No. 17-___

IN THE

Supreme Court of the United States

NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

KYLE O. SOLLIE
PAUL E. MELNICZAK
MICHAEL I. LURIE
REED SMITH LLP
Three Logan Square
1717 Arch Street
Suite 3100
Philadelphia, PA 19103

TODD S. KIM
Counsel of Record
REED SMITH LLP
1301 K Street, N.W.
Suite 1000, East Tower
Washington, D.C. 20005
(202) 414-9290
tskim@reedsmith.com

Counsel for Petitioner

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QUESTION PRESENTED

The Supreme Court of Pennsylvania agreed with a taxpayer that a collection of state taxes violated a long-settled understanding of the state constitution. Nevertheless, it expressly refused to grant the taxpayer any relief. It did not address the taxpayer's claim that the Due Process Clause of the Fourteenth Amendment entitled the taxpayer to a remedy.

The question presented is:

Does the Due Process Clause require a state to make a remedy available to a taxpayer if the collection of a tax violates settled state law?

CORPORATE DISCLOSURE STATEMENT

Nextel Communications of the Mid-Atlantic, Inc. is a Delaware corporation. Its common stock is owned by Sprint Communications, Inc., a Kansas corporation, which is in turn owned by Sprint Corporation, a Delaware corporation. A majority of the outstanding stock of Sprint Corporation is owned by SoftBank Group Corporation, a publicly traded Japanese corporation.

Other than SoftBank Group Corporation's ownership in Sprint Corporation, no parent or other publicly held corporation owns 10% or more of the stock of Sprint Corporation.

No parent or other publicly held corporation owns 10% or more of the stock of SoftBank Group Corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Supreme Court of Pennsylvania held that a collection of taxes violated the state constitution—yet it withheld any relief. It did so without refuting or even *mentioning* the taxpayer's straightforward claim under the Fourteenth Amendment: a state that deprives a person of property must provide a process to obtain relief if the deprivation was illegal. That claim is plainly correct under the very words of the Due Process Clause, as well as this Court's precedent. But as far as the decision below reveals, Pennsylvania had no such process available here, and instead simply chooses to retain tax money over which it has no legal right.

The Court routinely takes action when a state court, as here, has nullified a clear federal entitlement. In particular, it has done so in tax cases involving large amounts of money, and thus strong incentives for states to give short shrift to the Constitution. The Supreme Court of Pennsylvania had heard the state warn that a half-billion dollars was at stake here, and that refunding this amount would cause severe budgetary problems. When a state court skirts a federal question in that context, its only check is this Court. It is time again for this Court to grant review to ensure that federal rights are addressed and respected in state courts.

While at least remand is warranted, the Court should reverse outright. Reversal would send the message that a state court cannot thwart this Court by simply ignoring a meritorious federal issue. Remand, by contrast, could promote silence as a risk-free strategy for avoiding or delaying review.

Moreover, the Court by addressing the merits would provide needed guidance on due process requirements

in state tax cases. It held in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), that the Due Process Clause requires relief where a state tax was assessed in violation of federal law. But while some state supreme courts have recognized that *McKesson*'s reasoning applies equally to taxes assessed in violation of *state* law, others have failed to appreciate as much. The Court should correct those courts' misreading of *McKesson* and mend the split.

This issue relating to *McKesson*'s reach is important and pressing. It is implicated in every challenge to a state tax under state law and is especially likely to arise in challenges involving large amounts of money.

Finally, this case is ideal for resolving the issue. The facts were stipulated, and the taxpayer's due process claim was undisputedly preserved. And there is no need to decide any question of state law, as the Supreme Court of Pennsylvania recognized that the tax collection at issue was illegal under a long-settled understanding of the state constitution. This case thus provides an ideal opportunity to hold that *McKesson* applies to taxes that are illegal under both federal and state law.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 171 A.3d 682 (Pa. 2017) and reproduced at Pet. App. 1a. That court's order denying the application for rehearing is unpublished but is at Pet. App. 76a.

The opinion of the Commonwealth Court of Pennsylvania is reported at 129 A.3d 1 (Pa. Commw. Ct. 2015) and is at Pet. App. 47a. The order denying

the exceptions filed by the state is unpublished but is at Pet. App. 75a.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on October 18, 2017. Pet. App. 1a. Petitioner filed an application for rehearing on November 1, 2017, within the 14-day period established by Pennsylvania Rule of Appellate Procedure 2542. That application was denied on January 4, 2018. Pet. App. 76a. On March 14, 2018, Justice Alito extended the time to file this petition to May 4, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

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

Although the interpretation of relevant state law is not in dispute, a state constitutional provision and a state statute form the background for considering the federal due process issue here. The Uniformity Clause of the Pennsylvania Constitution provides:

> All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

Pa. Const. art. 8, § 1.

The state tax statute at issue limited how much net loss from prior years a corporation could deduct from its income for tax year 2007:

> For taxable years beginning after December 31, 2006, the greater of twelve and one-half per cent of taxable income . . . or three million dollars ($3,000,000) . . . .

72 Pa. Stat. § 7401(3)4.(c)(1)(A)(II) (2007).

STATEMENT

A. Nextel Challenges Its Unequal Tax Burden Under State Law.

Nextel Communications of the Mid-Atlantic, Inc. is a corporation in the wireless communications business. Nextel's business struggled for many years, with significant losses, before generating significant income in 2007. Pet. App. 83a–84a. Under Pennsylvania law, Nextel was allowed to carry over its pre-2007 losses and deduct them against its 2007 income. 72 Pa. Stat. § 7401(3)4 (2007). But because Nextel's income exceeded $3 million, the amount of its deduction was capped by statute. *Id.* As a result, Pennsylvania collected about $4 million in taxes from Nextel for 2007. Pet. App. 3a.

In 2007, that cap affected only a small minority of corporations. The cap applied to about 200 corporations whose income exceeded $3 million. Pet. App. 51a. Almost 20,000 corporations were not affected by the limitation—they deducted their net losses without any cap and reduced their 2007 tax to zero. Pet. App. 50a.

Nextel paid the tax for 2007 and timely petitioned for a refund of that tax under the procedures prescribed by state law. Pet. App. 3a; *see* 72 Pa. Stat.

§§ 1108(b), 10003.1(a) (2007). Nextel did so because the cap discriminated between corporations in violation of the Uniformity Clause of the Pennsylvania Constitution.

B. The Trial Court Grants Nextel A Refund Because It Agrees The Tax Collection Violated The Pennsylvania Constitution.

After exhausting administrative remedies, Nextel presented its Uniformity Clause claim to the Commonwealth Court of Pennsylvania on a set of stipulated facts. Nextel's petition for review linked its demand for relief on the Uniformity Clause claim to "the Due Process Clause[] of the United States Constitution" and sought relief on that federal claim. Pet. App. 79a–80a.

By then, the statute of limitations had run on any attempt to equalize the tax burden for 2007 by collecting tax from those whose net loss deductions had not been capped. Pet. App. 36a. The only way to remedy the illegal, unequal tax collection, Nextel explained, was to allow it "to deduct its net loss without limitation," and so to order a refund. Pet. App. 87a; *see* Pet. App. 124a (reply brief).

In response, Pennsylvania's Attorney General engaged Nextel on the merits of its Uniformity Clause argument as applied to its 2007 tax. Pet. App. 90a–113a. She understandably did not contest that, if Nextel was right on the state-law uniformity question, Nextel was entitled to a remedy for 2007. Instead, her sole further argument pertained to what should happen "for future tax years." Pet. App. 114a.

The Commonwealth Court agreed with Nextel's as-applied challenge and ordered a refund to equalize its tax position vis-à-vis the other taxpayers for 2007.

Pet. App. 68a. The majority recognized that a statutory severability analysis might "make the statutory scheme uniform" going forward, but "would not remedy the wrong suffered by Nextel in the 2007 Tax Year." Pet. App. 68a.

A separate opinion for two judges did not dispute that a remedy for 2007 was required given the success of Nextel's as-applied challenge. Pet. App. 69a–73a. Instead, "go[ing] on" as the Attorney General suggested, the separate opinion addressed the statute's facial constitutionality as it pertained to future years. Pet. App. 71a. It employed a severability analysis to conclude that all corporations, not just those with incomes above some threshold, should be subject to a cap on the net loss deduction. Pet. App. 71a–73a.

C. The Supreme Court Of Pennsylvania Also Agrees That The Tax Collection Was Illegal, Yet Orders No Relief And Does Not Address Nextel's Due Process Claim.

The state appealed to the Supreme Court of Pennsylvania. There, the principal briefs reiterated the basic arguments made in the trial court. Thus, the state again did not dispute that a refund was required if the court agreed with Nextel's as-applied Uniformity Clause argument for 2007. Instead, expressly adopting the analysis of the separate opinion below, the state presented a severability argument as to facial application of the statute "beyond Nextel." Pet. App. 144a–146a; *see* Pet. App. 173a–179a (reply brief). To this point in the briefing, Nextel had no reason to re-invoke the Due Process Clause, as no one had suggested that Nextel could be denied a refund if a Uniformity Clause violation was proven.

That all changed when a new Attorney General appeared and argued in a supplemental brief—concededly for the first time—that a decision agreeing with Nextel on the Uniformity Clause could be applied prospectively only, such that Nextel would get no refund for 2007. Pet. App. 183a, 187a–194a; *see* Pet. App. 225a–229a (supplemental reply brief). The Attorney General warned of "potential devastating budgetary repercussions" from having to refund money to all those in Nextel's position, in an amount supposedly "exceeding $500 million." Pet. App. 193a.

In response, Nextel properly and promptly raised its due process entitlement to relief again. Pet. App. 216a–218a. As it explained: "Nextel timely petitioned for refund of the tax resulting from [the classification that violated the Uniformity Clause] and followed the process established by statute to remedy that wrong. Nextel is therefore entitled to an order for the refund of that tax—otherwise there has been no 'due process of law.'" Pet. App. 217a.

In reply, the Attorney General did not dispute that the due process issue properly was before the court, and that the court could withhold a remedy only if doing so was consistent with the federal Constitution. He engaged Nextel instead on the merits of the due process issue, and in particular about the effect of this Court's decision in *McKesson*. Pet. App. 229a–230a. Importantly, his arguments on this score depended on the notions that Nextel's Uniformity Clause arguments—if accepted—would establish new law and that new law need not be applied retroactively. Pet. App. 230a.

Ultimately, the Supreme Court of Pennsylvania held that the statutory cap on deductions "as applied to . . . Nextel . . . violates the Uniformity Clause." Pet.

App. 2a. It rejected the Attorney General's argument that it was establishing new law; rather, it had "consistently" and "steadfastly adhered" to the applicable principles for "over a century." Pet. App. 25a–26a. To illustrate this point, it relied on cases from the Nineteenth Century to just a few months earlier. Pet. App. 25a–28a (citing, *e.g.*, *In re Cope's Estate*, 43 A. 79 (Pa. 1899), and *Mt. Airy #1, LLC v. Pa. Dep't of Rev.*, 154 A.3d 268 (Pa. 2016)). These cases made it "obvious" that a tax statute like this one violates the Uniformity Clause. Pet. App. 27a (quoting *Kelley v. Kalodner*, 181 A. 598, 602 (Pa. 1935)).

Yet the court expressly and inexplicably declined to order any relief for Nextel. It reversed the Commonwealth Court's decision to "refund $3,938,220 to Nextel," and determined that "Nextel is not entitled to have its 2007 tax assessment forgiven." Pet. App. 2a, 43a. It did so while recognizing that it was "not possible" to remedy the Uniformity Clause issue for 2007 without refund, because the state could not go back to increase other taxpayers' taxes for that year. Pet. App. 36a. Indeed, the court went out of its way to note that its decision would not authorize the state to try to do so. Pet. App. 42a n.27. The court thus acknowledged, but left intact, the unconstitutional collection of Nextel's 2007 taxes.

Instead of providing any relief, the court applied a severability analysis to hypothesize about what tax regime the Pennsylvania legislature would have passed if it *had* followed the Uniformity Clause. Pet. App. 39a–43a. The court thus "sever[ed] . . . the $3 million flat deduction" from the statute. Pet. App. 41a–42a. The statute, as reformed, would have thus capped the loss deduction for all corporations regardless of their income. Pet. App. 43a. The court

then reasoned that, if the hypothetical regime had been applied *ab initio*, Nextel would have been "subject to the same tax liability" as had actually been collected from Nextel for 2007. Pet. App. 43a. The corporations that had paid zero tax would have paid more—again, only hypothetically—because they would have been subject to the statutory cap.

The next step of the analysis was essential, but taken without citation or explanation. The court summarily stated: "As a result [of the severability analysis], Nextel is not entitled to have its 2007 tax assessment forgiven as, even with the offending provision of the [statute] stricken, it is subject to the same tax liability for tax year 2007 as previously assessed . . . ." Pet. App. 43a; *see* Pet. App. 43a–44a (reversing refund order "[b]ecause Nextel is not entitled to a refund under the [statute], as severed").

While the court quickly went on to distinguish some past decisions, Pet. App. 43a, it never explained how a statutory severability analysis could excuse a violation of the state constitution. Nor, more to the point, did it explain how a severability analysis under state law could eliminate a federal constitutional right to relief. Indeed, it did not even mention Nextel's due process claim while purporting to catalogue "the arguments of the parties." Pet. App. 19a.

Nextel petitioned for rehearing and raised its due process claim yet again. Pet. App. 234a–235a. The court denied rehearing without explanation, completing its failure ever to address how its judgment comported with the federal Constitution. Pet. App. 76a.

REASONS FOR GRANTING THE PETITION

The Supreme Court of Pennsylvania ruled that a collection of taxes was illegal under longstanding state law but refused to provide relief. It did not address the taxpayer's claim that the Due Process Clause required that a remedy be made available.

This Court should reverse. Reversal would make plain that this Court will not countenance silence as a state court's response to the invocation of a federal right. Moreover, this case presents an ideal vehicle for the Court to correct some state supreme courts' misinterpretation of its decision in *McKesson* and resolve a split on this important matter. But if this Court declines to address the merits at this time, at the very least it should remand to require the Supreme Court of Pennsylvania to explain itself.

I. THE SILENT NULLIFICATION OF THE TAXPAYER'S CLEAR DUE PROCESS RIGHT TO RELIEF CALLS FOR REVIEW.

Below, Nextel argued that it was entitled to relief under the Due Process Clause since the tax collection at issue was illegal under state law. So, after confirming that the tax *was* illegal, what reason did the Supreme Court of Pennsylvania have to reject Nextel's federal constitutional claim and withhold any relief? It never explained.

That silence is all the more unacceptable given the stakes. This case alone concerns $4 million in taxes that Nextel paid for 2007. Pet. App. 2a–3a. Its Attorney General has represented that hundreds of millions more are implicated—a half-billion dollars that the state has no right to retain under state law as interpreted by its highest court. Pet. App. 193a.

This Court's supervision is required when a state supreme court in such circumstances does not even try to reconcile its decision with the federal Constitution. And it is particularly necessary when, as here, there was no good way to do so.

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. A tax is plainly a "depriv[ation] . . . of . . . property." And "due process" must include *some* process to win relief against an illegal deprivation. Having upheld Nextel's as-applied challenge to its 2007 taxes under a settled understanding of the state constitution, Pet. App. 2a, the Supreme Court of Pennsylvania could not deny Nextel any way to get back property that the state has no right to retain.

This Court's decision in *McKesson* makes that clear. There, the Florida Supreme Court recognized that a tax was illegal, but refused to order a refund in light of "equitable considerations," and so granted only prospective relief. 496 U.S. at 25–26. This Court unanimously reversed. It recognized that "[b]ecause 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." *Id.* at 36–37. Thus, taking an "approach . . . rooted firmly in precedent dating back to at least early [last] century," the Court held that the Clause required "meaningful backward-looking relief"—"a 'clear and certain remedy." *Id.* at 31–33, 51 (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280, 285 (1912)); *see id.* at 33–36 (discussing earlier precedent). Prospective relief alone would not suffice. *Id.* at 31; *see Zinermon v. Burch*, 494 U.S. 113, 129 (1990) (recognizing that,

for post-deprivation remedy to be sufficient, it must "adequately redress the loss").

Making *McKesson* even more relevant, the taxpayer claimed that a tax was illegal because it was discriminatory, as Nextel does. Just like the Supreme Court of Pennsylvania here, Florida had argued that its legislature "would have" taxed petitioner at the same level if, hypothetically, it *had* legislated even-handedly. 496 U.S. at 41. And just like here, Florida had argued that it needed only to "place petitioner in the same tax position that petitioner *would have been placed* by such a hypothetical scheme," and so could withhold "retrospective relief (at least in the form of a refund)." *Id.* This Court roundly "rejected this line of reasoning" as "inconsistent with the nature of the State's due process obligation." *Id.* at 42. "[T]he State's duty under the Due Process Clause to provide a 'clear and certain remedy' requires it to ensure that the tax as *actually imposed* on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a [discriminatory] manner . . . ." *Id.* at 43.

Yet the Supreme Court of Pennsylvania ignored the due process issue and never even cited *McKesson*. And while other state courts denying relief in actions for refunds of illegal taxes have at least tried to engage this Court's precedent, their attempts to distinguish it have failed. These approaches fall into two basic categories.

First, some state courts have focused on the fact that *McKesson* happened to involve state taxes that were illegal under federal law (the Commerce Clause). But *McKesson's* reasoning applies to taxes that are illegal for any reason, including (as here) taxes that are illegal under a state constitution. *McKesson*'s point

was that a state has to "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 (emphasis added). Indeed, earlier cases that *McKesson* cited similarly focused on the legality of the tax, not whether any illegality was due to federal or state law. *E.g.*, *Ward v. Love Cty. Bd. of Comm'rs*, 253 U.S. 17, 24 (1920) ("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 Indian allottees arbitrarily and without due process of law.").

That understanding makes sense. Whether a tax is illegal under federal law or state law is irrelevant because the question of what process is due under the Fourteenth Amendment is a question of federal law. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). And under federal law, as *McKesson* and earlier cases demonstrate, "a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930).

Second, some courts have distinguished *McKesson* based on how, in that case, the taxpayer had been effectively "require[d] to pay first and obtain review of the tax's validity later in a refund action." 496 U.S. at 22. But this Court has held that a state may not "bait and switch" a taxpayer by initially holding out the option of seeking a refund *after* paying, then denying a refund on the ground that the taxpayer should have

challenged the tax *before* paying. *Newsweek, Inc. v. Fla. Dep't of Rev.*, 522 U.S. 442, 444–45 (1998) (per curiam); *Reich v. Collins*, 513 U.S. 106, 110–11 (1994). Nextel, which duly followed the refund process authorized by Pennsylvania law, *see* 72 P.S. §§ 1108(b), 10003.1 (2007), thus had a right to a remedy if it proved the illegality of the tax during that process. Unable to deny as much, the Supreme Court of Pennsylvania said nothing at all about *McKesson*.

Compounding that failure, the court below did not address this Court's recent decision in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). *Nelson* involved a statute under which Colorado would retain money a criminal defendant paid due to a conviction that had been invalidated, unless he proved innocence in a separate civil proceeding by clear and convincing evidence. *Id.* at 1252. The Court held that the statute violated the Due Process Clause. *Id.* at 1255.

The analysis in *Nelson* applies more strongly to this case. Just as here, the private parties had an "obvious interest in regaining the money they paid [the state]," while the state had "zero claim of right" because its basis for keeping the money was "*invalid.*" *Id.* at 1255, 1256 & n.11, 1257. But while Colorado at least provided some process for obtaining a refund (albeit one that unacceptably risked erroneous deprivation), the Supreme Court of Pennsylvania apparently would provide no remedy at all for a tax that was illegally collected. Such a holding would indicate either that Pennsylvania has no process to combat this illegal deprivation of property, or that the court was taking

property without just compensation.[1] One way or another, the result is a flat violation of the Due Process Clause.

Given all this, the Court should not accept how the Supreme Court of Pennsylvania gave the Constitution the silent treatment.

II. THE COURT SHOULD REVERSE TO PROVIDE NEEDED GUIDANCE, OR AT MINIMUM REMAND.

Reversal rather than just remand would be the best course here. While it is ordinarily preferable for a lower court to address a federal issue first, reversal would make clear that state supreme courts cannot count on getting a remand if they attempt to thwart this Court's review through silence. Moreover, this case presents an ideal opportunity to ensure that the Court's opinion in *McKesson* is properly understood. A decision on the merits would resolve a split in the state supreme courts and provide needed guidance on this important tax issue.

A. The state court's failure to address the due process issue itself warrants review on the merits, or at least remand.

The Court should not abide by the silent nullification of a substantial and consequential federal constitutional claim. Only this Court is positioned to ensure fair adjudication of federal rights in state tax cases, owing to its certiorari jurisdiction under

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[1] *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713–15 (2010) (plurality op. of Scalia, J.); *Chi. Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897); *see also* Pet. App. 235a n.18 (preserving judicial takings argument).

28 U.S.C. § 1257 and the limit on district-court adjudication of challenges to state taxes in 28 U.S.C. § 1341. Sending the message that the Court will act if a state court ignores federal issues in these cases will promote proper treatment of our Constitution in courts across the nation.

The clearest way to show that the Court will not allow state courts to thwart its review of federal issues would be to reverse on the merits. Doing so would make clear that a remand is not always necessary. Indeed, a practice of remanding when state courts completely fail to address meritorious federal claims would provide them an unfortunate incentive to bury claims in the hopes of lessening the chances of this Court's review, or delaying it, while risking at worst a remand.

There is a particular need for vigilance against such maneuvering when, as here, large amounts of state-tax monies are at issue. State budget pressures are powerful incentives for elected state judges to sideline inconvenient federal constitutional rights. Here, about 20,000 smaller corporations benefited, illegally, at the expense of a few larger corporations, and the state's Attorney General sounded a dire warning of "devastating budgetary repercussions" from over half a billion dollars in threatened refunds. Pet. App. 193a.

This Court has repeatedly defended the primacy of the Constitution in the face of these pressures. As explained in *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940), the Court recognizes its responsibility in tax cases to ensure "that state courts will not be the final arbiters of important issues under the federal constitution." *Id.* at 557. And so it has repeatedly granted review and unanimously overturned state supreme court decisions that improperly denied tax-

payers their Fourteenth Amendment rights—where those courts *did* try to reconcile their rulings with the Constitution.[2] The Court similarly should grant the petition and reverse here rather than validate a stratagem of silence.

At minimum, the Court should grant the petition, vacate the judgment below, and remand for resolution of the due process issue.[3] Sending a message at least through remand will improve state courts' decision-making processes on federal issues, including in future cases in which no party may seek this Court's review. It will also aid this Court's own decision-making process. As an initial matter, state courts' analyses of pertinent federal issues may have persuasive value. Encouraging those courts to provide those analyses thus generally will assist this Court both at certiorari and on the merits.

Moreover, the state court's explanation will assist this Court in determining its own jurisdiction. The Court lacks jurisdiction over a state-court judgment

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[2] *E.g.*, *Reich*, 513 U.S. at 108 (unanimously reversing state court's application of procedural rule to bar constitutional claim amidst "a great deal of litigation . . . to force States to provide refunds" required by earlier ruling of this Court); *Newsweek*, 522 U.S. at 443 (summarily remanding with instructions to state court that "failed to consider" *Reich*); *see also, e.g.*, *MeadWestvaco Corp. v Ill. Dep't of Rev.*, 553 U.S. 16 (2008); *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458 (2000); *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793 (1996); *McKesson*, 496 U.S. 18; *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty., W. Va.*, 488 U.S. 336 (1989); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931).

[3] *See, e.g.*, *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (per curiam); *State Tax Comm'n of Ariz. v. Murray Co. of Tex., Inc.*, 364 U.S. 289, 289 (1960) (per curiam); *Minnesota v. Nat'l Tea Co.*, 309 U.S. at 679–80.

that rests on adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032, 1037–38 (1983). But the Court "insist[s] that the nonfederal ground of decision have 'fair support,'" "[t]o ensure that there is no 'evasion' of [the Court's] authority to review federal questions." *Stop the Beach Renourishment*, 560 U.S. at 725 (plurality op. of Scalia, J.) (quoting *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930)). The Court may assert jurisdiction if a state procedure was used unreasonably to avoid a decision on a federal issue. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 455–58 (1958).

A state court should not be allowed to stonewall this inquiry through silence. If it provides no explanation *why* it rejects a federal claim, there may be no basis to decide whether it was employing "a mere device to prevent the review of a decision upon the federal question." *McCoy v. Shaw*, 277 U.S. 302, 303 (1928). And so, in the past, this Court has demanded clear explanations because its "authority as final arbiter of the United States Constitution could be eroded by a lack of clarity in state-court decisions." *Arizona v. Evans*, 514 U.S. 1, 9 (1995).

The Court should demand no less in this case. Indeed, the Court has had to remand to this particular court before because the record did "not disclose whether the Supreme Court of Pennsylvania passed on petitioners' federal claims." *Capital Cities Media, Inc. v. Toole*, 466 U.S. 378, 378 (1984) (per curiam); *Phila. Newspapers, Inc. v. Jerome*, 434 U.S. 241, 241–42 (1978) (per curiam).

The failure to address the federal claim this time, moreover, was particularly inexplicable. In 1991, the Supreme Court of Pennsylvania had been faced with a taxpayer's claim for a refund based on the Uniformity

Clause—just as here. *Auto. Trade Ass'n of Greater Phila. v. City of Phila.*, 596 A.2d 794, 795 (Pa. 1991). The court remanded, where a refund had been denied on the mistaken belief that "the grant of retroactive relief" was "discretionary." *Id.* It explained: "In light of *McKesson*, . . . there is significant question whether [a] determination not to grant retroactive relief in the circumstances of this case would comport with due process." *Id.* at 795–96. And the court recognized that this "significant question" stemmed from how the Uniformity Clause challenge, if meritorious, would mean there had been an "illegal collection to be remedied." *Id.* at 796. Asked the very same "significant question" here, the court's response was to give no answer at all. This Court should not accept that remarkable silence.

B. State supreme courts have split on *McKesson*, with some wrongly limiting it to taxes that violate federal law.

Resolving the merits rather than just remanding would also provide important guidance on the underlying due process issue. As explained, the import of *McKesson* is clear: a state must provide a process for relief when a tax was illegally imposed. But some state supreme courts nevertheless have held that *McKesson* applies only if a tax is illegal under *federal* law. The Court should take this case to correct that misinterpretation of its precedent, and to resolve the resulting split. *See* Sup. Ct. R. 10(b), (c).

The courts of last resort in Kentucky and Utah have limited *McKesson* improperly. In *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2008), the taxpayers claimed that an earlier decision of the Supreme Court of Kentucky entitled them to a refund under state statutes. *Id.* at 393–94 (citing *GTE v. Rev.*

Cabinet, Commonwealth of Ky., 889 S.W.2d 788 (Ky. 1994)). The court denied any refund and distinguished *McKesson* as being "premised upon a refund being due for an *unconstitutional* application of a tax, which naturally impacts due process." *Id.* at 402. The dissent pointedly disagreed, explaining that *McKesson* recognized a "due process principle" that "clearly applies regardless of the ground for challenging the tax, whether federal constitution or, as here, state statute." *Id.* at 414 (Abramson, J., dissenting).

The Supreme Court of Utah did similarly in *Kennecott Corp. v. State Tax Commission of Utah*, 862 P.2d 1348 (Utah 1993), which involved a claim for a refund under the Uniformity Clause of the Utah Constitution. It held *McKesson* "inapplicable" because *McKesson* "was based on [a] violation of the Commerce Clause." *Id.* at 1353; *accord Kay Elec. Coop. v. State ex rel. Okla. Tax Comm'n*, 815 P.2d 175, 179 n.2 (Okla. 1991) (Summers, J., concurring in part and dissenting in part).

Other state supreme courts, by contrast, have properly applied *McKesson* in considering what remedies were due for claims that exactions violated state law. The courts of last resort in Arizona and Iowa did so while expressly rejecting arguments that *McKesson* would not apply in that situation.

In *Aileen H. Char Life Interest v. Maricopa County*, 93 P.2d 486 (Ariz. 2004) (en banc), the Supreme Court of Arizona confronted this issue after concluding that taxpayers had been subject to unequal taxation in violation of Arizona's Uniformity Clause. *Id.* at 496. The court acknowledged that "*McKesson* involved a challenge under the federal Commerce Clause," but nonetheless held a refund of taxes assessed in violation of the state constitution to be required in light of

the "constitutional due process issues." *Id.* at 497; *see also MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equalization & Assessment*, 494 N.W.2d 535, 537 (Neb. 1993) (applying *McKesson* to claim that tax violated Uniformity Clause of Nebraska Constitution).

In *Kragnes v. City of Des Moines*, 810 N.W.2d 492 (Iowa 2012), similarly, the Supreme Court of Iowa rejected the city's argument that *McKesson* was limited to claims when an exaction was illegal because it violated "a federal constitutional right." *Id.* at 511. The court thus "appl[ied]" the reasoning in *McKesson* to require a refund even though the fees at issue were illegal under state law. *Id.* at 496–97, 511; *see also Jackson v. City of New Orleans*, 144 So. 3d 876, 895–96 (La. 2014) (recognizing *McKesson*'s applicability to claim that money was being withheld in violation of state law); *City of Houston v. Harris Cty. Outdoor Advert. Ass'n*, 879 S.W.2d 322, 333 (Tex. App. 1994) ("The Due Process Clause applies to any *unlawful collection* of taxes, including one that violates state law or provisions of the state constitution."); *Milewski v. Town of Dover*, 899 N.W.2d 303, 311–12 (Wis. 2017) (holding that *McKesson* guaranteed taxpayers process to challenge tax assessor's valuation of their home); *cf. Jewell v. Fletcher*, 377 S.W.3d 176, 186–87 (Ark. 2010) (applying *McKesson* to state-law dispute between private parties).

The Court should not tolerate the unseemliness of the Due Process Clause meaning different things in different jurisdictions. A taxpayer in Kentucky is entitled to the same constitutional rights as a taxpayer in Arizona. Moreover, absent this Court's intervention, taxpayers in other jurisdictions will suffer the risk that their states' courts will follow the lead of the

Supreme Court of Pennsylvania here and nullify their constitutional rights in silence.

C. This due process issue is important because it can arise in any case challenging a tax under state law.

There is a pressing need for timely resolution of the due process issue here. It is implicated whenever any court in any state decides whether a collection of taxes comports with state law. Obviously, such cases are ongoing and legion, and collectively significant. For example, the state represented that about "two hundred appeals . . . were known to be held pending a decision in" this case, together worth about $500 million. Pet. App. 228a n.3. But in this case, only a minority of taxpayers were disfavored by Pennsylvania's illegal tax. In other state tax cases involving questions of state law, a far greater number of litigants will be affected. And the more tax money is at stake, the stronger the pressure will be on a future state court to limit *McKesson*'s reach.

Furthermore, if a state court can simply declare that a state tax is illegal under state law, but nonetheless allow the state to keep a taxpayer's money, legislators too will be encouraged to enact illegal laws and taxpayers will be discouraged from challenging them in court. Indeed, in the wake of this decision of the Supreme Court of Pennsylvania, state legislators have continued to introduce tax bills with the same Uniformity Clause defects. *See, e.g.*, H.B. 333, 2017 Gen. Assemb. Reg. Sess. (Pa. 2018).

This case presents an opportunity to set an important constitutional marker in an area where, history shows, markers are needed.

D. This case is an ideal vehicle.

This is the right case for this Court to take on this issue. The facts are not in dispute—indeed, they were stipulated. The due process issue was preserved. *See supra* pages 5–7. There is no issue of state law; indeed, the Supreme Court of Pennsylvania agreed with Nextel on the relevant state-law question—whether the assessment of taxes violated the state constitution. Pet. App. 2a.

Moreover, unlike many state tax cases implicating the Constitution, this case does not present any "thorny" issue about "retroactive application" of new tax law. *Quill v. North Dakota*, 504 U.S. 298, 318 n.10 (1992). The case does not involve new law at all, because the Supreme Court of Pennsylvania explicitly stated that its ruling was based on principles of the state constitution to which it had "steadfastly adhered" for "over a century." Pet. App. 25a; *cf.* Brief of Respondents at 62–65, *South Dakota v. Wayfair, Inc.*, No. 17-494, 2018 WL 1621148, at *7 (U.S. Mar. 28, 2018) (warning of "crippling" consequences should overruling of precedent there lead to retroactive tax liability). Just as in *McKesson*, "the State . . . cannot claim that the . . . invalidation of the [tax] was a surprise." 496 U.S. at 50; *cf. Am. Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990) (fractured decision on retroactivity issued on same day as unanimous decision in *McKesson*).

Accordingly, the Court can decide this case without worry that it will limit a state's authority to craft new tax law in light of its legitimate budgetary needs. Here, for instance, a decision that Nextel is entitled to relief would appropriately leave the Pennsylvania legislature with the task of determining how best to deal with any ensuing shortfall.

The responsibility of the Supreme Court of Pennsylvania, by contrast, was to fairly adjudicate the due process claim that Nextel presented. The court admitted that its approach "fail[ed] to reward" the *successful* challenge Nextel made as to its 2007 tax assessment. Pet. App. 43a. The question, though, is not whether Nextel should be "reward[ed]." The question is what process Nextel is "due" as a matter of constitutional right. And what is due includes a process to get back property after the taxpayer proves that the state has no legal right to keep it.

CONCLUSION

The Court should grant this petition for a writ of certiorari and reverse the judgment below, or at minimum remand for petitioner's due process claim to be addressed on its merits.

Respectfully submitted,

KYLE O. SOLLIE
PAUL E. MELNICZAK
MICHAEL I. LURIE
REED SMITH LLP
Three Logan Square
1717 Arch Street
Suite 3100
Philadelphia, PA 19103

TODD S. KIM
Counsel of Record
REED SMITH LLP
1301 K Street, N.W.
Suite 1000, East Tower
Washington, D.C. 20005
(202) 414-9290
tskim@reedsmith.com

Counsel for Petitioner

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