No. 09-981

In The Supreme Court of the United States

JOHNSON CONTROLS, INC.; SECURITY GROUP, INC. AND SUBSIDIARIES, INCLUDING SARGENT & GREENLEAF, INC.; WILLIS NORTH AMERICA, INC. AND AFFILIATES; BUNZL USA, INC. AND SUBSIDIARIES INCLUDING MAK-PAK, INC.; TREDEGAR CORPORATION, INC. AND SUBSIDIARIES; RAYCOM TV BROADCASTING, INC., AS SUCCESSOR-IN-INTEREST OF COSMOS BROADCASTING CORPORATION AND AFFILIATES, PETITIONERS,

v.

JONATHAN MILLER, SECRETARY OF THE FINANCE AND ADMINISTRATION CABINET OF THE COMMONWEALTH OF KENTUCKY; COMMONWEALTH OF KENTUCKY, DEPARTMENT OF REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Due Process Clause, a state may not deprive a taxpayer of "meaningful backward-looking relief" when the taxpayer has no predeprivation remedy for the overpayment of taxes, and tax legislation that is retroactive in effect cannot be without limitation. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); and *U.S. v. Carlton*, 512 U.S. 26 (1994). Additionally, under the Equal Protection Clause, similarly-situated taxpayers are entitled to uniform treatment. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959). Nevertheless, the Kentucky General Assembly, in its 2000 regular session, amended Kentucky Revised Statute 141.200 to eliminate the post-deprivation remedy of a targeted group of taxpayers that had refund claims pending for tax years 1990-1994—a retroactive effect of six to ten years. The question presented is:

> Whether a state's interest in raising and controlling revenue gives the state an unfettered right to retroactively eliminate the post-deprivation remedy of a targeted group of taxpayers at the expense of their due process and equal protection rights.

PARTIES TO THE PROCEEDING

Parties to the proceeding are listed in the caption of the case.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the Petitioners state as follows:

Johnson Controls, Inc. has neither a parent corporation nor any publicly held corporation that owns 10% or more of its stock. The stock of Johnson Controls, Inc. is publicly traded on the New York Stock Exchange.

Security Group, Inc. is a wholly-owned subsidiary of Stanley Security Solutions, Inc. Stanley Security Solutions, Inc. is part of The Stanley Works, the stock of which is publicly traded on the New York Stock Exchange.

Willis North America, Inc. is a wholly-owned subsidiary of Willis Group Limited (UK), and its ultimate parent corporation is Willis Group Holdings Public Limited Company (Ireland). The stock of Willis Group Holdings Public Limited Company is publicly traded on the New York Stock Exchange.

Bunzl USA, Inc., is a wholly-owned subsidiary of Bunzl plc. The stock of Bunzl plc is publicly traded on the London Stock Exchange.

RULE 29.6 STATEMENT – Continued

Tredegar Corporation has neither a parent corporation nor any publicly held corporation that owns 10% or more of its stock. The stock of Tredegar Corporation is publicly traded on the New York Stock Exchange.

Raycom TV Broadcasting, Inc. is a privately held corporation.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Johnson Controls, Inc., Security Group, Inc. and Subsidiaries, including Sargent & Greenleaf, Inc.; Willis North America, Inc. and Affiliates; Bunzl USA, Inc. and Subsidiaries, including Mak-Pak, Inc.; Tredegar Corporation, Inc. and Subsidiaries; and Raycom TV Broadcasting, Inc., as successor-in-interest of Cosmos Broadcasting Corporation and Affiliates, respectfully petition for a writ of certiorari to review the opinion of the Supreme Court of Kentucky.

OPINIONS BELOW

The Supreme Court of Kentucky rendered its decision on August 27, 2009. The decision is reported at 296 S.W.3d 392 (Ky. 2009), and it is reprinted at Petitioners' Appendix (App.) 1-76. The court subsequently entered an order denying rehearing on November 25, 2009. This order is reported at 56 Ky. Law Summary (K.L.S.) 12, p. 110, and it is reprinted at App. 120-121.

The Court of Appeals of Kentucky rendered its decision on May 5, 2006. The decision is reported at 53 K.L.S. 5, p. 7, and it is reprinted at App. 77-101.

The Franklin Circuit Court, the court of first instance, entered its opinion and order on July 1, 2004. This opinion is unreported but reprinted at App. 102-119.

JURISDICTION

The opinion of the Supreme Court of Kentucky was rendered on August 27, 2009. The Petitioners' timely-filed petition for rehearing was denied on November 25, 2009. This Court has jurisdiction of this Petition under 28 USC § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution providing, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

The Kentucky statutory provisions involved are Kentucky Revised Statutes (KRS) §§ 141.200(9)-(10) (2000):

> (9) No claim for refund or credit of a tax overpayment for any taxable year either on or before December 31, 1995, made by an amended return or any other method after December 22, 1994, and based on a change from any initially filed separate return or returns to a combined return under the unitary business concept or to a consolidated return shall be effective or recognized for any purpose.

(10) No corporation or group of corporations shall be allowed to file a combined return under the unitary business concept or a consolidated return for any taxable year ending before December 31, 1995, unless on or before December 22, 1994, the corporation or group of corporations filed an initial or amended return under the unitary business concept or consolidated return for a taxable year ending before December 22, 1994.

STATEMENT OF THE CASE

A. Factual Background

The genesis of this case dates back to 1966, when the Kentucky General Assembly adopted the Uniform Division of Income for Tax Purposes Act (UDITPA). 1966 Ky. Acts, ch. 176, Part I, § 6. UDITPA, a uniform act adopted by numerous states, set forth, in pertinent part, a definition of "business income" and a means by which states could determine the corporation income tax liability of a multi-state corporation doing business within and outside of the state. From at least 1972 until 1988, the Kentucky Revenue Cabinet construed the statutory definition of "business income" to require multi-corporate groups that operated on a unitary basis to file combined income tax returns for the entire unitary group, rather than filing separate returns for each corporation within the group.

On November 27, 1988, the Kentucky Revenue Cabinet adopted Revenue Policy 41P225, which abrogated the policy of requiring unitary taxpayers to file combined income tax returns. Revenue Policy 41P225 declared that combined income tax returns only would be accepted when a unitary group included a sham or shell corporation established to reduce the group's income tax obligation, and that all other corporations would be required to file separate income tax returns.

After the Kentucky Revenue Cabinet's adoption of Revenue Policy 41P225, a multi-corporate taxpayer, GTE and Subsidiaries, challenged the policy as being inconsistent with the statutory definition of "business income." At the time the challenge was brought and decided, KRS § 141.120(1)(a) defined "business income" to include "income arising from transactions and activity in the regular course of a trade or business of the taxpayer." GTE and Subsidiaries maintained that the term "taxpayer" from the statutory definition should be read to refer to all of the corporations within a unitary group, arguing that because of the interrelated nature of the corporations within a unitary group the "business income" of the group could not be determined through separate returns filed by each corporation within the group. On December 22, 1994, the Kentucky Supreme Court invalidated Revenue Policy 41P225 and recognized that Kentucky law required unitary groups to file combined income tax returns:

> [KRS 141.120] is based on the calculation of business income which cannot be determined on a separate return basis for members of a unitary group but which must be calculated

> on the combined unitary business for the group as a whole.

GTE and Subsidiaries v. Revenue Cabinet, 889 S.W.2d 788, 793 (Ky. 1994).

In the years that immediately followed the *GTE* decision, twenty-nine taxpayers, including the six Petitioners, filed amended income tax returns for the years prior to the *GTE* decision, with the tax years at issue primarily being 1990 through 1994. These amended returns were based upon a change from the separate returns previously required by Revenue Policy 41P225 to the combined returns required by *GTE*, and all sought refunds of overpaid income tax.

The income tax refund claims involved a significant amount of money. The estimated total amount of the twenty-nine claims, before interest, is approximately $106,000,000, with the refund claims filed by the Petitioners totaling approximately $5,500,000. While the Kentucky Revenue Cabinet processed a limited number of the refund claims and refunded income tax overpayments to seven unitary groups, no substantive administrative action was taken on the majority of the refund claims prior to 2000.

During the 2000 Regular Session of the Kentucky General Assembly, KRS § 141.200 was amended to deprive the limited group of unitary taxpayers, including the Petitioners, of their right to pursue the refund claims. The General Assembly effected this deprivation through two substantive amendments.

The first amendment simply declared that the refund claims at issue would not be honored:

> No claim for refund or credit of a tax overpayment for any taxable year either on or before December 31, 1995, made by an amended return or any other method after December 22, 1994, and based on a change from any initially filed separate return or returns to a combined return under the unitary business concept or to a consolidated return shall be effective or recognized for any purpose.

KRS § 141.200(9) (2000). The second amendment retroactively precluded unitary taxpayers, including the Petitioners, from filing combined income tax returns that produced refund claims:

> No corporation or group of corporations shall be allowed to file a combined return under the unitary business concept or a consolidated return for any taxable year ending before December 31, 1995, unless on or before December 22, 1994, the corporation or group of corporations filed an initial or amended return under the unitary business concept or consolidated return for a taxable year ending before December 22, 1994.

KRS § 141.200(10) (2000).[1] The Petitioners challenged the validity of these amendments on state and federal constitutional grounds.

B. Proceedings Below

The Petitioners raised and litigated a number of state and federal constitutional challenges to the 2000 Amendments. However, only the challenges brought under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are pertinent to this proceeding. The Petitioners raised two arguments under the Due Process Clause: (1) The extinguishment of the Petitioners' right to pursue pending income tax refund claims violates the due process guarantee of "meaningful backward-looking relief" for overpaid taxes recognized by this Court in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); and (2) No legitimate legislative purpose supports the legislation and the six to ten year period of retroactivity is unconstitutionally excessive under this Court's decision in *U.S. v. Carlton*, 512 U.S. 26 (1994). In their Equal Protection Clause argument, the Petitioners maintained that the 2000

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[1] House Bill 541, 2000 Ky. Acts ch. 543, was the means through which the General Assembly amended KRS § 141.200. Section 3 of House Bill 541 provides that the amendments "shall apply retroactively for all taxable years ending before December 31, 1995." The relevant provisions of House Bill 541 are reprinted in at App. 122-124. KRS §§ 141.200(9)-(10) (2000) will be referred to as the "2000 Amendments" throughout this Petition.

Amendments should be invalidated because they create a classification that treated similarly-situated taxpayers differently based solely on two arbitrary criteria: (1) whether the taxpayers filed their income tax refund claims before or after the date of the Supreme Court of Kentucky's decision in *GTE*; and (2) whether the Kentucky Revenue Cabinet processed the particular refund claims prior to the enactment of the 2000 Amendments.

The Franklin Circuit Court, the state trial court in which the Petitioners first challenged the constitutionality of the 2000 Amendments, disposed of the action on summary judgment. *See* App. 102-119. The court rejected the due process and equal protection arguments raised by the Petitioners and upheld the constitutionality of the 2000 Amendments. *Id.* at 108, 111 and 114. The Court of Appeals reversed on the grounds that the period of retroactivity effected by the 2000 Amendments is excessive in violation of the Petitioners' due process rights under this Court's decision in *Carlton*, 512 U.S. 26. App. at 95-96. The Court of Appeals also recognized that the Petitioners are entitled to "meaningful backward-looking relief" for their overpaid income taxes under this Court's decision in *McKesson*, 496 U.S. 18. App. at 97. While reversing the Franklin Circuit Court's decision on due process grounds, the Court of Appeals agreed with the lower court's determination that the 2000 Amendments do not violate the Petitioners' equal protection rights. *Id.* at 98.

The Commonwealth sought and obtained discretionary review from the Kentucky Supreme Court, which rejected the due process and equal protection arguments raised by the Petitioners and affirmed the constitutionality of the 2000 Amendments. Addressing the Petitioners' due process arguments, the court found that the 2000 Amendments are rationally related to the legitimate governmental purpose of "raising and controlling revenue" and that the period of retroactivity is not constitutionally excessive because the General Assembly acted "[a]t the first reasonable opportunity, as it became aware of the issues . . . " 296 S.W.3d at 400-401, App. at 21. The court further found that the "meaningful backward-looking relief" requirement from *McKesson* does not apply in this case because the refund claims at issue are not premised on overpayments made as a result of "an *unconstitutional* application of a tax." *Id.* at 402, App. at 24 (emphasis in original). The court summarily disposed of the equal protection issue on a finding that a legitimate governmental purpose supports the 2000 Amendments and the means employed to accomplish that purpose are rationally related to the purpose. *Id.* at 403, App. at 27.

REASONS FOR GRANTING THE PETITION

In this case, the Kentucky Supreme Court has decided important federal questions in direct contravention of the decisions of this Court. These important questions have broad ramifications for the tension that exists between a state's interest in raising and controlling revenue and a taxpayer's constitutional rights to due process and equal protection. This tension is especially acute here as the legislative enactment selected by the Kentucky General Assembly to effectuate the interest in raising and controlling revenue has the effect of retroactively depriving a targeted group of taxpayers of the right to pursue income tax refund claims, and in so doing denies the taxpayers rights and opportunities afforded to other similarly-situated taxpayers.

This tension between a state's interest in raising and controlling revenue and a taxpayer's due process and equal protection rights is particularly important now as numerous states face continuous revenue shortfalls and aggressively look to alternative sources for necessary funds. Under the auspices of the necessity of raising and controlling revenue, states have enacted laws and enforced policies that retroactively subject taxpayers to additional taxes or deprive taxpayers of the right to pursue refund claims to recover overpaid taxes. Two such cases are currently before this Court on petitions for certiorari. *See Triple-S Management, Corp. v. Municipal Revenue Collection Center*, No. KLAN200701749 and No. KLAN200800249 slip op. (P.R. July 17, 2008) (unpublished), *request for cert. denied* (P.R.S.C. March 16, 2009) and *motion for reconsideration denied* (P.R.S.C. April 28, 2009), and *second motion for reconsideration denied* (P.R.S.C. May 27, 2009), *petition for cert. filed*, 78 U.S.L.W. 8, p. 3099 (U.S. August 25, 2009) (No. 09-233) (Puerto Rico Supreme Court upheld administrative action by the Municipal Revenue Collection Center to retroactively impose property taxes for a period of fifteen years); *Exelon Corporation v. Illinois Department of Revenue*, No. 105582 slip op. (Ill. Feb. 20, 2009) (unpublished), *modified upon denial of rehearing*, slip op. (Ill. July 15, 2009) (unpublished), *petition for cert. filed*, 78 U.S.L.W. 25, p. 3396 (U.S. December 22, 2009) (No. 09-759) (Illinois Supreme Court determined taxpayer entitled to a contested state tax credit, but limited taxpayer to prospective relief from the date of the decision).

The trend is clear—every branch of state government has become increasingly willing to justify the imposition of retroactive tax obligations and the confiscation of tax refunds and credits as necessary to raise and control revenue. This Court should accept certiorari to establish that a state's interest in raising and controlling revenue has limits and is not a carte blanche justification for the deprivation of rights guaranteed to taxpayers under the Fourteenth Amendment to the United States Constitution.

A. This Court Should Clarify That The Due Process Guarantee Of "Meaningful Backward-Looking Relief" Applies To Taxes Collected Under An Unlawful Application Of Law And Is Not Limited To Taxes Collected Under Unconstitutional Provisions.

This Court has held that an exaction of a tax is a deprivation of property, and due process requires a state to provide procedural safeguards sufficient to ensure that the state collects only the amount of tax to which it is legally entitled. *McKesson*, 496 U.S. 18, 36. A state may offer these procedural safeguards either in the form of predeprivation relief—*i.e.*, a taxpayer is authorized to challenge its tax obligation prior to paying the tax—or in the form of post-deprivation relief—*i.e.*, a taxpayer is compelled to "pay first, litigate later." *Id.* at 36. When a state deprives a taxpayer of a meaningful predeprivation remedy, due process requires the state to provide post-deprivation relief. *Id.* at 31.

The Kentucky Supreme Court has determined that Kentucky's statutory tax provisions do not provide taxpayers with predeprivation relief for the overpayment of taxes because they are "pointedly designed to coerce taxpayers into remitting taxes before challenging any liability to avoid potential economic disadvantage." *Revenue Cabinet v. Gossum*, 887 S.W.2d 329, 333 (Ky. 1994). It follows from *McKesson* and *Gossum* that due process requires Kentucky to offer taxpayers a meaningful post-deprivation remedy. *Id.* at 332 (*citing McKesson*, 496 U.S. at 31). To satisfy this due process requirement, Kentucky must not only provide a taxpayer with a fair opportunity to challenge the accuracy and legal validity of its tax obligation, but also must offer a clear and certain remedy for the overpayment of taxes. *McKesson*, 496 U.S. at 39. Kentucky satisfies this due process obligation through statutory refund provisions, two of which apply to overpaid corporate income taxes: (1) KRS § 141.235, the specific income tax refund statute; and (2) KRS § 134.580, the general tax refund statute. Kentucky's preference for a post-deprivation remedy is consistent with that of other states, and the remedy favored by the states has been to enact tax refund statutes allowing taxpayers to seek refunds of allegedly overpaid taxes after those taxes are paid. *See Reich v. Collins*, 513 U.S. 106, 112 (1994).

Having overpaid corporate income taxes on a separate return basis as required by the invalidated Revenue Policy 41P225, the Petitioners possessed a due process right to pursue refund claims for those overpaid taxes on the basis that their income should have been calculated on a combined basis for the unitary group as a whole. The 2000 Amendments deprive the Petitioners of this due process right by precluding the Petitioners from pursuing their refund claims. By effecting this deprivation, the 2000 Amendments employ the very "bait and switch" tactic condemned as unconstitutional by this Court in *Reich v. Collins*, 513 U.S. 106. *See also, Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. 442, 444-445 (1998) (vacating the decision of a Florida appellate court that had upheld the Department of Revenue's attempt to "cut off" the postpayment refund process on which Newsweek had relied because a predeprivation remedy existed). In its discussion of Georgia's decision to eliminate its previously-available, post-deprivation refund remedy for certain taxpayers, this Court offered the following analysis:

> [W]hat a State may *not* do, and what Georgia did here, is to reconfigure its scheme,

> unfairly, in *mid-course*—to "bait and switch," as some have described it. Specifically, in the mid-1980's, Georgia held out what plainly appeared to be a "clear and certain" postdeprivation remedy, in the form of its tax refund statute, and then declared, only after [the taxpayer] and others had paid the disputed taxes, that no such remedy exists. . . .
>
> Nor can there be any question that, during the 1980's . . . Georgia did appear to hold out a "clear and certain" postdeprivation remedy. To recall, the Georgia refund statute says that the State *"shall"* refund *"any and all* taxes or fees which are determined to have been erroneously or *illegally assessed* and collected from [a taxpayer] under the laws of the state, whether paid voluntarily or involuntarily."

Id. (emphasis in original). This is precisely what has happened with the Petitioners in this case. At the time the Petitioners filed their separate income tax returns pursuant to Revenue Policy 41P225, Kentucky held out a "clear and certain" post-deprivation remedy in the form of its refund statutes. It was only several years after the Petitioners filed their refund claims based on the Kentucky Supreme Court's ruling in *GTE* that the General Assembly enacted the 2000 Amendments, which retroactively precluded the Petitioners from pursuing any post-deprivation remedy to recover their corporate income tax overpayments.

The Kentucky Supreme Court rejected the Petitioners' argument that they possessed a due process right to pursue their refund claims under this Court's decisions in *McKesson* and *Reich*. In addressing the issue, the Kentucky Supreme Court determined that such a right only exists when a taxpayer alleges a refund is owed for taxes collected by a state in violation of the constitution:

> It is important to note that the Supreme Court made its ruling in *McKesson* premised upon a refund being due for an unconstitutional application of a tax, which naturally impacts federal due process. However, this Court in *GTE* did not make a constitutional declaration, but instead merely interpreted a constitutional statute. . . . Since constitutionality was not involved, the analysis then goes from deprivation of property without due process of law to the well-established analysis of when and how the government may enact economic legislation, specifically revenue-controlling legislation, under the *Carlton* line of cases.

296 S.W.3d at 402. The Kentucky Supreme Court's limitation of the due process guarantees recognized in *McKesson* and *Reich* to instances in which taxpayers seek refunds of taxes paid under unconstitutional laws is inconsistent with this Court's pronouncement on the issue, a pronouncement that is sufficiently clear for other jurisdictions that have considered the question to have followed uniformly.

In addressing the Petitioners' due process argument, the Kentucky Supreme Court articulated its understanding that this Court's decision in *McKesson* was "premised upon a refund being due for an unconstitutional application of a tax." *Id.* While there is a limited textual basis for the court's reading of *McKesson*,[2] the more complete reading establishes that this Court did not intend for its decision to be construed so narrowly. The best example of the Court's intention in *McKesson* is found in the following statement:

> To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a clear and certain remedy for *any erroneous or unlawful tax collection* to ensure that the opportunity to contest the tax is a meaningful one.

496 U.S. at 39 (internal quotations and citations omitted, emphasis added). This statement shows that

[2] Specifically, the following language appears in this Court's opinion: "Our precedent establishes that, if a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford the taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately held unconstitutional." 496 U.S. at 22.

this Court intended for *McKesson's* guarantee of "meaningful backward-looking relief" to apply to all refund claims involving "erroneous or unlawful tax collection" and not just to unconstitutional tax collection. This conclusion is logical as there is no reasonable basis for distinguishing between the remedies available to taxpayers that have paid unconstitutional taxes and those that have paid taxes that are otherwise unlawful. In both instances, the taxpayer has made payments to a state that were not owed and due process demands that the taxpayer be afforded an opportunity to have those payments refunded.

Numerous other jurisdictions that have considered this question have properly followed this Court's determination that due process guarantees "meaningful backward-looking relief" to all taxpayers who have paid taxes under unlawful provisions, and not just those that have paid under unconstitutional provisions. In *O'Connell Management Company, Inc. v. Massachusetts Port Authority*, 744 F.Supp. 368 (D. Mass. 1990), a federal district court rejected a state's invitation to limit the application of *McKesson* to refund claims involving taxes paid under unconstitutional statutes:

> [The State] argues that *McKesson* only applies to deprivations which violate the Constitution. "Congress—and Congress alone—must establish the appropriate relief from any violation of a *statutory* provision." [The State's] construction of *McKesson* is too narrow. The cases from which the Court

> derived its conclusion that postdeprivation remedies are constitutionally mandated involved violations of both constitutional and statutory law . . . I do not believe that the Supreme Court recognizes a substantive distinction between constitutional and statutory violations in this context.

Id. at 378; *see also, California State Outdoor Advertising Association, Inc. v. State of California*, 2006 U.S. Dist. LEXIS 11174 (E.D. Ca. March 2, 2006) (application of *McKesson* when permit fee paid pursuant to a regulation subsequently determined to be void for failure to comply with the Administrative Procedures Act). Similar decisions have been reached by other state courts that have considered the scope of *McKesson's* applicability. *See, e.g., City of Houston v. Harris County Outdoor Advertising Association*, 879 S.W.2d 322, 334 (Tex. App. 1994) ("The Due Process Clause applies to any *unlawful collection* of taxes, including one that violates state law or provisions of the state constitution.") (emphasis in original).

The Kentucky Supreme Court's decision to limit the due process guarantees of *McKesson* to taxpayers who have paid taxes under a law subsequently determined to be unconstitutional is in direct conflict with this Court's determination that no such limitation exists. 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 or erroneous collection of taxes as well as the unconstitutional collection of taxes.

B. This Court Should Clarify That The Due Process Clause Prohibits A State From Enacting Legislation With A Period Of Retroactivity Of Six To Ten Years, And In So Doing Offer Guidance To States And Taxpayers On The Due Process Limits Of Retroactive Legislation.

While this Court "repeatedly has upheld retroactive tax legislation against a due process challenge," *Carlton*, 512 U.S. at 30 (citations omitted), it has also acknowledged that retroactive application of a law is not without limits and cannot be "so harsh and oppressive as to transgress the constitutional limitation." *Welch v. Henry*, 305 U.S. 134, 147 (1938). In *Carlton*, this Court addressed the test that should apply when a taxpayer raises a due process challenge to retroactive tax legislation:

> "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. . . .
>
> "To be sure, . . . retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . 'The retroactive aspects of the legislation, as well as the prospective aspects, must meet

> the test of due process, and the justifications for the latter may not suffice for the former'. . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

Carlton, 512 U.S. at 30-31 (internal quotations omitted). While this Court has refrained from identifying an absolute standard beyond which retroactivity periods will run afoul of due process—*e.g.*, tax legislation with a period of retroactivity longer than one year—this Court has considered "a modest period of retroactivity" as a factor that supports the constitutionality of retroactive legislation. *Id.* at 32. In her concurring opinion in *Carlton*, Justice O'Connor expounded in greater detail on this notion of modesty and the extent to which it factors into this Court's decisions on the constitutionality of retroactive tax legislation:

> In every case in which we have upheld a retroactive federal tax statute against due process challenge, however, the law applied retroactively for only a relatively short period prior to enactment. In *Welch v. Henry*, the tax was enacted in 1935 to reach transactions completed in 1933; but we emphasized that the state legislature met only biannually and it made the revision "at the first opportunity after the tax year in which the income was received." A period of retroactivity longer than the year preceding the legislative session in which the law was

> enacted would raise, in my view, serious constitutional problems.

Id. at 38 (O'Connor, J., concurring).

Lower courts have followed this Court's determination in *Carlton* in different ways. Some courts have read *Carlton* as imposing a "modesty" requirement for retroactive legislation and have followed Justice O'Connor's pronouncements in concluding that due process is violated by a period of retroactivity longer than the year preceding the legislative session in which the law was enacted. *See, e.g., Rivers v. State*, 490 S.E.2d 261, 265 (S.C. 1997) (recognizing a period of retroactivity must be "modest" and finding that a three-year period of retroactivity violated due process); *Estate of Edward Kunze v. Commissioner of Internal Revenue*, 233 F.3d 948, 954 (7th Cir. 2000) (recognizing that "the period of retroactivity must be moderate" and upholding a curative statute with a period of retroactivity of only eleven months); *City of Modesto v. National Med., Inc.*, 128 Cal. App. 4th 518, 528-29 (Ca. App. 2005) (stating that "the legislative body must act promptly and establish only a moderate period of retroactivity" and invalidating retroactive legislation that applied to tax years four to eight years preceding the legislative session that produced the legislation). Other courts have rejected the notion that the "modesty" of retroactive tax legislation should be considered as a separate factor independent of the due process standard identified by this Court in *Carlton*. *See, e.g., United States v. Atlantic Richfield Company*, 1996 U.S. Dist. LEXIS

22886, *30-31 (D. Mo. 1996) (finding that *Carlton* simply considered "modesty" in its analysis and did not set forth a "modesty" requirement that all retroactive tax legislation must meet to satisfy due process). These courts generally have refused to follow Justice O'Connor's position that serious constitutional problems arise when state legislatures adopt periods of retroactivity that extend back longer than the year preceding the legislative session that produced the legislation. *See, e.g., Montana Rail Link v. United States*, 76 F.3d 991, 994 (9th Cir. 1996) (determining that limiting legislation to "a one or two year period of retroactivity . . . would have been arbitrary and irrational"); *Licari v. Commissioner*, 946 F.2d 690 (9th Cir. 1991) (upholding a tax penalty enacted in 1986 with retroactive effect to tax returns filed from 1982 through 1984); *Rocanova v. United States*, 955 F.Supp. 27 (S.D.N.Y. 1996) (upholding legislation that extended the statute of limitations on tax collection actions from six to ten years), *aff'd per curiam*, 109 F.3d 127 (2d Cir. 1997).

The Kentucky Supreme Court has adopted a reading of *Carlton* that recognizes a role for a "modesty" requirement, but that rejects the notion that due process imposes an absolute temporal limitation on the extent to which tax legislation may be applied retroactively:

> Retroactive application of a statute need only be (1) supported by a legitimate legislative purpose (2) furthered by rational means,

> which includes an appropriate modesty requirement. This requires analysis of the facts and circumstances of each case, rather than applying a specified modesty period. The pertinent question is whether the period of retroactivity is one that makes sense in supporting the legitimate governmental purpose (rationally related).

296 S.W.3d at 399. The Kentucky Supreme Court applied this standard in upholding the constitutionality of the 2000 Amendments, which retroactively applied to tax years between 1990 and 1994 and precluded the Petitioners from pursuing refund claims that had been pending as far back as 1995. Indeed, the 2000 Regular Session of the General Assembly, in which the 2000 Amendments were enacted, was the third such legislative session following the filing of the majority of the refund claims at issue in this case.[3]

It should matter little whether courts consider the modesty requirement as a test that must be

[3] The Kentucky Supreme Court determined that the General Assembly enacted the 2000 Amendments "[a]t the first reasonable opportunity, as it became aware of the issues. . . ." 296 S.W.3d at 401. There is no factual basis for this determination and the undisputed evidence before the Franklin Circuit Court on the parties' summary judgment motions established that the General Assembly was aware of the refund claims, and the amount of money at issue in those refund claims, before the 1996 Regular Session.

satisfied independent of the standard announced by this Court in *Carlton* or as factor to be considered within the determination of whether the period of retroactivity is "supported by a legitimate legislative purpose furthered by rational means." *Carlton*, 512 U.S. 31. The outcome should be the same under both approaches when the tax legislation being considered applies retroactively to a period of more than one year preceding the legislative session in which the legislation is enacted, as due process should limit state legislatures to enacting retroactive legislation only at the first opportunity to do so. It is fundamentally irrational for a state legislature to understand that a revenue or tax problem exists that can only be remedied through retroactive legislation, and fail to enact the necessary legislation at the first possible legislative session. This Court should grant certiorari to clarify the role that "modesty" plays in a due process challenge to retroactive legislation, and to establish that retroactive legislation violates due process when a state legislature fails to enact the legislation at the first possible legislative session.

C. This Court Should Establish That Equal Protection Precludes A State From Treating Similarly-Situated Taxpayers Differently Based Solely On The Date The Taxpayers Filed Income Tax Refund Claims And The Order In Which Those Claims Were Processed By A State Agency.

This Court has long recognized that a state has "broad powers to impose and collect taxes," *Allegheny Pittsburgh Coal Company v. County Commission of Webster County, West Virginia*, 488 U.S. 336, 344 (1989), and to establish classifications between and among various taxpayers. *See Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910). While these classifications are often permissible, this Court recognizes that the Fourteenth Amendment's Equal Protection Clause does impose a limit on the exercise of a state's authority:

> [There] is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule has often been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 527 (1959). Stated otherwise, a tax law that creates a classification between taxpayers cannot withstand an equal protection challenge if the classification drawn by the state is merely illusory. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). While instances of this Court invalidating state tax classifications on equal protections grounds are few, such action has been taken when it has been clear that similarly-situated taxpayers have been treated differently as a result of a state law or administrative policy. *See, e.g., Allegheny*, 488 U.S. at 346 (holding that property owners were denied equal protection of the law when they were taxed on the fair value of their property, and other similarly-situated property owners enjoyed the tax benefits of having their property under-valued).

This case involves similarly-situated taxpayers being treated differently as a result of the 2000 Amendments. There was only one class of taxpayers affected by the Kentucky Supreme Court's decision in *GTE*—multi-corporate groups that operated on a unitary basis. Equal protection requires that each member of this class of taxpayers be treated similarly for corporate income tax purposes, but the enactment of the 2000 Amendments had the effect of dividing this single class into four subclasses:

> (1) Taxpayers that did not comply with Revenue Policy 41P225, but filed combined returns prior to *GTE* and were allowed by the state to benefit from this filing method;
>
> (2) Taxpayers that complied with Revenue Policy 41P225, but who filed amended combined returns after *GTE* and obtained

refunds during the period between *GTE* and the enactment of the 2000 Amendments;

(3) Taxpayers that complied with Revenue Policy 41P225, but that filed amended combined returns after *GTE* and obtained refunds after, and despite, the enactment of the 2000 Amendments; and

(4) Taxpayers, including the Petitioners, that complied with Revenue Policy 41P225, and filed amended combined returns after *GTE*, but were not able to pursue refunds because no administrative action was taken on their claims until after the enactment of the 2000 Amendments.

The 2000 Amendments single out only this last subclass of taxpayers that filed income tax refund claims after the Kentucky Supreme Court's decision in *GTE*, and whose claims were not processed by the Kentucky Revenue Cabinet before the enactment of the 2000 Amendments. This limited subclass of taxpayers have been deprived of the opportunity to pursue their income tax refund claims, while other similarly-situated taxpayers faced no such deprivation. There is no question that the 2000 Amendments treated this subclass of taxpayers, including the Petitioners, differently than similarly-situated taxpayers who were permitted to file on a combined basis prior to *GTE* or subsequently pursue their income tax refund claims. The only issue for equal protection purposes is whether this disparate treatment is supported by a rational basis.

The Kentucky Supreme Court dismissed the Petitioners' equal protection arguments perfunctorily:

> [S]tatutes or practices that have the effect of distinguishing between entities solely on an economic basis are "presumed to be valid and . . . generally comply with federal equal protection requirements if the classifications that they create are rationally related to a legitimate state interest." The analysis is the same under the Kentucky Constitution. This "rational basis" test is the same as required under due process for economic legislation, and, as discussed above, the 2000 amendments to the tax statute clearly satisfy it.

296 S.W.3d at 403 (internal citations omitted). The "legitimate state interest" identified by the Kentucky Supreme Court was "raising and controlling revenue" and the prevention of an alleged "significant and unanticipated revenue loss." *Id.* at 400.

While "raising and controlling revenue" and the prevention of "a significant and unanticipated revenue loss" undoubtedly serve as a rational basis for certain state legislation, these considerations do not offer ample justification for depriving the Petitioners of the right to pursue their income tax refund claims, a right enjoyed by other similarly-situated taxpayers. This Court should take the opportunity presented by the unique facts of this case—*i.e.*, a class of similarly-situated corporate taxpayers divided by state legislation that deprives certain of the taxpayers of the right to pursue refund claims based on the filing of combined returns, a right afforded to other members of the class—to remind legislators and regulators alike that equal protection *does* preclude states from enacting discriminatory tax legislation. This Court should serve notice to the states that they will not be permitted to address purported revenue needs by enacting legislation that targets a specific group of taxpayers for discriminatory treatment.

At least one state court has concluded that a state cannot justify the elimination of refund procedures for a select group of taxpayers on the grounds of preservation of state revenue. In *Armco Steel Corp. v. Department of Treasury, Corp. Franchise Fee Div.*, 358 N.W.2d 839 (Mich. 1984), the Michigan Supreme Court invalidated a statute strikingly similar to the 2000 Amendments in its effect. The Michigan legislature confiscated certain refund claims brought by taxpayers that made payments following audits subsequently determined to be unauthorized. The state attempted to justify the confiscation by arguing that it would suffer a large potential revenue loss if required to grant the refunds. The court rejected this justification, finding that there was no rational basis supporting the disparate treatment between those taxpayers that made payments and subsequently sought refunds and those that refused to make the payments in the first instance. The court specifically held that the time of filing a refund claim is not a natural distinguishing characteristic upon which a classification of similarly-situated taxpayers may be based. *Id.* at 841-43.

A similar set of facts is presented in this case. The Petitioners complied with Revenue Policy 41P225 and have been denied the opportunity to pursue refunds of the taxes they would not have paid if permitted to file combined returns, while similarly-situated taxpayers that disregarded Revenue Policy 41P225 have enjoyed the benefits of combined filing. This is the result intended and carried out by the 2000 Amendments. This Court should grant certiorari to emphasize that the Equal Protection Clause still has viability in the context of tax legislation, and that states will not be able to address their revenue short-falls by discriminating against targeted groups of taxpayers.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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