No. 09-233

In the Supreme Court of the United States

TRIPLE-S MANAGEMENT CORPORATION, ET AL., PETITIONERS

v.

MUNICIPAL REVENUE COLLECTION CENTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. 1258 to review a decision of the Puerto Rico Court of Appeals that the Supreme Court of Puerto Rico declined to review.

2. Whether respondent violated the Due Process Clause by retroactively revoking a property-tax exemption that it had recognized in administrative letter rulings issued to petitioners.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulation:

Statutes and regulations—Continued: Page

Miscellaneous—Continued: Page

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Petitioner Triple-S Salud, Inc. (Triple-S) was organized in Puerto Rico in 1959 as a for-profit health insurer. Pet. App. 48-49. It sought a statutory income-tax exemption applicable to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." P.R. Laws Ann. tit. 13, § 3101(8) (1976) (repealed 1994); see Pet. App. 49. In 1979, the Puerto Rico Department of Treasury (Treasury) issued a letter ruling declaring that Triple-S would be entitled to that exemption if it agreed to operate as a

nonprofit organization and treat its income accordingly. *Id*. at 50, 139-140.

In 1987, Treasury issued another letter ruling, this time declaring that Triple-S was also exempt from personal and real property tax. Pet. App. 143. At the time, the governing statute exempted from taxation "[p]ersonal and real property belonging to any nonprofit association organized under the laws of Puerto Rico with the object of selling promoted programs or plans of medical and hospital services." P.R. Laws Ann. tit. 13, § 551(t) (Supp. 1987) (repealed 1991). Treasury stated that the exemption was granted "under the same conditions imposed in the prior administrative determinations." Pet. App. 143-144.

In 1991, the Puerto Rico legislature transferred the administration of property taxes to respondent, a newly created agency. Pet. App. 18-19. It also amended the property-tax scheme. *Id*. at 19. The current statute exempts from real and personal property taxation property owned by a "nonprofit association organized under the laws of Puerto Rico for the purpose of selling prepaid programs or plans for medical and hospital services." P.R. Laws Ann. tit. 21, § 5151(g) (Supp. 2008).

In 1998, Treasury again affirmed Triple-S's income-tax exemption. Pet App. 151. Respondent similarly reaffirmed Triple-S's property-tax exemption. *Id.* at 163.

On July 31, 2003, however, Treasury revoked Triple-S's income-tax exemption, effective January 1, 2003, based on a "new public policy" of construing the relevant Puerto Rico statute to confer exempt status only on "entities organized for non-profit purposes." Pet. App. 175. The same day, Treasury and Triple-S executed an agreement under which Triple-S accepted the revocation of its tax exemption and agreed to pay income tax on its

earnings for the entire taxable year 2003. *Id.* at 170, 172. In addition, Triple-S's parent agreed to pay income tax on an imputed dividend, treated as paid by Triple-S on December 31, 2002, of earnings and profits accumulated between July 1, 1979, and December 31, 2002. *Id.* at 171. The agreement was silent as to property taxes.

On February 1, 2006, respondent revoked Triple-S's property-tax exemption. Pet. App. 177-178. It explained that "the 1987 administrative determination by the Treasury Department and the 1998 determination of [respondent] to grant [a property-tax] exemption to Triple-S * * * were erroneous and did not generate any right in its favor." *Id.* at 178-179. Accordingly, respondent revoked the exemption, effective as of the date of respondent's creation in 1991. *Id.* at 178. Respondent demanded payment of approximately $4 million in personal property taxes and $1.3 million in real property taxes. *Id.* at 46, 52, 74.

2. In separate actions brought in the Court of First Instance in San Juan, Triple-S challenged the retroactive revocation of its real and personal property-tax exemptions. The Court of First Instance entered summary judgment for respondent in both cases. Pet. App. 46-67, 70-88.

The Court of First Instance concluded that the initial recognition of Triple-S's tax exemption had been granted "in total contravention of the clear language of the law" and was therefore *ultra vires*. Pet. App. 65. Accordingly, the court determined that respondent did "not have to honor the previous determinations of the Department of the Treasury" and could give retroactive effect to the revocation of those determinations. *Id.* at 65-66. The court also held that the imposition of retroactive liability was consistent with the applicable stat-

utes of limitations. With respect to personal property taxes, the court agreed with respondent that the four-year statute of limitations governing tax deficiencies did not apply to the tax at issue, which was not based on "a determination of deficiency detected after an audit." *Id.* at 87; see P.R. Laws Ann. tit. 21, § 5218 (2005). With respect to real property taxes, Triple-S had requested discovery to establish a statute-of-limitations defense, Pet. App. 15, but the court rejected that request, holding that there was "no real controversy over the essential facts," *id.* at 55.

3. In consolidated appeals, the Court of Appeals for the San Juan Region affirmed. Pet. App. 1-42. The court stated that "[t]here is no doubt that the provisions pursuant to which Triple S was granted the tax exemptions from 1976 to 2003 did not allow the concession of such benefits to for-profit entities." *Id.* at 37. The property-tax exemption that had nevertheless been granted to Triple-S, the court concluded, therefore was an *ultra vires* act. *Id*. at 39. The court explained that, under Puerto Rico law, "*ultra vires* acts by public officials do not create rights, do not obligate the administrative organism, nor do they impede it from effectuating a correction." *Ibid*. The court noted that respondent had a statutory obligation to appraise and add property to the tax rolls upon becoming aware of its omission, and it reasoned that, "[f]aced with the clarity and lack of ambiguity of this provision," respondent had a duty to collect Triple-S's unpaid property taxes. *Id*. at 40.

The court of appeals further held that respondent's collection of personal property taxes from Triple-S was not barred by the four-year statute of limitations contained in P.R. Laws Ann. tit. 21, § 5218 (2005). In the court's view, that provision did not apply because re-

spondent had made no "revision" of the tax forms filed by Triple-S, but had merely "demanded" payment of taxes that Triple-S had reported but had not paid (because of its tax-exempt status). Pet. App. 41. The court concluded that respondent was entitled to summary judgment on the limitations issue because the relevant documents "did not raise any legitimate controversy of material and essential facts." *Ibid*.

4. The Supreme Court of Puerto Rico denied certiorari. Pet. App. 89-92. That court subsequently denied two motions filed by respondent seeking reconsideration of the denial of certiorari. *Id.* at 93-100.

DISCUSSION

This Court lacks jurisdiction over the petition because the highest court to consider the merits of petitioners' claims was the Puerto Rico Court of Appeals, and no statute authorizes this Court to review the decisions of that court. Under 28 U.S.C. 1258—the jurisdictional provision on which petitioners rely—this Court may review only the judgments of the Supreme Court of Puerto Rico. That court, however, declined to hear this case. At a minimum, the procedural history of the case raises a serious question as to this Court's jurisdiction, making the case a poor vehicle for considering the due process issues petitioners seek to raise.

In any event, petitioners have raised no issue warranting this Court's review. The Due Process Clause does not prevent an agency from correcting an error in its interpretation of the law simply because doing so will disadvantage parties that relied on the error. Petitioners contend that respondent's revocation of their tax exemption violated the Due Process Clause because that agency action contradicted a letter ruling on which

petitioners had relied. That letter ruling, however, expressly provided that it could be revoked in respondent's discretion. Petitioners also argue that respondent reached too far back into the past in imposing tax liability on them. The Puerto Rico courts determined, however, that respondent's demand for back taxes was made within the applicable limitations period. The lower courts' interpretation of the local statute of limitations may have been mistaken, but any such error was one of Puerto Rico law, and petitioners identify no basis for treating it as an error of constitutional dimension.

A. This Court Lacks Jurisdiction

Petitioners have invoked (Pet. 1) this Court's jurisdiction under 28 U.S.C. 1258, which states that "[f]inal judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari" where the petitioner asserts a claim under federal law. Although the petition purports to seek "a writ of certiorari to review the judgment of the Supreme Court of Puerto Rico" (Pet. 1), the Supreme Court of Puerto Rico did not exercise jurisdiction over this case; it merely denied certiorari. Pet. App. 89-92; see P.R. Laws Ann. tit. 4, § 24s(d) (Supp. 2008) (specifying that writs of certiorari are "to be issued discretionally" by the Supreme Court of Puerto Rico). What petitioners are actually asking this Court to review is the decision of the Puerto Rico Court of Appeals, and Section 1258 does not authorize such review.

In that respect, Section 1258 is different from 28 U.S.C. 1257(a), which governs this Court's review of state-court judgments. Under Section 1257(a), this Court's jurisdiction is not limited to review of rulings is-

sued by state supreme courts. Rather, that statute authorizes certiorari review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had."

When a state supreme court denies discretionary review, the highest state court "in which a decision could be had" is the highest court to exercise jurisdiction—usually an intermediate appellate court. In such a case, the writ of certiorari is directed to the intermediate court. Eugene Gressman et al., *Supreme Court Practice* § 3.14, at 180 (9th ed. 2007) (Gressman) ("An order of a court of last resort declining to review a case is not ordinarily the judgment that is reviewable under §1257(a); in that event, the reviewable judgment is that of the highest court possessing and exercising jurisdiction."); see *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 159-160 (1954); *American Ry. Express Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923). Because Section 1258 does not similarly refer to the highest Puerto Rico court "in which a decision could be had," the decision of the Puerto Rico Court of Appeals is not reviewable here.

That reading is confirmed by the course of events preceding Section 1258's enactment in 1961. Before Section 1258 was enacted, the First Circuit had jurisdiction over appeals from certain "final decisions of the supreme court[] of Puerto Rico." 28 U.S.C. 1293 (1958). In construing former Section 1293, the First Circuit emphasized the distinction between its language and that of Section 1257. *International Basic Econ. Corp.* v. *Blanco Lugo*, 267 F.2d 263, 264 (1959) (per curiam). The First Circuit acknowledged that the Puerto Rico Supreme Court's denial of discretionary review "is a 'final

decision,' appealable to this court," but it went on to observe that "since the review sought in the Supreme Court of Puerto Rico was available only in its discretion, that court's action in denying the petition could be set aside by us only upon a finding of abuse of discretion." *Id.* at 265.

When it enacted Section 1258 two years later, Congress retained former Section 1293's reference to review of decisions of the Puerto Rico Supreme Court rather than adopting the broader language of Section 1257. In a letter to the House Judiciary Committee, then-Deputy Attorney General Byron White noted the difference between the provisions and suggested that "it might be advisable to consider amending the bill" that became Section 1258 to conform it to Section 1257 by "substitut[ing] the language 'highest court of the Commonwealth of Puerto Rico in which a decision could be had' for the words 'Supreme Court of the Commonwealth of Puerto Rico.'" H.R. Rep. No. 683, 87th Cong., 1st Sess. 4 (1961). No such amendment was made. Instead, while the House Committee stated that the bill would allow "final judgments or decrees of the Supreme Court of the Commonwealth of Puerto Rico [to] be reviewed by the Supreme Court * * * in the same way as judgments of the supreme or highest courts of the several States of the Union are now reviewed," it pointedly omitted any reference to inferior Puerto Rico courts. *Id.* at 2. That omission is particularly significant in light of the limited reading that the First Circuit had recently given Section 1258's statutory predecessor. Although the Committee did not explain its reasoning, it is hardly surprising that Congress would have chosen to provide for a more limited review of the decisions of courts "inheriting and brought up in a different system from that which pre-

vails here." *Diaz* v. *Gonzales*, 261 U.S. 102, 105-106 (1923) (Holmes, J.).[1]

Thus, the only question that petitioners could properly bring before this Court is whether the Puerto Rico Supreme Court abused its discretion—and in doing so somehow violated federal law—when it denied certiorari. Petitioners have not sought review of that question, however, and it would not warrant this Court's review in any event. This Court lacks jurisdiction to consider the questions petitioners have raised.[2]

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[1] Insofar as it authorizes this Court to review only those Puerto Rico cases in which the Supreme Court of Puerto Rico has actually ruled on the merits, Section 1258 is not unique. Under 28 U.S.C. 1259, this Court's certiorari jurisdiction extends to certain cases in which the Court of Appeals for the Armed Forces has reviewed the decision of an inferior military tribunal, but this Court "may not review by a writ of certiorari * * * any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review." 10 U.S.C. 867a(a); see Gressman § 2.14, at 128.

[2] In *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328 (1986), this Court concluded that it had jurisdiction to review a decision of the Puerto Rico Supreme Court dismissing an appeal for want of a substantial question. *Id.* at 338. The Court based that conclusion, however, on its determination that the Puerto Rico Supreme Court's dismissal of the appeal "constituted a decision on the merits." *Ibid.* In this case, by contrast, the Puerto Rico Supreme Court simply denied discretionary review. See *Sociedad Legal de Gananciales* v. *Pauneto Rivera*, 130 P.R. Dec. 749, 755 (1992), *translated in* 1992 WL 755587 (P.R.) (Puerto Rico Supreme Court explains that its "refusal to issue a writ of certiorari does not mean that the Court has assumed a position with regard to the merits of the cause").

B. The Due Process Clause Permits An Administrative Agency To Give Retroactive Effect To A Decision Correcting An Erroneous Interpretation Of The Law

Petitioner correctly acknowledges (Pet. 19) that the principles "that limit legislative retroactivity" do not "apply identically in the administrative context." Indeed, legislative, judicial, and administrative retroactivity each present different issues of statutory construction and constitutional law. As relevant here, however, petitioners have identified no authority for the proposition that the Due Process Clause prevents an agency from correcting an error in its interpretation of the law simply because doing so will disadvantage parties that have relied on the error.

1. This Court has observed that "statutory retroactivity has long been disfavored." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 268 (1994). For that reason, legislation generally is presumed to have only prospective effect unless Congress has clearly called for retroactive application. *Id.* at 272-273. At the same time, "the *constitutional* impediments to retroactive civil legislation are * * * modest." *Id.* at 272. If Congress clearly states its intention that a new statute will apply to past events, such retroactive application does not offend the Due Process Clause as long as it "is supported by a legitimate legislative purpose furthered by rational means," *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984), even if the new legislation imposes "liability [that] * * * was not anticipated" or "upsets otherwise settled expectations," *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

2. Retroactive judicial decisionmaking is subject to even fewer constitutional constraints. The general rule in civil litigation is that, when a court "applies a rule of

federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule." *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). That approach reflects the principle that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994); see *Harper*, 509 U.S. at 107 (Scalia, J., concurring) (noting that the "original and enduring American perception of the judicial role sprang * * * from the jurisprudence of Blackstone, which viewed retroactivity as an inherent characteristic of the judicial power, a power 'not delegated to pronounce a new law, but to maintain and expound the old one'") (quoting 1 William Blackstone, *Commentaries* *69).

3. Administrative agencies perform both quasi-legislative and quasi-judicial functions. Agency rulemaking resembles legislation in that it establishes new rules of conduct, while agency adjudication resembles judicial decisionmaking insofar as it interprets existing statutes and rules. The proper analysis of agency action with retroactive effects depends on the precise nature of the action at issue.

Given the diversity of agencies and agency actions, this Court has refrained from prescribing a general rule governing administrative retroactivity. At one end of the spectrum, "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in ex-

press terms." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). By contrast, when agencies interpret statutes or rules in adjudicatory proceedings, they generally may apply their new interpretations to the parties to the adjudication, even though doing so gives those interpretations retroactive effect. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203-204 (1947).

When an agency corrects a mistaken interpretation of the governing statute, its action closely resembles a judicial interpretation. See *Manhattan Gen. Equip. Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936) (an agency's correction of a mistake of law "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case at hand"). The Due Process Clause does not preclude agencies from applying such a correction to parties who acted before the correction was announced. This Court has long held, for example, that the Commissioner of Internal Revenue "is empowered retroactively to correct mistakes of law in the application of the tax laws to particular transactions," and that the Commissioner "may do so even where a taxpayer may have relied to his detriment on the Commissioner's mistake." *Dixon* v. *United States*, 381 U.S. 68, 72-73 (1965); accord *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183-184 (1957); see *Commissioner* v. *Miller*, 914 F.2d 586, 591-592 (4th Cir. 1990); *Becker* v. *Commissioner*, 751 F.2d 146, 150 (3d Cir. 1984); *Wisconsin Nipple & Fabricating Corp.* v. *Commissioner*, 581 F.2d 1235, 1239 (7th Cir. 1978); *Etter Grain Co.* v. *United States*, 462 F.2d 259, 265 (5th Cir. 1972). Like judicial interpretation, an administrative correction of such a mistake does not *change* the applicable law, but rather gives effect to the law as it existed when the relevant transaction (or other regulated conduct) occurred.

C. Petitioners' Due Process Challenges To The Agency Interpretation At Issue Here Do Not Warrant This Court's Review

Because it involved only the correction of a mistaken interpretation of the governing Puerto Rico statute, respondent's action in this case did not violate the Due Process Clause. Respondent retroactively revoked Triple-S's tax-exempt status on the ground that "the 1987 administrative determination by the Treasury Department and the 1998 determination of [respondent] to grant [a property tax] exemption to Triple-S * * * were erroneous." Pet. App. 178-179. Respondent explained that Triple-S, being a for-profit corporation, could not have been entitled to statutory exemptions for "nonprofit" entities. *Id.* at 178. The Puerto Rico Court of Appeals agreed, holding that the property-tax exemptions granted to Triple-S were "in clear conflict with" the statute and were "no doubt" based on a mistake of law. *Id.* at 37.

Petitioners do not appear to dispute the Puerto Rico courts' conclusion that the grant of tax exemptions to Triple-S was erroneous. In particular, petitioners make no effort to explain how Triple-S could have qualified for the exemptions under the plain language of the applicable Puerto Rico statute. Respondent's effort to collect back taxes for the years 1991-2006 thus does not represent an attempt to *change* the law retroactively; respondent simply sought to enforce the Puerto Rico tax laws as they existed during the years in question.

Rather than contending that Triple-S was actually entitled to tax-exempt status under the law in effect from 1991 to 2006, petitioners base their due process claim on two arguments. First, they assert (Pet. 24-30) that Treasury's prior letter rulings contained binding

assurances that any change in Triple-S's tax-exempt status would not be given retroactive effect. Second, they argue (Pet. 30-32) that, even if *some* retroactive application of respondent's new legal understanding is permissible, respondent's attempt to collect 15 years of back taxes is unconstitutionally harsh and oppressive. Neither contention warrants this Court's review.

1. Petitioners were on notice that Treasury's letter rulings were subject to retroactive revocation

Petitioners correctly observe (Pet. 22-23) that the authority of respondent and the Puerto Rico Treasury to issue letter rulings is similar to that of the federal Commissioner of Internal Revenue. Petitioners misunderstand the effect of such rulings, however. When the Commissioner determines that a prior ruling was erroneous and therefore decides to revoke it, his usual practice is to give the revocation solely prospective effect. That approach encourages taxpayers to seek and rely upon agency letter rulings. The governing statutes and regulations make clear, however, that such rulings are not categorical promises and that the agency retains the authority, when appropriate, to adopt a new interpretation and to apply it retroactively. The exercise of that authority is subject to review for abuse of discretion, but it raises no constitutional concerns.

a. A letter ruling issued by the IRS is "a written statement issued to a taxpayer * * * which interprets and applies the tax laws to a specific set of facts." 26 C.F.R. 601.201(a)(2); accord Rev. Proc. 2010-1, § 2.01, 2010-1 I.R.B. 1, 6. Letter rulings are issued for the benefit of taxpayers seeking to engage in transactions whose tax consequences are not clear from other published guidance. The Commissioner formally announced

the letter-ruling program in 1953. See Rev. Rul. 10, 1953-1 C.B. 488. Before then, the only way for taxpayers to obtain advance rulings was to ask the IRS to enter into a formal "closing agreement," a cumbersome process for both sides. See Mortimer M. Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, N.Y.U. 20th Inst. on Fed. Tax. 1, 4-5 (1962). Closing agreements are binding on the Commissioner absent "fraud or malfeasance, or misrepresentation of a material fact." 26 U.S.C. 7121(b); Rev. Proc. 2010-1, § 2.02, 2010-1 I.R.B. at 7.

Letter rulings are not similarly binding. Under 26 U.S.C. 7805(b)(8), "[t]he Secretary may prescribe the extent, if any, to which any ruling * * * shall be applied without retroactive effect." Treasury regulations provide that a letter ruling, "except to the extent incorporated in a closing agreement, may be revoked or modified at any time in the wise administration of the taxing statutes." 26 C.F.R. 601.201(l)(1). Under that approach, any "revocation or modification applies to all open years under the statutes, unless the Commissioner or his delegate exercises the discretionary authority under section 7805(b) of the Code to limit the retroactive effect of the revocation or modification." *Ibid.*

When the Commissioner seeks to correct a ruling that mistakenly interpreted the law, he is empowered to do so retroactively, even when the taxpayer relied on the Commissioner's mistake. *Dixon*, 381 U.S. at 72-73. Nevertheless, unless the taxpayer has omitted or misstated material facts, or the applicable law has changed, the Commissioner exercises that authority only in "unusual circumstances." 26 C.F.R. 601.201(l)(5); see 26 C.F.R. 601.201(n)(6)(i) (providing that changes to exempt status "will ordinarily take effect no later than the

time at which the organization received written notice that its exemption ruling [or] determination letter might be revoked or modified"); accord Rev. Proc. 2010-9, § 12.01, 2010-2 I.R.B. 258, 267.

Although the Commissioner's policy is intended to encourage reliance on letter rulings, apart from the stated conditions, the Commissioner maintains only that he "generally" or "ordinarily" will not revoke letter rulings retroactively. Contrary to petitioners' suggestion (Pet. 23), the Commissioner retains the discretion to revoke letter rulings retroactively when he concludes that such action is warranted. Indeed, the law requires that the Commissioner consider retroactivity on a case-by-case basis. See *IBM* v. *United States*, 343 F.2d 914, 919-920 (Ct. Cl. 1965), cert. denied, 382 U.S. 1028 (1966). The Commissioner's discretion is essential to the letter-ruling program since it allows him to review complex issues of tax law and to provide guidance, within a short time frame, precisely because the positions set out in such guidance are not immutable. Letter rulings thus strike "a fair balance between the present need of taxpayers for advance, rapid, and reliable information in regard to future transactions and the need of the Service to limit both the possible loss to the revenue resulting from a mistake in interpretation and the difficulties that might result from a premature freezing of Service position." Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulation, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within*, 46 Duquesne L. Rev. 323, 346 (2008).

Courts review the retroactive revocation of letter rulings for abuse of discretion, in the same manner that they review other discretionary administrative actions. See *Automobile Club*, 353 U.S. at 184-185. To be sus-

tained, the Commissioner's decision to give a revocation retroactive effect "must be a rational one, supported by relevant considerations." *Chock Full O' Nuts Corp* v. *United States*, 453 F.2d 300, 302 (2d Cir. 1971) (quoting *IBM*, 343 F.2d at 920); see *Anderson, Clayton & Co.* v. *United States*, 562 F.2d 972, 981 (5th Cir. 1977) (summarizing circumstances where courts have declined to give a ruling or regulation retroactive effect), cert. denied, 436 U.S. 944 (1978).

b. Because of the Commissioner's general policy of not retroactively revoking rulings issued in error, the statutory requirement that the Commissioner exercise sound discretion in deciding issues of retroactivity, and (in particular) the Commissioner's inability to collect unpaid taxes beyond the statutory limitations period (see note 4, *infra*), it would be extraordinary for the Commissioner retroactively to revoke a taxpayer's tax exemption and then seek to recover taxes for the prior 15 years, as occurred in this case. But constitutionalizing those limits on the retroactive revocation of letter rulings would disrupt the fact-intensive analysis undertaken by the Commissioner and the courts in addressing the issue, and it would threaten the balance of interests struck by the letter-ruling program. As petitioners point out (Pet. 29-30), if the Commissioner regularly revoked letter rulings after the relevant transactions had occurred, the purposes of the letter-ruling program would be subverted because taxpayers would likely cease to request and rely on such rulings in the future. But a categorical ban on retroactive revocation of letter rulings would be no less harmful, because it would discourage the Commissioner from issuing letter rulings for fear of being bound by an improvidently made ruling. The advantages of the rulings program would be lost,

forcing a return to the days when closing agreements were taxpayers' only option for obtaining advice from the agency. That approach proved unworkable over 50 years ago and would only be more so today.

c. At the time it issued the letter rulings granting a property-tax exemption to Triple-S, Treasury had authority similar to that of the Commissioner: a general power to prescribe rules and regulations necessary to enforce the tax law, P.R. Laws Ann. tit. 13, § 3429(a)(1) (1976) (repealed 1994), and more specific authority to determine what rules and regulations "shall be applied without retroactive effect," *id.* § 3429(b) (repealed 1994). In addition, Treasury had published Circular Letter 86-3, adopting an approach to the retroactive revocation of letter rulings similar to that of the Commissioner. Specifically, Treasury stated that "[a] ruling or administrative determination found either to have been issued in error or * * * not in accord with the current views of the Department may be modified or revoked." Pet. App. 186. Circular Letter 86-3 further informed taxpayers that if the facts as represented to Treasury were not materially different from the actual facts, there had been no intervening change in the law, the taxpayer had relied on the ruling in good faith, and retroactive revocation would be detrimental, then any subsequent revocation or modification would not be retroactive "[e]xcept in rare or unusual circumstances." *Id.* at 187.

Like the Commissioner, however, Treasury declined to offer taxpayers any categorical assurance that letter rulings issued in error would not be revoked retroactively. To the contrary, Treasury specifically reserved its right to pursue that course of action "in rare or unusual circumstances." The question whether the revoca-

tion at issue here was permissibly given retroactive effect is not of constitutional dimension but turns only on whether the agency abused its discretion. See *Automobile Club*, *supra*. Thus, if it was otherwise permissible for respondent to apply to earlier tax years its new understanding that Triple-S was not entitled to exempt status under the applicable Puerto Rico statute, nothing in the letter rulings precluded (let alone *constitutionally* precluded) respondent from taking that action.[3]

2. Any error in the lower courts' interpretation of the Puerto Rico statutes of limitations would not warrant review

As explained above, when an agency corrects a mistaken legal interpretation and gives that correction retroactive effect, it is merely clarifying the law that was in effect at the time of the relevant transaction, and its action does not violate the Due Process Clause. Limits on the length of time for which unpaid back taxes may be collected in such circumstances are imposed not by the Constitution, but by statutes of limitations.[4] In this

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[3] Perhaps because petitioners framed their challenge in constitutional terms, rather than arguing that respondent had abused its discretion as a matter of Puerto Rico administrative law, the courts below did not focus on whether "rare or unusual circumstances" justified retroactive revocation in this case. Both the trial court and the intermediate appellate court concluded, however, that Treasury's prior grant of tax-exempt status to Triple-S was so devoid of support in the relevant statute as to be *ultra vires*. See Pet. App. 39, 66. That sort of gross deviation from statutory requirements is presumably "rare or unusual" within the common understanding of those terms.

[4] In the federal tax context, for example, the Commissioner's ability to assess liability based on the retroactive revocation of letter rulings is subject to a statute of limitations that generally requires the Commissioner to assess a tax within three years after a taxpayer has filed a

case, the Puerto Rico Court of Appeals declined to apply the statutes of limitations on assessment of real and personal property taxes. Although the court's limitations analysis is open to question, any error was one of Puerto Rico law that does not provide a basis for review by this Court.

In the case of real property, the governing Puerto Rico statute requires respondent to keep the tax rolls up to date by making a continuous review of property and by appraising and adding to the list previously unappraised property. P.R. Laws Ann. tit. 21, § 5058 (2005). The statute further provides that "[t]he levy, notice and collection of [such] taxes * * * shall only be retroactive for five (5) years from the date said property was appraised." *Ibid.* In this case, Triple-S invoked that statute of limitations, contending that respondents' claim for real property taxes was time-barred, and arguing in the alternative that it was entitled to discovery on that point. Pet. App. 14-15, 23-24. The trial court granted summary judgment to respondent, concluding that there was no controversy over the essential facts and that further discovery was unnecessary. *Id.* at 55, 66. The court of appeals agreed that summary judgment was appropriate, reasoning that the documents accompanying the motion "did not raise any legitimate controversy of material and essential facts." *Id*. at 41. The correctness of

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return. 26 U.S.C. 6501(a); see 26 U.S.C. 6501(c) (Commissioner may assess tax at any time if taxpayer has failed to file a return). An organization that determines in good faith that it is tax-exempt and files a return to that effect under 26 U.S.C. 6033 (2006 & Supp. II 2008) starts the running of the statute of limitations on assessment. 26 U.S.C. 6501(g)(2). Section 6501 therefore places a concrete limitation on the Commissioner's authority to make assessments following the retroactive revocation of a tax exemption.

that factbound determination by the lower Puerto Rico courts does not present any question of federal law warranting this Court's review.

In the case of personal property, P.R. Laws Ann. tit. 21, § 5218 (2005), provides that respondent "shall have a term of four (4) years, from the date the [taxpayer] filed his/her tax return, to review the personal property tax return, the valuation of the properties, the tax computation made by the taxpayer, and to determine the correct tax to be paid." In this case, it was undisputed that Triple-S filed tax returns for the relevant periods in which it asserted that it was exempt from taxation. Pet. App. 41; see P.R. Laws Ann. tit. 21, § 5203 (2005). The court of appeals concluded that the statute did not apply because respondent had not "review[ed]" Triple-S's returns but had merely "demanded" payment of the taxes on the personal property reported. Pet. App. 41. It is questionable, however, that respondent can simply forgo the intermediate steps leading up to issuing a notice and demand for payment of taxes. Respondent is required by law to value a taxpayer's personal property based on information in its return, P.R. Laws Ann. tit. 21, §§ 5082, 5083 (2005), to compute the taxpayer's tax liability, *id.* § 5089, and to levy the tax, *id.* § 5076. Because respondent failed to take those steps within four years of the date that Triple-S filed its return, its demand for payment may have been barred by the statute of limitations, despite the lower courts' contrary holdings.

Any error the courts below may have committed in this regard, however, would be one of Puerto Rico law only that would not give rise to any constitutional deprivation. Cf. *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982) ("We have long recognized that a 'mere error of state

law' is not a denial of due process.") (quoting *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948)). Even assuming arguendo that a deprivation of the protections afforded by local statutes of limitations could under extreme circumstances effect a due process violation, cf. *Hicks* v. *Oklahoma*, 447 U.S. 343, 346 (1980) (State violated Due Process Clause by denying criminal defendant "the jury sentence to which he was entitled under state law"), petitioners do not contend that any breach of that character occurred in this case. Petitioners do not discuss the Puerto Rico statutes of limitations at all, let alone contend that the courts below misapplied those statutes in so extreme a manner as to violate the Constitution. Petitioners' objection to the temporal reach of the revocation therefore raises no issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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