No. 20-468

IN THE
Supreme Court of the United States

XPEDITE SYSTEMS, INC.,
Petitioner,
v.
JOHN J. FICARA, ACTING DIRECTOR,
NEW JERSEY DIVISION OF TAXATION,
Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Taxpayers Union Foundation

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *Amicus* represents that all parties were provided ten days' notice of *Amicus's* intention to file this brief and have granted consent to the filing of the brief.

submits this brief as *amicus curiae* in support of Petitioner in the above-captioned matter.

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels.

Because *Amicus* has testified and written extensively on the issues involved in this case, because this Court's decision may be looked to as authority by the many courts considering this issue, and because any decision will significantly impact taxpayers and tax administration, *Amicus* has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

This is a case about deference: whether a decision by a state to order a single taxpayer to use a completely different tax calculation can be insulated from constitutional review because tax authorities are accorded deference on tax apportionment calculations as an area of "special expertise."

Petitioner filed their taxes using the calculations established by New Jersey state law. New Jersey tax authorities decided that the Petitioner should owe more tax to New Jersey, and invoked a statutory provision allowing tax authorities to instead substitute a different (and unspecified by statute) calculation in circumstances where the default calculation produces an inequitable result. The substituted calculation resulted in much more of

Petitioner's income being subject to tax in New Jersey (between 76 and 100 percent of Petitioner's net income, instead of about 5 to 7 percent). Petitioner seeks to challenge the decision to use this new calculation as unfair and unreasonable. So far, a common dispute that could happen in any state.

Unlike other states, however, the New Jersey courts below held that the decision to use the alternative calculation is presumed correct, being entitled to deference unless the taxpayer demonstrates it is "arbitrary or lack[s] substantial evidential support in the record." The court below thus declined to consider non-procedural arguments brought by Petitioner.

The due process and internal consistency issues in this case would alarm any taxpayer, but those are issues for another day. The question this case presents to this Court now is whether taxpayers even get a chance to make those arguments. New Jersey's courts have decided that deference to administrative decisions includes not considering substantive constitutional challenges to those decisions. It is deference run amok, and this Court should take the opportunity to resolve the conflict between New Jersey and other states, hold that New Jersey's action violates the Due Process Clause, and establish clear guardrails to prevent deference taken too far.

ARGUMENT

I. STATES ACCORD DIFFERENT LEVELS OF DEFERENCE TO TAX ADMINISTRATOR DECISIONS, BUT NEW JERSEY'S IS AN EXTREME THAT CONFLICTS WITH OTHER STATES, VIOLATES DUE PROCESS, AND DESTROYS TAXPAYER CERTAINTY.

This Court's deference doctrines are exceptions to the general rule that judges reviewing administrative actions should decide all questions of law. *See, e.g.*, *Kisor v. Wilkie*, 588 U.S. ____, 139 S. Ct. 2400 (2019) (evaluating validity and scope of *Auer* deference); *Arlington v. FCC*, 569 U.S. 290, 296 (2013) (stating that the agency's reading must be "within the bounds of reasonable interpretation"); *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982 (2005) (holding that a "court's prior construction of a statute trumps an agency construction" only if the statute is unambiguous); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (holding that regulation must be genuinely ambiguous for deference to be accorded to the agency's interpretation); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that agency rule is not accorded deference if counter to the evidence or not the product of agency expertise); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (stating that agency's interpretation is controlling unless "plainly erroneous or inconsistent with the regulation"); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)

(holding that agency interpretations are not controlling on courts but can be resorted to for guidance).

Many states apply similar principles to accord deference to agency interpretation of laws. *See e.g.*, William Funk, *Rationality Review of State Administrative Rulemaking*, 43 Admin. L. Rev. 147 (Spring 1991) ("[A] large number of states do not provide for and consciously avoid judicial review for rationality of rulemaking."); *Ass'n of Cal Ins. Co. v. Jones*, 386 P.3d. 1188, 1196 (Cal. 2017); *Etzler v. Indiana Department of State Revenue*, 43 N.E.3d 250 (Ind. Ct. App. 2015); *Wirth v. Pennsylvania*, 95 A.3d 822 (Pa. 2014); *State ex rel. Crowl v. Del. Cty. Bd. of Elections*, 43 N.E.3d 406, 408 (Ohio 2015); *Goldberg v. Bd. of Health of Granby*, 830 N.E.2d 207, 213 (Mass. 2005); Lacey Ferrara, *Beyond Chevron: An Analysis of Idaho's Intermediate Deference Doctrine and Its Hypothetical Application in Federal Courts*, 70 Case Western L. Rev. 1193 (2020); *Farmer v. Hypo Holdings Inc.*, 675 So.2d 387 (Ala. 1996).

However, the recent trend is for states to not accord deference to agency interpretations of laws. *See, e.g.*, *HWCC-Tunica, Inc. v. Mississippi Department of Revenue*, 296 So.3d 668, 677 (Miss. 2020) ("[A]gency interpretations of statutes no longer will receive deferential treatment because doing so creates a conflict with the separation of powers doctrine . . . ."); *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 914 N.W.2d 21, 28 (Wis. 2018) ("We have decided to end our practice of deferring to administrative agencies' conclusions of law."); FLA. CONST. art. 5, § 21 (adopted 2018) ("In interpreting a state statute or rule, a state court or an officer hearing

an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo."); Ariz. Rev. Stat. § 12-910(E) (amended 2018) ("In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency."). *See also SBC Mich. v. Public Service Commission*, 754 N.W.2d 259, 271-72 (Mich. 2008) ("[T]he unyielding deference to agency statutory construction required by *Chevron* . . . conflicts with the separation of powers principles."); *Graham v. Dokter Trucking Grp.*, 161 P.3d 695, 700-01 (Kan. 2007) (declining to defer to agency determinations of questions of law).

New Jersey represents an extreme position in according total deference, as illustrated in this case where the Appellate Division deferred to the Tax Court, which deferred to the Tax Division. New Jersey has essentially granted its tax authorities unfettered discretion to "adjust" upward the share of an interstate company's tax going to New Jersey, at the expense of other states. *See Xpedite Systems, Inc. v. Director, Division of Taxation*, --- N.J. App. ----, Docket No. 018847-2010 at App. 13a (Jan. 9, 2020) ("Because the Tax Court has 'special expertise,' its findings will not be disturbed unless they are arbitrary or lack substantial evidential support in the record."). If New Jersey tax authorities give no justification for their decision to depart from the statutory scheme, and courts nonetheless accord deference to that

reapportionment, it is effectively impossible for taxpayers to challenge. *Cf. Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991) ("[T]to allow apportionment where there is no practical or theoretical justification could provide the opportunity for a state to export tax burdens and import tax revenues.").

New Jersey's level of deference violates the Due Process Clause and runs great risk of preventing taxpayers from effectively raising constitutional objections, such as the proper extent of deference, fair apportionment, and internal consistency. *See, e.g.*, *Kisor v. Wilkie*, 588 U.S. ____, 139 S. Ct. at 2440-41 (Gorsuch, J., concurring in the judgment) ("Whether purposeful or not, the agency's failure to write a clear regulation winds up increasing its power, allowing it to both write and interpret rules that bear the force of law—in the process uniting powers the Constitution deliberately separated and denying the people their right to an independent judicial determination of the law's meaning."); *id.* at 2449 (Kavanaugh, J., concurring in the judgment) ("[A] judge should engage in appropriately rigorous scrutiny of an agency's interpretation of a regulation, and can simultaneously be appropriately deferential to an agency's reasonable policy choices within the discretion allowed by a regulation."); *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2091 (2018) ("First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce."); *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 135 S. Ct. 1787, 1797 (2015) ("[I]f a State's tax unconstitutionally discriminates against interstate commerce, it is

invalid regardless of whether the plaintiff is a resident voter or nonresident of the State."); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 356 (2007) (Alito, J., dissenting) ("A local law that discriminates against interstate commerce is sustainable only if it serves a legitimate local purpose that could not be served as well by nondiscriminatory means.").

The taxpayer should have a chance to make those arguments, without deference acting as a thumb tilting the scale in favor of the state. The state should have to demonstrate its chosen methodology is reasonable and fair, or why the statutory methodology is unreasonable and unfair, instead of placing the entire burden on the taxpayer by presuming the tax authority's decisions are correct until proven otherwise. Taxpayers deserve to rely on the certainty of the law and the ability to challenge when the tax authorities depart from the letter of the law. *See, e.g.*, Pete Sepp, "IRS Reform: Resolving Taxpayer Disputes," National Taxpayers Union (Sep. 2017) ("The fact remains that some of the most contentious issues surrounding tax disputes center upon, or are a consequence of, audits. These matters range from the clarity and certainty of the laws themselves, to appeals of audit results, to IRS employee conduct, and to remedies in the courts.").

New Jersey is engaging in deference run amok. This Court should take the opportunity to resolve the conflict in approach between New Jersey and other states, invalidate New Jersey's approach as violative of due process, and establish clear guardrails to prevent the administrative disorder and harm to taxpayers from deference taken too far.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the decision of the court below be reversed.

Respectfully submitted,

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