No. _____

In the Supreme Court of the United States

ERNEST J. FRANCESCHI, JR. and
KEITH DeORIO, M.D.,
Petitioners,

v.

BETTY T. YEE, President of
California Franchise Tax Board, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Ernest J. Franceschi, Jr.
Counsel of Record
Franceschi Law Corporation
800 Wilshire Boulevard, 12th Floor
Los Angeles, California 90017
(213) 622-0835
ejf@franceschilaw.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

California in 2012 enacted a statutory scheme to suspend the driver and occupational licenses of the largest state income tax delinquents. *Revenue & Taxation Code* section 19195 directs the Franchise Tax Board to publish a list twice a year of the top 500 state income tax delinquents who owe more than $100,000.00. These individuals are then singled out for special penalties. Section 494.5 of the *Business & Professions Code* requires the summary suspension of driver and occupational licenses of those named on the list. However, the legislation does not provide for any form of hearing to contest the suspensions or the tax liability, and operates retrospectively. The tax liability of both Petitioners, for which their respective licenses were suspended accrued many years before the enactment of the legislation when license suspension was not a consequence of owing delinquent taxes.

There are three question presented:

1. Does the suspension of state issued occupational and driver licenses without a hearing opportunity, based upon tax delinquencies that pre date enactment of the legislation violate substantive and/or procedural due process?

2. Is legislation that requires the deprivation of driver and occupational licenses without a hearing facially unconstitutional under the due process clause?

3. Is legislation which singles out a class of tax debtors for public disclosure and special legislative punishments without a hearing, an unconstitutional bill of attainder?

PARTIES TO THE PROCEEDINGS

Franceschi v. Yee

Petitioner, Ernest J. Franceschi, Jr. was the appellant in *Franceschi v. Yee.* Respondents, appellees in that matter, were Betty T. Yee, President of the California Franchise Tax Board in her Official Capacity; George Runner, Board Member of the California Franchise Tax Board in his Official Capacity; Jean Shiomoto, Director of the California Department of Motor Vehicles in her Official Capacity; and Michael Cohen, Board Member of the California Franchise Tax Board in his Official Capacity.

DeOrio v. Yee

Petitioner, Keith R. DeOrio, M.D. was the appellant in *DeOrio v. Yee*. Respondents, appellees in that matter, were Betty T. Yee, President of the California Franchise Tax Board in her Official Capacity; Jerome E. Horton, Board Member of the California Franchise Tax Board in his Official Capacity; David Serrano Sewell, President of the California Medical Board in his Official Capacity; Michael Cohen, Board Member of the California Franchise Tax Board in his Official Capacity; Awet Kidane, Director of the California Department of Consumer Affairs in her Official Capacity; Anna Caballero, Acting Director of the California Department of Consumer Affairs in her Official Capacity; Barbara Yaroslavsky, Acting Director of the California Medical Board in her Official Capacity; Errol Fuller, Investigator Medical Board of California in his Personal Capacity; Carline McKenzie, Senior Investigator Medical Board of California, in her Personal Capacity, Jeff Gomez, Supervisor Medical Board of California, in his personal capacity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Ernest J. Franceschi, Jr. and Keith DeOrio, M.D., respectfully petition this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in their separate but related cases.

OPINIONS BELOW

The Opinion of the Ninth Circuit in *Franceschi* is reported at 887 F.3d 927 and reproduced in the appendix hereto ("App.") at App A. The Memorandum Decision in *DeOrio* is unpublished, and is reproduced at App. E.

JURISDICTION

The judgment of the Ninth Circuit was entered on April 11, 2018 in both matters. Petitions for Rehearing as to both were filed on April 25, 2018. The Petitions for Rehearing were denied on August 1, 2018. App. D and App. I. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Due Process Clause of the *Fourteenth Amendment* to the U.S. *Constitution* provides in pertinent part: "...nor shall any State deprive any person of life, liberty, or property, without due process of law."

Article I, Section 10, of the U.S. *Constitution* provides in pertinent part "that no state shall pass any bill of attainder."

California *Revenue & Taxation Code* section 19195 requires the pubic disclosure and publication at least twice a year of the 500 largest state income tax delinquents who over $100,000.00 ("Top 500 List").

California *Business & Professions Code* section 494.5 requires the California Department of Motor Vehicles and all occupational licensing boards to summarily suspend the driver and any occupational license issued to any person on the Top 500 List.

INTRODUCTION

This case raises critically important questions as to whether a state may summarily deprive persons of vested property rights in their issued driver and occupational licenses without a hearing, simply because they owe delinquent state income taxes. In the case of Petitioner Franceschi, the deprivation is a state issued driver license. In the case of Petitioner DeOrio, it is a medical license.

In the aftermath of the "Great Recession," which severely depleted state treasuries, a number of states including California enacted legislation mandating public disclosure of the identities of tax delinquents, and the amounts owed. Depending upon the amount, special punishments such as suspension of driver and occupational licenses are imposed. The intent of such legislation is to hoist a modern-day Sword of Damocles over the heads of tax debtors to coerce them to pay.

This type of draconian legislation transcends California. Approximately one third of the states have enacted public disclosure statutes for tax delinquencies, which carry a variety of sanctions. However, no state except for California has gone to the

extreme of suspending tax debtors licenses without providing a hearing opportunity contemporaneously with the depravation. To the contrary, every other comparable scheme affords either a prior hearing or a prompt opportunity for independent review after the suspension order is issued.

For example, Title 26 U.S.C. section 7345 which allows for the suspension of a federal income tax debtor's passport if the amount owed is greater than $50,000.00 expressly provides for judicial review in subsection (e) "...the taxpayer may bring a civil action against the United States in a district court...to determine whether the certification was erroneous..." The California legislation provides for no judicial or administrative review of any kind.

The California statutory scheme was enacted in 2012 and operates retrospectively. Both Petitioners have been included on the Top 500 List based entirely on alleged tax delinquencies that pre-date the enactment. Petitioner Franceschi's alleged cumulative tax deficit is based upon assessments imposed on him between 1995 and 2012. DeOrio's purported deficiency is for the years 1994 through 2002 and 2006, 2008 and 2011.

Both Petitioners were assessed their tax liability by way of "Notice of Proposed Assessments" or "NPA," which California uses in lieu of a tax return when one is not filed. An NPA is not based upon actual income but on statistical models of what the "average" doctor, in the case of DeOrio, and the "average" lawyer, in the case of Franceschi earns in a given geographical area. An NPA must be challenged within 60 days or it becomes final. However, Petitioners for economic

reasons did not challenge the NPA's. Therefore, when the subject legislation was enacted, all of the assessments that formed the basis for Petitioners placement on the Top 500 List had long become final. Although the legislative scheme operates retroactively, there is no concomitant opportunity to retroactively challenge the assessments.

Prior to the enactment of the legislation in 2012, the loss of a driver or occupational license was not a consequence of owing taxes to the State of California. The only consequence to owing delinquent taxes was subjection to the collection remedies available to the State. Petitioners had no notice, nor could they imagine that the Legislature would concoct a scheme that provides for their respective licenses to be taken more than two decades later without any opportunity to be heard on either the license deprivations or the tax liabilities.

As this Court has long held, the opportunity to be heard at a meaningful time and in a meaningful manner commensurate with a vested right deprivation is one of the fundamental requirements of due process. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); and *Armstrong v. Manzo*, 30 U.S. 545, 552 (1965). However, the Ninth Circuit now departs from this tenant and approves an "end run" around the due process clause that allows states to dispense with hearings altogether when suspending or revoking a licenses as a consequence of owing taxes.

States have become increasingly aggressive in their pursuit of tax revenue and it is foreseeable that deprivations will become increasingly draconian, and not limited to just license suspensions. The next

category of escalated deprivations will likely include fundamental rights such as the right to vote in state elections, the right to obtain a marriage license, to run for public office, or to access public services. These examples are not beyond the pale. In *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986), the Third Circuit held unconstitutional a conceptually similar ordinance that required a candidate for elected office be a "non-delinquent taxpayer and freeholder."

Although *Deibler* was decided on equal protection grounds, finding that the ordinance was irrational, the Ninth Circuit decision is clearly at odds with the reasoning and holding in *Deibler*.

The loss of a driver or occupational license are serious deprivations that often have the opposite effect of that intended by the legislation. If a high earner such as a doctor who has a tax liability large enough for placement on California's Top 500 List and thereby automatically loses his medical license, he will as a practical matter not be able to generate the income necessary to pay off the massive tax delinquency, which only increases each passing year as interest and penalties accrue. For many in this position, this is a hopelessly inescapable situation which could relegate one to "a life long sentence of penury." *Mason v. Young*, 237 F.3d 1168, 1178 (10th Cir. 2001). Since the inaugural edition of the Top 500 List in 2012, many of the same names remain to this day. During this time, they have ostensibly been unable to drive or engage in their licensed occupation and appear to be irremediably trapped.

Many states look to California's statutory schemes and public policy as models to emulate. The Ninth Circuit's Opinion now validates this California legislation that egregiously violates due process and amounts to a bill of attainder. The Opinion paves the way for other states to implement such schemes with confidence, particularly in the vast geographic area covered by the Ninth Circuit where this decision is now controlling authority.

However, the opinion is a dangerous precedent that is seriously flawed and runs contrary to the holdings of this Court and an unpublished opinion by a unanimous panel of the California Court of Appeal, Second Appellate District that examined the legislation and declared it to be unconstitutional on due process grounds. *Berjikian v. Franchise Tax Board*, 2015 WL 136825. The *Berjikian* decision, although not controlling authority due to the fact that it was unpublished, is well reasoned and prominently discussed in Petitioners' Briefs in the Ninth Circuit and during oral argument. Nevertheless, the Ninth Circuit makes no mention of *Berjikian* or any attempt to distinguish it, or explain why it was wrongly decided in the Court's Opinion below.

The Ninth Circuit's principal reason for why a hearing is not constitutionally required is that "Franceschi could have challenged his threatened suspension by paying his taxes and filing a refund claim with the FTB (citations)The payment of his tax liability would have allowed him to retain his driver's license. He would then have the opportunity to file a refund claim and challenge the original tax assessment..." 887 F.3d 927 at 936.

The Opinion erroneously conflates the "pay first, litigate later" process applicable to tax assessments challenges, with the constitutional right to a hearing required by due process pertaining to deprivations of vested rights. Tax liability challenges and vested rights deprivations are as different as "apples and oranges."

This is not a tax liability case, and the Opinion completely eviscerates the constitutional due process protections to which persons are entitled prior to suffering deprivations of vested rights. Under the "pay first, litigate later" approach applied by the Ninth Circuit, the constitutional deficiencies of any legislation that involves a deprivation based on a tax debt will escape judicial scrutiny because the door to the courthouse will be slammed shut on those who do not or cannot pay to challenge the deprivation. This is incongruent with the jurisprudence of this Court and amounts to the nullification of substantial and consequential federal constitutional claims.

The Court should review this case to decide if a state can suspend the occupational and driver's licenses of a tax debtor without a hearing on the tax liability or the deprivation. This case is of compelling importance and will have a profound effect on the lives a very large number of people in many states due to the proliferation of this type of legislation. Moreover, it is foreseeable that at some point in time, all tax delinquents, not just the California "Top 500," will be subject to automatic deprivations of licenses and fundamental rights without a hearing under the reasoning of the Ninth Circuit, unless reversed by this Court.

The legislation also amounts to a prohibited bill of attainder. It singles out a class of tax debtor, identifies them by name, and imposes a legislative punishment without a judicial trial. These are the three principal attributes of a bill of attainder. *Selective Service Systems v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 847 (1946). However, the Opinion below materially deviates from established precedent from this Court, that reference to a group such as "members of the Communist party" suffices for purpose of the identification requirement and holds that reference to the "Top 500 largest tax delinquents" is insufficient to constitute a bill of attainder. The Opinion therefore stands as an unwarranted obstacle to the enforcement of Article 1, section 10 of the *Constitution* and diminishes the protection that the framers of the Constitution determined was essential to eliminate the odious practice of legislative punishments that were frequently used by the Crown to target unpopular individuals.

STATEMENT OF THE CASE

A. The District Court Proceedings

Petitioner Franceschi filed an action for declaratory and injunctive relief in the United States District Court for the Central District of California on March 14, 2014, shortly after being notified by the California Franchise Tax Board that his driver license would be suspended pursuant to California *Business & Professions Code* section 494.5 upon publication of the next edition of the Top 500 List.

Franceschi's Complaint alleged that the statutory scheme comprised of *Revenue & Taxation Code* 19195 and *Business & Professions Code* section 494.5 violated his constitutional rights to procedural and substantive due process, equal protection, and amounted to a prohibited bill of attainder under Art. 1, sections 9 and 10 of the U.S. *Constitution.* However, the District Court granted Defendant's motion to dismiss under FRCP 12(b)(6) finding as a matter of law that none of the claims had merit. The District Court also denied Franceschi's motion for a preliminary injunction and dismissed the case. Franceschi timely appealed to the United States Court of Appeals for the Ninth Circuit.

Petitioner DeOrio filed a Complaint for damages and declaratory relief in the United States District Court for the Central District of California on June 23, 2015 after his medical licenses was suspended on August 30, 2013 pursuant to *Business & Professions Code* section 494.5. DeOrio claimed that the statutory scheme violated his constitutional right to procedural and substantive due process. DeOrio also brought other claims that are not pertinent to this Petition and will not be pursued herein.

The District Court granted summary judgment against DeOrio and in favor of defendants on all of DeOrio's claims. On the procedural and substantive due process claims, the District Court adopted the ruling in Franceschi's action as the basis for granting summary judgment. DeOrio timely appealed to the United States Court of Appeals for the Ninth Circuit.

B. The Ninth Circuit Proceedings

The Ninth Circuit combined for hearing at oral argument the Franceschi and DeOrio matters, deciding both separately on the same day. Both decisions were filed on April 11, 2018. The Franceschi Opinion is published at 887 F.3d 927, while DeOrio is an unpublished Memorandum decision, which adopts the reasons in Franceschi as to the denial of the due process challenge.

On April 25, 2018 both Franceschi and DeOrio filed Petitions for Rehearing with Suggestion for Rehearing En Banc. Both Petitions were denied on August 1, 2018. App. D and I.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit ruled that a hearing was not necessary under the due process clause in conjunction with the deprivations of Petitioners' licenses because they could have avoided the deprivations altogether by paying the tax and then filing suit for a refund. The Opinion below also misapplies this Court's holding in *Dixon v. Love*, 431 U.S. 105 (1977) and cites same in support for the proposition that a driver license may be revoked without a judicial hearing.

However, *Dixon* does not stand for such a proposition in the context of this case. In *Dixon*, the appellant suffered three motor vehicle convictions within twelve months and his license was suspended by the Illinois Department of Motor Vehicles for being negligent driver. He was then convicted of driving while on a suspended license. *Dixon* contended that the Illinois statute under which his license was revoked was unconstitutional because he was deprived of a

judicial hearing before revocation, even though he had available an administrative hearing which he declined.

This Court in analyzing the due process considerations applicable to the administrative license revocations held that procedural due process does not always require application of the judicial model. *Id* at 115. Moreover, there is a substantial public interest in the safety on the roads and highways, and the prompt removal of a safety hazard (*Dixon*) *Id.* at 114. Unlike *Dixon* who had available to him an administrative pre deprivation hearing on his licensee, but declined not to proceed with it, Petitioners under the challenged statutory scheme had no hearing opportunity on their license deprivations, either before or after they were suspended. Also, of critical importance, unlike *Dixon* there is no nexus here between public safety concerns and the license suspensions. No one has alleged that Petitioner Franceschi is a dangerous driver or that Petitioner DeOrio is unfit to practice medicine.

The Ninth Circuit has also engaged in impermissible judicial legislation, effectively re writing section 494.5. The Court below inserts into the statute through implication the "pay now, litigate later" procedure as a means of dispensing with a pre or post deprivation hearing. This kind of judicial activism, coupled with the failure or refusal to consider the facial due process challenge operates to nullify a material constitutional challenge.

This is unacceptable because it shirks a federal court's duty to squarely consider constitutional issues pertaining to the validity of legislation instead of nullifying, side-stepping them, or re writing the legislation. The Petition should be granted, or at

minimum the Petition should be granted and the matter remanded to the Ninth Circuit with instructions to decide the facial due process challenge in the first instance.

Finally, the legislative scheme is a bill of attainder, having all of the necessary attributes. Nevertheless, the Ninth Circuit's Opinion misapplies this Court's holding in *United States v. Brown*, 381 U.S. 437 (1965) which held that legislation targeting a group such as "members of the communist party" for punishment was a sufficiently particular designation. The Ninth Circuit erroneously concluded that being named to the Top 500 List lacks the specificity required for a bill of attainder under *Brown*. However, there is no conceptual difference between the two categories. The Ninth Circuit's tortured and strained reasoning erodes the constitutional protections against bills that impose legislative punishment without a trial against unpopular individuals or groups. This is a dangerous precedent which should be reversed.

The issues presented here are of compelling importance because the Opinion and the legislation that it approves negatively and unconstitutionally impacts the most fundamental aspect of life in a modern society, the right to drive and to pursue a livelihood.

I. THE CALIFORNIA LEGISLATION AMOUNTS TO AN EGREGIOUS VIOLATION OF THE DUE PROCESS CLAUSE

A. Procedural Due Process

This Court has repeatedly held that once a state occupational or driver license is issued, the holder has a constitutionally protected property interest therein which may not be taken away without adequate process. *Barry v. Barchi*, 443 U.S. 55, 64 (1979); *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); and *Bell v. Burson*, 402 U.S. 535, 539 (1971) "Suspension of issued [driver's] license...involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without procedural due process required by the Fourteenth Amendment. *Id.* at 539.

There is a basic fundamental due process requirement that whatever hearing is provided must be constitutionally "meaningful." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Here, the opportunity for a hearing on the tax liabilities did not occur at a meaningful time because there was no legislation in effect or pending to warn Petitioners that they could loose their license if they did not challenge the NPA's. Moreover, in *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86 (1993), this Court held that if no predeprivation remedy exists, the due process clause obligates a state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. Due process would in the context of this statutory scheme at minimum require that California provide an opportunity to

challenge the antecedent tax assessments before any present day license suspension could be imposed.

Petitioners were never afforded a reasonable opportunity to be heard at a meaningful time, or in a meaningful manner, to challenge their license suspension because suspension was not possible under any legislation in existence when the hearings on the tax assessments were afforded many years prior. This is the Achilles heel of the legislation. Such a scheme holds the tax debtor to a standard of clairvoyance, punishing him for not divining every future legislation that might attempt to use an antecedent tax liability as a basis for a present day property right deprivation.

Procedural due process guarantees a reasonable opportunity to be heard through procedures that are commensurate with the right for which the constitutional protection is invoked. *Anderson National Bank v. Luckett*, 321 U.S. 233, 246 (1944). This guarantee cannot be fulfilled unless the opportunity to be heard is "granted at a time when the deprivation can still be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *Mullane v. Century Hanover Bank*, 339 U.S. 317 (1950).

There are two separate and distinct processes at play here, which the Ninth Circuit conflates. There is the concept of "pay first, litigate latter," that as the Court below points out will allow for a challenge to the validity of the NPA's by paying the tax that is allegedly due and suing for a refund. Then there is the separate and distinct due process requirements applicable to license suspensions, which this Court has repeatedly held mandate a hearing opportunity.

No court other than the Ninth Circuit in this matter has ever held that the hearing required by the due process clause in conjunction with the deprivation of a vested right may be dispenses with because a tax debtor can "pay first, litigate later." The Ninth Circuit cites to this Court's decisions in *Bob Jones University v. Simon*, 416 U.S. 725, 746-748 (1974) and *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 595 (1931) for the proposition that "pay first, litigate later" satisfies due process in the context of tax collection. *Franceschi*, 887 F.3d 927, 936. However, the cases are inapposite. They are tax collection cases having nothing to do with deprivation of vested rights. The Ninth Circuit decision misreads this Court's precedent and applies it in an erroneous manner which was never intended and turns procedural due process principals upside down. Review by this Court is clearly warranted.

B. Substantive Due Process

The California legislation operates retroactively, using tax liabilities that predate the enactment for imposition of license suspensions, a new penalty that was not possible at the time of the assessments. Some of the assessments imposed on Petitioners are more twenty years old. Neither Petitioner has tax liabilities that have been imposed subsequent to the enactment of the legislation that would be large enough for inclusion on the List. Thus, but for the retroactive application of the legislation, neither Petitioner would have been subject to a license suspension under the legislation.

However, the Ninth Circuit Opinion holds that the legislation does not operate retroactively because "it does not sanction Franceschi for past conduct: The incurrence of past-due tax obligations. Rather it is his current refusal to discharge his tax obligations that exposes him to license revocation." *Franceschi*, 887 F.3d 927 at 940. This tortured reasoning amounts to legal fiction because the tax obligations are undisputedly not current, having been assessed well before license suspension became a consequence of owing taxes. The present day license suspension cannot reasonably be seen as anything other than a sanction for completed antecedent conduct, which violates the most fundamental tenant of due process.

What the California legislation does is single out disfavored persons for summary punishment based on past conduct. *United States v. Brown*, 381 U.S. 437, 456-462 (1965). As Justice Stevens observed in *Landgraff v. USI Film Products*, 511 U.S. 244, 266 (1994), a state legislature's "Unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* at 266.

There is no question that tax debtors are an unpopular group with state legislatures that are hungry for money, and it appears that the legislation was enacted for the purpose of exacting retribution against this group, because it does not aid in the collection of taxes. The state already has at its disposal the most potent collection arsenal available. It may

garnish wages, seize bank accounts and property, and place liens. On the other hand, suspending a tax debtor's driver and occupational license, only serve to prevent him form generating income which the state would otherwise be able to attach to satisfy the delinquencies. There appears to be no rational purpose for the legislation, and given the less burdensome alternatives that the state has to collect taxes, it must be viewed as punitive.

Finally, the legislation does not manifest any indication that it is to be applied retroactively. By allowing retroactive application, the Ninth Circuit gives short shrift to the presumption against retroactivity. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). The Due Process Clause protects the interest in "fair notice and repose that may be compromised by retroactive legislation." *Landgraff* at 266; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). "The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraff* at 265; *Kaiser Aluminum & Chemical Co. v. Bonjorno*, 494 U.S. 827, 837 (1990); and *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

The Ninth Circuit Opinion is squarely at odds with the jurisprudence of this Court and must be reversed.

II. THE REFUSAL TO ADDRESS THE FACIAL CHALLENGE CALLS FOR REVIEW

The Ninth Circuit Opinion completely overlooks the facial challenge and focuses only on the "as applied" challenge, fixating on how Petitioners were provided with numerous opportunities for a hearing on the tax assessments themselves at a time when no deprivation was possible under existing legislation.

The failure or refusal to consider the facial challenge is material because if the statutory scheme is found to be facially unconstitutional, it is invalid for all purposes, not just as applied to Petitioners. A successful challenge to the facial constitutionality of a law invalidates the law itself. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984).

This issue is one of great public importance because of the large number of persons that have suffered and will suffer the automatic deprivation of their state issued occupational and driver licenses without the opportunity for any hearing whatsoever should they find themselves on the "Top 500" List. This Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976) held that a fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner *Id.* at 333; *Armstrong v. Manzo*, 30 U.S. 545, 552 (1965). "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951).

The challenged statutory scheme is facially unconstitutional because there is no opportunity for any hearing whatsoever, either on the tax assessments or the deprivation. Simply because there was an opportunity for a hearing on the assessments at a distant point in time, when no deprivation was possible, does not years later render that hearing opportunity constitutionally meaningful. The legislation is fatally flawed.

III. THE NINTH CIRCUIT OPINION IS AT ODDS WITH THE *DEIBLER v. CITY OF REHOBOTH BEACH* DECISION OF THE THIRD CIRCUIT

The subject legislation is similar to that in *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986) where an ordinance required that any candidate for City Commissioner be a "non-delinquent taxpayer and freeholder." This requirement was imposed on the ground that delinquent taxpayers are "unfit" to hold public office. Similarly, the Ninth Circuit opinion gratuitously suggests that those who are not current on their tax obligations are not of good moral character and the state would be justified in revoking a professional license. *Franceschi*, 887 F.3d 927, 939. This pronouncement however is contrary to California law. The California Supreme Court in *In re Fahey*, 8 Cal. 3d 842 (1973) held that neither the failure to file a tax return or pay a tax amounts to moral turpitude. *Id.* at 851; see also *In re Higbie*, 6 Cal. 3d 562 (1972).

Nevertheless, the Third Circuit held such a requirement to be irrational, based upon a survey by Rutgers University which found a broad range of reasons for tax delinquencies, mostly attributable to

economic factors. The legislation is based on the unsupported assumption that tax debtors all have the ability to pay and that payment is justified in the case of each tax debtor. *Deibler* at 334-335.

Review is warranted because the reasoning of the Ninth Circuit Opinion cannot be reconciled with the Third Circuit's decision in *Deibler* on a significant issue of public importance.

IV. THE CHALLENGED LEGISLATION IS A BILL OF ATTAINDER

Bills of attainder are by their very nature retroactive legislation which were regarded as odious by the framers of the *Constitution* because it was the traditional role of the courts, not legislatures to judge a case and impose punishment. *United States v. Brown*, 381 U.S. 437, 445 (1965); *United States v. Lovett*, 328 U.S. 303, 315-316 (1946).

The Ninth Circuit Opinion acknowledges that there are three specific attributes to a bill of attainder. They are (1) the statute specifies the affected persons and (2) inflicts punishment (3) without a judicial trial. *Franceschi*, 887 F.3d 927 at 941. However, despite the obvious fact that the legislation requires the publication of a list identifying by name and city of residence the top 500 income tax debtors, the Court below in a tortured and strained explanation determined that Petitioners were not specifically identified and therefore the legislation did not constitute a bill of attainder. The Opinion below stops with this determination and does not reach the second or third attributes.

The reasoning of the Opinion below is contrary to established precedent of this Court. In *United States v. Brown,* supra, this Court held that a reference to "members of the Communist Party" in a legislative enactment was a sufficiently particularized description for purposes of a bill of attainder. "We cannot agree that the fact that s504 inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder." *Id.* at 461.

In recounting the history of bills of attainder, this Court in *Brown* noted that "most bills of attainder and bills of pains and penalties named the parties to whom they were to apply; a few however, simply described them." *Id.* at 442. "It was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people, sometimes by description rather than name." *Id.* at 461.

The Ninth Circuit attempts to distinguish *Brown* in an effort to prevent its application. The Opinion below seeks to differentiate the category of individuals which comprised the membership of the Communist Party in *Brown* with the category of individuals that comprise the Top 500 List. The Opinion points out that "the list is updated twice a year, and the 500 largest delinquents will not necessarily remain the same on different versions of the List. In this way, Sections 19195 and 494.5 can affect a growing number of persons over time and their effect is not limited to any particular group in existence at the time of the statute's enactment. Accordingly, this factor weighs against the conclusion that Sections 19195 and 494.5

specify the affected persons." *Franceschi*, 887 F.3d 927, at 942.

This explanation makes no sense. When the legislation was enacted in 2012, the top 500 tax delinquents were clearly ascertainable, and the legislation was enacted to specifically target those individuals. This is a fatal flaw of the legislation. The fact that the legislation also operates prospectively and the composition of the list may change over time has no bearing on the fact that it is the retrospective aspect of the legislation renders it a bill of attainder.

In another application of the "pay now, litigate later" concept, the Ninth Circuit holds that the legislation is not a bill of attainder because "these taxpayers have the power to escape license revocation by fulfilling their tax obligations." *Franceschi*, 887 F.3d 927, at 943. However, the fact that a taxpayer can escape license suspension by paying the tax does not remove the legislation from the category of bills of attainder.

As this Court pointed out in *Brown*, many of the early American bills attaining the Tories were passed in order to impede their effectively resisting the revolution. "It is a fact important to the history of the revolting colonies, that the acts prescribing penalties, usually offered to the person against whom they were directed the option of avoiding them" *Id.* at 459.

In Dickensy fashion, this type of legislation operates as a modern day debtor's prison that holds captive the tax debtor's licenses necessary to function in society and earn a living. Given the present day political and economic climate, states, particularly

California have been relentless in their pursuit of tax revenue. Unless the Opinion of the Ninth Circuit is reversed, passage of such bills of attainder will proliferate, targeting not only tax debtors but any class of persons that are unpopular with state legislatures. This is anathema to the principals of due process and fundamental fairness.

It has been fifty three years since this Court decided *Brown* and addressed the issues presented herein. The Ninth Circuit Opinion provides the perfect vehicle to revisit and reaffirm the constitutional prohibitions against bills of attainder, given the propensity for such legislation in the current era.

V. CONCLUSION

For the foregoing reasons, the case merits this Court's plenary review and the Petition for writ of certiorari should be granted.

Respectfully submitted,

Ernest J. Franceschi, Jr.
Counsel of Record
Franceschi Law Corporation
800 Wilshire Boulevard, 12th Floor
Los Angeles, California 90017
(213) 622-0835
ejf@franceschilaw.com

Counsel for Petitioners