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 Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than three million businesses and trade and professional organizations of every size and sector, and from nearly every geographic region. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts, including this Court. The Chamber regularly files *amicus curiae* briefs in this and other courts in suits concerning issues of state and federal taxation. *See, e.g.*, *Comptroller of the Treasury of Md. v. Wynne*, No. 13-485, and *Direct Marketing Ass'n v. Brohl*, No. 13-1032.

This case presents a question of exceptional importance to the business community regarding whether the Due Process Clause precludes the government from retroactively imposing tax liability that upends years of settled expectations. By permitting the State to impose a tax eight years after it first said it would not, the Washington Supreme Court's decision substantially undermines the ability of businesses to make long-term financial decisions with confidence, and exposes them to significant tax liability years after the fact.

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[1] This brief is filed with the written consent of all parties through letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Legislation that operates retroactively is subject to the limitations of the Due Process Clause of the Constitution. Although this Court in *United States v. Carlton*, 512 U.S. 26 (1994), held that a modest period of retroactivity—*i.e.*, a period covering the year of the legislative session preceding the statute's enactment—is permissible for tax laws, it has never upheld a statute imposing retroactive tax liability reaching back several years. To the contrary, it has invalidated such measures. *E.g.*, *Nichols v. Coolidge*, 274 U.S. 531 (1927).

In this case, the Washington Supreme Court concluded that an eight-year period of retroactive tax liability did not run afoul of the Due Process Clause. In that court's view, the State's desire to avoid a fiscal shortfall of its own making justified a tax that upended considered estate planning choices from an earlier decade.

The Washington Supreme Court's expansive holding invites legislatures to disrupt fiscal expectations in a wide variety of circumstances, no matter how settled by the passage of time. This risk is particularly high as States increasingly have resorted to retroactive tax revisions to fill budget gaps. And it is especially worrisome for businesses, which formulate financial plans, make investments, and structure complex operations years into the future based on known law—not the law of the future made retroactive years later. *Cf. Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1796-1797

(2015) (rejecting argument that corporations and individuals should be treated differently under the dormant Commerce Clause for purposes of double taxation). Because the decision below not only widens a conflict in authority, but does so by undermining basic notions of fairness recognized by ample precedent and safeguarded by the Due Process Clause, this Court's intervention is warranted.

ARGUMENT

I. RETROACTIVE APPLICATION OF TAX LAWS FOR SEVERAL YEARS DESTROYS SETTLED EXPECTATIONS AND CHILLS INVESTMENT

"Retroactivity is generally disfavored in the law in accordance with fundamental notions of justice that have been recognized throughout history." *Eastern Enters. v. Apfel*, 524 U.S. 498, 533 (1998) (plurality opinion) (citations and internal quotation marks omitted); *see also* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1398 (5th ed. 1891) ("Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."). As this Court has recognized, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," and that "settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

Where such disruption occurs, uncertainty pervades the law and hamstrings planning and

investment. That is because "[i]n a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 266. Conversely, insufficient "transparency, uniformity, and predictability" make it all but impossible for decisionmakers to "reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly." Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 1000 (2008); *see* Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1, 5-6 (1983) (recognizing that "uncertain law may deter activity" and "leave persons unsure of their entitlements").

This Court has long guarded against the "high stakes" harm that retroactivity engenders. *Landgraf*, 511 U.S. at 259. Over a century ago, the Court explained that, based on "principles * * * announced as early as 1827" and thereafter "steadily adhered to," "[i]t is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government." *United States v. Alabama Great S. R.R. Co.*, 142 U.S. 615, 621 (1892). The same concern more recently led the Court to conclude that "authoriz[ing] retroactive rejection of effective tariffs would significantly undermine the repose that carriers have traditionally been permitted to enjoy once their tariffs have been accepted by the

[Interstate Commerce] Commission." *ICC v. American Trucking Ass'ns, Inc.*, 467 U.S. 354, 363 n.7 (1984). The Court "stressed the importance of common carriers[] being able to rely on effective tariffs on file with the Commission." *Id.*

Similarly, the Court has regularly applied a presumption against retroactivity when interpreting statutes. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 315-326 (2001). In doing so, it has emphasized that retroactive laws make it difficult, if not impossible, to make plans or investments with any degree of confidence. *See Bennett v. New Jersey*, 470 U.S. 632, 640 (1985) ("Retroactive application of [statutory] changes in the substantive requirements of a federal grant program would deny both federal auditors and grant recipients fixed, predictable standards for determining if expenditures are proper.").

Even where the legislature has provided for a statute's retroactive operation in clear terms, the Constitution demands that the disruptive consequences be measured against the "timeless and universal" principle that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Landgraf*, 511 U.S. at 265 (citation and quotation marks omitted). With respect to non-penal legislation, the Due Process Clause and the Takings Clause provide "correlated" assurance that legislation will not have "severe[] retroactive impact." *Eastern Enters.*, 524 U.S. at 537; *see Landgraf*, 511 U.S. at 266 ("It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution.").

As relevant here, the Due Process Clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf*, 511 U.S. at 266; *see Eastern Enters.*, 524 U.S. at 549 (Kennedy, J., concurring in the judgment and dissenting in part) ("Both stability of investment and confidence in the constitutional system * * * are secured by due process restrictions against severe retroactive legislation."). Because "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation" in that the former can "deprive citizens of legitimate expectations and upset settled transactions," *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992), the Due Process Clause imposes a rationality requirement that goes beyond that applied to prospective enactments, *see Pension Benefit Guar. Corp. v. RA Gray & Co.*, 467 U.S. 717, 730 (1984) ("[R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects.").

Those principles apply to tax laws. This Court, for example, has invalidated a 12-year retroactive application of a state tax law under the Due Process Clause. *Nichols*, 274 U.S. at 542-543; *see also* ERIKA K. LUNDER ET AL., CONG. RESEARCH SERV., R42791, CONSTITUTIONALITY OF RETROACTIVE TAX LEGISLATION 2-3 & n.7 (2012) (listing "instances in which the Supreme Court has held that retroactive application of tax laws violated the Due Process Clause" as suggesting that "due process concerns are raised by an extended period of retroactivity").

To be sure, this Court has permitted a "modest period of retroactivity" in tax cases. *Carlton*, 512 U.S. at 32. But the Court has never extended its precedent upholding retroactive tax laws beyond the "short and limited periods required by the practicalities of producing national legislation," such as "the year of the legislative session preceding that of [the tax law's] enactment." *Id.* at 33 (citation and quotation marks omitted); *see id.* at 38 (O'Connor, J., concurring in the judgment) ("In every case in which we have upheld a retroactive federal tax statute against due process challenge, * * * the law applied retroactively for only a relatively short period prior to enactment.").

That time-limited exception makes sense. During a legislative session, the public is on notice that new tax laws may be enacted and made "retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment." *United States v. Hudson*, 299 U.S. 498, 500-501 (1937) (holding that retroactivity was not unreasonable, but consistent with historical practice, because "[i]n these circumstances" there was "strong pressure for legislation," "several bills * * * presented," and a presidential message to Congress); *see also United States v. Darusmont*, 449 U.S. 292, 299 (1981) ("The proposed increase in rate had been under public discussion for almost a year before its enactment."); *Cohan v. Commissioner*, 39 F.2d 540, 545 (2d Cir. 1930) (Hand, J.) (reasoning that taxpayer "must be prepared for such possibilities" during a given year, "the system being already in operation"). But once

the legislature concludes its session and shows no intention of taking up the issue after reconvening, taxpayers may reasonably expect that the consequences of past actions have become settled under the law. That is why "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise * * * serious constitutional questions." *Carlton*, 512 U.S. at 38 (O'Connor, J., concurring in the judgment).

The decision below, which permits a 2013 amendment to alter the legal landscape as it existed in 2005 and to impose retroactively *eight years* of tax liabilities, transgresses the Court's constitutional boundary between the "short and limited periods" allowed in *Carlton* and the longer periods struck down in *Coolidge*. The State upended Petitioners' estate planning and settled expectation that their trust assets would not be taxed under Washington law. Indeed, the Washington Department of Revenue had interpreted the original law immediately following its 2005 enactment to exempt the same category of trust assets from taxation that the 2013 amendment targets retroactively. Not until years later—after the Washington Supreme Court confirmed that Petitioners were not subject to tax liability, *see In re Estate of Bracken*, 290 P.3d 99 (Wash. 2012)—did the legislature act.

Such a result can only be deemed "harsh and oppressive." *Carlton*, 512 U.S. at 30. And it stands in stark contrast to this Court's decisions upholding retroactive tax laws against Due Process Clause challenges where the government neither invited

parties' reliance on an interpretation of the law, nor delayed in offering ostensibly curative or clarifying statutory language. If the Washington Supreme Court's decision (among others, *see* Pet. 12-15) is left standing, States have all the more incentive to adopt a wait-and-see approach when a dispute arises over the meaning of its tax laws, rather than to take immediate steps to remove the uncertainty and minimize disruption to financial planning. The Due Process Clause should not be narrowed to a point that it countenances avoidable disruption through the imposition of significant tax liability years after the liability-triggering decisions are made.

II. THE PREVALENT USE OF RETROACTIVE TAXATION TO GENERATE STATE REVENUE REINFORCES THE NEED FOR THIS COURT'S REVIEW

This Court's review is especially necessary because of the prevalence of retroactive state tax laws enacted in response to budget shortfalls. For example, when faced in 2010 with a $4.2 billion budget shortfall over the 2011 and 2012 fiscal years, the Virginia legislature proposed a revision to a corporate tax provision, retroactive to 2004. *See* Craig D. Bell & J. Christian Tennant, *The Constitutionality of Retroactive Tax Legislation in Virginia: Why Proposed Change to Add-Back Statute Violates Due Process*, BNA, WEEKLY STATE TAX REPORT, Feb. 12, 2010, at 1-2. When this bill failed to pass in both 2010 and 2013, the legislature enacted the same changes in 2014, this time going back ten years, as part of its biennial budget. *See* Tim Winks et al., Tax Insights from State and Local Tax

Services, *Virginia—Ten Year Retroactive Limitations Placed on Addback Exceptions*, PRICEWATERHOUSECOOPERS LLP, Apr. 7, 2014.

In another example, Michigan in 2014 repealed its multistate tax compact provisions retroactive to 2008, in response to an adverse court decision estimated to cost the State more than $1 billion. *See* Brian Kirkell et al., Tax Alert, *Michigan Retroactively Repeals Multistate Tax Compact*, McGladrey LLP, Apr. 10, 2015 (noting existence of more than 50 suits challenging retroactive repeal). This practice is no anomaly in Michigan. *See, e.g.*, *General Motors Corp. v. Department of Treasury*, 803 N.W.2d 698 (Mich. Ct. App. 2010) (per curiam) (upholding five-year retroactive tax legislation enacted in response to adverse court decision); *GMAC LLC v. Department of Treasury*, 781 N.W.2d 310 (Mich. Ct. App. 2009) (per curiam) (same for seven-year retroactive tax legislation). And similarly the decision below concerns only the latest example of retroactively taxing years-old events in Washington. *See, e.g.*, §§ 401, 402, 1704, 2010 Wash. Sess. Laws 2597-2598, 2648 (enacting retroactive amendment to reinstate 1999 revised interpretation of tax law in response to *Dot Foods, Inc. v. Washington Dep't of Revenue*, 215 P.3d 185 (Wash. 2009)); §§ 201, 1703, 2010 Wash. Sess. Laws 2584-2585, 2648 (making tax avoidance transaction provisions "appli[cable] to tax periods beginning January 1, 2006"); *accord Lawless Taxation,* WALL ST. J., Aug. 31, 2013, at A12 (detailing efforts to impose five-year retroactive liability in California).

Such laws bear out the "particular concern[]" that "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." *Landgraf*, 511 U.S. at 266. In the same way that "responsivity to political pressures poses a risk that [the Legislature] may be tempted to use retroactive legislation as a means of retribution," *id.*, budget pressures in difficult economic periods pose the risk that States will raise revenue by taxing past actions taken in reliance on laws then in effect and thereafter left unamended for several years.

Furthermore, in the last few years, courts reviewing the constitutionality of retroactive tax legislation in different States have reached conflicting results, with some declaring excessive a period as short as 16 months, *see, e.g.*, *James Square Assocs. LP v. Mullen*, 993 N.E.2d 374 (N.Y. 2013), and others upholding periods as long as 10 years, *see, e.g.*, *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009). Courts continue to confront the issue, *see* Pet. 18-19, and their decisions will only further muddle—rather than clarify—an already murky body of precedent. In light of these trends, state courts of last resort will benefit from prompt guidance on the limits the Due Process Clause imposes on retroactive tax legislation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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