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

IN THE
Supreme Court of the United States

SONOCO PRODUCTS COMPANY, ET AL.,
Petitioners,
v.
MICHIGAN DEPARTMENT OF TREASURY,
Respondent.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP,
Petitioner,
v.
MICHIGAN DEPARTMENT OF TREASURY,
Respondent.

GILLETE COMMERCIAL OPERATIONS NORTH AMERICA AND SUBSIDIARIES, ET AL.,
Petitioners,
v.
MICHIGAN DEPARTMENT OF TREASURY,
Respondent.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,
v.
MICHIGAN DEPARTMENT OF TREASURY,
Respondent.

GOODYEAR TIRE & RUBBER COMPANY ET AL.,
Petitioners,
v.
MICHIGAN DEPARTMENT OF TREASURY,
Respondent.

DIRECTV GROUP HOLDINGS, LLC,
Petitioner,
v.
MICHIGAN DEPARTMENT OF TREASURY,
Respondent.

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

BRIEF *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Council On State Taxation ("COST") is a nonprofit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents nearly 600 multistate businesses in the United States. During the 2014 term, COST submitted *amicus* briefs in all three significant state tax cases decided by the Court: *Comptroller of the Treasury of Maryland v. Wynne.*, 135 S. Ct. 1787 (2015); *Ala. Dep't of Revenue v. CSX Transp., Inc.,* 135 S. Ct. 1136 (2015); and *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (2015).[1]

As part of its mission to promote equitable taxation for businesses conducting operations in interstate commerce, COST has judiciously opposed retroactive tax laws and has submitted *amicus* briefs seeking guidance from this Court regarding the extent a state can pass such laws without offending the Due Process Clause, *see Dot Foods, Inc. v. Dep't of Revenue,* 372 P.3d 747 (Wash. 2016), *cert. pending*, ("*Dot Foods II*"), *In re Estate of Hambleton, v. State of Washington,* 335 P.3d 398 (Wash. 2014), *cert. denied*, 136 S. Ct. 318 (2015); *Ford Motor Credit Company v. Dep't of Treasury*, 2010 WL 99050 (Mich. Ct. App. 2010), *cert. denied*, 562 U.S. 1178, (2011); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009), *cert. denied*, 560 U.S. 935 (2010); and *Triple-S Management Corp. v. CRIM*, 2008 WL 3627190 (P.R. 2008), *cert. denied*, 561 U.S. 1037 (2010). Additionally, COST has

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus*' intent to file this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

filed *amicus* briefs with this Court over the past 25 years involving remedies and retroactivity, including *Newsweek, Inc. v. Fla. Dept. of Revenue*, 522 U.S. 442 (1998); *Reich v. Collins*, 513 U.S. 106 (1994); and *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).

COST's members are troubled by retroactive tax legislation that violates taxpayers' Due Process Clause rights. The level of controversy and uncertainty in recent years over the constitutional limitations of retroactive state tax legislation has increasingly affected COST's membership. *Amicus* asks this Court to review these cases in order to provide clarity on the extent to which states can apply retroactive tax laws to the detriment of taxpayers.

STATEMENT OF THE CASE

In 2007 (effective for 2008), Michigan enacted the Michigan Business Tax ("MBT"), which included a provision for apportioning income utilizing a single sales factor. *See* Mich. Comp. Laws § 208.1301(2). However, the new statute left intact another law that provided Michigan taxpayers the right to elect apportionment using the Multistate Tax Compact's ("MTC" or the "Compact") equally-weighted, three factor apportionment method. *See* Michigan Multistate Tax Compact Act, No. 343, 1969 Mich. Pub. Acts 770 (codified at Mich. Comp. Laws §§ 205.581-589).

In 2010, the Michigan Legislature considered (but did not adopt) legislation that would have prohibited taxpayer use of the Compact's election retroactive to the enactment of the MBT in 2008. *See* Mich. H.R. 6351, 95th Leg., Reg. Sess. (Mich. 2010). In 2011, the Michigan Legislature enacted legislation that provided that the Compact's election no longer applied

to the MBT retroactive to January 1, 2011. *See* Act of May 25, 2011, No. 40, 2011 Mich. Pub. Acts.

In July, 2014, following years of litigation by dozens of taxpayers seeking the right to utilize the Compact's election, the Michigan Supreme Court ruled in favor of the taxpayers, holding that the election to utilize the three-factor apportionment formula was available under Michigan law through at least 2010. *See Int'l Bus. Machines Corp. v. Dep't of Treasury*, 852 NW 2d 865 (Mich. 2014) ("IBM").

Shortly thereafter, in September 2014, after being notified of a possible revenue loss of $1.1 billion, the Michigan Legislature repealed the Compact (and its election) retroactive more than six years to January 1, 2008. 2014 PA 282. In 2015**,** the Michigan Appeals Court upheld the retroactive legislation as constitutional under the Due Process Clause and the Michigan Supreme Court declined to review the case. *Gillette Commercial Operations N. A. & Subsidiaries v. Dep't of Treasury*, 878 N.W.2d 891 (Mich. Ct. App. 2015), *appl. for leave to appeal denied*, 880 N.W.2d 230 (Mich. 2016). The petitioners then filed a *writ of certiorari* with this Court.

SUMMARY OF THE ARGUMENT

This Court should resolve a conflict among state and federal courts over the constitutionally acceptable purposes and time limits for retroactive tax legislation. In 1994, this Court addressed retroactive tax legislation in *U.S. v. Carlton*, 512 U.S. 26 (1994). Since then, litigation relating to the constitutional limits of retroactive tax legislation has proliferated. Over 40 state and federal court decisions have been rendered on retroactive tax legislation, with some courts finding as

little as 16 months excessive and other courts finding more than 10 years permissible.

In the two decades since *Carlton*, state legislatures have increasingly used retroactive tax legislation to rewrite previously enacted statutes and to reverse unfavorable outcomes in tax litigation. Far too frequently, courts have held that preventing **any significant revenue loss** can satisfy the "legitimate legislative purpose" test in *Carlton*. Moreover, retroactive tax legislation has been sustained no matter **how far removed** the corrective legislation is from the original legislation. This Court needs to clarify, for both government and taxpayers, when a revenue loss constitutes a "legitimate purpose" for sustaining retroactive legislation. Additionally, both legislators and taxpayers affected by retroactive laws need guidelines on the permissible length of time retroactive legislation can be sustained within the confines of the Due Process Clause.

Guidance is particularly important because retroactive tax legislation has become the standard procedure for many state legislatures to "clarify" previously enacted statutes or overturn unfavorable outcomes in tax litigation. While some states, such as Michigan and Washington, have repeatedly enacted retroactive tax legislation, their actions have not been isolated as at least 20 states have enacted retroactive tax legislation since *Carlton*.

Amicus is concerned that if this case is not reviewed by this Court, the Michigan Court of Appeals decision affirming the retroactive tax legislation (and other similar state court decisions) would effectively eviscerate the two-part test set forth in *Carlton* for determining whether retroactive tax legislation violates the Due Process Clause. *Amicus* is also concerned about

the delicate balance of power among the coordinate branches of government. If the judicial branch is allowed to cede the power of judicial review to the legislature, Due Process Clause protections as they apply to retroactive tax legislation will become a nullity.

ARGUMENT

I. THIS COURT NEEDS TO RESOLVE THE CONFLICT AMONG STATE AND FEDERAL COURTS OVER THE DUE PROCESS CLAUSE LIMITATIONS ON RETROACTIVE TAX LAWS.

State and federal courts are divided over the constitutional due process limits to retroactive tax laws. Over the last twenty years, two state courts of last resort have held that retroactive periods as short as sixteen months, *James Square Assocs. LP v. Mullen*, 993 N.E.2d 374 (N.Y. 2013), and two years, *Rivers v. State*, 490 S.E.2d 261 (S.C. 1997), were excessive and violated the Due Process Clause. Conversely, at least four state courts of last resort and one federal circuit have rejected Due Process Clause challenges to much longer retroactive periods, ranging from five years to over ten years. *See e.g.*, *Caprio v. New York State Dep't of Taxation and Fin.*, 37 N.E.3d 707 (N.Y. 2015); *In re Estate of Hambleton v. State of Washington*, 335 P.3d 398 (Wash. 2014); *Zaber v. City of Dubuque*, 789 N.W.2d 634 (Iowa 2010); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009); and *Montana Rail Link, Inc. v. United States*, 76 F.3d 991 (9th Cir. 1996).

Lower level state and federal courts are also split over the due process limits to retroactive tax laws, with some holding the statutes unconstitutional. *See*

City of Modesto v. Nat'l Med, Inc., *et al.,* 27 Cal. Rptr. 3d 215 (Cal. Ct. App. 2005) and *NetJets Aviation*, *Inc. v. Guillory*, 143 Cal. Rptr. 3d 111 (Cal. Ct. App. 2012). However, a vast majority of the courts have upheld the retroactive tax laws as constitutional.

These cases demonstrate that there is a significant conflict among the courts regarding the Due Process Clause ramifications of retroactive tax laws, albeit with sizable tilt in favor of the states. Guidance is needed from this Court to address the radically different outcomes of litigation on the same issue: what are the Due Process Clause limits on retroactive tax laws?

II. THIS COURT NEEDS TO CLARIFY THE CONSTITUTIONALLY ACCEPTABLE PURPOSE AND PERMISSIBLE LENGTH OF TIME FOR RETROACTIVE TAX LEGISLATION UNDER THE DUE PROCESS CLAUSE.

Litigation relating to the constitutional limits of retroactive tax legislation is more prevalent as state legislatures have become increasingly comfortable with enacting "corrective" legislation years (and sometimes decades) after the original legislation was enacted. Since *Carlton*, over 40 state and federal cases have been decided on the constitutionality of retroactive tax legislation; and of those, one-third address retroactive legislation enacted after a court previously adjudicated how the original law at issue should be interpreted.[2]

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[2] Retroactive tax cases where a state court had already adjudicated the intent of the original legislation in the taxpayers' favor include: *Dot Foods v. Dep't of Revenue*, 372 P.3d 747 (Wash. 2016); *Gillette Commercial Operations N. Am. & Subsidiaries v.*

Dep't of Treasury, 878 N.W.2d 891 (Mich. Ct. App. 2015), *appl. for leave to appeal denied*, 880 N.W.2d 230 (Mich. 2016); *Caprio v. Dep't of Taxation & Fin.*, 37 N.E.3d 707, *rehearing denied* (N.Y. 2015); *In re Estate of Hambleton v. State of Washington*, 335 P.3d 398 (Wash. 2014); *GMC v. Dep't of Treasury*, 803 N.W.2d 698 (Mich. App. 2010); *Zaber v. City of Dubuque*, 789 N.W.2d 634 (Iowa 2010); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009), *cert. denied*, 560 U.S. 935 (2010); *Jefferson Cty. Comm'n v. Edwards*, 49 So. 3d 685 (Ala. 2010); *GMAC LLC v. Dep't of Treasury*, 781 N.W.2d 310 (Mich. Ct. App. 2009); *King v. Campbell County*, 217 S.W.3d 862 (Ky. Ct. App. 2006); *Allegis Realty Inv'rs v. Novak*, 860 N.E.2d 246 (Ill. 2006); *City of Modesto v. Nat'l Med, Inc*., 27 Cal. Rptr. 3d 215 (Cal. Ct. App. 2005); *U.S. Bancorp v. Dep't of Revenue,* 103 P.3d 85 (Or. 2004); and *Moran Towing Corp. v. Urbach*, 768 N.Y.S.2d 33 (App. Div. 2003). Other retroactive tax cases include: *Estate of Petteys v. Farmers State Bank of Brush*, 381 P.3d 386 (Colo. App. 2016); *Sowell v. Panama Commons LP*, 192 So.3d 27 (Fla. 2016); *Ainley Kennels & Fabrication*, *Inc.*, *v. City of Dubuque*, No. 15-1213, 2016 WL 5480688 (Iowa Ct. App. Sept. 28, 2016); *Estate of Brooks v. Sullivan*, 60 Conn. L. Rptr. 264 (Super. Ct. Apr. 29, 2015); *Klinger v. Dep't of Revenue*, 21 Or. Tax 347 (2014); *James Square Assocs. LP v. Mullen*, 993 N.E.2d 374, 381 (N.Y. 2013); *NetJets Aviation, Inc. v. Guillory*, 143 Cal. Rptr. 3d 111 (Cal. Ct. App. 2012), *as modified on denial of reh'g* (July 18, 2012); *Revenue Cabinet v. Asworth Corp.*, Nos. 2007-CA-002549-MR, 2008-CA-000023-MR, 2009 WL 3877518 (Ky. Ct. App. May 15, 2007); *Estate of Kosakowski v. Dir., N.J. Div. of Taxation*, 47 A.3d 760 (N.J. Super. App. Div. 2012); *River Garden Ret. Home v. Franchise Tax Bd.*, 113 Cal. Rptr. 3d 62 (Cal. App. Dep't Super. Ct. 2010); *Ford Motor Credit Co. v. Dep't of Treasury*, 2010 WL 99050, at *1 (Mich. Ct. App. 2010), *cert. denied*, 178 L.Ed.2d 826 (U.S. 2011); *Enter. Leasing Co. of Phoenix v. Ariz. Dep't of Revenue*, 211 P.3d 1 (Ariz. Ct. App. 2008); *Tesoro Ref. & Mktg. Co. v. State Dep't of Revenue*, 190 P.3d 28, 35 (Wash. 2008); *Total Transit, Inc. v. State*, No. 1 CA-TX 06-0011, 2007 Ariz. App. Unpub. LEXIS 472 (Ct. App. May 15, 2007); *In re Garden City Med. Clinic*, *P.A.*, 137 P.3d 1058 (Kan. Ct. App. 2006); *Baker v. Arizona Dep't of Revenue*, 105 P.3d 1180 (Ariz. Ct. App. 2005); *In re Estate of Martha S. Turney v. State Tax Assessor*, 2005 WL 2708423 (Me. Super. Ct. Feb. 24, 2005); *Venable v. Commissioner*, T.C. Memo

Indeed, the retroactivity issue has grown more visible with heightened tax media attention[3] along with the filing of numerous petitions for *writ of certiorari* now pending with this Court. Despite the varied outcomes, all of the courts to consider this issue share one thing in common: they agree that this Court's *Carlton* decision is the litmus test for determining if retroactive tax legislation is permissible under the Due Process Clause.

In *Carlton*, this Court established a two-part test to determine if retroactive tax legislation violates the Due Process Clause of the United States Constitution. First, the Court looked to whether the legislation was enacted for a "legitimate legislative purpose furthered by rational means." *Id.* at 30. Second, the Court looked to whether Congress "acted promptly and established only a modest period of retroactivity." *Id.* at 32. However, since the time *Carlton* was decided, it

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2003-240 (U.S. T. Ct. 2003); *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470 (Ala. Civ. App. 1999); *Gardens at W. Maui Vacation Club v. Cty. of Maui*, 978 P.2d 772 (Haw. 1999); *W.R. Grace & Co. v. Dep't of Revenue,* 973 P.2d 1011 (Wash. 1999); *A. Tarricone, Inc. v. United States*, 4 F. Supp. 2d 323 (S.D.N.Y. 1998); *Atlantic Richfield Co. v. Dep't of Revenue*, 14 Or. Tax 212 (1997); *Rivers v. State*, 490 S.E.2d 261 (S.C.1997); *Montana Rail Link*, *Inc. v. United States*, 76 F.3d 991 (9th Cir. 1996); *Maples v. McDonald*, 668 So. 2d 790 (Ala. Civ. App. 1995); and *Smith v. Sears, Roebuck & Co*., 672 So. 2d 794 (Ala. Civ. App. 1995).

[3] *See*, *e.g.*, Vito Cosmo, Jr., et al., *The Problems with Retroactive State Tax Legislation*, 81 State Tax Notes 801 (2016); Amy Hamilton, *SALT Community Reacts to Michigan Judge's IBM Order*, 76 State Tax Notes 599 (2015); and David Sawyer, *Pomp Decries Michigan Court of Claims' Retroactive Compact Repeal Ruling*, Tax Notes (2015), http://www.taxnotes.com/state-tax-today/litigation-and-appeals/pomp-decries-michigan-court-claims-retroactive-compact-repeal-ruling/2015/07/17/14914946?highlight=retroactive %20legislation.

has become abundantly clear that *Carlton* neither provided a roadmap nor engendered a consensus among the lower courts to determine the constitutionality of retroactive tax legislation. The problem goes much deeper than just the conflict among the court decisions discussed above. While dutifully citing *Carlton* as the definitive precedent, many of these lower courts have turned *Carlton*'s limited approval of retroactive tax legislation into a virtually unlimited blank check.

Far too frequently, courts have held that preventing **any significant revenue loss** can satisfy the "legitimate legislative purpose" test in *Carlton.* And, this has been sustained no matter **how far removed** the corrective legislation is from the original legislation. Indeed, retroactive tax legislation has been upheld as constitutional in about 85 percent of the cases decided since *Carlton*.[4] The perfunctory approach taken by many of these courts highlights the urgency for this Court to address and rectify the erosion of the *Carlton* precedent.

A. Was the Retroactive Legislation Enacted for a Legitimate Purpose Furthered by Rational Means?

Under *Carlton*, the first test for determining whether retroactive legislation withstands a Due Process Clause challenge is that the legislation be enacted for a legitimate purpose furthered by rational means. In *Carlton*, this Court held that preventing a significant unanticipated revenue loss constitutes the "legitimate purpose" to satisfy the first test. *Id.* at 32.

The courts finding retroactive tax legislation constitutional rely predominately on this "significant

[4] *See* cases cited in note 2.

revenue loss" rationale to justify their decisions. For instance, in the case at hand, the Michigan Legislature used revenue loss as a basis for its retroactive legislation, following litigation in Michigan over a MTC apportionment of income election. Relying on an estimated revenue loss of over one billion dollars, the Michigan Legislature retroactively amended its tax code going back six years.

The retroactive legislation was enacted several months after the taxpayers prevailed at the Michigan Supreme Court on the merits of the underlying issue. *See IBM v. Dep't of Treasury*, 852 N.W.2d 865 (Mich. 2014). Following the Michigan Legislature's retroactive repeal of the MTC apportionment election, the Michigan Court of Appeals upheld the retroactive legislation as constitutional, citing *Carlton*. Specifically, the Michigan Court of Appeals concluded that "[i]t is legitimate legislative action to both (1) correct a perceived misinterpretation of a statute, and (2) eliminate a significant revenue loss resulting from that misinterpretation." *Gillette* at 910.

Similarly, in another petition for *writ of certiorari* pending before this Court in *Dot Foods II*, no. 16-308, the Washington Supreme Court upheld retroactive tax legislation passed in 2010. That legislation reinterpreted statutory language enacted 27 years earlier in 1983 and that Court held it satisfied the first prong of the *Carlton* test: "The legislature identified the prevention of 'large and devastating revenue losses' as the primary purpose for the narrowing the scope of [the original legislation]. . .. This is the same legislative intent that the Supreme Court recognized as a legitimate purpose in *Carlton* . . .." *Dot Foods II* at 750.

Superficially, it appears that these decisions are following the first prong of this Court's two-part test in *Carlton*. However, on closer examination it is clear that many of these courts are merely paying lip service to this Court's decision in *Carlton* while making decisions based on radically different fact patterns from those present in *Carlton*. In *Carlton*, the "revenue loss" was: (1) very large (20 times more than estimated); (2) unanticipated; (3) related to the voluminous and complex changes made in the 1986 Tax Reform Act;[5] (4) quickly identified by the IRS (within two months) as an unintended drafting error; and (5) corrected in a very short time frame by Congress (14 months). Upon these facts the Court concluded: "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." *Carlton*, at 32. There is no indication in *Carlton* that this Court was suggesting significant revenue losses, no matter the factual context, would suffice to satisfy the "legitimate purpose" test.

Tax litigation decided in favor of a taxpayer will invariably result in revenue losses for a state. If revenue loss is the only justification necessary for supporting retroactive tax legislation, then no taxpayer is safe from having a sound court decision subsequently reversed through legislative action. Justice Wiggins, in his dissent to the Iowa Supreme Court's decision in the *Zaber* case, made this point clearly:

> The majority decision holds, a curative statute may, consistent with due process principles, authorize the unfettered retroactive

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[5] 1986 Tax Reform Act, *see* Pub. L. No. 99–514, enacted October 22, 1986.

> application of an illegal tax so long as the purpose of the curative statute is to protect the public fisc. Of course, any time a city must pay out funds the public fisc is at risk. Thus, under the majority's decision, a curative statute authorizing the imposition and retention of an illegal tax can never be subject to a due process challenge.

Zaber at 657.

Separation of powers concerns compound this problem. Retroactive tax legislation not only offends the Due Process Clause, but it also upsets the delicate constitutional balance set up by this Court in the seminal case of *Marbury vs. Madison*, 5 U.S. 137 (1803). After all, what point is achieved by judicial review when legislatures can overrule courts' decisions with retroactive legislation?

For example, in the Dot Foods' litigation, the Washington State Legislature enacted retroactive legislation only after the Washington Supreme Court first held in Dot Food's favor regarding the contested exemption in the original legislation. Considering the Washington Supreme Court's firm position that the original legislation was "not ambiguous and we can derive its meaning from its face" (*Dot Foods*, *Inc. v. Dep't of Revenue*, 215 P.3d 185 (Wash. 2009), at 191, fn 4), it is deeply troubling that the Washington State Legislature felt it was entitled to make a "clarification" to the original legislation 27 years later. *See Dot Foods II*.

Dot Foods II is not an aberration. Since *Carlton*, one-third of the cases identified by *Amicus* (including the cases at issue here) involved a court sustaining the constitutionality of a retroactive law enacted after a

state court (frequently the same court) ruled in favor of the taxpayer on the merits of the underlying tax dispute.[6] Courts are remarkably nonchalant about these flagrant end-runs around judicial review. For instance, in *GMC* the Michigan Court of Appeals stated that "[a] legislature's action to mend a leak in the public treasury or tax revenue—whether created by poor drafting of legislation in the first instance or by a **judicial decision**—with retroactive legislation has almost universally been recognized as 'rationally related to a legitimate legislative purpose.'" (emphasis added) *GMC v. Dep't of Treasury*, 803 N.W.2d 698 (Mich. App. 2010), *cert. denied*, 132 S.Ct. 1143 (2012) at 710.

In *Carlton*, this Court neither stated nor implied that retroactive legislation satisfies the legitimate purpose test when it overturns a judicial decision of the jurisdiction's highest court on the legislative body's intent at the time of the original legislation. Unlike many of these cases, in *Carlton* the underlying legislative intent of the original legislation was never litigated or adjudicated in favor of a taxpayer by any federal court prior to the passage of the retroactive legislation. Quite the opposite, the Court analyzed Congress' original intent of the legislation in *Carlton*, sided with the government, and concluded that the retroactive legislation corrected a drafting "mistake" in the original legislation. *Id. at 31.* This Court went on to note that "[t]here is little doubt that the 1987 amendment to [I.R.C.] was adopted as a curative

[6] In 13 of the 14 cases identified in note 2 where courts had already adjudicated the intent of the original legislation in favor of the taxpayer, the courts subsequently upheld the retroactive tax legislation reversing earlier decisions in favor of the taxpayers (*Modesto* being the only exception).

measure . . .. It seems clear that Congress did not contemplate such broad applicability of the deduction when it originally adopted [it]." *Id.* at 31.

It is incumbent upon this Court to accept this case to clarify its interpretation of what constitutes a legitimate purpose sufficient to justify retroactive tax legislation. Otherwise, virtually any and all retroactive tax legislation that identifies a real or potential revenue loss will be immune from constitutional scrutiny. This outcome is particularly troubling in those cases where the interpretation of the original legislation was already adjudicated in favor of the taxpayer.

B. Did the Legislature Act Promptly and Establish Only a Modest Period of Retroactivity?

Carlton's second test requires a legislature to have "acted promptly and established only a modest period of retroactivity" for retroactive legislation to survive a Due Process Clause challenge. *Id.* at 32. In *Carlton*, this Court upheld retroactive legislation that "extended for a period of slightly greater than one year." *Id* at 33.

The Court's precedents in *Carlton* and other similar decisions make it clear that the Due Process Clause prevents retroactive tax legislation from reaching back indefinitely. For decades, the Court has justified short and modest periods of retroactive tax legislation, focusing on an underlying recognition of, and concern for, the practicalities of enacting legislation. *See Pension Ben. Guar. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984); *Welch v. Henry*, 305 U.S. 134, 141-42 (1938); *U.S. v. Darusmont*, 449 U.S. 292, 297 (1981); and *Untermyer v. Anderson*, 276 U.S. 440, 447-49 (1928). While the Court has not established a "bright line" test

for the allowable period of retroactivity, it has not approved a period of retroactivity for tax legislation extending beyond two years.

Justice O'Connor highlighted her view of the appropriate limitation for retroactive tax legislation in her concurrence in *Carlton*:

> The governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose . . .. A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions.

Carlton at 37-38 (O'Connor, J., concurring).

Justice O'Connor could not have been more prescient. Since *Carlton,* a large number of courts have strayed, sometimes brazenly, from the periods of retroactivity that have been sanctioned by the Court. In the 22 years since *Carlton* was decided, courts have upheld periods of retroactivity of four years or more in 19 cases (with 14 of these cases involving retroactivity periods of six years or more).[7]

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[7] Cases addressing a retroactive period of at least four years include: *Dot Foods*, 372 P.3d at 748; *NetJets Aviation*, *Inc.*, 143 Cal. Rptr. 3d at 117; *Johnson Controls*, *Inc.*, 296 S.W.3d at 395; *Enter. Leasing Co. of Phoenix*, 211 P.3d at 3; and *Asworth Corp.*, 2009 WL 3877518. Cases addressing a retroactive period of at least six years include: *Gillette Commercial Operations N. Am. & Subsidiaries*, 878 N.W.2d at 900; *Estate of Petteys*, 381 P.3d at 392; *Ainley Kennels & Fabrication*, *Inc.*, 2016 WL 5480688 at *1; *In re Estate of Hambleton*, 335 P.3d at 404; *River Garden Ret. Home*, 113 Cal. Rptr. at 81; *GMC*, 803 N.W.2d at 703; *Zaber*, 789 N.W.2d at 638; *GMAC LLC*, 781 N.W.2d at 314; *Allegis Realty Inv'rs*, 860 N.E.2d at 251; *U.S. Bancorp*, 103 P.3d at 91; *Moran Towing Corp.*, 768 N.Y.S.2d at 36; *Atlantic Richfield Co.*, 14 Or.

Many recent court decisions seem to justify a significantly longer retroactivity period than was allowed by this Court in *Carlton* by noting that this Court failed to provide a bright-line test. The Iowa Supreme Court, in approving a period of retroactivity of over five years, concluded that ". . . a majority of the Supreme Court in *Carlton* did not embrace a one-year rule, but instead provided a more flexible framework for deciding the due process question." *Zaber* at 654.

With the passage of time, the justification for ever-longer periods of retroactivity becomes entirely circular and self-perpetuating as courts point to other instances of long retroactivity as justification for their positions with no regard for how far most have strayed from the *Carlton* fact pattern and reasoning. As the Michigan Court of Appeals stated in approving an 11-year retroactive period, "[t]he period of retroactivity was comparable to the time frames of other retroactive legislation that this Court, other state courts, and federal courts have held were within the modesty limits of the Due Process Clause." *GMC* at 376-377; *see also Gillette Commercial Operations N. Am. & Subsidiaries v. Dep't of Treasury*, 878 N.W.2d 891 (Mich. App. 2015). Similarly, in *Dot Foods II,* the Washington Supreme Court stated "[DOT's] contention that a 27-year retroactivity period is per se unconstitutional is belied by the fact that we upheld a retroactive amendment that occurred 37 years after the statute was originally enacted . . .." *Id*. at 751 (citation deleted).

The Michigan Court of Appeals took a different approach in the instant case when the court attempted

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Tax at 213; *Montana Rail Link*, *Inc.*, 76 F.3d at 993; and *Sears*, *Roebuck & Co.*, 672 So. 2d at 796.

to cloak its retroactivity decision with the *Carlton* precedent by concluding "there is no doubt that the Legislature acted promptly to correct the error." *Gillette* at 911. The Michigan Court of Appeals' definition of "prompt," however, was based not on the lengthy six-year gap between the retroactive legislation and the original legislation, but rather on the much shorter two-month gap between the Michigan Supreme Court's decision in favor of the taxpayer on the interpretation of the original legislation and the Michigan Legislature's enactment of retroactive legislation overturning the Court's decision. *Id.* The Michigan Court of Appeals' logic is without support from *Carlton*, and it completely undermines any reasonable standard of "retroactivity." Promptness should not be measured by how quickly a legislature is able to react to an adverse court decision, but rather by how quickly the legislature responds to any perceived errors in the original drafting of the legislation.

In *Carlton*, this Court repeatedly stressed it did not intend to sustain retroactive laws for a long duration. This Court highlighted the awareness by the Internal Revenue Service ("IRS") and Congress for the need for a technical correction of the original legislation "within a few months" of the original legislation's enactment. *Carlton* at 33. This Court concluded Congress acted "promptly and established only a modest period of retroactivity[.]" *Id*. at 32. The Court cited the "customary congressional practice" of giving statutes effective dates prior to the dates of actual enactment generally "'confined to short and limited periods required by the practicalities of producing national legislation.'" *Id*. at 33 (quoting *U.S. v. Darusmont*, 449 US 292, 296 (1981)). The Court noted that the "1987 amendment extended for a period only

slightly greater than one year. Moreover, the amendment was proposed by the IRS in January 1987 and by Congress in February 1987, within a few months of the . . . original enactment." *Id.* Finally, in contrasting the facts in *Carlton* to a 1927 case, *Nichols v. Coolidge*, 274 U.S. 531 (1927), in which this Court overturned retroactive legislation with a twelve-year retroactivity period on Due Process grounds, the *Carlton* Court noted that the "period of retroactive effect is limited." *Carlton* at 34.

Nonetheless, in subsequent cases, this Court's cautionary approach to the constitutionally permissible length of retroactive tax legislation has been virtually washed away. *Amicus* seeks clarity from this Court on what it referred to as a "modest period of retroactivity" in *Carlton*. *Id.* at 32-33. The states' legislatures are pushing the outer limits. Direction is needed to prevent those legislatures from going well beyond what this Court imagined as "modest."

III. THE ABSENCE OF CLEAR GUIDANCE ON THE LIMITS OF RETROACTIVE TAX LEGISLATION UNDERMINES TAX ADMINISTRATION AND THE RULE OF LAW.

The Due Process Clause is fundamentally about fair play. If taxpayers cannot rely on the statutory law in effect at the time they file their returns, then taxpayers will lose trust in the tax system and the voluntary compliance system will falter. How can a government ask taxpayers to believe in a taxation system where the rules can change long after the tax reporting period has closed; and where any government losses or taxpayer wins in litigation can be arbitrarily reversed by retroactive tax legislation?

The irrationality of unchecked retroactive tax legislation is reinforced by the constant turnover within legislative bodies. At the state level, elections are held every two years for a substantial portion of state legislators.[8] This electoral process highlights due process concerns with a subsequent state legislative session, with almost entirely different membership, passing retroactive legislation to clarify laws enacted in prior sessions.

Longer periods of retroactivity increase the likelihood that legislative members "reinterpreting a law" did not participate in the consideration of, or voting on, the original legislation. Should a legislature with different membership sitting in a subsequent legislative session be able to retroactively determine what a prior legislature, many years earlier, really intended and make substantive retroactive changes that impose greater burdens on taxpayers? This outcome is arbitrary, is contradictory to the protections provided by the Due Process Clause, and underscores the need for this Court to provide guidance on the constitutional limits of retroactive tax legislation.

The National Conference of State Legislatures issued a report tracking the number of new state legislators in office as a result of the election in November 2014.[9] That report indicates 1,325 legislative seats (17.9 percent) turned over across the country in one

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[8] State representatives are generally elected every two years for two-year terms, and state senators are generally elected on a staggered two-year basis for four-year terms. *See* Ballotpedia, http://www.ballotpedia.org.

[9] *See* National Conference of State Legislatures, 2014 Post-Election State Legislative Seat Turnover, http://www.ncsl.org/research/elections-and-campaigns/2014-post-election-turnover.aspx.

election: 181 in the states' senates (9.2 percent) and 1,144 in the states' houses (21.1 percent).[10] Of relevance to the cases at issue here, the turnover in the Michigan Legislature between the date of the original legislation in 2008 and the retroactive legislation in 2014 was 85 percent.[11] In *Dot Foods II*, the turnover in Washington's legislature from the date of the original tax exemption in 1983 to the enactment of the retroactive legislation in 2010 was 99 percent.[12] By contrast, in *Carlton*, only 12 percent of Congress had turned over between the 99th session that enacted the original tax legislation and the 100th session that clarified that law.[13] The whole notion of due process is undermined when subsequent legislatures with significantly different memberships are allowed to determine the intent of tax legislation enacted by prior legislatures. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *U.S. v. Price*, 361 U.S. 304, 313 (1960).

This Court should grant review so that it can avoid these arbitrary outcomes by providing clearer guidance on when the period of retroactivity violates Due Process Clause protections.

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[10] These figures represent all legislators, including those not up for election in 2014. If only legislators up for election that year are taken into account, the turnover increases to 16.6 percent in the states' senates and 23.1 percent in the states' houses. *See* note 9.

[11] *See* Appellee Br., *Big Lots Stores, Inc. v. Michigan Dep't of Treasury,* No. 326039 (Mich. App. Ct. 2015).

[12] *See* Washington Secretary of State, Elections & Voting, http://www.sos.wa.gov/elections/results_search.aspx.

[13] *See* Election Statistics, 1920 to Present, available at: http://history.house.gov/Institution/Election-Statistics/Election Statistics.

IV. THE BINDING NATURE OF THE MULTISTATE TAX COMPACT IS AN ISSUE OF NATIONAL IMPORTANCE

This Court should also grant *certiorari* to examine whether the Multistate Tax Compact is a binding contract between its member states. This is an issue of national importance that is being litigated in multiple states. Guidance is needed from this Court on the appropriate criteria to be used in determining when the states that have entered into an interstate compact are bound.

Further, this issue's resolution has a much broader significance for state tax administration. Federal, state and local governments rely upon a system of voluntary compliance to account for the vast majority of tax collections from taxpayers. However, unlike the federal tax system, where taxpayers are only required to understand and comply with one set of rules, multijurisdictional taxpayers may be required to understand and comply with thousands of different state and local tax rules. To this end, the Compact was an important historical development that created a measure of uniformity for multijurisdictional corporate taxpayers. The Compact has been held up as an example of the states' ability to work together to craft more uniform laws for taxpayers and alleviate the need for Congressional preemption under the Commerce Clause. This Court needs to address whether, decades later, the states are free to disavow the Compact and thus undermine future collaborative efforts by states as well as weaken taxpayers' confidence that such efforts can be relied upon.

CONCLUSION

For the reasons stated above and for the reasons identified by all Petitioners, this Court should grant all Petitions for Writ of Certiorari.

Respectfully submitted,

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