No. 15-0669

IN THE SUPREME COURT OF TEXAS

Graphic Packaging Corporation,
Petitioner,

v.

Glenn Hegar, Comptroller of Public Accounts of the State of Texas, and
Ken Paxton, Attorney General of the State of Texas,
Respondents.

On Petition for Review from the Third Court of Appeals at Austin,
No. 03-14-00197-CV

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION

Sheldon H. Laskin*
Counsel

Multistate Tax Commission
444 North Capitol St., N.W.
Suite 425
Washington, D.C. 20001
(202) 650-0300
slaskin@mtc.gov
* *pro hac vice* admission pending

Counsel for Amicus Curiae
Multistate Tax Commission

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

As the organization created by the Multistate Tax Compact (Compact), the Multistate Tax Commission (the Commission) has a unique relationship to the Compact. The Commission agrees with the respondent's Brief on the Merits and files this brief as *amicus curiae* in support of the Texas Comptroller of Public Accounts.

INTRODUCTION

The petition raises a question fundamental to the Commission's work: Is the Compact election "binding," or, in other words, must states withdraw from the Compact in order to repeal its uniform apportionment formula election (Compact Article III(1))?

Since 1973, when this question was first raised by Florida's decision to eliminate the apportionment formula election, the Commission's answer has been the same: No, the election is not binding. Accordingly, a state can repeal the election without first withdrawing from the Compact.

This answer is not only amply supported by Comptroller's arguments, but is consistent with the nature of the Commission itself. If mandating state uniformity had been the Compact's purpose, one would expect to find a compact organization with, among other things, compulsory powers over its member states. But the Commission has no such compulsory powers. It cannot impose mandatory rules or

require compliance from its state members. The Commission's purpose is fundamentally different—to foster cooperation and broad participation of the states in promoting uniformity, voluntarily.

The alternative arguments suggesting that the apportionment election is or should be binding have a number of logical flaws which this brief addresses. The lure of these arguments and the invitation to exalt the Compact's name over both its substance and purpose have been rightly rejected by the courts in other states that have considered the issue. We urge this court to do the same.

THE UNIQUE INTEREST OF THIS *AMICUS*[1]

Must a state withdraw from the Compact in order to repeal the Compact's apportionment election? As the organization created by the Compact, the Commission's interest in this question needs no explanation. But the Commission's interest in the answer—that the election is not binding—does merit explanation, and can be best understood by considering how the Commission was (and was not) designed to function, and how it operates in order to achieve the Compact's purposes.

The General Duties of the Commission

The Commission is made up of the revenue agency heads of the states that

[1] All costs associated with preparing this brief are being paid by the Commission. *See* TEX. R. APP. P. 11.

have enacted the Compact by statute—currently sixteen states.[2] The Commission's official duties include appointing an executive director, establishing bylaws and other general operating procedures, approving an organizational budget and requesting related appropriations, giving final approval to model law and regulation recommendations, and establishing the programs and committees for carrying out other Commission business. Members of the Commission may also serve on the executive committee, which oversees and directs the Commission's activities. *See* TEX. TAX CODE § 141.001 art.VI.

Purposes of the Commission — Generally

The stated purposes of the Compact are:

1. facilitating the proper determination of the state and local liability of multistate taxpayers;
2. promoting uniformity or compatibility in significant components of tax systems;
3. facilitating taxpayer convenience and compliance; and
4. avoiding duplicative taxation.[3]

[2] The Compact members are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington.

[3] *See* TEX. TAX CODE § 141.001 art. I.

Nature of the Commission

The Commission is not the kind of regulatory body that operates by imposing requirements or that polices the compliance of members with Commission policy. In short, it lacks any compulsory power over its members. This lack of compulsory power has not proven to be a barrier to accomplishing the Commission's purposes nor does failing to enact the Compact at all prevent states from participating in many of the Commission's programs and activities as sovereignty[4] or associate member states[5] (including program members).[6]

The Compact's stated purpose most important to this case is the second—promoting uniformity or compatibility of significant components of state tax systems. The Commission promotes uniformity not by compelling states to conform, but by engaging them in a voluntary process. The Commission's uniformity efforts also further the Compact's fourth purpose, avoiding duplicative

[4] Sovereignty Members are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, and West Virginia.

[5] 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.

[6] *See* Bylaws of the Multistate Tax Commission (amended Aug. 2, 2017), Bylaw 13, *available at*: http://www.mtc.gov/getattachment/The-Commission/Bylaws/MTC-Bylaws-as-Amended-08-02-2017.pdf.aspx (last visited Aug. 30, 2017).

taxation, by providing a means for states to cooperate in adopting uniform tax bases and methods.[7]

To promote uniformity and compatibility in state tax laws, the Commission established a Uniformity Committee. Any state, regardless of membership status or involvement in other programs of the Commission, may choose to participate in the Uniformity Committee or its working groups and may advance that state's perspective on the issues taken up for consideration. The Commission approves uniform recommendations put forward by the committee through a general process set out in the Compact's Article VII and Commission bylaws.[8]

ARGUMENT

I. A state need not withdraw from the Compact in order to repeal the Compact's apportionment election.

A. The Compact is not a binding regulatory agreement.

The Commission fully concurs with the Comptroller's arguments that, despite its name, the Compact lacks the necessary elements of a binding regulatory agreement essential for Graphic Packaging to prevail on this issue. Importantly, the

[7] In addition, Compact Article V provides a credit for sales or use taxes paid a purchaser in one state that can be taken against any use tax imposed on the same purchased good in another state. *See* TEX. TAX CODE § 141.001 art. V.

[8] *See* TEX. TAX CODE § 141.001 art. VII and Bylaws of the Multistate Tax Commission (as amended Aug. 2, 2017), Bylaw 7, *available at*: http://www.mtc.gov/getattachment/The-Commission/Bylaws/MTC-Bylaws-as-Amended-08-02-2017.pdf.aspx (last visited Aug. 30, 2017).

Compact does not create reciprocal obligations on the part of the states. Graphic Packaging, itself, makes the point: "Having succeeded in avoiding federal preemption of state taxation through the Compact almost thirty years ago, party states have no incentive to monitor each other's compliance with the Compact's election provision." Pet Br. at 51. Nor has the Commission ever varied from the position that states may repeal the apportionment election without withdrawing from the Compact. The support put forward by Graphic Packaging for its position that the Compact's election is binding is fundamentally flawed.

1. It would be inconsistent for the Compact to create a binding election, requiring members to conform to a particular formula, but give the Commission no authority to require a uniform interpretation and application of the formula by the member states.

As was determined in prior litigation challenging the constitutionality of the Compact: "The member states have ceded no sovereignty over tax matters to the Commission." *U.S. Steel v. Multistate Tax Comm'n*, 417 F. Supp. 795, 803 (S.D.N.Y. 1976), aff'd, 434 U.S. 452 (1978). This limitation of the Commission's authority was in keeping with the extent of the agreement made by the Compact members. The Commission can only recommend model laws and regulations.

The first model regulations drafted by the Uniformity Committee and given final approval by the Commission in 1973 pertained to the apportionment provisions in Compact Article IV, which were essentially identical to the Uniform Divi-

sion of Income for Tax Purposes Act (UDTIPA).[9] UDITPA is the basis for formulary apportionment in most states, including non-Compact member states.[10] The initial regulations adopted by the Commission set out the kind of detailed guidance necessary for the implementation and application of UDITPA's general statutory provisions. Since then, the Commission has adopted dozens of model statutes and regulations, with periodic amendments. Many regulations are designed to implement important aspects of the Compact's apportionment formula, including a number of special industry rules that states may choose to adopt under the provisions of Compact Article IV, Section 18 (a provision identical to the same provision in UDITPA). Other models relate to other aspects of state business taxes.[11]

Yet the Commission has no authority to compel a state, including a Compact member, to adopt any of its recommended models, including those which interpret the Compact's apportionment formula. As the U.S. Supreme Court has previously found concerning the Commission's regulations: "These regulations are advisory only. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any

---

[9] *Compare* TEX. TAX CODE § 141.001 art. IV *with* Unif. Div. of Income for Tax Purposes Act, 7A U.L.A. 155 (2002).

[10] Walter Hellerstein & John Swain, *State Taxation,* ¶ 9.01, 1999 WL 1398924 (W. G. & L 3rd ed.).

[11] Information on the Commission's Uniformity Committee and model statutes and regulations recommended by the Commission, as well as ongoing projects, is on the Commission's website at: http://www.mtc.gov.

member State until adopted by that State in accordance with its own law." *U.S. Steel*, 434 U.S. 452, 457 (1978).

There has never been universal adoption of the Commission's proposed model statutes and regulations, even by Compact members. Over the years, some of the models have been adopted in whole by some states, and in part or with modifications by others. A few states have adopted rules that conflict in some way with the models approved by the Commission. But for all states, these models serve to provide information for policymakers wanting a fuller understanding of the related tax issues. And to the extent they are adopted by even a minority of states, they may serve as a standard against which competing policy choices can be gauged.

In short, the Commission's uniformity efforts are, by design, voluntary, rather than compulsory.[12] In fact, this was a primary criticism leveled by the plaintiffs against the Compact and the Commission in the *U.S. Steel* litigation in the

[12] The Compact's other purposes are also fostered by the same kind of broad, voluntary participation. Take, for example, the Joint Audit Program that was the primary focus of the *U.S. Steel* litigation (*see U.S. Steel* 434 U.S. at 473–74), and which fosters the first purpose of facilitating the proper determination of tax liability for multistate taxpayers. Participating states may join or leave the program at any time and no Compact member is required to participate. Each program state also decides whether to participate in particular joint audits and, if so, whether to issue assessments (or refunds) based on the audit results. Currently, 28 states are members of the Joint Audit Program.

Similarly, the Commission furthers the Compact's third purpose—facilitating taxpayer convenience and compliance—through its Nexus Program. That program allows taxpayers to come forward anonymously and enter into voluntary disclosure agreements with participating states, to pay back taxes with reduced penalties and interest, and get into compliance with state requirements. Again, state participation in this program is voluntary. Currently, 38 states participate in the Nexus Program.

District Court for the Southern District of New York. The plaintiffs there claimed that "the voluntary nature of Compact membership and the fact that only twenty-one states have joined necessarily limits its reach" in achieving uniformity and that "the advisory powers granted to the Commission are insufficient to override the differences in the substantive tax laws of the party states." *U.S. Steel*, 417 F. Supp. 795 at 802–03. The federal district court, however, recognized that "any agreement between two or more states to observe an identical principle of state tax law diminishes the existing possibility of fifty disparate state tax results." *Id.*

This insight is crucial to understanding the Commission and the Compact. What is at the core of the Compact is not the fossilized preservation of an apportionment formula, a formula that changing economic and other circumstances were bound to render obsolete or unsustainable. Rather, the Compact's core is the creation of a forum for ongoing, broad-based interstate cooperation to continuously promote uniformity in those changing circumstances. In short, the authority granted to the Commission by the Compact matches its purpose—to promote, rather than compel, uniformity and compatibility.

2. The threat of congressional action, which never came to pass, cannot establish the intent of state lawmakers to make the Compact election binding.

To guess the intent of a legislative body based on its inaction is a precarious enough endeavor. Graphic Packaging has built its argument on guesses about what

Congress's inaction implies as to the intent of state legislative bodies. To say that state lawmakers, and Texas lawmakers in particular, wanted to "fend off federal preemption," Pet. Br. at 9, barely states a motive. It does not show that lawmakers adopting the Compact believed that only an unalterable promise to provide the apportionment formula election would suffice to prevent congressional action.

Congress is not a signatory to the Compact, so whatever its intent might have been is irrelevant. Nor did Congress give its approval to the Compact, which would have made the apportionment formula election binding as federal law. *Cuyler v. Adams*, 449 U.S. 433, 434 (1981). Congress and the states did not enter into an agreement together—the states promising to maintain a uniform apportionment election, and the federal government promising not to act to preempt state taxation. There was no such agreement. The Compact does not represent that agreement. Instead, we have only congressional inaction—before and after the Compact.

3. It would be incongruous for the states to enter into a collective mandate in order to preserve their individual tax sovereignty.

Graphic Packaging fails to come to grips with the logical flaw in its argument that the states intended to fend off federal preemption of their taxing sovereignty by voluntarily surrendering that taxing sovereignty to a state collective, especially a state collective unequipped to deal with the delegation of that sovereign

authority. Experienced lawmakers would have assumed that the Compact's apportionment methods, like other tax rules, would likely need to change and adapt over time. Yet any attempt to change in the Compact's formula, if binding, would have faced obvious difficulties. Even if all the compact members were in agreement as to the required change, it would not be sufficient for one state's legislature to repeal and reenact the compact or the binding provision, or even for the majority of legislatures to do so. Rather, all member states would have to repeal the existing compact and then enact a new one with the same agreed-upon variation of the binding provision. The practical as well as political and legal issues with this are numerous. For instance, unless all states acted simultaneously, then during any transition period, there would be multiple binding compacts. Moreover, there would need to be clear rules for how agreement or consensus of the membership is reached on these important tax issues and members would have to be sure that such rules were otherwise consistent with state law and constitutions.

The way binding interstate compacts avoid this kind of fatal rigidity is by establishing a compact organization, providing it with rules for how members will agree, and delegating to the organization the authority and responsibility for determining substantive rules to which the members must comply. These substantive rules can then be varied over time as conditions change and the members agree. But, the Commission is not that kind of organization. Graphic Packaging asks this

court to conclude that state legislators either failed to appreciate the obvious problems which would arise from locking their substantive tax policies into place, with no reasonable prospect for change, or simply decided not to grapple with them.

B. Interpreting this election as binding is not necessary to further the purposes of this Compact or interstate compacts generally.

1. It is illogical to contend that the purpose of state tax uniformity would be furthered by insisting that states must either continue to provide an election for a formula that most states are moving away from, or alternatively, must withdraw from the Compact altogether.

In 1978, the U.S. Supreme Court recognized UDITPA's equally-weighted three-factor formula as "the prevalent practice" among the states. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279 (1978). At the same time, however, the Court recognized that "political and economic considerations vary from state to state," and that states may constitutionally address those considerations by requiring alternative factor weightings, including giving greater weight to or using a single sales or receipts factor. *Id.* As the respondent's brief demonstrates, the trend in state apportionment has been entirely in this direction, even among Compact members. Resp. Br. at 11–12.

A recent survey of states that use formulary apportionment (including property, payroll, and sales factors) to calculate a business-related tax found that 38 of

the 47 states give at least a double weight to the sales factor.[13] Only eight states exclusively require an equally-weighted three-factor formula, as provided for in Article IV of the Compact.[14] Of the 16 current Compact members, only five continue to require the equally-weighted apportionment formula.[15] Nine members require at least a double-weighted sales factor.[16] None of these nine permit the apportionment election of Article III.1.[17] Only one Compact member explicitly allows the election.[18]

Were they faced with the choice of continuing to allow the election of the Compact apportionment formula or withdrawing from the Compact entirely, we must assume that at least some of the present Compact members would choose to withdraw. This, in turn, would make it increasingly difficult for the Commission to continue as a vehicle for promoting uniformity. Ultimately, the Compact's demise would harm uniformity efforts while doing nothing to preserve the availability of

---

[13] *State Apportionment of Corporate Income,* Federation of Tax Administrators, *available at*: https://www.taxadmin.org/assets/docs/Research/Rates/apport.pdf (last visited August 30, 2017).

[14] *Id.*

[15] *Id.* Alaska, Hawaii, Kansas, Montana, and North Dakota.

[16] *Id.* Alabama, Arkansas, Colorado, Dist. of Columbia, Idaho, New Mexico, Oregon, Texas, and Utah. The Texas franchise tax is not imposed on net income. In 2013, Utah, Oregon, and the District of Columbia each repealed the Compact and enacted a version without Articles III.1 and IV. 2013 Utah Laws, c. 462; 2013 Oregon Laws Ch. 407 (SB 307); 2013 District of Columbia Laws Act. 20-130. Michigan repealed the Compact in its entirety in 2014. 2013 SB 156, 2014 Mich. Pub. Acts 282, retroactive to January 1, 2008.

[17] *Supra*, n. 9.

[18] MO. REV. STAT. § 32.200. *Note:* Colorado recognized the election until passage of H.B. 08-1380 (2008 Colo. Sess. Laws 953), signed May 20, 2008, effective for tax years commencing on or after Jan. 1, 2009.

an apportionment election. It would simply be a particularly pyrrhic victory of form over substance.

2. It is not true that if the Compact's apportionment election may be repealed, then no compact in which Texas is a member can have binding provisions.

Graphic Packaging asserts that if the Compact's election provision is determined not to be binding, then there is no non-congressionally approved compact provision that can ever be binding, so the Compact must be construed as binding. But this is a circular argument—that a compact is a contract because it is a compact. As the respondent's Brief on the Merits explains, it is the substance of the provisions contained within a non-congressionally approved compact, rather than the title "compact," which should determine how those provisions are treated. Resp. Br. at 41–42. Of course, the provisions of non-congressionally-approved compacts may create binding mutual obligations, such as when one state sends personnel, parolees, or juveniles into another state subject to various regulatory conditions.

Furthermore, the non-congressionally approved compact cases cited by Graphic Packaging arose from garden-variety disputes either among the members of a compact or between a single state and a third party as to that state's interpretation of the compact. Apart from the cases addressed to the Compact's apportionment election, we have found no case where a third party challenged the consistent

and unanimous position of compact members that their compact created no obligation to that third party.

Even under basic principles of contract law, were they applicable, it is the parties to the contract that determine what the contract means in the event of ambiguity. "Courts rightfully assume that parties to a contract are in the best position to know what was intended by the language employed." *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979). The members of the Multistate Tax Compact are in agreement that Article III.1 does not create a contractual obligation to allow taxpayers to elect the Compact's apportionment formula until and unless the state withdraws. And, as we discuss below, the state courts that have so far rendered final rulings on this issue have unanimously concurred.

II. If this Court stands alone in saying its legislature could not repeal the Compact apportionment election without repealing the entire Compact, Texas would be bound by the election while other states would not—which would not further uniformity.

In considering whether the apportionment election constitutes a binding obligation, this Court is not writing on a clean slate. In California, Minnesota, and Michigan, courts have made final determinations that their legislatures had the authority to repeal the apportionment election without withdrawing from the Compact. *Gillette Co. v. Franchise Tax Board*, 363 P.3d 94 (Cal. 2015) *cert. denied,* 137 S. Ct. 294 (2016); *Kimberly-Clark Corp. & Subs. v. Comm'r of Revenue*, 880

N.W.2d 844 (Minn. 2016), *cert. denied,* 137 S. Ct. 598 (2016); *Gillette Commercial Operations N. Am. v. Dep't. of Treasury*, 878 N.W.2d 891 (Mich. Ct. App. 2015), *appeal denied,* 880 N.W.2d 230 (Mich. 2016), *cert. denied,* 137 S. Ct. 2157 (2017).

While this court is free to disagree, it cannot, by doing so, create the kind of uniformity that Graphic Packaging claims to want. Graphic Packaging argues that it should be allowed to use the Compact's formula because "[p]ermitting taxpayers to use the same apportionment formula in every state … secures base line uniformity and compatibility." Pet. Br. at 47. Whatever merit that argument might have had prior to the decisions in California, Minnesota, and Michigan, a uniform interpretation of the Compact in favor of a binding election is no longer possible. In California, Minnesota, and Michigan, Graphic Packaging will be required to use whatever mandatory apportionment formula each state requires. Nor does there appear to be any compelling justification for why Texas should be restricted in this way while its sister states have more flexibility under the same Compact. As with interpreting uniform laws generally, the decisions of other states should be given additional weight here. *See Nathan v. Whittington,* 408 S.W.3d 870, 873 (Tex. 2013).

CONCLUSION

As the U.S. Supreme Court noted in *U.S. Steel*: "The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution." *U.S. Steel*, 434 U.S. at 470 (quoting *People of State of N. Y. v. O'Neill*, 359 U.S. 1, 6 (1959)). For 50 years, the Compact has been a primary vehicle for promoting uniformity and compatibility in state business taxes through the only means demonstrated to have lasting viability: voluntary, cooperative state effort. Graphic Packaging's position—that state legislatures wishing to vary the Compact's apportionment formula must first withdraw from the Compact—would certainly disrupt, and likely destroy, the Compact's ability to continue promoting uniformity through the Commission, while, ironically, doing nothing to preserve uniformity in apportionment methods generally. With respect to the question—is the Compact election binding—this court should hold that it is not.

Dated: August 30, 2017

Respectfully submitted,

/s/ Sheldon H. Laskin

Sheldon H. Laskin*
Counsel

Multistate Tax Commission
444 North Capitol St., N.W.
Suite 425
Washington, D.C. 20001
(202) 650-0300
slaskin@mtc.gov

* *pro hac vice* admission pending

Counsel for Amicus Curiae
Multistate Tax Commission

CERTIFICATE OF COMPLIANCE

1. This brief complies with the word-count limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because it contains 3,941 words, excluding the parts of the brief exempted by Rule 9.4(i)(1).

2. This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

s/ Sheldon H. Laskin

CERTIFICATE OF SERVICE

The undersigned certifies that on August 30, 2017, a copy of the foregoing brief was sent by electronic service to appellate counsel of record:

Amy L. Silverstein
asilverstein@sptaxlaw.com
Silverstein & Pomerantz, LLP
12 Gough Street, 2nd Floor
San Francisco, California 94103

Wallace B. Jefferson
wjefferson@adjtlaw.com
Rachel A. Ekery
rekery@adjtlaw.com
Dana Livingston
dlivingston@adjtlaw.com
Alexander Dubouse
Jefferson & Townsend, LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701

Counsel for Petitioner

Rance Craft
rance.craft@texasattorneygeneral.gov
Assistant Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548

Cynthia A. Morales
cynthia.morales@texasattorneygeneral.gov
Assistant Attorney General
Office of the Attorney General
Financial & Tax Litigation Division
P.O. Box 12548
Austin, Texas 78711

Counsel for Respondents

s/ Sheldon H. Laskin