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 WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, KENTUCKY CHAMBER OF COMMERCE, INC., MICHIGAN CHAMBER OF COMMERCE, AND MICHIGAN MANUFACTURERS' ASSOCIATION SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, the Kentucky Chamber of Commerce, Inc. ("Kentucky Chamber"), Michigan Chamber of Commerce ("Michigan Chamber"), Michigan Manufacturers' Association ("MMA") and Chamber of Commerce of the United States of America ("U.S. Chamber") (collectively, "Business Trade Groups"), as *amici curiae*, respectfully submit this brief in support of Petitioners.[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch. To that end, the Chamber has filed more than 1,700 amicus curiae briefs in cases of vital concern to the nation's business community. The U.S. Chamber is a non-profit corporation organized under the law of the District of Columbia and recognized as a Section 501(c)(6) entity by the IRS.

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1. Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. Pursuant to Rule 37.3, the parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae*'s intention to file this brief. Letters from the parties consenting to the filing of this brief are attached hereto.

The Kentucky Chamber is the largest broad-based business association in the Commonwealth, representing directly and indirectly the interests and views of more than 2,700 businesses engaged in commercial, industrial, agricultural, civic and professional activities in Kentucky – which is more than fifty percent of Kentucky's private workforce. The mission of the Kentucky Chamber is to provide leadership and serve as a consensus-builder and advocate for the advancement of Kentucky. The Kentucky Chamber is the principal voice of Kentucky businesses and works to enhance the economy and business climate of the Commonwealth. The Kentucky Chamber is a Kentucky non-profit corporation, recognized as tax favored by the Internal Revenue Service ("IRS") pursuant to 26 U.S.C. § 501(c)(6).

The Michigan Chamber represents more than 6,700 Michigan corporations and businesses engaged in commercial, industrial, agricultural, civic and professional activities across the State of Michigan, as well as local chambers of commerce and trade and professional associations. The mission of the Chamber is to promote conditions favorable to job creation and business growth in Michigan. Members include businesses of every size and type and come from every one of the state's 83 counties, representing a broad cross section of the state's economy. The Michigan Chamber is organized under Michigan law as a non-profit corporation and recognized by the IRS under 26 U.S.C § 501(c)(6).

The MMA is a business association composed of more than 3,000 Michigan manufacturing businesses. The MMA represents businesses employing over 90% of the industrial workforce in Michigan. As the state's leading

advocate for manufacturers, the MMA's mission is to promote the interests of Michigan manufacturers and of the public in the proper administration of laws relating to its members, and otherwise promote the general business and economic welfare of the State of Michigan. Through effective representation of its membership before the legislative, executive and judicial branches of government on issues of importance to the manufacturing community, the MMA works to foster a strong and expanding manufacturing base in Michigan. The MMA is a Michigan non-profit corporation and recognized as a Section 501(c)(6) entity by the IRS.

The Michigan Court of Appeals decision herein has, as have multiple prior decisions from other states recently, fostered an area of legal uncertainty and instability as it pertains to the scope of a state legislature's power to enact retroactive tax legislation under the Due Process Clause. Such legal uncertainty impacts businesses and taxpayers across the nation and threatens the interest of the business community therein. The Business Trade Groups believe that the Court's guidance and review is much needed in this case and so many others like it, and respectfully urges a grant of certiorari herein.

SUMMARY OF ARGUMENT

The Business Trade Groups submit this brief as *amici curiae* in support of the Petitioners. The petition for a writ of certiorari should be granted in order for the Court to consider the important and pressing tax and legislative policy interests implicated by the Michigan Court of Appeals' ruling in *Ford Motor Credit Co. v. Dep't of Treasury*, No. 289781 (Mich. App. Jan. 12, 2010) (unpublished) and the Michigan Legislature's actions as a part thereof, and to provide guidance to businesses across the nation regarding the scope of Due Process limitations on the ability of states to retroactively alter tax liability.

For several years, states across the country facing revenue shortfalls and are acting more aggressively in pursuing new streams of tax revenue and adopting creative strategies for retaining more tax dollars. Some of these strategies are not only creative, but also constitutionally suspect. In this instance, the Michigan General Assembly ("General Assembly") sought to remedy its revenue shortfall by clawing back tax refunds to Petitioner through retroactive legislation with no apparent temporal limit.[2] The Business Trade Groups assert that the General Assembly, in connection with the Michigan Department of Treasury (hereinafter referred to as "Treasury Department"), have, as have other sister-

2. Efforts like those of Michigan and other states to retroactively increase tax liability after losing tax cases in the courts, bring to mind the famous running gag in *Peanuts* – the widely-known comic strip by Charles M. Schulz – where Lucy offers to hold the football for Charlie Brown to kick, only to pull it away at the last moment, leaving Charlie Brown to fall flat on his back.

states in recent years, violated taxpayers' Due Process rights in an effort to raise or protect state tax revenue.

Accordingly, the Business Trade Groups support the present petition for a writ of certiorari because the Michigan Court of Appeals' opinion and Supreme Court of Michigan's denial of review results in uncertainty and instability in the application of Michigan tax laws, and furthers a split of authority all across the country.

REASONS FOR GRANTING THE PETITION

A. RETROACTIVE TAX LEGISLATION SUCH AS THAT UPHELD BY THE MICHIGAN COURTS CREATES ECONOMIC UNCERTAINTY AND UNDERMINES BUSINESSES' CONFIDENCE IN THE RULE OF LAW

1. Record Decline in State Tax Receipts Has Created a Dangerous Incentive for States to Violate Taxpayers' Due Process Rights Through Ad Hoc Retroactive Tax Legislation

All 50 states currently face "the steepest decline in state tax receipts" since the Great Depression.[3] In an effort to mitigate budget shortfalls, many states have enacted laws retroactively subjecting taxpayers

3. A Center on Budget and Policy Priorities Study shows that all fifty states had a budget gap in fiscal year 2010. Michigan, in particular had a $3.3 million budget gap. *See* Center on Budget and Policy Priorities, *Recession Continues to Batter States Budgets; State Responses Could Slow Recovery*, Table 4 at p. 10, *available at*: http://www.cbpp.org/cms/?fa=view&id+711.

to additional taxes or depriving taxpayers of a right to pursue refund claims of overpaid taxes.[4] Lower courts, as in this instance, now struggle to strike the fair and correct balance between a state's proper and lawful interest in raising and controlling revenue on the one hand, and fostering a stable and predictable tax environment for businesses and other taxpayers on the other hand. In this case, the lower court simply got the calculation wrong. The result is an unconstitutional deprivation of the Petitioner's due process rights, in addition to creating even more uncertainty for businesses already struggling in the current economy.

Ford Motor sets the scene for Michigan's ability to draft result-driven legislation, facially notated under the guise of protecting Michigan's revenue stream against an incorrect decision by the judiciary, on an "as needed" basis, all at the expense of Due Process for Michigan taxpayers.

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4. Of course, the temptation to abuse the power to tax is among the oldest of temptations of government. *See Loan Assoc. v. Topeka,* 87 U.S. 655, 663 (1874) ("Of all the powers conferred upon government that of taxation is most liable to abuse….The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly and indirectly to all classes of the people"). Thus, the temptation to retroactively change tax policy is all the greater in the face of recurring state deficits.

2. *Ford Motor* Is A Paradigmatic Example of States Baiting Businesses with One Tax Policy Only to Legislatively Switch the Policy After The State's Budget is Threatened

It is against the backdrop of strained state budgets[5] that this case arises. Ford Motor Credit Company, as a part of its parent corporation's integrated retail sales and financing programs, financed the sales of motor vehicles by Ford dealers to Michigan purchasers, which consisted of the full purchase price of the vehicle and all sales tax due thereon. For installment sales, Michigan law requires that the entire amount of sales tax must be paid at the time of sale instead of as each subsequent monthly payment is made over time. Here, Ford remitted the sales tax up front and required the vehicle purchasers to "repay" the sales tax and all other remaining amounts due over time. As happens from time to time in the ordinary course of business – but which has occurred with significantly greater frequency during the recent recession – certain purchasers defaulted on their contractual obligations and failed to repay Ford the amount financed, including the sales tax previously remitted to the Treasury Department.

On July 25, 2006, the Michigan Court of Appeals held that an integrated 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 on the underlying transactions. *DaimlerChrysler Services North*

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5. The majority of states have policy or constitutional mandates of a balanced budget; this simply compounds the problem presented here.

America LLC v. Dep't of Treasury, 723 N.W.2d 569 (Mich. Ct. App. 2006). Seeing these transactions as analogous in nature and effect, Ford then filed additional refund claims for sales tax paid on defaulted installment sales, as it had previously.

Subsequently, the Michigan Treasury Department sought legislation to overturn the decision in *DaimlerChrysler* and proposed that the legislation be imposed on a retrospective basis. A mere 43 days after the court's decision became final, the Michigan legislature passed, and the Governor signed into law, retroactive amendments which facially prevented Ford from receiving the tax refunds to which it was otherwise entitled. This is not just. This Court has stated:

> The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments.

Loan Assoc. v. Topeka, 87 U.S. 655, 663 (1874).

3. The Policy and Equity Issues Implicated by *Ford Motor* Merit This Court's Review

Michigan's retroactive legislation, and similar legislation from other states, has resulted in ambiguity and inconsistency in the application of tax laws. Critical legal questions aside, *Ford Motor* raises many policy questions, including: What is the effect of a state's refusal to follow

this Court's precedent? How can taxpayers, businesses and the like rely on tax statutes, administrative guidance and cases when they are not being fairly enforced? Why should taxpayers seek a remedy through the state courts when the General Assembly can with almost a click bypass same? Does the ability of states to enact invalid retroactive state laws lessen their burden of getting it right the first time? With the almost limitless power of a "do over," what incentive is there for a state legislature to strive for constitutional and statutory correctness up front?

These questions as applied to this action easily demonstrate the scope of the resultant problems. Michigan's decision to rescind Ford's right to its refunds could disrupt the orderly administration of the tax laws in the states by encouraging taxpayers not to pay a suspect tax, rather than pay the tax and then seek a refund which they may never receive. If *Ford Motor* is sustained, it would grant states a veritable license to have their revenue departments promulgate regulations or policies with questionable statutory or constitutional basis, risking nothing but the possible need for retroactive legislation to avoid the payment of any refunds. To protect their rights, taxpayers might be compelled to make all payments under protest and then contemporaneously file protective refund claims for refunds for the entire amount, a strategy likely to overburden state revenue departments and ultimately, the judiciary, where the disputes will ultimately end up.

Perhaps more troubling is that here, the retroactive legislation came in direct response to a decision by the state's judicial branch. By unraveling the court's holding in *DaimlerChrysler*, the legislature and the decision of the court below upholding the law threatens to undermine

businesses' confidence in the courts. The American public has long harbored deep suspicions of the fundamental fairness of retroactive legislation; it was, for example, a discussion during the Constitutional Convention. *See* DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON, AUG. 28, 1787, H.Doc. No. 398, at 626, 69th Cong. 1st Sess. (1927); *see also* DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON, AUG. 29, 1787, H.Doc. No. 398, at 632, 69th Cong. 1st Sess. (1927) (discussing concerns relating to not only to ex post facto laws in criminal cases, but also to retrospective laws in civil cases). And in his Commentaries on the Constitution, Justice Story famously argued that:

> Retrospective 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.

2 J. Story, COMMENTARIES ON THE CONSTITUTION § 1398 (5th ed. 1891); *see also* H. Broom, LEGAL MAXIMS 24 (8th ed. 1911) ("[r]etrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not change the character of past transactions carried on upon the faith of the then existing law.").

And, not only were the great minds of our country concerned about retroactive laws, but also about an unlimited power to tax. As Chief Justice John Marshall stated in *M'Culloch v. Maryland*, 17 U.S. 316, 327 (1819), "[a]n unlimited power to tax involves, necessarily a power to destroy," on which Justice Oliver Wendell Holmes later

expounded, "[t]he power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928).

Today's taxpayers still share Justice Story's concerns and seek Justice Holmes' viewpoint. This Court has stated:

> the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York v. United States, 505 U.S. 144, 186 (1996).

Because the *Ford Motor* decision raises such serious policy and equity issues regarding the fairness, the scope, and the practical consequences of retroactive tax legislation, the case merits this Court's review in order to ensure the constitutionally appropriate balance inherent in our tri-parte form of government.

B. THE DECISION BELOW DISREGARDS THIS COURT'S PRONOUNCEMENTS OF DUE PROCESS LIMITS ON RETROACTIVE TAX LEGISLATION, AND CONTRIBUTES TO THE CONFUSION AMONG THE LOWER COURTS ON *CARLTON*

1. Significant Confusion Among the Lower Courts Regarding *Carlton*'s "Modesty" Requirement Merits Certiorari to Provide Clarity

Although this Court has upheld retroactive tax legislation against a Due Process challenge, *United States v. Carlton,* 512 U.S. 26, 30 (1994), it has also acknowledged that retroactive application of a law is not without limits and cannot be "so harsh and oppressive to transgress the constitutional limitation." *Welch v. Henry*, 305 U.S. 134, 147 (1993). *Ford Motor* transgresses the constitutional limitations envisioned by this Court.

In *Carlton*, this Court stated that "retroactive legislation does have to meet a burden not faced by legislation that has only future effects," *Carlton,* 512 U.S. at 31, and that "a modest period of retroactivity" is a predicate that supports the constitutionality of retroactive legislation. *Id.* at 32 (upholding legislation with a period of retroactivity of one year because, as Justice Blackmun wrote, "Congress acted promptly and established only a modest period of retroactivity.").

In her concurring opinion in *Carlton*, Justice O'Connor expounded in greater detail on this pretext of modesty and the extent to which it factors into this Court's analysis when reviewing the constitutionality of retroactive tax legislation:

> In every case in which we have upheld a retroactive federal tax statute against due process challenge, however, the law applied retroactively for only a relatively short period prior to enactment. In *Welch v. Henry*, the tax was enacted in 1935 to reach transactions completed in 1933; but we emphasized that the state legislature met only biannually and it made the revision "at the first opportunity after the tax year in which the income was received." A period of retroactivity *longer than the year preceding the legislative session in which the law was enacted*, would raise, in my view, serious constitutional problems.

Id. at 38 (O'Connor, J., concurring) (emphasis added).

Since *Carlton*, literally dozens of cases across the country have addressed its "modesty analysis." *See, e.g., Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009), *cert. denied*, 130 S.Ct. 3324 (U.S. 2010). The perplexing, almost visceral manner in which some courts have addressed *Carlton* suggests an even deeper problem.

State courts have followed this Court's determination in *Carlton* in different ways. Some courts have correctly interpreted *Carlton* as imposing a "modesty" requirement for retroactive legislation and have followed Justice O'Connor's pronouncements in concluding that due process is generally violated by a period of retroactivity longer than one year preceding the legislative session in which the law was enacted. *See, e.g., Jefferson County Comm'n v. Edwards*, --- So.3d ---, 2010 WL 1946274, at *4, *9 (Ala. May 14, 2010) (citing *Carlton* as requiring a "modest"

retroactivity period); *City of Modesto v. Nat'l Med., Inc.*, 128 Cal.App.4th 518, 528-29 (Ca. App. 2005) (stating that "the legislative body must act promptly and establish only a moderate period of retroactivity" and finding retroactive legislation which applied to tax years four to eight years preceding the legislative session that enacted the legislation was invalid); *Estate of Edward Kunze v. Com'r of Internal Revenue,* 233 F.3d 948, 954 (7th Cir. 2000) (requiring a "moderate" period of retroactivity and upholding a curative statute with a period of retroactivity of eleven months); *Rivers v. State,* 490 S.E.2d 261, 265 (S.C. 1997) (requiring a period of retroactivity to be "modest" and holding that a three-year period of retroactivity violated due process).

Yet, still other courts have rejected the notion that "modesty" is a predicate requirement, finding it need only be considered. *See, e.g., Enterprise Leasing Co. of Phoenix v. Arizona Dep't of Revenue*, 211 P.3d 1 (Ariz. App. 2008) (determining that there is leeway for retroactivity beyond one year and upholding a six-year retroactive period); *Montana Rail Link v. United States*, 76 F.3d 991, 994 (9th Cir. 1996) (determining that limiting legislation to "a one or two year period of retroactivity…would have been arbitrary and irrational").

This Court has stated that, "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Texas v. Pinson*, 282 U.S. 499, 501 (1931). Herein, the "modest" period of retroactivity allowed by this Court is the "little play" in the "joints" of retroactive tax legislation. Thus, the period of retroactivity *is* a

fundamental element to be considered by the judiciary when evaluating retroactive tax legislation. While the facts certainly change from case to case, the scrutiny applied remains true.

When *Carlton* was issued, it was hoped to be a solution to the issue of retroactive legislation; the result has far from avoided or resolved disputes on this topic, considering the ample litigation since *Carlton* in 1994. The Court's consideration and discussion of modesty in determining whether retroactive legislation is valid has lead today to the very point which Justices Scalia and Thomas predicted:

> The reasoning the Court applies to uphold the statute in this case guarantees that *all* retroactive tax laws will henceforth be valid.

Carlton, 512 U.S. at 40 (Scalia & Thomas, JJ., concurring) (emphasis in original). Thus, if there is no modesty requirement, then all retroactive legislation reaching back *ad infinitum* would be *per se* valid – such a horrendous situation simply could not have been this Court's design in *Carlton*.

In sanctioning the suspect legislation, the Michigan Court of Appeals in *Ford Motor* contributed to the confusion among the lower courts by reading the "modesty" requirement of *Carlton* completely out of the governing Due Process law when analyzing this facially retroactive tax legislation. Justice Blackmun's majority Opinion coupled with the concurring Opinion of Justice O'Connor in *Carlton*, form a powerful combination plainly requiring a "modest" period of retroactivity. For these

reasons, the Michigan Court of Appeals' Opinion, simply the latest of many state appellate level decisions to fail to apply a "modesty" requirement, should be reviewed and certiorari granted. The Business Trade Groups request this Court's review of Ford Motor in order to provide much-needed clarity on the "modesty" issue, as states across the country are split on this important issue. This Court should grant *certiorari* and plainly and unequivocally confirm, 16 years after *Carlton*, that the period of retroactivity in implementing otherwise constitutional, non-curative tax legislation, retroactive on its face, must be "modest" – which certainly by definition cannot mean five years.

2. The Michigan Legislation Was Not "Curative," And the Decision Below Adds Confusion to Whether Retroactive Legislation Must be "Curative" To Satisfy Due Process Concerns

Traditionally, this Court has given more deference to so-called "curative" legislation when it comes to retroactivity. *See, e.g., Graham & Foster v. Goodcell*, 282 U.S. 409, 428 (1931) (upholding a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy could be applied without injustice); *see also*, *Zaber v. City of Dubuque*, --- N.W.2d ---, 2010 WL 2218625 (Iowa 2010) (upholding a five-year retroactive new tax and emphasizing the "curative" nature of the legislation).

The legislation which this Court upheld in *Carlton* not only involved a modest period of retroactivity, but was *curative* legislation relating to a generally applicable statute. *See Carlton*, 512 U.S. 26 (1994). The legislation

in *Carlton* was an effort by Congress to correct what it subsequently stated were unintentionally enacted "loopholes." In its starkest terms, the *Carlton* legislation – involving a circumstance where a tax break originally projected by Congress to be at $300 million, was a mere months later projected at $7 billion – was clearly a legislative effort to address the oft-referred to "law of unintended consequences." Designed to retroactively remedy what it saw and publicly asserted was a "patent abuse," Congress' Act at question in *Carlton* represented a rational method accompanying a legitimate governmental purpose when seen as the curative legislation it was.[6]

In this material respect, *Ford Motor* is far from *Carlton*. The amendments to M.C.L. § 205.54i, which retroactively overturned the decision in *DaimlerChrysler*, discussed *supra,* were admittedly described in the offensive amending legislation by the Michigan Legislature as "curative." But this is a red-herring and the Legislature simply stating that does not make it so: virtually all retroactive tax legislation increases or protects revenues. Consequently, if retroactive legislation under the guise of raising or controlling revenue satisfied Due Process, limits on retroactivity would *never* apply. And clearly, *Carlton* confirms otherwise.

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6. For further discussion of the "curative" nature thereof, *see* Briefs of Petitioner, United States of America, *United States v. Carlton*, 512 U.S. 26 (1994), reprinted at 1993 WL 638225 (U.S.), Reply Brief of Petitioner, United States of America, *United States v. Carlton*, 512 U.S. 26 (1994), reprinted at 1993 WL 13010930 (U.S.), making it clear that the Petitioner, United States, saw the case as involving only a curative tax amendment designed to plug a loophole.

The amendments to M.C.L. § 205.54i do not, for instance, raise or control revenue except in the same way that a state's discontinuation of payments to a vendor for services or supplies would otherwise fit those characterizations. Ford's refund claims represent obligations of the State and cannot be renounced. This is beyond question. The amendments to M.C.L. § 205.54i styled as "curative" legislation, retroactive or otherwise, is a huge stretch. There was no fiscal crisis asserted in the Act. The amendments do not impose or repeal a tax or change a rate – they do little more than refuse to honor a specific category of claims which were found by one branch of government, the Michigan Court of Appeals, to be valid.

Unlike *Carlton*, the amendments at issue herein: (1) do not involve a modest period of retroactivity; (2) are not "curative" insofar as all retroactive tax legislation raises or controls revenue; and (3) do not apply to a generally applicable statute. Rather, the amendments to M.C.L. § 205.54i, target a narrow class of taxpayers to rescind specific and valid refunds. Accordingly, there is no appropriate justification to override the modesty predicate of *Carlton*.

In one stroke of the political pen, tax refunds due to Ford were retroactively eliminated. Michigan's actions cannot be viewed in isolation. With greater frequency, states seem unwilling to abide by the rules, nor do they seem required to face the consequences of their often times ambiguous laws and wrongful actions. This arbitrary legislative and executive branch action must stop.

Retrospective tax situations are admittedly somewhat within their own group according to the cases. Thus, one commonality between *Ford Motor* and *Carlton* is that both cases involve tax, as contrasted with non-tax, legislation. Even so, this Court has noted that Congress' practice in the tax field has been to confine retroactive application to "short and limited periods." *See United States v. Darusmont,* 449 U.S. 292, 296-97 (1981). The rule is no different for state legislatures.

The uniqueness of retroactive tax legislation should not be ignored. The United States Solicitor General's perspective on retroactive application of tax laws as set forth in filings to this Court some four years after *Carlton*, is particularly telling – distinguishing tax legislation, and conceding that it requires "short and limited periods" of retroactivity:

> Congress's self-imposed custom with regard to tax legislation, which is intended to fund current government operations and is therefore ordinarily prospective, is not necessarily applicable to civil regulatory legislation. Many problems outside the tax area, such as black lung disease and hazardous waste, may exist, though latent, for a long time and may impose massive social costs before they are recognized as a proper subject for legislation; and even once the legislation to address them is enacted, further passage of time may yield new information that exposes inadequacies in prior law.

Brief for the Federal Respondent, Commissioner of Social Security et al., *Eastern Enterprises v. Apfel,* 118

S.Ct. 2131, reprinted at 1998 WL 25533, at *26 (U.S.) (distinguishing tax legislation from non-tax legislation and applying "more modesty," not less, to tax legislation).

Likely in response to the Solicitor General's Brief in *Eastern Enterprises*, this Court, in citing *Carlton,* stated that "the degree of retroactive effect…is a significant determinant in a statute's constitutionality." *Eastern Enterprises*, 118 S.Ct. at 2136. Therein, this Court also stated:

> Congress also may impose retroactive liability to some degree, particularly where it is "confined to short and limited periods required by the practicalities of producing national legislation."

Id. at 2149 (internal citations omitted).

Accordingly, it is this Court's custom to require *more*, **not less**, *modesty* with regard to non-curative (versus curative) legislation and tax (versus non-tax) legislation. Labels notwithstanding, as the legislation at issue in *Ford Motor* is *both* non-curative and tax, consistent with this Court's precedent, "modesty" is all the more required. The rift among the courts as to the breadth and scope of *Carlton*,[7] exacerbated by the lower court's decision, warrant intervention by this Court to head off further rounds of litigation concerning retroactive legislation.

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7. Commentators have over the years written extensively on the topic of retroactive tax legislation; the progression is worthy of review. *See* Frederick A. Ballard, *Retroactive Federal Taxation*, 48 Harv. L. Rev. 592 (1935); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 (Cont'd)

CONCLUSION

For the foregoing reasons, *amici curiae*, Kentucky Chamber of Commerce, Inc., Michigan Chamber of Commerce, Michigan Manufacturers' Association and Chamber of Commerce of the United States of America, request that the petition for a writ of certiorari to the Supreme Court of Michigan in *Ford Motor Credit Co. v. Dep't of Treasury* be granted.

Respectfully submitted,

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(Cont'd)

Harv. L. Rev. 692 (1960); *See also* Faith Colson, *The Supreme Court Sounds the Death Knell for Due Process Challenges to Retroactive Tax Legislation*, 27 Rutgers L.J. 243 (1995); Pat Castellano, *Retroactivity 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); Monica Risam, *Retroactive Reinstatement of Top Federal Estate Tax Rates Is Constitutional: Kane v. United States*, 51 Tax Law. 481 (1998); Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 Syracuse L. Rev. 917, 964 (1999); 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); and Lynn A. Gandhi, *Taxation*, 53 Wayne L. Rev. 599, 607 (2007).