Nos. 16-697, 16-699, 16-736

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 TREASURY,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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

(Additional Captions Listed on Inside Cover)

GILLETTE COMMERCIAL OPERATIONS
NORTH AMERICA & SUBSIDIARIES,

Petitioners,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.

DIRECTV GROUP HOLDINGS, LLC,

Petitioner,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF FOR PETITIONERS

Michigan does not, and could not, deny that the two questions presented here are important and recurring ones. In opposing review, the State nevertheless insists that the governing law is settled and the decision below correct. But Michigan's own opposition brief shows that the law is confused: Michigan makes no attempt to defend the state court's rationale for holding that the Multistate Tax Compact is not a binding interstate contract, while the State is unable even to articulate in an intelligible way the due process test that governs retroactive tax legislation. In fact, the holding below departs from this Court's decisions on both questions.

Two Justices of the Michigan Supreme Court, dissenting from denial of review below, recognized the "considerable constitutional significance" of the issues raised in this case for "tax policy and procedures" and "the fiscal and business environments." IBM Pet. App. 1a.[1] Those Justices flagged significant reasons to doubt the legality of Michigan's retroactive tax, noting that the tax both (1) "arguably exceeds '[the] modest period of retroactivity'" approved by this Court in *Carlton* and (2) may run afoul of the Contract Clause "because the Compact is a reciprocal and binding interstate compact between the signatory states." *Id*. at 3a, 4a.[2] This

[1] We follow the State's approach and cite to the decision below as it appears in the petition appendix in *International Business Machines Corp.* v. *Michigan Department of Treasury*, No. 16-698.

[2] Michigan's assertion that these Justices dissented "based on two state-law questions" (Opp. 15) is mystifying. Although the dissent *also* addressed state-law issues, it expressly cited the U.S. Constitution in addressing whether the Michigan tax is "consistent with federal due-process protections" and "violate[s]

Court's guidance, to clarify the law and correct manifest misunderstanding of the Court's precedent, is warranted.

A. The Court Should Settle The Due Process Rules Governing Retroactive Taxation.

Like Michigan, we will begin with retroactivity. On this, the State advocates an approach that disregards principle, guarantees inconsistent results, and reads all real limits on retroactive legislation out of the Constitution.

1. The decision below does not rest on an independent and adequate state ground.

The State's initial argument against review—that the decision below rests on an independent and adequate state ground because the challenged tax "was not, under Michigan law, retroactive at all" (Opp. 16)—is insubstantial. Michigan's theory is that the 2014 legislative amendment "clarified and corrected" a judicial misinterpretation of the 2008 law, and therefore "restor[ed] the status quo that had existed since 2008." *Ibid*. But this contention, which posits that the Michigan legislature engaged in a sort of time travel, misstates the basis of the decision below and makes no sense on its own terms.

The state court did not rely on—or even invoke—the idea that a legislative "clarification" lacks "retroactive" effect. To the contrary, it analyzed whether the 2014 repeal is impermissibly retroactive under *federal* law, applying this Court's retroactivity precedents. IBM Pet. App. 39a-51a. The state court thus repeatedly characterized the repeal as "retroactive." See, *e.g.*, *id.* at 23a, 27a, 39a, 46a, 48a,

---

either the federal or state prohibitions against the impairment of contracts." IBM Pet. App. 3a, 4a.

49a.[3] The language from the decision below that Michigan cites in its brief addressed not due process retroactivity but a state-law separation of powers issue, and even as to that held that the "power to amend includes the power to *retroactively* correct the judiciary's misinterpretation." Opp. 18 (quoting IBM Pet. App. 52a) (emphasis added). Accordingly, the state court "quite clearly rested its [due process retroactivity] decision solely on the Federal Constitution." *Oregon* v. *Guzek*, 546 U.S. 517, 523 (2006) (alterations omitted).

In fact, there is no doctrine of Michigan law holding that "curative" or "clarifying" legislation is not retroactive, even when that legislation attaches new legal consequences to past conduct. See, *e.g.*, *Gen. Motors Corp.* v. *Dep't. of Treasury*, 803 N.W.2d 698, 709 (Mich. Ct. App. 2010). Nor could there be. "[T]he Michigan Supreme Court has the ultimate responsibility for determining a question of state law." *In re Apportionment of State Legislature–1982*, 321 N.W.2d 565, 572 n.11 (Mich. 1982). Once that court has authoritatively interpreted the meaning of a state law—as it did in *IBM*, 852 N.W.2d 865, when it settled that Michigan's 2008 legislation did *not* displace the Compact election—any subsequent legislative amendment must be viewed as a change in the law.

And even if *that* were not so, the reality is that legislation like Michigan's revocation of the Compact election assigns new tax liability to events taking place in the past; it is a matter of *federal* law whether such legislation comports with the Due Process Clause. See,

---

[3] The Michigan legislature itself likewise treated 2014 PA 282 as "repeal[ing] retroactively" the Compact. 2014 PA 282, enacting § 1. See also IBM Pet. App. 46a (legislative analysis of the bill).

e.g., *Saltonstall* v. *Saltonstall*, 276 U.S. 260, 268 (1928).

2. The decision below upholding Michigan's retroactive tax is incorrect and contributes to widespread confusion on the governing due process principle.

When it finally reaches the constitutional issue presented here, Michigan is wrong in several fundamental respects.

First, the State misstates our argument. We do not assert, as Michigan would have it, that "a retroactivity period of more than a few years should be per se unconstitutional." Opp. 21; see *id.* at 22. We maintain, instead, that the due process test inquires into the effect of the retroactive legislation on (a) the affected taxpayer's "reasonable certainty and security" (*E. Enters.*, 524 U.S. at 548 (Kennedy, J., concurring in part and dissenting in part)); (b) the extent to which a retroactive law is "fundamentally unfair and unjust" in a manner that relates to "reasonable reliance and settled expectations" (*id.* at 559 (Breyer, J., dissenting)); and (c) the effect of such a law on "the taxpayer's interest in finality and repose." *Carlton*, 512 U.S. at 37-38 (O'Connor, J., concurring in the judgment). As we showed in the petition (at 31-33), a number of considerations bear on this inquiry, although "[i]n our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute." *E. Enters.*, 524 U.S. at 549 (Kennedy, J., concurring in part and dissenting in part) (citing cases).

Second, Michigan cannot articulate a coherent due process test. It asserts at several points that retroactive taxation satisfies due process so long as the retroactivity is "rational." Opp. 22, 23, 28. But as we

showed in the petition (at 26-27), in the retroactivity context "rationality," by itself, is no test at all: "any law that retroactively adds a tax, removes a deduction, or increases a rate rationally furthers th[e] goal" of raising revenue. *Carlton*, 512 U.S. at 40 (Scalia, J., concurring in the judgment). As we also showed in the petition (at 27-28), confining the inquiry to rationality in that sense is not consistent with this Court's decisions and does not explain the holdings of other courts that have invalidated retroactive taxation. In addition, we noted widespread expressions of uncertainty over the governing due process test by, among others, the Congressional Research Service. Pet. 27-29. Michigan fails to acknowledge any of these points.

Perhaps recognizing the inadequacy of a standard that looks only to rationality, Michigan also suggests, inconsistently, that courts apply a "multi-part due process test." Opp. 23. But this argument only confirms the uncertainty in the law: Michigan does not identify the "parts" of this multi-part test, how those parts fit together, or how the determination of unconstitutionality ultimately is to be made.

Third, Michigan's attempt to explain away the decisions of other courts that have invalidated retroactive taxes under the Due Process Clause is unavailing. The State's only distinction of those decisions is that they did not involve a "legislative correction" of a purported judicial error. Opp. 25. But Michigan here appears to be advocating for its *own* per se rule, which would validate a retroactive tax whenever a unit of government contends, after the fact, that it projected its new levy into the past to correct a court's asserted misunderstanding of the legislature's original intent. See Opp. 28.

In any event, as we explain in the petition (at 32), this focus on the current legislature's purportedly corrective purpose is unsatisfactory as a constitutional test. Such an approach would mean that legislatures *always* may retroactively overturn judicial decisions that reject the executive's construction of a tax, so long as the current legislature says that the new statute is what the prior legislature meant—even though, as a matter of law, judicial rejection of the executive's construction means that is *not* what the legislature originally intended. See page 3, *supra*. It also would have the constitutional inquiry hinge on untestable, after-the-fact assertions about the intent of a long-gone legislature. And the fact is, every change in the law rests on the current legislature's belief that existing statutes are inadequate: "there is no reason to pass a new law, after all, if the legislators are satisfied with the old one." *Carlton*, 512 U.S. at 36 (O'Connor, J., concurring in the judgment). Given that the governing test turns on reliance, fairness, and repose, it is not evident why it should matter for due process purposes that the retroactive tax is labeled "corrective" in this sense.

Finally, Michigan's brief attempt to defend the merits of the state court's retroactivity ruling (Opp. 28-29) confirms the confusion in the law:

a. Michigan insists that the period of retroactivity here is "sufficien[tly] modest" (Opp. 28), but that strips the word "modest" of any meaning. The period of retroactivity effected by the Michigan tax extends almost *seven* years. In contrast, this Court has *never* upheld a retroactive tax period of more than two years; and it several times emphasized the "modesty" of the one-year retroactivity period in *Carlton*. Insofar as "the degree of retroactive effect is a significant determinant in the constitutionality of a statute" (*E. Enters.*, 524

U.S. at 549 (Kennedy, J., concurring in part and dissenting in part)), that factor must cut strongly against Michigan's retroactive tax.

b. Michigan insists that its legislature acted to correct an error in the judicial interpretation of its tax law. But the Michigan Supreme Court held that the state legislature did not mean to preclude use of the Compact formula prior to 2011 (see Pet. 7-8) and, as a matter of state law, that ruling establishes the tax's original meaning. When the legislature acted in 2011 to preclude use of the Compact formula, three years after the initial enactment, it made that legislation *prospective*. See Pet. 8 & n.2. That the legislature had second thoughts almost four years later—almost seven years after the initial enactment—hardly proves the validity of its retroactive legislation.

c. We showed in the petition that the retroactive tax worked an obvious interference with the expectations of taxpayers who suddenly were faced with radically different consequences, projected back in time, for engaging in Michigan business activity. Pet. 32-33. The State's only response is the assertion that taxpayers could not have meant to rely on application of the Compact because some (but not all) taxpayers used a single-factor formula when originally filing their post-2008 returns. Opp. 25; see *id*. at 13. But that conclusion does not follow. In light of the Michigan tax authorities' position that the Compact formula was not available starting in 2008 (the position ultimately repudiated by the Michigan Supreme Court), cautious taxpayers as a matter of routine filed under the single-factor formula and then sought refunds to avoid any possible imposition of penalties. In fact, the Michigan legislature *itself* recognized in 2011 that the Compact election had remained available until that date—which

is why the legislature prospectively precluded use of the Compact formula beginning in that year.

d. This case illustrates the validity of Justice Kennedy's observation that retroactive laws are of "particular concern" because they may tempt legislatures to direct legislation "against unpopular groups or individuals." *E. Enters.*, 524 U.S. at 548 (Kennedy, J., concurring in part and dissenting in part). That is just what Michigan did here when it imposed its retroactive tax increase exclusively on interstate taxpayers. The State's contrary contention that its retroactive legislation created a "level playing field" between intrastate and interstate businesses (Opp. 7; see *id.* at 29-32) is nonsensical; by definition, retroactive elimination of the Compact formula affects *only* companies that engage in interstate business, and increases the tax for companies that have more of their payroll and property located in other States.

In all, there is no denying that the due process issue here is tremendously significant. Although the Court has denied review in past retroactivity cases, the decisions Michigan cites on the point (Opp. 25-26) show mostly that the issue arises often. Michigan does not dispute that legislatures are turning with increasing frequency to retroactive taxation, and decisions like the one in this case will accelerate that trend. Confusion on the governing standard is widely acknowledged and is evident in Michigan's arguments here. And this Court has never upheld a retroactive tax that extends anywhere near as far as Michigan's. For all these reasons, review by this Court is warranted.

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

On the Contract Clause issue, we showed in the petition that the decision below misapplied this Court's

precedents, an error that led the state court to misconstrue the Compact. That holding has harmful practical consequences and places the law relating to compact interpretation in a state of confusion. In its opposition, Michigan simply ignores most of our arguments; the little that it does say is wrong.

1. The court below misunderstood Northeast Bancorp.

The court below based its decision that Michigan did not enter into "a binding interstate compact" solely on its reading of *Northeast Bancorp*, which it believed set out "[t]he three classic indicia of a binding interstate compact." IBM Pet. App. 35a (internal quotation marks omitted). The court held that, "[a]pplying these same [three] factors, we conclude that the Compact contained no features of a binding interstate compact." *Id*. at 36a. We showed in the petition that this holding is wrong: *Northeast Bancorp* does *not* establish a universal list of factors that determine the existence of a binding compact; and the Michigan court misconstrued *each* of the *Northeast Bancorp* considerations. Pet. 15-19.

Michigan makes no response, ignoring our argument and offering no substantive discussion of *Northeast Bancorp*. The State thus implicitly concedes that the holding below is indefensible. For this reason alone, review is warranted. As we explain in the petition, the courts of *two* States have now applied the same manifest misreading of *Northeast Bancorp*, allowing their States to escape compact obligations. Pet. 3, 24-25. It should be intolerable that a misunderstanding of this Court's holding is having such an effect.

2. The Compact is binding.

In addition, what the State does say, in defense of the state court's separate holding that (aside from *Northeast Bancorp*) the Compact is not a binding contract, is wrong.

First, we showed in the petition (at 13-15) that the meaning of the Compact is a matter of federal law. The State makes no response.

Second, Michigan is unequivocally wrong when it asserts that we "do not deny that the statute here does not use words typically associated with a contract." Opp. 34. Actually, we showed in the petition (at 19-23) that the Compact's form and language unambiguously establish the Compact's binding status. The Compact is structured as a contract; is triggered by the entry-into-force mechanism by which States generally form binding contracts, which would be meaningless if the Compact is not binding; contains a withdrawal provision and limiting clauses that also would be superfluous were the Compact nonbinding; and contains reciprocal provisions imposing mandatory obligations on the "party states," which cannot be read as optional elements of an advisory law. Michigan has literally nothing to say about *any* of these controlling elements of the Compact's language. That default is telling.

Third, Michigan points to what it describes as the other Compact member States' "course of performance." Opp. 35. But no other State has followed Michigan's path by departing from the Compact retroactively. And in any event, that sort of extrinsic evidence of a contract's purported meaning bears weight only when contractual counter-parties have an incentive to object to breaches. See, *e.g.*, Restatement (Second) of Contracts § 202 (1981); 5-24 *Corbin on*

Contracts § 24.16 (2016). That is not the case here, where signatory States do not obtain particular direct benefits from contractual performance by other Compact members. Moreover, the course of performance under the Compact has been inconsistent; many States have *not* departed from the Compact's election provision and others have properly withdrawn from the Compact in accord with its terms. See *Gillette* v. *FTB,* Pet. 22 n.9.

Fourth, Michigan is wrong in contending that taxpayers are not the Compact's intended beneficiaries and therefore may not enforce it. Opp. 36. Although the member States' entry into the Compact doubtless had the incidental benefit to them of preempting congressional action (see Pet. 5-6), the Compact's *express intended purpose* was to benefit taxpayers by entitling them to use the Compact's neutral apportionment formula. See Compact Art. I. Those taxpayers' contractual rights were impaired when they were barred from using that formula. Cf. Opp. 37.

Fifth, Michigan is incorrect when it denies that its approach would undermine the effectiveness of interstate compacts. Opp. 38. Filing in *Gillette* v. *FTB*, numerous *amici* that have no ax to grind in this litigation—including the State of Ohio—agreed that a rule like that advocated by Michigan would affect many compacts, creating uncertainty about whether States are bound by existing compacts or should join additional ones in the future. See *Gillette* v. *FTB*, Ohio Amicus Br. 9; Litwak Amicus Br. 12, 14-15. This danger makes the error committed below one of exceptional importance that this Court should address.

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

MARCH 2017