No. 18-283

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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"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." *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36 (1990). This Court in *McKesson* unanimously held that where, as here, a state penalizes taxpayers for failure to remit their taxes timely, thereby requiring them to pay first and obtain a review of the tax's validity in a later refund action, the Due Process Clause "obligates the State to provide meaningful-backward looking relief." *Id.* at 31. The Kentucky Court of Appeals circumvented the commands of the Due Process Clause and denied Petitioners meaningful backward-looking relief by the artifice of a prospective-only decision. The Court of Appeals held that state-law equitable considerations, applied one-sidedly in the Library District's favor, overcomes Petitioners' federal Due Process safeguards.

Attempting to avoid this Court's review, the Library District in its Opposition tries to: (1) mischaracterize the issue presented in the Petition; (2) raise an issue not preserved for review; and (3) misapply this Court's plurality decision in *Am. Trucking Assns. v. Smith*, 496 U.S. 167 (1990). None of these arguments has merit. Like the decision of the Court of Appeals however, the Library District's efforts highlight the pervasive efforts of states to circumvent the mandates of Due Process and this Court's holdings in order to avoid refunding unlawful taxes.

McKesson squarely held that the Due Process Clause obligates states to provide meaningful backward-looking relief for unlawful taxes coerced from taxpayers. States nevertheless began circumventing *McKesson*'s taxpayer protections almost before the ink was dry on the decision. State courts have either substantially narrowed *McKesson*'s scope,[1] ignored the decision,[2] or as the Kentucky Court of Appeals did here, used one-sided state-law "equitable considerations" to circumvent states' constitutional obligations to provide refunds.[3] This Court has been

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[1] *See Fair Oaks Hosp. v. Dir., Div. of Taxation*, 13 N.J. Tax 94 (N.J. Tax Ct. 1993) (limiting *McKesson* to taxes that violate the Commerce Clause and denying refunds of taxes violative of the First Amendment on state-law equitable grounds).

[2] *See Nextel Communs. of the Mid-Atlantic, Inc. v. Pa. Dep't of Revenue*, 171 A.3d 682 (Pa. 2017), *rev. den.*, 138 S.Ct. 2635 (finding state tax law violated state constitution but denying a retroactive remedy without discussion of *McKesson* despite it being argued by the taxpayer). This Court denied *certiorari* in *Nextel* last Term.

[3] *Exelon Corp. v. Ill. Dep't of Revenue*, 917 N.E.2d 899 (Ill. 2009) (construing state tax law in favor of taxpayer but denying retroactive application based on state-law equitable principles); *Oz Gas, Ltd. v. Warren Area Sch. Dist.*, 938 A.2d 274 (Pa. 2007) (applying state law equitable principles to deny retroactive application of state court decision construing state tax law in favor of taxpayer); *Milwaukee Safeguard Ins. Co. v. Selcke*, 754 N.E.2d 349 (Ill. App. 2001) (denying refund of state tax violating state law on nonstatutory state law equitable principles); *Dryden v. Madison County*, 727 So.2d 245 (Fla. 1999) (denying refunds of special assessments violating state law on state-law equitable principles after vacatur and remand from this Court "for further consideration in light of *Newsweek, Inc. v. Fla. Dep't of Revenue*[, 522 U.S. 442 (1998)]"); *Kennecott Corp. v. State Tax Comm'n*, 862 P.2d 1348 (Utah 1993) (finding state tax provision violated state constitution but denying retroactive application based on state-law equitable

twice forced to reaffirm *McKesson*'s mandate to prevent state circumvention of taxpayer Due Process rights. *See Reich v. Collins*, 513 U.S. 106 (1994) and *Newsweek, Inc. v. Fla. Dep't of Revenue*, 522 U.S. 442 (1998). The pressing need for this Court's further guidance is apparent from the many decisions of state courts rendered since *McKesson*, *Reich* and *Newsweek* denying taxpayers meaningful backward-looking relief. This case is an excellent vehicle to give it. The Kentucky Court of Appeals' holding is wrong.

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principles); *Fair Oaks Hosp.*, 13 N.J. Tax 94 (limiting *McKesson* to taxes that violate the Commerce Clause and denying refunds of taxes violating the First Amendment on state-law equitable grounds); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992) (denying refunds of tax held unlawful on state-law grounds based on state law equitable principles); *Cabana v. Tax*, 1990 R.I. Super. LEXIS 178 (Super. Ct. R.I. 1990) (denying refunds of tax held unlawful on state-law grounds to unnamed class members based on state law equitable principles). *But see Kay Elec. Coop. v. State ex rel. Okla. Tax Comm'n*, 815 P.2d 175 (Okla. 1991) (applying state law equitable principles but granting refunds of state taxes unlawfully collected on state-law grounds). *Compare Kragnes v. City of Des Moines*, 810 N.W.2d 492 (Iowa 2012) (ordering refunds pursuant to *McKesson* of state taxes violating state law); *Aileen H. Char Life Interest v. Maricopa County*, 93 P.3d 486 (Ariz. 2004) (same); *Scottsdale Princess P'shp. v. Arizona Dep't of Revenue*, 958 P.2d 15 (Ariz. App. 1997) (ordering refunds pursuant to *McKesson* of state taxes violating state law and rejecting equitable consideration); *Tucson Elec. Power Co. v. Apache City*, 912 P.2d 9 (Ariz. App. 1995) (rejecting prospective application and ordering refunds of state tax violating state constitution based on *McKesson*).

ARGUMENT

I. THE PETITION SQUARELY PRESENTS AN ISSUE OF CONSTITUTIONAL LAW WITH A PRESSING NEED FOR REVIEW

The Library District erroneously claims that Petitioners do not raise a question of federal law, incorrectly asserting for the first time that whether a state court's decision interpreting a state tax law is to be applied prospectively-only is a question of state law. (Opp. 10). The Library District cites no authority for this unpreserved claim but simply argues that because *McKesson* involved a tax that violated the U.S. Constitution, the Due Process safeguards recognized therein should apply only where a tax is ruled unlawful on federal constitutional grounds. (Opp. 13-15).

The Due Process Clause means what it says – a state "shall" not "deprive any person of life, liberty, or *property*, without due process of law." U.S. Const. amend. XIV, § 1 (emphasis added). This Court in *McKesson* unanimously held that "[b]ecause exaction of a tax constitutes a deprivation, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." This Court's decision in *McKesson* and the subsequent decisions in *Reich* and *Newsweek* all clearly hold that where, as here, a state deprives a taxpayer of property through the coercive power of taxation without providing a meaningful predeprivation remedy, the Due Process Clause dictates that a decision that the tax was unlawfully collected must be given retroactive effect.

The question of whether the collection of a *state* tax violates *state* law is purely a *state-law* issue. However, whether a taxpayer must be granted meaningful backward-looking relief where the state fails to provide a meaningful predeprivation remedy is squarely an issue of *federal* constitutional law. It is settled law in Kentucky that *McKesson* requires a state to provide a refund where a *state* tax is erroneously collected or unlawful under *state* law. *See Phillips v. Commonwealth*, 324 S.W.3d 741, 743-44 (Ky. App. 2010); *see also Dep't of Revenue v. Revelation Energy, LLC*, 544 S.W.3d 170, 175 (Ky. App. 2018). Even the Kentucky Court of Appeals recognized this.[4] The Library District did not challenge these decisions or otherwise preserve the issue it seeks to raise in Sections I and II.A of its Opposition. (Opp. 8-15).

This Court's actions similarly confirm the commands of *McKesson*, *Newsweek* and *Reich* apply to all unlawful taxes, including those that violate state law. Just days after this Court's holding in *Newsweek*, this Court summarily vacated and remanded (in light of *Newsweek*) a second case denying Florida taxpayers a refund of unlawful taxes. *Dryden v. Madison County,*

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[4] The Court of Appeals held that *McKesson* clearly applies to Petitioners' claims against the Library District but avoided addressing those claims and avoided the obligations of the Due Process Clause through the artifice of making its decision prospective-only. Pet. App. 9a (quoting *Phillips*, 324 S.W.3d at 743 (quoting *McKesson*, 496 U.S. at 36)). The lower court held "[t]he taxpayers correctly contend that the taxation need not be pursuant to an unconstitutional statute to trigger due process protections." Pet. App. at 10a (citing *Reich* and *Newsweek*).

Florida, 522 U.S. 1145 (1998). *Dryden* vacated an opinion by the Florida Supreme Court on a question certified by the same intermediate Florida appellate court that decided *Newsweek*. *See Dryden v. Madison County*, 696 So.2d 728 (Fla. 1997). The Florida Supreme Court had held that notwithstanding *McKesson*, Florida courts could rely on state-law equitable considerations, such as the government's good faith reliance on a presumptively valid taxing statute, to deny refunds of taxes held unlawful under *state* law.[5] This Court's vacatur of the Florida Supreme Court's holding and remand in light of *Newsweek* confirms the Due Process safeguards announced in *McKesson*, and applied in *Newsweek*, apply to all unlawful taxes, whether the tax is unconstitutional or violates state law.

The lower court circumvented Petitioners' Due Process protections by applying state-law equitable principles. It did so in the face of binding precedent holding that as a matter of state law, a Kentucky court cannot deny refunds on the basis of equitable considerations because Kentucky statutes mandate refunds for unlawful taxation and "that is the minimum remedy under Kentucky law." *Revenue Cabinet v. Gossum*, 887 S.W.2d 329, 333 (Ky. 1994). It did so despite this Court's holding that "[s]tate law may provide relief beyond the demands of federal due process, but under no

[5] The taxes at issue in *Dryden* were special assessments levied under county ordinances. The Florida courts found the assessments unlawful because the ordinances violated a *state* statute authorizing such assessments.

circumstances may it confine petitioners to a lesser remedy." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 102 (1993). Absent this Court's review, states will continue to rely on state-law equitable principles to one-sidedly deny taxpayers the meaningful backward-looking relief Due Process commands, and state taxpayers will have no constitutionally-guaranteed remedy in state courts for taxes collected in violation of state law.

II. THIS COURT'S PLURALITY DECISION IN *AMERICAN TRUCKING ASSOCIATION V. SMITH* DOES NOT AUTHORIZE PROSPECTIVE-ONLY DECISIONMAKING BASED ON STATE-LAW EQUITABLE PRINCIPLES

The Library District relies heavily on this Court's plurality decision in *Am. Trucking Assns. v. Smith*, 496 U.S. 167 (1990) as support for prospective-only judicial decisionmaking in unlawful tax cases. (Opp. *passim*). That reliance is wholly misplaced. A majority of this Court in *Smith* agreed with the dissent that *Smith* should be dealt with just like *McKesson* – that the case should be remanded to the state court for it to determine, consistent with the due process standards articulated in *McKesson*, the meaningful retrospective relief to which the taxpayers were entitled.

The petitioners in *Smith* challenged the constitutionality of an Arkansas statute that imposed a discriminatory burden on interstate truckers. While their suit was pending, this Court declared a virtually

identical Pennsylvania tax unconstitutional as violating the dormant Commerce Clause. *See Am. Trucking Assns. v. Scheiner*, 483 U.S. 266 (1987). Shortly thereafter, the Arkansas Supreme Court struck down the Arkansas tax at issue. The primary issue in *Smith* was whether petitioners were entitled to a refund of taxes that were assessed before the date of the decision in *Scheiner*.

The Arkansas court held that petitioners were not entitled to a refund because *Scheiner* did not apply retroactively. Four Justices of this Court agreed with the result reached by the state court. However, a majority of this Court did not agree on the reasoning for that result. The plurality opinion of four Justices authored by J. O'Connor concluded federal law did not provide petitioners with a right to a refund of pre-*Scheiner* tax payments because *Scheiner* did not apply retroactively. *Smith*, 496 U.S. at 171 (Connor, J., joined by Rehnquist, White, and Kennedy, JJ.). Four Justices dissented and concluded *Smith* should be dealt with precisely like *McKesson* – the case should be remanded to the state court for it to determine, consistent with the due process standards articulated in *McKesson*, the meaningful retrospective relief to which the taxpayers were entitled. 496 U.S. at 205 (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ., rejecting the plurality's "anomalous approach" to retroactivity).

J. Scalia's concurring opinion is critical to the understanding of *Smith* and civil retroactivity. J. Scalia concurred only with the result reached in *Smith* "because he disagreed with the substantive rule in

Scheiner, but did not agree with the plurality's reasoning." *Danforth v. Minnesota*, 552 U.S. 264, 285 (2008) (explaining *Smith*). J. Scalia stated that despite concurring in the judgment, he agreed with the reasoning of the four *dissenting* Members "that prospective decisionmaking is incompatible with the judicial role." *Smith*, 496 U.S. at 201 (Scalia, J., concurring).

This Court in *Danforth* held that *Smith*'s holding as to retroactivity was best informed by the *Smith* dissenters. "Because Justice Scalia's vote rested on his disagreement with the substantive rule announced in *Scheiner* – rather than with the retroactivity analysis in the dissenting opinion – there were actually five votes supporting the dissent's views on the retroactivity issue." *Danforth*, 552 U.S. at 286-87.

Here, as held in *Danforth*, "it is the dissent rather than the plurality that should inform our analysis of the issue before us here today" – retroactivity. *Id.* at 287. The dissent stated that "if the retention of taxes assessed violates the Due Process Clause under [*McKesson*], petitioners are entitled to a remedy" and a state's "ability to impose various procedural requirements on the refund mechanism sufficiently meets any state interest in sound fiscal planning." *Smith*, 496 U.S. at 223 (Stevens, J., dissenting). In short, this Court's plurality decision in *Smith*, along with *McKesson*, *Reich* and *Newsweek*, fully support Petitioners here, not the Library District, and confirm the Court of Appeals erroneously elevated state equitable principles over minimum constitutional guarantees to deny Petitioners' Due Process rights.

III. THIS COURT SHOULD GRANT REVIEW TO REAFFIRM THAT *MCKESSON* AND TAXPAYER MINIMUM DUE PROCESS RIGHTS CANNOT BE CIRCUMVENTED BY ONE-SIDED STATE-LAW EQUITABLE CONSIDERATIONS

Like the Kentucky Court of Appeals, the Library District offers a completely one-sided view of the equities in this action in an attempt to avoid this Court's review. Those equities do not overcome the commands of *McKesson*, the minimum safeguards of the Due Process Clause and the state's obligation to provide Petitioners meaningful retrospective relief. Nor could they here, when the equities of both sides are considered in an even-handed way.

In tax refund cases, a retrospective application of a decision in favor of a taxpayer will always have a negative financial impact on the taxing authority. In this action, that was the only "equity" ostensibly "balanced" by the Kentucky Court of Appeals. "Balancing of equities" in state tax refund actions has become a euphemism for a judicial mechanism to deprive taxpayers of their minimum Due Process rights. This Court should grant the petition and reaffirm that the Due Process safeguards espoused in *McKesson* cannot be circumvented by a prospective-only holding.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for Certiorari, the petition should be granted.

Respectfully submitted,

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