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IN THE  
**Supreme Court of the United States**

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MACY'S DEPARTMENT STORES, INC., et al.,

*Petitioners,*

v.

CITY AND COUNTY OF SAN FRANCISCO,

*Respondent.*

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**On Petition for a Writ of Certiorari  
to the Court of Appeal of the State of California,  
First Appellate District**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

When a taxpayer has successfully challenged a state or local tax on grounds that it discriminates against interstate commerce, the Due Process Clause of the Fourteenth Amendment imposes two separate requirements on the remedy that taxing authorities must provide. First, if litigants are not permitted to make a pre-payment challenge, the taxing authority must provide a “clear and certain” post-deprivation remedy, either through a full refund or through retroactively “reformulating” the tax scheme. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Second, a State cannot undertake a “bait and switch” as to that post-deprivation remedy. *Reich v. Collins*, 513 U.S. 106 (1994). This case presents two questions regarding the scope of those requirements:

1. Whether, under *McKesson*’s “reformulat[ion]” option, the Due Process Clause requires the taxing authority to adopt a retroactive reformulation that eliminates the discrimination in the tax scheme rather than a plaintiff-specific, non-generalizable partial refund remedy.

2. Whether the Due Process Clause prohibits a State from diluting an existing postdeprivation remedy midstream by awarding only a partial refund for an unconstitutional tax when existing state law made clear that a full refund is the only proper remedy.

**PARTIES TO THE PROCEEDINGS**

The parties to the proceedings below included Macy's Department Stores, Inc., Broadway Stores, Inc., Federated Western Properties, Inc., and Macy's West, Inc. Those entities have since been merged into Macy's Department Stores, Inc., which is one of the three petitioners in this matter. The two remaining plaintiffs below were Federated Systems Group, Inc., and Macys.com, Inc. They are also petitioners here. All three of these entities—Macy's Department Stores, Inc., Federated Systems Group, Inc. and Macys.com, Inc. are wholly-owned subsidiaries of Federated Department Stores, Inc., which is a publicly-traded company. The three entities are collectively referred to in this Petition as "Macy's."

The remaining party, the City and County of San Francisco (the "City"), is the respondent.

**RULE 29.6 CORPORATE DISCLOSURE  
STATEMENT**

Petitioners are all wholly-owned subsidiaries, either directly or indirectly, of Federated Department Stores, Inc., a publicly-held company. No publicly-held company owns more than 10% of the stock of Federated Department Stores, Inc.

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## **PETITION FOR A WRIT OF CERTIORARI**

Macy's Department Stores, Inc., Federated Systems Group, Inc., and Macys.com, Inc. (collectively "Macy's") respectfully petition for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, First Appellate District.

### **OPINIONS BELOW**

The California Court of Appeal's opinion is reported at 50 Cal. Rptr. 3d 79. (Pet. App. 2a-23a). The trial court's opinion is unreported. (Pet. App. 24a-41a).

### **JURISDICTION**

The California Court of Appeal, First Division, issued its opinion on October 18, 2006. Macy's filed a timely petition for discretionary review in the California Supreme Court on November 27, 2006, which the California Supreme Court denied on January 17, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The principal provisions involved are the Due Process Clause of the Fourteenth Amendment to the United States Constitution (Pet. App. 43a); the Commerce Clause of Article I, § 8 of the United States Constitution (Pet. App. 42a); and Part III, Chapters 900 and 1000, of the San Francisco Municipal Code ("S.F. Code"), the relevant portions of which are set out in the Appendix to this Petition. (Pet. App. 42a-54a).

## INTRODUCTION

The decision below creates substantial confusion on two interrelated questions that are vitally important any time a taxpayer successfully challenges the constitutionality of a state or local (collectively "state") tax law. In particular, the Court has held that the Constitution, in addition to constraining the States' power to tax, also imposes a floor on the remedy that States must offer when they impose an unconstitutional tax. Unfortunately, the decision below muddies the substantive contours of that remedial requirement in two important ways.

First, in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the Court held that when a tax is struck because it discriminates against interstate commerce, the Due Process Clause requires the State either (1) to give a full refund to the successful litigant or (2) to retroactively reformulate the tax system to remove the discrimination, and then to retroactively apply the (now non-discriminatory) tax law to the contested period. And any such reformulation must offer a "clear and certain" remedy that provides "meaningful backward-looking relief."

While *McKesson's* full refund option is self-explanatory, the decision below causes confusion on *McKesson's* reformulation option in two ways. First, before the decision below, States had agreed that a *McKesson* reformulation must offer system-wide relief. That is, the State must reformulate *the tax system itself*, not merely provide a plaintiff-specific, litigation-specific partial refund to a successful litigant. The decision below, however, expressly rejected the idea that a *McKesson* reformulation must offer "a comprehensive remedy applicable to all taxpayers," Pet. App. 8a n.9, and the remedy it adopted, a plaintiff-specific, non-generalizable partial refund, clearly embodied its rejection of this principle. Second, even before the decision below, courts had struggled defining the maximum burdens a *McKesson* reformulation may permissibly impose on

taxpayers seeking relief. Some courts have pointed to the burdens of a proposed reformulation as a reason to require the taxing authority instead to provide a full refund. Other courts, however, including the court below, have upheld “reformulations” that seem just as burdensome as those that the first courts had rejected. In short, courts need direction regarding the permissible scope of a *McKesson* reformulation remedy.

In addition, the decision below exacerbates confusion on another remedial front. The Court has held that the Due Process Clause also limits the States’ power to *change* the remedy during the pendency of a taxpayer’s challenge. In the Court’s words, States cannot pull a “bait and switch.” *Reich v. Collins*, 513 U.S. 106, 111 (1994); *Newsweek, Inc. v. Florida Dep’t of Revenue*, 522 U.S. 442, 444 (1998). The Virginia Supreme Court has understood this rule to bar any material change to the post-deprivation remedy. See *Harper v. Virginia Dep’t of Taxation*, 462 S.E.2d 892 (Va. 1995). The court here, by contrast, much like the Washington Supreme Court in *W.R. Grace & Co. v. Department of Revenue*, 973 P.2d 1011 (Wash. 1999), saw in those cases only a “general principle” that taxpayers must receive *some* post-deprivation remedy. And under that “general principle,” these courts approved dramatic midstream changes to the States’ remedial schemes. The California and Washington approach cannot be squared with Virginia’s no-material-change rule, and only this Court can choose between the two.

Remedies matter. The *McKesson* interpretation adopted below will both decrease the States’ incentives to avoid imposing unconstitutional taxes (as even when a tax is challenged, the State need provide little relief), and at the same time reduce a taxpayer’s incentives to bring the challenge. And allowing States an essentially unrestricted right to change their post-deprivation remedies during the pendency of a challenge simply compounds the problem—even States that have pre-committed to full refund remedies could revisit that choice if they lose, meaning taxpayers

considering suit will know that any victory may be pyrrhic at best.

Both taxpayers and States need clear guidance on these remedy issues, and this case, where the unconstitutionality of the underlying tax is essentially undisputed, is an ideal vehicle for providing it. Accordingly, petitioner respectfully urges the Court to grant certiorari and reverse the decision below.

#### STATEMENT

##### **A. During the Relevant Period, San Francisco's Business Tax Required Businesses to Pay the Higher of Two Alternative Measures.**

From 1970 to 2001, San Francisco's Business Tax ordinances required businesses to calculate their liability under two different taxes, and then pay only the higher of the two. The first of the two taxes, the payroll tax, assessed 1.5% of all salaries, wages and commissions paid to all individuals who worked in San Francisco. S.F. Code §§ 902.6, 903 (Pet. App. 44a-45a). The second of the two taxes, the gross receipts tax, equaled 0.15% of all receipts from goods sold or services performed in San Francisco. S.F. Code §§ 1002.6, 1004.08 (Pet. App. 49a-51a). In the lower courts' parlance here, the two taxes worked in "tandem." E.g., Pet. App. 4a.

So, if a business in San Francisco had a \$4,000 liability under the payroll tax and a \$5,000 liability under the gross receipts tax, the business was required to pay the gross receipts tax and was exempt from the payroll tax.

##### **B. Later, San Francisco Changed Its Business Tax to be Based on One Measure Only.**

In April 2001 (after this suit was filed), San Francisco repealed the gross receipts measure of the Business Tax, seeking to cure the constitutional issues with its tandem tax. The City made the repeal retroactively effective to January 1, 2000. See San Francisco Ordinance 63-01 (Joint Exhibit 2 ("JX2")) 260-336). Accordingly, San Francisco's Business

Tax no longer takes the greater of the two measures, but instead taxes all business taxpayers based on payroll alone. The new law also recalculated all businesses' taxes for the year 2000 based on the payroll tax, and established a refund provision that returned to taxpayers the amount by which their 2000 Business Tax liability exceeded what it would have been under the payroll tax. See *id.* (JX2 261–63).

**C. The Trial Court Found that San Francisco's Higher-of-Two-Measures Tax Violated the Internal Consistency Test under the Commerce Clause.**

In January 1999, before the change in the law, Macy's filed claims seeking a refund of the Business Taxes it had paid since 1995 under the tandem tax scheme. When the City denied its refund, Macy's filed this lawsuit.

Macy's asserted that the Business Tax failed the internal consistency test and thus violated the Commerce Clause. Under this well-established test, a tax is invalid if "the imposition of a tax identical to the one in question by every other State would add [a] burden to interstate commerce that intrastate commerce would not also bear." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). See also *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644–45 (1984). Indeed, a litigant need not prove that it has suffered any actual discrimination. Rather, it is the possibility of such discrimination—if multiple taxing authorities were to use the same scheme—that triggers the unconstitutionality.

The trial court held (and the City did not challenge on appeal) that, if every city imposed the same tax scheme as San Francisco, a business operating in multiple cities (including cities in different States) faces greater tax burdens than a business operating in San Francisco alone. See *Pet. App.* 29a–30a.

A simple example illustrates the point. Assume two businesses (A and B) have the same total payroll expenses and gross receipts. For both businesses, the payroll tax would

yield \$5,000 in tax liability, and the amount due under the gross receipts tax would be \$4,000. Business A, the local business, has all of its payroll and earns all of its receipts in San Francisco. Business B, the interstate business, incurs its payroll costs in San Francisco, but obtains its receipts in Seattle. If both cities use the tandem tax scheme, Business A pays only a payroll tax in San Francisco (i.e., the greater of the \$5,000 payroll-based tax and the \$4,000 receipts-based tax). Business B, however, owes payroll tax in San Francisco (i.e., the greater of the \$5,000 payroll tax and the \$0 receipts tax) and gross receipts tax in Seattle (i.e., the greater of the \$0 payroll tax and the \$4,000 receipts tax) for a total of \$9,000. Cf. Pet. App. 29a. Thus, the interstate business pays two taxes, while the local taxpayer pays only one.

**D. The City Proposed a Partial Refund that Purported to Return the Hypothetical Excess Taxes Macy's Could Have Paid During the Relevant Period.**

Most of the one-day trial did not concern whether the pre-2000 San Francisco Business Tax violated the internal consistency test (as it clearly did), but rather what relief was required to remedy that violation.

1. The City proposed a partial refund remedy that it claimed would reflect the maximum amount by which Macy's could have hypothetically been "over-taxed" if the various cities in which Macy's was located had all used the impermissible tandem tax. Basically, the City's expert, Prof. Steven Sheffrin, proposed a remedy (the "Sheffrin Rule") that (1) calculated Macy's liability under the tandem tax as though all of the different Macy's stores were consolidated into one big store located in San Francisco, (2) calculated the tandem tax liability as though each of its stores were individually taxed by the jurisdictions in which they were located under the same tandem tax that San Francisco used, and then (3) refunded to Macy's the excess of step (2) over step (1). See generally Expert Report of Steven M. Sheffrin

(“Sheffrin Rep.”) at 2–4. See also Expert Report of Everett P. Harry (“Harry Rep.”) at 4–7. That is, the expert compared what Macy’s tax liability would have been as a “local” taxpayer, to what it would have been as an “interstate” taxpayer if all the jurisdictions in which it operated had the tandem tax. The difference between the two numbers, the City claimed, represented the hypothetical “harm” that Macy’s suffered as a result of the internal consistency violation. *Id.* at 4.

2. The calculations involved in implementing these steps were anything but straightforward. Macy’s had 141 stores. The Sheffrin Rule required calculation of each store’s separate hypothetical liability under the tandem tax, in turn requiring store-by-store payroll and receipts information for each separate location for each year in which Macy’s sought a refund, some of which Macy’s happened to have, but which many taxpayers, as further discussed below, may not. In other words, the remedy afforded to Macy’s for the illegal taxes it paid in San Francisco turned on its ability to provide years-old information not even relevant to its stores there.

And, even to the extent that this information was available, the City expert, Everett Harry, who performed the calculation, was still required to rely on estimates and guesswork at various stages of his calculation. For example, in calculating each store’s payroll tax liability, the City’s accounting expert had to invent some means of allocating corporate office payroll to the respective jurisdictions. Harry decided to allocate that payroll based on net sales by store. That in turn required a preliminary analysis of net sales per store as a percentage of total net sales, a task made more difficult by the fact that Macy’s tracked its sales on a fiscal year rather than calendar year basis (as the San Francisco tax required), requiring Harry to devise some way to estimate the correlation of the two. Then he added store-specific payroll to the estimated proportionate share of corporate payroll. He then compared the payroll measure of each store to the gross receipts measure based on net sales (again based

on his translation of fiscal year to calendar years sales figures). See Harry Rep. at 4-7.

Based on his estimates and assumptions, Harry opined that, except for certain gross receipts for which he could not identify a store and thus simply excluded, if all the Macy's stores had been located in San Francisco between 1995 and 2000, the payroll measure would have yielded the higher tax liability, and Macy's total tax liability would have been \$37,102,668. Id. at 5. If, by contrast, each of the Macy's stores had been individually taxed under a tandem tax scheme like that San Francisco employed (i.e., the assumption that the internal consistency test requires), Harry estimated that Macy's total tax liability across all its stores would have been \$37,566,194. Id. at 7. Thus, based on these complex, document-intensive, estimate-driven calculations, the expert opined that Macy's had been hypothetically "over-taxed" by \$463,526 as a result of the internal consistency violation. Id. at 6-7.

Harry made no effort to calculate the hypothetical tax overpayments for either Macys.com or Federated Systems Group, Inc., the other two plaintiffs (and petitioners here). For these entities it would have been even more difficult, if not impossible, to apply Sheffrin's Rule. Federated Systems Group, Inc., for example, provides data management services to Macy's and unrelated companies. It has (and had during the period here) more than 1,000 employees who work in facilities across the country. But the company did not track revenues on a locational basis, making the calculations that the Sheffrin Rule required virtually impossible.

3. Macy's expert, Dr. Charles E. McLure, Jr., criticized the City's proposed methodology as being both overly burdensome and uncertain. He noted, for example, that the calculations under the rule would require a taxpayer seeking relief to show both its payroll and its gross receipts at each separate location in which the taxpayer operated for each year for which the taxpayer sought relief. He pointed out that

there are more than 80,000 taxing jurisdictions in the United States, and that many taxpayers, such as for example UPS or a fast-food purveyor, may operate in literally thousands of those jurisdictions. Even assuming those taxpayers retained the records necessary for the backward looking hypothetical calculations—records that he noted the taxpayers may have no business reason to even create—the hypothetical calculations themselves would be overwhelming. See Expert Report of Charles E. McLure, Jr. (“McLure Rep.”) at 10–11.

Additionally, at least for some taxpayers, it would be difficult to determine whether various business components within a given taxing jurisdiction should be combined for purposes of the Sheffrin calculation. McLure offered the example of a vertically-integrated oil company that may have both refining and service station operations in a given tax jurisdiction. Those operations may have very different payroll/gross receipt mixes. *Id.* at 12–13. In implementing the Sheffrin Rule then, one would need to decide whether to treat the separate operations within the jurisdiction as only one entity, or to run the calculations treating them separately within each jurisdiction. *Id.* The Sheffrin Report itself offered no answer to this question that would be crucial in applying the rule more broadly.

In short, McLure pointed out that Sheffrin’s Rule was a plaintiff-specific “remedy” that (1) imposed significant compliance costs and burdens on Macy’s, (2) would be difficult, if not impossible, to extend to other business entities that had paid San Francisco’s unconstitutional tax, and (3) would eliminate taxing authorities’ incentives to avoid such unconstitutional taxes in the first place.

**E. The Trial Court Rejected the City’s Proposed Partial Refund, Finding that It Was Not a “Clear and Certain” Remedy as the Federal Due Process Clause Required.**

In post-trial briefing, Macy’s argued that the City’s unduly burdensome, non-generalizable approach to

calculating a partial refund would not satisfy *McKesson's* "clear and certain remedy" requirement. Pet. App. 58a–59a. Macy's also argued that awarding only a partial refund in this case would amount to a constitutionally prohibited "bait and switch" under *Reich* and *Newsweek* in that the California Court of Appeal had previously decided that California law required a full refund—and expressly rejected a similar partial refund theory on grounds that it would be too burdensome—in a materially indistinguishable case in which a virtually identical San Francisco Business Tax was found to violate the Commerce Clause. Pet. App. 59a–60a.

The trial court, relying on the earlier California appeals court decision—*General Motors Corp. v. City & County of San Francisco*, 81 Cal. Rptr. 2d 544 (Cal. Ct. App. 1999)—granted Macy's a full refund of the Business Taxes it paid between 1995 and 1999, plus interest. Pet. App. 31a.<sup>1</sup>

**F. The Appellate Court Reversed the Trial Court's Full Refund and Remanded the Case to the Trial Court to Implement a Partial Refund.**

The City appealed the trial court's full refund remedy. As appellee, Macy's supported the judgment by arguing, *inter alia*, that the Due Process Clause as interpreted in *McKesson*, Pet. App. 68a–70a, as well as the underlying policy bases supporting *McKesson*, Pet. App. 72a–87a, prohibited a partial refund remedy here. Similarly, Macy's again argued that if the appellate court deviated from the settled law announced in its own previous express rejection in *General Motors* of a partial refund remedy, that change would

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<sup>1</sup> With regard to the Business Taxes Macy's had paid in 2000, the trial court found that the retroactive change in the law to make it a payroll-only tax cured the constitutional deficiency and that the statutory refund provision was a proper reformulation that adequately remedied those who were injured by the unconstitutional tax in 2000. Macy's did not appeal the trial court's finding. Pet. App. 39a–40a.

amount to a constitutionally prohibited “bait and switch” under *Reich* and *Newsweek*. Pet. App. 70a–71a.

The appellate court rejected Macy’s arguments and reversed the trial court. The appeals court found no due process bar under *McKesson* and its progeny to a plaintiff-specific partial refund in this case. Rather than focusing on *McKesson*’s requirement of a “clear and certain remedy,” as the California appellate court had done in *General Motors* and the trial court had done here, the appellate court instead dwelt on *McKesson*’s caveat that the taxing authority “retains flexibility in responding” to a determination that a tax violates the Commerce Clause. Pet. App. 7a–8a (quoting *McKesson*, 496 U.S. at 39). *McKesson*, the appeals court concluded, allowed the court here to fashion a remedy that, without any systematic reformulation of the tax scheme itself, attempted to refund a hypothetical estimate of the hypothetical excess taxes that Macy’s might have paid during the relevant period. Pet. App. 15a. Indeed, the court expressly rejected the notion that *McKesson* required “a comprehensive remedy applicable to all taxpayers.” Pet. App. 8a n.9.

The court also rejected Macy’s arguments that the extremely burdensome nature of the remedy, combined with the vanishingly small prospect of meaningful relief, would deter other taxpayers from pursuing refunds and that, as a result, taxing authorities would be insufficiently deterred from imposing unconstitutional taxes in the future as they would likely be able to retain virtually all of their ill-gotten gains. The appellate court dismissed these concerns in a single sentence: “We consider here only the claims before us [ ] and express no general opinion regarding the appropriate remedy in other cases.” Pet. App. 10a (citation and punctuation omitted).

Finally, the court reviewed this Court’s decisions in *Reich* and *Newsweek* and saw in these cases not a rule that prevented midstream changes in the nature of the post-

deprivation remedy, but rather only a “reaffirm[ation of] a taxpayer’s general right to a post-deprivation refund of illegally-collected taxes, a proposition not under dispute in this case.” Pet. App. 11a.

**G. The California Supreme Court Declined Discretionary Review.**

Macy’s sought discretionary review in the California Supreme Court. In its petition, Macy’s again argued that both *McKesson*’s “clear and certain remedy” requirement and *Reich* and *Newsweek*’s prohibition on doing a “bait and switch” precluded the overly-burdensome, non-generalizable partial refund remedy that the lower court had imposed here. See California Pet. App. 88a–92a. The California Supreme Court declined to review the case. Pet. App. 1a.

**REASONS FOR GRANTING THE WRIT**

**A. The Decision Below Conflicts With The Court’s Holding in *McKesson* and Creates Confusion Regarding the Required Remedy When a State Tax Law Violates the Constitution.**

Whenever a State tax law is declared unconstitutional, the question necessarily turns to the form of relief that the taxing authority must offer as a remedy. In *McKesson*, the Court stated that, if a taxpayer successfully challenges a tax on the grounds that the tax unconstitutionally discriminates against interstate commerce, the State must provide a full refund to the litigant *unless* it can (i) “reformulate” the tax system in a way that cures the discrimination, and then (2) retroactively apply the non-discriminatory tax to taxpayers as a whole. And, while *McKesson* acknowledged that the State has “flexibility” as to the details of any such reformulation, to be an acceptable substitute for a full refund, the reformulation must afford a “clear and certain remedy,” and that the backward looking relief must be “meaningful.”

The full-refund remedy is, of course, self-explanatory. The decision below, however, creates confusion regarding when a given “reformulat[ion]” provides constitutionally-

acceptable alternative relief. This is true in two ways. First, while courts have disagreed as to whether the source of the reformulation must be legislative (rather than judicially-imposed), before the decision below, all courts had understood that any such reformulations must offer system-wide relief. The court here, however, expressly rejected any such requirement. Second, and relatedly, some courts have acknowledged that “meaningful . . . relief” requires that a reformulation not impose undue burdens on taxpayers seeking to take advantage of the backward-looking relief. Other courts, however, including the court here, have upheld remedy provisions that would interpose substantial, and even insurmountable, hurdles to taxpayers seeking relief.

**1. *McKesson* requires States to choose between two types of relief—fully refunding the unconstitutional tax or retroactively reformulating the tax system to remove the discrimination.**

In *McKesson*, the taxpayer challenged Florida’s liquor excise tax on Commerce Clause grounds. 496 U.S. at 22. The Florida Supreme Court struck the tax, finding that it unconstitutionally discriminated against interstate commerce because it provided lower tax rates on certain locally-produced products. In particular, that statute offered reduced excise tax rates for “specified citrus, grape, and sugarcane products, all of which are commonly grown in Florida and used in alcoholic beverages produced there.” *Id.* at 23.

The taxpayer sought both an injunction preventing the State from enforcing the tax on a going-forward basis and also “a refund in the amount of the excess taxes it had paid as a result of its disfavored treatment.” *Id.* at 24–25. In support of the latter, the taxpayer cited Florida’s “Repayment of Funds” statute, which provides for a refund of “an overpayment of any tax, license or account due.” *Id.* at 24. The trial court granted the requested prospective relief, but

denied the refund, a result that the Florida Supreme Court upheld on appeal.

This Court reversed, finding that “the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.” *Id.* at 31. Stated differently, the successful taxpayer must have a “clear and certain remedy” for the unconstitutionally-imposed tax. *Id.* at 39.

The Court then went on to explain that if, as in that case and here, a tax is unconstitutional in that it “operate[s] in a manner that discriminate[s] against interstate commerce,” *id.*, the State has two basic options. First, the State “may, of course, choose to erase the property deprivation itself by providing [the taxpayer] with a full refund of its tax payments.” *Id.* Second, the State may “reformulate and enforce the [unconstitutional tax] during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause.” *Id.* at 40.

The Court further noted that when a State chooses the latter option (i.e., retroactive enforcement of a reformulated and non-discriminatory tax scheme), it may well be the case that the suing taxpayer receives only a partial refund or, indeed, no refund at all. So, for example, in *McKesson* the Court noted that Florida was free to reform its tax system to retroactively apply the higher excise tax rate to the locally-produced products, meaning the plaintiff there (which had already been taxed at the higher rate) would get no refund at all. Alternatively, Florida could retroactively reformulate its tax system to tax the out-of-state products at the lower rate the preferred in-state products received. Or, Florida could even combine the two, changing its tax to both lower the tax rate on out-of-state products and raise it on locally-produced products, until they were the same. *Id.* at 40–41.

Nowhere, however, did *McKesson* suggest that courts are free to fashion partial refund remedies not predicated on a

system-wide “reformulat[ion].” That is, in the non-full-refund context, *McKesson* provides only for systemic relief in the form a system-wide tax “reformulat[ion].” To be sure, such relief may *result* in a partial refund. But, the partial refund is not *the remedy*, itself, but rather only the *result* of the remedy. In other words, in the absence of a full refund, *McKesson* commands system-wide “reformulat[ion],” and that reformulation then results (or could result, depending on the nature of the reformulation) in a partial refund.

**2. The decision below both creates and exacerbates conflicts regarding *McKesson*’s proper interpretation.**

State courts have clearly recognized that a full refund is a permissible form of relief under *McKesson* for discriminatory taxes. See, e.g., *Union Oil Co. of Calif. v. City of Los Angeles*, 94 Cal. Rptr. 2d 81, 87 (Cal. Ct. App. 2000); *General Motors Corp.*, 81 Cal. Rptr. 2d at 547–49; *Harper v. Virginia Dep’t of Taxation*, 462 S.E.2d 892, 899 (Va. 1995); *Dep’t of Revenue v. Kuhnlein*, 646 So. 2d 717, 726 (Fla. 1994) (ordering full refund after finding that it was the only “clear and certain” remedy available on the facts there). With regard to *McKesson* reformulations, however, the decision below creates conflict on one front and exacerbates conflict on another.

a. The decision below creates conflict on the question of whether a *McKesson* “reformulation” must consist of a system-wide change to the tax scheme. Before the decision below, courts had uniformly understood *McKesson* to require just that—system-wide relief, typically accomplished through *legislative* reformulation. So, for example, on remand after *Tyler Pipe Indus., Inc. v. Washington Dep’t of Revenue*, 483 U.S. 232 (1987), it was the Washington *legislature* that adopted a broad “cure” in the form of a retroactively-applicable credit for taxes paid to out-of-state taxing jurisdictions. See *W.R. Grace & Co. v. Dep’t of Revenue*, 973 P.2d 1011, 1018 (Wash. 1999) (interpreting

*McKesson* to allow “the state legislature [to] modify the offending statute retroactively to correct the constitutional defect”); cf. *Stonebridge Life Ins. Co. v. Dep’t of Revenue*, 2006 Ore. Tax Lexis 82, \*9–10 (Ore. Tax Ct. April 20, 2006) (“In Oregon, it is the role of the legislature to craft laws, and it is the role of the courts to interpret them. . . . The court lacks the power to reapportion taxpayer’s income. The court must therefore do that which *is* within its power to accord taxpayer the relief to which it is entitled: order the refund of all taxes paid under the unconstitutional application of [the tax statute in question] except for the \$10 minimum tax.”). Similarly, in *Kuhnlein*, after it voided a tax on internal consistency grounds, the Florida Supreme Court noted that a *McKesson* reformulation would require “the Legislature . . . to fashion a retroactive remedy,” that would be applicable to all taxpayers.

Even those Courts that do not strictly require legislative reformulation still require that the reformulation take a form that would provide system-wide relief. So for example, in the remand after *McKesson* itself, the court called on the Division of Alcoholic Beverages and Tobacco to fashion a reformulation that would reach all taxpayers. See *Div. of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 574 So. 2d 114, 116 (Fla. 1991). And in *ANR Pipeline Co. v. Louisiana Tax Commission*, 923 So. 2d 81, 97 (La. Ct. App. 2005), *cert denied*, 127 S.Ct. 157 (2006), a Louisiana court responded to a constitutional challenge to a property tax by requiring a reassessment of the property value and a new tax computed at “the same valuation and assessment methodology as that used to assess the [discriminatorily] preferred properties,” such that any holder of property in the same class would receive the same tax treatment. “The ultimate goal,” the Louisiana court concluded, “is to achieve uniformity and equality.” *Id.*

That is, in each of these cases, the remedy the court approved was one that vindicated the Commerce Clause by

comprehensively reformulating the tax system, rather than merely providing a partial refund to the litigating taxpayer.

The decision here, however expressly rejected the idea that *McKesson* requires “a comprehensive remedy available to all taxpayers.” And the state court’s analysis confirms that it did not read *McKesson* to impose that requirement. The court did not ask San Francisco to reformulate its tax scheme, see *W.R. Grace & Co.*, 973 P.2d at 1018, and then retroactively apply that reformulated scheme. Nor did the California court itself seek to determine how the tax scheme could be changed to make the scheme constitutional, and then apply that reformulated scheme to all taxpayers. See *McKesson*, 496 U.S. at 40. Rather, the court understood its mission as trying to estimate the hypothetical amount of harm that this taxpayer would have suffered had all cities enacted the same tax as San Francisco. It then awarded as a remedy a refund in that amount.

Also belying the notion of a system-wide reformulation, the court did not even suggest that San Francisco must make this relief available to others. Indeed the City’s expert’s approach most likely could not even be implemented with regard to some (and perhaps most) of San Francisco’s other business taxpayers.<sup>2</sup> And further evidencing that the California court adopted an unprecedented understanding of *McKesson*’s reformulation option, the City conceded that California law precluded the City from making retroactive changes to its tax law that extended back more than one tax year. That is, California law expressly *prevented* the system-wide reformulation that other courts have uniformly

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<sup>2</sup> Further evidencing the lack of “certainty” and system-wide uniformity in the remedy, those taxpayers for which the calculations were too burdensome would presumably still qualify for a full refund under *GM v. San Francisco*, 81 Cal. Rptr. 2d 544 (Cal. Ct. App. 1999), rather than the partial refund remedy adopted here. That means two taxpayers who mount identical challenges could receive vastly different forms of relief.

understood is the *only* alternative that *McKesson* allows to a full refund. In sum, the California court adopted a starkly different understanding of “reformulation” than the other courts that have addressed that issue, and this Court should resolve that conflict.

b. In addition to creating conflict, the decision below also exacerbates a pre-existing conflict on another front. In particular, two courts have expressly noted that a remedy would not pass *McKesson* muster if it was unduly burdensome and imposed uncertainty on taxpayers seeking relief. So, for example, in *General Motors*, the court rejected a remedy virtually identical to the one adopted below, saying that the “procedural aspects” of the remedy “condemn[ed] it as less than ‘clear and certain relief.’” 81 Cal. Rptr. 2d at 548 (citation omitted). This was true, according to the court, because the remedy would have “required [the] taxpayer to produce documentation [from long ago] that it was otherwise not required to maintain.” *Id.* Similarly in *Kuhnlein*, the Florida Supreme Court, while acknowledging that, as a general matter, legislative reformulation was an appropriate remedy, concluded that it was not available there as any conceivable reformulation “would be so highly imperfect and involve such delays as to result in fundamental injustice.” 646 So. 2d at 726. And of course, in *McKesson* itself, the reformulation remedy the court suggested, a change from one tax rate to another, was administratively easy to apply, and it provided an easily-calculable remedy. 496 U.S. at 40.

Other courts, however, have evidenced a different understanding of the burden issue in upholding *McKesson* reformulations. In *American National Can Corp. v. Washington Department of Revenue*, 787 P.2d 545, 551 (Wash. 1990), for example, the court upheld a retroactive reformulation that required the taxpayer seeking relief to actually prove what it had paid to other taxing jurisdictions during the contested period, a burden that seems quite similar to the one upon which the court in *General Motors*

relied to preclude reformulation as a remedy. And in *ANR Pipelines*, the court upheld a reappraisal remedy even though, as the taxpayer complained, the outcome of that reappraisal process in terms of tax reduction would be totally uncertain. 923 So. 2d at 99.

The court here clearly weighed in on the side of those courts that take very little, if any, consideration of the burdens and uncertainty that a remedy imposes. Indeed, the remedy upheld here was identical to the remedy disallowed in *General Motors* as too burdensome or uncertain.

In short, taxing authorities admittedly have “flexibility” in fashioning the post-deprivation relief under *McKesson*, but the extent of that “flexibility” is an open question that has engendered substantial confusion. Macy’s respectfully urges this Court to accept certiorari and resolve that confusion.

**B. The Decision Below Deepens a Split in Authority Regarding Whether States May Change the Nature of the Post-Deprivation Relief for Unconstitutional Taxation During the Pendency of the Constitutional Challenge.**

While a taxing authority’s choices in structuring its tax remedial scheme are “generally a matter of state law only,” the federal Due Process Clause prohibits a state court from pulling a “bait and switch” by changing “in mid-course” the settled understanding of that tax remedial scheme in a way that deprives a taxpayer of a post deprivation remedy on which it was reasonable to rely. *Reich*, 513 U.S. at 111; see also *Newsweek*, 522 U.S. at 443–44. The decision below creates confusion, however, as to the scope of this prohibition.

The Virginia Supreme Court has understood *Reich* and *Newsweek* to prohibit taxing authorities from making material changes to remedial schemes. See *Harper v. Virginia Dep’t of Taxation*, 462 S.E.2d 892 (Va. 1995). The court here, though, along with the Washington Supreme Court in *W.R. Grace & Co.*, evidenced a starkly different

understanding of *Reich*'s and *Newsweek*'s constraints. Both courts approved mid-litigation material changes to their States' post-deprivation remedial schemes, narrowly reading *Reich* and *Newsweek* as only preventing the State from *entirely depriving* a taxpayer of a pre-existing postpayment challenge option.

In sum, courts are in open conflict regarding the due process limits on material mid-course alterations to a State's remedial scheme. And the lax reading of those limits reflected below threatens to deprive those who challenge unconstitutional taxes of any real prospect for meaningful relief, removing their incentive to challenge the tax in the first place.

**1. This Court has held that the Due Process Clause prohibits taxing authorities from pulling a "bait and switch" as to existing post-deprivation remedies.**

In *Reich*, this Court reversed the Georgia Supreme Court's denial of a refund for an unconstitutional tax scheme, finding a due process violation under *McKesson*. The taxpayer sought the refund under Georgia's general tax refund statute, which provided that "[a] taxpayer shall be refunded any and all taxes . . . which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily." *Reich*, 513 U.S. at 109 (citation and punctuation omitted). The Georgia Supreme Court held that the refund statute did not apply "where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional." *Id* (citation and punctuation omitted). The Georgia high court also rejected the taxpayer's claim that interpreting the statute as it did would itself violate federal due process under *McKesson*. *Id.* at 110.

This Court reversed. According to the Court, "A State is free [ ] to reconfigure its remedial scheme over time, to fit its changing needs." *Id.* at 111. And "[s]uch choices are

generally a matter only of state law.” Id. “But what 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.” Id.

The Court made clear where the Georgia high court had gone wrong: “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 Reich and others had paid the disputed taxes, that no such remedy exists.” Id.

That is, the Court concluded that the Georgia Supreme Court, by re-interpreting the tax refund statute in a way that conflicted with the statute’s language and earlier court treatment, had denied the “‘meaningful backward-looking relief’” that the *McKesson* line of cases requires. Id. at 114 (quoting *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 101 (1993); *McKesson*, 496 U.S. at 31).

Three years after *Reich*, this Court summarily reversed a Florida intermediate appellate court that denied a refund to a taxpayer because the taxpayer did not pursue an available predeprivation remedy. *Newsweek*, 522 U.S. at 443–44. “The [Florida appellate court’s] decision failed to consider our decision in *Reich*,” this Court concluded. Id. at 443. In *Reich*, the Court reminded, before the Georgia Supreme Court limited the reach of the Georgia tax refund statute, “the taxpayer had no way of knowing from either the statutory language or case law that he could not pursue a postpayment refund and was relegated to a predeprivation remedy.” Id. at 444.

Likewise, the Court concluded, “[u]nder Florida law, there was a longstanding practice of permitting taxpayers to seek refunds under [Florida’s tax refund statute] for taxes paid under an unconstitutional statute.” Id. “The effect of the . . . decision below, however, was to cut off [the taxpayer’s] recourse to [the tax refund statute]. While Florida may be free to require taxpayers to litigate first and pay later, due

process prevents it from applying this requirement to taxpayers . . . who reasonably relied on the apparent availability of a postpayment refund when paying the tax.” Id. at 444–45.

**2. The Supreme Court of Virginia has applied *Reich* to deny a taxing authority’s argument for partial refund instead of full refund.**

The Supreme Court of Virginia correctly understood *Reich*’s import when it retackled the *Harper* case on remand from this Court. See *Harper v. Virginia Dep’t of Taxation*, 462 S.E.2d 892 (Va. 1995).

There, Virginia’s tax refund statute provided that “[i]f the [tax] assessment exceeds the proper amount, the court may order that the applicant be exonerated from the payment of so much as is erroneously or improperly charged, if not already paid and, if paid, that it be refunded to him.” Id. at 893 (quoting Va. Code § 58.1-1826). The taxpayer sought a full refund, but the Virginia Department of Taxation argued that the statute merely made refunds discretionary, not mandatory.

The Virginia Supreme Court, however, found that the statute’s predecessor had been interpreted as “mandating the refund of taxes illegally collected.” Id. at 895. And, in language directly relevant here, it concluded that *Reich* prevented Virginia from changing course in midstream on its post-deprivation remedy:

If, as [the taxpayer] contends, we have previously interpreted the statutory ancestor of [the refund statute] as mandating a refund of taxes illegally collected but we now adopt, for the first time, the Department’s view that a refund is discretionary, we certainly will have done what the Supreme Court said in *Reich* a state may *not* do.

Id. at 897. In other words, according to the Virginia Supreme Court, not only does a refund statute’s *express language* create a due process limit on the State’s ability to change that

remedy, but state courts' *past treatment* of the statute can also do so.

Finally, the Virginia court concluded that there was no way to "create[] in hindsight a nondiscriminatory scheme," and thus, under this Court's guidance in *Harper*, the only option was to give the plaintiffs a full refund. *Id.* at 895 (citation and punctuation omitted). Thus, "[g]iving *Reich* its full effect, [the court] reach[ed] the inevitable conclusion that [the plaintiffs] are entitled to full refunds." *Id.* at 899.

**3. California and Washington courts have adopted a starkly different view of *Reich*'s limitations on midstream changes to post-deprivation remedies.**

In direct conflict with the Virginia Supreme Court, the California court here, as well as the Washington Supreme court, have read *Reich* and *Newsweek* to allow material changes to the post-deprivation remedy. Indeed, the California court here approved not one, but two, material changes. It both changed the remedy available under the relief ordinance here from a full refund to a partial refund and also changed the retroactivity period over which new tax laws could apply.

a. In *General Motors*, 81 Cal. Rptr. 2d at 547 (Cal. Ct. App. 1999), the California Court of Appeal had determined that a very similar San Francisco Business Tax violated the Commerce Clause because it taxed business for manufacturing *or* selling products in the city but not both. Much like here, in-city manufacturers paid the San Francisco tax alone for products sold in San Francisco, while out-of-city manufacturers may have had to pay the San Francisco tax for products sold in San Francisco *plus* a manufacturing tax in the city where the products were made. Thus, like the tandem tax here, that tax violated the internal consistency test.

Crucially for this case, the appellate court also held that San Francisco's Business Tax refund ordinance, read

through the lens of the constitutional limitations the *McKesson* line of cases imposes, mandated a *full refund* of all taxes paid—not, as the City argued, the portion of San Francisco taxes “paid on goods that had also been assessed a manufacturing tax in another city.” *Id.* at 548. The city’s partial refund proposal, the court concluded, would have required GM to “produce documentation from 17 years ago that it was otherwise never required to maintain,” and thus offered “less than ‘clear and certain’ relief.” *Id.*

The language of that ordinance’s refund provision, however, was materially identical to the language in the related refund ordinance for the San Francisco Business Tax at issue here. Compare *General Motors*, 81 Cal. Rptr. 2d at 547 (summarizing S.F. Code § 1017 as providing “a refund of all taxes ‘illegally collected’”), with S.F. Code § 911 (Pet. App. 47a) (offering refund of taxes “illegally collected”). Thus, no one can dispute that San Francisco taxpayers would have “reasonably rel[ied],” *Newsweek*, 522 U.S. at 445, on the express holding in *General Motors* that San Francisco’s Business Tax refund statute provided a *full refund* for a taxpayer that successfully challenges a City tax as violating the Commerce Clause.

Similarly, another pre-existing limitation on the post-deprivation remedy was that any retroactive changes to the City’s tax code could extend back in time no more than one year. Indeed, the City conceded the existence of this limitation. See City Br. at 20 n.8,

b. The decision here materially changed settled law both as to the magnitude of the post-deprivation refund and the period of time over which retroactive changes could be made. In this case, Macy’s did just what *General Motors* had done: It successfully established that San Francisco’s Business Tax violated the Commerce Clause, and it sought a refund under a materially identical refund provision.

Faced with a similar situation in which earlier state courts had expressly granted a full refund under a given

refund statute, the Virginia Supreme Court in *Harper* found itself bound to follow the earlier state courts—not because of the earlier decisions’ *stare decisis* or even persuasive effect, but because of federal Due Process Clause requirements as laid out in *Reich*. The Virginia Supreme Court understood—even when faced with earlier precedent interpreting “may” as mandatory—that if it deviated from its earlier holdings, it would be pulling precisely the “bait and switch” tactic that *Reich* prohibits. *Harper*, 462 S.E.2d at 893.

But the lower court in this case evidenced a vastly different understanding of the federal constitutional constraints on changes to the post-deprivation remedial scheme. In one sentence, it dismissed *Reich* and *Newsweek* as “merely reaffirm[ing] a taxpayer’s general right to a postdeprivation refund of illegally collected taxes, a proposition not under dispute in this case.” Pet. App. 11a. And then freed from those bonds, the court reformed California law both by reducing the remedy from a full to a partial refund, and by requiring an eleven-year look back to implement a remedy retroactive to the 1995 through 1999 tax years at issue in this case.

Nor can San Francisco respond to this conflict by arguing that the decision here was not a departure from settled understandings of the refund statute. To be sure, the court below tried to distinguish the *General Motors* case (i.e., to say that the partial refund approach here is not a material change from the full refund approach there), but its attempts fail. First, its reasoning is faulty. The lower court held that unlike a “facially invalid tax,” placing a “burden upon the taxpayer to demonstrate double taxation in order to secure a refund,” this case was “very different.” Pet. App. 9a. “[O]nly the tandem interaction” of the payroll and receipts measures violates the commerce clause,” the court reasoned. “In isolation, each of the taxes is valid.” *Id.* But the same can be said for *General Motors*—either the manufacturing tax or the sales tax (the two components of the “tandem” tax there), in isolation, was valid. Thus, the only real explanation is that

the California court changed the relief available, an avenue that *Harper* understands the Constitution to foreclose.

Moreover, even if the remedy here were not a “mid-course change” with regard to the magnitude of the relief available, the court’s order here clearly worked a major change to the period over which such remedies can be retroactively applied. The City conceded that existing law limited retroactive tax changes to one year. City Br. at 20 n.8. Yet here, if the remedy was meant as a retroactive “reformulation”—the only remedy that *McKesson* allows to substitute for a full refund—the Court allowed that reformulation to reach back a full five years. This is unquestionably a material change to California’s post-deprivation relief. Yet, in direct conflict with *Harper*, the court here announced that change “in mid-course.”

c. In adopting the approach it did, the California court deepened a pre-existing conflict regarding *Reich* and *Newsweek*. Like the court here, the Washington Supreme Court in *W.R. Grace & Co.*, 973 P.2d at 1020, understands those cases quite narrowly. *W.R. Grace* arose out of Washington’s response to this Court declaring Washington’s business and occupation (“B&O”) tax unconstitutional in *Tyler Pipe* on the grounds that the tax discriminated against interstate commerce. Settled Washington law provided taxpayers the right to assert a post-deprivation refund action to an unconstitutional tax. The legislature, however, changed the law so that those who had paid the B&O tax had no right to a refund but instead only a right to a credit against future taxes that the taxpayers may become obligated to pay. *Id.*

*W.R. Grace* challenged the enactment, alleging, *inter alia*, that the new law created an unconstitutional “bait and switch” in the remedies that Washington offered. In rejecting that claim, the Washington court did not see in *Reich* and *Newsweek* any limitation on changing the nature of the post-deprivation *remedy*, but rather only a prohibition against

entirely depriving a taxpayer of its post-deprivation challenge *at all*:

*Newsweek* [and *Reich*] holds that where [existing] law provided a taxpayer with a choice of either prepayment or postpayment challenges to an assessed tax, it violated due process *to deprive a taxpayer of the postpayment challenge option* where he had paid the assessed taxes while reasonably relying on the availability of such option.

Id. (emphasis added).

In the end it comes to this: California and Washington courts do not understand *Reich* or *Newsweek* to impose meaningful limits on the taxing authority's ability to stray from settled understandings regarding available remedies, but the Virginia Supreme Court does. Macy's contends, consistent with the Virginia Supreme Court's approach, that the material changes here are precisely the kind of "bait and switch" that *Reich* and *Newsweek* forbid. But, whether the Court ultimately agrees that this is an impermissible bait and switch, it is clear that courts are now in open conflict as to the contours of the limitations those cases impose, and the Court should resolve that dispute.

**C. The Court Should Address These Issues Now, as Failing to Do So Incentivizes Taxing Authorities to Ignore Constitutional Limits on the Scope of Their Taxing Power.**

Not only is it important that the Court address these issues, it is vital that the Court do so now rather than later. More than many other areas of the law, effective enforcement of constitutional limitations in the tax arena depends largely on private citizens' efforts in challenging unconstitutional tax statutes. Effective remedies provide vital incentives both to encourage taxpayers to pursue such litigation and to encourage taxing authorities to avoid unconstitutional taxes in the first instance.

State and local taxing authorities have “strong political motives to engage in discriminatory taxation.” Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1733, 1833 n.569 (1991). The litany of cases in recent years from this Court and others striking state and local taxes on constitutional grounds provides strong evidence that tax authorities often succumb to these incentives. See, e.g., *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996); *McKesson*, 496 U.S. 18; *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); *Birth Hope Adoption Agency, Inc. v. Arizona Health Care Cost Containment Sys.*, 218 F.3d 1040 (9th Cir. 2000); *In re Appeal of CIG Field Servs. Co.*, 112 P.3d 138 (Kan. 2005); *Northwood Constr. Co. v. Twp. of Upper Moreland*, 856 A.2d 789 (Pa. 2004) (local tax), *cert. denied*, 544 U.S. 962 (2005); *Simon Aviation, Inc. v. Indiana Dep’t of Revenue*, 805 N.E. 2d 920 (Ind. Tax Ct. 2004); *D.D.I., Inc. v. State ex rel. Clayburgh*, 657 N.W.2d 228 (N.D. 2003); *Chapman v. Comm’r of Revenue*, 651 N.W.2d 825 (Minn. 2002). And the internal consistency test, with its bright line rule detecting and invalidating tax schemes that, by their very structure, impede interstate commerce, is an important bulwark against such overreaching by state and local taxing authorities, protection that the decision below essentially eliminates. *Oklahoma Tax Comm’n*, 514 U.S. at 185.

In deciding whether to pursue a tax scheme that may be unconstitutional, taxing authorities undoubtedly consider the likely remedy if the tax statute is indeed stricken. Similarly, from the taxpayer’s perspective, litigation is expensive. In deciding whether to incur such expenses, litigants quite rightly factor in the likely recovery if they are successful.

Against this backdrop, *McKesson*’s requirement for “meaningful backward-looking relief,” coupled with *Reich*’s prohibition on changing remedies in midstream, are crucial to ensuring effective vindication of constitutional rights. *McKesson*’s reformulation remedy is designed to achieve

system-wide relief, providing other taxpayers the benefit of a successful constitutional challenge by requiring the taxing authority to implement relief in a way that is easily extended to them. The remedy below, however, fails to meet that objective. It is a burdensome, fact-intensive, non-generalizable remedy that reflects not a reformulation of the underlying tax system, but rather an uncertain estimate of the hypothetical harm to which Macy's was exposed. There is no indication that San Francisco can, or will, extend this relief to other similarly-situated taxpayers, making a mockery of *McKesson's* reformulation option. As a result, the reading here insufficiently deters taxing authorities from enacting similar unconstitutional taxes in the future. For, if a taxing authority can provide a plaintiff-specific reformulation, that means as a practical matter, it will retain a significant share of the unconstitutional tax.<sup>3</sup>

The California court's reading of *Reich* and *Newsweek* simply exacerbates the problem. Those cases give taxpayers the right to rely on pre-existing remedies in deciding whether to pursue litigation, thereby encouraging taxpayers to undertake what may be expensive challenges. By allowing taxing authorities to change the course on remedies in midstream, though, taxpayers can no longer rely on the remedies in making those decisions.

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<sup>3</sup> The record here amply demonstrates a taxing authority's willingness to pursue taxes that it knows to be unconstitutional. In 1995, the California courts struck down, on Commerce Clause internal consistency grounds, a Los Angeles business tax that had an identical flaw to the one here in that it imposed two taxes (one on manufacturing and one on selling), but exempted those who paid the former from the effect of the latter. See *General Motors v. Los Angeles*, 42 Cal. Rptr. 2d 430 (Cal. Ct. App. 1995). Notwithstanding that, however, the City continued to collect under its virtually identical tandem tax for nearly five more years, ceasing to do so only after suit was filed. Meaningful remedies are an important component in policing such efforts.

Nor is there any doubt that these remedial issues and concerns are frequently recurring. A quick search of the Court's docket reveals a long list of petitions for certiorari in recent terms raising *McKesson* and *Reich* issues. See, e.g., Petitions for Writ of Certiorari, *Souza v. Wetlands Water Dist.*, No. 06-120 (July 21, 2006), 2006 WL 2091683; *ANR Pipeline Co. v. Louisiana Tax Comm'n*, No. 05-1606 (June 15, 2006), 2006 WL 1662255; *Venture Coal Sales Co. v. United States*, No. 04-306 (Aug. 27, 2004), 2004 WL 1967298; *Millcraft SMS-Servs., L.L.C. v. Underwood*, No. 02-0260 (Sept. 19, 2002), 2002 WL 32134112; *Textron Inc. v. Comm'r of Revenue*, No. 01-1083 (Jan. 17, 2002), 2002 WL 32135611; *Kalama Chem., Inc. v. State of Washington*, No. 00-1734 (May 15, 2001), 2001 WL 34125064; *W.R. Grace Co. v. Washington Dep't of Revenue*, No. 99-31 (June 30, 1999), 1999 WL 33639754; *Dryden v. Madison County*, No. 98-1691 (Apr. 21, 1999), 1999 WL 33641214; *St. Ledger v. Commonwealth of Kentucky*, No. 97-127 (July 21, 1997), 1997 WL 33549087; *Digital Equip. Corp. v. Washington Dep't of Revenue*, No. 96-1274 (Feb. 6, 1997), 1997 WL 33558051. As these petitions demonstrate, States too often use their "flexibility" in fashioning a remedy to delay or hinder taxpayers in obtaining the relief to which they are entitled when a tax law is struck on constitutional grounds. The interpretation below of *McKesson*, *Reich*, and *Newsweek* only enhances that problem.

In short, clear guidance on the correct understanding of *McKesson*, *Reich* and *Newsweek* is a vital part of policing the constitutional boundaries on state and local tax power. Macy's thus respectfully urges the Court to accept review, and reverse the decision below.

#### CONCLUSION

The petition should be granted.

Respectfully submitted,

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