No. 96694-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FIRST STUDENT, INC.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

MEMORANDUM OF AMICUS CURIAE NATIONAL ASSOCIATION FOR PUPIL TRANSPORTATION IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

As described further in the accompanying Motion for Leave to File Amicus Curiae Memorandum, the National Association for Pupil Transportation (NAPT) is a nonprofit association under Internal Revenue Code § 501(c)(6). NAPT is the country's leading trade association for student transportation providers. Its members form a diverse community of people and organizations that share a passion for safe and efficient student transportation.

The court of appeals' decision affects NAPT and its members because of its broad impact on school transportation providers in Washington. It will result in higher school transportation costs for school districts throughout the state. The decision below also affects NAPT's members outside of Washington because it disturbs a well-settled understanding of transportation "for hire" across many different legal and regulatory regimes. NAPT is not aware of any other court that has held that the transportation of students for compensation does not qualify as "for hire" because the student-passengers do not pay their own way.

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW

NAPT adopts the Issues in First Student's Petition.

III. STATEMENT OF THE CASE

NAPT adopts the Statement presented in First Student's Petition.

IV. ARGUMENT

This Court should accept review because the court of appeals' decision raises issues of substantial public importance and implicates significant constitutional concerns. *See* RAP 13.4(b)(4), (b)(3).

A. The court of appeals' interpretation of "for hire" negatively impacts school transportation throughout Washington.

The safe and efficient transport of students is central to the educational mission of American public schools. Every school day in the United States, school buses transport roughly 25 million students. Office of Superintendent of Public Instruction, School Bus Driver Handbook (Aug. 2017). In Washington, "school buses provide over 700,000 student trips per day and travel over 100 million miles per year." *Id*.

State law assigns responsibility for student transportation to each school district, although the State allocates funds to local districts to support student transportation. RCW 28A.160.010. While some school districts own and operate their own school buses, many school districts contract with private transportation providers or other school districts to discharge their student transportation responsibilities. *See id*. (authorizing school districts to "use school buses and drivers hired by the district or commercial chartered bus service for the transportation of school children."); RCW 28A.160.140 (setting forth the competitive bidding process for student transportation services).

Student transportation is an expensive undertaking. During the 2017-18 school year, the state allocated more the $473 million for student transportation funding in addition to local funds provided by school districts. Office of Superintendent of Public Instruction, Bulletin No. 012-18 Student Transportation (Feb. 26, 2018). The decision below increases those expenses by subjecting most student transportation to a higher tax rate than the transportation of non-student passengers or goods.

B. The court of appeals gave "for hire" a meaning contrary to the common law and its familiar legal meaning.

"A familiar legal term used in a statute is given its familiar legal meaning." *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530, 554 P.2d 1041 (1976). Likewise, "[i]f the legislature uses a term well known to the common law, it is presumed that the legislature intended it to mean what it was understood to mean at common law." *Ralph v. Dep't of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (citation omitted).

The court below did not follow those well-established standards. Instead, it adopted an unfamiliar construction of the statute: "the legal (or technical) meaning of the term 'for hire' at the time the statute was drafted contemplated that the 'passengers' would be directly responsible for any compensation paid." *First Student, Inc. v. Dep't of Revenue*, 4 Wn. App. 2d 857, 868, 423 P.3d 921 (2018). No case supports that conclusion.

As the Petition explains, there are numerous decisions around the country holding that transportation services paid for by third parties are "for hire." *E.g.*, *Surface Transp. Corp. of N.Y. v. Reservoir Bus Lines, Inc.*, 67 N.Y.S.2d 135, 271 A.D. 556 (N.Y. App. Div. 1946); *see* Petition at 12-14. NAPT is not aware of any case construing the phrase "for hire" that requires that the passenger pay for the transportation.

The authority cited by the Department to the contrary attempts to manufacture uncertainty in the common-law meaning of "for hire" by misreading distinguishable cases. *See* Answer at 11-12. For example, New York courts have held that a school bus *owned and operated by the school district* was not transportation of passengers "for hire." *Gibson v. Bd. of Educ. of Watkins Glen Cent. Sch. Dist.*, 414 N.Y.S.2d 791, 793, 68 A.D.2d 967 (N.Y. App. Div. 1979). The court simply concluded that the school district was not being compensated for providing transportation to students. The same would be true in Washington. A school district that owns and operates its own school buses would not be providing transportation "for hire" because no one would be paying for the transportation (except if another school district or third party hired the district to provide the service).

Texas courts have held that a company providing school bus transportation is not a "common carrier." *Durham Transp. Inc. v. Valero*,

897 S.W.2d 404, 409 (Tex. App. 1995). While common carriers may provide transportation "for hire," not all for-hire transportation is provided by common carriers. *See* RCW 82.16.010(6); RCW 81.80.010 (distinguishing between "common carriers," "contract carriers," and "private carriers," all of which may transport persons or property "for hire"). The case does not muddy the common-law definition of "for hire."

Similarly, Illinois courts have held that a school bus operated by First Student was not "public transportation" because "First Student was hired to transport special education children" and such transportation "is not available to the *general public*." *In re Jerome S.*, 360 Ill. Dec. 276, 280-81, 968 N.E.2d 769 (Ill. App. Ct. 2012). The case had nothing to do with whether the transportation was for "for hire" or how it was paid for.

None of those authorities bolsters the Department's novel theory that was accorded deference by the court below. At common law, any consideration provided for school bus transportation makes those services "for hire." Only the court of appeals' anomalous interpretation undermines the uniform understanding of the phrase "for hire."

C. The court of appeals' improper analytical approach led to an unreasonable statutory construction of "for hire."

A statute is ambiguous if it is "susceptible to two or more reasonable interpretations" but not "merely because different

interpretations are conceivable." *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (citations omitted).

Beyond having no basis in the common law, the interpretation of "for hire" adopted below is untenable as a matter of statutory construction. The phrase "for hire" appears nine times in the statute defining the businesses subject to public utility tax. *See* RCW 82.16.010. Six of these uses are plainly inconsistent with the court of appeals' interpretation of "for hire" because there are no "passengers" that could be responsible for payment. *See id.* (defining various public service businesses "for hire," such as distributing gas, electrical energy and water, providing telephonic and telegraphic communications, or "towing or pushing . . . vessels, barges or rafts."). The interpretation adopted below makes little more sense with any other definitions because each involves the transportation of "persons *or property* . . . for hire." RCW 82.16.010(6) (emphasis added).

Further, the interpretation adopted below leads to the absurd result that the payor of a service determines its tax treatment. A transportation service provider would be subject to public utility tax when the passenger purchases a bus ticket because such service would be "for hire," but the same service would be subject to a higher business and occupation tax when purchased by a passenger's employer, parent, friend, or—in this case—school district. Courts avoid statutory construction that produces

"[u]nlikely, absurd or strained consequence[s]." *Bowie v. Wash. Dep't of Revenue*, 171 Wn.2d 1, 14-15, 248 P.3d 504 (2011).

D. The court of appeals' mechanical use of agency deference raises serious constitutional concerns.

The theory of deference applied by the court below defies the constitutional design by reallocating the core judicial role to the executive. The State Constitution provides that "[t]he judicial power of the state shall be vested in a supreme court, superior courts, . . . and such inferior courts as the legislature may provide." Const. art. IV, § 1. This Court has explained that "the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine." *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). While the branches are not "hermetically sealed off from one another," *see id.*, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)).

Interpreting the statutory phrase "for hire"—which the Department has never deemed necessary to construe—is a classic task for the courts. Yet the court below afforded "great weight" to the Department's exclusion of "school buses" under WAC 458-20-180(5) even when the regulation

says nothing about the meaning of "for hire." *First Student, Inc.*, 4 Wn. App. 2d at 871. Such mechanical deference should raise constitutional scrutiny. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21, 201 L. Ed. 2d 433 (2018) (Kennedy, J., concurring) ("The type of reflexive deference exhibited in some of these cases is troubling. . . . The proper rules for interpreting statutes . . . should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.").

This concern is all the more acute here because the court of appeals deferred even though the Department did not interpret the purported statutory ambiguity until it made legal arguments in the midst of litigation. To be clear, the pertinent regulation does not fill any statutory gap created by the phrase "for hire." All that WAC 458-20-180(5) shows is that the agency historically excluded "school buses" from the definition of "motor transportation businesses." No Department regulation defines "for hire." No informal guidance explains that a transportation service is not "for hire" unless the passenger pays the fare. The statutory gloss set forth by the Department represents nothing more than layering a novel and previously undisclosed legal justification of "for hire" onto its historical policy of excluding school buses from "motor transportation businesses" under WAC 458-20-180(5).

When an agency has not interpreted the statutory ambiguity, it is well-established that this Court does not defer:

> If an agency is asserting that its interpretation of an ambiguous statute is entitled to great weight it is incumbent on that agency to show that it has adopted and applied such interpretation as a matter of agency policy. . . . Therefore, even if we were to assume for the sake of argument that the statute was ambiguous, . . . the Department has not established an agency interpretation entitled to great weight. Instead, it attempts to bootstrap a legal argument into the place of agency interpretation.

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 815, 828 P.2d 549 (1992); *see Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007) ("Lacey's claimed definition was not part of a pattern of past enforcement, but a by-product of current litigation. . . . [T]he agency must show it adopted its interpretation as a 'matter of agency policy.'") (citation omitted). Those same principles foreclose deference to the agency here.[1]

According deference to litigation-based agency interpretation disrupts the separation of powers. This case is no exception. The agency

[1] This Court does not defer to an agency's interpretation of its own regulation when the rule does not address the pertinent legal issue. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). Double-deference—crediting the Department's representation that WAC 458-20-180(5) embodies a longstanding agency policy that school buses are not "for hire"—would pose an even greater separation-of-powers threat. The U.S. Supreme Court will hear oral argument on March 27, 2019, in *Kisor v. Wilkie*, No. 18-15, which presents the question whether the Court should overrule federal authority requiring judicial deference to an agency's *reasonable* interpretation of its own regulations. *See Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). This Court recently recognized that the "the level of deference owed to regulations is an issue of ongoing debate." *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 624, 416 P.3d 1205 (2018). Whatever the scope of that debate, it surely does not extend to an *un*reasonable agency interpretation of its regulations, as is the case here.

relied on Black's Law Dictionary to argue that school buses are not "for hire"; the definition therein derives from (non-Washington) case law, not the agency's expertise applying the statutory scheme. No deference should apply. *See Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) ("There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions.") (citation omitted). That is no small flaw. And there is good reason to doubt a recently minted agency interpretation. *Cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 371 (1986) (explaining that courts scrutinize "whether the agency can be trusted to give a properly balanced answer" due to "fear that certain agencies suffer from 'tunnel vision' and as a result might seek to expand their power beyond the authority that Congress gave them").

Preserving the judiciary's core responsibility to interpret the law is essential when state agencies cloak legal arguments under the guise of longstanding agency policy entitled to great weight from this Court. Deference to an agency that never considered the statutory ambiguity crosses a constitutional boundary and warrants this Court's correction.

V. CONCLUSION

For the foregoing reasons, NAPT respectfully requests that the Court grant First Student's Petition for Review.

Respectfully submitted.

DATED: February 25, 2019.

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CERTIFICATE OF SERVICE

Today I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal, which will automatically cause such filing to be served on counsel for all other parties in this matter via the Court's e-filing platform.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: February 25, 2019, at Seattle, Washington.

s/ Jessica Flesner
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PERKINS COIE LLP

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