No. 10-481

In The

Supreme Court of the United States

FORD MOTOR CREDIT COMPANY,

Petitioner,

v.

DEPARTMENT OF TREASURY, TREASURER FOR THE DEPARTMENT OF TREASURY, AND STATE OF MICHIGAN,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

As explained in the petition, this case presents an important and recurring issue on which the lower courts are divided concerning the constitutional limits on retroactive tax legislation. Respondents ignore or concede each of the overriding reasons set forth in the petition for granting certiorari. They do not dispute that the lower courts are divided on the proper interpretation of *United States v. Carlton*, 512 U.S. 26 (1994), and the constitutional limits on retroactive tax legislation. They do not dispute that the question presented is exceptionally important and frequently recurring and, indeed, do not even acknowledge, much less address, the *amicus* briefs filed on behalf of the U.S. Chamber of Commerce and other interests emphasizing the need for this Court's review. And they do not seriously attempt to defend the constitutionality of the retroactive tax law at issue under this Court's precedents and due process principles. Instead, respondents devote their efforts almost entirely to attempting to evade review of the certworthy question presented by raising various vehicle objections. Each of those objections is entirely baseless and poses no obstacle to granting certiorari in this case.

ARGUMENT

1. Respondents' principal submission in arguing that certiorari is not warranted is that the courts

below did not decide the constitutional question presented, and instead resolved this case on the supposedly "independent and adequate" state ground that it does not involve a "retroactive application" of tax laws at all. Opp. 1, 10. That argument is patently wrong, and provides no basis for denying review.

First, respondents themselves acknowledge that the lower courts *did* decide the constitutional question presented. *See* Opp. 8 ("The trial court decided that . . . [petitioner's] constitutional challenge to the statute lacked merit."); *id.* at 9 ("The Michigan Court of Appeals found no merit to . . . Ford's claims that 2007 P.A. 105 violated constitutional rights and ran afoul of the criteria of *Carlton* for when tax law [sic] may be challenged retroactively."). And that conclusion is unassailable. *See* Pet. App. 1 ("We reject the constitutional arguments raised by plaintiffs . . . ") (Michigan Court of Appeals); *id.* at 11 ("[T]he Court can find nothing in th[e] statute that renders it constitutionally infirm.") (Michigan trial court); *ibid.* ("Plaintiff has not established that the challenged statute is unconstitutional either as written or as applied by Defendant in denying a sales tax refund in this matter.") (same); *see also id.* at 41 ("[P]laintiffs assert that the seven-year retroactive application of the amended MCL 205.54i constitutes a due process violation and the requirement that retroactive legislation be limited to a modest period of retroactivity. We disagree.") (*GMAC* decision). Moreover, respondents themselves previously acknowledged that the proper application of "the holding of [this] Court in

United States v Carlton" is "directly presented" in this case. Govt's Supp. Br. 1 (Mich. App. Sept. 11, 2009).

Second, although Michigan is free to label its laws as it wishes, the retroactive *effect* of its laws is a federal question – and that is the question presented here. In attempting to dodge that federal question and divert attention away from the statute's indefinite retroactive reach, respondents claim that the statute operates merely as the "Legislature's correction of a judicial interpretation." Opp. 10. But regardless of the statute's purpose, it undeniably applies retroactively. Indeed, the Michigan Legislature explicitly *directed* that the statute "shall be retroactively applied." Opp. 7 (quoting statute). The fact that the amendment was passed in the wake of a judicial decision declaring what the tax law had been does not alter the amendment's retroactive effect or constitutional infirmity.

This Court previously took up a case in an almost identical posture, in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). *Romein* also arose out of a Michigan state court decision and addressed whether a state legislative amendment was impermissibly retroactive under the Due Process Clause. The legislative amendment in *Romein* likewise dealt with a purported "correction" to a Michigan state court interpretation of a statute. The Michigan Legislature referred to the legislative amendments at issue in *Romein* as "remedial and curative." *Romein v. General Motors Corp.*, 462 N.W.2d 555, 560 n.3 (Mich. 1990) (quoting 1987 P.A. 28). The fact that the legislative

amendment in *Romein* was styled as "remedial and curative" did not prevent the Michigan Supreme Court and this Court from addressing the core constitutional issue of whether the retroactive law implicated due process concerns. Each of the participants in the *Romein* controversy (including the Michigan state officials themselves) readily acknowledged that the retroactive effect of the legislative amendment provided the central constitutional question regardless of the descriptive terms used to describe the amended law.

This Court has consistently held that it is the retroactive effect of a statute – and not the descriptive label assigned to it – that controls the constitutional analysis. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (discussing long pedigree); *cf. Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) ("In passing on the constitutionality of a tax law 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.'") (citation omitted). To conclude otherwise would elevate form over substance and subordinate critical due process protections to a legislature's creative drafting skills. This Court has long discouraged such efforts and instead looked to whether the statute at issue operates retroactively and – if so, as here – whether the retroactive effect passes federal constitutional muster. *Interstate Pipe Line Co. v. Stone*, 337 U.S. 662, 666 (1949) ("While we are of course bound by the construction given a state statute by the highest court

of the State, we are concerned with the practical operation of challenged state tax statutes, not with their descriptive labels.").

The Court also has made clear that whether or not a statute operates retroactively "demands a common sense, functional argument about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf*, 511 U.S. at 270). *See also Lynce v. Mathis*, 519 U.S. 433 (1997) (holding that a state law is retroactive if it "appl[ies] to events occurring before its enactment"); *Miller v. Florida*, 482 U.S. 423, 430 (1987) (holding that "a law is retrospective if it 'changes the legal consequences of acts completed before its effective date'" (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981))). In this case, that inquiry leads to the undeniable conclusion that the statute at issue has been applied retroactively, just as the Michigan legislature directed that it be.

It is undisputed that petitioner filed refund claims in the amount of several million dollars prior to the enactment of the amendments to M.C.L. § 205.54i for periods going back at least five years. *See* Opp. 6. The retroactive effect of the amendments to M.C.L. § 205.54i reached back and deprived petitioner of its outstanding refund claims for those years. Under Michigan law at the time the statute at issue was enacted, petitioner was entitled to the refunds at issue. "'[T]he new provision attaches new legal consequences to events completed before its

enactment.'" *Martin*, 527 U.S. at 357-58 (quoting *Landgraf*, 511 U.S. at 270). Michigan is of course free to change its tax laws, but not in a manner that retroactively claws back refunds to which a taxpayer is entitled going back five years in this case and, indeed, potentially indefinitely in other cases, given that the statute poses no limit on its retroactivity.

And to the extent there could be any doubt that a State may not avoid the unconstitutional retroactive effect of a tax law by simply labeling it "curative," then this Court should grant certiorari and eliminate it. Indeed, as the U.S. Chamber of Commerce (at 5-6) and other *amici* have stressed, particularly in these difficult economic times, it is critical that States have clear guidance on the constitutional limits on the politically expedient means of raising revenue by passing retroactive tax laws like the one at issue here.

2. Respondents also contend that this case is a poor factual vehicle for considering the constitutional limits on retroactive tax legislation and the reach of this Court's decision in *Carlton*. Opp. 16-17. Not so. Sadly for Michigan taxpayers, there is nothing "peculiar" (*id.* at 16) about the factual circumstances underlying this case. Indeed, respondents do not contest that there are over 90 cases pending before Michigan courts substantially identical to this action challenging the constitutionality of the retroactive application of the amendments to M.C.L. § 205.54i. *See* Pet. 21. In these cases, taxpayers filed sales tax refund claims prior to the effective date of the retroactive tax provision at issue and the Michigan state

officials applied the amended law retroactively to "extinguish[]" (Pet. App. 7) the taxpayers' entitlement to a refund. Moreover, as underscored by the significant *amicus* attention this case has attracted, there is nothing unique or atypical about this factual or legislative scenario.

Likewise, contrary to the suggestion of respondents (Opp. 17), there is no basis to draw any constitutional distinction between the retroactive denial of a tax *refund* to which a taxpayer was entitled and a retroactive increase in tax liability. An increase in tax liability and a denial of a refund are merely opposite sides of the same coin. There is no practical economic or pocketbook difference between a retroactive denial of a refund claim and a retroactive increase in tax liability. In each case, the retroactive application of the provision acts to make the taxpayer worse off economically. The same goes for the retroactive denial of a deduction, which was the tax vehicle at issue in *Carlton*. 512 U.S. at 28-29. Indeed, if anything, the retroactive denial of a refund actually presents a *stronger* case for review by this Court. As *amici* Council on State Taxation (COST) points out (at 12-14), retroactive denial of refunds raises unique constitutional questions not found when analyzing retroactive increases in tax liability.

3. To the extent that respondents even attempt to defend the constitutionality of the retroactive law at issue, their response is unavailing. Opp. 17-19. It does not help respondents that the Michigan Legislature passed its retroactive law to address an

unanticipated budget shortfall. *Id.* at 18. As *amici* explain, that simply heightens the general importance of the case and need for review. Moreover, the Court in *Carlton* was faced with a similar claim in support of the purportedly "curative" (512 U.S. at 31) tax law at issue there, but acknowledged that there are certainly limits on the efficacy of such a position. *See id.* at 32-33, 38 (O'Connor, J., concurring). And, even before *Carlton*, this Court struck down retroactive tax legislation supported by the government's claim of the need to raise revenues. *See United States v. Hemme*, 476 U.S. 558 (1986). Moreover, as noted by the U.S. Chamber of Commerce (at 9), acceptance of such a basis in support of retroactive tax provisions would "threaten[ ] to undermine businesses' confidence in the courts."

Respondents' claim (Opp. 18-19) that petitioner cannot show detrimental reliance or disruption to its settled expectations is mistaken. Prior to the enactment of the amendments to M.C.L. § 205.54i, and on the basis of the holding in *DaimlerChrysler Services North America LLC v. Dep't of Treasury*, 723 N.W.2d 569 (Mich. Ct. App. 2006) establishing what refunds were owed under existing Michigan law, petitioner filed claims for tax refunds. This Court has routinely used due process considerations to defend a taxpayer's settled interests in claims for refund. *See, e.g., McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). Unquestionably, petitioner's claims for refund are similarly protected by this Court's due process jurisprudence. "Retroactively disallowing the tax benefit that the earlier

law offered, without compensating those who incurred expenses in accepting that offer" is "harsh and oppressive by any normal measure." *Carlton*, 512 U.S. at 39-40 (Scalia, J., joined by Thomas, J., concurring in the judgment).

In attempting to find some limit on the retroactive reach of the law, respondents point to statutory language stating that "this amendatory act is not intended to affect a refund required by a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired." Opp. 19. However, that language does not impose a temporal limit on the amendment's retroactive reach; indeed, it contains no temporal reference at all. To the contrary, it is clear that this language was merely intended to isolate "winners" and "losers" under the amended law. DaimlerChrylser, having litigated and obtained a final order from the Michigan courts, would be paid its refund, while all other taxpayers would have their claims nullified on an indefinite retroactive basis. Moreover, whatever the statute's outer limits, in this case it was applied to extinguish refunds going back five years. Pet. 7. That crosses the due process "modesty" limit that this Court recognized in *Carlton*.

As explained in the petition, other state courts have held that periods of similar – and even shorter – retroactivity cross the constitutional line. Pet. 18-21. The decision below directly conflicts with those precedents, adding to the growing confusion in the lower courts on the scope of this Court's decision in *Carlton* and due process limits on retroactive tax legislation.

See id.; *see also Tesoro Refining and Marketing Co. v. Dep't of Revenue*, Docket No. 39417-1-II (Wash. Ct. App. Dec. 21, 2010) (retroactive tax law with 24-year reach held unconstitutional under *Carlton*). Respondents do not deny the existence of that conflict. They simply ignore it.

4. Respondents likewise ignore the widespread practical ramifications of the question presented, as stressed by the numerous *amici* that have filed in support of certiorari. First, as those *amici* have explained, if the decision below is permitted to stand, it will create "even more uncertainty" for businesses and taxpayers "already struggling in the current economy." U.S. Chamber Br. 6; *see also* COST Br. 14. Such uncertainty is antithetical to the predictable business climate needed to sustain economic growth. Second, the decision below undermines the tax system itself because taxpayers faced with the risk of "ambiguity and inconsistency in the application of tax laws" will be reluctant to rely upon, and voluntarily comply with, questionable tax laws. U.S. Chamber Br. 8-9. *See also* COST Br. 13-14 (such actions "produce the devastating consequence of discouraging compliance with tax laws" if taxpayers think a state will do "whatever it takes not to refund the tax even if it was unlawfully collected"). Third, if states have unlimited discretion to retroactively amend tax laws, then there is little incentive for them to try to get it right the first time. U.S. Chamber Br. 9. This further erodes public confidence in a tax system grounded in the rule of law. Finally, with the ever-present risk of

retroactive tax legislation, there will be a race to the courthouse to be the "lead" case and secure a favorable judgment before the legislature changes the law and precludes a remedy for all later-comers (which is precisely what happened here). COST Br. 5, 12-14. The resulting increase in litigation will be a considerable strain on the state administrative mechanisms, the judicial system and, ultimately, the taxpayers themselves. COST Br. 14.

The importance and recurring nature of the constitutional question presented is undeniable. As the U.S. Chamber of Commerce explains (at 5 n.3), States currently face insurmountable budget deficits and are increasingly turning to the politically expedient option of retroactive tax laws in an effort to alleviate their fiscal woes. Indeed, as respondents admit, budget concerns prompted enactment of the retroactive tax provision at issue here. Opp. 17-18. Faced with both a lack of guidance on the fundamental constitutional question presented and the increasing temptation on the part of state legislatures to turn to retroactive tax laws, the lower courts are now faced with a bevy of similar suits and have struggled under existing precedent – including *Carlton* – to "foster[] a stable and predictable tax environment for business." U.S. Chamber Br. 5-6. This has resulted in conflicting lower court decisions and constitutional disarray on a critically important issue. Absent needed guidance from this Court, States will continue to push the boundaries of retroactivity while likewise

creating additional uncertainty for businesses already struggling in the current economy.

* * *

The lower courts are divided on the constitutional limits governing retroactive tax laws. That issue was squarely presented to the courts below, and those courts expressly rejected it – finding no constitutional impediment, under this Court's decision in *Carlton* or otherwise, to a tax law that has no temporal limit on its retroactive reach. And as the U.S. Chamber of Commerce and other *amici* have stressed, this case presents a timely and worthy vehicle for this Court to provide much needed guidance on this nationally important question. Certiorari is therefore warranted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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