**No. 16-____**

IN THE

# Supreme Court of the United States

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP,
*Petitioner*,

v.

MICHIGAN DEPARTMENT OF TREASURY,
*Respondent*.

**On Petition For A Writ Of Certiorari To The Michigan Court of Appeals**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a state statute that retroactively imposes over $1 billion in increased tax liability on out-of-state businesses for the benefit of in-state businesses violates the dormant Commerce Clause.

2. Whether a state tax law that has a six-and-one-half-year period of retroactivity and targets out-of-state businesses for increased tax liability of over $1 billion violates the Due Process Clause.

3. Whether a state's retroactive repeal of a central provision of the decades-old Multistate Tax Compact violates the Contract Clause by imposing over $1 billion in retroactive tax liability on out-of-state taxpayers.

## RULE 14.1(b) STATEMENT

Petitioner, Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") was an appellant in the Michigan Court of Appeals. The Michigan Court of Appeals consolidated Skadden's appeal (No. 326135) with the appeals of sixteen other parties: Harley Davidson Motor Company, Inc.; Dun & Bradstreet, Inc.; L'Oreal, USA, Inc. & Subsidiaries; Easton Telecom Services, LLC; Anheuser Busch, Inc.; Intuitive Surgical, Inc.; T-Mobile USA, Inc. & Subsidiaries; General Aluminum Mfg. Company & Affiliates; Conair Corporation & Subsidiaries; Johnson Matthey, Inc.; McNeil-PPC, Inc.; Fluor Corporation & Subsidiaries; DIRECTV; Solo Cup Operating Corporation; ConAgra Foods, Inc. & Subsidiaries; and Boise, Inc. None of these sixteen other parties is a petitioner here, although some or all might file separate petitions for a writ of certiorari.

Respondent, the Michigan Department of Treasury, was the sole respondent in the Michigan Court of Appeals.

## RULE 29.6 STATEMENT

Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") is a limited liability partnership. Skadden has no parent corporation, and no publicly held company owns 10 percent or more of Skadden's stock.

## TABLE OF CONTENTS

QUESTIONS PRESENTED....................................i

RULE 14.1(b) STATEMENT...................................ii

RULE 29.6 STATEMENT.......................................ii

PETITION FOR A WRIT OF CERTIORARI........... 1

OPINIONS BELOW ................................................ 1

STATEMENT OF JURISDICTION......................... 1

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED .............................. 1

STATEMENT OF THE CASE ................................. 2

A. The Multistate Tax Compact ................... 4

B. The Evolution of Michigan's Tax Laws .......................................................... 6

1. Michigan's Taxes And The Compact ............................................ 6

2. The IBM Litigation.............................. 9

3. Michigan's Retroactive Legislation To Counter The Michigan Supreme Court's Decision........................................... 11

C. Proceedings Below ................................. 12

REASONS FOR GRANTING THE WRIT ............ 15

I. This Court Should Hold That The Commerce Clause Prohibits A State From Targeting Out-Of-State Taxpayers For The Imposition Of Substantial Retroactive Tax Liability ............................... 18

II. This Court Should Clarify The Due Process Limitations On The Retroactive Imposition Of Tax Liability............................ 26

III. The Court Should Review The Court Of Appeals' Flawed Interpretation Of The Contract Clause. ............................................ 30

IV. This Petition Presents An Ideal Vehicle To Resolve The Issues Presented. .................. 35

CONCLUSION ...................................................... 37

APPENDICES ....................................................... 1a

Appendix A, Michigan Court of Appeals Opinion .............................................. 1a

Appendix B, Michigan Supreme Court Order ..... 24a

Appendix C, Michigan Court of Claims Order .... 31a

Appendix D, Michigan Court of Claims Reconsideration Order .................... 33a

Appendix E, Michigan Court of Appeals *Gillette* Opinion ............................... 39a

Appendix F, Michigan Court of Claims *Ingram Micro* Opinion................................ 114a

Appendix G, Michigan Court of Claims *Yaskawa* Opinion .......................... 153a

Appendix H, Complaint...................................... 193a

## TABLE OF AUTHORITIES

### CASES

*Amarada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury*,
490 U.S. 66 (1989) ........................................ 19

*ASARCO Inc. v. Idaho State Tax Comm'n*,
458 U.S. 307 (1982) ........................................ 32

*Bacchus Imports, Ltd. v. Dias*,
468 U.S. 263 (1984) ............................ 19, 20, 21

*Boston Stock Exchange v. State Tax Comm'n*,
429 U.S. 318 (1977) ...................... 19, 20, 21, 25

*C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*,
511 U.S. 383 (1994) ........................................ 22

*Comptroller of Treasury of Md. v. Wynne*,
135 S. Ct. 1787 (2015) ............................... 19, 22

*Container Corp. of Am. v. Franchise Tax Bd.*,
463 U.S. 159 (1983) ........................................ 25

*Cooper v. United States*,
280 U.S. 409 (1930) ........................................ 27

*Dean Milk Co. v. City of Madison, Wis.*,
340 U.S. 349 (1951) ........................................ 22

*Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*,
459 U.S. 400 (1983) .................................. 31, 34

*Exxon Corp. v. Governor of Md.*,
437 U.S. 117 (1978)........................................24

*Gen. Motors Corp. v. Romein*,
503 U.S. 181 (1992)..................................31, 32

*Granholm v. Heald*,
544 U.S. 460 (2005)............................18, 19, 26

*Green v. Biddle*,
21 U.S. 1 (1823)..............................................32

*Healy v. Beer Inst., Inc.*,
491 U.S. 324 (1989)........................................25

*Hertz Corp. v. Friend*,
559 U.S. 77 (2010)..........................................25

*Hunt v. Washington State Apple Advertising Comm'n*,
432 U.S. 333 (1977)............................20, 21, 24

*In re Estate of Hambleton*,
335 P.3d 398 (Wash. 2014) ............................30

*Int'l Bus. Machines Corp. v. Dep't of Treasury*,
852 N.W.2d 865 (Mich. 2014) ........... 3, 8, 10, 29

*James Square Associates LP v. Mullen*,
993 N.E.2d 374 (N.Y. 2013)......................29, 30

*Keystone Bituminous Coal Ass'n v. DeBenedictis*,
480 U.S. 470 (1987)........................................33

*Landgraf v. USI Film Prods.*,
511 U.S. 244 (1994)........................................26

*McCreary Cnty., Ky. v. ACLU*,
545 U.S. 844 (2005)........................................24

*Miller v. Johnson Controls, Inc.*,
296 S.W.3d 392 (Ky. 2009) ............................30

*Milliken v. United States*,
283 U.S. 15 (1931)..........................................27

*Moorman Mfg. Co. v. Bair*,
437 U.S. 267 (1978)..................................22, 23

*New Energy Co. of Ind. v. Limbach*,
486 U.S. 269 (1988)..................................18, 24

*Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,
472 U.S. 159 (1985)..................................34, 35

*Pension Ben. Guar. Corp. v. R.A. Gray & Co.*,
487 U.S. 717 (1984)........................................27

*Rivers v. State*,
490 S.E.2d 261 (S.C. 1997) ............................30

*State ex rel. Dyer v. Sims*,
341 U.S. 22 (1951)..........................................32

*Tarrant Regional Water Dist. v. Herrmann*,
133 S. Ct. 2120 (2013)....................................32

*U.S. Dep't of Treasury v. Fabe*,
508 U.S. 491 (1993)........................................24

*U.S. Steel Corp. v. Multistate Tax Comm'n*,
434 U.S. 452 (1978)....................................4, 33

*U.S. Trust Co. of N.Y. v. New Jersey*,
431 U.S. 1 (1977) .................................... 33, 34

*United States v. Carlton*,
512 U.S. 26 (1994) ........................ 26, 27, 28, 30

*United States v. Darusmont*,
449 U.S. 292 (1981) ........................................ 27

*United States v. Hudson*,
299 U.S. 498 (1937) ........................................ 27

*Welch v. Henry*,
305 U.S. 134 (1938) ........................................ 27

**STATUTES**

2014 PA 282 ...................................................... *passim*

Mich. Comp. Laws § 205.581 ............................ *passim*

Mich. Comp. Laws § 208.1301 .................................... 8

Mich. Comp. Laws § 208.45 ........................................ 7

**OTHER AUTHORITIES**

Gray, *Tax Fix Bill Gets Final Approval, Awaits Gov. Snyder's Signature*, Detroit Free Press (Sept. 10, 2014) .................................... 11

Livengood, *Tax Case May Cost Michigan $1 Billion,* Detroit News (Aug. 9, 2014) ............. 12

*Retroactive IBM Tax Fix Passes House,* Gongwer Michigan Report, Vol 53, Rep 177 (Sept. 9, 2014) ................................... 12, 21

Senate Fiscal Agency Bill Analysis of SB 156
As Enrolled (Sept. 10, 2014) .......................... 21

**CONSTITUTIONS**

U.S. Const. amend. XIV .......................................... 1

U.S. Const. art. I, § 8 .............................................. 1

U.S. Const. art. I, § 10 ...................................... 2, 31

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") respectfully petitions for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

## OPINIONS BELOW

The opinion of the Michigan Court of Appeals under review (App. 1a–23a) is unreported but is available at 2016 WL 1040147. The Michigan Supreme Court's denial of application for leave to appeal (App. 24a–30a) is reported at 884 N.W.2d 292. The opinions of the Michigan Court of Claims on summary disposition (App. 31a–32a) and reconsideration (App. 33a–38a) are unreported.

## STATEMENT OF JURISDICTION

The Michigan Court of Appeals issued its judgment on March 15, 2016. The Michigan Supreme Court denied Skadden's application for leave to appeal on September 6, 2016. This Court has jurisdiction under 28 U.S.C. § 1257.

## CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Commerce Clause provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

The Contract Clause provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1.

The Multistate Tax Compact provides in relevant part: "Any taxpayer subject to income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state . . . may elect to apportion and allocate his income in the manner provided by the laws of such state . . . without reference to this compact, or may elect to apportion and allocate in accordance with article IV." Mich. Comp. Laws § 205.581, art. III(1). The Compact further provides in Article IV: "All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3." *Id.*, art. IV(9).

Michigan's 2014 Public Act 282 provides in relevant part: "[The Multistate Tax 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 [2007 PA 36] and to clarify that the election provision included within section 1 of [the Compact] is not available under the income tax act of 1967." 2014 PA 282, Enacting § 1.

## STATEMENT OF THE CASE

Skadden is a global law firm with no offices in Michigan. It nonetheless pays Michigan state taxes on income from legal services performed for Michigan clients. Skadden calculated its 2008, 2009, and 2010

Michigan taxes using a three-factor apportionment methodology laid out in the Multistate Tax Compact ("Compact"). The parties agree that the three-factor methodology was permitted under Michigan law with respect to 2008, 2009, and 2010 at the time that Skadden filed its tax returns.

The Michigan Department of Treasury ("Department") delayed action on Skadden's returns—which requested an aggregate $1.66 million refund of overpaid taxes for those years, App. 194a–195a—while it fought an unsuccessful court battle arguing that the Michigan Legislature had repealed the Compact's three-factor methodology for tax years after 2007. In July 2014, the Michigan Supreme Court finally rejected that argument, holding that the three-factor methodology was available under Michigan law through at least 2010. *See Int'l Bus. Machines Corp. v. Dep't of Treasury*, 852 N.W.2d 865, 876 (Mich. 2014) ("*IBM*"). Under that holding, Skadden's refunds should have been forthcoming, but the Michigan Legislature—unhappy with the Michigan Supreme Court's decision—hastily enacted Public Act 282 ("PA 282"), which retroactively eliminated the three-factor apportionment methodology effective 2008, creating a nearly seven-year period of retroactivity. Two weeks later, the Department denied Skadden's refund requests.

The Legislature's fundamental—and retroactive—upheaval of the State's corporate taxation landscape overwhelmingly affected and harmed out-of-state businesses, who had been permitted to employ the three-factor apportionment standard and had relied for over forty years on that bedrock component of the Compact when planning their operations in Michigan.

**A. The Multistate Tax Compact**

The Compact aims to avoid duplicative taxation of multistate businesses' incomes by establishing uniform standards for state-level taxation. In the years leading up to 1966, when drafting of the Compact began, multistate businesses were subject to a patchwork of conflicting state taxation systems that had become inefficient and burdensome to both states and taxpayers. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 456 (1978). To illustrate the problem, consider a clothing business that manufactures all of its clothes in State A and sells all of its clothes in State B. State A imposes a tax on the business's income based on the percentage of the business's property in State A (which is to say, 100%), while State B imposes a tax based on the business's percentage of sales in State B (again, 100%). In such a scenario, not only does the business have to calculate its taxes twice under two different systems, but it is also taxed twice on 100% of its income. The Compact addressed these issues by providing a uniform system of taxation that applied across all member states, giving multistate businesses a predictable, equitable legal backdrop against which to plan their business activities.

Article III of the Compact provides that "[a]ny taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party State . . . may elect to apportion and allocate his income in the manner provided by the laws of such State[] . . . without reference to this compact, or may elect to apportion and allocate in accordance with Article IV" of the Compact. Mich. Comp. Laws § 205.581, Art,

III(1).[1] Thus taxpayers subject to income tax in states that are party to the Compact are free to use either the apportionment method described in Article IV or, if available under state law, an apportionment method defined outside the Compact.

Article IV of the Compact provides a method for apportioning income across states that takes into account three "factors": property, payroll, and sales. To calculate the income attributable to a particular state under the Compact, a taxpayer multiplies its worldwide business income by a fraction, the numerator of which is the sum of the taxpayer's property, payroll, and sales factors with respect to the particular state, and the denominator of which is 3. *Id.*, Art, IV(9). To calculate each factor, the taxpayer divides (a) its property, payroll, or sales attributable to the particular state by (b) its global property, payroll, or sales, respectively. *Id.*, Art, IV(10)–(17).

As an example, consider two states, State C and State D, that have both joined the Compact. A taxpayer that makes half of its sales in State C and half in State D, but has all of its property and payroll in State D, would have the following property, payroll, and sales factors with respect to State C:

**Property Factor:** The taxpayer has no property in State C, so its State C property factor is zero.

**Payroll Factor:** The taxpayer has no payroll in State C, so its State C payroll factor is zero.

**Sales Factor:** The taxpayer makes half of its sales in State C, so its State C sales factor is 50%.

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[1] As discussed below, Michigan enacted the Compact in 1970 and did not alter it in any way until 2011. All citations in the Petition refer to the text as enacted.

The sum of the taxpayer's State C property, payroll, and sales factors is 50%. Dividing that number by 3, the Compact provides that 16.67% of the taxpayer's global income is attributable to State C. The taxpayer's State D property, payroll, and sales factors, meanwhile, are 100%, 100%, and 50%, respectively. Dividing the sum of those factors by 3, the Compact provides that 83.33% of the taxpayer's global income is attributable to State D. As this example illustrates, a taxpayer apportioning its tax among states using the Compact will not be taxed on more than 100% of its global income at the state level.

Article X of the Compact provides that the Compact "shall enter into force when enacted into law by any seven states," an event that occurred in 1967. *Id.*, Art, X(1). It also provides that "[a]ny party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal." *Id.*, Art, X(2). Thus the Compact conditions its legal effect on reciprocal agreement to its terms by at least seven states, and provides that it may only be repealed (1) in full, and (2) prospectively.

## B. The Evolution of Michigan's Tax Laws

### 1. Michigan's Taxes And The Compact

Michigan formally joined the Compact in 1970, when the Michigan Legislature enacted the Compact as Mich. Comp. Laws § 205.581 *et seq*. From 1970 until at least 2011, the three-factor apportionment methodology was part of Michigan law.

During that time, Michigan cycled through a number of approaches to taxing business activities, which are relevant to setting the stage for the constitutional violations in this case:

- When the Compact was enacted, businesses operating in Michigan were taxed on their income under rules set out in the Income Tax Act of 1967 ("ITA").
- In 1976, Michigan moved to a value-added approach to business taxation set out in the Single Business Tax Act of 1976 ("SBTA"), which expressly repealed conflicting portions of the ITA and did not mention the Compact.
- In 2007 (effective January 1, 2008), Michigan moved back to an income-based approach to business taxation with the Business Tax Act ("BTA"), which expressly repealed the SBTA and did not mention the Compact.

Enacted in 1976, the SBTA contained a three-factor apportionment methodology that closely mirrored the three-factor methodology provided under Michigan law by the Compact. Mich. Comp. Laws § 208.45. Nonetheless, as a legal matter, the SBTA's three-factor methodology was enacted separately from and without reference to the Compact.

Enacted in 2007, the BTA expressly repealed the SBTA. In doing so, it replaced the SBTA's value-added approach to business taxation with an income tax. *See IBM*, 853 N.W.2d at 878–80. It also replaced the SBTA's three-factor apportionment

methodology with a single-factor apportionment methodology based strictly on sales. *See* Mich. Comp. Laws § 208.1301(1). It made no mention of the Compact or the Compact's three-factor apportionment methodology.

Thus, the BTA made two changes that heightened the importance of the Compact to out-of-state businesses operating in Michigan: (1) it imposed an income tax, which is a precondition to invoking Article III of the Compact; and (2) it provided an apportionment methodology that differed significantly from the methodology available under the Compact. As a result, following enactment of the BTA, Article III of the Compact gave taxpayers a meaningful choice between the Compact's three-factor apportionment methodology and the BTA's sales-based approach.

Facing this choice, out-of-state businesses operating in Michigan, including Skadden, favored the three-factor apportionment method over the purely sales-based method. Such businesses typically had very little if any property or payroll in Michigan, but were nonetheless subject to tax because of sales or services provided to Michigan residents. Under the three-factor apportionment method, even a substantial sales factor could be averaged with low property and payroll factors to produce an income allocation that was lower than the allocation provided by using the sales factor alone. The three-factor apportionment method had the added benefit of being available in all states that had joined in the Compact, simplifying and unifying multistate businesses' state tax computation efforts and protecting against double taxation in such states. Businesses operating solely in Michigan, meanwhile, were indifferent between

the two choices: where 100% of property, payroll, and sales are located in Michigan, 100% of business income is allocable to Michigan regardless whether a company uses the three-factor or the sales-based apportionment methods. Thus the three-factor apportionment standard operated to the nearly exclusive benefit of out-of-state businesses operating in Michigan.

### 2. The IBM Litigation

One such out-of-state taxpayer was IBM, which, in December 2009, filed a Michigan tax return for its 2008 tax year electing to use the Compact's three-factor apportionment methodology in calculating its Michigan taxes. The Department, however, concluded that the BTA had implicitly repealed the Compact's three-factor methodology, and calculated IBM's income using the BTA's sales-based approach. IBM challenged the Department's determination in a complaint filed with the Michigan Court of Claims.

In May 2011, while IBM's case was still working its way through the Michigan court system, the Michigan Legislature enacted Public Act 40 ("PA 40"), which explicitly repealed the three-factor apportionment method available under the Compact, effective January 1, 2011. (By the terms of its effective date, PA 40 thus had no impact on the Compact's validity in 2008, 2009, or 2010.) PA 40 was the first explicit modification of the Compact's apportionment methodology under Michigan law since the Compact was enacted in 1970. As a new law eliminating the Compact's three-factor apportionment methodology starting in 2011, PA 40 critically undermined the Department's argument that the BTA had repealed

the three-factor methodology starting in 2008 by enacting the Legislature's view that the three-factor methodology should be unavailable only starting in 2011.

Three years later, in July 2014, the Michigan Supreme Court finally brought an end to IBM's dispute with the Department by confirming that Michigan law permitted out-of-state taxpayers to use the Compact's three-factor apportionment methodology before 2011. *See IBM*, 853 N.W.2d at 876, 880–81. The court rejected the Department's argument that the BTA had removed the three-factor methodology from Michigan law, noting that, "by only repealing the Compact's election provision starting January 1, 2011 [with PA 40], the Legislature created a window in which it did not expressly preclude use of the Compact's election provision for BTA taxpayers." *Id.* at 876. Therefore, out-of-state taxpayers like Skadden were permitted under Michigan law to use the Compact's three-factor methodology until 2011.

The Michigan Supreme Court's *IBM* decision came nearly five years after IBM filed its 2008 tax return, and more than three years after the Legislature acknowledged, through PA 40, that both the Compact's three-factor apportionment methodology and the BTA's sales-based methodology were available under Michigan law following enactment of the BTA. Thus not only was Michigan on notice of the issue raised by IBM's (and Skadden's) returns long before the *IBM* decision was issued, it had implicitly endorsed IBM's (and, by extension, Skadden's) position in 2011 by enacting PA 40.

### 3. Michigan's Retroactive Legislation To Counter The Michigan Supreme Court's Decision

The Legislature promptly tried to reverse the Michigan Supreme Court's decision. Less than two months after the *IBM* decision, the Legislature passed, and Michigan's Governor signed, PA 282, which retroactively repealed the Compact's three-factor methodology effective as of 2008. Describing the bill that would become PA 282, Michigan State Senator Mark Janson explained, "We basically are trying to stop and correct a corporate tax loophole that needed to be fixed with the Supreme Court ruling" in *IBM*.[2] The bill was enacted hastily: only two days passed between proposal of the language eliminating the Compact's three-factor methodology, on September 9, 2014, and the Governor's signature, on September 11, 2014.

The Legislature's objective in enacting PA 282 was to raise approximately $1.1 billion by targeting out-of-state businesses for retroactive tax liability, thereby benefiting in-state businesses as a result. Indeed, support for PA 282 was driven at least in part by the claimed need to eliminate the benefit that the three-factor methodology conferred on out-of-state taxpayers as compared with the sales-based approach. Jase Bolger, Speaker of Michigan's House of Representatives, publicly argued that the decision would allow out-of-state businesses to "reduce their [tax] bill based on having fewer employees in our state," giving such businesses "a tax advantage over

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[2] Gray, *Tax Fix Bill Gets Final Approval, Awaits Gov. Snyder's Signature*, Detroit Free Press (Sept. 10, 2014).

our local job providers."[3] State Representative Joe Haverman argued that the decision was wrong because "[n]o legislature, no matter who the administration was or who was here, ever would put together a piece of tax legislation that would benefit out-of-state companies versus in-state companies."[4]

Support for the bill also was driven by the potential for retroactive legislation to, in effect, raise nearly $1.1 billion in tax revenue by authorizing the State to withhold refunds to which taxpayers had been entitled under then-current law. Immediately following the *IBM* decision, the Department filed a motion to stay the Supreme Court's ruling, alleging that the decision would permit $1.1 billion in tax refunds that would not have been available had the Department's arguments prevailed. Livengood, n.3, *supra*. Representative Haverman picked up on that number in his public comments, noting, "[w]e were looking at a $1 billion hole in the budget, which is about 10 percent of the General Fund, so we had to deal with it." *Id.*

### C. Proceedings Below

Skadden timely filed amended tax returns for 2008–2010 calculating its Michigan tax liability using the Compact's three-factor apportionment methodology.[5] App. 194a–195a. These returns re-

[3] Livengood, *Tax Case May Cost Michigan $1 Billion,* Detroit News (Aug. 9, 2014).

[4] *Retroactive IBM Tax Fix Passes House,* Gongwer Michigan Report, Vol 53, Rep 177 (Sept. 9, 2014).

[5] Skadden initially filed its 2008, 2009, and 2010 tax returns on or before September 15th of 2009, 2010, and 2011, respectively. Skadden's returns as originally filed did not em-

quested an aggregate total of $1,660,998 in refunds for overpaid taxes. App. 194a–195a. In February 2014, the Department separately denied each of Skadden's returns, stating in each case that Skadden's "tax base must be apportioned based on the formula of sales in Michigan over sales everywhere," a position that was rejected in *IBM*. App. 195a–196a. Skadden timely requested an informal conference to discuss the Department's denials of Skadden's returns. App. 196a. No conference ever took place, but soon after Skadden's request, the Department notified Skadden that it had placed Skadden's account "in abeyance pending the outcome" of the IBM litigation. App. 196a–197a.

The Michigan Supreme Court issued its opinion in *IBM* on July 14, 2014. After waiting two months for the Department to take action on its returns in light of *IBM*, on September 10, 2014, one day before PA 282 became law, Skadden contacted the Department again to request the refunds calculated in its 2008–2010 tax returns. App. 197a. On September 25, 2014, two weeks after the enactment of PA 282, the Department formally denied Skadden's claims for refund. App. 198a.

On December 19, 2014, Skadden filed a complaint with the Michigan Court of Claims seeking a refund of the $1,660,998 in overpaid taxes for tax years 2008–2010 plus statutory interest, costs, and attorney fees. App. 207a. As is relevant here, Skadden

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ploy the Compact's three-factor apportionment methodology. On December 20, 2013, Skadden timely filed amended returns for each of the years at issue employing the three-factor methodology. Although raised below, Skadden's entitlement to refunds for its 2011 taxes is not at issue here.

alleged that PA 282 violated the Commerce Clause, App. 206a; the Due Process Clause, App. 205a–206a; and the Contract Clause, App. 206a. On that same day, the Court of Claims issued its decisions in *Ingram Micro, Inc. v. Department of Treasury* (App. 114a–152a) and *Yaskawa America, Inc. v. Department of Treasury* (App. 153a–192a), granting summary judgment to the Department and holding that PA 282 validly repealed the Compact starting in 2008. The Court of Claims concluded, in relevant part, that (1) PA 282 did not violate the Commerce Clause; (2) PA 282's nearly seven-year period of retroactivity did not violate the Due Process Clause; and (3) the Compact was not a binding contract for purposes of the Contract Clause. A week later, on December 26, 2014, the Court of Claims reached a similar conclusion in Skadden's case, incorporating by reference its opinions in *Ingram Micro* and *Yaskawa*. App. 31a–32a. The Court of Claims subsequently denied Skadden's motion for reconsideration in a February 4, 2015 order. App. 33a–38a.

Skadden timely appealed the Court of Claims' decision (including the court's rejection of Skadden's claims based on the Commerce Clause, Due Process Clause, and Contract Clause) to the Michigan Court of Appeals, where its case was consolidated with actions brought by a number of other similarly situated taxpayers. While the appeal was pending, the Court of Appeals issued a decision in *Gillette Commercial Operations North America & Subsidiaries v. Department of Treasury* (App. 40a–113a), which upheld PA 282 against challenges based on, among other things, the Contract Clause, Due Process Clause, and Commerce Clause. On March 15, 2016, the Court of

Appeals affirmed the Court of Claims' decision in Skadden's appeal in a brief opinion that incorporated *Gillette* by reference. *See* App. 10a–12a (rejecting arguments based on the Commerce Clause, Due Process Clause, and Contract Clause).

On April 26, 2016, Skadden and its co-appellants filed an application for leave to appeal with the Michigan Supreme Court. The Michigan Supreme Court denied Skadden's application on September 6, 2016. App. 24a–30a.

## REASONS FOR GRANTING THE WRIT

To fill a gap of $1.1 billion in its state budget, Michigan had many permissible options at its disposal. It could have reduced government expenditures by paring back spending in certain programs. It could have raised revenue through the prospective imposition of new or increased taxes. Or the State could have adopted a policy that blended both approaches. What the State was forbidden from doing—and what Michigan did here through enactment of PA 282—was to address the budgetary shortfall by extracting over $1 billion from out-of-state businesses through the imposition of a tax law with a six-and-one-half-year period of retroactivity, while leaving favored in-state businesses unaffected. The Court should grant review to consider three questions and make plain that the Constitution does not tolerate such retroactive measures born of naked economic protectionism.

***First***, the Court should decide whether PA 282 violates the dormant Commerce Clause by discriminating against out-of-state businesses for the resultant benefit of in-state businesses. As this

Court has explained time and again, the Commerce Clause bars states from enacting statutes that have the practical effect of discriminating against interstate commerce. Such is precisely the case here, where the Michigan Legislature trained its sights on out-of-state businesses to patch a $1.1 billion hole in the State budget. That the Legislature did so through a tax with an outsized retroactivity period of six-and-one-half years only sharpens the Commerce Clause violation and heightens the urgency for this Court to intervene. Were statutes like Michigan's allowed to stand, out-of-state businesses—who lack meaningful political representation in states outside their home base—could perpetually be on the losing end of states' fiscal decisions. And they would be helpless to adjust their conduct accordingly, given that a statute like PA 282 penalizes companies for business conducted in tax years long ago concluded in reliance on laws long ago enacted. Enactment of statutes like PA 282 among the states thus poses a very real risk of eroding the foundations of the Commerce Clause and jeopardizing the integrity of the nation's interstate markets.

***Second***, the Court should grant the Petition to clarify the appropriate bounds imposed by the Due Process Clause on retroactive tax laws. By adopting a period of retroactivity of six-and-one-half years—almost four years greater than that previously approved by this Court—and lacking a sufficient justification for doing so, PA 282 conflicts with this Court's precedent requiring that a tax statute apply only a limited period of retroactivity and be supported by a legitimate government purpose. The Court of Appeals' holding that PA 282 comports with due process, moreover, adds to a split of authority among

state courts regarding the Due Process Clause's constraints on a tax statute's retroactive application.

***Third***, review is necessary to reaffirm this Court's Contract Clause jurisprudence and enforce cornerstone Contract Clause principles. The Court of Appeals rejected the argument that PA 282 violated the Contract Clause by retroactively repealing the Compact's three-factor apportionment provision. In reaching this decision, however, the Court of Appeals failed faithfully to apply federal law to the preliminary question whether the Compact constitutes a contract for purposes of the Contract Clause. The Court of Appeals also neglected to grasp the degree to which Michigan's retroactive repeal of a crucial section of the Compact impaired the State's contractual obligations and lacked adequate justification.

The Court should grant this Petition to review all three questions because the issues are important and recurring. Each question implicates a bedrock principle underpinning the Constitution—that states are prohibited from enacting laws that imperil the nation's common market and penalize interstate commerce—while upsetting the long-standing presumption against retroactivity. In an age where state legislators across the country grapple each year with budgetary deficits and must pick winners and losers, the Court should step in to make sure that Michigan's example does not embolden its fellow states to single out out-of-state businesses to carry the burden wreaked by the states' flawed financial planning.

### I. This Court Should Hold That The Commerce Clause Prohibits A State From Targeting Out-Of-State Taxpayers For The Imposition Of Substantial Retroactive Tax Liability.

PA 282 is a classic violation of the dormant Commerce Clause. Michigan enacted PA 282 with the express purpose of extracting over $1 billion from out-of-state businesses while leaving the tax liabilities of favored in-state businesses untouched. And Michigan did so retroactively, violently upsetting the settled expectations of out-of-state businesses engaged in interstate commerce in the State. This Court's intervention is necessary to ensure that states may not solve budget shortfalls by sharply increasing the tax liability of politically vulnerable out-of-state businesses for tax years long ago concluded, thereby imperiling free commerce across interstate markets and defying the animating principles of the Commerce Clause.

1. As this Court has recognized, the Commerce Clause includes a "'negative' aspect," which "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).[6] Applying this core principle, the Court "[t]ime and again . . . has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm v. Heald*, 544 U.S. 460 (2005). This rule

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[6] Unless otherwise indicated, all citations within quotations are omitted.

flows from "[o]ne of the fundamental purposes of the [Commerce] Clause," which was to "'insure . . . against discriminating State legislation.'" *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984). The anti-discrimination principles embedded in the dormant Commerce Clause are "essential to the foundations of the Union" and "'reflect[] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid tendencies toward economic Balkanization" that had prevailed during the colonial era and under the Articles of Confederation. *Heald*, 544 U.S. at 472; *see also Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015) (noting that the dormant Commerce Clause "strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce").

The anti-discrimination principles underpinning the dormant Commerce Clause apply with full force in the taxation context. State tax laws that "favor local enterprises at the expense of out-of-state businesses" violate the Commerce Clause. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (explaining that such laws are unconstitutional because they "'would invite a multiplication of preferential trade areas destructive' of the free trade which the [Commerce] Clause protects"). To comply with the Commerce Clause, a state lax law must "'appl[y] to an activity with a substantial nexus with the taxing state,'" be "'fairly apportioned,'" "'not discriminate against interstate commerce,'" and be "'fairly related to the services provided by the State.'" *Amarada Hess Corp. v. Dir., Div. of Taxation, N.J.*

*Dep't of Treasury*, 490 U.S. 66, 72 (1989). As is relevant here, a state law fails the third prong of the governing test and violates the dormant Commerce Clause if it is "facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Id.* at 75.

This Court consistently has invalidated state laws—similar to PA 282—that have the practical effect of discriminating against out-of-state businesses. In *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), for instance, the Court struck down a North Carolina law that prohibited containers of apples shipped into or sold in the state from displaying a state grade (including a Washington state grade). The statute's discrimination against out-of-state apple businesses was "obvious" in that it "rais[ed] the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected." *Id.* at 351. These increased costs "result[ed] from the fact that North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute." *Id.* Likewise, the Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), invalidated a Hawaii liquor tax that included a "clearly discriminatory" exemption from the tax that "applie[d] only to locally produced beverages." *Id.* at 271; *see also, e.g.*, *Boston Stock Exchange*, 429 U.S. at 331 (holding that statute imposing greater transfer tax on securities transactions involving an out-of-state sale violated the Commerce Clause because the "obvious effect of the tax is to extend a financial advantage to sales on the

New York exchanges at the expense of the regional exchanges").

PA 282 cannot pass muster under this Court's Commerce Clause jurisprudence for similar reasons. It has the practical effect of discriminating overwhelmingly against out-of-state businesses. Indeed, the Michigan Senate candidly acknowledged that the aim of PA 282 was to recoup $1.1 billion in refunds owed to "certain taxpayers," i.e., out-of-state businesses, for tax liability that already had accrued. *See* Senate Fiscal Agency Bill Analysis of SB 156 As Enrolled (Sept. 10, 2014). Legislators made clear that PA 282 targeted out-of-state companies with the effect of benefitting in-state companies. *See* "Retroactive IBM Tax Fix," *supra* note 4.

As enacted, PA 282 has had the desired effect. Like the unconstitutional statute in *Hunt*, PA 282 "rais[es] the costs of doing business" in the Michigan market for out-of-state companies, while "leaving those of their [Michigan] counterparts unaffected," 432 U.S. at 351. As a practical matter, PA 282, by eliminating the option of apportioning taxes based on a three-factor standard, improperly "applies only" to out-of-state businesses—which face substantially increased tax liability under the single-factor standard and alone are forced to patch Michigan's budgetary hole. *See Bacchus Imports*, 468 U.S. at 271. Its "obvious effect" thus is to "extend a financial advantage" to Michigan businesses "at the expense of" out-of-state businesses. *See Boston Stock Exchange*, 429 U.S. at 331. And that PA 282 operates retroactively only makes the Commerce Clause violation even more insidious by forcing out-of-state businesses to bear the brunt of an in-state budget shortfall through

a $1.1 billion increase in tax liability for transactions long completed.

2. Review is needed here to address the Court of Appeals' obvious disregard of this Court's Commerce Clause precedent. For starters, the Court of Appeals improperly anchored its ruling in formalism when it concluded that PA 282 is not discriminatory because the "single-factor formula applies to *all* taxpayers, both Michigan and out-of-state companies." App. 96a. As this Court emphasized just last Term, "the fact that the tax might have 'the advantage of appearing nondiscriminatory does not save it from invalidation.'" *Wynne*, 135 S. Ct. at 1804–05. Where, as here, the effect of a statute is to burden out-of-state businesses, facial neutrality cannot salvage the statute. Such a statute "is no less discriminatory" just because in-state businesses "are also covered" by the terms of the statute. *See C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 391 (1994); *see also, e.g.*, *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 & n.4 (1951) (invalidating Madison, Wisconsin ordinance prohibiting the sale of milk as pasteurized unless it had been processed and bottled within five miles of Madison and deeming it "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce"). The Court of Appeals' facile determination to the contrary improperly elevates form over substance.

Nor is the Court of Appeals' reliance on this Court's decision in *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), availing. App. 95a–96a. In *Moorman*, the Court rejected the argument that Iowa's single-factor apportionment formula violated the Commerce Clause because it treated out-of-state

businesses less favorably than did Illinois' tax scheme. *Id.* at 277 n.12. The Court explained that "whatever disparity may have existed is not attributable to the Iowa statute." *Id.* "[The Iowa statute] treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa *and* Illinois statutes, and Iowa is not responsible for the latter." *Id.*

Unlike *Moorman*, Skadden's Commerce Clause argument is predicated solely on one state's tax statute (PA 282); Michigan, of course, is directly and solely "responsible" for the consequences that flow from that statute. The discrimination against out-of-state businesses embodied in PA 282 thus cannot be explained simply by pointing to the "'potential consequences of use of different formulas by' Michigan and other states." App. 96a. To the contrary, Michigan here changed the law with the express aim of imposing over $1 billion of tax liability on out-of-state businesses while leaving in-state businesses unaffected. And it did so retroactively, reaching back over six years to increase tax exposure and raising grave constitutional concerns not presented in *Moorman*. Skadden's claim here implicates only PA 282 and does not depend whatsoever on the application of another state's law.

The Court of Appeals also found that "PA 282 does not have a discriminatory purpose," App. 94a, but that conclusion is both incorrect and irrelevant. It is incorrect because there is substantial evidence that the Michigan Legislature adopted PA 282 for the express purpose of targeting out-of-state businesses for the imposition of $1.1 billion in retroactive tax liability, thereby benefitting in-state businesses by

comparison.[7] *See supra* pp. 11–12. The Commerce Clause flatly bars this kind of "economic protectionism." *See New Energy*, 486 U.S. at 273. And the Court of Appeals' conclusion is, in any event, beside the point because "the fact that no discrimination was intended is irrelevant where, as here, discriminatory effects result from the statutory scheme." *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 150 (1978); *see also, e.g.*, *Hunt*, 432 U.S. at 352–53 (striking down statute for having discriminatory effect and noting that Court "need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case").

3. This Court's intervention urgently is needed to ensure that states are foreclosed from targeting out-of-state businesses for the retroactive imposition of billions of dollars in increased tax liability for the simple aim of filling the states' coffers. The past decades have seen an "emergence of an interconnected and interdependent national economy," which, in turn, has "prompted a more expansive jurisprudential image of interstate commerce." *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499 (1993). And, in this interstate-market-driven economy, "[p]redictability is valuable to corporations making

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[7] The Court of Appeals overlooked this Court's precedent when it determined that "statements of individual legislators generally do not comprise proper evidence of legislative intent." App. 95a. This Court has explained that a court should consider "openly available data" to "infer[]" legislative "purpose," including, among other things, "detailed public comments" of an individual legislator. *McCreary Cnty., Ky. v. ACLU*, 545 U.S. 844, 862–63 (2005). Here, the evidence of the Michigan Legislature's intent comes from "readily discoverable fact" and should be considered by the reviewing court. *See id.* at 862.

business and investment decisions." *See Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). At the same time, the three-factor apportionment formula has come to be recognized as "something of a benchmark against which other apportionment formulas are judged." *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983). To promote the free exchange of goods and services across state lines—that which the Commerce Clause is designed to safeguard—out-of-state businesses must be confident that the taxation landscape will not markedly change in a way that disadvantages them and favors local businesses and applies retroactively, without warning and without a chance to alter their conduct.

Michigan's enactment of PA 282, if allowed to stand, raises the specter of recurring constitutional violations in the form of a race by the states to address budget shortfalls by disadvantaging out-of-state businesses. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) ("[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."). States following Michigan's lead could fill billion-dollar budget gaps simply by imposing increased tax liability on out-of-state businesses that stretches back into the previous decade. Such abject disadvantaging of out-of-state businesses and favoring of in-state businesses "'would invite a multiplication of preferential trade areas destructive' of the free trade which the [Commerce] Clause protects." *Boston Stock Exchange*, 429 U.S. at 329. Review is needed to guarantee that this

impermissible road to "economic Balkanization" stops now. *See Heald*, 544 U.S. at 472.

## II. This Court Should Clarify The Due Process Limitations On The Retroactive Imposition Of Tax Liability.

PA 282 imposes increased retroactive tax liability for a period stretching back six-and-one-half years. It far outstrips any duration of retroactive tax liability that this Court has found compatible with due process. It also sharpens a split among state courts regarding the extent to which the imposition of retroactive tax liability is consistent with due process. The Court should grant review in this case to resolve that split and to clarify when a retroactive tax law violates due process.

1. As this Court has stressed, "retroactive statutes raise particular concerns" because "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). For this reason, a "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265.

In the taxation context in particular, the Court has held that tax statutes with a retroactive effect satisfy due process only when "supported by a legitimate legislative purpose" that is "furthered by rational means." *United States v. Carlton*, 512 U.S. 26, 30–31 (1994). The Court has identified a "'customary congressional practice'" of giving tax statutes retroactive effect, but emphasized that the bounds of

retroactivity "generally ha[ve] been 'confined to short and limited periods required by the practicalities of producing national legislation.'" *Id.* at 33. In keeping with this common-sense guidepost, "[i]n every case in which [the Court has] upheld a retroactive federal tax statute against due process challenge, . . . the law applied retroactively for only a relatively short period prior to enactment." *Id.* at 38 (O'Connor, J., concurring); *see also, e.g.*, *id.* at 32–33 (upholding tax law with a roughly one-year period of retroactivity); *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 487 U.S. 717, 719–20 (1984) (five-month period); *United States v. Darusmont*, 449 U.S. 292, 295 (1981) (roughly ten-month period); *Welch v. Henry*, 305 U.S. 134, 151 (1938) (roughly two-year period); *United States v. Hudson*, 299 U.S. 498, 501 (1937) (35-day period); *Milliken v. United States*, 283 U.S. 15, 18 (1931) (roughly two-and-one-half-year period); *Cooper v. United States*, 280 U.S. 409, 410 (1930) (one-year period). But, as Justice O'Connor recognized, a tax law with a period of retroactivity exceeding that found in the Court's precedent—i.e., "longer than the year preceding the legislative session in which the law was enacted"—"would raise . . . serious constitutional questions." *Carlton*, 512 U.S. at 38 (O'Connor, J., concurring).

In *Carlton*, the Court outlined the governing test for determining whether a retroactive tax statute comports with due process. There, the Court considered an amendment to a previously enacted tax statute that operated retroactively for a little over one year. *Id.* at 29. In upholding the amendment as "rationally related to a legitimate legislative purpose," the Court highlighted two factors. *Id.* at 35. First, the Court concluded that "Congress' purpose in

enacting the amendment was neither illegitimate nor arbitrary," emphasizing that the legislative history of the previously enacted statute confirmed that the amendment was necessary to "correct what [Congress] reasonably viewed as a mistake in the original . . . provision that would have created a significant and unanticipated revenue loss." *Id.* at 32. Second, the Court determined that "Congress acted promptly and established only a modest period of retroactivity." *Id.*

2. In rejecting Skadden's argument that PA 282 violates due process because it has a six-and-one-half-year period of retroactivity and lacks a rational relationship to a legitimate legislative purpose, the Court of Appeals fundamentally misinterpreted *Carlton*, with far-reaching implications. The Court should grant review to elaborate the *Carlton* standard and make plain that the due process constraints on retroactive tax laws are not toothless.

As a threshold matter, the Court of Appeals fundamentally misapprehended this Court's holding in *Carlton* when it rejected Skadden's argument on the basis that Skadden "did not have a vested interest protected by the due process clause in the continuation of the Compact's apportionment provision." App. 82a. To be sure, this Court in *Carlton* rejected the argument that the retroactive amendment in that case violated due process solely because the taxpayer had relied on the pre-amendment version of the statute. 512 U.S. at 33 (noting that taxpayer reliance "alone is insufficient to establish a constitutional violation"). But where, as here, a retroactive tax law lacks a rational relationship to a legitimate legislative purpose and includes a period of retroactivity not

sufficiently limited, due process precludes its enforcement.

The Court of Appeals also fundamentally erred by concluding that the retroactive effect of PA 282 was rationally related to a legitimate purpose and carried only a "modest" period of retroactivity. App. 82a–85a. First, in contrast to the Court of Appeals' holding, simply increasing tax revenue is not sufficient justification for a retroactive tax law because "[r]aising funds is the underlying purpose of taxation, and such a rationale would justify every retroactive tax law, obviating the balancing test itself." *James Square Associates LP v. Mullen*, 993 N.E.2d 374, 383 (N.Y. 2013). Nor can PA 282 be justified as merely "correct[ing] a perceived misinterpretation of a statute," App. 84a. Indeed, the Michigan Supreme Court rejected this precise argument—that the Michigan Legislature intended the BTA to repeal the Compact's three-factor apportionment formula when it was enacted in 2007. *See IBM*, 852 N.W.2d at 874–75 (noting the Legislature's consistent practice of expressly repealing inconsistent tax statutes when enacting new statutes meant to supersede those statutes and concluding that the Legislature's failure to repeal the Compact's apportionment provision when enacting the BTA meant that the Legislature intended that the Compact remain in force). Instead, PA 282 was expressly aimed at extracting funds from out-of-state businesses while benefitting in-state businesses, raising profound concerns about fundamental fairness and implicating bedrock notions of due process.

Second, the Court of Appeals' conclusion that PA 282's six-and-one-half-year period of retroactivity was sufficiently limited to satisfy due process ignored

that this period exceeds by roughly four years any period previously approved by this Court. This factor, alone, raises "serious constitutional questions" warranting further examination by the Court. *See Carlton*, 512 U.S. at 38 (O'Connor, J., concurring).

3. Finally, the Court's review is all the more necessary to resolve a split in authority among state courts. The Court of Appeals aligned itself with courts of last resort in at least two other states in upholding tax laws with retroactive periods of at least six years. *See In re Estate of Hambleton*, 335 P.3d 398, 411 (Wash. 2014) (eight years); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 396 (Ky. 2009) (over six years). In sharp contrast, the courts of last resort in at least two other states have invalidated tax statutes under the federal Due Process Clause with periods of retroactivity far shorter than that found in PA 282. *See James Square*, 993 N.E.2d at 382–83 (16–32 months); *Rivers v. State*, 490 S.E.2d 261, 265 (S.C. 1997) (at least two years).

Unless this Court grants certiorari, the Court of Appeals' decision will signal to states that they may exceed the outer reaches of due process by enacting laws that stretch back farther and farther into the past. This Court should clarify the constraints that the Due Process Clause imposes on retroactive lax laws.

### III. The Court Should Review The Court Of Appeals' Flawed Interpretation Of The Contract Clause.

Review is necessary for the additional reason that the Court of Appeals fundamentally misinterpreted the Court's Contract Clause jurisprudence. The Con-

tract Clause forbids states from enacting "any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. Determining whether a law violates the Contract Clause requires a three-step inquiry. First, a court considers whether the state law "operated as a substantial impairment of a contractual relationship." *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). Second, if the statute is a substantial impairment of a contractual relationship, a court next evaluates whether the state has come forward with the requisite "significant and legitimate public purpose behind the regulation." *Energy Reserves*, 503 U.S. at 411. Third, "[o]nce a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Id.* at 412. Here, by purporting to retroactively repeal the Compact, PA 282 impairs Michigan's contractual obligations, in violation of the Contract Clause. The Court of Appeals, in concluding to the contrary, disregarded this Court's precedent in two primary ways.

1. First, the Court of Appeals improperly held that Michigan law governs the interpretation of the Compact because Congress did not approve the Compact. *See* App. 69a. As this Court has made clear, however, "[t]he question whether a contract was made is a federal question for purposes of Contract

Clause analysis." *Romein*, 503 U.S. at 187; *see also State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) (stating that this Court "must have final power to pass upon the meaning and validity of compacts").

The Court of Appeals' failure to apply federal law led to its incorrect conclusion that the Compact is not a contract for purposes of the Contract Clause. As an initial matter, the Court of Appeals ignored that this Court long ago explained that "the terms compact and contract are synonymous," *Green v. Biddle*, 21 U.S. 1, 92 (1823), and more recently confirmed that that the Compact, in particular, is an "interstate taxation *agreement* concerning state taxation of multistate businesses," *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 311 (1982) (emphasis added).

In addition to the common-sense principle that multistate compacts must be considered and construed as binding contracts, the "express terms" of the Compact—which are the "best indication of the intent of the parties"—highlight the Compact's binding nature. *See Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013). Among other things, the Compact provides that it is "enacted into law and entered into with all jurisdictions legally joining therein"; states that taxpayers in member states "may elect to apportion and allocate in accordance with [Compact] Article IV"; provides that the Compact "shall enter into force when enacted into law by any 7 states"; and authorizes a state to withdraw from the Compact only "by enacting a statute repealing the same." Mich. Comp. Laws § 205.581, Arts. III(1) & X(1)–(2). Not only that, the states joining the Compact received a benefit in return, further counseling in favor of interpreting the Compact as a

binding contract. *See U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 18 (1977) (explaining that fact that states entering into covenant "received the benefit they bargained for" bolstered conclusion that the covenant was a "contractual obligation of the two states"). In particular, states joining the Compact (like Michigan) were able to forestall federal legislation that threatened a one-size-fits-all standard to govern the taxation of income from out-of-state businesses, while at the same time solving problems of inefficiency and costliness in "traditional state tax administration." *See U.S. Steel*, 434 U.S. at 454–56; *see also* Mich. Comp. Laws § 205.581, Art. I.

Viewed through the proper federal lens, then, the Compact constitutes a binding contract. And because PA 282 represents a substantial impairment of the contractual relationship under the Compact that is not justified by a significant and legitimate public purpose, the statute violates the Contract Clause. The impairment here manifestly is substantial, in that it completely and retroactively deprived taxpayers of the benefit of a core provision of the Compact—the option to use a three-factor apportionment standard. *See, e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504 (1987) (finding substantial impairment where statute eliminated coal mining corporations' right to a damages waiver for harm resulting from removal of coal); *U.S. Trust*, 431 U.S. at 19 (same with respect to the "total[] eliminat[ion] [of] an important security provision" in a covenant). And Michigan has identified no significant and legitimate public purpose to justify the substantial impairment—a standard that calls for an increased level of scrutiny in this case given the extent of the impairment, and involves a less

deferential approach given that the State was a party to the Compact. *See Energy Reserves*, 459 U.S. at 411, 412 n.14. The only explanation proffered by the Court of Appeals—that PA 282's retroactive repeal of the Compact was necessary to remediate a budgetary shortfall—is insufficient under this Court's precedents to justify the substantial impairment. *See, e.g.*, *U.S. Trust*, 431 U.S. at 26 ("If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.").

2. Second, the Court of Appeals misconstrued this Court's precedent when it held that the determination whether the Compact constitutes a contract also depended on application of the three-part test that this Court announced in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985). App. 71a–75a. The issues in *Northeast Bancorp* were fundamentally different from those raised in this case. In *Northeast Bancorp*, the Court considered whether two separate state statutes constituted a compact that violated the Compact Clause. 472 U.S. at 163–64, 175. Expressing "some doubt as to whether there is an agreement amounting to a compact," the Court offered several factors that supported its conclusion. *Id.* at 175.

The Court of Appeals erred by turning this multifactor explanation into a talismanic standard in this case for purposes of determining whether the Compact qualifies as a contract under the Contract Clause. This Court nowhere indicated in *Northeast Bancorp* that the factors that it highlighted should be converted into any kind of inflexible test. The analysis in *Northeast Bancorp*, moreover, involved the

Compact Clause, not the Contract Clause. Most fundamentally, the Court in *Northeast Bancorp* considered the nature of two separate state statutes—requiring an inquiry far afield from that here, where Michigan has joined a multistate compact. For all these reasons, the Court's analysis in *Northeast Bancorp* should play no role in this case.

### IV. This Petition Presents An Ideal Vehicle To Resolve The Issues Presented.

This Petition is a compelling vehicle for the Court to use to consider the important and recurring constitutional issues raised. The Petition involves a single taxpayer (Skadden), a business from outside Michigan that has no offices in Michigan and whose business model depends in large part on interstate commerce. And the retroactive repeal of the Compact's three-factor apportionment provision has had a profound effect on Skadden, increasing its tax liability by over $1.6 million—nearly a staggering 80,000%—for the tax years 2008–2010. The Petition thus presents the Court with a straightforward case in which to decide whether the retroactive imposition of a substantial increase in tax liability offends the Constitution.

* * *

Facing a substantial budgetary deficit, Michigan elected to fill the gap by targeting the tax liability of out-of-state businesses and, in the process, benefitting in-state businesses. Michigan also did so retroactively, clawing back over six years to recoup

taxes incurred for services long ago rendered in reliance on a tax regime long ago established. If Michigan's disregard of fundamental principles animating the Commerce Clause and Due Process Clause is left unchecked, state legislators can be expected to continue to favor their state's taxpayers (and thereby safeguard their jobs) by leaving out-of-state businesses holding the bag. The Court should grant this Petition and review whether Michigan's action—which grew out of sheer economic protectionism and effected a retroactive repeal of a decades-old multistate compact—comports with the Constitution.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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