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

IN THE

Supreme Court of the United States

SONOCO PRODUCTS COMPANY, *et al.*,
Petitioners,

v.

DEPARTMENT OF TREASURY, STATE OF MICHIGAN,
Respondent.

[additional captions listed on inside cover]

On Petitions for Writs of Certiorari to the Michigan Court of Appeals

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP,
Petitioner,
v.

MICHIGAN DEPARTMENT OF TREASURY,
Respondent.

GILLETTE COMMERCIAL OPERATIONS NORTH AMERICA & SUBSIDIARIES, *et al.*,
Petitioners,
v.

MICHIGAN DEPARTMENT OF REVENUE,
Respondent.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,
v.

MICHIGAN DEPARTMENT OF TREASURY,
Respondent.

GOODYEAR TIRE & RUBBER COMPANY, *et al.*,
Petitioners,
v.

MICHIGAN DEPARTMENT OF REVENUE,
Respondent.

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BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICI CURIAE*

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million

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[1]No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici*'s intent to file this brief at least 10 days before it was due, and have consented to its filing in letters that have been lodged with the Clerk.

companies and professional organizations of every size, in every economic sector, and from every region of the country. One important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the Judiciary. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies that together have $6 trillion in annual revenues and nearly 15 million employees. The BRT's member companies comprise nearly one-quarter of the total value of the U.S. stock market and pay $226 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and participate in litigation as *amicus curiae* where important business interests are at stake.

Thousands of *amici*'s members engage in interstate commerce, and do business in states that are party to the Multistate Tax Compact. Accordingly, whether the Compact is binding, and the extent to which a state could repeal the Compact retroactively, are questions of significant importance to *amici* in these cases.

SUMMARY OF ARGUMENT

The Multistate Tax Compact requires its member states to provide multistate taxpayers the option of apportioning their income according to a three-factor, equal-weighted formula. Since the Compact took effect in 1967, businesses across the nation have relied on that formula in making key decisions, like where to expand their sales or open a manufacturing plant. They have also relied on that formula in making sure that their income is apportioned in the same, consistent way among multiple states.

The Michigan Court of Appeals' decision upends that reliance in two ways. First, the court held that the Compact is not binding at all. If allowed to stand, that decision would mean that member states could simply disregard their commitments under the Compact, including their promises to make the equal-weighted formula available. Companies that do business in member states could thus find themselves owing much more in taxes than they had ever expected.

Second, the court upheld legislation retroactively repealing the provisions of the Compact. The legislation at issue reaches back almost seven years to deny businesses the option of using the equal-weighted formula. Companies that had made decisions in reliance on that formula now must pay Michigan over $1 billion more in taxes. Absent this Court's intervention, the decision below will only encourage more states to use retroactive tax liability as a way of balancing budgets, in violation of the Constitution.

Each of the petitions for *certiorari* challenges these aspects of the decision below, and the need for review is even more compelling than in *Gillette Co.* v. *California Franchise Tax Board*, No. 15-1442, or *Kimberly-Clark Corp.* v. *Minnesota Commissioner of Revenue*, No. 16-565. Unlike in *Gillette* or *Kimberly-Clark*, the state in these cases sought not merely to break from the Compact, but to do so retroactively. These petitions thus place in even sharper relief the question whether the Compact is binding, and present the additional question whether retroactive tax liability may be imposed for a period of almost seven years. Because these issues bear immense practical consequences for businesses throughout the United States, this Court should grant the petitions and reverse.

ARGUMENT

I. WHETHER THE COMPACT IS A BINDING CONTRACT IS OF IMMENSE PRACTICAL IMPORTANCE TO BUSINESSES ACROSS THE NATION

The Multistate Tax Compact sets forth a number of rules governing the "proper determination of State and local tax liability of multistate taxpayers." 16-699 Pet. App. 21a (Compact art. I(1)). Among them is the provision at issue here: the requirement that member states give businesses the option of apportioning their income according to an equal-weighted apportionment formula. *Id.* at 23a (Compact art. III(1)). That formula determines how much of a business's nationwide income should be attributed to a particular state—and thus how much in income taxes the business must pay there—by giving equal weight to three factors: (1) the amount of property the business holds in the state (the property factor); (2) the amount of compensation the business pays employees in the state (the payroll factor); and (3) the amount of sales the business makes in the state (the sales factor). *See id.* at 28a-30a (Compact art. IV(9)-(15)).

The petitions ask this Court to decide whether the provisions of the Compact are binding and therefore enforceable under the Contract Clause of the Constitution. This Court should grant the petitions and hold that the answer is yes. Businesses across the nation have long relied on the Compact as a source of predictable and uniform rules governing the amount of income taxes they owe not just in Michigan but in other member states. If allowed to stand, the Michigan Court of Appeals' holding that "the Compact is not a binding contract," 16-697 Pet. App. 45a, would completely undermine that reliance: Member states could simply do away with the equal-weighted formula, without actually withdrawing from the Compact. The status of the Compact is thus an issue of profound national importance, warranting this Court's review.

A. Businesses Have Relied On The Compact As A Source Of Predictable Taxation Rules

To appreciate the significance of the question presented, consider the following example. A company manufactures and sells widgets in State A, which is a member of the Compact. The company is growing and wants to expand its sales into a neighboring state—but which one? After reviewing the tax regimes of the surrounding states, it decides to expand into State B. The rationale for that decision is simple: State B is also a member of the Compact, and so is obligated to let the company allocate its income according to the equal-weighted apportionment formula. To be sure, State B could one day *withdraw* from the Compact. But under Article X, that would require repealing the Compact *as a whole*—not just its provisions concerning the equal-weighted formula. *See* 16-699 Pet. App. 43a (Compact art. X(2)); 16-699 Pet. 21. So unless State B takes the steps required by Article X to withdraw, the amount of income taxes the company owes in

State B will never exceed what the equal-weighted formula yields. And that sort of certainty is important to the company, which is deciding where to sell for the long term.

After it has already expanded into State B, however, the company is told that the Compact was never binding. Without going through the process of withdrawing from the Compact, State B amends its tax code to eliminate the equal-weighted formula as an option. Under a different formula imposed by the state, the company owes State B more in income taxes than it had ever anticipated. If the company had known that State B could simply disregard the Compact as non-binding, it would have never expanded there in the first place; it decided to grow its business in State B only because it thought State B was committed to following the Compact.

The decision below makes this hypothetical a reality. Thousands of American businesses engage in commerce across state lines. Indeed, "[m]ost companies engaged in interstate commerce make sales into many more States than the number in which they have places of business, and probably into many more States than the number in which they have payroll." H.R. Rep. No. 88-1480, vol. 1, at 528-529 (1964). American companies thus make decisions all the time about the states in which they should do business.

Those decisions are often affected by the potential tax consequences of expanding into one state versus another. State and local taxes, after all, represent a "significant" part of a business's overall costs. Tax

Found. & KPMG, *Location Matters: The State Tax Costs of Doing Business* 1 (2015).[2] In fiscal year 2012 alone, manufacturers paid nearly $90 billion in taxes to state and local governments. Mfg. Inst., *State & Local Taxes by Funding Source*.[3] It should come as no surprise, then, that "business location decisions for new manufacturing facilities, corporate headquarter relocations, and the like are often influenced by assessments of relative tax burdens across multiple states." Tax Found. & KPMG, *supra*, at 1.

The Compact was supposed to make those assessments more predictable by "requir[ing]" member states to "make the [equal-weighted apportionment formula] available to any taxpayer wishing to use it." Council of State Gov'ts, *The Multistate Tax Compact: Summary and Analysis* 1 (1967); *see also id.* at 6 ("The Multistate Tax Compact provides that the [equal-weighted apportionment formula] will be available in all party States to any multistate taxpayer wishing to use it."). The availability of that formula was supposed to help manufacturers and other businesses make sound, long-term decisions—like where to build a new factory, or where to hire more salespeople. A business could expand its sales in a member state, confident that those sales would be weighted equally in determining how much in taxes it would have to pay.

The decision below, however, threatens to disrupt the settled expectations of countless businesses that have relied on the availability of the equal-weighted formula. If, as the decision below holds, the Compact

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[2] *Available at* http://goo.gl/rq45QZ.

[3] *Available at* http://goo.gl/JMAI9M.

is not a binding contract, then member states could simply deny those businesses the option of using that formula without actually withdrawing from the Compact. *See* 16-699 Pet. 24. Those businesses would then find themselves in the same position as the hypothetical company above, owing much more in taxes than they had originally anticipated.

B. Businesses Have Relied On The Compact As A Source Of Uniform Taxation Rules

The consequences of the decision below do not end there. The Compact was intended to make income taxes not only more predictable, but also more uniform. *See* 16-699 Pet. App. 21a (Compact art. I(2)) ("The purposes of this compact are to * * * [p]romote uniformity or compatibility in significant components of tax systems."). By opting for the equal-weighted apportionment formula in each member state, a business could ensure that each of those states apportioned its income in the same way. *See* Council of State Gov'ts, *supra*, at 6.

Such uniformity, in turn, would serve another key purpose: "[a]void[ing] duplicative taxation." 16-699 Pet. App. 21a (Compact art. I(4)). "[S]ome risk of duplicative taxation exists whenever the States in which a corporation does business do *not* follow identical rules for the division of income." *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 278 (1978) (emphasis added). When states *do* follow identical rules, however, the "possibility of double taxation" goes away. Council of State Gov'ts, *supra*, at 1.

Consider a company that does business across state lines. The company holds all of its property and pays all of its employees in State A, while also making $10 million in sales there. In State B, the company holds no property and pays no employees, but makes $15 million in sales. If both states applied the same equal-weighted formula, 80% of the company's income would be taxable in State A, while 20% of its income would be taxable in State B.[4] By contrast, if State A applies an equal-weighted formula and State B applies a formula based solely on the sales factor, *see* 16-697 Pet. App. 37a, 60% of its income would be taxable in State B—resulting in 40% of its income being taxed twice.[5] Uniformity avoids double taxation—and by avoiding double taxation, promotes fairness. *See* 16-699 Pet. App. 21a (Compact art. I(1)) (identifying "the equitable apportionment of tax bases" as one of the purposes of the Compact).

The decision below undermines these goals. If the Compact is not a binding contract, companies that engage in interstate commerce would no longer be able to count on each member state applying the same formula in apportioning their income. Rather, companies would face a serious risk of duplicative taxation as they do business across state lines.

In short, the question whether the Compact is a binding contract is of immense practical importance to businesses nationwide. The petitions should be

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[4]Because the company has 100% of its property, 100% of its payroll, and 40% of its sales in State A, the equal-weighted formula apportions 80% of the company's income (240% ÷ 3) to State A. Because the company has 0% of its property, 0% of its payroll, and 60% of its sales in State B, the equal-weighted formula apportions 20% of the company's income (60% ÷ 3) to State B.

[5]Because the company has 60% of its sales in State B, a formula based exclusively on the sales factor apportions 60% of the company's income to State B.

granted to resolve, once and for all, the status of the Compact.

II. THE CONSTITUTIONALITY OF RETROACTIVE TAX LIABILITY HAS FAR-REACHING IMPLICATIONS FOR THE NATION'S BUSINESSES

The petitions in these cases raise another issue: the constitutionality of imposing retroactive tax liability for a period of almost seven years. That issue warrants this Court's review as well. The Michigan Court of Appeals' conclusion that states are not bound by the Compact is worrisome enough. But if allowed to stand, the decision below would allow states not only to undo their commitments, but to undo their commitments *after the fact*—further undermining the reasonable reliance interests of businesses across the country.

A. Retroactive Tax Liability Undermines Reasonable Reliance Interests

In 2014, Michigan enacted legislation repealing the Compact. 16-697 Pet. App. 43a. But the effect of that legislation was not merely prospective. Michigan made the repeal effective as of January 1, 2008—a date almost seven years earlier. *Id.* at 42a-43a. As a result, companies that had for many years thought they were doing business under one tax regime were told that they in fact owed more money under another—over $1 billion more. *Id.* at 60a.

That result is inconsistent with the minimum predictability and rule of law that, in addition to being mandated by the Due Process Clause, is essential for business planning. As explained above, U.S. companies make decisions all the time based on the relative tax burdens of doing business in one state versus another. *See supra* pp. 6-7; *United States* v. *Carlton*, 512 U.S. 26, 38 (1994) (O'Connor, concurring in the judgment) ("[T]he tax consequences of commercial transactions are a relevant, and sometimes dispositive, consideration in a taxpayer's decisions regarding the use of his capital * * * ."). And in making those critical decisions, companies rely on "what the law is" and "conform their conduct accordingly." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994). In 2008, for example, an out-of-state business might have directed more and more of its sales into Michigan instead of a neighboring state, in reliance on the fact that Michigan had promised under the Compact to make the equal-weighted formula available. *See supra* pp. 5-6. That reliance would have grown only more reasonable following *IBM Corp.* v. *Department of Treasury*, 852 N.W.2d 865 (Mich. 2014), in which the Michigan Supreme Court expressly confirmed the availability of the equal-weighted formula in 2008. *See id.* at 876 ("[T]he Compact's election provision remained in effect for the 2008 tax year.").

Michigan's legislation retroactively repealing the Compact upends those reasonable expectations. The rule of law is supposed to "give[] people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 266. Yet Michigan's retroactive repeal does just the opposite, "chang[ing] the legal consequences of transactions long closed." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). That type of post hoc change "destroy[s] the reasonable certainty and security which are the very objects of property ownership." *Id.* It also risks stifling the investment and "creativity" that are the very engine of "a free, dynamic society." *Landgraf*, 511 U.S. at 266.

Michigan's retroactive repeal raises a further concern: that it was a means to target "unpopular groups or individuals." *Id.* When it comes to taxation, the easiest targets are often those without a vote: out-of-state businesses engaged in interstate commerce, like the hypothetical company above. *See supra* pp. 8-9. Those are precisely the businesses that must bear the heavy, $1-billion burden of Michigan's retroactive repeal here. And benefiting their in-state competitors may have actually motivated the passage of the repeal. *See* 16-688 Pet. 11-12; Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960) ("[Retroactive legislation] may be passed with an exact knowledge of who will benefit from it.").

Because Michigan's retroactive repeal "sweep[s] away" the "settled expectations" of so many out-of-state businesses, *Landgraf*, 511 U.S. at 266, its constitutionality presents an issue of vital importance to the nation's economy. As this Court has explained, "the antiretroactivity principle finds expression in several provisions of our Constitution"—among them, the Due Process Clause, which "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Id.* Because that Clause forbids Michigan's attempt to impose retroactive tax liability for a period of almost seven years, this Court should grant the petitions and reverse the decision below.[6]

B. The Decision Below Lacks Any Limiting Principle

This Court's review is particularly warranted because, if allowed to stand, the decision below would authorize retroactive tax liability without any genuine limit. States could reach back an untold number of years to impose unexpected tax liability on businesses and other taxpayers.

To be sure, the Michigan Court of Appeals sought to rest its decision on the principle that "the 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." No. 16-697 Pet. App. 52a. But its application of that test belies the existence of any true limiting principle.

The court concluded, for example, that Michigan had pursued a legitimate purpose by seeking to correct a "misinterpretation of a statute" that had resulted in "significant revenue loss." *Id.* at 60a. If that were truly sufficient, *any* retroactive tax legislation would pass muster. After all, a state can always say that a retroactive law is meant to correct something about an older one. *See Carlton*, 512 U.S. at 36 (O'Connor, J., concurring in the judgment) ("Every law touching on an area in which Congress has previously legislated can be said to serve the legisla-

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[6]Given Michigan's targeting of out-of-state businesses, the Court may also wish to consider whether the retroactive repeal violates the dormant Commerce Clause. *See* 16-687 Pet. 28-31; 16-688 Pet. 18-26.

tive purpose of fixing a perceived problem with the prior state of affairs—there is no reason to pass a new law, after all, if the legislators are satisfied with the old one."). And a state can always say that raising revenue is the purpose of retroactive taxation. *See James Square Assocs. LP* v. *Mullen*, 993 N.E.2d 374, 383 (N.Y. 2013) ("Raising funds is the underlying purpose of taxation, and such a rationale would justify every retroactive tax law * * * .").

The Michigan Court of Appeals also concluded that the "6½-year retroactive period" in this case was "sufficiently modest." 16-697 Pet. App. 61a-62a. But it did not even attempt to articulate any principled limit on the period of retroactivity. It did not, for instance, embrace Justice O'Connor's view that any "period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise * * * serious constitutional questions." *Carlton*, 512 U.S. at 38 (O'Connor, J., concurring in the judgment). Rather, the court left indeterminate how long a period of retroactivity the Constitution might tolerate.

Absent any limiting principle, the decision below will only embolden more states to resort to retroactive tax liability to make up for inevitable budget shortfalls. Numerous states, from California to Virginia, have already tried to balance budgets using retroactive tax legislation. *See* Tim Winks et al., *Virginia—Ten Year Retroactive Limitations Placed on Addback Exceptions*, Apr. 7, 2014;[7] Editorial, *Lawless Taxation*, Wall St. J., Sept. 2, 2013.[8] And

[7] *Available at* http://goo.gl/ISUAda.

[8] *Available at* http://goo.gl/kzPFhi.

courts reviewing such legislation have issued conflicting decisions, with some invalidating periods of retroactivity far shorter than the nearly seven years upheld here. *See James Square*, 993 N.E.2d at 382 (sixteen to thirty-two months); *Rivers* v. *State*, 490 S.E.2d 261, 265 (S.C. 1997) (two to three years).

This state of affairs is untenable. "The 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 problem is that the decision below provides no sense of where that point might be. Because the decision below lacks any limiting principle, this Court should intervene and reverse.

CONCLUSION

For the foregoing reasons and those stated in the petitions, the petitions should be granted.

Respectfully submitted,

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