No. _____

In The

Supreme Court of the United States

JOAN MANN, KEN DANKS d/b/a TEK INDUSTRIES,
TRACY WILKIE, CHRISTA MONETTE,
and other persons similarly situated,

Petitioners,

v.

ND TAX COMMISSIONER, CORY FONG,
ND TREASURER, KELLY SCHMIDT,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of North Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The plaintiffs won a ruling that fuel taxes on Indians were illegal, and sought refunds for a class (3,000) under *McKesson*. North Dakota passed a new law that required original invoices in an administrative process. Plaintiffs challenged the 2005 law for lack of a hearing. The trial court ruled no hearings were needed, and Indians had to submit original receipts for six years back. In 2007 the court below affirmed, saying refund claimants had to produce original receipts, and the 2005 law applied retroactively to 1997 (nine years back).

Due Process.

1. After taxpayers file a court suit for tax refunds, can a State substitute a new law that requires administrative claims and does not provide for a hearing?

2. Does due process prohibit a State from imposing a new refund law retroactively for a period of nine years?

RULE 29.6 STATEMENT

Petitioner Ken Danks d/b/a TEK Industries has no parent corporation. There is no publicly held corporation that owns 10% or more of petitioners stock. At the time the suit was filed in 2003 Ken Danks was a sole proprietor; later he formed a corporation noted above.

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PETITION FOR WRIT OF CERTIORARI

The petitioners request this Court review a decision of the North Dakota Supreme Court, and to grant appropriate relief.

OPINIONS BELOW

The opinion below is published at 736 N.W.2d 464 (ND 2007). Pet. App. 1. The trial court's decision denied petitioners' motion for summary judgment is unpublished. App. 26. The court below denied a request for rehearing. App. 66.

JURISDICTION

The ND Supreme Court entered a decision and judgment on July 25, 2007. Petitioners timely filed for rehearing, which was denied on August 22, 2007. App. 66. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AND LAWS INVOLVED

The Fourteenth Amendment to the U.S. Constitution states in relevant part: "[N]or shall any State deprive any person of life, liberty or property without due process of law."

Statutes. A general refund law requires the tax commissioner to pay refunds when a tax is "erroneously or illegally" collected. N.D.C.C. §§ 57-43.1-32 (gas), 57-43.2-20 (diesel). App. 5. A 2005 law allows Native Americans (Indians) to apply for fuel tax refunds for on-Reservation purchases. N.D.C.C. § 57-43.1-03.2. This law incorporated an old law (1997) that requires original receipts be submitted yearly, in an administrative claims process. N.D.C.C. § 54-43.1-04. App. 9.

State tax regulations. N.D.A.C. 81-01.1-02-01, states: "When provided by statute, a taxpayer may request a formal hearing before the tax commissioner." N.D.A.C. 81-01.1-02-02, Taxpayer's right to administrative hearing on refund issue (right to protest and administrative review only when such protest or review is specified by the statutes governing the specific tax type). Absent a right of review, the decision by the tax commissioner is final and irrevocable. *Id*. App. 40.

STATEMENT OF THE CASE

A. Procedural background.

The Indian plaintiffs (claimants or taxpayers) won a ruling that fuel taxes were illegal. The parties appealed, and in *Mann v. ND Tax Comm'r*, 2005 ND 36, 692 N.W.2d 490 the Court upheld the ruling that the state taxes were illegal, and remanded on the class action and refund issues. In 2005 North Dakota

(State or ND) enacted a 2005 law that required original receipts. The taxpayers challenged the 2005 law as it did not comply with due process. App. 38, 68. The trial court ruled the new law was fair; Indians had to file separate claims in an administrative process; and denied a class action. The taxpayers appealed. In *Mann v. ND Tax Comm'r*, 2007 ND 119, 692 N.W.2d 490, the Court affirmed, saying the original invoice law applied back to 1997.

B. Factual background.

ND allows fuel tax funds for businesses (industry and farmers) based on yearly receipts. Tax agents examine the original receipts and pay out in thirty days. App. 5, 10. ND collected the fuel tax from Indians who paid the tax on a Reservation. After the taxpayers won a ruling the fuel taxes on Indians were illegal, they sought refunds under a general refund law. App. 3, 68. The plaintiffs are Joan Mann and Ken Danks, members of the Three Affiliated Tribes (Ft. Berthold Indian Reservation). Tracy Wilkie and Christa Monette are members of the Turtle Mt. Chippewa (T. Mt. Indian Reservation). Lead plaintiff Danks sued on behalf of over 3,000 tribal members (purported class). *Id.*

2005 original invoice law. After the ruling in *Mann I*, ND enacted a new law that allowed Indians to apply for refunds, over on-Reservation purchases. N.D.C.C. 57-43.1-03.2. App. 5. This law incorporated an old law (1997) designed for businesses, based on

original invoices. N.D.C.C. § 54-43.1-04. The old law required a refund claim, and "original invoices or sales ticket proving the purchase of motor vehicle fuel on which the refund is claimed must be attached to the refund form." Other rules are:

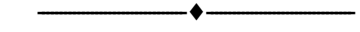
> The invoices or sales ticket must include the seller's name and address, the date the fuel was purchased, the type of produce, the number of gallons, the state tax as a separate item or statement that the state tax is included in the price, and the name of the claimant. . . . A certified history of purchases detailing required information may be accepted by the commissioner in lieu of original sale invoices or sales tickets.

App. 46.

The plaintiffs challenged the 2005 law, contending the refund process does not provide for a hearing for presentation of evidence on refund claims, or a chance to contest a refund amount. App. 38, 68. The State deprived plaintiff Danks (and class) of funds: ND takes over $1 million per year from Indians. App. 69. ND attempted to "buy out" lead plaintiff Danks with a partial refund that was rejected as inadequate for him and the purported class. App. 73. ND demands receipts that do not exist. Gas stations do not list the tax "separately stated." ND rejected Tracy Wilkie's $105 refund claim (for year 2005) though she provided receipts and owner's statement (tax included in sale price). ND Letter, App. 74. No notice of hearing was provided. *Id*.

Ruling below. The trial court noted the State tax regulations but rejected the need for a hearing, saying the 2005 law provided a "meaningful opportunity" to secure post-payment relief for taxes already paid. The detailed receipt rules (original invoice, name of seller, type of product, gallons, tax separately stated, name of seller) were "reasonable and not unduly burdensome." App. 41. The trial court ruled the statute of limitations applied six years back and interest had to be paid. App. 52. The trial court ruled the 2005 law applied retroactively. *Id*. In other words, Indian claimants had to produce original receipts from years back, in an administrative scheme.

The ND Supreme Court affirmed, saying the 2005 law complied with due process. A refund claimant "may protest the denial of a refund under rules adopted by the tax commissioner" and can get a hearing. App. 10. The Court affirmed the statute of limitations ruling of six years, and Indians can apply for refund from 1997 to 2005. App. 18. But the Court ruled the 2005 law applied retroactively – Indians had to produce original invoices back from 1997 to apply for a refund. App. 16. The Court noted a "strict use" of the 2005 original invoice law may violate due process. App. 13-14.



REASONS FOR GRANTING THE PETITION

The decision below that denies refund hearings conflicts with leading cases such as *McKesson* that

require a hearing and "clear and certain remedy" in tax refund cases. The taxpayers sued under a general refund law, and North Dakota substituted a new law that required original receipts. The court below recognized ND was on thin ice because it cautioned that the "original invoice" law strictly enforced would violate due process. *Reich v. Collins* prohibits a State from substituting a new law to deny refunds, as ND has done. Review is needed so ND and other States provide an adequate remedy on tax refunds. Finally, the court below imposed an original invoice law nine years back to 1997. This raises an important federal question on how far back a new law can be imposed. The nine-year period exceeds the limits of due process and reason.

I. THE DECISION BELOW CONFLICTS WITH LEADING PRECEDENT.

A. Due process requires some form of notice and hearing. Contrary to *McKesson* and *Flowers* the opinion below denied refund hearings to Indian claimants.

The landmark ruling *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 31 (1990) held a State must pay refunds over an illegal tax. Due process requires a "clear and certain remedy" under the Fourteenth Amendment.

> "Because extraction of a tax constitutes deprivation of property, the State must procedural safeguards against unlawful extractions in

> order to satisfy the commands of the Due Process Clause."

Id. 496 U.S. at 36. *McKesson* stated that Florida must provide an adequate post-deprivation remedy (refund suit). *Id. Matthews v. Eldridge*, 424 U.S. 319 (1976) noted some form of hearing is required before an individual is finally deprived of a property interest. *Accord*, *Jones v. Flowers*, 547 U.S. 220 (2006) (proper notice required before property taken). *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540 (1985) (due process requires opportunity for hearing before deprivation of property interest).

The 2005 law does not provide for a hearing or judicial review. It requires original invoices in an administrative scheme. This decision below denying a hearing to Indian claimants is wrong, and conflicts with *McKesson* and related cases: some form of hearing is required on tax refunds. Without a hearing, a claimant cannot present evidence for refunds (mileage logs, federal tax records, etc.).

B. Under *Flowers* the amount of process due is measured by federal standards, not state law. ND tax laws bar refund hearings to Indian claimants. This scheme lacks the procedural safeguards required by due process.

This Court recently emphasized that property can't be taken unless there are adequate procedural safeguards. *See Jones v. Flowers*, 547 U.S. 220 (2006)

(poor notice to owner before his home taken over taxes). Arkansas state law was deficient and the amount of process due is measured by *federal law*. *Id*. Due process requires the government to provide "notice and opportunity for hearing appropriate to the nature of the case," quoting *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950). *Id*. Due process is measured by federal standards, *Loudermill*, *supra*, 470 U.S. at 542.

The court below ruled that refund claimants "may protest the denial of a refund under rules adopted by the tax commissioner." App. 10. A claimant is entitled to a hearing to contest the denial of his refund claim, citing N.D.C.C. § 28-32-21." *Id*. The protest route leads nowhere.

First, it is undisputed the 2005 law does not provide for a hearing. Next, State tax regulations bar review. N.D.A.C. 81-01.1-02-01 (hearing only when provided by statute). N.D.A.C. 81-01.1-02-02 (right to protest and administrative review only when such protest or review is specified by the statutes governing the specific tax type). Absent a right of review by statute, the decision by the tax commissioner is "final and irrevocable." *Id.* How ND denies hearings. Read together, the State tax laws are used to bar relief. For example, ND denied a refund to claimant Wilkie (tax year 2005). The letter referred to a right to protest and Bill of Rights. App. 74. This is misleading

because the State tax laws *bar* a "right to protest" or hearing.[1]

Error: the decision below wrongly relied on state law. The decision is contrary to *Flowers as federal law* determines the amount of process due. The decision below approved a no-hearing scheme that violates due process, contrary to leading cases such as *McKesson* and *Loudermill*.

While Indians can't get a hearing, others can. *Compare*: Income tax statute. When a refund is denied, a taxpayer can request "formal administrative review . . . by filing a complaint and requesting an administrative hearing." N.D.C.C. § 57-38-40 (13). A taxpayer can appeal a decision rendered by the tax commissioner under chapter 28-32. *Id. Compare*: Coal tax statute. It allows for "hearing to be governed by the provision of chapter 28-32" and one can appeal to district court. N.D.C.C. § 57-61-07.

Ch. 28-32, Administrative Agencies Practice Act, allows an appeal when an adjudication (hearing) is held. N.D.C.C. § 28-32-21 notes a complaint is required to get a hearing. Ch. 28-32 does *not* authorize a refund hearing. *See Stephenson v. Hoeven*, 2007 ND

[1] In the court below ND's counsel argued Indians can protest and get a hearing. This is incorrect. The ND tax website (www.nd.gov/tax/genpubls/bill-of-rights) (2003) refers to a vague right to protest a refund denial. It cites income tax and oil and gas appeals – that by statute provide for a hearing. Compare: Tax Regulation Part 81: no right to protest or hearing unless provided in a statute.

136, 737 N.W.2d 260 (pilot booted out of National Guard could not get court review as no statute authorized an appeal). As the 2005 law does not allow a "protest" or hearing, there is nothing to appeal under Ch. 28-32.

C. *Reich v. Collins* prohibits a State from substituting a bogus remedy after a taxpayer sues under a general refund law. The court below wrongly substituted a 2005 administrative law, in place of a court suit.

Reich v. Collins, 513 U.S. 106 (1994) held a State could not substitute a bogus remedy, when a claimant relied on a general refund law. In *Reich* the claimant sued under a law that allowed for refunds when a tax is ruled "erroneously or illegally" collected. Due process requires an adequate post-deprivation remedy, i.e., a refund suit in court. *Id.* In *Reich* the State argued that no refund suit should be allowed. This Court ruled the "bait and switch" tactic was prohibited. *See McKesson, supra*: clear and certain remedy required over an illegal tax. *Accord*, *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442 (1998). In Newsweek this Court noted that Florida had a practice of permitting taxpayers to seek refunds under a general refund law. *Id*. This Court concluded Newsweek is entitled to a clear and certain remedy, and can use the refund procedures to adjudicate the merits of its claim. The Court granted certiorari, vacated the judgment, and remanded. *Id*.

The court below ruled that Indians must comply with the statutory refund procedure in the 2005 law, N.D.C.C. § 57-43.1 (2005 original receipts law). App. 13. The court below cautioned that a strict use of the original invoice law may be a "bait and switch," in violation of due process. App. 14.

First, ND has a law like the Georgia law in *Reich*; it requires a refund when a tax is "erroneously or illegally" collected. N.D.C.C. § 57-43.1-32 (gas). The plaintiffs sued under this general refund law. *Second*, after the Indians won a ruling the fuel tax was illegal in *Mann I*, ND enacted the 2005 law (original invoices required). *Third*, ND used the new law to deny refunds. ND letter to Tracy Wilkie denying refund as tax not "separately stated," even though she submitted original receipts. App. 68, 75-76. In short, ND wrongly substituted an administrative scheme, in place of a court suit, contrary to *Reich*. Meanwhile, ND has allowed other taxpayers to sue in court. *See Service Oil v. State*, 479 N.W.2d 815 (ND 1992) (additive fuel tax ruled illegal; retroactive refund awarded), citing *McKesson*. It follows that Indian claimants are entitled to sue in court, rather than be put in the "back of the bus."

Under *Reich* and *Newsweek*, certiorari should be granted and the judgment below vacated. If so, then ND has to provide a court hearing in this case. The Indian claimants can then proceed in state court on their quest, since 2003, for tax refunds.

II. A NINE-YEAR RETROACTIVE USE OF A NEW LAW RAISES AN IMPORTANT FEDERAL QUESTION.

A. Due process limits retroactive use of a law. The decision below imposed the original invoice law *nine* years back to 1997. National guidelines are needed.

The test if retroactive application of a tax law violates due process is in two parts. *United States v. Carlton*, 512 U.S. 26 (1994). First, the legislation must have a legitimate purpose furthered by rational means. Second, the period of retroactivity must be modest (citations omitted). Periods longer than one year are likely unlawful. *Id*. at 38 (O'Connor, J., concurring). In *Carlton* the retroactive statute was not arbitrary because it was a curative measure to correct a defect in the original legislation only months earlier.

Due process requires states to provide access to court, or a meaningful opportunity to have claims adjudicated. *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 437 (1982) (state law contained short time lines to file claims). *Cf. Hibbs v. Winn,* 542 U.S. 88 (2004) (federal court under 42 USC § 1983 over tax credits). The Court noted a state court remedy is adequate only if it provides a *full hearing* and judicial determination, quoting *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 514 (1981).

2005 law. It allowed Indians to file for refunds on fuel taxes and required use of original invoices in an

administrative process. N.D.C.C. § 57-43.1-03.2. It is effective for purchases made after "December 31, 2004." (S.L. 2005, Ch. 40, § 13). A Legislative Note said the Act could not be construed to preclude claims . . . for taxes on purchases "made before January 1, 2006." (House Bill No. 1015).

ND nine-year rule. The court below ruled the 2005 original invoice law applied retroactively: 2005 to 1997 – nine years back. App. 15-16. Though the 2005 law is not effective until "*after* December 31, *2004*" the court said this is not what it means. The court below cited a Legislative Note that said: this Act "may not be construed to preclude claims for motor vehicle . . . refunds by tribal members . . . for taxes on purchases made before January 1, 2005." App. 15-16. The court said the legislature intended to "apply the statutory fuels process, provided in N.D.C.C. ch. 57-43.1, to those claims." The court rejected the plaintiffs argument that the 2005 law does not apply retroactively. The court rejected the argument that the N.D.C.C. 57-43.1-32 (general refund law) applies as the substantive law. *Id.*

Errors. First, applying the ND nine-year rule (back to 1997) is excessive, and violates due process under *Carlton*. The court below failed to apply controlling federal standards on due process, *Flowers, supra*. Second, the 2005 law states it is not effective until "after 2004." The Legislative Note merely states the obvious: ND cannot bar refund claims from before 2005. *See McKesson*: a State must

provide an adequate remedy on refunds. Third, the nine-year rule is contrary to *Logan* because it denies access to court (under the general refund law).

Legislative purpose. There is no legislative history; the 2005 law was enacted at the end of the Legislative Session.[2] Whatever the stated purpose of the 2005 law, the results are harsh: the original invoice rule extends back to 1997, and no hearing allowed. The court below approved a scheme that bars an adequate remedy, contrary to *Rosewell* (requires full hearing and judicial determination).

Remedy. The court below denied a class action, saying separate claims were required, with original receipts from 1997. This ruling bars Indians from suing in a ND state court. This error is compounded because over 3,000 Indian claimants seek refunds. Many Indians lack the means to pursue administrative claims (2005 law). The remedy is to apply leading cases such as *Reich* (state cannot substitute bogus remedy). Under *McKesson* and related cases, the general refund law (N.D.C.C. § 57-43.1-32) should apply in a court suit.

[2] In 2005 lead plaintiff Ken Danks rejected a ND attempt to buy out the class with a partial refund just to him. App. 69. During this time in 2005 ND enacted the original receipt law, as part of a budget and funding bill (S.B. 2080, 2012 and House Bill 1015). In 2005-06 ND had a budget surplus of $500 million.

CONCLUSION

As in *Newsweek* this Court should grant the petition for writ of certiorari and vacate the judgment below. Granting relief will require North Dakota, and other States, to utilize fair tax refund laws.

Respectfully submitted,

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