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NO. 96694-0

SUPREME COURT OF THE STATE OF WASHINGTON

FIRST STUDENT, INC.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

DEPARTMENT OF REVENUE'S ANSWER TO MEMORANDUM OF AMICUS CURIAE NATIONAL ASSOCIATION FOR PUPIL TRANSPORTATION IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Amicus curiae National Association for Pupil Transportation (NAPT) bases its memorandum in support of review on the same false premise that First Student, Inc., argued in its Petition for Review. But the Court of Appeals did not adopt a specific definition of "for hire"; it merely found "for hire" as used in RCW 82.16.010(6) and (12) to be ambiguous. NAPT also erroneously claims that the Court of Appeals' decision will increase costs for school districts. But the decision simply continues the taxation of private school bus operators that has applied for more than 80 years. To the extent amicus or others have concerns about the cost of providing school bus transportation, and they believe reducing the tax rate for private school bus operators is an appropriate avenue to alleviate those costs, they should direct that argument to the Legislature, not this Court.

NAPT also raises a new argument that the Court of Appeals' affording of deference to an agency's contemporaneous and long-standing interpretation of a statute within its expertise implicates the separation of powers doctrine. This Court should decline to consider an argument first raised by an amicus. Moreover, the argument is meritless because the Court of Appeals followed established precedent in giving great weight to an agency interpretation to which the Legislature has long acquiesced. The Department of Revenue's interpretation of taxing private school bus

operators under the service or other classification of the Business and Occupation (B&O) tax has been reflected in its rules for more than 80 years. It is not a "litigation-based agency interpretation," as NAPT claims. The Court of Appeals did nothing more than follow this Court's precedent that an agency's interpretation of the law is entitled to great weight when the statute is ambiguous and is within the agency's special expertise. Applying this well-known rule of statutory construction does not violate the separation of powers doctrine. This Court should deny review.

II. ARGUMENT

A. The Court of Appeals' Decision Maintains the Status Quo for Taxation of School Bus Operators

NAPT erroneously characterizes the Court of Appeals' decision as resulting in higher school transportation costs for school districts in the state. But the Court of Appeals' holding rejecting First Student's refund request does not subject First Student to a tax rate higher than that historically applied. For more than 80 years, private school bus operators have paid B&O tax under the service and other classification on their revenues from providing services to school districts. And, as a result of the decision, they will continue to do so.

NAPT also ignores that, if the public utility tax (PUT) applies, as First Student claims, some revenues received by private school bus

operators would be subject to a *higher* tax rate. In place of the 1.5 percent rate under the B&O tax, *see* RCW 82.04.290(2), school bus operators in rural areas would be subject to a higher base rate of 1.8 percent under the "motor transportation business" PUT classification, plus an additional tax rate. *See* RCW 82.16.010(6) and RCW 82.16.020(1)(f) and (2).[1]

The Court also should reject NAPT's attempt to raise concerns about public school transportation funding. The fact that the state and school districts currently spend hundreds of millions of dollars to fund school bus operations, much of that on private school bus operators, does not mean that the Legislature in 1943 and 1955 intended to provide that group of taxpayers with a potentially lower tax rate. Whether private school bus operators should be subject to a PUT classification is a policy question for the Legislature, not this Court. Furthermore, nothing in the record suggests that if First Student were successful in obtaining a tax refund or reduced tax rate, it would result in lower transportation costs for Washington schoolchildren.

B. NAPT Repeats First Student's Statutory Construction Arguments that the Court of Appeals Properly Rejected

In the absence of a statutory definition of the term "for hire," the Court of Appeals properly evaluated the various definitions of the term

[1] School bus operators qualifying under the "urban transportation business" classification would benefit from a lower rate. *See* RCW 82.16.020(1)(d) and (2).

offered by the parties. *First Student, Inc. v. Dep't of Revenue*, 4 Wn. App. 2d 857, 866-71, 423 P.3d 921 (2018). No party has provided a Washington case directly answering the question of whether school bus operators provided their services "for hire" at the time of the statutory amendments. Instead, First Student cited a modern general-purpose dictionary definition. App. Br. at 10 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1072 (2000)). The Court of Appeals correctly recognized that courts "generally refrain, though, from applying modern definitions to time-worn statutes and will attempt to glean a definition from a dictionary in print at the time the [L]egislature amended the statute." *First Student*, 4 Wn. App. 2d at 866-67 (citing *League of Educ. Voters v. State*, 176 Wn.2d 808, 821, 295 P.3d 743 (2013)).

The Court of Appeals further explained that the general purpose dictionaries from the time period do not have a plain language definition of the phrase "for hire" and instead contain separate definitions of the terms "for" and "hire." *First Student*, 4 Wn. App. 2d at 867. Nonetheless, the Court recognized that the ordinary meaning of the term when the Legislature amended the statute in 1955 "could be understood as effecting the engagement or purchase of labor or services for compensation or wages." *Id.* The Department does not dispute that possible meaning; it disputes that such a meaning is the only reasonable meaning in light of the

other relevant definitions at the time and the statutory and regulatory history of school bus taxation.

The Court of Appeals also considered possible meanings offered by the Department, which included the contemporaneous definition of "for hire or reward" in Black's Law Dictionary for several decades, including in 1955. *First Student*, 4 Wn. App. 2d at 868. This definition provided that the reward or stipend paid to transport passengers was "to be paid by such passengers." *Id.* Contrary to NAPT's arguments, the Court of Appeals did not "adopt" this definition as the only reasonable meaning of "for hire." Rather, the Court recognized that it was "a fair reading" of the term "at the time the statute was drafted." *Id.* Accordingly, the Court concluded the statute at issue was ambiguous and, therefore, it was appropriate to apply rules of statutory construction that apply to ambiguous statutes.

The Court of Appeals' consideration of the contemporaneous definition of "for hire" in Black's Law Dictionary is entirely consistent with this Court's direction that courts give undefined terms their ordinary meaning, as provided in dictionaries or common law. *See, e.g., AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 395, 325 P.3d 904 (2014) (reviewing Black's Law Dictionary to ascertain the meaning of "recover" as used in RCW 4.84.270, an attorneys' fee statute). As discussed in the Department's Answer to First Student's Petition for

Review, no rule prohibits a court from considering or applying a dictionary definition if no specific case applies the definition to the context presented. *See* Ans. to Pet. at 8-12. This Court should reject NAPT and First Student's suggestions to the contrary.

C. The Court of Appeals' Analysis Is Consistent with Out-of-State Case Law and the Statutory Context

Contrary to NAPT's argument, out-of-state case law supports the Court of Appeals' conclusion that one plausible legal reading of "for hire" requires that the user pay a fee for the transportation. A New Jersey court, applying the Black's Law Dictionary definition, required that passengers pay the fare to the operator in deciding that an adult medical day-care services provider was not providing its transportation "for hire." *Nebinger v. Maryland Cas. Co.*, 711 A.2d 985, 988-89 (N.J. Super. App. Div. 1998) ("for hire" applies in "situations where the user of the motor bus pays a fee or fare for the transportation itself, rather than situations where the user pays a fee for a different kind of service which includes transportation thereto").

NAPT's effort to distinguish the other out-of-state cases also does not undermine the Court of Appeals' reasoning. While those cases may have analyzed whether the school buses were offered to the general public, they are entirely consistent with the Court of Appeals' conclusion that "for

hire" as used in RCW 82.16.010(6) and (12) is ambiguous. The public nature of the transportation is a dispositive factor in some "for hire" definitions. For example, the Utilities and Transportation Commission defines "for hire" as "transportation offered to the general public for compensation." WAC 480-51-020(7). It is also consistent with the language in the urban transportation business definition of the PUT, the tax classification for which First Student seeks to qualify: "operating any vehicle for *public use* in the conveyance of persons or property for hire." RCW 82.16.010(12) (emphasis added).

In addition, the legal meaning provided by Black's Law Dictionary can be harmonized with other definitions in the PUT. Nearly every other use of the term "for hire" (the distribution of gas and water, and the service of providing light, power, telephone networks, and telegraphs) involves public utility services unrelated to passengers. The only other term in RCW 82.16.010 involving passengers is "railroad business," which is defined in relevant part as operating any railroad for public use in the conveyance of persons or property for hire." RCW 82.16.010(8). There would be no inconsistency in applying such an interpretation, that "for hire" requires the passenger to pay for the transportation, to this definition. Accordingly, interpreting "for hire" as applied in the context of passengers may be harmonized with the use of the term in other contexts.

D. Giving Weight to an Agency's Longstanding Interpretation to Which the Legislature Has Acquiesced Is Consistent with the Separation of Powers

The Court should decline to consider NAPT's constitutional argument because First Student did not argue any constitutional grounds for review under RAP 13.4(b)(3). Pet. at 5. In fact, First Student never has raised a constitutional argument. *See Mains Farms Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 854 P.2d 1072 (1993) (declining to consider claimed violation of the Federal Fair Housing Act raised by amici because "[w]e do not consider issues raised first and only by amicus") (citing *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984)).

Even if the Court were to consider this newly-raised argument, NAPT has not established that a "significant question of law under the Constitution of the State of Washington or of the United States is involved." RAP 13.4(b)(3). NAPT's constitutional argument essentially boils down to claiming that unless an agency identifies a specific term in its rules and provides a precise definition of that term, the courts violate the separation of powers doctrine by giving weight to an agency's longstanding rule interpreting the statute at issue. This is not the standard, as this Court routinely defers to longstanding interpretive rules. *E.g. Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d

659 (2004); *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 779-81, 903 P.2d 443 (1995).

NAPT's assertion that the Department developed its justification for taxing school bus operators under the B&O tax as a "by-product of current litigation" is belied by the lengthy statutory and regulatory history of school bus taxation in Washington. The Department and its predecessor, the Washington State Tax Commission, repeatedly revisited and revised the relevant rules shortly after each statutory amendment to the PUT definitions of urban and highway/motor transportation. During that entire time, the Department and the Tax Commission interpreted the tax statutes as imposing taxes on private school bus operators under the service and other classification of the B&O tax.

NAPT's criticism that the "Department did not interpret the purported statutory ambiguity until it made legal arguments in the midst of litigation," Memo. at 8, does not undermine the Court of Appeals' conclusion that "for hire" as used in the PUT is ambiguous. Nor does it undermine the deference provided by the Court to the Department's consistent and long-standing interpretation.[2] Until First Student challenged the Department's interpretation, the Department had no reason to explain

[2] The fact that First Student paid the B&O tax, and not the PUT, for the first 25-plus years it operated in Washington State likewise supports the reasonableness of the Court of Appeals' analysis.

the reasoning of the 1943 and 1956 Tax Commission rules concluding that the PUT statute did not apply to private school bus operators.

Also, in contrast to the Court of Appeals' decision in this case, in neither *Cowiche Canyon Conservatory v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992) nor *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007), did this Court premise its analysis on a conclusion that the terms at issue were ambiguous. Furthermore, the Department's longstanding established practice of enforcement with respect to school bus taxation significantly distinguishes this case from the cases cited by NAPT. In both *Cowiche Canyon* and *Sleasman*, the agencies were advancing or enforcing an agency interpretation in the litigation for the first time. Here, for more than 80 years, the Department has consistently interpreted the PUT definitions in its rules.

III. CONCLUSION

This Court should decline review of this straightforward Court of Appeals' decision applying well-established precedent on statutory interpretation. While there is no dispute about the importance of school bus transportation as a general matter, the Court of Appeals' decision merely continues the longstanding interpretation of the tax classification for private school bus operators that has been in effect since the 1930's. It does not warrant this Court's review.

RESPECTFULLY SUBMITTED this 14th day of March, 2019.

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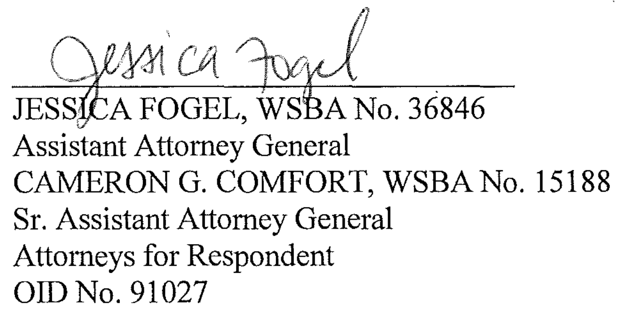

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Katelyn Johnson, Legal Assistant

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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