STATE OF LOUISIANA

SUPREME COURT

DOCKET NO. 2021-OC-00552

CALCASIEU PARISH SCHOOL BOARD SALES AND USE TAX DEPARTMENT AND KIMBERLY TYREE, IN HER CAPACITY AS ADMINISTRATOR OF THE CALCASIEU PARISH SCHOOL BOAD SALES AND USE TAX DEPARTMENT

Plaintiffs-Appellants

VERSUS

NELSON INDUSTRIAL STEAM COMPANY,

Defendant-Appellee

CIVIL ACTION

On Appeal from Judgment after Remand of the Third Circuit Court of Appeal, Docket No. 19-00315-CA
On Appeal from Judgment of the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana, Case No. 2017-1373, the Hon. Ronald F. Ware (Ret.), Presiding

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BRIEF OF *AMICI CURIAE*,
LOUISIANA CHEMICAL ASSOCIATION, LOUISIANA MIDCONTINENT OIL AND GAS ASSOCIATION, LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY, AND PULP AND PAPER ASSOCIATION, IN SUPPORT OF APPELLEE BRIEF ON THE MERITS FILED BY DEFENDANT-APPELLEE, NELSON INDUSTRIAL STEAM COMPANY

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I. INTRODUCTION AND STATEMENT OF THE ISSUE

The Appellant's Brief filed by CPSB,[1] and the *amicus curiae* briefs in support of CPSB (the "Amicus Briefs") ask this Court to contravene the clear mandate of Louisiana Constitution, article VII §2, which limits the power of the Louisiana Legislature to levy or expand taxes in this State:

> § 2. Power to Tax; Limitation
>
> Section 2. The levy of a new tax, an increase in an existing tax, or a repeal of an existing tax exemption **shall require** the enactment of a law by **two-thirds of the elected members of each house** of the legislature. (Emphasis added.)

That language is unequivocal. The Louisiana Constitution limits the power of the Louisiana Legislature when it comes to imposing a new tax or increasing an existing tax. The people of this state, and the businesses operating in this state, must have confidence that, before they are forced to pay any additional tax, the Legislature approved the tax by a supermajority vote – *i.e.*, approval by two-thirds of both houses of the Legislature.

The Transcripts of the Louisiana Constitutional Convention of 1973 demonstrate that the Delegates voted to carry forward from the prior constitution two restrictions on the Legislature's power to tax: (1) measures levying a new tax or increasing an existing tax could be passed only every other year, La. Const. article III §2; and (2) any measure levying a new tax or increasing an existing tax shall require a favorable vote of two-thirds of both houses of the Legislature. Louisiana Constitution article VII §2. This second limitation, at issue here, reflected the position of the Convention's Committee on Revenue, Finance and Taxation that a two-thirds vote would generally and uniformly be required for ***all tax measures*** because tax issues are so vital and so important, and taxes should not be imposed without a clear mandate from all sections of the State. As the Committee on Revenue for the 1973 Louisiana Constitutional Convention noted at Volume XII p. 661,

> The greatest advantage of the two-thirds rule is in preventing the legislature from enacting tax laws which could place too much of a tax burden on the taxpayers. Accordingly, the two-thirds rule prevents the legislature from passing tax laws too hastily and without serious consideration.

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[1] "CPSB" refers to the Calcasieu Parish School Board Sales and Use Tax Department and Kimberly Tyree, in her capacity as Administrator of the Calcasieu Parish Sales and Use Tax Department.

Thus, these limitations on the power of the Legislature are meant to assure that before any legislation imposing taxes is enacted, it is well-considered and necessary and not rushed into place, for example, in a hasty reaction to a decision from this Court.[2]

CPSB's Brief and the Amicus Briefs, in contrast, argue that the constitutional provision is limited in scope and does not apply when the Legislature disagrees with, or wants to change, a decision of this Court holding that certain transactions are not taxable. When the Legislature disagrees with this Court's decision that certain transactions are not subject to tax, they argue, this Court should defer to the Legislature and decline to apply the constitutional limitation as written. Instead, according to CPSB and the Amicus Briefs, the Court should allow the Legislature to fix, correct, or "clarify" the Court's decision by imposing a tax on those transactions without complying with the constitutionally-required two-thirds majority vote.

Four major business and trade organizations operating in Louisiana, the Louisiana Chemical Association, the Louisiana Midcontinent Oil and Gas Association, the Louisiana Association of Business and Industry, and the Pulp and Paper Association have joined together to file this *amicus curiae* brief because the importance to their members of upholding the integrity of the constitutionally-mandated limitation on legislative power cannot be overstated. This *amicus curiae* brief is not about agreement or disagreement with this Court's prior decision. Nor is this *amicus curiae* brief about the wisdom of Act 3[3] that was passed without the necessary two-thirds majority vote in both houses of the Louisiana Legislature. Instead, this brief specifically addresses whether the limitations on the power of the Louisiana Legislature written into this State's Constitution will be applied as written, or whether clever maneuvering by members of the Legislature, and CPSB and the Amicus Briefs, can circumvent the Constitution.

II. LAW AND ARGUMENT

La. Const. art. VII §2 of the Constitution intends for it to be difficult for the Legislature to force the people and businesses of this state to pay new taxes or to start paying taxes on

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2 A state constitution "is a document of *limitation* because its provisions are limitations upon the plenary powers reserved to the state and held by its people." *Hoag v. State ex rel. Kennedy*, 01-1076, p. 21 (La. App. 1 Cir. 11/20/02), 836 So.2d 207, 225 (emphasis in original) (*citing Louisiana Dep't of Agric. and Forestry v. Sumrall*, 99-1587, p. 6 (La. 3/2/99), 728 So.2d 1254, 1259)).

3 Act 3 of the 2016 Second Extraordinary Session**.** The Amicus Brief of the Lafourche and St. John Parish tax collecting bodies at p. 6 essentially argues that Act 3 was necessary legislation. The wisdom of Act 3 is not an issue for this Court. Instead, this *amicus curiae* addresses solely the primary issue of whether the Act complied with the Louisiana Constitution.

transactions not previously taxable. There may be times when a majority of the Legislature wants to increase taxes paid by certain people or businesses but cannot muster the two-thirds vote necessary under this constitutional provision. In those situations, the Legislature cannot be permitted to manipulate around the Constitution and levy a tax on transactions not previously subject to taxation without the constitutionally-required two-thirds supermajority vote. Allowing the Legislature to maneuver around the two-thirds requirement in this case would open the door to future undermining of the constitutional requirement.

Yet that is exactly what CPSB and the Amicus Briefs urge here. CPSB and the supporting Amicus Briefs urge this Court to allow the Legislature to levy and/or increase taxes without the constitutionally-required two-thirds majority vote in each house of the Legislature simply because the Legislature did not like a decision by this Court. Whether the Legislature called Act 3 a "clarification," whether the Legislature purportedly offset some of the perceived revenue impact from this taxpayer, Nelson Industrial Steam Company ("NISCO"),[4] or whether the Legislature attempted to claim that it did not have to follow article VII §2 of the Constitution – all of that is not relevant to the constitutional limitation. The fact is that before Act 3, the sale of materials for further processing was not a taxable transaction pursuant to La. R.S. 407:301(10)(c)(i), regardless of the nature of the products produced by that further processing. *Bridges v. Nelson Indus. Steam Co.*, 15-1439 (La. 0/5/03/2016), 190 So. 3d 276 ("*NISCO I*"). After Act 3, for the first time, a tax is now imposed on sales of materials for further processing when the products produced from those materials are certain defined "byproducts." Simply put, in Act 3, the Legislature amended a taxing statute to impose a tax on transactions that were not previously subject to tax.[5] *Dow Hydrocarbons & Resources v. Kennedy*, 96-2471 (La. 5/27/1997), 694 So. 2d 215 (when income was not subject to tax prior to Act 690 but was subject to tax after Act 690, the Act was a new tax or expansion of existing tax, subject to constitutional limitations). Whether it is considered the levy of a new tax or the increase in an existing tax, that is exactly the kind of legislative power that is limited by article VII §2. This Court should not accept CPSB's invitation to undermine that constitutional limitation on legislative power.

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[4] The perceived revenue impact is disputed by NISCO.

[5] The Court in *NISCO I* applied a definitional provision in the taxing statute that defined "sale at retail" to *exclude* sales of materials for further processing. Act 3 amended that taxing statute to change the definition of "sale at retail" so as to *include* sales of materials for further processing, when that further processing of those materials produced certain types of "byproducts."

A. Act 3 falls within the constitutional limitation on legislative power.

1. The constitutional limitations apply when the Legislature imposes a tax on income or transactions not previously subject to tax.

The basic question for the Court is simple: Did Act 3 impose sales and use taxes on transactions that previously were not subject to those taxes? If so, Act 3 constitutes an imposition of taxes that is subject to the constitutional limitations. This unambiguous "before and after" comparison is sufficient for the Court to determine whether the legislative act constitutes the imposition of taxes, or the increase in taxes, subject to the constitutional limitations. This Court made that analysis clear in *Dow Hydrocarbons*. There, the issue was the other major limitation on the legislative authority to impose taxes: the constitutional mandate that it could only be done (at the time) in even-numbered years. La. Const. art. III §2.[6] To determine whether the provision there, Act 690, was subject to this constitutional limitation on legislative power, the Court stated the test as follows:

> Simply put, prior to Act 690, corporations did not pay this tax to Louisiana. Under Act 690, they must pay this tax to Louisiana. This is an increase to corporate income tax. Although paying taxes on income previously not taxed is arguably a new tax, it matters not whether Act 690 is characterized as a new tax or an increase to an existing tax as both are violative of Article III, Section 2.

Dow Hydrocarbons at p. 4, 694 So. 2d at 218. The determinative issue, according to this Court, was that (1) the income was not previously taxed; and (2) the income became subject to tax as a result of the legislative act. According to this Court, that can only be accomplished by complying with the constitutional limitations on the power of the Legislature to levy or increase a tax.

Application of this Court's "before and after" test is just as clear in this case. The only difference is that in *Dow Hydrocarbons*, the tax at issue was an income tax, imposed on income; here, the tax is a transactional sales and use tax, imposed on "retail sales" or "sale at retail" transactions. The analysis, however, is the same. Prior to Act 3, under La. R.S. 47:301(10)(c)(i)(aa), the "sale of materials for further processing into articles of tangible personal property for sale at retail" was excluded from the scope of the sales and use tax. As this Court held in *NISCO I*, under that taxing statute, no sale of material for further processing was

[6] La. Const. article III §2 at the relevant time provided that new or extensions of taxes could not be introduced or enacted in regular sessions held in odd-numbered years. That provision later was amended to provide that new or extensions of taxes could not be introduced or enacted in regular sessions held in even-numbered years.

subject to sales/use taxes, regardless of the nature of the product produced by the "further processing." Pursuant to this Court's decision, manufacturers that had relied on the statute to exclude all sales of materials intended for "further processing" were correct to do so, as all such sales were, and always had been, excluded from the scope of the sales and use tax. Then, in Act 3, the taxing statute was amended and the sale of material for further processing into certain byproducts became, for the first time, subject to sales and use taxes. Under *Dow Hydrocarbons,* "it matters not" whether Act 3 "is characterized as a new tax or an increase in existing tax." Because Act 3 imposes a sales and use tax on transactions that previously were not subject to that tax, it falls within the scope of the constitutional limitations, *i.e.*, the requirement of the two-thirds majority vote set forth in article VII §2.

This Court's *per curiam* when this matter reached the Court for the second time reaffirms that analysis. In *Calcasieu Parish Sch. Bd. Sales & Use Dept. v. Nelson Indus. Steam Co.*, 2020-0074 (La. 10/20/2020), 303 So. 3d 292 ("*NISCO II*"), this Court recognized that the very same transaction that was found not to be subject to taxation in *NISCO I* was subject to taxation under the taxing statute ***as amended by Act 3.*** *See id.* In other words, the *per curium* in *NISCO II* validates that a transaction not subject to tax before Act 3 became subject to tax as a result of Act 3. Accordingly, this Court remanded the matter to the Third Circuit for "consideration of remaining assignments of error, which were pretermitted, including an analysis of whether the amendment is a new tax or an increase in a tax." *NISCO II* at p. 2, 303 So. 2d at 293.

CPSB misconstrues this Court's seminal *Dow Hydrocarbons* decision in an attempt to circumvent the Constitution.[7] Perhaps recognizing that *Dow Hydrocarbons* is decisive, CPSB ultimately resorts to arguing that, in that case, the Court "did not engage in a thorough review" and, apparently, that its stated holding should be ignored. CPSB Brief at 8. When it does discuss the *Dow Hydrocarbons* holding, CPSB never explains why extending the scope of the corporate income tax to a new source of income falls within the constitutional limitation, while extending the scope of the sales and use tax to a new sales transaction does not. CPSB apparently contends that *Dow Hydrocarbons* stands for the principle that the constitutional provision does not apply when the Legislature simply taxes previously non-taxable income; instead, the Legislature must

[7] The Amicus Briefs ignore the controlling decision, *Dow Hydrocarbons*. The fact that they do so is telling.

alter an entire "scheme" of taxes to trigger the constitutional limitation. In the words of CPSB, Act 690 "made an entire corporate income source taxable where it was previously not taxable. . . . [Act 690] ***significantly modified the scheme*** of corporate taxes."[8] CPSB Brief at 6 (emphasis added). CPSB argues that the constitutional limitation applies only to a complete overhaul of the entire taxing "scheme." According to CPSB, if a hypothetical act of the Legislature imposes a tax on a transaction not previously subject to taxation but does not change the nature of the sales and use tax system as a whole, that legislative act does not come within the constitutional limitations. That is a misreading of *Dow Hydrocarbons*, and adoption of CPSB's argument would severely limit the reach of both constitutional limitations.[9]

CPSB equally misstates the effect of this Court's decision in *Palmer v. Louisiana Forestry Com'n*, 97-0244 (La. 10/21/1997), 701 So. 2d 1300. CPSB claims that the basis for the *Palmer* decision was that "governmental action does not levy a new tax when it fits into the overall scheme of the tax structure." In other words, CPSB argues that *Palmer* gives the Legislature authority to impose new taxes, or expand existing taxes, without complying with the Constitution, as long as the new tax or the expansion of existing taxes is done within "the overall scheme of the tax structure." Similarly, the Amicus Brief filed by the Lafourche and St. John the Baptist tax collecting authorities[10] at 5-6 argues that, because the sales and use tax ***system*** existed prior to Act 3, expanding the tax to cover a previously non-taxable transaction cannot be a "new tax" or an expansion of an existing tax.

That is a misreading of *Palmer*. *Palmer* involved a severance tax imposed on forest products; different rates were imposed on different categories of those products. The Louisiana Forestry Commission and the Louisiana Tax Commission were responsible for determining which kinds of forest products fell into which category. The lawsuit was prompted by a decision by the Commissions that, due to technology improvements and market changes, certain "chip and saw" products became more prominent and more valuable. *Id.* at pg. 4-6, 701 So. 2d at 1302-1303. As a result, the Commissions, in accordance with their delegated authority,

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[8] Actually, Act 690 changed one of many aspects of the definition of "allocable income." That is not, as CPSB argues, an "overhaul of the entire scheme."

[9] Arguably, if legislation is not the levy of a new tax or the expansion of an existing tax for purposes of La. Const. art. VII §2 (two-thirds majority vote), the same result would apply for purposes of La. Const. art. III §2 (limitation to every other numbered year).

[10] The Lafourche Parish School Board *ex officio* Sales and Use Tax Collector and the St. John the Baptist Parish School Board *ex officio* Sales and Use Tax Collector.

determined that "chip and saw" products should be moved from one taxable category to another taxable category with a lower severance tax rate. The central issue was whether, by moving those products from one category to another, the Commissions had "violated the constitutional prohibition against the levy of a new tax without legislative approval." *Id.* at 3, 701 So. 2d at 1302. After determining that the Commission's factual and legal conclusions regarding the reclassification were proper, this Court moved to the task of determining "whether, by removing chip and saw from the 'pulpwood' category and designating that forest product as a subcategory of 'trees and timber' for severance tax purposes, the Commission levied a new tax." *Id.* at 13, 701 So. 2d at 1306 -1307. Notably, in *Palmer*, this Court recognized the importance of the "before and after" analysis in determining whether an act constituted the levy of a new tax:

> The *Dow* court noted, however, that by reclassifying, certain types of corporate dividend income earned outside the state **that had *not* been subject to the tax were now taxed**. In *U.S. v. Darusmont,* 449 U.S. 292, 101 S.Ct. 549, 66 L.Ed.2d 513 1981), the Court held that amendments to the minimum wage provision did not constitute a new tax because the items had been subject to taxation under the overall scheme before the change.

Id. at 13-14, 701 So. 2d at 1307 (emphasis added). The Court noted that "chip and saw" products "had always been a taxable item under" the relevant statute. The purpose of the Commission's authority to reclassify products was not to raise taxes, but instead to assure that, as a factual matter, the forest products would be classified in a way that conformed to the purpose of the taxing statute. This Court ultimately held that the reclassification was not the legislative imposition of a tax, but a proper exercise of the Commissions' delegated authority. *Id.* at 14-15; 701 So. 2d at 1307. Simply put, in *Palmer*, certain products that always were taxable were reclassified pursuant to the authority delegated to the Commissions; the taxing statute was not changed to impose a tax on products that were not previously subject to tax. Here, in contrast, the taxing statute, La. R.S. 47:301(10)(c), was changed for the purpose of imposing a tax on transactions that were not previously subject to taxation.

CPSB's argument, at its core, is that even if the legislative act imposes a tax on income or a sale transaction not previously taxable, the constitutional limitations do not apply. Instead, CPSB contends that only legislation that changes the nature of the tax itself (*i.e.,* changes the entire "scheme" of the income tax or the sales and use tax) must comply with the constitutional

limitations.[11] Adopting this argument not only would negate the holding of *Dow Hydrocarbons*, but it would essentially limit the scope of La. Const. art. VII §2 – and La. Const. art. III §2 – solely to complete overhauls of the tax system. That clearly was not the intent of the people of this State when they approved the 1974 Louisiana Constitution.

2. CPSB and Amicus Briefs argue that the transactions at issue previously were subject to taxation, despite the holding in *NISCO I.*

CPSB and the supporting Amicus Briefs apparently would have this Court hold that Act 3 does not meet the "before and after" analysis of *Dow Hydrocarbons* because the transaction really ***was*** subject to tax prior to Act 3 – *i.e.*, that this Court "got it wrong" in *NISCO I*, and Act 3 just fixed this Court's "error." CPSB argues that Act 3 just "clarifies" and "interprets" the statue, claiming that "this [Act 3] has always been the legislature's purpose and intent in the further processing exclusion,"[12] as if the *NISCO I* decision never happened.[13] The Amicus Briefs echo that argument. The Amicus Brief filed by the Lafourche and St. John the Baptist Parish tax collecting authorities at 3 expressly argues that the Legislature essentially can undo this Court's decisions: "It is very respectfully submitted that the Legislative Branch should have the final word ensuring that the correct interpretation and application of this law is consistent with the Legislature's intent." That same Amicus Brief, at p. 7, argues that the transactions found not taxable in *NISCO I* always were taxable, regardless of the holding of this Court. The Amicus Brief filed by the Ascension, St. James, and Rapides Parish Tax Collectors at page 3 overtly states that this Court got it wrong in *NISCO I*, claiming that the "only thing new" about Act 3 is that "the inclusion of the settled but apparently misunderstood Legislative intent of how the 'further processing exclusion' should be applied." CPSB and the Amicus Briefs assume that this Court committed legal error in *NISCO I*, argue that the transaction at issue there was taxable under the previous version of the statute, and contend that Act 3 simply confirmed that the transaction always was taxable, regardless of this Court's holding.

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11 *See also*, CPSB brief at 7 (government can only levy a "new tax" when it "alters the overall scheme of the taxing authority"). CPSB also argues that "[c]larifying a definition" in a taxing statute to make previously untaxed transactions taxable "is not the 'levy' of a new tax." *Id.*

12 CPSB Brief at 9.

13 CPSB Brief at 2-3 essentially argues that the *NISCO I* decision was based on an ambiguity in the taxing statute, and that by clarifying the supposed ambiguity, the Legislature essentially negated the *NISCO I* decision retroactively.

That argument undermines the authority of this Court. The only purported support for the contention that the transaction was always taxable is the disagreement of CPSB and the taxing authorities with this Court's holding in *NISCO I.* Whether CPSB and the taxing authorities agree with it or not, this Court's holding in *NISCO I* was final and binding as to the meaning and reach of the statute prior to Act 3. The Court held that the transaction there – the sale for further processing into a "byproduct" for resale – was not taxable under the law prior to Act 3. That holding cannot be retroactively undone by an Act of the Legislature. CPSB, and members of the Legislature, are free to disagree with that decision, of course. The solution is to act in accordance with the constitutional limitations to change the statute to impose the tax on the transactions found to be nontaxable in *NISCO I.* That is exactly what the Legislature apparently was trying to do in Act 3; as Representative Marcelle acknowledged, they were "fixing something based on what the Supreme Court has ruled in their interpretation of the law."[14] No one disputes that the Legislature ultimately has the power to change the law and to impose a tax on transactions that, according to this Court, were not subject to that tax prior to Act 3. The dispute here is that the Louisiana Constitution requires a two-thirds majority vote to impose that new tax on those previously non-taxable transactions, and Act 3 did not comply with that constitutional limitation.[15]

B. Legislative statements of intent cannot override the Constitution.

Both the Appellant and the Amicus Briefs repeatedly argue that certain statements by legislators, taken from the House debate, show the relevant "legislative history" of Act 3, and that this Court should take that "legislative history" at face value, meaning that if certain legislators state that they are not imposing a tax, the Court must conclude that the statute does not impose a tax. There are several problems with this approach.

First and most importantly, as this Court has held, because the sales and use taxes to be collected pursuant to Act 3 clearly are taxes, legislative intent is irrelevant. This Court addressed that very issue in *Dow Hydrocarbons*:

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[14] House Floor Debate on June 19, 2016 at 1:37:07 – 1:37:23, Tax Collectors' Brief at 4. Of course, the Legislature cannot "fix" a decision of this Court. The Legislature can, however, pass a new statute that changes the law, which is what the Legislature attempted to do here.

[15] Act 3 and its purported retroactive application also must comply with the equal protection, separation of powers, and due process limitations on the Legislature's power to tax. Those arguments are addressed in the NISCO Appellant's Brief.

> Where the collected moneys at issue are clearly taxes, there is no need to digress into an analysis of legislative intent. *See* La. Civ. Code art. 9. Where the collections could reasonably be a fee or some other non-taxing collection pursuant to the state's police power, the legislative intent to raise revenue could be controlling. *Audubon Insurance Co. v. Bernard,* 434 So.2d 1072 (La.1983). There are no such assertions here.

Dow Hydrocarbons at p. 4 n. 6; 694 So. 2d 218 at n. 6. Here, there is no dispute that the amounts collected pursuant to Act 3 are sales and use tax collections; there is no argument that the collections are simply a "fee" or an exercise of regulatory police power. Therefore, the legislative history behind Act 3 is irrelevant. It is for the courts, not the Legislature, to determine whether the change made to the statute in Act 3 is "clarification" or a substantive change in a taxing statute.

Second, even if this Court were to find the legislative history to be relevant, that legislative history clearly indicates that the Louisiana Legislature largely realized that compliance with the constitutional limitation of a two-thirds majority vote was always going to be a problem in enacting Act 3. That is obviously why, in the legislative history, there are repeated concerns about whether Act 3 constituted a new tax or an expansion of an existing tax, and there are repeated self-serving statements that Act 3 is just "clarifying" the law.[16] But the legislative history lacks any coherent explanation of what is being "clarified." Apparently, the statements were "clarifying" the view of certain legislators that *NISCO I* was wrongly decided and the transaction at issue always was subject to tax before Act 3, regardless of what the Court held in *NISCO I.*[17] That is not a "clarification" of the law; that is a legislative overruling of a Court decision. Where a decision of this Court holds that a transaction is not subject to tax, and the legislative overruling of that decision imposes a tax on that transaction, the legislation meets the "before and after" test of *Dow Hydrocarbons* and must comply with applicable constitutional limitations.

Third, the issue before this Court is not the legislative intent behind Act 3. The issue is whether Act 3 falls within the scope of a constitutional provision, La. Const. art. VII §2. That

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[16] *See* House Floor Debate on June 19, 2016, *cited by Amicus Curiae* in Support of Tax Collectors at 4.

[17] There is a portion of Act 3 that codified a jurisprudential three-part test; that portion might be considered "clarification." However, that portion of Act 3 is not at issue here.

involves interpretation and application of the Louisiana Constitution. That is a task for this Court, and this Court's jurisprudence makes the standard clear:

> This court, when interpreting our constitution, should give effect to language that is plain and unambiguous. *Bank of New Orleans and Trust Co. v. Seavey,* 383 So.2d 354 (La.1980), on remand, 399 So.2d 642 (La. App. 4th Cir.1981), writ denied, 401 So.2d 1196 (La.1981). Explicit constitutional provisions are not subject to judicial construction and should be applied by giving words their generally understood meaning. *State through Department of Highways v. Bradford,* 242 La. 1095, 141 So.2d 378 (1962).

Cajun Elec. Power Co-op, Inc. v. Louisiana Public Service Com'n, 544 So. 2d 362, 363 (La. 1989). The Court has reaffirmed that principle repeatedly, such as in *Caddo-Shreveport Sales and Use Tax Com'n v. Office of Motor Vehicles,* 97-CA-2233 (La. 4/14/1998), 710 So. 2d 776. In addition to interpreting the Constitution according to its plain terms, this Court has also made clear that "it is the understanding that can reasonably be ascribed to the voting population as a whole that controls." *Caddo-Shreveport Sales and Use Tax Com'n* at p. 7, 710 So. 2d at 780 (citing *Radiofone, Inc. v. City of New Orleans*, 630 So. 2d 694 (La. 1994)). The words "levy of a new tax, an increase in an existing tax" in La. Const. art. VII §2 are clear and unequivocal. More importantly, it is clear how "the voting population as a whole" interprets those words in the Constitution: if a transaction was not taxable prior to the act at issue, and is taxable after the passage of the tax, the voting population as a whole undoubtedly would consider that a levy of a new tax or an increase in an existing tax, just as this Court held in *Dow Hydrocarbons.* The Court cannot accept the attempts by CPSB and the Amicus Briefs to create an ambiguity where none exists.

Here, the legislative history seemingly was an attempt to circumvent the applicable constitutional limitations. The legislative history has repeated references to "clarification" or an attempt to "clarify" the law, as if this Court's decision in *NISCO I* did not reach a final holding on the meaning of the statute. Of course, that is not what happened. The Court expressly held that the transactions at issue were not taxable, and that the type of transaction (purchases of materials for further processing into byproducts) had never been taxable. Act 3 did not "clarify" anything; it legislatively changed the law.[18] That is permissible, of course, but only in compliance with the constitutional limitations.

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[18] A similar argument that the act at issue simply "clarified" the tax law has twice been rejected by this Court. In *Cox Cable New Orleans, Inc. v. City of New Orleans*, 624 So. 2d 890 (La. 1993),

C. CPSB distorts the relevance of an intent to raise revenue.

CPSB and Amicus Briefs also argue that Act 3 purportedly does not raise revenue overall, and therefore it cannot be a tax.[19] Essentially, they contend that, because there is a provision for an offset (an offset against the newly-imposed tax on further processing materials for taxes paid on the sales of the byproduct), imposing sales and use tax on transactions not previously taxable does not constitute a tax because the Act, overall, does not raise revenues.[20]

CPSB misstates the applicable test. When this Court looked to revenue-raising to determine whether legislation was, or was not, a tax, the Court looked to whether the intent was to raise revenue or whether the revenue was incidental to a different intent underlying the statute, as is the case with regulatory fees. In other words, the intent to raise revenue was relevant to determine whether the moneys collected were a "tax" or some kind of regulatory "fee." The seminal authority in this area is *Audubon Ins. Co. v. Bernard*, 434 So. 2d 1072 (La. 1983). There, the claim was that the tax did not comply with both major constitutional limitations, the requirement of a vote of two-thirds of the members of each house, and the prohibition against such acts being passed in a regular session in then-applicable odd-numbered years. In *Audubon Ins. Co.*, the Court discussed the distinction between a tax and a fee, explaining as follows:

> It is well settled generally and in Louisiana that not every imposition of a charge or fee by the government constitutes a demand for money under its power to tax. If the imposition has not for its principal object the raising of revenue, **but is merely incidental to the making of rules and regulations to promote public order, individual liberty and general welfare, it is an exercise of the police power**. . . . In similar fashion, the police power may be exercised to charge fees to persons receiving grants or benefits not shared by other members of society. . . . But if revenue is the primary purpose for an assessment and regulation is merely incidental, or if the imposition clearly and materially exceeds the cost of regulation or conferring special benefits upon those assessed, the imposition is a tax. . . .
>
> Applying these precepts, we conclude that the imposition of Act 434 of 1979 has for its primary object the raising of revenue. The

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this Court held that an amendment to the amusement tax that expanded the scope of that tax to include cable television subscriptions was a new tax and not just a clarification. In *Radiofone, Inc. v. City of New Orleans*, 616 So.2d 1243 (La. 1983), the Court reached the same conclusion with respect to an ordinance that expanded the scope of a telecommunications tax.

[19] *See* Appellant's Brief of CPSB at 9. NISCO disputes the purported fiscal impact.

[20] *See, e.g.*, brief of Ascension, Rapides, and St. James Parish Collectors at 6. Neither CPSB nor the Amicus Briefs explain the imposition of a sales and use tax on sales transactions is not a tax, and they do not explain what exactly the sales and use tax is, if it is not a tax. Notably, because by definition the byproduct is sold for less than the cost of the materials, the offset will always result in an increase in revenues created by this newly-imposed tax.

> legislative history and the provisions of Act 434 itself indicate that it is a tax and not just an incident of regulation or an assessment of persons for grants or special benefits.

Audubon Ins. Co.¸ 434 So. 2d 1074-1075 (emphasis added) (citations omitted). Thus, the Court looked to the primary purpose of the overall assessment of revenue to determine whether the moneys collected constituted a "tax" or an exercise of a police power with an incidental fee. If the primary purpose of the assessment is to raise revenue, it is a tax. In contrast, if the overall scheme is regulatory and the revenue is just incident to the regulation, or if the assessment is based on grants or special benefits, it is not a tax but instead is an exercise of police power. This Court made that clear in *Dow Hydrocarbons*, where this Court cited *Audubon* for the principle that legislative intent to raise revenue is ***only*** relevant when there is a question as to whether the statute at issue imposes a tax or a fee. *Dow Hydrocarbons* at p. 4 n. 6; 694 So. 2d 218 at n. 6.

Here, there is no dispute that the moneys collected are a tax and are not fees incidental to the government's regulatory power. Act 3 was a change to the statute that defined the scope of transactions subject to a tax – specifically, the sales and use tax. Clearly, the purpose of the sales and use tax is to raise revenue. The sales and use tax is not a regulatory scheme with an incidental fee; nor is it an assessment on persons with grants or special benefits. The sales and use tax is a tax; Act 3 imposed that tax on transactions that were not previously taxable.

CPSB and the Amicus Briefs instead distort the test to argue that if ***this specific Act*** does not raise revenue overall, then the tax imposed in the Act is not a tax at all. According to CPSB, Act 3 (1) imposed a tax in one area; but (2) also gave a credit against that tax to certain taxpayers for certain taxable sales of byproducts If the result of the imposition of the tax measured against the credit is revenue neutral, they argue, then the portion of the Act imposing the tax is not a tax at all.[21] They have not presented any evidence that the effect of Act 3 is revenue-neutral, but, more importantly, that is not what *Audubon* holds, and that is not the holding of *Dow Hydrocarbons* at p. 4 n. 6; 694 So. 2d 218 at n. 6. Adopting such a holding would again undermine the clear constitutional provision. Hypothetically, the Legislature could impose a new tax, or expand an existing tax, but in the same act grant a credit of some kind to offset the revenue that would be raised by the new tax. According to CPSB, that would mean the

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[21] *See* CPSB Brief at 7-8 (relying on a fiscal note to argue that, overall, Act 3 does not result in a net increase in revenue).

imposition of a new tax is not at tax, simply because the revenue is offset. That makes no sense. A tax does not change its nature, or become just a regulatory fee, simply because the Legislature decides to offset the revenue raised by the tax.

III. CONCLUSION

For the reasons stated above, and for the reasons stated in the Original Appellee Brief filed by NISCO, the Louisiana Chemical Association, the Louisiana Midcontinent Oil and Gas Association, the Louisiana Association of Business and Industry, and the Pulp and Paper Association urge this Court to affirm the decision of the Louisiana Third Circuit Court of Appeals and hold that Act 3 fails to comply with the Louisiana Constitution.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief of *Amici Curiae*, Louisiana Chemical Association, Louisiana MidContinent Oil and Gas Association, Louisiana Association of Business and Industry, and Pulp and Paper Association, has been delivered to the Clerk of the Louisiana Third Circuit Court of Appeal, the Presiding Judge in the Fourteenth Judicial district Court, Calcasieu Parish via Federal Express; to the Attorney General by Federal Express, and upon all counsel of record, via electronic mail, Federal Express, and/or United States mail, postage pre-paid, at the following proper addresses:

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