

No. 14-1436

IN THE
Supreme Court of the United States

MICHAEL HAMBLETON, AS SUCCESSOR
PERSONAL REPRESENTATIVE OF THE ESTATE
OF HELEN M. HAMBLETON, ET AL.,
Petitioners,

v.

WASHINGTON DEPARTMENT OF REVENUE,
Respondent.

**On Petition for a Writ of Certiorari
to the Supreme Court of Washington**

**BRIEF FOR TAX EXECUTIVES
INSTITUTE, INC. AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTRODUCTION AND STATEMENT OF INTEREST	1
SUMMARY OF THE REASONS FOR GRANTING THE PETITION.....	4
REASONS FOR GRANTING THE PETITION..	5
I. INCONSISTENT INTERPRETATIONS OF <i>CARLTON</i> HAVE CREATED A STRIKING CONFLICT AMONG STATE COURTS.....	6
A. This Court Considered Many Factors When Evaluating the Constitutionality of the Retroactive Amendment in <i>Carlton</i>	6
B. State Courts Purporting to Follow <i>Carlton</i> Have Utilized Different Standards to Analyze Retroactive Taxes	8
C. These Divergent Approaches Have Resulted in Inconsistent Conclusions and Created a Split Among State Courts.....	10
II. GUIDANCE FROM THIS COURT IS NEEDED TO DETER THE EMERGING PRACTICE OF OVERRULING STATE COURT DECISIONS WITH RETROACTIVE LEGISLATION	11

TABLE OF CONTENTS—Continued

	Page
A. <i>Hambleton</i> Invites Legislatures to Litigate and Then Overrule Unfavorable Court Decisions With Retroactive Legislation	12
B. Numerous State Legislatures Have Enacted Retroactive Legislation to Overrule Taxpayer-Favorable Decisions or Influence the Litigation Process.....	14
C. Legislation With Long Retroactive Periods and Retroactive Legislation to Overrule Unfavorable Court Decisions Should Be Discouraged	17
1. The Principles Governing Sound Tax Policy and Administration Demand that Retroactive Tax Legislation Be Used Sparingly	17
2. Retroactive Tax Legislation Overruling Court Decisions Raises Other Legal Concerns	20
CONCLUSION	21

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Atl. Richfield Co. v. Or. Dep't of Revenue</i> , 14 Or. Tax 212 (1997), <i>aff'd per curiam</i> , 958 P.2d 840 (Or. 1998).....	9, 10
<i>Betten Auto Ctr., Inc. v. Dep't of Treasury</i> , 723 N.W.2d 914 (Mich. Ct. App. 2006)	15
<i>City of Modesto v. Nat'l Med, Inc.</i> , 128 Cal. App. 4th 518 (2005).....	<i>passim</i>
<i>Daimler Chrysler Servs. N. Am. LLC v.</i> <i>Dep't of Treasury</i> , 723 N.W.2d 569 (Mich. Ct. App. 2006)	15
<i>Dot Foods, Inc. v. Wash. Dep't of Revenue</i> , 215 P.3d 185 (Wash. 2009).....	14
<i>Eastern Enterprises v. Apfel</i> , 524 U.S. 498 (1998)	18
<i>Estate of Bracken</i> , 290 P.3d 99 (Wash. 2012), <i>superseded</i> <i>by statute, Estate of Hambleton</i> , 335 P.3d 398 (Wash. 2014).....	<i>passim</i>
<i>Estate of Hambleton</i> , 335 P.3d 398 (Wash. 2014).....	<i>passim</i>
<i>Gen. Motors Corp. v. Dep't of Treasury</i> , 803 N.W.2d 698 (Mich. Ct. App. 2010), <i>cert. denied</i> , 132 S. Ct. 1143 (2012)	<i>passim</i>
<i>GMAC LLC v. Dep't of Treasury</i> , 781 N.W.2d 310 (Mich. Ct. App. 2009)	15
<i>GTE v. Revenue Cabinet</i> , 889 S.W. 2d 788 (Ky. 1994)	14

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Ingram Micro Inc. v. Dep't of Treasury</i> , No. 325507 (Mich. Ct. App. docketed on Jan. 9, 2015)	16
<i>Int'l Bus. Machs. Corp. v. Dep't of Treasury</i> , 852 N.W.2d 865 (Mich. 2014).....	<i>passim</i>
<i>Int'l Bus. Machs. Corp. v. Dep't of Treasury</i> , No. 327359 (Mich. Ct. App. docketed on May 13, 2015)	16
<i>McCulloch v. Maryland</i> , 17 U.S. 316 (1819)	5
<i>McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco</i> , 496 U.S. 18 (1990)	20
<i>Miller v. Johnson Controls, Inc.</i> , 296 S.W.3d 392 (Ky. 2009), <i>cert. denied</i> , 560 U.S. 935 (2010)	<i>passim</i>
<i>Mont. Rail Link, Inc. v. United States</i> , 76 F.3d 991 (9th Cir. 1996)	9, 10
<i>Pension Benefit Guar. Corp. v. R.A. Gray & Co.</i> , 467 U.S. 717 (1984)	7
<i>Reich v. Collins</i> , 513 U.S. 106 (1994)	20
<i>Rivers v. South Carolina</i> , 490 S.E.2d 261 (S.C. 1997).....	8, 10
<i>Tesoro Ref. & Mktg. Co. v. Dep't of Revenue</i> , 246 P.3d 211 (Wash. Ct. App. 2010), <i>rev'd on other grounds</i> , 269 P.3d 1013 (Wash. 2012).....	16

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>United States v. Carlton</i> , 512 U.S. 26 (1994)	<i>passim</i>
<i>Welch v. Henry</i> , 305 U.S. 134 (1938)	6
<i>Yaskawa Am., Inc. v. Dep't of Treasury</i> , No. 325475 (Mich. Ct. App. docketed on Jan. 8, 2015)	16
 CONSTITUTION	
U.S. Const. amend. V	<i>passim</i>
 STATUTES	
26 U.S.C. § 501(c)6).....	2
2000 Ky. Act. ch. 543, § 1.....	14
Wash. Laws of 2010, 1st Sp. Sess., ch. 23, §§ 401, 402, 1704	14
Wash. Laws of 2013, 2d Sp. Sess., ch. 2.....	12
Wash. Laws of 2013, 2d Sp. Sess., ch. 2, §§ 9-10	12, 20

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**INTRODUCTION AND
STATEMENT OF INTEREST**

Amicus curiae Tax Executives Institute, Inc. (“TEI”)¹ respectfully submits this brief in support of petitioners. The Washington Supreme Court’s decision in *Estate of*

¹ All parties received at least 10 days’ notice of TEI’s intention to file this brief, and the brief is filed with the consent of all parties. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than TEI, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Hambleton, 335 P.3d 398 (Wash. 2014), upholds legislation that retroactively amends Washington's estate tax for eight years and legislatively overrules that court's decision in *Estate of Bracken*, 290 P.3d 99 (Wash. 2012). *Hambleton* cannot be squared with the limitations imposed by the Due Process Clause of the U.S. Constitution and this Court's decision in *United States v. Carlton*, 512 U.S. 26 (1994). TEI's members have a substantial interest in ensuring that retroactive tax legislation is properly limited and that States provide adequate remedies for unlawful taxes. TEI thus urges this Court to grant the petition for writ of certiorari.

TEI is a voluntary, nonprofit association of business executives, managers and administrators responsible for the tax affairs of their employers. TEI was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code. TEI is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of tax administration and compliance to the benefit of the government and taxpayers, and vindicating the constitutional rights of taxpayers.

TEI's members are employed by a broad cross-section of the business community. The estate tax rules at issue in *Hambleton* do not affect the professional interests of TEI's members or their employers directly. However, as in-house tax professionals who advise their companies regarding the tax consequences of various transactions and business decisions, and who must decide whether to litigate tax assessments that are contrary to existing State law, TEI's members have a vital interest in ensuring that the power of State legislatures to enact retroactive tax legislation

is properly constrained and that the remedies for unlawfully imposed and collected taxes are adequate.

The Washington Supreme Court's decision in *Hambleton* undermines both of those protections. In *Carlton*, 512 U.S. at 30-33, this Court held that retroactive tax legislation must be "supported by a legitimate legislative purpose furthered by rational means" and gave meaning to this test by analyzing whether (1) the legislative purpose was "illegitimate" or "arbitrary" and (2) whether the legislature acted promptly and established a "modest" period of retroactivity. *Carlton* concluded that the retroactive tax legislation was constitutional because correcting a drafting mistake and preventing unanticipated revenue shortfalls constituted a legitimate legislative purpose, the legislature acted within a period of months, and the retroactive period was slightly more than one year. *Id.* at 33.

In contrast, *Hambleton*, 335 P.3d at 409, holds that legislation retroactively amending Washington's estate tax for eight years was constitutional because "[t]he legislature has a legitimate purpose for the retroactive amendment, and the period of retroactivity is rationally related to that purpose." That standard is inconsistent with this Court's analysis in *Carlton*. Moreover, by tying the legitimacy of the retroactive period to the legislative purpose, the Washington Supreme Court imposes virtually no limits on retroactive tax statutes. Such limitations are particularly necessary here, where the legislation seeks to overturn a judicial decision in favor of taxpayers retroactively for eight years.

Left to stand, the Washington Supreme Court's decision will embolden State governments to continue a growing trend – to neglect provisions in their tax law that are susceptible of multiple interpretations and force taxpayers to litigate them, knowing that the

State legislature can legislatively and retroactively overrule any court decision it disagrees with. This ploy creates uncertainty for taxpayers, is inconsistent with sound tax policy and administration and wastes judicial resources. It also raises other constitutional and legal concerns by denying taxpayers a clear and certain remedy for unlawfully imposed and collected taxes, threatens to treat similarly-situated taxpayers differently depending upon whether they are the lead litigant, and allows State legislatures to trump the judiciary and legislatively overrule court decisions with retroactive legislation. TEI thus respectfully submits this *amicus curiae* brief and urges this Court to grant the petition.

SUMMARY OF THE REASONS FOR GRANTING THE PETITION

This Court should grant the taxpayers' petition for a writ of certiorari to resolve the significant differences among State courts applying *Carlton* and to prevent State legislatures from overturning judicial decisions with legislation employing long retroactive periods. Following *Carlton*, State courts examining the constitutionality of retroactive tax statutes have taken one of two approaches. The first approach interprets *Carlton* as establishing a two-pronged test to determine whether retroactive tax legislation is "supported by a legitimate legislative purpose furthered by rational means" by considering (1) whether the legislative purpose is "arbitrary" or "illegitimate" and (2) whether the legislature acted "promptly" and established a "modest" period of retroactivity. *See Carlton*, 512 U.S. at 30-33. Courts applying this test have consistently held that taxes with retroactive periods exceeding one to two years are invalid.

The second approach posits that retroactive tax legislation is constitutional as long as the legislature had a legitimate purpose for the retroactive amendment and the *retroactive period* was rationally related to that purpose. Courts applying the second approach have concluded that remedying a fiscal shortfall constitutes a legitimate purpose and that a lengthy retroactive period satisfies that test because it is necessary to fully undo that fiscal shortfall. By conflating the analysis in this manner, these courts have held that retroactive tax legislation is constitutional even if the period of retroactivity exceeds any reasonable interpretation of “modest.”

These two divergent approaches have resulted in inconsistent State court decisions regarding an acceptable retroactive period for tax legislation under the Due Process Clause. Several states, Washington and Michigan in particular, have seized upon this apparent opportunity and regularly enact retroactive legislation to overrule taxpayer-favorable decisions. This practice is contrary to principles governing sound tax policy and administration and raises other concerns, such as the existence of a clear and certain remedy, equal treatment of similarly-situated taxpayers, and the authority of the legislative branch to override the judicial branch. This Court’s intervention is necessary to clarify the proper test for retroactive tax legislation and stem this abusive practice.

REASONS FOR GRANTING THE PETITION

As Chief Justice Marshall famously declared, “[a]n unlimited power to tax involves, necessarily, a power to destroy. . . .” *M’Culloch v. Maryland*, 17 U.S. 316, 327 (1819). The power to tax retroactively, years after taxpayers have relied upon the law as written, is even

more dangerous. Here, the Washington Supreme Court held that the State legislature had the power to retroactively change the financial obligations of taxpayers whenever it has a legitimate purpose (here, a fiscal shortfall) and the period of retroactivity is rationally related to that purpose. That standard all but assures that anytime a State legislature wishes to impose a retroactive tax obligation, it can do so at will. Washington's actions are not only unfair, they are at odds with this Court's ruling in *United States v. Carlton*, 512 U.S. 26. This Court's intervention is necessary to prevent the growing trend of retroactive State tax legislation.

**I. INCONSISTENT INTERPRETATIONS OF
CARLTON HAVE CREATED A STRIKING
CONFLICT AMONG STATE COURTS.**

**A. This Court Considered Many Factors
When Evaluating the Constitutionality
of the Retroactive Amendment in
Carlton.**

In *Carlton*, 512 U.S. at 27, this Court addressed whether Congress could enact a "curative measure" that retroactively amended and limited a federal estate tax deduction. The *Carlton* estate alleged that the retroactive amendment violated the Due Process Clause of the Fifth Amendment. *Id.*

This Court noted that prior decisions examining the constitutionality of retroactive tax legislation had turned on whether the "retroactive application [was] so harsh and oppressive as to transgress the constitutional limitation." *Id.* at 30 (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938) (internal quotation marks and other citations omitted)). This standard is equivalent to the conditions imposed on retroactive economic

legislation generally, which mandate that retroactive legislation be “supported by a legitimate legislative purpose furthered by rational means.” *Id.* at 30-31 (citations omitted). The Court stressed that the “retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.” *Id.* at 31 (citations omitted). However, “that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.” *Id.* (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-730 (1984)).

This Court held that the retroactive amendment at issue in *Carlton* complied with these due process requirements. The Court reasoned that Congress’ legislative purpose was not “illegitimate” or “arbitrary” because “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.” *Id.* at 32. The Court also reasoned that Congress acted “promptly” and “established only a modest period of retroactivity.” *Id.* In reaching this determination, the Court emphasized that the retroactive period was “slightly greater than one year” and that “the amendment was proposed by the IRS in January 1987 and by Congress in February 1987, within a few months of [the statute’s] original enactment.” *Id.* at 33.

Justice O’Connor’s concurrence repudiated the notion that legislatures have unfettered authority to enact retroactive tax legislation, declaring that “[t]he governmental interest in revising the tax laws must at some point give way to the taxpayer’s interest in finality and repose.” *Id.* at 37-38. Indeed, “[b]ecause the

tax consequences of commercial transactions are a relevant, and sometimes dispositive, consideration in a taxpayer's decisions regarding the use of his capital, it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them." *Id.* at 38 (citations omitted). Justice O'Connor thus concluded that "[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." *Id.*

B. State Courts Purporting to Follow *Carlton* Have Utilized Different Standards to Analyze Retroactive Taxes.

State courts purporting to apply *Carlton* have taken one of two approaches. Several courts have interpreted *Carlton* as establishing a two-pronged test to determine whether retroactive tax legislation is "supported by a legitimate legislative purpose furthered by rational means." *See Carlton*, 512 U.S. at 30-31. Under that test, retroactive tax legislation will be constitutional only if (1) the legislative purpose is not "arbitrary" or "illegitimate" and (2) the legislature acted "promptly" and established a "modest" period of retroactivity. *See, e.g., City of Modesto v. Nat'l Med, Inc.*, 128 Cal. App. 4th 518, 528-29 (2005); *Rivers v. South Carolina*, 490 S.E.2d 261, 278-79 (S.C. 1997).

Other State courts interpreting *Carlton*, including the Washington Supreme Court in *Hambleton*, have sidestepped or rejected *Carlton*'s two-pronged test. These courts have, in essence, concluded that retroactive legislation is constitutional if the legislature had a legitimate purpose for the retroactive amendment and the retroactive period was rationally related to that purpose. *See, e.g., Estate of Hambleton*, 335 P.3d 398

(Wash. 2014); *Atl. Richfield Co. v. Or. Dep't of Revenue*, 14 Or. Tax 212 (1997), *aff'd per curiam*, 958 P.2d 840 (Or. 1998); *Gen. Motors Corp. v. Dep't of Treasury*, 803 N.W.2d 698 (Mich. Ct. App. 2010); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009); *Mont. Rail Link, Inc. v. United States*, 76 F.3d 991 (9th Cir. 1996). Courts employing this approach have either wholly ignored or attempted to rationalize their legislatures' failure to take "prompt" action or limit the retroactive period to a "modest" amount of time.

For example, in *Hambleton*, the Washington Supreme Court did not conclude that the eight year retroactive period was "modest." Rather, the Washington court held that the length of retroactivity was warranted because it was "directly linked with the purpose of the amendment, which is to remedy the effects of *Bracken*." 335 P.3d at 411. Thus, "any period less than eight years would be arbitrary." *Id.*

In *General Motors Corp. v. Department of Treasury*, 803 N.W.2d at 710, the Michigan Court of Appeals acknowledged that *Carlton* examined the length of the retroactive period and evaluated whether it was modest. The Michigan court nonetheless held that a modest period of retroactivity was not per se required because "the Court did not specifically include a temporal 'modesty' requirement" when it "summarize[ed] its holding." *Id.* at 711. The Michigan court instead opted to apply a test balancing "the government's interest in retroactive application of a statute against that of the taxpayer's interest in finality . . . to determine whether the limit of modest retroactivity is reached." *Id.* Applying that test, the Michigan court held that the retroactive tax legislation was constitutional. *Id.* at 712-13.

In *Miller v. Johnson Controls*, the Kentucky Supreme Court similarly circumvented the modesty analysis articulated in *Carlton*. 296 S.W.3d at 399. That court instead opined that “[t]he pertinent question is whether the period of retroactivity is one that makes sense in supporting the legitimate governmental purpose (rationally related).” *Id.*

C. These Divergent Approaches Have Resulted in Inconsistent Conclusions and Created a Split Among State Courts.

Not surprisingly, the application of these divergent approaches has led to dramatically different results. Courts adhering to *Carlton*’s two-pronged analysis generally have concluded that the retroactive tax legislation violated the taxpayer’s due process rights. *See Rivers*, 490 S.E.2d at 276 (invalidating a 2-3 year retroactive period); *City of Modesto*, 128 Cal. App. 4th at 522 (invalidating an 8 year retroactive period). The decisions in these cases were based on those courts’ determinations that the retroactive periods were not modest.

In contrast, courts holding that the retroactive period need only be rational in light of the legislative purpose have concluded that the retroactive tax legislation satisfied due process. *See Atl. Richfield*, 14 Or. Tax at 220 (upholding an 8 year retroactive period); *Gen. Motors*, 803 N.W.2d at 712 (upholding a 5-11 year retroactive period); *Johnson Controls*, 296 S.W.3d at 401 (upholding a 6-10 year retroactive period); *Mont. Rail Link*, 76 F.3d at 995 (upholding a 6 year retroactive period). The decisions in these cases were based on those courts’ determinations that the length of the retroactive period was necessary to fully undo the fis-

cal shortfall that the amended statute sought to rectify. Thus, the conclusion regarding the constitutionality of a retroactive tax legislation is directly affected by which approach a State court adopts.

The decisions arising from the two approaches are striking given that these State court decisions all purport to emanate from this Court's decision in *Carlton*. This Court should grant the petition to resolve the conflict among the State courts regarding the proper interpretation of *Carlton*.

II. GUIDANCE FROM THIS COURT IS NEEDED TO DETER THE EMERGING PRACTICE OF OVERRULING STATE COURT DECISIONS WITH RETROACTIVE LEGISLATION.

Carlton presented a relatively easy case: the retroactive amendment fixed an obvious drafting error, the IRS provided notice of the error to the public within months, and Congress immediately thereafter proposed legislation to correct it. 512 U.S. at 29. This prompt action by the executive and legislative branches ensured that the retroactive period was limited to slightly over a year. *Id.* Consequently, *Carlton* did not require this Court to delve into what constitutes an “illegitimate” or “arbitrary” legislative purpose.

Hambleton squarely presents that question. State legislatures are increasingly using the gray area created by *Carlton* to defer amending statutes susceptible of multiple interpretations with the knowledge they can legislatively overrule court cases they have lost by enacting retroactive legislation. This Court's intervention is necessary to quell this disturbing practice.

A. *Hambleton* Invites Legislatures to Litigate and Then Overrule Unfavorable Court Decisions With Retroactive Legislation.

The prompt administrative and legislative action to correct a drafting mistake in *Carlton* is a far cry from the facts in *Hambleton*. Following the passage of Washington's estate tax in 2005, the Washington Department of Revenue ("WDOR") wrote regulations in 2006 that excluded federally-elected qualified terminable interest property ("QTIP") assets from Washington taxable estates. *See Bracken*, 290 P.3d at 104. The WDOR thereafter changed its position and determined that such assets were includable in Washington estates. *Id.* at 108. However, rather than asking the legislature to amend the governing statute to reflect the WDOR's position, the WDOR issued assessments, required estates to litigate this issue and, in 2009, amended the regulations to reflect the WDOR's revised position. *Id.* at 104, fn. 4. In 2013, the Washington Supreme Court issued *Bracken*, in which it unanimously held that the governing statute excluded QTIP assets from Washington estates where a federal election had been made and that the WDOR had "exceeded its authority under the [2005] Act." *Id.* at 101.

The Washington Legislature thereafter amended the governing statutes to include assets subject to a federal QTIP election in Washington estates. Wash. Laws of 2013, 2d Sp. Sess., ch. 2. The Washington Legislature enacted the amendments "both prospectively and retroactively," except for cases in which a final judgment had been entered. *Id.* at §§ 9-10. This provision treated the *Bracken* estate differently than

the numerous estates whose cases were stayed pending a decision in *Bracken*.

The Washington Supreme Court was not troubled by the Washington Legislature's failure to enact curative legislation promptly after determining that the governing statute was susceptible of an interpretation it did not like. Nor was the Washington court troubled by the 2013 legislation's eight year retroactive period or the Washington Legislature's effort to "eliminat[e] any refund claims resulting from the recent [*Bracken*] decision, other than for the Estate of Bracken." *Hambleton*, 335 P.3d at 411. Instead, the Washington Supreme Court sidestepped *Carlton*'s two-part test and concluded that the "largely economic" purpose of the legislation was legitimate and that "any period less than eight years would be arbitrary" as it "would allow some estates to escape the tax while similarly situated estates would be subject to it." *Id.*²

The Washington Supreme Court's holding creates a perverse invitation: it allows States to litigate questionable positions, and then legislatively and retroactively overrule court decisions they do not like. This result creates uncertainty for taxpayers and is at odds with the majority opinion in *Carlton*, which lauded the IRS and Congress for acting promptly and establishing a modest period of retroactivity. 512 U.S. at 32-33.

² Notwithstanding this purported evenhandedness, Washington's retroactive amendment does create dissimilar treatment between the Bracken estate and "similarly situated estates" that were litigating the question at issue in *Bracken*. *Id.* Thus, the legislation is arbitrary under the Washington court's own standard.

B. Numerous State Legislatures Have Enacted Retroactive Legislation to Overrule Taxpayer-Favorable Decisions or Influence the Litigation Process.

While *Hambleton* involved an estate tax, the practice of overruling State court decisions via retroactive tax legislation for business taxes is becoming more prevalent. Indeed, the retroactive amendment at issue in *Hambleton* is just the most recent instance of the Washington Legislature's actions. Below are a few examples demonstrating how State legislatures have used this practice to obviate judicial decisions they do not like.

In *Dot Foods, Inc. v. Washington Department of Revenue*, 215 P.3d 185 (Wash. 2009), the Washington Supreme Court held that the taxpayer was eligible for a business and occupations tax exemption. The Washington Legislature thereafter enacted an amendment eliminating the exemption retroactively for 10 years to prevent "large and devastating revenue losses." Wash. Laws of 2010, 1st Sp. Sess., ch. 23, §§ 401, 402, 1704.

In *GTE v. Revenue Cabinet*, 889 S.W.2d 788, 791 (Ky. 1994), the Kentucky Supreme Court held that corporate taxpayers could file combined returns under Kentucky's statutes. The Kentucky Legislature thereafter enacted a statute retroactively denying taxpayers this right back to 1998. See 2000 Ky. Act. ch. 543, § 1.

The Kentucky Supreme Court upheld the legislation in *Miller v. Johnson Controls*, 296 S.W.3d at 401, finding that "a retroactive statute need only be rationally related to a legitimate legislative purpose." The Kentucky court further remarked that "the legislature reestablished the status quo as it saw it prior to *GTE*"

and that “the legislature in this case took away the *dispute*, and hence any illegality that might be claimed, by properly enacting a retroactive statute that mooted the question of whether the Appellees were entitled to a refund.” *Id.* at 403 (emphasis in original).

The Michigan Legislature has also enacted retroactive legislation to overrule several taxpayer-favorable court decisions. The Michigan Legislature enacted sales tax legislation with a seven year retroactive period to combat the Michigan Court of Appeals’ decision in *Daimler Chrysler Services North America LLC v. Department of Treasury*, 723 N.W.2d 569 (Mich. Ct. App. 2006). The taxpayer challenged the retroactive amendment in *GMAC LLC v. Department of Treasury*, 781 N.W.2d 310 (Mich. Ct. App. 2009). The Michigan court blithely acknowledged the legislative override, stating that “plaintiffs are challenging the Legislature’s disapproval and corrective action with regard to the *DaimlerChrysler* decision. . . . [I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation.” *Id.* at 320 (emphasis added).

The Michigan Court of Appeals repeated similar language in *General Motors Corp. v. Department of Treasury*, 803 N.W.2d at 710. There, the Michigan court upheld the Michigan Legislature’s enactment of a five year retroactive use tax provision to legislatively overrule the Michigan Court of Appeals’ decision in *Betten Auto Center, Inc. v. Department of Treasury*, 723 N.W.2d 914 (Mich. Ct. App. 2006).

Most recently, the Michigan Legislature enacted legislation to overrule the Michigan Supreme Court’s decision in *International Business Machines Corp. v. Department of Treasury*, 852 N.W.2d 865 (Mich. 2014) (“IBM”). In *IBM*, the Michigan Supreme Court held

that Michigan's enactment of the Multistate Tax Compact allowed corporate taxpayers to elect a three-factor apportionment formula to apportion their income even though the State's business tax statutes prescribed a different method. *Id.* at 868. The retroactive amendment sought to overrule the *IBM* decision as to IBM and the other taxpayers with claims pending in the Michigan courts and eliminate those taxpayers refund claims for six years.

The Michigan Court of Claims has held in three separate decisions that the retroactive legislation barred IBM and other taxpayers from obtaining a refund under *IBM*. See *Int'l Bus. Machs. Corp. v. Dep't of Treasury*, No. 327359 (Mich. Ct. App. docketed on May 13, 2015); *Yaskawa America, Inc. v. Dep't of Treasury*, No. 325475 (Mich. Ct. App. docketed on Jan. 8, 2015); *Ingram Micro Inc. v. Dep't of Treasury*, No. 325507 (Mich. Ct. App. docketed on Jan. 9, 2015). These taxpayers have appealed the Court of Claims' decisions to the Michigan Court of Appeals, where the cases are now pending.

Besides retroactively overruling judicial decisions via legislation, some legislatures have sought to use the legislative process as a tool in ongoing litigation. For example, in *Tesoro Refining & Marketing Co. v. Department of Revenue*, the Washington Legislature enacted an amendment that limited the deduction at issue in that case – one day prior to trial. 246 P.3d 211 (Wash. Ct. App. 2010), *rev'd on other grounds*, 269 P.3d 1013 (Wash. 2012). That amendment was intended to eliminate the taxpayer's refund claims dating back to 1999.

The City of Modesto also attempted to influence ongoing litigation in *City of Modesto*, 128 Cal. App. 4th 518. There, the taxpayer challenged the City's unap-

portioned gross receipts tax. *Id.* at 523. After the taxpayer moved for summary adjudication, the City enacted a provision requiring apportionment. *Id.* The trial court rejected the City's position and held that the provision was no more than a "promise to adopt specific apportionment at some unknown future date." *Id.* While the case was on appeal, the City enacted detailed apportionment guidelines and requested the California Court of Appeal to remand the case back to the City's finance director to calculate an apportioned tax. *Id.* at 524. The Court of Appeal rejected the City's request and held that the amended ordinance and guidelines did not comply with the Due Process Clause under *Carlton*'s two-pronged test. *Id.* at 528.

The foregoing examples demonstrate that States are using retroactive tax legislation to overturn taxpayer-favorable court decisions and have even employed retroactive legislation as a litigation tool. Guidance clarifying the boundaries of *Carlton*, and when a legislative purpose is illegitimate or arbitrary, is necessary to ensure this process is not abused.

C. Legislation With Long Retroactive Periods and Retroactive Legislation to Overrule Unfavorable Court Decisions Should Be Discouraged.

1. The Principles Governing Sound Tax Policy and Administration Demand that Retroactive Tax Legislation Be Used Sparingly.

For a tax system to be fair, taxpayers must be able to rely upon the legislation and regulations that actually exist when business transactions and other taxable events occur. Governments may change their administrative policies and tax laws, but fairness

demands that these changes be enforced prospectively if they will have a significant financial effect on taxpayers. Even when governments possess the authority to change tax laws retroactively, legislatures should exercise that power sparingly and enforce limited retroactive periods.

Carlton's requirement of a legitimate legislative purpose, prompt action and a modest period of retroactivity provides those needed limits upon legislative power. See, e.g., *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, concurring in the judgment and dissenting in part, "In our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute.") State courts interpreting *Carlton* to only require that the retroactive period be rationally related to the legislative purpose of the amendment eviscerate the boundaries for when and how far back retroactive tax legislation may be applied. Lengthy retroactivity periods create great uncertainty for taxpayers, eliminate reasonable reliance upon the laws as written and undermine taxpayers' efforts to plan accordingly.

This is particularly true when the legislation retroactively overrules a judicial decision. It is always within the province of the legislature to prospectively change its tax laws in response to a judicial decision. However, doing so retrospectively for a lengthy period is troubling and cannot be reconciled with basic tenets of sound tax policy and administration.

If State legislatures have unlimited discretion to overrule court decisions they do not like, taxpayers will be loath to challenge an adverse decision of the taxing agency in court. There is no reason for taxpayers to expend the time and considerable expense to litigate a case if that court's decision can be overruled

retroactively with the stroke of the legislature's pen. Providing State legislatures unfettered power to overrule court decisions retroactively will discourage taxpayers from bringing challenges to court and will undermine the division of power among the three branches of government, and the checks and balances that the judiciary confers.

In addition, allowing State legislatures to overrule taxpayer-favorable decisions retroactively wastes judicial resources. Just as there is no reason for taxpayers to expend the time and resources necessary to litigate a case that can be overturned at the whim of a State legislature, there is no need for courts to hear such cases. The time and resources courts have expended on such matters is significant. For example, in the *Bracken/Hambleton* litigation, it is estimated that at least 25 estates had pending refund claims and outstanding deficiency assessments. In the *IBM* litigation, it is estimated that more than 30 corporate taxpayers have claims pending. States legislatures have a duty to act promptly to amend statutes they object to rather than litigating questionable issues and cluttering the courts with cases that will become obsolete via retroactive legislation.

Sound tax policy and administration requires governments to provide taxpayers with some degree of certainty and fairness. While retroactive tax legislation is permissible under some circumstances, the principles of certainty and fairness are not met when legislatures have unlimited authority to enact retroactive tax legislation to overrule court decisions.

2. Retroactive Tax Legislation Overruling Court Decisions Raises Other Legal Concerns.

The Washington Supreme Court's decision in *Hambleton* trades one problem for many others. Besides limiting retroactive tax legislation, due process mandates that taxpayers challenging suspect laws be provided with "a 'clear and certain remedy' for an erroneous or unlawful tax collection." *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 37-38 (1990). That requirement is not satisfied when taxpayers' refund claims are eliminated or invalid deficiency assessments are revived due to legislation retroactively overruling a court decision. Indeed, this result is no more valid than the bait-and-switch tactics this Court repudiated in *Reich v. Collins*, 513 U.S. 106 (1994).

Hambleton also treats similarly-situated taxpayers differently. To circumvent separation of powers concerns, the Washington Legislature carefully drafted the retroactive legislation to exclude cases in which a final judgment had been entered. See Wash. Laws of 2013, 2d Spec. Sess., ch 2, §§ 9-10. The legislation thus treats the Bracken estate differently than all of the other estates whose cases were stayed pending the outcome of *Bracken*.

This result is not only unfair, it creates perverse incentives. Treating similarly-situated taxpayers differently based upon whether they are the lead litigant will cause taxpayers to improperly expedite their litigation and oppose stays pending the resolution of other cases. That reaction will wreak havoc on State courts administering multiple cases involving the same tax issue and undoubtedly raise a plethora of estoppel claims.

Finally, despite the Washington Legislature's attempt to draft around it, the retroactive legislation undermines the role of the judiciary. State legislatures have the undeniable right to change their tax laws in response to a judicial decision prospectively. However, granting State legislatures the power to trump State courts by overruling judicial decisions with retroactive legislation frustrates the tripartite system of government this country has adopted.

CONCLUSION

For the foregoing reasons, TEI urges this Court to grant the taxpayers' petition for a writ of certiorari.

Respectfully submitted,

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