No. 10-481

IN THE

Supreme Court of the United States

FORD MOTOR CREDIT COMPANY,
Petitioners,

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

BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* in support of Petitioner ("Ford") is filed on behalf of the Council On State Taxation ("COST") and the National Association of Manufacturers ("NAM").[1]

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amici's* intent to file this brief. Petitioner and Respondent have consented to the filing of this brief and their letters has been filed with the Clerk of this Court.

COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing to America's economic future and living standards.

As *amici*, COST or the NAM have participated in many of this Court's significant cases over the past 20 years involving state tax remedies and retroactivity, including *Newsweek, Inc. v. Florida Dept. of Rev.*, 522 U.S. 442 (1998); *Reich v. Collins*, 513 U.S. 106 (1994); and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).

This case threatens to eliminate entirely the ability of a taxpayer to seek redress for an unlawful tax, unless the taxpayer happens to be the first aggrieved taxpayer in line at the courthouse to question the validity of a state tax. It is essential for this Court to protect taxpayers' Due Process rights from states' aggressive use of unconstitutional retroactive tax legislation whenever a state tax administrator is on the losing end of an unfavorable decision from a court. The retroactive imposition of tax changes through legislative or administrative action has proliferated in recent years, and affected taxpayers have petitioned this Court to curb the state actions on many occasions.[2] Throughout this period, states continue to enact legislation pressing retroactive periods significantly further than those periods ever endorsed by the prior holdings of this Court. In addition, Michigan and other states enact retroactive tax legislation with seemingly no legislative purpose apart from revenue preservation. Guidance from this Court is crucial to halt the troubling trend of states trampling upon taxpayers' Due Process rights with similar retroactive legislation.

Amici members are also fretful that if Michigan's retroactive deprivation of judicial remedies is permitted to stand, more states will follow suit and induce taxpayers to pay disputed taxes, and then once the tax has been successfully challenged by another taxpayer, leave them with no remedy to dispute the liability by retroactively changing the law. Undoubtedly, numerous states would be inclined to follow this model set forth by Michigan because states could impose unlawful taxes without worrying about the administrative burdens of providing a judicial remedy to all taxpayers guaranteed by the Constitution and Fourteenth Amendment. In addition, other states already have and will continue to impose tax legislation with lengthy and excessive retroactive periods that violate taxpayers' Due Process rights.

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[2] *See, e.g.*, *Ventas Fin. I, LLC v. Cal. Franchise Tax Bd.*, 165 Cal. App. 4th 1207 (Cal. App. 1st Dist. 2008), *cert. denied*, 129 S. Ct. 1917 (2010); *Miller v. Johnson Controls, Inc.* 296 S.W.3d 392 (Ky. 2009), *cert. denied*, 130 S. Ct. 3324 (2010); *Triple-S Mgmt. Corp. v. Mun. Revenue Collection Ctr.*, No. KLAN200701749 (P.R. Cir. Jun. 30, 2008), *cert. denied*, 130 S. Ct. 3498 (2010); *Exelon Corp. v. Dept. Rev.*, 917 N.E.2d 899 (Ill. 2009), *cert. denied*, 130 S. Ct. 1699 (2010).

STATEMENT OF THE CASE

The facts in this case are very straightforward. In 2006, the Michigan Court of Appeals held that DaimlerChrysler was entitled to a refund of sales taxes that the Department had previously refused to grant. Daimler was not the only taxpayer that had paid sales tax under identical circumstances. Based upon the *Daimler* decision, Ford Credit and other taxpayers sought refunds of the unlawful tax that they also paid. Rather than follow *Daimler* and honor the refund requests, the Department asked the Michigan legislature to nullify the refunds by retroactively changing the law. The legislature took note of the request and quickly changed the law by amending M.C.L. § 205.54i. The amendment expressly stated that it was intended to apply retroactively without limitation except for honoring the specific court order to refund the tax to Daimler. The ultimate effect of the legislation was to allow the first litigant its refund, but then to cut off the rights of all other litigants to seek redress.

SUMMARY OF THE ARGUMENT

This case concerns Michigan's use of retroactive legislation looking back for an indefinite period to deprive a specific group of taxpayers the ability to seek a refund based on case law. Michigan's legislation raises two Due Process violations that should be clarified by this Court. First, the Michigan legislation has an indefinite retroactive period—a period significantly longer than those permitted in prior cases by this Court. There exists in this country a clear and growing trend among states to enact lengthy retroactive legislation with seemingly no justification other than to prevent the refund of an unlawfully collected tax. The enactment of such legislation is a far cry from this Court's initial use of such justification to permit legislation with a retroactive period of 1 or 2 years, as utilized by customary congressional practice. Michigan has twisted this justification such that it could enact retroactive legislation looking back decades. The result is that the rational legislative purpose test proclaimed by this Court no longer places any restrictions on states with respect to retroactive tax legislation.

Secondly, what Michigan has done here was to use a form of bait-and-switch tactic that was previously rejected in *McKesson Corp. v. Florida,* 496 U.S. 18, 39 (1990). The retroactive legislation eviscerated any remedy Ford Credit and other taxpayers have to dispute their tax liability for all open years. Michigan essentially induced taxpayers to wait in line and rely upon remedies that might be available after the lead case is resolved, but then changed the rules for all other taxpayers after that case's resolution. This form of bait-and-switch tax administration serves no purpose except to encourage races to the courthouses to ensure that an aggrieved taxpayer will be the first in line to challenge a tax.

ARGUMENT

I. THIS COURT SHOULD PROVIDE GUIDANCE AS TO A CONSTITUTIONALLY-PERMISSIBLE LENGTH OF RETROACTIVITY FOR TAX LEGISLATION THAT IS CONSISTENT WITH TAXPAYERS' DUE PROCESS RIGHTS.

States frequently turn to retroactive tax legislation as a way to mend their budget gaps by changing the law for prior tax periods. Sometimes the retroactive period is modest, but often the retroactive period is extended—like the indefinite period at issue here. Legislation altering the rules for such a long period cannot be justified by the need to raise revenues and if upheld, would effectively eviscerate the rational legislative purpose test previously announced by this Court for determining whether the period of retroactivity violate Due Process.

This Court last addressed retroactive tax legislation in *U.S. v. Carlton*, 512 U.S. 26 (1994) when the Court reiterated the test used in *Pension Benefit Guaranty* to uphold a statute with a 5-month retroactive period: "[b]ut that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp. v. Ra Gray & Co.*, 467 U.S. 717, 730 (1994). The case at hand illustrates the need for guidance by this Court, because the lack of any rational legislative purpose here varies greatly from the initial application of the test by this Court to situations where legitimate reasons existed for imposing a short retroactive period that was the result of the customary legislative process. The cases decided by this Court upholding retroactive tax legislation are distinguishable from this case in two significant ways: (1) the rational legislative purposes for permitting the retroactive tax legislation; and (2) the length of applicable retroactivity.

A. The Rational Legislative Purposes Approved By This Court Do Not Justify Depriving Taxpayers Of Their Post-Deprivation Judicial Remedy After They Relied On It In Filing Amended Returns.

A review of the legislative purposes accepted by this Court for imposing retroactive tax legislation on taxpayers distinguish this case on two grounds: (1) in many of the Court's cases the legislation would have been far less effective if not enacted with a *short* retroactive period; and (2) in the cases justifying the retroactivity with raising revenue, the legislatures were merely altering the tax burden, but in this case the legislature retroactively deprived petitioners of their right to a remedy that an identical taxpayer received. Thus, although the Court has upheld raising revenues as a rational legislative purpose in some cases, those cases are distinguishable and never deprived a taxpayer of a remedy that they justifiably relied on to dispute their tax liability.

In *Pension Benefit Guaranty v. R.A. Gray & Co.*, this Court identified Congress' rational legislative purpose as a concern that, once employers got wind that the liability for withdrawing from multi-employer pension plans would sharply increase with the new legislation, they would all withdraw prior to the effective date of the legislation. 467 U.S. at 730-31 (1984). Thus, "Congress therefore utilized retroactive application of the statute to prevent employers from taking advantage of a lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute." *Id.* at 731. In that case, the legislation would have been significantly less effective if employers were permitted to withdraw without liability before the legislation was passed, since the point of the legislation was to discourage withdrawal by imposing a harsher liability for doing so.

In comparison, petitioners in this case were retroactively deprived of their ability to dispute their tax liabilities—a Due Process right guaranteed to them: "'[i]t is reasonable that a man who denies the legality of a tax should have a clear and certain remedy.'" *McKesson Corp. v. Florida*, 496 U.S. at 32 (citing *Atchison, T. & S.F. Ry. Co. v. O'Connor,* 223 U.S. 280, 285-86 (1912 (Holmes, J.)). There was no legitimate concern about the effectiveness of the legislation; rather the legislature specifically targeted Ford Credit and other taxpayers by denying a constitutionally guaranteed judicial remedy that was available to other taxpayers. Increasing pension plans' withdrawal liability for a short retroactive period does not inhibit their Due Process rights and thus, stands in stark contrast to stripping a group of taxpayers of their right to seek a refund for an unlawful tax.

B. The Length Of Retroactivity Previously Permitted By This Court Is Distinguishable From The Indefinite Period Faced By Petitioners.

What this Court referred to as a "modest period of retroactivity" in *United States v. Carlton*, 512 U.S. at 32-33, must be clarified in order to prevent states from pushing well beyond the outer limits of what this court likely imagined as "modest" when *Carlton* was decided. States have enacted retroactive legislation under the guise of losing revenues for retroactive periods extending many years beyond the retroactive time frames previously permitted by this Court and encompassed by the time necessary for customary congressional practice.

A review of the cases decided by this Court make it clear that retroactive tax legislation cannot reach back indefinitely, as done so here by Michigan. In *Carlton*, this Court upheld an amendment that "extended for a period of slightly greater than one year." *United States v. Carlton,* 512 U.S. at 33. In *Pension Benefit Guaranty*, this Court upheld retroactive tax legislation reaching back "five months before the statute was enacted into law." 467 U.S. at 725. In *Welch v. Henry*, this Court upheld an amendment enacted in 1935 reaching back to the 1933 tax year. 305 U.S. 134, 141-42 (1938). These short and modest periods of retroactivity come nowhere near Michigan's indefinite reach back.

Many state courts have upheld retroactive tax legislation that reach back further than the periods addressed in this Court's cases.[3] These cases under-

[3] *See, e.g.*, *Tate & Lyle v. Comm'r of Internal Revenue*, 87 F.3d 99 (3d Cir. 1996) (upholding treasury regulation with six-year retroactivity period against Due Process challenge and distinguished *Carlton* as only concerning permissible retroactivity periods for statutes, not regulations); *Montana Rail Link, Inc. v. United States*, 76 F.3d 991 (9th Cir. 1996) (holding that a statute with a 7-year retroactivity period did not violate Due Process); *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470, 473 (Ala. Civ. App. 1999), *cert. denied*, 529 U.S. 1022 (2000) (overruled on other grounds; *Patterson v. Gladwin Corp*., 835 So.2d 137 (Ala. 2002)) (upholding a tax statute with a retroactivity period of 2 to 3 years); *Enterprise Leasing Co. of Phoenix v. Arizona Dep't of Revenue*, 221 Ariz. 123, 221 P.3d 1

score the importance for this Court to provide a standard, test, or landmark for lower courts to follow when reviewing periods of retroactivity because without such guidance, lower courts will continue to bless lengthy retroactive periods that violate taxpayers' Due Process rights.

This Court for decades has justified short and modest periods of retroactive tax legislation with the underlying concern and recognition for the practicalities of producing legislation. *See, e.g.*, *Untermyer v. Anderson*, 276 U.S. 440 (1928); *United States v. Darusmont*, 449 U.S. 292 (1981); *Welch v. Henry*, 305 U.S. 134 (1938). Specifically, this Court has permitted short retroactive legislation based on the premise that customary congressional practice is to pass legislation "to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during the year of the preceding session." *Welch*, 305 U.S. at 148. This Court noted numerous instances of legislation that were made retroactive for the year prior to the passing of the legislation in *Untermyer*, and stated, "I suppose that the taxing act may be

(Ariz. Ct. App. 2009), *review denied* (June 1, 2009); *King v. Campbell County*, 217 S.W.3d 862 (Ky. Ct. App. 2006) (holding that an amendment for a fee credit did not violate Due Process because the amendment followed an unanticipated Court interpretation of the original statute, which had passed nine years earlier); *Zaber v. City of Dubuque,* 07-1819, 2010 WL 2218625, at *1 (Iowa June 4, 2010) (finding that a statute with unfettered retroactivity was constitutional since "[w]here legislation is curative, retroactive application may be constitutional despite a long period of retroactivity."). *See generally* Robert R. Gunning, "Back From the Dead: The Resurgence of Due Process Challenges to Retroactive Tax Legislation," 47 Duq. L. Rev. 291 (Spring 2009).

passed in the middle as lawfully as at the beginning of the year." 276 U.S. at 446 (Sanford, J. and Holmes, J., concurring).

Michigan surely cannot justify an indefinite retroactive period by the "practicalities" of producing legislation. If this Court allows an indefinite retroactive period to stand, legislatures will merely continue to expand the length of retroactivity and continually find excuses for why they were not able to pass the legislation sooner. Thus, there will be no limit on how far back they can reach when amending their laws. Reviewing the cases in which this Court permitted retroactive tax legislation to stand highlights the difference between those cases and the instant case: In all prior instances the retroactive period was limited to approximately one to two years prior to the passage of the legislation, whereas the case at hand reaches back indefinitely, that surely cannot be justified by the practicalities of passing legislation.

"The need of the government for revenue has hitherto been deemed a sufficient justification for making a tax measure retroactive whenever the imposition *seemed consonant with justice* and the conditions were not such as would ordinarily involve hardship." *Untermyer*, 276 U.S. at 449 (emphasis added).

II. MICHIGAN'S DEPRIVATION OF MEANINGFUL BACKWARD LOOKING RELIEF FOR TAXPAYERS WHO PAID DISPUTED TAXES VIOLATES THE DUE PROCESS CLAUSE BY NOT PROVIDING TAXPAYERS WITH ANY JUDICIAL REMEDY FOR DISPUTING THEIR TAX LIABILITIES.

Due Process requires that states provide some "'clear and certain remedy' for the State's unlawful exaction of tax moneys under duress." *McKesson Corp.*, 496 U.S. at 33. That remedy can be offered by the state pre- or post- payment of the taxes, but what has been reiterated by this Court numerous times is that a state cannot induce a taxpayer to rely on a post-deprivation remedy only to deprive him of that remedy once the taxpayer has paid the disputed taxes and filed a claim for refund. *Reich*, 513 U.S. at 110-11. What has occurred in this case is the very same scenario as in *Reich v. Collins*. Petitioners relied on the availability of refunds based upon *Daimler* before Michigan law was retroactively amended, and then subsequently were deprived of that remedy when they filed suit to dispute their tax liabilities.

The bait-and-switch tactic utilized by Michigan in this case is all the more dangerous for taxpayers and the state, because such a tactic, particularly in the tax arena, can have far-reaching consequences. Taxpayers subjected to this sort of bait-and-switch tactic are essentially being punished for not clogging the court system and waiting for the "test case" to make its way through. The acute problem of the bait-and-switch tactic is most onerous in the area of taxation because taxpayers are themselves subject to self-assessment and compliance duties and the burden is on them to comply with this system.

In *Reich v. Collins*, this Court noted the "remarkable resemblance" to *NAACP v. Alabama ex rel. Patterson*. 513 U.S. at 112. In *NAACP v. Alabama ex rel. Patterson*, this Court held that a state could not subsequently deprive the petitioner of his right to a judicial remedy after the petitioner had justifiably relied "upon prior decisions." 357 U.S. 449 (2001). In that case and in *Reich*, this Court disallowed states from depriving parties of judicial remedies which were afforded to them and which they were further deprived of once they came to rely on them. These actions by states are particularly onerous and produce the devastating consequence of discouraging compliance with tax laws.

The U.S. tax system depends entirely on self-assessment and uniform administration of the tax laws. Taxpayer duties and actions necessary to comply with these laws can be quite burdening and time consuming, particularly for large multi-state businesses. Because our tax system cannot survive without voluntary self-assessment, states seek to encourage broad compliance with tax laws. That voluntary system is based upon two bedrock principles. The first principle is that if a taxpayer pays a tax that should have not been paid for any reason, the taxpayer is entitled to ask for a refund within a reasonable time. The second principal is that tax laws will be uniformly administered to all taxpayers. Michigan violated both of these principles here.

The end and potentially devastating result of Michigan's action on our tax system will be two-fold. First, taxpayers will hesitantly pay a questionable tax because of the real risk that a state will do whatever it takes not to refund the tax even if it was unlawfully collected. Taxpayers will necessarily become less conservative in their tax filings if they fear the state will never return the money, even if the state never should have had it in the first place. Second, the race to the courthouse will become accelerated. Taxpayers with facts that are similar to a "lead case" often choose to delay bringing their own action or perhaps hold a pending action in abeyance until the lead case is resolved. Because Michigan and other states now show a real propensity to retroactively deny any remedy to taxpayers not in the lead case, taxpayers will jockey to make sure they actively litigate as part of the lead case. The onslaught of litigation is not in the best interest of taxpayers, tax administrators, and our judicial system.

As state enactment of retroactive legislative measures accelerates, pressures on the judicial system will be felt by not only state courts, but our federal courts as well. State tax disputes are rarely heard in federal courts because the Tax Injunction Act deprives federal courts of jurisdiction to hear these cases. 28 U.S.C. § 1331 (2010). However, the Tax Injunction Act allows federal courts to hear state matters where a state has deprived a taxpayer of a "plain, speedy and efficient remedy." Increasingly, taxpayers look for federal courts to intervene in the instances where it is clear that a state has retroactively deprived a taxpayer of a lawful remedy. See e.g. *Johnson Controls, Inc. v. Kentucky*, No. 3:07-CV-65-KKC, 2008 WL 594467 (E.D. Ky. Feb. 29, 2008).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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