No.

In the Supreme Court of the United States

GOODYEAR TIRE & RUBBER COMPANY,
DELUXE FINANCIAL SERVICES, LLC,
AND MONSTER BEVERAGE CORPORATION,

Petitioners,

v.

MICHIGAN DEPARTMENT OF REVENUE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

AMY L. SILVERSTEIN
Silverstein & Pomerantz LLP
12 Gough Street, No. 2
San Francisco, CA 94103
(415) 593-3502
asilverstein@sptaxlaw.com

GREGORY A. NOWAK
Miller Canfield
150 W. Jefferson, Ste. 2500
Detroit, MI 48226
(313) 496-7963
nowak@millercanfield.com

CHARLES A. ROTHFELD
Counsel of Record
MICHAEL B. KIMBERLY
E. BRANTLEY WEBB
JOHN T. LEWIS
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioners

QUESTIONS PRESENTED

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 Michigan then unilaterally repealed the Compact, including the formula election provision, giving this new rule a retroactive effect of almost seven years.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

The questions presented are:

1. Whether the Multistate Tax Compact has the status of a contract that binds its signatory States.

2. Whether a state law that imposes retroactive tax liability for a period of almost seven years, in a manner that upsets settled expectations and reasonable reliance interests, violates the Due Process Clause.

RULE 14.1(B) STATEMENT

Petitioners Goodyear Tire & Rubber Company, Deluxe Financial Services, LLC, and Monster Beverage Corporation were plaintiffs-appellants in the Michigan Court of Appeals. Eight other parties—Sapa Extrusions, Inc. (formerly known as Alcoa Extrusions, Inc.), Ball Corp., Family Dollar Stores, Inc., Webloyalty Holdings, Inc. & Subsidiaries, Affinion Group Holdings, Inc. & Subsidiaries, EMC Corp., International Business Machines Corp., and Schwan's Home Service, Inc.—also were plaintiffs-appellants in the Michigan Court of Appeals, but they are not parties to this petition.

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

RULE 29.6 STATEMENT

1. Goodyear Tire & Rubber Company has no parent company, and no publicly held corporation owns 10% or more of its stock.

2. Deluxe Financial Services, LLC, is a wholly owned subsidiary of Deluxe Corporation. Deluxe Corporation has no parent company, and no publicly held corporation owns 10% or more of its stock.

3. Monster Beverage Corporation (formerly known as Hansen Natural Corporation) has no parent company, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Goodyear Tire & Rubber Company, Deluxe Financial Services, LLC, and Monster Beverage Corporation respectfully petition for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

OPINIONS BELOW

The decision of the Michigan Court of Appeals (App., *infra*, 7a-14a) is unreported. The decisions of the Michigan Court of Claims (App., *infra*, 15a-19a) are unreported. The order of the Michigan Supreme Court denying review (App., *infra*, 1a-6a) is reported at 884 N.W.2d 268.

JURISDICTION

The order of the Michigan Supreme Court denying leave to appeal was entered on September 6, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

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

Former MCL § 205.581 provided in relevant part:

> Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state * * * may elect to apportion and

> allocate his income in the manner provided by the laws of such state * * * without reference to this compact, or may elect to apportion and allocate in accordance with article IV.

Former MCL § 205.581 provided in relevant part:

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

STATEMENT

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

The Court *can* consider the holding below on the meaning of the Compact because the question whether a contract was made is a federal question for purposes of Contract Clause analysis; this Court unquestionably has the authority to pass upon the meaning of interstate compacts. And the Court *should* grant review because it is imperative that States be held to

their contractual commitments—especially where, as here, the matter is one of great public importance; the contract involves numerous States; and the agreement was consummated specifically to benefit out-of-state entities.

Of course, this is not the first petition to present this issue to the Court. The Court declined to review the question in *Gillette Co.* v. *California Franchise Tax Board* ("*Gillette* v. *FTB*"), No. 15-1442 (2016). And the issue is pending in *Kimberly-Clark Corp.* v. *Minnesota Commissioner of Revenue*, No. 16-565 (2016). But the nature of these recurring decisions confirms the need for review by this Court. Although these state-court holdings have used a variety of rationales and divergent reasoning, all rest on misunderstandings of this Court's decisions—and all have in common a determination to rule for the State and against the out-of-state taxpayer. Resolving such disputes "is the function and duty of the Supreme Court of the Nation." *State ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951). There is no denying the importance of the issue: the petition in *Gillette* was supported by dozens of *amici* who filed nine separate briefs, making arguments for review that apply with equal force in this case.

As for the second and separate constitutional problem with the challenged Michigan legislation: it imposed almost seven years of retroactive tax liability, in an aggregate amount exceeding $1 billion. This retroactive legislation destroyed settled expectations and upset reasonable reliance interests, in a manner that undercut both the "stability of investment and [the] confidence in the constitutional system" that "are secured by due process restrictions against severe retroactive legislation." *E. Enters.* v. *Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). As Justice Markman

observed below, while dissenting from the denial of review on this issue, the power to tax "must be kept subject to proper constitutional limits, particularly when, as here, a heightened tax burden has been imposed not on future business activities, but on business activities planned and undertaken many years ago." *Gillette Commercial Operations N. Am. & Subsidiaries* v. *Dep't of Treasury* ("*Gillette Commercial Operations II*"), 880 N.W.2d 230, 232 (Mich. 2016). Because the decision below upholding this retroactive legislation exacerbated widely acknowledged confusion on the nature of the rules that apply to retroactive tax legislation—and because that decision departs from fundamental due process principles—further review of this issue is warranted.

A. The Multistate Tax Compact

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

In an attempt to counter these problems, the National Conference of Commissioners for Uniform State Laws drafted a model law in 1957, the Uniform Division of Income for Tax Purposes Act ("UDITPA"). UDITPA adopts an approach to income apportionment that averages three fractions: (1) the cost of the taxpayer's real property in the taxing State, divided by the total cost of its property; (2) the compensation the

taxpayer pays employees in the State, divided by its total payroll; and (3) the taxpayer's gross sales in the State, divided by its total sales. That figure is multiplied by the taxpayer's total income to determine its state taxable income. Although UDITPA's formula is widely regarded as the least discriminatory approach to apportionment, by 1965 only three States had adopted it.

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

2. In response, state officials adopted the Compact, which took effect in 1967. There is no doubt that the Compact's purpose was to forestall federal preemption; the contemporaneous summary and analysis of the Compact offered by the Council of State Governments ("CSG"), under whose auspices the Compact was prepared, explained that the Compact "is the result of * * * the growing likelihood that federal action will

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[1] The study was part of the reaction to this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), which was generally understood to expand state authority to tax the income of interstate businesses. See *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 455 (1978).

curtail seriously existing State and local taxing power if appropriate coordinated action is not taken very soon by the States." CSG, *The Multistate Tax Compact, Summary and Analysis* 1 (1967) ("CSG *Summary*"); see *U.S. Steel*, 434 U.S. at 455-456. Following the Compact's adoption, none of the proposed federal bills became law.

The Compact directly addressed the Willis Commission's concerns regarding burdens on out-of-state companies. Most significantly for present purposes, the Compact's Article III(1) provides unequivocally that "[a]ny taxpayer * * * may elect to apportion and allocate" its income using UDITPA's equal-weighted, three-factor approach, while also allowing States to craft their own alternative formulas that taxpayers may, but need not, use. App., *infra*, 23a.

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

The Compact provided that it "shall enter into force when enacted into law by any seven States." Art. X(1) (App., *infra*, 43a). Nine States joined the Compact within six months, making it effective. This Court subsequently rejected the contention that the Compact is invalid under the Constitution's Compact Clause, Art. I, § 10, cl. 3, because it has not been approved by Congress. In *U.S. Steel*, the Court held that congressional approval of agreements between States is required only when an interstate agreement contains provisions "that would enhance the political power of the member States in a way that encroaches upon the

supremacy of the United States." 434 U.S. at 472. The "pact" embodied by the Compact, the Court concluded, has no such effect on congressional supremacy. *Id.* at 473.

B. Proceedings below

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

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

therefore held that "the BTA and the Compact are compatible and can be read as a harmonious whole" for the tax years 2008-2010. *Id.* at 875.[2]

2. The Michigan Legislature responded to the 2014 *IBM* decision by purporting to repeal the Compact's election provision retroactively for a period of almost seven years, as of January 1, 2008. See *Gillette Commercial Operations N. Am. & Subsidiaries* v. *Dep't of Treasury* ("*Gillette Commercial Operations I*"), 878 N.W.2d 891, 901 (Mich. Ct. App. 2015); 2014 PA 282. When state revenue authorities sought to apply this rule, taxpayers contended, insofar as is relevant here, (1) that they had a contractual right under the Compact to use the UDITPA three-factor formula, departure from which violates the Contract Clauses of the federal and state constitutions; and (2) that a retroactive change in tax law dating back almost seven years violates the Due Process Clauses of the federal and state constitutions. The state claims court rejected these arguments, ruling for the State. App., *infra*, 15a-19a.

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

[2] The court added that in 2011 the Michigan Legislature provided that, as of January 1, 2011, taxpayers would be required to use the BTA's single-factor apportionment formula rather than the Compact's three-part formula. See 852 N.W.2d at 875-876. This express repeal of the Compact's election provision only as of 2011, the court explained, "is evidence that the Legislature had not impliedly repealed the provision" as of 2008. *Id.* at 876.

be bound to the Compact, and specifically [in] Article III(1)." *Id.* at 904 (internal quotation marks omitted).

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

The court next rejected the taxpayers' due process arguments regarding retroactivity. In its view, "retroactive modification of tax statutes does not offend due process considerations as long as there is a legitimate legislative purpose that is furthered by a rational means." *Id.* at 907. That standard is satisfied here, the court held, because the Michigan Legislature acted to "correct a perceived misinterpretation of a statute" by the Michigan Supreme Court and to "eliminate a significant revenue loss." *Id.* at 910. The court added that its conclusion was supported by its belief that the retroactive change does not "assess a

wholly new tax," instead "clarif[ying] the method of apportioning the tax base"; that taxpayers could not reasonably have relied on the availability of the UDITPA formula in light of the State's litigation position that the formula was unavailable; that the legislature "acted promptly to correct the error" after the Michigan Supreme Court's *IBM* decision; and that "the 6½-year retroactive period was sufficiently modest." *Id.* at 911 (internal quotation marks omitted).

3. The Michigan Supreme Court denied review. *Gillette Commercial Operations II*, 880 N.W.2d 230. But Justice Markman, joined by Justice Viviano, dissented from the denial, explaining that "the issues raised here are * * * of considerable constitutional significance as to matters affecting the tax policy and procedures, the fiscal and business environments, and the jurisprudence of this state." *Id.* at 231. In particular, Justice Markman would have addressed whether Michigan's unilateral abrogation of the Compact election violates the Contract Clause "because the Compact is a reciprocal and binding interstate compact between the signatory states with respect to which a retroactive withdrawal from the Compact amounts to an unconstitutional impairment of the contract." *Id.* at 232. He also would have addressed whether Michigan's retroactive tax legislation is "consistent with federal due-process protections, * * * given that the retroactive period here of six years and nine months arguably exceeds 'a modest period of retroactivity,' [*United States* v. *Carlton*, 512 U.S. 26, 32 (1994)], and that one justice has observed in this same regard in a frequently cited statement that '[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise * * * serious constitutional questions.'" *Ibid.* (quoting *Carlton*, 512 U.S. at 38 (O'Connor, J.,

concurring in the judgment) (ellipses added by the court)).

4. An identical tax challenge brought by the taxpayers in this case was considered separately by the Michigan Court of Appeals, which denied the challenge on the basis of its ruling in *Gillette Commercial Operations I*. App., *infra*, 12a-14a. The Michigan Supreme Court denied review, with Justices Markman and Viviano again dissenting. *Id*. at 5a-6a.

REASONS FOR GRANTING THE PETITION

The decision below that the Compact is not binding rests on a manifest misreading of this Court's precedent. That error has significant legal consequences. It adopts an approach to the interpretation of interstate compacts that calls into question the binding nature of *all* compacts, creates grave uncertainty for persons now engaged in the drafting of compacts, and makes it impossible for States to know the scope of their obligations when they decide whether to join compacts that are or will become open for membership. The error below, moreover, addresses a matter of great practical importance, affecting thousands of taxpayers and billions of dollars in tax liability across the Nation. See *Gillette Commercial Operations I*, 878 N.W.2d at 910.

The Michigan court's due process holding also warrants review. That ruling reflects widely acknowledged confusion about the nature of the due process restrictions on retroactive tax legislation. It involves an issue that arises frequently, as legislatures often turn to retroactive tax increases as a ready source of revenue. And it reaches a troubling conclusion, stating a standard that allows legislatures freely to disturb settled expectations and reasonable

reliance interests. This Court should provide necessary clarity to this area of the law.

I. The Multistate Tax Compact Is Binding On Its Members.

The Michigan court's principal basis for holding that the Compact is not a binding agreement was its reliance on this Court's decision in *Northeast Bancorp*, which the court below understood to state a test identifying "three classic indicia of a binding interstate compact." *Gillette Commercial Operations I*, 878 N.W.2d at 905 (internal quotation marks omitted). "Applying these same factors," the state court reasoned that "the Compact contained no features of a binding interstate compact and, therefore, was not a compact enforceable under the Contracts Clause." *Ibid*. This analysis was identical to the approach taken by the California Supreme Court in *Gillette* v. *FTB*, which likewise understood the three "indicia of binding interstate compacts" stated in *Northeast Bancorp* to be a "test"; the California court applied that test to hold that the Compact is not "the type of binding agreement contemplated by *Northeast Bancorp*." 363 P.3d 94, 99-103 (Cal. 2015).

Those holdings, however, are wrong, and rest on a plain misunderstanding of *Northeast Bancorp*. That decision did *not* state a general three-part test that governs when compacts are binding, and did *not* apply the three particular considerations relied upon below in a manner that points away from enforcement of the Compact. To the contrary, the ordinary rules of compact interpretation applied by this Court leave no doubt that the Compact *is* binding.

The error committed below, moreover, warrants this Court's attention. It should be intolerable that *two* state courts have premised significant, far-reaching

holdings on the same misreading of this Court's precedent. That is especially so because, as these repeated errors demonstrate, the issue of compact interpretation presented here is a recurring and important one. It is significant as a legal matter: confusion about the meaning of *Northeast Bancorp* creates uncertainty regarding both the status of existing compacts and the obligations created by compacts that are or will become open for membership. And it is significant as a practical matter: the meaning of the Compact is itself an issue of nationwide scope that affects innumerable taxpayers and enormous amounts of tax liability.

A. The Meaning Of The Compact Is A Matter Of Federal Law.

To begin with, as explained in the *Kimberly-Clark* petition (at 12-14), the meaning of the Compact, and of the rules that govern its interpretation, are matters of federal law that should be settled by this Court.

1. This Court determines the meaning of contracts for Contract Clause purposes.

All compacts, whether or not ratified by Congress, have the status of contracts between the signatory States. This Court has recognized for almost two centuries that, "[i]n fact, the terms compact and contract are synonymous" (*Green* v. *Biddle*, 21 U.S. 1, 92 (1823)), and that "[a] compact is a contract" or a "bargained-for exchange between its signatories." *Kansas* v. *Colorado*, 533 U.S. 1, 20 (2001). And although the Compact is not a law of the United States because it was not ratified by Congress (see *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981)), this Court has jurisdiction to determine both whether the Compact *is* a contract and what its terms mean.

In cases like this one involving the Contract Clause, the Court repeatedly has explained that, "ultimately[,] we are 'bound to decide for ourselves whether a contract was made.'" *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 187 (1992) (citation omitted). That is because "[t]he question whether a contract was made is a federal question for purposes of Contract Clause analysis, * * * and 'whether it turns on issues of general or purely local law, [this Court] can not surrender the duty to exercise [its] own judgment.'" *Ibid*. (citation omitted).

That imperative applies with particular force when the contract at issue is one *between* States:

> Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States * * * can be unilaterally nullified, or given final meaning by an organ of one of the contracting States.

State ex rel. Dyer v. *Sims*, 341 U.S. 22, 28 (1951).

2. Federal common law governs the interpretive rules used to interpret contracts between States.

As this last point suggests, the Court in determining the meaning of agreements between States must apply interpretive rules that are grounded in federal common law. Here, for example, if variable state-law rules of contract construction were applied to construe a textually identical body of rights and obligations under a single multistate compact, the contract's meaning would vary from State to State. Cf. *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670 (1931)

(determination of riparian rights). Such an outcome would be intolerable.

In such circumstances, "it becomes [this Court's] responsibility * * * to adopt a [federal] rule [to] settle the [dispute]." *Texas* v. *New Jersey*, 379 U.S. 674, 677 (1965). The Court employs that approach in a wide range of contexts in which there is an "obvious need for rules of decision controlled by the Supreme Court." 17 Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4052 (3d ed.) (citing cases). Indeed, if the outcome here turns on application of *Northeast Bancorp*—as both the court below and the California Supreme Court believed—the governing rule necessarily is federal in nature.

B. The Decision Below Distorts The Meaning Of *Northeast Bancorp*.

In interpreting the Compact, the lower court looked to three considerations addressed in *Northeast Bancorp*, which it took to be "the three classic indicia of a binding interstate compact." *Gillette Commercial Operations I*, 878 N.W.2d at 905 (internal quotation marks omitted). Measuring the Compact against "th[o]se same factors," the court concluded that the Compact "contained no features of a binding interstate compact." *Ibid.*; see *id.* at 906 (Compact "was an advisory agreement"). This approach, however, both misreads *Northeast Bancorp* and fundamentally misunderstands the nature of interstate agreements—analytical errors that led the court below to misconstrue the Compact.

1. Northeast Bancorp *does not state a universal test for identifying binding compacts.*

To begin with, *Northeast Bancorp* does not purport to identify a universal list of factors that bear on the existence of a binding compact. That decision

addressed legislation unilaterally enacted by two States that lifted the then-existing restriction on interstate banking, thus permitting the creation of regional banking networks. See 472 U.S. at 164-166. Affected banks challenged the state laws as constituting a compact that, because not approved by Congress, was invalid under the Compact Clause. The Court expressed "some doubt as to whether there is an agreement amounting to a compact," noting that "[n]o joint organization or body has been established to regulate regional banking or for any other purpose"; that "[n]either statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally"; and that "neither statute requires a reciprocation of the regional limitation." *Id.* at 175. But, the Court continued, "even if we were to assume that these state actions constitute an agreement or compact," the state laws would be consistent with the Compact Clause because, in light of permissive federal legislation, they "cannot possibly infringe federal supremacy." *Id.* at 175, 176.

On the face of it, it is unlikely that the Court intended this discussion to establish a one-size-fits-all, exclusive catalog of three considerations that are relevant to the finding of a binding interstate agreement. The Court's inconclusive discussion of its "doubt" about the existence of a compact appears in a single paragraph of dicta addressed to the particulars of the state legislation at issue in that case. The Court in *Northeast Bancorp* simply had no occasion to address many of the considerations that bear most strongly on whether an interstate agreement is binding. Most notably, because there was no agreed-upon text in *Northeast Bancorp* (indeed, there was no formal "agreement" at all), the Court said nothing about the central role of the contractual language in determining

the meaning of an interstate agreement—although the Court elsewhere has described a compact's text as "the best indication of the intent of the parties." *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2130 (2013).

2. *The considerations discussed in* Northeast Bancorp *show that the Compact is binding.*

In addition, the Michigan court was wrong even in its understanding of the particulars of the *Northeast Bancorp* decision. In fact, the legislation addressed in that case was fundamentally different from the Compact, in *every* respect addressed by this Court in *Northeast Bancorp*.

First, the court below held that, under *Northeast Bancorp*, the Compact is not a binding agreement because, although it establishes a commission, "it did not confer any governing or regulatory powers on that body." 878 N.W.2d at 905. But this rule has no basis in *Northeast Bancorp*. This Court nowhere suggested that an organization with the authority to regulate member States is a necessary characteristic of a compact; instead, it simply observed, of the challenged banking legislation, that "[n]o joint organization or body has been established to regulate regional banking *or for any other purpose*." 472 U.S. at 175 (emphasis added). And here, the Compact *does* establish just such a joint organization that serves a variety of significant "other purpose[s]." *Ibid.* See App., *infra*, 32a-37a. Many existing interstate compacts make use of this sort of nonregulatory commission; in fact, many make no use of a joint body at all. This Court surely did not mean to suggest that, for this reason alone, such agreements are not binding on their signatories.

Second, the court below opined that "the Compact did not require reciprocal action" because "[e]ach

member state operates its respective tax systems independently from the tax systems of other Member States." 878 N.W.2d at 905. But the first half of this observation is simply wrong, while the second is beside the point—and neither has any grounding in *Northeast Bancorp*. In fact, when *Northeast Bancorp* addressed reciprocal legislation, the Court found "[m]ost important[]" that "neither statute requires a reciprocation of the regional limitation;" thus, Maine and Rhode Island were "included in the ostensible compact under [the challengers'] theory" even though they did not impose that limitation. 472 U.S. at 175. Here, in contrast, each of the Compact member States agreed to make the same UDITPA formula available to taxpayers, meaning that the Compact *is* reciprocal between member States in exactly the sense addressed by *Northeast Bancorp*. The factor that the Court described as "most important[]" to its consideration of the existence of a compact in *Northeast Bancorp* (*ibid.*) therefore *supports* the conclusion that the Compact is binding.

Third, the Michigan court asserted that "the Compact allows unilateral modification and withdrawal," which it took to mean that "the Compact was not a binding agreement on this state." 878 N.W.2d at 905, 906. But this proposition also is wrong. The assertion that the Compact allows for unilateral modification assumes its conclusion; our submission is that such action is prohibited by the Compact's term. And it is immaterial that the Compact includes a withdrawal provision—as do nearly all interstate compacts (see pages 24-25, *infra*)—as it is black-letter law that contracts may be binding despite the inclusion of such provisions. See, *e.g.*, 3 *Williston on Contracts* § 7:13 (4th ed. 2015); 13-68 *Corbin on Contracts* § 68.9 (2015).

Indeed, when contracts do include such termination provisions, it is fundamental that parties wishing to depart from their contractual obligations must follow the withdrawal method spelled out in the agreement. In such circumstances, "termination" may take place only when "either party *pursuant to a power created by agreement or law* puts an end to the contract." Restatement (Second) of Contracts § 283 (1981) (quoting U.C.C. § 2-106) (emphasis added). See also 17A Am. Jur. 2d *Contracts* § 513 (2016) ("Generally, a contract may be canceled only under its own terms or through mutual agreement."); 17B C.J.S. *Contracts* § 583 (2016) ("A contract generally remains in force until it has been terminated, either according to its terms or through the acts of the parties evidencing an abandonment."). Here, the exclusive method of withdrawal specified by the Compact is full repeal of the enacting statute. Art. X (App., *infra*, 43a). When bound by such a term, a party may not pick and choose which provisions to disregard: the right to rescind must be exercised *in toto* and is applied to the contract in its entirety. 17A Am. Jur. 2d *Contracts* § 522 (2016).

C. Ordinary Rules Of Contract Construction Show That The Compact Is Binding.

1. The Compact's language and history show that it is binding.

The Michigan court's focus on *Northeast Bancorp* led it to disregard the actual language of the Compact. But "[i]nterstate compacts are construed as contracts under the principles of contract law" (*Tarrant*, 133 S. Ct. at 2130), which means that they are "subject to normal rules of [contract] enforcement and construction." *Oklahoma* v. *New Mexico*, 501 U.S. 221, 245 (1991) (Rehnquist, C.J., concurring in part and dissenting in part). Compacts therefore must be

construed by looking to all the indicia that ordinarily govern the interpretation of contracts: the contract language, the intent of the parties, and so on. Numerous decisions of this Court have looked to such materials in construing interstate agreements, invoking the *Restatement of Contracts* and other standard guides to contract interpretation.[3] But the Michigan court, believing itself constrained by what it understood to be the *Northeast Bancorp* template, ignored virtually all of these considerations.

Thus, without even quoting the relevant terms of the Compact, the court below opined that "[t]here are no words in the Compact * * * that indicate that the state intended to be bound to the Compact." 878 N.W.2d at 904. But for several reasons, that simply is not so.

First, the drafters elected to call their agreement a "compact," a term that is used no fewer than twenty-five times in the Compact's title and text. This choice of language is significant. As we have noted, at the time the Compact was adopted, the word "compact" had long been understood to be "synonymous" with "contract.". *Green*, 21 U.S. at 92. It must be presumed that the drafters of the Compact, who labeled the document a "compact" rather than an "advisory agreement," had that meaning in mind.

Second, the Compact provides that it "shall enter into force when enacted into law by any seven States," and that "[t]hereafter, this compact shall become effective as to any other State upon its enactment thereof." Art. X(1) (App., *infra*, 43a). Such entry-into-

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[3] See, *e.g.*, *Tarrant*, 133 S. Ct. at 2130, 2133; *Montana* v. *Wyoming*, 563 U.S. 368, 375 n.4 (2011); *Alabama* v. *North Carolina*, 560 U.S. 330, 345-346 (2010).

force provisions are the mechanisms by which States enter into binding agreements. In fact, the "enter into force" language would serve no purpose at all if, as the Michigan court believed, the Compact is in the nature of a nonbinding "advisory" agreement. Yet it is the first rule of contract construction that "an interpretation which gives a[n] * * * effective meaning to all the terms is preferred to an interpretation which leaves a part * * * of no effect." Restatement (Second) of Contracts § 203(a).

Third, the Compact provides that, after signatory States become bound, "[a]ny party State may withdraw from this compact by enacting a statute repealing the same." Art. X(2) (App., *infra*, 43a). Under this provision, as the California Court of Appeals recognized in *Gillette* v. *FTB*, "[f]aced with the desire to escape an obligation under the Compact, a state's only option is to withdraw completely by enacting a repealing statute." 147 Cal. Rptr. 3d 603, 616 (2012). This language, too, would be wholly superfluous were the Compact not binding; there is no need for a withdrawal provision in an advisory agreement.

Fourth, the Compact contains reciprocal provisions setting out the steps negotiated by the States to address the problem of threatened federal preemption. In expressly referring to "party states," this language plainly presupposes a binding agreement. See, *e.g.*, Art. III(2) ("[e]ach party State * * * shall provide by law" for short-form tax option) (App., *infra*, 24a); Art. VI(1) ("the State shall provide by law" for the selection of Commission members in specified circumstances and "[e]ach party State shall provide by law for the selection of representatives" from affected subdivisions) (*id.* at 31a). Provisions that expressly require action by or impose obligations on "party States" cannot sensibly be

read as elements of an advisory agreement, as to which the concept of "party States" would be meaningless.

Finally, there is no doubt that the drafters *intended* the Compact to bind its signatories. Thus, the CSG's summary and analysis of the Compact expressly analogized the Compact to other already operational compacts, as "the accepted instrument" for "handling significant problems which are beyond the capabilities of * * * individual State governments." CSG *Summary*, at 8; see also, *e.g.*, *id*. at 1 ("[e]ach party State * * * would be required to make the [Compact formula] available to any taxpayer wishing to use it").

That understanding is confirmed by the context in which the Compact was written and adopted. As we have explained, there is no doubt that the Compact was drafted as a direct reaction to congressional criticism of state tax regimes that were characterized by inconsistency and repeated modification, in an effort to forestall impending federal preemption of state taxing authority. See pages 5-6, *supra*. In this setting, an advisory agreement could not have been effective in accomplishing the States' goal; in fact, at the time of the threatened congressional action, a model uniform law—UDITPA itself—*already* had been in existence for almost a decade.

2. The Compact's binding nature is unmistakable.

Separately, the court below opined that, "for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract"; it regarded that standard as unsatisfied here. *Gillette Commercial Operations I*, 878 N.W.2d at 903-904 (citation omitted). The court did not, however, appear to regard this as a

rationale that stood as a basis for its ruling independent of *Northeast Bancorp*. And that proposition is, in any event, wrong even on its own terms.

For the reasons noted above, the language of the Compact *is* susceptible of no other reasonable construction than that it is a binding contract. And as explained in the *Kimberly-Clark* petition (at 21-23), the conclusion that the language at issue here is contractual in nature applies with special force in the context of an interstate compact, "the whole purpose of [which] * * * was precisely to come to a compromise agreement on the exercise of the [compacting] States' sovereign powers." *New Jersey* v. *Delaware*, 552 U.S. 597, 629 (2008) (Scalia, J., dissenting). Here, "[t]here is no way the Compact can be interpreted o*ther than* as a yielding by both States of what they claimed to be their sovereign powers." *Id*. at 629-630. As the Compact itself declares, the member States adopted it to provide for uniform rules and avoid duplicative taxation (see App., *infra*, 21a); as we show above (at 5-6, *supra*), those States' immediate aim was to put in place enforceable restrictions on state authority that would make unnecessary the enactment of preemptive federal legislation. The Compact accomplishes these goals by providing unequivocally that taxpayers "may elect to apportion and allocate in accordance with [the UDITPA formula]." App., *infra*, 23a. This is the language of a binding contract.[4]

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[4] The state court also vaguely suggested that there "likely" would be no contract impairment even if the Compact imposed binding contractual commitments on the State. *Gillette Commercial Operations I*, 878 N.W.2d at 906. That issue is appropriately addressed on remand. And on examination, the state court's suggestion was wrong. The court below looked to decisions addressing the impairment of contracts between private parties—

D. The Contract Clause Question Is One Of Substantial And Recurring Importance.

The need for consideration by this Court is especially compelling because the question presented in the case is one of significant practical and doctrinal importance.

Most obviously, the meaning of the Compact should be settled correctly. The issue presented affects numerous taxpayers in each of the nine States that have repudiated the Compact's apportionment election without taking the steps required by the Compact to withdraw. Unsurprisingly, the sums at stake are enormous; the aggregate amount at issue nationwide is on the order of $3 billion.

In addition, the rule applied below, following the approach of the California Supreme Court in *Gillette* v. *FTB* and paralleling that of the Minnesota Supreme Court in *Kimberly-Clark*, undermines the effectiveness, and calls into question the meaning, of virtually *all* multistate compacts. The petitions in *Kimberly-Clark* and *Gillette* v. *FTB* demonstrate this point in detail, listing some of the many dozens of compacts that are written in terms similar to the Multistate Tax Compact. Petitioners showed in *Gillette* v. *FTB*, for example, that at least forty-five compacts allow member States to withdraw unilaterally, most often (like the Multistate Tax Compact) by repealing the enacting statute—which the court below held renders a

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but "impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 n.15 (1978). And here, Michigan's decision not to allow the election mandated by the Compact strikes at the heart both of what the contracting States attempted to achieve and what multistate businesses expected to receive.

compact "advisory." *Gillette Commercial Operations I*, 878 N.W.2d at 906. See Reply Br. for Pet'rs at 8, *Gillette* v. *FTB*. Some of the numerous *amici* who filed in support of the petition in *Gillette* v. *FTB*, including the State of Ohio and academic authorities on compacts, confirmed that the approach taken below will undermine the effectiveness of existing compacts and discourage States from entering into new compacts in the future. See *ibid*. Accordingly, intervention by this Court is appropriate.

II. Michigan's Retroactive Tax Legislation Violates The Due Process Clause.

For the reasons set out above, Michigan's violation of its contractual obligations violates the Contract Clause. But the State also committed a second, independent constitutional violation: its imposition of substantial *retroactive* tax liability cannot be squared with the requirements of due process. Given the significant and recurring nature of this due process issue, as well as the highly confused nature of the governing due process rules, this question warrants the Court's review.

A. The Due Process Rules Relating To Retroactivity Are Confused.

There is no doubt that the Due Process Clause imposes *some* enforceable limits on retroactive tax legislation. As a general matter, the Court has "treat[ed] due process challenges based on the retroactive character of the statutes in question as serious and meritorious, thus confirming the vitality of our legal tradition's disfavor of retroactive economic legislation." *E. Enters.*, 524 U.S. at 548 (Kennedy, J., concurring in the judgment and dissenting in part). And in the tax context, the Court has, to offer just one example, accepted that a "'wholly new tax' cannot be

imposed retroactively." *United States* v. *Carlton*, 512 U.S. 26, 38 (1994) (O'Connor, J., concurring in the judgment) (quoting *United States* v. *Hemme*, 476 U.S. 558, 568 (1986)). Indeed, as Justice O'Connor has noted, "[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." *Ibid*. Accordingly, at least two state supreme courts have invalidated retroactive tax legislation on due process grounds in circumstances substantially similar to those here. See *James Square Assocs. LP* v. *Mullen*, 993 N.E.2d 374 (N.Y. 2013) (invalidating retroactivity of sixteen or thirty-two months); *Rivers* v. *State*, 490 S.E.2d 261 (S.C. 1997) (invalidating two- or three-year tax retroactivity statute).

The rules that govern application of this due process principle, however, are confused and uncertain. Although the Court has recognized that legislatures routinely and permissibly apply tax legislation to the "entire calendar year in which [the] enactment took place" (*United States* v. *Darusmont*, 449 U.S. 292, 297 (1981)), it has *never* upheld tax legislation dating back more than two years—and found even that period of retroactivity permissible only when the legislature met biannually and changed the law "at the first opportunity after the tax year in which the income was received." *Welch* v. *Henry*, 305 U.S. 134, 151 (1938).

The Court's most recent treatment of the issue is *Carlton*—itself now more than twenty years old—which stated the governing test as whether "the retroactive application * * * is supported by a legitimate legislative purpose furthered by rational means." 512 U.S. at 30-31 (citations and internal quotation marks omitted). But this test is, to say the least, imprecise. In a literal sense, raising revenue

always is a legitimate state purpose, while imposing a retroactive tax on past events would in all cases be a perfectly rational way of advancing that goal; "such a rationale would justify every retroactive tax." *James Square*, 993 N.E.2d at 383. Surely, however, imposing a retroactive tax on completed conduct that took place decades or generations ago would be unconstitutional; "[t]he governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose." *Carlton*, 512 U.S. at 37-38 (O'Connor, J., concurring in the judgment). The *Carlton* test gives little guidance on how and where to draw this line.

In fact, it is plain from *Carlton* itself that the inquiry is more complex than a simple focus on "rationality." The Court in *Carlton* did not content itself with noting that raising revenue is a legitimate purpose that is furthered in a rational way by imposing a retroactive tax on completed conduct. Instead, the Court ran at some length through a range of additional considerations, among them that the legislature did not "act[] with an improper motive" (512 U.S. at 32); that it "acted promptly" after discovering an unintended loophole in the tax law (*ibid.*); that it "established only a modest period of retroactivity" (*ibid.*), "extend[ing] for a period only slightly greater than one year" (*id.* at 33), see *id.* at 34 ("period of retroactive effect is limited"); and that the enactment "certainly is not properly characterized as a 'wholly new tax.'" *Ibid.* It is at least implicit in *Carlton* that such considerations are part of the due process retroactivity inquiry.

Against this background, the law of retroactivity is deeply confused, marked by uncertainty and imprecision as to both the governing principle and the elements of the test used to apply that principle. As

noted above, two state supreme courts have invalidated retroactive tax legislation materially similar to—and involving *shorter* periods of retroactivity than—that at issue here. Like the decision below, however, other state courts of last resort have upheld substantially identical retroactive legislation.[5]

It therefore is no surprise that commentators uniformly, and repeatedly, have recognized that "Supreme Court decisions on retroactive actions * * * provide no sense of clarity that will help taxpayers to plan for or guard against a retroactive taking." Mystica M. Alexander, *California—Land of "Lawless Taxation" and the "Midnight Special": Outlier or Leader in A Growing Trend?*, 12 U.N.H. L. Rev. 219, 242 (2014). See, *e.g.*, 1 Jerome R. Hellerstein et al., *State Taxation* ¶ 4.17(1)(a)(i) (2016) ("[C]ourt decisions provide little concrete guidance on this issue."); Daniel S. Goldberg, *Government Precommitment to Tax Incentive Subsidies: The Impact of* United States v. Winstar Corp. *on Retroactive Tax Legislation*, 14 Am. J. Tax Pol'y 1, 13 (1997) ("[T]here is disagreement regarding the bounds of retroactive tax legislation among the commentators just as [there] is in the courts."); Steve R. Johnson, *Retroactive Tax Legislation*, State Tax Notes, Aug. 15, 2016, at 3 ("Courts, legislators, and

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[5] See *Dot Foods, Inc.* v. *State, Dep't of Revenue*, 372 P.3d 747 (Wash. 2016), cert. pending, No. 16-308; *In re Estate of Hambleton*, 335 P.3d 398 (Wash. 2014), cert. denied, 136 S. Ct. 318 (2015); *Miller* v. *Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009), cert. denied, 560 U.S. 935 (2010). Still other courts have drawn a distinction between "curative" acts that ratify the past collection of funds and retroactive taxes. Compare *Zaber* v. *City of Dubuque*, 789 N.W.2d 634 (Iowa 2010) (upholding curative act) with *Ainley Kennels & Fabrication, Inc.* v. *City of Dubuque*, 2016 WL 5480688 (Sept. 28, 2016) (invalidating retroactive tax).

commentators have repeatedly debated the appropriate parameters of retroactivity analysis, and the debate shows few signs of abating.").[6]

Notably, the Congressional Research Service recently observed that this Court's decisions "suggest[] that due process concerns are raised by an extended period of retroactivity. However, it is not clear how long a period might be constitutionally problematic." Erika K. Lunder et al., *Constitutionality of Retroactive Tax Legislation*, Cong. Res. Serv. 3 (2012). And adding to the confusion, the CRS went on to note that, although "[t]he Court has recognized retroactive liability for periods beyond one or two years in non-taxation contexts, * * * it is not clear how a similar situation arising under the tax laws would be addressed." *Ibid*. This confusing doctrine, which leaves both legislatures and taxpayers in a state of uncertainty, should be clarified.

B. The Retroactivity Question Is One Of Great Importance.

Additionally, the retroactivity question is one of great importance. As has been widely noted,

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[6] In addition, courts' failure to enforce constitutional limits on retroactive tax legislation has been the subject of frequent criticism from commentators. See, *e.g.*, Robert R. Gunning, *Back from the Dead: The Resurgence of Due Process Challenges to Retroactive Tax Legislation*, 47 Duq. L. Rev. 291, 294 (2009) ("[T]ax legislation containing retroactivity periods greater than one year in length should be presumptively invalid under *Carlton*'s modesty doctrine."); Andrew G. Schultz, *Graveyard Robbery in the Omnibus Budget Reconciliation Act of 1993: A Modern Look at the Constitutionality of Retroactive Taxes*, 27 J. Marshall L. Rev. 775, 808 (1994) ("[C]ourts should permit retroactive curative statutes only where the retroactivity is necessary to correct minor technical errors and where the probability of taxpayer reliance is minimal.").

retroactive tax increases are being imposed with increasing and alarming regularity: "The never-slaked thirst of governments—both federal and state—for additional revenue forebodes more retrospective tax legislation." Johnson, *supra*, at 7. See Alexander, *supra*, at 230 ("State legislative tax rate increases have also become increasingly common as states use retroactive taxes to cure budget shortfalls."). And the amounts at stake in any one of these retroactive tax increases may be enormous. As indicated above, the single piece of legislation at issue here would impose more than $1 billion in tax liability. In the aggregate, retroactive tax legislation affects untold numbers of taxpayers and tremendous sums of money, with significant effects on state budgeting, taxpayer planning, and the national economy. Yet there is substantial reason to believe that these impacts are harmful: "If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership." *Apfel*, 524 U.S. at 548 (opinion of Kennedy, J.); see *id.* at 558 (Breyer, J., dissenting).

There is, moreover, a special danger that retroactive tax legislation will be abusive. As Justice Kennedy has noted, the Court's decisions "reflect our recognition that retroactive lawmaking is a particular concern for the courts because of the legislative 'tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals.'" *Apfel*, 524 U.S. at 548 (opinion of Kennedy, J.) (citation omitted; bracketed material added by the Court). That sort of concern is at play here; although Michigan's retroactive legislation doubtless was not enacted as "retribution," it did target its burden exclusively at interstate businesses, in a

manner that had the necessary effect of disproportionately increasing the taxes of out-of-state companies—while greatly magnifying that effect by running it back in time. Cf. *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994).

C. Michigan's Retroactive Tax Legislation Is Unconstitutional.

Against this background, this case presents an especially suitable vehicle for review because there are powerful arguments that the decision below is wrong, for several reasons.

First, the challenged legislation here surely does not "establish[] only a modest period of retroactivity." *Carlton*, 512 U.S. at 32. "In our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute." *E. Enters.*, 524 U.S. at 549 (opinion of Kennedy, J.). The legislation upheld in *Carlton* extended back in time a single year; Justice O'Connor observed that any longer period of retroactivity would raise "serious constitutional questions." 512 U.S. at 38 (O'Connor, J., concurring in the judgment). But Michigan's legislation, in sharp contrast, created almost *seven* years of retroactive liability. "[T]he period of retroactivity was long enough in the present case so that plaintiffs gained a reasonable expectation that they would 'secure repose' in the existing tax scheme." *James Square*, 993 N.E.2d at 382 (citation omitted).

Second, and again in contrast with *Carlton*, this is not a case where it can be said that "[i]t seems clear" that the original tax provision contained an error that the legislature "acted to correct" through retroactive legislation. 512 U.S. at 31, 32. Here, as the Michigan Supreme Court explained in initially holding that the state legislature did *not* displace the Compact's election

provision in 2008, "the Legislature left the Compact's election provision intact," even with "full knowledge of the Compact and its provisions." *IBM*, 852 N.W.2d at 875. The point was confirmed by the legislature's subsequent act expressly repealing the election provision—but only as of 2011, which "is evidence that the Legislature had not impliedly repealed the provision when it enacted the BTA [in 2008]." *Id.* at 876.

To be sure, the legislature subsequently declared, when enacting the retroactive tax increase at issue here, that the Michigan Supreme Court misunderstood the legislation's initial intent. See *Gillette Commercial Operations I*, 878 N.W.2d at 900-901, 910. But it always will be possible for a State to make such an assertion when its reading of a statute is rejected in litigation. If due process limits otherwise would bar retroactive legislation, States surely may not give themselves a free pass against due process challenges through the simple expedient of declaring, after the fact, that the retroactive legislation was "corrective." Cf. *Carlton*, 512 U.S. at 36 (O'Connor, J., concurring in the judgment) ("[e]very law touching on an area in which [a legislature] has previously legislated can be said to serve the legislative purpose of fixing a perceived problem with the prior state of affairs").

Third, insofar as due process limits rest on the view that "an unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself" (*E. Enters*, 524 U.S. at 558 (Breyer, J., dissenting)), that limit is crossed here. Although Michigan may not have imposed an entirely new form of tax, its retroactive legislation did work a fundamental change in the basis for calculating tax liability that greatly increased the portion of interstate income subject to tax in the State. And as Justice

Markman noted below, this "heightened tax burden has been imposed not on future business activities, but on business activities planned and undertaken many years ago." *Gillette Commercial Operations II*, 880 N.W.2d at 232.

Here, Michigan's law upset "reasonable reliance and settled expectations" in a manner that is constitutionally problematic. *E. Enters*, 524 U.S. at 559 (Breyer, J., dissenting). Interstate taxpayers were entitled to, and did, rely on established apportionment rules in deciding where to make investments and conduct their business operations, the decisions that bore on their state-tax liability. The Michigan Supreme Court's *IBM* decision confirmed that these taxpayers correctly understood the law upon which they relied. Their reliance, and their associated expectations, were frustrated by Michigan's after-the-fact change in the law. And this problem is compounded by the legislature's focus on interstate businesses as a source of retroactive revenue, which at a minimum raises the possibility that the State "acted with an improper motive, as by targeting [out-of-state businesses] after deliberately inducing them to engage in [in-state] transactions." *Carlton*, 512 U.S. at 32.

As Judge Learned Hand explained, although legislatures necessarily have substantial leeway in drafting laws that bear on economic interests, parties nevertheless can "expect * * * that courts will intervene when the defeat of their expectations passes any measure that reasonable persons could think tolerable." *Cohan* v. *Comm'r*, 39 F.2d 540, 545 (2d Cir. 1930). Given the confusion in the law on retroactivity and the importance of the question, the Court should use this case to settle when due process principles require such judicial intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

AMY L. SILVERSTEIN
Silverstein & Pomerantz LLP
12 Gough Street, No. 2
San Francisco, CA 94103
(415) 593-3502
asilverstein@sptaxlaw.com

GREGORY A. NOWAK
Miller Canfield
150 W. Jefferson, Ste. 2500
Detroit, MI 48226
(313) 496-7963
nowak@millercanfield.com

CHARLES A. ROTHFELD
Counsel of Record
MICHAEL B. KIMBERLY
E. BRANTLEY WEBB
JOHN T. LEWIS
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
crothfeld@-mayerbrown.com

Counsel for Petitioners

NOVEMBER 2016

APPENDIX A

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Robert P. Young, Jr.,
Chief Justice

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

Order

September 6, 2016
153265-79

SAPA EXTRUSIONS, INC., formerly known as
ALCOA EXTRUSIONS, INC.,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153265
COA: 326414
Court of Claims: 14-000068-MT
____________________________________/

BALL CORPORATION,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,

Defendant-Appellee.
SC: 153266
COA: 326415
Court of Claims: 14-000069-MT
________________________________/

FAMILY DOLLAR STORES, INC.,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153267
COA: 326512
Court of Claims: 13-000044-MT
________________________________/

FAMILY DOLLAR STORES, INC.,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153268
COA: 326513
Court of Claims: 14-000088-MT
________________________________/

GOODYEAR TIRE AND RUBBER COMPANY,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153269
COA: 326585
Court of Claims: 15-000013-MT
________________________________/

FAMILY DOLLAR STORES, INC.,
Plaintiff-Appellant,
v.
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153270
COA: 326586
Court of Claims: 14-000029-MT
___________________________________/

WEBLOYALTY HOLDINGS, INC.
& SUBSIDIARIES,
Plaintiff-Appellant,
v.
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153271
COA: 326732
Court of Claims: 15-000057-MT
___________________________________/

AFFINION GROUP HOLDINGS, INC.
& SUBSIDIARIES,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee
SC: 153272
COA: 326733
Court of Claims: 15-000056-MT
___________________________________/

EMC CORPORATION,
Plaintiff-Appellant,

v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153273
COA: 326818
Court of Claims: 14-000145-MT
___________________________________/

EMC CORPORATION,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153274
COA: 326819
Court of Claims: 13-000119-MT
___________________________________/

DELUXE FINANCIAL SERVICES, LLC,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153275
COA: 327725
Court of Claims: 14-000287-MT
___________________________________/

SCHWAN'S HOME SERVICE, INC.,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153276
COA: 327880

Court of Claims: 15-000096-MT
_________________________________/

MONSTER BEVERAGE CORPORATION,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee
SC: 153277
COA: 327962
Court of Claims: 12-000083-MT
_________________________________/

MONSTER BEVERAGE CORPORATION,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153278
COA: 327963
Court of Claims: 12-000122-MT
_________________________________/

SCHWAN'S HOME SERVICE, INC.,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
SC: 153279
COA: 328231
Court of Claims: 15-000134-MT
_________________________________/

On order of the Court, the application for leave to appeal the January 21, 2016 judgment of the Court

of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *Gillette Commercial Operations North America v Dep't of Treasury*, 499 Mich 960, 961-962 (2016).

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

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

SAPA EXTRUSIONS, INC., formerly known as
ALCOA EXTRUSIONS, INC.,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.

UNPUBLISHED
January 21, 2016

No. 326414
Court of Claims
LC No. 14-000068-MT
_________________________________/

BALL CORPORATION,
Plaintiff-Appellant,
v.
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 326415
Court of Claims
LC No. 14-000069-MT
_________________________________/

FAMILY DOLLAR STORES, INC.,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 326512

Court of Claims
LC No. 13-000044-MT
__________________________________/

FAMILY DOLLAR STORES, INC.,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 326513
Court of Claims
LC No. 14-000088-MT
__________________________________/

GOODYEAR TIRE AND RUBBER COMPANY,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 326585
Court of Claims
LC No. 15-000013-MT
__________________________________/

FAMILY DOLLAR STORES, INC.,
Plaintiff-Appellant,
v.
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 326586
Court of Claims
LC No. 14-000029-MT
__________________________________/

WEBLOYALTY HOLDINGS, INC.
& SUBSIDIARIES,
Plaintiff-Appellant,
v.
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 326732
Court of Claims
LC No. 15-000057-MT
_______________________________/

AFFINION GROUP HOLDINGS, INC.
& SUBSIDIARIES,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee
No. 326733
Court of Claims
LC No. 15-000056-MT
_______________________________/

EMC CORPORATION,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 326818
Court of Claims
LC No. 14-000145-MT
_______________________________/

EMC CORPORATION,
Plaintiff-Appellant,

v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 326819
Court of Claims
LC No. 13-000119-MT
___________________________________/

INTERNATIONAL BUSINESS MACHINES CORPORATION
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 327360
Court of Claims
LC No. 12-000102-MT
___________________________________/

DELUXE FINANCIAL SERVICES, LLC,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 327725
Court of Claims
LC No. 14-000287-MT
___________________________________/

SCHWAN'S HOME SERVICE, INC.,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 327880

Court of Claims
LC No. 15-000096-MT
___________________________________/

MONSTER BEVERAGE CORPORATION,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee
No. 327962
Court of Claims
LC No. 12-000083-MT
___________________________________/

MONSTER BEVERAGE CORPORATION,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 327963
Court of Claims
LC No. 12-000122-MT
___________________________________/

SCHWAN'S HOME SERVICE, INC.,
Plaintiff-Appellant,
v
DEPARTMENT OF TREASURY,
Defendant-Appellee.
No. 328231
Court of Claims
LC No. 15-000134-MT
___________________________________/

Before: RIORDAN, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

In these 16 consolidated appeals, plaintiffs are taxpayers who respectively appeal as of right final orders that were entered in each case following a grant of either full or partial summary disposition to defendant under MCR 2.116(I)(1). Each appeal raises identical issues challenging the validity of 2014 PA 282 ("PA 282"), which retroactively withdrew Michigan from the Multistate Tax Compact ("the Compact") and thereby eliminated a multistate taxpayer's option to elect the three-factor apportionment formula that is a key provision of the Compact. We affirm.

I. STANDARD OF REVIEW

We review *de novo* a grant of summary disposition under MCR 2.116(I)(1). *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket Nos. 325258 *et al*), lv pending; slip op at 16. MCR 2.116(I)(1) states, "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." Issues of statutory interpretation and the resolution of constitutional issues are also subject to *de novo* review. *Gillette*, ___ Mich App at ___; slip op at 16.

II. DISCUSSION

Plaintiffs present multiple state and federal constitutional challenges to PA 282, which are identical in all relevant respects to the arguments raised by

the plaintiffs in *Gillette*. In *Gillette*, we rejected all of the plaintiffs' arguments.

In particular, we held that the Compact was not a binding agreement on this state but was merely an advisory agreement, such that PA 282's removal of Michigan from membership in the Compact was not prohibited; no violation of the Contract Clauses of either the federal or state Constitutions occurred. *Gillette*, ___ Mich App at ___; slip op at 21. Further, we concluded that "the retroactive repeal of the Compact did not violate the Due Process Clauses of either the state or federal [C]onstitutions or Michigan's rules regarding retrospective legislation. Nor did it violate the terms of the Compact itself." *Id.* at ___; slip op at 22. We also held that the enactment of PA 282 "did not violate the separation of powers provision of the state Constitution[.]" *Id.* at ___; slip op at 30. In addition, "PA 282 does not violate the Commerce Clause" of the United States Constitution. *Id.* at ___; slip op at 32. Nor was there a violation of "the right to petition the government under the First Amendment of the federal Constitution or the analogous Michigan provision." *Id.* We further held that "the enactment of 2014 PA 282 did not violate the Title-Object Clause, the Five-Day Rule, or the Distinct-Statement Clause of the Michigan Constitution." *Id.* at ___; slip op at 34. Finally, summary disposition was not premature because discovery would not have produced relevant support for the plaintiffs' position. *Id.* at ___; slip op at 39-40.

III. CONCLUSION

In short, we rejected in *Gillette* the same arguments that plaintiffs raise in these consolidated appeals. Thus, plaintiffs' challenges to PA 282, and their respective challenges to the grant of either full

or partial summary disposition in favor of defendant in each case, are devoid of merit.

Affirmed.

/s/ Michael J. Riordan
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

APPENDIX C

STATE OF MICHIGAN
COURT OF CLAIMS

THE GOODYEAR TIRE & RUBBER COMPANY
v
DEPT OF TREASURY

Case No. 14-000024-MT

Hon. Michael J. Talbot

ORDER

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

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

With respect to the remaining claims, the parties have until February 2, 2015, to file dispositive motions. Any response must be filed within 14 days of the service of said motion. The parties will be notified if the Court determines that oral argument is necessary.

/s/ Michael J. Talbot, Chief Judge

APPENDIX D

STATE OF MICHIGAN
COURT OF CLAIMS

DELUXE FINANCIAL SERVICES INC
v
DEPT OF TREASURY

Case No. 14-000287-MT

Hon. Michael J. Talbot

ORDER

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

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

With respect to the remaining claims, the parties have until February 2, 2015, to file dispositive motions. Any response must be filed within 14 days of the service of said motion. The parties will be notified if the Court determines that oral argument is necessary.

/s/ Michael J. Talbot, Chief Judge

APPENDIX E

STATE OF MICHIGAN
COURT OF CLAIMS

HANSEN BEVERAGE COMPANY
v
DEPT OF TREASURY

Case No. 11-000080-MT

Hon. Michael J. Talbot

ORDER

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

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

/s/ Michael J. Talbot, Chief Judge

APPENDIX F

Original Model Multistate Tax Compact

Article I	....	Purposes
Article II	......	Definitions
Article III	......	Elements of Income Tax Laws; Taxpayer Option, State and Local Taxes; Taxpayer Option, Short Form; Coverage
Article IV	......	Division of Income
Article V	......	Elements of Sales and Use Tax Laws; Tax Credit; Exemption Certificates. Vendors May Rely.
Article VI	......	The Commission; Organization and Management; Committees; Powers; Finance
Article VII	......	Uniform Regulations and Forms
Article VIII	......	Interstate Audits
Article IX	......	Arbitration
Article X	......	Entry into Force and Withdrawal
Article XI	......	Effect on Other Laws and Jurisdiction
Article XII	......	Construction and Severability

TEXT OF THE MODEL MULTISTATE TAX COMPACT

Article I. Purposes.

The purposes of this compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicative taxation.

Article II. Definitions.

As used in this compact:

1. "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any Territory or Possession of the United States.

2. "Subdivision" means any governmental unit or special district of a State.

3. "Taxpayer" means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than one State.

4. "Income tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, one or more forms of

which expenses are not specifically and directly related to particular transactions.

5. "Capital stock tax" means a tax measured in any way by the capital of a corporation considered in its entirety.

6. "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.

7. "Sales tax" means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by State or local law to be separately stated from the sales price by the seller, or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

8. "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

9. "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other

tax which has a multistate impact, except that the provisions of Articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of Article IX of this compact shall apply only in respect to determinations pursuant to Article IV.

Article III. Elements of Income Tax Laws.

Taxpayer Option, State and Local Taxes.

1. Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party State or pursuant to the laws of subdivisions in two or more party States may elect to apportion and allocate his income in the manner provided by the laws of such States or by the laws of such States and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. This election for any tax year may be made in all party States or subdivisions thereof or in any one or more of the party States or subdivisions thereof without reference to the election made in the others. For the purposes of this paragraph, taxes imposed by subdivisions shall be considered separately from State taxes, and the apportionment and allocation also may be applied to the entire tax base. In no instance wherein Article IV is employed for all subdivisions of a State may the sum of all apportionments and allocations to subdivisions within a State be greater than the apportionment and allocation that would be assignable to that State if the apportionment or allocation were being made with respect to a State income tax.

Taxpayer Option, Short Form.

2. Each party State or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property and whose dollar volume of gross sales made during the tax year within the State or subdivision, as the case may be, is not in excess of $100,000 may elect to report and pay any tax due on the basis of a percentage of such volume and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The Multistate Tax Commission, not more than once in five years, may adjust the $100,000 figure in order to reflect such changes as may occur in the real value of the dollar, and such adjusted figure, upon adoption by the Commission, shall replace the $100,000 figure specifically provided herein. Each party State and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

Coverage.

3. Nothing in this Article relates to the reporting or payment of any tax other than an income tax.

Article IV. Division of Income.

1. As used in this Article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property

constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipeline, or the production, transmission, sale, delivery, or furnishing of electricity, water or steam; and (2) whose rates of charges for goods or services have been established or approved by a Federal, State or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article.

(h) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any Territory or Possession of the United States, and any foreign country or political subdivision thereof.

(i) "This State" means the State in which the relevant tax return is filed or, in the case of application of this Article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

2. Any taxpayer having income from business activity which is taxable both within and without this State, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this Article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this Article, the taxpayer may elect to allocate and apportion his entire net income as provided in this Article.

3. For purposes of allocation and apportionment of income under this Article, a taxpayer is taxable in another State if (1) in that State he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that State has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the State does or does not do so.

4. Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs 5 through 8 of this Article.

5. (a) Net rents and royalties from real property located in this State are allocable to this State.

(b) Net rents and royalties from tangible personal property are allocable to this State: (1) if and to the extent that the property is utilized in this State, or (2) in their entirety if the taxpayer's commercial domicile is in this State and the taxpayer is not organized under the laws of or taxable in the State in which the property is utilized.

(c) The extent of utilization of tangible personal property in a State is determined by multiplying the rents and royalties by a fraction the numerator of which is the number of days of physical location of the property in the State during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the State in which the property was located at the time the rental or royalty payer obtained possession.

6. (a) Capital gains and losses from sales of real property located in this State are allocable to this State.

(b) Capital gains and losses from sales of tangible personal property are allocable to this State if (1) the property had a situs in this State at the time of the sale, or (2) the taxpayer's commercial domicile is in this State and the taxpayer is not taxable in the State in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this State if the taxpayer's commercial domicile is in this State.

7. Interest and dividends are allocable to this State if the taxpayer's commercial domicile is in this State.

8. (a) Patent and copyright royalties are allocable to this State: (1) if and to the extent that the patent or copyright is utilized by the payer in this State, or (2) if and to the extent that the patent or copyright is utilized by the payer in a State in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(b) A patent is utilized in a State to the extent that it is employed in production, fabrication, manufacturing, or other processing in the State or to the extent that a patented product is produced in the State. If the basis of receipts from patent royalties does not permit allocation to States or if the accounting procedures do not reflect States of utilization, the patent is utilized in the State in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a State to the extent that printing or other publication originates in the State. If the basis of receipts from copyright royalties does not permit allocation to States or if the accounting procedures do not reflect States of utilization, the copyright is utilized in the State in which the taxpayer's commercial domicile is located.

9. 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 three.

10. The property factor is a fraction the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented

and used in this State during the tax period and the denominator of which is the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the tax period.

11. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

12. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period; but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

13. The payroll factor is a fraction the numerator of which is the total amount paid in this State during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

14. Compensation is paid in this State if:

(a) the individual's service is performed entirely within the State;

(b) the individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or

(c) some of the service is performed in the State and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the State, or (2) the base of

operations or the place from which the service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State.

15. The sales factor is a fraction the numerator of which is the total sales of the taxpayer in this State during the tax period and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

16. Sales of tangible personal property are in this State if:

(a) the property is delivered or shipped to a purchaser, other than the United States Government, within this State regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this State and (1) the purchaser is the United States Government or (2) the taxpayer is not taxable in the State of the purchaser.

17. Sales, other than sales of tangible personal property, are in this State if:

(a) the income-producing activity is performed in this State; or

(b) the income-producing activity is performed both in and outside this State and a greater proportion of the income-producing activity is performed in this State than in any other State, based on costs of performance.

18. If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator

may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article V. Elements of Sales and Use Tax Laws.

Tax Credit.

1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another State and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the State, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Exemption Certificates. Vendors May Rely.

2. Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate State or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.

Article VI. The Commission.

Organization and Management.

1. (a) The Multistate Tax Commission is hereby established. It shall be composed of one "member" from each party State who shall be the head of the State agency charged with the administration of the types of taxes to which this compact applies. If there is more than one such agency, the State shall provide by law for the selection of the Commission member from the heads of the relevant agencies. State law may provide that a member of the Commission be represented by an alternate, but only if there is on file with the Commission written notification of the designation and identity of the alternate. The Attorney General of each party State or his designee, or other counsel if the laws of the party State specifically provide, shall be entitled to attend the meetings of the Commission, but shall not vote. Such Attorneys General, designees, or other counsel shall receive all notices of meetings required under paragraph 1(e) of this Article.

(b) Each party State shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the Commission member from that State.

(c) Each member shall be entitled to one vote. The Commission shall not act unless a majority of the members are present, and no action shall be binding unless approved by a majority of the total number of members.

(d) The Commission shall adopt an official seal to be used as it may provide.

(e) The Commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its Executive Committee may determine. The Commission bylaws shall specify the dates of the annual and any other regular meetings and shall provide for the giving of notice of annual, regular and special meetings. Notices of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The Commission shall elect annually, from among its members, a Chairman, a Vice Chairman and a Treasurer. The Commission shall appoint an Executive Director who shall serve at its pleasure, and it shall fix his duties and compensation. The Executive Director shall be Secretary of the Commission. The Commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party State, the Executive Director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the Commission and shall fix their duties and compensation. The Commission bylaws shall provide for personnel policies and programs.

(h) The Commission may borrow, accept or contract for the services of personnel from any State, the United States, or any other governmental entity.

(i) The Commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The Commission may establish one or more offices for the transacting of its business.

(k) The Commission shall adopt bylaws for the conduct of its business. The Commission shall publish its bylaws in convenient form and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party States.

(l) The Commission annually shall make to the Governor and legislature of each party State a report covering its activities for the preceding year. Any donation or grant accepted by the Commission or services borrowed shall be reported in the annual report of the Commission and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The Commission may make additional reports as it may deem desirable.

Committees.

2. (a) To assist in the conduct of its business when the full Commission is not meeting, the Commission shall have an Executive Committee of seven members, including the Chairman, Vice Chairman, Treasurer and four other members elected annually by the Commission. The Executive Committee, subject to the provisions of this compact and consistent with the policies of the Commission, shall function as provided in the bylaws of the Commission.

(b) The Commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the Commission, including problems of special interest to any party

State and problems dealing with particular types of taxes.

(c) The Commission may establish such additional committees as its bylaws may provide.

Powers.

3. In addition to powers conferred elsewhere in this compact, the Commission shall have power to:

(a) Study State and local tax systems and particular types of State and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of State and local tax laws with a view toward encouraging the simplification and improvement of State and local tax law and administration.

(c) Compile and publish such information as would, in its judgment, assist the party States in implementation of the compact and taxpayers in complying with State and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

Finance.

4. (a) The Commission shall submit to the Governor or designated officer or officers of each party State a budget of its estimated expenditures for such period as may be required by the laws of that State for presentation to the legislature thereof.

(b) Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party States. The total amount of appropriations required under any such budget shall be apportioned

among the party States as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party State and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In determining such amounts, the Commission shall employ such available public sources of information as, in its judgment, present the most equitable and accurate comparisons among the party States. Each of the Commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The Commission shall not pledge the credit of any party State. The Commission may meet any of its obligations in whole or in part with funds available to it under paragraph 1(i) of this Article; provided that the Commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it under paragraph 1(i), the Commission shall not incur any obligation prior to the allotment of funds by the party States adequate to meet the same.

(d) The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the Commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the Commission.

(e) The accounts of the Commission shall be open at any reasonable time for inspection by duly consti-

tuted officers of the party States and by any persons authorized by the Commission.

(f) Nothing contained in this Article shall be construed to prevent Commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Commission.

Article VII. Uniform Regulations and Forms.

1. Whenever any two or more party States or subdivisions of party States have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, or sales or use tax, the Commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax or prescribing uniform tax forms. The Commission may also act with respect to the provisions of Article IV of this compact.

2. Prior to the adoption of any regulation, the Commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party States and subdivisions thereof and to all taxpayers and other persons who have made timely request of the Commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party States and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the Commission.

3. The Commission shall submit any regulations adopted by it to the appropriate officials of all party States and subdivisions to which they might apply. Each such State and subdivision shall consider any

such regulation for adoption in accordance with its own laws and procedures.

Article VIII. Interstate Audits.

1. This Article shall be in force only in those party States that specifically provide therefor by statute.

2. Any party State or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the Commission to perform the audit on its behalf. In responding to the request, the Commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The Commission may enter into agreements with party States or their subdivisions for assistance in performance of the audit. The Commission shall make charges, to be paid by the State or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

3. The Commission may require the attendance of any person within the State where it is conducting an audit or part thereof at a time and place fixed by it within such State for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the Commission within the State of which he is a resident.

4. The Commission may apply to any court having power to issue compulsory process for orders in

aid of its powers and responsibilities pursuant to this Article, and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the Commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the State or subdivision on behalf of which the audit is being made or a court in the State in which the object of the order being sought is situated.

5. The Commission may decline to perform any audit required if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the Commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party States or their subdivisions, it may offer to make the audit or audits, the offer to be contingent upon sufficient participation therein as determined by the Commission.

6. Information obtained by any audit pursuant to this Article shall be confidential and available only for tax purposes to party States, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the States or subdivisions on whose account the Commission performs the audit and only through the appropriate agencies or officers of such States or subdivisions. Nothing in this Article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party States or any of their subdivisions are not superseded or invalidated by this Article.

8. In no event shall the Commission make any charge against a taxpayer for an audit.

9. As used in this Article, "tax," in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes.

Article IX. Arbitration.

1. Whenever the Commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this Article in effect, notwithstanding the provisions of Article VII.

2. The Commission shall select and maintain an Arbitration Panel composed of officers and employees of State and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

3. Whenever a taxpayer who has elected to employ Article IV, or whenever the laws of the party State or subdivision thereof are substantially identical with the relevant provisions of Article IV, the taxpayer, by written notice to the Commission and to each party State or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation if he is dissatisfied with the final administrative determination of the tax agency of the State or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by two or more party States or subdivi-

sions thereof. Each party State and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

4. The Arbitration Board shall be composed of one person selected by the taxpayer, one by the agency or agencies involved, and one member of the Commission's Arbitration Panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the Arbitration Panel. The two persons selected for the Board in the manner provided by the foregoing provisions of this paragraph shall jointly select the third member of the Board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the Arbitration Panel. No member of a Board selected by lot shall be qualified to serve if he is an officer or employee of or is otherwise affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

5. The Board may sit in any State or subdivision party to the proceeding, in the State of the taxpayer's incorporation, residence or domicile, in any State in which the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

6. The Board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The Board shall act by majority vote.

7. The Board shall have power to administer oaths, take testimony, subpoena and require the attendance of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the Board. In case of failure to obey a subpoena, and upon application by the Board, any judge of a court of competent jurisdiction of the State in which the Board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoena, and the court may punish failure to obey the order as a contempt.

8. Unless the parties otherwise agree, the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the Board in such manner as it may determine. The Commission shall fix a schedule of compensation for Arbitration Board members and of other allowable expenses and costs. No officer or employee of a State or local government who serves as a member of a Board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such Board member shall be entitled to expenses.

9. The Board shall determine the disputed apportionment or allocation and any matters necessary thereto. The determinations of the Board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

10. The Board shall file with the Commission and with each tax agency represented in the proceeding: the determination of the Board; the Board's written statement of its reasons therefor; the record of the

Board's proceedings; and any other documents required by the arbitration rules of the Commission to be filed.

11. The Commission shall publish the determinations of Boards together with the statements of the reasons therefor.

12. The Commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party States.

13. Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceedings.

Article X. Entry Into Force and Withdrawal.

1. This compact shall enter into force when enacted into law by any seven States. Thereafter, this compact shall become effective as to any other State upon its enactment thereof. The Commission shall arrange for notification of all party States whenever there is a new enactment of the compact.

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

3. No proceeding commenced before an Arbitration Board prior to the withdrawal of a State and to which the withdrawing State or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the Board thereby lose

jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI. Effect on Other Laws and Jurisdiction.

Nothing in this compact shall be construed to:

(a) Affect the power of any State or subdivision thereof to fix rates of taxation, except that a party State shall be obligated to implement Article III 2 of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than sales tax; provided that the definition of "tax" in Article VIII 9 may apply for the purposes of that Article and that the Commission's powers of study and recommendation pursuant to Article VI 3 may apply.

(c) Withdraw or limit the jurisdiction of any State or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States.

Article XII. Construction and Severability.

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this

compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States and in full force and effect as to the State affected as to all severable matters.