STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Murray, P.J., and Jansen and Meter, JJ.

INTERNATIONAL BUSINESS MACHINES CORP.

Plaintiffs-Appellants

v

DEPARTMENT OF TREASURY, STATE OF MICHIGAN

Defendant-Appellee

Supreme Court No. 152650

Court of Appeals No. 325484

Court of Claims No. 14-000219-MT

SECOND CORRECTED BRIEF OF AMICUS CURIAE COUNCIL ON STATE TAXATION (COST) IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

Lynn A. Gandhi (P60466)
Counsel for *Amicus Curiae*
Council On State Taxation (COST)
Honigman Miller Schwartz and Cohn LLP
660 Woodward Ave. Detroit, MI 48226-3506
(313) 465-7646

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

CASES

STATUTES

CONSTITUTIONAL AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE

COST is a nonprofit trade association based in Washington, D.C. COST was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST's existence and history has always been closely intertwined with the Multistate Tax Compact ("Compact"), which was created two years prior to COST in 1967.

Today, COST has an independent membership of almost 600 of the largest multistate corporations engaged in interstate and international commerce, many of which do business in Michigan. COST members are directly affected by state taxation of interstate and international business operations. Thus, COST is vitally interested in cases such as this that significantly affect the uniformity, certainty, and fair apportionment of state and local taxes.

COST's mission is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST has steadfastly pursued this mission since its creation. COST's members conduct substantial business in Michigan, employ numerous Michigan citizens, and own extensive property in Michigan.

COST urges this Court to review the Court of Appeals decision to provide guidance regarding the extent to which Michigan's Legislature can bypass this Court's power of judicial review by retroactively "clarifying" the intent of a law already reviewed and settled by the judiciary. If the Court of Appeals' decision is upheld, taxpayers will be unable to rely on statutes as they appear on the books. The Legislature's retroactive repeal of the Compact election, which reversed this Court's decision in *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) ("*IBM*"), creates uncertainty for the global business community as there will be no finality of a decision rendered by this Court.

COST determined it is important to file a brief in this matter since COST brings an important national perspective to this dispute.

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in finding that PA 282 of 2014 was effective in allowing the State of Michigan to retroactively repeal the Multistate Tax Compact?

Plaintiff/Appellant answers "Yes"

Defendant/Appellee answers "No"

Court of Claims answered "No"

Court of Appeals answered "No"

Amicus Curiae Council on State Taxation answers "Yes"

INTRODUCTION

The substantive issue in this case is whether this State's Legislators can retroactively repeal the Multistate Tax Compact (MCL 205.581, the "Compact"), through 2014 PA 282. COST asserts this violates taxpayers' Due Process Clause[1] rights by attempting to reverse this Court's express finding that the Compact's election was available from 2008 through 2010. The overarching concern is whether a decision of this Court - the highest court of the state - can be muted by the State's Legislature retroactively changing the tax laws. Such action is unsound tax policy, and this Court's review is required to determine if the Legislature's action violates the Due Process Clause.

COST supports Plaintiff-Appellants' petition for review to reverse the Michigan Court of Appeals' September 29, 2015 opinion in Docket No. 325258. That decision upheld 2014 PA 282, the legislation that retroactively repealed, back to 2008, Michigan's membership in the Compact and the apportionment election it provided to taxpayers. That decision should be reversed because Plaintiff, as well as the Plaintiffs in the companion cases of Gillette Commercial Operations North America & Subsidiaries ("Gillette"), Sunoco Products Company, *et.al*, Lubrizol Corp., Yaskawa America, Inc., and many other multistate taxpayers took tax positions affirmed by this Court in *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) ("*IBM*"). In that case, this Court held that when the Michigan Legislature adopted the Michigan Business Tax ("MBT") in 2007 (effective January 1, 2008) it did not repeal by implication the three-factor apportionment election set forth in both the Compact and Michigan's law.

---

[1] US Const amend IV, § 1 ("No state . . . shall deprive any person of life, liberty, or property, without the due process of law[.]")

While *IBM* was making its way through the Michigan courts, Plaintiff-Appellant and many other taxpayers filed original or amended returns using the Compact's three-factor apportionment election to determine their MBT tax liability. After the Michigan Department of Treasury ("Department") denied the elections, those taxpayers appealed their cases. These cases were held in abeyance until this Court decided *IBM*, and many of the cases were not addressed until after the Legislature passed 2014 PA 282. At that time, the lower courts upheld the Legislature's retroactive repeal of the Compact and apportionment election back to 2008, and the Court of Appeals ultimately determined the legislature's action did not violate the taxpayer's Due Process Clause rights. *Gillette Comm Ops N Am v Dep't of Treasury*, -- Mich App--; -- NW2d--; 2015 WL 5704567 at *25 (2015)(hereinafter "Ct of App"). This simply cannot stand. This Court needs to review this case and reverse the Court of Appeals' decision.

The U.S. taxation system relies on taxpayers' voluntary compliance, which requires mutual trust by the government and taxpayers. If taxpayers cannot rely on the statutory law in effect at the time they file their returns or refund claims, then taxpayers will lose trust in the tax system and the voluntary compliance system will be weakened. The Department argues this retroactive legislation was required to prevent a "significant and unanticipated revenue loss." Dep't of Treasury's Brief in Opposition to Gillette's Application for Leave to Appeal p 2. If, however, a state legislature can simply retroactively change tax laws whenever there is pressure to mitigate a decrease in a state's coffers, taxpayers' trust in the tax system will be eroded. Such action flies in the face of common sense, good government, and, most importantly, the Due Process Clause. It is absurd for a government to ask taxpayers to continue to voluntarily comply with a system when the rules can change long after the tax reporting period has closed.

STATEMENT OF FACTS

COST refers this Court to the Statement of Facts and Procedural History in the Brief of Plaintiff-Appellant IBM.

STANDARD OF REVIEW

"Questions of statutory interpretation are . . . reviewed *de novo*." *Grimes v Mich Dept of Transp,* 475 Mich 72, 76; 715 NW2d 275 (2006) (emphasis added). This Court's review of a decision to deny or grant summary disposition is *de novo*. *Herald Co v Bay City,* 463 Mich 111, 117; 614 NW2d 873 (2000). Summary disposition should be granted when the affidavits or other documentary evidence demonstrate that there is no genuine issue in respect to any material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co,* 460 Mich 446, 454-55; 597 NW2d 28 (1999); MCR 2.116(c)(10). On review of the undisputed facts and questions of law in the grant of summary disposition, the standard of review in this appeal is *de novo.*

In construing tax statutes, any ambiguities must be resolved in favor of the taxpayer. *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994). Tax statutes are to be liberally construed in favor of the taxpayer. *Ford Motor Co v State Tax Comm'n,* 400 Mich 499, 506; 255 NW2d 608 (1977). Ambiguities and doubtful language are to be construed in favor of the taxpayer. *Ecorse Screw Machine Prods Co v Michigan Corp & Securities Comm'n,* 378 Mich 415, 418; 145 NW2d 46 (1996). Moreover, tax officials have the burden to identify express language authorizing the tax sought to be imposed. *Standard Oil Co v Michigan,* 283 Mich 85, 88-89; 276 NW 908 (1937).

ARGUMENT

I. THE MICHIGAN LEGISLATURE'S RETROACTIVE LEGISLATION VIOLATES THE TAXPAYERS' 14TH AMENDMENT DUE PROCESS RIGHTS AS SET FORTH IN THE U.S. SUPREME COURT'S *CARLTON* DECISION

In *Carlton*, which is the most recent and definitive U.S. Supreme Court decision addressing retroactive tax legislation, the Court set forth a two-part test to determine if retroactive tax legislation violates the Due Process Clause of the United States Constitution. *United States v Carlton,* 512 US 26, 30-32; 114 S Ct 2018; 129 L Ed 2d 22 (1994). First, the Court looked to whether the legislation was enacted for a "legitimate legislature purpose furthered by rational means." *Id.* at 30. Second, the Court looked to whether Congress "acted promptly and established only a modest period of retroactivity." *Id.* at 32. Contrary to the Court of Appeals' holding, Michigan's retroactive legislation at issue in this case fails both prongs of this test.

A. The Retroactive Legislation Was Not Enacted For a Legitimate Purpose Furthered by Rational Means

The Court of Appeals' determination that there was a legitimate purpose for enacting the retroactive legislation contradicts 1) this Court's decision in the *IBM* case, 2) the Legislature's actions in the years following the original legislation's enactment, and 3) the U.S. Supreme Court's decision in *Carlton*. In September 2014, the Legislature repealed the Multistate Tax Compact (and its election provision) retroactively to January 1, 2008, stating the repeal expressed "the original intent of the legislature." See 2014 SB 156, H-1 Substitute. This, however, was in direct opposition to this Court's decision in *IBM*, in which this Court specifically held that the Compact's election and its three-factor apportionment formula could be utilized by taxpayers for years 2008 to 2010. *IBM*, 49 Mich at 644.

The Legislature's actions since the original legislation was enacted in 2007 undermine the Court of Appeals' conclusion that the Legislature was merely clarifying its original intent when it enacted the retroactive legislation in 2014. Unlike the corrective action the U.S. Congress took in *Carlton*, where it acted within 14 months after the enactment of the estate tax provision, the Michigan Legislature took no action to enact a technical correction following the adoption of the MBT legislation in 2007. The Legislature has been on notice of taxpayers making the Compact election at least since 2009 when IBM made the election on its timely-filed 2008 return which was the subject of the *IBM* litigation. This action involves IBM's subsequent election on its 2010 timely-filed return, which resulted in the assessment of additional tax, interest and penalties for that tax year. Additionally, in 2010, the Legislature had the opportunity to express its "original" intent when it considered, but did not enact, legislation to prohibit the utilization of the Compact's apportionment election retroactive to the enactment of the MBT in 2007 (effective for tax years beginning in 2008). 2010 HB 6351. Moreover, in 2011, when the Legislature replaced the MBT with the Michigan Corporate Income Tax, the Legislature provided in accompanying legislation that the Compact's election no longer applied to the MBT retroactive to January 1, 2011, but it chose not to make that legislation retroactive to tax years 2008 to 2010. 2011 PA 40.

Having foregone all of these opportunities to more timely enact retroactive legislation, the Legislature acted six years later, after this Court decided the *IBM* case confirming the availability of the Compact's apportionment election for tax years 2008 through 2010. Based on the Department's position not being affirmed in the *IBM* case, the Department estimated that the state's exposure for tax refunds was approximately $1.1 billion. Senate Legislative Analysis, SB 156, September 10, 2014. It was only then the Legislature enacted the retroactive legislation. This belated action by the Legislature is indicative of a "results-oriented" attempt to overturn a

fairly adjudicated decision rather than a true attempt to clarify the legislative intent in the original legislation.

The Court of Appeals relied on *Carlton* to justify its decision that retroactive legislation can satisfy the "legitimate purpose" test even if it overrides a decision by this Court. Quoting from its 2010 decision in *Gen Motors Corp*, the Court of Appeals stated: "A legislature's action to mend a leak in the public treasury or tax revenue – whether created by poor drafting of legislation in the first instance or by a judicial decision – with retroactive legislation has almost universally been recognized as 'rationally related to a legitimate legislative purpose.'" *Gen Motors Corp*, 290 Mich App 355, 373; 803 NW2d 698 (2010), quoting *Carlton*, 512 US at 35. *Gillette*, at *25.

The problem with the Court of Appeals' reasoning is that the *Carlton* decision neither states nor infers that retroactive legislation satisfies the legitimate purpose test when it overturns a judicial decision of the state's highest court (or the U.S. Supreme Court) on the legislative body's intent at the time of the original legislation. Unlike this case, in *Carlton*, the original legislation's underlying intent was never litigated or adjudicated in favor of the taxpayers by the U.S. Supreme Court prior to the retroactive legislation. Quite the opposite, the U.S. Supreme Court, when faced in *Carlton* with Congress's original intent, sided with the government concluding the retroactive legislation was correcting a drafting "mistake" in the original legislation:

> There is little doubt that the 1987 amendment to § 2057 was adopted as a curative measure. As enacted in October 1986, § 2057 contained no requirement that the decedent have owned the stock in question to qualify for the ESOP proceeds deduction. As a result, any estate could claim the deduction simply by buying stock in the market and immediately reselling it to an ESOP, thereby obtaining a potentially dramatic reduction in (or even elimination of) the estate tax obligation.

> It seems clear that Congress did not contemplate such broad applicability of the deduction when it originally adopted § 2057. [*Carlton*, 512 US at 31.]

To be sure, the U.S. Supreme Court in *Carlton* recognized avoiding an unanticipated revenue loss could constitute part of a "legitimate legislative purpose" for retroactive legislation. The Court stated, "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." *Carlton*, 512 US at 32. Nonetheless, the U.S. Supreme Court made this determination under significantly different facts than in the instant case. In *Carlton*, the U.S. Supreme Court agreed with Congress' intent in the original legislation (unlike this Court's disagreement evidenced by the *IBM* decision), and Congress almost immediately recognized the drafting mistake in the original legislation and passed retroactive legislation soon thereafter (unlike the Legislature's delayed reaction and six and one-half year gap in this case). There was no mistake in this case for the Legislature to seize upon. As this Court opined in *IBM*, the Legislature *actually* intended to permit taxpayers the option of the Compact's apportionment provisions. The fact that the Legislature today finds itself disagreeing with this Court's opinion does not give the Legislature a license to reinvent what the law was six and one-half years ago. If, as the Court of Appeals indicated, a legitimate legislative purpose is plugging a hole in a state's revenue base regardless of the length of time between the original legislative enactment and the retroactive amendment, then no legislation is safe from retroactive amendment, and taxpayers will no longer be able to reasonably rely on settled laws to organize their affairs and estimate their tax liabilities.

B. The Retroactive Legislation Was Not Enacted Promptly and for a Modest Duration

The retroactive legislation in this case also fails the second part of the *Carlton* test, which demands "prompt" legislative action after the original legislation as well as "a modest period of

retroactivity." *Carlton,* 512 US at 32. In *Carlton*, the legislation's retroactive application was for "a period slightly greater than one year." *Id.* at 33. By comparison, in this case, the retroactive period is approximately six and one-half years.

The Court of Appeals attempts to cloak its decision within the *Carlton* precedent, by concluding "there is no doubt that the Legislature acted promptly to correct the error." *Ct of App*, at *26. The Court of Appeals' definition of "prompt," however, is based not on the lengthy six and one-half year gap between the original legislation and the retroactive legislation, but on the much shorter two-month gap between this Court's decision in *IBM* and the Legislature's retroactive legislation. As the Court of Appeals explained: "As the trial court found, "[n]ot until July 14, 2014, when the Court decided *IBM*, was it made clear to the Legislature that 2007 PA 36 was defective. SB 156, H-1, which added the retroactive repeal of the Compact provisions, was introduced on September 9, 2014, and was enacted into law on September 11, 2014." *Ct of App.*, at 26.

This is a very curious definition of "promptness" – without support in the *Carlton* decision. Again, the U.S. Supreme Court, in *Carlton*, focused on the "slightly greater than one year" gap between the original legislation and the retroactive legislation. *Carlton*, 512 US at 33. The U.S. Supreme Court never approved a test of "promptness" or "modest" retroactive period based on the time gap between the issuance of a judicial decision favoring the taxpayers (interpreting the original legislation) and the enactment of retroactive legislative.

The underlying statutory interpretation surely turns this concept on its head; it suggests the appropriate time consideration for a "modest" period of retroactivity begins with a court of last resort's opinion against the government. This interpretation is incorrect. First, it highlights the problematic nature of the retroactive legislation itself, as it directly contradicts a decision by

this State's highest court on the interpretation of the statute at issue. Second, it completely undermines any reasonable standard of "retroactivity" as it excludes the period of litigation from the determination of "promptness" and "modest" retroactive period, regardless of how long after the original legislation the litigation is initiated or how long it takes to conclude. Promptness should not be measured by how quickly a legislature reacts to a court decision, but rather how quickly it responds to any perceived errors in, or necessary technical corrections to, the original legislation itself.

In *Carlton*, the U.S. Supreme Court repeatedly stressed it did not intend the period of retroactivity to be a long duration. The U.S. Supreme Court highlighted the awareness by the Internal Revenue Service and Congress for the need for a technical correction of the original legislation "within a few months" of the original legislation's enactment. *Id.* at 33. The Court concluded Congress acted "promptly and established only a modest period of retroactivity[.]" *Id.* at 32. The Court cited the "customary congressional practice" of giving statutes effective dates prior to the dates of actual enactment generally "'confined to short and limited periods required by the practicalities of producing national legislation.'" *Id.* at 33, quoting *United States v Darusmont*, 449 US 292, 296; 101 S Ct 549; 66 L Ed 2d 513 (1981). The Court noted that the "1987 amendment extended for a period only slightly greater than one year. Moreover, the amendment was proposed by the IRS in January 1987 and by Congress in February 1987, within a few months of the...original enactment." *Carlton*, 512 US at 33. Finally, in contrasting the facts in *Carlton* to a 1927 case, *Nichols v Coolidge*, 274 US 531; 47 S Ct 710 (1927), in which the Supreme Court overturned retroactive legislation with a twelve-year retroactivity period on Due Process grounds, the *Carlton* Court noted that the "period of retroactive effect is limited." *Carlton*, 512 US at 34.

By contrast, the Michigan Legislature waited over six years to enact "clarifying" legislation, which was prompted only by a decision of this Court. This undercuts the State's position on the Due Process Clause issue. The Legislature had multiple opportunities to enact retroactive legislation on a more timely basis; however, it expressly chose not to do so. By failing to act sooner, the Legislature forfeited any opportunity to even marginally satisfy the "promptness" and "modest" retroactivity standards laid down by the U.S. Supreme Court in *Carlton.*

The high level of turnover of the Michigan Legislature between the enactment of the original legislation and the retroactive legislation is a final indication the retroactive period upheld by the Court of Appeals in this case was not "modest." In Michigan, there was an 85 percent turnover in the Legislature between the date of the original legislation in 2008 and the date of the retroactive legislation in 2014. See Appellee Br., *Big Lots Stores, Inc v Dep't of Treasury*, No. 326039 (Mich. Ct. App.) at 36. Thus, only 15 percent of the legislators present and involved with the passage of the original legislation were also involved with its reinterpretation six and one-half years later. It is difficult to fathom how a small minority of carryover legislators several legislative sessions removed from the original legislation could speak for the entire body of a past legislature. As noted in a U.S. Supreme Court case, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v Price*, 361 US 304, 313; 80 S Ct 326; 4 L Ed 2d 33 (1960).

By contrast, the turnover in the U.S. Congress between the time of the enactment of the original legislation at issue in *Carlton* and the retroactive legislation clarifying the statute was only 12 percent. See http://history.house.gov/Institution/Election-Statistics/Election-Statistics/. In other words, in *Carlton*, 88 percent of Congressional members were still present when

Congress enacted retroactive legislation slightly more than one year after the original legislation. While the *Carlton* decision does not establish a litmus test for a "modest" duration based on the percentage of carryover legislators, the radically different composition of the Michigan Legislature and Congress at the time each legislative body enacted the retroactive legislation certainly underscores the Due Process violation in the instant case.

II. THE MICHIGAN LEGISLATURE'S RETROACTIVE LEGISLATION VIOLATES THE SEPARATION OF POWER DOCTRINE.

As discussed above, the Legislature retroactively repealed the Compact election following this Court's decision in *IBM*. In addition to violating the Due Process Clause, the Legislature's action also violates the separation of powers doctrine. The separation of powers doctrine, as set forth by the Michigan Constitution, provides that "[t]he powers of the government are divided into three branches: legislative, executive and judicial" and that "[n]o person shall exercise the powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. In *Quinton v General Motors Corporation*, 453 Mich 63; 551 NW2d 677 (1996), this Court noted that "[a]s in the federal system, this doctrine has been said to preclude the Legislature from reversing or setting aside a judgment entered by a court." *Id.* at 75, citing *Wylie v Grand Rapids City Comm,* 293 Mich 571, 582-83 (1940).

The Legislature's action completely subverted this Court's well-reasoned decision in *IBM*. Again, in that decision, this Court determined the Legislature's actions in 2011 were not retroactive and that IBM was entitled to make the Compact election for tax years 2008 through 2010.. The Legislature's action following that decision reversed and set aside that judgment in violation of Michigan's Constitution.

The Department asserts that Plaintiff-Appellant, and others, should be denied relief, because a final judgment in the IBM case was not entered until after the Legislature's action. That, however, is a distinction without a difference. The separation of powers doctrine should nonetheless apply. As noted above, Plaintiff-Appellant claimed the election on its timely-filed 2010 tax return. Plaintiff-Appellant's case was held in abeyance pending a decision in *IBM*, which was the lead case on this issue and addressed the same election made by Plaintiff-Appellant on its 2008 tax return. Plaintiff-Appellant's 2010 case is being held in abeyance and a final order not issued prior to the action by the Legislature should not be the determining factor. In other words, a taxpayer should not be punished merely because that taxpayer is not the lead tax litigant on an issue applying to multiple taxpayers and multiple years. This outcome frustrates any reliance on the judicial system, a separate branch of the government from the legislature. Just as this Court did not allow the Department to change its interpretation of a tax law related to exempting lottery proceeds from an inheritance tax, see *In re D'Amico Estate*, 435 Mich 551; 460 NW2d 198 (1990), this Court should not allow the Legislature to retroactively alter this Court's interpretation of a tax law related to the availability of an election.

The Legislature's retroactive repeal of the Compact election is particularly egregious because multiple taxpayers had relied upon the law in effect when they made the election and had litigation pending on the same issue. Taxpayers should not be treated differently based on where they are situated in the litigation pipeline. Every taxpayer asserting the availability of the Compact's apportionment election should have been entitled to that election when this Court decided *IBM* in favor of the taxpayer. The separation of powers doctrine should also protect those litigants that were made to wait. It is unjust to make them worse off than the initial taxpayer.

This Court needs to review this case to determine if this and other taxpayers are protected by the separation of powers doctrine. If not, the judicial system will be required to hear and decide multiple cases on the same legal issue simultaneously. This creates serious inefficiencies within in the court system, frustrating not only the courts but taxpayers as well.

III. RETROACTIVE TAX LEGISLATION IS UNFAIR

Sound tax policy requires legislation negatively impacting taxpayers should apply prospectively only. As the U.S. Supreme Court noted, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Langfall v USI Film Prods*, 511 US 244, 265; 114 S Ct 1483 (1994). Taxpayers make decisions based on the law controlling at the time the decision is made. When that law is retroactively altered, taxpayers are often injured and have no recourse. This undermines fairness in taxation. The Legislature's action here is similar to a bait-and-switch change Georgia's Legislature made to one of its state tax laws that was subsequently invalidated by the US Supreme Court in *Reich v Collins*, 513 US 106; 115 S Ct 547; 130 L Ed 2d 454 (1994). In that case, the Court held Georgia could not reconfigure its post deprivation remedy for an invalid tax to deny a taxpayer a refund. *Id.* at 111. By allowing the Michigan Legislature to pass a law retroactively trumping this Court's determination of how an apportionment election is applied, the Court of Appeals effectively blessed the same "bait-and-switch" behavior. *Id.* This Court should not allow that to stand.

Retroactive tax legislation also undermines taxpayers' confidence in the tax system. Why should a taxpayer abide by a set of laws that can be retroactively changed to make something that was legal at the time no longer legal? Taxpayers should have some certainty that their transactions will be legal and taxable before they take a position on their return or file a

claim for refund. Rules guide decision-making. Taxpayers will be ill-equipped to make decisions if the rules can unpredictably change after judicial decisions are made.

If retroactive tax legislation is allowed, taxpayers will no longer have certainty they are complying with a state's tax laws. Although difficult for Michigan's Legislature to anticipate every single consequence of new legislation, when unanticipated outcomes occur, the Legislature has the power to pass legislation on a *going forward* basis to address such problems. With prospective legislation, taxpayers are put on notice and can adjust their behaviors accordingly. When a law is changed retroactively, taxpayers have no notice of such changes. If the Michigan Legislature wanted to repeal the Compact, it had the power to do so prospectively (and in fact did so when it passed legislation in 2011). 2011 PA 40. The Michigan Legislature's enactment of 2014 PA 282 punishes taxpayers, mainly multistate taxpayers, for doing something they were legally entitled to do; and, to now suggest they acted illegally is unconscionable.

Finally, allowing the Legislature to retroactively change this Court's decision discourages the Legislature from acting prudently. Courts are the branch of the government empowered to interpret and strike down illegitimate laws. If the Legislature can retroactively change its law, then what is the purpose of empowering the courts with the authority to interpret laws? Also, if litigants who win a case before this Court are then retroactively made losers through legislation, litigants unfairly bear the expense of litigation with no corresponding recovery.

CONCLUSION

For these reasons, amicus respectfully requests this Court grant Plaintiff-Appellant's leave to appeal the decision of the Court of Appeals, and that this Court reverse that decision and permit Petitioner to elect whether to apportion income according to the terms of the Compact.

Respectfully submitted,

By ___/s/ Lynn A. Gandhi _____
Lynn A. Gandhi (P60466)
Counsel for *Amicus Curiae,*
Council On State Taxation
Honigman Miller Schwartz and Cohn LLP
660 Woodward Ave.
Detroit, Michigan 48226
(313) 465-7646

Dated: February 12, 2016

208698551