# STATE OF MINNESOTA
# IN THE SUPREME COURT

Case No. A17-0078

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Phone Recovery Services, LLC for itself
and on behalf of the State of Minnesota,

Plaintiff/Relator/Appellant,

v.

CenturyLink, Inc., *et al.*,

Defendants/Respondents.

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## BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF RESPONDENTS CENTURYLINK, INC., ET AL.

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**Statement of Interest of Amicus Curiae**

The Council On State Taxation ("COST") respectfully submits this Brief of *Amicus Curiae* in support of Defendants/Respondents, Century Link, Inc., *et al.* ("Defendants").

COST is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today, COST has an independent membership of approximately 600 major corporations engaged in interstate and international business. COST members employ a substantial number of Minnesotans, own and lease property in Minnesota, and conduct substantial business in Minnesota.

COST advocates for fair and equitable administration of state and local tax laws by the agencies that administer those taxes. As part of this effort, COST has long advocated for the exclusion of state and local taxes from state false claims acts, such as the exclusion for taxes in Minn. Stat. § 15C.03. For tax laws to be consistently and equitably administered, a single agency must control the enforcement of tax laws. Allowing private parties such as the relator, Phone Recovery Services, LLC ("PRS"), in this case to intervene in the administration, interpretation, or enforcement of the tax law usurps the authority of state agencies that administer taxes (including those labeled as fees), creates uncertainty, and results in inequitable treatment of taxpayers.[1]

[1] *Amicus* notes that the telecommunication service providers are like sellers for sales and use tax purposes, meaning that are responsible for collecting and remitting the 911, TAM and TAP fees rather than being a subject to the tax directly. Thus, any reference to the

## Statement of Facts

Telecommunications service providers in Minnesota are required to collect three fees from their customers and remit them to the Commissioner of the Department of Public Safety: a 911 fee, Minn. Stat. § 403.11(d); a Telecommunications Access Minnesota ("TAM") fee, Minn. Stat. § 237.52; and a Telephone Assistance Plan ("TAP") fee, Minn. Stat. § 237.70. PRS alleges that Minnesota's telecommunications service providers are underpaying these fees in three ways: (1) not charging the fee, (2) misclassifying services, and (3) not collecting the correct amount on channelized services (*e.g.,* use of one exchange line to enable multiple voice and data transmission). *See* Appellant's Brief, p. 8-9. In May 2014, PRS initiated this suit alleging almost all of Minnesota's telecommunication service providers were not properly collecting the State's 911, TAM, and TAP fees from their customers under Minnesota's False Claims Act ("MFCA"), Minn. Stat. §§ 15C.01-.16. *See Phone Recovery Services, LLC on behalf of State v. Qwest Corp.*, 901 N.W.2d 185, 188 (Minn. App. 2017), *review granted* (Oct. 25, 2017).

On November 22, 2016, the District Court entered a judgment in favor of the Defendants, dismissing the case based on the exclusion of tax-related claims from the MFCA under Minn. Stat. § 15C.03. That exclusion states that "[t]his chapter does not apply to claims, records, or statements made under portions of Minnesota Statutes relating to taxation." PRS appealed that finding to the Court of Appeals, which affirmed

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term "taxpayer" is meant only to refer to Defendants' obligation to collect and remit these taxes.

the District Court's decision on August 7, 2017. PRS subsequently appealed to this Court, which granted review.

## Argument

Both the District Court and the Court of Appeals were correct in dismissing the MFCA suit against the Defendants. The MFCA bar of tax-related claims is clear and is based on sound policy. Minn. Stat. § 645.44, the statute that addresses the meaning of certain words in Minnesota Statutes, leaves no question that 911, TAM, and TAP fees are "taxes." Thus, a further common law analysis is not needed to confirm the legislature's intent. Further, even if it were not clear that such fees constitute "taxes" under Minnesota's statutory definition, the same rules of statutory construction and interpretation afforded to ambiguous tax laws (*i.e.,* any ambiguity in an imposition of a tax should be read in favor of the taxpayer) should be used in a MFCA case. In other words, any ambiguity should be read in favor of a MFCA defendants and not the relator. This Court should affirm the decisions of both lower courts to prevent the abuses that can occur when tax laws are subject to interpretation by outside parties, bypassing the actual state entities in charge of administering and auditing taxes. PRS, a third-party litigant acting as a relator, is simply not necessary to protect the State's interest because the fees at issue are already subject to oversight by a specialized administrator of these taxes, the Commissioner of the Minnesota Department of Public Safety.

## I. 911, TAM, and TAP fees are "taxes" under Minnesota's law.

Prior to the adoption of the MFCA in 2009, the Minnesota State Legislature in 2006 added subdivision 19 to Minn. Stat. § 645.44 to address what constitutes a tax:

> **Fee and tax.** (a) "Tax" means any fee, charge, exaction, or assessment imposed by a governmental entity on an individual, person, entity, transaction, good, service, or other thing. *It excludes a price that an individual or entity chooses voluntarily to pay in return for receipt of goods or services provided by the governmental entity*. A government good or service does not include access to or the authority to engage in private market transactions with a nongovernmental party, such as licenses to engage in a trade, profession, or business or to improve private property.
>
> (b) For purposes of applying the laws of this state, a "fee," "charge," or other similar term that satisfies the functional requirements of paragraph (a) must be treated as a tax for all purposes, regardless of whether the statute or law names or describes it as a tax. The provisions of this subdivision do not exempt a person, corporation, organization, or entity from payment of a validly imposed fee, charge, exaction, or assessment, nor preempt or supersede limitations under law that apply to fees, charges, or assessments.
>
> (c) This subdivision is not intended to extend or limit article 4, section 18, of the Minnesota Constitution.
>
> Minn. Stat. § 645.44 subd. 19 (emphasis added).

Not only do the 911, TAM, and TAP fees, which the Defendants are required to collect, fall clearly within the definition of "tax" established by the Legislature by a plain reading of the statute, they also do not meet the exception provided in Minn. Stat. § 645.44. Neither the Defendants nor their customers voluntarily paid these fees in return

for goods or services provided by a governmental entity. The fees are required to be paid to offset the government's cost for providing certain specialized telecommunication services to all Minnesotans and noncitizens of the State that use those services. For example, a nonresident visiting the Mall of America that calls 911 for an emergency using a wireless phone will receive 911 services even though that nonresident does not pay the State's 911 fee.

Beyond the fact that these fees are not paid in exchange for a government good or service, the payment of the fees is also not voluntary. Telecommunications service customers cannot tell the telecommunications service providers that they do not want to use these services and therefore demand their 911, TAM, or TAP fees be waived. This is very different from a situation where a person voluntarily contracts with a state or local government agency for services, such as permits to camp at state parks, or tolls to travel on a toll road, etc. PRS ignores the clear definition of "tax" in Minn. Stat. § 645.44. Given the fact that the Minnesota Legislature placed the definition of "tax" in the law several years prior to the enactment of the MFCA, the legislature was clearly aware of the existing definition of "tax" in the State's law and it made no attempt to modify that definition or use a different definition of "tax" for purposes of the MFCA.

Importantly, PRS appears to be arguing that the definition of "tax" as used in the MFCA exclusion is ambiguous, and asserts that the use of "tax" should be construed to effectuate the intention of the legislature. Appellant's Brief p. 22. The definition of "tax" in Minn. Stat. § 645.44 is not ambiguous. However, if it were, it would be extremely unfair to subject Defendants to treble damages under an ambiguous law.

Moreover, if there were an ambiguity in the definition of "tax" in Minn. Stat. § 645.44, Minnesota courts "construe ambiguous taxation provisions in favor of the taxpayer where the ambiguous term is crucial to the applicability of the tax." *BCBSM, Inc. v. Commissioner of Revenue*, 663 N.W.2d 531, 533 (Minn. 2003). This same principle should also be applicable to a key provision in the MFCA that excludes "taxes," which PRS argues is ambiguous.[2]

Some historical context may be useful to shed light on the legislative intent behind Minn. Stat. § 645.44. The legislature enacted the statute in 2006. It was part of a bill that was presented to the Governor on May 22, 2006, and which was signed by the Governor on June 1, 2006. 2006 Minn. Laws ch. 259, art. 13, sec. 15. The legislation was almost certainly a reaction to arguments made in a highly publicized case decided by this Court on May 16, 2006. *State v. Phillip Morris USA, Inc*., 713 N.W. 350 (Minn. 2006). In that case, cigarette (and other tobacco product) manufacturers challenged a Health Impact Fee imposed by Minn. Stat. § 256.9658 (2005).[3] The cigarette manufacturers had entered into a 1998 settlement agreement of a suit brought by the State against them, and they claimed that the Health Impact Fee violated the release in that agreement and was unconstitutional. *Id*. at 353. The manufacturers conceded that the release did not prevent

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[2] In contrast to this Court's decision in *Marks v. Commissioner of Revenue*, 875 N.W.2d 321 (2016), there is no "longstanding agency interpretation" of the exclusion for taxes that is entitled to deference with the MFCA. 875 N.W.2d at 328.

[3] The Health Impact Fee was imposed as a charge on the sale of cigarettes and other tobacco products "to recover for the state health costs related to or caused by tobacco use and to reduce tobacco use, particularly by youths." Minn. Stat. § 256.9658, subd. 1 (2005). The revenues raised were to be deposited in a special health impact fund. Minn. Stat. § 256.9658, subd. 9 (2005); *see also* Minn. Stat. § 16A.725 (2005)(statute created the health impact fund).

the State from raising cigarette taxes, but they argued that the State could not impose fees on cigarette smokers. The district court ruled in their favor:

> The [district] court found that the Health Impact Fee is a "fee," not a tax, and concluded the legislature's imposition of a "fee" is barred by the state's release, although a "tax" would not be barred. It appears that respondents agree, conceding that a "general excise tax" imposed on tobacco products would not be contrary to the release. But respondents contend a revenue measure expressly earmarked to fund tobacco-related health care costs is barred, regardless of whether it is considered a tax or a fee.

*Id*. at 362. The Supreme Court was able to avoid deciding the "fee vs. tax" issue in reversing the district court and ruling for the State. The legislature, however, wanted to avoid any future ambiguity resulting from the use of labels such as fee, charge, exaction or assessment. Thus, it enacted Minn. Stat. § 645.44, subd. 19, to say that any such term "must be treated as a tax for all purposes" in applying Minnesota Statutes.

Finally, even under this Court's decision in *First Baptist Church of St. Paul., et al. v. City of St. Paul*, 884 N.W.2d 355 (Minn. 2016), which addressed a right-of-way assessment imposed to offset St. Paul's cost to maintain and clear the city's rights-of-way, the 911, TAM, and TAP fees are taxes. First, the charges imposed for the 911, TAM, and TAP fees are not designed merely to recoup the State's cost of providing those services used by the taxpayers. These fees are no different from the right-of-way assessments addressed in *First Baptist* which "approximate[d] [the] total right-of-way maintenance costs." *Id.* at 357. For example, the 911 fee is imposed "to cover the costs of ongoing maintenance and related improvements … for 911 emergency

telecommunications service …." Minn. Stat. § 403.11 Subd. 1(a). Second, the benefits of the 911, TAM, and TAP fees are enjoyed by others, not merely Minnesota's telecommunications service customers who pay for such services. As stated in *First Baptist*, the "assessment benefit[ed] the general public in precisely the same manner as they benefit the properties assessed." *Id.* at 362. While the customers who pay the 911, TAM, and TAP fees can derive some benefit from those services, other persons who are not paying for those services also have access to and benefit from those services. Thus, the fees, similar to the assessments levied in *First Baptist*, are "not imposed on a limited group of payers; rather, the charge is assessed to, and raises revenue from … all … within [a jurisdiction's] limits." *Id.* at 362. The Court of Appeals was correct in stating "[f]ollowing *First Baptist*, we conclude that the 911, TAM, and TAP chares are revenue-raising taxes under the common law." *Phone Recovery Services,* 901 N.W.2d at 196.

## II. 911, TAM, and TAP fee disputes should be adjudicated through the normal administrative appeals process provided by Minnesota law.

The unauthorized filing of a MFCA lawsuit by PRS against the Defendants circumvents Minnesota's normal audit and administrative appeals process for resolving disputes relating to 911, TAM, and TAP fees. As previously stated, the MFCA specifically excludes taxes from its scope, and these fees are included under the definition of a tax. One of the reasons for this exclusion under Minnesota's law is because the State already provides an audit and administrative appeals process for 911, TAM, and TAP fees.

Under Minnesota law, the Commissioner of Public Safety oversees the administration and auditing of the State's 911, TAM, and TAP fees.[4] Minn. Stat. § 403.11. The Commissioner is tasked with collecting the State's 911, TAM, and TAP fees on a monthly basis, and it may require service providers who collect and remit the 911, TAM, and TAP fees to submit a sworn declaration verifying information regarding the 911, TAM, and TAP fees they have remitted. Minn. Stat. § 403.11 subd. 1(a). Further, the Commissioner has audit authority and may require a "telecommunications service provider [to] contract with an independent certified public accountant to conduct an examination of fees. The examination must be conducted in accordance with attestation audit standards." Minn. Stat. § 403.11 subd. 1(b).

Thus, if the Commissioner believes that a telecommunication service provider is under collecting 911, TAM, and TAP fees, there are mechanisms in place to allow the Commissioner to audit and contest the monthly filings of such a service provider. To allow the MFCA to be used by a private citizen (or, as in the case here, a for-profit, professional litigant) to circumvent the normal administrative and audit process puts Defendants at risk of potentially defending their interpretation of the law against both PRS in this lawsuit and against the Commissioner if an audit were to be initiated. This is clearly an inefficient and ineffective way to administer 911 taxes in Minnesota.

If not refuted, PRS's misapplication of the MFCA law will also become a *de facto* contingent fee audit arrangement. The appropriate administrative agency (here the

[4] These fees are administered by the Emergency Communications Network Division of the Minnesota Department of Public Safety.

Department of Public Safety) should use its expertise to determine the correct amount of 911, TAM, and TAP fees due. Minnesotan businesses should not have to defend against outside litigants who seek to garner the greatest amount of personal compensation possible, with little regard for the interest of the State in resolving a tax dispute.[5] There is no justification for paying a third-party litigant up to 30 percent of recoveries for raising this matter under the MFCA and subjecting the Defendants to treble damages when the Department of Public Safety already has the responsibility to audit the Defendants actions.[6] *Amicus* has a policy statement against these actions.[7]

The confidentiality of taxpayers' records would also be put at risk if this Court were to permit tax claims such as those at issue in this case to be brought under the MFCA. Because the MFCA addresses confidentiality in a way similar to confidentiality rights in criminal proceedings, Defendants' confidential taxpayer information could be disclosed inappropriately. *See* Minn. Stat. Ann. § 403.11 subd. 6(c), which requires the Commissioner to protect the information as a trade secret. *Amicus* asks this Court, in accordance with the clear intent of the Legislature, to restrict the application of the

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[5] *See* Policy Position Paper, COST, Government Utilization of Contingent Fee Arrangements in Tax Audits and Appeals, *available at* http://cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/government-utilization-of-contingent-fee-arrangements-in-tax-audits-and-appeals.pdf.

[6] *See* David W. Bertoni and David Swetnam-Burland, *Barbarians at the Gates: Private State Tax Enforcement*, 82 State Tax Notes 585 (2016) (examining the "present nightmare of private state tax enforcement suits," including the undermining of specialized expert state administrator determinations by "the bounty-hunter-style approach to claims.").

[7] *See* Policy Position Paper, COST, False Claims Acts Should Exclude State & Local Taxes, *available at* http://cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/cost-fca-policy-statement-final.pdf.

MFCA when the issue at hand involves the interpretation of tax laws to prevent otherwise confidential tax records from being made public to the detriment of the State's taxpayers.

With respect to excluding taxes, the MFCA is similar to the federal False Claims Act. 31 U.S.C. § 3729. The federal False Claims Act does not apply to "claims, records, or statements made under the Internal Revenue Code," *i.e.,* tax issues. While the federal government has a separate "whistleblower" process embedded entirely within the normal administrative channels of the Internal Revenue Service ("IRS"), no third-party action can be taken unless approved by the IRS and undertaken within the normal IRS audit, assessment, and appeals procedures. 26 U.S.C. § 7623. Because a federal tax-initiated whistleblower action takes place within the IRS, the normal statutory rules apply to taxpayers regarding interest, penalties, and statute of limitations. Additionally, confidentiality of taxpayer information and other procedural safeguards apply to the IRS administrative appeals process. There is no impediment to the IRS's control over the tax administration process and no opportunity for outside litigants to initiate False Claims Act proceedings against a taxpayer wholly outside of normal administrative processes. In this manner, the federal government avoids the egregious situation in the instant case in which the taxpayer is erroneously subjected to an onerous and unwarranted MFCA lawsuit. Indeed, the State has already spoken: In September 2015, it declined to intervene in PRS's MFCA action. *Phone Recovery Services,* 901 N.W.2d at 188.

## Conclusion

Both the District Court and the Court of Appeals appropriately dismissed PRS' amended complaint. This Court should provide clear guidance by affirming those decisions. The MFCA clearly precludes PRS from continuing this unwarranted litigation.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

**WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 3,147 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2010, the word processing system used to prepare this Brief.

s/Walter A. Pickhardt
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