No. 20-1611

IN THE
Supreme Court of the United States

HEALTHCARE DISTRIBUTION ALLIANCE, ET AL.
Petitioners,
v.
LETITIA JAMES, ATTORNEY GENERAL OF NEW YORK, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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

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June 18, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, DC 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

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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 their ability to access the federal courts, *Amicus* has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

Broadly and universally, (1) taxes are imposed for the primary purpose of raising revenue, (2) fees are imposed for the primary purpose of recouping costs from those being regulated or benefitting from a service, and (3) penalties are imposed for the primary purpose of punishment. All three are imposed by government, raise revenue, and impose economic costs.

While the history of distinguishing taxes, fees, and penalties is filled with many close cases, generally a state tax involves the money being used for general government purposes, paid to the tax collector deposited into the state general fund, and imposed with a primary purpose unrelated to recouping costs, regulating conduct, or punishing bad actors.

Penalties redress wrongs to the public or the state, as opposed to individuals, and intended more to deter others from similar conduct than to compensate victims for their loss. The charge imposed in this case is a penalty, and the Second Circuit is an outlier in concluding that a challenge to the charge is barred by the Tax Injunction Act.

The conclusion reached by the court below erodes the long relied upon definition of "tax" and wrongfully invokes the TIA in order to stifle any scrutiny or legal challenge as to its constitutionality. Because the TIA applies only to taxes, as determined under federal law, distinguishing between taxes, fees, and penalties is paramount to clearly defining the scope of the Act. As the TIA serves to bar almost any federal challenge to a state tax statute and is the threshold for the vast majority of tax disputes, any festering circuit split as to what constitutes a "tax" will create havoc for lower courts and for taxpayers who depend on clear law.

This Court's recent decision in *CIC Services* unanimously rejected a broad interpretation of "tax" sought by the government that would have subsumed nearly everything and barred those challenging regulatory actions only tangentially related to revenue collection from having their day in court. This Court has the opportunity to do the same here for those facing a legislatively-imposed punishment masquerading as a tax.

ARGUMENT

I. THE SECOND CIRCUIT'S DEFINITION OF "TAX" IS AN OUTLIER.

A. Taxes, Fees, and Penalties Are Different and Consistently Applying Those Distinctions is Vital for Taxpayer Protections.

In his book compiling caselaw, historical sources, and popular understanding on the distinction between taxes, fees, and penalties, Joseph Bishop-Henchman observes that the definition of tax is "not just a matter of semantics." *See* JOSEPH HENCHMAN, HOW IS THE MONEY USED? FEDERAL AND STATE CASES DISTINGUISHING TAXES AND FEES (2013) at 3. Judicial attentiveness to these distinctions is vital to "strengthen taxpayer protection provisions, contribute to openness in tax policy debates, minimize distortions caused by hidden or mislabeled taxes, and help increase awareness of the full cost of government programs," because politicians have incentives to mischaracterize taxes, fees, and penalties depending on the incentives of any given political situation. *Id.*

Broadly and universally, the key factor is the primary purpose of the exaction: (1) taxes are imposed for the primary purpose of raising revenue, (2) fees are imposed for the primary purpose of recouping costs from those being regulated or benefitting from a service, and (3) penalties are imposed for the primary purpose of punishment. *See id.* at 5. All three are imposed by government, raise revenue, and impose economic costs. "While some may equate a tax to any government action that results in costs of any kind, the general public and the courts have been careful to

distinguish between different forms of government-collection exactions. The key difference between these different assessments, according to laws and interpretive rules used in nearly every state, is their purpose." *Id.*

An example of this standard being applied is in the widely-cited 1992 case *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992), which involved interpreting a tax injunction statute:

> The classic 'tax' is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community…. Courts [analyzing close cases] have tended (sometimes with minor differences reflecting the different statutes at issue) to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation.

Id. In other words, taxes fund general benefits to everyone while fees fund particularized benefits to the fee-payer. *San Juan Cellular*'s three-part test—(1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies obtained by the charge—is used to make this determination. *See id.* When the three-part inquiry yields a result that places the charge somewhere in the middle of the *San Juan Cellular* descriptions, the most important factor

becomes the purpose behind the statute, or regulation, which imposes the charge. *See, e.g.*, *Hill v. Kemp*, 478 F.3d 1236, 1245 (10th Cir. 2007) ("[T]he critical inquiry focuses on the purpose of the assessment and the ultimate use of funds." (quotation marks omitted)); *Hedgepeth v. Tennessee*, 215 F.3d 608, 612 (6th Cir. 2000) (describing the revenue's ultimate use as "the predominant factor" (quotation marks omitted)); *Collins Holding Corp. v. Jasper County*, 123 F.3d 797, 800 (4th Cir. 1997) (explaining that "the heart of the [TIA] inquiry centers on function, requiring an analysis of the purpose and ultimate use of the assessment"); *San Juan Cellular*, 967 F.2d at 685 (noting that courts "have tended ... to emphasize the revenue's ultimate use" in cases falling in the middle of the tax–regulatory fee spectrum).

In those circumstances if the ultimate use of the revenue benefits the general public then the charge will qualify as a "tax," conversely, if the benefits are more narrowly circumscribed then the charge will more likely qualify as a "fee." *See San Juan Cellular*, 967 F.2d at 685; *South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir. 1983). However, it should be noted that the fact that revenue is placed in a special fund is not reason on its own to warrant characterizing a charge as a "fee." *See, e.g.*, *Collins Holding Corp.*, 123 F.3d at 800 (4th Cir. 1997). If the revenue of the special fund is used to benefit the population at large then the segregation of the revenue to a special fund is immaterial. *See, e.g.*, *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 932 (9th Cir. 1996).

Thus, when revenue is placed in a special fund the further inquiry must be whether the money is used "to benefit regulated entities, ... to defray the cost of

regulation" (making it resemble a "fee") or else to benefit the general public. *See Collins*, 123 F.3d at 800. Indeed, when "[a]n assessment [is] placed in a special fund and used only for special purposes" it is not a tax. *Bidart Brothers*, 73 F.3d at 932. Further, mere indirect public benefit from the assessment's expenditure does not transform a fee into a tax. The relevant question then is "whether an injunction would pose a 'threat to the central stream of tax revenue relied on by' the state." *American Trucking Associations, Inc. v. Alviti*, 944 F.3d 45, 53 (1st Cir. 2019). When proceeds of an assessment are placed in a segregated account and expended by a single entity for a particular purpose they never enter that central stream. Funds of this nature therefore "stand quite apart from the state's central stream of government funding provided by traditional types of taxes." *Id.*

A challenge to such an excise is not barred by the TIA. For example, the Fifth Circuit has recognized that courts applying the TIA must be "more concerned with the purposes underlying the ordinance than with the actual expenditure of the funds collected under it." *See Home Builders Association of Mississippi v. City of Madison*, 143 F.3d 1006 (5th Cir. 1998). In the Eighth Circuit, what constitutes a "tax" for purposes of the Tax Injunction Act is a question of federal law, not state labels. *See Ben Oehrleins, Inc. v. Hennepin County*, 115 F.3d 1372, 1382 (8th Cir. 1997). In the Third Circuit, the label affixed to an ordinance by its drafters has no bearing on the resolution of the question. *See Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371, 374 (3d Cir. 1978). The same is true for all but one state supreme court. *See* HENCHMAN, HOW IS THE MONEY USED?, *supra*, at 8.

Unlike taxes and fees, penalties are "punishments imposed on a wrongdoer, usually in the form of imprisonment or a fine; especially, a sum of money exacted as punishment for either a wrong to the state or a civil wrong." BLACK'S LAW DICTIONARY (11TH ED. 2019); *see Kokesh v. Securities and Exchange Commission*, 581 U.S. ____, 137 S. Ct. 1635, 1642 (2017) ("A 'penalty' is a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws."). Penalties redress wrongs to the public or the state, as opposed to individuals, and intended more to deter others from similar conduct than to compensate victims for their loss. *See Kokesh*, 137 S. Ct. at 1642.

The court below departed significantly from this body of case law despite emphasizing the same *San Juan Cellular* factors as other courts. Specifically, the Second Circuit's working definition of tax diminishes the importance of the ultimate disposition of the funds without justification, and further muddies the waters as to the determining the identity of any charge levied by the government. Indeed, the Second Circuit essentially contradicts itself in conceding that depositing of funds into the general treasury is usually a sign that the charge is a tax, but then holds the opposite in this case. *See Ass'n for Accessible Medicines v. James*, 974 F.3d 216, 226 (2d Cir. 2020). The court below also acknowledged that taxes are usually paid to the Commissioner of the Department of Taxes, are not dedicated for any particular purpose, and are labeled as a tax, none of which are applicable to the opioid stewardship payment. *Id.*, *quoting Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 737 F.3d 228, 231 (2d Cir. 2013). And yet, while also

conceding that a charge that defrays an agency's cost of regulation is likely a fee, the court below held that the charge here is a tax. Its conclusion is not supportable.

B. The Second Circuit's Conclusion is At Odds With the View of New York State Courts.

New York state courts have followed this standard in evaluating fees in their leading case on the subject. *See American Sugar Ref. Co. of New York v. Waterfront Comm'n of New York Harbor*, 432 N.E.2d 578, 585 (N.Y. 1982). There, the court provided: "The distinction between a license fee and a tax is, of course, one long understood in our law. A license fee has for its primary purpose the regulation or restriction of a business deemed in need of public control, the cost of such regulation being imposed upon the business benefited or controlled, whereas the primary purpose of a tax is to raise money for support of the government generally." *Id.*

New York cases have also observed that when determining whether a charge is a fee, judges can also look to (1) whether the charge is reasonably related to the costs expended by the government under the regulation or whether, as here, the amount levied was arbitrarily determined; and (2) whether there is maintained a separate earmarked account in which to keep the funds, or whether funds are commingled with state general funds. *See, e.g., Am. Ins. Ass'n v. Lewis*, 409 N.E.2d 828, 833-34 (N.Y. 1980) (holding that a "capping" fee imposed on insurers as a condition of doing business in New York constituted an unlawful tax where it bore no relationship to cost of

administering a licensing program or the benefits received by insurers); *Suffolk County Bldrs. Ass'n, Inc. v. Suffolk County*, 389 N.E.2d 133, 137 (N.Y. 1979) (deciding inspection fees imposed by the health department with respect to issuance of permits were legitimate because there was a reasonable concurrence between the fees and regulatory program expenses); *Jewish Reconstructionist Synagogue of N. Shore v. Inc. Vill. of Roslyn Harbor*, 352 N.E.2d 115, 125 (N.Y. 1976) (finding fees imposed on applicants for zoning variances and special use permits were invalid where the village failed to demonstrate any correspondence between fees and regulatory costs); *City of New York v. Second Ave. R. Co.*, 32 N.Y. 261, 273-74 (N.Y. 1865) (finding a $50 annual fee to run rail cars through the City of New York to be a tax because its primary purpose was to raise revenue and there was no conceivable connection between the charge and any regulatory benefit or cost); *Town Bd. of Town of Poughkeepsie, on Behalf of Arlington Water Dist. v. City of Poughkeepsie*, 255 N.Y.S.2d 549, 556 (N.Y. App. Div. 1964) (holding that a water charge by the city which supplied water to water districts outside the city and made the charge depend solely on the quantity of water used was not a "tax"); *City of Buffalo v. Stevenson*, 100 N.E. 798, 800 (N.Y. 1913) ("There is no evidence that a fee of $5 is an unreasonable charge. . . . [T]he purpose of the charge [is] . . . to meet the expenses necessarily or possibly attendant upon the granting of the permission to open the street pavement. The monies are reserved in a particular fund, set apart for the repairs of streets, and not intended for the expenses of conducting the municipal government.").

II. TAXPAYERS DESERVE CLARITY ON THE SCOPE OF THE TAX INJUNCTION ACT.

Because the TIA applies only to taxes, as determined under federal law, distinguishing between taxes, fees, and penalties is paramount to clearly defining the scope of the Act. This need is further compounded by the fact that elected and appointed officials, who face the dual reluctance to raise taxes and cut spending, are increasingly turning to a strategy of hiding increased tax burdens through subterfuge: any number of contortions to deny that even an obvious tax is a tax. They label them user fees, fines, surcharges, revenue enhancements, special assessments, and so forth. "Taxpayer protections can be undermined if the legislature can circumvent them by merely relabeling what would otherwise be a tax, so a workable definition of "tax" is necessary to give them meaning." HENCHMAN, HOW IS THE MONEY USED? at 3.

As the TIA serves to bar almost any federal challenge to a state tax statute and is the threshold for the vast majority of tax disputes, any festering circuit split as to what constitutes a "tax" will create havoc for lower courts and for taxpayers who depend on clear law. The struggle for taxpayer rights and safeguards against overreach from state taxing authorities has occupied National Taxpayers Union Foundation and our sister organization National Taxpayers Union (NTU) for the better part of five decades, involving at least 10 significant legislative or administrative reform initiatives such as the Taxpayer Bill of Rights, the IRS Restructuring and Reform Act, and the Taxpayer First Act. The

imposition of the opioid stewardship payment and the scope of the Tax Injunction Act, while seemingly technical matters, have real impacts.

The Court's recent unanimous decision in *CIC Services* properly rejected the Government's argument that just because a regulatory action is plausibly related in an attenuated manner to revenue collection in the future, a challenge to that action is not barred by the TIA's sister law, the Anti-Injunction Act. *See CIC Servs., LLC v. Internal Revenue Serv.*, 141 S. Ct. 1582, 1590 (2021). This is the correct conclusion and taxpayers deserve similar clarification for state impositions. Taxes that are not called taxes, or fees that are being passed off as taxes, violate the principle of transparency by depriving taxpayers of the information they need to make meaningful choices about public priorities. Consistency concerning the working definition of "tax" is essential to ensuring that the government is providing an equitable remedy to taxpayers under the law, and this case presents an excellent vehicle for the Court to render a decision to that effect.

The conclusion reached by the court below erodes the long relied upon definition of "tax" and wrongfully invokes the TIA in order to stifle any scrutiny or legal challenge as to its constitutionality.

CONCLUSION

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

Respectfully submitted,

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