No. 18-_____

In The
Supreme Court of the United States

CHARLIE COLEMAN, JOHN P. ROTH, JR., AND ERIK HERMES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

CAMPBELL COUNTY LIBRARY BOARD OF TRUSTEES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY J. EIFLER
Counsel of Record
WALTER L. SALES
STEPHEN A. SHERMAN
STOLL KEENON OGDEN PLLC
2000 PNC Plaza
500 W. Jefferson St.
Louisville, KY 40202
(502) 333-6000
timothy.eifler@skofirm.com

BRANDON N. VOELKER
GATLIN VOELKER, PLLC
2500 Chamber Center Dr.
Suite 203
Fort Mitchell, KY 41017
(859) 905-0946

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The Kentucky Court of Appeals agreed with the taxpayer-petitioners that the tax rates levied by the Campbell County Library District-respondent violated Kentucky law. On remand, the lower courts denied the taxpayers any relief for taxes overpaid for prior years. The Kentucky Court of Appeals held that *under Kentucky law*, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution did not entitle the taxpayers to retroactive relief. The lower courts ruled on only one count of taxpayers' multi-count complaint, ignoring all others.

The questions presented are:

1) Whether a state can circumvent the requirements of the Due Process Clause to provide taxpayers retroactive relief from unlawful taxes by making its decision prospective-only.

2) Whether a state violates the Due Process Clause by refusing to rule on claims asserted in an action to recover unlawful taxes.

PARTIES TO THE PROCEEDING

Petitioners, who were the Plaintiffs-Appellants below, are Charlie Coleman, John P. Roth, Jr., and Erik Hermes.

Respondent, who was the Defendant-Appellee below, is Campbell County Library Board of Trustees.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

OPINIONS BELOW

The initial decision of the Campbell County Circuit Court finding the library tax illegal was rendered on April 1, 2013, is not reported and is reproduced at Pet. App. 1.

The Kentucky Court of Appeals' decision harmonizing the statutes governing the library tax and remanding the Campbell Circuit Court's decision for further instructions is reported at 475 S.W.3d 40 (Ky. App. 2015) and reproduced at Pet. App. 30a. The order denying petitioners' Motion for Discretionary Review by the Kentucky Supreme Court is reported at 2015 Ky. LEXIS 2047 and reproduced at Pet. App. 29a.

The Final Order of the Campbell Circuit Court holding the Kentucky Court of Appeals' decision shall be given a prospective-only effect and dismissing petitioners' complaint was rendered on September 16, 2016, is not reported but is at Pet. App. 22a. The Order of the Circuit Court denying petitioners' motion to alter, amend, or vacate was entered on October 21, 2016, is not reported but is at Pet. App. 18a.

The Opinion of the Kentucky Court of Appeals from which this Petition arises is reported at 547 S.W.3d 526 (Ky. App. 2018) and reproduced as Pet. App. 1a. The denial of petitioners' Motion for Discretionary Review by the Kentucky Supreme Court is reported at 2018 Ky. LEXIS 235 and reproduced at Pet. App. 62a.

JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on January 5, 2018. Pet. App. 1a. Petitioners' Motion for Discretionary Review with the Kentucky Supreme Court was timely filed and denied on June 6, 2018. Pet. App. 62a. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the U.S. Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Article VI, Clause 2.

The Fourteenth Amendment to the U.S. Constitution provides: "No state shall . . . deprive any person of life, liberty or property without due process of law. . . ." U.S. Const., Amendment XIV, § 1.

Though the interpretation of any Kentucky statutes or constitutional provisions is not at issue here, statutory provisions form the background for considering the federal Due Process issues here. Kentucky

Revised Statutes (KRS) § 173.790(1) provides limitations on changing library district property tax rates:

> The special ad valorem tax rate for the maintenance of a public library district created pursuant to KRS 173.710 to 173.800 before July 13, 1984, shall not be increased or decreased unless a duly certified petition requesting an increase or decrease in the tax rate of a specifically stated amount is signed by fifty-one percent (51%) of duly qualified voters. . . .

KRS § 132.023(3)(a) provides limitations on tax rates levied by special purpose governmental entities:

> That portion of a tax rate levied by any action of a special purpose governmental entity which will produce revenue from real property, exclusive of revenue from new property, more than four percent (4%) over the amount of revenue produced by the compensating tax rate shall be subject to a recall vote or reconsideration by the special purpose governmental entity, as provided for in KRS 132.017. . . .

STATEMENT OF THE CASE

This case involves an effort by the Kentucky courts to protect taxing authorities from refunding illegal taxes, even though this Court in *McKesson Corp. v. Div. of Alch. Bev. and Tob.*, 496 U.S. 18 (1990) held that Due Process requires a state to provide meaningful backward-looking relief whenever it collects taxes

illegally and does not provide a meaningful pre-deprivation remedy. The Kentucky Court of Appeals erroneously held that Kentucky law supersedes the minimum procedural Due Process safeguards guaranteed by the U.S. Constitution.

The petitioners are property owners and taxpayers who filed an action seeking a declaratory judgment as to the appropriate statute governing the Respondent Library District's ad valorem tax rates, refunds for prior periods and injunctive relief as to the future calculation of Respondent's tax rates. The lower courts, through the artifice of a prospective-only decision as to petitioners' declaratory judgment count, wholly failed to address and determine the law governing the Library District's tax rates for prior periods. The Kentucky Court of Appeals further held that *McKesson* and its Due Process safeguards applied, "[b]ut our case law also provides that due process protections may be balanced against considerations of good-faith reliance and equity." *Coleman*, 547 S.W.3d 526, 533. The Court of Appeals conveniently balanced petitioners' minimum Due Process protections exclusively in favor of the Library District to find, as a matter of Kentucky law, that petitioners were not entitled to any federal Due Process protections, and that Kentucky law was supreme.

The Kentucky Court of Appeals' analysis directly conflicts with this Court's holding in *McKesson*. It also dangerously elevates state retroactivity doctrine over federal constitutional guarantees, creating an exception to the rule of backward-looking relief for illegally-collected taxes so large and bereft of boundary that the

rule and its guarantee of Due Process disappear. States and taxing authorities created by the states universally face massive deficits due to overspending and promised retirement benefits to public employees without adequate funding. If the decision of the Kentucky Court of Appeals is allowed to stand, states and their taxing authorities could always justify denying backward-looking relief for any illegally collected tax and taxpayers will continue to be denied any remedy in state courts.

A. FACTUAL BACKGROUND

The petitioners (hereinafter, "taxpayers") are property owners and taxpayers that reside within the Campbell County Library District's boundaries. Taxpayers' multi-count complaint was filed January 19, 2012 against the Campbell County Library Board of Trustees (hereinafter, the "Library District") seeking a declaratory judgment that KRS § 173.790 governed the Library District's ad valorem tax rates for prior *and* future periods, asserting causes of action for refunds and seeking injunctive relief. The Library District moved for summary judgment solely on taxpayers' declaratory judgment count, claiming that KRS § 132.023 governed the mechanism by which the district could set its tax rates. KRS § 173.790 required that library districts created prior to 1984, as this one was, could change their tax rates only with a petition signed by fifty-one percent (51%) of the qualified voters. KRS § 132.023 provides that taxing authorities could set tax rates that increased tax revenues after

giving public notice and holding a public hearing. A tax rate that increases revenue by more than four percent (4%) is subject to a potential voter recall. *Id.*

Initially, the trial court held in favor of the taxpayers, holding that the more specific statute, KRS § 173.790, applied over the more general statute. (Pet. App. 1a). There was no evidentiary hearing. The issue of the appropriate statute governing the Library District's tax rate was decided as a matter of law.

The Kentucky Court of Appeals in the first appeal addressed only taxpayers' declaratory judgment count. The Court of Appeals interpreted and harmonized two ostensibly inconsistent statutes (KRS §§ 173.790 and 132.023), holding that,

> A library taxing district formed by petition may set the ad valorem tax rate each year at the compensating tax rate[1] or at a rate that would allow up to a 4% increase in revenue above the compensating tax rate as permitted under KRS 132.023.
>
> However, our reconciliation of these statutes does not end here. We also construe KRS 173.790 to be concomitantly applicable as a method available to a library taxing district

[1] The compensating tax rate is the "rate which, rounded to the next higher one-tenth of one cent ($0.001) per one hundred dollars ($100) of assessed value and applied to the current year's assessment of the property subject to taxation by a taxing district, excluding new property and personal property, produces an amount of revenue approximately equal to that produced in the preceding year from real property." KRS § 132.010(6).

> seeking to increase the revenue from ad valorem taxes over 4% of the revenue generated from the compensating tax rate as permitted by KRS 132.023. If a library taxing district formed by petition seeks to increase revenue from ad valorem taxes above 4% of the revenue generated from the compensating tax rate, the specific procedure outlined in KRS 173.790 is then triggered and the tax rate or revenue from ad valorem taxes may only be increased by petition of the voters.
>
> . . . **KRS 132.023 generally controls the ad valorem tax rate assessed by a library taxing district formed by petition; however, KRS 173.790 is triggered if the library seeks to increase revenue from ad valorem taxes above 4 percent of the revenue generated from the compensating tax rate as set forth in KRS 132.023(1) and (3).**

Campbell County Library Bd. of Trs. v. Coleman, 475 S.W.3d 40, 47-48 (Ky. App. 2015) (Pet. App. 30a) (emphasis added). The Court of Appeals remanded the case "for proceedings consistent with this Opinion." *Id.* at 48. The Kentucky Supreme Court denied review. (Pet. App. 29a).

On remand, the Library District moved for summary judgment arguing that the decision of the Kentucky Court of Appeals should be given a prospective-only application, thus denying any decision as to prior period tax rates and backward-looking relief to the taxpayers. The taxpayers also moved for summary

judgment, arguing that the Library District had increased taxes in violation of the statutes as harmonized by the Court of Appeals and seeking refunds of taxes overpaid since January 19, 2007.[2] The taxpayers submitted evidence in the record that the Library District had consistently raised its tax rate and had amassed cash reserves of approximately $3,100,000.[3] Without supporting evidence to the contrary, the trial court determined that the Court of Appeals' opinion should be given a prospective-only application under Kentucky's retroactivity doctrine and granted the Library District's motion for summary judgment on the remaining counts in the taxpayers' complaint. (Pet. App. 22a).

The taxpayers moved to alter, amend, or vacate the trial court's summary judgment order, raising several issues, two of which are pertinent here; to wit, the order on remand denied taxpayers meaningful backward-looking relief as required by the Due Process Clause of the Fourteenth Amendment to the U.S.

---

[2] In Kentucky there is a five-year statute of limitations for refunds of local taxes under common law and a two-year statute of limitations for statutory refunds of local property taxes. KRS §§ 413.120(12), 413.130(3) and 134.590(3)-(6). The common law remedy and the statutory remedy under KRS § 134.590 are cumulative under Kentucky law. *Grimes v. Central Life Insurance Co.*, 188 S.W. 901 (Ky. 1916).

[3] Plaintiffs' Combined Resp. to Defendant's Mot. for Summ. Judge. And Memo. of Law in Support of Plaintiffs' Cross-Motion for Summ. Judgm. Filed March 18, 2016 at 14 and Ex. 4 (showing the Library District had raised its tax rate nearly 20% since 2008) and *id.* at 6 and Ex. 3 (showing the Library District had amassed approximately $3,100,000 in cash reserves).

Constitution, and the trial court failed to address the law governing the Library District's tax rates prior to the Court of Appeals' opinion. The trial court denied taxpayers' motion (Pet. App. 18a).

The Court of Appeals affirmed in the published decision for which taxpayers request this Court's review. *Coleman v. Campbell Cty. Bd. of Trs.*, 547 S.W.3d 526 (Ky. App. 2018) (Pet. App. 1a), *discretionary rev. denied*, *Coleman v. Campbell Cty. Pub. Library Bd. of Trs.*, 2018 Ky. LEXIS 235 (Pet. App. 62a). The Court of Appeals rejected the Library District's claim that *McKesson* was limited to unconstitutional taxes, holding that the collection of a tax constitutes a deprivation of property and minimum procedural Due Process safeguards apply to all "unlawful exactions." *Id.* at 532 (quoting *Phillips v. Commonwealth*, 324 S.W.3d 741, 743 (Ky. App. 2010) and *McKesson*, 496 U.S. 18, 36). The Court of Appeals nevertheless held that Kentucky law can supersede these federal constitutional guarantees. The Kentucky Supreme Court denied review of the Court of Appeals' decision. (Pet. App. 62a).

REASONS FOR GRANTING THE PETITION

The U.S. Supreme Court in *McKesson Corp. v. Div. of Alch. Bev. and Tob.*, 496 U.S. 18 (1990), held that where, as here, taxpayers are coerced into paying taxes first and litigating the validity of the tax through a refund action, minimum Due Process safeguards require "meaningful backward-looking relief" for any

"unlawful exaction." This Court stated that "[t]he question before us is whether prospective relief, by itself, exhausts the requirements of federal law. **The answer is no**." *Id.* at 31 (emphasis added). The Kentucky Court of Appeals paid lip service to *McKesson*'s mandate but then denied these minimum constitutional safeguards through the artifice of a prospective-only decision. The lower court held that the Due Process safeguards of the U.S. Constitution are limited by Kentucky law because "**our case law provides that due process protections may be balanced against considerations of good-faith reliance and equity**." *Coleman*, 547 S.W.3d 526, 533. This Court should grant review and reaffirm that minimum constitutional guarantees are just that – minimum protections guaranteed by the U.S. Constitution notwithstanding considerations of state law.

The Court of Appeals inflicted a final blow to Due Process and the judicial role itself by holding that Kentucky courts have discretion to simply not decide a dispute. The prior appeal was limited to the declaratory judgment count in taxpayers' complaint. The lower courts' prospective-only determination and dismissal of taxpayers' causes of action for refund leaves completely unresolved the question of whether, and how, the law applied to the Library District's tax rates for prior periods. The lower courts have not just failed to provide the meaningful review mandated by Due Process. They have wholly failed to provide *any* review of taxpayers' dispute of the Library District's prior tax rates. This Court should grant review and clarify that

states cannot avoid the mandates of the Due Process Clause by simply refusing to decide a dispute.

I. THIS COURT SHOULD CONFIRM THAT THE DUE PROCESS GUARANTEE OF "MEANINGFUL BACKWARD-LOOKING RELIEF" CANNOT BE CIRCUMVENTED BY A PROSPECTIVE-ONLY HOLDING

Due Process mandates backward-looking relief where taxpayers are denied a meaningful opportunity to challenge unlawful taxes before payment. In *McKesson Corp. v. Div. of Alch. Bev. and Tob.*, 496 U.S. 18 (1990), this Court held that the collection of a tax "constitutes a deprivation of property" (*id.* at 36) requiring states to provide sufficient procedural safeguards against "any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *Id.* at 39. This Court further held that where a state does not provide ***meaningful*** predeprivation procedures, to satisfy Due Process requirements the state is constitutionally required to provide its citizens with ***meaningful*** "backward-looking relief" to rectify the unlawful deprivation of property. *Id.* at 31. A "predeprivation procedure" is a right to challenge a tax before payment. *Id.* at 38, n. 21. When "a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure." *Id.*

McKesson overruled ***prospective-only*** decisions of the lower Florida courts and held that prospective-only relief ***does not*** fulfill the requirements of Due Process. As here, McKesson had sought "both declaratory and injunctive relief against the continued enforcement of the discriminatory tax scheme" and "also sought a refund in the amount of the excess taxes it had paid as a result of its disfavored treatment." *McKesson*, 496 U.S. 18, 24-25. The trial court found the tax unlawful ***prospective-only*** (*id*. at 25), and the Florida Supreme Court affirmed. *Id.* at 25-26; *see also Div. of Alch. Bev. and Tob. v. McKesson Corp.*, 524 So.2d 1000, 1010 (Fla. 1988) (holding "the prospective nature of the rulings below was proper in light of the equitable considerations present in this case."). This Court reversed. This Court held that because McKesson was coerced into paying the unlawful tax, federal Due Process required meaningful backward-looking relief which could not be circumvented by a ***prospective-only*** holding:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson, 496 U.S. 18, 31.

This Court expanded on *McKesson* in *Reich v. Collins*, 513 U.S. 106 (1994). *Reich* involved a review of a Georgia Supreme Court decision denying a taxpayer recovery under a general refund statute. The Georgia Supreme Court acknowledged the taxpayer's Due Process protections but nevertheless held that because taxpayers had a meaningful opportunity to challenge the tax prior to payment, they were not entitled to refunds under the statute. This Court reversed. This Court in *Reich* held that states may not "bait and switch" taxpayers by holding out what plainly appears to be a post-deprivation remedy and then, after taxes are paid, declare no such remedy exists. *Id.* at 111 ("[E]ven assuming the constitutional adequacy of [Georgia's predeprivation] procedures . . . no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the ***exclusive*** remedy for unlawful taxes" (emphasis in original)). *See similarly*, *Newsweek, Inc. v. Fla. Dep't of Revenue*, 522 U.S. 442, 444-45 (1998) ("While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.").

McKesson, *Reich* and *Newsweek* are directly on point and mandate that Kentucky and other state courts cannot circumvent taxpayers' minimum Due Process guarantees through prospective-only decisionmaking. The Library District's collection of taxes

from taxpayers constitutes a deprivation of property triggering those Due Process guarantees. *McKesson*, 496 U.S. 18, 36. Due Process requires that Kentucky provide sufficient procedural safeguards against erroneous or unlawful exactions of tax. *Id.* at 36-39.

There can be no doubt that taxpayers were coerced into payment of the Library District's taxes to avoid severe economic and financial sanctions imposed for nonpayment. Taxpayers who do not pay the Library District's taxes are subject to the following:

- Unpaid District taxes are secured by a lien on the property taxed;[4]
- Unpaid District taxes are subject to an up to ten percent (10%) penalty and an additional ten percent (10%) collection fee;[5]
- Unpaid District taxes accrue interest at twelve percent (12%) per annum;[6]
- Unpaid District taxes can be collected by the summary process of distraint

[4] KRS § 134.420.

[5] KRS § 134.015(2)(b), (c) (five percent (5%) penalty if paid by January 31st), (d) (ten percent (10%) penalty if paid after January 31st) and (6) (ten percent (10%) penalty for taxes on omitted property); KRS § 134.119(7) (additional ten percent (10%) penalty fee for the sheriff); KRS § 134.122(2)(d)3.

[6] KRS § 134.125(1); *see also Coleman v. Reamer's Exr.*, 36 S.W.2d 22, 24 (Ky. 1931) (interest on taxes due a taxing authority is in the nature of a penalty).

(seizure) and sale of the taxpayer's personal property;[7] and

- After one year, unpaid District taxes can be collected by foreclosing the lien on the property taxed.[8]

Because taxpayers had no meaningful remedies prior to paying the Library District's unlawful taxes, Due Process requires that Kentucky provide meaningful ***backward-looking*** relief. Due Process further requires that Kentucky provide a postpayment remedy.

The Kentucky Court of Appeals' decision to allow state principles of nonretroactivity to deny the Due Process guarantees of *McKesson* is in direct conflict with this Court's determination in *McKesson* that the lower court's prospective-only holding did not satisfy Due Process safeguards. The lower court's failure to address what law governed the Library District's tax rates for prior periods directly conflicts with this Court's determinations in *Reich* and *Newsweek* that states cannot negate postpayment remedies plainly available at the time unlawful taxes were paid. This Court should grant certiorari to clarify that the taxpayer protections of the Due Process Clause cannot be circumvented by prospective-only decisionmaking, and that the guarantee of "meaningful backward-looking relief" is available to remedy the unlawful or erroneous collection of state taxes.

---

[7] KRS § 134.119(5).

[8] KRS § 134.490(2); KRS § 134.546.

II. THIS COURT SHOULD CONFIRM THAT STATE RETROACTIVITY DOCTRINES DO NOT AND CANNOT FORM THE BASIS FOR OR LIMIT TAXPAYERS' FEDERAL DUE PROCESS RIGHTS

McKesson prohibits state courts from using prospective-only decisionmaking to avoid a state's obligations under the Due Process Clause to provide taxpayers meaningful backward-looking relief. *McKesson* rests on sound policy grounds. Retroactivity doctrines, whether state-created or under the principles outlined by this Court in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), are inherently subjective, ripe for abuse and lead to different standards governing taxpayer minimum Due Process guarantees amongst the states and even amongst internal state taxing authorities.

This Court's holding in *McKesson* properly recognizes that if state courts could avoid state Due Process obligations by the simple expedient of making their decisions prospective-only, it would give states a free hand to engage in result-oriented decisionmaking, enable them to protect their own financial self-interests, and deny federal guaranteed rights. That is exactly what has occurred here. The sole reason cited by the trial court and the Court of Appeals for denying taxpayers a post-deprivation remedy was those courts' flawed application of Kentucky's retroactivity doctrine.

Like many states, Kentucky's retroactivity doctrine is based on this Court's decision in *Chevron Oil*. In *Chevron Oil*, this Court outlined three factors for

determining whether a decision should be applied prospectively: first, the decision "must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; second, the court "must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation"; and, third, the court must weigh "the inequity imposed by retroactive application, for '[w]here a decision of this Court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.'" *Id*. at 106-07. These three factors are balanced to determine whether the presumption favoring retroactive application is overcome.

The presumption of retroactive application of judicial opinions rests on sound policy considerations. Prospective-only application of judicial decisions however, allows taxing authorities to profit from their unlawful levies, creates an incentive for reckless administration of taxes, encourages arbitrary enforcement of the tax laws and promotes general disdain for the rights of taxpayers. It also provides an incentive for taxpayers to simply not pay their taxes instead of relying upon illusory rights to refund. For these reasons, retroactive application of federal judicial decisions is the general rule and prospective-only application under *Chevron Oil* is the extreme exception.

This case is a perfect example of what occurs when state courts apply a *Chevron Oil*-type analysis to decisions involving large refunds of unlawful taxes: they overwhelmingly find for the taxing authority by making their decisions prospective-only, circumventing taxpayer Due Process rights based on the one-sided premise of presumed good faith by and financial hardship to the taxing authority. Here, the lower courts conducted no analysis of how taxpayers and those similarly situated were injured. The lower courts ignored the evidence in the record that the Library District had consistently raised its tax rates since the Great Recession began in 2008, exacting ever increasing revenue from property owners that otherwise would be available to pay mortgages and pay for electricity, food and other necessities. The lower courts similarly gave no consideration to taxpayers' good faith reliance, albeit misplaced, on the taxing authority's calculation and billing of only those taxes that were authorized by law. Instead, the lower courts applied a virtually conclusive presumption of good faith and financial hardship on the part of the Library District. The lower courts engaged in no fact finding as to any financial hardship on the Library District and completely ignored the evidence in the record that the Library District had amassed approximately $3,100,000 of cash reserves. Finally, the lower courts ignored the taxpayers' claim that allowing the Library District to retain its existing tax rate and to base the calculation of future years' rates on that existing rate would require property owners to suffer the Library District's excessive tax rates in perpetuity.

The lower courts' *Chevron Oil*-type analysis here reeks of a result-oriented process. The criticisms of *Chevron Oil* in *Harper v. Va. Dept. of Taxation*, 509 U.S. 86 (1995) and *Am. Trucking Assn. v. Smith*, 496 U.S. 167 (1990) that prospective-only lawmaking is essentially a legislative function performed by the courts have come home to roost here. The lower courts in the first appeal harmonized two statutes in a way that was as described by the Court of Appeals in the first appeal "based on our interpretation of legislative intent" while "we believe the ultimate recourse for statutory change lies in the General Assembly, not the courts." 475 S.W.3d at 48. On remand, the lower courts assumed the mantle of the legislature by applying the newly harmonized statutes prospective-only. At the same time, the lower courts patently refused to address how these statutes applied in prior periods – an issue directly presented in this case. Plainly, the Court of Appeals saw the difficulty it was creating. It is the same difficulty that Justice Scalia identified in *Harper v. Va. Dept. of Taxation* that "prospective decisionmaking is quite incompatible with the judicial power, and the courts have no authority to engage in the practice." 509 U.S. at 106 (Scalia, J., concurring).

The lower courts' focus on the financial hardship on state taxing authorities is an equally flawed foundation on which to base taxpayer Due Process rights. If states may abrogate Due Process rights on the basis of financial hardship to the taxing authority, taxpayers' guarantee to meaningful backward-looking relief will be greatly jeopardized now and in the years to

come. It is no secret that state taxing authorities are under financial stress. Underfunded public employee pension funds and state mandates to provide medical care for all citizens under the Affordable Care Act, together with other financial decisions and promises made by states, have created financial problems which make taxpayer refund claims easily avoidable on the basis of *Chevron Oil*-type analyses. This is particularly true in Kentucky.

The Mercatus Center at George Mason University has published a ranking of states by Fiscal Condition.[9] The Mercatus study shows a significant weakening of state fiscal health. Kentucky in particular is ranked forty-sixth in long run solvency. *See* Mercatus Study at Table 6. Table 8 shows that Kentucky is ranked forty-fourth in Trust Fund Solvency. Table 9 shows that Kentucky is ranked forty-seventh in overall Fiscal Condition.

If states or their political subdivisions need only show financial hardship to avoid constitutional requirements to refund unlawful taxes, a taxpayer's place of residence would be determinative of his or her constitutional right to a remedy. The rights of Kentucky taxpayers to meaningful backward-looking relief for unlawful taxes would be less than those of the taxpayers in forty-five other states. In the same vein, the rights of Kentucky taxing authorities to retain

[9] *See* Eileen Norcross and Olivia Gonzalez, *Ranking the States by Fiscal Condition*, George Mason University Mercatus Center (2017), https://www.mercatus.org/system/files/norcross-fiscalrankings-2017-mercatus-v1.pdf (last visited Aug. 29, 2018).

unlawful taxes would be greater than those of forty-five other states. The existence or extent of state taxpayers' federal minimum Due Process guarantees cannot be a function of the financial wisdom of a state's governing authorities.

The minimum Due Process guarantees of the Fourteenth Amendment to the U.S. Constitution are the "supreme law of the land" and cannot be supplanted by or limited by state retroactivity principles. *McKesson* properly holds that prospective-only relief does not "exhaust[] the requirements of federal law" and prevents state courts from using these one-sided considerations of good faith, equity, financial hardship and other subjective factors as a basis to deny taxpayers meaningful backward-looking relief. This Court should reaffirm that federal law is the supreme law of the land and that state courts cannot apply state law principles of retroactivity to avoid the state's constitutionally-mandated obligation to provide taxpayers meaningful retroactive relief for unlawful exactions.

III. THIS COURT SHOULD CLARIFY THAT STATES CANNOT AVOID FEDERAL DUE PROCESS GUARANTEES BY REFUSING TO DECIDE AN ISSUE IN DISPUTE THAT IS PROPERLY PRESENTED TO THE COURT FOR ADJUDICATION

In the initial decision of the Court of Appeals in this action, the Court determined taxpayer's declaratory judgment count. The Court of Appeals held that

both KRS §§ 173.790 and 132.023 govern the Library District's tax rate and set out in detail how the District's tax rate should be calculated.[10] The trial court on remand granted the Library District's motion for summary judgment and held the decision of the Court of Appeals on the declaratory judgment count was to be given prospective-only application. In other words, the Court of Appeals' determination of the proper method to calculate the District's tax rate applied only from the date of that Court's decision forward. The trial court did not resolve the issue of which statute or method of calculation governed the District's tax rate for periods prior to the decision of the Court of Appeals in 2015. Because taxpayers' complaint was filed in 2012, asking for declaratory relief and other claims for refund the Court should have identified the governing statute and the calculation of the tax rate before 2015. Its decision leaves open a question that in essence places Kentucky taxpayers in the odd and unfair position of possibly paying taxes to one library district calculated differently than the rates used in another library district for the period prior to 2015 when the Court of Appeals first set forth the procedure for calculating the tax rate.

Nor does the Court of Appeals' decision resolve the question of the propriety of the prior period tax rates levied by the Campbell County Library District. The trial court never certified a class in this action.

---

[10] 475 S.W.3d at 47-48.

Moreover, the taxpayers here have alleged in the complaint common law and statutory counts for a refund which neither the trial court nor the Court of Appeals ever addressed. KRS § 134.590(3) provides that "[i]f a taxpayer pays . . . special district ad valorem taxes to a . . . special district when no taxes were due or the amount paid exceeded the amount determined to be due the taxes **shall be refunded** to the person who paid the tax." (emphasis added). There was no ruling or holding by the trial court or the Court of Appeals on these common law and statutory causes of action.

Finally, though raised and argued by the taxpayers, the lower courts completely ignored *Revenue Cabinet v. Gossum*, 887 S.W.2d 329 (Ky. 1994). In *Gossum*, the Kentucky Supreme Court addressed whether this Court's holding in *Davis v. Michigan Dept. of Treas.*, 489 U.S. 803 (1989), would be given prospective-only application in spite of the mandatory nature of the statute. This Court in *Davis* held that a state taxing scheme nearly identical to Kentucky's was unlawful. The *Gossum* Court held that the taxpayers who sought a refund based on *Davis* were not only entitled to backward-looking relief under *McKesson*, but also refunds were required by statute:

> Moreover, state law requires relief beyond consideration of the demands of federal due process as the Kentucky legislature has enacted refund statutes that provide that Kentucky taxpayers who have paid taxes above what they are legally required to remit are entitled to refunds. . . . Because the General

> Assembly decreed that the Commonwealth is required to make 'the statutorily authorized remedy of tax refunds' where a person has been improperly taxed, **then that is the minimum remedy available under Kentucky law**.

Gossum, 887 S.W.2d at 333 (emphasis added) (citing KRS § 134.590 and other refund statutes), and that Kentucky satisfied its duty to meet minimum Due Process standards by enacting refund statutes that are mandatory.

This issue along with the failure of either lower court to address the proper rate for the years prior to 2015 when the Court of Appeals rendered its holding, requires reversal and remand so that taxpayers can obtain a ruling on important issues and causes of action raised in the complaint but left unaddressed by the lower courts.

CONCLUSION

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

Respectfully submitted,

TIMOTHY J. EIFLER
Counsel of Record
WALTER L. SALES
STEPHEN A. SHERMAN
STOLL KEENON OGDEN PLLC
2000 PNC Plaza
500 W. Jefferson St.
Louisville, KY 40202
(502) 333-6000
timothy.eifler@skofirm.com

BRANDON N. VOELKER
GATLIN VOELKER, PLLC
2500 Chamber Center Dr.
Suite 203
Fort Mitchell, KY 41017
(859) 905-0946

Counsel for Petitioners