are no provisions in the Compact that control its amendment or interpretation. There are no advance notification provisions for withdrawal. As the Commission's regulations are advisory only, there are no provisions for them to remain in force following withdrawal. There are no provisions in the Compact by which the Commission can compel a member to share information with the Commission.

3. Interstate Compact for Juveniles (ORS 417.030)("Juvenile Compact"). The Juvenile Compact provides for the interstate supervision or return of juveniles, delinquents, and status offenders who are on probation or parole and who have absconded, escaped, or run away from supervision in one state to another state. The Interstate Commission for Juveniles has the authority to provide for dispute resolution between sending and receiving states, to issue rules to effect the purposes and obligations of the compact, "which shall have the force and effect of statutory law and shall be binding in the compacting states," to oversee, supervise, and coordinate the interstate movement of juveniles and to enforce compliance with the compact, including by the use of judicial process. Juvenile Compact, Article IV. Courts are required to take judicial notice of the compact and any rules promulgated thereunder. Juvenile Compact, Article VII.2. The Juvenile Compact is explicitly declared to supersede any inconsistent provisions of state law. Juvenile Compact, Article

XIII.A.2. All lawful actions of the Interstate Commission, and all agreements between the Commission and the compacting states, are binding upon the state. Juvenile Compact, Article XIII,B.1. and 2.

The Multistate Tax Compact contains no provisions like those in the Juvenile Compact that declare its provisions to be binding. Yet Health Net asserts the Compact in this case is binding because it contains procedural provisions that govern when it takes effect and how a state may withdraw. Clearly, it takes more than mere procedural provisions like these to create binding obligations. It takes substantive provisions that create specific reciprocal obligations upon which members may rely and the necessary mechanisms for allowing enforcement of those obligations. As this court has stated, a statute is treated "as a contractual promise only if the legislature has clearly and unmistakably expressed its intent to create a contract." *Moro v. State,* 357 Or 167, 195 (2015). All statutes take effect, either on a definite date or upon the satisfaction of an express condition. And unless they sunset automatically, all statutes continue in effect until repealed.

4. Driver License Compact (ORS 802. 540). The Driver License Compact requires compacting states to exchange records of motor vehicle offense convictions and driver license suspensions or convictions. Most significantly for this case, the Driver License Compact provides that "the licensing authority in the home state, for the purposes of suspension, revocation

or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported, pursuant to Article III of this compact, as it would if such conduct had occurred in the home state, in the case of [certain specified convictions].” Driver License Compact, Article IV. Similarly, the compacting states “shall not issue a license to drive” if an applicant has had his license suspended or revoked by another compacting state. Driver License Compact, Article V. Finally, a state must give six months’ notice of its intent to withdraw from the Driver License Compact before repealing it. Driver License Compact, Article VIII.

Under the Multistate Tax Compact, no state is required to apply the apportionment provisions in the same manner as other member states or to provide the Article III election if other states do. Again, whether or not a state allows the election does not affect any other state. Nor does the Compact contain any similar language to the effect that a state shall or must retain the apportionment election indefinitely unless it withdraws from the Compact altogether.

5. Interstate Compact on Mental Health (ORS 428.310)(“ Mental Health Compact”). The Mental Health Compact establishes mandatory procedures by which mental health patients can be transported from a sending state to a receiving state, to receive necessary mental health services or institutionalization. This Compact provides that patients from the sending state

"shall receive the same priority" for treatment as patients who are residents of the receiving state. Mental Health Compact, Article III (d). If a dangerous patient escapes from an institution in a party state, that state "shall promptly notify all appropriate authorities" within and without the state to facilitate apprehension. Mental Health Compact, Article V. Upon apprehension, "the patient shall be detained in the state where found pending disposition in accordance with law." *Id.* A state may withdraw from the Mental Health Compact on one year's notice, provided the status of any patient previously sent into or out of that state does not change as a result of the withdrawal. Mental Health Compact, Article XIII.

Like the other Compacts cited by Health Net, the Mental Health Compact creates reciprocal benefits and obligations for the member states on which they may rely for their mutual benefit. Typical of such compacts are commissions with substantial authority to require members to perform agreed upon functions or otherwise perform or enforce reciprocal obligations.

These other interstate compacts contain provisions that use the kind of explicit contractual language typical of binding contracts or agreements on which the parties expect to rely. This language signifying a bargained for exchange, or reciprocal benefit conditioned on the mutual and continued performance of some obligation, is conspicuously absent from the Multistate Tax Compact. The Compact was designed to form a voluntary cooperative

framework to facilitate the study of common problems that arise in the areas of state taxation—not to enforce a particular framework on its members.

C. *Nothing in the Multistate Tax Compact justifies restricting a legislature's ability to unilaterally amend or repeal the Article III apportionment election.*

The principle that states generally do not easily cede their sovereignty "has informed [the Supreme Court's] interpretation of interstate compacts." *Tarrant Regional Water Dist. v. Herrman*, ___ US ___, 133 S Ct 2120, 2132, 186 L Ed 2d 153 (2013). Taxation goes to the very core of state sovereignty.

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.

Dows v. Chicago, 78 US 108, 110, 20 L Ed 65, 11 Wall 108 (1871).

As the principle that states do not easily cede their sovereignty informs the interpretation of compacts, the contention that the apportionment election is binding merely because it is in a compact that is devoid of any explicit contractual language is specious.

The regulatory compacts cited above illustrate that state legislatures, when necessary, understand how to create binding obligations under interstate compacts. There is, therefore, no justification for this court to read into the Multistate Tax Compact the necessary clear and unequivocal language that would be required in order to conclude that the legislature was prohibited from

repealing the apportionment election. Health Net can only prevail by reading such language into the Compact since it nowhere exists.

V. CONCLUSION

Decades of interstate cooperation will not be threatened if this court rules in favor of the respondent. The obligations assumed by the state legislature under interstate compacts will not disappear. The Multistate Tax Compact and its election provision are easily distinguished from the regulatory compacts and their provisions, discussed above. To the contrary, there is an important function served by advisory compacts that could well be undermined if state legislators are bound to retain every provision in those compacts regardless of whether those provisions convey any clear or unequivocal obligation. A holding that the legislature must choose to either withdraw from such advisory compacts, or conform to all aspects of their provisions, could actually reduce interstate cooperation in important matters. Therefore, this court should affirm the holding of the Tax Court that the Oregon legislature had the authority to repeal the Compact election provision.

DATED this 16th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH WORD-COUNT AND FONT-SIZE REQUIREMENTS

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and that the word count of this brief (as described in ORAP 5.05(2)(a)) is 5,992 words.

I certify that the font size in this brief is Times New Roman 14-point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

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NOTICE OF FILING AND PROOF OF SERVICE

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