No. 17-1506

In the
Supreme Court of the United States

NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC.,
Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF REVENUE,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

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?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest.[1] PLF is the most experienced public interest law foundation of its kind, fighting for the constitutional principles of limited government in state and federal courts throughout the nation. To that end, PLF frequently participates in cases that involve both due process and taxation. For example, PLF attorneys directly represent taxpayers in a challenge to the City of Seattle's illegal imposition of an income tax, *Shock v. City of Seattle*, consolidated with *Kunath v. City of Seattle*, No. 95295-7 (Wash. Supreme Ct., pending), and have long represented the interests of taxpayers as amici curiae in courts across the country. *Rozenblit v. Lyles*, No. A-001161-17 (N.J. Super. App. Div., pending); *Nat'l Fed'n of Indus. Bus. v. Williams*, No. 2015CA2017 (Colo. Ct. App., pending); *Cal. Cannabis Coal. v. City of Upland*, 3 Cal. 5th 924 (2017); *Biggs v. Betlach*, 243 Ariz. 256 (2017) (challenging constitutionality of statute authorizing assessment of hospitals to fund some costs of expanding coverage).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

The power to tax is the power to destroy. *M'Culloch v. State of Md.*, 17 U.S. (4 Wheat.) 316, 327 (1819). Given the magnitude of this power, a state's interest in raising and controlling revenue is limited by the due process guaranteed to taxpayers under the Fourteenth Amendment to the United States Constitution.

In this case, the Commonwealth of Pennsylvania assessed Nextel Communications nearly $4 million in state taxes, in violation of the state constitution's Uniformity Clause. Nextel sued under that state provision and the federal Due Process Clause. The Pennsylvania Supreme Court held in favor of Nextel insofar as the tax was illegally collected under long-standing state law. *Nextel Commc'ns of the Mid-Atlantic Inc. v. Commonwealth of Pa.*, 171 A.3d 682, 697 (Pa. 2017). But the court failed to address Nextel's due process claim and it gave Nextel no remedy, *i.e.*, no reimbursement of the illegally collected tax. *Id.* at 704-05. In *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), this Court held that the Due Process Clause requires relief when a state tax is assessed in violation of *federal* law (in that case, the Commerce Clause). Lower courts are split as to whether *McKesson* applies when a state tax violates *state* law.

The answer to this question is one of national importance. In addition to the conflicts among the lower courts, this case goes to the fundamental fairness and justice of whether a state is permitted to keep ill-gotten gains because it violated state law, rather than federal law, in the illegal collection of

taxes. This Court should grant the petition to hold that taxes enacted in violation of state law raise the same due process concerns and, thus, require the same remedies, as taxes enacted in violation of federal law.

REASONS TO GRANT THE PETITION

I

LOWER COURTS CONFLICT ON WHETHER DUE PROCESS REQUIRES STATES TO REFUND ILLEGALLY ASSESSED TAXES

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco held that, when a state does not give a taxpayer an opportunity to challenge a tax's legality before paying the tax, the Due Process Clause of the Fourteenth Amendment requires the state to offer a post-payment opportunity to challenge the tax's validity and, if the tax turns out to have been invalid, a remedy sufficient to cure the violation. 496 U.S. at 22. The plaintiff in that case successfully challenged a Florida tax law under the Commerce Clause, and this Court's opinion generalized its holding beyond that particular cause of action to apply to violations of any other constitutional provision. *Id.* at 31 ("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.") (footnotes omitted). The question left unanswered was whether

the principles applied in *McKesson* extend to other provisions of law, particularly state law.

In the context of *McKesson* and this case, the due process guarantee acts as a mechanism for corrective justice. *See Alden v. Maine*, 527 U.S. 706, 740 (1999) (A state's obligation to provide a promised tax refund remedy "arises from the Constitution itself."). Corrective justice repairs "discrete harms suffered by individuals at the hands of state officials," as contrasted with injuries caused by structural deficiencies, such as school segregation or prison conditions. Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 Ariz. L. Rev. 859, 870 (1991). In *Cheatham v. United States*, 92 U.S. (2 Otto) 85, 88 (1875), this Court noted that both the federal and state governments established a "complete" "system of corrective justice, as well as a system of taxation" in which a taxpayer may pay under protest to test the validity of a tax and "if the money was wrongfully exacted, the courts will give [the taxpayer] relief by a judgment." *See also Marsh v. Fulton Cty.*, 77 U.S. (10 Wall.) 676, 684 (1870) ("The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."); John F. Coverdale, *Remedies for Unconstitutional State Taxes*, 32 Conn. L. Rev. 73, 75-76 (1999) ("As a moral matter, taxpayers who have been unconstitutionally taxed have been unjustly deprived of their property and corrective justice requires that this injustice be remedied.").

This theory of corrective justice in the taxation context extends beyond claims that a tax is unconstitutional. For example, in *Ward v. Bd. of Cty. Comm'rs of Love Cty.*, 253 U.S. 17, 20 (1920), a county taxed Indian lands that were non-taxable under the treaty allotting the land to the Indians. The tribe paid the taxes to avoid a distress sale of the lands then sought a refund. This Court held that due process required a post-deprivation remedy, *id.* at 18, specifically a refund of the taxes paid:

> 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. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the state.

Id. at 24. *See also Carpenter v. Shaw*, 280 U.S. 363, 369 (1930) ("[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment."); *Mont. Nat'l Bank of Billings v. Yellowstone Cty.*, 276 U.S. 499, 504 (1928) (decision that invalidates tax must order refunds of illegally collected taxes paid under protest; prospective relief alone can "not cure the mischief which had been done").

With this understanding of the federal constitutional requirements, some courts—in conflict with the decision below—hold that states that assessed taxes in violation of state constitutional or

statutory law must disgorge the illegally collected taxes to taxpayers who paid under protest. For example, in *Aileen H. Char Life Interest v. Maricopa Cty.*, 208 Ariz. 286, 297 (Ariz. 2004), the Arizona Supreme Court held that taxpayers who remitted taxes that were collected in violation of the state constitution's Uniformity Clause were entitled to a refund as a matter of constitutional due process: "Although *McKesson* involved a challenge brought under the federal Commerce Clause, denying any refund to the Taxpayers could raise constitutional due process issues." *See also City of Hous. v. Harris Cty. Outdoor Advert. Ass'n*, 879 S.W.2d 322, 333 (Tex. App. 1994), *cert. denied* 516 U.S. 822 (1995) ("The Due Process Clause applies to any unlawful collection of taxes, including one that violates state law or provisions of the state Constitution."); *O'Connell Mgmt. Co., Inc. v. Massachusetts Port Auth.*, 744 F. Supp. 368, 378 (D. Mass. 1990) (regarding the application of *McKesson* to refund claims involving taxes paid under unconstitutional statutes, the court "do[es] not believe that the Supreme Court recognizes a substantive distinction between constitutional and statutory violations in this context").

Similarly, in *Kragnes v. City of Des Moines*, 810 N.W.2d 492, 496-97 (Iowa), *cert. denied*, 568 U.S. 884 (2012), the Iowa Supreme Court invalidated franchise fees as illegal taxes under state law and held that those who paid the illegal taxes under protest had a due process entitlement to a refund. The court acknowledged that *McKesson* involved a federal constitutional right but held that its reasoning is "compelling" and therefore applied it to the unlawful exaction. The Iowa court emphatically rejected the city's complaint that refunds would adversely affect

the public coffers, *id.* at 511, particularly because the city was on notice of Kragnes's claims and nonetheless collected the illegal taxes during the pendency of the action—even increasing them. *Id.* The court, therefore, was not swayed by the city's complaints of an "onerous fiscal burden" and reminded the city that it "has available to it the full range of legal tax and fee options, budgetary measures, and spending policy choices to cover the refund and its ongoing future expenses." *Id.* at 513.[2] *See also Matter of the Tax Appeal of Haw. Flour Mills, Inc.*, 76 Hawai'i 1, 11 (1994) (Fiscal consequences that are "purely of the state's own doing" "cannot be the basis for the state to skirt its constitutional obligations.").

Although the Kentucky Supreme Court's majority opinion in *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 402 (Ky.), *cert. denied*, 560 U.S. 935 (2009), held a challenged tax to be validly assessed, obviating the need to discuss the constitutional requirements for a refund, two dissenting justices discussed this issue at length. Writing for herself and Justice Bill Cunningham, Justice Lisabeth (Hughes) Abramson argued that the tax was illegally assessed and then relied on this Court's decisions in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *McKesson* to

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[2] Among these policy choices, a state or city could put proceeds from challenged taxes into an escrow account. *See Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1309 (1987) (Circuit Justice Stevens ordering the Arkansas Highway Department to place disputed taxes in an escrow fund to eliminate the risk that "like other state courts, the Arkansas courts would deny restitution of taxes found to have been unconstitutionally collected."); *City & Suburban Distribs.-Ill., Inc. v. City of Chi.*, 157 Ill. App. 3d 791, 792 (1987) (all funds paid under a challenged liquor tax held in escrow until the court ruled on the tax's legality).

argue that a refund was constitutionally required. Justice Abramson emphasized the state's requirement that taxpayers who object to a tax's legality proceed with their legal challenges only *after* paying the taxes under protest. *Miller*, 296 S.W.3d at 413 (Abramson, J., dissenting). Under this circumstance, she argued that "the due process principle involved—that a taxpayer may not be deprived of his or her property without a meaningful opportunity to challenge the legality of the deprivation—clearly applies regardless of the ground for challenging the tax, whether federal constitution or, as here, state statute." *Id.* at 414. She noted that the cases relied on by this Court in deciding *McKesson* addressed taxes that were invalid for reasons other than violating the United States Constitution and thus *McKesson* should not be limited to such violations. *Id.* At bottom, "[a] tax exacted in violation of state law, no less than one in violation of federal law, raises the exact same due process concerns and requires the same meaningful procedural safeguards." *Id.*

Scholars addressing the gap left by *McKesson* similarly opine that the Due Process Clause requires a remedy when a state tax violates state law. *See, e.g.*, Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 Yale L.J. 1683, 1784 n.421 (1997) ("[A] state's violation of its own law that results in a deprivation of liberty or property implicates the Due Process Clause and, it might be argued, requires the state to offer a postdeprivation damage remedy."); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77, 138 (1997) (early cases in which federal courts ordered remedies for taxes illegal under

state law suggest that those remedies may be constitutionally compelled).

In conflict with these courts and commentators, other courts take a more limited view of *McKesson* and the Due Process Clause, specifically taking the position that *McKesson*'s holding extends only to taxes invalidated under federal law. *See*, *e.g.*, *Kennecott Corp. v. State Tax Comm'n of Utah*, 862 P.2d 1348, 1353 (Utah 1993); *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) ("A refund is required under the Federal Constitution only when a state requires payment of the tax as a condition precedent for judicial review and the tax is contrary to the Federal Constitution. No arguments or claims are made herein that the Federal Constitution requires a refund.") (citing *McKesson*). The court below did not choose a side in this dispute, failing to address Nextel's due process claims at all. However, there is no constitutional or prudential bar that would prevent this Court from considering this important issue. *See Thigpen v. Roberts*, 468 U.S. 27, 32 (1984) (addressing due process issue that was argued before the district court and court of appeals where the factual record "would not be improved by a remand"); *United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) ("[A] court may consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even [an issue] the parties fail to identify and brief.").

Minimum requirements of due process are not a matter of local discretion or option, and the question of refunds of discriminatory state taxes is too pervasive and important to be left to conflicting state

rules. Taxpayers are entitled to a uniform standard regardless of the state where their claims arise. Only this Court can restore uniformity and predictability in this critical area of the law.

II

WHETHER STATES HAVE A CONSTITUTIONAL OBLIGATION TO REFUND ILLEGALLY ASSESSED TAXES IS A MATTER OF NATIONAL IMPORTANCE

Constitutional doctrines should promote political accountability. *Murphy v. NCAA*, Nos. 16-476, 16-477, slip op. at 17-18 (U.S. May 14, 2018). This is particularly important in the context of taxation, given the perennial conflicts between the taxers and the taxed. Taxation "is the chief burden which government imposes upon the people, and is likely, therefore, to be the greatest source of discontent. This renders it of the utmost importance that taxation should as nearly as possible be just, and also that it should appear to those who pay it to be just." Thomas M. Cooley, *Remedies of Illegal Taxation*, 29 Am L. Reg. 1, 1 (1881). A taxpayer who remits millions of dollars under an illegal collection scheme cares not whether the illegality derives from federal or state law. Justice—and due process—require a remedy.

A constitutional remedy for improper taxation must furnish an incentive for states and taxing officials to respect constitutional requirements. *Owen v. City of Indep.*, 445 U.S. 622, 651-52 (1980) (municipal liability for unconstitutional behavior "should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens'

constitutional rights"). A "rock-bottom constitutional principle requires a scheme of constitutional remedies sufficient to keep government tolerably within the bounds of law." Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 338 (1993). Courts must demand real, effective remedies for unconstitutional taxes "not only because of the moral imperative of compensating taxpayers whose funds have been taken in violation of the Constitution, but also because of the instrumental need to deter states from exacting unconstitutional taxes in the future." Coverdale, *Remedies*, 32 Conn. L. Rev. at 79; *Aileen H. Char*, 208 Ariz. at 297-98 ("In addition to raising due process concerns, denying the Taxpayers a refund provides limited incentive for taxing authorities to adhere to the Arizona constitutional mandate that all taxes 'be uniform upon the same class of property.'").

Inadequate state procedures or remedies must not be allowed to frustrate federal rights. *See, e.g., Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty.*, 488 U.S. 336, 346 (1989) (inadequate state remedy for unconstitutional property taxes). Yet it is an unfortunate political reality that if states are not bound to refund illegally collected taxes, they will not do so. *See* Pa. Dep't of Rev. Corp. Tax Bulletin 2018-02, *Net Operating Loss Deduction (NOL) Application of Nextel Commc's v. Commonwealth* (May 10, 2018)[3] (announcing refusal to apply the *Nextel* decision to taxable years prior to 2017). *See also*

[3] http://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/TaxBulletins/CT/Documents/ct_bulletin_2018-02.pdf.

Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1833 n.569 (1991) ("[S]tates already have strong political motives to engage in discriminatory taxation, and acceptance of the windfall argument might too far erode the needed, contrary incentives."). This undermines the states' "moral obligation to refund an excessive tax" that exists for the simple reason that the payment is "beyond that which should in justice have been charged." *City of Rochester v. Chiarella*, 98 A.D.2d 8, 11, 470 N.Y.S.2d 181, 184 (N.Y.A.D. 1983), *aff'd*, 63 N.Y.2d 857 (1984). *See also In re Heinemann's Will*, 230 N.W. 698, 699 (Wis. 1930) (noting "moral obligation of the state to return moneys collected under a void taxation law").

In fact, certain states repeatedly attempt to assess illegal taxes even in light of court rulings striking them down. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. Conway*, 152 Vt. 363, 378 (1989) (holding did not establish a new rule of law because a previous iteration of litigation "struck down a retaliatory tax almost identical to that challenged today, and for the same reasons: it facially discriminated against out-of-state truckers"); Coverdale, *Remedies*, 32 Conn. L. Rev. at 79-81 (detailing the stubborn efforts of Florida and Pennsylvania, among others, to retain and continue collecting unconstitutional taxes). As Professors Fallon and Meltzer have observed, deterrent remedies are necessary in this context because "a regime of public administration that [is] systematically unanswerable to the restraints of law" is simply "intolerable." Fallon & Meltzer, *Constitutional Remedies*, 104 Harv. L. Rev. at 1789.

Protecting the state treasury is an objective that serves a state as a whole and is not properly made the burden of a few taxpayers. Yet, as in this case, the burden in many illegal tax cases of protecting constitutional rights frequently falls upon those few taxpayers who pay the most. *See* Ferdinand P. Schoettle, *Commerce Clause Challenges to State Taxes*, 75 Minn. L. Rev. 907, 914 (1991) (plaintiffs in Commerce Clause cases tend to be very large businesses because "only large businesses have sufficient tax liability to justify incurring legal and other fees to contest tax liability"). Without the ability to regain their property (money) that was wrongly taken from them, these taxpayers have little incentive to spend the time and money necessary to challenge unlawful taxes—to the detriment of all taxpayers and to the rule of law. *Cf. Dryden v. Madison Cty.*, 696 So. 2d 728, 733 (Fla. 1997) (Wells, J., dissenting), *cert. granted and judgment vacated*, 522 U.S. 1145 (1998) ("I do not believe that the ultimate burden of the County's mistake should fall only on those property owners who did what we expect all citizens to do—pay when the government sends the notice to pay.").[4]

The Pennsylvania Supreme Court's ruling effectively—but silently—limits the due process guarantees relied upon in *McKesson*. Failure to apply the due process requirement of a remedy to taxpayers who have paid taxes under a state law subsequently determined to be illegally collected under the state

[4] On remand, a 4–3 split Florida Supreme Court again refused Dryden's claim for a refund of illegally collected taxes. *Dryden v. Madison Cty.*, 727 So. 2d 245 (Fla.), *cert. denied,* 527 U.S. 1022 (1999). The three dissenting justices decried the majority's ignoring of the "patently discriminatory and inequitable" refusal to refund the taxes. *Id.* at 250 (Wells, J., dissenting).

constitution conflicts with this Court's intimation that no such limitation exists and several lower courts so holding. This Court should grant certiorari to clarify that the applicability of the Due Process Clause is not so limited, and that the guarantee of meaningful backward-looking relief is available to remedy the unlawful collection of taxes under state law as well as under federal law.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: June, 2018.

Respectfully submitted,

DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation