

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 WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Substantive due process imposes minimal restraints on state tax policy, including retroactive changes to tax laws. *United States v. Carlton*, 512 U.S. 26 (1994). No federal or state court has imposed a bright-line limit on States' ability to retroactively amend their tax laws. Instead, following *Carlton*, federal and state courts have consistently determined whether a retroactive amendment satisfies substantive due process by analyzing whether it is justified by a rational legislative purpose.

The question presented is whether a retroactive amendment to an existing state tax is a per se violation of substantive due process if the retroactive period is longer than one year.

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INTRODUCTION

None of the “compelling reasons” this Court requires before granting certiorari are present. Rule 10. The decision below presents no conflict with any decision of this Court, there is no split of authority in the lower courts, and the issue rarely arises. The Court should deny review of the question presented, as it has several times in recent years.

In 1983, Washington enacted a tax exemption for direct marketing businesses such as Avon and Amway. The exemption applied to out-of-state businesses that (1) sold consumer goods in Washington, (2) to or through in-state representatives, (3) that marketed the products at home or “otherwise than in a permanent retail establishment.” Former Wash. Rev. Code § 82.04.423 (reprinted as amended in 2010 in Pet. App. at 39a-40a). Until 2009, Washington courts consistently applied the exemption narrowly.

In 2009, the Washington Supreme Court expanded the reach of the tax exemption. *Dot Foods, Inc. v. Dep’t of Revenue*, 215 P.3d 185 (Wash. 2009). It applied the exemption to out-of-state businesses that (1) sold *either* consumer, or both consumer and non-consumer goods, in Washington, (2) to or through in-state representatives, (3) even if some of the goods eventually were sold in permanent retail establishments. This reading granted out-of-state businesses a massive tax advantage unavailable to in-state businesses and created a huge and unexpected drop in state tax revenue, estimated at over \$150 million for the 2009-2011 biennium alone. Pet. App. at 9a.

The State Legislature rapidly responded, retroactively closing the unanticipated loophole within months of the *Dot Foods* decision. The amendment prevented the unanticipated loss of substantial tax revenue, leveled the playing field for in-state and out-of-state sellers, and “reaffirm[ed] the legislature’s intent” in establishing the exemption in the first place. Pet. App. at 38a-39a.

Dot Foods challenged the amendment on substantive due process grounds. The Washington Supreme Court rejected the argument. Petitioner now asks this Court to intervene. It should decline.

“This Court repeatedly has upheld retroactive tax legislation against a due process challenge.” *United States v. Carlton*, 512 U.S. 26, 30 (1994). In fact, only eight months ago this Court reiterated that “the restrictions that the Constitution places on retroactive legislation ‘are of limited scope.’” *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324 (2016) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267 (1994)). In light of this deferential standard, Petitioner does not contend that the decision below conflicts with this Court’s precedent.

Lacking conflict with this Court, Dot Foods claims that New York and South Carolina courts adopted bright-line rules “that retroactivity periods over one year exceed the limits of due process.” Pet. at 3. In reality, both courts consider a range of factors, as this Court’s precedent requires. New York recently upheld a retroactive tax going back three and one-half years. *Caprio v. New York Dep’t of Taxation & Fin.*, 37 N.E.3d 707 (N.Y. 2015). And South Carolina pointedly rejected a bright-line limit

on retroactivity. *Rivers v. State*, 490 S.E.2d 261, 265 n.4 (S.C. 1997) (“In some instances, a lengthy period of retroactivity may be necessary to accomplish certain legitimate legislative ends.”). In short, the alleged split is illusory.

Dot Foods’ claims of urgency are also imagined. It presents no evidence of a rash of abusive retroactive tax legislation, and disregards the valid reasons that prompted the Washington State Legislature to narrow the exemption retroactively. This Court has repeatedly and very recently denied review of the question presented in this case. *See* note 1 *infra* p. 15. It should do the same here.

STATEMENT OF THE CASE

A. Washington’s Direct Seller’s Tax Exemption

Washington imposes a gross receipts tax, known as the business and occupation or “B&O” tax, for “the act or privilege of engaging in business activities” within the State. Wash. Rev. Code § 82.04.220(1). The tax applies broadly to virtually all business activities in Washington.

In 1983, Washington enacted a direct seller’s exemption from the B&O tax. This exemption provided tax relief to out-of-state businesses that had minimal contact with the State and made “sales in this state exclusively to or through a direct seller’s representative.” Former Wash. Rev. Code § 82.04.423(1)(d); Pet. App. at 39a. A “direct seller’s representative” was defined as “a person who buys consumer products on a buy-sell basis or a deposit-

commission basis for resale . . . in the home or otherwise than in a permanent retail establishment” or a person “who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment,” and meets certain other requirements. Former Wash. Rev. Code § 82.04.423(2); Pet. App. at 40a. The exemption applied to well-known companies that solicit sales through in-home parties or door-to-door marketing, such as Avon, Amway, and Pampered Chef.

In early 2001, the Washington Court of Appeals analyzed the Washington direct seller’s exemption with respect to an out-of-state business that sold beer and other alcoholic beverages to Washington beverage distributors. *Stroh Brewery Co. v. Washington Dep’t of Revenue*, 15 P.3d 692, 693-94 (Wash. Ct. App. 2001). The distributors resold the products to retail outlets such as restaurants and taverns, which in turn resold the products to consumers. *Id.* at 694. The Department of Revenue asserted that Stroh Brewery did not qualify for the exemption because its beverages were resold in retail establishments, rather than through in-home parties or door-to-door marketing. *Id.* The Court of Appeals agreed, holding that the exemption would not apply “if either the direct seller’s representative or anyone else sells the direct seller’s products in a permanent retail establishment.” *Id.* at 696. The Washington Supreme Court denied review. *Stroh Brewery Co. v. Dep’t of Revenue*, 29 P.3d 718 (Wash. 2001).

B. Application of the Direct Seller's Exemption to Dot Foods

Dot Foods is an Illinois corporation that sells food and related products, including to Washington customers. Most of the products it sells are consumer products, many of which are resold in retail establishments such as convenience and grocery stores. It also sells non-consumer products such as restaurant equipment and commercial cleaning solution. Until January 2008, Dot Foods solicited sales in Washington through its wholly-owned subsidiary, Dot Transportation, Inc. Pet. App. at 2a, 4a.

In 1997, the Washington Department of Revenue concluded that Dot Foods' business activities qualified for the direct seller's exemption. At the time, the Department construed the statute to apply so long as the direct seller's representative did not make sales in a permanent retail establishment. However, in 1999, around the same time as the commencement of the Stroh Brewery litigation, the Department amended its administrative rule to explain that the exemption did not apply if the out-of-state seller's products are sold by *anyone* in a permanent retail establishment. *Dot Foods, Inc. v. Dep't of Revenue*, 173 P.3d 309, 311-12 (Wash. Ct. App. 2007), *rev'd*, 215 P.3d 185 (Wash. 2009). The Department notified Dot Foods that, beginning January 2000, the company would no longer qualify for the exemption because some of its consumer products were eventually sold in permanent retail establishments. *Id.* at 312.

C. The *Dot Foods I* Decision—Expanding the Scope of the Tax Exemption

When Dot Foods ignored the amended rule and continued to claim the exemption, Washington assessed the company for the B&O tax owed on its Washington sales. Dot Foods paid the disputed tax and filed a state court action for a refund.

A sharply divided Washington Supreme Court held that Dot Foods met the requirements of the direct seller's exemption. *Dot Foods, Inc. v. Dep't of Revenue*, 215 P.3d 185 (Wash. 2009) (*Dot Foods I*). The Court rejected the Department's assertion that the statute should be construed narrowly and in light of its underlying purpose, concluding that "the statute at issue is not ambiguous" and its meaning can be derived "from its face." *Id.* at 191 n.4.

D. The Washington Legislature Acts Quickly

The Washington Legislature promptly acted to stop the significant revenue loss created by the Washington Supreme Court's decision. By April 2010, the Legislature amended the tax exemption. Pet. App. at 38a-40a. The Department estimated that the Washington Supreme Court's broad interpretation of the statute would result in a negative fiscal impact of over \$150 million in the 2009-2011 biennium alone. *Id.* at 9a. By prospectively and retroactively amending the exemption, the Legislature prevented a "large and devastating" loss of state tax revenue and removed an unintended tax incentive for "in-state businesses to move their operations outside Washington." *Id.* at 38a-39a.

The 2010 amendment did not affect the tax refund Dot Foods received in *Dot Foods I*. *Id.* at 40a. But for periods after the tax years litigated in *Dot Foods I*, Dot Foods did not qualify for the exemption under the amended law. *Id.* at 3a.

E. Proceedings Below

Dot Foods challenged the 2010 legislation on constitutional and equitable grounds. It asserted that the retroactive narrowing of the exemption violated its substantive due process rights under the Fourteenth Amendment of the United States Constitution. Pet. App. at 1a.

A unanimous Washington Supreme Court upheld the 2010 retroactive amendment. Applying *Carlton*, the Court held that the amendment was rationally related to preventing the “large and devastating revenue losses” created by the *Dot Foods I* decision and to “restoring parity” between in-state and out-of-state sellers of consumer goods. Pet. App. at 7a. The Court further found that the four-year retroactive period that applied to Dot Foods and “any other taxpayer” under the statute of limitations for assessing state B&O tax was rationally related to the legitimate legislative purpose of preventing a substantial fiscal shortfall. *Id.* at 11a, 13a.

REASONS WHY THIS COURT SHOULD DENY REVIEW

Substantive due process imposes minimal restrictions on matters of economic policy. These minimal restrictions apply to retroactive changes to economic legislation, including tax legislation. *See, e.g., Carlton*, 512 U.S. 26; *Welch v. Henry*, 305 U.S.

134 (1938). There is no due process violation when “the retroactive application of legislation is itself justified by a rational legislative purpose.” *Carlton*, 512 U.S. at 31 (internal quotation marks omitted) (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30 (1984)).

For three distinct reasons, this case presents no compelling reason to address or modify the Court’s longstanding approach to retroactive economic legislation. First, there is no conflict between lower courts applying the substantive due process standard discussed in *Carlton*. Second, this Court’s decisions provide ample guidance on the substantive due process standard that applies to retroactive economic legislation. Third, this case provides a poor vehicle to consider a new bright-line limit on retroactive tax legislation. The retroactive amendments here were enacted only a few months after the Washington Supreme Court broadly interpreted and applied a state tax exemption in *Dot Foods I* and would survive all but the most formulaic bright-line rule.

A. There Is No Conflict as to Whether Substantive Due Process Imposes a One-Year Limit on Retroactive Tax Laws

The decision below presents no conflict with any decision of this Court or any other. Dot Foods simply misses the mark when it claims a split of authority as to whether substantive due process imposes a bright-line, one-year limit on the allowable retroactivity of tax legislation.

“This Court repeatedly has upheld retroactive tax legislation against a due process challenge.”

Carlton, 512 U.S. at 30. In fact, the Court has not invalidated retroactive tax legislation since the 1920s. See *Nichols v. Coolidge*, 274 U.S. 531 (1927); *Blodgett v. Holden*, 275 U.S. 142 (1928); *Untermeyer v. Anderson*, 276 U.S. 440 (1928). While these *Lochner*-era cases have not been overruled, they were decided “under an approach that ‘has long since been discarded.’” *Carlton*, 512 U.S. at 34 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)). Thus, the decision below presents no conflict with this Court’s precedent. Pet. at 2.

Dot Foods asserts, however, that “conflict and confusion have emerged” in lower courts in the twenty years since *Carlton*, and that this warrants certiorari. Pet. at 3, 9-15. Dot Foods’ argument relies on misrepresenting the two state supreme court cases they cite as turning entirely on the period of retroactivity involved, rather than the multi-part test courts actually have applied under this Court’s precedent interpreting the Due Process Clause. In particular, *Carlton* holds that a court cannot simply look at the period of retroactivity and determine whether an amendment violates due process. Instead, courts must determine whether there is a “legitimate legislative purpose” for the amendment and whether that purpose is “furthered by rational means.” *Carlton*, 512 U.S. at 30-31. That is exactly what lower courts have done, and though the outcome has varied from case to case (as one would expect with a multi-part test), no case supports the bright-line rule Dot Foods advocates.

In *Carlton*, this Court upheld retroactive application of an amendment to the federal estate tax. In October 1986, Congress enacted an estate tax

deduction for half the proceeds of a “sale of employer securities by the executor of an estate” to “an employee stock ownership plan.” *Id.* at 28. Just over a year later, Congress amended the deduction, limiting it to sales of employer securities owned by the decedent “immediately before death.” *Id.* at 29. The amendment was intended to cure the unexpected loss of nearly \$7 billion over the next five years. *Id.* at 32. After observing that “[t]his Court repeatedly has upheld retroactive tax legislation against a due process challenge,” the Court analyzed several factors in determining that the tax complied with due process. *Id.* at 30.

First, it found that Congress’s purpose “was neither illegitimate nor arbitrary.” *Id.* at 32. The Court found no indication that Congress “acted with an improper motive, as by targeting estate representatives . . . after deliberately inducing them” to engage in stock sales. *Id.* The Court explained that although Congress could have chosen to make up the unexpected revenue loss through general taxation, it was not “unreasonable” to “prevent the loss by denying the deduction.” *Id.*

Second, the Court considered that Congress had acted promptly and imposed a limited period of retroactivity. *Id.* Even though it was uncontested that the plaintiff detrimentally relied on the prior law, the Court upheld the amendment. “Tax legislation is not a promise, and a taxpayer has no vested right” in the tax code. *Id.* at 33. No federal or state supreme court has departed from *Carlton* and ruled that a period of retroactivity beyond one year is excessive simply because of its length.

In contending that courts are “sharply split” and “deeply divided” over how to apply due process to retroactive tax laws, Dot Foods mischaracterizes decisions in two states—New York and South Carolina. Pet. at 10-11. In reality, courts in both states follow the analysis set forth in *Carlton*.

In New York, the State’s high court struck down a retroactive tax amendment that changed the eligibility criteria for participating in a tax incentive program. *James Square Assocs. LP v. Mullen*, 993 N.E.2d 374 (N.Y. 2013). In analyzing the retroactive amendment at issue, the Court considered three factors—reliance on the prior law, length of the period of retroactivity, and public purpose for the retroactive application of the amendments. *Id.* at 382-83. The Court held that the third factor (public purpose) was “dispositive” and invalidated the legislation because the New York Legislature “did not have an important public purpose to make the law retroactive.” *Id.* at 383. The state legislature “was not attempting to correct an error in the tax code as in *Carlton*.” *Id.* “Absent an unexpected loss of revenue,” raising money for the state budget is not a compelling justification for retroactivity. *Id.* Contrary to Dot Foods’ allegations, the Court did not establish a maximum period of retroactivity. It distinguished cases upholding longer periods of retroactivity by noting that, in those cases, there was a valid legislative purpose for the amendment. *Id.* at 382-83.

Roughly two years after deciding *James Square*, the New York Court of Appeals applied the same due process analysis and upheld a retroactive amendment to a different state tax law. *Caprio*, 37

N.E.3d at 708-09. The legislation at issue in *Caprio* had a retroactive reach of three and one-half years and was designed to repudiate two administrative determinations that would have permitted taxpayers to avoid state income tax on receipt of certain installment payments. In contrast to the tax considered in *James Square*, the Court found that the Legislature “was not acting merely to increase tax receipts,” but rather “to prevent unanticipated and unintended consequences” arising from the administrative determinations. *Caprio*, 37 N.E.3d at 717. The Court unanimously concluded that the three and one-half year retroactive period was not “excessive, arbitrary or irrational” and, therefore, was “valid under the Due Process Clauses of the United States and New York Constitutions.” *Id.*

Dot Foods also incorrectly contends that South Carolina held that retroactivity periods longer than 2-3 years are per se excessive. Pet. at 3. In *Rivers v. State*, 490 S.E.2d 261 (S.C. 1997), the South Carolina Supreme Court relied on *Carlton* in striking down a retroactive tax amendment altering the State’s capital gains tax rate. The Court considered whether the amendment was “supported by a legitimate legislative purpose furthered by rational means” and whether the period of retroactivity was “modest.” *Id.* at 264 (quoting *Carlton*, 512 U.S. at 30-31, 32). The Court did not note any legislative purpose for amending the tax. It found that the plaintiff executor had acted in detrimental reliance on the prior law by selling shares in a corporation to receive the preferential capital gains rate. *Id.* at 262. Rather than adopting a bright-line rule about the permissible period of retroactivity, the South

Carolina Court concluded that “under the facts and circumstances here, the retroactivity period is simply excessive.” *Id.* at 265. In fact, the Court explicitly noted that “[w]e 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 legislative ends. However, this is not such a situation.” *Id.* at 265 n.4.

Like Washington, New York and South Carolina followed *Carlton* and decided these cases based on the particular facts presented. Contrary to Dot Foods’ assertion, no state court has created a *per se* rule that any period of retroactivity over one year is unconstitutional, regardless of whether there is a rational legislative purpose. This is not surprising. The substantive due process standard is highly dependent upon the individual facts and circumstances of the particular case. It is not a “one size fits all” approach to the delicate balancing of judicial, executive, and legislative powers under our constitutional system of government.

Federal courts also consistently apply the rational basis standard to the facts and circumstances of each case, rather than making a decision solely based on the period of retroactivity. In applying the due process standard, the federal courts have upheld retroactive tax legislation that serves the legitimate governmental purpose of correcting unexpected mistakes in the original tax provision or in court decisions interpreting the tax provision. For example, the Federal Circuit recently upheld a five-year retroactivity period in a law amending the federal Tariff Act of 1930. *GPX Int’l Tire Corp. v.*

United States, 780 F.3d 1136, 1145 (Fed. Cir. 2015) (*GPX II*). The Court reasoned that the amendment served the legitimate legislative purpose of curing “the unexpected results” created by a 2011 court decision limiting the imposition of a duty tax on certain countries. *GPX II*, 780 F.3d at 1143. Likewise, the Ninth Circuit upheld an amendment to the railroad retirement tax with a four-year retroactive reach in *Montana Rail Link, Inc. v. United States*, 76 F.3d 991 (9th Cir. 1996). The amendment “resolved an ambiguity” in the original tax law and the period of retroactivity was rationally related to that legitimate legislative purpose. *Id.* at 994. No federal court has adopted a bright-line rule limiting the period of retroactivity without regard to the purpose and nature of the amendment.

Consistent with well-settled state and federal case law, the Washington Supreme Court upheld the State’s 2010 tax amendment not because the period of retroactivity complied with an arbitrary time limit, but because it was rationally related to the purposes of curing the unintended loophole and significant fiscal shortfall created by the *Dot Foods I* decision. *See* Pet. App. at 13a. Its decision creates no conflict warranting this Court’s review.

B. This Court Has Provided Ample Guidance on the Substantive Due Process Standard Applicable to Retroactive Economic Legislation

Dot Foods’ second reason for granting certiorari is that retroactive amendments to state tax laws are supposedly “proliferating around the country,” requiring additional guidance from this

Court to “bring order to litigation over such laws.” Pet. at 14-15. But this Court has already provided extensive guidance on the substantive due process limits imposed on retroactive tax legislation. Moreover, the Court has repeatedly—and as recently as last term—denied review of questions related to this issue, suggesting that the Court itself sees no need for further guidance in this area.¹ The Court should again deny review here.

The due process standard that applies to tax statutes with retroactive effect is longstanding and appears unclear only to those who disagree with it. It

¹ 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); *General Motors Corp. v. Michigan Dep’t of Treasury*, 803 N.W.2d 698 (Mich. Ct. App. 2010), *review denied*, 800 N.W.2d (Mich. 2011), *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), *review denied*, (Ky. 2010), *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), *review denied*, 782 N.W.2d (Mich. 2010), *cert. denied*, 562 U.S. 1178 (2011); *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); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009), *cert. denied*, 560 U.S. 935 (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., Inc.*, 749 So. 2d 470 (Ala. Civ. App. 1999), *review denied* (Ala. 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).

“is the same as that generally applicable to retroactive economic legislation,” and is met “simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.” *Carlton*, 512 U.S. at 30-31 (quoting *Pension Benefit Guar. Corp.*, 467 U.S. at 729-30); accord *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (applying due process to uphold retroactive state worker benefits legislation enacted in response to a court decision issued two years earlier); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (holding that due process is satisfied “simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose”); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976) (finding legislation making employers retroactively liable for former employees’ disabilities satisfied due process as a rational measure to spread the costs of the disabilities).

The rational basis standard is deferential to legislative action on matters of economic and tax policy. The broad deference accorded to the legislative and executive branches of government under substantive due process analysis is longstanding and requires no clarification. Long before *Carlton*, it was generally understood that this Court “has been extremely reluctant to override the legislative judgment as to the necessity for retroactive taxation.” Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 706 (1960); see *Bank Markazi*, 136 S. Ct. at 1324 (quoting *Landgraf*, 511 U.S. at 267). As the lack of a genuine

conflict demonstrates, state and federal courts are having no trouble applying the rational basis test to the facts and circumstances of the particular case being adjudicated.

Given the abundance of case law, there is no merit to Dot Foods' suggestion that guidance is necessary to thwart "fiscal train wrecks" or improve communication between the State's political branches. Pet. at 15, 17. The Washington Legislature could not have predicted the state Supreme Court's expansion of the exemption. The Washington Department of Revenue prevailed at the trial court and at the state Court of Appeals in the *Dot Foods I* litigation. See *Dot Foods*, 173 P.3d at 310-11. Moreover, the Department prevailed years earlier in a tax refund case filed by another out-of-state business advocating for an expanded interpretation of the direct seller's exemption. *Stroh Brewery*, 15 P.3d 692. When the Washington Supreme Court more broadly interpreted the scope of the exemption, the Legislature promptly reinstated the intended meaning of the statute and cured the unexpected revenue loss caused by the *Dot Foods I* decision.² The

² Amicus Curie Institute for Professionals in Taxation (IPT) argues that the 2010 Washington Legislature could not have known the original intent of the direct seller's exemption. Amicus Br. of IPT at 21-22. In reality, there is abundant legislative history regarding the intent of the original exemption. See, e.g., Final Bill Report on Substitute Senate Bill 3244 (1983). As the dissent in *Dot Foods I* recognizes, there was "no dispute" regarding the legislative history. *Dot Foods I*, 215 P.3d at 192 (Stephens, J., dissenting). The exemption was "designed to provide a tax exemption for those engaged in direct sales of consumer products, typically through in-home parties or door-to-door marketing," such as "Mary Kay, Avon,

Washington Supreme Court upheld this legislative action based on the ample guidance in *Carlton*. Pet. App. at 1a.

Dot Foods’ call for a bright-line limit on the retroactive reach of tax legislation is not a call for guidance—it is a request that the Court depart from its well-settled due process test. That test imposes no bright-line rule, and instead requires analysis of the facts presented by each case to determine whether the period of retroactivity is rationally related to a legitimate government purpose. Dot Foods’ requested arbitrary one-year limit would divorce the period of retroactivity from the legislative purpose. In this case, the Washington Supreme Court properly applied the due process test and found that the four-year retroactive reach rationally related to “the legislature’s legitimate, stated purpose of ‘prevent[ing] the loss of revenues resulting from the expanded interpretation of the exemption’” in *Dot Foods I*. Pet. App. at 13a (quoting 2010 amendment).

The deferential rational basis standard applied in *Carlton* respects the role of legislatures to make economic policy decisions and the ability of state courts to determine whether due process is satisfied under the facts of each case. There is no need for guidance about—or legal justification for disposing of—the *Carlton* test.

Pampered Chef, Longaberger, and Creative Memories.” *Id.* The underlying purpose for the direct seller’s exemption was well known to the 2010 Legislature, and Dot Foods does not argue otherwise in its petition for certiorari.

C. This Case Is a Poor Vehicle for Considering a New Bright-Line Limit on Retroactive Tax Legislation

Dot Foods contends that this case presents the Court with an opportunity to create a separate due process standard that would apply to retroactive tax legislation “designed simply to raise more money than was possible under then-existing law.” Pet. at 18. This case does not present that issue. Washington’s tax was amended to address the unexpected fiscal impact of a court decision and prevent inequities between in-state and out-of-state taxpayers, not because the State wanted to raise more money. Until the *Dot Foods I* decision, Washington courts applied the direct seller’s exemption narrowly and in a manner comporting with its underlying purpose. There was no “tax benefit[] promised” to businesses like Dot Foods that sold both consumer and non-consumer goods in the state, some of which were eventually sold in retail establishments. Pet. at 18. Additionally, since the Legislature amended the law within months of the *Dot Foods I* decision, taxpayers had no longstanding reliance on the unexpected windfall of the Court’s decision.

1. The Amendment Was Passed to Respond to an Unexpected Court Decision, Not to Raise Revenue

The Washington Legislature did not enact a wholly new, retroactive tax with the purpose of creating a new source of state revenue. As New York’s Court of Appeals recognized, “raising money for the state budget is not a particularly compelling

justification. Absent an *unexpected* loss of revenue, such a legislative purpose is insufficient to warrant retroactivity . . .” *James Square*, 993 N.E.2d at 383 (emphasis added). But in this case, the Washington Legislature did not arbitrarily enact a tax to raise revenue. It was responding to an unexpected shortfall created by the Washington Supreme Court’s decision in *Dot Foods I*. The 2010 amendment to the direct seller’s exemption was “necessary to reaffirm the legislature’s intent in establishing the direct sellers’ exemption and prevent the loss of revenues resulting from the expanded interpretation of the exemption” in *Dot Foods I*. Pet. App. at 39a.

The facts here do not present a novel or unresolved issue. This Court has already held that correcting or repudiating a court holding can be the rational legislative purpose justifying a retroactive tax amendment. *General Motors Corp.*, 503 U.S. 181, involved legislation initially enacted by the Michigan Legislature in 1981 regarding employer-provided workers’ compensation benefits. In 1985, the Michigan Supreme Court issued a decision that interpreted the legislation to allow employers to decrease certain workers’ compensation benefits. Two years later, the state legislature enacted a retroactive amendment repudiating the court decision and requiring employers to refund benefits withheld in reliance on the court decision. In an opinion delivered by Justice O’Connor, the Court upheld the amended statute’s six-year retroactive reach. As a result, General Motors and Ford Motor Company were required to repay nearly \$25 million in workers’ compensation benefits. *Id.* at 183, 185-86. In rejecting the petitioners’ due process argument,

the Court explained that “[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process’: a legitimate legislative purpose furthered by rational means.” *Id.* at 191 (quoting *Pension Benefit Guar. Corp.*, 467 U.S. at 730). The retroactive law met that standard because it rationally achieved the Legislature’s legitimate objective of correcting “the unexpected results” of the Michigan Supreme Court’s opinion. *Id.* Thus, although the 1987 amendment significantly impacted employers that had relied on the prior law, and had a retroactive reach of roughly six years, the Due Process Clause imposed no impediment to the Michigan Legislature’s power to amend the workers’ compensation law retroactively.

Because the tax amendment at issue in this case was enacted to prevent the unexpected impact of a court decision, it does not provide an opportunity for the Court to consider whether a retroactive tax satisfies due process if it is enacted solely as a revenue raising mechanism.

2. The Amendment Had Minimal Impact on Taxpayer Expectations

Dot Foods also contends that this case is a good vehicle for considering when a state may “lure out-of-state businesses inside [its] borders” through tax incentives and then “deny the very tax benefits promised.” Pet. at 18. But the facts of this case do not present that issue. The Washington Legislature’s prompt response to the *Dot Foods I* decision prevented taxpayers from obtaining a settled expectation that all out-of-state sellers would be exempt from tax on their in-state sales of consumer

goods. In this respect, the 2010 Washington legislation is similar to the federal legislation upheld in *GPX II*. In that case, the court decision that was subsequently repudiated by the amendment to the federal law was only a “clear statement of the law” for a brief period before Congress overturned it. *GPX II*, 780 F.3d at 1143 (approving a five-year period of retroactivity). Likewise, the Washington Supreme Court’s broad interpretation of the direct seller’s exemption in *Dot Foods I* was a “clear statement of the law” for only a very brief period before the Legislature overturned it.

The impact on settled expectations in *Carlton* was of far greater significance than the brief period of time at issue in this case. In upholding retroactive application of the amendment to the estate, the Court held that “reliance alone is insufficient to establish a constitutional violation.” *Carlton*, 512 U.S. at 33. “Tax legislation is not a promise, and a taxpayer has no vested right” in the tax code. *Id.*

Carlton involved actual reliance on the prior law to the estate’s detriment, and a concrete impact a year after the reliance. In contrast, the present appeal involves a general expectation held for no longer than a few months. If the 2010 amendment repudiating *Dot Foods I* violates due process, it is difficult to imagine how any retroactive economic amendment can pass constitutional muster.

CONCLUSION

The legislation at issue here was enacted quickly, was designed to correct the unexpected results of the *Dot Foods I* decision, and impacted no long-held right. The legislation reflects a rational

response to a significant fiscal and tax policy issue facing the State and meets the settled substantive due process standard applied in *Carlton*. Dot Foods identifies no sound policy justification for imposing a new substantive due process limitation that would mechanically limit the retroactive effect of tax laws to one year. This case presents no opportunity to adopt such a rule. The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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