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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, legislatures may enact retroactive tax legislation depriving taxpayers of property interests such as tax refunds or credits only when supported by a legitimate purpose and limited to a "modest" period of retroactivity. *United States v. Carlton*, 512 U.S. 26 (1994). In 2007, the Michigan Legislature amended a state tax provision (Mich. Comp. Laws § 205.54i) to retroactively deny taxpayer refunds that were vested and due under the prior version of the law. The amended provision was purportedly enacted as a "curative" measure and has no temporal limit on its retroactive effect. The question presented is:

Whether the state courts below properly held – in conflict with decisions of this Court and other lower courts – that such a state tax law having indefinite retroactive reach with respect to tax refunds otherwise available under state law satisfies due process even when applied to deny refunds owed to a taxpayer from the preceding five-year period.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to the proceedings for which review is sought are those appearing in the caption of the case. Ford Motor Credit Company is a trade name for Ford Motor Credit Company, L.L.C., a Delaware limited liability company. The sole member of Ford Motor Credit Company, L.L.C. is Ford Holdings, L.L.C., a Delaware limited liability company. Ford Motor Company, a Delaware corporation, owns 100% of Ford Holdings, L.L.C.

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OPINIONS BELOW

The order of the Supreme Court of Michigan denying petitioner's application for leave to appeal (App., *infra*, 13) is reported at 782 N.W.2d 771 (Mich. 2010). The decision of the Michigan Court of Appeals (App., *infra*, 1) is unreported. It disposes of the constitutional question presented for the reasons stated in *GMAC LLC v. Dep't of Treasury*, 781 N.W.2d 310 (Mich. Ct. App. 2009), which is appended hereto (App., *infra*, 25). The decision of the Michigan Court of Claims (App., *infra*, 3) is unreported.

JURISDICTION

On June 10, 2010, the Supreme Court of Michigan issued an order denying petitioner's application for leave to appeal the decision of the Michigan Court of Appeals. App., *infra*, 13. On September 2, 2010, Justice Thomas granted an extension of time within which to file a petition for writ of certiorari to and including October 8, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due

process of law." U.S. Const. amend. XIV, § 1. The relevant Michigan statutes are set forth at App., *infra*, 15.

STATEMENT OF THE CASE

In *United States v. Carlton*, 512 U.S. 26 (1994), this Court held that retroactive tax legislation that deprives taxpayers of property interests such as tax refunds or credits available under pre-existing law does not violate due process if it is supported by a legitimate purpose and the period of retroactivity is "modest." *Id.* at 32. The law at issue in *Carlton* had a 14-month period of retroactivity, which overlapped for several months with the legislative session in which the law was passed. Justice O'Connor, concurring in the judgment, explained that, in her view, "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions." *Id.* at 38; *see id.* at 33. Indeed, as she noted, "[i]n every case in which [this Court has] upheld a retroactive federal tax statute against due process challenge, . . . the law applied retroactively for only a relatively short period prior to enactment." *Id.* at 38.

In the fifteen plus years since this Court's decision in *Carlton*, lower courts have divided on the proper interpretation of that decision and its constitutional command concerning the permissible period of retroactivity under the Due Process Clause.

Several courts have faithfully followed the Court's directive to ensure that retroactive tax legislation reach back only a "modest" period of time, such as the 14-month period upheld in *Carlton* itself. *See, e.g.*, *Rivers v. State*, 490 S.E.2d 261 (S.C. 1997) (two- to three-year period unconstitutional); *City of Modesto v. National Med, Inc.*, 27 Cal. Rptr. 3d 215 (Ct. App. 2005) (four- to eight-year period unconstitutional). Other courts, however, – including the state courts in this case – have failed to heed *Carlton* and have upheld retroactive tax legislation reaching back several years or longer. *See, e.g.*, *Zaber v. City of Dubuque*, ___ N.W.2d ___, No. 07-1819, 2010 WL 2218625 (Iowa June 4, 2010) (five-year period upheld); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009) (five- to nine-year period upheld), *cert. denied*, 130 S. Ct. 3324 (2010). The lower courts have squarely acknowledged this conflict. *See, e.g.*, *River Garden Ret. Home v. Franchise Tax Bd.*, 113 Cal. Rptr. 3d 62, 77-81 (Ct. App. 2010).

The state courts in this case upheld the constitutionality of a Michigan tax statute that has no temporal limit on its retroactive reach and that was applied to petitioner retroactively to deprive it of tax refunds otherwise owed to it under the pre-existing law from the preceding five-year period. In conflict with *Carlton*, the Michigan Court of Appeals held that the Michigan statute's "'retroactive application meets the requirements of due process.'" App., *infra*, 42 (quoting *Carlton*). This case therefore starkly presents the issue that has divided the lower courts

on whether, and to what extent, the constitutional "modesty" requirement recognized in *Carlton* acts as a check on how far back a legislature may reach in depriving taxpayers of tax refunds or credits which they are otherwise owed. Moreover, this case is an especially good vehicle to consider the constitutional limits on retroactive tax legislation because the state legislature made no pretense whatsoever of placing temporal limitations on its retroactive reach and the law has been applied to deprive the taxpayer of refunds to which it was otherwise entitled going back *five years*.

This issue is exceptionally important and warrants guidance from this Court. The question presented has frequently recurred in the wake of *Carlton* and divided the lower courts. Especially in an economic downturn, retroactive tax legislation is an easy means of generating revenue and legislatures across the country have explored and enacted comparable laws. This Court's guidance is necessary to ensure that legislatures do not cross the constitutional line in enacting such retroactive legislation. This Court should thus grant review to resolve the conflict with *Carlton* itself, and the conflict among lower courts, on this fundamental constitutional issue of national importance.

A. Factual Background

Ford Motor Credit Company ("Ford Credit"), working with its Ford Motor Company branded dealerships in Michigan, financed the installment

sales of motor vehicles to Michigan purchasers. The dealerships entered into retail installment contracts with such purchasers with respect to the sale of the motor vehicles and assigned these contracts to Ford Credit pursuant to the terms of a Master Dealer Financing Agreement.

Under the terms of the Master Dealer Financing Agreement, at the time of the installment sales, the dealerships assigned to Ford Credit all statutory and contractual rights, titles, and interests, including the dealers' rights as secured parties, the rights to enforce the debts and repossess the collateral, and all rights to sales tax refunds and deductions provided by law. In exchange for the assignments, Ford Credit paid the dealers the "amount financed," which consisted of the full purchase price of each of the motor vehicles and all applicable sales tax due thereon.

Michigan law requires that, in an installment sale, the entire amount of the sales tax on the full expected purchase price must be paid up front to the Michigan Department of Treasury at the time of sale instead of over time as the payments are made. Mich. Comp. Laws ("M.C.L.") § 205.52(2)(c). In accordance with Michigan law, the dealers reported and remitted all of the sales tax due up front on the full expected purchase prices of the motor vehicles sold under the installment sales agreements to the Department after receiving the amount financed from Ford Credit.

Pursuant to the terms of the retail installment contracts, the purchasers of the motor vehicles agreed

to repay the sales tax and all other amounts due over time. Certain purchasers defaulted on their contractual obligations and failed to repay to Ford Credit the amounts financed, including the sales tax previously remitted to the Michigan Department of Treasury. After reasonable collection efforts were made, Ford Credit determined that the debts were worthless and uncollectible and claimed the uncollected amounts as bad debt deductions on its federal income tax returns pursuant to § 166 of the Internal Revenue Code of 1986, as amended. 26 U.S.C. § 166.

On July 25, 2006, in *DaimlerChrysler Services North America LLC v. Dep't of Treasury*, 723 N.W.2d 569 (Mich. Ct. App. 2006),[1] the Michigan Court of Appeals held that a motor vehicle financing company was entitled to refunds of sales tax paid and remitted by dealerships pursuant to Michigan law on installment sales when the purchasers subsequently default. At the time, Michigan law (M.C.L. § 205.54i) permitted a "taxpayer" to claim bad debt sales tax refunds under certain circumstances, where "taxpayer" included any "individual, firm, partnership, joint venture . . . or any other group or combination acting as a unit." *See* M.C.L. § 205.51(1)(a) & (h). Interpreting this statutory scheme, the court concluded that – under the "plain language" of the statute – a

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[1] As discussed later, this case was superseded by statute. *See GMAC LLC v. Dep't of Treasury*, 781 N.W.2d 310 (Mich. Ct. App. 2009) (recognizing that M.C.L. § 205.54i superseded *DaimlerChrysler*) (App., *infra*, 25).

motor vehicle financing company was a "taxpayer" entitled to claim bad debt sales tax refunds. *Daimler-Chrysler*, 723 N.W.2d at 574, 575. The court explained that its decision was consistent not only with the plain text of the statute, but with "prior analyses of similar statutory language." *Id.* at 576.

Ford Credit filed claims for bad debt refunds with the Michigan Department of Treasury on December 19, 2006, December 28, 2007, and April 21, 2008, pursuant to M.C.L. § 205.54i, in the aggregate amount of $16,007,711 for the periods April 1, 2002 through May 31, 2006; April 1, 2006 through December 28, 2007; and April 1, 2002 through March 31, 2006.

A mere forty-three days after exhausting its appeal rights, the Department of Treasury introduced legislation to amend M.C.L. § 205.54i, for the purpose of overturning the decision in *DaimlerChrysler*. The Michigan legislature retroactively amended M.C.L. § 205.54i, directing that the amendment "shall be retroactively applied" without limitation and describing the Act as "curative." *See* 2007 Mich. Pub. Act 105. It expressly mandated that its retroactive revision was "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 if the refund is payable without interest and after September 30, 2009 and before November 1, 2009," *i.e.*, the refund ordered under *DaimlerChrysler*. On October 1, 2007, the Governor

signed the retroactive amendments into law and they became effective immediately.

B. Proceedings Below

On December 28, 2007, petitioner filed suit in state court seeking payment of its refund claims. Petitioner argued, *inter alia*, that the amendments to M.C.L. § 205.54i violate the Due Process Clause of the United States Constitution because they impose an indefinite period of retroactivity and were applied here to a five-year tax period reaching back to 2002. The court disagreed. It concluded that the state law did not violate due process – "either as written or as applied by [the State] in denying a sales tax refund in this matter" – and dismissed Ford Credit's action. App., *infra*, 11. The court entered a final order on December 16, 2008.

Petitioner appealed to the Michigan Court of Appeals, arguing, *inter alia*, that the five-year look-back was clearly not a modest period of retroactivity, as required by *Carlton*. On January 12, 2010, the court affirmed, rejecting "the constitutional arguments raised by [Ford Credit] for the reasons stated in *GMAC, LLC v. Dep't of Treasury*, [781 N.W.2d 310 (Mich. Ct. App. 2009)]." App., *infra*, 1. *GMAC* was argued in tandem with this case before the Michigan Court of Appeals and was decided one month earlier. There, the court held that a seven-year retroactive application of M.C.L. § 205.54i does not violate "due process . . . and the requirement that retroactive

legislation be limited to a modest period of retroactivity." App., *infra*, 41 (discussing *Carlton*).

On June 10, 2010, the Michigan Supreme Court denied petitioner's application for leave to appeal the decision of the Michigan Court of Appeals. App., *infra*, 13. Justice Markman would have granted the petition and set the case for argument with the *GMAC* case in which the Michigan Supreme Court also denied review, *see* 782 N.W.2d 770 (Mich. 2010). App., *infra*, 13-14.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case for three overriding reasons. First, the decision below conflicts with this Court's decision in *United States v. Carlton*, 512 U.S. 26 (1994). In that case, this Court upheld the constitutionality of a federal tax law with a 14-month period of retroactivity, but stressed that to comport with due process retroactive tax legislation must be supported by a legitimate purpose and confined to a modest period of retroactivity. *Id.* at 32. Justice O'Connor wrote separately to emphasize that, in her view, any "period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions." *Id.* at 38. The decision below upholding the constitutionality of the Michigan tax law at issue – which sets forth *no* limit on the period of retroactivity and was applied in this case to reach

back *five* years – is at odds with this Court's decision in *Carlton*.

Second, this case implicates an entrenched conflict among the lower courts over the proper interpretation of *Carlton* and the constitutional limits on the period of retroactivity for tax laws that seek to deprive taxpayers of refunds or credits. Since this Court's decision in *Carlton*, many federal and state courts have addressed challenges to retroactive tax statutes. But the lower courts have reached conflicting results on the proper constitutional principles for analyzing such legislation in the wake of *Carlton* and on whether laws that seek retroactively to deprive taxpayers of refunds or credits over a multiple-year period are constitutional. The lower courts have expressly acknowledged this conflict. *See, e.g., River Garden Ret. Home v. Franchise Tax Bd.*, 113 Cal. Rptr. 3d 62, 77-81 (Ct. App. 2010). And the decision below upholding the constitutionality of the Michigan law at issue directly conflicts with the decisions of other courts that have held that comparable retroactive tax laws with *shorter* periods of retroactivity were unconstitutional under *Carlton*.

Third, the question presented is exceptionally important and frequently recurring. As the retroactive tax statute at issue in this case illustrates, states have become increasingly emboldened to pass state tax legislation with longer periods of retroactivity and, indeed, as here, even potentially *indefinite* periods of retroactivity. Periods of economic difficulty, like the country faces today, make it particularly

tempting for states to push the constitutional limits on retroactive tax legislation. And without direction from this Court, states effectively will be given *carte blanche* by decisions like the one below to retroactively to claw-back tax refunds or credits otherwise owed to taxpayers limited only (perhaps) by the size of the budget shortfall to be closed.

This case provides a timely vehicle for the Court to resolve the conflict and confusion over this Court's decision in *Carlton* and the constitutional limits on retroactive tax legislation. In this period of severe economic tumult, businesses and States need guidance and clarity from this Court. States facing revenue shortfalls need to know the period of retroactivity that is constitutionally permissible and the Nation's businesses need to understand the limits of the protections afforded by the Due Process Clause against states that seek to aggressively pursue tax revenues – or avoid tax expenditures – by appropriating tax refunds or credits otherwise owed from prior tax years. Likewise, guidance is needed on when a purportedly "curative" retroactive tax statute is legitimate notwithstanding its indefinite period of retroactivity.

The petition for certiorari should be granted.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT LIMITING RETROACTIVITY TO A "MODEST" PERIOD

In *Carlton*, this Court upheld a retroactive tax under the Due Process Clause because it was supported by a legitimate purpose and was limited to a "modest" period of retroactivity – 14 months, which included a several-month overlap with the current legislative session. 512 U.S. at 32. In sharp contrast, the lower court here upheld a state statute that imposes an *indefinite* period of retroactivity and, in this case, has been applied to a *five-year* tax period. The lower court's due process analysis directly conflicts with *Carlton* and fundamental principles recognized therein. The Court should grant review to clarify that, under *Carlton*, courts must ensure that tax legislation is limited to a "modest" period of retroactivity.

This Court has long disfavored retroactive laws that deprive individuals of property or other protected interests because "'[r]etrospective laws are, indeed generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'" *Eastern Enterprises. v. Apfel*, 524 U.S. 498, 533 (1998) (plurality) (quoting 2 J. Story, *Commentaries on the Constitution* § 1398 (5th ed. 1891)). "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can . . . upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191

(1992). The Due Process Clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994).

Although this Court has often upheld retroactive tax legislation against a due process challenge, it "has never intimated that [a legislature] possesses unlimited power to readjust rights and burdens and upset otherwise settled expectations." *Carlton*, 512 U.S. at 37 (O'Connor, J., concurring) (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986) (O'Connor, J., concurring)) (internal quotation marks omitted). Indeed, "[t]he governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose." *Id.* at 37-38. Thus, in *Carlton*, the Court upheld the challenged retroactive tax statute, but only after emphasizing that the 14-month period of retroactivity at issue was "modest" and consistent with prior enactments "'confined to short and limited periods [of retroactivity] required by the practicalities of producing national legislation.'" *Id.* at 32-33 (citation omitted).

Consistent with this principle, this Court has upheld limited retroactivity periods in tax legislation against due process challenges. *See, e.g., United States v. Hemme,* 476 U.S. 558, 562 (1986) (four-month); *United States v. Darusmont*, 449 U.S. 292, 294-95 (1981) (ten-month); *United States v. Hudson*, 299 U.S. 498, 501 (1937) (one-month). At the same time, however, the Court has recognized that the

Constitution places outer limits on the period of retroactivity that may be imposed. *Carlton*, 512 U.S. at 32; *see id.* at 38 (O'Connor, J., concurring in judgment) (period of retroactivity greater than the year preceding the legislative session would raise "serious constitutional questions"); *Apfel*, 524 U.S. at 550 (Kennedy, J., concurring in judgment and dissenting in part) (30-to-50 year retroactivity period "is far outside the bounds of retroactivity permissible" under the due process clause). In other words, under our Constitution there is a point at which the interests of the government in enacting retroactive legislation must yield to concerns of finality and fairness.

The lower court here essentially flouted *Carlton* and recognized no such limitations. The court acknowledged *Carlton*, but it concluded that the Michigan law's "'retroactive application meets the requirements of due process,'" App. *infra*, 42 (quoting *Carlton*), even though the law imposes no limit on the period of retroactivity that the state may apply to deprive taxpayers of refunds, and even though the law was applied in this case to deprive Ford Credit of refunds going back *five* years – quintuple the period that Justice O'Connor reasoned in *Carlton* would raise "serious constitutional questions." 512 U.S. at 38 (concurring in the judgment).[2] The decision below thus squarely conflicts with *Carlton*.

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[2] In *GMAC*, the Court of Appeals observed that the plaintiffs' reliance on *Carlton* was misplaced on the ground that

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II. THE DECISION BELOW EXACERBATES AN ENTRENCHED CONFLICT AMONG THE LOWER COURTS OVER *CARLTON* AND THE BASIC "MODESTY" REQUIREMENT

The proper application of *Carlton* and the constitutional limits on retroactive legislation have divided the lower courts in the wake of this Court's decision. The decision below directly conflicts with the decisions of other lower courts that have invalidated under the principles recognized in *Carlton* retroactive tax legislation that imposed comparable and in some cases even shorter periods of retroactivity. Review is warranted to resolve this conflict of authority.

"plaintiffs are not challenging the retroactive amendment to MCL 205.54i" but rather "the Legislature's disapproval and corrective action with regard to the *DaimlerChrysler* decision." App., *infra*, 43. To be clear, Ford Credit here challenged the constitutionality of the Michigan law in the Court of Appeals based on *Carlton* and the constitutional principles recognized therein. More fundamentally, the *DaimlerChrysler* decision interpreted and expounded on the law as it had previously existed under the statute – and was originally enacted by the legislature. The legislature was free to amend the statute, but – as *Carlton* held – the Constitution imposes limits on the period of retroactivity that it could go back to deprive taxpayers of refunds otherwise owed under the law.

A. The Decision Below Follows In A Line Of Cases Essentially Disregarding *Carlton* And Trivializing The "Modesty" Requirement

An increasing number of federal and state courts are trivializing or ignoring *Carlton*'s "modesty" requirement. The *GMAC* decision on which the Michigan Court of Appeals disposed of this case (App., *infra*, 25-44) exemplifies this line of cases. In *GMAC*, the court essentially ignored the modesty requirement by upholding the same law at issue here over a seven-year retroactive period. There, the court referred to the legislation as merely a "corrective action" rather than a retroactive tax law. But that is a distinction without a constitutional difference. In *Carlton*, for example, the tax statute was retroactive even though the Court characterized it as a "curative measure." 512 U.S. at 31. Indeed, Justice O'Connor stressed that *any* new law can be seen as fixing "a perceived problem with the prior state of affairs." 512 U.S. at 36. Simply relabeling the effect as "curative," however, cannot relieve the court of ensuring a limited temporal reach. Otherwise, as happened here, courts will readily be able to side-step the due process protections provided by *Carlton*'s "modesty" requirement.

More recently, in *Zaber v. City of Dubuque*, ___ N.W.2d ___, No. 07-1819, 2010 WL 2218625 (Iowa June 4, 2010), the Iowa Supreme Court upheld application of a new tax law to a five-year retroactive period as a legitimate means to "avoid financial

disruption." *Id.* at *16. As in *GMAC*, the court referred to the new tax law at issue as a mere "curative" measure for which "longer periods of retroactivity" are permissible, "in contrast to the so-called modest period of retroactivity accorded the imposition of a new tax" under *Carlton*. *Id.* at *9. That provoked a strong dissent, arguing that the decision permits "unfettered retroactive application" as long as the legislature couches a new law as a "curative" measure intended to "protect the public fisc." *Id.* at *20 (Wiggins, J., dissenting). As the dissent pointed out, "a retroactive tax is a new tax whether the legislature enacts it as a curative statute or by other legislation" because the "effect is the same." *Id.* at *21. Accordingly, under *Carlton*, due process requires a "modest period of retroactivity." *Id.* at *23.

Like the Iowa Supreme Court in *Zaber*, the Kentucky Supreme Court recently upheld a retroactive tax law with a five- to nine-year period of retroactivity. Citing *Carlton*, the Kentucky high court stated that "[t]he pertinent question is whether the period of retroactivity is one that makes sense in supporting the legitimate governmental purpose (rationally related)." *Miller*, 296 S.W.3d at 399. The court then applied an indeterminate facts and circumstances test and upheld the law, notwithstanding that it reached back as far as nine years to deprive taxpayers of vested property interests. And a California appellate court recently employed a similar analysis in dismissing the taxpayer's call for a concrete test for evaluating the constitutionality of

retroactive tax laws and engaged in an indeterminate analysis in upholding a four-year period of retroactivity – candidly stating "we do not subscribe to the view that a period longer than one year in and of itself raises serious constitutional questions." *River Garden*, 113 Cal. Rptr. 3d at 80.

Other courts have in similar fashion ignored or minimized the requirements of *Carlton*. *See, e.g.*, *Enterprise Leasing Co. of Phoenix v. Arizona Dep't of Revenue*, 211 P.3d 1, 3-6 (Ariz. Ct. App. 2008) (upholding tax legislation with six-year retroactive period); *Buerer v. United States*, 141 F. Supp. 2d 611, 614 (W.D.N.C. 2001) (interpreting *Carlton* as necessitating only an evaluation of the period of retroactivity in light of the legislative purpose for the statute); *cf. Tate & Lyle, Inc. v. Commissioner*, 87 F.3d 99, 107 (3d Cir. 1996) (upholding six-year retroactive period on a regulation and distinguishing *Carlton* as involving a statute).

B. By Contrast, Other Courts Have Followed *Carlton* And Faithfully Applied The Constitutional "Modesty" Requirement

At the same time, other courts have faithfully applied the "modesty" requirement recognized in *Carlton* and invalidated tax legislation with periods of retroactivity comparable to and even shorter than the period involved in this case. In *Rivers v. State*, 490 S.E.2d 261, 277-79 (S.C. 1997), for example, the

South Carolina Supreme Court invalidated tax legislation with a period of retroactivity of between two and three years on the grounds that a two- to three-year claw-back period was not "modest" as required by *Carlton*. Likewise, in *City of Modesto v. National Med, Inc.*, 27 Cal. Rptr. 3d 215, 222 (Ct. App. 2005), the court relied on the constitutional "modesty" requirement in invalidating tax legislation with a retroactivity period of between four and eight years. As one commentator has observed, cases like *Rivers* and *City of Modesto* "each contain a more robust analysis of the modesty doctrine and are the better reasoned authorities." Robert R. Gunning, *Back from the Dead: The Resurgence of Due Process Challenges to Retroactive Tax Legislation*, 47 Duq. L.Rev. 291, 327 (2009).

And many courts have likewise heeded the modesty requirement in upholding "'short and limited periods,'" *Carlton*, 512 U.S. at 33 (citation omitted), typically even less than a year. In *Estate of Edward Kunze v. Commissioner of Internal Revenue*, 233 F.3d 948, 954 (7th Cir. 2000), for example, the court relied on *Carlton*'s "modesty" requirement in upholding a statute with an eleven-month retroactivity period. *See also, e.g.*, *Kitt v. United States*, 277 F.3d 1330, 1334-35 (Fed. Cir. 2002) (seven-month); *Quarty v. United States*, 170 F.3d 961, 965-68 (9th Cir. 1999) (eight-month); *Kane v. United States*, 942 F. Supp. 233, 234 (E.D. Pa. 1996) (eight-month); *Gardens at W. Maui Vacation Club v. County of Maui*, 978 P.2d 772, 782-83 (Haw. 1999) (six-month); *cf. Jefferson County*

Comm'n v. Edwards, ___ So. 3d ___, Nos. 1090437, 1090517, 2010 WL 1946274, at *4, *9 (Ala. May 14, 2010) (citing *Carlton* as requiring a "modest" retroactivity period). Consistent with such decisions, numerous scholars have recognized that, to pass due process muster, a "statute must possess a modest period of retroactivity." *Zaber*, 2010 WL 2218625, at *23 (Wiggins, J., dissenting) (citing examples).[3]

In short, the lower courts themselves have expressly acknowledged this conflict of authority and the growing doctrinal confusion in this important area of law. *See, e.g., River Garden*, 113 Cal. Rptr. 3d at 79 (noting lower courts have "assumed a variety of stances on whether *Carlton* separately requires a modest period of retroactivity"); *see also* Gunning, *supra*, 47 Duq. L.Rev. at 312-29 (surveying decisions).[4]

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[3] *See, e.g.*, Gunning, *supra*, 47 Duq. L.Rev. at 293-94; Lynn A. Gandhi, *Taxation,* 53 Wayne L.Rev. 599, 607 n.70 (2007); Kaiponanea T. Matsumura, *Reaching Backward While Looking Forward: The Retroactive Effect of California's Domestic Partner Rights and Responsibilities Act,* 54 UCLA L.Rev. 185, 203 (2006); Michael J. Phillips, *The Slow Return of Economic Substantive Due Process,* 49 Syracuse L.Rev. 917, 964 n.306 (1999); Monica Risam, *Retroactive Reinstatement of Top Federal Estate Tax Rates Is Constitutional: Kane v. United States,* 51 Tax Law. 481, 485 (1998); Charles H. Koch, Jr., 3 *Administrative Law & Practice* § 12.34[11] (2d ed. 1997); Pat Castellano, *Retroactively Taxing Done Deals: Are There Limits?,* 43 U. Kan. L.Rev. 417, 438 (1995); Leo P. Martinez, *Of Fairness and Might: The Limits of Sovereign Power to Tax After Winstar,* 28 Ariz. St. L.J. 1193, 1208-09 (1996).

[4] Commentators have likewise disagreed on the state of the law post-*Carlton*. *Compare, e.g.*, Gunning, *supra*, 47 Duq. L.Rev.

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The decision below deepens the conflict and is flatly at odds with decisions like *Rivers* and *City of Modesto*. This Court should grant review to resolve this conflict.

III. THE QUESTION PRESENTED IS RECURRING AND CONCERNS A MATTER OF NATIONAL IMPORTANCE

The decision below establishes a dangerous precedent at a time when legislatures nationwide are looking for easy and creative ways to address budget shortfalls. In Michigan alone, at least 90 pending cases involving challenges to the denial of millions of dollars of tax refunds under the retroactive law at issue are being held for disposition of this case.

Moreover, seizing on the uncertainty of *Carlton*'s role in evaluating retroactive tax legislation, within the last year the legislatures of Virginia (2010 H.B. 30/2010 S.B. 30) and Washington (2 E.S.S.B. 6143) have either proposed or enacted retroactive tax laws with retroactivity periods of four (Washington) or six (Virginia) years in order to close budget shortfalls. But Virginia and Washington are just two of the most recent examples. In the last several years several

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at 312-29 (*Carlton* provides meaningful due process protection), *with* Faith Colson, *The Supreme Court Sounds the Death Knell for Due Process Challenges to Retroactive Tax Legislation*, 27 Rutgers L.J. 243 (1995).

states have enacted retroactive legislation in order to shore-up state budgets. *See* N.J. Rev. Stat. § 54A:6-11 (retroactive taxation of lottery winnings); Ohio Rev. Code Ann. § 5747.02(A) (retroactive personal income tax rate increase). And the use of retroactive legislation to remedy budget deficits is not a tool solely employed by the states. Faced with its own looming budgetary shortfalls, the federal government is also pondering retroactive taxes. *See* Opinion, *A Very Grim Reaper: Another Tax That Democrats Want To Raise From The Dead*, Wall St. J., Sept. 21, 2010, at A20 (discussing proposal to impose estate tax retroactively to January 1, 2010).

This Court has long warned of the temptation "to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266. Indeed, "[g]roups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them." *Apfel*, 524 U.S. at 549 (Kennedy, J., concurring in judgment and dissenting in part); *see also Carlton*, 512 U.S. at 32. This Court's guidance is needed to dispel such fears and provide taxpayers with the certainty that they deserve in order to efficiently arrange their affairs. And businesses, no less than individuals, should be permitted to rely on tax refunds and credits due under existing laws without fear that legislatures may suddenly retroactively deprive them of those interests beyond a "modest" period of retroactivity – and potentially *indefinitely* –

regardless of whether such laws are styled as "curative" in nature.[5]

As the growing body of lower court case law and increasing legislative activity in this important area underscore, the question presented is frequently recurring and only likely to become more important as state legislatures search desperately for new sources of revenue in the current difficult economic times. This Court's guidance on the exceptionally important question presented is therefore urgently needed.

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[5] Of course, retribution is not the only concern of the Due Process Clause potentially implicated by retroactive legislation. Such legislation may also implicate basic concerns of fair treatment that the constitutional command of due process serves to protect. Here, for example, the Michigan legislature not only sought to change the rules after the fact, but compounded its error by preserving benefits Ford Credit's competitors enjoyed for some of the same periods that are at issue here while purporting to deny those benefits to all other taxpayers.

CONCLUSION

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

Respectfully submitted,

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