No. 16-____

IN THE

Supreme Court of the United States

DOT FOODS, INC.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Due Process Clause, a law enlarging tax liability may be applied retroactively only insofar as it rationally furthers a legitimate legislative objective. *See, e.g., United States v. Carlton*, 512 U.S. 26, 30-31 (1994). Applying that test, this Court has never endorsed a retroactive period of more than a year or two—that is, a period covering the year preceding the legislative session in which the law was enacted—as a legitimate means of furthering revenue goals or correcting asserted legislative mistakes in drafting tax laws. In the only case it has heard involving a longer period (twelve years), this Court invalidated the law. *Nichols v. Coolidge*, 274 U.S. 531, 542-43 (1927).

The question presented is whether, or under what circumstances, imposing additional tax beyond the year preceding the legislative session in which the law was enacted violates due process.

RULE 29.6 STATEMENT

Dot Foods, Inc., is a closely held Illinois business corporation, has no parent corporation, and has no publicly traded shareholders.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dot Foods, Inc. ("Dot Foods"), respectfully petitions for a writ of certiorari to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

The opinion of the Washington Supreme Court as modified is reported at 372 P.3d 747 and is reproduced at Pet. App. 1a-20a. The Washington Supreme Court's denial of Dot Foods' motion for reconsideration is unpublished and is reproduced at Pet. App. 37a. The relevant orders of the state trial courts are unpublished and are reproduced at Pet. App. 21a-36a.

JURISDICTION

The Washington Supreme Court issued its original opinion on March 17, 2016. The Washington Supreme Court modified its opinion and denied Dot Foods' timely motion for reconsideration on April 28, 2016. Pet. App. 37a. On July 6, 2016, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including September 12, 2016. *See* No. 16A22. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

The relevant statutory provisions of Washington law are reproduced at Pet. App. 38a-40a.

INTRODUCTION

This case involves the constitutionality of a Washington statute retroactively changing state tax law and imposing tax liability on petitioner Dot Foods for business conducted four years before the statute's enactment. "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); *see also* JOSEPH 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."). But applying "a particularly heavy presumption of constitutionality" and "the most relaxed form of judicial scrutiny," Pet. App. 8a (internal quotation marks and citations omitted), the Washington Supreme Court held that the retroactive imposition of tax liability here comports with the Due Process Clause. *Id.*

This Court, however, has never held that the Constitution permits a legislature to upend business planning and expectations of repose in this manner. The Due Process Clause allows legislatures to make tax laws retroactive by matters of months, in order to correct mistakes in drafting and to ensure uniform rules over a tax year. *See*, *e.g.*, *United States v. Carlton*, 512 U.S. 26 (1994). But this Court has never approved a retroactivity period of more than a year or two, and Justice O'Connor opined last time the Court confronted the subject 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.* at 38 (O'Connor, J., concurring in the judgment); *see also Nichols*

v. Coolidge, 274 U.S. 531, 542-43 (1927) (invalidating tax with twelve-year retroactive period).

Over the twenty-plus years since the *Carlton* case, conflict and confusion have emerged over the temporal issue that Justice O'Connor highlighted and the necessity of a "curative" purpose to impose any retroactive tax liability in the first place. The Washington Supreme Court held here that a four-year retroactive imposition of a tax, in the absence of any curative intent, comported with the Due Process Clause. Pet. App. 10a-13a. This decision comports with holdings from other courts. But it also breaks from the holdings of courts of last resort in two other states, which have held that retroactivity periods over one year exceed the limits of due process. *See James Square Assocs. LP v. Mullen*, 993 N.E.2d 374, 382-83 (N.Y. 2013) (retroactivity period between 16 and 32 months is "excessive" in the absence of any curative purpose); *Rivers v. State*, 490 S.E.2d 261, 265 (S.C. 1997) (retroactivity period between two and three years is "simply excessive"). Meanwhile, the Congressional Research Service is currently advising Congress that the period for a valid retroactive change in tax law is "not clear." Erika K. Lunder et al., Cong. Research Serv., R42791, *Constitutionality of Retroactive Tax Legislation* 3 (2012).

Resolving the uncertainty over whether, or under what circumstances, legislatures may impose retroactive tax liability is critical to settle expectations for taxpayers, tax agencies, and legislators alike. Taxpayers need to know whether they can count on legislative tax schemes to provide a relatively stable background for investments, transactions, and operational business planning. Legislators and agencies similarly need guidance concerning the limitations on applying their tax power retroactively in order to responsibly forecast government

revenues and establish budget priorities and tax policy. Only this Court can provide that guidance. This Court should take this opportunity to provide it.

STATEMENT OF THE CASE

1. In 1983 the Washington Legislature enacted a statute excluding out-of-state businesses from the State's business and occupation tax ("B&O tax") when their in-state activity was limited to soliciting and taking product orders through separately organized representatives. *See* Act of June 13, 1983, ch. 66, Wash. Sess. Laws 1st Ex. Sess. 2017, § 5 (codified at Wash. Rev. Code § 82.04.423). Specifically, the Washington statute provided an exemption to any business that (a) did not own or lease real property in the state, (b) did not regularly maintain a stock of tangible goods in the state for sale in the ordinary course, (c) was not a Washington corporation, and (d) made sales of consumer products in the state "exclusively to or through a direct seller's representative." Pet. App. 39a. The statute defined "direct seller's representative," as relevant to this case, as "a person . . . who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment." Pet. App. 40a (omitting words added by the 2010 amendment).

From 1983 through 1999, the Washington Department of Revenue ("the Department") granted this exemption to out-of-state businesses so long as their in-state representatives did not solicit the sale of products in permanent retail establishments. *See Dot Foods, Inc. v. Dep't of Revenue*, 215 P.3d 185, 186 (Wash. 2009) ("*Dot Foods I*"). In operation, therefore, the Washington statute incentivized out-of-state sellers to stay out of state and instead to use separate in-state sales forces to distribute their products. And during this sixteen-year period, no

Washington public official ever expressed any view that this implementation of the tax exemption thwarted legislative intent or was otherwise improper. *See* Pet. App. 28a (trial court opinion).

2. Petitioner Dot Foods is an Illinois corporation that—during the period relevant to this case—occupied no property in Washington, maintained no local stock of goods, and made sales of consumer products solely through representatives who did not themselves sell or solicit sales in a fixed retail setting. *See Dot Foods I*, 215 P.3d at 186, 189-90. In 1997, the Department issued a ruling letter to Dot Foods expressly stating that Dot Foods qualified for the tax exemption at issue. *See Dot Foods, Inc. v. Dep't of Revenue*, 173 P.3d 309, 311 (Wash. App. 2007).

In late 1999, however, the Department reversed its position on the meaning of state law. Revising its interpretation of the statutory definition of "direct seller's representative," the Department declared that, even if an out-of-state business's in-state representative never sold products in a permanent retail establishment, it could render the business ineligible for the tax exemption if the products themselves were ultimately sold by someone else in a permanent retail establishment. *Dot Foods I*, 215 P.3d at 189-90. This regulatory change, if valid, would have revoked Dot Foods' previous exemption from the state's B&O tax.

In 2009, however, the Washington Supreme Court held that "the Department's revised interpretation of RCW 82.04.423 was contrary to the statute's plain and unambiguous language." Pet. App. 2a. Accordingly, as of 2009, "Dot Foods remain[ed] qualified for the B&O tax exemption to the extent its

sales continue to qualify for the exemption." Pet. App. 2a-3a (quoting *Dot Foods I*, 215 P.3d at 189-90).

3. The Washington Legislature next enacted the tax law at issue, referred to here as the 2010 Amendments. The Legislature claimed that its original intent in 1983 "was to provide a narrow exemption for out-of-state businesses engaged in direct sales of consumer products, typically accomplished through in-home parties or door-to-door selling." Pet. App. 38a. After *Dot Foods I*, however, the Legislature feared

> that most out-of-state businesses selling consumer products in this state will either be eligible for the exemption under RCW 82.04.423 or could easily restructure their business operations to qualify for the exemption. As a result, the legislature expects that the broadened interpretation of the direct seller's exemption will lead to large and devastating revenue losses. . . . Moreover, the legislature further finds that RCW 82.04.423 provides preferential tax treatment for out-of-state businesses over their in-state competitors and now creates a strong incentive for in-state businesses to move their operations outside Washington.

Pet. App. 38a-39a (Act of April 23, 2010, ch. 23, Wash. Sess. Laws 1st Spec. Sess. 2574, § 401(3) (the "2010 Amendments")).

There is no evidence that the budgetary assumptions of the 1983 law excluded the cost of providing the exemption to out-of-state companies in Dot Foods' position. Nor did the legislative statement of intent in the 2010 law claim that the revenue impact of *Dot Foods I* was unexpected. Pet. App. 39a. Nevertheless, the Legislature declared that it was "necessary to reaffirm [its] intent in

establishing the direct seller's exemption and prevent the loss of revenues resulting from the expanded interpretation by amending RCW 82.04.423 retroactively to conform the exemption to the original intent of the legislature and by prospectively ending the direct sellers' exemption as of the effective date of this section." Pet. App. 39a.

The 2010 Amendments "do[] not affect any final judgments, not subject to appeal, entered by a court of competent jurisdiction before the effective date of this section." Pet. App. 40a. But, as interpreted by the Washington Supreme Court, they do purport to enable the Department to retroactively impose tax liability on any business operations—including Dot Foods' own operations—that fall outside of those directly at issue in *Dot Foods I.*

4. When the Legislature enacted the 2010 Amendments, Dot Foods had a pending request for a refund of the B&O taxes it had paid to avoid penalties and interest in 2006 and 2007—the period outside of that directly covered by the judgment in *Dot Foods I.* Pet. App. 3a. Based on the 2010 Amendments, the Department denied the refund request.

Dot Foods then filed suit in state court for a refund of taxes it paid in 2006 and 2007.

The trial court entered summary judgment in favor of Dot Foods, holding that applying the 2010 Amendments to Dot Foods' 2006 and 2007 operations violated the Fourteenth Amendment's Due Process Clause. Deeming "impossible" the Legislature's assertion in 2010 that it knew the original legislative purpose of the 1983 law was different from the holding in *Dot Foods I*, the trial court reasoned that the retroactive period here was too long and

not supported by any legitimate legislative purpose. Pet. App. 27a-29a.[1]

The Washington Court of Appeals transferred the case to the Washington Supreme Court, and the Washington Supreme Court reversed the trial court's due process holding. Applying "the most relaxed form of judicial scrutiny," Pet. App. 8a (internal quotation marks and citations omitted), the Washington Supreme Court held that the retroactive imposition of tax liability on Dot Foods was rationally related to legitimate state objectives. Specifically, the Washington Supreme Court reasoned that the 2010 Amendments legitimately prevented "large and devastating revenue losses" and rescinded an incentive *Dot Foods I* had created for "in-state businesses to move their operations outside Washington" to avoid taxation. *Id.* at 7a (quoting 2010 Amendments § 401(3)).

The Washington Supreme Court implicitly acknowledged that the four-year period of retroactivity at issue here is substantial. But it brushed aside any significance of this fact, noting that the period was "well within the range of retroactivity periods that we have previously upheld." Pet. App. 11a (citing, *inter alia*, *In re Estate of Hambleton*, 335 P.3d 398 (Wash. 2014), *cert. denied*, 136 S. Ct. 318 (2015) (eight-year period satisfied due process)). The Washington Supreme Court offered no response to the cases Dot Foods cited holding that the Due Process Clause prohibits periods of retroactivity longer than a year or two.

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[1] Dot Foods also advanced state-law challenges to the 2010 Amendments, which the Washington courts rejected. Dot Foods does not press those claims here.

The Washington Supreme Court also acknowledged that the retroactive tax law this Court upheld in *United States v. Carlton*, 512 U.S. 26 (1994), was enacted to prevent revenue losses that were "unanticipated." Pet. App. 9a. And the Washington Supreme Court did not dispute the same could not be said of the revenue losses here. Pet. App. 8a-9a. But the Washington Supreme Court deemed the *Carlton* Court's repeated reliance on the unanticipated nature of the losses there to be mere "dictum" and refused to afford that reasoning any "binding" effect. Pet. App. 9a.

Dot Foods filed a timely motion for reconsideration. The Washington Supreme Court made minor amendments to one footnote but otherwise denied the motion. Pet. App. 37a.

REASONS FOR GRANTING THE WRIT

I. Courts Are Sharply Split Over the Due Process Limits on Retroactive Tax Laws.

In *Nichols v. Coolidge*, 274 U.S. 531 (1927), this Court held a twelve-year retroactive imposition of an estate tax provision violated the Due Process Clause. More recently, in *United States v. Carlton*, 512 U.S. 26 (1994), the Court distinguished that holding from a situation in which a legislature imposes a "modest" period of retroactivity that renders tax law consistent back to the previous legislative session to forestall an "unanticipated" revenue loss. *Id.* at 32-34.

Courts are deeply divided over where the line is between those two situations. How long, in other words, may a retroactive revenue measure reach back before it violates the Due Process Clause? And must a revenue loss be unforeseen to legitimate a period of retroactivity? Two

state courts of last resort have held that due process forbids periods of retroactivity that extend beyond the previous legislative session, whereas three such courts and the Ninth Circuit, as well as the Washington Court, have held that longer periods of retroactivity are permissible, in some cases regardless of whether revenue losses were foreseeable.

1. In *James Square Assocs. LP v. Mullen*, 993 N.E.2d 374 (N.Y. 2013), the New York Court of Appeals held that a retroactive tax period of only 16 to 32 months "should be considered excessive." *Id.* at 382. The court recognized that the goals of the retroactive law were to stem abuses in an incentive program and "to increase tax receipts." *Id.* at 383. Stemming abuses could not change behavior retroactively, however, and "[a]bsent an unexpected loss of revenue, . . . [the] legislative purpose [of raising revenue] is insufficient to warrant retroactivity in a case where the other factors militate against it." *Id.* The 16-to-32-month period was therefore "long enough in the present case so that plaintiffs gained a reasonable expectation that they would 'secure repose' in the existing tax scheme." *Id.* at 382 (citations omitted).

In *Rivers v. State*, 490 S.E.2d 261 (S.C. 1997), the South Carolina Supreme Court likewise held the retroactive period of "at least two years and possibly as long as three years" was "simply excessive." *Id.* at 265. The court noted that in *Carlton* this Court upheld a one-year period of retroactivity. *Id.* at 264-65. But, picking up on Justice O'Connor's concurrence in that case, the South Carolina Supreme Court explained that "[a]t some point, however, the government's interest in meeting its revenue requirements must yield to taxpayers' interest in finality regarding tax liabilities and credits." *Id.*; *see also Carlton*, 512 U.S. at 37-38 (O'Connor, J., concurring in the

judgment) ("The governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose.").[2]

2. In contrast, the Washington Supreme Court recently held in *In re Estate of Hambleton*, 335 P.3d 398 (Wash. 2014), *cert. denied*, 136 S. Ct. 318 (2015), that an eight-year retroactive period is permissible when necessary to prevent an "unanticipated and significant fiscal shortfall." *Id.* at 411 (citing *Carlton*, 512 U.S. at 32). And the Washington Supreme Court extended that holding here to validate another lengthy retroactive period (this time, four years) even though the State's purported revenue loss was not even unanticipated. Pet. App. 8a-9a.

Other courts have also upheld retroactive periods in excess of a year against due process challenges. In *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009), *cert. denied*, 560 U.S. 935 (2010), the Kentucky Supreme Court upheld a retroactive amendment reaching back six to ten years. The amendment was enacted some three to four

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[2] Other, pre-*Carlton* cases have similarly invalidated retroactive tax increases for three-to-four-year periods where, just like the instant case, the State's highest court had interpreted a statute against the position of the tax agency and the legislature subsequently amended the statute to adopt the agency's position retroactively. *Comptroller of Treasury v. Glenn L. Martin Co.*, 140 A.2d 288, 300 (Md. 1958); *Lacidem Realty Corp. v. Graves*, 43 N.E.2d 440 (N.Y. 1942); *State v. Pac. Tel. & Tel. Co.*, 113 P.2d 542 (Wash. 1941), *distinguished in* Pet. App. 12a; *see also City of Modesto v. Nat'l Med., Inc.*, 128 Cal. App. 4th 518, 529 (2005) ("Generally in California, courts have upheld the retroactive application of tax laws only where such retroactivity was limited to the current tax year.") (citing *Gutknecht v. City of Sausalito*, 43 Cal. App. 3d 269, 282 (1974)).

years after a court decision allowing corporate groups to file combined income tax reports and not just separate returns. *Id.* at 395-96. The length of the period was justified, in the court's view, because "the legislature had no means of knowing who would wish to combine their separate returns" in the years immediately following the court decision clarifying the meaning of the law and the legislature acted as soon as the scope of the "unanticipated revenue loss" became known. *Id.* at 400-01.

In *Zaber v. City of Dubuque*, 789 N.W.2d 634 (Iowa 2010), the Iowa Supreme Court upheld a retroactive tax law that reached back five and one-half years before its enactment. Assuming that *Carlton* applied to a curative act that ratified municipal authority, the Iowa Supreme Court held that the period was rationally related to the goal of protecting the financial stability of municipalities by preventing refunds of sums already "spent." *Id.* at 655.

In *Montana Rail Link, Inc. v. United States,* 76 F.3d 991 (9th Cir. 1996), the Ninth Circuit likewise rejected a due process challenge to a congressional prohibition of refunds for a six-year period after the statutory ambiguity arose. The Ninth Circuit held that the Due Process Clause permits a legislature to make a tax law retroactive for as long as it takes to cover a period of "ambigu[ity]" created by a poorly drafted statute and thereby to "prevent[] a loss of government revenue." *Id.* at 993-94.[3]

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[3] In *Gillette Commercial Operations N. Am. & Subsidiaries v. Dep't of Treasury*, 878 N.W.2d 391 (Mich. App. 2015), *appl. for leave to appeal denied*, 880 N.W.2d 230 (Mich. 2016), the Michigan Court of Appeals similarly recently upheld a retroactivity period of six years in the absence of any unanticipated revenue loss. Other intermediate court decisions have upheld retroactive withdrawal of refund claims for

3. The confusion in the law with respect to the acceptable period of retroactivity has not escaped notice of commentators. A leading tax treatise, for example, notes that "the court decisions provide little concrete guidance." 1 Jerome Hellerstein et al., *State Taxation* ¶ 4.17[1][a][i] (3d ed. 2001–15 & Supp. 2015); *see also id.* at S4-43 to 4-46 (reviewing the contrasting court approaches in recent cases).

Furthermore, in a recent report for Congress, the Congressional Research Service assessed potential due process limitations on tax legislation. The report explained that "[t]he most common potential concern with respect to substantive due process is the length of the retroactivity." Erika Lunder et al., Cong. Research Serv., R42791, *Constitutionality of Retroactive Tax Legislation* 2 (2012). To illustrate the point, the report contrasted this Court's opinions upholding short periods of retroactivity (one to two years) in *Carlton*, *United States v. Darusmont*, 449 U.S. 292 (1981), *Welch v. Henry*, 305 U.S. 134 (1938), and *Milliken v. United States*, 283 U.S. 15 (1931), with the decision in *Nichols* invalidating a 12-year retroactive period. *Id.* at 2-3. Noting that *Carlton* "unfavorably

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remote periods when the claims were filed only after a court decision changed the common understanding of the law or a court decision or a new statute raised new consciousness of an ambiguity under prior law, including *Gen. Motors Corp. v. Mich. Dep't of Treasury,* 803 N.W.2d 698, 712 (Mich. App. 2010), *cert. denied*, 132 S. Ct. 1143 (2012) (five years, preventing "significant loss of previously collected revenue"); *GMAC LLC v. Mich. Dep't of Treasury*, 781 N.W.2d 310 (Mich. App. 2009) (seven years); *Atl. Richfield Co. v. Oregon Dep't of Revenue,* 14 Or. Tax 212 (1997), *aff'd per curiam*, 958 P.2d 840 (Or. 1998) (eight years). We understand Michigan taxpayers in *Gillette* will be seeking review in this Court.

compared the 12-year period with periods where the 'retroactive effect is limited,'" the authors concluded:

> This suggests that due process concerns are raised by an extended period of retroactivity. However, *it is not clear* how long a period might be constitutionally problematic. The Court has recognized retroactive liability for periods beyond one or two years in non-taxation contexts, but *it is not clear* how a similar situation arising under the tax laws would be addressed.

Id. at 3 (emphasis added) (footnote omitted).

Academic commentators likewise have noted that this Court's current jurisprudence "provide[s] no sense of clarity that will help taxpayers to plan for or guard against a retroactive taking." Mystica M. Alexander, *California—Land of "Lawless Taxation" and the "Midnight Special": Outlier or Leader in a Growing Trend?* 12 U.N.H. L. REV. 219, 242 (2014); *see also* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1058 (1997) (considering the Court's retroactivity cases in the *Carlton* era more broadly and observing that those "decisions, rife with separate opinions, reflect a variety of conflicting and confusing approaches").

II. The Question Presented Is Important And Should Be Resolved Now.

For three overarching reasons, there is a pressing need for this Court to resolve the conflicts over the extent to which legislatures may impose taxes retroactively.

1. Retroactive changes in state tax laws are proliferating around the country. *See supra* at 10-13 (discussing cases in conflict); Steve R. Johnson, *Retroactive Tax Legislation*, 81 State Tax Notes 529, 535 (Aug. 15,

2016) (discussing Florida property tax cases); Alexander, *supra*, 12 U.N.H. L. Rev. at 220 (discussing California income tax cases); *Gillette Commercial Operations N. Am. & Subsidiaries v. Dep't of Treasury*, 878 N.W.2d 391 (Mich. App. 2015), *appl. for leave to appeal denied*, 880 N.W.2d 230 (Mich. 2016). This Court's guidance is therefore necessary to bring order to litigation over such laws and to inform legislatures of the constitutional limits on their authority in this realm.

2. Businesses need to know whether they can reasonably engage in financial planning based on current tax law. This Court has frequently "stressed the importance" of businesses being able to assume that economic decisions will be judged against the law that exists at the time the decisions are made. *ICC v. Am. Trucking Ass'ns, Inc.*, 467 U.S. 354, 363 n.7 (1984). In other words, private enterprise's "investment-backed expectations" are entitled to respect and constitutional consideration. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *see also Eastern Enters. v. Apfel*, 524 U.S. 498, 532 (1998) (plurality opinion). This Court should erase the cloud of uncertainty that now surrounds tax planning in our Nation's businesses.

3. Permitting tax laws to reach years back in time encourages political gamesmanship and willful ignorance. Accurate and efficient governmental budgeting depends on healthy and open dialogue between the executive and legislative branches about realistic revenue expectations based on existing law. Yet the trend in cases such as this to allow long periods of retroactivity encourages the executive branch to obscure or ignore legal threats to the revenue base that arise from ambiguous or otherwise poorly drafted tax laws. Under the Washington Supreme Court's reasoning, the revenue shortfall that the

executive's silence later causes provides an excuse for making the retroactive changes to the laws in question.

The Washington political branches are the poster children for selective communications that lead to the purported needs to cover such shortfalls. In this case, for example, Dot Foods disputed Department's assertion that it was ineligible for an exemption from the moment the Department changed its position on the issue. Years later, the Washington Supreme Court confirmed that "the Department's revised interpretation of RCW 82.04.423 was contrary to the statute's plain and unambiguous language." Pet. App. 2a. Yet only then did the Department request and obtain from the Legislature an amendment to change the law. And the Department claimed the change was needed, retroactive to the original enactment of the exemption, to prevent "large and devastating revenue losses." Pet. App. 3a, 7a.

The dynamic of failed-litigation-followed-by-retroactive-amendment transpired in another recent Washington case as well. In *In re Estate of Hambleton*, 335 P.3d 398 (Wash. 2014), *cert. denied*, 136 S. Ct. 318 (2015), the Department reversed its position on an estate tax question. When the Department's new position was challenged, the Department advised the Washington Governor's office that there was no need for emergency legislation and instead continued to litigate its position on the issue against dozens of estates. The Washington Supreme Court then unanimously rejected the Department's position. *In re Estate of Bracken*, 290 P.3d 99 (Wash. 2012). At that point, the Department prevailed on the Washington Legislature to retroactively change the law to enable the Department to collect some $118 million from the affected estates. *Hambleton*, 335 P.3d at 411.

Clear and meaningful due process restrictions on retroactive tax legislation can help avoid these "fiscal train wrecks" and help governmental agencies fulfill their legal responsibilities to provide accurate and honest revenue forecasts. Equally important, clear constitutional commands will prevent the political branches from litigating a tax controversy for many years and then, after the taxpayers' position is upheld, pulling the rug out from under taxpayers retroactively.

III. This Case Is An Ideal Vehicle For This Court To Resolve The Issues.

For two reasons, this case affords this Court a particularly suitable opportunity to resolve the question presented.

1. The facts of this case afford this Court an opportunity to resolve both prongs of disagreement concerning the permissibility of retroactive tax laws extending more than a year backward in time. The retroactivity period of the state law at issue here, as applied to Dot Foods, is "four years." Pet. App. 11a. That period is comparable to (indeed, longer than) the periods that have been held unlawful by the high courts of New York and South Carolina. *See supra* at 10-11. The four-year period here also cleanly distinguishes this case from "every case in which [this Court has] upheld a retroactive federal tax statute against due process challenges," where "the law applied retroactively for only a relatively short period prior to enactment." *Carlton*, 512 U.S. at 38 (O'Connor, J., concurring in the judgment).

Furthermore, in contrast to the justification the Washington Supreme Court relied on in In *In re Estate of Hambleton*, 335 P.3d 398, 411 (Wash. 2014), *cert. denied*, 136 S. Ct. 318 (2015), the retroactive law here did not

address an "unanticipated" revenue loss. Pet. App. 8a-9a. Instead, it was designed simply to raise more money than was possible under then-existing law. That put this case on all fours with *James Square Assocs. LP v. Mullen*, 993 N.E.2d 374 (N.Y. 2013), where the New York Court of Appeals held that "[a]bsent an *unexpected* loss of revenue," the legislative interest of "raising money for the state budget" does not justify retroactive tax legislation exceeding a year. *Id.* at 383 (emphasis added). In other words, the validity of Dot Foods' claim that retroactive revocation of the exemption in this case violated due process turns squarely and exclusively on which side of the conflict over the relevance of unexpected revenue losses is correct.

2. The type of tax at issue here puts the stakes of the question presented into sharp relief. The Constitution's concerns regarding retroactive legislation apply with special force, as here, with respect to tax incentives that states grant to attract out-of-state business or otherwise stimulate the growth of jobs and activity within their borders. Such inducements are widespread. *See* Philip M. Tatarowicz, *Federalism, the Commerce Clause, and Discriminatory State Tax Incentives: A Defense of Unconditional Business Tax Incentives Limited to In-state Activities of the Taxpayer*, 60 TAX LAW. 835, 839 (2006-07). And this Court has described them as reflective of "competition [lying] at the heart of a free trade policy" within the Nation. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 337 (1977).

If states may lure out-of-state businesses inside their borders, or conversely entice them to stay out and instead rely on local resources to exploit the local market, and then retroactively deny the very tax benefits promised, then the nature of competition between states for free

enterprise is not as this Court has previously assumed. And it will surely dampen the mobility of business.

IV. The Washington Supreme Court's Holding Is Incorrect.

The Washington Supreme Court's holding drains *Carlton*'s rational basis test of any vitality. Legislatures may quickly correct mistakes in tax laws and make those corrections effective back to the preceding legislative session. But legislatures have no legitimate reason to saddle taxpayers with retroactive liability years after the fact—particularly where, as here, the Legislature induced the taxpayer's business arrangements purposefully in the first place and the financial shortfall the new law seeks to address was not a surprise to the State.

1. "In our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute." *Eastern Enters. v. Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring in part and dissenting in part) (citing, *inter alia*, *United States v. Carlton*, 512 U.S. 26, 32 (1994)). Such is the case in the realm of tax law as well.

The high water mark in this Court in terms of permitting a retroactive tax increase is *Welch v. Henry*, 305 U.S. 134 (1938). In that case, this Court upheld a two-year period of retroactivity because the amended law applied no more than to "the year of the legislative session preceding that of its enactment." *Id.* at 150. Similarly, this Court in *Carlton* upheld a period of retroactivity of about a year. This Court emphasized the prompt discovery of the drafting error of the original law, which was proven by legislative history and the original estimate of the revenue costs of the provision in question. *See id.* at 31-32. "Congress acted to correct what it reasonably viewed as a

mistake in the original [statute] that would have created a significant and unanticipated revenue loss." *Id.* at 32.

On the other hand, *Carlton* declined to disturb the holding in *Nichols v. Coolidge*, 274 U.S. 531 (1927), in which this Court invalidated "a novel development in the estate tax which embraced a transfer that occurred 12 years earlier." *Carlton*, 512 U.S. at 34. This Court contrasted the 12-year period in that case with the "modest" retroactivity period in *Carlton*, explaining that the latter was permissible because "its period of retroactive effect is limited." *Id.* at 32, 34. This Court has also never approved the retroactive revocation of a tax incentive in the absence of a clear mistake such as in *Carlton.*

The Washington Supreme Court, however, shrugged at the four-year retroactivity period here, asserting that "[t]he standard set forth in *Carlton* . . . states only that the retroactive period must be 'rationally related' to a legitimate legislative purpose." Pet. App. 11a (citation omitted). The Washington Supreme Court then credited the legislative goal of avoiding a fiscal shortfall as sufficient to justify the lengthy retroactivity period. In other words, according to the Washington Supreme Court, a state tax agency's lawless change in position, causing state financial planners to depend on money to which they were never entitled, is enough to justify retroactive amendments to the tax code.

If this were the law, there would be no due process limitation at all on retroactive taxes. As the New York Court of Appeals has put it, "[r]aising funds is the underlying purpose of taxation, and such a rationale would justify every retroactive tax law." *See James Square Assocs. LP v. Mullen*, 993 N.E.2d 374, 383 (N.Y. 2013).

This, of course, is the view that Justice Scalia championed in his separate opinion in *Carlton.* Yet the majority in *Carlton* rejected Justice Scalia's theory. Under the majority's rule, the Due Process Clause permits a law enlarging tax liability to be applied retroactively only insofar as it *rationally* furthers a *legitimate* legislative objective. *See Carlton*, 512 U.S. at 30-31. This test "is not a toothless one." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (internal quotation marks and citation omitted). It honors the federal tradition—the "customary congressional practice"—of enacting general revenue statutes with modestly retroactive effective dates generally "confined to short and limited periods required by the practicalities of producing national legislation." *Carlton*, 512 U.S. at 33 (quoting *United States v. Darusmont*, 449 U.S. 292, 296-97 (1981)) (internal quotation marks omitted). But the Due Process Clause's rational basis test places a cloud of suspicion on any "period of retroactivity longer than the year preceding the legislative session in which the law was enacted." *Id.* at 38 (O'Connor, J., concurring in the judgment).

And the *Carlton* test surely cannot be satisfied where the period of retroactivity is *several* years. By that time, taxpayers that have "conducted their business affairs in a manner consistent with existing program requirements" may "justifiably rely on the receipt of the tax benefits that were then in effect." *James Square*, 993 N.E.2d at 382. Legislatures can have no legitimate state interest in

changing the law in such a retrospective manner. Any such legislation is inherently arbitrary.[4]

2. The due process infirmities in retroactive tax legislation are particularly pronounced where, as here, the purported revenue loss cannot even be characterized as unanticipated. Even if the Due Process Clause is somewhat forgiving of retroactive legislation when necessary to cure a good-faith mismatch between statutory drafting and revenue forecasting, it cannot tolerate retroactive laws designed to do nothing more than validate the government's own blatant misreadings of the law—changes in official position that contravene unambiguous statutes. Yet that is exactly what the Washington Supreme Court has condoned here, belittling *Carlton*'s emphasis on the "unanticipated" nature of the revenue problem there as mere "dictum." Pet. App. 9a. Given the

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[4] The Washington Supreme Court asserted that the Washington Legislature legitimately sought in the 2010 Amendments to avoid "'preferential tax treatment for out-of-state businesses over their in-state competitors and [eliminate] a strong incentive for in-state businesses to move their operations outside Washington.'" Pet. App. 7a (quoting 2010 Amendments § 401(3)). But a purported desire to avoid preferential treatment (at least as a backward-looking goal) adds nothing here because it is just another way of framing a desire to revoke an exemption. And, as the New York Court of Appeals has recognized, a desire to affect future behavior (here, preventing in-state businesses from moving out of state) may justify a prospective change in the law, but it has nothing to do with imposing *retroactive* taxes. *James Square*, 993 N.E.2d at 383. At any rate, evaluating the tax "preference" out-of-state businesses enjoyed in the Washington market alone was inapt, given the roughly reciprocal protection from state income tax that Washington businesses, similarly situated, enjoy in other States under Pub. L. 86-272, 73 Stat. 555 (1959) (codified at 15 U.S.C. § 381(a)).

Department's own prior, long-standing interpretation of the tax exemption at issue, and the exemption's "plain and unambiguous language," Pet. App. 2a, no reasonable legislator could have thought that the Department's changed position here would survive judicial scrutiny. That being so, elementary notions of due process forbid changing the law retroactively to upset taxpayers' reasonable and longstanding expectations of repose.

Put another way, a legislative desire to vindicate a prior administrative interpretation of the law later deemed baseless cannot be enough to justify retroactive tax legislation. Nearly a century ago, the State of Florida defended a law allowing the retroactive collection of canal tolls on such grounds, after the Florida Supreme Court had rejected the State's attempt to interpret prior law to allow the collection. Writing for a unanimous Court, Justice Holmes swiftly rejected the argument as contrary to due process:

> To say that the Legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot [to write the law differently the first time].

Forbes Pioneer Boat Line v. Bd. of Comm'rs of Everglades Drainage Dist., 258 U.S. 338, 340 (1922). This holding remains good law today and compels invalidation of the State's retroactive law here.

* * *

Tax law demands clarity, not obfuscation. Yet the current patchwork of state high court decisions

interpreting and applying the Due Process Clause's limits on retroactive legislation—culminating in the Washington Supreme Court's decision here—provide anything but clarity. This Court should grant certiorari to bring order and predictability to this area of law that is so critical to our economy.

CONCLUSION

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

Respectfully submitted,

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September 9, 2016

APPENDIX

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

[Filed March 17, 2016, as amended April 27, 2016]

No. 92398-1

DOT FOODS, INC.
Respondent/Cross-Appellant,
v.
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellant/Cross Respondent.

En Banc

Filed March 17, 2016

YU, J.—We are asked to decide whether retroactive application of the legislature's amendment to a business and occupation (B&O) tax exemption violates a taxpayer's rights under the due process clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, collateral estoppel, or separation of powers principles. Taxpayer Dot Foods contends that it should remain eligible for a B&O tax exemption pursuant to our decision in *Dot Foods, Inc. v. Department of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009) (*Dot Foods I*), despite an intervening, contrary amendment to the applicable law. Because *Dot Foods I* does not encompass the tax periods

before us now, we hold that retroactive application of the legislative amendment to Dot Foods does not violate due process, collateral estoppel, or separation of powers principles. We affirm in part and reverse in part.

FACTUAL & PROCEDURAL HISTORY

The B&O tax is imposed for "the act or privilege of engaging in business activities" within the state. RCW 82.04.220(1). The tax applies unless a specific exemption exists. *See* RCW 82.04.310-.427; *see also TracFone Wireless, Inc. v. Dep't of Revenue,* 170 Wn.2d 273, 296-97, 242 P.3d 810 (2010). Former RCW 82.04.423(1)(d) (1983) exempted certain out-of-state sellers from the B&O tax if they made "sales in this state exclusively to or through a direct seller's representative," as defined in former RCW 82.04.423(2).

Dot Foods is an Illinois-based food reseller that sells products to service companies in Washington through its wholly owned subsidiary DTI. Dot Foods qualified for the direct seller's exemption under former RCW 82.04.423 from 1997 until 2000, when the Department of Revenue (Department) narrowed its interpretation of the statute. This new interpretation gave rise to *Dot Foods I*, the previous tax appeal implicated in the current dispute.

In 2009, we decided *Dot Foods I*, which held that the Department's revised interpretation of RCW 82.04.423 was contrary to the statute's plain and unambiguous language. *Dot Foods I*, 166 Wn.2d at 920-21. We concluded that "Dot [Foods] remains qualified for the B&O tax exemption to the extent its

sales continue to qualify for the exemption." *Id.* at 926.

Dot Foods continued to pay the full B&O tax during the pendency of its prior tax appeal to avoid penalties and interest. Clerk's Papers (CP) at 360. In December 2009, pursuant to the judgment in *Dot Foods I*, Dot Foods requested a refund for B&O taxes paid from January 2005 through August 2009, *id.* at 83-84, a time period that extends beyond the tax periods directly at issue in *Dot Foods I*.

In April 2010, the legislature amended former RCW 82.04.423 in direct response to our decision in *Dot Foods I*. LAWS OF 2010, 1st Spec. Sess., ch. 23, §§ 401, 402. The amendment retroactively narrowed the scope of RCW 82.04.423(2) and prospectively repealed the direct seller's exemption. *Id.* at § 401(4). It is undisputed that Dot Foods qualified for the exemption under former RCW 82.04.423 but is ineligible for the exemption under the 2010 amendment.

In July 2010, based on the retroactive application of the 2010 amendment, the Department denied Dot Foods' refund request for the periods outside the litigation in *Dot Foods I*, "[s]pecifically, the refund request for Wholesaling B&O tax for the periods from May 2006 through August 2009." CP at 309. However, the Department explained that "retroactive application of the bill does not affect the periods included in the Dot Foods Supreme Court decision. Specifically, it will not apply to the periods from January 2000 through April 2006." *Id.* at 308. Later that year, Dot Foods negotiated a settlement with the Department for over 97 percent of the B&O taxes paid from January 2000 through April 2006, the

refund period directly at issue in *Dot Foods I.* Dot Foods' Resp. Br. & Br. on Cross-Appeal (Dot Foods' Resp. Br.) at 7.

Dot Foods now seeks a refund for the B&O taxes it paid from May 2006 through December 2007, the interim period beginning immediately after the tax periods at issue in *Dot Foods I* and ending when Dot Foods' business practices changed in 2008. After the Department denied its refund request, Dot Foods brought a refund action against the Department in Thurston County Superior Court, challenging retroactive application of the amendment under theories of collateral estoppel, separation of powers, and due process.

In a letter opinion, the trial court granted summary judgment to the Department on the collateral estoppel and separation of powers issues but found in favor of Dot Foods on the due process claim. CP at 468-74. The Department appealed, and Dot Foods cross appealed on the separation of powers and collateral estoppel issues. The Court of Appeals certified the case to this court pursuant to RAP 4.4.

ANALYSIS

The history of litigation around Washington's B&O tax and its subsequent amendments has been a long and winding road.[1] While the constitutional

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[1] *See Tyler Pipe Indus., Inc. v. Dep't of Revenue,* 105 Wn.2d 318, 715 P.2d 123 (1986), *vacated*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987) (invalidating Washington's B&O tax scheme); *Nat'l Can Corp. v. Dep't of Revenue,* 109 Wn.2d 878, 749 P.2d 1286 (1988) (*Nat'l*

validity of the ability to impose a B&O tax is not at issue, this case requires us to examine whether due process and collateral estoppel should disallow retroactive application of an amended statute to a particular period of time. The dispute before us is resolved by our own precedent, traditional legal principles, and cases from the United States Supreme Court and federal district courts.

A. DUE PROCESS CLAIM

The Supreme Court set forth the due process standard for retroactive tax legislation in *United States v. Carlton,* 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994). *Carlton* established that "[t]he due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation," *id.* at 30; that is, the statute must be "'supported by a legitimate legislative purpose furthered by rational means.'" *Id.* at 30-31 (quoting *Pension Benefit Guar.*

Can II) (*Tyler Pipe* applies prospectively only), *overruled by Digital Equip. Corp. v. Dep't of Revenue,* 129 Wn.2d 177, 196 P.2d 933 (1996); *Am. Nat'l Can Corp. v. Dep't of Revenue*, 114 Wn.2d 236, 787 P.2d 545 (1990) (applying the remedial amendment that cured the constitutional defects of the B&O scheme to the interim period between *Tyler Pipe* and the effective date of the amendment), *overruled by Digital Equip.*, 129 Wn.2d 177; *Digital Equip. Corp.*, 129 Wn.2d 177 (*Tyler Pipe* applies retroactively, overruling *National Can* II; limiting relief to retroactive credit not a violation of due process); *W.R. Grace & Co. v. Dep't of Revenue,* 137 Wn.2d 580, 973 P.2d 1011 (1999) (affirming retroactive application of *Tyler Pipe* and upholding the exclusive remedy feature of the remedial legislation that cured the B&O tax).

Corp. v. R.A. Gray & Co., 467 U.S. 717, 729, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984)). Retroactive legislation must meet an additional burden not faced by statutes with only prospective effect, but "'that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.'" *Id.* at 31 (quoting *Pension Benefit,* 467 U.S. at 730).

We affirmed a retroactive tax amendment under the *Carlton* rational basis standard most recently in *In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014), *cert. denied*, 136 S. Ct. 318 (2015). The legislature retroactively amended the Estate and Transfer Tax Act, chapter 83.100 RCW, in direct response to our decision in *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012). In *Hambleton,* we upheld the retroactive application of the amendment against a due process challenge under the *Carlton* rational basis standard.

Although the present case involves a different tax scheme, the underlying facts are analogous to those in *Hambleton*, which is controlling precedent here.[2] Under the rational basis standard set forth in *Carlton*, as applied in *Hambleton*, retroactive application of the 2010 amendment at issue here does not violate due process protections.

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[2] The trial court did not have the benefit of our decision in *Hambleton* when it issued its letter opinion.

i. The 2010 amendment serves a legitimate legislative purpose

As with other economic legislation, a tax statute must serve a legitimate legislative purpose. *Carlton*, 512 U.S. at 30. The legislature identified the prevention of "large and devastating revenue losses" as the primary purpose for narrowing the scope of RCW 82.04.423. LAWS OF 2010, 1st Spec. Sess., ch. 23, § 401(3). This is the same legislative intent that the Supreme Court recognized as a legitimate purpose in *Carlton*, 512 U.S. at 32, and that we upheld in *Hambleton*, 181 Wn.2d at 827. Additionally, the legislature concluded that former RCW 82.04.423 provided "preferential tax treatment for out-of-state businesses over their in-state competitors and now creates a strong incentive for in-state businesses to move their operations outside Washington." LAWS OF 2010, 1st Spec. Sess., ch. 23, § 401(3). This is analogous to the legislature's goal of restoring parity between different classes of taxpayers, which we also accepted as a legitimate legislative purpose in *Hambleton*, 181 Wn.2d at 826. *See also Am. Nat'l Can Corp. v. Dep't of Revenue*, 114 Wn.2d 236, 247-48, 787 P.2d 545 (1990). It is clear that the amendment to RCW 82.04.423 serves a legitimate legislative purpose under our case law.

Dot Foods alleges that the 2010 amendment is not supported by a legitimate legislative purpose because the legislature was attempting to reinstate the "original intent" of the direct seller's exemption. Dot Foods' Resp. Br. at 19. Dot Foods contends, and the trial court agreed, that because "the [l]egislature cannot know the intentions of a prior, distant legislature," the asserted purpose of the amendment

is both arbitrary and unreasonable. *Id.*; s*ee also* CP at 473.

However, our duty is to review the statute for its rational basis, not to analyze the strength of its epistemological underpinnings. The rational basis test is the "most relaxed form of judicial scrutiny." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 223, 143 P.3d 571 (2006). Our review is highly deferential, especially in light of the fact that the legislature "'possesses a plenary power in matters of taxation except as limited by the [c]onstitution,'" *State ex rel. Heavy v. Murphy*, 138 Wn.2d 800, 809, 982 P.2d 611 (1999) (quoting *Belas v. Kiga*, 135 Wn.2d 913, 919, 959 P.2d 1037 (1998)), and "'a particularly heavy presumption of constitutionality applies when the statute concerns economic matters,'" *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 563, 800 P.2d 367 (1990) (quoting *Am. Network, Inc. v. Utils. & Transp. Comm'n*, 113 Wn.2d 59, 79, 776 P.2d 950 (1989)). We have previously observed that where the legislature holds plenary power, "'the courts will not question the wisdom or desirability of such legislative requirements, so long as there is *any reasonable basis* upon which the legislative determination can rest.'" *Bang D. Nguyen v. Dep't of Health, Med. Quality Assur. Comm'n*, 144 Wn.2d 516, 549, 29 P.3d 689 (2001) (emphasis added) (quoting *Ellestad v. Swayze*, 15 Wn.2d 281, 291, 130 P.2d 349 (1942)).

Dot Foods further claims that *Carlton* requires revenue losses be "'unanticipated'" to meet the rational basis standard. Dot Foods' Resp. Br. at 28 (quoting *Hambleton*, 181 Wn.2d at 825 (citing *Carlton,* 512 U.S. at 32)). There is no holding in *Carlton* to that effect, and Dot Foods provides no case

law supporting this contention. The fact that the revenue losses in *Carlton* were, in fact, "unanticipated" is dictum. *Carlton,* 512 U.S. at 32. *Carlton* should not be—and has not been—interpreted as requiring that revenue losses be "unanticipated" in order to satisfy the rational basis standard.

Similarly, the allegation that the amendment fails to serve a legitimate purpose because the legislature had an "improper motive" of targeting Dot Foods is unsubstantiated. The fact that the legislature was acting in direct response to our decision in *Dot Foods I* does not constitute targeting a specific taxpayer, and the statement of intent does not single out Dot Foods beyond pointing to the negative impact that the decision would have on revenue generally.[3] The "improper motive" that the Court refers to in *Carlton* was targeting taxpayers after deliberately inducing them to engage in certain transactions. *Carlton*, 512 U.S. at 32. We see no evidence of any improper motive here, only the normal interplay between the legislature and the judiciary. Furthermore, as long as it is acting within its lawful power, "the motives of the [l]egislature are

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[3] In a memorandum describing the estimated fiscal impact of our decision in *Dot Foods I*, the Department projected a revenue loss of more than $150 million over the 2009-2011 biennium. CP at 56, 80. Dot Foods' refund request was for just over $500,000, Dot Foods' Resp. Br. at 9, indicating that other taxpayers would be affected by the 2010 amendment—not just Dot Foods. This supports the conclusion that the legislature was not improperly targeting Dot Foods but was enacting a statute of general application.

irrelevant to questions of state taxation under the due process clause." *Am. Nat'l Can Corp.*, 114 Wn.2d at 247 (citing *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44, 54 S. Ct. 599, 78 L. Ed. 1109 (1934)).

We do not find support for Dot Foods' assertions and hold that the 2010 amendment serves a legitimate legislative purpose.

ii. The 2010 amendment is rationally related to the legitimate legislative purpose

A retroactivity period meets the *Carlton* standard if it is rationally related to the amendment's legitimate purpose. *Hambleton*, 181 Wn.2d at 823. Relying on *Tesoro Refining & Marketing Co. v. Department of Revenue*, 159 Wn. App. 104, 246 P.3d 211 (2010), *rev 'd on other grounds*, 173 Wn.2d 551, 269 P.3d 1013 (2012) *(Tesoro* I), Dot Foods asserts that the purported 27-year retroactivity period is "irrational on its face." Dot Foods' Resp. Br. at 24.

Tesoro I is not controlling authority on this court, and to the extent that the trial court relied on this case, it was operating in the absence of our decision in *Hambleton.* Further, Dot Foods' 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 in *W.R. Grace & Co. v. Department of Revenue,* 137 Wn.2d 580, 973 P.2d 1011 (1999). Thus, the length of time that has elapsed since a statute's original enactment is not dispositive.

While it is true that the 2010 amendment theoretically dates back to enactment under the plain language of section 402 and section 1704, LAWS OF

2010, 1st Spec. Sess., ch. 23, §§ 402, 1704, the actual retroactive application of the amendment is necessarily limited by the particularities of this case as well as the applicable statute of limitations. At issue here is whether the amendment, which went into effect on May 1, 2010, applies retroactively to the May 2006 through December 2007 interim tax periods. Thus, the retroactivity period as applied to Dot Foods is only four years.

In practical terms, the 2010 amendment cannot reach back 27 years, as Dot Foods alleges. The statute of limitations prescribed by RCW 82.32.060(1) functionally limits retroactive application of the amendment to four years. A four-year retroactivity period, both as applied to Dot Foods in this particular case or as generally applicable to any other taxpayer under the statute of limitations, is well within the range of retroactivity periods that we have previously upheld. *See Hambleton*, 181 Wn.2d at 827 (eight-year retroactivity period); *Digital Equip. Corp. v. Dep't of Revenue*, 129 Wn.2d 177, 194-95, 916 P.2d 933 (1996) (four-year retroactivity period); *W.R. Grace*, 137 Wn.2d at 586-87 (eight-year retroactivity period).

Furthermore, there is no "absolute temporal limitation on retroactivity." *W.R. Grace*, 137 Wn.2d at 602. The standard set forth in *Carlton*, which has been followed by this court, states only that the retroactive period must be "rationally related" to a legitimate legislative purpose. *Hambleton*, 181 Wn.2d at 823 (citing *Carlton*, 512 U.S. at 30-31). While there are certainly constitutional limits on how far back

laws may reach, *see State v. Pac. Tel. & Tel. Co.*, 9 Wn.2d 11, 117 P.2d 542 (1941),[4] whether the length of a retroactivity period breaches that limit should be determined by a qualitative analysis of the law, not solely by a quantitative measurement of time, *see Welch v. Henry*, 305 U.S. 134, 147, 59 S. Ct. 121, 83 L. Ed. 87 (1938) ("In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.").

In *Hambleton*, for example, we found that the retroactivity period was "rationally related to preventing the fiscal shortfall." *Hambleton*, 181 Wn.2d at 827. Noting that the eight-year retroactivity period at issue was "not far outside other retroactive periods that courts have accepted," we upheld the retroactive application of the amendment against a due process challenge because it was "directly linked with the purpose of the amendment, which [was] to remedy the effects of *Bracken." Id.* Furthermore, we observed that any shorter retroactivity period would have been arbitrary because "[i]t would allow some estates to escape the tax while similarly situated estates would be subject to it." *Id.* This illustrates that it is the

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[4] We invalidated a four-year retroactivity period in *Pacific Telephone* based solely on a reference to "'prior but recent transactions.'" *Pac. Tel. & Tel. Co.*, 9 Wn.2d at 17 (quoting *Welch v. Henry*, 223 Wis. 319, 271 N.W. 68, 72 (1937)). *Pacific Telephone* did not specify or cite to an absolute constitutional limit on retroactivity and provides no insight into why a hard-line rule should apply.

function—rather than the length—of a retroactivity period that should determine whether it comports with due process protections.

In this case, the actual retroactive effect of the amendment as applied to Dot Foods is rationally related to the legislature's legitimate, stated purpose of "prevent[ing] the loss of revenues resulting from the expanded interpretation of the exemption." LAWS OF 2010, 1st Spec. Sess., ch. 23, § 401(4). Consequently, there is no due process violation.

B. COLLATERAL ESTOPPEL CLAIM

Dot Foods asserts that the May 2006 through December 2007 interim tax periods are encompassed by the judgment in *Dot Foods I,* which prevents the Department from assessing B&O taxes against it under the 2010 amendment pursuant to collateral estoppel. Dot Foods also asserts that there is statutory support for its collateral estoppel claim in section 1706 of the amending statute, which explicitly preserves final judgments, LAWS OF 2010, 1st Spec. Sess., ch 23, § 1706. We do not find support for these arguments in our case law and hold that collateral estoppel does not apply in this case.

i. Dot Foods fails to meet the requirements for collateral estoppel

The collateral estoppel doctrine "may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding." *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). To invoke collateral estoppel, Dot Foods must establish that (1) the issue decided in *Dot Foods I*

was identical to the issue that is presented to us now, (2) the prior action ended in a final judgment on the merits, (3) the Department was a party or in privity with a party in the prior action, and (4) application of the doctrine would not work an injustice. *Id.* "Failure to establish any one element is fatal" to a collateral estoppel claim. *Lopez-Vasquez v. Dep't of Labor & Indus.*, 168 Wn. App. 341, 345, 276 P.3d 354 (2012). Because Dot Foods cannot satisfy the first requirement, collateral estoppel does not apply.

Both the facts and the applicable law in this case are distinguishable from *Dot Foods I*. The dispute in *Dot Foods I* arose out of Dot Foods' refund request for the tax periods from January 2000 through April 2006, and the legal issue was whether Dot Foods qualified for the direct seller's exemption under former RCW 82.04.423. *Dot Foods I*, 166 Wn.2d at 919. Dot Foods neither alleges nor establishes that the subsequent interim tax periods from May 2006 through December 2007 were directly at issue or actually litigated in *Dot Foods I*. In fact, Dot Foods itself acknowledges that "the periods directly at issue in the prior appeal" were January 2000 through April 2006, CP at 359, and that the interim tax periods fall outside the scope of *Dot Foods I*, Dot Foods' Reply Br. at 8.

Dot Foods asserts that under collateral estoppel principles, the decision in *Dot Foods I* should extend to the interim tax periods because the prior tax appeal adjudicated Dot Foods' exempt status under former RCW 82.04.423. Dot Foods' Resp. Br. at 44. Nothing in the statute or our case law supports this assertion. To the contrary, tax appeals are very limited causes of action. Under RCW 82.32.180, tax

appeals are confined to the specific taxes and associated time periods identified by the aggrieved taxpayer. Thus, although *Dot Foods I* and the present case concern the same taxable activity, different tax periods are involved.

The United States Supreme Court and federal circuit courts have declined to apply collateral estoppel in federal tax cases involving identical taxable transactions that occur in subsequent taxing periods. *See* Harvie Branscomb, Jr., *Collateral Estoppel in Tax Cases: Static and Separable Facts*, 37 TEX. L. REV. 584, 587 (1959). In *Commissioner v. Sunnen*, 333 U.S. 591, 598, 68 S. Ct. 715, 92 L. Ed. 898 (1948), the Court determined that separate tax periods give rise to separate causes of action for collateral estoppel purposes. The Court held that the United States Tax Court was not bound by a prior decision of the Unites States Board of Tax Appeals, reasoning that where a subsequent proceeding relates to a *different* taxing period, "the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit." *Id.*

Dot Foods contends that *Sunnen* is inapplicable because it deals with the federal income tax, which is assessed annually, as opposed to continuously on a monthly basis like Washington's B&O tax. Dot Foods' Resp. Br. at 42. However, the federal courts have extended *Sunnen* specifically to cases involving excise tax liability. In *Smith v. United States*, 242 F.2d 486, 488 (5th Cir. 1957), the Fifth Circuit Court of Appeals concluded that "[e]ach month, then, is the origin of a new liability and of a separate cause of action." Applying *Sunnen*, the court stated that "it is

clear that the doctrine of res judicata does not apply since the instant suit does not involve the same claim and the same taxable periods as were involved in the prior action." *Id.*

Regardless of the different taxes involved, the broader rationale of *Sunnen* is compelling:

> A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion.

Sunnen, 333 U.S. at 599. The Court further observed that collateral estoppel is only meant to apply in situations that "have remained substantially static, factually and legally." *Id.* This reflects the well-established principle that an "'intervening change in the applicable legal context'"—such as the retroactive amendment in this case—prohibits the application of collateral estoppel. *Hambleton*, 181 Wn.2d at 835 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(b) (AM. LAW INST. 1982)). The facts following *Dot Foods I* were not static, factually or legally. Factually a different tax period was at issue, and

legally there was an intervening change in the law that narrowed the scope of the exemption in such a way that excluded Dot Foods. In fact, Dot Foods concedes that if the amendment applies retroactively, it would not be able to satisfy the requirements for invoking collateral estoppel. Dot Foods' Resp. Br. at 37 ("Had the [l]egislature not changed the law retroactively, Dot Foods would have met the 4-part test for collateral estoppel.").

Sunnen and earlier federal cases[5] established that determinations about tax liability for one taxing period under then-applicable statutes do not control decisions regarding subsequent taxing periods under amended statutes. We find the reasoning of these cases persuasive and hold that collateral estoppel does not apply to subsequent taxing periods that were not previously adjudicated.

ii. Section 1706 does not extend the judgment in Dot Foods I *to the subsequent interim tax periods.*

The traditional application of issue preclusion principles adequately addresses the collateral

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[5] *See Monteith Bros. Co. v. United States*, 142 F.2d 139, 140 (7th Cir. 1944) ("[A]lthough the transactions involved in different years were similar, they were not identical, and must therefore be studied in the light of the law and facts of the year involved."); *Henricksen v. Seward*, 135 F.2d 986, 987 (9th Cir. 1943) ("While the mechanical processes and the business practices of the taxpayer were found to be substantially identical in the several periods, nevertheless the transactions held not subject to tax in the earlier suit were not the transactions subjected to tax in this, nor were the periods involved the same.").

estoppel claim, but Dot Foods also asserts a statutory basis for the preclusive effect of the judgment in *Dot Foods I*. The amending statute explicitly provides that the substantive amendment to RCW 82.04.423 "does not affect any final judgments, not subject to appeal, entered by a court of competent jurisdiction before the effective date of this section." LAWS OF 2010, 1st Spec. Sess., ch. 23, § 1706. This section has the effect of preserving the judgment in *Dot Foods I* only as to the tax periods actually litigated in that case. Perhaps anticipating that it could not satisfy the requirements for collateral estoppel, Dot Foods asserts that collateral estoppel is "built into the 2010 legislative amendment" under section 1706. CP at 469.

The trial court properly rejected this argument, observing that "the 2006 to 2007 refund request was not a 'final judgment' when the amendment went into effect. Indeed, that matter is currently 'subject to appeal' in this very case." *Id.* at 470. As discussed above, Dot Foods cannot show—and in fact admits—that the interim period was not directly at issue or actually litigated in *Dot Foods I*. Because a refund for the interim period was not reduced to a final judgment prior to the date that the 2010 amendment went into effect, section 1706 is not implicated.

C. SEPARATION OF POWERS CLAIM

"The legislature violates separation of powers principles when it infringes on a judicial function." *Hambleton*, 181 Wn.2d at 817-18 (citing *Haberman v. Wash. Pub. Power Supply Sys.,* 109 Wn.2d 107, 143, 744 P.2d 1032, 750 P.2d 254 (1987)). We have recognized "that a retroactive legislative amendment

that rejects a judicial interpretation would give rise to separation of powers concerns" but have been willing to uphold such amendments where "the legislature was careful not to reverse our decision." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 508, 510, 198 P.3d 1021 (2009).

Dot Foods cannot point to any evidence that the legislature intended to affect or curtail the judgment in *Dot Foods I*. In fact, as discussed above, the legislature explicitly preserved prior judgments in section 1706 and we upheld a retroactive amendment with language identical to section 1706 against a separation of powers challenge in *Hambleton*, 181 Wn.2d at 817. Furthermore, as also discussed above, the judgment in *Dot Foods I* does not encompass the interim period at issue now; therefore, retroactive application of the amendment to this period does not run afoul of the separation of powers doctrine.

CONCLUSION

We have previously observed that "[o]ccasionally, try as the court may, the legislature is disappointed with the court's interpretation." *Hale*, 165 Wn.2d at 509. It is entirely within the proper function of the legislature to amend laws in response to our decisions. This is how the lawmaking process is meant to work.

In amending RCW 82.04.423(2), the legislature was careful to avoid trespassing on the judicial function by explicitly preserving any final judgments prior to the effective date of the amendment. Our jurisprudence requires us to show the legislature equal respect in this case by upholding the retroactive application of this amendment as to Dot

Foods for the tax periods not encompassed by our prior decision in *Dot Foods I.*

We affirm the trial court's decision to grant the Department's motion for summary judgment on the collateral estoppel and separation of powers arguments, but we reverse the trial court's decision to grant Dot Foods' motion for summary judgment on the due process claim. In doing so, we hold that the retroactive application of the amendment to RCW 82.04.423 applies to the May 2006 through December 2007 interim tax periods, and that Dot Foods is liable for the B&O tax for this time period.

Yu, J.

WE CONCUR:

Madsen, C.J. Stephens, J.

Johnson, J. Wiggins, J.

Owens, J. González, J.

Fairhurst, G. Gordon McCloud, J.

APPENDIX B

Superior Court of the State of Washington
For Thurston County

[Filed October 3, 2013]

October 2, 2013

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Re: *Dot Foods Inc. v. Dept. of Revenue*
Thurston County Cause No. 10-2-02772-3

LETTER OPINION

Dear Parties,

Both parties in this case moved for full summary judgment dismissal. This court reviewed and

considered the entire case file and heard oral argument on the motion on September 16, 2013. The court took the matter under advisement, and now grants in part and denies in part each party's motion. Specifically, the court issues summary judgment to the Department on the issues of collateral estoppel and separation of powers, and issues summary judgment to Dot Foods on the issue of due process.

Background

In a previous action, Dot Foods, Inc. sought a refund of B&O taxes that it paid between 2000 and 2006. It appealed the case to our Supreme Court and, in 2009, prevailed. *Dot Foods, Inc. v. Dept. of Revenue*, 166 Wn.2d 912 (2009). The matter was remanded and then the Department applied the Supreme Court's ruling to the 2000-2006 period and refunded those taxes to Dot Foods.

In 2010, the legislature amended the relevant statute, RCW 82.04.423, to "fix" the Supreme Court's ruling. Laws of 2010, 1st Sp. Sess., ch. 23 (Second Engrossed Substitute Senate Bill 6143). The amendment was expressly made retroactive.

Dot Foods sought a refund of a $507,818 B&O assessment for the period of May 2006 to December 2007.[1] The Department relied on the amended statute and denied the refund. In the case currently

[1] Dot Foods changed its business practice in 2008 and withdrew a refund claim for 2008 to 2010, conceding that it is no longer eligible for this refund under previous or current law.

before this court, Dot Foods appeals and seeks a declaratory judgment.

The parties present cross motions for summary judgment. At issue are purely legal questions that allow the case to be resolved on summary judgment. The parties have never litigated whether Dot Foods would be entitled to a refund if the 2010 amendment applies. That issue is not before the court. Rather, the parties dispute whether retroactive application of the 2010 legislation violates: (1) collateral estoppel, (2) separation of powers, or (3) due process. The court grants summary judgment to the Department on the first two issues and hold [sic] that the amendment violates due process, as articulated in *Tesoro I. Teroso [sic] Refining and Marketing Company v. Department of Revenue.* 159 Wn. App. 104 (2010) ("*Tesoro I*"), *rev'd on other grounds*, 173 Wn.2d 551 (2012).

Statutes are presumed to be constitutional and a party seeking to invalidate a statute on constitutional grounds must establish that the provision is unconstitutional beyond a reasonable doubt. *Wash. State Grant v. Locke*, 153 Wn.2d 475, 486 (2005). Further, collateral estoppel is an affirmative defense and the party that asserts it bears the burden of proof. *Lemond v. Dept. of Licensing*, 143 Wn. App. 797, 805 (2008). Dot Foods bears this burden.

Collateral Estoppel

Dot Foods originally asserted that the doctrine of collateral estoppel prohibits the Department from applying the 2010 amendment to it. However, in its reply, it clarified that, rather than applying collateral estoppel in a traditional sense, collateral estoppel is built into the 2010 legislative amendment. It is not.

The bill states, in section 1706:

> Section 402 of this act does not affect any final judgments, not subject to appeal, entered by a court of competent jurisdiction before the effective date of this section.

2010 Laws of Washington, 1st Sp. Sess., Ch. 23 § 1706 (S.S.S.B. 6143). Section 402, in turn, is the substantive amendment to RCW 82.04.423. Section 1706 clearly limits the bill's application to matters that have reached final judgment. The first litigation, regarding the 2000 to 2006 refund request, was a final judgment because it was resolved by our Supreme Court before this amendment went into effect. The amendment therefore does not apply to the first litigation. However, the 2006 to 2007 refund request was not a "final judgment" when the amendment went into effect. Indeed, that matter is currently "subject to appeal" in this very case. Dot Foods does not argue otherwise.

Rather, Dot Foods asks the court to expand this plain language to any refund requests that *it* makes under this law, whether the requests are final judgments or not. It cites the House Bill Report, which states that "[t]he retroactive change will not impact the taxpayer that prevailed in the *Dot Foods* decision." A House Bill Report is not law. It is a summary of the bill and is, at best, inartfully worded regarding how the bill would affect Dot Foods. Plainly, the bill does not affect the 2000 to 2006 refund request, but it does apply to any other refund requests that were not reduced to a final judgment before the bill's effective date. The 2006 to 2007 refund request was not reduced to a final judgment before that date, and so the amendment applies to that request.

Separation of Powers

Next, Dot Foods argues that the legislature violated the doctrine of separation of powers by, essentially, overturning the Supreme Court's decision in *Dot Foods I*. This is an as-applied challenge. There is no violation of separation of powers here.

The legislature may not enact retroactive legislation that "requires its own application in a case already finally adjudicated" because doing so would essentially "reverse a determination once made, in a particular case." *Plaut v. Spendthift Farms*, 514 U.S. 211, 225 (1995). The legislature lacks powers to reopen, reverse, vacate, or annul a final court judgment. *Plaut*, 514 U.S. at 219-20, 224.

Dot Foods argues that the legislature has "reversed" our Supreme Court's decision in *Dot Foods I* through this amendment, violating the separation of powers doctrine. But the amendment specifically excludes application to any final judgments. This law did not affect *Dot Foods I*. The company did not file its application for a refund for May 2006 to December 2007 until after the Supreme Court made its decision in *Dot Foods I*. The 2006 to 2007 request has not been litigated until now. The amendment did not reopen, reverse, vacate, or annual a final court judgment. *See Plaut*, 514 U.S. at 219-20, 224.

Dot Foods additional [sic] argues that the amendment is prohibited "[r]etroactive legislation that interferes with vested rights established by judicial rulings." *Lummi Indian Nation v. State*, 170 Wn.2d 247, 262 (2010). However, Dot Foods has not demonstrated that it has a vested right to have a particular version of the tax code apply. In contrast, the United States Supreme Court has held that "[t]ax

legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *United States v. Carlton*, 512 U.S. 26, 33 (1994). Dot Foods fails to distinguish this ruling in the context of the Washington tax code.[2]

Here, the legislature acted "wholly within its sphere of authority to make policy, to pass laws, and to amend laws already in effect." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 509 (2009). Moreover, "courts must exercise care not to invade the prerogatives of the legislative branch lest the judicial branch itself violate the doctrine of separation of powers." *Lummi Indian Nation v. State*, 170 Wn.2d 247, 262 (2010). Dot Foods has not met its burden to show that this amendment violates the doctrine of separation of powers.

Due Process

Finally, Dot Foods argues that the 27-year retroactive amendment violates substantive due process. It relies almost exclusively on *Teroso [sic] Refining and Marketing Company v. Department of Revenue.* 159 Wn. App. 104 (2010) ("*Tesoro I*"), *rev 'd on other grounds*, 173 Wn.2d 551 (2012). The Department, in contrast, relies on earlier United States and Washington Supreme Court cases. The Department fails to distinguish *Tesoro I* in any

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[2] In the context of the due process argument, Dot Foods asserts that it relied on the previous tax code when it structured its business model. Reliance is not enough, however, to demonstrate whether a taxpayer has a vested right in the application of former tax codes.

meaningful way. Summary judgment is granted in favor of Dot Foods on this ground.

In *Tesoro I*, a taxpayer, Tesoro Refining and Marketing Company, sought a B&O tax refund for the period of December 1, 1999 to December 31, 2007 under former RCW 82.04.433 (1985). The Department ruled that Tesoro was not entitled to the refund. Tesoro appealed. On the day before the appellate hearing at superior court, the legislature amended RCW 82.04.433. The amendment was retroactive for a 24-year period.

The Court of Appeals first held that Tesoro was entitled to a tax refund under the former law, RCW 82.04.433 (1985). It then analyzed whether applying the amended law to Tesoro would violate due process. The Court held in favor of Tesoro. In doing so, the Court carefully analyzed the leading case on this subject, *United States v. Carlton*, 512 U.S. 26, 30 (1994). In that case, the United States Supreme Court held that retroactive economic legislation will be upheld if it is "supported by a legitimate legislative purpose furthered by rational means." *Carlton*, 512 U.S. at 30-31. The *Carlton* Court upheld the retroactive economic legislation that it reviewed, in large part because "Congress acted promptly and established only a modest period of retroactivity" and there was "no plausible contention that Congress acted with an improper motive, as by targeting [the taxpayer]." *Carlton*, 512 U.S. at 32.

In contrast, the Tesoro case involved retroactivity of 24 years. The Court of Appeals reasoned:

> There is no colorable argument to suggest a legislative act creating a 24-year retroactive tax period is "prompt" or establishes a "modest

> period of retroactivity." *Carlton*, 512 U.S. at 32-33, 114 S.Ct. 2018. We recognize that identifying and correcting significant fiscal losses is a legitimate legislative purpose. But we hold that it is not reasonable for the legislature to enact a retroactive amendment spanning 24 years in direct response to a taxpayer's refund lawsuit.

Tesoro I, 159 Wn. App. at 119.

The *Tesoro I* case was appealed to the Washington Supreme Court. On appeal, the high court held that the statute at issue, former RCW 82.04.433 (1985), did not entitle Tesoro to a tax refund. For this reason, the Court did "not address the constitutional issue of retroactivity." *Tesoro Refining & Marketing Co. v. Dept. of Revenue*, 173 Wn.2d 551 (2012).

The *Tesoro I* case is very similar to the present case. Here, the legislature responded to a tax appeal by amending the law, as in *Tesoro I.* Here, the amendment was retroactive 27 years, rather than the 24 years in *Tesoro I.* In both cases, the recent legislature purported to "clarify" the intent of the legislature that enacted the tax code decades earlier. Such an attempt at discerning the original legislative intent is, as the appellate courts conclude, impossible. Moreover, here the Department itself had interpreted the statute consistent with our Supreme Court's ruling in *Dot Foods I* for the first 16 years of the statute's history. The legislature did not act during those 16 years to correct the Department's 'false' interpretation. Instead, it acted only after the Department changed its interpretation of the statute and then received an unsatisfactory ruling.

The Department argues that the legislation served a legitimate purpose, to avoid an unexpected revenue loss, and employed rational means. It fails to meaningfully distinguish *Tesoro I*, however, and this court must apply that case. The Department also points out that the amendment is not *really* retroactive for 27 years because of the four-year statute of limitations for making tax claims. RCW 82.32.050(4). This argument was not apparently presented to the *Tesoro I* Court. However, it is notable that the Court analyzed the scope of the retroactivity on its face — 24 years — rather than as it applied to the case before it. The case before it involved a claim for a tax period beginning on December 1, 1999, ten years before the amendment. The Court of Appeal's approach to this issue seems to render irrelevant the fact that a statute of limitations may effectively limit the scope of this law's retroactivity.

It is also notable that *Tesoro I* involved legislation that apparently targeted a particular taxpayer, while the present legislation does not contain such a targeted approach. While that fact may ultimately distinguish *Tesoro I*, it is not sufficient to allow this court to avoid its application. *Tesoro I* controls the outcome of this case.

The remedy for this violation is to prohibit retroactive application of 2010 Laws of Washington, 1st Sp. Sess., Ch. 23 § 1706 (S.S.S.B. 6143). As explained above, the court was not asked to determine whether Dot Foods is entitled to a refund for this claim, as that has not been litigated at an administrative level and the parties have not apparently agreed on this issue.

To summarize, the court grants summary judgment to the Department on the issues of collateral estoppel and separation of powers, and grants summary judgment to Dot Foods on the issue of due process. The parties may present an agreed order consistent with this opinion on an ex parte basis, or may schedule presentation the court's civil motion calendar.

Sincerely,

/s/ Chris Wickham

Chris Wickham

Thurston County Superior Court

APPENDIX C

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

[Filed November 1, 2013]

DOT FOODS, INC., Plaintiff, v. THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON, Defendant.	No. 10-2-02772-3 ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER came on for hearing on the parties' cross-motions for summary judgment. The Plaintiff, Dot Foods, Inc., appeared by Michele Radosevich and Dirk Giseburt of the firm Davis Wright Tremaine LLP, and the Defendant, Department of Revenue, appeared by Charles Zalesky and Kelly Owings, Assistant Attorneys General. The following documents and evidence were called to the attention of the Court:

1. Department of Revenue's Motion for Summary Judgment;
2. Declaration of Charles Zalesky in Support of Department of Revenue's Motion for

Summary Judgment, with attached Exhibits 1-8;

3. Dot Foods' Motion for Summary Judgment;
4. Declaration of William H. Metzinger in Support of Dot Foods' Motion for Summary Judgment, with attached Exhibit 1;
5. Declaration of David Tooley in Support of Dot Foods' Motion for Summary Judgment;
6. Dot Foods' Response to Department of Revenue's Motion for Summary Judgment;
7. Department of Revenue's Opposition to Dot Foods' Motion for Summary Judgment;
8. Dot Foods' Reply to Department of Revenue's Opposition to Dot Foods' Motion for Summary Judgment;
9. Reply Brief in Support of Department of Revenue's Motion for Summary Judgment; and
10. Department of Revenue's Statement of Additional Authorities.

The Court has considered the documents filed by the parties in support of and opposition to the cross-motions for summary judgment, and having heard argument of counsel, and being fully advised in the premises, issued its letter opinion on October 2, 2013, rejecting Dot Foods "collateral estoppel" and "separation of powers" arguments but granting Dot Foods motion for summary judgment as to its "due process" claim. Accordingly, this Court finds that there is no genuine issue of material fact in dispute and that the Department is entitled to judgment as a matter of law with respect to Dot Foods' collateral

estoppel or separation of powers claims. The Court further finds that there is no genuine issue of material fact in dispute and that Dot Foods is entitled to judgment as a matter of law with respect to its claim that retroactive application of Laws of 2010, 1st Sp. Sess., ch. 23, § 402 (amending RCW 82.04.423(2)), was unconstitutional as applied to Dot Foods for the May 2006 through December 2007 periods at issue.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The Department's Motion for Summary Judgment is GRANTED as to the collateral estoppel and separation of powers claims raised by Dot Foods and is denied as to Dot Foods' due process claim.
2. Dot Foods' Motion for Summary Judgment is GRANTED as to its due process claim and denied as to its alternative collateral estoppel and separation of powers claims.
3. The Department must refund the Washington B&O taxes paid by Dot Foods for the May 2006 through December 2007 tax periods in the amount $507,818, plus interest thereon as provided in RCW 82.32.060.
4. This judgment resolves all claims of the parties.

DATED this 1 day of November, 2013.

/s/ Chris Wickham
HONORABLE CHRIS WICKHAM

Presented by:	Approved as to form:
ROBERT W. FERGUSON Attorney General	DAVIS WRIGHT TREMAINE LLP
/s/ Charles Zalesky	/s/ Michele Radosevich
CHARLES ZALESKY, WSBA No. 37777	MICHELE RADOSEVICH, WSBA #24282
Assistant Attorney General	Attorneys for Dot Foods, Inc.
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APPENDIX D

Superior Court of the State of Washington
For Thurston County

[Filed December 17, 2013]

December 16, 2013

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Re: *Dot Foods Inc. v. Dept. of Revenue*
Thurston County Cause No. 10-2-02772-3

LETTER OPINION

Dear Parties,

The Court has received and reviewed the following materials:

- DOR's Request for Reconsideration

- DOT Foods' Response to DOR's Request for Reconsideration
- Declaration of Dirk Gisebert
- DOR's 2nd Amended Reply to DOT Foods' Response to DOR's Request for Reconsideration
- DOR's Reply to DOT Food's Response to DOR's Request for Reconsideration
- DOR's Amended Reply to DOT Food's Response to DOR's Request for Reconsideration

After full consideration of these materials, the Department of Revenue's Request for Reconsideration is hereby denied.

Sincerely,

/s/ Chris Wickham

Chris Wickham

Thurston County Superior Court

APPENDIX E

THE SUPREME COURT OF WASHINGTON

DOT FOODS, INC., Respondent/Cross Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Appellant/Cross Respondent.	[Filed April 28, 2016] No. 92398-1 ORDER DENYING FURTHER RECONSIDERATION Thurston County No. 10-2-02772-3

The Court having considered Respondent/Cross Appellant "DOT FOODS' MOTION FOR RECONSIDERATION" and the Court having entered an order changing opinion in the above cause on April 27, 2016;

Now, therefore, it is hereby

ORDERED:

That further reconsideration is denied.

DATED at Olympia, Washington this 28th day of April, 2016.

For the Court

Madsen, C.J.
CHIEF JUSTICE

APPENDIX F

ACT OF APRIL 23, 2010, CH. 23,
WASHINGTON SESSION LAWS
1ST SPEC. SESS. 2574 (SELECTED SECTIONS)

NEW SECTION. **Sec. 401.** (1) A business and occupation tax exemption is provided in RCW 82.04.423 for certain out-of-state sellers that sell consumer products exclusively to or through a direct seller's representative. The intent of the legislature in enacting this exemption was to provide a narrow exemption for out-of-state businesses engaged in direct sales of consumer products, typically accomplished through in-home parties or door-to-door selling.

(2) In *Dot Foods, Inc. v. Dep't of Revenue*, Docket No. 81022-2 (September 10, 2009), the Washington supreme court held that the exemption in RCW 82.04.423 applied to a taxpayer: (a) That sold nonconsumer products through its representative in addition to consumer products; and (b) whose consumer products were ultimately sold at retail in permanent retail establishments.

(3) The legislature finds that most out-of-state businesses selling consumer products in this state will either be eligible for the exemption under RCW 82.04.423 or could easily restructure their business operations to qualify for the exemption. As a result, the legislature expects that the broadened interpretation of the direct sellers' exemption will lead to large and devastating revenue losses. This comes at a time when the state's existing budget is facing a two billion six hundred million dollar

shortfall, which could grow, while at the same time the demand for state and state-funded services is also growing. Moreover, the legislature further finds that RCW 82.04.423 provides preferential tax treatment for out-of-state businesses over their in-state competitors and now creates a strong incentive for in-state businesses to move their operations outside Washington.

(4) Therefore, the legislature finds that it is necessary to reaffirm the legislature's intent in establishing the direct sellers' exemption and prevent the loss of revenues resulting from the expanded interpretation of the exemption by amending RCW 82.04.423 retroactively to conform the exemption to the original intent of the legislature and by prospectively ending the direct sellers' exemption as of the effective date of this section.

Sec. 402. RCW 82.04.423 and 1983 1st ex.s. c 66 s 5 are each amended to read as follows:

(1) Prior to the effective date of this section, this chapter ((~~shall~~)) does not apply to any person in respect to gross income derived from the business of making sales at wholesale or retail if such person:

(a) Does not own or lease real property within this state; and

(b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and

(c) Is not a corporation incorporated under the laws of this state; and

(d) Makes sales in this state exclusively to or through a direct seller's representative.

(2) For purposes of this section, the term "direct seller's representative" means a person who buys only consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells at retail, or solicits the sale at retail of, only consumer products in the home or otherwise than in a permanent retail establishment; and

(a) Substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and

(b) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such purposes for federal tax purposes.

(3) Nothing in this section ((~~shall~~)) may be construed to imply that a person exempt from tax under this section was engaged in a business activity taxable under this chapter prior to ((~~the enactment of this section~~)) August 23, 1983.

NEW SECTION. **Sec. 1704.** Sections 402 and 702 of this act apply both retroactively and prospectively.

NEW SECTION. **Sec. 1706.** Section 402 of this act does not affect any final judgments, not subject to appeal, entered by a court of competent jurisdiction before the effective date of this section.