No. 22-1238

IN THE

Supreme Court of the United States

OFFICE OF THE UNITED STATES TRUSTEE,

Petitioner,

v.

JOHN Q. HAMMONS FALL 2006, LLC, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE INSTITUTE FOR PROFESSIONALS IN TAXATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS*

The Institute for Professionals in Taxation is a non-profit educational organization founded in 1976.[1] IPT serves more than 6,000 members, representing approximately 1,200 corporations, firms, and taxpayers throughout the United States and Canada. IPT's membership includes small businesses as well as most of the Fortune 1,000 companies, and represents the spectrum of business and industry sectors, including agriculture, manufacturing, retail, communications, finance, transportation, and energy. IPT is dedicated to promoting the uniform and fair administration of state and local taxation, minimizing the costs of tax administration and compliance, and promoting equitable and non-discriminatory taxation of multi-state businesses.

This case is a follow-up to *Siegel v. Fitzgerald*, 142 S.Ct. 1770 (2022), and seeks to answer a remedial question that the Court left open in that case. In *Siegel,* the Court held that imposing higher fees on bankruptcy debtors in districts administered under the Trustee Program violates the Constitution's Bankruptcy Clause (which requires bankruptcy laws to be uniform). *Id.* at 1782–83. However, the Court did not determine what remedy was appropriate to cure this constitutional violation, and instead remanded to allow the lower courts to address this question in the first instance. *Id.*

In determining the remedy, the lower courts have leaned heavily on state tax precedent regarding due

[1] Pursuant to Supreme Court Rule 37.6, IPT states that no counsel for a party authored this brief in whole or in part and that no person other than IPT or IPT's counsel made a monetary contribution to the preparation or submission of this brief.

process. See, *e.g., USA Sales, Inc. v. Office of the United States Tr.*, 76 F.4th 1248, 1253–54 (9th Cir. 2023); *United States Tr. Region 21 v. Bast Amron LLP*, 71 F.4th 1341, 351 (11th Cir. 2023); see also Pet. Br. at 29–34. Two of the Court's seminal state tax decisions on due process came up repeatedly: *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Business Regulation of Fla.*, 496 U.S. 18 (1990), and *Reich v. Collins*, 513 U.S. 106 (1994).

As an organization devoted exclusively to taxation at the state and local level, IPT believes it will be helpful to the Court to explain the positive impact that *McKesson* and *Reich* have had on state tax policy. In these bankruptcy fee cases, *McKesson* and *Reich* have been invoked outside their ordinary state-tax context, and no party to this bankruptcy fee case has a material interest in state tax policy or state tax administration. Regardless of how the Court resolves this case, IPT respectfully requests that the Court avoid casting any doubt on the important due process protections that *McKesson* and *Reich* provide to state taxpayers.

SUMMARY OF ARGUMENT

McKesson and *Reich* are seminal decisions that determine the remedies that States must provide in state tax cases. In *McKesson*, this Court unanimously held that due process requires a State to provide meaningful backward-looking relief when a taxpayer successfully challenges a state tax. 496 U.S. at 22. *Reich* further bolstered this rule by clarifying that if state law provides a "postdeprivation" (i.e., a refund) process, due process prevents a State from denying a taxpayer a remedy for using that process simply because a separate "predeprivation" process was also available. 513 U.S. at 110–14.

McKesson and *Reich* provide vital procedural safeguards to state taxpayers. Before these decisions, States frequently denied, on questionable grounds, refunds of illegal taxes. *McKesson* and *Reich* have largely put an end to these unfair practices.

McKesson and *Reich* also benefit the States. By providing taxpayers with procedural certainty, these decisions make taxpayers more likely to choose to follow a postdeprivation procedure, and thus make the States more likely to continue to receive revenue while a tax is under dispute.

Regardless of how the Court resolves the dispute in this case, it should avoid casting doubt on *McKesson* or *Reich* in the state-tax context. A decision casting doubt on *McKesson* or *Reich* would risk disrupting taxpayers' reliance interests and could deprive the States of predictable revenue while a tax is under dispute.

ARGUMENT

I. *McKesson*: Due process requires a State to provide meaningful backward-looking relief when a taxpayer successfully challenges a state tax.

Under this Court's decision in *McKesson*, if a taxpayer shows that a state tax is unconstitutional (for example because it unlawfully discriminates), due process requires the State to provide meaningful backward-looking relief to cure the illegality.

McKesson was a follow-up to *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Bacchus had challenged a Hawaii alcohol tax that provided a tax preference for locally produced alcoholic spirits. Bacchus sold alcoholic products that did not benefit from the in-

state tax preference, and it sued to equalize the tax treatment. This Court ruled in favor of Bacchus, holding that the Commerce Clause prevents a State from providing preferential tax treatment for locally produced products. *Bacchus*, 468 U.S. at 273. Despite its holding on the merits, this Court declined to order a refund to Bacchus, and instead remanded to the Hawaii Supreme Court to determine the proper remedy. *Id.* at 277. The parties reached a settlement before that court could address the remedy question. Joshua J. Michaels & Jonathan W. White, *Make America Drink Again: 100 Years Off the Wagon*, 99 Tax Notes State 245, 246 (2021).

McKesson picked up where *Bacchus* had left off. McKesson challenged a Florida alcohol excise tax that provided a tax preference for certain in-state alcoholic products. McKesson, which sold alcoholic products that did not benefit from this preference, sought to equalize the tax treatment and to obtain a refund of tax it had paid on disfavored out-of-state products. Like most state tax cases, McKesson's case started out in the state court system. The Florida Supreme Court acknowledged that, consistent with *Bacchus*, Florida's tax preference for in-state products violated the Commerce Clause. *Div. of Alcoholic Beverages & Tobacco, Dep't of Business Regulation v. McKesson Corp.*, 524 So.2d 1000, 1009 (Fla. 1988). But the state court declined to order a refund for tax paid on out-of-state products and did not order an assessment of tax against the in-state products. *Id.* at 1010. Rather, the state court struck the tax preference for in-state products on a prospective-only basis. The state court justified this result on the grounds that providing a refund would result in a "windfall." *Id.*

This Court granted certiorari and reversed. In a unanimous decision, the Court held that the Florida Supreme Court's approach did not comport with due process. 496 U.S. at 22. The Court set forth a clear rule: "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31 (footnotes omitted). Notably, the Court did not hold that due process requires a State to adopt any particular remedy to cure a discriminatory tax: due process would be satisfied if a State were to "level down" a discriminatory tax (by issuing a refund to the taxpayer who did not originally benefit from the discriminatory preference); and due process would also be satisfied if a State were to "level up" the tax (by assessing additional tax against tax-payers who had originally benefited from the unconstitutional preference). *Id.* at 46–47.

Ever since it was decided, *McKesson* has stood at the core of state tax jurisprudence. See generally. Jerome R. Hellerstein et al., *State Taxation* ¶ 4.17 (3d ed. 2021, Supp. 2022-23). Remedial questions come up frequently in state tax cases, and courts look to *McKesson* as their polestar in resolving these questions. See, *e.g., Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442 (1998); *Reich v. Collins*, 513 U.S. 106 (1994); *Ceridian Corp. v. Franchise Tax Board*, 85 Cal. App. 45h 875 (Cal. Ct. App. 2000); *Chapman v. Commissioner of Revenue*, 651 N.W. 2d 825, 838–41 (Minn. 2002); *General Motors Corp. v. Commonwealth*, 265 A.3d 353 (Pa. 2021); *W.R. Grace & Co. v. Dep't of Revenue*, 973 P.2d 1011, 1018 (Wash. 1999).

II. *Reich*: If state law provides a "post deprivation" (i.e., a refund) process, due process prevents a State from denying a taxpayer a remedy for using that process simply because a separate "predeprivation" process was also available.

One point left unclear by *McKesson* was whether due process requires a State to provide meaningful backward-looking relief only "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. . . ." *McKesson*, 496 U.S. at 38. n.21. McKesson had, in fact, been forced to pay tax under duress and to file a refund action to challenge the tax's legality, so *McKesson* did not present a case or controversy that would allow the Court to opine on this point. See *Bast Amron*, 71 F. 4th at 1348–49.

The Court did not need to wait long to hear a live case on this point, though. Just four years after *McKesson*, the Court held, in *Reich v. Collins*, that a taxpayer who had successfully challenged a tax through a postdeprivation refund procedure was entitled to "meaningful backward-looking relief"—even though a State's law also allowed the taxpayer the opportunity to challenge the tax through a predeprivation procedure. 513 U.S. 106, 111

Charles Reich was a federal retiree who sought a refund of Georgia income tax that was imposed on federal, but not state, retirement benefits. *Id.* at 108–09. A federal statute prohibited Georgia from imposing tax on federal retirement benefits if the tax was not also imposed on the retirement benefits of state retirees. 4 U.S.C. § 111. The Court had,

just a few years earlier, struck down a similar discriminatory tax that Michigan had imposed on federal retirement benefits. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989).

Reich paid the Georgia tax, and sought a refund pursuant to a Georgia statute that provided a taxpayer with the right to seek a refund of taxes that "have been erroneously or illegally assessed and collected. . . ." *Reich* at 108–09 (citing Ga. Code Ann. § 48-2-35(a)). On appeal, the Georgia Supreme Court acknowledged that, consistent with *McKesson*, due process required the State to "provide procedural safeguards against the unlawful exactions of tax," but concluded that the State was not required to provide a refund to Reich because Georgia law provided him with predeprivation remedies that were "sufficient to satisfy federal due process requirements." *Reich v. Collins*, 437 S.E.2d 320, 321 (Ga. 1993). Since Reich chose to pay the tax and claim a refund, he was out of luck—even though state law clearly provided for that procedural path.

The Court granted certiorari and reversed—unanimously. The Court criticized Georgia's conduct in the case, characterizing the State's belated disavowal of the statutory refund procedure as an unfair "bait and switch." 513 U.S. at 111. The Court noted that while due process allows a State "flexibility to maintain an exclusively predeprivation remedial scheme," a State cannot "hold out what plainly appears to be a 'clear and certain' postdeprivation remedy [i.e., a refund claim process] and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Id.* at 108. This means that if state law gives a taxpayer the option to challenge a tax through either predeprivation or postdeprivation procedures, due

process requires the State to provide meaningful backward-looking relief to a taxpayer that brings a successful challenge to a state tax regardless of which of those procedures the taxpayer chose to pursue. *Id.* at 110–14; see also *Newsweek, Inc. v. Fla. Dep't of Revenue*, 522 U.S. 442, 444–45 (1998).

Reich serves as an important adjunct to *McKesson*, as it prevents state taxing authorities from "creating hitherto unknown procedural obstacles" to avoid "paying large refunds or . . . imposing retroactive taxes" to cure unconstitutional taxes as would otherwise be required by *McKesson*. Eric Rakowski, Harper *and Its Aftermath*, 1 Fla. Tax Rev. 445, 478–79 (1993).[2] Although it had long been understood that a person "who denies the legality of a tax should have a clear and certain remedy," *Reich* established that this is required as a matter of federal due process. See

[2] The United States Trustee suggests that *Reich* is limited to "the narrow circumstance of a bait and switch where a State, by statute, set up a procedure that promised that a refund would be available in a postdeprivation proceeding, but then reconfigured its scheme, unfairly to an exclusively predeprivation remedy after a taxpayer reasonably relied on the apparent availability of a postdeprivation refund remedy in forgoing a predeprivation challenge." Pet. Br. at 33 (cleaned up). Contrary to the Trustee's suggestion, Taxpayers have generally read *Reich* more broadly as standing for the proposition that due process prevents a state from denying a taxpayer a remedy when the taxpayer follows a postdeprivation process simply because a separate predeprivation process was also available. There can be little doubt that taxpayers' broad reading of *Reich* is reasonable, as it is consistent with the analysis of *Reich* in *USA Sales, Inc.*, 76 F.4th 1248, 1254 (9th Cir. 2023) and *Bast Amron LLP*, 71 F.4th 1341, 1350 (11th Cir. 2023). Construing *Reich* in the narrow manner suggested by the Trustee would unfairly undermine the interests of taxpayers who reasonably relied on *Reich* in following postdeprivation refund procedures.

Atchison, Topeka & Santa Fe R. Co. v. O'Connor, 223 U.S. 280, 285 (1912); see also John F. Coverdale, *Remedies for Unconstitutional State Taxes*, 32 Conn. L. Rev. 73, 92 n. 123 (2000).

III. *McKesson* and *Reich* provide important procedural safeguards for taxpayers, and benefit both taxpayers and the States.

Thanks to *McKesson* and *Reich*, taxpayers now take it for granted that they will receive meaningful backward-looking relief if they challenge a state tax. This was not always the case, though. Before the Court decided *McKesson* and *Reich*, the States frequently denied, on questionable grounds, refunds of illegal taxes. See generally Paul H. Frankel et al., *don't pay! Don't Pay!! DON'T PAY!!!: States Continue to Resist Issuing Refunds After* Jim Beam, Interstate Tax Report Vol. 9, No. 10, at 1–4, 12 (1993).

Over the years, the States developed different strategies to deny refunds of illegal taxes. Historically, a common way that States avoided refunding illegal taxes was by pressuring a taxpayer to pay the illegal tax, and then asserting that the taxpayer had voluntarily paid the tax despite the coercion that caused the payment. *E.g., Oceanic S.S. Co. v. Tappan*, 18 F. Cas. 530, 531 (N.Y. Circuit Court 1879) (payment following threat of penalty was voluntary); *Union Nat. Bank v. Mayer*, 51 N.Y. 638 (1872) (payment following threat of distress warrant was voluntary); *Detroit v. Martin*, 34 Mich. 170 (1876) (payment following threat of seizure was voluntary); see generally Oliver P. Field, *The Recovery of Illegal & Unconstitutional Taxes*, 45 Harv. L. Rev. 501 (1932). As caselaw at that time only required a State to pay a refund for an illegal tax if the tax was paid under compulsion, see*, e.g.*, *Atchison, Topeka & Santa Fe R. Co.*, 223 U.S. at 285,

framing payment as voluntary allowed the States to keep illegal taxes.

In the latter half of the twentieth century, the States discovered a new rationale to deny refunds of illegal taxes: non-retroactivity. Although the rule had long been that court decisions in civil cases have full retroactive effect, the Court had gradually opened the doors to allow decisions to have non-retroactive effect. See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). With the hammer of non-retroactivity in hand, States began to find lots of nails: after a state tax was declared to be unconstitutional, the States would reflexively argue that the decision holding the tax unconstitutional was not retroactive—without regard to whether such an argument was justified. *E.g.*, *Revenue Cabinet v. CSC Oil Co.*, 851 S.W.2d 497, 502–03 (Ky. 1993) (refusing to give retroactive effect to *New Energy Co. v. Limbach*, 486 U.S. 269 (1988)); *James B. Beam Distilling Co. v. Georgia*, 382 S.E.2d 95, 97 (Ga. 1989) (refusing to give retroactive effect to *Bacchus*), *rev'd*, 501 U.S. 529 (1991); *Harper v. Va. Dep't of Taxation*, 401 S.E.2d 868, 871 (Va. 1991) (refusing to give retroactive effect to *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989)), *rev'd*, 509 U.S. 86 (1993).

The final method that States used to deny refunds of illegal taxes was to impose novel procedural requirements on taxpayers. *Reich* provides a clear example of this practice. In *Reich*, Georgia insisted that its statute did not allow taxpayers to seek refunds of unconstitutional taxes. 513 U.S. 106 (1994). *Reich* was not an isolated incident, either. For example, after the Court found that federal law prohibits a State from imposing tax on federal government bonds if it exempts state government bonds, *Memphis Bank &*

Trust Co. v. Garner, 459 U.S. 392 (1983), Minnesota denied taxpayers' refund claims on the grounds that they were barred by the acceptance-of-benefits estoppel doctrine. *E.g.*, *Cambridge State Bank v. Roemer*, 457 N.W.2d 716, 720 (Minn. 1990) (subsequent history omitted). There was only one problem with this argument: the Minnesota Supreme Court had seemingly renounced the acceptance-of-benefits estoppel doctrine. See *Wegan v. Lexington*, 309 N.W.2d 273, 277 (Minn. 1981). Nevertheless, the Minnesota Supreme Court allowed the acceptance-of-benefits estoppel doctrine to continue only in the tax context. *Cambridge State Bank*, 457 N.W.2d at 720.

States continued to deny refunds of unconstitutional taxes on questionable grounds until this Court made a concerted effort to protect taxpayers' rights. From 1990 through 1998, this Court decided a flurry of state tax procedural cases that sent a clear message: as a matter of due process, taxpayers are entitled to fair treatment when they challenge state taxes. See *Newsweek*, 522 U.S. 442 (1998); *Reich*, 513 U.S. 106 (1994); *Harper*, 504 U.S. 954 (1992); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *McKesson*, 496 U.S. 18 (1990); *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990); *Ashland Oil v. Caryl*, 497 U.S. 916 (1990); see also *Duffy v. Wetzler*, 509 U.S. 917 (1993) (summarily vacating in light of *Harper*); *Norwest Bank Duluth, N.A. v. McClung*, 509 U.S. 917 (1993) (same); *Sheehy v. Mont. Dep't of Revenue*, 509 U.S. 916 (1993) (same); *Swanson v. North Carolina*, 509 U.S. 916 (1993) (same); *Bass v. South Carolina*, 501 U.S. 1246 (1991) (summarily vacating in light of *James B. Beam*).

The Court's decisions—including *McKesson* and *Reich*—have largely put an end to the States' sharp

practices in denying remedies to cure unconstitutional taxes.

CONCLUSION

IPT has no "skin in the game" when it comes to fees imposed in bankruptcy litigation. But regardless of how the Court decides that question, IPT urges the Court to avoid casting any doubt on the continuing vitality of the due process protections provided by *McKesson* and *Reich* in the context of state taxes. A decision that questions *McKesson* or *Reich* would not only unfairly disrupt taxpayers' long-standing reliance interests, see *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), but would also pose a risk of disturbing States' ability to collect taxes.

McKesson and *Reich* provide taxpayers with certainty that they will be entitled to meaningful backward-looking relief if they successfully challenge a state tax, regardless of which state law procedure that they follow to challenge the tax. Many States allow taxpayers the option of choosing between predeprivation and postdeprivation procedures to challenge state taxes. See, *e.g.*, Fla. Stat. §§ 220.717, .727; 35 ILCS 5/908, /909; N.Y. Tax Law §§ 1138(a)(1), 1139(a); 72 P.S. §§ 9702, 10003.1; Wis. Stat. §§ 71.75, .89. Taxpayers face a complicated choice in deciding which of these options to pursue, as they need to consider several factors such as the interest rate difference between assessments and refunds, the potential for penalties for underpayment, and cash flow needs.[3] See Frankel, *supra*, at 1. *McKesson* and

[3] State tax systems often pressure state taxpayers to pay contested tax liability by imposing above-market interest rates. Compare Conn. Gen. Stat. § 12-235 (12% interest); 68 Okl. St. § 217 (15% interest); and Wis. Stat. § 71.82 (12% interest) with Rev. Rul. 2023-17 (Aug. 25, 2023) (8% interest on federal tax

Reich allow taxpayers to avoid interest and penalties by paying the contested tax without fear that they will lose their right to recover the tax if they prevail.

Indeed, on this point *McKesson* and *Reich* actually provide a benefit to the States because they increase taxpayers' willingness to pay contested taxes and seek refunds rather than withhold the contested taxes. States have a strong interest in preserving their ability to collect tax, including while a tax is under legal challenge. See *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 414 (2010); see also Pet. Br. at 30–31 n.2 (noting that "the tax context is unusual in light of concerns that 'premature judicial interference' could disrupt the flow of government revenue") (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974)). In fact, Congress enacted the Tax Injunction Act to protect States from the risk of predeprivation challenges to taxes that would grind government operations to a halt. See 28 U.S.C. § 1341; *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 128–30 (1981). If there were a risk that a taxpayer's rights could be impaired by pursing a postdeprivation procedure to challenge a tax, taxpayers would be encouraged to withhold contested taxes, for fear that if they paid the tax, they would never get the tax back—even if they prevailed in the litigation. See Paul H. Frankel et al., *After* Harper, *Three Rules Still Apply: Don't Pay! Don't Pay!! Don't Pay!!!*, 5 State Tax Notes 1432 (1993). By guaranteeing that taxpayers will receive meaningful backward-looking relief, regardless of which procedure they choose to follow in challenging a state tax,

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underpayments). State tax systems also impose tough penalties, such as strict liability penalties that are imposed on underpayments of tax, without regard to whether a tax position was unreasonable. See, *e.g.,* Cal. Rev. & Tax Code §§ 19138, 19164.

McKesson and *Reich* make taxpayers more likely to choose to follow a postdeprivation procedure, and thus make the States more likely to continue to receive revenue while a tax is under dispute.

If the opinion in this case were to cast any doubt on the applicability of *McKesson* or *Reich* in the state-tax context, it would risk upending the reliance interests of the countless taxpayers with pending postdeprivation challenges to state taxes. In addition to upending taxpayers' reliance interests, a decision questioning *McKesson* or *Reich* would also pose a risk of depriving the States of predictable tax revenue because taxpayers might become more hesitant to follow post-deprivation procedures in future challenges to state taxes and could bring a return to the era when this Court needed to devote considerable attention to policing the States' efforts to deny refunds of illegal taxes.

For the foregoing reasons, IPT respectfully requests that the Court avoid casting any doubt on the important due process protections that *McKesson* and *Reich* provide to state taxpayers.

Respectfully submitted,

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