

No. 24-393

IN THE
Supreme Court of the United States

GEORGE ARSENIS, *et al.*,

Petitioners,

v.

BOROUGH OF BERNARDSVILLE, NEW JERSEY, *et al.*,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION**

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Court may exercise jurisdiction over a published New Jersey Appellate Division decision, denied certification by the New Jersey Supreme Court, when the decision is strictly based on state law.
2. Whether an issue based strictly on statutory interpretation of state law has adequate and independent nonfederal grounds to permit review by the Court.
3. Whether a thinly veiled tax appeal brought as a state law tort action, filed in the New Jersey Superior Court, Law Division, to avoid the statutory deadlines for tax appeals, constitutes a compelling reason for the Court to grant Petitioner's writ of certiorari.

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OPINIONS BELOW

The order denying certification of the Supreme Court of New Jersey (Pet. App. 1a-2a) is reported at 314 A.3d 1274 (N.J. 2024). The opinion of the New Jersey Superior Court, Appellate Division (Pet. App. 3a-23a), is reported at 298 A.3d 366 (N.J. Super. Ct. App. Div. 2023). The order and opinion of the New Jersey Superior Court, Law Division (Pet. App. 24a-60a), which granted the motion to dismiss, are unreported.

JURISDICTION

The Supreme Court of New Jersey denied Petitioner's Petition for Certification on May 29, 2024. The Petitioner's Petition for a Writ of Certiorari was filed in the United States Supreme Court on August 27, 2024. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a).

STATEMENT OF THE CASE

1. New Jersey statutory law outlines the comprehensive procedure for tax assessments and appeals, N.J. Stat. Ann. § 54:3-1 *et seq.*, and the limited jurisdiction of the state's Tax Court, N.J. Stat. Ann. § 2B:13-1 *et seq.* The statutory procedures include strict compliance with filing deadlines for appeals; “[f]ailure to meet statutory filing deadlines is a ‘fatal jurisdictional defect.’” *Macleod v. City of Hoboken*, 750 A.2d 152, 154-56 (N.J. Super. Ct. App. Div. 2000) (quoting *F.M.C. Stores Co. v. Borough of Morris Plains*, 495 A.2d 1313 (N.J. 1985)). New Jersey Tax Court has limited jurisdiction to review actions or regulations with respect to a tax matter of a state agency or official, county board of

taxation, or county or municipal official, and actions that raise issues where expertise in taxation is desirable. N.J. Stat. Ann. § 2B:13-2. Claims involving “spot assessments” are within the parameters of a tax appeal, must comply with the statutory appeal provisions, and are justiciable in New Jersey Tax Court. *See Twp. of W. Milford v. Van Decker*, 576 A.2d 881, 882-84 (N.J. 1990); *Macleod*, 750 A.2d at 154-55.

2. This case arises from local property tax assessments levied by the Borough of Bernardsville between 2013-2018. Pet. App. 6a. On May 14, 2021, C. Arsenis, S. Arsenis, G. Arsenis (collectively “Petitioner”), filed a four count complaint in the New Jersey Superior Court, Law Division, Bergen County, against Borough of Bernardsville; Edward Kerwin, Tax Assessor; Tom Czerniecki, Borough Administrator; Anthony Suriano, Borough Clerk; and John Does 1-10 and ABC Corporation 1-10 (collectively “Respondent”). Pet. App. 61a-80a. The Complaint alleged that the Respondent engaged in an elaborate scheme to defraud the Petitioner out of \$251,815 in unreasonably imposed local taxes as a result of “spot assessing” its property between 2013-2018. *Id.* Petitioner’s Complaint included four counts: (1) “Tax/ Mortgage Escrow Fraud”; (2) “Common Law Fraud”; (3) “Unjust Enrichment”; and (4) “Negligent Misrepresentation.” Pet. App. 73a-79a.

3. Respondent moved to transfer venue to the New Jersey Superior Court, Law Division, Somerset County on July 14, 2021. The motion was granted on August 6, 2021, and the matter was transferred from New Jersey Superior Court, Law Division, Bergen County, to the New

Jersey Superior Court, Law Division, Somerset County.
Pet. App. 36a.

4. Respondent moved to dismiss Petitioner's Complaint pursuant to N.J. Ct. R. 4:6-2 on August 11, 2021. After hearing oral argument on September 22, 2021, the trial court issued an Order and Statement of Reasons on September 24, 2021, dismissing Petitioner's Complaint with prejudice. Pet. App. 24a-60a. In relevant part, the New Jersey Superior Court, Law Division, Somerset County, held that Petitioner's Complaint was the substantive equivalent of a tax appeal as it alleged "spot assessing" and fraud in the assessment of Petitioner's Property, which resulted in alleged damages equal to the overpaid taxes. Since analysis of Plaintiffs' Complaint would require the Law Division to examine the merits of the quantum and methodology of the tax assessments, subject matter jurisdiction could only be exercised by the Tax Court. Any transfer to the Tax Court would be futile, because Petitioner's failure to adhere to the strict statutory deadlines constituted a fatal jurisdictional defect. Pet. App. 38a-45a.

5. Petitioner filed a Notice of Appeal with the New Jersey, Superior Court, Appellate Division, on February 10, 2022. Petitioner argued, in relevant part, that its Complaint goes beyond an ordinary tax appeal, and therefore is cognizable in the New Jersey Superior Court, Law Division, regardless of the expiration of statutory filing deadlines for tax appeals. Pet. App. 10a.

6. On June 23, 2023, in a published decision, the New Jersey Superior Court, Appellate Division affirmed

the dismissal with prejudice by the New Jersey Superior Court, Law Division. Pet. App. 3a-23a. The Appellate Division outlined New Jersey's statutory structure for tax appeals, and the limited jurisdiction of the New Jersey Tax Court. Pet. App. 12a-18a. The Appellate Division confirmed that Petitioner's Complaint was a "thinly veiled tax appeal[,]" as the claims were precisely the type of challenges cognizable in tax appeals, including the "spot assessment" allegations. Pet. App. 18a-21a. If Petitioners filed a timely tax appeal, the Law Division could have transferred the Complaint to the Tax Court, but since the late filing deprived the Tax Court of jurisdiction, any transfer would have been futile. Pet. App. 22a-23a.

7. On August 18, 2023, Petitioner filed a Petition for Certification to the Supreme Court of New Jersey for review of the published decision issued by the New Jersey Superior Court, Appellate Division. Pet. App. 81a-94a. The Supreme Court of New Jersey issued an Order denying Petitioner's Petition for Certification on May 29, 2024. Pet. App. 1a-2a.

REASONS FOR DENYING THE WRIT

The United States Supreme Court does not have jurisdiction to review Petitioner's Petition under 28 U.S.C. 1257(a) since it does not involve a federal question, and rests on adequate and independent state grounds. The New Jersey Superior Court, Law Division (Pet. App. 24a-60a) and New Jersey Superior Court, Appellate Division (Pet. App. 3a-23a) were correct in holding that Petitioner's Complaint was properly dismissed for lack of jurisdiction.

I. PETITIONER'S PETITION FAILS TO RAISE A FEDERAL QUESTION SUFFICIENT TO INVOKE THE SUPREME COURT'S JURISDICTION UNDER 28 U.S.C. 1257 AS THE MATTER IS STRICTLY A QUESTION OF STATUTORY INTERPRETATION OF NEW JERSEY LAW.

Since this litigation began in May, 2021, Petitioner has made every attempt to transmogrify a time barred tax appeal into an actionable claim for damages. In the New Jersey Trial Court, Appellate Division, and Supreme Court, Petitioner pursued tort claims, including fraud, unjust enrichment, and negligent misrepresentation. Now, for the first time before this Court, Petitioner seeks relief under the Equal Protection Clause of the United States Constitution. Indeed, the words "equal protection" are not found in Petitioner's Complaint. Petitioner's claims are entirely state law claims, outside of the Court's Federal Question Jurisdiction under 28 U.S.C. 1257.

This Court may exercise jurisdiction over "final judgments and decrees rendered by the highest court of the State" to determine:

1. The validity of a United States treaty or statute.
2. The validity of a state statute under the United States Constitution, treaties, or laws.
3. Any right, title, privilege, or immunity claimed under the United States Constitution, treaties, or laws, or any United States commission or authority.

28 U.S.C. 1257.

Here, Petitioner's Petition fails to raise an issue within the jurisdiction of this Court. The Petitioner does not challenge the constitutional validity of New Jersey Tax Court's limited jurisdiction, N.J. Stat. Ann. § 2B:13-1 *et seq.*, or the statutory procedure for tax assessments and appeals under New Jersey's Tax Law, N.J. Stat. Ann. § 54:3-1 *et seq.*

Nor did the New Jersey Trial Court or Appellate Division rest their decisions on federal law. Instead, the decisions were based entirely on the statutory interpretation of New Jersey tax law. *See Pet. App. 3a-60a.* Now, for the first time before this Court, Petitioner reframes its argument into constitutional violations of the Fourteenth Amendment's Equal Protection Clause.

This Court has consistently held that "it will not decide federal constitutional issues raised [] for the first time on review of state court decisions." *See, e.g., Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, [] they should be given the first opportunity to consider them.

Id. at 439 (internal citation omitted).

If Petitioner sought to raise a federal constitutional challenge to the application of New Jersey's tax assessment and appeal procedure, it was obligated to do so before New Jersey state courts. It did not.

Petitioner may point to vague references of "unconstitutionality" in its Complaint before the Trial Court, but those passing references are insufficient to raise the federal constitutional challenge necessary to warrant review by this Court. "[T]his Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam)). "No particular form of words or phrases is

essential’ for satisfying the presentation requirement, so long as the claim is ‘brought to the attention of the state court with fair precision and in due time.’” *Hemphill v. New York*, 595 U.S. 140, 148 (2022) (quoting *Street v. New York*, 394 U.S. 576, 584 (1969)).

Both the Trial Court and Appellate Division decisions made no findings on the federal Equal Protection claim. This is because Petitioner failed to present the Equal Protection claim now sought to be reviewed by this Court.

When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, [*Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987)], and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had ‘a fair opportunity to address the federal question that is sought to be presented here,’ [*Webb v. Webb*, 451 U.S. 493, 501 (1981)].

Adams, 520 U.S. at 86-87.

Although the New Jersey Supreme Court denied certification of Petitioner’s appeal, the New Jersey Appellate Division’s published decision did not address the alleged constitutional nature of Petitioner’s claims, outside of confirming that the New Jersey Tax Court enjoys specific jurisdiction to “consider constitutional claims, such as the imposition of a spot assessment, as alleged by plaintiffs.” Pet. App. 17a. As a result of the Appellate Division’s silence on the merits of Petitioner’s Equal Protection claim, the Court may “assume that the

issue was not properly presented” before New Jersey state courts. *Adams*, 520 U.S. at 86-87 (citing *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 550). Therefore, it is Petitioner’s burden to defeat that presumption, which it cannot do because the issue was never presented, let alone fairly presented, to the state courts.

II. THE APPELLATE DIVISION’S PUBLISHED DECISION RESTS ON ADEQUATE AND INDEPENDENT STATE LAW THAT PRECLUDES REVIEW BY THIS COURT.

Even had Petitioner established that the federal Equal Protection claim was fairly presented to the New Jersey courts, both decisions were based on adequate and independent state grounds to preclude review by this Court.

“[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.” *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). “[The] Court has no jurisdiction to review decisions based on adequate, nonfederal grounds.” *Republican Nat'l Comm. v. Burton*, 455 U.S. 1301, 1302 (1982) (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 568 (1977)). If the nonfederal ground is independent, broad enough to sustain the judgment, and has “fair support”, the Court is “not at liberty to inquire whether it is right or wrong, but must accept it[.]” *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917) (citations omitted).

The Appellate Division's decision was entirely based on the statutory construction of New Jersey law; both on New Jersey Tax Court's limited jurisdiction under N.J. Stat. Ann. § 2B:13-1 *et seq.*, and the statutory procedure for tax assessments and appeals under New Jersey's Tax Law, N.J. Stat. Ann. § 54:3-1 *et seq.* The Appellate Division did not reference any federal law, let alone make a decision on the merits in regards to equal protection. The Appellate Division upheld the Trial Court's dismissal of Petitioner's Complaint since it was filed long after the expiration of the statutory deadlines, and refused to transfer the matter to Tax Court as an exercise in futility, since that court would be without jurisdiction to adjudicate the claims due to the late filing. Pet. App. 22a. State law was the only law at issue in this litigation, and state courts, not federal courts, are the appropriate tribunals to decide questions of state law. Therefore, the Court lacks jurisdiction to entertain this Petition as the New Jersey Courts decided the matters on adequate and independent state grounds.

III. PETITIONER'S PETITION FAILS TO STATE A COMPELLING REASON.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Those compelling reasons typically include three categories of cases:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from

the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10.

Petitioner has failed to assert a valid or compelling reason for this Court to issue a writ of certiorari. First, Supreme Court Rule 10(a) does not apply since Petitioner's Petition appeals the decision of a state court of last resort, and not a decision from a United States court of appeals. Sup. Ct. R. 10(a).

Second, the New Jersey Appellate Division's decision, as the Supreme Court denied certification, does not conflict with any decision of a United States court of appeals, state court of last resort, or this Court. Sup. Ct. R. 10(b)-(c). As a preliminary matter, this matter does not involve a federal question, let alone one of national importance that

should be settled by this Court. Petitioner alleges (Br. 16) that the alleged spot assessment at issue in its Complaint contravenes New Jersey case law, particularly *Tri-Terminal Corp. v. Edgewater*, 346 A.2d 396 (N.J. 1975). Respondent has never disagreed that spot assessments are inconsistent with Article VIII, §1 ¶ 1 of New Jersey's Constitution. Rather, Respondent argued that the proper method to challenge an assessment is through timely appeal of said assessment to the county board of taxation or the New Jersey Tax Court, consistent with New Jersey Tax Law. Instead, Petitioner ignored the statutory procedure for New Jersey tax appeals, filed a four count complaint which consisted strictly of state law tort claims, in the New Jersey Superior Court, Law Division, all in an effort to evade the statutory deadline. The New Jersey Trial Court and Appellate Division both saw Petitioner's state law tort action for what it was: a thinly veiled tax appeal, and dismissed the matter for lack of jurisdiction. Petitioner now seeks to reframe these allegations, this time as an equal protection violation, to seek review from this Court. No such claim was pled; none exists.

This matter is one strictly of state statutory law. It presents no question of federal law, never mind an important one, that warrants review by this Court.

Accordingly, there is no compelling reason for this Court to issue a writ of certiorari.

CONCLUSION

Based upon the above, Respondents respectfully urge the Court to deny the Petition.

Respectfully submitted,

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