No. 16-308

In the Supreme Court of the United States

DOT FOODS, INC., PETITIONER

v.

DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE INSTITUTE FOR PROFESSIONALS IN TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The Institute for Professionals in Taxation ("IPT") is a non-profit educational organization founded in 1976. IPT's purposes include promoting uniform and equitable administration of taxes and eliminating illegitimate methods of determining tax liabilities. IPT is the only professional organization that educates, certifies, and establishes strict codes of conduct for state and local income, property, and sales and use tax professionals who represent taxpayers.

IPT has more than 4,100 members, including more than 1,400 corporations, firms, and taxpayers. Represented within IPT's membership are most of the Fortune 500 companies and numerous small businesses, spanning the range of industries, including aerospace, agriculture, manufacturing, wholesale and retail, communications, healthcare, financial, oil and gas, hospitality, transportation and others.

IPT files this brief to underscore the urgent need for this Court's review of the issue of retroactive taxation and the due process standard articulated by the Washington Supreme Court. Such retroactive taxes, and the decision below, threaten uniform and equitable tax administration, undermine effective and efficient tax compliance, chill beneficial investment, and distort and diminish public reliance on the judicial

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[*] Pursuant to Rule 37.2(a), *amicus* provided timely notice of its intention to file this brief. All parties consented. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus,* its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

process to effectively resolve tax disputes. IPT members cannot effectively plan their business affairs if they must not only understand what the law *is* but speculate as to how its application to past actions might change long after the fact. Moreover, IPT members deciding whether to judicially vindicate their rights under the laws as they *are* must consider the now-very-real possibility that even a win in court may be a loss—the law may simply be changed retroactively.

Unfortunately, the retroactive tax at issue in this case is only the latest (and most egregious) example of an emerging pattern of retroactive taxes imposed by state legislatures. The decision below further clouds an already inconsistent thicket of case law on this issue. Moreover, the facts of this case present an especially appropriate vehicle for this Court to consider the issue. The Washington Legislature has purported to divine the "original intent" of legislation passed more than a quarter century earlier by a group of legislators that included just *one* member of the legislature today. See Pet. App. 38a-39a. The court then applied this supposed "original intent" retroactively to a taxpayer who relied on the long-standing original law in structuring its affairs, and who had just concluded long and expensive litigation in which Washington's highest court held emphatically that this supposed, newly divined "original intent" was "contrary to the statute's plain and unambiguous language." Pet. App. 2a. This Court's intervention is urgently needed.

STATEMENT OF THE CASE

In 1983, Washington passed a law exempting from its business and occupation ("B&O") tax out-of-state businesses that made sales in Washington "exclusively to or through a direct seller's representative."[1] Petitioner Dot Foods, an Illinois corporation, structured its Washington affairs to take advantage of the exemption, and in 1997 the Washington Department of Revenue (the "Department") issued a letter ruling concluding that Dot Foods qualified for it. See *Dot Foods, Inc.* v. *Dep't of Revenue*, 173 P.3d 309, 311 (Wash. Ct. App. 2007). Later, however, the Department reversed itself, and in 2004 assessed a B&O tax against Dot Foods for all of its Washington sales after January 1, 2000. *Dot Foods, Inc.* v. *Dep't of Revenue*, 215 P.3d 185, 187 (Wash. 2009).

Knowing that it qualified for the B&O exemption under the plain language of the statute, but wishing to avoid penalties, Dot Foods paid the assessed tax (and continued to do so during the pendency of litigation) but filed a refund action in state court. *Ibid.* In 2009, after years of litigation, the Washington Supreme Court held that, under the "unambiguous" language of the statute, Dot Foods was clearly entitled to the B&O exemption. *Ibid.*

Dot Foods' victory was short-lived. Six months later, the Washington Legislature retroactively amended the statute to "conform the exemption to the original intent of the legislature" and to retroactively remove companies such as Dot Foods from the ex-

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[1] Act of June 13, 1983, ch. 66, Wash. Sess. Laws 1st Ex. Sess. 2017, § 5 (codified at Wash. Rev. Code § 82.04.423).

emption.[2] Based on this retroactive legislation, the Department denied Dot Foods' pending request for a refund of taxes paid from 2006 to 2009.

Dot Foods challenged the constitutionality of this retroactive taxation in court, arguing that it violated due process. The trial court agreed, but the Washington Supreme Court reversed, concluding that the retroactive tax at issue was supported by a "legitimate legislative purpose" of preventing "large and devastating revenue losses." Pet. App. 7a-9a.

SUMMARY OF THE ARGUMENT

Dot Foods' petition ably explains that the federal and state courts are sharply divided over the constitutional limits on retroactive tax legislation, that similar retroactive taxes are on the rise, and that the decision below conflicts with this Court's precedents on the limits of retroactive taxation. We fully agree with those arguments. We file this brief to highlight several additional reasons why the Court should address the fundamental issues of fairness and predictability raised by retroactive taxation, and why this particular case is an excellent vehicle to do so.

First, the retroactive tax at issue here is contrary to fundamental concerns of fairness and notice at the very heart of the Constitution and the American legal tradition in general. Aversion to retroactive legislation "embodies a legal doctrine centuries older than our Republic." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994). Rules against retroactive laws were accepted by the English common law, the Napoleonic

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[2] Pet. App. 38a-39a (Act of April 23, 2010, ch. 23, Wash. Sess. Laws 1st Spec. Sess. 2574, § 401(3)).

Code, the Romans, and the Greeks. *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855-856 (1990) (Scalia, J., concurring). Leading American scholars and jurists have powerfully explained that retroactive legislation is contrary to the basic principles of the social compact and the very idea of law itself. *E.g.*, L. Fuller, The Morality of Law 53 (1964). And this Court has called it a "fundamental principle" of due process that "laws which regulate persons or entities must give *fair notice* of conduct that is forbidden or required." *FCC* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (emphasis added). Allowed to stand, however, the rule adopted by the Washington Supreme Court logically suggests that *all* retroactive taxation is permissible. That extraordinary view calls out for this Court's review.

Second, sound principles of law and economics confirm that retroactive legislation like that upheld below burdens investment and economic activity, creates inefficiencies, and undermines governmental legitimacy. Because retroactive laws—and even the threat thereof—"leave persons unsure of their entitlements" in conducting commercial activities, "the underlying commercial activities will be deterred if not stifled." D'Amato, *Legal Uncertainty*, 71 Cal. L. Rev. 1, 5-6 (1983).

Moreover, when government enacts taxes that induce taxpayers to act, only to later deny the very benefits that incentivized taxpayers' actions, taxpayers inevitably and justifiably feel that they have been deceived by the government. This creates inefficiencies moving forward, as taxpayers become less willing to comply voluntarily with a system that they view as fundamentally unfair. *E.g.*, Logue, *Tax Transitions,*

Opportunistic Retroactivity, and the Benefits of Gov't Precommitment, 94 Mich. L. Rev. 1129, 1139-1142 (1996).

Finally, the Washington Legislature's declaration that, in passing the retroactive legislation at issue, it was honoring the "original intent" of a law passed more than a quarter century earlier by an entirely different group of legislators calls out for review. If state legislatures (or Congress) may engage in this sort of revisionist history, it is not an overstatement to say that due process no longer imposes a meaningful limit on retroactive legislation. But the Constitution does not permit a later legislature to rewrite an earlier legislature's enactment by retroactively declaring its "original" meaning, and certainly not where taxpayers reasonably relied on the prior law in structuring their affairs. Whatever the Court's ultimate views on the constitutional limits on retroactive taxation, this Court should make clear that such measures should be judged based on what they are—deliberate decisions by the legislature to upset settled expectations—not on revisionist history.

ARGUMENT

I. Retroactive legislation is anathema to the American legal tradition and to the most basic concepts of notice and due process.

The "presumption against retroactive legislation is deeply rooted in [American] jurisprudence." *Landgraf*, 511 U.S. at 265. "In a free, dynamic society," this Court has recognized, "creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Id.* at 265-266. Changes

in the legal consequences of actions already undertaken "destroy the reasonable certainty and security which are the very objects of property ownership," and thus "due process protection for property *must* be understood to incorporate the settled tradition against retroactive laws of great severity." *E. Enters.* v. *Apfel,* 524 U.S. 498, 502 (1998) (Kennedy, J., concurring) (emphasis added).

Our nation's long aversion to retroactive legislation reflects "elementary considerations of fairness" and notice at the heart of our legal tradition. *Landgraf*, 511 U.S. at 265. Indeed, as people cannot conform their actions to the law without *knowing* the law, the right to be informed of the law is one of the suppositions entailed by the very concept of "[l]iving under a rule of law."[3] *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939)). As explained below, that is why the disdain for retroactivity can be traced back to the English common law roots of American jurisprudence (and even back to ancient legal precepts), and why the concept of retroactive legislation has been so reviled by great jurists and legal scholars.

The retroactive tax law at issue here—amending a statute passed 27 years earlier—is anathema to this

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[3] As this Court has noted, it "is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution." *Landgraf*, 511 U.S. at 266 (citing the *Ex Post Facto* Clause, the Contracts Clause, the Fifth Amendment's Takings Clause, the prohibitions of Bills of Attainder, and the Due Process Clause).

long-standing tradition. Moreover, the Washington Supreme Court's stated justification for upholding this retroactive tax would in practice mean that *all* retroactive taxes are constitutional—contrary to this Court's statements that such taxes are bounded by due process concerns. This Court should grant certiorari and provide needed guidance on the operation of the Fifth and Fourteenth Amendments' requirement of due process in the context of retroactive taxation.

A. Disapproval of retroactive legislation is older than the Republic itself.

Antipathy to retroactivity in legislation is not only a fundamental precept of our legal system; it "embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. Its roots can be traced back to the common law at the core of our legal tradition. *E.g.*, *Dash* v. *Van Kleeck*, 7 Johns. 477, 503 (N.Y. Sup. Ct. 1811) ("It is a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect."); D. Troy, Retroactive Legislation 25-31 (1998) (collecting historical sources and discussing their adoption in early American law).

Examples are abundant. Bracton's 1250 treatise advocated a presumption against retroactive legislation, concluding that "every new constitution ought to impose a form upon future matters, and not upon things past." 3 H. Bracton, De Legibus et Consuetudinibus Angliae 531 (T. Twiss tr. 1880) (cited in Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisdiction*, 20 Minn. L. Rev. 775, 776 (1936)). Lord Coke recognized the same antiretroactivity principle as a maxim of the common law: "for it is a rule and law of Parliament, that Reg-

ularly *Nova constitutio futuris formam imponere debet non praeteritis*." 2 Inst. 292; see also Troy, Retroactive Legislation 26 (translating the Latin as "a new statute should govern the future, not the past").

Blackstone too elucidated the inequity of retroactive laws, concluding that "[a]ll laws should be * * * made to commence *in futuro*, and be notified before their commencement, which is implied in the term 'prescribed.'" 1 W. Blackstone, Commentaries *45-46. Indeed, he went so far as to say that, without notice (which a retroactive law necessarily lacks), a so-called "law" *is not even law*: "[A] bare resolution confined in the breast of the legislator * * * can never be properly called a law. It is requisite that this resolution be notified to the people who are to obey it." *Ibid*.[4]

This principle extends beyond the English common law. That "the legal effect of conduct should ordinarily be assessed under the law that existed when conduct took place has timeless and universal human appeal." *Kaiser*, 494 U.S. at 854 (Scalia, J., concurring); Smead, *Rule Against Retroactive Legislation*, 20 Minn. L. Rev. at 775 ("The bias against retroactive laws is an ancient one."). The antiretroactivity principle was recognized not only by the English common law, but by the Greeks, the Romans, and the Napoleonic Code. *Kaiser*, 494 U.S. at 855 (citing 2 P. Vinogradoff, Outlines of Historical Jurisprudence

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[4] See also H. Broom, Legal Maxims 24 (8th ed. 1911) ("Retrospective laws are * * * contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.").

139-140 (1922); Justinian Code, Book 1, Title 14, § 7; 1 Code Napoleon, Prelim. Title, Art. I, cl. 2 (B. Barrett trans. 1811)).

B. Antiretroactivity is inherent in basic notions of fairness and notice.

It is for good reason that retroactive laws are antithetical to our legal tradition. Renowned legal scholars and jurists have explained that laws that purport to change the legal effect of past actions are fundamentally unjust. As Lon Fuller famously put it in *The Morality of Law*: "Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose." Fuller, The Morality of Law 53. As Fuller understood, the antiretroactivity principle is so integral to the concept of justice as to be a requirement of *any* ordered legal system.

Similarly, Justice Story warned that retroactive laws are "generally unjust; and, as has been forcibly said, neither accord with sound legislation nor the fundamental principles of the social compact." 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891). Chancellor Kent likewise decried retroactive legislation as contrary to "every sound principle" of law. 1 J. Kent, Commentaries on American Law 426 (1st ed. 1826) ("[I]t cannot be admitted that a statute shall, by any fiction or relations, have any effect before it was actually passed. * * * [I]t would be against every sound principle.").[5] And Justice

[5] https://books.google.com/books?id=cgY9AAAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (last visited Oct. 10, 2016).

Holmes wrote that, "while the law is * * * continually adding to its specific rules, it does not adopt the coarse and impolitic principle that a man always acts at his peril." O. Holmes, The Common Law 163 (43d printing 1949).

At bottom, what all of these great thinkers have recognized is that retroactive legislation is counter to the "fundamental principle in our legal system [] that laws which regulate persons or entities must give *fair notice* of conduct that is forbidden or required." *Fox Television Stations, Inc.*, 132 S. Ct. at 2317 (emphasis added). As the Court put it in *Landgraf*, "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." 511 U.S. at 265.

The Court has made similar observations in discussing the void for vagueness doctrine, explaining that the requirement of fair notice lies at the heart of due process—"regulated parties should know what is required of them so they may act accordingly." *Fox Television Stations,* 132 S. Ct. at 2317. Thus, in *Fox Television Studios*, this Court held that the FCC's indecency regulations were unconstitutionally vague because they failed to give "sufficient notice of what [was] proscribed," in violation of the "fair notice" requirement of "the Due Process Clause." 132 S. Ct. at 2317, 2320. In short, "'[All persons] are entitled to be informed as to what the State commands or forbids.'" *Papachristou*, 405 U.S. at 162 (quoting *Lanzetta*, 306 U.S. at 452) (alterations in *Papachristou*)).

Measured against the constitutional requirement of "fair notice," retroactive laws like the one upheld

below are a measure worse than even the laws that this Court has invalidated as void for vagueness. An unconstitutionally vague law fails to provide fair notice because it lacks "sufficient definiteness that ordinary people can understand what conduct is prohibited" or required. *Skilling* v. *United States*, 561 U.S. 358, 404 (2010). But a retroactive tax like that imposed below—where the legislation explicitly *changes* the effect of actions already taken—does far more than fail to provide "sufficient definiteness." Those who rely on the prior law act not just without a "definite" understanding of the law in effect, but under an *affirmative misrepresentation* of its meaning. Review is needed to confirm that such bait-and-switch taxation is unconstitutional.

C. This Court should grant certiorari to clarify that retroactive taxes are subject to meaningful review under the Due Process Clause.

Despite the long-held concerns with retroactive legislation discussed above, the Washington Supreme Court applied a standard for evaluating the constitutionality of retroactive taxation that, in application, would obviate any due process protections at all. As the petition explains (at 20), the court below concluded that the retroactive tax at issue satisfied due process because the Washington Legislature, in passing the law, stated that it did so in part to avoid a potential fiscal shortfall. But if the desire to raise funds is sufficient to shield retroactive taxation from a due process challenge, then state legislatures have a blank check to impose retroactive taxes. As the Court of Appeals of New York has noted, "Raising funds is the underlying purpose of taxation," so "such a ra-

tionale would justify every retroactive tax law." *James Square Assocs. LP* v. *Mullen*, 993 N.E.2d 374, 383 (N.Y. 2013).

We recognize that this Court has concluded that certain taxes retroactive for "modest" periods of time —never any further back than the legislative session preceding the one in which the retroactive tax was enacted—are constitutional. *E.g.*, *United States* v. *Carlton*, 512 U.S. 26, 32-34 (1994); see also Lunder, et al., Cong. Research Serv., R42791, *Constitutionality of Retroactive Tax Legislation* 2-3 (2012) (collecting cases). But this Court has never suggested, as the court below effectively held, that all retroactive taxes used to generate revenue are appropriate.

To the contrary, the Court in *Carlton* emphasized that Congress, in passing the retroactive tax at issue there, corrected an understood mistake in a law passed only a year earlier, "acted promptly and established only a modest period of retroactivity." *Carlton*, 512 U.S. at 32-33; see also *id.* at 38 (O'Connor, J., concurring) (retroactive tax extending "longer than the year preceding the legislative session in which the law was enacted" would raise "serious constitutional questions"). In those circumstances, the Court understandably concluded that the taxpayer lacked settled expectations limiting alteration of the law. But even where a tax scheme unconstitutionally discriminates between different classes of taxpayers, any attempt to remedy such discrimination by "retroactively impos[ing] equal burdens on the tax's former beneficiaries" must be "consistent with other constitutional provisions"—"[]notably due process[]." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 346 (1996); ac-

cord *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 41 n.23 (1990).

Exacting a tax "constitutes a deprivation of property" and must therefore "satisfy the commands of the Due Process Clause." *McKesson*, 496 U.S. at 36. The retroactive tax here, which upsets the unambiguous language of a statute passed 27 years earlier, makes a mockery of the fair notice requirement at the heart of due process and the antiretroactivity principles embodied in ancient and modern law. This Court should grant certiorari, confirm that our Constitution will not countenance such retroactive taxes, and hold that "due process protection for property must be understood to incorporate the settled tradition against retroactive laws of great severity." *E. Enters.,* 524 U.S. at 502.

II. Retroactive legislation is inefficient, deters investment, and undermines governmental legitimacy.

Beyond the concerns for fairness and notice that animate various rules against retroactive laws in our legal tradition, review is warranted for economic reasons. As sound principles of law and economics confirm, retroactive laws—and retroactive taxation in particular—deter optimal investment, create inefficiencies for individuals and government, and undermine the governmental legitimacy that undergirds our system of voluntary tax compliance. These are weighty concerns, and legislatures are imposing such taxes more and more—a problem that will only grow if the decision below is allowed to stand. Thus, this Court's guidance is urgently needed.

The most pronounced economic problem with retroactive legislation is that it increases legal uncertainty, creating inefficiencies in investment and other economic decisionmaking by undermining the ability to rely upon expectations. As Max Weber stressed, "uncertainty of this type is seriously prejudicial to the smooth functioning of the modern economy." Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 Wis. L. Rev. 720, 741 (1972). In a market economy, "expectations determine decisions and actions." Sidek & Spulber, *Deregulatory Takings & Breach of the Regulatory Contract*, 71 N.Y.U. L. Rev. 851, 865 (1996). Uncertain rules of law "leave persons unsure of their entitlements while affording unfettered discretion to official decisionmakers," and as the rules governing commercial activities become more uncertain, "the underlying commercial activities will be deterred if not stifled." D'Amato, *Legal Uncertainty*, 71 Cal. L. Rev. at 5-6.

In the most extreme cases, such uncertainty can deter investment altogether. Troy, Retroactive Legislation 21 (discussing the example of countries where "safeguarding institutions" such as a stable political system and an independent judiciary "are not sufficient to reduce the risk of administrative expropriation") (quoting Spiller, *Institutions and Regulatory Commitment in Utilities' Privatization*, 2 Indus. Corp. Change 387, 393 (1997)). In such circumstances, capital investment, which can only be amortized over time, is unlikely to be forthcoming at all. *Ibid.*

Even in much less extreme conditions, however, the costs imposed by the specter of retroactive legislation, and the legal uncertainty it entails, can be significant. As Ronald Cass has noted, "[p]redictability

allows adjustments of individual behavior that increase societal well-being," and "increased predictability lowers costs associated with a decision." Cass, *Judging: Norms & Incentives of Retrospective Decision-Making*, 75 B.U. L. Rev. 941, 961 (1995).

By upsetting such predictability, retroactive legislation increases the costs of economic decisionmaking and decreases the net amount of investment. There is no clear way to insure or hedge against the risk of retroactive legislation that is unconstrained by the Constitution. Unlike an unreliable counterparty in a consensual contract, investors cannot refuse to deal with the government. See Troy, Retroactive Legislation 21 ("[R]etroactive legislation is a contingency for which it is very difficult, if not impossible, for a firm to plan.").

The inefficiencies generated by retroactive *taxation* are particularly pronounced. Whether credits or exemptions, tax measures are often intended by the legislature to incentivize or disincentivize particular conduct, and they have such effects even when unintended. See Logue, *Tax Transitions*, 94 Mich. L. Rev. at 1139. When taxpayers rely on such measures in structuring their affairs, only to have the legislature later deny the very benefits that motivated their conduct, taxpayers will inevitably feel that they have been deceived by the government. *Ibid*.

This loss of confidence in government integrity raises many serious concerns. Most immediately, of course, it decreases investment. But retroactively reversing tax laws upon which taxpayers have already relied in structuring their affairs may have even more serious economic consequences. As discussed above, the precept that citizens are entitled

to know and rely upon the law is deeply rooted in our legal tradition. Taxpayers who feel that they have been "tricked" by the government are thus likely to feel that the government has acted in a manner that is fundamentally unfair and illegitimate—which can "engender distrust and antipathy toward the government." *Id.* at 1142.

At a minimum, this in turn imposes inefficiencies in the form of "increased administrative and operational costs of the tax system," since a "tax system that is viewed as unfair requires a good deal of coercive governmental power to enforce." Goldberg, *Tax Subsidies: One-Time vs. Periodic An Economic Analysis of the Tax Policy Alternatives*, 49 Tax L. Rev. 305, 329 (1994) ("[T]he demoralization costs of the repeal of a tax subsidy may be substantial and should not be ignored * * * *"). At its worst, such distrust of the government can "undermine individuals' willingness to comply with the tax laws, an ominous prospect in the federal income tax context, as the system's success depends heavily upon a large degree of voluntary compliance." Logue, *Tax Transitions*, 94 Mich. L. Rev. at 1142. As one commentator has noted: "If [taxpayers] were to believe that the laws will be applied to them in a wholly arbitrary fashion, their incentive to comply with the law would evaporate. Thus, avoiding retroactive [taxes] increases individuals incentives to conform their behavior to the law, and enhances the legitimacy of the legal system." Troy, Retroactive Legislation 19; see also Sheffrin & Triest, *Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance*, in Why People Pay Taxes: Tax Compliance and Enforcement 193 (Joel Slemrod ed., 1992) (collecting evidence that tax-

payers' attitudes toward the taxing authority affect compliance); *cf.* Maguire & Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 Harv. L. Rev. 1281, 1299 (1935) ("If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the Government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." (quoting *Rock Island, A. & L. R. R.* v. *United States*, 254 U.S. 141, 143 (1920)).

Saul Levmore has argued that there are potential efficiencies to be realized in the "surprise" nature of retroactive taxation, asserting that because a retroactive tax affects "water under the bridge," taxpayers cannot adjust their behavior in response thereto, and a "revenue-equivalent retroactive tax" will therefore require "a lower rate than its prospective alternative." Levmore, *The Case For Retroactive Taxation*, 22 J. Legal Stud. 265, 273-74 (1993). But even putting aside whether any potential "allocative efficiency" outweighs the costs of such retroactive taxation (and whether an efficiency realized only by intentionally duping the public is even worthy of consideration), even Levmore recognizes that such efficiencies are lost when retroactive taxes become "regular features of the fiscal landscape." *Id.* at 277. In other words, Levmore defends a "one-time scheme," used "when the need for revenue is unusual and somewhat unpredictable, as in time of war or as an innovative means of retiring government debt." *Ibid.* This approach does not work long-term.

Further, retroactive taxes like those upheld below are not being implemented only rarely or in unusual situations. Rather, they are proliferating nationwide

(Pet. 14-15 (collecting examples)), and this case presents only the latest example of the trend. That problem will only worsen if the decision below is allowed to stand. Thus, for the sake of both individuals and firms who need to know whether they can rely on the current tax laws in planning their affairs, this Court should grant certiorari.

III. This Court should clarify that later legislatures cannot avoid due process scrutiny of retroactive laws by purporting to divine the "original intent" of earlier legislatures.

Review also is needed to clarify that legislatures may not insulate retroactive taxes from constitutional scrutiny by purporting, long after the fact, to divine the intent of earlier legislatures.

Perhaps aware that, in *Carlton*, Congress acted to correct an understood "mistake" in the law it passed the year before, the Washington Legislature purported to declare that the tax law here was intended only to restore the "original intent" of the statute. Pet. App. 39a. But any such attempt to satisfy precedent is ultimately ill-conceived. Both this Court's precedent and basic common sense confirm that the Washington Legislature could not rationally have determined the "original intent" of legislation passed more than a quarter century earlier by an entirely different group of legislators. That is nothing more than the worst form of revisionist history.

Almost a century ago, Justice Holmes, writing for this Court, rejected the notion that Florida's legislature could retroactively rewrite legislation to conform to its purported original intent. *Forbes Pioneer Boat Line* v. *Bd. of Comm'rs of Everglades Drainage Dist.*,

258 U.S. 338, 340 (1922). There, after the Florida Supreme Court interpreted a Florida law not to authorize collecting a toll that the State wished to collect, Florida's legislature retroactively amended the law to allow the toll. In the ensuing litigation, the State argued that the retroactive amendment simply conformed the law to "the situation as both parties [*i.e.,* the legislature and Forbes] knew it to be." *Ibid.* This Court would have none of it. As Justice Holmes noted, Forbes "went through the canal relying upon its legal rights," and Florida could not alter the effect of those prior passages "because the Legislature forgot." *Ibid.*[6]

More recent decisions of this Court likewise have emphasized the dangers of relying on statements of legislative intent made after a law is enacted. As Justice Scalia explained for the Court in *Bruesewitz* v. *Wyeth LLC*: "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." 562 U.S. 223, 242 (2011). Justice Breyer has expressed a similar point for the Court: "[W]hatever interpretive force one attaches to legislative history, the Court normally gives little

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[6] State high courts, too, have rejected the idea that a later legislature can rationally pass on the intent of an earlier legislature. *See Comcast Corp.* v. *Dept. of Revenue,* 337 P.3d 768, 793 (Or. 2014) ("What later legislators thought is irrelevant to what an earlier legislature intended with an enactment."); *San Carlos Apache Tribe* v. *Super. Ct.*, 972 P.2d 179, 193 (Ariz. 1999) (en banc) ("[T]o suggest that the 1995 Legislature knows and can clarify what the 1919 or 1974 Legislature intended carries us past the boundary of reality and into the world of speculation. We refuse to cross that border.").

weight to statements * * * made *after* the bill in question has become law." *Barber* v. *Thomas*, 560 U.S. 474, 486 (2010) (emphasis in original).[7] In short, where statements of intent are made after the passage of the legislation, it is plain that "no one voting at that earlier time could possibly have been informed by those later statements." *Bruesewitz*, 562 U.S. at 242.

The Washington Legislature's purported divination of "original intent" is even less rational than in the more typical "post-enactment legislative history" situations in *Bruesewitz* and *Barber*. To begin with, the retroactive tax here was passed *27 years* after the original law. Further, the supposed "original intent" discerned in the later law sharply conflicts with the "plain and unambiguous" language of the original law, and there is no indication—whether from before or after the passage of the original law—that the lawmakers who voted for the original law ever expressed this "original intent" in any way. Pet. App. 2a.

Finally, the 2010 legislature that purported to declare the "original intent" of the 1983 law was almost wholly different than the legislature that passed the original act: Washington's legislature is made up of 147 legislators (49 senators and 98 representa-

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[7] Notably, although two members of the Court dissented in *Bruesewitz*, even the dissent recognized that post-enactment statements of intent are typically a "hazardous basis from which to infer the intent of the enacting Congress" and therefore "justifiably given little or no weight." *Bruesewitz*, 562 U.S. at 260 (Sotomayor, J., dissenting).

tives)[8]—146 of whom (*99.3 percent*) moved on between the original passage of the statute and the 2010 amendments. See Wash. Sec'y of State, Election Results & Voter Pamphlets.[9]

In short, it is an irrational fiction to suggest that a later legislature can divine and declare the "original intent" of a law passed by different legislators years earlier. Whatever the constitutional bona fides of retroactive taxation, such measures should be judged based on what they are—a deliberate decision to upset the settled expectations of taxpayers that have relied on the prior law—rather than any pretend

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[8] Ballotpedia, Washington State Legislature, https://ballotpedia.org/Washington_State_Legislature (last visited Oct. 10, 2016).

[9] http://www.sos.wa.gov/elections/research/Election-Results-and-Voters-Pamphlets.aspx (last visited Oct. 10, 2016). The numbers reported here are based on a comparison of the election results for the specific years in question. But similar, high rates of legislative turnover could be expected any time a legislature years removed from the passage of a law attempted to deduce the "original intent" of such earlier legislation. See Nat'l Conference of State Legislatures, 2014 Post-Election State Legislative Seat Turnover, http://www.ncsl.org/research/ele ctions-and-campaigns/2014-post-election-turnover.aspx (last visited Oct. 10, 2016) (reporting 21.1 percent turnover in state house seats and 9.2 percent turnover in state senate seats); see also Ballotpedia, State Legislative Incumbent Turnover in 2014, https://ballotpedia.org/State_legislative_incumbent_turnover_in_2014 (last visited Oct. 10, 2016) (collecting and analyzing detailed data on legislative turnover for 2010, 2012, and 2014 elections).

claim to state the "intent" of laws voted for years earlier. This Court's intervention is needed to make that clear.

CONCLUSION

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

Respectfully submitted.

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