

No. 18-283

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IN THE  
**Supreme Court of the United States**

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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.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE KENTUCKY COURT OF APPEALS

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**BRIEF OF AMICUS CURIAE  
NEW ENGLAND LEGAL FOUNDATION  
IN SUPPORT OF PETITIONERS**

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October 5, 2018

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BATEMAN & SLADE, INC.

BOSTON, MASSACHUSETTS

**MOTION FOR LEAVE TO FILE BRIEF  
AS AMICUS CURIAE  
IN SUPPORT OF PETITIONERS<sup>1</sup>**

Pursuant to Supreme Court Rule 37.2(b), New England Legal Foundation (“NELF”) respectfully moves for leave to file the attached brief as amicus curiae in support of Petitioners.

As required by Rule 37.2(a), all parties were provided with at least 10-day written notice of NELF’s intention to file this brief. Notice was emailed to both counsels of record on September 25, 2018. A copy of the Petitioners’ written consent is included in this filing. Counsel for Respondents respectfully declined to consent, and a written copy of his response is also included.

NELF is a nonprofit, nonpartisan, public interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF’s mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights and property rights generally. NELF’s members and supporters include both large and small businesses located primarily in the New England region. In the years since its founding, NELF has filed numerous amicus briefs in this

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored its proposed brief in whole or in part and that no person or entity, other than NELF, made any monetary contribution to its preparation or submission.

Court in cases dealing with property rights in a variety of legal contexts.<sup>2</sup>

This case is of concern to NELF because it raises serious questions about the meaning of due process when a state uses its taxing power to coerce payment of a tax that turns out to be unlawful. If the state denies taxpayers a pre-deprivation opportunity to challenge the tax, as here, they must surrender their money first and challenge the exaction later. It is therefore the state itself that puts them in the position of having to depend on post-deprivation proceedings for relief if they are ever to have justice and see their money returned to them. Rather incredibly, the state court in this case decided that under such circumstances it would be *unfair to the local state taxing authority* for the money it unlawfully coerced from the Petitioners to be returned to them.

For the reasons set out in the proposed brief, NELF believes that the result is based on a faulty analysis of the retroactivity issue present in this case and is seriously at odds with the due process rights of the taxpayers. Because NELF's proposed brief critically examines the state court's justification for its "balancing" of so-called equities against the due process rights of the Petitioners, NELF believes that its brief will assist the Court in evaluating the Petitioners' request for a writ of certiorari.

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<sup>2</sup> Among the most recent such briefs are those filed in *Knick v. Township of Scott*, No. 17-647 (pending on merits); *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); and *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93 (2014).

For the foregoing reasons, NELF respectfully moves that it be allowed to participate in this case by filing the attached amicus brief.

Respectfully submitted,

NEW ENGLAND LEGAL  
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By its attorneys,

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## INTEREST OF AMICUS CURIAE

NELF is a nonprofit, nonpartisan, public interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights and property rights generally. NELF's members and supporters include both large and small businesses located primarily in the New England region. In the years since its founding, NELF has filed numerous amicus briefs in this Court in cases dealing with property rights in a variety of legal contexts.<sup>1</sup>

The present case is of concern to NELF because it raises serious questions about the meaning of due process when a state uses its taxing power to coerce payment of a tax that turns out to be unlawful. If the state denies taxpayers a pre-deprivation opportunity to challenge the tax, as here, they must surrender their money first and challenge the exaction later. It is therefore the state itself that puts them in the position of having to depend on post-deprivation proceedings for relief if they are ever to have justice and see their money returned to them. Rather incredibly, the Kentucky court in this case decided that under such circumstances it would be *unfair to the local state taxing authority* for the

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money it unlawfully coerced from the Petitioners to be returned to them.

For the reasons set out herein, NELF believes that the result is based on a faulty analysis of the retroactivity issue present in this case and is seriously at odds with the due process rights of the taxpayers. Because NELF critically examines the state court's justification for its "balancing" of so-called equities against the constitutional due process rights of the Petitioners, NELF believes that its brief will assist the Court in evaluating the Petitioners' request for a writ of certiorari.

### **SUMMARY OF THE ARGUMENT**

A state may deny taxpayers an opportunity for a pre-deprivation due process challenge to the legality of a tax. When it does so, it becomes constitutionally obligated to make available post-deprivation due process that is fully adequate to provide meaningful, certain relief for any prior unlawful tax exactions. The post-deprivation legal situation that results, including the due process necessity for retrospective relief, is one of the state's own making, and it should not be heard to complain of hardship.

This Court has expressed particular concern that money coercively collected pursuant to an unlawful tax law not remain in the hands of the state but be paid back to the affected taxpayers. Equitable factors like good-faith reliance and inconvenience to the state, which has ample legal means to protect its interests both pre- and post-deprivation, do not outweigh the constitutional command that meaningful backward-looking relief must be given to the taxpayers for illegal tax exactions.

This case urgently warrants this Court's review. The Kentucky Court of Appeals failed properly to appreciate the constitutional dimensions of this case. In declining to give retrospective application to its earlier ruling on state tax statutes and thereby denying Petitioners the possibility of retrospective relief, the state court failed to examine *McKesson's* extended due process analysis of legal situations such as the present one. Instead, it reached its decision by balancing, in a one-sided way, so-called equities having no foundation in the Constitution against the Petitioners' constitutional due process rights. In doing so, it relied on case law that does not deal with constitutional rights, let alone a due process right that is extinguished by a state court ruling, as here.

Moreover, none of those cases involved the state itself creating the due process necessity of a retrospective application of a legal ruling, as happened here, which is an equitable consideration that the court failed to accord any weight in its analysis of the equities. Indeed, in balancing so-called equities against due process in order to decide the retroactivity of its prior ruling, the Kentucky appeals court employed a one-sided analysis of exactly the same kind as that rejected by this Court in *McKesson* where the analysis had been used by a state court to deny relief directly.

## ARGUMENT

### I. Under *McKesson*, Meaningful “Backward-looking” Post-deprivation Relief May Not Be Withheld Because Tax Money Was Taken Unlawfully But in Good Faith or Because Restitution Would Be Inconvenient to the State.

While conceding the applicability to this case of *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), the Kentucky Court of Appeals failed to conduct a careful examination of the reasoning of that decision. *See Coleman v. Campbell Cty. Bd. of Trs.*, 547 S.W.3d 526, 532 (Ky. App. 2018) (*Coleman II*). Had it done so, it would not have concluded that it had the power, on state law principles of “equity,” to deny the taxpayers the due process, post-deprivation relief to which they are entitled, and thereby to permit the Campbell County Library District to retain taxes it collected from them illegally.

Most significantly, the state court asserted that it was not compelled by federal law to apply to the parties before it the important tax law ruling it made in the previous appeal involving the same parties. There it had ruled that the procedures set out in KRS 173.790 must be used by county library districts when they desire to raise the ad valorem tax by more than 4%. *Coleman v. Campbell Cty. Bd. of Trs.*, 475 S.W.3d 40, 47-48 (Ky. App. 2015) (*Coleman I*). Since the Petitioners allege that the Campbell County Library District has violated that statute, application of the *Coleman I* ruling to their case is necessary in order for them to obtain the tax refunds they seek. *See* Petition at 7-8. We note a point that NELF shall make again: when the state chose to deny them a pre-deprivation due process

right to contest the tax, the state, in doing so purely to protect its own monetary interests, ensured that the Petitioners would need a retrospective application of that earlier ruling if they were ever to vindicate their due process rights in the taxes they paid. The state should therefore not be heard to plead equitable defenses to persuade courts to deny the Petitioners the last hope of relief to which the state itself has relegated them. *See infra* p. 12.

In *McKesson*, the Florida high court had recognized a state tax as unconstitutional but, while that holding governed the validity of taxes antedating the decision, the court only enjoined the use of the tax in the future and refused to apply its ruling to the plaintiff corporation, which was seeking refunds for unlawful past taxes. *See* 496 U.S. at 31 & n.15. In ruling that the state court could not refuse retrospective relief, *id.* at 22, this Court wrote:

We have not had occasion in recent years to explain the scope of a State's obligation to provide retrospective relief as part of its *postdeprivation procedure* in cases such as this. Our approach today, however, is rooted firmly in precedent dating back to at least early this century.

*Id.* at 32 (emphasis added). Beginning immediately in the second paragraph of the decision, the Court laid out the legal situation to which its precedent was addressed.

Our precedents establish that if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain

review of the tax’s validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.<sup>2</sup>

*Id.* at 22.

The Court observed that it was “well established” that, in light of the states’ need for predictable revenues and financial security, they were not required to provide taxpayers the pre-deprivation due process that is customarily thought of as “the root requirement of the Due Process Clause.” *Id.* at 37 (quotation marks and citation omitted). However, when a state chooses to deny taxpayers a pre-deprivation opportunity to challenge the taxes it imposes on them, it must afford them post-deprivation due process that includes the right, finally, to challenge earlier unlawful exactions and to receive meaningful relief for them. As the Court said, in order “[t]o satisfy the requirements of the Due Process Clause,” a state “must,” like Florida in the *McKesson* “refund action,” “provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a ‘clear and certain remedy,’ . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.” *Id.* at 39 (quoting *Atchison, T. & S.F.R. Co. v.*

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<sup>2</sup> The Kentucky Court of Appeals agreed that it is inconsequential to the role of *McKesson* to the present case whether the state tax statute in question is found unlawful on state or federal grounds. *See Coleman II*, 547 S.W.3d at 533.

*O'Connor*, 223 U.S. 280, 285 (1912)). *See also id.* at 43 (to provide “clear and certain remedy” is “State’s duty under the Due Process Clause”), 51 (“federal due process principles long recognized by our cases require the State’s postdeprivation procedure to provide a ‘clear and certain remedy’”).

As part of its extended due process analysis, the Court seemed especially troubled by the possibility of the state’s retaining possession of money it had acquired by unlawful taxation. “[A]llowing the State to ‘collect these unlawful taxes by coercive means and not incur any obligation *to pay them back* . . . would be in contravention of the Fourteenth Amendment.” *Id.* at 39 (quoting *Ward v. Love County Board of Comm’rs*, 253 U.S. 17, 24 (1920)) (emphasis added here).

“To say that the county could collect these unlawful taxes by coercive means and not incur any obligation *to pay them back* is nothing short of saying that it could take or appropriate the property of these [individuals] arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State.”

*Id.* at 33-34 (quoting *Ward*, 253 U.S. at 24) (alteration and emphasis added here). In other words, adequate due process relief means “an opportunity to contest the validity of the tax and a ‘clear and certain remedy’ designed to render the opportunity meaningful by *preventing any permanent unlawful deprivation of property*.” *Id.* at

40 (emphasis added). It is irrelevant that the money unlawfully taken sits in the public treasury. *See id.* at 34-35 (held in *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499, 504 (1928), state court’s grant of prospective-only relief depriving bank of right to refund did not “cure the mischief that had been done” by unlawful collection of taxes and “le[ft] the monies thus exacted in the public treasury”) (quoting *Montana National Bank*).

Also of particular significance to the present case is that the *McKesson* Court rejected the Florida court’s use of “equitable considerations” as grounds to forestall an award of retrospective relief. None of those “equitable considerations” derived from the constitutional text, constitutional principles, or this Court’s constitutional jurisprudence about deprivation of property without due process. Perhaps that is why the Court only somewhat grudgingly deigned to discuss them. *See id.* at 45-46 (“even were we to assume” good faith, etc. are relevant to due process relief, etc.). The Court had so little regard for them when weighed against the constitutional right of due process that it repeatedly placed disclaimer quotation marks around the very term “equitable considerations,” and it easily dismissed any such considerations by pointing out how feeble they were when viewed merely in relation to the facts of the case. *See id.* at 44-49.

As for the state’s interest in avoiding economic and administrative “dislocation,” the Court pointed out that after the state had exercised its “well established” prerogative of denying taxpayers pre-deprivation relief in order to safeguard its interest in sound fiscal planning, it still had available to it sufficient other legal protections in the post-

deprivation proceedings, such as notice requirements and limitations of action. *See id.* at 49-51. As the Court insisted throughout the decision, the one thing that states are not permitted to do is to shirk their “obligation to provide meaningful relief for their unconstitutional taxation.” *Id.* at 50.

In short, in *McKesson* this Court was presented with the question “whether prospective relief, by itself, exhausts the requirements of federal law” when taxes have been collected unlawfully and pre-deprivation due process was denied. *Id.* at 31. Throughout this unanimous decision, the Court was clear that the “federal law” at stake was constitutional due process and that the answer was therefore a constitutional mandate to state courts.

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.

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These [precedents] demonstrate the traditional legal analysis appropriate for determining Florida’s *constitutional duty* to provide relief to petitioner *McKesson* for its payment of an unlawful tax. Because exaction of a tax constitutes a deprivation of property, the State *must* provide procedural

safeguards against unlawful exactions in order to satisfy the *commands of the Due Process Clause*.

*See id.* at 31, 36 (emphasis added). *See also id.* at 51.

## II. The Kentucky Court of Appeals' Denial of Retrospective Relief Warrants Review by This Court.

As we have noted, the Kentucky Court of Appeals conceded the relevance of *McKesson* to relief mandated by due process. *See Coleman II*, 547 S.W.3d at 532 (quoting *Phillips v. Commonwealth*, 324 S.W.3d 741, 743 (Ky. App. 2010) (quoting *McKesson*)). Nonetheless, it maneuvered around the “commands of the Due Process Clause” for an award of “meaningful backward-looking relief,” *McKesson*, 496 U.S. at 31, 36, by holding that retroactive application of state law is a question for state courts and then ruling against such application here, *Coleman II*, 547 S.W.3d at 531 (relying on authority that traces back to *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-66 (1932)). In short, if the ruling of *Coleman I* is not applied retrospectively, a request for relief need not be reached. Significantly, however, the Kentucky court’s supposed *retroactivity of law* analysis consists of an equity-based, “good faith”/reasonable reliance analysis, *see id.* at 533, essentially indistinguishable from the *relief* analysis adopted by the Florida court in *McKesson* and later rejected there by this Court.

As a glance at the Kentucky appeals court’s chief authority, *Great Northern*, reveals, the state court

was too hasty in asserting that the retroactive application of state law is a realm in which state courts may freely “fashion their own rules.” *Id.* at 532. In *Great Northern*, this Court took repeated, express pains to delimit the “freedom state courts may enjoy” to those questions of state law which do not fall afoul of a protection guaranteed by the Constitution. 287 U.S. at 364-66 (“not dealing with any question of constitutional law,” no hint of “denial of due process,” “carrier did not suffer a denial of due process,” “there is involved in it no denial of a right protected by the Federal Constitution,” “Federal Constitution has no voice upon the subject”). The same cannot be said of the present case, of course, a point the state court failed to address despite its admission of *McKesson*’s relevance. Pre-deprivation due process protection, which is “the root requirement of the Due Process Clause,” *see supra* p. 6, may be denied, as it was here, only on the constitutional condition that post-deprivation due process is adequate to provide a “clear and certain remedy” for unlawful prior exactions. As we quoted this Court earlier as saying:

Our precedents establish that if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax’s validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

*McKesson*, 496 U.S. at 22.

Moreover, none of the three cases cited by the Kentucky court in support of its balancing of equitable considerations against due process protections remotely supports the court's decision. *See Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991); *Kindred Hosps. Ltd. P'ship v. Lutrell*, 190 S.W.3d 916, 922 (Ky. 2006) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 694 (2004)).<sup>3</sup> In none of these cases was a constitutional right *extinguished* because a state law was given solely prospective application; in none of them did the state itself create the necessity of retrospective relief by denying plaintiffs the right to timely challenge the lawfulness of a harm the state inflicted on them, leaving them with an IOU that they could collect on only later or else not at all. *See supra* pp. 4-6. Cf. *Commonwealth v. Gossum*, 887 S.W.3d 329, 333 (Ky. 1994) ("Because the statutory scheme is pointedly designed to coerce taxpayers into remitting taxes before challenging any liability to avoid potential economic disadvantage, Kentucky does not offer meaningful, adequate predeprivation remedies for purposes of federal law.").

Furthermore, as we have said, the Kentucky appeals court, under the guise of conducting an analysis of the retroactive application of law (i.e., a subject supposedly antecedent to the question of granting relief), to all intentions and purposes performed exactly the same kind of equities-based analysis that this Court rejected when it was offered directly on the question of whether retrospective relief should be granted in *McKesson*. Pinning a different label on the analysis and calling it a

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<sup>3</sup> Amicus has corrected the pin citation for *Altmann*.

retroactivity of law analysis rather than a retrospective relief analysis should not make any difference to its validity when pitted against a constitutional due process right.

If we imagine, for a moment, that the Kentucky court had agreed to retrospective application of the law and had then moved on to consider relief, its present supposed *retroactive application of law* argument could easily have been pasted in as an argument against *retroactive relief*—and it would have resembled nearly perfectly the Florida state court’s equitable arguments against retrospective relief that were rejected by this Court in *McKesson*.

In both *McKesson* and the present case, the “equitable considerations” do not derive from constitutional text, constitutional principles, or this Court’s constitutional jurisprudence dealing with deprivation of property without due process, and yet the Kentucky court deemed them potent enough to nullify the Petitioners’ constitutional right to “meaningful” post-deprivation relief. Indeed, conspicuous by its absence was any discussion whatsoever in which the court explicitly recognized Petitioners’ constitutional interests and explicitly balanced them against the Library District’s supposed equities. As in *Coleman I*, the state appeals court once again seemed preoccupied with the supposed plight of the local taxing authority to the exclusion of that of the taxpayers. *See Coleman I*, 475 S.W.3d at 48; *Coleman II*, 547 S.W.3d at 533. For example, the panel was apparently entirely untroubled by the taxing authority’s retention of money procured from taxpayers by unlawful means, a concern that, by contrast, disturbed this Court greatly in *McKesson*. *See supra* pp. 7-8.

Nor did the court weigh in the balance any of the additional legal protections that the state, having already protected public fiscal planning by denying pre-deprivation due process, has erected in its favor (and in favor of local state taxing authorities) in post-deprivation proceedings, or could have erected but neglected to do so, or enjoyed as a common law right. *See McKesson*, 496 U.S. at 45. For example, the Petitioners note Kentucky statutory and common law limitation of actions for tax refunds. Petition at 8 n.2. The state court's inadequate, one-sided "balancing" of interests stands in stark contrast to this Court's critical analysis in *McKesson*.

In short, the state court's putative retroactivity of law analysis merits the characterization given to it by the Petitioners—an "artifice"—and urgently warrants review by this Court.

## CONCLUSION

For the reasons stated above, NELF supports the Petitioners' petition for a writ of certiorari.

Respectfully submitted,

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