STATE OF MICHIGAN

IN THE SUPREME COURT

GILLETTE COMMERCIAL OPERATIONS NORTH AMERICA & SUBSIDIARIES,

Plaintiff – Appellant,

v

DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant – Appellee.

Supreme Court
No. 152588

Court of Appeals
No. 325258

Court of Claims
No. 14-000053-MT

BRIEF OF *AMICUS CURIAE* TAX EXECUTIVES INSTITUTE, INC.

Paul V. McCord (P61138)
Graham K. Crabtree (P31590)
FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
(517) 377-0861
pmccord@fraserlawfirm.com
Michigan Counsel for Amicus Curiae
Tax Executives Institute, Inc.

A. Pilar Mata*
John L. Schoenecker*
**pro hac vice* pending
TAX EXECUTIVES INSTITUTE, INC.
1200 G Street, N.W., Suite 300
Washington, DC 20005-3814
(202) 464-8346
pmata@tei.org
Counsel for Amicus Curiae
Tax Executives Institute, Inc.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

THE ORDER APPEALED FROM

On September 29, 2015, the Court of Appeals issued its Opinion in *Gillette Commercial Operations North America v Department of Treasury*, ___ Mich App ___; ___ NW2d ___ (2015) ("*Gillette*"), affirming the Court of Claims' ruling granting summary disposition in favor of Defendant-Appellee, Michigan Department of Treasury (the "Department" or "Defendant"), and denying Plaintiff-Appellant, Gillette Commercial Operations North America's ("Gillette" or "Plaintiff") motion for summary disposition and dismissing its complaint.

ALLEGATIONS OF ERROR AND RELIEF SOUGHT

This case raises a number of state and federal constitutional questions relating to the enactment and application of 2014 PA 282. As discussed in the following pages, the Court of Appeals' opinion in *Gillette* cannot be squared with the limitations on retroactive tax legislation imposed by the Due Process and Separation of Powers Clauses of the United States and Michigan Constitutions, or the United States Supreme Court's decision in *United States v Carlton*, 512 US 26; 114 S Ct 2018; 129 L Ed2d 22 (1994). In these respects, among others, the Court of Appeals erred in holding that:

1. 2014 PA 282 did not violate Gillette's and all of the similarly situated taxpayers' right to due process protected by the Fourteenth Amendment of the United States Constitution, US Const, Am XIV and the Michigan constitutional guarantee, Const 1963, art 1, § 17 , that no state shall deprive any person of "life, liberty or property, without due process of law," and

2. 2014 PA 282 did not reverse a judicial decision or repeal a final judgment in violation of the Separation of Powers Clause of the Michigan Constitution. Const 1963, art 3, § § 2.

Amicus Curiae Tax Executives Institute, Inc. ("TEI") respectfully submits this brief in support of Gillette's Application for Leave to Appeal. In addition to *Gillette*, there are four companion cases where approximately fifty similarly situated taxpayers filed Applications for Leave to Appeal involving the enactment and application of 2014 PA 282. Those companion cases are:

1) *Sonoco Products Company, et al. v Department of Treasury*, MSC Docket Nos. 152598 – 152610 (consolidated) (app for lv filed November 10, 2015);

2) *Lubrizol Corp v Department of Treasury*, at MSC Docket No. 152613 (app for lv filed November 10, 2015);

3) *Yaskawa America, Inc, et al. v Department of Treasury*, at MSC Docket Nos. 152615 – 152648 (consolidated) (app for lv filed November 10, 2015); and

4) *International Business Machines Corp Inc v Department of Treasury*, at MSC Docket No. 152650 (app for lv filed November 10, 2015).

TEI requests the Court to consider this brief in support of the similarly situated taxpayers that filed applications in the companion cases. For all of the reasons discussed more fully to follow, TEI respectfully requests that this Honorable Court GRANT Gillette's Application, and REVERSE the Court of Appeals.

INTRODUCTION

Amicus Curiae Tax Executives Institute, Inc. ("TEI") respectfully submits this brief in support of the taxpayers that filed applications for leave to appeal the Michigan Court of Appeals' decision in *Gillette Commercial Operations North America v Department of Treasury*, ___ Mich App ___; ___ NW2d ___ (2015) ("*Gillette*").[1] Left to stand, the Court of Appeals' decision would embolden the Michigan Legislature to continue a disturbing pattern – neglecting provisions in Michigan's tax law and forcing taxpayers to litigate them, knowing the Legislature can retroactively overrule any court decision it disagrees with. This tactic creates uncertainty for taxpayers, is inconsistent with sound tax policy and administration, and wastes judicial resources.

The Court of Appeals' decision also raises a host of constitutional and legal concerns. *Gillette* cannot be squared with the limitations imposed by the Due Process and Separation of Powers Clauses of the United States and Michigan Constitutions, or the United States Supreme Court's decision in *United States v Carlton*, 512 US 26(1994); 114 S Ct 2018; 129 L Ed2d 22 (1994) . TEI thus respectfully submits this A*micus Curiae* brief and urges this Court to grant the taxpayers' applications for leave to appeal and reverse the Court of Appeals' erroneous decision.

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[1] The Court of Appeals consolidated all cases potentially impacted by the passage of 2014 PA 282. Gillette Commercial Operations North America is the first plaintiff/appellant listed on the court's September 29, 2015 opinion.

STATEMENT OF INTEREST

Gillette upholds 2014 PA 282 (the "2014 Legislation"), which retroactively amended Michigan's business tax for over six years. The 2014 Legislation overruled this Court's decision in *International Business Machines Corp v Department of Treasury*, 496 Mich 642; 852 NW2d 865 (2014)) ("*IBM*"), invalidated refunds this Court determined were due, and revived assessments this Court determined were invalid in that case. The Court of Appeals rationalized that these outcomes were warranted because the Legislature "clarif[ied] through statutory amendment the intended meaning of a statutory provision that had been *misread* by the courts." *Gillette* ___ Mich App at ____; slip op at 27 (emphasis added). The Court of Appeals' decision places virtually no limit on the Legislature's ability to retroactively amend tax laws and invalidate court decisions it disagrees with, and interferes with the judicial power vested in the courts. This creates substantial uncertainty for taxpayers doing business in the state.

TEI is a voluntary, nonprofit association of business executives, managers, and administrators responsible for the tax affairs of their employers. TEI was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code. TEI is dedicated to the development of sound tax policy, compliance with and the uniform enforcement of tax laws, and the minimization of administration and compliance costs for governments and taxpayers.

TEI's members are employed by a broad cross-section of the business community. As in-house tax professionals, TEI's members evaluate tax laws, advise their companies regarding the tax consequences of various transactions and business decisions, and make practical decisions regarding whether to challenge tax assessments and denied refund claims. TEI's members thus have a vital interest in state legislatures' power to enact retroactive tax legislation and remedies for unlawfully imposed and collected taxes. The Court of Appeals' decision in *Gillette* undermines these basic protections.

GROUNDS FOR APPEAL

This Court's intervention and acceptance of the taxpayers' appeals is crucial. *Gillette* is the most recent Court of Appeals decision addressing and upholding retroactive tax legislation in Michigan[2] and imposes no meaningful constraints on when retroactive legislation is permitted. The Legislature's passage of the 2014 Legislation demonstrates that the Legislature, if left unchecked, will not exercise restraint voluntarily and will continue its practice of retroactively overruling court decisions. This legislative ploy creates uncertainty for Michigan taxpayers and undermines their ability to make informed business judgments and decisions.

The taxpayers' applications for leave to appeal easily meet the requisite grounds for appeal in Michigan Court Rule 7.305(B).). First, *Gillette* involves a substantial question

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[2] *See GMAC LLC v Department of Treasury*, 286 Mich App 365; 781 NW2d 310 (2009; *General Motors Corp v Department of Treasury*, 290 Mich App 355; 803 NW2d 698 (2010) .

about the validity of the 2014 Legislation, which retroactively amended Michigan's business tax for over six years and legislatively overruled the Court's carefully considered decision in *IBM*. *See* MCR 7.305(B)(1). Second, whether the Legislature can retroactively change tax laws to eliminate refund claims and revive assessments, particularly after taxpayers spent years in litigation and this Court ruled on their validity, is an issue of significant public interest. *See* MCR 7.305(B)(2).. Third, the 2014 Legislation implicates important Due Process and the Separation of Powers principles of foremost significance to Michigan's jurisprudence. *See* MCR 7.305(B)(3). Finally, the Court of Appeals' decision is clearly erroneous and will cause material injustice by invalidating refunds this Court determined were due and reviving assessments this Court determined were invalid in *IBM*. *See* MCR 7.305(B)(5).

LEGISLATIVE AND PROCEDURAL BACKGROUND

I. Michigan's Tax Legislation

Michigan became a party to the Multistate Tax Compact ("Compact") in 1970. 1969 PA 343; MCL 205.581(1) (effective July 1, 1970). The purpose of the Compact was to facilitate the proper determination of state and local taxes for multistate taxpayers, promote uniformity or compatibility in significant components of tax systems, facilitate taxpayer convenience and compliance in filing tax returns, and avoid duplicative taxation. 1969 PA 343; MCL 205.581, Art. I. Member states joined the Compact to

circumvent proposed federal legislation that would have mandated uniformity in state taxation. Multistate Tax Commission 1st Annual Report, pp 9-10.

The Compact's provisions, which were incorporated into Michigan's Laws, provided taxpayers the option to apportion their income using either the method prescribed by the state or the method prescribed in Article IV of the Compact, which contained a three-factor apportionment formula. MCL 205.581, Art. III(1). In 2007, the Legislature repealed Michigan's Single Business Tax and enacted the Michigan Business Tax ("MBT"), which required taxpayers to apportion their income using an apportionment formula based on sales. 2007 PA 36; MCL 208.1101 *et seq.* (effective January 1, 2008); MCL 208.1301(1) ("2007 Legislation"). The Legislature did not repeal the Compact or the Compact's election provision when it enacted the MBT. MCL 205.581, Art. III(1).

II. The Compact Election Cases

Numerous taxpayers elected to apportion their income using the Compact's three-factor apportionment formula on originally filed or amended tax returns. The Department of Treasury ("Department") denied those taxpayers' right to make this election, recalculated their tax liabilities based on the MBT's apportionment formula, and issued assessments and denied refund claims accordingly. IBM's case was the first to proceed through the Michigan courts. Compact cases pending before the Department, the Michigan Tax Tribunal, the Michigan Court of Claims, and the Court of Appeals were held in abeyance pending this Court's resolution of IBM's appeal.

III. The 2011 Legislation

In 2011, the Legislature replaced the MBT with the Michigan Corporate Income Tax. 2011 PA 39 (effective December 31, 2011). The Legislature also enacted 2011 PA 40 in 2011, which provides the Compact's election and apportionment provisions were not applicable to the MBT as of January 1, 2011 ("2011 Legislation"). The 2011 Legislation purported to end taxpayers' rights to elect Compact apportionment as of 2011.[3]

IV. The *IBM* Decision

On July 14, 2014, this Court decided *IBM*, holding (1) IBM was entitled to use the Compact's three-factor apportionment formula when calculating its 2008 tax liability, and (2) the modified gross receipts tax ("MGRT") component of the MBT was an income tax under the Compact.

A plurality of the Court (Justices Viviano, Cavanagh, and Markman) held the 2007 Legislation "did not impliedly repeal the Compact's election provision" because the Court could "harmonize the BTA and the Compact's election provision" when the statutes were read *in pari materia*. *IBM*, 496 Mich at 658, 661. The plurality concluded "the Legislature...had full knowledge of the Compact and its provisions. Even with such knowledge...the Legislature left the Compact's election provision intact." *Id.* at 657. The plurality further found that its "interpretation allows the Compact's election provision to

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[3] Taxpayers contend that this attempt to amend the Compact on a piecemeal basis rather than withdrawing completely violates the terms of the Compact and the Contract Clause.

serve its purpose of providing uniformity to multistate taxpayers in light of Michigan's enactment of an apportionment formula different from the Compact's formula." *Id.* at 661. The plurality noted the 2011 Legislation supported this conclusion. *Id.* at 658-59.

Justice Zahra concurred with the plurality holding that IBM was entitled to use the Compact's election provision and that the MGRT component of the MBT was an income tax. *Id.* at 668 (ZAHRA, J. concurring). However, Justice Zahra concluded it was unnecessary to determine whether the Legislature impliedly repealed the Compact in 2007 because "the Legislature, in 2011, clearly intended to provide multistate taxpayers the benefit of the Compact's election provision for [the 2008 – 2010] tax years." *Id.*

This Court remanded IBM's case to the Court of Claims for entry of an order granting summary disposition in favor of IBM. *Id.* at 667 (opinion of the Court). On August 4, 2014, the Department filed a motion for rehearing with this Court, which the Court denied on November 14, 2014. *International Business Machines Corp v Department of Treasury*, 497 Mich 894; 855 NW2d 512 (2014).

V. The 2014 Legislation

While the Department's motion for rehearing was pending, the Governor signed the 2014 Legislation into law. The 2014 Legislation, effective on September 12, 2014, states:

> "[The Compact] is repealed retroactively and effective beginning January 1, 2008. It is the intent of the legislature that the repeal of [the Compact] is to express the original intent of the legislature regarding the application of [the

> MBT's apportionment provision], and the intended effect of that section to eliminate the [Compact's election provision], and that the 2011 amendatory act that amended the [Compact's election provision] was to further express the original intent of the legislature regarding the application of [the MBT's apportionment provision] and to clarify that the [Compact's election provision] is not available under the income tax act of 1967...."

2014 PA 282., Enacting Section 1. Thus, the 2014 Legislation repealed the Compact in its entirety for over six years, retroactively eliminated taxpayers' right to apportion their income using the Compact's three-factor apportionment formula, eliminated the refund claims this Court held were due in *IBM*, and revived assessments the *IBM* Court held were invalid.

The 2014 Legislature boldly claimed the 2014 Legislation reflected the intent of the 2007 Legislature when enacting the MBT, as well as the intention of the 2011 Legislature when it repealed the Compact's election provision to the beginning of 2011. The 2014 Legislation is thus directly contrary to this Court's determination in *IBM* that the 2007 Legislature did not repeal the Compact's election provision by implication and the 2011 Legislature intended to provide the election to taxpayers for 2008 through 2010.

Litigation challenging the 2014 Legislation ensued, culminating in the Court of Appeals' decision in *Gillette*.

LEGAL ARGUMENTS

As Chief Justice Marshall famously declared, "[a]n unlimited power to tax involves, necessarily, a power to destroy...." *McCulloch v Maryland*, 17 US 316, 327; 4 L Ed 579 (1819). The power to tax retroactively, years after taxpayers have relied upon the law as written, is even more dangerous. Yet the Court of Appeals' decision blesses the Legislature's wish to impose retroactive tax obligations at will. This standard is not only unfair, it conflicts with the due process principles articulated by the U.S. Supreme Court in *United States v Carlton, supra,* and violates separation of powers principles embodied in Michigan's Constitution.

I. Sound Tax Policy and Administration Demand That Retroactive Tax Legislation Be Enacted Sparingly.

Taxpayers must be able to rely upon the legislation and regulations in existence when business transactions and other taxable events occur for a tax system to be fair and perceived as fair. Governments may change their administrative tax policies and laws, but fairness demands these changes be enforced prospectively, especially if they will have significant financial effects on taxpayers. Moreover, legislatures should exercise that power sparingly and within narrow limits even when governments possess the authority to change tax laws retroactively.

This is particularly true when the legislation retroactively overrules a judicial decision. It is always within the legislature's province to change tax laws prospectively

in response to a judicial decision. However, doing so retrospectively for a lengthy period is troubling and cannot be reconciled with basic tenets of sound tax policy and administration.

Taxpayers will be loath to challenge an adverse decision from a taxing agency in court if legislatures have unlimited discretion to overrule court decisions they dislike. There is no reason for taxpayers to spend the time and considerable expense to seek judicial redress if the court's decision can be overruled retroactively with the stroke of the legislature's pen. Providing state legislatures unfettered power to overrule court decisions retroactively thus will discourage taxpayers from bringing challenges to court in the first place and undermine the division of power among the three branches of government, and the checks and balances the judiciary confers.

In addition, allowing state legislatures to retroactively overrule taxpayer-favorable decisions wastes judicial resources. Just as there is no reason for taxpayers to expend resources to litigate a case that can be overturned at a state legislature's whim, there would be no need for courts to hear such cases. Without question, the resources dedicated by courts on such matters has been significant. *Gillette* consolidates 50 separate Compact election cases, with additional cases pending at the Michigan Tax Court, Court of Claims, and Department. It was patently irresponsible for the Legislature to stand by for years while the Department litigated questionable issues and cluttered the courts with cases that the Legislature rendered obsolete via retroactive legislation.

Sound tax policy and administration require governments to provide taxpayers with some degree of certainty and fairness. While retroactive tax legislation is permissible in limited circumstances, these principles of certainty and fairness are not met if the legislatures are provided unlimited authority to enact retroactive tax legislation to overrule court decisions.

II. The Court of Appeals Erred in Holding the 2014 Legislation Does Not Violate Due Process.

A. Due Process Imposes Meaningful Limits on Retroactive Tax Legislation.

The Fifth Amendment of the U.S. Constitution, US Const, Am V, and Article 1, § 17 of the Michigan Constitution, Const 1963, art 1, § 17, guarantee the right of due process. The U.S. Supreme Court has repeatedly stated that retroactive legislation is disfavored as it "presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions." *Eastern Enterprises v Apfel*, 524 US 498, 501; 118 S Ct 2131; 141 L Ed2d 451 (1998) (*citing General Motors Corp v Romein*, 503 US 181; 112 S Ct 1105; 117 L Ed2d 328 (1992)); *see also* Broom, A Selection of Legal Maxims 24 (8th ed, 1911) ("Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."); 2 Story, Commentaries on the Constitution (5th ed 1891), § 1398 ("Retrospective laws are, indeed, generally unjust; and,

as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."). Thus, the standards applied to retroactive legislation are higher than those applied to prospective legislation: "retroactive legislation does have to meet a burden not faced by legislation that has only future effects....and the justifications for the latter may not suffice for the former." *Pension Benefit Guarantee Corp v R.A. Gray & Co*, 467 US 717, 729-730; 104 S Ct 2709; 81 L Ed2d 601 (1984).

The seminal case examining whether retroactive tax legislation was lawful is *United States v Carlton, supra*, where the U.S. Supreme Court addressed whether Congress could enact a "curative measure" that retroactively amended and limited a federal estate tax deduction. *Id.* 512 US at 27. The taxpayer in *Carlton* alleged that the retroactive amendment violated the Due Process Clause of the Fifth Amendment. *Id.*

The U.S. Supreme Court noted that prior decisions examining the constitutionality of retroactive tax legislation turned on whether the "retroactive application [was] so harsh and oppressive as to transgress the constitutional limitation." *Id.* at 30 (quoting *Welch v Henry*, 305 US 134, 147; 59 S Ct 121; 83 L Ed 87 (1938) (internal quotation marks and other citations omitted). This is the same test applied to retroactive economic legislation generally, and mandates that such legislation be "supported by a legitimate legislative purpose furthered by rational means." *Carlton*, 512 US at 30-31 (citations omitted).

The U.S. Supreme Court conducted a two-prong analysis in *Carlton* to determine whether retroactive legislation is supported by a legitimate legislative purpose furthered by rational means. First, the Court held Congress' legislative purpose was not "illegitimate" or "arbitrary" because "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." *Id.* at 32.

This is a critical factual distinction not at issue in this case. Specifically, *Carlton* involved a flaw in one of the "major revisions of the Internal Revenue Code in the Tax Reform Act of 1986, 100 Stat. 2085," which involved "grant[ing] a deduction for half the proceeds of 'any sale of employer securities by the executor of an estate' to 'an employee stock ownership plan.'" *Id.* at 28. Congress's mistake was neglecting to include language stating the obvious: the deceased person actually had to own the stock on his or her death for his or her estate to sell stock in this manner to obtain the tax deduction. Otherwise, "any estate could claim the deduction simply by buying stock in the market [after the decedent's death] and immediately reselling it to an [employee stock ownership plan], thereby obtaining a potentially dramatic reduction in (or even elimination of) the estate tax obligation." *Id.* at 31. Simply put, the U.S. Supreme Court gave Congress wide latitude in *Carlton* in part because the retroactive legislation fixed an error that was otherwise too good to be true for taxpayers.

Second, the Court also held Congress acted "promptly" and "established only a modest period of retroactivity." *Id.* In reaching this determination, the Court emphasized the retroactive period was "slightly greater than one year" and "the amendment was proposed by the IRS in January 1987 and by Congress in February 1987, within a few months of [the statute's] original enactment." *Id.* at 33.

Justice O'Connor's concurrence further repudiated the notion that legislatures have unfettered authority to enact retroactive tax legislation, declaring "[t]he governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose." *Id.* at 37-38 (O'CONNOR , J., concurring). Indeed, "[b]ecause the tax consequences of commercial transactions are a relevant, and sometimes dispositive, consideration in a taxpayer's decisions regarding the use of his capital, it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them." *Id.* at 38 (citations omitted). Justice O'Connor thus concluded "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions." *Id.*

B. The 2014 Legislation Does Not Comply with the Due Process Mandates Established by *Carlton.*

Carlton presented a relatively easy case: the retroactive amendment fixed a simple and obvious drafting error, which, if left uncorrected, would have allowed a deceased's estate to claim tax benefits from the sale of stock the deceased individual never owned.

Id. at 27-28 (opinion of the Court). The IRS provided notice of the error to the public within months, and Congress immediately thereafter proposed legislation to correct it and limited the retroactive period to slightly over one year. *Id.* at 29. The prompt administrative and legislative action to correct a drafting mistake in *Carlton*, however, is easily distinguishable from *Gillette*.

1. The 2014 Legislation Lacked a Legitimate Legislative Purpose.

The 2014 Legislation is not supported by a legitimate legislative purpose. Unlike *Carlton*, the 2014 Legislation did not correct a drafting mistake. Rather, it sought to make a retroactive policy change and to repeal a statute deliberately enacted by the 1970 Legislature. As this Court confirmed in *IBM*, "the Compact's election provision, by using the terms 'may elect,' contemplates a divergence between a party state's mandated apportionment formula and the Compact's own formula – either at the time of the Compact's adoption by a party state or at some point in the future. Otherwise, there would be no point in giving taxpayers an election between the two." *IBM*, 496 Mich at 656. Further, "the Legislature, in enacting the [MBT] had full knowledge of the Compact and its provisions" but "left the Compact's election provision intact" while expressly repealing or amending other inconsistent acts. *Id.* at 657. The Compact's election provision is thus not comparable to the drafting error corrected by Congress in *Carlton*.

The Court of Appeals concluded the 2014 Legislation satisfied the legitimate legislative purpose requirement because: "[i]t is a legitimate legislative action to both (1)

correct a perceived misinterpretation of a statute, and (2) eliminate a significant revenue loss resulting from that interpretation," citing *Carlton* as support. *Gillette,* ___ Mich App at ___; slip at 26. *Carlton,* however, supports neither of these propositions.

First, *Carlton* held Congress had a legitimate legislative purpose when it enacted a retroactive amendment to promptly correct a drafting error that Congress determined it had made. In contrast, the Michigan Legislature amended a statute retroactively to erase a court decision it disliked. The Legislature should not be permitted to do what it wished a prior Legislature had done years ago – explicitly repealing the Compact's election provision, which is much more than correcting a drafting error.

The Legislature writes the laws, the executive branch administers them, and the courts interpret them as written under a system of divided government and the Michigan Constitution. Const 1963, art 3, § 1; art 4, § 1; art 5, § 1; *In re Manufacturer's Freight Forwarding Co,* 294 Mich 57; 292 NW 678(1940). Thus, it is the role of the Michigan courts, not the Legislature, to interpret Michigan's statutes. While it is legitimate for the Legislature to amend its statutes prospectively in response to judicial interpretations, it is not a legitimate exercise of legislative power to retroactively overrule a judicial decision the Legislature dislikes. Doing so is an overt attempt to substitute the Legislature's judgment for that of the courts', in violation of Michigan's tripartite system of government.

Second, the Legislature's desire to mitigate the prospect of significant revenue loss does not salvage its legislative purpose. The revenue loss in *Carlton* was unanticipated because it arose from a drafting error. *Carlton*, 512 US at 31-32. Indeed, any reasonable person evaluating the legislation at issue in *Carlton* should have known the tax benefit as too good to be true. In contrast, the revenue loss in *Gillette* arose from what this Court in *IBM* determined was a purposeful decision to allow Michigan taxpayers to apportion their income using the Compact's three-factor apportionment formula. *IBM*, 496 Mich at 657. Moreover, no claim of surprise is supportable here, as Michigan had notice regarding the potential revenue loss when taxpayers made the election on their original or amended tax returns.

2. The Legislature Did Not Act Promptly or Establish a Modest Period of Retroactivity.

The Legislature also clearly fails *Carlton*'s requirement of prompt action and a modest period of retroactivity. In *Carlton*, the U.S. Supreme Court lauded the IRS and Congress for the actions taken within months of the original statute's enactment, the legislation's passage shortly thereafter, and the establishment of a retroactive period slightly greater than one year. *Carlton*, 512 US at 33. The Court of Appeals claimed the 2014 Legislation met this same standard here because the Legislature passed the 2014 Legislation within months of this Court's decision in *IBM* and the Court of Appeals had upheld retroactive periods of similar lengths in its prior decisions, as had other courts. *Gillette*, ___ Mich App at ____; slip op at 26.

However, the Legislature's action was anything but prompt. For *Gillette* to be comparable to *Carlton*, the Legislature would have repealed the Compact's election provision in 2008, shortly after the MBT was enacted. Instead, the Legislature idly stood by as the Department litigated the Compact election cases for years and amended the statute only after this Court decided *IBM*, six years later.

The Legislature's failure to act promptly is compelling evidence it was not simply correcting a mistake. Rather, its actions were a bald attempt to substitute the 2007 Legislature's policy decision in favor of the 2014 Legislature's policy decision, and to overrule this Court's decision in *IBM*.[4] This assertion is underscored by the 2010 Legislature's consideration, and rejection, of a bill that would have expressly repealed the Compact's election provision back to 2008. 2010 HB 6351. It defies logic to contend that the 2014 Legislature was correcting a mistake because, if it was, the 2010 Legislature would have fixed that "mistake" then rather than creating a three-year window during which taxpayers could make the Compact's election.

Moreover, the 2014 Legislation's six-year period of retroactivity was not modest. In *Carlton*, the U.S. Supreme Court emphasized that the retroactive period was "slightly greater than one year." *Carlton*, 512 US at 33. Justice O'Connor, in her concurrence,

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[4] This Court is surely well aware of the principle that one legislature cannot bind a future legislature. It must also be the case that a current legislature cannot change the intent of a past legislature. The prior Legislature was thinking what it was thinking, and no law can change that history.

opined that "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions." *Id.*

Rather than address *Carlton*'s temporal requirement, the Court of Appeals sought to justify the 2014 Legislation's six-year period of retroactivity by reference to its own prior decisions in *GMAC LLC v Department of Treasury*, 286 Mich App 365; 781 NW2d 310 (2009) (upholding a seven-year period) and *General Motors Corp v Department of Treasury*, 290 Mich App 355; 803 NW2d 698 (2010) (upholding a five-year period). However, *GMAC* and *General Motors* simply sidestepped the modesty requirement the U.S. Supreme Court articulated in *Carlton*.

In *GMAC*, the Court of Appeals dismissed *Carlton* out of hand, stating "we conclude that plaintiffs' reliance on the *Carlton* decision is misplaced. Plaintiffs are not challenging the retroactive amendment to MCL 205.54i; rather, plaintiffs are challenging the Legislature's disapproval and corrective action with regard to the *DiamlerChrysler* decision." *GMAC*, 286 Mich App at 380.

In *General Motors*, the Court of Appeals acknowledged *Carlton* examined the length of the retroactive period and evaluated whether it was modest. *General Motors*, 290 Mich App at 374. Nonetheless, the Court of Appeals held that because "the Court did not specifically include a temporal 'modesty' requirement" when it "summarize[ed] its holding," a modest period of retroactivity was not *per se* required. *Id.* The Court of

Appeals opted instead to apply a test balancing "the government's interest in retroactive application of a statute against that of the taxpayer's interest in finality...to determine whether the limit of modest retroactivity is reached." *General Motors*, 290 Mich App at 374. The Court of Appeals held the retroactive tax legislation at issue was constitutional under this test because "the period of retroactivity is consistent with the applicable statute of limitations" and "[b]y its waiving application of the statute of limitations, we conclude GM has waived any interest it may have had under the Due Process Clause to 'finality and repose.'" *Id.* at 378.

That, of course, is not the standard articulated by the U.S. Supreme Court in *Carlton*, and for good reason. Statutes of limitation provide certainty to taxpayers and governments by limiting the time for governments to seek additional taxes and the time for taxpayers to recover tax overpayments. The question of how long it is appropriate to allow governments to assess or collect a liability established under existing law is entirely different than the question of how long governments should be given to change the calculation and amount of a taxpayer's liability. In any event, using the statute of limitation as a guideline for modesty would have resulted in the 2014 Legislation being retroactive for only four years rather than six.

The other cases referenced by the Court of Appeals as justification for concluding a six-year period of retroactivity was modest suffer from a similar fallacy. See, e.g., *In re Estate of Hambleton v Department of Revenue*, 181 Wn2d 802; 335 P3d 398 (Wash, 2014); *Atl*

Richfield Co v Or Department of Revenue, 14 OTR 212 (Or Tax, 1997), aff'd 327 Or 144; 958 P2d 840 (1998); *Miller v Johnson Controls, Inc*, 296 SW3d 392 (Ky, 2009); *Mont Rail Link, Inc v United States*, 76 F3d 991 (CA 9, 1996). Those courts, in essence, concluded that retroactive legislation is constitutional if the legislature had a legitimate purpose for the retroactive amendment and the retroactive period was rationally related to that purpose.

For example, in *Hambleton*, the Washington Supreme Court did not address whether the eight-year retroactive period was "modest" but concluded that the length of retroactivity was warranted because it was "directly linked with the purpose of the amendment, which is to remedy the effects" of a court decision the Washington legislature disliked and that "any period less than eight years would be arbitrary." *Hambleton*, 335 P3d at 411. The Kentucky Supreme Court similarly circumvented the modesty analysis articulated in *Carlton* when it decided *Johnson Controls*, 296 SW3d at 399. That court instead opined that "[t]he pertinent question is whether the period of retroactivity is one that makes sense in supporting the legitimate governmental purpose (rationally related)." *Id.* Allowing whatever retroactive period is necessary to fully undo the revenue loss the amended statute seeks to rectify, however, completely eradicates *Carlton*'s modesty requirement and provides legislatures with unfettered authority to enact retroactive tax legislation.

Gillette creates a perverse invitation: it allows the government to litigate questionable positions and then retroactively overrule court decisions it does not like. If this Court

upholds the Court of Appeals' reasoning in *Gillette*, there will be virtually no limits on the Legislature's ability to retroactively amend tax statutes. This result creates uncertainty for taxpayers, eliminates reasonable reliance upon the laws as written, undermines taxpayers' efforts to plan their affairs, and squarely contradicts the holding in *Carlton*.

III. The Court of Appeals Erred in Holding the 2014 Legislation Does Not Violate Separation of Powers Principles.

The Department maintains the Legislature may erase this Court's decision in *IBM* because it amended the law during the window of time between when this Court decided *IBM* and when the lower courts entered judgment in each of the taxpayers' cases. This gamesmanship mocks the notion that legislatures make the laws while courts interpret them. Notwithstanding the issue of retroactivity, to maintain the separation of powers required by the U.S. and Michigan Constitutions, this Court should rule it handed down a final decision on the substantive tax matters at issue in this litigation when it decided *IBM* and that *IBM* is binding on all taxpayers litigating that same question.

A. The Michigan Constitution Vests the Power to Interpret the Law With the Judiciary.

The Michigan Constitution states "[t]he 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 3, § 2. The Michigan Constitution vests the judicial power of the state with the Michigan courts. Const 1963, art 6, § 1. Thus, in Michigan and elsewhere throughout the country,

> "To declare what the law shall be is legislative; to declare what is or has been is judicial. The legislative power prescribes rules of action. The judicial power determines whether, in a particular case, such rules of action have been transgressed. The Legislature prescribes rules for the future. The judiciary ascertains existing rights."

In re Mfr's Freight Forwarding Co, 294 Mich 57, 63; 292 NW 678 (1940), quoting *In re Application of Consolidated Freight Co*, 265 Mich 340, 343; 251 NW 431 (1933). "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." *People ex rel Sutherland v Governor*, 29 Mich 320, 325-26 (1874).

The U.S. Supreme Court provided the historical context for why legislatures may not reverse final court decisions in *Plout v Spendthrift Farms, Inc*, 514 US 211; 115 S Ct 1447; 131 L Ed2d 328(1995). According to the Court, "[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers ... which after the Revolution had produced factional strife and partisan oppression," in part because colonial assemblies and legislatures often chose to change judicial outcomes through special bills and other legislation. *Plout*, 514 US at 219. For example, in 1786 the Vermont Council of Censors issued its Address of the Council of Censors to the Freemen of the State of Vermont in which it found that "the General Assembly, in all the instances

where they have vacated judgments, recovered judgments, recovered in due course of law ... have exercised a power not delegated, or intended to be delegated, to them, by the Constitution." *Id.* at 220, quoting Vermont State Papers 1779-1786, (Slade ed, 1823), pp 531, 533. Similarly in Connecticut, the pre-Constitution General Assembly would often "extend[] their deliberations to the cases of individuals," as those individuals had "been taught to consider an application to the legislature, as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process of law." *Plout*, 514 US at 221, quoting Report of the Committee of the Council of Censors (Bailey ed, 1784), p 6.

The Supreme Court held in *Plout*,

> "When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.... Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the court said it was."

Plout, 514 US at 227 (emphasis original) (holding a statute that allowed former plaintiffs to reopen judgments based on a longer retroactive limitations period was unconstitutional).

B. This Court Finally Adjudicated the Availability of the Compact's Election Provision When it Decided *IBM*.

The Department argues the Legislature may revert to the pre-Constitutional era of overturning final decisions because the Legislature amended the law before judgment was actually entered for IBM and the other taxpayers. Such finality, however, was a foregone conclusion in light of this Court's decision because the Court had conclusively decided that IBM could elect to calculate their Michigan tax liability using the Compact's three factor apportionment formula between 2008 and 2010 and the issue is purely legal, and thus equally applicable to all taxpayers' cases for those years. Thus, once this Court decided *IBM*, its interpretation of law was final and could not be changed by the Legislature.

The U.S. Supreme Court has allowed legislation to alter the outcome of pending litigation if the legislation "compel[s] changes in law, *not findings or results* under old law." *Robertson v Seattle Audubon Society*, 503 US 429, 438; 112 S Ct 1407; 118 L Ed2d 73 (1992) (emphasis added). *Seattle Audubon Society* involved legal challenges under various environmental statutes to the federal government's allowance of harvesting and sale of timber from old-growth forests that made up the endangered Spotted Owl's habitat. *Seattle Audubon Society*, 503 US at 431. During the pendency of that litigation in the lower courts, Congress passed legislation popularly known as the "Northwest Timber Compromise," which included explicit language – so explicit that the legislation even referenced the pending litigation – permitting the government's harvesting allowances

challenged by the litigation. *Id.* at 434-35. The Supreme Court found that the Northwest Timber Compromise amended the law prospectively rather than directing a decision in a pending case. *Id.* at 441. Therefore, the outcome Congress dictated in that pending case did not violate the federal separation of powers.

In contrast, with the 2014 Legislation, the Legislature purports to direct a new decision in the *IBM* case and the cases following its lead. This it may not do. The cases now before this Court differ from *Seattle Audubon Society* because, for all substantive purposes, after this Court decided *IBM*, there was nothing left to decide on the issue of the Compact's implied repeal. The issue in *IBM* was purely retrospective, and this Court already decided it, leaving no room for the Legislature to alter that retrospective analysis. To use the language of *Seattle Audubon Society*, the Legislature may obviously "compel changes in law" but it may not change "findings or results under old law." *Seattle Audubon Society*, 503 US at 438.

Similarly, under Michigan law, "the Legislature may not reverse *a judicial decision* or repeal the final judgment entered." *Wylie v City Commission of Grand Rapids*, 293 Mich 571; 292 NW 668, 673 (1940) (emphasis added). *Wylie* involved special-assessment refund claims by assessment districts, including one from whom taxpayers had already secured a judgment from this Court in *Smith v City Commission of Grand Rapids*, 281 Mich 235; 274 NW 776 (1937). That case held a city commission could not choose what assessment districts would receive assessment refunds when their paid assessments became

unnecessary, and the commission had to pay refunds to taxpayers in all such assessment districts. *Wylie*, 293 Mich at 578. During the pendency of those refund claims, but after final judgment in *Smith*, the Legislature enacted a statute giving the city commission the discretion to determine which special-assessment districts received refunds. *Wylie*, 293 Mich at 581-82.

This Court ruled that this statute did not reverse (or attempt to reverse) the decision in *Smith*, nor did it reverse whatever refund was due to the assessment district involved in *Smith*. *Wylie*, 293 Mich at 584-85. This Court came to this conclusion, in part, by doubting that the Legislature "deliberately chose to reverse a final judgment of the court and to usurp the functions of the judiciary." *Wylie*, 293 Mich at 585. To the contrary, in this case, the Legislature clearly passed the 2014 Legislation to reverse this Court's decision in *IBM* with the intent of usurping the functions of the judiciary. See also, *McManus v Hornaday*, 124 Iowa 267, 275-276; 100 NW 33 (1904) ("If a council may by one ordinance levy an illegal tax, and then, after the same has been adjudged void by the courts, proceed by another ordinance to declare its former acts 'legal and valid,' and thus avoid the effect of the adverse adjudication, then indeed have judicial determinations ceased to be of any force or effect for the protection of the citizen or his property against municipal usurpation."); see also, *Langever v Miller*, 124 Tex 80; 76 SW2d 1025, 1036 (1934) ("As the legislature cannot set aside the construction of the law already applied by the

courts to the actual cases, neither can it compel the courts for the future to adopt a particular construction of law which the legislature permits to remain in force.")

In his well-respected treatise on constitutional law, *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union*, former Michigan Supreme Court Justice Cooley essentially stated that a legislature could not reverse this Court's *IBM* decision with the 2014 Legislation. According to Justice Cooley,

> "A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law, or the meaning of another statute, and which declares what it is and ever has been. Such a statute, therefore, is always in a certain sense retrospective; because it assumes to determine what the law was before it was passed; and as a declaratory statute is important only in those cases where doubts have already arisen, the statute, when passed, may be found to declare the law to be different from what it has already been adjudged to be by the courts..... Was the legislature ... within the limits of its authority when it passed the declaratory statute? The decision of this question must depend perhaps upon the purpose which was in the mind of the legislature in passing the declaratory statute; whether the design was to give to the rule now declared a retrospective operation, or, on the other hand, merely to establish a construction of the doubtful law for the determination of cases that may arise in the future. It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which

> parties might appeal when dissatisfied with the rulings of the courts."

Cooley, Constitutional Limitations (7th ed), pp 134-36 (internal quotations omitted).

In these cases, the Legislature is obviously trying to exercise judicial power by reversing this Court's *IBM* decision. This is perhaps even more objectionable than Justice Cooley imagined. Not only is the Legislature sitting as a court in review of this Court, but it is itself the party to which it seeks to grant relief.

The Restatement (Second) of Judgments indirectly supports the notion that finality for separation-of-powers purposes exists upon a final decision rather than a formal judgment in its discussion on the effects of a final judgment and collateral estoppel: "The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." Restatement of Judgments, 2d, § 13.

The obvious reason for this is that once an issue, as opposed to a claim, is finally decided in the first case, the same parties in the second case (one involving similar issues but a different claim) have no reason to wait for the very end of the first case to apply one of its final issue findings to the same issue in the second case. According to the Restatement comments,

> "[T]o hold invariably that [issue] carryover is not to be permitted until a final judgment in the strict sense has been reached in the first action can involve hardship—either

> needless duplication of effort and expense in the second action to decide the same issue, or, alternatively, postponement of decision of the issue in the second action for a possibly lengthy period of time until the first action has gone to a complete finish. In particular circumstances the wisest course is to regard the prior decision of the issue as final for the purpose of issue preclusion without awaiting the end judgment."

Restatement of Judgments, 2d, comment *g*. This principle should also apply to determine finality of an issue for separation-of-powers purposes. If a second court cannot change an issue for a litigating party once the first court has finally decided that issue, the legislature also should be precluded from changing that decided issue for a litigant's case.

Further, the fact that a case might involve a post-judgment motion seeking to overturn that judgment should not affect an issue's finality for separation-of-powers purposes. Under the Restatement,

> "A judgment otherwise final for purposes of the law of res judicata is not deprived of such finality by the fact that time still permits commencement of proceedings in the trial court to set aside the judgment and grant a new trial or the like; nor does the fact that a party has made such a motion render the judgment non-final. This is the case even when a statute or rule of court provides that the judgment cannot be executed upon or otherwise enforced during the period allowed for making such a motion and the further period until the motion if made is decided."

Restatement of Judgments, 2d, § 13, comment *f*. Again, if the existence of post-judgment motions do not change the finality of a decision for purposes of a second court re-

litigating the matter, the same principle should apply to legislatures for separation-of-powers purposes.

C. The Court's *IBM* Decision Applies to Taxpayers Whose Cases Were Held in Abeyance Pending the Resolution of *IBM*.

The Department argues it may deprive other taxpayers of the benefit of this Court's decision in *IBM* because other taxpayers' cases were stayed pending the resolution of that case. However, the other taxpayers' cases were held in abeyance for the sole purpose of preserving judicial resources, and this Court's decision in *IBM* constitutes mandatory authority for these taxpayers.

That is because the other taxpayers' cases were stayed for the obvious reason that they could be decided based on the legal question raised in *IBM*. For example, in *AK Steel Holding Corp v Michigan Department of Treasury*, the parties stipulated and agreed that:

> "[The] action be held in abeyance pending the resolution by the Michigan Supreme Court of *International Business Machines Corp. v. Michigan Department of Treasury*, Supreme Court Docket No. 146440. The parties believe abeyance will facilitate an efficient resolution and focusing of the issues presented in this case. Both parties agree to advise the Court on the status of this matter within 60 days of the final resolution of *IBM v. Treasury*.

AK Steel Holding Corp v Department of Treasury, Stipulation and Order Holding Case in Abeyance, issued July 24, 2013 (Court of Claims Docket No. 13-000074-MT) . Similarly, in *Big Lot Stores, Inc v Michigan Department of Treasury*, the Court of Claims ordered that the matter be held in abeyance on its own motion for the same reasons:

> "IT IS HEREBY ORDERED that the instant case is placed in abeyance pending the final resolution and exhaustion of all appeals of *Int'l Business Machines Corp. v. Michigan Dep't of Treasury* (Michigan Supreme Court Docket No. 146440)."

Big Lot Stores, Inc v Department of Treasury, Sua Sponte Order Holding Case in Abeyance, issued February 7, 2014 (Michigan Court of Claims Docket No. 13-000133-MT)

The meaning of these orders is obvious: the trial courts waited to see how this Court would decide the availability of the Compact's election because they would be required to rule the same way. As this Court is surely well aware, the doctrine of *stare decisis* makes this virtually inevitable:

> "Under the doctrine of stare decisis, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365, 550 NW2d 215 (1996)) (citations and quotation marks omitted). Indeed, in order to "'avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them....'" *Petersen v Magna Corp*, 484 Mich 300, 314-315, 773 NW2d 564 (2009)) (opinion by KELLY, C.J.), quoting The Federalist No 78,, p 471 (Alexander Hamilton) (Clinton Rossiter ed, 1961). As the United States Supreme Court has stated, the doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v Tennessee*, 501 US 808, 827, 111 S Ct 2597, 115 L Ed2d 720 (1991).

McCormick v Carrier, 487 Mich 180, 209-210; 795 NW2d 517 (2010). Therefore, when this Court ruled in favor of *IBM*, it effectively resolved that legal issue for other taxpayers as well.

Holding otherwise would wreak havoc on the Michigan court system. IBM was one of numerous taxpayers that elected to apportion their income using the Compact's three-factor apportionment formula on originally filed or amended tax returns. IBM's case was not unique; it was simply the first to proceed through the Michigan courts. No taxpayer would agree to stay their case pending the resolution of another if this Court holds that similarly situated taxpayers can be treated differently based on their place in line. Indeed, such a holding would not only create a perverse incentive for taxpayers to expedite their cases and waste judicial resources, but also would result in a plethora of estoppel claims.

As the U.S. Supreme Court ruled in *Plout*, "[h]aving achieved finality, ... a judicial decision becomes the last word of the judicial department with regard to a particular case of controversy." *Plout*, 514 US at 227. This Court's opinion in *IBM* answered the question of whether the Compact's election provision was available between 2008 and 2010. This Court should not allow the Legislature to compel a different result merely because taxpayers held their cases in abeyance and did not formally reach otherwise-inevitable judgments.

Stepping back from the procedural intricacies of these cases, what the Legislature has done in light of the *IBM* decision is breathtaking. The Legislature decided it did not want the State of Michigan to abide by this Court's decision in *IBM* and passed a law saying that the State did not have to. Upholding the 2014 Legislation will do tremendous damage to separation of powers principles. The pre-Constitutional era practice of legislatures overturning final judicial decisions will once again permeate the nation's moral threshold of acceptability, and the finality of independent judicial decisions in favor of otherwise unpopular litigants will be a thing of the past. This Court should not bring about that demise. It should find that the 2014 Legislation, as applied to all litigants, violates the basic principle that legislatures make the law and courts interpret it.

CONCLUSION

For the foregoing reasons, TEI urges this Court to GRANT Gillette, and the other similar situated taxpayers in the companion docket cases, leave to appeal the decision of the Court of Appeals so that this Court may properly consider and ultimately REVERSE the Court of Appeals' decision in *Gillette*.

Respectfully submitted,

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.

By: _____

Paul V. McCord (P61138)
Graham K. Crabtree (P31590)
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
(517) 377-0861
pmccord@fraserlawfirm.com

Michigan Counsel for Amicus Curiae Tax Executives Institute, Inc.

Dated: January 5, 2016

TAX EXECUTIVES INSTITUTE, INC.

By: _____

A. Pilar Mata*
John L. Schoenecker*
**pro hac vice* pending
1200 G Street, N.W., Suite 300
Washington, DC 20005-3814
(202) 464-8346
pmata@tei.org

Counsel for Amicus Curiae Tax Executives Institute, Inc.

Dated: January 5, 2016