IN THE SUPREME COURT
OF THE STATE OF MICHIGAN
Appeal from the Michigan Court of Appeals
(on Appeal from the Michigan Court of Claims)

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Plaintiff/Appellant,

v.

DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN,

Defendant/Appellee.

Supreme Court No. 146440

Court of Appeals No. 306618

Court of Claims No. 11-033-MT

AMICUS CURIAE BRIEF OF THE INTERSTATE COMMISSION FOR JUVENILES and THE ASSOCIATION OF COMPACT ADMINISTRATORS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN IN SUPPORT OF PLAINTIFF/APPELLANT

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I. INTRODUCTION

Amici Curiae, Interstate Commission for Juveniles and Association of Compact Administrators of the Interstate Compact on the Placement of Children, respectfully submit this brief for the purpose of assisting the Court with the proper interpretation and enforcement of interstate compacts. The Multistate Tax Compact ("MTC" or "Compact") is a valid and binding interstate compact. The effectiveness of the MTC, the Interstate Compact for Juveniles ("ICJ"), and the Interstate Compact on the Placement of Children ("ICPC"), as both statutes in each member state and contracts among the member states, necessarily depends upon their uniform application by the member states, each of which is contractually bound by these compacts. These compacts are dependent on the principle that member states are not free to deviate unilaterally from their express terms. This is the very reason states choose to enact compacts — binding contracts between the states — rather than enacting uniform laws (such as the Uniform Commercial Code) which each state would otherwise be free to modify or interpret differently.

The instant action presents a fundamental issue of interstate compact law, namely, whether a state may apply or interpret subsequently enacted legislation to conflict with the provisions of an interstate compact. "[A]n 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." See *Hess v Port Authority Trans-Hudson Corp*, 513 US 30, 42 (1994). Because they represent the exercise of collective state sovereignty, the express terms of an interstate compact must be respected and enforced. See *Kansas v Colorado,* 533 US 1 (2001) ("A compact is a contract. It represents a bargained-for exchange between its signatories and remains a legal document that must be construed and applied in accordance with its terms.").

The law is clear that, due to the unique status of interstate compacts as both statutes and agreements among sovereign states, the terms of interstate compacts cannot be unilaterally

amended or altered by one member state. Rather, interstate compacts take priority over conflicting state law. See, e.g., *West Virginia ex rel Dyer v Sims*, 341 US 22, 24; 71 S Ct 557, 95 L Ed 713 (1951); *McComb v Wambaugh,* 934 F2d 474, 479 (CA 3 1991), overruled on other grounds; *State Dep't of Econ Sec v Leonardo,* 200 Ariz 74, 22 P3d 513 (2001); *Hellmuth v Wash Metro Area Transit Auth,* 414 F Supp 408, 409 (D Md 1976); *Doe v Ward*, 124 F Supp 2d 900, 914-15 (WD Pa 2000); and other cases discussed at pp.11-12, 24-27. These principles apply whether or not a compact has been the subject of Congressional consent. *Alabama v North Carolina,* 560 US 330, 130 S Ct 2295 (2010), *New Jersey v New York,* 523 US 767, 811 (1998), see also *Seattle Master Builders Ass'n v Pacific NW Elec Power & Conservation Planning Council*, 786 F2d 1359 (CA 9 1986), cert den 479 US 1059 (1987); *McComb, supra* at 479.

As the Supreme Court has determined, the MTC is a valid and binding interstate compact, notwithstanding the absence of congressional consent. *U.S. Steel Corp v Multistate Tax Comm'n*, 434 US 452, 471, fn 24 (1978). Like other compacts, it contains the classic indicators of a compact. These include 1) clear terms for entering into the Compact with other party states and for it to take force and effect among party states, see § 1, Art. X(1); 2) its purpose statement, which explicitly requires liberal construction of its terms to "effectuate its express purposes – equitable apportionment, uniformity, taxpayer convenience and compliance, and the prevention of double taxation," see Arts. I and XII; 3) terms for withdrawal, see Art. X; 4) the creation of a compact agency with specified powers, see Arts. VI - IX; and 4) a clear ceding of unilateral authority to, among other things, mandate a state-only apportionment formula (Arts. III and IV). As a result of entering into the Compact, Michigan is obligated to abide by its provisions, including allowing multistate taxpayers the election in Article III to choose between a state-only apportionment formula and the Uniform Division of Income for Tax Purposes Act (UDITPA) set forth in Article IV.

The foregoing provisions demonstrate the Compact's status as an interstate compact that cannot be unilaterally modified by a party state. They contradict the Defendant-Appellee Department of Treasury's ("DOT") arguments that the Compact does "not rise to the level of a binding contract . . ." because it allegedly does not require reciprocal action by party states, involve the ceding of sovereignty by member states, or contain the "indicia" or "attributes" of a binding contract/compact. DOT Brief at 7-18. The Compact repeatedly requires reciprocal action – the enactment by seven states for it to take force and effect, the honoring of sales and use tax payments made to other party states, the obligation to provide the apportionment election to multistate taxpayers (meaning taxpayers doing business in other party states), and the requirement of paying dues to the Commission. These reciprocal obligations are crucial to the effectiveness of the Compact. While the Compact recognizes that individual signatory jurisdictions may have apportionment and allocation tax laws at variance with those set forth in the Compact, multistate taxpayers must be given the option to elect between the provisions of Article IV of the Compact, or, in the alternative, the provisions of the individual jurisdiction's tax code. The member states expressly gave up the right to unilaterally eliminate the Compact election in exchange for the uniformity secured by the Compact and the protection of multistate taxpayers from double taxation and the higher compliance costs caused by different formulas in each state — in other words, to serve the explicit purposes in Article I of the Compact. Moreover, in order for a party state to avoid the obligation to provide the Compact election, withdrawal from the compact by repeal is required (along with the party state remaining accountable for any existing liabilities). See *Northeast Bancorp v Bd of Governors of Fed Reserve Sys,* 472 US 159 (1985); *Alabama v. North Carolina,* supra at 2313. That the *Commission's* powers are largely advisory does not change the Compact into one that can be unilaterally altered. The Compact's terms impose clear obligations on the party states (including

to provide the apportionment election) and allow the Commission to propose regulations which may be adopted by the party states. In this way, it secured baseline uniformity *and* allowed for future efforts toward even greater uniformity. Many unquestionably binding interstate compacts contain a similar mix of provisions.

In an attempt to avoid its binding obligation to provide the Compact election, the DOT argues that the Compact election must be interpreted as optional based on "course of performance" by the member states. This argument is contrary to recognized principles of compact interpretation as most recently set forth in *Tarrant Regional Water Dist v Herrmann,* 596 US ___, 133 S Ct 2120 (2013), which reiterated that the express terms of the compact must be respected, and allowed consideration of extrinsic evidence such as course of conduct of the parties only because the term at issue ("equal rights") in that case was ambiguous. *Id.* at 2130-31; *Alabama v North Carolina, supra* at 2309-13. There is no such ambiguity in the Compact's election provision, see Art. III(1) and Art. IV. Even if there were, compact cases require the interpretation of ambiguity to be consistent with a compact's stated purposes and drafting and enactment history. See *Oklahoma v New Mexico,* 501 US 221 (1991); *Arizona v California,* 292 US 341 (1934); Appellant's Br at 5-10. In addition, the Contract Clause protects interstate compacts from impairment by subsequent conflicting legislation in a member state. *Green v Biddle,* 21 US 1 (1823); *McComb, supra; Kansas City Transp Auth v Missouri,* 640 F2d 173 (CA 8 1981). The DOT takes issue with the proposition that its interpretation of MCL 208.1301 violates the Contract Clause of the U.S. Constitution (US Const, art I, §10, Cl 1) as well as the analogous provision of the Michigan Constitution (Const 1963, art I, §10). The DOT touts the three-step Contract Clause analysis, yet cites no case in which such an analysis has been used to uphold a state's attempt to unilaterally amend or repeal a provision of an interstate compact by a conflicting state enactment. Even under that analysis, MCL 208.1301 is a substantial and

unjustified impairment of the Compact's core, mandatory election provision. See *US Trust Co v New Jersey*, 431 US 1, 30 (1977).

As explained herein, it is the statutory and contractual nature of interstate compacts which allows the states that are parties to compacts to achieve enforceable uniformity among all member states, while preserving their "collective sovereignty" in addressing supra-state problems.[1] As such, interstate compacts serve a crucial function in our increasingly complex society. They are the only formal mechanisms by which individual states can reach beyond their borders and collectively regulate the conduct of other states and the citizens of other states.

The Court of Appeals' decision – in failing to grapple with the proper interpretation and enforcement of the Compact as an interstate compact/contract – jeopardizes the vitality of the interstate compacts Michigan has enacted. Most of the compacts Michigan has joined (approximately 22 in all) involve the exercise of collective administrative policy or regulatory authority concerning multi-state issues of national concern such that every state in the Union is a party to one or more of them. These compacts include the following:

- Interstate Agreement on Qualifications of Educational Personnel, MCL 388.1371, *et seq.*
- Interstate Compact on Educational Opportunity for Military Children, MCL 388.1301
- Interstate Compact on the Placement of Children, MCL 3.711, *et seq.* (note congressional consent required for government of Canada or any province to join)
- Interstate Compact on Mental Health, MCL 330.1920 *et seq.*
- Interstate Pest Control Compact, MCL 286.501, *et seq.*
- Interstate Compact for Juveniles, MCL 3.701, *et seq.*
- Interstate Compact for Adult Offender Supervision, MCL 3.1011 *et seq.*

Thus, a decision in this case which has the effect of permitting subsequent state legislation to be interpreted to change the terms under which Michigan participates in the Multistate Tax Compact could undermine Michigan's continued participation in other vital interstate compacts.

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[1] See Broun, Buenger, McCabe and Masters, *The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide*, 2-3 (A.B.A. Publishing 2006).

In addition, a decision upholding the Court of Appeals' determination could provide judicial precedent which is not only at odds with current compact jurisprudence but which might be asserted as a basis for similar action by other state legislatures and state courts. Both the ICJ and the ICPC require member states to comply with the provisions of those compacts in order to ensure consistent child placement decisions and the coordinated transfer of juvenile probation and parole supervision across state lines, as well as the return of runaways and absconders to their states of residence. The effectiveness of both of these important compacts, which depend upon binding uniformity among the member states, will be jeopardized if the Court of Appeals' decision stands.

II. IDENTITY AND INTEREST OF AMICI

The Interstate Commission for Juveniles

The Interstate Commission for Juveniles ("ICJ Commission") is the interstate governing body created under the authority of the ICJ to oversee the administration and enforcement of the compact. The ICJ is the only state or federal law which provides the legal authority to transfer supervision of juveniles under parole or probation supervision or to allow the apprehension and safe return of juvenile runaways and absconders across state lines of the member states. Fifty-one (51) jurisdictions have enacted the ICJ, including Michigan. Among the purposes of the ICJ is to provide a means of joint and cooperative action among the compacting states to ensure that adjudicated juveniles are provided adequate supervision and services in the receiving state as ordered by the adjudicating judge or parole authority in the sending state. The ICJ Commission has no financial interest in the outcome of this case and, by and through its Executive Committee, has authorized the filing of this amicus brief.

The Association of Administrators of the Interstate Compact on the Placement of Children

The ICPC was established in 1974 and was enacted in all 50 states, the District of Columbia and the U.S. Virgin Islands. The Association of Administrators of the Interstate Compact on the Placement of Children ("AAICPC") has authority under ICPC to "promulgate rules and regulations to carry out more effectively the terms and provisions of this compact." The ICPC was prompted by concerns regarding states' inability to protect the welfare of children once they are moved across a state border and was drafted to promote state cooperation ensuring safe and timely placement in a suitable environment with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care. The AAICPC has significant interest in promoting the uniform interpretation and application of the compact for the protection of child welfare.[2] Like the ICJ, the compact's effectiveness as both a statute and a contract among the member states necessarily depends upon its uniform application by each member state. The AAICPC has no financial interest in the outcome of this case and through its Executive Committee has authorized the filing of this amicus brief.

Statement of Interest of the Compact Amici

The Compact Amici are "creations" of the respective state legislatures' grant of authority which is set forth in the language of their respective compact statutes. In the case of the ICJ, this authority is exercised as the only state or federal law of its kind to regulate the interstate transfer and return of delinquent juveniles under parole or probation supervision as well as runaways. In the case of the ICPC, such authority serves the interest of the member states in the protection of child welfare by regulation of the interstate movement and safe placement of children between

[2] *McComb, supra* at 479 ("uniformity of interpretation [of the ICPC by member states] is important").

states when the children are in the custody of a state, being placed for private/independent adoption, or under certain circumstances, being placed by a parent or guardian in a residential treatment facility.

Thus the Compact Amici have a vested interest in this matter, given that the Court of Appeals' decision effectively allows Michigan, or by extension of its logic, any other compact member state, unilaterally to contravene the uniform requirements of, not just the MTC, but all other interstate compacts which the State of Michigan has enacted. This impermissible allowance of a unilateral amendment of the terms of an interstate compact by one member state has serious implications not only for the Appellant, but also for the other interstate compacts represented herein and other compacts across the nation, whose authority to regulate such matters as juvenile offender transfers and child welfare placements is dependent upon the binding validity of the uniform provisions of these respective compacts. Without the assurance of uniform compliance and enforcement of these compacts, the entire system of interstate placement of children and both the transfer of juvenile probation and parole supervision as well as the appropriate apprehension and return of runaways and absconders will be threatened. If states are permitted to unilaterally reject such interstate transfers in violation of compact provisions, both child welfare and public safety may be endangered.

III. THE NATURE OF INTERSTATE COMPACTS

This case is first and foremost a case which concerns the legal nature of interstate compacts. Interstate compacts have been used throughout U.S. history to contractually control relationships between and among states (and sometimes with the federal government) on a broad range of issues.[3]

[3] See Michael Buenger and Richard Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 Roger Williams UL Rev 71, 73, 79-83 (2003).

A. Interstate Compacts Are Widely Used to Define Legal Relationships Among States

The Compact Clause of the U.S. Constitution, US Const, art I, §10, cl 3, provides that "No State shall, without the Consent of Congress, . . . enter into any Agreement of Compact with another State . . ." Originally used for resolution of inter-colonial boundary disputes, the Compact Clause has undergone a significant transformation since that time. See Buenger and Masters, 9 Roger Williams U L Rev at 79-83, 90-91; see also Felix Frankfurter & James Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 Yale L J 685, 691-95 (1921). Thus, while interstate compacts have long been used in the United States, their use as ongoing governing mechanisms has been a development of the twentieth (continuing into the twenty-first) century, evidenced by the emergence of the so-called "regulatory," "administrative," or "management" compacts. Prior to the twentieth century, interstate compacts were used almost exclusively to settle boundary disputes or adjust jurisdictional lines. More recently, however, compacts have been used to manage a wide array of multistate matters. This, in turn, has led to the creation of interstate compact agencies with specific subject matter control and management responsibilities, such as the Compact Amici ICJ Commission and AAICPC. Although compacts have been used to settle land claims between states as recently as 1999,[4] today they are primarily used to deal with wide-ranging regional and national problems including such diverse matters as water-resource management, pollution control, regional economic development, crime control, child welfare, education, emergency management, waste disposal, multistate taxation, etc.[5]

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[4] See Missouri-Nebraska Boundary Compact, PL 106-101, 113 Stat 1333 (1999) (resolving boundary and related issues of criminal and civil court jurisdiction, taxes, and riparian rights).

[5] See Broun, Buenger, McCabe and Masters, *supra* at xvi-xvii.

The function and purposes of interstate compacts can best be understood and appreciated by acknowledgement that the states are not mere political subdivisions of the national government. Rather, they exist in "a system in which the State and Federal Governments . . . exercise concurrent authority over the people and in which the Constitution reserves (to the states) a substantial portion of the Nation's primary sovereignty. . ." See *Alden v. Main*, 527 US 706, 714 (1999).

Understanding the status of an interstate compact begins with this basic point: Interstate compacts are *formal agreements between states* that are both at once (1) statutory law, and (2) interstate contractual agreements. They are enacted and entered into by state legislatures adopting reciprocal laws that substantively mirror one another, which give a compact its contractual nature. See *Int'l Union v Delaware River Joint Toll Bridge Comm'n*, 311 F3d 273, 281 (CA 3 2002).

Beginning in 1921 with the adoption of the New York-New Jersey Port Authority Compact, states have enacted an increasingly large number of compacts regulating a range of matters as diverse as water use, land use and the environment, transportation systems, professional licensure, crime control, and child welfare. Both the ICJ and the ICPC are examples of regulatory compacts managing the complex multistate relations governing the interstate movement and supervision of juvenile offenders and interstate child welfare placements, including adoptions. Today there are some 200 compacts in place, many of which now fall into the category of "regulatory compacts" or "administrative compacts" similar to the ICJ and ICPC, as well as the MTC.[6] Consequently, such compacts are part of a long and accelerating use of interstate compacts to solve a number of multilateral state issues beyond boundary disputes.

[6] Regulatory or administrative compacts as statutes and contracts entered into by state *legislatures* are distinguishable from intergovernmental or administrative agreements between state *agencies*. See Broun, Buenger, McCabe and Masters, *supra* p.19.

Compacts are aptly described as instruments that regulate matters that are sub-federal, supra-state in nature.[7]

B. Compacts Provide Uniformity through Collective Exercise of Sovereignty by the Member States

A primary reason why modern usage of compacts has increasingly been for the purpose of uniformly addressing interstate matters is that no single state may regulate matters beyond its borders without entering into such an arrangement. The ability to secure uniform treatment of transactions regulated by interstate compacts is the quintessential reason why states enter into interstate compacts. See *Nebraska v Central Interstate Low-Level Radioactive Waste Comm'n*, 207 F3d 1021 (CA 8 2000). The DOT seeks to turn this overarching principle on its head and argues in essence that the absence of a limitation on a member state's authority to enact subsequent legislation mandating the use of a different apportionment formula, evinces the intent to allow states to unilaterally alter the Compact's election provision. DOT's Br at pp. 9-12, 15-17. In fact, the nature of compacts is just the opposite. In effect, by agreeing to enter into a compact, member states contractually cede a portion of their jurisdiction, sovereignty, and authority over the specified subject matter of the compact in favor of governing principles that apply collectively to all member states. As observed in *Hellmuth, supra*:

> 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 parties. It therefore appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories.

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[7] See Buenger and Masters, 9 Roger Williams U L Rev at 77.

See also *Hess, supra at* 42 (1994) ("[A]n 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."). Because they are both binding state law (within the member states) *and* a contract (between the member states),[8] the provisions of a compact are binding, and take precedence over state law, except to the extent that they expressly allow party states to deviate from them. *See McComb, supra* at 479 ("Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states."); *Int'l Union, supra* at 281 (explaining that there is no basis to alter or amend a compact unless provided in the compact's terms).

By entering into a compact, the member states contractually agree that the terms and conditions of the compact supersede parochial state considerations. In effect, compacts create collective governing tools to address multilateral issues and, as such, they jointly regulate these issues contingent on the *collective will* of the member states, not the will of any single member state.[9] This point is critically important relative to the ICJ and other compacts, including the ICPC and the MTC. Once a state enters into an interstate compact, the terms of the compact supersede substantive state laws that may be in conflict. As in any other such contractual relationship, the states which are parties to the compact rely upon each other to perform the terms agreed upon in the express provisions. This includes the reasonable expectation that the only "escape" from the obligations imposed by the compact is withdrawal as provided by the terms of the agreement. See *Int'l Union, supra at* 281.

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[8] There is (1) an offer (the presentation of a reciprocal law to two or more state legislatures), (2) acceptance (the actual enactment of the law by two or more state legislatures), (3) consideration (the settlement of a dispute or creation of a regulatory scheme). *See* Frederick L. Zimmerman & Mitchell Wendell, *The Law & Use of Interstate Compacts* 4, 9 (The Council of State Governments, 1976).

[9] See Broun, Buenger, McCabe and Masters, supra at 28-29.

IV. THE MULTISTATE TAX COMPACT IS A VALID AND BINDING INTERSTATE COMPACT

The DOT is simply wrong in its contention that the MTC is somehow not a binding compact and does not impose reciprocal obligations (including the obligation to provide multistate taxpayers with the apportionment election) on party states.

A. The Compact was Enacted and Entered into as an Interstate Compact

Michigan adopted, and became a signatory to, the Compact in 1970. MCL 205.581 *et seq.*, Article I "Enactment of Compact," reads as follows: "The 'Multistate Tax Compact' is enacted into law and entered into with all jurisdictions legally joining therein, in the form substantially as set forth . . . ." In addition, the Compact provides: "This compact shall enter into force when enacted into law by any seven (7) States. Thereafter, this compact shall become effective as to any other State upon its enactment thereof." MCL 205.581 *et seq.*, Art. X(1). By entering into the Compact with other jurisdictions, Michigan bound itself to its terms.

Various courts in Compact member states have recognized the reciprocal nature of the Compact and its effect upon enactment. See *Ex Parte Uniroyal Tire Co*, 779 So 2d 227 (Ala 2000) ("The MTC was created in 1966 to establish a uniform system for taxing multistate taxpayers and became effective in 1967 after various states had adopted it."); see also *Dow Chemical Co, Inc v Director of Revenue*, 834 SW2d 742, 747 (Mo 1992) ("It infuses §143.431 (Missouri Corporate Tax Statute) with the grounding principle that validates the compact apportionment formula as a device of constitutional state taxation of interstate activity" (citations omitted)).

B. The Compact Has Clear Withdrawal Terms

The Compact's withdrawal provisions also confirm its status as an interstate compact. (Uniform or model laws do not include such provisions.) The withdrawal provision requires

that, in order to withdraw from the Compact, a member state must "enact a statute repealing the same" and that "[n]o withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal." MCL 205.581, Art X(2). This reciprocal withdrawal provision is important because it is the mechanism by which the sovereignty of a member state is "reclaimed" by repealing and withdrawing from the Compact. Because compacts are statutes and contracts, this provision is also consistent with customary terms in other contractual relationships which routinely include provisions governing the manner in which parties to the contract can terminate and "wind up" their contractual relationship. As in other types of contracts, withdrawal terms of an interstate compact typically specify the means by which termination and withdrawal may be accomplished and, as is the case with the Compact, contain sufficient safeguards to ensure the satisfaction of any outstanding obligations by the withdrawing party, as well as any continuing responsibilities or obligations which cannot be discharged or avoided by such withdrawal.[10] Article X(2) directs that party states are accountable for existing liabilities if they withdraw, and Article X(3) further prohibits any proceeding commenced before an Arbitration Board by a party state from being "discontinued or terminated by the withdrawal, nor shall the Board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein." The U.S. Supreme Court has explained that such a withdrawal provision is one of the classic indicia of an interstate compact. See *Northeast Bancorp, supra* at 175. Indeed, the Compact's withdrawal provision is consistent with that of other compacts. See, e.g., *Alabama v. North Carolina, supra* at 2313 (discussing similar withdrawal provision).

Because of its reciprocal and contractual nature, once adopted, the terms of the Compact may only be amended by unanimous agreement of the party states (absent an express provision

[10] Broun, Buenger, McCabe and Masters, *supra* at 118-119.

in the compact allowing amendment). See *Int'l Union, supra* at 281. There is no provision in the MTC allowing unilateral amendment. As discussed, Article X of the Compact provides the method for withdrawal. Thus, by its express terms, the Compact became valid upon enactment by seven (7) states. To alter or avoid its terms, the party states' only options are to withdraw from the Compact under Article X or negotiate and agree to an amended compact. However, during the time period at issue and up to the present, Michigan has not withdrawn from the Compact and continues to be bound by its terms.

C. The Compact Contains Reciprocal Obligations By Which Party States Have Ceded Sovereignty in Specified Ways

The DOT's argument that the Compact lacks reciprocal obligations is incorrect. DOT's Br at pp 13-16. In addition to the above-referenced sections, Article III(1) of the Compact (the apportionment election provision), is clearly reciprocal in nature, requiring each party state to allow multistate taxpayers the election to apportion under the Compact or under state law. Article III of the Compact recognizes that individual signatory jurisdictions may have apportionment and allocation tax laws at odds with those set forth in Article IV. However, in this event, multistate taxpayers must be given the option to elect between the apportionment provisions of Article IV of the Compact, or, in the alternative, the apportionment provisions of the individual jurisdiction's tax code. It represents one of the specific areas in which there has been a surrender of the states' sovereignty to act unilaterally. Under these provisions, Michigan has surrendered its ability to determine unilaterally the method of apportionment for multistate taxpayers *in exchange for other party states doing the same.*

In other Compact provisions, Michigan has obligated itself to provide sales and use tax credits for taxes paid in other states. See MCL 205.581, Art. V(1). The party states have agreed to act in a uniform and reciprocal fashion as to these matters specified in the Compact and have

surrendered their authority to act unilaterally unless and until they withdraw from the Compact. This ceding of sovereign authority and commitment to collectively govern in specified ways further confirms the status of the Compact as an interstate compact. See *Hess, supra* at 42 ("[a]n 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.").

In addition to the reciprocal provisions discussed above, party states are also obligated to pay dues to fund the Multistate Tax Commission (the "Commission") (MCL 205.581, Art. VI(4), to appoint members to the Commission (Art. VI(1)), and to submit to arbitration of certain disputes between member states (Art. IX). Contrary to DOT's arguments regarding reciprocity, the U.S. Supreme Court has explained that such provisions are another fundamental characteristic of an interstate compact. *West Virginia ex rel Dyer v Sims, supra* at 27, 30 (West Virginia's obligation to pay its appropriations under the terms of the Ohio River Valley Water Sanitation Compact could not be "unilaterally nullified or given final meaning by one of the contracting states").

These reciprocal obligations of the Compact are the principal means of implementation of the stated goals of uniformity, equitable apportionment, taxpayer convenience and avoidance of duplicative taxation which are the fundamental purposes of the Compact, for the mutual benefit of each of the signatory states. (See Art. I of the Compact). Any suggestion that compliance with the apportionment election provision does not impact other party states or the functioning of the Compact is incorrect. The apportionment election provision is critical to each of the Compact's stated purposes. Without an election to apportion multistate income using one common apportionment formula (the Compact Formula) across multiple party states, multistate taxpayers are only able to apportion using each individual state's unique (and typically different) formula. Without access to a common formula through the Compact election, the purposes of

equitable apportionment, eased compliance burdens, the avoidance of double taxation, and increased uniformity are all *disserved.* Obviously, these purposes cannot be met if each party state can impose its own individual apportionment and allocation schemes on multistate taxpayers. Contrary to DOT's arguments, its interpretation of the Michigan Business Tax Act to eliminate the Compact election defeats the essential and reciprocal purposes of the Compact. See MCL 205.581 *et seq.*, Art. I ("The Compact must be liberally construed to effectuate its express purposes – equitable apportionment, uniformity, taxpayer convenience and compliance and the prevention of double taxation"); also *West Virginia ex rel Dyer v Sims*, *supra* at 30-31; *KMOV-TV v Bi-State Dev Agency*, 625 F Supp 2d 808, 811 (ED Mo 2008). The Compact achieves its goals by one consistent set of laws that binds the signatories and which taxpayers may elect to use even though some individual signatory states may have laws at variance with it. Here, among other things, each party state commits to providing the election to multistate taxpayers from other party states, protecting those taxpayers from double taxation and inequitable apportionment. These reciprocal obligations are central to the proper functioning of the Compact across state lines.

This type of reciprocal relationship is by no means unique to the Compact. For example, the Driver License Compact and Nonresident Violator Compact require reciprocal recognition of traffic violations such as speeding tickets, and allow information to be exchanged for the purpose of sanctioning motorists in their home states for traffic violations which have occurred in another member state. These compacts ensure that nonresident motorists who violate minor traffic laws in a member state will be provided the same treatment accorded resident motorists. Similarly, the Nurse Licensure Compact establishes reciprocal licensing between member states for both Licensed Practical Nurses and Registered Nurses and provides that a nurse's license in one compact member state (the home state) entitles the nurse to the privilege to practice in all

compact member states and that disciplinary violations in a state other than the home state may be used as a basis for discipline including license revocation in the home state.

The DOT argues that the compact "does not involve a ceding of sovereignty by member states." DOT Brief at pp. 9-10. In essence the DOT is arguing that the sovereignty which each state was seeking to preserve by joining the Compact was the unilateral right of an individual state to do whatever it pleases. This contention is not supported by either the history or the text of the Compact. Moreover, such an argument is contrary to the fundamental reason why states enter into interstate compacts in the first place, which is, as the Constitution permits, to cede a portion of their unilateral authority over an interstate problem in exchange for the promise of other states which agree to do the same so that all member states can wield their collective sovereignty to resolve an interstate dispute or problem in a manner which no individual state could unilaterally accomplish in the absence of such an agreement. See *Int'l Union, supra* at 276; also *Spence-Parker v Delaware River & Bay Auth.*, 616 F Supp 2d 509 (D NJ 2009). Like the Compact, interstate compacts provide for supra state effect to achieve uniformity in resolving interstate issues which do not necessarily fall within the immediate purview of the federal government and are an effective vehicle by which states retain policy control over both regional and national issues, preserve their sovereignty to act on such issues and prevent federal interference or preemption.[11]

This was precisely the situation which led to the enactment of the Compact. As has been well documented in the briefs, at the time the Compact was enacted, Congress was threatening federal preemption of apportionment of state taxes and other related tax issues which would "comprise a significant affront to State tax sovereignty." See *US Steel, supra* at 455. Although

[11] Buenger and Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 Roger Williams U L Rev 72 (2003).

the DOT noticeably omits reference to the context in which the MTC was developed in its recap of the "Compact's history", it is beyond cavil that states enacted the Compact to stave off federal preemption and the deprivation of state control over state tax issues in this area. See DOT Brief at p. 12, also *U.S. Steel, supra* at 454-55. The party states avoided federal preemption and preserved their collective sovereignty by committing to specified obligations to secure uniformity and equitable apportionment, particularly the core apportionment election. Neither the Compact's terms nor its history support the DOT's view that the Compact should now be interpreted to preserve the party states' sovereignty to act unilaterally and override the election.

In sum, the Compact imposes clear obligations upon the party states, further confirming its status as an interstate compact. Under the express terms of the Compact, Michigan and the other party states have committed themselves to provide the Compact election (and comply with its other terms) and have limited their rights to unilaterally determine the apportionment method for multistate taxpayers in exchange for the contractual promise by the other member states to do the same. This is the way compacts work.

D. The Compact Creates a Compact Agency, the Multistate Tax Commission

Another indicator of the Compact's status as an interstate compact is its creation of a joint compact agency, the Multistate Tax Commission (the "Commission"). Compacts are not required to create compact agencies to be binding, but many do so to assist party states in carrying out the compact's provisions. See Broun, Buenger, McCabe and Masters, *supra* at 153-54. Party states are also not required to cede sovereign authority or grant regulatory powers to a compact agency. Rather, the powers of any compact agency are determined by the express terms of the compact agreed to by the party states. *Alabama v North Carolina, supra* at 2305-08; *Texas v New Mexico,* 462 US 554, 569 (1983).

The DOT erroneously asserts that the Compact is not binding because, under the terms of the Compact, the power of the Commission to promulgate "uniform regulations"' is limited by the requirement that it must first "recommend" regulations to the member states, which must then decide whether to promulgate these rules within each state's administrative codes. See DOT Brief at p.13; MCL 205.581, Art. VII. The fact that the Compact expressly states that the Commission's regulations are advisory and not automatically binding on party states in no way transforms the other Compact provisions (including the Compact election) into non-binding ones. The DOT cannot demonstrate how the Commission's authority to recommend regulations, in similar fashion to other compacts, supports its assertion that the Compact is a "non-binding uniform law" rather than a compact. The DOT also fails to explain how this is relevant to the plain text of Article III(1) of the Compact which requires that multistate taxpayers be permitted to choose the method of tax allocation and apportionment without regard to the commission's regulations.

The DOT is wrong when it asserts that this is a unique feature of the Compact. A number of other compacts operate in similar fashion. For example, the Nurse Licensure Compact provides that, while the compact administrators have the authority to develop uniform rules to facilitate and coordinate implementation of the compact, in order to be effective these rules must first be adopted by each party state. See Article VIII c and Article VI d.[12] Similarly, the Interstate Insurance Product Regulation Compact, of which the State of Michigan is also a member, authorizes member states to "opt out" of a uniform standard enacted by interstate commission established to administer the compact.[13]

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[12] See, for example, Kentucky's statute at KRS 314.470.

[13] See, for example, Oregon's statute at Or. Rev. Stat. §732.820.

Moreover, like these other compacts, the Compact not only establishes the Commission as a governing body comprised of a representative from each member state, but requires that each compact member state must "provide by law" for the appointment of such representative and specifically states that the actions of the Commission are binding if "approved by a majority of the total number of members." See Art. VI (1)(a),(b) and (c). The Commission is also empowered to appoint and pay an Executive Director, hire employees, and borrow or contract for services of personnel from any state. See Art. VI(1)(f),(g) and (h). The Compact confers other powers on the Commission including powers to carry out audits and subpoena information (Art. VI(1, 4); Art. VIII(2-3)), powers to "adopt and publish rules of procedure and practice" and commission panels for arbitration proceedings for the resolution of certain disputes involving member states (Art. IX), and powers to study state and local tax systems and make proposals to further additional uniformity and compatibility (Art. VI). Like other compacts, the Compact vests a compact agency with a range of delineated powers and duties, further confirming its status as an interstate compact.[14]

E. The Compact is Not a Model or Uniform Law

The DOT argues that the Compact is "only a State law, not a binding contract," and that it is a model law that Michigan is free to adopt, adapt, or reject, just like the Uniform Commercial Code or any other model law the Legislature adopts in whole or in part." See DOT

[14] While the Commission has claimed to be "uniquely situated to inform the Court regarding the Compact's proper interpretation," the Compact does not contain a provision empowering the Commission to issue advisory opinions or other interpretations of the meaning of the Compact. Other compacts such as the Interstate Compact for Juveniles, (See MCL 3.692, art XIII §B.3); the Interstate Compact for Adult Offender Supervision (See MCL 3.102, art XIV §B) and the Interstate Compact on Educational Opportunities for Military Children (See MCL 3.1041, art X §C) contain express provisions for rendering such opinions. As noted above, the powers of a compact agency are limited to the compact's terms (see *Alabama v North Carolina, supra* at 2305-08); therefore, there is no basis to defer to the Commission's views on the meaning of the Compact, particularly decades after the Compact's enactment. The Commission has no authority and no incentive to enforce a party state's compliance with the Compact's election provision (and jeopardize its dues, audit powers and continued existence).

Brief at pp. 1-2. No authority is cited in support of this assertion. Uniform or model laws do not contain the clear contractual provisions of the Compact. Unlike the Compact, uniform laws do not condition their effectiveness on enactment in the same form by a certain number of states. Uniform laws do not create governing bodies such as the MTC Commission. Uniform laws do not provide for dispute resolution among the member states (see Art IX(1)-(3)). Uniform laws do not specify the requirements for withdrawal from them. Broun, Buenger, McCabe and Masters, *supra* at 153-54; see also, *West Virginia ex rel Dyer, supra* at 27; *New York v New Jersey*, 256 US 296, 313 (1921). The fact that the Compact incorporated the terms of a uniform law (UDITPA) into Article IV does not render the Compact a uniform law. Rather, the Compact intentionally incorporated UDITPA along with a mandatory election to allow multistate taxpayers to choose to apportion using UDITPA as a fair, common apportionment method or to choose to apportion using an individual party state's apportionment laws. The fact that the Commission and the party states repeatedly submitted the Compact for Congressional approval provides further confirmation that it was not considered a uniform or model law by the party states.

V. LIKE OTHER INTERSTATE COMPACTS, THE COMPACT IS BINDING UPON THE PARTY STATES AND CANNOT BE UNILATERALLY ALTERED

As detailed in the prior sections, the Compact is an interstate compact, not a uniform or model law. While it is true that compacts differ as to the subject matter issues which each compact is designed to manage or resolve, there is absolutely no basis for the DOT's suggestion that the Compact is exceptional from other compacts with respect to its functions. In fact, by its nature, it clearly falls within one of the three categories into which interstate compacts can generally be divided.[15] 1) These are: boundary compacts, which, until 1921, included all but one

[15] Broun, Buenger, McCabe & Masters, *supra* at 12.

of some thirty-six (36) compacts entered into before that date[16]; 2) "advisory" compacts, which are not actually designed to resolve an interstate problem but simply to study such matters; and 3) the broadest and largest category which are commonly referred to as "regulatory" or "administrative" compacts.

The Compact is obviously not a boundary compact and is clearly not an advisory compact because its functions are not limited to research and dissemination of reports or the study of an issue, but it also regulates the means by which multistate taxpayers may apportion income among the member states as well as the treatment of sales and use tax payments across state lines.. The Compact is a typical example of the third category of regulatory compacts and, like them, is largely a development of the twentieth and now the twenty-first centuries, embracing wide ranging topics including multistate taxation ; regional planning and development (Lake Tahoe Regional Planning Compact); crime control (Interstate Compact for Adult Offender Supervision); fishery resource management (Pacific Marine Fisheries Compact); traffic safety (Driver License Compact); water resource management (Great Lakes-St. Lawrence River Basin Water Resources Compact); education (Interstate Compact on Educational Opportunities for Military Children); juvenile delinquency (Interstate Compact for Juveniles); child welfare, custody and placement (Interstate Compact on the Placement of Children); and transportation (Washington Area Metro Transit Authority Compact); among many others.[17]

Moreover, there is no authority for the proposition that the function of a particular compact allows it to avoid the effect of compact law principles barring unilateral modification or the Contract Clause with respect to impairment of the Compact by enactment of conflicting legislation. Regardless of its function (boundary, advisory or regulatory), courts are constrained

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[16] *Id.*, p. 9.
[17] *Id.*, pp. 13-15.

to interpret and enforce interstate compacts consistent with their dual status as both statutes and contracts between the member states. As discussed above in Section III(B) and detailed in Appellant's Brief, this means that the express terms of interstate compacts must be enforced, that compact statutes take precedence over conflicting state law, and that party states may not unilaterally alter or eliminate terms of an interstate compact. See Appellant's Brief at pp. 26-30; see also, *New Jersey v New York, supra* at 810-812 (1998); *Texas v New Mexico*, 462 US 554, 564 (1983); *West Virginia ex rel Dyer v Sims*, supra at 24; *McComb, supra* at 479; *Hellmuth, supra* at 409; *Doe v. Ward*, 124 F Supp 2d 900, 914-15 (WD Pa, 2000) ("An interstate compact functions as a contract and 'takes precedence over statutory law in member states.' The law of interstate compacts as interpreted by the U.S. Supreme Court is clear that interstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes . . . "); *California DOT v City of South Lake Tahoe,* 466 F Supp 527 (1978) (California Environmental Quality Act could not be applied to give California the power to unilaterally impose its will on a bi-state agency unless specific provisions of the compact reserved such a right to California). Under these clear legal principles, the MBTA cannot be interpreted to eliminate the Compact's core election provision.

A. Interstate Compacts Prevail Over Conflicting State Laws Regardless of Congressional Consent

The Supreme Court, in *U.S. Steel, supra*, clearly applies the Compact Clause to the MTC, holding that the MTC is a compact for which no congressional consent was either given or required. ("The Clause reaches both 'agreements and compacts' the formal as well as the informal." See 434 U.S. at p. 471, *also* footnote 23.) The Court explicitly categorizes the MTC as belonging to the compact genre and determined that "agreements and compacts" are virtually

indistinguishable under the Compact clause in its analysis of the congressional consent requirement.

> Appellants describe various compacts . . . and attempt to show that they are similar to the **Compact [MTC]** before us . . . These **other Compacts** are not before us. We have no occasion to decide whether congressional consent was necessary to their constitutional operation, nor have we any reason to compare **those Compacts to the one [MTC] before us.**

434 US at p. 473, footnote 24 (emphasis added).

As discussed above, the terms of interstate compacts, such as the MTC, are both binding contracts and statutory obligations among the member states. Regardless of Congressional consent, compacts must be interpreted and applied by state courts consistent with their dual status as both statutes and contracts:

> Because Congressional consent was neither given nor required, the [Interstate] Compact [for Placement of Children] does not express federal law. Consequently, this Compact must be construed as state law. Nevertheless, uniformity of interpretation is important in the construction of a Compact because in some contexts it is a contract between the participating states. Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states.

McComb, supra at 479. Compact terms and conditions are controlling over the actions and conduct of the member states as to the subject matter of the compact. The fact that compacts are creations of individual state legislatures in no way alters their status as contracts with enforceable obligations binding upon the party states. The contractual character of the compact prevails over unilateral action by a member state, no state being permitted to adopt any laws "impairing the obligation of contracts," including a contract adopted by state legislatures. See *Hinderlider v La Plata River and Cherry Creek Ditch Co,* 304 US 92 (1938); *West Virginia ex rel Dyer v Sims, supra* at 29 (West Virginia's obligation to pay its appropriations under the terms of the Ohio River Valley Water Sanitation Compact could not be "unilaterally nullified or given final meaning by one of the contracting states"); *Washington Metro Area Transit Auth v One Parcel of*

Land, 706 F2d 1312, 1319 (CA 4 1983) (explaining that the WMATA's "quick take" condemnation powers under the compact are superior to the Maryland Constitution's prohibition on "quick take" condemnations). Interstate compacts fundamentally constitute enforceable obligations among states. The courts of Michigan have also long recognized this important attribute of compact law. See *Mundy v Monroe,* 1 Mich 68 (1848) and, more recently in construing the State's obligations under an Indian Gaming Compact, see *Taxpayers of Michigan Against Casinos v State,* 657 NW2d 503 (Mich App 2002), overruled on other grounds 708 NW2d 119 ("A compact is a contract.").

As contracts, compacts constitute solemn "treaties" between the member states acting as quasi-sovereigns within a federal union. See *Rhode Island v Massachusetts*, 37 US 657, 725 (1838) (compacts operate with the same effect as treaties between sovereign powers). By enacting the compact statute, the member states contractually agree on certain principles and rules concerning the exercise of joint governing authority over the subject matter of the compact. As noted in *Hess, supra,* "[a]n 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." *Id.* at p. 42. In the adoption of many compacts, including the ICJ and the ICPC, the member states have collectively and contractually agreed to reallocate governing authority away from individual states to a multilateral relationship defined by commonly accepted principles. Depending on the terms of the compact, states effectively cede a portion of their individual sovereignty over the subject matter of the agreement, which can be "reclaimed" through withdrawal by repealing the compact as provided by the terms of the agreement. However, until and unless a state has withdrawn from the compact, one party to an interstate compact may not enact legislation which conflicts with the compact or which would impose burdens upon

compact absent concurrence of other signatories. *Kansas City Area Transp Authority v Missouri, supra*; *Delaware River and Bay Authority v Carello,* 222 A2d 794 (1966).

B. Extrinsic Evidence Such as Course of Conduct is Inapplicable

The DOT adopts the Commission's argument in its amicus briefs that the Compact should be rewritten as non-binding by this Court based on the conduct of some party states (mostly decades after enactment of the Compact). DOT's Brief pp. 16-17. This is an approach to compact interpretation that has never been and cannot be successfully applied to interstate compacts because of their unique role in facilitating interstate cooperation. As the U.S. Supreme Court has reiterated time and again, an interstate compact is like a contract to the extent that it is "a legal document that must be construed and applied in accordance with its terms." *Texas v New Mexico,* 482 US 124, 128, 107 S Ct 2279, 96 L Ed 2d 105 (1987) . "As we have said before, we will not order relief inconsistent with [the] express term' of a compact, 'no matter what the equities of the circumstances might otherwise invite." *Alabama v North Carolina,* 130 S Ct at 2313, citing *New Jersey v New York,* 523 US 767, 811 (1998); *Texas v New Mexico,* 462 US 554 at 564; also *In re C.B.,* 188 Cal App 4th 1024 (2010) ("while compact association's interpretation may be good policy, court was not authorized to alter compact terms agreed to by sovereign states").

The DOT's/Commission's argument for compact interpretation, by reference to "course of performance," represents a misstatement of the teachings of the U.S. Supreme Court on the subject. Although the Supreme Court has acknowledged that an interstate compact is like a contract to the extent that it is "a legal document that must be construed and applied in accordance with its terms," *Texas v New Mexico,* 482 US 124, 128 (1987), the Court has also recognized the unique features and functions of such a compact. An interstate compact is one "of two methods under our Constitution of settling controversies between States," *Petty v*

Tennessee-Missouri Bridge Comm'n, 359 US 275, 279 n. 5 (1959), and it "performs high functions in our federalism," *id.* at 279. See also Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution-A Study in Interstate Adjustments,* 34 Yale L J 685, 691-95 (1925) (discussing history of Compact Clause). Put another way, an interstate compact represents a political compromise between "constituent elements of the Union," as opposed to a commercial transaction. *Hess, supra* at 40. Such an agreement is made to "address interests and problems that do not coincide nicely either with the national boundaries or with state lines-interests that may be badly served or not served at all by the ordinary channels of National or State political action." *Id.*

The Supreme Court has recently reiterated its consistent approach to construction of the provisions of interstate compacts. *Alabama v North Carolina, supra*; *Tarrant Regional Water District, supra.* Express terms must be enforced. In the absence of an ambiguity, no "construction" by the Court is necessary or permissible. See *Coates v. Bastian Bros, Inc*, 741 NW2d 539 (Mich 2007); *Oklahoma v New Mexico, supra* ("Where the terms of the compact are unambiguous, this Court must give effect to the express mandate of the signatory states."). If there were ambiguity, a court could consider a range of extrinsic evidence and principles in interpreting a compact. *See Alabama v. North Carolina, supra* at 2317 ("When construing the provisions of a compact a court, in giving full effect to the intent of the parties, may consult sources that might differ from those reviewed when an ordinary federal statute is at issue, including canons of construction and the Restatement (Second) of Contracts"). Applying such principles with respect to contracts generally, in the absence of an ambiguity, no "construction" by the Court is necessary or permissible. See *Coates v. Bastian Bros, Inc*, 741 NW2d 539 (Mich 2007). Importantly, even if a Court holds that a term is ambiguous, it is not permitted to consider meanings that contradict the term being construed. See also, *Kaiser Foundation Health*

Plan v Doe, 903 P2d 375 (Or 1995), mod. 908 P2d 850 (Or 1996) ; *Oakridge Cablevision v First Interstate Bank,* 673 P2d 532 (Or 1983); Charles F. Adams, *Contract Litigation: The Roles of Judge and Jury and the Standards of Review on Appeal,* 28 Will L Rev 223, 255 (1992).

There is no ambiguity in the Compact's terms, and therefore, no basis to consider extrinsic evidence. Compare *Tarrant, supra* (considering party states' course of conduct in interpreting ambiguous phrase "equal rights"); *Alabama v North Carolina, supra* (considering party states' course of conduct in interpreting ambiguous phrase "appropriate steps"); see also, *New Jersey v New York,* 523 US 767 (1998). If there were ambiguity, courts must also consider the drafting history and purposes of the Compact in reaching the proper interpretation. See, e.g., *Oklahoma v New Mexico,* 501 US 221 (1991); *Arizona v California,* 292 US 341 (1934). As discussed above, the purposes and history of the Compact make clear that the Compact election is mandatory. See pp. 18-19; Appellant's Br pp. 5-12, 39-41.

Thus, in the absence of an ambiguity, as a binding and enforceable contract, the terms of the Compact cannot be contradicted by extrinsic evidence such as "course of conduct", nor to consider meanings which contradict the express terms of the agreement. See *Northern Assurance Co of London v Grand View Building Ass'n,* 183 US 308 (1902); *City of Huntington Woods v Detroit,* 761 NW2d 127 (2008).

C. The DOT's Interpretation of MCL 208.1301 Violates the Contract Clause of the United States and Michigan Constitutions

Due to its fundamental nature as a statute and a contract, the enforcement of an interstate compact is subject to the "Contract Clause" (*See* Article I, §10, Clause 1) of the U.S. Constitution (as well as the principles discussed above that compact statutes must be interpreted and enforced consistent with this dual status). And, yet, an interstate compact is not a contract between private parties but between two or more equal sovereign states. Thus, it is not

surprising that DOT's argument, that the "three-prong test" from this Court's 1994 decision in *Fun N' Sun v. State,* 447 Mich 765,777; 527 NW2d 468 (1994), allows a state to unilaterally impair the obligation of compacts by enacting conflicting legislation, is not supported with as much as a single case in which such an analysis was applied to allow a compact member state to do so. *Fun N' Sun* indicates that a contractual impairment by a state may be justified if it was necessary to the public good and the means reasonable. *Id.* at 777. *Fun N' Sun* does not involve an interstate compact, and no case applies such a balancing test to the impairment of a compact. Instead, the proper approach to the limitations placed by the Contract Clause on impairing interstate compact obligations is the same in the 21st century as it was in the 19th century. In the context of interstate compacts, "[a] . . . law impairing the obligation of contracts may not be passed." *Green v. Biddle, supra*; *Doe v. Ward, supra.*

Consequently, no state or state official can act in conflict with the terms of a compact and the DOT's interpretation of the MBTA to conflict with the Compact must be rejected. See *US Trust Co v New Jersey*, 431 US 1 (1977) (Contract clause applied to state's obligation to bondholders in connection with interstate compact); *Wroblewski v Commonwealth*, 809 A2d 247 (Pa 2002) (terms of an interstate compact contain the substantive obligations of the parties as is the case with all contracts; the Contracts clause of the Federal Constitution protects compacts from impairment by the states; although a state cannot be bound by a compact to which it has not consented, an interstate compact supersedes prior statutes of signatory states and takes precedence over subsequent statutes of signatory states). Compacts stand as probably the only exception to the general rule that a sitting state legislature cannot bind future state legislatures. See generally, Broun, Buenger, McCabe & Masters, *supra* at § 1.2.2 ; *West Virginia ex rel Dyer v Sims, supra* at 29.

Even if the Court were to apply the three-step balancing test from *Fun N' Sun,* it is clear that the impairment of the central, mandatory apportionment formula contained in the MTC by MCL 208.1301 (as interpreted by the DOT) is both substantial and unjustified. As detailed above, the Compact is an interstate compact, a binding contract among the party states, with more than sufficient indicia of its compact/contract status. The Compact election is central to the Compact, and the DOT's interpretation of MCL 208.1301 eliminates the election. Therefore, there is a substantial impairment of a contractual obligation.[18] To the extent the three-step test allows this impairment to sometimes be justified by exigent needs, it cannot be justified here. The Court in *US Trust v New Jersey, supra,* made clear that even if it could otherwise be justified, because the 'impaired obligation' was an interstate compact statute rather than a private contractual relationship, the subsequent statute was even less susceptible to justification. *Id.* at 22. Moreover the Court's skepticism was heightened due to the fact the State sought to avoid one of its own obligations. *Id.* at 25-26 ("deference . . . is not appropriate because the State's self-interest is at stake"). *Green* indicates that the bar is even higher if the obligation is imposed by compact. *Green, supra* at 83 (state cannot justify departure from clear obligations agreed to in an interstate compact in its "sovereign capacity"). Further, Michigan had the option to withdraw from the Compact. The Court in *US Trust* left no doubt that "[a] state is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." The Court determined that the state failed to demonstrate that there was no other alternative to impairment (as is the case here). *See US Trust, supra* at 30. In this case, if the Legislature determined that a mandatory tax apportionment formula should be imposed

[18] The DOT's argument that there is no Contract Clause violation because Appellant does not have a contractual relationship with the State is a red herring. Appellant is not suing for breach of contract. It has standing to pursue a tax refund and to argue for the proper interpretation and application of the Compact as both a statute and a contract among the party states. Further, the Compact explicitly grants rights to taxpayers like Appellant. MCL 205.581 Art I, III(1).

upon all taxpayers, the State of Michigan had the explicit authority to withdraw from the Compact (which prerogative it has chosen not to exercise). A similar argument was flatly rejected by the Supreme Court in *Green v Biddle, supra;* see also, *Doe v Ward, supra* at 914-15. For these reasons, the Contract Clause is violated under the three-step test as well.

VI. THE UNIFORMITY SECURED BY COMPACTS IS JEOPARDIZED BY THE DECISION OF THE COURT OF APPEALS

The DOT refuses to acknowledge that the position which it advocates here, that the MBTA should be interpreted to eliminate a core Compact provision, is contrary to the law of contracts, compact jurisprudence, and the Contract Clause of the U.S. and Michigan Constitutions. See US Const, art I, §10, cl 1, Const 1963, art I, §10, cl 1. The Court of Appeals' decision not only ignores the interests of the Appellant but has a destabilizing effect upon the entire system of interstate compacts, negotiated by and between the states.

Contrary to DOT's rather limited view of the primary role of interstate compacts, other courts have recognized that they are mechanisms provided by the U. S. Constitution to address "matters that are clearly beyond the realm of individual state authority but which, due to their nature, may not be within the immediate purview of the federal government or easily resolved through a purely federal response." Broun, Buenger, McCabe & Masters, *supra* at 1 n. 2. See *Hubble v Bi-State Dev. Agency of Illinois-Missouri Metro Dist*, 938 NE2d 483, 493 (Ill 2010). As such, "courts of signatory states should promote consistency in interpreting an interstate compact based on comity." *Id.* at 491, also *State ex rel. Ohio Adult Parole Authority v. Coniglio*, 610 NE2d 1196, 1198 (Ohio 1993): *McComb, supra* at 479.

Reviewing the history and text of the Compact, it could be described in similar terms as another compact which the U.S. Supreme Court was called upon to construe. "As part of the federal plan prescribed by the Constitution, the states agreed to the power sharing, coordination,

and united action . . . that typify Compact Clause creations." *Hess, supra* at 41-42. "Such an agreement is made to 'address interests and problems that do not coincide nicely either with the national boundaries or with State lines-interests that may be badly served or not served at all by the ordinary channels of National or State political action." *Id.* at 40.

The impermissible allowance of a unilateral amendment of the terms of an interstate compact by one member state has serious implications not only for the Appellants, but also for the other interstate compacts represented herein and other compacts across the nation, whose authority to regulate such matters as juvenile offender transfers and child welfare placements is dependent upon the consistent application of compact law. As Justice Jackson put it, "But if the compact system is to have vitality and integrity, [one member State](West Virginia) may not raise an issue of *ultra vires*, decide it, and release herself from an interstate obligation." *West Virginia ex rel Dyer v Sims, supra* at 35. The opinion from the Court of Appeals as well as the DOT's position in this case violate this cautionary note and conflict with nearly two centuries of compact jurisprudence. A decision from this Court upholding the Court of Appeals would release the State of Michigan from the mandatory election in Article III of the Compact, potentially allows Michigan to similarly undermine its continued participation in other compacts to which it is a signatory, and could make other states reticent to join with Michigan in other interstate compacts.

VII. CONCLUSION

For all the foregoing reasons, and based upon the points and authorities cited herein, the Compact Amici join the Appellant in requesting that the Judgment of the Court of Appeals be reversed.

Respectfully Submitted this 19th day of November, 2013.

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