Nos. 16-687, 16-688, 16-697, 16-698, 16-699, 16-736

In the Supreme Court of the United States

SONOCO PRODUCTS CO., ET AL., PETITIONERS

v.

MICHIGAN DEPARTMENT OF TREASURY

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

BRIEF IN OPPOSITION

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Scott L. Damich
Assistant Attorney General
Revenue and Collections Division

Attorneys for Respondent

(Additional Captions Listed on Inside Cover)

SKADDEN, ARPS, SLATE, MEAGER & FLOM, LLP, PETITIONER

v.

MICHIGAN DEPARTMENT OF TREASURY

GILLETTE COMMERCIAL OPERATIONS NORTH AMERICA AND SUBSIDIARIES, PETITIONERS

v.

MICHIGAN DEPARTMENT OF TREASURY

INTERNATIONAL BUSINESS MACHINES CORP., PETITIONER

v.

MICHIGAN DEPARTMENT OF TREASURY

GOODYEAR TIRE & RUBBER CO., ET AL., PETITIONERS

v.

MICHIGAN DEPARTMENT OF TREASURY

DIRECTV GROUP HOLDINGS, LLC, PETITIONER

v.

MICHIGAN DEPARTMENT OF TREASURY

QUESTIONS PRESENTED

1. As a matter of Michigan law, which controls when ascertaining the original meaning of a Michigan statute (here, as part of a retroactivity analysis): a Michigan Supreme Court decision or a statute passed two months after the decision to enact a legislative correction?

2. Did a Michigan statute that eliminated preferential treatment for out-of-state companies and required them to use the same formula for apportioning their tax base that in-state companies must use violate the dormant aspect of the Commerce Clause by discriminating in favor of in-state companies?

3. Did a Michigan statute create a contractual obligation between Michigan and other States that is enforceable under the Contracts Clause by private taxpayers?

PARTIES TO THE PROCEEDING

The petitioners in No. 16-687 (the Sonoco petitioners) are Advance/New House Partnership; AK Steel Holding Corporation; Big Lots Stores Inc.; Flour Corporation & Subsidiaries; General Aluminum Mfg. Company & Affiliates; Ingram Micro Inc. & Subsidiaries; Intuitive Surgical, Inc.; Nintendo of America Inc.; Sonoco Products Company; and T-Mobile USA. The petitioner in No. 16-688 is Skadden, Arps, Slate, Meagher & Flom. The petitioners in No. 16-697 (the Gillette petitioners) are Gillette Commercial Operations North America & Subsidiaries and Coventry Health Care, Inc. The petitioner in No. 16-698 is International Business Machines Corporation. The petitioners in No. 16-699 (the Goodyear petitioners) are Deluxe Financial Services, LLC; Goodyear Tire & Rubber Company; and Monster Beverage Corporation. The petitioner in No. 16-736 is DirecTV Group Holdings.

The respondent in all petitions is the Michigan Department of Treasury. (The respondent is misidentified in No. 16-697 as the Michigan Department of Revenue).

The following are respondents who were appellants in the Michigan Court of Appeals:

In Michigan Court of Appeals No. 325258 and consolidated cases:

Anheuser-Busch LLC; Ball Corp.; BI-ORX LLC; Cargill Inc.; Circor Energy Products Inc.; Commercial Metals Co.; Crown Holdings Inc.; Dollar Tree Inc.;

Hallmark Marketing Company LLC; Hansen Beverage Co.; Interstate Gas Supply Inc.; Kimball International Marketing Inc.; Lord Corp.; Lubrizol Corp.; Michelin Corp.; Paperweight Development Corp.; Rainier Investment Management Inc.; Raven Industries Inc.; Renaissance Learning Inc.; Rodale Inc.; Sapa Extrusions Inc.; Teradyne Inc.; United Stationers Supply Co.; Watts Regulator Co.; Yaskawa America Inc.

In Michigan Court of Appeals No. 325498 and consolidated cases:

Anheuser Busch, Inc.; Boise, Inc.; Conagra Foods, Inc. and Subsidiaries; Conair Corporation and Subsidiaries; Dun & Bradstreet, Inc.; Easton Telecom Services, LLC; Harley Davidson Motor Co., Inc.; Johnson Matthey, Inc.; McNeil–PPC, Inc.; L'oreal USA, Inc. & Subsidiaries; Solo Cup Operating Corp.

In Michigan Court of Appeals No. 326414 and consolidated cases:

Affinion Group Holdings, Inc. & Subsidiaries; Ball Corp.; EMC Corp.; Family Dollar Stores, Inc.; Sapa Extrusions, Inc., formerly known as Alcoa Extrusions, Inc.; Schwan's Home Service, Inc.; Webloyalty Holdings, Inc. & Subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

OPINIONS BELOW

The September 29, 2015 decision of the Michigan Court of Appeals (Sonoco Pet. App. 1–76)—which involved some of the Sonoco petitioners, the Gillette petitioners, some of the Goodyear petitioners, and petitioner IBM—is reported at 878 N.W.2d 891.

The January 21, 2016 decision of the Michigan Court of Appeals (IBM Pet. App. 82a–89a)—which involved some of the Sonoco petitioners, petitioner Skadden, and petitioner DirectTV—is not reported, but is available at 2016 WL 299803. (Some petitioners were involved in multiple cases because they asserted claims relating to different tax years.)

The March 15, 2016 decision of the Michigan Court of Appeals (Sonoco Pet. App. 151–75)—which involved the Goodyear petitioners and petitioner IBM—is not reported, but is available at 2016 WL 1040147.

The related decisions of the Michigan Supreme Court denying leave to appeal from those three decision are reported at 880 N.W.2d 230 (Gillette Pet. App. 1a–5a), 880 N.W.2d 521 (Sonoco Pet. App. 143–150), 880 N.W.2d 526, 880 N.W.2d 530 (IBM Pet. App. 1a–5a), 884 N.W.2d 268 (Goodyear Pet. App. 1a–6a), 884 N.W.2d 269 (IBM Pet. App. 80a–81a), and 884 N.W.2d 292 (Skadden Pet. App. 24a–30a).

The primary decisions of the Michigan Court of Claims, see IBM Pet. App. 23a n.2, are not reported but available at 2014 WL 10320500 (Skadden Pet. App. 114a–52a) and 2014 WL 10474036 (Skadden Pet.

App. 153a–192a). Other Court of Claims orders following the primary decisions are not reported; some of them are scattered throughout the petitioners' appendices (e.g. Sonoco Pet. App. 122).

JURISDICTION

The State of Michigan accepts the petitioners' statements of jurisdiction and agrees that this Court has jurisdiction over the petitions under 28 U.S.C § 1257(a).

STATUTORY PROVISIONS INVOLVED

Michigan Compiled Laws § 205.581, article III, § 1, which was enacted in 1970 to implement the Multistate Tax Compact and amended by Public Act 40 of 2011, provided, before it was repealed:

> 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 2 or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state 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 except that beginning January 1, 2011 any taxpayer subject to the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, or the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.697, shall, for pur-

> poses of that act, apportion and allocate in accordance with the provisions of that act and shall not apportion or allocate in accordance with article IV. 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. . . .

Michigan Compiled Laws § 208.1301(2), which was enacted in 2007 Public Act 36 as the part of the Michigan Business Tax Act, provides:

> Each tax base of a taxpayer whose business activities are confined solely to this state shall be allocated to this state. Each tax base of a taxpayer whose business activities are subject to tax both within and outside of this state shall be apportioned to this state by multiplying each tax base by the sales factor calculated under section 303.

Enacting § 1 of Public Act 282 of 2014 provides:

> 1969 PA 343, MCL 205.581 to 205.589, is repealed retroactively and effective beginning January 1, 2008. It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589, is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section to eliminate the election provision included within section 1 of 1969 PA 343, MCL 205.581, and that the 2011 amendatory act that amended section 1 of

1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and to clarify that the election provision included within section 1 of 1969 PA 343, MCL 205.581, is not available under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.713.

INTRODUCTION

In 2008, Michigan passed the Michigan Business Tax Act, which required all taxpayers with business activities both inside and outside the State to apportion their Michigan business tax base using a particular single-factor formula. Because this statute applied to all businesses, the Department of Treasury concluded that the Act repealed a 1970 statute that arose from the Multistate Tax Compact; the Compact provision had allowed out-of-state businesses to choose to use a different, three-factor apportionment formula. Following the plain text of the Michigan Business Tax, which took effect January 1, 2008, Treasury began applying the single-factor method—that is, it applied the Act *prospectively* to the tax years at issue in this case (2008 to 2011). In 2014 (three years *after* the last tax year in question and so well after all tax-related conduct had occurred), a Michigan court (our Supreme Court) held for the first time that taxpayers had a right, from 2008 to 2011, to continue to use the Compact's three-factor apportionment option.

Because that holding retroactively created a new right that applied only to out-of-state taxpayers, the Michigan Legislature acted swiftly to correct the judicial misinterpretation of the statute; just 59 days after the decision, the Legislature passed Public Act 282 to clarify that the original intent of the Michigan Business Tax had been to repeal the Compact's apportionment option. That legislative correction is, as a matter of state law, binding on Michigan courts as to the original meaning of the Business Tax. Accordingly, as a matter of state statutory-construction law, the Compact's apportionment option was repealed in 2008.

This result of Michigan law undercuts the premise of all of the retroactivity questions posed by the petitions. Under Michigan law, the legislative correction is controlling and definitively establishes that the three-factor apportionment option is deemed to have been repealed in 2008. E.g., *Adrian Sch. Dist.* v. *Michigan Pub. Sch. Employees Ret. Sys.*, 582 N.W.2d 767, 771 (Mich. 1998) ("[W]hen a legislative amendment is enacted soon after a controversy arises regarding the meaning of an act, "it is logical to regard the amendment as a legislative interpretation of the original act . . . ." (quotation marks omitted)). The decision of the Michigan Court of Appeals in this case recognized that Public Act 282 was a legislation correction and thus, following Public Act 282 instead of the Michigan Supreme Court's reading of the statutes, it applied the 2008 Michigan Business Tax's single-factor apportionment to the petitioners in this case.

This decision, based on Michigan's rules of statutory construction, is an adequate and independent state law ground upholding the decision below. As a result, this Court lacks jurisdiction to review any questions premised on retroactive application of the Compact's three-factor apportionment method. E.g., *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991) ("In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.").

The questions about the dormant aspect of the Commerce Clause also do not warrant this Court's review. This case presents the unusual situation where a judicial misunderstanding of a statute creates a budget crisis by giving out-of-state business a tax advantage over in-state businesses, and the Legislature acts within 59 days to restore a level playing field by clarifying what the statute originally meant. If that scenario violates the dormant aspect of the Commerce Clause, then any time a State makes a mistake in tax law that *favors* out-of-state businesses, the State will be powerless to correct that error, because correcting the error will be seen as discriminating against out-of-state businesses. The Commerce Clause does not require that result—it does not prevent States from passing legislation that, as here, ensures that in-state and out-of-state businesses are treated equally. That may be why the petitions cannot allege any confusion in the lower courts.

Finally, the Multistate Tax Compact is an advisory compact, not binding on the State, especially with respect to taxpayers who are not parties to the Compact (or even third-party beneficiaries). Indeed, this Court has recently denied petitions on this issue.

The petitions for certiorari should be denied.

STATEMENT OF THE CASE

A. Regulatory and Factual Background

1. The 1970 Multistate Tax Compact allows three-factor apportionment.

In 1970, Michigan enacted provisions of the Multistate Tax Compact. IBM Pet. App. 24a. The Compact, created by a group of States to preserve state sovereignty over taxation against proposed federal legislation, included a formula by which business could apportion their taxes when they engaged in business in multiple States. *Id.* at 25a. The Compact's apportionment method, set out in Michigan Compiled Laws § 205.581, took into account three factors: sales in the State, property in the State, and payroll in the State. *Id*. This apportionment option benefited companies that do not have significant property and payroll located in Michigan. *Id*.

As to the nature of the Compact, the States that are actually parties to the Compact all agree that the Compact is not a contract. IBM Pet. App. 145a n.7 (McCormack, J., dissenting) (reaching, unlike the majority, the question whether the Compact is a binding contract and noting that in a California case, "all of the member states jointly filed an amicus brief urging the Supreme Court of California to reject the lower court's construction of the Compact as a binding contract"); accord Oregon Amicus Br., *Kimberly-Clark Corp. & Subs.* v. *Comm'r*, 880 N.W.2d 844 (Minn. 2016) (available at 2015 WL 9941665). The Compact member States' course of performance over the past 40 years is consistent with the States' and Commissions understanding that the compact is not a binding

contract. IBM Pet. App. 38a n.7. Since 1971, at least nine states and the District of Columbia enacted legislation deviating from the terms of the Compact without repercussion from the Commission nor the other member states. IBM Pet. App. 144a ("Compact members have deviated from the Compact's election provision and apportionment formula without objection from other members."). When Michigan retroactively repealed the Compact through Public Act 282, no party state objected, and no member state has intervened on behalf of any of the petitioners in these cases.

2. The 2008 Michigan Business Tax adopts single-factor apportionment.

In 2008, Michigan revised its business tax system, creating a new approach called the Michigan Business Tax. IBM Pet. App. 25a, 106a. As relevant here, the Michigan Business Tax requires all companies with business activities both within and outside of Michigan to apportion the taxes due to Michigan based on only a single factor: sales. *Id*. at 25a; Mich. Comp. Laws § 208.1301 ("Each tax base of a taxpayer whose business activities are subject to tax both within and outside of this state *shall be apportioned* to this state by multiplying each tax base *by the sales factor*.") (emphasis added). In light of this statute, which took effect January 1, 2008, taxpayers were on notice that three-factor apportionment under the Compact was no longer an option.

3. IBM litigates over apportionment.

In 2009, after the legislation requiring single-factor apportionment, petitioner IBM filed its return for the 2008 tax year—i.e., a time period covering conduct that occurred after the effective date of the Business Tax—and sought to use the Compact's three-factor apportionment. IBM Pet. App. 101a. The Department of Treasury determined that IBM had to use the single-factor apportionment required by the Michigan Business Tax Act. *Id*. at 102a.

IBM challenged that decision in the Michigan Court of Claims, but that court held, in a 2011 decision, that the Michigan Business Tax required single-factor apportionment. *Id*.

While this litigation was in process, the Legislature in 2011 amended the Compact provision to further clarify that the Compact's apportionment three-factor apportionment method was no longer an option: "[B]eginning January 1, 2011 any taxpayer subject to the Michigan business tax act . . . shall, for purposes of that act, apportion and allocate in accordance with the provisions of that act and shall not apportion or allocate in accordance with article IV." Mich. Comp. Laws § 205.581, article III, § 1, as amended by Public Act 40 of 2011 (later repealed).

IBM appealed, but the Michigan Court of Appeals held, in 2012, that the Michigan Business Tax impliedly repealed § 205.581 (the Michigan statute with the Compact provision allowing three-factor apportionment). IBM Pet. App. 102a–03a.

Thus, from the enactment of the Business Tax in 2008 until July 14, 2014, no Michigan court interpreted the relevant Michigan statutes as allowing a business to choose, after January 1, 2008, to use the Compact's method of apportionment. But in July 2014, a divided Michigan Supreme Court held, in *IBM* v. *Department of Treasury*, 852 N.W.2d 865 (Mich. 2014), that the 2008 statute did *not* impliedly repeal the Compact's apportionment option. IBM Pet. App. 96a–146a.

4. The Michigan Legislature acts within two months to clarify the original intent of the statutes.

In response to the Michigan Supreme Court's new interpretation on July 14, 2014, the Michigan Legislature enacted, on September 11, 2014—just one month and 28 days after the *IBM* decision—another statute (Public Act 282 of 2014) to clarify the law. Public Act 282 clarified that the original intent of both the 2008 Michigan Business Tax Act and the 2011 amendment to the Compact had been to require one-factor apportionment and to eliminate the three-factor apportionment of the Compact. IBM Pet. App. 27a; 2014 Public Act 282.

Specifically, the enacting section of Public Act 282 stated that it was the original intent of the Legislature, both in 2008 and in 2011, that the Michigan Business Tax (in § 208.1301) would eliminate the Compact's election provision (in § 205.581). As to the 2008 statute, Enacting § 1 stated: "It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589 is to express the original intent of

the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section *to eliminate the election provision* included within section 1 of 1969 PA 343, MCL 205.581"—i.e., the Compact provision. 2014 P.A. 282, enacting § 1 (emphasis added). As to the 2011 amendment, Enacting § 1 similarly stated: "It is the intent of the legislature . . . that the 2011 amendatory act that amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301 . . . ." 2014 P.A. 282, enacting § 1.

The Legislature acted to correct the Michigan Supreme Court's interpretation of the statute within two months because the *IBM* ruling threatened an unanticipated $1 billion revenue loss. IBM Pet. App. 47a. This loss would result from the refund of already collected taxes (as opposed to resulting from the imposition of a new tax). *Id.*

B. Proceedings below.

Most of the petitioners filed their original returns applying Michigan's Business Tax Acts single-factor formula. They then filed amended returns seeking to apportion under the Compact's three-factor formula. For example, "Skadden initially filed its 2008, 2009, and 2010 tax returns on or before September 15th of 2009, 2010, and 2011, respectively." Skadden Pet. 12 n.5. "Skadden's returns as originally filed did not employ the Compact's three-factor apportionment methodology." *Id.* at 12–13 n.5. It was not until the last

days of 2013 that Skadden filed amended returns using the three-factor apportionment. *Id*. As with Skadden, the record reflects that a number of other petitioners (Sonoco petitioners Advance/New House, Big Lots, Intuitive Surgical, and Sonoco; petitioner Gillette; Goodyear petitioners Deluxe Financial and Goodyear; and petitioner DirecTV) did not file amended returns seeking to use the Compact's option of three-factor apportionment until 2011 or later—i.e., after the 2011 amendment that expressly repealed the Compact's apportionment provision.

After the Michigan Department of Treasury denied their claims, the petitioners filed suit in Michigan's Court of Claims.[1] The Court of Claims rejected all of the constitutional challenges to Public Act 282 and granted summary disposition to the Department on all claims based on Public Act 282. Skadden Pet. App. 114a–52a, 153a–92a. The Court also issued orders on all other cases granting summary disposition in accordance with that ruling.

The Court of Appeals affirmed. It held that Public Act 282 did not violate the Contracts Clause because

---

[1] IBM's petition includes an unresolved jurisdictional issue as to the 2010 tax year. Specifically, IBM filed its 2010 appeal with Michigan's Court of Claims *before* the Department of Treasury acted on IBM's 2010 amended return. Under Michigan's Revenue Act, the Court of Claims has jurisdiction over Department of Treasury assessments, orders, or decisions. Mich. Comp. Laws § 205.22. Because IBM did not wait for a decision from Treasury, but instead filed suit prior to any denial of its claim, the Court of Claims may not have jurisdiction over the complaint that is subject to IBM's petition. The jurisdictional issue has been preserved by the Department and will have to be ruled on by Michigan's Court of Claims if this Court were to rule in the petitioners' favor.

"the Compact is not a binding contract under Michigan law . . . ." IBM Pet. App. 32a. The Court also determined that the Compact was not a binding interstate compact enforceable under the Contract Clause. *Id*. at 35a–39a. Instead, the Compact "was an advisory agreement." *Id*. at 37a. The Court noted that "even if there was a binding contractual commitment on the part of the state, there likely would still be no violation" because the repeal of the Compact would not interfere with any reasonably expected contractual benefits since taxpayers lacked a vested interest in the continuation of any tax law. *Id*. at 38a.

The Court ruled that the repeal in Public Act 282 was consistent with due process because the petitioners "had no vested right in the tax laws," and Public Act 282 rationally furthered the legitimate purposes of correcting a misinterpretation of a statute and eliminating a significant revenue loss. *Id*. at 46a–47a. The Court of Appeals further recognized that Public Act 282 was a legislation correction, made two months after the Michigan Supreme Court's *IBM* decision, to express the original meaning of the 2008 and 2011 laws. IBM Pet. App. 45a, 47a, 49a, 50a, 52a–54a & n.12. When the petitioners "contend[ed] that the 2014 Legislature could not declare the intent of the Legislature in 2007," the Michigan Court of Appeals rejected that contention as contrary to state law: "overwhelming caselaw recogniz[es] the Legislature's power to correct what it perceives to be an incorrect interpretation of a statute." *Id*. at 54a n.12. The Court of Appeals thus applied Public Act 282's interpretation of the apportionment statutes (by holding that the petitioners had to use single-factor apportionment) and did not follow the reasoning of the Michigan Supreme Court's *IBM*

decision (which would have allowed the petitioners to use three-factor apportionment).

The Court of Appeals further held that PA 282 did not violate the Commerce Clause as it was "not facially discriminatory," "does not have a discriminatory purpose," and "does not have a discriminatory effect." IBM Pet. App. 57a–58a. Instead, it "puts in- and out-of-state corporate taxpayers *in the same position* relative to Michigan tax calculations," "to ensure a level playing field and to avoid giving an unfair advantage to out-of-state businesses." *Id.* at 58a–59a (emphasis in original).

In a June 24, 2016 order, the Michigan Supreme Court denied the petitioners' application for leave to appeal. IBM Pet. App. 1a. And though two justices dissented from the order denying leave, they did so based on two state-law questions (e.g., a separation-of-powers question) that the petitioners do not present in their petitions. *Id.* at 3a–4a. All seven Michigan Supreme Court Justices unanimously declined to grant leave to address the Commerce Clause issue Sonoco and Skadden raise in their petitions. All seven justices also let stand the Court of Appeals' decision to treat Public Act 282's statement of original intent as controlling over their decision in *IBM*.

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction to review the substantive-due-process question because the decision below rests on independent and adequate state grounds.

The petitioners' primary reason for granting their petitions is alleged confusion regarding due-process limits applicable to retroactive tax legislation, confusion that they allege has caused a split among state courts. Specifically, citing *United States* v. *Carlton*, 512 U.S. 26 (1994), the petitioners' contend that a retroactivity period of more than a few years should be considered per se unconstitutional and that state courts are deeply divided over how long a period is permissible. Sonoco Pet. 27; IBM Pet. 34; Skadden Pet. 27, 30. In their view, this Court's guidance is needed to clarify that retroactivity periods exceeding a year are problematic, and they contend that this case involves a retroactivity period of 6½ years.

But this case does not allow the Court to reach that question because the apportionment law at issue (i.e., the Michigan Business Tax, § 208.1301) was not, under Michigan law, retroactive at all: it set out the apportionment rule prospectively, in 2008, *before* each of the tax years in question, and Michigan courts consistently followed that rule through each of the tax years (2008 to 2011) in question. Retroactivity only briefly came into the picture three years *after* those tax years, when a judicial misinterpretation of the law in July 2014 retroactively gave out-of-state businesses a new right. But the Legislature clarified and corrected that misinterpretation, restoring the status quo that had existed since 2008. And as a matter of

Michigan law, a legislative clarification reflects the original intent of the Legislature, so no retroactivity has occurred.

A. As a matter of state law about legislative clarifications, no retroactivity occurred.

The statutory question underlying this case is whether a 2008 Michigan statute (the Michigan Business Tax Act) repealed a 1970 Michigan statute (the Compact provision). If the 2008 statute did in fact repeal the Compact's three-factor apportionment option, then each of the petitioners had *prospective* notice—that is, notice *before* the 2008, 2009, 2010, and 2011 tax years at issue. State law governs that question of statutory interpretation, and under Michigan law, a legislative clarification is considered to express the original legislative intent and therefore is controlling.

As the Michigan Supreme Court has put it, "We have long and repeatedly held that, when a legislative amendment is enacted soon after a controversy arises regarding the meaning of an act, " ' "it is logical to regard the amendment as a legislative interpretation of the original act . . . ." ' " *Adrian Sch. Dist.* v. *Michigan Pub. Sch. Employees Ret. Sys.*, 582 N.W.2d 767, 771 (Mich. 1998) (quoting *Detroit* v. *Walker*, 520 N.W.2d 135, 142 (Mich. 1994), which quoted *Detroit Edison Co.* v. *Revenue Dep't*, 31 N.W.2d 809, 816 (Mich. 1948), which quoted 1 Sutherland Statutory Construction (3d ed.), § 1931, p. 418); accord *Petition of Detroit Edison Co.*, 87 N.W.2d 126, 130 (Mich. 1957) ("[T]here are, as undoubtedly, other instances, particularly if uncertainty exists as to the meaning of a statute, when amendments are adopted for the purpose of

making plain what the legislative intent had been all along from the time of the statute's original enactment."); *Trinova Corp*. v. *Dep't of Treasury*, 421 N.W.2d 258, 262 (Mich. Ct. App. 1988), (" '[A] later statement of legislative intent by the Legislature is binding on this Court.' "), aff'd and remanded, 445 N.W.2d 428 (Mich. 1989).

The Court of Appeals applied this doctrine in this case. The Court of Appeals explained that there is "little doubt" that the Legislature "has the authority—if not the obligation—to amend a statute that it believes has been misconstrued by the judiciary," and that "[t]his power to amend includes the power to retroactively correct the judiciary's misinterpretation of legislation." *Id*. 52a. And it relied on this principle of Michigan law not just in its separation-of-powers analysis, but also in its due-process analysis. *Id*. 45a, 47a, 50a, 52a–54a (each referencing legislative correction). This issue was squarely joined and resolved: when the petitioners "contend[ed] that the 2014 Legislature could not declare the intent of the Legislature in 2007," the Court rejected the contention, pointing to "the overwhelming caselaw recognizing the Legislature's power to correct what it perceives to be an incorrect interpretation of a statute." IBM Pet. App. 54 n.12. The Court of Appeals followed that overwhelming caselaw by applying Public Act 282's interpretation of the relevant statutes as requiring single-factor apportionment, instead of applying the reasoning of the Michigan Supreme Court's *IBM* decision (which would have allowed three-factor apportionment). And the Michigan Supreme Court denied leave to appeal that decision.

That doctrine, which provides an independent and adequate state law ground for the decision below, was properly applied here. The "legislative amendment [was] enacted soon after a controversy [arose] regarding the meaning of [the] act," *Adrian Sch. Dist.*, 582 N.W.2d at 771: the controversy attracted the Legislature's attention on July 14, 2014, when for the first time a Michigan court created uncertainty by reading the 2008 Michigan Business Act's apportionment provision as not being mandatory, and the legislative amendment was enacted just 59 days later. As a result, under Michigan law, Public Act 282 is regarded "as a legislative interpretation of the original act," *Adrian Sch. Dist.*, 582 N.W.2d at 771; in other words, under Michigan law, the 2008 Michigan Business Tax (as well as the 2011 clarifying amendment to the Compact provision) eliminated the Compact's three-factor apportionment option *in 2008* (and also clarified in 2011 that it had already been eliminated). That is, in fact, precisely what Public Act 282 says: it "express[ed] *the original intent of the legislature*" that "section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301 . . . eliminate[d] the election provision included within . . . MCL 205.581." 2014 Public Act 282, enacting § 1 (emphasis added). And that means that as a matter of Michigan law, no retroactivity occurred because in 2008 the Michigan Business Tax eliminated the Compact's apportionment method, and that change occurred before all of the tax years in question here.

This independent and adequate state-law ground means that this Court lacks jurisdiction over questions premised on the theory that Public Act 282 made a retroactive change to Michigan law (as opposed to

clarifying what it originally meant). As this Court has explained, "[i]n the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id*.

Neither procedural or substantive due process prevent a State from having a doctrine of legislative clarification, which allows the Legislature to overturn a retroactive judicial expansion of narrow and precise statutory language. Here, the Michigan Business Tax provides, and has since 2008, that "[e]ach tax base of a taxpayer whose business activities are subject to tax both within and outside of this state *shall be apportioned* to this state by multiplying each tax base *by the sales factor*." Mich. Comp. Laws § 208.1301 (emphasis added). The Legislature's clarification, via Public Act 282, that the statute's plain language has always meant what it plainly says, is not a retroactive change, but rather a controlling "legislative interpretation of the original act." *Adrian Sch. Dist.*, 582 N.W.2d at 771.

Indeed, this is the opposite of the usual retroactivity scenario. In the usual case, a retroactive change *deprives* a citizen of the right to do something that was lawful at the time of his conduct, e.g., *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964); here, in contrast, the Michigan Supreme Court's decision retroactively

created a new right, contrary to statute, and the Legislature acted promptly to clarify that the supposed statutory right to use three-factor apportionment did not in fact exist.

B. Even if this Court had jurisdiction, the lower courts are not split regarding the proper substantive-due-process test relative to retroactive legislation.

Even if jurisdiction existed as to this question, certiorari would not be warranted. Relying heavily on Justice O'Connor's concurring opinion in *Carlton*, the petitioners' contend that a retroactivity period of more than a few years should be per se unconstitutional and that state courts are deeply divided over how this rule applies. The petitioners are mistaken for two reasons. First, *Carlton* did not hold that a law is per se unconstitutional if the retroactive reach exceeds a period of more than a few years. And second, the conflict alleged in the certiorari petitions does not exist.

1. The petitioners misread *Carlton*.

As an initial matter, *Carlton* is a substantive-due-process case, because *Carlton* focused on the substance of the legislation—on whether it was " 'arbitrary and irrational legislation.' " *Carlton*, 512 U.S. at 30; accord *id*. at 39 (Scalia, J., concurring in judgment) (objecting to the majority's "test of substantive due process unconstitutionality in the field of retroactive tax legislation" but agreeing the retroactive tax at issue should be upheld because "the Due Process Clause does not prevent retroactive taxes"); see also *Empresa Cubana Exportadora de Alimentos y Productos Varios*

v. *U.S. Dep't of Treasury*, 638 F.3d 794, 800 (D.C. Cir. 2011) (citing *Carlton* as a substantive-due-process case); cf. *Atkins* v. *Parker*, 472 U.S. 115, 130 (1985) (" '[T]he legislative determination provides all the process that is due.' ").

Applying its substantive-due-process test, the *Carlton* majority did not establish a rule that a retroactivity period of more than a few years is per se unconstitutional. Instead, "[t]he due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation." *Carlton*, 512 U.S. at 31. That standard allows that, "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . . ." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984). Applying that standard, the *Carlton* Court upheld a retroactive amendment to the Internal Revenue Code against a due-process challenge. The Court noted that Congress had a rational purpose: "to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." *Carlton*, 512 U.S. at 32. Thus, adopting a retroactive law was a "rational means" to a "legitimate purpose." *Id.* The majority did not adopt a rule that a retroactive period longer than one year or even a few years is a *per se* due process violation. And it noted with approval that the amendment at issue "was *proposed* by the IRS in January 1987 and by Congress in February 1987, with a few months of [the statute's] original enactment." *Id.* at 33 (emphasis

added). The amendment was not actually *enacted* until December 1987. *Id.* at 29.

This case is fully consistent with *Carlton*. The Legislature here acted with the same rational purpose: to correct what it reasonably viewed as a mistake in the law—namely the Michigan Supreme Court's *IBM* decision—that would have created a significant and unanticipated revenue loss. And the Legislature acted even more quickly than Congress did in *Carlton*: it didn't just *propose* legislation in a few months, it *enacted* the corrective legislation in 59 days. (And again, because of Michigan caselaw concerning corrective legislation, there was no retroactivity in the first place.)

In any event, various courts agree that *Carlton* did not rule out retroactivity periods longer than a year. *See Montana Rail Link, Inc.* v. *United States*, 873 F. Supp. 1415, 1421 (D. Mont. 1994) ("in *Carlton* the Court did not establish a specific time frame for the validity of retroactive legislation"); *Enter. Leasing Co. of Phoenix* v. *Ariz. Dep't of Revenue*, 211 P.3d 1, 5–6 (Ariz. 2009) (same); *Miller* v. *Johnson Controls, Inc.*, 296 S.W.3d 392, 399 (Ky. 2009) (same); *Licari* v. *Comm'r of Internal Revenue*, 946 F.2d 690, 695 (9th Cir. 1991) (same); *Temple Univ.* v. *United States*, 769 F.2d 126, 135 (3d Cir. 1985) ("no federal court of appeals has yet adopted an absolute temporal limitation on retroactivity), cert. denied, 107 S. Ct. 1887 (1987). Instead, *Carlton* applied the same multi-part due process test that had been applied for decades, treating "modesty" as one fact supporting the rational-means prong. 512 U.S. at 32.

2. The lower-court conflict alleged in the petitions does not exist.

The alleged conflicts in the petitions are illusory. The South Carolina and New York high courts—like this Court—did not hold in the cases cited in the petitions that a period of years was an automatic indicator of constitutionality. Goodyear Pet. 26–28, 31; IBM Pet. 34–35; Skadden Pet. 16, 29–30; Sonoco Pet. 10, 26. Instead, those courts applied the same multi-step legal analysis applied by this Court in *Carlton* to a different set of facts and circumstances, considering modesty as a fact implicating the rational means prong of the analysis. *Rivers* v. *South Carolina*, 490 S.E.2d 261 (S.C. 1997) ("We do not suggest that *every* retroactivity period of this length is *per se* unreasonable. In some instances, a lengthy period of retroactivity may be necessary to accomplish certain legitimate ends . . . ."); *James Square Assocs.* v. *Mullen*, 993 N.E.2d 374, 383 (N.Y. 2013) (invalidating legislation because the Legislature "did not have an important public purpose to make the law retroactive.").

Even the state intermediate court decisions cited, cf. S. Ct. Rule 10(a), did not focus merely on duration. *City of Modesto* v. *Nat'l Med*, *Inc.*, 27 Cal. Rptr. 3d 215, 222 (Ct. App. 2005) ("retroactive application of this tax legislation does not meet the second prong of the due process test."); *Tesoro Ref. & Mktg. Co.* v. *Dep't of Revenue*, 246 P.3d 211, 218 (Wash. Ct. App. 2010) (recognizing that correcting significant fiscal losses is a legitimate legislative purpose but invalidating the legislation because "it is not reasonable for the legislature to enact a retroactive amendment spanning 24 years in direct response to a taxpayer's refund lawsuit").

While those four courts reached the rare conclusion of sustaining a substantive-due-process challenge to retroactive legislation, they did so only after applying the multi-factor substantive-due process test to the facts and circumstances of those cases.

And this case involves a significant circumstance that was not present in any of those cases. None of those cases involved the situation where it was an erroneous judicial decision misinterpreting a statute that created a retroactive right and so required a legislative correction of an already existing tax; instead, in those cases the retroactivity was a legislative policy decision. *James Square*, 970 N.W.2d at 377–78; *Rivers*, 490 S.E.2d at 262; *City of Modesto*, 27 Cal. Rptr. at 218–19; *Tesoro Refining*, 246 P.3d at 217–18. In short, it is not clear, given the uncommon posture of this case, that those courts would have reached a different conclusion than the Michigan Court of Appeals did here (especially if their state law include a legislative-correction doctrine). This is especially true because the petitioners' contentions that they relied on the Compact ring hollow in light of a simple fact: most of the petitioners correctly filed their original returns using single-factor apportionment and did not seek to use the Compact's repealed three-factor apportionment formula until the relevant tax years had already passed (and so the relevant business conduct had already occurred).

Finally, the Court has denied certiorari in a number of petitions presenting substantive-due-process challenges similar to that the petitioners present here. See, e.g., *In re Estate of Hambleton* v. *Washington Dep't of Revenue*, 335 P.3d 398 (Wash. 2014), cert.

denied, 136 S. Ct. 318 (2015); *GMC* v. *Dep't of Treasury*, 290 Mich. App. 355 (2010), cert. denied, 132 S. Ct. 1143 (2012); *Revenue Cabinet* v. *Asworth Corp.*, Nos. 2007-CA-002549-MR, 2008-CA-000023-MR, 2009 WL 3877518 (Ky. Ct. App. 2009) (unpublished), cert. denied, *Asworth*, *LLC* v. *Kentucky Dep't of Revenue*, 562 U.S. 1200 (2011); *Ford Motor Credit Co.* v. *Michigan Dep't of Treasury*, No. 289781, 2010 WL 99050 (Mich. Ct. App. 2010) (unpublished), cert. denied, 562 U.S. 1178 (2011); *Miller* v. *Johnson Controls*, *Inc.*, 296 S.W.3d 392 (Ky. 2009), cert. denied, 560 U.S. 935 (2010); *Triple-S Mgmt.*, *Corp.* v. *Mun. Revenue Collection Ctr.*, No. K CO2006-0029(901), 2008 WL 3627190 (P.R. June 30, 2008), cert. denied, 561 U.S. 1037 (2010); *U.S. Bancorp* v. *Oregon Dep't of Revenue*, 103 P.3d 85 (Or. 2004), cert. denied, 546 U.S. 813 (2005); *Monroe* v. *Valhalla Cemetery Co.*, 749 So. 2d 470 (Ala. Civ. App. 1999), cert. denied, 529 U.S. 1022 (2000), overruled on other grounds, *Patterson* v. *Gladwin Corp.*, 835 So. 2d 137 (Ala. 2002); *W.R. Grace & Co.* v. *Washington Dep't of Revenue*, 973 P.2d 1011 (Wash. 1999), cert. denied, 528 U.S. 950 (1999); *Ubel* v. *Minnesota*, 547 N.W.2d 366 (Minn. 1996), cert. denied, 519 U.S. 1057 (1997).

3. The petitioners' caselaw addressing procedural due process is off point.

Some petitioners assert that Public Act 282 improperly subjected them to a "bait-and-switch" in violation of due process. Sonoco Pet. 25. This argument lacks merit for two reasons. First, the cases involve the *procedural*-due-process right to challenge a tax assessment, a right that is not at issue here as the taxpayers are challenging retroactive legislation under a

substantive-due-process framework. And second, it is based on the false premise that Michigan "deliberately induced" taxpayers to rely on the Compact.

As to the first, the case that the petitioners rely on to construct this argument, *Newsweek Inc.* v. *Florida Department of Revenue*, 522 U.S. 442 (1998), is one in a line of procedural-due-process cases addressing tax appeals. Those cases, beginning with *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990), require that "because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause."

Those cases have no application here. The petitioners' ability to file suit to challenge a denial of a tax refund is not at issue. The petitioners have been able to get a judicial adjudication on its claim by both Michigan trial and appellate courts below. They have not been disallowed any "procedural safeguard" to the determination of its tax liability. And Public Act 282 in no way interferes with the procedural due process permitted by Michigan's Revenue Act, Mich. Comp. Laws § 205.22, for tax refund claims.

As to the second, even if that were not true, there has been no inducement or "bait and switch." The State has never held out that the Compact was beyond repeal: quite the opposite, the Compact's very terms say it can be repealed in Article X. Nor did the State ever allow the petitioners to elect to use the Compact after the enactment of the Michigan Business Tax and

then "pull out the rug." Michigan consistently maintained, since 2008, that no taxpayer could use the Compact's three-factor apportionment formula.

C. The decision below used the proper test for assessing the constitutionality of retroactive economic legislation.

Even if this case did involve a retroactivity period, the lower court correctly applied this Court's precedents in determining that Public Act 282 furthered legitimate legislative purposes by a rational means. The Act was passed for at least two legitimate purposes: (1) to correct a law that it believed the judiciary interpreted incorrectly and (2) to eliminate a significant revenue loss resulting from that misinterpretation. IBM Pet. App. 47a (citing *Carlton*, 512 U.S. at 32). And the lower court recognized as significant the facts that (1) Public Act 282 did not assess a new tax, but rather confirmed how the Department of Treasury had administered the Michigan Business Tax, IBM Pet. App. 48a; (2) the Michigan Legislature acted promptly—in only 59 days—in response to the *IBM* opinion, *id*. at 49a; and (3) Public Act 282's retroactivity (assuming for the moment it was retroactive) was sufficiency modest given the periods approved by Michigan Courts, federal courts, and other state courts, *id*. Thus, like in *Carlton*, Public Act 282 furthered a legitimate legislative purpose by rational means and was valid under the Due Process Clause

This Court "repeatedly has upheld retroactive tax legislation against a due process challenge." *United States* v. *Carlton*, 512 U.S. 26, 30 (1994) (citing *United States* v. *Hemme*, 476 U.S. 558 (1986); *United States*

v. *Darusmont*, 449 U.S. 292 (1981); *Welch* v. *Henry*, 305 U.S. 134 (1938); *United States* v. *Hudson*, 299 U.S. 498 (1937); *Milliken* v. *United States*, 283 U.S. 15 (1931); *Cooper* v. *United States*, 280 U.S. 409 (1930)). There is no reason why this case should be the exception.

II. A statute that restores a level playing field, after a state-court decision grants a benefit only for out-of-state companies, is not discriminatory under the dormant aspect of the Commerce Clause and so further review unnecessary.

The Sonoco and Skadden petitions ask this Court to consider an issue relating to the "dormant" aspect of the Commerce Clause, based on the assertion that Michigan's 2014 statute discriminates against out-of-state businesses by retroactively increasing their tax liability. They do not assert that any circuit split exists, or even that the decision conflicts with any holding of this Court. Instead, they simply suggest the issue is important enough to warrant this Court's review because it involves the Commerce Clause and because Michigan's statute will lead to economic balkanization. But this case does not involve discrimination against out-of-state businesses, let alone in a retroactive way. Quite the opposite, it *levels* the playing field so that out-of-state businesses are not receiving a tax advantage over in-state businesses, and it does so by restoring Michigan law to a correct interpretation of a statute in place since 2008.

This Court's jurisprudence provides that the dormant aspect of the Commerce Clause "prohibits

economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273 (1988); see also *Dep't of Revenue of Ky.* v. *Davis*, 553 U.S. 328, 343 (2008) (upholding a tax exemption that lacked "any differential treatment favoring local entities over substantially similar out-of-state interests"). A state tax satisfies the dormant commerce clause if it: (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit*, *Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). The petitioners challenge only the third element of the test: whether the law is discriminatory against interstate commerce.

In the context of the Commerce Clause, " 'discrimination' simply means differential treatment of in-state and out-of-state economic interests *that benefits the former and burdens the latter*." *United Haulers Ass'n. Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (emphasis added; quotation marks omitted). "A tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp.* v. *Dir.*, 490 U.S. 66, 75 (1989). Applying those standards, the lower court properly determined that Public Act 282 is not discriminatory.

A. Public Act 282 is not discriminatory on its face.

Because Public Act 282 makes no classifications based on a business's state of origin or where commerce occurs, the lower court was correct to determine that Public Act 282 is not facially discriminatory. IBM Pet. App. 57a. Facial discrimination requires an "explicit discriminatory design to the tax." *Amerada Hess*, 490 U.S. at 76. As an example, in *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984), the Court struck down a tax credit expressly provided for products shipped from New York to other states. There, the Court concluded that the "tax, on its face, is designed to have discriminatory economic effects . . . ." *Id.* at 406. In contrast, Public Act 282 makes clear that no taxpayer, regardless of location, can elect the Compact's formula in place of Michigan's business tax formula. *Id.* at 58a–60a.

B. It is not discrimination to treat in-state and out-of-state businesses the same.

Public Act 282 was not motivated by discriminatory intent nor does it have a discriminatory effect. As already noted, "discrimination" under the Commerce Clause requires "differential treatment of in-state and out-of-state economic interests that *benefits* the former and burdens the latter." *United Haulers*, 550 U.S. at 338 (emphasis added; quotation marks omitted). All the Act did was eliminate the inequality created by a judicial decision that allowed out-of-state businesses more apportionment options than in-state businesses had; the Act thus restored the level playing field that the Legislature created in 2008, through § 208.1301(2), when it required *both* Michigan *and*

non-Michigan businesses "whose business activities are subject to tax both within and outside of [Michigan]" to use single-factor apportionment.

If the Sonoco and Skadden petitioners were right that the Commerce Clause's dormant aspect prevents States from taking corrective action when their law inadvertently *benefits* out-of-state businesses and burdens in-state benefits, then the dormant aspect becomes a turnstile, allowing judicial mistakes affecting tax policy through but barring any legislative correction of those mistakes. The correction here, via Public Act 282, had both the purpose and effect of "ensur[ing] a *level playing field*" and "avoid[ing] giving an unfair advantage to out-of-state businesses." IBM Pet. App. 59a (emphasis in original).

Nor would allowing other States to do what Michigan has done lead to economic balkanization. If other states inadvertently impose a burden on in-state businesses and then remove it, the result will be, as here, that both in-state and out-of-state business are being treated equally. And that is the very goal of this Commerce Clause doctrine. *General Motors Corp*. v. *Tracy*, 519 U.S. 278, 299 (1997) ("the dormant Commerce Clause's fundamental objective [is] preserving a national market for competition undisturbed by preferential advantages").

Because this question presents an unusual situation, does not involve any split of authority or conflict with a decision of this Court, and was decided correctly by the lower court, this issue does not warrant review.

III. The state law at issue here does not violate the Contract Clause because Michigan had no contractual obligation to the petitioners (or even to other states).

The petitioners do not assert that a circuit split exists relating to the Contract Clause and the Multistate Tax Compact, nor do they assert that the decision below conflicts with a holding of this Court. To the contrary, the Sonoco petition, for example, candidly admits (at 9) that this is "a case of first impression as to whether" "retroactively repeal[ing] an interstate compact" "is permissible under the Contract Clause . . . ," and other petitioners simply argue that the decision below was incorrect. E.g., Skadden Pet. 17, 30–35; IBM Pet. 3–4, 13–25; Goodyear Pet. 2–4, 12–25. It was not.

When determining if legislation unconstitutionally impairs a contractual obligation in violation of the Contract Clause, the threshold question, as the petitioners agree, is "whether there is a contractual relationship" to impair. *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 186 (1992). The petitioner's contention here is that the lower court's opinion misinterpreted the language of the Compact as it once existed in Michigan law. But the lower court interpreted the statute correctly, and no further review is warranted.

A. A Contracts Clause violation cannot occur when there is no contractual obligation to infringe upon.

Because the Multistate Tax Compact does not require (nor has it received) congressional approval,

U.S. Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452, 479 (1978), its construction is a matter of state statutory and contract law. *McComb* v. *Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991). And while this Court has the ultimate authority for purposes of the Contract Clause to determine whether a state statute creates a contract, this Court gives considerable deference to a state court's interpretation of state law: "where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state," and "[u]nless those views are palpably erroneous we should accept them." *Phelps* v. *Bd. of Educ. of Town of W. N.Y.*, 300 U.S. 319, 322–23 (1937).

The lower court correctly recognized that Michigan's statute contains no words evidencing an intent to bind itself contractually: " 'There are no words in the Compact, as adopted by the Legislature under 1969 PA 3, that indicate that the state intended to be bound to the Compact . . . .' " IBM Pet. App. 33a. To the contrary, Michigan's statute includes language indicating an intent not to be bound to the Compact: "the Compact's withdrawal provisions was strong evidence that the member states did not intend to be contractually bound, as it demonstrates the member states' desire to retain control over their sovereignty with respect to taxation" *Id.* at 34a.

The petitioners do not deny that the statute here does not use words typically associated with a contract, such as "contract, covenant, or vested rights." *In re Request for Advisory Opinion*, 490 Mich. 295, 320–21 (2011). Instead, they criticize the lower court's interpretation, arguing that the word "compact" is

equivalent to contract. Goodyear Pet. 13; IBM Pet. 17; Skadden Pet. 32; Sonoco Pet. 14; see also Gillette Pet. 10 (referring to the Goodyear petition's arguments); DirecTV Pet. 10 (same). But the word "compact" does not by itself signify a contract enforceable under the Contract Clause. The label attached to a particular arrangement is not dispositive. *Northeast Bancorp Inc.* v. *Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985); *U.S. Steel*, 434 U.S. at 470. There must be more than a few words typically associated with contractual relationships to overcome the presumption that a law is not intended to create contractual rights—it must be "clearly and unequivocally expressed" that the law creates a contract, *Nat'l R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe R. Co.*, 470 U.S. 451, 466 (1985), because states "do not easily cede their sovereign powers . . . ." *Tarrant Regional Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2132 (2013).

Moreover, this Court also considers a party's course of performance as "highly significant" evidence to determine whether a statute creates contractual rights. *Id.* at 2135. As the lower court's opinion recognizes, the parties' course of conduct, and the uniform position of every State that is an actual party to the Compact, confirms that Michigan's Legislature was not contractually bound by the Compact. That conclusion is consistent with those of a number of other courts addressing similar challenges brought in other states. *Gillette Co.* v. *Cal. Franchise Tax Bd.*, 363 P.3d 94 (Cal. 2015), cert. denied, 137 S. Ct. 294 (2016); *Kimberly-Clark Corp.* v. *Minn. Comm'r of Revenue*, 880 N.W.2d 844 (Minn. 2016), cert. denied, 137 S. Ct. 598 (2016); *HealthNet, Inc. & Subs.* v. *Dep't of Revenue*, 22 Or. Tax 128, 129–30, 133 (2015).

B. Even if the Compact were a binding contract, the legislation here would not violate the Contract Clause.

Only laws that "operat[e] as a substantial impairment of *a contractual relationship*" are forbidden. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978). But the petitioners have no contractual relationship, either as parties or intended beneficiaries. As the three Michigan Supreme Court justices who reached this question in *IBM* explained, "taxpayers like IBM were not parties to the Compact." IBM Pet. App. 143a; *id.* 120a n.67 (plurality)("we decline to discuss whether the Compact is binding"). "To the extent [the Compact] can be viewed as a contract, *it is an agreement between its member states*, *not between taxpayers and the states." Id.* at 143a–44a (emphasis added).

Nor are the petitioners third-party beneficiaries. Under Michigan law, only *intended* (not incidental) third-party beneficiaries may enforce a contractual promise. Mich. Comp. Laws § 600.1405. A person is an intended beneficiary "only when the contract establishes that a promisor has undertaken a promise 'directly" to or from that person." *Schmalfeldt* v. *N. Point Ins. Co.*, 469 Mich. 422, 428 (2003). Nothing in the Compact designates any taxpayer as a beneficiary. Moreover, nothing indicates that Michigan "had undertaken to give or to do or refrain from doing something directly to or for" any taxpayer. *Id.* at 428–29; Mich. Comp. Laws § 600.1405(1). The Compact was established to protect the States' sovereignty—not to benefit taxpayers. The petitioners may have benefitted from it. But any benefit was *incidental*.

Second, as the lower court's opinion recognizes, "an impairment takes on constitutional dimensions only when it interferes with reasonably expected contractual benefits." IBM Pet. App. 38a. The petitioners cannot credibly argue that they relied on Articles III and IV when they conducted their business affairs because most petitioners (Advance/New House, AK Steel, Big Lots, Deluxe Financial, DirecTV, Goodyear, Gillette, Intuitive Surgical, Nintendo, Skadden, and Sonoco) filed their original returns for the 2008 and 2009 tax years applying Michigan's Business Tax Acts single-factor formula, not the Compact's three-factor formula. If they were truly relying on it for how they structured their conduct in those years, they would not have failed to apply it. Nor could the petitioners have reasonably relied on Articles III and IV of the Compact, given the history of the Compact member States repealing, amending, or rendering ineffectual those articles. The unreasonableness of any claimed reliance is further underscored by the "fact that these taxpayers have no vested interest in the continuation of any tax law" and that the Department of Treasury has consistently denied the election for over five years, as the lower court pointed out. IBM Pet. App. 39a.

And third, Michigan's Legislature clarified that it had withdrawn from the Compact for legitimate purposes: to affirm Michigan's mandatory apportionment formula and to avoid paying unanticipated refunds to the tune of $1 billion-dollars. For those additional reasons, the lower court was correct in holding that there was no Contract Clause violation.

C. The lower court's opinion does not put other multistate compacts at risk.

The petitioners also assert that the Court of Appeals' decision threatens the effectiveness of multistate compacts. Goodyear Pet. 24; IBM Pet. 25; Sonoco Pet. 9; Gillette Pet. 10; DirecTV Pet. 10. The opposite is true: the petitioners' position, if adopted, would create significant concern from States participating in other compacts that they might be drawn into litigation brought by third parties attempting to enforce contractual rights that do not exist. The lower courts' opinion creates no threat to multistate compacts. The decisions' distinction between congressionally approved and non-congressionally approved compacts significantly limits the scope of its ruling to only non-congressionally approved compact. IBM Pet. App. 32a–33a). Among those, the Michigan Court of Appeals' holding requires a totality-of-the-circumstances, factual analysis of individual compacts. And in the case of the Multistate Tax Compact, all member States are in agreement that it is non-contractual.

In short, it is not correct that this Court must save the States and private businesses from unknown consequences to interstate relations unrelated to the Compact. This Court should deny further review on this issue as well.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record

Scott L. Damich
Assistant Attorney General
Revenue and Collections
Division

Attorneys for Respondent

Dated: MARCH 2017