IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

THE GEO GROUP INC.,

Appellant-Petitioner,

v.

THE NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Appellee-Respondent.

Sup. Ct. No. S-1-SC-40323
Ct. App. No. A-1-CA-39471
Admin. Hearing No. 20-17

IN THE MATTER OF THE PROTEST OF THE GEO GROUP INC. TO ASSESSMENT ISSUED UNDER LETTER ID NO. L092835088.

NATIONAL TAXPAYERS UNION FOUNDATION MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER-APPELLANT THE GEO GROUP INC.

Pursuant to Rules 12-309 and 12-320(A) NMRA, the National Taxpayers Union Foundation respectfully moves for leave to file an *amicus curiae* brief in support of appellant-petitioner The GEO Group Incorporated. All parties have received timely notice of the intent to file this *amicus curiae* brief in accordance with Rule 12-320(D)(1) NMRA, and no parties expressed opposition thereto.

National Taxpayers Union Foundation is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. National Taxpayers Union Foundation's Taxpayer Defense Center advocates for taxpayers in the courts, through direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. National Taxpayers Union Foundation participated as *amicus curiae* in cases involving the Due Process Clause and retroactive application of a statute such as *Boechler, P.C., v. Commissioner of Internal Revenue* on *writ of certiorari* before the U.S. Supreme Court and *U.S. Auto Party Network, Inc. v. Commissioner of Revenue* in the Supreme Judicial Court of Massachusetts.

Because *Amicus* has worked extensively on the issues involved in this case, this Court's decision may be looked to as authority, and any decision will significantly impact taxpayers, *Amicus* has institutional interests in this Court's ruling.

For the foregoing reasons, proposed *Amicus* respectfully moves this court to grant them leave to file the proposed *amicus curiae* brief and accept the *amicus curiae* brief submitted together with this motion.

Respectfully submitted,

DATED: April 26, 2024

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CERTIFICATE OF SERVICE

I, Benjamin Allison, hereby certify that on this 26th day of April, 2024, I filed this Brief of *Amicus Curiae* of National Taxpayers Union Foundation In Support of Petitioner-Appellant electronically through the Court's Odyssey Filing System, which caused all counsel of record to be served electronically, including:

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BRIEF OF *AMICUS CURIAE* OF NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF PETITIONER-APPELLANT THE GEO GROUP INC.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-502(E) NMRA, *amicus* hereby certifies that this *amicus curiae* brief complies with the limitations and requirements set forth in Rule 12-502(D)(3) NMRA and is printed in Times New Roman, 14-point type, and contains 2,857 words.

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life.

All parties to this case have received timely notice in accordance with Rule 12-320(D)(1) NMRA. Because *Amicus* has worked extensively on the issues involved in this case, this Court's decision may be looked to as authority, and any decision will significantly impact taxpayers, *Amicus* has institutional interests in this Court's ruling.

[1] *Amicus* counsel certify that counsel authored the brief in whole, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *Amicus* contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

The underlying decision's affirmation of the New Mexico Taxation and Revenue Department's (Department's) 2016 tax assessment (the Assessment) against the GEO Group Incorporated (GEO) grants the Department free rein to retroactively change, then apply, new tax policy. This raises substantial issues of retroactive application of law and equitable estoppel. Thus, the underlying decision should be reversed.

The U.S. Supreme Court and New Mexico courts have held a retroactive tax law is permissible under the U.S. Due Process Clause only if the law's retroactive periods are limited. Even New Mexico cases dealing solely with retroactivity have never approved a six-year period of retroactivity the Department seeks to enforce here. Moreover, the Department's actions violated the doctrine of equitable estoppel when it belatedly changed its position on whether GEO qualified for Type 2 nontaxable transaction certifications (NTTCs) and assessed a tax and penalty against GEO for relying on its earlier representations.

In short, the underlying decision, if left to stand, will create an alarming precedent which not only erodes the force of equitable estoppel, but also raises substantial issues under the U.S. Constitution's Due Process Clause and New Mexico jurisprudence. Taxpayers need to not only be assured they will not be subject to expansive retroactive tax laws, but also they can rely on agency's representations

without later penalization for doing so. This Court should take this opportunity to affirm the scope of the Due Process Clause as applied to taxation policies, apply equitable estoppel to the Department's actions, and correct the Department's retroactive policy.

ARGUMENT

I. THE DECISION BELOW EXPANDS RETROACTIVE TAXATION BEYOND ALL PREVIOUS CASES, IN VIOLATION OF THE DUE PROCESS CLAUSE.

The underlying decision endorses the Department's changing its position on a taxation issue with retroactive application onto six years of a taxpayer's prior income. This six-year period is beyond the scope of permissible retroactivity established under the Due Process Clause and New Mexico jurisprudence.

A tax law is considered retroactive if it is "intended to affect transactions which occurred, or rights which accrued, before it became operative as such, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence." *Crane v. Cox*, 1913-NMSC-089, ¶ 6, 18 N.M. 377 (quotation and citations omitted). A retroactive ruling enacted by an administrative agency is generally permissible if "such intention on the part of the Legislature is clearly apparent." *Bradbury & Stamm Const. Co. v. Bureau of Rev.*, 1962-NMSC-078, ¶ 40, 70 N.M. 226 (citations omitted). Notwithstanding, the U.S. Supreme Court

has limited the scope of a retroactive law under the Due Process Clause: "The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former . . . ." *United States v. Carlton*, 512 U.S. 26, 30-31 (1994) (internal quotation marks omitted) (quotation omitted). A retroactive tax law satisfies the Due Process Clause if it "show[s] that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 30-31 (quotation omitted).

The permissible scope of retroactivity has limits. "In every case in which [the Court] ha[s] upheld a retroactive federal tax statute against due process challenge, however, the law applied retroactively for only a relatively short period prior to enactment." *Id.* at 38 (O'Connor, J., concurring). Indeed, U.S. Supreme Court opinions on this issue have cabined their decisions to small periods of time of zero to two years. *Cf. United States v. Carlton*, 512 U.S. 26 (1994); *United States v. Darusmont*, 449 U.S. 292 (1981) (per curiam); *Welch v. Henry*, 305 U.S. 134 (1938); *United States v. Hudson*, 299 U.S. 498 (1937). In *Carlton*, the Court affirmed a tax with a "modest period of retroactivity" of "slightly greater than one year." *Carlton*, 512 U.S. at 32-33. In *Darusmont*, the October 4, 1976, Tax Reform Act was allowed to be retroactive to tax years after December 31, 1975. *See Darusmont*, 449 U.S. at 294-95, 301. *Hudson* held a retroactive period of thirty-five days was permissible. *See Hudson*, 299 U.S. at 501. *Welch* approved a two-year retroactivity period, but

clarified this was because the "first opportunity" for the Wisconsin Legislature to act after 1933 income was taxed was in 1935 due to constitutional restraints. *Welch*, 305 U.S. at 146, 150-51.

New Mexico jurisprudence has also only approved of a short retroactivity periods under the Due Process Clause. In *Hansman v. Bernalillo County Assessor*, the New Mexico Legislature passed a new tax limitation formula on April 4, 1979, eliminated the previously permissible amount of property value increase of ten percent, and made it applicable "to the '1979 and subsequent property tax years[] . . . .'" 1980-NMCA-088, ¶¶ 1-5, 95 N.M. 697. Concurrently, the Bernalillo County Assessor failed to send the 1979 tax year notices by April 1, and sent out taxpayers' notices using the new formula. *See id.* ¶¶ 4-5. On appeal, the Court held the "unambiguous" language in the new law made it applicable to the entire year of 1979. *See id.* ¶ 12. The Court elaborated that under U.S. Supreme Court's and states' supreme court precedents, retroactive tax statutes "have been upheld with some frequency[,]" but in order to determine whether a retroactive tax is unconstitutional, a case by case analysis is required. *Id.* ¶¶ 14, 16. Because taxpayers did not show any harshness or oppression, the Court held the new tax law's four month retroactivity was permissible. *See id.* ¶ 17.

Cases where this Court has examined the retroactivity aspect of a tax law outside of the context of the Due Process Clause have also only approved of limited

periods of retroactivity. *Cf. Kewanee Indus., Inc. v. Reese*, 1993-NMSC-006, 114 N.M. 784; *Bradbury & Stamm Const. Co. v. Bureau of Rev.*, 1962-NMSC-078, 70 N.M. 226; *Asplund v. Alarid*, 1923-NMSC-079, 29 N.M. 129; *Territory ex rel. Castillo v. Perea*, 1900-NMSC-026, 10 N.M. 362. In *Kewanee Industries, Incorporated*, this Court refused to apply regulations which were not in effect during the relevant tax years. 1993-NMSC-006, ¶ 24. In *Bradbury & Stamm Construction Company*, this Court rejected the Bureau of Revenue's contention a law decreasing the interest rate for tax refunds applied retroactively, explaining, "[i]f the statutory rate is changed after the cause of action accrues, the interest should be allowed at the old rate before[] . . . ." 1962-NMSC-078, ¶¶ 41-42 (quotation omitted). *Asplund* held the Legislature had the power to retroactively apply a tax exemption to the year prior. *See* 1923-NMSC-079, ¶¶ 6, 15. *Crane* reasoned a law pertaining to the procedures for a property sale for delinquent taxes was not retroactive because it did not interfere with any act that occurred prior to its passage. *See* 1913-NMSC-089, ¶¶ 2-3, 11. *Territory ex rel. Castillo* explained an "act cannot have the effect of reimposing penalties which have by the effect of former legislation been set aside and destroyed." 1900-NMSC-026, ¶ 8.

The New Mexico Court of Appeals has also only upheld laws with a limited period of retroactivity. *Cf. GEA Integrated Cooling Tech. v. State Tax. & Rev. Dep't*, 2012-NMCA-010, ¶¶ 2, 8-9, 268 P.3d 48 (holding the Department's 2009 twenty

percent penalty assessment against taxpayers for failure to pay its gross receipts taxes between 2006 and 2007 was valid because the assessment date sets the point in time for determining a penalty); *Addis v. Santa Fe Cty. Valuation Protests Bd.*, 1977-NMCA-122, ¶¶ 20-21, 91 N.M. 165 (holding a property valuation law passed on April 8, 1977, was retroactive to all of 1977 under the statute's language); *Phelps Dodge Corp. v. Rev. Div. of Dep't of Tax. & Rev. of State of N.M.*, 1985-NMCA-055, ¶¶ 15-17, 103 N.M. 20 ("Changes, not merely clarifications, of an existing law cannot be constitutionally applied retroactively.").

In sum, under the U.S. Supreme Court's and New Mexico's jurisprudence, the Due Process Clause permits retroactivity only if the period is limited. *See also Darusmont*, 449 U.S. at 296-97 ("This 'retroactive' application apparently has been confined to short and limited periods required by the practicalities of producing national legislation."). However, the decision below did not follow these established limited retroactivity principles. Here, in 2012, the Department approved in writing that GEO was qualified for the NTTC deductions for the 2008 tax year. *Geo Group, Inc. v. N.M. Tax. & Rev. Dep't*, AHO D&O No. 20-17, p. 13-16 (N.M. Admin. Hearing Office Tax Admin., Dec. 30, 2020). When the Department assessed taxes after the 2016 audit, it formally changed its ruling that GEO was qualified for the NTTC deductions. *See id.* at 20. Despite the fact the Department change its policy in 2016, it is now attempting to tax GEO's income for reporting periods ending

January 31, 2010, through September 30, 2015, effectively establishing a six year period of retroactivity. *See id.* at 3.

The six-year period the Department asserts is beyond periods upheld in those previous decisions, where longer periods exacerbated the concerns of finality and reliance.[2] *See, e.g.*, *Welch*, 305 U.S. at 148 (explaining a tax may "reach events so far in the past" as to make it unconstitutional). "The governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose." *Carlton*, 512 U.S. at 37-38 (O'Connor, J., concurring). Therefore, the lower court's decision should be reversed.

II. THE DECISION BELOW INCORRECLY APPLIED THE EQUITABLE ESTOPPEL DOCTRINE.

Because the Department provided multiple written, personal representations on how to comply with the tax code to GEO, only to change its position and assess taxes and penalties against GEO later, the decision below incorrectly held the Department is not barred by equitable estoppel from making the Assessment. Taxpayers need to know they can rely on an agency's representations.

"Estoppel is the preclusion, by acts or conduct, from asserting a right which might otherwise have existed, to the detriment and prejudice of another, who, in

[2] The Department's action is even more egregious than those analyzed under New Mexico case law because although the law creating Type 2 NTCCs remained the same, the Department's interpretation was subject to retroactive changes.

reliance on such acts and conduct, has acted thereon." *Brown v. Taylor*, 1995-NMSC-050, ¶ 10, 120 N.M. 302 (cleaned up) (quotation omitted). The New Mexico courts look to see if, first, "the agency's conduct amount[s] to a false representation or concealment of material facts or . . . is calculated to convey the impression that the facts are . . . inconsistent with[] those which the party subsequently attempts to assert;" second, "the agency's intention, or at least expectation, that the other party will act upon such conduct;" and third, "the agency's knowledge, actual or constructive, of the real facts." *Waters-Haskins v. N.M. Dep't, Income Support Div.*, 2009-NMSC-031, ¶ 22, 146 N.M. 391. The party raising estoppel must show "(1) [l]ack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially." *State, ex rel. State Highway Dep't v. Shaw*, 1977-NMSC-041, ¶ 6, 90 N.M. 486 (quotation omitted).

Although courts are reluctant to hold a state agency is estopped, equitable estoppel applies when "the agency has engaged in a 'shocking degree of aggravated and overreaching conduct,' or when 'right and justice demand' it." *Waters-Haskins*, 2009-NMSC-031, ¶ 23 (quotations omitted). This includes when "representations that are contrary to the essential facts to be relied on [are made], even when made

innocently or by mistake[] . . . ." *Green v. N.M. Hum. Servs. Dep't, Income Support Div.*, 1988-NMCA-083, ¶ 4, 107 N.M. 628.

The facts of this case resemble two cases where the courts have applied equitable estoppel against an agency. *See Shaw*, 1977-NMSC-041; *United States v. Bureau of Rev.*, 1975-NMCA-001, 87 N.M. 164. In *Shaw*, Highway Department officials granted two companies a driveway permit and orally and in writing assured the companies on multiple occasions between 1972 and 1973 the State did not intend to take the relevant properties. *See* 1977-NMSC-041, ¶ 1. The companies relied on these representations and each paid $85,000 for driveways thereon, but in 1974 and 1975 the Highway Department backtracked and included the properties in its takings plan. *See id.* During the condemnation proceedings, the State argued the properties should be valued at their pre-enhancement prices. *See id.* ¶ 11. This Court disagreed, concluding the Highway Department was "now adopting a position . . . contrary to its representations . . . in 1973." *Id.* ¶ 8. This Court reasoned the Highway Department's employee was authorized to speak for the State, the Highway Department's letter contained a signature block of the State Highway Engineer, and the Highway Department employees' testimonies showed no awareness the companies' properties would be subject to a takings prior to 1974. *See id.* ¶¶ 8-9. As such, the Highway Department was estopped from seeking the properties' low values as the companies. *See id.* ¶ 11.

The Bureau of Revenue was estopped from collecting a compensating tax in *United States v. Bureau of Revenue*. There, two United States Atomic Energy Commission contractors or their associates received eight written opinions between 1947 and 1961 from various State entities or representatives which were "to the effect that neither school tax nor compensating tax would be owed under the facts of th[e] case [now before the court]." *Bureau of Rev.*, 1975-NMCA-001, ¶ 3. In 1966, the Bureau assessed a school and compensating tax against the companies. *See id.* ¶ 1. The Court of Appeals estopped the Bureau from collecting the tax, reasoning it had "repeatedly assured the taxpayers that compensating tax was not to be paid and the taxpayers relied on that assurance. The Bureau's action in seeking to collect the compensating tax raises a question of an unconstitutional change in policy." *Id.* ¶ 13.

Both *Shaw* and *Bureau of Revenue* illustrate "[r]epresentations that are contrary to the essential facts to be relied upon, even though made innocently or by mistake, will support the application of the estoppel doctrine." *Shaw*, 1977-NMSC-041, ¶ 8; *see also Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 28, 136 N.M. 440 ("We have been willing to grant estoppel when a party relied on written assertions made by the taxing authorities, but not when the party relied on oral representations."). This case violates this principle. Similar to the state agencies in *Shaw* and *Bureau of Revenue*, the Department, in 2012, confirmed multiple times in writing that GEO was qualified to use the NTTC deductions. *Geo Group, Inc. v. N.M. Tax. & Rev.*

Dep't, AHO D&O No. 20-17, p. 13-16 (N.M. Admin. Hearing Office Tax Admin., Dec. 30, 2020). Like *Shaw*'s companies, GEO acted in good faith, relied upon the Department's written communications, oral representations, and qualification for the NTTC deductions for subsequent tax years, when it claimed the deductions and did not pay the otherwise owed taxes. By doing so, GEO "changed [its] position for the worse" because if it had known the Department would change its policy, it could have restructured its operations, or, at the very least, paid the full tax so as to avoid the penalties now assessed against it. *Chambers v. Bessent*, 1913-NMSC-012, ¶ 5, 17 N.M. 487 (quotation omitted).

As such, "right and justice demand" the Department be estopped from making the Assessment against GEO. *Waters-Haskins*, 2009-NMSC-031, ¶ 23 (quotations omitted). If the Court of Appeals decision is left to stand, Taxpayers' reliance on the Department's representations will unravel. Taxpayers would be unable to trust the Department's written guidance if the precedent is established that it could backtrack its decisions in the future and penalize taxpayers for relying on its previous representations. The underlying decisions should be corrected.

CONCLUSION

For the foregoing reasons, *Amicus* requests this Court grant the petition for writ of certiorari and reverse the decision below.

Respectfully submitted,

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