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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Petitioner.

**AMICUS CURIAE BRIEF
OF INSTITUTE FOR PROFESSIONALS IN TAXATION**

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Institute for Professionals in Taxation (“IPT”) is a nonprofit educational organization formed in 1976 under the laws of the District of Columbia. It has more than 4,400 members representing more than 1,400 tax paying businesses across the United States and Canada. IPT’s organizational purposes include the promotion of uniform and equitable administration of state and local taxes. IPT wishes to be heard as amicus curiae because the retroactive tax involved in this case threatens uniform and equitable tax administration, both in Washington and in other jurisdictions that may look to this Court’s decision as persuasive authority.

II. ISSUE ADDRESSED BY AMICUS CURIAE

This brief addresses the legality of the 2009 Legislature’s retroactive amendment of RCW 82.04.433.

III. SUMMARY OF RELEVANT FACTS

The arguments in this brief are based upon the facts stated in the parties’ briefs and in the Court of Appeals’ opinion, *Tesoro Refining and Marketing Co. v. Department of Revenue*, 159 Wn. App. 104, 246 P.3d 211 (2010). Tesoro Refining and Marketing Company (“Tesoro”) is a Delaware corporation with an oil refinery in Anacortes, Washington. It manufactures marine bunker fuel and sells the fuel to vessels engaged primarily in foreign commerce.

RCW 82.04.220 imposes an excise tax measured by gross receipts from business activities in the state. The tax is commonly referred to as the business and occupation tax or B&O tax. B&O tax rates vary

according to statutory classifications of business activities. The primary classifications applicable to Tesoro are manufacturing (RCW 82.04.240), wholesaling (RCW 82.04.270) and retailing (RCW 82.04.250). The B&O tax statutes also include numerous exemptions, deductions and credits, including RCW 82.04.440 allowing taxpayers engaged in both manufacturing and selling in the state, such as Tesoro, to credit the manufacturing tax against the selling tax that otherwise would be due. After Tesoro applied this credit, it paid manufacturing B&O tax on the bunker fuel produced at its Anacortes refinery.

The issue in this case involves a deduction statute, RCW 82.04.433(1), which prior to May 14, 2009 read as follows: "In computing tax there may be deducted from the measure of tax amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce." Tesoro did not claim this deduction initially but now seeks a refund of the manufacturing taxes it paid on bunker fuel in the years 2000 through 2007. The Court of Appeals ruled that Tesoro was entitled to the deduction under the plain and unambiguous language of the statute.

The legislation creating the bunker fuel deduction was adopted in 1985. Laws of 1985, ch. 471, § 16. Though the Department had previously allowed similarly situated refiners to take the deduction, it denied Tesoro's refund request on the basis that the deduction applied only to wholesaling and retailing B&O taxes, not manufacturing B&O tax. Just prior to the trial court hearing on Tesoro's entitlement to the

deduction, RCW 82.04.433 was amended to limit the deduction to wholesaling and retailing B&O tax. Laws of 2009, ch. 494. The amendment was also made retroactive. *Id.* at § 4.

IV. ARGUMENT

Retroactive legislation is disfavored because of its high risk of unfairness. Legislatures generally feel constrained to make changes prospectively only. In those instances where retroactive legislation emerges from the political process, the retroactivity must be judged against the constitutional guarantee of due process. This is such a case.

The Court of Appeals correctly held that the 2009 Legislature's retroactive amendment of RCW 82.04.433 cannot stand under this Court's precedents. Affirming the Court of Appeals' decision will further Washington's commitment to uniform and equitable taxation and provide a model to other jurisdictions. Reversing the Court of Appeals, on the other hand, would approve and encourage arbitrary and inequitable tax treatment. Subsequent actions of the 2010 Legislature, as discussed below, demonstrate that the risk to uniform and equitable taxation is very real. Now is the time for this Court to stand by its existing precedents.

A. Principles Central to Our Legal Tradition Oppose the Retroactive Legislation at Issue in This Case.

The Court of Appeals was rightly skeptical of the 24-year reach of the 2009 Legislature's retroactive amendment of RCW 82.04.433. *Tesoro*, 159 Wn. App. at 116-20. Concerns with respect to the inherent

unfairness of retroactive legislation, including economic legislation, are deeply ingrained in both our national and state laws.

The bias against retroactive legislation is longstanding and fundamental in the Anglo-American legal tradition. "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *United States v. Security Industrial Bank*, 459 U.S. 70, 79, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982). See also *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311-12, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994). "Retroactivity is generally disfavored in the law . . . in accordance with 'fundamental notions of justice' that have been recognized throughout history" *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998).

Retroactive economic legislation involves significant policy concerns. "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992). This inherent risk of unfairness is well recognized in the law:

Although we have been hesitant to subject economic legislation to due process scrutiny as a general matter, the Court has given careful consideration to due process challenges to legislation with retroactive effects. As today's plurality opinion notes, for centuries our law has harbored a singular distrust of retroactive statutes

Eastern Enterprises, 524 U.S. at 547 (Kennedy, J., concurring in the judgment and dissenting in part).

This distrust is heightened where the degree of retroactivity is long. At some point – a point far short of 24 years under the controlling precedents of our state – these policy concerns rise to the level of a constitutional infirmity. In concurring with the result in the lead opinion in *Eastern Enterprises*, Justice Kennedy explained his opposition to a piece of economic legislation with long retroactive effect: “As the plurality explains today, in creating liability for events which occurred 35 years ago the Coal Act has a retroactive effect of unprecedented scope.” *Id.* at 549. The scope of retroactivity at issue here is no less worrisome.

Another concern – very much present here – is the potential for targeting unpopular taxpayers with retroactive laws. *Tesoro*, 159 Wn. App. at 118 (“[T]he legislative history of the 2009 act shows the recent amendment was in direct response to Tesoro’s refund request.”) Justice Kennedy clearly perceived this danger:

[R]etroactive lawmaking is a particular concern for the courts because of the legislative “tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals.” . . . If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership.

As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional

system, then, are secured by due process restrictions against severe retroactive legislation.

Eastern Enterprises, 524 U.S. at 548-49. See also *United States v. Carlton*, 512 U.S. 26, 32, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (noting Congress had not “acted with an improper motive, as by targeting estate representatives such as Carlton”).

Despite this general commitment to due process limits on retroactive legislation, it must also be said that the United States Supreme Court’s decisions on this subject are not a model of clarity. If one could wipe the slate clean, perhaps a very different framework for analysis would emerge. See, e.g., *Eastern Enterprises*, 524 U.S. at 538-39 (Thomas, J., concurring); *Carlton*, 512 U.S. at 39-42 (Scalia, J., concurring in the judgment). Instead, we must operate within the existing framework of cases, which is aptly described as a “thicket.” Supp. Br. of Resp. at 10. Other observers have been far more critical than that:

[T]he Supreme Court’s recognition of the intellectual poverty of its retroactivity analysis has led to efforts to formulate a more rational analytical structure, albeit with limited success. The Court has addressed retroactivity questions on at least seven occasions in the past five years, but its decisions, rife with separate opinions, reflect a variety of conflicting and confusing approaches.

Jill E. Fisch, “Retroactivity and Legal Change: An Equilibrium Approach,” 110 Harv. L. Rev. 1055, 1058 (1997). The publication of this article was followed shortly by the Court’s decision in *Eastern Enterprises*, which both proved the author’s criticisms and yet declined to acknowledge them. Fortunately the decision in this case is a relatively easy one based on existing Washington precedents.

B. The Sound Policy of Our State, As Reflected in the Controlling Precedents Relied Upon by the Court of Appeals, Prohibits the Retroactive Legislation at Issue in This Case.

Protections from unfair retroactive legislation are deeply ingrained in Washington law. Reflecting the same fundamental notions of justice discussed above, the Washington Constitution generally requires **delayed** effective dates for new legislation. Const, art. II, § 41. This allows citizens time to learn of new legislation, consider its effect, and adjust the conduct of their affairs accordingly.

Washington's specific concern with legislation imposing tax on prior transactions is clearly articulated in the cases cited by the Court of Appeals. In *State v. Pacific Tel. & Tel. Co.*, 9 Wn.2d 11, 113 P.2d 542 (1941), this Court considered whether an existing tax, newly extended in 1939 to transactions as early as 1935, exceeded the "limit of permissible retroactivity." The Court concluded that the four-year retroactive period was excessive and struck down the statute's retroactive feature. This Court also held that retroactive application of a new tax for the two and one-half months preceding enactment violated due process. *Bates v. McLeod*, 11 Wn.2d 648, 655-56, 120 P.2d 472 (1941). These cases are this state's controlling precedents on retroactive tax increases, as correctly decided by the Court of Appeals in this case. This Court should adhere to those precedents.

"The doctrine of stare decisis, which means 'to stand by decisions and not to disturb settled matters,' is of ancient lineage." Fred W. Catlett,

“The Development of the Doctrine of Stare Decisis and the Extent to Which It Should be Applied,” 21 Wash. L. Rev. 158, 158 (1946). There are compelling reasons why this doctrine has been a fundamental part of our legal system for centuries:

[The reasons lying at the base of stare decisis] are stability and certainty in the law, convenience, and uniformity of treatment of all litigants. To the English or American mind, a system of law which lacks certainty and stability would be faulty and undesirable. It would be exceedingly difficult for a citizen to conduct his business or to deal with his property or to carry on satisfactorily many of the affairs of life, if he could not count upon the continued recognition of the principles of law in effect when he is compelled to act. It would be impossible for a lawyer to give any dependable advice to a client. If the courts were free to apply to each particular case the personal views of the particular judge or judges sitting, or if a judge were free to settle controversies in accordance with his own personal desires, the conduct of business would involve an added hazard and the decision of controversies between litigants would lose all semblance of justice or fairness. Confidence in the honesty and integrity of the courts and in their impartiality could not be maintained. We should have a government of men and not of laws.

Id. at 159. The United States Supreme Court summed up stare decisis this way: “[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.” *Hutto v. Davis*, 454 U.S. 370, 375, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982).

Although this Court may reconsider its own past decisions, it does so only upon a clear showing that the precedent is both incorrect and harmful. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172

(2009). The Department of Revenue does not even attempt to satisfy that standard here. In fact, the controlling Washington precedents relied upon by the Court of Appeals are not even identified in the Department's Table of Authorities. Rather, the Department makes only the dismissive assertion (in a footnote) that the precedents relied upon by the Court of Appeals are "decisions from a bygone era." Supp. Br. of Pet. at 18 n.6.

The Department's attempt to distinguish *Pacific Tel. & Tel.* is particularly misleading. *Pacific Tel. & Tel.* relies on *Welch v. Henry*, 305 U.S. 134, 59 S. Ct. 121, 83 L. Ed. 87 (1938), the very same decision that the majority in *Carlton* cited as a still vital case. Both *Pacific Tel. & Tel.* and *Carlton* emphasize the focus in *Welch* on the recency of transactions to which retroactive tax legislation may apply. *Pacific Tel. & Tel.*, 9 Wn.2d at 17; *United States v. Carlton*, 512 U.S. at 33. In fact, *Carlton* holds up *Welch* as a case that helped move beyond the too exacting review of prior cases. *Carlton*, 512 U.S. at 30, 33-34. *Welch* and more recent cases alike scrutinize retroactive economic legislation for due process violations: "[Numerous recent] decisions treat due process challenges based on the retroactive character of the statutes in question as serious and meritorious, thus confirming the vitality of our legal tradition's disfavor of retroactive economic legislation." *Eastern Enterprises*, 524 U.S. at 549 (Kennedy, J., concurring in the judgment and dissenting in part). Citing *Carlton* as an example, Justice Kennedy observed in *Eastern Enterprises*, "In our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute." *Id.* at 548. Thus *Pacific*

Tel. & Tel., which recognizes this important principle, cannot be so easily cast aside. Like the *Welch* decision, it is part of a tradition that remains as relevant today as when it was decided.

The Department relies principally on *W.R. Grace & Co. v. Department of Revenue*, 137 Wn.2d 580, 973 P.2d 1011 (1999), and *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007). *W.R. Grace* involved retroactive application of a remedy – something that is actually required by the constitution -- not retroactive increase of a tax. Consistent with this view, the majority opinion in *W.R. Grace* has been cited by this Court only twice and never for its statement on retroactivity. *Ford Motor Co. v. City of Seattle, Executive Services Department*, 160 Wn.2d 32, 52, 156 P.3d 185 (2007) (mentioning *W.R. Grace* only in noting that “the measure of our state’s B & O tax on engaging in wholesaling activities is fairly apportioned and constitutional”); *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 247, 178 P.3d 981 (2008) (citing *W.R. Grace* for the standard of review only). See also *Asarco Inc. v. Department of Ecology*, 145 Wn.2d 750, 782, 43 P.3d 471 (2002) (Sanders, J., dissenting) (citing his dissenting opinion in *W.R. Grace*). Perhaps most tellingly, *Washington Farm Bureau* does not cite *W.R. Grace* (nor does it cite *Carlton*), suggesting its lack of relevance. Indeed, neither *Washington Farm Bureau* nor *W.R. Grace* involves any issue similar to this case. Just as *W.R. Grace* is distinguishable because it involved application of a tax remedy, not a tax increase, the due process issue in *Washington Farm Bureau* involved a

“novel theory that the citizens of Washington have a *vested right* to vote on taxes.” *Washington State Farm Bureau*, 162 Wn.2d at 305 (emphasis in original). Due process concerns regarding the mechanism to enact tax legislation, which was at issue in *Washington Farm Bureau*, are much different than due process concerns regarding retroactive imposition of taxes on prior transactions. Unlike the authorities cited in the Court of Appeals’ decision, those proposed by the Department are not on point.

C. The Legislature Needs This Court’s Guidance on the Limits of Retroactive Taxing Powers.

In *Dot Foods, Inc. v. Department of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009), this Court rejected the Department’s narrow interpretation of the B&O tax exemption for sales through “direct seller’s representatives” (RCW 82.04.423) in favor of the Department’s original broader interpretation. After this Court issued its decision, the Legislature amended RCW 82.04.423 so as to adopt the Department’s narrow interpretation retroactively to the statute’s original enactment date of August 23, 1983. Laws of 2010, Sp. Sess., ch. 23 §§ 402, 1704.

A majority of this Court determined in *Dot Foods* that the original language of RCW 82.04.423 was not ambiguous. *Dot Foods*, 166 Wn.2d at 926. The Court’s decision crystallized what RCW 82.04.423 had always meant since the time of its enactment. The amendment to RCW 82.04.423 did not merely restrict the exemption prospectively, but effectively reversed *Dot Foods* as though the Legislature had superior

authority to this Court in saying what the law is. The Legislature did recognize some limit to its power by allowing one exception – *Dot Foods*, itself – at least for the years subject to appeal in *Dot Foods*. Laws of 2010, Sp. Sess., ch. 23, § 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.”). This exceedingly narrow exception hardly vindicates this act of overreaching with respect to the notion of coequal branches of government. This is particularly true with respect to the amendment’s effect on other taxpayers, not to mention the years between those under appeal in *Dot Foods* and the year in which the amendment was enacted.

Retroactively reversing this Court’s interpretation of the 1983 legislation – an interpretation initially adopted by the Department of Revenue, itself, *see Dot Foods*, 166 Wn.2d at 915-17, 921 – is an example of the lengths to which lawmakers can go if they perceive themselves as unfettered by due process constraints on tax legislation. Similarly, in this case, the Department altered its interpretation of the 1985 legislation at issue here very recently. Confronted with litigation, the Legislature decided to extend the Department’s new interpretation far into the past. This conduct offends the values of uniform and equitable administration of taxes that underlie the common law and constitutional protections for taxpayers.

The Court of Appeals issued a well-reasoned analysis rejecting the Legislature’s mid-litigation attempt to change the law applying to past tax

periods. Affirming the Court of Appeals' decision will appropriately guide the Legislature away from further misuse of the power of taxation.

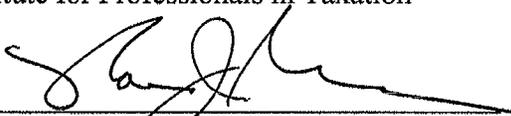
V. CONCLUSION

For the reasons stated herein, this Court should adopt the Court of Appeals' conclusion that the retroactivity clause of the amendment to RCW 82.04.433 is impermissible as a violation of due process.

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Respectfully submitted,
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