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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

HEALTH NET, INC. AND SUBSIDIARIES, Plaintiffs-Appellants, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant-Respondent.	Tax Court No. 5127 Supreme Court No. S063625

RESPONDENT'S BRIEF

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

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2016

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STATEMENT OF THE CASE

Defendant-Respondent, Department of Revenue ("department"), accepts Sections A to D and G of the Statement of the Case of Plaintiffs-Appellants Health Net, Inc., and Subsidiaries ("HealthNet").

Questions Presented on Appeal

1. Does ORS 314.606 impair the obligation of contracts in violation of Article I, section 21, of the Oregon Constitution?
2. Does ORS 314.606 impair the obligation of contracts in violation of Article I, section 10, clause 1, of the United States Constitution?
3. Did the legislative process employed in adopting ORS 314.606 violate Article IV, section 22, of the Oregon Constitution?

Summary of Argument

This case involves a principle central to legislative authority—the principle that one legislature ordinarily may not prohibit future legislatures from amending or repealing laws. HealthNet argues that the 1967 Legislature, by adopting ORS 305.655, the Multistate Tax Compact (the "tax compact"), precluded future legislatures from opting out of two provisions in ORS 305.655. In particular, according to HealthNet, the 1967 Legislature prohibited future legislatures from opting out of Articles III.1 and IV unless all provisions in ORS 305.655 were repealed. The Tax Court correctly concluded otherwise.

Article III.1 of ORS 305.655 provides that a multistate income taxpayer "may elect to apportion and allocate his income in the manner provided by the laws of such state * * * without reference to this compact, or may elect to apportion and allocate in accordance with Article IV." Article IV.9 apportions business income to Oregon using a formula that gives equal weight to property, payroll, and sales.

Two years before Oregon adopted ORS 305.655, Oregon adopted the Uniform Division of Income for Tax Purposes Act ("UDITPA"), ORS 314.605 to 314.675. ORS 314.650 (1965) prescribed the same equally-weighted three-factor formula as Article IV.9. However, effective in 1991, following many other states, Oregon amended ORS 314.650, giving the sales factor more weight than property and payroll. As of 1991, then, the apportionment formula in ORS 314.650 diverged from the formula in Article IV.9 of ORS 305.655.

In 1993, the legislature adopted ORS 314.606, which provides: "In any case in which the provisions of ORS 314.605 to 314.675 are inconsistent with the provisions of ORS 305.655, the provisions of ORS 314.605 to 314.675 shall control." On appeal, it is undisputed that, by adopting ORS 314.606, the legislature intended to mandate use of the sales-weighted formula in ORS 314.650 and preclude taxpayers from electing the equally-weighted three-factor formula in Article IV.9. HealthNet nonetheless attempts to rely on the tax compact's formula for tax years 2005 to 2007, claiming that the formula entitles it to a tax refund exceeding

$450,000, plus interest. HealthNet's position is that ORS 314.606 is unconstitutional under Article I, section 21, of the Oregon Constitution (the "Oregon Contract Clause"); Article I, section 10, clause 1, of the United States Constitution (the "Federal Contract Clause"); and Article IV, section 22, of the Oregon Constitution. Yet ORS 314.606 is valid under each constitutional provision.

HealthNet primarily argues that, in adopting ORS 305.655, the 1967 Legislature entered a contractual agreement with other states to be bound by Articles III.1 and IV until and unless a future legislature repealed ORS 305.655 in its entirety. That is, HealthNet argues that because ORS 314.606 disabled Articles III.1 and IV without repealing ORS 305.655 altogether, ORS 314.606 violates a contractual agreement that the 1967 Legislature made by adopting ORS 305.655. But under the Oregon and Federal Contract Clauses, intent to prevent future legislatures from superseding an earlier law must be clear and unmistakable.

ORS 305.655, however, says nothing that unmistakably prohibits amendment of, or partial withdrawal from, Articles III.1 and IV. The tax compact creates the Multistate Tax Commission (the "Commission"), an advisory body that has no power to bind any member state, and includes uniform laws that any state could adopt in the absence of the tax compact. Nothing in the tax compact shows unmistakable intent by the states to waive their reserved sovereign power of taxation, and many members' constitutions expressly prohibited contractual suspension of that power. The history of the tax compact, moreover, demonstrates the member states adopted the tax compact to *preserve* their sovereign tax powers. The states' course of performance likewise shows that the tax compact did not prohibit member states from modifying or opting out of Articles III.1 and IV. As a result, ORS 314.606 did not impair any contractual rights belonging to any states that joined the compact. ORS 305.655 also says nothing that unmistakably grants taxpayers contractual rights. For those reasons alone, ORS 314.606 comports with the Oregon and Federal Contract Clauses.

But even if Oregon had any contractual obligations to HealthNet under Article III.1, the actions of a majority of member states disabling or amending Articles III.1 and IV support contractual defenses of waiver and material breach. In other words, the actions of other states released Oregon from any alleged contractual obligations before HealthNet invoked Article III.1 in 2010.

Alternatively, ORS 314.606 did not unconstitutionally impair any contractual obligation because no *substantial* impairment occurred. No substantial impairment arises merely because of the *way* Oregon disconnected from Articles III.1 and IV in 1993. HealthNet would have had no contractual rights after 1993 if Oregon repealed all of ORS 305.655 and readopted the tax compact without Articles III.1 and IV. Because ORS 314.606 had the same effect, HealthNet had no legitimate expectation, for tax years 2005 to 2007, that Articles III.1 and IV remained available to it.

Moreover, if ORS 314.606 had substantially impaired any contractual obligation to HealthNet, ORS 314.606 would not violate either the Oregon or Federal Contract Clause because ORS 314.606 was reasonable and necessary for an important public purpose. The 1993 passage of ORS 314.606 was a reasonable and necessary way of countering changes in the tax laws of other states that began giving greater weight to the sales factor and that thus provided an incentive for companies to locate payroll and property in those states. ORS 314.606 promoted economic investment in Oregon and put Oregon-based taxpayers on the same footing as taxpayers based in those other states.

Finally, adoption of ORS 314.606 did not violate Article IV, section 22, which prohibits the legislature from amending or revising any act "by mere reference to its title." Though ORS 314.606 impliedly precludes taxpayers subject to ORS 314.650 from choosing the formula in ORS 305.655, Article IV, section 22, permits implied amendment and repeal.

RESPONSE TO ASSIGNMENT OF ERROR

The Tax Court correctly held that ORS 314.606 violated no provision of the Oregon or United States Constitution.

Preservation of Error

HealthNet preserved its arguments.

Standard of Review

On appeal from a grant of summary judgment, this court reviews for errors of law. ORS 305.445 (2013); *Tektronix, Inc. v. Dept. of Rev.*, 354 Or 531, 533, 316 P3d 276 (2013).

ARGUMENT

HealthNet initially filed tax returns for 2005 to 2007 using the formula in ORS 314.650(1)[1] for apportioning a multistate company's business income to Oregon. But on amended returns filed in 2010, HealthNet claimed it was entitled to a refund for the taxes it had paid for 2005 to 2007; it reasoned that Article III.1 of ORS 305.655 entitled it to use instead the formula in ORS 305.655, Article IV.9—the tax compact formula that, compared to ORS 314.650's formula,

[1] As adopted in 1965, ORS 314.650 prescribed the equally-weighted three-factor formula based on property, payroll, and sales. In 1989, following many other states, Oregon amended ORS 314.650 by double-weighting the sales factor, effective in 1991. *See* 1989 Or Laws, ch 1088, § 1 (HB 2643); SER-17-21. In 2001, Oregon amended ORS 314.650, weighting the sales factor 80 percent effective 2003. Or Laws 2001, ch 793, § 1. In 2005, Oregon again amended ORS 314.650, mandating use of a formula based solely on sales for tax years beginning on or after July 1, 2005. Or Laws 2005, ch 832, §§ 48-49. The 2005 amendments superseded 2003 amendments that would have increased the sales factor to 90 percent for tax years beginning 2006 and 100 percent beginning 2008. *See* Or Laws 2003, ch 739, §§ 1, 5.

would have reduced HealthNet's Oregon tax liability for 2005 to 2007 by over $450,000. ER-173-174.[2]

Article III.1 provides, in part:

> "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 state 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 election for any tax year may be made in all party states or subdivisions thereo f or in any one or more of the party states or subdivisions thereof without reference to the election made in the others."

Before 1993, Article III.1 of ORS 305.655 arguably permitted HealthNet to use the formula in Article IV.9 instead of ORS 314.650. In 1993, however, the legislature adopted ORS 314.606, which provides: "In any case in which the provisions of ORS 314.605 to 314.675 are inconsistent with the provisions of ORS 305.655, the provisions of ORS 314.605 to 314.675 shall control."

HealthNet concedes that—as a matter of statutory construction—ORS 314.606 requires HealthNet to apportion its income using the formula in ORS 314.650. App Br at 18 ("The Tax Court interpreted ORS 314.606 to override the Compact's election and apportionment formula. Plaintiffs do not appeal that

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[2] The department currently estimates that other taxpayers' pending refund claims similar to HealthNet's for tax years before 2013 would exceed $100 million if allowed.

conclusion."). Instead, HealthNet argues that ORS 314.606 is invalid under Article I, section 21, of the Oregon Constitution (the "Oregon Contract Clause"); Article I, section 10, clause 1, of the United States Constitution (the "Federal Contract Clause"), and Article IV, section 22, of the Oregon Constitution.[3]

The Tax Court correctly held that ORS 314.606 violated neither the Oregon nor Federal Contract Clauses, nor Article IV, section 22. This court should affirm.

I. ORS 314.606 does not impair the obligation of contracts under the Oregon Constitution.

HealthNet argues that ORS 314.606 violates the Oregon Contract Clause, which provides: "No * * * law impairing the obligation of contracts shall ever be passed." Or Const, Art I, § 21. HealthNet's argument depends on its assertion that

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[3] As HealthNet acknowledges and the Tax Court correctly held, ORS 314.606 cannot violate a fourth constitutional provision—Article I, section 10, clause 3, of the United States Constitution (the "Compact Clause")—because the tax compact neither required nor received congressional consent. *See United States Steel Corp. v. Multistate Tax Comm'n*, 434 US 452, 98 S Ct 799, 54 L Ed 2d 682 (1978) (holding tax compact did not enhance state power with respect to federal government and therefore did not require congressional consent); App Br at 26; ER-222-235. Since the Compact Clause does not apply to a non-congressionally-approved compact, ORS 305.655 "must be construed as state law." *McComb v. Wambaugh*, 934 F2d 474, 479 (3d Cir 1991). Thus, though HealthNet cites cases addressing a miscellany of other compacts for the proposition that "party states no longer have sovereignty to legislate inconsistently" with the terms of a compact, the alleged contractual status of Article III.1 matters here only if ORS 314.606 violates the Oregon or Federal Contract Clause. App Br at 39. *See MacPherson v. DAS*, 340 Or 117, 127, 130 P3d 308 (2006) (noting "limitations on legislative power must be grounded in specific provisions of either the state or federal constitutions," and "even implied limitations must find their source in some constitutional provision").

the 1967 Legislature intended Articles III.1 and IV as contractual obligations that no future legislature could supersede except by repealing ORS 305.655 in its entirety.

To determine if a legislative enactment violates the Oregon Contract Clause, the court addresses

> "the following questions: (1) is there a contract?; (2) if so, what are its terms?; (3) what obligations do those terms require?; and (4) has the state impaired an obligation of that contract?
>
> We normally answer those questions by applying general rules of contract law. But if the state is alleged to be a party to the contract, we supplement the general rules of contract law with additional considerations informed by the state's role serving the public."

Moro v. State, 357 Or 167, 194, 351 P3d 1 (2015) (internal citation omitted). Furthermore, "the laws in existence when a contract is formed define the obligation of that contract." *Eckles v. State of Oregon*, 306 Or 380, 399 n 18, 760 P2d 846 (1988).

When the state allegedly is a contracting party, "the intention to surrender or suspend legislative control over matters vitally affecting the public welfare cannot be established by mere implication. We * * * treat a statute as a contractual promise only if the legislature has *clearly and unmistakably* expressed its intent to create a contract." *Moro*, 357 Or at 195 (emphasis added; internal quotations and citations omitted); *see Strunk v. PERB*, 338 Or 145, 239, 108 P3d 1058 (2005) (Balmer, J., concurring) (describing "clear, unambiguous, and unmistakable promissory intent" as “polestar” of Contract Clause analysis). The rule demanding “clear and unmistakable contractual intent” applies not only to “the question of whether there is an offer to form a contract,” but also “to whether a particular provision is a term of that offer.” *Moro*, 357 Or at 202.

Applying the foregoing principles, ORS 314.606 does not impair any contractual obligations. Oregon did not unmistakably promise other states or taxpayers that it would allow an election under Article III.1 until it repealed all of ORS 305.655. Instead, ORS 305.655’s text shows that the states intended to form an advisory commission and that they intended Articles III.1 and IV as nonbinding uniform laws. The history of the tax compact likewise shows the states intended to *preserve* their sovereignty, not cede it. The member states’ course of performance also confirms they have viewed Articles III.1 and IV as nonbinding uniform laws.

But even if the tax compact showed the states agreed not to unilaterally exempt themselves from Article III.1, ORS 314.606 does not impair the obligation of contracts. First, the states’ course of performance supports defenses of waiver or material breach that excuse any obligations under Articles III.1 and IV. Alternatively, if ORS 314.606 technically impaired contractual obligations to taxpayers, prospective application of ORS 314.606 does not substantially impair any obligations and therefore does not violate Article I, section 21. Oregon was free to repeal the tax compact at any time and reenact it without Articles III.1 and

IV. ORS 314.606 achieves the same result. Moreover, if any impairment were substantial, ORS 314.606 does not violate Article I, section 21, because it is reasonable and necessary for an important public purpose.

A. Because the tax compact does not prohibit the states from unilaterally exempting themselves from Articles III.1 and IV, ORS 314.606 did not impair the obligation of contracts.

Although ORS 305.655 enacts a "compact," its use of that term does not automatically demonstrate that the state entered into a binding contract—either with other states or with taxpayers who might benefit from ORS 305.655—by enacting the statute. More to the point, the statute's use of the word "compact" does not demonstrate that ORS 305.655 embodies an enforceable contractual promise that Oregon would abide by Article III.1 until and unless it repealed ORS 305.655 in its entirety. Instead, courts must read each provision of ORS 305.655 in context and in light of the tax compact's history to assess whether that provision is an unmistakable contractual promise binding future legislatures until the legislature repeals the entirety of ORS 305.655. Here, the tax compact's text, other states' constitutions, the history of the tax compact, and the member states' course of performance confirm that Articles III.1 and IV are not contractual terms.

1. Nothing in the tax compact's text prohibits states from opting out of individual provisions (including Article III.1).

The tax compact allows any state to withdraw at any time. Article X.2 provides: "Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal."

HealthNet mistakenly argues that Article X.2 "does not allow piecemeal alteration or elimination of Compact provisions." App Br at 30. To the contrary, the withdrawal provision says nothing that prohibits the states from deleting or amending Articles III.1 or IV. *See* ORS 174.010 (court may not "insert what has been omitted"). Although Article X.2 describes a method a state may use to withdraw from the compact as a whole,[4] it does not purport to address whether or how a state may opt out of a particular provision in the compact, much less prohibit a state from doing so. *See Gillette Co. v. Franchise Tax Bd.*, 62 Cal 4th 468, 480-81, 363 P3d 94, 101 (2015), *petition for cert. filed* (US May 27, 2016) (No. 15-1442) (holding that nothing in Article X.2 limits "a member state's ability to unilaterally modify the Compact" and that "no express language of the

[4] Holding that the withdrawal provision rendered all promises under the compact illusory, the Tax Court concluded that no part of the tax compact formed a contract. ER-205. Though this court may consider the Tax Court's holding that all promises in the compact were illusory, it need not. As the Tax Court correctly held, even if the states provided adequate consideration for some parts of the tax compact, the provisions at issue here, Articles III.1 and IV, were not binding promises. ER-206.

Compact * * * proscribes unilateral amendment"); *cf. Northeast Bancorp v. Board of Governors*, 472 US 159, 175, 105 S Ct 2545, 86 L Ed 2d 112 (1985) (expressing "doubt as to whether there is an agreement amounting to a compact" when "each State is free to modify or repeal its law unilaterally").[5]

Nothing else in the language of the tax compact shows that the members unmistakably intended to *contractually guarantee* uniformity by adopting Articles III.1 and IV—that is, that each state intended to promise the others that it would remain bound to Articles III.1 and IV *unless* it repealed the compact in its entirety. HealthNet refers to the purposes described in Article I as "secur[ing] base-line uniformity." App Br at 31. Though ORS 305.655, Article I.2 provides that one

[5] In *Gillette*, the California Supreme Court concluded the tax compact was not a binding interstate agreement, relying on indicia of interstate compacts identified in *Northeast Bancorp*: prohibition on unilateral action, reciprocal obligations among member states, and creation of an organization with regulatory powers. *See also Seattle Master Builders v. Pacific Northwest Elec. Power*, 786 F2d 1359, 1363 (9th Cir 1986) ("indicia" of compact include "establishment of a joint organization for regulatory purposes; conditional consent by member states in which each state is not free to modify or repeal its participation unilaterally; and state enactments which require reciprocal action for their effectiveness"). In the Tax Court, the department made substantially the same arguments upheld in *Gillette*. Defendant's Cross-Motion for Summary Judgment and Response, filed April 8, 2014 ("Defendant's Cross-Motion") at 31-37. The Tax Court determined the indicia in *Northeast Bancorp* were "irrelevant" because they were analyzed in the context of the Compact Clause. ER-224. But *Gillette* is correctly decided because the same indicia show the states never intended Article III.1 as a binding contractual term.

purpose of the compact is to "[p]romote uniformity or compatibility in significant components of tax systems," promoting is not guaranteeing.[6]

Nor do the tax compact's descriptions of the Commission's powers show that the states unmistakably intended to contractually secure uniformity. Under Articles VI and VII, the Commission makes "*proposals* for uniform state tax laws [and] regulations"—proposals that are merely "advisory" and "have no force in any state until adopted by that state in accordance with its own laws." *Multistate Tax Comm'n v. Merck & Co., Inc.*, 289 Or 717, 724, 617 P2d 1371 (1980) (emphasis added). That is consistent with the conclusion that the tax compact as a whole, including Articles III and IV, was not intended as a set of binding contractual provisions.

HealthNet argues that Article VIII.1 implies that the states intended Articles III.1 and IV as contractual terms. App Br at 29. Article VIII.1 provides: "This Article shall be in force only in those party states that specifically provide therefor by statute." HealthNet incorrectly infers that omission of similar language from all other articles means all other articles are mandatory contractual terms. Instead, Article VIII.1 exists for a reason peculiar to Article VIII. Under Article VIII, the Commission has authority to conduct audits only as agent for a state and to

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[6] Moreover, Oregon's version of UDITPA, ORS 314.610 to 314.670, similarly must be "construed so as to effectuate its general purpose to make uniform the law of those states which enact it." ORS 314.605(2).

charge that state for such activity. *See Merck*, 289 Or at 724 (holding audit under Article VIII "is essentially an Oregon audit performed under Oregon law by the Oregon Department of Revenue acting for convenience through its agent, the Multistate Tax Commission * * *)"; *Gillette*, 363 P3d at 103 (Commission's audit power "exists solely at the pleasure of each member state"). That the compact requires states to adopt a separate statute to make Article VIII of the compact effective does not suggest that the compact somehow prohibited states—after they had adopted the compact as a whole—from later opting out of an individual provision in the compact.

Finally, Article XII provides that "[t]he provisions of this compact shall be severable." Article XII shows that Articles III.1 and IV were not inseparable parts of the compact. Nothing in the compact unmistakably prevents the members' legislatures from omitting Articles III.1 and IV in the first instance while continuing to participate in the compact in other respects, or from amending or disabling them later.[7]

[7] HealthNet also asserts that ORS 314.710—which was enacted in 1967—"confirmed availability of the Compact election." App Br at 14. But ORS 314.710, like ORS 314.695, merely notes that UDITPA applies to corporations and nonresident individuals and not to resident individuals, estates, and trusts. It neither shows that the 1967 Legislature unmistakably intended Articles III.1 and IV as contractual terms, nor that those Articles could somehow withstand the subsequent adoption—in 1993—of ORS 314.606. *See* App Br at 18.

Because no provision of ORS 305.655 unmistakably waives the sovereign tax power, Oregon must be presumed to have reserved that power. *See United States v. Winstar Corp.*, 518 US 839, 878, 116 S Ct 2432, 135 L Ed 2d 964 (1996) (plurality opinion) ("unmistakability [is] needed for waiver, not reservation" of sovereign power). Even when this court has held that a statute contains an explicit contractual promise to exempt state employees' retirement benefits from all taxes "heretofore or *hereafter* imposed," it has construed the exemption narrowly to apply only to benefits for work performed before the statute's repeal. *Hughes v. State*, 314 Or 1, 28, 838 P2d 1018 (1992) (court's emphasis). Here, the tax compact's silence on amendment or partial repeal must be construed in favor of each state retaining its sovereign tax power. *Cf. Tarrant Reg'l Water Dist. v. Herrmann*, 569 US___, 133 S Ct 2120, 2133, 186 L Ed 2d 153 (2013) (holding "the better understanding of [another compact's] silence is that the parties drafted [it]" in light of background rule that states do not cede sovereign powers). Accordingly, the text of ORS 305.655 does not unmistakably prohibit states from exempting themselves from Articles III.1 and IV. The compact's text thus shows that ORS 314.606—in exempting the state from Article III.1 and IV—does not violate the Oregon Contract Clause.

2. Many member states' constitutions support the conclusion that the states did not intend to prohibit each other from opting out of Article III.1.

The preexisting laws of many member states also undermine any inference that member states collectively intended Articles III.1 and IV to bind each state until that state repealed the entire compact. The constitutions of fourteen current and former member states, including half the current members, prohibit contractual suspension or surrender of the taxing power.[8] The sovereign tax power encompasses not only whether to tax, but how to tax, including use of an apportionment formula. Any interpretation of Articles III.1 and IV that views the states as unmistakably promising each other—and multistate taxpayers—that their legislatures were powerless to modify or eliminate Articles III.1 and IV without repealing the entire compact would exceed the constitutional provisions of a significant number of compact members. *See Jefferson Branch Bank v. Skelly*, 66 US (1 Black) 436, 448, 17 L Ed 173 (1862) (noting states may not contract by legislation to release exercise of tax power when "prohibited in terms by state constitutions"). Thus, the member

[8] *See* Alaska Const, art IX, § 1; Ark Const, art 16, § 7; Cal Const, art XIII, § 31; Haw Const, art VII, § 1; Ill Const, art IX, § 1; Mich Const, art IX, § 2; Minn Const, art X, § 1; Mo Const, art X, § 2; Mont Const, art VIII, § 2; ND Const, art X, § 2; SD Const, art XI, § 3; Tex Const, art VIII, § 4; Wash Const, art VII, § 1; Wyo Const, art 15, § 14. Other states' constitutional prohibitions historically arose to prevent legislative contracts allowing particular corporations or individuals permanent tax exemptions. But the "decision to address a narrow problem with a broader solution is not unusual." *Tektronix*, 354 Or at 545.

states' constitutions show the states did not collectively intend to prohibit each other from opting out of Article III.1.

3. The history of the tax compact shows that member states intended to preserve their tax powers, supporting the conclusion that the tax compact does not prohibit states from departing from Article III.1.

The tax compact's history also refutes the argument that Articles III.1 and IV were unmistakably intended as binding terms, rather than as uniform laws that could be amended or deleted by successive legislatures. "The origin and history of the Multistate Tax Compact are intimately related and bound up with the history of the states' struggle to *save* their fiscal and political independence from encroachments of certain federal legislation" proposed by Congress in the 1960s. ER-67 (emphasis added). The states did not intend to protect their sovereign tax powers from federal interference only to surrender them to other states—or taxpayers.

The history of the tax compact also indicates that, by including UDITPA's apportionment formula in Article IV, the states were encouraging adoption of "proposed uniform state legislation," not binding themselves contractually. ER-110; *see Gillette*, 363 P3d at 100 (holding Article III.1 "more akin to the adoption of a model law rather than the creation of any mutual obligations among Compact members”).[9] Article IV was merely one vehicle among others for promoting UDITPA, not a binding promise.

HealthNet, however, describes the tax compact as a “deal struck” in which the states agreed to “binding uniformity to stave off federal preemption.” App Br at 17. HealthNet tries to support that characterization by noting that, in the wake of the tax compact’s creation, Congress did not in fact preempt state tax apportionment methods. But one cannot infer the member states’ contractual intent from inaction of Congress, a nonparty. Congressional inaction does not even reveal *Congress’* intent.[10] Nor can one infer that any particular aspect of the compact, including its alleged contractual status, was responsible for such inaction.[11]

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[9] *See, e.g.*, 1968 Op Atty Gen Wash No 22, 1968 WL 90977 (describing option to use Article IV as “essentially a uniform act”); Brief of Multistate Tax Commission in *United States Steel Corp. v. Multistate Tax Commission*, United States Supreme Court No. 76-635, 1977 WL 189138 at *8, *42 (describing Articles III and IV as “essentially a uniform act” and declaring “each state has retained complete and absolute control over its own tax system”). Other state courts construing the tax compact also held it was “never intended by anyone to be a substantive taxation statute.” *Goldberg v. State Tax Comm’n*, 639 SW2d 796, 799 (Mo 1982); *Burton Mfg. Co. v. State*, 469 So2d 620, 622 (Ala Civ App 1985) (citing *Goldberg*); *Land O’Frost, Inc. v. Pledger*, 823 SW2d 887, 890 (Ark 1992) (same).

[10] *See United States v. Price*, 361 US 304, 312, 80 S Ct 326, 4 L Ed 2d 334 (1960) (“Whether Congress thought the proposal unwise * * * or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of Congress to act.”).

[11] Federal proposals to regulate state taxation of multistate corporations failed many times before *and after* 1967. *See, e.g.*, *US Steel*, 434 US at 456 n 4. Moreover, many income tax states separately had adopted UDITPA before the model tax

In short, the history of the tax compact demonstrates that the states unmistakably entered into the compact to *preserve* their powers to control their own substantive tax policies, not cede them. ER-86; ER-110. Nothing in the tax compact's history indicates that it was a bargain with Congress—much less taxpayers, many of whom subsequently challenged the tax compact's validity. *See US Steel*, 434 US at 458 & 458 n 7; *Kinnear v. Hertz Corp.*, 545 P2d 1186 (Wash 1976).

4. The states' course of performance shows that the tax compact did not prohibit states from exempting themselves from Articles III.1 and IV.

The states' course of performance confirms that the states never intended Articles III.1 and IV to bind a state until that state withdrew from the entire compact. Generally, "[t]he parties to an agreement know best what they meant, and their action under it is often the strongest evidence of the meaning." *Restatement (Second) of Contracts* § 202, cmt. g (1981). The US Supreme Court has considered the parties' "'course of performance under [a compact] [a]s highly significant' evidence of [their] understanding of the compact's terms." *Tarrant*, 569 US at___, 133 S Ct at 2135 (quoting *Alabama v. North Carolina*, 560 US 330, 346, 130 S Ct 2295, 176 L Ed 2d 1070 (2010)). This court likewise considers the course of

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compact was proposed: By December 1966, "14 of the 38 income tax states" had adopted UDITPA, including Oregon. ER-46.

performance when construing an ambiguous contract. *See Yogman v. Parrott*, 325 Or 358, 364, 937 P2d 1019 (1997) (in examining extrinsic evidence, "parties' practical construction of an agreement may hint at their intention"); *Tarlow v. Arntson*, 264 Or 294, 300, 505 P2d 338 (1973) (holding how parties "conducted themselves in relation to the agreement is instructive in our determination of what must have been intended"); *Perkins v. Standard Oil Co.*, 235 Or 7, 15, 383 P2d 107 (1963) (looking to course of conduct "where performance covered a course of years and involved extensive efforts").

The member states' course of performance demonstrates that they have long allowed each other to eliminate or override Articles III.1 and IV while continuing to participate as full compact members. The member states' actions show they did not view the compact as embodying a contractual promise that states could opt out of those articles *only* by repealing the compact in its entirety. For example, in 1972, after Florida deleted Articles III and IV,[12] the states' representatives to the Commission unanimously declared that "Florida be recognized as a regular member

[12] *See* 1971 Fla Laws, ch 71-980, § 1. Florida deleted Articles III and IV and adopted an apportionment formula using a double-weighted sales factor. *See* Fla Stat § 220.15(4); 1971 Fla Laws, ch 71-984, § 1 (eff. Jan. 1, 1972). Florida simultaneously allowed taxpayers to request a refund of the amount in excess of the tax that would have been imposed under the equally-weighted three-factor formula—but only if the taxpayer could establish that its net income subject to tax by Florida and all other states exceeded 100 percent of its taxable income. *See id*. App-1-10. Article III.1 contained no such restriction. Florida withdrew from the compact in 1976. SER-6.

in good standing of the Multistate Tax Compact and the Multistate Tax Commission." SER-1. This explicit course of conduct is significant. It reflects the intentions of the then-members soon after the tax compact became effective. In addition, some compact jurisdictions, including California, Minnesota, and the District of Columbia, adopted the tax compact afterwards, presumably aware of this background.[13]

Between 1987 and 2009, seven states—Minnesota, Oregon, California, Idaho, Arkansas, Texas, and Colorado—adopted laws that eliminated, disabled, or superseded Article III.1, and the Commission continued to recognize those states as full-fledged members. Minnesota deleted Articles III and IV from Minn Stat § 290.171 in 1987 and increased the sales factor's weight.[14] Oregon adopted ORS 314.606 in 1993.[15] California[16] and Idaho[17] each adopted statutes mandating use of a

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[13] The Commission's continued acceptance of Florida was publicly declared not only in the 1972 resolution, but also in its annual reports. SER-4 (noting Florida had deleted UDITPA from tax compact and declaring that its "corporate income tax statute is substantially in accord with UDITPA").

[14] 1987 Min Laws 1039, 1098-1112; Minn Stat § 290.171 (1987) (deleting Articles III and IV); 1987 Minn Laws 1039, 1112-1119; Minn Stat § 290.191 (1987) (superweighting sales factor). The Minnesota Tax Court upheld Minnesota's elimination of Articles III and IV. *See 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). While Kimberly-Clark's case was pending, Minnesota withdrew from the tax compact in 2013. 2013 Minn Laws, ch 143, art 13 § 24.

[15] Oregon also directly amended Article IV.6 in 1989. *See* 1989 Or Laws, ch 625, § 75. That provision is not at issue here. In 2013, the legislature repealed ORS 305.655 and adopted ORS 305.653—the tax compact without Articles III and

double-weighted sales factor "[n]otwithstanding" the tax compact. Arkansas amended the apportionment formula in both Article IV.9 and its separately adopted version of UDITPA.[18] When Texas adopted an alternative franchise tax base that arguably created an income tax subject to Articles III and IV, it simultaneously enacted a statute making the tax compact inapplicable to that tax.[19] In 2008,

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IV. *See* Or Laws 2013, ch 407 (SB 307). The 2013 legislative history demonstrates that the legislature understood that ORS 314.606 already made ORS 314.650's apportionment formula mandatory, and it estimated ORS 305.655's repeal had no revenue or fiscal impact. *See* House Revenue Committee, SB 307-A (Staff Measure Summary) (May 21, 2013), *available at* https://olis.leg.state.or.us/liz/2013R1/Downloads/MeasureAnalysisDocument/20060 (last accessed May 30, 2016). However, knowing the California Court of Appeals had decided a claim similar to HealthNet's in favor of taxpayers, the 2013 Legislature acted "in an abundance of caution" and to "cut off any potential liability." Audio Recording, House Revenue Committee, SB 307-A, May 21, 2013 at 44:57-48:15 (statement of Kate Toswill) & 1:04:59-1:05:30 (statement of Rep. Barnhart), *available at* https://olis.leg.state.or.us (last accessed May 20, 2016). *See Gillette Co. v. Franchise Tax Bd.*, 144 Cal Rptr 3d 555, 207 Cal App 4th 1369 (2012), *rev'd* 62 Cal 4th 468, 363 P3d 94 (2015), *petition for cert. filed* (US May 27, 2016) (No. 15-1442).

16 *See* Cal Rev & Tax Code § 25128(a) (1993); 1993 Cal Stat 946 (SB 1176); *Gillette*, 363 P3d 94. In 2012, "[i]n the wake of the [intermediate California] Court of Appeal's decision, the Legislature passed a bill repealing the Compact." *Gillette*, 363 P3d at 98 n 6.

17 Idaho Code § 63-3027(i)(1); 1994 Idaho Sess Laws 301 (HB 897).

18 *See* Ark Code Ann § 26-5-101 (1995) (amending Article IV.9); Ark Code Ann § 26-51-709 (amending UDITPA formula); 1995 Ark Acts 682.

19 1991 Tex Gen Laws 134, 159-60 (adopting "earned surplus" alternative franchise tax base, an adjusted version of "federal taxable income"); 1991 Tex Gen Laws 134, 162 (providing that "Chapter 141 [the tax compact] does not apply to this chapter [the franchise tax]"). In 2006, Texas repealed the "earned surplus" portion of its franchise tax. 2006 Tex Gen Laws 1, 1-35. In 2015, the Texas Court of Appeals held that the current franchise tax is not an income tax subject to

Colorado deleted Article III.1 and adopted a single-sales factor formula.[20] Since 2009, four other[21] compact members—Utah,[22] Alabama,[23] the District of Columbia,[24] and North Dakota[25]—have amended or repealed and reenacted the tax compact without Articles III and IV. ER 211-212.

"Over the history of the Multistate Tax Commission, the Commission has never expelled or otherwise sanctioned a member state because it adopted a position

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Articles III or IV. *Graphic Packaging v. Hegar*, 471 SW3d 138 (Tex App—Austin 2015), *petition for review filed* (Tex Dec. 14, 2015) (No. 15-0669).

[20] Colo Rev Stat § 24-60-1301 (Article III.1 deleted effective 2009); Colo Rev Stat § 39-22-303.5(2) (2009) (mandating single-sales factor formula for tax years beginning in or after 2009); 2008 Colo Sess Laws 256.

[21] In addition, Michigan has withdrawn. In *International Business Machines Corp. v. Department of Treasury*, 852 NW2d 865 (Mich 2014), four justices held that Article III.1 remained in effect for the tax years at issue as a matter of statutory construction, without addressing constitutional issues. Three justices would have held that the legislature impliedly repealed Article III.1 without violating any constitutional provisions. Subsequently, Michigan retroactively repealed the tax compact. *See* 2014 Mich Pub Acts 282. The Michigan Court of Appeals has upheld that repeal, also finding the compact was advisory and that the repeal did not impair contractual obligations. *See Gillette Commercial Ops. N. Am. & Subs. v. Dep't of Treasury*,___NW2d___, 312 Mich App 394 (2015), 2015 WL 5704567 (appeal pending).

[22] In 2010, Utah amended the apportionment formula in Article IV. 2010 Utah Sess Laws 155, § 1 (amending Utah Code § 59-1-801). In 2013, Utah repealed the tax compact and readopted it without Articles III and IV. 2013 Utah Sess Laws 462, §§ 1, 4.

[23] In 2011, Alabama amended the apportionment formula in Article IV. Ala Code § 40-27-1 (2011); 2011 Ala Acts 2011-616.

[24] In 2013, the District repealed the compact and readopted it without Articles III and IV. 2013 DC Stat 20-61, § 7342; DC Code § 47-411 (2013).

[25] In 2015, North Dakota "amended and reenacted" the compact by deleting Articles III and IV and renumbering the remaining provisions. ND Cent Code § 57-59-01, *as amended by* 2015 ND Sess Laws 446, § 3 (SB 2292).

that varied from that of the model Compact." SER-2. Representatives of states that amended, deleted, or disabled Article III.1 or IV have continued to hold significant Commission positions. SER-7-16. This course of performance demonstrates the states did not intend Articles III.1 and IV to bind a state until it withdrew from the compact entirely. It shows they understood each state was free to modify or repeal those articles, just as it would be with any other legislation promoting uniform laws.

5. The tax compact does not show that the states intended to grant taxpayers contractual rights under Article III.1.

In addition, nothing in ORS 305.655 unmistakably makes taxpayers third-party beneficiaries with contractual rights to enforce Article III.1. Because taxpayers lack contractual rights to enforce Article III.1, ORS 314.606 cannot impair any obligation to HealthNet.

Generally, "a third party's right to enforce a contractual promise in its favor depends on the intention of the parties to the contract." *Sisters of St. Joseph of Peace, Health, & Hosp. Servs. v. Russell*, 318 Or 370, 374, 867 P2d 1377 (1994). Oregon case law recognizes three types of contract beneficiaries: donee beneficiaries, creditor beneficiaries, and incidental beneficiaries. *See id.* at 374-75. Donee and creditor beneficiaries "are entitled to enforce directly contractual promises intended to be for their benefit, even though they are strangers to the contract. Incidental beneficiaries are not so entitled." *Id.* at 375; *see also Aetna Cas.*

& Sur. Co. v. OHSU, 310 Or 61, 65, 793 P2d 320 (1990) ("Absent an intention to confer a contract right upon a third party who has paid no value, the contract will not be interpreted to promise performance to the third-party stranger to the contract even though the stranger may incidentally benefit from the contract."). Because HealthNet is neither a creditor nor donee beneficiary, ORS 314.606 did not impair any contractual obligation to HealthNet.

When construing contracts with a government under the unmistakability doctrine, courts presume that the legislature did not intend to confer contractual rights on third parties. "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries [and thus as possessing no entitlement to enforce the contract] unless a different intention is manifested." *Restatement (Second) Contracts*, § 313, cmt. a; *see also* J. Murray, *Corbin on Contracts* § 45.6 at 92 (rev ed 2007) ("The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity."). Here, nothing in the tax compact suffices to overcome the presumption that the states did not confer contractual rights on nonparty taxpayers such as HealthNet.

HealthNet is not a creditor beneficiary. A person is a creditor beneficiary of a contractual promise when "the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary." *Restatement (Second) Contracts* § 302(1)(a); *see Restatement (First) Contracts* § 133(1)(b); *Sisters*, 318 Or at 375. Oregon has not promised to pay HealthNet any money that another state owes it.

Nor is HealthNet unmistakably a donee beneficiary. For HealthNet to be a donee beneficiary under ORS 305.655, the other member states would have had to intend to confer contractual rights on HealthNet. *See Restatement (First) Contracts* § 133(1)(a) (looking to "purpose of *promisee* in obtaining the promise") (emphasis added); *see Sisters*, 318 Or at 375 (same); *Restatement (Second) Contracts*, § 302(1) ("intended beneficiary" only if "circumstances indicate that the *promisee* intends to give the beneficiary the benefit of the promised performance") (emphasis added). The tax compact reflects no such intent.

Further, nothing in the text or history of the tax compact shows that the purpose of each member state, as alleged promisee, was to require each other member state, as alleged promisor, to confer contractual rights to Articles III.1 and IV on all multistate taxpayers of the promisor state until the promisor state repealed the entire compact. A taxpayer could invoke Article III.1's election in Oregon even when the taxpayer conducted business solely in Oregon and *nonmember* states. Nothing shows that, say, Washington or California unmistakably intended to extract a promise from Oregon to allow a taxpayer doing business solely in Oregon and a nonmember state a contractual right under Article III.1 until Oregon repealed the entirety of ORS 305.655.

Before the Tax Court, HealthNet relied on *General Expressways, Inc. v. Iowa Reciprocity Board*, 163 NW2d 413 (Iowa 1968) to argue that taxpayers are intended beneficiaries of Article III.1. Tr 158:5-159:13. *General Expressways* is distinguishable. There, each state had agreed to impose a specific proration formula, giving up its right to impose a full license fee on interstate carriers. The compact at issue required "approval by the contracting states of any restrictions and modifications." *Id.* at 424. Revocation also required 30-days' notice to all states, which never occurred. *See id.* at 420. Nonetheless, Iowa tried to apply a new proration formula that the other compacting states had not yet approved. Interstate carriers challenged the new formula, and the Iowa Supreme Court held that they had standing to do so. The court reasoned that that compact's formula remained in effect as state law and that the carriers were entitled to invoke it. Here, however, the tax compact contained no provisions requiring approval by member states of any new state-law formula, and Articles III.1 and IV thus did not survive ORS 314.606's passage. *General Expressways* cannot assist HealthNet.[26]

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[26] The Iowa court also cited four cases for the proposition that third parties were intended beneficiaries of other compacts, but none so holds. In *Green v. Biddle*, 21 US (Wheat.) 1, 11, 5 L Ed 547 (1823), heirs' standing to determine their "private rights and interests of lands" under the Kentucky-Virginia compact was not

In sum, HealthNet is at most an incidental beneficiary—the type of beneficiary that is not entitled to enforce a contract. That member states had taxpayers in mind when they adopted Article III.1 is not enough. Nothing in ORS 305.655 shows that Oregon and other member states unmistakably intended to give Oregon taxpayers contractual rights under Article III.1, or that they intended to give taxpayers such rights until Oregon repealed the entirety of the compact.

6. *US Steel* does not hold that each provision of the tax compact is a binding contract until the entire statute is repealed.

HealthNet asserts that in *US Steel* the Court "assumed the Compact was a valid, binding compact." App Br at 26. The Court made no such assumption, nor did it construe the compact under the Federal Contract Clause. Instead, the Court observed that the Compact Clause may apply to informal agreements "effected

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challenged. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 US 92, 58 S Ct 803, 82 L Ed 1202 (1938), a company argued that a congressionally-approved compact determining state water rights *violated* the company's previously adjudicated rights, not that it was a *beneficiary*. In *Interstate Motor Freight System v. Bowers*, 128 NE2d 97 (Ohio 1955), the court—construing an exemption of motor carriers from state mileage taxes under an interstate agreement that Ohio admitted remained in full force and effect—found the exemption covered a later-adopted mileage-based highway use tax. The court did not examine whether the carriers were donee beneficiaries. In *Olin v. Kitzmiller*, 259 US 260, 263, 42 S Ct 510, 66 L Ed 930 (1922), the Court concluded that an Oregon law preventing a noncitizen from obtaining a fishing license did not impair contractual obligations under a compact with Washington, declaring "all other questions may be disregarded."

through reciprocal legislation" when those arrangements enhance state power vis-à-vis the federal government. 434 US at 470. The Court held that the tax compact did not enhance states' power as to the federal government, and thus that the tax compact did not implicate the Compact Clause. It "had no occasion to decide whether the Compact constituted a binding agreement that could not be unilaterally amended by its members." *Gillette*, 363 P3d at 100 n 7.

In fact, the majority held that Article VIII, which permits the Commission to audit on behalf of each state, "amounts to nothing more than reciprocal legislation for providing mutual assistance to the auditors of the member States." *US Steel*, 434 US at 476. The Court's view of the tax compact as reciprocal legislation mirrored the Commission's, which explained in its brief in *US Steel* that the compact

> "does not impose any binding agreement on any state. Any state is free to join or withdraw from the Compact at will * * *. The operative provisions of the Compact are merely reciprocal arrangements among the party states for their mutual benefit in administering their state tax laws as applied to multistate-multinational businesses."

Brief of Appellee Multistate Tax Commission, *United States Steel Corp. v. Multistate Tax Comm'n*, No. 76-635 (July 9, 1977), 1977 WL 189138 at *43-44; *see also id.* at *17 (tax compact "consists solely of uniform laws, an advisory mechanism for the uniform interpretation and application of those laws, and an advisory mechanism for otherwise developing uniformity and compatibility * * *").

Accordingly, nothing in the majority opinion in *US Steel* or that case's history shows that Articles III.1 and IV are contractual terms.

B. Even if the tax compact showed that the states agreed not to unilaterally exempt themselves from Article III.1, ORS 314.606 does not impair the obligation of contracts.

1. Contractual defenses of waiver or material breach release Oregon from any contractual obligations under Article III.1.

Below, the department asserted in the alternative defenses of waiver and material breach, relying on the same facts regarding the states' numerous deviations from Article III.1 and IV discussed above. Defendant's Cross Motion at 46-47. The Tax Court did not need to address the department's defenses. ER-213. But if Articles III.1 and IV were contractual terms, other member states waived or materially breached them, releasing Oregon from any contractual obligation.

The department's contractual defenses of waiver and material breach are available against HealthNet, even if HealthNet were a third-party beneficiary. *See Restatement (First) of Contracts* § 140 (when contract "ceases to be binding in whole or in part because of * * * the present or prospective failure of the promisee to perform a return promise which was the consideration for the promisor's promise, the right of a donee beneficiary * * * under the contract is subject to the same limitation"); *Restatement (Second) of Contracts* § 309(2) ("If a contract ceases to be binding in whole or in part because of * * * present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified”).

a. The states waived any contractual obligation under Article III.1.

Parties to a contract may waive a contractual obligation through unequivocal conduct, and when multiple parties engage in such conduct the contract may be modified by mutual assent and consideration. *See Bennett v. Farmers Ins. Co.*, 332 Or 138, 148, 26 P3d 785 (2001) (“axiomatic” that parties may modify contract by mutual assent supported by consideration). Here, all parties to the compact waived any contractual obligation Articles III.1 and IV may have created when—in 1972—they approved a resolution supporting Florida’s continued participation after Florida deleted Articles III and IV and adopted legislation using a double-weighted sales factor. Thereafter, the compact states also waived any obligation under those Articles by unequivocal conduct—multiple states’ passage of legislation eliminating or modifying Articles III.1 and IV and continued acceptance of those states as Commission members.

b. Alternatively, other states materially breached Articles III.1 and IV.

If one assumes, as HealthNet argues, that Articles III.1 and IV were material contractual terms enforceable by taxpayers until a member state withdrew from the entire compact, the majority of member states’ deletion or amendment of those

Articles constitutes a material breach that discharged future performance of contractual duties under those articles. *See Restatement (First) of Contracts* § 397 ("A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty.").

Under *Restatement (Second) of Contracts* § 237, "[e]xcept as stated in § 240, it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time." According to § 240, when performances under an "exchange of promises can be apportioned into corresponding pairs of part performances * * * a party's performance of his part of such a pair has the same effect on the other's duties to render performance of the agreed equivalent as it would have if only that pair of performances had been promised." Here, any obligations under Articles III.1 and IV represent corresponding pairs of part performances. Breach of Article III.1 and IV by other states therefore excuses Oregon's performance of any obligations under those Articles, without regard to any performance that might be due under any other Article.

2. Even if ORS 314.606 impaired a contractual obligation to HealthNet, that impairment is not substantial and therefore cannot violate Article I, section 21.

Article III.1 never constituted a contractual obligation to other states or HealthNet, and, if it did, Oregon's performance was excused when many other members took similar actions. Accordingly, ORS 314.606 did not impair any contractual obligation to HealthNet. But even if Article III.1 reflected a contractual obligation, ORS 314.606's application to HealthNet did not *substantially* impair an obligation of contract. For that reason also, ORS 314.606 cannot violate Article I, section 21.

"[T]his court has yet to determine whether substantiality of an impairment of a contractual obligation is required to show a violation of Article I, section 21." *Strunk*, 338 Or at 206 (holding impairment would be substantial, assuming without deciding that substantiality is required); *see also Moro*, 357 Or at 228. Here, the court should hold that impairments must be substantial to violate the Oregon Contract Clause and that application of ORS 314.606 in 2010 to tax years 2005 to 2007 does not substantially impair any contractual obligation.

In *Eckles*, the court held that "the framers of the Oregon Constitution intended to incorporate the substance of the federal provision, as it was then interpreted by the Supreme Court of the United States, into the Oregon Constitution, though not necessarily every case decided under the federal provision." 306 Or at 390; *see also*

Moro, 357 Or at 192. Yet the Court's pre-1857 jurisprudence does not resolve whether a contractual impairment violates Federal Contract Clause principles when it is not "substantial." In *Green v. Biddle*, 21 US at 84, Justice Washington forbade "[a]ny deviation" from the contract's terms—"however minute, or apparently immaterial, in their effect upon the contract." But in *Charles River Bridge v. Warren Bridge*, 36 US (11 Pet.) 420, 573, 9 L Ed 773 (1837), the Court declared that state laws may not impair a contractual obligation "by altering it in any *material* part." (Emphasis added.) The Court also often distinguished between the "obligation" of a contract and the "remedy" for its enforcement, sometimes allowing alteration of the remedy if it did not materially affect the obligation. In *Mason v. Haile*, 25 US (12 Wheat.) 370, 378, 6 L Ed 660 (1827), for example, the majority held that laws releasing a debtor from prison did not impair the obligation of a bond contract because the law "act[ed] merely upon the remedy, and that in part only."

Thus, the Court's early Federal Contract Clause jurisprudence does not resolve whether Oregon's framers intended that impairments would violate the Oregon Contract Clause even when they were not substantial. However, this court has followed the remedy-obligation distinction, allowing changes in remedy that leave "every *substantial* right unimpaired." *Evans v. Finley*, 166 Or 227, 234, 111 P2d 833 (1941) (emphasis added); *see also Wilkinson v. Carpenter*, 277 Or 557, 561 P2d 607 (1977) (applying modern Federal Contract Clause analysis). Accordingly, this court's decisions before *Eckles* have recognized a substantiality threshold when contractual remedies are altered.

This court should hold that the substantiality threshold recognized in its prior decisions applies even when a law alters a contractual right and not just the remedy. The "obligation of contracts" refers to "the law which binds the parties to perform their agreement," and in this sense "[n]othing can be more material to the obligation than the means of enforcement." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 US 398, 429-30, 54 S Ct 231, 78 L Ed 413 (1934) (internal citations and quotations omitted). The obligation-remedy distinction therefore is best "viewed as approximating the result of a more particularized inquiry into the legitimate expectations of the contracting parties," since "a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement." *United States Trust Co. of New York v. New Jersey*, 431 US 1, 19 n 17, 97 S Ct 1505, 52 L Ed 2d 92 (1977) (*US Trust*) (describing obligation-remedy distinction as "largely an outdated formalism").

This court should construe the Oregon Contract Clause in light of experience and hold that impairments must be substantial to violate Article I, section 21. *Cf. State v. Lane*, 357 Or 619, 625, 355 P3d 914 (2015) (stating court's "purpose is not to freeze the meaning of the constitutional provision to the time of its adoption").

In determining whether an impairment is substantial, it should follow the same analysis employed by the United States Supreme Court under the Federal Contract Clause, by looking to the "legitimate expectations" of the contracting parties. *US Trust*, 431 US at 19 n 17. As discussed below under the Federal Contract Clause, any impairment here was insubstantial: HealthNet had no legitimate expectation that Oregon could legislatively opt out of Article III.1 in only one way. Disabling Article III.1 in 1993 put HealthNet in the same position for tax years 2005 and 2007 as if Oregon had repealed all of ORS 305.655 and readopted the tax compact without Articles III.1 and IV.

3. Even if any impairment were substantial, it was reasonable and necessary for an important public purpose, and for that reason also ORS 314.606 did not violate Article I, section 21.

ORS 314.606 did not substantially impair any contractual obligation to HealthNet. But even if it did, this court should hold that ORS 314.606 did not violate Article I, section 21, because ORS 314.606 was reasonable and necessary for an important public purpose.

Before *Eckles*, this court recognized the public purpose defense. In *Campbell v. Aldrich*, 159 Or 208, 217, 79 P2d 257 (1938), the court held that "private [contractual] rights must yield to the public welfare" when the police power was exercised for a public purpose through means reasonably adapted for that end. *See also Wilkinson*, 277 Or 557 (following Court's approach in *Blaisdell*). More recently, however, this court has left open whether the Oregon Contract Clause includes a public purpose defense, concluding that, "[a]ssuming, without deciding, that we could recognize a public purpose defense in appropriate circumstances," the state had "failed to demonstrate those circumstances here." *Moro*, 357 Or at 231; *see also Strunk*, 338 Or at 207-8 (concluding circumstances would not satisfy public purpose defense).

This court should hold both that the public purpose defense is inherent in the Oregon Contract Clause and that that defense applies when the state exercises its sovereign tax power. This court already recognizes the rule that the state cannot contractually bargain away its police power. *See Moro*, 357 Or at 195. If "the reservation of the reasonable exercise of the protective power of the state is read into all contracts," one still must determine whether particular legislation is a reasonable exercise of that reserved power. *Blaisdell*, 290 US at 444. The public purpose defense reconciles the principle that the state cannot contract away an essential attribute of its sovereignty with the fact that particular exercises of legislative power may affect existing contractual obligations.

The present case involves the tax power, not the police power. But no principled reason exists to treat the two powers differently when contractual expectations are involved. If an exercise of the reserved tax power advances important public purposes in a manner that is reasonable and appropriate in light of legitimate contractual expectations, it should—as would be true with an appropriate exercise of the police power—be deemed to comport with the Oregon Contract Clause. Considering whether a legislature's exercise of its tax power advances important public purposes in a way that is reasonable and necessary in light of the legitimate expectations of contracting parties recognizes that "the reservation of essential attributes of sovereign power is * * * read into contracts as a postulate of the legal order." *Blaisdell*, 290 at 435.

To be sure, this court has found the state *may* contract away the tax power. *See Hughes*, 314 Or at 14. But the limits of the rule that the state may contract away part of its taxing power have never been defined. The *Hughes* court identified the rule in a handful of Court decisions before 1857—some 4-to-3 decisions—involving tax preferences contained in a particular land grant or corporate charter. *See Dodge v. Woolsey*, 59 US (18 How.) 331, 15 L Ed 401 (1855) (corporate charter); *Piqua Bank v. Knoop*, 57 US (16 How.) 369, 14 L Ed 977 (1853) (same); *Gordon v. The Appeal Tax Court*, 44 US (3 How.) 133, 11 L Ed 529 (1845) (same); *New Jersey v. Wilson*, 11 US (7 Cranch) 164, 3 L Ed 303 (1812) (land grant). Yet the legislature's ability to contract away its tax power cannot be boundless. For example, it would be absurd to infer that, in a contract with a single corporation or a small group of taxpayers who provide a peppercorn of consideration, the state could agree to preclude all future exercise of the tax power over all persons as intended beneficiaries.[27]

This court should hold that the Oregon Contract Clause includes a public purpose defense that examines whether an alleged substantial impairment is reasonable and necessary for an important public purpose. Furthermore, it should apply that defense under the same standards that the United States Supreme Court applies under the Federal Contract Clause. For the reasons discussed under the Federal Contract Clause, the circumstances show that, if ORS 314.606 substantially impaired any contractual obligation to HealthNet, that impairment was reasonable and necessary for an important public purpose: ORS 314.606 encouraged economic development in Oregon in a manner that left other states and taxpayers with the gains reasonably expected from the tax compact, just as if Oregon had repealed ORS 305.655 and readopted the tax compact without Articles III.1 and IV.

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[27] Indeed, this court once rejected the view that "the legislature can, *for any consideration it may deem adequate*, exempt or commute the taxes on one class of property, or on the property of one taxpayer," as involving "[a] construction of the constitution which would permit or allow opportunities for such manifest injustice"—shifting tax burdens entirely onto those "too poor or too honest to purchase such immunity." *Hogg v. Mackay*, 23 Or 339, 342-43, 31 P 779 (1893) (emphasis added; internal quotation and citation omitted).

II. ORS 314.606 does not impair the obligation of contracts under the United States Constitution.

The Federal Contract Clause provides: "No State shall * * * pass any * * * Law impairing the Obligation of Contracts." "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 US 400, 411, 103 S Ct 697, 74 L Ed 2d 569 (1983) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 US 234, 244, 98 S Ct 2716, 57 L Ed 2d 727 (1978)). If a state law substantially impairs a contractual relationship, the impairment is "constitutional if it is reasonable and necessary to serve an important public purpose." *US Trust*, 431 US at 25.

Here, no substantial impairment occurred. Even if it did, the impairment was reasonable and necessary for an important public purpose.

A. ORS 314.606 does not substantially impair any contractual obligation.

A substantial impairment occurs only if there is a contractual relationship, a change in law impairs that contractual relationship, and that impairment is substantial. *See General Motors Corp. v. Romein*, 503 US 181, 186, 112 S Ct 1105, 117 L Ed 2d 328 (1992). As argued above, here HealthNet has no contractual relationship on which to rely. The states neither unmistakably intended Article III.1

as a contractual term nor unmistakably intended to make taxpayers third-party beneficiaries with contractual rights to enforce it.

But if HealthNet were correct that it had contractual rights, the adoption of ORS 314.606 did not substantially impair them. In evaluating whether impairments are substantial, the Court generally looks at "the legitimate expectations of the contracting parties," including reasonable reliance. *US Trust*, 431 US at 19 n 17. In *US Trust*, the Court found substantial impairment when state laws retroactively repealed a pledge covenant with bondholders that the bondholders relied on before advancing funds. In *Allied Structural*, 438 US at 246, the Court determined a law that retroactively modified the amount employers were required to contribute to a pension plan resulted in substantial impairment when the company "relied heavily, and reasonably, on [its] legitimate contractual expectation in calculating its annual contributions to the pension fund."

By contrast, "[l]aws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract." *El Paso v. Simmons*, 379 US 497, 515, 85 S Ct 577, 13 L Ed 2d 446 (1965). In Oregon, no taxpayer could reasonably rely on Article III.1 of ORS 305.655 after 1993, when the Oregon legislature made it clear that ORS 314.650's formula took precedence over the tax compact's formula.[28] HealthNet's insistence that Oregon's *only* constitutional recourse was to withdraw under Article X.2—as opposed to legislation that disabled Articles III.1 and IV—is an insistence on procedural formality that has no warrant in the compact. ORS 314.606 left taxpayers and other states in the same position as if Oregon had withdrawn from the entire compact and then reenacted it without Articles III.1 and IV.

B. Any substantial impairment was reasonable and necessary for an important public purpose.

Even if ORS 314.606 substantially impaired a contractual obligation to HealthNet under Article III.1, that "impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." *US Trust*, 431 US at 25. ORS 314.606 satisfies those criteria.

1. ORS 314.606 serves an important public purpose—economic investment in Oregon.

An important public purpose includes "remedying of a broad and general * * * economic problem." *Energy Reserves*, 459 US at 412. ORS 314.606 serves important public purposes: employment and economic investment in Oregon. After the Court, in *Moorman Manufacturing Co. v. Bair*, 437 US 267, 98 S Ct 2340, 57 L Ed 2d 197 (1978), held that a single-sales factor formula was constitutional

[28] Moreover, as the Tax Court held, HealthNet did not rely on it. ER-222; *see also* ER-173-74.

under both the Due Process Clause and the Commerce Clause, many other states gave greater weight to the sales factor. Recognizing that "[a]s other states move in this direction, Oregon firms face increased taxes on their sales to other states without any compensating reduction in the Oregon tax," the 1989 Legislature adopted a double-weighted sales factor formula starting in tax year 1991. SER-20. The 1989 Legislature intended to increase Oregon jobs, "[r]educe [the] Oregon tax impact of expanding property investment" in Oregon, and "[l]evel the playing field for Oregon-based corporations" doing business in states that gave greater weight to the sales factor under a mandatory apportionment formula. SER-21; *see also* SER-17-19.

By mandating use of the formula in ORS 314.650, the 1993 Legislature had the same goals as the 1989 Legislature: to make sure all taxpayers were "on the same playing field," to give taxpayers an incentive to locate in Oregon, and to mitigate the tax impact created by "other states that enacted the double-weighted sales factor first." SER-22-24. The legislature did not intend that "both in-state *and* out-of-state companies [would] get[] the most advantageous treatment." ER-221. Allowing taxpayers a choice between the tax compact's formula and ORS 314.650's would have continued to give tax incentives for companies to locate payroll and property in—or move payroll and property to—other states that used a mandatory formula that gave greater weight to sales.[29]

2. ORS 314.606 was reasonable and necessary.

"Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption"—that is, the law must be "reasonable and necessary." *US Trust*, 431 US at 22, 29. "The extent of impairment is * * * a relevant factor in determining its reasonableness." *US Trust*, 431 US at 27. The Court also evaluates reasonableness "in light of the surrounding circumstances," including whether the earlier statute "had effects that were unforeseen and unintended by the legislature when originally adopted." *US Trust*, 431 US at 31. In evaluating the necessity of an impairment, the Court has considered whether the law

[29] For example, suppose Taxpayer has $100 of apportionable income and made 50 percent its sales to Oregon customers and 50 percent to customers in another state. Suppose Taxpayer has all its property and payroll in Oregon. Suppose Oregon allows an election between the tax compact's formula and a single-sales factor formula, while the other state mandates use of the single-sales factor. Taxpayer would use the single-sales factor formula in each state to apportion $50 of its taxable income to Oregon and $50 to the other state [$100 x 50 percent]. If Taxpayer relocated all property and payroll to the other state, it still would apportion $50 of its income to the other state; however, electing the tax compact formula in Oregon, it would apportion only $16.67 to Oregon. [$100 x ((0 payroll + 0 property + 0.5 sales)/3) = $16.67] Thus, if taxpayers could elect to use the tax compact formula in Oregon but not in the other state, Taxpayer would have an incentive to relocate to the other state and reduce its effective apportioned income by $33.33. Likewise, any taxpayer considering where to locate in the first instance would have a tax incentive to locate in the other state rather than Oregon.

imposes a "drastic modification" when a "more moderate course" suffices. *US Trust*, 431 US at 31.[30] The 1993 adoption of ORS 314.606 satisfied those criteria.

First, ORS 314.606's adoption constituted a reasonable attempt, for reasons already discussed, to achieve the legislature's purpose—encouraging economic development in Oregon and putting taxpayers on equal footing, after numerous states adopted mandatory formulas that gave greater weight to the sales factor (a development Oregon legislators would not have had reason to predict prior to the *Moorman* decision). ORS 314.606 limited taxpayers like HealthNet to the gains reasonably expected, rather than allowing unforeseen and unintended effects. *See* ER-219-221.

Second, because ORS 314.606 is ultimately no more "drastic" than the "more moderate course" that HealthNet claims Oregon needs to follow, ORS 314.606's adoption qualifies as "necessary." HealthNet concedes that the 1993 Legislature permissibly could have withdrawn from the tax compact in its entirety. The 1993 Legislature then could have readopted everything except Articles III.1 and IV. Yet

[30] When a state law retroactively impaired financial obligations in bond covenants between the state and private parties, the Court held that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *US Trust*, 431 US at 26. But lack of deference arose from the fact that the states "are not acting as sovereignties" by borrowing money. *Id.* at 25 n 23 (internal quotation and citation omitted). Even if prospective application of a general tax law intended to advance the public welfare is subject to similar scrutiny, however, ORS 314.606 is reasonable and necessary.

whether the 1993 Legislature proceeded in that fashion or whether it proceeded as it did (by adopting ORS 314.606), the practical effect on HealthNet would have been the same—under either scenario, HealthNet would no longer have had the option of invoking the tax compact's formula. As a result, the 1993 adoption of ORS 314.606 cannot be deemed "drastic" compared to the alternative course that HealthNet asserts should have been taken.

ORS 314.606 qualifies as both reasonable and necessary. Accordingly, ORS 314.606 did not impair any contractual obligations under the Federal Contract Clause.

III. Other compacts are not at issue and are distinguishable from the advisory tax compact.

HealthNet and its amici urge that upholding ORS 314.606 will have a dramatic impact on other interstate compacts. But no other compacts are before the court. Moreover, the cited compacts are readily distinguishable. None of the cited compacts was intended to preserve the states' tax power, and, unlike the tax compact, none of them need to be read in light of many states' constitutional prohibitions on contractually suspending the tax power.

Furthermore, HealthNet cites a number of cases addressing compacts that are easily distinguished from the tax compact because—unlike the tax compact—they were approved by Congress. Congressional consent transforms those compacts into federal law under the Supremacy Clause, superseding conflicting state laws. *See* US Const, Art VI, § 2; *Cuyler v. Adams*, 449 US 433, 440, 101 S Ct 703, 66 L Ed 2d 641 (1981) (holding that "consent of Congress transforms the States' agreement into federal law under the Compact Clause"); *see, e.g.*, ORS 507.010 (Oregon-Washington Columbia River fish compact); ORS 507.040 (Pacific States Marine Fisheries Compact). Here, however, ORS 305.655 remained nothing more than a state statute, and subsequent state legislatures were free to enact legislation that superseded it in whole or in part.

Likewise, every non-congressionally-approved compact cited by HealthNet and its amici is distinguishable in material respects. Those compacts generally involve reciprocal obligations of the member states to one another involving regulatory activities that cross-state lines. For example, ORS 417.200 regulates the transfer and placement of children between states, and ORS 417.030 governs supervision and return of adjudicated juveniles and status offenders between states. By contrast, Article III.1 of the tax compact "does not create an obligation of member states *to each other*." *Gillette*, 363 P3d at 100 (emphasis in original). Indeed, as HealthNet acknowledged in the Tax Court, under the tax compact, the "states do not perform or deliver obligations to one [an]other" or "exchange obligations." Plaintiffs' Response and Reply to the Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment filed May 6, 2014, at 23.

In addition, most other compacts cited by HealthNet and its amici unmistakably prescribe particular mechanisms for amending the compact, require states to provide notice in a particular manner to effectively withdraw from the compact, or both.[31] The tax compact contains no such provisions.

[31] *See* ORS 181A.135 (withdrawal "effective 180 days after written notice of renunciation is provided by the Party State"); ORS 357.340, Art XI(b) (compact "binding upon * * * state until six months after * * * state has given notice to each other party state"); ORS 417.030, X.C (2009) (amendment ineffective "unless and until it is enacted into law by unanimous consent of the compacting states."); ORS 417.030, XIII.A.2 (2009) ("All compacting states' laws other than state Constitutions and other interstate compacts conflicting with this compact are superseded to the extent of the conflict."); ORS 417.030, Art XIV (1979) (repeal requires "sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto"); ORS 417.200, IX (withdrawal "shall not take effect until two years after the effective date of such statute and until written notice of the withdrawal has been given by the withdrawing state to the Governor of each other party jurisdiction."); ORS 421.284, VIII ("actual withdrawal shall not take effect until two years after the notices provided in said statute have been sent"); ORS 421.296, VII ("This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states."); ORS 428.310, XIII(a) (withdrawal "shall take effect one year after notice thereof has been communicated officially and in writing to the governors and compact administrators of all other party states"); ORS 496.750, Art VIII(c) ("withdrawal shall not take effect until 90 days after notice of withdrawal is given" to each state); ORS 496.750, Art IX(b) ("Adoption of an amendment shall require endorsement by all party states * * *."); ORS 732.820, XIII (amendment ineffective "unless and until all compacting states enact the amendment into law"); ORS 802.540, Art VIII(b) (no withdrawal "shall take effect until six months after the executive head of the withdrawing state has given notice of the withdrawal to the executive heads of all other party states"); ORS 802.560, Art III.6 (permitting amendment "by unanimous joint action of the participating jurisdictions"); ORS 802.560, Art VI.2 (30-days' notice required for effective withdrawal).

Ultimately, the threat to interstate cooperation in this case arises from taxpayers, not member states. Here, the states and the advisory Commission have affirmed that Articles III.1 and IV are not binding terms, and members have not objected when individual states exempted themselves from Article III.1 and IV. But in the wake of taxpayer challenges similar to HealthNet's, California, Michigan, and Minnesota have withdrawn from the tax compact, diminishing a long history of full participation in the Commission. *See Gillette*, 363 P3d at 98 n 6; *Kimberly*, 2015 WL 3843986 at *6; *Gillette Commercial Ops.*,___NW2d___(2015), 2015 WL 5704567 (appeal pending).

IV. ORS 314.606 does not violate Article IV, Section 22.

HealthNet also argues that the 1993 Legislature violated Article IV, section 22, of the Oregon Constitution when it enacted ORS 314.606. Article IV, section 22, provides: "No act shall ever be revised, or amended by mere reference to its title, but the act revised, or section amended shall be set forth, and published at full length." HealthNet argues that Article IV, section 22, required the legislature to set forth ORS 305.655 in the bill that enacted ORS 314.606. The Tax Court correctly rejected that argument.

At root, HealthNet argues that Article IV, section 22, required the legislature to set forth ORS 305.655 in full because ORS 314.606 refers to ORS 305.655. *See* ORS 314.606 ("In any case in which the provisions of ORS 314.605 to 314.675 are inconsistent with the provisions of ORS 305.655, the provisions of ORS 314.605 to 314.675 shall control."). But Article IV, section 22, merely precludes the legislature from explicitly inserting or substituting words or phrases into an existing statute without including the full text of that statute. The "evil" that Article IV, section 22, intended to prohibit was

> "the practice of amending or revising laws by additions or other alterations, which, without the presence of the original law, were usually unintelligible. Acts were passed, amending an existing statute by substituting one phrase for another, or by inserting a sentence, or by repealing a sentence, or a part of a sentence, in some portion or section thereof, which, as they stood, often conveyed no meaning, and, without examination and comparison with the original statute, failed to give notice of the changes effected."

Warren v. Crosby, 24 Or 558, 561, 34 P 661 (1893).

HealthNet's true grievance is that ORS 314.606 impliedly amended ORS 305.655. Article IV, section 22, however, permits implied amendment and repeal:

> "If the act is in itself complete and perfect, and is not amendatory or revisory in its character, it is not interdicted by [Article IV, section 22], although it amends by implication other legislation upon the same subject. Such an act, although it may operate to change or modify prior acts, is not within the mischief designed to be remedied by said section 22. 'Statutes,' says Judge Cooley, 'that amend others by implication are not within this provision, and it is not essential that they even refer to the acts or sections which by implication they amend': Cooley, Const. Lim. p. 152. Hence an act of the legislature, not amendatory in character, but original in form, and complete in itself, exhibiting on its face what the law is to be, its purpose and scope, is valid, notwithstanding it may, in effect, change or modify some other law upon the same subject."

Id. at 561-2. Thus, if the legislature announces in a new statute—as the 1993 Legislature did in ORS 314.606, which announces that ORS 314.650's formula supersedes any conflicting formula in ORS 305.655—that a particular standard applies despite a previously adopted statute that announced a different standard, the act adopting the new statute need not set forth the older statute.

Because the bill that enacted ORS 314.606 implicitly amended ORS 305.655 without inserting or altering words or phrases *within* ORS 305.655, it complied with Article IV, section 22. ORS 314.606 merely resolves any conflict between ORS 314.650 and ORS 305.655 in favor of ORS 314.650. It does not purport to insert or delete provisions in ORS 305.655. Nor did it confuse legislators; the legislative history shows that the 1993 Legislature understood the purpose of ORS 314.606.[32] *See* ER-196-198.

Insofar as ORS 314.606 *impliedly* amends ORS 305.655, nothing in Article IV, section 22, proscribes it. In *Gilbertson et al. v. Culinary Alliance et al.*, 204 Or 326, 282 P2d 632 (1955), the court rejected the defendant's argument that a statute providing that "ORS 662.010 to 662.130 [the Oregon Norris-La Guardia Act] shall

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[32] HealthNet also asserts that the department was "confused by ORS 314.606" when it "promulgated" OAR 150-305.655 "in 1993." App Br at 50. It is HealthNet that is confused. In 1969, the department published a rule allowing an election under Article III.1. SER-25-27. In 1993, the department added to that rule: "In any case in which the provisions of ORS 314.605 to 314.670 are inconsistent with the provisions of ORS 305.655, the provisions of ORS 314.605 to 314.670 shall control." App-11-14.

not be applicable to proceedings brought under ORS 662.610 to 662.790" violated Article IV, section 22. Despite the fact that the statute effectively repealed parts of Oregon's Norris-La Guardia Act by making them "inapplicable," the court found that "[r]epeals by implication are not prohibited by Art. IV, § 22 * * *." *Id.* at 373; *see also In re Idleman's Commitment*, 146 Or 13, 27 P2d 305 (1933) (finding act providing that persons paying maintenance charge for insane "shall not be required to furnish clothing as provided in section 67-1710, Oregon Code 1930," did not violate Article IV, section 22, by failing to publish section 67-1710 in full).

HealthNet's reliance on *Martin v. Gilliam County*, 89 Or 394, 173 P 938 (1918) is misplaced.[33] *See* App Br at 50. The 1915 legislation invalidated in *Martin* specified that certain public bodies "are hereby made subject to the provisions of chapter 234 of the General Laws of Oregon, 1913"—the 1915 act thereby attempted to include those public bodies within the previously enacted 1913 statute without setting out the 1913 statute's text. ORS 314.606, by contrast, impliedly amends ORS 305.655 by preventing multistate taxpayers subject to ORS 314.605 to 314.675 from choosing the formula in Article IV.9 over that in ORS 314.650. By adopting ORS 314.606, the 1993 Legislature did not violate Article IV, section 22.

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[33] HealthNet's reliance on the concurrence in *State v. Coats*, 158 Or 102, 107-8, 74 P2d 1120 (1938), which relies on *Martin*, is similarly misplaced. *See* App Br at 50.

CONCLUSION

ORS 314.606 does not violate any provision of the Oregon or United States Constitution. The judgment of the Tax Court should be affirmed.[34]

Respectfully submitted,

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[34] If ORS 314.606 *were* held invalid under the Oregon or United States Constitution, the court must remand to the Tax Court to determine the amount of refund allowable under ORS 305.765. *See* ER-176; ER-236 n 35; Tr. 10:2-11:20.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 13,828 words.

Type size

I certify that the size of this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 9th day of June, 2016.

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CERTIFICATE OF SERVICE

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