NOS. 16-687, 16-688, 16-697, 16-698, 16-699

In the Supreme Court of the United States

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

DEPARTMENT OF TREASURY, STATE OF MICHIGAN,
Respondent.

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

BRIEF OF THE AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This Court has held that a law applied retroactively increasing a taxpayer's tax liability satisfies the Due Process Clause of the United States Constitution[*] only if it furthers a legitimate legislative objective by rational means. *See United States v. Carlton*, 512 U.S. 26, 30-31 (1994). Here, the Michigan Court of Appeals ("Court of Appeals") effectively held that raising additional revenue, by itself and without regard to the circumstances, is a "legitimate legislative purpose justifying a retroactive change to a tax statute." The question presented by this case is whether the Court of Appeals misapplied this Court's holding in *Carlton*. The question is particularly important because state legislatures throughout the United States are increasingly resorting to retroactive tax legislation to meet fiscal needs.

[*] United States Constitution, 5th and 14th Amendments.

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INTEREST OF AMICUS

The American College of Tax Counsel (the "College") respectfully submits this brief as amicus curiae supporting the hereinafter identified Petitioners.[1]

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief, wholly or partially, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Other than the *amicus curiae*, its members, or its counsel, the only monetary contributions to preparation or submission of its brief were made by individual tax practitioners acting in their individual capacities, not as representatives of their firms or other organizations. Petitioners and Respondent have consented to the filing of an amicus brief by the College.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

The College submits this *amicu*s brief because it is concerned that state courts have been misapplying the standards established by this Court, and sustaining state tax officials' efforts to raise or protect revenue through retroactive tax legislation. The uncertainty of when tax legislation may be applied retroactively does great harm to the fair and equitable administration of state and federal taxes. Taxpayers who, in good faith, relied upon the terms of a statute pursuant to the interpretation of the statute by the state taxing authority should not be subject to the upheaval caused by a retroactive change to the tax law that imposes new, unexpected fiscal burdens upon the taxpayers and that requires re-thinking of business operations and of personal and investment decisions. This is not only a problem for businesses. Individuals often rely upon existing tax laws, for example, when making charitable contributions and entering into home mortgages. Their reasonable expectations should not be upset retroactively.

INTRODUCTION AND SUMMARY

This amicus brief is being submitted to support five (5) separate Petitions for Certiorari filed by five (5) separate groups of Petitioners raising the same issues. The five (5) separate Petitions and their respective Petitioners are:

16-687	Sonoco Products Company Ingram Micro, Inc. and Subsidiaries AK Steel Holdings Corp. Big Lot Stores, Inc. Nintendo of America, Inc. Advance/Newhouse Partnership Fluor Corporation and Subsidiaries T-Mobile USA, Inc. and Subsidiaries Intuitive Surgical, Inc. General Aluminum Mfg. Company and Affiliates
16-688	Skadden Arps Slate Meagher & Flom LLP
16-697	Gillette Commercial Operations North American and Subsidiaries Coventry Health Care, Inc.
16-698	International Business Machines Corporation
16-699	Goodyear Tire & Rubber Company Deluxe Financial Services LLC Monster Beverage Corp.

The seminal case addressing the question of whether retroactive tax legislation satisfies the constitutional requirement of due process is this Court's decision in *United States v. Carlton*, 512 U.S.

26 (1994). In *Carlton*, this Court held that retroactivity was justified only if it served a "legitimate legislative purpose furthered by rational means."[2] By holding that raising revenue itself was a "legitimate legislative purpose," the Court of Appeals herein misapplied this test and established a principle that, taken to its logical conclusion, would justify virtually any retroactive tax statute. Other than legislation granting an exemption or exclusion or reducing rates, virtually all tax legislation can be justified as "raising revenue." Notwithstanding its recognition that *Carlton* involved the correction of an obvious error, the Court of Appeals ignored the unique circumstances of *Carlton*, which involved the prompt correction of an obvious legislative error that was identified very soon after the statute was enacted and which the taxpayer was admittedly exploiting for its own benefit. Conversely, as described more fully below, the statute at issue here was enacted seven (7) years before resolution of the Michigan Department of Treasury's unsuccessful challenge to Petitioners' right to elect use of the alternative apportionment formula allowed by the Multistate Tax Compact ("Compact"). *International Business Machines Corporation v. Michigan Department of Treasury*, 852 N.W.2d 865 (Mich. 2014) ("IBM"). Undaunted by this setback, the Michigan state legislature revised the statute to Petitioners' detriment, and applied it retroactively for the seven-year period.

As a result, the matter returned to the judicial arena, where the Court of Appeals upheld the

[2] 512 U.S. at 30-31, quoting *Pension Benefit Guaranty Corporation v. R.A. Gary & Co.*, 467 U.S. 717, 733 (1984).

retroactive elimination of the apportionment election based upon its reading of *Carlton* that simply raising revenue satisfies the Due Process Clause's requirement of "a legitimate legislative purpose furthered by rational means." If the standard articulated by the Court of Appeals is a correct statement of the law, legislatures would have a blank check to impose retroactive tax increases upon taxpayers who had relied upon prior law to structure their affairs. In light of the inequities resulting from such a broad potential application of this Court's standard in *Carlton* to tax and non-tax cases, the College believes it is imperative that the scope of this Court's "legitimate legislative purpose" concept be clarified.

The problem is not limited to this case. A number of other state legislatures, perhaps recognizing the political difficulties involved with raising tax rates, are resorting to legislation that retroactively increases taxes.[3] Individuals and businesses relying upon the tax laws that applied when their affairs were structured are seeing those expectations retroactively upset without warning and through no fault of their own.

There are circumstances when retroactive tax legislation is both constitutional and appropriate as a matter of tax policy, but those circumstances need clarification by this Court for the benefit of state and local governments as well as for taxpayers.

[3] *See*, *e.g*., Act of June 13, 1983, ch 66, section 5, 1983 Wash. Sess. Laws, 1st Ex. Sess. 2021-22 (codified at Wash. Rev. Code section 82.04.423) App 2; Va. Code § 58.1-402(B)(8); N.Y.L. 2010, Ch. 57, Part C, § 4; Ky. Stats. § 141.200 (16)-(18).

THE *CARLTON* CASE

Carlton involved a unique set of circumstances requiring Congress to correct an obvious drafting error through retroactive tax legislation.

The Tax Reform Act of 1986 ("Act") was enacted by Congress during October 1986 as a complete replacement of the 1954 Internal Revenue Code. It was a massive piece of legislation, extending over several hundred pages. Among other changes, it totally overhauled the manner by which corporations and their shareholders were taxed. Buried within the Act (§ 1172 of the Act, codified as 26 U.S.C. § 2057) was a special provision that provided an estate tax deduction for sales of employer securities to an employee stock ownership plan ("ESOP"). As enacted, the deduction equaled 50% of the proceeds received by the estate from a qualified sale of employer securities to an ESOP. The provision did not require that the employer securities sold to the ESOP be owned by the decedent at the time of his or her death. This was an acknowledged clear oversight by Congress. The mistake may have resulted from a failure of the drafters to focus upon this aspect of the provision. The ESOP provision was a very small part of this massive piece of legislation involving major tax policy changes.

The mistake became immediately apparent once commentators began to focus upon the Act's estate tax provisions. An article in Taxes-The Tax Magazine, published on November 1, 1986, nine days after the Act was signed by President Reagan, observed that "[t]he availability of this deduction appears to be virtually unlimited. There is no restriction that it apply to stock that is not readily tradable on an established market, that the decedent have been an employee of the employer maintaining the ESOP, or that the decedent have owned the employer securities at the time of death."[4] Another article published in Tax Notes, a leading tax journal, noted that the provision allowed an executor to use the proceeds of a qualifying sale of stock to an ESOP to buy still more stock and sell the new stock to the ESOP, thus "rolling over" the same funds multiple times and effectively eliminating the estate tax.[5] The article quoted one investment advisor as saying, "It's a ridiculous loophole, a complete screw-up… there is no way to defend it. It's embarrassing." The Tax Notes article indicated that the ESOP proposals (and this was one of several) were presented as a package to the Senate Finance Committee and were added to the bill by the Committee without discussion. A Wall Street Journal article dated December 31, 1986, made the same point. It reported that Washington tax officials started referring to the provision as "the repeal of the estate tax." A tax advisor was quoted as saying, "This is the loophole you could drive a truck through… when I first saw it, I said, boy, this is a real giveaway." The article indicated that an aide to the Senate Finance Committee confirmed that Senator Russell Long, who had sponsored the provision, did not intend for it to allow an estate to buy shares of employer stock after a decedent's death. "It wasn't the intention to allow

[4] William E. Mattingly and Zarina O'Hagin, *Into the Future-ESOPs After 1986*, Taxes-The Tax Magazine, Nov. 1, 1986.

[5] Lee A. Sheppard, *Senator Long leaves a Loophole for Post-Mortem Estate Planning*, State Tax Notes, Jan. 9, 1987.

people to do post-death estate planning."[6] Although intended to encourage the expansion of ESOPs, the provision permitted the executor of the estate of a decedent who had owned no employer securities and who had no connection with the company to buy employer stock on the open market, sell it to the employer's ESOP, and receive a substantial estate tax deduction.

The decedent in *Carlton*, Willametta K. Day, had no connection with MCI Communications Corporation ("MCI"). She had never been employed by MCI and owned none of its stock at her death. The executor of her estate, Jerry W. Carlton, bought $11.2 million of MCI stock on the open market and sold it to the MCI ESOP two days later at a $631,000 loss. Thus, the transaction had no economic significance and Mr. Carlton stipulated that the transaction was engaged in purely to manufacture an estate tax deduction.

Recognizing that transactions like this would happen, the Internal Revenue Service, soon after the Act's passage, stated that it would seek corrective legislation. Within three months of the Act's enactment, during January 1987, the Service announced that it would apply the provision as if it required that the decedent own the ESOP stock on the date of death "[p]ending the enactment of clarifying legislation."[7] The Treasury Department estimated that the drafting mistake would cause "sham transactions"

[6] Allan Murray and Jeffrey H. Birnbaum, *New Loophole May Help Many Beat Estate Tax*, The Wall Street Journal, Dec. 31, 1986.

[7] Notice 87-13, 1987-1 C.B. 438, 442.

and a revenue loss of more than $7 billion, which was twenty times more than what had been anticipated.[8] Congress amended the statute December 22, 1987, effective as if it had been enacted fourteen months earlier when the Act became law. The likelihood that corrective retroactive legislation would be enacted was apparent to many, presumably including Carlton, from the date upon which the Act became law, and the public at large was advised that such changes would occur within three months of enactment of the law.

When this Court addressed the retroactivity issue in *Carlton*, it was within the context of the unusual circumstances of the case. The Court said that it was "clear that Congress did not contemplate such broad applicability of the deduction when it originally adopted section 2057."[9] The Court noted that Senator Bentsen, when introducing the corrective legislation, stated that "Congress did not intend for estates to be able to claim the deduction by virtue of purchasing stock in the open market and simply reselling the stock to an ESOP."[10]

Upholding the constitutionality of the corrective legislation, this Court stated that "Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that

[8] Brief for petitioner United States of America at 4-6, *U.S. v. Carlton*, 512 U.S. 26 (1994).

[9] 512 U.S. at 31.

[10] 512 U.S. at 32.

would have created a significant and unanticipated revenue loss."[11]

Nowhere in its *Carlton* opinion did this Court suggest, yet alone hold, that raising revenue, without more, was a "legitimate legislative purpose" that could justify retroactive tax legislation.

ARGUMENT

The Petitions for a Writ of Certiorari should be granted because these cases present several important questions of law that have not been fully resolved by this Court regarding the Due Process Clause limits imposed upon a state's ability to enact retroactive tax legislation: Must a court consider the reliance of a taxpayer upon a tax statute to determine whether retroactive amendments to that statute violate the Due Process Clause? What circumstances allow a state legislature to enact retroactive tax legislation purportedly to correct a supposed "error" in a prior tax statute? Is a state's interest in raising or protecting revenue alone a sufficient justification for enacting retroactive tax legislation? And, how long of a period of retroactivity for tax legislation does Due Process permit? Acceptance of the Court of Appeals holdings would allow state legislatures an almost plenary right to enact retroactive tax legislation, entirely unrestricted by constitutional Due Process. Furthermore, the recent trend toward the enactment of retroactive state tax legislation demonstrates that these questions are recurring more frequently. A petition for a writ of certiorari raising these same

[11] 512 U.S. at 32.

questions for an unrelated case was filed with this Court on or about September 12, 2016, and it is currently pending before this Court.[12] Review of these cases by the United States Supreme Court is warranted.

These cases involve the retroactive repeal of a long-standing statute enacting the Compact and its apportionment election into Michigan law. The Compact -- an interstate tax agreement enacted, *inter alia*, for the purpose of "facilitat[ing] taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration"[13] -- provided taxpayers with an election to apportion their income using an equally-weighted, three-factor apportionment formula based upon sales, property, and payroll.[14] Michigan's adoption of the Compact occurred during 1970.

Subsequently, effective January 1, 2008, the Michigan state legislature adopted the Michigan Business Tax ("MBT"), which apportioned taxpayer income based solely upon sales.[15] The Compact apportionment formula offered more favorable treatment for out-of-state taxpayers, which therefore

[12] Petition For a Writ of Certiorari to the Supreme Court of Washington, *Dot Foods, Inc. v. State of Washington Department of Revenue*, Docket No. 16-308.

[13] *U.S. Steel Corp. v. Multistate Tax Comm.*, 434 U.S. 452, 456 (1978).

[14] MICH. COMP. LAWS § 205.581 *et seq.*

[15] MICH. COMP. LAWS § 208.1303.

elected at times to apportion their income based upon the Compact's elective three (3)–factor formula rather than the MBT's single sales factor formula. During July 2010, the legislature considered a bill to eliminate the Compact apportionment election, but that bill failed to pass.[16] A second attempt was made during May 2011. At that time the legislature passed a law eliminating the Compact's election retroactive to January 1, 2011, meaning that the election was still valid for tax years 2008 through 2010.[17]

Meanwhile, various taxpayers filed suit seeking refunds based upon their prior Compact apportionment elections, which had been rejected by the Michigan Department of Treasury.[18] Those actions were held in abeyance pending a decision of the Michigan Supreme Court in the *IBM* case, which raised similar issues.[19] During July 2014, the Court rendered its *IBM* decision, holding that the Compact apportionment election was permitted through 2010.[20]

Thereafter, during September 2014, the legislature passed another law, this time eliminating the Compact apportionment election retroactively to January 1,

[16] Mich. H.R. 6351.

[17] 2011 Mich. Pub. Acts 40.

[18] *See* 878 N.W.2d at 901.

[19] *See* 878 N.W.2d at 901.

[20] 852 N.W.2d 865 (Mich. 2014).

2008.[21] In these cases, the Court of Appeals held that the 2014 legislation extinguished the outstanding refund claims based upon the retroactive repeal of the election.[22] The Michigan Supreme Court denied leave to appeal from the Court of Appeals.[23]

The decision of the Court of Appeals in these cases, relying partially upon this Court's opinion in *Carlton,* raises at least four (4) important questions regarding the limits imposed by the Due Process Clause upon a state's ability to enact retroactive tax legislation.

I. May/Must a Court Consider a Taxpayer's Reliance Upon a Tax Statute to Determine Whether Retroactive Amendments to That Statute Violate Due Process?

The Court of Appeals cited *Carlton* for the proposition that a retroactive change to a tax statute cannot violate the Due Process Clause based upon a taxpayer's reliance because a taxpayer has "no vested right in the tax laws or in the continuance of any tax

[21] *Gillette Commercial Operations North America & Subsidiaries v. Dep't of Treasury*, 878 N.W.2d 891 (Mich. Ct. App. 2015).

[22] 878 N.W.2d at 899.

[23] *Gillette Commercial Operations North America & Subsidiaries v. Dep't of Treasury*, 880 N.W.2d 230 (Mich. 2016); *Sonoco Products Co. v. Dep't of Treasury*, 880 N.W.2d 521 (Mich. 2016); *Sapa Extrusions, Inc. v. Dep't of Treasury*, 884 N.W.2d 268 (Mich. 2016); *IBM v. Dep't of Treasury*, 884 N.W.2d 269 (Mich. 2016); *Harley Davidson Motor Co., Inc. v. Dep't of Treasury*, 884 N.W.2d 292 (Mich. 2016).

laws."[24] But *Carlton* does not stand for such a sweeping proposition. This Court stated the executor's reliance upon law as it existed when he entered into the transactions at issue was not sufficient to establish a constitutional violation. This Court did not state that reliance upon existing law should *never* be considered as a factor when challenging the constitutionality of a law. Its statement should be limited to the facts of the case that was before it. The executor in *Carlton* knew that he had taken advantage of a defectively drafted statutory provision enacted by mistake, that his transaction lacked economic significance, and that the transaction was designed solely to manufacture an artificial tax deduction. This should have been enough to place the executor upon notice that retroactive repeal was a real and distinct possibility. He did not enter into a legitimate business or investment arrangement relying upon then-existing law. He was relying upon an obvious "loophole" allowing him to obtain a tax benefit from pursuing what amounted to "sham transactions." That his particular reliance was viewed by this Court as being unjustified does not mean that taxpayer reliance upon intentionally enacted law should never be considered. Indeed, *Carlton* merely reiterated the observation made earlier in *Welch v. Henry*, 305 U.S. 134, 147 (1938), that the lack of a vested right in tax laws means that "retroactive imposition does not *necessarily* infringe due process," not that retroactive imposition *never* infringes due process.

[24] 878 N.W.2d at 910.

Taxpayer reliance cannot be totally excluded from consideration in all cases. There will be some cases in whichtaxpayer reliance should prohibit retroactive legislation. The reliance upon current tax laws placed by buyers of solar heating panels presents a clear example. The Internal Revenue Code now provides a credit for buyers of solar heating panels for personal residences. The credit was designed to make it possible for people who could not otherwise afford it to heat their homes by solar energy. If Congress decided that the federal government needed more money and that a good way to obtain it would be to repeal this credit retroactively, then the settled expectations and financial plans of thousands of Americans would be adversely affected. Taxpayers who relied upon the tax credit to buy and have the solar panels installed might not be able to pay their contractors. No one could reasonably say that their reliance upon prior law should not be considered when determining the constitutionality of retroactive repeal. As another example, many people rely upon the deductibility of charitable contributions when deciding how much they can give to their church or their volunteer fire department. Should Congress be allowed to retroactively repeal the charitable contributions deduction just because it needs to raise or protect revenue?

The College does not suggest that taxpayer reliance should always be a bar to retroactive tax legislation, but it believes reliance should be a factor that should be considered, and that this Court should clarify the circumstances when that will be the case.

II. When May a State Legislature Enact Retroactive Tax Legislation to Correct a Supposed "Error?"

The Court of Appeals cited *Carlton* for the proposition that a legislature acts with a legitimate purpose when it enacts retroactive tax legislation to "correct a perceived misinterpretation of a statute."[25] Justice O'Connor, in her *Carlton* concurrence, readily perceived the danger of this rationale, observing, "Every law touching on an area in which Congress has previously legislated can be said to serve the legislative purpose of fixing a perceived problem with the prior state of affairs – there is no reason to a pass a new law, after all, if the legislators are satisfied with the old one."[26] In other words, courts -- such as the Court of Appeals in these cases -- might approve of the imposition of almost any legislation as necessary to "fix" the prior law. Here, the Court of Appeals apparently relied solely upon statements made in the 2014 repealing legislation to conclude that the legislature had enacted the legislation to correct an error, specifically, failing to explicitly repeal the Compact apportionment election when it enacted the MBT.[27] Apart from this post-legislation rationalization, there is no reason to believe that the lack of an explicit repeal was an oversight rather than a conscious choice of the prior legislature to preserve the Compact election and the MBT apportionment formula together. In fact,

[25] 878 N.W.2d at 910.

[26] 512 U.S. at 36 (O'Connor, J., concurring).

[27] *See* 878 N.W.2d at 900-01.

although the Court of Appeals recognized that the MBT was amended during 2011 to eliminate the Compact's apportionment election as of tax year 2011, it apparently failed to consider that the legislature had the opportunity to repeal the election retroactively to 2008 at that time but failed to do so. Contrary to the circumstances presented by *Carlton*, the legislature's failure to repeal the election during 2011 retroactively to 2008 is a clear indication that allowing the decades-old election provision to survive the enactment of the MBT during 2008 was not a mistake. Unlike the taxpayer in *Carlton*, the taxpayers here had no reason to suspect that retroactive repeal of the relevant tax law might be enacted. The 2014 statement of the legislature, made when it was confronted with MBT refunds payable to taxpayers who had properly made the election, should have been recognized for what it was: an attempt to protect the state treasury at the expense of taxpayers who had followed the law as it had been written for years. Review of this case is necessary to provide guidance to courts and legislatures as to when retroactive tax legislation may be justified as correcting a previous "error."

III. Is the Interest of a State to Raise or Protect Revenue Alone a Sufficient Justification to Enact Retroactive Tax Legislation?

The Court of Appeals stated that the legislature had acted with a legitimate purpose to "eliminate a significant revenue loss."[28] The Court of Appeals apparently relied upon that potential revenue loss as an independent justification for the retroactive repeal.

[28] 878 N.W.2d at 910.

But all tax statutes are enacted for the purpose of raising and preserving revenue for the state. If revenue concerns alone are a sufficient justification for enacting retroactive tax legislation, then all such legislation is absolutely justified. That simply cannot be the case. As Justice O'Connor's concurring opinion in *Carlton* observed: "[t]he governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose. For example, a 'wholly new tax' cannot be imposed retroactively, even though such a tax would surely serve to raise money."[29] The decision of the Court of Appeals demonstrates the need for a clear statement from this Court defining the limits for retroactive tax legislation based upon revenue concerns. Indeed, the need for this limitation is further demonstrated by the frequency with which legislatures are resorting to retroactive tax legislation for the sole purpose of raising revenue.[30]

IV. How Long a Period of Retroactivity is Permissible Without Violating Due Process?

Carlton relied, *inter alia*, upon the fact that "Congress acted promptly and established only a *modest* period of retroactivity," specifically, "a period

[29] 512 U.S. at 37-38 (O'Connor, J., concurring).

[30] *See, e.g., Caprio v. New York Dep't of Taxation and Finance*, 25 N.Y.3d 744 (2015); *In re Hambleton Estate*, 335 P.3d 398 (2014), *cert. denied*, 136 S. Ct. 318 (2015), *In re Bracken Estate*, 175 Wash. 2d 549 (2012).

only slightly greater than one year."[31] *Carlton* approved of that period based upon the "short and limited periods required by the practicalities of producing national legislation."[32] But, here, the Court of Appeals approved a much greater, seven-year-long period of retroactivity after the legislature initially eliminated the Compact election retroactively to 2011 only. As Justice O'Connor recognized, "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions."[33]

Moreover, the Michigan legislature not only waited a significant period of time to fix its supposed legislative error, but it also failed to take advantage of a least two prior opportunities to do so: once in 2010, when it attempted, but failed, to pass repealing legislation; and, once in 2011, when it passed repealing legislation, but only with an effective date stretching back to January 1 of that year.

An issue not addressed in *Carlton*, but presented by these cases, is the effect of pending litigation upon the determination of whether a legislature acted promptly. Here, the Court of Appeals relied upon the premise that the legislature did not know until 2014, when the Michigan Supreme Court rendered its *IBM* decision, that the 2008 MBT enactment had not effectively

[31] 512 U.S. at 32-33 (emphasis added).

[32] 512 U.S. at 33.

[33] 512 U.S. at 38 (O'Connor, J., concurring).

repealed the Compact apportionment election.[34] But, given its 2010 and 2011 legislative actions, attempting to repeal the Compact's election, the legislature was clearly of the mind that the MBT had not affected the total repeal of the Compact's election. Furthermore, there is no reason that the legislature should have waited upon the outcome of court litigation. If the legislature believed there were a problem or error, it should have acted promptly to correct the error.

It is difficult to understand how the Court of Appeals concluded that the legislature had acted promptly during 2014 to cure an alleged 2007 statutory defect. Thus, courts and legislatures clearly require guidance as to how to determine whether legislatures acted promptly and consistent with *Carlton*. We submit that the Court of Appeals decision is part of a conflict among state courts about whether the permissible period of retroactivity under the *Carlton* Due Process analysis can significantly exceed one year.[35]

Because each of the above questions is recurring in courts and legislatures throughout the country, the need for clarification by this Court is manifest. As

[34] 878 N.W.2d at 911.

[35] *Compare In re Hambleton Estate*, 335 P.3d 398, 411 (Wash. 2014) (eight-year period permitted), and *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 396 (Ky. 2009) (period greater than six years permitted), *with James Square Assocs. v. Mullen*, 993 N.E.2d 374, 382-83 (N.Y. 2013) (16–32 month period invalid), *Rivers v. State*, 490 S.E.2d 261, 265 (S.C. 1997) (two-three year period invalid), and *City of Modesto v. National Med, Inc.*, 27 Cal. Rptr. 3d 215, 222 (Ct. App. 2005) (eight-year period invalid).

previously noted, a petition for a writ of certiorari raising many of the same questions in an unrelated case is currently pending before this Court. *See Dot Foods, Inc. v. State of Washington*, Docket No. 16-308

The need for clarification by this Court is all the more pressing because retroactive tax legislation has recently been enacted by other state legislatures and more can be expected. As Professor Steve R. Johnson recently observed in a thoughtful article:

> The never-slaked thirst of governments – both federal and state – for additional revenue forebodes more retrospective tax legislation. Courts will be forced to decide whether to hold the line of constitutional restraint or to accommodate legislatures through more indulgent retroactivity doctrine. Some commentators have already seen a slide at the state level away from the former and toward the latter.[36]

While state court decisions reviewing those statutes generally upheld retroactivity, to a great extent this was attributable to the misapplication of this Court's ruling in *Carlton*. No clear principles have emerged from these cases addressing the constitutionality of retroactive tax legislation. The leading state and local tax treatise, authored by Professor Walter Hellerstein,

[36] Steve R. Johnson, *Retroactive Tax Legislation*, State Tax Notes, Aug. 15, 2016, at 535-36.

observes that "the court decisions provide little concrete guidance."[37]

CONCLUSION

In determining the circumstances when retroactive tax legislation will meet Due Process standards, state courts throughout the United States are misapplying this Court's decision in *Carlton.*

State legislatures, emboldened by court decisions that give *Carlton* an unduly expansive reading, are enacting retroactive laws solely to increase revenues when no special circumstances justifying retroactivity are present. These cases offer an ideal opportunity for this Court to clarify this important area of the law, and we respectfully request that the Court issue a writ of *certiorari* to the Court of Appeals of the State of Michigan.

[37] J. Hellerstein & W. Hellerstein, State Taxation ¶4.17 (3rd ed. 2001 and 2016 Supp.).

Respectfully Submitted,

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