

Case No. A15-1322  
STATE OF MINNESOTA  
IN SUPREME COURT

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**Kimberly-Clark Corporation &  
Subsidiaries,**

Relators/Cross-Respondents,

vs.

**Commissioner of Revenue,**

Respondent/Cross-Appellant.

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**BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT  
OF RESPONDENT, COMMISSIONER OF REVENUE\***

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## INTEREST OF THE *AMICUS*<sup>1</sup>

*Amicus curiae*, Multistate Tax Commission (the Commission), respectfully submits this brief in support of Respondent and Cross-Appellant, the Minnesota Commissioner of Revenue, and urges this Court to affirm the decision of the Tax Court, that the Minnesota legislature was not constrained from repealing certain provisions of the Multistate Tax Compact (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.<sup>2</sup> 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 offered by the Commission. As the administrative body for the Compact, the Commission's interest in this case is substantial.

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<sup>1</sup> 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. This brief is filed by the Commission, not by any particular member state.

<sup>2</sup> 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, Tennessee, Vermont, Wisconsin, and Wyoming.

The Commission serves to staff certain joint state functions, but under the Compact, it is granted no power over its member states to impose binding uniform rules or regulations. It cannot act on behalf of any state 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 by allowing the states themselves to work together voluntarily on shared problems and issues and by providing a process for exchanging information and expertise. The Commission believes that it is because of, not despite of, the voluntary nature of the Commission's functions that the states are able to participate in those functions. Construing the provisions of the Compact at issue in this case as obligatory, or binding on state legislatures, would undermine the voluntary cooperation of states on important tax issues.

### **SUMMARY OF ARGUMENT**

The question in this case is whether the Multistate Tax Compact, as properly construed under state law, prohibits the Minnesota legislature from unilaterally amending or partially repealing provisions allowing taxpayers to elect the Compact's apportionment formula. Both the opinion of the Minnesota Tax Court and Respondent's brief thoroughly address the proper analysis of this question, as well as the recent opinions of other courts. The Commission concurs with 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 Relators' *amici* that a ruling for Respondent would threaten other interstate agreements to which Minnesota is a party.

The Minnesota legislature's repeal of Article III's election did not impair any obligation Minnesota 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 Relators theorize that since some interstate compacts might properly be construed as containing a prohibition against unilateral amendment or repeal, the Multistate Tax Compact must be similarly construed.<sup>3</sup> 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 regulatory compacts that are cited by Relators' *amici*, 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, the Compact creates a commission with 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. The Compact does not include any explicit prohibition against or penalty for unilaterally amending or

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<sup>3</sup> See Relator's brief p. 32, "In this case, by enacting the election *as part of an interstate compact*, the State made an unmistakably clear and binding promise to make the Compact election available to taxpayers for as long as the Compact is in force in the State." (emphasis added)

repealing the election provision, nor did it create any reciprocal obligation or incentive to refrain from such action.<sup>4</sup> Even if the Compact were presumed to contain such a prohibition, it does not contain a mechanism for the Commission or the member states to determine and enforce conformity with the Compact's apportionment provisions.

To demonstrate the fallacy of the contention by Relators' *amici* that other regulatory compacts to which Minnesota is a signatory might be affected by a ruling in favor of Respondent, this brief compares the provisions of the Multistate Tax Compact with the compacts on which the *amici* rely. This comparison clearly demonstrates that these other compacts contain explicit provisions creating enforceable obligations—provisions which the Multistate Tax Compact lacks.

## ARGUMENT

### **I. A ruling by this Court that the legislature had the authority to partially repeal provisions of the Multistate Tax Compact will not undermine the regulatory compacts under which Minnesota may have assumed binding obligations.**

#### **A. The Multistate Tax Compact is an advisory compact.**

Not all compacts are created equal. The terms of each compact must be individually evaluated to determine the extent to which it may create contractual obligations. Statutes are presumed not to create such obligations. Therefore, MINN. STAT. § 290.171 (repealed by 2013 Minn. Laws, Ch. 143, art. 13, § 24, eff. July 1, 2013) will

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<sup>4</sup> Nor is there any requirement under state law generally or under the federal constitution for states to use the same apportionment formula to apportion multistate income. Therefore, the method used by one state has no effect on the method that may be used by another. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978).

not be construed as creating contractual obligations unless it “clearly and unequivocally” expresses the 1983 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 U.S. 451, 466 (1985).

The Compact cannot be so construed because it belongs to a class of compacts that are advisory only and does not “clearly and unequivocally” express the requisite intent. 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.<sup>5</sup>

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.*”

Advisory compacts “cede no sovereignty nor delegate any governing power to a compact-created agency.”

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<sup>5</sup> 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 U.S. 452 (1978), that congressional consent was not required.

Broun et al., *supra*, at 13-14 (emphasis added).<sup>6</sup>

The Compact, MINN. STAT. § 290.171, art. 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 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 to provisions of the Compact's apportionment formula.

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*, 434 U.S. at 457.

It is clear that the Multistate Tax Compact is an advisory compact under the description set out above since it: (a) lacks both reciprocal obligations and the necessary

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<sup>6</sup> Richard L. Masters is co-author of the aforementioned *Practitioner's Guide*, as well as of the relators' *amici* brief. Although the Guide discusses the distinction between advisory and regulatory compacts at length, it is not mentioned in the brief.

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.<sup>7</sup>

**B. The compacts cited by Relators' *amici* are regulatory or administrative compacts that do impose specific obligations on the member states.**

Advisory compacts impose no (or perhaps only very limited) explicit obligations on their members. Regulatory compacts do impose such obligations and therefore prohibit the unilateral amendment or repeal of such provisions. 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 Minnesota may be a party.

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, the Association of Compact Administrators of the Interstate Compact On the Placement of Children, and Jeffrey B. Litwak have joined in the taxpayer's cause.

If this Court holds that the Minnesota legislature had the power to modify the election provision of the Compact in application to this state, without withdrawing from the Compact, there will be no negative effect on Minnesota's continued participation, administration and enforcement of compacts listed on pp. 7-8 of Relators' *amici* brief

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<sup>7</sup> There is a third category of interstate compacts that establish and govern borders between states. Broun et al., at 12.

because those compacts are regulatory in nature and create explicit obligations.<sup>8</sup> To the contrary, as the Respondent notes in its brief, a ruling that a state legislature binds itself to retain every provision of an advisory compact, enacted solely for the purpose of joining with other states to work on multistate issues, would frustrate interstate cooperation.

Below, the provisions of the regulatory Interstate Compact on the Placement of Children as well as other compacts listed at p. 7 of Relators' *amici* brief are compared with the Multistate Tax Compact and its provisions to show the distinct differences between these two types of compacts.

Each of the eight compacts below, by their express and unequivocal terms, create commissions with substantial authority to require members to perform agreed upon functions or otherwise create reciprocal and explicitly binding contractual obligations to perform activities and functions specified for the mutual benefit of the members. Whether the subject of the compact is establishing and maintaining binding multistate standards for industrialized/modular buildings or insurance products, regulating the transfer of educational personnel or the placement of juveniles, establishing procedures to govern the exchange of library materials, designing and implementing multistate rail

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<sup>8</sup> The Compact for Education, MINN. STAT. § 127A.80, listed on page 7 *is* an advisory compact. As with the Multistate Tax Compact, the Compact for Education creates a forum for cooperation among the member states for the discussion, development, crystallization and “recommendation of public policy alternatives in the field of education.” Compact for Education, art. I(A)(1) and (2). Minnesota is similarly free to amend, modify, or withdraw from that compact.

transportation systems, or exchanging National Guard personnel or assets, the compacts in question clearly create mutual obligations.

These interstate compacts contain the kind of explicit contractual language that is typical of written contracts or agreements intended to create binding obligations. 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 cooperative framework to study problems that arise in the areas of state taxation—not to enforce a particular framework on its members.

**1. Interstate Compact on the Placement of Children (MINN. STAT. § 260.93)**

The purposes of the Child Placement Compact are to provide a process through which children from a sending state are placed in safe and suitable homes in a receiving state and to facilitate ongoing supervision of a placement, the delivery of services, and communication between the states. Furthermore, the compact provides operating procedures to ensure safe and suitable homes for the children and provides for the promulgation and enforcement of binding administrative rules by the Interstate Commission for the Placement of Children.

The compact imposes numerous, explicit, mandatory obligations on both the sending and the receiving states. A court exercising jurisdiction over child placement in the receiving state must confer with the court of the sending state to determine the most appropriate forum. Public child-placing agencies in the sending state are required to provide a written request for assistance to the receiving state before a child can be sent or

brought to the receiving state. Private child-placing agencies are required to obtain provisional approval for placement of both the sending and the receiving state's public child-placing agencies. The compact specifies in detail what the contents of a request for provisional approval must contain. Approval of the receiving state child-placing agency is required "as provided for in the rules of the Interstate Commission [for the Placement of Children]" before a placement can be approved by the court. Placement Compact, art. V.D.

The interstate commission mandates the procedures for making the request for an assessment and directs what information shall be contained in the request. The receiving state is required to initiate an assessment upon receipt of a request from the sending state. The child cannot be placed if the public child-placing agency in the receiving state disapproves the proposed placement. The receiving state must provide written documentation of any such disapproval in accordance with the rules of the Interstate Commission. Such determination is not subject to judicial review in the sending state. The receiving state public child-placing agency is required to provide timely assessments, as provided for in the rules of the interstate commission. Similarly, it is required to provide, or arrange for the provision of, supervision and services for the child, including timely reports.

Each member state is required to provide coordination among all branches of government concerning the state's participation in the compact and interstate commission activities. Each state must establish a central state compact office which is responsible for state compliance with the compact and the rules of the commission. The commission's

rules are binding on the members, unless a majority of the legislatures of the member states reject a rule in which case the rule has no further force and effect in any member state. All three branches of state government are required to enforce the compact and the commission's rules. Member state courts are required to take judicial notice of the compact and the commission's rules.

The commission may resolve disputes among the member states by binding dispute resolution as well as by mediation. The commission can enforce compliance by suing a defaulting member in the United States District Court for the District of Columbia or in the federal district court where the commission has its principal place of business. The compact authorizes both injunctive relief and damages, as well as attorney's fees.

It is readily apparent that the Multistate Tax Compact has none of the reciprocal or binding features of the Child Placement Compact. The Commission also has none of the related enforcement authority—it has no power to issue binding rules or to sue members for non-compliance or in any way require a member state to adhere to any provision of the Compact or a particular interpretation of that provision. Nor does the Compact authorize or require any state to initiate enforcement proceedings against other member states. The courts are not required to take judicial notice of Commission model rules or of Commission proceedings. A member state is not required to recognize the legal position of another member state on any point of state tax law, including interpretations of the Compact provisions.

Finally, the Placement of Children Compact contains a withdrawal provision that allows a state to withdraw by enacting a statute repealing the compact, provided the

withdrawing state gives written notice to the president of the interstate commission immediately upon the introduction of a proposed repeal statute. Placement Compact, art. XV. An advance notice provision provides the consideration for a withdrawal provision that the Multistate Tax Compact's unqualified right to withdraw lacks. "The factor that distinguishes an unenforceable promise from an enforceable contract is consideration, or the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other." *Murray v. MINNCOR*, 596 N.W.2d 702, 704 (Minn. Ct. App. 1999) (citation omitted). Given the detailed mutual obligations in the Placement Compact, an advance notification provision prior to withdrawal provides the other members an opportunity to discuss the issue to perhaps persuade the withdrawing state not to withdraw. It is unnecessary to require advance notice under the Multistate Tax Compact, because the Compact is purely advisory and there are no ongoing regulatory functions that could be disrupted under an advisory compact.<sup>9</sup>

**2. Interstate Compact on Industrialized/Modular Buildings (MINN. STAT. § 326B.194)<sup>10</sup>**

This compact is designed to coordinate and uniformly administer the member states' rules and regulations regarding the construction of industrialized/modular buildings, to assure interstate reciprocity in such construction. The compact establishes the Interstate Industrialized/Modular Buildings Commission as an agency of each

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<sup>9</sup> The necessity to avoid disrupting ongoing regulatory functions is equally strong for the compacts discussed *supra* that have a delayed effective date.

<sup>10</sup> MINN. STAT. § 326B.194 references the Modular Buildings Compact, but does not include the text of the compact. A copy of the compact is available at <http://www.interstateibc.org/legislation.htm>.

compacting state. The commission consists of representatives from each state as well as industry representatives and, if federal law allows, representatives of the federal government. The commission promulgates model standards for the construction of industrialized/modular buildings. The compact further provides that, to the extent the commission determines that a member's construction standards are at least equal to the commission's model rules, and that they are enforced in accordance with the commission's uniform administrative procedures, the state's standards "shall be deemed to have been approved by all the compacting states for placement [of industrialized/modular buildings] in those states." Building Compact, art. XI. Article XI establishes a reciprocal contractual obligation pursuant to which member states must accept the construction standards of another member as long as the commission has certified that those standards are, at least, equal to the commission's standards. Article XI of the compact therefore establishes the commission as the enforcement mechanism for the compact through its power to certify states as being in compliance with the model standards.

In contrast, the Multistate Tax Compact contains no mechanism that would compel any member state to retain the apportionment election at issue while a member of the Compact or to grant such an election based on the actions of any other member state. Nor does the Commission have the power to require the states to retain the election, or to adopt any of the Commission's recommended model statutes and regulations governing the interpretation of the Compact formula, to which the election would apply.

### **3. Interstate Agreement on Qualification of Educational Personnel (MINN. STAT. § 122A.90)**

In order to encourage the employment of teachers and other educational personnel who are educated and certified in an origin state, the agreement authorizes each member of the compact to enter into contracts with one or more additional members to accept educational personnel in the receiving state. Article III specifically states that each such contract is binding on the states that enter into it “with the same force and effect as if incorporated in [the] agreement.” Article III.2 sets forth mandatory minimum provisions to be included in such contracts. Article VIII of the agreement provides that any state may withdraw from the agreement by enacting a statute repealing the same but that “no such withdrawal shall take effect until one year after the governor of the withdrawing state has given notice in writing ... to the governors of all other party states.”

The Educational Personnel Agreement is a binding compact by virtue of the contracts that the member states are specifically authorized to make. There is no comparable provision in the Multistate Tax Compact. Furthermore, the members of the Multistate Tax Compact are free to withdraw from the Compact at any time without advance notice to the other members. In contrast, states can only withdraw from the Educational Personnel Compact on one year’s advance notice.

### **4. Interstate Insurance Product Regulation Compact (MINN. STAT. § 60A.99)**

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 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 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 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 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 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 under state procedures that are consistent with the Compact's provisions for prospective disapproval of products and advertising. Insurance Compact, art. XIV.1.(e).

The Multistate Tax Compact contains no provisions that are analogous to the binding provisions explicitly contained in the Insurance Compact. The Commission is granted no power to establish binding state tax 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. 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.

## **5. Interstate Library Compact (MINN. STAT. § 134.21)**

The Library Compact authorizes states and localities in contiguous states to enter into contracts to provide library services to communities of people regardless of jurisdictional lines. The compact continues in force and is binding upon each party state until six months after the withdrawing state gives notice of repeal by the legislature. Any outstanding contracts remain in effect until the stipulated period of duration for each contract expires.

The Multistate Tax Compact, MINN. STAT. § 290.171, does not authorize the Commission or its member states to administer state tax laws or procedures regardless of jurisdictional lines. Although MINN. STAT. § 290.171, art. VIII authorizes the Commission to conduct joint audits on the request of the states, the substantive and procedural laws of each state govern the audit. Nor can the Commission issue an assessment upon the completion of the audit. Each participating state determines whether to issue an assessment and the scope of any assessment. Any appeals from the assessment are litigated in the courts of each participating state, subject to that state's substantive law and procedural rules. And as noted, there is no delayed effective date for withdrawal from the Multistate Tax Compact.

## **6. Midwest Interstate Passenger Rail Compact (MINN. STAT. § 218.75)**

The Passenger Rail Compact is intended to promote development and implementation of improvements to intercity passenger rail service in the Midwest and to coordinate interaction among Midwestern state elected officials on passenger rail issues. To further the compact's purposes, the compact creates a commission to carry out the

duties specified in the compact. The commission is specifically empowered to, among other things, implement or provide oversight for specific rail projects, upon request of each state participating in such a project and under the terms of a formal agreement approved by the participating states. States may withdraw from the compact by enacting a statute repealing it, but withdrawal is effective one year after the effective date of any such statute.

In contrast, the Multistate Tax Compact grants no authority to the Commission to implement state tax policy or to provide oversight for specific state tax projects. The Commission's functions are merely to study state policies and to make non-binding recommendations for the adoption of uniform state tax regulations.

#### **7. Midwestern Higher Education Compact (MINN. STAT. § 135A.20)**

The purpose of the compact is to provide greater higher education opportunities and services in the Midwestern region. The compact creates the Midwestern Higher Education Commission. Among other provisions, the compact grants the commission the power to enter into agreements for undergraduate, graduate, and professional student exchanges between any higher education institutions or compacting states to provide programs and services for the citizens of those states. The compact is therefore a regulatory compact that is designed to actually address an interstate problem, rather than to merely study it. The Multistate Tax Compact grants no such power to the Commission or to the member states.

#### **8. National Guard Mutual Assistance Counterdrug Activities Compact (MINN. STAT. § 192.88)**

Pursuant to the National Guard Compact, the member states can exchange National Guard personnel, assets, and services to provide increased support and presence to receiving states to counter unlawful drug activities in the receiving states. Any state may withdraw from the compact by enacting a statute repealing the same, but no such withdrawal takes effect until one year after the governor of the withdrawing state has given written notice of withdrawal to the governors of all party states.

The Multistate Tax Compact does not create a mechanism by which its member states can exchange personnel with each other. While MINN. STAT. § 290.171, art. VI.1.(h) authorizes the Commission to “borrow, accept or contract for the services of personnel from any State, the United States, or any other governmental entity,” that provision simply authorizes the Commission to contract for the services of personnel from any State to carry out *the Commission’s* purely advisory functions. The activities do not cease to be advisory merely because they are performed by state personnel acting on behalf of the Commission. In contrast, the National Guard Compact authorizes the states to exchange Guard personnel and assets *with each other* to directly perform drug enforcement activities in the receiving state.

To summarize, these compacts must be evaluated on their own terms to determine the nature and extent of obligations imposed on the state. An obligation in one compact does not imply a similar obligation in another compact. Likewise, this Court must evaluate the Multistate Tax Compact according to its own terms.

**C. Neither the Multistate Tax Compact’s apportionment election nor its withdrawal provision serve to create the kind of explicit, binding obligations found in regulatory compacts.**

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*, 133 S. Ct. 2120, 2132 (2013). Taxation goes to the very core of state sovereignty, as the drafters of the Minnesota Constitution were aware: “The power of taxation shall **never** be surrendered, suspended or contracted away.” Minn. Const. art. 10, sec. 1 (emphasis added).<sup>11</sup> Nevertheless, 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 any clear or unequivocal obligation to continue the apportionment election or to refrain from the amendment or repeal of the election provision.

MINN. STAT. § 290.171, art. III.1 states:

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 or pursuant to the laws of subdivisions in two or more party States may elect to apportion and allocate his income in the manner provided by the laws of such States or by the laws of such States and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with Article IV.

This provision creates no explicit requirement or commitment that the state maintain conformity, and no mechanism for enforcing conformity. Nor does the Compact

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<sup>11</sup> As the Commissioner of Revenue notes in his brief, if the election provision did in fact create a binding contractual obligation, it would be void *ab initio* as an unconstitutional surrender of the state’s sovereign authority to tax.

provide explicitly that the provision shall be in effect until and unless the state withdraws from the Compact pursuant to MINN. STAT. § 290.171, art. X. The withdrawal provision, itself, unlike the withdrawal provisions discussed *supra*, requires neither advance notice of intent to withdraw nor a delayed effective date for such withdrawal. Article X does nothing more than make explicit what would be implicit in the absence of *any* withdrawal provision.

### CONCLUSION

Decades of interstate cooperation will not be threatened if this Court rules in favor of 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 regulatory compacts and their provisions. To the contrary, there is an important function served by advisory compacts that could well be undermined if state legislators are bound to 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 Minnesota legislature had the authority to repeal the Compact election provision.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE  
WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 5,579 words, excluding the title page and tables of contents and authorities, and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2010, the word processing system used to prepare this Brief.

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