

No.

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**In the Supreme Court of the United States**

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GILLETTE COMMERCIAL OPERATIONS NORTH AMERICA &  
SUBSIDIARIES AND COVENTRY HEALTH CARE, INC.,  
*Petitioners,*

v.

MICHIGAN DEPARTMENT OF REVENUE,  
*Respondent.*

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**On Petition for a Writ of Certiorari to  
the Court of Appeals of Michigan**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

The Multistate Tax Compact is a multistate agreement that addresses significant aspects of the state taxation of interstate businesses. Among other things, the Compact is designed to prevent the over-taxation of such businesses, guaranteeing that Compact member States will allow such taxpayers to use a specified formula when apportioning their income for state-tax purposes. In 2014, the Michigan Supreme Court held that the Michigan Legislature had not precluded interstate taxpayers in Michigan, a Compact member State, from using the Compact formula. Michigan then unilaterally repealed the Compact, including the formula election provision, giving this new rule a retroactive effect of almost seven years. As a result, interstate businesses in Michigan were subject to retroactive taxes on business activities undertaken many years ago, in an aggregate amount exceeding \$1 billion. In this case, the Michigan Court of Appeals held that the State's retroactive legislation is consistent with both the Contract and the Due Process Clauses of the United States Constitution.

The questions presented are:

1. Whether the Multistate Tax Compact has the status of a contract that binds its signatory States.
2. Whether a state law that imposes retroactive tax liability for a period of almost seven years, in a manner that upsets settled expectations and reasonable reliance interests, violates the Due Process Clause.

**RULE 14.1(B) STATEMENT**

Petitioners Gillette Commercial Operations North America & Subsidiaries and Coventry Health Care, Inc., were plaintiffs-appellants in the Michigan Court of Appeals. Thirty-five other parties—Yaskawa America, Inc., Rainier Investment Management, Inc., Hansen Beverage Co., International Business Machines Corp., Paperweight Development Corp., Dollar Tree, Inc., Ball Corp., Commercial Metals Co., BioRx, LLC, Sonoco Products Co., Anheuser-Busch, LLC, Ingram Micro, Inc., Renaissance Learning, Inc., AK Steel Holding Corp., Advance/Newhouse Partnership, United Stationers Supply Co., Rodale, Inc., CIRCOR Energy Products, Inc., Crown Holdings, Inc., Michelin Corp., Interstate Gas Supply, Inc., Sapa Extrusions, Inc. (formerly known as Alcoa Extrusions, Inc.), Raven Industries, Inc., Cargill, Inc., Watts Regulator Co., LORD Corp., Teradyne, Inc., Lubrizol Corp., Goodyear Tire & Rubber Co., Hallmark Marketing Co., LLC, Big Lots Stores, Inc., Kimball International Marketing, Inc., Nintendo of America, Inc., Fluor Corp. & Subsidiaries, T-Mobile USA, Inc., & Subsidiaries—were also plaintiffs-appellants in the Michigan Court of Appeals, but they are not petitioners before this Court.

Respondent, the Michigan Department of Revenue, was the sole defendant-appellee in the Michigan Court of Appeals.

**RULE 29.6 STATEMENT**

1. Gillette Commercial Operations North America is a subsidiary of The Gillette Company LLC, which in turn is a direct subsidiary of The Procter & Gamble Company. The Procter & Gamble Company has no parent company, and no publicly held company owns 10% or more of its stock.

2. Coventry Health Care, Inc., is a subsidiary of Aetna, Inc. Aetna, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners Gillette Commercial Operations North America & Subsidiaries and Coventry Health Care, Inc., respectfully petition for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

### OPINIONS BELOW

The decision of the Michigan Court of Appeals (App., *infra*, 20a-90a) is reported at 878 N.W.2d 891. The decision of the Michigan Court of Claims (App., *infra*, 91a-92a) is unreported. The order of the Michigan Supreme Court (App., *infra*, 1a-5a) denying review is reported at 880 N.W.2d 230.

### JURISDICTION

The order of the Michigan Supreme Court denying leave to appeal was entered on June 24, 2016. On September 13, 2016, Justice Kagan extended the time for filing the petition for a writ of certiorari to November 21, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1257.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the U.S. Constitution, art. I, § 10, cl. 1, provides in relevant part:

No State shall \* \* \* pass any \* \* \* Law impairing the Obligation of Contracts.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides:

[N]or shall any state deprive any person of life, liberty, or property, without due process of law.

Former MCL § 205.581 provided in relevant 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 \* \* \* 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.

Former MCL § 205.581 provided in relevant part:

All business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3.

#### STATEMENT

States entered into the Multistate Tax Compact (“the Compact”) to establish a method for calculating state tax liability that would benefit out-of-state businesses by precluding duplicative state taxation. But a number of the Compact member States subsequently broke their agreement and departed from the Compact’s terms, in a manner that deprived taxpayers of the intended benefit. The decision below is one of a series of recent state-court holdings that allowed States to avoid their Compact commitments in this manner, rejecting taxpayer arguments that a unilateral state departure from the Compact’s guarantees violates the Contract Clause. The decision below then went a step further, allowing Michigan to give its departure from the Compact a retroactive effect of almost *seven* years.

The decision below in this case is substantively identical to that challenged by the petition for certiorari in *Goodyear Tire & Rubber Co. v. Michigan Department of Revenue*, which is being filed

simultaneously with this petition; the decision challenged in *Goodyear* rests entirely on the holding below in this case. For the reasons explained in the *Goodyear* petition, the Court should grant the petition in that case; it should hold this petition for disposition as appropriate in light of the resolution of *Goodyear*.

#### **A. The Multistate Tax Compact**

1. The Compact addresses problems that arise from the state taxation of businesses that operate in more than one State. One of these problems concerns the division of a business's income between the concerned States so as to avoid duplicative taxation. To determine the percentage of the interstate company's income that is taxable by any one State, States use an apportionment formula. But when States use different formulas, taxpayers face complexity, burdensome compliance costs, and the risk of being taxed on more than 100% of their income. See H.R. Rep. No. 1480, vol. 1 (1964) ("Willis Report").

In an attempt to counter these problems, the National Conference of Commissioners for Uniform State Laws drafted a model law in 1957, the Uniform Division of Income for Tax Purposes Act ("UDITPA"). UDITPA adopts an approach to income apportionment that averages three fractions: (1) the cost of the taxpayer's real property in the taxing State, divided by the total cost of its property; (2) the compensation the taxpayer pays employees in the State, divided by its total payroll; and (3) the taxpayer's gross sales in the State, divided by its total sales. That figure is multiplied by the taxpayer's total income to determine its state taxable income. Although UDITPA's formula is widely regarded as the most neutral and least discriminatory approach to apportionment, by 1965 only three States had adopted it.

Separately, Congress's so-called Willis Commission embarked on an extensive and, ultimately, highly critical review of the state taxation of interstate business.<sup>1</sup> It concluded that taxation of multistate taxpayers was inefficient and inequitable, particularly criticizing the diversity in apportionment formulas and the propensity of States to change those formulas frequently. To address these problems, the Willis Commission recommended federal preemptive legislation to mandate uniformity in state taxation. See H.R. Rep. No. 89-952, at 1143-1164 (1965). Members of Congress introduced several bills to implement this preemptive recommendation. *E.g.*, H.R. 11798, 89th Cong., 2d Sess. (1965).

2. In response, state officials adopted the Compact, which took effect in 1967. There is no doubt that the Compact's purpose was to forestall federal preemption; the contemporaneous summary and analysis of the Compact offered by the Council of State Governments ("CSG"), under whose auspices the Compact was prepared, explained that the Compact "is the result of \* \* \* the growing likelihood that federal action will curtail seriously existing State and local taxing power if appropriate coordinated action is not taken very soon by the States." CSG, *The Multistate Tax Compact, Summary and Analysis* 1 (1967) ("CSG Summary"); see *U.S. Steel*, 434 U.S. at 455-456. Following the Compact's adoption, none of the proposed federal bills became law.

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<sup>1</sup> Congress was reacting to this Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), which was generally understood to expand state authority to tax the income of interstate businesses. See *U.S. Steel Corp. v. Multi-state Tax Comm'n*, 434 U.S. 452, 455 (1978).

The Compact directly addressed the Willis Commission’s concerns regarding burdens on out-of-state companies. Most significantly for present purposes, the Compact’s Article III(1) provides unequivocally that “[a]ny taxpayer \* \* \* may elect to apportion and allocate” its income using UDITPA’s equal-weighted, three-factor approach, while also allowing States to craft their own alternative formulas that taxpayers may, but need not, use. *Petition for a Writ of Certiorari, Appendix at 23a, Goodyear Tire & Rubber Co. v. Mich. Dep’t of Revenue* (Nov. 21, 2016) [hereinafter *Goodyear App.*].

To join the Compact, States enact its text into their domestic statutory codes. The Compact thus provides that it “shall become effective as to any \* \* \* State upon its enactment” by that State. Art. X(1) (*Goodyear App.* 43a). And it offers a specific mechanism for withdrawal: after enactment, “[a]ny party State may withdraw from th[e] compact by enacting a statute repealing the same.” Art. X(2) (*Goodyear App.* 43a).

The Compact provided that it “shall enter into force when enacted into law by any seven States.” Art. X(1) (*Goodyear App.* 43a). Nine States joined the Compact within six months, making it effective. This Court subsequently rejected the contention that the Compact is invalid under the Constitution’s Compact Clause, art. I, § 10, cl. 3, because it has not been approved by Congress. In *U.S. Steel*, the Court held that congressional approval of agreements between States is required only when an interstate agreement contains provisions “that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States.” 434 U.S. at 472. The “pact” embodied by the Compact, the Court concluded, has no such effect on congressional supremacy. *Id.* at 473.

## B. Proceedings below

1. Michigan became a member State of the Compact in 1970 by enacting the Compact's terms, including the guarantee that taxpayers could make use of the UDITPA apportionment formula. MCL § 205.581 (1970). In 2007, Michigan revised its method of business taxation, enacting the Michigan Business Tax Act (BTA); although that statute provided for the apportionment of income through a single-factor formula based on sales, it "did not expressly repeal the Compact" and the Compact's election guarantee. *Int'l Bus. Mach. Corp. v. Dep't of Treasury* ("IBM"), 852 N.W.2d 865, 870 (Mich. 2014). When state tax authorities nevertheless took the position that the BTA precluded taxpayers from using the Compact's three-factor formula, taxpayers brought suit, contending that the Compact election remained available.

The Michigan Supreme Court agreed with the taxpayers, holding in 2014 that the Michigan Legislature did not repeal the Compact's election provision when it enacted the BTA in 2007. The court explained that "reading the Compact's election provision as forward-looking—i.e., contemplating the future enactment of a state income tax with a mandatory apportionment formula different from the Compact's apportionment formula—is the only way to give meaning to the provision \* \* \* in Michigan." *IBM*, 852 N.W.2d at 874. The court added that "the Legislature, in enacting the BTA, had full knowledge of the Compact and its provisions," but "[e]ven with such knowledge \* \* \* the Legislature left the Compact's election provision intact." *Id.* at 874-875. The court therefore held that "the BTA and the Compact are

compatible and can be read as a harmonious whole” for the tax years 2008-2010. *Id.* at 875.<sup>2</sup>

2. The Michigan Legislature responded to the 2014 *IBM* decision by purporting to repeal the Compact’s election provision retroactively for a period of almost seven years, as of January 1, 2008. See *Gillette Commercial Operations N. Am. & Subsidiaries v. Dep’t of Treasury* (“*Gillette Commercial Operations I*”), 878 N.W.2d 891, 901 (Mich. Ct. App. 2015); 2014 PA 282. When state revenue authorities sought to apply this rule, taxpayers contended, insofar as is relevant here, (1) that they had a contractual right under the Compact to use the UDITPA three-factor formula, departure from which violates the Contract Clauses of the federal and state constitutions; and (2) that a retroactive change in tax law dating back almost seven years violates the Due Process Clauses of the federal and state constitutions. The state claims court rejected these arguments, ruling for the State. App., *infra*, 91a-92a.

The Michigan Court of Appeals affirmed. See *Gillette Commercial Operations I*, 878 N.W.2d at 902-912 (App., *infra*, 20a-90a). On the first point, the court ruled “that the Compact is not a binding contract.” *Id.* at 903 (App., *infra*, 45a). The court opined initially that “[t]here are no words in the Compact \* \* \* that indicate that the state intended to be bound to the

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<sup>2</sup>The court added that in 2011 the Michigan Legislature enacted a law providing that, as of January 1, 2011, taxpayers would be required to use the BTA’s single-factor apportionment formula rather than the Compact’s three-part formula. See 852 N.W.2d at 875-876. This express repeal of the Compact’s election provision only as of 2011, the court explained, “is evidence that the Legislature had not impliedly repealed the provision” as of 2008. *Id.* at 876.

Compact, and specifically [in] Article III(1).” *Id.* at 904 (App., *infra*, 46a).

The state court then turned to this Court’s decision in *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985), which the state court understood to identify “[t]he three ‘classic indicia’ of a binding interstate compact[, which] are (1) the establishment of a joint regulatory body, (2) the requirement of reciprocal action for effectiveness, and (3) the prohibition of unilateral modification or repeal.” *Gillette Commercial Operations I*, 878 N.W.2d at 905 (bracketed material added by the court) (App., *infra*, 48a). These considerations, the court continued, each indicate that the Compact is not a binding contract because (1) the Compact “did not confer any governing or regulatory power on” a commission; (2) “[t]here is nothing reciprocal about the Compact’s provisions” because “[e]ach member state operates its respective tax systems independently from the tax systems of other Member States”; and (3) “the Compact allows unilateral modification and withdrawal.” *Ibid.* (App., *infra*, 48a-50a) For these reasons, the court concluded, “the Compact was not a binding agreement on this state. Instead, it was an advisory agreement.” *Id.* at 906 (App., *infra*, 50a).<sup>3</sup>

The court next rejected the taxpayers’ due process arguments regarding retroactivity. In its view, “retroactive modification of tax statutes does not offend due process considerations as long as there is a legitimate legislative purpose that is furthered by a rational means.” 878 N.W.2d at 907 (App., *infra*, 52a).

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<sup>3</sup> The court added that, even if there were a binding contractual commitment, that contract “likely” would not have been impaired within the meaning of the Contract Clause. *Gillette Commercial Operations I*, 878 N.W.2d at 906 (App., *infra*, 50a-51a).

That standard is satisfied here, the court held, because the Michigan Legislature acted to “correct a perceived misinterpretation of a statute” by the Michigan Supreme Court and to “eliminate a significant revenue loss.” *Id.* at 910 (App., *infra*, 60a). The court added that its conclusion was supported by its belief that the retroactive change does not “assess a wholly new tax,” instead “clarif[ying] the method of apportioning the tax base for a previously enacted tax”; that taxpayers could not reasonably have relied on the availability of the UDITPA formula in light of the State’s litigation position that the formula was unavailable; that the legislature “acted promptly to correct the error” after the Michigan Supreme Court’s *IBM* decision; and that “the 6½-year retroactive period was sufficiently modest.” *Id.* at 911 (internal quotation marks omitted) (App., *infra*, 60a-62a).

3. The Michigan Supreme Court denied review. *Gillette Commercial Operations N. Am. & Subsidiaries v. Dep’t of Treasury* (“*Gillette Commercial Operations II*”), 880 N.W.2d 230 (App., *infra*, 1a). But Justice Markman, joined by Justice Viviano, dissented from the denial, explaining that “the issues raised here are \* \* \* of considerable constitutional significance as to matters affecting the tax policy and procedures, the fiscal and business environments, and the jurisprudence of this state.” *Id.* at 231 (App., *infra*, 2a). In particular, Justice Markman would have addressed whether Michigan’s unilateral abrogation of the Compact election violates the Contract Clause “because the Compact is a reciprocal and binding interstate compact between the signatory states with respect to which a retroactive withdrawal from the Compact amounts to an unconstitutional impairment of that contract.” *Id.* at 232 (App., *infra*, 4a). He also would have addressed whether Michigan’s retroactive tax

legislation is “consistent with federal due-process protections, \* \* \* given that the retroactive period here of six years and nine months arguably exceeds ‘a modest period of retroactivity,’ [*United States v. Carlton*, 512 U.S. 26, 32 (1994)], and that one justice has observed in this same regard in a frequently cited statement that ‘[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise \* \* \* serious constitutional questions.’” *Id.* at 231 (quoting *Carlton*, 512 U.S. at 38 (O’Connor, J., concurring in the judgment) (ellipses added by the court)) (App., *infra*, 3a).

#### **REASONS FOR GRANTING THE PETITION**

This petition is one of several that do or will present the questions (1) whether the Compact is binding and (2) whether Michigan’s retroactive tax legislation violates the Due Process Clause. In addition to *Goodyear Tire & Rubber Co. v. Michigan Department of Revenue*, our understanding is that petitions will be filed by additional taxpayers arising out of the same or related decisions by the Michigan Court of Appeals.

For the reasons described at greatest length in the *Goodyear* petition, petitioners here respectfully suggest that the Court should grant the petition in *Goodyear*. It should then hold this petition pending resolution of that case and dispose of it as appropriate in light of the resolution of that proceeding.

**CONCLUSION**

The petition for a writ of certiorari should be held pending the disposition of *Goodyear Tire & Rubber Co. v. Michigan Department of Revenue*.

Respectfully submitted.

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*Counsel for Petitioners*

NOVEMBER 2016

**APPENDIX A**  
**MICHIGAN SUPREME COURT**  
**LANSING, MICHIGAN**

Robert P. Young, Jr.,  
Chief Justice

Stephen J. Markman  
Brian K. Zahra  
Bridget M. McCormack  
David F. Viviano  
Richard H. Bernstein  
Joan L. Larsen,  
Justices

**Order**

June 24, 2016  
152588

GILLETTE COMMERCIAL OPERATIONS NORTH  
AMERICA & SUBSIDIARIES,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152588  
COA: 325258  
Court of Claims: 14-000053-MT

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On order of the Court, the application for leave to  
appeal the September 29, 2015 judgment of the  
Court of Appeals is considered, and it is DENIED,

because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J. (*dissenting*).

I respectfully dissent from this Court's order denying leave to appeal. Because the issues raised here are, in my judgment, of considerable constitutional significance as to matters affecting the tax policy and procedures, the fiscal and business environments, and the jurisprudence of this state, I believe they ought to be heard by the highest court of this state, and would thus grant leave to appeal.

In 1970, Michigan joined the Multistate Tax Compact (the Compact) when the Legislature enacted MCL 205.581. See 1969 PA 243, effective July 1, 1970. Article III(1) of the Compact provided that certain multistate taxpayers may elect to apportion income to Michigan for tax purposes "in the manner provided by the laws of such state," i.e., the laws of Michigan, or else "in accordance with Article IV." MCL 205.581, art III(1). Article IV provided for an apportionment formula based on property, payroll, and sales factors. MCL 205.581, art IV(9). Effective January 1, 2008, the Legislature enacted the Michigan Business Tax Act (BTA), MCL 208.1101 *et seq.*, 2007 PA 36, which provided that "each tax base established under this act shall be apportioned in accordance with this chapter." MCL 208.1301(1). Finally, MCL 208.1301(2) of the BTA provided for an apportionment formula based solely on a sales factor.

At issue in *IBM v Dep't of Treasury*, 496 Mich 642 (2014), was whether the plaintiff multistate taxpayer could elect to use the Compact's three-factor apportionment formula for its 2008 Michigan taxes or whether, as the defendant Department of Treas-

ury argued, it was required to use the BTA's sales-factor-only apportionment formula. This Court ruled in *IBM* that the taxpayer could elect to use the Compact's apportionment formula. The lead opinion stated that "the Legislature had [not] repealed the Compact's election provision by implication when it enacted the BTA," *id.* at 645 (opinion by VIVIANO, J.), while the concurring opinion left that question open, *id.* at 668 (ZAHRA, J., concurring). In response, the Legislature enacted 2014 PA 282, which repealed the Compact "retroactively and effective beginning January 1, 2008." 2014 PA 282, enacting § 1. As a consequence, 2014 PA 282 retroactively repealed the Compact election provision beginning that date as well. Several multistate taxpayers challenged the constitutionality of 2014 PA 282, but the Court of Claims and the Court of Appeals upheld the statute against those challenges. *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 401 (2015). In my judgment, the following four constitutional questions that are raised in the taxpayers' various applications for leave to appeal warrant thorough consideration by this Court by a grant of leave to appeal:

*First*, is 2014 PA 282 consistent with federal due-process protections, US Const, Ams V and XIV, given that the retroactivity period here of six years and nine months arguably exceeds "a modest period of retroactivity," *United States v Carlton*, 512 US 26, 32 (1994), and that one justice has observed in this same regard in a frequently cited statement that "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions," *id.* at 38 (O'Connor, J., concurring in the judgment)?

*Second*, is 2014 PA 282 consistent with the Michigan Due Process Clause, Const 1963, art 1, § 17, when that clause is worded differently than the federal Due Process Clause and we have held that the state provision may afford heightened protections, *Delta Charter Twp v Dinolfo*, 419 Mich 253, 276 n 7 (1984), because “while the Federal supreme court is the final judge of violations of the Federal Constitution, the decision of the Supreme Court of this State is final on the question of whether or not a State statute conflicts with the State Constitution,” *People v Victor*, 287 Mich 506, 514 (1939)?

*Third*, does 2014 PA 282 violate either the federal or state prohibitions against the impairment of contracts, US Const, art I, § 10, cl 1; Const 1963, art 1, § 10, because the Compact is a reciprocal and binding interstate compact between the signatory states with respect to which a retroactive withdrawal from the Compact amounts to an unconstitutional impairment of that contract, see *Gillette Co v Franchise Tax Bd*, 62 Cal 4th 468, 477-479 (2015)?

*Fourth*, does 2014 PA 282 violate the Separation of Powers Clause, Const 1963, art 3, § 2, because by prescribing the outcomes of those cases that were held in abeyance pending *IBM*, as well as *IBM* itself, the Legislature has impinged on the judicial power, Const 1963, art 6, § 1, and contravened the principle that “the Legislature cannot dictate to the courts what their judgments shall be, or set aside or alter such judgments after they have been rendered,” *People ex rel Sutherland v Governor*, 29 Mich 320, 325-326 (1874); cf. *Plaut v Spendthrift Farm, Inc*, 514 US 211, 217-218 (1995) (“Congress has exceeded its authority by requiring the federal courts to exercise [t]he judicial Power of the United States,” U. S.

Const., Art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III.”)?

As the United States Supreme Court has recognized, “[T]he power to tax involves the power to destroy[.]” *McCulloch v Maryland*, 17 US (4 Wheat) 316, 431 (1819). This power must be kept subject to proper constitutional limits, particularly when, as here, a heightened tax burden has been imposed not on future business activities, but on business activities planned and undertaken many years ago. While I do not yet have any firm belief regarding the constitutionality of 2014 PA 282, I do have a firm belief that before retroactive tax burdens such as those set forth in this law are imposed, the arguments of affected taxpayers deserve consideration by the highest court of this state. Accordingly, I respectfully dissent and would grant leave to appeal.

VIVIANO, J., joins the statement of MARKMAN, J.

**APPENDIX B**  
**MICHIGAN SUPREME COURT**  
**LANSING, MICHIGAN**

Robert P. Young, Jr.,  
Chief Justice

Stephen J. Markman  
Brian K. Zahra  
Bridget M. McCormack  
David F. Viviano  
Richard H. Bernstein  
Joan L. Larsen,  
Justices

**Order**

June 24, 2016  
152615-648

YASKAWA AMERICA, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152615

COA: 325475

Court of Claims: 11-000077-MT

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RAINIER INVESTMENT MANAGEMENT, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152616

COA: 325476

Court of Claims: 13-000015-MT

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RAINIER INVESTMENT MANAGEMENT, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
SC: 152617  
COA: 325477  
Court of Claims: 13-000090-MT

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RAINIER INVESTMENT MANAGEMENT, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
SC: 152618  
COA: 325478  
Court of Claims: 13-000110-MT

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RAINIER INVESTMENT MANAGEMENT, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
SC: 152619  
COA: 325479  
Court of Claims: 12-000032-MT

---

HANSEN BEVERAGE COMPANY,  
Plaintiff-Appellant,  
v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152620

COA: 325480

Court of Claims: 11-000080-MT

---

COVENTRY HEALTH CARE, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152621

COA: 325481

Court of Claims: 11-000127-MT

---

YASKAWA AMERICA, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152622

COA: 325482

Court of Claims: 13-000052-MT

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YASKAWA AMERICA, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152623

COA: 325483

9a

Court of Claims: 12-000155-MT

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PAPERWEIGHT DEVELOPMENT CORPORATION,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152624

COA: 325485

Court of Claims: 12-000160-MT

---

PAPERWEIGHT DEVELOPMENT CORPORATION,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152625

COA: 325486

Court of Claims: 12-000075-MT

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DOLLAR TREE, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152626

COA: 325487

Court of Claims: 14-000192-MT

---

BALL CORPORATION,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152627

COA: 325488

Court of Claims: 13-000123-MT

---

COMMERCIAL METALS COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152628

COA: 325489

Court of Claims: 12-000161-MT

---

COMMERCIAL METALS COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152629

COA: 325490

Court of Claims: 12-000087-MT

---

DOLLAR TREE, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

11a

SC: 152630  
COA: 325491  
Court of Claims: 14-000030-MT

---

BIORX, LLC,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
SC: 152631  
COA: 325492  
Court of Claims: 11-000128-MT

---

UNITED STATIONERS SUPPLY COMPANY,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
SC: 152632  
COA: 325515  
Court of Claims: 12-000059-MT

---

RODALE, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
SC: 152633  
COA: 325516  
Court of Claims: 12-000101-MT

---

CIRCOR ENERGY PRODUCTS, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152634

COA: 325517

Court of Claims: 13-000098-MT

---

CROWN HOLDINGS, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152635

COA: 325518

Court of Claims: 13-000106-MT

---

MICHELIN CORPORATION,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152636

COA: 325520

Court of Claims: 14-000217-MT

---

INTERSTATE GAS SUPPLY, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
SC: 152637  
COA: 325522  
Court of Claims: 14-000144-MT

---

INTERSTATE GAS SUPPLY, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
SC: 152638  
COA: 325523  
Court of Claims: 14-000070-MT

---

SAPA EXTRUSIONS, INC., formerly known as  
ALCOA EXTRUSIONS, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
SC: 152639  
COA: 325525  
Court of Claims: 14-000157-MT

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RAVEN INDUSTRIES, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
SC: 152640  
COA: 325526

Court of Claims: 14-000037-MT

---

CARGILL, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152641

COA: 325528

Court of Claims: 12-000113-MT

---

WATTS REGULATOR COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152642

COA: 325529

Court of Claims: 13-000021-MT

---

WATTS REGULATOR COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152643

COA: 325532

Court of Claims: 13-000041-MT

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15a

WATTS REGULATOR COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152644

COA: 325533

Court of Claims: 14-000010-MT

---

LORD CORPORATION,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152645

COA: 325534

Court of Claims: 13-000124-MT

---

TERADYNE, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152646

COA: 325535

Court of Claims: 12-000063-MT

---

GOODYEAR TIRE & RUBBER COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152647  
COA: 325972  
Court of Claims: 14-000024-MT

---

HALLMARK MARKETING COMPANY, LLC,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

SC: 152648  
COA: 325974  
Court of Claims: 15-000009-MT

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On order of the Court, the application for leave to appeal the September 29, 2015 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J. (dissenting).

I respectfully dissent from this Court's order denying leave to appeal. Because the issues raised here are, in my judgment, of considerable constitutional significance as to matters affecting the tax policy and procedures, the fiscal and business environments, and the jurisprudence of this state, I believe they ought to be heard by the highest court of this state, and would thus grant leave to appeal.

In 1970, Michigan joined the Multistate Tax Compact (the Compact) when the Legislature enacted MCL 205.581. See 1969 PA 243, effective July 1, 1970. Article III(1) of the Compact provided that certain multistate taxpayers may elect to apportion in-

come to Michigan for tax purposes “in the manner provided by the laws of such state,” i.e., the laws of Michigan, or else “in accordance with Article IV.” MCL 205.581, art III(1). Article IV provided for an apportionment formula based on property, payroll, and sales factors. MCL 205.581, art IV(9). Effective January 1, 2008, the Legislature enacted the Michigan Business Tax Act (BTA), MCL 208.1101 *et seq.*, 2007 PA 36, which provided that “each tax base established under this act shall be apportioned in accordance with this chapter.” MCL 208.1301(1). Finally, MCL 208.1301(2) of the BTA provided for an apportionment formula based solely on a sales factor.

At issue in *IBM v Dep’t of Treasury*, 496 Mich 642 (2014), was whether the plaintiff multistate taxpayer could elect to use the Compact’s three-factor apportionment formula for its 2008 Michigan taxes or whether, as the defendant Department of Treasury argued, it was required to use the BTA’s sales-factor-only apportionment formula. This Court ruled in *IBM* that the taxpayer could elect to use the Compact’s apportionment formula. The lead opinion stated that “the Legislature had [not] repealed the Compact’s election provision by implication when it enacted the BTA,” *id.* at 645 (opinion by VIVIANO, J.), while the concurring opinion left that question open, *id.* at 668 (ZAHRA, J., concurring). In response, the Legislature enacted 2014 PA 282, which repealed the Compact “retroactively and effective beginning January 1, 2008.” 2014 PA 282, enacting § 1. As a consequence, 2014 PA 282 retroactively repealed the Compact election provision beginning that date as well. Several multistate taxpayers challenged the constitutionality of 2014 PA 282, but the Court of Claims and the Court of Appeals upheld the statute against those challenges. *Gillette Commercial Opera-*

*tions North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 401 (2015). In my judgment, the following four constitutional questions that are raised in the taxpayers' various applications for leave to appeal warrant thorough consideration by this Court by a grant of leave to appeal:

*First*, is 2014 PA 282 consistent with federal due-process protections, US Const, Ams V and XIV, given that the retroactivity period here of six years and nine months arguably exceeds "a modest period of retroactivity," *United States v Carlton*, 512 US 26, 32 (1994), and that one justice has observed in this same regard in a frequently cited statement that "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions," *id.* at 38 (O'Connor, J., concurring in the judgment)?

*Second*, is 2014 PA 282 consistent with the Michigan Due Process Clause, Const 1963, art 1, § 17, when that clause is worded differently than the federal Due Process Clause and we have held that the state provision may afford heightened protections, *Delta Charter Twp v Dinolfo*, 419 Mich 253, 276 n 7 (1984), because "while the Federal supreme court is the final judge of violations of the Federal Constitution, the decision of the Supreme Court of this State is final on the question of whether or not a State statute conflicts with the State Constitution," *People v Victor*, 287 Mich 506, 514 (1939)?

*Third*, does 2014 PA 282 violate either the federal or state prohibitions against the impairment of contracts, US Const, art I, § 10, cl 1; Const 1963, art 1, § 10, because the Compact is a reciprocal and binding interstate compact between the signatory states with respect to which a retroactive withdrawal from

the Compact amounts to an unconstitutional impairment of that contract, see *Gillette Co v Franchise Tax Bd*, 62 Cal 4th 468, 477-479 (2015)?

*Fourth*, does 2014 PA 282 violate the Separation of Powers Clause, Const 1963, art 3, § 2, because by prescribing the outcomes of those cases that were held in abeyance pending *IBM*, as well as *IBM* itself, the Legislature has impinged on the judicial power, Const 1963, art 6, § 1, and contravened the principle that “the Legislature cannot dictate to the courts what their judgments shall be, or set aside or alter such judgments after they have been rendered,” *People ex rel Sutherland v Governor*, 29 Mich 320, 325-326 (1874); cf. *Plaut v Spendthrift Farm, Inc*, 514 US 211, 217-218 (1995) (“Congress has exceeded its authority by requiring the federal courts to exercise ‘[t]he judicial Power of the United States,’ U. S. Const., Art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III.”)?

As the United States Supreme Court has recognized, “[T]he power to tax involves the power to destroy[.]” *McCulloch v Maryland*, 17 US (4 Wheat) 316, 431 (1819). This power must be kept subject to proper constitutional limits, particularly when, as here, a heightened tax burden has been imposed not on future business activities, but on business activities planned and undertaken many years ago. While I do not yet have any firm belief regarding the constitutionality of 2014 PA 282, I do have a firm belief that before retroactive tax burdens such as those set forth in this law are imposed, the arguments of affected taxpayers deserve consideration by the highest court of this state. Accordingly, I respectfully dissent and would grant leave to appeal.

VIVIANO, J., joins the statement of MARKMAN, J.

**APPENDIX C**  
**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GILLETTE COMMERCIAL OPERATIONS  
FOR PUBLICATION NORTH AMERICA  
& SUBSIDIARIES,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

FOR PUBLICATION

September 29, 2015

9:00 a.m.

No. 325258

Court of Claims

LC No. 14-000053-MT

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YASKAWA AMERICA, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325475

Court of Claims

LC No. 11-000077-MT

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RAINIER INVESTMENT MANAGEMENT, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

21a

No. 325476  
Court of Claims  
LC No. 13-000015-MT  
Advance Sheets Version

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RAINIER INVESTMENT MANAGEMENT, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325477  
Court of Claims  
LC No. 13-000090-MT

---

RAINIER INVESTMENT MANAGEMENT, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325478  
Court of Claims  
LC No. 13-000110-MT

---

RAINIER INVESTMENT MANAGEMENT, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325479  
Court of Claims  
LC No. 12-000032-MT

---

HANSEN BEVERAGE COMPANY,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325480  
Court of Claims  
LC No. 11-000080-MT  
Advance Sheets Version

---

COVENTRY HEALTH CARE, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325481  
Court of Claims  
LC No. 11-000127-MT

---

YASKAWA AMERICA, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325482  
Court of Claims  
LC No. 13-000052-MT

---

YASKAWA AMERICA, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325483

Court of Claims

LC No. 12-000155-MT

---

INTERNATIONAL BUSINESS MACHINES COR-  
PORATION,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325484

Court of Claims

LC No. 14-000219-MT

Advance Sheets Version

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PAPERWEIGHT DEVELOPMENT CORPORATION,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325485

Court of Claims

LC No. 12-000160-MT

---

PAPERWEIGHT DEVELOPMENT CORPORATION,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325486  
Court of Claims  
LC No. 12-000075-MT

---

DOLLAR TREE, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325487  
Court of Claims  
LC No. 14-000192-MT

---

BALL CORPORATION,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325488  
Court of Claims  
LC No. 13-000123-MT  
Advance Sheets Version

---

COMMERCIAL METALS COMPANY,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325489

25a

Court of Claims  
LC No. 12-000161-MT

---

COMMERCIAL METALS COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325490

Court of Claims  
LC No. 12-000087-MT

---

DOLLAR TREE, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325491

Court of Claims  
LC No. 14-000030-MT

---

BIORX, LLC,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325492

Court of Claims  
LC No. 11-000128-MT  
Advance Sheets Version

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SONOCO PRODUCTS COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325505

Court of Claims

LC No. 14-000142-MT

---

ANHEUSER-BUSCH, LLC,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325506

Court of Claims

LC No. 13-000111-MT

---

INGRAM MICRO, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325507

Court of Claims

LC No. 11-000035-MT

---

RENAISSANCE LEARNING, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325508  
Court of Claims  
LC No. 12-000093-MT  
Advance Sheets Version

---

RENAISSANCE LEARNING, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325509  
Court of Claims  
LC No. 13-000006-MT  
Advance Sheets Version

---

AK STEEL HOLDING CORPORATION,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325510  
Court of Claims  
LC No. 13-000074-MT

---

ADVANCE/NEW HOUSE PARTNERSHIP,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325511

Court of Claims  
LC No. 14-000067-MT

---

UNITED STATIONERS SUPPLY COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325515

Court of Claims

LC No. 12-000059-MT

Advance Sheets Version

---

RODALE, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325516

Court of Claims

LC No. 12-000101-MT

Advance Sheets Version

---

CIRCOR ENERGY PRODUCTS, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325517

Court of Claims

LC No. 13-000098-MT

---

CROWN HOLDINGS, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325518

Court of Claims

LC No. 13-000106-MT

---

MICHELIN CORPORATION,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325520

Court of Claims

LC No. 14-000217-MT

Advance Sheets Version

---

INTERSTATE GAS SUPPLY, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325522

Court of Claims

LC No. 14-000144-MT

---

INTERSTATE GAS SUPPLY, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325523

Court of Claims

LC No. 14-000070-MT

---

SAPA EXTRUSIONS, INC., formerly known as  
ALCOA EXTRUSIONS, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325525

Court of Claims

LC No. 14-000157-MT

---

RAVEN INDUSTRIES, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325526

Court of Claims

LC No. 14-000037-MT

Advance Sheets Version

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CARGILL, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325528

Court of Claims

LC No. 12-000113-MT

---

WATTS REGULATOR COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325529

Court of Claims

LC No. 13-000021-MT

---

WATTS REGULATOR COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 325532

Court of Claims

LC No. 13-000041-MT

---

WATTS REGULATOR COMPANY,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

32a

No. 325533  
Court of Claims  
LC No. 14-000010-MT  
Advance Sheets Version

---

LORD CORPORATION,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325534  
Court of Claims  
LC No. 13-000124-MT

---

TERADYNE, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325535  
Court of Claims  
LC No. 12-000063-MT

---

LUBRIZOL CORPORATION,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325541  
Court of Claims  
LC No. 14-000143-MT

---

GOODYEAR TIRE & RUBBER COMPANY,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325972  
Court of Claims  
LC No. 14-000024-MT  
Advance Sheets Version

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HALLMARK MARKETING COMPANY, LLC,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 325974  
Court of Claims  
LC No. 15-000009-MT

---

BIG LOTS STORES, INC.,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 326039  
Court of Claims  
LC No. 13-000133-MT

---

KIMBALL INTERNATIONAL MARKETING, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 326075

Court of Claims

LC No. 14-000300-MT

---

NINTENDO OF AMERICA, INC.,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 326080

Court of Claims

LC No. 14-000253-MT

Advance Sheets Version

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ADVANCE/NEWHOUSE PARTNERSHIP,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.

No. 326110

Court of Claims

LC No. 14-000206-MT

---

FLUOR CORPORATION AND SUBSIDIARIES,  
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 326123  
Court of Claims  
LC No. 14-000292-MT

---

T-MOBILE USA, INC., AND SUBSIDIARIES,  
Plaintiff-Appellant,  
v  
DEPARTMENT OF TREASURY,  
Defendant-Appellee.  
No. 326136  
Court of Claims  
LC No. 14-000276-MT  
Advance Sheets Version

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Before: MURRAY, P.J., and JANSEN and METER, JJ.  
MURRAY, P.J.

## I. INTRODUCTION

In these consolidated appeals, numerous foreign<sup>1</sup> corporations doing business in Michigan appeal as of right the trial court's orders granting summary disposition to defendant, the Michigan Department of Treasury, pursuant to MCR 2.116(I)(1), and dismissing their complaints.

These cases involve a significant number of state and federal constitutional challenges to 2014 PA 282,

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<sup>1</sup> By foreign we mean corporations that were incorporated outside Michigan, not necessarily outside the United States.

which the Legislature—taking the cue from the Supreme Court in *Int’l Business Machines Corp v Dep’t of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) (*IBM*)—enacted to retroactively rescind Michigan’s membership in the Multistate Tax Compact (the Compact), precluding foreign corporations from utilizing a three-factor apportionment formula previously available under the Compact. See former MCL 205.581 *et seq.*, as enacted by 1969 PA 343. In a well-written and well-reasoned opinion, the trial court rejected each of the constitutional challenges.<sup>2</sup> For the reasons expressed below, so do we. Consequently, we affirm the trial court’s final orders of dismissal.

## II. BACKGROUND FACTS AND PROCEDURAL HISTORY

Rather than re-creating the wheel, we adopt the trial court’s recitation of the background facts leading to these lawsuits:

### History of the Compact

The Compact is an interstate tax agreement that was originally enacted in 1967 by the legislatures of seven states. The Compact was initially drafted out of concerns of state sovereignty in reaction to the introduction of federal legislation that sought to regu-

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<sup>2</sup> The trial court, MICHAEL J TALBOT, J., issued two full opinions in these cases. The orders resolving the other cases referred back to the reasoning set forth in those opinions. For ease of reference, when we refer to the trial court’s reasoning, we are referring to the reasoning set forth in *Yaskawa America, Inc v Dep’t of Treasury*, unpublished opinion and order of the Court of Claims, issued December 19, 2014 (Case No. 11-000077-MT).

late various areas of state taxation.<sup>3</sup> The original purposes of the Compact included:

(1) facilitating proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) promoting uniformity and compatibility in state tax systems; (3) facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative taxation. [*US Steel Corp v Multistate Tax Comm*, 434 US 452, 456; 98 S Ct 799; 54 L Ed 2d 682 (1978).<sup>4</sup>]

Michigan adopted the Compact provisions, effective in 1970, through enactment of 1969 PA 343.

#### **Apportionment Formulas under the Compact and the MBT Act**

The present case, and others like it, concern two alternative methods of apportioning income for purposes of calculating [Michigan business tax (MBT)]. Under the MBT Act, created by 2007 PA 36,<sup>5</sup> income is apportioned by applying a single factor apportionment formula based solely on sales. MCL

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<sup>3</sup> The legislation, which was never enacted, was introduced in the wake of *Northwestern States Portland Cement Co v Minnesota*, 358 US 450; 79 S Ct 357; 3 L Ed 2d 421 (1959), which held that there is no Commerce Clause barrier to the imposition of a direct income tax on a foreign corporation carrying on interstate business within a taxing state.

<sup>4</sup> The Compact was never approved by Congress, but it was upheld against constitutional challenges in *US Steel*, 434 US 452.

<sup>5</sup> For a history of business taxation in Michigan, see *IBM*, 496 Mich at 648-650.

208.1301(2). In contrast, under the Compact's election provision, income may be apportioned using an equally-weighted, three-factor apportionment formula based on sales, property and payroll. The potential effect of electing "out" of the MBT Act's single-factor apportionment methodology is a reduction of the overall apportionment percentage for companies that do not have significant property and payroll located in Michigan.

### **Decision in *IBM***

In *IBM*, 496 Mich 642, the Supreme Court considered the issue of whether MBT taxpayers must use a single-factor apportionment formula as mandated by the MBT Act or whether MBT taxpayers may elect to apply a three-factor apportionment formula under the Compact. The parties were asked by the Court to brief four issues:

(1) whether the plaintiff could elect to use the apportionment formula provided in the Multistate Tax Compact, MCL 205.581, in calculating its 2008 tax liability to the State of Michigan, or whether it was required to use the apportionment formula provided in the Michigan Business Tax Act, MCL 208.1101 *et seq.*; (2) whether § 301 of the Michigan Business Tax Act, MCL 208.1301, repealed by implication Article III(1) of the Multistate Tax Compact; (3) whether the Multistate Tax Compact constitutes a contract that cannot be unilaterally altered or amended by a member state; and (4) whether the modified gross receipts tax component of the Michigan Business Tax Act constitutes an income tax under the Multistate Tax Compact. [*Int'l*

*Business Machines v Dep't of Treasury*, 494 Mich 874; 832 NW2d 388 (2013).]

In its decision, the Court determined that for tax years 2008 through 2010,<sup>6</sup> the Legislature did not repeal by implication the three-factor apportionment formula as set forth in MCL 205.581 *et seq.*, and concluded that the taxpayer was entitled to use the Compact's three-factor apportionment formula in calculating its 2008 taxes. The Court also concluded that both the business income tax base and the modified gross receipts tax base of the MBT are "income taxes" within the meaning of the Compact. The Court did not reach the third issue of whether the Compact constitutes a contract. On November 14, 2014, the Michigan Supreme Court denied reconsideration. *Int'l Business Machines v Dep't of Treasury*, [497 Mich 894]; 855 NW2d 512 (2014).

**Retroactive Repeal of the Compact Provisions by [2014] PA 282**

On September 11, 2014, 2013 SB 156 (SB 156) was enacted into law as [2014] PA 282, amending the MBT Act and expressly repealing the Compact provisions, as codified under MCL 205.581 to MCL 205.589. The Legislature gave the Act retroactive effect by providing as follows:

Enacting section 1. 1969 PA 343, MCL 205.581 to 205.589, is repealed retroactively and effective beginning January 1, 2008. It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589, is to

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<sup>6</sup> The Legislature explicitly repealed the Compact apportionment provisions effective January 1, 2011, through enactment of 2011 PA 40.

express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section to eliminate the election provision included within section 1 of 1969 PA 343, MCL 205.581, and that the 2011 amendatory act that amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and to clarify that the election provision included within section 1 of 1969 PA 343, MCL 205.581, is not available under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.713.

[2014] PA 282 thus amended the MBT Act to express the “original intent” of the Legislature with regard to (1) the repeal of the Compact provisions, (2) application of the MBT Act’s apportionment provision under MCL 208.1301, and (3) the intended effect of the Compact’s election provision under MCL 205.581.<sup>7</sup> The effect of the amendments, as written, retroactively eliminates a taxpayer’s ability to elect a three-factor apportionment formula in calculating tax liability under both the MBT Act and income tax act.

Between 2011 and 2015 these multistate taxpayers all filed suit in the Court of Claims seeking refunds due under the Compact that had been refused by Treasury on the ground that the only apportion-

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<sup>7</sup> [2014] PA 282 also clarified that the Compact’s election provision is not available under the income tax act of 1967, 1967 PA 281.

ment method available was that established by the MBT. Most of the cases were filed prior to the Supreme Court’s resolution of *IBM*, so the trial court prudently held the cases in abeyance pending that decision. Ultimately, however, the case was resolved not by the *IBM* decision, but by passage of 2014 PA 282, at least once the trial court upheld the statute against plaintiffs’ constitutional challenges. We now turn our attention to those same constitutional arguments.

### III. ANALYSIS

#### A. STANDARDS OF REVIEW

The trial court entered summary disposition in favor of Treasury under MCR 2.116(I)(1), a decision which we review de novo. *Kenefick v Battle Creek*, 284 Mich App 653, 654; 774 NW2d 925 (2009). MCR 2.116(I)(1) states, “If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.” We likewise pay no deference to the trial court’s statutory interpretation or resolution of constitutional issues, as both of those issues also require review de novo. *Elba Twp v Gratiot Co Drain Comm’r*, 493 Mich 265, 277-278; 831 NW2d 204 (2013); *Gen Motors Corp v Dep’t of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010).<sup>8</sup>

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<sup>8</sup> Though we can give no deference to the trial court’s legal rulings, unlike the deference we give to discretionary calls on evidence or findings of fact, we nevertheless give the trial court’s legal rulings careful consideration.

## B. GENERAL PRINCIPLES

Before delving into our analysis of these issues, we first set forth in chronological sequence several undisputed factual matters and legal principles that, although partially contained in Part II of this opinion, are worth keeping in mind as they provide critical background for our decision:

1. Michigan became a member state to the Compact in 1970.

2. A member state can withdraw from the Compact by “enacting a statute repealing the same.” Former MCL 205.581, art X(2).

3. Under the Compact as originally enacted, a foreign business taxpayer had the option of either utilizing the apportionment formula under the Compact or what was available under a state’s tax laws. Former MCL 205.581, art III.

4. The Michigan Business Tax Act, enacted into law in 2007 and effective January 1, 2008, required foreign business taxpayers to use the apportionment formula contained in the act. MCL 208.1301(2) and MCL 208.1303.

5. In 2011, the Legislature repealed the apportionment provision of the Compact, effective January 1, 2011. 2011 PA 40.

6. In *IBM*, the Supreme Court held that through 2011 PA 40 the Legislature created a window (from January 1, 2008 until January 1, 2011) wherein certain taxpayers could still utilize the apportionment option available under Article IV of the Compact. The Court recognized that the Legislature “could have—but did not—extend this retroactive repeal to the start date of the [MBT].” *IBM*, 496 Mich at 659.

7. In response to the *IBM* decision, the Legislature enacted 2014 PA 282, which retroactively repealed the Compact to the start date of the MBT. 2014 PA 282 therefore eliminated the three-year window the *IBM* Court stated was created by 2011 PA 40.

8. In general, it is constitutional for tax statutes to be retroactively amended, and taxpayers do not generally have a vested interest in tax laws that exist at any particular moment. *United States v Carlton*, 512 US 26, 30; 114 S Ct 2018; 129 L Ed 2d 22 (1994).

With these principles and facts in mind, we now turn our attention to the precise arguments put forth by the parties.

### C. STATE AND FEDERAL CONTRACTS CLAUSES

We first address whether repeal of the Compact through 2014 PA 282 violated the Contracts Clauses of the state and federal Constitutions. The United States Constitution provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .,” US Const, art I, § 10, cl 1, while our state Constitution similarly provides that “[n]o . . . law impairing the obligation of contract shall be enacted,” Const 1963, art 1, § 10. In conducting this constitutional review, we give deference to the legislative branch by presuming statutes to be constitutional, and we will construe statutes as constitutional unless their unconstitutionality is clearly apparent. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011). This presumption is “es-

pecially strong” when tax legislation is concerned. Id. at 308 (citation omitted).

Like many provisions of the federal Constitution, the Contracts Clause has not been applied by the Supreme Court according to its plain, unequivocal language. As that Court has acknowledged, “[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State ‘to safeguard the vital interests of its people.’ “ *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 410; 103 S Ct 697; 74 L Ed 2d 569 (1983), quoting *Home Bldg & Loan Ass’n v Blaisdell*, 290 US 398, 434; 54 S Ct 231; 78 L Ed 413 (1934). In order to determine whether the clause’s prohibition should be accommodated, the Supreme Court developed a three-part test. The first part of the three-part test is “whether the change in state law has ‘operated as a substantial impairment of a contractual relationship.’ “ *Gen Motors Corp v Romein*, 503 US 181, 186; 112 S Ct 1105; 117 L Ed 2d 328 (1992), quoting *Allied Structural Steel Co v Spannaus*, 438 US 234, 244; 98 S Ct 2716; 57 L Ed 2d 727 (1978).

Whether a change in state law has resulted in “a substantial impairment of a contractual relationship” itself requires consideration of three factors: “[1] whether there is a contractual relationship, [2] whether a change in law impairs that contractual relationship, and [3] whether the impairment is substantial.” *Romein*, 503 US at 186. If this first prong of the test is met, i.e., “[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . .” *Energy Reserves Group*, 459 US at 411. Finally, the third part

of the test is “whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.” *Id.* at 412 (citation and quotation marks omitted; alterations in original). See also *Borman LLC v 18718 Borman, LLC*, 777 F3d 816, 824-825 (CA 6, 2015).<sup>9</sup>

We agree with the trial court that the Compact is not a binding contract under Michigan law. Because Congress did not approve the Compact, Michigan law governs its interpretation. See *McComb v Wambaugh*, 934 F2d 474, 479 (CA 3, 1991) (stating that where the consent of Congress is not obtained, a compact does not express federal law and must be construed as state law). The trial court provided the following analysis of the Compact under Michigan law, with which we are in full agreement:

In Michigan, there is a “strong presumption that statutes do not create contractual rights.” *Studier v Mich Pub Sch Employees’ Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). “In order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract.” *Id.* at 662 (quotation marks and citation omitted). As noted in the dissent in *IBM*, “[t]his presumption is grounded in the principle that ‘surrenders of legislative power are sub-

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<sup>9</sup> Lower federal court decisions are not binding on this Court but may be considered for their persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

ject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments.” *IBM*, 496 Mich at 682 (MCCORMACK, J., dissenting), quoting *Studier*, 472 Mich at 661.

There are no words in the Compact, as adopted by the Legislature under 1969 PA 343, that indicate that the state intended to be bound to the Compact, and specifically to Article III(1). Therefore, the presumption must be that the state did not surrender its legislative power to require use of a particular apportionment formula. Such interpretation comports with the Supreme Court’s recognition of “the basic principle[] that the States have wide latitude in the selection of apportionment formulas . . . .” *Moorman [Mfg Co v Blair]*, 437 US [267,] 274[; 98 S Ct 2340; 57 L Ed 2d 197 (1978)]. This interpretation is also consistent with the Court’s recent acknowledgement that states “do not easily cede their sovereign powers . . . .” *Tarrant [Regional Water Dist v Herrmann]*, [569 US \_\_\_, \_\_\_;] 133 S Ct [2120,] 2132[; 186 L Ed 2d 153 (2013)]. Because there is no clear indication under MCL 205.581 that the state contracted away its ability to either select an apportionment formula that differs from the Compact, or to repeal the Compact altogether, the Court concludes that no contractual obligation was created by enactment of 1969 PA 343 that would prohibit the enactment of [2014] PA 282.

See also *IBM*, 496 Mich at 683 (MCCORMACK, J., dissenting) (opining that the Compact’s withdrawal

provision was “strong evidence that the member states did not intend to be contractually bound, as it demonstrates the member states’ desire to retain control over their sovereignty with respect to taxation”). Accordingly, plaintiffs’ state and federal Contracts Clause arguments are unavailing because they are premised on the incorrect view that the Compact comprises a binding contract under state law.<sup>10</sup> See *Romein*, 503 US at 186.

However, plaintiffs also argue, using law developed under the federal Compact Clause, US Const, art I, § 10, cl 3,<sup>11</sup> that Michigan created binding contractual obligations by entering into the Compact and that those binding obligations are enforceable

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<sup>10</sup> We also point out that because a Legislature cannot bind a subsequent Legislature under Michigan law, 1969 PA 343 did not restrict a subsequent Legislature’s ability to correct an error prospectively or retroactively. See, e.g., *Studier*, 472 Mich at 660; *LeRoux v Secretary of State*, 465 Mich 594, 615-616; 640 NW2d 849 (2002). See also *Atlas v Wayne Co Bd of Auditors*, 281 Mich 596, 599; 275 NW 507 (1937) (“The power to amend and repeal legislation as well as to enact it is vested in the legislature, and the legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the repeal or amendment of statutes; nor may one legislature restrict or limit the power of its successors.”).

<sup>11</sup> Plaintiffs do not allege a violation of the Compact Clause, and for good reason. According to the Supreme Court, the Compact Clause is limited to “agreements that are ‘directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.’” *US Steel*, 434 US at 471, quoting *Virginia v Tennessee*, 148 US 503, 519; 13 S Ct 728; 37 L Ed 537 (1893). The Compact does nothing of the sort, and essentially exists for the benefit of multistate taxpayers. It gives no advantage to the states vis-a-vis the federal government.

under the Contracts Clause. See, e.g., *Thompson v Auditor General*, 261 Mich 624, 636; 247 NW 360 (1933), citing *Green v Biddle*, 21 US (8 Wheat) 1; 5 L Ed 547 (1823); *Doe v Ward*, 124 F Supp 2d 900, 915 n 20 (WD Penn, 2000), quoting *Aveline v Pennsylvania Bd of Probation & Parole*, 729 A2d 1254, 1257 n 10 (Pa, 1999). Relying upon caselaw addressing whether an agreement between two or more states constitutes a compact for purposes of the Compact Clause, in its own words the trial court considered “[t]he three ‘classic indicia’ of a binding interstate compact[, which] are (1) the establishment of a joint regulatory body, (2) the requirement of reciprocal action for effectiveness, and (3) the prohibition of unilateral modification or repeal.” See *Northeast Bancorp, Inc v Bd of Governors of the Fed Reserve Sys*, 472 US 159, 175; 105 S Ct 2545; 86 L Ed 2d 112 (1985), and *Seattle Master Builders Ass’n v Pacific Northwest Electric Power & Conservation Planning Council*, 786 F2d 1359, 1363 (CA 9, 1986). Applying these same factors, we conclude that the Compact contained no features of a binding interstate compact and, therefore, was not a compact enforceable under the Contracts Clause.

With respect to the first factor, whether the Compact created a joint regulatory agency, although the Compact created the Multistate Tax Commission, former MCL 205.581, art VI, it did not confer any governing or regulatory powers on that body. Rather, the Commission’s powers included studying state and local tax systems, developing and recommending proposals for greater uniformity, and compiling information helpful to the party states. Former MCL 205.581, art VI(3). As the trial court noted, “[n]one of these purposes is regulatory, and it in no way indicates a delegation of sovereign authority to

tax,” a point the Court in *US Steel Corp*, 434 US at 473, also made clear:

[The Compact] does not purport to authorize the member States to exercise any powers they could not exercise in its absence. *Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission.* [Emphasis added.]

Concerning the second factor, we adopt the trial court’s analysis and its conclusion that the Compact did not require reciprocal action:

There is nothing reciprocal about the Compact’s provisions. Each member state operates its respective tax systems independently from the tax systems of other Member States, and the determination of tax in one state is generally independent of the determination in another state. With respect to apportionment formulas, in particular, Articles III(1) and IV’s application in one member state has no bearing on another state. And the functionality of one member state’s apportionment methodology does not hinge on whether another member state’s apportionment methodology is reciprocal in nature. As the Supreme Court recognized in *Moorman Mfg Co* [437 US at 274], “the States have wide latitude in the selection of apportionment formulas.” Consistent with *Moorman*, a Member State’s decision to allow or eliminate a certain apportionment formula is unaffected by the choice of formula that another member state has made.

Finally, with regard to the third factor, the Compact allows unilateral modification and withdrawal. The Compact expressly says that member states are free to withdraw unilaterally without notice to other member states. As previously noted, former MCL 205.581, art X(2), provides that a state may withdraw from the Compact by enacting a statute repealing it. See also *US Steel Corp*, 434 US at 473 (“[E]ach State is free to withdraw at any time.”). Because the Compact specifically allows member states to unilaterally withdraw (subject to one condition, discussed later in this opinion) by merely passing legislation doing so, which is precisely what Michigan did through 2014 PA 282, we hold that the Compact was not a binding agreement on this state. Instead, it was an advisory agreement that was agreed to by participating states as a means of addressing interstate business taxation and threatened federal intervention into that area. 2014 PA 282, which removed the state as a member of the Compact, was therefore not prohibited.<sup>12</sup>

Before concluding on this issue, we point out that even if there was a binding contractual commitment on the part of the state, there likely would still be no violation of the Contracts Clause. The United States Court of Appeals for the Sixth Circuit recently stated that “an impairment takes on constitutional dimen-

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<sup>12</sup> We also point out, as did Justice MCCORMACK in her *IBM* dissent, that the member states’ course of performance shows that unilateral amendments or withdrawals had long been accepted. As Justice MCCORMACK noted, “member states did *not* view strict adherence to Articles III and IV as a binding contractual obligation, as Compact members have deviated from the Compact’s election provision and apportionment formula without objection from other members.” *IBM*, 496 Mich at 681-682 (MCCORMACK, J., dissenting).

sions only when it interferes with reasonably expected contractual benefits.” *Borman LLC*, 777 F3d at 826, citing *US Trust Co of New York v New Jersey*, 431 US 1, 21, 31; 97 S Ct 1505; 52 L Ed 2d 92 (1977). As the Supreme Court has previously declared, “a statute does not violate the Contract Clause simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment.” *Exxon Corp v Eagerton*, 462 US 176, 190; 103 S Ct 2296; 76 L Ed 2d 497 (1983). Given the fact that these taxpayers have no vested interest in the continuation of a tax law, and that tax law is one of the more highly regulated areas in the law, it is difficult to see what reasonable expectation was actually interfered with. See, e.g., *All Star, Inc v Georgia Atlanta Amusements, LLC*, 332 Ga App 1, 9; 770 SE2d 22 (2015), and cases cited therein. This is particularly so when considering Treasury’s position on this issue over the past five years or so.

In any event, because the Compact is not binding, either as a contract or a compact, it is subject to Michigan law concerning the interpretation of statutes.

#### **D. RETROACTIVITY AND THE DUE PROCESS CLAUSES**

We hold, as did the trial court, that the retroactive repeal of the Compact did not violate the Due Process Clauses of either the state or federal Constitutions or Michigan’s rules regarding retrospective legislation. Nor did it violate the terms of the Compact itself.

In confronting these issues it is certainly worth repeating that “[s]tatutes are presumed to be consti-

tutional, and this presumption is especially strong with respect to tax legislation. The party challenging the constitutionality of the statute has the burden of proving the law's invalidity." *Gen Motors Corp*, 290 Mich App at 369 (citations omitted). In *Gen Motors Corp* we noted that the Due Process Clause of the Fourteenth Amendment has been read by the Supreme Court to contain a substantive component even though the clause itself contains only a procedural component:

The Fourteenth Amendment to the United States Constitution and Const 1963, art 1, § 17 guarantee that no state shall deprive any person of "life, liberty or property, without due process of law." Although textually only providing procedural protections, the Due Process Clause has a substantive component that protects individual liberty and property interests from arbitrary government actions. But to be protected by the Due Process Clause, a property interest must be a vested right. A vested right is an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice. [*Id.* at 370 (citations and quotation marks omitted).]

Both the federal courts and our state courts have uniformly held that the retroactive modification of tax statutes does not offend due process considerations as long as there is a legitimate legislative purpose that is furthered by a rational means. For example, in *Welch v Henry*, 305 US 134, 146-151; 59 S Ct 121; 83 L Ed 87 (1938), the United States Supreme Court rejected a due process challenge to a Wisconsin statute enacted in 1935 that imposed a

tax on income received in 1933. The Supreme Court explained that “a tax is not necessarily unconstitutional because retroactive.” *Id.* at 146. It further concluded:

Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute. [*Id.* at 146-147.]

In order to resolve this issue, it is necessary “[i]n each case . . . to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.” *Id.* at 147.

*Carlton*, 512 US 26, involved a due process challenge to the retroactive application of a 1987 amendment of a federal tax law to a taxpayer’s transactions that occurred in 1986. The Supreme Court noted that it “repeatedly has upheld retroactive tax legislation against a due process challenge.” *Carlton*, 512 US at 30. In addressing the “harsh and oppressive” language in *Welch*, the Court explained that “[t]he ‘harsh and oppressive’ formulation . . . does not differ from the prohibition against arbitrary and irrational legislation that applies generally to enactments in the sphere of economic policy.” *Id.* (citation and quotation marks omitted). That is, if the

retroactive application of a statute is supported by a legitimate legislative purpose that is furthered by rational means, then the wisdom of the legislation is a determination left *exclusively* to the legislative and executive branches. *Id.* at 30-31. Once the relatively easy two-part test is met, a court has no further business addressing any policy implications emanating from the statute.

*Carlton* makes clear that a taxpayer's reliance on a view of the law—even a correct view of the law—does not prevent the Legislature from retroactively amending a statute. In *Carlton*, the 1987 amendment was adopted as a curative measure because the tax provision adopted in 1986 failed to require that a decedent must have owned the stock in question in order for the decedent's estate to qualify for the deduction. *Id.* at 31. "As a result, any estate could claim the deduction simply by buying stock in the market and immediately reselling it to an [employee stock ownership plan (ESOP)], thereby obtaining a potentially dramatic reduction in (or even elimination of) the estate tax obligation." *Id.* Congress did not contemplate such a broad application of the deduction when it was originally enacted in 1986. *Id.* In rejecting the taxpayer's due process challenge to the retroactive application of the 1987 amendment, the Supreme Court reasoned:

We conclude that the 1987 amendment's retroactive application meets the requirements of due process. First, Congress'[s] purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unantic-

ipated revenue loss. There is no plausible contention that Congress acted with an improper motive, as by targeting estate representatives such as Carlton after deliberately inducing them to engage in ESOP transactions. Congress, of course, might have chosen to make up the unanticipated revenue loss through general prospective taxation, but that choice would have burdened equally “innocent” taxpayers. Instead, it decided to prevent the loss by denying the deduction to those who had made purely tax-motivated stock transfers. We cannot say that its decision was unreasonable. [*Id.* at 32.]

The *Carlton* Court explained that Congress had acted promptly and established only a modest period of retroactivity. *Id.* The Court took note of the customary congressional practice of giving general revenue statutes effective dates that precede the dates of actual enactment, confined to short and limited periods related to the practicalities of producing national legislation. *Id.* at 32-33.

In *Carlton*, “the actual retroactive effect of the 1987 amendment extended for a period only slightly greater than one year.” *Id.* at 33. Although it was uncontested that the taxpayer in *Carlton* had relied on the original 1986 version of the tax statute when engaging in stock transactions in December 1986, and the reading of the original statute on which the taxpayer relied appeared to have been correct, the taxpayer’s reliance alone was insufficient to establish a due process violation. *Id.* “Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.” *Id.* And, the 1987 amendment did not impose “a wholly new tax.” *Id.* at 34

(quotation marks omitted). Because the retroactive application of the 1987 amendment was rationally related to a legitimate legislative purpose, the Court held that the amendment as applied to the taxpayer's 1986 transactions comported with due process. *Id.* at 35.

Michigan law is, of course, in accord. In *Detroit v Walker*, 445 Mich 682, 698; 520 NW2d 135 (1994), our Supreme Court noted that “[t]he concern regarding the retroactivity of statutes arises from constitutional due process principles that prevent retrospective laws from divesting rights to property or vested rights, or the impairment of contracts.”

A vested right has been defined as an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice. Nonetheless, when determining whether a right is vested, policy considerations, rather than inflexible definitions must control, and we must consider whether the holder possesses what amounts to be a title interest in the right asserted. [*Id.* at 699 (citations omitted).]

A vested right is a legal or equitable title to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand by another. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 377; 781 NW2d 310 (2009). To be vested, a right must be more than a mere expectation based on an anticipated continuance of the present laws. *Id.* Relative to taxpayers, the *Walker* Court—just like the United States Supreme Court in *Carlton*—held that “it is also well established that a taxpayer does not have a vested

right in a tax statute or in the continuance of any tax law.” *Walker*, 445 Mich at 703. Not surprisingly, we have more recently held, consistently with *Walker*, that

a vested right cannot be premised on an expectation that general laws will continue *and certainly cannot be premised on the continuation of tax law*. In light of the fact that plaintiffs did not have a vested right, the contention that due process rights were violated is simply without merit. [*GMAC*, 286 Mich App at 378.]

Likewise, in *Gen Motors Corp*, 290 Mich App at 371, we held that the plaintiff’s “claim for a refund of use taxes it paid was not a vested right but rather a mere expectation that its claim might succeed in light of” an earlier decision of this Court. The plaintiff’s “claim rest[ed] on the theory that it held a vested chose in action—its refund claim—and relies on cases involving rights of action for damages to property or personal injury.” *Id.* But, this Court noted, the case before it involved a tax rather than a right of action, and the plaintiff, “as a taxpayer, does not have a vested right in a tax statute or in the continuance of any tax law.” *Id.* This Court concluded that the Legislature had not acted illegitimately by enacting a statute for the purpose of reversing a decision of this Court because the statute did not reverse a judicial decision or repeal a final judgment. *Id.* at 372-373. Stating the obvious, we said that “it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted.” *Id.*, citing *GMAC*, 286 Mich App at 380 (“[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to

obviate a judicial interpretation.”). “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 at 373, quoting *Carlton*, 512 US at 35.

In *Gen Motors Corp*, 290 Mich App at 376, the retroactive application of the statute did not exceed the “modesty limitation” of the Due Process Clause, as the statutory amendment did not reach back in time to assess a wholly new tax on long-concluded transactions. Rather, it confirmed a tax that had been assessed and paid for many years. *Id.* Quite similar to this case, the Legislature acted promptly in response to this Court’s earlier decision by correcting what might have resulted in a significant loss of revenue. *Id.* This Court reasoned that “the nominal period to which the amendment retrospectively applies—five years—cannot be said to extend beyond the taxpayers’ interest in finality and repose because the period of retroactivity is consistent with the applicable statute of limitations.” *Id.* The period of retroactivity was “comparable to the time frames of other retroactive legislation that this Court, other state courts, and federal courts have held were within the modesty limits of the Due Process Clause.” *Id.* at 377; see also *id.* at 377 n 3 (citing authorities in support of this proposition).

On the basis of the above authorities, we hold that the retroactive impact of 2014 PA 282 did not violate the Due Process Clauses of either the state or federal Constitutions. First, plaintiffs had no vested right in the tax laws or in the continuance of any tax

laws. *Carlton*, 512 US at 33; *Walker*, 445 Mich at 703; *GMAC*, 286 Mich App at 378. Indeed, plaintiffs attempt to characterize their tax refund claims as causes of action that comprised vested interests, but that same argument was considered and rejected in *Gen Motors Corp*, 290 Mich App at 371. Plaintiffs did not have a vested interest protected by the Due Process Clause in the continuation of the Compact's apportionment provision.

Further, caselaw supports the proposition that the Legislature had a legitimate purpose for giving retroactive effect to 2014 PA 282. As the trial court explained, a Senate Fiscal Agency analysis of SB 156 addressed the potential ramifications of failing to accord retroactive effect to 2014 PA 282:<sup>13</sup>

The first enacting section of the bill would retroactively repeal the State's enactment of the Multistate Tax Compact, effective January 1, 2008. As a result, taxpayers filing under the MBT would not be allowed to use alternative apportionment calculations provided under the Compact when computing a Michigan tax base. While the Department of Treasury has not allowed taxpayers to use these alternative calculations, the Michigan Supreme Court's recent decision in *IBM Corp. v Department of Treasury* may enable certain taxpayers to use these calculations,

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<sup>13</sup> Legislative bill analyses can be probative in determining the historical background leading up to the introduction of legislation, though we do not look to them for official statements of legislative intent. See *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 406 n 12; 578 NW2d 267 (1998); *Kelly Servs, Inc v Dep't of Treasury*, 296 Mich App 306, 317-318; 818 NW2d 482 (2012).

and the Department estimates that approximately \$1.1 billion in refunds would be paid as a result. Because MBT revenue is directed to the General Fund, these refunds would reduce General Fund revenue, and *the bill would prevent a reduction in General Fund revenue of \$1.1 billion*. [Senate Legislative Analysis, SB 156, September 10, 2014, p 5 (emphasis added).]

It is legitimate legislative action to both (1) correct a perceived misinterpretation of a statute, and (2) eliminate a significant revenue loss resulting from that misinterpretation. See *Carlton*, 512 US at 32 (finding a legitimate legislative purpose for the retroactive application of tax legislation meant to correct what Congress reasonably viewed as a mistake in earlier legislation “that would have created a significant and unanticipated revenue loss”), and *Gen Motors Corp*, 290 Mich App at 373 (noting that “it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted,” and that “[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”) (quotation marks and citation omitted). Accordingly, the retroactive application of 2014 PA 282 served a legitimate governmental purpose.

The retroactive application of 2014 PA 282 was likewise a rational means to further these legitimate purposes. Four factors are relevant in this determination. First, like the statutes in *Carlton* and *Gen Motors Corp*, 2014 PA 282 “does not reach back in

time to assess a ‘wholly new tax’ on long-concluded transactions.” *Gen Motors Corp*, 290 Mich App at 376. Rather, 2014 PA 282 clarifies the method of apportioning the tax base for a previously enacted tax, the MBT, by confirming that the single-factor apportionment method must be utilized and that the three-factor method may not be elected. Second, plaintiffs, as a matter of law, could not have relied on the availability of the three-factor apportionment method. As discussed, taxpayers do “not have a vested right in a tax statute or in the continuance of any tax law,” *Walker*, 445 Mich at 703, and states have wide latitude in the selection of apportionment methodologies, *Moorman*, 437 US at 274. And a taxpayer’s reliance on a particular tax law is insufficient to establish a due process violation because “[t]ax legislation is not a promise, and a taxpayer has no vested right in” a tax statute. *Carlton*, 512 US at 33. And, factually, plaintiffs either were—or should have been—aware that the state (through Treasury) had been arguing since at least 2011 (and even then relative to the 2008-2009 tax years) that the apportionment provision in the Compact was no longer available. See *Int’l Business Machines Corp v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No 306618), rev’d by *IBM*, 496 Mich 642.

Third, there is no doubt that the Legislature acted promptly to correct the error. As the trial court found, “[n]ot until July 14, 2014, when the [Supreme] 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.” Fourth, the 61/2-year retroactive period was suffi-

ciently modest relative to the time frames of other retroactive legislation that have been upheld by Michigan courts, federal courts, and other state courts. See *Gen Motors Corp*, 290 Mich App at 376-377 (upholding a five-year retroactive application), and at 377 n 3 (citing caselaw from Michigan and other jurisdictions approving similar retroactive periods); *GMAC*, 286 Mich App at 378 (affirming a seven-year retroactive period). These factors squarely lead to the conclusion that the retroactive application of 2014 PA 282 was a rational means of furthering legitimate governmental purposes.

Some plaintiffs rely on *Newsweek, Inc v Florida Dep't of Revenue*, 522 US 442; 118 S Ct 904; 139 L Ed 2d 888 (1998), contending that Michigan engaged in a “bait and switch” by enticing foreign companies to engage in commerce in Michigan by providing the three-factor apportionment formula and then retroactively taking away this apportionment method. But reliance on *Newsweek* is misplaced. In *Newsweek*, 522 US at 444, the Supreme Court held that a state could not engage in a “bait and switch” by holding out what appeared to be a clear and certain remedy, i.e., a tax appeal that could be pursued after paying disputed taxes, and then later declare that no such remedy exists. (Quotation marks omitted.) Here, however, Michigan has not taken away any procedure for seeking a refund, nor has any procedural remedy been denied. Instead, the Michigan Legislature has done what legislatures across the country have had to do—clarify through statutory amendment the intended meaning of a statutory provision that had been misread by the courts. Further, Michigan never engaged in a “bait and switch” because it never suggested that the three-factor method of apportionment under the Compact could

not be altered. To the contrary, the Compact expressly indicated a member state *could unilaterally* get out of the Compact at any time, and as we just emphasized, Michigan has consistently maintained that the three-factor apportionment method could not be used under the MBT Act, as reflected in the litigation in *IBM*, 496 Mich 642.<sup>14</sup> The retroactive provisions of 2014 PA 282 were not enacted in violation of the state or federal Due Process Clauses.

Plaintiffs also argue that retroactive withdrawal from the Compact is prohibited by 1969 PA 343, art X(2),<sup>15</sup> which states that a party state may, by enacting a statute, withdraw from the Compact but that “[n]o withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.” According to plaintiffs, retroactive withdrawal is nonsensical because Michigan *participated* under the Compact in the period from 2008 through 2010 by paying dues, voting, participating in Commission leadership and meetings, and exchanging confidential taxpayer information. However, plaintiffs have failed to provide any authority establishing the relevancy of such evidence, and since the statutory and constitutional issues raised are legal issues, *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009) (“We review de novo questions of law involving statutory interpretation and questions concerning the constitutionality of a

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<sup>14</sup> Some plaintiffs suggest that the retroactive application of 2014 PA 282 violates Michigan caselaw setting forth rules regarding retrospective legislation. This unpreserved argument fails because plaintiffs lacked a vested interest in the continuance of tax laws and in a tax refund based on the continuation of the Compact election provisions.

<sup>15</sup> See also former MCL 205.581, art X(2).

statute.”), we fail to see how Michigan’s participation in the Commission impacts the legal import of the statute. Accordingly, we are unconvinced by plaintiffs’ contention that Michigan’s alleged participation in the Commission during the relevant time frame affects the question whether 2014 PA 282 retroactively repealed the Compact provisions.

### E. SEPARATION OF POWERS

We now turn our attention to the argument that retroactive application of 2014 PA 282 violates the Separation of Powers Clause of the Michigan Constitution. Const 1963, art 3, § 2 states:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

“The legislative power of the State of Michigan is vested in a senate and a house of representatives.” Const 1963, art 4, § 1. “Simply put, legislative power is the power to make laws. By contrast, a defining aspect of judicial power is the interpretation of law.” *People v Konopka (On Remand)*, 309 Mich App 345, 361; 869 NW2d 651 (2015) (quotation marks and citation omitted).

There is little doubt that the Legislature lacks authority to reverse a judicial decision or to repeal a final judgment, *Wylie v Grand Rapids City Comm*, 293 Mich 571, 582; 292 NW 668 (1940); *Gen Motors Corp*, 290 Mich App at 372-373, but there is also little doubt that it has the authority—if not the obligation—to amend a statute that it believes has been misconstrued by the judiciary, *Romein v Gen Motors*

*Corp*, 436 Mich 515, 537; 462 NW2d 555 (1990), aff'd 503 US 181 (1992); see also *Gen Motors Corp*, 290 Mich App at 373 (stating that “it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted”). This power to amend includes the power to retroactively correct the judiciary’s misinterpretation of legislation:

[The Legislature possesses the] authority to retroactively amend legislation perceived to have been misconstrued by the judiciary. Such retroactive amendments based on prior judicial decisions are constitutional if the statute comports with the requirements of the Contract and Due Process Clauses of the federal and state constitutions, and *so long as the retroactive provisions of the statute do not impair final judgments*.

Numerous courts have recognized that the Legislature may cure the judicial misinterpretation of a statute. For instance, the federal courts have upheld statutes that retroactively abrogate statutory rights, at least where the repealing statute does not impair final judgments. In *Seese v Bethlehem Steel Co*, 168 F2d 58, 62 (CA 4, 1948), the court reasoned that the Legislature’s enactment of a retroactive statute repealing the effects of a prior judicial decision is not an exercise of judicial power[.] [*Romein*, 436 Mich at 537 (emphasis altered; citation omitted).]

See also *Konopka*, 309 Mich App at 361-365 (finding no separation of powers violation where the Legislature retroactively amended a statute that was perceived to have been misconstrued by the judiciary); *GMAC*, 286 Mich App at 380 (“[I]t is the province of

the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation.”).

There are several reasons why the Legislature did not violate the Separation of Powers Clause by retroactively repealing the Compact to January 1, 2008, thereby obviating the *IBM* Court’s legal conclusions. First, 2014 PA 282 did not reverse a judicial decision or repeal a final judgment. In *IBM*, 496 Mich at 645, 658-659, 662 (opinion by VIVIANO, J.), the lead opinion held that 2007 PA 36 did not implicitly repeal the Compact’s election provision. 2014 PA 282 did not overturn that judicial interpretation of the 2007 law. Instead, the Legislature created a new law, not interpreted by the *IBM* Court, that explicitly repealed the Compact provisions effective January 1, 2008, to further what the Legislature understood to have been its original intent when it enacted 2007 PA 36. This did not impinge on the judiciary’s role of interpreting the law but instead corrected a mistake that was made clear by the holding in *IBM*. That is, the Legislature in 2014 PA 282 *explicitly* repealed the Compact provisions after the holding in *IBM* revealed that the Compact election provision had not been *implicitly* repealed by the enactment of 2007 PA 36. Although 2014 PA 282 may have rendered moot the effect of the judicial interpretation in *IBM*, this did not overturn that Court’s judgment and did not violate the Separation of Powers Clause. See *Romein*, 436 Mich at 537 (citing with approval a federal case “reason[ing] that the Legislature’s enactment of a retroactive statute repealing *the effects of a prior judicial decision* is not an exercise of judicial power”); *GMAC*, 286 Mich App at 380 (“[I]t is the province of the Legislature to acquiesce in the judicial interpre-

tation of a statute or to amend the legislation to obviate a judicial interpretation.”).

Some plaintiffs cite *Presque Isle Twp Bd of Ed v Presque Isle Co Bd of Ed*, 364 Mich 605, 612; 111 NW2d 853 (1961), for the proposition that a legislative body may not declare what its intention was on a former occasion such that it would affect past transactions. Although *Presque Isle* cited a Wisconsin case<sup>16</sup> that contained this language, the actual holding in *Presque Isle* was the unremarkable proposition that one legislator’s present recollection of what he intended when a bill was passed could not be received in evidence for use in interpreting a statute. *Id.* The holding in *Presque Isle* is inapplicable to this issue.<sup>17</sup>

Finally, plaintiffs proclaim that they are entitled to the benefit of the *IBM* Court’s ruling as to the effect of 2007 PA 36. They are wrong. Instead, it is well-settled that our duty as an appellate court is to apply the most recent legislative pronouncement on an issue pending before this Court when the Legisla-

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<sup>16</sup> *Northern Trust Co v Snyder*, 113 Wis 516; 89 NW 460 (1902).

<sup>17</sup> Plaintiffs also contend that the 2014 Legislature could not declare the intent of the Legislature in 2007 because only 15% of the members of the 2014 Legislature were members of the 2007 Legislature. We have been presented with no authority stating that the composition of the Legislature affects whether it may clarify its original intent in enacting a prior law, *Hover v Chrysler Corp*, 209 Mich App 314, 319; 530 NW2d 96 (1995) (stating that a party may not leave it to the Court to search for authority to sustain or reject the party’s position), and cannot square that purported rule with the overwhelming caselaw recognizing the Legislature’s power to correct what it perceives to be an incorrect interpretation of a statute.

ture makes the new law or amendment retroactive. As stated by the United States Supreme Court:

It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. . . . It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was. [*Plout v Spendthrift Farm, Inc*, 514 US 211, 226-227; 115 S Ct 1447; 131 L Ed 2d 328 (1995) (citations omitted).]

2014 PA 282 did not declare what the law was as to any final judgment, as each of these cases was pending<sup>18</sup> when the statute was passed. In other words, none of these cases had a judgment that was

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<sup>18</sup> Although International Business Machines is a party to these appeals, its tax appeal from the 2008 tax year—the tax year subject to the Supreme Court's 2014 *IBM* decision, is not at issue here.

“frozen,” *King v McPherson Hosp*, 290 Mich App 299, 306; 810 NW2d 594 (2010) (quotation marks and citations omitted), and so it was constitutionally permissible to apply 2014 PA 282 to these pending cases.

For all these reasons, we hold that the Legislature did not violate the Separation of Powers Clause of the state Constitution when it enacted 2014 PA 282.

#### F. COMMERCE CLAUSE

We next turn to plaintiff’s argument that 2014 PA 282 violates the Commerce Clause of the United States Constitution.

The Commerce Clause, US Const, art I, § 8, provides: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .” Although the Commerce Clause says nothing about the protection of interstate commerce in the absence of any action by Congress, the Supreme Court has greatly expanded this Clause to include “a negative sweep” by “prohibit[ing] certain state actions that interfere with interstate commerce.” *Quill Corp v North Dakota*, 504 US 298, 309; 112 S Ct 1904; 119 L Ed 2d 91 (1992). According to the Court, the Commerce “Clause prohibits discrimination against interstate commerce and bars state regulations that unduly burden interstate commerce.” *Id.* at 312 (citations omitted).

The United States Supreme Court . . . has established a four-pronged test to determine whether a state tax violates the Commerce Clause. *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L

Ed 2d 326 (1977). A state tax will withstand scrutiny under a Commerce Clause challenge and will be held to be constitutionally valid under the four-pronged test articulated in *Complete Auto* provided that the tax: (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. [*Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 415; 488 NW2d 182 (1992).]

Only the third prong is challenged in this case; plaintiffs contend that 2014 PA 282 discriminates against interstate commerce. “A tax violates the third prong of the *Complete Auto* test if it is facially discriminatory, has a discriminatory purpose, *or* has the effect of unduly burdening interstate commerce.” *Caterpillar*, 440 Mich at 422, citing *Amerada Hess Corp v New Jersey Dep't of Treasury*, 490 US 66, 75; 109 S Ct 1617; 104 L Ed 2d 58 (1989).

We hold that 2014 PA 282 does not discriminate against or unduly burden interstate commerce. First, 2014 PA 282 is not facially discriminatory. A tax statute is facially discriminatory if there is “an explicit discriminatory design to the tax.” *Amerada Hess*, 490 US at 76. 2014 PA 282 does not, on its face, create any classification based on a taxpayer’s state of origin or the location of commerce. Rather, it repeals the Compact and eliminates the provision allowing election of a three-factor apportionment formula for all taxpayers, both in-state and out-of-state companies. Therefore, 2014 PA 282 does not reflect an explicit discriminatory design, and no facial discrimination occurred.

Second, 2014 PA 282 does not have a discriminatory purpose. A discriminatory purpose may be found, for example, where a tax statute “was motivated by an intent to confer a benefit upon local industry not granted to out-of-state industry . . . .” *Amerada Hess*, 490 US at 76. 2014 PA 282 states that it was enacted to express the original intent of the Legislature to eliminate the election provision for purposes of the MBT Act and the Income Tax Act, as well as to protect state revenues. Senate Legislative Analysis, SB 156, September 10, 2014, pp 3-5. There is no evidence of a legislative intent to give a benefit to local industry that is denied to out-of-state businesses. Indeed, 2014 PA 282 puts in- and out-of-state corporate taxpayers *in the same position* relative to Michigan tax calculations.

There is a contention by some that a discriminatory purpose is reflected in comments made by certain legislators to the media, but as we have said, statements of individual legislators generally do not comprise proper evidence of legislative intent. See *Chmielewski v Xermac, Inc*, 457 Mich 593, 609 n 18; 580 NW2d 817 (1998); *Detroit Pub Sch Bd of Ed v Romulus Community Sch Bd of Ed*, 227 Mich App 80, 89 n 4; 575 NW2d 90 (1997); *Williamston v Wheatfield Twp*, 142 Mich App 714, 719; 370 NW2d 325 (1985), citing *Presque Isle*, 364 Mich at 612. Plaintiffs identify no caselaw permitting consideration of the statements of individual legislators, particularly statements made to the media, to establish legislative intent. And in any event, the purported media comments of the legislators do not reveal any intent to discriminate against interstate commerce but, instead, are reasonably understood to reflect a desire to ensure a *level playing field* and to avoid giving an unfair advantage to out-of-state businesses.

There is no evidence of a discriminatory purpose underlying the enactment of 2014 PA 282.

Third, 2014 PA 282 does not have a discriminatory effect, as it merely precludes both in-state and out-of-state taxpayers from electing the three-factor apportionment formula previously available under the Compact. The federal Constitution does not require the use of a particular apportionment formula, and a single-factor formula is presumptively valid. See *Moorman*, 437 US at 273, which provides a good example. In *Moorman*, the Supreme Court rejected a Commerce Clause challenge to Iowa's use of a single-factor formula; the Court did not agree with the argument that Iowa's single-factor formula was responsible for an alleged duplication of taxation with Illinois, which used a three-factor formula. *Id.* at 276-281. The Court held that, in the absence of implementing legislation from Congress, the Commerce Clause did not require Iowa to compute net income under Illinois's three-factor formula. *Id.* at 277-278. The Court reasoned in part that any disparity in the tax treatment of Iowa and Illinois companies was "not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa *and* Illinois statutes, and Iowa is not responsible for the latter." *Id.* at 277 n 12. The purported "discrimination" against interstate commerce was "simply a way of describing the potential consequences of the use of different formulas by the two States. These consequences, however, could be avoided by the adoption of any uniform rule; the 'discrimination' does not inhere in either State's formula." *Id.*

Plaintiffs have not established that application of the single-factor formula required by 2014 PA 282 discriminatorily affects out-of-state companies. As noted, the single-factor formula applies to *all* taxpayers, both Michigan and out-of-state companies. As with the Iowa statute in *Moorman*, 2014 PA 282 treats local and foreign companies with an equal hand by requiring the single-factor formula for both. Any purported discrimination against interstate commerce is, in truth, “simply a way of describing the potential consequences of the use of different formulas by” Michigan and other states. *Moorman*, 437 US at 277 n 12. Such “consequences, however, could be avoided by the adoption of any uniform rule; the ‘discrimination’ does not inhere in” the apportionment formula used by Michigan or by other states. *Id.* Plaintiffs have not established that Michigan’s single-factor formula discriminates against interstate commerce. 2014 PA 282 does not violate the Commerce Clause.

### G. THE FIRST AMENDMENT

Moving on to the next argument, we conclude that plaintiffs were not denied the right to petition the government under the First Amendment of the federal Constitution or the analogous Michigan provision.

“The right of citizens to petition their government for redress of grievances is specifically guaranteed by the United States and Michigan Constitutions.” *Jackson Co Ed Ass’n v Grass Lake Community Sch Bd of Ed*, 95 Mich App 635, 641; 291 NW2d 53 (1979), citing US Const, Am I, and Const 1963, art 1, § 3. But this right “may be circumscribed to the extent necessary to achieve a valid state objective.” *Jackson Co Ed Ass’n*, 95 Mich App at 642. The right

to petition extends to all departments of the government and includes the right of access to the courts. *California Motor Transp Co v Trucking Unlimited*, 404 US 508, 510; 92 S Ct 609; 30 L Ed 2d 642 (1972). See also *In re ALZ*, 247 Mich App 264, 276; 636 NW2d 284 (2001) (noting that the *Cal Motor Transp* Court “found a constitutional basis for the right of access to the courts as an aspect of the First Amendment right of petition”); *Mayor of Lansing v Knights of the Ku Klux Klan (After Remand)*, 222 Mich App 637, 647; 564 NW2d 177 (1997) (“The First Amendment right to petition the government has been construed to implicate the right of access to courts for redress of wrongs.”).

However, the First Amendment right to advocate does not guarantee that the speech will persuade or that the advocacy will be effective. *Smith v Arkansas State Hwy Employees, Local 1315*, 441 US 463, 464-465; 99 S Ct 1826; 60 L Ed 2d 360 (1979). That is, “the First Amendment does not impose any affirmative obligation on the government to listen” or respond to the speaker. *Id.* at 465. “Nothing in the First Amendment or in [the United States Supreme] Court’s case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals’ communications on public issues.” *Minnesota State Bd for Community Colleges v Knight*, 465 US 271, 285; 104 S Ct 1058; 79 L Ed 2d 299 (1984). See also *We The People Foundation, Inc v United States*, 376 US App DC 117, 120; 485 F3d 140 (2007) (rejecting the plaintiffs’ contention “that they have a right under the First Amendment to receive a government response to or official consideration of a petition for a redress of grievances”).

Further, legislative retraction of the only remedy available to a decision-maker is different from interference with the plaintiffs' abilities to express their views to the decision-maker. Thus, such a retraction does not violate the right to petition the government. *Mich Deferred Presentment Servs Ass'n, Inc v Comm'r of the Office of Fin & Ins Regulation*, 287 Mich App 326, 336; 788 NW2d 842 (2010) (finding no denial of lenders' right of access to courts in a 42 USC 1983 case, stating that "[p]laintiff cannot claim that a violation of 42 USC 1983 occurred simply because a newly enacted statute precluded recovery of certain damages that plaintiff's members had become accustomed to receiving in [nonsufficient funds] cases"). Accord: *American Bus Ass'n v Rogoff*, 396 US App DC 353, 360; 649 F3d 734 (2011).

Plaintiffs assert that, in rejecting their argument, the trial court erred in relying on cases addressing the right to be heard by the Legislature; plaintiffs say they are instead contending that they were "thrown out of court." As a result of the enactment of 2014 PA 282, plaintiffs contend that they have been denied the right to petition Treasury and to appeal to a court for a refund of taxes already paid. Plaintiffs characterize this as a classic denial of the right to petition and rely on *Flagg v Detroit*, 715 F3d 165, 174 (CA 6, 2013), to argue that they have established the elements necessary to establish a denial of access to the courts.

In *Flagg*, the court observed that the United States "Supreme Court has recognized a constitutional right of access to the courts, whereby a plaintiff with a nonfrivolous legal claim has the right to bring that claim to a court of law." *Id.* at 173, citing *Christopher v Harbury*, 536 US 403, 415 n 12; 122 S

Ct 2179; 153 L Ed 2d 413 (2002). The right to access the courts does not create substantive rights; a plaintiff claiming a denial of access “must have an arguable, nonfrivolous underlying cause of action.” *Flagg*, 715 F3d at 173. The *Flagg* court explained:

Denial of access to the courts claims may be forward-looking or backward-looking. In forward-looking claims, the plaintiff accuses the government of creating or maintaining some frustrating condition that stands between the plaintiff and the courthouse door. The object of the suit is to eliminate the condition, thereby allowing the plaintiff, usually an inmate, to sue on some underlying legal claim. In backward-looking claims, such as those at issue in the instant case, the government is accused of barring the courthouse door by concealing or destroying evidence so that the plaintiff is unable to ever obtain an adequate remedy on the underlying claim. Backward-looking claims are much less established than forward-looking claims, but this Court has recognized them and the Supreme Court has provided additional guidance as to the elements of a viable backward-looking claim. [*Id.* (citations and quotation marks omitted).]

Relying on *Christopher*, 536 US 403, and *Swekel v City of River Rouge*, 119 F3d 1259 (CA 6, 1997), the *Flagg* court identified the “elements of a backward-looking denial of access claim: (1) a non-frivolous underlying claim; (2) obstructive actions by state actors; (3) substantial[] prejudice to the underlying claim that cannot be remedied by the state court; and (4) a request for relief which the plaintiff would have

sought on the underlying claim and is now otherwise unattainable.” *Flagg*, 715 F3d at 174 (citations and quotation marks omitted; alteration in original).

Plaintiffs cannot establish the second element identified in *Flagg* for a backward-looking denial-of-access claim, as there are no obstructive actions by state actors. Although plaintiffs contend that enactment of 2014 PA 282 obstructed plaintiffs’ access to the courts by retroactively destroying their right to elect the three-factor apportionment formula under the Compact and preventing them from obtaining a larger tax refund, *Flagg* itself indicates that a backward-looking denial of access claim can only prevail when “the government is accused of barring the courthouse door *by concealing or destroying evidence . . .*” *Flagg*, 715 F3d at 173 (emphasis added). There is no allegation in these cases that Treasury or any state actor has concealed or destroyed evidence. The enactment of 2014 PA 282, which retroactively repealed the Compact and required the use of a single-factor apportionment formula, did not deny plaintiffs access to the courts. In fact, as is obvious, this very litigation demonstrates that plaintiffs have had an ample opportunity to present their arguments to the courts.<sup>19</sup> Legislative elimination of the right to elect the three-factor apportionment formula, and any refund on the basis of such an election, does not interfere with plaintiffs’ abilities to file claims or seek refunds from the courts or Treasury. All that they have been prohibited from doing is seeking a refund under one particular formula. This does not violate the First Amendment. See *American Bus Ass’n*, 396 US

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<sup>19</sup> Like any other citizen, the First Amendment gave plaintiffs the ability to voice any objection to the Legislature or Governor before 2014 PA 282 was passed and signed into law.

App DC at 360; *Mich Deferred Presentment Servs Ass'n, Inc*, 287 Mich App at 336.

## **H. MISCELLANEOUS STATE CONSTITUTIONAL PROVISIONS**

Despite plaintiffs' protests to the contrary, the enactment of 2014 PA 282 did not violate the Title-Object Clause, the Five-Day Rule, or the Distinct-Statement Clause of the Michigan Constitution.

### **1. TITLE-OBJECT**

Const 1963, art 4, § 24 provides:

No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

2014 PA 282 contains the following title:

AN ACT to amend 2007 PA 36, entitled "An act to meet deficiencies in state funds by providing for the imposition, levy, computation, collection, assessment, reporting, payment, and enforcement of taxes on certain commercial, business, and financial activities; to prescribe the powers and duties of public officers and state departments; to provide for the inspection of certain taxpayer records; to provide for interest and penalties; to provide exemptions, credits, and refunds; to provide for the disposition of funds; to provide for the interrelation of this act with other acts; and to make appropriations," by amending sections 111, 305, 403, and 433 (MCL 208.1111, 208.1305, 208.1403, and

208.1433), sections 111 and 305 as amended by 2012 PA 605, section 403 as amended by 2008 PA 434, and section 433 as amended by 2007 PA 215, and by adding section 508; and to repeal acts and parts of acts.

This Court has explained:

When assessing a title-object challenge to the constitutionality of a statute, all possible presumptions should be afforded to find constitutionality. An amended title should be construed reasonably, not narrowly and with unnecessary technicality. The goal of the Title-Object Clause is notice, not restriction, of legislation, and it is only violated where the subjects are so diverse in nature that they have no necessary connection. The purpose of the clause is to prevent the Legislature from passing laws not fully understood, and to ensure that both the legislators and the public have proper notice of legislative content and to prevent deceit and subterfuge. [*Lawnichak v Dep't of Treasury*, 214 Mich App 618, 620-621; 543 NW2d 359 (1995) (citations omitted).]

Three types of challenges may be asserted under the Title-Object Clause:

(1) a “title-body” challenge, which indicates that the body exceeds the scope of the title, (2) a “multiple-object challenge,” which indicates that the body embraces more than one object, and (3) a “change of purpose challenge,” which indicates that the subject matter of the amendment is not germane to the original purpose. [*Wayne Co Bd of Comm'rs v*

*Wayne Co Airport Auth*, 253 Mich App 144, 185; 658 NW2d 804 (2002).]

All three types of challenges have been raised in these cases.

We agree with the trial court that plaintiffs' multiple-objects challenge is devoid of merit. "The body of the law, and not just its title, must be examined to determine whether the act embraces more than one object. The purpose of the single-object rule is to avoid bringing into one bill diverse subjects that have no necessary connection." *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 557; 595 NW2d 176 (1999) (citations and quotation marks omitted). "The object of the legislation must be determined by examining the law as enacted, not as originally introduced." *People v Kevorkian*, 447 Mich 436, 456; 527 NW2d 714 (1994) (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.). "The object of a law is defined as its general purpose or aim. The constitutional requirement should be construed reasonably and permits a bill enacted into law to include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object." *Gen Motors Corp*, 290 Mich App at 388 (citations and quotation marks omitted). "Legislation should not be invalidated merely because it contains more than one means of attaining its primary object." *City of Livonia v Dep't of Social Servs*, 423 Mich 466, 499; 378 NW2d 402 (1985). "The Legislature may enact new legislation or amend any act to which the subject of the new legislation is germane, auxiliary, or incidental. A statute may authorize the doing of all things that are in furtherance of the general purpose of the act without violating the one-object limitation

of art 4, § 24.” *Mooahesh v Dep’t of Treasury*, 195 Mich App 551, 564; 492 NW2d 246 (1992) (citations and quotation marks omitted), overruled in part on other grounds by *Silverman v Univ of Mich Bd of Regents*, 445 Mich 209 (1994), overruled in part on other grounds by *Parkwood Ltd Dividend Housing Ass’n v State Housing Dev Auth*, 468 Mich 763 (2003).

In *Mooahesh*, this Court quoted from a prior opinion of this Court that summarized the single-object requirement in a case concerning the repeal of a tax:

It might have been better draftsmanship to have placed the provision concerning the taxability of municipal transportation utilities in the general property tax law (where one might expect to find it) rather than in the home rule act. There is, however, no constitutional requirement that the legislature do a tidy job in legislating. It is perfectly free to enact bits and pieces of legislation in separate acts or to tack them on to existing statutes even though some persons might think that the bits and pieces belong in a particular general statute covering the matter. *The constitutional requirement is satisfied if the bits and pieces so enacted are embraced in the object expressed in the title of the amendatory act and the act being amended.* [*Mooahesh*, 195 Mich App at 564, quoting *Detroit Bd of Street R Comm’rs v Wayne Co*, 18 Mich App 614, 622-623; 171 NW2d 669 (1969).]

The trial court in *Mooahesh* found that 1988 PA 516, which amended the Income Tax Act to provide that lottery winnings are taxable, violated the Title-

Object Clause because it repealed a section of the Lottery Act containing a tax exemption for lottery winnings, which the trial court viewed as an object distinct from the general object of raising revenue. *Mooahesh*, 195 Mich App at 562. This Court reversed that determination, noting that the object of 1988 PA 516 was to raise revenue, *id.* at 565, and that “[t]he object of such an act is necessarily broad-ranging and comprehensive.” *Id.* at 566 (citation and quotation marks omitted).

Revenues can be raised in any number of ways, as history has made obvious. Taxes may be imposed, increased, or rearranged. The object of meet[ing] deficiencies in state funds may reasonably be found to include the repeal of a tax exemption, even if that exemption does not appear in any act specifically devoted to taxation. While it might have been better draftsmanship to have provided for a separate amendment to the Lottery Act, the inclusion of the repeal of the tax exemption provision in an act amending the income tax laws does not render the act in violation of the single-object requirement. [*Id.* (citations and quotation marks omitted; alteration in original).]

In rejecting plaintiffs’ multiple-objects challenge in the present cases, the trial court discussed *Mooahesh* and reasoned as follows:

Just as the statute considered in *Mooahesh* had as its general purpose the raising of revenues, so too was the general purpose of [2014] PA 282. And just as it might have been “better draftsmanship” to have provided for a separate amendment re-

pealing § 34 of the Lottery Act, the Legislature in enacting [2014] PA 282 might have been better advised to repeal the Compact provisions in a separate act. But like the choice to amend the [Income Tax Act] and repeal a section of the Lottery Act in one act, the choice to include the repeal of the Compact and amend the MBT in one act is not a violation of the single-object requirement.

The trial court's analysis is convincing. The single object, i.e., the general purpose or aim, of 2014 PA 282 is to amend 2007 PA 36, the MBT Act. This general object was accomplished by amending provisions of the MBT Act and by repealing the Compact. This object is reflected in the title of 2014 PA 282, which refers to the amendment of certain sections of 2007 PA 36 and the repeal of acts and parts of acts. Enacting § 1 of 2014 PA 282 provides that the Compact is repealed retroactive to January 1, 2008, and provides that the repeal is intended to express the original intent of the Legislature regarding the application of a section of the MBT Act and to eliminate the apportionment election provision in the Compact. This enacting section thus clarifies that the repeal of the Compact and the concomitant elimination of the apportionment election provision is germane to the object of amending the MBT Act in that it clarifies the appropriate method of apportionment. In other words, the Compact and the MBT Act are related to one another because they each pertain to the method of apportioning the tax base. Thus, 2014 PA 282 does not contain diverse subjects that have no necessary connection. Rather, the repeal of the Compact directly relates to, carries out, and implements the principal object of amending the MBT Act.

“With regard to a title-body challenge, this Court has indicated that the title of an act must express the general purpose or object of the act.” *Wayne Co Bd of Comm’rs*, 253 Mich App at 185. “Only the general object and not all the details and incidents of a statute need be indicated in the title.” *Ace Tex Corp v Detroit*, 185 Mich App 609, 616; 463 NW2d 166 (1990).

[I]t is not necessary that a title be an index of all of an act’s provisions. It is sufficient that the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose[.] [*City of Livonia*, 423 Mich at 501 (citations and quotation marks omitted).]

“Whether a provision is germane to its purpose depends upon its relationship to the object of the act.” *Ace Tex Corp*, 185 Mich App at 616. “The test is whether the title gives fair notice to the legislators and the public of the challenged provision. The notice aspect is violated where the subjects are so diverse in nature that they have no necessary connection.” *H J Tucker & Assoc, Inc*, 234 Mich App at 559 (citations and quotation marks omitted).

Again, the title of 2014 PA 282 expresses the general purpose or object of amending the MBT Act and refers to the repeal of acts or parts of acts. Although the title does not use the word “Compact,” the title need not be an index of all of the act’s provisions. *City of Livonia*, 423 Mich at 501. The repeal of the Compact is germane, auxiliary, or incidental to the amendment of the MBT Act because the elimina-

tion of the Compact's election provision is pertinent to the proper method of apportionment of the MBT tax base. The subjects are not so diverse in nature that they lack a necessary connection, and neither the legislators nor the public were deprived of notice of the challenged provision. See also *Mooahesh*, 195 Mich App at 569 ("Despite [1988 PA 516's] failure to state explicitly in the title that the Lottery Act exemption was being repealed, we are able to declare that the subjects are not so diverse as to have 'no necessary connection.'").

When confronting a change-of-purpose challenge, a court must consider whether the change comprises a mere amendment or extension of the basic purpose of the original bill or instead introduces an entirely new and different subject matter. *Anderson v Oakland Co Clerk*, 419 Mich 313, 328; 353 NW2d 448 (1984). "[T]he test for determining if an amendment or substitute changes a purpose of the bill is whether the subject matter of the amendment or substitute is germane to the original purpose. The test of germaneness is much like the standard for determining whether a bill is limited to a single object." *Kevorkian*, 447 Mich at 461 (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.) (citations omitted). In *Kevorkian*, *id.* at 451-452, the bill as introduced would have created a commission on death and dying to study "voluntary self-termination of life," but the amended bill that became law added criminal penalties for assisting another person in committing suicide. Our Supreme Court rejected a change-of-purpose challenge because the criminal penalties were an interim measure that provided a stable environment while the commission, the Legislature, and the citizenry studied the matter further. *Id.* at 461; *id.* at 497 (BOYLE, J., concurring in part); *id.* at

511-512 (LEVIN, J., concurring in part); *id.* at 524 (MALLET, J., concurring in part).

With respect to 2014 PA 282, both the original and amended bill contained provisions related to the MBT tax base. The original purpose of SB 156 was to amend the MBT Act in various ways, including by enacting amendments concerning the gross-receipts tax base under the MBT. The change implemented by substitute H-1, as enrolled as 2014 PA 282, did not introduce an entirely new and different subject matter. Instead, it amended or extended the basic purpose of the original bill by retaining the original amendments and adding other provisions, including language retroactively repealing the Compact provisions and expressing legislative intent concerning the use of the single-factor apportionment formula and the elimination of the Compact's election provision. This was germane to the original purpose of amending the MBT Act because, as discussed, the elimination of the Compact's election provision was pertinent to the proper method of apportionment under the MBT Act. Therefore, the repeal of the Compact was sufficiently interconnected with the MBT Act that it fell within the basic purpose of the original bill. This was a far cry from the introduction of an entirely new and different subject matter, as in *Toth v Callaghan*, 995 F Supp 2d 774, 778 (ED Mich, 2014), where a bill that began by allowing emergency managers to reject, modify, or terminate collective bargaining agreements ended up being passed as a bill that excluded graduate student research assistants from the definition of "public employee."

## 2. THE FIVE-DAY RULE

Plaintiffs have also failed to establish a violation of the Five-Day Rule. Const 1963, art 4, § 26 pro-

vides, in relevant part: “No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days.”

The five-day rule and the change of purpose provision were contained in the same article and section of the Constitution of 1908. Const 1908, art 5, § 22. It is clear that the function of the change of purpose provision, both in the Constitution of 1908 and as modified in the Constitution of 1963, is to fulfill the command of the five-day rule.

Whether measured by the title of the act or by the title and contents of the act, the five-day rule could be rendered ineffective without a change of purpose provision. It is equally clear that a change of purpose rule standing alone would be meaningless, because any time the purpose of a bill was changed it would be a new bill which could be passed immediately. In sum, the alteration of purpose provision operates as an ultimate limitation to prevent evasion of the five-day rule. [*Anderson*, 419 Mich at 329-330.]

“A long history underscores an intent through these requirements to preclude last-minute, hasty legislation and to provide notice to the public of legislation under consideration irrespective of legislative merit.” *Id.* at 329.

The legislative record establishes that SB 156 was before each house for at least five days. And as discussed earlier, there was no change of the original bill’s purpose. Accordingly, no violation of the Five-Day Rule occurred.

### 3. DISTINCT-STATEMENT CLAUSE

Finally, plaintiffs have not established a violation of the Distinct-Statement Clause. Const 1963, art 4, § 32, provides: “Every law which imposes, continues or revives a tax shall distinctly state the tax.” The purpose of this provision “is to prevent the Legislature from being deceived in regard to any measure for levying taxes, and from furnishing money that might by some indirection be used for objects not approved by the Legislature.” *Dawson v Secretary of State*, 274 Mich App 723, 747; 739 NW2d 339 (2007) (opinion by WILDER, P.J.) (citations, quotation marks, and emphasis omitted). The Distinct-Statement Clause is violated if a statute imposes an obscure or deceitful tax. *Dukesherer Farms, Inc v Dep’t of Agriculture Dir*, 73 Mich App 212, 221; 251 NW2d 278 (1977), *aff’d* 405 Mich 1 (1979), such as when a tax is disguised as a regulatory fee, *Dawson*, 274 Mich App at 740. 2014 PA 282 does not impose or revive any tax, but clarifies the Legislature’s intent regarding apportionment of the MBT tax base. There is nothing deceptive about the legislation. It is clear from the title and body of 2014 PA 282 that it is amending the MBT Act. There has been no violation of the Distinct-Statement Clause.

#### I. DISCOVERY

“[S]ummary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition is appropriate if there is no fair chance that further discovery will result in factual support for the party opposing the motion.” *Mackey v Dep’t of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994) (citation omitted). As alluded to earlier, plaintiffs wanted to engage in discovery regarding Michigan’s participation in the

Commission since 2008, which according to plaintiffs would establish that the Compact was not in fact repealed retroactively beginning on January 1, 2008, because Michigan in fact participated in the Commission during the relevant time.

But as we also alluded to earlier, discovery on any of these issues would not produce relevant information. Setting aside plaintiffs' failure to cite authority regarding the relevancy of Michigan's participation in the Commission, more to the point is the fact that the issues raised concern statutory interpretation and constitutional challenges. And those issues are, as we said before, matters of law. *Elba Twp*, 493 Mich at 277-278; see also *Hunter*, 484 Mich at 257; *GMAC*, 286 Mich App at 380. How and to what extent the state participated in the Commission has no bearing on the meaning or effect of the words used in the statute or the state and federal Constitutions. Accordingly, discovery on this issue did not stand a fair chance of providing support for plaintiffs' position.

Discovery was also not required regarding the extent of plaintiffs' reliance on the Compact's election provision. As a matter of law, taxpayers do "not have a vested right in a tax statute or in the continuance of any tax law," *Walker*, 445 Mich at 703, while states have wide latitude in the selection of apportionment methodologies, *Moorman*, 437 US at 274. And a taxpayer's reliance on a particular tax law is insufficient to establish a due process violation because "[t]ax legislation is not a promise, and a taxpayer has no vested right in" a tax statute. *Carlton*, 512 US at 33. Therefore, plaintiffs have not established a fair chance that discovery on the extent of their reliance on the Compact apportionment method

would have led to any relevant support for their position.

Plaintiffs also incorrectly contend that discovery should have been held regarding the Legislature's intent in enacting 2014 PA 282, including internal communications regarding the purpose of the legislation. But as we previously made clear, statements of individual legislators generally do not comprise proper evidence of legislative intent. See *Chmielewski*, 457 Mich at 609 n 18; *Detroit Bd of Ed*, 227 Mich App at 89 n 4; *City of Williamston*, 142 Mich App at 719, citing *Presque Isle*, 364 Mich at 612. Hence, discovery on this issue would not have had a fair chance of producing support for plaintiffs' position.

Affirmed. No costs, an issue of public importance being involved. MCR 7.219(A).

/s/ Christopher M. Murray  
/s/ Kathleen Jansen  
/s/ Patrick M. Meter

**APPENDIX D**  
**STATE OF MICHIGAN**  
**COURT OF CLAIMS**  
**GILLETTE COMMERCIAL OPERATIONS NA**  
**& SUBSIDIARIES**  
**v**  
**DEPT OF TREASURY**  
**Case No. 14- 000053-MT**  
**Hon. Michael J. Talbot**

**ORDER**

At a session of said Court held in,  
Detroit, Wayne, Michigan, on  
December 19, 2014.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000033-MT and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael J. Talbot, Chief Judge

**APPENDIX E**  
**STATE OF MICHIGAN**  
**COURT OF CLAIMS**  
**COVENTRY HEALTH CARE INC**  
**v**  
**DEPT OF TREASURY**  
**Hon. Michael J. Talbot**  
**Case No. 11-000127-MT**

**ORDER**

At a session of said Court held in,  
Detroit, Wayne, Michigan, on  
December 19, 2014.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000033-MT and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(1)(1). This order resolves the last pending claim and closes the case.

/s/ Michael J. Talbot, Chief Judge