No. 04-631

In The
# Supreme Court of the United States

STEPHEN RICHARDS,
in his official capacity as Secretary,
Kansas Department of Revenue,
*Petitioner*,

v.

PRAIRIE BAND POTAWATOMI NATION,
*Respondent,*

**On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit**

## BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

FRANK D. KATZ, General Counsel
(*Counsel of Record*)
MULTISTATE TAX COMMISSION
444 No. Capitol Street, N.W. #425
Washington, D.C. 20001
(202) 624-8699

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## BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

### INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members, eighteen States are associate members and three states are project members.[2] This Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax sys-

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[1]No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its member States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member State. Finally, this brief is filed pursuant to the consent of the parties.

[2] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia and Wisconsin. Project members are Iowa, Nebraska and Rhode Island.

tems that followed recommendations of the Willis Committee.[3] The States' initial interest in forming the COMPACT was to safeguard state taxing authority—an essential governmental power for States to fulfill their constitutional role—from federal encroachment.

Preserving state taxing sovereignty under our vibrant federalism remains a key purpose of the Commission. When States seek to tax transactions on Indian lands, tribes are a third concentric sovereign whose interests must properly be considered. Sorting out which sovereign has authority to impose tax on what transactions inevitably requires line drawing. The brighter the lines, the more administrable the tax, the fewer the conflicts and the lower compliance burdens on taxpayers and tax agencies.

The territorial component of sovereignty has been a key factor in forging bright-line rules. For over 170 years, the Court has imposed a bright-line standard that States have no jurisdiction over Indians on their sovereign lands unless Congress expressly authorizes it.[4] With regard to off-reservation transactions, the Court has likewise relied on a clear demarcation—that tribal sovereignty ends at the reservation boundary. "Absent express federal law to the contrary, Indians going beyond reserva-

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[3] The Willis Committee, a congressional study of State taxation of interstate commerce sanctioned by TITLE II of PUB. L. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate State taxation of interstate and foreign commerce.

[4] *E.g. McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 168-69 (1973); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

tion boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973).

State authority to tax non-Indians for transactions with Indians on tribal reservations raises more difficult issues. The non-Indian taxpayer is within the State and under state authority. Yet the transactions are with Indians on tribal lands, and therefore implicate tribal sovereignty. With sensitivity to both sovereigns, the Court has developed a complex and nuanced balancing test to determine whether States may impose tax in these cases. The analysis calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

In the instant case, Kansas sought to impose fuel tax on non-Indian distributors for receiving gasoline off the reservation. The bright-line rule from *Mescalero Apache Tribe* should have controlled. The Tenth Circuit's erroneous use of the uncertain balancing test of *White Mountain* clouds this bright line and impacts the Commission's interest in protecting state sovereignty in two ways.

First, the Tenth Circuit's holding jeopardizes the unambiguous rules that define state authority with regard to reservations. Bright-line rules allow good relations to flourish between States and tribes and pretermit disputes and litigation between them.

This strong preference for bright-line rules has been pursued by the States in this Court even against the immediate interests of other States. In *Oklahoma*

*Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995), this Court noted that eleven States urged the retention of the "'legal incidence' test" with regard to taxation that impacts Indians and Indian tribes in Indian country, even though another State had urged adoption of more uncertain "economic reality" rule which might have furthered its cause in that litigation. The Court noted that the eleven States had favored the test because it "provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority." *Id.*

Second, the holding jeopardizes state authority to tax off-reservation transactions. States depend upon tax revenues to run their governments. Subjecting off-reservation transactions that may subsequently impact Indian tribes to the inexact balancing test will substantially impair States' ability to impose taxes. The decision below deprived Kansas of tax revenue it rightfully expected from a tax imposed on a non-Indian distributor receiving fuel off the reservation merely because the gasoline was later sold to a tribal retailer.

## ARGUMENT

### I

### APPLYING THE *WHITE MOUNTAIN APACHE TRIBE* BALANCING-OF-INTERESTS TEST TO OFF-RESERVATION TRANSACTIONS IS CONTRARY TO THIS COURT'S FIRM PRECEDENT.

This Court's jurisprudence governing state authority to tax Indians and activities on Indian lands may fairly be divided into three areas, two of which

are pillars of certainty controlled by bright-line rules modifiable only by explicit congressional action. The third area is governed by the flexible and indefinite balancing-of-interests test.

States have long been barred from taxing Indians for *on-reservation* activity absent explicit *permission* from Congress. *Chickasaw Nation*; *McClanahan*; *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1866).

States have long been permitted to tax *off-reservation* activity, whether conducted by Indians or others, absent express *preemption* by Congress. Long-standing precedent holds that tax exemptions are not granted by implication in recognition of the crucial importance of taxation to the very existence of each governmental entity. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1938); *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933). States may tax activities off-reservation, even if they involve or affect Indians, "[a]bsent express federal law to the contrary." *Mescalero Apache Tribe*, 411 U.S. at 145. *See also Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division*, 107 N.M. 399, 759 P.2d 186 (1988), *appeal dismissed*, 490 U.S 1043 (1989) (pre-emption by implication doctrine inapplicable to tax on legal services performed off reservation for tribe).

These two per-se rules, one barring state taxation and the other permitting it in the absence of express congressional action, provide a certainty that furthers state tax administrability.

When States seek to tax non-Indians on reservation transactions with Indians, however, competing interests of three concentric sovereigns are in-

volved.[5] The State is asserting jurisdiction over its citizens for activity in its territory. The tribe is asserting jurisdiction over its territory and has legitimate concerns about the economic affect on its members. And all are subject to the supreme sovereignty of the federal government and Congress's expansive authority under the Indian Commerce Clause. Recognizing that three competing sovereignty interests must be weighed in allocating governmental authority in these cases, the Court abandoned an absolutist approach in favor of a more flexible implied-preemption standard in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) and *McClanahan*, 411 U.S. at 172. The Court further transformed this implied-preemption analysis into a malleable balancing-of-interests test in *White Mountain*. Under this approach the Court

> examine[s] the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

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[5] See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188 (1989) ("There are, therefore, three different governmental entities, each of which has taxing jurisdiction over all of the non-Indian [on-reservation] wells.")

*White Mountain*, 448 U.S. at 144-45.

The implied-preemption balancing test has been confined exclusively to reservation activities consistent with the territorial limits of tribal sovereignty. In *McClanahan*, the Court referenced "Indian sovereignty" as "a backdrop against which the applicable treaties and federal statutes must be read." 411 U.S. at 172. In *White Mountain*, the Court noted the "unique historical origins of tribal sovereignty" as the reason for using an adaptable, implied-preemption standard in these cases, 448 U.S. at 143, and affirmed that geography matters.

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry.

*Id.* at 151. Significantly, the Court in *White Mountain* reaffirmed the *Mescalero Apache Tribe* bright line that off the reservation and outside the boundaries of tribal sovereignty an express congressional statement of tax exemption is required. 448 U.S. at 144, n. 11. In each case, tribal sovereignty, which exists only over tribal territory, has been the conceptual basis for the implied preemption analysis.

Applying the balancing test to off-reservation transactions also makes no practical sense. The State's interest should virtually always predominate with regard to any off-reservation transaction. The erroneous application of the balancing test below highlights this fact. The Tenth Circuit improperly focused on an activity the State did *not* tax—the retail sale on the reservation—rather than on the ac-

tivity it *did* tax—the receipt of gasoline by the distributor in Troy, Kansas. State roads radiating out from Troy include the very state roads that carried the distributor's gasoline, along with many of the tribal casino's customers, to the reservation. The State's interest in obtaining road fund revenues for its 60 mile portion of this trip formidably predominates over tribal interest in funding the 1½ mile reservation portion.

The Tenth Circuit's decision below flouts this Court's firm precedent by applying the implied-preemption balancing test to off-reservation activity.

## II

## THE UNCERTAINTY FROM APPLYING THE BALANCING TEST OFF RESERVATION THREATENS STATE TAX ADMINISTRATION, STATE TAX REVENUES AND STATE-TRIBAL RELATIONS.

The Tenth Circuit decision, if left unchecked, threatens dire consequences for state tax administration. By applying the vagaries of the balancing test where it should not have—to a transaction that occurred off the reservation where the gasoline distributor received the gasoline—the decision greatly expands uncertainty about state taxing authority. Any tax imposed on a transaction that may ultimately have an economic consequence on a reservation will be subject to challenge. How can taxpayers know whether items on which they have paid tax will subsequently be resold or used on a reservation? Under the Tenth Circuit's ruling, does the creation of a tribal casino insulate from taxation any off-reservation purchase for the casino, or for any

related enterprise, or for any enterprise which can claim a benefit from the casino? Will state tax imposed on all off-reservation purchases by tribal entities be subject to defeasance?

The unpredictability of the balancing test is well reflected by comparing the Tenth Circuit's decision below, balancing state and tribal interests in the tribe's favor, with its earlier decision in *Sac and Fox Nation v. Pierce*, 213 F.3d 566 (10th Cir 2000), *cert. denied*, 531 U.S. 1144 (2001), balancing seemingly indistinguishable interests in the State's favor.

Moreover, the manner in which the Tenth Circuit applied the balancing test will acerbate uncertainty. It balanced interests without reference to a single federal law that might—even by implication—preempt state authority to tax. This would leave every decision to the unfettered judgment of each trial court, unhinged from federal law. This Court has explicitly rejected such generalized use of congressional acts that advance tribal sovereignty and promote economic development as an all-purpose justification for preempting any state action that might have an adverse economic affect on tribes. *Cotton Petroleum*, 490 U.S. at 183, n. 14; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

Additionally, this extension of the balancing test will impact state regulatory authority. The "particularized inquiry" of *White Mountain* applies to state regulatory, as well as state tax, authority. *Chickasaw Nation*, 515 U.S. at 458 ("We have balanced federal, state and tribal interests in diverse contexts, notably in assessing state regulation that does not involve taxation.") *See also Oregon Dep't of Fish &*

*Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 (1985). States impose many regulations on the off-reservation manufacture of goods and provision of services. A tribe, employing the Tenth Circuit's reasoning, can presumably challenge a regulation under *White Mountain* balancing standards to the extent that it has what the tribe perceives as an untoward impact on tribal interests.

Judging tax authority based on balancing interests can provide needed flexibility when demands of three conflicting sovereigns must be satisfied. The unprecedented and unwarranted extension of that test to State tax authority over off-reservation activities subject only to federal and state sovereignty, however, will cause great uncertainty and turmoil.

## III

## THE PRESENT CASE, ALONG WITH THE CASE OF *HAMMOND V. COEUR D'ALENE TRIBE*, PRESENT THE COURT WITH AN OPPORTUNITY TO BRING CLARITY AND CERTAINTY WITH REGARD TO INDIAN TAXATION MATTERS.

Your amicus respectfully suggests that Idaho's pending petition for certiorari in *Hammond v. Coeur d'Alene Tribe*, No. 04-624, provides the court with an opportunity to reinforce the two pillars of certainty in Indian taxation matters. The instant case is properly controlled by the requirement of express congressional *preemption*, clearly lacking here. The *Hammond* case is properly controlled by express congressional *permission*, there provided by the Hayden-Cartwright Act which authorizes state taxation of "licensed traders" on "United States military

or other reservations," a combined terminology that uniquely refers to Indian reservations. *Hammond* also implicates the off-reservation bright-line standard in the first issue presented: whether a federal court may, despite an express allocation by the state legislature of the legal incidence of the motor fuels tax to a distributor, nonetheless deem the incidence of the tax to be borne by the retailers.

*Hammond* serves as a suitable companion to the present case, and consideration and resolution of the cases together would be of benefit to the States, to the tribes, and to the public.

## CONCLUSION

The decision below radically departs from this Court's jurisprudence governing state authority to tax off-reservation activity. It threatens the ability of States to raise revenues. It reduces certainty in state tax administration and stability in state-tribal relations. Let stand, the decision will permit contradictory lower court decisions, which will serve to encourage litigation. Your amicus respectfully requests that the Court grant the Petition and issue a writ of certiorari to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

Frank D. Katz, General Counsel
*Counsel of Record*
MULTISTATE TAX COMMISSION
444 No. Capitol Street, N.W., #425
Washington, D.C. 20001
(202) 624-8699

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