No. 17-1506

IN THE

Supreme Court of the United States

NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

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

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BRIEF *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

KARL FRIEDEN
Counsel of Record
NIKKI DOBAY
FREDRICK NICELY
DAVID SAWYER
COUNCIL ON STATE TAXATION
122 C St. N.W., Suite 330
Washington, D.C. 20001
(202) 484-5222
kfrieden@cost.org

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INTEREST OF *AMICUS CURIAE*

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today COST has grown to an independent membership of approximately 550 major corporations engaged in interstate and international business.[1] COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST members employ a substantial number of citizens in Pennsylvania, own extensive property in Pennsylvania, and conduct substantial business in Pennsylvania.

COST has a history of submitting *amicus* briefs to this Court when it is considering state and local tax issues. For example, during the Court's 2014 term, where the Court accepted *certiorari* in three significant state tax cases, COST submitted an *amicus* brief in each: *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015); *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136 (2015); and *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015). As a long-standing representative of large multi-jurisdictional taxpayers, COST is uniquely positioned to provide this Court with background information and reasons why state tax systems must be fair and pass muster under the U.S. Constitution's Due Process Clause. COST members have significant

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus'* intent to file this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

operations in all fifty states and are often directly impacted when a state court fails to correctly apply the principles demanded by this Court's Due Process Clause decisions.

STATEMENT OF THE CASE

In 2007, the Pennsylvania Legislature passed 72 Pa. Stat. § 7401(3)4.(c)(2)(A) (2007), which limited the amount of net operating loss that could be deducted by taxpayers with net income of greater than $3 million. Such taxpayers' net operating loss carryovers ("NLC") were limited to the greater of $3 million or 12.5 percent of taxable income starting in 2007, with the remainder net operating loss being carried forward for up to 20 years. *Id*. Taxpayers with net income of less than $3 million were not subject to any limitation and could deduct 100 percent of their net operating losses during the same period. *Id*.

As noted by Petitioner, for the 2007 tax year, the cap affected approximately 200 corporations, while almost 20,000 corporations were not impacted. Pet. App. 51a; Pet. p. 4. For that tax year, Petitioner filed its return in accordance with the NLC cap pursuant to 72 Pa. Stat. § 7401(3)4 and timely filed a claim for refund asserting the NLC cap discriminated between corporations in violation of the Uniformity Clause of the Pennsylvania Constitution. Pet. pp. 4-5.

After exhausting administrative remedies, Petitioner appealed its Uniformity Clause claim to the Commonwealth Court of Pennsylvania. By the time Petitioner's appeal was filed with the Commonwealth Court, the general statute of limitations had run for the 2007 tax year, meaning the ability to equalize any possible Uniformity Clause infirmity by imposing the 12.5 percent cap on the NLC of taxpayers with less

than $3 million of taxable income was no longer an option for the State. Pet. p. 5. In December 2015, the Commonwealth Court determined the net operating loss cap violated Pennsylvania's Uniformity Clause and granted Petitioner a refund, finding a statutory severability analysis would not provide a remedy for Petitioner for the 2007 tax year. *Nextel Communications of the Mid-Atlantic, Inc., v. Commonwealth of Pa., Dep't of Rev.*, 129 A.3d 1 (Pa. Commw. Ct. 2015).

The State appealed the Commonwealth Court's decision to the Supreme Court of Pennsylvania, and for the first time the Pennsylvania Attorney General asserted that even if the Pennsylvania Supreme Court were to agree with Petitioner's Uniformity Clause challenge it would only be required to provide prospective relief. Thus, it was the State's position that regardless of whether the NLC cap as applied to Petitioner violated the Pennsylvania Uniformity Clause, Petitioner was not entitled to a refund for the 2007 tax year. In response, Petitioner asserted it was entitled to a refund as a matter of due process.

Considering the parties' arguments, the Supreme Court of Pennsylvania affirmed the Commonwealth Court's decision in part. First, the Supreme Court of Pennsylvania agreed with the Commonwealth Court that the NLC cap violated the State's Uniformity Clause. *Nextel Communications of the Mid-Atlantic, Inc., v. Commonwealth of Pa., Dep't of Rev.*, 171 A.3d 682, 701 (Pa. 2017). Nevertheless, the Supreme Court of Pennsylvania rejected Petitioner's refund for the 2007 tax year. *Id*. at 705. Instead, the Supreme Court of Pennsylvania applied a "hypothetical" severability analysis, under which it applied the 12.5 percent NLC cap to all corporations regardless of whether their

income was over $3 million. *Id*. Under that analysis, the court found all corporations would have paid something because they would have been subject to the 12.5 percent statutory cap. *Id*.

The Supreme Court of Pennsylvania did not address Petitioner's Due Process claim in its 2017 decision and rejected Petitioner's petition for rehearing on that issue. Pet. p. 9.

SUMMARY OF THE ARGUMENT

The Court's acceptance of *certiorari* in this case is needed to address the lack of due process in this case. Without the Court's review of this case, the states will feel free to disregard this Court's precedent in *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), where a state tax law is invalidated under a state law provision. With *McKesson*, this Court made clear that the Due Process Clause required meaningful post-payment relief where a taxpayer had already paid a tax and the assessment of other taxpayers, which would remedy any discrimination, is unavailable. Yet, here the Supreme Court of Pennsylvania, finding the tax law at issue was invalid pursuant to the State's Uniformity Clause denied Petitioner a refund, in clear violation of this Court's precedent in *McKesson*.

Without review by this Court to clarify that *McKesson* applies to all cases where a state tax law is invalidated, the states will likely see this as a signal they are free to disregard the requirement to provide meaningful post-payment relief or a refund. This will likely have a chilling effect on some taxpayers considering litigating state tax provisions that might be invalid pursuant to a state law or state constitution since, even if successful as to the merits of the case,

they may be precluded from obtaining a refund of any prior payment of tax required to litigate the issue. Without this very important check on the system, states will also likely feel emboldened to push the boundaries regarding state taxation through the passage of potentially unlawful laws, knowing taxpayers are handicapped when challenging such laws. In other words, if a state is not required to provide a meaningful remedy—such as a refund in this case—taxpayers will be held hostage by states legislatures and courts. For the reasons asserted below, and by Petitioner, this Court should grant *certiorari* in this case to ensure that its precedent in *McKesson* is not disregarded and that the Due Process rights of Petitioner and countless other taxpayers are not violated.

ARGUMENT

I. PETITIONER IS ENTITLED TO MEANINGFUL POST-PAYMENT RELIEF PURSUANT TO THIS COURT'S PRECEDENT IN *McKESSON*.

This Court has clearly established a taxpayer's right under the Due Process Clause to meaningful post-payment relief from a state for taxes already paid under an illegal tax regime. *McKesson*, 496 U.S. 18. In *McKesson*, this Court concluded that ". . . the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure post-payment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *Id.* at 22.

Petitioner in this case satisfies all of the criteria set forth in *McKesson* for post-payment relief; therefore, this Court should reverse the Supreme Court of Pennsylvania's denial of a refund for the Petitioner

despite that court's finding that the Pennsylvania tax was imposed in violation of the State Constitution.

First, the tax **statute at issue** (*i.e.*, the net operating loss cap) in Pennsylvania **was invalid** pursuant to the Uniformity Clause of the Commonwealth's Constitution. As noted above, Petitioner was one of a small minority of taxpayers that had NLCs that were limited by the $3 million cap on NLCs used in violation of the Uniformity Clause of the State Constitution. As the Supreme Court of Pennsylvania concluded:

> It is clear, then, that the NLC, by allowing corporations to take a flat $3 million net loss carryover deduction against their taxable income, has effectively created two classes of taxpayers among corporations. . . . The first and larger class, comprising 98.8% of all corporate taxpayers for tax year 2007, was exempted from paying any corporate net income tax simply because their income was $3 million or less, and a much smaller class of corporate taxpayers, 1.2%, was required to shoulder the entire corporate net income tax burden for that tax year due only to the fact that each of those class members had income in excess of $3 million. Because the NLC has created disparate tax obligations between these two classes of similarly situated taxpayers . . . it is, as the Commonwealth Court determined, an arbitrary and unreasonable classification which is prohibited by the Uniformity Clause.

Nextel, 171 A.3d at 699.

Second, this Court has made it abundantly clear that a taxpayer is entitled to **meaningful post-**

deprivation relief to place the taxpayer in the same position as other similarly situated taxpayers.[2] This requirement is not a new principle that was first rendered by this Court in 1990 in *McKesson*. Rather, over the last 100 years, this Court has consistently held pursuant to the Due Process Clause that a taxpayer must be provided meaningful backward-looking relief to rectify any unconstitutional deprivation. *See McKesson* at 19, *citing Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280 (1912); *Ward v. Love County Board of Comm'rs*, 253 U.S. 17 (1920); *Carpenter v. Shaw*, 280 U.S. 363 (1930).

At the same time, this Court has afforded states significant flexibility in determining how to cure any discrimination against a taxpayer during the contested tax period. Among the options this Court has provided are (1) assessing other taxpayers so that they pay as much as the taxpayer contesting the discriminatory provision; (2) providing the taxpayer with a refund; or (3) some combination of the two including a partial assessment of other taxpayers and a partial refund. *McKesson* at 19.

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[2] As noted by Petitioner, this Court should reject any attempt to distinguish *McKesson* because Petitioner paid the tax at issue and later filed a claim for refund, pursuant to the Court's precedent in *Newsweek, Inc. v. Fla. Dep't of Rev.*, 522 U.S. 442, 444-45 (1998) (per curiam) and *Reich v. Collins*, 513 U.S. 106, 110-11 (1994). *See* Pet. pp. 13-14. Not only did Petitioner properly follow Pennsylvania's refund process (*see* 72 P.S. §§ 1108(b), 10003.1 (2007), but Petitioner would have likely been required to pay a security prior to appealing its case to the Commonwealth Court (*see* Pa. Rule of Appellate Procedure 1782 and 61 P.S. § 7.16) had Petitioner filed its original return in accordance with its refund claim position and been assessed by the Department of Revenue. In either situation, Petitioner is entitled to relief under *McKesson*.

In this case, however, the only available option for **meaningful backward-looking relief is a refund**. The State is unable (because the statute of limitations expired) and in any event unwilling to assess other taxpayers to place Petitioner in the same position as those corporations not subject to the NLC. In fact, the Pennsylvania Department of Revenue recently issued a public statement confirming that it will not attempt to assess other taxpayers. *See* Pennsylvania Corporation Tax Bulletin 2018-02 (May 10, 2018). In this Bulletin, the Department of Revenue declared: "In order to provide greater clarity for corporate taxpayers, the Department hereby announces that it will not apply the *Nextel* decision to taxable years beginning prior to January 1, 2017.[3] The Department will determine corporate tax liability of taxpayers for taxable years beginning after December 31, 2006 through December 31, 2016, by allowing the greater of the flat dollar cap or the percentage cap as authorized by statute prior to the issuance of the decision in *Nextel*." *Id*.

Finally, this Court has made it patently clear that **prospective relief is not enough**. As this Court stated in *McKesson*, "The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment 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

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[3] Pennsylvania has a general three-year statute of limitations to issue an assessment for additional tax due. 72 Pa. Stat. § 7407.3(a). Thus, tax years 2015 and 2016 are still fully open for assessment

backward-looking relief to rectify any unconstitutional deprivation." *McKesson* at 31; *see also* footnote 2.

Indeed, the *McKesson* case itself involved an attempt by the lower court to avoid providing backward-looking relief (*e.g.*, a refund) by relying on a "hypothetical" nondiscriminatory scheme to cure the unlawful deprivation. And, as this Court observed in *McKesson*: "Respondents suggest that, in order to redress fully petitioner's unconstitutional deprivation, the State need not actually impose a constitutional tax scheme retroactively on all distributors during the contested tax period. Rather, they claim, the State need only place petitioner in the same tax position that petitioner would have been placed by such a hypothetical scheme." *Id.* at 41. "But the State's offer to restore petitioner only to the same *absolute* tax position it would have enjoyed if taxed according to a 'hypothetical' nondiscriminatory scheme does not in hindsight avoid the unlawful deprivation. . . ." *Id.* at 43.

Nonetheless, the Supreme Court of Pennsylvania completely ignored the nearly identical facts and approach in the Florida Supreme Court decision that was overturned in *McKesson.* In declining to provide meaningful backward-looking relief, the Supreme Court of Pennsylvania created its own hypothetical analysis and remedy, asking what the Pennsylvania Legislature would do with the NLC if it understood that the $3 million cap was unconstitutional. It concluded that the Legislature would sever the $3 million cap from the statute, but still maintain the NLC, subject to the remaining limit on the deduction of 12.5 percent of taxable income. Thus, the Supreme Court of Pennsylvania determined that hypothetically under this outcome the Petitioner would be treated the

same as other similarly situated companies because the same percentage cap would apply to all companies.

As the Supreme Court of Pennsylvania stated, "By striking this provision [the $3 million flat deduction], all corporations for the tax year 2007 would be limited to taking a net loss carryover deduction of 12.5% of their taxable income for that year. Thus, each corporation will be entitled to avail itself of a net loss carryover deduction, as the legislature intended, but such deduction will be equally available to all corporations during that year, no matter what their taxable income." *Nextel*, 171 A.3d at 704. Conveniently omitted in this analysis was that this outcome could be true only if the State retroactively assessed other taxpayers that benefitted from the $3 million cap, based on the 12.5 percent limitation, which the State (as discussed above) could not and is not willing to do.

The fact that the Supreme Court of Pennsylvania did not specifically address the "Due Process" infirmity of the Pennsylvania NLC statute, under this Court's *McKesson* decision (despite briefing on the issue by both parties) does not change this result. The Supreme Court of Pennsylvania cannot "wish away" the Due Process Clause by simply ignoring it. Thus, this Court needs to grant *certiorari* here to prevent the Supreme Court of Pennsylvania (and other future state courts) from circumventing the important Due Process protections afforded to taxpayers by the 14th Amendment as set forth by this Court in *McKesson* and its prior rulings.

There is, however, one distinction between this case and *McKesson* that needs to be addressed here. In *McKesson*, the Florida statute at issue was found to have violated the Commerce Clause, and in this case the Pennsylvania statute is found to have violated the

Uniformity Clause of the Commonwealth's Constitution. Thus, while both cases involved underlying state statutes, in *McKesson* the state statute violated a federal constitutional provision while in this case the state statute violated a state constitutional provision. This, however, is a distinction without a difference, because regardless of the reason the statutory provision is found invalid, the Court in *McKesson* was clear that the failure to provide meaningful relief, in and of itself, is a violation of the Due Process Clause. The fundamental fairness principles of the Due Process Clause should not be eviscerated merely because a court is addressing the remedy for a state constitutional law violation—the Due Process Clause demands a fair and adequate remedy in all tax cases.

Where the state finds a tax law unconstitutional or invalid, it is required to provide a remedy. The Court in *McKesson* made no distinction regarding when such a remedy must be provided. In other words, the issue for the *McKesson* Court with respect to requiring a refund was not that the Florida statute violated the Commerce Clause as opposed to a state constitutional provision. That simply was not at issue in *McKesson*, and it was improper for the Supreme Court of Pennsylvania to deny relief. It is imperative that the Court accept this case and clarify whether the *McKesson* precedent applies equally to post-deprivation relief that is denied in relation to a state statute that violates a state constitutional provision as it does to a state statute that violates a federal constitutional provision. The failure to do so will seriously inhibit the ability of taxpayers to level the playing field when they successfully challenge unlawful state tax provisions

As discussed in Petitioner's brief, the Supreme Courts of Arizona and Iowa both properly found pursuant to *McKesson* a state must provide a refund where a state tax provision has been invalidated under state law. *See* Pet. pp. 20-21, *citing Aileen H. Char Life Interest v. Maricopa County*, 93 P.3d 486 (Ariz. 2004) and *Kragnes v. City of Des Moines*, 810 N.W.2d 492 (Iowa 2012). Both the *Aileen* and *Kragnes* courts rightfully concluded that *McKesson* required a refund to be issued because the failure to provide such a refund would violate the Due Process Clause. These courts made no distinction based on whether the taxes at issue were in violation of state law or the Commerce Clause. Petitioner also points to two other state supreme courts that have held that *McKesson* did not apply where a state tax provision was invalidated under a state law. *See* Pet. pp. 19-20, *citing Miller v. Johnson Controls, Inc*., 296 S.W.3d 392 (Ky. 2009) and *Kennecott Corp. v. State Tax Commission of Utah*, 862 P.2d 1348 (Utah 1993). It is *amicus's* position that the Kentucky and Utah Supreme Court cases were wrongly decided and that this Court should accept *certiorari* in this case to clarify its holding in *McKesson* and preclude other states from following suit.

Finally, it is important to note that the Fifth and Fourteenth Amendments to the United States Constitution each contains a Due Process Clause. The Due Process Clause acts as a safeguard from arbitrary denial of life, liberty or property by the government. The Fourteenth Amendment was considered necessary precisely because it addressed "State" deprivation of due process of law whereas the Fifth Amendment made no reference to a "State."[4] Therefore, it would be

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[4] *See* Akhil Reed Amar, *America's Constitution: A Biography*, New York, Random House (2006), at 385-392.

highly ironic and ahistorical if the *McKesson* principle on post-deprivation relief applied only in circumstances where a "federal" law was violated and not a "state" law.

By granting *certiorari* in this case, the Court can provide definitive clarity that the Due Process Clause extends to remedy state law tax violations. "[L]itigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991). Although some states have differed on applying the Due Process Clause to violations of state law versus federal law; the due process provisions of the Fourteenth Amendment should equally apply to state law tax issues as well as those violating a federal law.

Reviewing this case will also force Pennsylvania to harmonize the competitive disadvantage it imposed on businesses with annual income over $3 million. Businesses with income below and above that threshold compete with each other and when the Supreme Court of Pennsylvania invalidated a state law without applying *McKesson's* post-deprivation relief requirement, it essentially left in place the unequal treatment of competitors under the prior law (despite the finding that the law is invalid). Unlike in *Southern California Edison v. State Department of Taxation*, 398 P.3d 896 (2017), *cert. denied*, 138 S.Ct. 746 (2018), where there was no known instate competitor providing commercial grade coal to disadvantage coal purchased outside the state that was subject to Nevada's sales/use tax, in this case, there were nearly 20,000 taxpayers that were given a competitive advantage in Pennsylvania. This Court should review this case to prevent Pennsylvania, and discourage other states, from

favoring certain businesses when their competitors had unfavorable tax treatment. The failure to review this case will embolden other states in their belief that they are immune from having to address disadvantaged taxpayers.

II. FAILURE TO REQUIRE PENNSYLVANIA TO FOLLOW *MCKESSON* WILL HAVE A CHILLING EFFECT ON TAXPAYERS' ABILITY TO CHALLENGE UNLAWFUL STATE TAX STATUTES.

Review of this case is needed to address the Commonwealth's failure to provide an adequate remedy given an infirmity with its tax law. If this case is not reviewed, other states will be encouraged to follow the same path and deny a taxpayer challenging a state tax statute remedies required under the Due Process Clause. As a result, taxpayers' trust that they will be fairly treated by state courts will diminish and their willingness to challenge unlawful state tax statutes will be significantly undermined.

As noted above, this Court has held that "prospective" relief is insufficient to remedy a Due Process violation. Prospective relief may level the playing field between different types of taxpayers on a "going forward" basis, but it does not remedy past inequities. This is especially true in state and local taxation, where a litigating taxpayer is required to invest significant time and resources into the litigation of its issue. Not only does this undermine the purpose of Due Process safeguards against the "taking of property," it also subverts the entire purpose of litigating an unlawful state statute by nullifying the immediate remedy available to a taxpayer. If the litigant that challenges a state tax statute (and frequently, as in this case, on behalf of other taxpay-

ers) is placed in a position that it may prevail on the merits after a lengthy and expensive lawsuit, but still be denied relief in the form of a refund (or assessment of its competitors), then the outcome will have a chilling effect, discouraging taxpayers from filing lawsuits on state tax issues.

Moreover, if states believe they have the ability to protect the public fisc by denying a taxpayer meaningful backward-looking relief after a taxpayer successfully litigated a state tax case, the temptation may be too difficult for many states to forego. Indeed, recent history is replete with state legislatures and state courts trying to avoid unfavorable fiscal outcomes from state tax litigation, even if it means subverting prior decisions where taxpayers were successful on the merits of the underlying litigation.

For example, over the past two decades, there has been extensive state tax litigation relating to the constitutionality of retroactive tax legislation. While this case presents no issue of retroactivity, Pet. 23, that litigation shows the lengths to which states will go to evade constitutional requirements in the face of large refund claims.

This Court last addressed retroactive tax legislation in *U.S. v. Carlton*, 512 U.S. 26 (1994). In *Carlton*, this Court established a two-part test to determine if retroactive tax legislation violates the Due Process Clause of the United States Constitution. First, the Court looked to whether the legislation was enacted for a "legitimate legislative purpose furthered by rational means." *Id.* at 30. Second, the Court looked to whether the legislative body "acted promptly and established only a modest period of retroactivity." *Id.* at 32.

Since the time *Carlton* was decided, however, it has become abundantly clear that state courts have turned *Carlton*'s limited approval of retroactive tax legislation into a virtually unlimited blank check. Far too frequently, courts have held that preventing **any significant revenue loss** can satisfy the "legitimate legislative purpose" test in *Carlton*. And, far too frequently, this has been sustained no matter **how far removed** the corrective legislation is from the original legislation.

Since *Carlton*, over 40 cases (almost all at the state level) have been decided on the constitutionality of retroactive tax legislation. The absence of a level playing field for taxpayers is evidenced by the fact that the retroactive tax legislation has been upheld as constitutional in about 85 percent of these cases.[5]

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[5] Retroactive tax cases where a state court had already adjudicated the intent of the original legislation in the taxpayers' favor include: *Dot Foods v. Dep't of Revenue*, 372 P.3d 747 (Wash. 2016), *cert. denied*, 137 S. Ct. 2156 (2017); *Gillette Commercial Operations N. Am. & Subsidiaries v. Dep't of Treasury*, 878 N.W.2d 891 (Mich. Ct. App. 2015), *appl. for leave to appeal denied*, 880 N.W.2d 230 (Mich. 2016), *cert. denied*, 137 S. Ct. 2157 (2017); *Caprio v. Dep't of Taxation & Fin.*, 37 N.E.3d 707, *rehearing denied* (N.Y. 2015); *In re Estate of Hambleton v. State of Washington*, 335 P.3d 398 (Wash. 2014), *cert. denied*, 136 S. Ct. 318 (2015); *GMC v. Dep't of Treasury*, 803 N.W.2d 698 (Mich. App. 2010); *Zaber v. City of Dubuque*, 789 N.W.2d 634 (Iowa 2010); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009), *cert. denied*, 560 U.S. 935 (2010); *Jefferson Cty. Comm'n v. Edwards*, 49 So. 3d 685 (Ala. 2010); *GMAC LLC v. Dep't of Treasury*, 781 N.W.2d 310 (Mich. Ct. App. 2009); *King v. Campbell County*, 217 S.W.3d 862 (Ky. Ct. App. 2006); *Allegis Realty Inv'rs v. Novak*, 860 N.E.2d 246 (Ill. 2006); *City of Modesto v. Nat'l Med, Inc.*, 27 Cal. Rptr. 3d 215 (Cal. Ct. App. 2005); *U.S. Bancorp v. Dep't of Revenue*, 103 P.3d 85 (Or. 2004), *cert. denied*, 546 U.S. 813 (2005); and *Moran Towing Corp. v. Urbach*, 768 N.Y.S.2d 33 (App. Div.

Moreover, since *Carlton*, one-third of these cases involved a court sustaining the constitutionality of a retroactive law enacted **after** a state court (frequently the same court) ruled in favor of the taxpayer on the

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2003). Other retroactive tax cases include: *Estate of Petteys v. Farmers State Bank of Brush*, 381 P.3d 386 (Colo. App. 2016); *Sowell v. Panama Commons LP*, 192 So.3d 27 (Fla. 2016); *Ainley Kennels & Fabrication, Inc., v. City of Dubuque*, No. 15-1213, 2016 WL 5480688 (Iowa Ct. App. Sept. 28, 2016); *Estate of Brooks v. Sullivan*, 60 Conn. L. Rptr. 264 (Super. Ct. Apr. 29, 2015); *Klinger v. Dep't of Revenue*, 21 Or. Tax 347 (2014); *James Square Assocs. LP v. Mullen*, 993 N.E.2d 374, 381 (N.Y. 2013); *NetJets Aviation, Inc. v. Guillory*, 143 Cal. Rptr. 3d 111 (Cal. Ct. App. 2012), *as modified on denial of reh'g* (July 18, 2012); *Revenue Cabinet v. Asworth Corp.*, Nos. 2007-CA-002549-MR, 2008-CA-000023-MR, 2009 WL 3877518 (Ky. Ct. App. May 15, 2007); *Estate of Kosakowski v. Dir., N.J. Div. of Taxation*, 47 A.3d 760 (N.J. Super. App. Div. 2012); *River Garden Ret. Home v. Franchise Tax Bd.*, 113 Cal. Rptr. 3d 62 (Cal. App. Dep't Super. Ct. 2010); *Ford Motor Credit Co. v. Dep't of Treasury*, 2010 WL 99050, at *1 (Mich. Ct. App. 2010), *cert. denied*, 178 L.Ed.2d 826 (U.S. 2011); *Enter. Leasing Co. of Phoenix v. Ariz. Dep't of Revenue*, 211 P.3d 1 (Ariz. Ct. App. 2008); *Tesoro Ref. & Mktg. Co. v. State Dep't of Revenue*, 190 P.3d 28, 35 (Wash. 2008); *Total Transit, Inc. v. State*, No. 1 CA-TX 06-0011, 2007 Ariz. App. Unpub. LEXIS 472 (Ct. App. May 15, 2007); *In re Garden City Med. Clinic, P.A.*, 137 P.3d 1058 (Kan. Ct. App. 2006); *Baker v. Arizona Dep't of Revenue*, 105 P.3d 1180 (Ariz. Ct. App. 2005); *In re Estate of Martha S. Turney v. State Tax Assessor*, 2005 WL 2708423 (Me. Super. Ct. Feb. 24, 2005); *Venable v. Commissioner*, T.C. Memo 2003-240 (U.S. T. Ct. 2003); *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470 (Ala. Civ. App. 1999); *Gardens at W. Maui Vacation Club v. Cty. of Maui*, 978 P.2d 772 (Haw. 1999); *W.R. Grace & Co. v. Dep't of Revenue*, 973 P.2d 1011 (Wash. 1999); *A. Tarricone, Inc. v. United States*, 4 F. Supp. 2d 323 (S.D.N.Y. 1998); *Atlantic Richfield Co. v. Dep't of Revenue*, 14 Or. Tax 212 (1997); *Rivers v. State*, 490 S.E.2d 261 (S.C.1997); *Montana Rail Link, Inc. v. United States*, 76 F.3d 991 (9th Cir. 1996); *Maples v. McDonald*, 668 So. 2d 790 (Ala. Civ. App. 1995); and *Smith v. Sears, Roebuck & Co*., 672 So. 2d 794 (Ala. Civ. App. 1995).

merits of the underlying tax dispute.[6] State courts have been remarkably nonchalant about these blatant reversals of taxpayer wins in state tax litigation.

For instance, in *GMC v. Dep't of Treasury*, 803 N.W.2d 698 (Mich. App. 2010), the Michigan Court of Appeals stated that "[a] legislature's action to mend a leak in the public treasury or tax revenue—whether created by poor drafting of legislation in the first instance or by a judicial decision—with retroactive legislation has almost universally been recognized as 'rationally related to a legitimate legislative purpose.'" *Id.* at 710.

Similarly, in *Dot Foods v. Dep't of Revenue*, 372 P.3d 747 (Wash. 2016), *cert. denied*, 137 S. Ct. 2156 (2017), the Washington Supreme Court took no issue with the Washington State Legislature's assertion that it was merely clarifying a statute enacted 27 years earlier. According to the Washington Supreme Court:

> Further, [DOT's] contention that a 27-year retroactivity period is per se unconstitutional is belied by the fact that we upheld a retroactive amendment that occurred 37 years after the statute was originally enacted in *W.R.Grace & Co. v. Department of Revenue* [973 P.2d 1011 (Wash. 1999)]. . . . Thus, the length of time that has elapsed since a statute's original enactment is not dispositive . . . Furthermore, there is no absolute temporal limitation on retroactivity. . . .

Id. at 751-52 (internal quotations omitted).

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[6] In 13 of the 14 cases identified in the prior footnote where courts had already adjudicated the intent of the original legislation in favor of the taxpayer, the courts subsequently upheld the retroactive tax legislation reversing earlier decisions in favor of the taxpayers (*Modesto* being the only exception).

Given this recent history of state tax litigation over retroactive tax legislation, it is clear that taxpayers are at a significant disadvantage in state court if a state legislature decides to retroactively change the interpretation of a state tax statute (even after the taxpayer prevails) to favor the government's position. If—in addition to this trend—state courts are now also allowed to deny taxpayers appropriate post-payment relief such as refunds, even after ruling in favor of the taxpayers on the merits, then the rule of law will be undermined. This will further discourage taxpayers from defending their rights in state courts.

Absent the Court's acceptance of *certiorari* in this case, taxpayers will face great uncertainty over whether a challenge to an unlawful state statute, even if successful, will result in an adequate remedy that levels the playing field with competitors. A taxpayer that believes a state law is unconstitutional or invalid will be required to weigh the significant cost of litigating a state tax issue against the potential reality that even if it prevails, the taxpayer will unfairly be denied a refund of any tax previously paid. Thus, a taxpayer would be required to bear not only the expense of litigating an issue but also be required to pay the tax. For many taxpayers, this is simply too great a burden to bear and, if faced with this new reality, taxpayers may simply acquiesce to the state's position. The consequence of no further check on the states—either on the courts or the legislatures—would empower states to push the bounds regarding state tax matters, passing more and more suspect tax laws knowing taxpayers had little, if any, recourse.

Without this Court stepping in and restraining the states, Petitioner and many other taxpayers will be left without any meaningful remedy when it comes to the issue of state taxation. This Court should grant *certiorari* in this case to clarify that its precedent in *McKesson* is clearly applicable to Petitioner's case and stop the states from trampling on the Due Process rights of taxpayers.

CONCLUSION

The Due Process Clause requires adequate remedies for unlawful state taxes to mitigate the preferential treatment given to certain taxpayers. This Court should review this case to require Pennsylvania to apply *McKesson*'s principles.

Respectfully submitted,

KARL FRIEDEN
Counsel of Record
NIKKI DOBAY
FREDRICK NICELY
DAVID SAWYER
COUNCIL ON STATE TAXATION
122 C St. N.W., Suite 330
Washington, D.C. 20001
(202) 484-5222
kfrieden@cost.org

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