No. 09-233

In the
Supreme Court of the United States

TRIPLE-S MANAGEMENT, CORP.;
TRIPLE-S SALUD, INC.,

Petitioners,

v.

MUNICIPAL REVENUE
COLLECTION CENTER (CRIM),

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth Of Puerto Rico

REPLY BRIEF FOR PETITIONERS

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REPLY

Respondent's brief in opposition only confirms the reasons this Court should grant certiorari. That brief fully endorses the sweeping proposition on which the taxing authorities and the courts below relied: that if an agency proclaims its earlier interpretation of a statute "wrong," there are no limits whatsoever on the agency's power to apply that re-interpretation retroactively—no matter how far back in time the agency reaches, no matter the consequences or how much that retroactive change defeats reasonable, investment-backed reliance, and no matter how formal, authoritative, and purportedly binding was the agency's prior interpretation. Constitutional principles that limit retroactive government action are not indifferent to such extreme regulatory retroactivity. Respondent's opposition confirms there are no meaningful facts in dispute, and the only legal authority respondent invokes reinforces the justifications for this Court's review.

*1. **The Issues Are of Broad National Importance.*** The fundamental issue at stake is whether due process applies *at all* when agencies change their authoritative, binding interpretations of law retroactively, even when that retroactivity reaches far back into the past—in this case, 15 years—to impose dramatic, unforeseen financial liabilities. In interpreting the tax code, the taxing authorities in this case adopted a "new public policy," as they forthrightly characterized it, *see* Pet. App. 175, and imposed the new policy retroactively back a decade and a half. The

respondent, CRIM, does not dispute that, had a legislature similarly adopted a new tax policy and reached back 15 years, the statute would violate due process. Nor does the respondent dispute that, as the petition explains, decisions like the one below tear a large hole in the fabric of this Court's retroactivity cases by completely exempting retroactive changes in agency re-interpretations of law from any of the due process limitations that constrain other retroactive government action.

The national importance of this issue is confirmed by the Council of State Taxation's participation. The Council has moved to file an *amicus curiae* brief in support of the petition because the "business community throughout the nation is significantly concerned about the continued inconsistent and frequently incorrect application by state courts of the Due Process Clause standard to challenges brought against retroactive taxes." CST Br. 4. The Council notes that its members routinely challenge retroactive tax imposition, "but find a severe lack of consistency in state court decisions based on state courts' varied interpretations of the Due Process clause." *Id.* at 2. Thus, the issues presented are clearly of the breadth and significance that justify this Court's review.

2. Far From Supporting Respondent, This Court's Decision in Automobile Club of Michigan Provides Further Reason to Grant the Petition. Respondent's *only* legal argument is that the petition should be denied on the basis of *Automobile Club of Michigan v. Commissioner,* 353 U.S. 180 (1957). But *Automobile Club* does not

address the constitutional issue presented here in any way. It provides no basis for respondent's position that due process gives agencies *carte blanche* to change their interpretations of law retroactively—no matter how far back in time that retroactivity runs, no matter how oppressive it is to reasonable, investment-backed reliance interests, and no matter how little justification the agency offers for reaching back 15 years to impose retroactive taxation. Moreover, to the extent *Automobile Club* is relevant at all, it confirms the reasons the Court should grant certiorari.

In that case, the Commissioner of Internal Revenue, in 1934 and 1938 letter rulings, had concluded that the Club was tax exempt. In 1943, the Commissioner reconsidered and changed course; the Commissioner got around to applying this policy to the Automobile Club of Michigan in 1945 and applied it back to 1943, when the change in position was first implemented for other automobile clubs. The Club argued that the Commissioner should be "equitably estopped" from doing so, and the Court properly rejected that argument. *Id.* at 183.

That decision provides no comfort to the respondents. First, the Club did not raise, and the Court did not address, any constitutional or due process claim. That is not surprising, given the mild transitional retroactivity involved. Second, and perhaps even more important, the mild, two-year transitional retroactivity involved in *Automobile Club* is precisely the kind of modest retroactivity in the tax area, justified by legitimate purposes, that this Court's cases permit. The

petition acknowledges that this kind of modest retroactivity in the tax area is fully proper. *See* Pet. 15-16 (discussing *United States v. Carlton*, 512 U.S. 26 (1994), and related cases). Thus, even had a due process issue been raised in *Automobile Club*—and even had the Court rejected such a due process argument there—it would have no bearing on the reasons to grant certiorari here. The petition already accepts that situations like that in *Automobile Club* do not violate due process, let alone raise the kind of due process concerns at issue here.

Yet it is noteworthy that the Commissioner in *Automobile Club*, unlike the taxing authorities in this case, did *not* assert or exercise the power to reach back to 1934, eleven years earlier, when it first had ruled the Club tax exempt. Indeed, the change in interpretation in that case was essentially prospective. The Commissioner announced and began to apply the policy in 1943 only to tax years starting with 1943; in beginning to apply that policy to the Automobile Club of Michigan in 1945, the Commissioner went back to 1943 only because that was the date the new interpretation had gone into effect for others. In refraining from reaching all the way back to when the Commissioner had first ruled the Club exempt, eleven years earlier, the Commissioner might or might not have been motivated by constitutional avoidance concerns. But the Commissioner did refrain from imposing a grossly oppressive and unfair result that *would* have raised serious due process issues.

The Commissioner's decision at issue in *Automobile Club* is appropriate and completely consistent with the principles on which the petition for certiorari rests. In contrast, when taxing authorities assert that they have constitutional *carte blanche* to go back as far in time as they want with a change in legal interpretation—indeed, all the way back to the day the taxing authority itself was created, as in this case—the evident need for this Court's review cannot be undermined by pointing to the *Automobile Club* case.

3. There Are No Material Facts in Dispute. Respondent does not deny that Triple-S organized its business structures and practices in reliance upon the formal, binding rulings it received from the Puerto Rican taxing authorities. Nor does the respondent deny that the taxing authorities were delegated statutory authority to issue binding rulings of this sort. Respondent does not dispute that Triple-S received at least six such formal, binding administrative rulings over 30 years that entitled it to tax-exempt status, as long as it complied with various conditions. *See* Pet. 2. Nor does the respondent deny that Triple-S fully complied with approximately five pages of strict terms and conditions that Treasury laid out for Triple-S to maintain its tax-exempt status. Those restrictions included specified limits on compensation to officers and directors, requirements that surpluses be invested in a defined manner (to lower premium costs), obligations of annual sworn filings that testified to Triple-S's operations, and the like. *See* Pet. 4–5.

In short, respondent does not deny that Triple-S had reasonable, investment-backed reliance interests, based on 30 years of consistent formal rulings by the taxing authorities, and that those reliance interests were obliterated when CRIM reached back to impose 15 years of retroactive tax liability. Instead, respondent's position is simply that none of this matters: as long as an agency declares its earlier interpretation of law "wrong," an agency can reset the clock at will and apply its new interpretation as retroactively as it wants.

Respondent does introduce one new "factual" assertion that requires clarification. Although irrelevant to the legal issues presented, respondent asserts that Triple-S agreed to pay retroactive taxes to the Department of the Treasury in Puerto Rico ("Treasury"), totaling $51 Million, going back many years. Even if this characterization were accurate, that separate agreement would have no bearing on whether CRIM violates due process in demanding 15 years of retroactive taxes from Triple-S. Triple-S has not somehow "waived" its constitutional rights; not even CRIM goes that far. But in any event, the characterization is false.

The agreement is reproduced in the Petition at Appendix D. *See* Pet. App. 164. As its text makes clear, Treasury imposed only prospective taxes on Triple-S, in light of what Treasury forthrightly called its "new policy" about how to interpret the tax code. *See* Pet. App. 170, ¶¶ 1–4.[1]

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[1] The payment to which CRIM refers was imposed on, and paid by, Triple-S Management, a separate taxpayer, not by

Finally, CRIM inaccurately suggests that Triple-S benefitted unfairly because its competitors were not exempt. But these competitors, which eventually emerged in the health-insurance sector, were fully run as for-profit corporations. They did not operate under all the conditions and constraints under which Triple-S operated in order to receive and maintain its tax-exempt status. Indeed, as far as petitioner is aware, none of these entities ever even sought tax-exempt status. As a low-cost provider of pre-paid medical and hospital insurance, whose shareholders (doctors and dentists) relinquished any right to dividends, Triple-S had a unique history. Triple-S does not raise any constitutional objection to its tax treatment being changed prospectively, including through administrative re-interpretation of the tax code to adopt a "new policy." But Triple-S does argue that due process demands more from agencies that seek to impose 15 years of retroactive taxation than just the simple statement that they now believe their earlier, authoritative, and binding interpretation was "wrong."

*4. **The Petition Should be Granted or Held.*** As the petition explains, the decision below opens a wide hole in this Court's retroactivity

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Triple-S, which is the entity that Treasury and CRIM had ruled tax exempt. Triple-S Management Corp. was the shareholder of Triple-S; once Treasury revoked the exemption, Triple-S Management Corp. became entitled to receive dividends from Triple-S, for which it would be taxed. The parties agreed to a partial pre-payment of these taxes before the distribution actually took place.

jurisprudence by treating changes in agency legal interpretations—no matter how retroactive or draconian—as completely outside that body of law. Respondent does not address or dispute any of this. Further, the *amicus curiae* brief that the Council on State Taxation has moved to file notes the widespread nature, and inconsistent lower-court treatment, of the problem the petition presents.

The Court should grant certiorari to clarify that the executive branch, like the legislative branch, is subject to due process constraints when the executive branch retroactively applies 180-degree changes in its formal, binding legal interpretations. At a minimum, this petition should be held pending resolution of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, No. 08-1151. As the petition explains, if the Court concludes that judicial re-interpretation of common law can constitute a taking, that could easily have implications for whether retroactive agency re-interpretations of statutory law can similarly violate due process. For executive branch agencies to be the one branch of government immune from constitutional constraints on extreme retroactivity would be exceedingly odd, to say the least. Respondent has not replied to the point that, at minimum, this petition should be held.

Respectfully submitted,

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