

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE LUBRIZOL CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Court of Appeals Docket No. 325541

Court of Claims Docket No. 14-000143-MT

Consolidated with Court of Appeals
STATE OF MICHIGAN, Docket Nos.
325475; 325476; 325477; 325478; 325479;
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STATEMENT OF JURISDICTION

Plaintiff-Appellant The Lubrizol Corporation (“Lubrizol”) appealed the December 19, 2014 Order of the Court of Claims granting Defendant-Appellee Department of Treasury, State of Michigan (the “Department”), summary disposition pursuant to MCR 2.116(I)(1) (hereinafter “Slip Opinion” attached as Ex 1). The December 19, 2014 Order is a final judgment; therefore, this Court has jurisdiction over Lubrizol’s appeal under MCL 205.22(3), MCR 7.203(A), and MCL 600.308(1)(a).

QUESTIONS PRESENTED

1. Was Lubrizol entitled to apportion its Michigan business taxes pursuant to Articles III(1) and IV of the Multistate Tax Compact?

Plaintiff-Appellant answer, "Yes."

Defendant-Appellee answers, "No."

Court of Claims answered, "No."

2. Was the unilateral and retroactive repeal of the Multistate Tax Compact by 2014 PA 282 ineffective or unconstitutional because 2014 PA 282:

- a. violated the terms of the Multistate Tax Compact;
- b. violated the Contract Clause of Const 1963, art 1, § 10 or the Federal Constitution, US Const, art I, § 10, cl 1;
- c. violated Lubrizol's right to due process;
- d. violated the separation of powers clause of Const 1963, art 3, § 2;
- e. violated the five-day rule under Const 1963, art 4, § 26?

Plaintiff-Appellant answer, "Yes."

Defendant-Appellee answers, "No."

Court of Claims answered, "No."

3. Was summary disposition premature when there was a genuine dispute regarding a material fact and Lubrizol was not given an opportunity to conduct discovery regarding that material fact?

Plaintiff-Appellant answer, "Yes."

Defendant-Appellee answers, "No."

Court of Claims answered, "No."

I. INTRODUCTION

In this appeal, Appellant challenges the validity of 2014 PA 282 (“PA 282”) and the process by which the Court of Claims summarily dismissed Appellant’s action. This appeal raises serious issues under the Michigan and United States Constitutions as well as issues involving long-standing law of interstate compacts.

Rather than ruling on the basis of full briefing, development of a full record, and argument on these important issues, the Court of Claims issued a lengthy order dismissing Appellant’s action. Although Appellant appreciates that the number of pending cases with similar issues requires an efficient process, in this case, the Court of Claims plainly sacrificed careful development of a record and the legal issues and the due process rights of Appellant in favor of expediency.

PA 282 purports to retroactively repeal Michigan’s enactment of the Multistate Tax Compact (the “Compact”), MCL 205.581 to 205.589, effective January 1, 2008. This Court should reverse the Court of Claims’ Order.

Withdrawing from an interstate compact retroactively for years during which the State operated with the other member states under the compact is nonsensical and illegal. The Compact is a binding interstate compact, i.e., a unique type of agreement through which states exercise their collective sovereignty to address critical interstate issues, ranging from child welfare, parole and prisoner transfer, to water resources, transportation, education, and others. States, their citizens, and direct stakeholders (such as the children, taxpayers, or the prisoners and their victims) rely on the binding nature of interstate compacts. The United States Constitution expressly authorizes, and is predated, by compacts.

The Compact's legislative history confirms that the states and the drafters understood interstate compacts to be an established mechanism for resolving cross-border issues, and that they *knew* and *intended* for the Compact to be a binding interstate compact. Moreover, the plain terms of the Compact confirm the same. Ordinary state statutes are not referred to as compacts, do not require enactment by other states to become effective, and do not contain withdrawal provisions.

Over more than 200 years, the United States Supreme Court, along with lower courts, have developed interpretive principles that account for the critical role of interstate compacts in our federalist system. This body of federal and state case law establishes that compacts take precedence over—or stand above—other state law, much like a state constitution: an individual party state cannot unilaterally alter the terms of an interstate compact. Because a party state is bound to all of the terms of a compact, and every compact affects numerous stakeholders in crucial ways, states need a mechanism for orderly withdrawal.

Here, the Compact provides:

Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

1969 PA 343, MCL 205.581, art X(2). According to its plain terms, any withdrawal from the Compact must be prospective only, i.e., it cannot affect *any* liability already incurred. Because an individual party state cannot unilaterally alter the terms of an interstate compact, this withdrawal provision is binding on Michigan.

Additionally, retroactive withdrawal is a practical impossibility; having performed under the Compact (e.g., paid dues to the Multistate Tax Commission; voted on Commission business; participated in Multistate Tax Commission leadership, meetings, and multistate audits;

exchanged confidential taxpayer information regarding litigation and tax enforcement), it is impossible to retroactively undo that performance. In fact, Appellant is not aware of any state ever attempting to withdraw retroactively from a compact, nor certainly are there any cases upholding such a withdrawal.

PA 282 is also invalid because it violates the Due Process clauses of the United States and Michigan Constitutions. As of July 14, 2014, when *Int'l Business Machines Corp. v Dep't of Treasury*, 496 Mich. 642; 852 NW2d 865 (2014) ("*IBM*"), was decided, Appellant had a vested right in their tax refund claims. In purporting to divest Appellant of this vested right, PA 282 violates due process. Furthermore, PA 282 violates the due process requirements for retroactive tax legislation established in *United States v Carlton*, 512 US 26, 30-31; 114 S Ct 2018; 129 L Ed 2d 22 (1994), i.e., retroactive tax legislation must serve a legitimate governmental purpose, the government must act promptly, and the legislation must have only a modest period of retroactivity. *IBM* held that the Legislature intentionally granted taxpayers the right to elect the Compact apportionment formula for the years 2008 through 2010. Thus, Michigan had no right to Appellant's money, and it has no legitimate purpose not to return it. PA 282 also was not enacted promptly or for only a modest period of retroactivity. The Legislature's decision in 2011 to eliminate the election prospectively only negates any argument that, in waiting an additional three years, the Legislature acted promptly to repeal the Compact (to eliminate the election) retroactively to 2008. PA 282 also violates separation of powers because the Legislature has usurped a judicial function in attempting to direct courts to overturn the ruling of the Michigan Supreme Court in *IBM*. Finally, PA 282 violates the Constitution's Change-of-Purpose Clause. For all of these reasons, Appellant respectfully asks this Court to overturn the Court of Claims' order.

II. THE HISTORY OF THE MULTISTATE TAX COMPACT

The origin of the Compact dates back to just after World War II. Corporate taxpayers were increasingly expanding their operations into multiple states, and state income taxes were becoming more popular. The proliferating state income taxes varied widely (including their apportionment formulas). See HR Rep No 88-1480, at 99-103, 118-19 (1964) (Ex 2) (“Willis Report, vol 1”). Taxpayers faced complexity in attempting to comply with these varying apportionment formulas, and with that complexity came steep costs. With different apportionment formulas, taxpayers also risked being taxed on more than 100% of their total income. *Id.* at 118-19, 596 (Ex 2). As explained below, Congress and taxpayers began to demand uniformity in state taxation of multistate businesses, and states responded with the Compact. *US Steel Corp v Multistate Tax Comm’n*, 434 US 452, 452-55; 98 S Ct 799; 54 L Ed 2d 682 (1978).

A. Uniform Division of Income for Tax Purposes Act

In an early attempt to promote uniformity, the National Conference of Commissioners for the Uniform State Laws drafted a model law, the Uniform Division of Income for Tax Purposes Act (“UDITPA”) in 1957. Willis Report, vol 1, at 132-33 (Ex 2); Sharpe, *State Taxation of Interstate Business and the Multistate Tax Compact*, 11 Colum J L & Soc Probs 231, 241-42 (1974-75) (Ex 4). UDITPA is a formula for computing an apportionment percentage that is multiplied by a multistate corporation’s total income to determine the amount of income that a particular state is entitled to tax. The formula consists of the sum of three equally-weighted factors (i.e., fractions)—a payroll factor, a property factor, and a sales factor—divided by three. *Id.* UDITPA was not a panacea for uniformity; by 1965 only three states had enacted UDITPA. Mathews, *State Taxation of Interstate Business*, 23 V and L Rev 1317, 1328 (1969-70) (Ex 5).

B. Congressional Involvement

Meanwhile, in 1959, the Supreme Court decided *Northwestern States Portland Cement Co v Minnesota*, 358 US 450; 79 S Ct 357; 3 L Ed 2d 421 (1959), which adopted a surprisingly broad view of the ability of states to tax multistate businesses. Willis Report, vol 1, at 7 (Ex 2). Alarmed, the business community began to question whether there were any effective limits on state taxation. *Id.* Congress reacted swiftly and for the first time in its history adopted an act, Public Law 86-272, restricting the power of states to tax interstate business. *Id.* at 8 (Ex 2); 15 USC §§ 381-84.

Congress also ordered a full-scale study of state taxation of multistate business to recommend legislation establishing uniform standards. *US Steel*, 434 US at 455; Willis Report, vol 1, pp 8-9 (Ex 2); Sharpe, *supra* at 242 (Ex 4). In its multi-volume reports issued in 1964-65, the congressionally appointed Willis Commission described taxation of multistate taxpayers as inefficient and inequitable:

Increasingly the States, reinforced by judicial sanction, have broadened the spread of tax obligations of multistate sellers. . . . The expanding spread of tax obligations has not, however, been accompanied by the development of an approach by the States which would allow these companies to take a national view of their tax obligations. The result is a pattern of State and local taxation which cannot be made to operate efficiently and equitably when applied to those companies whose activities bring them into contact with many States.

HR Rep No 89-952 (1965) ("Willis Report, vol 4"), p 1127 (Ex 3); see also Willis Report, vol 1, at 99-103 (Ex 2) (concluding that the lack of uniformity in state taxation unacceptably burdened interstate companies). The Willis Commission particularly focused on the diversity in apportionment formulas and the propensity of states to change them frequently:

[V]ariation appears to be [formulary apportionment's] most significant historical characteristic. Not only have there always been wide diversities among the various formulas employed by

the States, but the composition of those formulas seems to be constantly changing.

Willis Report, vol 1, at 118-19) (Ex 2) (describing at least eleven different state apportionment formulas as of 1963); see also *id.* at 194, 247-9 (Ex 2) (variance in apportionment formulas causes complexity in compliance and over-taxation).

As the solution to complexity, volatility, and over-taxation, the Willis Report recommended federal legislation to mandate uniformity in state taxation. See *US Steel*, 434 US at 455; Willis Report, vol 4, at 1128 (Ex 3) (“There is every reason to believe that, without congressional action, the worst features of the present system will continue to multiply.”). It concluded with specific legislative recommendations, including a single, mandatory apportionment formula to divide corporate income among the states, a uniform sales and use tax act, and federal oversight — in short, federal preemption of critical aspects of state taxation. See Willis Report, vol 4, at 1133-38, 1143 (Ex 3); Sharpe, *supra* at 242 (Ex 4). Soon after the Report’s release, Congress introduced a bill (HR 11798, 89th Cong, 2d Sess (1965)), including the mandatory apportionment formula, to implement these sweeping recommendations. (Ex 6).

C. The Multistate Tax Compact

With federal preemption imminent, the states conceived the Compact. *US Steel*, 434 US at 454; Sharpe, *supra* at 243 (Ex 4) (“With the . . . Willis Bill, it became apparent to state tax administrators that Congress would act if businesses and the states failed to reform the existing system.”); Multistate Tax Commission 1st Annual Report, at 1 (Ex 7) (“Comm 1st Annual Report”) (“The origin and history of the Multistate Tax Compact are intimately related and bound up with the history of the states’ struggle to save their fiscal and political independence from encroachments of certain federal legislation introduced in [C]ongress . . .”); Council of State Governments’ Compact Summary and Analysis, dated January 20, 1967, p 1 (Ex 8)

(“Development of the [C]ompact 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.”).

The National Association of Tax Administrators convened an “unprecedented” special meeting in January 1966 to oppose HR 11798 and to devise an alternative that would eliminate the need for federal legislation. See Sharpe, *supra* at 244 n 49 (Ex 4). Michigan played a key role. Bill Dexter, “a longtime assistant attorney general for taxes in Michigan . . . fathered the idea” of the Compact presented at this meeting “as a means of heading off then-pending federal legislation that the states regarded as intruding on their taxing jurisdiction.” Eugene Corrigan, *MTC’s 40th Anniversary – A Retrospective*, 45 State Tax Notes 529 (2007) (Ex 9). Dexter, compact experts from the Council of State Governments, and representatives of other organizations, including the National Association of Attorneys General, drafted the Compact. *Id.*; see also Comm 1st Annual Report, at 1 (Ex 7).

Unveiled in 1967, by its terms, the Compact would become effective as to all party states upon its enactment by any seven states, only seven months after the final draft. Comm 1st Annual Report, at 2 (Ex 7); *US Steel*, 434 US at 454. Michigan became a party state to the Compact with the enactment of MCL 205.581 in 1970: “The multistate tax compact is enacted into law and entered into with all jurisdictions legally joining therein . . .” MCL 205.581(1), 1969 PA 343 (effective July 1, 1970).

Thus, the Compact was a bargain struck by states and Congress; the party states agreed to be bound by the terms of the Compact, and thereby established a baseline level of uniformity, with the expectation that the federal government would not enact legislation imposing uniformity. See Comm 1st Annual Report, at 9-10 (Ex 7). After the Compact became effective, Congress declined to enact the legislation proposed in the Willis Report.

D. The Compact's Provisions

The drafters expressly articulated the purposes of the Compact in Article I:

- (1) Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
- (2) Promote uniformity or compatibility in significant components of tax systems.
- (3) Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
- (4) Avoid duplicative taxation.

1969 PA 343, MCL 205.581, art I; see also *US Steel*, 434 US at 456.

The core provision of the Compact establishing baseline uniformity for taxpayers was the apportionment election. Council of State Governments' 1967 Compact Summary and Analysis, at 1 (Ex 8) (discussing importance of election provision to Compact's purposes). Specifically, Article III(1) requires states joining the Compact to offer the specific apportionment formula contained in the Compact as an option to taxpayers, but also allows states to craft their own alternative apportionment provisions:

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.

1969 PA 343, MCL 205.581, art III(1). Article IV contains the Compact's apportionment formula, which is the same as the one in the model law drafted by the National Conference of Commissioners for Uniform State Laws and referred to as UDITPA. *Id.* at art IV.

The United States Supreme Court confirmed that in Compact member states Article III "allows multistate taxpayers to apportion and allocate their income under formulae and rules set forth in the Compact *or* by any other method available under state law." *US Steel*, 434 US at

457 n 6 (emphasis added); see also *Donovan Constr. Co v Dep't of Treasury*, 126 Mich App 11, 20; 337 NW2d 297 (1983) (“[The Compact] provides that a multistate taxpayer may elect to apportion or allocate its income in accordance with state law or may elect to apportion and allocate its income in accordance with Article IV of the [C]ompact.”); Council of State Governments’ Compact Summary and Analysis, at 1 (Ex 8) (“Each party [s]tate could retain its existing division of income provisions, but it would be required to make [UDITPA] available to any taxpayer wishing to use it.”); Multistate Tax Commission 3rd Annual Report, at 3 (Ex 10) (“Comm 3rd Annual Report”), Article V of the Compact obligates each party state (a) to provide a full use tax credit for sales or use taxed paid to another state with respect to the same property, and (b) to honor tax exemption certificates from other states. 1969 PA 343, MCL 205.581, art V; Council of State Governments’ 1967 Compact Summary and Analysis, at 2 (Ex 8). Inequities in state sales and use tax laws were among the wide variety of tax-related issues beyond income tax apportionment that the Willis Report addressed. See Willis Report, vol 1, at 9 (Ex 2).

The Compact established the Multistate Tax Commission (the “Commission”) and provided for governance and funding of the Commission and its activities. 1969 PA 343, MCL 205.581, art VI. Each party state must appoint a member to the Commission and is entitled to one vote. *Id.* at VI(1)(c). Votes may be taken only when at least a majority of members is present and actions may be approved only by a majority of the total number of members. *Id.* The members elect a Chairman, a Vice Chairman, and a Treasurer. The Commission has an Executive Committee consisting of those three officers plus four other members elected annually. *Id.* at art VI(2). Member states must pay dues computed according to a formula in the Compact. *Id.* at art VI(4)(b). The powers of the Commission are set forth

in Article VI: to study state and local tax systems, to develop and recommend proposals for greater uniformity, and to compile information helpful to the states. *Id.* at art VI(3). The Commission may propose uniform regulations relating to state taxation and submit them to the member states, but “[e]ach such state and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures.” *Id.*, art VII(3); *US Steel*, 434 US at 457.

Article XIII provides for audits of taxpayers by the Commission, imbuing the Commission with powers of subpoena and judicial remedies. Importantly, subdivision 1 of Article XIII provides, “This Article shall be in force only in those party [s]tates that specifically provide therefore by statute.” Thus, in contrast to the mandatory apportionment election, the Compact is express when it allows variations from its terms.

In addition, the Compact leaves certain matters to the states’ individual control. It explicitly reserves to the states control over the rate of tax. 1969 PA 343, MCL 205.581, art XI(a). Like UDITPA, the Compact does not address issues related to determination of a corporation’s tax base. See *US Steel*, 434 US at 457 (explaining that individual member states retain “complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due”).

The Compact allows withdrawal only by enacting a statute repealing the Compact:

Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

1969 PA 343, MCL 205.581, art X(2).

In sum, the Compact's express purposes and provisions reflect a balance struck between uniformity to stave off federal preemption, state flexibility over revenue matters, and taxpayer interests. Although some matters are left to the states by the terms of the Compact (such as tax rate, tax base, and the decision whether to adopt any regulations proposed by the Commission or pursue multistate taxpayer audits), other matters are mandatory and leave no choice to party states but to follow them — the sales and use tax credit; the election to use the Compact Formula; and the obligation to pay dues to the Commission, *unless the state withdraws from the Compact in compliance with the withdrawal provision*.

As noted, after the Compact became effective, Congress declined to enact legislation imposing uniformity on the states.

E. United States Supreme Court Ruling on the Compact

In 1972, a group of multistate corporate taxpayers challenged the constitutionality of the Compact on grounds that included the Compacts' lack of congressional consent under the Constitution's Compact Clause. *US Steel*, 434 US at 454; US Const, art I, § 10, cl 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."). The challenging taxpayers sought to halt audits of their tax records by the Commission. The Commission and party states argued that the Compact was valid and binding without congressional consent, and the Supreme Court agreed. Congressional consent is only required if a compact "is 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 (citing *Virginia v Tennessee*, 148 US 503, 518-19 (1893)). The Court determined that the Compact dealt with the traditionally non-federal issue of state taxes and did not grant party states any powers over taxation that they did not already

possess individually (and could therefore commit to exercise collectively) and that the states did not delegate sovereign powers to the Commission. *US Steel*, 434 US at 456-58, 471-78. Thus, the Compact was valid and enforceable, and the Commission was authorized to continue its audits and other activities.

F. Michigan's Participation in the Governance and Activities of the Multistate Tax Commission from 2008-2013

Michigan actively and extensively participated in the Compact *after* January 1, 2008, the date by which the State now claims it withdrew from the Compact. From 2008 through 2011, Michigan officials held officer positions within the Commission. Former Michigan State Treasurer Robert J. Kleine was elected Treasurer of the Commission's Executive Committee for the period July 1, 2009 through June 30, 2010. 2009-2010 Annual Report of the Multistate Tax Commission (Ex 11). As an Executive Committee member, Mr. Kleine met with other Executive Committee Members, who collectively directed the Commission's Uniformity Committee to consider proposed legislation, directed public hearings to be held, directed the Commission's Executive Director to survey Compact members regarding various matters, and approved the Commission's audited financial statements and budgets. *Id.* at 4-5 (Ex 11). Former Michigan State Treasurer Andy Dillon was elected as an at-large member of the Executive Committee for the period July 1, 2011 through June 30, 2012. 2011-2012 Annual Report of the Multistate Tax Commission (Ex 12). As an Executive Committee member, Mr. Dillon met with other Executive Committee Members, who collectively directed the Commission's Uniformity Committee to consider proposed legislation and approved the Commission's audited financial statements and budgets. *Id.* at 4-5 (Ex 12).

Michigan paid membership dues to the Commission, and the Legislature appropriated money for such membership dues. Multistate Tax Commission Fiscal Year 2009 Budget (Ex

14).

From at least 2008 through 2011, the Commission also performed multistate tax audits for Michigan. Multistate Tax Commission, *Audit Member States*, <http://www.mtc.gov/Audit-Program/Member-States> (accessed March 4, 2015) (Ex 13).

III. MICHIGAN'S TAX LAWS

In 2007, the Legislature enacted the Michigan Business Tax Act, MCL 208.1101 *et seq* ("MBTA"), effective January 1, 2008, which included the Michigan Business Tax ("MBT"), the tax at issue in this case. To compute a taxpayer's liability under the MBT, the taxpayer's tax base must be multiplied by an apportionment formula. The MBT's apportionment formula was computed using only one factor (i.e., fraction), based on the taxpayer's sales. MCL 208.1301(2) ("each tax base of a taxpayer whose business activities are subject to tax both within and outside of this state shall be apportioned to this state by multiplying each tax base by the sales factor calculated under section 303").

In 2011, the Legislature replaced the MBT with the Michigan Corporate Income Tax. 2011 PA 39 (effective December 31, 2011). 2011 PA 40 also amended the Compact to eliminate the apportionment election for purposes of the MBT beginning January 1, 2011:

[B]eginning January 1, 2011 any taxpayer subject to the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, or the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.697, shall, for purposes of that act, apportion and allocate in accordance with the provisions of that act and shall not apportion or allocate in accordance with article IV.

2011 PA 40, MCL 205.581, art III(1). The new Corporate Income Tax (effective January 1, 2012) also expressed the Legislature's intent to supersede the Compact election: "It is the intent of the legislature that the tax base of a taxpayer is apportioned to this state by multiplying the tax base by the sales factor multiplied by 100% and that apportionment shall not be based on

property, payroll, or any other factor notwithstanding section 1 of 1969 PA 343, 2010 MCL 205.581.” MCL 206.663(3).

IV. *IBM* AND ITS AFTERMATH

A. *International Business Machines Corp v Department of Treasury*¹

In a 4-3 decision, issued July 14, 2014, the Michigan Supreme Court in *IBM*, held that IBM was entitled to make the Compact election and use its three-factor apportionment formula to compute its 2008 Michigan taxes. 496 Mich at 644.

A plurality of the Court (Justices Viviano, Cavanagh, and Markman) rejected Treasury’s argument that the MBT’s apportionment formula was the sole formula available to taxpayers because in enacting it, the Legislature impliedly repealed the Compact’s election provision. To the contrary, the plurality’s “review of the statutes *in pari materia* indicates a uniform and consistent purpose of the Legislature for the Compact’s election provision to operate alongside Michigan’s tax acts.” *Id.* at 656-57. The plurality noted that the Legislature later *expressly* repealed the Compact’s election retroactive to January 1, 2011, and “could have—but did not—extend this retroactive repeal to the start date of the BTA.” *Id.* at 659.

[B]y only repealing the Compact’s election provision starting January 1, 2011, the Legislature created a window in which it did not expressly preclude use of the Compact’s election provision for BTA taxpayers. Further, we believe that the express repeal of the Compact’s election provision effective January 1, 2011, is evidence that the Legislature had not impliedly repealed the provision when it enacted the BTA.

Id. In a concurrence, Justice Zahra “agree[d] with the lead opinion’s holding that IBM was entitled to use the Compact’s elective three-factor apportionment and allocation formula.” *Id.*

¹*Int’l Business Machines Corp v Dep’t of Treasury*, unpublished order of the Supreme Court, issued November 14, 2014 (Docket No. 146440) (Ex 15) (“IBM”).

at 668 (ZAHRA, J., concurring). Justice Zahra declined to reach the implied-repeal question, because “the Legislature made clear that taxpayers are entitled to use the Compact’s election provision for the 2008, 2009, and 2010 tax years.” *Id.* That is, the Legislature actually “*re-enacted* all the provisions of the Compact,” confirming their applicability for 2008 through 2010. *Id.* (emphasis in original). Thus, “the Legislature in 2011 *created* a window in which it intended the Compact’s election provision to apply.” *Id.* at 670.²

On August 4, 2014, the Department filed a Motion for Rehearing with the Michigan Supreme Court, along with a Motion for Stay and Motion for Immediate Consideration. The Supreme Court denied rehearing on November 14, 2014. *IBM, supra.*

B. 2014 PA 282

PA 282 began as Senate Bill 156 (“SB 156”), introduced by Senator Jack Brandenburg on February 6, 2013. SB 156 as introduced (Ex 16). As introduced, SB 156 did not mention the Compact. The enacting section provided that it was “curative and intended to clarify the original intent of 2007 PA 36 [i.e., the MBTA].” *Id.* It sought to amend the MBT as follows:

- Allow an adjustment to the modified gross receipts tax base for amounts attributable to the taxpayer pursuant to cancellation of debt;
- Revise the calculation of the investment credit with respect to the recapture of revenue when property previously subject to the credit is sold;
- Revise the calculation of the credit for a taxpayer located and conducting business in a renaissance zone before December 1, 2002; and
- Revise a provision concerning where a dock sale is deemed to occur.

² Justices McCormack and Kelly and Chief Justice Young dissented. The dissent believed the Legislature impliedly repealed the Compact’s election provision when it enacted the MBT. *Id.* at 673. “[T]he 2011 Legislature may have simply been acting expressly to confirm what the 2007 Legislature believed it had already done implicitly.” *Id.* at 659.

Senate Legislative Analysis, SB 156 Summary, September 10, 2014 (Ex 18). After two substitutes to allow a taxpayer to claim a refund if the foregoing amendments resulted in an overpayment of tax, the Michigan Senate passed SB 156 on May 14, 2014. (Ex 20). SB 156 then went to the House of Representatives.

SB 156 referenced the Compact for the first time on September 9, 2014. SB 156 was read for a second time in the House, and substitute H-1 to SB 156 was then adopted, including the following new enacting section:

Enacting section 1. 1969 PA 343, MCL 205.581 to 205.589 [i.e., the Compact] 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 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.

House Substitute for SB 156 (Ex 19); see also 2014 House Journal 1658 (Ex 21). There is no record of any debate regarding the substitute in the House Journal. 2014 House Journal 1662-1663 (Ex 21). The House then amended the title to SB 156 to provide:

A bill 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.

The title does not mention the Compact.

Representative Joe Haveman, responsible for adding the retroactive Compact repeal language to SB 156, stated that he believed the Michigan Supreme Court was wrong in *IBM* because “[n]o Legislature, no matter who the administration was or who was here, ever would put together a piece of tax legislation that would benefit out-of-state companies versus in-state companies.” *Retroactive IBM Tax Fix Passes House*, Gongwer Michigan Report, vol 53, Rep 177 (September 9, 2014) (Ex 22); see also Gray, *Tax Fix Bill Gets Final Approval, Awaits Gov. Snyder’s Signature*, Detroit Free Press (September 10, 2014) (Ex 23). Senator Mark Jansen also publically stated, “We basically are trying to stop and correct a corporate tax loophole that need to be fixed with the Supreme Court ruling [in *IBM*]” *Id.*

The next day, September 10, 2014, the Senate passed the House substitute for SB 156 with immediate effect. SB 156 as Passed (Ex 20); see also 2014 Senate Journal 1607-1608, 1616-1617 (Ex 24). There is no record of any debate in the Senate Journal. *Id.* Senator Brandenburg (who initially introduced SB 156) asked to be removed as the sponsor, stating, PA 282 was “a way to legislate around a Supreme Court ruling [*IBM*] and I’m definitely not about that.” Gray, *supra* (Ex 23). The Governor signed the bill on September 11, 2014, and it was effective on September 12, 2014. PA 282 (Ex 17).

V. PROCEDURAL BACKGROUND

Lubrizol timely filed its original MBT return for the year 2009 (“Year at Issue”). In this original return, Lubrizol apportioned its tax base using the single sales factor formula in the

MBT, MCL 208.1301 et seq. On September 26, 2013, Lubrizol filed timely filed an amended MBT return for the Year at Issue. Among other items within the Amended Return, Lubrizol elected to calculate its apportionment formula for purposes of the Business Income Tax base of the MBT pursuant to the equal three-factor weighting of the Multistate Tax Compact.³ The amended return requested a refund of MBT in the total amount of \$177,421.

On March 19, 2014, the Department denied Lubrizol's MTC election and the associated refund amount, but approved other items requested in the refund claim. The Department approved Lubrizol's refund claim in the amount of \$73,500 but denied Lubrizol's refund claim pertaining to the MTC election in the amount of \$103,921.

Subsequently, on December 19, 2014, the Court of Claims issued opinions and orders in two Compact cases: *Ingram Micro, Inc & Subsidiaries v Dep't of Treasury*, unpublished opinion and order of the Court of Claims, issued December 19, 2014 (Docket No. 11-000035-MT) (Ex 1), and *Yaskawa America, Inc v Dep't of Treasury*, unpublished opinion and order of the Court of Claims, issued December 19, 2014 (Docket No. 11-000077-MT) (Ex 1). In both *Ingram Micro* and *Yaskawa*, the Court of Claims granted summary disposition to the Department and concluded that "PA 282 retroactively applies to this case, and all pending MBT refund actions filed in reliance on the Compact's elective, three-factor apportionment formula under the former MCL 205.581 et seq." *Ingram Micro, supra* at 2-3 (Ex 1); *Yaskawa, supra* at 2 (Ex 1).

Also on December 19, 2014, the Court of Claims granted summary disposition in favor of Defendant-Appellee pursuant to MCR 2.116(I)(1) because of PA 282's

³ Plaintiff's Complaint at ¶ 6. On or about August 19, 2014, Lubrizol timely filed and served another amended MBT return for the Year at Issue. In this second Amended return, Lubrizol also elected to calculate its apportionment formula for purposes of the Modified Gross Receipts base of the MBT pursuant to the equal three-factor weighting of the Multistate Tax Compact. To date, the Department has not affirmed or denied this request.

enactment.⁴ *Lubrizol Corporation v Dep't of Treasury*, unpublished order of the Court of Claims, entered December 19, 2014 (Docket No. 14-0000143-MT) (Ex 1). The Court of Claims concluded “that PA 282 applies to this action and negates the basis for [Lubrizol’s] claim” for the reasons set forth in *Ingram Micro* and *Yaskawa*. *Id.* PA 282 was the only evidence of Michigan’s Compact membership that the Court of Claims considered. This appeal followed.

VI. STANDARD OF REVIEW

This Court reviews *de novo* a trial court’s decision to grant summary disposition pursuant to MCR 2.116(I)(1). *Kenefick v Battle Creek*, 284 Mich App 653, 654; 774 NW2d 925 (2009). Similarly, claims that a statute is unconstitutional, as well as issues of statutory interpretation, are questions of law that this Court reviews *de novo*. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010).

VII. ARGUMENT

A. Retroactive Repeal of the Compact is Illegal.

1. The Compact’s Terms Prohibit Retroactive Withdrawal

The plain language of the Compact withdrawal provision prohibits withdrawal that affects *any* liability already incurred, i.e., retroactive withdrawal is prohibited:

Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

1969 PA 343, MCL 205.581, art X(2). The dictionary definition of “liability” is “something

⁴ MCR 2.116(I)(1) provides: “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.”

(such as the payment of money) for which a person or business is legally responsible.” *Merriam Webster Dictionary*, <http://www.merriam-webster.com/dictionary/liability> (accessed March 16, 2014). Placing “any” before “liability” underscores the intent for the broadest construction possible. Indeed, not only can a withdrawal not undo a prior liability, it cannot even *affect* a prior liability. Because withdrawal cannot affect anything a party became legally responsible for prior to the withdrawal, the plain terms prohibit retroactive withdrawal.

This Court should reject any argument that the provision applies narrowly only to previously incurred *financial* liabilities such as dues owed to the Commission. Such a reading conflicts with the plain language (*any* liability) and requires the Court to read the word financial into the statute. *Lash v Traverse City*, 479 Mich 180, 189; 735 NW2d 628 (2007) (applying the plain-language rule and stating, “[W]e may not substitute alternative language for that used by the Legislature.”). In fact, allowing retroactive withdrawal, other than to the extent of financial liabilities, is nonsensical. Having performed under the Compact (e.g., paid dues; voted; participated in Multistate Tax Commission leadership, meetings, and multistate audits; exchanged confidential taxpayer information regarding litigation and tax enforcement), it is impossible to undo that performance.

The only court to have considered this question agreed:

[T]he Compact provides for a state’s orderly withdrawal, namely by enacting a statute repealing the Compact. However, any repealing legislation must be prospective in nature, because it cannot “affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal.” (Former § 38006, art. X, subd. 2.)

Gillette Co v Franchise Tax Bd, 209 Cal App 4th 938, 954; 147 Cal Rptr 3d 603, 614 (2012).⁵

⁵ This case is pending on review by the California Supreme Court.

In sum, the Compact's withdrawal provision prohibits retroactive repeal, and as explained below, the Michigan Legislature was powerless to override that prohibition with a subsequent law.

2. The Compact is a Binding Interstate Compact.

The Compact was intentionally drafted and enacted as an interstate compact of the variety that had been used pervasively and successfully by states to solve issues that cross state borders. The history of the Compact demonstrates the reason for choosing an interstate compact as the vehicle to respond to the threat of imminent federal preemption. As detailed above and in *US Steel*, 434 US at 455-56, the states genuinely and reasonably believed that the Compact was a bargain with Congress that would stave off federal preemption by establishing a baseline uniformity in state taxation. UDIPTA, a model law, had been ineffective in establishing uniformity for multistate taxpayers – only three states had enacted UDITPA when Congress took up the issue, and it could be modified by states before adoption and amended at will. An interstate compact upped the ante with a solution that would satisfy Congress that it could actually work. One of the specific concerns of the Willis Commission was the propensity of states to change apportionment formulas frequently. Willis Report, vol 1, at 118-19 (Ex 2) (“Not only have there always been wide diversities among the various formulas employed by the States, but the composition of those formulas seems to be constantly changing.”). The legislative history of the Compact shows that the states and the drafters understood interstate compacts to be an established mechanism for resolving cross border issues and that they *knew* and *intended* for the Compact to be a binding interstate compact. See Council of State Governments’ 1967 Compact Summary and Analysis, at 8 (Ex 8) (“For handling significant problems which are beyond the unaided capabilities of the regularly constituted agencies of individual State governments, the accepted instrument is an interstate

compact;” discussing the use of other interstate compacts to address multistate problems); Comm 3rd Annual Report, at 13 (Ex 10), (The Commission stated in 1970, the Compact is “like all compacts” allowing states to accomplish collectively what they cannot do individually); Comm 1st Annual Rep, at 8-9 (Ex 7) (distinguishing between *individual* action by states in adopting uniform laws and *collective* action of states in enacting the Compact). The reason Compacts are able to solve such problems is that party states must adopt all terms as written (subject to express exceptions), and the states are bound to the entire compact unless they withdrew entirely. To disavow the states’ intention to enter into a binding interstate compact is disingenuous and self-serving. After the Compact was enacted, Congress declined to enact the federal legislation. See discussion above, at § II.B.

Through interstate compacts, party states, such as Michigan, commit to collectively exercise their sovereignty in specified ways, to address a shared problem. *Hess v Port Auth Trans-Hudson Corp*, 513 US 30, 42; 115 S Ct 394, 401; 130 L Ed 2d 245, 256-57 (1994) (“An interstate compact, by its very nature, shifts a part of a state’s authority to another state or states, or to the agency the several states jointly create to run the compact.”); *West Virginia ex rel Dyer v Sims*, 341 US 22, 30-31; 71 S Ct 557, 561-62; 95 L Ed 713, 723-724 (1951); Broun et al, *The Evolving Use and Changing Role of Interstate Compacts, A Practitioner’s Guide* (2006) (“Broun on Compacts”), at 21 (Ex 25) (by compact, “the member states have collectively and contractually agreed to reallocate government authority away from individual states to a multilateral relationship”). As a result of this collective exercise of state sovereignty, interstate compacts are not mere parallel statutes in each state, but they are a special type of contract, one between states rather than private parties; in particular, the courts describe this special status as *simultaneously both* binding reciprocal statutes and a contract

among sovereign states. See *Texas v New Mexico*, 482 US 124, 128; 106 S Ct 2279, 2283-84; 96 L Ed 2d 105, 113-14 (1987); *CT Hellmuth v Washington Metro Area Transp Auth*, 414 F Supp 408, 409 (D Md, 1976); *Doe v Ward*, 124 F Supp 2d 900, 914-15 (WD Pa, 2000); 1A Singer, Sutherland Statutory Construction (7th ed), § 32:5, at 723 (“When adopted by a state, the compact is not only an agreement between that state and the other states that have adopted it, but it becomes the law of those states as well, and must be interpreted as both contracts between states and statutes within those states.”); *Entergy Arkansas Inc v Nebraska*, 358 F3d 528, 541 (CA 8, 2004) (compacts are not akin to commercial contracts among private parties but must be interpreted and enforced as contracts among political equals that have unique features and functions in our system of government).

3. Compacts Take Precedence over Other State Statutes.

Under the well-developed case law governing interpretation of compacts, because of the special, unique status of a compact as simultaneously *both* binding reciprocal statutes among sovereign states, and their unique and essential purpose, compacts are subject to their own set of interpretive principles. Foremost among these principles is that a compact takes precedence over other state law, and *one state cannot subsequently unilaterally alter or eliminate a compact's terms piecemeal*:

Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all the parties.

CT Hellmuth, 414 F Supp at 409. “It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ

of one of the contracting States” or altered by any one of the contracting states. *West Virginia ex rel Dyer*, 341 US at 23, 28; *Doe*, 124 F Supp 2d at 914-15 (“[I]nterstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes Having entered into a contract, a participant state may not unilaterally change its terms;” finding Parole Compact superseded Pennsylvania’s Megan’s Law that imposed additional transfer conditions); *McComb v Wambaugh*, 934 F2d 474, 479 (CA 3, 1991) (overruled on other grounds, *State Dep’t of Economic Security v Leonardo*, 200 Ariz 74; 22 P3d 513 (Ariz App, 2001)) (“A compact also takes precedence over statutory law in member states”). This principle is critical to achieving the purpose of compacts to solve cross-border problems; states would have little incentive to enter into compacts, and they would not be very effective, if a state could change its obligations at will.

This principle holds true regardless of whether the compact has congressional consent.⁶ Both congressionally-approved and non-approved compacts are designed and intended to solve cross-border problems, and both types of compacts hold the special status of being simultaneously statutes and binding agreements among sovereign states. Compact member states and other stakeholders such as taxpayer businesses, need to be able to rely on the binding nature of compacts. As noted above, if a state like Michigan can override a compact term at will,

⁶ The decisive error in the *IBM* dissent was its belief that IBM cited only two cases in support of the proposition that a non-congressionally approved compact supersedes conflicting state law *McComb*, 934 F2d at 479, and *CT Hellmuth*, 414 F Supp at 409, and distinguishing them on superficial grounds. Those cases do provide authority for the principle that the Compact supersedes conflicting state law, yet IBM did not rely on them exclusively. Rather, IBM and amici in support of IBM provided the court with the extensive background and purposes of compacts, and a lengthy and complex analysis of the case law involving compacts, both approved and not approved by Congress. The dissent’s failure both to acknowledge and to consider those facts and legal authorities resulted in its erroneous conclusion and one that, if upheld, will reverberate through interpretation, application, and operation of all compacts.

the compact will not serve its vital purposes. A compact's status as both a statute and as a binding agreement among sovereign states results in a compact taking precedence over other state laws.⁷

By contrast, congressional consent is entirely unrelated to, and has no bearing on, the need for states and other stakeholders to be able to rely on the binding nature of compacts for them to achieve their fundamental purpose. Congressional consent serves an entirely different purpose. A compact requires consent only if it "tend[s] to the increase of political power in the States, [and thus] may encroach upon or interfere with the just supremacy of the United States." *US Steel*, 434 US at 471 (citing *Virginia v Tennessee*, 148 US 503, 518-19; 13 S Ct 728; 37 L Ed 537 (1893)). In that case, congressional consent ensures that Congress knows about, and agrees to, the interstate agreement.

Thus, congressional approval is an additional reason (not the sole one) that a compact cannot be overridden by subsequent state law. See *Alcorn v Wolfe*, 827 F Supp 47, 52 (D DC, 1993) ("In light of the Supremacy Clause . . . and because compacts are analogous to contracts between states, the terms of the . . . compact cannot be modified unilaterally by state legislation and take precedence over conflicting state law.") (emphasis added) (internal citation omitted); Broun on Compacts, at 65 (Ex 25) ("Congressional consent may change the venue in which compact disputes are ultimately litigated; it does not change the controlling

⁷ Michigan relies upon the binding nature of the compact obligations of other states under at least twenty interstate compacts; likewise, the other states similarly rely upon Michigan. See, e.g., MCL 3.1011 *et seq.* (non-congressionally approved Interstate Compact for Adult Offender Supervision); MCL 3.161 *et seq.* (non-congressionally approved Multistate Highway Reciprocal Act); MCL 3.711 *et seq.* (non-congressionally approved Interstate Compact on Placement of Children); MCL 330.1920 *et seq.* (Interstate Compact on Mental Health); MCL 388.1301 (non-congressionally approved Interstate Compact for Education); MCL 400.115r-s (non-congressionally approved Interstate Compact on Adoption and Medical Assistance).

nature of the agreement on the member states.”).

Ample law confirms that even without congressional approval, compacts take precedence and party states cannot unilaterally alter them through subsequent legislation. See *McComb*, 934 F.2d at 479; see also *Gen Expressways, Inc v Iowa Reciprocity Bd*, 163 NW2d 413, 419 (Iowa, 1968) (subsequent legislation could not “unilaterally alter the terms of the compact previously entered into by the board”); *In re OM*, 565 A2d 573, 579-80 (DC App, 1989) (signatory to non- approved compact could not unilaterally alter its compact obligations); *In re DB*, 139 Vt 634; 431 A2d 498 (Vt, 1981) (compact valid and enforceable despite lack of congressional consent); *In re CB*, 188 Cal App 4th 1024, 1031; 116 Cal Rptr 3d 294 (Cal App, 2010) (non-approved compact cannot be contradicted or overridden by inconsistent state law).

4. The Compact is a Binding Interstate Compact, and the Michigan Legislature was Prohibited from Overriding the Withdrawal Provision with Subsequent State Law.

That the Compact is a binding interstate compact is compelled by the face of the Compact itself, as well as its legislative history. As noted above, the United States Supreme Court upheld the Compact without congressional consent, allowing the Commission established by the Compact to continue to exist and to perform its duties under the Compact. *US Steel*, 434 US at 473-79. In other words, the Compact was binding on the states and other key stakeholders, namely the taxpayer corporations that filed the lawsuit. It is doubtful that the Court would have engaged in its lengthy analysis of whether congressional approval was necessary if it believed that the Compact was not an interstate compact.

US Steel should be determinative of MCL 205.581’s status as a true, binding interstate compact rather than a garden-variety statute that the Michigan legislature can amend at will. But it is not necessary to rely on *US Steel* because the Compact bears all of the indicia of an interstate

compact. First, it is titled the Multistate Tax *Compact*, and the term “compact” is used 25 times in Michigan’s enactment. 1969 PA 343, MCL 205.581. It required enactment by seven party states to become effective. *Id.* at art X(1). It was both “enacted into law *and entered into* with all jurisdictions legally joining therein” by party states, including Michigan. *Id.* at § 1 (emphasis added). It imposes clear obligations on party states – to provide sales and use tax credits and exemptions; to secure all taxpayers the election to use the Compact Formula; and to pay dues to the Commission. *Id.* at art III-V. The fact that it is express when it allows variations from its terms indicates that the remaining terms are mandatory. For example, the Compact explicitly allows party states choose whether to enact Article VIII’s audit provisions. 1969 PA 343, MCL 205.581, art VIII(1) (“This Article shall be in force only in those party [s]tates that specifically provide therefore by statute.”); *US Steel*, 434 US at 457. And, it created a joint Compact agency, the Multistate Tax Commission, with delineated powers. 1969 PA 343, MCL 205.581, art VI-VIII; *US Steel*, 434 US at 456-57; *see also Seattle Master Builders Ass’n v Pacific Northwest Electric Power & Conservation Planning Council*, 786 F2d 1359, 1363 (CA 9, 1986). Finally, it specifies the terms for a party state to withdraw and prohibits withdrawal from affecting liabilities already incurred. 1969 PA 343, MCL 205.581, art X.⁸

Ordinary state statutes are not referred to as compacts, do not require enactment by other states to become effective, and do not contain withdrawal provisions. Moreover, as noted above, the legislative history confirms that the states and the drafters understood interstate compacts to

⁸ No two compacts are identical; each one is tailored to the specific cross-border problem it seeks to address. Thus, as recognized in *Seattle Master Builders*, 786 F2d at 1363, “[a]n unusual feature of a compact does not make it invalid.” Moreover, *Northeast Bancorp, Inc v Bd of Governors of the Fed Reserve*, 472 US 159; 105 S Ct 2545; 86 L Ed 2d 112 (1985), and *Seattle Masters Builders*, 786 F2d 1359, discussed common indicia that tend to characterize an interstate compact but did not establish absolute requirements for their existence.

be an established mechanism for resolving cross border issues, and that they *knew* and *intended* for the Compact to be a binding interstate compact. See discussion above, at § II.C. Michigan simply cannot enter into the Compact and accept its benefits, most importantly avoiding federal *preemption*, and more than 40 years later argue it was never actually bound to its Compact obligations. This approach has already been rejected by the Supreme Court. In *West Virginia ex rel Dyer*, the Supreme Court refused to allow a party state to avoid its compact obligations by later arguing that it did not have authority under its constitution. 341 US at 35 (JACKSON, J., concurring) (“Whatever she now says her Constitution means, she may not apply retroactively that interpretation to place an unforeseeable construction upon what the other States to this Compact were entitled to believe was a fully authorized act.”); see also *McComb*, 934 F2d at 479 (directing that compacts need to be interpreted uniformly across the party states).

Because the Compact is a binding interstate compact, Michigan is bound to its terms, including its prospective-only withdrawal provision, and Michigan’s attempt to withdraw retroactively through PA 282 is void. In fact, even without the withdrawal provision, PA 282 would be illegal, violating the prohibition on subsequent legislatures unilaterally enacting laws that impair or alter compact obligations. Orderly withdrawal from compacts is critical because the retroactive repeal of a compact statute by one state would upset the expectations of other party states equally or more profoundly than a prospective unilateral modification. Allowing retroactive repeals would eviscerate the use of compacts as the tool that they are designed to be. For all of these reasons, the Court of Claims’ decision should be reversed.

B. Retroactive Withdrawal from the Compact Violates the Contract Clause.

To override the withdrawal provision, a core obligation of the Compact, through PA 282 would violate the Constitutional prohibition on state law that impairs the obligation of contracts. US Const, art I, § 10, cl 1; Const 1963, art I, § 10 (“No . . . law impairing the obligation

of contracts shall be enacted.”). “[T]he constitution of the United States embraces all contracts . . . a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals.” *Green v Biddle*, 21 US (8 Wheat) 1, 39; 5 L Ed 547, 570 (1823); *Thompson v Auditor General*, 261 Mich 624, 636; 247 NW 360, 364 (1933) (“The constitutional prohibition embraces all contracts executed or executory whether between individuals or the State and others.”); *see also Washtenaw Community College Ed Ass’n v Bd of Trustees*, 50 Mich App 467, 471-78; 213 NW2d 567 (1973). The Supreme Court has held that this constitutional prohibition specifically extends to interstate compacts, precluding states from passing laws that impair obligations secured by a compact. *Green*, 21 US at 12-13; *see also Broun on Compacts*, at 17 (“The Contracts Clause of the U.S. Constitution prohibits the impairment of contracts, and that prohibition extends to interstate compacts.”).

In *Green*, the Supreme Court invalidated a Kentucky statute that materially impaired the rights of landowners subject to an interstate compact between Virginia and Kentucky on Contract Clause grounds:

If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous: and in *Fletcher v Peck*, the Chief Justice defines a contract to be a compact between two or more parties. The principles laid down in that case are, that the constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a State and individuals; and that a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals. Kentucky, therefore, being a party to the compact which guaranteed [sic] to claimants of land lying in that State, under titles derived from Virginia, their rights, as they existed under the laws of Virginia, was incompetent to violate that contract, by passing any law which rendered those rights less valid and secure.

Green, 21 US at 91-93; see also *Pennsylvania v Wheeling & Belmont Bridge Co*, 54 US 518; 14 L Ed 249 (1852) (State statute authorizing construction of bridge so as to obstruct navigation on navigable river between that state and another is unconstitutional upon ground that it impairs obligation of contract, where it is contrary to provision of compact made between such states that navigation of river should remain free); *Gen Expressways*, 163 NW2d at 420-21 (interpreting later statute to not conflict with compact to avoid violation of Contract Clause).

Similarly, in *Doe*, a federal district court held that a subsequent Pennsylvania statute could not impose additional obligations on a probationer's transfer rights under the Parole Compact, citing compact law as well as the Contract Clause. 124 F Supp 2d at 914-15, n 20 ("the Contract Clause of the United States Constitution protects compacts from impairment by the states"). Thus, the Contract Clause also prohibits Michigan from overriding the withdrawal provision by purporting to retroactively repeal the Compact.⁹

C. Retroactive Withdrawal from the Compact Violates the Due Process Clause.

1. Appellant had a Vested Right in their Claims for Refund following IBM.

PA 282 also violates the Due Process clauses of the United States and Michigan Constitutions.¹⁰ Constitutional due process principles prohibit retrospective laws from divesting vested rights. *Detroit v Walker*, 445 Mich 682; 520 NW2d 135 (1994).

⁹ The Department would be wrong to argue that Plaintiff did not have standing to advance rights under the Compact because it was not a party to the Compact. Plaintiff is not pursuing a breach of contract claim; rather, Plaintiff's complaint is for refund of taxes, a claim it unquestionably has standing to pursue. As part of its refund action, Plaintiff is entitled to argue for the proper determination of its tax liability, and for an interpretation that comports with the Constitution and with the status of MCL 205.581 as an interstate compact. Moreover, taxpayers plainly were intended to be stakeholders and beneficiaries of the Compact. In *Gillette*, the California court held that the taxpayer had standing. 209 Cal App 4th at 952.

¹⁰ US Const, Am XIV, § 1; Const 1963, art I, § 2.

A “vested right” is “[a] right, so fixed that it is not dependent on any future act, contingency or decision to make it more secure.’ ‘A vested right is a present or future right to do or possess certain things not dependent upon a contingency.’” *Henry L Meyers Moving & Storage v Mich Life & Health Ins Guaranty Ass’n*, 222 Mich App 675, 691; 566 NW2d 632 (1997) (quoting *Wylie v Grand Rapids City Comm*, 293 Mich 571, 586-587; 292 NW 668 (1940)). “To determine whether a right is vested, policy considerations are controlling rather than inflexible definitions” *GMAC, LLC v Dep’t of Treasury*, 286 Mich App 365, 377; 781 NW2d 310 (2009).

Appellant had a vested right in their claim for refund as of July 14, 2014 when the Michigan Supreme Court filed its published opinion in *IBM*. On that date, the decision became final by operation of Judicial Branch law. MCR 7.317(C)(1) (“The clerk shall enter an order or judgment pursuant to an opinion as of the date the opinion is filed with the clerk . . .”). The motion for rehearing in *IBM* operated only as an automatic stay of the opinion as to the parties. MCR 7.313(E). The decision remained a published Supreme Court decision binding on lower courts.

The Court’s denial of Treasury’s rehearing motion in *IBM* did not affect the date that *IBM* was final. A new order is only entered if a rehearing motion is granted and the Court issues a new opinion. MCR 7.317(C)(2)(b). The Supreme Court denied Treasury’s rehearing motion (made on substantive and PA 282 grounds) and issued no new opinion. Thus, *IBM* was final on July 14, 2014.

As a final published decision, *IBM* was binding on all Michigan state courts as of July 14, 2014.¹¹ As of that date, *IBM* resolved that during the window period, 2008 through 2010, taxpayers were entitled to elect the Compact's apportionment formula and, thus taxpayers with timely claims for refund for those tax years electing the Compact's formula were entitled to their claimed refunds. *IBM* involved purely legal issues, and the application of *IBM* to a particular taxpayer does not depend on any taxpayer-specific facts. Thus, as of July 14, 2014, Lubrizol was entitled to judgment in their favor and had a vested right in such judgment. That the Court of Claims had not yet formally entered a judgment in favor of Lubrizol does not diminish its vested rights because as of July 14, 2014, in light of *IBM*, the Court of Claims had no discretion to take any action except to enter a judgment in Lubrizol's favor and the entry of judgment is a ministerial act. *Mahrle v Danke*, 216 Mich App 343, 349; 549 NW2d 56, 59 (1996); *St. Clair Commercial & Savings Bank v Macauley*, 66 Mich App 210, 211; 238 NW2d 806, 808 (1975) ("The conceptual difference between the rendition of a judgment and entry of a judgment has long been recognized in Michigan. The rendition of a judgment is the judicial act by which the court decides the case in favor of one party or the other. The entry of the judgment is merely the ministerial act that records that a judgment has been rendered."); *S & S Excavating Co v Monroe Co*, 37 Mich App 358, 365; 194 NW2d 416, 419 (1971). Accordingly, as of July 14, 2014, Appellant was entitled to judgment in its favor. No "future act" or "contingency" was required for Appellant to recover on its claim. Appellant had a

¹¹ Four Michigan Supreme Court justices agreed that a taxpayer could elect to apportion its income pursuant to Compact Articles III(1) and IV. *IBM*, 496 Mich at 659 (VIVIANO, J., lead opinion); *Id.* at 668-70, (ZAHRA, J., concurring); see also 9/4/14 Plaintiff's Motion for Summary Disposition, at § III.B.

vested right in its refund claim, and if PA 282 is applied to retroactively repeal the Compact and divest Appellant of their vested rights, PA 282 will violate due process.¹²

2. Retroactive withdrawal from the Compact violates *Carlton*.

Due Process Clause requires “the retroactive application of a statute [to be] supported by a legitimate legislative purpose furthered by rational means.” *United States v Carlton*, 512 US 26, 30-31; 114 S Ct 2018; 129 L Ed 2d 22 (1994) (quoting *Pension Benefit Guaranty Corp v R A Gray & Co*, 467 US 717, 729-30; 104 S Ct 2709; 81 L Ed 2d 601 (1984)). The legislation in *Carlton* corrected an unanticipated loophole and was retroactive for slightly over one year. The Court concluded that “the 1987 amendment’s retroactive application meets the requirements of due process. First, Congress’ purpose in enacting the amendment was neither illegitimate nor arbitrary. . . . Second, Congress acted promptly and established only a modest period of retroactivity.” *Id.* at 32. While reliance on the original statute was not sufficient for a due process violation, the decision implies it is a relevant factor. *Id.* at 33.

Under *Carlton*, PA 282 violates the Due Process Clause. First, there was no legitimate purpose for repealing the entire Compact retroactively. The only officially stated purpose for PA 282 was to implement the intent of a prior Legislature. However, in *IBM*, 496 Mich 642, the justices in the lead opinion determined that the earlier Legislature (in 2008) did not intend to repeal the Compact and the justice in the concurrence determined that the Legislature had intentionally reenacted the Compact provisions in 2011. *IBM*, 496 Mich at 659 (VIVIANO, J., lead opinion); *Id.* at 668-70, (ZAHRA, J., concurring). Effecting the intent of

¹² Appellant had a vested right in its claim for refund as a result of *IBM*. This is different from the argument made in *General Motors* and *GMAC*, that the taxpayers had a vested right in the continuation of a tax law. *Gen Motors Corp v Dep’t of Treasury*, 290 Mich App 355; 803 NW2d 689 (2010); *GMAC*, 286 Mich App 365.

a prior Legislature could not have been the purpose of PA 282. Rather, the actual purpose of PA 282 must have been to override the intent of two prior Legislatures that intended to preserve the Compact election for the Years at Issue and to overturn *IBM*, thereby avoiding the payment of refunds that were legitimately owed and fully vested as of the July 14, 2014, the issuance date of the *IBM* opinion.

According to *IBM*, the Legislature intentionally granted taxpayers the right to elect the Compact apportionment formula for the years 2008 through 2010. The Legislature is presumed to know the effect of these actions, i.e., to have knowingly created this tax result. *Reynolds v Bureau of State Lottery*, 240 Mich App 84, 103, 610 NW2d 597, 607 (2000) (“The law presumes that the Legislature knows the legal ramifications of the actions it takes and those ramifications must be implemented even if, in fact, the Legislature did not know the ramifications.”). Despite the Legislature’s intent, the Department of Treasury distorted the Legislature’s actions, inventing arguments for denying taxpayers their apportionment election. Given that the Supreme Court rejected those arguments, concluding that the Legislature was clear, twice, the State never should have collected the disputed amounts in the first place; the State has the taxpayers’ money in its possession *illegitimately*. Now the Department is claiming that a different Legislature’s decision not to return the *taxpayers’ own money* is legitimate. No court has held that retroactive legislation serves a legitimate purpose where it is aimed at overriding the intent of two prior Legislatures and the Supreme Court to retain tax refunds properly owed to taxpayers.

Furthermore, the effects of PA 282 go well beyond just keeping the taxpayer’s own money. It also purports to repeal the entire Compact, including its twelve separate articles covering numerous subjects, ranging from income apportionment, and sales/use tax credits; joint

tax audits to organization, management, and participation in the Multistate Tax Commission; and arbitration. 1969 PA 343, MCL 205.581. The Department might argue that the Legislature took this grossly overbroad approach out of concern that the courts ultimately would rule that a piecemeal amendment of the Compact is prohibited. But the State should not be permitted to rely on this as a legitimate reason for its action because the State indefatigably denies it.

The Court of Claims misread and misapplied *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355; 803 NW2d 698 (2010). First, the Court of Appeals itself said that the taxpayer in that case did not qualify for the exemption in question as a statutory matter and, therefore its “constitutional claims [were] moot.” *Id.* at 385-86. At most, the Court of Appeal’s discussion of issues is persuasive. *Lafayette Dramatic Productions, Inc v Ferentz*, 305 Mich 193, 218; 9 NW2d 57, 66 (1943) (“Notwithstanding such questions and the issues presented by this record might be considered moot, we deem the case of sufficient importance to warrant our decision, even though it may be in the nature of a declaratory decree.”); *Anway v Grand Rapids R Co*, 211 Mich 592, 635; 179 NW 350, 365 (1920) (SHARPE, J., dissenting) (“[T]he decision of a moot case is mere dictum, as no rights are affected thereby. . . .”); see *In re Humphrey’s Estate*, 107 Mich App 778, 782; 309 NW2d 722 (1981) (identifying pronouncements of the Michigan Court of Appeals on a moot issue in *In re Butterfield*, 100 Mich App 657, 300 NW2d 359 (1980), as dicta because of their mootness).

Second, the Court of Appeals said that it “was almost universally recognized” as a legitimate purpose for retroactive legislation under *Carlton* 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” of the Court of Appeals. *Gen Motors Corp*, 290 Mich App at 373. In stating that it is “almost universally recognized,” the Court acknowledged that there can be

situations in which it is not legitimate to “mend a leak,” even if the tax benefit was created by poor drafting or by a judicial decision. In any event, the Compact’s apportionment election was not created by either. Instead, availability of the Compact’s apportionment election for 2008 through 2010 was an intentional act of the Legislature. *IBM*, 496 Mich at 659 (VIVIANO, J., lead opinion); *Id.* at 668-70, (ZAHRA, J., concurring). In sum, mending a leak does not provide a legitimate legislative purpose for PA 282, nor is there any other legitimate purpose for it.

Second, in enacting PA 282, the Legislature did not act “promptly” or establish “only a modest period of retroactivity.” *Carlton*, 512 US at 32. The Legislature’s elimination of the election prospectively by passing 2011 PA 39 eliminated any argument that it acted promptly in waiting an additional three years to repeal the Compact (to eliminate the election) retroactively to 2008. IBM filed its complaint on March 15, 2011, and the Legislature passed 2011 PA 39 on May 25, 2011. Through 2011 PA 39, the Legislature communicated and acted on its concern of the financial consequences of the Compact’s apportionment election. It acted reasonably and promptly after the filing of the complaint by IBM to address the concern. Furthermore, with awareness of the potential problem, in 2011 the Legislature *intentionally* declined the opportunity to act in a timely fashion to repeal the election (or repeal the Compact) retroactively at that time. Given the Legislature’s action in 2011 demonstrating its awareness of the problem and a solution to address it, there is no reasonable justification for an additional three-year delay to implement the retroactive part of its action. The purported retroactive repeal in 2014 was not prompt.

Moreover, even if PA 282 could somehow be viewed as curing an inadvertent error (as in *Carlton*), a six-year period of retroactivity cannot be countenanced here. The length of

the period of retroactivity also should be evaluated by the scope of the action. Because PA 282 purports to repeal the entire Compact, the scope and numbers of parties and stakeholders affected are enormous. There are significantly more affected parties and stakeholders than in prior cases considered by this Court in which there were apparently only one or several other taxpayers affected. See, e.g., *Gen Motors Corp*, 290 Mich App 355; *GMAC*, 286 Mich App 365. The interest in finality of all of these parties and stakeholders in the wide range of provisions and subjects contained in the Compact must be substantially greater than the interest in finality in *General Motors*.¹³

Furthermore, while taxpayers' reliance may not be determinative, it is highly relevant here. The Legislature's acting affirmatively to eliminate the election only for 2011 and thereafter, and making clear that the election was available for 2008 through 2010 created reliance interests that do not exist with ordinary legislation.

However, upholding PA 282's retroactive repeal will undermine the reasonable expectations of all taxpayers with *IBM* claims that as the lead case, *IBM* would govern their lawsuits. And it would cause havoc in the courts in the next case affecting a large group of litigants, as *IBM* did.

For all of these reasons, PA 282 lacks a legitimate legislative purpose, it is not furthered by rational means, and, thus, it violates Due Process.

¹³ In *Gen Motors Corp*, 290 Mich App at 375-76, the Court of Appeal judged the length of retroactivity in the context of the "totality of the circumstances," applying a balancing test—the government's interest in retroactive application of a statute against interests in finality. To the extent that this Court is inclined to follow *Gen Motors*, the Legislature's action in 2011, the enormous scope and numbers of parties and stakeholders affected, and the reliance interests are all factors that should weigh in Appellant' favor in determining under the totality of circumstances whether the Legislature used rational means to achieve its purpose in this instance.

D. The Court of Claims Committed Reversible Error by Entering Judgment Before the Parties Conducted Evidence of Disputed Issues of Material Fact

Granting summary disposition on grounds that there is no genuine issue as to any material fact is premature when discovery on a disputed issue is incomplete unless there is no reasonable chance that discovery will result in factual support for the nonmoving party. *Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000); *Dep't of Soc. Servs. v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). The Court of Claims committed reversible error because it ordered summary disposition of this case even though no discovery had been conducted regarding material facts, i.e., Michigan's participation in the Compact from 2008 to the present.¹⁴

PA 282 attempts to ignore Michigan's longstanding and active participation in the Compact and to rewrite history, which it may not do. *Romein v Gen Motors Corp*, 436 Mich 515, 540-46; 462 NW2d 555, 567-70 (1990) (BRICKLEY, J., concurring), *aff'd* 503 US 181 (1992) ("The voters do not delegate authority to rewrite history.") (quoting Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 Am Bar Found Research J 379 (1987)); *United States v Enas*, 255 F3d 662, 675 (CA 9, 2001) (en banc) ("It cannot be the case that Congress may override a constitutional decision by simply rewriting the history upon which it is based."). Michigan participated extensively in the Compact during 2008 to the present. As noted above, Michigan appointed members to the Commission, and those members held Executive Committee positions. See discussion above, at § II.F. As members of the Commission and its committees, Michigan representatives attended meetings where policy, legislation, information proprietary to other states and potentially

¹⁴ Michigan's Compact participation was in dispute. Plaintiff asserted that during the Years at Issue, Michigan was a Compact member. Plaintiff's Complaint at ¶ 17.

confidential taxpayer information were discussed. The Commission conducted audits for Michigan. *Id.* Employees of Michigan received confidential taxpayer information in connection with these audits. Other states were provided with confidential taxpayer information received by the Commission in audits of Michigan taxpayers. During the period 2008 to the present, Michigan also paid dues to the Commission. *Id.*

Appellant was entitled to discovery regarding all of Michigan's activities under the Compact from 2008 to the present, including but not limited to the meetings attended, the information discussed and the documents exchanged, and the confidential taxpayer information received from and provided to the Commission. Appellant was entitled to discovery regarding whether Michigan actually retroactively unwound all of its obligations under the Compact. The available facts establish that Michigan did not actually repeal the Compact retroactively.

Appellant contends that these facts show that Michigan took actions under the Compact that cannot be undone which in turn shows that retroactive withdrawal from the Compact is not possible and Michigan did not do it. These facts are material because if Michigan was a Compact member during the Years at Issue, Appellant was entitled to apportion its income under Articles III(1) and IV of the Compact and entitled to a corresponding refund. *IBM*, 496 Mich 642; see also discussion below, at § IV.D. Discovery regarding Michigan's additional activities with Compact members and participation in the Compact during 2008 to the present likely would have revealed more detailed facts supporting Appellant's claims in this case.

Because Michigan's Compact participation and its actions to retroactively unwind its participation in the Compact were material facts that were in dispute, Appellant should have been allowed to conduct discovery regarding participation in the Compact between 2008 and the

present.

E. 2014 PA 282 Violates the Separation of Powers.

The Michigan Constitution, like the United States Constitution, grants certain powers to each of the three branches of government – powers that may not be encroached upon by the other branches:

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.

Const 1963, art III, § 2.

It is the province of the judiciary to “interpret” the laws enacted by the Legislature: “To declare what the law shall be is legislative; to declare what it is or has been is judicial.” *In re Mfr’s Freight Forwarding Co*, 294 Mich 57, 63; 292 NW 678 (1940); see also *In re Complaint of Rovas*, 482 Mich 90, 98; 754 NW2d 259, 265 (2008) (“Since the time of *Marbury v. Madison*, interpreting the law has been one of the defining aspects of judicial power.”). “[I]f there is any ambiguity, the doubt should be resolved in favor of the traditional separation of governmental powers.” *Civil Serv Comm of Mich v Auditor General*, 302 Mich 673, 683; 5 NW2d 536, 540 (1942).

The Court of Claims correctly stated that retroactive legislation may “not reverse a judicial decision.” *Ingram Micro, supra* at 22 (Ex 1) (citing *GMAC*, 286 Mich App at 380); *Romein*, 436 Mich at 536-37; *Wylie, supra*. The Legislature has the power to enact laws, but the courts decide the outcome of cases. The Legislature may change the laws, but it cannot prescribe the outcome of a given case or group of cases without changing the underlying law. *United States v Klein*, 80 US (13 Wall) 128, 146; 20 L Ed 519 (1871) (holding that a legislative enactment which changed the effect of a civil war pardon in cases where the

pardoned sought to regain seized property impermissibly “prescribe[d] a rule for the decision of a cause in a particular way.”); *Miller v French*, 530 US 327, 349; 120 S Ct 2246; 147 L Ed 2d 326 (2000) (citing *Klein* favorably); *Bank of Denver v. Se Capital Group, Inc*, 789 F Supp 1092, 1098 (D Colo, 1992); *In re Brichard Securities Litigation*, 788 F Supp 1098, 1106 (ND Cal, 1992) (quoting *Klein*, 80 US at 147-48) (striking down congressional action because, “[a]s in *Klein*, the statute’s ‘great and controlling purpose’ was to direct the outcome in specific cases without changing the law”); *People ex rel Sutherland v Governor*, 29 Mich 320, 325-26 (1874) (“It has long been a maxim in this country 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. If it could, constitutional liberty would cease to exist; and if the Legislature could in like manner override executive action also, the government would become only a despotism under popular forms.”).

PA 282 does not actually amend any law retroactively. To be sure, it *purports* to repeal the entire Compact retroactively. But it is impossible to retroactively undue all of the acts taken by Michigan under the Compact. Actions taken under the Compact cannot be undone, nor has the State attempted to do so. The State has not recovered dues that it paid, tried to undo votes that were taken by Michigan representatives as Commission members, returned confidential information, or the like. In short, PA 282 could not and did not repeal the Compact. After striking the first sentence of the enacting section, what remains of PA 282 merely purports to “*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 [states] 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.” In other words, rather than actually amending any law, PA 282 is a statement by the 2014 Legislature of what the Legislature intended by its 2008 and 2011 actions, namely to eliminate the compact election, i.e., to impliedly repeal the Compact election. Because the Supreme Court in *IBM* held that the 2008 Legislature *did not* impliedly repeal the election, through PA 282, the Legislature is, in essence, prescribing the outcome of the court cases that were held in abeyance pending the outcome of *IBM* and that involve vested refund claims as of July 14, 2014. Thus, PA 282 violates separation of powers.¹⁵

F. The Enactment of PA 282 Violated the Change-of-Purpose Clause and is, Therefore, Void.

Article IV, § 26 establishes the constitutional “five-day rule” and provides in pertinent part that “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

¹⁵ See also *Bd of Ed v Presque Isle Cnty Bd of Ed*, 364 Mich 605, 612; 111 NW2d 853, 856 (1961) (“It is too elementary to justify us in referring to authority on the question, that a legislative body is not permitted under any circumstances to declare what its intention was on a former occasion so as to affect past transactions.”); *Bowman v State*, 162 Wash 2d 325, 335; 172 P3d 681, 686 (2007) (“[T]here is no ‘retroactive’ effect of the court’s construction of a statute; rather, once the court has determined the meaning, *that is what the statute has meant since its enactment.*”) (citation omitted and emphasis in original); *Unwired Telecom Corp v Parish of Calcasieu*, 903 So 2d 392, 406 (La, 2005) (similar); *Karadanis v Bond*, 116 Nev 163, 170; 993 P2d 721 (2000) (similar); *Steinke v South Carolina Dep’t of Labor, Licensing, & Regulation*, 336 SC 373, 402; 520 SE2d 142 (1999) (similar); *People v Smith*, 141 Ill App 3d 797, 802; 96 Ill Dec 314, 317-18; 491 NE2d 128, 131-32 (1986) (similar); *Phelps Dodge Corp v Revenue Div of Dep’t of Taxation*, 103 NM 20, 24; 702 P2d 10 (NM App, 1985) (similar); *Roth v Yackley*, 77 Ill 2d 423, 429; 33 Ill Dec 131, 133; 396 NE2d 520, 522 (1979) (similar); *Fed Express Corp v Skelton*, 265 Ark 187, 199; 578 SW2d 1, 7-8 (Ark, 1979) (similar).

least five days.” Const 1963, art 4, § 26. Integrally related to the five-day rule is the “change-of-purpose clause,” which 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.

Const 1963, art 4, § 24 (emphasis added); see also *People v Kevorkian*, 447 Mich 436; 527 NW2d 714, 720 (1994).¹⁶ The two constitutional protections are intertwined. Amendments to a bill that change or add to its purpose must satisfy the constitutional five-day rule. *Anderson v Oakland Cnty Clerk*, 419 Mich 313, 330; 353 NW2d 448 (1984); see also *US Gypsum Co v Dep’t of Revenue*, 363 Mich 548, 554; 110 NW2d 698 (1961) (concluding “this Court has not hesitated to hold void legislation enacted to evade the procedural requirements which the Constitution places on legislation”).

PA 282 is void because the provisions referring to the Compact were added and approved in less than five days. See Exs 19, 20. The original bill exclusively contained specific, narrow amendments to the MBT (adjustments for amounts attributable to the cancellation of debt, revise the calculation of certain credits, and revise a provision concerning a dock sale.). See Ex 16. The repeal of the Compact is an entirely different subject. Only two of its 12 articles (Articles III and IV) relate to the MBT, and then only somewhat indirectly, i.e., the apportionment election can be used to apportion the MBT base

¹⁶ The five-day rule and the change-of-purpose clause go back to Michigan’s 1908 Constitution. The record from the 1907–08 constitutional convention indicates that the prohibitions were included so “that by no possibility can the publicity secured by the five day rule [prohibiting a bill from being passed until “it has been printed and in the possession of each house” for this period of time] be nullified or evaded.” State of Michigan, *Journal of Constitutional Convention of 1907–08*, at 1551. The record also explains that this “new section” was “inserted to prevent hasty and careless legislative action, also, to deal effectively with so called snap legislation . . . and to provide sufficient time “whereby the people may become acquainted with proposed legislation and to petition, or remonstrate, before a bill is passed.” *Id.*

according to the Compact's apportionment formula. The other ten articles cover a wide range of subjects, including sales and use taxes, the Commission, and audits.

The Court of Claims' conclusion that the original purposes of SB 156 and PA 282 were the same ("to raise revenues") renders the five-day rule and change-of-purpose clause toothless. *Ingram Micro, supra* at 31 (Ex 1). The change-of-purpose clause is meaningful only if the court's analysis of a bill's "purpose" focuses on fair notice to the public. *Toth v Callaghan*, 995 F Supp 2d 774, 784 (ED Mich, 2014). "If identifying merely some commonality of subject matter between a bill as introduced and as enacted is sufficient to pass constitutional muster, then the change-of-purpose clause will provide no effective protection to the public at all." *Id.* Rather, "courts must ask whether those members of the public who are interested in, or affected by, an enactment were put on fair notice that the bill, as introduced, might impact their interests." *Id.* The original subject matters of PA 282 gave no notice that the Compact could be affected, let alone repealed entirely.

Anderson, 419 Mich at 318-319, is instructive. The Michigan Supreme Court held that using "a fairly innocuous piece of legislation designed to amend the Michigan Election Law" as a vehicle to reapportion the Legislature into 38 senatorial and 110 representative districts violated Article IV, § 24. Although the Court could have upheld the law by reasoning that both the initial bill and the amended one pertained to elections, the Court instead concluded that substituted provisions constituted "the introduction of entirely new and different subject matter." *Anderson*, 419 Mich at 331 (citations omitted). The Court emphasized that "[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.

Similarly, in *Toth*, 995 F Supp 2d at 784, the court rejected a “bare overlap of subject matter” standard, concluding that amending the same law (Public Employment Relations Act) did not save a bill from violating the five-day rule because “the amendments address entirely unrelated subject matters within the statute.” *Id.* at 786-87 (substituting a provision excluding graduate student employees from the definition of “public employee” for purposes of collective bargaining rights at the University of Michigan for a provision requiring public collective bargaining agreements to include a provision allowing emergency managers to reject, modify, or terminate those agreements violated Article IV, § 24).¹⁷

As in *Anderson* and *Toth*, the repeal of the Compact is a different subject matter than the technical amendments to the MBT in the original bill. Therefore, the Legislature violated Article IV, §§ 24 and 25, and PA 282 is void.¹⁸

VIII. CONCLUSION

For the reasons set forth above, Lubrizol respectfully asks this Court to reverse the Court of Claims and enter judgment in Lubrizol’s favor.

¹⁷ See also *Kevorkian*, 447 Mich at 461 in evaluating whether the subject matter of the amendment or substitute was germane to the original purpose, the court did not simply compare the bare subject matter of assisted suicide in the original and amended bills; rather, the Court considered how the purpose of the original bill—studying the issue of assisted suicide—could be promoted by creating a “stable” environment for study through the adoption of criminal penalties). *Id.*

¹⁸ For similar reasons, PA 282 violates the title-object clause. Const 1963, art 4, § 24; *Mooahesh v Dep’t of Treasury*, 195 Mich App 551, 562; 492 NW2d 246 (1992). The first 110 words of the title reference specific laws, all of which are in the MBT. See Ex 17. Only the last eight words arguably describe the Compact, and then only by inference: “to repeal acts and parts of acts.” *Id.* Those last eight words did not provide any notice at all that the Compact with its vast scope of provisions, extending well beyond the MBT, would be affected, let alone repealed entirely. See *People v Carroll*, 274 Mich 451; 264 NW 861 (1936) (concluding that test of sufficiency of title is whether the language of the title is sufficient to give notice of general subject of legislative act and interest likely to be affected).

Respectfully submitted,

Michael Best & Friedrich LLP

Dated: April 1, 2015

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EXHIBITS

Exhibit	Description
1	<p><i>Lubrizol Corporation v Dep't of Treasury</i>, unpublished order of the Court of Claims, entered December 19, 2014 (Docket No. 14-0000143-MT) (Ex 1)</p> <p><i>Ingram Micro, Inc & Subsidiaries v Dep't of Treasury</i>, unpublished opinion and order of the Court of Claims, issued December 19, 2014 (Docket No. 11-000035-MT)</p> <p><i>Yaskawa America, Inc v Dep't of Treasury</i>, unpublished opinion and order of the Court of Claims, issued December 19, 2014 (Docket No. 11-000077-MT)</p>
2	HR Rep No 88-1480 (1964), Willis Report, vol 1, pp 7-9, 99-103, 118-119, 132-133, 194, 247-249, 596
3	H.R. Rep. No. 89-952 (1965), Willis Report, vol 4, pp 1127, 1128, 1133-1138, 1143
4	Sharpe, <i>State Taxation of Interstate Business and the Multistate Tax Compact</i> , 11 Colom J L & Soc Probs 231 (1974-75)
5	Mathews, <i>State Taxation of Interstate Business</i> , 23 Vand L Rev 1317, 1328 (1969-70)
6	HR 11798, 89th Cong, 2d Sess (1965) excerpts
7	Multistate Tax Commission 1st Annual Report
8	Council of State Governments, <i>Compact Summary and Analysis</i> , (January 20, 1967)
9	Eugene Corrigan, <i>MTC's 40th Anniversary – A Retrospective</i> , 45 State Tax Notes 529 (2007)
10	Multistate Tax Commission 3rd Annual Report
11	Multistate Tax Commission Annual Report, 2009-2010
12	Multistate Tax Commission Annual Report, 2011-2012
13	Multistate Tax Commission, <i>Audit Member States</i> , http://www.mtc.gov/Audit-Program/Member-States (accessed March 11, 2015)
14	Multistate Tax Commission Fiscal Year 2009 Budget, July 2008
15	<i>Int'l Business Machines Corp v Dep't of Treasury</i> , unpublished order of the Supreme Court, issued November 14, 2014 (Docket No. 146440)
16	2013 SB 156 as introduced on February 6, 2013
17	2014 PA 282
18	Senate Legislative Analysis, SB 156, September 10, 2014
19	House Substitute for 2013 SB 156
20	2013 SB 156 as passed on May 14, 2014

21	2014 House Journal 1658, 1662-1663
22	<i>Retroactive IBM Tax Fix Passes House</i> , Gongwer Michigan Report, vol 53, Rep 177 (September 9, 2014)
23	Gray, <i>Tax Fix Bill Gets Final Approval, Awaits Gov. Snyder's Signature</i> , Detroit Free Press (September 10, 2014)
24	2014 Senate Journal 1607-1608, 1616-1617
25	Broun et al., <i>The Evolving Use and Changing Role of Interstate Compacts, a Practitioner's Guide</i> (2006), excerpts