In the Supreme Court of the United States

THOMAS R. OKRIE and SIMILARLY SITUATED RETIRED MICHIGAN STATE AND PUBLIC SCHOOL EMPLOYEES, WHO WERE BORN AFTER 1945 AND WHO RETIRED BEFORE MICHIGAN'S 2011 P.A. 38 WENT INTO EFFECT ON JANUARY 1, 2012,

Petitioners,

v.

STATE OF MICHIGAN,
GOVERNOR RICK SNYDER,
MICHIGAN DEPARTMENT OF TECHNOLOGY,
MANAGEMENT AND BUDGET,
OFFICE OF RETIREMENT SERVICES,
STATE EMPLOYEES RETIREMENT SYSTEM,
MICHIGAN PUBLIC SCHOOL EMPLOYEES
RETIREMENT SYSTEM, and
MICHIGAN DEPARTMENT OF TREASURY,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Michigan

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are retired Michigan state and public school employees who were born after 1945 and who made irrevocable decisions to retire prior to January 1, 2012. At the time of their retirement, their defined-benefit pensions were tax exempt as deferred compensation earned for their years of governmental service after vesting in one of the State of Michigan's public pension plans. Michigan enacted 2011 P.A. 38 and related legislation, specifically Mich. Com. Law 206.30(9), as amended, which eliminated the tax exemptions for these retirees, effective January 1, 2012.

THE QUESTION PRESENTED IS:

Does Michigan's retraction of the retirement tax benefits for these retirees violate the retroactivity principles stated in *Landgraf v. USI Film Prods.,* 511 U.S. 244 (1994) and the principles underlying the rule of law?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners

Petitioner Thomas R. Okrie, who was the Plaintiff-Appellant in the court below, is a retired Michigan public school teacher who was born in 1946 and who retired in July 2000. He represents a proposed class of similarly situated retired Michigan state and public school employees who were born after 1945 and who retired before Michigan's 2011 P.A. 38 went into effect on January 1, 2012. None of the Petitioners is a corporate entity.

Respondents

Respondents, who were Defendants-Appellees in the court below, are the State of Michigan; Rick Snyder, the Governor of the State of Michigan, in his official capacity; the Michigan Department of Technology, Management and Budget and its Office of Retirement Services; State Employees Retirement System; Michigan Public School Employees Retirement System; and the Michigan Department of Treasury.

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The Opinion of the Court of Appeals of Michigan (June 16, 2016) is unpublished and appears at 2016 Mich. App. LEXIS 1165 (App. 1a). The Opinion and Order of the Michigan Court of Claims (April 21, 2014) is found at App. 23a. The Opinion and Order of the Michigan Court of Claims (November 5, 2013) is found at App. 37a. The Order of the Supreme Court of Michigan denying Application for Leave to Appeal (January 5, 2017) is found at App. 50a. The Order of the Supreme Court of Michigan (April 4, 2017) denying Motion for Reconsideration is found at App. 52a.

STATEMENT OF JURISDICTION

This Court has jurisdiction over Mr. Okrie, *et al.*'s Petition pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant parts of the federal constitutional provisions and state statutory provisions are set forth below.

- United States Constitution, Art. I, § 10, clause 1

  No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

- United States Constitution, Art. VI, clause 2

  This Constitution and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to

the Contrary notwithstanding.

- United States Constitution, Amend. V

  No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

- United States Constitution, Amend. XIV, § 1

  . . . [Nor] shall any State deprive any person of life, liberty, or property without due process of law . . . .

- Mich. Com. Law 206.30, 300 P.A. 1980, as amended

  (1) "Taxable income" means, for a person other than a corporation, estate, or trust, adjusted gross income as defined in the internal revenue code subject to the following adjustments under this section:

  [* * *]

  (h) Deduct to the extent included in adjusted gross income:

  (i) Retirement or pension benefits received from a public retirement system of or created by an act of this state or a political subdivision of this state.

  (ii) Any retirement or pension benefits received from a public retirement system of or created by another state or any of its political subdivisions if the income tax laws of the other state permit a similar deduction or exemption or a reciprocal deduction or exemption of a retirement or pension benefit received from a public retirement system of or created by this state or any of the political subdivisions of this state.

- Mich. Comp. Law 206.30, 2011 P.A. 38, as amended

  (1) "Taxable income" means, for a person other than a corporation, estate, or trust, adjusted gross income as defined in the internal revenue code subject to the following adjustments under this section:

[* * *]

(f) Deduct the following to the extent included in adjusted gross income subject to the limitations and restrictions set forth in subsection (9):

(i) Retirement or pension benefits received from a federal public retirement system or from a public retirement system of or created by this state or a political subdivision of this state.

(ii) Retirement or pension benefits received from a public retirement system of or created by another state or any of its political subdivisions if the income tax laws of the other state permit a similar deduction or exemption or a reciprocal deduction or exemption of a retirement or pension benefit received from a public retirement system of or created by this state or any of the political subdivisions of this state.

* * *

(9) In determining taxable income under this section, the following limitations and restrictions apply:

(a) For a person born before 1946, this subsection provides no additional restrictions or limitations under [Mich. Comp. Law 206.30(1)(f)].

(b) For a person born in 1946 through 1952, the sum of the deductions under [Mich. Comp. Law 206.30(1)(f)(*i*), (*ii*), and (*iv*)] is limited to $20,000.00 for a single return and $40,000.00 for a joint return. After that person reaches the age of 67, the deductions under [Mich. Comp. Law 206.30(1)(f)(i), (*ii*), and (*iv*)] do not apply and that person is eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return, which deduction is available against all types of income and is not restricted to income from retirement or pension benefits. However if that person's total household resources exceed $75,000.00 for a single return or $150,000.00 for a joint return, that person is not eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return. A person that takes the deduction under [Mich. Comp. Law 206.30(1)(e)] is not eligible for the unrestricted deduction of $20,000.00 for a single

return and $40,000.00 for a joint return under this subdivision.

(c) For a person born after 1952, the deduction under [Mich. Comp. Law 206.30(1)(f)(*i*), (*ii*), or (*iv*)] does not apply. When that person reaches the age of 67, that person is eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return, which deduction is available against all types of income and is not restricted to income from retirement or pension benefits. If a person takes the deduction of $20,000.00 for a single return and $40,000.00 for a joint return, that person shall not take the deduction under [Mich. Comp. Law 206.30(1)(f)(*iii*)] and shall not take the personal exemption under [Mich. Comp. Law 206.30(2)]. That person may elect not to take the deduction of $20,000.00 for a single return and $40,000.00 for a joint return and elect to take the deduction under [Mich. Comp. Law 206.30(1)(f)(*iii*)] and the personal exemption under [Mich. Comp. Law 206.30(2)] if that election would reduce that person's tax liability. However, if that person's total household resources exceed $75,000.00 for a single return or $150,000.00 for a joint return, that person is not eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return. A person that takes the deduction under [Mich. Comp. Law 206.30(1)(e)] is not eligible for the unrestricted deduction of $20,000.00 for a single return and $40,000.00 for a joint return under this subdivision.

(d) For a joint return, the limitations and restrictions in this subsection shall be applied based on the age of the older spouse filing the joint return.

INTRODUCTION

This case represents a continuation of the *Davis* litigation, which was before this Court nearly thirty years ago. See *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989). In *Davis*, the State of Michigan argued to this Court that tax exemptions for defined-benefit pensions of retired state employees were offered as inducements to hire and retain qualified civil servants, constituting deferred compensation for their years of governmental service to the State after vesting in the state employees' pension plan. *Id.* at 816. The State also reaffirmed its previous argument to the Court of Appeals of Michigan that such tax exemptions were "an integral part of retirement benefits conferred upon state employees." See *Davis v. State of Michigan*, 160 Mich. App. 98; 408 N.W.2d 433, 436 (1987).

While this Court had "no difficulty concluding that civil service retirement benefits are deferred compensation for past years of service rendered to the Government," it held that the Michigan statute exempting from income tax the retirement benefits paid by state or political subdivisions, 1980 P.A. 300, as amended, but not the federal government, violated the doctrine of intergovernmental tax immunity codified at 4 U. S. C. § 111. *Davis*, 489 U.S. at 816. As this Court explained, the State of Michigan could have provided "the same after-tax benefits to all retired state employees by means of increased salaries or benefit payments instead of tax exemptions." *Id.* at 815 n. 4. Addressing the State's

important financial incentive of providing tax-exempt pensions as deferred compensation to its employees for their years of governmental service, this Court noted that "the State may always compensate in pay or salary for what it assesses in taxes." *Id*. Accordingly, this Court remanded the *Davis* case to allow the Court of Appeals of Michigan to determine whether to extend the tax exemptions to retired federal employees or eliminate them for retired state employees.

On remand, the Court of Appeals of Michigan in *Davis v. Dep't. of Treasury,* 179 Mich. App. 683; 446 N.W.2d 531, 533 (1989), acting as if it were the Michigan Legislature, agreed with the State of Michigan's position on extending the tax exemptions to retired federal employees because the elimination of the tax exemptions for retired state employees would have had a "deleterious effect" upon "the reliance interests and financial well-being of those employees." In addition, the Court of Appeals of Michigan held that "equitable considerations favor an extension" of the tax exemptions to retired federal employees, as opposed to an elimination of the tax exemptions of retired state employees. *Id*.

Thereafter, in 1991, in response to a State Senator's question about whether the Michigan Legislature may limit or withdraw the tax exemptions for retired state employees, the State Attorney General issued a formal legal opinion based upon governing Michigan law recognizing that the State Legislature may limit or repeal the tax exemptions found in the four retirement statutes as to current retired public employees and members, but only "if it provides alternative benefits in their

place that are equal to or greater than the pension benefit[s] that would be limited or withdrawn . . .” 1991 OAG No. 6697, 1991 Mich. AG LEXIS at p 9. [1]

Accordingly, the prevailing legal holding of the Court of Appeals of Michigan in *Davis,* 446 N.W.2d 531 after remand from this Court, and the subsequent formal opinion of the State Attorney General issued in 1991 OAG No. 6697, establish the firm legal basis for the contention of Mr. Okrie and similarly situated retired Michigan state and public school employees, who were born after 1945 and who retired before Michigan’s 2011 P.A. 38 went into effect on January 1, 2012 (“Mr. Okrie, *et al*.”), that the tax exemptions for their defined-benefit pensions constituted deferred compensation that they earned for their years of governmental service to the State of Michigan, or one of its political subdivisions. Thus, in making their irrevocable retirement decisions and calculating their total retirement benefits, Mr. Okrie, *et al*. reasonably and properly relied upon the repeated statements included for decades in the Retirement Guidelines’ booklets and other publications of the State of Michigan’s Office of Retirement Services (“ORS”) that their defined-benefit pensions “are exempt from Michigan state and city income tax,” as these statements by the ORS correctly reflected the language of Mich. Comp. Law 206.30, 300 P.A. 1980, as amended, the statute in effect at the time of their irrevocable retirement decisions.

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[1] Although the Attorney General’s formal opinions are not binding upon the state courts, they are binding upon the state agencies and officers, and may be relied upon in good faith in carrying “great weight.” *Frey v. Dep’t of Management and Budget*, 429 Mich. 315; 414 N.W.2d 873, 883 (1987); *Traverse City School Dis. v. Attorney General*, 383 Mich. 390; 185 N.W.2d 9, 15 n. 2 (1971).

Notwithstanding Mr. Okrie *et al*.'s "reliance interests" and "settled expectations" for at least two decades that they were entitled to the receipt of tax-exempt pensions upon retirement, the Michigan Legislature enacted 2011 P.A. 38 and related legislation, specifically, Mich. Com. Law 206.30(9) of the Income Tax Act, effective January 1, 2012, which eliminated the tax exemptions for the defined-benefit pensions of Mr. Okrie, *et al*., but without providing comparable alternative financial benefits, equal to or greater than the retirement benefits that were eliminated, as stated in the theretofore binding formal legal opinion issued by the State Attorney General in 1991. See *In re Request for Advisory Opinion Regarding the Constitutionality of 2011 PA 38*, 490 Mich. 295; 806 N.W.2d 683 (2011) (advisory opinion regarding the constitutionality of 2011 P.A. 38, particularly Mich. Com. 206.30(9) of the Income Tax Act, effective January 1, 2012).

STATEMENT OF THE CASE

The basic facts are set forth in the Court of Appeals of Michigan's opinion in *Okrie v State* as follows:

> Plaintiff, who was born in 1946, served for 33 years as a health and social studies teacher in the Troy School District. According to plaintiff, he regularly consulted the Michigan Public School Employees Retirement System's (MPSERS) guideline booklets that were published by defendant Office of Retirement Services (ORS). These booklets all contained the statement that "Pensions paid by MPSERS are exempt from Michigan state income tax and Michigan city tax." However, the booklets also contained the following disclaimer:
>
> > Remember, this book is a summary of the main features of the plan and not a complete description. The operation of the plan is controlled by the Michigan Public School Employees Retirement Act (Public Act 300 of 1980, as amended). If the

> provisions of the Act conflict with this summary, the Act controls.

During the pertinent timeframe, a guideline booklet from the State Employees' Retirement System (SERS) stated, "Pensions paid by the State Employees' Retirement System are exempt from the Michigan state and city income tax," while also indicating that the ORS "will process your retirement application and pay your pension under the provisions of the State Employees' Retirement Act, 1943 P.A. 240, as amended."

Plaintiff claims that he relied on the statements in such guideline booklets when deciding whether and when to retire. He believed that the statements constituted a promise that his pension income would remain tax exempt throughout his retirement. Additionally, plaintiff alleges that he purchased 4.698 year[s] of service credit to increase the value of his pension and that he entered into the Michigan Investment Plan (MIP), under which he contributed regular portions of his salary in exchange for a yearly increase on his best three years of service in his pension plan.

Plaintiff submitted the necessary paperwork to MPSERS to begin his retirement in July 2000. As part of the process, plaintiff filled out an "Income Tax Information" form that stated his pension income would be exempt from state and local tax. After retiring, plaintiff received his first remittance. No state tax was withheld. Plaintiff continued to receive such remittances—without state income tax being withheld—for 11 years. But the tax treatment changed with the entry into force of 2011 PA 38 and related legislation that removed the tax-exempt status of plaintiff's pension benefits.

* * *

Plaintiff filed his original complaint in this action on behalf of himself and all other Michigan public school teacher retirees and State employee retirees who were born after 1945 and had begun receiving pension benefits from their retirement plan[s] prior to the effective date of 2011 PA 38. Plaintiff's complaint contained two counts, one for promissory estoppel and one for equitable relief. The parties filed competing motions for summary disposition. But prior to the trial court ruling on those motions, plaintiff filed an amended complaint that added counts for unjust enrichment, breach of contract under traditional contract principles, violation of the Contract Clauses of the Michigan and United States Constitutions, violation of the Takings Clause of the Michigan and United States Constitutions, violation of substantive due process, and violation of procedural due process. Plaintiff also filed a second motion for summary disposition with

> respect to his first amended complaint. Shortly thereafter, the trial court granted defendant's first motion for summary disposition on the counts in plaintiff's original complaint. Defendants then filed their second motion for summary disposition, in which they sought dismissal of all counts in plaintiff's amended complaint.
>
> Subsequently, plaintiff filed a motion seeking to file a second amended complaint to add counts for breach of a purchase of service credit contract and for breach of the Michigan Investment Plan contract. Defendants responded by filing a motion opposing plaintiff's request to file a second amended complaint, along with a motion for summary disposition regarding plaintiff's first amended complaint. Plaintiff also filed a motion seeking class certification.

(App. 2a-5a)

As the Court of Appeals of Michigan noted, the Court of Claims entered orders granting the State of Michigan's motions for summary disposition and denying Mr. Okrie*, et al.'s* cross-motions for summary disposition as to the claims asserted in the original complaint as well as the second amended complaint. (App. 6a-8a) The Court of Claims also denied Mr. Okrie, *et al.'s* motion for class certification as moot. (App. 8a)

Nevertheless, the Court of Appeals of Michigan's opinion failed to address Mr. Okrie *et al.*'s argument based upon state case law authority that the retroactive application of 2011 P.A. 38 and the related legislation eliminating the tax-exemptions for their defined-benefit pensions violated the Federal and State Constitutions. Primarily, the Court of Appeals of Michigan decided the case on contract principles under state law, but sidestepped federal law and the retroactivity issue altogether. (App. 9a-16a). In pertinent part, the Court of Appeals of Michigan's opinion simply ignored the protection of the retired public employees

in this matter under the Federal Contracts Clause, U.S. Const., Art I., § 10, cl. 1, as set forth in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), *Indiana v. Brand*, 303 U.S. 95 (1938) and *Mississippi ex. rel. Robertson v. Miller*, 276 U.S. 174 (1928). Further, in their Application for Leave to Appeal that was denied by the Supreme Court of Michigan, Mr. Okrie, *et al.* specifically argued that the retroactive application of 2011 P.A. 38 and the related legislation violated the retroactivity principles stated in *Landgraf*. Finally, in their Motion for Reconsideration that was denied by the Supreme Court of Michigan, Mr. Okrie *et al*. expressly argued the issues now presented to this Court.

REASONS FOR GRANTING THE PETITION

I. THE RETROACTIVE APPLICATION OF MICHIGAN'S 2011 P.A. 38 AND THE RELATED LEGISLATION, SPECIFICALLY MICH. COM. LAW 206.30(9), ELIMINATING THE TAX EXEMPTIONS FOR THE DEFINED-BENEFIT PENSIONS OF MR. OKRIE AND SIMILARLY SITUATED RETIRED MICHIGAN STATE AND PUBLIC SCHOOL EMPLOYEES, WHO WERE BORN AFTER 1945 AND WHO RETIRED BEFORE 2011 P.A. 38 WENT INTO EFFECT ON JANUARY 1, 2012, VIOLATES THE RETROACTIVITY PRINCIPLES STATED IN *LANDGRAF*.

A. Retroactive Legislation is Disfavored

As a general rule, there is a presumption against retroactive legislation. *Eastern Enterprises v Apfel,* 524 U.S. 498, 532-34 (1998) ("Retroactivity is generally disfavored in the law . . .); see also *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation . . . can deprive citizens of legitimate expectations."). Specifically, statutes may not be applied retroactively if they abrogate or impair vested rights. *Landgraf*, 511 U.S. at 268-270, 280. In *Landgraf*,

this Court observed that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id*. at 265. This Court further stated that there is a presumption against retroactivity because prospectivity "accords with widely held intuitions about how statutes ordinarily operate" and "will generally coincide with legislative and public expectations." *Id*. at 272.

As this Court has noted, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id*. at 268. Specifically, this Court observed:

> A statute does not apply "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges have "sound . . . instinct[s] . . . and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." [*Id*. at 269-270 (internal citations omitted)].

Thus, in analyzing retroactivity issues, this Court established the following framework:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains

> no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. [*Id*. at 280].[2]

B. The Factors for Determining Retroactivity

Under this Court's retroactivity jurisprudence, a two-step procedure is thus employed in deciding whether civil legislation should be given retroactive effect. The first step is whether there is clear legislative intent expressly providing for retroactive effect. To apply a statute retroactively, clear legislative intent must exist in favor of retroactive application. Thus, without clear legislative intent, a law is presumed to apply prospectively only. See *Landgraf*, 511 U.S. at 270 (citing *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806)).

But even if the legislature has not "expressly prescribed the statute's proper reach," the law may not be given retroactive effect if it violates one of the "antiretroactivity principle[s that] find expression in several provisions of our Constitution." *Landgraf*, 511 U.S. at 266, 280. This second step considers three different factors. The first factor is whether the legislation is subject to constraint under the Contracts Clause, U.S. Const., art. I, § 10, cl. 1) ("No State shall . . . pass

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[2] See also *Martin v. Hadix*, 527 U.S. 343, 352 (1999) ("If there is no directive on the temporal reach of a statute, we determine whether the application of the statute to the conduct at issue would result in retroactive effect. If so, then in keeping with our 'traditional presumption' against retroactivity, we presume that the statute does not apply to that conduct.").

any . . . law impairing the Obligation of Contracts . . .”). See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (holding that the Contracts Clause prevents the retroactive alteration of contract with state bondholders).

The second factor is whether the legislation is constrained by the Takings Clause, U.S. Const. amend. V and amend. XIV (stating that private property shall not “be taken for public use, without just compensation”). See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (holding that if a regulation goes too far it will be recognized as a taking for which compensation must be paid). In *Landgraf,* this Court noted that “new provisions affecting contractual or property rights are matters in which predictability and stability are of prime importance,” *id.* at 271, and that the Contracts Clause “prohibits states from passing . . . retroactive . . . laws ‘impairing the Obligation of Contracts.’” *Ibid.* at 266.

The third factor is whether retroactive application would violate “elementary considerations of fairness” under the Due Process Clauses, U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law. . . “) and amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”). See, e.g., *United States Trust Co.*, 431 U.S. at 1, n. 13 (“The Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly ‘harsh and oppressive.’”) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)). From the beginning of this Court’s retroactivity jurisprudence, various forms of fundamental fairness have been recognized in determining whether the

legislation would impair vested rights or settled expectations. See *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch), 103, 110 (1801) (stating that courts should "struggle hard against a construction which will, by retroactive operation, affect the rights of parties"); *Heth*, 7 U.S. (3 Cranch) at 399 (noting a variety of fairness considerations against retroactive application, including "reasonable expectation" and "vindicat[ing] the justice of the government by restricting the words of the law to a future operation" (Johnson, J. at 408); refusing to "deprive an officer of a compensation previously allowed by law" (Washington, J. at 412); avoiding a construction that would "alter the preexisting situation of parties or will affect or interfere with their antecedent rights, services, and remuneration" (Paterson, J. at 413); or declining to "divest vested rights of the collector" (Cushing, J. at 414).

C. Under *Landgraf,* 2011 P.A. 38 Cannot Be Retroactively Applied to Mr. Okrie, *et a*l.

In this case, the Michigan Legislature did not "expressly prescribe[]" the proper reach of 2011 P.A. 38, as stated in Mich. Com. Law 206.30(9). *Landgraf*, 511 U.S. at 280. Specifically, the language of 2011 P.A. 38 falls far short of demonstrating a clear intent by the Michigan Legislature favoring the retroactive elimination of tax exemptions for the defined-benefit pensions of Mr. Okrie, *et al*., without the payment of comparable financial benefits that were equal to, or greater than, the deferred compensation that they earned for their years of governmental service in the form of tax-exempt pensions, as stated in the formal opinion issued by the State Attorney General in 1991. Accordingly, "[this Court] must determine

whether application of this [statute] in this case would have retroactive effects inconsistent with the usual rule that legislation is deemed to be prospective." *Martin v. Hadix*, 527 U.S. 343, 357 (1999). As this Court noted in *Hadix*:

> The inquiry into whether a statute operates retroactively demands a common sense, functional judgment about "whether the new provision attaches new legal consequences to events completed before its enactment." [*Landgraf*] at 270. This judgment should be informed and guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Ibid.*

Applying these principles, 2011 P.A. 38 cannot operate retroactively against Mr. Okrie *et al.* because it "attaches new legal consequences to events [i.e., their irrevocable retirement decisions] completed before its enactment." *Landgraf,* 511 U.S. at 270. Here, the retroactive application of 2011 P.A. 38 abrogates or impairs vested rights of Mr. Okrie, *et al.* to defined-benefit pensions exempt from state or local taxation, which Mr. Okrie *et al.* possessed when they made their irrevocable decisions to retire based upon the statute in effect at the time of their retirement – Mich. Com. Law 206.30, 300 P.A. 1980, as amended. *Id.* at 268-270, 280. See also *Mississippi ex. rel. Robertson v. Miller*, 276 U.S. 174, 178-79 (1928) (recognizing that public employees have a constitutionally protected contractual right to compensation that has been earned through services rendered). Thus, 2011 P.A. 38 cannot be applied retroactively because the law governing this case is what was in effect at the time Mr. Okrie, *et al.* made their irrevocable decisions to retire.

In this regard, Mr. Okrie *et al.* adopts the position that the State of Michigan maintained throughout the *Davis* litigation, as well as the State Attorney General's

formal opinion in 1991 with respect to the elimination of the tax exemptions for the pensions of retired state and public school employees. Specifically, in the *Davis* litigation, the State maintained that the tax exemptions constituted deferred compensation that retired state employees earned for their years of governmental service, *Davis*, 489 U.S. at 816, constituting an "integral part of retirement benefits conferred upon state employees" after vesting in the state pension plan. *Davis*, 408 N.W.2d at 436. Further, as this Court noted, the tax exemptions were given in lieu of "increased salaries or benefit payments." *Davis*, 489 U.S. at 815 n.4. Consequently, upon remand from this Court in *Davis*, the Court of Appeals of Michigan agreed with the State of Michigan's position in extending the tax exemptions to retired federal employees because retired state employees had "reliance interests" in maintaining the tax exemptions. *Davis*, 446 N.W.2d at 533. Thereafter, the State Attorney General recognized that if the State eliminated the tax exemptions, then it must "provide[] alternative benefits in their place that are equal to or greater than the pension benefit[s] that would be limited or withdrawn." 1991 OAG No. 6697, 1991 Mich. AG LEXIS at p. 9.

Unquestionably, the retroactive application of 2011 P.A. 38 upsets Mr. Okrie *et al.'s* "reliance interests" and "settled expectations" that their defined-benefit pensions were not subject to state or local taxation after they retired based upon the law in effect at the time of their retirement. As the Court of Appeals of Michigan acknowledged:

> [The Retirement Guidelines'] booklets also explicitly state that "the plan is controlled by Michigan Public School Employees Retirement Act (Public Act 300 of 1980, as amended)" and that "[i]f the provisions of the Act conflict with this summary, the Act controls." While the booklets did not explicitly inform [Mr. Okrie] that their provisions were subject to change, they did explicitly inform [Mr. Okrie] that his retirement plan was governed by a statute. [App. 12a-13a](emphasis in original)

Yet, as the Court of Appeals of Michigan conceded, Mr. Okrie *et al.* were *never* informed at the time of retirement that their defined-benefit pensions were subject to taxation after they made their irrevocable retirement decisions based upon the statute in effect at time. Consequently, without being provided with "fair notice" at the time of retirement that the tax-exemptions for their defined-benefit pensions were subject to taxation after they retired, Mr. Okrie *et al.* were not given "an opportunity to know what the law is and to conform their conduct accordingly," when they made their irrevocable retirement decisions and calculated their total retirement benefits. *Landgraf,* 511 U.S. at 265. The retroactive application of 2011 P.A. 38 thus defeated the ability of Mr. Okrie, *et al.* to guide their behavior in accordance with the governing law as it stood at the time of their irrevocable retirement decisions. Accordingly, the governing law in this matter is Mich. Com. Law 206.30, 300 P.A. 1980, as amended, which was the statute in effect at time Mr. Okrie, *et al.* made their irrevocable retirement decisions providing that their defined-benefit pensions were exempt from state and local taxation.

In addition, as Mr. Okrie *et al.* has argued in the Michigan courts, the retroactive application of 2011 P.A. 38 violates the Federal Contracts Clause, U.S. Const., art. I, § 10, under *United States Trust Co.,* 431 U.S. at 1. In this respect,

Mr. Okrie, *et al.* has relied upon *Indiana ex. rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), where this Court held:

> The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy. Nevertheless, it is established that a legislative enactment may contain provisions, when accepted as the basis of actions by individuals, become contracts between them and the State or its subdivisions within the protection of Art. I, § 10.

In *Brand*, this Court found that there was a legislative impairment of a teacher's tenure rights where tenured teachers had a contractual right to their positions for an "indefinite period." *Id.* at 102, 104. As in *Brand*, the "legislative enactment" exempting defined-benefit pensions of retired state and public school employees from state and local taxation *was* "accepted as the basis of actions" by Mr. Okrie, *et al.* in making their irrevocable retirement decisions and calculating their total retirement benefits, and thus became "contracts between them and the State or its subdivisions within the protection of Art. I, § 10." [3]

In this case, the Court of Appeals of Michigan simply ignored this Court's decision in *Brand*. Instead, the Court of Appeals of Michigan, relying upon the Supreme Court of Michigan's decision in *Studier v. Mich. Pub. Sch. Employees' Retirement Bd.*, 472 Mich. 642; 698 N.W.2d 350 (2005), held that the Michigan Legislature never intended to create contractual rights to tax-exempt pensions.

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[3] See also *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (plurality decision standing for the proposition that the government will be liable for contract damages if, as a result of a subsequent change in the tax law, the United States denies a contractor the benefit of an earlier bargain).

(App.9a-12a). The Court of Appeals of Michigan's decision, however, directly conflicts with this Court's decision in *Brand*. Pursuant to the Supremacy Clause, U.S. Const., Art. VI, clause 2, *Brand* is controlling authority because the legislative provision stating that their defined-benefit pensions were exempt from state and local taxation was accepted as "the basis of actions" by Mr. Okrie *et al.* when making their irrevocable retirement decisions and in calculating their total retirement benefits. *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990) (holding that the Supremacy Clause empowers federal courts to compel states to fulfill their constitutional obligations). As a result, the Court of Appeals of Michigan's decision violates the Federal constitutional rights of possibly hundreds of thousands of retired state and public school employees who were born after 1945 and who retired before January 1, 2012.

Mr. Okrie *et al*. have specifically shown that the retroactive application of 2011 P.A. 38 impairs contractual obligations in violation of the Federal Contracts Clause. To establish a Contracts Clause violation against a state under the U.S. Constitution, it is necessary to show three elements: (1) a contractual relationship; (2) the change in the state's law has resulted in a "substantial impairment of a contractual relationship; and (3) the impairment is justified as "reasonable and necessary to service an important public purpose." *United States Trust Co*., 432 U.S. at 25; *Energy Reserves Group v. Kansas Power & Light Co*., 459 U.S. 400, 410-413 (1983); *Romein*, 503 U.S. at 186.

"The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves Group*, 459 U.S. at 411, quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). In deciding whether an impairment is substantial, contracts are examined to determine whether the plaintiff had "reasonably relied" upon the abridged right, which "substantially induced" the plaintiff to "enter into the contract. *Id.* at 246. An impairment may be substantial if the "Legislation [] deprives one of the benefit of a contract," and thus "necessarily impairs the obligation of the contract." *Northern Pac. Py. Co. v. State of Minnesota*, 208 U.S. 583, 591 (1908).

In determining whether the substantial impairment was reasonable and necessary to serve an important public purpose, *United States Trust* found that the state must establish that (1) no less drastic modification could have been implemented to accomplish the state's goal and (2) the state could not have achieved its public policy objective without the modification. 431 U.S. at 29-30. However, *United States Trust* made it crystal clear that a state's impairment of its contracts was subject to heightened scrutiny and afforded little deference because a state's own financial interest was at stake. *Id.* at 25-26, 29.

Applying these principles, this Court found substantial impairments of public contracts in violation of the Federal Contracts Clause in *United States Trust* and *Allied Structural Steel*. Specifically, in *Allied Structural Steel*, this Court held that the Contracts Clause prevented the State of Minnesota from retroactively modifying

the pension law because it severely impaired established contractual relationships and because the State of Minnesota had not acted to address an important public problem, but had improperly provided a benefit to special interests.

The same is true in the present case because the retroactive application of 2011 P.A. 38 constitutes a substantial contractual impairment by taking away the deferred compensation earned by Mr. Okrie, *et al*. for their years of governmental service to the State of Michigan, or one of its political subdivisions. Further, the State of Michigan's purported justification for the impairment of the contracts was neither reasonable nor necessary to serve an important public purpose. Instead of fairly administering the financial affairs of the State of Michigan, the Michigan Legislature specifically targeted, in age-discriminatory fashion, the class of retired state and public school employees who were born after 1945, taking away their deferred compensation earned in the form of tax-exempt pensions after making irrevocable retirement decisions. See *United States Dep't. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (noting that "animus is not a legitimate state interest" and that "a bare desire to harm a politically unpopular group cannot constitute a legitimate government interest"); *United States v. Carolene Prods. Corp*., 304 U.S. 144, 152 n.4 (1938) (observing that "prejudice against discrete and insular minorities may be a special condition . . . which may call for correspondingly more searching judicial inquiry").

The retroactive application of 2011 P.A. 38 also violates the Takings Clause, U.S. Const. amend. V and amend. XIV. As explained by Justice Brandeis in *Lynch v. United States*, 292 U.S. 571, 579 (1934), "valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States," and thus are protected by the Fifth and Fourteenth Amendments. Here, the retroactive application of 2011 P.A. 38 constitutes a "takings" because the Act, "without just compensation," deprives Mr. Okrie, *et al.* of "an integral part of their retirement benefits," *Davis*, 408 N.W. at 436, which they had earned as deferred compensation in exchange for their years of governmental service to the State, or one of its political subdivisions, after vesting in one of the State's public pension plans.

Finally, the retroactive application of 2011 P.A. 38 violates "elementary considerations of fairness" under the Due Process Clauses, U.S. Const. amend. V and amend. XIV, § 1. *Heth*, in particular, fully supports Mr. Okrie, *et al.* in this matter. 7 U.S. (3 Cranch) at 399. Specifically, *Heth* involved an amendment to a federal statute that decreased the commission received by customs collectors from three per cent to two and one-half percent of the duties collected on "goods, wares, and merchandise, imported into the United States, and on the tonnage of ships and vessels." The amended statute took effect on June 30, 1800. Before that time, the collector of the customs for the district of Petersburgh, Virginia, had secured duties by bonds. As a result, the customs collector claimed that he was entitled to retain three per cent of the bonds for the duties taken before the effective date of the

amendment. In *Heth*, this Court held for the customs collector, finding that the reduction in the commission percentage did not apply to the monies due by bond. In reaching this conclusion, the justices all confirmed that fairness is the primary motivating factor supporting the presumption against retroactivity and refusing to deprive the officer of his earned compensation previously allowed by law. *Heth*, 7 U.S. (3 Cranch) at 408, 412-414.

As in *Heth*, this Court should not permit the State of Michigan to strip Mr. Okrie, *el al*. of their earned compensation that was deferred in the form of tax-exempt pensions, or their financial equivalents, which was previously allowed by the statute that was the governing law in effect at the time of their irrevocable retirement decisions. Accordingly, based upon the foregoing, the retroactive application of Michigan's 2011 P.A. 38 eliminating the tax-exemptions for the defined-benefit pensions of Mr. Okrie, *et al.* violates the retroactivity principles stated in *Landgraf*.

II. THE RETROACTIVE APPLICATION OF 2011 P.A. 38 AND THE RELATED LEGISLATION, SPECIFICALLY MICH. COM. LAW 206.30(9) ELIMINATING THE TAX EXEMPTIONS FOR THE DEFINED-BENEFIT PENSIONS OF MR. OKRIE AND SIMILARLY SITUATED RETIRED MICHIGAN STATE AND PUBLIC SCHOOL EMPLOYEES, WHO WERE BORN AFTER 1945 AND WHO RETIRED BEFORE 2011 P.A. 38 WENT INTO EFFECT ON JANUARY 1, 2012, VIOLATES THE PRINCIPLES UNDERLYING THE RULE OF LAW.

A. Under Raz's Morally Neutral, Instrumental Theory of the Rule of Law, All Laws Should Be Prospective, Open and Clear in Guiding the Behavior of Ordinary Citizens.

In his essay, "*The Rule of Law and its Virtue*," Professor Joseph Raz sets forth the principles underlying the idea of the rule of law.[4] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd ed., Oxford, 2009), pp. 210-229. Under Raz's morally neutral instrumental conception of the law, the rule of law embraces the basic notion that the relationship between the individual and the state is governed by law, and that the primary function of law is the guide the conduct of ordinary citizens. In Raz's formulation, "the literal sense of 'the rule of law' . . . has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it." *Id*. at 212 (footnote omitted). Thus, for Raz, "if the law is to be *obeyed it must be capable of guiding the behavior of its subjects*. It must be such that they can find out what it is and act on it." *Id*. at 214 (emphasis in original).

Given this conception of the rule of law, Raz derives a number of important basic principles, several of which are particularly relevant to the case at hand. Specifically, "(1) All laws should be prospective, open and clear." *Id*. As Raz explains: "One cannot be guided by retroactive law." *Id*. Essentially, a law is retroactive if it alters the legal status of acts that were performed before it came into existence. Further, "(2) Laws should be relatively stable." *Id*. Specifically, Raz states:

> They should not be changed too often. If they are frequently changed people will find it difficult to find out what the law is at any given moment and will

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[4] See also Lon Fuller, *The Morality of Law* (2nd ed., Yale , 1969), especially chapter two; H.L.A. Hart, *The Concept of Law* (Oxford, 1961).

> be constantly in fear that the law has changed since they last learnt what it was. But more important still is the fact that people need to know the law not only for short-term decisions (where to park one's car, how much alcohol is allowed duty free, etc.) *but also for long-term planning*. Knowledge of at least the general outlines and sometimes even of details of tax law and company law are often important for business plans which will bear fruit only years later. *Stability is essential if people are to be guided by law in their long-term decisions*. (*Id.* at 214-215 (emphases added)).

As Raz points out, "[t]he rule of law is often rightly contrasted with arbitrary power." *Id.* at 219. According to Raz, "[a] government subjected to the rule of law is prevented from changing the law retroactively or abruptly or secretly whenever this suits its purposes." *Id.* Ultimately, while "the rule of law does help to curb such forms of arbitrary power," Raz states "there are more reasons for valuing the rule of law." *Id*. at 220. Specifically, "[w]e value the ability to choose styles and forms of life, to fix long-term goals and effectively direct one's life towards them," such that "the law itself [is] a stable and safe basis for individual planning." *Id.*

B. The Retroactive Application of 2011 P.A. 38 to Mr. Okrie, *et al.* Violates the Principles Underlying the Rule of Law

In this case, the retroactive application of 2011 P.A. 38 impinges upon the rule of law because it impacts the results of Mr. Okrie, *et al.*'s irrevocable retirement decisions when calculating their retirement benefits based upon the law in effect at the time. Simply put, applying 2011 P.A. 38 retroactively compromises the fundamental end of the law in guiding the behavior of those subject to the law. Because 2011 P.A. 38, and specifically Mich. Com. Law 206.30(9), could not have guided the irrevocable retirement decisions of Mr. Okrie, *et al.*, it may only be

applied prospectively to state and public school employees who retired after the effective date of its enactment.

CONCLUSION

Based upon the foregoing arguments, Michigan's 2011 P.A. 38 and related legislation, specifically Mich. Com Law 206.30(9) eliminating the tax exemptions for the defined-benefit pensions of Petitioners Thomas R. Okrie and similarly situated retired Michigan state and public school employees, who were born after 1945 and who retired before 2011 P.A. 38 went into effect on January 1, 2012, cannot be applied to them retroactively, pursuant to the retroactivity principles stated in *Landgraf* and the principles underlying the rule of law. Thus, Mr. Okrie *et al.* request that the Supreme Court grant review of this matter and issue a writ of certiorari.

Respectfully Submitted,

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